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THE CONSTITUTIONAL PERSONALITY OF THE UNBORN

C'Zar Bernstein[*]

INTRODUCTION

The Supreme Court recently overruled *Roe v. Wade*.[1] The Court held that no part of the Constitution—including the Equal Protection Clause[2]—protects a right to kill an unborn child.[3] But the Court did not address *Roe*'s other holding that the unborn are not within the meaning of "person" in the Fourteenth Amendment.[4] That prevailing view is the target of a battery of objections by legal scholars.[5] And pro-life activists will likely challenge statutes that discriminate against the unborn based on those objections. The courts will not be able to avoid the question for long now that *Roe* is gone.

The constitutional personality of the unborn would call into question the constitutionality of statutes that permit abortion.[6] On modern equal-protection doctrine, statutes that discriminate against a class of persons by excluding them from the protection of the law against homicide would not likely survive scrutiny. In *Levy v. Louisiana*,[7] the Court declared unconstitutional the exclusion of illegitimate children from the definition of "child" for the purpose of denying them recovery for the wrongful death of their parents.[8] The Court reasoned that illegitimate children "are not 'nonpersons'" under the Fourteenth Amendment because they "are humans, live, and have their being."[9] The Court held "that it is invidious to discriminate against them

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[*] I am grateful to the editors at the Journal of Law, Economics and Policy. I am also grateful to the Catholic Bar Association for inviting me to present an earlier version of this Article at its 2022 conference.

[1] 410 U.S. 113 (1973) (overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

[2] The Equal Protection Clause of the Fourteenth Amendment declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[3] Dobbs, 142 S. Ct. at 2245–46 (2022).

[4] 410 U.S. at 158.

[5] *E.g.*, Joshua J. Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. PUB. POL'Y 539 (2017).

[6] *See, e.g.*, N.Y. PUB. HEALTH LAW §§ 2599-aa–2599-bb (Conso. 2023); WASH. REV. CODE § 9.02.110 (2023); 775 ILL. COMP. STAT. ANN. 55/1-15(b) (LexisNexis 2023).

[7] 391 U.S. 68 (1968).

[8] Specifically, "as construed" by the Louisiana courts, the word "child" in the statute "mean[t] 'legitimate child,' the denial to illegitimate children of 'the right to recover' being 'based on morals and general welfare because it discourages bringing children into the world out of wedlock.'" *Id.* at 70 (quoting Levy v. State, 192 So. 2d 193, 195 (La. Ct. App. 1966)).

[9] *Id.*

when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done to the mother."[10] If the unborn likewise enjoy constitutional personality, that same reasoning applies to express exclusions of the unborn from the protection of state homicide statutes.

The same conclusion follows from scholarly accounts of the original meaning of "equal protection." According to recent originalist scholarship, although "[d]ue process of law provides the rules for how the *government* can deprive a [person] of natural rights to life, liberty, and property[,] [t]he protection of the laws is the concept that requires government to protect these same rights from *private interferenc*e."[11] Needless to say, abortion statutes fail to equally protect the unborn from private interference with their right to life.[12] Here again, if the unborn are constitutional persons, then exclusions of the unborn from the protection of state homicide statutes are unconstitutional.

Either way, *Roe* correctly explained that, "[i]f th[e] suggestion [that fetuses are persons] is established, . . . the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[13] Can we establish that fetuses are constitutional persons?

In a recent Article, I argued that the word "person" in the Equal Protection Clause is apparently ambiguous because there are two possible original meanings.[14] First, "person" could mean what it ordinarily meant to the public in 1868: a living human being.[15] That public meaning of "person" encompasses the unborn in the light of their palpable humanity,[16] and by 1868 the public recognized that fact.[17] Second, "person" could mean what it meant in law: those persons or things that the law regarded as persons.[18] That legal meaning of "person" encompassed natural persons and artificial ones in addition,[19] but it did not always encompass *all* natural persons.[20] I argued that the evidence is mixed whether the common law recognized the unborn as legal persons by 1868.[21]

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10 *Id*. at 72.

11 ILAN WURMAN, THE SECOND FOUNDING 36 (2020).

12 *See* C'Zar Bernstein, *Fetal Personhood and the Original Meanings of "Person*,*"* 26 TEX. REV. L. & POL. 485, 495–501 (2022).

13 410 U.S. at 156–57.

14 Bernstein, *supra* note 12.

15 Craddock, *supra* note 5, at 549 ("According to dictionaries of common and legal usage at the time of the Fourteenth Amendment's adoption, the term 'person' was largely interchangeable with 'human being' or 'man.'").

16 Bernstein, *supra* note 12, at 507–10.

17 *Id.* at 507–10, 550–51 n.353.

18 JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 28, § 67 (1909).

19 Bernstein, *supra* note 12, at 512–18.

20 *Id*. at 519–37.

21 *Id*. at 511–50.

In this essay, I shall do what I did not do in the previous one. I shall identify which of the two competing accounts best explains the evidence.[22] I shall argue that the ambiguity is merely apparent; that "person" in the Equal Protection Clause is the original ordinary and public meaning of "person"; and that by this Clause the unborn are entitled to state protection against private violence.

I shall take as my foil the argument for the prevailing view that I developed and explored in my previous Article. What I called the common-law argument has two premises.[23] First, the original meaning of "person" in the Fourteenth Amendment is the original common-law meaning of "person."[24] Second, the original common-law meaning of "person" excluded the unborn.[25] It follows from these premises that the unborn are not within the meaning of "person" in the Fourteenth Amendment.

I take the common-law argument as my foil because it is the best originalist one for the prevailing view of which I am aware.[26] Courts sometimes *do* favor common-law meanings over ordinary ones.[27] And the old common law *did* pretend, for some purposes, that the unborn are not persons in existence.[28] If the common-law argument is unsound, the originalist case for the prevailing view is significantly weaker.

I shall argue that the common-law argument is unsound. To overcome the strong presumption in favor of original ordinary meaning, a legal meaning must be clearly established. By 1868 there was no settled and general common-law exclusion of the unborn from legal personality. To be sure, the criminal law stubbornly persisted in pretending that the unborn are not persons in existence. That vestigial fiction meant that fetuses could not be victims of homicide at common law. But throughout the eighteenth century and into the nineteenth, some common-law authorities recognized the unborn as persons in other areas of the law. Because legal personality is not an all-or-nothing concept,[29] the mixed state of the common law by 1868 cannot furnish the basis for favoring a controversial technical sense of "person." And that conclusion is even more evident in light of the public's widespread abrogation of the common law by the *statute* law around the time of ratification.[30]

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22 *Id*. at 490–91.

23 *Id.* at 511.

24 *Id.*

25 *Id.*

26 *Id.* at 489–90 n.17.

27 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 320 (2012).

28 *See, e.g.*, MICHAEL DALTON, THE COUNTRY JUSTICE 332 (London, Henry Lintot 1742) (1618) (explaining that feticide was not homicide because "the Party killed must be in *esse*" or "*in rerum natura*, and born into the World").

29 GRAY, *supra* note 18, at 27, § 64 ("One who has rights but no duties, or who has duties but no rights is . . . a person.").

30 Dobbs, 142 S. Ct. at 2253.

Although the common law lagged the statutory law, the movement in both was in the direction of expanding legal protection for the unborn precisely because the public increasingly recognized them *as persons*. A common-law meaning that only some common-law authorities endorsed is not plausibly in the text of the Fourteenth Amendment. Let us examine this reasoning about the original meaning of "person" in greater detail before we turn to competing accounts and objections.

I. APPARENT AMBIGUITY

"Person" in the Constitution is apparently ambiguous. Taken in isolation, "person" had more than one ordinary sense:[31] a philosophical sense denoting thinking intelligent beings generally,[32] and another sense denoting living human beings specifically.[33] The philosophical sense arguably does not refer to fetuses who are not while fetuses thinking or intelligent beings, but it also does not refer to newborn infants, the severely mentally disabled, or those in comas. It refers to most living humans, but it also refers to God, angels, demons, and intelligent extraterrestrial beings (if such beings exist). The philosophical sense is therefore at once too inclusive and too exclusive.[34] The other sense refers neither to supernatural beings nor alien ones, but it does refer to infants, the severely mentally disabled, those in comas, and fetuses. As between these possible ordinary senses, "context disambiguates"[35] against the philosophical sense. The Fourteenth Amendment refers to persons who can be born[36] and whose lives can be deprived.[37] The more specific sense was intended. If "person" bears an ordinary-language sense, there is no genuine ambiguity.[38]

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31 *Cf.* SCALIA & GARNER, *supra* note 27, at 70 ("Many words have more than one ordinary meaning.").

32 *Person*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("A *person* is a thinking intelligent being."); *Person*, JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (1792) ("[A] thinking intelligent being that has reason or reflection, and can consider itself as itself . . . .").

33 *Person*, WEBSTER, *supra* note 32 (explaining that "person" meant "[a]n individual human being" and applied to "*living* beings only, possessed of a rational nature" such as "a man, woman or child.").

34 Like the philosophical sense, the law can and sometimes has recognized the existence of supernatural beings as persons. *See* GRAY, *supra* note 18, at 39–41, § 96–98 ("In several systems of Law, supernatural beings have been recognized as legal persons."). This was not true of the common law. *Id.* at 42, § 99 ("In the Common Law, neither the Deity nor any other supernatural being has ever been recognized as a legal person."). It is therefore doubly unlikely that the Framers intended any sense that includes such beings within its extension.

35 SCALIA & GARNER, *supra* note 27, at 70.

36 *See* U.S. CONST. amend. XIV, § 1.

37 *See id.*

38 *See* Bernstein, *supra* note 12, at 504 n.90.

"Person" is also apparently ambiguous between ordinary and legal senses. In law, "person" has a technical sense denoting those entities—natural or artificial—that the law regards as persons.[39] The concept of legal personality refers to all and only those entities, regardless of whether they are in fact persons. *A priori*, then, the concept of legal personality can for all or some purposes be more inclusive or exclusive than the ordinary concepts. Corporations are not *in fact* persons, but they are so regarded sometimes *in law*.[40] The law could pretend that sub-rational beasts are persons for all or some purposes,[41] but they are not persons in either of the ordinary senses. And the law could *exclude* from legal protection beings that are in fact persons in either or both ordinary senses. Historically, fetuses,[42] infants,[43] slaves,[44] bastards,[45] clerics,[46] and foreigners[47] were so excluded for all or some purposes. It follows that there is no necessary connection between legal and natural personality. If a legal text uses "person" in a legal sense, the historical question is whether the law at the relevant time recognized the entity in question as a person for some purpose or other.

Here is the problem: the common law did not always regard the unborn as persons. At different times and for various reasons, the common law pretended that the unborn do not exist.[48] When that fiction applied, the unborn began to exist "in contemplation of law" only upon live birth.[49]

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39 *See* GRAY, *supra* note 18, at 27, § 63 ("In books of the Law, as in other books, and in common speech, 'person' is often used as meaning a human being, but the technical legal meaning of a 'person' is a subject of legal rights and duties.").

40 *See* Sutton's Hosp. Case (1612) 77 Eng. Rep. 960, 973; 10 Co. Rep. 23 a, 32 b (Coke, C.J.) ("[A] corporation aggregate of many is invisible, immortal, and rest[s] only in intendment and consideration of the Law . . . They may not commit treason, nor be outlawed, nor excommunicate, for they have no souls . . . .").

41 *See* GRAY, *supra* note 18, at 42–44, §§ 100–105 ("'[A]nimals may conceivably be legal persons. . . . It is quite conceivable, however, that there may have been, or indeed, may still be, systems of Law in which animals have legal rights.").

42 *See, e.g.*, *supra* text accompanying note 28.

43 *See, e.g.*, JAMES KENT, COMMENTARIES ON AMERICAN LAW 524 n.a (2d ed. New York, O. Halsted 1832) ("[Ancient Roman law] gave to fathers the power of life and death and of sale over their children, and the right to kill immediately a child born deformed."); MARY BEARD, SPQR: A HISTORY OF ANCIENT ROME 144 (2015) ("[Ancient Roman law laid] down procedures for the abandonment or killing of deformed babies (a practice common throughout antiquity, euphemistically known to modern scholars as 'exposure') . . . .").

44 *E.g.*, Bailey v. Poindexter's Ex'r, 55 Va. 132, 198 (1858).

45 *See* Levy, 391 U.S. at 70 (explaining that "illegitimate children are not 'nonpersons'" because "[t]hey are humans, live, and have their being" notwithstanding the exclusion of such children from the meaning of "child" in a state law).

46 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 479 (10th ed. London, A. Strahan, T. Cadell, and D. Prince 1787) (1765) ("[M]embers of [ecclesiastical bodies] "were reckoned dead persons in law . . . .").

47 *See* TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1765).

48 *See* Bernstein, *supra* note 12, at 518–36.

49 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (1648).

Depending on the answers to three questions, that history bears on the original meaning of "person" in the Fourteenth Amendment. First, does that account accurately describe the status of fetuses at common law *at any time*? Professors Finnis and George have rejected my interpretation of the evidence, and I shall here say a word about their response. Second, if it is an accurate description of the old common law, did the common law change by 1868? Third, if the Born Alive Rule obtained in 1868, is the ordinary or the common-law meaning of "person" in the text of the Fourteenth Amendment? I shall address these questions in this essay.

II. THE OLD COMMON-LAW FICTION THAT THE UNBORN ARE NOT IN EXISTENCE

Let us examine the historical premise of the common-law argument that the common-law meaning of "person" excluded the unborn. That premise was generally true before the turn of the 17th-century, and we shall presently consider whether it held when the relevant provisions of our Constitution were ratified. Examination of the early common law is necessary to understand the later developments, so I shall begin with the legal status of fetuses before the year 1700.

The common law adopted the fiction that the unborn are not persons in existence. The rule was commonly characterized by saying that the unborn are not "reasonable creatures, *in rerum natura*"[50] or *in esse*[51] until live birth. For that reason, the unborn were not under the protection of the law against homicide although the common law proscribed abortion as a separate misdemeanor offense.[52] When explaining why the unborn could not when unborn be victims of homicide, Coke, whose exposition of the common law the founding generation "held in high veneration and respect,"[53] famously said that "*in law* [the fetus] is accounted a reasonable creature, *in rerum natura*, when it is born alive."[54] Blackstone and early American authorities later endorsed Coke's statement of the law of homicide and likewise affirmed that

50 *Id.*

51 DALTON, *supra* note 28, at 332.

52 3 COKE, *supra* note 49, at 50. Some degree of protection of the criminal law against private violence is insufficient, by itself, for a thing to be a legal person. In "modern civilized societies, beasts have no legal rights" or duties although "there are everywhere statutes for their protection" enacted "to preserve the dumb creatures from suffering." *See* GRAY, *supra* note 18, at 42–45. Because the unborn, unlike unreasonable beasts, are in fact persons, the law ought to regard them as such and protect them in the manner that it protects other persons, but the common law did not always do so.

53 1 ZEPHANIAH SWIFT, SYSTEM OF THE LAWS OF CONNECTICUT 41 (1795).

54 3 COKE, *supra* note 49, at 50.

the unborn are not there considered as being *in rerum natura*.[55] I shall explain the meaning of these concepts in turn.

First, consider the original meaning of "reasonable creature." The word "reasonable," archaic when used in this way, meant "[h]aving the faculty of reason"[56] or "eluded with Reason."[57] "In this sense, *rational* is now generally used."[58] *Rational creature* or *rational animal*, in turn, is a canonical account of what we human persons are.[59] All humans are rational creatures because, unlike other animals, humans are created in the image and likeness of God and endowed with the capacity of reason[60] even if that capacity is never realized.[61] Unlike unreasonable beasts, the law recognized human persons as worthy of protection *as persons*. Authorities used "person" and "reasonable creature" interchangeably,[62] and later authorities replaced the latter with the former.[63]

Second, consider the legal rule that the person must be *in rerum natura* or *in esse*. The concepts *in rerum natura* and *in esse* were used synonymously.[64] Both Latin forms meant "in existence"[65] or "in being."[66] Early authorities distinguished between things *in esse* and *in posse*.[67] The latter are things that do not yet exist but potentially exist.[68] The rule excludes from protection things that are reasonable creatures *in posse*. Things *in esse*, by

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55 *See* 4 BLACKSTONE, *supra* note 46, at 197–98. Chief Justice Zephaniah Swift explained that "no writer on law has acquired greater distinction than Sir William Blackstone." 1 SWIFT, *supra* note 53, at 41. *See also* 2 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 267 (1823) (explaining that to kill an unborn child "is not murder at common law, because it is not in existence").

56 *Reasonable*, 2 WEBSTER, *supra* note 32.

57 *Rational*, EDWARD PHILLIPS, THE NEW WORLD OF WORDS: OR, UNIVERSAL ENGLISH DICTIONARY (6th ed. 1706) ("Rational, eluded with Reason, reasonable.").

58 *Reasonable*, 2 WEBSTER, *supra* note 32.

59 *See, e.g.*, 1 SWIFT, *supra* note 53, at 7–10 (explaining that men are created by God and eluded with reason); AQUINAS, Commentary on Aristotle's Nicomachean Ethics, V lecture 12, §1019 (man is "a rational animal"); AQUINAS, Commentary on Aristotle's Metaphysics, VII, lect. 3, §1326 ("For animal is predicated of man essentially, and in a similar way rational is predicated of animal. Hence the expression rational animal is the definition of man.").

60 *Cf. Human*, JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (1792) (stating that being a "human" involves "having the qualities of a reasonable creature or man; belonging to, or like a man").

61 *See* Sutton's Hosp. Case (1612) 77 Eng. Rep. 960, 972.

62 Bernstein, *supra* note 12, at 519, 528 n.173.

63 Bernstein, *supra* note 12, at 519, 528.

64 *E.g.*, DALTON, *supra* note 28, at 332.

65 *In rerum natura*, 1 BOUVIER, A LAW DICTIONARY (T & J.W. Johnson 3d ed. 1848) (1839); Bernstein, *supra* note 12, at 540 n.297 (collecting dictionary definitions); *In Esse*, HENRY JAMES HOLTHOUSE, A NEW LAW DICTIONARY (2d ed. 1850).

66 4 BLACKSTONE, *supra* note 55, at 197–98; Bernstein, *supra* note 12, at 540 n.297 (collecting dictionary definitions).

67 Bernstein, *supra* note 12, at 540 n.297 (collecting dictionary definitions); *see, e.g.*, *In Esse*, 1 JOHN BOUVIER, A LAW DICTIONARY (T & J.W. Johnson 3d ed. 1848) (1839).

68 *In Esse*, BOUVIER, *supra* note 67, at 1.

contrast, are things that exist.[69] To illustrate the distinction, one early law dictionary explained that "[a] Child before he is born or conceived, . . . is . . . *in posse*; after he is born, he is said to be *in esse*, or actual Being."[70] If *in rerum natura* meant "in existence," then Coke reported in his discussion of murder that "in law" the fetus is considered as in existence "when it is born alive," but not before that point.[71]

Professors Finnis and George have recently rejected my account of the original meanings of *in rerum natura* and *in esse*. They assert that no significant authority translated the Latin to mean "in existence."[72] They argue that, in the context of discussions of the legal status of the unborn, these concepts had an idiomatic meaning.[73] On their account, when Coke says that the unborn are not in law accounted as *in rerum natura*, he meant that they are not yet born and in the outside world.[74] If Professors Finnis and George were right, it would follow that, although the law made live birth a requirement of murder, Coke did not endorse the fiction that the unborn are not in existence; Coke said by the words *in rerum natura* only that they are not yet born.

The idiomatic account is disconfirmed by *dicta* in one of Coke's own influential judgments.[75] In *Sutton's Hospital Case*,[76] Coke held that a hospital could be incorporated before it came into existence. In Coke's view, a *potential* hospital "sufficeth" for "an incorporation" although it is not *in esse* at the time of the incorporation.[77] Coke used two examples to support his holding that disconfirm the idiomatic account of *in rerum natura* and *in esse*. First, Coke explained that "a child *as soon as he is born* is called [reasonable]"

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69 *Id.*

70 *In Esse*, GILES JACOB, A NEW LAW DICTIONARY (6th ed. 1750).

71 3 COKE, *supra* note 49, at 50.

72 Specifically, Professors Finnis and George swiftly reject the account by the following reasoning: "As for 'in existence,' if it were a fully safe translation of *in rerum natura* it would surely have been used by Coke, Hale, Blackstone, and all; but it is not, so they didn't." John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A* Dobbs *Brief*, 45 HARV. J.L. PUB. POL'Y 927, 1010 (2022). Relatedly, they assert that this "routine phrase" was "always kept, elusively, in a foreign tongue." *Id.* at 941 n.28. These assertions are mistaken. Authorities replaced the Latin with the English translations I have used: "in being" or "in existence." *See, e.g.*, 2 SWIFT, *supra* note 55, at 267 (explaining that to kill an unborn child "is not murder at common law, because it is not in existence"). For a fuller treatment of the evidence, *see* Bernstein, *supra* note 12, at 530–32 n.238.

73 Finnis, *supra* note 72, at 941 n.28, 961 n.76, 1010–11 & n.218.

74 *Id*. at 1010 (*In rerum natura* was "obviously used … in an idiomatic sense, as a term of art, signifying being in a condition to participate in the *ordinary world*, in the palpable social world as a distinct individual of known sex, appearance, ability to communicate even if inarticulately, and so forth."); *id.* at 1010–11 n.218 (what authorities "meant by '*in rerum natura*' was 'not yet part of that human, "social" world of interpersonal communication that everyone enters by birth and (whether or not we are immortal and headed for heaven or hell) leaves by death'").

75 *See* Bernstein, *supra* note 12, at 521 n.180.

76 Sutton's Hosp. Case (1612) 77 Eng. Rep. 960.

77 *Id.* at 972.

because he is potentially reasonable although not actually so.[78] Second, Coke explained that "[a] thing which is not *in esse* but in apparent expectancy is regarded in law; as a bishop who is elect before he be consecrated; an infant in his mother's womb before his birth."[79]

These *dicta* fit nicely with the account that Coke meant in his discussion of murder that "in law" the unborn are not "accounted a[s] reasonable creature[s], [in existence]," until live birth.[80] In Coke's view, a thing that is "in apparent expectancy" may be "regarded in law" although not yet in existence. By "regarded in law," Coke meant that the law would indulge for a time the fiction that a potential thing is the thing it is expected to become. Just as an unconsecrated bishop or unborn child need not otherwise exist in law for them to be so regarded, so too a hospital not yet in existence can be incorporated, in all cases because of the apparent expectancy of their existence as bishops, persons, and hospitals, respectively. He could not have sensibly meant by *in esse* an idiomatic sense denoting live birth because that sense has no application whatever to an unconsecrated bishop or hospital. And the important point for our purposes is that if the elected bishop is never consecrated, or the unborn child is never born, then any conditional legal recognition that occurred in expectation of their unconditional legal existence would be nullified. For that reason, Coke explained that to kill a child in the womb could be no murder, because there never was a person the law regarded as in existence.[81]

III. THE GRADUAL REJECTION OF THE COMMON-LAW FICTION THAT THE UNBORN ARE NOT IN EXISTENCE

A curious legal controversy in the 1690s concerning posthumous children reveals at once the legal fiction that the unborn do not exist and the probable point at which the law began to change.[82] In *Reeve v. Long*,[83] John Long devised land by will to his nephew Henry for life, then to his male heirs, but if Henry died without any male heirs, to Richard for life. John died, and Henry took the land. Henry thereafter died leaving his wife pregnant with a son, "who was born about six months after the death of his father."[84] Because Henry died "without issue male," Richard, "being next in remainder, entered, . . . and afterwards the *posthumous son*, by his guardian, entered upon" Richard.[85] "Richard brought [an] ejectment" against Henry's posthumous son,

78 *Id*.
79 *Id.* at 973.
80 3 COKE, *supra* note 49, at 50.
81 *Id*.
82 *See* Bernstein, *supra* note 12, at 539–40.
83 Reeve v. Long (1694) 87 Eng. Rep. 395.
84 *Id.*
85 *Id*.

"and had the judgment in the Common Pleas."[86] The judges of the Court of King's Bench unanimously affirmed the judgment against the posthumous child.[87] At common law, "every *contingent remainder* must take place *eo instanti* that the particular estate determines, or vests during the particular estate."[88] And in this case, "the estate being limited to Henry Long for life, remainder to his first son, and Henry dying before that son was born, the remainder could not vest in him [instantly], who was not then in being."[89]

Application of that "rule, to which the common law courts clung tightly,"[90] shows that the law did not generally regard the unborn as in existence until birth. If the unborn were in law accounted as in existence, then there would be no violation of the rule that "every *contingent remainder* must take place" at the instant "that the particular estate determines, or vests during the particular estate,"[91] for at that time there would have been a person the law regarded as in existence, in whom the remainder could vest. But because Henry's posthumous son came into existence in the eye of the law only six months after his father's death, the remainder vested in Richard at the instant of Henry's death, and "the estate [could not be] fetched back again, though [Henry] ha[d] a son born afterwards."[92]

The House of Lords reversed the judgment of all the common-law judges. The Lords thought that, because the case concerned a will, "by the meaning and equity thereof they ought not to disinherit the heir for such a nicety."[93] Instead, the Lords held "that the freehold should vest in Richard Long till *the* [posthumous] *son* was born."[94] Despite the Lords' attempt to change the common law, all the common-law judges "did not change their opinions,"[95] and "[t]he reversal by the Lords carried little weight at this time with the profession."[96] Because the common-law judges refused to acquiesce in the opinion of the Lords, Parliament took "such cases out of the old law" by the statute of William III, according to which posthumous children may take "in the same manner as if born in the life-time of [their] father . . . to

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86 *Id*.

87 *Id.* at 397.

88 *Id*.

89 *Id*.

90 PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 590 (Little, Brown, & Co., 1956).

91 Reeve, 87 Eng. Rep. at 397; *see also* Reeve, 91 Eng. Rep. at 202.

92 Reeve, 91 Eng. Rep. at 202.

93 Reeve, 87 Eng. Rep. at 397.

94 *Id.* This last point is interesting, because it still recognizes a gap: if the posthumous son had a legal existence at the moment his father died, why should the freehold vest in Richard at all?

95 Reeve, 87 Eng. Rep. at 397.

96 PLUCKNETT, *supra* note 90, at 591 n.2. This was apparently a time in which judges took a very different view of the authority of vertical precedent. *See* Michah S. Quigley, *Article III Lawmaking*, 30 GEO. MASON L. REV. 279, 293–95 (2022).

preserve the contingent remainder of such after-born [children], until . . . they[] come *in esse*, or are born."[97]

The eighteenth century marked the beginning of a period in which leading authorities extended the law so that unborn children were "considered, independent of the statute of William III[,] as in actual existence, for many purposes."[98] The most notable champion of the unborn was Lord Chancellor Hardwicke. In *Wallis v. Hodson*,[99] he declared that if a child was inside the womb, he is "consequently a person *in rerum natura*, so that by the rules of the common and civil law, []he was, to all intents and purposes, a child."[100] Following Lord Chancellor Hardwicke, another English judge considered the argument that the unborn child is a "non-entity."[101] Judge Buller responded,

> Let us see what this non-entity may do. He may be vouched in a recovery, though it is for the purpose of making his answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.[102]

"[Q]uite a repertoire of actions for a non-entity."[103]

Marking a shift from earlier authorities, Lord Chancellor Hardwicke reached judgments in favor of posthumous children on the ground that they are persons in existence. Tapping Reeve, sometime Chief Justice of Connecticut and one of "the most distinguished judicial writers of [the Founding] age,"[104] later said that it was "remarkable that the ground on which [Lord Chancellor Hardwicke] went was, that at the death of the intestate, [the child] was a person *in rerum natura*."[105] Reeve explained that "[a] contrary doctrine could never have been advocated, were it not from the doubt whether a child in *ventra sa mere* was in esse, a question of sufficient magnitude to occupy the minds of men, when the metaphysical learning of schoolmen was all the rage."[106] The Lord Chancellor betrayed no such doubt for "like cases of inheritance."[107] And the key point is that "the Chancellor consider[ed] a child *in ventre sa mere* as a person *in esse*, in whom the estate may vest" as the

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97 An Act to enable Posthumous Children to take Estates as if borne in their Fathers Life time 1698, 10 Will. III c. 16 (Eng.).

98 Stedfast ex dem. Nicoll v. Nicoll, 3 Johns. Cas. 18, 28 (N.Y. Sup. Ct. 1802) (Kent, C.J.).

99 (1740) 26 Eng. Rep. 472.

100 *Id.* at 473.

101 Thellusson v. Woodford (1799) 31 Eng. Rep. 117, 163; 4 Ves. Jun. 227, 321–22 (Buller, J.).

102 *Id.*

103 GERARD CASEY, BORN ALIVE: THE LEGAL STATUS OF THE UNBORN CHILD IN ENGLAND AND THE U.S.A. 21–22 (2005).

104 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF CONNECTICUT 41–42 (1795).

105 TAPPING REEVE, A TREATISE ON THE LAW OF DESCENTS LXIII (1825).

106 *Id.*

107 CASEY, *supra* note 103, at 22.

"person who has a right to it."[108] "If so, such a child is *in esse*"[109]; an estate cannot vest in a legal non-entity.[110] The fiction was disregarded.

Authorities in the United States also recognized the existence of the unborn in such cases.[111] Posthumous children "take with the other children" "after the death of the intestate" *because* "the estate will vest in the child in the mother's womb, or as the law calls it, in ventre sa mere."[112] The same Chief Justice Reeve explained in his early treatise on family law that unborn children were then "considered, in most instances, *in esse*, as much as one that is born, and, for many purposes, have always been so considered."[113] For example, Zephaniah Swift, another great early expositor of the law, explained that "[a]ll natural persons," including the "unborn, may be devisee[s]."[114] Likewise, "[a]ll persons are capable of being legatees: an infant in *ventre sa mere*, a child unborn, is capable of being a legatee."[115] It is incoherent to suppose that a gift of property, real or personal, by devise or legacy, can be made to a legal non-entity. The supreme courts of Pennsylvania and Massachusetts adopted Lord Chancellor Hardwicke's view.[116] The former notably declared—using language that would later form part of the relevant provision of the Fourteenth Amendment itself—that unborn children are "under the protection of the law, and possess[] all the privileges of a living being."[117]

I should like to qualify in two ways this brief rehearsal of the history of the fiction that the unborn do not exist. First, although some important authorities abrogated the old rule in property, the common-law courts of this

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108 REEVE, *supra* note 105, at LVII.

109 *See id.* at LXXI (explaining that "the Chancellor held that the distribution of intestate estates is governed by the civil law; and observes, that nothing was more clear than that the civil law considers the child in ventre sa mere, as absolutely born to all intents and purposes for the child's benefit.")

110 This development furnishes a complete response to the old common-law "objection . . . that the distributive share vests immediately on the death of the intestate, and that the posthumous child is not *in esse* at that time, and therefore it could not vest in him." *See id.* at XXXI. "[T]he answer is, the law admits that the right to the distributive share vests immediately on the death of the intestate; but the law considers the posthumous child, whilst *in ventre sa mere*, as *in esse*." *Id.*

111 *E.g.*, 1 SWIFT, *supra* note 53, at 99 ("The grant to a man, and the heirs of his body, as effectually secures the estate to his unborn children by our law, as it can be done in England, by granting an estate to a man for life, remainder to his unborn children, with trustees to preserve contingent remainders."); 4 KENT, *supra* note 43, at 249 ("[I]t is now settled law in England, and in this country, that an infant *en ventre sa mere* is deemed to be *in esse*, for the purpose of taking a remainder, or any other estate or interest which is for his benefit, whether by descent, by devise, or under the statute of distributions.").

112 1 SWIFT, *supra* note 53, at 281; *accord* 1 SWIFT, *supra* note 53, at 114.

113 TAPPING REEVE, THE LAW OF BARON AND FEMME 295 (1816).

114 1 SWIFT, *supra* note 53, at 135.

115 *Id.* at 452.

116 *See* Hall v. Hancock, 32 Mass. 255, 257–58 (1834) ("[G]enerally, a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered."); Mills v. Commonwealth, 13 Pa. 631, 633 (1850) ("By the well-settled and established doctrine of the common law, the civil rights of an infant *in ventre sa mere* are fully protected at all periods after conception.").

117 Swift v. Duffield, 5 Serg. & Rawle 38, 40 (Pa. 1819).

country clung to it stubbornly in the criminal law, and extended it in tort,[118] straight into the 20th century.[119] Chief Justice Reeve recognized this tension in the law. He explained that, "[w]hilst it was the opinion of the court[s] that an unborn infant was not *in esse*, it was determined[] that the killing [of] such child was not homicide, but a great misprison; and this is still the law, notwithstanding that, for some purposes, such infant is considered as *in esse*."[120] The common law, despite all its wisdom, said both that the unborn exist and that they do not exist, in property and in the criminal law, respectively.

Despite the lack of general recognition, in those jurisdictions whose common law recognized the unborn as in existence for some purposes, the unborn were legal persons. In those jurisdictions, the unborn were subjects of legal rights: in property, the law recognized their existence as persons if such recognition was to their benefit. And "any one who has rights though no duties, or duties though no rights . . . is . . . a person in the eye of the Law."[121] If legal personality were an all-or-nothing concept, corporations would not be legal persons. Like the unborn, corporations were not regarded as persons for many purposes, including in the criminal law. As Coke memorably put it, corporations exist "only in intendment and consideration of the law; . . . [t]hey cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls."[122] Because legal personality is not an all-or-nothing concept, the unborn enjoyed legal personality in some jurisdictions, even if not across all the law.

Second, there were other authorities who gave the rule in favor of posthumous children a fictional construction.[123] In my previous work, I explained in some detail that some authorities endorsed two fictions: the old fiction that the unborn do not exist, and then the corrective fiction that posthumous children were born before they were in fact born.[124] That imperfect or conditional recognition in expectation of live birth was therefore proleptic and destroyed if the child died before that point.[125] There was, then, at common law,

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118 *See, e.g.*, Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 16 (1884) (Holmes, J.).

119 *E.g.*, Meadows v. State, 722 S.W.2d 584 (Ark. 1987).

120 REEVE, *supra* note 113, at 297.

121 GRAY, *supra* note 18, at §§ 63, 27.

122 Sutton's Hosp. Case, 77 Eng. Rep. at 973; *see also* 1 BLACKSTONE, *supra* note 46, at 465 ("A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities. Neither is it capable of suffering a traitor's, or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood.").

123 This is the interpretation of the evidence taken by Professor Gray. *See* GRAY, *supra* note 18, at 38–39 n.2 ("[I]n our Law a child once born is considered for many purposes as having been alive from the time it was begotten.").

124 *E.g.*, Gillespie v. Nabors, 59 Ala. 441, 444–45 (1877).

125 This may itself be enough to count as a legal person in any event. Consider the early fictionalist decision, Marsellis v. Thalhimer, 2 Paige 35 (N.Y. Ch. 1830). In that decision, the Chancellor explained that "the existence of the infant as a real person before birth is a fiction of law . . . in the hope and expectation that it will be born alive and be capable of enjoying those rights which are thus *preserved* for it in anticipation." *Id.* at 40. This characterization of the fictionalist view does not itself entail that the unborn

inconsistency between the criminal law and property, and different treatments of the old fiction within property itself.

IV. THE COMMON-LAW MEANING OF "PERSON" IS NOT IN THE TEXT

That inconsistency blocks the common-law argument. The historical premise of the common-law argument is that *the* common-law meaning of "person" excluded the unborn.[126] Against this premise, the history confirms that the common law did not uniformly exclude the unborn from the category of persons in existence by 1868. Some authorities recognized that fact in law for some purposes;[127] others did so only conditionally and by fictional construction.[128] The received view that the unborn are not protected by the Fourteenth Amendment requires elevating a common-law meaning of "person" that was controversial for the better part of two centuries. And it would involve elevating an old common-law fiction *despite* a trend in the law away from that fiction. Consequently, any argument from the common law for the received view would require an independent justification for reading into the Fourteenth Amendment the old fiction instead of the later "progressive and liberal consideration"[129] of children who would have been disinherited because of the fiction.

The development of the common law in this country also throws into doubt the other premise of the common-law argument. That premise says that

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lacked any degree of legal personality, because the existence of corporations as real persons is as much a fiction of the law, and yet they are regarded as legal persons. *Marsellis* says that the law will entertain that fiction to preserve the child's rights, but that if the child dies before birth, he is "considered as if [he] had never been born or conceived." *Id.* That rule entails that the rights preserved for the unborn are conditional and imperfect, but a conditional or imperfect right is still a right, and can inhere only in a person regarded in law. *But see* Bernstein, *supra* note 12, at 548–50. Thus, "when waste is committed upon such estate, as will be the inheritance of a child *in ventre sa mere*, a court of chancery will grant an injunction against the waste, on a bill filed in favor of such an infant, by any person who styles himself *prochein ami* to the infant." REEVE, *supra* note 113, at 295–96; *accord* REEVE, *supra* note 105, at LVII ("A bill in chancery may be brought in favour of such a child to stay waste."). And saying that a thing has that kind of right involves some degree of recognition. *See* 1 SWIFT, *supra* note 53, at 178 ("The law regards an infant even in the mother's womb, and if it be in any way killed, it is a great misdemeanor. It is also capable of taking a legacy, and an estate limited to its use."); *accord* 1 SWIFT, *supra* note 53, at 16. That kind of recognition is what Coke meant when he reported that "[a] thing which is not *in esse* but in apparent expectancy is regarded in law; as a bishop who is elect before he be consecrated." Sutton's Hosp. Case, 77 Eng. Rep. at 972–73. The potential bishop who is elect before consecration is regarded for some purposes and may act in anticipation of his consecration. His death before consecration would call into question the legal status of the acts he performed before that point. It is still the case that he was regarded in law for a time.

126 *See* Bernstein, *supra* note 12, at 518.

127 *See, e.g.*, 4 KENT, *supra* note 43, at 389 (explaining that "posthumous children who take remainders under the statute of" William III are "entitled to the profits of the estate before [their] birth" "for they are to take in the same manner as if born in the lifetime of the father").

128 *E.g.*, Gillespie, 59 Ala. at 444–45.

129 Stedfast *ex dem*. v. Nicoll, 3 Johns. Cas. 18, 29 (N.Y. Sup. Ct. 1802) (Kent, J.).

the original meaning of "person" in the Fourteenth Amendment is the original common-law meaning of "person."[130] As we have seen, there were different meanings of "person" depending on how jurisdictions construed the relevant rules that were developed on behalf of the unborn and posthumous children.

But there is a related reason that the history casts doubt on application of the canon of construction from which the premise is taken. When a word is ambiguous between ordinary and legal senses, courts sometimes will correctly favor the latter over the former.[131] Authorities thought it appropriate to do so when the word has "received a construction certain and definite" by the courts.[132] As Justice Story explained, "the same word often possesses a technical and a common sense," and "[i]n such a case the latter is to be preferred, unless some attendant circumstance points *clearly* to the former."[133] Otherwise, he explained that "every word employed in the Constitution is to be expounded in its plain, obvious, and common sense," for "[c]onstitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research."[134] The Supreme Court has adopted Justice Story's view. In *District of Columbia v. Heller*, the Court explained that "the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."[135]

The history establishes that the word "person" had no certain and definite meaning affixed to it by the courts that would justify a departure from the ordinary meaning. Applied to the unborn, the word "person" had different meanings between and within different areas of the law. If the Constitution had used the word "person" in a provision about homicide, for example, then the uniform, certain, and definite common-law exclusion of the unborn from

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130 Bernstein, *supra* note 12, at 512.

131 *E.g.*, United States v. Wong Kim Ark, 169 U.S. 649 (1898).

132 *See, e.g.*, REEVE, *supra* note 105, at XXVI; *see also id.* at XII ("Whenever I have found certain terms used in any particular statute, which terms have received a definite meaning in the English laws, previously to the enacting of our statutes, I give to them the same meaning which they have heretofore received."). *See also* McCool v. Smith, 66 U.S. (1 Black) 459, 469 (1861) ("[W]henever our Legislature use a term without defining it, which is well known in the English law, and there has been a definite appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law.").

133 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 334 (Bos.: Little, Brown, & Co. 1873).

134 *Id.* at 333. The Supreme Court now favors a strong presumption in favor of original ordinary meaning. *See* District of Columbia v. Heller, 554 U.S. 570, 576 (2008) ("In interpreting [an amendment's] text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (quoting United States v. Sprague, 282 U.S. 716, 731 (1931))); *id.* at 577 (explaining that the ordinary meaning "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation").

135 *Id.* at 576.

the category of persons *in rerum natura* would cast into doubt whether the unborn were protected by the Constitution in that context.[136] But the Fourteenth Amendment uses the word in a more general provision. The Equal Protection Clause is not restricted to the criminal law, but broadly encompasses a guarantee of the protection of the law of property in addition.[137] The relevant fiction here—that the unborn are not *in rerum natura* or *in esse*—is precisely the kind of metaphysical subtlety[138] that Justice Story cautioned against reading into the Constitution. The context of the Fourteenth Amendment reveals no clear intention to incorporate any of the various technical meanings of "person" in any of its contexts. It cannot therefore be presumed to have favored the old fiction that excluded the unborn over the ordinary meaning and other legal meanings that would include them.

V. CONSTITUTIONAL PERSONALITY IS NATURAL PERSONALITY

The conclusion that the Framers did not use "person" in a technical legal sense is confirmed by internal evidence in the Constitution itself. To interpret a word in one provision, courts correctly consider how the same word is used in other provisions.[139] If a word is obviously used in a proposed sense in the other provisions, then that fact is defeasible evidence that it was used in the same sense in the provision to be interpreted.[140] Are there other uses of "person" in the Constitution that undermine the view that "person" was used in a technical legal sense in the Fourteenth Amendment?

The use of "person" in the Constitution to refer to slaves is striking evidence that the Framers used "person" in its ordinary sense. Article I, section 2 of the original Constitution infamously provided that representatives "shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding

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136 *Cf.* REEVE, *supra* note 105, at XXVI ("If we have a statute that directs murder, manslaughter, or any other crime, by name, to be punished, without defining those terms in a manner different from their known construction in the English laws, it is a legislative assent to the construction given to those terms by the English courts.").

137 *See* WURMAN, *supra* note 11, at 36 (explaining that "[d]ue process of law provides rules for how the *government* can deprive a subject or citizen of natural rights to life, liberty, and property" and "[t]he protection of the laws is the concept that requires government to protect these same rights from *private interference*."); 1 BLACKSTONE, *supra* note 46, at 120–21, 125–26 (explaining that "the principal aim of society" and "the principal view of human laws" "is to protect individuals in the enjoyment of [their] absolute rights," including "the right of private property").

138 *Cf.* REEVE, *supra* note 105, at LXIII ("A contrary doctrine could never have been advocated, were it not from the doubt whether a child in *ventra sa mere* was in esse, a question of sufficient magnitude to occupy the minds of men, when the metaphysical learning of schoolmen was all the rage.").

139 SCALIA & GARNER, *supra* note 27, at 170 ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.").

140 *See id.* at 170–71.

Indians not taxed, three fifths of all *other Persons*."[141] Article I, section 9 declared that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."[142] And Article IV, section 2 provided that "[n]o *person* held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour be due."[143]

The provisions in the original Constitution referring to slaves refute any suggestion that imperfect recognition of personhood in law excludes one from being a person in the sense used in the Constitution. In the slave states, slaves were treated as persons in the criminal law and stripped of all legal personality in property.[144] "In some respects," the High Court of Errors and Appeals of Mississippi explained, "slaves may be considered as chattels,[145] but in others, they are regarded as men. The law views them as capable of committing crimes. This can be only upon the principle, that they are men and rational beings."[146] Just as slaves, by virtue of their natural personality, were the subject of legal duties in the criminal law and therefore there considered as legal persons,[147] so the law sometimes considered them as persons capable of being victims of homicide.[148] One decision held that to kill a slave with malice aforethought was murder, because he "is still a human being, and

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141 U.S. CONST. art. I, § 2, cl. 3 (emphasis added).

142 *Id.* at § 9, cl. 1 (emphasis added).

143 *Id.* at § 2, cl. 2; 2 STORY, *supra* note 133, at 565–66.

144 Bailey, 55 Va. 132, is a particularly appalling decision. The court held that a clause of a will that provided that the testator's slaves should have the choice whether to be emancipated was void on the ground that slaves lack legal capacity to choose. *Id.* at 186–87, 197. Because "slaves have no civil or social rights;" "they have no legal capacity to make, discharge or assent to contracts;" and "a slave cannot take any thing under a decree or will except his freedom," the court held "that nothing short of the exhibition of a positive enactment, or of legal decisions having equal force, can demonstrate the capacity of a slave to exercise an election in respect to his manumission." *Id.* at 197. The testator "cannot endow, with powers of such import as are claimed for slaves here, persons whose status or condition, in legal definition and intendment, exists in the denial to them of the attributes of any social or civil capacity whatever." *Id.* at 198. Judge Moncure, in dissent, explained that "slaves have some capacity to choose, though it may, generally, be very weak and imperfect. They are responsible for their criminal acts; and may incur, and have to suffer the heaviest penalty of the law." *Id.* at 202.

145 *See* Craddock, *supra* note 5, at 540 n.9 (discussing the exclusion of slaves from legal personality); Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORD. L. REV. 807, 837 (1973) (same).

146 State v. Jones, 1 Miss. 83, 84 (1820).

147 *See* GRAY, *supra* note 18, at 27.

148 Fields v. State, 9 Tenn. 156, 159 (1829) ("It is the same judgment that would have been rendered against the plaintiff in error, if the subject of the homicide had been a free man, instead of a negro slave. There is no law authorizing any distinction between the two cases.").

possesses all those rights, of which he is not deprived by the positive provisions of the law."[149]

The sordid debate concerning the Three-Fifths Compromise is illustrative. The question was whether "slaves ought to be included in the numerical rule of representation."[150] One side argued that slaves ought not be counted for the benefit of Southern political power, for slaves were considered in the law of the slave states as property, not as persons.[151] Slaves were "bought and sold, devised and transferred, like any other property."[152] Slaves also "had no civil rights or political privileges" and "had no [legal] will of their own, but were bound to absolute obedience to their masters."[153] The defenders of the slave states "den[ied] the fact that slaves are considered merely as property, and in no respect whatever as persons."[154] Although slaves were considered as property,[155] they were considered as persons in the criminal law, both because they were subject to criminal liability, and because (it was said) they were under the protection of the law against homicide and mayhem.[156] The upshot for our purposes is that no one in the debate regarded slaves as legal persons across the law, and yet the Constitution uses a sense of "person" that unambiguously included them.[157]

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149 Jones, 1 Miss. at 84–85. This form of protection was mostly nominal in the slave states, and for many purposes eliminated even on paper.

150 THE FEDERALIST NO. 54, at 336 (James Madison) (Clinton Rossiter ed., 1961).

151 *Id.* ("Slaves are considered as property, not as persons."); 1 STORY, *supra* note 133, at 451 ("On the one hand it was contended that slaves were treated in the States which tolerated slavery as property and not as persons.").

152 1 STORY, *supra* note 133, at 451.

153 *Id. See also* ST. GEORGE TUCKER, 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, Appendix 54 (1803) ("Civil, or rather social rights, we may remember, are reducible to three primary heads; the right of personal security; the right of personal liberty; and the right of private property. In a state of slavery the two last are wholly abolished, the person of the slave being at the absolute disposal of his master; and property, what he is incapable, in that state, either of acquiring, or holding, to his own use."); *id.* at Appendix 58 ("From this melancholy review it will appear that not only the right of property, and the right of personal liberty, but even the right of personal security, has been, at times either wholly annihilated, or reduced to a shadow: and even in these days, the protection of the latter seems to be confined to very few cases.").

154 THE FEDERALIST NO. 54, at 337; *see also* 1 STORY, *supra* note 133, at 451 ("On the other hand it was contended that slaves are deemed persons as well as property.").

155 2 KENT, *supra* note 43, at 253 ("[I]n contemplation of law, slaves are considered as things, or property, rather than persons, and are vendible as personal estate. They cannot take property by descent or purchase, and all they find, and all they hold, belongs to the master.").

156 THE FEDERALIST NO. 54, at 337; 1 STORY, *supra* note 133, at 451–52.

157 The received view is subject to a dilemma. If slaves lacked any legal personality in the slave states, the Constitution does not use a legal sense of "person," for the Constitution refers to them as persons. If slaves enjoyed a modicum of legal personality, then either a legal sense is in the text, and having a modicum is sufficient to be a "person" within the meaning of the Constitution, or else a modicum is insufficient. If a modicum is insufficient, the Constitution uses the ordinary sense of "person," for it referred to slaves as such. The unborn would then also be included, for they are within the ordinary sense.

We are now able to see the relevance of this brief digression into that miserable chapter of our country's history. The best explanation of this evidence is that the Constitution uses "person" in the ordinary sense denoting all living human beings.[158] It referred to slaves as persons because of their palpable natural personality; because they were living human beings.[159] To be sure, in some jurisdictions, slaves were at once regarded as persons and as non-persons, in the criminal law and in property, respectively. These jurisdictions recognized the reality of the natural personality of slaves for some purposes, for example, to subject them to criminal liability, but they endorsed the fiction that slaves are merely property for others. The legal status of the unborn was the reverse. In some jurisdictions, the unborn were regarded as persons in property but not in the criminal law. These jurisdictions recognized the reality of the natural personality and humanity of the unborn for some purposes, and they endorsed the fiction that they do not exist as such for others. Because the original Constitution uses the word "person" in a sense that unambiguously referred to slaves, it follows that being imperfectly recognized as persons in the law of some jurisdictions cannot exclude one from the extension of the original meaning of "person" in the Constitution. And it likewise follows that the imperfect degree to which the common law recognized and protected the unborn cannot, by itself, furnish the ground of their exclusion from constitutional personality. If the original meaning of "person" in the original Constitution is "living human being," and if the same meaning is in the Fourteenth Amendment, the only question is whether the unborn are living and human.

These considerations point us toward an answer to *Roe*'s treatment of the legal status of the unborn. *Roe* recognized that the unborn were regarded as persons for some purposes. The Court explained that "unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*."[160] But it concluded that "the unborn have never been recognized in the law as persons *in the whole sense*" because "[p]erfection of the interests involved . . . has generally been contingent upon live birth."[161] It did not occur to the Court that slaves were also not "recognized in the law as persons in the whole sense," and yet the Constitution refers to them as such.

If a modicum is sufficient, then both slaves and the unborn are included, for both had some recognition in the law. On any of the horns of this dilemma, the unborn come out as persons within the meaning in the Constitution.

158 *Cf.* CONG. GLOBE, 38TH CONG., 1st Sess. 1753 (1864) (Brown), http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=065/llcg065.db&recNum=778 (explaining that "all other persons" in Article I, section 2 meant does not "carry with it anything further than a simple allusion to the existence of the individual").

159 *See* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO STATE L.J. 13, 20 & n.19, 49 (2013).

160 *Roe*, 410 U.S. at 162.

161 *Id.* (emphasis added).

This evidence from the use of "person" in the original Constitution bears on the way that word is used in the Equal Protection Clause. The meaning of "person" in the Due Process Clause of the Fifth Amendment must be taken to have the same meaning as "person" in the provisions referring to slaves.[162] It follows that the ordinary meaning is in the original Due Process Clause.[163] The Fourteenth Amendment, in turn, transplants the Fifth Amendment's Due Process Clause and applies it against the states.[164] To be sure, it is possible that the meaning of "due process" changed between 1791 and 1868. Some scholars argue, for example, that the meanings of the substantive rights in the Bill of Rights changed in that period.[165] But there is no reason to suppose that any linguistic changes in the decades between the two clauses related to the meaning of "person," or that the Fourteenth Amendment included a more restrictive sense than the one used in the original Constitution. The relevant sense of "person"—living human being[166]—has remained remarkably stable for centuries. And the ordinary meaning of that word remained constant between 1791 and 1868.[167] If "person" means "living human being" in the Due Process Clause of the Fourteenth Amendment, and if "person" bears the same meaning throughout the Fourteenth Amendment, then the meaning of "person" in the Equal Protection Clause is "living human being."[168]

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162 *See* Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); SCALIA & GARNER, *supra* note 27, at 170 ("A word or phrase is presumed to bear the same meaning throughout a text . . . .").

163 *Cf.* CONG. GLOBE, 37TH CONG., 2d Sess. 1449 (1862) (Sumner), http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=059/llcg059.db&recNum=490 (explaining that the Fifth Amendment "is also applicable to all who are claimed as slaves; for, in the eye of the Constitution, every *human being* within its sphere, whether Caucasian, Indian, or African, from the President to the slave, is a *person*" and noting that the word "person" was used instead of "freeman").

164 *See* Bernstein, *supra* note 12, at 516 n.159. *Cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) (explaining that if a provision "is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

165 *Cf.* New York State Rifle & Pistol Assoc., Inc. v. Bruen, 142 S. Ct. 2111, 2138 (2022) ("acknowledg[ing] that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope").

166 *See, e.g.*, *Person*, WEBSTER, *supra* note 32 (explaining that a "person" is "[a]n individual human being" and the word applied to "living beings only, possessed of a rational nature" such as "a man, woman or child"). A fetus was regarded as an unborn *child*. E.g., Swift v. Duffield, 5 Serg. & Rawle 38, 40 (Pa. 1819) (referring to a fetus as "[a] child in the womb of the mother"); 4 BLACKSTONE, *supra* note 46, at 36–37, 198 (referring to a fetus as "a child in its mother's womb"); Jones, 1 Miss. at 85 (explaining that a "child unborn" is a "*reasonable creature*" and "a human being"); *Childbrearing*, WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (1788) ("the act of bearing children").

167 *See* Bernstein, *supra* note 12, at 504 & nn.90–91; Craddock, *supra* note 5, at 549 ("According to dictionaries of common and legal usage at the time of the Fourteenth Amendment's adoption, the term 'person' was largely interchangeable with 'human being' or 'man.'").

168 John Bingham reported that the ordinary sense of "person" was intended, providing direct historical evidence that the framers intended to communicate precisely the same sense most likely to be received

VI. THE ARGUMENT FROM EXPECTED APPLICATIONS

As I argued above and elsewhere,[169] that conclusion is bad news for those who support a right to abortion. The proposition that the unborn are living human beings is not controversial as a scientific matter. For that reason, some of the most prominent proponents of abortion rights accept that the unborn are living members of our species.[170] The debate is not whether the unborn are living and human, but whether all living human beings are worthy of legal protection. If my argument is sound, the Constitution adopted the affirmative answer to that question in 1868.

Professors Bernick and Lens recently published the first lengthy originalist critique of fetal personhood.[171] Although their Article contains evidence that is of considerable historical interest, its central argument—that the evidence recited conclusively refutes fetal personhood—is unsound. Their argument—which is perhaps the commonest one against fetal personhood[172]—is worth considering at some length. As I understand it, the argument involves two premises and a conclusion:

1. The expected applications of concepts in 1868 are "strong evidence" of the public meaning of those concepts in 1868.[173]

2. The public in 1868 did not generally expect "person" to apply to or encompass fetuses.[174]

Therefore,

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by the public. *See* Erving E. Beauregard, *John A. Bingham and the Fourteenth Amendment*, 50 THE HISTORIAN 67, 69 (1987) (explaining that his "laboring for the Fourteenth Amendment represented [his] conviction of the fundamental, eternal rights of humanity" and that he "sought to obtain for all human beings . . . the precious rights of life, liberty and the pursuit of happiness").

169 Bernstein, *supra* note 12, at 508–09 & accompanying notes.

170 PETER SINGER, PRACTICAL ETHICS 73 (3d ed. 2011) ("there is no doubt that from the first moments of its existence, an embryo conceived from human sperm and eggs is a human being").

171 EVAN D. BERNICK & JILL WIEBER LENS, ABORTION, ORIGINAL PUBLIC MEANING, & THE AMBIGUITIES OF PREGNANCY (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4342905. I respond to a pre-publication draft of the Article. The final published version may include substantive changes of which I could not take account here.

172 The argument is not new. Justice Scalia and Judge Bork endorsed it in cursory fashion. Professors Bernick and Lens fill in the historical details. *See* Bernstein, *supra* note 12, at 488, 490 nn.10, 17.

173 BERNICK & LENS, *supra* note 171, at 9, 13.

174 *Id.* at Part III. It is unclear whether Professors Bernick and Lens believe that the evidence supports this premise throughout all pregnancy. As I read their evidence, it is not at all clear that the public would not have considered the unborn as persons later in pregnancy. It is therefore equally unclear whether their argument supports the received view that the Fourteenth Amendment gives no protection whatever to the unborn as opposed to a more moderate position.

3. The expected application in 1868 that "person" would not apply to or encompass fetuses is strong evidence that the public meaning of "person" in 1868 would not apply to or encompass fetuses.

Call this the *expectations argument*.

Let us begin by considering the evidential weight of expected applications. To bolster their argument, Professors Bernick and Lens take as their foil the dueling opinions in *Bostock v. Clayton County*.[175] Their point is that Justice Alito's dissent puts much weight on the fact that the public in 1964 did not expect the Civil Rights Act to prohibit discrimination based on sexual orientation or gender identity.[176] The Court focused on dictionaries; the dissent more so on broader societal context.[177] "One can side methodologically with . . . Gorsuch or with Alito," they say, "but *one must stay on that side, and practice what one preaches*."[178] "If original expectations that are shaped by and part of . . . social context are strong evidence of the original public meaning of Title VII," they argue, "they should be treated as strong evidence of the original public meaning of the Fourteenth Amendment."[179] Professors Bernick and Lens argue "prenatal personhood proponents operate at a Gorsuchian level of abstraction from the social context in which the Fourteenth Amendment was framed and ratified."[180]

Although generally relevant, expected applications are not strong evidence of meaning for *some* concepts. For example, things may belong to *natural kinds* even if most people do not yet see that they do.[181] Professors Bernick and Lens use an example involving gold.[182] Suppose that many people believe that a metal object that resembles the stuff of which a man's wedding ring is typically composed is gold. They believe this, let us say, because the object is yellowish and has the property of being a soft metal. Notwithstanding their expectations, if the object does not have 79 as its atomic number, then the many have been fooled. The upshot is that expected applications about natural-kind concepts like "gold" are particularly defeasible.

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175 140 S. Ct. 1731 (2020).

176 BERNICK & LENS, *supra* note 171, at 4–5, 10–12.

177 *Id.*

178 *Id.* at 13. Professors Bernick and Lens "do not take sides" on the dueling approaches, so their overall argument is more like a *tu quoque* against originalists who believe in fetal personhood and that *Bostock* was mistaken. *Id.* at 12–13.

179 BERNICK & LENS, *supra* note 171, at 13.

180 *Id.*

181 Professor Strang calls this "natural kind meaning," or "meaning that corresponds to natural reality, independently of human convention." Brief for Lee J. Strang as Amicus Curiae supporting Petitioners at 11–12, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), https://www.supremecourt.gov/DocketPDF/19/19-1392/185338/20210729155700355_Dobbs%20Amicus.pdf.

182 BERNICK & LENS, *supra* note 171, at 9 (citing John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007)).

If *person*, in its most ordinary sense, is the natural-kind concept *human being*,[183] that conclusion bears importantly on the expectations argument. Imagine that a time traveler from the distant future had travelled to the eighteenth century with a robot that looked and behaved indistinguishably from humans. The robot was known as George Washington. If, in this counterfactual scenario, everyone expected that Washington was "[t]he Person having the greatest Number of Votes"[184] in the Election of 1792, they would have been mistaken about the facts; John Adams would have been within the original meaning of that provision although everyone thought it applied to Washington instead. If we, in 2023, learned that Washington was a robot, no judge could sensibly hold that robots are within the original meaning of "Person" based on an advocate's argument that everyone expected that "Person" applied to Washington.

That thought experiment, though counterfactual,[185] illustrates a significant problem with the expectations argument in relation to the account it targets. If "Person" originally meant *human being*, a natural-kind concept, then original beliefs about whether this or that thing falls within that kind are not "strong evidence against prenatal constitutional personhood."[186] To stretch the gold example a little more, even though people commonly believe that fool's gold is gold, those beliefs would not throw into doubt whether fool's gold is within the extension of "gold … Coin."[187] Those folk beliefs are better explained as mistakes of fact than by proper application of a meaning of "gold" that does not correspond to the natural kind.

The expectations argument misses its target for the same reasons. The target is the following account: "person" meant "[a]n individual human being"[188]—a being "[b]elonging to . . . man*kind*"[189] or the human "species."[190] Proponents of that account have pointed to at least three sources of evidence for it: evidence from the sense recorded in dictionaries,[191] direct evidence that the Framers used "person" in that sense,[192] and usage of "person" or related

183 Strang Brief, *supra* note 181, at 13–21.

184 U.S. CONST. art II, § 1.

185 Less counterfactual examples would also illustrate the point. If person means *human* being, anyone who thought that Africans are not *persons* was egregiously mistaken about the *facts*, not the *meaning* of person—*human being*.

186 *Contra* BERNICK & LENS, *supra* note 171, at 13.

187 U.S. CONST. art. I, § 10.

188 *Person*, WEBSTERS, *supra* note 32.

189 *Human*, *id.*

190 *Mankind*, *id.*

191 *See supra* notes 188–190.

192 Strang Brief, *supra* note 181, at 14–16 (Trumbull, Howard, and Bingham all used "person" and "human being" interchangeably); John Bingham reported that the ordinary sense of "person" was intended, providing direct historical evidence that the framers intended to communicate precisely the same sense most likely to be received by the public. *See* Beaureg, *supra* note 68, at 69 (explaining that his "laboring for the Fourteenth Amendment represented [his] conviction of the fundamental, eternal rights

concepts in statutes.[193] Against those sources of evidence, Professors Bernick and Lens appeal to 19th-century folk beliefs that the unborn—at least at some stages—are not living human beings.[194] But whether something is a living human being, like whether something is gold, is entirely a question of "biological fact" about which persons can be mistaken.[195] Accordingly, if 19th-century folk beliefs are better explained as mistakes of fact than by proper application of *another* meaning of "person" that does not correspond to the relevant natural kind, then the historical evidence Professors Bernick and Lens rehearse does not refute the proposition that the sense recorded in dictionaries, spoken by the Framers, and used in 19th-century statutes is the commonest one.[196]

The historical evidence Professors Bernick and Lens rehearse confirms that mistakes of fact plausibly explain the original beliefs about "person" on which they rely. We are told that "women's conceptions of what was growing inside of them was fluid."[197] Some women believed that it was "'a person inside,'"[198] while others thought of it as "'a more nebulous object.'"[199] Beliefs sometimes varied depending on the stage of pregnancy, with some women thinking that what had been a nebulous object later became human.[200]

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of humanity" and that he "sought to obtain for all human beings . . . the precious rights of life, liberty and the pursuit of happiness").

193 Strang Brief, *supra* note 181, at 19 ("State law itself reflected this understanding because twenty-eight of the thirty jurisdictions that statutorily restricted abortion placed their restrictions under the label 'offenses against the person,' and twenty-three states labeled unborn human beings children.").

194 BERNICK & LENS, *supra* note 171, at 34–40.

195 *See* Singer, *supra* note 170, at 73 ("Whether a being is a member of a given species is something that can be determined scientifically by an examination of the nature of the chromosomes in the cells of living organisms.").

196 A significant weakness of their argument is that Professors Bernick and Lens do not identify another candidate for the ordinary meaning of "person." Professors Bernick and Lens need to show that, if a reasonable speaker of English had been asked what "person" means, she would not have answered "living human being"—the sense endorsed by lexicographers of the day. For if she would have answered "living human being," then her beliefs about whether "whatever it is that grows in the womb after conception," *id.* at 32, is a person could be explained by her *factual* beliefs about whether that thing is a human being. If it is and she thinks not, then her false belief obviously does not show that she was mistaken about the meaning of "person," but it would explain why she thinks the unborn are not persons: she thinks they are not living human beings. Accordingly, if the lexicographers got it right, we cannot avoid the factual question of what the unborn are.

197 *Id.* at 40.

198 *Id.* at 36.

199 *Id.* at 33–34.

200 "One example is Caroline Dall. When her second pregnancy ended with birth at eight months, Dall described that her husband 'buried the little one with his own trembling hands.'" But "Dall also had a miscarriage in an earlier pregnancy" and "Dall never mentioned anything in her diaries regarding what she did with the fetal remains from her miscarriage." *Id.* at 37. Professors Bernick and Lens argue that most women's treatment of fetal remains betrayed "an understanding flatly incompatible with prenatal personhood." *Id.*; *see also id.* at 40 ("Everything about this historical public understanding of fetal tissue is incompatible with the emphasis on 'unborn human beings' in *Dobbs* and prenatal personhood.").

Moreover, we are told that these beliefs were "affect[ed]"[201] by and "not surprising given" false scientific theories of the day like "preformation."[202] On that "dominant" view, "[w]hat comes out of women in pregnancy loss, especially early pregnancy loss" is not human because it the tissue "'did not resemble a fully formed, but miniature' baby.'"[203] "'Many believe[d] it is no sin to produce abortion *before there is life*, but there is always life from the moment of conception.'"[204] Mutually exclusive folk beliefs about when human life begins, misinformed by false scientific theories, fit comfortably with what was always the correct and unremarkable explanation of the data: people were (and remain) generally ignorant about when human life *in fact* begins.

In response, Professors Bernick and Lens reject the thesis that "person" meant "living human being" with a cursory argument from silence.[205] They argue that legislators received the medical evidence that the unborn are living human beings and adopted abortion restrictions in the light of that evidence, but "none of those in possession of these purportedly novel facts raised the possibility that the Fourteenth Amendment had any implications for abortion."[206] "The stronger inference from this silence," they conclude, "is not nineteenth-century ignorance," and "if the public meaning of 'person' denotes a natural kind, prenatal life is not of that kind."[207]

Their rejoinder is too quick. There are plausible explanations of the silence that are entirely compatible with the thesis that "person" meant "living human being"—a kind to which the unborn unquestionably belong. Consider just one plausible explanation of the silence.

"[T]he one pervading purpose" and "foundation" of the Fourteenth Amendment was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[208] The Fourteenth Amendment "was addressed to the grievances of that race, and designed to remedy them."[209] To be sure, the Fourteenth Amendment by its neutral terms applies to persons of all races.[210] But the treatment of former slaves "alone was in the mind of the Congress

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Perhaps so. But that fact does not tell us *why* women treated the remains the way they did. If it was because they did not regard (earlier) fetuses as living humans, then the reason was a mistake of fact, not correct application of a meaning of "person" hitherto undiscovered by the lexicographers of the day.

201 *Id.* at 34–35.

202 *Id.* at 40, 34–35.

203 *Id.* at 34–35.

204 *Id.* at 36.

205 *Id.* at 40–41.

206 *Id.* at 41.

207 *Id.*

208 Slaughter-House Cases, 83 U.S. 36, 71 (1872).

209 *Id*. at 72.

210 *Id*. at 129.

which proposed" it.[211] Because the Fourteenth Amendment was ratified to remedy those grievances, it is not surprising that politicians devoted their Fourteenth Amendment-related attention after 1868 to the condition of those who had been enslaved.

Significantly, unlike black persons, *the law had already protected unborn persons* by the end of the 19th-century.[212] The common law had for centuries protected the unborn by outlawing abortion[213] consistent with the then-prevailing beliefs about when life began or could be detected,[214] and the evidentiary difficulties associated with determining the cause of fetal death.[215] "By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening."[216] "Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910."[217] "All [Territories] criminalized abortion at all stages of pregnancy between 1850 … and 1919."[218] And in 1873, Congress proscribed the conveyance or advertisement of "any drug or medicine, or any article whatever, … for causing unlawful abortion."[219]

The politicians who received the "novel facts"[220] expeditiously acted to expand protection of the unborn *before ratification of the Fourteenth Amendment* and shortly thereafter. The fact that former slaves were not protected, and the fact that the unborn were probably protected as far as was then thought practicable given the very ambiguities of pregnancy to which

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211 *See id.* at 72.

212 As discussed here, in the 19th-century, the statute law had virtually everywhere abrogated the common law of abortion to protect the unborn. By contrast, consider the lot of bastards in the 19th- and 20th-centuries. "The harsh and inhumane doctrine of the English common law ha[d] been carried over and incorporated into the common law of all American jurisdictions" except one. *Inheritance By, From and Through Illegitimates*, U. PENN. L. REV. 531, 531 (1936). The common-law rule that a bastard could not inherit from his father remained the rule in most of the states well into the 20th-century. *Id.* at 536. And it was not until that century that the Supreme Court applied the Equal Protection Clause in behalf of illegitimate children. *Levy*, 391 U.S. at 70. It would be odd to suppose that any silence about the application of the Fourteenth Amendment to illegitimate children is strong evidence that illegitimate children are not "Person[s]" (or citizens) within the public meaning of that concept.

213 1 Blackstone *126.

214 *Dobbs*, 142 S. Ct. at 2251–52.

215 Because of those evidentiary concerns, the law adopted the Born Alive Rule for murder. *See* Sims Case, 75 Eng. Rep. 1075, 1076 ("[I]f it be dead born, it is no murder, for *non constat* whether the child were living at the time of the battery or not, or if the battery were the cause of the death.").

216 *Dobbs*, 142 S. Ct. at 2253.

217 *Id*.

218 *Id*.

219 17 Stat. 598, 598–99 (Mar. 3, 1873), codified at 18 U.S.C. §§ 1461, 1462. This national abortion ban is still in the statute books. All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, 267–70 (5th Cir. 2023) (Ho, J., concurring in part and dissenting in part); All. for Hippocratic Med. v. FDA, 2023 WL 2913725, at *20–21 (5th Cir. Apr. 12, 2023); All. for Hippocratic Med. v. FDA, 2023 WL 2825871, at *16–19 (N.D. Tex. Apr. 7, 2023).

220 BERNICK & LENS, *supra* note 171, at 41.

Professors Bernick and Lens draw our attention, make unsurprising the fact that politicians did not go around championing the constitutional argument for the unborn. It would instead have been surprising if politicians had focused on persons already "under the protection of the law, and" who "possess[ed] all the privileges of a living being,"[221] when the people about whom they were principally concerned were still being subjugated. The original meaning of "person" is the meaning recorded in dictionaries of the day, the meaning that the Framers of the Fourteenth Amendment themselves unambiguously expressed, and the meaning that the founding generation unambiguously used in statutes: living human being.

CONCLUSION

Before concluding, I should like to address the cursory skepticism of fetal personhood that was lately expressed by Justice Kavanaugh in *Dobbs v. Jackson Women's Health Organization*.[222] In his concurrence, Justice Kavanaugh declared that "[t]he Constitution neither outlaws abortion nor legalizes abortion."[223] Elsewhere in his opinion, he expressed skepticism of the relevance of the English common law to interpret the Constitution. That evidence, he asserted, is merely "background information on the issue of abortion."[224] He explained instead that "the dispositive point in analyzing American history and tradition for purposes of the Fourteenth Amendment inquiry is that abortion was largely prohibited in most American States as of 1868 when the Fourteenth Amendment was ratified."[225] In the light of the considerations developed in this essay, Justice Kavanaugh is right to be skeptical of the relevance of the old common law. I mention all this because the English common law is the most plausible basis to suppose that the unborn are not constitutional persons. Why Justice Kavanaugh thinks that the unborn are not constitutional persons, despite his skepticism of importing the common law of England into the Constitution, is unclear.

For the reasons discussed above, the reasoning cannot be that the framers and ratifiers of the Fourteenth Amendment did not have unborn persons in mind. To reason that way would be to confuse *sense*—the meaning of a word—and *reference*—the persons to whom or the things to which the word refers.[226] The original meaning of a law is binding, not original beliefs (or lack thereof) about reference or applications to particular cases.[227] A

221 Swift v. Duffield, 5 Serg. & Rawle 38, 40 (Pa. 1819).

222 142 S. Ct. 2228 (2022).

223 *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring).

224 *Id.* at 2304 n.1 (Kavanaugh, J., concurring).

225 *Id.*

226 *See* Bernstein, *supra* note 12, at 493–94 & accompanying notes.

227 *See id.* at 494. The framers of the Fourteenth Amendment could not have foreseen the kind of zeal for unrestricted abortion that occupies the minds of many people today, and likely did not foresee

legislator can know what "automobile" means without having any beliefs about a particular kind of automobile that exists in a foreign country. If a legislature passes a statute that regulates automobiles, and a foreign model is for the first time imported into this country, then the statute will apply to it although nobody in the legislature thought about the foreign model when the statute was enacted.[228] The framers and ratifiers of the Fourteenth Amendment did not have Sentinelese persons in mind; they were principally concerned about former slaves.[229] Still, if such persons later emigrate here, they would be under the protection of the laws, for they satisfy all the conditions in the original ordinary meaning of "person:" they "are humans, live, and have their being."[230] The same is true of the unborn.[231] And no State, consistent with the requirements of equal protection, may permit private individuals to kill innocent human beings.[232]

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that many states would strip the unborn of virtually all legal protection until live birth. At the time, the law across the country provided the unborn with some protection. *See* Dobbs, 142 S. Ct. at 2297 app'x A (2022) (listing state statutes criminalizing abortion). It is irrelevant that nobody foresaw that States would strip the unborn of the protection of the laws, and therefore that the Equal Protection Clause would later apply in the context of abortion. *Cf.* Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (explaining that "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet new and different conditions which are constantly coming within the field of their operation" and "although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall").

228 *Cf.* SCALIA & GARNER, *supra* note 27, at 101 ("General terms are to be given their general meaning.").

229 *See* Slaughter-House Cases, 83 U.S. at 72 ("We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.").

230 *Levy*, 391 U.S. at 68; *Cf.* SCALIA & GARNER, *supra* note 27, at 101 (denying the proposition that "when courts confront generally worded provisions, they should infer exceptions for situations that the drafters never contemplated and did not intend their general language to resolve"); *id.* (rejecting the proposition that because the Fourteenth Amendment "was enacted for the benefit of blacks, it should not apply to anybody else" despite use of the word "persons").

231 *See* Bernstein, *supra* note 12, at 507–10.

232 *Id.* at 495–501.

FAILURE TO LAUNCH: AGENCY INCENTIVES AND INDUSTRY INTERESTS IN AVOIDING COMPREHENSIVE EMERGING TECHNOLOGY EXPORT CONTROLS

Tim O'Shea

> *"The eagle, pierced by the bow-sped shaft, looked at the feathered device, and said, 'Thus, not by others, but by means of our own plumage, are we slain.'"*
>
> —Libyan fable[1]

I. INTRODUCTION: SEEKING CONTROL AT THE CUTTING EDGE

On February 15, 1996, a Chinese rocket carrying a commercial satellite from U.S.-based companies Loral Space & Communications and Hughes Electronics blew up twenty-two seconds after launch, sending fiery debris and fuel billowing down over a nearby village and killing 200 civilians.[2] Loral engineers cooperated with Chinese officials in diagnosing the cause of the crash, sending them information about issues with the rocket guidance system and the construction of the Inertial Measurement Unit (IMU).[3] This seemingly innocuous action had two consequences on opposite sides of the planet. First, the Chinese government relayed this guidance system and telemetry information to the People's Liberation Army (PLA), allowing the military to improve critical missile guidance systems, including the missiles that carried the country's nuclear arsenal.[4] Secondly, this development was not lost on the U.S. government, which launched a Congressional inquiry and a grand jury investigation of the company for illegally sharing with the

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[1] Emmanuel Plantade & Nedjima Plantade, *Libyca Psyche: Apuleius' Narrative and Berber Folktales*, *in* APULEIUS AND AFRICA 175 n.17 (Benjamin Todd Lee, Ellen Finkelpearl & Luca Graverini, eds., 2014).

[2] Eric Schmitt, *A Secret U.S. Device Missing After '96 China Rocket Crash*, N.Y. TIMES (June 24, 1998), https://www.nytimes.com/1998/06/24/us/a-secret-us-device-missing-after-96-china-rocket-crash.html.

[3] Peter Grier, *The China Problem*, A.F. MAG. (Aug. 1, 1999), https://www.airforcemag.com/article/0899china/.

[4] HUGO MEIJER, TRADING WITH THE ENEMY: THE MAKING OF US EXPORT CONTROL POLICY TOWARD THE PEOPLE'S REPUBLIC OF CHINA 222 (2016); CRS Report: Congressional Research Service, China: Possible Missile Technology Transfers, Under U.S. Satellite Export Policy — Actions and Chronology 6-8 (2003), https://www.everycrsreport.com/files/20031006_98-485_da6014009a3511321a51c2ee3b73f061906f7bf5.pdf.

Chinese information critical to U.S. national security.[5] Loral eventually paid a $14 million civil fine without an admission of guilt.[6]

The Hughes-Loral Incident demonstrates the delicate balancing act between economic interdependence and national security presented by advanced technology. While Hughes and Loral were permitted to cooperate with the Chinese in launching their satellites, there were opaque but significant limitations on that cooperation designed to prevent the transfer of sensitive information. Export controls represent the clearest way to permit international commerce while preventing the proliferation of dangerous technology, utilizing regulations and limits on technology transfer to protect national interests. Export controls have also gained new importance due to the growth of dual use technologies: items with both civilian and military applications, whose commercial exports could offer new military capabilities to foreign militaries. Dual use technologies have become more integral to military strategy, both as weapons become more expensive and complex, and as world militaries increasingly integrate information and communications technologies into warfighting.[7] Consider only the history of U.S. military aircraft. In the decade after World War II alone, the military designed the B-52 bomber and redesigned it thirteen times.[8] Meanwhile, the latest fighter jet in the Air Force, the F-35 Lightning II, took fourteen years and $406.5 billion to develop.[9] It is no coincidence that a primary feature of the F-35 is its advanced computing technology and software, on top of other advanced features such as stealth capability.

Common sense dictates that such a high-stakes, high-risk international balancing act would require vast, proactive regulatory action. Indeed, the salience and intensity of this issue suggests that the regulatory response to control these dynamics would be swift and robust. However, when Congress sought to enhance regulations on emerging technologies and bring export controls into the twenty-first century, the regulatory follow-through was vague and piecemeal, running counter to expectations of expansive agency action and thorough regulation. While a traditional framework would suggest that a high-stakes, high-risk situation would lead to comprehensive

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5 *CIA Suspected Bribe to China in 1996*, CHI. TRIB. (Dec. 24, 1998), https://www.chicagotribune.com/news/ct-xpm-1998-12-24-9812240065-story.html.

6 Reily Gregson, *Loral to Pay Civil Fine in Failed Rocket Launch Case*, RCR WIRELESS NEWS (Jan. 10, 2002), https://www.rcrwireless.com/20020110/archived-articles/loral-to-pay-civil-fine-in-failed-rocket-launch-case.

7 MEIJER, *supra* note 4, at 5.

8 Missy Ryan, *The U.S. System Created the World's Most Advanced Military. Can It Maintain an Edge?*, WASH. POST (Apr. 2, 2021), https://www.washingtonpost.com/national-security/china-us-military-technology/2021/03/31/acc2d9f4-866c-11eb-8a67-f314e5fcf88d_story.html.

9 James Drew, *First Operational F-35 Squadron Declared Ready for Combat*, FLIGHTGLOBAL (July 31, 2015), https://www.flightglobal.com/first-operational-f-35-squadron-declared-ready-for-combat/117812.article; Anthony Capaccio, *F-35 Program Costs Jump to $406.5 Billion in Latest Estimate*, BLOOMBERG (July 10, 2017), https://www.bloomberg.com/news/articles/2017-07-10/f-35-program-costs-jump-to-406-billion-in-new-pentagon-estimate.

regulation, this article argues that this dilemma instead fell victim to incentives in both agency practice and private industry that foreclosed the possibility of a serious regulatory regime.

This article seeks to examine the strategies of the Department of Commerce Bureau of Industry and Security (BIS) and the U.S. technology industry during the Export Controls Reform Act of 2018 (ECRA) rulemaking regarding export controls on emerging technologies, and explain how both actors sought to prevent the emergence of bright-line technology classifications. This is a strong case study for understanding the interaction of agency incentives and technology sector interests on this critical foreign policy tool for three reasons. First, the rulemaking proceeding forced BIS to confront a broad range of technologies with uncertain futures, testing the ability of the agency to craft complex and comprehensive regulations while drawing in many technology industry stakeholders. Second, because the rulemaking concerned technologies outside the purview of the existing export control legal regime, the proceeding offers an opportunity to examine how BIS and technology sector stakeholders would attempt to build regulations from the ground up, revealing more of their policy preferences than efforts to slightly modify existing regimes. And third, recent public discourse around technology regulation in the areas of antitrust, misinformation, and privacy have fueled rapid growth in the strength of technology industry government affairs contingents. From 2016 to 2019, the lobbying expenditures of the four largest technology firms (Amazon, Apple, Facebook, and Google) doubled, from $27.4 million to $55 million.[10] This rulemaking therefore offers the opportunity to evaluate the strategy of the technology industry accurately given its reinforced strength, as well as how BIS interacts with this influential sector.

Part II begins by describing the background and text of ECRA's provisions regarding emerging technologies, kickstarting the regulatory process. Part III identifies a framework for evaluating the optimal precision of rulemaking, and how agency and industry incentives under uncertainty may alter the outcomes of rulemaking counter to the expectations of that framework and result in suboptimal levels of regulation. Part IV then examines the agency strategy for implementing ECRA, and how internal and external incentives against regulation may have contributed to a lack of follow-through and codification. Part V explores the participation of the technology industry, drawing on data from the ECRA rulemaking process and legal analysis of a popular advocacy tool to argue that the technology industry's two-track preference system similarly sought to prevent the emergence of optimal regulations. Part VI concludes by identifying the conditions and incentives present in this case study, and summarizing the lessons and takeaways for other areas of regulation.

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10 Cecilia Kang & Kenneth Vogel, *Tech Giants Amass a Lobbying Army for an Epic Washington Battle*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/us/politics/amazon-apple-facebook-google-lobbying.html.

II. THE EXPORT CONTROLS REFORM ACT OF 2018 (ECRA)

A. *ECRA's Background*

Concerns over dual use exports have arisen over China specifically for three reasons. First, Chinese accession to the WTO in 2001 allowed them to acquire a wider range of military technology, placing new emphasis on scrutiny over exports.[11] Second, the Chinese military in the early 2000s publicly shifted their procurement strategy from a buildup of conventional weapons to the "integration of the civilian and defense industrial base."[12] Indeed, a primary drive of the modernization of the PLA has been its integration of so-called dual use items. For instance, the PLA's acquisition of supercomputers allowed it to quickly advance weapons development, produce stealth materials, and simulate tests of missile systems and nuclear weapons.[13] Third, Chinese territorial and hegemonic ambitions have placed Chinese military acquisition at the forefront of global stability concerns, elevating these procurement issues into levers in the global balance of power.[14]

ECRA sought to address the issue of Chinese aggression by bolstering U.S. export restrictions around new categories of "commodities, software, and technology" that could represent a security threat in the hands of foreign actors.[15] The bill was consolidated into the National Defense Authorization Act of 2019, and passed in August 2018.[16] Among other directives, the bill required BIS to explore and designate "emerging technologies": cutting-edge developments with a nexus to national security that should be subject to dual use controls. The choice to delegate this decision to the executive is consistent with historic Congressional deference to executive agencies on both highly technical and national security-related matters. Importantly, this delegation would require BIS to build the category from scratch, requiring a

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11 MEIJER, *supra* note 4, at 241-42.

12 *Id.* at 245.

13 *Id.* at 255.

14 *See* Marcus Clay, *The PLA's New Push for Military Technology Innovation,* THE DIPLOMAT (Oct. 31, 2020), https://thediplomat.com/2020/10/the-plas-new-push-for-military-technology-innovation/; Zhao Lei, *Tech Key to Military Modernization, Says General,* CHINA DAILY (Dec. 29, 2020), https://www.chinadaily.com.cn/a/202012/29/WS5fea81f5a31024ad0ba9f24a.html.

15 Export Control Reform Act of 2018, H.R. 5040, 115th Cong. (2018); Ian F. Fergusson, Paul K. Kerr & Christopher K. Casey, Cong. Rsch. Serv., The U.S. Export Control System and the Export Control Reform Act of 2018 (2018), https://congressional.proquest.com/congressional/docview/t21.d22.crs-2021-crs-215295?accountid=14541.

16 John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong. § 1751 (2019); FY19 Defense Authorization Bill Passes Congress in Record Speed, (2018), https://www.defense.gov/Newsroom/Releases/Release/Article/1591064/fy19-defense-authorization-bill-passes-congress-in-record-speed/#:~:text=The%20Department%20of%20Defense%20applauds,359%2D54%20in%20the%20House (last visited Apr. 5, 2021).

long research process and serious deliberation over how to draw the scope of new controls.

ECRA represented a broadside in the rapidly emerging technological competition between the United States and China. In spite of being America's "biggest acknowledged security threat," China is also the largest export market for many U.S.-based multinational companies.[17] Threading this needle has previously been a serious challenge for BIS, which has often received criticism for siding with industry interests over the recommendations of the national security community when the two come into conflict.[18] Former President Donald Trump's administration heavily wielded BIS in its geopolitical battles with China, adding hundreds of Chinese companies to the "Entity List," forcing U.S. companies to acquire licenses to do business with them.[19] But export controls are a significant escalation above even these tactics; because China is under a U.S. arms embargo, any exports would require licensure if they fell under the new dual use export controls.[20] While the Entity List is more surgical, flagging and punishing wrongdoing companies, export controls would impact whole swaths of the U.S. and Chinese technology sectors. The U.S. has historically used these controls mainly on high-profile, dual use technology exports such as supercomputers and advanced guidance systems, including those used in the Hughes-Loral incident.[21] With its broad mandate over highly valuable and impactful technologies, ECRA reinforced the role of BIS in the clash of national security and international trade on the newest frontiers of technological development.

As such, ECRA implicated the interests of an ascendant U.S. technology industry. As of 2020, the U.S. technology industry was responsible for $1.9 trillion in economic output, accounting for ten percent of U.S. GDP and 12.1 million jobs.[22] All five largest publicly traded U.S. companies are technology companies, and together constitute twenty percent of the stock market's total worth, a concentration not seen in the U.S. for seventy years.[23] Importantly, the technology industry also draws massive revenue from exports: $338

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17 Ana Swanson, *The Agency at the Center of America's Tech Fight With China*, N.Y. TIMES (Mar. 26, 2021), https://www.nytimes.com/2021/03/26/business/economy/commerce-department-technology-china.html.

18 *Id.*

19 *Id.*; *Entity List*, U.S. DEP'T OF COM. BUREAU OF INDUS. AND SEC., https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list (last visited Apr. 2, 2021).

20 Mario Mancuso & Anthony Rapa, *Anticipating a Turning Point in US Export Controls for Tech*, KIRKLAND & ELLIS (Jan. 28, 2020), https://www.kirkland.com/publications/article/2020/01/anticipating-turning-point-us-export-controls-tech.

21 *See generally* MEIJER, *supra* note 4.

22 N.F. Mendoza, *US Tech Industry Had 12.1 Million Employees in 2019*, TECHREPUBLIC (Apr. 21, 2020), https://www.techrepublic.com/article/us-tech-industry-had-12-1-million-employees-in-2019/.

23 Peter Eavis & Steve Lohr, *Big Tech's Domination of Business Reaches New Heights*, N.Y. TIMES (Aug. 19, 2020), https://www.nytimes.com/2020/08/19/technology/big-tech-business-domination.html.

billion in 2018 alone, including $17.9 billion from exports to China.[24] Although the technology industry and its interests are not monolithic, this level of commercial activity nonetheless introduced serious incentives for technology companies and associations to participate in shaping the implementation of ECRA and protecting global markets and opportunities. Thus, ECRA's directed rulemaking on emerging technologies prompted a necessary negotiation of the technology industry's commercial interests and the interest of BIS in protecting national security. However, as this article argues, the resulting under-regulation conformed to the preferences of both of these parties.

B. *ECRA's Emerging Technologies Directive*

ECRA directed the executive branch to conduct a sweeping inquiry to place controls on new technologies, tasking BIS with making major decisions over international trade and national security. The statute directed the President to lead a regular, ongoing interagency process to identify emerging technologies that were not covered by existing controls on critical technologies but were nonetheless "essential to the national security of the United States."[25] It required the process to take into account "(i) the development of emerging . . . technologies in foreign countries; (ii) the effect export controls imposed pursuant to this section may have on the development of such technologies in the United States; and (iii) the effectiveness of export controls imposed pursuant to this section on limiting the proliferation of emerging . . . technologies to foreign countries."[26] It required a notice-and-comment period for the process, leading to the rulemaking proceeding analyzed in this article.[27]

Other sections of the statute also defined the scope of the inquiry. It instructed the executive branch to take into account "the potential end uses and end users of the technology[,]" and exemptions were made for specific types of transactions, such as transactions which could not result in foreign parties using the technology in question.[28]

ECRA's Statement of Policy also contained language recommending the scope of possible controls. It states that:

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24 *US Technology Exports Totaled Nearly $340 Billion in 2018, CompTIA Analysis Finds*, COMPTIA (May 21, 2019), https://www.prnewswire.com/news-releases/us-technology-exports-totaled-nearly-340-billion-in-2018-comptia-analysis-finds-300853695.html.

25 H.R. 5515, 115th Cong. § 1758(a)(1).

26 *Id.* § 1758(a)(2)(B)(i)-(iii).

27 *Id.* § 1758(a)(2)(C). ECRA also required parallel rulemaking for so-called "foundational" technologies, although that rulemaking is not explored here.

28 *Id.* §§ 1758(b)(2)(B)(ii), 1758(b)(4)(C)(iii).

- Export controls are appropriate "only after full consideration of the impact on the economy of the United States and only to the extent necessary" in order "to restrict the export of items which would make a significant contribution to the military potential" of other "countries which would prove detrimental to the national security of the United States . . . ."[29]

- Export controls must take into account that the "national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sectors . . . ."[30]

- "[U]nilateral export controls should be limited for purposes of protecting specific United States national security and foreign policy interests."[31]

The statute therefore holistically established certain criteria for the executive branch to consider when weighing controls on emerging technologies. BIS had to consider whether the technologies were essential to U.S. national security, the foreign development of the technologies, impacts on domestic development, and the effectiveness of prospective controls. The Statement of Policy encouraged the evaluation of the impact of controls on foreign proliferation, the impact on the U.S. economy, the impact on U.S. technological leadership, and the specific national security and foreign policy interests invoked. Importantly, these considerations were framed as procedural elements, with the agency needing to consider such factors before placing controls. It did not create singular substantive elements whereby any of these considerations would be dispositive in the regulatory classification. This distinction is critical; whereas procedural requirements mandate an agency to consider a possible collateral impact and weigh it in their decision, a substantive requirement might preclude agency action based solely on a finding under that singular factor. This deference for substantive conclusions meant that BIS would still be the ultimate decider for which impacts or considerations would be influential or dispositive to the outcome of a classification. Ultimately, these classifications would determine if a given technology would be considered as a "critical technolog[y]," and therefore fall under the control of the Export Administration Regulations (EAR) as a dual use technology.[32] EAR regulations not only require licensure of exports based on the

29 *Id.* § 1752(1).

30 *Id.* § 1752(3).

31 H.R. 5515, 115th Cong. § 1752(6).

32 *Id.* § 1703(a)(6)(A)(vi).

specific technology and end-user, but often include costly additional compliance duties such as the verification of technology end users.[33]

For purposes of judicial review, ECRA exempted export control determinations from the Administrative Procedure Act (APA) requirement that agency decisions not be arbitrary or capricious.[34] Regulated parties have instead fought determinations in court by arguing that determinations fail rational basis review for a violation of Fifth Amendment substantive due process or that a determination represents the agency acting ultra vires.[35] This protection therefore offers BIS wide latitude in classifying and controlling emerging technologies, which they were forced to apply to wide and complex categories of technology under the directive of the statute.

III. FRAMEWORK: OPTIMAL PRECISION AND STRATEGIC IMPRECISION IN RULEMAKING

A. *Measuring Optimal Precision*

Evaluating agency and industry strategies in influencing rulemaking requires a paradigm by which to measure the important elements of rules and how agencies should approach the creation of robust rules. In his article, "The Optimal Precision of Administrative Rules," Colin Diver identifies three elements that can measure a rule's level of precision. First, regulations must be transparent, by formulating the rule with terminology and language that properly convey information to regulated parties.[36] Transparent rules clearly define what they are regulating and what they are not. Second, they must be accessible, meaning they can be ported into relevant scenarios and easily applied to different circumstances.[37] Accessible rules are therefore flexible and give regulated parties a degree of predictability about their future ventures. And third, they must be congruent, by matching their performance with the

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33 *China – Country Commercial Guide: U.S. Export Controls*, U.S. INT'L TRADE ADMIN. (Apr. 7, 2023), https://www.trade.gov/knowledge-product/china-us-export-controls.

34 *See* Fed. Express Corp. v. U.S. Dep't of Com., 486 F. Supp. 3d 69, 79 (D.D.C. 2020).

35 *See id*. at 75.

36 Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 67 (1983). Diver's framework is appropriate here for two reasons. First, his focus on discrete components of regulations allows for granular analysis of prospective rule changes, such as the analysis performed in Part V of this article. Second, this framework is a widely cited and accepted framework for measuring and characterizing administrative rules. *See generally* Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363 (Mar. 1986); Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209 (Sept. 2018); Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effects on Agency Rules*, 119 COLUM. L. REV. 85 (2019); James T. Hamilton & Christopher Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 L. & CONTEMP. PROBS. 111 (1994).

37 Diver, *supra* note 36, at 67.

underlying policy objective.[38] Congruent rules comport with the intention of the regulator in achieving the classifications they set out to create.

In the case of emerging technology export classification, an accessible rule would create a rubric or metric by which regulated parties could grade their products and understand the regulatory treatment. For example, the United States Munitions List (USML), which designates items and services as subject to the export licensing requirements of the Arms Export Control Act, includes certain firearm components under a residual category of "[a]ny part, component, accessory, attachment, equipment, or system that: (i) Is classified; (ii) Contains classified software; or (iii) Is being developed using classified information."[39] A transparent rule could include a specific list of technologies that fall under the rule. The USML specifically includes under its purview "[f]ully automatic firearms to .50 caliber (12.7 mm) inclusive" and "[f]ully automatic shotguns regardless of gauge."[40] Congruent classifications meet the intended outcome of the policy, which in this case means that the USML covers the appropriate categories of weapons the Arms Export Control Act intended to control.

However, Diver acknowledges that simply maximizing each of these elements is not only difficult, but often self-contradicting. For example, "[t]ransparency is usually bought at the price of incongruity or ex ante rulemaking costs" because fitting complex policymaking objectives into one concrete list of regulated items can often produce edge cases that frustrate the purpose of the rulemaking.[41] Instead, an agency must consider different formulations for rules along these three axes and determine how they perform under objective considerations such as compliance rates, over- and under-inclusion, costs of ex ante rulemakings, and costs of application.[42] For instance, issues that involve a large volume of prospective enforcement cases might require higher accessibility rather than congruence in order to facilitate fast and easy resolution of cases, even if this leads to marginal over or under-inclusion.[43] Significantly for the instant case, alterations to administrative rules that unilaterally reduce transparency, accessibility, or congruence can disarm rules of their essential purpose. An interested party might engineer an under-inclusion problem in relevant criteria in order to exempt some of their behavior from scrutiny or push for heightened accessibility through the creation of criteria that do not comport with the purpose of the regulation. Indeed, critics of the growing administrative state have long argued that notice-

38 *Id.*

39 22 C.F.R. § 121.1(II)(j)(17)(i)-(iii). Note that this article generally uses "classification" in the sense of designating items as "emerging technologies" or other export categories. However, the USML uses "classified" to refer to classified information.

40 22 C.F.R. § 121.1(I)(b), (d).

41 Diver, *supra* note 36, at 91.

42 *Id.* at 72-74.

43 *Id.* at 75.

and-comment rulemaking offers a pathway for regulatory influence by special interests.[44]

While this framework offers a useful lens for measuring the construction and impact of administrative rules, and therefore expectations of how an agency ought to logically construct regulations, its reliance on the objective evaluation of a rule without consideration for other agency or industry incentives creates a blind spot in the predictive power of the framework. As the below section argues, actor-specific incentives and uncertainty can result in the regulator and the regulated neglecting this framework, resulting in suboptimal under-regulation.

B. *Optimal Precision Confronted with Uncertainty*

Diver's framework fails to account for two important factors in rule construction: the interests of regulating and regulated parties and how those interests are impacted by uncertainty in regulated matters. First, Diver's framework is mainly actor-neutral insofar as it considers objective measures of the outcome of the rule, and does not consider exogenous incentives for participating parties. However, agencies and private parties have different perspectives on which levers of precision are most important, and these subjective perspectives may neglect the objective measure of rule precision. Regulated interests are biased towards accessibility and transparency because they have little financial interest in the congruence of the rule. Whether an agency classifies in accordance with Congressional command is less important to the economic success or failure of a regulated party. Meanwhile, regulators must focus more seriously on the congruence of the rule not only for selfish reasons of self-advancement, but because the Congressional intent underlying a rule is often a locus of political pressure and judicial review over agency actions. Given the procedures of notice-and-comment rulemaking and the ability of regulated parties to participate in the rulemaking process, the degree of congruence will therefore always be a serious point of contention when regulators and the regulated present conflicting visions of new regulations.

Second, uncertainty over present or future regulated action complicates the objectives of both the regulator and the regulated. In the case of emerging technologies, the uncertainty over the capabilities and dangers of nascent technology produces parallel and opposite effects. The uncertainty around the technology translates into more uncertainty over how regulators will

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[44] Clyde Wayne Crews, *Cataloging Regulatory Costs of Cronyism and Rent-Seeking in a Self-Interested Administrative State*, COMPETITIVE ENTER. INST. (Aug. 19, 2019), https://cei.org/blog/cataloging-regulatory-costs-of-cronyism-and-rent-seeking-in-a-self-interested-administrative-state/; Daniel Walters, *Capturing Regulatory Agenda?: An Empirical Study of Industry Use of Rulemaking Petitions*, 43 HARV. ENV'T L. REV. 175, 184-85 (2019), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2971&context=faculty_scholarship.

confront that confusion, which increases the desire of private parties to seek out transparent and accessible rules. Insofar as technical and physical characteristics do not offer companies predictive power over how their products will be classified, clear and concrete rules offer them a safe harbor for their commercial activity. However, from the perspective of a rulemaking agency, such clear lines may complicate future enforcement efforts in the event that technology rapidly evolves or new evidence of dangers comes to light. Grey areas give agencies an incentive to retain flexibility by refusing to offer concrete rules that could constrain their future actions. Thus, the type of uncertainty at hand in the emerging technologies rulemaking exacerbated the already-existing divergence in the preferences of agencies and private parties.

The below sections demonstrate how actor-specific incentives and uncertainty in the emerging technologies rulemaking resulted in a hesitation by BIS to regulate and opposition by the technology industry to flexible regulations. On the agency side, objective measures of rule precision ultimately failed to overcome significant internal and external incentives against comprehensive regulation, resulting in an ad-hoc approach that sought to avoid major policymaking dilemmas and retain flexibility. On the industry side, private actors sought to deter the creation of major export controls, or create a deferential regulatory regime that would cater to private interests.

IV. AGENCY STRATEGY: AVOIDANCE AND DISCRETION

A. *The ANPRM and Agency Incentives*

In order to fulfill its obligations under ECRA, BIS released an Advance Notice of Proposed Rulemaking (ANPRM) entitled "Review of Controls for Certain Emerging Technologies" on November 19, 2018.[45] The scope assigned to the rulemaking was broad, encompassing nearly every cutting-edge field of the U.S. technology industry. The areas under consideration included technologies related to biotechnology; AI and machine learning; position, navigation, and timing (PNT); microprocessors; advanced computing; data analytics; quantum computing and sensing; logistics; additive manufacturing (i.e. 3D printing); robotics; brain-computer interfaces; hypersonics; advanced materials; and advanced surveillance technologies.[46] Within each of these fourteen categories were sub-categories including such disparate categories as flight control algorithms, natural language processing, synthetic biology, quantum encryption, and adaptive camouflage.[47] The ANPRM also signaled some of the terms of its analysis of these categories, noting that it

45 Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58201 (proposed Nov. 19, 2018) (to be codified as 29 C.F.R. pt. 744).

46 *Id.* at 58202.

47 *Id.*

welcomed comments on the "status of development of these technologies in the United States and other countries" and "the impact specific emerging technology controls would have on U.S. technological leadership."[48]

The rulemaking set out two key goals. First, to ascertain "criteria for defining and identifying emerging technologies" (the definition question).[49] Second, to identify "specific emerging technologies that are important to the national security of the United States for which effective controls can be implemented" (the treatment question).[50] While similar, these two questions represent different priorities under Diver's optimal precision framework. The definition question is an accessibility measure, setting criteria for the agency to use in future determinations. Given the range of technologies under examination and the unknown trajectory of future technological developments, creating a flexible definition to use in the future is important for post-rulemaking enforcement. However, vague definitional components may cut into the rule's transparency, with companies unsure about how the agency would assess new technology under broad considerations such as national security risks. Meanwhile, the treatment question is primarily a transparency lever. Clearly designating certain items as emerging technologies would make the boundaries of the rule less opaque and more legible for regulated parties. However, it is at most a piecemeal approach to construct the regulation and would likely generate under-inclusion issues as technologies continually evolve. Moreover, the scope of the questions also vary. The definition question implicates a wide range of technologies with a single rule, while the treatment question deals with technologies on a case-by-case basis.

Importantly, both the definition and the treatment question involve possible avenues of action that BIS had the right to pick and choose. In *SEC v. Chenery Corp.*, the Supreme Court held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[51] The Supreme Court explicitly couched this deference in terms of agency flexibility, noting that "problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule."[52] Moreover, "the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule," or "the problem may be so specialized and varying in nature as to be impossible of capture within the

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48 *Id.*

49 *Id.*

50 *Id.* The rulemaking did present other enumerated goals, such as assembling possible sources for identifying future emerging technologies. However, these are mostly secondary or are subsumed within the definition question and treatment question, which represent the crux of the rulemaking.

51 SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (citing Colum. Broad. Sys. v. United States, 316 U.S. 407, 421 (1942)).

52 *Id.* at 202.

boundaries of a general rule."[53] Thus, "the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective."[54]

This discretionary authority can result in under-regulation because agencies often face multiple internal and external incentives not to come to firm resolutions of difficult questions. From an internal perspective, agencies may seek to avoid resolving difficult issues due to the personal costs and risks associated with designing new regulatory regimes out of whole cloth. Daryl Levinson, in evaluating the supposed mission creep and expansive ambitions of agencies, notes that "[w]ith jurisdiction comes responsibility and blame. If government officials cannot take credit for solving a problem, they will have every incentive to pass the buck by disclaiming jurisdiction over it."[55] Officials also face obvious incentives to avoid large increases in agency workloads and tasks with a high risk of failure.[56] Richard Stewart similarly notes that agencies increasingly "face an acute problem of regulatory fatigue" as increasingly wide-ranging and complex regulations expand agency workloads, force personnel to reconcile with more impacted market actors, and intensify political constraints and pressures agency actions.[57] In the emerging technologies rulemaking, the scope of possible controls and expertise required to make regulatory determinations represented a large workload for the agency, and the complexity of a resulting regulatory regime would take years to construct, justify, and defend. BIS therefore faced real incentives to avoid comprehensive regulations, which *Chenery* would allow it to do if it decided that an ad hoc approach comported with its needs.

From a public-facing policy perspective, resolving the definition question would force BIS to decide on a firm balancing mechanism between international trade and national security that may be too restrictive or undesirable. Writing on the use of "symbolic legislation" in the environmental context, John Dwyer notes that where the full implementation of statutes would result in "wholly disproportionate economic and social costs," agencies use "interpretation, delay, and, less commonly, revision … to round off the sharp corners of legislation."[58] This occurs because, especially where statutes raise conflicts between competing policy objectives, legislative buck-passing "does not suppress the conflicts that arise in designing and implementing a regulatory scheme; instead, it transfers those conflicts to agencies."[59] This

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53 *Id.* at 202-03.

54 *Id.* at 203; *see also id.* at 202 ("The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.").

55 Daryl Levinson, *Empire-Building in Constitutional Law*, 118 HARV. L. REV. 915, 935 (2005).

56 *See id.* at 924.

57 Richard Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U.L. REV. 437, 446-47 (2003).

58 John Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 284-85 (1990).

59 *Id.* at 250.

creates even deeper fissures when agencies do not desire firm resolution to an issue they are directed to resolve. Insofar as BIS had not previously used its regulatory authority to design a universal definition for emerging technologies for the purpose of regulation, it may have considered such a universal mechanism as inappropriate or unworkable. Legislation forcing BIS into action on a problem it did not desire to solve meant the agency had further incentives to not follow through or finalize regulations.

Even assuming that BIS wanted to pursue some regulatory objectives, a grey zone of uncertainty over regulated matters may push agencies not to codify solid rules in order to prevent lock-in to an approach that may quickly become obsolete. Sarah Light's concept of advisory nonpreemption fits within this canon of agency flexibility maximization. "[I]n periods of rapid innovation, technology may develop in unpredictable ways," Light asserts, and agencies often respond to this uncertainty by using memos or guidance documents to issue limited, rough guidelines of their regulatory posture to provide regulated parties with some information while retaining future discretion and flexibility.[60] This strategy "offers temporary flexibility in the allocation of regulatory authority if innovation takes an unpredictable path."[61] While Light's work focuses on how this uncertainty impacts the allocation of authority under dynamic federalism, it demonstrates that agencies try to maximize flexibility under uncertainty, accepting some regulatory confusion in order to protect possible future courses of action.[62] If BIS sought to maintain flexibility over a rapidly evolving field of technology, temporary guidance without firm guardrails would allow it to offer some insight to regulated parties without committing to classifications that might become quickly outdated as emerging technologies continued to change.

These internal and external incentives illustrate how regulatory decisions by BIS were not entirely grounded in objective considerations of rule precision such as those contemplated by Diver. Faced with significant workloads, regulatory fatigue, intractable policy dilemmas, and concerns over future flexibility, BIS had many reasons to avoid creating comprehensive and precise export controls on emerging technologies.

B. *Under-regulation and Agency Flexibility*

The result of the rulemaking was twofold. First, in January of 2020, BIS published rules requiring export licenses for AI systems that automate geospatial imagery analysis.[63] Second, in October of 2020, BIS instituted new

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60 Sarah Light, *Advisory Nonpreemption*, 95 WASH. U. L. REV. 325, 351, 353 (2017).

61 *Id.* at 335.

62 *Id.* at 341-42.

63 *BIS Publishes Advance Notice of Proposed Rulemaking to Identify and Review Controls on Foundational Technologies: What's Next?*, THOMPSON HINE (Sep. 1, 2020),

export controls on a narrow set of emerging technologies: advanced machine tools, computational lithography software, equipment for manufacturing extremely small circuit components, certain types of surveillance software relating to metadata, digital forensics tools, and sub-orbital spacecraft.[64] This result is significant for two reasons. First, BIS did not establish a uniform definition for emerging technologies as the basis for its decisions. And second, the agency ultimately created a highly narrow set of controls compared to the broad field it originally sought to consider. In fact, the latter set of controls was only codified after they were agreed to under the Wassenaar Arrangement, a U.S.-led multilateral export control regime.[65]

This indeterminate conclusion to the rulemaking comports with agency incentives in the rulemaking process. By imposing some controls without foreclosing future classifications, and declining to establish a clear operating definition of emerging technology, BIS retained flexibility for future enforcement decisions. Especially considering the evolutionary state of emerging technologies, agreeing to a specific definition could create serious under-inclusion problems in the future, as previously nascent dual use technologies develop into possible security threats. In Diver's terms, the agency's failure to determine an appropriate definition may be a measure to preserve the rule's congruence against more transparent or accessible rules that could not capture the unstable nature of emerging technology. Indeed, in Senate testimony in July 2019, former Under Secretary of Commerce for Industry Eric Hirschhorn defended a flexible approach that would hold off on setting transparent and accessible rules until threats emerged:

> "So when it comes to controlling emerging technologies, the sensible approach is for the government to do what it already has been doing for decades and what ECRA is telling it to do now: Follow emerging technologies, with a particular eye toward applications that would give an adversary a military or intelligence advantage. If and when those potential applications begin to become concrete (and hence to be suitable subjects for legally enforceable regulation), control those . . . ."[66]

The agency's decision also matches with agency rationales offered by other scholars of agency behavior. Similar to Light's analysis of agencies

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https://www.thompsonhine.com/publications/bis-publishes-advance-notice-of-proposed-rulemaking-to-identify-and-review-controls-on-foundational-technologies-whats-next.

64 Implementation of Certain New Controls on Emerging Technologies Agreed at Wassenaar Arrangement 2019 Plenary, 85 Fed. Reg. 62583 (effective Oct. 5, 2020); *See also* John Shane & Lori Scheetz, *Commerce Publishes New Controls on Emerging Technologies*, WILEY REIN (Oct. 7, 2020), https://www.wiley.law/alert-Commerce-Publishes-New-Controls-on-Emerging-Technologies.

65 *Export Control Reform Implementation: Outside Perspectives: Hearing Before the S. Comm. on Banking*, Housing and Urban Affairs, 6 (July 18, 2019) (statement of Eric L. Hirschhorn, Former Under Secretary for Industry and Security, U.S. Dept. of Com). This article does not allege causation between the advocacy strategies pursued by technology industry comments and this outcome, but this does not foreclose the value of analyzing the strategies pursued by the technology industry during the notice-and-comment period because they acted under the assumption that broad controls were a possibility.

66 *Id.* at 8-9.

attempting to regulate technology under uncertainty and dynamic federalism, BIS here sought to assert its authority to regulate emerging technologies but only place minimal guardrails in the short term, retaining flexibility for future enforcement. The agency also avoided the statutory directive to create a firm definition, which was both a dilemma handed down to them by Congressional buck passing and a potentially fraught new jurisdiction for their action, which Dwyer and Levinson both suggest would incentivize the agency not to act. They also avoided long term rulemaking justifications and implementation issues, suggesting the consideration of Stewart's concept of regulatory fatigue.

The decision by BIS to avoid comprehensive regulations in favor of a congruent and flexible approach cuts against expectations by Diver that it would seek a more objectively balanced rule, with due consideration to the transparency and accessibility sought by regulated parties. As the below section demonstrates, however, under-regulation was also a preference for the technology industry. However, the preferences of the regulators and the regulated meaningfully diverged past this point, with the technology industry advocating for transparent and accessible rules where they were unavoidable.

V. INDUSTRY STRATEGY: CLEAR RULES OR NO RULES

A. *Industry Incentives and Regulatory Participation*

While the technology industry does not have a formal role in the regulation of emerging technologies, agencies have increasingly turned to industry input and consultation in the formation of administrative rules.[67] Stewart explains this dynamic by noting that agencies can leverage private sector cooperation to increase support for possible decisions, evade increasingly wrought regulatory processes using cooperative agreements, and draw on private resources and expertise while ensuring buy-in from regulated parties in upcoming policies.[68] Commentators have pointed to BIS as an example of this engagement, criticizing the agency for being overly deferential to industry.[69] In the context of Diver's framework of rule precision, this means that regulated parties, as future constituents of the regulations, should have an interest in constructing effective rules. However, as the data demonstrates, private industry similarly ignored objective ideals of rule construction and focused on their own specific incentives and management of uncertainty, diverging significantly from Diver's prescriptions on rule precision.

In engaging with the emerging technologies rulemaking, the technology industry was acting on a two-track preference system in submitting

67 Stewart, *supra* note 57, at 448.

68 *Id.* at 449.

69 *See generally* Swanson, *supra* note 17.

comments. First and foremost, the industry preferred the unregulated status quo to the encroachment of new regulations on vast categories of their products. It is an established reality that "interest groups and other constituencies who expect to do worse under a new government institution will resist jurisdictional expansions."[70] However, in the event that regulation was going to occur, the industry wanted the regulations to include their desired characteristics. As the below sections demonstrate, these desired characteristics maximized the transparency and accessibility of the rule without consideration for enforcement realities or the congruence of the rule, pushing BIS to adopt exactly the sort of standard it sought to avoid.

B. *Common Strategies Among Commenters*

The nuanced differences between the definition question and the treatment question in the ANPRM present an opportunity to analyze how the technology industry sought to disarm a regulation with the potential to create risks to their future export opportunities. Entities may prioritize addressing definition concerns over isolated treatment concerns if they work with a wider array of technology because successful advocacy on the definition question alone would protect a large part of their business. Meanwhile, an entity with an interest in only one form of technology may prefer to allocate time and energy contesting only the treatment of their silo. Larger, more sophisticated entities might also have the wherewithal to navigate future regulatory determinations around products, allowing them to accept a less transparent definition of emerging technology they can leverage and deploy in the future. This long-term strategy might be unavailable to smaller or weaker entities, who might rather win the short-term battle for preferred treatment rather than worry about waging a longer term war over definitions. The below data analysis of submitted comments to the BIS rulemaking examines how these different priorities crystallized in the comments submitted by various stakeholders in response to the emerging technologies ANPRM.

While this method does not capture any advocacy that might have taken place in meetings with BIS or with other influential executive officials, this approach is still valuable for three reasons. First, given the quantity of commenters on the rulemaking, a large number of industry stakeholders likely used the commenting opportunity as a primary tool for their regulatory advocacy. Second, analyzing submitted comments would likely still reveal the strategies and preferences of those parties even if they pursued that strategy through an additional channel external to their comment. And third, largely popular tools such as the common definition explored in Parts B and C likely reflect underlying points of agreement in the industry insofar as they were explicitly or tacitly coordinated.

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70 Levinson, *supra* note 55, at 935.

In order to identify the relative priorities of regulated actors in this rulemaking process, the 231 comments submitted to the docket for the rulemaking were examined and coded along three variables. First, the type of entity which submitted the comment, including associations, companies, nonprofits, universities, individuals, and a small number of foreign ministries. Second, whether the commenter advocated for a definition, or component of a definition, of emerging technology ("definition advocacy").[71] Third, whether the commenter advocated for treatment or non-treatment of a specific technology identified in the ANPRM ("treatment advocacy").[72] The second and third variable were created in order to correspond with the two primary questions posited in the rulemaking. The comments were then categorized according to the first variable, revealing the distribution of strategies by each type of entity.

The distribution of strategies varied depending on the type of entity. For associations, 41 out of 68 (or 60%) of comments included definition advocacy and 30 (or 44%) included treatment advocacy.[73] This distribution was reversed for companies: 30 out of 72 (or 42%) included definition advocacy, while 54 (or 75%) included treatment advocacy. Interestingly, 32 (or 44%) included treatment advocacy without including any definition advocacy, a strategy pursued by only 13 (or 19%) of associations.

This pattern comports with the relative priorities for associations and individual companies in the rulemaking process. Associations must represent a large range of interests and manufacturers, meaning that definition

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[71] Definition components included certain outer bounds and factors identified by commenters. For example, the Small Business Technology Council advocated for a context requirement where any "restrictions on new technology should apply to very specific applications of the technology in specified, security relevant systems." Small Business Technology Council, SBTC Comment on BIS Export Controls for Emerging Technologies (Jan. 9, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0084.

[72] Examples of treatment advocacy include: Google, Advanced Notice of Proposed Rulemaking Regarding Review of Controls for Certain Emerging Technologies (Jan. 10, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0160 ("Given the international character of the technologies necessary for the development of robotics, the imposition of unilateral controls will put U.S. companies at a competitive disadvantage to foreign sources of the same technology."); Aerospace Industries Association, Comments for Advanced Notice of Proposed Rulemaking Regarding Review of Controls for Certain Emerging Technologies (Jan. 10, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0143 ("Controls imposed on general AI and ML developments have the potential to disadvantage the United States for many reasons."); State University of New York Research Foundation, Comment on Advanced Notice of Proposed Rulemaking Regarding Review of Controls for Certain Emerging Technologies (Jan. 10, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0135 ("Specific to quantum technologies (and perhaps this logic applies to other areas) the field is so nascent and the applications so distant, it would be wise to defer the pursuit of technology controls until the technology actually exists, or at least until it becomes clear which applications will be under pursuit with federal funds.").

[73] Some comments included only requests for the extension of the comment period, with the commenter adding a fuller comment later in the process. In order to prevent the dilution of the trends measured, these comments were excluded from the statistical measurement. Statistics were omitted for nonprofits because of the small number (eleven) of submitted comments, and individual commenters were omitted due to the absence of a clear advocacy pattern.

advocacy may be more efficient than treatment advocacy in obtaining preferable regulatory treatment. Crafting a single definition that protects many of their members is more efficient than pursuing preferential treatment for a large number of technology categories simultaneously. Meanwhile, technology companies have more narrow interests, enveloping only the specific products and technologies they offer. Treatment advocacy satisfies their needs, and achieving their preferred treatment presents less risk than advocating for a definition that an agency may ultimately still use to adversely classify their products. Moreover, associations often have more sophisticated and dedicated government and regulatory affairs teams, meaning that definition advocacy is an available strategy for associations who can predict and leverage favorable definitions in the future. Comparatively, companies may not have the resources or expertise to strategize these battles long term, preferring to merely protect their current investments.

Universities pursued a strategy closer to that of associations than that of companies. Out of 22 university commenters, which included individual departments and other sub-units, 14 (or 64%) utilized definition advocacy, while only 4 (or 18%) utilized treatment advocacy. Given that universities often contain wide-ranging research departments, a definition-centric strategy likely serves their interests better than focusing on preventing treatment of specific, smaller projects.

In the context of the technology industry's two-track preference system of avoiding regulations or accepting amenable ones, the second-order preferences diverge for different factions of the industry given that, in the context of Diver's framework, associations and companies are pursuing different priorities in attempting to modify the precision of the rule. Associations and universities are seeking high accessibility in order to make sure all of their constituent research groups or members can understand the regulation as they develop their technology. Companies, meanwhile, are seeking high transparency in order to remove their products from regulatory consideration, even if this creates an awkward definition that may complicate future enforcement of the rulemaking. Importantly, as noted above, none of these actors have an incentive to consider congruence, because they have no financial stake in whether the policy achieves its intended outcome. This altered calculus creates the primary tension of the rulemaking: while BIS needs to weigh congruence in order to fulfill its statutory duties under ECRA, associations and companies both faced no incentive to consider that lever and instead sought to optimize transparency and accessibility regardless of the intention of the rulemaking. It is with this in mind that a dominant strategy of many commenters, the "common definition," exemplifies the means by which the technology industry sought to tilt the scales of the rulemaking against the congruence of the rule. The below section delves further into this tool as a case study for how definition advocacy attempts to augment rules.

C. *The Common Definition*

Common points of advocacy between commenters can be critical for analyzing the strategy of commenters writ large for two reasons. First, many companies or universities may interact through associations to cooperate and create common advocacy tools, meaning that common tools may be the result of serious contemplation on the needs of regulated parties. Second, less sophisticated actors can free ride on more experienced regulatory affairs departments by echoing the advocacy tools of other commenters in their own submissions. This also represents a degree of agreement and contemplation that suggests that such common advocacy tools can be indicative of the underlying preferences of many commenters.

In submitted comments, there was a degree of coordination among association commenters, and some company and university commenters, on the definition BIS ought to use in defining emerging technologies. With minor differences for certain commenters, the definition mostly appeared as such:

> "Emerging technologies" are specific "technologies" that:
> (a) Are "required" for the "development" of "items" that:
> (i) provide the United States with a specific and identifiable qualitative military advantage;
> (ii) are essential to the national security of the United States;
> (iii) are not described on the Commerce Control List or the United States Munitions List;
> (iv) are not available in or otherwise being developed in foreign countries; and
> (b) do not include "production" technology or any aspect of "use" technology for items in production.
>
> Note 1: A "technology" must not be identified or controlled as "emerging" unless it is within the scope of policy statements in ECRA for which technologies should be controlled for export. In particular, a technology must not be so identified if a unilateral export control over it would:
> (i) harm domestic research into the identified technology, such as through loss of investment, reduction in cash flows, or the availability of qualified professionals necessary to develop it;
> (ii) not be effective at preventing countries of concern from developing it indigenously or otherwise acquiring comparable technology from third countries;

> (iii) be imposed without a full consideration of the impact on the economy of the United States of such a control; or
> (iv) be of a type that is not likely to be considered acceptable by the multilateral regime allies or that is inconsistent with the standards for the types of controls that are subject to the multilateral regimes.
>
> Note 2: This definition does not apply to an exporter's determination of whether a "technology" is "emerging." Rather, it governs BIS determinations regarding whether a specific "technology" should be added to the Commerce Control List as an "emerging technology."

This definition, or one close to it, was used by 32 commenters, including 16 associations, 10 companies, and 7 universities. In a testament to the widespread appeal of the definition, in the first three days of its appearance in submitted comments (Jan. 7-9, 2019), the definition was included in comments submitted by the Association of University Export Control Officers (AUECO), the National Foreign Trade Council (NFTC), the Internet Association, Penn State University, and companies Teradyne, Thinci, and Raytheon.[74] Notably, a sizable proportion (13.9%) of companies advocated for the common definition even though definition advocacy was not a common strategy among commenting companies. However, once the definition had started to appear in more comments in the docket, companies were able to free-ride the work of associations and advocate for the definition as a secondary strategy to seeking their preferred treatment. As such, eight of the nine companies who advocated for the common definition also included treatment advocacy in their comments, suggesting that the definition acted as a supplement rather than the primary tool of their advocacy strategy.

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[74] Association of University Export Control Officers, Re: RIN 0694–AH61 – Review of Controls for Certain Emerging Technologies (Jan. 9, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0085; National Foreign Trade Council, Comment on Advanced Notice of Proposed Rulemaking Regarding Review of Controls for Certain Emerging Technologies (Jan. 9, 2019); Internet Association, Review of Controls for Certain Emerging Technologies , 83 Fed. Reg. 58,201 (Nov. 19, 2018), 83 Fed. Reg. 64,299 (Dec. 14, 2018) (Jan. 10, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0091; Pennsylvania State University, Re: RIN 0694—AH61 — Review of Controls for Certain Emerging Technologies (Jan. 9, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0073; Teradyne, Comment on Advanced Notice of Proposed Rulemaking Regarding Review of Controls for Certain Emerging Technologies (Jan. 7, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0057; Thinci, Review of Controls for Certain Emerging Technologies (Jan. 10, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0060; Raytheon, Comment on Advance Notice of Proposed Rulemaking Regarding Review of Controls for Certain Emerging Technologies (Jan. 9, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0077.

There are three notable aspects of the common definition. First, and most clear, the definition converts procedural elements from the text of ECRA into substantive elements. Whereas ECRA required BIS to *consider* such issues as foreign development and economic impacts in deciding whether to classify technology, allowing the analysis of such issues to be weighed on a continuum, the common definition outlines those issues as tripwires, prohibiting action in the event of an adverse finding by the agency. As described below, these conversions created real congruence risks in the resulting definition as it would likely apply to technologies under consideration. Second, the common definition utilizes elements of the Statement of Policy as requirements for controls. For example, the common definition elements regarding the specificity of foreign threats and the analysis of economic harm appear only in the ECRA Statement of Policy.[75] But there are a number of legal theories that reject the required incorporation of such purpose statements into agency decision-making.[76] Frank Easterbrook writes that differences between purpose provisions and textual commands are discrete legislative choices that are not meant to be subsequently grafted into combined rules.[77] John Manning similarly argues that the legislative process is best respected by adhering to textual commands alone because directives are subject to more legislative bargaining than vague purpose provisions.[78] This is not to say that purpose provisions should be ignored entirely, but the common definition nonetheless elevates ECRA's purpose provisions in order to pile additional requirements into the controls. And third, the common definition operationalizes terms such as national security and economic harms into more defined impacts. As Parts V(D)(1)-(3) demonstrate, these specified provisions bias the definition against the imposition of controls.

D. *The Strategic Imprecision of the Common Definition*

As mentioned above, the common definition diverged significantly from ECRA and the ANPRM by converting procedural elements into substantive requirements, bolstering the importance of ECRA's Statement of Policy, and materially altering the specificity of ECRA's requirements. This latter tactic was most clearly used in three key common definition components that commenters sought to introduce that would have made the final rule less precise and more accommodating to the needs of the technology industry. These include (1) the specificity of the national security risk criteria, (2) the lax foreign availability standard, and (3) the scale of the economic analysis burdens.

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75 H.R. 5515, 115th Cong. §§ 1752(1), (6).

76 *But see* Kevin Stack, *The Enacted Purposes Canon*, 105 IOWA L. REV. 283 (2019).

77 Frank Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533, 546 (1983).

78 John Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2040 (2006).

1. National Security Risk Criteria

The common definition requires an unusual degree of specificity in the military advantage weighed in part (a)(i). The common definition attempts to confine the classification to items that "provide the United States with a specific and identifiable qualitative military advantage."[79] Variants of the definition alternatively limit the classification to items that "are required for the development of specific conventional weapons, intelligence collection, weapons of mass destruction, or terrorist applications" or "would provide the U.S. or another country or group of countries with a specific and identifiable qualitative military or intelligence advantage."[80] However, this language exceeds the commands of ECRA, ignores intrinsic uncertainty around emerging technology, and runs counter to the history of how technological development impacts national security.

First, this level of specificity contradicts the broad considerations outlined in the text of ECRA. ECRA's only standard for national security risk is that the classified technology be "essential to the national security of the United States."[81] The Statement of Policy mirrors this vague directive, including calling for controls on items "which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States" or items "necessary to further significantly the foreign policy of the United States."[82]

It is true that ECRA's Statement of Policy notes that export controls "should be limited for purposes of protecting specific United States national security and foreign policy interests."[83] However, not only is this recommendation confined to the statute's Statement and Policy and not its discussion of the mechanics of the rulemaking, but the common definition still narrows this consideration from "specific . . . national security and foreign policy interests" to "specific and identifiable military advantage[s]." Thus, even fully weighing the Statement of Policy as instructive, the common definition still raises the bar for agency justification beyond the statute.

Second, besides being divorced from the textual commands of ECRA, the specificity language in the common definition also contradicts the policy needs of emerging technology export controls. Specifically, the narrowing of technological potential to only specific-use cases betrays the history of how

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79 Consumer Technology Association, Comment on Advanced Notice of Proposed Rulemaking Regarding Review of Controls for Certain Emerging Technologies (Feb. 19, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0103.

80 CompTIA, Review of Controls for Certain Emerging Technologies (Feb. 19, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0109.

81 H.R. 5515, 115th Cong. § 1758(a)(1)(A).

82 *Id.* § 1752(1)(A)-(B).

83 *Id.* § 1752(6).

U.S. military innovations have emerged. In 1949, forty percent of all U.S. expenditure in "pure science" research came from the U.S. Office of Naval Research.[84] Indeed, with the advent of military investment in medicine, space, environmental issues, and advanced physics, there is "no longer any distinction whatever [*sic*] between basic scientific research which may have military relevance and that which does not."[85] The central idea of controlling emerging technologies is that they may eventually evolve into applications that could pose threats, and the government needs to therefore move proactively in order to foreclose those possible developments. In short, the specificity language seeks to avoid controls based on indeterminacy that is baked into the very technology under consideration.

Third, the specificity language also ignores the tendency of technology to acquire new uses or applications over time, vastly changing the use cases or military potential of the technology. The internet, for example, began as a method to decentralize U.S. research storage in the event of a nuclear strike from the Soviet Union.[86] If an export control decision on ARPANET had been based purely on the concrete and specific use cases available, it would have highly underappreciated the impact of enhanced communications and connectivity that it would later provide to global militaries.[87] Thus, emerging technologies have both highly indeterminate future use cases, and any current use cases are likely poor barometers of the future risk of the technology.

This strategy, under Diver's terminology, constitutes an attempt to maximize transparency and accessibility at the cost of congruence. By attempting to build solid metrics to measure more liquid risks, the specificity language would preclude regulations on precisely the type of indeterminate technology that the rulemaking was designed to control.

2. Foreign Availability Standard

The standard for foreign development outlined in part (a)(iv) is incongruous with previous standards for foreign development and the issues under consideration in the rulemaking. The common definition would impose controls on items that "are not available in or otherwise *being developed* in

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84 Milton Leitenberg, *The Role of Scientific Research in Weapon Development: What is Military R&D and How Does It Work?*, 16 (1984), https://fas.org/man/eprint/leitenberg/intro.pdf.

85 *Id.* at 17.

86 John Naughton, *The evolution of the Internet: from military experiment to General Purpose Technology*, 1 J. CYBER POL'Y 5, 7 (2016).

87 ARPANET was an early computer network funded by the Department of Defense's Advanced Research and Projects Agency (ARPA) that facilitated this decentralization and would later evolve into the privatized internet. Ben Tarnoff, *How the internet was invented*, THE GUARDIAN (July 15, 2016), https://www.theguardian.com/technology/2016/jul/15/how-the-internet-was-invented-1976-arpa-kahn-cerf.

foreign countries."[88] While development and availability may seem similar, the language creates a distinct new carve-out because it could prevent controls on technology that is not available for export by other nations but is nonetheless being researched. This standard is also decoupled from the text of ECRA, abandons approaches to foreign availability from previous regulations and the ANPRM, and again ignores critical aspects of emerging technologies themselves.

First, the addition of foreign development as an independent form of foreign availability is pulled from ECRA without critical context which makes it clear that it is not a distinct element but rather a factor in a larger calculation. While ECRA does instruct BIS to "take into account . . . the development of emerging and foundational technologies in foreign countries," it also requires consideration of "the effectiveness of export controls . . . on limiting the proliferation of emerging and foundational technologies to foreign countries."[89] Therefore, foreign development that would not render export controls ineffective would not be an independent element of a classification decision. Similarly, the Statement of Policy only mentions foreign availability in noting that controls "applied unilaterally to items *widely available* from foreign sources generally are less effective in preventing end-users from acquiring those items."[90]

Second, foreign availability has historically been measured not by foreign development but by the status of market-ready foreign alternatives. When the Department of Commerce considered export controls on supercomputers, they considered not the development trajectory of foreign technology but actual Chinese imports of similar systems.[91] Export Administration Regulations in 1996 allowed for the removal of controls if an item was "available to countries subject to export controls in sufficient quantity and comparable quality from sources outside the United States."[92]

The ANPRM does attempt to accommodate the development considerations by requesting input on metrics for "the stage of development or maturity level of an emerging technology that would warrant consideration for export control."[93] Therefore, the best solution for identifying foreign alternatives may not be the bright line of availability but instead a threshold somewhere on a development continuum that ranges from nascent, exploratory research to full commercialization. However, rather than utilize either the availability threshold or an alternative point along a development continuum,

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88 Consumer Technology Association, Comment on Advanced Notice of Proposed Rulemaking Regarding Review of Controls for Certain Emerging Technologies (Feb. 19, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0103 (emphasis added).

89 H.R. 5515, 115th Cong. § 1752(a)(2)(B)(i).

90 *Id.* at § 1752(6) (emphasis added).

91 MEIJER, *supra* note 4, at 175.

92 *Id.* at 188.

93 Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58201 (proposed Nov. 19, 2018) (to be codified as 29 C.F.R. pt. 744).

the common definition instead creates a categorical element for technologies in any development stage whatsoever.

Third, such a standard is once again incompatible with the nature of the technology the rulemaking was designed to address. The nature of emerging technologies is that they are in nascent stages of development and their impact is not yet fully understood. Thus, prohibiting controls on technology at any stage of development would nullify the entire rule, allowing only for controls on purely hypothetical technology not being researched by any foreign competitor.

Similar to the national security risk standard, this weakened foreign availability requirement would increase the transparency and accessibility of the regulation while greatly damaging the congruence of the rule. The ANPRM's inclusion of extremely nascent technology such as "Neural controlled interfaces," "adaptive camouflage," and "Nanobiology" clearly indicates an intention to consider controls on technologies in the early stages of development.[94] Allowing foreign early-stage research to serve as a bar for controls would therefore cut against the preferred outcome of the rule at the expense of giving a clean, accommodating standard to the technology industry.

3. Economic Analysis Burden

The burdens placed on BIS in analyzing economic impacts in Note 1 (parts (i) and (iii)) skew the level of analysis required for export controls. The common definition prohibits controls on technologies if those controls would "harm domestic research into the identified technology, such as through loss of investment, reduction in cash flows, or the availability of qualified professionals necessary to develop it," or would "be imposed without a full consideration of the impact on the economy of the United States of such a control."[95] The definition, therefore, imposes both a substantive and procedural economic analysis requirement for the imposition of controls. This burden is divorced from the statutory requirements in ECRA and creates a skewed standard for prospective controls.

First, the substantive burden is incompatible with the text of ECRA. ECRA's Statement of Policy includes only the latter procedural element, stating that controls should be used "only after full consideration of the impact on the economy of the United States and only to the extent necessary" to restrict the item.[96] The reason for both Congress and the rulemaking agency to prefer procedural requirements over substantive ones is clear: procedural

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94 *Id.*

95 Consumer Technology Association, Comment on Advanced Notice of Proposed Rulemaking Regarding Review of Controls for Certain Emerging Technologies (Feb. 19, 2019), https://www.regulations.gov/comment/BIS-2018-0024-0103.

96 H.R. 5515, 115th Cong. § 1752(1).

requirements increase agency flexibility and allow for decisions about economic harm that scale to the magnitude of a possible security risk. However, that scaling calculus is more difficult for the technology industry to navigate, especially when the magnitude of national security risk may be unknown due to its basis in gathered intelligence or classified material. The substantive requirement is, therefore, another attempt to increase transparency and accessibility, albeit at the cost of congruence in the event that an agency is unable to contain a security risk due to the substantive requirements of the definition.

Second, the substantive economic analysis burden places an extremely low bar on the economic harm required to preclude controls. The common definition places the threshold for a control prohibition at the level of any harm, without any qualifier common to other regulations such as "major," "severe," or "disproportionate." The magnitude of economic harm required to preclude controls under the common definition is thus nearly tautological to the nature of export controls. Any export control, used in at least a single case, will invariably disrupt cash flow by stopping the export of a technology or reducing investment in a given product line, given new limitations on its international market. It is indeed difficult to theorize an export control that would not create some degree of economic harm even in the best circumstance. As such, the low substantive bar strikes directly at the congruence of the rule, because such a burden would invariably preclude exports on exactly the high-value emerging technology the rule was designed to restrict.

It is true that excessively stringent controls may be unwise for policy reasons, insofar as they could dampen future innovations in those fields or push researchers or companies to operate in foreign jurisdictions.[97] U.S. export controls have previously been blamed for the offshoring of technological developments in commercial space technology, machine tools, and thermal imaging.[98] Especially as the U.S. military relies more heavily on commercially-sourced technologies for defense innovation, choking off export market access for dual use technology could reduce the innovation necessary for U.S. technological leadership.[99] These economic harms can be real, and associations and companies have the prerogative to defend their business opportunities and shareholders. But procedural requirements are preferred by agencies because they give the agency the ability to be flexible and deal with economic harm on a case-by-case basis. Precluding any economic harms from the control regime is an overcorrection, eliminating the possibility of controls on technology whose export could greatly damage U.S. national security.

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[97] Adam Thierer, *Innovation Arbitrage and Export Controls*, THE BRIDGE (Jan. 7, 2019), https://www.mercatus.org/bridge/commentary/innovation-arbitrage-and-export-controls.

[98] Eric Hirschhorn, *Export Controls on Emerging and Foundational Technologies: A Null Set?*, CHINA BUS. REV. (June 23, 2020), https://www.chinabusinessreview.com/export-controls-on-emerging-and-foundational-technologies-a-null-set/.

[99] MEIJER, *supra* note 4, at 18.

In Diver's terms, the substantive economic burden again cuts against the congruence of the rule by limiting the discretion of BIS to control exactly the technologies the rulemaking set out to contain: high-value technologies ripe for export. More significantly in this case, the substantive economic requirement is so intrinsic to emerging technologies that the transparency or accessibility value of the burden may not even be significant. If the economic harm provision is entwined with the nature of emerging technology itself, it might not offer current technologies or future cases the predictability sought in transparent and accessible rules. Instead, the technology industry benefits by complicating the task of the agency. This speaks to Diver's consideration of trade-offs and other policy considerations under different rule formulations; a unilateral reduction in congruence of the rule, even absent increases in transparency and accessibility, can complicate enforcement and contribute to knock-on litigation.

VI. CONCLUSION: MUTUAL PREFERENCES IN UNDER-REGULATION

The emerging technologies rulemaking presents an example of how the competing incentives and strategies of agencies and industry in high-stakes and uncertain matters can result in under-regulation that does not consider the objectively optimum level of precision, even when the regulation concerns a highly salient issue of geopolitical importance. While Diver suggests that interested parties would seek to balance the congruence, transparency, and accessibility of export controls in order to minimize certain objective costs, both BIS and the technology industry instead pursued separate, subjective preferences that did not comport with expectations around how to construct optimally precise rules.

For BIS, the preservation of flexibility and refusal to make large, difficult commitments resulted in an open-ended decision that allows BIS to classify technology on an *ad hoc* basis going forward, even if this results in regulatory uncertainty. While common sense suggests that an agency should desire more precise rules and regulations in order to minimize issues such as *post hoc* litigation and enforcement costs, here, BIS appeared more concerned with internal and external factors such as high workloads, regulatory fatigue, political dilemmas, and the preservation of future flexibility. Under Secretary Hirschhorn's testimony demonstrates that this under-regulation was a feature, not a bug, of agency strategy to defer resolution of difficult questions in favor of a case-by-case strategy, and *Chenery* will continue to offer BIS the power to exercise this discretion. In fact, as recently as May 2022, BIS issued a proposed rule, in reliance on ECRA's emerging technologies mandate, to restrict the export of dual use biological toxins, in which it acknowledged that it had yet to define the term "emerging technologies,"

stating that it had found that "the categorization of the technologies has sometimes delayed the imposition of controls."[100]

For the technology industry, the rulemaking mostly preserved the unregulated status quo for many of the technologies considered by BIS, granting them the priority of their two-track preference system. In the event that the agency is forced to solidify regulations, the industry has also provided input that will push the agency to craft transparent and accessible rules in the event that solid regulations emerge, preserving export opportunities at the expense of the congruence and practicability of the regulations. While Diver would suggest that regulated parties have a vested interest in creating precise and understandable regulations, the ability of private parties to deter rulemaking and argue for problematic provisions means that the technology industry was similarly unconcerned by a lack of comprehensive regulation.

It is worth noting the specific conditions of this case study that limit any conclusions about the behavior of regulatory agencies and regulated parties writ large. Export controls are a high-risk, highly impactful regulatory space with significant risks of agency mismanagement and an already convoluted spiderweb of regulatory jurisdiction. Emerging technologies are also a highly uncertain sector, encompassing a wide variety of technologies that are constantly evolving and escape any easy classification. Therefore, these findings suggest only that such high-risk, highly uncertain regulatory dilemmas may lead to the internal and external incentives described here in deterring comprehensive regulation.

What this case study does suggest, however, is that under these specific conditions, objective measures of rule precision such as those suggested by Diver require additional analysis of actor incentives and indexing to uncertainty to offer any predictive power on how administrative rules are constructed. In the face of counterincentives such as those proposed by Levinson, Dwyer, and Stewart, agency incentives to regulate effectively took a back seat to both internal and external concerns. And the data and legal analysis of the common definition suggest that private parties may not engage in objective measurement either, and instead pursue a two-track preference strategy of either avoiding regulation entirely or seeking regulations catered to their interests.

Considering the future of such dilemmas for regulatory agencies, some uncertainty is likely unavoidable when Congress or public pressure forces agencies to regulate firmly on inherently fluid subject matter. Given the unavoidability of these dilemmas, Light defends the opaque use of advisory nonpreemption as a method of retaining agency flexibility while providing "*some* guidance to the regulated community as to the agency's thinking about its authority, especially as that thinking evolves over time in response to changing circumstances and the development of technology."[101] However,

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100 Commerce Control List: Controls on Certain Marine Toxins, 87 Fed. Reg. 31195 (proposed May 23, 2022) (to be codified as 15 C.F.R. pt. 740).

101 Light, *supra* note 60, at 348-49 (emphasis added)*; see also* Nielson, *supra* note 36.

Light notes that advisory nonpreemption is appropriate "for an expressly limited period of time only, and must be reevaluated on a periodic basis to determine whether the need for flexibility to promote innovation outweighs the costs of uncertain regulatory rules."[102] Dwyer's writings on symbolic legislation similarly pose a warning for the use of legislation as buck-passing difficult balancing equations to agencies. In his example, Congressional deference to agencies on setting the exact formula and requirements for dangerous pollutants forced the agency to burn valuable time studying the problem and drawing out their decision making, prolonging the very dangers the legislation sought to prevent.[103] While BIS will retain authority under *Chenery* to avoid creating a comprehensive emerging technology export control regime, it may only be deferring a confrontation with the technology industry over how to construct such regulations, and will need to be prepared for when the bill comes due.

102 Light, *supra* note 60, at 344-45.

103 Dwyer, *supra* note 58, at 260.

PUSHING THE BOUNDS OF JUDICIAL DEFERENCE: SOME THOUGHTS ON THE FTC'S NEW UNFAIR METHODS OF COMPETITION POLICY STATEMENT

Lawrence J. Spiwak, Esq.[*]

INTRODUCTION

American antitrust law protects consumers against anticompetitive conduct primarily through Sections 1 and 2 of the Sherman Act,[1] both of which are concurrently enforced by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC").[2] In addition to concurrently enforcing the Sherman Act with the DOJ, the FTC is exclusively charged with, among other responsibilities, protecting consumers from "unfair methods of competition" ("UMC") under Section 5 of the eponymous Federal Trade Commission Act.[3] The FTC Act does not define "unfair methods of competition," leaving the analytical bounds of this standard to be determined by the Commission in the first instance. An important question to ask, therefore, is how much deference a reviewing court must accord the FTC when it seeks to interpret and enforce the UMC standard of Section 5.

As detailed below, with the issuance of a new *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* in 2022 (hereinafter the "*2022 UMC Policy Statement*"),[4] current FTC leadership appears to believe that this judicial deference is so great that the agency is now free to reject the consumer welfare standard and rule of reason analysis altogether when enforcing Section 5. This belief is likely an overreach, however. A review of the caselaw reveals that while the FTC is entitled to judicial deference when interpreting and enforcing Section 5, this deference is not unfettered. The FTC, as the independent agency charged with enforcing the nation's antitrust laws, must still respect antitrust terms of art and economic fundamentals when invoking Section 5 and, as such, many applications of its new (and indeed) vague

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[1] 15 U.S.C. §§ 1–2.

[2] Both the FTC and the DOJ are also responsible for ensuring that mergers and acquisitions do not "substantially … lessen competition, or . . . tend to create a monopoly" pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18.

[3] 15 U.S.C. § 45.

[4] *See generally,* Fed. Trade Comm'n, Comm'n File No. P221202, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022).

interpretation of unfair methods of competition are unlikely to survive judicial scrutiny.

I. BACKGROUND

A. *2015 UMC Policy Statement*

Given the ambiguous nature of the phrase "unfair methods of competition," over the years there have been many calls for the Commission to issue a policy statement to help businesses avoid FTC Section 5 UMC enforcement actions.[5] In 2015, the Obama-era FTC attempted to do just that, issuing a bipartisan *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act* (hereinafter "*2015 UMC Policy Statement*").[6] While perhaps not the most detailed statement of policy,[7] the Commission set forth three general principles that the agency would use when evaluating potential enforcement of Section 5's UMC standard:

> First, the Commission would be "guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare";
>
> Second, the Commission would evaluate the challenged act or practice under a framework similar to the rule of reason—i.e., "an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications"; and
>
> Third, the Commission would be "less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice."[8]

But while this bipartisan policy approach towards UMC enforcement offered some guidance to businesses and did not appear to have hindered antitrust enforcement during either the Obama Administration or the subsequent

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[5] *See, e.g.*, William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930 (2010).

[6] *See generally*, Fed. Trade Comm'n, Policy Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, 80 Fed. Reg. 57056 (Sept. 21, 2015).

[7] *See, e.g.*, FED. TRADE COMM'N, DISSENTING STATEMENT OF COMMISSIONER MAUREEN OHLHAUSEN, FTC ACT SECTION 5 POLICY STATEMENT (Aug. 13, 2015); Lawrence Spiwak, *FTC Misses Mark with New "Unfair Methods of Competition" Statement,* THE HILL (Sept. 22, 2015, 6:30 AM), http://thehill.com/blogs/pundits-blog/technology/254463-ftc-misses-mark-with-new-unfair-methods-of-competition.

[8] *See 2015 UMC Policy Statement*, *supra* note 6.

Trump Administration,[9] the Biden Administration decided to turn back the clock several decades to when the FTC was known as the "National Nanny"[10] and return to an unbounded vision of Section 5 as a standalone mechanism for market intervention.[11]

B. *2022 UMC Policy Statement*

As noted in the previous section, the bipartisan *2015 UMC Policy Statement* appeared to offer some guidance to businesses while not hindering enforcement under both Democratic and Republican administrations. Still, among the first actions of controversial FTC Chair Lina Khan — a noted critic of the consumer welfare standard and rule of reason analysis[12] — was to have the FTC revoke the *2015 UMC Policy Statement*.[13]

According to the Commission, the *2015 UMC Policy Statement* "contravene[d] the text, structure, and history of Section 5 and largely [wrote] the FTC's standalone authority out of existence." Moreover, argued the current Commission, the "the 2015 Statement abrogate[ed] the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute." As such, the FTC formally withdrew the *2015 UMC Policy Statement* and promised "to restore the agency['s] … critical mission" of aggressively pursuing standalone UMC cases under Section 5.[14]

True to its promise, on November 19, 2022, the FTC released a new *Policy Statement Regarding the Scope of Unfair Methods of Competition*

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9 *See, e.g.*, FTC v. Qualcomm, Inc., 969 F.3d 974, 986 n.11 (9th Cir.), *reh'g denied en banc*, U.S. App. LEXIS 34011 (2020) ("Because the district court concluded that Qualcomm violated the Sherman Act and thereby violated the FTC Act—which prohibits '[u]nfair methods of competition,' including Sherman Act violations—it did not address whether Qualcomm's conduct constituted a standalone violation of the FTC Act.").

10 *Cf.* J. Howard Beales III & Timothy J. Muris, *Return of the National Nanny,* WALL ST. J. (May 26, 2022, 6:25 PM), https://www.wsj.com/articles/return-of-the-national-nanny-ftc-activists-rulemaking-regulation-banning-mandates-illegal-11653596958.

11 *See* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 934 (2010) (arguing that the dearth of standalone Section 5 cases brought over past several decades is probably attributable to fact that "the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century.").

12 *See, e.g.*, Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 359–61 (2020); *but cf.* Lawrence J. Spiwak, *A Change in Direction for the Federal Trade Commission?*, 22 FEDERALIST SOC. REV. 304 (2021); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33 (Summer 2021).

13 *See generally* Fed. Trade Comm'n, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021).

14 *Id.*

Under Section 5 of the Federal Trade Commission Act.[15] As detailed below, this new *2022 UMC Policy Statement* marks a substantial departure from established antitrust analysis and precedent, opening the door to expanded (and analytically untethered) FTC intervention into the market.

1. The FTC Rejects the Consumer Welfare Standard and Rule of Reason Analysis

Consistent with Chair Khan's long-stated views,[16] the *2022 UMC Policy Statement* firmly rejects both the consumer welfare standard and rule of reason analysis. In their place, the FTC sets forth the following new analytical paradigm to determine whether conduct constitutes "unfair methods of competition." According to the Commission, it will now use "two key criteria" to determine whether it should prosecute a UMC case under Section 5. First, the Commission will look to see whether the disputed conduct is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature."[17] Second, the Commission will look to see whether, in its view, the alleged conduct will "tend to negatively affect competitive conditions."[18] After answering both of these questions, the Commission will then weigh these two findings "according to a sliding scale" to determine whether enforcement action is warranted.[19]

2. Analytical Problems with the FTC's New Approach

In rejecting the consumer welfare standard and rule of reason analysis, the FTC's new approach differs significantly from traditional antitrust analysis in several important respects. For example, under traditional antitrust jurisprudence, black-letter law inquiries should focus on harm to competition, not individual competitors.[20] Under the FTC's new UMC approach, however, the Commission will now look to see whether the alleged conduct harms "consumers, workers, or other market participants."[21] Moreover, the FTC will not require any "showing of market power or market definition

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15 *See generally 2022 UMC Policy Statement, supra* note 4.

16 *See, e.g.*, Khan & Chopra, *supra* note 12; *see also* Fed. Trade Comm'n, Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021).

17 *2022 UMC Policy Statement, supra* note 4, at 9.

18 *Id.*

19 *Id.*

20 *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 488 (1977) ("[A]ntitrust laws . . . were enacted for 'the protection of competition not competitors.'" (quoting Brown Shoe v. United States, 370 U.S. 294, 320 (1962)).

21 *2022 UMC Policy Statement, supra* note 4, at 9.

when the evidence indicates that such conduct tends to negatively affect competitive conditions."[22] In fact, the FTC will not even require a formal showing of any "*actual* harm in the specific instance at issue."[23] Thus, as the FTC concedes, the "inquiry will not focus on the 'rule of reason' inquiries more common in cases under the Sherman Act, but will instead focus on stopping unfair methods of competition in their incipiency *based on their tendency to harm competitive conditions*."[24]

But what exactly constitutes a "tendency to harm competitive conditions"? If the FTC will not define relevant markets, determine market power, or require a demonstration of actual harm, then we are left with an extremely subjective enforcement standard—of an already highly subjective statutory standard[25]—that can easily be abused with frivolous enforcement actions from which innocent firms cannot escape liability.

FTC Commissioner Christine Wilson called out this important due process concern in her dissent to the *2022 UMC Policy Statement*. As Commissioner Wilson noted, given the FTC's extremely permissive new analytical framework, "[a]fter a prima facie case has been established, the respondent has little recourse." Indeed, as Commissioner Wilson explains, under the new policy statement's standard:

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22 *Id.* at 10.

23 *Id.* (emphasis in original).

24 *Id.* (emphasis supplied). The FTC's new focus on harm to "consumers, workers, or other market participants" rather than the traditional focus on harm to "competition" overall has broader implications beyond the *2022 UMC Policy Statement*. It is a basic economic maxim that firms are not passive recipients of regulation. Accordingly, if the FTC is now only concerned with harms to "consumers, workers, or other market participants," then firms will correspondingly tailor their pleadings with the agency to make sure these political constituencies are accommodated as they bargain with the FTC to get their deals approved. *See* T. Randolf Beard, George S. Ford, Lawrence J. Spiwak, & Michael Stern, *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, Phoenix Ctr. Pol'y Paper No. 49 (Oct. 2015), https://www.phoenix-center.org/pcpp/PCPP49Final.pdf), and published as *Regulating, Joint Bargaining, And The Demise of Precedent*, MANAGERIAL & DECISION ECON. (June 27, 2018), https://onlinelibrary.wiley.com/doi/abs/10.1002/mde.2934. Yet, in a recent op-ed in the Wall Street Journal Chair Khan appears shocked that firms are acting in this very way. L. Khan, *ESG Won't Stop the FTC,* WALL ST. J. (Dec. 21, 2022, 5:10 PM) ("I've heard would-be merging parties [are making] all sorts of commitments to be better corporate citizens if only we would back off from a lawsuit. If only we hold off on suing to block the merger, they promise they will reduce their carbon footprints, give back to the community and so on."). As Ms. Khan has made no bones about her desire to transform the FTC from a dispassionate enforcer of the Nation's antitrust laws to an aggressive omnipotent regulator of the U.S. economy, *see, e.g.*, Chopra and Khan, *supra* note 12; Non-Compete Clause Rule, RIN 3084-AB74 (proposed Jan. 5, 2023) (to be codified at 16 C.F.R. pt. 910), the fact that Chair Khan fails to recognize that firms are responding to the very signals put out by the Commission under her leadership reveals a remarkable naivety about the nature of regulation.

25 *See, e.g.*, E.I. Du Pont de Nemours v. FTC*,* 729 F.2d 128, 137–38 (2d Cir. 1983) ("The term 'unfair' is an elusive concept, often dependent upon the eye of the beholder. A line must therefore be drawn between conduct that is anticompetitive and legitimate conduct that has an impact on competition.").

> A respondent can assert a justification for the conduct but, according to the *Policy Statement*, the Commission's "inquiry would not be a net efficiencies test or a numerical cost benefit analysis" and "the more facially unfair or injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind." For a respondent to be heard, the justification must show that the benefits of the conduct redound to market participants other than the respondent, those benefits must be in the same market where the harm occurs (even though market definition is unnecessary to find competitive harm), and the respondent has the "burden to show that the asserted justification for the conduct is legally cognizable, that it is nonpretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any impact on competitive conditions."[26]

In other words, as Commissioner Wilson bluntly stated, the FTC has now adopted an "'I know it when I see it' approach that seeks to protect interests beyond those of consumers."[27]

3. FTC Arguments for Judicial Deference

Notwithstanding these analytical and due process problems, the Commission offers up two justifications for its radical departure from traditional antitrust analysis. First, the Commission contends that according to established Supreme Court precedent, "Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions" and, as such, it may now abandon the consumer welfare standard and rule of reason analysis.[28] Second, given the preceding point, the Commission then argues that because the FTC is an "independent, expert agency," courts must *a fortiori* bless the Commission's new analytical paradigm regarding its "determinations as to what practices constitute an unfair method of competition . . . . "[29]

At the 30,000-foot level, the FTC's arguments certainly have a patina of legitimacy. As a general matter, no one is disputing that (1) Section 5 contains a different standard than the respective standards found in Sections 1 and 2 of the Sherman Act; (2) that this standard (unfair methods of competition) is ambiguous; and, therefore, according to the Supreme Court's *Chevron* doctrine, that (3) the courts should accord the FTC—as the expert agency exclusively charged with enforcing Section 5—deference about how the agency chooses to craft the application and enforcement of this statutory provision.[30] However, what the current FTC leadership fails to accept is that this judicial deference is not unfettered. Indeed, "deference" is not the same as a judicial free pass to abandon the consumer welfare standard and rule of

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26 Fed. Trade Comm'n, Comm'n File No. P221202, Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act," (Nov. 10, 2022) at 5 [hereinafter Dissent of Commissioner Wilson].

27 *Id.* at 17.

28 *2022 UMC Policy Statement, supra* note 4, at 1.

29 *Id.* at 7.

30 *See* Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837, 844 (1984).

reason analysis or else abandon antitrust practice in general. As detailed below, the caselaw is clear that the FTC may not plow through the guardrails of economic fundamentals in its pursuit of other objectives.

II. THE FTC'S ABILITY TO DEFINE "UNFAIR METHODS OF COMPETITION" IS NOT UNFETTERED

As support for its central argument that it may abandon the consumer welfare standard and rule of reason analysis, the FTC provides a string cite of cases that purport to hold that the FTC may move "beyond" traditional antitrust analysis.[31] However, just because Section 5 "reaches beyond" the Sherman Act to fill in possible gaps does not *a fortiori* mean the Commission can abandon economic fundamentals.[32] Two cases cited by the Commission in the *2022 UMC Policy Statement* illustrate the point.

The first case is the Ninth Circuit's decision in *Boise Cascade v. FTC*.[33] In *Boise*, the FTC argued that a group of manufacturers engaged in unfair methods of competition in violation of Section 5 via a coordinated pricing scheme which utilized the computation of rail freight charges in determining the price of plywood. The court began its analysis by noting that while the FTC is indeed entitled to deference when enforcing Section 5, Congress gave "the courts the responsibility of ensuring that administrative agencies stay within reasonable bounds."[34]

Turning to the merits, the court then found that the FTC had exceeded those "reasonable bounds."[35] According to the court, the Commission failed to demonstrate either collusion or any harm to competition.[36] As the court admonished, "to allow a finding of a Section 5 violation on the theory that the mere widespread use of [a common industry pricing] practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior."[37]

The other illustrative case is the Second Circuit's ruling in *E.I. Du Pont de Nemours v. FTC* (commonly referred to as the "*Ethyl*" case).[38] In *Ethyl*, the FTC argued that several manufacturers of anti-knock compounds had engaged in unfair methods of competition in violation of Section 5 when each firm independently and unilaterally adopted at different times some or all of three business practices that were neither restrictive, predatory, nor adopted

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31 *See 2022 UMC Policy Statement, supra* note 4, at n.3 and citations therein.

32 *See also* Dissent of Commissioner Wilson, *supra* note 26, at 18 (noting that the legislative history of Section 5 "reveals that Congress designed Section 5's 'unfair methods of competition' prohibition to have economic content.").

33 637 F.2d 573 (9th Cir. 1980).

34 *Id.* at 577 (citations omitted).

35 *Id.* at 582.

36 *Id.*

37 *Id.*

38 729 F.2d 128 (2d Cir. 1983).

for the purpose of restraining competition. The Commission argued that, although the firms' adoption of these practices was non-collusive, by removing some of the uncertainties about price determination the practices collectively had the effect of substantially lessening competition by facilitating price parallelism at non-competitive levels higher than might have otherwise existed.[39]

As in *Boise*, the court in *Ethyl* began its analysis by noting that while the FTC's "interpretation of Section 5 is entitled to great weight" and that the Commission's "power to declare trade practices unfair is broad," it is still the function of the judiciary "ultimately to determine the scope of the statute upon which the Commission's jurisdiction depends."[40] Indeed, noted the court, the Commission's discretion to define Section 5 is not unfettered. As the court explained, "Congress did not . . . authorize the Commission under § 5 to bar any business practice found to have an adverse effect on competition." Rather, the Commission is obligated (and courts are to ensure) that the agency does "not act arbitrarily or without explication but according to *definable* standards that [are] properly applied."[41]

Turning to the merits, upon review the court found that the FTC had failed to articulate these required "definable standards." As the court observed:

> When a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is "unfair" within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5; the FTC could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition.[42]

Thus, reasoned the court, given this "patent uncertainty" about the bounds of UMC enforcement, the Commission "owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that business will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[43]

39 *Id.* at 130.
40 *Id.* at 136.
41 *Id.* at 136 (emphasis supplied).
42 *Id.* at 138–39.
43 *Id.* at 139.

III. LESSONS LEARNED FROM OTHER INDEPENDENT AGENCIES' ATTEMPTS TO "REACH BEYOND" ANTITRUST

As noted above, FTC essentially claims that as independent "expert" agency it is free to do what it wants and disregard precedent.[44] But as also noted in the preceding discussion, such a bold assertion simply is not true.[45] Accordingly, if the FTC is going to invoke the "independent agency must be accorded absolute deference" argument, then perhaps a look at how courts viewed other independent agencies' efforts to "reach beyond" the antitrust laws might also be insightful.

A. *Independent Agencies—Including the FTC—Must Account for Antitrust Terms of Art*

Contrary to the current FTC's leadership's desires, independent agencies may not ignore accepted antitrust terms of art. This obligation is particularly binding when that independent agency is responsible for enforcing the Nation's antitrust laws.

The D.C. Circuit's ruling in *Comcast Cable Communications v. Federal Communications Commission* illustrates this point well.[46] In this case, Comcast challenged an FCC ruling that Comcast had unduly discriminated against the Tennis Channel in violation of the program carriage requirements of Section 616 of the Cable Competition and Consumer Protection Act of 1992 by refusing to broadcast the Tennis Channel in the same tier as Comcast's affiliated sports networks. At issue in *Comcast* was whether that ruling was arbitrary and capricious.

By way of background, the FCC Program Carriage regulations seek to promote competition and diversity in video programming by prohibiting certain types of discriminatory conduct by a Multichannel Video Programming Distributor (MVPD). Under this statute, Congress charged the FCC to develop rules,

> to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors[.][47]

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44 *See 2022 UMC Policy Statement, supra* note 4, at 7 ("Congress intended for the FTC to be entitled to deference from the courts as an independent, expert agency" and that the FTC's "determinations as to what practices constitute an unfair method of competition deserve 'great weight' . . . .").

45 *See also* Dissent of Commission Wilson, *supra* note 26, at 9 and discussion therein.

46 717 F.3d 982 (D.C. Cir. 2013).

47 47 U.S.C. § 536(a)(3).

Moreover, Congress mandated that the FCC "provide for expedited review of any complaints made by a video programming vendor pursuant to this section."[48] Pursuant to that mandate, the FCC adopted general rules consistent with the statute's specific directions.[49] The FCC's program carriage rules state in relevant part that:

> No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[50]

In other words, the Program Carriage provisions seek to address potential harm arising from the vertical integration of MVPDs into programming by demanding that unaffiliated and affiliated programming be treated similarly.

The Tennis Channel, with which Comcast was unaffiliated, complained that Comcast placed it "on a tier with narrow penetration that is only available to subscribers who pay an additional fee, while Comcast carries its own similarly-situated affiliated networks Golf Channel and Versus (now NBC Sports Network) on a tier with significantly higher penetration that is available to subscribers at no additional charge."[51] (Market definition is required to place the Tennis Channel in the market with "similarly-situated affiliated networks.") The administrative law judge concluded that Comcast had indeed discriminated against the Tennis Channel,[52] and the full Commission later affirmed the ALJ's finding.[53] Comcast appealed to the D.C. Circuit, and, after review, the court ruled that the FCC's decision was arbitrary and capricious.[54]

The D.C. Circuit began its analysis by noting that the parties agreed that Comcast distributed its affiliates more broadly than the Tennis Channel. But the court also noted that the plain language of Section 616 only prohibits discrimination "*based on* affiliation."[55] Thus, reasoned the court, if Comcast treated third-party content providers differently "based on a reasonable business purpose," then there is no violation of Section 616.[56] The court found

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48 47 U.S.C. § 536(a)(4).

49 *See* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, FCC 93-457, SECOND REPORT AND ORDER, 9 FCC Rcd. 2642 (1993).

50 47 C.F.R. § 76.1301(c).

51 *See* In re Tennis Channel, Inc. v. Comcast Cable Commc'ns, L.L.C., FCC 12-78, MEMORANDUM OPINION AND ORDER, 27 FCC Rcd. 8508, 8509 (rel. July 24, 2012) ("Tennis Channel Order") at ¶ 1.

52 Tennis Channel, Inc. v. Comcast Cable Commc'ns, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR-8258-P, 26 FCC Rcd. 17160, 17204 at ¶ 101 (Dec. 20, 2011).

53 Tennis Channel Order, *supra* note 51.

54 *Comcast*, 717 F.3d at 961 (D.C. Cir. 2013) (emphasis in original).

55 *Id.* at 985 (emphasis in original).

56 *Id.*

that the Tennis Channel failed to present sufficient evidence of harm to support a claim of discrimination under the statute.

For example, the court found that in contrast to the detailed evidentiary submission by Comcast that showed it would have to bear significant costs if it added the Tennis Channel to the same tier as its affiliates, the Tennis Channel "showed no corresponding benefits that would accrue to Comcast by its accepting the change."[57] Similarly, the court found that the Tennis Channel offered no analysis "on either a qualitative or quantitative basis" to show that Comcast would receive a net benefit from the allegedly discriminatory conduct. As a result, concluded the court, the Tennis Channel had not shown that the discrimination was unreasonable.[58] *Comcast* thus sends an unmistakable message that when evaluating claims of discrimination and anticompetitive harm, a reviewing court will judge harshly independent agency decisions that lack serious economic analysis—even under statutes that go beyond the antitrust laws.[59]

Then-Judge (now-Justice) Brett Kavanaugh's extensive concurrence in *Comcast* is also helpful in elucidating how courts should approach interpreting statutes that seek to advance competition policy objectives through means other than antitrust. Judge Kavanaugh specifically refuted the argument that in passing Section 616, Congress abandoned the long-standing consumer welfare standard requirement that a complainant must demonstrate harm to *competition* in favor of a requirement that it simply showing harm to an individual *competitor*. As Judge Kavanaugh noted, Section 616 sets up a two-part test: a MVPD has violated Section 616 if (1) it discriminated among video programming networks on the basis of affiliation; and (2) the discrimination unreasonably restrained an unaffiliated network's ability to compete fairly.[60] As Judge Kavanaugh explained, because the "phrase 'unreasonably restrain' is of course a longstanding term of art in antitrust law," it follows that "Section 616 incorporates antitrust principles governing unreasonable restraints. . . ." Established legal precedent dictates that when "a statute uses a term of art from a specific field of law, [a court must] presume that Congress adopted 'the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'"[61] In other words, reasoned Judge Kavanaugh, "the goal of antitrust law (and thus of Section 616) is to promote consumer welfare by protecting competition, not by protecting individual competitors."[62] He elaborated:

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57 *Id.*

58 *Id.* at 985–86.

59 *Cf.* Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 760 (6th Cir. 1995) (reversing administrative agency's decision because the order contained no "expert economic data or [analogies] to related industries in which the claimed anticompetitive behavior has taken place" but instead justified its conclusions as "simply 'common sense.'").

60 *Comcast,* 717 F.3d at 989 (citing 47 U.S.C. § 536(a)(3)).

61 *Id.*

62 *Id.* at 992.

> It is true that Section 616 references discrimination against competitors. But again, the statute does not ban such discrimination outright. It bans discrimination that *unreasonably restrains* a competitor from competing fairly. By using the phrase "unreasonably restrain," the statute incorporates an antitrust term of art, and that term of art requires that the discrimination in question hinder overall competition, not just competitors.[63]

Judge Kavanaugh also specifically rejected the argument that Section 616 does not require a demonstration of market power. As noted above, Judge Kavanaugh pointed out that because Section 616 specifically uses the antitrust term of art "unreasonably restrain," any application of Section 616 must incorporate antitrust principles and precedent. After providing a lengthy exegesis of the relevant caselaw, Judge Kavanaugh pointed out that:

> Vertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market. That's because, absent market power, vertical integration and vertical contracts are *procompetitive.* Vertical integration and vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies—and thus reduce prices and lead to better goods and services for consumers.[64]

Thus, concluded Judge Kavanaugh, because "Section 616 incorporates antitrust principles and because antitrust law holds that vertical integration and vertical contracts are potentially problematic only when a firm has market power in the relevant market, it follows that Section 616 applies only when a video programming distributor has market power in the relevant market."[65]

Rather than abandon the consumer welfare standard in passing Section 616, Congress embraced it. As explained by Judge Kavanaugh,

> Section 616 thus does not bar vertical integration or vertical contracts that favor affiliated video programming networks, absent a showing that the video programming distributor at least has market power in the relevant market. To conclude otherwise would require us to depart from the established meaning of the term of art "unreasonably restrain" that Section 616 uses. Moreover, to conclude otherwise would require us to believe that Congress intended to *thwart* procompetitive practices. It would of course make little sense to attribute that motivation to Congress.[66]

And in this particular case, Judge Kavanaugh argued that Commission failed to make such a showing. Indeed, because the Agency defined the relevant geographic market for video programming as national, Judge Kavanaugh pointed out that it was difficult for Comcast to have market power with only a 24% market share.[67]

Judge Kavanaugh's concurrence is particularly applicable to the FTC's *2022 UMC Policy Statement*. When the FTC rescinded the bi-partisan *2015*

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63 *Id.* (emphasis in original).

64 *Id.* at 990 (emphasis in original).

65 *Id.* at 991.

66 *Comcast,* 717 F.3d at 991 (emphasis in original).

67 *Id.* at 992 (citing Tennis Channel Order, *supra* note 51, at ¶ 87).

UMC Statement (and its adherence to a rule of reason analysis and the consumer welfare standard), Chair Khan argued that that "Congress enacted the Federal Trade Commission Act *to reach beyond* the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws."[68] And as noted *supra*, the Commission adopted Chair Khan's hostile view towards the consumer welfare standard in full in the *2022 UMC Policy Statement* by stating that it would abandon any rule of reason analysis.[69] But while the FTC Act is, of course, not the Sherman Act (or Clayton Act for that matter), it is still an antitrust law and tethered to antitrust principles and, therefore, the Commission must respect basic antitrust principles as embodied in current caselaw. That caselaw requires antitrust enforcement to proceed using a rule of reason approach—including defining the relevant markets at issue and demonstrating actual harm—under the consumer welfare standard.

B. *Courts Have Chastised Other Independent Agencies for Abandoning the Consumer Welfare Standard when Conducting Competitive Inquiries.*

The *2022 UMC Policy Statement* marks a deliberate and unambiguous decision by the FTC to discard the consumer welfare standard when enforcing Section 5. But it should be noted that courts have chastised other regulatory agencies when they attempted to abandon the consumer welfare standard when adjudicating competition issues under the ubiquitous "public interest" standard which can be found in a host of "public utility" statutory regimes, including, but certainly not limited to, the Federal Power Act[70] the Communications Act[71] and, of particular relevance, even the Federal Trade Commission Act.[72]

Like the current FTC, these administrative agencies also often argued that the "public interest" standard permits them to go beyond the antitrust laws without any constraints to remedy various perceived societal ills. The courts, however, did not agree. In the immortal words of Justice Potter Stuart, the fact that Congress may have included the "public interest" standard in a regulatory statute is not "a broad license to promote the general public welfare."[73] For this reason, the courts have provided some important guidance—

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68 *See* Khan, Chopra, & Slaughter Statement, *supra* note 16, at 2–3 (emphasis supplied).

69 *See 2022 UMC Policy Statement*, *supra* note 4, at § II.B.

70 *See, e.g.*, 16 U.S.C. § 824b.

71 *See, e.g.*, 47 U.S.C. § 310.

72 15 U.S.C. § 45(b) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition . . . in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, ...").

73 NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976) (rejecting arguments the Federal Power Commission must affirmatively promote equal employment opportunity and nondiscrimination in the employment practices of the firms it regulates under the Federal Gas and Power Acts).

particularly when an agency is tasked with conducting a competitive analysis—on the boundaries of the public interest standard.[74]

While independent administrative agencies are certainly not required to agree with antitrust enforcement agencies' competitive analyses, they are not permitted to ignore antitrust considerations either.[75] Courts have long "insisted that [administrative] agencies consider antitrust policy as an important part of their public interest calculus."[76] As such, assertions that no relationship exists between antitrust and economic regulation are incorrect. As Supreme Court Justice Felix Frankfurter stated seventy years ago, "[t]here can be no doubt that competition is a relevant factor in weighing the public interest."[77]

Given this requirement, it is little wonder that any application of the public interest standard requires a focus on the interests of the *public,* and not the interests of individual *competitors* who may seek to use the regulatory process to hamstring their rivals.[78] For example, in the 1981 case of *Hawaiian Telephone v. FCC*,[79] the D.C. Circuit remanded an FCC grant of Section 214 authority for service between the U.S. mainland and Hawaii because it found that the Commission had engaged in an *ad hoc* approach that improperly aimed at "equalizing competition among competitors."[80] The D.C. Circuit stated that the FCC's public interest analysis must be more than an inquiry into "whether the balance of equities and opportunities among competing carriers suggests a change."[81] The court found that it was "[a]ll too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the objective of equalizing competition among competitors."[82]

Subsequent decisions reiterate the importance that consumer welfare analysis plays in the public interest standard. In 1995, various parties

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74 For a detailed analysis, see T.M. Koutsky and L.J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard*, 18 COMMLAW CONSPECTUS 329 (2010).

75 *See, e.g.*, United States v. FCC*,* 652 F.2d 72 (D.C. Cir. 1980).

76 *See, e.g.*, *id.* at 82 (in evaluating transactions, FCC must in the exercise of its responsibilities "make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations."); N. Natural Gas Co. v. FPC*,* 399 F.2d 953, 961 (D.C. Cir. 1968) (stating that antitrust laws are a tool that a regulatory agency can use to bring "'understandable content to the broad statutory concept of the 'public interest.'" (internal citation omitted)). *See also* United States v. AT&T, 498 F. Supp. 353, 364 (D.D.C. 1980) (Green, J.) ("[I]t is not appropriate to distinguish between Communications Act standards and antitrust standards …. [because] both the FCC, in its enforcement of the Communications Act, and the courts, in their application of the antitrust laws, guard against unfair competition and attempt to protect the public interest.").

77 FCC v. RCA Commc'ns Inc., 346 U.S. 86, 94 (1953); *see also N. Natural Gas Co.,* 399 F.2d at 961 (noting that "competitive considerations are an important part of the 'public interest'" standard).

78 *See, e.g.*, *Brunswick Corp.*, 429 U.S. 477.

79 498 F.2d 771 (D.C. Cir. 1974).

80 *Id.* at 774–76.

81 *Id.* at 776.

82 *Id.* at 775–76.

challenged the FCC's approval of the acquisition of McCaw Cellular licenses by AT&T by arguing that the FCC should have imposed the antitrust Modified Final Judgment (MFJ) restrictions applicable to the Regional Bell Operating Companies (RBOCs) on the merged firm.[83] Citing *Hawaiian Telephone,* the D.C. Circuit rejected the merger opponents' arguments and found that the application of the MFJ restrictions to the merged entity would "serve the interests only of the RBOCs rather than those of the public."[84] Writing for the unanimous court, Judge Douglas Ginsburg ruled that when the Commission considers whether a proposed merger serves the public interest, the "Commission is not at liberty . . . to subordinate the public interest to the interest of 'equalizing competition among competitors. '"[85]

CONCLUSION

By any reasonable standard, the FTC's *2022 UMC Policy Statement* is not an analytically serious document.[86] Not only does the *2022 UMC Policy Statement* reject years of antitrust precedent, abandon adherence to economic first principles, and raise significant due process concerns, but it also exudes a remarkable regulatory hubris by the Commission in its belief that the FTC can act with judicial impunity when enforcing Section 5. But while it is easy to scoff at the *2022 UMC Policy Statement*, its adoption has real world consequences: until any enforcement action made pursuant to the *2022 UMC Policy Statement* is sorted out by the courts (a process which could take years), businesses great and small will be forced to look over their shoulders in deep uncertainty as to what perceived slights or disfavored business decision might invoke the FTC's wrath. Or worse, businesses will intensify efforts to curry the favor of the current FTC leadership rather than focusing on investing. innovating, and aggressively competing for the patronage of consumers.[87]

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83 SBC Commc'ns Inc. v. FCC, 56 F.3d 1484, 1490 (D.C. Cir. 1995).

84 *Id.* at 1491.

85 *Id.* (quoting *Hawaiian Telephone,* 498 F.2d at 776) (emphasis supplied); *see also* W. Union Tel. Co. v. FCC, 665 F.2d 1112, 1122 (D.C. Cir. 1981) ("[E]qualization of competition is not itself a sufficient basis for Commission action."). One of the counter-arguments to this position is the often misguided notion that the naked "protection of competitors" is the analytical equivalent to attempting to promote tangible new entry into a market currently dominated by a monopoly incumbent. It is not. As Joe Farrell—the FTC's former Chief Economist—argued, it is "important that the playing field should be leveled upwards, not downwards" because "rules that forbid a firm from exploiting efficiencies just because its rivals cannot do likewise" harm, rather than improve, consumer welfare. J. Farrell, *Creating Local Competition*, 49 FED. COMM. L.J. 201, 212 (1996). In highly concentrated industries, the focus of policy should be on regulation that promotes competitive entry, rather than regulation that protects competition. The latter will often turn into the mere protection of the private interests of competitors.

86 *See* Dissent of Commission Wilson, *supra* note 26, at 2 ("Instead of a law enforcement document, it resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy.").

87 *See* discussion, *supra* note 24.

So, as we wait for the courts[88] (or a change in FTC leadership) to sort this out, let us hope that Congress will take an active oversight role to ensure the Commission does not abuse its power and become, once again, the "National Nanny."

88 As this article was going to press, the FTC filed a complaint against Amazon for allegedly violating the Nation's antitrust laws. *See* Federal Trade Commission et al. v. Amazon.com, Inc., Complaint, Case No. 2:23-cv-01495 (W.D. Wash. Sept. 26, 2023). Among the assorted counts, the FTC alleged that Amazon engaged in unfair methods of competition in violation of Section 5 of the FTC Act. (See Counts II and IV). Given the weakness of the FTC's Sherman Act claims, we should not be surprised if the FTC pushes its new approach to UMC enforcement (which, by design, has a much lower standard of proof) as the litigation plays out.

REVERSE SEARCH WARRANTS: ECONOMICALLY BENEFICIAL?

Jacob P. Frankson

INTRODUCTION

Imagine going out for dinner on a Friday night with the family or for happy hour at the local pub with co-workers. However, unbeknownst to you, a nearby bank is robbed. Hours later, after you have already left for home, the police investigate by interviewing witnesses and searching camera footage but fail to turn up anything. The police then turn to reverse search tools, such as geofence and keyword searches. Due to your proximity to the crime, you may be cast in a geofence net. Where although what you were doing was completely legal activity, your private information is looked at by a worker at Google or possibly by the detective of the case. Or, since you happened to use the same bank and inputted the address into your GPS earlier that week, you pop up on a reverse keyword search. Here, Google gives law enforcement a list of everyone who searched a specific term, such as an address, during a specified time period. Even though everything you did was legal, the police and Google can still intrude upon your privacy. Are there any measures to prevent such an invasion of privacy? And, if so, do they reliably protect the invasions of privacy that reverse searches create? The answer to both is yes.

Geofences and keyword searches are but one small aspect of a broader category, that of reverse searches. Reverse searches involve the police working backward, casting a particular net in order to find suspects. These kinds of searches involve tower dumps, geofences, and keyword searches. All share the similar quality of lacking individualized suspicion and obtaining a warrant to request a company, such as Google, to provide information about people within certain date, time, and location parameters. The Supreme Court most notably looked at one type of reverse search, tower dumps, in *Carpenter v. United States*, where the Court found that police needed a warrant to obtain CLSI information found at cell towers. However, while the Court has not looked at the more novel geofence and keyword searches, Google and every lower court require a warrant to utilize such a tool.

Another lens to analyze these searches and whether a warrant is enough protection is through economics. There are many calling for a complete ban on geofence and keyword searches, such as one potential bill in New York. These search techniques are invaluable and, with the right restrictions, such as a warrant requirement, can benefit society. Utilizing an economic analysis, one can see whether the societal benefit outweighs the societal cost. In addition, one can cast doubt on the true social cost of such techniques and whether

the cost is as high as those who call for a ban believe. The approach of requiring a warrant for reverse searches, such as tower dumps, geofences, and keyword searches, is economically efficient because the privacy intrusions accrued by using such tools are substantially curbed by warrant requirements.

This comment does not question the constitutionality of reverse searches; it only discusses the narrow question of whether the use of warrants for reverse searches is economically efficient. It utilizes court decisions and economics to determine whether a warrant requirement is sufficient to protect the privacy interests at stake when utilizing reverse search techniques. This comment will begin with Part I, which examines the current state of the law regarding the Fourth Amendment and technology, diving specifically into geofence and keyword warrants. Part II will examine Fourth Amendment economics, looking at ways to examine the balancing interests test from a cost-benefit analysis approach. Part III will apply the cost-benefit analysis formula found in Part II to reverse searches such as tower dumps, geofences, and keyword searches.

I. LEGAL BACKGROUND

A. *Technology and the Fourth Amendment*

Prior to the latter half of the twentieth century, the Court found that only property law violations or physical intrusions could constitute a search or seizure under the Fourth Amendment.[1] However, the Court parted ways from this longstanding precedent in 1967 with its holding in *Katz v. United States*. This legendary case extended the protections normally only found in physical intrusions to focus on the privacy of individuals.[2] As stated aptly by Justice Harlan in his concurrence, a "person has a constitutionally protected reasonable expectation of privacy."[3] Harlan further laid out the requirements for a court to find whether a reasonable expectation of privacy exists. First, "a person [must] have exhibited an actual (subjective) expectation of privacy," second, "the expectation [must] be one that society is prepared to recognize as 'reasonable.'"[4] The importance of this doctrine cannot be overstated as it laid the framework for the Court in the next half-century in interpreting the relationship between the Fourth Amendment and the explosion of technology.

The Court, about ten years following its decision in *Katz*, created the third-party disclosure doctrine. This doctrine follows that there is no reasonable expectation of privacy if the information is voluntarily provided to

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1 *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004).

2 *See* Katz v. United States, 389 U.S. 347, 353 (1967).

3 *Id.* at 360.

4 *Id.* at 361.

others because one assumes the risk that it could be shared, thus, not requiring a warrant.[5] The Court most notably discussed this doctrine in *United States v. Miller* and *Smith v. Maryland*. In *Miller*, the Court held that the Fourth Amendment was not implicated in the contents of the original checks and deposit slips the defendant gave to the bank.[6] There was no reasonable expectation of privacy since the defendant had voluntarily offered that information to a bank that was subject to subpoena, and this information was used in commercial transactions.[7] Similarly, in *Smith v. Maryland*, the Court held that the Fourth Amendment was not implicated with pen registers.[8] There was no reasonable expectation of privacy because the "petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business."[9] Both cases established this doctrine that would be later used and highly relevant when discussing privacy issues, most notably in *Carpenter v. United States*.

The next big innovation in technology heard by the Court occurring only a few years after the third-party disclosure doctrine was electronic tracking beepers found in *United States v. Knotts*. The Court held that these beepers did not invade the legitimate expectations of privacy of the defendant.[10] No reasonable expectation of privacy exists on the public streets where the defendant was tracked and which led to the contraband.[11] The Court further noted that there was nothing wrong with the police using the enhancements in technology in "augmenting the sensory faculties bestowed upon them at birth."[12] This case touched upon the ever-increasing advancements in technology that the Court would soon face at excess in the next century.

At the beginning of the century, the Court heard a case involving thermal imaging used to quantify the presence of infrared radiation inside a person's home to detect marijuana farms in *Kyllo v. United States*.[13] The Court found that this technology threatens the expectations of privacy by the defendant and society at large since thermal imaging reveals both illegal and innocent intimate activity within the home.[14] Regarding the advancements in technology, the Court found that since thermal imaging was not in general

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5 *See* Esteban De La Torres, *Digital Dragnets: How the Fourth Amendment Should be Interpreted and Applied to Geofence Warrants*, 31 S. CAL. INTERDISC. L.J. 329, 335 (2022); Cassandra Zietlow, *Reverse Location Search Warrants: Law Enforcement's Transition to 'Big Brother'*, 23 N.C. J.L. & TECH. 669, 684 (2022).

6 *See* United States v. Miller, 425 U.S. 435, 442 (1976).

7 *See id.*

8 *See* Smith v. Maryland, 442 U.S. 735, 742 (1979) (noting that pen registers record all the numbers called from a particular telephone).

9 *Id.* at 744.

10 *See* United States v. Knotts, 460 U.S. 276, 285 (1983).

11 *See id.* at 281-82.

12 *Id.* at 282.

13 *See* Kyllo v. United States, 533 U.S. 27, 29-30 (2001).

14 *See id.* at 33.

public use, they would be leaving the homeowner at "the mercy of advancing technology."[15] The Court further stated that it must take into account "more sophisticated systems that are already in use or in development."[16] In this case, the Court stated firmly that new advancements in technology need to be taken into account and further that certain types of technology threaten the privacy interests of individuals.

A little over a decade later, the Court heard another major Fourth Amendment technological case involving GPS trackers in *United States v. Jones*. The majority utilized common law trespass due to the vehicle being an "effect," finding that the Fourth Amendment was violated since the police failed to attain a warrant for the GPS device.[17] In Justice Sotomayor's concurrence, she viewed the issue under the *Katz* framework which found that the defendant's expectations of privacy were violated.[18] Justice Sotomayor found the conduct a violation because the monitoring created a "comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[19] Further, she noted her issues with the third-party disclosure doctrine that "this approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[20] Justice Alito, in his concurrence, further added that the "use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."[21] Shown by Justice Sotomayor and Alito in their concurrences are the concepts of long-term monitoring and the advent of individuals giving over vast information to third parties, which are both highly relevant issues in *Carpenter v. United States* and presently geofences.

The Court made its most notable and most recent decision regarding technology and the Fourth Amendment in *Carpenter v. United States*. The FBI identified the cell phone numbers of several robbery suspects where they, under the Stored Communications Act, obtained an order to collect cell site location information ("CSLI") information from the service provider.[22] The Stored Communications Act requires a showing of less than probable cause, specifically that the facts show "there are reasonable grounds to believe the contents of a wire or electronic communication . . . are relevant and material to an ongoing criminal investigation."[23] Under the order, the police

15 *Id.* at 35-36.

16 *Id.*

17 United States v. Jones, 565 U.S. 400, 404 (2012).

18 *See id.* at 415.

19 *Id.*

20 *Id.* at 417.

21 *Id.* at 430.

22 *See* Carpenter v. United States, 138 S. Ct. 2206, 2212 (2018).

23 Amanda Regan, *Dumping the Probable Cause Requirement: Why the Supreme Court Should Decide Probable Cause Is Not Necessary for Cell Tower Dumps*, 43 HOFSTRA L. REV. 1189, 1197 (2015).

obtained a comprehensive catalog of Carpenter's movements over a span of 127 days.[24] The CSLI information requested is that of all calls transmitted through a cell tower at a given time, date, and location.[25]

The Court held that a warrant is required for CSLI information and tower dump searches.[26] The "all-encompassing" 127-day record of Carpenter's movement was problematic for the Court.[27] This information created an "intimate window" into the personal life of Carpenter, violating his reasonable expectation of privacy.[28] Further, the Court found that cell phone use is an "insistent part of daily life."[29] Due to this assertion, the user does not voluntarily assume the risk since the data is essentially logged without an affirmative act.[30] Additionally, a key feature of all reverse searches is that the police do not have particularized suspicion.[31] The Court found this an issue for not just Carpenter's privacy was intruded upon but everyone's data within that date, time, and location.[32] *Carpenter* portrays the current Court's direction in interpreting the Fourth Amendment with technological advances used by the police. However, the Court emphasized the narrowness of the opinion stating that they are only discussing the implications of CSLI and not disturbing the application of the third party doctrine.[33] Despite this, the fact pattern and holding share key similarities with the current use of geofences and keyword warrants.

The Court's holding in *Carpenter* established that a warrant is required to search cell towers for information. This entails that all of the prongs enumerated in the Fourth Amendment must be satisfied in order to lawfully acquire this information. The Fourth Amendment enumerates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[34] First, probable cause is a "practical, nontechnical conception" based on "commonsense conclusions about human behavior," which is viewed in the totality of the circumstances.[35] A probable cause determination is upheld so long as the magistrate had a "'substantial basis for . . . [concluding]' that a search would uncover evidence of wrongdoing."[36] Second, an oath or affirmation must be in support of the warrant; usually, a police

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24 *Carpenter*, 138 S. Ct. at 2212.

25 *See* Regan, *supra* note 23, at 1191.

26 *See Carpenter*, 138 S. Ct. at 2223.

27 *Id.* at 2217.

28 *Id.*

29 *Id.* at 2220 (quoting Riley v. California, 573 U.S. 373, 385 (2014)).

30 *See Carpenter*, 138 S. Ct. at 2220.

31 *See* Zietlow, *supra* note 5, at 688.

32 *See Carpenter*, 138 S. Ct. at 2221.

33 *See id.* at 2220.

34 U.S. CONST. amend. IV.

35 Illinois v. Gates, 462 U.S. 213, 231 (1983).

36 *Id.* at 236.

affidavit detailing that probable cause exists and particularizing the search.[37] Finally, the Fourth Amendment contains a particularity requirement which forces the police in the affidavit to detail what is to be searched and for what purpose.[38] The purpose behind this requirement is that it "ensures that the search will be carefully tailored to its justifications and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit."[39]

All three of the search techniques discussed demand a warrant.[40] While this has been settled for tower searches specifically, it is not mandated by the Supreme Court for either geofence or keyword searches. Nonetheless, the courts and the Fourth Amendment itself have a strong preference for warrants, especially with such techniques that tend to invade privacy interests, and therefore, warrants are needed for both geofence and keyword searches.[41]

B. *Geofence searches*

Geofences are a tool utilized by law enforcement that "create[] a virtual border around the area of where a crime has occurred . . . from which data can be gathered on users who entered that area."[42] Geofence boundaries are quite flexible, "[v]irtually any shape of any size that can be drawn using geographic coordinates can be used, including rectangles, triangles, or other irregular shapes, like the perimeter of a building or the length of a street."[43] For example, if a robbery occurred at a 7-Eleven, the geofence would set a specified area around the Seven-Eleven, such as a one-mile radius. Then it would detail who, during a specified period of time, such as thirty minutes, entered into this area. If someone's phone was turned on and the Location Service feature was selected, then companies, such as Google, would know whether that person entered into this one-mile radius and how long they were in it during the thirty-minute period of time.[44]

The police use software, such as Trax or Google's location software, which recognizes cell phone data and maps cell towers, call information, and caller habits.[45] Google collects information from any of its apps, "Gmail;

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37 *See id.* at 239.

38 *See* Maryland v. Garrison, 480 U.S. 79, 84 (1987).

39 *Id.*

40 *See* Zietlow, *supra* note 5, at 671.

41 *See Gates*, 462 U.S. at 236.

42 De La Torres, *supra* note 5, at 332.

43 *In re* Search of Information that is Stored at the Premises Controlled by Google LLC, 579 F. Supp. 3d 62, 69 (D.D.C. 2021) ("Google II").

44 Google will actually know the full extent of the phone's location data outside of this time frame but will only provide what is in the warrant to law enforcement.

45 Mohit Rathi, *Rethinking Reverse Location Search Warrants*, 111 J. CRIM. L. & CRIMINOLOGY 805, 809 (2021).

YouTube; Google Maps; and Google's Internet browser, Chrome[,]" connecting to "cell sites or towers, wi-fi networks, and Bluetooth devices."[46] This software is very accurate, with the location data having a margin of error "within 20 meters."[47] This margin of error depends upon the quantity and quality of the location information, but Google states that it aims to accurately capture 68% of users' location data.[48] The margin of error means that even if everything within the geofence passes constitutional muster, there is still the possibility of the information of those just outside of the zone being looked at.

One feature of Google is that individuals can opt into the Location History service, which is where Google attains the location information it shares with law enforcement.[49] To enable this feature, one must be signed in to their Google account, enable the device location setting, enable the share location feature, and finally opt into the Location History service.[50] While this may seem like many steps, most of these other features, apart from the last, are used for multiple other Google services such as Google Maps. Meaning that most of the time, it is as simple as one tap to enable or disable the feature. However, "opting out of the location-tracking function is not as intuitive as opting in."[51] There are multiple instances where people think they have opted out but are instead opted in, leading to confusion within the service.[52]

Geofences are subject to the warrant requirements enumerated in the Fourth Amendment. Therefore, when submitting an affidavit in support of a warrant, law enforcement cannot do broad sweeping locations; they must narrow them to areas in which there is probable cause, such as where the crime occurred. However, issues often occur, especially in populated urban areas where even a small geofence area can include many people.[53] Since the advent of geofences, companies like Google have received a substantial increase in geofence warrants, with "approximately 982 geofence warrants . . . served on Google in 2018; 8,396 were served in 2019; and, 11,554 were served in 2020."[54]

Obtaining a geofence warrant is a multi-step process, typically involving Google.[55] First, the government requests from Google the location data

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46 *Google II*, 579 F. Supp. 3d at 70-71.

47 *Id.* at 71.

48 *Id.*

49 De La Torres, *supra* note 5, at 331.

50 *Id.*

51 *Id.*

52 *See id.*

53 *See* Rathi, *supra* note 45, at 821; De La Torres, *supra* note 5, at 333.

54 Zietlow, *supra* note 5, at 679.

55 *See id.* at 676. Other companies such as Lyft, Uber, Snapchat, and Apple have also issued information for geofence warrants. *Geofence Warrants and The Fourth Amendment*, 134 HARV. L. REV. 2508, 2512-13 (2021).

on all devices within a set date, time, and location range.[56] Google then produces an anonymized list of the accounts for law enforcement to review.[57] Anonymized data includes the date and time of a device connecting to "Bluetooth, Wi-Fi, or cellular service" in the area and the exact coordinates.[58] Second, after law enforcement has reviewed the anonymized list, it may request further information from certain devices, such as additional location information, to defeat a potential false positive.[59] Finally, the government applies for a traditional warrant that requests "account-identifying information," which includes names, email addresses, and potentially bank information.[60] The main issue that judges and scholars focus on is the initial warrant that the police send to google since that one lacks the particularized suspicion.

1. The Courts and Geofence Warrants

The Supreme Court has not heard a case on geofences and therefore has not stated whether they are constitutional and, further, whether they require a warrant.[61] However, companies, including Google, have required law enforcement to produce a warrant for them to attain the location data from a geofence.[62] The lower courts have heard multiple cases about the validity of a warrant for geofences and have come up with different answers depending upon the circumstances of the warrant. None of these courts have made a decision finding them categorically unconstitutional, focusing instead on whether the warrant itself is supported by probable cause and contains particularity.[63]

There are two prime examples of the lower courts finding a geofence warrant valid: one in the Northern District of Illinois and the other in the District of Columbia District Court. First, is *Google I*, which involved an arson investigation.[64] A series of ten arsons occurred in the Chicago area, and after further investigation the police deduced that the fires were connected and applied for a geofence warrant.[65] The warrant contained six "target locations" where the police requested a geofence to attain the location data of

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56 *See* Zietlow, *supra* note 5, at 676-77; Rathi, *supra* note 45, at 809.

57 *See* Zietlow, *supra* note 5, at 677; *Geofence Warrants and The Fourth Amendment*, *supra* note 55, at 2515.

58 Zietlow, *supra* note 5, at 677.

59 *Id.*; *see Geofence Warrants and The Fourth Amendment*, *supra* note 55, at 2515.

60 Zietlow, *supra* note 5, 677; *see Geofence Warrants and The Fourth Amendment*, *supra* note 55, at 2515.

61 *See In re* Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation, 497 F. Supp. 3d 345, 362 (N.D. Ill. 2020) ("Google I").

62 *See id.* at 359-60.

63 *See id.* at 362.

64 *Id.* at 351.

65 *Id.*

those locations.[66] The target locations included sections of multiple commercial lots where the police believed the arsonists went through and further narrowed each target location to a time window between fifteen and thirty-seven minutes.[67]

The court then assessed whether the warrant met constitutional muster, specifically whether it met the probable cause requirement and the partiality requirement under the Fourth Amendment.[68] The court found that there was probable cause that evidence concerning the crime would be located in the locations described in the warrant.[69] While the court noted there was no evidence presented that the perpetrators carried cell phones during the time of the geofence searches, the court stated that cell phones are incredibly common in the modern age and further that it is common for conspirators to plan and communicate via cell phone.[70] Furthermore, the court found that the warrant contained sufficient particularity.[71] The warrant limited the time frame for each target location, it limited the locations to ones in which there was a fair probability that evidence could be found, and it was also limited in scope to focus on the arson sites and streets leading to those locations.[72] The warrant excluded residential and commercial buildings that had nothing to do with the arsons and had a higher chance of infringing on innocent people.[73] Moreover, the court noted that the crimes occurred in the early morning, when the streets are "generally sparsely populated by pedestrians."[74] The court, however, stated that "the fact that one uninvolved individual's privacy rights are indirectly impacted by a search is present in numerous other situations and is not unusual."[75]

Second is *Google II,* which involved "federal crimes" where the government applied for a geofence warrant.[76] The business center was located in an industrial area that shares its building with another business.[77] The geofence described in the warrant covers only the part of the business in question, excluding the business sharing the building and the parking lot.[78] Additionally, the government sought a total of 185 minutes dispersed over a five-and-a-half-month period in two to twenty-seven-minute segments.[79]

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66 *Id.*
67 *Google I*, 497 F. Supp. 3d at 351-53.
68 *See id.* at 353.
69 *See id.* at 354.
70 *See id.* at 356.
71 *See id.* at 357.
72 *See id.* at 357-58.
73 *See Google I*, 497 F. Supp. 3d at 358.
74 *Id.*
75 *Id.* at 361.
76 *In re* Search of Information, 579 F. Supp. 3d at 72.
77 *See id.*
78 *See id.*
79 *Id.*

Unlike the previous case, the government presented evidence through CCTV video that the perpetrator checked his or her phone in the alley.[80]

The court held that there was more than a fair probability that the suspects were located in the geofence time window and location.[81] Evidence that the suspects were using a phone during the time windows and that Google operating systems comprise "74 percent of the world's smartphone market" support this conclusion.[82] Furthermore, the court found the particularity requirement satisfied.[83] The three hours of location data spread out over six months did not "'provide [the] all-encompassing record of the [phone] holder's whereabouts.'"[84] Similar to the court in *Google I*, the court in *Google II* affirmed that "constitutionally permissible searches may infringe on the privacy interests of third persons—that is, persons who are not suspected of engaging in criminal activity."[85] The court also concluded that the capturing of an innocent's privacy data does not provide a fatal flaw in a warrant.[86] In this case, the court found that it was "physically impossible" for the government to exclude everyone from the geofences.[87] Additionally, since the geofences fell in industrial areas, lacking pedestrians and residences, it did not encompass any "sensitive locations" and therefore supported the particularity requirement.[88]

In contrast, there are two prime examples where the lower courts found geofence warrants invalid, one in the Eastern District of Virginia and the other in the Northern District of Illinois.[89] First is *United States v. Chatrie*, which involved law enforcement investigating a robbery where they obtained a geofence warrant which led to the capture of the suspect, Chatrie.[90] While conducting the investigation, the detective reviewed security camera footage which revealed that the suspect was holding a phone next to their ear.[91] Unable to unearth any leads, the detective used geofence technology to find the suspect.[92] The geofence measured a 150-meter radius, spanning three football fields or 17.5 acres in length, and was located in an urban environment,

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80 *See id.* at 78.

81 *See id.* at 77.

82 *Google II*, 579 F. Supp. 3d at 78-79.

83 *See id.* at 80-81.

84 *Id.* at 81 (quoting Carpenter, 138 S. Ct. at 2217).

85 *Google II*, 579 F. Supp. 3d at 82.

86 *See id.* at 85.

87 *Id.*

88 *Id.*

89 *See In re* Search of Info. that is Stored at Premises Controlled by Google, LLC, 542 F. Supp. 3d 1153 (D. Kan. 2021); *In re* Search of Info. Stored at Premises Controlled by Google, as further described in Attachment A, No. 20 M 297, 2020 WL 5491763 (N.D. Ill. July 8, 2020).

90 *See* United States v. Chatrie, 590 F. Supp. 3d 901, 905-06 (E.D. Va. Mar. 3, 2022).

91 *Id.* at 917.

92 *See id.* at 905-06.

including a bank and a nearby church within the area.[93] Additionally, the geofence was requested for a two-hour period measuring thirty minutes before and after the robbery and one hour during.[94] Google produced anonymized data of nineteen users from the geofence.[95]

The court found that the geofence warrant failed to establish probable cause to search each of the nineteen targets and failed to meet the particularity requirement.[96] However, the court noted that just because the instant warrant fails to meet the warrant requirement does not mean all geofence warrants are unconstitutional.[97] While the sweeping search may have found the potential suspects, it also swept in "unrestricted location data for private citizens who had no reason to incur Government scrutiny."[98] The margin of error proved problematic for the court as the geofence could have captured someone's location "hundreds of feet outside the geofence," notably the residences near the southeastern edge of the border.[99] Additionally, the court found the three-step geofence warrant process did not cure the warrant's defects stating that it provided police "unchecked discretion to seize more intrusive and personal data with each round of requests" with no need to involve a magistrate.[100]

Second is *Google III*, which involved the theft of prescription medications where the police applied for a geofence warrant to identify the unknown subjects.[101] The proposed geofence included cell phone users that would not have been involved in the offenses and took place in a "congested urban area[,]" which included residences among other nearby businesses and healthcare facilities.[102] In an amended application, the government reduced the size of the geofence, which was again denied.[103] In denying the application, the magistrate noted that shrinking the zone did not solve the problems: there were still no quantifiable numbers of how many people would be identified in the geofence and further no margin of error listed.[104] The court upheld the findings of the magistrate denying the geofence warrant.[105] The court first addressed the probable cause requirement for the warrant to be issued.

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93 *Id.* at 918.

94 *Id.* at 919.

95 *Id.* at 920.

96 Court upheld the warrant due to the good faith exception. *See Chatrie*, 590 F. Supp. 3d at 937-41.

97 *Id.* at 933.

98 *Id.* at 930.

99 *Id.* at 922.

100 *Id.* at 934.

101 *See In re* Search of: Information Stored at Premises Controlled by Google, 481 F. Supp. 3d 730, 732 (N.D. Ill. 2020) ("Google III").

102 *Id.* at 744.

103 *See id.*

104 *See id.*

105 *See id.* at 744-45.

The major issue the court found was that while the identification of the unknown subject would be found within the geofence, the geofence area included information about persons not involved in the crime.[106] The court cited the "all persons" rule in which a warrant to search all persons present must include evidence of all persons present in the warrant.[107] Thus, the warrant would violate this principle due to the possibility of a customer within the parking lot of a retail business being potentially searched when the police had no evidence of criminal activity to validate the search.[108]

Next, the court addressed the particularity requirement for a warrant. The court found that the warrant application "puts no limit on the government's discretion to select device ID's from which it may derive identifying subscriber information from among the anonymized list."[109] Since the government did not include a list identifying the persons whose location was to be searched, it did not meet the muster of the particularity requirement.[110] Therefore, the court found the warrant unconstitutional on both probable cause and particularity grounds.[111] The lower courts vary greatly in interpreting the Court's reasoning from similar cases and applying it to this novel technology, which shows a need for the Court to hear a case on geofence warrants. Such a case would clarify whether lower courts should apply the *Carpenter* reasoning.

C. *Reverse keyword searches*

The reverse keyword search is a novel way for police to find suspects for a crime. Similar to geofence warrants, keyword warrants work backward and involve attaining information from Google.[112] However, unlike geofences, which only give away location data, keyword warrants give away specified terms an individual searched during a specified time period, location, and date.[113] These types of warrants are most used in pattern robbery and arson investigations, where the police can look for the addresses searched in the phone's search history to find potential suspects.

The Colorado Supreme Court heard a case this year involving the use of a keyword warrant by the police in *People v. Seymour*.[114] This case

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106 *Google III*, 481 F. Supp. 3d at 751.

107 *Id.* at 751-52.

108 *See id.* at 752.

109 *Id.* at 754.

110 *See id.* at 754-55.

111 *See id.* at 756-57.

112 *See* Thomas Brewster, *Warrants Can Force Google To Look Through Your Search History–A Tragic Arson Case May Decide If That's Constitutional*, FORBES, June 30, 2022.

113 *See id.*

114 Jeff Anastasio & Russell Haythorn, *Colorado Supreme Court Ruled in Favor of Reverse-keyword Search Denver Police Used to Track Arson Suspects*, DENVER 7, Oct. 16, 2023.

involved an arson investigation that resulted in the murder of five.[115] Denver police conducted the investigation using traditional investigative techniques such as interviewing witnesses and reviewing security camera footage.[116] However, after two months nothing had come about.[117] To combat this problem, the police requested a reverse keyword search warrant from Google.[118] The third and final iteration of the warrant specifically requested an anonymized list of the IP addresses of "any Google accounts that [searched the address during the fifteen-day period before the fire] while using Google Services."[119] The police then received eight accounts which after utilizing deductive techniques directed them to the defendant.[120]

The Colorado Supreme Court found that the defendant enjoyed a reasonable expectation of privacy in the date requested in the warrant.[121] Moreover the court discussed the Supreme Court's decision in *Carpenter* and the debate regarding the third party exception.[122] The Colorado Supreme Court found tension in the debate citing some federal circuit and district court opinions utilizing the third party doctrine despite the Court's ruling in *Carpenter*.[123] However, the court found this reasonable expectation of privacy was granted under the Colorado Constitution thus avoiding the debate regarding the Fourth Amendment's protections.[124] The court emphasized in its opinion that "In reaching these conclusions, we make no broad proclamation about the propriety of reverse-keyword warrants" thus narrowing the overall precedential weight of the decision.[125] The court ultimately held that despite lacking probable cause, the warrant was upheld under the good faith exception.[126]

Arson is but one of the many crimes in which the reverse keyword search can be used to find potential suspects. Police have used it to find potential suspects in a sex trafficking case by having Google search multiple spellings of the name and address during a specified period of time.[127] Moreover, the police utilized the reverse keyword search technology in the 2018 Austin bombings having Google, among other internet search companies, search terms associated with bomb-making.[128] The most recent and notable

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115 2023 CO 53, ¶ 5.

116 *See id.* ¶ 6.

117 *See id.*

118 *See id.* ¶ 7.

119 *Id.* ¶ 11.

120 *Id.*

121 *See Seymour*, 2023 CO 53, ¶ 32.

122 *See id.* ¶ 29-30.

123 *See id. But see id.* ¶ 99 (Márquez, J. dissenting) (finding there was a reasonable expectation of privacy under both federal and Colorado law).

124 *See id.* ¶ 32.

125 *Id.* ¶ 4.

126 *See id.* ¶ 3.

127 *See* Brewster, *supra* note 112.

128 *See id.*

adaption may pertain to the Court's recent decision in *Dobbs v. Jackson Women's Health Organization*; the technology could be used in such a way as to have companies search people's history, looking for the addresses or telephone numbers of abortion clinics.[129] While this technology certainly can help solve some egregious crimes, such as arson and bombings, it also has the potential for abuse. This potential abuse begs the question of what factors courts should use in determining what level of protection is needed.

II. ECONOMIC BACKGROUND

A. *Balancing Interests Test*

The Supreme Court utilizes a rough cost-benefit analysis tool in certain instances of analyzing a Fourth Amendment violation. This balancing-of-interests test weighs potential benefits versus the potential costs of requiring a warrant and favors the side which has a greater showing. *Riley v. California* most prominently displays this principle, where the Court found a warrant was required to search a seized cell phone.[130] The Court, in this case, applied the balancing interests test, balancing the privacy intrusion caused by such a search and whether the governmental interests outweighed it.[131] The main governmental interest brought by the government was that of preventing the destruction of evidence or making sure confederates were not headed to the scene.[132] However, the Court quickly saw the vast amount of privacy intrusion factors outweighed this minimal governmental interest.[133] The Court noted first that once the phone was seized, it endangered no one and was no longer a risk for destruction.[134] Further, any of the other concerns were more suited to be addressed by the exigent circumstances exception rather than by the balancing interests approach.[135] Second, the Court noted that modern-day cell phones have more privacy concerns and expose far more than a search of a house.[136] Cell phones contain immense storage capabilities and essentially record nearly every aspect of a person's life.[137] Therefore, the Court, in weighing both the social benefits and social costs, found that a warrant was required to search cell phones absent exigent circumstances.[138]

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129 *See* Jon Schuppe*, Police Sweep Google Searches to Find Suspects. The Tactic Is Facing Its First Legal Challenge.*, NBC NEWS, June 30, 2022.

130 *See* Riley v. California, 573 U.S. 373, 403 (2014).

131 *See id.* at 385-86.

132 *See id.* at 387-88.

133 *See id.* at 401.

134 *See id.* at 387.

135 *See id.* at 401-02.

136 *See Riley*, 573 U.S. at 396.

137 *See id.*

138 *See id.* at 401.

In *Birchfield v. North Dakota*, the Court similarly conducted a balancing interests test to analyze whether a warrant is required for breath and blood alcohol tests.[139] For governmental interests, the government brought up the safety of public highways, specifically from drunk drivers, and the deterrent effect of allowing warrantless testing.[140] For the privacy interests of breath alcohol tests, the Court found there was a negligible intrusion.[141] The most prominent point made by the Court was that they revealed only the amount of alcohol in one's breath, therefore not revealing any intimate details.[142] For the privacy interests of the blood alcohol tests, the Court did find a privacy intrusion.[143] Unlike breath alcohol tests, blood alcohol tests reveal much more information beyond alcohol content, bringing up intimate details outside the scope of the search.[144] Thus, the Court required a warrant for taking blood tests but not for breath alcohol tests absent exigent circumstances.[145] This balancing interests test utilized by the Court is a basic form of the Fourth Amendment economics analysis test expanded upon in greater detail in the following section.

B. *Fourth Amendment Economics*

The fields of economics and law overlap countless times, shown in prominent areas of law, most notably in first-year studies of torts, property, and contracts. This overlap shows the importance of utilizing economic tools in analyzing various reasons why certain legal outcomes should be chosen or declined. Criminal law is no different, and an economic analysis can and should be used to evaluate the outcomes of certain tools and techniques utilized by law enforcement. The foundation of economics applied to the criminal law arena is rooted in Gary Becker's *Crime and Punishment: An Economic Approach*.[146] In this article, Becker laid the foundation upon which many scholars have sought to expand upon, that the optimal level of law enforcement is a function of the marginal cost of enforcement and marginal benefit of enforcement.[147] While simply put, this equation is quite complex and includes many variables that affect the outcomes of a wide array of crimes that are found in the current United States legal system.

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139 *See* Birchfield v. North Dakota, 579 U.S. 438, 444 (2016).

140 *See id.* at 464.

141 *See id.* at 462.

142 *See id.* at 462-63.

143 *See id.* at 463-64.

144 *See id.*

145 *See Birchfield*, 579 U.S. at 474.

146 *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968).

147 *See id.*

Scholars, such as Craig Lerner, have brought new legal frameworks into the criminal law economic field.[148] In his article, *The Reasonableness of Probable Cause*, Lerner imports the infamous Learned Hand formula found in Torts to Fourth Amendment reasonable search and seizure scholarship.[149] In doing so, he adapted the Hand formula creating P*V>C where P is the probability of a successful search, V is the social benefit, and C is the social cost.[150] This formula was later expanded upon by Orin Kerr, one of the foremost scholars of the Fourth Amendment, who proposed a formula to economically measure Fourth Amendment concerns.[151] This formula is labeled as such P*V – Ci – Ce, where P represents the probability of a successful search and prosecution, V is the value of a successful prosecution in deterrence, Ci is the internal costs of the investigative steps, and Ce is the external costs such as privacy intrusion.[152] This formula is best broken down into the societal benefit containing the P and V variables and the social cost, which is represented by both the internal and external costs associated with societal cost.

1. Measuring Social Benefit

In measuring the social benefit, the relevant part of Kerr's formula is that of the P and V variables. These variables combined show the probability of law enforcement catching criminals and the value of deterrence from a successful prosecution.[153] The incentive behind a high probability of success in prosecutions is, at the first level, police officers wanting to do their job and solve cases.[154] At a second level, this is incentivized by political campaigns and the general public's desire for a lower crime rate which results in votes for the politicians.[155]

A high P shows that the method is more likely to solve crime and, therefore, more beneficial for society.[156] The introduction of new technologies, such as the ones brought up in this comment, help police more accurately find perpetrators. After expending police resources by following up on potential leads and searching video camera footage, there is not much more the police could do. Without these new technologies, many crimes would go

148 *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 1019-20 (2003).

149 *See id.*

150 *Id.*

151 *See* Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 UNIV. PA. L. REV. 591, 599 (2016).

152 *Id.*

153 *See id.*

154 *See id.* at 602.

155 *See id.*

156 *Id.* at 599.

unsolved, for the police typically use geofence and keyword warrants more as a last resort showing that without them, the crime would probably have gone unsolved.[157]

A high V shows that the deterrent effect is more substantial, reflecting a more serious crime.[158] For more severe and serious crimes, a high V shows that the investigative techniques are working to catch criminals that commit these crimes and therefore raises the deterrent effect associated with these crimes by lowering the expected value of committing the crime to the criminal.[159] For example, the use of a geofence to catch an arsonist who otherwise would have gone unpunished increases the chances of an arsonist being caught and therefore increases the deterrent effect, which increases the societal benefit.

While Kerr specifically discusses the value of deterrence, there are other societal benefits that can also be included, such as an efficient police force that more accurately solves crimes.[160] From this perspective, the societal benefit does not occur by making it harder for criminals to get away with crime, but instead occurs by police catching criminals with advanced tools, which makes the job faster and more efficient. In doing so efficiently, law enforcement can spend time which otherwise would have been devoted to solving the crime in a more traditional manner and utilize that to solve other crimes. Furthermore, solving crimes accurately aids in ensuring that innocent citizens are not charged or later convicted of a crime they did not commit. If police can use methods that identify suspects while weeding innocents out, they are providing a social benefit by finding the perpetrator of the crime but also vindicating any nearby innocents of the crime. Therefore, the higher this side of the equation, the higher the societal benefit and the higher the social costs need to be to outweigh it.

2. Measuring Social Costs

In measuring the social costs, this section focuses on the latter half of Kerr's formula which measures both the internal and external costs to society from utilizing a particular law enforcement method. Social costs are divided into both internal police enforcement costs and external privacy intrusion costs, with much of the debate revolving around the latter.[161]

Internal costs are measured by looking at both the individual officer's costs in conducting the investigation and the police force's overall cost in

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157 *See Google II*, 579 F. Supp. 3d at 78; *Chatrie*, 590 F. Supp. 3d at 917.

158 Kerr, *supra* note 151, at 599.

159 *See id.*

160 *See id.* at 629.

161 *Id.* at 599.

utilizing the investigative method.[162] The main incentive of both the individual officer and the police organization is the minimization of crime.[163] Thus, police solely take into account the budgetary constraints and are not concerned with the social intrusions that occur due to their actions. In this incentive structure, police have little incentive to take into account social intrusions that affect the ordinary individual that may happen to be affected by the investigative technique.

An individual police officer's time, effort, and threat to personal safety are measured under this portion.[164] Police officers have the incentive to solve crimes, whether that is for their own personal satisfaction or for status.[165] Thus, hindrances or obstacles such as warrants can often stop officers from solving crimes that they otherwise would be able to solve. This creates internal costs on the side of the police to ensure they are following the rules laid out by Congress and the Courts in order to arrest criminals.

From the leaders within the police and politicians' perspectives, both have incentives to want more efficient techniques to solve crimes.[166] Politicians set budgets for the police to follow, and a lower crime rate means more votes for the politicians.[167] The police station or chief will want more efficient techniques that do not eat away at the budget.[168] Thus, the warrant requirement for new techniques such as geofence and keyword searches poses barriers for police to utilize new technology in solving crimes. If these obstacles cost too much, then they may be forced to use less costly and less effective substitutes and thus restrict the efficiency of the police and increase crime. An apt example given by Steven Penney is that if police could not use electronic surveillance to get evidence for a warrant to search a drug dealer's house, then fewer physical searches would occur, which in turn diminishes the probability of punishment and the expected cost of dealing drugs.[169] The higher the costs associated with a particular technique, the higher the internal costs, which incentivizes police to want fewer obstacles such as warrants; therefore, the costly technique will not be utilized, and police investigation will be less efficient.

External costs are measured by looking at the privacy intrusion that is accrued from a specific investigative technique.[170] Intruding on an individual's privacy leads to many social negatives, which can make the costs of a

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162 *Id.* at 601.

163 *See id.* at 601-02.

164 Kerr, *supra* note 151, at 601.

165 *See id.* at 603-04.

166 *See id.* at 601.

167 *See id.* at 602.

168 *See id.*

169 *See* Steven Penney, *Reasonable Expectations of Privacy and Novel Search Technologies: An Economic Approach*, 97 J. CRIM. L. & CRIMINOLOGY 447, 492 (2007).

170 Kerr, *supra* note 151, at 600.

certain investigative technique outweigh the public benefit.[171] Privacy enhances the quantity and quality of interpersonal communications.[172] Without any safeguards preventing police from eavesdropping on individuals on their whim, communication would be greatly restricted. Thus, the positive externalities associated with communication are lost.

Empirical studies do exist that measure individual's degree of privacy intrusion based on people's responses to Fourth Amendment Court rulings. One such notable study was conducted by Henry F. Fradella, among others, which asked participants whether they agreed with certain court opinions involving privacy.[173] The cases varied, including some discussed in the factual background section, such as *Kyllo*, *Miller*, *Knotts*, and *Katz*.[174] When it comes to information and communication privacy, which is the category that would include geofence searches, the respondents "overwhelmingly expressed agreement with precedent limiting invasions of communication privacy."[175] The participants agreed highly with the court's opinion in *Katz,* which found a warrant requirement to record a phone conversation.[176] The respondents disagreed overwhelmingly with both the *Miller* opinion, which established the third-party doctrine and *Knotts*, which allowed the warrantless installation of a tracking beeper.[177]

While this study occurred in 2011 and therefore did not include *Carpenter*, one can extrapolate that individuals hold strong protections for information and communication privacy and thus likely agree with *Carpenter*. Moreover, the fact that many disagreed with the *Miller* opinion shows that they likely would have agreed with the court in *Carpenter* since the court declined to apply the third-party doctrine. However, it should also be noted that this survey was conducted by a group of around 589, which included a large majority of educated individuals, which may skew the results and not relate to society generally.[178] While empirical studies do exist to try and measure the subjective privacy interests of society at large, they do not and probably cannot attain an accurate prediction of an individual's privacy interests. Thus, trying to extrapolate specific evidence, such as a preference for warrants among the general public, because 63% of a group of 589 people agreed with the court cannot be accurately attained.[179] However, what can be extrapolated from such data is very broad strokes, and most notably from this empirical study, that there is a general preference for privacy especially

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171 *See id.*

172 Penney, *supra* note 169, at 492.

173 *See* Henry F. Fradella et al., *Quantifying Katz: Empirically Measuring "Reasonable Expectations of Privacy" in the Fourth Amendment Context*, 38 AM. J. CRIM. L. 289, 343 (2011).

174 *Id.* at 354.

175 *Id.* at 366.

176 *See id.*

177 *See id.*

178 *Id.* at 346.

179 Fradella *et al.*, *supra* note 173, at 359.

involving such information or communication categories that involve present-day tower dumps, geofence, and keyword searches.

The main issue with economically measuring Fourth Amendment intrusions still pervades, which is putting a number to social cost due to the subjective nature of privacy intrusions. For example, a hundred people could have their phones searched by one of these warrants and not mind in the slightest or accept it as the cost of living in society. On the other hand, one person who had their phone searched could find it reprehensible and abhorrent that the government can commit such an action. There is no tangible way to measure these subjective feelings of a privacy intrusion, but there are certain basic assumptions that can be used in determining a rough estimate of the privacy intrusion that is accrued from certain investigative techniques.

There are rough assumptions that can help in calculating the external costs. One assumption is that the more people who are affected by privacy intrusions, the more likely there is a higher external cost. In the previous hypothetical, it is more likely that one of the hundred is likely to experience a severe privacy intrusion than just the one person. The Court, in multiple opinions, most notably *Carpenter*, has utilized this assumption in finding a high privacy intrusion. In *Carpenter*, the Court specifically noted the large number of people that would be affected by a warrantless tower dump.[180] Additionally, as discussed previously, every case involving the validity of a geofence warrant, at a minimum, discussed how many people would be affected by the search or whether the area itself led to a high probability of affecting a large number of individuals, such as congested urban zones.[181] In doing so, whether explicitly or implicitly, the Court was concerned about how many people would be affected by the geofence.

Another assumption is the more intimate details revealed by a search, the higher the level of privacy intrusion. The Court has time and again found the level of intimate detail revealed by a search an important factor in the cost-benefit analysis. Again, in *Carpenter*, the court discussed the intimate details disclosed by such a broad and warrantless search.[182] Moreover, in *Riley*, the Court specifically noted the intimate details stored on cell phones and that a warrant was required to search something which essentially contained a person's everyday life.[183] Utilizing these two assumptions, one can make rough estimates of how the Court would determine the social cost of an investigative technique.

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180 *See Carpenter*, 138 S. Ct. at 2221.

181 *See Google I*, 497 F. Supp. 3d at 358; *Google II*, 579 F.Supp.3d at 85; *Chatrie*, 590 F. Supp. 3d at 922-23; *Google III*, 481 F. Supp. 3d at 752.

182 *See Carpenter*, 138 S. Ct. at 2217.

183 *See Riley*, 573 U.S. at 395-96.

III. APPLICATION TO TOWER DUMPS, GEOFENCE, AND KEYWORD WARRANTS

For the following analysis, very few actual empirical figures will be mentioned due to the subjective nature of trying to measure social benefit and cost. To account for this lack of empirical evidence, the first analysis will show what factors the Court used and measured in order to find a warrant requirement for tower dumps. The subsequent analysis will focus on different factors weighing heavier or lower to determine whether they are overall socially beneficial to society and whether a warrant requirement is enough to adequately protect against the social intrusion produced by the investigative techniques.

A. *Tower dump warrants*

The Court in *Carpenter v. United States* required police to obtain a warrant to search CLSI or cell towers.[184] Similar to both geofence and keyword searches, police in a CLSI or tower dump search do not know in advance whether to follow particular individuals or not, lacking individualized suspicion.[185] Despite this major point, the Court allowed such searches to be conducted, showing arguably its approval of reverse search techniques.

The Court noted a variety of factors, which it utilized in its analysis, which similarly align with Fourth Amendment economics. First, the Court noted the intimate details revealed from such a search.[186] In this case, a 127-day all-encompassing record was created of the defendant.[187] This record opened an intimate window into the personal life of the defendant, which called for a warrant requirement as opposed to allowing the third-party doctrine to reign.

Second, the Court noted the vast amount of people affected by such an intrusive search.[188] Applying the third-party doctrine would significantly expand it by allowing a warrantless search for not just Carpenter but everyone within the tower and not for a short time but for an extended period of time, in Carpenter's case, 127 days.[189] Furthermore, in addressing the third-party doctrine, the Court found that users do not voluntarily assume the risk of exposing their information since the phones log the information without any

184 *See Carpenter*, 138 S. Ct. at 2223.
185 *See* Zietlow, *supra* note 5, 684-85.
186 *See Carpenter*, 138 S. Ct. at 2217.
187 *Id.*
188 *See id.* at 2221.
189 *Id.* at 2216-17.

affirmative actions and that phones, in general, are an insistent part of daily life.[190]

Fourth Amendment economics align with the Court decision by balancing the social cost and benefit and applying the proper remedy to adequately protect against privacy intrusion while still allowing the police to utilize the technique. The social benefit of the investigative technique is that the data from the wireless carriers helped in solving serious crimes which otherwise would not have been solved.[191] This shows that on the P and V side of the equation, there is a tangible benefit for the technique aids in making prosecutions successful and deterring future conduct.

Turning to the social costs, the Court found that there was a great external cost to this investigative technique.[192] Tower dumps reveal both intimate information of the individual searched and revealed the information of many people. The investigative technique aligns with both of the previous assumptions discussed. Thus, since many people would be affected and the more affected, the more privacy intrusion occurs, the higher the external cost. Moreover, since intimate details would be viewed and the more intimate details revealed, the more privacy intrusion increases, the higher the external cost. Due to these factors, the Court found the high external social cost outweighed the social benefit, and therefore some form of remedy was needed to adequately protect these interests.[193]

Both Alito and Kennedy, in dissent, found that the warrant requirement was overly used in this instance and that the lower standard created by the Stored Communications Act was sufficient. Justice Alito argued that legislation, such as, in this instance, the Stored Communications Act made a warrant requirement unnecessary.[194] Alito argued that the Stored Communications Act already incorporated a high standard making the warrant requirement unnecessary.[195] Justice Kennedy similarly supported this argument stating that the Court should defer to the legislative judgment due to the difficulty in determining the effects of evolving technology.[196] This theory is similarly argued by Steven Penney in stating that "[e]conomics and public choice theory can also reduce decision-making error by identifying the circumstances in which courts should be especially deferential to legislative choices, such as where a search technology is novel, technically complex, and undergoing rapid change, and its costs are borne by a broad swath of the population."[197] Despite these arguments, the Court found that the warrant

190 *See id.* at 2220.
191 *See id.* at 2233-34 (Kennedy, J., dissenting).
192 *See Carpenter*, 138 S. Ct. at 2223.
193 *See id.*
194 *See id.* at 2261 (Alito, J., dissenting).
195 *See id.*
196 *See id.* at 2233 (Kennedy, J., dissenting).
197 Penney, *supra* note 169, at 528.

requirement was needed and that the Stored Communication Act was not sufficient in protecting the privacy interests of the citizenry.

B. *Geofence warrants*

While geofence searches contain privacy intrusion costs, these costs are not substantial and are in part offset by the value of such an investigative technique; thus, a warrant requirement is sufficient to make geofence searches economically efficient. First, looking at their societal benefit, the geofence cases from above recognize that this novel technology has benefits. For example, without it, many of the arsons or robberies noted in the cases would have been left unsolved. In cases such as *Chatrie*, this was not the first step taken by law enforcement but more of a last-ditch effort to try to solve the crime.[198] Moreover, as shown in *Google I*, this investigative technique aids in finding pattern crimes such as the pattern arson in that case.[199] New technological innovations such as geofences allow police to be more efficient in solving crimes by allowing them to solve crimes that they otherwise would not have been able to with the resources they had at the time.

There is a great deterrent effect from utilizing geofences. Would-be criminals who are about to commit pattern crimes are less likely to do so now that the police have more tools available at their disposal to catch criminals that commit such crimes. While police still use traditional methods of investigation, geofences allow the police now to find suspects that they otherwise would not have been able to find through camera footage or witnesses. This adds to the societal benefit, specifically the "V" part of the equation, raising the overall social value of such an investigative technique.[200]

The courts in both *Google I* and *II* found that an innocent's individual privacy rights being impacted by a search is not unusual.[201] And in some cases, like in *Google II*, it was "physically impossible" for the government to exclude everyone from a geofence search.[202] While there may be some innocent people caught within the geofence, were there not innocent people considered suspects in crimes before geofences? For example, a camera could easily show an innocent person walking through the area five minutes before a crime took place. Would the police not think to investigate who this person was? Just because one innocent or a few people are indirectly

198 *See Chatrie*, 590 F. Supp. 3d at 917.

199 *See Google I*, 497 F. Supp. 3d at 351.

200 Further research should be conducted to quantifiably measure the successful probability of prosecution in cases involving geofence searches by looking at the amount of cases involving geofence searches and whether or not the case was successfully prosecuted. More in depth analysis such as whether the case would have been successfully prosecuted but for the use of geofence searches should also be conducted.

201 *See Google I*, 497 F. Supp. 3d at 361; *Google II*, 579 F. Supp. 3d at 82.

202 *Google II*, 579 F. Supp. 3d at 85.

impacted by the search does not mean that the societal benefits do not outweigh the privacy intrusion.

Additionally, while solving cases helps deter would-be criminals by punishing those committing acts that society has deemed wrong and inefficient, it also helps prove people's innocence. In utilizing the technology, the police can identify many people who were at the scene and therefore prove an individual's innocence. The police can do this by utilizing the traditional methods of investigation, such as camera footage, comparing that with who was at the scene. In doing so, the police can identify people innocent of the crime and exclude them from the investigation altogether. Moreover, the police can potentially verify a person's alibi. Even if the police find someone of particular interest from the geofence search, it does not mean that the person is guilty of the crime. The police still need to follow up with the suspect and see if they are truly guilty of the crime. While this does involve some limited invasion of privacy, such as a person's whereabouts, when a person walks in public, they have a limited expectation of privacy. As shown in the *Knotts* case, the Court found little issue with utilizing a beeper to track an individual who left the curtilage of the home because the police could do the same thing utilizing visual surveillance.[203]

Second, there are social costs in the form of privacy intrusions that are accrued under geofence searches. There are minimal internal costs which involve the cost to individual officers as well as the cost of executing geofence warrants. To make internal costs zero, there must be no hindrances or barriers in the way, so the fact that a warrant is needed to utilize a geofence automatically introduces internal costs. However, these costs are minimal, for the mere requirement of a warrant is something police are used to for many other types of searches. Thus, this type of hindrance is not something that should dissuade police from still attaining a warrant for a geofence on the margin.

As discussed previously, there is a multi-step process between the police and companies such as Google to attain the information from a warrant.[204] This process, however, only occurs after the warrant is issued by the magistrate.[205] The internal cost of the long, drawn-out process of the back and forth between the police and Google is more of an individualized cost on the officer of the case.[206] Thus, there is only a minimal internal cost compared to other investigative techniques that similarly, require a warrant.

The external costs involve privacy intrusions which are present in all of the investigative techniques mentioned in this comment, with geofences as no exception. The primary privacy intrusion with geofences is personal data of a person's physical location at a specified time. The main concern is abusing such power since innocent peoples' location data can be obtained through such searches. However, these concerns are easily remedied by the warrant

203 *See Knotts*, 460 U.S. at 284-85.

204 *See* Zietlow, *supra* note 5, at 676.

205 *Id.*

206 *See id.* at 677.

requirement. The courts are adequately equipped to determine the particularity of warrants and whether the technique violates the Fourth Amendment.

The cases discussed previously show the courts utilizing the narrow tool provided by the warrant requirement in balancing the governmental interests in solving crime with the privacy intrusion caused by the investigative technique. The courts in the *Google I* and *Google II* cases found that instances where the police followed the warrant restrictions geofences proved a useful tool. In *Google I*, the court noted the particularity of the warrant targeting only specific locations in a pattern arson case at specified times, which did not include any highly urban or residential areas.[207] Similarly, in *Google II*, the court found that the geofence was of sufficient particularity describing in detail specific locations and dates.[208] It further did not cover any "sensitive locations" such as residential zones.[209] Under such restrictions, the courts have found that geofences provide an invaluable tool to police and that the warrant requirement is sufficient to meet the needs of the privacy intrusion caused by the investigatory tool.

Additionally, the courts, on multiple occasions, have found the searches to be too broad, doing exactly what the courts should do in interpreting the warrant requirement. In *Chatrie*, the court denied the geofence application for a single robbery citing that the geofence area and the margin of error were too large since the geofence was located near a residential zone.[210] Additionally, in *Google III*, the court denied a geofence application citing the urban area in which it was located and further the lack of particularity in defining how many people would be affected by the search.[211] However, the court in *Google III* noted that not all geofence warrants are unconstitutional and that if they meet the warrant requirements, they can be perfectly legal and useful.[212] Such conduct by the courts shows the validity of the warrant requirement and no need for additional legislative barriers.

While proposed legislation such as that in New York, cited in *Chatrie*, would completely limit any privacy intrusions, it can be considered overdeterrence.[213] The Court in *Carpenter* found that the lower standard in the Stored Communications Act was not enough to adequately protect against the privacy intrusion caused by the investigative technique.[214] The Court subsequently found that the warrant requirement met this burden and, therefore, any further requirement imposed would be overdeterrence since it would not protect the interest but cut into the effectiveness of the tool in combating crime.[215] Similarly, any legislation to completely outlaw geofence

207 *See Google I*, 497 F. Supp. 3d at 358.
208 *See Google II*, 579 F. Supp. 3d at 85, 89.
209 *Id.*
210 *See Chatrie*, 590 F. Supp. 3d at 929-30.
211 *See Google III*, 481 F. Supp. 3d at 744.
212 *See id.* at 756.
213 *See Chatrie*, 590 F. Supp. 3d at 926.
214 *See Carpenter*, 138 S. Ct. at 2221.
215 *See id.* at 2233 (Kennedy, J., dissenting).

technologies goes beyond the point of protecting against privacy intrusion and into the realm of interfering with the effectiveness of law enforcement.

Turning to the basic assumptions discussed in the economics section, geofence warrants can lead to many people's privacy being intruded upon if utilized incorrectly, and similarly intimate details can also be intruded upon. If no warrant requirement existed, then police could create geofences for any time, location, and length. This would create problems since thousands of individuals could be potentially caught in a geofence for a crime they were miles away from. Moreover, the intimate details of an innocent individual's life could be intruded upon due to the great extent of power given to the police.

However, with the warrant requirement, these concerns are much less troublesome. The warrant requirements easily solve these issues by forcing the search to be particular. This requirement severely limits the scope of the geofence. Under the warrant requirement, the search must be particular in describing the location, time, and length of the search as detailed in *Carpenter*. Such restrictions force police to be careful and meticulous in approaching geofences.

Geofences are a novel and valuable tool for law enforcement that, under a warrant requirement, correctly balances governmental interests with privacy intrusions.

C. *Keyword warrants*

Keyword warrants are similar to the last two analyses but pose different challenges when analyzing their social cost and benefit. First, keyword warrants hold a great social benefit.

The social benefit attained by utilizing keyword warrants is quite high, which in the equation is measured by the P and V elements. Police utilizing this technique solve crimes they otherwise would never have solved. For instance, the police in *Seymour* would not have found the defendant but for the use of the keyword search technology.[216] There are many similar crimes that add to such a social benefit because not only does it help identify who committed the crime, but by association helps determine innocents who had no part in the crime.[217] However, keyword searches are a relatively novel technology, and the police do not use them to the same extent as geofence warrants. Next, the net social costs of keyword warrants are quite high, at least compared to both tower dump and geofence warrants. The internal costs are not high for the police to utilize keyword warrants. Police forces across the nation, from local to federal, utilize keyword warrants, and therefore they are a cost-saving technique for if there was a more efficient alternative option, law enforcement would be using it instead. Police regularly attain warrants

216 *See Seymour*, 2023 CO 53, ¶ 6-7.

217 *See id.* ¶ 12,

for a variety of different techniques, so the internal cost of obtaining a warrant is negligible compared to other similar techniques.

The bulk of the social cost stems from the external costs associated with the privacy intrusions from police utilizing these warrants. Looking at the two previously discussed assumptions to measure the extent of the privacy intrusion, there are major concerns associated with both. First, it depends upon the situation whether a vast amount of people will have their privacy intruded upon. For example, in *Seymour*, the police initially had Google look through nine different variations of the address to find suspects.[218] Google returned with eight accounts; thus, in this instance, there was a low amount of privacy intrusion.[219] Contrast this with an instance where a local bank branch was burned down in an arson. Unlike a residence, people regularly look up a business address more often on Google maps or search engines. In such an instance, one can assume that a larger amount of people will show up in Google's search and, thus, a higher intrusion cost. This assumption, therefore, screams that allowing a warrant procedure is best. The courts, now similar with geofence and tower dump warrants, can undertake a fact-based analysis to see whether the police have gone too far or violated too many individuals' privacy based upon the particularization of the warrant.

The intimate details revealed by such a warrant are similarly fact dependent. In a geofence warrant, one has a diminished expectation of privacy when going out into the public where many of the geofences take place, such as public parking lots and alleys. Therefore, the external costs will be lower to negligible in public areas within a geofence. But in a keyword warrant, one has a higher expectation of privacy when it comes to what is searched or inputted into a mobile device.[220] When an individual searches for an address or looks up a medical condition on their phone, they are not displaying for all the world to see. While one might argue that this falls under the third-party doctrine, since you are voluntarily giving this information over to Google, which is subject to subpoena or keyword warrants, this does not definitively show that there is a diminished expectation of privacy. The Court, following the logic in *Carpenter*, would likely apply the restrictions it set on the third party doctrine to reverse-keyword searches as well.[221] The court in *Chatrie* found that third-party doctrine would not apply citing the Court in *Carpenter*.[222] Similarly, the dissent in *Seymour* found that *Carpenter*'s limits on the third-party doctrine applied to reverse keyword searches.[223] Such information found on Google can be intimate and private such as looking up

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218 *See id.* ¶ 8.

219 *See id.* ¶ 11. *But see id.* ¶ 99 (Márquez, J. dissenting) (arguing that this would be a high privacy intrusion because it would affect the billion users with a Google account).

220 *See Seymour*, 2023 CO 53, ¶ 26.

221 *See Carpenter*, 138 S. Ct. at 2220 (citing *Riley*, 573 U.S. at 385 (2014)).

222 *See Chatrie*, 590 F. Supp. 3d at 925.

223 *See Seymour*, 2023 CO 53, ¶ 100-01 (Márquez, J. dissenting).

birth control or medical diagnosis which the Court has held time and again violate reasonable expectations of privacy.

One major counterargument is that the police only search certain terms that have to do with an investigation, such as an address, name, or ingredients for a bomb. The police are not looking for intimate details and are not looking to intrude on one's privacy; they are merely working toward their investigation. Looking up multiple variations of an address or name in an investigation is a small intrusion, but it could be a large intrusion if the search reveals any intimate details such as the address of an abortion clinic. However, a slippery slope argument would state what terms count towards an investigation. What if the intimate details had to do with the investigation, such as looking up addresses of a now illegal abortion clinic to see who had a procedure there? The scope of abuse possible by such a novel technology is boundless, and a warrant requirement does not satisfy the privacy intrusion possible under such an investigative technique.

Additionally, there is the argument of how much an individual values privacy on their phone and whether there is a diminished expectation of privacy when searching on Google. For instance, if someone seriously wanted to protect these interests, then they could use a service such as Duckduckgo, which does not save any search information. However, as the Court stated in *Carpenter*, the third-party doctrine does not apply, and merely because one utilizes the service of a third party does not mean that private data is unprotected.[224] Google searching is such a part of daily life, similar to the use of a cell phone, that the contents are private and should require a warrant to search. Additionally, unlike geofences where walking in public contains limited expectations of privacy, the data stored on the phone does contain a significant expectation of privacy shown in *Riley*.[225] One could, however, make the argument that due to such a difference between the two types of reverse searches, keyword searches should require extra protections.

Therefore, in the formula, the benefits likely outweigh the costs, although not to the same extent as geofence warrants. While there is still a high social cost, specifically external cost, that is imposed, such costs are remedied by the warrant requirement. While there are fact patterns that a court would definitely have an issue with allowing the search, the courts can look at warrants on a case by case basis similar to geofences and determine whether the words searched are particular or whether they go beyond and so intrude on an individual's privacy. The courts can detail whether the words searched are so intimate as to violate the Fourth Amendment or whether a search of over a hundred variations is not particular enough.

The other alternatives to the warrant requirement are to either wholesale outlaw them through legislation or create legislation that puts a harsher restriction on them than a warrant requirement. In either case, the alternative would further restrict the societal benefit and positive externalities associated

224 *See Carpenter*, 138 S. Ct. at 2220.

225 *See Riley*, 573 U.S. at 396.

with the successful use of keyword warrants. These alternatives go beyond what is necessary to adequately protect the privacy interests at stake. Therefore, the warrant requirement is sufficient and should continue to be utilized, under a narrow interpretation, in deciding the constitutional validity of keyword warrants.

CONCLUSION

The warrant requirement is sufficient to make both geofence and keyword warrants economically efficient. There is no need to pass legislation or for the Court to wholesale outlaw or ban them from use. The warrant requirements sufficiently protect the privacy intrusions created by both investigative techniques, and thus the societal benefit outweighs the social costs. While it is understandable why many find such privacy intrusions to be substantial, this again goes back to the subjective value of privacy. It is nearly impossible to accurately quantify the privacy intrusions brought on by investigative techniques. Moreover, while through basic deduction and assumptions, there are privacy intrusions for these types of investigative techniques, the warrant requirements sufficiently prevent widespread abuse of these techniques. Courts have, on multiple occasions, found the searches too broad or that they captured too many innocent bystanders within the area. In doing so, the courts have shown the warrant requirements, if accurately interpreted, can prevent the type of widespread abuse that those who want to wholesale ban these techniques are afraid of. Technology cannot be suppressed for fear of its abuse when it provides many societal benefits that, when accurately interpreted under the Fourth Amendment, help society more than hinder it.

FIGHTING FIRE WITH FIRE: EXPANDING THE EXCEPTIONAL EVENTS RULE TO MAKE A WORKABLE SOLUTION FOR PRESCRIBED FIRES

Gregory Pelletier

INTRODUCTION

Within just the first ten months of 2022, over 54,000 wildfires burned 6.9 million acres across the United States, more than the equivalent landmass of Rhode Island, Delaware, and Connecticut combined.[1] Another seventy million acres of federal lands are at high risk for further ignition.[2] Wildfires have proven to be catastrophically unpredictable and devastatingly difficult to legally regulate. Wildfires pose incredible short and long-term threats to peoples' safety, property, and the economy. The historic 2018 wildfires in California cost the state and federal economies $148.5 billion in capital losses.[3] The grim reality is environmentalists expect the quantity and severity of wildfires to increase.[4] Over recent decades policymakers have designed regulations, liability schemes, and land management strategies to disincentivize potentially harmful behavior and incentivize prevention efforts in an attempt to minimize the wildfire threat. Prescribed fires have become a prominent solution.[5] Prescribed fires are a land management strategy in which a landowner intentionally ignites a controllable fire to burn brush, dead foliage, and other wildfire fuels.

Prescribed fires are renowned for their cost-effective wildfire prevention.[6] However, federal regulations have complicated the implementation of prescribed fires. In particular, the Clean Air Act's (CAA) minimum air quality standards, set by the Environmental Protection Agency (EPA), have

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1 CONG. RSCH. SERV., IF10244 Version 63, WILDFIRE STATISTICS, 7-5700, (Oct. 2022); *see* U.S. CENSUS BUREAU, STATE AREA MEASUREMENTS & INTERNAL POINT COORDINATES, 1-2 (2010), https://www.census.gov/geographies/reference-files/2010/geo/state-area.html.

2 U.S. DEP'T THE INTERIOR ET AL., REV. AND UPDATE OF THE 1995 FED. WILDLAND FIRE MGMT. POLICY, 8 (2001).

3 *Full Cost of California's Wildfires to the U.S. Revealed*, UNIV. COLL. LONDON (Dec. 2020), https://www.ucl.ac.uk/news/2020/dec/full-cost-californias-wildfires-us-revealed; Daoping Wang et al., *Econ. Footprint of Cal. Wildfires in 2018*, NATURE SUSTAINABILITY, 252, 253 (Dec. 2020).

4 ENV'T PROT. AGENCY, CLIMATE CHANGE INDICATORS: WILDFIRES, 2 (Jul. 2022), https://www.epa.gov/climate-indicators/climate-change-indicators-wildfires.

5 OFF. THE GOVERNOR, STATE CAL., *Governor's Task Force Launches Strategic Plan to Ramp Up Wildfire Mitigation with Prescribed Fire Efforts*, 1 (Mar. 2022), https://www.gov.ca.gov/2022/03/30/governors-task-force-launches-strategic-plan-to-ramp-up-wildfire-mitigation-with-prescribed-fire-efforts/.

6 Renata Martins Pacheco & João Claro, *Prescribed burning as a cost-effective way to address climate change and forest management in Mediterranean countries*, ANNALS FOREST SCI., 78, 100-01 (2021).

forced states to discourage the practice of prescribed fires in order to abide by the CAA's air quality standards. Annually, the EPA sets National Health-Based Ambient Air Quality Standards (NAAQS) which limit the total amount of air pollution that may be emitted in each state. States may face adjudicative penalties for failing to comply with the EPA's NAAQS. Therefore, current regulatory policy disincentivizes the practice of prescribed fires by requiring states to count air pollution produced from prescribed fires towards their annual air pollution measurement totals. This perverse incentive works against the CAA's own purpose – to promote and protect public health – by limiting states' abilities to prevent wildfires and thereby failing to limit wildfire risk.

This comment will advocate for a narrow expansion of the CAA's Exceptional Events Rule, which exempts wildfire smoke from a state's air quality measurements. The proposed expansion of this statutory rule, to include prescribed fire smoke, will reduce perverse incentives and will encourage the practice of prescribed fires. The CAA grants the EPA Administrator with broad discretion in defining new types of exceptional events. The flexibility and deference granted to the EPA Administrator suggests the Administrator has the ability, if not the responsibility, to exempt prescribed fire smoke in the same way wildfire smoke is exempt.

Section I of this paper provides background information on the widespread use and effectiveness of prescribed fires. It lays the foundation for what a prescribed fire is, why we should care about them, and what obstacles block their implementation. Additionally, the background section provides information on the current wildfire threat facing the United States, including why and how wildfires can devastate communities and economies. Section II of the background portion outlines the structure and requirements of the CAA, including the Exceptional Events Rule. Section II explains the legal basis for the Exceptional Events Rule, the regulatory purpose behind the CAA, and it introduces important federal court decisions, such as *Natural Resources Defense Council v. Environmental Protection Agency*,[7] which shaped courts' interpretations of the CAA.

Section III and IV comprise the analysis section of the paper. Section III advocates for an expansion of the Exceptional Events Rule to include prescribed fires. First, section III analyzes the recent caselaw and recent application of the Exceptional Events Rule and CAA. Second, it argues to abolish the CAA's statutory distinction between "natural" fire and "anthropogenic" fire because the distinction is counterintuitive and arbitrary for courts to apply. Finally, the analysis section explains how an expanded Exceptional Events Rule will realign incentives to be consistent with the CAA's overarching purpose and suggestive legislative history.

Section IV of the analysis concludes this comment with a hypothetical application of the proposed expansion of the Exceptional Events Rule as well

[7] NRDC v. EPA, 559 F.3d 561 (D.C. Cir. 2009).

as a brief discussion of how states can reintroduce prescribed fires. This section applies the legal principles and caselaw discussed to a wildfire situation modeled after the 2018 California Camp Wildfire.

I. BACKGROUND

A. *The Growing Threat of Wildfires Across the United States*

Wildfires are among the highest risk natural disasters affecting the United States.[8] Despite the states' diverse climates and landscapes, wildfires impact nearly every American territory. In 2021, wildfires ignited in forty-nine of the fifty states.[9] Wildfires are any unplanned fires burning natural wildland areas. Wildfires can occur in a variety of environments, including forests, grasslands, and even swampy wetlands.[10] These blazes thrive on high winds and warm temperatures. Dry seasons, such as the summer months, are especially susceptible. The adaptability of wildfires allows them to inflame almost anywhere. Wildfires have indiscriminately burned lands and threatened communities from the Appalachian Mountains to the Mississippi River Valley and even the Hawaiian tropics.[11] From 2018 to 2021, approximately 227,000 wildfires ignited different territories across the United States.[12] These fires destroyed more than 24,000 structures, over half of which were residential homes.[13]

The 2018 Camp Fire exemplifies the threat wildfires pose to human life.[14] The Camp Fire remains the deadliest and most destructive wildfire in California history.[15] The town of Paradise, California is located approximately seven miles downwind of where the fire broke out.[16] Thirty miles per hour gusts and terrain dried-out from drought guided the wall of fire toward the town.[17] In just seventeen days, the Camp Fire ingulfed the town of

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8 U.S. FED. EMERGENCY MGMT. AGENCY, WILDFIRE NAT'L RISK INDEX, 1 (2022), https://hazards.fema.gov/nri/wildfire.

9 CONG. RSCH. SERV., *supra* note 1.

10 Adam C. Watts & Leda N. Kobzar, *Smoldering Combustion and Ground Fires: Ecological Effects and Multi-Scale Significance*, FIRE ECOL., 124 (2013).

11 *Id.* at 132.

12 CONG. RSCH. SERV. *supra* note 1, at 7-5700 tbl.1.

13 *Id.* at tbl.2.

14 *See* U.S. DEP'T OF COM., NAT'L INST. STANDARDS AND TECH., NEW TIMELINE OF DEADLIEST CAL. WILDFIRE COULD GUIDE LIFESAVING RESEARCH AND ACTION, 1-2 (Mar. 2022), https://www.nist.gov/news-events/news/2021/02/new-timeline-deadliest-california-wildfire-could-guide-lifesaving-research.

15 *Id.*

16 *Id.* at 3.

17 *Id.*

Paradise and claimed eighty-five lives.[18] Officials blame a variety of factors including high winds, recent drought, and burnovers which occur when firefighters become completely surrounded and are forced to reposition.[19] However, the single factor experts cited most responsible was the dense vegetation throughout the town, exacerbated by the 100 years without wildfires reducing the town's vegetation.[20]

Wildfires also pose a unique ripple effect on the economy, impacting different levels of the economy directly and indirectly. Direct wildfire damages include the value of structures, vehicles, crops, and other property actually burned or destroyed. Alternatively, wildfires can indirectly damage the economy by destroying places of business, jobs, tourism attractions, and vital infrastructure. These indirect damages pose longer-lasting consequences than just the value of lost property. The cost of wildfires often extends beyond local and state lines, making it difficult to precisely measure wildfires' economic toll. Regardless of precise measurements, the economic impact of wildfires is profound. The 2018 California wildfires alone cost the United States economy $148.5 billion, including an astounding $45.9 billion in production and consumption supply-chain losses connected to California.[21]

In comparison, California's Governor proposed budgeting only $400 million annually for wildfire prevention and forest management efforts.[22] American spending on wildfire mitigation totals only a small percentage of the economic damage wildfires wreak on the American economy.

B. *Fighting Fire with Fire*

Prescribed fires are a simple yet ironic solution to combat wildfires: proactively burn a wildfire's fuel. More specifically, prescribed fires (also commonly referred to as controlled burns) are a land management strategy in which a high-risk wildfire area is intentionally burned to prevent the spread of a future wildfire.[23] The United States has suffered from wildfires since long before its Declaration of Independence, but the first official federal wildfire suppression policy was not introduced until the early 1900s.[24] The

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18 *Id.*

19 *Id.*

20 *Id.* at 4.

21 *Full Cost of California's Wildfires to the U.S. Revealed*, *supra* note 3, at 1; Wang, *supra* note 3, at 254.

22 LEGIS. ANALYST'S OFF. THE CAL. LEGIS., THE 2022-2023 WILDFIRE AND FOREST RESILIENCE PACKAGE, 1 (Jan. 26, 2022).

23 U.S. NAT'L PARK SERV., WILDLAND FIRE: WHAT IS A PRESCRIBED FIRE?, 1 (Mar. 2020), https://www.nps.gov/articles/what-is-a-prescribed-fire.htm.

24 Jan W. Van Wagtendonk, *The Hist. and Evolution of Wildland Fire Use*, 3 FIRE ECOLOGY 3, 4 (2007).

wildfire prevention and suppression tools used today are products of teachings, experiences, and policies that have existed for thousands of years.

1. Native Americans' Use of Fire as Medicine

Native Americans first used prescribed fires with the belief that fire was medicine.[25] Tribes would set small fires to nurture the land for farming, to remove brush and cover in case of enemy attacks, to drive herds of bison into huntable terrain, and most profoundly, to reduce the risk of more serious wildfires.[26] The tall grasses and gusting winds of the northern Great Plains made (and still do make) the territory especially prone to fast-spreading wildfires.[27] Similarly, in other regions of the Americas, such as the Northern Rockies, tribes like the Salish and Pend d'Oreille have passed down teachings of prescribed fires for thousands of years.[28] Today, government agencies like the United States Forest Service and United States National Park Service work in coordination with native tribes to better understand the practice of prescribed burns.

2. Modern Day Prescribed Fire Policy

Native teachings have bled into many of the federal and state regulations we see today. The United States Forest Service, a subsidiary of the Department of Agriculture, first used preventative wildfire suppression tactics as early as 1886 at conservation sites like Yellowstone National Park and Yosemite National Park.[29] However, the effectiveness of prescribed fires was not fully recognized until 1972, when the Forest Service realized that allowing some wildfires to burn would temper the landscape in preparation of future fires.[30] The Forest Service established its Wilderness Prescribed Natural

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25 Dave Roos, *Native Americans Used Fire To Protect And Cultivate Land Indigenous People Routinely Burned Land To Drive, Prey, Clear Underbrush And Provide Pastures*, 2 (2021), https://www.history.com/news/native-american-wildfires; Germaine White, David Rockwell, & Erin McDuff, *Embracing Indigenous Knowledge to Address the Wildfire Crisis*, U.S. DEP'T THE INTERIOR, OFF. OF WILDLAND FIRE, 2 (2021), https://www.doi.gov/wildlandfire/embracing-indigenous-knowledge-address-wildfire-crisis; David Natcher, *Implications of Fire Policy on Native Land Use in the Yukon Flats, Alaska*, HUM. ECOLOGY, 421, 421-41 (2004).

26 *Id.*

27 *Id.*

28 CONFEDERATED SALISH & KOOTENAI TRIBES, DIVISION OF FISH, WILDLIFE, RECREATION & CONSERVATION, FIRE ON THE LAND: NATIVE PEOPLE AND FIRE IN THE N. ROCKIES, 1 (2021), https://fwrconline.csktnrd.org/Fire/index.html.

29 Van Wagtendonk, *supra* note 24, at 4.

30 Michael P. Dombeck, Jack E. Williams, & Christopher A. Wood, *Wildfire Policy and Pub. Lands: Integrating Sci. Understanding with Soc. Concerns Across Landscapes*, 18 CONSERVATION BIOLOGY 883, 884 (2004).

Fire Program, but it was short-lived.[31] At the turn of the twenty-first century, the Forest Service adopted a more analytic approach to wildfire suppression which relied heavily on a cost-benefit analysis of prevention efforts such as prescribed fires.[32] For example, the analytic approach allocated federal spending to suppression efforts such as purchasing new firefighting equipment rather than investing in preventative methods like prescribed fires.[33]

The number of wildfires exceeding 50,000 acres has been increasing over the past thirty years, with a majority of the change occurring between 2000 and 2014.[34] Prescribed fires are more necessary than ever; an estimated 181 million acres are considered to be at high risk of damage from wildfires due to excessive fuel levels.[35] Prescribed fires are designed to (1) prevent the ignition of a wildfire, (2) prevent the spread of a wildfire, and (3) clear an open area for firefighters to extinguish wildfires.[36] Studies have proven that prescribed fires effectively reduce potential and actual wildfire intensity in environments across the United States.[37]

3. The Science Behind Prescribed Fire

Prescribed fire has been extensively studied. One study, completed in the Eastern Cascade Mountains of Central Washington found prescribed burning, used in conjunction with manual thinning of trees, significantly reduced the fuel density within the studied plots.[38] A separate study, performed in the Payette National Forest in Idaho, concluded "even patchy, low severity prescribed fires can be effective at reducing wildfire severity, at least within

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31 *Id.*

32 Geoffrey H. Donovan & Thomas C. Brown, *Wildfire Mgmt. in the U.S. Forest Serv.: A Brief Hist.*, 29 NAT. HAZARD OBSERVER 1, 2 (July 2005).

33 CONG. RSCH. SERV., *supra* note 1.

34 NAT'L ASS'N STATE FORESTERS, QUADRENNIAL FIRE REVIEW 2014, 22 (2014).

35 Ross W. Gorte, *Federal Funding for Wildfire Control and Management*, CONG. RSCH. SERV., 17 tbl.5 (2011).

36 U.S. DEP'T OF COM., *supra* note 14.

37 Emily Williams, *Reimagining Exceptional Events: Regulating Wildfires Through the Clean Air Act,* 96 WASH. L. REV. 765, 767-68 (2021) (citing *A Comparison of Landscape Fuel Treatment Strategies to Mitigate Wildland Fire Risk in the Urban Interface and Preserve Old Forest Structure*, 259 FOREST ECOLOGY & MGMT. 1556, 1563 (2010); Scott L. Stephens & Jason J. Moghaddas, *Experimental Fuel Treatment Impacts on Forest Structure, Potential Fire Behavior, and Predicted Tree Mortality in a California Mixed Conifer Forest*, 215 FOREST ECOLOGY & MGMT. 21, 28 (2005); Mark A. Finney, *Design of Regular Landscape Fuel Treatment Patterns for Modifying Fire Growth and Behavior*, 47 FOREST SCI. 219, 219 (2001)).

38 Richy J. Harrod, Nicholas A. Povak, & David W. Peterson, *Comparing The Effectiveness Of Thinning And Prescribed Fire For Modifying Structure In Dry Coniferous Forests*, U.S. DEP'T AGRIC., FOREST SERV., ROCKY MOUNTAIN RSCH. STATION, 329, 335-42 (2007).

a few years post-treatment."[39] This study was conducted in a wildfire-ravaged region of the forest so researchers could more accurately study the difference between how wildfires and prescribed fires burned.[40] Researchers found "prescribed fires and wildfires may burn in fundamentally different ways, likely because of differences in seasonal fuel conditions, but this does not appear to reduce the effectiveness of prescribed fire."[41] Numerous other studies have shared similar conclusions, that prescribed fire, even without other forms of treatment like thinning, "greatly reduce[s] fireline intensity relative to no treatment."[42] Scientific support has revived interest in prescribed fires. In 2020, California Governor Gavin Newsom signed an agreement with the U.S. Forest Service to reintegrate prescribed fires across California.[43]

C. *The Dangers of Prescribed Fire*

As the saying goes, sometimes when you play with fire, you get burned. Occasionally, this holds true for prescribed fires. Despite their history and effectiveness, prescribed fires have several drawbacks that policymakers are forced to weigh when deciding whether or not to use prescribed fire. First, prescribed fires are expensive. Treating wildland can cost anywhere between $100 and $1,000 per acre of land, and there are millions of acres across the United States that would benefit from wildfire-fuel reduction.[44] The exact cost of prescribed fire per acre is dependent on the location's accessibility, risk, and foliage density.[45] Some states, such as Texas, have designed grants for eligible private landowners in an effort to reduce the cost of prescribed fires.[46] In other states, such as North Carolina, prescribed fires have proven to be more costly than effective for many private landowners.[47] As of 2008, prescribed fires were only profitable in the coastal region of North Carolina

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39 Robert S. Arkle, David S. Pilliod, & Justin L. Welty, *Pattern And Process Of Prescribed Fires Influence Effectiveness At Reducing Wildfire Severity In Dry Coniferous Forests*, FOREST ECOLOGY AND MGMT., 174, 183 (2012).

40 *Id.*

41 *Id.*

42 Nicole M. Vaillant, JoAnn Fites-Kaufman, & Scott L. Stephens, *Effectiveness of Prescribed Fire as a Fuel Treatment in Cal. Coniferous Forests*, USDA FOREST SERV. PROC., 465, 473-74 (2006).

43 Press Release, Off. the Governor Gavin Newsom, California, U.S. Forest Service Establish Shared Long-Term Strategy to Manage Forests and Rangelands, 1, 3 (Aug. 13, 2020) (on file with author).

44 MARSHALL BURKE ET AL., MANAGING THE GROWING COST OF WILDFIRE (Stan. Inst. Econ. Pol'y Rsch. 2020).

45 Jesse Kreye, Melissa Kreye, Arun Regmi, *Prescribed Fire: Does It Have a Place on My Land?*, PENN. STATE UNIV. (2020).

46 *Texas A&M Forest Service Promotes Prescribed Fire Benefits Through Grants For Landowners*, TEX. A&M FOREST SERV. (Feb. 2022).

47 Ronald Meyers et. al., *Prescribed Burning Cost Recovery Analysis on Nonindustrial Private Forestland in North Carolina*, U.S. DEPT. AGRIC. FOREST SERV. (2012).

once labor, equipment, and patrolling costs were accounted for.[48] External costs also drive up the price of prescribed fires, as many states and localities require burn permits or approval from local authorities.[49]

Second, prescribed fires run the inherent risk of raging out of control. Some of the most destructive wildfires in United States history were ignited by out-of-control prescribed fires. A 2012 Colorado prescribed fire tragically burned out of control, killing three people, destroying twenty-three homes, and charring over 4,000 acres.[50] Again in May 2022, New Mexico suffered from its largest wildfire in state history after the U.S. Forest Service lost control of an intentional burn.[51] The Hermits Peak Calf Canyon Fire has since burned over 300,000 acres and displaced tens of thousands of New Mexicans.[52] However, fires such as these are rare and are often the result of human error, as was the Hermits Peak Calf Canyon Fire, where the U.S. Forest Service conducted an intentional burn despite forecasts for high winds.[53] Even though prescribed fires run the risk of spreading, the vast majority of intentional burns are properly controlled. Outliers such as the Hermits Peak Calf Canyon Fire can be prevented by adjusting burn policies and procedures and by ensuring professional supervision during the burns.

Finally, prescribed fires produce smoke emissions, just like wildfires. The process of burning overgrown vegetation releases similar particulates into the atmosphere as if a wildfire itself had burned the land. Prescribed fires pollute while also serving as a pollution reduction tool. Legal scholars have described prescribed fire as something of a "good" environmental "bad."[54] However, unlike unpredictable wildfires, prescribed fires can be strategically burned to release the least amount of air pollution possible. Furthermore, prescribed fires as a whole produce just a fraction of the air pollution a full wildfire would produce if burned in the same location. In the aggregate, studies suggest the practice of prescribed fires minimizes the total amount of smoke produced per acre of wildfire.[55]

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48 *Id.*

49 Williams, *supra* note 37, at 760.

50 Leslie Jorgensen, *Lower North Fork Fire Victims Want Answers*, COLO. OBSERVER, Aug. 21, 2012.

51 Andrew Hay, *U.S. Stops Controlled Burns Nationwide After New Mexico Disaster*, REUTERS, May 2022.

52 U.S. DEP'T OF COM., *supra* note 14.

53 U.S. DEP'T OF COM., *supra* note 14.

54 Kristen Engel, *Perverse Incentives: The Case of Wildfire Smoke Regulation*, 40 ECOLOGY L.Q. 623, 642-46 (2013).

55 OR. ADMIN. R. 629-048-0020 (3) (2012).

D. *The Clean Air Act and States' Responsibility to Abide*

Over the last century, the federal government has increasingly regulated air pollution. In 1963, the passage of Congress's Clean Air Act (CAA) instituted the first national air quality regulations.[56] Since then, Congress and the authorized Environmental Protection Agency (EPA) have developed policies aimed at improving air quality across the United States. One of the CAA's most notable promulgations is its directive for the EPA to establish National Health-Based Ambient Air Quality Standards NAAQS (NAAQS).[57] As explained by the EPA, "the CAA requires EPA to set NAAQS for pollutants that are common in outdoor air, considered harmful to public health and the environment, and that come from numerous and diverse sources."[58] The NAAQS measure six primary air pollutants: carbon monoxide, lead, particulate matter, ozone, nitrogen dioxide, and sulfur dioxide.[59] Wildfires emit all of these pollutants, especially particulate matters. Wildfires burn and produce smoke from organic matter such as wood and more hazardous matters such as plastics, rubbers, and even metals. Annually, the EPA reviews data from its designated air quality zones throughout the United States "to ensure that [the NAAQS] provide adequate health and environmental protection, and to update those standards as necessary."[60]

The CAA guidance allows individual states to set stricter air pollution limits, but states may not set air pollution limits lower than those enacted by the EPA.[61] Failure of a state to satisfy the NAAQS by the respective target date can trigger administrative compliance orders[62] and administrative civil penalties.[63] Congress even retains the authority to withhold federal highway funding to states that refuse CAA compliance.[64] Highway funding may seem *de minimis*, but in 2021 alone, the Federal Highway Administration distributed $52.5 billion in Federal-aid highway funding to states.[65] Once annual NAAQS are set, states must submit State Implementation Plans to the EPA

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56 The Clean Air Act of 1963, Pub. L. No. 88-206, 42 U.S.C. §§ 7401-7671q (1963).

57 42 U.S.C. § 7407.

58 *Reviewing National Ambient Air Quality Standards (NAAQS): Scientific and Technical Information*, U.S. ENV'T PROT. AGENCY (Aug. 2, 2023), https://www.epa.gov/naaqs.

59 *Id.*

60 *Particulate Matter (PM) Air Quality,* United States Environmental Protection Agency (July 11, 2023), https://www.epa.gov/pm-pollution/particulate-matter-pm-basics#:~:text=Particulate%20matter%20contains%20microscopic%20solids,even%20get%20into%20your%20bloodstream.

61 *Regulatory and Guidance Information by Topic: Air*, U.S. ENV'T PROT. AGENCY (Jun. 6, 2023), https://www.epa.gov/regulatory-information-topic/regulatory-and-guidance-information-topic-air.

62 42 U.S.C. § 7413(a).

63 42 U.S.C. § 113(d); 42 U.S.C. § 205(c); 42 U.S.C. § 211(d)(1); 42 U.S.C. § 213(d); 42 U.S.C. § 7413(d); 42 U.S.C. § 7424(c); 42 U.S.C. § 7545(d)(1); 42 U.S.C. § 7547(d).

64 *National Ambient Air Quality Standards: Attainment of Air Quality Standards*, CAL. AIR RES. BD. (2022), https://ww2.arb.ca.gov/resources/national-ambient-air-quality-standards.

65 Budget Estimates, Fiscal Year 2023, U.S. DEP'T TRANSP., FED. HIGHWAY ADMIN.

which serve as blueprints informing the agency of how the particular state will comply with the standards.[66] The combination of strict oversight and looming penalties incentivizes states to limit air pollution in accordance with the NAAQS, even if these incentives are perverse and have unintended consequences.

E. *The Aptly Named Exceptional Events Rule*

One of the few exceptions to the CAA and NAAQS is aptly named the Exceptional Events Rule.[67] The Exceptional Events Rule was created by a 2005 amendment to the CAA, and the rule was intended to provide relief to states that would satisfy the EPA's NAAQS if not for events outside of the states' control.[68] The statutory definition of the Exceptional Events Rule is an event that (1) affects air quality; (2) is not reasonably controllable or preventable; (3) is an event caused by human activity that is unlikely to recur at a particular location or a natural event; and (4) is determined by the Administrator . . . to be an exceptional event.[69] Examples of exceptional events under the statute and approved by the Administrator include: unplanned wildfires, high wind disasters, pollution originating from outside of the United States, and pollution caused by unpredictable events like terrorism.[70]

Prescribed "anthropogenic" fires were considered by policymakers when the Exceptional Events Rule was drafted, but the EPA's current policy distinguishes between natural and anthropogenic fires, which the agency claims "has particular significance when considering the impacts of wildland fires on air quality and how these impacts should be regarded."[71] The specific use of the language "unplanned" has led scholars to theorize the EPA has not entirely ruled out prescribed fires under the Exceptional Events Rule, as unplanned wildfires can be caused by human acts, namely negligent human acts. The EPA has already manipulated its definition of what constitutes a "natural wildfire" under the statute and for means of air quality compliance.[72]

II. ANALYSIS

The increasing prevalence and severity of wildfires across the United States emphasizes the need for regulatory and wildfire policy change. This comment advocates for an additional exception to be carved into the CAA

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66 42 U.S.C. § 7410(a).

67 42 U.S.C. § 7619.

68 42 U.S.C. § 7619.

69 42 U.S.C. § 7619(b).

70 Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13560, 13564-67 (Mar. 22, 2007).

71 *Id.* at 13566.

72 *NRDC*, 559 F.3d at 565.

for the primary purpose of promoting prescribed fires and reducing the arbitrary and capricious nature of the current exceptional events policy. The CAA's Exceptional Events Rule should be narrowly expanded to exempt smoke produced by prescribed fires from national air quality measurements for several reasons. First, expanding the Exceptional Events Rule is consistent with recent case law and recent applications of the rule. Second, the CAA's statutory distinction between "natural" fire and "anthropogenic" fire is counterintuitive and arbitrary for courts to apply. Third, expanding the Exceptional Events Rule will remove the perverse incentives forced on states to limit the practice of prescribed fires in order to abide by the CAA's air quality standards. Finally, expansion of the Exceptional Events Rule is necessary to honor the statute's legislative purpose clearly outlined in its legislative history. This analysis section concludes with a hypothetical application of the expanded Exceptional Events. This hypothetical application serves to illustrate the reality and legality behind expanding this rule.

A. *Allowing Caselaw to Guide the Way*

Three federal court decisions have pioneered the Exceptional Events Rule jurisprudence and have shaped the way the EPA executes the directives of the CAA. Other judicial exceptional events interpretations are rare because cases often become moot, and there are few private actors negatively impacted enough by the exceptional events policy to file suit. The nature of the exceptional events policy is that it governs natural disasters and other incidents that have a tight ripeness window for judicial review. This is evident in the first significant case, the 2009 case of *Naturals Resources Defense Council v. United States Environmental Protection Agency* (hereafter "*NRDC v. EPA*"). The U.S. Court of Appeals for the District of Columbia (hereafter "D.C. Circuit") decided that "even if the statements in the preamble were reviewable under the Clean Air Act, they are not ripe for review at this time."[73] The court saw "no significant hardship to the parties from waiting for a real case to emerge."[74]

The NRDC filed suit claiming the "EPA should not have defined 'natural event' in [the CAA] to include events in which human activities play "little" causal role."[75] The NRDC argued a natural event is "something that occurs without the slightest human influence."[76] In particular, the NRDC challenged the CAA's inclusion of natural disaster clean-up activities within the Exceptional Events Rule.[77] The case serves as a litmus test of the federal

73 *Id.*
74 *Id.* at 565-66.
75 *Id.* at 562-63.
76 *Id.* at 563.
77 *Id.*

court's interpretation of the EPA's flexibility in defining exemptions within the exceptional evens policy. The DC Circuit refused to issue a final ruling on the specifics of the case, but the court set guideposts regarding the EPA's ability to gap-fill within the CAA and Exceptional Events Rule. The court suggested the EPA could elaborate on the CAA's statutory definition of "natural event" to include situations where human activities play a minimal but significant role.[78] Rather than propose a more comprehensive definition, the court evaded the issue entirely, hinting "it is not apparent that EPA even rested its view about clean-up activities on the proposed definition of 'natural event' in rather than on the clause in another proposed subsection defining 'exceptional events' to include human activities 'unlikely to recur at a particular location,'"[79] Regardless of the case's outcome, *NRDC v. EPA* cracked open the door to future reform, and it serves as the foundation of judicial interpretation on the Exceptional Events Rule.

In 2018, the U.S. Court of Appeals for the Tenth Circuit expanded on these guideposts. Robert Ukeiley, a private landowner, filed suit against the EPA after the agency deemed a high-winds event an Exceptional Event under the CAA.[80] Ukeiley suffered from a respiratory illness and disagreed with the EPA's classification of the high-wind dust storms as exceptional events because the dust storms were very common and otherwise exceeded air pollution standards.[81] In certain aspects, the holding in *NRDC v. EPA* differs from the Tenth Circuit's interpretation in *Ukeiley v. United States Environmental Protection Agency* (hereafter "*Ukeiley v. EPA*"). The Tenth Circuit found the EPA's definitions to be unambiguous.[82] Nevertheless, the court once again left the door open for the EPA to make additional exceptions, such as for prescribed fires, in its exceptional events policy. The court suggested that Congress specified what cannot be an "exceptional event," but Congress did not otherwise limit the EPA from creating further exceptions. The court explained, "Congress specifies what cannot be an exceptional event: 'stagnation of air masses or meteorological inversions'; 'a meteorological event involving high temperatures or lack of precipitation'; or 'air pollution relating to source noncompliance' . . . but these requirements [only] served as a starting point for the EPA's rulemaking to further define the boundaries of exceptional events."[83]

The Tenth Circuit also explained future CAA exceptions could be rooted in the "unlikely to recur" clause of the rule.[84] If so, a prescribed fire could be eligible for air pollution exclusion under the Exceptional Events

78 *NRDC*, 559 F.3d at 569.

79 *Id.* at 563-64 (internal citations omitted).

80 Ukeiley v. EPA, 896 F.3d 1158, 1160 (10th Cir. 2018).

81 *Id.*

82 *Id.*

83 *Id.* at 1165.

84 *Id.*

Rule while maintaining its ordinary definition of a human-caused event. The court reasoned the "events must . . . be 'an event caused by human activity that is unlikely to recur at a particular location *or* a natural event.'"[85] Both the *NRDC* and *Ukeiley* decisions leave room for the EPA to either define the Exceptional Events Rule as ambiguous and fill in the gaps or claim that prescribed fires are unlikely to recur in the same location and are therefore exempt. The Tenth Circuit in *Ukeiley* claims that the statute's "plain meaning" prohibits human activity from qualifying under the rule.[86] However, this broad ruling seems at odds, at least in part, with the guidance of the court in *NRDC*. Future judicial clarification is likely needed for this discrepancy.

The third case in the triad of exceptional events jurisprudence is the U.S. Court of Appeals for the Ninth Circuit case *Bahr v. United States Environmental Protection Agency* (hereafter "*Bahr v. EPA*"). Unlike in *NRDC v. EPA* and *Ukeiley v. EPA*, the Ninth Circuit was not asked to rule directly on a statutory definition or agency interpretation of the Exceptional Events Rule. Rather the court shed light on breadth of deference federal courts give the EPA in the gap-filling statutes like the CAA.[87] Courts "generally must be at [our] most deferential when reviewing scientific judgments and technical analyses within the agency's expertise."[88] "Here, the EPA considered the relevant factors and articulated a rational connection between the facts found and the choice made."[89] The Ninth Circuit's emphasis on deference owed to the EPA would strengthen any attempt by the EPA to create an additional CAA exception for prescribed fires. If such an exception were drafted, courts would be more likely to rule that the issue is "'properly left to the informed discretion of' the EPA," because of the ruling in *Bahr v. EPA*. [90]

The Ninth Circuit's decision also underscores the need for substantive legal foundation for a prescribed fire exception. In *Bahr v. EPA*, the Ninth Circuit refused to acquiesce to the EPA's interpretation solely on policy grounds. The court reasoned "even if we agreed that the EPA's policy considerations are compelling, such considerations cannot override the plain language of the statute. We therefore cannot give them controlling weight here."[91] Accordingly, without plain language changes to the statute by Congress, a prescribed fire exception would require the EPA to root the exception in a compelling legal principle, such as an expanded statutory definition in the agency's rulemaking.

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85 *Id.*

86 *Ukeiley*, 896 F.3d at 1158.

87 Bahr v. EPA, 836 F.3d 1218, 1233 (9th Cir. 2016).

88 *Id.* (quoting Lands Council v. McNair, 629 F.3d 1070, 1074 (9th Cir. 2010)).

89 *Id.*

90 *Id.* (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)).

91 *Bahr*, 836 F.3d at 1236-37.

B. *Removing the Distinction Between Types of Fire*

The CAA's distinction between "natural" fire and "anthropogenic" fire is futile. Further, the distinction is counterintuitive and arbitrary for courts to apply in real cases. The CAA defines a natural event, such as fire, as "an event and its resulting emissions, which may recur at the same location, in which human activity plays little or no direct causal role. . . . [and] [f]or purposes of the definition of a natural event, anthropogenic sources that are reasonably controlled shall be considered to not play a direct role in causing emissions."[92] Alternatively, the EPA seemingly adopts the ordinary statutory definition of "anthropogenic" fires as those "caused by human activity."[93] Importantly, the CAA only defines a natural event, not an anthropogenic event.[94] This distinction is critical, as it determines which types of smoke will or will not be exempt under the CAA's Exceptional Events Rule. This seemingly small distinction plays a major role in determining what smoke or emissions will contribute to a state's air quality measurements.

Currently, the EPA Administrator defines a prescribed fire as an anthropogenic source.[95] This distinction not only undervalues the wildfire-prevention aspects of prescribed fires, but also undermines the logic of the statutory language.[96] For instance, a wildfire caused by a human act, such as an out-of-control campfire, is nevertheless considered a "natural" fire under the CAA despite the wildfire literally being human-caused.

The vulnerability of this distinction is exposed by the example of emissions from post-wildfire cleanup. The EPA's regulation explains "clean-up activities associated with [natural disaster] events, may be considered exceptional events."[97] In other words, emissions produced from wildfire clean-up activities such as removing debris or rebuilding structures, can be considered "natural events" even though the natural disaster has concluded, and all remaining emissions are entirely human produced. In this regard, states are incentivized to allow a wildfire to ignite and then attempt to extinguish the blaze rather than prevent the wildfire in the first place. This distinction between natural versus human-caused events was weighed by the DC Circuit in *NRDC v. EPA*. The NRDC argued:

> [T]he activities themselves that are responsible for the emissions (and possible violations of the NAAQS) are of human origin, and by definition *not* natural events. The fact that a natural event precipitates the need for human activity cannot and does not transform the human

92 National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. § 50.1(k) (2016).

93 Air Quality Monitoring, 42 U.S.C. § 7619(b).

94 40 C.F.R. § 50.1.

95 § 50.1(m).

96 Engel, *supra* note 54, at 665.

97 Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13560, 13564-65 (Mar. 22, 2007).

> activity itself into a natural event. Thus, the Act clearly precludes EPA from identifying emissions from clean-up activities as "natural events" that qualify as exceptional events.[98]

The D.C. Circuit disagreed, avoiding the ordinary meaning entirely.[99] The court explained "[i]t is not apparent that EPA even rested its view . . . on the proposed definition of 'natural event' . . . rather than on the clause in another proposed subsection defining 'exceptional events' to include human activities 'unlikely to recur at a particular location.'"[100] The inconsistency of the CAA's natural and anthropogenic event distinction has forced courts to manipulate the terms' ordinary meanings and, in some cases, courts have chosen to ignore the ordinary meaning altogether.

The Tenth Circuit evaded the ordinary definition of "natural" in upholding a high-winds event as an Exceptional Event despite the high-wind events being common in the region.[101] The plaintiff contended the "'EPA can only exclude monitoring data that is *rare and exceeding the usual*,' and he points to dictionary definitions for support. For instance, Black's Law Dictionary defines 'exceptional' as 'out of the ordinary.'"[102] However, the court counterintuitively disagreed. The court held "when a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."[103] In *Ukeiley v. EPA*, the Tenth Circuit all but admitted that the CAA's definition of a "natural" event is arbitrary, capricious, and even contradictory to its literal meaning. Accordingly, the CAA's distinction between natural fires and anthropogenic fires should be abolished. The "EPA's treatment in its exception event policy of wildfires as per se natural events is inconsistent with EPA's own definition of wildfire" and the ordinary definition of a natural event.[104]

Not only should the EPA carve out an exception for prescribed fires, but the agency appears to have the legal authority to do so through the distinction between natural and anthropogenic events. As previously discussed, federal courts have increasingly provided the EPA with broad discretion in defining and executing its exceptional events policy.[105] But this deference does not extend to terms Congress explicitly defined. The U.S. Court of Appeals for the Ninth Circuit warned "[w]here Congress has 'directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'"[106] However, Congress only explicitly defined the term "natural

98 *NRDC*, 559 F.3d at 563.
99 *Id.* at 564.
100 *Id.* at 563-64.
101 *Ukeiley*, 896 F.3d at 1164.
102 *Id.*
103 *Id.*
104 Engel, *supra* note 54, at 666.
105 *Bahr*, 836 F.3d at 1232.
106 *Id.* at 1235 (quoting Chevron, U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43 (1984)).

event" in the CAA and failed to provide such definition for anthropogenic.[107] Accordingly, the EPA has deferential authority to gap-fill aspects of the CAA that Congress intentionally or unintentionally left undefined. This EPA authority is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'"[108] As outlined throughout this comment, at the very least, a reasonable basis exists for the inclusion of prescribed fires in the agency's exceptional events policy.

This legal theory is echoed by judges on the D.C. Circuit. The non-majority judges in the *NRDC v. EPA* contended "the Clean Air Act does not define 'natural event' or specify how to categorize events with predominantly natural causes but some human contribution. Because the statute leaves a gap to be filled by EPA, the statutory term is ambiguous. EPA's definition, in turn, is permissible."[109] The EPA should use their gap-filling authority to modify the definition of anthropogenic and remove the stark distinction between natural and human caused fires, thereby fitting a workable solution for prescribed fires within the Exceptional Events Rule.

C. *Incentivizing Prescribed Fire by Expanding the Exceptional Events Rule*

Another contributing factor to the insufficient use of prescribed fire is the perverse incentive the CAA's NAAQS place on states. Over the last century, the increasing regulatory focus on air quality has pitted air and resource agencies against one another.[110] Despite proof that prescribed fires minimize wildfire intensity and total amount of smoke production per acre, policymakers have placed the narrow interest of maintaining NAAQS over the broader public interest of reducing wildfires.[111] A study found that federal agencies have continually failed to conduct prescribed fires on the number of acres the agencies themselves previously reported was needed for proper forest management.[112]

A national survey of state forestry agencies outlined the perverse incentive federal air pollution policies and regulations have wielded on states' usage of prescribed fire. A survey of all fifty state forestry agencies ranked air pollution regulations as the third largest obstacle to conduct prescribed burns,

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107 40 C.F.R. § 50.1(k).

108 *Bahr*, 836 F.3d at 1229 (quoting Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 499 F.3d 1108, 1115 (9th Cir. 2007)).

109 *NRDC*, 559 F.3d at 569.

110 Engel, *supra* note 54, at 642-43.

111 OR. ADMIN. R. 629-048-0020 (3) (2019).

112 Lenya N. Quinn-Davidson & J. Morgan Varner, *Impediments to Prescribed Fire Across Agency, Landscape and Manager: An Example from Northern California*, 21 INT'L J. WILDLAND FIRE, 210, 213 (2012).

only behind weather and capacity concerns.[113] In turn, states are incentivized to avoid prescribed fires in order to satisfy air quality standards because prescribed fire smoke is not exempt in the same way actual wildfire smoke is exempt. The trend of this perverse incentive is showcased by state implementation plans submitted to the EPA which reflect a decline in usage of prescribed fires.[114]

Congress attempted to remedy this problem in 2021 with the introduction of the National Prescribed Fire Act. The legislation was aimed at "significantly increase[ing] the number and size of prescribed fires conducted on federal land."[115] However, the legislation was a shortsighted approach that failed to acknowledge the legal incentives at the core of the issue. Allocating more money does not solve the issue. Expanding the CAA's Exceptional Events Rule by making an exception for prescribed fire smoke would remove the perverse incentive placed on states. States would no longer be forced to choose between satisfying air quality standards and preventing wildfires.

Creating a narrow exception for prescribed fire smoke is consistent with the legislative purpose and legislative history of the CAA. The act's overarching regulatory purpose is to "protect[] . . . public health."[116] Every aspect of the law, including the NAAQS, are designed to control air quality and promote a healthier atmosphere. Furthermore, the Exceptional Events Rule is designed to make an exception for certain events which are entirely uncontrollable or serve other public health purposes.[117] The CAA was enacted "to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention."[118] In the aggregate, prescribed fires accomplish both these statutory purposes. First, prescribed fires reduce the severity of wildfires, and less severe wildfire seasons directly promote public health. Second, reducing wildfire risk limits total smoke production per acre,[119] thus accomplishing the pollution reduction goal of the CAA. The current exceptional events policy undermines the statutory purpose of the CAA "because it treats harmful pollution from wildfire smoke as if it were uncontrollable and unpreventable. . . . [when] scientists agree that better land management can reduce the amount of smoke produced by wildfires."[120]

Conflicting statutes and Congressional directives must also be taken into account. In 2005, Congress passed the Safe, Accountable, Flexible,

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113 Mark A. Melvin, *2012 National Prescribed Fire Survey Report* 16-19 (Coal. Prescribed Fire Councils, Inc. 2012).

114 Cal. Air Res. Bd., *2022 California State Implementation Plan*, https://ww2.arb.ca.gov/our-work/programs/california-state-implementation-plans.

115 National Prescribed Fire Act of 2021, S. 1734, 117th Cong. § 102(a) (2021).

116 42 U.S.C. § 7619(b)(3)(A)(i).

117 *Id.* at § 7619(b)(1)(A).

118 42 U.S.C. § 7401(c).

119 OR. ADMIN. R. 629-048-0020 (3).

120 Williams, *supra* note 37, at 802.

Efficient Transportation Equity Act of 2005 (SAFETEA-LU).[121] The legislation was primarily tailored to transportation emissions, but the act included broad language directing the EPA to "take necessary measures to safeguard public health regardless of the source of the air pollution."[122] This guidance provides separate Congressional authorization for a prescribed fire exception regardless of whether prescribed fires are net-positive in air pollution reduction.

The legislative history of the CAA also suggests the EPA has proper authority to "fill in the statutory gaps in a flexible way."[123] The statute explicitly allows the Administrator of the EPA to determine which events shall be deemed exceptional under the rule.[124] This authorizes the Administrator to carve out a narrow exception for prescribed fires. With the combination of direct statutory permission and the flexibility granted by recent federal caselaw, a narrow exception for prescribed fires would, at the very least, have a strong legal footing.

Some scholars have proposed alternative CAA and Exceptional Event Rule reforms with the shared goal of promoting prescribed fires. However, many of these regulatory and legal recreations are under and over inclusive. For instance, "smoke is smoke" default rules would count all wildfire related smoke (including prescribed fires) towards national air quality measurements.[125] Removing the exception for wildfire smoke would also remove the perverse incentives discouraging prescribed fires, but it is over inclusive in that it offers no exception for fires outside of a state's control. A default rule encompassing every type of wildfire related smoke would require a complete overhaul of the CAA's Exceptional Events Rule. Alternatively, drafting a narrow exception for prescribed fire smoke would solidify the beneficial aspects of the Exceptional Events Rule while also forging new flexibility to include the practice of prescribed fires.

D. *Reimplementation Starts with the States*

Even if prescribed fires become included in the Exceptional Events Rule, the question remains how states will reintroduce prescribed fires in their budgets and forest management plans. This comment advocates for several solutions: (1) states should streamline the prescribed burn permitting process, (2) states should alter their State Implementation Plans to budget and plan for prescribed fires, and (3) states should dedicate grant funds to

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121 *See* 42 U.S.C. § 7619; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59 (2005).

122 *Id.* at § 6013(b)(3)(iv).

123 Williams, *supra* note 37, at 800.

124 42 U.S.C. § 7619(b)(1)(A)(iv).

125 Engel, *supra* note 54, at 642-43, 665-66.

promote prescribed fires on private lands. By streamlining the prescribed fire permitting process and increasing public funds dedicated to prescribed fires states will enable private landowners to maintain their own lands which are inaccessible to state and federal agencies.[126] Crowdsourcing private landowners and enabling them to contribute to wildfire risk reduction is a necessary element of promoting prescribed fire policy. Additionally, by adjusting states' implementation plans, the EPA can maintain oversight of prescribed fires without having to regulate them vicariously through the CAA.

III. HYPOTHETICAL TEST SUITE

The following test suite is designed to provide a brief realistic example of an expanded Exceptional Events Rule applied to a situation similar to the 2018 California Camp wildfire.

A southwest area of California is located in a high-risk wildfire region, but wildfires have not burned through the region in over a century. This has caused forests in the region to become overgrown and a hotbed for wildfire activity. A town (hereafter "Town") in the region is particularly vulnerable as its private landowners and local government has failed to maintain the Town's vegetation.

As wildfire season begins, policymakers and agencies attempt to devise a strategy to prevent wildfires in the region while also abiding by all necessary federal regulations. The Town is located in one of the EPA's NAAQS zones, meaning the region must report its annual air quality measurements to the EPA for review. Further, the region is subject to the EPA's strict air quality monitoring as well as under the jurisdiction of the CAA. California must budget and account for its annual air pollution to remain in compliance under the statute.

Under existing CAA and exceptional events doctrine, California would be discouraged from conducting prescribed burns, even in the vulnerable region and Town. The State Implementation Plan could not include prescribed fires without otherwise removing another significant source of air pollution. California would have allotted its maximum amount of air pollution under the CAA. Future wildfires in the region would be eligible under the CAA's Exceptional Events Rule for exemption from air quality measurements. However, proactive prescribed burns would be ineligible regardless of their effectiveness and overall smoke reduction compared to wildfires. Under this doctrine, the Town would remain vulnerable and land management agencies would have their hands tied. The existing air quality regulations incentivize California to allow a wildfire to ignite and then attempt to suppress the wildfire rather than prevent it altogether. This is because the state could exempt the wildfire's smoke, but not the prescribed burn's smoke.

126 Williams, *supra* note 37, at 807.

Under this comment's expanded Exceptional Events Rule, which includes an exception for prescribed fires, the state of California would be allowed to plan accordingly for prescribed burns in the Town's region without adjudicative penalties from the EPA. This would be accomplished in two steps. First, the EPA would remove the stark distinction between natural and anthropogenic fire by gap-filling the CAA and expanding on Congress's definition. Such a definition may include an exception for "anthropogenic events intended to reduce air particulate pollution" or an exception for "anthropogenic events in which human activity plays only a minor role." The District of Columbia, Tenth, and Ninth Circuit decisions in *NRDC v. EPA*, *Ukeiley v. EPA*, and *Bahr v. EPA* permitted this type of expansion. Such an expansion is grounded in the EPA's extensive deference, gap-filling authority, and the CAA's legislative purpose and legislative history. An expansion for prescribed fires would also remove the perverse incentive forced on California to choose between air regulation compliance and reducing wildfire risk for the Town. Furthermore, prescribed burns by the Town's private landowners could be encouraged by the promotion of prescribed fire and by the distribution of state grants budgeted for within California's State Implementation Plan.

CONCLUSION

Preventing wildfires and reducing wildfire risk is as much a public health concern as regulating air pollution and promoting clean air. Air regulations and prescribed fire policy do not need to be pitted against one another. The current perverse incentives surrounding this dualism discourages the practice of prescribed fire while simultaneously requiring courts to arbitrarily apply exceptional event rules that lack clear definitions. This comment advocates for the adoption of a narrow exception akin to the Exceptional Events Rule and specifically designed for prescribed fires. This expansion of the Exceptional Events Rule will enable state and federal agencies to overcome these legal challenges. This expansion is consistent with current caselaw on the CAA and the Exceptional Events Rule. Additionally, an expansion would allow the EPA to draft a more comprehensive definition of "natural fire" and "anthropogenic fire." As it stands, this distinction is counterintuitive and arbitrary and capricious for courts to apply. The expansion outlined in this comment is also consistent with the Congressional purpose and legislative history behind the CAA. Recent wildfires, such as the 2018 Camp Fire, underscore the human life, property, and economic values at stake. Policymakers must take proactive steps to encourage wildfire reduction rather than rely on discouraging regulatory schemes. It is time for a workable prescribed fire solution, and recent caselaw has opened the door.

ALMOST HEAVEN, *WEST VIRGINIA*?: THE COUNTRY ROAD TO TAKE FIREARM REGULATION BACK HOME TO CONGRESS AND THE STATES

Tristan Silva II

INTRODUCTION

Despite the Constitution's vesting "all legislative powers" in Congress,[1] the vast majority of federal law that binds states and individuals is promulgated by executive agencies. In the last decade, the ratio of promulgated rules to Congressional legislation was twenty-six to one.[2] While we have a rough estimate of how many rules are created each year, attempts to count the number of executive departments and agencies produce excessively different results.[3] At the same time, Congress delegates increased authority to the executive branch, giving the innumerable agencies an unprecedented amount of power.[4] Indeed, some legal commentators—even on the political right—welcome the growth of congressional delegation, and chide courts for insisting that there exists any problem at all.[5] Heterodox arguments[6] about the propriety of delegation aside, the trend where the administrative state amasses more power as time goes on—never ceding or returning it to Congress—continues to fly in the face of our Constitutional purpose, design, and structure.

Despite seemingly constant reminders about enumerated powers and how only the states retain the police power,[7] it appears little has been done to

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1 U.S. CONST. art. I, § 1.

2 Clyde Wayne Crews Jr., *Mapping Washington's Lawlessness 2016: A Preliminary Inventory of "Regulatory Dark Matter"*, ISSUE ANALYSIS 2015 NO. 6, December 2015, at 7.

3 *Id.*

4 *See* City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (ROBERTS, C.J., dissenting) ("The administrative state 'wields vast power and touches almost every aspect of daily life' . . . And the federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies . . . . And more are on the way") (citations omitted).

5 *See, e.g.*, RANDY BARNETT, *Deep-State Constitutionalism*, CLAREMONT REV. OF BOOKS, 36 (Spring 2022) (Reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 UNIV. CHI. L. REV. 1721, 1722, 1762 (2002) ("In our view there just is no constitutional nondelegation rule, nor has there ever been" and "courts should finally shake off the cobwebs of the old jurisprudence and acknowledge that the nondelegation doctrine and its corollaries for statutory interpretation[] are dead.")

6 *Id.* at 1721 ("we have come to hold a far cruder, less nuanced view than *any currently found in the literature*").

7 *See e.g.,* Haaland v. Brackeen, 143 S. Ct. 1609, 1662 (2023) (Thomas, J., dissenting) (citing McCulloch v. Maryland, 4 Wheat. 316, 405 (1819)) ("Our Federal Government is acknowledged by all to be one of enumerated powers . . . [and] thus lacks a general police power") (internal quotations omitted);

stymie, let alone reverse, the perpetual "accumulation of all powers . . . in the same hands" which, the Framers thought "may justly be pronounced the very definition of tyranny."[8] One theory of the case suggests that it is up to the Supreme Court to whip Congress into shape. Ironically, it posits that the "least dangerous" of the government's branches — that "can never attack with success either of the other two"— must now take up its pen to make the most powerful branch perform its job.[9] At a minimum, when Congress decides against making a decision, it is supposed to supply the Executive with an intelligent principle to guide the President or his administration with a semblance of direction.[10] Failure to do so is a violation of the nondelegation doctrine.

In 2019, the Supreme Court declined to revive the long dormant nondelegation doctrine in *Gundy v. U.S.*[11] Two years later, however, the Supreme Court officially put name to — or, created (depending on who you ask) — the major question doctrine in *West Virginia v. EPA*.[12] Falling far short of nondelegation, the major questions doctrine nonetheless may still pose a barrier to unchecked agency discretion. Scholars are torn on whether the major questions doctrine is a novelty, recognition of a familiar term, or rebranding of nondelegation doctrine. Regardless, the major questions doctrine represents the latest and greatest weapon at hand for litigators, states, and courts when challenging agency actions.

One such agency is the Bureau of Alcohol, Tobacco, and Firearms (ATF). The politics surrounding the ATF are contentious, to say the least. Between 2006 and 2013, no President was able to fill the Director of the ATF's empty seat.[13] In the last sixteen years, the ATF has had only two full time directors approved by the Senate – most recently, Steve Dettelbach in the summer of 2022.[14] The ATF is a political briar patch because of its rulemaking authority. For instance, the ATF interprets, among other statutes, the Gun Control Act of 1968.[15] In doing so, the ATF defines "firearm,"

Nat. Fed. Of Indep. Bus. v. Sebelius, 569 U.S. 519, 535 (2012) ("Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'").

8 THE FEDERALIST PAPERS No. 47 (Madison).

9 THE FEDERALIST PAPERS No. 78 (Hamilton).

10 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

11 Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

12 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

13 Sari Horwitz, *Senate Confirms ATF Director*, WASHINGTON POST, July 31, 2013, https://www.washingtonpost.com/world/national-security/senate-confirms-atf-director/2013/07/31/dc9b0644-fa09-11e2-8752-b41d7ed1f685_story.html.

14 Glenn Thrush, *Senate Confirms Biden's Pick to Direct A.T.F.*, N.Y. TIMES (July 12, 2022), https://www.nytimes.com/2022/07/12/us/politics/steven-dettelbach-atf-guns.html.

15 Definition of "Frame or Receiver" and Identification of Firearms; Corrections, 87 Fed. Reg. 51249 (adopted Apr. 26, 2022) (to be codified at 27 C.F.R. 478, 479), https://www.federalregister.gov/documents/2021/05/21/2021-10058/definition-of-frame-or-receiver-and-identification-of-firearms.

"gunsmith," "complete weapon" and "complete muffler or silencer device," and more.[16]

This article will examine the potential effect that *West Virginia* has on the ATF's rulemaking authority. As this article's case study, I will use the aforementioned rule, finalized after technical corrections in 2022. The first section will explain the Supreme Court's decision in *West Virginia v. EPA*, going through the relevant facts and precedents that informed the Court's decision. Then, I briefly discuss the history of the nondelegation doctrine (or the lack thereof) as a means of explaining *why* the major questions doctrine seems appealing to the Court in 2022. Next, I evaluate the precedents cited by both the Court in *West Virginia* and the cases that the scholarship draws on to explain the rapid and nuanced development of the major questions doctrine.

After discussing *West Virginia*, I provide context for the ATF's 2022 rule, which the article's discussion centers on. I begin with an explanation of the problem that politicians have been attempting to solve for decades: gun violence. After discussing gun violence generally, I evaluate the Biden Administration's proposed solutions, both on the campaign trail and in office, to give context to the eventual release of the ATF's rule. Lastly, I examine both the Gun Control Act of 1968 and the National Firearms Act, as ATF asserts its rulemaking authority form both laws acting in tandem.

The second section of this article will argue that, because the definitions of "firearm," "frame," and "receiver" are "major questions," the ATF will be constrained in its ability to outright define the critical language such as "firearm." First, I provide case comparisons between the ATF's rule, and previously held "major questions" to establish that firearm regulation *is* a "major question" under the Court's precedents, even before *West Virginia*. The world of firearm regulation is *both* of major political and economic consequence. After step one of the major questions doctrine test is answered, the challenged agency shoulders the burden to prove that Congress: (a) authorized the agency in question to regulate; and (b) wished for it to regulate in the manner it chose to. Again, the ATF fails to meet these requirements, violating the major questions doctrine.

I. BACKGROUND

The United States Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America."[17] The Framers, however, did not expect the law to be executed by a single person alone.[18]

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16 *Id.*

17 U.S. CONST. art. II.

18 U.S. CONST. art. II, § 2 ("he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices"). *See*

The First Congress quickly began establishing departments within the executive branch. Among the first executive departments were the Department of Foreign Affairs (later, State Department) and the Department of the Treasury.[19] Alexander Hamilton's Treasury Department was to "digest and prepare plans for the improvement of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue and public expenditures . . ." and so forth.[20] The Treasury Department quickly became the biggest government entity, amassing more than five hundred employees.[21] For context, Henry Knox's War Department had a measly dozen civilian employees; Thomas Jefferson's State Department had six.[22]

With this many employees, the Treasury "represented a prodigious bureaucracy."[23] These employees were not idle, however. The Customs Service, under the Treasury Secretary's direction, was responsible for collecting import duties, which provided for ninety percent of the Federal Government's revenue.[24] Hamilton was to maintain "in good repair the lighthouses, beacons, buoys, and public piers in the several states," with authorization to hire and supervise as necessary.[25] Thus, Hamilton "wielded huge patronage powers in awarding contracts for these navigational aids."[26] Despite all of this, the buck still stopped at President Washington: "Hamilton reviewed each and every contract and got Washington's approval – an administrative routine that stifled the two men with maddening minutiae."[27]

This vignette of the early Executive is necessary to demonstrate its humble beginnings. A cursory knowledge of what today's Federal Executive looks like creates a romantic longing for the days of simpler times. Besides its physical size, two key differences between Washington and Hamilton's departments and today's Federal Executive are worth emphasizing. First, for example, Congress' direction "[t]hat a lighthouse shall be erected near the entrance of the Chesapeake Bay . . . as the President of the United States shall direct,"[28] represents a pointed direction for the Executive to act on. Second,

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also, Myers v. United States, 272, U.S. 52, 117 (1926) ("But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court") (citing cases).

19 CHARLES C. LITTLE & JAMES BROWN, THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA FROM THE ORGANIZATION OF THE GOVERNMENT IN 1789, TO MARCH 3, 1845, 28, 65 (Richard Peters ed. 1845), https://bit.ly/FirstCongStatutes.

20 *Id.* at 65.

21 RON CHERNOW, ALEXANDER HAMILTON, 339 (2005).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 339–40.

26 *Id.* at 340.

27 Chernow, *supra* note 21, at 340.

28 Little, *supra* note 19, at 53.

that despite having a small army of employees, Washington, as President, was still personally responsible for oversight.

These two features are lacking in the modern Federal Executive. In 2001, then-professor Elena Kagan wrote, "no President (*or his executive office staff*) could, and presumably none would wish to, supervise so broad a swath of regulatory activity."[29] The change in the President's oversight of the executive from 1789 to 2001 cannot be attributed to differences in the men at the helm. The inescapable fact remains that there is a qualitative difference between Congress's detailed instruction for the first president, and the broad, sweeping, suggestions Congress gave the forty-second.

A. *West Virginia v. E.P.A., How Did We Get Here?*

For administrative law, assuming its goal is to force Congress' hand, and make them reassert its constitutionally vested legislative power, the Supreme Court's decision in *West Virginia* is akin to moving a knight into the middle of the chess board. On the one hand, it could combine *West Virginia* with another piece of precedent and put Congress in an interesting bind — forcing it to do its job, whether it wants to or not.[30] On the other, it could prove to be an errant, confusing, and muddying move if the Court wavers and retreats in the future.

In 2015, the Obama administration's Environmental Protection Agency (EPA) promulgated the Clean Air Plan (hereinafter "Plan").[31] Essentially, the Plan effectuates Section 111 of the Clean Air Act, where Congress charged EPA to "regulate stationary sources of any substance that 'causes, or contributes significantly to, air pollution' and that 'may reasonably be anticipated to endanger public health or welfare.'"[32] Once identifying the hazard, EPA would regulate by figuring out the "best system of emission reduction" and promulgating a rule accordingly.[33] The Plan was immediately jammed up in a saga of litigation that eventually coalesced into *West Virginia*'s procedural history.[34] Once it finally reached the Supreme Court, it considered whether EPA's "broader conception of [its] authority is within the power granted to it by the Clean Air Act."[35]

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29 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001) (emphasis added).

30 *See e.g.,* Lindsay Wise et al., *Speaker Fight Could Preview Months of Turmoil in Congress*, WALL ST. J. (Jan. 6, 2022), wsj.com/articles/speaker-fight-could-preview-months-of-turmoil-in-congress-11673045830.

31 *West Virginia*, 142 S. Ct. at 2627 (KAGAN, J., dissenting).

32 *Id.* (citing 42 U.S.C § 7411 (b)(1)(A)).

33 *Id.* at 2601 (citing 42 U.S.C. § 7411(a)(1)).

34 *See id.* at 2627.

35 *Id.* at 2600.

The Court then invoked the major question doctrine to invalidate the Plan.[36] As described by Chief Justice Roberts, the major question doctrine can be simplified into a two-step inquiry.[37] The majority of major question analysis comes from the first step, where courts must answer whether the case at bar is an "extraordinary case" that gives a court "reason to hesitate before concluding that Congress meant to confer [the agency's claimed] authority."[38] Specifically, courts are to assess the novelty of the agency's claim in light of the "economic and political significance" of their assertion.[39] Once that determination is made, the agency has a burden to show "clear Congressional authorization" for the challenged regulation.[40]

In addition to giving the major question doctrine a definitive stamp of approval, the Chief Justice, Justice Gorsuch, and Justice Kagan contribute to a truncated version of the academic debates surrounding the doctrine. Relying principally on *Utility Air*, the Chief Justice takes pains to explain that the Court "'typically greet[s]' assertions of 'extravagant statutory power over the national economy' with 'skepticism.'"[41] Justice Kagan is, nonetheless, unsatisfied. She argues that the Court is not following precedent, but rather, extending so far as to create something new.[42] Finally, Justice Gorsuch's concurring opinion draws a much thicker through-line of cases that apply the major questions doctrine, although he seems to read the doctrine as a means of avoiding larger nondelegation constitutional questions.[43] Justice Gorsuch's description of the major questions doctrine finds support in academia.[44]

This debate begs the question, though, why does the Court only move to incentivize Congress to legislate, rather than force it to? Chief Justice Roberts lamented that "the federal bureaucracy continues to grow . . . and more [is] on the way" in 2013.[45] To his credit, he was right, but it was the Supreme Court nearly 100 years ago that put itself in this position. Comparing *West Virginia's* major questions doctrine against nondelegation doctrine; as well as comparing the "old" major questions doctrine to the "new" major

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36 *Id.* at 2616.

37 *West Virginia*, 142 S. Ct. at 2608, 2614.

38 *Id.* at 2608 (quotations omitted).

39 *Id.*

40 *Id.* at 2614.

41 *Id*. at 2609 (citing Utility Air Reg. Group v. EPA, 573 U.S. 302, 324 (2014)).

42 *Id.* at 2633–34.

43 *West Virginia*, 142 S. Ct. at 2619 ("In the years that followed, the Court routinely enforced 'the non-delegation doctrine' through 'the interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional'"); *see also*, Gundy, 139 S. Ct. at 2142 ("Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency") (GORSUCH, J., dissenting).

44 *See, e.g.*, Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 453–62 (2016), http://www.administrativelawreview.org/wp-content/uploads/2019/02/Monast_68.3.pdf.

45 *City of Arlington*, 569 U.S. at 313.

questions doctrine, helps to clarify what seems to be a moving target for executive agencies.[46]

1. 1935: "The One Good Year"

In 1935, the Supreme Court handed down two cases which explicitly invalidated federal laws on nondelegation grounds.[47] In *Panama Refining*, the Court, in no ambiguous terms, reasoned from the text of the Constitution alone that Congress had no authority to assign the executive lawmaking duties.[48] In addition to Article I, section 1, where "*All legislative Powers herein granted* shall be vested in a Congress of the United States,"[49] section eight also assigns Congress the duty "To make *all* Laws which shall be necessary and proper for carrying into Execution the foregoing powers."[50] Thus, the Supreme Court concludes, "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[51]

Next, in *Schechter Poultry Corporation v. U.S.*, the Court relies on the same premise.[52] *Schechter* stands for a slightly different, but more obvious, proposition that Congress cannot delegate its legislative authority to private entities to present to the president, that he may then either adopt or deny.[53] Naturally, if Congress has no authority to delegate lawmaking internally to other branches of government, it certainly cannot privatize its obligations to unelected businessmen. Thus, 1935 has been regarded as the "one good year" for the conventional nondelegation doctrine.[54]

Immediately following *Panama Refining* and *Schechter*, the Supreme Court seems to abandon (or restructure) this approach to nondelegation doctrine.[55] Citing *Panama Refining* and *Schechter*, Justice Scalia noted in 2001: "In the history of the Court, we have found the requisite 'intelligible principle lacking in only two statutes."[56] The "intelligible principle" standard Justice

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46 *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023).

47 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

48 *Panama Refining*, 293 U.S. at 248.

49 U.S. CONST. art. I, § 1.

50 U.S. CONST. art. I, § 8.

51 *Id.*

52 *Schechter Poultry*, 295 U.S. at 537–38.

53 *Id.*

54 Cass R. Sunstein, *Nondelegation Canons*, 67 UNIV. OF CHI. L. REV., 315, 322 (2000) (arguing that nondelegation doctrine plays an active role in the Supreme Court's jurisprudence but lives on through different canons, "renamed and relocated").

55 *Id.* at 315-16.

56 Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 474 (2001).

Scalia refers to was first announced in 1928 in *J.W. Hampton, Jr. & Co. v. United States*: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[57] Justice Scalia, then, provides a skeletal account of a thread of cases where the Court found intelligible principles in Congress's directions to various agencies, and concludes that the challenged law is a permissible delegation.[58] It is important to note that, in *Whitman*, Justice Scalia wrote for a unanimous court—bringing the vote tally against nondelegation doctrine, between 1989–2001, to 53-0.[59]

In 2019, where Justice Scalia seemed acquiescent in the face of these precedents, Justice Kagan unabashedly articulates the extent that "the Court has made clear," the intelligible principle standard is "not demanding."[60] The only time the Court has ever—or should—invoke the nondelegation doctrine is when "Congress ha[s] failed to articulate *any* policy or standard" to guide the delegee.[61] Justice Gorsuch's dissent, joined by Chief Justice Roberts and Justice Thomas, on the other hand, castigates the 2019 version of the intelligible principle standard as a "mutated version" of a "remark" that "has taken on a life of its own."[62] Indeed, the majority's formulation of the intelligible principle standard "has no basis in the original meaning of the Constitution, in history, or even in the decision form which it was plucked."[63] The dissent continues by paraphrasing Professor Gary Lawson's oft-cited quote: "where some have claimed to see 'intelligible principles' many 'less discerning readers [have been able only to] find gibberish.'"[64] The tongue lashing is punctuated by a 254 word footnote that compiles an eclectic assortment of writings that assault the intelligent principle standard from 1972–2014.

The dissent pulls its punches only to explain where "the problem can be overstated."[65] The details of the cases that satisfy the dissenting justices' sense of which delegations are constitutional are unimportant for this

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57 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

58 *Whitman*, 531 U.S. at 474–75 (citing five cases representing the "outer limits of [the Court's' nondelegation] precedents").

59 Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV., 327, 330 (2002).

60 *Gundy*, 139 S. Ct. at 2129 (plurality opinion).

61 *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989)) (emphasis in original); s*ee also id.* at 2123 (internal citations omitted): "That is the case here, because § 20913(d) does not give the Attorney General anything like the "unguided" and "unchecked" authority that Gundy says. The provision, in Gundy's view, "grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time." *Id.*, at 42. If that were so, we would face a nondelegation question. But it is not."

62 *Id.* at 2139 (GORSUCH, J., dissenting).

63 *Id.*

64 *Id.* at 2139–40 (quoting Lawson, *supra* note 59 at 329).

65 *Id.*

analysis, except where Justice Gorsuch leans into the major questions doctrine.[66] The upshot of this acknowledgement is that it moves them out of an intellectual check on their aforementioned critique of the Court's lacking nondelegation enforcement. Each of the dissenting justices has authored opinions criticizing the expanse of the administrative state.[67] For their argument to work, the dissenting justices need there to be examples of the Court utilizing some form of nondelegation. Without the limited instances of enforcement of nondelegation doctrine, then the justices' arguments in *West Virginia* become self-defeated. Simply put, *West Virginia*'s majority could not have said, on the one hand, that major questions doctrine enjoys the full backing of precedents, while also accusing other majorities of *never* enforcing nondelegation principles.

2. What Are Major Questions?

On its face, the major questions doctrine addresses a "recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[68] Recently, however, scholars have delineated two forms of the major questions doctrine.[69] One parsing of the two of major questions doctrines comes down to its interaction with *Chevron* deference.[70] Regardless of where that line is, though, there are now "new" and an "old" major questions doctrines on the table at the Supreme Court.[71] The entire set of precedents invoking the doctrine will inform agencies, litigators, and courts moving forward.

The origins of the major questions doctrine can be traced to 1994, in *FDA v. Brown & Williamson Tobacco Corp*,[72] where the "majorness inquiry first crystalized."[73] *West Virginia*'s dissent is correct to describe *Brown & Williamson* as the "key case" when articulating the major questions

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66 *Gundy*, 139 S. Ct at 2142 ("Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency").

67 *See, e.g.*, *id.* (Gorsuch, J., dissenting); *City of Arlington*, 569 U.S. at 3123 (Roberts, C.J., dissenting); *Whitman*, 531 U.S. at 486 (Thomas, J., concurring).

68 *West Virginia,* 142 S. Ct. at 2609.

69 *See, e.g.*, Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021).

70 *Id.* at 487 ("The major questions doctrine seems to be based on considerations similar to those that once led lower courts to deny Chevron deference to jurisdictional determinations, and it is predictably sowing confusion . . . . The relevant distinction is one of degree rather than one of kind; there is a continuum here, not a dichotomy, and courts have no simple way to separate major from nonmajor questions").

71 *See* Deacon & Litman, *supra* note 46, at *23.

72 F.D.A. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

73 Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787 (2017).

doctrine.[74] There, the Court rejected FDA's argument that, in charging FDA with the duty to regulate or even ban unsafe drugs and drug delivery devices, that Congress implicitly granted them license to oversee the entire American tobacco industry.[75] Instead, Congress had "spoken directly to the FDA's authority to regulate tobacco" when it enacted specific legislation regarding tobacco, and failed to pass legislation extending FDA's jurisdiction to tobacco products.[76] *Brown & Williamson*, further presented an "extraordinary case" because FDA had for the first time asserted regulatory jurisdiction over tobacco, reversing the agency's own position that it maintained since 1914.[77] Given that tobacco has, "its own unique place in American history and society, tobacco has its own unique political history . . . we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[78] Thus, where things are deeply imbedded in American society, with particularly unique political histories, should require explicit delegation from Congress.

In 2001, Attorney General John Ashcroft issued an interpretive rule for the implementation of the Controlled Substances Act, first enacted in 1970.[79] The thrust of the interpretive rule was to combat Oregon's assisted suicide legislation that allowed Oregon residents to seek a lethal prescription of a federally controlled substance.[80] The Attorney General's interpretive rule, of its own regulation, declared assisting suicide an illegitimate medical purpose, inconsistent with the public interest, and left physicians' licenses, "subject to possible suspension of revocation."[81] The Court rejected the Attorney General's claim of "such broad and unusual authority through an implicit delegation," on which the Attorney General's arguments rested.[82] Critically, the Court found that "the importance of the issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country, makes the oblique form of the claimed delegation all the more suspect."[83]

One key distinction between the "new" and "old" major questions doctrine cases is at what step the search for an explicit Congressional delegation is found.[84] Beginning in the October 2021 term, new major questions doctrine

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74 *West Virginia*, 142 S. Ct. at 2634.

75 *Brown & Williamson*, 529 U.S. at 161.

76 *Id.* at 143–59.

77 *Id.* at 159 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. This is hardly an ordinary case.").

78 *Id.* at 159–60.

79 Gonzales v. Oregon, 546 U.S. 243, 250 (2006).

80 *Id.* at 251-52.

81 *Id.* at 254.

82 *Id.* at 267.

83 *Id.* (citation omitted).

84 *See* Deacon & Litman, *supra* note 46, at 23.

cases are marked by invoking the doctrine at step zero.[85] By contrast, the old major questions doctrine cases employed the doctrine as a piece of confirmatory evidence for statutory construction the Court had already concluded.[86] Now, "the majorness of an issue frames . . . the entire enterprise of statutory interpretation."[87] Whether this will lead to a slowdown in the promulgation in new regulatory rules remains to be foreseen;[88] but regardless of the approach to the major questions doctrine, new or old, one should expect a jolt from Congress to scramble and attempt to fill in *its own gaps*. At the same time, one should also expect Congress to cut corners and adopt language that quickly attempts to dress up unconstitutional laws in major questions doctrine window dressing.[89]

To date, the major questions doctrine(s) has rebuffed the efforts of executive agencies to: assert new far-reaching regulatory authority in the national economy;[90] resolve soul-stirring sociopolitical questions undergoing "earnest and profound debate" in the states;"[91] newly "construct" a statutory term so broadly that it allows the agency to absorb millions of previously unreachable Americans;[92] adopt a nation-wide eviction moratorium in response to the COVID-19 pandemic;[93] hook a vaccine mandate on a workplace safety statute;[94] and more.

In 2023, the Supreme Court applied the major questions doctrine in *Biden v. Nebraska*.[95] Over Justice Kagan's "frontal assault on what [she] styles 'the Court's made-up major questions doctrine'" the Chief rebuffed her dissenting "attempt to relitigate *West Virginia*," and swept away President Biden's unilateral cancelation of $430 billion in federal student loans.[96] While *Nebraska* should have been an rote application of *West Virginia*, the

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85 *Id.* at 23–24.

86 *Id.*

87 *Id.*; *see also*, Monast, *supra* note 44, at 474 ("As the cases above demonstrate, applying the major questions inquiry in place of *Chevron* flips the traditional *Chevron* analysis.").

88 Monast, *supra* note 44, at 476 (predicting that doctrinal uncertainty will lead to a "chill effect" on executive agency action, resulting in a slowdown of the promulgation of rules). *But see*, Crews Jr., *supra* note 2, at 8 (table 2 figures show that the rate of total rules promulgated by agencies outpace public laws at an approximate rate of 20:1).

89 *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000) (rejecting two attempts from Congress to attach language from Commerce Clause jurisprudence as a means to expand the scope of federal criminal law).

90 *Brown & Williamson*, 529 U.S. at 159–60.

91 *Gonzales*, 546 U.S. at 267.

92 *Utility Air*, 573 U.S. at 324.

93 Ala. Ass'n. of Realtors v. Dep't. of Health and Hum. Servs., 141 S. Ct. 2485, 2486-87 (2021) (per curium).

94 Nat'l Fed'n of Indep. Bus. v. Occupational Safety and Health Admin., 142 S. Ct. 661, 665 (2022) (per curium).

95 Biden v. Nebraska, 143 S. Ct. 2355 (2023).

96 *Id.* at 2374.

very nature of the major questions doctrine explains why this case was so important.

Nebraska is not important because it makes waves in constitutional or administrative jurisprudence, rather, it is controversial because of its political and economic implications. One great irony of the major questions doctrine is that it forces a government agency to downplay the significance of its stated authority—while recent media coverage of these cases immanentize the eschaton and stress that if the government loses, then ultimate disaster will be upon us.[97] Indeed, even the President—leader of the agency that argued that these actions do not violate the major questions doctrine—cannot understate their importance.[98] According to the President, his student debt relief invalidated in *Nebraska* was a necessary "lifeline" for tens of millions of Americans and was "literally . . . about to change their lives."[99] *West Virginia* was even more cataclysmic—participating in "a long-term campaign to *strip away our right to breathe clean air*."[100] The Executive cannot have its cake and eat it too. Agency actions cannot simultaneously be casual, ordinary uses of delegated authority while the fate of the universe is cast in jeopardy if and when the Supreme Court, correctly, enforces the Constitutional limits placed on the Executive.[101]

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97 *See, e.g.*, Jacqui Germain, *Student Loans Came Due Again: Many Borrowers Will Lose a Lifeline*, N.Y. TIMES (July 22, 2023); *How to Prepare for the Return of Student Loan Payments*, NAT. PUB. RADIO (July 3, 2023); Scott Detrow, *Supreme Court Curbs the EPA's Power to Protect the Environment*, NAT. PUB. RADIO (July 1, 2022); Frederica Perea & Kari Nadeau, *The Supreme Court Dealt a Terrible Blow to Children's Health*, N.Y. TIMES (July 9, 2022); Washington Post Editorial Board, *The Supreme Court Ends a Disastrous Term by Gutting Climate Change Rules*, WASH. PO. (June 30, 2022); Mark Stern, *How the Supreme Court's Conservatives Prioritize Property Over Lives*, SLATE (Aug. 27, 2021).

98 *See Statement from President Joe Biden on Supreme Court Decision on Student Loan Debt Relief*, THE WHITE HOUSE (June 30, 2023) ("[m]y Administration's student debt relief plan would have been the lifeline tens of millions of hardworking Americans needed as they try to recover from a once-in-a-century pandemic"); Michael Shear, *Student Loans Decision Unravels One of Biden's Signature Efforts*, N.Y. TIMES (June 30, 2023) (quoting President Biden, the case "literally snatch[ed] from the hands of millions of Americans thousands of dollars in debt relief that was about to change their lives"); *Statement by President Joe Biden on Supreme Court Ruling on West Virginia v. EPA*, THE WHITE HOUSE (June 30, 2022) (calling the Court's opinion a "devastating decision" that "risks damaging our nation's ability to keep our air clean and combat . . . the climate crisis").

99 Shear, *supra* note 98.

100 White House, *supra* note 98.

101 While relying primarily on statutory authorization arguments, the agencies also argued that both cases were not major questions cases. *See* Brief for Petitioner at 47–49, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (Nos. 22-506, 22-535); Brief for Federal Respondents at 47–48, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (Nos. 20-1530, 20-1531, 20-1778, 20-1780).

3. Is the Doctrine Substantive or Textual?

Politics will always politic. *Nebraska* is more interesting because gave Justice Barrett an occasion to join the fray.[102] Unlike Justice Gorsuch, who sees the major questions doctrine as a quasi-nondelegation-avoidance canon,[103] Justice Barrett stresses the major questions doctrine is a textual canon, useful to "arrive[] at the most plausible reading of the statute."[104] This is in contrast to "substantive canons" which "advance values external to a statute"—ranging from "modest" tie-breaking rules to "counsel[ing] a court to *strain* statutory text to advance a particular value."[105] At bottom, Justice Barrett's view of the major questions' doctrine is that it is a *contextual* rule. Instead of seeking to read text "exclusively within the four corners of a statute,"[106] the major questions doctrine simply directs courts to read an authorizing provision in the context it was found in—against the backdrop of the Constitution, the rest of the statute, legal conventions, its historical and linguistic contexts, and most importantly, "common sense."[107]

By contrast, Justice Barrett argues, substantive cannons cannot be reconciled with textualism "insofar as they instruct a court to adopt something other than the statute's most natural meaning."[108] If the major questions doctrine was a substantive canon, she continues, it would "load the dice so that a [merely] plausible anti-delegation interpretation wins even if the agency's interpretation is better."[109] *Chevron* and *Auer* deference doctrines are quintessential examples of substantive canons. Instead of encouraging courts to apply the best interpretation of a statute, they prevent courts from constructing statutes in the first place, just as long as the agency has not advanced an affirmatively *incorrect* interpretation.[110]

Shortly after Justice Barrett's concurrence was released, one response chided it as "an arbitrary categorization-game" that "shuffle[s background principles] into or out of 'context' in mysterious ways . . . on inconsistent and conceptually untenable grounds."[111] In short, Professor Vermeule argues that Justice Barrett's invocation of background legal conventions is so "capacious" as to adopt all of the substantive values that she believes textual

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102 *Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).

103 *See West Virginia*, 142 S. Ct. at 2619.

104 *Nebraska*, 143 S. Ct. at 2383 (Barrett, J., concurring).

105 *Id.* at 2376 (emphasis in original).

106 *Id.* at 2378.

107 *Id.* at 2379.

108 *Id.* at 2377.

109 *Id.* at 2378.

110 See Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, 467 U.S. 837, 843 (1984); Auer v. Robbins, 519 U.S. 452, 461 (1997).

111 Adrian Vermeule, *Text and "Context"*, YALE J. ON REG. NOTICE & COMMENT BLOG (July 13, 2023).

canons keep out.[112] The objection is that, insofar as context may be found "outside of the four corners of the statute," the constructive tools that Justice Barrett employs are indistinguishable from all other value-advancing substantive canons of interpretation.[113]

Albeit nuanced, this objection fails to appreciate what the judge or justice is trying to do—or, at least, what Justice Barrett believes that a judge or justice should be doing. To demonstrate, compare the textual canon *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others)[114], with the rule of lenity.[115] Generally, they differ as to when they come into play. Textual canons are invoked to interpret the text for general purposes. The *expressio unius* canon can be used in a vacuum, regardless of any facts, and allow the judge or justice to apply it generally because it merely gives them the *meaning* of the text. On the other hand, substantive canons are invoked *after* the text has been interpreted. The rule of lenity does nothing to advance a clearer meaning of an ambiguous criminal statute. Instead, because people generally believe that imprisoning innocent people is unjust and that the accused are innocent until proven guilty, the rule of lenity instructs a court to defer in favor of innocence. Further, it discourages a legislature from writing ambiguous criminal laws—if the legislature does not want to risk guilty defendants going free, then they should be more exacting and take it out of the hands of the judges.

Properly understood, this substantive canon can only be invoked after the text has been constructed. Put differently, substantive canons are concerned with the application phase of judging, not the interpretive phase. The rule of lenity forbids judges from applying an ambiguous statute to convict someone, but it is powerless to clarify what the statute actually means. Granted, a judge can certainly use textual canons to advance value-laden substantive ends, but that does not mean that the canon itself is substantive. If a judge were to plug and play different textual canons until they arrived at their preferred outcome, no one would suggest that they are attempting to find the best reading of a statute or using a textualist analysis. So too, the Major Questions Doctrine is distinct from, say *Chevron*. The Major Questions Doctrine is invoked to answer the question "what does the authorizing statute reasonably mean?" as opposed to *Chevron*, where a judge must be first convinced that the statute is ambiguous and declines to figure out the meaning because the agency's interpretation is colorable. Invoking *Chevron* cannot clarify statutes no matter how many times it has been done. It does not resolve the *ambiguity*; it just resolves the *case* by informing the judge who should win.

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112 *Id.*

113 *See id.* ("Barrett's two categories do not describe different things.").

114 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 107 (2012).

115 As described by Justice Barrett, *see Nebraska*, 143 S. Ct. at 2376.

Professor Vermeule may be right that context can be "capacious," but even big tents have walls. On Justice Barrett's view, text can be loaded with all sorts of background principles, as long as it is not the judge's whim that is doing the loading. So, yes "rational background principles of legal justice, rooted in history and tradition, are themselves part of what statutes are legally deemed to 'mean,'"[116] but it is not the judges' application of the law that supply that meaning. Necessarily, *for statutes*, legislators must cloak a given text with the status of law, placing it in the legal context, and separating combinations of words and sentences from terms of art.

Thus, Justice Barrett concludes that the major questions doctrine cannot be a substantive canon because it is not a "normative rule that discourages Congress from empowering agencies."[117] A substantive, nondelegation version of major questions doctrine would put a "clarity tax"[118] on legislation, and goad Congress into being transparent about the sweeping scope of a delegation, which in turn, tees up and risks revitalizing of the nondelegation doctrine. The major questions doctrine cannot be understood as so strong, though. It does not foreclose the possibility that the authorizing text *does* really mean what the agency says—where, "[i]f so, the court must adopt the agency's reading despite the 'majorness' of the question."[119]

B. *ATF Interpretation and Implementation of the Gun Control Act and National Firearms Act.*

1. The Gun Violence Problem

Naturally, the framing of the problem is political, but there is undoubtably a violent crime problem in the United States. Last year, Justice Breyer provided framing for the issue in his dissent in *Bruen*.[120] First, the United States leads the world in private firearm ownership—with about 120 firearms for every 100 people, totaling 393.3 million firearms.[121] This coincides with around 36,000 deaths in 2015.[122] Of which, Justice Breyer notes, sixty-one percent were suicides, thirty-seven percent homicides, and one percent were

116 Vermeule, *supra* note 111.

117 143 S. Ct. at 2376. at 2381.

118 *Id.* at 2377.

119 *Id.* at 2381.

120 N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2164–68 (2022) (Breyer, J., dissenting).

121 *Id.* at 2164.

122 *Id.*

accidents.[123] Moreover, between 2009 and 2017, firearms "caused an average of 85,694 emergency room visits for nonfatal injuries."[124]

The AR-15 is the most controversial firearm in the United States—it is also the most popular.[125] Standing for "ArmaLite Rifle," the AR-15 is "less a specific weapon than a family of them."[126] Although AR-15 once referred to a specific brand and design, the term has become a "catchall" to describe several different makes and models of rifle after the patent rights, key to its design, expired.[127] After President Clinton's "assault weapons ban" expired in 2004, AR-15s flew off the shelves because "[i]n outlawing it, the government made the AR-15 tantalizing."[128] What is more, the assault weapons ban expired shortly after 9/11 when Americans had an increased sense of patriotism; having an AR-15 was one symbolic way to support the country and her war in the War on Terror.[129] Despite this original infatuation, the image of the AR-15 has soured in the minds of some (a lot of) Americans after becoming associated with high profile mass shootings.

The public perception of AR-15s, and the subsequent political response to them, is important to understand because executive agencies are supposed to have the kind of expertise that places them above the fray of politics. Where the Administrative Procedure Act prohibits agency actions from being arbitrary and capricious in their rulemaking authority,[130] this has been interpreted as a means of preventing presidential administrations from changing executive rules based on policy preferences alone.[131] To whatever degree a presidential administration is going to attempt to affect the gun violence problem, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[132] Thus, "an agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[133]

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123 *Id.*

124 *Id.* at 2164–65.

125 Matthew Loh, *America has 20 Million AR-15 Style Rifles in Circulation, and More Guns than People in the Country*, BUSINESS INSIDER, May 30, 2022.

126 Ali Watkins et al., *Once Banned, Now Loved and Loathed: How the AR-15 Became 'America's Rifle'*, N.Y. TIMES, Mar. 3, 2018.

127 *Id.*

128 *Id.* ("If you want to sell something to an American, just tell him that he can't have it.").

129 *See id.* ("'So[,] you want to buy a rifle like our troops are using in Iraq? Well, step up to the counter and tell the man what you want.").

130 Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

131 Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 2 (2009).

132 *Id.* at 17 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins., 463 U.S. 29 (1983)).

133 *Id.*

Thus, it is necessary to level-set with some facts about the AR-15. AR-15s are most typically chambered in the 5.56 NATO cartridge, which is nearly identical to the .223 Remington.[134] This is not, by any objective standard, a "high powered cartridge."[135] Contrary to claims from politicians, the AR-15 is frequently used to hunt, however, its only utility hunting small game, "varmints," because, unlike truly high-powered rounds (e.g., .338 Lapua), it is incapable of killing large animals.[136] That its ammunition is uniquely dangerous can be ruled out as a reason that the ATF can draw on for significant regulation.

More importantly though are the claims surrounding its connection to man-on-man violence in the United States. Here, the data stands in contraposition to ATF being able to target the AR-15 for special regulation. In 2019, where there were nearly 14,000 homicides in the United States, rifles (a broader category than AR-15s) accounted for just 364 of the killings.[137] To the extent that they are associated with mass shootings, it is because they were the weapon of choice in a significant amount of America's most recent, most noteworthy mass shootings.[138] Squabbling over the definition of "mass shooting" aside, handguns outpace AR-15s by orders of magnitude, with AR-15s being counted in just three percent of mass shootings.[139]

2. The Biden Administration's Approach

The Biden Plan to End Our Gun Violence Epidemic outlines then-presidential candidate Joe Biden's comprehensive strategy to address gun violence in the United States.[140] President Biden's campaign plan proposed a myriad of strategies to tackle gun violence, such as supporting the party's preferred legislation at the state and federal level.[141] More directly, President Biden promised to utilize the ATF and its rulemaking authority to implement agency rules that would "regulate [the] possession of existing assault weapons" and increase reporting duties.[142]

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134 Kevin D. Williamson, *A Guide to Guns*, THE DISPATCH (Dec. 28, 2022), https://thedispatch.com/article/a-guide-to-guns/.

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 John Gramlich, *What the Data Says about Gun Deaths in the U.S.*, PEW RESEARCH CENTER (Apr. 26, 2023) https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/.

140 Democratic National Committee, *The Biden Plan to End Our Gun Violence Epidemic*, https://s3.documentcloud.org/documents/6443980/The-BIDEN-PLAN-to-END-OUR-GUN-VIOLENCE-EPIDEMIC.pdf (last visited Oct. 15, 2023).

141 *See id.*

142 *Id.*

In July 2022, the White House released a fact sheet reporting that the ATF was assisting in just one of the "21 ways the Biden Administration has already used executive action to make our communities safer."[143] Indeed, the ATF's appearance on the fact sheet was muted–the ATF's rule did not appear until point ten.[144] Now, obtaining a Federal Firearms dealer license officially requires an applicant to make available firearm storage, anywhere one is sold.[145]

To whatever extent this rule seems lackluster, ATF makes up for it in its 2022 final rule *Definition of "Frame or Receiver" and Identification of Firearms* (the Rule).[146] ATF promulgates the Rule to interpret the Gun Control Act of 1968[147] and the National Firearms Act.[148] The Rule, which went into effect on August 24, 2022, contains within it seven new definitions related to firearms and their components.[149] While each definition deserves exacting scrutiny, this article will focus on the ATF's new definitions of the terms "firearm," "frame or receiver."

According to the ATF, a firearm is:

> Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an antique firearm. In the case of a licensed collector, the term shall mean only curios and relics. *The term shall include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive. The term shall not include a weapon, including a weapon parts kit, in which the frame or receiver of such weapon is destroyed as described in the definition "frame or receiver".*[150]

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143 The White House, *Fact Sheet: The Biden Administration's 21 Executive Actions to Reduce Gun Violence*, (July 11, 2022) https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/11/fact-sheet-the-biden-administrations-21-executive-actions-to-reduce-gun-violence/.

144 *Id.*

145 Secure Gun Storage and Definition of "Antique Firearm," 87 Fed. Reg. 182 (adopted Jan. 4, 2022) (to be codified at 27 C.F.R. 478), https://www.federalregister.gov/documents/2022/01/04/2021-28398/secure-gun-storage-and-definition-of-antique-firearm.

146 Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652 (Apr. 26, 2022) (Note: the ATF has issued a twin set of rules—one with all of the substance being discussed, and another with "technical corrections." This article assumes that the technical corrections are innocuous and have no substantive effect on the rule, so I will refer to the first rule that was promulgated on April 26, 2022).

147 18 U.S.C. §§ 921–34.

148 26 U.S.C. §§ 5841–49.

149 *See id.*

150 27 C.F.R. 478.11.

Prior to 2022, the last two sentences of this definition did not exist.[151] In the Rule, the ATF presents this addition as superfluous, implying that weapons parts kits were already firearms under the previous definition but merely "makes explicit that manufacturers and sellers of such kits or aggregations of weapon parts are subject to the same regulatory requirements," as conventional firearms.[152]

Next, the ATF acknowledges that the Gun Control Act does not define the terms "frame" or "receiver" in the statute.[153] Accordingly, the 2022 definition of the terms was a necessary for three reasons.[154] First, the update generally catches up with technological developments in firearms and recognizes that multipart frames and receivers are now commonplace.[155] Second, "some courts have treated [the old definition] as inflexible when applied to . . . the AR-15-type rifle . . . [which] could mean that as many as 90 percent of all firearms . . . in the United States would not . . . [be] subject to regulation."[156] Finally, the update allows ATF to reach companies that "sell firearm parts kits, standalone frame or receiver parts, and easy-to-complete frames or receivers."[157] Thus, the ATF *now* defines frame as:

> The term "frame" means the part of a handgun, or variants thereof, that provides housing or a structure for the component (*i.e.,* sear or equivalent) designed to hold back the hammer, striker, bolt, or similar primary energized component prior to initiation of the firing sequence, even if pins or other attachments are required to connect such component (*i.e.,* sear or equivalent) to the housing or structure.[158]

And "receiver" as:

> The term "receiver" means the part of a rifle, shotgun, or projectile weapon other than a handgun, or variants thereof, that provides housing or a structure for the primary component designed to block or seal the breech prior to initiation of the firing sequence (*i.e.,* bolt, breechblock, or equivalent), even if pins or other attachments are required to connect such component to the housing or structure.[159]

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151 *See* Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652 (Apr. 26, 2022).

152 *Id.*

153 *Id.*

154 *See id.*

155 *Id.*

156 *Id.*

157 87 Fed. Reg. 24652.

158 27 C.F.R. § 478.12(a)(1).

159 27 C.F.R. § 478.12(a)(2).

3. The Gun Control Act and National Firearms Act.

Originally enacted in 1934, the ATF explains that the original version of the National Firearms Act established a system of taxes for the making, transferring, importing, manufacturing, and dealing of specified firearms.[160] Its purpose, however, is not just for revenue collection — the ATF explains that the legislative history shows that it was an attempt at the prohibition of the selected firearms.[161] Although the statute requires a "central registry of all firearms in the United States," "firearms" as used in the statute is defined as a specific, limited category of firearms.[162] Instead, regulated firearms are:

> (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer . . . and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.[163]

The Gun Control Act of 1968 came in the wake of three major assassinations of political figures: John F. Kennedy in 1965, Martin Luther King, Jr. in 1968, and just two months later, Robert Kennedy.[164] At the time, firearms were not as much of a polarizing issue, however, the Gun Control Act marked a change for gun owners where they first felt like they were being targeted.[165] After removing a requirement for a national ownership registry, even the President of the National Rifle Association said, "the measure as a whole as a whole appears to be one that the sportsmen of America can live with."[166]

The Gun Control Act of 1968 features its own set of definitions for firearms and related articles. There, a firearm is "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; [or] (B) the frame or receiver of any such weapon."[167] The ATF finds authority to promulgate rules and

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160 Bureau of Alcohol, Tobacco, and Firearms, and Explosives, *National Firearms Act* (Apr. 7, 2020), https://www.atf.gov/rules-and-regulations/national-firearms-act.

161 *Id.*

162 26 U.S.C. §§ 5841(a), 5845.

163 *Id.* § 5845.

164 Olivia Waxman, *How the Gun Control Act of 1968 Changed America's Approach to Firearms—And What People Get Wrong About That History*, TIME, Oct. 30, 2018.

165 *Id.*

166 Arica L. Coleman, *When the NRA Supported Gun Control*, TIME, July 31, 2016.

167 18 U.S.C. § 921(a)(3).

regulations of the Gun Control Act of 1968 and National Firearms Act through a chain of delegations.[168] First, Congress authorized the Attorney General of the United States to "prescribe *only* such rules and regulations as are *necessary* to carry out the provisions of this chapter."[169] Next, the ATF's enabling statute gives its director the power to "perform such functions as the Attorney General shall direct."[170]

In addition to asserting this in the background section of the final rule, the ATF reiterates it forcefully in the section for responding to comments received during the Notice and Comment rulemaking process.[171] Notably, commentors argued that the ATF's rule was illegal because it came in response to losing litigation.[172] While the ATF does respond to this comment directly, because the ATF is reinterpreting its own rule, rather than a term in the statute, Supreme Court precedent is much narrower than the commentor would like.[173] In addition, the ATF makes the claim that "necessary" in § 926 is afforded deference because of the agency's expertise over what is and is not necessary.[174] Finally, commentors protested that the ATF violates the nondelegation doctrine by creating the Rule. In response, ATF relies on *Whitman* and a Fifth Circuit case to establish that the Gun Control Act and National Firearms Act provide the ATF with an intelligible principle and is thus a constitutional delegation.[175]

II. ANALYSIS

A. *ATF's Rule Constitutes a Major Question.*

ATF's Rule does not assess its authority to promulgate the Rule in light of the major questions doctrine.[176] ATF's rule, nonetheless, violates the major questions doctrine, and as it stands, is unconstitutional. There are two appropriate stipulations to make before explaining why, in full. First, a court does not have to take issue with the substantive content of the agency's rule or

168 *See* 18 U.S.C. § 926(a); 28 U.S.C. § 599A(a).

169 *Id.* § 926(a).

170 *Id.* § 599A(a)(2).

171 *See* 87 Fed. Reg. 24652.

172 *Id.*

173 *See* Nat'l Cable & Tellecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (explaining that agencies may not use *Chevron* deference to reinterpret a statutory term after a court has defined it).

174 *See* 87 Fed. Reg. 24652.

175 *Id.*

176 *Id.* Note: this is descriptive and not pejorative. Given the Major Question Doctrine's long history prior to West Virginia, ATF could have defended itself against this objection *sua sponte* but considering that West Virginia was not handed down for months after the proposed rule, it is fair that they did not anticipate the implications the case would have.

interpretation thereof to find that an issue raises a major question.[177] Thus, a court could find the ATF's interpretations of "firearm" and "receiver" are permissible but strike down the Rule as a violation of the major questions doctrine all the same because the ATF lacked the authority or power to promulgate it. Second, the ATF's Rule does not appear to impose any costs or burdens on any party or people per se. Thus, to dispense with any standing arguments at the outset, I will assume for the sake of argument that either some clever litigant has found someone who was harmed by the Rule directly, or the ATF has issued another rule regulating conduct, directly based on this rule.

1. ATF's Rule implicates a Major Question

West Virginia articulates the first step of the major questions doctrine to ask whether a case "provides 'a reason to hesitate before concluding that Congress' meant to confer" the authority in question.[178] Generally, where an asserted authority is novel and has major consequences of national "economic and political significance," it satisfies this first step. Because firearm ownership represents a white-hot point of political conflict at the state level and is a major economic sector in the United States and beyond, the ATF's Rule implicates *both* major economic and political significance.

First, it is an understatement to say that the cultural political debates surrounding firearm ownership are politically consequential. Uncontrovertibly, the "gun debate" is of course most salient in media and the culture whenever tragedy strikes. Less obvious though, is its political significance whenever there is an extended period of time without a major national tragedy. Nonetheless, the National Rifle Association is infamous for its lobbying efforts, spending at least one million dollars per year in its public efforts, with spending as high as 5.12 million dollars in 2017.[179] The "gun debate" is ongoing at the state level as well, where the split in public opinion is always shifting, but never emerges into a consensus.[180] As New York was litigating, and ultimately lost, *Bruen*–forcing it, and six other states, to become "shall issue" concealed carry licensing states—the number of states that adopted

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177 *See* King v. Burwell, 576 U.S. 473, 485–85 (2015) (finding that the Affordable Care Act's "involving billions of dollars in spending each year and affecting the price of health insurance for millions of people" presents a major question but nonetheless affirms the agency's reading of the ACA).

178 *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159-160).

179 Statista Research Department, *Expenditure of the National Rifle Association (NRA) in the United States from 1998 to 2022* (Jul. 31, 2023), https://www.statista.com/statistics/249398/lobbying-expenditures-of-the-national-rifle-associaction-in-the-united-states/.

180 *See, e.g.*, *Guns*, GALLUP, https://news.gallup.com/poll/1645/guns.aspx (last visited Oct. 9, 2023).

"constitutional carry" laws grew.[181] Assisted suicide is, of course, a serious issue that implicates issues of key social and moral significance, however, its political salience is nowhere near that of the general issue of firearms in America. To the extent that assisted suicide was undergoing, "earnest and profound debate" when *Gonzales* was decided, so too does the role of firearms in our society.[182]

Second, Justice O'Connor singled out tobacco's "own unique place in American history and society, [and concluding that] tobacco has its own unique political history."[183] It would be irreconcilable for the Court to grant tobacco this lofty status while denying it to firearms. American gun ownership strikes at the core of what it means "to be an American." Revolutionary War Minute Men are an iconic (albeit maybe romantic) staple of the Founding and understanding of their generation. Whether one focuses on the expansion out west, or diverts their attention east to the Civil War, the role that firearms have played in shaping the nature of the United States is undeniable. When one considers the significance of the Second Amendment in American law, this truth becomes further undeniable. Simply put, guns were so important to "American history and society," that the Framers guaranteed their right to ownership, and two centuries later, the Supreme Court affirms that right in perpetuity.[184]

Firearms are as economically significant as they are politically. In 2021 alone, it is estimated that 5.4 million Americans became first-time gun owners.[185] Additionally, in 2022, manufacturing, distributing, selling, and tertiary businesses related to the firearm industry combined to buoy nearly 375,000 domestic jobs.[186] This amounts to an industry worth of approximately $70.52 billion, which in turn contributes around nine billion dollars in taxes to both the Federal and State governments.[187] Granted, there is no specific threshold dollar amount or taxes contributed to be found in the major questions doctrine precedents, *Burwell*, *Utility Air*, and *Alabama Association of Realtors* all imply that the implicated industries were worth billions of dollars, too.[188]

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181 *See Bruen*, 142 S. Ct. 2111, 2123-24; *Constitutional Carry in 25 States Which States Allow Constitutional Carry?*, USCCA (Apr. 23, 2023), https://www.usconcealedcarry.com/blog/constitutional-carry-in-states/.

182 *Gonzales*, 546 U.S. 243, 249 (citing Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

183 *Brown & Williamson*, 529 U.S. at 159-61.

184 *See Bruen*, 142 S. Ct. at 2111; Heller v. District of Columbia, 554 U.S. 570, 570 (2008).

185 NATIONAL SHOOTING SPORTS FOUNDATION, FIREARM AND AMMUNITION INDUSTRY ECONOMIC IMPACT REPORT 2022, 2-3 (2022).

186 *Id.*

187 *Id.*

188 *See generally Ala. Ass'n of Realtors*, 141 S. Ct. at 22487 (eviction moratorium); *Burwell*, 576 U.S at 485 (Medicare exchanges); *Utility Air*, 573 U.S. at 324.

2. There is no Congressional Authorization for the ATF's Specific Regulation.

Step two in *West Virginia*'s formulation of the major questions doctrine demands that if Congress meant to delegate a question of such significance to an executive agency, then the agency must "point to clear congressional authorization to regulate in that manner."[189] In *West Virginia*, the EPA was unable to do so, despite the statute directing them to find the "best system."[190] This means that not only does the agency have to prove that it is tasked with crafting the sort of regulation in question—the challenged regulation must also be in accord with Congress's expectations.

Similarly, the plain text of the two statutes militates against the ATF being able to prove that they were delegated authority to regulate in their chosen manner. To start with the National Firearms Act, the definitions section of the statute defines "firearm" in an extremely narrow and obscure way.[191] This is because the original purpose of the statute was to crack down on disfavored kinds of firearms and prevent them from being owned privately.[192] There is no indication from the text of the statute that it anticipated the ATF further defining "firearm" and even less reason to believe that Congress wished for the ATF to make its definition incongruent with its own. Additionally, that the National Firearms Act was originally passed in 1934 is instructional. There is no colorable argument that Congress in 1934 could have delegated the authority to define "firearm" to the ATF nearly thirty years before the ATF was established, let alone guided them "to regulate in that manner."[193] Moreover, guidance from Congress cannot be read into either of the ATF's definitions of "receiver" or "frame." The ATF's own Rule negates that possibility; in explaining that they need to expand and reshape the definitions, the ATF argues that it is necessary because there is new technology today that did not exist at the time of the acts passage. To the extent that guidance informed their previous implementation of the National Firearms Act, the ATF admits that that guidance is obsolete and that its own *new* definition is necessary.

The same arguments apply to the Gun Control Act of 1968. First, the Gun Control Act of 1968 supplies its own definition of firearm.[194] Unlike the National Firearms Act, the Gun Control Act's definition of "firearm" is generally applicable. The ATF grasps at the portion of the statute that includes inoperable weapons "designed to" or "may readily be converted" to operation.[195] At the same time, the ATF seeks to argue that the additional two

189 *West Virginia*, 142 S. Ct. at 2614 (quoting *Utility Air*, 573 U.S. at 324).

190 *See id.* (citing 42 U. S. C. § 7411(a)(1)).

191 § 5845.

192 87 Fed. Reg. 24652.

193 § 5845 (establishing ATF in 1970).

194 18 U.S.C. § 926(a).

195 87 Fed. Reg. 24652.

sentences are duplicative of the old statute's definition, while saying that it is unfit to capture modern weapons parts kits, or worse still, an aggregation thereof. This is, on its face, a major expanse of the ATF's authority in regulating firearms without any indication from the text of the Gun Control Act that Congress intended for the ATF to alter its (apparently insufficient) definition.

This applies more forcefully, still, to ATF's defining "frame" and "receiver." Although more primitive frames and receivers existed, Congress chose not to define them in the text of the Gun Control Act. Unlike instances where Congress explicitly tells an agency to "fill in the gaps," (e.g., "choose the best system available"[196]) there is no such direction for the ATF to redefine anything. ATF concedes the lack of guidance and directions and offers no further explanation in its rule.[197]

Lastly, neither of the statutes authorize the ATF to regulate firearms in an arbitrary and capricious manner. ATF explicitly created these regulations to target the AR-15 platform of firearms, their parts, and aggregates thereof. Given, however, that ATF does not allude to any colorable evidence that AR-15s or their progeny contribute in an outsized way to the gun violence issue in America, what is left is to understand the change in regulation as a political one. The Supreme Court is clear that the Administrative Procedure Act forbids agencies from changing their regulatory scheme based purely or primarily on the political preferences of the administration.[198]

3. Proposed Solutions

Given that this is a legal problem of overreach, and the particular harms from the ATF's rule have yet to manifest, there is a lot of room for Congress to respond and fix the problem. First, Congress could simply authorize the ATF's rule. By passing an amendment to the Gun Control Act of 1968 that defines "firearm," "frame," and "receiver" in the manner the ATF does, it would resolve the problem of the ATF exercising more authority than it is granted. On the other hand, if Congress chooses to amend the Gun Control Act of 1968 and define the terms in the other direction, then the problem is similarly solved, as the statutory language would be clear and override the ATF's interpretation. Thus, if Congress acts, either way, it can resolve the issue all the same.

Less perfectly, Congress could also amend the Gun Control Act of 1968 to expressly direct either the Attorney General or the ATF to interpret the

196 *See West Virginia*, 142 S. Ct. at 2614.

197 87 Fed. Reg. 24652 ("the GCA *does not define the terms* "frame" or "receiver" to implement the statute") (emphasis added); *but see* 18 U.S.C. § 921 (including the terms "frame" and "receiver" in statute without defining them).

198 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring).

relative provision's terms, and delegate more authority for the agencies to define the terms. This does not move the Federal Government back towards its designed system of separated powers where Congress answers the most politically fraught questions, but at least it removes the problem of the Executive acting without guidance and subjecting the rights and privileges of millions of Americans to the whims of the current administration.

The least desirable way to resolve the issue is "the old-fashioned way." At some point in time, the ATF will expand upon this rule or utilize it in some way. As all things have tradeoffs, there is a high likelihood that the ATF's rule will detriment someone, giving rise to a "case or controversy"[199] and providing the Supreme Court occasion to strike down the ATF's unconstitutionally exercised rulemaking authority.

199 U.S. CONST. art. III, § 2

IF IT LOOKS LIKE A DUCK: THE CASE FOR REGULATING STABLECOINS AS MONEY MARKET FUNDS

Mia Wright

INTRODUCTION

The past decade brought the innovations of blockchain and Bitcoin, leading to the explosion of cryptocurrencies as an investment product and store of value. This has been a truly revolutionary moment for both technology and financial markets, generating billions of dollars' worth of new assets.

One subset of cryptoassets that is generating attention from investors, regulators, and Congress is stablecoins. Stablecoins are crypto tokens which aim to track a reference asset, usually the U.S. dollar, on a one-to-one basis. They are tracked and sold on a blockchain, either private or public. Stablecoins are backed by reserve assets, which can include securities, other cryptocurrencies, and other crypto tokens, or not truly backed at all, instead tracking their reference asset or currency by algorithmic code. Stablecoins have enormous potential to revolutionize the world's payments systems and money transfer protocols because of the capabilities of blockchains to offer instantaneous transfer and settlement, and promised redemption on a one-to-one basis. Recognizing this potential, even the central banks of the world are exploring the possibilities of issuing their own stablecoins, Central Bank Digital Currencies.

Yet as the collapse of the TerraLuna USD stablecoin (and wider crypto market) in 2022 showed, stablecoins can be anything but stable. A lack of transparency around the assets and reserves backing stablecoins, and lack of governance and oversight, can lead to losses for investors. In order for stablecoins to live up to their potential use cases and the widespread adoption their proponents yearn for, they will require standardization and oversight to allow customers the security they seek in these instruments.

As more and more customers flock to crypto, and U.S. financial institutions sit on the sidelines waiting to jump into these markets, policymakers must decide how to address the standardization and oversight of stablecoins. The President's Working Group on Financial Markets, in a report issued in 2021, identified stablecoins as an area within the crypto umbrella where regulators can act quickly to address risk. The Working Group observed that depending on their use, stablecoins could be classified as commodities, securities, or derivatives. But these initial definitions ignore that in most other cases in financial regulation, it is the characteristics of an asset, not its use, which determine which definition applies and what regulatory regime would

apply. The initial attempt at definition also ignores the mirror image stablecoins have in money market funds.

Given their characteristics, the correct legal definition and standards of regulation to apply to stablecoins should be those of money market funds: investment vehicles backed by cash and cash equivalent securities, among other high-quality assets, hat allow investors a highly liquid, low risk investment that can be redeemed one-to-one for U.S. dollars. Regulating assets based on their characteristics, rather than diverse use cases, is a more appropriate and efficient regulatory approach. It is consistent with the application of the test in *Howey* which underpins traditional securities regulation.

The SEC should adopt a regulatory regime that encompasses both assets—stablecoins and money market funds—that can address the similar characteristics of the assets and risks they pose to customers. Stablecoins should be regulated in the same way as money market funds because of the similarity in their structure, backing, and use. To do so, the SEC should adopt new definitions of stablecoin, stablecoin fund, and stablecoin issuer in Rule 270.2a-7, proposed in this Comment.

I. BACKGROUND

This section will provide an overview of money market funds and their regulation, disruptions in the MMF markets, stablecoins and the crypto ecosystem they developed from, and major crypto market events impacting stablecoins such as the collapses of FTX and TerraLuna. The section will also discuss the President's Working Group on Financial Markets' Stablecoin report, which lays out how the administration believes stablecoins should be regulated and the criteria for evaluating securities laid out by the Supreme Court. This section will also address proposals to allow the Federal Reserve to create a Central Bank Digital Currency, and the impacts such a token would have.

A. *Money Market Funds: Their Development and Qualities*

Money market funds are a type of mutual fund, developed in the 1970s.[1] They were developed with the intent to offer investors high liquidity, low risk investment vehicles that can be used for storing cash before moving the cash into another asset or investment, or to use as a short-terms savings vehicle.[2] Money market funds are typically composed of high-quality assets

[1] U.S SEC. AND EXCH. COMM'N, WHAT ARE MONEY MARKET FUNDS?, https://www.investor.gov/introduction-investing/investing-basics/investment-products/mutual-funds-and-exchange-traded-5.

[2] *Id.*

such as cash, cash-equivalent securities, and U.S. Treasury securities,[3] and pay dividends reflective of short-term interest rates.[4] Money market funds are redeemable by investors on demand, usually on the basis of a net asset value of one dollar, and they are designed to maintain this NAV at one dollar.[5]

Because of their liquidity, high quality backing, and stability, money market funds have become a popular way for both retail and institutional investors to manage cash.[6] The market has developed over time to include different kinds of money market funds with different goals and backing – such as prime money market funds and government money market funds, among others.[7] Although some money market funds aim for different NAVs, such as ten dollars, the vast majority seek to maintain a one dollar-per-share NAV.[8] As of July 2021, there were over 300 registered money market funds holding $5 trillion in assets.[9]

Money market funds generally provide higher returns than the interest rates offered on typical bank accounts because of the composition of assets the funds hold.[10] Money market funds are typically offered by financial institutions and while they are insured by the Federal Deposit Insurance Corporation, they are primarily subject to the SEC's regulation.[11]

B. *Overview of Money Market Fund Regulation in the U.S.*

In the U.S., money market funds are currently subject to regulation under the Securities and Exchange Commission, pursuant to the Investment Company Act of 1940.[12] 17 C.F.R. § 270.2a-7 governs money market funds, commonly referred to as Rule 2a-7.[13] Rule 2a-7 was first adopted by the SEC in 1983,[14] and has been periodically amended since its adoption. The SEC has reviewed its regulation of these assets in response to disruptive market events, which are discussed below. The reforms have generally been targeted at the resilience of money market funds, for example, in the wake of the 2008

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3 U.S SEC. AND EXCH. COMM'N, MONEY MARKET FUNDS, https://www.sec.gov/spotlight/money-market.shtml.

4 Money Market Fund Reform, 79 Fed. Reg. 47735, 47737 (proposed Aug. 14, 2014) [hereinafter 2014 Money Market Fund Reform] (to be codified at 17 C.F.R. pt. 230).

5 *Id.*

6 *Id.*

7 *Id.* at 47738.

8 *Id.* at 47737.

9 Money Market Fund Reforms, 87 Fed. Reg. 7248, 7250 (proposed Feb. 8, 2022) [hereinafter 2022 Money Market Fund Proposal] (to be codified at 17 C.F.R. pt. 230).

10 U.S SEC. AND EXCH. COMM'N, MONEY MARKET FUNDS, *supra* note 3.

11 U.S SEC. AND EXCH. COMM'N, WHAT ARE MONEY MARKET FUNDS?, *supra* note 1.

12 2014 Money Market Fund Reform at 47737.

13 *Id.*; 17 C.F.R. § 270.2a-7 (2023).

14 Valuation of Debt Instruments and Computation of Current Price Per Share by Certain Open-End Investment Companies (Money Market Funds), 48 Fed. Reg. 32555 (July 11, 1983).

financial crisis the SEC took aim at reducing interest rate, credit, and liquidity risks present in fund portfolios.[15]

Money market funds are subject to rules governing the pricing and redeeming of their shares, fees they may impose on their customers, the quality and diversification of the assets in the portfolio, ongoing reviews for credit risks, stress testing, recordkeeping, and reporting.[16] Issuers of money market funds are regulated as investment companies, specifically, "open-end companies" or securities issuers.[17] The issuers are then subject to the gamut of SEC regulations related to securities issuance, sale, and trading, and owe a fiduciary duty to their shareholders.[18]

While money market funds generally maintain their stability as opposed to other assets, there have been some significant disruptions in the asset class throughout their fifty-year history. For example, in March 2020, growing economic concerns about the impact of the COVID-19 pandemic led investors to reallocate their assets into cash and short-term government securities.[19] This led to prime and tax-exempt money market funds, particularly institutional funds, experiencing large outflows, which contributed to stress on short-term funding markets.[20] The outflows significantly slowed following intervention from the Federal Reserve, but led to concerns about the stress placed on bank funding markets and effects on broader market stability and liquidity.[21] In response, the SEC proposed further amendments to its money market fund rules.[22] These reforms are aimed at the resilience of money market funds, as well as increasing transparency.[23] The reforms address liquidity concerns that arise in periods of stress, where more investors seek to exit the market and redeem their shares in a fund, by modifying NAV requirements, enhancing disclosures, and adjusting the asset quality and portfolio liquidity requirements.[24]

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15 *See* Money Market Fund Reform, 75 Fed. Reg. 10060 (proposed Mar. 4, 2010) (to be codified at 17 C.F.R. pt. 230).

16 17 C.F.R. § 270.2a-7.

17 15 U.S.C. § 80a-5(a)(1).

18 15 U.S.C. § 80a-35; *see, e.g.*, Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 295 (2d Cir. 1982) (discussing the duty owed to shareholders of a money market fund when shareholders contend imposed fees breached fiduciary duty), *disapproved of by* Jones v. Harris Assocs. L.P., 527 F.3d 627, 632 (7th Cir. 2008).

19 2022 Money Market Fund Proposal at 7252.

20 *Id.*

21 *Id.* at 7252, 7253.

22 *Id.* at 7253.

23 *Id.*

24 *Id.*

C. *Crypto and Stablecoins: What They Are, What They Do*

The advent of cryptocurrencies and blockchain technology began with the Bitcoin white paper in 2008, which outlined the creation of a digital asset called Bitcoin.[25] Bitcoin can be transferred electronically via a distributed ledger known as blockchain.[26] Bitcoin became popular, as did blockchain technology, and its popularity let to an explosion in the creation of other crypto tokens and digital assets.

While the mechanics of Bitcoin and blockchain are largely beyond the scope of this comment, there are some fundamental concepts of the crypto ecosystem worth explanation. Digital assets themselves can be defined as tokens representing value, traded and stored on software known as blockchain. A blockchain is a decentralized store of record in software.[27] What makes blockchain decentralized is rather than be stored in one location, in one server like one would think of cloud storage, is that it is instead verified across multiple nodes across multiple servers, making it widely accessible in combination with open access software.[28] Nodes can be thought of as serving as a point-of-access and clearinghouse for the ledger of transactions on the blockchain: they show in real time all the transactions occurring on the chain as well as verify the ownership and transfer of the digital asset.[29]

The original blockchain license and design was intended to be public and "peer-to-peer."[30] This has enabled the market for Bitcoin and novel applications of the technology underpinning cryptocurrency to explode rapidly over the last decade, as software developers have free access to create whatever blockchain projects they wish.[31]

Bitcoin, the first cryptocurrency, is mined by computer programs who unlock Bitcoins as a reward for solving ever-complex algorithmic problems.[32] Other cryptocurrencies are minted via similar proof-of-work models, or via proof-of-stake, like Ethereum, where tokens are representative of smart contracts between parties.[33] Digital assets are stored in digital wallets, protected by complex keys.[34] These wallets can be "hot," where the digital assets

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25 Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, 3 (2008).

26 *Id.*

27 *Id.*

28 *Id.* at 4.

29 *Id.* at 5.

30 *Id.* at 3.

31 Trevor I. Kiviat, *Beyond Bitcoin: Issues in Regulating Blockchain Transactions*, 65 DUKE L.J. 569, 579 (2015).

32 *Id.* at 579.

33 Tiffany L. Minks, *Ethereum and the Sec: Why Most Distributed Autonomous Organizations Are Subject to the Registration Requirements of the Securities Act of 1933 and A Proposal for New Regulation*, 5 TEX. A&M L. REV. 405, 414 (2018).

34 Mitchell Prentis, *Digital Metal: Regulating Bitcoin As A Commodity*, 66 CASE W. RES. L. REV. 609, 614 (2015).

are held by a cryptocurrency exchange on behalf of the customer, or "cold," where the owner of the assets holds the tokens on a hard drive or similar secure, non-internet connected means.[35] In the limited litigation that arisen around cryptocurrencies, courts have begun to categorize Bitcoin as a commodity.[36] This view has not been challenged by the regulators squabbling for jurisdiction over cryptocurrencies, with both the SEC and Commodity Futures Trading Commission agreeing that Bitcoin is a commodity.[37]

Because digital assets are native to software, additional programming can be applied to them, allowing the creation of smart contracts, which are programmed after the parties agree to their terms and then run automatically for the life of the contract, typically for purchases of more cryptocurrency.[38] Blockchains can be used to record information other than crypto transactions, for example in the burgeoning non-fungible token (NFT) market, blockchains record sections of code that represent images or video clips.[39] These sections of code are packaged as a token, the NFT, and can be bought and sold like any other asset.[40]

Digital assets can be exchanged and transactions settled almost instantaneously, especially with the advent of stablecoins. In 2014, the first stablecoin was created, now known as Tether.[41] While a formal, legal definition for stablecoin has not been created, in 2021, the President's Working Group on Financial Markets defined them as "digital assets designed to maintain a stable value relative to a national currency or other reference assets."[42] The

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35 Rosie Perper, *Hot vs. Cold Crypto Storage: What Are the Differences?*, COINDESK (Aug. 4, 2022), https://www.coindesk.com/learn/hot-vs-cold-crypto-storage-what-are-the-differences; *see also* Nicole Mirjanich, *Digital Money: Bitcoin's Financial and Tax Future Despite Regulatory Uncertainty*, 64 DEPAUL L. REV. 213, 216 (2014); Kevin V. Tu, Michael W. Meredith, Rethinking Virtual Currency Regulation in the Bitcoin Age, 90 WASH. L. REV. 271, 273 (2015).

36 *See, e.g.*, Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 217 (E.D.N.Y.), *adhered to on denial of reconsideration*, 321 F. Supp. 3d 366, 367 (E.D.N.Y. 2018).

37 Daniel Kuhn, *SEC's Gensler Reiterates Bitcoin Alone Is a Commodity. Is He Right?*, YAHOO NEWS (June 28, 2022), https://www.yahoo.com/video/sec-gensler-reiterates-bitcoin-alone-161257549.html; Leo Schwartz, *'Inaction Is Paralysis': CFTC Chair Rostin Behnam Calls For Regulation In The Wake Of FTX's Collapse*, FORTUNE (Nov. 30, 2022), https://fortune.com/crypto/2022/11/30/inaction-is-paralysis-cftc-chair-rostin-behnam-calls-for-regulation-in-the-wake-of-ftxs-collapse/.

38 Minks, *supra* note 33, at 416; *see also* Joshua Fairfield, *Smart Contracts, Bitcoin Bots, and Consumer Protection*, 71 WASH. & LEE L. REV. ONLINE 35, 46 (2014).

39 Hermes Int'l v. Rothschild, 2022 WL 1564597 at *1, (S.D.N.Y. May 18, 2022) (defining non-fungible tokens in the context of a copyright suit between a fashion brand and entrepreneur who sold NFTs represented by likenesses of the brand's signature handbag style).

40 *Id.*

41 Agata Ferreira, *The Curious Case of Stablecoins – Balancing Risk and Rewards?*, 24 J. INT'L ECON. L. 755, 756 (2021).

42 Press Release, President's Working Group on Financial Markets Releases Report and Recommendations on Stablecoins, United States Department of the Treasury 1 (Nov. 1, 2021). [hereinafter President's Working Group].

general idea and use case behind the development of stablecoins is to allow payments, trading, lending, and borrowing of other digital assets.[43] For the fast-paced world of digital assets, the traditional payments system from bank to bank did not offer the speed they required, with the clearing and settlement process taking days.[44] Stablecoins were created to allow crypto investors to "cash out" their tokens into a stablecoin before purchasing another token.[45] Usually, stablecoins offer the promise of one-to-one redemption to the asset they claim to reference.[46]

Very often on some of the major exchanges, Bitcoin or other cryptocurrency cannot be purchased directly with dollars, but dollars must be first converted to a stablecoin to purchase the crypto, in what are called "trading pairs."[47] While the price of Bitcoin is displayed in USD across market data providers, the price is actually the amount of stablecoin, such as Tether, the displayed dollar amount will buy. Stablecoins are thus a key underpinning of the crypto ecosystem.[48] The use of stablecoins could be expanded beyond the crypto ecosystem to allow for faster payments systems, more inclusive digital finance, and the creation of digital cash.[49]

To illustrate the difference between tokens like Bitcoin and stablecoins, consider that some crypto proponents consider Bitcoin to be digital gold, a store of value that will appreciate and store value over time, so using it as a payment method would be unappealing, while stablecoins, which track currency, are digital cash.[50] Furthering the analogy, while business may be hesitant to accept cryptocurrencies as payment because there is no real agreement on the intrinsic value of most coins, stablecoins, tracking the dollar or other reference asset, have a much easier path to acceptance in wider settings outside the crypto ecosystem because their value is more apparent to consumers outside the crypto true-believers.[51]

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43 *Id.*

44 Gordon Y. Liao & John Caramichael, *Stablecoins: Growth Potential and Impact on Banking,* INT'L FIN. DISCUSSION PAPERS WASH.: BD. GOVERNORS THE FED. RSRV. SYS. 1334, 1336-37 (2022), https://doi.org/10.17016/IFDP.2022.1334 (providing an overview of stablecoin uses, technology, and potential applications).

45 Jan van Eck, Commentary, *What the Government's Recommendations for Stablecoins Got Wrong, and How to Do Better*, BARRON'S (Feb. 9, 2022), https://www.barrons.com/articles/what-the-governments-recommendations-for-stablecoins-got-wrong-and-how-to-do-better-51644419137.

46 President's Working Group, supra note 42, at 6-8.

47 Kat Tretina, *How To Buy Bitcoin (BTC),* FORBES ADVISOR (Aug. 5, 2022), https://www.forbes.com/advisor/investing/cryptocurrency/how-to-buy-bitcoin.

48 Garrick Hileman, *2019 State of Stablecoins*, BLOCKCHAIN, 2, 39 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3533143, ("Tether has proven particularly attractive to major exchanges that do not offer US dollar customer accounts. For example, in 2017 Tether experienced a rapid increase in volume on Poloniex, arguably playing a key role in it becoming the market leading exchange by volume in mid-2017.").

49 President's Working Group, supra note 42, at 6-8.

50 Hileman, *supra* note 48, at 14.

51 *See id.*

Some traditional financial companies have deployed blockchain technology and stablecoins to enhance their internal processes. For example, J.P. Morgan launched the JPM Coin system. The JPM Coin functions similarly to a private stablecoin, and provides the bank's clients the ability to tokenize dollar deposits into JPM Coin and use the Coin as opposed to dollars when transacting with other J.P. Morgan clients.[52] Holders of JPM Coin can then redeem JPM Coin for dollars at will.[53]

Despite the distinction between "digital gold" and "digital cash," stablecoins share many features with Bitcoin: because they are digital instruments on a blockchain, they can be programmed to have near-instant settlement times, permissionless access to the blockchain software, efficiency, and fungibility.[54] Much like how money market funds can be a venue for investors to store cash before moving it into another investment, stablecoins are used to store value before it is transferred into another digital asset.[55]

The vast majority of stablecoins in circulation are asset-backed stablecoins, such as the oldest, Tether (USDT).[56] These stablecoins are mostly backed by fiat currencies, usually the U.S. dollar, or a mix of assets, such as U.S. Treasury securities. These assets are held with the goal of supporting the one-to-one redemption of the stablecoin's reference asset.[57] Some stablecoins track commodity prices like gold or silver.[58] As these are the vast majority of stablecoins, this Comment will focus on these assets when referring to stablecoins and their potential regulation. An even smaller subset of stablecoins are algorithmic stablecoins, which use software code rules to maintain their stability by "dynamically matching the supply of stablecoin with demand."[59] These algorithmic coins have a variety of funding mechanisms, including a fee-backed or "hybrid" structure.[60] But algorithmic coins make up less than 20% of the asset class, and are typically held by more advanced, technology-focused, evangelist cryptocurrency proponents, and are not representative of the asset class.[61]

Many of the largest stablecoins are registered with the U.S. Treasury Department's Financial Crimes Enforcement Network as money services businesses.[62] Currently, there are no stablecoins subject to regulation that

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52 Eddie Wen, Managing Director, Global Head Digital Markets, J.P. Morgan, Presentation at the Commodity Futures Trading Commission Technology Advisory Committee, 3 (Feb. 26, 2020), available at: https://www.cftc.gov/PressRoom/Events/opaeventtac022620.

53 Hileman, *supra* note 48, at 14.

54 *See id.* at 12.

55 *Id.*

56 TETHER WHITEPAPER, https://tether.to/en/whitepaper/ (last visited Oct. 9, 2023).

57 *See* Hileman, *supra* note 48, at 23.

58 PAXOS, 4, https://insights.paxos.com/stablecoins101 (last visited Oct. 9, 2023).

59 *See* Hileman, *supra* note 48, at 14.

60 *Id.*

61 *See id.*

62 Kiviat, *supra* note 31, at 575.

would impose custody, disclosure, and conflict of interest requirements on stablecoins and their issuers. There are only enforcement actions taken when they fail to do so.[63] But some stablecoins have submitted to regulation by choice. Two major stablecoin issuers, Gemini and Paxos, have registered as trust companies with the New York Department of Financial Services, subjecting themselves to oversight on the state level.[64]

Table 1: Examples of Key Stablecoins[65]

Token	Structure	Year Issued	Issuer(s)	Notes
Tether (USDT)	Asset-Backed	2014	BitFinex	First stablecoin on the market. More centralized, less transparent. Generates fees from imposing small fee on issuance of new tokens. Concerns that issuer is only holding a fractional reserve of assets.
USD Coin	Asset-Backed	2018	Circle, Coinbase, Chainalysis, Elliptic, Coinfirm, etc. (20+)	Strong support across crypto ecosystem for the well-funded partnership supporting USD coin. Registered with FinCEN in the U.S. Open source software hosted on Ethereum blockchain will allow multiple companies to join as issuers or participants. Could allow customers to access USDC through traditional banks.
Gemini Dollar	Asset-Backed	2018	Gemini	Established custody agreement with State Street Bank for deposits, deposits held in U.S. Eligible for FDIC pass-through insurance.
TrueUSD	Asset-Backed	2018	TrueCoin LLC	Requires $1,000 minimum for redemptions. Holds all customer deposits in escrow accounts, enabling direct banking. Unique smart contract "burning" structure ensures 1-1 match between TrueUSD tokens and USD held in escrow.
Binance USD	Asset-Backed	2019	Binance and Paxos	Stablecoin primarily used for transactions on the Binance crypto exchange, currently the largest crypto exchange in the world. Binance converted holdings of other stablecoins into Binance USD in the wake of the FTX collapse in November 2022.
UST	Algorithmic	2019	Terra Network	The UST stablecoin functioned through a peg between two tokens, Terra and LUNA, discussed at length in Section E.

63 *See, e.g.*, In the Matter of Tether Holdings Ltd., Tether Operations Ltd., Tether Ltd., and Tether Int'l Ltd., CFTC No. 22-04 (Oct. 15, 2022).

64 PAXOS, *supra* note 58, at 4.

65 Data: Hileman, *supra* note 48; Liao & Caramichael, *supra* note 44.

				The algorithmic backing of Terra was based in a combination of reserves, crypto, and by smart contracts on Blockchain that automatically sold or bought the coin to maintain its peg.

D. *When Stablecoins Have Faced Instability*

While stablecoins are designed to be more stable in value than other digital assets like Bitcoin or Ether, the two major cryptocurrencies, they are still more volatile than similar traditional financial instruments.[66] As crypto markets began their decline in the first half of 2022, it was a stablecoin that was at the heart of the beginning of the "crypto winter." The Terra network was launched in 2018 by South Korean entrepreneurs who planned to develop e-commerce and payments apps with a price-stable cryptocurrency, to facilitate transactions.[67] This network was supported by fifteen large e-commerce companies in Asia.[68] In 2019, the network launched Terra, a crypto currency that aimed to "[combine] the best of both fiat and Bitcoin."[69] The Terra project aimed at creating a price-stable cryptocurrency, mimicking fiat money, while also taking advantage of Bitcoin's growth potential.[70] To do so, Terra deployed a "system" of stablecoins – the token UST being the most popular in the system.[71] UST tracked the value of a U.S. dollar, where it historically hovered around $1 in price.[72] To do so, a blockchain-based algorithm was used to stabilize the UST coin at $1 by destroying tokens of another cryptocurrency in the system, LUNA, to create more UST, in a simple arbitrage scheme.[73] Users of the Terra network were always able to swap the UST they held for LUNA, and vice versa, guaranteed at a $1 price.[74] During the swap, a percent of LUNA was permanently removed from circulation,

66 Ferreira, *supra* note 41, at 762.

67 Krisztian Sandor, *What is LUNA and UST? A Guide to the Terra Ecosystem*, COINDESK (May 9, 2022), https://www.coindesk.com/learn/what-is-luna-and-ust-a-guide-to-the-terra-ecosystem/.

68 Krisztian Sandor & Ekin Genç, *The Fall of Terra: A Timeline of the Meteoric Rise and Crash of UST and LUNA*, COINDESK (Aug. 19, 2022), https://www.coindesk.com/learn/the-fall-of-terra-a-timeline-of-the-meteoric-rise-and-crash-of-ust-and-luna/.

69 Evan Keriakes et al., *Terra Money: Stability and Adoption* (Apr. 2019), https://assets.website-files.com/611153e7af981472d8da199c/618b02d13e938ae1f8ad1e45_Terra_White_paper.pdf.

70 *Id.*

71 Sandor, *supra* note 67.

72 *Id.*

73 *Id.*

74 *Id.*

with any remains deposited into a treasury on the network, which were then used to expand and develop the Terra network.[75]

Terra was intended to be a global platform for electronic cash, and gained traction in Asia because it offered cheaper transaction fees than most credit card providers and payment processors.[76] Users were able to pay for ecommerce with Terra's stablecoins, as the network's founders intended.[77] And the network worked well – users and e-commerce merchants were using the coins, more and more applications were built on the network's blockchain, and when crypto markets faced increased volatility, the twin UST and LUNA coins performed well, keeping the peg to the USD.[78]

But this stability was not long-lived. At the end of 2021, LUNA's price reached record highs, above ninety dollars, and continued to climb.[79] The founder of the network began to build an organization dedicated to supporting the Terra ecosystem and UST/LUNA stability, raising $1 billion for a reserve system.[80] In March of 2022, several investors began to raise the alarm with concerns on UST/LUNA's algorithmic health and backing, making large financial bets against the health of LUNA in particular.[81] In May 2022, the collapse began. On May 7, two billion dollars in UST were taken off of the Terra network's blockchain for still-unknown reasons. After this, millions of dollars of UST were swapped for another dollar-pegged stablecoin, USDC.[82] After the exit began, UST dropped to record lows, at one point reaching a value of thirty-five cents, but LUNA's market supply skyrocketed as panicked investors fled UST.[83] LUNA crashed dramatically to less than ten cents.[84] The stablecoins' collapse led to erasure of $300 billion in value across the cryptocurrency markets.[85]

Another critical event in 2022 for the crypto ecosystem and the stablecoin asset class was the sudden collapse of global crypto exchange FTX, widely believed to be the one of the most well controlled and capitalized crypto companies. FTX dramatically imploded after CoinDesk reported that

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75 *Id.*

76 *Id.*

77 Sandor, *supra* note 67.

78 *Id.*

79 Sandor & Genç, *supra* note 68.

80 *Id.*

81 *Id.*

82 Curve Whale Watching (@CurveSwaps), TWITTER (May 7, 2022, 5:57 PM), https://twitter.com/CurveSwaps/status/1523059517486891008?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1523063668807995392%7Ctwgr%5E%7Ctwcon%5Es2_&ref_url=https%3A%2F%2Fdecrypt.co%2F99704%2Fterras-luna-declines-10-amid-ust-de-pegging-concern.

83 Sandor & Genç, *supra* note 68.

84 *Id.*

85 David Yaffe-Bellany & Erin Griffith, *How a Trash-Talking Crypto Founder Caused a $40 Billion Crash*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/2022/05/18/technology/terra-luna-cryptocurrency-do-kwon.html.

Alameda Research, a hedge fund intertwined with FTX, was almost solely propped up by the exchange's proprietary crypto token FTT.[86] The concerns raised by this reporting and Binance's subsequent failed FTX acquisition led to revelations that Alameda had stolen eight billion dollars of customer funds from the FTX exchange in a spectacular failure of governance. FTX filed for bankruptcy, Alameda and FTX founder Sam Bankman-Fried was arrested, and the SEC and Commodity Futures Trading Commission (CFTC) brought actions against Bankman-Fried and many of his associates.[87]

FTX played a unique role in crypto markets through its 130 affiliates, and its implosion resulted in serious contagion effects across crypto markets while traditional financial markets remained insulated.[88] Several other crypto companies filed for bankruptcy in the wake of FTX's filing, and the full effects on markets remain to be seen as new information is released.[89]

Stablecoin markets were not immune to the effects of the FTX collapse. Some data suggest crypto investors moved away from other crypto tokens into various stablecoin products following the meltdown.[90] But as investors grew increasingly concerned about keeping their crypto on large, centralized exchanges, they began moving their crypto assets, including stablecoins, into alternative storage methods resulting in a liquidity crunch.[91] This resulted in the suspension of trading in several stablecoins including USDC and USDT, two of the most widely used stablecoins, at some exchanges.[92] The largest crypto exchange in the world, Binance, converted positions in other stablecoins to the stablecoin it issues, Binance USD, contributing to the liquidity crisis.[93]

Beyond the FTX and TerraLuna collapses, even the largest of the stablecoins have not been immune to scandals and enforcement actions. The largest and oldest stablecoin, Tether, was ordered by the CFTC in October 2021 to pay fines totaling forty-one million dollars because of failures to maintain their 100% reserve of dollars to USDT in circulation.[94] In the enforcement action, the CFTC found that for several periods in 2017 there were over 400 million USDT tokens in circulation, but the reserves held by Tether

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86 Ian Allison, *Divisions in Sam Bankman-Fried's Crypto Empire Blur on His Trading Titan Alameda's Balance Sheet*, COINDESK (Nov. 2, 2022), https://www.coindesk.com/business/2022/11/02/divisions-in-sam-bankman-frieds-crypto-empire-blur-on-his-trading-titan-alamedas-balance-sheet/.

87 Rutgers L. Sch., *The Significance and Consequences of the FTX Crypto Collapse*, (Dec. 13, 2022), https://law.rutgers.edu/news/significance-and-consequences-ftx-crypto-collapse.

88 *Id.*

89 *Id.*

90 Casey Wagner, *FTX Fraud Pushed Traders Into Stablecoins: Galaxy*, BLOCKWORKS (Nov. 18, 2022), https://blockworks.co/news/ftx-pushed-traders-into-stablecoins.

91 *Id.*

92 *Id.*

93 *Id.*

94 *In the Matter of Tether Holdings Ltd*., *supra* note 63.

never exceeded $61.5 million.[95] Furthermore, Tether did not hold reserves in an FDIC insured or U.S.-regulated bank.[96] Beginning in 2017, Tether held over eighty percent of its reserves with an unlicensed money transmitting business based in Panama.[97] In events that would predict the FTX to Alameda transfers (but nowhere approach their market impact), Tether made loans to an affiliate, Bitfinex, on several occasions using the reserve collateral held by the Panamanian business.[98] In 2019, Tether disclosures were updated to include a statement that Tether reserves could include "other assets and receivables from loans made by Tether to third parties, which may include affiliated entities."[99] At the time of the CFTC enforcement action, Tether had never audited its reserves.[100]

This CFTC enforcement action followed a suit where investors filed a putative class action for fraud, securities and commodities laws violations, and antitrust violations.[101] In responding to Tether's motion to dismiss the suit, the United States District Court for the Southern District of New York found plausible the allegation that Tether engaged in market manipulation by unpegging USDT—maintaining a less than 100% reserve—to inflate crypto commodity prices.[102] As a result of the CFTC enforcement action, litigation, and other news coverage, Tether continues to face concerns over its reserves and stability.[103] Several other large stablecoins, such as USDC and Binance USD, have faced similar concerns over the adequacy of their financial audits.[104]

However, despite these strange market events and actions, the stablecoin technology seemed to function well and outperform other affected crypto assets.[105] As noted by Gordon Y. Liao and John Caramichael in their January 2022 Federal Reserve discussion paper, in response to crypto market instability March 2020 and May 2021, asset-backed stablecoin prices went up.[106] Liao and Caramichael also contrast this with money market funds, which in similar circumstances discussed previously experienced outflows, suggesting that stablecoins performed well as "digital safe havens" for periods of market stress.[107] The potential positive uses of stablecoins remains despite these market disruptions, with adequate protections of regulation and

95 *Id*.
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 *In the Matter of Tether Holdings Ltd*., *supra* note 63.
101 In re Tether & Bitfinex Crypto Asset Litig., 576 F. Supp. 3d 55, 70 (S.D.N.Y. 2021).
102 *Id.* at 111.
103 Liao & Caramichael, *supra* note 44, at 3.
104 *Id.*
105 Wagner, *supra* note 90.
106 Liao & Caramichael, *supra* note 44, at 10.
107 *Id.*

oversight, even over their traditional finance counterpart, money market funds.

E. *Current Proposal on Regulation of Stablecoins: The President's Working Group on Financial Markets and Potential Legal Definitions*

In response to growing interest among the investing community and regulators, the President's Working Group on Financial Markets issued a report in late 2021 on the treatment of stablecoins.[108] The report highlighted significant regulatory concerns for investor protection and market integrity, as well as prudential regulatory concerns.[109] Most notably of the report's recommendations, however, was how it proposed to legally categorize stablecoins. The report stated:

> Depending on the facts and circumstances, a stablecoin may constitute a security, commodity, and/or derivative implicating the jurisdiction of the SEC, and be subject to the U.S. federal securities laws, or implicating the jurisdiction of the CFTC, and be subject to the CEA. The federal securities laws and/or the CEA may apply to the stablecoin, the stablecoin arrangement, transactions in, and/or participants involved in, the stablecoin or stablecoin arrangement, and/or derivatives of any of the foregoing instruments.[110]

Rather than place stablecoins in one legal category, the report decided to leave the definition question open,[111] leaving the confusion and lack of clarity for the asset class intact. Nor did the report address public debate over which agency should take the lead on stablecoin regulation.

Much of the debate around cryptocurrency regulation more broadly than just stablecoins has been whether digital assets are better defined as securities or commodities. Commodities are regulated by the CFTC under the Commodity Exchange Act. Commodities are defined in the CEA as all the agricultural commodities listed in Section 1a(4) of the Act, but also more broadly as agricultural products or natural resources as opposed to financial instruments: they are all goods and articles able to be bought and sold.[112] The CFTC also has jurisdiction over futures and other financial instruments such as derivatives.[113] Securities are regulated by the SEC under its authorizing statutes.

Defining a security comes to us from the Supreme Court. The test of whether a financial instrument is a security, or investment contract, was definitively laid out in *SEC v. W.J. Howey Co.*: an investment contract exists if

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108 President's Working Group, supra note 42.

109 *Id.*

110 *Id.* at 15.

111 *Id.*

112 7 U.S.C. § 1(a)(9).

113 7 U.S.C. § 2(D)(i).

there is an "investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others."[114] Rather than prescribe lists of investment products or assets that fall under SEC regulation, Congress, the Commission, and the Supreme Court have all relied on *Howey*'s defining characteristics to determine whether an investment is a security.[115] The *Howey* test can be broken into three prongs: investment of money, common enterprise, and reasonable expectation of profits derived from the efforts of others.[116] The SEC has expressed the view that the vast majority of cryptocurrencies would meet the three criteria of the *Howey* test, and issued guidance with analysis demonstrating how the agency came to that assessment.[117]

The *Howey* analysis laid out by the SEC would include digital assets like LUNA, for example. The first two prongs of *Howey* are easily satisfied by LUNA, investment of money is typically present where there is offer of a digital asset and sale,[118] and common enterprise because the success of the digital asset is linked to the success of the issuer.[119] As to the third prong, LUNA was not pegged in value to the dollar like UST and the increase in prices of LUNA resulted in the Terra network investing in their platform.

F. *Central Bank Digital Currencies*

If widely used, one concern is that stablecoins could impair a central bank's control of monetary policy and possibly undermine confidence in fiat currencies value or operational continuity.[120] Most important for regulators are the potential impacts stablecoins could have on international monetary policy and financial stability.[121]

A central bank digital currency, essentially a stablecoin issued by a central bank, each with a specific denomination for their relevant jurisdiction, could alleviate these concerns. The general principle of why a CBDC would be useful is that once it is backed by the power and reserves of a government central bank, the need for commercial or private stablecoins evaporates.[122]

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114 S.E.C. v. W.J. Howey Co., 328 U.S. 293, 301 (1946).

115 *Id.* at 293.

116 U.S Sec. & Exch. Comm'n, *Framework for "Investment Contract" Analysis of Digital Assets* (2023).

117 *Id.*

118 *See, e.g.*, In re Tomahawk Exploration LLC, Securities Act Rel. 10530 (Aug. 14, 2018).

119 *See* S.E.C. v. Int'l Loan Network, Inc., 968 F.2d 1304 (D.C. Cir. 1992).

120 *See generally* President's Working Group, supra note 42.

121 Steven L. Schwarcz, *Regulating Digital Currencies: Towards An Analytical Framework*, 102 B.U.L. REV. 1037, 1041 (2022).

122 *Id.* at 1044.

As a result of China's deployment of a CBDC in several cities as a pilot program,[123] many jurisdictions have begun to explore the possibilities of issuing their own CBDC.[124] In particular, a concern has been articulated by policymakers in the U.S. that a digital yuan could threaten the role of the U.S. dollar as the global reserve currency.[125] In the U.S., the Federal Reserve has indicated it lacks statutory authority to issue a CBDC, but is exploring the possibility.[126]

The benefits of a CBDC are numerous. A programmable, tokenized U.S. dollar could offer instant transfer of money, expand access to financial technology to the underbanked, reduce fraud and counterparty risk, allow for international payments denominated in USD, and potentially allow for instant securities settlement.[127] And many of the risks associated with private stablecoin issuers would not be present in the case of a Federal Reserve-issued CBDC, such as fraud, custody issues, de-pegging, illicit finance risks, and market manipulation.[128] In practice, two individuals exchanging CBDC as payment could be the digital equivalent of handing someone a twenty dollar bill, backed with the full force of the Federal Reserve.

II. ANALYSIS

The characteristics of stablecoins lead them to resemble money market funds more so than other assets based on their use, backing, and structure. As such, the President's Working Group on Financial markets was incorrect in describing stablecoins as either commodities, derivatives, or securities for legally defining this new asset class. Assets should be defined for regulation and other legal purposes based on their characteristics, not their uses. While stablecoins could fit the requirements of the *Howey* test, they fail to meet the definition of commodity as laid out in the Commodity Exchange Act. The definition of money market fund is therefore the appropriate and efficient way to legally treat these assets. Applying the same principles of money

123 S*ee, e.g.*, Aditi Kumar & Eric Rosenbach, *Could China's Digital Currency Unseat the Dollar?*, FOREIGN AFF'S. (May 20, 2020), https://www.foreignaffairs.com/articles/china/2020-05-20/could-chinas-digital-currency-unseat-dollar; Rebecca Isjwara, *China May Seek to Raise Yuan's Stature via a Digital Avatar*, S&P GLOB. MKT. INTEL. (Sept. 23, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/china- may-seek-to-raise-yuan-s-stature-via-a-digital-avatar-60106560.

124 Kevin Carmichael, *Will the Coronavirus Prompt Central Bankers to Rethink Their Approach to Digital Currencies?*, CTR. FOR INT'L GOVERNANCE INNOVATION (May 25, 2020), https://www.cigionline.org/articles/will-coronavirus-prompt-central-bankers-rethink-their-approach-digital-currencies.

125 Schwarcz, *supra* note 121, at 1039.

126 Bd. of Governors the Fed. Rsrv. Sys., *Money and Payments: The U.S. Dollar in the Age of Digital Transformation* (2022), https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf.

127 The Digit. Dollar Found., *The Digital Dollar Project: Exploring a US CBDC* (2020), http://digitaldollarproject.org/wp-content/uploads/2021/05/Digital-Dollar-Project-Whitepaper_vF_7_13_20.pdf.

128 *Id.*

market fund regulation to stablecoins would result in efficient regulation, borrowing from a well-tested regime which allows for growth and investor protection. Further, while private stablecoins may aim to be treated as currency, the only digital currency that would have a substantial use case and widespread adoption would be a Federal Reserve-issued CBDC, so deeming privately issued stablecoins "money" is also inappropriate.

A. *Why Stablecoins Resemble Money Market Funds*

Like MMFs, stablecoins claim to track the dollar one to one. While both do so by holding USD and other securities, in MMFs' case, high quality securities, their value can fluctuate slightly around their peg to the dollar. Neither asset is engaged in the practice of lending, which makes the President's Working Group's suggestion to treat stablecoin issuers like insured depository institutions, or banks, incongruous with the characteristics of stablecoins. Both MMFs and stablecoins are traded on exchanges, unlike bank deposits, and in use represent investments, not debts.

Slightly different from mutual funds, as one major asset manager observed, "most stablecoin issuers keep the income generated from the assets in the stablecoin... In response, some stablecoins now assign a part of their investment gains to holders, much like other mutual funds."[129] Further, both MMF operators and stablecoin operators both only undertake investing their customers' funds into securities, but can be affiliated with other projects: in traditional finance, banks and brokers, in crypto, networks, exchanges, and other blockchain projects.[130]

Defining stablecoins as MMFs would also address concerns articulated by the Federal Reserve over "narrow banking," where stablecoins functioning like fully tokenized money and holding 100% reserve assets in cash deposits would result in less credit and credit intermediation available in the banking system.[131] The concern is such a model would result in huge expansions of bank balance sheets and demand for dollars, with negative monetary policy impacts.[132] Allowing stablecoins to hold a mix of cash-equivalent securities, government securities, and cash like MMFs would allow for the easiest integration of stablecoins into the traditional finance ecosystem without risk of credit disruption, balance sheet expansion, and fewest monetary impacts, since financial markets and institutions are already equipped to accommodate the requirements of asset segregation and balancing required for money market funds.

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129 Van Eck, *supra* note 45.

130 *Id.*

131 *See, e.g.*, Liao & Caramichael, *supra* note 44, at 12.

132 *Id.*

B. Stablecoins and the Howey Test

Recall the prongs of the *Howey* test: investment of money, in a common enterprise, with a reasonable expectation of profits to be derived from the efforts of others.[133] The first two prongs, investment of money and common enterprise, are satisfied in the use case of the typical asset-backed stablecoin. Stablecoin users deposit currency with a stablecoin issuer and receive the requisite number of tokens in exchange, all in a pooled asset, occasionally with distributed gains.[134]

It is the third prong that the analysis therefore rests on. Taking the Supreme Court's guidance that "in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality,"[135] what matters is the intent of stablecoin purchasers when they purchase the tokens. Because stablecoins should not lose their peg to the dollar, the foundational idea behind them is the one-to-one transferability. If this is what investors seek, and are purchasing the stablecoin in order to facilitate the purchase or sale of another cryptocurrency, then it is not clear that an expectation of profit exists. But, as noted earlier, since many stablecoins out-value their price because of accumulating assets, some could return gains to their users. Relying again on the Supreme Court's instruction to focus on the economic reality and substance,[136] like their MMF counterparts, that stablecoins meet the first two prongs of the test is sufficient to label them securities and place them within the jurisdiction of the SEC.

Further, while stablecoin issuers may argue that because they aim to offer fixed, as opposed to variable, returns, they fail to qualify under the *Howey* test because there could not be a reasonable expectation of profit under those circumstances. Another argument against stablecoins meeting the expectation of profit comes from the implications of the definition of the word profit itself. Profits imply that a business is gaining income and incurring costs, and an argument could be made that the use of the word profit does not apply to a stablecoin. A stablecoin, or any digital token, is not a business. Investors may have an expectation of a return, but not one derived from any business.

However, the Supreme Court held in *S.E.C. v. Edwards* that fixed returns could still result in an investment being subject to securities regulation because "[t]here is no reason to distinguish between promises of fixed returns

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133 *W.J. Howey Co.*, 328 U.S. at 301.

134 *See* Revak v. SEC Realty Corp., 18 F.3d. 81, 87-88 (2d Cir. 1994) (discussing the "common enterprise" definition as "tying of each individual investor's fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits.").

135 Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (citing *W.J. Howey Co.*, 328 U.S. at 293).

136 *Id.*

and promises of variable returns for purposes of the [*Howey*] test."[137] Therefore, under *Edwards*, stablecoins do qualify under the three prongs of *Howey* and must be regulated under the securities laws.

The *Edwards* decision built on the Supreme Court's decision in *Reves v. Ernst and Young*, where it held that Congress' purpose in enacting the securities laws was to "regulate investments, in whatever form they are made and by whatever name they are called."[138] Accordingly, the SEC could regulate investments in new asset classes at their inception if they meet the requirements of *Howey* and regardless of where the returns generated by the asset come from. The SEC's broad authority could be applied to stablecoins, with definitions added to their rules as detailed below in Part III.

While many stablecoin issuers may balk at the idea of SEC regulation, regulation by the SEC as securities issuers in the business of MMFs would be considerably less expensive in compliance costs than the burdens placed on banks or insured depository institutions through regulation as suggested by the PWG report. Bank regulation includes oversight from the Federal Reserve, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, and the myriad of state regulators. Having one regulator as opposed to the patchwork of federal banking laws as suggested by the President's Working Group would be a more cost-effective and efficient result for stablecoin regulation, however over-broad and expansive the SEC's authority may be in many cases.

C. *Why Stablecoins Are Not Appropriately Regulated by the CFTC*

Commodities are regulated by the CFTC under the Commodity Exchange Act. Commodities are defined in the CEA as all the agricultural commodities listed in Section 1a(9) of the Act, but also more broadly as agricultural products or natural resources as opposed to financial instruments.[139] The CFTC also has jurisdiction over futures and other financial instruments such as derivatives.[140] Stablecoins do not meet the *prima facie* definition of commodity found in the CEA as they are not agricultural nor natural resources, nor are they goods or articles.

Nor do stablecoins meet the definitions of a derivative that could be regulated by the CFTC, contrary to the conclusion of the President's Working Group. The CFTC regulates financial derivatives, which derive their value from underlying assets.[141] The argument that a stablecoin could be a

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137 S.E.C. v. Edwards, 540 U.S. 389, 394 (2004) (upholding the *Howey* test and finding that "profits" refers to the expectations of value investors place on their investments).

138 Reves v. Ernst & Young, 494 U.S. 56, 61 (1990).

139 7 U.S.C. § 1(a)(9).

140 7 U.S.C. § 2(D)(i).

141 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

derivative in the President's Working Group report is not entirely without merit, especially when comparing common derivatives like futures to the TerraLuna pair, for example. An argument could be made that Terra and LUNA operated like a commodity and a related option, both of which could be under the jurisdiction of the CFTC as a commodity and derivative. An option is defined as a contract that gives the buyer the right, but not the obligation, to buy or sell a specified quantity of a commodity or other instrument at a specific price within a specified period of time, regardless of the market price of that instrument.[142] LUNA derived all of its value from its peg to Terra, and allowed users of the token to redeem at will for a stated amount of Terra. Unlike futures,[143] TerraLuna had no requirements of delivery, price convergence, or margin. Further, futures and most other derivatives are designed to address hedge risk[144] and are not a store of value. Therefore, it is inappropriate to categorize most stablecoins as derivatives such as futures because of this difference in their characteristics.

However, the SEC has jurisdiction over derivatives where the instrument derives its values from underlying securities,[145] much like stablecoins and money market funds derive their value from underlying securities and cash. Therefore, it would be inappropriate to categorize stablecoins as commodities or derivatives under the CFTC's jurisdiction, as the President's Working Group suggested they could be.

III. SOLUTIONS

Merely assigning an asset to a legal definition for purposes of regulation does not solve the problems and risks the asset class poses. Since stablecoins can be classified as MMFs, next it must be assessed what aspects of current MMF regulation can apply at the instance such determination is made. First, it is clear that in order to best protect customers, audit, recordkeeping, and capitalization requirements are key. Second, the SEC's MMF regulations must be amended to include stablecoins.

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142 COMMODITY FUTURES TRADING COMM'N, A GUIDE TO THE LANGUAGE OF THE FUTURES INDUSTRY (available at https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm).

143 *See* 7 U.S.C. § 1(a)(9); COMMODITY FUTURES TRADING COMM'N, ECONOMIC PURPOSE OF FUTURES MARKETS AND HOW THEY WORK (available at https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/economicpurpose.html).

144 *Id.*

145 7 U.S.C. § 2(D)(i).

A. *SEC Regulations*

The first step in applying the SEC's MMF regulation to stablecoins would be to amend Regulation 2(a)-7 to include the new asset. Most importantly for stability purposes, this would mean applying portfolio liquidity and asset quality requirements to stablecoins. Currently, 2(a)-7 requires that MMFs hold at least ten percent of its total assets in daily liquid assets, defined as cash, direct obligations of the U.S. government, securities that will mature or can be payable within one business day, and amounts due to the fund within one business day after sales of portfolio securities.[146] MMFs must also hold thirty percent of their total assets in weekly liquid assets, defined in the regulations as cash, direct obligations of the U.S. government, government securities within a remaining maturity of sixty days or less, and amounts due to the fund within five business days after sales of portfolio securities.[147] These liquidity requirements are designed to ensure the MMF can meet redemption demand even in times of higher redemptions, and the SEC has proposed to increase these percentages.[148] Applying these thresholds and asset quality requirements would ensure that asset-backed stablecoins live up to the promise of their name and retain value. It would minimize the risks seen in the TerraLuna collapse and concerns around Tether, and other stablecoins', backing. These requirements would give stablecoin issuers a better way to manage significant redemptions rather than scramble for funding, avoiding the classic "bank run" scenario.

The rest of the requirements in Regulation 2(a)-7 would further strengthen stablecoins and reduce risks. Regulation 2(a)-7(d) imposes key risk-limiting measures on U.S. MMFs that would be beneficial to stablecoin issuers.[149] First, the portfolio of assets backing MMFs must meet maturity requirements, limits investments in securities to U.S. dollar denominated securities, requires diversity in issuers of asset securities, and limits acquisition of illiquid securities.[150] While it is difficult to assess what the current state of stablecoin backing is due to the opacity of many tokens, it is likely that many stablecoins would likely have to undertake massive rebalancing efforts to meet these requirements. This would include even the largest of stablecoins like USDC and Tether's USDT, which have faced concerns over their backing in the wake of the FTX collapse. But the security and stability offered by these requirements would only make the stablecoins more attractive and lead to wider adoption by the general, risk-adverse investing public as opposed to the risk-seeking crypto community. While the costs of rebalancing at first may seem large and produce inefficient results, the wider adoption of stablecoins would likely result in greater value and liquidity in the market.

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146 17 C.F.R. § 270.2a-7(a)(8).

147 17 C.F.R. § 270.2a-7(a)(28).

148 2022 Money Market Fund Proposal at 7250.

149 17 C.F.R. § 270.2a-7(d).

150 *Id.*

Perhaps one of the starkest differences that exists today between money market funds and stablecoins is the level of transparency. While most stablecoins publish white papers illustrating their structure, purpose, and philosophy, very rarely do they publish exactly what they are backed with, as discussed above. Regulation 2(a)-7(h)(10) requires MMFs to "prominently" post on their websites each security the fund holds and the amount, six months' worth of data on daily and weekly liquid assets, net inflows and outflows, and NAV, among other requirements.[151] These requirements would be the most important to apply to stablecoins for transparency and market oversight, and would likely alleviate most concerns investors face with stablecoins. And the audit requirements of the SEC's MMF regulations would prevent the transfer of reserve funds away from reserve accounts at insured institutions and de-pegging the value of the stablecoin, as Tether was fined by the CFTC for in October 2021.

B. *Proposed Definitions*

To incorporate stablecoins in Regulation 2(a)-7, the SEC should adopt new definitions of stablecoin, stablecoin fund, and stablecoin issuer in Regulation 2(a)-7(a):

Proposed Regulation 2(a)-7(a)(29):

> ***Stablecoin*** means a stable-value, currency-denominated digital asset or token, representing one unit of a stablecoin fund as defined in this section.

Proposed Regulation 2(a)-7(a)(30):

> ***Stablecoin Fund*** means any money market fund backing the issuance of a stable-value, currency denominated digital asset or token.

Proposed Regulation 2(a)-7(a)(31):

> ***Stablecoin Issuer*** means any investment company as defined in 15 U.S.C. § 80a-5(a)(1) who operates a stablecoin fund.

These definitions would allow the SEC to apply the full weight of its money market fund rules to stablecoins in a simple, efficient way. By linking the new definition "stablecoin fund" to MMFs, it allows for efficient integration into the traditional finance ecosystem. Congress would have to pass

151 17 C.F.R. § 270.2a-7(h)(10).

legislation to adopt these definitions in an amendment to the Investment Company Act of 1940. Asking Congress to slightly amend a statute that has been amended dozens of times since its adoption is an easier lift for lawmakers than a wholesale framework for a new asset class.

Stablecoin issuers and investors could then rely on decades' worth of lessons learned in the MMF system and the knowledge of the Securities Bar rather than start from scratch. Stablecoin issuers would likely face a large compliance burden when these definitions are first applied, and many may cease operations as a result, but overtime, compliance costs would be mitigated by the predictability and stability of the money market fund rules. Even though the rules have been changed over the decades since MMFs were first regulated, they have amounted to tweaks: the removal of some requirements, the adjusting of asset levels, but never wholesale reform.

From a regulatory perspective, it will be more efficient for the SEC to slot stablecoins into existing frameworks for oversight and enforcement, rather than begin the rulemaking process from nothing. It will be more efficient for the SEC to request comments on three new definitions rather than create an entirely new framework for stablecoins. Adding stablecoins to Regulation 2(a)-7 would avoid duplicative regulation, increased compliance costs, and rely on the institutional knowledge of the regulator. Regulatory clarity and certainty, though it may come with increased costs, is more efficient than the limbo stablecoin issuers currently find themselves in.

C. *The Federal Reserve Should Issue a Digital Dollar*

To preserve the dollar as the world's reserve currency and ensure consumer protection, Congress should authorize the Federal Reserve to issue a CBDC. Doing so would ensure the dollar's continued use as a reserve currency even when blockchain technology revolutionizes current global payment systems. Furthermore, the protections offered by the U.S. Constitution should provide notoriously private crypto investors with more comfort using a CBDC than stablecoins issued by private or overseas companies. The Federal Reserve, as a branch of the U.S. government, is bound by the First Amendment's protection for speech,[152] the Fourth Amendment's protection against unreasonable search and seizure,[153] the Fifth Amendment's protection against government taking without just compensation,[154] and the Fourteenth Amendment's due process protections.[155] This would mean that unlike Binance, the Federal Reserve could not take another stablecoin and convert it into another without compensating the investor. The Federal Reserve would not be able to share data on digital dollar usage without a warrant, nor could

152 U.S. CONST. amend. I.
153 U.S. CONST. amend. IV.
154 U.S. CONST. amend. V.
155 U.S. CONST. amend. XIV.

it do so without due process. While private companies would face criminal and civil liability for doing any of these, the protections for citizens against the government are likely stronger. Not only among those who believe in crypto's anti-establishment aspects, but these factors should result in more widespread adoption of a CBDC stablecoin among the general public, as opposed to solely crypto evangelists and serious investors dominating the use of stablecoins as is currently the case.

The concerns many household investors have with cryptoassets and stablecoins are around protection and security. A Fed-issued CBDC would be backed by the credit of the United States, as opposed to the murky underpinnings of even the largest stablecoins. This would alleviate the concerns around stablecoins issued by private companies, the largest of which have been shown to act in bad faith (such as FTX). The Constitutional protections should offer household investors more confidence in the security of their assets and the privacy they could enjoy.

CONCLUSION

While it has seen much volatility in its first decade, cryptocurrency and its underlying technologies could revolutionize the financial system. Stablecoins in particular have enormous potential to revolutionize the world's payments systems and money transfer protocols because of the capabilities of blockchains to offer instantaneous transfer and settlement, and promised redemption on a one-to-one basis.

However, as market events have shown, stablecoins will require oversight and transparency to reach their full potential as an investment vehicle. The appropriate, efficient way to do so is to align stablecoin regulation with the SEC's regulation of money market funds, whose use and purpose mirror those of stablecoins. SEC oversight of stablecoins in the vein of funds will allow for greater customer protection, enhanced transparency through disclosures, and the integration of innovative technology into the traditional financial system. Applying the same principles of existing money market fund regulation and defining stablecoins as money market funds will result in better regulatory outcomes for investors and issuers, efficient, predictable regulation, and more widespread adoption of this new asset. To best protect investors and ensure U.S. monetary policy goals, the SEC should amend Rule 2(a)-7 to include stablecoins, and Congress should grant the Federal Reserve clear authority to issue its own stablecoin, a CBDC. Doing so will allow the existing stablecoin market to continue its functions with the benefit of a decades-tested regulatory regime, and allow the Federal Reserve to co-opt the benefits of exciting new technology in its payments systems.