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Articles

Essay

Book Review

Notes

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Articles

Abortion. A Woman's Private Choice

Erwin Chemerinsky* & Michele Goodwin**

Introduction

Abortion rights in the United States are in serious jeopardy. Despite the fact that a legal abortion is medically safer than carrying a pregnancy to term in the United States, that right may soon be more illusory than real.[1] Both before and after his 2016 election as President of the United States, Donald Trump expressed the view that *Roe v. Wade*[2] should be overruled.[3]

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1. *See* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012) (noting that a woman is fourteen times more likely to die by carrying a pregnancy to term than a legal abortion).

2. 410 U.S. 113 (1973).

3. *See, e.g.*, Emily Schultheis, *Trump Talks to '60 Minutes' About Same-Sex Marriage, Abortion and the Supreme Court*, CBS NEWS (Nov. 13, 2016),

Mr. Trump predicts that the Supreme Court will reverse itself on abortion rights, and after, states will determine women's access to abortion; some states will ban the procedure and others may allow abortion services. Such a system would undoubtedly produce a two-tier system of abortion access, causing significant health burdens for women generally and reifying fundamental inequities in society, particularly for low-income women. In a nationally televised interview, President Trump dismissed such concerns, stating: 'Yeah, well, they'll perhaps have to go, they'll have to go to another state.'[4]

If *Roe* is overturned, lessons from the era preceding that landmark decision underscore the broad harms women will encounter, particularly because 49% of pregnancies in the United States are unintended.[5] In traditionally conservative states, the rates of unintended pregnancies are even higher: 54% in Texas,[6] 55% in Alabama[7] and Arkansas,[8] 60% in Louisiana,[9] and 62% in Mississippi,[10] among others. For women aged 20–24, 64% of pregnancies are unintended.[11] As one prominent study explains, '[s]ince 2001, the United States has not made progress in reducing unintended pregnancy. Rates increased for nearly all groups and remain high overall.'[12]

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http://www.cbsnews.com/news/trump-promises-pro-life-justices-supreme-court-same-sex-marriage/ [https://perma.cc/W3TM-CQS6] (noting that Trump said: "I'm pro-life The judges will be pro-life.").

4. *Id.*

5. *See* Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 CONTRACEPTION 478, 478–80 (2011) (noting that "the percentage of unintended pregnancies are some of the most essential [health-status] indicators in the field of reproductive health"); *Unintended Pregnancy Prevention*, CENTERS FOR DISEASE CONTROL & PREVENTION (Jan. 22, 2015), https://www.cdc.gov/reproductivehealth/unintendedpregnancy/ [https://perma.cc/PB8G-5ZDV].

6. *State Facts About Unintended Pregnancy: Texas*, GUTTMACHER INST. (Sept. 2016), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-texas [https://perma.cc/RU8P-QHNU]. The economic costs of unintended pregnancies spread beyond Texas. For example, "in 2010, 133,200 or 73.7% of unplanned births in Texas were publicly funded, ' with over $2.05 billion paid by the federal government. *Id.*

7. *State Facts About Unintended Pregnancy: Alabama*, GUTTMACHER INST. (Sept. 2016), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-alabama [https://perma.cc/QA2F-9C29] (highlighting that in Alabama "in 2010, the federal and state governments spent $323.2 million on unintended pregnancies; of this, $250.5 million was paid by the federal government and $72.6 million was paid by the state.").

8. *State Facts About Unintended Pregnancy: Arkansas*, GUTTMACHER INST. (Sept. 2016), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-arkansas [https://perma.cc/MAD9-8LE5].

9. *State Facts About Unintended Pregnancy: Louisiana*, GUTTMACHER INST. (Sept. 2016), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-louisiana [https://perma.cc/3573-QFWZ].

10. *State Facts About Unintended Pregnancy: Mississippi*, GUTTMACHER INST. (Sept. 2016), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-mississippi [https://perma.cc/79UD-CVXS].

11. CENTERS FOR DISEASE CONTROL & PREVENTION, *supra* note 5.

12. Finer & Zolna, *supra* note 5, at 478.

Affluence will not spare women the indignity of traveling to another state or country to obtain abortions.[13] For poorer women, including the working-class populations President Trump appealed to during his campaign, the options will be far more dire. According to the Guttmacher Institute, '[t]he toll the nation's abortion laws took on women's lives and health in the years before *Roe* was substantial.'[14] Estimates vary, but reports suggest that about one million illegal abortions took place each year, prior to *Roe v. Wade*, with hundreds ending in death and numerous others requiring emergency hospital interventions.[15] Sometimes women were left infertile as a result of illegal procedures.[16] In fact, by the 'early 1960s, [illegal] abortion-related deaths accounted for nearly half, or 42.1 percent, of the total maternal mortality in New York City.'[17] Sadly, these deaths were preventable, because legal abortions are even safer than childbirth.[18]

According to Leslie Reagan, author of *When Abortion Was a Crime: Women, Medicine, and Law in the United States*, '[p]hysicians and nurses at Cook County Hospital saw nearly one hundred women come in every week for emergency treatment following their abortions.'[19] She writes that '[s]ome barely survived the bleeding, injuries, and burns; others did not.'[20] Cook County Hospital and other medical facilities devoted entire wards to address 'abortion-related complications, which impacted '[t]ens of thousands of women every year' who needed emergency care following self-induced or back-alley abortions.[21] Deaths were particularly acute among women of color.[22]

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13. However, affluence does contribute to a two-tiered system of healthcare generally, and particularly with regard to reproductive healthcare, decision making, privacy, and opportunity. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (forthcoming 2017) (manuscript at 6) (observing that 'absent unique circumstances, privately insured women can avoid and be spared painfully invasive interrogations and intrusions by government into their personal lives when pregnant). Nevertheless, we argue that even more affluent women experience the indignities of marginalized privacy within the legal framework and construction of reproductive rights cases.

14. Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, 6 GUTTMACHER POL'Y REV. 8, 8 (2003).

15. Symposium, *Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 420–21 (1967) [hereinafter Guttmacher] (statement of Alan F. Guttmacher).

16. NARAL PRO-CHOICE AM. THE SAFETY OF LEGAL ABORTION AND THE HAZARDS OF ILLEGAL ABORTION 1 (2016), http://www.prochoiceamerica.org/media/fact-sheets/abortion-distorting-science-safety-legal-abortion.pdf [https://perma.cc/NPU2-MAV6].

17. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867–1973, at 214 (1997).

18. *See, e.g.*, Michele Goodwin & Allison M. Whelan, *Constitutional Exceptionalism*, 2016 U. ILL. L. REV. 1287, 1324 (noting that "pregnancies are fourteen times more likely to cause a woman's death than an abortion").

19. REAGAN, *supra* note 17, at 210.

20. *Id.*

21. *Id.* at 210–11.

22. *Id.* at 212–13 (explaining that "[t]he racial differences in abortion-related deaths and access to safe therapeutic abortions mirrored the racial inequities in health services in general and in overall

Numerous essays and interviews recount the grave indignities, health risks, and even deaths of women who sought illegal abortions in the pre-*Roe* era.[23] One telling example from Polly Bergen, consistent with the accounts we have researched, tells the story of desperation. In her case, she recounts:

> A greasy looking man came to the door and asked for the money as soon as I walked in. He told me to take off all my clothes except my blouse; there was a towel to wrap around myself. I got up on a cold metal kitchen table. He performed a procedure, using something sharp. He didn't give me anything for pain—he just did it. He said that he had packed me with gauze, that I should expect some cramping, and that I would be fine. I left.[24]

In many instances, the most horrific accounts come from women who sought back-alley abortions as teenage girls.[25]

America's past experiences with illegal abortions paint a grim picture for the future. However, the threat to women's reproductive autonomy reaches beyond denying access to an abortion—it now includes criminal punishment. In an interview, candidate Trump declared that women who obtain abortions should be punished, before recanting hours later.[26] Some pundits dismiss such statements as unlikely, empty threats, geared at revving up an excitable and active base of supporters.[27] They claim that Americans really do not know what the new president will do because of Trump's

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health' and noting that "[m]aternal mortality rates of black women were three to four times higher than those of white women").

23. *See, e.g.*, NARAL FOUND., CHOICES: WOMEN SPEAK OUT ABOUT ABORTION 11 (1997); Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes 'Punishment' for Women, Then Recants*, N.Y. TIMES (Mar. 30, 2016), https://www.nytimes.com/2016/03/31/us/politics/donald-trump-abortion.html [https://perma.cc/3NFN-33YL]. For accounts that further capture women's painful, coercive experiences, see Dorothy Fadiman, *When Abortion Was Illegal: Untold Stories*, CONCENTRIC MEDIA, http://concentric.org/films/when_abortion_was_illegal.html [https://perma.cc/VVP6-BPQQ]; Stephanie Hallett, *8 Stories That Show What Abortion Was Like Before* Roe v. Wade, MS. MAGAZINE BLOG (Jan. 19, 2016), https://msmagazine.com/blog/2016/01/19/8-stories-that-show-what-abortion-was-like-before-roe-v-wade/ [https://perma.cc/DDW7-5TNG]; Lisa Woods, *9 Older Women Share Their Harrowing Back Alley Abortion Stories*, THOUGHT CATALOG (Dec. 30, 2015), http://thoughtcatalog.com/lisa-woods/2015/12/9-older-women-share-their-harrowing-back-alley-abortion-stories/ [https://perma.cc/HW5V-MLJQ].

24. NARAL FOUND., *supra* note 23, at 11.

25. *E.g.*, Hallett, *supra* note 23 (chronicling the stories of women who, after receiving back-alley abortions, either died or suffered from peritonitis and infection).

26. Flegenheimer & Haberman, *supra* note 23.

27. *See, e.g.*, Nancy LeTourneau, *Why Would Anyone Take What Trump Says Seriously?*, WASH. MONTHLY (June 21, 2016), http://washingtonmonthly.com/2016/06/21/why-would-anyone-take-what-trump-says-seriously/ [https://perma.cc/MD2Y-A9H3] ("Saying outrageous things to get media attention is how he made a name for himself in the entertainment world and won the Republican primary."); Sarah Smith, *Taking Trump Literally and Seriously*, BBC NEWS: US & CANADA (Dec. 7, 2016), http://www.bbc.com/news/world-us-canada-38188074 [https://perma.cc/FK63-NT5V] (describing supporters saying that they responded to his campaigning but did not expect him to govern the same way).

contradictory statements on a number of issues.[28] Despite urgings that Americans should hope for the best, we are concerned, for reasons we explain below.

First, the Republican Party platform repeatedly mentions eliminating abortion rights; no less than thirty-five times it references abortion.[29] The platform lauds 'states' authority and flexibility to exclude abortion providers from federal programs such as Medicaid and other healthcare and family planning programs,'[30] calls for 'a permanent ban on federal funding and subsidies for abortion and healthcare plans that include abortion coverage,'[31] urges the 'codification of the Hyde Amendment,'[32] and even opposes contraception being referred to or counseled about in school-based health clinics and sexual-education programs.[33] Tellingly, the attack on contraceptive education and access reveals that the battle against women's reproductive-healthcare access is about more than abortion. Rather, it touches on women's most basic fundamental rights: privacy and bodily autonomy.[34]

Second, for those who doubt a president's ability to shape the future of fundamental rights, it is worth considering the scope of power that office wields and President Trump's authority to shape the future Supreme Court. President Trump's statements on abortion, as well as his promises to eliminate abortion access and only appoint judges who oppose this fundamental constitutional right to fill Supreme Court vacancies, cannot be dismissed. In light of aggressive state and federal efforts to constrain reproductive-healthcare access, including more antichoice legislation

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28. *See, e.g.*, Jared Bernstein, *I Don't Know What Trump Will Do. Here's Some of What He Can Do.* WASH. POST: POSTEVERYTHING (Nov. 16, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/16/i-dont-know-what-trump-will-do-heres-some-of-what-he-can-do/?utm_term=.e6e4daa05664 [https://perma.cc/2635-SGYG] (arguing that "we cannot yet know" what Trump will do or "how seriously to take him"); Jim Galloway, *We've Elected Mr. Trump. Now It's Time to See What We've Bought.* AJC.COM (Nov. 9, 2016), http://politics.blog.ajc.com/2016/11/09/weve-elected-mr-trump-now-its-time-to-see-what-weve-bought/ [https://perma.cc/93JB-E9N3] ("Trump's was a campaign of wispy generalities—vows and threats that appeared, disappeared, then re-appeared, morphing as the situation demanded.").

29. *See generally* REPUBLICAN PARTY PLATFORM COMM. REPUBLICAN PLATFORM 2016, (2016); Steven Ertelt & Micaiah Bilger, *Republicans Adopt Most Pro-Life Platform Ever Condemning Abortion and Planned Parenthood*, LIFENEWS.COM (July 18, 2016, 4:47 PM), http://www.lifenews.com/2016/07/18/republicans-adopt-most-pro-life-platform-ever-condemning-abortion-and-planned-parenthood/ [https://perma.cc/8ZDZ-4WZN] (describing the new Republican platform as the "strongest pro-life platform the party has ever adopted").

30. REPUBLICAN PARTY PLATFORM COMM. 2016, *supra* note 29, at 24.

31. *Id.* at 37.

32. *Id.*

33. *Id.* at 34.

34. For example, the insightful scholarship of Khiara Bridges explicates how profoundly and unjustly privacy rights of poor, vulnerable women of color are impaired. *See, e.g.*, BRIDGES, *supra* note 13.

proposed and enacted between 2010 and 2015 than the prior thirty years,[35] the threats to women's privacy and abortion are real.[36]

President Trump promised to replace Justice Antonin Scalia's vacated seat on the Supreme Court with a staunch opponent to abortion rights.[37] In Justice Neil Gorsuch we predict that he has found such a person. Despite the fact that Justice Gorsuch is new to the Supreme Court, his record on women's rights while sitting on the Tenth Circuit Court of Appeals causes deep concern. Gorsuch's judicial record on contraceptive care access[38] and defunding Planned Parenthood,[39] as well as his views on discrimination

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35. Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, GUTTMACHER POL'Y REV. (Mar. 1, 2014), https://www.guttmacher.org/gpr/2014/03/surge-state-abortion-restrictions-puts-providers-and-women-they-serve-crosshairs [https://perma.cc/L662-22RQ] (noting that a "wave of state-level abortion restrictions" have "swept the country over" in the past few years, and calling this uptick "unprecedented" and "startling"); Elizabeth Nash & Rachel Benson Gold, *In Just the Last Four Years, States Have Enacted 231 Abortion Restrictions*, GUTTMACHER INST. (Jan. 5, 2015), https://www.guttmacher.org/article/2015/01/just-last-four-years-states-have-enacted-231-abortion-restrictions [https://perma.cc/3QQJ-7TYS] ("During the 2014 state legislative session, lawmakers introduced 335 provisions aimed at restricting access to abortion."); *see generally* Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781 (2014) (describing state initiatives to pass fetal-protection laws and their effects on a variety of constituencies).

36. For example, in 1985, fewer than twenty antiabortion measures were even proposed in the United States. Boonstra & Nash, *supra* note 35. However, in 2011, over 90 antiabortion laws were enacted that year in the United States. *Id.*

37. *See, e.g.*, Ariane de Vogue, *How Trump's Election Reignites the Abortion Wars*, CNN (Dec. 14, 2016), http://www.cnn.com/2016/12/14/politics/trump-abortion-supreme-court/ [https://perma.cc/3T2L-FTUL] (citing Mr. Trump's statement that "[t]he judges will be pro-life" and noting that one of his stated contenders for nomination to the Supreme Court, Judge William Pryor, referred to *Roe v. Wade* as an "abomination").

38. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1152–59 (10th Cir. 2013) (Gorsuch, J. concurring) (referring to the Religious Freedom Restoration Act (RFRA) as "something of a 'super-statute'" which trumps all other legislation, including federal laws like the Affordable Care Act, which mandates contraceptive health coverage for women); *see also*, Little Sisters of the Poor Home for the Aged v. Burwell 799 F.3d 1315 (10th Cir. 2015) (Judge Gorsuch dissenting from a denial of en banc review, where a Tenth Circuit panel ruled that the government's "accommodation scheme relieves [nursing home owners] of their obligations under the [Affordable Care Act's contraceptive mandate] and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights." (quoting Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1160 (10th Cir. 2015)). Even though the plaintiffs did not issue a petition for rehearing, Gorsuch urged and voted for an en banc review of the court's decision because he and fellow dissenting judges believed the opinion was "clearly and gravely wrong." *Id.* at 1316.

39. As a judge on the Tenth Circuit Court of Appeals, Neil Gorsuch wrote an opinion dissenting from the denial of en banc review in a case where the circuit court upheld an injunction against Utah Governor Gary Herbert's attempt to defund Planned Parenthood. *Planned Parenthood Association v. Herbert*, 839 F.3d 1301, 1307 (10th Cir. 2016) (Gorsuch, J. dissenting). Gorsuch urged an en banc rehearing in the case (although the Governor did not appeal the court's decision). *Id.* The court denied the en banc rehearing, and in Gorsuch's dissent, he wrote that, "if the Governor discontinued funding," because he believed Planned Parenthood affiliated with illegal fetal tissue sellers, "as he said he did" then "no constitutional violation had taken place. *Id.* Troublingly, Gorsuch's dissenting opinion gave judicial authority to Governor Herbert's unsubstantiated claims that illegally obtained, surreptitiously filmed, and deeply edited videos purporting to show Planned

against pregnant women,[40] and statements on privacy rights[41] indicate enmity and opposition to women's reproductive rights.

Justice Gorsuch's appointment—along with filling vacancies that could emerge from retirements of Justices Ruth Bader Ginsburg, Anthony Kennedy, or Stephen Breyer during his term—almost surely will create a majority to overrule *Roe*. That is, since 1960, seventy-eight years old is the average age at which a Justice has left the bench.[42] Justice Scalia surpassed that by one year: he was seventy-nine when he died on February 13, 2016.[43] At the time of Trump's election, Justice Ginsburg was eighty-three, Kennedy was eighty, and Breyer was seventy-eight.[44]

It is possible that each of these Justices will still be on the bench on January 20, 2021, when a new president could be inaugurated. However, it means that abortion rights depend on the physical and mental health of three

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Parenthood staff negotiating over fetal body parts were credible evidence against the organization. *See id.*

40. Justice Gorsuch has denied claims made by two female law students that on April 19, 2016, nearly a year before his Supreme Court nomination hearings, he indicated women abuse maternity leave policies, thereby harming the interests of employers—and that women engage in such behavior with alarming frequency. Sean Sullivan, *Gorsuch Denies Former Student's Allegation on Maternity Benefits Question*, WASH. POST (Mar. 21, 2017), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-denies-former-students-allegation-on-maternity-leave-question/?utm_term=.aafb968514c6 [https://perma.cc/UK5D-K5S9]. Specifically, when asked by Senator Richard J. Durbin (D-Ill.) whether he asked "students in class to raise their hands if they knew of a woman who had taken maternity benefits from a company and then left the company after having a baby?" *Id.* Gorsuch answered, "No." *Id.* However, Justice Gorsuch refused to clarify his position as to whether he believes women abuse maternity leave policies or whether employers should be entitled to ask family planning questions that currently violate federal law. *Judge Gorsuch Confirmation Continues*, CNN: TRANSCRIPTS (March 21, 2017), http://transcripts.cnn.com/TRANSCRIPTS/1703/21/wolf.01.html [https://perma.cc/432L-SBCD]. For example, when Senator Durbin asked, "whether employees should or should not make inquiries into whether an applicant or employee intends to become pregnant." *Id.* Justice Gorsuch deflected the question, quoting Socrates. *Id.* He told Senator Durbin that "it sounds like you are asking about a case or controversy" and, "with all respect, when it comes to cases and controversies, a good judge will listen. *Id.* For a discussion of Justice Gorsuch's former clerks' position on the allegations, see Arnie Seipel & Nina Totenberg, *Amid Charges by Former Law Student on Gender Equality, Former Clerks Defend Gorsuch*, NPR (March 20, 2017), http://www.npr.org/2017/03/20/520743555/former-law-student-gorsuch-told-class-women-manipulate-maternal-leave [https://perma.cc/J8XA-MYL9].

41. In an amicus brief written in 1996, before Justice Gorsuch entered the bench, he expressed that countless problems "plagued the Court's abortion jurisprudence." Brief for the American Hospital Association as Amicus Curiae Supporting Petitioners, Washington v. Glucksberg, 521 U.S. 702 (1997) (Nos. 96-110, 96-1858) 1996 WL 656278 ("[T]he plurality's opinion rests at heart upon stare decisis principles, upholding the abortion right largely because of the need to protect and respect prior court decisions in the abortion field."). He surmised that *Planned Parenthood v. Casey* was a case rooted in stare decisis rather than the Court affirmatively upholding abortion rights. *Id.*

42. Erwin Chemerinsky, *Chemerinsky: What Will the Presidential Election Mean for SCOTUS?*, ABA J. (Sept. 6, 2016), http://www.abajournal.com/news/article/chemerinsky_what_will_the_coming_election_mean_for_scotus [https://perma.cc/PC47-BGQX].

43. *Id.*

44. *Id.*

individuals who by that time would be eighty-seven, eighty-four, and eighty-two. If Mr. Trump is a two-term president, it is implausible that all (or perhaps even any) of these three Justices will still be on the bench on January 20, 2025.

Finally, Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito have voted to uphold every restriction on abortion that has come before the Court during their tenure.[45] There is nothing in the writings or opinions of Roberts, Thomas, and Alito that causes reason to doubt that they will overrule *Roe v. Wade* if given the chance.[46] Indeed, the separate, vehement dissents by these three Justices in *Obergefell v. Hodges*,[47] the Supreme Court's decision protecting a right to marriage equality for gays and lesbians, shows a conservative jurisprudence of each of these Justices that leaves us little doubt that they would vote to overrule *Roe*.[48]

The uncertainty about abortion rights makes it especially important to provide a strong constitutional foundation for their protection. This, of course, still may not be enough if there are five Justices committed to overruling *Roe*. Yet, abortion rights should have the best possible constitutional defense. That is our purpose in this Article.

We actually contemplated this as a very different contribution to the literature on abortion. As we anticipated the replacement of Justice Scalia with Chief Judge Merrick Garland or a Democratic appointee,[49] we wanted to write an article urging the new Court, with a majority of Justices appointed by Democratic presidents, to reconsider prior decisions upholding restrictions on abortion, such as the denial of public funds for abortions and the ban on so-called 'partial-birth abortions. We still believe that these changes in constitutional law are desirable and will explain why in this Article. For the immediate and foreseeable future, there will not be a Supreme Court to expand abortion rights, but one that well could place all constitutional protections of reproductive autonomy in jeopardy.

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45. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330 (2016) (Alito, J. dissenting); Gonzales v. Carhart, 550 U.S. 124, 167–69 (2007) (upholding the federal Partial-Birth Abortion Ban Act).

46. At the very least, they are certain votes to uphold the almost infinite variety of state laws adopted in recent years to impose restrictions on abortion, including the challenged Texas legislation in *Whole Woman's Health*. Upholding targeted restrictions of abortion providers (TRAP laws) and other antiabortion legislation will make the procedure unavailable to most women in the United States, even if *Roe v. Wade* is not overruled.

47. 135 S. Ct. 2584 (2015).

48. *See id.* at 2611 (Roberts, C.J. dissenting) (arguing that when the Constitution does not clearly create a right, the question of that right's existence is to be left to the states); *id.* at 2640 (Alito, J. dissenting) (same).

49. *See, e.g.*, Domenico Montanaro, *NPR Battleground Map: Hillary Clinton Is Winning—And It's Not Close*, NPR (Oct. 18, 2016), http://www.npr.org/2016/10/18/498406765/npr-battleground-map-hillary-clinton-is-winning-and-its-not-close [https://perma.cc/E7PV-M374] (predicting that Hillary Clinton would easily win the 2016 presidential election, which would presumably result in a Democratic appointee to the Supreme Court).

We begin in Part I by explaining the flawed foundation for the protection of reproductive rights under the Constitution. The problem began in *Griswold v. Connecticut*,[50] the first case to protect reproductive freedom. Notwithstanding the fact that there is much to praise about Justice Harry Blackmun's opinion in *Roe v. Wade*, we believe that it was flawed in failing to clearly explain why the choice of whether to continue a pregnancy or have an abortion must be regarded as a private choice of a woman. From a reproductive-justice standpoint, women's bodily autonomy and privacy should encompass choices along a spectrum of pregnancy that no more favors abortion over pregnancy or pregnancy over abortion. In this Part, we explain why we do not believe that abortion should have been resolved by legislatures, precisely because of women's marginalized status in society during the *Roe* era and even now.

In subsequent decisions, especially in *Planned Parenthood v. Casey*,[51] the Court has seriously erred by abandoning strict scrutiny and using an 'undue burden' test for evaluating government regulation of abortions. Even the most recent abortion ruling, *Whole Woman's Health v. Hellerstedt*,[52] came to a desirable result in striking down restrictions on abortion that would have closed most facilities in Texas where abortions were available, but used the undesirable 'undue burden' test.[53]

In Part II, we seek to reconceptualize abortion rights and underscore the value and relevance of a reproductive justice framework, including taking serious account of women's lived lives. We begin by justifying the protection of rights not found in the text of the Constitution, something the Court has done throughout American history. Foremost among these rights is control over one's body and over one's reproduction. Based on this, we offer our normative argument that the right to abortion should be seen as a private choice left to each woman.[54]

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50. 381 U.S. 479 (1965).

51. 505 U.S. 833 (1992).

52. 136 S. Ct. 2292 (2016).

53. *Id.* at 2300.

54. We recognize the critiques of some prior scholarship on privacy and abortion, such as criticisms about the exclusionary focus or concentration only on the concerns of elites in society, rendering women of color and their social, economic, legal, and medical concerns invisible and their interests unacknowledged and unaddressed. *See* LORETTA J. ROSS, SISTERSONG WOMEN OF COLOR REPROD. HEALTH COLLECTIVE, UNDERSTANDING REPRODUCTIVE JUSTICE 6 (2006), https://d3n8a8pro7vhmx.cloudfront.net/rrfp/pages/33/attachments/original/1456425809/Understanding_RJ_Sistersong.pdf?1456425809 [https://perma.cc/BV28-87UV]. Ross explains:

> [Women of color] were also skeptical about the motivations of some forces in the pro-choice movement who seemed to be more interested in population restrictions rather than women's empowerment. They promoted dangerous contraceptives and coercive sterilizations, and were mostly silent about the economic inequalities and power imbalances between the developed and the developing worlds that constrain women's choices.

Finally, in Part III we discuss what it would mean for abortion to be regarded as a private choice. In this Part, we identify three implications: restoring strict scrutiny to examining laws regulating abortions, which would mean that the government must be neutral between childbirth and abortion; preventing the government from denying funding for abortions when it pays for childbirth; and invalidating the countless types of restrictions on abortion—often referred to as 'targeted restrictions of abortion providers'—that have the purpose and effect of limiting women's access to abortion rather than promoting safety and health. We especially focus on 'informed consent' and waiting period laws and show that they are inconsistent with regarding abortion as a private choice for each woman.

Before *Roe v. Wade*, women faced the horrific choice between an unsafe back-alley abortion and an unwanted child; we know women who encountered these untenable options. We write this Article because we believe it is essential that the country never go back to those days. We write this Article because we think it important to explain why the Constitution must be interpreted to protect reproductive freedom, including recognizing that abortion is a private choice for each woman.

I. The Flawed Foundation for the Constitutional Protection of Reproductive Rights

The Court's misguided approach to reproductive autonomy began with its first decision on the subject: its tragically wrong decision in *Buck v. Bell*.[55] *Buck v. Bell* upheld the ability of the government to involuntarily sterilize individuals with mental disabilities.[56] In *Buck*, the Supreme Court stated that it was constitutional for the state of Virginia to sterilize Carrie Buck, pursuant to a law that provided for the involuntary sterilization of the mentally retarded or 'feeble minded' who were in state institutions.[57] In reality, the law and similar legislation in other states imposed the grave indignity of sterilization on people simply because they were poor, uneducated, vagrants, 'illegitimate, homeless, or had parents with histories of alcoholism or drug

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Id.; *see also* ALEXANDER SANGER, BEYOND CHOICE: REPRODUCTIVE FREEDOM IN THE 21ST CENTURY 289–90 (2004) (advocating that those in favor of abortion rights embrace evolutionary biology as an argument for reproductive freedom); RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA 252 (2005) (criticizing the creation of "conditions for maternal legitimacy that give special treatment to white, middle-class women and threaten almost all other women" as a "vehicle for institutionalizing racism and other forms of oppression").

55. 274 U.S. 200 (1927); *see* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 1–4 (2014) (discussing *Buck v. Bell*); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 236–79 (2008) (discussing *Buck v. Bell* and its aftermath).

56. *Buck*, 274 U.S. at 207.

57. *Id.* at 205–07.

addiction.[58] Carrie fit into the latter category: her mother was institutionalized for being an unkempt woman.[59]

Carrie was raped at sixteen years old and was eighteen when her case came before the United States Supreme Court.[60] Justice Oliver Wendell Holmes, in some of the most offensive language found anywhere in the United States Reports, declared: 'It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. Three generations of imbeciles are enough.'[61] He opined that states' authority was broad enough to cover ''cutting the Fallopian tubes.'[62]

The legacy of *Buck v. Bell* echoed for decades throughout the United States, particularly in southern states like North Carolina, which expanded eugenic sterilizations to include cases of rape, incest, and poverty—often without informing the women undergoing the procedures.[63] In the case of Elaine Riddick, an African-American woman raped as a fourteen-year-old child, doctors removed the baby resulting from that sexual assault and sterilized Riddick in the process.[64] A reporter who followed her case notes, '[a] consent form shows the 'X' mark of her illiterate grandmother.'[65] In

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58. *Id.* at 205.

59. *See* Trevor Burrus, *The United States Once Sterilized Tens of Thousands—Here's How the Supreme Court Allowed It*, CATO INST. (Jan. 27, 2016), https://www.cato.org/publications/commentary/united-states-once-sterilized-tens-thousands-heres-how-supreme-court-allowed [https://perma.cc/485S-GPTB] ("In the Colony, Carrie was reunited with her mother. Colony records describe Emma Buck as a widow who 'lacked moral sense and responsibility. She had a reputation as 'notoriously untruthful, had been arrested for prostitution, and had allegedly given birth to illegitimate children. Perhaps most shockingly, her housework was 'untidy. Emma was stamped with a diagnosis: 'Mental Deficiency, Familial: Moron. '').

60. *Buck*, 247 U.S. at 205; *see* LOMBARDO, *supra* note 55, at 140–41 (noting that Carrie gave birth after she had been raped by a relative of her foster parents at 16).

61. *Buck*, 274 U.S. at 207. Subsequently, in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), the Court held a forced sterilization law unconstitutional and declared:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. He is forever deprived of a basic liberty.

62. *Buck*, 274 U.S. at 207.

63. Valerie Bauerlein, *North Carolina to Compensate Sterilization Victims*, WALL STREET J. (July 26, 2013), http://www.wsj.com/articles/SB10001424127887323971204578629943220881914 [https://perma.cc/J7BH-D3JB] (reporting that "North Carolina sterilized 7,600 people from 1929 to 1974 who were deemed socially or mentally unfit"). Elaine Riddick, one of the victims who was sterilized by the state, became pregnant after being raped—North Carolina's response was to sterilize her. *Id.*; Julie Rose, *N.C. Considers Paying Forced Sterilization Victims*, NPR (June 22, 2011), http://www.npr.org/2011/06/22/137347548/n-c-considers-paying-forced-sterilization-victims [https://perma.cc/24HN-RKQB].

64. Rose, *supra* note 63.

65. *Id.*

North Carolina, 26% of forced sterilizations were carried out on children 'under age 18' and 60% of all sterilization victims were African-Americans.[66]

The Court's failure to recognize pregnant women's privacy and autonomy during the notorious eugenics period in the United States serves as a potent landmark for reproductive justice and rights in this nation. Autonomy and privacy in pregnancy relate not only to terminating a pregnancy, but also a woman's dignity to carry a pregnancy to term if she wishes to do so. When the State makes judgments as to who should or should not be granted autonomy over her reproductive decision making, it engages not only in social determinism, but also an unconstitutional and discriminatory practice.

As Professor Dorothy Roberts explains: 'Governmental policies that perpetuate subordination through the denial of procreative rights, which threaten both racial equality and privacy at once, should be subject to the most intense scrutiny.'[67] In hindsight, scholars and lawmakers have come to agree with the assessment that *Buck v. Bell* was wrongly decided and that it perpetuated nativism and sex discrimination. However, given this history, the foundation for recognizing a privacy right in women's reproductive health sphere rests on disappointingly unstable ground,[68] because a woman's control over her body was not deemed a fundamental right even in the aftermath of rape and a subsequent pregnancy.

Thus, the constitutional protection of abortion rights is made more difficult by the failure of the Court to provide a persuasive explanation for why reproductive autonomy should be deemed a fundamental right. This problem began with the Court's first decision concerning contraception and abortion, *Griswold v. Connecticut*, and continues through its most recent ruling, *Whole Woman's Health v. Hellerstedt*. The flawed foundation makes these rights more susceptible to criticism, more subject to restrictions, and more vulnerable to overruling.

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66. *See* Bauerlein, *supra* note 63 (noting that '[a]bout 2,000 of the 7,600 who were sterilized were under age 18' and 60% of all sterilization victims were black).

67. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 308 (1997).

68. Despite the Court's subsequent ruling in *Skinner v. Oklahoma*, overturning a law that criminalized petty thefts with the punishment of sterilization, *Buck v. Bell* remains 'good law' in that it has never been overturned. 316 U.S. at 540–41. In *Skinner*, the Supreme Court ruled that the right to bear children is 'one of the basic civil rights of man,' and struck down the Oklahoma Habitual Criminal Sterilization Act on the grounds that it fostered unequal treatment between classes of criminal offenders who committed similar acts. *Id.* at 536, 541, 543. Habitual petty thieves were subjected to sterilization whereas habitual embezzlers and white-collar offenders were not. *Id.* at 541–42.

A. Griswold v. Connecticut

The first case to consider a right to prevent procreation was *Griswold v. Connecticut*, where the Supreme Court declared unconstitutional a state law that prohibited the use and distribution of contraceptives.[69] A Connecticut law stated: 'Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned. '[70] The law also made it a crime to assist, abet, or counsel a violation of the law.[71]

The case involved a criminal prosecution of Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, a physician and Yale Medical School professor who openly ran a Planned Parenthood clinic from November 1 to November 10, 1961.[72] Connecticut prosecuted Griswold and Buxton for providing contraceptives to a married woman.[73]

The Supreme Court, in an opinion by Justice Douglas, found that the right to privacy was a fundamental right and that the Connecticut law violated this right.[74] Although we, of course, believe that the result in this case was unquestionably correct, Justice Douglas wrote a poor opinion explaining the basis for the decision and thus created a weak and unstable foundation for future protection of reproductive rights.

First, the Court found the right to privacy to be protected under the 'penumbra' and 'emanations' of the Bill of Rights, an approach justifiably subjected to much ridicule.[75] Justice Douglas expressly rejected the argument that the right was protected under the liberty right of the due process clause. He stated: '[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation as we did [in many other cases]. '[76]

Instead, Justice Douglas found that privacy was implicit in many of the specific provisions of the Bill of Rights, such as the First, Third, Fourth, and Fifth Amendments. He declared: 'The foregoing cases suggest that specific

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69. 381 U.S. 479, 485–86 (1965); *see* CONN. GEN. STAT. §§ 53-32, 54-196 (1958) (repealed 1969).

70. *Griswold*, 381 U.S. at 480 (internal quotations omitted).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 485–86.

75. *Id.* at 484; *see* Robert G. Dixon Jr., *The 'New' Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43, 84 (arguing that in *Griswold*, Justice Douglas "skipped through the Bill of Rights like a cheerleader—'Give me a P give me an R an I and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right").

76. *Griswold*, 381 U.S. at 481–82 (citations omitted).

guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.'[77] Penumbras and emanations are a flimsy foundation for fundamental rights, which is why they never again have been mentioned by the Court. We believe it would have been far better for the Court to explain why reproductive autonomy is safeguarded under the liberty right of the Due Process Clause, as Justice Harlan urged.[78] As Justice Harlan wrote, 'the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty. '[79] Besides, Justice Douglas failed even in his efforts to avoid substantive due process: the Bill of Rights is applied to the states through the Due Process Clause of the Fourteenth Amendment.

Second, astoundingly, Justice Douglas's majority opinion never mentions a right to avoid procreation or to make reproductive choices. While this may be implicit in the broader reading of the case, this principle of autonomy to avoid procreation lacks explicit mention in the decision. Instead, Justice Douglas focuses on how objectionable it would be for police to search the bedroom of a married couple, which was totally irrelevant to this case. Justice Douglas writes: 'Would we allow the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. '[80] Most importantly, the Court never explains why the ability to control reproduction should be regarded as a fundamental right under the Constitution. Ironically, the first Supreme Court case to address reproductive autonomy never mentioned reproductive autonomy.

Subsequent to *Griswold*, the Supreme Court recognized a right to purchase and use contraceptives based on a right of individuals to make decisions concerning procreation. In *Eisenstadt v. Baird*,[81] the Supreme Court declared unconstitutional Massachusetts' 'Crimes Against Chastity, Morality, Decency and Good Order"[82] law that prohibited distributing contraceptives to unmarried individuals and only allowed physicians to distribute them to married persons.[83] In that case, Bill Baird—famously

77. *Id.* at 484 (citation omitted).

78. *See* Poe v. Ullman, 367 U.S. 497, 523 (1961) (Harlan, J. dissenting) (noting that Connecticut's anti-birth control laws "violate[d] the Fourteenth Amendment, in that they deprive[d] appellants of life, liberty, or property without due process").

79. *Griswold*, 381 U.S. at 500 (Harlan, J. concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969)).

80. *Griswold*, 381 U.S. at 485–86.

81. 405 U.S. 438 (1972).

82. *Id.* at 450 (internal quotations omitted).

83. *Id.* at 443.

known for challenging such laws in various states—was arrested and jailed for violating the Massachusetts law following a speech where he publicly distributed information about birth control to a group of Boston University students and provided one young woman with a foam contraceptive.[84]

The Court stated, as it should have in *Griswold*: 'If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. '[85]

B. Roe v. Wade

Roe v. Wade, of course, is the key case recognizing a constitutional right to abortion.[86] *Roe* involved a challenge to a Texas law that prohibited all abortions except those necessary to save the life of the mother.[87] A companion case, *Doe v. Bolton*,[88] presented a challenge to a Georgia law that outlawed abortions except if a doctor determined that continuing the pregnancy would endanger a woman's life or health, if the fetus likely would be born with 'a grave, permanent, and irremediable mental or physical defect, or if the pregnancy resulted from rape.[89]

In *Roe*, Justice Blackmun, writing for the Court, exhaustively reviewed the history of abortion from ancient attitudes through English law through American history and to the present.[90] Blackmun also described the development of medical technology to provide safe abortions.[91] With this as background, Blackmun focused on the right to privacy. After reviewing earlier cases addressing family and reproductive autonomy, Blackmun concluded:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[92]

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84. *Id.* at 440.

85. *Id.* at 453.

86. 410 U.S. 113, 153 (1973).

87. *Id.* at 117–18.

88. 410 U.S. 179 (1973).

89. *Id.* at 181, 183.

90. *See Roe*, 401 U.S. at 129–47 (detailing the various positions on abortion held by different societies, organizations, and cultures throughout history).

91. *See id.* at 149 (describing how the development of modern medical techniques has led to a decrease in mortality rates for women undergoing early abortions and has resulted in abortions becoming relatively safe medical procedures).

92. *Id.* at 153.

It is notable that the Court did not find privacy, as Justice Douglas did in *Griswold*, in the penumbra of the Bill of Rights, but instead as part of the liberty protected under the Due Process Clause.

The *Roe* opinion then explained why prohibiting abortion infringes on a woman's right to privacy. Justice Blackmun observed that: 'Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child '[93] Forcing a woman to continue a pregnancy against her will obviously imposes enormous physical, psychological, and economic burdens.

The Court observed, however, that the right to abortion is not absolute and that it must be balanced against other considerations, such as the state's interest in protecting 'prenatal life. '[94] The Court said that strict scrutiny was to be used in striking the balance because the right to abortion was a fundamental right.[95] The Court reiterated that where 'fundamental rights' are involved regulation limiting these rights may be justified only by a 'compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. '[96]

The Court explicitly rejected the state's claim that fetuses are persons and that there was a compelling interest in protecting potential life.[97] That position was not inconsistent with prior court rulings.[98] Even decades prior to *Roe v. Wade*, appellate courts rejected the notion that fetuses were persons for purposes of civil or criminal law, refusing to adopt the position that an infant could possibly maintain an action against 'its own mother' for injuries occurring within the womb.[99] Simply put, a fetus was not considered a

93. *Id.*

94. *Id.* at 155.

95. *Id.*

96. *Id.* (citations omitted).

97. *See id.* at 162–63 (noting that fetuses have never been recognized in the law wholly as living persons and that with respect to the state's interest in protecting potential life, there is no "compelling" state interest until the point of viability).

98. *See, e.g.*, Allaire v. St. Luke's Hospital, 184 Ill. 359, 359 (Ill. 1900) (holding that an unborn child cannot recover damages for an injury sustained while in the womb because while courts have sometimes indulged "the legal fiction that an unborn child may be regarded as [in being] for some purposes, ' they have never gone as far as "sustaining an action by an infant for injuries [sustained] before its birth"); Regina v. Knights (1860) 175 Eng. Rep. 952, 952–53; 2 F. & F. 46, 47 (rejecting the prosecution's theory that a pregnant mother would be guilty of manslaughter for negligently failing to take the precautions to preserve the life of a child after birth); Rex v. Brain (1834) 172 Eng. Rep. 1272, 1272; 6 Car. & P. 350, 350 (holding that "[a] child must be actually wholly in the world, in a living state, to be the subject of a charge of murder").

99. *See, e.g.*, Stanford v. St. Louis-San Francisco Ry. Co., 108 So. 566, 566 (Ala. 1926) (holding the representatives of a premature child who died as a result of injuries sustained while in his mother's womb could not recover damages); Keeler v. Superior Court of Amador Cty., 470 P.2d 617, 623 (Cal. 1970) (holding that a live birth is a prerequisite for a homicide conviction); *Allaire*, 184 Ill. at 359 (holding that an unborn child cannot recover damages for an injury sustained while

human child for purposes of law; a fetus could not maintain life apart from a pregnant woman; and courts found the notion of fetal litigation against its mother or criminal actions to be contrary to justice.[100] In England, Australia, and ultimately in the United States, courts agreed that fetuses were not persons, and could not possess rights until they had lives 'independent of the mother[s].'[101] Thus, the Court's opinion in *Roe* fit a long-held view.

Justice Blackmun observed that there was no indication that the term 'person' in the Constitution ever was meant to include fetuses.[102] Moreover, he emphasized there was no consensus as to when human personhood begins, but rather enormous disagreement among various religions and philosophies.[103] The Court rejected arriving at a conclusion regarding fetal life, stating: 'We need not resolve the difficult question of when life begins.'[104] Blackmun and his fellow Justices expressed ambivalence about shaping law on that question, '[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus'[105] Given that, he wrote, 'the judiciary, at this point in the

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in the womb); Newman v. City of Detroit, 274 N.W. 710, 711 (Mich. 1937) (holding that an unborn child does not have a cause of action for injuries sustained while in the womb that later result in the unborn child's death); Buel v. United Rys. Co. of St. Louis, 154 S.W. 71, 73 (Mo. 1913) (asserting a child cannot recover for injuries sustained before its birth); Drabbels v. Skelly Oil Co., 50 N.W.2d 229, 232 (Neb. 1951) (holding that the administrator of the estate of a child born dead cannot bring a wrongful death action for injuries sustained while the child was in the womb); Endresz v. Friedberg, 248 N.E.2d 901, 902 (N.Y. 1969) (holding that "a wrongful death action may not be maintained for the death of an unborn child"); Gorman v. Budlong, 49 A. 704, 704 (R.I. 1901) (holding that where a mother was injured through the defendant's negligence so that she gave premature birth to a child, which died as a result of the premature delivery, the child's father cannot maintain a wrongful death action for the death of the premature child); Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944, 949 (Tex. 1935) (holding that a child cannot recover in damages for an injury sustained while in the womb unless the child becomes viable); Lipps v. Milwaukee Elec. Ry. & Light Co., 159 N.W. 916, 916–17 (Wis. 1916) (holding that damages cannot be recovered for a fetus unless the fetus is viable); Rex v. Pritchard, 17 TLR 310 (1901) (holding that in order for a child to have a legal existence separate from that of his mother, the child must be able to carry on its being without the help of his mother's circulation); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], bk. 1, div. 1, tit. 1, § 1 (Ger.) ("The legal capacity of a human being begins on the completion of birth."); CÓDIGO CIVIL [C.C.] [CIVIL CODE], tit. 2, ch. 1, art. 30 (Spain) (requiring that the fetus be born and living outside of the mother's womb to be considered born); ERNEST J. SCHUSTER, THE PRINCIPLES OF GERMAN CIVIL LAW 18 (1907) (noting that "the completion of the act of birth in the medical sense, coupled with the survival of the child for one moment at least after such completion, is all that is necessary").

100. *See* sources cited *supra* note 99.

101. VICTORIAN LAW REFORM COMM'N, LAW OF ABORTION: FINAL REPORT 97 (2008), http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Abortion_Report.pdf [https://perma.cc/7ECY-GL8S].

102. *Roe*, 410 U.S. at 157–58.

103. *Id.* at 159.

104. *Id.*

105. *Id.*

development of man's knowledge, is not in a position to speculate as to the answer.'[106]

Instead, the Court announced that in balancing the competing interests, the state had a 'compelling' interest in protecting maternal health after the first trimester because it was then that abortions became more dangerous than childbirth.[107] The Court further concluded that '[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.'[108]

Thus, the Court announced a trimester approach to legalizing abortions. Importantly, during the first trimester, the government could not prohibit abortions and was permitted to regulate abortions only as it regulated other medical procedures, such as by requiring that they be performed by a licensed physician.[109] During the second trimester, the government also could not outlaw abortions. Instead, the government could, 'if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.'[110] Finally, '[f]or the stage subsequent to viability, the government could regulate, and even prohibit, abortions except if necessary to preserve 'the life or health of the mother.'[111]

We certainly agree with the Court's conclusion—it is often forgotten that *Roe* was a 7–2 decision—and much of Justice Blackmun's reasoning. The Court clearly explains why a prohibition of abortion infringes on a woman's autonomy. Moreover, we reject as misguided many of the criticisms of *Roe*. For example, some, including Justice Ginsburg, have argued that *Roe* went too fast, that there was a trend towards protecting abortion rights, and that *Roe* triggered a backlash.[112] Justice Ginsburg's argument, though, ignores the reality as the law existed in 1973: the marginalized social status of all women,[113] particularly women of color;[114]

106. *Id.*

107. *Id.* at 163.

108. *Id.*

109. *Id.* at 164.

110. *Id.*

111. *Id.* at 164–65.

112. Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198–209 (1992).

113. *See* CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 143 (2005) (discussing the fundamental sex inequality created by forced motherhood); U.N. SOC. STATISTICS & INDICATORS, THE WORLD'S WOMEN 1970–1990: TRENDS AND STATISTICS, at 1–8, U.N. Doc. ST/ESA/STAT/SER.K/8, U.N. Sales No. E.90.XVII.3 (1991) (compiling and analyzing statistical indicators of the social status of women); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 366 (1992) (arguing that compelled pregnancy is historically tied to sexist conceptions of women).

114. *See, e.g.*, PETER M. BLAU & OTIS DUDLEY DUNCAN, THE AMERICAN OCCUPATIONAL STRUCTURE 241 (1967) (describing the 'universalistic' entrenchment of 'severe' race discrimination in American society that African-Americans 'suffer[] at every step in the process

the extreme toll of domestic violence,[115] particularly during pregnancy;[116] and the horrific experiences of girls and women who experienced unintended pregnancies—sometimes from rape.[117]

The reality is that in the early 1970s, sexual harassment in the workplace had yet to be recognized as abnormal, let alone a problem with a remedy in law.[118] Racism continued to burden women of color and limit opportunities for them and their families.[119] Indeed, the advances born from the hopeful activism of the 1950s and 1960s met a backlash for blacks in the 1980s and 1990s as 'conservative politicians advanced a series of racial projects designed to limit if not eliminate the social gains' of prior decades.[120] Patricia Hill Collins and other scholars remind us that this backlash was 'formidable, in nearly all aspects of life, particularly for women of color.[121]

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toward achieving occupational success"); PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 110 (2d ed. 2000) ("Since the 1970s, U.S. Black women have been unevenly incorporated into schools, jobs, neighborhoods, and other U.S. social institutions that historically have excluded [them]. As a result, African-American women have become more class stratified than at any period in the past."); ROBERTS, *supra* note 67, at 22–23 (describing the control slave owners exercised over the reproduction of enslaved people); Toni Cade, *The Pill: Genocide or Liberation?*, *in* THE BLACK WOMAN: AN ANTHOLOGY 162, 168 (Toni Cade ed., 1970) (describing the strained condition of black women who lacked the means to care for their children or themselves); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40 (explaining that women of color are frequently overlooked in feminist theory, resulting in the further disenfranchisement of black women).

115. *See generally* PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE (2000) (analyzing the chilling extent of domestic violence in the United States); U.N. SOC. STATISTICS & INDICATORS, *supra* note 113, at 19–20 (showing statistically the reality of domestic violence faced by women across the world); Jay G. Silverman et al., *Intimate Partner Violence Victimization Prior to and During Pregnancy Among Women Residing in 26 U.S. States: Associations with Maternal and Neonatal Health*, 195 AM. J. OBSTETRICS & GYNECOLOGY 140, 140 (2006) (explaining that '[w]omen experiencing intimate partner violence both prior to and during pregnancy are at risk for multiple poor maternal and infant health outcomes").

116. *See* Abbey B. Berenson et al., *Perinatal Morbidity Associated with Violence Experienced by Pregnant Women*, 170 AM. J. OBSTETRICS & GYNECOLOGY 1760, 1760 (1994) (explaining that '[w]omen assaulted in the current pregnancy were twice as likely to have preterm labor as compared with those who denied [ever being] assault[ed], as well as 'a twofold increased risk of chorioamnionitis"); Gilian C. Mezey & Susan Bewley, *Domestic Violence and Pregnancy: Risk Is Greatest After Delivery*, 314 BRIT. MED. J. 1295, 1295 (1997) (finding '[p]regnancy may increase the risk of violence, and the pattern of assault may alter, with pregnant women being more likely to have multiple sites of injury and to be struck on the abdomen").

117. *See* sources cited *supra* note 23.

118. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 179 (1979) (discussing Title VII sexual harassment suits in the 1970s).

119. For example, Patricia Hill Collins writes, in the 1970s, "Black women could find work, but it was often part time, low paid, and lacking in security and benefits. COLLINS, *supra* note 114, at 58–59.

120. *Id.* at 60.

121. *Id.* As Audre Lorde wrote decades ago, men have never "been forced to bear child[ren] [they] did not want or could not support.' She explained, 'enforced sterilization and unavailable

Structural systems of racism forged through slavery and honed during Jim Crow dynamically persisted. Racial segregation was among these problems. Racial segregation in education, employment, and housing further undermined the important goals of civil rights legislation, even in Northern cities. Equally, however, black women suffered from the intersectional problems welded by sexism and class stratification combined with racism, which affected the scope and scale of their employment, wages, and status or 'invisibility' in society.

In their landmark work tracking job opportunities of working-class women, Sally Hillsman Baker and Bernard Levenson point out the grave racial discrepancies associated with job placement and attainment.[122] They observed how deep patterns of racial oppression impacted working-class women's job opportunities, resulting in black women earning lower wages and working in the least desirable jobs.[123] As Professor Collins writes, 'some of the dirtiest jobs in [American] industries were offered to African-American women, including in the cotton mills, 'as common laborers in the yards, as waste gatherers, and as scrubbers of machinery.'[124] However, intersectional oppressions in day-to-day life extended beyond black women, and also impacted other women of color.

Women were (and continue to be) underpaid compared to their male counterparts when performing the same and similar jobs.[125] During the 1970s and '80s, women's standard of living dramatically declined after divorce, while it increased for men.[126] Even for women who desired motherhood, the concept of family leave did not exist and was not available.[127] Given the

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abortions are tools of oppression' against women generally, and especially black women. AUDRE LORDE, SISTER OUTSIDER 46 (1984); *see also* PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA (1984); BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981); BELL HOOKS, KILLING RAGE: ENDING RACISM (1995).

122. Sally Hillsman Baker & Bernard Levenson, *Job Opportunity of Black and White Working Class Women*, 22 SOC. PROBS. 510, 531–32 (1975).

123. *Id.*

124. COLLINS, *supra* note 114, at 57; *see also* Evelyn Nakano Glenn, *Racial Ethnic Women's Labor: The Intersection of Race, Gender and Class Oppression*, 17 REV. RADICAL POL. ECON. 86, 96 (1985).

125. *See* David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. J. THEORY & PRAC. 33, 37 (1984) ("examin[ing] the effects of gender perspective on the [Supreme] Court's decisions"); Carol Jean Pint, *Value, Work and Women*, 1 LAW & INEQ. J. THEORY & PRAC. 159, 185 (1983) (discussing the lack of economic equality between the sexes and the future efforts required of women to correct the inequality).

126. *See* Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1251 (1981) (describing a study which found that, one year after divorce, '[m]en experienced a 42% improvement in their standard of living, while women experienced a 73% loss").

127. *See* 29 U.S.C. § 2601 (2012) (finding that the lack of family leave policies "force[d] individuals to choose between job security and parenting" and that the "responsibility [of parenting] affects the working lives of women more than it affects the working lives of men").

social status of women, rendered and maintained at least in part by state legislative action and inaction, when were their rights to be elevated and their reproductive autonomy and privacy recognized?

During the 1970s, household labor was generally ignored or considered to be the woman's role in the family and society.[128] Violence was normalized during the period in which Justice Ginsburg thought states should move the abortion question along[129] and was exploited in matrimony, because marital rape was legal.[130] Indeed, some states into the 2000s created exceptions for marital rape or codified it differently than general rape laws such that nonconsensual sex with an incapacitated wife did not qualify as rape.[131] In the infamous case of Trish Crawford's rape, a jury saw a thirty-minute videotape that her husband recorded while he bound and raped her with various objects.[132] Despite this graphic evidence, Dale Crawford was acquitted, as were numerous other men across the United States, because marital rape was legal until the 1990s and sometimes juries believed wives *consented* to torture and rape.[133] In fact, at trial, Mr. Crawford testified on his own behalf, explaining, "No, I didn't rape my wife. How can you rape your own wife?"[134] Sadly, Mr. Crawford killed his third wife a decade later.[135] Neither were girls safe from sexual violence in the household,

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128. *See* Batya Weinbaum & Amy Bridges, *The Other Side of the Paycheck: Monopoly Capital and the Structure of Consumption*, MONTHLY REV., July–Aug. 1976, at 88, 91–92 (discussing "the economic aspect of women's work outside the paid labor force" and arguing that household labor should be considered "work").

129. *See* Evan Stark et al. *Medicine and Patriarchal Violence: The Social Construction of a 'Private' Event*, 9 INT'L J. HEALTH SERVICES 461, 467 (1979) (detailing a 1970s study finding one in four female patients was a domestic violence victim).

130. *See* Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1477–85 (2003) (describing the history of the marital rape exemption from English common law to the law of the United States in the 1970s); Diana E.H. Russell & Nancy Howell, *The Prevalence of Rape in the United States Revisited*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 688, 690 (1983) (noting that 44% of women were victims of either rape or attempted rape in their lifetimes).

131. Thadeus Greenson, *An Evolution of Law: Spousal Rape Recently Prosecutable*, TIMES STANDARD (Mar. 23, 2008), http://www.times-standard.com/article/zz/20080323/NEWS/803239696 [https://perma.cc/9J44-H9XW].

132. Gary Karr, *Woman in Marital Rape Case Urges Rape Victims: 'Take a Stand*, AP NEWS ARCHIVE (Apr. 21, 1992), http://www.apnewsarchive.com/1992/Woman-In-Marital-Rape-Case-Urges-Rape-Victims-Take-a-Stand-/id-7ef8a4f1c0a35732613da0cbd55e284a [https://perma.cc/M54R-DPZ3] ("A Lexington County jury took less than an hour Thursday to acquit her husband, Dale. He had videotaped the alleged rape and characterized it as a sex game."); CATHARINE A. MACKINNON, ONLY WORDS 114 n.3 (1996) (offering a theory that Crawford's acquittal was bounded in the notion that his wife consented to rape and torture).

133. RAQUEL KENNEDY BERGEN, WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS 4–5 (1996).

134. Karr, *supra* note 132.

135. Jack Kuenzie, *Man Formerly Charged with Marital Rape Now Charged with Murder of Third Wife*, WISTV.COM (Nov. 26, 2004), http://www.wistv.com/story/2612294/man-formerly-charged-with-marital-rape-now-charged-with-murder-of-third-wife [https://perma.cc/R5P9-CSNL].

because the law also protected fathers in sexual assaults against their daughters, providing civil immunity in cases of incest.[136]

Prior to the Supreme Court's decision in *Roe v. Wade*, abortion was illegal in forty-six states.[137] Fourteen states enacted laws similar to the provisions of the Model Penal Code,[138] allowing abortion if necessary to protect a pregnant woman's life or health, if a fetus would be born with a 'grave physical or mental defect,' or if 'pregnancy resulted from rape [or] incest.'[139] And twenty-five states prohibited abortion except when necessary to save the woman's life.[140]

Thus, the political realities were such that it was highly unlikely that state legislatures would repeal these laws.[141] Yale Professors Reva Siegel and Linda Greenhouse have persuasively shown there was no trend towards significant protection of abortion rights before *Roe* and there was no backlash against *Roe* until 1980 when the Reagan presidential campaign made a concerted effort to gain the support of fundamentalist Christians.[142] More importantly, once the Court concluded that there is a constitutional right to abortion, it should be protected for all women; delaying would mean that countless women would have suffered under laws restricting their ability to exercise a fundamental right. We thus strongly disagree with those who believe that the Court went 'too fast' in *Roe*. The protection of a fundamental right that profoundly affects women's lives should not have been delayed and, if anything, should have come much earlier in American history.

Yet, we see problems in Justice Blackmun's opinion in *Roe*. To begin, the Court's analysis of the right to abortion and the ability of the government

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136. *See* Michele Goodwin & Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors' Access to Assisted Reproductive Technology*, 34 HARV. J.L. & GENDER 503, 512 (2011) (outlining the reasoning and policy behind the parental and familial immunity doctrine that protected rapists from being charged for sexual abuse of family members); Diana E. H. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT 133, 144 (1983) (conducting a study finding intrafamily sexual abuse as more prevalent than previously thought).

137. Four states—Alaska, Hawaii, New York, and Washington—repealed criminal penalties for abortions performed in early pregnancy by a licensed physician. ALASKA STAT. § 11.15.060 (1970); HAW. REV. STAT. § 453-16 (1970); N.Y. PENAL LAW § 125.05 (McKinney 1970); WASH. REV. CODE §§ 9.02.060–9.02.080 (1970). The Alaska, Hawaii, and Washington statutes contained residency requirements limiting access to abortion to residents of those states.

138. MODEL PENAL CODE § 230.3 (AM. LAW INST. Proposed Official Draft 1962).

139. *Id.* A list of these fourteen state statutes is found in *Roe v. Wade*, 410 U.S. 113, 140 n.37 (1973).

140. *Roe*, 410 U.S. at 139 n.34.

141. In part, the intensity and political power of supporters of restrictive abortion laws created "unusual legislative rigidity" and made reforms unlikely. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 929 (1978). In part, too, because abortion was available to the relatively wealthy, there was much less pressure for repeal of restrictive laws. *Id.* at 930.

142. LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 259–62 (Linda Greenhouse & Reva B. Siegel eds. 2010).

to regulate was based on drawing distinctions among the trimesters of pregnancy. Dividing a woman's pregnancy into three segments, each of three months, seemed arbitrary and based on little except nine being divisible by three. More importantly, the Court made viability the point at which a state could prohibit abortions (except when necessary to protect a woman's life or health). However, that too seems arbitrary. Viability is a moving target, and depending on available local technology, viability may change even while the fetus could not survive on its own without medical intervention.

Why viability as opposed to many other points at which human life can be said to begin: conception, implantation into the uterine wall, individuation of the fetus, detection of a heartbeat, quickening (when the woman detects the movement of the fetus), or birth? The Court declared that it 'need not resolve the difficult question of when life begins.'[143] But wasn't the Court doing exactly that in choosing viability as the point at which abortion can be prohibited? Moreover, viability changes as neonatal technology improves. Should a constitutional standard depend on the medical technology of the moment?

Indeed, an implication of the determination that the state's interest in the fetus becomes compelling at viability is that medical progress could virtually eliminate all abortions. Scientific advances might make a fetus viable at an early stage of pregnancy. If technology is available to enable the fetus to survive outside the womb after the first month or six weeks of pregnancy, then no abortions would be allowed after that time. The result would be an almost total ban on abortions. Medical science is nowhere near that point, but the possibility shows the difficulty of focusing on technology rather than a woman's control over her body and her reproduction.

Also, the Court, in its opinion in *Roe*, never identified the ways in which laws restricting abortion are inherently discriminatory. Most obviously, they affect women totally differently than they affect men. Almost two decades later, Justice Blackmun, the author of *Roe*, stated this eloquently:

> A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal

143. *Roe*, 410 U.S. at 159.

> Protection Clause. The joint opinion recognizes that these assumptions about women's place in society 'are no longer consistent with our understanding of the family, the individual, or the Constitution.'[144]

Roe would have been stronger if it had included this language and analysis.

It has long been recognized that restrictive abortion laws operate to discriminate against indigent women. The relatively wealthy can persuade a friendly doctor to perform the minor surgical procedure or can afford to travel to one of the states that allows abortion on demand.[145] Even when abortion was illegal in all states, wealthier women still had access to abortion by travelling to foreign countries that permitted the procedure.[146] For example, between 1968, when Great Britain liberalized its abortion laws, and 1970, when New York repealed its criminal ban, making legal abortions available in the United States, it is estimated that 5,000 abortions per year were performed on American women in Great Britain.[147]

Poor women desiring an abortion and unable to afford the costs of travel, to say nothing of paying for the procedure itself, faced a cruel dilemma. On the one hand, they could bring the pregnancy to term and give birth to an unwanted child they could not afford. Alternatively, they could 'subject themselves to the notorious 'back-street' abortion[,] fraught with the myriad possibilities of mutilation, infection, sterility and death.'[148]

In the years prior to *Roe v. Wade*, all too many women made the latter choice and faced exactly those consequences. It is estimated that prior to 1973, one million illegal abortions were performed each year in the United States.[149] And while white women were as likely to have illegal abortions, the death rate from illegal abortions was far higher among women of color. For example, one study indicated that in New York City there were 0.8 abortion deaths for every 10,000 live births by white women.[150] Among black women there were 7.1 abortion deaths per 10,000 births, and for Puerto Rican women the figures were 4.5 deaths for every 10,000 births.[151]

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144. Planned Parenthood v. Casey, 505 U.S. 833, 928–29 (1992) (Blackmun, J. concurring in part, concurring in the judgment in part, and dissenting in part) (citations omitted).

145. Guttmacher, *supra* note 15, at 421.

146. Since more than 60% of the world's population lives in countries where abortion is legal during the first trimester, it is inevitable that rich women will have access to safe abortions while indigent women will not in the United States. William T. Liu, *Abortion and the Social System*, *in* ABORTION: NEW DIRECTIONS FOR POLICY STUDIES 137, 144 (Edward Manier et al. eds. 1977).

147. Richard L. Worsnop, *Abortion Law Reform*, *in* 2 EDITORIAL RESEARCH REPORTS 543, 553 (William B. Dickinson et al. eds. 1970).

148. YWCA v. Kugler, 342 F. Supp. 1048, 1074 (D.N.J. 1972).

149. Guttmacher, *supra* note 15, at 420; Worsnop, *supra* note 147, at 554.

150. Guttmacher, *supra* note 15, at 421.

151. *Id.*

According to the Guttmacher Institute, 'a clear racial disparity is evident in the data of mortality because of illegal abortion.'[152] Researchers note that '[i]n New York City in the early 1960s, one in four childbirth-related deaths among white women was due to abortion.'[153] However, 'in comparison, abortion accounted for one in two childbirth-related deaths among nonwhite and Puerto Rican women.'[154] Even more disturbing, 'from 1972 to 1974, the mortality rate due to illegal abortion for nonwhite women was 12 times that for white women.'[155] Importantly, these figures do not even speak of the injuries and illnesses caused by illegal abortions.[156] That these deaths and injuries are a result solely of illegality is indicated by the fact that there was an almost immediate 40% decrease in abortion-related deaths after *Roe v. Wade*.[157]

We recognize, of course, that identifying abortion laws as discriminatory does not address whether the government's interest in protecting fetal life is sufficient to justify the discrimination. We also realize that the Court has found that the poor are not a suspect class and discrimination on the basis of wealth does not trigger heightened scrutiny.[158] But we think *Roe* would have been a more persuasive opinion if grounded in this social reality.

C. *The Undue Burden Test*

By the 1990s, the change in the composition of the Supreme Court raised questions as to whether *Roe v. Wade* would be overruled. In 1989, in *Webster v. Reproductive Health Services*,[159] four Justices seemed poised to overrule *Roe*.[160] In *Webster*, a Missouri law declared the state's view that life begins at conception, prohibited the use of government funds or facilities from performing or 'encouraging or counseling' a woman to have an abortion, and allowed abortions after twenty weeks of pregnancy only if a

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152. Rachel Benson Gold, *Lessons From Before Roe: Will Past Be Prologue?* GUTTMACHER POL'Y REV. (Mar. 1, 2003), https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue [https://perma.cc/Z93B-MBEU].

153. *Id.*

154. *Id.*

155. *Id.*

156. *See* SOPHIA J. KLEEGMAN & SHERWIN A. KAUFMAN, INFERTILITY IN WOMEN: DIAGNOSIS AND TREATMENT 301 (1966) (asserting that induced illegal abortions often "cause[] subsequent infertility and pelvic disease").

157. *Abortion-Related Deaths Down 40 Percent Since 1973*, 7 FAM. PLAN. PERSP. 54, 54 (1975).

158. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (holding that disparities in school funding do not deny equal protection and that discrimination against the poor does not trigger heightened scrutiny).

159. 492 U.S. 490 (1989).

160. *Id.* at 519 (plurality opinion); *id.* at 532 (Scalia, J. concurring in part and concurring in the judgment).

test was done to ensure that the fetus was not viable.[161] The Supreme Court upheld the Missouri law, but without a majority opinion.[162]

Chief Justice Rehnquist, in a plurality opinion joined by Justices White and Kennedy, strongly criticized *Roe*.[163] Rehnquist argued: '[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.'[164] Rehnquist believed that '[t]he State's interest, if compelling after viability, is equally compelling before viability.'[165] Rehnquist's opinion did not expressly urge the overruling of *Roe v. Wade*; however, that was the unmistakable and profound implication of declaring that the state has a compelling interest in protecting fetal life from the moment of conception. Rehnquist and White were the two dissenters in *Roe*, and they had consistently argued for overruling it.[166] At the time, it seemed telling that Justice Kennedy—in his first case dealing with abortion—joined their opinion that unmistakably would have overruled *Roe*.

Justice Scalia wrote a separate opinion concurring in part and concurring in the judgment. He said that the plurality opinion 'effectively would overrule *Roe v. Wade*.'[167] He said: 'I think that should be done, but would do it more explicitly.'[168] He argued that the failure to overrule *Roe* 'needlessly prolong[s] this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical.'[169]

Justice O'Connor provided the fifth vote for the result in *Webster*, but she ruled only on the specifics of the Missouri law and did not opine on the question of whether *Roe* should be overruled.[170] O'Connor noted that the Missouri law did not prohibit abortions, and thus 'there is no necessity to accept the state's invitation to reexamine the constitutional validity of *Roe*.'[171] She said that '[w]hen the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully.'[172]

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161. *Id.* at 501 (plurality opinion).

162. *Id.* at 496.

163. *Id.* at 519.

164. *Id.* (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J. dissenting)).

165. *Id.*

166. *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 797 (1986) (White, J. dissenting).

167. 492 U.S. at 532 (Scalia, J. concurring in part and concurring in the judgment).

168. *Id.*

169. *Id.*

170. *Id.* at 522–24 (O'Connor, J. concurring in part and concurring in the judgment).

171. *Id.* at 525.

172. *Id.* at 526.

Between 1989, when *Webster* was decided, and 1992, when *Planned Parenthood v. Casey* was before the Court, Justices Brennan and Marshall resigned and were replaced, respectively, by Justices Souter and Thomas.[173] It was thought that either of them, and particularly Thomas, might cast the fifth vote to overrule *Roe v. Wade*.[174] Indeed, the United States, through the Solicitor General, urged the Court in *Casey* to use it as the occasion for overruling *Roe*.[175]

The Court, however, did not do so. By a 5–4 margin, the Supreme Court reaffirmed that states cannot prohibit abortion prior to viability.[176] We know now, especially through the revelations from Justice Blackmun's papers, that Anthony Kennedy changed his mind and provided the fifth vote to reaffirm *Roe*.[177] However, the plurality opinion by Justices O'Connor, Kennedy, and Souter significantly changed the law with regard to abortion: it overruled the trimester distinctions used in *Roe* and also the use of strict scrutiny for evaluating government regulation of abortions.[178] Instead, the plurality said that government regulation of abortions prior to viability should be allowed unless there is an 'undue burden' on access to abortion.[179] Justices Blackmun and Stevens concurred in the judgment and would have reaffirmed the trimester distinctions and the use of strict scrutiny.[180]

The joint opinion reaffirmed viability as the key dividing line during pregnancy. Before viability, the government may not prohibit abortion, but after viability, abortions may be prohibited except where necessary to protect the woman's life or health. The joint opinion, however, explicitly rejected the trimester framework, which the Court did not 'consider to be part of the essential holding of *Roe*.'[181] O'Connor, Souter, and Kennedy found there to be 'basic flaws' in the trimester framework articulated in *Roe*, such as its misconception of 'the nature of the pregnant woman's interest.'[182] In

173. James Gerstenzang & David Lauter, *Little-Known Judge Named to Replace Brennan on Court*, L.A. TIMES (July 24, 1990), http://articles.latimes.com/1990-07-24/news/mn-573_1_supreme-court-justice [https://perma.cc/9PCF-GSXS]; Maureen Dowd, *The Supreme Court; Conservative Black Judge, Clarence Thomas, Is Named to Marshall's Court Seat*, N.Y. TIMES (July 2, 1991), http://www.nytimes.com/1991/07/02/us/supreme-court-conservative-black-judge-clarence-thomas-named-marshall-s-court.html [https://perma.cc/58UG-796Q].

174. *See* sources cited *supra* note 173.

175. Planned Parenthood v. Casey, 505 U.S. 833, 842 (1992).

176. *Id.* at 846.

177. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 203–04 (2005) (describing Justice Kennedy's switch of position in *Casey*).

178. *Casey*, 505 U.S. at 873–74 (plurality opinion).

179. *Id.* at 874.

180. *Id.* at 914–16 (Stevens, J. concurring in part and dissenting in part); *id.* at 929–30 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

181. *Id.* at 873 (plurality opinion).

182. *Id.*

addition, they surmised that 'in practice, [the trimester framework] undervalues the State's interest in potential life, as recognized in *Roe*.'[183]

Most importantly, the joint opinion said that the test for evaluating the constitutionality of a state regulation of abortion is whether it places an 'undue burden' on access to abortion.[184] The joint opinion explained:

> [T]he undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty. A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.[185]

The joint opinion said, however, that '[t]o promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed.'[186] In what has become the foundation (or justification) for much of the antiabortion legislation over the past five years, the Court opened the door to permitting states to regulate abortion in the name of protecting and advancing a pregnant woman's 'informed' decision. Thus, 'measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.'[187] Despite the Court's concluding that '[t]hese measures must not be an undue burden on the right,'[188] states have enacted laws that make it virtually impossible for a woman to obtain an abortion. In Mississippi and several other states, there is now only one abortion clinic remaining.[189]

Justices Stevens and Blackmun wrote opinions concurring in part, concurring in the judgment in part, and dissenting in part.[190] These Justices would have used strict scrutiny and continued the basic framework outlined in *Roe*. Justice Blackmun, for example, said:

> [A]pplication of this analytical framework is no less warranted than when it was approved by seven Members of this Court in *Roe* [because] [s]trict scrutiny of state limitations on reproductive choice

183. *Id.*

184. *Id.* at 876.

185. *Id.* at 876–77.

186. *Id.* at 878.

187. *Id.*

188. *Id.*

189. Esmé E. Deprez, *U.S. Abortion Rights Fight*, BLOOMBERGQUICKTAKE (July 7, 2016), https://www.bloomberg.com/quicktake/abortion-and-the-decline-of-clinics [https://perma.cc/5VJZ-RCGJ].

190. Justice Stevens's opinion is concurring in part and dissenting in part. *Casey*, 505 U.S. at 911. Justice Blackmun's opinion is concurring in part, concurring in the judgment in part, and dissenting in part. *Id.* at 922.

> still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion.[191]

According to Blackmun, '[t]he factual premises of the trimester framework have not been undermined.'[192]

In *Stenberg v. Carhart*,[193] the majority opinion, in striking down a Nebraska law prohibiting so-called 'partial birth abortion, expressly adopted and applied the undue burden test, which three Justices had urged in *Casey*.[194] Subsequently, in *Gonzales v. Carhart*,[195] the Court again used the undue burden test, though this time to *uphold* a federal law prohibiting so-called 'partial birth abortion.'[196]

Most recently, in *Whole Woman's Health v. Hellerstedt*, the Court declared: '[A] statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.'[197] To the contrary, '[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.'[198]

In *Hellerstedt*, the Court used the undue burden test to invalidate two provisions of a Texas law, which provided that a doctor could perform an abortion only if he or she had admitting privileges at a hospital within 30 miles and that abortions could be performed only if there were ambulatory surgical-level facilities.[199] The Court, in striking down these provisions as significantly impeding access to abortion, stressed that it is for the judiciary, not the legislature, to determine whether a restriction on abortion is justified in terms of the benefits in protecting women's health.[200]

Justice Ginsburg, in a concurring opinion, went even further and declared: 'When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety.'[201] She wrote, 'so long as this Court adheres to *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, Targeted Regulation of Abortion Providers

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191. *Id.* at 930 (Blackmun, J. concurring in part, concurring in the judgment in part, and dissenting in part).

192. *Id.*

193. 530 U.S. 914 (2000).

194. *Id.* at 921, 946.

195. 550 U.S. 124 (2007).

196. *Id.* at 133, 146–47; *see infra* text accompanying notes 219–23.

197. 136 S. Ct. 2292, 2309 (2016) (quoting *Casey*, 505 U.S. at 877 (plurality opinion)).

198. *Id.* (quoting *Casey*, 505 U.S. at 878).

199. *Id.* at 2300.

200. *Id.* at 2310.

201. *Id.* at 2321 (Ginsburg, J. concurring).

laws like H.B. 2 that 'do little or nothing for health, but rather strew impediments to abortion, cannot survive judicial inspection.'[202]

The respondents argued that the Texas law advanced women's health by ensuring easy access to a hospital if complications arose during an abortion.[203] However, evidence revealed that the law did not address any actual or likely health issues associated with pregnancy terminations. The Court stated:

> '[T]he great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.
>
> Expert testimony [shows] that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic.[204]

No evidence suggested that the law would lead to improved treatment for women, and the law created a 'substantial obstacle in the path of a woman's choice.'[205] Indeed, legal abortions are safer than pregnancy.[206] According to the World Health Organization, a legal abortion is as safe as a penicillin shot.[207] However, H.B. 2's impacts on local abortion clinics were unmistakable and significant. In the months leading up to the law taking effect, the number of abortion clinics in Texas decreased by half: from 40 to 20.[208] Indeed, the new Texas law served the purpose to undermine women's private choice to have an abortion, because it severely constrained doctors. The Court stated that among other problems,

> [I]t would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because '[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital.'[209]

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202. *Id.* (citations omitted).

203. *Id.* at 2311 (majority opinion).

204. *Id.* (quoting Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)).

205. *Id.* at 2312 (quoting Casey v. Planned Parenthood, 505 U.S. 833, 877 (1992) (plurality opinion)).

206. Raymond & Grimes, *supra* note 1, at 216 (explaining that a woman is fourteen times more likely to die carrying a pregnancy to term than undergoing a legal abortion).

207. WORLD HEALTH ORG. UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008, at 14 (6th ed. 2011), http://apps.who.int/iris/bitstream/10665/44529/1/9789241501118_eng.pdf [https://perma.cc/42ZJ-QP27].

208. *Whole Woman's Health*, 136 S. Ct. at 2312.

209. *Id.*

Justice Breyer recognized that doctors would not be able to maintain admitting privileges under such circumstances 'because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit.'[210] In fact, he wrote, '[o]ther *amicus* briefs filed here set forth without dispute other common prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures.'[211] The Court found that admitting privileges do nothing for the health of women in the abortion context because abortions are already very safe.[212]

Notwithstanding the result in *Hellerstedt*, the undue burden test (though it sometimes has been used to strike down restrictions and sometimes to uphold them), was an undesirable change in the law for many reasons. First, the abandonment of strict scrutiny was unjustified. Strict scrutiny is the test that the Court uses when the government has infringed a fundamental right. For the reasons given in *Roe* and discussed above and in Part II, a woman's right to abortion should be regarded as a fundamental right. Strict scrutiny is thus the appropriate test. Anything less makes it too easy for the government to infringe a fundamental constitutional right. The Court's upholding a twenty-four hour waiting period for abortions in *Casey* and the federal Partial Birth Abortion Ban Act in *Gonzales v. Carhart* are examples of laws that almost surely would have been declared unconstitutional under strict scrutiny.

Second, the undue burden test combines three distinct questions into one inquiry. When the Supreme Court considers cases involving individual liberties, there are four issues: Is there a fundamental right; is the right infringed; is the infringement justified by a sufficient purpose; are the means sufficiently related to the end sought? The undue burden test combines the latter three questions. Obviously 'undue burden' pertains to whether there is an infringement of the right, but the joint opinion in *Casey* also uses it to analyze whether the law is justified.[213] No level of scrutiny is articulated by the joint opinion; there is no statement that the goal of the law must be compelling or important or that the means have to be necessary or substantially related to the end. Undue burden is thus confusing to apply because it melds together three distinct issues. Again, there is reason for great concern that the lack of analytical clarity makes it easier for courts to uphold laws restricting a woman's right to choose whether to have an abortion.

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210. *Id.*

211. *Id.*

212. *Id.* at 2311.

213. *See* Planned Parenthood v. Casey, 505 U.S. 833, 876–77 (1992) (plurality opinion) (endorsing the undue burden test to not only determine whether a law creates a "substantial obstacle" to a woman's exercising the abortion right but also to "reconcil[e] the State's interest with the woman's constitutionally protected liberty").

Third, the joint opinion's statement in *Casey* of the undue burden test has an internal tension. The joint opinion says that a law is an undue burden 'if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'[214] But the joint opinion then says,

> [t]o promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.[215]

The problem is that the joint opinion says both that the state cannot act with the purpose of creating obstacles to abortion and that it can act with the purpose of discouraging abortion and encouraging childbirth. Every law adopted to limit abortion is for the purpose of discouraging abortions and encouraging childbirth. How is it to be decided which of these laws is invalid as an undue burden and which is permissible? The joint opinion simply says that the regulation 'must not be an undue burden on the right.'[216] But this, of course, is circular; it offers no guidance as to which laws are an undue burden and which are not. As we explain below, because abortion should be regarded as a private choice for each woman, the state should not be allowed to take actions to encourage childbirth over abortion.[217]

After *Casey*, the Court compounded the problem of the undue burden test by requiring that there be a showing that a law adversely affects a large fraction of women. In *Casey*, the plurality found that the requirement for spousal notification before a married woman could receive an abortion was an undue burden because *some* women might be adversely affected. The opinion unequivocally stated:

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.[218]

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214. *Id.* at 878.
215. *Id.*
216. *Id.*
217. *See infra* subpart II(B).
218. *Casey*, 505 U.S. at 894 (citation omitted).

But, in *Gonzales v. Carhart*, in upholding the federal Partial-Birth Abortion Ban Act, the Court said that for a law to be unconstitutional there must be a showing that it would be an undue burden for a 'large fraction of relevant cases.'[219] In other words, under the plurality's approach in *Casey*, the focus is on whether a law is an undue burden likely to keep some women from having access to abortion. But under the subsequent decision in *Gonzales v. Carhart*, a law regulating abortion is unconstitutional only if it would be an undue burden for a large fraction of women. This is a significant change in the law and one which makes it more likely that courts will uphold regulations of abortion. It also is wrong. If a law is an undue burden on any woman's right to abortion, it should be unconstitutional; the number whose rights are violated is not relevant in determining whether a person's constitutional rights have been infringed. Violating one person's speech or privacy or enslaving one person violates the Constitution; it should not be necessary to prove dozens, hundreds, or even thousands suffer harms from the act(s).

The Court's approach to abortion in *Gonzales v. Carhart* is particularly objectionable. In *Gonzales v. Carhart* the Court upheld the federal Partial-Birth Abortion Ban Act.[220] The Act has no health exception, and, though narrower than the Nebraska law, it is more broadly written than the Court said it would allow in *Stenberg*.[221] Nonetheless, the Court upheld the federal act.[222] Justice Kennedy wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.[223] The key to the case was not in the difference in wording between the federal law and the Nebraska act; it was Justice Alito having replaced Justice O'Connor and thus shifting the Court from 5–4 to invalidate partial-birth abortion laws to 5–4 to uphold them.[224]

The Court concluded that the government's interest in preventing partial-birth abortion was sufficient to uphold the law. The Court explained:

> The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, [partial-birth abortion] is a procedure itself laden with the power to devalue human life. Congress could nonetheless

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219. 550 U.S. at 167–68.

220. *Id.* at 132–33.

221. *Compare* Stenberg v. Carhart, 530 U.S. 914, 938, 946 (2000) (holding a Nebraska statute criminalizing partial-birth abortion unconstitutional as an undue burden on a woman's right to abort), *with Gonzalez*, 550 U.S. at 133, 141 (upholding a narrower federal act prohibiting the knowing performance of a partial-birth abortion unnecessary to save the mother's life).

222. *Gonzalez*, 550 U.S. at 133.

223. *Id.* at 130.

224. *See* David J. Garrow, *Significant Risks:* Gonzalez v. Carhart *and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 1 (attributing the Court's ideological shift to Justice Alito's replacement of Justice O'Connor).

> conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.[225]

Congress determined that the abortion methods it proscribed had a 'disturbing similarity to the killing of a newborn infant, and thus it was concerned with 'draw[ing] a bright line that clearly distinguishes abortion and infanticide.'[226]

The Court found that the federal law is constitutional even though it has no exception for allowing the procedure where necessary to protect the health of the mother. The dissent argued that the banned procedure is in many cases the safest for the woman.[227] Alternative procedures last longer and involve increased risks of perforation of the uterus, blood loss, and infection.[228] Moreover, the most frequently used alternative is to dismember the fetus in the uterus and remove it piece by piece.[229] This is no less 'barbaric' and is more dangerous because it requires repeated surgical intrusions into the uterus.[230] The majority rejected this argument and said that there was medical uncertainty over what was safest and stated:

> Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.[231]

It also is important to note that the Court changed the rhetoric of abortion rights and expressed much more support for government regulation of abortion. Justice Kennedy's majority opinion repeatedly referred to the fetus as the 'unborn child.'[232] He wrote:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once

225. *Gonzales*, 550 U.S. at 158.

226. *Id.* (citations omitted).

227. *See id.* at 177 (Ginsburg, J. dissenting) (discussing the extensive scientific evidence finding that partial-birth abortions are often 'safer than alternative procedures and necessary to protect women's health").

228. *Id.* at 178.

229. *See id.* (discussing dismemberment abortion as the alternative to partial-birth abortion).

230. *See id.* (noting that partial-birth abortion, as compared to dismemberment abortion, "minimizes the number of times a physician must insert instruments and thereby reduces the risk of trauma").

231. *Id.* at 164 (majority opinion) (citations omitted).

232. *Id.* at 134, 160.

> created and sustained. Severe depression and loss of esteem can follow.[233]

This statement is at odds with prior Supreme Court decisions protecting the right to reproductive freedom and harks back to draconian days where the Court found that a woman's life was defined by motherhood and household duties.[234] Simply stated, Justice Kennedy's statement and majority opinion for the Court demeans women. *Roe v. Wade* is based on the fundamental premise that it is for a woman to decide how to regard the fetus before viability and whether to have an abortion. Women—not the legislature or five men on the Supreme Court—are in the best position to decide whether continuing an unwanted pregnancy is best for their psychological and physical well-being.

As Justice Kennedy candidly admitted, there is no reliable data to support the notion that the ban on so-called partial-birth abortions will improve the psychological health of women. The majority ignored the fact that the banned procedure is in many cases the safest for the woman. Alternative procedures take more time and involve increased risks of perforation of the uterus, blood loss, and infection. Nor did the Court pay attention to the psychological benefits women receive from safely terminating an unwanted pregnancy.

Justice Ginsburg, writing for the four dissenters, strongly objected to Justice Kennedy's statement, finding it at odds with prior Supreme Court decisions protecting the right to reproductive freedom and demeaning to women. She wrote:

> This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Though today's majority may regard women's feelings on the matter as 'self-evident, this Court has repeatedly confirmed that '[t]he destiny of the woman must be shaped on her own conception of her spiritual imperatives and her place in society.'[235]

In other words, Justice Ginsburg forcefully says that the issue of abortion is a private choice for each woman to make. That is exactly what the Court should have said all along.

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233. *Id.* at 159 (citations omitted).

234. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139, 141 (1872) (affirming Illinois law denying women admission to the bar, reasoning that women are delicate and suited for home duties); *see also* Minor v. Happersett, 88 U.S. 162, 178 (1874) (upholding restrictions barring women from suffrage, opining that the Court's role is not "to look at the hardship of withholding" suffrage from women, but rather to determine whether "it is within the power of a State to withhold").

235. *Gonzales*, 550 U.S. at 185 (Ginsburg, J., dissenting) (citations omitted).

II. Reconceptualizing Abortion as a Private Choice for Each Woman

A. The Constitutional Issues Concerning Abortion

The Court in *Roe* faced three questions, as would any Court considering the right to abortion. First, is there a right to privacy protected by the Constitution even though it is not mentioned in the document's text? Second, if so, is the right infringed by a prohibition of abortion? Third, if so, does the state have a sufficient justification for upholding laws prohibiting abortion? These same issues will confront the Supreme Court if ever it reconsiders *Roe v. Wade*.

The first question, is there a right to privacy protected by the Constitution, is really the place where opponents of *Roe* have focused their attack, arguing that there is no such right because it is not mentioned in the Constitution and was not intended by its drafters. The most famous critique of the decision was written by then-Harvard Professor John Hart Ely, where he declared: 'It is, nevertheless, a very bad decision. It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.'[236] Ely's objection was that abortion and privacy are not mentioned in the Constitution and therefore no such rights exist. This, of course, is the criticism that conservatives have launched at *Roe* since it was decided.[237]

The problem with this argument is that it fails to acknowledge that its advocates are urging a radical change in constitutional law. Before *Roe*, the Court had expressly recognized a right to privacy, including over matters of reproduction, even though there is no mention of this in the text of the Constitution. As explained above, in *Griswold v. Connecticut*, in 1965, the Court declared unconstitutional as violating the right to privacy a state law prohibiting the sale, distribution, or use of contraceptives.[238] In *Eisenstadt v. Baird*, in 1972, the Court invalidated a state law keeping unmarried individuals from having access to contraceptives and declared: 'If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'[239]

In fact, long before these decisions, the Court safeguarded many aspects of autonomy as fundamental rights even though they are not mentioned in the text of the Constitution and were never contemplated by its drafters. For

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236. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) (emphasis omitted).

237. *See, e.g.*, J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (critiquing *Roe*'s 'absence of a commitment to textualism").

238. 381 U.S. 479, 485 (1965).

239. 405 U.S. 438, 453 (1972) (emphasis omitted).

example, the Court has expressly held that certain aspects of family autonomy are fundamental rights and that government interference will be allowed only if the government can prove that its action is necessary to achieve a compelling purpose. In the 1920s, the Supreme Court held that parents have a fundamental right to control the upbringing of their children and used this to strike down laws prohibiting the teaching of the German language and forbidding parochial school education.[240] In the 1940s, the Court ruled that the right to procreate is a fundamental right and declared unconstitutional an Oklahoma law that required the sterilization of those convicted three times of crimes involving moral turpitude.[241]

By the 1960s, the Court proclaimed that there is a fundamental right to marry and invalidated a Virginia law prohibiting interracial marriage.[242] This, of course, was the foundation for the Court declaring that laws prohibiting same-sex marriage are unconstitutional as infringing the fundamental right to marry.[243] Thus, under the rubric of "privacy, the Court has safeguarded the right to marry, the right to custody of one's children,[244] the right to keep the family together,[245] the right of parents to control the upbringing of children, the right to procreate, the right to purchase and use contraceptives, the right to refuse medical treatment,[246] and the right to engage in private, consensual homosexual activity.[247]

Unless the Court intends to overrule all of these decisions, it is clear—and it was clear at the time of *Roe*—that the Constitution is interpreted as protecting basic aspects of personal autonomy as fundamental rights even though they are not mentioned in the text of the document. Put another way, the Court never has adopted the position of Justices Scalia and Thomas (and others) who insist that the Constitution is limited to those rights explicitly stated or originally intended at the time of its ratification. In fact, rejecting privacy as a right because it is not in the text of the Constitution would mean repudiating other rights not mentioned that have long been safeguarded, such as freedom of association.[248]

Of course, opponents of *Roe* could argue that all of these decisions were wrong and that there should be no protection of privacy or other nontextual

240. Pierce v. Soc'y of Sisters, 268 U.S. 510, 531–32, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400, 403 (1923).

241. Skinner v. Oklahoma, 316 U.S. 535, 541, 543 (1942).

242. Loving v. Virginia, 388 U.S. 1, 12 (1967).

243. Obergefell v. Hodges, 135 S. Ct. 2584, 2589–90, 2598, 2603 (2015).

244. Troxel v. Granville, 530 U.S. 57, 65–66 (2000).

245. Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1997).

246. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–78 (1990).

247. Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

248. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 460 (1958) (protecting freedom of association as a fundamental right).

rights.[249] However, this would be a dramatic change in the law. Professor Cass Sunstein has explained: '[The rejection of privacy rights] is a fully plausible reading of the Constitution. But it would wreak havoc with established law. It would eliminate constitutional protections where the nation has come to rely on them—by, for example, allowing states to ban use of contraceptives by married couples.'[250]

The second question before the Court with regard to abortion was whether laws that prohibit abortion infringe a woman's right to privacy. Interestingly, no one, not even the staunchest opponents of abortion rights, disputes this. Opponents of *Roe* argue against there being a right to privacy or claim that the state has a sufficiently important interest in prohibiting abortion. That said, there is no disagreement that a prohibition of abortion interferes with a woman's autonomy.

Obviously, forbidding abortions interferes with a woman's ability to control her reproductive autonomy and to decide for herself, in the words of *Eisenstadt v. Baird*, whether to 'bear or beget a child.'[251] Also, no one can deny that forcing a woman to continue a pregnancy against her will is an enormous medical, financial, psychological, and social intrusion on her control over her body. Justice Blackmun forcefully expressed this view in his majority opinion in *Roe*, where he opined that the 'detriment' imposed by the State against a pregnant woman when denying her the choice of terminating her pregnancy 'is apparent.'[252]

Justice Blackmun and his fellow Justices recognized that '[s]pecific and direct harm medically diagnosable even in early pregnancy may be involved'[253] when denying a pregnant woman the right to an abortion. In addition, the Court underscored how '[m]aternity, or additional offspring, may force upon the woman a distressful life and future.'[254] The Justices stressed that not only might '[p]sychological harm be imminent,' but that '[m]ental and physical health may be taxed by child care.'[255] These were not only concerns for the pregnant woman, as the Court noted, because 'for all concerned [or] associated with the unwanted child there is the problem of bringing a child into a family already unable, psychologically and otherwise,

249. *See, e.g.*, Bradley P. Jacob, Griswold *and the Defense of Traditional Marriage*, 83 N.D. L. REV. 1199, 1214, 1221 (2007) (arguing against nontextual rights in general and 'the 'rights' to have sex outside of marriage, to redefine marriage, to engage in homosexuality, and to abort children'' in particular).

250. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 81–82 (2005).

251. 405 U.S. 438, 453 (1972).

252. 410 U.S. 113, 153 (1973).

253. *Id.*

254. *Id.*

255. *Id.*

to care for it. '[256] And there was also the stigma and shaming associated with unwed motherhood, which arguably continues in society today. Justice Blackmun wrote, '[i]n other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. '[257]

The third question before the Supreme Court was whether states have a compelling interest in protecting fetal life. Once it was decided that there is a fundamental right to privacy and that laws prohibiting abortion infringe upon it, then the question became whether laws prohibiting abortions are needed to achieve a compelling government interest. This is the test the government must meet whenever it burdens or infringes a fundamental right. The key question at this stage in the analysis was whether the government has a compelling interest in protecting the fetus from the moment of conception.

The Court rejected a state interest in outlawing abortions from the moment of conception and concluded that the state has a compelling interest in prohibiting abortion only at the point of viability, the time at which the fetus can survive outside the womb. Justice Blackmun, writing for the majority, stated: 'With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. '[258]

Yet, as many commentators noted, this begs the question of why viability was deemed the point at which the state has a sufficient interest to prohibit abortion.[259] In fact, the choice of viability as the point where there is a compelling government interest seems at odds with Justice Blackmun's earlier declaration that the Court 'need not resolve the difficult question of when life begins. '[260] Justice Blackmun was of the opinion that '[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. '[261]

Ultimately, the question is who should decide whether the fetus before viability is a human person: Each woman for herself or the state legislature? Harvard law professor Laurence Tribe, in an article written soon after *Roe*,

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256. *Id.*

257. *Id.*

258. *Id.* at 163.

259. *See, e.g.*, Randy Beck, Essay, Gonzales, Casey, *and the Viability Rule*, 103 NW. U. L. REV. 249, 252 (2009) (arguing that the Court owes a constitutional justification for the viability rule while noting that viability varies based on factors such as available medical technology and the race and gender of the fetus); Ely, *supra* note 236, at 924 (criticizing the Court's lack of reasoning for the viability standard).

260. *Roe*, 410 U.S. at 159.

261. *Id.*

put this well: 'The Court was not, after all, choosing simply between the alternatives of abortion and continued pregnancy.'[262] Instead, as he explains, '[i]t was choosing among alternative allocations of decisionmaking authority, for the issue it faced was whether the woman and her doctor, rather than an agency of government, should have the authority to make the abortion decision at various stages of pregnancy.'[263]

Why leave the choice as to abortion to the woman rather than to the state? First, there was then, and is now, no consensus as to when human life begins.[264] As Professor Tribe explains: '[T]he reality is that the 'general agreement' posited simply does not exist.'[265] In other words, '[s]ome regard the fetus as merely another part of the woman's body until quite late in pregnancy or even until birth; others believe the fetus must be regarded as a helpless human child from the time of its conception.'[266] Moreover, according to Professor Tribe, '[t]hese differences of view are endemic to the historical situation in which the abortion controversy arose.'[267] The choice of conception as the point at which human life begins, which underlies state laws prohibiting abortion, thus was based not on consensus or science, but religious views.[268]

In fact, historically, abortions were not illegal in the United States. Rather, due to political, medical, and religious movements—particularly the agitation of Anthony Comstock—abortion, contraceptive access, and contraceptive use became crimes.[269] Indeed, states jailed women for violating Comstock's so-called 'chastity laws,' because they disseminated information about human anatomy, family planning, and birth control. Comstock claimed that the women and the materials they distributed promoted vice and thereby implicitly and explicitly associated birth control advocates with men who sex trafficked and bootlegged liquor. In part, one could argue that Comstock's campaign against contraception and abortion

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262. Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11 (1973).

263. *Id.* (emphasis omitted).

264. *See* A. Kurjak, *The Beginning of Human Life and Its Modern Scientific Assessment*, 30 CLINICS PERINATOLOGY 27, 27 (2003) (discussing the "seemingly endless debate" about when human life begins).

265. Tribe, *supra* note 262, at 19.

266. *Id.*

267. *Id.*

268. *Id.* at 20–22.

269. *See People & Events: Anthony Comstock's 'Chastity' Laws*, PILL, http://www.pbs.org/wgbh/amex/pill/peopleevents/e_comstock.html [https://perma.cc/JYC7-Y62W] ("In 1872 Comstock set off for Washington with an anti-obscenity bill, including a ban on contraceptives, that he had drafted himself. The statute defined contraceptives as obscene and illicit, making it a federal offense to disseminate birth control through the mail or across state lines. Soon after the federal law was on the books, twenty-four states enacted their own versions of Comstock laws to restrict the contraceptive trade on a state level.").

reflected 'a statement of religious faith upon which people will invariably differ widely.'[270]

Legislatures could cloak religious objections to abortion in secular arguments (and often they do this) by claiming that potential human life exists at the point of conception and therefore the state may restrict abortion after that point, because a compelling interest exists in preserving that potential life. As stated in prior work, the problem with that legislative approach is that it is factually absurd and medically inaccurate. According to this line of argument, absent an abortion, all or the overwhelming majority of pregnancies develop fetuses to term and produce babies. This is woefully misguided and inaccurate.

Rather, pregnancy is more precisely described as bounded in uncertainty. For example, statistically, roughly 10%–20% of known pregnancies will spontaneously terminate, resulting in miscarriages. Moreover, two-thirds 'of all human embryos fail to develop successfully, and terminate before women even know they are pregnant.[271] Even in the most controlled, hormone-rich circumstances, such as in vitro fertilization—over 65% of the embryos end in demise.[272] According to the most recent Centers For Disease Control and Prevention (CDC) data on this issue, only 23.5% of implanted embryos result in normal live births (for women over thirty-five years old, the chances of pregnancy resulting in live birth are dramatically lower).[273] In other words, there is not a probable chance that but for an abortion there will be a baby resulting from conception. Instead, there may be a reasonable chance—but clearly no more than that—that there will be a baby but for an abortion.

Equally, the same logic applies to contraception. We agree that a potential life can result from sex without the use of contraception. That is, but for the use of contraception, there is a reasonable possibility that a baby may result. For example, data on fertility and infertility indicates that '[w]hen trying to conceive, a couple with no fertility problem has about a 30 percent chance of getting pregnant each month.'[274]

Our point is this: arguments framed in protecting 'potential life' to justify a ban on contraceptives make as little sense they do when applied to

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270. Tribe, *supra* note 262, at 21.

271. Stanford Univ. Med. Ctr. *Which Fertilized Eggs Will Become Healthy Human Fetuses? Researchers Predict with 93% Accuracy*, SCIENCEDAILY (Oct. 4, 2010), https://www.sciencedaily.com/releases/2010/10/101003205930.htm [https://perma.cc/J64B-3YM5].

272. *Id.*

273. CTRS. FOR DISEASE CONTROL & PREVENTION, 2014 ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 13 (2016), https://ftp.cdc.gov/pub/Publications/art/ART-2014-Clinic-Report-Full.pdf [https://perma.cc/EF64-P782].

274. ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 174 (2010) (internal citations omitted).

abortion. However, the Catholic Church takes this position.[275] When examined closely, as we have here, Professor Tribe's argument that there is no secular basis for a prohibition on abortion and contraception makes profound sense. Put in this way, it becomes clearer why the choice whether to continue a pregnancy or terminate should reside with the pregnant woman and is not for the state to make.

B. Abortion as a Private Choice

The best approach to the abortion issue is for the Court to declare that the decision whether to have an abortion is a private judgment which the state *may not* encourage, discourage, or prohibit. Problematically, the state does exactly this within the reproductive-healthcare realm when it favors pregnancies, discourages abortions, misleads women about the safety of abortions, and imposes various prohibitions on this right. Crisis pregnancy centers (CPCs) provide a telling example, particularly because they favor discouraging women from seeking to terminate pregnancies.[276]

According to Jenny Kutner, a reporter for *Salon*, "[m]ore often than not, CPCs—which now outnumber abortion clinics by an estimated 3 to 1—can be misleading, manipulative or downright coercive, pushing a distinctly antiabortion agenda that relies heavily on lying to clients."[277] Frequently, such centers facilitate those aims in nontransparent and therefore coercive ways, which the government funds.[278] A 2016 report, by Bryce Covert and Josh Israel, revealed that some states even siphon funds intended for Temporary Assistance for Needy Families (TANF) to CPCs, diverting

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275. *See* PAUL VI, HUMANAE VITAE 4–5 (1968) (proclaiming that contraceptives that interfere with the procreative aspect of marital intercourse are "unlawful"); *see also* CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH § 2370 (documenting the church's teaching that methods of contraception other than "[p]eriodic continence" are "intrinsically evil").

276. Jenny Kutner, *How Crisis Pregnancy Centers Are Using Taxpayer Dollars to Lie to Women*, SALON (July 14, 2015), http://www.salon.com/2015/07/14/how_crisis_pregnancy_centers_are_using_taxpayer_dollars_to_lie_to_women/ [https://perma.cc/6A5C-NQWE] (reporting that "governments are incentivizing [crisis pregnancy centers] to provide misleading antiabortion counseling").

277. *Id.*; *see* NARAL, CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM 2 (2015), http://www.prochoiceamerica.org/assets/download-files/cpc-report-2015.pdf [https://perma.cc/XW5F-FWCV] (advocating that representatives of crisis pregnancy centers "unleash a documented pattern of deception, coercion, and misinformation to discourage [a woman] from abortion, contraception, and comprehensive, medically accurate counseling").

278. Thirty-four states fund CPCs, including Texas, Arizona, Mississippi, Louisiana, Alabama, Georgia, North Carolina, South Carolina, Florida, Arkansas, Tennessee, Ohio, Kentucky, and West Virginia, among others. *See* Katie McDonough, *These Are the 34 States That Fund Crisis Pregnancy Centers with Taxpayer Dollars*, SALON (Aug. 16, 2013), http://www.salon.com/2013/08/16/here_are_the_34_states_that_fund_crisis_pregnancy_centers_with_taxpayer_dollars/ [https://perma.cc/7TKH-R7B8] (stating that "[i]t is no secret that crisis pregnancy centers lie to women" and providing a map of the United States showing the thirty-four states that use taxpayer money to support these crisis pregnancy centers).

urgently needed welfare funds from children and families in dire poverty to antiabortion groups.[279] Currently such practices do not violate law. Under our framework, conditioning access to abortion services on receiving inaccurate and antiabortion messaging in an effort to coerce a pregnant woman from terminating a pregnancy would violate her privacy.

A yearlong investigation by NARAL confirms prior reports of CPCs abandoning or outright disregarding honesty, neutrality, and objectivity in efforts to coerce pregnant women against abortion and even the use of contraception.[280] Findings from the study reveal that 'CPCs employ a number of tactics to get women in their doors, including strategically placed online and offline advertisements, locations near comprehensive women's health-care clinics, and even state-sanctioned referrals. The promise is always the same: counseling for unintended pregnancy. '[281] The report notes that CPC volunteers typically warn women that abortions cause mental and physical health problems, including breast cancer, infertility, and perforated uteruses,[282] despite the fact that a pregnant woman is fourteen times more likely to die in childbirth than in a legal abortion.[283] What pregnant women actually receive from such centers, at taxpayer expense, is antiabortion 'counseling, ' which some have described as 'nerve-racking, emotional, and 'a terrible way to find out you're pregnant. '[284] Yet, the state must be neutral and leave this choice to each woman to make as she deems appropriate.

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279. Bryce Covert & Josh Israel, *The States That Siphon Welfare Money to Stop Abortion: Millions in TANF Dollars Are Flowing to Crisis Pregnancy Centers That Mislead Women*, THINK PROGRESS (Oct. 3, 2016), https://thinkprogress.org/tanf-cpcs-ec002305dd18#.4z8rnf39w [https://perma.cc/8C86-EWTJ].

280. *See* Jenny Kutner, *Crisis Pregnancy Center Tells Woman Her IUD is 'Your Baby, Plus Countless Other Lies*, SALON (Mar. 18, 2015), http://www.salon.com/2015/03/18/crisis_pregnancy_center_tells_woman_her_iud_is_your_baby_plus_countless_other_lies/ [https://perma.cc/7YP7-95PX] (discussing the results of the NARAL investigation, which indicated "a disturbing trend among CPCs of using whatever means necessary—slut-shaming, fear-mongering, misinformation and straight-up manipulation—to prevent pregnant women from having abortions").

281. NARAL, *supra* note 277, at 2, 4 ("CPCs also employ online strategies to target women. All too often, when a woman types the words 'abortion clinic' into a search engine, she gets results for CPCs, which use false advertising tactics to lure women to their facilities instead of actual health clinics. CPCs advertise through Google, the most-used online search engine."); *see also*, Jennifer Ludden, *States Fund Pregnancy Centers That Discourage Abortion*, NPR (Mar. 9, 2015), http://www.npr.org/sections/health-shots/2015/03/09/391877614/states-fund-pregnancy-centers-that-discourage-abortion [https://perma.cc/R7ZB-TLRF] (explaining how the author performed a simple Google search to find a CPC on the front page "whose aim is actually to guide women out of having the procedure").

282. NARAL, *supra* note 277, at 7.

283. Raymond & Grimes, *supra* note 1, at 216.

284. NARAL, *supra* note 277, at 2. For some women, CPCs may offer relief and validate their choices. We simply do not believe that the government should lie to women or pay others to do so at such a critical time in their lives. *See also* Ludden, *supra* note 281 (noting that "counselors told [women that] abortion causes breast cancer and infertility, or leads to drug abuse and depression, none of which is supported by rigorous medical research").

When the state makes this decision for a woman, against her will, it inscribes her to a fate of its choosing, which for all purposes is to serve as its designated womb or incubator.

In California, CPCs may have resulted in pregnant women's significant underutilization of important medical resources. Seeking to correct this, California legislators enacted the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act), requiring 'licensed pregnancy-related clinics disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion.'[285] The FACT Act also imposes a duty on unlicensed facilities to disseminate notices that they are not licensed in California, because, 'the Legislature found that the ability of California women to receive accurate information about their reproductive rights, and to exercise those rights, is hindered by the existence of crisis pregnancy centers.'[286]

According to the Ninth Circuit in *NIFLA v. Harris*,[287] the '[l]egislature found that CPCs, which include unlicensed and licensed clinics, employ 'intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.'' Roughly 200 CPC operate in California, and while the new legislation holds great promise, antiabortion organizations have already sought to enjoin the law's enforcement, albeit unsuccessfully.[288]

The consequence of establishing abortion as a private judgment is that a woman would have the right at any point during her pregnancy to remove a fetus from her body.[289] We believe that (a) postviability abortions of healthy fetuses would be extremely unlikely and rare (and evidence supports this); (b) a state could prescribe a procedure for removing a postviability fetus so as to maximize its chances of survival; but (c) never could a woman be prosecuted for removing the fetus from her body.

Previously, a state's interest in preserving the health of a viable fetus that could independently survive outside the womb has been forced upon a woman without her reproductive autonomy or choice. States have done this

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285. Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 828–29 (9th Cir. 2016).

286. *Id.* at 829.

287. 839 F.3d 823, 829 (9th Cir. 2016) (holding "the proper level of scrutiny to apply to the Act's regulation of licensed clinics is intermediate scrutiny, which it survives," and concluding, "with respect to unlicensed clinics the Act survives any level of scrutiny"). The Court explains that with regard to the free exercise claim, "the Act is a neutral law of general applicability, and that it survives rational basis review." *Id.*

288. *Id.*

289. For a compelling argument that women should have this right, see generally Judith Jarvis Thomson, *A Defense of Abortion*, *in* THE RIGHTS AND WRONGS OF ABORTION 3 (Marshall Cohen et al. eds. 1974).

without any mindfulness toward the dignity of pregnant women. We disagree with this logic. Rather, the state could set standards to ensure that the fetus is removed in the manner most likely to lead to its survival, and it may take the steps it chooses to keep the fetus alive once removed. Nor do we believe that a woman should be responsible economically or in any other manner for the state's decision to maintain the life of a fetus. But whether the fetus will or will not survive removal is irrelevant to the right of the woman to terminate her pregnancy. It is the woman's body and at no point can a state force her to be an incubator.

This approach overcomes the problems of *Roe v. Wade*, discussed above, and while it is not without flaws, it could be defended as principled, not arbitrary, and consistent with precedents. First, the Court could articulate a legal principle to support its decision: it is the right of a person to decide what happens to her body. Insightful lessons from the Nuremberg trials[290] and investigations probing coercive government research conducted on vulnerable African-American subjects in Tuskegee[291] are consistent with our view: respecting and promoting autonomy should be the first principles not

290. *See* George J. Annas, *The Legacy of the Nuremberg Doctors' Trial to American Bioethics and Human Rights*, 10 MINN. J.L. SCI. & TECH. 19, 19 (2009) (explaining that the Nuremberg Trials created modern bioethics, the importance of which is apparent with the modern global war on terror in which the United States "uses physicians to help in interrogations, torture, and force-feeding hunger strikers"); JAY KATZ ET AL., EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS, AND STATE IN THE HUMAN EXPERIMENTATION PROCESS, at ix (1972) (describing how the author's own reflections of the Nuremberg trials inspired the author to provide a climate of scholarly analysis for discussing human experimentation to "give some meaning to the suffering of those who were harmed by human experimentation against their will").

291. *See* FRED D. GRAY, THE TUSKEGEE SYPHILIS STUDY 138 (1998) (observing that as part of President Clinton's 1997 formal apology for the study, he directed the Secretary of Health and Human Services to investigate how to "best involve communities, especially minority communities, in research and healthcare in ways that are positive [because] we must bring [their] benefits to all Americans"); HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 185 (2006) (describing as among the study's cautionary lessons the "banality of evil, "medicine's betrayal by physicians of the very government entity charged with protecting our health, and the "carefully orchestrated complicity" of the powerful and the privileged in exploiting the poor, powerless, and vulnerable); Rob Stein, *U.S. Apologizes for Newly Revealed Syphilis Experiments Done in Guatemala*, WASH. POST (Oct. 1, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100104457.html [https://perma.cc/4RNV-2ZAD] (discussing revelations discovered in the papers of "a doctor with the federal government's Public Health Service who later participated in Tuskegee" that the U.S. "government conducted medical experiments in the 1940s in which doctors infected soldiers, prisoners and mental patients in Guatemala with syphilis and other sexually transmitted diseases"); Jean Heller, *Syphilis Victims in U.S. Study Went Untreated for 40 Years*, N.Y. TIMES (July 26, 1972), http://www.nytimes.com/1972/07/26/archives/syphilis-victims-in-us-study-went-untreated-for-40-years-syphilis.html [https://perma.cc/X6QC-P3LW] (reporting the existence of the study and the opinion of the then-chief of the venereal disease branch of the Centers for Disease Control & Prevention that "with our current knowledge of treatment and the disease and the revolutionary change in approach to human experimentation, I don't believe the program would be undertaken").

only for medicine, but also for when the state interferes with individuals' bodies.[292]

In both cases of Nuremberg and Tuskegee, state agents shamefully carried out government agendas on vulnerable populations: Jews and disfavored minority groups in Germany. Poland, and other European nations, and in the United States against poor, black farmers. In both instances, states conscripted vulnerable minority groups for their research and other purposes. German and U.S. governments justified their actions as benefiting the greater good. In the case of Tuskegee, the U.S. Public Health Service (PHS) claimed that its research, which denied penicillin to African-American farmers suffering from syphilis, benefitted Southern black communities.[293] Numerous individuals were injured by the governments' actions. The result of these now-refuted studies was the birth of bioethics, and with it foundational, core principles: bodily autonomy, social justice, informed consent, and nonmalfeasance.[294] The state can no more compel a pregnant woman to participate in a coercive research study against her will than it can force her to endure a pregnancy for the government's benefit.

The state cannot compel a person to use her body to keep another person alive.[295] Likewise, parents cannot be forced to donate a kidney or even blood to keep a child alive. A corollary of this principle is that it is a private judgment for each person to make as to whether and how her body will be used to sustain another's life. Individuals and religious groups have sharply divergent and irreconcilable views on the morality of abortion. Although everyone can agree that an individual capable of surviving outside the womb should be protected, consensus never will be reached as to the status of the fetus. Professor Robert Bennett persuasively explained the distinction between criminal abortion statutes and other laws three decades ago.[296]

Bennett explains that 'criminal statutes often reflect values that are held with near unanimity in the society.'[297] In other words, he notes that even the most deviant members of society, such as murderers, 'likely do not think that they are being treated unfairly if they are severely punished for their

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292. *Cf.* Nicholas D. Kristof, *Unmasking Horror—A Special Report. Japan Confronting Gruesome War Atrocity*, N.Y. TIMES (Mar. 17, 1995), http://www.nytimes.com/1995/03/17/world/unmasking-horror-a-special-report-japan-confronting-gruesome-war-atrocity.html [https://perma.cc/W7W6-VM74] (detailing the atrocities that the Japanese Army inflicted upon live human experiments including vivisection, the testing of biological weapons, and field testing of new weaponry to measure effectiveness).

293. *See* WASHINGTON, *supra* note 291, at 157, 159 (noting the high incidence of syphilis infections in Alabama in 1929 and PHS's explanation that the study was designed to examine the disease's progression, as it was long claimed to manifest differently in blacks than whites).

294. Goodwin, *supra* note 35, at 818–20; *see also* Annas, *supra* note 290, at 19.

295. Thomson, *supra* note 289, at 5.

296. Robert W. Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U. L. REV. 978, 1007 (1981).

297. *Id.*

crimes.'[298] By contrast, he explained that 'doctors and women and others involved in abortions usually feel little culpability, because the society is sharply divided about whether substantial culpability attends an abortion.'[299]

Second, this approach avoids the arbitrary line drawing of *Roe* and *Casey*. No longer does the Court have to defend viability or any other point at which the woman cannot remove the fetus from her body. It is the woman's body and, in the words of *Eisenstadt v. Baird*, it is for each person to make the profound decision of whether to 'bear or beget a child.'[300] Moreover, this approach would be consistent with traditional tort and criminal law principles. It's 'a deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual who is in danger or in need of assistance. [O]ur law does not require people to be Good Samaritans.'[301] Just as the law does not require individuals to donate body organs to save other people's lives, so should the state not require a woman to donate her body, against her will, to house a fetus.[302]

Third, troubling racial and class disparities exist in how states intervene in the lives of pregnant women. It is long overdue to take these matters seriously and develop a legal approach that avoids arbitrariness and racial discrimination in reproductive healthcare. Indeed, this is the point of recognizing reproductive healthcare and rights as reproductive-justice issues. Poor women are less likely to have access to urgently needed medical services whether they desire to obtain contraception, carry pregnancies to term, or terminate their pregnancies. Yet, poor pregnant women disparately encounter arbitrary criminal and civil interventions in their pregnancies that result in punishment, stereotyping, and stigma.[303]

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298. *Id.*

299. *Id.* Bennett notes another distinction between criminal abortion statutes and other laws: outside of the abortion context, 'criminal statutes seldom burden innocent individuals, except perhaps incidentally.' *Id.*

300. 405 U.S. 438, 453 (1972).

301. Donald Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1569 (1979).

302. Perhaps it could be argued that under the 'Good Samaritan' principle a woman who has become pregnant has consented to providing assistance and therefore must continue to do so by bearing the child. This, though, would require assuming that a woman is consenting to pregnancy every time she has sex. The law should not make this assumption. Obviously, it would not apply in instances of rape or incest. It also would not apply in instances of contraceptive failure. And thankfully there would be no way for the law to know if a pregnancy was the result of this. Put another way, entirely apart from involuntary pregnancies due to rape, even '[i]f contraceptive methods of very high effectiveness, say 98%, were used carefully and consistently, there would be hundreds of thousands of pregnancies caused by contraceptive failure.' *Id.* at 1594. As such, it is inaccurate and unjust to women to regard pregnancy as a purely voluntary condition.

303. Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1202 (1990).

Moreover, criminal prosecutions of pregnant women are deeply racialized in the U.S. The criminal prosecutions of Regina McKnight,[304] Paula Hale,[305] Rennie Gibbs,[306] and Bei Bei Shuai,[307] to name a few, underscore our point. Ms. Gibbs was fifteen when the state of Mississippi charged her with depraved heart murder after her pregnancy resulted in stillbirth. McKnight was pressured into a plea deal after she suffered a stillbirth. She served twelve years in prison before the conviction was overturned. In Hale's case, although it was documented that she had been raped and physically abused prior to her pregnancy, she along with dozens of African-American women were dragged out of the Medical University of South Carolina (MUSC) in shackles and chains and prosecuted for abusing and endangering their fetuses.[308] Bei Bei Shuai, a Chinese immigrant, was charged with first degree murder for attempting suicide during her pregnancy.[309]

One need only look to Wisconsin's recent forced civil confinement of Alicia Beltran at fourteen weeks into her pregnancy to understand the seriousness of our attention to these matters. In that case, the state denied Ms. Beltran access to a lawyer, although she requested one three times. Wisconsin authorities held Beltran for more than seventy days, supposedly to protect the fetus. In fact, although the state denied Alicia Beltran an attorney, a lawyer was appointed to represent her fetus. Eventually, Wisconsin released Beltran, but by that time, she had lost her job and housing.[310]

The cases described above reflect troubling patterns embedded in law that disparately impose penalties on poor pregnant women, especially women of color, whether they seek to carry pregnancies to term or end them. Our conclusion is that a woman always has autonomy over her body and the state never has the authority to force her to continue a pregnancy. Whether to remove the fetus should be regarded by law as a private choice for each woman to make.

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304. McKnight v. State, 661 S.E.2d 354, 356–57 (S.C. 2008).

305. Lynn Paltrow, *South Carolina: First in the Nation for Arresting African-American Pregnant Women—Last in the Nation for Funding Drug and Alcohol Treatment*, NAT'L ADVOCATES FOR PREGNANT WOMEN (Jan. 8, 2003), http://advocatesforpregnantwomen.org/issues/briefingpaper.htm [https://perma.cc/ZSA6-UCQV].

306. Associated Press, *Court to Hear Case of Woman Accused in Stillbirth*, JACKSON FREE PRESS (Apr. 1, 2013), http://www.jacksonfreepress.com/news/2013/apr/01/court-hear-case-woman-accused-stillbirth/ [https://perma.cc/RE2Z-U9KA].

307. Charles Wilson, *Ind. Mom's Lawyer: Cause of Baby's Death Unproven*, SAN DIEGO UNION-TRIB. (Oct. 10, 2012), http://www.sandiegouniontribune.com/sdut-ind-moms-lawyer-cause-of-babys-death-unproven-2012oct10-story.html [https://perma.cc/FPY6-W8ED].

308. Ferguson v. City of Charleston, 532 U.S. 67, 69–75 (2001); Paltrow, *supra* note 305.

309. Wilson, *supra* note 307.

310. Erik Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. TIMES (Oct. 23, 2013), http://www.nytimes.com/2013/10/24/us/case-explores-rights-of-fetus-versus-mother.html [https://perma.cc/L4P4-8W6K].

III. The Implications of Seeing Abortion as a Private Choice for Each Woman

A. Restoring Strict Scrutiny: The Government Cannot Favor Childbirth Over Abortion

At the very least, the Supreme Court should restore strict scrutiny in evaluating government regulation of abortions. For the reasons described in Part II, and for that matter articulated in *Roe v. Wade*, a woman's right to decide whether to have an abortion should be regarded as a fundamental right. Fundamental rights trigger strict scrutiny. As Justice Blackmun declared: 'Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion.'[311]

We are not alone in this view that abortion is a fundamental right. Professor Michael Dorf recently wrote, 'although *Casey* and other post-*Casey* cases contain some confusing language, taken as a whole, these cases are best read as preserving the status of abortion as a fundamental right.'[312] Other legal scholars, including Reva Siegel, Sylvia Law, Khiara Bridges, Dorothy Roberts, as well as colleagues responding to this Article, Leah

311. Planned Parenthood v. Casey, 505 U.S. 833, 930 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

312. Michael C. Dorf, *Abortion is Still A Fundamental Right*, SCOTUSBLOG (Jan. 4, 2016, 11:28 AM), http://www.scotusblog.com/2016/01/symposium-abortion-is-still-a-fundamental-right/ [https://perma.cc/7FPN-GN6N]; *see also* Khiara Bridges, *'Life' in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1313 (2013) ("[A] finding of an undue burden-qua-infringement should result in the application of strict scrutiny and an inquiry into whether the state has a compelling interest in infringing the right."); Valerie J. Pacer, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 313 (1995) ("The undue burden standard allows the current political majority to actively interfere with its citizens' exercise of their fundamental rights, so long as such interference does not amount to an undue burden."); Neil S. Siegal & Reva B. Siegal, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160, 165 (2013) (adopting an "equality-informed understanding of Casey's undue burden test," which "prohibits government from coercing, manipulating, misleading, or stereotyping pregnant women"); Scott Skinner-Thompson, Sylvia A. Law & Hugh Baran, *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 139 (2016) ("Because the woman's right to choose whether to bear a child is fundamental, 'regulation limiting these rights may be justified only by a "compelling state interest" [and] legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.' ").

Litman,[313] Kimberly Mutcherson,[314] Aziza Ahmed,[315] Noya Rimalt, and Karin Carmit Yefet[316] recognize abortion as a fundamental right, although they take different philosophical and legal approaches in addressing the issue.

The joint opinion in *Casey* premised its adoption of the 'undue burden' test rather than strict scrutiny on the claim that a state has a valid interest in encouraging childbirth over abortion. The joint opinion said, however, that

> [t]o promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.[317]

However, once it is determined that abortion is a private choice for each woman, no longer should the state be able to use its regulatory power or resources to interfere or influence a woman's choice. In other words, the explicitly stated premise for using the undue burden test rather than strict scrutiny—that the state has a valid interest in encouraging childbirth over abortion—cannot be reconciled with abortion being a private choice for each woman. Indeed, recognizing that abortion is a private moral choice for each woman means that no longer will the government have the power to regulate abortion based on its desire to encourage childbirth over abortion. So-called 'informed consent' laws, special waiting periods for abortions, and prohibitions of 'partial birth abortions' all should be deemed unconstitutional.

B. Reconsidering the Abortion-Funding Decisions

Nor is the Court's jurisprudence on abortion funding acceptable. In fact, the abortion-funding cases point to the problematic nature of states coercing motherhood upon poor, pregnant women. The Supreme Court repeatedly has

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313. Leah M. Litman, *Potential Life in the Doctrine*, 95 TEXAS L. REV. SEE ALSO (forthcoming 2017) (warning that '[t]he threat to abortion rights is real, but it is not just from the undue burden standard; it is from politicians who, with the help of lawyers, will continue to try and legislate abortion out of existence and drain the legal standards governing abortion of any meaning").

314. Kimberly Mutcherson, *Fetal Rights in the Trump Era*, 95 TEXAS L. REV. SEE ALSO (forthcoming 2017) (recognizing the "dangerous territory that we are entering" and considering "how activists, inside and outside of academia, can prepare to protect some of the vital gains that women have achieved in the passage of time since *Roe* was decided").

315. Aziza Ahmed, *Abortion in a Post-Truth Moment: A Response to Erwin Chemerinsky and Michele Goodwin*, 95 TEXAS L. REV. SEE ALSO (forthcoming 2017) (urging that the legal analysis about abortion rights, including efforts to restore strict scrutiny as the legal basis for abortion rights, must take into account the problematic nature of living in a "post-truth" era).

316. Noya Rimalt & Karin Carmit Yefet, *Rethinking the Choice of 'Private Choice' in Conceptualizing Abortion: A Response to Erwin Chemerinsky and Michele Goodwin's Abortion: A Woman's Private Choice*, 95 TEXAS L. REV. SEE ALSO (forthcoming 2017) (referring to *Casey* as providing a "lenient level of scrutiny" and urging an equal protection framework for addressing abortion).

317. Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion).

held that the government is not constitutionally required to subsidize abortions even if it is paying for childbirth. In three cases in 1977, the Court upheld the ability of the government to deny funding for 'nontherapeutic abortions'—that is, abortions that were not performed to protect the life or health of the mother. In *Beal v. Doe*,[318] the Supreme Court held that the federal Medicaid Act did not require that states fund nontherapeutic first-trimester abortions as part of participating in the joint federal–state program.[319] In *Maher v. Roe*,[320] the Supreme Court upheld the constitutionality of a state law that denied the use of Medicaid funds for nontherapeutic first-trimester abortions, although the law provided funding for medically necessary first-trimester abortions.[321] And, in *Poelker v. Doe*,[322] the Court found that it was constitutional for a city to refuse to pay for nontherapeutic first-trimester abortions in its public hospital.[323]

In two cases in 1980, the Supreme Court went further and upheld the constitutionality of laws that denied public funding for medically necessary abortions except where necessary to save the life of the mother. In *Harris v. McRae*,[324] the Court upheld a federal law, the Hyde Amendment, that prohibited the use of federal funds for performing abortions 'except where the life of the mother would be endangered if the fetus were carried to term, or except for [cases] of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.'[325] Similarly, in *Williams v. Zbaraz*,[326] the Supreme Court found constitutional a state law that prohibited the use of state funds for performing abortions except where the mother's life was in danger.[327]

Nearly a decade later, in *Webster v. Reproductive Health Services*,[328] in 1989, the Court upheld a state law that prohibited the use of public employees and facilities to perform or assist the performance of abortions except where necessary to save the mother's life.[329] The Court said that this law was indistinguishable from the earlier cases that allowed the government to deny funding of abortions.[330]

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318. 432 U.S. 438 (1977).
319. *Id.* at 445–46.
320. 432 U.S. 464 (1977).
321. *Id.* at 465–66, 474.
322. 432 U.S. 519 (1977).
323. *Id.* at 521.
324. 488 U.S. 297 (1980).
325. *Id.* at 302 (internal citations omitted).
326. 448 U.S. 358 (1980).
327. *Id.* at 368–69.
328. 492 U.S. 490 (1989).
329. *Id.* at 511.
330. *Id.* at 509–11. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court held that the government does not violate the First Amendment if it denies funding to Planned Parenthood clinics that perform abortion counseling or make abortion referrals. *Id.* at 178.

In all of these cases, the Court gave the same basic reasons as to why it is constitutional for the government to deny funding or facilities for abortions, even though it pays for childbirth. First, the Court often said that the existence of a constitutional right does not create a duty for the government to subsidize the exercise of the right.[331] In other words, the government has no affirmative duty to make constitutional rights a reality or meaningful.

For example, in *Harris v. McRae*, the Court declared: 'It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their children to a private school,'[332] that the state 'therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.'[333]

This is in accord with a more general principle that the government rarely has an affirmative constitutional duty to provide benefits or to facilitate the exercise of rights. In *Webster*, the Court furthered this principle, stating, 'our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'[334]

Second, the Court asserted that denial of public funding places a woman in no different position than she would have been if there was no Medicaid program or no public hospital. In *Maher v. Roe*, the Court reasoned that the state law denying use of Medicaid funds does not place obstacles, either 'absolute or otherwise—in the pregnant woman's path to an abortion.'[335] Instead, the Court came to the conclusion that '[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth.'[336]

In *Maher*, the Court further explained that although poverty may deeply constrain a pregnant woman's options, 'mak[ing] it difficult—and in some cases, perhaps, impossible—for some women to have abortions, their status and circumstances are 'neither created nor in any way affected by the Connecticut regulation.'[337] Justices Brennan, Marshall, and Blackmun offered a vigorous dissent to the Court's opinion, highlighting the 'distressing insensitivity to the plight of impoverished pregnant

331. *E.g. id.* at 201.

332. 448 U.S. 297, 318 (1980) (citations omitted).

333. *Id.*

334. *Webster*, 492 U.S. at 507 (quoting DeShaney v. Winnebago Cty. Dept. of Social Servs. 489 U.S. 189, 196 (1989)).

335. 432 U.S. at 464, 474 (1977).

336. *Id.*

337. *Id.*

women inherent in the Court's analysis."[338] Their bristling dissent emphasized that '[t]he stark reality for too many, not just 'some,' indigent pregnant women is that indigency makes access to competent licensed physicians not merely 'difficult' but 'impossible.'"[339]

Nevertheless, the Court came to a similar conclusion in *Harris v. McRae*. The Court said that the prohibition of the use of federal funds for abortions 'leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all."[340]

Third, the Court emphasized that the government constitutionally could make the choice to encourage childbirth over abortion. We disagree with this position. In *Maher*, the Court wrote that *Roe* 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[341]

Ultimately, the Court decided that the question of whether or not the government should subsidize abortions is a matter for the legislature to decide. They said that the ultimate choice as to 'whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided."[342] The Court went on to urge that 'when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature."[343]

The Court was wrong in these decisions. The Supreme Court's decisions in the abortion-funding cases were premised on the assumptions that the government has a valid interest in discouraging abortion and that there is a difference between prohibiting abortion and creating an incentive in favor of childbirth. Neither of these assumptions would be consistent with the view that abortion is a private moral judgment. In his dissent in *Harris*, Justice Brennan argued: '[T]he State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion."[344]

Initially, it must be recognized that the distinction between discouraging abortions and prohibiting them is meaningless for many indigent women. The effect of the refusal to pay for abortion is to compel many women to bear

338. *Id.* at 483 (Brennan, J. dissenting).
339. *Id.*
340. Harris v. McRae, 448 U.S. 297, 317 (1980).
341. *Maher*, 432 U.S. at 474.
342. *Id.* at 479.
343. *Id.*; *Harris*, 448 U.S. at 326.
344. *Harris*, 448 U.S. at 330 (Brennan, J. dissenting).

and have children.[345] Even the Court recognized that failure to fund abortions under Medicaid programs meant that some women would be forced to forego abortions.[346]

In fact, the undeniable purpose of the funding restrictions was to accomplish precisely such a decrease in abortions. The government did not refuse to subsidize abortions as a way to save money: childbirth is much more expensive than abortion. Justice Stevens observed this in his dissent in *Harris*, noting that one lower court found that while publicly funded abortions cost an average of less than $150, the average cost to the state of childbirth exceeded $1,350.[347] Clearly then, '[a]bortion funding restrictions are not enacted for the sake of frugality or to encourage the welfare client to practice contraception or sexual self-restraint.'[348] The sole purpose of the funding restrictions was to decrease the number of abortions.

The question, therefore, is whether the government may enact laws that have the purpose and effect of preventing abortions. If abortion is viewed as a private judgment, then the decision whether to bear or abort the fetus is to be left entirely to each pregnant woman. The state must adopt a position of neutrality. The government may not take actions which have the purpose and effect of preventing abortions because those policies, by definition, deny a woman the right to make an autonomous decision.[349] Regarding abortion as a matter of private choice, the state may not involve itself in the choice of whether or not to have an abortion. The laws restricting use of government funds for abortion were intended to do exactly what should not be allowed: publicly interfere with a private decision. If the Court were to treat abortion as a purely private decision, as we urge, then it could not consistently hold that the state has a sufficient interest in protecting 'potential life.'[350]

The point is not that the government has an affirmative duty to subsidize abortions, or any other medical procedure. Rather, the point is that the government may not use its resources and power to prevent abortions. The

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345. Michael J. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1244 (1978) (arguing that the Court's abortion-funding decisions "mean that some indigent women, perhaps many, will be unable to have abortions. These are the very women *most* likely to have unwanted pregnancies and *least* able to accommodate additional children."). Empirically, studies have shown a decrease in abortions as a result of funding cutbacks. One study of the impact of the Hyde Amendment in Ohio and Georgia indicates that over 20% of the female Medicaid recipients who desired an abortion could not get one because of the absence of funds. James Trussell et al., *The Impact of Restricting Medicaid Financing for Abortion*, 12 FAM. PLAN. PERSP. 120, 129 (1980).

346. *Maher*, 432 U.S. at 474.

347. *Harris*, 448 U.S. at 355 n.9 (Stevens, J. dissenting).

348. Dennis J. Horan & Thomas J. Marzen, *The Moral Interest of the State in Abortion Funding: A Comment on* Beal, Maher & Poelker, 22 ST. LOUIS U. L.J. 566, 573 (1979).

349. *See* Perry, *supra* note 345, at 1244 ("There is simply no way to justify, consistently with *Roe v. Wade*, a governmental scheme the sole purpose of which is to curtail abortion [for moral reasons].").

350. Planned Parenthood v. Casey, 505 U.S. 833, 873 (1992) (plurality opinion).

government is under no obligation to subsidize childbirth expenses. But if it chooses to do so, since childbirth and abortion are the *only* possible outcomes of pregnancy. it must also subsidize abortions. The state may not make the moral judgment about whether the fetus should be aborted, and it may not attempt to coerce decisions through its power of the purse.

This is hardly a novel conclusion. The Court repeatedly has held that 'states burden fundamental interests involving freedom of choice when they threaten to withhold or withdraw such discretionary benefits unless a person exercises his or her constitutionally protected option in a particular way.'[351] For example, in the area of free exercise of religion, the Court has rejected any distinction between prohibiting and discouraging religious conduct. In cases such as *Sherbert v. Verner*[352] and *Thomas v. Review Board of Indiana*,[353] the Court rejected as unconstitutional state-funding schemes that have the effect of discouraging individuals from following their religious beliefs. Just as religion is a matter of individual conscience, which the state may not try to influence, so must the abortion decision be left to each woman, uninfluenced by the state.[354] In fact, if the Court were to take the approach to the abortion issue suggested above, it would be declaring a right to 'free exercise' in making abortion decisions. Government discouragement is per se inconsistent with individual free exercise.

This concept of free exercise in the area of abortion decisions shows the fallacy of the Court's analogy between the government's refusal to fund abortions and its failure to subsidize parochial schools. The Court rightly noted that while the state could not prevent children from attending private schools, the state did not necessarily have an obligation to pay for parochial education.[355] The Court drew the analogy to abortions, concluding that while the state may not prohibit abortions, it has no obligation to subsidize them.[356]

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351. Gary J. Simson, *Abortion, Poverty and the Equal Protection of the Laws*, 13 GA. L. REV. 505, 509 (1979).

352. *See* 374 U.S. 398, 409–10 (1963) (holding that a worker who quit a job rather than work in contradiction to her religious belief requiring observance of the Sabbath was entitled to unemployment compensation).

353. *See* 450 U.S. 707, 709, 720 (1981) (holding that a worker who quit his job rather than work in a job requiring production of armaments in contradiction to his religious beliefs was entitled to unemployment compensation).

354. Justice Powell, writing for the majority in *Maher v. Roe*, attempted to distinguish failure to fund abortions from refusing to pay unemployment compensation to workers who quit their jobs for religious reasons. 432 U.S. 464, 474 n.8 (1977). Powell argued that *Sherbert* is not analogous because it involved withholding of benefits from persons who were otherwise entitled to the benefits on the ground that those persons exercised a fundamental right. *Id.* But this argument begs the key question: by funding childbirth and not abortion is not the state penalizing women who choose to exercise their fundamental right to have an abortion?

355. Harris v. McRae, 448 U.S. 297, 318 (1980); *Maher*, 432 U.S. at 477 (citing Norwood v. Harrison, 413 U.S. 455, 462 (1973)).

356. *See supra* notes 318–43 and accompanying text.

Though this analogy seems plausible at first, it does not withstand critical analysis.

First, private and public education are functionally the same. If a student cannot afford private education, the student still receives an education. By contrast, if a pregnant woman cannot afford an abortion, she has a baby. Abortion and childbirth obviously are not alike. The state's choice to fund public and not parochial schools has an effect different in kind from its choice to fund childbirth and not abortions.

Second, the purpose of the government's failure to fund parochial schools is different from its motive for not funding abortions. At the very least, the state's failure to subsidize private schools is a simple resource-allocation decision. The state is not hostile to parochial education, but instead chooses to put its scarce resources in a single school system. The state's motive for funding only public education is not to prevent students from attending parochial schools. By denying funds for abortions, however, the government's purpose is to prevent, in the only way available to the state, abortions. It is not a matter of resource allocation because the government is willing to pay for the more expensive medical procedures attendant to childbirth. The purpose of denying funds for abortion while providing funds for childbirth is impermissible: interference with the 'free exercise' of indigent women's decision-making authority.

Finally, the Court's analogy to funding of parochial schools is inapt because the government could not constitutionally subsidize parochial education even if it wanted to do so. Government funding of parochial schools would violate the Establishment Clause of the First Amendment.[357] Therefore, the failure to fund parochial schools is not at all similar to the failure to fund abortions. In the former, the state has no choice since it cannot act, whereas in the latter, the state is making an impermissible choice to discourage abortions.

Simply stated, if, as we argue, the Court took the position that abortion is a private moral judgment, it would be impossible to sustain statutes whose purpose was to prevent abortions. When we began working on this Article, we were hopeful that in the near future the Court would reconsider the abortion-funding decisions. We remain hopeful that this will happen, even though it will not happen imminently.

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357. *See, e.g.*, Comm. for Pub. Educ. v. Regan, 444 U.S. 646, 653 (1980) (holding that a government school-funding scheme would violate the Establishment Clause if its primary purpose or effect was to advance religion); Levitt v. Comm. for Pub. Educ. 413 U.S. 472, 479–82 (1973) (holding that a statute violated the Establishment Clause because it constituted impermissible aid to religion and religious instruction); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (creating the famous three-part *Lemon* test for determining if a statute violates the Establishment Clause—that is, the statute must have a secular purpose, must neither advance nor inhibit religion, and must not excessively entangle government with religion).

C. *Informed Consent Laws and Waiting Periods*

Many states have adopted various types of laws requiring that women be informed of the characteristics of the fetus at the time of abortion.[358] Some have gone so far as to require that a woman have an ultrasound and be shown pictures of the fetus before undergoing an abortion.[359] States have also adopted laws requiring waiting periods before abortions, even though waiting periods of this sort are not required for other medical procedures.[360]

When the Court used strict scrutiny for abortion, it invalidated such requirements. In *City of Akron v. Akron Center for Reproductive Health*,[361] the Court declared unconstitutional a part of a city ordinance that required physicians to inform a woman seeking an abortion about the development of her fetus, that 'the unborn child is a human life from the moment of conception,'[362] 'the date of possible viability. [and] the physical and emotional complications that may result from an abortion.'[363] The Court said 'that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether.'[364] That is, '[b]y insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'[365]

Similarly, in *Thornburgh v. American College of Obstetricians and Gynecologists*,[366] the Court invalidated a Pennsylvania law that required, in part, that women be given seven different kinds of information at least twenty-four hours before they consent to abortions.[367] This information included telling the woman 'that there may be [unforeseeable] detrimental physical and psychological effects' to having an abortion, the possible availability of prenatal and childbirth medical care, and the father's liability

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358. Scott W. Gaylord & Thomas J. Molony, Casey *and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 598 (2012) ("[T]en states currently require a woman to have an ultrasound prior to having an abortion Pursuant to mandatory speech-and-display requirements in each of these states, a woman must have an ultrasound, and the images must be displayed so that she can see them. Moreover, and more controversially, the physician who is to perform the abortion must explain the images, providing a medical description that includes 'the dimensions of the embryo or fetus' and 'the presence of external members and internal organs.'").

359. *Id.* (noting that at least three states—namely, Texas, North Carolina, and Oklahoma—have enacted such stricter ultrasound requirements).

360. Samantha Allen, *6 in 10 Women Now Subjected to Abortion Waiting Period Laws*, DAILY BEAST (Feb. 29, 2016, 11:01 PM), http://www.thedailybeast.com/articles/2016/03/01/6-in-10-women-now-subjected-to-abortion-waiting-period-laws.html [https://perma.cc/2BXL-GB5L].

361. 462 U.S. 416 (1983).

362. *Id.* at 444 (internal citations omitted).

363. *Id.* at 442.

364. *Id.* at 444.

365. *Id.* at 445 (quoting Whalen v. Roe, 429 U.S. 589, 604 n.33 (1977)).

366. 476 U.S. 747 (1986).

367. *Id.* at 760.

to pay child support.[368] Also, the physician had to inform the woman of the availability of printed materials that describe the 'anatomical and physiological characteristics of the [fetus] at two-week gestational increments.'[369] The Court said that, as in *Akron*, the Pennsylvania law was unconstitutional because it was motivated by a desire to discourage women from having abortions and because it imposed a rigid requirement that a specific body of information be communicated regardless of the needs of the patient or the judgment of the physician.[370]

In *Casey*, however, the Court upheld a provision virtually identical to that invalidated in *Thornburgh*. The joint opinion said:

> To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires the giving of truthful, nonmisleading information about the nature of the [abortion] procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled.[371]

Specifically, the Court upheld a section of the statute that required that women be told information about the health risks of abortion and childbirth, be informed of the availability of other materials that describe the fetus, and be provided information about medical care for childbirth and a list of adoption providers.[372]

The shift from *Akron* and *Thornburgh* to *Casey* reflects the Court's abandonment of strict scrutiny and the position that the state may not regulate abortions in a way to encourage childbirth. Such requirements are undoubtedly motivated by the state's desire to discourage abortion. This purpose is impermissible because, as explained earlier, the state must take a neutral position on the abortion issue. Laws with the purpose and effect of discouraging abortion are unconstitutional. Recognizing abortion as a private choice for each woman would mean that the 'informed consent' and waiting-period laws are unconstitutional.

Conclusion

The issue of abortion obviously is not going away. The election of Donald Trump as President and the Justice—perhaps Justices—he will appoint to the Supreme Court mean that there soon could be a Court that will reconsider *Roe v. Wade*. We write this fearful that a right that has existed for over forty years, and that generations of women have relied on and even taken

368. *Id.* at 760–61.
369. *Id.* at 761.
370. *Id.* at 762.
371. Planned Parenthood v. Casey, 505 U.S. 833, 882 (1992).
372. *Id.* at 881, 887 ("The informed consent requirement is not an undue burden on that right.").

for granted, may cease to exist. We are mindful of what that would mean for women's lives, especially for poorer women and for teenagers.

Abortion can be examined from countless perspectives. Ours is from the perspective of constitutional law. We believe that *Roe* was unquestionably correct in its conclusion and that subsequent cases—such as those shifting to the undue burden test and upholding restrictions on abortion—were misguided. All of this, we believe, is made clearer if abortion is regarded under the Constitution as a private choice for each woman.

* * *

Pennoyer Was Right

Stephen E. Sachs*

Pennoyer v. Neff *has a bad rap. As an original matter,* Pennoyer *is legally correct. Compared to current doctrine, it offers a more coherent and attractive way to think about personal jurisdiction and interstate relations generally.*

To wit: The Constitution imposes no direct limits on personal jurisdiction. Jurisdiction isn't a matter of federal law, but of general law—that unwritten law, including much of the English common law and the customary law of nations, that formed the basis of the American legal system. Founding-era states were free to override that law and to exercise more expansive jurisdiction. But if they did, their judgments wouldn't be recognized elsewhere, in other states or in federal courts—any more than if they'd tried to redraw their borders.

As Pennoyer *saw, the Fourteenth Amendment changed things by enabling direct federal review of state judgments, rather than making parties wait to challenge them at the recognition stage. It created a federal question of what had been a general one: whether a judgment was issued with jurisdiction, full stop, such that the deprivation of property or liberty it ordered would be done with due process of law.*

Reviving Pennoyer *would make modern doctrine make more sense. As general-law principles, not constitutional decrees, jurisdictional doctrines could be adjusted by international treaty—or overridden through Congress's enumerated powers. The Due Process Clause gives these rules teeth without determining their content, leaving space for federal rules to govern our federal system.*

In the meantime, courts facing jurisdictional questions should avoid pitched battles between 'sovereignty' and 'liberty,' looking instead to current

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conventions of general and international law. Pennoyer*'s reasoning can be right without* International Shoe*'s outcome being wrong; international law and American practice might just be different now than they were in 1878 or 1945.*

But if not, at least we'll be looking in the right place. General law may not be much, but it's something: the conventional settlement of the problems of political authority at the root of any theory of personal jurisdiction. Recovering those conventions is not only useful for its own sake, but a step toward appreciating our deep dependence on shared traditions of general law.

Introduction

This Article addresses the 'central mystery"[1] of *Pennoyer v. Neff*[2]· what does due process have to do with jurisdiction?[3]

Pennoyer is mysterious in more than one way. How do Fourteenth Amendment protections against the power of any state allocate power among particular states? Why would a guarantee of ''liberty interest[s]"[4] act 'as an instrument of interstate federalism"?[5] Is it even worth having a 'liberty' to be sued in California but not in Oregon?

As it happens, these questions were answered in *Pennoyer*, more or less correctly. And those answers may help us solve other legal puzzles—of procedure, of interstate relations, and of the nature of our federal system.

Today, *Pennoyer* has a bad rap. Every fall, it frustrates a new generation of law students, who revile it almost as much as their professors do. At best, it's seen as a relic, long ago cast aside by *International Shoe v. Washington*.[6] At worst, it's dismissed as a nineteenth-century dogma or a *Lochner*[7]-era power grab. To its critics, *Pennoyer* is 'unsupported, "[8] 'unsound, "[9] or ''dead

1. Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 38 (1990).

2. 95 U.S. 714 (1878).

3. *See generally* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*. 46 RUTGERS L. REV. 1071 (1994) (suggesting that the answer is very little).

4. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

5. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).

6. 326 U.S. 310 (1945).

7. *See generally* Lochner v. New York, 198 U.S. 45 (1905) (invalidating state labor laws under the Fourteenth Amendment).

8. Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1125 (1981).

9. Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 76 (1984).

wrong';[10] an 'err[or]"[11] and a 'misinterpretation';[12] 'anachronistic, 'spurious, 'shallowly reasoned and conceptually confused';[13] a decision that 'arouses dismay and even despair."[14]

That derision is a mistake. As an original matter, *Pennoyer* is legally correct. While its language may seem archaic, its reasoning shouldn't. Compared to current doctrine, it offers a more coherent and attractive way to think about personal jurisdiction and about interstate relations generally.

To understand why, though, we first have to abandon what many see as the main holding of *Pennoyer*: that the Fourteenth Amendment's Due Process Clause—"nor shall any State deprive any person of life, liberty, or property, without due process of law"[15]—imposes rules for personal jurisdiction. In fact, the Constitution imposes *no* direct limits on personal jurisdiction *at all*. Personal jurisdiction isn't a matter of constitutional law, or even of federal law. Instead, it's a matter of general law—that unwritten law, including much of the English common law and the customary law of nations, that formed the basis of the American legal system and that continues to govern unusual corners of the system today.[16]

As general law, jurisdiction is something on which different court systems can disagree, in much the same way that dictionary editors might disagree on questions of conventional usage. The Constitution takes no position on these disagreements; it takes the generally accepted practices as it finds them. It regulates personal jurisdiction not through *rules* but through *institutions*—declining to provide specific answers in favor of creating a neutral forum in which to ask the questions. Because that forum is federal, not state, it can disregard local views that appear to conflict with the general rule. And because the rule is general, not constitutional, Congress might potentially displace it by statute—providing federal rules to govern a federal system.

The Founding-era picture was as follows. In the time of the special appearance, personal jurisdiction mattered mostly for *recognition*. Instead of sending an attorney to a distant court, the best way to dispute jurisdiction was

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10. Adrian M. Tocklin, Pennoyer v. Neff: *The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75, 137 (1997).

11. Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 501 (1981) [hereinafter Whitten, *Part One*].

12. Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 840 (1981) [hereinafter Whitten, *Part Two*].

13. Conison, *supra* note 3, at 1076.

14. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 271.

15. U.S. CONST. amend. XIV, § 1.

16. *See generally* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006).

often to take a default and live to fight enforcement another day. A sovereign might claim exorbitant jurisdiction in its own courts, executing judgments on whatever property it could find. But when the winner tried to enforce the judgment elsewhere, the 'foreign' judgment would be held to international standards—which were part of the law of nations, which was part of the general law.

For this purpose, other American states were just as 'foreign' as distant countries. The Full Faith and Credit Clause,[17] together with its implementing statute (the 1790 Act),[18] didn't alter the law of jurisdiction, which each state court could still enforce. Even the federal courts held states at a certain arm's length, giving no more weight to laws asserting jurisdiction beyond state borders than to laws purporting to redraw those borders themselves. Before *Pennoyer*, though, these federal views held no special weight; the general law they applied wasn't federal law, and conflicting state judgments couldn't be appealed to federal court.

The Fourteenth Amendment remade this picture simply by changing the route for appeal. A judgment without jurisdiction was void; its execution took away property (or, less commonly, liberty) without due process of law. That turned the presence or absence of jurisdiction, full stop, into a matter of constitutional concern. Whether a state court *had* jurisdiction would be answered by other rules; in particular, by general law, of which the Supreme Court on writ of error could take its own view. So instead of waiting for collateral attack, defendants could now raise personal jurisdiction directly—and expect state courts to conform to the federal view of things, on pain of being reversed. Over time, the need for collateral attack faded away, as did the memory of the doctrine's general-law roots. Personal jurisdiction became a subcategory of due process, a matter of "traditional notions of fair play and substantial justice"[19] and a field of endless dispute.

Different commentators have all seen different pieces of this puzzle,[20] but no one seems to have fully assembled it, or to have explained why

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17. U.S. CONST. art. IV. § 1.

18. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (2012)).

19. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

20. *See, e.g.*, Borchers, *supra* note 1, at 24, 88 (arguing that "due process" historically "did *not* connote any limitation on personal jurisdiction" and calling on the Court to "get out of the business of regulating personal jurisdiction"); Conison, *supra* note 3, at 1076 (arguing, on similar historical grounds, for excising due process from the law of jurisdiction); John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "Limited View" of* Pennoyer v. Neff, 28 U.C. DAVIS L. REV. 591, 595 (1995) (criticizing Borchers's historical account and arguing that due process does impose territorial jurisdictional constraints); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 7 (2006) (arguing that "sovereignty principles, and not due process, "are what limit a court's jurisdiction" over foreign defendants); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 499–500 (1987) [hereinafter Perdue, *Scandal*] (recounting the history of *Pennoyer*, and describing its reliance

Pennoyer's solution was the logical response to the questions it faced. The traditional summary of *Pennoyer*, that the Fourteenth Amendment simply included rules of personal jurisdiction as 'part of the constitutional mandate,'[21] is widely (and correctly) viewed as ahistorical.[22] In its place has emerged a wilderness of theories—that personal jurisdiction is really governed by substantive due process,[23] or individual fairness,[24] or the Full Faith and Credit Clause,[25] or Lockean notions of consent,[26] or federal common law.[27] Those who emphasize *Pennoyer*'s dependence on general law generally see this as a strike *against* the doctrine, a reason to 'decouple the personal jurisdiction analysis from the Constitution altogether.'[28]

Yet reviving *Pennoyer* does more than correct the historical record. It also serves a pressing modern need. If anything is as unpopular among procedure scholars as *Pennoyer*, it's the Supreme Court's decisions since

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on due process as "startling"); Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 731–32 (2012) [hereinafter Perdue, *Sovereignty*] (presenting a more sophisticated theory of *Pennoyer*, under which due process acts as a "hook" to raise other challenges in state and federal court); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 415 (1995) (arguing that international law, of its own force, constrains domestic jurisdictional law); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 852 (1989) (portraying the law of personal jurisdiction as federal common law); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 264 (2004) (same); Whitten, *Part One*, *supra* note 11, at 501 (arguing that *Pennoyer*'s approach to due process was a "doctrinal error").

21. Oakley, *supra* note 20, at 685.

22. *See, e.g.*, Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 704 (1983); Redish, *supra* note 8, at 1120–21; Whitten, *Part Two*, *supra* note 12, at 818.

23. *See, e.g.*, Jacob Kreutzer, *Incorporating Personal Jurisdiction*, 119 PENN ST. L. REV. 211 (2014); *see also* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEXAS L. REV. 689, 694 (1987) (describing "a due process right not to be subjected to unjustified assertions of state court jurisdiction"); *cf.* Perdue, *Scandal*, *supra* note 20, at 508–09 ("Just as in Field's time, personal jurisdiction continues to be treated as a substantive due process right.").

24. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) (describing limits on personal jurisdiction as "a function of the individual liberty interest preserved by the Due Process Clause"); Abrams & Dimond, *supra* note 9, at 75–76; John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1029 (1983); Redish, *supra* note 8, at 1114; Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 487 (1984).

25. *See* Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 796 (1955); *see also* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 564–70 (1991) (suggesting such an approach).

26. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880–81 (2011) (plurality opinion). *See generally* Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257 (1990).

27. *See generally* Trangsrud, *supra* note 20; Weinstein, *supra* note 20.

28. Parrish, *supra* note 20, at 56; *accord* Borchers, *supra* note 1, at 105; Conison, *supra* note 3, at 1205. *But see* Perdue, *Sovereignty*, *supra* note 20, at 743 (suggesting a "doctrinal 'reset'").

Pennoyer.[29] The pitched battles of modern jurisdiction doctrine—between 'sovereignty' and 'liberty. between 'traditional notions' and 'substantial justice'—haven't been solved by staring harder at the words 'due process of law. Returning to jurisdiction's general- and international-law origins might help. Precisely because jurisdiction is a topic in general law, and is only enforced through the vehicle of due process, its substance isn't fixed in constitutional amber. If the rules need improving, Congress has power to improve them.

In the meantime, courts needn't be left adrift. *Pennoyer*'s reasoning can be right without *International Shoe*'s outcome necessarily being wrong. International law might just be different now than it was in 1878, or even in 1945; so might the general law of which it's a part. But either way. we'll be looking in the right place. Courts don't need to plumb the depths of due process or solve all of political philosophy to discern the rules that are currently in general application. General law may not be popular at the moment, but it offers something important: a conventional settlement of the problems of political authority that personal jurisdiction so obviously raises.

The idea of general law, and our sense of its place in our federal system, has fallen somewhat out of fashion since *Erie Railroad Co. v. Tompkins*.[30] So this Article begins with an extended illustration, focused on the law of state borders, of why the Constitution might have left important topics to be regulated in this way. It then describes how the same model illuminates the law of personal jurisdiction, resolving many of the confusions that followed *Pennoyer*. Finally, the Article suggests some implications of *Pennoyer*'s view for the present day, and in particular for the powers of Congress over personal jurisdiction.

Coming to a right understanding of *Pennoyer* tells us about much more than jurisdiction. It shows that, even in the post-*Erie* landscape, there's still a vital role for general law. In the field of interstate relations, *Erie* doesn't always demand deferring to state courts on the scope of their own authority. And if it did, so what? In this field, as in so many. the rejection of *Erie* is the beginning of wisdom.

I. The Model of Sovereign Borders

A century after *Pennoyer*, it may seem hard to believe that the Constitution left personal jurisdiction open, establishing a union of states without limiting the reach of their courts. Nearly eighty years after *Erie*, it may seem even stranger that the topic might have been left to general law—

29. *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 5 (2010) (offering a parade of pejoratives that scholars have used to describe current doctrine); Weinstein, *supra* note 20, at 171 ("[T]he one point of consensus is that Supreme Court personal jurisdiction doctrine is deeply confused.").

30. 304 U.S. 64 (1938).

that 'fallacy,'[31] that 'illusion,'[32] that 'brooding omnipresence in the sky.'[33] Yet the Constitution did just this on a much more fundamental topic: the law governing state borders. Jurisdictional rules might effectively limit state authority, but borders *are* limits on state authority: they represent *the* basic constraint on state governments that have different powers on different sides of the line.

Like personal jurisdiction, the law of sovereign borders restricts state authority without obvious warrant in the text. Thinking carefully about borders helps us see why the Constitution might fail to discuss fundamental features of our system; why it leaves those features as matters of general law; and why it regulates them, if at all, through the creation of federal institutions.

A. Sovereign Borders and Constitutional Text

The Constitution tells us that states *have* borders: they're entities that 'Places' can be 'in,'[34] 'where Crimes' can be 'committed within,'[35] 'from which' criminals can "flee,'[36] and so on.[37] But it doesn't tell us where those borders are, or even how to find them.

This could be a real problem for a federal union. Like foreign nations, states that agree on their borders can settle them by compact, albeit with Congress's consent.[38] But also like foreign nations, states that disagree might come to blows, the way Ohio and the Michigan Territory fought the 1830s 'Toledo War.'[39] (The Constitution forbids states to 'engage in War,' but not if they're 'actually invaded'[40]—such as if another state's militia shows up on their land.)

In practice, American courts use an extensive set of rules to settle border disputes without bloodshed. For instance, if two states border on a river, their borders will shift along with slow, accretive changes in the river's course, while 'a sudden shoreline change known as avulsion has no effect on boundary.'[41] Usually the border doesn't lie in the exact middle of the river, but 'along the main downstream navigational channel, or thalweg, which

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31. *Id.* at 79.

32. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co. 276 U.S. 518, 533 (1928) (Holmes, J. dissenting).

33. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J. dissenting).

34. U.S. CONST. art. III, § 2, cl. 3.

35. *Id.*

36. *Id.* art. IV, § 2, cl. 2.

37. *See generally* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 315–20 (1992) (describing the constitutional commitment to territorial states).

38. U.S. CONST. art. I, § 10, cl. 3.

39. *See generally* Joseph Blocher, *Selling State Borders*, 162 U. PA. L. REV. 241, 264–65 (2014) (describing the Toledo border dispute).

40. U.S. CONST. art. I, § 10, cl. 3.

41. New Jersey v. New York, 523 U.S. 767, 784 (1998) (internal quotation marks omitted).

each state can access; and should the channel shift around an island, a boundary 'on one side of the island remains there, even though the main downstream navigational channel' is now on 'the island's other side."[42]

Where do these rules come from? Not from Congress, which hasn't legislated on the topic (and maybe couldn't).[43] Nor from interstate compacts, nor old treaties, nor the Constitution itself—which doesn't talk about *any* of this, and explicitly brackets the subject.[44] Accretion and avulsion are nowhere in the text; general principles of "Our Federalism,"[45] like the states being 'coequal sovereigns,"[46] won't get us anything as specific as the thalweg rule.[47]

Unfortunately, the one thing the Constitution does for state border disputes is guarantee that we'll have to decide them. Article III authorizes federal jurisdiction over controversies likely to involve state borders—such as those 'between two or more States, 'between Citizens of different States, or 'between Citizens of the same State claiming Lands under Grants of different States."[48] But it doesn't tell the federal courts what to do when such cases arise. So the Constitution is almost maximally unhelpful: it ensures that federal courts will hear questions that it takes great care not to answer.

B. Sovereign Borders and Modern Doctrine

Why would the Constitution have done this? From a modern perspective, it's hard to say. As Justices Brandeis and Holmes told us, '[t]here is no federal general common law,"[49] no "brooding omnipresence in the sky."[50] So, '[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State, whether 'declared by its Legislature in a statute or by its highest court in a decision."[51] This produces a certain 'layer-cake' picture of law, with the Constitution and federal law at the top, and state law (written and unwritten) at the bottom. (See Figure 1.) When the federal sources are silent, the

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42. Louisiana v. Mississippi, 516 U.S. 22, 25 (1995).

43. *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1828–29 (2012) (suggesting that it couldn't).

44. U.S. CONST. art. IV, § 3, cl. 2 ("[N]othing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

45. Younger v. Harris, 401 U.S. 37, 44 (1971).

46. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1325 (1996) ("Because states are coequal sovereigns under the Constitution, neither party to an interstate dispute has legislative power to prescribe rules of decision binding upon the other." (footnote omitted)).

47. *See* Sachs, *supra* note 43, at 1837.

48. U.S. CONST. art. III, § 2, cl. 1.

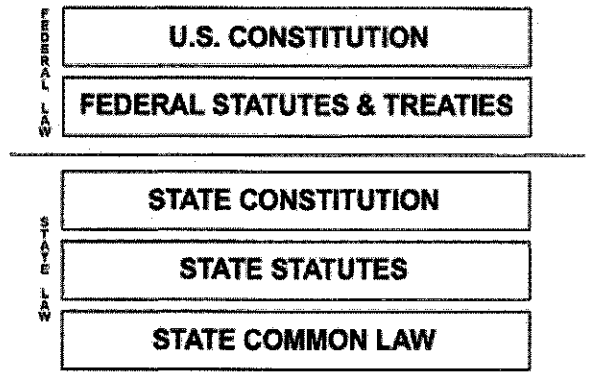
49. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (Brandeis, J., plurality opinion).

50. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J. dissenting).

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

Supreme Court has told us, 'state law must govern because there can *be* no other law. '[52]

Figure 1. The Modern "Layer-Cake' View of Law



That picture doesn't really work for state borders. If the good people of Michigan amend their constitution to announce that they've always owned Toledo, we wouldn't take their word for it—though nothing in the Constitution's text obviously stands in their way. (A ban on annexing new territory still assumes some law to determine the *old* territory.) The same would be true if they only voted to repeal the island exception to the thalweg rule. Many scholars might agree that 'the Constitution implicitly strips the states of lawmaking power over this sort of question, '[53] but it's not clear what part of the Constitution is doing this—or why the Constitution is involved at all. China and Japan have no constitution binding them together, but if they somehow submitted their territorial disputes to an American court, we'd have just as much reason to discount a Japanese statute as we would one from Michigan.

What is more, border questions necessarily involve more than one state. Federal courts regard as 'rules of decision' the 'laws of the several states in cases where they apply' ;[54] but the Rules of Decision Act doesn't tell us where state laws apply, or *whose* laws apply where. In *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[55] the Court held that *Erie*'s prohibition 'against such independent determinations by the federal courts[] extends to the field of conflict of laws, so that federal courts should apply the 'conflict of laws

52. Hanna v. Plumer, 380 U.S. 460, 471–72 (1965) (emphasis added).

53. Nelson, *supra* note 16, at 508.

54. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2012)).

55. 313 U.S. 487 (1941).

rules prevailing in the states in which they sit.'[56] At the same time, the Court has given states broad license to favor their own law whenever their interests are at stake.[57] So, in a border conflict between Michigan and Ohio, the modern doctrine in theory turns the interstate dispute into a race to the courthouse, with each federal court equally obliged to favor the state in which it sits.

This is absurd, of course, which is why the Court has never taken all its pronouncements in *Erie* or *Klaxon* at face value. Necessity being the mother of invention, the Court famously declared on the day it decided *Erie* that interstate disputes raise questions 'of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive.'[58] The same now goes for other areas of law—including 'the rights and obligations of the United States, 'international disputes, 'admiralty cases,'[59] and perhaps questions of customary international law.[60] (See Figure 2.)

In these areas, the federal courts 'have assumed the power to formulate and announce rules of federal law generally.'[61] Like Acts of Congress, such rules preempt state law,[62] provide federal-question jurisdiction,[63] and can be deliberately chosen to achieve policy goals.[64] That's a neat trick, especially under a Constitution that vests '[a]ll legislative Powers herein granted in a Congress of the United States.'[65] It's even more impressive given that modern concepts of federal common law were apparently absent for nearly a

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56. *Id.* at 494, 496.

57. *See* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 818 (1985) (letting a state choose its own law whenever it has 'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair" (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981))).

58. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

59. Tex. Indus. Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

60. *Compare, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816, 821 (1997) [hereinafter Bradley & Goldsmith, *Critique*] (critiquing the 'modern position' that customary international law "has the status of federal common law"), *with* Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825–27 (1998) (defending the view that 'international law, as applied in the United States, must be federal law"), *and* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, Commentary, 111 HARV. L. REV. 2260, 2260 (1998) (responding to Koh). *See generally* Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002) (suggesting a return to earlier views of general law).

61. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 892 (1986).

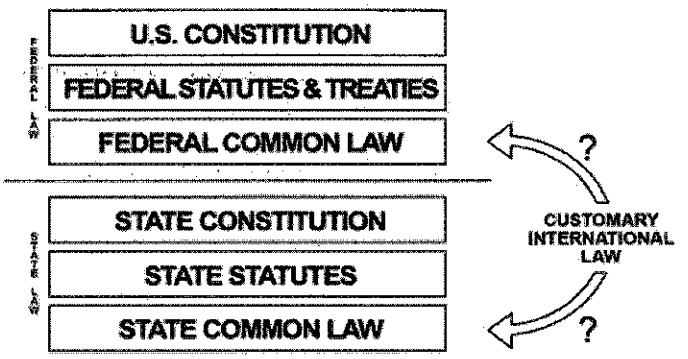
62. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

63. Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972); *accord Hinderlider*, 304 U.S. at 110.

64. *See, e.g.*, *Boyle*, 487 U.S. at 513 (adopting a test for federal-contractor liability based on what does and "does not seem to [the Court] sound policy").

65. U.S. CONST. art. I, § 1.

Figure 2: The Modern View, Including Federal Common Law and Customary International Law



century after the Founding.[66] (How did anyone know where the states' borders were, before the Supreme Court realized it could tell them?) So while the emergence of federal common law may have solved some of *Erie*'s problems, it did so only at the cost of persistent doubts.[67]

C. *Sovereign Borders and General Law*

There is, of course, another way to look at things—a 'way of looking at law' that *Erie* and its progeny purported to 'overrule[].'[68] The Constitution may have left state borders to be governed by general law instead.

To modern lawyers, claims about general law might sound like so much make-believe. As Holmes and Brandeis saw it, a law 'outside of any particular State, subsisting 'without some definite authority behind it, was simply a 'fallacy.'[69] Law is only the command of a sovereign, and no one commanded the general law—except for the courts, which can issue new commands with every new ruling.

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66. *See, e.g.*, Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1274 (1985) ("[N]othing like the theory of jurisdiction just articulated was generally accepted until far into the nineteenth century.").

67. *Compare* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An 'Institutionalist' Perspective*, 83 NW. U. L. REV. 761 (1989) (criticizing federal common law as illegitimate), *with* Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303 (1992) (defending its legitimacy), *and* Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1 (2015) (defending its legitimacy when it most resembles the preexisting general law).

68. Guar. Tr. Co. v. York, 326 U.S. 99, 101 (1945).

69. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (Brandeis, J.) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532–36 (1928) (Holmes, J. dissenting)).

This 'command theory' has less influence today, and for good reason. We routinely follow rules of English grammar and spelling that nobody ever laid down, rules we accept and use by practice and custom. It'd be 'merely dogmatic,' to borrow H.L.A. Hart's phrase, to say that nothing can be a rule of grammar 'unless and until it has been *ordered* by someone to be so.'[70] Grammar rules might vary across societies, but they're hardly a 'fallacy' or a 'brooding omnipresence.' In the same way, per Brian Simpson, we might see the common-law rules 'as similar to grammarian's rules, which both describe linguistic practices and attempt to systematize and order them.'[71] The customary practices—on accretion and avulsion, inheritance by half-siblings,[72] and so on—are passed on to new generations of lawyers, much the way grammar rules persist over time. As Hart says, a legal system might then give force to these 'customs of certain defined sorts,' with courts applying them 'as they apply statute, as something which is already law and because it is law.'[73]

In such a system, the courts' role might be to find the law, rather than to make it[74]—to identify the recognized legal practice the way dictionary authors identify proper usage, or the way fashion magazines report what's 'in' this season.[75] Courts in different jurisdictions can all draw on these practices and customs at the same time, just as school boards in different states can draw on a common linguistic tradition. Various parts of a practice might be contested, and the courts' act of describing a practice might lead that practice to change, the way fashion magazines sometimes set the fashion. But the practice itself and what any particular authority says about it are still two different things.

As strange as this might seem to modern ears, it may be a better way of explaining legal practice at the Founding, as well as many aspects of legal practice today. The place of general law was controversial from the start (though less so, as Stewart Jay describes, before the Alien and Sedition Acts made the issue politically radioactive),[76] so what follows is necessarily summary in nature. But without a full-blown historical account, we can still

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70. H.L.A. HART, THE CONCEPT OF LAW 46–47 (Penelope A. Bulloch & Joseph Raz eds. 3d ed. 2012).

71. A.W.B. SIMPSON, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND LEGAL HISTORY 359, 376 (1987).

72. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *70–71 (describing a rule against half-brothers' inheritance as "a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath and the law").

73. HART, *supra* note 70, at 46.

74. Stephen E. Sachs, Finding Law (Mar. 29, 2017) (unpublished manuscript) (on file with author).

75. I owe the fashion example to James Stern.

76. *See generally* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985); Jay, *supra* note 66.

sketch out a plausible outline of the argument—and of why leaving interstate relations up to general law might have made a good deal of sense.

1. General Law at the Founding.—After independence, many states enacted reception provisions to declare which portions of British law still remained in effect.[77] What's less clear is whether they had to. The Revolution wasn't a Year Zero: it severed certain links to Great Britain without wiping the legal slate clean. Americans who were legally married on July 3, 1776, were still married the next day; so too people who owned houses, or owed debts, or so on. As Chief Justice Marshall put it:

> This common law has been adopted by the legislature of Virginia. Had it not been adopted, I should have thought it in force. When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation; and I do not conceive that the Revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking our political connection with the parent state, we did not break our connection with each other. It remained subsequent to the ancient rules, until those rules should be changed by the competent authority.[78]

As Judge William Fletcher and Caleb Nelson recount, these 'ancient rules' were seen in the early Republic as part of an existing tradition, rather than as a plaything of the courts.[79] Standing outside any one judicial system, the tradition was available to multiple states at once; and two courts could disagree about the tradition without either being obliged to take the other's view.[80] In practice, judges had good reason to seek consistency, and federal courts often set the tone for the rest.[81] They deferred to state courts on 'local' questions about state statutes or property rules, questions that usually came up only in that state's courts[82]—just as federal courts today will defer to the

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77. *See, e.g.*, N.Y. CONST. of 1777, art. XXXV (adopting 'such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law" on April 19, 1775, 'subject to such alterations and provisions as the legislature" shall make); Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 797–800 (1951) (describing the process of reception).

78. Livingston v. Jefferson, 15 F. Cas. 660, 665 (Marshall, Circuit Justice, C.C.D. Va. 1811) (No. 8411).

79. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514–15 (1984); Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 929–49 (2013).

80. *See* Nelson, *supra* note 79, at 929 & n.29 (citing Stalker v. McDonald, 6 Hill 93 (N.Y. 1843) (rejecting the Supreme Court's rule in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842))).

81. *See, e.g.*, Fletcher, *supra* note 79, at 1538–54 (describing the evolution of the law of marine insurance).

82. *See* Pollard v. Dwight, 8 U.S. (4 Cranch) 421, 429 (1808) (Marshall, C.J.) ("In deciding on so much of this objection as depends on the laws of Connecticut, this court would certainly be guided by the construction given by that state to its own statute "); *see also* Swift v. Tyson, 41

Sixth Circuit on issues of Michigan law.[83] But by and large, every court was to apply the general law by its own best lights.[84]

The general law was also available to the United States as a whole. There was no 'common law of America, in the sense of a full body of unwritten rules that preempted contrary state law.[85] Yet federal courts did apply general rules that were said to underlie the law of the thirteen states—what Marshall called 'those general principles and those general usages which are to be found not in the legislative acts of any particular state, but in that generally recognised and long established law, which forms the substratum of the laws of every state.'[86] These included the systems of "Law and Equity,'[87] together with 'the practice of the courts of King's Bench and Chancery in England, which the early Supreme Court saw as 'affording outlines for the practice of this court.'[88] They included the law of nations[89]—both public and private international law, including the law of admiralty,[90] the general commercial law,[91] and the principles of conflict of laws.[92] And they included innumerable other rules, great and small, which federal courts could apply in appropriate cases.[93]

U.S. (16 Pet.) 1, 18 (1842) (referring to "the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character").

83. MacGregor v. State Mut. Life Assurance Co., 315 U.S. 280, 281 (1942) (per curiam); *accord* Rutherford v. Columbia Gas, 575 F.3d 616, 627 (6th Cir. 2009) (Clay, J., concurring in part and dissenting in part).

84. *See* Nelson, *supra* note 79, at 944–49 (observing that, until a consensus across jurisdictions emerged, state courts were likely to exercise independent judgment about the content of general law).

85. *See* Letter from John Marshall to St. George Tucker (Nov. 27, 1800), *reprinted in* Jay, *supra* note 66, app. A, at 1326–27 (disparaging such an idea).

86. United States v. Burr, 25 F. Cas. 187, 188 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,694); *accord* United States v. Burr, 25 F. Cas. 55, 159 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,693) (referring to England as "that country whose language is our language, and whose laws form the substratum of our laws").

87. U.S. CONST. art. III, § 2, cl. 1.

88. Rule, 2 U.S. (2 Dall.) 411, 413–14 (1792) (emphasis omitted).

89. 4 BLACKSTONE, *supra* note 72, at *67 ("[I]n England . . . the law of nations (wherever any question arises which is properly the object of [its] jurisdiction) is here adopted in [its] full extent by the common law, and is held to be a part of the law of the land."); Bradley & Goldsmith, *Critique*, *supra* note 60, at 820, 824; Young, *supra* note 60, at 467.

90. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 1–16, at 45 (2d ed. 1975) (describing admiralty law as "probably seem[ing] 'self-evident' " to the founders and as "need[ing] no express or implied legislative action on the part of any one nation to make it valid" in that nation's courts); Whitten, *Part One*, *supra* note 11, at 592 & n.414; *cf.* Luke v. Lyde (1759) 97 Eng. Rep. 614, 617 (K.B.) (Mansfield, C.J.) ("[T]he maritime law is not the law of a particular country, but the general law of nations . . . ").

91. *See* Fletcher, *supra* note 79, at 1517.

92. *See, e.g.*, Conison, *supra* note 3, at 1103.

93. *See, e.g.*, United States v. Burr, 25 F. Cas. 187, 188, 191 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,694) (applying the general law of evidence and of bail).

Rules like these were particularly important to a fledgling government with few statutes of its own. Rather than reinvent the wheel on each topic, the federal system could apply existing standards whenever its own law was silent.[94] When the Seventh Amendment incorporated 'the rules of the common law';[95] when the All Writs Act referred to 'all other writs not specially provided for by statute, which may be agreeable to the principles and usages of law';[96] and when the Rules of Decision Act referred to state laws and 'cases where they apply,'[97] these weren't empty gestures; people knew what they were referring to. Indeed, the European Union did much the same thing after it was formed, and for much the same reasons: its courts now identify 'general principles of EU law,' 'unwritten rules of law which a judge of the [European Court of Justice] has to find and apply, but not create,' in order to 'fill what would otherwise be gaps in EU law.'[98]

In the early United States, general law filled the gaps in a very particular way. It was available for use by federal courts without really being 'federal law.' It was law *for* the United States, but not 'Law[] *of* the United States,'[99] of the kind that supported federal-question jurisdiction.[100] And it was law of the land but not '*supreme* Law of the Land,' of the kind that would override contrary law in the states.[101] By legislation or by local usage, a state could alter the general rules on any topic under its control.[102] But as the Supreme

94. *Cf.* Nelson, *supra* note 16, at 505 (arguing that 'our federal system all but requires continuing recourse to rules of general law").

95. U.S. CONST. amend. VII.

96. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 1651 (2012)).

97. *Id.* § 34, 1 Stat. at 92.

98. ALINA KACZOROWSKA, EUROPEAN UNION LAW 115 (3d ed. 2013); *cf.* Consolidated Versions of the Treaty on the Functioning of the European Union art. 340, Oct. 26, 2012, 2012 O.J. (C 326) 47, 193 (adopting "the general principles common to the laws of the Member States' to govern certain liabilities of the EU itself).

99. U.S. CONST. art. III, § 2, cl. 1 (emphasis added); *id.* art. VI, cl. 2 (emphasis added); *see* Fletcher, *supra* note 79, at 1575.

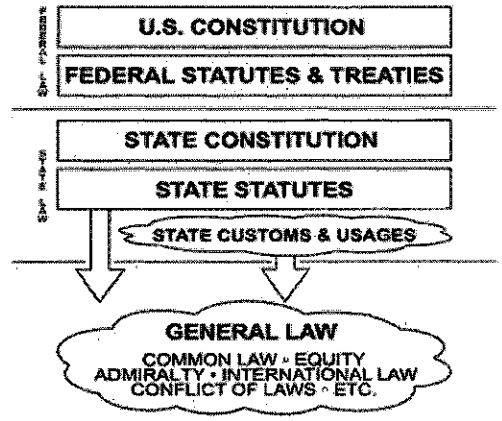
100. *See* Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545–46 (1828) ("A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. [T]he law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise."); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 325 (1818) (finding "no law of the United States, which interferes with, or touches, the question of damages," as it was "a question depending altogether upon the common law"); *cf.* N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286, 286–87 (1876) (finding "no jurisdiction" to review a judgment involving "the law of nations' and "principles of general law alone"); RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 46 (1977) (distinguishing 'jurisdiction of' and 'jurisdiction from' the common law").

101. U.S. CONST. art. VI, cl. 2 (emphasis added); *see* Bradley & Goldsmith, *Critique*, *supra* note 60, at 823 (observing that prior to *Erie*, "federal court interpretations of general common law were not binding on the states, and a case arising under general common law did not by that fact alone establish federal question jurisdiction"); Fletcher, *supra* note 79, at 1521–27.

102. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842); Fletcher, *supra* note 79, at 1532; Nelson, *supra* note 79, at 927. *But see* Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal*

Court later put it, when a state couldn't alter the prior law (or simply chose not to), a legal question would be 'determinable only by the general principles of that law.'[103] (See Figure 3.)

Figure 3: The General-Law View. (General law might be received by statute or by usage.)



2. General Law and Border Disputes.—Assembling the pieces, we can now see how sovereign borders could rest on general law. The Constitution didn't *need* to say anything about sovereign borders, because the topic was already covered. The text just left the general law as it stood, while creating new institutions to enforce it. If a dispute arose in state court, in a case that couldn't be removed, then maybe it'd be decided under state-made rules. But in the cases that mattered—diversity, land grants, suits between states—there could be original jurisdiction in the federal courts, which would look past state land grabs and apply the general law for themselves.

This is largely how the Court understood things in *Rhode Island v. Massachusetts*,[104] decided in 1838. By providing jurisdiction but not the rule of decision, the Constitution necessarily 'gives power to decide according to the appropriate law of the case.'[105] What counts as the appropriate law, absent further direction, is a question for general conflicts principles: it 'depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them.'[106] These might include, in turn,

Court, 54 WM. & MARY L. REV. 655, 659 (2013) (noting that federal courts over time exercised more authority than *Swift* would have allowed); Clark, *supra* note 46, at 1290 (same).

103. Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 378 (1893); *see* Nelson, *supra* note 79, at 927.

104. 37 U.S. (12 Pet.) 657 (1838).

105. *Id.* at 737.

106. *Id.*

'the law of nations,'[107] 'the law of prescription,'[108] and—for a bill filed 'on the equity side of the Court'—"the principles and usages of a court of equity.'[109] In other words, general law provides both the conflicts rule and, potentially, the rule of decision.

The Court also explained why it wouldn't treat the states' own territorial claims as determinative. While the states started off with their own territories upon independence,[110] they joined a 'firm league of friendship' in the Articles of Confederation[111]—which, by 'a settled principle of the law of nations, would bar them from taking each other's territory so long as the alliance lasted.[112] When their alliance ended with ratification in 1788, each state 'surrendered the right to judge of her own boundary' by 'submitt[ing] the power of deciding a controversy concerning it to this Court.'[113] By so doing, under those settled principles, each state 'has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.'[114] A state couldn't assert power to declare its own sovereign borders and at the same time ask another sovereign's court to declare them instead. (That's also why China or Japan, which aren't bound by the Constitution, can't declare victory by statute in someone else's court.) In other words, the general law, and not any rule imposed by the Constitution, told the Court which other sources of law to trust.

The point can be put more broadly. When a federal court hears a case, it needs to know what law to use and where any state laws 'apply. That question can't be settled by state laws, as we don't know yet if they apply or not. Without federal conflicts law on point, federal courts before *Klaxon* would fall back on the general law of conflicts, independently of whatever the state's conflicts principles might be. (In fact, this might have been the *point* of diversity jurisdiction, which *Klaxon* accidentally vitiated.)[115]

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107. *Id.* at 748.

108. *Id.* at 749.

109. *Id.* at 732.

110. *Id.* at 748; *accord* Howard v. Ingersoll, 54 U.S. (13 How.) 381, 398 (1852) ("It is well known to all of us, when the colonies dissolved their connection with the mother country by the Declaration of Independence, that it was understood by all of them, that each did so, with the limits which belonged to it as a colony.").

111. ARTICLES OF CONFEDERATION of 1781, art. III.

112. *Rhode Island*, 37 U.S. (12 Pet.) at 748.

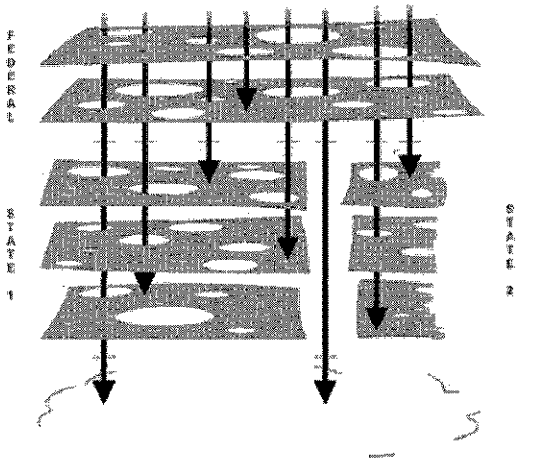
113. *Id.*

114. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 380 (1821) (cited in *Rhode Island*, 37 U.S. (12 Pet.) at 748).

115. *See, e.g.*, Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 496 (1928); Laycock, *supra* note 37, at 282; Nelson, *supra* note 16, at 567; *accord* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 359 (1827) (Johnson, J.) (stating that the establishment of federal courts was intended "to obviate that *conflictus legum*, which has employed the pens of *Huberus* and various others, and which any one who studies the subject will plainly perceive, it is infinitely more easy to prevent than to adjust").

So the general law helped specify the domain in which a state could legislate—"could, in the sense that its legislation would be *listened to*. Any rule a state adopted within its area of competence (torts, contracts, property, etc.) would be a rule of decision for the federal courts. But if the state legislated outside its competence (as judged by federal conflicts statutes, or, in their absence, by general law), or if the state had adopted no rule of local law on point, the federal courts would look elsewhere. In contrast to the modern layer-cake approach, a better model for these overlapping rules might be a stack of Swiss cheese, with different issues falling through the holes of one type of law to be answered by another—and sometimes slipping all the way through, falling outside the laws of any one state to be caught at the bottom by general law. (See Figure 4.)

Figure 4: Different Legal Questions Answered at Different Levels



As the Court later held, the right answer to these questions of general law will sometimes depend on who's answering them. Questions of international law aren't federal questions, so they 'must be determined in the first instance by the court, state or national, in which the suit is brought.'[116] In the absence of truly federal rules, a state court would take its own view of the general doctrine, and it might be bound to follow its own state's statutes in preference thereto.[117] (Even if general conflicts principles point elsewhere, the state legislature could always insist.) But a federal court could take its own view, both of the conflicts questions and of the substance, considering

116. Huntington v. Attrill, 146 U.S. 657, 683 (1892).

117. *See supra* note 102 and accompanying text.

each of these issues as among 'those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions.'[118]

So it made sense for the Constitution to regulate sovereign borders by *providing a forum* instead of *providing rules*. Codifying the international law of sovereign borders is hard; establishing some courts to apply it is easy. If border questions would usually wind up in federal court, they'd be decided in a (presumably) neutral forum, under a (presumably) neutral view of the law.[119] The Constitution doesn't have to 'partake of the prolixity of a legal code';[120] it can prevent the states from stacking the deck in their own favor without adopting any specific rules.

3. General Law Today.—Surprisingly, eighty years after *Erie*, the Court still adheres to something very like these doctrines. Though federal courts claim the power to create new rules, they rarely do.[121] Instead, given the Constitution's silence, courts tend to assume that the law of interstate relations is whatever it *was* at some prior date. As Justice Breyer once wrote, 'silence is not ambiguity; silence means that ordinary background law applies.'[122]

In recent border cases, the Court has looked to the 'traditional common-law rule governing avulsive littoral changes,'[123] as well as 'the received rule of law of nations on this point, as laid down by all the writers of authority, including Sir William Blackstone.'[124] In other words, when it comes to borders, federal common law isn't all that 'federal'; the Court uses the same rules that foreign nations do. So do the states, applying these rules to private landholdings and political subdivisions.[125] When the Court declares, as late as 1990, that the '[g]eneral rules concerning the formation of riparian land are well developed and are simply expressed and well accepted,'[126] it's invoking a 'common legal object that's part of a common legal tradition'—not just one among hundreds of distinct bodies of law whose rules just happen to coincide.[127]

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118. *Huntington*, 146 U.S. at 683.

119. *See* Bradley & Goldsmith, *Critique*, *supra* note 60, at 826 (noting that the Constitution, through Article III's heads of jurisdiction, had 'enabled Congress to ensure uniform federal interpretations' of customary international law in the cases in which it typically arose, without adopting any rules in particular).

120. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

121. *See* Nelson, *supra* note 16, at 508 ("Instead of fashioning a brand new code of interstate relations, the Court has relied heavily upon preexisting bodies of general law.").

122. New Jersey v. New York, 523 U.S. 767, 813 (1998) (Breyer, J. concurring).

123. *Id.* at 784 (majority opinion).

124. *Id.* (citations and internal quotation marks omitted).

125. *See, e.g.*, Dye v. Anderson Tully Co., 385 S.W.3d 342, 346 (Ark. Ct. App. 2011) (applying the thalweg rule to the boundary between two counties).

126. Georgia v. South Carolina, 497 U.S. 376, 403 (1990).

127. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1137 (2017).

As Nelson demonstrates, this persistence of general law is quite widespread. It shows up in any number of fields—federal contracting, bankruptcy fraud, vicarious liability, criminal defenses—in which federal law presupposes legal rules that it doesn't supply.[128] 'Rather than tracking the local law of any single state, these federal rules reflect state law *in general*; what matters is how *most* states do things, not whatever the policymakers in one particular state have said.'[129]

This participation in broadly shared practice is more than a convenient choice. There's an element here of *opinio juris*, a sense of legal obligation. The Court's claim to make rules of federal common law doesn't mean that it can 'make up any rules it likes.'[130] Redrawing (or 'reinterpreting") all the states as isosceles triangles wouldn't just be a terrible policy choice; it'd seem beyond the scope of a judge's authority, something our system hasn't entrusted judges to do. Even partisans of federal common law share an intuition against altering 'the historic boundaries of the states"[131]—though the source of that intuition is a little unclear. But the better understanding might be that the Constitution simply left certain areas of law intact, and that modern courts have some obligation to do the same.

II. Personal Jurisdiction Before *Pennoyer*

The Constitution treated personal jurisdiction in much the same way as sovereign borders. That shouldn't surprise us: both topics are about the range of state authority, over territory as well as people. If we have rules about where to locate state lines, then we also might have rules about what those state lines *mean*—about what state officials can actually do, either behind those lines or beyond them.

'Can, of course, is a relative term. Michigan 'can' pass a statute claiming universal jurisdiction, just like it can claim ownership of Toledo. The question is whether anyone else will listen.[132] As Shakespeare put it:

> Glendower: I can call spirits from the vasty deep.
>
> Hotspur: Why, so can I, or so can any man; But will they come when you do call for them?[133]

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128. Nelson, *supra* note 16, at 504, 524 & n.114.

129. *Id.* at 503–04.

130. *Id.* at 508.

131. Field, *supra* note 61, at 891 n.34.

132. *See* Conison, *supra* note 3, at 1108 ("Ultimately, whether a court 'could' or 'could not' legitimately exercise jurisdiction in the international sense was a matter of how other states would treat the resulting judgment.").

133. Pub. Citizen, Inc. v. Office of Mgmt. & Budget, 598 F.3d 865, 879 (D.C. Cir. 2010) (Williams, J. concurring in part and dissenting in part) (quoting WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH act 3, sc. 1).

This was the crucial question before *Pennoyer*. when personal jurisdiction was typically a problem in recognition. Foreign countries' judgments were obviously free of any limits in the U.S. Constitution. The question for American courts was whether those judgments would be recognized and enforced. A judgment with jurisdiction, one that complied with the international rules (or, more precisely. with the American understandings of those rules), was valid and could be recognized. A judgment without jurisdiction was void. The foreign court's subject-matter jurisdiction might be primarily regulated by its own law. but its jurisdiction over the parties was not. Early American courts applied what they saw as rules of general and international law to determine whether foreign judgments deserved any respect.

By and large, the same regime was in place for courts at home. States that wanted to exercise broad jurisdiction would do so, and would execute judgments within their borders on as much of the defendant's property as they could find. These state judgments, unlike foreign ones, could claim the benefit of the Full Faith and Credit Clause and the 1790 Act. But these provisions were read to leave the law of personal jurisdiction alone. So when American courts were presented with the judgment of another tribunal, whether from Michigan or Mexico, they used the same approach to determining personal jurisdiction. The judgment was the product of a separate sovereign, which was expected to comply with international rules.

The Constitution's role here was largely indirect—letting defendants remove their cases into federal court or challenge enforcement through diversity suits. But because jurisdictional standards were general law, federal and state courts weren't bound by each other's decisions, and federal courts could take their own view of whether the standards were satisfied. Congress might have chosen to alter this regime, but it didn't. As a result, the same considerations that applied to international judgments were commonly applied to American judgments as well.

A. Foreign Judgments

In one sense, personal jurisdiction is always a matter of domestic law: whether a court will hear a case depends in the first instance on its own rules. In the widely cited 1808 case of *Buchanan v. Rucker*,[134] a creditor brought an action in King's Bench based on a judgment 'of the island Court in Tobago.'[135] Process had been served by 'nailing up' the summons 'at the Court-House door, though the defendant 'never appeared to have been within the limits of the island, nor to have been in any other way subject to the jurisdiction of the Court at the time.'[136] This practice was said to be

134. (1808) 103 Eng. Rep. 546; 9 East. 192 (K.B.) (per curiam).

135. *Id.* at 546, 9 East. at 192.

136. *Id.* 9 East. at 192–93.

entirely lawful by Tobago's standards; it 'was warranted by a law of the island, and was commonly practised there.'[137] Justice Johnson noted in 1827 that '[t]he Scotch, if I remember correctly, attach the summons on the flag-staff, or in the market place, at the shore of Leith, and the civil law process by proclamation, or *viis et modis*, is not much better.'[138] Even today, French courts claim jurisdiction over suits by French plaintiffs against defendants encountered abroad.[139] States might find it politic to limit their claims to authority, but they also might not.

Yet these assertions of exorbitant jurisdiction do have a weakness. If a French court summons you to appear, you don't have to comply, unless you happen to visit or have assets in France. If you do, international law might respect French authority over your person or property within their borders, so their initially excessive claim to jurisdiction won't matter. But if you don't want to respond, just take a default, and make sure not to vacation in France. (Or, for that matter, any other country bound to respect French judgments.)[140]

The real problem comes later. In the early Republic, jurisdiction was frequently raised at the recognition stage, for procedural as well as substantive reasons. Procedurally, before the advent of liberal pleading standards, it was risky for a defendant with a half-decent jurisdictional objection to respond to the summons. Arguing the merits could be taken as consenting to the court's authority.[141] The alternative was to give up on the merits, by entering a special appearance or by defaulting and contesting enforcement elsewhere.[142] Substantively, it was often better for defendants to litigate jurisdiction in some other forum nearer to home. For example, in *Buchanan*, the British court refused to recognize the foreign judgment—not only by construing Tobago's law more narrowly, but also by rejecting its

137. *Id.* 9 East. at 193.

138. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 366 (1827) (Johnson, J.).

139. Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 388 & n.56 (1995) (citing CODE CIVIL [C. CIV.] [CIVIL CODE] art. 14).

140. *See, e.g.*, Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1 (providing for recognition of judgments within the European Union).

141. *See, e.g.*, Pollard v. Dwight, 8 U.S. (4 Cranch) 421, 428–29 (1808) (Marshall, C.J.) (portraying defendants who argued the merits as having "placed themselves precisely in the situation in which they would have stood, had process been served upon them," and so having "consequently waived all objections to the non-service of process"); *accord* Shields v. Thomas, 59 U.S. (18 How.) 253, 259 (1855); Mayhew v. Thatcher, 19 U.S. (6 Wheat.) 129, 130 (1821); *cf.* FED. R. CIV. P. 12(b) ("No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion."); Orange Theatre Corp. v. Rayherstz Amusement Corp. 139 F.2d 871, 874 (3d Cir. 1944) ("Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances.").

142. *See, e.g.*, *Orange Theatre Corp.* 139 F.2d at 874.

international force.[143] Even if Tobago's law had made the judgment valid, asked Lord Ellenborough, 'how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?'"[144]

Early American courts adopted a similar approach—insisting that foreign courts have power over the subject matter and the parties. This followed the 'ubiquitous' rule in English law, inherited by the American legal system, that 'proceedings without jurisdiction were *coram non judice*—that is, not before a judge.'[145] Jurisdiction was the lawful power to decide the case, what distinguished a real judge from Judge Judy. Without it, '*non est judex*, and it was no more necessary to obey the judgment than to obey 'a mere stranger.'[146] In domestic cases, a judgment of a court of competent jurisdiction was binding;[147] but a judgment without jurisdiction was void, a 'nullity' subject to collateral attack[148] and which might even expose the officers who executed it to damages.[149] A foreign judgment might be scrutinized on the merits;[150] but a lack of jurisdiction would still turn it into 'waste paper.'[151] As Chief Justice Marshall wrote in 1808, a document 'professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to

143. Buchanan v. Rucker (1808) 103 Eng. Rep. 546, 547; 9 East. 192, 194 (K.B.) (per curiam).

144. *Id.*

145. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1828 (2008); *see also* Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 164 (1977) [hereinafter *Filling the Void*] ("For over three centuries it has been black-letter law that the judgment of a court without jurisdiction over the subject matter of the action before it is null and void in its entirety.' ' (footnote omitted)).

146. Case of the Marshalsea (1612) 77 Eng. Rep. 1027, 1039; 10 Co. Rep. 68b, 76b (K.B.).

147. Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173, 186 (1809) (Marshall, C.J.) ("The judgment [given by the New Jersey Court of Common Pleas] was erroneous, but it is a judgment, and, until reversed, cannot be disregarded.").

148. *Id.* at 184–85 (determining whether the judgment was an 'absolute nullit[y], which may be totally disregarded' in a collateral proceeding). *But see* Durfee v. Duke, 375 U.S. 106 (1963) (restricting the use of collateral attack for lack of subject-matter jurisdiction, but with little warrant in pre-New Deal case law).

149. *Compare* Elliott v. Lessee of Peirsol, 26 U.S. (1 Pet.) 328, 340 (1828) (noting that if a court should "act without authority, its judgments and orders are regarded as nullities," and "all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers"), *with* Simms v. Slacum, 7 U.S. (3 Cranch) 300, 306–07 (1806) (reasoning that "judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void," so that '[a] sheriff who levies an execution under a judgment fraudulently obtained, is not a trespasser").

150. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 102 (New York, O. Halsted 1827) (noting that a domestic court, before enforcing a foreign judgment, could "examine into the merits of such judgment"); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1214 (2009).

151. Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 450, 474–75 (1836).

take cognizance of the subject it had decided, could have no legal effect whatever.'[152]

To be respected abroad, foreign judgments not only needed jurisdiction under their own law but also had to comply with international rules. The subject matters that a foreign court could hear—patent cases, say, or claims under $75,000—might well be left to foreign law to decide.[153] But no court, Marshall wrote, could 'exercise[] a jurisdiction which, according to the law of nations, its sovereign could not confer.'[154] And the law of nations *did* regulate jurisdiction over the parties. According to Marshall and Justice Story, whatever force a judgment might have 'within the dominions of the prince from whom the authority is derived,'[155] or 'upon the subjects of that particular nation,'[156] a judgment that exceeded international limits on personal jurisdiction would not be 'regarded by foreign courts' as binding,[157] or given any effect 'upon the rights or property of the subjects of other nations.'[158] Principles like these didn't come from the Constitution, or from anywhere else in federal law. Instead, as James Kent put it, they were principles 'of general jurisprudence founded on public convenience, and sanctioned by the usage and curtesy of nations.'[159]

B. Jurisdiction in State Court

Early American states stood in much the same position as foreign nations. Upon independence they had claimed all the rights of 'Free and Independent States,' having 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.'[160] These powers remained in place unless they were limited by the Articles of Confederation,[161] or later on

152. Rose v. Himely, 8 U.S. (4 Cranch) 241, 268–69 (1808) (Marshall, C.J.).

153. *See id.* at 276 ("Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected.").

154. *Id.*; *see also* Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) ("The jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent sovereign power.").

155. *Rose*, 8 U.S. (4 Cranch) at 276.

156. Bradstreet v. Neptune Ins. Co. 3 F. Cas. 1184, 1187 (Story, Circuit Justice, C.C.D. Mass. 1839) (No. 1793).

157. *Rose*, 8 U.S. (4 Cranch) at 276–77; *accord* Bischoff v. Wethered, 76 U.S. (9 Wall.) 812, 814 (1870) (finding that an improperly rendered English judgment was not valid in the United States); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 586, at 492 (Boston, Hilliard, Gray & Co. 1834) (finding it "indispensable to establish, that the court pronouncing judgment had a lawful jurisdiction over the cause, and the parties," or else its decision would be "a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunals").

158. *Bradstreet*, 3 F. Cas. at 1187.

159. 2 KENT, *supra* note 150, at 102; *cf.* STORY, *supra* note 157, § 611, at 509–10 (describing the rules for recognition as among "the doctrines of the common law").

160. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (emphasis omitted).

161. ARTICLES OF CONFEDERATION of 1781, art. II.

by the Constitution or by federal law[162]—none of which addressed personal jurisdiction. So if a state wanted to claim exorbitant jurisdiction within its borders, it could; 'for aught I know, Justice Story wrote, 'the local tribunals might give a binding efficacy to such judgments.'[163] Should a state authorize service against a nonresident's 'tenants, attornies, or agents, or by attachment of "a debt, a glove, or a chip, federal law would not interfere; 'it is not for us to say, that such legislation may not be rightful, and bind [that state's] courts.'[164] The states themselves didn't perceive any such limits until the second half of the nineteenth century—at which point a few courts found limits in their own state constitutions, not in the federal one.[165]

The ultimate constraint on state judgments was whether anyone else would listen to them. A judgment would be recognized elsewhere, Connecticut's high court noted in 1814, only 'if the defendants [had been] so within the jurisdiction of the court that they [could] be *commanded* to appear and answer.'[166] For a New Hampshire state court, a New Hampshire statute commanding an appearance was good enough. But a Massachusetts court would first apply conflicts principles to see if that statute really bound the defendant—or if New Hampshire had tried, as Marshall had put it, to 'exercise[] a jurisdiction which its sovereign could not confer.'[167] In applying those standards, states weren't always consistent; they sometimes rejected judgments as illegitimate that they themselves would issue at home. (One Massachusetts judge in 1805 described it as 'well known that many of the States, of which *this* is one, proceed to final judgment without requiring the appearance of the defendant, or even personal notice to him, but he still voted to deny enforcement of a New Hampshire judgment for precisely that failing.)[168]

Even before the Constitution was ratified, states were already in the habit of reviewing each other's jurisdiction. The Articles of Confederation provided that '[f]ull faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of

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162. U.S. CONST. art. VI, cl. 2; *id.* amend. X.

163. Picquet v. Swan, 19 F. Cas. 609, 612 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134); *accord* Dearing v. Bank of Charleston, 5 Ga. 497, 515 (1848) (acknowledging that, if Georgia's legislature authorized a broader-than-usual jurisdiction, "the local tribunals might give effect to it").

164. *Picquet*, 19 F. Cas. at 614; *accord* Morrison v. Underwood, 59 Mass. (5 Cush.) 52, 54 (1849) (upholding personal jurisdiction, per a Massachusetts statute, at the previous residence of a defendant who "was not an inhabitant of the state, and was out of the commonwealth, at the time").

165. *See, e.g.*, Beard v. Beard, 21 Ind. 321, 323–24 (1863); Weil v. Lowenthal, 10 Iowa 575, 578 (1860); *see also* Oakley v. Aspinwall, 4 N.Y. (4 Comst.) 513, 521–22 (1851) (raising the possibility in dicta); Jarvis v. Barrett, 14 Wis. 591, 592 (1861) (questioning the extent of the state legislature's power over jurisdiction).

166. Hart v. Granger, 1 Conn. 153, 168–69 (1814); *see* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1573–74 (2002).

167. Rose v. Himely, 8 U.S. (4 Cranch) 241, 276 (1808) (Marshall, C.J.).

168. Bartlet v. Knight, 1 Mass. 401, 410 (1805) (opinion of Sedgwick, J.).

every other State. '[169] That obligation was more than a little vague; but courts generally agreed that, whatever it meant, it *didn't* oblige them to recognize judgments that violated general jurisdictional rules.[170] For example, a year after the Articles took effect, a South Carolina court required a showing of a 'condemnation in a court of competent jurisdiction, under 'common law rules, before it would recognize the judgment of a North Carolina admiralty court and give 'due faith and credit to all its proceedings' under '[t]he act of confederation and the law of nations. '[171]

The same thing happened in Connecticut and Pennsylvania. There, creditors who had won judgments by foreign attachment in Massachusetts—seizing a handkerchief or a blanket said to belong to the defendant—tried to get their judgments recognized abroad.[172] The courts in both states refused, with Chief Justice McKean of Pennsylvania dryly congratulating the plaintiff on obtaining the blanket; '[i]f that is sufficient to satisfy [him], he has done well to secure himself.'[173] But the judgment itself could only be considered as 'a proceeding *in rem*, and ought not certainly to be extended further than the property attached. '[174] The Articles didn't speak expressly to the issue of jurisdiction, and they 'must not be construed to work such evident mischief and injustice, as are contained in the doctrine, urged for the Plaintiff.'[175] Likewise, the Connecticut court rejected the argument that the 'pretended service of the writ'[176] at the defendant's home in Connecticut, together with the attachment of a handkerchief in Massachusetts, might suffice for jurisdiction under Massachusetts law.[177] Those acts couldn't give a Massachusetts court 'legal jurisdiction of the cause', the Articles only mandated respect for judgments 'where both parties are within the jurisdiction of such courts at the time of commencing the suit, and are duly served with the process, and have or might have had a fair trial of the cause. '[178]

Courts continued to reason this way after ratification. Judges today speak of the Full Faith and Credit Clause in almost mystical tones, as

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169. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 3.

170. *See* Sachs, *supra* note 150, at 1221–26 (describing areas of confusion and of agreement, both before and after the Articles).

171. Jenkins v. Putnam, 1 S.C.L. (1 Bay) 8, 10 (1784) (per curiam).

172. *See generally* Kibbe v. Kibbe, 1 Kirby 119 (Conn. Super. Ct. 1786); Phelps v. Holker, 1 U.S. (1 Dall.) 261 (Pa. 1788).

173. *Phelps*, 1 U.S. at 264 (opinion of McKean, C.J.).

174. *Id.*

175. *Id.*

176. *Kibbe*, 1 Kirby at 126.

177. *Id.* at 120–21, 125–26; *accord* Kilburn v. Woodworth, 5 Johns. 37, 38, 40–41 (N.Y. Sup. Ct. 1809) (per curiam) (rejecting the argument that the Massachusetts judgment should be recognized because "by the laws of *Massachusetts*, the judgment was regular and valid, and would be so considered in *Massachusetts*").

178. *Kibbe*, 1 Kirby at 126.

'alter[ing] the status of the several states' and 'mak[ing] them integral parts of a single nation.'[179] But the Clause actually left the states as foreign to one another in important ways. The Constitution's Clause largely resembled that of the Articles; it included 'public Acts' along with 'Records, and judicial Proceedings, and it let Congress 'prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.'[180] Congress soon followed up with the 1790 Act, which specified the mode of authentication and added that 'the said records and judicial proceedings' would have 'such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.'[181] Yet none of these changes were thought to displace the existing jurisdictional rules.

That became apparent in the course of a long debate in state courts over the 1790 Act. The Act left unclear whether the phrase 'such faith or credit' addressed effect or authentication—whether it made sister-state judgments conclusive on the merits, or whether it made particular copies of the judgments, once introduced in court, conclusive evidence of the originals' existence and contents. As I've described elsewhere,[182] courts and commentators argued about this for decades, both before and after the Supreme Court endorsed the 'effect' interpretation in *Mills v. Duryee*.[183]

Mills probably got it wrong,[184] but for now it doesn't matter. What does matter is something on which both sides of the debate agreed: that a state judgment could be challenged in other courts for violating general-law rules of personal jurisdiction. In a widely cited 1803 decision in New York, some justices opposed the 'effect' reading precisely because it might give effect to whatever strange forms of jurisdiction states might exercise at home.[185] Supporters of the 'effect' reading countered that the 1790 Act implicitly applied only to valid judgments that respected the prevailing rules.[186]

The courts spoke rather vaguely about the exact source of these rules. What counsel in one 1809 case in New York called 'the principles, of the

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179. V.L. v. E.L., 136 S. Ct. 1017, 1020 (2016) (quoting Milwaukee Cty. v. M.E. White Co. 296 U.S. 268, 277 (1935)).

180. U.S. CONST. art. IV, § 1.

181. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (2012)).

182. Sachs, *supra* note 150, at 1233–78.

183. 11 U.S. (7 Cranch) 481, 484 (1813).

184. *See* Sachs, *supra* note 150, at 1233–40 (collecting evidence on the meaning of the 1790 Act); *id.* at 1259–62 (describing the *Mills* decision).

185. *See, e.g.*, Hitchcock v. Aicken, 1 Cai. 460, 481 (N.Y. Sup. Ct. 1803) (opinion of Kent, J.); *id.* at 478 (opinion of Radcliff, J.); *accord* Picket v. Johns, 16 N.C. (1 Dev. Eq.) 123, 131 (1827) (opinion of Henderson, J.).

186. *See, e.g.*, *Hitchcock*, 1 Cai. at 465–66 (opinion of Thompson, J.); *id.* at 473 (opinion of Livingston, J.); *accord* Rogers v. Coleman, 3 Ky. (Hard.) 413, 417 (1808); Bissell v. Briggs, 9 Mass. (9 Tyng) 462, 469 (1813) (Parsons, C.J.) (per curiam); *Picket*, 16 N.C. (1 Dev. Eq.) at 134 (Taylor, C.J. dissenting); Curtis v. Martin, 2 N.J.L. (1 Penning.) 399, 406 (1805) (Pennington, J.).

common law,'[187] the court referred to as 'the first principles of justice,'[188] while a Kentucky court combined international-law rhetoric,[189] general-law reasoning,[190] and a concern that a contrary view would be 'too rigid and unjust.'[191]

Yet one particularly influential explanation, advanced in the 1813 Massachusetts case of *Bissell v. Briggs*,[192] was simply that the restrictions had existed in international law before the Constitution and that the 1790 Act had left them in place. Before the Articles of Confederation, 'all the courts of the several provinces, colonies or states were, at common law, deemed to be foreign to each other, and judgments rendered by any one of them were considered by the others as foreign judgments.'[193] The Constitution and 1790 Act had altered the recognition process in various ways, but neither had the 'intention of enlarging, restraining, or in any manner operating upon, the jurisdiction of the courts of any of the *United States*, which 'remains as it was before.'[194] To receive any benefit from the 'federal constitution, then, 'the court must have had jurisdiction, not only of the cause, but of the parties'[195]—under rules that the Constitution didn't supply. Should a state court 'render judgment against a man not within the state, nor bound by its laws, nor amenable to the jurisdiction of its courts, its jurisdiction 'might be inquired into' in another tribunal, 'and if a want of jurisdiction appeared, no credit would be given to the judgment.'[196]

These views continued to dominate in state courts, and the Supreme Court took care to leave the jurisdictional issue open when it opted for the 'effect' interpretation in *Mills*.[197] The Court reaffirmed *Mills* in *Hampton v. M'Connel*,[198] and the jurisdictional issue was understood to stay open

187. Kilburn v. Woodworth, 5 Johns. 37, 40 (N.Y. Sup. Ct. 1809) (argument of counsel).

188. *Id.* at 41 (majority opinion) (per curiam).

189. *Rogers*, 3 Ky. (Hard.) at 419.

190. *See id.* at 417 ("Jurisdiction of the courts, is spoken of, and a proper attention to that subject, will furnish an easy solution ").

191. *Id.*

192. 9 Mass. (9 Tyng) 462 (1813) (per curiam).

193. *Id.* at 464–65 (Parsons, C.J.).

194. *Id.* at 467.

195. *Id.* at 468.

196. *Id.*

197. *See* Mills v. Duryee, 11 U.S. (7 Cranch) 481, 484 (1813) (noting pointedly that "the Defendant had full notice of the suit, for he was arrested and gave bail"); *see also id.* at 486–87 (Johnson, J. dissenting) (worrying that details of common-law pleading might lead to the enforcement of out-of-state judgments contrary to "eternal principles of justice which never ought to be dispensed with").

198. 16 U.S. (3 Wheat.) 234, 235 (1818) (Marshall, C.J.).

afterwards,[199] despite some indications to the contrary.[200] By 1828, according to the highest court of Massachusetts, "almost every State court in the Union' had ruled on the subject, and their views were 'unanimous' that 'in all instances, the jurisdiction of the court rendering the judgment may be inquired into.'[201] The 'principles of the common law' applicable 'to judgments of the tribunals of foreign countries' were still just as applicable 'to the judgments of the courts of the several States when sought to be enforced [abroad].'[202] Positions like these were repeatedly expressed by state courts.[203]

C. *Jurisdiction in Federal Court*

This account of state courts is largely consistent with the scholarly consensus. What's less well known is the role of federal courts in this system—and that they, too, held the judgments of state courts at arm's length.

In the early Republic, relatively few interesting personal jurisdiction questions arose in cases filed originally in federal court. Under the Judiciary Act of 1789, no one could be 'arrested in one district for trial in another, in any civil action before a circuit or district court, and a suit against a U.S. resident had to be heard in the district 'whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.'[204] In any suit that satisfied the statute, personal jurisdiction was already airtight.

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199. *Id.* at 236 n.c (1818) (reporter's footnote) ("[I]t may safely be affirmed, that the question is still open in this court whether a plea to the jurisdiction of the court in which the judgment was obtained might, in some cases, be pleaded to avoid the judgment."); Gerault v. Anderson, 1 Miss. (1 Walker) 30, 33 (1818) (noting contemporary agreement "that the jurisdiction of [another state's] courts can be enquired into, in an action brought on a judgment"); *see also* Aldrich v. Kinney, 4 Conn. 380, 386 (1822) (holding that only judgments 'as are duly rendered by a court of competent jurisdiction' need to be afforded full faith and credit); Borden v. Fitch, 15 Johns. 121, 144 (N.Y. Sup. Ct. 1818) (holding that a judgment rendered by another state is only "conclusive where the defendant was arrested, or had in some way appeared, and had an opportunity of defending the original suit").

200. *See* Lanning v. Shute, 5 N.J.L. 778, 779–80 (1820) ("The question presented by these pleadings [attacking a New York judgment] has been considered and settled in the Supreme Court of the *United States*, in the case of *Hampton v. M'Connel.* This last is conclusive we have no further discretion upon it.").

201. Hall v. Williams, 23 Mass. (6 Pick.) 232, 244 (1828).

202. *Id.* at 238.

203. *See, e.g.*, Dearing v. Bank of Charleston, 5 Ga. 497, 513 (1848) ("[T]he Constitution leaves this question where we find it—it is still a question of jurisdiction and State authority."); Starbuck v. Murray, 5 Wend. 148, 158 (N.Y. Sup. Ct. 1830) (holding, as to jurisdiction, that "the judgment of a court of another state is in its effect like a foreign judgment"); Steel v. Smith, 7 Watts & Serg. 447, 451 (Pa. 1844) ("Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the revolution."); *see also* Sallee v. Hays, 3 Mo. 116, 117–18 (1832) (reading *Mills* to permit a Missouri court to set aside a Kentucky judgment on jurisdictional grounds).

204. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

But federal courts did hear actions involving the recognition of other courts' judgments, giving them opportunities to comment on the general rules. Federal courts, like state courts, reviewed the judgments of other judicial systems much like those of foreign nations.[205] As in the maritime insurance cases studied by Judge Fletcher, federal and state courts saw themselves as engaged in the same enterprise, with the U.S. Supreme Court as '*primus inter pares*' in determining questions of general law.[206] The 1790 Act, which applied to 'every court within the United States,'[207] made it particularly urgent for federal courts to decide which judgments to enforce, but it left the law of jurisdiction as it stood. And by directing new cases into federal courts, the statute created new opportunities to assess the states' compliance with the general law.

1. General Principles.—The federal courts' approach flowed naturally from the ordinary procedure on collateral attack. Consider *Elliott v. Lessee of Peirsol*,[208] which arose from a challenge in a federal court in Kentucky to a prior Kentucky judgment for lack of subject-matter jurisdiction. The Supreme Court affirmed the lower court's decision in 1828, noting that 'the jurisdiction of *any* Court exercising authority over a subject, may be inquired into in *every* Court, when the proceedings of the former are relied on.'[209] With jurisdiction, the state court's judgment would normally be binding and conclusive; without jurisdiction, 'its judgments and orders are regarded as nullities.'[210] Even though the Kentucky state and federal courts were as closely related as courts from different systems could be, the Court saw no reason why the state courts' jurisdiction would be immune from scrutiny: 'We know nothing in the organization of the Circuit Courts of the Union, which can contradistinguish them from other Courts, in this respect.'[211]

A few years earlier, in *Flower v. Parker*,[212] Justice Story had taken the same approach as to personal jurisdiction. A Massachusetts court gave judgment against a Louisiana resident after 'trustee process' on locals who owed him money:[213] when the Louisianan later tried to recover from the locals in a Massachusetts federal court, the locals pled the state-court judgment in defense.[214] On circuit, Story noted that Massachusetts might have had in rem jurisdiction over the debts themselves (as in the later, more

205. For extended discussion of this issue, see *infra* text accompanying notes 319–46.
206. Fletcher, *supra* note 79, at 1575.
207. Act of May 26, 1790, ch. 11, 1 Stat. 122.
208. 26 U.S. (1 Pet.) 328 (1828).
209. *Id.* at 340–41 (emphasis added).
210. *Id.* at 340.
211. *Id.*
212. 9 F. Cas. 323 (Story, Circuit Justice, C.C.D. Mass. 1823) (No. 4891).
213. *Id.* at 323–24.
214. *Id.*

famous case of *Harris v. Balk*),[215] but the original creditor had bungled the state procedures.[216] More importantly, though the initial action had listed the Louisianan as a defendant, Story found that the judgment didn't actually bind him—based on the 'universal' principle, 'consonant with the general principles of justice, that the legislature of a state can bind no more than the persons and property within its territorial jurisdiction.'[217] Indeed, Story wrote, '[n]o legislature can compel any persons, beyond its own territory, to become parties to any suits instituted in its domestic tribunals.'[218] In other words, the federal circuit court reviewed a judgment from Massachusetts under the same general principles as one from anywhere else.

2. Full Faith and Credit.—Nothing in the Constitution or the 1790 Act required the courts to do otherwise. While some federal decisions on the 'effect' controversy simply skipped over the jurisdictional issues,[219] one early case did not. In 1799, Justice Washington on circuit refused to treat a Maryland bankruptcy discharge as discharging the defendant's debt to a Virginia creditor.[220] As the plaintiff hadn't been summoned to attend the proceeding, the discharge couldn't really 'be considered as a judgment of a Maryland court, which can bind persons residing out of that state.'[221] Washington specifically compared the issue to that of recognition of a foreign judgment, noting that while admiralty decisions received a certain preference under the law of nations, 'the justice of other decisions may be questioned, and if a law of a foreign country were to declare that a decision of causes, without notice, should bind everybody, no foreign country would observe it.'[222] The Full Faith and Credit Clause *might* have been read to require obedience to such a judgment, but it gave the duty of prescribing effect to Congress, and according to Justice Washington, nothing that Congress had written gave any effect to the discharge at issue.[223]

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215. 198 U.S. 215 (1905).

216. *See Flower*, 9 F. Cas. at 325–26.

217. *Id.* at 324–25.

218. *Id.* at 324.

219. *See, e.g.*, Bastable v. Wilson, 2 F. Cas. 1012, 1012 (C.C.D.C. 1803) (No. 1097) (per curiam) (refusing a plea of *nil debet* to an action of debt on a state judgment); Armstrong v. Carson, 1 F. Cas. 1140, 1140 (Wilson, Circuit Justice, C.C.D. Pa. 1794) (No. 543) (same).

220. Banks v. Greenleaf, 2 F. Cas. 756, 756, 758–59 (Washington, Circuit Justice, C.C.D. Va. 1799) (No. 959).

221. *Id.* at 758.

222. *Id.*

223. *Id.* at 759. *But see* Green v. Sarmiento, 10 F. Cas. 1117, 1119–20 (Washington, Circuit Justice, C.C.D. Pa. 1810) (No. 5760) (suggesting in dicta ten years later that the validity of a New York state judgment under the 1790 Act would turn only on New York law, without recognizing any tension with *Banks*, and noting only that cases where a judgment rendered "exparte," with "the defendant having had no opportunity to make his defense might form an exception"); Field v. Gibbs, 9 F. Cas. 15, 16 (Washington, Circuit Justice, C.C.D.N.J. 1815) (No. 4766) ("[W]hat is to be done, if the judgment has been obtained against a person, residing out of the state, who was never served with process, or even notified of the existence of the suit, in which it was rendered? I

After leaving the matter open for some decades, the Supreme Court appeared to endorse this view in 1839, when it noted in *M'Elmoyle v. Cohen*[224] that federal courts presented with prior state-court judgments could 'inquire' into 'the right of the state itself to exercise authority over the persons or the subject matter.'[225] Echoing the reasoning of *Bissell* (and of Justice Story's then-recent treatise on the Constitution), the Court wrote that the Full Faith and Credit Clause 'did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state.'[226]

In 1851, the Court settled the issue in *D'Arcy v. Ketchum*,[227] holding that neither the Clause nor the 1790 Act gave effect to judgments that lacked jurisdiction under international law. *D'Arcy* involved a New York judgment against several copartners based on the appearance of one of them, a procedure accepted in New York but not universally.[228] The creditor tried to enforce the judgment in a federal court in Louisiana[229]—facing that court with 'the question, whether the New York statute, and the judgment founded on it, bound a citizen of Louisiana not served with process.'[230] On writ of error, the Court analyzed the question in terms familiar since *Bissell*: under 'well-established rules of international law, regulating governments foreign to each other, courts would 'disregard a judgment merely against the person, where he has not been served with process nor had a day in court.'[231] Such a proceeding 'is deemed an illegitimate assumption of power, and resisted as mere abuse.'[232] That was 'the international law as it existed among the States in 1790,'[233] and neither the Constitution nor the 1790 Act had 'altered the rule'.[234] Congress legislated '[s]ubject to this established principle, and without any intent 'to overthrow [it].'[235] Even if New York's statutory service provisions were valid in New York's courts, they had no power to 'bind the citizens of one State to the laws of another.'[236] New York could *say* that its judgments were valid, but under ordinary conflicts principles, no

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answer, that his remedy is the same, and no other, as would be open to him, if the suit had been brought in the state, where the judgment was rendered. (footnote omitted)).

224. 38 U.S. (13 Pet.) 312 (1839).

225. *Id.* at 326–27.

226. *Id.* at 327 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1307, at 183 (Boston, Hilliard, Gray & Co. 1833)).

227. 52 U.S. (11 How.) 165 (1851).

228. *Id.* at 166–67, 174.

229. *Id.* at 167.

230. *Id.* at 174.

231. *Id.*

232. *Id.*

233. *Id.* at 176.

234. *Id.* at 174.

235. *Id.* at 176.

236. *Id.*

one else had to listen. New York's statutes simply couldn't settle the question when 'neither the legislative jurisdiction [of New York], nor that of [its] courts of justice, had binding force.'[237]

3. Federal-Question Review.—D'Arcy was purely a negative decision: it confirmed that courts were under no obligation to recognize a judgment that lacked international sanction. But it quickly gave rise to more affirmative holdings, as the federal courts were now clearly committed to international rules of jurisdiction. So when one state court denied recognition to the valid judgment of another—valid, that is, according to the federal view of things—the losing party could seek Supreme Court review under section 25 of the Judiciary Act, portraying the denial as contrary to a 'title, right, privilege or exemption specially set up or claimed' under the 1790 Act.[238]

In this way, the 1790 Act served as an occasional 'hook' for the Court to correct state-court errors on the general law of jurisdiction. In 1867, the Court held that it had federal-question jurisdiction to review a New York decision refusing to give effect to an Illinois judgment.[239] Two New Yorkers claimed certain movable property located in Chicago; the property was attached and awarded to one of them in Illinois, but a New York court later denied Illinois's in rem jurisdiction, in light of an outstanding mortgage under New York law.[240] The two states' substantive laws disagreed on whether the property had been liable to attachment, and the Supreme Court applied what it saw as the general conflicts rule—namely that the state where the property was located had had full power to attach and dispose of it.[241]

This rule didn't come from any federal statute, of course, and questions of general law couldn't support federal jurisdiction on their own.[242] If the issue were merely one of New York law, or even of general conflicts or property law that New York had adopted as its own, then the Court would have had no grounds for federal-question review of the New York judgment[243]—any more than it could review ordinary errors in state property

237. *Id.*

238. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86 (codified as amended at 28 U.S.C. § 1738 (2012)); *accord* Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130, 134 (1875) ("[W]hether the validity or due effect of a judgment of the State court, or that of a judgment of a United States court, is disallowed by a State court, the Constitution and laws furnish redress by a final appeal to this court."); *see also* Christmas v. Russell, 72 U.S. (5 Wall.) 290, 301–03 (1866) (holding that the 1790 Act rendered a Mississippi statute "unconstitutional and void as affecting the right of the plaintiff to enforce" a valid Kentucky judgment).

239. Green v. Van Buskirk, 72 U.S. (5 Wall.) 307, 314 (1867).

240. *Id.* at 311, 313.

241. Green v. Van Buskirk, 74 U.S. (7 Wall.) 139, 148–52 (1869).

242. N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286, 287 (1875).

243. *See* Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 325 (1818) (Story, J.) (refusing to examine a state court's award of damages because it was "a question depending altogether upon the common law," and not on a "law of the United States").

or contract cases as unconstitutional takings or impairments of contracts.[244] The Court wouldn't invent federal issues by assuming that state courts had gotten their own law wrong.[245]

Today we might explain the Court's involvement by reference to modern concepts of federal common law.[246] James Weinstein, for example, has argued specifically in these terms, contending that the 1790 Act implicitly authorized a federal common law that was 'essentially homegrown' rather than 'mindlessly adopted' from international standards.[247] As Weinstein correctly notes, early courts often described the rules they applied as being good policy[248]—much as courts often do today. But it's hardly clear that these courts actually viewed their rules as purely 'instrumental"[249]—or that their routine claims to be applying international standards,[250] or at least *attempting* to apply them, were made in bad faith. Rather than reading the Act as implicitly authorizing something new, the simpler explanation—and the one more faithful to the sources' own self-understanding—may just be that the Act failed to override something old.

Instead, what made the 1790 Act special was that it rested a federal issue (such as whether an Illinois judgment had to be recognized by other courts) on a state judgment's *international* validity and, in turn, on the reach of the state court's jurisdiction under the preexisting international law.[251] This was a question of general law, and one which New York's laws couldn't override—at least not in a way that the courts of other sovereigns had to

244. *See, e.g.*, R.R. Co. v. Rock, 71 U.S. (4 Wall.) 177, 181 (1866) (rejecting an argument that "every case of a contract held by the State court not to be binding, for any cause whatever, can be brought to this court for review").

245. *See* Miller v. Nicholls, 17 U.S. (4 Wheat.) 311, 315 (1819) (Marshall, C.J.) ("No other question is presented, than the correctness of the decision of the State Court, according to the laws of Pennsylvania, and that is a question over which this Court can take no jurisdiction."); *see also* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 638 (1875) (declining to review the portion of a Tennessee judgment based on 'general principles of equity jurisprudence' and "unaffected by anything found in the Constitution, laws, or treaties of the United States"); Rector v. Ashley, 73 U.S. (6 Wall.) 142, 147 (1867) (refusing to undertake the "useless labor" of reviewing a judgment sustainable on state-law grounds).

246. *Cf.* Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 626 (2013) (arguing that, '[a]fter *Erie*,' federal courts are limited in their ability to apply general law directly, but "may create federal common law that incorporates or chooses general law").

247. Weinstein, *supra* note 20, at 193, 195.

248. *See id.* at 195–98 (providing examples of "early nineteenth-century judges,' both state and federal, who "candidly acknowledged the instrumental reasons" for limits on jurisdiction).

249. *Id.* at 195.

250. *E.g.*, Bryant v. Ela, 1 Smith 396, 401 (N.H. 1815) ("The law of nations forms a part of the law of Vermont, and of this State, and of every independent State.").

251. *See* Green v. Van Buskirk, 74 U.S. (7 Wall.) 139, 148–51 (1869); *see also* Crapo v. Kelly, 83 U.S. (16 Wall.) 610, 618–22 (1872) (exercising federal-question jurisdiction to decide, based on general conflicts principles, that a Massachusetts judgment was valid and so required recognition in New York); Whitten, *Part One*, *supra* note 11, at 587–89 (summarizing the effect of *Green* and *Crapo*).

respect. New York could *say* that an Illinois judgment was invalid, but that wouldn't make it so.

This interdependence of federal and general law was what separated the general law of jurisdiction from, say, the law of negotiable instruments applied in *Swift v. Tyson*[252]—or from any other field of general law from which the states could depart by legislation.[253] To the extent that a federal question rested directly on the general law of jurisdiction, a federal court had to take its own view of the issue,[254] rather than treating it as a question of state law on which a state court—or even a state statute—might have the last word.[255] As one law review put it, 'the question of jurisdiction being thus thrown open to inquiry, the courts are at liberty to govern their conduct upon the subject, by the principles of international law.'[256]

D. Departures from General Law

The Full Faith and Credit Clause, together with the 1790 Act, partly federalized the general law of personal jurisdiction. But they did so in a very particular way. Despite what some scholars have argued, *D'Arcy* didn't hold that the Act or Clause simply adopted the then-prevailing standards of jurisdiction, as if in invisible ink.[257] Neither did they authorize new fields of federal common lawmaking. Instead, they merely obliged states to respect valid sister-state judgments, full stop. But when the question of validity came before a federal court, whether in its original jurisdiction or on Supreme Court review, that court would have to determine the question according to its own views of general law.[258] As later courts recognized, *D'Arcy* simply applied a rule of international law, which it held that federal law had left alone.[259] This left substantial flexibility, both for states and for Congress, to depart from the general standards.

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252. 41 U.S. (16 Pet.) 1 (1842).

253. *See id.* at 18 (noting that "the Courts of New York do not found their decisions upon this point upon any local statute," and suggesting that a federal court would be obliged to enforce that statute if they did).

254. *Cf.* Huntington v. Attrill, 146 U.S. 657, 683–84 (1892) (holding that if a state refuses to recognize what it sees as a penal judgment, the Court "must determine for itself whether the original cause of action is penal in the international sense").

255. *See supra* note 102 and accompanying text.

256. Alexander Martin, *Actions Against Non-residents and Absentees*, 15 AM. L. REG. 1, 9 (1866).

257. *See, e.g.*, Rheinstein, *supra* note 25, at 795–96 (taking the Clause, as construed by *D'Arcy*, to apply "to the judicial proceedings of such other State as under the Law of Nations has had jurisdiction to proceed judicially"). *But see* David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1589 (2009) (noting that the Clause itself—as opposed to the 1790 Act—wasn't understood to stipulate the effect of state acts or judgments until the decision in *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615 (1887)).

258. *See supra* subpart II(C).

259. *See, e.g.*, Hall v. Lanning, 91 U.S. 160, 168–69 (1875) (describing *D'Arcy* as reading the 1790 Act to "prescribe only the effect of judgments" of courts that "had jurisdiction," including "by

As general law, the rules of personal jurisdiction could be overridden by state law within a state's own courts. If a state wanted its courts to recognize the exorbitant decisions of some other tribunal (domestic or foreign), that was just fine. General law could be overridden by statute, and neither the Clause nor the Act forbade states to act against interest.[260] Or if a state simply misunderstood the international rules, accepting more sister-state judgments as valid than it had to, that was fine, too.[261] And if a state wanted to ignore *D'Arcy* and serve process on copartners anyway, within its own courts, that was *also* fine. So long as it understood that other courts might not enforce its judgments, it would never have to worry about federal review. As one mid-nineteenth-century commentator wrote, '[i]t could hardly be shown that such a law was in violation of the Federal Constitution, and the courts would not be justified in declaring it void as opposed to natural justice or the principles of international law.'[262] The only rule binding the states was that, if a state or federal judgment *did* have jurisdiction, under its own law and under the international rules, it had to be given effect under the 1790 Act. If a state court failed in this, its decision could be taken up to the Supreme Court[263]—in which case the federal courts' view of the general law was the one that counted.

Yet general law could be overridden in federal courts too. Because the Full Faith and Credit Clause didn't really constitutionalize jurisdiction, it left it open for Congress—in the exercise of some enumerated power—to rewrite the rules. International standards of jurisdiction could be used to supplement and interpret federal statutes, as other international rules are today.[264] But they could also be abrogated, both for federal and for state courts.

Congress's power was prominently examined in the 1828 case of *Picquet v. Swan*,[265] in which Justice Story on circuit used the general law to

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international law"); Price v. Hickok, 39 Vt. 292, 298, 301 (1866) (describing *D'Arcy*—under the wrong name but the correct page citation—as resting "upon general principles of international law existing between the several states of the Union").

260. *See* Bissell v. Briggs, 9 Mass. (9 Tyng) 462, 466 (1813) (describing a 1795 Massachusetts statute that recognized judgments rendered in other states and adding that "we know of no provision in the federal constitution, or in any law of Congress passed in pursuance of it, prohibiting any state from giving to judgments recovered in any other state any effect it may think proper" so long as the state "does not derogate from the effect secured by the constitution, and the acts of congress passed under it").

261. *Cf.* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1585–86 (1990) (noting that before 1914, the Supreme Court lacked jurisdiction to review state decisions mistakenly *upholding* claims of federal right).

262. Martin, *supra* note 256, at 12.

263. *See supra* note 238 (discussing Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130 (1875)).

264. *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (stating the canon that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *see also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (invoking this canon).

265. 19 F. Cas. 609 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134).

resolve a potential conflict between two acts of Congress. The Process Act of 1792 told federal courts to use certain state modes of proceeding[266]—which included, in *Picquet*, a version of foreign attachment.[267] Yet by the Judiciary Act of 1789, as noted above, a suit against a U.S. resident could only be brought in the district 'whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.'[268] Story reconciled the two by holding that plaintiffs could 'use the appropriate state process' to reach defendants who already met the Judiciary Act's terms—but that state laws could 'confer no authority on this court to extend its jurisdiction over persons or property, whom it could not otherwise reach.'[269]

The Supreme Court endorsed the same solution a decade later,[270] but what's more important is Story's reasoning. The reach of any court, whether state or federal, was presumed to be limited by 'the general principles of law [that] must be presumed to apply to them all'—namely, that a court of a particular territory 'is bounded in the exercise of its power by the limits of such territory.'[271] Because the Judiciary Act had created territorial districts, the territorial scope of a lower court's powers would be determined by applying the ordinary rules of international law.[272]

Yet if the jurisdictional rules only had the status of general law, they could be overridden by statute. If Congress wanted to, it could tell the federal courts to send their process 'into every state in the Union'[273]—a conclusion that the Supreme Court would later reach as well.[274] Indeed, Story wrote, if Congress ordered that 'a subject of England, or France, or Russia, be summoned from the other end of the globe,'[275] a federal court 'would certainly be bound to follow it, and proceed upon the law.'[276] Story expressed no sense of any constitutional limit on this power, in the Fifth Amendment's Due Process Clause or anywhere else. All that mattered was whether the court had jurisdiction—and the only limits on its jurisdiction were those of general law, which federal statutes would always outrank. Such an exorbitant jurisdiction would, of course, 'be deemed an usurpation of foreign sovereignty, not justified or acknowledged by the law of

266. *See generally* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275.

267. 19 F. Cas. at 609–10.

268. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

269. *Picquet*, 19 F. Cas. at 611.

270. *See* Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838) (concurring with *Picquet*'s substance and describing its reasoning "as having great force").

271. *Picquet*, 19 F. Cas. at 611.

272. *Id.*

273. *Id.*

274. *Toland*, 37 U.S. at 328.

275. *Picquet*, 19 F. Cas. at 613.

276. *Id.* at 615.

nations' ·[277] so Story wouldn't lightly 'infer[]' so extraordinary a rule 'from so general a legislation as congress has adopted. '[278] But Story offered no reason to suppose that, if Congress *did* want to assert universal jurisdiction, there was anything in the Constitution to stop it.

Congress's ability to revise the law of jurisdiction may also have extended into the state courts. Under the second sentence of the Full Faith and Credit Clause, Congress had power 'by general Laws' to 'prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.'"[279] In a series of proposals in the early nineteenth century. congressional drafters repeatedly made the effect of a judgment in other states turn on the source of personal jurisdiction.[280] One typical bill proposed in 1806 would have made state judgments conclusive 'against any party thereto, who appeared, or was personally served with legal notice to appear'—but rebuttable on the merits if the defendant 'neither appeared, nor was personally served with legal notice. '[281]

If the Constitution itself had required personal service, or even just adherence to the international rules, these bills would have been unconstitutional: a judgment without jurisdiction was *void*, not merely rebuttable. But if the jurisdictional rules were general law. they could be abrogated by a properly enacted statute. Congress could use its power to 'prescribe the Effect"[282] of state judgments by determining which ones would be recognized in federal courts, whether or not they would be respected abroad. As it happens, none of these bills were ever enacted. But the fact that they were proposed, and that the objections to them typically weren't phrased in constitutional terms, suggests that there was no firm consensus *against* their constitutionality—and that if Congress had tried to exercise its power, it might well have succeeded.[283]

III. What *Pennoyer* Got Right

At the Founding, personal jurisdiction was a topic in general law, focused on a state's sovereign power over persons or property within its territory. Today, it's a constitutional question rooted in due process. How

277. *Id.* at 611.

278. *Id.* at 615.

279. U.S. CONST. art. IV, § 1.

280. *See* Sachs, *supra* note 150, at 1254–57, 1262–66, 1267–74 (describing these proposals).

281. H.R. 46, 9th Cong., § 1 (1st Sess. 1806). For other proposals, see H.R. 17, 15th Cong. (1st Sess. 1817); H.R. 45, 13th Cong. (2d Sess. 1814); H.R. 20, 10th Cong. (2d Sess. 1808).

282. U.S. CONST. art. IV, § 1.

283. *See* Sachs, *supra* note 150, at 1270–74 (describing the debates over the 1817 proposal); *see also id.* at 1264–65 n.278 ("[T]he cases and bills discussed here show judgments rendered without personal service were thought to be potentially enforceable. [T]here is no indication in the debates that such enforcement by a federal court would have violated due process.").

did we get from there to here? And how could *Pennoyer* have lawfully brought about this change?

As it turns out, *Pennoyer* was a sensible, perhaps even natural consequence of combining existing jurisdictional doctrines with the newly enacted Fourteenth Amendment. *Pennoyer*'s application of traditional principles was more or less right, in both reasoning and result. More importantly, *Pennoyer* was right as to its most 'novel, even 'startling, contribution to American law: the identification of due process as a limit on state jurisdiction.[284] On that question, *Pennoyer*'s approach was and is entirely defensible.

The starting point for *Pennoyer*'s holding was that state and federal courts could take different views of the general law. As other scholars have concluded,[285] *Pennoyer* didn't try to 'constitutionalize' jurisdiction, in the sense of elevating specific rules to constitutional status. To the Court, jurisdictional doctrine was just a branch of the ordinary general law, one on which federal and state courts could amicably disagree. What the Fourteenth Amendment changed wasn't the status of the law of jurisdiction, but the consequences of that disagreement.

The reason was that due process often depended on a court's jurisdiction, full stop. Due process is commonly thought to forbid deprivations of liberty or property without the lawful judgment of a properly authorized court.[286] The insight underlying *Pennoyer* is that a court lacking in personal jurisdiction isn't properly authorized, so it can't issue a lawful judgment. Relying on the judgment to take property away from the defendant, limit his or her liberty, and so on, works a deprivation without due process.

As a result, even though it didn't speak to jurisdiction directly, the Fourteenth Amendment altered the prevailing jurisdictional rules by adjusting the mechanisms of appellate review. When determining the presence or absence of jurisdiction, courts of the United States would have to take an independent view of the general law, not bound by state statutes or by the decisions of state courts. Should a state disagree with the federal courts, its judgment might appear—in federal eyes—to lack jurisdiction under general law, and so to threaten a violation of due process. That meant the losing party could seek review in the Supreme Court, with the lack of Fourteenth Amendment due process providing the necessary federal question. And because the state courts knew all this in advance, they would have to adopt the federal view of things, to avoid any future reversals. In short, the Fourteenth Amendment effectively federalized the law of jurisdiction without anyone necessarily intending to. It created an obligation

284. Perdue, *Scandal*, *supra* note 20, at 499–500.

285. *See* Perdue, *Sovereignty*, *supra* note 20, at 732.

286. *See infra* section III(B)(1).

for state courts—one that hadn't existed before—to follow the federal courts' lead on questions of personal jurisdiction.

The goal of this analysis isn't to discover some gnostic 'true meaning' of *Pennoyer*, much less to read the mind of Justice Field. Instead, the goal is to put forward a plausible reading of *Pennoyer*—and, most importantly, to show why this sympathetic reconstruction would have been legally correct.

A. Pennoyer *Without the Fourteenth Amendment*

To see what *Pennoyer* changed, it's important to start with what it took for granted. This subpart explores *Pennoyer* as if it were a pre-Fourteenth Amendment case, showing why it would have been correctly decided on existing legal grounds.

To start with, *Pennoyer* was a recognition case. It stemmed from a default judgment of an Oregon state court, in a lawsuit by John Mitchell against Marcus Neff for unpaid legal fees.[287] Neff having moved to California, process was served by publication under Oregon statutes.[288] A default judgment issued and was executed against Neff's land, which was eventually conveyed to Sylvester Pennoyer—against whom Neff, on returning, filed a diversity action in Oregon federal court.[289] The trial court saw various defects in the publication process, but the Supreme Court held that all state-law requirements had been satisfied; the problem with the state judgment, if there was one, rested on 'principle[s] of general, if not universal, law.'[290]

Just as other federal courts had done before, the Court in *Pennoyer* examined the Oregon judgment as the tribunal of a separate sovereign, subject to international standards. Except insofar as the states were 'restrained and limited' by the Constitution, they still retained "the authority of independent States.'[291] This authority was determined by reference to 'principles of public law"[292]—a reference, in contemporary legalese, to international law.[293] And among those principles, the Court stated, was the rule that 'no State can exercise direct jurisdiction and authority over persons or property without its territory, such as by 'extend[ing] its process beyond

287. The best treatment of the facts and personalities involved is generally acknowledged to be Perdue, *Scandal*, *supra* note 20.

288. *See* Pennoyer v. Neff, 95 U.S. 714, 716–17 (1878) (statement of the case); *id.* at 720 (opinion of the Court).

289. *Id.* at 715–16 (statement of the case).

290. *Id.* at 720–21 (opinion of the Court).

291. *Id.* at 722.

292. *Id.*

293. *See* Conison, *supra* note 3, at 1090; Drobak, *supra* note 24, at 1026 n.59; Weinstein, *supra* note 20, 180 n.45.

that territory so as to subject either persons or property to its decisions."[294] As the Court saw things, the Oregon judgment failed on both counts.

1. Jurisdiction over Persons.—According to *Pennoyer*, before it could determine a nonresident's 'personal rights and obligations' (including, say, the obligation to pay legal fees), a state needed jurisdiction over the person.[295] This jurisdiction couldn't be obtained by sending process 'into another State, and summon[ing] parties there domiciled to leave its territory and respond to proceedings against them.'[296] Nor would publishing the summons internally 'create any greater obligation upon the non-resident to appear.'[297]

These conclusions were entirely orthodox. While *Pennoyer*'s views on personal service have had their share of historical criticism, other research has defended their general outlines.[298] The standard nineteenth-century means of establishing in personam jurisdiction was to show the defendant's subjection to the court, whether by voluntary appearance or by lawful service of a summons to appear.[299] Mere notice to the defendant wasn't enough.[300] To make the defendant 'bound to appear' as a matter of general principle,[301] states needed to accomplish an official legal act, which they only had power to do within their own territories.[302]

There were a few recognized exceptions to the rule, but not many. States were seen as having more freedom to create novel service methods for their

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294. *Pennoyer*, 95 U.S. at 722.

295. *Id.* at 732.

296. *Id.* at 727.

297. *Id.*

298. *Compare* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens*, 65 YALE L.J. 289, 292 (1956) (arguing against a historical service requirement), *and* Hazard, *supra* note 14, at 271 (same), *with* Weinstein, *supra* note 20, at 189–90 (arguing that the service requirement was well-established historically), *and* Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 94 (1968) ("The common law courts neither exercised nor believed they could exercise jurisdiction in personal actions without either physical custody of the defendant or an appearance by him.").

299. *See, e.g.*, Nations v. Johnson, 65 U.S. (24 How.) 195, 205 (1860); Harris v. Hardeman, 55 U.S. (14 How.) 334, 339 (1852); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 623 (1838); Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466, 472 (1830); Rogers v. Coleman, 3 Ky. (Hard.) 413, 424–25 (1808); Hall v. Williams, 23 Mass. (6 Pick.) 232, 241 (1828); Borden v. Fitch, 15 Johns. 121, 144 (N.Y. Sup. Ct. 1818); *see also* Levy, *supra* note 298, at 63 (describing the history of the summons).

300. *See* Gerault v. Anderson, 1 Miss. (1 Walker) 30, 34 (1818) (describing notice and authority as distinct requirements); *accord* Ewer v. Coffin, 55 Mass. (1 Cush.) 23, 28 (1848); Colvin v. Reed, 55 Pa. 375, 380 (1867); Benton v. Burgot, 10 Serg. & Rawle 240, 241 (Pa. 1823); STORY, *supra* note 157, § 546, at 457–58.

301. Picquet v. Swan, 19 F. Cas. 609, 612 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134).

302. *See* Warren Mfg. Co. v. Etna Ins. Co., 29 F. Cas. 294, 298 (Thompson, Circuit Justice, C.C.D. Conn. 1837 [approximate date]) (No. 17,206) (holding that personal service beyond a state's borders could have no legal effect); *accord Ewer*, 55 Mass. (1 Cush.) at 28; Fenton v. Garlick, 8 Johns. 194, 197 (N.Y. Sup. Ct. 1811); Hitchcock v. Aicken, 1 Cai. 460, 484 (N.Y. Sup. Ct. 1803) (opinion of Lewis, C.J.); Price v. Hickok, 39 Vt. 292, 296 (1866).

own citizens or residents, who had separate obligations to obey their own state's laws.[303] There were special rules for cases involving marriage or divorce,[304] as well as for corporate defendants.[305] But these subject-specific additions didn't do much to change the general rule. By the mid-nineteenth century, one Massachusetts court had called the matter 'now too well settled to admit of discussion, that if a defendant 'is not served with process, and does not voluntarily appear and answer to the suit, any resulting judgment 'cannot be enforced against him out of the local jurisdiction.'[306]

2. Jurisdiction over Property.—The other route to defending the Oregon judgment was as a judgment in rem. Oregon unquestionably had power over Neff's land within its borders, and the Supreme Court agreed that it could use that land to satisfy claims against its owner.[307] But as *Pennoyer* saw things, states could exercise in rem jurisdiction after service by publication only 'where property is once brought under the control of the court by seizure or some equivalent act.'[308] Neff's property was first brought under the court's control as part of the process of execution, well after the judgment had issued.[309] That meant the judgment, when it issued, wasn't really in rem at all, but just an ordinary judgment for money damages.

This analysis, too, was largely orthodox. No state, the Court had held in 1844, 'can arrogate to itself the power of disposing of real estate without the forms of law' it had to 'obtain jurisdiction of the thing in a legal mode.'[310] Attaching property would be taken, other cases said, 'as constructive notice to the whole world'—but only 'where the proceeding is

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303. *See* Welch v. Sykes, 8 Ill. (3 Gilm.) 197, 201 (1846) (holding that a state's new mode of process can be "binding on its own citizens"); Weaver v. Boggs, 38 Md. 255, 261 (1873) (describing constructive service as "binding upon persons domiciled within the State where such law prevails," a rule "based upon international law"); *see also* Dearing v. Bank of Charleston, 5 Ga. 497, 510–11 (1848) (construing a statute regarding service to apply only to English subjects, as "the citizen of each independent State should be liable to, and be protected by, the laws of the State to which he owes allegiance"); Sim v. Frank, 25 Ill. 125, 127 (1860) (stating that a Pennsylvania statute allowing judgment without notice or appearance "can only be binding upon citizens of that State"); Douglas v. Forrest (1828) 130 Eng. Rep. 933, 940; 4 Bing. 686, 703 (C.P.) (permitting a judgment by foreign attachment when "the party owed allegiance to the country," by whose laws "his property was, at the time those judgments were given, protected"); Martin, *supra* note 256, at 7 (noting the commonly invoked "principle," of which he strongly disapproved, that "every citizen is amenable to the laws of his country wherever he may be").

304. *See, e.g.*, *Colvin*, 55 Pa. at 378–83.

305. *See, e.g.*, *Warren Mfg. Co.*, 29 F. Cas. at 299; Moulin v. Trenton Mut. Life & Fire Ins. Co. 24 N.J.L. 222, 234 (1853).

306. Phelps v. Brewer, 63 Mass. (9 Cush.) 390, 395–96 (1852); *accord Sim*, 25 Ill. at 127; Melhop v. Doane & Co. 31 Iowa 397, 406–07 (1871).

307. Pennoyer v. Neff, 95 U.S. 714, 723 (1878); *see also* Hall v. Williams, 23 Mass. (6 Pick.) 232, 241 (1828) ("If the property of a citizen of another State, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive.").

308. *Pennoyer*, 95 U.S. at 727.

309. *Id.* at 720.

310. Shriver's Lessee v. Lynn, 43 U.S. (2 How.) 43, 60 (1844).

strictly and properly in rem, and in which the thing condemned is first seized and taken into the custody of the court.'[311] A state might skip attachment pursuant to statute when the case was 'substantially, a proceeding *in rem*, determining the ownership of specific property without leaving the defendant 'personally bound.'[312] But Mitchell's judgment had let him execute against whatever property he could find—and a judgment in rem could not be used, per international standards, to establish that kind of personal debt.[313]

To Justice Hunt, in dissent, the timing of attachment was 'a matter not of constitutional power, but only 'of detail.'[314] If Oregon had full power over Neff's land, why care about when the writ issued? Some cases (and state statutes) agreed with Hunt;[315] but other cases agreed with Justice Field,[316] who may have had the better of the argument. It was black-letter law that a judgment without jurisdiction was void, not merely voidable.[317] So the presence or absence of jurisdiction couldn't depend, as Oregon law would have it, on property to be named later—'upon facts to be ascertained after [the court] has tried the cause and rendered the judgment.'[318] To Field,

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311. Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466, 475 (1830) (quoting the decision below, of which the court "unanimously approve[d]," *see id.* at 470).

312. Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 348 (1850); *see Pennoyer*, 95 U.S. at 734 (categorizing actions "to partition real estate, foreclose a mortgage, or enforce a lien' as "substantially proceedings *in rem*"); *cf.* Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 317 (1870) (describing the statutory attachment of real or intangible property without a physical seizure).

313. *See, e.g.*, Green v. Van Buskirk, 74 U.S. (7 Wall.) 139, 149 (1869) (describing a "manifest" distinction, 'supported by authority,' between using foreign attachment proceedings to establish a claim against the debtor personally and merely to defend the seizure of the goods attached); *id.* at 148 ("Of course Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached."); *accord Boswell's Lessee*, 50 U.S. (9 How.) at 348; Picquet v. Swan, 19 F. Cas. 609, 612 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134); Dearing v. Bank of Charleston, 5 Ga. 497, 513 (1848); Bissell v. Briggs, 9 Mass. (8 Tyng) 462, 469 (1813); Borden v. Fitch, 15 Johns. 121, 142 (N.Y. Sup. Ct. 1818).

314. *Pennoyer*, 95 U.S. at 738, 748 (Hunt, J. dissenting).

315. *See id.* at 738–40 (listing statutes); Jarvis v. Barrett, 14 Wis. 591, 594–95 (1861); *see also* Tocklin, *supra* note 10, at 132–34 (defending Hunt's view).

316. *See Cooper*, 77 U.S. (10 Wall.) at 319 ("Without [seizing or attaching property] the court can proceed no further "); Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1851) (describing certain judgments as "nullities, ' because there was no "attachment or other proceeding against the land, until after the judgments"); *Boswell's Lessee*, 50 U.S. at 348 (limiting the effect of in rem judgments to "property of the defendant, within the jurisdiction of the court"); *see also* Oakley, *supra* note 20, at 679–83 (defending at length the strength of authority on this point).

317. Elliott v. Lessee of Peirsol, 26 U.S. (1 Pet.) 328, 340 (1828); *Filling the Void*, *supra* note 145, at 164.

318. *Pennoyer*, 95 U.S. at 728 (majority opinion). *Compare* Borchers, *supra* note 1, at 40 (arguing that *Pennoyer* was really a case about state law, as Justice Field "construed the Oregon Code to allow for personal jurisdiction only in accordance with the territorial principles"), *with Pennoyer*, 95 U.S. at 720 (construing Oregon's damage cap to limit recoveries against absent property owners "to the extent of such property" at the time of suit, but not as limiting courts' jurisdiction "only [to] such property,' and thereby permitting ordinary money judgments "having no relation to the property" so long as they didn't exceed the determined amount), *and id.* at 733

Mitchell's judgment didn't run against hypothetical property that Neff might have already sold off, or that he might never have owned at all; it ran against *Neff*, establishing a personal liability, and so was void in international eyes.

3. State Jurisdiction in Federal Court.—Hunt and Field's dispute over attachment brought forward a deeper tension in the case. The Court rejected Oregon's judgment based on international standards. But why did international standards matter? As Hunt argued, this case wasn't about 'the faith and credit to be given in one State to a judgment recovered in another', it was about 'land lying in the same State' of Oregon.[319] So why would a federal court in Oregon come to a different answer than a state one?

Field asked the same question, but in the opposite direction. If Mitchell's judgment were really just 'waste paper'[320]—if it were void *ab initio*, and not just voidable—why should it be valid in the state's eyes? As the Court wrote, 'if the whole proceeding is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice—it is difficult to see how the judgment can legitimately have any force within the State.'[321] Field praised cases from the few states that had begun to incorporate the general rules as part of their own law—and that maintained, 'as it always ought to have been, that an exorbitant judgment 'is not entitled to any respect in the State where rendered.'[322] But why hadn't this happened in every state?

The answer, again, can be found in the special features of general law. On general-law questions, state and federal courts could agree to disagree. Neither of them controlled the other, and while there were advantages in uniformity, neither side had to blink first. The correct legal answer in any particular case would depend on the forum in which the case was brought.

This arrangement may seem bizarre to modern eyes, but it shouldn't. Even today, courts are sometimes obliged to render different judgments on identical questions of law. Suppose that a criminal defendant raises a good First Amendment defense that's nonetheless barred by circuit precedent. An appellate panel might then affirm the conviction, even while privately agreeing with the defendant. Should the case be reheard en banc, the same judges might vote to vacate the panel decision and reverse the judgment—even though the panel and the district court, by following circuit precedent, had done *exactly* what they were required to do. In one sense, the district court 'got it wrong', the First Amendment doesn't mean one thing at trial and another on appeal, or one thing before the panel and another en banc.

(disapproving "the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States").

319. *Pennoyer*, 95 U.S. at 741 (Hunt, J. dissenting).

320. Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 475 (1836).

321. *Pennoyer*, 95 U.S. at 732 (majority opinion).

322. *Id.*

But in another sense, the district court 'got it right', it delivered the kind of decision that a court in its position was supposed to deliver. (And had it followed its best lights on the First Amendment question, circuit precedent be damned, it would have been acting contrary to its legal obligations, all things considered.)

Sometimes the law makes us take others' views as authoritative, even if they're potentially incorrect. The Oregon court had to pay attention to Oregon's statutes, including statutes that overrode the general law and expanded the state's legislative and judicial powers. But a federal court might not, if *its* reading of the general law put the outer limits of personal jurisdiction beyond Oregon's power to legislate.

Pennoyer explained this disagreement between state and federal courts with an eye to the available means of review. Diverse parties could take their cases directly to federal court. But when a state court applied its own state's statutes, there had been 'no mode of directly reviewing such judgment or impeaching its validity within the State where rendered.'[323] General-law cases didn't create federal-question jurisdiction,[324] and without federal law on point, there was no possibility of Supreme Court review. So the state judgment 'could be called in question only when its enforcement was elsewhere attempted'[325] only a change in forum could produce a change in law.

Once the question did arise in a different court, though—as in Neff's federal suit to recover his land—that court could give a different answer. '[T]he courts of the United States, wrote Field, 'are not required to give effect to judgments of this character when any right is claimed under them.'[326] The U.S. courts were 'not foreign tribunals, but they were 'tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and only 'bound to give to the judgments of the State courts the same faith and credit which the courts of another State are bound to give to them.'[327] In other words, a federal court wasn't required to take a state's jurisdictional statutes at their word—and it would give state judgments the recognition they were due, not as a matter of state law, but as a matter of *general* law.

Hunt's argument does have some modern defenders. Patrick Borchers, for example, argues that the federal courts sitting in each state were bound to follow that state's jurisdictional law, even as they might reject similar

323. *Id.*
324. *See supra* note 100 and accompanying text.
325. *Pennoyer*, 95 U.S. at 732.
326. *Id.*
327. *Id.* at 732–33.

judgments from other states.[328] Yet as Borchers notes,[329] the 1790 Act applies to 'every court within the United States'"[330]—to federal courts as well as state ones. If the Act is generally limited to internationally valid judgments, as *D'Arcy* held,[331] it imposes no obligation on *any* federal court to respect a void judgment, whether in or out of the state that rendered it.[332]

Numerous statements by the Supreme Court suggested that federal courts, as courts of a separate sovereignty, were supposed to subject every other court system to the same degree of scrutiny. In *Elliott v. Lessee of Peirsol*, Attorney General Wirt had argued that the Circuit Court for the District of Kentucky 'was not competent to inquire into the acts of the Court of the state of Kentucky, by analogy to courts of the same system in Britain.[333] As noted above, the Supreme Court specifically rejected that argument, stating that '[w]e know nothing in the organization of the Circuit Courts of the Union, which can contradistinguish them from other Courts, in this respect.'"[334] Likewise, in *M'Elmoyle v. Cohen*, the Court denied that the 1790 Act was 'intended to exclude,' in 'any Court in the United States,' defenses that 'inquire into the jurisdiction of the Court in which the judgment was given,' regarding 'the right of the state itself to exercise authority over the persons or the subject matter.'"[335] And in *Baldwin v. Hale*,[336] the Court reasoned from the premise that state insolvency laws 'have no extra-territorial operation,' and that a state court 'sitting under them' can give no '[l]egal notice' creating an 'obligation to appear,' to the conclusion that the court would have 'no jurisdiction' that could bind any other tribunal[337]—and so a discharge from the Court of Insolvency in Massachusetts applied only in Massachusetts *state* courts, and not 'in the courts of the United States, or of any other State.'"[338]

This reasoning supports Justice Story's decision in *Flower v. Parker*, when sitting on circuit in Massachusetts, to give the same scrutiny to a

328. Patrick J. Borchers, Pennoyer*'s Limited Legacy: A Reply to Professor Oakley*, 29 U.C. DAVIS L. REV. 115, 127 & n.61 (1995) [hereinafter Borchers, *Limited Legacy*]; Borchers, *supra* note 1, at 30–32, 36 n.115.

329. Borchers, *Limited Legacy*, *supra* note 328, at 127.

330. Act of May 26, 1790, ch. 11, 1 Stat. 122.

331. *See supra* note 229 and accompanying text.

332. *See* Christmas v. Russell, 72 U.S. (5 Wall.) 290, 302 (1866) (describing the 1790 Act as "applicable in all similar cases where it appears that the court had jurisdiction of the cause, and that the defendant was duly served with process, or appeared and made defence").

333. 26 U.S. (1 Pet.) 328, 331 (1828) (argument of counsel) ("This is not done by the Courts of King's Bench, of England, in reference to the proceedings of Ecclesiastical Courts, or Courts of Common Pleas.").

334. *Id.* at 340 (majority opinion).

335. 38 U.S. (13 Pet.) 312, 326–27 (1839) (quoting Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234, 235 (1818)) (internal quotation marks omitted).

336. 68 U.S. (1 Wall.) 223 (1863).

337. *Id.* at 234.

338. *Id.* at 230; *see id.* at 224 (statement of the case).

Massachusetts state judgment as to judgments from out of state.[339] It also supports Justice Field's conclusion prior to *Pennoyer*, addressing the issue on circuit in *Galpin v. Page*,[340] that '[a]ll the circuit courts of the United States have the same relation to the state courts, and would 'examine into [their] jurisdiction' to the same extent, no matter where they sit.[341] And, of course, the federal courts' taking an independent view of any conflicts questions was standard practice prior to *Klaxon*.[342]

At the same time, to my knowledge, there don't seem to have been any open statements of Hunt's view before Hunt's dissent. Judges sometimes paraphrased the language of the 1790 Act, stating blandly that state judgments would receive the same effect in federal court as in the court where they were rendered.[343] But the 1790 Act required the same thing for *every* state judgment, local or distant—which is why *M'Elmoyle* emphasized that the Act didn't cover jurisdiction. Other courts regularly spoke of recognition in geographic terms; a given judgment might be enforceable within a state, but 'a dead letter beyond the territory within which it was pronounced.'[344] But of course state courts faced these issues only with respect to the judgments of *other states*; and while federal courts used the same refrain, they didn't actually apply it as a rule. Borchers cites a number of in-state federal recognition cases applying state rules of jurisdiction, yet each of them had other legal reasons to do so[345]—and none suggested that federal courts

339. 9 F. Cas. 323, 324–25 (Story, Circuit Justice, C.C.D. Mass. 1823) (No. 4891).

340. 9 F. Cas. 1126 (Field, Circuit Justice, C.C.D. Cal. 1874) (No. 5206).

341. *Id.* at 1132.

342. *See supra* note 115 and accompanying text.

343. *See, e.g.*. Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466, 471 (1830). *But see id.* at 472, 474–75 (concluding that the state judgment rested on service that was improper even on state-law principles, rendering it unnecessary to discuss what would have happened if those principles had contradicted "the general law of the land").

344. Hall v. Williams, 23 Mass. (6 Pick.) 232, 246 (1828).

345. Some of these cases involved collateral attacks on the prior judgment's *subject-matter* jurisdiction, which of course would depend on state law. *See* Elliott v. Lessee of Peirsol, 26 U.S. (1 Pet.) 328, 340–41 (1828) (inquiring into a Kentucky court's 'authority over a subject,' as "derived wholly, from the statute law of the state"); Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173, 185–86 (1809) (inspecting "the constitution and powers of the [New Jersey] court in which this judgment [of treason] was rendered, and looking to New Jersey statutes to determine that '[w]ith respect to treason, then, it is a court of general jurisdiction"). Some found state law consistent with international law, so compliance with state law became the only question worth answering. *See* Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 317–19 (1870) (determining that procedures established by state statute were consistent with general requirements for in rem jurisdiction); Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 470–72 (1836) (describing the process required by statute as more exacting than under the "general principles of law, by which the validity of sales made under judicial process must be tested"). Some found that the plaintiff had failed to comply with state law, making it unnecessary to reach other issues. *See* Galpin v. Page, 85 U.S. (18 Wall.) 350, 372–73 (1874) (finding that "[t]he provisions mentioned were not strictly pursued," as state law required); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 350 (1850) (finding that "the requisites of the statute [had not] been complied with"). Some fell into *Pennoyer*'s category of cases that were 'substantially proceedings *in rem*, 95 U.S. 714, 727 (1878), in which compliance

were legally *bound* by the jurisdictional practices, no matter how exorbitant, of the state in which they sat.

The strongest argument for Hunt's view may be an argument from silence. Why didn't more out-of-state defendants challenge state judgments in this way? Why didn't they just default in the state court and then sue the winner right back in federal court—a strategy that might even survive modern limits on collateral attack?[346] One answer, of course, is that some defendants did: this was essentially the strategy in *Flower*. Another answer is that most out-of-state defendants were probably happy to sit at home and wait for the plaintiff to try to collect. Suing abroad, even in federal court, meant the expense of distant litigation and the risk of a hostile jury; Flower brought his suit to recover money from his debtors, not just to challenge recognition in the abstract. And, in any case, the rarity of a litigation strategy doesn't always mean that the strategy was wrong. (To my knowledge, scholars have turned up no antebellum examples of Supreme Court review of a state's refusal to recognize a judgment under the 1790 Act—even though such challenges were legally available from the beginning.)[347]

Given the absence of more direct statements of Hunt's view, together with the presence of statements pointing the other way—as well as the actual application of federal scrutiny to in-state judgments in *Flower* and *Galpin*—the preponderance of the evidence seems to favor *Pennoyer*, and the rule that federal courts could take their own view of state jurisdiction.

B. The Fourteenth Amendment in Federal Court

Immediately after establishing that federal courts could make their own judgments, *Pennoyer* delivered its most famous sentence:

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights

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with local statutes was all that was required. *See* Sargeant v. State Bank of Ind., 53 U.S. (12 How.) 371, 383–87 (1851) (discussing the evidence admissible under state law in a collateral attack on a state court's order to convey land); Steele's Lessee v. Spencer, 26 U.S. (1 Pet.) 552, 559–60 (1828) (assessing the impact on third-party purchasers, under state law, of an injunction requiring the current owner to convey land). And some concerned substantive state-law issues that were only indirectly related to jurisdiction, such as the evidentiary sufficiency of the record of a previous judgment, *see* Harvey v. Tyler, 69 U.S. (2 Wall.) 328, 341–48 (1865), or the formalities for acknowledging a deed, *see* Deery v. Cray, 72 U.S. (5 Wall.) 795, 806–07 (1866) (looking to the decisions of the Supreme Court of Maryland when rejecting an argument that a deed was void because it did not show compliance with "the law of Maryland then in force concerning the privy examination of married women").

346. *See, e.g.*, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982); *cf.* Durfee v. Duke, 375 U.S. 106, 115 (1963) (preventing relitigation of subject-matter jurisdiction once the issue has been "fully litigated and judicially determined").

347. *See supra* text accompanying notes 238–56.

> and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.[348]

This connection between jurisdictional standards and due process isn't obvious. Martin Redish, for example, has argued that there was no 'historical link between due process and the concepts of federalism or interstate sovereignty, at least 'prior to its unexplained creation in *Pennoyer v. Neff*."[349] It's true that there's no direct link; the Due Process Clause isn't a federalism provision. But that doesn't mean there's no link at all. Read another way, *Pennoyer*'s invocation of due process makes perfect sense: a judgment without jurisdiction is void, and property or liberty taken under a void judgment is taken without due process of law.

The crucial point here is that due process doesn't require any particular technique of obtaining personal jurisdiction. It just requires *jurisdiction*, full stop. Jurisdiction is what makes the process *lawful*, what gives the court legal power to take away property or liberty. A judgment without jurisdiction is void, a piece of "waste paper."[350] And taking away someone's property or liberty based on a piece of waste paper is, if *anything* is, a deprivation without due process of law.

1. Due Process and Jurisdiction.—Even those quite skeptical of *Pennoyer* might agree that due process sometimes requires a properly constituted court.[351] This is a familiar part of due process doctrine, particularly in cases about administrative tribunals and other entities at the edges of Article III.[352] And it's also a familiar part of ancient doctrine, dating at least from Bracton's principle that 'no one shall be disseised of his free tenement without a judgment."[353] From roughly the fourteenth century to

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348. Pennoyer v. Neff, 95 U.S. 714, 733 (1878).

349. Redish, *supra* note 8, at 1120–21; *accord* Whitten, *Part Two*, *supra* note 12, at 818 (arguing that "the traditional territorial rules" weren't part of the original meaning of due process).

350. *Voorhees*, 35 U.S. (10 Pet.) at 475.

351. *See, e.g.*, Hazard, *supra* note 14, at 270–71, 270 n.102 (criticizing the "logic and policy" of *Pennoyer*, but acknowledging that Justice Field's assertion linking 'limitations on state-court jurisdiction' with due process "rested on better ground in the precedent than is sometimes assumed").

352. *See, e.g.*, Thomas v. Union Carbide Agric. Prods. Co. 473 U.S. 568, 593 (1985) (suggesting that, under certain circumstances, some "Article III review" may be "required by due process considerations"); Murray's Lessee v. Hoboken Land & Improvement Co. 59 U.S. (18 How.) 272, 280 (1855) (associating due process with a "trial according to some settled course of judicial proceedings"); *cf.* Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J. dissenting) ("If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process."); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 269 (1990) (describing "a fundamental congruence between the question whether the citizen has been afforded the judicial process that is 'due' and the question whether sufficient scope has been given to the 'judicial' power").

353. F.W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 316 & n.2 (A.H. Chaytor & W.J. Whittaker eds. 1910).

today. 'due process' has 'consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law,' a sense that continued to be relevant as the phrase crossed the Atlantic and found its way into the Constitution.[354] This doesn't have to be all that 'due process' means, of course—not by half. But it is a core sense of the term. If the Supreme Court was right to say that 'due process of law' generally implies and includes actor, reus, judex,'[355] then it's a real problem to find yourself *coram non judice*.

a. Jurisdiction, Personal and Subject-Matter.—The vital clue to this theory of *Pennoyer*, as highlighted by Wendy Collins Perdue, is that the case refers equally to *subject-matter* as well as to personal jurisdiction.[356] According to Field, whatever other difficulties attend the Fourteenth Amendment's words, 'there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'[357] For 'such proceedings' to have 'any validity' in establishing 'the personal liability of the defendant, they must be conducted by 'a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit, and the defendant 'must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.'[358]

No one thinks that the Constitution includes any specific rules for the *subject-matter* jurisdiction of state courts. (Say, that a small-claims court can only hear cases up to $10,000, and so on.) Subject-matter jurisdiction is typically state law, which the Due Process Clause takes as it finds—just as, for example, it looks to state-law definitions of property.[359] But this suggests that due process might not specify any particular rules for *personal* jurisdiction of state courts, either. All that matters is that they *have* personal jurisdiction, in the eyes of the forum examining the judgment. And if that forum is federal, the standards for personal jurisdiction may be drawn from the federal courts' view of the general law. In other words, due process isn't a stand-in for a list of acceptable service methods; it's a consequence of a

354. Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012).

355. *Murray's Lessee*, 59 U.S. (18 How.) at 280 (emphasis omitted); *cf.* EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 39 (London, Societie of Stationers 1628) (describing "*Actor*, *Reus*, and *Iudex*" as requisite to a judgment).

356. Perdue, *Scandal*, *supra* note 20, at 505–06.

357. Pennoyer v. Neff, 95 U.S. 714, 733 (1878).

358. *Id.*

359. *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998).

court's having subject-matter and personal jurisdiction, as defined by whatever *other* sources of law confer them.[360]

b. Contemporary Readings.—Reading *Pennoyer* as requiring jurisdiction, full stop, makes more sense than reading it to treat any particular service rules as written in stone. *Pennoyer* does cite a treatise by Thomas Cooley for the proposition that '"due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."'[361] But Cooley's treatise repeatedly stated that due process depended on *jurisdiction*, not just on particular requirements involving personal service.[362] And Cooley himself argued, soon after *Pennoyer*, that the range of state personal jurisdiction was partly defined by 'an admitted principle in the law of nations,'[363] not just by constitutional requirements. So it's at least as plausible to read *Pennoyer*'s quote from Cooley as simply carrying through an incorporation by reference. Due process required various personal service rules, not as a (necessary) matter of definition, but as a (contingent) matter of implication—in light of the fundamental need for jurisdiction, full stop, as well as any particular legal standards for personal jurisdiction that happened to be in place.

Indeed, that's how a number of the early decisions applying *Pennoyer* spoke about the matter. In 1889, the New Jersey Supreme Court noted that if a court 'has no jurisdiction, then "no part of such procedure would constitute due process of law"'—in which case 'the recent amendment to the federal constitution illegalizes the entire affair.'[364] In 1897, the Ohio Supreme Court explained *Pennoyer*'s personal-service requirement as resting 'on the ground that the proceedings of a court of justice to determine personal rights and obligations of one over whom *it has no jurisdiction* is not due process of law.'[365] And in 1908, the Supreme Court itself identified two requirements of procedural due process: that the court 'shall have jurisdiction' (for which it cited *Pennoyer*, among other cases), *and* that the parties be given 'notice and opportunity for hearing.'[366]

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360. *See* Perdue, *Scandal*, *supra* note 20, at 506; Perdue, *Sovereignty*, *supra* note 20, at 732.

361. *Pennoyer*, 95 U.S. at 734 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 405 (Boston, Little, Brown & Co. 1868)).

362. *See* COOLEY, *supra* note 361, at 358 ("If in these cases the court has jurisdiction, they proceed in accordance with the law of the land "); *id.* at 397–98 (stating that "the question, what constitutes due process of law," is "not so difficult" as to courts, for "[t]he proceedings in any court are void if it wants jurisdiction"—both subject-matter and personal—"of the case in which it has assumed to act").

363. Thomas M. Cooley, *The Remedies for the Collection of Judgments Against Debtors Who Are Residents or Property Holders in Another State, or Within the British Dominions*, 31 AM. L. REG. (o.s.) 697, 700 (1883).

364. Elasser v. Haines, 18 A. 1095, 1097 (N.J. 1889).

365. Kingsborough v. Tousley, 47 N.E. 541, 543 (Ohio 1897) (emphasis added).

366. Twining v. New Jersey, 211 U.S. 78, 110–11 (1908).

c. Jurisdiction Under State Law.—This theory might seem to prove too much. If the key issue is jurisdiction, full stop, won't the Supreme Court be overwhelmed with garden-variety jurisdictional defects? Does *every* case in which a state court lacked jurisdiction, whether personal or subject-matter, really pose a due process problem too?

Only sort of. It *is* a problem for a defendant to be deprived of life, liberty, or property without due process of law. And if a state court actually lacks subject-matter jurisdiction, then its judgment doesn't provide due process. But that doesn't mean the case would—or should—be reviewed by the Supreme Court.

As noted above, every incorrect construction of state contract law is a potential Contracts Clause problem; every wrong decision about public property is a potential takings problem; and so on.[367] Yet we don't expect the Supreme Court to hear all these cases. That's because these federal issues are premised on errors of state law, arising only on the assumption that the state courts got their own law wrong. The Supreme Court usually doesn't second-guess state courts in this way,[368] unless it suspects some kind of 'evasion' of a federal right.[369] So long as the state decision 'rests upon a fair or substantial basis, it'll be taken as authoritative[370]—in which case the Court could only conclude that there was in fact no error, and so no failure of due process.

By contrast, *Pennoyer*'s doctrines of personal jurisdiction weren't state law in this sense. They were pure questions of general law—which the federal courts could look to directly, both because Congress hadn't legislated on the topic and because, under the conflicts principles applicable in federal courts, no state could rewrite the jurisdictional rules on its own. So if a state supreme court wrongly upheld the trial court's jurisdiction—as a matter of general law, or even as a matter of state statute—the Supreme Court could still look past that court's decisions and come to its own view.

At the same time, this understanding doesn't open the door to full federal review of all state decisions involving general law. State courts have an obligation to faithfully apply their own state's law—not only local law, but also any general-law rules that the state incorporates by reference. On most topics (torts, contracts, etc.), the state is perfectly competent to depart from the general law by statute. And where it isn't, or where the state has chosen to leave the general law in place, not every state-court mistake in applying the general law will create a due process problem. A judgment with

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367. *See supra* text accompanying note 244.

368. *See* Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 159 (1825) (noting that, "in cases depending on the laws of a particular State," the Court would uniformly "adopt the construction which the Courts of the State have given to those laws," rather than suggest that other courts "had misunderstood their own statutes").

369. Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 540 (1930).

370. *Id.*

proper jurisdiction may be *erroneous* and liable to correction on appeal; but it isn't *void*, and its execution raises no due process problem. *Pennoyer* worked as it did only because both key elements were present: jurisdictional concerns that implicated due process, as well as general-law rules on which the federal courts were forced to reach their own conclusions.

This interpretation explains why the Court still sometimes looks past state assertions of *subject-matter* jurisdiction. For example, try as it might, a state court can't reassign title to land in another state,[371] nor bar a witness from testifying elsewhere[372]—even if the state declares itself competent to do so, and even if the parties have fully litigated the issue and lost before the state courts.[373] In cases where the *whole state system* lacks authority to decide a particular matter,[374] the Court will prevent the state court (in Chief Justice Marshall's words) from 'exercis[ing] a jurisdiction which, according to the law of nations, its sovereign could not confer.'[375] In these exceptional cases, in which the general law actually does place limits on subject-matter jurisdiction, the Court can and does take an independent view.

2. Pennoyer*'s Puzzles, Explained.*—Understanding due process as requiring jurisdiction, full stop—and understanding jurisdiction as governed by general law—gives us an easy way to resolve a number of longstanding confusions about *Pennoyer*. Why did the connection between jurisdiction and due process only emerge with the Fourteenth Amendment, and not earlier? Why would a lawsuit infringe a liberty interest on one side of a state border, and not the other? How can personal jurisdiction be waivable, if it's a function of sovereign authority? And how do we reconcile grand theories of due process with the archaic exceptions and encrustations of the law of jurisdiction? Thinking of the problem in terms of general law may help solve all four.

a. Timing.—The Fifth Amendment's Due Process Clause has been with us from the beginning; so have many state equivalents. But only one state court explicitly held that its own due process clause limited jurisdiction, and that wasn't until halfway through the nineteenth century.[376] Why didn't anyone draw this connection earlier?

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371. Fall v. Eastin, 215 U.S. 1, 11–12 (1909).

372. Baker v. Gen. Motors Corp. 522 U.S. 222, 239 (1998).

373. *Compare* Durfee v. Duke, 375 U.S. 106, 116 (1963) (barring collateral attack for lack of subject-matter jurisdiction when the issue had been "fully and fairly litigated"), *with id.* at 114 n.12 (recognizing exceptions when "the lack of jurisdiction over the subject matter was clear" or "the policy against the court's acting beyond its jurisdiction is strong" (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 451(2) (AM. LAW INST. Supp. 1948) (internal quotation marks omitted))).

374. *Cf.* McDonald v. Or. R.R. & Navigation Co. 233 U.S. 665, 670 (1914) (suggesting that the Court could consider "contentions address[ed] to the subject-matter of jurisdiction in the sense of the fundamental absence of any and all right to take cognizance of the cause").

375. Rose v. Himely, 8 U.S. (4 Cranch) 241, 276 (1808) (Marshall, C.J.).

376. *See* Beard v. Beard, 21 Ind. 321, 324, 328 (1863) (holding that the "due course of law" clause of the Indiana Constitution required personal service of process on nonresidents).

Pennoyer's theory offers a potential answer. Think of the state clauses. If due process just requires jurisdiction, full stop, and a state court thinks it has jurisdiction on state-law grounds, then there's no due process problem under the state constitution. (And if it *doesn't* have jurisdiction on state-law grounds, then it rules on those grounds, without reaching the state-constitutional question.) The same goes for sister-state recognition: sister states would deny recognition to an exorbitant judgment on general-law grounds long before it might pose a problem for their own due process clauses.

It's equally hard to imagine a case in which the issue could have arisen under the Fifth Amendment. The Judiciary Act of 1789 limited federal original jurisdiction to areas that were perfectly safe on general-law principles; anything unusual would lose on statutory grounds first. State assertions of jurisdiction couldn't violate the Fifth Amendment directly. And if some federal trial court had wrongly decided to recognize a state judgment that violated international standards, the Supreme Court would have reversed based on *those standards*, not based on the Fifth Amendment. Again, there'd never have been a reason to reach the constitutional ground.

b. Interests.—The Due Process Clause is concerned with 'depriv[ations]' of 'life, liberty, or property.'[377] In modern personal jurisdiction cases, we normally identify the deprivation as the order to appear in some distant state, or perhaps the imposition of the judgment per se. Due process is said to 'protect[] an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'[378] But why would these contacts or relations be relevant to a *liberty* interest? Individual rights are about the individual—and an individual defendant has no more liberty when bossed around by one state than by another.

In fact, the Court explained the problems with this modern view soon after *Pennoyer*. In *York v. Texas*,[379] a state statute made any appearance in the Texas courts—even a limited one objecting to jurisdiction—equivalent to a general appearance that consented to jurisdiction.[380] The defendant claimed that this procedure violated due process.[381] The Court agreed that it would be 'more convenient' for the defendant to contest jurisdiction in the first suit, rather than defaulting and challenging recognition later.[382] But the state

377. U.S. CONST. amend. XIV, § 1.

378. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–72 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)); *see also* Drobak, *supra* note 24, at 1046 (describing the view that "the defendant's liberty" is "affected by his forced participation in a lawsuit," the "time, effort, and cost" of which "intrude on a defendant's personal life").

379. 137 U.S. 15 (1890).

380. *Id.* at 19.

381. *Id.* at 19–20.

382. *Id.* at 21.

offered a variety of other remedies, too: if any property were to be seized, he could seek to enjoin the execution; or he could wait and sue for its return, with the invalid judgment giving the other side no defense.[383]

What made these remedies adequate was that they would prevent a 'depriv[ation] of liberty [and] property,'[384] which is what the Due Process Clause was all about. According to the Court, 'the mere entry of a judgment for money, which is void for want of proper service, wasn't the deprivation in question; it was a legal nullity, an empty breath.[385] Only 'when process is issued thereon or the judgment is sought to be enforced' would 'liberty or property [be] in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the amendment is preserved, and there is no just cause of complaint.'[386]

York's explanation makes much more sense than current doctrine. What the Constitution protects isn't the defendant's liberty to sit peacefully at home, or to exercise his arms by throwing a foreign summons (but not a local summons!) in the trash. Rather, the things protected are the things the judgment orders taken away: property, liberty, and so on. Any one of these might be taken away, but only with 'due process of law'—including the judgment of a court of competent jurisdiction, and not just some piece of 'waste paper. The constitutional 'depriv[ation]' is the execution, not the judgment.

That said, the judgment itself can still be challenged on due process grounds. Courts can't lawfully issue judgments that are unlawful to execute: a defendant can ask the Supreme Court to declare a void judgment to be void precisely *because* it threatens an unlawful deprivation, contrary to rights set up under the Constitution. Suppose a state court issued a $500 judgment out of the blue, against someone who hadn't even been sued. The execution of that judgment would violate due process—an excellent reason for an appellate court to vacate the judgment ordering it, even before any money changes hands. (As one Louisiana court put it, 'if any judgment based on such substituted service would be an absolute nullity, incapable of any effect whatever against the person or property of defendant, it would be mere folly to permit the ear of the Court to be vexed with such useless and inconsequential proceedings.')[387] But the judgment in *York* posed no such problem. If the trial court really had personal jurisdiction, then Texas's lack of a special appearance procedure to raise the issue didn't itself reflect an independent due process concern. But if jurisdiction really were absent, then

383. *Id.*

384. *Id.* at 20 (quoting U.S. CONST. amend. XIV, § 1).

385. *Id.*

386. *Id.* *accord* Kauffman v. Wootters, 138 U.S. 285, 287 (1891).

387. Laughlin v. La. & New Orleans Ice Co. 35 La. Ann. 1184, 1185 (1883).

any subsequent proceeding involving the judgment would have to recognize it as invalid—and a failure to do so would be reviewable in federal court.

Indeed, the same would be true in a recognition case in *state* court. Suppose that Mitchell had carried his Oregon default judgment into California, filing a state-court action to enforce the judgment and serving Neff in person. The California court might reject the prior judgment on general-law grounds. But if it didn't, without the Fourteenth Amendment, there was nothing Neff could do; it would just be an ordinary error by a California court on a question of general law. With the Amendment in place, though, the new judgment involves a due process problem: the California court, no less than the Oregon one, would be threatening to take away Neff's property based on a piece of waste paper.[388] (That said, because the California court really would have had personal jurisdiction over Neff, *its* judgment would be merely erroneous, not void; and if Neff failed to seek Supreme Court review, he couldn't collaterally attack the California judgment in some third proceeding.)[389]

c. Waiver.—Unlike subject-matter jurisdiction, personal jurisdiction is waivable. Yet if jurisdiction really reflects limits on state authority, how can an individual choose to waive it? How could a private person 'change the powers of sovereignty"?[390]

The general-law approach obviates this concern. Whether an issue is waivable depends on the particular legal standard involved, not on the abstract category to which it belongs.[391] As the law currently stands, parties can't confer subject-matter jurisdiction on a federal court; but Congress could still structure its jurisdictional statutes to create some opportunities for waiver. Suppose Congress amended the diversity statute to state that 'the required amount-in-controversy is usually $75,000, but anything over $20,000 is fine unless the defendant timely objects. That's neither incoherent, nor unconstitutional, nor legally impossible: it just sets a different

388. *See* Scott v. McNeal, 154 U.S. 34, 50 (1894) (agreeing that a state can't declare "a judicial determination made in [a party's] absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property,' as that would 'deprive him of property without any process of law whatever" (quoting Lavin v. Emigrant Indus. Sav. Bank, 1 F. 641, 662 (C.C.S.D.N.Y. 1880))); Pennoyer v. Neff, 95 U.S. 714, 732 (1878) (stating that "to hold a defendant bound by such a judgment is contrary to the first principles of justice").

389. *See* RESTATEMENT (FIRST) OF JUDGMENTS § 13 & cmt.c (AM. LAW INST. 1942) (noting that the 'second judgment, although not void and not open to collateral attack,' is still 'subject to reversal in the Supreme Court . . . on the ground that the rendition of the second judgment, as well as the rendition of the first judgment, is in violation of the Fourteenth Amendment to the Constitution of the United States").

390. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

391. *See* Stephen E. Sachs, *The Forum Selection Defense*, 10 DUKE J. CONST. L. & PUB. POL'Y 1, 7 (2014) (explaining that courts recognize venue waivers not "because contract law somehow trumps procedure, or because the parties are somehow entitled to override whatever the law actually requires,' but because 'our procedural law just happens to recognize a role for private understandings when allowing rights to be waived").

kind of rule. So whether personal jurisdiction is waivable depends on whether the general law says it is. If so, there's no mystery to be explained.

(Separately, personal jurisdiction might be inherently 'waivable' to the extent that the doctrine involves the court's power to force an appearance.[392] A defendant outside the court's reach can always appear anyway—in which case the doctrinal requirements would be *satisfied*, not ignored.)

d. Arbitrariness.—One occasionally embarrassing feature of personal jurisdiction involves what one scholar calls the 'special jurisdictional rules' that apply in particular areas, such as 'divorce, real property, and penal law.'[393] These rules leave the doctrine 'marbled with elements that, if explicable in due process terms at all, can only be so explained with a great deal of effort.'[394] It's an impossible task to assemble a clean, theoretically coherent approach to due process that *also* predicts all these doctrinal hangers-on. (Out of the crooked timber of jurisdictional doctrine, no straight thing was ever made.)

Fortunately, a conventional standard of general law doesn't have to follow from any grand theory—whether of consent, sovereignty, fairness, or anything else. Customary standards are customary, which means that they can be just as strange as the societies that produced them. So it's not surprising to see various old doctrines crawl out of the woodwork now and then, even if they detract from the coherence of the system as a whole.

C. *The Fourteenth Amendment in State Court*

As discussed so far, *Pennoyer*'s reasoning rested on two pillars. Due process requires that state courts have jurisdiction, full stop, which federal courts will assess based on their own view of the general law. The third pillar, the one that held up the whole, was the system of appellate review. With the Fourteenth Amendment in place, a state judgment that violated general standards would also be held to violate due process, providing for federal-question jurisdiction and a route to Supreme Court review.

This meant that state courts, if they wanted to avoid reversal, needed to change their jurisdictional practices. Instead of taking their own view of the general law (let alone abrogating it by statute), states now had to hew to the Supreme Court's view of things—including its view of the reach of state law.

1. Due Process and Appellate Review.—As noted above, before the Fourteenth Amendment, there was no direct federal review of state courts' personal jurisdiction. Questions of general law weren't federal questions;[395] all the parties could do was to wait for the recognition stage, in which a new

392. *See* Nelson, *supra* note 166, at 1568–74.

393. Weinstein, *supra* note 20, at 222–23 (footnotes omitted).

394. *Id.* at 249.

395. *See* N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286, 286–87 (1875).

lawsuit might qualify for diversity jurisdiction or raise a question under the 1790 Act.

After the Fourteenth Amendment, though, a case in state court could be taken to the Supreme Court, on a claim that the underlying judgment lacked personal jurisdiction and so threatened a deprivation without due process. The specific standards to be applied were still drawn from general law; jurisdiction hadn't become a federal question in *that* sense.[396] But federal law required compliance with those standards, whatever they were—and a state decision that failed to comply with them would be 'against the title, right, privilege or exemption specially set up or claimed' under federal law.[397] (Consider, as above, how the 1790 Act was read to require recognition of valid state judgments; the Supreme Court might review a state's failure on this ground, even though the substantive standards of validity weren't themselves federal law.)[398] As the Court described it in 1899, '[t]he Federal question with which we are now concerned is whether the [state] court obtained jurisdiction to render judgment in the case against the [defendant] so that to enforce it would not be taking the property of the [defendant] without due process of law.'[399] Or to put it another way, due process functioned as a 'hook' to get a general-law case into federal court.[400]

The most important feature of *Pennoyer*'s 'hook' wasn't just the new route to federal review. It was the effect of that review—whether for legal reasons or just *in terrorem*—on decisions in the state courts. The standards for jurisdiction weren't constitutional: they didn't stem from the Due Process Clause. But once state courts realized that their own views of general law might be reversed as erroneous, they started to adopt the federal ones instead.

2. Appellate Review and Judicial Deference.—Even before the federal judiciary declared itself 'supreme in the exposition of the law of the Constitution,'[401] state courts regularly looked to Supreme Court decisions in the interest of not being reversed. On a question within the Court's appellate jurisdiction, one Massachusetts court wrote in 1822, 'that court has the final

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396. *See* Whitten, *Part Two*, *supra* note 12, at 820 (considering and dismissing the possibility that traditional territorial rules of personal jurisdiction 'are *incorporated* in the meaning of due process").

397. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

398. *See supra* section II(C)(3).

399. Conn. Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 609 (1899); *see also* Nat'l Exch. Bank of Tiffin v. Wiley, 195 U.S. 257, 261–62 (1904) (considering only "the part of the defense which distinctly raises a Federal question, ' namely that the Ohio court's judgment was rendered 'entirely without authority or jurisdiction, and so "could not be upheld consistently with the Fourteenth Amendment of the Constitution of the United States").

400. Perdue, *Sovereignty*, *supra* note 20, at 731; *accord* Oakley, *supra* note 20, at 625–26; Trangsrud, *supra* note 20, at 879; *cf.* Kreutzer, *supra* note 23, at 221 (accusing *Pennoyer* of "pretend[ing]" to treat the Due Process Clause as such a hook, when the Court was actually transforming the substantive law of jurisdiction).

401. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

and conclusive authority: so that their decision must be taken to be the law of the land.'[402] Maybe it'd be otherwise, a later court reasoned, if the Court were 'restrained by the smallness of the sum in controversy'; but if "the case itself may be carried to that court by writ of error, then the 'law, thus settled, is binding upon this Court.'[403]

This reasoning is highly practical: there's no point in a court issuing a ruling that it knows will be reversed. It also helps make sense of the lines of judicial authority. In the days of *Swift v. Tyson*, it wasn't always obvious which courts would defer to which others on which issues; appellate review provided one easy test. Just as district courts today will 'follow the holdings of the Federal Circuit in cases falling within [that Circuit's] appellate jurisdiction,'[404] and will follow the holdings of their own geographic circuit courts otherwise, state courts would apply the Supreme Court's views in any case subject to that Court's review. This understanding followed from a simple 'postulate,' namely 'that one rule must prevail in the court of original jurisdiction and in the court of last resort'[405]—a postulate that works just as well regardless of what kind of law is involved.

This is exactly how some contemporaries regarded *Pennoyer*. Consider the evidence of Volume 59 of the Tennessee reports, printed in 1878. After reporting the five-year-old case of *Barrett v. Oppenheimer*,[406] which refused to enforce a sister-state judgment founded on improper service,[407] the reporter included a long footnote summarizing what was then the Supreme Court's very recent decision in *Pennoyer*.[408] It described *Pennoyer* as holding that judgments in violation of the traditional rules 'were void, upon general principles, and *also* under the Fourteenth Amendment's Due Process Clause.'[409] In particular, it addressed the question of how state courts should respond. Noting that *Pennoyer* let other states provide their own statutory methods of service on their own citizens, it invoked a line of case law about the methods of ascertaining those other states' laws, arguing that state courts should choose such methods 'by the same rule which is to determine the appellate court on a writ of error'—namely that of the Supreme Court,

402. Commonwealth v. Green, 17 Mass. (16 Tyng) 515, 546 (1822).

403. Braynard v. Marshall, 25 Mass. (8 Pick.) 194, 196–97 (1829). On the dispute over whether the amount-in-controversy requirement added to section 22 of the Judiciary Act carried over to section 25, see Buel v. Van Ness, 21 U.S. (8 Wheat.) 312, 322–23 (1823), and Kevin C. Walsh, *In the Beginning There Was None: Supreme Court Review of State Criminal Prosecutions*, 90 NOTRE DAME L. REV. 1867, 1888–91 (2015).

404. Rates Tech. Inc. v. Speakeasy, Inc. 685 F.3d 163, 174 n.9 (2d Cir. 2012).

405. Hanley v. Donoghue, 116 U.S. 1, 6 (1885).

406. 59 Tenn. (12 Heisk.) 298 (1873).

407. *Id.* at 304.

408. *Id.* at 304 n.*.

409. *Id.* at 304–05 n.*.

'where the case is *ultimately* cognizable."[410] In other words, courts should adopt *Pennoyer*'s view of the 'general principles' not solely on its own merits, but also to avoid inconsistency with the ultimate court of review.

3. Judicial Deference in State Court.—This institutional account of the duty to follow *Pennoyer* may help explain its uneven reception in state courts. Some state courts took to it immediately, while others resisted for decades. If *Pennoyer* were just a straightforward analysis of the Fourteenth Amendment, that division would have been very odd. But because *Pennoyer* in fact had a number of important moving parts, it's easy to see why some state courts might have understood or accepted them sooner than others.

a. Reception.—Some state courts quickly saw *Pennoyer* as affecting their approach to the general law. Indeed, one of the earliest state decisions described the situation in almost precisely these terms.

In *Belcher v. Chambers*,[411] a nonresident of California had been served by publication under California law.[412] He then mounted a collateral attack on the default judgment by challenging its execution in state court.[413] Under prior California decisions, the court would have upheld the judgment, presuming that the defendant had somehow received adequate service.[414] And if this were merely a matter of state law, like interpreting a state statute, the federal courts might do the same—trusting the state courts to understand their own law.

But state courts' jurisdiction was no longer just a matter of state law. As Justice Field had previously ruled on circuit, presumptions affecting jurisdiction were matters of general law—and if a federal court ever got hold of the case, it would take a different view of the general law and make the opposite presumption.[415] With the Fourteenth Amendment in place, the federal courts *would* get hold of the case, because they could use due process to 're-examine every judgment of this Court' involving personal jurisdiction.[416] So to avoid unnecessary reversal, the opinion reasoned, California's courts should follow their 'practice' of always 'adopt[ing] that view of a legal question which has been taken by the Supreme Court, whenever 'the question involved' might arrive there by writ of error.[417]

Viewed with modern eyes, the opinion in *Belcher* is most surprising for what it *didn't* say: that the Fourteenth Amendment actually imposes any

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410. *Id.* at 306 n.* (citing Baxley v. Linah, 16 Pa. 241 (1851)); *see also Hanley*, 116 U.S. at 5–7 (correcting errors in that line of case law but endorsing its underlying premise).

411. 53 Cal. 635 (1879).

412. *Id.* at 636 (statement of the case).

413. *Id.*

414. *Id.* at 640 (majority opinion).

415. *Id.* (citing Galpin v. Page, 9 F. Cas. 1126, 1131 (Field, Circuit Justice, C.C.D. Cal. 1874) (No. 5206)).

416. *Id.* at 643.

417. *Id.* at 642–43.

substantive restrictions on state-court jurisdiction. We're used to the idea of following federal courts for federal law, state courts for state law, and so on. But the court bypassed substantive questions like that for purely institutional ones: what legal issues were involved, who would get to decide them, and how they would make their decisions. Or, as it helpfully summarized:

> (1) A writ of error will issue from the Supreme Court
>
> (2) In such proceeding, the Supreme Court will not follow the rule of the Supreme Court of California but will declare the law as announced in *Galpin v. Page* and *Pennoyer v. Neff*.
>
> (3) To accord with the decisions of the Supreme Court of the United States, the judgment in the present action must be held to be null and void.
>
> (4) When our judgment must depend upon a question which may be reëxamined by the Supreme Court we will follow the rule of law laid down by that Court.[418]

Again, the court wasn't following the Supreme Court's reading of *federal* law: *Galpin* was a pre-Fourteenth Amendment case. It was following the Supreme Court's lead on a question of general law—and none too willingly at that. Several other state courts did the same.[419]

Commentators noticed the same thing. In the 1881 edition of his treatise on judgments,[420] A.C. Freeman described *Pennoyer* in what might seem a very curious way. He didn't say that *Pennoyer* altered any actual jurisdictional rules. Rather, he described the consequence of *Pennoyer*'s reading of the Fourteenth Amendment (assuming that it would stick) as being that "all questions regarding the [personal] jurisdiction of courts must ultimately be determined in the national courts, *or at least according to the principles there recognized and applied*"—so that the 'wide dissimilarity' in state rules 'must ultimately disappear.'"[421] If one thinks that the Fourteenth Amendment constitutionalized personal service, that's a strange way of

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418. *Id.* at 643.

419. *See* Eliot v. M'Cormick, 10 N.E. 705, 710 (Mass. 1887) (noting that, '[a]s the question before us depends upon the construction of a provision of the federal constitution"—the standard for Supreme Court review under section 25 of the Judiciary Act—"our decision, if against the exemption or privilege claimed under that provision, would be subject to be re-examined by the [Supreme Court] upon a writ of error"); Elmendorf v. Elmendorf, 44 A. 164, 165 (N.J. Ch. 1899) ("[I]nasmuch as the decisions of the United States supreme court control state courts as to [the Fourteenth Amendment's] construction and application, a judgment within the terms of the amendment as so construed is no longer valid within the state "); Kingsborough v. Tousley, 47 N.E. 541, 543 (Ohio 1897) ("Whether the enforcement of such a judgment violates the constitutional provisions referred to, is a federal question, with respect to which the state courts are necessarily controlled by the decisions of the national supreme court.").

420. 1 A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS (S.F. A.L. Bancroft & Co. 3d. ed. 1881).

421. *Id.* § 561, at 591 (emphasis added).

saying it.[422] But it's a relatively straightforward way of saying that the Amendment made the need for jurisdiction into a federal question, which the Court would answer based on its own view of the general law—or, as another scholar put it, that the Amendment 'impose[d] upon the state courts a duty to *conform* their decisions to *what the Supreme Court regards* as correct principles of the conflict of laws.'[423]

b. Resistance and Reconciliation.—The reception of *Pennoyer* wasn't entirely smooth. A number of state courts, particularly in New York and North Carolina, obstinately rejected *Pennoyer*'s due process language—holding that they could do what they wished within their own states,[424] until the Court finally reversed them in 1915.[425] Some interpret this response, and the Supreme Court's equivocal rhetoric in subsequent cases, as reflecting persistent uncertainty about *Pennoyer*'s commitment to independent review in federal courts.[426] But the odds seem low that the Supreme Court would flip-flop so many times in succession, without even commenting on the change in doctrine. A better explanation may just be that the states were able to get away with resisting dicta, and various procedural constraints delayed the point at which *Pennoyer*'s dicta crystallized into holding.

First, and most simply, *Pennoyer*'s discussion of the Due Process Clause really was dicta. The problem wasn't that Mitchell's original judgment predated the Fourteenth Amendment, as is often thought; the problem was that the case arose from Neff's *federal* suit to undo the sale, filed in the Circuit Court for the District of Oregon.[427] That federal court couldn't violate the Fourteenth Amendment if it wanted to—and it applied the same general standard of review to the Oregon judgment as it would have applied to a judgment from Ontario, even though Ontario isn't subject to the Fourteenth Amendment either. In other words, *Pennoyer* would have reached the same

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422. *Cf.* Borchers, *Limited Legacy*, *supra* note 328, at 159–60 (highlighting Freeman's treatise as evidence of uncertainty regarding *Pennoyer*'s holding).

423. E. Merrick Dodd, Jr., *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 533 (1926) (emphasis added); *see also id.* at 533–34 ("Since the Federal Constitution is silent as to the requirements for jurisdiction, the Supreme Court has been obliged to seek for these elsewhere, and it has sought for and found them in principles of conflict of laws.").

424. *See, e.g.*, Menefee v. Riverside & Dan River Cotton Mills, 76 S.E. 741, 743 (N.C. 1912) (disagreeing with the Supreme Court as to the validity of service on a corporate representative); *see also* Pope v. Terre Haute Car & Mfg. Co., 87 N.Y. 137, 140 (1881) (same); *cf.* Grant v. Cananea Consol. Copper Co. 82 N.E. 191, 192–93 (N.Y. 1907) (acknowledging that "in so far as the service of process is concerned, the decisions of our own court are not in entire accord with those of the Supreme Court of the United States").

425. *See* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 194–95 (1915).

426. *See, e.g.*, Borchers, *supra* note 1, at 43–51 (canvassing the period's case law and arguing that "*Pennoyer* left the matter of whether there was a general constitutional limitation on the reach of state courts in splendid ambiguity").

427. *See* Pennoyer v. Neff, 95 U.S. 714, 715 (1878) (statement of the case); Perdue, *Scandal*, *supra* note 20, at 500 n.142.

outcome with or without the Amendment in place, which is enough to make dicta of its discussion of due process. We might understand Field's interest in including the discussion nonetheless; the logic here is complicated enough to warrant signaling it to other courts up front, rather than waiting for some enterprising attorney to build the whole Rube Goldberg machine from scratch. But the fact that the discussion was dicta also limited its immediate impact on state courts.

Second, there were sound procedural reasons for the Supreme Court not to mention due process in every case. In cases arising from federal trial courts, the Fourteenth Amendment wasn't an issue;[428] so the Court often discussed jurisdictional issues without mentioning the Amendment,[429] or without taking any position on whether state judgments could now be 'directly questioned, and their enforcement in the State resisted.'[430] The same was sometimes true when it reviewed state courts' failure to give Full Faith and Credit effect to another state's judgment, which again required no consideration of the Fourteenth Amendment.[431] By contrast, when the Court reviewed state courts directly, it made no secret of the constitutional standard that applied.[432] It's unclear why more litigants didn't press the issue earlier,

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428. *See* U.S. CONST. amend. XIV, § 1 (discussing what '[n]o *State* shall' do) (emphasis added)).

429. *See, e.g.*, Wilson v. Seligman, 144 U.S. 41, 44 (1892) (discussing *Pennoyer*'s principles but not the Fourteenth Amendment); *accord* Arndt v. Griggs, 134 U.S. 316, 320, 326 (1890); Freeman v. Alderson, 119 U.S. 185, 187–88 (1886); Brooklyn v. Ins. Co. 99 U.S. 362, 370 (1879).

430. *Pennoyer*, 95 U.S. at 733; *see, e.g.*, Cooper v. Newell, 173 U.S. 555, 567 (1899) (citing *Pennoyer*'s discussion of the rules for federal courts, and leaving aside whether a state judgment "was entitled to any force in the State in which it was rendered"); Goldey v. Morning News, 156 U.S. 518, 521 (1895) ("Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."); Hart v. Sansom, 110 U.S. 151, 155 (1884) ("The courts of the State might perhaps feel bound to give effect to the service made as directed by its statutes."); Ins. Co. v. Bangs, 103 U.S. 435, 439 (1881) (Field, J.) (noting that "the State law cannot determine for the Federal courts what shall be deemed sufficient service of process," though that "[i]t may be otherwise in the State courts"); *see also* St. Clair v. Cox, 106 U.S. 350, 353 (1882) (describing the issue in *Pennoyer* as how "State courts [might] acquire jurisdiction to render a personal judgment against non-residents which would be *received as evidence* in the Federal courts" (emphasis added)); *cf.* Conley v. Mathieson Alkali Works, 190 U.S. 406, 410–11 (1903) (relying on *Goldey*).

431. *See* Haddock v. Haddock, 201 U.S. 562, 605 (1905) (holding that New York had no obligation to recognize a divorce decree, but "[w]ithout questioning the power of the State of Connecticut to enforce within its own borders the decree of divorce which is here in issue"); *accord* Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287, 299 (1890). *But see* Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough, 204 U.S. 8, 15 (1907) (noting, in an interstate recognition case, that "no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law").

432. *E.g.*, Conn. Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 610 (1899) ("[T]he question for us to decide is whether [there] was a sufficient service to give jurisdiction to the [state] court over this corporation. If it were, there was due process of law "); *cf.* Dewey v. Des Moines, 173 U.S. 193, 202–03 (1899) (determining a state's jurisdiction to tax by analogy to *Pennoyer*'s principles,

making use of the Court's then-mandatory jurisdiction to resolve the ongoing split;[433] but the same could be said of other topics on which the law was far more settled.[434] When the issue did come up, at least, the Court didn't forget what *Pennoyer* had said a few years earlier; it simply wasn't necessary to every decision.

Third, while there was some resistance in the states, many courts did reconsider their prior decisions over time.[435] Some applied the general-law standards as a matter of their own normal procedure;[436] some repeated older language about judgments being received differently in and out of the state;[437] but many recognized that *Pennoyer* had fundamentally changed the process of review, even before the Court confirmed it in 1915.[438] 'Formerly, the Supreme Court of New Jersey wrote in 1889, judgments pursuant to state statutes were 'sometimes held to be enforceable in such state, though the court had lacked personal jurisdiction 'according to the general principles of law and justice, and though the judgments 'would not be recognized extraterritorially. But now, by force of the addition to the federal constitution just adverted to, such judgment would be of no legal avail either at home or abroad. "[439] Field couldn't have put it better.

IV From *Pennoyer* to the Present Day

When the Fourteenth Amendment was adopted, jurisdiction was governed by a complex interplay of general law, constitutional rules, and

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and holding that a tax without proper jurisdiction "would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution").

433. *See* Circuit Court of Appeals Act of 1891 (Evarts Act), ch. 517, § 6, 26 Stat. 826, 828 (codified as amended in scattered sections of 28 U.S.C.) (establishing—for the first time—discretionary Supreme Court certiorari review of certain federal judgments); *see also* Act of Feb. 13, 1925 (The Judges' Bill), ch. 229, § 1, sec. 237(b), 43 Stat. 936, 937 (codified as amended in scattered sections of 28 U.S.C.) (extending that discretion to many cases from state courts).

434. *See supra* note 347 and accompanying text.

435. *See, e.g.*, Kemper-Thomas Paper Co. v. Shyer, 67 S.W. 856, 860 (Tenn. 1902) ("Since the deliverance of [*Pennoyer*] some of the states that had previously announced the distinction there reprehended and repudiated, have overruled their former decisions to the contrary and adopted a rule in harmony with it.").

436. *E.g.*, Amsbaugh v. Exch. Bank of Maquoketa, 5 P. 384, 386 (Kan. 1885).

437. *See, e.g.*, Pickett v. Ferguson, 45 Ark. 177, 192 (1885) ("Now, as Ferguson was neither personally summoned, nor voluntarily appeared in the Tennessee suit, and was not even a citizen of that state, no court sitting there could render any judgment against him which would be recognized elsewhere as of any validity. Such a judgment is treated in other jurisdictions as a mere nullity.").

438. *See* De La Montanya v. De La Montanya, 44 P. 345, 347–48 (Cal. 1896) (taking *Pennoyer*'s rule as "based upon a proposition of international law," which now affected "the validity of [a] judgment within the state where rendered"); *id.* at 350 (McFarland, J. dissenting) (describing the invalidity of a judgment "even in the state where it was rendered' as "the main proposition decided by" the case, and one "which may, perhaps, be styled 'modern' "); *accord* Denny v. Ashley, 20 P. 331, 332 (Colo. 1889); Bickerdike v. Allen, 41 N.E. 740, 742 (Ill. 1895); Wilson v. Am. Palace Car Co. of N.J. 55 A. 997, 998–99 (N.J. 1903).

439. Elasser v. Haines, 18 A. 1095, 1097 (N.J. 1889).

federal review. It's not surprising that these subtleties were lost over time. Today, personal jurisdiction is a topic in due process, with the Supreme Court regularly divining specific doctrines from a famously obscure text. Those who find this practice legally arbitrary or otherwise unsatisfying might wish to look to an earlier model.

This Article defends *Pennoyer* on original grounds. Based on American law as it stood at the Founding, and as it's been lawfully modified since, the reasoning of *Pennoyer* was and is legally correct.[440] For some people, that's defense enough. But even those who reject originalism as a general approach might still hesitate to enforce 'constitutional' restrictions with no better source than the pen of Chief Justice Stone. After all, the current panoply of due process restrictions on state jurisdiction is widely disliked.[441] So if personal jurisdiction doctrine is of the Court's own invention, and if it can't claim roots in an actual Fourteenth Amendment that was actually enacted, what is it good for? Why not do something else—or let democratically elected legislators, whether in the states or in Congress, choose a different path?

Indeed, the one clear result of returning to *Pennoyer*'s model would be a substantial increase in the power of Congress over state jurisdiction. Because due process requires jurisdiction, full stop, and because this federal question is answered in the last instance by a federal court, what matters is the federal view of who has authority over what. To the extent that Congress has enumerated power to determine the federal view, the Due Process Clauses won't stand in the way.

Before Congress acts, of course, courts will still need to decide personal jurisdiction cases. In the meantime, returning to the original law of personal jurisdiction might make less difference in practice than in theory. The practices that constitute general and international law can change over time. It might be that today's law of jurisdiction, even when reconstructed along these lines, would look more like *International Shoe* than like *Pennoyer*. Or maybe not. There are different ways of understanding the process of common-law change, and these in turn would have different implications for the unwritten requirements enforced by federal courts. Odds are, though, that the result would be more determinate, more sensible, and in any case more legally sound than the doctrines we've got now.

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440. *See generally* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015) (describing this approach to constitutional law).

441. *See* Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1304–05 (2014) ("The one thing jurisdiction scholars agree on is the sad state of personal jurisdiction law.").

A. The Decline of General Law

Pennoyer was partly a victim of its own success. Its reasoning was based on the process of *recognition*. Before *Pennoyer*, whatever jurisdiction a state asserted in its own courts could only be challenged in some other forum. But once parties could raise their due process challenges in the *rendering* court, fewer cases had to wait for the recognition stage—and with the issue already litigated in one court, it couldn't be relitigated in another.[442]

That procedural change obscured a broad swath of substantive law—such as the distinct roles of the 1790 Act and the Full Faith and Credit Clause, or the differences between Supreme Court and state-court review. By the time of *Hess v. Pawloski*,[443] the Court no longer relied on what Perdue calls the 'awkward formulation' of whether 'Massachusetts lacked legitimate authority [under other doctrines] and, as a result, enforcement of any subsequent judgment would have violated the Due Process Clause.'[444] Instead, the Court understandably described the issue as 'whether the Massachusetts enactment contravenes the due process clause of the Fourteenth Amendment.'[445] In other words, the Court spoke in shorthand—and soon judges began to treat the shorthand as if it were substance.[446] Rather than look to sources beyond the constitutional text, courts assumed that the Due Process Clause told them everything they needed to know. Treating jurisdiction as a subfield of constitutional due process also made life easier for judges after *Erie* and *Klaxon*; jurisdiction was too important to be left up to state courts, but it didn't have to be maintained as a prominent example of general law.

As a topic in due process, and not general law, jurisdiction was highly susceptible to other trends in due process jurisprudence. From the idea that '[t]he state is free to regulate the procedure of its courts , unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'[447] it's but a short step to the 'traditional notions of fair play and substantial justice'[448] so central to *International Shoe*[449]—and from there to our current menagerie of

442. *See generally* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).

443. 274 U.S. 352 (1927).

444. Perdue, *Sovereignty*, *supra* note 20, at 733.

445. *Hess*, 274 U.S. at 355.

446. *See* Brief of Professor Stephen E. Sachs as *Amicus Curiae* in Support of Petitioner at 28, BNSF Ry. Co. v. Tyrrell, No. 16-405 (U.S. cert. granted Jan. 13, 2017).

447. Brown v. Mississippi, 297 U.S. 278, 285 (1936) (internal quotation marks omitted).

448. Milliken v. Meyer, 311 U.S. 457, 463 (1940).

449. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting *Milliken*, 311 U.S. at 463).

'minimum contacts, 'purposeful availment, five-factor reasonableness, and so on.[450]

But the details of the doctrine only mask deep divisions on the foundations. Every Justice now on the Court might speak the same language of specific and general jurisdiction, but there's no consensus on the animating principles behind these categories—leading to wild swings in doctrine over the past few years.[451] Once we start searching for substantive criteria in the Due Process Clause, we're bound to come up short—for only on the most heroic readings of the Clause is there anything in it for us to work with. ("Turn it over, and turn it over, for all is therein. ')[452] Without firm ground to build on, the Court seems to lurch from theory to theory as the mood strikes—citing convenience,[453] fairness,[454] federalism,[455] liberty,[456] tradition,[457] consent,[458] or all of the above.

B. Implications for Congress

By treating the Due Process Clause as a font of substantive rules, the Court has seized control of the law of jurisdiction without any idea of what to do with it. This is perhaps the exact opposite of the earlier, general-law model—on which courts were expected to leave the law in place, applying shared unwritten principles until the *legislature* said otherwise. Were we to restore the original approach to jurisdiction, the most significant change wouldn't be any particular substantive rule, but a reallocation of authority: between the courts and Congress, and between states and the federal government.

Today we place federal courts in charge of articulating limits on state ones. That makes it very hard to regulate fast-moving fields such as the Internet; legislatures can respond to new facts and make sensible-but-undertheorized compromises without having to justify everything they do as

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450. Erbsen, *supra* note 29, at 3 (bemoaning the "catchphrases and buzzwords" that dominate jurisdiction doctrine).

451. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 760–61, 762 n.20 (2014) (Ginsburg, J.) (unexpectedly elevating the phrase "at home," introduced without fanfare three years earlier in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), into the primary test for general jurisdiction); *see also id.* at 773 (Sotomayor, J. concurring in judgment) (noting the novelty of the Court's rule).

452. Caperton v. A.T. Massey Coal Co. 556 U.S. 868, 903 (2009) (Scalia, J. dissenting) (quoting 8 THE BABYLONIAN TALMUD: SEDER NEZIKIN, Aboth 76–77 (I. Epstein ed. & trans. 1935)).

453. *See* McGee v. Int'l Life Ins. Co. 355 U.S. 220, 223–24 (1957).

454. *See* Shaffer v. Heitner, 433 U.S. 186, 206, 212 (1977).

455. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293–94 (1980).

456. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

457. *See* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (Scalia, J., plurality opinion).

458. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880–81 (2011) (Kennedy, J. plurality opinion).

having been dictated by the Fourteenth Amendment. While that Amendment gives Congress an enforcement power,[459] under current doctrine there's not much Congress could do to vary (and, in particular, to weaken) the obligations the courts have imposed. Even if we negotiated a broad multilateral treaty coordinating jurisdiction across nations, we still might be unable to sign it, should any of its terms be thought to depart from the Court's current take on due process.[460]

Under *Pennoyer*, though—putting concerns about notice to one side[461]—the Fourteenth Amendment only requires jurisdiction, full stop. When state judgments are challenged in federal courts, those courts will use any relevant sources of law to see if jurisdiction was present or absent. The Constitution doesn't *limit* those sources to general law. It just so happens that, at the time of *Pennoyer*, the courts didn't have anything else to work with. But they could use other sources of law too, if we only had some way to provide them.

As it turns out, we do. The Full Faith and Credit Clause lets Congress 'prescribe the Effect' of 'the public Acts, Records, and judicial Proceedings' of the several states.[462] As noted above, early Congresses repeatedly considered proposals to vary a judgment's effect based on the source of its jurisdiction.[463] If Congress were to tighten the reins on state courts, declaring that a judgment based on a certain kind of service should have no effect in any other forum, then a federal court considering that judgment would have to conclude that it indeed had no effect, whatever the general law might say. And if the judgment were legally ineffective, its use against an individual's liberty or property would violate due process.

Alternatively, if Congress wanted to expand the reach of state courts, it could pass a statute defining additional grounds on which to recognize a state judgment as valid. Because statutes outrank general law—and because federal statutes, if constitutional, are *supreme* law—the federal courts would necessarily give such a judgment its full effect. The same thing could happen through a self-executing treaty, made by the President with the Senate's consent. (Or, perhaps, an interstate compact made with Congress's consent,[464] which commanded each state's citizens to attend the other's courts.) In this way, a judgment that might be questionable under general law can be declared valid by statute or treaty, whether in a state's own courts or in the federal courts. And if the judgment itself is legally valid, then

459. U.S. CONST. amend. XIV, § 5.

460. *See* Stanley E. Cox, *Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 ALB. L. REV. 1177, 1186 (1998) (discussing whether "*properly construed* due process limits can be trumped by reasonably negotiated treaties").

461. *See* Mullane v. Cent. Hanover Bank & Tr. Co. 339 U.S. 306, 315 (1950).

462. U.S. CONST. art. IV, § 1.

463. *See supra* notes 279–85 and accompanying text.

464. *See* U.S. CONST. art. I, § 10, cl. 3.

there'd be no particular reason to suspect that the deprivations it orders would violate due process: such deprivations would only occur, as far as any federal court could tell, pursuant to the judgment of a court of competent jurisdiction.

In other words, though constitutional due process is still involved, the federal government has essentially free rein to set jurisdictional doctrine for the states. The Fourteenth Amendment still plays a crucial role; without it, there'd be no way to challenge an exorbitant judgment in the rendering court, whatever Congress might say about recognition in any other forum. But the Due Process Clause gives teeth to Congress's pronouncements, entitling defendants to challenge jurisdiction without waiting for the recognition stage.

Congress also has free rein to regulate jurisdiction in the federal system. The Supreme Court has suggested that the Fifth Amendment might limit federal courts in much the same way that the Fourteenth Amendment limits state courts.[465] But as *Pennoyer* saw things, that may not be right. Again, all that due process requires is jurisdiction, full stop. Under the Tribunals Clause[466] or the Necessary and Proper Clause,[467] Congress might confer personal jurisdiction on lower federal courts in an enormous range of cases—summoning 'a subject of England, or France, or Russia from the other end of the globe to obey our process.'[468] That might annoy our friends abroad, but it'd be fully effective at home, overriding any general-law rules to the contrary. In so doing, it'd also eliminate any potential Fifth Amendment objections: the court would have had jurisdiction according to federal law, and the judgment of a competent court is a paradigmatic example of due process.[469] The scope of federal power abroad, like the scope of state power at home, would be decided by our elected representatives—and not divined, or perhaps manufactured, from an unyielding Due Process Clause.

C. Implications for Courts

Waiting for statutes can take quite a while. To date, Congress has regulated state-court jurisdiction in only a handful of cases.[470] Perhaps it'd act more quickly if its authority were widely acknowledged; but the courts

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465. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987) (leaving as an open question whether 'a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole").

466. U.S. CONST. art. I, § 8, cl. 9.

467. *Id.* cl. 18.

468. Picquet v. Swan, 19 F. Cas. 609, 613 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134).

469. *See* Wendy Perdue, *Aliens, the Internet, and 'Purposeful Availment': A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 471 (2004) ("[O]ne might reasonably conclude that with respect to the questions of allocation of sovereign authority between the United States and other nations, the Constitution does not constrain at all.").

470. *See, e.g.*, 28 U.S.C. §§ 1738A–1738B (2012) (child custody and child support determinations).

have to decide cases in the meantime. So if we wished, for whatever reason, to leave the wilderness of modern due process and to return to the original model of personal jurisdiction, what would the courts do differently?

In some areas, the answers are easy. Courts would continue to scrutinize state judgments under the Due Process Clause—this time for compliance with the general law, not as it stood in 1878, but as it stands today. The goal is identifying existing standards, not building rationalist castles in the air. Courts might also look to international practice for these standards, but only to the extent that it still coheres with American practice.

The harder questions involve identifying those practices, especially after many decades in which practice abroad has become less uniform and judges have muddied the record at home. How can we tell what the existing practice is, if the courts have for many decades been doing something else? How is it even possible for 'the existing practice' to be something other than what's currently done? As it turns out, these practices can exist at more than one level, and many jurisdictional practices are still recognized as shared. Despite decades of neglect, general law may still have something to offer us.

And when the answers do remain vague, a renewed focus on general law may also help clarify which considerations have greatest weight. If jurisdiction's substantive standards were emanations of the Due Process Clause, it might make sense to focus on the 'liberty' of the defendant. But once attention moves to general law, it becomes easier to see why sovereignty—a concept found nowhere in the Clause's text—might be jurisdiction's definitive concern.

1. Easy Answers.—Rejecting the modern due process theory doesn't mean that courts should 'abandon' the enforcement of jurisdictional rules;[471] nor should they 'stop supervising jurisdiction under the Due Process Clause.'[472] Due process really does require lawful jurisdiction, so federal courts should still take a hard look at state-court judgments, even without any legislative guidance.

At the same time, returning to a general-law model wouldn't mean simply resetting the clock to 1878. General law is customary law, and custom can change over time—even due to actions that once violated the custom. (Think of spelling or grammar rules, which routinely evolve due to routine violations.) Should today's generally accepted standards of jurisdiction look more like *International Shoe* than *Pennoyer*,[473] it wouldn't matter if these customs had changed partly due to judicial influences, which themselves resulted from mistakes about the Due Process Clause. Alternatively, it's

471. Borchers, *supra* note 1, at 20.

472. Conison, *supra* note 3, at 1205.

473. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (AM. LAW INST. 1987) (describing a highly flexible regime of jurisdiction to adjudicate).

possible that the general rules of *Pennoyer*'s day might still be in force today; but that requires further argument.

What courts *would* give up would be the general approach of *International Shoe* and its progeny, of requiring each remaining 'traditional practice' to conform to a court's '[f]reeform notions of fundamental fairness.'[474] Such practices may seem out of keeping with the times. But when it comes to general law, the fact that 'so it was laid down in the time of Henry IV'[475] is an *excellent* reason for courts to continue to apply the longstanding rule, letting Congress decide whether and when to change it. In that respect, *Burnham v. Superior Court*[476] is an easy case, notwithstanding its widespread disapproval among academics.[477] Tag jurisdiction would be permissible as 'the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the Federal Government.'[478]

Likewise, the insistence in *Shaffer v. Heitner*[479] that existing rules of in rem jurisdiction pass 'the same test of 'fair play and substantial justice,'[480] or the more recent insistence in some courts that 'older precedent' on corporate consent give way to new theories of general jurisdiction,[481] would both be out of place. Again, it might turn out that either of these requirements just happens to conform to the modern practice. But that, too, requires further argument.

At the same time, courts should be careful about treating any international practice as the currently accepted one, no matter how many familiar American precedents it disrupts.[482] As under *Swift*, widely shared rules are sometimes displaced by local customs,[483] much the way that American English diverges from that spoken elsewhere; it was clear even in Story's day that the common law could develop its own conflicts principles

474. J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (Kennedy, J. plurality opinion).

475. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

476. 495 U.S. 604 (1990).

477. *See, e.g.*, Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. ILL. L. REV. 593.

478. *Burnham*, 495 U.S. at 615 (Scalia, J., plurality opinion).

479. 433 U.S. 186 (1977).

480. *Id.* at 207.

481. Genuine Parts Co. v. Cepec, 137 A.3d 123, 145 (Del. 2016) (applying Daimler AG v. Bauman, 134 S. Ct. 746 (2014)); *see also id.* at 145 n.19 (citing similar decisions).

482. *See, e.g.*, Perdue, *supra* note 469, at 462 (arguing that American notions of "purposeful availment" are "noticeably absent" abroad, where "effects or harm within the country is generally sufficient"); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 612 (1991) (arguing that tag jurisdiction "is contrary to the consensus of civilized nations and may violate international law").

483. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) (noting that, in any particular jurisdiction, a "local usage" might displace general principles of law).

as distinct from international norms.[484] If American practice has knowingly departed from international custom (say, by treating in-state service as sufficient), then in case of such a conflict, the American practice would control.

2. Harder Questions.—The more difficult problems for courts involve areas where the shared system of rules has broken down over time. International practice, for example, is less clear than it used to be. Some authorities argue that there *is* no international law of jurisdiction—that the opprobrium directed at well-known examples of exorbitant jurisdiction, such as jurisdiction based on the plaintiff's nationality, is nowadays a matter only of international comity and no longer one of international law.[485] Should this prove correct, though, the distinction between law and comity might turn out not to be as pressing as it seems—so long as there's substantial agreement on which exercises of jurisdiction are truly exorbitant.[486] If a federal court would hold a given foreign judgment invalid, as too jurisdictionally fishy for international comity to save, then the same judgment would be properly held invalid if it were issued by a state court instead. All that matters is whether the relevant standards are well-defined enough to be applied by courts; if so, then the state courts can still be required (through the 'hook' of due process and appellate review) to adhere to the federal courts' view of things.

On the domestic side, absent legislative intervention, the crucial question is determining what counts as American practice. One approach might look to Nelson's account of general law—as based on 'how *most* states do things, and not 'whatever the policymakers in one particular state have said.'[487] In that case, the minimum-contacts test, the purposeful-availment rule, and so on might all continue uninterrupted, as reflections of an American practice that acknowledges but still departs from international rules.

But another approach looks to a different kind of American practice—to our practice of attributing certain rules to the general common law of

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484. *See* STORY, *supra* note 157, § 241, at 201 (describing the difference of opinion between "foreign jurists' and "the common law" on capacity to contract).

485. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, reporters' note 1 (Tentative Draft No. 2, 2016) ("With the exception of sovereign immunity, modern customary international law generally does not impose limits on jurisdiction to adjudicate."); *see also* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2123 (2015) ("[N]o customary international law rule prohibiting the exercise of [exorbitant] jurisdictional bases has emerged."). *But see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 2, ch. 2, intro. note (AM. L. INST. 1987) ("The exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement.").

486. *See* Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 473, 475 (2006) (suggesting that "the world's different bases of exorbitant jurisdiction are, in essence, not as different as they appear").

487. Nelson, *supra* note 16, at 503–04.

jurisdiction, bypassing those rules we attribute to the Due Process Clause instead. This approach treats jurisdiction much the way the Multistate Bar Exam treats criminal law:[488] it identifies the rules we conventionally preface with 'at common law ," such as that burglary must be of a dwelling house[489] or that voluntary intoxication is no defense.[490] In this sense, we can all agree on what the shared common-law rule *is*—the one that *would* obtain absent legislative or judicial intervention—even though we also know that it may no longer be what's regularly done.

These rules, too, can change over time. The common law of intoxication was different at the end of the nineteenth century than at the beginning,[491] just as the common law of contract was different under Mansfield than it had been under Holt.[492] But these were changes internal to the common law, not separate impositions by statute. As the Supreme Court envisioned it in *United States v. Chambers*,[493] the prevailing rule of common law is something distinct from a restatement of the prevailing statute law—especially when the governing statutes 'themselves recognize the principle which would obtain in their absence. "[494] (In the same way. it'd be error to take the *customary* practice of European states to be whatever European Union members have agreed to by treaty and legislation.)[495]

This approach wouldn't be without its critics. Maybe we can't say what jurisdiction would be like without *International Shoe*, because we can't even imagine the legal contours of that world. Unlike statutes modifying the common law of burglary, court decisions construing (or misconstruing) the Due Process Clause aren't conscious stand-ins for a specific alternative that might be revived at any moment. Maybe the general-law practice has long since broken up, and *International Shoe* is all we have.

On the other hand, maybe the best way to describe the Court's twentieth-century case law really is as the imposition of separate standards on *Pennoyer*-era practices, rather than the growth and development of that particular customary tradition into something new. Or some of each; maybe a few of the early post-*Pennoyer* cases were still toiling in the fields of the

488. *See* Daniel J. Solove, *The Multistate Bar Exam as a Theory of Law*, 104 MICH. L. REV. 1403, 1406 n.10 (2006) (commenting on the fact that the Multistate Bar Exam employs 'archaic common law definitions of crimes" that have long since been 'supplanted with statutory law").

489. Note, *A Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009, 1009 (1951).

490. *See* Montana v. Egelhoff, 518 U.S. 37, 44–45 (1996) (Scalia, J. plurality opinion) (describing early common-law beliefs about voluntary intoxication).

491. Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1048–49 (1944).

492. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 350–51 (4th ed. 2002).

493. 291 U.S. 217 (1934).

494. *Id.* at 226; *cf.* Baude & Sachs, *supra* note 127, at 1108–09 (discussing *Chambers*).

495. *Cf.* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 909 (2011) (Ginsburg, J., dissenting) (comparing the American law of personal jurisdiction to the European Court of Justice's interpretation of particular EU regulations).

general-law tradition, while later cases superadded distinct standards of due process. If so, then perhaps the removal of these separate standards might leave the early twentieth-century service rules—with their unfashionable emphasis on presence, citizenship, and consent—as the last standing default.

Developing a full theory of common-law change—and successfully applying it to the twentieth-century history of personal jurisdiction—is somewhat beyond this Article's scope. But even a partial theory, to be developed further in future work, can still make a real difference. Understanding jurisdiction as general law would have a real impact over and above any revisions it makes to specific doctrines. The judge's task wouldn't be to find the best theory of due process, to reconcile ancient traditions with fundamental fairness, and so on, but to issue the ruling most consistent with our existing practices. That may be more of a change of tone and emphasis than a change in substance, at least at first. But it could have substantial effect on the development of the doctrine over time—making it both more predictable and more determinate, in the long run, than the Court's continuing efforts to rationalize the law.

3. Refocusing on Sovereignty.—Reviving *Pennoyer* offers no guarantee of doctrinal certainty. The general law of jurisdiction is only as determinate as it is;[496] and neither the general law, nor the customary international law that it incorporates, has any great reputation for clarity. But these bodies of law do have one extremely important feature: a sensible connection to the allocation of sovereign power.

Under *Pennoyer*, due process requires jurisdiction, full stop, with the actual jurisdictional standards supplied by other sources of law. This fact helps us resolve the oft-repeated conflict of "sovereignty' and 'liberty' that's long occupied the courts.[497] Due process requires a lawful judgment *before* liberty or property is taken, and our notions of sovereignty are necessarily connected to our convictions about which judgments are lawful.

Indeed, it's hard to see how the field could be about anything else.[498] Personal jurisdiction doctrines are 'inescapably political' [499] they regulate the exercise of power by some people over others. Jurisdiction isn't about *where* litigation takes place—and it hasn't been since at least 1794, when the Supreme Court barred a French consul from hearing admiralty claims on U.S.

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496. *See generally* Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014) (cautioning against views of law as inherently rule-like).

497. *Compare, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880–81 (2011) (Kennedy, J., plurality opinion), *with id.* at 899–900 (Ginsburg, J., dissenting).

498. *See generally* Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After* Walden v. Fiore, 19 LEWIS & CLARK L. REV. 769 (2015) (arguing for such a reorientation).

499. Stein, *supra* note 23, at 692.

soil.[500] If geographic convenience were all we cared about, we could have had the consul hear claims in people's living rooms.[501]

Instead, jurisdiction is about *who* gets to decide.[502] It's about choosing the group of people who get to choose the judges, to write the rules of procedure and evidence, to supply the jury—that is, to dispose of 'all [the defendants'] worldly goods,'[503] and often their liberty to boot. In particular, because jurisdiction includes the power to come to the *wrong* judgment,[504] it's about choosing the people who have power to make the *wrong* choices on all these counts and who have the right to see their choices enforced anyway.

Perhaps because the right answers are so hard to find, and the temptation to throw in the towel so great, jurisdiction scholars sometimes downplay the importance of their subject—suggesting, for instance, that the only really meaningful aspect of personal jurisdiction is its effect on choice of law.[505] But there'd be no point in getting excited over procedural issues—over the election of judges,[506] over pleading standards,[507] over the scope of class actions,[508] over the treatment of sexual assault victims on the witness stand,[509] and so on—if our political process had no effect on the answers, and if anyone could just as easily sue or be sued in some other forum with any or none of these rules.

Each of these topics involves the exercise of political power over defendants, because the defendant doesn't choose the forum. Courts sometimes explain this exercise through a framework of consent or voluntary submission;[510] but that's merely *tacit* consent, a well-known 'quagmire' of

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500. Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 16 (1794).

501. Sachs, *supra* note 441, at 1311.

502. *See id.* at 1303 (identifying the crucial questions regarding personal jurisdiction as ones about "not *where*, but *who*"); *see also* Erbsen, *supra* note 498, at 772 ("[M]odern personal jurisdiction doctrine conflates two distinct questions: (1) where may litigation occur, and (2) which governments may authorize litigation.").

503. Burnham v. Superior Court, 495 U.S. 604, 623 (1990) (Scalia, J., plurality opinion).

504. *See* Baude, *supra* note 145, at 1831 ("[J]udgments closed disputes even when they were wrong, but only when there was jurisdiction. The lawfulness of judicial action in a given case depended on the authority of the judge, not the reasons for judgment.").

505. *See, e.g.*, Drobak, *supra* note 24, at 1058 (stressing that personal jurisdiction requirements function as a limit on choice of law); Redish, *supra* note 8, at 1139 (suggesting that jurisdictional limits are the results of states' desires to achieve their policy goals by having their substantive law control the outcomes of cases).

506. *See* Sandra Day O'Connor, Opinion, *Take Justice Off the Ballot*, N.Y. TIMES (May 22, 2010), http://www.nytimes.com/2010/05/23/opinion/23oconnor.html [https://perma.cc/BR7T-PT5D] (arguing that the direct election of state court judges should be replaced with a "merit selection system").

507. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

508. *See generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

509. *See* FED. R. EVID. 412.

510. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (Kennedy, J., plurality opinion) ("A person may submit to a State's authority in a number of ways.").

political theory.[511] What exactly does a British metal-shearer manufacturer have to do to become subject to the will of the American people, or to those of New Jersey in particular? As Perdue writes, '[t]he problem of political legitimacy has troubled philosophers for centuries,'[512] and it's unlikely that any convincing theory will finally be developed in the U.S. Reports, between the first Monday in October and the last day of June.[513]

This is where the general law of jurisdiction can help. For a workable jurisdictional doctrine, we don't need a philosophically correct theory of political obligation—any more than we need actually correct policy in any other area of the law. The law usually serves as a means of conventional settlement, something 'on which society (mostly) agrees and which allow[s] us (mostly) to get along.'[514] With regard to political authority, some of our conventional settlement is found in international law, the amorphous body of customs and practices that allocate authority among sovereign nations; within the United States, much of the rest is found in general-law principles. To the extent that there *are* any shared rules about judicial jurisdiction—and this is not to assume that there will be any, or any at the level of specificity we need—the principles of general and international law seem like good places to start.

After all, everyone believes in *some* limits on a state's territorial authority. Jurisdiction to execute a judgment usually ends at the border: one state shouldn't send its judicial marshals to seize persons or property within the territory of another. Yet sovereign borders, too, are a form of conventional settlement of questions of political authority. They serve as arbitrary dividing lines, and they only work to the extent that people agree on them. Where people disagree, borders cease to be useful—say, in the East China Sea.[515] But where borders do work, they help answer what might otherwise be theoretically insoluble questions: which groups of people should rule over which other groups, which decisions should be made in Washington or in Mexico City, and so on. Courts could always try to think up better answers, like colonial administrators offhandedly redrawing maps, but there are also plenty of reasons why they shouldn't. Finding the current conventional answers is not only easier than finding true ones—it may also be more suitable for a judge's role.

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511. Perdue, *supra* note 25, at 537.

512. *Id.* at 546.

513. *See* Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 308 (1987) ("United States Reports is hardly an adequate forum for philosophical debate.").

514. *See* Baude & Sachs, *supra* note 127, at 1096; *see also id.* at 1096–07 ("We don't have an inherent 'just is' law of narcotics, either, but judges don't handle drug cases by making their own first-order normative decisions.").

515. *See generally* MARK E. MANYIN, CONG. RESEARCH SERV., THE SENKAKUS (DIAOYU/DIAOYUTAI) DISPUTE: U.S. TREATY OBLIGATIONS (2016), http://www.fas.org/sgp/crs/row/R42761.pdf [https://perma.cc/CUN6-9LBG] (describing the dispute between Japan and China regarding islands in the East China Sea and the United States' role therein).

Conclusion

That *Pennoyer* got it right is more than a historical debating point. The American law of personal jurisdiction is an intellectual shambles. If there's a half-coherent alternative, defensible on original grounds, that should be seen as good news. If this alternative is moderately helpful in achieving other goals, like modernizing jurisdictional doctrine by statute, so much the better.

That alternative, it turns out, is the much-mocked notion of general law, together with the long-despised decision in *Pennoyer*. Other scholars have discussed jurisdiction with general law before, but they've generally thought that it proved *Pennoyer* wrong.[516] In fact, recovering the model of general law is crucial to understanding why *Pennoyer* got things right.

More importantly, recovering this model points the way to other areas of the law we might better understand, once we let the scales of *Erie* and *Klaxon* fall from our eyes. To some scholars, because jurisdiction is 'part of the law of conflicts, *Erie* and *Klaxon* undermined the case for continued federal court supervision' of the subject.[517] The same argument would ring hollow as applied to state borders, where federal supervision seems vital to the constitutional plan. One person's *modus ponens* being another's *reductio*, we might with equal justice say that the case for federal supervision of state personal jurisdiction has undermined the case for *Erie* and *Klaxon*.

Erie's reasoning depends crucially on the impossibility—the 'fallacy'—of general law.[518] Yet general law is not only possible, but indispensable. State-court jurisdiction is just one topic, and far from the only one, as to which our Constitution was designed in light of general law. Many areas that are crucial to a federal system go unaddressed in our constitutional text: choice of law, jurisdiction to tax, extraterritoriality, interstate and international relations, and so on. That may or may not have been a deliberate choice, but it also wasn't really an oversight. These areas weren't left to 'majestic generalities"[519] or to arbitrary gaps, but to an already-functioning

516. *See, e.g.*, Borchers, *supra* note 1, at 20, 22–24 (arguing that the Court should "abandon the notion that state court personal jurisdiction is a matter of constitutional law" and attributing the "constitutionalization of American personal jurisdiction' to *Pennoyer* and its progeny). *See generally* Conison, *supra* note 3, at 1135–39 (characterizing *Pennoyer* as unjustifiedly breaking with a prior tradition).

517. Conison, *supra* note 3, at 1183.

518. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938); *see* Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1119 (2011); Sachs, *supra* note 74 (manuscript at 47) (arguing that the "whole logic" of *Erie* "unravels" once one recognizes that a state court could decide cases by finding general law instead of making state law).

519. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (Jackson, J.).

system of law—the entire purpose of which is to lie in reserve, answering questions that other sources of law have left open.

After so many years under *Erie*, it takes a great effort just to understand how our own legal system was supposed to work. Recovering the general law of jurisdiction might be a good first step.

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Essay

Toward a Science of Torture?

M. Gregg Bloche, M.D.*

Does torture 'work? Proponents, including President Trump and the architects of CIA 'Enhanced Interrogation' say it does, by breaking terrorists' resistance to revealing information that saves lives. Torture's foes typically dismiss this claim as false to the point of fraud—fortuitous coincidence with torture's unlawfulness. Neither view, I argue herein, rests firmly on evidence. Rival anecdotes, not data, have, so far, driven this debate. And a scientific answer is beyond our reach, since: (1) rigorous comparison between interrogation methods that do and don't involve torture isn't possible, and (2) studies of this sort would be transparently unethical. This hasn't stopped the CIA from pursuing a research-based answer. Recently released documents, reviewed here for the first time, reveal that the Agency looked to science for a resolution and raise the explosive possibility that the CIA conducted a clandestine program of human-subjects research on the risks and efficacy of torture. What can be said, based on the available science, is that there's no evidence that torture is more effective than lawful interrogation and some reason to suspect that interviewing strategies grounded in state-of-the-art understandings of persuasion and cognition work best of all. What can also be said is that: (1) America's post-9/11 torture program wrecked lives, and (2) torture has wide appeal, as symbolic riposte to the powerlessness many feel in the face of vertiginous economic and cultural change.

'Torture works, President Trump said repeatedly at campaign events last year.[1] 'Believe me, it works.'[2] Torture's opponents insist otherwise. They mean, of course, not that torture doesn't 'succeed' at traumatizing souls but that it does no better than lawful interrogation methods at obtaining information for the purpose of preventing terrorist violence.[3] For political

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* Professor of Law, Georgetown University. I thank Alexander Capron, Brian Galle, Henry Greely, Dror Ladin, and David Luban for their insights and suggestions. I also thank participants in Georgetown University Law Center's faculty workshop, Stanford Law School's 'Bio Lawlapalooza' Conference, and Houston Methodist Hospital's Conference on Bioethics After the Holocaust, at which I presented parts of this Essay.

1. Vanessa Schipani, *Trump on Torture*, FACTCHECK.ORG (July 28, 2016), http://www.factcheck.org/2016/07/trump-torture/ [http://perma.cc/5ADY-H24A].

2. *Id.*

3. As the U.N.'s Committee Against Torture (CAT)—which oversees implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—recognizes, torture can have other purposes. The convention defines torture as "severe pain or suffering, whether physical or mental, intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a

liberals, this is fortuitously coincident with torture's repugnance. More than that, it pushes back against portrayals of progressives as faint-hearted: it sounds more tough-minded to say torture doesn't 'work' than to say torture is wrong because it is cruel.

This matters since tough-mindedness carries rhetorical advantage. Unwillingness to traumatize terror suspects out of concern for their rights and dignity is *de rigueur* among progressives but weak-kneed to many others. Most Americans support torture, at least in some circumstances. A March 2016 Reuters/Ipsos poll found that 63% of Americans think torture of terror suspects is 'often' or 'sometimes' justified.[4] A series of ten Pew surveys conducted from 2004 to 2011 yielded similar results. Asked whether "torture [can] be justified against suspected terrorists to gain important information," only a quarter to a third of respondents said 'never.'[5] The Republican Party's 2012 presidential nominee endorsed 'enhanced interrogation,' albeit insisting it isn't torture.[6] The party's 2016 nominee dropped all pretense and prevailed, promising 'the torture,' including waterboarding and 'a hell of a lot worse,' and vowing to 'expand the laws' to allow it.[7] That 'the laws' against torture are *jus cogens* (international principles that cannot be set aside by one country)[8] and that torture of captives is a war crime[9] have been little-noted during election seasons. In our politics, torture has become a trope for toughness and moral qualms about it, a sign of weakness.

So the more muscular proposition that torture doesn't 'work' to stop the bad guys has moved to the fore as an argument against it. For a dozen years, since the details of the Bush Administration's post-9/11 Enhanced

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third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

4. *See* Chris Kahn, *Exclusive: Most Americans Support Torture Against Terror Suspects Reuters/Ipsos Poll*, REUTERS: POLITICS (Mar. 30, 2016), http://www.reuters.com/article/us-usa-election-torture-exclusive-idUSKCN0WW0Y3 [https://perma.cc/6XZF-MECV] (reporting that almost 25% of respondents answered "often" and another 38% answered "sometimes").

5. DAVID LUBAN, TORTURE, POWER, AND LAW 301 (2014). Between 43% and 53% of respondents answered "often" or "sometimes" over the course of the ten surveys; 17% to 25% said "rarely," and 2% to 5% answered "don't know." *Id.*

6. *See* Charlie Savage, *Election to Decide Future Interrogation Methods in Terrorism Cases*, N.Y. TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/28/us/politics/election-will-decide-future-of-interrogation-methods-for-terrorism-suspects.html [https://perma.cc/5MFN-FVF2] (noting that Mitt Romney's advisors urged him to permit "enhanced interrogation techniques" they characterized as "safe, legal and effective").

7. Steve Inskeep, *Listen: Trump Foreign Policy Adviser Hopes to Talk Him Out of Torture*, NPR: POLITICS (Mar. 23, 2016), http://www.npr.org/2016/03/23/471543396/trump-taps-former-romney-campaign-foreign-policy-adviser-for-team [https://perma.cc/F5LS-APJK].

8. *E.g.*, Siderman de Blake v. Republic of Arg., 965 F.2d 699, 714, 716 (9th Cir. 1992).

9. *See, e.g.*, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 2, Sept. 2009 (noting that "torture or inhuman treatment" of captives constitutes a 'grave breach' of the Geneva Conventions of 1949).

Interrogation program began to emerge, a battle of invective has played out over whether the program saved lives—and, more generally, whether abuse rising to the level of torture can extract "actionable intelligence. Can science give an answer? We look to empirical methods to measure the efficacy of myriad interventions, from medical tests and treatments to capital punishment as a deterrent to murder. Shouldn't the question of torture be similarly amenable?

I. Beyond Straw Men: The CIA's Behavioral Science Model of Torture

A bevy of psychologists, brain scientists, and others say it is—and that they've answered it decisively. A 2015 book by neuroscientist Shane O'Mara, titled *Why Torture Doesn't Work*, pulls together a large body of research on the effects of sleep deprivation, simulated drowning, and other abuses on the mind and brain.[10] With the exception of a series of studies on U.S. soldiers who underwent mock torture as part of survival and resistance training,[11] the subjects of this research weren't put through anything resembling enhanced interrogation; rather, they were patients, college students, and others who volunteered for brain scans, psychological testing, and experimental exposure to mild sleep deprivation, pain, or other stressors.[12] O'Mara also assembles animal studies of the neurobiology of stress, including prolonged sleeplessness, solitude, cramped confinement, and exposure to extreme temperatures.[13] He ties this work together with current understandings of the biology of fear, anger, isolation, and exhaustion.[14] All this adds up to a powerful argument for torture's destructive effect on memory, recall,[15] and ability to construct coherent narratives of remembered events—capabilities critical for effective interrogation.

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10. *See generally* SHANE O'MARA, WHY TORTURE DOESN'T WORK: THE NEUROSCIENCE OF INTERROGATION (2015).

11. *See id.* at 127–30 (chronicling studies on military personnel).

12. *E.g.*, *id.* at 133–34 (sensory-deprivation study on volunteers); *id.* at 158 (sleep-deprivation study on volunteers); *id.* at 192–93 (temperature-manipulation study on volunteers); *see also id.* at 159 ("Contrary to the thinly researched and poorly discussed impression provided by the memos, there was available a large and extensive literature about sleep deprivation in healthy volunteers, in chronic insomniacs, and in shift workers and other occupational groups.").

13. *Id.* at 125, 135, 161 (noting that "severe, chronic, repeated stressor[s], irrespective of [their] origin[s] . . . inhibits the production of new brain cells . . . in just about every animal model of stress and also in models of depression").

14. *See generally, e.g.*, *id.* at 105–15 (explaining the biological effects of stress, fear, and pain caused by torture).

15. Memory and recall are different things; the former refers to storage of information, and the latter refers to the mind's ability to access stored information. *Memory*, ENCYCLOPÆDIA BRITTANNICA, https://www.britannica.com/topic/memory-psychology [https://perma.cc/6J5J-GHVA]; *Recall*, ENCYCLOPÆDIA BRITTANNICA, https://www.britannica.com/topic/recall-memory [https://perma.cc/3TET-K8NM].

But does this argument establish that torture doesn't 'work"? Torturers don't aver that their efforts help people to remember; rather, their claim is that harsh methods overcome captives' resistance to sharing what they know.[16] If greater *willingness* to answer questions truthfully more than makes up for diminished cognitive functioning, then the science O'Mara marshals is beside the point: reduced resistance, achieved through torture, can yield positive intelligence results. Those who invoke this science to rebut claims that torture 'works' must show that the damage it does to memory and recall outweighs any purported gains from torture's overcoming of detainees' resistance.

So does torture overcome captives' resistance to revealing useful information? More precisely, what advantages, if any, does torture offer over lawful interrogation methods as a way to surmount resistance? Opponents of torture usually insist it offers none.

They typically portray the torturer's craft as the overpowering of people through force and fear; this, they contend, is less effective than building relationships with interviewees, as seasoned law enforcement and military interrogators have traditionally done.[17] These strategies, they note, are hardly warm and fuzzy—they rely on shame and embarrassment as much as empathy—but they're powered by human connection and the mutual expectations it engenders.[18] Intimidation through force and fear shatters this connection, the argument goes. More than that, it stiffens subjects' resistance by arousing their ire.

Torture as intimidation—imposition of interrogators' will upon their captives—is a pop culture meme, from 'Jack Bauer' in the Fox television series *24* to the waterboarding scene in the film *Zero Dark Thirty*.[19] It likewise prevails in scholarly discussion. Consider, for example, the legal philosopher David Luban's definition of torture as 'the assertion of unlimited power over absolute helplessness, communicated through the infliction of

16. *See* Mark A. Costanzo & Ellen Gerrity, *The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate*, 3 SOC. ISSUES & POL'Y REV. 179, 198 (2009) ("[T]orture is designed to break the resistance of an enemy.").

17. *See* Jonathan P. Vallano et al., *Rapport-Building During Witness and Suspect Interviews: A Survey of Law Enforcement*, 29 APPLIED COGNITIVE PSYCHOL. 369, 370 (2015) (discussing the prominence and recognized effectiveness of rapport-building among law enforcement interviewers).

18. *See* Jonathan P. Vallano & Nadja Schreiber Compo, *Rapport-Building with Cooperative Witnesses and Criminal Suspects: A Theoretical and Empirical Review*, 21 PSYCHOL. PUB. POL'Y & L. 85, 86 (2015) (noting that, in contrast to literature on rapport-building in the therapeutic or interviewing contexts, 'recent interrogation literature has conceptualized rapport-building as not necessarily involv[ing] a positive relationship. This conceptualization is also consistent with the Army Field Manual, which states that 'rapport-building does not necessarily equate to a friendly atmosphere', as well as the Reid Technique, which implies that rapport involves cultivating a relationship by any means necessary to procure a confession. (internal citations omitted)).

19. *24* (Fox television broadcast 2001–2010); ZERO DARK THIRTY (Annapurna Pictures 2012).

severe pain or suffering on the victim that the victim is meant to understand as the display of the torturer's limitless power and the victim's absolute helplessness.'[20]

But this isn't what *America's* torturers—the designers of the CIA's Enhanced Interrogation program—had in mind. To the contrary, the program's chief architect, psychologist James Mitchell, warned against allowing interrogation to devolve into a 'battle of wills'[21] between interrogator and captive. In a March 2016 e-mail to me, former CIA Behavioral Sciences Chief Kirk Hubbard (who managed Mitchell during the program's early years and still passionately defends it) wrote, 'I remember many years ago Jim Mitchell telling me that 'torture' doesn't work (I was thinking a cordless drill with a 3/8" bit!).'[22] Mitchell *agreed* with critics of the 'Jack Bauer' model—raw intimidation—that it often stiffens resistance to interrogation by stirring detainees' fighting spirits.

Mitchell, Hubbard, and CIA leaders who embraced their approach had another, very different model in mind. Much has been made of Mitchell's reliance on psychologist Martin Seligman's theory of 'learned helplessness,'[23] but the more important influence was CIA, Air Force, and Army research in the 1950s into how Chinese interrogators obtained false 'confessions' from captured U.S. airmen during the Korean War.[24] Work by sociologist Albert Biderman, in particular, was the foundation for Mitchell's model. Drawing on access to 'former Chinese and Soviet interrogators, ex-POWs, and still-classified sources, Biderman and others sought to reconstruct the methods the Chinese used and to understand how and why they worked.[25]

At the heart of the methods' effectiveness, Biderman found, was avoidance of a contest of endurance between interrogator and captive. Rather than trying to impose their will upon prisoners by inflicting agony face-to-face, interrogators sought to pit each prisoner against himself—to force an 'internal' struggle that the prisoner was bound to lose.[26] Techniques like forced standing in awkward positions that became excruciating over time averted *mano-a-mano* contests between torturer and captive. 'The

20. LUBAN, *supra* note 5, at 128.

21. S. REP. NO. 113-288, at 166 n.1016 (2014).

22. E-mail from Kirk Hubbard, former Behavioral Scis. Chief, CIA, to author (Mar. 30, 2016) (on file with author).

23. *See, e.g.*, JANE MAYER, THE DARK SIDE 163–64 (2008) (describing the centrality of Seligman's work to Mitchell's thinking and his application of learned helplessness principles during his time with the CIA).

24. *See* M. GREGG BLOCHE, THE HIPPOCRATIC MYTH: WHY DOCTORS ARE UNDER PRESSURE TO RATION CARE, PRACTICE POLITICS, AND COMPROMISE THEIR PROMISE TO HEAL 122–37 (2011) (explaining CIA and Defense Department research into Soviet and Chinese prisoner interrogation in the wake of the Korean War and its impact on Mitchell's work).

25. *Id.* at 122–25.

26. *Id.* at 124.

immediate source of pain, Biderman concluded, 'is not the interrogator but the victim himself.'[27] The purpose of this suffering—this *losing*—was to dispirit the victim to a breaking point.

Total command of each captive's environment hastened the onset of hopelessness. Control of bathroom breaks and body positioning, prolonged isolation, confinement in tiny spaces, and extended darkness or bright light created what Biderman called 'monopolization of perception.'[28] 'Sleep deprivation, loud noise, frigid temperatures, and disruption of routines' further wore prisoners down.[29] 'Small gestures of contempt—facial slaps and frequent insults—humiliated them.'[30] The end result, sometimes within weeks, was despair.[31]

This set the stage, Biderman argued, for the next phase: motivating these psychologically defeated captives to believe and act as their captors wanted.[32] To this end, the Chinese relied on rapport as much as fear—a psychological dynamic much different than the 'Jack Bauer' model of torture. The interrogator became the captive's 'sole human connection, with monopoly power to praise, punish, coax, scold, and reward, so as to sculpt behavior and belief.[33] This, rather than raw intimidation, Biderman concluded, drove American POWs to confess to purported crimes and political errors.[34]

Mitchell seized on this analysis as the foundation for his 'enhanced interrogation' model. Early critics, including me, pointed out the seeming absurdity of seeking accurate information via the method our enemies used to extract false confessions.[35] But we neglected a key nuance in the Biderman analysis: his distinction between 'inducing' and "shaping' compliance.[36] The first phase—the 'internal' struggle, 'monopolization of perception, and

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 124–25.

33. *Id.* at 124.

34. *See id.* (observing that Chinese and Soviet interrogation techniques 'avoided face-to-face contests of physical endurance between [interrogators] and the men they tried to break[, i]nstead set[ting the] men against themselves"). These methods were less than fully successful at effecting long-term changes in political views, leaving some former POWs confused and conflicted about what they believed—and emotionally troubled as a consequence of both this confusion and the psychological trauma they experienced. *See generally* ROBERT JAY LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM (1961) (evaluating the effects of Chinese Communist "brainwashing" on both Westerners and Chinese intellectuals).

35. *E.g.*, M. Gregg Bloche & Jonathan H. Marks, *Doing unto Others as They Did unto Us*, N.Y. TIMES (Nov. 14, 2005), http://www.nytimes.com/2005/11/14/opinion/doing-unto-others-as-they-did-unto-us.html [https://perma.cc/M65B-K2T9] (criticizing the Pentagon for signing off on "inhumane" and "ineffective" interrogation tactics that "mimic[ed] Red Army methods, ' for which "truth was beside the point: their aim was to force compliance to the point of false confession").

36. BLOCHE, *supra* note 24, at 124–25.

multiple humiliations—was meant only to create a compliant state of mind. Chinese interrogators then *shaped* compliance by encouraging and rewarding sham confessions.[37] Mitchell, though, contended that interrogators could sculpt compliance differently, by coaxing captives to tell the truth.[38]

To this end, CIA interrogators put much emphasis on rapid access to intelligence from multiple sources, so as to be able to quickly spot contradictions and flag possible falsehoods.[39] Hubbard, moreover, reached out to psychologists who worked on the detection of deception and even co-organized a conference on this topic.[40] And Mitchell's contracts with the CIA, released last July, reveal that his approach borrowed ideas from psychologist Albert Bandura,[41] whose widely recognized work on how people form moral and political beliefs has drawn interest from national security psychologists interested in changing militants' moral allegiances.[42] How, exactly, Mitchell and his colleagues marshalled Bandura's thinking, the science of deception detection, and CIA information-sharing capabilities so as to shape compliance remains uncertain; the documents that set out this story remain mostly classified. But it is clear that the designers of Enhanced Interrogation took the danger of false leads seriously and sought to bring science to bear on the task of cajoling their despairing victims to reveal truth.

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37. *Id.* at 125.

38. *Id.* at 136.

39. *See id.* (indicating that detecting falsehood in real time in order to swiftly punish dishonesty was necessary to coerce detainees to tell the truth). How well they achieved this in practice is uncertain. The Senate Select Committee on Intelligence unearthed multiple instances of what might be charitably called confirmation bias—episodes in which detainees provided inaccurate information that fit interrogators' preconceptions and that interrogators therefore believed. S. REP. NO. 113-288, at 85–96, 108–09 (2014).

40. DAVID H. HOFFMAN ET AL., SIDLEY AUSTIN LLP, REPORT TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION: INDEPENDENT REVIEW RELATING TO APA ETHICS GUIDELINES, NATIONAL SECURITY INTERROGATIONS, AND TORTURE 173–79 (2015) [hereinafter SIDLEY REPORT].

41. The contracts speak euphemistically. A "Statement of Work" dated April 2003 (at the height of the "Enhanced Interrogation" program, when Mitchell was personally overseeing, even conducting, Enhanced Interrogation at CIA Black Sites) includes the following language:

> 3.0 DELIVERABLES
>
> 3.1 Adapt and modify the Bandura social cognitive theory for application in operational settings.
>
> 3.2 Refine variables of interest to assess in order to apply the model (3.1) to specific individuals.

Exhibit 1 to Notice of Filing of Defendants' Contracts and Nondisclosure Agreements at 72–73, Salim v. Mitchell, No. 2:15-CV-286 (E.D. Wash. Oct. 11, 2016) [hereinafter Mitchell Contracts]. The ACLU obtained these contracts via discovery in the course of litigation against Mitchell (the ACLU represents several former CIA detainees in pending tort litigation against Mitchell). Notice of Filing of Defendants' Contracts and Nondisclosure Agreements at 2, Salim v. Mitchell, No. 2:15-CV-286 (E.D. Wash. Oct. 11, 2016). ACLU attorneys shared these contracts with the author.

42. Thomas J. Williams et al. *Operational Psychology: Foundation, Applications, and Issues*, *in* THE OXFORD HANDBOOK OF MILITARY PSYCHOLOGY 37, 40–41 (Janice H. Laurence & Michael D. Matthews eds. 2012).

Recently released language from another CIA document shows that the program's designers also fretted over the possibility that extended sleep deprivation would degrade cognition to the point that even willing prisoners wouldn't be able to recall and recount what they knew. Previously redacted paragraphs from a CIA Office of Medical Services (OMS) directive to black-site physicians note the adverse cognitive impact of sleeplessness and complain that '[t]he circumstances that medical officers will be called to advise on in the detainee programs' haven't been the subject of 'reported research.'[43] The directive instructs physicians (who, it makes plain, codesigned regimens of sleep deprivation and other abuse)[44] to use their 'clinical judgment' to balance between 'demonstrating helplessness in an unpleasant environment' and keeping detainees 'reasonably attentive, and clear-thinking' during interrogation.[45]

As O'Mara points out, a large body of published research on sleep deprivation demonstrates its devastating effects on people's ability to search through memory or otherwise process information.[46] The OMS directive gives this research short shrift—and cites none of it.[47] Moreover, as O'Mara notes, the subjects of this research have been patients with insomnia or people who have agreed to endure mild to moderate sleeplessness in laboratory settings.[48] The extreme sleep deprivation (accompanied by other intense stress) that was a hallmark of Enhanced Interrogation[49] surely did greater damage to cognitive function. But supporters of the CIA's approach could argue, as some have, that this cognitive degradation is more a plus than a minus. Sleep deprivation, O'Mara notes, quoting a review article, 'impairs decision making involving the unexpected, innovation, revising plans, competing distraction, and effective communication.'[50] It could thus undermine a resistant interviewee's ability to spin persuasive falsehoods, tell consistent half-truths, and otherwise detect and adapt to an interviewer's

43. CENT. INTELLIGENCE AGENCY OFFICE OF MED. SERVS. OMS GUIDELINES ON MEDICAL AND PSYCHOLOGICAL SUPPORT TO DETAINEE RENDITION, INTERROGATION, AND DETENTION 16 (2004), https://www.cia.gov/library/readingroom/docs/0006541536.pdf [https://perma.cc/6WZE-SN4Z] [hereinafter OMS GUIDELINES].

44. M. Gregg Bloche, Opinion, *When Doctors First Do Harm*, N.Y. TIMES (Nov. 22, 2016), https://www.nytimes.com/2016/11/22/opinion/doctors-should-stand-against-trump-reviving-torture.html [http://perma.cc/2RCG-ZBUS].

45. OMS GUIDELINES, *supra* note 43, at 15–16.

46. O'MARA, *supra* note 10, at 160–67.

47. *See* OMS GUIDELINES, *supra* note 43, at 15 (briefly mentioning that "cognitive effects are [a] common" result of sleep deprivation, but citing none of the research discussed by O'Mara).

48. O'MARA, *supra* note 10, at 161–65.

49. The CIA OMS permitted sleep deprivation for up to forty-eight hours at a time; moreover, these forty-eight-hour sleep-deprivation periods could be continuously repeated, after just two hours of sleep, for up to 180 hours. OMS GUIDELINES, *supra* note 43, at 15–16.

50. O'MARA, *supra* note 10, at 158 (quoting Yvonne Harrison & James A. Horne, *The Impact of Sleep Deprivation on Decision Making: A Review*, 6 J. EXPERIMENTAL PSYCHOL.: APPLIED 236, 236 (2000)).

stratagems. Whether, from an intelligence-gathering perspective, these effects outweigh impairments of memory and recall isn't a question that the research literature answers.

To sum up, proponents of the position that the CIA's torture program didn't 'work' have summoned a series of straw men. The program's design differed sharply from the pop-culture meme of torture as intimidation by brute force; indeed, the program's chief architect warned that setting up a 'battle of wills' between interrogator and captive would backfire. Moreover, the program didn't simply mime Chinese methods for extracting sham confessions (which would have made it transparently unsuited for seeking *truth*); rather, the CIA sought to *shape* prisoners' 'compliance' differently, drawing upon contemporary psychological thinking about persuasion and deception detection. Nor did the Agency disregard evidence of sleep deprivation's corrosive effects on cognition; rather, CIA physicians were instructed to take them into account, however unscientifically, in customizing regimens of sleep deprivation and other abuse.[51]

This is *not* to suggest that the CIA's actions weren't torture. Much of what the Agency did to prisoners rose to the level of torture under international law,[52] as the Obama Administration would later acknowledge on our nation's behalf.[53] But it *is* to say that it's a misunderstanding to treat 'torture' as an interrogation strategy, to be compared to 'rapport-building' or other approaches. 'Torture' is a legal and moral concept—a level of misery that law and decency say we must not inflict. It is *not* an interrogation method or model. Multiple interrogation methods can rise to the level of torture as a matter of law. They shouldn't therefore be treated as a single approach for the purpose of inquiring into whether they, or torture, 'work. The question of whether torture works makes no sense without clarity about the method or model we're assessing, as well as the alternatives to which we're comparing it.

II. Putting Torture to the Test?

So does the CIA's enhanced interrogation strategy—James Mitchell's model—'work' as an intelligence-gathering tool? Critics of the CIA's interrogation program point to accounts of intelligence-gathering success through rapport-building methods[54] as proof that they are more effective.

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51. OMS GUIDELINES, *supra* note 43, at 15–16.

52. *See supra* note 3.

53. Kathleen Hennessey, *Obama: 'We Tortured Some Folks*, L.A. TIMES (Aug. 1, 2014), http://www.latimes.com/nation/politics/politicsnow/la-pn-obama-torture-20140801-story.html [https://perma.cc/7LV4-PCEG].

54. *See, e.g.*, STEVEN KLEINMAN, NATIONAL SECURITY INTERROGATIONS: MYTH V. REALITY 2 (2011), http://s3.amazonaws.com/content.thirdway.org/publishing/documents/pdfs/000/001/297/national-security-interrogations-myth-v-reality.pdf?1462826469 [https://perma.cc/S6D4-EDFF]

They dispute the CIA's claims[55] to have obtained actionable intelligence through enhanced interrogation, and since 2014 they've been able to point to a detailed rebuttal of these claims by the U.S. Senate Select Committee on Intelligence (SSCI) in its study of the CIA's post-9/11 interrogation program.[56] But this rebuttal isn't proof, in a rigorous sense, that the Mitchell model doesn't work.

For one thing, many of the particulars of this rebuttal (and of the CIA's claims of efficacy) remain classified. The threads of evidence and inference that support (or counter) assertions that attacks were thwarted, terror networks disrupted, and perpetrators captured or killed as a consequence of enhanced interrogation aren't fully accessible. We're left to take the SSCI's conclusions more or less on faith.[57]

A. The Limits of Science

More importantly, a review of cases—e.g. particular interrogations or of plots allegedly thwarted—cannot show in a scientific sense that an interrogation method does or doesn't 'work. Cases are anecdotal evidence. They permit the detection of coincidence, not causality. Suppose, for example, that several or more terror suspects interrogated in the same manner disclose facts that help to foil plots. This tells us nothing about the effectiveness of the chosen interrogation method—nothing about its superiority (or inferiority) to other methods of getting these facts. To make a meaningful comparative judgment, we'd need to contrast results obtained using *each* of the methods we wished to weigh, and we'd need to ensure that each method is employed on a similar population. For most readers of this Essay, I'm stating the obvious. Yet this has gone unrecognized in public wrangling over the CIA program's effectiveness.

(citing evidence that a rapport-based approach "has often induced detainees to volunteer important operational information that the interrogator may not have suspected they possessed").

55. Memorandum from John O. Brennan, Dir. CIA, Comments on the Senate Select Comm. on Intelligence's Study of the Cent. Intelligence Agency's Former Det. & Interrogation Program to Senators Dianne Feinstein & Saxby Chambliss 13 (June 27, 2013), https://www.cia.gov/library/reports/CIAs_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf [https://perma.cc/WY66-WYVT] [hereinafter CIA Comments].

56. Thousands of pages from this detailed study remain classified, but in December 2014 the Committee released its 525-page summary, including a 'Findings and Conclusions' section and an "Executive Summary," in largely unredacted form. This document is mostly dedicated to contesting CIA claims that the program helped to foil terror plots and kill or capture high-profile terror suspects (including Osama bin Laden). SEN. REP. NO. 113-288, Foreword, at 3 (2014).

57. My own view is that the SSCI's Executive Summary and Findings and Conclusions, *supra* note 56, set out a potent argument for the minimal value of the CIA's brutal methods in the cases the SSCI reviewed. My limited point here is that nondisclosure of the six thousand plus pages of the SSCI report, plus much of the documentary evidence (e.g., internal CIA communications, deliberations, and findings) that the report relied upon, makes full, rigorous assessment of the SSCI's judgments impossible.

Medical researchers go about such comparisons in two ways: by randomly assigning subjects from a homogenous pool to one of the two or more treatment methods being studied, or by statistically adjusting for differences between populations after the fact when these methods have already been employed on differing groups of people.[58] The former approach, the randomized, controlled clinical trial, is often said to be the 'gold standard' (so long as the patient populations being studied are sufficiently large and homogeneous to generate statistically significant results);[59] the latter is a compromise that reflects the difficulty of doing randomized trials. The history of medicine is replete with deeply held beliefs, based on anecdotal impression, about the effectiveness of treatments that were later proven useless, even harmful.

Enhanced interrogation has not been put to anything resembling these tests. A randomized, prospective trial of the Mitchell model versus other approaches cannot be done. Because captives' knowledge about terrorist plots and networks differs widely, detainee populations lack the homogeneity needed for such a trial. Large differences in what detainees know would confound efforts to compare interrogation methods' performance, especially if the population under study numbers in the dozens rather than the hundreds or thousands. Variations in prisoners' personalities and motives would further confound such comparisons, as would the fact that interrogators customize their approaches to prisoners in iterative fashion, based on their impressions of each prisoner's responses.[60] 'Success, moreover, would be difficult to quantitate and compare systematically; since relationships between information from detainees and ultimate intelligence payoffs are often indirect and subjective. The same problems would confound any effort to compare alternative interrogation strategies retrospectively (and would make after-the-fact adjustment for group differences impossible).

In a recently declassified excerpt from a February 2005 paper for CIA leaders, Mitchell himself pointed to this set of problems.[61] Resistance to interrogation, he wrote (with his psychologist–collaborator Bruce Jessen), 'is not overcome through the use of this physical technique to obtain that

58. ALVAN R. FEINSTEIN, CLINICAL EPIDEMIOLOGY: THE ARCHITECTURE OF CLINICAL RESEARCH 295, 298–99 (1985).

59. Laura E. Bothwell et al., *Assessing the Gold Standard—Lessons from the History of RCTs*, 374 NEW ENG. J. MED. 2175, 2175 (2016).

60. The CIA alluded to such difficulties in its response to the SSCI's criticism of the Agency's failure to conduct a 'comprehensive analysis' of the Enhanced Interrogation program's effectiveness. *See* CIA Comments, *supra* note 55, at 24.

61. CENT. INTELLIGENCE AGENCY, SUMMARY AND REFLECTIONS OF CHIEF OF MEDICAL SERVICES ON OMS PARTICIPATION IN THE RDI PROGRAM 45 (2016) (quoting James E. Mitchell & John B. Jessen, Interrogation and Coercive Physical Pressures: A Quick Overview (Feb. 2005) (unpublished manuscript)), https://www.thetorturedatabase.org/files/foia_subsite/cia_prod_c065441727.pdf [https://perma.cc/FSW2-GZLY].

effect independent of the other forces at work."[62] Thus, the two contended, 'the relative contribution of individual interrogation techniques' cannot 'be teased out and quantified."[63] They added:

> [T]he choice of which physical techniques, if any, to use is driven by an individually tailored interrogation plan and by a real-time assessment of the detainee's strengths, weaknesses and reactions to what is happening. [A] single physical interrogation technique is almost never employed in isolation from other influence strategies. Rather, multiple techniques are deliberately orchestrated and sequenced "[64]

This, they argued, makes standardization for research purposes impossible.[65]

B. The Ethical Barrier

More chillingly, torturing prisoners as part of a science experiment conjures up images of Dr. Mengele, grotesquely beyond the bounds of both international law and transnational medical ethics.[66] As the CIA's interrogation program unfolded, agency officials recognized this prohibition—though recently released documents suggest that they didn't fully honor it.

In a 2010 e-mail, Hubbard told me the Agency did no such study, and that he didn't think one could be approved.[67] Regulations governing human-subjects research by multiple agencies, including the CIA, make it plain that such research is beyond the pale. The regulations, known as the federal 'Common Rule, require 'voluntary, informed consent to 'research involving more than minimal risk."[68] That clandestine imprisonment and abuse meant to induce despair don't permit 'voluntary' consent was appreciated by at least some in the CIA's OMS, who, according to the SSCI, warned agency leaders that studying the program's results would constitute unlawful human experimentation.[69]

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62. *Id.* (emphasis omitted).

63. *Id.*

64. *Id.*

65. *Id.*

66. *See generally* ROBERT JAY LIFTON, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE (1986).

67. E-mail from Kirk Hubbard, former Behavioral Scis. Chief, CIA, to author (April 21, 2010) (on file with author).

68. 45 C.F.R. § 46.116(a) (2016). The "Common Rule," so-called because it was adopted by the Department of Health & Human Services and other federal agencies in coordinated fashion, was made binding on the CIA by President Ronald Reagan in 1981, via Executive Order. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (1982); Office for Human Research Prots., *Federal Policy for the Protection of Human Subjects ('Common Rule')*, HHS.GOV (Mar. 18, 2016), https://www.hhs.gov/ohrp/regulations-and-policy/regulations/common-rule/ [https://perma.cc/FMJ9-P8TU].

69. S. REP. NO. 113-288, Executive Summary, at 126 (2014).

But what about efforts to assess these results comprehensively, after the fact, without comparative study of enhanced interrogation versus other methods? In a January 2005 e-mail to CIA Director Porter Goss, the Agency's Inspector General, John Helgerson, pushed back against OMS's human-subjects research objection. 'I fear there was a misunderstanding[,]' Helgerson told Goss:

> OIG [Office of the Inspector General] did not have in mind doing additional, guinea pig research on human beings. What we are recommending is that the Agency undertake a careful review of its experience to date in using the various techniques and that it draw conclusions about their safety, effectiveness, etc. [70]

Recently released documents suggest that the Agency conducted such a lookback—or at least laid the information-gathering groundwork for a retrospective study.

The CIA's contracts with Mitchell, the interrogation program's chief architect, make cryptic reference to 'applying research methodology to meet mission goals.'[71] Contract 'deliverables' include 'variables of interest to assess' when applying Bandura's model and 'strategies and methods for assessing [these] variables in high risk operational settings.'[72] The nature of this 'research methodology' and its associated 'variables' and 'strategies and methods' remains opaque. The CIA has so far refused to release additional documentation on these research efforts in response to Freedom of Information Act requests by myself and others.

But language (some of which was declassified and released only last summer) in the OMS's directive to black-site 'medical officers"[73] is consistent with a classified effort to draw some evidence-based conclusions about the risks and efficacy of torture techniques. This language instructed medical officers to record information about the type and duration of the techniques employed (including shackling in stressful positions, sleep deprivation, and waterboarding), as well as clinical sequelae, including ulcerations, edema, venous thromboses (blood clots), and whether the naso- or oro-pharynx was flooded during waterboarding.[74] Twice—when

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70. E-mail from John Helgerson, Inspector Gen., to Porter Goss, CIA Dir. (Jan. 28, 2005), *quoted in* S. REP. NO. 113-288, Executive Summary, at 126 (2014).

71. Mitchell Contracts, *supra* note 41, at 73. This language is from a contractual 'Statement of Work" dated April 2003, near the height of the Enhanced Interrogation program.

72. *Id.*

73. CIA 'Medical Officers' included psychologists, physicians, and physician assistants. Katherine Hawkins, *Medical Complicity in CIA Torture, Then and Now*, JUST SECURITY (July 1, 2016, 9:45 AM), https://www.justsecurity.org/31762/medical-complicity-cia-torture/ [https://perma.cc/M8TJ-VCLS].

74. *See generally* CIA Office of Med. Servs., *Draft Office of Medical Services Guidelines on Medical and Psychological Support to Detainee Interrogations*, *in* CENTRAL INTELLIGENCE AGENCY INSPECTOR GENERAL SPECIAL REVIEW: [REDACTED] COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001–OCTOBER 2003), 153, 155–63 (May 7, 2004),

addressing shackling and waterboarding—OMS stated that officers should collect this information '[i]n order to best inform future medical judgments and recommendations.'[75] Moreover, language declassified and released last fall, from a still largely redacted statement by the CIA's Director of Medical Services, shows ongoing commitment in early 2005 to more rigorous assessment of the Mitchell 'methodology.'[76] Pushing back against Mitchell's and Jessen's skeptical view of such assessment, the Director argued:

> The assumption was that a gifted interrogator would know best; and the implicit message was that this art form could not be objectively analyzed. Indeed, by this time their methodology was more nuanced, in stark contrast to the rapid escalation and indiscriminate repetitions of early interrogations. Still, there remained a need to look more objectively for the least intrusive way to gain cooperation.[77]

Forty-one pages of entirely redacted text follow these words tantalizingly, inviting the question of what more the CIA did, on a still-classified basis, to "look more objectively."[78]

The OMS directive did venture some conclusions, albeit without explaining their basis beyond an occasional reference to 'experience. For example, it judged sleep deprivation to be 'among the most effective adjuncts to interrogation' and 'the only technique with a demonstrably cumulative effect—the longer the deprivation (to a point), the more effective the impact.'[79] 'Cramped confinement' in 'awkward boxes, by contrast, 'ha[s] not proved particularly effective, OMS said, 'as they may become a safehaven offering a respite from interrogation.'[80] And waterboarding's effectiveness was 'not yet known.'[81] 'Subjects unquestionably can

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https://www.cia.gov/library/readingroom/docs/0005856717.pdf [http://perma.cc/MH9U-CARW] [hereinafter *Draft OMS Guidelines*]. This iteration of the guidelines was the version most likely distributed to black-site medical officers at the height of the Enhanced Interrogation program. For a later draft of the guidelines, see OMS GUIDELINES, *supra* note 43, at 6–20.

75. OMS GUIDELINES, *supra* note 43, at 15, 20.

76. *See* CENT. INTELLIGENCE AGENCY, *supra* note 61, at 45–46 (discussing Mitchell and Jessen's work and noting the importance of finding less intrusive interrogation methods). This document is undated, but the previous paragraph cites an unpublished, apparently classified paper by Mitchell and Jessen dated February 2005, indicating that this document was written then or after.

77. *Id.* at 45–46.

78. *Id.* at 47–88.

79. *Draft OMS Guidelines*, *supra* note 74, at 159; *see also* OMS GUIDELINES, *supra* note 43, at 15.

80. *Draft OMS Guidelines*, *supra* note 74, at 159; *see also* OMS GUIDELINES, *supra* note 43, at 16.

81. *Draft OMS Guidelines*, *supra* note 74, at 160; *see also* OMS GUIDELINES, *supra* note 43, at 17.

withstand a large number of applications, OMS reported, 'with no seeming cumulative impact beyond their strong aversion to the experience.'[82]

All of this raises the explosive possibility that the CIA conducted a clandestine program of human-subjects research on the risks and efficacy of torture, in violation of the Common Rule. What the CIA's Inspector General called 'guinea pig research' (presumably meaning prospective trial of alternative methods) constitutes only part of the realm that the Common Rule governs. The Rule defines 'research' as 'systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge.'[83] This encompasses systematic, *retrospective*, and observational studies, not only prospective trials. And the Rule covers human subjects of such studies if information gathered from them is 'individually identifiable' to the researchers and of a sort 'which the individual can reasonably expect will not be made public.'[84]

OMS instructed its black-site medical officers to collect and record information *systematically*, 'to best inform future medical judgments and recommendations'—language strongly suggestive of 'investigation designed to develop or contribute to generalizable knowledge.' OMS, moreover, evaluated the effectiveness and safety of abusive methods, at times altering these methods' design based on its assessments.[85] And surely, information about terror plots and networks (the main measure of an interrogation's success) is 'individually identifiable'—its intelligence value can't be assessed without a rich sense of the perspective and motives of its source. Surely, moreover, information a detainee refuses to reveal until his interrogator outwits or coerces him is information he should 'reasonably expect' not to become widely known.[86] Mitchell's contracts with the CIA,

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82. *Draft OMS Guidelines*, *supra* note 74, at 160. "Whether the waterboard offers a more effective alternative to sleep deprivation and/or stress positions, or is an effective supplement to these techniques is not yet known. *Id.* That OMS's skepticism about waterboarding's effectiveness at eliciting information was based at least in part on anecdotal experience, not systematic study, is suggested by an isolated text fragment (nine lines), surrounded by several pages of redacted text, in the undated 'Summary and Reflections of Chief of Medical Services, *supra* note 61, at 41. This document's unidentified author concludes that the 'cooperation' of CIA detainee Abu Zubaydah 'did not correlate well with his waterboard sessions' and that 'there was no evidence that the waterboard produced time-perishable information which otherwise would have been unobtainable. *Id.* From this isolated, nine-line fragment, it's impossible to know for certain whether the author is concluding that there is no evidence that waterboarding yielded "time-perishable, otherwise-unobtainable information from Zubaydah or from CIA detainees more generally.

83. 45 C.F.R. § 46.102(d) (2016).

84. *Id.* § 46.102(f).

85. Bloche, *supra* note 44.

86. One might argue that intelligence useful for the disruption of terror plots or networks—or for national security purposes more generally—isn't information a detainee should *reasonably* expect not to become known. The decisive answer to this is that torture or other abuse that breaches human rights or the laws of war is *not* something a detainee should *reasonably* expect and that intelligence extracted through these means is, therefore, information the detainee should reasonably

for a time when his sole known responsibility was to run the Enhanced Interrogation program, call explicitly for 'research methodology, 'variables of interest, and 'strategies and methods for assessing [these] variables.'[87] How all of this (and possibly more) fit together as a torture-research program remains a mystery—one that calls out for a vigorous, independent inquiry to ensure that a potential human-subjects-research scandal of historic proportions isn't covered up.

Less mysterious is whether the research hinted at in recently released CIA documents can answer the question of whether torture 'works. A research program along these lines, involving neither a randomized trial nor some other outcome-assessment strategy that compares enhanced interrogation with other methods (and adjusts for differences between the groups subjected to each),[88] can't resolve the question of whether enhanced interrogation does better. More generally, for the reasons I've reviewed, a scientific answer to the question of whether torture of any sort is more effective than lawful interrogation methods is unachievable.

III. Can We Conclude Anything?

There are, nonetheless, science-based conclusions we can draw. First, the Mitchell model of interrogation is useless as an answer to the 'ticking-bomb' scenario that has become the main popular and scholarly justification for torture.[89] This scenario is both mythic and manipulative. It postulates a crisis that has never occurred: a single bad actor (whom the authorities hold) knows the whereabouts of a bomb that is about to explode and kill hundreds, thousands, or more. The point of the myth is to provoke the response that we can never say never—that torture can be permissible, even necessary.[90] But this camel's-nose gambit presumes torture's rapid effectiveness, something even the Mitchell model's most enthusiastic backers don't claim. The model's crucial first step—'inducing' compliance by reducing a prisoner to the state of helplessness Biderman described—can take weeks or months, not minutes or hours.[91] 'Shaping' compliance along the lines Mitchell envisioned could take weeks more, were it possible.

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expect to be able to keep to himself. It should, moreover, go without saying that individuals held captive and tortured or otherwise abused are in no position to give voluntary consent.

87. *See supra* note 41.

88. The recently released documents contain no suggestion that the CIA pursued any kind of *comparative* outcomes assessment.

89. *See generally* FRITZ ALLHOFF, TERRORISM, TICKING TIME-BOMBS, AND TORTURE: A PHILOSOPHICAL ANALYSIS (2012).

90. LUBAN, *supra* note 5, at 56–60.

91. As O'Mara notes, *supra* note 10, at 251, internal estimates of the time needed for waterboarding and other abusive techniques to achieve their desired effect rose to two months. Biderman's report on his findings from the Korean War-era Chinese interrogation program describes courses of abuse lasting weeks to months. BLOCHE, *supra* note 24, at 124–25. And former CIA Director Michael Hayden, still a staunch defender of the Mitchell model, said in his 2016 book,

That the architects of Enhanced Interrogation understood this—and thus grasped the dishonesty of the 'ticking-bomb' argument—is underscored by Hubbard's response when I queried him about President Trump's claim that torture of an ISIS operative detained in Brussels last March could have stopped the terror attacks that traumatized that city four days later.[92] 'Why are you interested in anything that idiot Trump has to say. Hubbard wrote back.[93] The 'ticking-bomb' hypothetical deserves no place in debates about torture. It rests on a false premise about how torture *might* work—if indeed it *does* work—a premise at odds with the empirical basis Mitchell and Hubbard claimed for the CIA's program.

Second, there is indirect empirical support, albeit well short of scientific proof, for the effectiveness of lawful interrogation stratagems that build on concepts from cognitive psychology. As O'Mara acknowledges, there have not been any 'properly statistically powered, substantial randomized-controlled trials on the differing [interrogation] methodologies.'[94] But techniques of interpersonal influence that borrow from psychology research[95] and empirically tested psychotherapeutic methods are attracting interest from police and national security interrogators. This field is too large to review here, but an overarching theme is recasting interrogation as 'interviewing, with an eye toward exploring interview subjects' systems of belief, social affiliations and identities, and other sources of resistance.[96] Rather than

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Playing to the Edge, that it took a week, on average, "to move a detainee from defiance to cooperation by imposing on him a state of helplessness." MICHAEL V. HAYDEN, PLAYING TO THE EDGE: AMERICAN INTELLIGENCE IN THE AGE OF TERROR 223 (2016).

92. Told by CNN anchor Wolf Blitzer on the air that Belgian police said the operative was cooperating, Trump replied: "Well, he may be talking but he'll talk a lot faster with the torture. If he would have—if he would have talked, you might not have had the blow up, all these people dead and all these people horribly wounded because he probably knew about it." *Transcript: The Situation Room*, CNN: TRANSCRIPTS (Mar. 22, 2016), http://transcripts.cnn.com/TRANSCRIPTS/1603/22/sitroom.01.html [https://perma.cc/8DST-W9NQ].

93. E-mail from Kirk Hubbard, former Behavioral Scis. Chief, CIA, to author (Mar. 30, 2016) (on file with author).

94. O'MARA, *supra* note 10, at 270.

95. Cognitive psychology and neuroimaging research has spotlighted the roles of social influence, empathy, pride, shame, and other emotional responses in shaping and changing people's political and moral commitments. Indeed, much evidence supports the conclusion that these factors play a larger belief-shaping role than does reason alone. *See, e.g.*, Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001) (arguing that people reach moral judgments intuitively, then later try to justify these judgments with post hoc reasoning).

96. A special issue of a journal maintained by interrogation researchers and practitioners, some of whom rose to prominence as critics of the CIA's Enhanced Interrogation program, contains several articles that review this research base and set out current thinking about its implications for national security interrogation. INT'L INVESTIGATIVE INTERVIEWING RESEARCH GRP. SPECIAL ISSUE: INVESTIGATIVE INTERVIEWING FOR THE PURPOSES OF GATHERING INTELLIGENCE (2015). An earlier comprehensive review, covering similar ground in greater detail and accompanied by case studies, was prepared in 2009 by the U.S. Intelligence Science Board, an advisory body within the Office of the Director of National Intelligence. INTELLIGENCE SCI. BD. INTELLIGENCE

trying to shatter these commitments, the interviewer searches for those he or she shares—indeed interviewers are sometimes assigned to interview subjects based on the potential for such matching.[97] Interviewers prompt subjects' memories by asking them to recall feelings, weather, and even meals.[98] And they try to maneuver around interviewees' resistances by encouraging feelings of shared identity[99] and asking interviewees to reflect on contradictions between their core beliefs and continuing resistance.[100]

In so doing, interviewers rely on research into how negotiators, politicians, and others persuade—research that has spotlighted the various roles of interpersonal reciprocity, social affiliation, personality style, pride, and shame.[101] Interviewers also probe for falsehoods by increasing 'cognitive load'—the mental demands a subject must manage as he spins out his story. For example, they ask subjects to recount events in reverse-chronological order or to draw sketches while telling their stories. Such methods build on cognitive psychology studies that suggest invention of internally consistent falsehoods is more intellectually demanding than honest recall.[102]

Some of these studies have focused directly on interrogation,[103] pushing the boundaries of what human-subjects research regulation permits. For example, researchers have obtained transcripts of actual police interrogations, categorized and coded suspects' and interrogators' verbal maneuvers, and then performed large-scale content analyses with an eye

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INTERVIEWING: TEACHING PAPERS AND CASE STUDIES (2009), https://fas.org/irp/dni/isb/interview.pdf [https://perma.cc/AMD2-RN2N]. O'Mara also briefly discusses this body of work. O'MARA, *supra* note 10, at 261–65.

97. Examples include matching a devout Christian interrogator with a deeply religious Muslim subject (in the hope that the shared importance of faith in their lives will become a basis for connection) and assigning an interviewer with Arab family origins to an Arab detainee. *See* INTELLIGENCE SCI. BD. *supra* note 96, at 56 (discussing 'cross-cutting identities' and their value in decreasing resistance from interviewees).

98. *See id.* at 85–89 (discussing interview tactics to enhance interviewees' accurate recall).

99. *Id.* at 55–57.

100. *See id.* at 73–80 (discussing multiple dimensions of resistance and strategies to deal with them).

101. *See id.* at 9–28 (describing research about successful persuasion).

102. *See* R. Edward Geiselman, *The Cognitive Interview for Suspects (CIS)*, AM. J. FORENSIC PSYCHOL., Issue 3, 2012, at 1, 1 (describing a study about "the potential of CIS for assessing the likelihood of deception during investigative interviews").

103. In 2010, President Obama announced a new interagency initiative, the "High-Value Detainee Interrogation Group" (HIG), an FBI–CIA–Pentagon collaboration meant to supplant CIA and Pentagon reliance on enhanced interrogation. Robert Kolker, *A Severed Head, Two Cops, and the Radical Future of Interrogation*, WIRED (May 24, 2016), https://www.wired.com/2016/05/how-to-interrogate-suspects/ [https://perma.cc/G9QU-LCA9]. In addition to interrogating high-profile terror suspects (including the convicted Boston Marathon bomber and suspected members of ISIS), the HIG had, by mid-2015, funded several dozen research studies applying cognitive and social psychology models to interrogation. Interviews with three senior HIG officials (Summer 2015) (on condition of anonymity); *see also id.* (describing the origins of the HIG and reporting that it has funded 60 university-based behavioral science studies of interrogation).

toward learning which interrogators' moves are most effective at surmounting resistance (these researchers have generally found that relationship-building fares better than confrontation).[104] Unless researchers can persuade their institutional review board that suspects' words are not 'individually identifiable, they must obtain 'voluntary' consent,[105] a stretch when criminal charges and loss of liberty loom. Other researchers have created sham tasks for experimental subjects, wrongly accused the subjects (psychology undergraduates) of cheating, then extracted false confessions by intimating disciplinary consequences for failure to fess up.[106] This work suggests both the information-yielding benefits of building on relationships and the potential of confrontation to produce falsehoods. It also spotlights the ethical challenges that confront experimental study of even lawful interrogation methods.

Some dismiss these obstacles as unimportant. O'Mara, for example, urges 'recruitment' and 'training' of both suspects and interrogators for studies of interrogation methods' comparative effectiveness. 'There are, he insists, 'vast institutional memories available for the ethical conduct of these kinds of investigations.'[107] But neither he nor others have offered a way around the obstacles I've referenced—because there isn't one. Absent a sharp break with ethical and legal principles that have governed human-subjects research for generations, comparative-effectiveness studies using suspects for whom harsh, real-world consequences loom are not possible.[108]

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104. *See, e.g.*, Christopher E. Kelly et al., *The Dynamic Nature of Interrogation*, 40 LAW & HUM. BEHAV. 295, 306 (2016) (finding that suspect cooperation was positively influenced by relationship-building domain, but was negatively impacted by confrontation).

105. *See supra* text accompanying note 72.

106. One research team recruited undergraduate psychology students to solve a set of "logic problems' for academic credit, then falsely accused some of the students of collaborating improperly (these students had been instructed to work independently, and they had done so). Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 483–84 (2005). These students were told that the professor in charge was unhappy about the cheating. *Id.* at 483. Adverse academic consequences were intimated, and the students were told that the irate professor wanted a signed confession. *Id.* A subset of these students was offered reassuring excuses (e.g., "I'm sure you didn't realize what a big deal it was") and told it was in their interest to confess; another subset was offered no such reassurance and told that if they didn't sign the confession, the angry professor would "handle the situation as he saw fit.' *Id.* These and related procedures (including a proffered "deal") yielded double-digit percentages of false confessions. *Id.* at 484. As Russano and her colleagues point out, these and similar confrontational methods are commonly used by police interrogators—indeed they are cornerstones of the widely taught "Reid Technique" for extracting confessions from criminal suspects. *Id.* at 481–82. *See generally* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986) (addressing issues regarding specific interrogation techniques and the underlying principles surrounding the Reid Technique).

107. O'MARA, *supra* note 10, at 269 (offering no explanation of what he means by "institutional memories").

108. Recruitment of subjects (e.g., undergraduate students) to participate in sham interrogation scenarios without significant real-world consequences offers a way around this problem, but the very artificiality that could make such studies ethical also gives them dubious real-world value.

We're thus unable to conclude decisively that emerging cognitive psychology-based techniques are more effective than either the CIA's post-9/11 torture strategy or the confrontational methods traditionally taught to police interrogators.[109] But neither does the available evidence favor what the CIA did. To the contrary, the research findings on memory, persuasion, and resistance that undergird the cognitive psychology-based approach merit the tentative belief that it gets better results.

Comparative assessment of medical treatments offers a useful model for making this judgment. A global public–private alliance, including the World Health Organization and leading professional societies, has come together behind a grading scheme for evidence of clinical efficacy.[110] The scheme confers quality ratings—"High, 'Moderate, 'Low, or 'Very Low'—upon bodies of published evidence (ranging from randomized trials to case reports) relied upon by authors of medical practice protocols. The absence of randomized-trial data—along with heavy reliance on observational studies, case reports, and indirect inference from behavioral science research—render the evidence supporting the cognitive psychology approach 'Low' or 'Very Low' quality within this scheme.[111] That's insufficient for issuers of medical-practice protocols, who typically require a grade of 'High' or 'Moderate' to go forward, and it isn't enough to conclude that *science* compels the cognitive psychology approach. But neither is it equipoise, so it lends support to preference for this approach over the Mitchell model or other abusive methods.[112]

IV Torture and Powerlessness

Given this evidence and torture's *jus cogens* unlawfulness, what explains its ongoing appeal to most Americans and to some national security policy makers? In times past, rulers and their subjects openly embraced torture's ferocity—indeed, high-profile brutality was the point. Unbridled cruelty toward captives, Luban notes, celebrated military victors' total

109. For an authoritative presentation of the most widely used confrontational approach, the so-called "Reid Technique," see INBAU ET AL., *supra* note 106, at 78–81.

110. *See generally* THE COCHRANE COLLABORATION, COCHRANE HANDBOOK FOR SYSTEMATIC REVIEWS OF INTERVENTIONS § 12.2.1, http://handbook.cochrane.org/index.htm#chapter_12/12_2_1_the_grade_approach.htm [http://perma.cc/DN9Y-UZ6B] (describing the GRADE approach).

111. *See id.* §§ 12.2.2–12.2.3 (grading evidence from observational studies and case reports, absent randomized trials, as "Low" or "Very Low" grading indirect inference from controlled studies similarly).

112. Pursuant to the National Defense Authorization Act for Fiscal Year 2016, 42 U.S.C. § 2000dd-2(a)(6)(B) (2015), an interagency body created by former President Obama to formulate national security interrogation policy, *supra* note 103, formally adopted the cognitive psychology-based approach as "best practice" in August 2016. *See generally* HIGH-VALUE DETAINEE INTERROGATION GRP. INTERROGATION BEST PRACTICES (2016), https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view [http://perma.cc/QLC4-YA92].

triumph.[113] Terrorism of whole populations through vicious example squelched challenges to tyrannical rule,[114] and gruesome punishments expressed the sovereign's wrath toward perpetrators of crime, real and imagined.[115] But today's torturers try to hide and temper the ferocity. The story of enhanced interrogation has only partially emerged, thanks to the persistence of journalists, academics, and congressional investigators. It is well established, though, that its designers eschewed brute force in favor of more subtle ways to reduce subjects to despair.[116] And the professed goals of those who urge a return to torture are informational—intelligence to protect the nation—not triumphalist, terroristic, or punitive. One might expect people who fear for the nation's safety (and their own) to follow the evidence, imperfect as it is, and to resolve empirical uncertainty in favor of compliance with the law of nations.

That some in the national security policy elite refuse to do so, insisting that enhanced interrogation works best, is said by some progressives to reflect a quest for vengeance. O'Mara warns that 'the desire to punish the detainee' conflicts with pursuit of information from him.[117] The authors of the SSCI study go further, characterizing the CIA's claims of success as dishonest cover for lawless reprisal.[118] But a more variegated explanation seems to me more powerful—more helpful as a starting point for pushing back against torture's appeal.

I grant that outrage at terrorists and fierce desire to punish them play a role, conscious or subliminal, in distorting perceptions of evidence and thus tilting policy. Consider, though, the vision that animated the CIA. In its directive to black-site physicians, OMS began by noting that the Agency's interrogation methods 'are designed to psychologically 'dislocate' the detainee, to 'maximize his feeling of vulnerability and helplessness.'[119]

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113. *See* LUBAN, *supra* note 5, at 50 & n.25 (citing Nietzsche's chilling reference to "the enjoyment of violation").

114. *Id.* at 51; *see also* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 288 (2d enlarged ed. 1951) (observing that absolutist regimes needn't link brutal treatment to individuals' offenses to prevent uprisings through mass terror).

115. *See* LUBAN, *supra* note 5, at 51–52 (drawing on Michel Foucault's argument to this effect in DISCIPLINE AND PUNISH).

116. *See supra* text accompanying notes 20–22.

117. O'MARA, *supra* note 10, at 242.

118. S. REP. NO. 113-288, Findings and Conclusions, at 2–3 (2014).

119. *Draft OMS Guidelines*, *supra* note 74, at 153. Similar language can be found in the so-called Torture Memos, the August 2002 and May 2005 opinions from the Department of Justice Office of Legal Counsel, that permitted the Enhanced Interrogation program to proceed. *E.g.*, Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A to Alberto R. Gonzales, Counsel to the President 29 (Aug. 1, 2002); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel, on Application of United States Obligations Under Article 16 of the Convention Against Torture to

Dislocation and vulnerability are what vast numbers of Americans felt in 9/11's wake. Enhanced interrogation turned this feeling back onto those who attacked us—or, at least, onto a small number whom we'd managed to take alive.[120] It brought some of us, therefore, security of a symbolic sort—the sense 'that we could assert control in the face of sudden, dislocating helplessness.'[121] The large roles of medicine and the behavioral sciences in the design of the CIA's program reinforced this feeling of control with the promise of clinical precision. And in the years since, as many Americans experienced profound economic dislocation, fear of terrorism became a meme for a more general sense of powerlessness, sustaining torture's symbolic appeal as an antidote.

Seen through this lens, abusive methods can appear to work. Confirmation bias can set in. Intelligence extracted from torture victims can be ascribed to torture methods, whether or not it might have been acquired by other means. Facts obviously obtained by other methods (say, phone monitoring) can seem less important; meanwhile, information extracted from prisoners subjected to torture can loom large. Such cognitive distortion, not rank dishonesty, likely explains support for torture among intelligence professionals whom one might expect to be more attuned to empirical uncertainty.

V Backlash: Science, Ethics, and Optics

Torture is back on our national agenda, openly embraced by an American president for the first time in history. Torture opponents' claims to have shown that it doesn't 'work' don't hold up to close scrutiny. There isn't scientific proof that techniques rising to the level of torture don't fare better than other approaches to extracting intelligence from terror suspects. For both practical and ethical reasons, such proof is unobtainable. But the balance of probabilities, based on indirect inference from available science, supports the judgment that methods grounded in what we know about cognition and persuasion perform better than the Enhanced Interrogation approach employed with devastating effect in 9/11's immediate wake.

That the effect was strategically devastating is underscored by studies showing the torture program's corrosive effect on U.S. allies' willingness to cooperate militarily, its power as a terrorist recruiting tool, and the propaganda benefits it bestowed upon nations like Russia, Iran, and North

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Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency 30 (May 30, 2005).

120. That some of those interned and abused at black sites, Guantanamo, and elsewhere turned out not to have been involved in planning attacks against the United States (or otherwise part of terror groups targeting us) went lost on some enhanced interrogation supporters, who seemed to treat these people as collateral damage.

121. BLOCHE, *supra* note 24, at 150–51.

Korea.[122] It sapped our 'soft power' and bolstered our foes' hard power. Its lawlessness, moreover, has hindered prosecution of terrorists and led to litigation against European governments complicit in the operation of black sites.[123] Those who embraced torture as national policy bet on being able to keep it to the 'dark side. But cover-up of such a vast enterprise, so sharply at odds with transnational norms of decency, proved unsustainable.

Backlash against the post-9/11 torture program is, moreover, undermining efforts to base national security interrogation on state-of-the-art behavioral science thinking. In an astonishing breakdown of professional self-governance, the organization that issues ethics rules for America's more than 100,000 psychologists allowed a small cadre of members with ties to the Enhanced Interrogation program to secure a 2005 position statement immunizing participating psychologists against ethical and legal accountability.[124] As evidence of psychologists' role in the torture program emerged, leaders of the organization, the American Psychological Association (APA), refused to revisit this statement or act against the psychologists involved.[125] Dissenting members became furious, activists revealed internal communications expressing contempt for international human rights law's restraints, and demands grew for an independent inquiry into how the APA's free pass for complicity in torture came about.[126]

The findings of the eventual inquest, conducted by Sidley Austin LLP, were scathing. Based on scores of interviews and review of thousands of previously confidential documents, Sidley's investigative team found in 2015 that the APA's ethics director colluded with military psychologists (including some who oversaw enhanced interrogation at Guantanamo and Abu Ghraib)

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122. Douglas A. Johnson et al., *The Strategic Costs of Torture: How 'Enhanced Interrogation' Hurt America*, FOREIGN AFFAIRS, Sept./Oct. 2016, at 121, 129–30.

123. *Id.* at 127.

124. BLOCHE, *supra* note 24, at 162–66. The statement conferred this immunity tacitly, by decreeing that '[p]sychologists involved in national security-related activities follow all applicable rules and regulations that govern their roles,' but then adding that '[o]ver the course of the recent United States military presence in locations such as Afghanistan, Iraq, and Cuba [Guantanamo], such rules and regulations have been significantly developed and refined. *Id.* at 163. This was, of course, an allusion to the Bush Administration's contortionist redefinition of torture, the Administration's basis for claiming enhanced interrogation was lawful—and thus the APA's basis for treating psychologists' participation as ethical.

125. *See id.* at 164–65 (describing the APA's task force and the military psychologists' reaction to the *New York Times* article on the psychologists' role at Guantanamo).

126. *See, e.g.*, Spencer Ackerman, *US Torture Doctors Could Face Charges After Report Alleges Post-9/11 "Collusion*, GUARDIAN (July 11, 2015), https://www.theguardian.com/law/2015/jul/10/us-torture-doctors-psychologists-apa-prosecution [https://perma.cc/XMQ9-BHZU] (detailing the criticism and complaints leveled against the APA by its critics prior to the inquest); James Risen, *American Psychological Association Bolstered C.I.A. Torture Program, Report Says*, N.Y. TIMES (Apr. 30, 2015), https://www.nytimes.com/2015/05/01/us/report-says-american-psychological-association-collaborated-on-torture-justification.html [http://perma.cc/45BM-FZC5] (describing the APA board's ordering of an independent review of the Association's role in interrogation).

to protect psychologists from punitive consequences for participation in torture, first via the 2005 position statement and then through a campaign to disparage critics of the 2005 statement.[127] The association sacked its ethics director,[128] rescinded the 2005 statement, and banned its members from participating in national security interrogation.[129]

The ban was an understandable response to outrage over the profession's lead role in post-9/11 torture, but it paralyzed national security policy makers' efforts to enlist behavioral science expertise in support of lawful interrogation.[130] Its proponents conflated lawful interrogation with torture, then made the category mistake of applying therapeutic ethics to a nontherapeutic endeavor—intelligence gathering for national security purposes. The APA resolution containing the ban tacitly *acknowledges* this mistake by conceding that psychologists perform an array of nontherapeutic services, including forensic assessment and consultation to interrogators, in the criminal justice setting.[131] The resolution *permits* these—without explaining why—without even trying to distinguish between lawful national security and criminal justice interrogation.

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127. SIDLEY REPORT, *supra* note 40, at 9, 18–20, 260–61, 388–91.

128. Spencer Ackerman, *Psychologist Accused of Enabling US Torture Backed by Former FBI Chief*, GUARDIAN (July 12, 2015), https://www.theguardian.com/law/2015/jul/12/apa-torture-report-louis-freeh-stephen-behnke [http://perma.cc/DJP5-JVVC].

129. The APA decreed that "psychologists shall not conduct, supervise, be in the presence of, or otherwise assist any national security interrogations for any military or intelligence entities, including private contractors working on their behalf, nor advise on conditions of confinement insofar as these might facilitate such an interrogation. AM. PSYCHOLOGICAL ASS'N, RESOLUTION TO AMEND THE 2006 AND 2013 COUNCIL RESOLUTIONS TO CLARIFY THE ROLES OF PSYCHOLOGISTS RELATED TO INTERROGATION AND DETAINEE WELFARE IN NATIONAL SECURITY SETTINGS, TO FURTHER IMPLEMENT THE 2008 PETITION RESOLUTION, AND TO SAFEGUARD AGAINST ACTS OF TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT IN ALL SETTINGS 5 (2015), http://www.apa.org/independent-review/psychologists-interrogation.pdf [http://perma.cc/9R6T-222C] [hereinafter APA, RESOLUTION TO AMEND]. A footnote to this resolution hints at a loophole: "Psychologists may provide consultation with regard to policy pertaining to information gathering methods which are humane so long as they do not violate the prohibitions of this Resolution and are not related to any specific national security interrogation or detention conditions. *Id.* at 5 n.6. This awkward phrasing suggests that advising about interrogation in general might be acceptable, so long as advice doesn't bear on particular interrogations with particular detainees. But this footnote's grammatical messiness (e.g. its incoherent reference to "information gathering methods' that "are not related to any specific national security interrogation") and indeterminate recursive logic (its prerequisite that "information gathering methods not violate the prohibitions of this Resolution"—which, of course, include prohibition of advice on national security interrogation!) casts this loophole into doubt, creating career-threatening ethical and legal risk for any psychologist who contemplates giving advice on interrogation in general.

130. Psychologists could quit the APA and defy the ban, as some who work in national security have said they might do. Interviews with former CIA & military psychologists (on condition of anonymity). But doing so puts them at risk of becoming professional pariahs—and at risk for disciplinary action by state licensing boards that take their ethical guidance from the APA.

131. APA, RESOLUTION TO AMEND, *supra* note 129, at 5 n.6.

There isn't a reasoned distinction. It may make sense as a matter of ethical optics to bar psychologists from serving as interrogators;[132] their social role as healers, committed to the well-being of patients, fits uncomfortably with their use of empathy and interviewing savvy to extract intelligence from people held captive. But psychologists serve in myriad *nontherapeutic* roles, as consultants to businesses and governments, in pursuit of marketing, management, and other goals at odds with individuals' welfare. To permit psychologists to, say, opine on criminal responsibility or competency to stand trial in capital cases—or even to help corporations pitch products to people who can ill afford them—isn't logically compatible with barring their involvement in lawful interrogation.

Yet in professional ethics, optics matter: high-visibility ethical commitments can both inspire clients' trust[133] and affirm professional identity.[134] Those who put the behavioral sciences into the business of torture, then tried to keep this business secret, set the stage for fierce backlash when the facts of their frisson with torture emerged. That this outrage darkened the optics, putting all behavioral science contributions to national security under a cloud, should surprise no one. As a matter of crystalline logic, the APA's 2015 ban reaches too far. But it is defensible as an assertion of professional trustworthiness and identity in response to suspicions inflamed by the behavioral sciences' lead role in an antiterror program run amok. Our nation's resulting reduced ability to tap behavioral science expertise to protect us from foes is yet another cost of our having succumbed to torture's lawless appeal.

VI. Conclusion: Is Torture 'Who We Are?'

The claim that torture doesn't 'work' has not and cannot be scientifically proven. But neither has the pro-torture camp established that torturers extract information others cannot. What the available science *does*

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132. O'Mara urges that both national security and criminal justice interrogation be conducted *only* by "forensic psychologists" with "training in clinical, forensic, and interviewing techniques for normal, neuropsychological, and neuropsychiatric populations as well as criminal or terrorist populations. O'MARA, *supra* note 10, at 270–71. The APA's current ethics policy prohibits this in national security-related settings where American criminal procedure's constitutional protections are not afforded. *See* APA, RESOLUTION TO AMEND, *supra* note 129, at 5–6.

133. Nobel Prize-winning economist Kenneth Arrow gives the example of physicians' ethical commitment to prioritize patient well-being over their own financial advantage (a commitment that is, perhaps, often honored in the breach, but that has long been a professional lodestar). This commitment, he argues, is "part of the commodity the physician sells' it signals trustworthiness, making medical care more valuable in patients' eyes, compensating for the reduction in perceived worth that can arise from patient uncertainty about the efficacy of doctors' recommendations. Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 965–66 (1963).

134. *See generally* ELIOT FRIEDSON, PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE (1970).

suggest is that interviewing strategies grounded in state-of-the-art psychological understandings of memory and persuasion offer interrogators their best chance to obtain accurate information, even when interviewees resist.

What stronger evidence shows, beyond torture's grave damage to our global standing,[135] is its devastating effect on the minds of those whom it breaks. The behavioral science professionals who assured the Bush Administration Office of Legal Counsel that enhanced interrogation would do no lasting mental harm, clearing the way for OLC's approval, proved to be terribly wrong. At least half of the thirty-nine black-site detainees known to have endured enhanced interrogation (the actual number may have been more than 100) suffered long-term psychiatric symptoms, according to a review of clinical and court records conducted by the *New York Times*.[136] For some, these symptoms were ruinous: psychosis, sudden rage, depression, and extreme anxiety disabled them and wrecked their personal lives.[137] Had the CIA's psychologists and physicians taken account of the considerable pre-9/11 research literature on torture's psychiatric sequelae,[138] they could have readily predicted this.

As our nation contemplates a return to torture, those who oppose it are doing their utmost to focus Americans' attention on its transnational lawlessness, repugnance, and strategic costs. Torture, former President Obama has said repeatedly, is 'not who we are.'[139] Yet polls and election results[140] suggest that sometimes, it is who we want to be. Here, President Trump may be the ultimate psychologist of torture. His successful 2016 campaign was an answer to the powerlessness many feel in the face of vertiginous economic and cultural change. Trump's insight was to link this personal sense of powerlessness to his larger narrative of national weakness. Torture, like tough trade deals and the wall Mexico will pay for, became part of his muscular riposte. In the dark basements of black sites, the torturer

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135. *E.g.*, Johnson et al., *supra* note 122, at 127–28.

136. Matt Apuzzo et al., *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES (Oct. 9, 2016), https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html [http://perma.cc/LU84-J37R].

137. *Id.*

138. *See generally, e.g.*, Metin Başoğlu et al., *Psychological Effects of Torture: A Comparison of Tortured with Nontortured Political Activists in Turkey*, 151 AM. J. PSYCHIATRY 76 (1994); Richard Mollica et al., *The Dose-Effect Relationships Between Torture and Psychiatric Symptoms in Vietnamese Ex-Political Detainees and a Comparison Group*, 186 J. NERVOUS & MENTAL DISEASE 543 (1998).

139. *E.g.*, Joseph A. Palermo, *'We Tortured Some Folks, but 'That's Not Who We Are'* HUFFINGTON POST (Dec. 12, 2014), http://www.huffingtonpost.com/joseph-a-palermo/cia-torture-report_b_6317672.html [http://perma.cc/TQ2S-TY36]; *Obama's Speech on Detainees and National Security*, WALL STREET J. WASH. WIRE (May 21, 2009), http://blogs.wsj.com/washwire/2009/05/21/obamas-speech-on-detainees-and-national-security/ [http://perma.cc/PNL7-7B3M].

140. *See supra* text accompanying notes 3–4.

takes control, turning the tables not just on terrorists but, symbolically, on all who disempower us. That this control is chimerical beyond the torturer's redoubt hasn't made it less appealing. The larger challenge for all who reject torture isn't to show that it doesn't 'work' it is to convince Americans that the torturer's brutality is a marker of weakness and fear, not national resurgence.

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Book Review

The Accidental Death Penalty

COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT. By Carol S. Steiker & Jordan M. Steiker. Cambridge, Massachusetts: Harvard University Press, 2016. 400 pages. $29.95.

Evan J. Mandery*

The modern Supreme Court's treatment of capital punishment is a paradigm of what Robert K. Merton referred to as 'the problem of the unanticipated consequences of purposive action.'[1] The Court's bizarre regulatory enterprise, which requires that death penalty statutes simultaneously curtail arbitrariness and treat defendants as individuals, is now forty years old.[2] Even the most casual student of capital punishment's history can't help but be struck by how much of the formative background was pure happenstance.

An essential, rarely noted starting point to understanding these events is that the National Association for the Advancement of Colored People Legal Defense Fund (LDF) never intended to challenge the death penalty under the Eighth Amendment. LDF's leadership believed the argument needed to be held back.[3] At the National Conference on the Death Penalty in 1968, the incomparable Tony Amsterdam discouraged attendees from raising the Eighth Amendment argument, urging them to focus instead on procedural claims.[4] LDF's strategy was to educate the Supreme Court about the problems with capital punishment and to overwhelm the lower courts with

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1. Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894 (1936).

2. The bizarreness was most famously described by Justice Scalia in his concurrence in *Walton v. Arizona*:

> To acknowledge that "there perhaps is an inherent tension" between this line of cases and the line stemming from *Furman*, is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing "twin objectives, is rather like referring to the twin objectives of good and evil. They cannot be reconciled.

497 U.S. 639, 664 (1990) (Scalia, J. concurring) (citations omitted) (quoting McClesky v. Kemp, 481 U.S. 279, 363 (1987) (Blackmun, J. dissenting) and Spaziano v. Florida, 468 U.S. 447, 459 (1984), *overruled by* Hurst v. Florida, 136 S. Ct. 616 (2016)).

3. EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 60 (2013).

4. *Id.* at 61–62.

appeals—"like sand poured in a machine."[5] It was essential to this scheme to get cases before the Supreme Court 'in the right order."[6]

In October 1968, the Supreme Court granted certiorari in *Boykin v. Alabama*,[7] challenging the death penalty for robbery as excessive.[8] Later that term, the Court announced that it also would hear *Maxwell v. Bishop*,[9] on the constitutionality of standardless sentencing and single-phase trials.[10] When the Justices conferenced the cases on March 6, 1969, they didn't agree on much, but Justice William Brennan saw a clear path to overturning William Maxwell's conviction on the single-phase-trial issue.[11] *Witherspoon v. Illinois*[12] had dealt a blow to capital punishment the prior term.[13] Had *Maxwell* continued the trend, it's easy enough to imagine the death penalty dying from a thousand cuts.[14]

But rather than assign *Boykin* and *Maxwell* to Justice Brennan, Chief Justice Earl Warren instead assigned the opinions to Justice William Douglas.[15] Looking backwards, this choice stands out as a historical flux point—the moment where the butterfly alters the path of the impending hurricane. The superficially insignificant decision—to assign a pair of death penalty opinions to one liberal Justice rather than another—sends this entire history down a different path.

Rather than focus solely on the question of single-phase trials, as the master conciliator Brennan urged, the irascible, iconoclastic Douglas attempted a more ambitious opinion, which also addressed the standards question.[16] During the negotiations, Douglas managed to alienate almost everyone on the Court, including his only true ally, Abe Fortas.[17] By the time

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5. MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 71 (1973).

6. MANDERY, *supra* note 3, at 58.

7. 395 U.S. 238 (1969); MANDERY, *supra* note 3, at 66.

8. *Boykin*, 395 U.S. at 240.

9. 398 U.S. 262 (1970) (per curiam).

10. *Id.* at 264.

11. MANDERY, *supra* note 3, at 70–84, 89–92 (detailing the Court's conference and discussions regarding *Maxwell v. Bishop*, particularly Justice Brennan's ultimately unsuccessful strategy for getting five votes in favor of Maxwell on the single-phase trial issue).

12. 391 U.S. 510 (1968).

13. *Id.* at 522–23 (holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction").

14. In retrospect, LDF First Assistant Counsel Michael Meltsner identified *Maxwell* as a turning point, a chance for the Court to take "a measured step toward abolition. MANDERY, *supra* note 3, at 97.

15. Boykin v. Alabama, 395 U.S. 238, 239 (1969); William J. Brennan, Jr., Associate J. U.S. Supreme Court, The 1968 Oliver Wendell Holmes, Jr. Lecture: Constitutional Adjudication and the Death Penalty: A View From the Court, *in* 100 HARV. L. REV. 313, 316 (1986).

16. MANDERY, *supra* note 3, at 89–90.

17. *Id.* at 91–92.

Douglas decided to focus solely on the single-phase-trial issue, his opportunity had passed. Following a scandal surrounding his acceptance of a contribution from a Las Vegas financier, Fortas resigned on May 13th.[18] Shortly thereafter, John Harlan withdrew his vote in *Maxwell*, saying he wouldn't 'provide the fifth vote in such a crucial case.'[19] The Court put *Maxwell* over to the following term and decided *Boykin* on the narrowest possible grounds.[20]

From here, things spiraled. Warren Burger replaced Earl Warren in May 1969.[21] The Burger Court decided *Maxwell* on *Witherspoon* grounds[22] and held over the larger procedural question for the following term when the Court would be at full strength. In April 1970, Harry Blackmun was nominated to replace Abe Fortas.[23] The Minnesota twins, Burger and Blackmun, joined John Harlan's opinion in *McGautha v. California*,[24] rejecting the constitutional necessity of single-phase trials and jury standards.[25] The case was a resounding defeat for abolition forces.[26] *Furman*[27] and its companion cases were taken as housekeeping matters. When the Court broke for summer recess, everyone believed the Eighth Amendment cases would be decided 8–1, with Justice Brennan writing the sole dissent.[28]

That *Furman* came out as it did is one of the great eleventh-hour surprises in Supreme Court history. On June 9th, 1972—just twenty days before *Furman* would be announced—no majority had emerged.[29] It's easy and natural to imagine *Furman* having come out the other way. 'Contingency much more than determinism characterized the tumultuous foundational death penalty era of the 1960s and 1970s, write Carol and Jordan Steiker in their new book, *Courting Death: The Supreme Court and Capital*

18. *Id.*

19. *Id.* at 92.

20. *Id.*

21. *Id.*

22. Maxwell v. Bishop, 398 U.S. 262, 266–67 (1970) (per curiam) ("It appears, therefore, that the sentence of death imposed upon the petitioner cannot constitutionally stand under *Witherspoon v. Illinois*."); MANDERY, *supra* note 3, at 96.

23. MANDERY, *supra* note 3, at 93–94.

24. 402 U.S. 183, 184 (1971).

25. *Id.* at 185–86.

26. Justice Brennan said: 'In candor, I must admit that when *McGautha* was decided, it was not just a lost skirmish, but rather the end of any hope that the Court would hold capital punishment to be unconstitutional. MANDERY, *supra* note 3, at 114 (quoting Brennan, *supra* note 16, at 321).

27. Furman v. Georgia, 408 U.S. 238 (1972).

28. MANDERY, *supra* note 3, at 118–19.

29. *See id.* at 197–200 (discussing the uncertainty Justice White, the deciding vote in *Furman*, exhibited towards the death penalty in the days leading up to the Court's decision).

Punishment.[30] Had *Furman* been decided differently, "[t]he consequences for the path of capital punishment in America would have been profound."[31]

The flux point: on that Friday afternoon, Potter Stewart walked to Byron White's chambers and struck a deal.[32] Stewart would condemn the arbitrariness of the death penalty,[33] rather than its treatment of people as a means to an end, as he had intended.[34] In exchange White would provide the decisive fifth vote based on his idiosyncratic position that the problem with the death penalty was the infrequency of its use.[35]

It's possible that Stewart could have foreseen what would follow from this fateful arrangement. His and White's opinions, which were perceived as the core holding of the most fractured decision in Supreme Court history, left open the possibility for states to revise their statutes.[36] But Stewart neither intended nor foresaw this consequence. He believed his decision would end the American death penalty.[37] The ensuing backlash surprised and disappointed him.[38]

When Stewart, Lewis Powell, and John Paul Stevens came together four years later to address the constitutionality of the revised death penalty statutes,[39] Stewart and Powell in particular felt constrained by history. "I accept *Furman* as precedent," Powell wrote to himself in April 1976.[40] Each man also harbored deep misgivings about capital punishment. The compromise they struck—another flux point—can only be understood in this context. Here we need to distinguish between the unintended consequences of purposeful action (such as when Arthur Goldberg dissented from *Rudolph*

30. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 77 (2016).

31. *Id.* at 76.

32. MANDERY, *supra* note 3, at 215–17.

33. Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J. concurring).

34. MANDERY, *supra* note 3, at 168, 173, 197.

35. *Id.* at 215–17.

36. *See Furman*, 408 U.S. at 309–10 (Stewart, J. concurring) (arguing that the petitioners in this case were "capriciously selected" and that the death penalty cannot be "wantonly" and "freakishly" imposed, as it was in this case); *id.* at 310–11, 313 (White, J. concurring) (explaining that the death penalty is not unconstitutional per se and that the crucial issue in this case was the infrequency with which the death penalty was applied).

37. Stewart told his clerks that "the death penalty in America was finished." MANDERY, *supra* note 3, at 242.

38. Stewart said, "I misjudged the passion among voters." *Id.* at 401.

39. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (plurality opinion) (upholding as constitutional the revised Georgia statutory scheme for imposition of the death penalty, which requires the finding of at least one aggravating factor, the consideration of mitigating factors, and direct review by the state supreme court); Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion) (finding the mandatory imposition of the death penalty for homicidal offenses, as required by North Carolina's revised statute, to be unconstitutional under the Eighth Amendment).

40. MANDERY, *supra* note 3, at 404.

v. Alabama[41] as a signal to the bar) and the unintended consequences of purposeless action—or, more charitably, actions whose central purpose was to avoid an abhorrent result. The historical record is devoid of any evidence of Stewart, Stevens, or Powell thinking through how the *Furman* principle of nonarbitrariness would co-exist with the *Woodson*[42] (and later *Lockett*[43]) principle of unconstrained discretion,[44] or whether they even could co-exist at all.[45] Their compromise, which established the parameters of constitutional regulation, seems best understood simply as a splitting of the baby by men who felt bound to uphold the constitutionality of a practice about which they each harbored such substantial misgivings.

Over the past two decades, no two American scholars have done more to explore and expose the abject failure of this enterprise than the redoubtable Steikers. *Courting Death*, which synthesizes and expands upon their prior scholarly contributions, immediately takes its place as the seminal text on the subject. Readable and accessible, it is an extraordinary scholarly achievement, with revelations even for those well familiar with the Steikers' oeuvre.

It could hardly be surprising that a compromise constructed so hastily and with such ambivalence could have failed. The surprise is the breadth of that failure. Judged against any measure of success, the Court's regulation has been a spectacular disappointment. In 1976, the Court "embarked on a course that seemed to please no one, write the Steikers.[46] The death penalty is "perversely[] both over- and underregulated."[47]

From the standpoint of death penalty supporters, the Court has created a "labyrinthine' structure that causes extraordinary delay between sentence and execution.[48] This delay undermines the deterrence and retributive goals of capital punishment and, ironically, advances awareness of the innocence problem, which the Steikers see as the "foreseeable by-product' of the Court's regulation.[49]

From the standpoint of death penalty opponents, the Court's scheme created a veneer of regularity that solidified sagging confidence in capital

41. 375 U.S. 889 (1963) (Goldberg, J. dissenting from denial of certiorari).

42. 428 U.S. 280.

43. Lockett v. Ohio, 438 U.S. 586 (1978).

44. *See Lockett*, 438 U.S. at 605 (plurality opinion) (holding unconstitutional a statute that prevents consideration of "the defendant's character and record and [the] circumstances of the offense"); *Woodson*, 428 U.S. at 304 (plurality opinion) (requiring '[c]onsideration of both the offender and the offense in order to arrive at a just and appropriate sentence").

45. MANDERY, *supra* note 3, at 408–19 (discussing the roles played by Stewart, Stevens, and Powell in the 1976 capital cases).

46. STEIKER & STEIKER, *supra* note 30, at 154.

47. *Id.* at 155.

48. *Id.*

49. *Id.* at 209.

punishment in the two decades following *Gregg*[50] (until the problem of wrongful convictions became more widely known)[51] and helped tame what Robert Weisberg calls the 'existential moment' of death.[52] 'After *Furman*, Steiker and Steiker write, jurors 'are more likely to *believe* that the offense before them is especially deserving of death.'[53] A similar belief has caused governors to be less vigilant in exercising their oversight function.[54] But this belief has no basis in reality, as the regulatory enterprise has done nothing to combat the arbitrariness and racism that the Court explicitly and implicitly condemned in *Furman*. Sentencing was arbitrary before and is arbitrary now.

Some of the blame lies with the specifics of the Court's regulatory choices. Its post-*Gregg* decisions have not meaningfully analyzed whether capital statutes meaningfully limit the class of death-eligible offenders, a function the Steikers termed "narrowing' in their seminal 1997 article, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*.[55] The Court, they say, has essentially abandoned any effort to require specificity in aggravating factors, and it has utterly ignored any exploration of how they function collectively.[56] In California, more than 87% of first degree murders are potentially eligible for the death penalty under the state's definitions.[57] In Colorado, the rate is 91.1%.[58]

Another culprit is the questionable ability of courts—and the Supreme Court in particular—to create social change. This limitation, explored by Gerald Rosenberg,[59] among others, is exacerbated in the context of capital punishment. For the death penalty to function as a nonarbitrary legal system, laws must differentiate between those who deserve to live and die with a specificity of draftsmanship that Justice John Harlan deemed 'beyond

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50. Gregg v. Georgia, 428 U.S. 153 (1976).

51. STEIKER & STEIKER, *supra* note 30, at 156.

52. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 353.

53. STEIKER & STEIKER, *supra* note 30, at 162.

54. *See id.* at 141 (noting the sharp decline in individual commutations in Texas because of executive trust in extended judicial review).

55. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 372 (1995) (defining "narrowing" as a body of legislation that reduces those eligible to receive the death penalty as those offenders deemed 'most deserving").

56. STEIKER & STEIKER, *supra* note 30, at 159–62. The Steikers allow for the possibility that this abandonment could be meaningful. *See id.* at 177 ("[T]he Court could look more closely at whether state aggravating factors collectively accomplish much in terms of limiting the class of death-eligible offenders.").

57. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283, 1308–09, 1331 (1997).

58. Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1109 (2013). The prosecution sought the death penalty in only 2.78% of cases, pursued through sentencing in only 0.93% of cases, and obtained a death sentence only 0.56% of the time. *Id.* at 1111–12.

59. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 420–29 (2d ed. 2008).

human ability' in *McGautha*.[60] It's difficult to imagine such superhuman consistency in a federalist system committed to state autonomy. It's definitively impossible in a scheme that requires the preservation of jury discretion.[61]

But *Courting Death* is most damningly a condemnation of the way the Supreme Court—and lawyers in general—talk about complicated ethical issues, a vivid illustration of how disempowering and problematic it is for judges to drape themselves "in the longiloquent language of a generalized logic."[62] In its analysis of the gross divergence between the text and subtext of the Supreme Court's capital punishment decisions, *Courting Death* soars. No dinner table conversation about American capital punishment could go on for more than a few minutes without discussing racism, but racism has been virtually absent from the critical Supreme Court decisions.[63]

Race is the issue that brought LDF to the capital punishment campaign.[64] In *Witherspoon*, LDF's and the ACLU's amicus briefs focused on racial discrimination, yet the Court's opinion made no mention of race.[65] LDF's argument about jury discretion, first presented in *Maxwell* and ultimately rejected in *McGautha*, focused on how the lack of standards exacerbated discrimination.[66] In *Furman*, LDF's briefs drew attention to the pervasiveness of race discrimination in state sentencing.[67] The various amicus briefs documented the history of race discrimination in the administration of capital punishment.[68] Everyone understood *Furman* as a case about race.[69] Yet, only Justice Douglas and Justice Marshall mentioned race in their opinions, and neither put the practice in its historical context.[70]

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60. McGautha v. California, 402 U.S 183, 204 (1971) ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.").

61. *See* STEIKER & STEIKER, *supra* note 30, at 177 ("The inevitability of discretion means that the capital decision cannot be tamed through legal language.").

62. FRED RODELL, WOE UNTO YOU, LAWYERS! 68 (2d ed. 1957).

63. The Steikers first explored these issues in their extraordinary article. Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 253–94 (2015).

64. *See* MANDERY, *supra* note 3, at 48 (discussing how in LDF case selection, '[r]ace was always the factor").

65. STEIKER & STEIKER, *supra* note 28, at 85–86.

66. *Id.* at 83, 86–87.

67. *Id.* at 88. *See also* Motion for Leave to File Brief as Amici Curiae and Brief Amici Curiae of the National Association for the Advancement of Colored People et al. at 2–7, Furman v. Georgia, 408 U.S. 238 (1972) (No. 69-5003) (discussing the findings that the way the death penalty was administered was inherently racist against minorities and the poor).

68. *See* STEIKER & STEIKER, *supra* note 28, at 87–88 (outlining how the various briefs addressed racial discrimination in the administration of the death penalty).

69. MANDERY, *supra* note 3, at 276.

70. *See* Furman v. Georgia, 408 U.S. 238, 242, 250–51 (1972) (Douglas, J., concurring) (noting that '[i]t would seem to be incontestable that the death penalty inflicted on one defendant is

From here, seemingly impossibly, race faded further into the background. LDF's *Gregg* brief emphasized that its experience 'in handling capital cases over a period of many years convinced [it] that the death penalty is customarily applied in a discriminatory manner against racial minorities and the economically underprivileged.'[71] None of the 1976 decisions referenced race discrimination.[72]

A year later the Court considered the constitutionality of the death penalty for rape.[73] The abolition campaign had begun about thirteen years earlier when Justice Arthur Goldberg dissented from the Court's refusal to grant certiorari in the appeal of Frank Lee Rudolph, "a black man who had been sentenced to die for raping a white woman.'[74] Goldberg's position was predicated on his law clerk Alan Dershowitz's research showing profound race discrimination in the use of the death penalty for rape.[75] LDF's first foray into capital punishment advocacy was a study of racism in twelve southern states, which revealed that 110 of 119 defendants who received the death penalty for rape were black.[76] The constitutionality and morality of the death penalty for rapists could not be separated from that history. LDF wrote, '[I]n Georgia, the death penalty for rape was specifically devised as a punishment for the rape of white women by black men.'[77] In an amicus filing for several advocacy groups including the National Organization for Women Legal Defense and Education Fund, Ruth Bader Ginsburg wrote that the practice of punishing rape with death derived from Southern traditions 'which valued white women according to their purity and chastity and

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'unusual' if it discriminates against him by reason of his race,' and discussing a study that found that black capital offenders had a higher frequency of executions than their white counterparts (citing Rupert C. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQ. 132, 141 (1969))); *id.* at 364–65 (Marshall, J. concurring) (acknowledging the existence of racial discrimination in the administration of executions).

71. Brief for the NAACP. Legal Defense and Education Fund, Inc. as Amicus Curiae at 1, Gregg v. Georgia, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 178715, at *1.

72. STEIKER & STEIKER, *supra* note 30, at 94.

73. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (deciding 7–2 that the death penalty was a 'grossly disproportionate and excessive punishment for the crime of rape").

74. Rudolph v. Alabama, 375 U.S. 889, 889 (1963) (Goldberg, J. dissenting from denial of certiorari) (calling on the Court to decide 'whether the Eighth and Fourteenth Amendments permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life,' and listing questions that 'seem relevant and worthy of consideration"); MANDERY, *supra* note 3, at 28.

75. *See* ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 291 (2002) ("I cited national prison statistics showing that between 1937 and 1951, 233 blacks were executed for rape in the United States, while only 26 whites were executed for that crime."); *see also* MANDERY, *supra* note 3, at 19 (summarizing how Dershowitz showed Justice Brennan the research he had done for Brennan in an effort to bring Brennan to Goldberg's side).

76. MANDERY, *supra* note 3, at 38–39.

77. Brief for Petitioner at 54, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181481, *54.

assigned them exclusively to white men.'[78] Nevertheless, neither the plurality nor dissenting opinions in *Coker v. Georgia*[79] made any mention of race.

No one could have been surprised when the Court rejected a systemic claim to Georgia's capital punishment scheme on the basis of statistical evidence of racism. *McCleskey v. Kemp*[80] was *the* case in this history. *Furman* and *Gregg* raised important questions with which any humane society must grapple: What, if any, are the limits on the severity of punishment? What procedural protections are defendants entitled to? But it's possible to make a cogent argument in favor of the use of capital punishment in select, especially heinous cases. It's impossible to defend the American system, which reserves the death penalty for a handful of defendants drawn randomly among poor people who kill white victims. *McCleskey* demanded that the Court deal with systemic racism in criminal justice and our nation's history of cruelty to African-Americans, especially in the South.[81] Yet, Justice Powell's opinion reads like a disquisition on the nature of proof and statistics, utterly detached from the lived history of American capital punishment.

The Steikers point to several forces behind this extraordinary disconnect, some legitimate, some not. Crime rates were on the rise.[82] Abolishing the death penalty because of racism would suggest that the Court lacked the capacity to combat institutionalized racism, even as it was engaged in its controversial desegregation project. 'There were good reasons, the Steikers write, 'for the Court to worry that constitutional limitation or abolition of capital punishment for explicitly race-based reasons would inspire more spirited public resistance than apparently race-neutral interventions.'[83]

Most importantly, the Justices couldn't conceive how to limit the impact of the proof of racism if its validity was admitted. Justice Lewis Powell wrote, 'McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice

78. Brief Amici Curiae of the American Civil Liberties Union et al. at 6, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181482, at *6. *See also* STEIKER & STEIKER, *supra* note 28, at 95–96 (describing Ruth Bader Ginsburg's brief as "powerfully expos[ing] the ways in which the death penalty for rape fundamentally rested on both sexist and racist beliefs"); Steiker & Steiker, *supra* note 55, at 274–75 (same).

79. 433 U.S. 584 (1977).

80. 481 U.S. 279 (1987).

81. *See* STEIKER & STEIKER, *supra* note 28, at 174 (discussing the Baldus study, put before and rejected by the Court in *McCleskey*, which found that "the race of the victim powerfully influenced the imposition of the death penalty in post-*Furman* Georgia and that cases with black defendants and white victims were much more likely to generate death sentences than any other racial pairing").

82. *Id.* at 100 (noting that crime rates in the 1960s and 1970s rose, especially in inner-city minority communities).

83. *Id.*

system.'[84] The Steikers say. '[I]f the Court relied on statistical racial disparities to invalidate capital punishment, it would be forced to explain why similar disparities must be accepted in the imposition of ordinary criminal punishment.'[85] Powell and his colleagues thought that crediting McCleskey's argument simply would have been too destabilizing.[86]

Maybe, maybe not. All we can say for certain is that the "system' we have today. eviscerated by the Steikers, is not a system at all, but rather a thin veneer of regularity that somehow simultaneously has divested decision makers of moral responsibility for their actions, exposed the unreliability of its procedures, and created extraordinary delays, which are a cruelty independent of executions themselves. Its complexity and incompetence is stunning.

All the more stunning is that that no one in this history got what he wanted. At bottom, *Courting Death* is a case study for what happens when nine men charged with the solemn duty of overseeing a complex ethical and legal system refuse to ever speak about it honestly.

They get exactly what they deserve.

84. *McCleskey*, 481 U.S. at 314–15.

85. STEIKER & STEIKER, *supra* note 30, at 108.

86. *Id.* at 108–09.

Notes

Equity Crowdfunding of Film—Now Playing at a Computer Near You*

I. Introduction

In 1999, *The Blair Witch Project* shocked Hollywood and the entire filmgoing world.[1] The film portrays the alleged 'found footage' of a documentary made by three film students who ventured into woods believed to be haunted by the ghost of an eighteenth-century witch.[2] While there are elements of the plot and premise that are undoubtedly shocking and startling, the real surprise was the film's enormous commercial success despite filming on such a limited budget.[3] Reportedly made on a production budget of just $30,000,[4] the film grossed an astonishing $248,639,099 at the worldwide box office.[5] Focusing on these numbers, a hypothetical $1,000 investment in *The Blair Witch Project* would bring the investor a return of over $4 million. Of course, determining a movie's profits involves considerably more than simply subtracting the production budget from the box office returns.[6] Yet, the numbers illustrate the point that movies made on small budgets have the potential to bring huge returns on relatively small investments.

While these high returns may attract any person with a disposable income looking to invest, film finance has traditionally been an activity

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1. Nicholas Barber, *Was* The Blair Witch Project *the Last Great Horror Film?*, BBC NEWS: CULTURE (Oct. 30, 2015), http://www.bbc.com/culture/story/20151030-was-the-blair-witch-project-the-last-great-horror-film [https://perma.cc/6U2B-LTYV].

2. *Id.*

3. Gitesh Pandya, *Summer 1999 Box Office Wrapup*, BOX OFFICE GURU (Sept. 21, 1999), http://www.boxofficeguru.com/summer99.htm [https://perma.cc/C2YL-SX7K].

4. *The Blair Witch Project*, BOX OFFICE MOJO, http://www.boxofficemojo.com/movies/?id=blairwitchproject.htm [https://perma.cc/CJR4-MTFS]. It should be noted that sound mixing, reshoots, and other postproduction activities took the budget up to around $500,000. Barber, *supra* note 1 (explaining that, while the movie's production budget was less than $30,000, postproduction costs increased the final budget to around $500,000).

5. Barber, *supra* note 1; BOX OFFICE MOJO, *supra* note 4.

6. *See* Derek Thompson, *How Hollywood Accounting Can Make a $450 Million Movie 'Unprofitable'*, ATLANTIC (Sept. 14, 2011), http://www.theatlantic.com/business/archive/2011/09/how-hollywood-accounting-can-make-a-450-million-movie-unprofitable/245134/ [https://perma.cc/C9TS-4KMC] (describing the creative accounting often employed by studios).

reserved for only the wealthiest Americans.[7] Until recently, if unknown filmmakers wanted to break into the industry, getting their movie produced often meant courting the friendship of rich individuals in the hopes that they would invest.[8] Some people have even suggested that the influence these wealthy benefactors wield by backing movies contributes to Hollywood's lack of diversity, which shrouded the 2016 Academy Awards in controversy.[9] With the advent of the Internet and the rise of social media, a new method of funding films not requiring a filmmaker to pander to wealthy individuals is becoming increasingly popular: crowdfunding.[10]

Crowdfunding, as its name would suggest, refers to the raising of capital through 'relatively small contributions from a large number of people.'[11] The concept of crowdfunding is not technically new, as charities, politicians, and nonprofits have employed this method for years.[12] The concept really exploded in popularity, though, when websites like Kickstarter and Indiegogo gave aspiring inventers, entrepreneurs, and artists an open forum to pitch their ideas to the world in the hopes of receiving funding.[13] A 'creator,' be it in connection with a film, an invention, art, or any number of other projects that require raising capital, generates a listing that describes her project to potential "backers' browsing the site.[14] The creator sets a fundraising goal and backers can pledge money to her project.[15] The backer is only charged the amount of her promised contribution if and when the project reaches its fundraising goal.[16] The vast majority of pledges on these

7. *See* Zack O'Malley Greenburg, *Panning for Silver Screen Gold: How to Invest in Films*, FORBES: MEDIA & ENTERTAINMENT (Dec. 10, 2014), http://www.forbes.com/sites/zackomalleygreenburg/2014/12/10/panning-for-silver-screen-gold-how-to-invest-in-films/#5d799bbd7d0e [https://perma.cc/X29U-KMCP] (describing film investment as expensive and risky).

8. *See id.* (discussing how wealthy entrepreneurs have been 'swaggering into Hollywood' to invest in movies); *see also* Jason Brubaker, *How to Meet Rich People So You Can Get Movie Money*, FILMMAKING STUFF (Dec. 18, 2013), http://www.filmmakingstuff.com/filmmaking-lesson-6-meet-rich-people/ [https://perma.cc/YU4E-BU35] (detailing the importance of meeting "a few rich people" if a person wants to make a movie).

9. Joel Anderson, *Can Equity Crowdfunding Revolutionize Film Financing?*, EQUITIES.COM (Feb. 10, 2016), https://www.equities.com/news/can-equity-crowdfunding-revolutionize-film-financing [https://perma.cc/GQ5P-H3JS].

10. *See* Greenburg, *supra* note 7 (highlighting directors' success using crowdfunding websites to fund million-dollar movies).

11. C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 10.

12. Stuart R. Cohn, *The New Crowdfunding Registration Exemption: Good Idea, Bad Execution*, 64 FLA. L. REV. 1433, 1434 (2012).

13. INDIEGOGO, https://www.indiegogo.com [https://perma.cc/PNU8-JLFE]; KICKSTARTER, https://www.kickstarter.com [https://perma.cc/RX92-PFRA].

14. *Kickstarter Basics: Kickstarter 101*, KICKSTARTER, https://www.kickstarter.com/help/faq/kickstarter%20basics [https://perma.cc/M2B4-H5F8].

15. *Id.*

16. *Id.*

sites are relatively small; the median pledge on Kickstarter is only $25.[17] As of February 2017. Kickstarter, founded in 2009, has successfully funded over 117,000 projects with over $2.8 billion pledged to these projects.[18]

Film projects already make up a substantial number of the projects on these sites. In 2014, 3,846 film and video projects were successfully funded on Kickstarter, second only to music projects.[19] It is not just small-time filmmakers using these sites to fund low-budget projects. Over 90,000 fans of the TV show *Veronica Mars* gave $5.7 million to fund a movie based on the show, which was taken off the air seven years earlier.[20] Additionally, since 2011, at least one Kickstarter film has been nominated for an Academy Award each year, with three crowdfunded projects nominated in 2016.[21] While these sites allow fans and film buffs to give money to fund projects, they do not allow the backer to actually invest in the project and share in any profits the movies might have.[22] Rather, in exchange for the donation, the filmmaker usually offers the backer some sort of reward.[23] For the *Veronica Mars* movie, for example, rewards ranged from a PDF of the movie script for a $10 donation to a speaking part in the film in exchange for a $10,000 pledge.[24]

While this rewards-based model of crowdfunding has undoubtedly successfully created a new opportunity for filmmakers looking to get their projects funded, an offer of an equity stake in the film would likely greatly expand the funder base, enticing many more people to fund film projects. The problem with an equity model of crowdfunding has traditionally been that offering a portion of the movie's profits in exchange for capital involved the sale of a security, triggering the application of federal securities laws.[25] Thus, in the past, for a filmmaker to make such an offer to the public, she

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17. *Building Rewards*, KICKSTARTER, https://www.kickstarter.com/help/handbook/rewards [https://perma.cc/ZB8C-MSD2].

18. *Stats*, KICKSTARTER, https://www.kickstarter.com/help/stats [https://perma.cc/6J6T-KGUR].

19. *2014: By the Numbers*, KICKSTARTER, https://www.kickstarter.com/year/2014/data [https://perma.cc/9NEP-8FDB].

20. Sarah Rappaport, *Kickstarter Funding Brings 'Veronica Mars' Movie to Life*, CNBC: MEDIA (Mar. 12, 2014), http://www.cnbc.com/2014/03/12/kickstarter-funding-brings-veronica-mars-movie-to-life.html [https://perma.cc/C4HM-PYMF].

21. David Ninh, *The Envelope, Please: Celebrating the Kickstarter Creators Nominated for Oscars*, KICKSTARTER BLOG (Feb. 24, 2016), https://www.kickstarter.com/blog/cheers-to-this-years-oscar-nominated-kickstarter-films [https://perma.cc/5SYN-3C4V].

22. *See* Bradford, *supra* note 11, at 16 (describing how sites like Kickstarter and Indiegogo use a reward or prepurchase model).

23. *Id.*

24. *The Veronica Mars Movie Project*, KICKSTARTER, https://www.kickstarter.com/projects/559914737/the-veronica-mars-movie-project/description [https://perma.cc/N7UK-54U6].

25. Crowdfunding, Release Nos. 33-9974, 34-76324, 7 (Nov. 16, 2015) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249, 269, 274) [hereinafter Crowdfunding]; Bradford, *supra* note 11, at 33.

was required to register with the Securities and Exchange Commission (the 'SEC' or the "Commission"), a process typically prohibitively expensive for the relatively small amount of capital sought by the filmmaker.[26] Recently, after a public push by small businesses and investors, President Obama signed into law the Jumpstart Our Business Startups (JOBS) Act, which provides a crowdfunding exemption to federal securities law.[27] Although the President signed the act into law on April 5, 2012, the SEC did not adopt the final rules for the new crowdfunding exemption until October 30, 2015, and the rules did not go into effect until May 16, 2016.[28] This new exemption opens the door for equity crowdfunding and has the potential to give everyday investors the opportunity to participate in the financing of movies like *The Blair Witch Project* with the hopes of substantial returns from the films' profits. As discussed in Part IV of this Note, though, the minuscule odds of funding a *Blair Witch*-type hit may not be worth the overall riskiness of these types of investments.

This Note examines this new crowdfunding exemption to federal securities laws and analyzes its potential impact on the financing of independent films. Part II of the Note surveys securities laws before the enactment of the JOBS Act—specifically the aspects of the laws serving as barriers to equity crowdfunding and the rationale for the exemption. Part III analyzes the JOBS Act and the rules promulgated by the SEC, explaining how the crowdfunding exemption works in practice. Part IV focuses on film finance—evaluating the benefits and risks of the equity financing of movies, both from the perspective of the filmmaker and the potential investor.

II. The Problem—The Pre-JOBS Act Securities Laws that Made Equity Crowdfunding Unworkable

The meaningful regulation of securities began in the 1930s in response to the Stock Market Crash of 1929 and the Great Depression that followed.[29] One of the primary causes of the crash was the 'frenzied' speculation in stocks by investors who were promised huge profits by 'silver-tongued' brokers without any meaningful disclosure to the investors of information about the companies in which they were investing.[30] In the hopes of preventing future catastrophes in the markets, Congress passed the Securities

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26. Crowdfunding, *supra* note 25, at 7.

27. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified in scattered sections of 15 U.S.C.).

28. Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rules to Permit Crowdfunding (Oct. 30, 2015), https://www.sec.gov/news/pressrelease/2015-249.html [https://perma.cc/PG26-EGG5] [hereinafter SEC Adopts Rules].

29. Sharon Yamen & Yoel Goldfeder, *Equity Crowdfunding—A Wolf in Sheep's Clothing: The Implications of Crowdfunding Legislation Under the JOBS Act*, 11 BYU INT'L L. & MGMT. REV. 41, 42–43 (2015).

30. *Id.*

Act of 1933[31] (the Securities Act) and the Securities Exchange Act of 1934[32] (the Exchange Act).[33]

The Securities Act, sometimes referred to as the 'truth in securities' law, has two main objectives: (1) to ensure that investors receive financial and other meaningful information concerning any security offered for public sale, and (2) to protect against fraud in the sale of securities.[34] The primary means by which the act accomplishes these goals is through the registration of securities.[35] In general, all securities within the meaning of the Securities Act must be registered with the SEC.[36] Further, the Exchange Act permits the SEC to require continued periodic reporting by registered companies with publicly traded securities.[37]

A. A 'Security'

In understanding the breadth of these acts, it is crucial to understand what constitutes a 'security.' The Securities Act defines a security very broadly.[38] The Supreme Court broadened the definition even further by announcing the test as 'whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.'[39] The Court later dropped 'solely' from this test,[40] and more recently, the Court stated, 'Congress' purpose in enacting the securities laws

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31. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2012)).

32. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp (2012)).

33. Yamen & Goldfeder, *supra* note 29, at 43.

34. *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/about/laws.shtml#secact1933 [https://perma.cc/2FR2-E2ES].

35. *Id.*

36. *Id.* The SEC was created by the Exchange Act, which gave the organization broad authority over all aspects of the securities industry and gave that body the power to "register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self regulatory organizations. *Id.*

37. *Id.*

38. *See* 15 U.S.C. § 77b(a)(1) (2012) (defining a security as 'any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a 'security' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing").

39. SEC v. W.J. Howey Co. 328 U.S. 293, 301 (1946).

40. Bradford, *supra* note 11, at 30–31.

was to regulate investments, in whatever form they are made and by whatever name they are called."[41]

Under this formulation, the rewards-based crowdfunding model, employed by websites like Kickstarter and Indiegogo, is free from the reach of the registration requirement of the Securities Act.[42] Simply, the money given on these sites is not an investment. The creators offer these backers no expectation of financial return in exchange for their contributions, and "because investors on reward or pre-purchase sites are not offered stock, notes, or anything else that falls within the definition of security, federal securities law does not apply."[43]

While rewards-based crowdfunding has and may continue to operate without any interference from federal securities law, it is these rules that have stood as the major impediment to equity crowdfunding in the United States.[44] The sale of an equity stake in a motion picture on a crowdfunding site fits the Court's broad definition of the sale of a security.[45] First, offering portions of the venture to such a great number of investors through crowdfunding is 'almost by definition' a common enterprise.[46] Additionally, since equity crowdfunders solicit funds solely in exchange for a share of either future earnings or revenue, these investors would have an expectation of profits.[47] Lastly, these profits, if there are to be any, come solely from the work of the filmmaker and others involved in the actual production and distribution of the film, not the investors contributing money online.[48] Therefore, before the passage of the JOBS Act, a filmmaker looking to raise money for a project by offering a share of any future profits would have had to register the security with the SEC, unless an exemption applied.[49]

B. Registering a Security

For an independent filmmaker looking to raise a relatively small amount of money, registration is simply not a viable option.[50] The costs associated

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41. Reves v. Ernst & Young, 494 U.S. 56, 61 (1990) (emphasis omitted).

42. Bradford, *supra* note 11, at 32.

43. *Id.*

44. Crowdfunding, *supra* note 25, at 7.

45. *See* Bradford, *supra* note 11, at 33–34 (evaluating equity-based crowdfunding under the *Howey* test).

46. *Id.* at 33.

47. *Id.* at 33–34.

48. *Id.* at 34.

49. 15 U.S.C. § 77e(c) (2012); Crowdfunding, *supra* note 25, at 7.

50. *See, e.g.*, Crowdfunding, *supra* note 25, at 7 ("Some observers have stated that registered offerings are not feasible for raising smaller amounts of capital, as is done in a typical crowdfunding transaction, because of the costs of conducting a registered offering and the resulting ongoing reporting obligations under the Securities Exchange Act of 1934 (Exchange Act) that may arise as a result of the offering."); Bradford, *supra* note 11, at 42 ("[R]egistration is not a viable option for early-stage small businesses seeking relatively small amounts of capital.").

with the actual registration and the ongoing disclosure requirements are exceedingly high.[51]

> The costs of an initial SEC registration typically include underwriting compensation, a registration fee paid to the SEC, legal and accounting fees and expenses, printing and engraving costs, a Financial Industry Regulatory Authority filing fee, electronic filing fees when using a service for filing, stock exchange listing fees (if applicable), Blue Sky filing fees (if applicable), and transfer agent and registrar fees when the issuer retains the services of a third party to handle its stock records.[52]

While these costs are lower for smaller offerings, accounting, legal, and other associated fees can easily add up to more than $50,000.[53] Further, this process takes a significant amount of time,[54] and once registered, the offeror must carry the expensive ongoing burden of continued compliance and reporting required under the Exchange Act.[55]

For a small project, the whole process is paradoxical. Consider a film project in dire need of money for production. In a desperate measure, the filmmakers decide to solicit the public for funds, but in order to do so they would need a significant amount of money for registration.[56] In sum, registration is an incredible financial undertaking for any typical startup, but it is especially unworkable for a filmmaker seeking to finance an independent movie with a limited budget, scope, and project duration.

C. Exemptions to the Registration Requirement

Because of the handcuffs in which the registration requirement puts many small businesses, even before the JOBS Act, a number of exemptions existed to help these companies raise capital.[57] The traditional exemptions that small businesses utilize are those pursuant to § 3(a)(11),[58] § 4(a)(2),[59]

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51. Paige M. Lager, Note, *The Route to Capitalization: The Transcendent Registration Exemptions for Securities Offerings as a Means to Small Business Capital Formation*, 94 TEXAS L. REV. 567, 569, 573 (2016).

52. Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 908 (2011).

53. *Id.* at 909.

54. *Id.* at 909–10.

55. *See* Lager, *supra* note 51, at 569 (estimating that the ongoing cost of regulatory compliance for a registered public offering is $1.5 million per year).

56. *See id.* at 573 (noting the "chicken or the egg" problem created by the prohibitively expensive registration and reporting requirements).

57. Michael B. Dorff, *The Siren Call of Equity Crowdfunding*, 39 J. CORP. L. 493, 501–02 (2014).

58. 15 U.S.C. § 77c(a)(11) (2012).

59. *Id.* § 77d(a)(2).

Regulation A,[60] and Regulation D.[61] Yet, none of these exemptions would permit equity crowdfunding.[62]

Section 3(a)(11) exempts intrastate offerings from registration, but as crowdfunding invariably crosses state lines, this section cannot be employed for this purpose.[63]

Similarly unhelpful is § 4(a)(2), which exempts from registration "transactions by an issuer not involving any public offering."[64] Although the Securities Act does not actually define 'public offering,'[65] the Supreme Court has stated, "the applicability of [the exemption] should turn on whether the particular class of persons affected needs the protection of the Act."[66] In making this determination, courts consider both the "sophistication"[67] of the solicited investors and their access to meaningful information.[68] The ambiguity surrounding these concepts and their application to the exemption led the SEC to adopt a safe harbor to § 4(a)(2) in Rule 506 of Regulation D, discussed below.[69] Regardless, it is impractical for a potential crowdfunding website to operate under the 4(a)(2) exemption, as that would require the website to somehow ascertain the sophistication of its users and to furnish the requisite level of information to potential investors.[70] Equity crowdfunding from a website similar to Kickstarter or Indiegogo is therefore not permitted under this exemption.

Regulation A, as it existed pre-JOBS Act,[71] provided small companies the opportunity to legally make up to $5 million offerings without undergoing full registration with the SEC.[72] Regulation A seemed attractive to crowdfunders, as it had no prohibition on general solicitation.[73] Yet, Regulation A required what amounted to a 'mini-registration,' which although less extensive than what the Securities Act required, still involved preparing offering materials, obtaining a qualification statement by the SEC,

60. 17 C.F.R. §§ 230.251–.263 (2016).

61. *Id.* §§ 230.500–.508.

62. Dorff, *supra* note 57, at 502.

63. 15 U.S.C. § 77c(a)(11).

64. *Id.* § 77d(a)(2).

65. Heminway & Hoffman, *supra* note 52, at 912.

66. SEC v. Ralston Purina Co. 346 U.S. 119, 125 (1953).

67. This refers to those '[o]fferees who possess financial and business knowledge that allows them to appreciate the risks of the investment.' Heminway & Hoffman, *supra* note 52, at 914.

68. *Id.* at 913–15.

69. *Fast Answers: Rule 506 of Regulation D*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/answers/rule506.htm [https://perma.cc/8EWM-DZ7K].

70. *See* Heminway & Hoffman, *supra* note 52, at 915–16 (pointing out the aspects of § 4(a)(2) that make equity crowdfunding unworkable under the exemption).

71. In addition to creating the crowdfunding exemption, the JOBS Act made changes to Regulation A, creating what has been termed Regulation A+. For a more thorough discussion of this change to federal securities law, see Lager, *supra* note 51, at 581–87.

72. Bradford, *supra* note 11, at 48.

73. *Id.*

and in some cases, going through qualification and registration in multiple states.[74] In 1997, the average cost of a Regulation A offering was $40,000–$60,000[75]—basically the entire production budget of *The Blair Witch Project*.[76] Further, between 2012 and 2014, qualification for a Regulation A exemption took an average of three hundred days.[77] This process is simply too expensive, time consuming, and burdensome for the types of small offerings that equity crowdfunding seeks to attract.[78]

Traditionally, small businesses looking to raise money have relied on Regulation D as an exemption to registration.[79] Under Regulation D, "[e]ligible issuers can rely on Rule 504 to raise up to $1 million within a twelve-month period, on Rule 505 to raise up to $5 million within a twelve-month period, and on Rule 506 to raise an unlimited amount of capital."[80] The largest problem with these exemptions for crowdfunding was, and still is, their restrictions on general solicitation, or the company's ability to advertise and market its securities to the general public.[81] Prior to the JOBS Act, Rules 505 and 506 both contained general prohibitions on solicitation to the public,[82] while Rule 504 only allows for solicitations if the security is sold: (1) only in states requiring delivery of a disclosure document, (2) in at least one state requiring delivery of a disclosure document and that document is distributed to all purchasers in all states, or (3) pursuant to a state exemption that limits sales to accredited investors.[83] Since one of the major purposes of crowdfunding is to make a broad pitch to the public, these restrictions are practically prohibitive.[84] Further, Rules 505 and 506 permit

74. *Id.* Lager, *supra* note 51, at 575.

75. Bradford, *supra* note 11, at 48.

76. *See supra* note 4 and accompanying text.

77. Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 21,806, 21,869 (Apr. 20, 2015) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 240, 249, 260) [hereinafter Amendments to Regulation A].

78. Bradford, *supra* note 11, at 48.

79. Amendments to Regulation A, *supra* note 77, at 21,869.

80. *Id.*

81. Dorff, *supra* note 57, at 502.

82. Bradford, *supra* note 11, at 46–47. The JOBS Act amended Rule 506 to allow for general solicitations so long as the investors in the offering are all accredited investors. *See* 17 C.F.R. § 230.506(c)(2) (2016) ("All purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors."). This creates the opportunity for what has been termed "accredited crowdfunding." Dorff, *supra* note 57, at 517–18.

83. 17 C.F.R. § 230.504 (2016). Most relevantly for the purposes of this Note, Regulation D's definition of accredited investor includes a person: (1) "whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000" excluding the value of the person's primary residence; or (2) "who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year." *Id.* § 230.501(a)(5)–(6). For a full explanation of who qualifies as an accredited investor under Regulation D, see *id.* § 230.501(a).

84. Dorff, *supra* note 57, at 502.

a maximum of thirty-five nonaccredited investors,[85] with 506 adding on the additional requirement from § 4(2) that the nonaccredited investors be sophisticated.[86] Crowdfunding's reliance on small donations from a large number of investors makes these Rules' caps on the number of nonaccredited investors unworkable.[87] In sum, while these Regulation D exemptions may be extremely valuable for a typical startup approaching rich, accredited investors, they are not suitable for equity crowdfunding aimed at a broad audience.

With all of these exemptions inadequate to support equity crowdfunding, it became clear that a new exemption was needed if a profit-sharing model of crowdfunding was to legally exist in the United States.[88] Not long after websites like Kickstarter and Indiegogo gained significant popularity, a movement formed in 2010 to lobby the government to amend securities law to enable equity crowdfunding.[89] This movement quickly gained the support of many academics,[90] entrepreneurs,[91] and, of particular interest for the purposes of this Note, Hollywood actors.[92] These forces quickly caught the attention of the President and Congress, and in 2012, Congress passed the bipartisan JOBS Act, containing the framework for a crowdfunding exemption to the Securities Act.[93]

III. The Solution—Title III of the JOBS Act and Regulation Crowdfunding

On April 5, 2012, President Obama signed the JOBS Act into law, hailing it as a 'potential game changer' for startups and small businesses in

85. 17 C.F.R. §§ 230.505(b)(2)(ii), 230.506(b)(2)(i) (2016).

86. *Id.* § 230.506(b)(2)(ii).

87. *See supra* note 17 and accompanying text.

88. Bradford, *supra* note 11, at 44.

89. *See The Road to Legalizing Crowdfunding – The Thank You Chart*, STARTUP EXEMPTION (Apr. 20, 2012), http://www.startupexemption.com/archives/294#axzz455MIcNYU [https://perma.cc/7GCF-JGD8] [hereinafter *Legalizing Crowdfunding*] (providing a timeline of the lobbying effort for a startup exemption covering crowdfunding).

90. *E.g.*, Nikki D. Pope, *Crowdfunding Microstartups: It's Time for the Securities and Exchange Commission to Approve a Small Offering Exemption*, 13 U. PA. J. BUS. L. 973, 974 (2011).

91. *E.g.*, *About Us*, STARTUP EXEMPTION, http://www.startupexemption.com/about-us#axzz45CTZudru [https://perma.cc/M6ZV-YRJE].

92. *E.g.*, Angus Loten, *Whoopi to SEC: Let Small Firms Raise Capital*, WALL STREET J. (Mar. 23, 2011), http://blogs.wsj.com/in-charge/2011/03/23/whoopi-to-sec-let-small-firms-raise-capital/ [https://perma.cc/9C2G-S25B].

93. Mark Landler, *Obama Signs Bill to Promote Start-Up Investments*, N.Y. TIMES (Apr. 5, 2012); *Legalizing Crowdfunding*, *supra* note 89, http://www.nytimes.com/2012/04/06/us/politics/obama-signs-bill-to-ease-investing-in-start-ups.html?_r=0 [https://perma.cc/YQ3R-8FXJ].

search of capital.[94] While the Act contains various provisions aimed at making it easier for companies to raise funds, Title III of the JOBS Act provides an exemption from the registration requirements for certain crowdfunding transactions.[95] Specifically, Title III adds § 4(a)(6) to § 4 of the Securities Act, creating a new exemption that makes equity crowdfunding available to non-reporting companies looking to raise a maximum of $1 million in any twelve-month period.[96] Although the Act provides the framework for equity crowdfunding, it remained unusable until the SEC promulgated rules to carry out the exemption.[97] The JOBS Act initially gave the SEC 270 days to accomplish this task,[98] but the final rules, termed Regulation Crowdfunding, were not adopted until October 30, 2015 and did not go into effect until May 16, 2016.[99] In its pronouncement of the rules, the SEC set out the functionality of the crowdfunding exemption, the conditions for issuers seeking to use the exemption, and the requirements for the intermediary 'funding portals' that facilitate the crowdfunding through their platforms.[100]

A. The Crowdfunding Exemption

1. Limit on Capital Raised.—Starting May 16, 2016, the exemption from registration provided by § 4(a)(6) became available to a U.S. issuer, provided that 'the aggregate amount sold to all investors by the issuer, including any amount sold in reliance on the exemption provided under [§ 4(a)(6)] during the 12-month period preceding the date of such transaction, is not more than $1,000,000.'[101] This limit applies to the issuer, not to a particular project.[102] Therefore, as an example, if A seeks to produce two films in a single year, she may not raise $1 million for each project through crowdfunding. Instead, the exemption limits her to $1 million raised between the two projects. Further, A may not circumvent the limitation by creating separate subsidiary organizations for each film, as the calculation of the amount sold by a particular issuer in a twelve-month period includes 'amounts sold by entities controlled by, or under common control with, the

94. President Barack Obama, Remarks by the President at JOBS Act Bill Signing (Apr. 5, 2012) (transcript available at https://www.whitehouse.gov/photos-and-video/video/2012/04/05/president-obama-signs-jobs-act#transcript [https://perma.cc/R8CP-VEBU]).

95. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 302(a), 126 Stat. 306, 315 (2012) (codified in scattered sections of 15 U.S.C.).

96. 15 U.S.C. § 77d(a)(6) (2012).

97. Joe Wallin, *President Obama Signed the JOBS Act! Now What?*, STARTUP L. BLOG (Apr. 23, 2012), http://www.startuplawblog.com/2012/04/23/president-obama-signed-jobs-act/ [https://perma.cc/7JNL-7YEV].

98. §§ 303(b), 304(a)(2), 126 Stat. 306 at 321–22.

99. Crowdfunding, *supra* note 25, at 1; SEC Adopts Rules, *supra* note 28.

100. Crowdfunding, *supra* note 25, at 14–16, 151–52.

101. 15 U.S.C. § 77d(a)(6)(A).

102. Crowdfunding, *supra* note 25, at 18–20.

issuer.'[103] Whether an entity is under 'common control' with the issuer depends on whether or not the issuer possesses the power to direct or cause the direction of the management and policies of the entity.[104]

This monetary limitation concerns the raising of capital under § 4(a)(6) and has no effect on the issuer's ability to raise capital through other methods, including the use of other exemptions such as those under Regulation D.[105] This portion of the rule is crucial for movie producers, as making a movie today often costs well over $1 million.[106] A filmmaker may use traditional methods of financing, including those methods involving separate exemptions to the registration requirement under the Securities Act, in addition to raising up to $1 million through an offering under the crowdfunding exemption.[107]

2. Investment Limits.—In addition to a cap on the amount of capital that can be raised through equity crowdfunding, the law contains strict limits on the amount an individual may invest.[108] If either an investor's annual income or net worth is less than $100,000, the individual is limited to investing 'the greater of: $2,000 or 5 percent of the lesser of the investor's annual income or net worth.'[109] For an investor whose annual income and net worth exceed $100,000, the individual may invest "10 percent of the lesser of the investor's annual income or net worth.'[110] Additionally, the law limits any one investor from purchasing more than an aggregate amount of $100,000 worth of securities from crowdfunding offerings.[111] To illustrate, under these rules,

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103. *Id.* at 18.

104. Since the JOBS Act provides no definition of control, the SEC decided to use the definition provided in Securities Act Rule 405. *Id.* at 19–20. Rule 405 states, '[t]he term control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. 17 C.F.R. § 230.405 (2016) (emphasis omitted).

105. Crowdfunding, *supra* note 25, at 18.

106. *See* Adam Leipzig, *Sundance Infographic 2015: Dollars and Distribution*, CULTURAL WKLY. (Jan. 28, 2015), http://www.culturalweekly.com/sundance-infographic-2015-dollars-and-distribution/ [https://perma.cc/YTJ8-R7G5] (noting that the estimated average budget for indie dramatic features at the Sundance Film Festival in 2015 was $1.7 million).

107. *See* Crowdfunding, *supra* note 25, at 18 ("Capital raised through other means should not be counted in determining the aggregate amount sold in reliance on Section 4(a)(6).").

108. *Id.* at 25.

109. *Id.*

110. *Id.* This represents a departure from the rules proposed in the JOBS Act. Under the SEC's final pronouncement of the rule, both the investor's annual income and net worth must exceed $100,000 in order to be able to invest up to 10% of her income. Under the JOBS Act, *either* the investor's net worth or annual income had to exceed $100,000 in order to invest 10% of her income. Under the final rules, an investor with an annual income of $50,000 and $105,000 in net worth is subject to an investment limit of $2,500, in contrast to $10,500 under the proposed rules. *Compare id.* (permitting 10% investment only when both annual income and net worth equal or exceed $100,000), *with* 15 U.S.C. § 77d(a)(6)(B) (allowing 10% investment if either annual income or net worth are $100,000 or greater).

111. Crowdfunding, *supra* note 25, at 8.

an individual with a net worth in excess of $100,000 but an annual income of $90,000 is subject to an investment limit of $4,500, while an individual with a net worth in excess of $100,000 who makes $101,000 annually may invest up to $10,100.[112] Further, an investor may not resell securities purchased in a crowdfunding transaction for a period of one year.[113] In constructing these limitations, the SEC attempted to balance its desire to provide issuers with more access to capital with its paternalistic goals of protecting investors from potentially risky investments.[114]

Neither § 4(a)(6) nor the rules implementing the crowdfunding exemption distinguish between accredited and nonaccredited investors.[115] As noted above, the limitations on the permitted number of nonaccredited investors stood as a major impediment to equity crowdfunding, which seeks to amass funding from a wide group of individuals.[116] Unlike some of the exemptions under Regulation D, Regulation Crowdfunding allows any number of nonaccredited investors to invest in crowdfunding offerings, subject only to limitations on the amount of their investment.[117] It should be noted, however, that while Regulation Crowdfunding expands the market of individuals permitted to provide capital compared with Regulation D, the exemption limits the investment of any such individual, regardless of wealth, to $100,000 in any twelve-month period for crowdfunding offerings.

3. Interaction with State Law.—The new crowdfunding exemption preempts state law.[118] This is an incredibly important aspect of the law, as crowdfunding characteristically reaches a wide variety of people, frequently crossing state lines in the process.[119] Compliance with each state's securities laws would have cost issuers significant amounts of time and money, and these costs saved through preemption may ultimately be passed along to the investors.[120] While this preemption greatly benefits the issuer, it deprives investors of an additional layer of protection.[121]

B. Issuer Requirements

1. Advertising and General Solicitation.—For equity crowdfunding to truly thrive, it is critical that issuers have some ability to advertise their

112. For a chart providing more examples of the application of the limits, see *id.* at 26.

113. *Id.* at 11.

114. *Id.* at 26.

115. 15 U.S.C. § 77d(a)(6) (2012); Crowdfunding, *supra* note 25, at 28.

116. *See supra* notes 79–87 and accompanying text.

117. Crowdfunding, *supra* note 25, at 25, 28.

118. 15 U.S.C. § 77r(b)(4) (2012).

119. *See generally* Ajay K. Agrawal et al., *The Geography of Crowdfunding* (Nat'l Bureau of Econ. Research, Working Paper No. 16820, 2011).

120. Crowdfunding, *supra* note 25, at 481–82.

121. *Id.* at 482.

offerings to the public.[122] As its name suggests, crowdfunding requires a crowd, and without the ability to market the security to a broad audience, projects will have great difficulty securing funding.[123] Under the rewards-based model, a project's success often depends on the creator's ability to promote its product on social media websites like Facebook and Twitter.[124] Before the JOBS Act, most of the exemptions from the registration requirement of the Securities Act proscribed this type of solicitation,[125] and this prohibition served as a major barrier to equity crowdfunding.[126]

The new crowdfunding exemption under § 4(a)(6) authorizes general solicitation, including on social media, on a limited basis.[127] The law only allows 'notices which direct investors to the funding portal or broker.'[128] No limitation exists as to how an issuer may distribute such a notice, but the SEC limits what the advertising notice may include.[129] The Commission permits an issuer to include a statement announcing the offering and the name of the intermediary facilitating the offering, along with a link to the intermediary's site.[130] Further, the issuer may specify the 'terms of the offering' and 'information about the legal identity and business location of the issuer, limited to the name of the issuer of the security, the address, phone number and website of the issuer, the e-mail address of a representative of the issuer and a brief description of the business of the issuer.'[131]

Although these items represent the full extent of what an issuer may include in the advertising notice, the issuer has the flexibility to omit any of the enumerated items.[132] As noted by one commentator, this flexibility effectively allows the issuer to make what amounts to a "teaser" ad to promote its offering.[133] A clever filmmaker is given license to create a shroud of mystery around its advertisement in the hopes of 'going viral' and attracting a large number of potential investors to the website hosting the offering.

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122. *See supra* note 81 and accompanying text.

123. Dorff, *supra* note 57, at 502.

124. *See* Salvador Briggman, *A Great Strategy for Kickstarter Success*, CROWD CRUX, http://www.crowdcrux.com/a-great-strategy-for-kickstarter-success/ [http://perma.cc/Q8GK-C55R] (suggesting the use of social media sites to promote a project); *Promotion*, KICKSTARTER, https://www.kickstarter.com/help/handbook/promotion [https://perma.cc/BVV8-CJLZ] (same).

125. The exception to this was Regulation A, which was unattractive to crowdfunders for other reasons. *See supra* notes 71–78 and accompanying text.

126. *See supra* note 81 and accompanying text.

127. *See* 15 U.S.C. 77d-1(b)(2) (2012) (prohibiting the advertisement of the "terms of the offering," save those that direct prospective investors to the issuer's website).

128. *Id.*

129. Crowdfunding, *supra* note 25, at 136–39.

130. *Id.* at 139.

131. *Id.*

132. *Id.* at 140.

133. Lager, *supra* note 51, at 590.

2. General Information About the Issuer and the Offering.—The SEC allows the exclusion of information on advertising notices largely because of the information the issuer must provide to investors in its offering.[134] The Commission requires the issuing party to provide general information about the business,[135] as well as information about the businesses' owners and officers[136] and capital structure.[137] Because the SEC recognizes that many projects seeking to raise money through equity crowdfunding, such as independent films, will not have a traditional corporate structure and traditional officers, directors, or managers, the SEC requires 'disclosure only to the extent an issuer has individuals serving in these capacities or performing similar functions.'[138] Although the rules mandate that the issuer provide potential investors with a business plan, the Commission realizes that offerings will come from a variety of industries with companies at varying stages of development and thus provides no specific requirements for what must be included in such a plan.[139] Similarly, the SEC mandates that an issuer disclose material factors that make an investment particularly speculative or risky, but it provides no specific standards for what must be included.[140]

In addition to information about the business venture, issuers must also provide information about the offering. This includes the target offering amount, the offering price or the method for determining the price, and the deadline to reach the offering amount.[141] The issuer must also include a 'reasonably detailed description of the purpose of the offering' so that investors have a basic idea of how their money will be used.[142]

3. Financial Disclosure.—An individual or company seeking to finance a project through equity crowdfunding must also make certain financial disclosures.[143] An issuer must provide a narrative discussion of its financial condition.[144] While the SEC does not prescribe specific content or format, the Commission advises that the discussion include 'the issuer's historical

134. *See* Crowdfunding, *supra* note 25, at 140 ("There is no requirement for legends on these notices because the issuer will be directing investors to the materials on the intermediary's platform that will include those required legends.").

135. *Id.* at 50–51.

136. If a company has it, information must be disclosed about its officers and 20% beneficial owners. This information includes positions held with the issuer, how long the individuals have held such positions, and the various individuals' prior business experiences. *Id.* at 46–49.

137. *Id.* at 57.

138. *Id.* at 46.

139. *Id.* at 49–51.

140. *Id.* at 68–69.

141. *Id.* at 55–56. In an effort to protect investors, the Commission requires the offeror to inform the investor of her right to cancel before the deadline. *Id.* at 56. The rules give the issuer discretion to value the security and set the price provided that its valuation method is disclosed to investors. *Id.* at 148–50.

142. *Id.* at 52.

143. 15 U.S.C. § 77d-1(b)(1)(D) (2012).

144. Crowdfunding, *supra* note 25, at 75.

results of operations in addition to its liquidity and capital resources.'[145] For a filmmaker, this may include a description of past projects and their level of success, as well as the amount of capital on hand from other methods of fundraising.

The issuer must provide the investor with certain financial statements, depending on the size of the offering.[146] For offerings of $100,000 or less, the issuer need only disclose 'the amount of total income, taxable income and total tax as reflected in the issuer's federal income tax returns' and financial statements both certified by the principal executive officer to be true and complete.[147] Issuers offering between $100,000 and $500,000 must provide financial statements reviewed by an independent public accountant, unless they already have financial statements that have been audited by an independent public accountant, in which case, the issuer must provide those instead.[148] These same rules apply to issuers offering more than $500,000 using the crowdfunding exemption for the first time.[149] If an issuer offering more than $500,000 has previously sold securities in reliance on Regulation Crowdfunding, she must offer financial statements audited by an independent public accountant.[150]

The reporting requirement does not terminate for issuers after the initial offering. The rules require an issuer to give investors progress reports[151] and to post an annual report on its website.[152] The annual report should include the information provided in the original offering statement, as well as financial statements 'certified by the principal executive officer of the issuer to be true and complete in all material respects.'[153]

C. *Intermediary Requirements*

The JOBS Act and the SEC rules implementing the law require all issuers to conduct crowdfunding offerings under § 4(a)(6) through a

145. *Id.* at 76–77.

146. *Id.* at 91–92.

147. *Id.* at 91. The only caveat to this rule is that if the issuer has available financial statements that have been audited or reviewed by an independent accountant, the issuer must provide those financial statements instead. *Id.*

148. *Id.* at 91–92.

149. *Id.* at 92. This represents a departure from the proposed rules under the JOBS Act. *See* 15 U.S.C. § 77d-1(b)(1)(D)(iii) (2012) (requiring audited financial statements for all issuers making an offering of more than $500,000). The SEC decided this would be too costly and burdensome for these issuers, worrying that they would have to incur the expense of an audit before having any proceeds or assurance of proceeds. Crowdfunding, *supra* note 25, at 98–99.

150. Crowdfunding, *supra* note 25, at 92.

151. *Id.* at 111. This burden only falls on the issuer if the intermediary does not furnish progress reports. *Id.*

152. *Id.* at 120–21.

153. *Id.* at 122.

registered broker or a funding portal.[154] The Exchange Act broadly defines broker as 'any person engaged in the business of effecting transactions in securities for the account of others.'[155] This term is well established in federal securities law, and the law has long required brokers to register with the SEC.[156] The concept of a 'funding portal' is new and was created exclusively to facilitate crowdfunding transactions under § 4(a)(6) of the Securities Act.[157] Essentially, the funding portals are websites like Kickstarter and Indiegogo that display equity crowdfunding investment opportunities to potential investors browsing their sites. The vast majority of crowdfunding offers are likely to take place through these types of funding portals, as brokers are unlikely to be willing to subject themselves to the liability associated with these offerings in exchange for the limited potential for commissions from the relatively small offerings.[158]

Funding portals, like a broker, must register with the SEC, but the requirements of registration are generally less extensive than that of a broker.[159] Additionally, a funding portal must become a member of a national securities association, such as the Financial Industry Regulatory Authority.[160]

The SEC requires all intermediaries, whether brokers or funding portals, to abide by certain requirements aimed at protecting investors.[161] The intermediaries must screen issuers, taking reasonable efforts to verify the issuer's compliance with securities laws and conducting background and securities enforcement checks on the issuer and its officers and directors.[162] Further, the intermediaries must provide investors with educational

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154. 15 U.S.C. § 77d(a)(6)(C) (2012); Crowdfunding, *supra* note 25, at 151.

155. 15 U.S.C. § 78c(a)(4)(A) (2012).

156. *See Broker-Dealer Registration*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/answers/bdregis.htm [https://perma.cc/QE3M-SWJQ] (explaining that, since the Securities Exchange Act of 1934, brokers, as defined by that Act, have been required to register with the SEC).

157. 15 U.S.C. § 78c(a)(80). The law defines 'funding portal' as any person acting as an intermediary solely for transactions pursuant to Securities Act § 4(a)(6) that does not:

> (A) offer investment advice or recommendations; (B) solicit purchases, sales, or offers to buy the securities offered or displayed on its website or portal; (C) compensate employees, agents, or other persons for such solicitation or based on the sale of securities displayed or referenced on its website or portal; (D) hold, manage, possess, or otherwise handle investor funds or securities; or (E) engage in such other activities as the Commission, by rule, determines appropriate.

Id. The SEC has provided a nonexclusive, conditional safe harbor for funding portals with a list of permissible activities. *See* Crowdfunding, *supra* note 25, at 273 (discussing the permissible activities in the proposed safe harbor).

158. *See* Cohn, *supra* note 12, at 1439–40 (discussing the aspects of equity crowdfunding that make it unattractive to traditional brokers).

159. Crowdfunding, *supra* note 25, at 249–50.

160. *Id.* at 154–56.

161. *See generally id.* at 151–245. The enumeration of requirements that follows is not exclusive. For a discussion on all of the requirements, see *id.*

162. *Id.* at 168–69, 178–79.

materials, including information about the 4(a)(6) exemption and the risks associated with crowdfunding investments.[163] Intermediaries must require investors to acknowledge that they have reviewed the educational materials provided and to complete a questionnaire demonstrating their basic understanding of the statutory elements and the substantial risk involved.[164] Additionally, the law dictates that intermediaries 'have a reasonable basis for believing that the investor satisfies the investment limits established by § 4(a)(6)(B).'[165] Finally, intermediaries are responsible for displaying, on their sites, all of the issuers' required disclosures[166] so that such disclosures are easily accessible to potential investors.[167]

Overall, in enacting the crowdfunding exemption, Congress and the SEC were tasked with the difficult job of striking a balance between the desire to increase the availability of capital to startups and small businesses and the desire to continue to protect investors from fraud and unforeseeable risk. Some commentators argue that these requirements do not go far enough to protect investors, while others argue that the cost of disclosure to an issuer and intermediary are too high, rendering the exemption ineffective.[168] It is beyond the scope of this Note to evaluate the effectiveness of the SEC in achieving its goals. Regardless of one's views, the equity crowdfunding exemption took effect on May 16, 2016, and the remainder of this Note evaluates its potential impact on independent filmmakers and individuals interested in investing in film.

IV The Implications—Evaluating the Potential Implications of the Equity Crowdfunding of Films

While the new equity crowdfunding exemption has the potential to impact different startups and small businesses in numerous different sectors, there is reason to believe that the new exemption will have an especially significant impact on the movie industry. There is a historical connection between crowdfunding and film finance. Indiegogo actually launched its business at the Sundance Film Festival in 2008, specifically marketing itself as 'an online social marketplace connecting filmmakers and fans to make

163. *Id.* at 187–88. For a full list of what must be included in the educational materials, see *id.* at 187–95 (outlining the proposed rules on educational materials and their comments, then summarizing the final rules).

164. *Id.* at 213–15.

165. *Id.* at 204.

166. *See supra* notes 134–52 and accompanying text.

167. Crowdfunding, *supra* note 25, at 199–204.

168. *Compare* Yamen & Goldfeder, *supra* note 29, at 70–71 (criticizing the JOBS Act for 'open[ing] the door to take advantage of" investors who may not have the financial means to recover from fraudulent brokers), *with* Lager, *supra* note 51, at 591–93 (noting the high costs imposed on issuers for compliance with the exception).

independent film happen.'[169] Further, the success of crowdfunding films in the rewards-based model serves as a proof of concept moving forward. As previously noted, in 2014, Kickstarter successfully funded 3,846 films, second only to music as the industry with the most successfully funded projects.[170] Seeing these numbers, it is inevitable that individuals and companies interested in serving as intermediaries in equity crowdfunding transactions will set up funding portals aimed at film offerings.[171] Some of the early portals are already marketing film-related offerings with great success.[172] This creates unique opportunities for both filmmakers and potential investors, but each group should carefully contemplate certain considerations before deciding whether or not to utilize equity-based crowdfunding.

A. The Filmmaker Perspective

1. A New Source of Capital.—The most obvious benefit to filmmakers of the new equity crowdfunding exemption is the availability of an additional stream of capital. The 2008 financial crisis fundamentally altered the landscape for independent-film producers trying to raise money for their films.[173] Prior to the crisis, independent films were largely funded by bank loans collateralized by presale commitments from foreign distributors.[174] These commitments, often sold before the film had been produced, generally accounted for more than half the film's production budget.[175] The crisis caused many foreign distributors to abandon the acquisition of American films, shifting their focus instead to local films.[176] This left American

169. GEOFF KING, INDIE 2.0: CHANGE AND CONTINUITY IN CONTEMPORARY AMERICAN INDIE FILM 90 (2014).

170. *See supra* note 19 and accompanying text (showing successfully funded film and video projects at 3,846 and successfully funded music projects at 4,009).

171. Since the removal of the ban on general solicitation under Rule 506, see *supra* note 82, multiple equity-based crowdfunding platforms have been formed specifically aimed at financing film. R. B. Jefferson, *The Top 5 Equity Based Crowdfunding Sites for Film Finance*, LAW. ROCK (May 26, 2014), http://www.lawyersrock.com/equity-based-crowdfunding-2/ [https://perma.cc/MBL2-PC94]. Because of the limitations under Rule 506, only accredited investors may use these sites. *Id.* Now that the new exemption is in effect under § 4(a)(6), investors are likely to see similar equity crowdfunding sites geared towards film be made available to nonaccredited investors.

172. *See, e.g. Legion M: The First Hollywood Studio Owned by Fans*, WEFUNDER, https://wefunder.com/legionm [https://perma.cc/T2WY-MKNR] (offering an equity stake in a film studio). For a greater discussion on Legion M, see *infra* notes 220–22 and accompanying text.

173. Lauren A.E. Schuker, *Indie Films Suffer Drop-Off in Rights Sales*, WALL STREET J. (Apr. 20, 2009), http://www.wsj.com/articles/SB124018425311033183 [https://perma.cc/GE7J-ZEDL].

174. For a more thorough discussion on how this process worked, see Sahil Chaudry, *The Impact of the JOBS Act on Independent Film Finance*, 12 DEPAUL BUS. & COM. L.J. 215, 216–19 (2014).

175. Schuker, *supra* note 173.

176. *Id.*

independent-film producers with a dearth of financing options.[177] Rewards-based crowdfunding has already offered filmmakers an opportunity to fill some of the void left by the decrease in foreign presales.[178] Equity crowdfunding has the potential to further increase an independent filmmaker's access to capital by connecting producers 'to a much larger universe of potential investors and [by facilitating] a cost-effective aggregation of smaller investment amounts.'[179] Further, by democratizing the funding process, filmmakers will not be subject to the whims of high-dollar financiers or studios and can keep intact their artistic visions.[180]

2. The $1 Million Limit.—The relatively low annual cap of $1 million that an issuer may offer to the public may cause concern for some filmmakers considering equity crowdfunding.[181] There is no doubt that many projects will require far more than $1 million. As noted above, though, this limitation does not proscribe producers from using other fundraising methods in conjunction with equity crowdfunding for movies with budgets exceeding $1 million.[182] Further, for those most likely to use the exemption—namely, producers of independent films—$1 million has the potential to go a long way. It often takes longer than a year to make a movie.[183] The producer could initially raise $1 million to support preproduction, production, and postproduction, and a year later make another $1 million offering to support marketing and distribution.[184] Further, at the 2015 Sundance Film Festival, the average budget for an indie dramatic feature was $1.7 million and $400,000 for documentary features.[185] If the rules had taken effect, equity crowdfunding could have funded more than half the budget of the average

177. Erin Davies, *Indie-Film Shakeout: There Will Be Blood*, TIME (Nov. 7, 2009), http://content.time.com/time/business/article/0,8599,1936350,00.html [https://perma.cc/Y5KE-VD3Q].

178. *See* Heesun Wee, *How Equity Crowdfunding Just Might Upend Film Financing*, CNBC (May 15, 2013), http://www.cnbc.com/id/100724191 [https://perma.cc/XPP2-76YC] (discussing how filmmaker Zach Braff turned to Kickstarter in part because of his lack of value in the eyes of foreign distributors).

179. Matthew Savare & Richard Jaycobs, *Crowded Marketplace: How the JOBS Act Will Transform Film Financing*, FILMMAKER (Apr. 17, 2012), http://filmmakermagazine.com/44000-how-the-jobs-act-will-transform-independent-film-financing/#.Vw1haTYrJR2 [https://perma.cc/N4BH-AGW4].

180. *See* Wee, *supra* note 178 (describing how one filmmaker turned to crowdfunding because '[studios] wanted final cut of the film and to cast stars in roles").

181. *See supra* notes 101–04 and accompanying text.

182. *See supra* notes 105–07 and accompanying text.

183. *See* Michael R. Barnard, *Filmmakers, It's 2013. Do You Know Where Your JOBS Act Is? Part 2*, FILMMAKING LIFE BLOG (Jan. 27, 2013), https://michaelrbarnard.wordpress.com/2013/01/27/filmmakers-its-2013-do-you-know-where-your-jobs-act-is-part-2/ [https://perma.cc/VUW6-YVVN] (discussing how the crowdfunding exemption can fit the "common timetable" of making films).

184. *Id.*

185. Leipzig, *supra* note 106.

Sundance dramatic feature in 2015, proportionately similar to the amount funded by foreign presales before the 2008 crisis.[186]

3. Proof of Concept.—Additionally, for films with production budgets significantly higher than $1 million, equity crowdfunding has the potential to serve as validation of the filmmaker's idea to larger investors.[187] People invest in products and ideas they believe will succeed, and an effective equity crowdfunding campaign demonstrates to institutional investors that there is desire in the market for the film.[188] A successful campaign may also arm the producer or filmmaker with greater leverage during negotiations with traditional investors, who are notorious for trying to strong-arm producers during the negotiation of terms.[189]

4. Marketing Benefits.—Equity crowdfunding also has the potential to become a powerful marketing strategy. Research shows taking a company public can have substantial marketing benefits.[190] It creates a buzz, which can make both media outlets and potential filmgoers excited about the film. In this way, crowdfunding increases the film's chances of obtaining distribution, as it can 'act as a source of credibility to increasingly conservative distributors who can leverage the implicit promotion of a fundraising campaign for all avenues of distribution, including box office, television, and video-on-demand sales.'[191]

Depending on the size of the offering and the average donation, equity crowdfunding will create devoted advocates of the films in which they choose to invest. This is one of the few true advantages over the rewards-based model. Giving people from all around the country a stake in a film's success greatly incentivizes them to actively promote the movie to friends, families, and acquaintances in their respective communities. While this type of grassroots marketing would likely have limited effect on blockbusters with substantial advertising budgets and a wide release, it could greatly impact independent films with limited releases, whose success is often judged by the per screen average.[192] Knowing this, distributors of equity crowdfunded films would be wise to consider the demographics of the film's investors.

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186. *See supra* notes 171–76 and accompanying text.

187. Savare & Jaycobs, *supra* note 179.

188. Jim Saksa, *The Benefits of Crowdfunding Aren't What You Think*, TECHNICAL.LY: PHILLY (Sept. 9, 2014), http://technical.ly/philly/2014/09/09/benefits-crowdfunding-arent-think/ [https://perma.cc/E7YT-Q7ME].

189. Savare & Jaycobs, *supra* note 179.

190. *See generally* Elizabeth Demers & Katharina Lewellen, *The Marketing Role of IPOs: Evidence From Internet Stocks*, 68 J. FIN. ECON. 413 (2003) (exploring the potential marketing benefits of going public and of IPO underpricing).

191. Chaudry, *supra* note 174, at 233.

192. *See* Marc Schiller, *Why Our Obsession With 'Per Screen Average' Will Eventually Kill Independent Cinema*, INDIEWIRE (May 1, 2013), http://www.indiewire.com/article/why-our-obsession-with-per-screen-average-will-eventually-kill-independent-cinema

5. The Costs and Potential Liability.—The costs associated with using the exemption represent the greatest downside of equity crowdfunding.[193] Most obviously, equity crowdfunding requires issuers to give up a share of the profits, a problem not faced by filmmakers using the rewards-based model.[194] Additionally, although the exemption requirements are not nearly as burdensome as registration under the Securities Act, there are still significant costs and potential liability associated with making the required disclosures under § 4(a)(6).[195] For offerings under the exemption, a filmmaker is liable to investors for any losses if she 'makes an untrue statement of a material fact or omits to state a material fact required to be stated or necessary in order to make the statements not misleading.'[196] The risk this poses to issuers requires the consultation of lawyers and other professionals to ensure substantial compliance with the complex rules. In addition, the law itself requires the enlistment of an independent accountant to either certify or audit financial statements for offerings over $100,000.[197]

Although it is too early to tell, funding portals will also likely pass their costs on to the issuer.[198] The SEC estimates the cost on intermediaries to be between $417,000 and $770,000 the first year, with significant annual ongoing costs to be paid as well.[199] According to the SEC, this could lead funding portals to charge transaction fees as high as 15% in order to recoup their costs.[200] On a $1 million offering, issuers may have to pay as much as $150,000 simply to use the funding portal's services.

6. Risk to Intellectual Property.—Crowdfunding also poses potential risks to a filmmaker's intellectual property.[201] Many of the filmmakers using the exemption will likely be at the earliest stages of development. Consider a documentarian who may only have an idea for a project when she decides to seek funding through a crowdfunding offering. As there is nothing yet to copyright, posting the idea to the public puts it at risk of being stolen by anyone browsing the website.[202] If the filmmaker has already created the copyrightable work, disclosure to the public is equivalent to 'publication'

[https://perma.cc/4A48-9D3L] (noting the film industry's obsession with the per screen average metric).

193. Lager, *supra* note 51, at 596–97.

194. Chaudry, *supra* note 174, at 233.

195. Lager, *supra* note 51, at 596–97.

196. Crowdfunding, *supra* note 25, at 333–34.

197. *See supra* notes 145–49 and accompanying text.

198. Lager, *supra* note 51, at 592–93.

199. Crowdfunding Proposed Rules, Release Nos. 33-9470, 34-70741, 385 (Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249).

200. Lager, *supra* note 51, at 593.

201. Nicholas Wells, *The Risks of Crowdfunding*, 60 RISK MGMT. 26, 26–28 (2013).

202. *Id.* at 28.

under the Copyright Act, and the filmmaker must pay the additional expense of registering with the Copyright Office in order to protect it.[203]

The weight accorded to each of the above considerations largely depends on the specific project and why the filmmaker decided to use the exemption. For example, a filmmaker primarily motivated by equity crowdfunding's marketing benefits may be less concerned by the compliance costs, seeing them as part of the film's overall marketing budget. Similarly, a filmmaker using equity crowdfunding for a completed film's prints and advertising budget will likely have protected the intellectual property and need not be concerned with the risks of publishing the details of the project to the public. Each filmmaker, then, must consider the specific costs and benefits of the exemption as it relates to her specific project.

B. The Investor Perspective

Like the filmmaker, the investor should not hastily elect to participate in the equity crowdfunding of film without careful reflection on the potential implications. The prospect of large returns may be enticing, but this remote possibility will usually be outweighed by the great risks involved.

1. The Risks.—As equity crowdfunding becomes more popular, the offerings made to investors through equity crowdfunding will likely be some of the riskiest investments on the market. Even in the SEC's final rules, the Commission acknowledges that 'startups and small businesses that will rely on the crowdfunding exemption are likely to experience a higher failure rate than more seasoned companies.'[204] Film projects may be even more susceptible to this high failure rate.[205] For every ten movie projects launched by a studio, one commentator estimates only one is actually produced and released.[206] The most knowledgeable experts in the film industry option these films and yet still they fail at an incredibly high rate. Studios and other sophisticated investors manage this risk by diversifying their investments using the profits from their most successful films to cover the losses of their failed investments.[207] While equity crowdfunders have the ability to diversify their investments, they are provided limited information about the projects and are unlikely to take the time required to properly research each

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203. *Id.*

204. Crowdfunding, *supra* note 25, at 26.

205. *See* Alex Mayyasi, *The Odds of a Hollywood Movie Being Made Are the Same as a Startup Making It*, PRICEONOMICS (Aug. 9, 2013), http://priceonomics.com/the-odds-of-a-hollywood-movie-being-made-are-the/ [https://perma.cc/78D7-GLPK] ("[T]he odds of a Hollywood movie making it into theaters are the same as Silicon Valley's 9 out of 10 figure and much longer than startups' actual failure rate.").

206. *Id.*

207. *Id.*

investment.[208] For nonexperts, crowdfunding investments in movies represent a game of chance with the odds largely stacked against them.

The high costs associated with compliance and disclosure will likely cause filmmakers to resort to equity crowdfunding only after exhausting other funding sources.[209] Thus, investors largely will only have available to them those opportunities already rejected by more experienced and sophisticated film investors, representing yet another reason the films offered to the public are likely to fail.[210]

2. Dilution.—Even if an investor wisely uses the limited information available to her and finds a film more likely to succeed, she risks having her interest in the venture significantly diluted during subsequent fundraising rounds.[211] While institutional investors negotiate protections from dilution with the issuer, '[n]one of these measures are likely to be available to equity crowdfunders unless the portals or the SEC require them.'[212] Thus, producers and filmmakers can manipulate the process to benefit themselves and new investors at the expense of those who invested at the equity crowdfunding stage.[213]

3. Potential for Fraud.—The potential for fraud in equity crowdfunding transactions represents another risk for potential investors.[214] Section 4(a)(5) of the Securities Act requires an intermediary to 'take such measures to reduce the risk of fraud' with respect to transactions made under the crowdfunding exemption.[215] Still, by loosening disclosure requirements and decreasing the transparency of businesses as compared to registered offerings, 'the opportunities to scam unsuspecting Americans will inevitably increase.'[216] Investors should be skeptical of "filmmakers' promising large returns and significant box office success.

V Observations and Conclusion

As equity crowdfunding in the United States is less than a year old, it remains difficult to predict the full impact of the new crowdfunding exemption under § 4(a)(6) on film finance. However, early results suggest

208. Dorff, *supra* note 57, at 514–15.

209. *See id.* at 517 ("[E]ntrepreneurs who can secure funding from other sources will prefer those sources to equity crowdfunding.").

210. *Id.*

211. *Id.* at 515–16. For an explanation of how dilution can happen to early stage investors, see *id.*

212. *Id.* at 517; *see also* Crowdfunding, *supra* note 25, at 387 ("Investors purchasing securities issued in reliance on Section 4(a)(6) may not have the experience or the market power to negotiate various anti-dilution provisions ").

213. Dorff, *supra* note 57, at 516.

214. Yamen & Goldfeder, *supra* note 29, at 66–67.

215. 15 U.S.C. § 77d-1(a)(5) (2012).

216. *See* Yamen & Goldfeder, *supra* note 29, at 66–70 (using history to argue that crowdfunding transactions are particularly susceptible to issuers trying to defraud investors).

film-related offerings will be a significant part of the emerging market. As of April 7, 2017, investors have funded over $23 million in equity crowdfunding offerings.[217] Of the eighty-five companies that have reached their minimum funding target, three companies have already reached the $1 million annual cap.[218] One of these companies is Legion M—a film studio marketing itself as "the first Hollywood studio owned by fans."[219] Legion M's success and the great proliferation of film projects offered on rewards-based crowdfunding platforms suggest that a significant number of films and production companies will be available for investing on funding portals facilitating the new exemption. The fact that producers and investors can equity crowdfund, though, does not necessarily mean that they should.

For filmmakers, equity crowdfunding under the new exemption should be avoided in most cases. The significant costs and potential liabilities of the SEC's rules do not justify the relatively small access to capital the new exemption affords. If possible, filmmakers are better off raising funds through traditional sources of capital or on websites like Kickstarter and Indiegogo where they are not hamstrung by the $1 million cap or by the significant costs of disclosure and SEC compliance.[220] However, there are two particular scenarios where equity crowdfunding is worth the cost.

The first is when a filmmaker has exhausted all of the less costly funding options to no avail and the new exemption provides the only hope of getting the project produced. Of course, this is an extremely risky position to be in, as there is no guarantee that the investing public will fund the project. The second and much more desirable scenario that warrants use of the exemption is a well-funded filmmaker taking advantage of the marketing and public relations benefits of equity crowdfunding—exemplified by Legion M's use of the exemption.[221] In funding its production company, Legion M had already raised over $400,000 from accredited investors before opening up the offering to the general public.[222] Legion M then raised the permitted $1 million from over 3,000 investors and became the first "fan-owned entertainment company."[223] The media grabbed onto Legion M's story, and

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217. *See The Current Status of Regulation Crowdfunding*, WEFUNDER, https://wefunder.com/stats [https://perma.cc/E25F-2DCE] (providing updated statistics hourly regarding the use of the new crowdfunding exemption).

218. *Id.*

219. *Legion M*, WEFUNDER, https://wefunder.com/legionm [https://perma.cc/5YHC-GKSJ].

220. Including so-called "accredited crowdfunding" under the amended Rule 506. *See* sources cited *supra* note 82.

221. *See supra* notes 189–91 and accompanying text.

222. *Legion M*, *supra* note 219.

223. Samantha Hurst, *Legion M Closes Record-Setting $1M Wefunder Crowdfunding Round & Named Itself Most Popular CF Company*, CROWDFUND INSIDER (Aug. 15, 2016), https://www.crowdfundinsider.com/2016/08/89117-legion-m-closes-record-setting-1m-wefunder-crowdfunding-round/ [https://perma.cc/3AVT-DNRM]; Midori Yoshimura, *Brief: Legion M, One of World's First Fan-owned Entertainment Companies, Launches Today*, CROWDFUND INSIDER

it has received a notable amount of good press and notoriety.[224] Further, once Legion M begins producing movies, it will have an army of investors with a stake in each film's success that will undoubtedly function as a kind of grassroots marketing team. Essentially, the cost of SEC compliance becomes an investment for companies or filmmakers like Legion M, who can leverage their use of the equity crowdfunding exemption to increase profits long-term. Such a strategy works largely when a company or film is not desperate for the capital gained from the actual offering.

Separately, for investors who seek profit, equity crowdfunding of films should largely be avoided altogether. In theory, investing in a movie sounds like an exciting investment opportunity. In reality though, films represent a risky investment even for those with the requisite expertise. It is estimated that fewer than 2% of independent films make a profit.[225] Further, other than the offerings by filmmakers like Legion M, the projects offered on the funding portals for investing are likely to be those turned down by all the traditional and less costly funders, making these projects even riskier than a typical independent film. The chances of investing in a film like *The Blair Witch Project* are extremely remote, and the average investor who cares about profits and losses is better off spending her money on a movie ticket, rather than an equity stake in the film's success.

—*Joshua A. Gold*

(Mar. 9, 2016), https://www.crowdfundinsider.com/2016/03/82607-brief-legion-m-one-of-worlds-first-fan-owned-entertainment-companies-launches-today/ [https://perma.cc/576H-Y984].

224. *Legion M*, *supra* note 219.

225. Chris O'Falt, *Equity Crowdfunding Is Here – And It Could Be Terrible for Indie Filmmakers*, INDIEWIRE (May 17, 2016), http://www.indiewire.com/2016/05/equity-crowdfunding-is-here-and-it-could-be-terrible-for-indie-filmmakers-290400/ [https://perma.cc/H63K-LF6D].

Potential Citizens' Rights: The Case for Permanent Resident Voting*

Introduction

Currently, lawful permanent residents[1] living within the United States cannot vote for candidates for federal office,[2] and any who do vote in violation of this law can be deported.[3] Permanent residents are noncitizens that have satisfied one of the thirteen categories set forth in 8 U.S.C. § 1255,

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1. '[L]awfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant 8 U.S.C. § 1101(a)(20) (2012).

2. 18 U.S.C. § 611(a) (2012).

3. 8 U.S.C. § 1227(a)(6)(A) (2012).

legally allowing them to remain within this community indefinitely.[4] To become a permanent resident, an immigrant must first qualify for an immigrant category, limited to family-based, employment-based, refugee- or asylum-based, or specific special categories.[5] However, because there is a five-year residency period required for naturalization,[6] and the application period for naturalization can take years more, this Note will advocate for the extension of voting rights in state and local elections to lawfully admitted permanent residents living in the United States.

Permanent residents do not have a direct effect on election outcomes through voting, even when the result of an election directly affects them, making them "especially vulnerable to exploitation by the majority."[7] Many arguments against noncitizen voting focus on the idea that aliens are not a part of the political community simply because they are not citizens.[8] However, permanent residents are a part of the political community, distinct from other noncitizens, particularly because they have completed the legal process to remain in this country on the path to citizenship and generally have much stronger ties to the community.[9] Some critics argue that permanent residents' rights are already protected and that permanent residents do not need to vote because they have at least some representation in the political system.[10] But virtual representation does not necessarily account for permanent residents' interests, especially when legislators have no reason to listen to those who cannot vote.[11]

Specifically because they are a part of this community—on their way to becoming full citizens and affected by government policies in the same ways as citizens—permanent residents should be granted the right to vote. Voting is a 'fundamental matter in a free and democratic society' because it 'is preservative of other basic civil and political rights.'[12] Permanent residents should be given the right to vote in state and local elections[13] because

4. 8 U.S.C. § 1255 (2012).

5. *Green Card Eligibility*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 30, 2011), http://www.uscis.gov/green-card/green-card-processes-and-procedures/green-card-eligibility [https://perma.cc/72TL-GLED].

6. 8 U.S.C. § 1427(a) (2012).

7. Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1138 (2006).

8. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982) ("Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition outside of this community.").

9. Posner & Vermeule, *supra* note 7, at 1143.

10. *See, e.g.*, *id.* at 1143–44 (arguing that resident aliens have several ways in which they can influence their host government and that these methods "may well be as good as [voting]").

11. *See id.* at 1143 (acknowledging that "'virtual representation' alone is insufficient to protect a resident alien's interests).

12. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

13. This Note will not discuss the voting rights of felons or illegal aliens.

excluding 'persons from the right to vote is often the equivalent, as a practical matter, of excluding them from (genuine) representation.'[14]

Part I of this Note will address the history and the current state of noncitizen voting in the United States. Part II focuses on distinguishing lawful permanent residents from noncitizens in general, laying the foundation for why permanent residents specifically should be granted suffrage. Part III describes how the current system of representation is inadequate for permanent residents and how legislative decisions affect permanent residents the same way as citizens, providing the need for permanent resident voting rights. Part IV analyzes the constitutional and historical arguments in favor of permanent resident voting and addresses counterarguments to this expansion of suffrage. Part V describes a proposal to extend suffrage to permanent residents while accounting for many opponents' concerns with noncitizen voting. Part VI provides a conclusion summarizing the key arguments described in this Note.

I. Modern Trends in Permanent Resident Voting Rights

The number of legal permanent residents admitted to the United States has been over one million every year since 2005—twice the number admitted each year three decades ago.[15] Recently, partly due to the increase of foreign-born permanent residents, many advocates within the United States have pushed to include resident aliens in local elections, including proposing legislation in several U.S. cities.[16] This revival of noncitizen voting is partly due to 'a civil-rights and human-rights response to economic and cultural globalization and its consequences. Globalization has propelled mass migration Immigrants have reemerged as pivotal players in contemporary American politics, although their numbers exceed their political representation and clout.'[17]

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14. Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1274 (2002).

15. Paul Taylor et al. *Recent Trends in Naturalization, 2000-2011*, PEW RES. CTR. (Nov. 14, 2012), http://www.pewhispanic.org/2012/11/14/ii-recent-trends-in-naturalization-2000-2011 [https://perma.cc/ZP2R-C8KZ].

16. *See, e.g.*. Jonah Bennett, *In Wake of Trump, DC Councilmembers Want to Give Non-citizens the Right to Vote*, DAILY CALLER (Jan. 26, 2017), http://dailycaller.com/2017/01/26/in-wake-of-trump-dc-councilmembers-want-to-give-non-citizens-the-right-to-vote/ [https://perma.cc/B777-YQJ9]; Arelis R. Hernandez, *Hyattsville Will Allow Non-U.S. Citizens to Vote in City Elections*, WASH. POST (Dec. 7, 2016), https://www.washingtonpost.com/local/md-politics/hyattsville-will-allow-non-us-citizens-to-vote-in-city-elections/2016/12/07/63bc87ae-bc8c-11e6-ac85-094a21c44abc_story.html?utm_term=.26e9148bdafe [https://perma.cc/J7QK-2VAT].

17. Ron Hayduk & Rodolfo O. de la Garza, *Immigrant Voting*, *in* DEBATES ON U.S. IMMIGRATION 91, 97 (Judith Gans et al. eds., 2012).

This globalization has "prompted many countries to reconsider the relationship between nationality and voting rights"[18] and has led to an increase of noncitizen voting throughout the world.[19]

A. History of Noncitizen Voting in the United States

Noncitizen voting was not always prohibited in the United States. There is a significant history of noncitizen voting where, from the founding to the 1920s, 'noncitizens voted in forty states and federal territories in local, state, and even federal elections.'[20] Noncitizen voting began in the colonial era, when many colonies required inhabitants or residents to meet certain property requirements, but did not limit voting to only citizens.[21]

Noncitizen voting continued after the American Revolution, when many states gave foreigners state 'citizenship.'[22] In 1789, Congress reenacted the Northwest Ordinance of 1787, giving noncitizens who had lived within a territory for two years the right to vote for the legislature of that territory.[23] Shortly after in 1809, the Supreme Court of Pennsylvania held that a resident alien who paid borough taxes was entitled to vote in a borough election.[24]

But the impact of the War of 1812 'reversed the spread of alien suffrage' that dominated the political landscape up to that point by stimulating a 'rise of national consciousness' and producing 'a militant nationalism and suspicion of foreigners.'[25] Between 1830 and 1840, every state that joined the United States except Michigan restricted the right to vote to only citizens, and prior to 1840, many states amended their constitutions to do the same, including Maryland, Connecticut, New York, Massachusetts, Vermont, and Virginia.[26]

Shortly after, there was a movement in the opposite direction. In 1845, the Wisconsin Territory adopted a state constitution that gave the right to vote

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18. Miles E. Hawks, *Granting Permanent Resident Aliens the Right to Vote in Local Government: The New Komeitō Continues to Promote Alien Suffrage in Japan*, 17 PAC. RIM L. & POL'Y J. 369, 369 (2008).

19. *See, e.g.*, Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1456–60 (1993) (discussing the relationship between globalization and local noncitizen voting).

20. Ron Hayduk, *Democracy for All?: The Case for Restoring Immigrant Voting in the United States*, IMMIGRANT MOVEMENT INT'L (2011), http://immigrant-movement.us/wordpress/democracy-for-all-the-case-for-restoring-immigrant-voting-in-the-united-states/ [https://perma.cc/CNU4-KTA9].

21. *See* Raskin, *supra* note 19, at 1399 (acknowledging other "tests' including "race, religion, and gender").

22. *Id.* at 1400.

23. *Id.* at 1402 (citing Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a) (1789)).

24. Stewart v. Foster, 2 Binn. 110, 110 (Pa. 1809).

25. Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 276 (2000).

26. *Id.* at 276 & n.36.

to noncitizens who declared their intention to apply for citizenship, and several other Northern states, including Ohio, Illinois, Michigan, and Indiana, followed this trend.[27] This trend was generally limited to Northern states, as many Southern states prior to the Civil War opposed granting noncitizens the right to vote because many immigrants were against the institution of slavery.[28]

Once the Civil War ended, thirteen states adopted noncitizen suffrage, rising to twenty-two states and territories by 1875.[29] In 1900, as anti-immigrant attitudes began to emerge in the United States, only eleven states retained noncitizen suffrage.[30] Noncitizen suffrage lasted only until shortly after World War I during the 'frantic and overreactive days' of anti-immigrant sentiments.[31] Alabama eliminated noncitizen voting in 1901, Colorado in 1902; Wisconsin in 1908; Oregon in 1914; Kansas, Nebraska, Texas, and South Dakota in 1918; and Mississippi in 1924.[32] The final state to eliminate noncitizen voting was Arkansas in 1926.[33] This hostility towards noncitizens continued long after World War I, leading many states to restrict immigration altogether.[34] Noncitizen voting has only recently been revived, limited to local elections in a few municipalities.[35]

B. Noncitizen Voting Internationally

Prohibiting noncitizen voting is not universal. In fact, '[n]early 60 countries on nearly every continent allow resident noncitizens to vote at the local, regional, or national level, and most adopted such legislation during the past three decades.'[36] In Europe, every European Union (E.U.) citizen has the right to vote in municipal and European Parliament elections in whichever E.U. country the citizen resides, under the same conditions as nationals.[37] Ireland allows resident aliens of any nation to vote in local

27. *Id.* at 276–78.

28. *See id.* at 279 (noting that "northerners and southerners agreed" that immigrants tended to repudiate slavery).

29. *Id.* at 281.

30. *Id.* at 282.

31. Raskin, *supra* note 19, at 1416 (quoting Ambach v. Norwick, 441 U.S. 68, 82 (1979) (Blackmun, J. dissenting)).

32. *Id.* at 1415–17; Harper-Ho, *supra* note 25, at 282 n.81.

33. Harper-Ho, *supra* note 25, at 282.

34. *See id.* at 282–83 (citing the enactment of immigration literacy requirements across the country).

35. *Id.* at 283 (highlighting local elections in Maryland and school board elections in New York and Chicago).

36. Hayduk & de la Garza, *supra* note 17, at 94.

37. Consolidated Version of the Treaty on the Functioning of the European Union art. 22, Oct. 26, 2012, 2012 O.J. (C 326) 57 [hereinafter TFEU].

elections after six months of residency.[38] New Zealand is one of four countries that allows noncitizens to vote in all local and national elections and has allowed this since 1975,[39] granting voting rights to permanent residents after only one year of residency.[40]

In support of noncitizen voting, 'none of the countries with local voting rights have seen naturalization numbers decline.'[41] In fact, naturalizations in the Netherlands increased from 20,000 per year to 80,000 per year from 1986 to 1996, the decade following the grant of municipal voting rights.[42] Apparently. local voting rights "function as an incentive to become naturalized,"[43] and "[t]hese policy changes reveal much about the evolution of citizenship and the practice of democracy in the era of globalization."[44] As our world becomes more international, more people have the ability to choose their desired country of residence. Those that choose this country and complete the legal steps to remain should be welcomed into this community.

C. *Current Noncitizen Voting Within the United States*

Xenophobia is still a serious problem in the United States[45]—especially after the attacks on September 11, 2001, and the ISIS attacks in Paris on November 13, 2015. These attacks have led some citizens to view illegal immigrants as "potential terrorists,"[46] increasing immigrant discrimination, such as racial profiling.[47] During periods of "high unemployment, economic distress, and national security scares[,] the immigration issue receives more negative attention,"[48] even leading to political campaigns run on

38. David C. Earnest, Noncitizen Voting Rights: A Survey of an Emerging Democratic Norm 12 (Aug. 29, 2003) (unpublished manuscript).

39. Kate McMillan, National Voting Rights for Permanent Residents: New Zealand's Experience 1–2 (Apr. 24, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2449068 [https://perma.cc/2SJS-U2L6].

40. *Id.*

41. KEES GROENENDIJK, MIGRATION POLICY INST. LOCAL VOTING RIGHTS FOR NON-NATIONALS IN EUROPE: WHAT WE KNOW AND WHAT WE NEED TO LEARN 14 (2008).

42. *Id.* When asked why they decided to naturalize, "two-thirds [of immigrants] said that secure legal status and full voting rights were important factors in their decision. *Id.*

43. *Id.*

44. Hayduk & de la Garza, *supra* note 17, at 94.

45. *See, e.g.*, Lilian Jiménez, *America's Legacy of Xenophobia: The Curious Origins of Arizona Senate Bill 1070*, 48 CAL. W. L. REV. 279, 281 (2012) (arguing that state laws, such as Arizona S.B. 1070, are 'coordinated responses to demographic changes in the [United States]' reflecting an animus towards immigrants).

46. Erick C. Laque, *Immigration Law and Policy: Before and After September 11, 2001*, 10 SOC. SCI. J. 25, 32–33 (2011).

47. *See* Bryant Yuan Fu Yang, Note, *Fighting for an Equal Voice: Past and Present Struggle for Noncitizen Enfranchisement*, 13 ASIAN AM. L.J. 57, 62, 65 (2006) (noting that immigration can lead to crime, violence, and delinquency).

48. Linda Bertling Meade, *Human Rights and the Current Immigration Debate: Legislative Proposals' Effects on the Mexican Immigrant Population*, 3 S.C. J. INT'L L. & BUS. 107, 107 (2007).

'know-nothing xenophobia."[49] Most opponents focus on the status of being an immigrant, claiming that noncitizens are a drain on government resources and that immigrants are unwilling to assimilate into American society.[50] Immigration was a contention at the very heart of the 2016 presidential election.[51] This dislike even amounted to some recent denials of U.S. birth certificates to children of immigrants born within the United States.[52] Yet this directly violates Section One and the purpose of the Fourteenth Amendment.[53] Such a denial functionally deprives citizenship to a child born in the United States[54] by requiring specific forms of identification—forms that noncitizen parents are unlikely to have—to obtain a birth certificate.[55] Even the Supreme Court has acknowledged that 'federal immigration law has changed dramatically over the last 90 years, expanding the number of deportable offenses while simultaneously limiting judicial power to mitigate these harms.[56]

In 2012, there were an estimated 13.3 million legal permanent residents in the United States.[57] Almost 8.8 million permanent residents were eligible to become naturalized citizens, and the number remains stable over time as those who naturalize are replaced by others who become permanent

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49. Andrew Soergel, *Does Donald Trump Tap Into America's Underlying Xenophobia?*, U.S. NEWS & WORLD REP. (July 1, 2015), http://www.usnews.com/news/articles/2015/07/01/does-donald-trump-tap-into-americas-underlying-xenophobia [https://perma.cc/LKQ9-SBMP].

50. Carolyn J. Craig, *Nativism*, *in* DEBATES ON U.S. IMMIGRATION, *supra* note 17, at 112, 117.

51. *See* Thomas M. Holbrook, *Here's a Close Look at How Immigrant Voters Could Affect the 2016 U.S. Election*, WASH. POST (June 26, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/26/heres-a-close-look-at-how-immigrant-voters-could-affect-the-2016-election/ [https://perma.cc/DGV9-PK7Q] (noting that foreign-born voters will be more pivotal in swing states); Sahil Kapur, *Party Conventions Highlight Growing U.S. Divide on Immigration*, BLOOMBERG (July 28, 2016), http://www.bloomberg.com/politics/articles/2016-07-28/party-conventions-highlight-growing-u-s-divide-on-immigration [https://perma.cc/2YLC-7MDH] ("The divergence reflected a widening national gulf on immigration, an issue that has taken center stage in the 2016 presidential election in a year marked by increasing political polarization and heightened racial tensions.").

52. Fourth Amended Complaint at 4, Serna v. Hellerstedt, No. 1:15-cv-00446 (W.D. Tex. Feb. 15, 2016), 2016 WL 1321233.

53. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

54. 8 U.S.C. § 1401 (2012).

55. *See* Eyder Peralta, *Texas Fights Suit After Denying Birth Certificates To Children Of Illegal Immigrants*, NPR (July 23, 2015), http://www.npr.org/sections/thetwo-way/2015/07/23/425568894/texas-fights-suit-after-denying-birth-certificates-to-children-of-illegal-immigr [https://perma.cc/N6HK-Q924] (noting that "according to the complaint, Texas is refusing most forms of ID that undocumented immigrants would have access to, ' including a "*matrícula* or an ID card issued by a local Mexican consulate").

56. Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (detailing changes in immigration legislation).

57. Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2012*, OFF. OF IMMIGR. STATS. http://www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2012.pdf [https://perma.cc/63TR-TLHH].

residents.[58] About 56% of legal, foreign-born residents have become naturalized citizens—the highest amount since the 1980s.[59] In 2014, 654,949 people were naturalized after completing residency and application requirements,[60] but some have not naturalized due to difficulties with language, administrative processes, or citizenship-test requirements.[61] Immigrants, including permanent residents, compose a significant portion of our country, including many of our major cities. Over 37% of people living in New York City were born in another country.[62] In 2014, 174,714 people obtained legal permanent resident status in New York, 80,527 in Los Angeles, 32,904 in San Francisco, 33,856 in Houston, and 28,780 in Dallas.[63]

Fortunately, there have been many recent movements toward extending voting rights to permanent residents. Currently, six towns in Maryland allow noncitizen voting in municipal elections,[64] and Takoma Park, Maryland, has allowed noncitizen voting in local elections since the early 1990s.[65] Chicago currently allows noncitizens to vote in local school-council elections,[66] and from 1968 to 2003, noncitizen parents of local schoolchildren could vote in New York School Board Elections.[67]

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58. *Id.*

59. Paul Taylor et al. *Recent Trends in Naturalization, 2000-2011*, PEW RES. CTR. (Nov. 14, 2012), http://www.pewhispanic.org/2012/11/14/ii-recent-trends-in-naturalization-2000-2011/ [https://perma.cc/ZP2R-C8KZ].

60. *Naturalization Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Oct. 24, 2012), http://www.uscis.gov/archive/archive-news/naturalization-fact-sheet [https://perma.cc/3KZ8-34GH].

61. Paul Taylor et al. *Reasons for Not Naturalizing*, PEW RES. CTR. (Nov. 14, 2012), http://www.pewhispanic.org/2012/11/14/iv-reasons-for-not-naturalizing/ [https://perma.cc/P9A5-5U32].

62. *More Foreign-Born Immigrants Live in NYC Than There Are People in Chicago*, HUFFINGTON POST (Dec. 19, 2013, 2:58 PM), http://www.huffingtonpost.com/2013/12/19/new-york-city-immigrants_n_4475197.html [https://perma.cc/5VUX-XQ6N].

63. *See Persons Obtaining Lawful Permanent Resident Status by Core Based Statistical Area (CBSA) of Residence: Fiscal Years 2005 to 2014*, U.S. DEP'T HOMELAND SEC. https://www.dhs.gov/immigration-statistics/yearbook/2014/table5 [https://perma.cc/L2N3-S7XM] (noting the number of persons obtaining legal permanent resident status by metro areas).

64. Editorial, *Should Non-citizens in the U.S. Vote?*, L.A. TIMES (Dec. 21, 2014), http://www.latimes.com/opinion/editorials/la-ed-citizenship-voting-20141221-story.html [https://perma.cc/6GPA-BP77].

65. Scott Keyes, *Why You Have Nothing To Fear From Non-citizen Voting*, THINKPROGRESS (May 24, 2013), https://thinkprogress.org/why-you-have-nothing-to-fear-from-non-citizen-voting-302eeb43d1cd#.adh3hcfxj [https://perma.cc/76DP-K8BN]; *see also Register To Vote*, CITY TAKOMA PARK, https://takomaparkmd.gov/register-to-vote/ [https://perma.cc/9CCS-9M58] (stating that non-U.S. citizens who are residents of Takoma Park may register and vote in municipal elections).

66. *Voting by Nonresidents and Noncitizens*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 27, 2015), http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx [https://perma.cc/FYE5-9U3D].

67. CITY COLL. OF N.Y. NONCITIZEN VOTING IN NEW YORK CITY 11 (2014), https://www.ccny.cuny.edu/sites/default/files/psm/upload/NonCitizenFinal.pdf

No state currently extends suffrage to noncitizens, but several major cities are continuing to push for the expansion of suffrage. A bill in Washington, D.C., seeks to expand voting rights to permanent residents in local elections.[68] As residents of Washington, D.C., who have been effectively excluded from representation in Congress, they know 'taxation without representation' fairly well.[69] The New York City Council also took up legislation to permit legal residents to vote in local elections, and because roughly one million permanent residents in New York City would become eligible to vote, this would significantly impact the political atmosphere of the city, giving noncitizens political representation denied to them for almost a century.[70] Our world is becoming more international, especially as people gain an increased ability to choose their country of residence, and noncitizens contribute tremendously to this country—they pay billions in taxes and provide significant social and scientific achievements.[71]

One major step to integrate immigrants into this country is the "Stand Stronger' initiative announced by President Obama in 2016. This proposal includes a task force intended to promote citizenship, aid legal permanent residents in obtaining citizenship, and integrate them into the American community.[72] 'Nearly one out of every three eligible individuals obtained LPR status in 1990 or earlier, meaning that many have been part of our communities for decades. But they don't yet enjoy all of the rights, benefits, and responsibilities that come with being a full American citizen. '[73]

II. Inclusion in the American Political Community

Permanent residents are distinct from other classes of noncitizens because they have a significant long-term stake in this community.[74] Because

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[https://perma.cc/SQF2-NYVP]; Tara Kini, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 271, 273 (2005).

68. Bennett, *supra* note 16.

69. *See Why DC Voting Rights Matter*, LEADERSHIP CONF., http://www.civilrights.org/voting-rights/dc-voting-rights/why-dc-voting-rights.html [https://perma.cc/FQY7-YKDB] (noting that '[t]he District's only voice in Congress is a non-voting delegate who serves in the House of Representatives but is not permitted to vote on the floor of Congress").

70. Kanishk Tharoor, *Non-citizens in New York City Could Soon Be Given the Right to Vote*, GUARDIAN (Apr. 2, 2015), http://www.theguardian.com/us-news/2015/apr/02/new-york-city-non-citizens-local-elections [https://perma.cc/HP83-HVAA].

71. Arizona v. United States, 132 S. Ct. 2492, 2510 (2012) ("The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here."); IMMIGRANT AND REFUGEE FAMILIES: GLOBAL PERSPECTIVES ON DISPLACEMENT AND RESETTLEMENT EXPERIENCES 9 (Jaime Ballad et al. eds. 2016).

72. *Fact Sheet: 'Stand Stronger' Citizenship Awareness Campaign*, WHITE HOUSE (Sept. 17, 2015), https://www.whitehouse.gov/the-press-office/2015/09/17/fact-sheet-stand-stronger-citizenship-awareness-campaign [https://perma.cc/8228-V7KJ].

73. *Id.*

74. *See* Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 291 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (explaining that '[l]awful permanent residents have a long-term stake in the

they are closer in status to citizens than to other immigrants, Congress generally provides more rights and protections to permanent residents—such as permitting them to make political contributions—than to other foreign nationals. Permanent residents can participate in the electoral process—for instance by contributing to political campaigns and using their right to free speech and association for political advocacy—making them a part of this political community. The United States has been traditionally hospitable to aliens, according 'a generous and ascending scale of rights as he increases his identity with our society.'[75] Because permanent residents choose to be here, have satisfied the legal qualifications to remain indefinitely in this country, and have a significant stake in this community, they should be given the right to vote in local and state elections.

A. Permanent Residents Are Separate from Other Immigrants

In *Bluman v. Federal Election Commission*,[76] the court acknowledged that 'minors, American corporations, and citizens of other states and municipalities are all members of the American political community' but reasoned that '[a]liens are by definition those outside of this community' because Congress has a compelling interest to prevent foreign influence over the government.[77] But the court, like Congress, also distinguished permanent residents from other aliens, explaining why Congress explicitly exempted permanent residents from this statute:

> Congress may reasonably conclude that lawful permanent residents of the United States stand in a different relationship to the American political community than other foreign citizens do. [L]awful permanent residents share important rights and obligations with citizens [for reasons such as] their indefinite residence in the United States and their eligibility for military service—lawful permanent residents can be viewed as more similar to citizens than they are to temporary visitors.[78]

Even the Immigration and Nationality Act separates lawful permanent residents from the general noncitizen population.[79] In other areas of the law, the Supreme Court groups permanent residents together with citizens, including in jurisdictional decisions, stating that '[c]itizens or *residents* deserve somewhat more deference than foreign plaintiffs"[80] and the 'distinction between resident or citizen plaintiffs and foreign plaintiffs is

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flourishing of American society, whereas temporary resident foreign citizens by definition have only a short-term interest in the national community").

75. Johnson v. Eisentrager, 339 U.S. 763, 770 (1950).

76. 800 F. Supp. 2d 281 (D.D.C. 2011).

77. *Id.* at 290 (quoting Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982)).

78. *Id.* at 290–91.

79. *See* 8 U.S.C. § 1101(a)(15), (20) (2012) (creating a specific permanent resident status).

80. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 n.23 (1981) (emphasis added).

fully justified,'[81] supporting the idea that permanent residents are part of the community in which they live.

Recently, it appears that the Court has been moving towards a more 'stake-based' theory of immigration, where the greater the stake the immigrant has in the country, the more constitutional protection she is provided.[82] This has created a substantial line of cases extending constitutional rights to immigrants,[83] where lawful permanent residents present in the United States who develop significant roots are given the broadest range of constitutional rights.[84] The Court has long held that 'once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.'[85]

Opponents of extending voting rights to permanent residents argue that voting is a right directly connected to being a citizen and extending suffrage would blur the line between citizens and noncitizens. Mark Krikorian asserted that '[e]xtending voting rights to noncitizens eliminates the last distinction between people who have accepted permanent membership in the American people and those who have not.'[86] However, the historical analysis discussed above shows that this idea is incorrect, as citizenship has not been directly connected to the right to vote. Furthermore, permanent residents would still be distinct from citizens, particularly because the most significant and stringent consequence of being a noncitizen is being subject to deportation at any time.[87] Deportation or removal is a 'drastic measure and at times the equivalent of banishment of exile,'[88] but the government's power to exclude and expel foreigners is broad.[89] However, a natural-born citizen

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81. *Id.* at 255.

82. Alyssa Markenson, *What's at Stake?:* Bluman v. Federal Election Commission *and the Incompatibility of the Stake-Based Immigration Plenary Power and Freedom of Speech*, 109 NW. U. L. REV. 209, 222 (2014).

83. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 270–71 (1990) (cataloging cases extending constitutional rights to aliens and ultimately declining to extend those rights to a nonresident alien because he "had no previous significant voluntary connection with the United States").

84. *See* Markenson, *supra* note 78, at 218 (describing the Supreme Court's use of a sliding scale which correlates the extent of aliens' constitutional rights with their level of ties to the country).

85. Landon v. Plasencia, 459 U.S. 21, 32 (1982).

86. Robert F. Worth, *Push Is On to Give Legal Immigrants a Vote in the City*, N.Y. TIMES (Apr. 8, 2004), http://www.nytimes.com/2004/04/08/nyregion/push-is-on-to-give-legal-immigrants-a-vote-in-the-city.html?pagewanted=all [https://perma.cc/ZFN6-S4N4].

87. 8 U.S.C. § 1227 (2012) (listing many grounds for deportation of resident aliens).

88. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

89. *See, e.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest.").

generally cannot have his citizenship taken away without his assent to relinquish it.[90]

B. Permanent Residents and their First Amendment Right to Free Speech

'Speech is an essential mechanism of democracy,'[91] and the First Amendment provides that 'Congress shall make no law abridging the freedom of speech or the right of the people to petition the Government for a redress of grievances.'[92] Once again, the word "people' is not clearly defined, but it has been settled that permanent residents have this right of free speech and petition,[93] and the Court has 'acknowledged the existence of a First Amendment interest in voting.'[94]

In 1990, the Supreme Court acknowledged that the First Amendment was designed to protect a class of people who 'are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.'[95] As discussed above, permanent residents are clearly distinguished from the rest of the immigrant class, particularly because "[l]awful permanent residents have a long-term stake in the flourishing of American society, whereas temporary resident foreign citizens by definition have only a short-term interest in the national community.'[96] Under the First Amendment, both citizens and permanent residents have the right of political expression.[97]

Parallel to voting, there has been a history of immigrants exercising their First Amendment rights of speech and petition since the founding of the United States, particularly because, like voting, there is no direct relationship between citizenship and the First Amendment.[98] Opponents of the Alien and Sedition Act of 1798 looked to the 'broad language of the Bill of Rights and

90. 8 U.S.C. § 1481 (2012) (listing acts that can cause a U.S. national to lose their citizenship if performed "voluntarily" and "with the intention of relinquishing United States nationality"); Vance v. Terrazas, 444 U.S. 252, 260–61 (1980) (holding that Congress does not have the power to take away an American citizen's citizenship without his "assent").

91. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010).

92. U.S. CONST. amend. I.

93. Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J. concurring) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."); *see also* Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 309 n.5 (1970) (adopting Justice Murphy's concurrence in *Bridges*).

94. Doe v. Reed, 561 U.S. 186, 224 (2010) (Scalia, J. concurring).

95. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

96. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 291 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

97. *Cf.* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1448 (2014) (affirming the right to participate in public debate and political expression, with no distinction made between citizens and resident aliens).

98. *See, e.g.*, Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 691 (2003) (arguing that it is improbable that the framers intended to limit First Amendment protections to citizens because of the history of granting noncitizens the right to petition).

the legal obligations imposed on *all persons residing within our territory* as support for the notion that foreign nationals were entitled to the protection of the Bill of Rights.'[99] Petitioning was a fundamental part of colonial America,[100] and members of all strata of society exercised the right to petition the government.[101] Furthermore, the First Amendment 'protects political association as well as political expression,'[102] and the 'right to associate with the political party of one's choice.'[103] This appears to protect permanent residents' right to become invested in the political community by joining a political party, subject to some limitations.[104]

Today, the First Amendment continues to protect permanent residents' free speech rights, including political activism and political contributions.[105] The United States even provides protection from foreign judgments for defamation unless a U.S. court determines that the foreign court provided 'at least as much protection for freedom of speech and press in that case as would be provided by the first amendment.'[106] The statute further defines 'United States person' as including 'an alien lawfully admitted for permanent residence to the United States.'[107] One of the motivations for Congress to enact this statute was that the freedom of speech and press is 'necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy.'[108]

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99. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 371 n.18 (2003) (emphasis added).

100. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 603–11 (1999).

101. Wishnie, *supra* note 98, at 688–89 (noting that '[d]isenfranchised white males, such as prisoners and those without property, as well as women, free blacks, Native Americans, and even slaves' exercised this right of petition).

102. Buckley v. Valeo, 424 U.S. 1, 15 (1976) (per curiam).

103. Kusper v. Pontikes, 414 U.S. 51, 57 (1973).

104. *See* 8 U.S.C. § 1182(a)(3)(D) (2012) (providing that "[a]ny immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible" unless participation was involuntary or terminated prior to application).

105. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 285 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

106. 28 U.S.C. § 4102(a)(1)(A) (2012); *see also* Trout Point Lodge, Ltd. v. Handshoe, 729 F.3d 481, 490 (5th Cir. 2013) (denying enforcement of Canadian judgment because "the law applied in the Nova Scotia proceeding did not provide at least as much protection for freedom of speech and press" as the First Amendment).

107. 28 U.S.C. § 4101(6)(B) (2012).

108. Securing the Protection of Our Enduring and Established Constitutional Heritage Act (SPEECH Act), Pub. L. No. 111-223, 124 Stat. 2380, 2380 (2010) (codified at 28 U.S.C. §§ 4101–4105 (2012)).

C. Bluman v. FEC: *Permanent Residents Can Make Political Contributions*

Permanent residents enjoy free speech rights and protections for political speech, while other noncitizens do not. The textual analysis in favor of granting legal permanent residents voting rights is strengthened by the recent decision in *Bluman*, which the Supreme Court affirmed without an opinion.[109] There, the district court held that, under 2 U.S.C. § 441e(a),[110] foreign nationals were barred 'from contributing to candidates or political parties" and from making independent expenditures.[111] However, the statute defines "foreign national' to include all foreign citizens *except* lawful permanent residents.[112] Congress created a specific exemption for lawful permanent residents in this statute, granting them the ability to make political contributions,[113] which theoretically could be used to influence American policy. While this limited right to make political donations is not enough to protect permanent residents' rights—especially when even corporations can make enormous expenditures[114]—it does indicate that permanent residents are a part of, and can participate in, this political community.

The holding in *Bluman* is actually more relevant because of its distinction from *Citizens United*,[115] decided a year before.[116] In *Citizens United*, the Supreme Court determined that identity-based 'restrictions distinguishing among different speakers, allowing speech by some but not others, are prohibited.[117] Prohibiting certain speakers from making independent expenditures interferes with the marketplace of ideas,[118] and the government cannot impose restrictions on 'certain disfavored speakers' in the political speech context.[119] However, the Supreme Court in *Citizens United* did not decide whether the government may ban foreign-national

109. Bluman v. Fed. Election Comm'n, 565 U.S. 1104 (2012).

110. Congress has recodified the statute since *Bluman*. It can now be found at 52 U.S.C. § 30121 (2012).

111. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 284 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

112. 52 U.S.C. § 30121(b)(2) (2012).

113. Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 663, 692 (2011).

114. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and holding that corporate electioneering expenditures are protected by the First Amendment's free speech right).

115. *Id.* at 340.

116. The discussion of *Citizens United* in this Note is not meant to evaluate whether that holding was correct; rather, it is meant only to show the distinction between that holding and *Bluman*'s, where the Court allowed identity-based distinctions in prohibiting political speech, thereby defining permanent residents as within the political community.

117. *Citizens United*, 558 U.S. at 340.

118. *Id.* at 354.

119. *Id.* at 341.

contributions,[120] leaving that issue until *Bluman*, where the Court affirmed these identity-based restrictions.[121] Congress and the lower court in *Bluman* allowed permanent residents to make political contributions but specifically excluded foreign nationals because of their identity as foreigners, suggesting and supporting the idea that permanent residents are included in our political community. unlike other noncitizens who are prohibited from making political contributions.[122]

A fundamental part of our political community is that it is limited to citizens of that community. and 'foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. '[123] Yet both Congress and the Judiciary have distinguished permanent residents from other foreign citizens,[124] instead showing that permanent residents are more similar to U.S. citizens. And lawful permanent residents are part of the American political community, deserving most, if not all, of the same protections as citizens.

Again, some argue that resident aliens cannot vote because they are not part of the political community and only those within the political community—citizens—can vote.[125] The *Bluman* court recognized the state's interest in limiting participation in its government to those within "the basic conception of a political community. '[126] So when Congress passed the law allowing permanent residents to contribute to political campaigns and causes, or, in other words, to engage in political speech, and the Court upheld this law. they determined that permanent residents were included within this basic conception of a political community. Political contributions and express-advocacy expenditures are 'integral' to how citizens elect officials to all government positions.[127] Because permanent residents are within this basic conception of our political community and possess First Amendment rights of free speech,[128] they can participate in politics, which should include voting.

The First Amendment 'protects political speech"[129] and the freedom of assembly. including political activism, and congressional legislation upheld by *Bluman* allows permanent residents, but not other noncitizens, to make political donations. However, just because permanent residents have the

120. *Id.* at 362.

121. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 283–84 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

122. *Id.*

123. *Id.* at 288.

124. *Id.* at 290–91; 148 CONG. REC. 1400–02 (Feb. 13, 2002) (statements of Reps. Mink, Menendez, Reyes, Morella, and Solis).

125. Cabell v. Chavez-Salido, 454 U.S. 432, 438 (1982).

126. *Bluman*, 800 F. Supp. 2d at 288 (quoting Foley v. Connelie, 435 U.S. 291, 295–96 (1978)).

127. *Id.*

128. *See supra* subpart II(B) (expounding the First Amendment's application to permanent residents).

129. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010).

ability to contribute to campaigns does not mean they realistically can. Like the average citizen, they cannot compete with the campaign contributions of the wealthy and corporations, particularly after *Citizens United*.[130] This is why extending voting to permanent residents is so important: even though they potentially can donate money, they either may not have the funds to do so, or the effect would be minimal compared to other enormous campaign donations. Voting is fundamental because it "is preservative of other basic civil and political rights,"[131] and without the right to vote, permanent residents' rights and protections—even their freedom of speech—could be taken away, as has repeatedly been done in the past.

III. (Un)representative Democracy

One definition of a 'representative democracy' is '[a] form of government where the powers of the sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation.'[132] A democracy requires that those affected by legislative and political decisions be involved in that decision making,[133] and laws must have 'the consent of the society, over whom no body can have a power to make laws, but by their own consent.'[134] But when groups are excluded from legislative and governmental decision making, their interests are 'disregarded or marginalized precisely because their voices do not matter to decision makers.'[135] When this happens, permanent residents have little to no representation, disregarded by the very people elected to represent their community. But even if elected officials are not politically accountable to resident aliens within the community, those elected 'should, nonetheless, treat them with an appropriate concern and respect that will assure that their interests are in fact taken into account in the making of public policy.'[136]

Legislators are elected to represent their constituents, advocating for issues relevant to the people within their district. Besides jury duty, there are no additional burdens to citizenship 'not also shouldered by noncitizen

130. *See* Johanna Kalb, *J. Skelly Wright's Democratic First Amendment*, 61 LOY. L. REV. 107, 109 (2015) (discussing how America's "system of elections [is] financed disproportionately by wealthy donors").

131. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

132. WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, THE CYCLOPEDIC LAW DICTIONARY 879 (2d ed. 1922).

133. April Chung, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 UCLA ASIAN PAC. AM. L.J. 163, 164 (1996).

134. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 70 (C.B. Macpherson ed., 1980) (1690) (emphasis omitted).

135. Daniel Munro, *Integration Through Participation: Non-citizen Resident Voting Rights in an Era of Globalization*, 9 J. INT'L MIGRATION & INTEGRATION 63, 67 (2008) (emphasis omitted).

136. Levinson, *supra* note 14, at 1291.

residents."[137] Permanent residents are governed every day by the same laws as citizens, but legislators do not have as much reason to listen to people who cannot vote.[138] This nonrepresentation, along with disenfranchisement, creates a political imbalance in many major cities, including Los Angeles and New York, which contain significant immigrant populations.[139] Permanent residents are a part of, and contribute to, our political, economic, and societal community, but because they have no representation, many argue that resident aliens should have the right to vote.[140]

A. Permanent Residents Are Affected in the Same Ways as Citizens

One of the strongest bases for this country's independence was the idea that there should not be "taxation without representation,"[141] yet permanent residents within the United States are taxed on the same scale as citizens.[142] While there might not be an express constitutional right to "no taxation without representation,"[143] taxing permanent residents without affording them the right to vote creates an unfair system, taking advantage of people who have no direct political recourse but are striving to become a part of this country. Furthermore, many permanent residents own property within the United States and therefore pay property taxes to finance public services, including education, police protection, and sanitation.[144] An estimated $25 billion was collected from Texas school district property taxes—55% of all

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137. Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899, 899 (2013).

138. Cole, *supra* note 99, at 376.

139. *See* Paul Tiao, *Non-citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 COLUM. HUM. RTS. L. REV. 171, 172, 182 & n.52 (1994) (considering how "[l]arge minority communities, comprised primarily of LPRs have little or no political power" and reporting demographic statistics about Los Angeles's voting community).

140. *See, e.g.*, Munro, *supra* note 132, at 65 (arguing that "non-citizen voting is not only compatible with, but [is] required by, principles of democratic legitimacy").

141. *See* JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1764), http://lf-oll.s3.amazonaws.com/titles/2335/Otis_RightsBritishColonies1556.pdf [https://perma.cc/6VYJ-FAD6]. Otis is often cited as the originator of the slogan "taxation without representation is tyranny" based on the wording in this pamphlet, which famously argues that taxation "without any consent or representation in Parliament" deprives British colonists "of one of their most essential rights, as freemen. *Id.* at 57–58, 83; Grant Dorfman, Essay, *The Founders' Legal Case: 'No Taxation Without Representation' Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1378 (2008).

142. Resident aliens are taxed on the same income gradation and filing system as citizens. *Taxation of U.S. Resident Aliens*, INTERNAL REVENUE SERV. (Nov. 10, 2015), http://www.irs.gov/Individuals/International-Taxpayers/Taxation-of-Resident-Aliens [https://perma.cc/2GC3-9WSB].

143. *See* Campbell v. Hilton Head No. 1 Pub. Serv. Dist., 580 S.E.2d 137, 140 (S.C. 2003) (finding no independent, federal right in the Guarantee Clause that prohibits taxation without representation).

144. *State and Local Taxes*, U.S. DEP'T TREASURY (Dec. 5, 2010), http://www.treasury.gov/resource-center/faqs/Taxes/Pages/state-local.aspx [https://perma.cc/SDS6-WTVQ].

property taxes in Texas in 2013.[145] Children of permanent residents are very likely to be citizens themselves, even attending these schools, but unlike the children of citizens, they 'are also left unrepresented in the political process, because their parents are denied a vote. '[146]

As argued by Professor Sanford Levinson: '[C]itizenship is a fatally underinclusive category because the universe of people whose interests are vitally affected by any given election is far larger than the universe of those who are allowed to participate in choosing public officials Noncitizens also may share what are thought to be the requisite values. '[147]

Resident aliens are significantly affected by electoral decisions in essentially the same way as citizens, yet they have no voice in those decisions. Everyone affected by governmental decisions should be able to participate in that government.[148] If the job of the legislators is truly to represent the people within their district, then each representative should be responsible for obtaining resources for that same number of people. Even nonvoting groups, such as permanent residents and children, need resources just as much as voters.[149] The foundation of all our rights is 'an idea of justice and genius, the idea that the government derives its power from 'the consent of the governed. '[150] Permanent residents are part of that 'governed' community and have all the local, political, social, and military[151] requirements as citizens. Permanent residents can even volunteer for military service to fight for this country. but they are not accorded the privilege of voting.

B. Virtual Representation Does Not Protect Permanent Residents' Rights

The inadequacy of 'virtual representation' has been used in previous arguments in favor of expansions of voting. Prior to the Revolutionary Period, American colonists argued that they were not represented in the British Parliament, and while the response of the British government was that

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145. TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, BIENNIAL PROPERTY TAX REPORT: TAX YEARS 2012 AND 2013, at 7 (2014).

146. Kini, *supra* note 67, at 306.

147. Sanford Levinson, *Suffrage and Community: Who Should Vote?*, 41 FLA. L. REV. 545, 557 (1989).

148. *Cf.* ROBERT A. DAHL, AFTER THE REVOLUTION? 64 (rev. ed. 1990) (criticizing Rousseau's historical conception of what constitutes "a people" in a democracy as underinclusive).

149. Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888, 1907 (2012).

150. Richard Nixon, President of the United States, Radio Address on the Philosophy of Government (Oct. 21, 1972) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)), http://www.presidency.ucsb.edu/ws/?pid=3637 [https://perma.cc/6CBP-XG6N].

151. Noncitizens can choose to enter the military, but permanent residents must also register for the Selective Service. 50 U.S.C. § 453(a) (2012) ("[I]t shall be the duty of every male citizen of the United States, and *every other male person residing in the United States*, who is between the ages of eighteen and twenty-six, to present himself for and submit to registration [for the Selective Service].") (emphasis added).

they were 'virtually represented, the founders vehemently rejected this answer.[152] Many regarded virtual representation as 'too ridiculous to be regarded' in the American colonies.'[153] Virtual representation arguments were again used when denying women the right to vote, claiming that because women were 'naturally dependent' on their husbands, they were virtually represented by their husbands' votes.[154] Years later, Martin Luther King, Jr. claimed that an 'unjust law' is a 'code inflicted upon a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote.'[155]

As a theory, virtual representation assumes that there are communities of interests—that those who have the right to vote have the same interests as those unable to vote.[156] This argument continues today to deny suffrage to permanent residents, claiming that they are 'virtually represented' in our political system.[157] In their book, Eric Posner and Adrien Vermeule claim that while permanent residents cannot vote themselves, their friends or family often can, and through virtual representation, aliens receive a degree of political influence.[158] But this is not enough protection by itself. As even Posner and Vermeule acknowledge, 'the resident alien has numerous local ties (employers, friends, perhaps relatives) who will support the resident alien's interests in the political arena, but '[t]his kind of 'virtual representation' is not sufficient in itself.'[159] They go on to state that resident aliens have an 'exit option' and the protection of foreign governments which are 'weak instruments' for influencing the government that may actually match the ability to vote.[160] While this argument may apply to noncitizens in general, it is not applicable to permanent residents, as it does not take into account the reasons why permanent residents move here: to become a permanent part of this community and establish a foundation in this country. Permanent residents want to remain in this country, so having an exit option does not provide any protection because they have given up their foreign

152. Joan R. Gundersen, *Independence, Citizenship, and the American Revolution*, 13 SIGNS: J. WOMEN CULTURE & SOC'Y 59, 63 (1987).

153. Jonathan R. Macey, *Representative Democracy*, 16 HARV. J.L. & PUB. POL'Y 49, 50 n.7 (1993) (quoting BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 161–75 (1967)).

154. Gunderson, *supra* note 152, at 65.

155. MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR., 289, 294 (James Melvin Washington ed., 1986).

156. Gunderson, *supra* note 152, at 63.

157. Noah Feldman, *'One Man, One Vote' Keeps Changing*, BLOOMBERGVIEW (May 27, 2015), http://www.bloombergview.com/articles/2015-05-27/-one-man-one-vote-keeps-changing [https://perma.cc/9GJD-92N8].

158. ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 125 (2007).

159. Posner & Vermeule, *supra* note 7, at 1143–44.

160. *Id.*

communities to move to the United States. Some scholars even state that virtual representation is already 'dead, as suffrage has expanded to include many more groups than before.[161]

C. *Assimilating Permanent Residents into the American Community*

Not only would local and state voting rights protect permanent resident interests, but suffrage would aid in assimilating permanent residents into our society and even promote naturalization. The five-year residency period for permanent residents before naturalization is designed to help integrate noncitizens into the U.S. community. One view against noncitizen voting claims that "extending voting rights to non-citizens undermines one of the incentives that newcomers have to pursue citizenship.'[162] However, not only would permanent resident 'voting be a powerful tool to promote the assimilation of immigrants into American society.'[163] but there is also evidence that naturalizations would actually increase by extending voting rights.[164] Permanent resident voting would foster the participation that democracy requires and can familiarize permanent residents with U.S. political culture, creating a sense of belonging that could make naturalization more attractive.[165] Recognizing that permanent residents are a part of our community and demonstrating that we want them to be a part of American society as equal people, not as a lower class, would contribute to a mutual respect, showing that permanent residents are not outsiders, but potential citizens.[166]

Part of the naturalization process requires good moral character, necessitating that the permanent resident be 'well disposed to the good order and happiness of the United States.'[167] Because permanent resident voting would promote political participation and encourage permanent residents to become more involved in their communities,[168] this would motivate and instill this notion of good moral character in permanent residents. Local voting rights for permanent residents would be a pathway to promote civic

161. Fishkin, *supra* note 149, at 1903–04.

162. Munro, *supra* note 135, at 65.

163. Yang, *supra* note 47, at 62.

164. *See* GROENENDIJK, *supra* note 38, at 14 (showing empirically that in the European countries studied, there was no decrease in naturalization rates after immigrants were given the right to vote).

165. T. Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy*, *in* FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 119, 126–27 (T. Alexander Aleinikoff & Douglas Klusmeyer eds. 2000).

166. *See* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 36–37 (Amy Gutmann ed., 1994) (emphasizing the importance of respect and equal recognition to the health of a democratic society).

167. 8 U.S.C. § 1427(a)(3) (2012).

168. Yang, *supra* note 47, at 62.

education and citizenship,[169] and in Alexander Hamilton's view, this country needs 'that temperate love of liberty. so essential to real republicanism. '[170] Naturalization would become something more than simply a difficult administrative process because permanent residents would actually feel part of their community by having a voice in their new society, increasing their "love of liberty.

IV Constitutional Analysis

While voting rights have been restricted to certain groups since the formation of this country. the U.S. Constitution does not preclude permanent residents from voting. As described above, there has been a long history of noncitizen voting in the United States. The argument that the Constitution actually does restrict voting to only citizens[171] ignores both the history of noncitizen voting, even continuing after the Fourteenth Amendment, and the literal reading of the amendments related to voting, which only prevents the government from denying or abridging voting rights of citizens on specific grounds.[172] 'Undeniably the Constitution of the United States *protects* the right of all qualified citizens to vote, '[173] but it does not *restrict* the right to vote.

A. The Constitution Does Not Preclude Permanent Residents from Voting

Reading the text shows that the Constitution does not prohibit permanent resident voting. Several amendments, including the Fifth Amendment, use the terms 'person' or 'people. '[174] While many phrases in the Constitution are vague, the term 'people' is broader than just "citizens. '[175] On analyzing a Second Amendment case brought by permanent residents, the court in *Fletcher v. Haas*[176] put forth that '[t]he terms 'citizen' and 'the people' have generally not been treated as synonymous for purposes

169. Hayduk, *supra* note 20.

170. Alexander Hamilton, The Examination No. VII (Jan. 12, 1802), *in* 25 THE PAPERS OF ALEXANDER HAMILTON 495, 495–97 (Harold C. Syrett et al. eds. 1977).

171. *See, e.g.*. Karen Nelson Moore, Madison Lecture, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 806–07, 806 n.16 (2013) (discussing the history of alien voting rights under the Constitution and Bill of Rights, and the break from the common law tradition in the United States prior to the Civil War that allowed for alien voting in various states).

172. *See* U.S. CONST. amends. XIV, XV, XIX, XXIV, XXVI (proscribing the denial or abridgment of the right to vote for citizens over the age of eighteen on the basis of race, color, sex, and failure to pay poll taxes).

173. Reynolds v. Sims, 377 U.S. 533, 554 (1964) (emphasis added).

174. *See e.g.*. U.S. CONST. amend. V ("No person shall be deprived of life, liberty, or property, without due process of law ").

175. For example, the Equal Protection Clause applies to all people residing in the United States, including aliens. Plyler v. Doe, 457 U.S. 202, 210 (1982); Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas, 448 U.S. 1327, 1329 (1980).

176. 851 F. Supp. 2d 287, 294 (D. Mass. 2012).

of constitutional usage, and the only time the Supreme Court defined both terms as the same was in *Dred Scott v. Sandford*,[177] a case which the *Fletcher* court acknowledged was an 'unfortunate aberration.'[178]

The Constitution's language does not preclude permanent residents from being granted the right to vote. Section Two of the Fourteenth Amendment only creates a penalty when 'the right to vote is *denied* to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, *or in any way abridged*, except for participation in rebellion, or other crime.'[179] Similarly, the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments all use the same language: '[t]he right of citizens of the United States to vote *shall not be denied or abridged*.'[180]

The language of the Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments specifies only that a state may not exclude citizens from voting on unconstitutional bases. There is nothing in the Constitution that restricts suffrage to only citizens, thereby preventing permanent residents from voting.[181] When the Declaration of Independence was signed, alien enfranchisement seemed 'the logical thing to do [; t]he key suffrage qualifications in the states centered on property ownership, race and gender, not on national citizenship.'[182] Citizenship has not been and still is not directly connected to voting: currently, neither minors[183] nor felons[184] are permitted to vote in numerous states, despite both groups containing many citizens.[185] The only right the Constitution expressly limits to citizens is the right to hold public office,[186] specifying that the President must be a native-born citizen, that senators must be citizens for at least nine years, and

177. 60 U.S. (19 How.) 393, 404 (1857), *superseded by* U.S. CONST. amend. XIV.

178. 851 F. Supp. 2d at 294.

179. U.S. CONST. amend. XIV, § 2 (emphasis added).

180. U.S. CONST. amends. XV, XIX, XXIV, XXVI (emphasis added).

181. Raskin, *supra* note 21, at 1425.

182. Jayanth K. Krishnan, *Mobilizing Immigrants*, 11 GEO. MASON L. REV. 695, 702 (2003) (quoting Jamin B. Raskin, *Time to Give Aliens the Right to Vote (Again)*, NATION, Apr. 1993, at 433, 433).

183. U.S. CONST. amend. XXVI, § 1.

184. *See* U.S. CONST. amend. XIV, § 2 (allowing the right to vote to be abridged on account of participation in a rebellion or other crimes).

185. Raskin, *supra* note 19, at 1429.

186. U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have been seven Years a Citizen of the United States "); U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have been nine Years a Citizen of the United States "); U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen shall be eligible to the office of President "); U.S. CONST. amend. XII ("But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."); *see also* Fletcher v. Haas, 851 F. Supp. 2d 287, 295 (D. Mass. 2012) (noting that the right to hold federal public office is the only constitutional right that is exclusive to U.S. citizens). Notably, the word "citizen" is also stated in the Privileges and Immunities Clause, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. U.S. CONST. art. IV, § 2, cl. 1.

that representatives must be citizens for at least seven years.[187] While the Court has 'upheld other citizens-only right-restrictions arising under state and federal statutes, [it] has never declared them to be mandated by the Constitution.'[188]

Voting does not grant citizenship,[189] and permanent resident voting does not conflict with Congress's authority to establish naturalization laws.[190] This is especially true given that the federal government has plenary authority over immigration and foreign policy. If permanent resident voting were limited to state and local elections, this would prevent the appearance of a conflict when noncitizens vote on foreign policy.

B. Constitutional Support for Permanent Resident Voting

Not only does the Constitution not prohibit noncitizens from voting, but there is support for this idea in its text. As the term 'people' includes more than just "citizens, this may be an indication that the framers intended to extend substantial rights to noncitizens—such as the right to free speech—shown by the absence of the word "citizen' within the Bill of Rights[191] and supported by the framers' outside writings. Thomas Jefferson wrote to Edmund Pendleton in 1776: "I was for extending the right of suffrage (or in other words the rights of a citizen) to all who had a permanent intention of living in the country.'[192] In opposition to the Alien Act, James Madison asserted that:

> [I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.[193]

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187. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. II, § 1, cl. 5.

188. 28 U.S.C. § 1865 (2012) (limiting jury service to citizens); *Fletcher*, 851 F. Supp. 2d at 295 (citing 18 U.S.C. § 611 (2012)).

189. Kini, *supra* note 67, at 281.

190. U.S. CONST. art. I, § 8, cl. 4; Kini, *supra* note 67, at 281 (asserting that Congress's power "to 'establish a uniform Rule of Naturalization' is not threatened by granting noncitizens the right to vote" since voting does not grant citizenship).

191. *See generally* U.S. CONST. amends. I–X. '[T]he Bill of Rights makes no mention of citizens; instead, it focuses on persons (and specific categories of persons) and the people. [The] conscious avoidance of the word 'citizen' conveys the drafters' intention that the rights defined in the Bill of Rights extend beyond those with citizen status. Moore, *supra* note 171, at 807.

192. Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON: 1760-1776, at 503, 504 (Julian P. Boyd et al. eds. 1950).

193. James Madison, Report to the Committee on the Virginia Resolutions (1800), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 556 (Jonathan Elliot ed., 1836).

Furthermore, the Constitution provides for the specific exclusion of "Indians not taxed' from population counts for district representation.[194] By including this specific language, Congress must have thought and debated about whom to exclude from being counted for apportionment of federal representatives and determined that only "Indians not taxed' should be, but the representatives did not exclude permanent residents or even immigrants in general. During the debate over the Fourteenth Amendment, New York representative Robert Hale argued that by 'reading the language in its grammatical and legal construction[,] it is a grant of the fullest and most ample power to Congress to make all laws 'necessary and proper to secure to *all persons* in the several States protection in the rights of life, liberty, and property. '[195]

Both Article I and the Fourteenth Amendment "exempt 'Indians not taxed' from population enumerations for congressional apportionment, '[196] but neither permanent residents nor immigrants were excluded in the text. For over a century, the Supreme Court has determined that Fourteenth Amendment rights "are universal in their application, to *all persons* within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. '[197] This simply shows that the Constitution does not exclude permanent residents from voting, but because the framers intended to include every person within a district to be represented by legislators, there is textual support for including all people with a permanent intention of living in this country in the voting community.

Federal statutes bar permanent residents from voting in federal elections,[198] and many states preclude their voting as well.[199] However, states are free to allow permanent residents to vote in state and local elections, and federal law expressly permits such a choice.[200] Because of the numerous legal and practical obstacles lawful permanent residents face—the (present) inability to vote, the lack of resources to contribute to political campaigns, and sometimes, even the lack of a comfortable grasp of English[201]—they do

194. Levinson, *supra* note 14, at 1283.

195. Honorable Robert S. Hale, N.Y. Representative, Speech in the United States House of Representatives: An Increase of the Powers of Congress Under the Constitution Not Desirable 3 (Feb. 27, 1866) (emphasis added).

196. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEXAS L. REV. 1, 26 (2002).

197. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (emphasis added).

198. *See* 18 U.S.C. § 611(a) (2012) (proscribing alien voting in federal elections).

199. *See, e.g.*, TEX. ELEC. CODE ANN. § 11.002 (West 2010) (restricting qualified voters to U.S. citizens).

200. *See* 18 U.S.C. § 611(a)(2) (2012) (authorizing aliens to vote in federal elections "under a State constitution or statute or a local ordinance").

201. Note, *The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078, 1099 (2013).

not possess the political power necessary to protect their central rights.[202] Allowing lawful permanent residents to vote in state and local elections would restore their political power, as state legislators would be forced to account for their interests while legislating or face repercussions at the ballot box.

C. *Arguments Opposing Permanent Resident Voting Rights*

Many opponents of permanent resident voting argue 'every vote cast by a noncitizen, whether an illegal alien or a resident alien legally in the country, dilutes or cancels the vote of a citizen, effectively disenfranchising that citizen.'[203] While there is evidence that many noncitizens favor the Democratic Party,[204] this argument is simply based on anti-immigrant sentiment and has been used before to oppose the expansion of suffrage to women because it would only 'double or annul' their husband's vote.[205] Each new expansion of suffrage may have an effect of diluting voting power, but the state cannot simply '[f]enc[e] out' from the franchise a sector of the population because of the way they may vote.'[206] Just because a permanent resident may vote either the same or differently than a citizen does not support the argument that permanent residents should not be allowed to vote.

More importantly, permanent residents would not be represented at all if this assertion that they would vote differently than some citizens within their community is correct. The argument that noncitizens' voting rights would dilute or cancel out a citizen's vote actually strengthens the argument in favor of extending suffrage to permanent residents. Noncitizens are included in the census's total population number, and districts are

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202. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (calling for a more 'searching judicial inquiry' when there is "prejudice against discrete and insular minorities").

203. Hans A. von Spakovsky, *The President's Executive Actions on Immigration and Their Impact on Federal and State Elections*, HERITAGE FOUND. (Feb. 12, 2015), http://www.heritage.org/research/testimony/2015/the-presidents-executive-actions-on-immigration-and-their-impact-on-federal-and-state-elections [https://perma.cc/6S9R-DHWG] (testimony before the House of Representatives, Committee on Oversight and Government Reform, Subcommittee on National Security, and the Subcommittee on Health Care, Benefits, and Administrative Rules).

204. *See* Jesse T. Richman et al., *Do Non-citizens Vote in U.S. Elections?*, 36 ELECTORAL STUD. 149, 153 (2014) (graphically illustrating the higher proportion of Democrat to Republican vote choice by noncitizens in recent elections).

205. *See Document Study Sheet: Pamphlet from the National Association Opposed to Woman Suffrage*, JEWISH WOMEN'S ARCHIVE (2003), http://sblc.registereastconn.org/History/PrimarySourcePacket%20AntiSuffrage/HouseholdHints%20Transcription%20and%20%20Study Sheet.pdf [https://perma.cc/A97B-5S7K] (discussing the National Association Opposed to Woman Suffrage's reasons against letting women vote, including that votes of married women 'can only double or annul their husband's votes"); Eleanor Barkhorn, *'Vote No on Women's Suffrage' Bizarre Reasons For Not Letting Women Vote*, ATLANTIC (Nov. 6, 2012), http://www.theatlantic.com/sexes/archive/2012/11/vote-no-on-womens-suffrage-bizarre-reasons-for-not-letting-women-vote/264639/ [https://perma.cc/U88F-V5N8] (same).

206. Carrington v. Rash, 380 U.S. 89, 94 (1965).

apportioned based on total population, so citizens' votes in areas with more noncitizens count for more than citizens' votes in areas with fewer noncitizens. This was the rationale the plaintiffs used in *Evenwel v. Abbott*[207] to argue for requiring states to exclude noncitizens from being counted in district apportionment,[208] which the Supreme Court unanimously rejected.[209] Permanent residents are included in the total population, but do not have the right to vote. This leaves permanent residents underrepresented and without a voice or protection in the political process.[210]

However, some claim that even if noncitizens were granted voting rights, the benefits gained from noncitizen voting would not actually occur because either the number of noncitizens in the community is too small or permanent residents would not vote even if they could.[211] But the existence of a right should not be conditioned on the amount of people that may actually use it. Only a small fraction of citizens actually contribute money to a candidate, party, or political action committee (PAC),[212] even though it is their right, and many citizens do not even exercise their right to vote.[213] Furthermore, there is no actual proof that permanent residents would not vote. One opponent cites a study of one specific region where noncitizens currently can vote in local elections,[214] but the history after the Fourteenth and Nineteenth Amendments can explain this low turnout. While these Amendments granted the right to vote to a large number of people, it took years before widespread turnout actually occurred, primarily due to social and political hurdles.[215] But, eventually, those movements were successful.

Some even argue that if permanent residents want to vote, they should simply become citizens, asserting: 'It should only be for United States

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207. 136 S. Ct. 1120 (2016).

208. *See id.* at 1123 ("Voter-eligible population, not total population, [the plaintiffs] urge, must be used to ensure that their votes will not be devalued in relation to citizens' votes in other districts.").

209. *Id.* at 1133.

210. *See* Harper-Ho, *supra* note 25, at 304 (arguing that counting resident aliens for apportionment purposes while denying them the right to vote serves only to inflate the political influence of the voting population in their districts).

211. *See* STANLEY A. RENSHON, CTR. FOR IMMIGRATION STUDIES, ALLOWING NON-CITIZENS TO VOTE IN THE UNITED STATES? WHY NOT 23 (2008), http://cis.org/sites/cis.org/files/articles/2008/renshon_08.pdf [https://perma.cc/PV6P-EXDC] (citing the small relative size of noncitizen populations and their low turnout in jurisdictions in which they can vote as evidence that the purported benefits of granting noncitizens the vote "ring hollow indeed").

212. For the 2013–2014 election cycle, only about 0.23% of citizens donated $200 or more. *Donor Demographics*, CTR. FOR RESPONSIVE POL. https://www.opensecrets.org/overview/donordemographics.php [https://perma.cc/CS8W-7UVW].

213. In the 2012 presidential election, voter turnout was 57.5% and 93 million eligible voters did not vote. *2012 Voter Turnout Report*, BIPARTISAN POL'Y CTR. (Nov. 8, 2012), http://bipartisanpolicy.org/library/2012-voter-turnout/ [https://perma.cc/PQM2-NSYT].

214. *See* RENSHON, *supra* note 211, at 24 (examining noncitizen voting in Takoma Park, Maryland).

215. Krishnan, *supra* note 182, at 708.

citizens. It's also a reason for people who are on a path to citizenship to aspire to citizenship. It's something for them to look forward to."[216] However, voting has not always been tied to citizenship and was not restricted to citizens alone at the time of the founding.[217] Voting became tied to citizenship shortly after World War I with the rise of anti-immigrant sentiment, and noncitizen voting has struggled to reemerge since.[218]

Furthermore, this argument does not account for the five years spent completing the residency requirement to become a citizen, the time after those five years for their application to be completed, or the time spent here prior to becoming a permanent resident. A permanent resident cannot simply become a citizen but must first complete their residency and then apply for citizenship. Even after completing the five-year-residency requirement, the application period alone can take months or even years.[219] Throughout this time, permanent residents are still directly affected by both state and local legislation and representatives, but they have no effect in even the most direct aspects of their communities.

One of the most prevalent arguments against granting noncitizen voting rights focuses on why voting rights should be expanded when the United States already has problems with its own citizens voting. Many citizens do not vote or cannot vote due to issues such as voter-ID laws or voter suppression.[220] However, we do not have to address only one issue or the other; problems with both citizen and permanent resident voting can be confronted simultaneously.

There are many problems in our current voting process, including some types of voter-ID laws. This past July, the Texas voter-ID law was struck down in the Fifth Circuit because the court held the law violated Section Two of the Voting Rights Act due to its discriminatory effects on minorities and the poor.[221] Prior to the bill (SB 14) being passed, a Texas voter could simply

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216. Matthew Chayes, *NYC Council to Decide on Letting Noncitizens Vote in Local Elections*, NEWSDAY (Mar. 22, 2015), http://www.newsday.com/news/new-york/nyc-council-to-decide-on-letting-noncitizens-vote-in-local-elections-1.10100418 [https://perma.cc/Z4CC-5E83] (quoting Eric Ulrich, a Republican city councilmember from Queens).

217. *See supra* subpart I(B).

218. *Id.*

219. *A Guide to Naturalization: Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/sites/default/files/files/article/chapter3.pdf [https://perma.cc/97J3-5P4R].

220. Zoltan Hajnal et al., Voter Identification Laws and the Suppression of Minority Votes 27 (2017) (unpublished manuscript), http://pages.ucsd.edu/~zhajnal/page5/documents/VoterIDLawsSuppressionofMinorityVoters.pdf [https://perma.cc/K4E6-FYDL]; *see also* Christopher Ingraham, *New Evidence That Voter ID Laws 'Skew Democracy' in Favor of White Republicans*, WASH. POST (Feb. 4, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/04/new-evidence-that-voter-id-laws-skew-democracy-in-favor-of-white-republicans/ [https://perma.cc/2EHJ-KF9B] (arguing that voter-ID laws decrease voter turnout).

221. Veasey v. Abbott, 830 F.3d 216, 272 (5th Cir. 2016).

cast a ballot in person by presenting a registration certificate at the time of voting.[222] After SB 14 passed, Texas required certain forms of identification to vote, which resulted in roughly 534,512 voters being unable to vote because they lacked these forms of identification and did not qualify for a disability exemption.[223] The 'district court concluded that SB 14 disproportionately impacts the poor, who are disproportionately minorities, '[224] a decision the Fifth Circuit upheld.[225]

Problems in citizens' voting rights such as these are constantly being addressed, and many groups continue to push citizens to get out and vote.[226] However, noncitizens do not have similar protections or equivalent support. In a time when there is much hostility toward immigrants and foreigners—many even calling for a border wall between Mexico and the United States,[227] and Britain leaving the European Union, which many claim was primarily because of immigration,[228]—immigrants' protections are dwindling. Citizens are protected by their citizenship, which cannot be taken away except through a consensual act of expatriation.[229] By contrast, noncitizens are subject to deportation at any time,[230] and the government's power to exclude and expel foreigners is broad.[231] Granting suffrage in local and state elections to permanent residents may not give noncitizens a voice in federal

222. *Id.* at 225.

223. *Id.* at 250.

224. *Id.* at 251.

225. *Id.* at 256.

226. *See, e.g.*, ROCK THE VOTE, http://www.rockthevote.com/ [https://perma.cc/5UE3-WW35] (a nonprofit and nonpartisan organization that focuses on registering young voters, providing information about where and how to vote, and encouraging young voters to vote).

227. Jeremy Diamond, *Trump: Border Wall Will Cost $8 Billion*, CNN (Feb. 9, 2016), http://www.cnn.com/2016/02/09/politics/donald-trump-border-wall-cost-8-billion/ [https://perma.cc/B49M-KXS2].

228. *See, e.g.*, David Frum, *Why Britain Left*, ATLANTIC (June 24, 2016), http://www.theatlantic.com/international/archive/2016/06/brexit-eu/488597/ [https://perma.cc/HB7Q-39KH] ("The force that turned Britain away from the European Union was the greatest mass migration since perhaps the Anglo-Saxon invasion. 630,000 foreign nationals settled in Britain in the single year 2015. Britain's population has grown from 57 million in 1990 to 65 million in 2015 "); *see also* Krishnadev Calamur, *Will Brexit Actually Curb Immigration to the U.K.?*, ATLANTIC (June 29, 2016), http://www.theatlantic.com/news/archive/2016/06/brexit-migration/489014/ [https://perma.cc/LN28-BBGW] (describing the results of Britain's 2016 referendum on whether to leave the European Union as "a very clear message" for "more control over immigration").

229. *See* 8 U.S.C. § 1481 (2012) (listing acts such as obtaining citizenship in or formally declaring allegiance to a foreign state or engaging in hostilities against the United States); *see also* Vance v. Terrazas, 444 U.S. 252, 252 (1980) ("Congress does not have any general power to take away an American citizen's citizenship without his 'assent' ").

230. 8 U.S.C. § 1227 (2012) (listing many grounds for deportation of resident aliens).

231. *See, e.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (holding that the power of the federal government to exclude aliens from the United States if it concludes that doing so serves the country's interests is an aspect of the government's sovereignty).

immigration or national security issues, but it could provide some protection for permanent residents from discriminatory laws at the state and local levels. Immigrants, including permanent residents, are a major part of our nation, and because permanent residents have the same stake in their local community as citizens, they deserve similar protections.

V Proposed Solution

Proposals for extending noncitizen voting rights range from voting in local or school board elections[232] to voting in all elections, including federal. But the 'most common form of resident-alien voting rights today is a nondiscriminatory right to vote in local elections only.'[233]

I propose that permanent residents should be granted the right to vote in both state and local elections. These are the units of government that have the most direct effect on both citizens and noncitizens alike and would allow permanent residents to have a stronger connection to the immediate community. Because foreign policy and immigration are solely under federal control, this proposal would strike a balance for both citizens and permanent residents because it would provide permanent residents a voice in their immediate community while protecting the interests of citizens in national security and immigration. This would also allow for a more gradual process, integrating permanent residents into the voting community over a period of time. Once permanent residents become naturalized, they would be entitled to full voting rights, including in federal elections. Local voting rights would encourage naturalization and full integration into the political community[234] and could be combined with the 'Stand Stronger' initiative.

There are generally two ways this proposal could be implemented: either through a federal constitutional amendment or individual state constitutional amendments or laws. Preferably, this change would be implemented by a federal constitutional amendment, which would provide a uniform grant of suffrage to all permanent residents throughout the United States. Because the Constitution already permits permanent resident voting,[235] the amendment would only prevent states from denying permanent residents state and local voting rights. While allowing the states and localities to choose to include permanent residents might be preferable to some, an amendment to the Constitution would be much quicker, more effective, and more permanent, as previous voting rights extensions have done through the amendment process. However, an amendment would be unlikely because of

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232. *See* Yang, *supra* note 47, at 58 (discussing a failed 2004 proposition in San Francisco, modeled after similar successful initiatives in Chicago and New York City, that would have given noncitizens voting rights in local school board elections).

233. Earnest, *supra* note 38, at 11.

234. GROENENDIJK, *supra* note 41, at 5.

235. *See supra* subpart II(A).

the difficulty in acquiring the high number of votes in both Congress and states needed to ratify an Amendment.[236]

The second option would be to have each individual state grant voting rights to permanent residents, given that the states have "broad power to define [their] political community."[237] The first step would be to amend many state constitutions, including Texas's[238] and California's,[239] to permit voting by permanent residents. Each state would need to amend its constitution according to that state's amendment process. For example, California can amend its state constitution either by legislative referendum, requiring a two-thirds vote in each house to approve the proposal and a majority vote of the state's qualified electors for ratification,[240] or by direct initiative, requiring a petition signed by eight percent of the votes for all candidates for Governor at the last gubernatorial election and then submitted for a statewide election.[241] Similarly, amending the state constitution in Texas requires the proposed amendment to be approved by a vote of two-thirds in each house and a vote by the qualified voters in a statewide election.[242]

However, the amendment process in many states would face strong opposition. Anti-immigrant sentiment has risen recently in the United States and continues to be one of the most significant obstacles to extending suffrage to permanent residents.[243] While the proposal above would protect states' rights in controlling the election process, some states would vehemently fight this voting extension. Furthermore, an amendment to each individual state constitution would not only face many hurdles in state legislatures even before voting but would most likely instigate many lawsuits opposing the amendments. Waiting for change state-by-state would be slow and arduous.

There may also be some administrative hurdles to enabling permanent residents to vote, and these issues would need to be addressed in any proposal. One such problem is preventing permanent residents from voting in federal elections, as all federal, state, and local elections are generally held

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236. *See* U.S. CONST. art. V (requiring a two-thirds congressional vote to propose an amendment and a three-fourths state vote to ratify an amendment).

237. Sugarman v. Dougall, 413 U.S. 634, 642–43 (1973).

238. TEX. ELEC. CODE ANN. § 11.002 (West 2010) ("In this code, 'qualified voter' means a person who: is a United States citizen.").

239. CAL. ELEC. CODE § 2101 (West 2003) ("A person entitled to register to vote shall be a United States citizen ").

240. CAL. CONST. art. XVIII, § 1.

241. *Id.* art. II, § 8.

242. TEX. CONST. art. XVII, § 1(a).

243. Kevin C. Wilson, *And Stay Out! The Dangers of Using Anti-immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain's Past*, 24 GA. J. INT'L & COMP. L. 567, 567 (1995) (noting that anti-immigrant policies and sentiments lead to anti-immigrant laws that may even be based on racial biases).

on the same day.[244] Takoma Park, the most looked-to example of noncitizen voting, holds local elections on odd-numbered years to prevent conflicts with state and federal elections.[245] While this is one way to solve the administrative problem, on a large scale it may not be possible to hold all local and state elections on odd-numbered years. A better solution would be to have all state and local election proposals on a separate ballot sheet from the federal ballot or a separate voting booth to ensure that permanent residents vote only in the state and local elections.

Even though state-by-state changes would be difficult, it is possible. States such as California, New York, and Maryland would most likely lead the way, as there is a strong push in all three states to include permanent residents in the voting process. Several cities, including Takoma Park and Chicago, have already granted limited voting rights to noncitizens.[246] Throughout the country, civil rights groups are pushing for noncitizen voting[247] and advocating for both cities and states to enfranchise noncitizens.

This proposal for state and local permanent resident voting would strike a balance between concerns on both sides. Permanent residents have shown a strong interest in wanting to be a part of this country and have a strong stake in this community. They have also completed the legal requirements needed to remain in this country indefinitely. Limiting voting rights to only permanent residents removes most of the concern of foreign influence, and permitting voting in only state and local elections prevents potential conflicts with noncitizens voting on immigration issues and foreign policy, which are solely under federal control.

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244. *See, e.g.*, *November 8, 2016 Election Law Calendar*, TEX. SECRETARY ST. http://www.sos.state.tx.us/elections/laws/november-8-election-calendar-2016.shtml#November8 [https://perma.cc/GTB2-EEUB] (showing that elections for federal, state, and county officers are held on the same day).

245. Keyes, *supra* note 65.

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

247. *See, e.g.*, Carl Campanile, *New Bill Could Give Illegal Aliens Voting Rights in New York City*, N.Y. POST (Feb. 22, 2016), http://nypost.com/2016/02/22/new-bill-could-give-illegal-aliens-voting-rights-in-new-york-city/ [https://perma.cc/7SR2-4C7M] (discussing black and Hispanic activists' support for New York City legislation that would allow illegal aliens the right to vote in a future New York City election); Pamela Constable, *D.C. Other Cities Debate Whether Legal Immigrants Should Have Voting Rights*, WASH. POST (Feb. 9, 2015), https://www.washingtonpost.com/local/should-legal-immigrants-have-voting-rightscontentious-issue-comes-to-dc-other-cities/2015/02/09/85072440-ab0f-11e4-ad71-7b9eba0f87d6_story.html [https://perma.cc/V7EP-PQ5V] (comparing opposing opinions regarding a D.C. bill that would allow legal immigrants to vote locally); Sarah Stuteville, *Local Voting Rights for Noncitizens? Advocates Say Time Has Come*, SEATTLE TIMES (Sept. 18, 2015), http://www.seattletimes.com/seattle-news/advocating-for-local-voting-rights-for-noncitizens/ [https://perma.cc/U6KV-UGCP] (explaining support for noncitizen voting rights in Washington by advocates for undocumented immigrants).

Conclusion

Permanent residents are substantially more similar to citizens than to other immigrants, having direct connections to this country and a strong stake in this community. While the Constitution does not preclude permanent residents from voting in elections, the federal government and states prohibit voting through statutes, despite a significant history of noncitizen voting in the United States. Currently, there are an estimated 13.3 million permanent residents that are not adequately represented by this country's representatives or eligible voters. Extending the right to vote to noncitizens has not created problems in other countries, even in those that have allowed this right for years. And "as Madison articulated so long ago, there seems to be a deeply ingrained sense that the increasing closeness of an alien's ties with the United States should afford greater entitlement to the Constitution's protections."[248]

America is a nation of immigrants. Every American who ever lived, with the exception of the Native Americans, was either an immigrant or a descendent of immigrants, and there is "no part of our nation that has not been touched by our immigrant background."[249] As President Barack Obama declared: "We are a proud Nation of immigrants, home to a long line of aspiring citizens who contributed to their communities, founded businesses, or sacrificed their livelihoods so they could pass a brighter future on to their children."[250] Our world is more international than ever, and people choose to move to the United States to become a part of this community—especially permanent residents, as they have satisfied the legal process to remain indefinitely in this country. To protect permanent residents' rights and interests in the United States—their chosen country—permanent residents should be afforded the right to vote in local and state elections, prompting them to become integrated into this community and eventually naturalized citizens of the United States.

—David M. Howard

248. Moore, *supra* note 171, at 887; *see also* Cole, *supra* note 99, at 371 (discussing Madison's argument that "those subject to the obligations of our legal system ought to be entitled to its protections").

249. JOHN F. KENNEDY, A NATION OF IMMIGRANTS 2–3 (1964).

250. Barack Obama, *Presidential Proclamation—Constitution Day, Citizenship Day, and Constitution Week, 2013*, WHITE HOUSE (Sept. 16, 2013), https://www.whitehouse.gov/the-press-office/2013/09/16/presidential-proclamation-constitution-day-citizenship-day-and-constitut [https://perma.cc/9SLC-VJRX].

Revising *Markman*: A Procedural Reform to Patent Litigation*

I. Introduction

This Note presents a procedural reform to the current process of patent litigation in the United States, specifically focusing on claim construction and appellate review. This Note owes a great deal to John F. Duffy and his influential piece, *On Improving the Legal Process of Claim Interpretation: Administrative Alternatives*.[1] Mr. Duffy's article suggested how administrative law principles could be incorporated into patent law to reduce inefficiency. At its core, this Note operationalizes and expands on the concepts of Mr. Duffy's article by using the new programs from the America Invents Act,[2] which was signed into law twelve years after Mr. Duffy's article was published. For a more in-depth analysis of the rationale for applying administrative law principles to patent law, please see his work.[3]

This Note begins by providing a brief background on the basics of patent law, patent litigation in the United States, the current problems facing our patent system, as well as background on relevant administrative law principles and how these principles can be integrated into patent law. Building off this foundation, the Note will outline the objectives of the proposed procedural reform, outline the proposal itself, and discuss implementation concerns related to the proposal.

II. Background on Patent Law

A modern patent is separated into multiple parts including a summary page, drawing set, background of the invention discussion, brief summary of the invention, brief description of the drawings, a detailed description of the invention, and the claims.[4] The goal of the patent is to clearly explain the invention to the public, detail how the invention works, and illustrate utility for the invention. While all parts of the patent are necessary, in modern

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* I must first thank Richard W. Hanes who provided my initial introduction to patents nearly a decade ago. I owe many thanks to David Wille and Justin Nelson for their thoughts and guidance, to Clark Oberembt for his thoughts and unending willingness to discuss this topic, and to my family for their patience and support. Finally I owe a thank you to the *Texas Law Review* for their hard work in editing this Note. All errors that persist despite their diligence are mine alone.

1. John F. Duffy, *On Improving the Legal Process of Claim Interpretation: Administrative Alternatives*, 2 WASH. U. J.L. & POL'Y 109 (2000).

2. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 28 U.S.C. and 35 U.S.C.).

3. *See generally* Duffy, *supra* note 1 (suggesting the use of primary jurisdiction administrative law to improve the patent law process).

4. PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 486 (5th ed. 2002) (explaining the specification of a patent).

patent law, the claims are the most important part. The claims are the legal mechanism that defines the invention.

A valid patent provides its owner the exclusive rights to make, use, offer, or sell the new invention;[5] that is, the invention as defined by the claims of the patent. The purpose of the claims is to clearly delineate the invention so that the patent can be enforced. A patent can be enforced against someone that uses, manufactures, sells, or offers to sell any product that includes the patent.[6]

It is important to note here that products and inventions are not synonymous. In practice, products and inventions can be hard to differentiate, but conceptually they are distinct, and the distinction is critical to understanding patent litigation. Generally speaking, inventions are what patents protect. Products are what use the invention; often these are physical products that are sold to consumers. For example, Apple has a patent on their 'swipe-to-unlock' invention and their iPhone product uses the invention.[7] Also, allegedly some of Samsung's products used the invention, which was the basis of one lawsuit between Apple and Samsung. In its first appeal to the Federal Circuit, Apple argued that Samsung's phone infringed Apple's patent because a feature of Samsung's phone fell within the scope of Apple's patent, as defined by the claims of Apple's patent.[8] In other words, Apple argued Samsung's phone used the Apple invention because Samsung's unlock feature was a particular application of what was claimed in Apple's patent.[9]

Claims are important because they specify the bounds of the invention and the patent. However, the scope of a patent, as defined by the claims, is frequently far from firmly established. Lawyers often write claims as broadly and vaguely as the U.S. Patent and Trademark Office will permit in hopes of expanding the patent's scope, thereby making the patent more valuable because it will cover the largest possible set of applications. As a way of illustrating the previous example, the claims of Apple's 'swipe-to-unlock' patent were written vaguely enough to create disagreement—and eventually costly litigation—as to whether or not the unlock feature on the Samsung

5. 35 U.S.C. § 271(a) (2012).

6. *Id.*

7. This patent is currently valid; although it was invalidated previously by the Federal Circuit, the Federal Circuit, sitting en banc, vacated that invalidation. Apple Inc. v. Samsung Elecs. Co., 839 F.3d 1034, 1038–40 (Fed. Cir. 2016) (en banc), *vacating in part*, 816 F.3d 788, 793–94 (Fed. Cir. 2016).

8. Apple Inc. v. Samsung Elecs. Co. 809 F.3d 633, 642–43 (Fed. Cir. 2015), *aff'd*, 839 F.3d 1034 (Fed. Cir. 2016) (en banc).

9. How a product infringes a patent, especially in our modern world, is conceptually difficult to understand. In the present example, Apple did not argue that the unlock feature on the Samsung phone was not specifically disclosed by Apple's patent but rather that Samsung's unlock feature represented a particular application of Apple's patent and was therefore within the scope of the patent.

phone fell within the scope of the patent. While broad claims can expand the scope of a patent, broad claim language also introduces uncertainty over the exact scope of the claims.

Patent litigation begins when a patent owner accuses another party of infringing the patent owner's rights by creating, distributing, or selling a product that falls within the scope of the patent. Therefore, the first step of the litigation is to define precisely the scope of the patent-in-suit, in order to later determine if the accused product falls within the patent's scope. This always requires the court to interpret the language of claims to decide what the patent covers, frequently done in a special pretrial hearing. The pretrial hearing is called a *Markman* hearing, in reference to the 1996 Supreme Court case, *Markman v. Westview Instruments, Inc.* [10] which held that the language of a patent is to be interpreted as a matter of law, not a matter of fact.[11] After 1996, U.S. district courts began routinely performing claim interpretation as a matter of law in a pretrial hearing. This claim interpretation, called a claim construction, is frequently the central issue in the case because different interpretations can have dramatic effects on the finding of infringement.[12]

Given the relative importance of the claim construction on the outcome of a patent litigation, the Federal Circuit has made frequent attempts to reduce uncertainty in claim construction. Since the mid-1990s, the Federal Circuit has sat en banc on several cases to clarify and resolve conflicts in claim-construction jurisprudence.[13] But problems persist. Since claim construction must resolve any substantial disputes over the scope of the patent, it is important that it be done accurately. However claim construction can be considered 'inherently indeterminate' where multiple reasonable interpretations are possible, instead of one correct answer.[14] As a matter of interpretive theory, the Federal Circuit has recognized that 'there is no magic formula or catechism for conducting claim construction, and the court must

10. 517 U.S. 370 (1996).

11. *Id.* at 388 ("[J]udges, not juries, are better suited to find the acquired meaning of patent terms.").

12. *See, e.g.*, Markman v. Westview Instruments, Inc., 52 F.3d 967, 989 (Fed. Cir. 1995) (en banc) (Mayer, J. concurring in the judgment) ("[T]o decide what the claims mean is nearly always to decide the case."), *aff'd*, 517 U.S. 370 (1996).

13. *See* Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp., 744 F.3d 1272, 1276, 1292 (Fed. Cir. 2014) (en banc) (interpreting whether the claim term "voltage source means" was not subject to means-plus-function limitation to decide the appeal), *vacated sub nom.* 135 S. Ct. 1173 (mem. op.); Phillips v. AWH Corp., 415 F.3d 1303, 1324–28 (Fed. Cir. 2005) (en banc) (holding that the construction of "baffles' was not limited to "non-perpendicular" projectile-deflecting structures); *see also* Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1458–59 (Fed. Cir. 1998) (en banc) (finding that a limitation requiring that fluid flow "to" second pumping means did not preclude fluid from passing through intervening components and was thus literally infringed); *Markman*, 52 F.3d at 982–84 (holding that "inventory" meant "articles of clothing," rather than cash or inventory receipts because of the patent specification and patent history).

14. Thomas Chen, Note, *Patent Claim Construction: An Appeal for* Chevron *Deference*, 94 VA. L. REV. 1165, 1177 (2008).

use a flexible process.[15] In deciding the scope of a claim, different judges can reach different, yet still reasonable, interpretations by weighing evidence differently based on different interpretive theories or even within the same interpretive theories.[16] Despite recognizing that multiple reasonable interpretations likely exist, the Federal Circuit and Supreme Court have created a procedural system that values the 'correct' interpretation above all else. This singular focus on the 'correct' interpretation has undermined the effectiveness of the patent system by weighing it down with overly burdensome costs and inefficacies.[17]

With an eye to the difficulties of "correctly' interpreting the claims of a patent, the Federal Circuit moved in 1996 to resolve whether claim construction was a legal or factual question.[18] The en banc Federal Circuit, held that claim construction was purely a matter of law and therefore should receive de novo review on appeal.[19] The court justified de novo review by comparing claim construction to statutory interpretation, taking the opinion that there is 'only one correct interpretation. "[20] The Supreme Court affirmed citing 'functional considerations, including relative interpretive abilities of judges versus juries.[21] The Federal Circuit has regularly reaffirmed the position that claim construction is to be done by the court rather than by the jury.[22] This judicial ruling is meant to achieve more consistent and accurate

15. *Phillips*, 415 F.3d at 1324. Although, it should be noted that it is far from established truth that claim construction does not have one "correct" interpretation rather than multiple reasonable interpretations. The Federal Circuit and the Supreme Court have, in some cases, related claim interpretation to statutory interpretation, thus driving toward the conclusion that, much like statutory interpretation, there should be only one "correct" interpretation. *See generally* Duffy, *supra* note 1 (analyzing why a single source of interpretation leads to beneficial predictability, which would better serve the interpretation of claim language and thus the patent system as a whole).

16. *See* Chen, *supra* note 14, at 1177 (noting that judges' interpretations can vary dramatically by applying different theories of construction within the broad net of interpretative theories recognized by the Federal Circuit).

17. *See* Dan L. Burk & Mark A. Lemley, *Quantum Patent Mechanics*, 9 LEWIS & CLARK L. REV. 29, 56 (2005) (arguing that, because claim construction is inherently indeterminate, the Federal Circuit could promote certainty and predictability by making determinations regarding claim construction earlier in the life cycle of a patent case, rather than by spending more time looking for the single right answer).

18. *Markman*, 52 F.3d at 976.

19. *Id.* at 979; *see also* Chen, *supra* note 14, at 1170 (noting the historical development of appellate deference established in *Markman*).

20. *Id.* at 987.

21. Markman v. Westview Instruments, Inc., 517 U.S. 370, 384–88 (1996).

22. *See, e.g.*, *Markman*, 52 F.3d at 970–71 (reaching the conclusion that "the interpretation and construction of the patent claims is a matter of law exclusively for the court."); *R+L Carriers, Inc. v. Qualcomm, Inc.*, 801 F.3d 1346, 1350 (Fed. Cir. 2015) (same); *Am. Calcar, Inc. v. Am. Honda Motor Co., Inc.*, 651 F.3d 1318, 1336 (Fed. Cir. 2011) (same); *Laitram Corp. v. NEC Corp.*, 163 F.3d 1342, 1347 (Fed. Cir. 1998) (same).

claim constructions,[23] but it has repercussions later in the litigation on appeal.[24]

One of the most persistent problems in today's patent litigation is claim-construction uncertainty lingering beyond the *Markman* hearing. This is because, since claim construction is a matter of law, it can be easily changed by reviewing courts. In 1998, the Federal Circuit held that district court claim-construction decisions are reviewed without deference in the appeal.[25] In 2014, the Federal Circuit reaffirmed that conclusion in *Lighting Ballast*,[26] although this time with a very strong dissent.[27] Most recently in *Teva*,[28] the Supreme Court attempted to fix the issue by drawing distinctions between questions of fact and questions of law during claim construction and varying appellate deference accordingly.[29]

Commentators have frequently pointed to the uncertainty created by the historically high rate of claim-construction reversals by the Federal Circuit as a major problem in current patent litigation.[30] Studies have found that claim constructions, in the wake of *Markman* and *Cybor*, have been reversed between 29.6%[31] and 34.5% of the time.[32] In 1998, dissenting in part in *Cybor*, Judge Rader cited the Federal Circuit's own 1997 statistic that 53% of cases from district courts were reversed, at least in part, further remarking that an even higher reversal rate would provide more certainty in district court decisions than was currently available to parties because 'this reversal rate, hovering near 50%, is the worst possible.'[33]

III. Major Problems Targeted

The primary objective of this proposed procedural reform is to combat the judicial inefficiency endemic to the current system for patent litigation. The reform uses the changes and new resources introduced in the America

23. *See Markman*, at 384–88 (discussing and ultimately rejecting Markman's contention that juries are responsible for determining the meaning of terms of art in patent construction).

24. Duffy, *supra* note 1, at 123–24 (noting that after *Markman* and *Cybor* questions of law receive de novo review on appeal).

25. Cybor Corp. v. FAS Techs. Inc. 138 F.3d 1448, 1454–55 (Fed. Cir. 1998) (en banc).

26. Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp. 744 F.3d 1272, 1283–86 (Fed. Cir. 2014) (en banc), *vacated sub nom.* 135 S. Ct. 1173 (mem. op.).

27. *Id.* at 1296 (O'Malley, J. dissenting).

28. Teva Pharm. USA, Inc. v. Sandoz, Inc. 135 S. Ct. 831 (2015).

29. *Id.* at 836–38.

30. *See, e.g.*. Mark A. Lemley & Shawn P. Miller, *If You Can't Beat 'Em, Join 'Em? How Sitting by Designation Affects Judicial Behavior*, 94 TEXAS L. REV. 451, 452 (lamenting the uncertainty created by high claim construction reversal rates).

31. Christian A. Chu, *Empirical Analysis of the Federal Circuit's Claim Construction Trends*, 16 BERKELEY TECH. L.J. 1075, 1104 (2001)

32. Kimberley A. Moore, Markman *Eight Years Later: Is Claim Construction More Predictable?*. 9 LEWIS & CLARK L. REV. 231, 233 (2005).

33. Cybor Corp. v. FAS Techs. Inc. 138 F.3d 1448, 1476 (Fed. Cir. 1998) (Rader, J. dissenting in part, joining in part, and concurring in the judgment).

Invents Act, specifically the Inter Partes Review program, to increase the efficiency of patent litigation by reforming procedures concerning claim construction.

Claim construction at the trial and appellate courts is wrought with challenges balancing determinacy with efficiency and costs related to obtaining information.[34] The Federal Circuit's goal with de novo review was to maximize determinacy by focusing on achieving the 'correct' interpretation.[35] This focus on the 'correct' interpretation, despite the indeterminate nature of claim language, has imposed great costs on the courts at the expense of patent litigation effectiveness.[36] The inability of litigants to firmly define the exact scope of a claim until after the Federal Circuit has reviewed de novo the claim construction presents significant costs that make patent litigation inefficient.[37] While de novo review likely produces the most accurate claim construction—a worthy goal—it does so at too high of a cost. Given the inherent indeterminacy in interpreting patent claims, the quality of a claim construction should be measured "not on its fidelity to some abstract ideal of interpretation"[38] but rather by an optimization of factors including accuracy, predictability, reliability, and cost to obtain. The proposed reform produces 'better' claim constructions that are overall marginally less 'correct' but are more reliable (less likely to be reversed on appeal), cheaper, and more predictable.

IV Reform Overview

Using cost-shifting and deference standards, the proposed reform seeks to capitalize on the new programs created by the America Invents Act, specifically the Inter Partes Review program, to implement Mr. Duffy's concepts of applying administrative law principles to patent law to increase the efficiency of patent litigation. This reform draws from principles of administrative law to create a patent litigation procedure that makes use of primary jurisdiction doctrine and relies on the institutional competency and

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34. Chen, *supra* note 14, at 1175. For an illustration of the Federal Circuit's struggle with the challenges presented by claim construction, see generally Phillips v. AWH Corp. 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

35. *See* Cybor Corp.. 138 F.3d at 1455 (arguing that de novo review of claim construction promotes certainty and uniformity in patent cases across the country).

36. Chen, *supra* note 14, at 1175.

37. *See* Cybor Corp. 138 F.3d at 1476 (Rader, J. dissenting in part, joining in part, and concurring in the judgment) ("The meaning of a claim is not certain until nearly the last step in the process—decision by the Court of Appeals for the Federal Circuit. To get a certain claim interpretation, parties must go past the district court's *Markman* proceeding, past the entirety of discovery, past the entire trial on the merits, past post trial motions, past briefing and argument to the Federal Circuit—indeed past every step in the entire course of federal litigation, except Supreme Court review. In implementation, a *de novo* review of claim interpretations has postponed the point of certainty to the end of the litigation process ").

38. Duffy, *supra* note 1, at 159.

expertise of the U.S. Patent and Trademark Office to improve patent litigation.

V Administrative Law & Primary Jurisdiction Doctrine

In order to better understand how primary jurisdiction could be applied to patent litigation in line with Mr. Duffy's article, it is important to first understand the basics of primary jurisdiction doctrine.

By guiding the relationship between courts and administrative agencies with regulatory duties, primary jurisdiction seeks to increase efficiency when both groups grapple with the same subject matter.[39] The doctrine dates back to 1907 in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*[40] In *United States v. Western Pacific Railroad Co.* [41] a case about railroad tariffs, the Court cited a desire for uniform and expert regulatory administration, reasoning that having the agency construe the tariffs first would create more uniformity and prevent conflicting results between the administrative agency and the court.[42]

The Court's view toward agencies has developed over time. Over time, the Court struggled to balance the competing interests of valuing the specific expertise of agencies with the Court's role as arbiter of legal interpretation.[43] Initially this balancing act led to *Skidmore v. Swift & Co.*[44] and the establishment of the *Skidmore*-deference standard (the 'power to persuade' standard) given to executive branch agencies.[45] Since *Skidmore*, the Supreme Court has revisited the subject of the appropriate level of deference a court should give to administrative agencies by balancing concerns of judicial efficiency and agency expertise in a detailed regulatory scheme and on concerns regarding agency capture and judicial activism.[46]

Primary jurisdiction can be instituted simply by the court allowing referral to the relevant agency (in this case the Patent Trial and Appeals Board within the U.S. Patent and Trademark Office) by granting a stay to give the

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39. Christopher Ilardi, Note, *The Broken System of Parallel Patent Proceedings: How to Create a Unified, One-Judgment System*, 36 CARDOZO L. REV. 2213, 2240 (2015) (citing United States v. W. Pac. R.R. Co. 352 U.S. 59, 63 (1956)).

40. 204 U.S. 426 (1907).

41. 352 U.S. 59 (1956).

42. *Id.* at 64; *see also* Duffy, *supra* note 1, at 139–40.

43. *See, e.g.*. Universal Elecs. Inc. v. United States, 112 F.3d 488, 492 (Fed. Cir. 1997) ("Questions of law such as these lie within the domain of the courts, for '[i]t is emphatically the province and duty of the judicial department to say what the law is. '") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

44. 323 U.S. 134 (1944).

45. *Id.* at 140.

46. *See, e.g.*. United States v. Mead Corp., 533 U.S. 218, 227–28 (2001) (reinvigorating *Skidmore*); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

parties a 'reasonable opportunity to seek an administrative ruling' on a relevant issue.[47] Referring the issue to the Patent and Trial Appeals Board would not deprive the court of jurisdiction.[48] The court can regulate any aspect of the doctrine including creating a timeline.[49] Therefore, the court can establish timing mechanisms for administrative rulings, including a time limit for an administrative ruling to be made beyond which the court will proceed without the agency's input.[50]

A. Applying Primary Jurisdiction & Administrative Law to Patent Law

Courts have used a four-factor test to identify circumstances where applying primary jurisdiction may be appropriate:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's field of expertise, (2) whether the question at issue is within the agency's discretion, (3) whether there exists a substantial danger of inconsistent rulings, and (4) whether a prior application to the agency has been made.[51]

In the patent context, the question of patent validity satisfies all these factors. The desirability of uniformity and the benefits of specialized knowledge toward that goal have long been valued in this field and were the very reasons that Congress created the Federal Circuit in 1982.[52] The Supreme Court has acknowledged that patent cases present complex issues, and several courts have expressed a lack of competence in resolving these issues.[53] Further, questions of validity and defining the appropriate scope of a patent's claim are within the Patent and Trademark Office's discretion because the Patent and Trademark Office, during patent prosecution, is responsible for determining the allowable scope and validity of patent applications.[54] Also, the initial patent application by the inventor to the Patent and Trademark Office, prior to the granting of the patent, can

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47. Duffy, *supra* note 1, at 137 (citing Reiter v. Cooper, 507 U.S. 258, 268 (1993)).

48. *Id.* (citing Reiter, 507 U.S. at 268).

49. *Id.* (citing Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Prot., 163 F.3d 74, 86–87 (1st Cir. 1998)).

50. *Id.*

51. Ellis v. Tribune Television Co., 443 F.3d 71, 82–83 (2d Cir. 2006).

52. *See* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study In Specialized Courts*, 64 N.Y.U. L. REV. 1, 3, 7 (1989) (noting that the Federal Court Improvements Act of 1982, which established the Federal Circuit, was designed to create a uniform, more predictable application of law).

53. *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 331 (1971) ("We are also aware that some courts have frankly stated that patent litigation can present issues so complex that legal minds, without appropriate grounding in science and technology, may have difficulty in reaching decision.").

54. *See* Ilardi, *supra* note 39, at 2242–44 (2015) (citing 35 U.S.C. § 2(a)(1) (2012)).

reasonably be considered a prior application regarding patent validity to the Patent and Trademark Office.[55]

After establishing the appropriateness of courts using the Patent and Trademark Office's expertise to help them efficiently litigate a patent case, the appropriate deference for the court to give to the Patent and Trademark Office's decision must be established. Several embodiments of administrative law deference have developed over the past few decades, all established for different purposes and providing varying levels of deference to administrative law decisions.[56] These deference standards can vary from *Chevron* deference, which holds that courts are required to defer to an agency's construction of a statute when the agency administers the statute, as long as the interpretation is reasonable,[57] to *Seminole Rock*,[58] which requires courts to defer to agency interpretations of its own regulations on a plainly erroneous standard,[59] to *Skidmore*, which makes an agency's construction binding on the court only to the extent it is persuasive.[60]

In the case of patent claim interpretation, the Federal Circuit has previously acknowledged that the Patent and Trademark Office has interpretive expertise worthy of deference.[61] Given that the language of claims is highly technical and the Patent and Trademark Office 'itself has been responsible for 'developing a complex and rigid code of rules to govern claim format, deference to the Patent and Trademark Office's expertise in claim construction is particularly appropriate.[62] On the other hand, courts have also influenced claim format, and the Federal Circuit also has expertise in claim interpretation.[63] Therefore, requiring binding deference would be inappropriate because it would insinuate that courts lack the capacity to adequately perform claim constructions. Many courts, particularly the Federal Circuit and district courts with heavy patent dockets, have expertise in claim interpretation and have capacity to perform claim constructions. Since the courts have already recognized the Patent and Trademark Office's

55. *Id.* at 2244–45.

56. *See supra* note 46 and accompanying text.

57. Duffy, *supra* note 1, at 129.

58. Bowles v. Seminole Rock & Sand Co. 325 U.S. 410 (1945).

59. *Id.* at 414.

60. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("[T]he rulings, interpretations and opinions of [an administrative agency] while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

61. Duffy, *supra* note 1, at 130 & n.77 (citing Ultra-Tex Surfaces, Inc. v. Hill Bros. Chem. Co., 204 F.3d 1360, 1367 (Fed. Cir. 2000), and Am. Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1359 (Fed. Cir. 1984), *abrogated on other grounds*, Therasense, Inc. v. Becton, Dickson & Co. 649 F.3d 1276 (Fed. Cir. 2011)).

62. *Id.* at 130–31 (quoting Karl B. Lutz, *Evolution of the Claims of U.S. Patents*, 20 J. PAT. & TRADEMARK OFF. SOC'Y 457, 488 (1938)).

63. *Id.* at 131.

expertise and the courts have expertise themselves, a *Skidmore* level of deference for Patent and Trademark Office claim constructions is most appropriate—the agency's decision would be given deference to the extent that it is persuasive to the court. The courts in *Skidmore* and in *Mead*[64] outlined factors for determining the weight of an agency decision including: 'the thoroughness evident in the agency's interpretation, the validity of its reasoning, [the interpretation's] consistency with earlier and later pronouncements," the degree of the agency's care, the agency's relative 'expertness' and specialized experience, the highly detailed nature of the regulatory scheme, the value of the uniformity in the agency's understanding of what a national law requires, and 'all those factors which give it power to persuade. "[65]

By making use of the Patent and Trademark Office's expertise and administrative law deference, the proposed plan will produce better claim constructions and reduce inefficiency. The Federal Circuit has already recognized that the Patent Trial and Appeal Board has the expertise to make accurate interpretations.[66] Further, nationally unified constructions will be more predictable than the variation caused by district-by-district constructions.[67] The proposed plan gives additional deference to Patent Trial and Appeal Board claim constructions at the Federal Circuit, which will make initial claim interpretations more reliable.[68] Patent Trial and Appeal Board claim constructions will cost less than those conducted by general courts because of the Patent Trial and Appeal Board's specialized knowledge.[69] Finally. additional deference to initial claim interpretations will reduce litigation costs by reducing the currently high rate of Federal Circuit claim-construction reversals that lead to decision reversals and remands to district court.[70] Any claim likely supports several 'correct' interpretations that different judges can reasonably find using Federal Circuit-endorsed canons

64. 533 U.S. 218 (2001).

65. *Mead*, 533 U.S. at 227–28 (quoting *Skidmore*, 323 U.S. at 140).

66. Duffy, *supra* note 1, at 130 n.77 (citing *Am. Hoist*, 725 F.2d at 1359, and *Ultra-Tex Surfaces*, 204 F.3d at 1367).

67. *See id.* at 159 ("[T]he history of patent administration suggests that specialized institutions advance predictability.").

68. *See id.* at 129 (arguing the results of the relevant case law "show that reviewing courts should afford[] much greater deference to administrative agencies on mixed questions of fact and law than to lower courts."); Burk & Lemley, *supra* note 17, at 56 ("[T]he inherent indeterminacy of language might paradoxically incline us to procedural mechanisms that force courts to make [claim interpretations] earlier in litigation.").

69. Duffy, *supra* note 1, at 158.

70. *See* Chu, *supra* note 31, at 1104 ("In sum, the Federal Circuit reversed 29.6% of cases involving an express review of claim construction."); Moore, *supra* note 32, at 233 ("The reversal rate for appealed claim terms from 1996 through 2003 [was] 34.5%.").

of construction.[71] Therefore, the interpretations found by the Federal Circuit reviewing claim constructions de novo are not so much more 'correct' as to justify their high cost. De novo review by the Federal Circuit is extremely costly because it creates frequent reversals and remands on claim constructions, resulting in a whole new district court trial and making any previous analysis of validity or infringement irrelevant.[72]

VI. Benefits

The successful implementation of the proposed procedural reform will reap benefits primarily by increasing the efficiency of patent litigation: making it less costly, more consistent, and more quickly resolved. One of the major improvements will be to eliminate the judicial inefficiencies introduced by multiple claim constructions. Currently, one patent suit is likely to have several claim constructions performed on the same set of claims: one done by the Patent Trial and Appeal Board during an inter partes review, another done by the district court during trial, and perhaps yet another by the Federal Circuit if the Federal Circuit finds error in the trial construction and reverses (which frequently is the case).[73] The proposed procedural reform adds incentives for defendants to file inter partes reviews early in the timeline of the district court case, incentivizes district courts to accept the claim construction performed by the Patent Trial and Appeal Board rather than perform its own, and increases the deference standard the claim construction receives on appeal. The efficiency of a single claim construction is most impactful for the roughly one-third of patent cases whose claim constructions are reversed at the Federal Circuit and wholly remanded, because these claims may have been interpreted as many as three separate times.[74]

Additionally, the decreased likelihood of a subsequent court finding error in the claim construction and reversing it gives the parties greater certainty in litigation. Under the current system, the claim construction for a case is not firmly set until after the Federal Circuit has made a ruling on the construction.[75] The proposed reform increases judicial efficiency by making

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71. *See supra* notes 14–17 and accompanying text (discussing the inherent indeterminacy of patent claims and that claims are more likely to have multiple reasonable interpretations rather than a singular correct interpretation).

72. Duffy, *supra* note 1, at 112 (noting that "a significant number of infringement trials may be wasted if, as is likely, institutional differences create frequent divergence between trial and appellate interpretations").

73. *See supra* notes 25–32 and accompanying text (discussing the judicial resources frequently spent on claim construction).

74. *See supra* notes 25–32 and accompanying text (discussing the high frequency of claim construction reversals by the Federal Circuit).

75. *See* Teva Pharm. USA, Inc. v. Sandoz, Inc. 135 S. Ct. 831, 841 (2015) (holding the "ultimate interpretation' of a patent claim to be 'a legal conclusion' and that the Federal Circuit can "review the district court's ultimate construction of the claim *de novo*").

the claim construction firmer earlier in the life cycle of a suit. Certainty in the claim construction earlier in the litigation allows parties and the courts to make better use of district court proceedings rather than treating district court proceedings as a cumbersome formality necessary to reach the Federal Circuit and a binding claim construction before the infringement analysis can begin in earnest.[76]

Another benefit of the proposed procedural reform is overall improvement in the quality and consistency of claim constructions. As discussed previously, primary jurisdiction doctrine in administrative law can be used to empower an administrative agency to aid trial courts in their decision making when the subject matter involves a detailed regulatory scheme and the agency has specialized experience.[77] Here the U.S. Patent and Trademark Office would be very helpful. The proposed reform will allow the U.S. Patent and Trademark Office, and specifically the Patent Trial and Appeal Board, to use its relative "expertness' in the field of patents and the process of performing claim constructions to produce more consistent and accurate claim constructions.

A tangential benefit to this reform is reducing the value to plaintiffs of forum shopping in patent cases. Forum shopping in patent cases and the concentration of patent suits in particular districts has recently been the target of great skepticism among commentators and legislators.[78] This reform would decrease the incentive for plaintiffs to forum shop for favorable claim constructions. As previously noted, much of a patent case is determined by what the court interprets the claims of the patent-in-suit to mean during claim construction. Currently, plaintiffs are incentivized to forum shop for a court that is likely to give them a favorable claim construction.[79] This procedural reform will take claim construction out of the hands of district court judges and place it with a Patent Trial and Appeal Board panel that has been assigned to it (not chosen by the plaintiffs). As noted earlier, this procedure will not eliminate all of the incentives for plaintiffs to engage in forum shopping because there are a wide variety of other factors for plaintiffs to consider in choosing a forum, notably including favorable local procedure rules.[80] Nonetheless, by having the Patent Trial and Appeal Board panel perform the

76. The American Intellectual Property Law Association recently found that the cost of a district court litigation with less than $1 million at issue was approximately $700,000 and $5.5 million when there was $25 million or more at issue. AM. INTELLECTUAL PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 2013, at 34 (2013).

77. United States v. Mead Corp. 533 U.S. 218, 227–28 (2001).

78. *See generally* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*. 79 N.C. L. REV. 889 (2001) (investigating the scale of forum shopping for patent cases, the impact of forum shopping, and how it might be reduced or eliminated).

79. *See supra* notes 8–13 and accompanying text (discussing the high significance of claim construction on a patent suit).

80. *See* Moore, *supra* note 78, at 907–12 (discussing the variations between district courts for patent suits in light of different local patent-litigation rules and the impact on forum shopping).

majority of claim constructions, this procedural reform will promote uniformity in claim constructions across the country and the timeline of cases. Uniformity—an oft-cited benefit of primary jurisdiction[81]—is desirable for national and complex regulatory schemes, such as patent law.

VII. Proposal

The following Part outlines the proposed procedural reform, broken down into four main chronological steps for how a case would proceed through litigation under the proposed plan.

A. Step 1(a): Denial of Pre-Claim-Construction Motions to Dismiss

The first step of the proposed procedural reform is to eliminate pre-claim-construction motions to dismiss on the basis of invalidity, specifically Federal Rule of Civil Procedure 12(b)(6) motions. Particularly with the recent growth of computer-based, business-method patents and dramatic uncertainty for patentability in light of *Alice*,[82] courts have inappropriately begun granting 12(b)(6) motions on the basis of invalidity. To survive a Federal Rule of Civil Procedure 12(b)(6) motion, the plaintiff must make factual allegations enough to 'raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true.'[83] Further, patents themselves are presumed valid.[84] Therefore, in order to grant a pre-trial motion declaring invalidity, the judge must determine that, despite presuming the patent is valid and the allegations are true, the patent holder has failed to state a claim upon which relief could be granted.

Beyond the logical conclusion that invalidity decisions at this early stage are inappropriate in the vast majority of cases, eliminating these motions incentivizes defendants to file inter partes reviews to challenge the validity of the patent-in-suit. In the present system, which is not hostile to these pretrial motions, a ruling of invalidity on one of these motions is the fastest and cheapest way to invalidate the plaintiff's patent because it can be done prior to substantial discovery and can be filed immediately upon receiving the complaint. This makes it a more desirable path for defendants striving for a ruling of invalidity. In the absence of a realistic chance of success on 12(b)(6) invalidity motions, defendants will seek the next most efficient way to attempt to invalidate the patent. Specifically, defendants will look to use

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81. *See, e.g.*, United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956) (explaining the Court's emphasis on the 'desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions").

82. Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014).

83. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

84. 35 U.S.C. § 282(a) (2012) (stating '[a] patent shall be presumed valid. Each claim of a patent . . . shall be presumed valid independently of the validity of other claims . . . The burden of establishing invalidity . . . shall rest on the party asserting such invalidity.").

an inter partes review, due to the time constraints placed on inter partes reviews,[85] as the next best way to potentially invalidate the patent-in-suit.[86] This will push defendants to seek a ruling from the Patent Trial and Appeal Board. This is the first major step for this procedural reform plan to efficiently make use of the U.S. Patent and Trademark Office's subject-matter expertise in patent litigation.

B. Step 1(b): Immediate Inter Partes Review & District Court Stay Pending Inter Partes Review

In addition to doing away with pre-claim-construction motions to dismiss on the basis of invalidity. the proposed plan also includes incentives for the defendants to immediately file an inter partes review and incentives for the district court to stay the district court case pending the inter partes review. The inter partes review process has already gained popularity as a tool for defendants facing patent infringement suits in district court. A full 80% of inter partes reviews were instituted in cases where 'the challenged patent was also asserted in litigation between the petitioner and respondent.'[87] In order to further incentivize defendants to file inter partes reviews in parallel with district court litigation, the proposed procedural reform includes a cost-shifting program. If the challenged patent is invalidated by the Patent Trial and Appeal Board in the inter partes review, then the patent owner would be liable for the cost of the inter partes review. The cost of instituting an inter partes review pales in comparison to the average cost of district court litigation, which already provides some incentive to use the inter partes review system.[88] However, this cost-shifting program further incentivizes defendants to file inter partes reviews in response to district court litigation and provides some deterrence to plaintiffs (particularly nonpracticing entities) from filing patent infringement cases in district court with patents that are likely to be invalidated.[89]

To be effective, the proposed procedural reform also requires district court judges to stay the patent cases, pending the resolution of an inter partes review. Judges already grant stays at a consistently high rate.[90] To increase

85. Congress mandated that inter partes reviews be concluded in 12 months, extendable to 18 months on a showing of cause for the extension. 35 U.S.C. § 316(a)(11) (2012).

86. *See* Brian Love & Shawn Ambwani, *Inter Partes Review: An Early Look at the Numbers*, 81 U. CHI. L. REV. DIALOGUE 93, 99 (2014) (finding that inter partes review is "more likely [than inter partes reexamination] to serve its intended purpose as an alternative to full-blown litigation").

87. *Id.* at 11–12.

88. *See supra* note 76 and accompanying text (discussing the cost of patent litigation).

89. Given that the cost of a single inter partes review is likely considered trivial in light of overall patent litigation costs, this cost-shifting program only becomes a substantial burden on plaintiffs if they assert a large number of patents and the Patent Trial and Appeal Board invalidates them all.

90. In cases with parallel inter partes reviews and district court proceedings, 76% had motions to stay district court litigation pending the inter partes review. Love & Ambwani, *supra* note 86, at

judges' staying district court cases, the reform imposes different deference standards for claim constructions on appeal, depending on the claim construction's source. If a judge allows a stay for an inter partes review and then accepts the Patent Trial and Appeal Board's claim construction rather than performing her own, then the claim construction receives greater deference on appeal. This makes it less likely that the district judge will have the case reversed and remanded on a claim-construction error—an incentive to the district judge.[91] Additionally, since the referral of the issue to the administrative agency does not deprive the court of jurisdiction, the court may, in its discretion to prevent further delay, establish a time limit for the stay beyond which the court would proceed without the agency's ruling or allow limited discovery during the stay. This will give sufficient incentive for defendants to file inter partes reviews and sufficient flexibility to district court judges to grant stays pending inter partes reviews. Immediate inter partes reviews and stays for district court are necessary for the success of the proposed reform because the judicial efficiencies created by having the Patent Trial and Appeal Board conduct claim constructions are only available with parallel proceedings.[92]

C. Step 2: Inter Partes Review and Patent Trial and Appeal Board Claim Construction

Next, the Patent Trial and Appeal Board conducts a claim construction using the Person of Ordinary Skill In The Art (POSITA) standard in order to make an invalidity decision. Currently, the Patent Trial and Appeal Board does its claim construction using the Broadest Reasonable Interpretation (BRI) standard consistent with other appeals from Patent and Trademark Office proceedings;[93] in contrast, district courts use the POSITA standard.[94] Despite distinctions, early post-America Invents Act cases that have had claim constructions from both the Patent Trial and Appeal Board and the district courts suggest that the difference between the two standards is negligible but still present.[95] Therefore, it is not clear that conforming the

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103. Of those 76% of cases where a motion to stay was filed, courts granted stays, at least in part, 84% of the time. *Id.*

91. *See infra* notes 96–94 and accompanying text (discussing the proper appellate deference to the district court's claim construction, depending on whether the district court accepted the Patent Trial and Appeal Board's claim construction).

92. *See supra* notes 51–72 and accompanying text (detailing how primary jurisdiction principles can be applied to patent law to make use of the Patent Trial and Appeal Board's expertise to improve judicial efficiency in patent litigation).

93. *In re* Abbott Diabetes Care Inc. 696 F.3d 1142, 1148 (Fed. Cir. 2012).

94. Phillips v. AWH Corp., 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc).

95. *Compare* Vibrant Media, Inc. v. Gen. Elec. Co., IPR 2013-00172, at 5 (P.T.A.B. July 28, 2014) (showing the Patent Trial and Appeal Board approaching the second claim construction issue with the BRI standard), *and* Rackspace Hosting, Inc. v. Rotatable Tech. L.L.C., IPR 2013-00248, at 8 (P.T.A.B. Oct. 1, 2013) (same), *with* Rotatable Techs. L.L.C. v. Nokia, No. 2:12–CV–265–

Patent Trial and Appeal Board BRI-standard to the district court POSITA standard will materially affect the Patent Trial and Appeal Board claim constructions. But changing the standard will eliminate any potential difficulty between the two standards, such as concerns over changing the patent's scope between invalidity and infringement analysis, making the Patent Trial and Appeal Board construction more acceptable to district courts, and promoting uniformity in patent litigation (particularly invalidity analysis).

Under the proposed plan, once the Patent Trial and Appeal Board has made a decision regarding most patent validity contentions,[96] the case will proceed. If the patent is invalidated by the Patent Trial and Appeal Board, the district court simply closes the case, subject to appeal, thereby not wasting district court resources on a patent infringement case regarding a patent that has been invalidated. The patent owner has the right to appeal the decision to the Federal Circuit, as is currently available.[97] On appeal, the standard of review applied by the Federal Circuit to the decisions of the Patent Trial and Appeal Board has been established as de novo for legal conclusions[98] and the 'substantial evidence' standard for factual findings.[99]

If the patent is revalidated by the Federal Circuit, the case will be remanded to district court where the claim construction used by the Federal Circuit will be used for infringement analysis.

On the other hand, if the patent is ruled valid, the Patent Trial and Appeal Board will do any additional claim construction necessary for infringement analysis; the initial claim construction (in line with current inter partes review proceedings) is only to determine most contentions of patent validity.[100] After being ruled valid, additional claim construction may be necessary in order to make a future decision regarding infringement. It is not always the case that additional claim construction will be necessary for infringement analysis, but there may be circumstances that a term dispute is relevant only to infringement analysis and not invalidity. In such cases, the disputed terms must be construed before an infringement analysis, and the Patent Trial and Appeal Board panel that completed the claim construction for invalidity will be the best prepared to do additional construction.

JRG, 2013 WL 3992930 at *3 (E.D. Tex. Aug. 2, 2013) (showing a district court approaching the first claim construction issue with the POSITA standard), *and* Gen. Elec. Co. v. Kontera Techs. Inc., No. 12–525–LPS, 2013 WL 4757516 at *3–4, *4 n.4 (D. Del. Sept. 3, 2013) (same).

96. *See* 35 U.S.C. § 311(b) (2012) (stating that an inter partes review petition can only be filed to invalidate a patent on §§ 102 or 103 grounds based on prior art consisting of patents or printed publications).

97. 35 U.S.C. § 141(a) (2012).

98. *In re* Gartside, 203 F.3d 1305, 1316 (Fed. Cir. 2000).

99. Dickinson v. Zurko, 527 U.S. 150, 152 (1999); *id.*

100. *See* 35 U.S.C. § 311(b) (2012) (inter partes reviews are limited in scope to §§ 102 and 103 validity examinations).

By having an inter partes review ruling on the majority of validity contentions before any substantial district court proceedings, this program prevents wasting court resources analyzing a patent that will be invalidated by the Patent and Trademark Office. Once the inter partes review has ruled on the validity of the patent-in-suit, the parties and the court can focus entirely on infringement contentions without overhanging questions of invalidity.

This process will act in practice similarly to the German bifurcated patent law system that tests validity and infringement separately, although the German system analyzes invalidity and infringement separately but concurrently.[101] Similar to the German system, bifurcating the majority of validity and infringement in a system where courts accept Patent Trial and Appeal Board claim constructions improves judicial efficiency by sparing generalist district courts the difficulty of adjudicating many highly technical questions of patent law, and leaving it to those with a more developed background for such adjudication.[102] However, the German bifurcated system—because validity and infringement are tested concurrently—can result in incongruent decisions.[103] This proposed reform eliminates the risk of the 'injunction gap' by incentivizing district courts to grant stays pending inter partes review resolution. Giving the Patent Trial and Appeal Board the ability to perform claim construction and primary invalidity analysis, consistent with the traditional goals of primary jurisdiction, will promote national uniformity in claim construction[104] and give the Patent and Trademark Office greater control over claim interpretation and patent validity.[105]

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101. Colleen Chien & Christian Helmers, Inter Partes Review *and the Design of Post-Grant Patent Reviews*, STAN. TECH. L. REV. (forthcoming) (manuscript at 5), http://ssrn.com/abstract=2601562 [https://perma.cc/HL7X-7AST].

102. *See, e.g.*, Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents: Why Litigation Won't Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help*, 19 BERKELEY TECH. L.J. 943, 946–48 (2004) (detailing why district courts are not the appropriate venues for complex patent validity analyses).

103. Chien & Helmers, *supra* note 101 (manuscript at 10) ("[I]nvalidity proceedings take around 18 months to complete, infringement proceedings move faster, resolving in a median of 9 months' leading to the 'so-called injunction gap—the period of time after [a finding of infringement but] before the validity judgment is handed down.'").

104. *See supra* notes 66–72 and accompanying text (discussing the traditional benefits of primary jurisdiction administrative law).

105. *See* MCM Portfolio LLC v. Hewlett-Packard Co., 812 F.3d 1284, 1291 (Fed. Cir. 2015) (discussing the value of allowing the Patent and Trademark Office to make validity decisions even on issued patents by noting that "[i]t would be odd indeed if Congress could not authorize the [Patent and Trademark Office] to reconsider its own decisions' when discussing the power of the Patent Trial and Appeal Board to perform invalidity analysis in an inter partes review proceeding). For additional commentary regarding the benefits of national uniformity and giving the Patent and Trademark Office greater control over claim interpretation and patent validity, see Duffy, *supra* note 1, at 136–48.

D. Step 3: District Court Litigation for Infringement

After the Patent Trial and Appeal Board has ruled a patent valid and performed the necessary claim construction, the district court will judge infringement and other validity contentions.[106] Also, if the Patent Trial and Appeal Board has failed to reach a determination regarding a patent before the judge's deadline,[107] then the judge will likely have to perform his or her own claim construction. This timing mechanism allows judges to make room for the administrative law proceeding while not adding undesirable disruption to their dockets.

Under the proposed reform, the claim construction returns to the district court on a *Skidmore*-deference standard. Therefore, the district court should accept the Patent Trial and Appeal Board construction to the extent that it is persuaded. Factors to be considered include the four factors of when to apply primary jurisdiction:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's field of expertise, (2) whether the question at issue is within the agency's discretion, (3) whether there exists a substantial danger of inconsistent rulings, and (4) whether a prior application to the agency has been made.[108]

Further, the court can look to the factors outlined in *Skidmore* and in *Mead*, which include the thoroughness evident in the agency's interpretation, the validity of its reasoning, the interpretation's consistency with earlier and later pronouncements, the degree of the agency's care, the agency's relative 'expertness' and specialized experience, the highly detailed nature of the regulatory scheme, the value of the uniformity in the agency's understanding of what a national law requires, and 'all those factors which give it power to persuade.'[109] Considering the specialized nature of the field, the expertise of the Patent and Trademark Office, and the value of uniformity, the Patent Trial

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106. *See* 35 U.S.C. § 311 (2012) (only §§ 102 and 103 grounds for invalidity can be heard by the Patent Trial and Appeal Board; therefore, all other invalidity contentions must be ruled on by the district court following the inter partes review).

107. *See supra* notes 47–50 and accompanying text (explaining the district court judge's ability—in line with other areas of administrative law—to schedule the trial and give a reasonable deadline for an inter partes review decision at the time the stay pending the review is granted, and, if the Patent Trial and Appeal Board fails to conclude the review prior to the deadline, the district court judge's ability to end the stay and perform his own full patent suit, including claim construction). For an example of this practice, see also American Auto. Mfrs. Ass'n v. Mass. Dept. of Envtl. Prot., 163 F.3d 74, 86–87 (1st Cir. 1998).

108. Ellis v. Tribune Television Co., 443 F.3d 71, 82–83 (2d Cir. 2006).

109. United States v. Mead, 533 U.S. 218, 227–28 (2001) (quoting Skidmore v. Swift & Co. 323 U.S. 134, 139–40 (1944)).

and Appeal Board claim construction, while not binding on the district court, is likely to be persuasive.[110]

Once the district has accepted the Patent Trial and Appeal Board claim construction, the district court will conduct the trial and judge infringement and other validity contentions using appropriate means, recognizing that claim construction often paves the way for summary judgment or other proceedings and that a trial for infringement may not require an actual jury trial.

E. Step 4: District Court Appeal to Federal Circuit with the Substantial Evidence Deference Standard and No Interlocutory Review

The final step of the proposed plan deals with how the claim construction is handled on appeal to the Federal Circuit. Under the proposed reform, Patent Trial and Appeal Board claim constructions are reviewed under the substantial evidence standard, while district court claim constructions are reviewed de novo. This deference shifting incentivizes trial judges to use the agency's expertise and accept the Patent and Trademark Office's claim construction because doing so dramatically reduces the likelihood of being reversed on appeal.[111] As said before, the trial judge receives the Patent Trial and Appeal Board's claim construction on a *Skidmore* deference level and is not obligated to accept the construction if it is not persuasive. However, if the trial judge refuses the Patent Trial and Appeal Board claim construction and performs a new construction, that construction receives much less deference on appeal. Because the substantial evidence standard of review makes the Patent Trial and Appeal Board claim construction less likely to be overturned on appeal, it creates much more certainty in the claim construction for the parties and the courts when performing the infringement analysis. Finally, from a judicial-efficiency perspective, increasing the deference to claim constructions reduces the likelihood of performing multiple claim constructions on the same claims, previously noted as a judicial inefficiency.[112]

In sum, while matters of law, claim constructions are heavily fact intensive, and courts have struggled with the appropriate standard of review

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110. *See supra* notes 52–63 and accompanying text (noting the value of Patent Trial and Appeal Board claim constructions).

111. Given that "to decide what the claims mean is nearly always to decide the case," substantially increasing the deference the Federal Circuit shows to the claim construction substantially decreases the likelihood of reversal, even though the legal conclusions (i.e., infringement) will still be reviewed de novo by the Federal Circuit. Markman, 52 F.3d 967, 989 (Fed. Cir. 1995) (en banc) (Mayer, J. concurring in the judgment).

112. *See supra* notes 34–38 and accompanying text (discussing how the judicial cost of achieving the "most accurate" claim construction outweighs the value derived from the "most accurate" claim construction because claims often support multiple reasonable interpretations, making finding the "most accurate" interpretation an unjustifiable judicial cost).

for claim constructions.[113] In light of this difficulty, the proposed reform applies one standard of review for the claim construction and a separate standard of review for subsequent determinations. Claim constructions performed by the Patent Trial and Appeal Board will be subject to the substantial evidence standard of review on appeal at the Federal Circuit regardless of if the appeal comes from the Patent Trial and Appeal Board or from the district court.[114] On the other hand, claim constructions made by the district court will be subjected to de novo review in line with patent law jurisprudence prior to *Teva*.[115]

Finally, this reform would not allow interlocutory appeals to the Federal Circuit. This reform pushes claim construction certainty earlier in the timeline of patent litigation. Therefore, interlocutory appeals are less justifiable than under the current system where claim-construction certainty can only be obtained through a review by the Federal Circuit. In the current system, the initial district court proceedings are potentially wasted pending the Federal Circuit's review of the claim construction; therefore, interlocutory reviews are an appealing way to limit the district court waste.[116] Under the proposed reform, concerns regarding wasted district court proceedings are less relevant, thereby dramatically limiting the value of an interlocutory appeal and making such reviews not worth the judicial inefficiency caused by delays pending interlocutory review.[117]

VIII. Implementation Concerns

A. Hand-Off Issues

One of the major potential problems with the proposed reform is difficulty in timely passing decisions between the Patent Trial and Appeal Board and the district courts. In deciding whether or not to stay litigation, judges take into consideration various factors relating to efficiently managing their docket such as the stage of litigation—particularly whether discovery

113. *See* Teva Pharm. USA, Inc. v. Sandoz, Inc. 135 S. Ct. 831, 836–38 (2015) (asking courts on review to distinguish questions of law from questions of fact within the claim construction and apply different standards of review to each).

114. *See In re* Gartside, 203 F.3d at 1316 (defining the standard of review for Patent Trial and Appeal Board claim constructions at the Federal Circuit).

115. *Teva*, 135 S. Ct. at 836–38 (attempting to distinguish between questions of law and questions of fact within a claim construction and applying different standards of review to each in order to increase the certainty of the district court claim construction).

116. *See* Duffy, *supra* note 1, at 125 ("[I]nterlocutory appeals would avoid the waste of trials where the district court's interpretation differs from the Federal Circuit.").

117. *See id.* at 125 ("[T]he appellate process usually extends several months from the time of docketing to decision and typically requires formal briefing and oral argument.").

has completed or not.[118] While courts always have the power to stay a litigation pending an inter partes review, a court may, in its sound judgment, refuse to institute a stay after weighing competing interests—particularly in the case of inter partes review stays because the court has no control over the timeline of the stay.[119] Sufficiently incentivizing judges to grant stays pending inter partes reviews will be one of the greatest challenges to this reform's success. To combat this pitfall, the reform gives judges greater control over the duration of a stay by borrowing a primary jurisdiction policy. This new procedure allows judges to set a deadline for the Patent Trial and Appeal Board to conclude an inter partes review or the case will proceed in district court without the Patent Trial and Appeal Board ruling. Further, the increased deference of the claim construction on appeal, if judges accept the Patent Trial and Appeal Board construction, will combat their reluctance to grant stays pending inter partes reviews.

Additionally, judges providing deadlines to the Patent Trial and Appeal Board, as long as the deadlines are reasonable, will help reduce undue delay that could appear as the case transfers between the Patent Trial and Appeal Board and the district court. By setting a deadline for an inter partes review to be concluded, district judges will be able to schedule the trial, if necessary, at the time of granting the stay. This would eliminate any additional delay in the case passing between the Patent Trial and Appeal Board and district courts.

B. Problem of Interpreting the Interpretation

Another foreseeable trouble point for the proposed reform is the possibility of uncertainty regarding the claim construction itself. While the goal of claim construction is to define the scope of the patent-in-suit and eliminate ambiguity, there are occasions when the claim construction itself must be interpreted in light of some development during trial, particularly facts relating to infringement. If a judge was forced by circumstance to do a major interpretation of the claim construction, he or she would be hindered by not having done the claim construction personally. Further, there would likely be an undue delay if the court was forced to stay the case pending clarification from the Patent Trial and Appeal Board panel that performed the claim construction. Therefore, a district court judge would be forced to perform any necessary interpretations of the claim construction that come up during trial.

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118. *See, e.g.*, Matthew R. Frontz, *Staying Litigation Pending Inter Partes Review and the Effects on Patent Litigation*, 24 FED. CIR. B.J. 469, 469 (2015) (noting that district court judges need to determine if such stays are proper for their dockets).

119. *See* Drink Tanks Corp. v. GrowlerWerks, Inc., 2016 WL 3844209, at *2 (D. Or. July 15, 2016) (citing Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) for the proposition that it is in the court's discretion whether to grant or to deny motions to stay).

While judges are likely to have more certainty interpreting their own claim construction than one from the Patent Trial and Appeal Board, this shortcoming is not fatal to the proposed reform. In many cases, such as *Teva,*[120] where the claim-construction disagreement stemmed from a difference in the interpretation of the term 'molecular weight, there is unlikely to be a need for substantial interpretation of the claim construction.[121] In such cases, problems interpreting the interpretation would be irrelevant. In the cases where judges would be required to make some interpretation of the claim construction, the judges do have the option to disregard the Patent Trial and Appeal Board's claim construction. The Patent Trial and Appeal Board's claim construction comes to the district court on *Skidmore* deference and is only binding in as much as it is persuasive. If the court believes that the Patent Trial and Appeal Board's claim construction will require too much interpretation, it is not bound to use it. Therefore, this relieves any major problems with judges interpreting the Patent Trial and Appeal Board's claim construction.

C. *Quality of Patent Trial and Appeal Board Judges*

Perhaps the most notable potential pitfall of the proposed reform is inconsistency in the quality of Patent Trial and Appeal Board judges. Part of the core rationale for primary jurisdiction is that using the agency will yield more accurate and consistent results because of the agency's expertise. This reform places increased pressure on Patent Trial and Appeal Board judges to be consistent and accurate while simultaneously requiring the U.S. Patent and Trademark Office to hire a large number of new Patent Trial and Appeal Board judges to handle the increased number of inter partes review petitions stemming from this reform. A major concern is that there will be some inconsistency among the Patent Trial and Appeal Board judges that will negatively affect this reform.

However, the *Skidmore*-deference standard that accepts Patent Trial and Appeal Board constructions accounts for these inconsistencies. The relevant factors that judges will look to in determining how persuasive a Patent Trial and Appeal Board claim construction is include the agency's consistency, logic, thoroughness, and care.[122] The judge is the ultimate arbiter of claim construction and if, for example, a particular Patent Trial and Appeal Board panel has recently had their construction overturned by the Federal Circuit,

120. Teva Pharm. USA, Inc. v. Sandoz, Inc. 723 F.3d 1363 (Fed. Cir. 2013), *vacated*, 135 S. Ct. 831 (2015)).

121. *Id.* at 1367–70 (summarily determining that "molecular weight," as used in two claims, was inherently indefinite and thus "not amenable to construction" (quoting Biosig Instruments, Inc. v. Nautilus, Inc. 715 F.3d 891, 898 (Fed. Cir. 2013)).

122. United States v. Mead Corp. 533 U.S. 218, 227–28 (2001).

the judge can take this into account when determining the persuasiveness of the claim construction.

Another major concern regarding the quality of Patent Trial and Appeal Board judges is how to attract high-quality Patent Trial and Appeal Board judges. This is not trivial. Correctly identifying and attracting quality judges is a core concern; however, it is intimately tied to the complex investigation of the program's cost. Presumably a major factor in attracting quality judges will be paying them sufficiently, an issue beyond the scope of this Note.

D. U.S. Patent and Trademark Office Susceptibility to Political Influence

Another potential pitfall will be concerns over administrative corruption, or agency capture, where agencies advance concerns of special interests over the public interest. Mark Lemley, specifically, has introduced the idea that greater reliance on the U.S. Patent and Trademark Office for decision making might not be wise for fear of the Patent and Trademark Office's susceptibility to political influence.[123] Agency capture by interest groups is a common fear relating to administrative agencies because they are not as insulated from the public as Article III judges. For their part, courts responded to agency capture concerns by increasing the scrutiny on agency actions 'even as to the evidence on technical and specialized matters.'[124]

This Note does not worry about the parade of horribles in the generic case, and the *Skidmore*-deference standard for judges to accept the Patent Trial and Appeal Board's claim construction is more than capable of dissuading large-scale problems caused by interest-group pressure on the Patent and Trademark Office.

E. Backlog

The proposed reform will immediately cause an increase in the number of inter partes review petitions filed with the Patent Trial and Appeal Board, which creates concerns over backlog and undue delays due to limited resources. As previously noted, discussion regarding the necessary hiring of new Patent Trial and Appeal Board judges and available funding is beyond the scope of this Note. However, the judicial efficiencies of resolving claim construction earlier in litigation by judges with specialized knowledge will, over time, streamline the patent litigation system and eliminate any backlog. Further, the reduction in reversals and remands as well as not allowing

123. *See* Dan L. Burk & Mark A. Lemley, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 106–07 (2009) (discussing the likelihood and problems with Patent and Trademark Office capture).

124. Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447, 456 (citing Ethyl Corp. v. EPA, 541 F.2d 1, 35 (D.C. Cir. 1976)).

interlocutory appeals will, over time, reduce the burden on the courts and eliminate undue delays due to backlog from a lack of judicial resources.

F. Article III and Seventh Amendment Concerns

This procedural reform, with its use of inter partes reviews under the Patent Trial and Appeal Board as the primary means for invalidating patents, presents Article III and Seventh Amendment concerns regarding an administrative body's capacity to revoke property rights. Ever since the America Invents Act was first implemented, there have been challenges to the constitutionality of the Patent Trial and Appeal Board's capacity to determine property rights. In *McCormick Harvesting Machine Co. v. Aultman*,[125] the Supreme Court held that when a patent issues, it passes beyond the control of the patent office and "is not subject to be revoked or cancelled by the President, or any other officer of the Government."[126] Similarly in 1890, the Supreme Court held that patent validity "is always and ultimately a question of judicial cognizance."[127] Under this precedent, an inter partes review as an administrative law proceeding with the statutory power to invalidate an issued patent would seem to lack the constitutional power to do so. Nonetheless, the Federal Circuit decided an analogous issue in *Patlex Corp. v. Mossinghoff*[128] where the Federal Circuit found that reexaminations by the Patent and Trademark Office did not violate the Seventh Amendment.[129] Several challenges to the constitutional validity of the inter partes review process have emerged after the America Invents Act, notably *MCM Portfolio LLC v. Hewlett-Packard Co.*[130] However, on December 2, 2015, the Federal Circuit ruled that the inter partes reviews do not violate Article III[131] and further do not violate the Seventh Amendment because, 'when Congress created the new statutory right to inter partes review, it did not violate the Seventh Amendment by assigning its adjudication to an administrative agency.'[132] Although *Markman* states that 'patent infringement actions in district court are subject to the Seventh Amendment, [it] does not suggest that there is a jury trial right in an administrative adjudication of patent validity."[133] Further, *MCM* states that 'because patent rights are public rights, and their validity susceptible to review by an administrative agency, the Seventh Amendment poses no

125. 169 U.S. 606 (1898).
126. *Id.* at 608.
127. Iron Silver Mining Co. v. Campbell, 135 U.S. 286, 293 (1890).
128. 758 F.2d 594 (Fed. Cir. 1985).
129. *Id.* at 604–05.
130. 812 F.3d 1284 (Fed. Cir. 2015).
131. *Id.* at 1285.
132. *Id.* at 1292.
133. *Id.* at 1292 n.2.

barrier to agency adjudication without a jury.'[134] Barring a Supreme Court reversal of the Federal Circuit's most recent decision regarding the constitutionality of the Patent Trial and Appeal Board's power to invalidate patents during inter partes reviews, it is unlikely that the proposed procedural reform will face any major constitutional challenge.

G. Showing Success

A primary concern when implementing this new procedure as a small trial or in a sweeping reform is how to evaluate the success or failure of the implementation. In evaluating litigation changes, such as this procedural one, selection bias presents an evidentiary problem. Litigators will make strategic decisions based on how the new rules will affect them, thus changing their initial strategy and preventing independent qualitative assessments of the program's success.

In light of selection bias, one the most revealing statistics in judging success will be the percentage of district courts that accept the Patent Trial and Appeal Board claim construction after the inter partes review (Step 4 of the procedure).[135] If a majority of courts are accepting the Patent Trial and Appeal Board claim construction, then this would show that the incentives of the program (including deference shifting) are sufficient to encourage courts to follow the program. Further, if a majority of district courts accept the Patent Trial and Appeal Board claim construction, this will indicate the courts' willingness to trust the administrative body (and its relative subject matter expertise), thus indicating the appropriateness of primary jurisdiction for improving the efficiency of patent litigation. A core justification for primary jurisdiction is that the administrative body is better suited to the specific decision making than the courts because of its specialized knowledge.[136] Finally, a majority of district courts accepting claim constructions from the Patent Trial and Appeal Board would show a substantial reduction in the number of cases where both the Patent Trial and Appeal Board and district court do their own claim constructions—a large judicial inefficiency that this program attempts to correct.[137]

Other factors that would be relevant to judging the success of this program that would suffer from selection bias include: Federal Circuit reversal rate, the timeline of cases reaching conclusion, changes in patent case concentration by district, and changes in the overall cost of patent suits. A reduction in Federal Circuit reversal rates would indicate more certainty in

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134. *Id.* at 1293.

135. *See supra* notes 111–14 and accompanying text (discussing this plan's means for incentivizing judges to accept claim constructions performed by the Patent Trial and Appeal Board).

136. *See supra* notes 51–72 and accompanying text (discussing the applicability of administrative law primary jurisdiction to patent law).

137. *See supra* notes 34–38 and accompanying text (discussing the objectives targeted by the proposed procedural reform).

claim constructions early on in the patent suit and would also mean fewer cases with multiple claim constructions. A reduction in the Federal Circuit reversal rate would likely also include a reduction in the average time for a case to reach conclusion because fewer cases would have a full district court trial, appellate hearing, followed by a remand, and a subsequent, additional district court trial. A diminishment of patent-case concentration in particular districts would also be some evidence of this program's success due to a reduction in forum shopping for favorable claim constructions.[138] Although it is important to note that the likelihood of a favorable claim construction is only one of several reasons for parties to engage in forum shopping.[139] Finally, a decrease in the overall cost of a patent suit would be some evidence of success in making patent litigation more efficient.

IX. Conclusion

The proposed procedural reform expands on the ideas of John Duffy in *On Improving the Legal Process of Claim Interpretation: Administrative Alternatives*. In many ways, Mr. Duffy's article was written before its time, and only since the new America Invents Act administrative programs (specifically the Inter Partes review program) has there been an institutional framework to capitalize on Mr. Duffy's ideas that apply administrative law principles to patent law. The proposed reform draws principles of administrative law to make patent litigation more judicially efficient, specifically by targeting claim construction. In practice, the Patent Trial and Appeal Board will do the primary invalidity analysis, and the district court will do the infringement analysis, not unlike the German bifurcated patent process which separates most invalidity analyses from infringement analyses. The proposed plan uses cost-shifting and deference-shifting to incentivize judges and parties to participate in parallel proceedings—in district court and in front of the Patent Trial and Appeal Board—where both will work together to make use of the Patent and Trademark Office's subject matter expertise, avoid redundancy, and increase judicial efficiency.

—Gavin P. W. Murphy

138. *See supra* notes 79–81 and accompanying text (discussing this reform's potential impact on the incentives for plaintiffs to engage in forum shopping).

139. *See* Moore, *supra* note 78 at 907–12 (discussing the variations between district courts for patent suits in light of different local patent-litigation rules and the impact on forum shopping).

Can Congress Authorize Judicial Review of Deferred Prosecution and Nonprosecution Agreements? And Does It Need To?*

Corporate deferred prosecution agreements (DPA) and nonprosecution agreements (NPA) are on the rise. So are their critics. Despite the other options federal prosecutors have for enforcing federal criminal law against corporations, prosecutors continue to rely heavily upon DPAs and NPAs. Federal prosecutors' broad legal discretion—over who gets a deal, what the terms are, and when breach occurs—draws ire from many critics. Some argue that prosecutors negotiate lenient N/DPAs, letting huge corporations and high-level executives off the hook too easily for gross malfeasance. Others argue that prosecutors' unfettered discretion gives them too much negotiating leverage, resulting in harsh and misguided N/DPAs. Both sides advocate subjecting corporate N/DPAs to judicial review.

Congress has looked into judicial review as a solution. The proposed Accountability in Deferred Prosecution Act (ADPA) of 2014 included a provision that required judicial approval of N/DPAs.[1] Prosecutors would submit N/DPAs to federal judges for approval, and the judges would review those N/DPAs for consistency with the guidelines promulgated by the Attorney General and to ensure those N/DPAs are 'in the interests of justice.'[2]

But as of now, the Judiciary's only potential foothold to review DPAs is the Speedy Trial Act. (Notably, no statutory foothold is currently available to review NPAs.) Under 18 U.S.C. § 3161(h)(2), the seventy-day clock for trial after indictment may be tolled, 'with the approval of the court, by a prosecutor who submits a DPA to the court.[3] Most motions to exclude time under § 3161(h)(2) are approved by the court, no hassle. But recently, some district court judges have refused to act as rubber stamps. One has interpreted the 'with the approval of the court' clause as a basis for reviewing prosecutors' decision not to pursue charges against individuals or corporations.[4] Two others have interpreted the clause as a basis for reviewing the precise terms of the negotiated settlement with the corporation.[5]

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1. Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. § 7(a) (2014).

2. *Id.*

3. 18 U.S.C. § 3161(h)(2) (2012).

4. United States v. Fokker Servs. B.V. 79 F. Supp. 3d 160, 165 (D.D.C. 2015), *rev'd* 818 F.3d 733 (D.C. Cir. 2016).

5. United States v. Saena Tech Corp. 140 F. Supp. 3d 11, 28–30 (D.D.C. 2015); United States v. HSBC Bank USA, No. 12–CR–763, 2013 WL 3306161, at *3–5 (E.D.N.Y. July 1, 2013).

The "with the approval of the court' clause, however, has recently been interpreted narrowly by the D.C. Circuit in *United States v. Fokker Services B.V.*[6] In an opinion by Judge Sri Srinivasan, the court interpreted the section against a "backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions."[7] It found that '[n]othing in the statute's terms or structure suggests any intention to subvert those *constitutionally rooted* principles so as to enable the Judiciary to second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges."[8] The Act therefore 'confers no authority' to withhold approval of a DPA 'based on concerns that the government should bring different charges or should charge different defendants."[9]

In this Note I argue that Judge Srinivasan got the law right but, in the process, potentially got the Constitution wrong. The 'backdrop of long-settled understandings' he cites is largely a product of *prudential* considerations that lack *constitutional* potency. The constitutionally rooted remainder does not bar Congress from establishing judicially enforceable criteria that prosecutors must follow when determining who to enter into an agreement with, the scope of the agreement, whether breach of the agreement has occurred, and how to enforce an agreement. In short, meaningful judicial oversight of corporate N/DPAs is constitutionally permitted.

My inquiry differs from the bulk of the recent literature. Commentators—largely in response to controversial Obama Administration nonenforcement decisions over immigration,[10] marijuana,[11] and the Affordable Care Act[12]—have addressed the constitutional limits of executive nonenforcement discretion in the absence of a clear congressional command.[13] They generally ask 'at what point does a non-enforcement policy cross the line between the executive discretion properly vested in the President and instead become violative of the President's constitutional duty

6. 818 F.3d 733 (D.C. Cir. 2016).

7. *Id.* at 738.

8. *Id.* (emphasis added).

9. *Id.*

10. Memorandum from Sec'y Janet Napolitano, U.S. Dep't of Homeland Sec. to David Aguilar, Acting Comm'r, U.S. Customs & Border Protection et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).

11. Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).

12. Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Dep't of Health & Human Servs., to State Ins. Comm'rs (Nov. 14, 2013).

13. *See, e.g.*, 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 TEXAS L. REV. 781, 783–85 (2013) (arguing that Obama's immigration nonenforcement decision was unconstitutional); Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEXAS L. REV. SEE ALSO 115, 115–17 (2013) (defending Obama's immigration nonenforcement decision as constitutional); Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the Dream Act*, 91 TEXAS L. REV. SEE ALSO 59, 60 (2013) (same).

to 'take care that the laws be faithfully executed[?]' '[14] My question is the inverse: at what point does a congressional command cross the line from a legitimate exercise of Congress's power and encroach upon the Executive's power? While a comprehensive answer is beyond the scope of this Note, my analysis of corporate N/DPAs sheds light on the broader question.

This Note has three Parts. Part I introduces the mechanics of corporate N/DPAs, documents their rise, and reviews the various criticisms of executive[15] nonprosecution discretion[16] in the context of corporate N/DPAs. It then turns to one of the major proposals for corporate N/DPA reform—judicial review. Part II discusses cases analyzing the scope of judicial review of corporate DPAs under the Speedy Trial Act. In Part III, I defend my thesis: Congress *could* constitutionally authorize judicial review of corporate N/DPAs. I then provide a brief conclusion.

I. An Overview of Corporate N/DPAs

A. The Mechanics of N/DPAs

After filing an indictment, instead of pursuing a conviction or dismissing charges, a federal prosecutor may pursue a 'middle ground' option—a DPA.[17] The corporation admits incriminating facts and typically pays a negotiated amount of restitution or fines.[18] The corporation may also agree to a set of conditions designed 'to promote compliance with applicable law and to prevent recidivism.'[19] These conditions can require structural

14. Peter L. Markowitz, *Prosecutorial Discretion at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. (forthcoming 2017) (manuscript at 2) (internal quotations omitted), http://ssrn.com/abstract=2753709 [https://perma.cc/LM4Q-CUYS].

15. I use the term 'executive' to describe the entity that wields nonprosecution discretion. Doing so, I am mindful of the clash between those that view all power to implement federal law as flowing from the President and those that contest the idea of a "unitary executive." *Compare* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544 (1994) (arguing for a unitary Executive), *with* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994) (arguing that the Executive is in fact not unitary). I do not take a stand on this voluminous debate.

16. I use the phrase "nonprosecution discretion" instead of prosecutorial discretion. It is a more precise phrase to describe "the discretionary and plenary power *not* to prosecute." *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 925 (6th ed. 2014) (observing that "the power is better described as one of 'nonprosecution' discretion" because "the courts may not compel or mandamus a prosecution, and '[c]onversely, the President's power to affirmatively prosecute can rather easily be thwarted by grand juries and courts; the former may simply refuse to agree to an indictment, and the latter may always throw the case out"). It is not even clear that the Executive retains exclusive authority to bring prosecution. *See* Lessig & Sunstein, *supra* note 15, at 18–20 (observing that original practice involved state and private authority over the decision to bring prosecution).

17. EXEC. OFFICES OF THE U.S. ATTORNEYS, U.S. ATTORNEYS' MANUAL 9-28.200 (2015), https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/HW69-JLL9] [hereinafter U.S. ATTYS' MANUAL].

18. *Id.* at 9-28.1100.

19. *Id.*

reforms, including 'hiring additional compliance personnel, governance changes, requirements of periodic reporting and evaluation of compliance, and retention of independent corporate monitors.'[20] In exchange, the prosecution agree to drop charges against the corporation at the end of the agreed-upon period. If the corporation fails to comply with the terms of the agreement, the government can prosecute based on the admitted facts.

The time limitations established by the Speedy Trial Act[21] play an important role in the operation of DPAs. DPA negotiation typically occurs before the filing of an indictment.[22] Once DPA terms are agreed upon, the prosecution files an indictment along with a motion for a specific exclusion of time under the Speedy Trial Act. Such a motion is necessary because the filing of an indictment triggers the Speedy Trial Act's seventy-day clock within which the trial must commence.[23] This seventy-day clock then may be tolled for '[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, in order for the defendant to demonstrate his good conduct.[24] Importantly, such arrangement requires "approval of the court.'[25] This exemption was crafted to permit prosecutors to utilize DPAs without running afoul of the Speedy Trial Act's seventy-day clock.[26]

NPAs operate in much the same way as DPAs with two major differences, the second difference following from the first.[27] With an NPA, no formal charges are filed. The agreement 'is maintained by the parties

20. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007). Garrett has documented the rise of DPAs and NPAs with "structural reform" provisions. *Id.* at 856. Structural reform provisions are conditions not aimed at obtaining a conviction but at reforming corporate governance. *Id.* at 855. Garrett's view of how prosecutors deploy N/DPAs has achieved 'some consensus among scholars.' Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. LAW. 61, 66 (2014).

21. 18 U.S.C. §§ 3161–3174 (2012).

22. Peter Spivack & Sujit Raman, Essay, *Regulating the 'New Regulators' Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160 (2008).

23. 18 U.S.C. § 3161(c)(1).

24. *Id.* § 3161(h)(2).

25. *Id.*

26. S. REP. NO. 93-1021, at 36–37 (1974) ("Of course, in the absence of a provision allowing the tolling of the speedy trial time limits, prosecutors would never agree to such diversion programs. Without such a provision the defendant could automatically obtain a dismissal of charges if prosecution were held in abeyance for a period of time in excess of the time limits set out in section 3161 (b) and (c).").

27. *See* Brian Lewis & Steven Woodward, *Corporate Criminal Liability*, 51 AM. CRIM. L. REV. 923, 960 (2014) (explaining that "NPAs work in much the same way [as DPAs], except there are no publically filed charges and no court supervision of compliance with an agreement. The company typically acknowledges wrongdoing, pays a fine, and agrees to comply with any other required conditions and to cooperate with the government's ongoing investigation' (footnotes omitted)).

rather than being filed with a court.'[28] Because no indictment is filed, the Speedy Trial Act's clock does not start.[29] There is therefore no need to acquire 'approval of the court' in order to finalize an NPA.

B. The Rise of Corporate N/DPAs

In spite of the other options federal prosecutors have for enforcing the criminal law against corporations—pursuing a conviction, obtaining a plea bargain—prosecutors have continually relied upon DPAs and NPAs.[30] A recent review of Department of Justice (DOJ) policy observes that '[d]espite substantial judicial and public scrutiny, [NPAs] and [DPAs] have retained their prominence as vehicles to resolve complicated corporate investigations.'[31] This trend is expected to continue, especially after *Fokker Services*.[32] To put the rise of N/DPAs in perspective, in the twelve years preceding 2004, the DOJ entered just twenty-six.[33] In 2015 alone, it entered

28. Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., Selection and Use of Monitors in Deferred Prosecution Agreements and Non-prosecution Agreements with Corporations n.2 (Mar. 7, 2008), https://www.justice.gov/usam/criminal-resource-manual-163-selection-and-use-monitors [https://perma.cc/94SE-T3VF].

29. 18 U.S.C. § 3161(c)(1).

30. GIBSON DUNN, 2016 MID-YEAR UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS) 1 (July 6, 2016), http://www.gibsondunn.com/publications/documents/2016-Mid-Year-Update-Corporate-NPA-and-DPA.pdf [https://perma.cc/22XJ-ZU9T]; *see also id.* at 2 (observing that "[i]n the first half of 2016, DOJ and the SEC have collectively entered into eleven corporate NPAs and DPAs, of which nine were NPAs and two were DPAs"). The Gibson Dunn 2016 Mid-Year Update does acknowledge that "the number of NPAs and DPAs entered into year-to-date are at their lowest since 2010, when there were also eleven agreements released by July 6. *Id.* But the report also acknowledges that the 'data, however, is not necessarily predictive of a slow year: in 2010, the second half of the year more than compensated for the slow start, and 2010 ultimately yielded forty corporate agreements; it is entirely possible that the same may happen in 2016.' *Id.* Notably, NPAs and DPAs have "been used in virtually all areas of corporate criminal wrongdoing including antitrust, fraud, domestic bribery, tax evasion, environmental violations as well as foreign corruption cases. Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 537 (2015).

31. GIBSON DUNN, *supra* note 30, at 1.

32. *Id.*

33. David M. Uhlmann, *Prosecution Deferred, Justice Denied*, N.Y. TIMES (Dec. 13, 2013), http://www.nytimes.com/2013/12/14/opinion/prosecution-deferred-justice-denied.html [https://perma.cc/RHJ6-4WGH].

100.[34] The annual monetary recovery for N/DPAs has exceeded $1 billion every year since 2009, topping out at $9 billion in 2012.[35]

Prosecutors are not just extracting lots of money from corporations. They are also extracting significant nonmonetary concessions. Recent empirical research comparing N/DPAs to plea agreements shows that N/DPAs contain on average more provisions relating to governance and legal process.[36] This empirical research helps corroborate anecdotal evidence that prosecutors use N/DPAs as a scalpel to help reform corporate governance, rather than as a hatchet to punish corporate wrongdoing.

N/DPAs' attractiveness is, in part, a product of the undesirability of corporate convictions. Corporate convictions bring with them the risk of catastrophic collateral consequences. The conviction and eventual acquittal of now-deceased accounting powerhouse Arthur Andersen is a stark example. The initial filing of a criminal indictment against Arthur Andersen was alone sufficient to kill the firm and destroy 28,000 jobs.[37] Arthur Andersen's eventual acquittal did nothing to save the firm from ruin, but did embarrass the government.[38] The DOJ's prosecutorial guidelines recognize that pursuing a corporate conviction can result in large collateral consequences, far exceeding the appropriate punishment to rectify and deter wrongdoing.[39] The guidelines urge prosecutors to account for the substantial

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34. GIBSON DUNN, *supra* note 30, at 2. However, 2015 may have been an outlier due to the DOJ Tax Division's decision to enter into a significant number of NPAs pursuant to the Swiss Banks Program. *Id.* Even accounting for the effects of this unique program, which drew to a close at the end of 2015, the DOJ entered into 25 NPAs and DPAs that were unrelated to the DOJ Tax Swiss Banks Program in 2015. GIBSON DUNN, 2015 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS) 3 (2016), http://www.gibsondunn.com/publications/documents/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf [https://perma.cc/68XW-GVDH].

35. GIBSON DUNN, *supra* note 30, at 3.

36. Alexander & Cohen, *supra* note 30, at 541–42.

37. Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 107–09 (2006). The conviction of Arthur Andersen is the most repeatedly invoked example of the corporate death penalty, but other examples exist. *See, e.g.*, *The Criminalisation of American Business*, ECONOMIST (Aug. 28, 2014), http://www.economist.com/news/leaders/21614138-companies-must-be-punished-when-they-do-wrong-legal-system-has-become-extortion [https://perma.cc/KE8A-YNHS] (Drexel Burnham Lambert and E.F. Hutton). One commentator, however, contends that the corporate death penalty is in fact a myth. Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 800, 802 (2013). Markoff finds no empirical basis for the corporate death penalty, *id.* at 827, and concludes that the benefits of N/DPAs can be acquired by utilizing convictions to secure corporate-compliance programs. *Id.* at 830; *see also* Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 21 (2014) ("[E]mpirical evidence accumulated since Andersen demonstrates that corporations and other businesses rarely collapse from indictments or face other serious collateral consequences.").

38. Scott Cohn, *Indictments Can Kill a Company*, CNBC (July 25, 2013), http://www.cnbc.com/id/100913974 [https://perma.cc/B9DU-B98J].

39. U.S. ATTYS' MANUAL, *supra* note 17, at 9-28.1100.

consequences to 'a corporation's employees, investors, pensioners, and customers, many of whom may not be culpable for the offense.[40]

Another reason that federal prosecutors use N/DPAs is the DOJ's increased focus on prosecuting employees for their wrongdoing.[41] By using the threat of criminal conviction as leverage against companies, prosecutors can acquire large concessions that can help the government's case against corporate employees.

C. *Prosecutorial Discretion Under Attack*

As federal prosecutors have increasingly relied on corporate N/DPAs, the ranks of their critics have swelled. These criticisms are not uniform.[42] Section I(C)(1) outlines one attack on N/DPAs, namely that the broad scope of prosecutorial discretion that they afford facilitates the imposition of unfair and oppressive conditions on corporations. Section I(C)(2) provides an opposing viewpoint. Advocates of this view argue that prosecutors invoke their discretion when using N/DPAs to avoid giving corporations their just deserts. Where the sides share a common ground is one proposed solution—judicial review. Section I(C)(3) outlines this position.

1. The Abuse Critique.—This group of critics argues that prosecutors' unfettered discretion results in unfair and counterproductive N/DPAs. Prosecutors are too heavy-handed, using N/DPAs to bully corporations.[43]

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40. *Id.* While corporate plea deals do not have the same magnitude of collateral consequences as indictments or convictions, they are not devoid of secondary effects. A corporation that enters a formal plea faces collateral costs such as debarment from government contracting. Alexander & Cohen, *supra* note 30, at 539, 544–45.

41. *See* U.S. ATTYS' MANUAL, *supra* note 17, at 9-28.210 (explaining that "[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation Provable individual culpability should be pursued even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation "). The Yates Memorandum is the most recent sign of the DOJ's intent. *See* Memorandum from Sally Quillian Yates, Dep. Attorney Gen., Individual Accountability for Corporate Wrongdoing 1 (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download [https://perma.cc/93U6-CXCY] ("One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."). Some argue that the Yates Memorandum merely "codifies and reinforces a long-standing trend of focus on individuals. GIBSON DUNN, *supra* note 34, at 5; *see also* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 329–32 (2007) (observing that prosecutors' focus on their conviction rate, the heightened vulnerability of individual employees after Sarbanes–Oxley, and the increased reluctance by prosecutors to allow collateral consequences have all led prosecutors to '[f]ocus on employee targets"). Not everyone, however, is convinced that the DOJ is diligently seeking individual prosecutions for corporate wrongdoing. *See* GIBSON DUNN, *supra* note 34, at 4–5 (noting that several high profile DPAs following on the heels of the Yates Memorandum have been criticized for not taking action against culpable individuals).

42. *See* Kaal & Lacine, *supra* note 20, at 64–65 (observing that "N/DPAs remain controversial' and outlining the two critiques).

43. *See* Garrett, *supra* note 20, at 855–56.

Corporations face overwhelming pressure to cut a deal. Corporate conviction risks numerous collateral consequences,[44] adverse publicity,[45] and total collapse.[46] Relative to convictions of natural persons, corporate convictions are relatively easy to obtain.[47] Even if a corporation has a robust corporate-compliance program, due to the size and complexity of the regulatory apparatus, violations are inevitable.[48] This leverage makes the negotiation one-sided[49] and allows prosecutors to extract large concessions, including: monetary sanctions equivalent to what the defendant would have paid if convicted,[50] structural reforms to the corporation,[51] and sanctions

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44. Such collateral consequences include debarment from government contracting and revocation of professional licenses. Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1885–86 (2005).

45. *Id.* at 1886 (explaining that for corporate defendants, the possibility of negative publicity is so detrimental that "it has even been proposed as a penalty in and of itself"); Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1467 (2007) (citing "corporate vulnerability to bad publicity" as a factor enabling prosecutorial abuse).

46. Ainslie, *supra* note 37, at 107–09; Greenblum, *supra* note 44, at 1887–88 (outlining the saga of Arthur Andersen).

47. Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 73–74 (2007); Paulsen, *supra* note 45, at 1467 (citing the "expansive nature of vicarious liability law" as a potential avenue of prosecutorial abuse).

48. *See A Mammoth Guilt Trip*, ECONOMIST (Aug. 28, 2014), http://www.economist.com/news/briefing/21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt [https://perma.cc/M62T-EPD8] (observing that due to the high number of statutes carrying criminal penalties (300,000) and the cost of compliance, "even the most diligent company may not escape censure"). Indeed, Larry Thompson, a former deputy attorney general, has said that "[n]o matter how gold-plated your corporate compliance efforts, no matter how upstanding your workforce, no matter how hard one tries, large corporations today are walking targets for criminal liability." *Id.*

49. As Reilly writes: "The ultimate negotiation between prosecutor and accused can sometimes be unfair to the point where any 'bargaining' taking place is merely illusory. This is because, in many instances, the government has too much power, too much leverage, and too much discretion in presenting, negotiating, and implementing DPAs and NPAs. Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 349 (2014); *see also* Ainslie, *supra* note 37, at 107–09 (observing that corporations face overwhelming pressure to cut deals due to the corporate death penalty); Griffin, *supra* note 41, at 327–30 (2007) ("Because virtually no company will risk indictment, prosecutors have come to expect compliance with every government demand."); Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312 (2007), http://yalelawjournal.org/forum/the-organizational-guidelines-rip [https://perma.cc/MU5L-PKCV] ("Few companies are willing to risk an indictment, much less a criminal trial And alternatives do exist: deferred and non-prosecution agreements offer corporations the chance to avoid an indictment altogether."); Paulsen, *supra* note 45, at 1457 ("Since corporations cannot run the risk of going to trial, their choice to accept a deferred prosecution agreement is not really a choice at all.").

50. Greenblum, *supra* note 44, at 1889–90; *see also id.* at 1889 (observing that "prosecutors could potentially impose excessive monetary sanctions against corporate deferees' because the sentencing guidelines do not bind prosecutors in setting the terms of corporate N/DPAs).

51. Garrett, *supra* note 20, at 855. Through structural reform provisions, prosecutors effectively take over core corporate management functions. *Id.* This can be disastrous. Prosecutors

unrelated to the accused wrongdoing.[52] Resolving cases though N/DPA contributes to a 'legal fog' surrounding corporate legal obligations because cases do not go to trial and judges do not write opinions.[53] As a result of this,

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lack business experience and may inadvertently harm shareholder interests. *Id.*; *see also* Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62, 63 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (arguing that prosecutors lack both the experience in business and the industry-specific knowledge to make reliable decisions). *But see* Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.* 43 AM. CRIM. L. REV. 1043, 1043–44, 1052–53 (2006) (arguing that a specific example of a structural reform provision helped enhance corporate accountability).

52. John C. Coffee, Jr., *Deferred Prosecution: Has it Gone Too Far?*, NAT'L L.J. July 25, 2005, at 13, 13. In recent years, the DOJ has significantly cut back on the type of conditions that can be imposed on corporations under DPAs. For a time, federal prosecutors could and did impose obligations upon corporations unrelated to the accused wrongdoing. *See* Greenblum, *supra* note 44, at 1893–94 (documenting a particularly flagrant imposition of unrelated obligations by the DOJ). In an egregious example of prosecutorial abuse, "Bristol Myers-Squibb was required to endow a chair in business ethics at Seton Hall University Law School, the U.S. Attorney's alma mater, while Operations Management International contributed one million dollars to endow a chair in environmental studies at the U.S. Coast Guard Academy." F. Joseph Warin & Andrew S. Boutros, *Response: Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 121, 124 (2007). In addition to unrelated conditions, the DOJ imposed self-limitations on the use of attorney–client and work product waivers. Memorandum from Mark Filip, Deputy Attorney Gen., on the Principles of Federal Prosecution of Business Organizations, to the Heads of Dep't Components U.S. Attorneys 8 (Aug. 28, 2008); U.S. ATTYS' MANUAL, *supra* note 17, at 9-28.1500(b) ("[C]ooperation is not measured by the waiver of attorney-client privilege and work product protection, but rather is measured, as a threshold issue, by the disclosure of facts about individual misconduct, as well as other considerations identified herein "). But concerns still linger. *See* Rachel Delaney, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, 93 MARQ. L. REV. 875, 903–04 (2009) (advocating legislation because DOJ guidelines can be changed and do not provide corporations with legal remedies).

53. *A Mammoth Guilt Trip*, *supra* note 48; *see also The Criminalisation of American Business*, *supra* note 37 ("Since the cases never go to court, precedent is not established, so it is unclear what exactly is illegal. That enables future shakedowns, but hurts the rule of law and imposes enormous costs."). Reilly writes in the context of the Foreign Corrupt Practices Act (FCPA):

> The primary way jurisprudence (meaning precedents, legal opinions, and foundational principles and theories pursuant to a particular statute or area of the law) is developed is through litigation trials, jury verdicts, and appellate court decisions. That is not happening with the FCPA because cases are generally not going to trial but are instead being resolved mostly through DPAs and NPAs.

Reilly, *supra* note 49, at 358. As Garrett notes in the broader context:

> Scholars have observed that courts rarely ensure that underlying substantive criminal statutes are interpreted narrowly or that vagueness is eliminated, in part due to separation of powers deference. Congress continues to pass an increasing number of broad, ill-defined statutes. Where courts do not narrow the meaning of such statutes, prosecutors fix their meaning in practice, so that in effect the legislature has delegated common law crime-making authority to prosecutors.

Garrett, *supra* note 20, at 933–34 (footnotes omitted).

federal prosecutors have been able to attain large concessions from corporations for conduct that no court has held to be a violation of law.[54]

Further, once an N/DPA is formed, the corporation's troubles do not end. Once the corporation has spilled the beans and can no longer plausibly proclaim their innocence, prosecutors have incredible leverage to demand fundamental changes to the corporation.[55] This power is the 'sword of Damocles' above the corporation's head.[56] In most N/DPAs, the prosecutor will have the power to unilaterally declare breach of the deal, making their interpretation of the conditions final.[57]

2. The Leniency Critique.—Another groups of critics has argued that prosecutors' unreviewable discretion when shaping corporate N/DPAs has allowed them to be far too lenient to corporations. These critics accuse federal prosecutors of being swayed by the power of corporations.[58]

This group balks at sweetheart deals following massive corporate wrongdoing. They typically claim that the negotiated fines are too small for the scale of the corporation's malfeasance, the conditions are too weak for the massive task of reforming corporate culture, or culpable individuals are allowed to walk away. For example, HSBC, a massive international bank that was involved in 'nearly a trillion dollars' worth of money laundering, much of it from drug trafficking,'[59] entered into a DPA in 2012 where it

54. *See* Bharara, *supra* note 47, at 73–75 (analyzing the externalities that implicate legal rules with respect to corporations). Such a state of affairs has its roots in the mismatch between manager incentives and shareholder interest. *The Criminalisation of American Business*, *supra* note 37 ("For their managers, the threat of personal criminal charges is career-ending ruin. Unsurprisingly, it is easier to empty their shareholders' wallets. To anyone who asks, 'Surely these big firms wouldn't pay out if they knew they were innocent?' the answer is: oddly enough, they might.").

55. *See* Greenblum, *supra* note 44, at 1884–85 (describing the strength of prosecutors' power once corporations sign a deferral agreement).

56. *Id.* at 1884.

57. *Id.*

58. *See* BRANDON L. GARRETT, TOO BIG TO JAIL 1 (2014) (referring to a corporate prosecution as a battle between David and Goliath where the United States is David). Russell Mokhiber, Editor, Corp. Crime Reporter, Address at the National Press Club, Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements (Dec. 28, 2005), http://www.corporatecrimereporter.com/deferredreport.htm [https://perma.cc/MK3J-T5SC] (arguing that DPAs lack the same stigmatic effect that accompanies a conviction and thus cannot attain the same deterrence value); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ [https://perma.cc/6ZQ3-2CUS]. *But see* Henning, *supra* note 49 (arguing that N/DPAs, despite being largely nonpunitive in nature, can reform corporate culture by reducing the risk of corporate crime without causing severe business consequences for the company); Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 451–52 (2010) (defending the expansion of NPAs and DPAs on the ground that they elicit cooperation by corporations and lower the cost of investigation for the government).

59. Uhlmann, *supra* note 33.

agreed to pay 'about $1.9 billion and beef up its compliance measures.'[60] Other examples of perceived leniency abound: the DPA with JPMorgan Chase over its role in the Madoff Ponzi scheme;[61] an NPA with Massey, the owner of a mine who concealed over 300 safety violations from government inspectors, resulting in a mine disaster in 2010 which left twenty-nine dead;[62] a $667 million DPA with Standard Chartered Bank, a London-based conglomerate accused of hiding 60,000 secret transactions in Iranian funds worth $250 billion;[63] and a $900 million DPA with General Motors regarding its failure to disclose conduct which "affirmatively misled consumers' about a 'potentially lethal safety defect' where no individuals were criminally charged.[64] For these critics, these deals demonstrate that federal prosecutors will avoid sparring with large corporations.[65] The fact that 'not a single high-level executive has been successfully prosecuted in connection with the recent financial crisis' further suggests that the DOJ isn't putting the screws to the worst offenders.[66]

These commentators argue that the DOJ should let civil enforcers cope with the small fish. This would free up resources to pursue convictions against truly egregious violators.[67] Animating this critique is a concern that N/DPAs lack the same stigmatic effect that accompanies a conviction and thus cannot attain the same deterrence value.[68] The N/DPA 'middle ground' should be abandoned, and prosecutors should only seek conviction or decline

60. Peter J. Henning, *In Bank Settlements, Fines but No Accountability*, N.Y. TIMES: DEALBOOK (Dec. 12, 2012), http://dealbook.nytimes.com/2012/12/12/in-bank-settlements-big-fines-but-no-accountability [https://perma.cc/NL35-L5T7].

61. Uhlmann, *supra* note 33.

62. *Id.*

63. Kristie Xian, Note, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 631, 631–33 (2014).

64. General Motors Company—Deferred Prosecution Agreement, No. 1:15-cv-07342 (S.D.N.Y.), ECF No. 1-1 at 3, 34–35.

65. *See, e.g.*, David M. Uhlmann, *Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1324 (2013) (arguing that the DOJ "nearly always fares at least as well as it would have with a corporate prosecution and without investing the investigative, prosecutorial, or judicial resources that might be needed in a corporate prosecution").

66. Rakoff, *supra* note 58.

67. *See* Uhlmann, *supra* note 65, at 1343 (arguing that '[i]f a particular violation does not warrant criminal enforcement . . . the government can and should use civil or administrative enforcement to impose penalties and any corrective actions").

68. *Id.* at 1302; Mokhiber, *supra* note 58. *But see* Larry A. Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Address at the New York City Bar Association (Sept. 13, 2002), https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association [https://perma.cc/764R-YGTY] (arguing that "a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea"); Christie & Hanna, *supra* note 51, at 1043, 1059 (arguing that N/DPAs have deterrence value because they give prosecutors options unavailable in criminal prosecutions).

to prosecute.[69] A key part of this critique rests on new empirical evidence that the corporate death penalty is, in fact, a myth.[70] In the absence of severe collateral consequences, the benefits of N/DPAs can be acquired through convictions to secure corporate-compliance programs.[71]

3. Proposals for N/DPA Reform.—Corporate N/DPAs are under attack from multiple directions, but existing statutes do not allow courts to reign in alleged abuses. Despite disagreements over the goals of reform, both sides do find some common ground—that the Judiciary should have more than a pro forma role in negotiation and implementation of N/DPAs.[72]

Congress has looked into modifying the Speedy Trial Act to expand judicial review of N/DPAs.[73] The proposed Accountability in Deferred Prosecution Act (ADPA) of 2014 included a provision that required judicial approval of N/DPAs.[74] The ADPA requires the Attorney General to promulgate public guidelines delineating when federal prosecutors should enter into N/DPAs with corporate entities.[75] Those guidelines direct prosecutors on a variety of areas: whether an independent monitor is warranted, what terms and conditions are appropriate, which methods for

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69. *See* Uhlmann, *supra* note 65, at 1302 (asserting that N/DPAs may only be necessary for "less serious violations where there are no civil or administrative remedies or perhaps in the rare situation where prosecutors can demonstrate that a criminal conviction would cause unacceptable harm to innocent third parties").

70. Markoff, *supra* note 37, at 827. But see Ainslie, *supra* note 37, at 117–19, for a defense of the corporate death penalty theory.

71. Markoff, *supra* note 37, at 830.

72. *See e.g.*, Court E. Golumbic & Albert D. Lichy, *The 'Too Big to Jail' Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1342–44 (2014) (defending meaningful judicial review as a means to avoid the perception that some companies are "too big to jail"); Greenblum, *supra* note 44, at 1901 (noting that judicial involvement can protect "parties whose interests may be unnecessarily compromised by the prosecutor's unilateral imposition of the deferral terms"); Alex B. Heller, *Corporate Death Penalty: Prosecutorial Discretion and the Indictment of SAC Capital*, 22 GEO. MASON L. REV. 763, 798 (2015) (arguing that judicial review can help alleviate prosecutor's "abuse of leverage and undue pressure"); Reilly, *supra* note 49, at 392 (advocating judicial review as a remedy for unbalanced negotiation leverage and as a means to protect employee and shareholder interests). But not all commentators believe that judicial review is necessary or wise. Uhlmann advocates that the DOJ should engage in internal reforms of its DPA decision-making process. Uhlmann, *supra* note 65, at 1341. Bharara argues that attempts to restrict prosecutorial discretion are fruitless; prosecutors will simply find new, creative ways to avoid judicial oversight. Bharara, *supra* note 47, at 56. Rather than attempt to restrict prosecutorial discretion, he advocates changing the underlying substantive law to make attachment of corporate criminal liability more difficult. *Id.* at 113. Bourjaily advocates wholesale abolition of corporate DPAs. Gordon Bourjaily, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. LEGIS. 543, 544 (2015).

73. Bills have been proposed before multiple Congresses. Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. § 7 (2014); Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. § 7 (2009); Accountability in Deferred Prosecution Act 2008, H.R. 6492, 110th Cong. § 7 (2008).

74. H.R. 4540 § 7(a).

75. *Id.* § 4(a).

determining breach are appropriate, how long should the agreement last, and what constitutes cooperation.[76] N/DPAs would only be approved by a court if they are 'consistent with the guidelines for such agreements and in the interests of justice.'[77]

This proposed reform raises a key question: Can Congress authorize judicial review of corporate N/DPAs without running afoul of the Executive's constitutional authority regarding nonprosecution? Some do not think so.[78] I disagree. But before I dive into that question, I review existing case law addressing judicial review of corporate DPAs under the Speedy Trial Act.

II. Existing Case Law on Judicial Review of Corporate DPAs

District courts rarely reject or modify proposed DPAs.[79] They typically approve of the DPA without any published ruling.[80] This section discusses three cases where the district court took a more active role in reviewing the proposed DPA. It also discusses in depth the D.C. Circuit opinion in *Fokker Services*. There, the appellate court rebuked the district court's expansive understanding of its role under the Speedy Trial Act.

A. United States v. Fokker Services B.V *(D.D.C.)*

Fokker Services, a Dutch aerospace services provider, found itself in some hot water when the U.S. government discovered it was exporting American aircraft parts, technology, and services to the Iranian military.[81] From 2005 to 2010, Fokker Services sent aircraft from its Iranian, Sudanese, and Burmese customers to the United States for service and repair.[82] U.S. sanctions on these three countries prohibits this sort of transaction without preapproval.[83] Fokker Services exports were not preapproved.[84] Instead, to avoid detection, Fokker Services concealed its customers' affiliation with sanctioned countries from the U.S. government and U.S. businesses.[85]

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76. *Id.* § 4(b).

77. *Id.* § 7(a).

78. Michael Patrick Wilt, *Who Watches the Watchmen? Accountability in Federal Corporate Criminal Prosecution Agreements*, 43 AM. J. CRIM. L. 61, 68 (2015) ("The lack of an effective judicial oversight system is a serious problem with the current prosecution agreement method. Judicial oversight is unlikely to occur without a congressional law requiring the DOJ to submit its agreements for judicial review. However, whether such a law would even be constitutional is an open question." (footnote omitted)).

79. Reilly, *supra* note 49, at 393.

80. Garrett, *supra* note 20, at 922.

81. United States v. Fokker Servs. B.V. 79 F. Supp. 3d 160 (D.D.C. 2015), *rev'd*, 818 F.3d 733 (D.C. Cir. 2016).

82. *Id.* at 162 & n.2.

83. *Id.* at 161–62.

84. *Id.* at 162.

85. *Id.*

Fokker Services' management was aware of U.S. export laws and its own subterfuge, yet it continued the illegal dealings.[86]

But in 2010, Fokker Services changed its ways. It disclosed its transactions to U.S. regulators, hired an outside law firm to conduct internal investigations, and began to cooperate with U.S. law enforcement and regulatory authorities.[87] It stopped servicing sanctioned-country customers' aircraft to the extent such services violated U.S. law.[88] It fired its president, demoted other personnel, and trained its employees in U.S. export-control laws.[89] It adopted a new compliance program and changed its service contracts to indicate that it will not engage in any exportation or re-exportation in violation of U.S. law.[90] Finally, it cut ties with banks in the sanctioned countries and closed its Iranian office.[91]

In 2014, the U.S. government filed an information, charging Fokker Services with conspiracy to unlawfully export U.S.-origin goods and services to Iran, Sudan, and Burma.[92] On the same day, the government filed a DPA with the court.[93] In the DPA, Fokker Services agreed to admit responsibility, pay $10.5 million, cooperate with U.S. authorities, continue its new compliance program, and comply with U.S. export laws.[94] The U.S. agreed to not prosecute Fokker Services, and, after eighteen months, dismiss its charges.[95] Finally, the government moved to exclude time under the Speedy Trial Act.[96]

The district court denied the motion.[97] The court, quoting the Speedy Trial Act, concluded that § 3161(h)(2)'s "plain language' calls for court approval before granting a motion to exclude time.[98] Section 3161(h)(2) excludes '[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, *with the approval of the court*, for the purpose of allowing the defendant to demonstrate his good conduct. [99] Judge Leon then set about determining when a district court should withhold approval.[100]

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86. *Id.* at 162–63.
87. *Id.* at 163.
88. *Id.*
89. *Id.*
90. *Id.* at 163–64.
91. *Id.* at 164.
92. *Id.* at 161.
93. *Id.* at 163.
94. *Id.* at 164.
95. *Id.*
96. *Id.* at 163.
97. *Id.* at 161.
98. *Id.* at 164.
99. 18 U.S.C. § 3161(h)(2) (2012) (emphasis added).
100. *Fokker Servs. B.V.* 79 F. Supp. 3d at 164.

The court settled on an analysis heavily reliant on the doctrine of supervisory power.[101] Federal judges possess supervisory power 'to protect the integrity of the judicial process.'[102] Pursuant to its supervisory power, the court has not only the authority but the 'responsibility' to deny 'legal redress in appropriate situations in order to maintain respect for the law and private confidence in the administration of justice.'[103]

The parties' proposed DPA implicated the 'integrity of the judicial process' in two ways. First, through their motion to exclude time, the parties were effectively asking for the court's blessing of the DPA.[104] Second, by leaving the charges on the court's docket, the court would be serving 'as the leverage over the head of the company.'[105]

Tailoring his supervisory-power analysis to the situation at hand, Judge Leon acknowledged the Executive's plenary authority to refuse to prosecute a case and to dismiss existing charges.[106] Indeed, he accepted that 'this Court would have no role here if the Government had chosen not to charge Fokker Services with any criminal conduct—even if such a decision was the result of a non-prosecution agreement.'[107] But Judge Leon nevertheless concluded that such plenary authority was not implicated in this case.[108] The government had charged Fokker Services.[109] The charges were still on the court's docket, and would remain there for at least eighteen months.[110]

Having considered the government's plenary-authority argument, the court turned to whether approving the DPA would compromise the 'integrity of the judicial process.' Judge Leon found the proposed penalties and conditions anemic relative to Fokker Services' wrongdoing.[111] Fokker Services would only pay $10.5 million in fines even though it collected $21 million in revenue from its illegal transactions.[112] No employees would be prosecuted, and many employees involved in the illegal transactions would keep their jobs.[113] No independent monitor would be installed and no periodic reports would be required after the eighteen-month period.[114]

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101. *Id.* at 165.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 167.
112. *Id.* at 166.
113. *Id.*
114. *Id.*

This was beyond the pale for Judge Leon. Given the length of Fokker Services' wrongdoing and the fact that their conduct was for the benefit of 'one of our country's worst enemies, Judge Leon refused to lend his judicial imprimatur to the DPA.[115] He concluded that doing so would 'undermine the public's confidence in the administration of justice and promote disrespect for the law.'[116]

B. United States v. Fokker Services B.V *(D.C. Cir.)*

The government petitioned for a writ of mandamus, seeking vacatur of the district court's denial of the motion to exclude time.[117] The D.C. Circuit granted the requested relief.[118] Judge Srinivasan, writing for the court, concluded that the Speedy Trial Act's 'with the approval of the court' language did not grant to the district court the authority to withhold approval based on who the government charges and what they are charged with.[119]

The court began its construction of the Speedy Trial Act by looking to the Constitution. It observed that the 'Executive's primacy in criminal charging decisions is long settled.'[120] To support this, it cited three sources of the Executive's power in this domain: the text of Article II,[121] separation-of-powers principles,[122] and prudential considerations.[123] The court did not precisely state which of these sources gives rise to the Executive's power to negotiate and enter into DPAs. Rather, it concluded that these settled principles broadly 'counsel against interpreting statutes and rules in a manner that would impinge on the Executive's constitutionally rooted primacy over criminal charging decisions.'[124]

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115. *Id.* at 167.

116. *Id.*

117. United States v. Fokker Servs. B.V. 818 F.3d 733, 738 (D.C. Cir. 2016).

118. *Id.*

119. *Id.*

120. *Id.* at 741.

121. *Id.* ("That authority stems from the Constitution's delegation of 'take Care' duties, and the pardon power to the Executive Branch.' (citations omitted)).

122. *See id.* ("Decisions to initiate charges, or to dismiss charges once brought, 'lie[ ] at the core of the Executive's duty to see to the faithful execution of the laws. (quoting Cmty. for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986))). The Court also cited *In re Aiken County*, a decision that expressly cites separation-of-powers as one of the origins of the Executive's nonprosecution discretion. 725 F.3d 255, 264 (D.C. Cir. 2013) ("The Executive's broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution's separation of powers.").

123. *Fokker Servs. B.V.* 818 F.3d at 741. ("The decision whether to prosecute turns on factors such as 'the strength of the case, the prosecution's general deterrence value, the [g]overnment's enforcement priorities, and the case's relationship to the [g]overnment's overall enforcement plan. The Executive routinely undertakes those assessments and is well equipped to do so. By contrast, the Judiciary, as the Supreme Court has explained, generally is not 'competent to undertake' that sort of inquiry.' (citations omitted)).

124. *Id.* at 742.

Next, the court analyzed a rule and a statute containing analogous language to the Speedy Trial Act's 'with the approval of the court' clause.[125] The D.C. Circuit had previously interpreted both narrowly to avoid impinging the Executive's constitutional authority.[126]

The court first examined Rule 48(a) of the Federal Rules of Criminal Procedure. The rule requires a prosecutor to obtain 'leave of court' before dismissing charges against a criminal defendant.[127] A broad reading of the rule would allow a court to deny leave based on its assessment that the defendant should stand trial or that the remaining charges fail to address the gravity of the wrongdoing.[128] The Supreme Court has rejected this reading.[129] Rather, it has held that approval should be withheld only to protect the defendant from prosecutorial harassment—i.e. when the '[g]overnment moves to dismiss an indictment over the defendant's objection.'[130]

The court then turned to the Tunney Act. The Tunney Act, which directs district courts to enter a proposed antitrust consent decree if it is 'in the public interest,'[131] has been interpreted narrowly.[132] Again, driven by concerns that an expansive understanding of the court's power would raise constitutional questions, courts have narrowed the scope of district courts' power to review consent decrees.[133]

In sum, the court concluded that if "leave of court' and 'public interest' should be interpreted narrowly to avoid letting courts second-guess charging decisions, then so should the Speedy Trial Act's "with the approval of the court' language.[134]

The court then proceeded to its major move—characterizing DPAs as charging decisions.[135] To establish this, the court analogized DPAs to the paradigmatic charging decision—decisions to dismiss charges.[136] It observed two similarities. First, like decisions to dismiss charges, 'the decision to seek dismissal pursuant to a DPA ultimately stems from a conclusion that additional prosecution or punishment would not serve the public interest.'[137] Second, the same prudential considerations surrounding 'the prosecution's initiation and dismissal of charges equally applies to review of the

125. *Id.*
126. *Id.*
127. FED. R. CRIM. P. 48(a).
128. *Fokker Servs. B.V.* 818 F.3d at 742.
129. *Id.*
130. *Id.* (quoting Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977)).
131. *Id.* (quoting 15 U.S.C. § 16(e) (2012)).
132. *Id.* at 742–43.
133. *Id.* at 743.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*

prosecution's decision to pursue a DPA and the choices reflected in the agreement's terms.'[138] 'As with conventional charging decisions, a DPA's provisions manifest the Executive's consideration of factors such as the strength of the government's evidence, the deterrence value of a prosecution, and the enforcement priorities of an agency, subjects that are ill-suited to substantial judicial oversight.'[139]

The court then analyzed the Speedy Trial Act's text and history to determine whether either dictates a contrary conclusion. Neither did.[140] The text of § 3161(h)(2) ties the language of "approval of the court' to the DPA's 'purpose of allowing the defendant to demonstrate his good conduct.'[141] The legislation's history corroborates this interpretation.[142] Accordingly, the district court's focus should be on whether the DPA is geared toward establishing compliance with the law and is not merely a pretext to evade the Speedy Trial Act's time constraints.[143]

The court then turned to the argument that district courts have the same leeway to review DPAs as they do over proposed plea agreements under Rule 11 of the Federal Rules of Criminal Procedure. The court rejected this argument.[144] In doing so, it relied upon a distinction between charging power and sentencing power.[145] Under Rule 11, district courts retain some discretion to review proposed plea deals.[146] This discretion is not unfettered. A court may not reject a plea deal based on a mere disagreement with a prosecutor's underlying charging decisions.[147] But district courts do retain the authority to reject deals because they are too harsh or too lenient.[148] Judges may review plea bargains because plea bargains implicate sentencing

138. *Id.* at 744 (internal citations omitted).

139. *Id.*

140. *Id.* at 744–45.

141. *Id.* at 744 (quoting 18 U.S.C. § 3161(h)(2) (2012)).

142. *Id.* at 745.

143. *Id.* at 744.

144. *Id.* at 745.

145. *Id.* at 746.

146. *Id.* at 745.

147. *Id.* (citing United States v. Maddox, 48 F.3d 555, 556 (D.C. Cir. 1995), and United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973)).

148. *See Ammidown*, 497 F.2d at 622 ("The requirement of judicial approval entitles the judge to obtain and evaluate the prosecutor's reasons. That much, indeed, was proposed by the Advisory Committee, and the Supreme Court's amendment obviously did not curtail the proposed authority of the judge. The judge may withhold approval if he finds that the prosecutor has failed to give consideration to factors that must be given consideration in the public interest, factors such as the deterrent aspects of the criminal law. However, trial judges are not free to withhold approval of guilty pleas on this basis merely because their conception of the public interest differs from that of the prosecuting attorney. The question is not what the judge would do if he were the prosecuting attorney, but whether he can say that the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion.").

power.[149] The parties enter the plea bargain so that the court can exercise its coercive power over the defendant—by entering a judgment of conviction and sentencing him or her.[150] In contrast, DPAs do not implicate the court's sentencing powers.[151] The judge takes no formal judicial action imposing or adopting the DPA's terms, and the district court enters no judgment of conviction.[152] DPAs do not implicate sentencing power, and therefore judges may not review them.[153]

Finally, the D.C. Circuit concluded that the district court improperly reviewed the DPA for whether it brought charges against the right people or sought the right remedies.[154] Rather, "the court should have confined its inquiry to examining whether the DPA served the purpose of allowing Fokker to demonstrate its good conduct."[155]

* * *

Turning away from the Fokker Services saga, two other district courts have considered the breadth of district courts' authority under the Speedy Trial Act to review the terms of DPAs. Both have held that the Speedy Trial Act affords the Judiciary a larger role than the D.C. Circuit found in *Fokker Services*. But in neither case did the district court withhold approval of the DPA. I address both below.

C. United States v. Saena Tech Corp.[156]

In *United States v. Saena Tech Corp.* the district court considered and ultimately approved two DPAs—one for Saena Tech and another for Intelligent Decisions.[157] Both companies were charged with public bribery.[158] Both DPAs deferred prosecution for two years in exchange for payment of fines and enactment of compliance measures.[159] The government did not seek criminal prosecution of any employees based on Saena Tech's bribery.[160] In contrast, the government charged and obtained guilty pleas

149. *See Fokker Servs. B.V.* 818 F.3d at 746.
150. *See id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 747.
156. 140 F. Supp. 3d 11 (D.D.C. 2015).
157. *Id.* at 13.
158. *Id.* at 14.
159. *Id.*
160. *Id.*

from two employees of Intelligent Decisions in connection with the crime covered by the DPA.[161]

Judge Sullivan first considered the legislative history of § 3161(h)(2).[162] He concluded that '[t]he legislative history demonstrates that Court involvement in the deferral of a prosecution was specifically intended by Congress when it passed this legislation.'[163]

The court then observed that its interpretation of the Speedy Trial Act must account for the Executive's primacy in charging decisions.[164] The court recognized three sources of this primacy: text,[165] structure,[166] and prudence.[167]

Returning to § 3161(h)(2), the court concluded that "its authority under the Speedy Trial Act is limited to assessing whether the agreement is truly about diversion"—i.e. whether 'the agreement is intended to hold prosecution in abeyance while a defendant demonstrates good conduct.'[168] The court rejected the amicus's argument that 'the Court should fashion its own standards for approving or rejecting an agreement on a case-by-case basis, looking to standards provided for court oversight of other types of agreements.'[169] Nevertheless, the court emphasized the agreement's 'fairness and adequacy' is still relevant under this limited standard.[170] The court hypothesized that an agreement void of any punitive or deterrence-based measures could not be designed to reform the defendant and accordingly should be rejected.[171] A DPA which contained only "vague' or "sham' conditions would face a similar fate.[172]

Considering the two DPAs before it, the court found that both contained "most of the hallmarks of an agreement that is designed to reform a

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161. *Id.*

162. *Id.* at 22–23.

163. *Id.* at 25.

164. *Id.* at 27.

165. *Id.* at 28 ("Not only is the Judicial Branch ill-suited to review prosecutorial decisions—given the complex factors involved—but judicial intervention would also undermine the Executive Branch's ability to 'take Care that the Laws be faithfully executed. (quoting U.S. CONST. art. II, § 3)).

166. *Id.* at 27 ("Review of a Deferred-Prosecution Agreement Must Recognize the Expertise of Prosecutors and the *Separation-of-Powers* Concerns Inherent in Judicial Review of Charging Decisions. (emphasis added)); *id.* at 28 ("Furthermore, 'a district judge must be careful not to exceed his or her constitutional role. The judiciary is separated from the prosecutorial function 'keep[ing] the courts as neutral arbiters in the criminal law generally. 'When a judge assumes the power to prosecute, the number [of branches] shrinks to two.' (internal citations omitted)).

167. *Id.* at 28 ("[T]he decision to prosecute is 'particularly ill-suited to judicial review. (quoting Wayte v. United States, 470 U.S. 598, 607 (1985))).

168. *Id.* at 30.

169. *Id.*

170. *Id.* at 31.

171. *Id.*

172. *Id.*

company's conduct. '[173] Both contained substantial fines.[174] Both included a corporate-compliance program.[175] The court was not perturbed by the lack of independent monitors given both companies' small size and their appointment of outside counsel to serve as monitor.[176] Accordingly, the court approved the government's motion for an exclusion of time.[177]

D. United States v. HSBC Bank USA[178]

In *United States v. HSBC Bank USA*, the district court reviewed and ultimately approved a proffered DPA.[179] But pursuant to the court's supervisory power, Judge Gleeson concluded that the court's approval was 'subject to a continued monitoring of [the DPA's] execution and implementation. '[180]

In 2012, the U.S. government charged HSBC Bank USA with violations of the Bank Secrecy Act.[181] HSBC had failed to implement an effective anti-money laundering program, allowing drug traffickers to launder at least $881 million in drug trafficking proceeds through the bank.[182] The information also charged HSBC Bank's holding company with willfully facilitating transactions that circumvented U.S. sanctions.[183] Along with the information, the government filed a DPA, a statement of facts outlining the HSBC defendants' wrongdoing, a corporate-compliance monitor agreement, and a letter requesting that the Court hold the case in abeyance for five years in accordance with the DPA and to exclude time under the Speedy Trial Act.[184]

The court observed the Judiciary's supervisory power exists for the court to ensure that it does not 'lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety. '[185] By filing the DPA with the court and requesting for a time extension, the parties 'asked the Court to lend precisely such a judicial imprimatur. '[186]

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173. *Id.* at 37.
174. *Id.* at 35–37.
175. *Id.*
176. *Id.*
177. *Id.* at 46–47.
178. No. 12–CR–763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).
179. *Id.* at *1.
180. *Id.* at *7.
181. *Id.* at *1.
182. *Id.* at *1, *8.
183. *Id.* at *1.
184. *Id.*
185. *Id.* at *6.
186. *Id.*

The Court then laid out both concrete and hypothetical examples of when it may be forced to intervene 'to protect the integrity of the Court"[187]· when corporate-cooperation requirements violate a company's attorney–client privilege and work-product protections, or its employees' Fifth or Sixth Amendment rights; when a remediation is an 'offer to fund an endowed chair at the United States Attorney's alma mater' or when a replacement monitor's 'only qualification for the position is that he or she is an intimate acquaintance of the prosecutor. '[188] Accordingly, to protect itself, the court directed the government to file quarterly reports for the five years that the case would remain pending.[189]

* * *

Having considered the existing case law addressing the Judiciary's authority to review DPAs, the stage is now set for me to defend my thesis.

III. Congress Can Constitutionally Subject Corporate N/DPAs to Meaningful Judicial Review

Meaningful judicial review of corporate N/DPAs is constitutionally permitted. Specifically, Congress could establish, or require the Attorney General to establish, judicially reviewable criteria that prosecutors must follow when determining whether to enter into a corporate N/DPA, the terms of a corporate N/DPA, and whether the corporation is complying with those terms. The rest of this Note defends this proposition.

Executive nonprosecution discretion emanates from three sources: (1) the text of Article II, (2) separation-of-powers principles, and (3) prudential considerations. In turn, the source of discretion determines how far Congress may go in regulating an executive decision before hitting the constitutional third rail. Textually grounded discretion is off limits. Prudentially derived discretion may be reined in if Congress makes its intent to do so clear. The proper analysis for separation-of-powers questions is sharply contested. Two modes of analysis exist: formalist or functionalist. I defend, in this context, a functionalist approach.

Using this tripartite configuration, I argue that prosecutors do not exercise authority constitutionally protected by the text of Article II when fashioning corporate N/DPAs. Rather, the discretion is largely a product of prudential considerations with a constitutional remainder informed by separation-of-powers principles. This constitutional remainder does not proscribe a statute like the ADPA. A statute like the ADPA would not

187. *Id.*
188. *Id.*
189. *Id.* at *1.

threaten the effective balance of power between the branches. In fact, such a statute would rebalance a system thrown off-kilter. Corporate N/DPAs allow the Executive to usurp core judicial functions—guilt adjudication and sentencing. Accordingly, judicial review is a necessary check on a system that now aggrandizes power in the Executive.

A functionalist approach to this particular separation-of-powers question is warranted.[190] A formalist separation-of-powers analysis in this context elevates form over substance. A formalist analysis turns on labels. The formalist would label all N/DPAs unreviewable 'charging decisions' simply because they look like decisions to decline prosecution or drop charges. This ignores the very nature of the decisions being made. For the corporate defendant, the phase when investigation is ongoing but before charges are brought is the guilt-adjudication and sentencing phase. The penalties just for getting hit with an indictment are so severe that few corporations can risk having their day in court. Due to this incredible trial penalty, many questions of corporate criminal law remain unsettled. Negotiations therefore do not operate against a backdrop of precedent that courts (and juries) had some role in shaping.

In short, reliance on a formalist approach flies in the face of separation-of-powers' purpose: stopping a single branch from being the sole arbiter of an entity's destiny. In fact, because corporate N/DPAs are negotiated against a backdrop the other branches have little role in shaping, the Executive has become the sole arbiter of an entire class's fate.

Before diving in, I must clarify the scope of my argument. I agree with the D.C. Circuit in *Fokker Services* that under the current statutory regime, Congress has not authorized meaningful judicial review of corporate DPAs. (The Speedy Trial Act does not reach NPAs.) The D.C. Circuit in *Fokker Services* correctly held that the Speedy Trial Act as it currently stands 'confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants.'[191] The court's interpretation correctly accounts for prudential considerations counseling against robust judicial review absent congressionally provided criteria. Resting its decision

190. This argument builds off of Rachel Barkow's influential article, *Separation of Powers and the Criminal Law*. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006). In it, Barkow argues for a formalist approach to separation of powers in the context of criminal law to preserve judicial authority. *Id.* at 994–97. I flip and reverse her argument. It is precisely because the Executive's invocation of nonprosecution discretion in the context of corporate DPAs has the effect of usurping judicial power over guilt and sentencing that a functionalist approach is needed.

191. United States v. Fokker Servs. B.V. 818 F.3d 733, 738 (D.C. Cir. 2016). Instead, according to the D.C. Circuit, courts should confine their "inquiry to examining whether the DPA served the purpose of allowing [the defendant] to demonstrate its good conduct" and should not consider whether the "prosecution ha[s] been unduly lenient in its charging decisions and in the conditions agreed to in the DPA. *Id.* at 747.

on its interpretation of the Speedy Trial Act, the D.C. Circuit did not answer the question of whether Congress had the power to authorize judicial review of N/DPA.

Congress has this power. But to exercise it, Congress must speak clearly.[192] A 'clear statement rule'—where the Executive's nonprosecution discretion would be circumscribed only if Congress expresses a clear intent—would give adequate weight to important prudential considerations that militate in favor of broad executive nonprosecution power.[193]

My argument in this section is divided into several subparts. In subpart III(A), I set forth the three origins of executive nonprosecution discretion—text, structure, and prudence. I then discuss the implications of determining the origin of a particular exercise of nonprosecution discretion. Finally, I argue that congressional authorization of meaningful judicial review of corporate N/DPAs implicates only separation-of-powers principles and prudential considerations. In subpart III(B), I argue that under a functionalist separation-of-power analysis, judicial review of corporate DPAs is constitutional. I then defend this functionalist approach. In subpart III(C), I reconcile my argument with extant case law.

A. The Origins of Executive Nonprosecution Discretion: Text, Structure, and Prudence

Courts and commentators have struggled to identify the origin of the Executive's nonprosecution discretion.[194] That is because there is not one origin but three: the text of Article II, separation-of-powers principles, and judicially constructed prudential doctrines.

1. Text.—Three clauses in the Constitution provide potential textual origins for executive nonprosecutorial discretion: the Take Care Clause,[195]

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192. *Cf.* United States v. Batchelder, 442 U.S. 114, 122 (1979) ("[T]he maxim that statutes should be construed to avoid constitutional questions is appropriate only when [an alternative interpretation] is fairly possible from the language of the statute." (internal quotations omitted)).

193. While clear statement rules are most commonly conceived of as a federalism-protecting canon of interpretation, they can also extend to other "traditionally sensitive areas." United States v. Bass, 404 U.S. 336, 349 (1971) (noting that "the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision").

194. *See* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 3 (2009) ("The origins of prosecutorial discretion in the federal criminal justice system are poorly understood.").

195. U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed "). While read most naturally as a duty, a compelling case can be made that the original meaning of the clause delegated a power to the Executive. *See* Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069, 1077–78 (1990) (duty). *But see* Delahunty & Yoo, *supra* note 13, at 800 n.104 (both duty and power).

the Vesting Clause,[196] and the Pardon Power Clause.[197] Tracking down and regurgitating the voluminous case law and commentary on these three clauses would be a daunting task and not particularly helpful for addressing my problem. While the Take Care Clause reads naturally as imposing a duty upon the President to enforce legislation to its full extent,[198] some commentators have argued that it should be read as a grant of power.[199] Maddeningly, key case law points in opposite directions over whether the Constitution's text renders executive nonenforcement decisions unreviewable.[200]

Cutting through the confusion, Professor Price aptly observes that the 'Constitution by its terms obligates the President to 'take Care that the Laws be faithfully executed. The real action concerns the other two origins—structure and prudence.[201] Still, 'courts confront very real practical and

196. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."). It remains unclear whether criminal prosecution is an "executive Power." *Compare* Morrison v. Olson, 487 U.S. 654, 704–05 (1988) (Scalia, J. dissenting) (positing that prosecutorial functions are the exclusive province of the Executive), *with* Dangel, *supra* note 195, at 1070 (arguing that prosecutorial functions were not traditionally within the exclusive province of the Executive).

197. U.S. CONST. art. II, § 2 ("The President shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."); *see generally In re* Aiken Cnty. 725 F.3d 255, 262 (D.C. Cir. 2013) (citing all three clauses as the sources of nonprosecution discretion).

198. Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 282 (1989).

199. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 539 (2005). In the context of the Vesting Clause, the Supreme Court has not clarified whether the Clause vests additional powers in the President, or whether it is purely redundant. *Compare* Myers v. United States, 272 U.S. 52, 117–18 (1926) (vests additional powers), *with* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952) (confers only powers enumerated in Article II).

200. Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1572 (2016).

201. As Price writes:

> [C]ourts confront very real practical and institutional challenges in ensuring faithful execution of prohibitory statutes by enforcement officials. To begin with, directly compelling an enforcement suit in any particular case would raise acute separation-of-powers concerns, as it would collapse the constitutional separation of judicial and executive power and compromise the court's neutrality in adjudicating the resulting lawsuit. Beyond this particular formal problem, moreover, insofar as enforcement officials must pick and choose between cases because they cannot do everything, courts will rarely have objective benchmarks for assessing whether enforcement agencies are focusing on the right priorities, or indeed whether they are genuinely doing their best at all. The upshot is that exercise of executive nonenforcement authority, like certain other core executive functions, is effectively a political question, in the peculiar sense of the "political question doctrine"—it is an area where institutional limitations on courts place a gap between what executive officials ideally should do and what courts will require from them.

Id. at 1573–74 (footnotes omitted).

institutional challenges in ensuring faithful execution of prohibitory statutes by enforcement officials."[202]

2. Structure.—Moving away from the Constitution's text, another potential source of nonprosecution discretion is the Constitution's structure—specifically, the separation-of-powers principles it espouses. While not expressly stated in the Constitution, the principle of separation of powers is impliedly established by the Constitution's creation of three separate branches of government—the Legislature, Executive, and Judiciary—each with distinct powers and duties. The founding generation viewed separation as an essential mechanism to protect liberty and as a crucial bulwark against tyranny.[203]

Strong textual and historical evidence exists that the framers intended all three branches to participate in the process of criminal prosecutions.[204] Congress must prospectively criminalize conduct,[205] the Executive must decide to prosecute,[206] and the Judiciary must agree to convict and sentence.[207] Forcing all three branches to participate lessens the risk that a single tyrannical branch can use the criminal law to eliminate its enemies or a disfavored local majority.

In the broader range of separation-of-powers cases, two main interpretive strategies exist—formalism and functionalism.[208]

Formalism is characterized by brightline rules.[209] The court first categorizes an action as an exercise of legislative, executive, or judicial

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202. *Id.* at 1573.

203. In his defense of the federal Constitution, James Madison wrote that the "accumulation of all powers, legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

204. Barkow, *supra* note 190, at 1017 ("Under the scheme established by the Constitution, each branch must agree before criminal power can be exercised against an individual.").

205. Federal judges are barred from creating their own crimes. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

206. Well actually, maybe not. Literature exists positing that "at the time of the Framing and for some time thereafter, state and *private* prosecutors initiated prosecutions, and prosecutors were often associated with the judicial branch." Barkow, *supra* note 190, at 1003 n.63 (emphasis added). But the literature also reflects that during the framing period, prosecutors retained absolute discretion over *nolle prosequi*, or the power to drop charges, even if they had been filed by another actor. Krent, *supra* note 198, at 296.

207. The Bill of Attainder Clause, the prohibition on ex post facto laws, and limits on Congress's authority to suspend the writ of habeas corpus all work as "express limits on the legislative exercise of judicial power." Barkow, *supra* note 190, at 1013. But also before conviction, a person is entitled to judicial process. U.S. CONST. art. III, § 2, cl. 3 (jury trial right); *id.* amend. VI, cl. 1 (speedy and public trial right).

208. Barkow, *supra* note 190, at 997. Aziz Huq and Jon Michaels have ably criticized the formalism–functionalism division in their recent article, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 355 (2016).

209. Barkow, *supra* note 190, at 997.

power.[210] The court then checks to see if the proper actor exercised the power.[211] Accordingly. a formalist would contend:

- Congress cannot delegate to itself the power of a one-house veto over an Attorney General's decision to allow a deportable alien to stay in the United States. Such a veto is an exercise of legislative power, and legislative power can only be exercised according to the bicameralism and presentment requirements of Article I.[212]
- Congress cannot delegate rulemaking authority to private parties no matter how carefully it specifies an intelligible principle. Article I assigns legislative authority to Congress, and private parties are not Congress.[213]
- Congress cannot give bankruptcy courts the power to decide all matters 'related to' a bankruptcy case. The adjudication of 'state-created private rights' is for Article III courts, and bankruptcy courts are not Article III courts.[214]
- Congress cannot recognize a foreign state because that is the 'exclusive prerogative of the Executive. '[215]

And so on.[216] No room in this analysis exists for considerations of whether the law in question promotes a 'workable government. '[217]

Functionalism, in contrast, is concerned with whether the arrived-at balance of power results in a workable government. It is characterized by standards and balancing. '[F]unctional analysis allows some mixing of power among the branches so long as one branch does not aggrandize its power at the expense of another or otherwise impede a branch from performing its core responsibilities. '[218] Accordingly, a functionalist would contend:

- Congress can insulate a special prosecutor from removal by the Attorney General absent good cause because doing so would

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210. *Id.*

211. *Id.*

212. INS v. Chadha, 462 U.S. 919, 959 (1983).

213. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); *see also* Dep't of Transp. v. Ass'n of Am. R.R.s. 135 S. Ct. 1225, 1237 (2015) (Alito, J. concurring) ("Congress 'cannot delegate regulatory authority to a private entity. ' (quoting Ass'n of Am. R.R.s. v. Dep't of Transp. 721 F.3d 666, 670 (D.C. Cir. 2013))).

214. N. Pipeline Constr. Co. v. Marathon Pipe Line Co. 458 U.S. 50, 65–76 (1982) (plurality opinion).

215. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2089, 2094 (2015).

216. *See* Clinton v. City of New York, 524 U.S. 417 (1998); Bowsher v. Synar, 478 U.S. 714 (1986); Barkow, *supra* note 190, at 998 (characterizing the majority opinions in *Bowsher* and *Clinton* as formalist).

217. Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc. 501 U.S. 252, 276 (1991).

218. Barkow, *supra* note 190, at 1000.

not sufficiently 'impede the President's ability to perform his constitutional duty.'[219]

- Congress can delegate authority to establish sentencing laws to an independent commission housed in the Judiciary.[220]

The functionalist focuses on the "practical consequences' of the delegation and not 'the label[] of an activity.'[221]

3. Prudence.—Finally, executive nonprosecution discretion may have prudential origins. Prudential considerations that favor broad discretion range from skepticism of the Judiciary's institutional competence,[222] concerns about chilling swift executive action,[223] and inertia from long-standing traditions of prosecutorial discretion.[224] These prudential reasons for not second-guessing the Executive give rise to a strong, but ultimately rebuttable, background presumption for interpreting statutes. Congress must speak clearly if it wishes to overcome these prudential doctrines.[225]

To summarize, here are the stakes involved in classifying the origin of a particular exercise of nonprosecution discretion: A nonprosecution decision authorized by the Constitution's text is absolutely immune from congressional encroachment (provided that an external restraint on nonprosecution discretion does not exist).[226] The constitutionality of a congressional regulation on nonprosecution discretion derived from separation-of-powers principles is assessed using either a formalist or

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219. Morrison v. Olson, 487 U.S. 654, 691 (1988).

220. *See* Barkow, *supra* note 190, at 1005–06.

221. Mistretta v. United States, 488 U.S. 361, 393 (1989).

222. The Supreme Court has observed that the decision to prosecute turns on factors such as "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan. Wayte v. United States, 470 U.S. 598, 607 (1985). The Executive routinely undertakes those assessments. *Id.* The Judiciary does not, and indeed '[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.' Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).

223. United States v. Armstrong, 517 U.S. 456, 465 (1996) (quoting *Wayte*, 470 U.S. at 607).

224. *See, e.g.*, United States v. Cox, 342 F.2d 167, 170–71 (5th Cir. 1965) (citing *nolle prosequi* as a long-standing tradition to justify interpreting a statute to preserve U.S. Attorneys' discretion to file and sign indictments).

225. *See, e.g.*, Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 381 (2d Cir. 1973) ("The mandatory nature of the word 'required' as it appears in [42 U.S.C.] § 1987 is insufficient to evince a broad Congressional purpose to bar exercise of executive discretion in the prosecution of federal civil rights crimes. Nor do we find the legislative history of § 1987 persuasive of an intent by Congress to depart so significantly from the normal assumption of executive discretion."); *cf.* Heckler v. Chaney, 470 U.S. 821, 831–33 (1985) (noting that the relative competence of agencies and courts gives rise to a rebuttable presumption that agency nonenforcement action is unreviewable).

226. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (suggesting that separate constitutional provisions restrain prosecutorial discretion); *see also Wayte*, 470 U.S. at 608 (holding that the Equal Protection Clause bars prosecution motivated by an improper discriminatory purpose).

functionalist analysis. Prudential doctrines may be overwhelmed if Congress speaks clearly enough. Courts use these prudential doctrines to infer congressional intent. If that intent is clear and points in the direction of eliminating executive discretion, the courts will follow Congress's command.

With this, I turn now to my main argument.

B. Judicial Review of Corporate DPAs Is Constitutional Under a Functionalist Separation-of-Power Analysis

This subsection presents two arguments: First, a functionalist approach to separation-of-powers disputes would afford Congress leeway in creating judicially reviewable criteria for the Executive to follow when crafting N/DPAs. Second, in this context, a functionalist approach is warranted.

The current use of N/DPAs by prosecutors, unchecked by congressionally authorized judicial review, threatens the framers' three-branch-participation model at both a granular and systemic level. Due to the broad criminal code and prosecutors' negotiation leverage, the use of N/DPAs means that corporate defendants only receive process from prosecutors.[227] For a corporation, the investigatory and negotiation phases, when the Executive calls the shots, are the guilt-adjudication and sentencing phases. That is the corporation's only meaningful opportunity to establish its innocence or plea for leniency. Corporations risk economic obliteration over an indictment, never mind conviction at trial.[228] In fact, the results of the overweening negotiation leverage are so perverse that corporations will sometimes accept an N/DPA that mandates restitution of an amount equivalent to or greater than a possible sentencing amount.[229]

This is not only harming particular corporations' liberty—it's creating systemic deficiencies. The incredible trial penalty and the drive to settle that it generates, means that questions of corporate criminal law remain unsettled.[230] Investigations over corporate wrongdoing and negotiations over correct penalties no longer operate against a backdrop of precedent that courts and juries had some role in shaping. Instead, past negotiated settlements serve as the precedent prosecutors and corporations rely upon. Federal prosecutors, as a result, can obtain N/DPAs from corporations for conduct that no court has held to be illegal.[231]

In sum, N/DPAs threaten to usurp the Judiciary's core functions—guilt adjudication and sentencing—not just on a defendant-by-defendant basis, but systemically. Looking at the other side of the balance of power,

227. *Cf.* Barkow, *supra* note 190, at 1024.
228. *See supra* note 46 and accompanying text.
229. *See supra* note 50 and accompanying text.
230. *See supra* note 53 and accompanying text.
231. *See supra* note 54 and accompanying text.

congressional authorization of judicial review would not meaningfully curtail executive involvement in corporate prosecutions. Federal prosecutors would retain their absolute discretion over whether to indict and what to charge. They would also retain key negotiating tools. They could negotiate plea bargains with corporations and continue using N/DPAs—subject to deferential review by federal judges. While judicial review may slightly blunt those tools, the core of executive nonprosecution discretion would not be compromised.

This is all well and good, but why use a functionalist approach here? Why not rely on Judge Srinivasan's categorization of DPAs as charging decisions? Recall that the court in *Fokker Services* labeled DPAs charging decisions due to their similarity with decisions to dismiss charges. According to the court, the two are similar in two ways: First, the decision to utilize a DPA, like a decision to dismiss charges, 'stems from a conclusion that additional prosecution or punishment would not serve the public interest. Second, the same prudential considerations counseling against judicial review of decisions to dismiss also counsel against judicial review of DPAs.[232]

This formalist approach relies heavily on the fit of its criteria. And therein lies the problem. The court's two criteria are overinclusive. They scoop up executive actions few would characterize as off limits from judicial review. Plea bargains, which historically have required judicial approval and implicate the Judiciary's sentencing powers, satisfy those same two criteria—they may stem from a prosecutor's desire to be lenient and raise similar competence concerns. Same goes for civil enforcement actions. The Supreme Court has indicated that judicial review of agency nonenforcement in the civil context may be permissible if Congress speaks clearly enough.[233] Yet that type of nonenforcement decision satisfies the same two criteria—agencies may decline to enforce based on the belief that leniency may serve the public interest, and courts may lack the competence to review such decisions.

But the formalist approach faces a larger problem here. The labeling approach generally does a good job at policing the borders between the branches. What it fails to do is rectify the problems that arise when one branch's exercise of its power renders another branch impotent. This is exactly the problem here—not the traditional problem that one branch is playing with another's toys. Instead, one branch is being shut out of the playpen altogether.

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232. *See supra* notes 135–39 and accompanying text.

233. *See* Heckler v. Chaney, 470 U.S. 821, 833 (1985) ("Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.").

Robust precedent exists for the use of a functionalist accommodation.[234] Take the rise of the administrative state. Following a battle with FDR and the democratic Congress, the Court eventually blessed the New Deal compromise between those concerned that the aggregation of power of the Executive would undermine liberty and those that wanted to promote government efficiency.[235] 'Instead of relying on separated powers as the primary means of protection against government abuse, those concerned with the tyrannical effect of concentrated power 'proposed other checks on state power, namely judicial review through the Administrative Procedure Act.[236] These checks allowed the blending of executive, judicial, and legislative power in regulatory agencies.[237] A similar compromise could be struck over N/DPAs.

C. Existing Case Law Is Consistent with My Thesis

A future court reviewing the constitutionality of the ADPA of 2020 may uphold the statute without overruling any major cases. In this section, I answer two arguments that could be raised against my thesis: First, that there is on-point case law precluding judicial review of all executive nonprosecution decisions. Second, that existing case law holds that executive nonprosecution discretion is at its zenith in all criminal cases.

The Court has not squarely held that the Executive retains plenary nonprosecution discretion in criminal cases. The case most frequently cited for this proposition, *United States v. Nixon*,[238] used broad but unnecessary language when describing nonprosecution discretion—"the Executive Branch has *exclusive* authority and *absolute* discretion to decide whether to

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234. Barkow appears to have foreshadowed the crux of my argument. She proposed that separation-of-powers questions in criminal cases could be viewed as similar to administrative law cases:

> Just as in the administrative law context, some blending of powers would be permitted to allow the federal government to respond more readily to criminal matters. At the same time, and again following the administrative law model, other checks should take the place of the constitutional separation of powers to ensure that the government does not abuse its power.

Barkow, *supra* note 190, at 992. Barkow, however, does not endorse this approach. She notes that Congress has not moved to put various "other checks" in place. Also, she notes that in the criminal context 'state power is at its apex and the consequences of abuse are so high—an individual could lose his or her liberty or even life"—such that efficiency concerns must give way. *Id.* Accordingly, this favors a strict formalist approach that sacrifices the efficiency gains from blending power in order to preserve liberty. I think this analysis is correct, but in the context of N/DPAs, the solution should be different. I agree that if legislation to rebalance power amongst the branches is not forthcoming, a functionalist compromise makes little sense. But in this Note I argue that such a functionalist compromise is appropriate where Congress authorizes the Judiciary to review N/DPAs.

235. *Id.* at 991.

236. *Id.*

237. *Id.*

238. 418 U.S. 683 (1974).

prosecute a case.'[239] The Court's ultimate holding—that the Executive could not decide what documents to disclose without first revoking regulations which delegated the power to pursue criminal convictions to the Special Prosecutor[240]—did not rely upon such an expansive conception of the criminal nonprosecution power. The Court, rather, assumed without deciding that the Executive retained absolute control over the decision to prosecute and nevertheless held that the Executive could not withhold documents from the Special Prosecutor without first changing executive regulations.[241]

The Court in *Nixon* supported its broad formulation of the Executive's nonprosecution discretion with two influential cases: The *Confiscation Cases*[242] and *United States v. Cox*.[243] Neither squarely holds that the criminal nonprosecution power is constitutionally grounded.

In the *Confiscation Cases*, the Court expressed the opinion that nonprosecution discretion may be restricted by Congress.[244] The Court went so far as to say that Congress could take away the power, including perhaps even the power of *nolle prosequi*—the power to drop criminal charges—through legislation.[245]

The Fifth Circuit in *Cox* did not squarely rule on the constitutional question. While the court did state that 'constitutional separation of powers' doctrine prevents interference by courts with the 'free exercise of the discretionary powers" by U.S. Attorneys "in their control over criminal prosecutions,'[246] the posture of this case (and many others like it) limits the potency of this language. In *Cox*, the court used separation of powers in a similar way as the D.C. Circuit in *Fokker Services*: as a mechanism of interpreting ambiguous congressional commands.[247] The Fifth Circuit interpreted the Federal Rules of Criminal Procedure to comport with such background principles and did not strike down a precise congressional

239. *Id.* at 693 (emphasis added).

240. *Id.* at 696.

241. *Id.*

242. 74 U.S. (7 Wall.) 454 (1868).

243. 342 F.2d 167 (5th Cir. 1965).

244. *Confiscation Cases*, 74 U.S. (7 Wall.) at 457 (holding that the district attorney's power not to prosecute can be limited by acts of Congress).

245. *Id.* ("Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is empanelled for the trial of the case, *except in cases where it is otherwise provided in some act of Congress*." (emphasis added)). This reading comports with a view of prosecutorial discretion as merely a product of the Judiciary Act of 1789. *See* Johnathan Keim, *Prosecutorial Discretion, Part One: Indisputably There, But Disputably from Where?*. NAT'L REV. (Aug. 26, 2014), http://www.nationalreview.com/bench-memos/386374/prosecutorial-discretion-part-one-indisputably-there-disputably-where-jonathan [https://perma.cc/CC3J-3TZA] (discussing the possible constitutional and statutory origins of prosecutorial discretion).

246. *Cox*, 342 F.2d at 171.

247. *Id.*

command for courts to review prosecutors' decisions.[248] The holding, therefore, cannot go so far as to state what the Constitution means, but rather what Congress meant when it promulgated the rule.

This raises an important point. Caution is called for before concluding that an interpretation of statute or rule is necessarily unconstitutional simply because a court has avoided it through the constitutional-doubt canon. The canon 'militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality.'[249] Indeed, almost every case that addresses executive nonprosecution and separation-of-power principles is interpreting a statute and not the Constitution.[250]

More importantly, the result in *Cox* is reconcilable with a functionalist approach to separation-of-powers. In *Cox*, the Fifth Circuit overturned the district court's holding that the grand jury could compel a U.S. Attorney to draft and sign an indictment.[251] Such an encroachment on executive nonprosecution discretion would be impermissible under a functionalist approach. Compelling the prosecutor to bring charges and try a case would eliminate the Executive's capacity to meaningfully participate in criminal prosecution.

Turning to the second argument, some precedent appears to indicate that executive nonprosecution discretion in the criminal context is plenary.[252] In contrast, the Supreme Court and lower courts are more willing to accept congressional intervention in executive nonprosecution discretion in the civil context than in the criminal context.[253] Courts uncritically assume that executive nonprosecutorial discretion over criminal cases is plenary and engage in a more flexible analysis for civil law cases. A court considering

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248. *Id.* at 172.

249. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247–48 (2012) (citing Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.")).

250. *See, e.g.*, United States v. Fokker Servs. B.V., 818 F.3d 733, 738 (D.C. Cir. 2016) (Speedy Trial Act); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 381 (2d Cir. 1973) (42 U.S.C. § 1987).

251. *Cox*, 342 F.2d at 170–71.

252. *See, e.g.*, *Fokker Servs. B.V.* 818 F.3d at 744 ("Executive independence is assumed to be even more pronounced in the context of criminal charging decisions than in the context of civil enforcement decisions.").

253. Heckler v. Chaney, 470 U.S. 821, 833 (1985) ("Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."); Dunlop v. Bachowski, 421 U.S. 560, 566–68 (1975) (holding as constitutional a congressional mandate of agency action if the Secretary of Labor finds probable cause of a violation that will likely impact the outcome of a union election); Cook v. FDA, 733 F.3d 1, 7–10 (D.C. Cir. 2013) (interpreting a statute to deny the FDA discretion to decline to initiate enforcement actions regarding the importation of certain drugs).

the constitutionality of a statute authorizing judicial review of corporate DPAs could distinguish past case law that appears to utilize criminal exceptionalism by observing that such statements in dicta do not apply to the 'upside-down world' of corporate DPAs.[254]

The force animating the apparent criminal–civil divide is not the building the government lawyer prosecuting the case works in. Rather, underlying the divide is a deep concern over physical-liberty preservation, a value corporate criminal prosecution definitionally does not threaten.

Executive nonprosecution discretion is at its zenith when it is used to protect physical-liberty interests, regardless of whether the matter arises in a criminal or administrative context. While judicial doctrine appears at first glance to comport with the criminal–administrative distinction, existing case law, history, and structure all indicate that the liberty–property distinction is correct. Courts have suggested in a variety of civil contexts that Congress may directly limit the agency's enforcement discretion. All these cases, however, arose in a context 'where the enforcement proceedings would not result in the deprivation of physical liberty.'[255] This bias in favor of physical-liberty protection is expressed by Due Process jurisprudence[256] and is recognized in numerous places in the Constitution where it erects hurdles and safeguards against government action that threatens a deprivation of physical liberty.[257]

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254. *Cf. Stranger Things: Chapter Eight: The Upside Down* (Netflix 2016). My argument builds upon Markowitz's forthcoming article, *Prosecutorial Discretion Power at its Zenith*. Markowitz argues that "[h]istorical practice, the constitutional text and structure, and participatory democratic theory" show that the Executive's nonprosecution discretion "is at its zenith when individuals' physical liberty is at stake." Markowitz, *supra* note 14 (manuscript at 5). Markowitz, like many other commentators, uses this argument to find the limits of executive nonprosecution discretion outside the criminal context. *Id.* (manuscript at 11–12, 46–48). He assumes that executive nonprosecution discretion in the criminal context is plenary. *Id.* (manuscript at 46). I've argued that because physical-liberty interests are not implicated by corporate prosecutions, nonprosecution in the corporate context should not be exclusively reserved to the Executive.

255. Markowitz, *supra* note 14 (manuscript at 51).

256. *See id.* (manuscript at 38) (observing that "while the Constitution secures many varieties of liberty, a review of the Due Process jurisprudence demonstrates that not all liberty interests receive the same level of protection. The Constitution reserves the greatest process protections for those at risk of losing their physical liberty."); *see also* Turner v. Rogers, 564 U.S. 431, 445 (2011) (characterizing the deprivation of physical liberty as "the core of the liberty protected by the Due Process Clause" (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)); Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion) (recognizing physical liberty as "the most elemental of liberty interests"); *In re* Winship, 397 U.S. 358, 363–64 (1970) (observing that physical liberty is an "interest of immense importance" and "transcending value").

257. *See* Markowitz, *supra* note 14 (manuscript at 40) (citing the Suspension Clause, the Bill of Attainder Clause, the Pardon Clause, and a "host of additional protections against unwarranted liberty deprivations in criminal proceedings' such as the right to grand jury, protection against double jeopardy, right against self-incrimination, right to a speedy trial, right to trial by jury, right to confront witnesses, and the right to counsel).

IV Conclusion

The only potential foothold for judicial review of DPAs, the Speedy Trial Act, has been correctly interpreted to lack much bite. That does not mean that meaningful judicial review of N/DPAs is constitutionally precluded. Congressionally imposed restraints on executive nonprosecution discretion is constitutionally tolerable in this area. In fact, absent congressional intervention, executive nonprosecutorial discretion over N/DPAs threatens to usurp the Judiciary's guilt-adjudication and sentencing authority. Deferential but meaningful judicial review of N/DPAs would bring the Judiciary off the sidelines while preserving executive nonprosecution discretion. Congressionally authorized judicial review of N/DPAs may very well be a usurpation of the Executive's power. But even if it is, Congress would only be giving back to the Judiciary what the Executive stole.

—*Alexander A. Zendeh*

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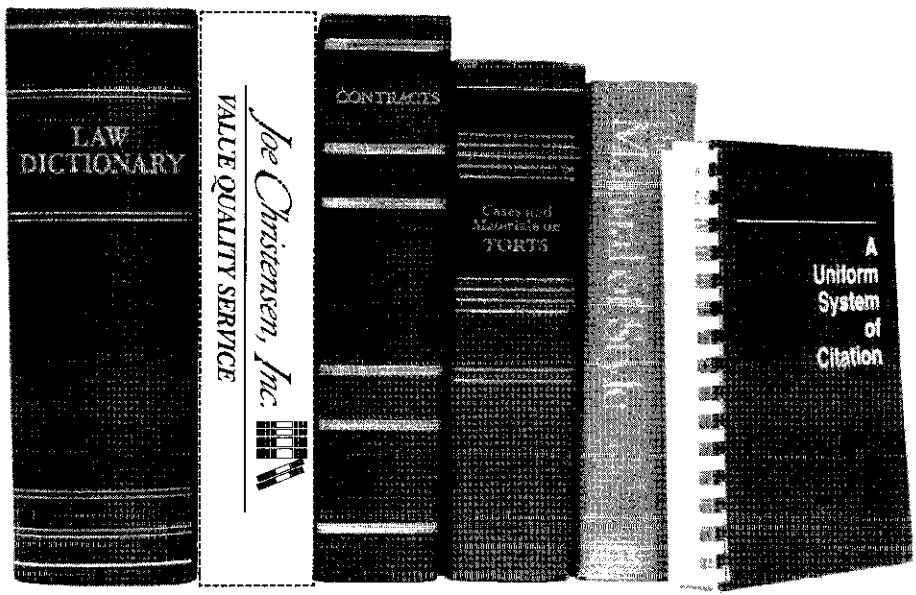

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