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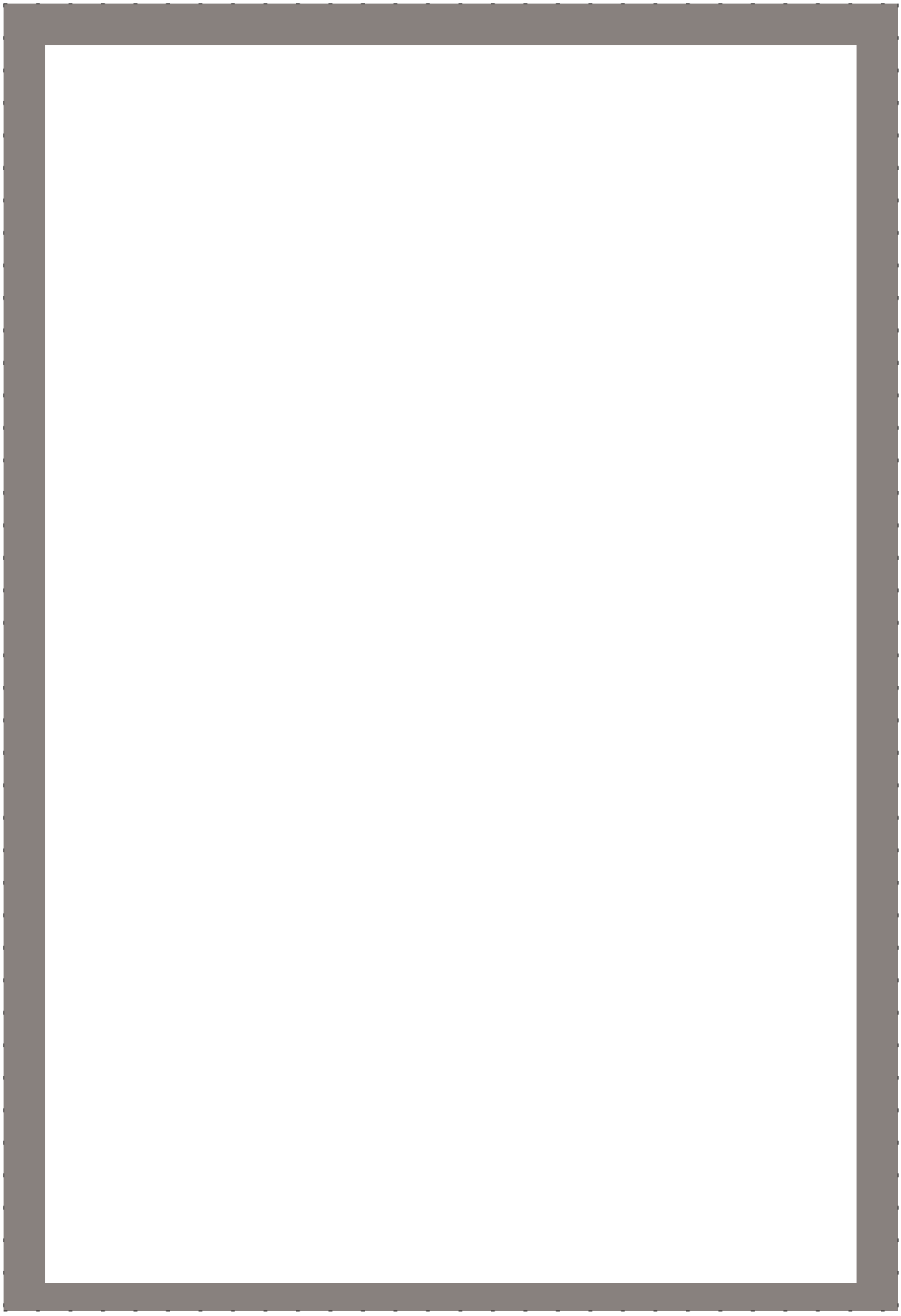

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MODERN SCOFFLAWS: AN EXAMINATION OF ALCOHOL RESALE LAW AND THE BOURBON BLACK MARKET

Christian Bush

"Too much of anything is bad, but too much good whiskey is barely enough"

Mark Twain

INTRODUCTION

In 1923, Delcevare King, a vigorous supporter of the then three-year-old "Noble Experiment" known as Prohibition, advertised a contest in the *Boston Daily Globe*.[1] King offered to pay 200 dollars in gold for a new epithet to "stab awake the conscience of the drinker of liquor illegally made or illegally obtained, and . . . [alert] . . . the public . . . that such lawless drinking is . . . 'a menace to the republic itself.'"[2] Of the more than 25,000 entrants from all states in the Union and several countries, two people split the prize after independently submitting the same word: "scofflaw."[3] Although alcohol sales are no longer categorically prohibited under the Constitution, a new generation of scofflaws is using social media to illegally resell rare bourbons.

In 2021, a user in a Kentucky secondary market Facebook group posted an image of seven boxes containing Blanton's Gold single barrel bourbon—a rare whiskey known for its collectible bottle toppers depicting the parts of a horse's stride with corresponding letters spelling B-L-A-N-T-O-N-S.[4] In the comment section he posted another image with three lines of text: "FS[5]: [horse emoji] Gold w/ Box (x7), ISO[6]: 200 ea, Sunday…Pickup." This

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1 *See STILL SEEK NAME OF DRY LAW-BREAKER: Examine 30,000 Words in D. King Contest*, BOSTON DAILY GLOBE (Jan. 3, 1924), https://s3.amazonaws.com/s3.documentcloud.org/documents/1271680/20-000-words.pdf.

2 *Id.*

3 *ARE YOU A SCOFFLAW? This is the Epithet For a Lawless Drinker of Illegal Liquor Which Won $200 Prize in Contest of Delcevare King of Quincy*, BOSTON DAILY GLOBE (Jan. 16, 1924), https://s3.amazonaws.com/s3.documentcloud.org/documents/1271678/scofflaw.pdf.

4 This introduction is based on a real transaction conducted in a Kentucky Facebook secondary market group on October 2, 2021. A portion of this transaction is on file with the author. *See* Photograph of Seven Boxes of Blanton's Gold, Kentucky BSM Group, FACEBOOK (Oct. 2, 2021) (post on file with author).

5 "FS" is short for "For Sale."

6 "ISO" is short for "In Search Of."

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posting is one of many secondary market listings designed to evade social media algorithms and federal and state law.[7]

Almost immediately, users started commenting. One buyer offers "180 x 1," but the seller turned him down writing, "sorry. Firm at 200." Another buyer inquired which letters are available and asked, "are you accepting [recycling emoji as a stand in for trading alcohol]." The seller confirmed that he had the correct toppers but is not interested in trades, writing, "mainly looking for [deer/buck emoji for dollars] right now, but would consider if fair [recycling emoji]."

A third buyer asked, "DD?"—inquiring about the date when the distillery dumped the bourbon from the barrel. The seller responded "3-11-21," and the prospective buyer said, "dang close but need 3/7 thank you." Still another buyer commented, "son born 3/10. I'll take one but can't meet . . . tomorrow. Potentially could on Monday during day." The seller agreed to meet Monday, the buyer responds "PM" [private message]. The seller commented: "6 left."

Other buyers did not fuss over the details and simply commented "BIN" (buy it now). A final "BIN" offer came too late (about an hour after the initial post), and the seller replied, "they're gone, but I should have more next week and I can honor pricing."

Transactions in excess of a thousand dollars, coded language, and semi-formal selling rules are commonplace on the Kentucky group and the many other secondary market groups on social media that support the black-market sale of rare bourbon.[8] But should this sale be illegal?

Recognizing that online secondary markets undermine states' efforts to ensure alcohol remains untainted, prevent fraudulent sales, and restrict minors' access to alcohol, attorneys general from forty-six states sent open letters to Facebook, Craigslist, and eBay in October 2019 asking the platforms to curb the black-market sales.[9] Although eBay took steps to limit the sales on its platform, Facebook and Craigslist still have secondary market

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[7] This essay references Facebook posts in secondary market groups that may be deleted or hidden. Some posts are in private groups, or the author may delete the post after a transaction. The posts are also difficult to retrieve if Facebook shuts the group down for violating its terms and conditions. The essay primarily references two active secondary market Facebook groups at the time of writing: a Kentucky group with 2,500 members and a national group with 3,800 members.

[8] Secondary markets could arguably be called "gray" markets because they deal in otherwise legal goods. I refer to secondary markets as black markets because that is the term used by the National Association of Attorney's General. *See* Letter from Nat'l Ass'n of Att'ys Gen. to Scott Schenkel, CEO, Ebay, Mark Zuckerberg, CEO, Facebook, & Jim Buckmaster, CEO, Craigslist 1 (Oct. 22, 2019) (https://naagweb.wpenginepowered.com/wp-content/uploads/2020/10/Final-Letters-Merged.pdf) [hereinafter NAAG Letter]; *MARKET*, WESTLAW PRECISION: BLACK'S LAW DICTIONARY, https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default) (click "Secondary Sources on "get started" toolbar, then click "Black's Law Dictionary" on "Tools & Resources" toolbar on right, search "market" under "Dictionary term," and it is result 64 on p. 4 of results) (last visited Mar. 6, 2023) (describing Black Market as "[a]n illegal market for goods that are controlled or prohibited by the government, such as the underground market for prescription drugs").

[9] *See* NAAG Letter, *supra* note 8, at 1–2.

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groups or alcohol resale postings. Under these circumstances, why are legislators and social media companies unable or unwilling to effectively enforce laws that prohibit the private resale of alcohol? Is there a better way to address legislators' concerns about secondary sales, either through clamping down more effectively or allowing greater alienation?[10]

This note seeks to illustrate the scope and impact of bourbon secondary markets. In Section II.A, I offer a brief historical primer on alcohol regulation in the United States before focusing on secondary market sales. Although much of the writing on alcohol secondary markets is non-academic, Section II.B uses these sources to help illustrate how these secondary markets function. Section II.C explores the countervailing concerns of lawmakers and industry leaders regarding the restriction of secondary peer-to-peer sales. Finally, Section III examines how lawmakers could better respond to the alcohol secondary market. This could take on one of two diverging approaches: additional restrictions and more vigorous enforcement of existing laws or reformation of state laws to allow a greater degree of free alienation. Under current laws, technology companies are insulated from potential liability when users resell alcohol on their platforms. Although these companies have taken steps to quell secondary alcohol sales, they may take a more aggressive stance if laws are changed to shift liability to these platforms. Law enforcement officials could also enforce existing laws more aggressively against unlicensed sales. Alternatively, recently passed legislation like the Kentucky Vintage Spirits Bill offers a welcome alternative to increased enforcement and could be a starting point for future reform.

I. BACKGROUND: FROM PROHIBITION TO REGULATION

A. *Historical Background*

Anyone familiar with American history knows this country has a complicated relationship with alcohol. George Washington, known for distilling whiskey at Mount Vernon, attempted to run for the Virginia House of Burgesses in 1755 without providing voters with free alcohol, as was customary.[11] Washington lost his bid but learned his lesson. "Three years later, Washington provided 144 gallons of rum, punch, wine, hard cider, and beer" to win with 307 votes—each vote costing almost half a gallon of alcohol.[12] On September 14, 1787, Washington and a group of fifty-four

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[10] Most law students learn in property class that property consists of a "bundle" of rights including: use, exclusion, and transfer (alienation). *See e.g.*, Peiter v. Degenring, 71 A.2d 87, 90 (Conn. 1949) ("restrictions upon the free and unrestricted alienation of property [are not upheld] unless they serve a legal and useful purpose).

[11] *See* W.J. RORABAUGH, PROHIBITION, A CONCISE HISTORY 12 (2019) [hereinafter RORABAUGH].

[12] *Id.*

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guests (including several Framers) gathered at the City Tavern in Philadelphia to celebrate Washington's departure from the Constitutional Convention and the near completion of the document.[13] In one night, the party ran up an impressive tab—roughly $15,400 in today's currency, including charges for broken wine glasses, decanters, and tumblers.[14] Other seminal events in the Revolutionary Period, such as planning the Boston Tea Party and Thomas Jefferson penning and revising the Declaration of Independence, took place in taverns.[15]

As the new nation grew, Americans settled into areas like Kentucky and converted excess corn into whiskey.[16] By 1810, distilled spirits counted for ten percent of the country's manufacturing sector and liquor licenses served as a major revenue source for municipalities.[17] "No state government[] licensed, taxed, or otherwise controlled alcohol."[18]

However, Americans also increasingly recognized the social ills of alcohol and sought to curb or abolish consumption. This "temperance" movement had roots in the colonial period with early prohibition legislation beginning with an 1851 Maine statute.[19] Northern religious and abolitionist leaders drove the first wave of prohibition.[20] The second wave of prohibition centered around a "local option" or statewide prohibition.[21] Two church-based organizations, the Women's Christian Temperance Union and the Anti-Saloon League, played important roles in pushing state legislation and "dry" candidates as part of the third wave of prohibition—culminating in the Eighteenth Amendment.[22]

In the early twentieth century, the Prohibition movement took on a national character in its third wave. Irrespective of party, the Anti-Saloon League backed dry candidates and used pressure politics to keep United States representatives and senators in line.[23] In late 1917, Congress passed

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13 *See* Steve Hendrix, *The Bender That Began America: Bar Tab Shows Framers Celebrated a Newly Finished U.S. Constitution and a Future President*, CHI. TRIB. (Feb. 22, 2018), https://www.chicagotribune.com/nation-world/ct-george-washington-bar-tab-20180222-story.html.

14 The party drank: fifty-four bottles of Madeira wine, sixty bottles of claret, twenty-two bottles of porter, twelve bottles of beer, eight bottles of hard cider, and seven large bowls of punch. *See id.*

15 *See* RORABAUGH, *supra* note 11, at 13.

16 *See id.* at 15

17 *See id.*

18 *Id.*

19 *See* S. J. Mennell, *Prohibition: A Sociological View*, 3 J. AM. STUD. 159, 160 n.3 (1969), https://www.jstor.org/stable/27552891 [hereinafter Mennell].

20 *See id.* at 160.

21 *Id.* at 161.

22 *Id.*

23 *See id.* at 162–163. the Prohibition coalition was unique in American history and it is doubtful that any other social movement could align Southerners (who feared alcohol caused African Americans to commit crimes) with African American leaders like Booker T. Washington (who believed that alcohol hindered African American progress). *See Prohibition Helps the Negro*, 39(13) SACRED HEART REV. 208 (1908), https://newspapers.bc.edu/cgi-bin/imageserver.pl?oid=BOSTONSH19080321-01&getpdf=true; *see also* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION, 42–43 (2011).

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the 18th Amendment banning the "manufacture, sale, or transportation of intoxicating liquors . . ." and sent it to the States for ratification.[24] Nebraska became the thirty-sixth state to ratify the amendment, cementing Prohibition as the supreme law of the land.[25] Congress also promulgated the Volstead Act of 1919 to implement the 18th Amendment's provisions.[26] Among the more draconian provisions in an already strict law, the Volstead Act defined the term "intoxicating" as anything containing more than one half of one per cent alcohol—effectively banning all beer, wine, and liquor.[27] Prohibition came into effect at midnight on January 16, 1920.[28] The thirteen-year Noble Experiment had begun.

Concurrent with Prohibition was a period of cultural change popularly known as the Jazz Age.[29] Many pre-Prohibition saloons closed, while secret bars called "speakeasies" opened to serve thirsty scofflaws.[30] Unlike the saloon culture of pre-Prohibition, the nascent American bar culture enabled men and women to drink together and allowed Americans of different backgrounds to interact.[31] Speakeasies often used passwords, employed word-of-mouth advertising, and bribed law enforcement to look the other way.[32] "One estimate says that for every legitimate bar that closed during Prohibition, six speakeasies opened in its place."[33]

Americans who continued to imbibe also risked consuming alcohol with questionable provenance. Some private organizations, like the Yale Club in New York City, stored enough pre-Prohibition alcohol to last all thirteen years—only running out the same month that Prohibition was set to expire.[34] Other scofflaws relied on illegally imported alcohol to safely imbibe.[35] The biggest danger came from homemade bootleg alcohol, such as "bathtub gin," which could contain industrial alcohol used in paint, antifreeze, and as a solvent in many mechanical processes.[36] In response, the federal government ordered industrial alcohol manufacturers to add poison to the products to

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24 U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI; *see also* Mennell, *supra* note 19, at 162.

25 *See* Mennell, *supra* note 19, at 162.

26 *See id.*

27 *See id.*

28 *See id.*

29 *See* John Edward Hasse, Jazz, Smithsonian Music (March 2016), https://music.si.edu/story/jazz ("The imposition of Prohibition in the 1920s, and the prevalence of jazz in the speakeasies that followed in Prohibition's wake, quickly turned jazz into both a musical and cultural phenomenon, to the point that author F. Scott Fitzgerald dubbed the era the "Jazz Age.'").

30 RORABAUGH, *supra* note 11, at 10.

31 *See* id.

32 *See* id.

33 *Prohibition: Speakeasies, Loopholes and Politics*, NPR (June 10, 2011), https://www.npr.org/2011/06/10/137077599/prohibition-speakeasies-loopholes-and-politics.

34 *See* RORABAUGH, *supra* note 11, at 51.

35 *See id.* at 61.

36 *Id.* at 57, 60.

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make them undrinkable.[37] Bootleggers often cut their products with tainted alcohol (either industrial or distilled in an unsafe manner) leading to several deaths.[38]

Another consequence of Prohibition is the rise of organized crime in major cities. Powerful gangsters, such as Al Capone, used connections, bribery, and violence to control Chicago's illegal alcohol industry.[39] In a brazen move, Capone sent four hired guns dressed as police officers to interrupt another gang's meeting, lined five opponents and two witnesses against a wall, and executed their rivals in a hail of machine gun fire.[40] The event came to be known as the St. Valentine's Day Massacre, and the public reacted with disgust for the criminal underworld and the Prohibition laws that incentivized it.[41] Prosecutors struggled to connect Capone to the violence, but Capone eventually went to prison for tax evasion.[42]

States tended to spend little on Prohibition enforcement, so the federal government usually prosecuted violators.[43] Federal courts quickly adopted plea bargaining to cope with the backlog of cases—often scheduling days where hundreds of Volstead Act violators would plead guilty to a lesser charge and pay a small fine.[44]

After thirteen years the Noble Experiment ended in 1933.[45] The 21st Amendment abrogated the 18th Amendment, but the Jazz Age changed drinking culture forever.[46] States largely took control of supervising the production, sale, and distribution of alcohol, and that remains the case today.[47] One longstanding prohibition, under federal and state law, is that unlicensed individuals may not purchase alcohol from other unlicensed individuals.[48] Nevertheless, secondary market sales, especially for bourbon, have exploded—thanks to online platforms such as Facebook.[49]

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37 Prominent Prohibitionist Wayne Wheeler commented: "The government is under no obligation to furnish the people with alcohol that is drinkable, when the Constitution prohibits it. The person who drinks this alcohol is a deliberate suicide." *Id.* at 60.

38 *See* id.

39 *See* RORABAUGH, *supra* note 11, at 62-63.

40 *See id.* at 63.

41 *See id.* at 63–64.

42 *See id.* at 64.

43 *See id.* at 77–78.

44 *See id.* at 76–77.

45 *See* Mennell, *supra* note 19, at 175.

46 U.S. CONST. amend. XXI.

47 *See* Harry G. Levine & Craig Reinarman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 MILBANK Q. 466 (1991), https://www.jstor.org/stable/3350105.

48 *See* 27 C.F.R. § 31.141 (2023); *e.g.*, KY. REV. STAT. ANN. § 243.020(1) (2021).

49 *See* Stewart O'Nan, *Thirsty for Unicorns: On the Hunt for High-End Bourbons*, WALL ST. J., (Aug. 7, 2019, 9:49 AM), https://www.wsj.com/articles/thirsty-for-unicorns-on-the-hunt-for-high-end-bourbons-11565185759.

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B. *The State of Bourbon Resale—Legal and Illegal*

1. Limitations in the Legal Alcohol Market Encourage Illegal Secondary Sales

Although previous research examined a variety of secondary markets, both legal and illegal, there is limited inquiry into secondary markets for spirits. Conor Lennon and Tom Shohfi offer a good example of how online alcohol secondary markets function.[50] While Lennon and Shohfi focus primarily on the returns for bourbon whiskey as suitable alternative investment instead of the economic and legal incentives that create the market itself, they also illustrate the uniqueness of alcohol as a secondary market and the difficulty in finding a suitable comparison for a better legal model.

Lennon and Shohfi note that major distilleries are reluctant to drastically raise prices and the supply of bourbon is restricted by its production process and distribution.[51] The authors surmised that major incumbents' "aversion to increasing prices for their most-popular bourbons . . . creates shortages and leads to reselling in secondary markets."[52] This shortage is also driven by the value generally gained from aging bourbon for a longer period of time.[53] For example, the Scottish Company Whisky Auctioneer sold a 1974 bottle of A.H. Hirsch Reserve 15 year for 5,700 pounds (6,709 dollars[54]) at a September 2021 auction.[55] Because valuable bourbons tend to be aged longer, the short-run supply is highly inelastic, and distilleries are unable to quickly increase output in response to increased demand.[56] The bourbon supply also suffers from distribution problems. In most U.S. jurisdictions, the alcohol

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50 *See* Conor Lennon & Tom Shohfi, *Unbridled Spirit: Illicit Markets for Bourbon Whiskey*, 191 J. ECON. BEHAV, & ORG. 1025 (Nov. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstractid=3950800 [hereinafter Lennon & Shohfi].

51 *See id.* at 1026, 1028.

52 *Id.* at 1028.

53 Congress recognized bourbon whiskey as a "distinctive product[] of the United States" and laid out minimum requirements for identifying spirits as such. 27 C.F.R. § 5.143 (2023). Although "Bourbon whisky" has standards such as where it can be distilled and what ingredient ratio is required, there is no strict legal requirement for aging unless the product is labelled as "straight" bourbon whiskey (which requires a minimum two-year aging period). *Id.*

54 Assuming an exchange rate is 1.1771 USD/EUR, which was the average for September 2021. *See Euro to US Dollar Spot Exchange Rates for 2021*, EXCH. RATES U.K., https://www.exchangerates.org.uk/EUR-USD-spot-exchange-rates-history-2021.html (Last Visited Mar. 6, 2023).

55 *See A.H. Hirsch Reserve 1974 15 Year Old / 1st Release Auction*, WHISKY AUCTIONEER (Oct. 2021), https://whiskyauctioneer.com/lot/5004764/ah-hirsch-reserve-1974-15-year-old-1st-release.

56 *See* Lennon & Shohfi, *supra* note 50, at 7.

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market is split into three "tiers": manufacturers, distributors, and retailers.[57] Private companies may not control more than one of the three tiers, and each tier builds in its own profit margin and transaction costs.[58] Although this note does not seek to judge the wisdom of the three-tier system, it is worth acknowledging that manufacturers cannot dictate the prices charged by retailers, much less those charged by private individuals on the secondary market.[59] Manufacturers lack the kind of power to curb secondary market sales that a ticketed organization like a sports club could enjoy.[60]

The limited number of rare bottles are distributed to a limited number of liquor stores throughout the country. As Lennon and Shohfi note, "many bourbons are allocated using lotteries and overnight queuing, leading to profitable reselling in secondary markets."[61] In liquor control states, such as Virginia, certain allocated items are automatically used in lotteries reserved for state residents.[62] These distribution methods, based on luck rather than willingness to pay, are conducive to secondary markets.

2. Limitations on Alcohol Resale and the Kentucky Vintage Spirits Bill

Those who possess rare bourbon have limited outlets for disposing of rare bottles. In Kentucky, it is not uncommon for family members to discover unopened bottles in a relative's attic.[63] Historically, many distilleries included whiskey in their workers' compensation packages.[64] However, it is illegal for an unlicensed person to sell a bottle of distilled spirits or wine

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57 *See* Blake, *Buffalo Trace to Crack Down on Secondary Market*, BOURBONR BLOG (Dec. 1, 2015), http://bourbonr.com/blog/buffalo-trace-to-crack-down-on-secondary-market/(discussing Buffalo Trace holiday season email).

58 *See id.*

59 *See id.*

60 For a discussion of secondary markets in sports ticket sales, see Alexander P. Frawley, *Revoking the Revocable License Rule: A New Look at Resale Restrictions on Sports Tickets*, 165 U. PA. L. REV. 433, 439 n.26 (2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9566&context=penn_law_review (discussing how sports clubs discourage ticket scalping by threatening to revoke the license created by a ticket).

61 Lennon & Shohfi, *supra* note 50, at 1.

62 *See Lottery System Update*, VA. ALCOHOLIC BEVERAGE CONTROL AUTH. (Jan. 25, 2021), https://www.abc.virginia.gov/products/limited-availability/lottery. Virginia recently experimented with overnight queuing in lieu of the traditional lottery system. *See* Josh Rosenthal, *High-end Bourbon Drinkers Weathering the Cold for Chance at Bottle*, Fox (Nov. 19, 2021), https://www.fox5dc.com/news/high-end-bourbon-drinkers-weathering-the-cold-for-chance-at-bottle.

63 *See* Tim McKirdy, *The Landmark Kentucky Law Bringing Vintage Bourbon to the Masses*, VINEPAIR (Sept. 15, 2020) https://vinepair.com/articles/kentucky-vintage-bourbon-law/.

64 *See id.*

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directly to another unlicensed person in Kentucky.[65] Violators are guilty of a Class B misdemeanor for the first offense, a Class A misdemeanor for the second offense, and a Class D felony for the third and each subsequent offense.[66] Such transactions are likewise generally illegal under federal law.[67] This leaves few options other than consuming or disposing of the alcohol. Kentuckians may donate alcohol to a charitable group for a charity event or auction—provided the organization holds a special temporary alcoholic beverage license.[68] The only statutorily permissible way an unlicensed individual can sell a bottle of alcohol in Kentucky is through the commonwealth's "Vintage Spirits Bill."[69]

Under the Vintage Spirit Bill, which is the colloquial name for several changes to Kentucky alcohol regulations from 2018, a non-licensed individual may sell alcohol to a licensed retailer for resale to consumers provided that the alcohol is a "vintage distilled spirit."[70] The licensed retailer must report several details from the transaction to the Kentucky Department of Alcoholic Beverage Control including: (1) the name, address, state license number and phone number of the purchaser, (2) the name, address, and phone number of the seller, (3) the brand name and quantity of each distilled spirit purchased, (4) the date of purchase, and (5) any prior purchases from the same seller.[71] Vintage distilled spirits are defined as a package or packages of distilled spirits that are unopened, not owned by a distiller, and "are not otherwise available for purchase from a licensed wholesaler within the Commonwealth."[72] Although there was debate about whether the statute should only cover older bottles, popularly known as "dusties," licensed Kentucky retailers and bar owners have interpreted the statute to allow the

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65 *See* KY. REV. STAT. ANN. § 243.020 (West 2021) ("A person shall not do any act authorized by any kind of license with respect to the manufacture, storage, sale, purchase, transporting, or other traffic in alcoholic beverages unless the person holds . . . the kind of license that authorizes the act").

66 *See* KY. REV. STAT. ANN. § 243.990 (West 2021) (Penalties).; Class B misdemeanors carry a maximum prison sentence of less than ninety (90) days and a fine of up to 250 dollars. *See* KY. REV. STAT. ANN. §§ 532.020(3), 534.040(2)(b) (West 2021). Class A misdemeanors carry a prison sentence from ninety (90) days to twelve months in prison and a fine up to 500 dollars. *See* KY. REV. STAT. ANN. §§ 532.020(2), 534.040(2)(a) (West 2021). Class D felonies carry a prison sentence from one to five years in prison and a fine between 1,000 dollars and 10,000 dollars or double any gain from committing the offence, whichever is greater. *See* KY. REV. STAT. ANN. §§ 532.020(1)(a), 534.030(1) (West 2021).

67 *See* 27 C.F.R. §§ 31.141, 31.3 (2023).

68 *See* KY. REV. STAT. ANN. § 243.036 (West 2017).

69 Chuck Cowdery, *The Bourbon Secondary Market Is Now Legal in Kentucky, Sort Of*, GO-WINE FOOD & BEVERAGE KNOWLEDGE PORTAL (Jan. 04, 2018) https://www.go-wine.com/wine-article-1047-The-Bourbon-Secondary-Market-Is-Now-Legal-in-Kentucky-Sort-of.html; 804 KY. ADMIN. REGS. 5:080 (2018); KY. REV. STAT. ANN. §§ 241.010(71)(72) (2021), 243.232 (2018).

70 KY. REV. STAT. ANN. § 243.032 (West 2018).

71 *See* 804 KY. ADMIN. REGS. 5:080(3)(1)–(5) (2018).

72 KY. REV. STAT. ANN. § 241.010(71) (2021).

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purchase of bottles from any vintage other than the current year.[73] The Vintage Spirits Bill represents a welcome exception to the general rule that alcohol cannot be legally resold by non-licensed individuals. Nevertheless, in Kentucky and across the U.S., several online groups continue to operate illegal secondary markets for bourbon with little interference from law enforcement.

C. *Policy Justifications for Restricting Unlicensed Peer-to-Peer Sales and Technology Companies' Responses*

1. Lawmaker Concerns Regarding Secondary Alcohol Sales—In General and Online

State and federal government officials advance several reasons for opposing peer-to-peer unlicensed alcohol sales including: the risk of minors acquiring alcohol and the danger of counterfeit, fraudulent, or mislabeled products.[74] Even though the three-tier system is imperfect, distillery companies highlight that it provides a good chain of custody for spirits.[75] Alcohol on the secondary market lacks the obvious provenance of a legitimate retail transaction.[76] Other countries, like Costa Rica and the Dominican Republic have encountered widespread tampering and resale of tainted alcohol.[77]

In its open letters to Facebook, eBay, and Craigslist, the National Association of Attorneys General noted that, "[t]he consumer may not know this method of alcohol sales is illegitimate…" and that "[b]ad actors may exploit the anonymity of a digital platform to evade regulation, law enforcement, taxation and responsibility."[78] Also, the letters appealed to the companies' "ethical and moral responsibility to protect customers" and their

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[73] The Kentucky Alcoholic Beverage Control Department (KABC) was authorized to make administrative regulations for the bill post-enactment. Cowdery, *supra* note 69. Some organizations suggested "vintage" be defined as pre-metric bottles from before 1981 (when spirits were bottled under the imperial system). *See id.* In the first month of registered transactions in January 2018, however, licensed sellers self-reported purchasing bourbon bottled as recently as 2016. *See* Nick Beiter, *The Bourbon Secondary Market is Legal in Kentucky…Now What?*, BREAKING BOURBON (Nov. 6, 2018), https://www.breakingbourbon.com/article/kentucky-spirits-law-now-what. This is also consistent with more recent news outlets declaring any bottles from before the current year as "vintage." *See id. See also* Susannah Skiver Barton, *How Kentucky's Vintage Spirits Law Has Changed Alcohol Retail*, VINEPAIR (Oct. 14, 2021), https://vinepair.com/articles/kentucky-spirits-law-alcohol-retail/.

[74] *See* NAAG Letter, *supra* note 8, at 1.

[75] *See* Blake, *supra* note 47.

[76] *See* NAAG Letter, *supra* note 8, at 1.

[77] *See* Frank Holland, *Facebook Bans Sales of Alcohol and Tobacco Between Users*, CNBC (July 26, 2019), https://www.cnbc.com/2019/07/26/facebook-bans-sales-of-alcohol-and-tobacco-between-users.html.

[78] NAAG Letter, *supra* note 8, at 1.

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"technical prowess and power to accomplish basic protections against illegal sales."[79] The NAAG specifically requested that the companies review their content and remove postings for illegal alcohol sales and transfers and develop and deploy programming to block such postings.[80]

2. Technology Companies Efforts to Limit Secondary Market Sales and Limitations

The named companies took steps to clamp down on secondary market sales, and—perhaps anticipating future scrutiny—did so even before the 2019 letter. In June 2019, Facebook shut down the group "Bourbon Secondary Market" (BSM), which boasted upwards of 55,000 members.[81] After BSM, secondary markets fractured into private splinter groups.[82] Lennon and Shohfi examined the humorously titled Facebook group "Strong Water Trading" (SWT) and noted that since the 6,000-member group shut down, replacement groups emerged, including some that serve particular geographic areas or product categories.[83] In contrast to Facebook's whack-a-mole problem, eBay currently forbids all alcohol sales except approved wine sellers, closely scrutinizes its listings, and removes illegal posts.[84] Craigslist also prohibits alcohol sales, but a cursory search shows that bourbon sellers remain active on the site.[85]

The pattern of market shutdown and renewal is analogous to previous scholarship examining the online market for illegal drug sales on the Dark Web. Bhaskar et. al noted that as online drug sales have grown, some platforms have been seized and shut down by law enforcement.[86] Other platforms have abruptly shut down when the operators ran off with the money they were holding for pending transactions.[87] Nevertheless, there was no evidence that these large-scale exits stopped buyers or sellers from engaging in online drug transactions, as new platforms quickly arose to replace those

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79 *Id.*

80 *See id.* at 1–2.

81 *See* Chris Wright, *Inside the Dying World of Facebook's Whiskey Black Markets, the Best Place to Buy (and Sell) Rare Bourbon*, GEAR PATROL (Sept. 12, 2021) https://www.gearpatrol.com/food/drinks/a700726/bourbon-secondary-market-facebook/.

82 *See id.*

83 *See* Lennon & Shohfi, *supra* note 50, at 9.

84 *See Alcohol Policy*, EBAY, https://www.ebay.com/help/policies/prohibited-restricted-items/alcohol-policy?id=4274 (last visited Mar. 6, 2023).

85 *See Prohibited*, CRAIGSLIST, https://www.craigslist.org/about/prohibited (last visited Mar. 6, 2023).

86 *See* Venkataraman Bhaskar et al., *The Economic Functioning of Online Drugs Markets*, 159 J. OF ECON. BEHAV. & ORG. 426, 427 (2017), https://www.researchgate.net/publication/318776142_The_Economic_Functioning_of_Online_Drugs_Markets [hereinafter Bhaskar et. al.].

87 *See id.*

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taken down.[88] The authors concluded that "the market seems to reconstitute itself rapidly and so continues to rapidly grow . . . ."[89]

Part of the reason Facebook secondary market groups endure is that they operate with rules to evade detection and removal. For example, the Kentucky group's rules require no text in the body for a buying, selling, or "in search of" post.[90] Furthermore, users may not use dollar signs.[91] Any comment saying "BIN" means "buy it now," and the commentor is bound to that purchase.[92] Finally, buyers and sellers must use private messaging to arrange payment and meet-up logistics.[93] Failure to follow the rules may result in the offender being banned from the group by one of the group's administrators.[94] And if the Kentucky group is ultimately discovered and shut down, the group's administrators have a smaller backup group already established.[95]

The Facebook groups are also cohesive in the absence of legal enforcement mechanisms or formal rating systems found on other selling platforms. As Lennon and Shohfi point out, "The fact that [secondary market] groups…can function smoothly is somewhat surprising, especially given they cannot resort to violence to enforce property rights due to the physical distance between participants."[96] This also contrasts with earlier scholarship from John Donohue and Steven Levitt who suggest that violence is a likely substitute in the absence of enforceable contracts and well-established property rights.[97] Instead, secondary market groups rely on moderators to enforce the group rules—blacklisting scammers and rulebreakers and often calling them out explicitly in a post. Buyers and sellers may also ask for references as part of the negotiating process. This allows other group members to vouch for a party, thereby ensuring a smooth transaction.

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88 *See id.*

89 *Id.*

90 Group Rules, *Kentucky Bourbon Secondary Market*, FACEBOOK (Mar. 17, 2021) (copy on file with author).

91 *See id.*

92 *Id.*

93 *See id.*

94 *See id.*

95 *See* Backup Group Post, *Kentucky Bourbon Secondary Market Group*, FACEBOOK (Mar. 22, 2021) (copy on file with author). A similar secondary market group conducting sales at a national level went through three iterations during the course of writing this comment. The first group was named with three emojis (a hushing face, a glass of whiskey, and the recycling emoji) and boasted more than 6,000 members before being shut down in fall 2021. The currently active backup group boasts around 3,800 members. Finally, the backup group to this group boasts 1,000 members but is currently paused. Presumably buyers and sellers will migrate to the third group if Facebook shuts down the current group *see* Backup Group Post, *National Secondary Market Group*, FACEBOOK (Nov. 27, 2021) (copy on file with author).

96 Lennon & Shohfi, *supra* note 50, at 9.

97 *See id.* (citing John Donohue and Steven Levitt, *Guns, Violence, and the Efficiency of Illegal Markets*, 88 AM. ECON. REV. 463–67 (1998)).

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A second distinguishing factor is that reputation and norms help keep the Facebook secondary market groups together in the absence of formal rating systems available on other online sales platforms. In the previously mentioned survey of Dark Web drug sales, the authors examined over 1.5 million online drugs sales to determine if online platforms created a significant moral hazard problem—that is, would dealers be more likely to adulterate or tamper with the quality of their products online?[98] Although only a small minority of the transactions examined resulted in a negative seller review, bad ratings subsequently lead to significant sales reductions and market exit.[99] The authors concluded that online drugs seemed to be higher quality than those in street-level deals because the presence of feedback offers more information to the buyer relative to street sales.[100]

A third factor that stymies social media platforms' response is simply a matter of priorities. Facebook, in particular, removes more than 100 million pieces of content each year for sexual exploitation, hate speech, violent content, and terrorism.[101] Given the sheer number of posts, Facebook uses content monitoring algorithms to sift through content—arguably leading to mixed results.[102] In addition to policing objectionable content, Facebook also removes hundreds of millions of spam posts and many fake accounts every year.[103] This content moderation is also in the context of heightened scrutiny of large technology corporations. Given the sheer quantity of content Facebook reviews, subject prioritization (such as a focus on disinformation and hate speech), and overt efforts to evade the reviewing algorithm (such as coded language), it is unsurprising that secondary market alcohol sales persist.

3. Technology Company Protections from Liability for Secondary Alcohol Sales

In addition to the limitations in the previous section, social media companies also

have a high degree of legal protection from liability for secondary alcohol sales under a legal framework known as Section 230. Congress enacted the Communications Decency Act ("CDA") as part of the

98 *See* Bhaskar et. al., *supra* note 86, at 3.

99 *See* Bhaskar et. al., *supra* note 86, at 3.

100 *See* id.

101 *See* Kirsten Grind, *Inside 'Facebook Jail': The Secret Rules That Put Users in the Doghouse*, WALL ST. J., (May 4, 2021), https://www.wsj.com/articles/inside-facebook-jail-trump-the-secret-rules-that-put-users-in-the-doghouse-11620138445.

102 *See* id.

103 *See* Sheera Frenkel, *Facebook Says It Deleted 865 Million Posts, Mostly Spam*, NY TIMES (May 15, 2018), https://www.nytimes.com/2018/05/15/technology/facebook-removal-posts-fake-accounts.html.

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Telecommunications Act of 1996.[104] Section 230 of the CDA "immunizes providers of interactive computer services against liability arising from content created by third parties."[105] Section 230's use of the phrase "publisher or speaker" reflects its use in the New York Supreme Court case *Stratton Oakmont Inc. v. Prodigy Services Co.*[106] In that case, an internet service provider voluntarily removed posts from its message boards "on the basis of offensiveness and bad taste."[107] The Court held that the provider had become a publisher for the messages it failed to delete and could be liable for defamatory statements.[108] In passing Section 230, Congress wanted to allow interactive computer services "to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete."[109]

Section 230 contains two provisions that repulse *Stratton Oakmont*. The operative provision, § 230(c)(1), states "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[110] The second provision eliminates liability for interactive computer service providers and users for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" or "any action taken to enable or make available to…others the technical means to restrict access to [objectionable] material."[111] Section 230(e)(3) also states that "[n]o cause of action may be brought and no liability may be imposed under any State of local law that is inconsistent with this section."[112]

Section 230(c)'s twin provisions are often compared to a sword and a shield: "platforms are shielded from liability, but they also get a sword to moderate the content they host."[113] Section 230 does not protect online services that do not have lawful purposes. For example, Ross William, who allegedly operated the online drug marketplace "Silk Road" under the name "Dread Pirate Roberts," was unable to raise a Section 230 defense to civil

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104 *See* Gonzalez v. Google LLC, 2 F.4th 871, 886 (9th Cir. 2021).

105 *Id.*

106 *See id.* at 887 (citing Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229, at *1 (S.D.N.Y. Mar. 7, 2000)).

107 Stratton Oakmont, Inc., 1995 N.Y. Misc. LEXIS 229, at *4.

108 *See* id.

109 Gonzalez, 2 F.4th at 887 (quoting Stratton Oakmont, 1995 N.Y. Misc. LEXIS 229, at *4).

110 47 U.S.C. § 230(c)(1).

111 *Id.* § 230(c)(2).

112 *Id.* § 230(e)(3).

113 Emily Stewart, *Ron Wyden wrote the law that built the internet. He still stands by it – and everything it's brought with it*, VOX (May 16, 2019), https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality.

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liability.[114] The Court noted that "[e]ven a quick reading of [Section 230] makes it clear that it is not intended to apply to the type of intentional and criminal acts alleged to have occurred here."[115] Unlawful platforms like the Silk Road stand in contrast with "neutral" platforms, which, like physical tools, have an intended lawful use, but individual end users may use them for intended or unintended lawful ends or unlawful ends.[116]

Recently, courts have grappled with whether Section 230 protects neutral platforms from products liability for the actions of third-party users and sellers. One approach courts use to analyze this type of claim is to collapse these negligence claims into free speech.[117] In *Herrick v. Grindr LLC*, the plaintiff deactivated his account on a gay dating app after meeting his (now) ex-boyfriend.[118] After their relationship ended, the ex-boyfriend created a fake Grindr account in the plaintiff's name and, posing as the plaintiff, connected with more than a thousand users and invited men over to the plaintiff's house for violent sex.[119] The plaintiff alleged that Grindr failed "to incorporate widely used, proven, and common safety software" and "Grindr knew, but failed to warn, that its Grindr App has been and can be used as a stalking weapon."[120] The plaintiff argued that Section 230 did not extend to Grindr's operation or design. On appeal, the Second Circuit found that the plaintiff's claims arose from Grindr's management of its content, rather than its users.[121] The plaintiff's injuries stemmed from content submitted by the ex-boyfriend, and Grindr exercised a traditional publisher function by providing "neutral assistance" in the form of tools available to bad actors and the app's intended users.[122] The Court held that Grindr was protected under Section 230 from liability.

The Supreme Court of Wisconsin considered a similar products liability claim in *Daniel v. Armslist, LLC*.[123] Armslist.com is a firearms advertisement website that allows users to post, view, and sort through listings for firearms sales.[124] In Wisconsin, private sellers may sell firearms without conducting a background check.[125] Radcliffe Haughton posted a "want to buy" ad on Armslist and used the website to facilitate a private firearm purchase—even

114 *See* United States v. Ulbricht, 31 F. Supp. 3d 540 (S.D.N.Y. 2014).

115 *Id.* at 568.

116 *See* Will Duffield, *Circumventing Section 230: Product Liability Lawsuits Threaten Internet Speech*, CATO INST. (Jan. 26, 2021), https://www.cato.org/policy-analysis/circumventing-section-230-product-liability-lawsuits-threaten-internet-speech (comparing Section 230 to a hammer that could hammer nails or be used to hit someone). [hereinafter Duffield]

117 *See* id.

118 *See* Herrick v. Grindr LLC, 765 F. App'x. 586, 588 (2d Cir. 2019).

119 *See* Duffield, *supra* note 116.

120 *Id.*

121 *See* Herrick, 765 F. App'x. at 590.

122 *Id.* at 591; *see* Duffield, *supra* note 116.

123 *See* Daniel v. Armslist, LLC, 386 Wis. 2d 449 (Wis. 2019).

124 *See id* at 459.

125 *See id.* at 475.

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though he could not lawfully obtain a firearm because of a restraining order.[126] In October 2012, Haughton entered a spa and used the firearm to kill four people, including his ex-wife Zina Haughton, before turning the gun on himself.[127]

Zina's daughter sued Armslist alleging that the "design and operation" of Armslist.com negligently encouraged illegal sales to persons prohibited from owning firearms.[128] As in *Herrick*, the Court recontextualized the plaintiff's claim along traditional Section 230 analysis:

> The complaint alleges that Armslist breached its duty of care by designing a website that could be used to facilitate illegal sales, failing to provide proper legal guidance to users, and failing to adequately screen unlawful content. Restated, it alleges that Armslist provided an online forum for third-party content and failed to adequately monitor that content. The duty Armslist is alleged to have violated derives from its role as a publisher of firearm advertisements. This is precisely the type of claim that is prohibited by § 230(c)(1), no matter how artfully pled.[129]

Even though Armslist may have provided a tool that Haughton misused for an illegal end, it only provided a neutral tool.[130] Armslist's features that enabled Haughton to circumvent gun buying restrictions also facilitated lawful private gun sales.[131] *Herrick* and *Daniel* show Section 230 protection shields platforms from liability in cases where a third party abuses a neutral platform in pursuit of illegal ends.

However, recent decisions in other jurisdictions suggest that Section 230 immunity should be curtailed for ecommerce platforms in some situations. In *Loomis v. Amazon.com LLC*, a third-party seller on Amazon sold a hoverboard that caught fire and burned a consumer's hand and foot.[132] Although Amazon attempted to argue that it merely provided an online storefront for the third-party seller, the Court held that its businesses practices made it a "direct link in the vertical chain of distribution under California's strict liability doctrine."[133] The Court noted that unlike an online mall that charged a fixed amount for stores, Amazon was directly involved in the transaction by: (1) interacting with the customer; (2) taking the order; (3) processing the order to the third party seller; (4) collecting the money; and (5) being paid a percentage of the sale.[134] These factors made Amazon a retailer or distributor of consumer goods, open to liability.[135]

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126 *See id.* at 458–59.
127 *See id.* at 459.
128 *Id.* at 466.
129 Daniel, 386 Wis. 2d at 482.
130 *See id.* at 472–75.
131 *See id.* at 473 (discussing Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003)).
132 *See* 277 Cal. Rptr. 3d 769, 772 (Cal. Ct. App. 2021).
133 *Id.* at 780.
134 *See id.*
135 *See* id.

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The Court also found Amazon strictly liable under an alternative theory: the stream of commerce approach (or market enterprise theory). The Court predicated liability on (1) Amazon receiving a direct financial benefit in the form of fees, including a monthly subscription fee and a fifteen percent referral fee from the sale of the product; (2) Amazon's failure to prove that it was not integral to bringing the defective hoverboard to the initial consumer market; and (3) Amazon had control over, or a substantial ability to influence, the manufacturing or distribution process.[136] Therefore, the Court reversed the granting of Amazon's Motion for Summary Judgment.[137]

II. THE FORK IN THE ROAD: HOW SHOULD LAWMAKERS ADDRESS SECONDARY MARKET ALCOHOL SALES?

Based on the current state of secondary market alcohol sales, lawmakers have two potential avenues to curb illegal sales: either clamp down on online secondary markets or adopt new legal regimes that allow greater alienation through private transactions. This section will argue that that the clamping down approach, either through shifting Section 230 liability to platforms or through greater law enforcement, is unlikely to be effective in addressing secondary markets. Conversely, adopting laws that allow for private alienation, such as the Vintage Spirits Bill or laws analogous to firearms regulations, could be a viable approach to curb secondary markets.

A. *Clamp Down on Online Secondary Markets*

1. Put Greater Responsibility on the Technology Companies Hosting Secondary Market Groups

One approach to curbing secondary market sales would place greater legal responsibility on online platforms that host secondary markets. The caselaw surrounding liability under Section 230 suggests that social media companies could not be held liable for illegal alcohol sales or an injury caused by the sale of tainted alcohol. This also explains why the 2019 Attorney's General letter appealed to the technology companies' ethical and moral obligations to their customers—rather than a legal duty.[138] But assume for a moment that someone purchased tainted alcohol from an online secondary market and was injured as a result.

Although Section 230 does not protect online services that do not have lawful purposes, few would plausibly compare Facebook and Craigslist to sites like the Silk Road that only exist to facilitate illegal transactions. At the

136 *See id.* at 780–83.
137 *See id.* at 786–87.
138 *See* NAAG Letter *supra* note 8, at 2.

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very least, the online platforms mentioned in this article should not be categorically barred from raising a Section 230 defense.

Under the general Section 230 approach used in *Herrick* and *Daniel*, online platforms offer "neutral assistance" at most for secondary markets. It is true that these companies offer tools to connect buyers and sellers and facilitate transactions. However, Facebook forbids alcohol sales and actively removes secondary market groups. This behavior embodies the "sword" of Section 230 and contrasts with Grindr's failure to address a fake account (which was still covered by Section 230 immunity). Secondary market groups also actively evade detection with coded language and backup groups. This sort of user activity justifies using the "shield" of Section 230 to protect Facebook from liability for actors intentionally hiding illegal activity. This situation also contrasts with *Daniel*, which involved an unlawful purchase through an otherwise legal firearms purchasing site. If Armslist.com can avoid liability for failing to monitor the content of private gun sales, part of its core business, surely Facebook can avoid liability for illegal alcohol sales that (1) the platform actively discourages and shuts down, (2) exist in private groups outside the website's normal marketplace, and (3) are products of tactics designed to avoid detection.

Even under the ecommerce analysis in *Loomis*, Facebook could not be considered a "direct link in the vertical chain of distribution" [139] because it does not (1) interact with the alcohol buyer, (2) take the order, (3) process the order to the third-party seller, (4) collect the money, or (5) receive a percentage of the sale. Facebook resembles a traditional publisher in this case more than an active participant. Facebook would escape liability under the stream of commerce approach as well because it does not receive a direct financial benefit from the sale of the alcohol and cannot control or influence the manufacturing or distribution process. Therefore, Facebook could claim Section 230 protection if a third party user sold tainted alcohol in a secondary market group.

Although there is an ongoing debate around reforming Section 230, the phenomenon of black-market alcohol sales should not be included in that debate; this is an area where Section 230 operates as intended. Even before the 2019 Attorneys General letter, Facebook took steps to remove the largest secondary market groups and continues to remove groups today. Imposing greater liability, either through Section 230 reform or caselaw, would be more appropriate if Facebook actively promoted illegal sales or made no effort to stop them. Such is not the case here. The fact that secondary market groups take such elaborate steps to avoid being shut down shows that Section 230 is working as intended; imposing additional liability on platforms may not have a major impact on secondary market sales.

Another risk posed by greater online enforcement is that fragmentation may exacerbate the problems state and federal officials are concerned about.

139 *Loomis*, 277 Cal. Rptr. at 779.

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The existing literature on illegal online drug sales shows that repeat transactions and the ability to review sellers increased the quality of drugs sold. Unlike eBay or Craigslist, Facebook groups resemble actual marketplaces rather than one-off transactions. This allows for more stability through repeat transactions, seller reviews and references, and rules to organize trades. The illegal drug literature and Facebook's experience with secondary markets show that disbanded groups will often reform (although the membership count may decrease). Larger groups have an advantage over smaller groups because they can establish uniform rules to facilitate a greater number of transactions. Larger groups can also warn members of a potential scammer. Finally, the threat of being shunned by a larger group creates a deterrent effect for buyers and sellers—making them less likely to engage in unscrupulous behavior beyond the illegal transaction itself.

Although online platforms could arguably do more to curb secondary market sales, the status quo is not alarming. Thankfully, the United States does not face widespread alcohol tampering as other countries do. Another advantage is that secondary market groups are largely self-policing. However, these groups also take steps to insulate themselves from detection and removal. Given the active response of technology companies to secondary markets and the way these groups are organized, it is not a good idea to increase the platform's liability in hopes that it will more aggressively target the black-market groups.

2. Expand Legal Enforcement Against Buyers and Sellers

Another option to curb secondary market sales is to pursue legal action against buyers and sellers. Enforcement is so sporadic that I had trouble finding examples of people being arrested for reselling alcohol or buying from an unlicensed individual.[140] There are several reasons that legal enforcement is so infrequent, and these reasons also underscore why increased law enforcement is not an effective solution for black-market alcohol sales.

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140 *See 5 Arrested of First-degree Misdemeanors in Ohio Secondary Market Liquor Sales Crackdown*, DISTILLERY TRAIL (Jan. 7, 2019), https://www.distillerytrail.com/blog/5-arrested-on-first-degree-misdemeanors-in-ohio-secondary-market-liquor-sales-crackdown/ (The Ohio Investigative Unit (OIU) in conjunction with OHIO Liquor Control (OHLQ) arrested five individuals in 2019 for crimes related to unlicensed alcohol sales); Gordon Rago, *$750 Bottle of Whiskey Lands Maryland Man in Pa. Trouble*, YORK DAILY REC. (Sept. 14, 2017), https://www.ydr.com/story/news/crime/2017/09/14/750-bottle-whiskey-lands-maryland-man-pa-trouble/664504001/ (undercover Pennsylvania law enforcement arrested an individual who posted an advertisement on Craigslist before attempting to deliver a bottle as part of a secondary market resale); *See also,* Justin Jouvenal, *Prosecutors Allege an Inside Job. The Target? Rare Bourbon*, WASH. POST (2022) https://bit.ly/3ijzLq2 (Providing a recent high-profile example of a state employee facing legal consequences for leaking allocation information to bourbon hunters).

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Although the resale of drugs, like alcohol, is illegal, alcohol possession is not illegal per se. This distinction makes it harder to effectively deter illegal alcohol reselling. Moreover, transactions tend to be small, one-off, or involve references for the buyer and seller. These factors are overlayed with a priority problem; law enforcement officials have more pressing issues.

As noted in Section II.C.2, one problem that may limit digital platforms from more aggressively targeting secondary markets is the need to address other objectionable content such as hate speech or sexually exploitive material. Law enforcement officers probably have a similar calculus when it comes to arresting secondary market buyers and sellers. The secondary market is not as hierarchal as organized crime or drug rings, so arresting alcohol resellers probably has a small effect on the greater market in terms of deterrence or actual prevention (by removing a buyer or seller from the market). Instead, states correctly chose to go after the market itself—relying on technology companies to shut down secondary market groups to frustrate the market.

If secondary markets, as they currently function, led to widespread distribution of tainted alcohol or minor sales, there would be a stronger argument for redirecting law enforcement resources to correcting the problem. So long as these dangers are risks but not widespread realities, additional enforcement actions against secondary markets seems imprudent.

B. *Allow Greater Alienation of Alcohol for Resale*

1. States Should Adopt Similar Laws to Kentucky's Vintage Spirits Bill

An alternative to greater enforcement would allow for greater alienation.

Kentucky's Vintage Spirits Bill offers a good starting point for alcohol resales that protects the state interest in preventing tainted alcohol and sales to minors. The most obvious advantage of the bill is that unlicensed individuals have an outlet to sell alcohol. The bill also reinforces the chain of custody found in the three-tier system. If the product is counterfeit or tainted, law enforcement officers can access the buyer and seller information from the transaction because it must be reported to the state government.

One disadvantage of the bill, however, is that there is not a mechanism for unlicensed peer to peer sales. The Vintage Spirits Bill essentially creates a "fourth tier" in the three-tier system by adding an extra retailer. Retailers will likely buy bottles under the vintage spirits bill for more than they would pay a distributor for the same bottle. The retailer will also pass along its own profit margin and extra costs in the resale price. Although the bill creates additional transaction costs, it offers a legal alternative to the secondary market. If other states adopted similar measures, then there would be less

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incentive to use the secondary market. Buyers with a high willingness to pay will find rare bourbons more readily available, sellers can legally and more readily alienate their property, and the state's safety and regulatory interests remain protected.

2. The Secondary Market for Guns May Provide a Blueprint for Expanded Resales

Although the Vintage Spirits Bill provides an outlet for unlicensed Kentuckians to resell their alcohol, lawmakers should examine if this solution is suboptimal considering other potentially hazardous secondary markets. Specifically, it is easier for a Kentuckian to purchase firearms in a private sale than bourbon. As websites like Armslist.com show, private firearms sales between unlicensed individuals are legal and rarely require background checks. Such is also the case in Kentucky.[141]

One possible way to address secondary markets is to allow citizens to freely alienate alcohol as they can with guns. Sellers may still incur liability for fraudulent gun sales or knowingly selling a firearm to a person who is forbidden from possessing one.[142] A similar approach to secondary market sales could still punish wrongdoing, such as selling alcohol to minors, but allow for freer exchange of goods. This solution may be farfetched today given America's complicated history with alcohol regulations, but proposed firearms regulations may still offer a middle-of-the-road model for alcohol resale.

Former New York City Mayor Michael Bloomberg and his "Everytown for Gun Safety in America" lobby are known for pushing state and federal laws such as "universal background checks" to regulate firearms.[143] One prominent "Bloomberg law" forbids most private firearms sales unless the transaction is processed at a gun store using the same procedures as if the gun store were selling the firearm.[144] Some commentators have attacked the private sale laws on constitutional or policy grounds.[145] Others declare the requirement to be needlessly burdensome.[146] Such an arrangement may be burdensome to private firearms sellers who have a tradition of relatively free

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141 *See* KY. REV. STAT. ANN. § 237.020 (West 2007) (Residents of…Kentucky shall have the right to purchase [firearms] from unlicensed individual persons in Kentucky…"); *Id.* § 237.104 (West 2006) (No person, unit of government, or governmental organization shall [at any time] have the right to revoke, suspend…other otherwise impair…the right of any person to purchase [or] transfer…a firearm…"); *but see id.* (listing exceptions).

142 *See e.g.*, *id.* § 237.070 (LexisNexis 2022) (Treated as a Class A misdemeanor and required forfeiture and destruction of the firearm).

143 David B. Kopel, *Symposium Article: Background Checks for Firearms Sales and Loans: Law, History, and Policy*, HARV. J. ON LEGIS. 303, 304 (2016).

144 *Id.*

145 *See id.* at 305.

146 *See id.*

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exchange, but this "restriction" could be a gamechanger to private alcohol resellers.

The next logical step to safely allow greater alienation of rare alcohol would be to incorporate similar Bloomberg private sale regulations into the existing Vintage Spirits Bill. A private seller and buyer could agree to meet at a liquor store to sell a rare bottle of bourbon. The store could then process the transaction by examining the bottle for tampering, checking the ages of both parties, and recording the information required for a sale under the current Vintage Spirits Bill (such as the address, phone number, and product information). Such a system would preserve the bottle's provenance, allow for greater alienation, and would not be inconsistent with the framework already established by the Vintage Spirits Bill. On the other hand, legislators would need to ensure that retailers are incentivized to participate in the system and properly allocate liability for the resold product. In states like Kentucky, such an arrangement could directly compete with the Kentucky secondary market Facebook group by fulfilling the same function—albeit with greater legal certainty and safety. Small steps towards greater alienation, like the Vintage Spirits Bill, undercut secondary markets and will make illegal resales less desirable.

CONCLUSION

In 1924, when Prohibition was still relatively new, an African American community newspaper called *The Louisville Leader* published an anonymous article reflecting on the judiciary's uneven enforcement of the Volstead Act. The author wrote: "[t]he ability to enforce the laws – this is the acid test of the power of America. To admit that the government cannot enforce its laws is to admit that America has been weighed in the balance and found wanting. . . ."[147] Lawmakers face a similar dilemma in tackling secondary market alcohol sales. Ensuring alcohol remains untainted, preventing fraudulent sales, and restricting minor access to alcohol are all valid state objectives for alcohol regulation. However, the existence of online secondary markets for alcohol shows that the current regime is not working. The history of alcohol laws from Prohibition to regulation also demonstrates that the state and federal government can and should adapt when there are better alternatives.

Rare spirits are not moving to the highest value buyer, so there is a motivation to mark up and resell bottles purchased at MSRP. Online platforms help facilitate these transactions, and internal rules and coded language help these groups avoid detection and reconstitute if they are shut down. In short, the bourbon black market accounts for inefficient allocation

147 *It Can Be Done*, LOUISVILLE LEADER (Louisville, KY), Apr. 25, 1924, at 8.

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created by state and federal liquor laws, the inelastic supply of aged spirits, and the demand for rare spirits.

Rather than double down on the secondary market prohibition, lawmakers should look to other means to weaken illegal sales. Kentucky's Vintage Spirits Bill offers one common sense option, but alcohol laws should be expanded to allow some level of exchange between two unlicensed individuals. These reforms respect the state's interest in regulating alcohol while allowing individuals to alienate their private property more freely.

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ACCESS GRANTED: AN EXAMINATION OF EMPLOYEE BIOMETRIC PRIVACY LAWS AND A RECOMMENDATION FOR FUTURE EMPLOYEE DATA COLLECTION

Cristina Del Rosso

INTRODUCTION

Biometric technology has become ubiquitous in society. For example, we use our face to unlock our phones and use our thumbprints to unlock doors. It is estimated that over 75% of the U.S. uses some form of biometric technology.[1]

Employers increasingly use biometric information from their employees to keep track of computer logins, timekeeping, and restricted access points. Biometric authentication has many benefits for employers. For example, requiring user authentication to enter a restricted area or punch employee timecards increases security and reduces the risk of fraud. However, employer benefits from biometric use may be offset by employee tensions over their privacy concerns. Employees fear the potential misuse of their private information and may even object to the information collection as an invasion of privacy.[2] Perhaps an even more significant threat is the security of this data once handed over to the employer because many employers are free to collect, use, and manipulate their employees' biometric information without repercussions.

As a result of these risks, some states have implemented legislation that regulates the collection, storage, and use of biometric data.[3] For example, Illinois passed the "Biometric Information Privacy Act" ("BIPA") in 2008.[4] This law places several restrictions on the collection of employees' biometric data and is the "gold standard" for employee biometric legislation.[5] The Illinois legislature's goal in enacting this legislation was to provide for the "public welfare, security, [and] safety, [which would] be served by regulating

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[1] *Biometric Devices–Complete Guide on Technology*, RECFACES (Aug. 4, 2021), https://recfaces.com/articles/articles-biometric-devices.

[2] Although outside of the scope of this paper, there is currently no legislation providing that an employee cannot be fired for refusing to provide biometric data because, absent an agreement to the contrary, employees in the United States are at-will.

[3] E.g., WASH. REV. CODE § 19.375 (2017), TEX. BUS. & COM. CODE § 503.001 (2009), 740 ILL. COMP. STAT. 14/1-99 (2008).

[4] 740 ILL. COMP. STAT. 14/15.

[5] *Id.*; Gabrielle Neace, *Biometric Privacy: Blending Employment Law with the Growth of Technology*, 53 UIC J. MARSHALL L. REV. 73, 111 (2020).

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the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information."[6]

While some federal laws protect certain kinds of employee information in the workplace,[7] no one law secures an employee's personal data. However, states have enacted laws regulating pre-employment drug testing, the use and disclosure of social security numbers, and security breach notifications. If an employee's biometric information is leaked or stolen by hackers, recourse is not guaranteed. This leaves biometric technology as an open battleground between employers and employees.

Biometric data requires protection because it is derived from our own physical and behavioral characteristics, including our face, fingerprint, hand geometry, keystroke, signature, and voice. By its very nature, it is a unique identifier. Biometric data is not like a password. If a password is compromised, you can create a new one; biometric identifiers are irreplaceable.[8]

Thus, with an ever-increasing reliance on biometrics and a lack of associated privacy rights for employees, the time for legislation is now. The recognition of data privacy rights requires accountability at the state level and among employers to ensure safety for all employees. Other states must follow Illinois' lead and continue to enact similar statutes to BIPA and grant individuals the private right to protect and adjudicate offenses against their data.

This comment examines the relationship between biometric data and employment law. Part I of this comment will explore the background of biometric authentication, highlighting how and why employers use biometric data. Part I will also highlight the reasons why biometrics call for privacy protections. Part II is divided into four sections: (A) an overview of current laws that provide some level of privacy in the employment context; (B) the legal issues in the collection of data with a focus on data breach litigation; (C) the unsuccessful federal attempts for biometric privacy legislation; and (D) an overview of current state laws focused on biometric privacy. Finally, Part III will examine why current privacy protections are nonexistent or insufficient and encourage states to adopt biometric information privacy statutes that will provide sufficient protection of employees' biometric information.

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6 740 ILL. COMP. STAT. 14/5.

7 For example, the Health Insurance Portability and Accountability Act (HIPAA) protects employee health-related information, and the Genetic Information Nondiscrimination Act (GINA) protects employees against discrimination from their genetic profiles.

8 *See generally* April Glaser, *Biometrics Are Coming, Along with Serious Security Concerns*, WIRED (Mar. 9, 2016, 11:00 AM), https://www.wired.com/2016/03/biometrics-coming-along-serious-security-concerns/ ("It's hard to fake someone's ear, eye, gait, or other things that make an individual uniquely identifiable. But if a biometric is compromised, you're done. You can't get another ear.").

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I. BACKGROUND

Understanding the threat of biometrics requires an understanding of biometrics and the potential risks they impose on employees. Accordingly, this background defines biometrics, explores how biometric information is used in the workplace, and analyzes why biometric information deserves some level of privacy protection.

A. *Defining Biometrics*

Biometrics is "the measurement and analysis of unique physical or behavioral characteristics, such as fingerprint or voice patterns, especially as a means of verifying personal identity."[9] Biometrics is divided into two categories: (1) physical, biological characteristics, which are derived from a person's unique physical attributes—including fingerprints, facial recognition, and retina scanning[10]; and (2) behavioral characteristics, which are derived from a person's behavioral patterns—like speech patterns, length of stride, and typing speed.[11] Both of these categories can use biometrics for identification and authentication purposes.

Essentially, biometrics information is used to (1) identify the individual and answer the question "'who are you?'" and (2) authenticate the individual and answer the question "'are you really who you say you are?'"[12] In order to answer these questions, a biometric system must go through three phases: collection, live sample, and comparison. For example, if Person *A* wants to enter a controlled facility for the first time, *A* would scan his unique characteristic onto a biometric scanner that can capture his unique information and convert it into a template.[13] Then, a computer stores the template in a database.[14] Lastly, a database holds the biometric data for

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[9] Biometrics Definition, MERRIAM-WEBSTER ONLINE DICTIONARY, http:// www.merriam-webster.com/dictionary/biometrics (last visited Oct. 23, 2021).

[10] *What is Biometrics: Are Biometrics Safe to Use*, TECHINBUSINESS (Sep. 13, 2021), https://techinbusiness.org/what-is-biometrics-are-biometrics-safe-to-use/.

[11] *Behavioral Biometrics*, INT'L BIOMETRICS AND IDENTITY ASS'N 1, 4, https://www.ibia.org/download/datasets/3839/Behavioral%20Biometrics%20white%20paper.pdf (last visited Dec. 11, 2021).

[12] Susan Gross Sholinsky & Barbara J. Harris, *Biometrics in the Workplace*, THE J., TRANSACTIONS & BUS. (June 2018), https://www.ebglaw.com/wp-content/uploads/2018/06/PLJ-Jun18-Sholinsky-Feature-Biometrics-In-The-Workplace.pdf.

[13] Rigoberto Chinchilla, *Ethical and Social Consequences of Biometric Technologies*, AM. SOC'Y FOR ENGINEERING EDUC. 1, 5-6 (2012), https://peer.asee.org/ethical-and-social-consequences-of-biometric-technologies.pdf; Alison Grace Johansen, *Biometrics and Biometric Data: What is it and is it Secure,* NORTON (Feb 8, 2019), https://us.norton.com/internetsecurity-iot-biometrics-how-do-they-work-are-they-safe.html. (Last visited Oct. 24, 2021).

[14] Johansen, *supra* note 13.

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verification so the database can compare the new scan to the template previously provided by *A* should *A* decide to re-enter the controlled facility later.[15]

Using biometrics to identify a person is preferable due to the intrinsic uniqueness of biometric characteristics. Disregarding potential counterfeit efforts, the "chance of two users having the same identification in the biometrics security technology system is nearly zero."[16]

In 2012, the Federal Trade Commission ("FTC") issued a press release, titled *Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies*, in hopes of urging companies who use facial recognition technology to protect consumers' privacy.[17] In light of this goal, the press release details recommendations for companies, including urging them to "develop reasonable security protections for the information they collect," including best practices for retaining and destroying information.[18] The press release also suggested companies who use facial recognition technology should give consumers "clear notice" explaining "how the feature works, what data it collects, and how the data will be used" and provide consumers with a choice to not have their data collected or have their data deleted if their data was previously collected.[19]

B. *Biometrics in the Workplace*

By 2022, 40% of businesses plan to adopt biometric technology to reduce total costs and fraud.[20] Biometric data may be used for various business functions such as verifying entry to secure access points, timekeeping purposes to avoid "buddy punching," and improved access to computer systems.[21]

The use of biometric data has both advantages and disadvantages. The advantages of using biometric data in the workplace include increased convenience, accuracy, and security. It increases convenience and accuracy because employees are no longer required to remember different login

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15 Johansen, *supra* note 13.

16 Chien Le, *A Survey of Biometrics Security Systems* (Nov. 28, 2011), http://www.cse.wustl.edu/~jain/cse571-11/ftp/biomet.pdf.

17 Press Release, FTC, FTC Recommends Best Practices for Companies That Use Facial Recognition Technologies, (Oct. 22, 2012), https://www.ftc.gov/news-events/press-releases/2012/10/ftc-recommends-best-practices-companies-use-facial-recognition.

18 *Id.*

19 *Id.*

20 Khizar Sheikh, *Biometric Technology in the Workplace: No Harm, No Foul*? SPARK: ADP https://www.adp.com/spark/articles/2019/07/biometric-technology-in-the-workplace-no-harm-no-foul (last visited Oct. 24, 2021).

21 Sholinsky *supra* note 12; AccountingTools, *Buddy Punching Definition*, ACCOUNTINGTOOLS (Feb. 10, 2023), https://www.accountingtools.com/articles/buddy-punching ("Buddy punching occurs when one employee asks another person to clock in or out for him.").

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credentials or go through multiple steps for authentication. Additionally, recognition systems that depend on tangible objects, like a badge or password, can be easily compromised, as badges can be lost or reproduced, and passwords can be forgotten or stolen. Instead, security is enhanced with little up-front burden since the employee can enter a restricted area or login to a computer with a simple face or finger scan. A recognition system based on biometrics is not as easily compromised.

Accordingly, "the level of security provided by most biometric systems far exceeds the level of security provided by passwords."[22] Because the level of security is higher with biometric technology, it can also deter fraud since the technology can correctly identify individuals who have already registered and denies access to everyone else.[23]

However, even though biometric systems may seem more secure, the potential for vulnerabilities is high. Biometric systems can be bypassed or spoofed with fake fingerprints or high-resolution photographs of the face.[24] In fact, in August 2019, Biostar 2, a security platform that provides software for defense contractors and the United Kingdom police and government, suffered a massive breach involving over thirty million records which included facial recognition information and over a million fingerprint records.[25] The hackers were able to add their own fingerprints to the software, thus giving themselves access to whatever building the original user was authorized to access.[26]

In December 2021, Kronos, a human resources management provider that supplies various United States companies with employment resources, was hacked.[27] Aside from the payroll issues, which have caused many employers to switch from direct deposit to paper checks, concerns are mounting that employees' private information may have been compromised.[28]

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22 Chinchilla, *supra* note 13.

23 *Id.*

24 Cohen Coberly, *Hacking Fingerprints is Affordable and Simple, Says Kraken Security*, TECHSPOT (Nov. 23, 2021), https://www.techspot.com/news/92354-hacking-someone-fingerprint-affordable-simple-kraken-security-labs.html. Machine intelligence can prevent malicious threats, but additional biometric information is often needed to increase chances of detection; *see generally Behavioral Biometrics, supra* note 11, at 5.

25 Neace, *supra* note 5, at 105; Josh Taylor, *Major Breach Found in Biometrics System Used by Banks, UK Police, and Defense Firms*, THE GUARDIAN (Aug. 14, 2019, 3:11 PM), https://www.theguardian.com/technology/2019/aug/14/major-breach-found-in-biometrics-system-used-by-banks-uk-police-and-defence-firms.

26 *Id.*

27 Jennifer Korn, *Kronos Ransomare Attack Could Impact Employee Paychecks and Timesheets for Weeks*, CNN BUS. (Dec. 17, 2021), https://www.cnn.com/2021/12/16/tech/kronos-ransomware-attack/index.html.

28 *Id.*; Gustav Anderson, *Kronos (UKG) Data Breach Leaves Businesses in the Dark for "Several Weeks,"* WORKFORCE (Dec. 14, 2021), https://workforce.com/news/kronos-data-breach-leaves-businesses-in-the-dark-for-several-weeks.

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Additionally, there are studies examining the high probability of false identifications. For instance, in 2018, the American Civil Liberties Union ("ACLU") conducted a study using Amazon's facial recognition software, "Rekognition," where the software incorrectly matched 28 members of Congress to those people who had committed a crime.[29] A year later, the ACLU performed the same test, this time running the faces of members of California's legislators against 25,000 criminal mugshots.[30]

Aside from false identification problems, biometric systems are also expensive to install and maintain due to the specialized equipment required. Entities who use biometric information must consider how to store large amounts of data; this level of storage often requires the newest and most modern technology, which is often the most expensive.[31]

Biometric technology solutions are not far off in the future. For instance, ZKTeco, a security provider of access control systems, invented a piece of technology called SpeedFace, which is a face and palm verification and recognition sensor that can perform functions like access control and manage businesses premises.[32] Kisi, another access control system provider, has similar software which can also be unlocked via access card or smartphone technology.[33]

C. *Why Employee Biometrics Calls For Privacy Protection*

Biometric recognition systems will only become more common and more powerful as technology continues to advance. The risk of employee biometric data being breached is exacerbated by the nature and scope of the data being collected by the employer. Employers' unrestricted collection of biometric data can also encourage the information's misuse. This is a legitimate security concern, especially as the Identity Theft Resource Center reports the popularity of ransomware and phishing attacks against

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29 Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress with Mugshots*, ACLU (July 26, 2018, 8:00 AM), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28.

30 Anita Chabria, *Facial Recognition Software Mistook 1 in 5 California Lawmakers for Criminals, says ACLU*, L.A. TIMES (Aug. 13, 2019), https://www.latimes.com/california/story/2019-08-12/facial-recognition-software-mistook-1-in-5-california-lawmakers-for-criminals-says-aclu#:~:text=Facial%20recognition%20software%20mistook%201%20in%205%20California,software%20from%20being%20used%20with%20police%20body%20cameras.

31 Le, *supra* note 16.

32 *See generally* ZKTECO, https://www.zkteco.com/en/HybridBiometric4ZM/SpeedFace-V5L (last visited Mar. 24, 2023).

33 *See generally* KISI, https://www.getkisi.com/access-control-system (last visited Mar. 24, 2023).

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individuals.[34] Hackers are increasingly targeting businesses for logins and passwords to access consumers' personal information.[35]

An individual's biometric information is unique to that individual. A person's voice is a part of them, in a way that a social security or credit card number is not. Since it is so unique, personal, and unchangeable, it may be thought to be the worst kind of password.

Biometric data can be stored in a variety of different ways: (1) "locally in an individual's device, (2) on a centralized server that may reside inside or outside of the United States," or (3) by distributing the biometric data files in different locations.[36] These records can easily be compromised, just like any other computer system.[37] Once compromised, the very nature of biometrics makes it impossible to regain. As one scholar writes, "biometrics are the equivalent of a PIN that is impossible to change. The theft of biometric information amounts to permanent identity theft, and thus may be extremely difficult to counteract."[38]

The word "privacy" is absent from the text of the United States Constitution. Generally, the term "privacy" is described as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[39] The Fourth Amendment, which provides the right to be free from unreasonable searches and seizures, has been read broadly, especially regarding technology.[40] In 1890, Samuel D. Warren and Louis D. Brandeis authored *The Right to Privacy*, which articulated their view of privacy as the "right to be let alone," which has been interpreted to include "the individual's independence, dignity, and integrity."[41]

In 1977, the Supreme Court recognized the need to treat privacy as a means to protect various other facets of life, including the realization that information can be protected under an extension of the Fourth Amendment.[42] Incidentally, the Court has broadly recognized a constitutional privacy

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34 *Identity Theft Resource Center's 2020 Annual Data Breach Report Reveals 19 Percent Decrease in Breaches*, IDENTITY THEFT RES. CTR. (Jan. 28, 2021), https://www.idtheftcenter.org/post/identity-theft-resource-centers-2020-annual-data-breach-report-reveals-19-percent-decrease-in-breaches/?utm_source=email&utm_medium=tmiemail012821&utm_campaign=2020dbrreport.

35 *Id.*

36 Paul B. Keller & Jenny Shum, *Biometrics: Is It Always about You*, 2 THE J. ROBOTICS, ARTIFICIAL INTEL. & L. 75, 86 (2019).

37 Chinchilla, *supra* note 13.

38 Steven C. Bennett, Privacy Implications of Biometrics, PRAC. L. 13, 16-17 (2007).

39 ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (New York, Atheneum, 1st ed. 1967).

40 U.S. Const. amend. IV; *see generally* Riley v. California, 573 U.S. 373 (2014); Carpenter v. United States, 138 S. Ct. 2206 (2018).

41 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 195, 197 (1890); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964).

42 *See* Whalen v. Roe, 429 U.S. 589 (1977).

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interest in "avoiding disclosure of personal matters."[43] The Court further opined, in the interest of individual's privacy:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. . . . The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.[44]

The recent Supreme Court decision *Carpenter v. United States*[45] is the most relevant discussion of privacy concerning the role of privacy in society. The majority states that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'"[46] Ubiquitous scanning will soon become a way of life, and it cannot possibly be said that individuals want their private biometric information in public.

As one scholar points out, the ubiquity of biometric information floating around in the public could become more like an Orwellian 1984 scenario.[47] According to the scholar, civil liberties are especially threatened due to the rise of biometric scanning because mass amounts of personal information provides overwhelming power that can easily be misused or abused.[48]

II. CURRENT STATE OF AFFAIRS

This section explores the current data breach landscape with an emphasis on the employer-employee relationship. It then discusses current biometric data privacy laws in Illinois, Texas, and Washington and statutes around the rest of the United States and concludes with a discussion about the lack of federal biometric privacy regulations.

A. *Lack of Current Federal Statutes for Employee Privacy on Biometric Information*

Workplace privacy has become a significant issue for employers and employees as technological changes have expanded. The issue is likely not whether employers have a legitimate interest in running an efficient business; instead, the issue is understanding the limit to the employers' collection of

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43 *Id.* at 599-600.

44 *Id.* at 605.

45 *See generally* Carpenter v. United States, 138 S. Ct. 2206 (2018).

46 *Id.* at 2217 (quoting Katz v. United States, 389 U.S. 347, 351-52 (1967)).

47 *See generally* Mika Westerlund et al., *The Acceptance of Digital Surveillance in an Age of Big Data*, 11 TECH. INNOVATION MGMT. REV. (2021).

48 *Id.*

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personal biometric information and the standards for the collection, retention, and destruction of that information.

Generally, privacy in employment stems from various sources that ensure both the employer and employee are treated fairly: common law,[49] state laws and regulations,[50] federal laws and regulations, and federal statutes containing privacy restrictions applicable to employment.[51] However, there are no federal laws in place that would extend to protect an employee's biometric data collected by their employer.

B. *Legal Issues in the Collection of Data with a Focus on Data Breach Litigation*

Suppose that Company X fails to secure its employees' personal data stemming from the biometric identifiers it collects, leading to a data breach. In the hackers' hands are unique personal identifiers that may include fingerprints, facial images, and voice recordings. Employees whose data has been compromised are under the threat that the hackers will use their data for future criminal purposes.

The growing use of data allows hackers to "seek personally identifiable information to steal money, compromise identities, or sell over the dark web."[52] No sector is immune from these data breaches. There are many recent cases of consumer data stolen from retail establishments and technology platforms, financial institutions, and retail stores.[53]

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49 *See generally* Restatement (Second) of Torts §§ 652A-E (1997) (defining four privacy torts: unreasonable intrusion upon seclusion; appropriation of the name or likeness of another; unreasonable publicity given to private life; and publicity that unreasonably places another in a false light). The common law in some states recognizes one or more of these privacy torts.

50 At least two states, Delaware and Connecticut, have enacted laws requiring employers to provide prior notice before electronically monitoring employees. *See* Del. Code Ann. tit. 19, § 705 (2008); Conn. Gen. Stat. § 31-48d (2008). Some states, like California and Illinois, mandate that all parties to a communication provide consent to its interception in transit which means employers must receive consent from the employee before passing along their communications.

51 *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552(a) (2008); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, 12112(d) (2008); Electronic Privacy Communications Act, 18 U.S.C. § 2510; 18 U.S.C. § 2701; Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320(d)(2) (2008).

52 Alison Grace Johansen, *What is a Data Breach,* NORTON (Mar. 10, 2020), https://us.norton.com/internetsecurity-privacy-data-breaches-what-you-need-to-know.html.

53 E.g., In re SuperValu, Inc., 870 F.3d 763 (8th Cir. 2017); Remijas v. Neiman Marcus Grp., L.L.C., 794 F.3d 688 (7th Cir. 2015); In re Capital One Consumer Data Sec. Breach Litig., 488 F. Supp. 3d 374 (E.D. Va. 2020); In re Adobe Systems, Inc. Privacy Litigation, 66 F. Supp. 3d 1197 (N.D. Cal. 2014); *see generally* Dennis Green, et al., *If You Bought Anything From These 19 Companies Recently, Your Data May Have Been Stolen*, BUSINESS INSIDER (Nov. 19, 2019, 11:05 AM), https://www.businessinsider.com/data-breaches-retailers-consumer-companies-2019-1; Maria Henriquez, *The Top Data Breaches of 2021*, SECURITY MAGAZINE (Dec. 9, 2021), https://www.securitymagazine.com/articles/96667-the-top-data-breaches-of-2021.

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In the first half of 2021, nearly 100 million individuals were impacted by data breaches.[54] Since 2017, over 9,000 data breaches have been reported.[55] These data breaches have generated national attention and have given rise to concerns over privacy.[56] Although there is a plethora of instances of data breach litigation, with many of these cases being instructive to employers, this Note will focus on data breach litigations as they relate to the employer-employee relationship.

After a data breach, an employee may wish to recover for injuries arising from the risk of future identity theft. However, litigation depends on whether the threat of potential harm is enough for Article III standing.[57] As such, the injured plaintiff must demonstrate that: (1) they "suffered an injury in fact"; (2) the injury is "fairly traceable to the challenged conduct of the defendant"; and (3) "a favorable judicial decision" would likely redress the injury.[58]

In the general data breach context, the Second, Third, and Fourth Circuits hold that the risk of injury due to data breach litigation is too speculative to confer standing.[59] Meanwhile, the Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits hold that the risk of injury due to a data breach is sufficient to confer standing.[60] This uncertainty overlaps with the few circuits who have examined the issue of employer liability for future risk of harm and have disagreed over whether employees have standing to sue in a data breach situation.

For example, in 2011, the Third Circuit addressed whether a threat of future injury is sufficient to confer standing in *Reilly v. Ceridian Corp*.[61] In *Reilly*, a computer system containing the personal information of nearly 27,000 employees at 1,900 companies was hacked.[62] Employees filed suit against Ceridian Corp., even though no one knew for certain whether the

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54 Michael Novinson, *The 10 Biggest Data Breaches of 2021 (So Far)*, CRN (July, 23, 2021, 2:26 PM), https://www.crn.com/slide-shows/security/the-10-biggest-data-breaches-of-2021-so-far-/2.

55 *See* Ani Petrosyan, *Annual number of data compromises and individuals impacted in the United States from 2005 to 2022*, STATISTA (Feb. 24, 2023), https://www.statista.com/statistics/273550/data-breaches-recorded-in-the-united-states-by-number-of-breaches-and-records-exposed/ (compiling reported breach figures since 2017).

56 Green, *supra* note 53.

57 Lujan v. Defs. of Wildlife, 504 U.S. 555, 559 (1992). Article III of the Constitution confines the federal courts to adjudication of actual "cases" and "controversies." *Id.*

58 *Id.* at 560–61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

59 Whalen v. Michaels Stores, Inc., 689 F. App'x. 89 (2d Cir. 2017); Beck v. McDonald, 848 F.3d 262, 268 (4th Cir. 2017), *cert. denied sub nom*. Beck v. Shulkin, 137 S. Ct. 2307 (2017); In re SuperValu, Inc., 870 F.3d 763 (8th Cir. 2017).

60 Attias v. Carefirst, Inc., 865 F.3d 620 (D.C. Cir. 2017), *cert. denied* Carefirst v. Attias, 138 S.Ct. 981 (2018); In re: Horizon Healthcare Services Inc. Data Breach Litigation, 846 F.3d 625, 629 (3d Cir. 2017); Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x. 384, 386-87 (6th Cir. 2016); Remijas v. Neiman Marcus Grp., 794 F.3d 688, 693 (7th Cir. 2015); Robins v. Spokeo, Inc., 867 F.3d 1108 (9th Cir. 2017); Resnick v. AvMed, Inc., 693 F.3d 1317 (11th Cir. 2012).

61 664 F.3d 38 (3d Cir. 2011).

62 *Id.* at 40.

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hacker actually accessed or used the personal information.[63] To establish injury-in-fact, the employees relied on a potential future injury theory, claiming they suffered an increased risk of identity theft because of the data breach.[64] However, the Third Circuit found that the employees' "string of hypothetical injuries" injuries did not meet the injury-in-fact requirement.[65] The court further noted that the potential future harm was not sufficiently imminent to meet the injury-in-fact standard because "there [was] no evidence that the intrusion was intentional or malicious."[66]

Although the Third Circuit did not find a sufficient injury-in-fact for the employees in *Reilly*, other circuits have found injury-in-fact in the employment context when applying the same potential future injury test in similar data breach situations. Indeed, the D.C. Circuit in 2019 found that a group of employees sufficiently alleged an injury-in-fact after hackers breached U.S. government employee databases and stole government employee's personal information, including fingerprint records.[67] The D.C. Circuit held that the government employees established injury-in-fact because they faced a "substantial" risk of future identity theft, largely due to the sensitivity of the breached information, because "birth dates and fingerprints stay with us forever."[68]

In 2010, the Ninth Circuit was willing to recognize injury-in-fact when a thief stole a laptop from Starbucks in Washington that contained former and current employees' personal, unencrypted information.[69] The Ninth Circuit found that because the personal information had been stolen, the employee's allegations were more than "conjectural or hypothetical"; thus, the injury was "real and immediate" to establish injury-in-fact.[70]

The Supreme Court has failed to address whether a plaintiff who has been a victim of a data breach may allege an injury-in-fact due to the increased risk of identity theft—despite the clear circuit split, both in the consumer and employment privacy contexts.[71] That said, it is possible the recent Supreme Court decision of *TransUnion LLC v. Ramirez* provides insight which could be instructive for lower courts for establishing standing in data privacy cases.[72]

In *TransUnion*, Ramirez went to buy a car at a dealership, but when the dealership conducted a credit check on him, the credit report returned an alert matching Ramirez's name to a list of individuals deemed to be potential

63 664 F.3d 38 (3d Cir. 2011).
64 *Id.*
65 *Id.* at 44.
66 *Id.*
67 928 F.3d 42, 49 (D.C. Cir. 2019).
68 *Id.* at 56.
69 Krottner v. Starbucks Corp., 628 F.3d 1139, 1140 (9th Cir. 2010).
70 *Id.* at 1143.
71 *See* Attias v. CareFirst, Inc., 865 F.3d 620 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018).
72 141 S. Ct. 2190 (2021).

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national security threats to America.[73] As a result, Ramirez filed a class action suit against TransUnion for failure to use reasonable procedures to ensure the accuracy of credit card files and for providing those inaccurate reports to third parties.[74] The parties stipulated that only some of the members of the class had their credit reports sent to third parties.[75]

The Supreme Court found that only those consumers whose erroneous credit reports were actually provided to third parties suffered an injury sufficient to confer standing in Court.[76] The Court recognized that it was "difficult to see how a risk of future harm could supply standing when the plaintiff did not even know that there was a risk of future harm."[77] Thus, *TransUnion* may clarify concrete harm for injury-in-fact where a plaintiff, on behalf of a class, states a claim for actual harm—like identity theft—after a data breach. Similarly, *TransUnion* could be used to undermine a plaintiff's injury-in-fact claim if they assert the data breach increases their risk of future harm.

Presented with the opportunity to redress millions of individuals' concerns about their information after a data breach, legislators in all fifty states have enacted statutes regulating the collection of biometric data in relation to data breach notification laws.[78] While each state statute is different, each state provides citizens with the right to be notified if the data breach exposed personal information.[79]

Some states—Louisiana and Arkansas, for example—have expanded their definition of "personal information" to include biometric data.[80] In 2018, Louisiana amended its Data Breach Security Notification Law to include biometric data and required notice to any Louisiana resident affected by a data breach to receive notice within 60 days.[81] Private rights of action are permitted.[82] In 2019, Arkansas expanded the scope of "personal information" in its Personal Information Protection Act, a data breach act, to include biometric data which is defined as data that is "generated by automatic measurements of an individual's biological characteristics."[83]

Additionally, some states provide definitions of what constitutes a breach. For example, in Mississippi, a "breach" is an "unauthorized acquisition of electronic files…containing personal information of any

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73 141 S. Ct. 2190 (2021) at 2201.

74 *Id.* at 2200, 2202.

75 *Id.* at 2202.

76 *Id.* at 2208.

77 *Id.* at 2212.

78 *See generally Security Breach Notification Laws*, NAT'L CONF. ST. LEGISLATURES (July 17, 2020), https://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.

79 *Id.*

80 La. Stat. Ann. § 51:3073; Ark. Code Ann. § 4-110-103.

81 La. Stat. Ann. § 51:3073.

82 La. Stat. Ann. § 51:3075.

83 Ark. Code Ann. § 4-110-103.

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resident…when access to the personal information has not been secured by encryption."[84] In Pennsylvania, a "breach" is an "unauthorized access and acquisition of computerized data that materially compromises the security or confidentiality of personal information" that may cause loss or injury to any resident unless the personal information is encrypted or redacted.[85]

C. *Overview of Current State Laws Focused on Biometric Privacy*

A few states—Illinois, Texas, and Washington— have taken the initiative to create their own regulations concerning the protection and use of biometrics. Other states have passed data privacy statutes to protect data more generally. The discussion below will mention the critical provisions of the Illinois, Texas, and Washington statutes. Following thereafter is a brief overview of data privacy statutes.

1. Illinois

Illinois' Biometric Information Privacy Act was the first comprehensive legislation to establish safeguards "regulating the collection, use, safeguarding, handling, storage, retention, and destruction" of biometric data.[86] It defines "biometric information" as "any information, regardless of how it is converted, stored, or shared, based on an individual's biometric identifier used to identify an individual."[87] Under the statute, a "biometric identifier" includes "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry," but it does not include writing samples, photographs, or physical descriptions like height or eye color.[88]

BIPA applies to the collection of biometric data by any private entity.[89] BIPA prohibits businesses and other private organizations from purchasing, capturing, or obtaining personal "biometric information" unless the business first: (1) "informs the subject…in writing that a biometric identifier is being collected or stored; (2) informs the subject…in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and (3) receives a written release executed by the subject."[90] Any private organization who possesses biometric information must "store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry," storing the information in "the

84 Miss. Code Ann. § 75-24-29 (defining "breach of security").
85 73 Pa. Stat. §§ 2302.
86 *See* 740 ILL. COMP. STAT. 14/15.
87 *Id.* § 14/10.
88 *Id.* § 14/10. *See* 410 ILL. COMP. STAT. 513/5 to 513/10.
89 *Id.* § 14/5.
90 *Id.* § 14/15.

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same way as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information."[91] A private entity, like an employer, who has retained biometric information must provide, in writing, the ways in which they will dispose of the identifiers after the collection or within "[three] years of the individual's last interaction with the private entity, whichever comes first."[92]

BIPA permits an Illinois employee to directly sue their private employer who breaches the statute's requirements through the statute's private right of action provision.[93] The statute simply requires the aggrieved person show that an employer violated their rights established under the BIPA; the aggrieved need not allege actual injury or adverse effect.[94] BIPA gives rise to claims where liability can be established "regardless of whether damage can be shown and regardless of the violator's state of mind."[95] Furthermore, "a separate claim accrues under the [BIPA] each time a private entity scans or transmits an individual's biometric identifier or information."[96] The injured party can recover damages up to "$1,000 for each negligent violation of the act and $5,000 for each intentional or reckless violation" and reasonable attorney's fees and costs.[97]

The Illinois legislature detailed their concerns about the growing use of biometrics in their statute, finding that an individual's biometrics are "biologically unique to the individual; therefore, once compromised, the individual has no recourse . . . [and] is at a heightened risk for identity theft."[98] Accordingly, the Illinois courts have generally held that a BIPA violation is an invasion of privacy.[99]

BIPA has led to a plethora of lawsuits, but most of the BIPA lawsuits in the employment context surround one common technology: the punch clock. The modern punch clock scans an employee's fingerprint instead of stamping

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91 *See* 740 ILL. COMP. STAT. § 14/15(e).

92 *Id.* § 14/15(a).

93 *See id.* § 14/20. The Supreme Court of Illinois has interpreted a five-year Statute of Limitations into the BIPA statute. Tims v. Black Horse Carriers, Inc., --N.E. 3d--, No. 127801, 2023 WL 1458046 (Ill. Feb. 2, 2023).

94 Rosenbach v. Six Flags Ent. Corp., 129 N.E. 3d 1197, 1206 (Ill. 2019).

95 Snider v. Heartland Beef, 479 F. Supp. 3d 762, 772 (C.D. Ill. 2020).

96 Cothron v. White Castle System Inc., --N.E. 3d--, No. 128004, 2023 WL 2052410 (Ill. Feb. 17, 2023). The Illinois Supreme Court also discusses possibility that lower courts have the discretion to "fashion a damage award." *Id.* at *8.

97 740 ILL. COMP. STAT. 14/20(1)-(4). *But see* Namuwonge v. Kronos, Inc., 418 F. Supp. 3d 279, 286 (N.D. Ill. 2019) (dismissing a BIPA "claim for damages based on intentional and reckless conduct" because the plaintiff did "not allege any substantive details regarding whether the allegations were reckless or intentional.").

98 *Id.* § 14/5(c). *Supra* note 6 and accompanying text.

99 Rosenbach, 129 N.E.3d at 1206 (explaining that the Illinois legislature has "codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information."); Patel v. Facebook Inc., 290 F. Supp. 3d 948, 954 (N.D. Cal. 2018) (claiming that the Illinois legislature appropriately recognized that BIPA is "well-grounded in a long tradition of claims actionable in privacy law.").

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a punch card. In *Figueroa v. Kronos, Inc.*, Kronos provided timekeeping software that utilized biometric information to various employers in Illinois.[100] Figueroa was an employee at one of these businesses who was required to punch in and out of work using the Kronos timekeeping systems.[101] Figueroa alleged that Kronos' practices violated BIPA because Kronos never informed him "of the purposes or length of time for which Kronos was collecting, storing, using or disseminating [his] data" nor was he ever informed of a retention or destruction policy.[102] Figueroa successfully alleged a concrete informational injury to confer Article III injury,[103] and he was also successful in arguing that Kronos violated BIPA when they did not obtain written release from the employees before acquiring biometric data.[104] Further, Figueroa successfully stated a valid claim under BIPA because Kronos disseminated workers' biometric data "to other firms that hosted [biometric] information in their data centers."[105]

In *Snider v. Heartland Beef, Inc.*, Snider, and the other class action plaintiffs, were required to clock in and clock out of a shift or break using fingerprint authentication.[106] The court found that Snider had Article III standing to bring a BIPA claim against Heartland because they (1) failed to inform employees of the collection of biometrics and (2) failed to obtain a written release.[107] More importantly, the Illinois court found that the Illinois Workers' Compensation Act did not preempt Snider's BIPA claim because biometric identification injuries are "distinct from physical or psychological injuries" and employees "possess a right to privacy in and control over their biometric identifiers and biometric information."[108] The Illinois Appellate Court echoed this rationale in *McDonald v. Symphony Bronzeville Park LLC*, explaining that since BIPA does not require actual harm, it does not "[f]it within the purview of the Compensation Act, which is a remedial statute designed to provide financial protection for workers that have sustained an actual injury."[109]

The *Snider* and *McDonald* decisions are notable because, generally speaking, an injured employee cannot recover for an injury under a Workers' Compensation claim and the common law.[110] Although not entirely defined,

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100 454 F. Supp. 3d 772, 778–79 (N.D. Ill. 2020).

101 *Id.* at 779.

102 *Id.*

103 *Id.* at 781.

104 *Id.* at 783.

105 *Id.* at 785.

106 *Snider*, 479 F. Supp. 3d at 764.

107 *Id.* at 767.

108 *Id.* at 770 (internal quotations omitted).

109 174 N.E.3d 578, 586 (Ill. App. Ct. 2020).

110 In the collective bargaining context, see Walton v. Roosevelt University, 2023 IL 128338 (Ill. Mar. 23, 2023) (affirming that Section 301 of the Labor Management Relations Act preempts privacy claims under BIPA asserted by bargaining unit employees covered by a collective bargaining agreement).

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this exception is important for the development of BIPA because it may limit the number of lawsuits brought by employees.

2. Texas

The year after Illinois's enactment of BIPA, in 2009, Texas enacted its Capture or Use of Biometric Identifier ("CUBI").[111] CUBI protects the confidentiality of biometric identifiers, defined as "a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry" by restricting their collection, sale, lease, or disclosure.[112]

CUBI does not require a written release as part of their notice and consent laws, but the statute does require entities to store, transmit, and protect the data using reasonable care in the same manner as the business treats other confidential information.[113] CUBI requires the business to destroy biometric data within a "reasonable time" not to exceed one year after the biometric data was no longer needed.[114]

CUBI instructs companies not to capture information for "commercial purposes" without notice and consent, but CUBI fails to define what types of activities may be considered a "commercial purpose."[115] However, CUBI provides a unique exception in the context of employment law; the statute states, "[i]f a biometric identifier captured for a commercial purpose has been collected for security purposes by an employer," the biometric identifier expires upon "termination of the employment relationship."[116]

There is also no private right of action, unlike Illinois BIPA; instead, the state's Attorney General is the only one who can sue to enforce this statute.[117] The Attorney General can pursue up to $25,000 per violation.[118]

Thus far, CUBI has only been implicated in consumer privacy lawsuits. In February 2022, the Texas Attorney General sued Meta (previously known as Facebook) for violating CUBI.[119] The lawsuit seeks millions of dollars in

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111 TEX. BUS. & COM. CODE ANN. § 503.001.

112 *Id.* § 503.001(a).

113 *Id.* § 503.001(c)(2).

114 *Id.* § 503.001(c)(3).

115 *Id.* § 503.001(b); *See No Harm, No Foul? Not So, Under Illinois Biometric Privacy Law*, DLA PIPER: THE LABOR DISH (June 24, 2019), https://www.labordish.com/2019/06/no-harm-no-foul-not-so-under-illinois-biometric-privacy-law/#page=1 (proposing that "commercial purposes" could include an employer collecting biometric information to pay employee salaries).

116 Tex. Bus. & Com. Code Ann. § 503.001(c-2).

117 Tex. Bus. & Com. Code Ann. § 503.001(d).

118 *Id.*

119 Press Release, Ken Paxton, Texas Attorney General, Paxton Sues Facebook for Using Unauthorized Biometric Data (Feb. 14, 2022), https://www.texasattorneygeneral.gov/news/releases/paxton-sues-facebook-using-unauthorized-biometric-data.

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civil penalties based on Meta's practice of collecting facial geometry information from photographs its users posted on the social media site.[120]

3. Washington

Washington enacted its biometric privacy statute in 2017, eight years after Texas enacted CUBI.[121] The Washington statute broadly defines biometric information as any "data generated by automatic measurements of an individual's biological characteristics, such as a fingerprint, voiceprint, eye retinas, irises, or other unique biological patterns or characteristics that is used to identify a specific individual."[122] The Washington statute requires that every entity who possesses biometric information "take reasonable care to guard against unauthorized access to and acquisition of" such biometric information.[123]

The Washington legislature enacted this statute to allow their citizens more control over their data; they wanted to inform their citizens of the nature of the information they were providing for "commerce, security, and convenience" purposes without "consent or knowledge."[124] Thus, Washington's statute requires businesses in possession of biometric data to "disclose how it uses that biometric data, and provide notice to and obtain consent from an individual before enrolling or changing the use of that individual's biometric identifiers in a database."[125] However, the statute does not provide what notice and consent consists of but instead considers notice and consent "context-dependent."[126]

The Washington statute carves out an exemption for biometric data collected and stored by businesses for "security purposes"—"preventing shoplifting, fraud, or any other misappropriation or theft of a thing of value."[127]

The Washington statute does not provide for a private right of action and must be enforced "solely by the attorney general under the consumer protection act."[128] Violators can expect to pay up to $25,000.[129] The Washington statute has not been formally litigated.

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120 *Id.; see also* Pl.'s Pet. at 25-26, *The State of Texas v. Meta Platforms, Inc*., No. 22-0121 (Tx. Dist. Ct. Feb. 14, 2022).

121 WASH. REV. CODE ANN. § 19.375, *et seq*.

122 *Id.* § 19.375.010.

123 *Id.* § 19.375.020.

124 *Id.* § 19.375.900.

125 Id. § 19.375.020; Paresh Trivedi & Wai L. Choy, *A Conversation on Biometric Privacy*, PROSKAUER 48 (June 20, 2017), https://www.mcca.com/wp-content/uploads/2017/06/Biometric-Privacy-Presentation.pdf.

126 WASH. REV. CODE § 19.375.020.

127 *Id.* § 19.375.010.

128 *Id.* § 19.375.030.

129 *Id.* § 19.86.140.

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4. Comparing and Contrasting the Statutory Requirements

Not surprisingly, the previously discussed statutes' restrictions on the collection of biometric data overlap. Although the three statutes differ slightly in their protections, they generally all require notice and consent to collect biometric identifiers, reasonable security measures, and adequate disclosure, retention, and destruction guidelines.

For instance, BIPA defines private entities as "any individual, partnership, corporation, limited liability company, association, or other group, however organized."[130] However, CUBI and the Washington statute refer to the same private entities simply as a "person."[131] The Washington statute further defines a person as "an individual, partnership, corporation, limited liability company, organization, association, or any other legal or commercial entity, but does not include a government agency."[132]

All three statutes rely on a standard of "reasonable care," although with minor differences when addressing the protections of biometric data.[133] Specifically, BIPA requires entities to "store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry."[134] However, CUBI simply states that a person who possesses biometric information "shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the person stores, transmits, and protects any other confidential information the person possesses.…"[135] Similarly, Washington's statute requires those in possession of biometric information to "take reasonable care to guard against unauthorized access to and acquisition of biometric identifiers that are in possession or under the control of the person…."[136] Thus, BIPA requires a reasonable standard of care "focused on market custom by measuring a private entity's protection against other similar entities in the market or industry" whereas CUBI and the Washington statute are more focused on an objective standard of care.[137]

Further, BIPA, CUBI, and the Washington statute require consent before an entity can collect an individual's biometric information, but unlike the BIPA, CUBI does not require the consent to be in writing.[138]

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130 740 ILL. COMP. STAT. 14/10 (2008).

131 WASH. REV. CODE § 19.375.010. *See generally* TEX. BUS. & COM. CODE ANN. § 503.001.

132 WASH. REV. CODE § 19.375.010 (2017).

133 Michael A. Rivera, *Face Off: An Examination of State Biometric Privacy Statutes & Data Harm Remedies,* 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 571, 590 (2019).

134 740 ILL. COMP. STAT. 14/15 (2008).

135 TEX. BUS. & COM. CODE ANN. § 503.001.

136 WASH. REV. CODE § 19.375.020.

137 Rivera, *supra* note 133, at 590.

138 *See generally* TEX. BUS. & COM. CODE § 503.001(a)-- (e) (lacking a notice provision and written consent provision).

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Washington's statute is broader than BIPA and CUBI, only stating that affirmative consent is "context-dependent."[139]

Lastly, the Illinois legislature explained that their purpose in passing BIPA was to protect its citizens from the growing use of biometrics in the "business and security…sectors."[140] Likewise, the Washington statute also contains a statement of purpose, which explains that the Washington legislature enacted its statute after finding that citizens of Washington were increasingly being asked to disclose "sensitive biological information that uniquely identifies them for commerce, security, and convenience."[141] Meanwhile, CUBI does not contain any statement of purpose.[142]

Although there is some overlap, there are also important distinctions between the aforementioned state statutes. First, BIPA is the only statute that contains a private right of action, while CUBI only allows the attorney general to enforce the statute, and Washington narrows the requirement even more, only allowing the Washington attorney general to enforce pursuant to the consumer protection act.[143] Additionally, the Washington statute does not provide for the deletion of biometric data.[144]

5. Data Privacy Statutes

Some states have included biometric information within the definition of "personally identifiable information" or "personal information" within their data privacy statutes.[145] Other states have biometric privacy bills pending.[146]

For example, Arkansas enacted the Personal Information Privacy Act, which defines biometric data as a type of personal information.[147] The Arkansas statute requires a business who possesses this information to take all reasonable steps to destroy the information and requires the

139 WASH. REV. CODE § 19.375.020(2).

140 740 ILL. COMP. STAT. ANN. 14/5.

141 WASH. REV. CODE § 19.375.900.

142 *See* TEX. BUS. & COM. CODE § 503.001.

143 740 ILL. COMP. STAT. ANN. (West 2021). *See* TEX. BUS. & COM. CODE ANN. § 503.001 (West 2021); WASH. REV. CODE ANN. § 19.375.030.

144 WASH. REV. CODE § 19.375 (lacking a provision for the deletion of biometric data).

145 *E.g.*, Del. Code Ann. tit. 6, § 12B-100-104 (2005); N.C. Gen. Stat. § 75-65 (2005); Colo. Rev. Stat. Ann. § 6-1-716 (2006); Neb. Rev. Stat. §§ 87-802 to -806 (2006); Wis. Stat. Ann. § 134.98 (2006).

146 See *U.S. Biometric Laws & Pending Legislation Tracker*, BRYAN, CAVE, LEIGHTON, PAISNER (May 12, 2021), https://www.bclplaw.com/en-US/insights/us-biometric-laws-and-pending-legislation-tracker.html?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration for a complete list of pending legislation [hereinafter *U.S. Biometric Laws*]. Colorado has since joined "California and Virginia as the third state to enact its own comprehensive consumer data privacy legislation." For more information on the Colorado statute, see Deborah Howitt et al., *Start Your Data Compliance Countdown! Colorado Becomes Third U.S. State to Enact Privacy Law*, 26 No. 9 Cyberspace Lawyer NL 2 (Oct. 2021).

147 ARK. CODE ANN. § 4-110-101.

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implementation and maintenance of reasonable security procedures and practices.[148] The Arkansas Attorney General may enforce this statute.[149]

A Maryland statute is nearly identical to the Arkansas statute, except for its provision that "requires a business to take reasonable steps to protect against unauthorized access to or use of personal information," which includes biometric information, "including requiring in contracts with nonaffiliated third-party service providers that the service provider will implement and maintain reasonable security procedures and practices."[150]

Virginia's Consumer Data Protection Act ("VCDPA") went into effect on January 1, 2023.[151] This statute defines biometric data as "data generated by automatic measurements of an individual's biological characteristics" like a fingerprint or iris and will require consent prior to a private entity's collection or use of biometric data.[152] The VCDPA applies to all persons who conduct business in the state and either (1) "control or process the personal data of at least 100,000 consumers during a calendar year" or (2) "control or process the personal state of at least 25,000 consumers and derive at least 50% of its gross revenue from the sale of personal data."[153] Unfortunately, while the VCDPA expansively covers consumer rights, employment biometric data explicitly falls outside the scope of the statute.[154]

However, the California Privacy Rights Act ("CPRA"), which also went into effect on January 1, 2023, expands employers' obligations concerning biometric data.[155] This Act expands the protections already provided in the California Privacy Rights Act of 2020, which includes "biometric data" in the definition of "personal information."[156] The CPRA restricts the collection, storage, use, and retention of personal information, and requires companies who possess such information to perform annual cybersecurity audits and submit a risk assessment to the California Privacy Protection Agency.[157]

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148 *Id.* § 4-110-104.

149 *Id.* § 4-110-108.

150 MD. CODE. ANN., N.Y. COM. LAW § 14-3503(B)(1); *U.S. Biometric Laws*, *supra* note 146.

151 VA. SB. 1392 § 59.1-572; *U.S. Biometric Laws*, *supra* note 146.

152 Va. Code Ann. § 59.1-575.

153 Sarah Rippy, *Virginia Passes the Consumer Data Protection Act*, INT'L ASS'N OF PRIV. PROS., (Mar. 3, 2021), https://iapp.org/news/a/virginia-passes-the-consumer-data-protection-act/.

154 *Id.*

155 Zoe M. Argento, *California Privacy Rights Act for Employers: The Rights to Know, Delete, and Correct*, LITTLER MENDELSON P.C. (Aug. 16, 2021), https://www.littler.com/publication-press/publication/california-privacy-rights-act-employers-rights-know-delete-and-correct; *see* California Privacy Rights Act of 2020, 2020 Cal. Legis. Serv. Proposition 24 (to be codified at Cal. Civ. Code § 1798.100 et seq.).

156 Brandon P. Reilly & Scott T. Lashway, *The California Privacy Rights Act Has Passed: What's In It,* MANATT (Nov. 11, 2020), https://www.manatt.com/insights/newsletters/client-alert/the-california-privacy-rights-act-has-passed.

157 *Id.*

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D. *Unsuccessful Federal Push for Biometric Data Privacy Legislation*

In contrast to the states who have enacted regulations concerning the protection and use of biometrics from private entities, Congress has been less successful.

In 2014, Representative Stockman, introduced the Biometric Information Privacy Act, making it a crime for any business, government entity, or person to fraudulently obtain personal biometric information or disclose such information without the individual's consent.[158] The Bill defined personal biometric information as including "fingerprints, palm prints, hand geometry, iris scans, retina scans, and eye vein scans."[159] The Bill was referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, but it did not go further.[160]

In 2015, the U.S. Government Accountability Office completed a report, at the request of the Department of Commerce, to determine privacy issues related to facial recognition technology.[161] Although they did not make a recommendation, they urged that due the rapid changes in technology and the marketplace, the current privacy framework in commercial settings warrants reconsideration.[162] They did note the applicability of "laws governing the collection, use, and storage of personal information" and the applicability to other contexts.[163]

In 2019, Senator Markey, introduced the Privacy Bill of Rights Act to the Senate.[164] This Bill would have required the FTC to establish rules for businesses, the government, and persons who collect, use, retain, or share personal information that could identify a particular individual.[165] "Personal information" in this Bill includes biometric information like fingerprints or voiceprints or hand geometry.[166] This Bill was read twice to the Senate and then referred to the Committee on Commerce, Science, and Transportation.[167]

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158 *See* Biometric Information Privacy Act, H.R. 4381, 113th Cong. (2014), https://www.govtrack.us/congress/bills/113/hr4381 (last visited Oct. 24, 2021) (showing that a bill was introduced to Congress for federal biometric legislation in 2014).

159 *Id.*

160 *Id.*

161 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-621, *Facial Recognition Technology: Commercial Uses, Privacy Issues, and Applicable Federal Law* (2015).

162 *Id.*

163 *Id.*

164 Privacy Bill of Rights Act, S. 1214, 116th Cong. (2019), https://www.govtrack.us/congress/bills/116/s1214 (last visited Oct. 24, 2021) (showing that the bill did not receive a vote).

165 *Id.*

166 *Id.*

167 *Id.*

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In 2020, Senator Merkley, introduced the National Biometric Information Privacy Act of 2020.[168] The Act defined "biometric identifier" as a retina or iris scan, faceprint, fingerprint, or "any other uniquely identifying information based on the characteristics of an individual's gait or other immutable characteristic of an individual."[169] This Act required private entities to comply with the retention and destruction schedule created in the Act, and it would have limited private entities from capturing or receiving a person's biometric information unless they need it to provide a service or if the entity first receives consent from the individual.[170] This Act allowed any individual or state attorney, on behalf of residents of a state, who was injured to bring a civil action against the private entity that committed the violation.[171] This Act was read twice to the Senate and then referred to the Committee on the Judiciary.[172]

The Consumer Data Privacy and Security Act of 2020 was introduced to the Senate in 2020.[173] Unless the data collection meets certain exceptions, this Act would require individual consent before a company may collect or process "personal data."[174] Consent is not required if the data is collected in the performance of a contract, for example.[175] The Act explicitly excludes "employee data," which includes information collected "solely for the purposes related to the individual's employment."[176] The Act further excludes "information about employees or employment status collected or used by an employer pursuant to an employer-employee relationship, including information related to prospective employees and relevant application materials.[177] The Act designates the Federal Trade Commission as the federal agency in charge of administering this Act, and it does not provide for a private right of action so, even in a more broad consumer data protection context, an individual cannot sue to recover damages following a breach.[178] Although the bill has been introduced to the Committee on Commerce,

168 National Biometric Information Privacy Act of 2020, S. 4400, 116th Cong., https://www.govtrack.us/congress/bills/116/s4400 (last visited Oct. 24, 2021) (showing that the Bill did not receive a vote).

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 Consumer Data Privacy and Security Act of 2020, S. 3456, 116th Cong. (2020).

174 *Id.* § 3(a), (c).

175 *Id.* § 3(c).

176 *Id.* § 3(d).

177 *Id*. § 2(9)(C).

178 *See* Gregory M. Kratofil, Jr. & Elizabeth Harding, *Federal Privacy Legislation Update: Consumer Data Privacy and Security Act of 2020*, NAT'L. L. REV. (Mar. 14, 2020), https://www.natlawreview.com/article/federal-privacy-legislation-update-consumer-data-privacy-and-security-act-2020.

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Science, and Transportation, no further action has been taken since March 2020.[179]

In June 2022, Representative Pallone, Jr., introduced the American Data Privacy and Protection Act to the House.[180] This Act would have established consumer data protections to limit the collection, processing, and retention of consumer data.[181] As of December 2022, this Act is actively moving through the House.[182]

In January 2021, the FTC signaled its interest in focusing on the biometric industry when it settled with Everalbum, a now-defunct technology company that used facial recognition technology to sort and tag users' photos.[183] The settlement came after the FTC accused Everalbum of deceiving consumers about how it used its facial recognition technology and retained that data.[184] FTC Commissioner Rohit Chopra expressed his willingness to regulate biometrics in the wake of Illinois, Texas, and Washington passing laws related to biometric identifiers but did not specify the FTC's application to employment law.[185] However, biometric privacy is not a singular issue to consumer law, and thus any FTC regulation should seamlessly be applied to any context.

III. PROPOSED STATUTE

Employees' privacy rights are in peril as the collection, storage, use, and dissemination of biometric data continues to be collected in the course of their employment. Therefore, the question remains as to how to best protect sensitive employee information in the United States. Thus, this section suggests best practices for a statute as federal and state governments continue to respond.

Some scholars argue for federal legislation in order to streamline biometric privacy concerns. For example, political commentator and legal scholar Johnathan Turley argues for a national biometric data law to avoid a "patchwork system" of state laws because "biometric privacy is an interstate

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179 Consumer Data Privacy and Security Act of 2020, S.3456, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/3456/.

180 American Data Privacy and Protection Act, H.R. 8152, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/8152.

181 *Id*. §§ 203–10.

182 American Data Privacy and Protection Act, H.R. 8152, *All Actions*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/8152/all-actions?overview=closed#tabs.

183 *Federal Trade Commission Signals Increased Focus on Commercial Collection and Use of Biometric Data*, JD SUPRA: EVERSHEDS SUTHERLAND (Jan. 20, 2021), https://www.jdsupra.com/legalnews/federal-trade-commission-signals-1468222/. *See generally* Everalbum, Inc., No. 192-3172, 2021 WL 118892 (F.T.C.) (Jan 2021).

184 *Id.*

185 *See id.*; In the Matter of Everalbum and Paravision, FTC File No. 1923172 (F.T.C. Jan. 8, 2021) (Statement of Commissioner Rohit Chopra).

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problem demanding a single, comprehensive national approach."[186] However, legislators have tried to enact biometric laws, as evidenced from previous sections discussed in this Note, but no legislation has made it past Committee.[187]

As technology develops rapidly, employees' data remains vulnerable under current standards. The process to pass federal legislation is too slow. Waiting for federal legislators to draft and enact legislation could be disastrous because of the rapid development of technology.[188] Protections for employees can be implemented more effectively and efficiently if concentrated at the state level.

In any event, state legislatures pass more legislation and are often thought to be more proactive, compared to the "political theater" that often occurs in Congress.[189] Further, leaving the legislation to the states gives states more freedom to evaluate how they feel is best to protect employees while promoting innovation as federal legislation is often broader to satisfy different states' needs. This harkens back to a view expressed by Justice Brandeis, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[190]

As seen, Illinois, Texas, and Washington passed their statutes (with many states following in their footsteps) in the time that the federal legislators introduced three failed bills. Accordingly, Congress should leave the protection of employee data to state legislatures. The following is a discussion of the important provisions a state statute should include.

A. *Biometric Identifier Definition*

Any state who wishes to implement a biometric data protection statute must define "biometric data" in a way that protects as many biometric characteristics as possible while also keeping an eye on future technology.[191] Defining "biometric data" too narrowly will result in certain identifiers not being adequately protected, but defining "biometric data" too broadly will

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186 Jonathan Turley, *Anonymity, Obscurity, and Technology: Reconsidering Privacy in the Age of Biometrics*, 100 B.U. L. REV. 2179 (2020).

187 *See supra* section II.D.

188 *See generally* Daniel C. Vock, *State Labs: Congress Can Learn a Lot from State Legislatures*, GOVERNING (Sep. 2019), https://www.governing.com/topics/politics/gov-state-labs.html.

189 *Id.* "Showmanship will always be part of politics . . . but committee hearings at the state level tend to be more focused on getting public feedback about specific proposals."

190 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

191 *See* Michael Birnhack, *Reverse Engineering Informational Privacy Law*, 15 YALE J.L. & TECH. 24, 36–37 (2012) (recognizing the need for technology-based legislation to "speak in broader terms that can encompass more than one technology and . . . cover future technologies that are not yet known at the time of legislation").

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make it more difficult for companies to abide by the statute.[192] Any state who chooses to include biometric data in its definition of personal information must allow the statute to apply to the employment law sector—unlike Virginia.

B. *Notice and Consent*

Upon the collection of any biometric information, an employer must inform the employee in writing of (1) the type of biometric information collected, (2) the purpose for the collection, and (3) how long the employer will retain the information. To protect the interests of the employee and the business, the employee's consent should be in writing. If the employee's biometric information is used for a purpose other than what the employee initially agreed to—for example, the employer is now using facial scanning for building access and timekeeping purposes—the employee must provide consent.

Further, as has been litigated under BIPA, the statute should specifically provide that an employer cannot disclose or sell employee biometric information to third parties, including payroll service providers and timeclock providers, without first receiving consent from the employee.

Like BIPA, entities should use a reasonable standard of care to protect biometric information. Reasonable standard of care may also include "restricting employees' access to personal information to a need-to-know basis" or using "update[d] software and operating systems with the latest security patches" or "training employees on basic cybersecurity measures and taking precautions" like educating employees about scams or phishing emails.[193]

C. *Retention and Destruction*

The importance of the biometric data privacy statute of any state adopting safeguards to address the disposal of biometric information cannot be overstated. Each state should adopt the shortest retention schedule with an expedited destruction to minimize the risk that the biometric information can be compromised. Ideally, the statute should provide for the destruction of the information similar to the Illinois statute, which provides for the destruction of data either "when the initial purpose for collecting or obtaining such

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192 *See id.* at 39–42 (explaining when technology-based legislation should be flexible or more narrowly-tailored to the specific technology at issue).

193 Adam Brouillet, *Reasonable Measures in Cybersecurity: Guidelines for Breach Prevention and Response, Financial Poise* (Nov. 24, 2020), https://www.financialpoise.com/cybersecurity-best-practices/.

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identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first."[194]

A favorable statute would also specify that a company cannot collect biometric data from its employees without *first* providing the employee with the written retention and destruction policy.[195] If an employer wishes to change its retention and destruction policy, it must provide notice to the employee.

D. *Security Breach*

The ability to seek redress for a data breach is increasingly important, especially for employees as they often do not have a clear way to recover or protect themselves from future identity theft when their employer suffers an attack. Accordingly, any employee biometric privacy statute must address the situation where employees' biometric information has been accessed, or acquired, by a person without valid authorization. State legislatures should specify the definition of a breach in their statute and potentially define what constitutes an injury to avoid the uncertainty of the federal circuit split.

Given the reasonableness standard described above, a data breach would be actionable only if their storage policies and standard of care was not reasonable. This should be done to protect both employers' business interests and employees' interests in data privacy. This standard would also include an employer notifying employees within a reasonable amount of time about the breach; the notification should (1) specify what information the employer initially believes to be compromised and (2) include a duty on the employer to update the employee within a certain time period about additional information about the breach.

E. *Additional Provisions*

A private right of action, like the provision in BIPA, is tantamount to the discussion of statutory protection for biometric information. The right of an individual to sue privately emphasizes the importance of privacy rights. Although it is possible that employers may be subject to a mass of litigation if there is a private right of action,[196] a private right of action also encourages

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194 740 ILL. COMP. STAT. ANN. 14/15.

195 *See* Mora v. J&M Plating, Inc., --N.E. 3d.--, No. 2-21-0692, 2022 WL 17335861 (Ill. App. Ct. Nov. 30, 2022) (holding that BIPA requires employers to publish data retention and destruction policies to employees when or before it first obtains biometric data).

196 Sholinsky, *supra* note 12 (describing that a private right of action is likely the reason for the "disproportionate litigation brought under BIPA compared to the other biometric privacy states."); Joseph Jerome, *Private Right of Action Shouldn't Be a Yes-No Proposition in Federal US Privacy Legislation*, INT'L ASS'N FOR PRIVACY PROS. (Oct. 3, 2019), https://iapp.org/news/a/private-right-of-action-shouldnt-be-a-yes-no-proposition-in-federal-privacy-legislation/.

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businesses to adopt reasonable standards to protect biometric information. Similarly, a state legislature must decide whether violations can reoccur (such that each independent violation is a separate claim) or if the violation is capped.[197] This involves balancing individual employees' privacy interest with promoting general welfare of businesses.

Lastly, in the event only some states pass statutes governing employee's biometric data, it is important state legislatures include either a forum selection clause or provision which prevents employers from acting opportunistically against employees. In the employment biometric data context, the forum selection clause must be mandatory, so employers and employees are aware of their rights and responsibilities pursuant to the agreed-upon forum. Similarly, opportunism may look like an employer requiring the employee to waive their right to privacy as a term for employment.

CONCLUSION

Technology has increased efficiency and allows people to be interconnected, but the overreach has stepped into individual's personal privacy. Biometrics is easy to use and often portrayed as secure, but, like any technology, biometrics comes with risks in the form of privacy and security concerns.

As employers continue to embrace technology, state legislatures must enact biometric information privacy protections to reflect an understanding of the risks of innovation outpacing individual rights of privacy in the employment context. An employee should not be forced to compromise their right to privacy simply because they entered into an employment relationship.

While some states have taken the initiative and passed laws dedicated to biometric privacy, all states must continue to step up and protect individual's biometric data due that the strong likelihood that a federal statute will not pass. The level of protection afforded for biometric information must reflect its invaluable nature. Enacting biometric data protections through state legislation is the best option for quickly and efficiently regulating information.

197 One company is facing nearly $17 million in liability due to violations that occurred every time an employee scanned their fingerprints to access their pay stubs and computers. Cothron v. White Castle System Inc., --N.E. 3d--, No. 128004, 2023 WL 2052410, *7 (Ill. Feb. 17, 2023).

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INDECENT DISCLOSURE: THE THREAT TO PRIVATE INFORMATION UNDER PUBLIC DISCLOSURE LAW

Tom Dossey

INTRODUCTION

Very few people would be thrilled if told that their employer would immediately disclose their personal information when asked by a random passerby on the street. For the average person, and the average employer, that might mean a stranger learning their salary, home address, or emergency contacts. Barring a particularly bad boss, most people do not have to worry about this sort of risk; their private information is protected. But, if a company contracts to do work for the federal government, or even worse—a state—that risk is real, and it reaches far beyond emergency contacts.

Superficially, contracting with the government has significant benefits, particularly if a company wants a trillion-dollar paycheck. After all, 2021 saw federal spending reach over seven trillion dollars.[1] Fortunately, if one fails to secure federal funds, the states are an ideal—if less obvious—backup. In 2021, the ten states that spent the most on contractors exceeded two trillion dollars in awards for work on behalf of their governments.[2] But these paychecks come with strings attached, and—due to recent changes in the law—some of those strings are longer and tighter than even the federal government's.

Those strings include mandatory and forced information disclosure, required to even bid on a contract, for those persons and companies seeking to fulfill government orders.[3] The information flowing from contractors to governments regularly includes balance sheets, cash-flow statements, supplier information, and more, far exceeding the emergency contacts in the earlier hypothetical.[4] And the flow of such sensitive information does not stop at the government. Instead, states have implemented public disclosure laws—often imitating federal law—that frequently provide for mandatory disclosure of

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[1] *How much has the U.S. government spent this year?*, U.S. DEPT. OF THE TREASURY https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/ (last visited Jan. 12, 2022).

[2] *Find a State Profile*, USASPENDING, https://www.usaspending.gov/state (last visited Jan. 12, 2022).

[3] *Requests for Proposals*, EMPIRE STATE DEVELOPMENT, https://esd.ny.gov/doing-business-ny/requests-proposals (last visited Jan. 12, 2022).

[4] *See, e.g.*, Prairie Island Indian Cmty. v. Minn. Dep't of Pub. Safety, 658 N.W.2d 876 (Minn. Ct. App. 2003).

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government records, even when those records include information provided by a private individual.[5]

These disclosure laws are intended to balance two competing interests: public oversight of government officials, and the need to protect information (that would cause more harm if disclosed than could be supported by its release).[6] This delicate balancing act has been negotiated at the federal level with the Freedom of Information Act ("FOIA").[7] FOIA, as debated in 1966, was partly a response to growing concerns that American political parties were using government secrecy as a shield to protect themselves from public scrutiny.[8] The law provides for general disclosure of government information falling within specific enumerated categories.[9]

The legislators, however, recognizing the potential harm should FOIA go too far, included nine broad exemptions.[10] Exemption four, relating to "trade secrets and commercial or financial information from a person [that is] privileged or confidential," codified the expectation that certain business information would not be disclosed under FOIA.[11] While Congress elected to amend FOIA seven times since its implementation, exemption four's language has been left unaltered from its form in 1966.[12]

Although Congress left exemption four untouched, federal courts did not.[13] Beginning in 1974, courts looking to interpret FOIA and its use of the word "confidential" began finding an implied requirement: that information is confidential when "disclosure of the information is likely to . . . cause substantial harm to the competitive position of the person from whom the information is obtained."[14] Forty-five years would pass before the Supreme Court would find the creation of this requirement was the incorrect result of misguided statutory interpretation.[15] During these forty-five years, states adopted

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5 MINN. STAT. ANN. § 13.03 ("All government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute, or temporary classification pursuant to section 13.06, or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential").

6 112 Cong. Rec. 13640, 13642 (1966) (describing FOIA as "a moderate bill and carefully worked out . . . not intended to impinge upon the appropriate power of the Executive or to harass the agencies of Government" but "to enforce a basic public right-the right to access to Government information").

7 5 U.S.C. § 552 (2016) (current federal disclosure law, most recently updated in 2016).

8 112 Cong. Rec. 13640, 13641 (1966).

9 5 U.S.C. § 552 (2016).

10 *Id.*

11 *Id.*

12 *FOIA Legis. Materials*, DEP'T OF JUSTICE, https://www.justice.gov/oip/foia-legislative-materials (recording seven amendments to FOIA since its implementation); 5 U.S.C. § 552 (2016).

13 *See* Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770–71 (D.C. Cir. 1974), *abrogated by* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019).

14 *Id.* at 770.

15 *See* Food Mktg. Inst. v. Argus Leader, 139 S. Ct. 2356, 2364–65 (2019).

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disclosure laws inspired by FOIA or updated their own existing transparency requirements with language borrowed from the statute.[16]

The result, after forty-five years of legal evolution, was less a Darwinist ideal and more a Frankenstein patchwork, with the protection of business information varying widely depending upon the applicable law. This patchwork has inspired warning calls, including from the American Bar Association, asserting that "[w]hen companies submit their confidential business information to government agencies, they should be aware of the risk that their information could become such a public record, and should take steps to protect against unwarranted disclosure."[17] The risk for some companies is an opportunity for others; guides, training courses, and anonymous "information requesters" openly advertise assisting with taking advantage of unwary businesses and government officials to obtain competitive information.[18]

But these risks and exploitations took time to develop. Part I of this discussion will examine federal and state disclosure law's evolution, from FOIA's inception to present day, and explain that development. Numerous lawsuits provide a record of how disclosure law has changed over time, influencing state statutes and leading to the generation and spread of the "substantial competitive harm" standard.

As explored in Part II, the result of these lawsuits did not only influence state statutes. Instead, businesses began protecting themselves from—and exploiting—public disclosure laws. The efforts spent on protection and exploitation under the substantial competitive harm standard resulted in harmful market effects, disincentivizing qualified government contractors while incentivizing unfair competitive practices.

Part III will argue that in responding to these market effects, state courts and legislatures should strive towards a uniform protection of business information emulating the current federal regime. That federal regime—which recognizes private and government information are categorically different—better balances the competing interests supporting public disclosure law.

I. PUBLIC DISCLOSURE LAW FROM FEDERAL FOIA TO THE STATES

FOIA was intended to rebalance a government policy that weighed too heavily against disclosure of government records. With the policy focus being upon government information and operations, rather than private businesses, Congress took steps to protect proprietary information from

16 *See e.g.,* VA. CODE ANN. § 2.2-3700 (limiting disclosure of information based on whether it is "confidential"); Hurlbert v. Matkovich, 760 S.E.2d 152, 164 (2014) (reviewing state disclosure law modeled after federal FOIA by considering the purpose of the language at the federal level).

17 Christian L. Hawthorne, *Tips for Protecting Your Trade Secrets When Dealing with the Government*, AM. BAR ASS'N (Aug. 30, 2018), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2018/tips-for-protecting-your-trade-secrets-when-dealing-with-the-government.

18 See discussion *infra* Section II.B.

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disclosure. This protection waxed and waned in the courts, even as states emulated the federal government in efforts to achieve government transparency while protecting businesses.

A. *FOIA's Inception, Structure, and Purpose*

Before FOIA, government transparency largely relied upon the Administrative Procedure Act's (APA's) provisions for disclosing government records.[19] The APA limited or obstructed access, however, in three ways that became the target of legislators drafting FOIA.[20]

First, a person could only successfully access government records if they were "properly or directly concerned" with the subject matter of the records.[21] FOIA drafters would later eliminate this language entirely from the law, replacing this limitation with "any person,"[22] and the Supreme Court would later hold FOIA does provide access to persons regardless of any "special interest" they may have.[23]

Second, the APA did not provide for judicial review for those denied access to government records.[24] Within FOIA, a provision was inserted to explicitly provide relief in the form of appeal to federal district courts.[25] This relief has been upheld and exercised in litigation since.[26]

Third, the APA's exemptions for withholding were vague and weighed heavily against disclosure.[27] Under the APA, the government could withhold records "if secrecy [was] required 'in the public interest,'" if the records related "solely to the internal management of an agency," or "for good cause" found by the government.[28] These exemptions would be replaced by the nine enumerated exemptions included within FOIA, including exemption four and its protection of business information.[29] This discussion will revisit these changes in Part II and discuss how the combination of these efforts to

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19 112 Cong. Rec. 13640, 13642 (1966).

20 *Id.*

21 *Id.*; 5 U.S.C. § 1002(3).

22 5 U.S.C. § 1002(3).

23 N. L. R. B. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (interpreting FOIA to "clearly . . . [intend] to give any member of the public as much right to disclosure as one with a special interest therein").

24 112 Cong. Rec. 13640, 13642 (1966); Dep't of Air Force v. Rose, 425 U.S. 352, 379 n.18 (1976) (noting "[o]ne of the prime shortcomings of the [APA], in the view of Congress which passed [FOIA], was precisely that it provided no judicial remedy for the unauthorized withholding of agency records.").

25 112 Cong. Rec. 13640, 13642 (1966); 5 U.S.C. § 1002(3).

26 *Dep't of Air Force*, 425 U.S at 379.

27 112 Cong. Rec. 13640, 13642 (1966).

28 *Id.* (quoting 5 U.S.C. § 1002(3) (1964)).

29 112 Cong. Rec. 13640, 13642 (1966); 5 U.S.C. § 552 (2016).

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promote government transparency would ultimately and unexpectedly result in private market harm.

From FOIA's inception onward, exemption four—and its language that was replicated by states and their courts—has been seen as accomplishing two purposes by protecting private business information.[30] First, the protection incentivizes voluntary disclosure of private information to government bodies.[31] Second, the protection limits potential "competitive disadvantages that would result from publication."[32]

The incentive created by information protection is plain; no one tells their secrets to the person notorious for being a gossip. But the intention to prevent "competitive disadvantages" evidences a separate interest behind the language contained in disclosure law that goes beyond the public interest in information collection and disclosure. The private, business interest in information protection was raised by the Department of Justice during the Senate's 1963 hearing on FOIA.[33] The DOJ representative, discussing information "volunteered" by private persons, stated "[a]gain, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors."[34] Following this hearing, a prototype of exemption four was introduced into the text of FOIA that put in print the protection for "trade secrets and other information obtained from the public and customarily privileged or confidential."[35]

Another legislative decision and interest is revealed by FOIA's text, which differentiates between "trade secrets" and "commercial or financial information from a person [that is] privileged or confidential."[36] Trade secrets are commonly codified as information that meets two qualifications: (1) economic value is derived from the information not being generally known to others and not being readily ascertainable through proper means by those who could benefit from disclosure, and (2) reasonable efforts are made to keep the information secret.[37] Giving effect to every word of exemption four would compel courts to find that confidential information means something different than information that is protected for its value as a secret.

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30 Castagna v. Sec'y of Health & Hum. Servs., No. 99-411V, 2011 WL 4348135, at *16 (Fed. Cl. Aug. 25, 2011).

31 *Id.*; *see also* Verizon New York, Inc. v. New York State Pub. Serv. Comm'n, 23 N.Y.S.3d 446, 447 (2016) (reviewing a company's submission of its commercial information and subsequent request that the information be protected as confidential under New York State disclosure law).

32 *Castagna*, 2011 WL 4348135, at *16.

33 Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 1, 199 (1964).

34 *Id.*

35 S. Rep. No. 1219, 88th Cong., 2d Sess. 2 (1964).

36 5 U.S.C. § 552 (2016).

37 *See, e.g.*, MONT. CODE ANN. § 30-14-402.

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B. *Exemption Four in the Courts*

Within the context of disclosure, what confidential information means has depended upon the year, the courts, and the methods of interpretation applied. Early decisions found information was confidential if it could be considered private, or if the government assured that it would be kept secret. These standards would be abandoned for decades, in favor of a test for competitive harm to determine if confidentiality was truly necessary. That review for competitive harm would control federal precedent until a landmark decision by the Court in 2019.

Shortly after FOIA's implementation, the Ninth Circuit reviewed exemption four's language and determined it protected information "that a private individual wishes to keep confidential for his own purposes."[38] The D.C. Circuit found even sales documents were confidential and protected so long as they were "customarily . . . not released,"[39] an interpretation that would be reached by subsequent courts.[40]

Yet these decisions—and the standards upon which they rested—were not without critics. Relying solely upon whether the government had promised confidentiality led courts to worry whether judicial review was being abandoned entirely in the face of agencies seeking to return to the pre-FOIA days of agency information capture.[41] Turning from the government's actions to the business's did not settle the matter either; subsequent courts would find this standard unfavorable for "[placing] too much emphasis on the intent of the submitter."[42]

Without a well-loved standard, the D.C. Circuit redefined the meaning of "confidential" under exemption four in the landmark case, *National Parks & Conservation Association v. Morton*.[43] There, the National Park Service had engaged concessionaries for national parks, and the plaintiff requested to review agency records about the concessionaries' operations.[44] The government first denied access to the plaintiff, and when the plaintiff appealed to the district court, he was denied again.[45] The government successfully invoked exemption four and obtained favorable summary judgment from a lower court, spurring Morton to appeal to the D.C. Circuit.[46]

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38 Gen. Servs. Admin. v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

39 Sterling Drug Inc. v. FTC, 450 F.2d 698, 709 (1971).

40 *See, e.g.*, Grumman Aircraft Eng. Corp. v. Renegotiation Bd., 425 F.2d 578, 580, 582 (D.C. Cir. 1970).

41 *See, e.g.*, 9 to 5 Org. for Women Off. Workers v. Bd. of Governors of Fed. Rsrv. Sys., 721 F.2d 1, 7 (1st Cir. 1983).

42 *Id.*

43 *See Nat'l Parks*, 498 F.2d at 770.

44 *Id.* at 770–71.

45 *Id.*

46 *Id.*

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Although the D.C. Circuit had considered exemption four just a few years earlier in *Sterling Drug, Incorporated*, and found no question regarding the meaning of confidential then, that question arose and became central in *National Parks*.[47] Indeed, in the very first line of analysis, the court stated "[u]nfortunately, [FOIA] contains no definition of the word 'confidential.'"[48] The court then turned to the legislative history surrounding FOIA to determine its proper meaning.[49] The court cited pages of reports and discussions by legislators and interested parties, without any appearance of the key words "substantial", "competitive," or "harm", in isolation or in conjunction with each other.[50] Instead, the legislative history reviewed by the court emphasized the purpose of exemption four in protecting business information from being disclosed to competitors through strategic FOIA requests.[51]

The court, however, found this legislative history implied that the inclusion of "confidential" in exemption four was effectively a qualification on business information protection.[52] The court did not examine the plain meaning of confidential, or any evidence that a party seeks to protect its information from publication.[53] Instead, the court determined "commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to . . . cause substantial harm to the competitive position of the person from whom the information was obtained."[54] While the court did not explicitly link this determination to any specific piece of legislative history, the selected history emphasized the role of exemption four in protecting private parties from competitive harm.[55]

One consequence of *National Parks* was the introduction of a new evidentiary burden upon parties that would disclose information to the federal government but request exemption four protection.[56] Under *National Parks*, a party fighting disclosure would have to show the hypothetical harm caused by disclosure of their information.[57] In the following years, the standard set down in *National Parks* would be adopted by a majority of circuits.[58] That adoption would be used by the D.C. Circuit to subsequently bolster its reasoning in *National Parks* against attacks from other courts and legal scholars,

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47 *Nat'l Parks*, 498 F.2d at 766.

48 *Id.*

49 *Id.*

50 *Id.* at 766–69.

51 *Id.*

52 *Id.* at 770.

53 *Nat'l Parks*, 498 F.2d at 770.

54 *Id.*

55 *Id.* at 766–69.

56 *See* Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976).

57 *Id.*

58 *See e.g.,* Critical Mass Energy Project v. Nuclear Regul. Comm'n, 975 F.2d 871, 876 (D.C. Cir. 1992).

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including assertions that the "substantial competitive harm" standard was "fabricated, out of whole cloth."[59]

National Parks—and its progeny over the next decade—would lead the Department of Justice to declare "the standard of business data protection" enshrined in exemption four "[had] been largely ignored."[60] Cases worked their way up and down the federal courts, often seeing multiple appeals. This spurred then-Judge Breyer to write a dissent decrying the length of litigation that would become common to fighting for exemption four protection.[61]

Courts did not just struggle with appeals after decisions; the actual application of *National Parks* required courts and government agencies to delve into industry standards to determine the substance and likelihood of competitive harm.[62] In one striking decision relying upon the substantial competitive harm standard, the Fifth Circuit affirmed in *Sharyland Water Supply Corporation v. Block* that a business's commercial or financial information could fall categorically outside exemption four's protection.[63] A water company, fighting disclosure of financial reports to the government, argued disclosure of the reports "would cause it irreparable harm in its relations with contractors, materialmen, suppliers, employees, and landowners."[64] But the district court rejected these arguments, finding instead the water company lacked significant competition and so could expect neither competitive harm nor information protection.[65] During the Fifth Circuit's review, the court declined to examine any other potential harm to a company beyond direct benefit to a competitor.[66]

Even direct benefit to a competitor would be considered insufficient to warrant protection if a court found it was "not the sort of thing" that needed

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59 Critical Mass Energy Project v. Nuclear Regul. Comm'n, 931 F.2d 939 (D.C. Cir. 1991), reh'g en banc granted, judgment vacated, 942 F.2d 799 (D.C. Cir. 1991), and on reh'g, 975 F.2d 871 (D.C. Cir. 1992) (J. Randolph concurring) (quoting John C. Janka, *Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets*, 54 U. CHI. L. REV. 334, 364 (1987)).

60 Dep't of Justice, *FOIA Update*, (Jan. 1, 1983) https://www.justice.gov/oip/blog/foia-update-protecting-business-information.

61 *See* 9 to 5 Org. for Women Off. Workers v. Bd. of Governors of Fed. Rsrv. Sys., 721 F.2d 1, 13 (1st Cir. 1983) (Breyer, J., dissenting) (arguing that remand was wasteful when the litigation had already been subject to "several district court opinions").

62 *See, e.g.*, Acumenics Rsch. & Tech. v. U.S. Dep't of Just., 843 F.2d 800, 807 (4th Cir. 1988) (holding there was insufficient competitive harm to protect data because the court "[did] not believe" the business's assertions regarding its industry were valid); Dep't of Justice, *supra* note 60 ("[The] *National Parks* test . . . requires agencies to conduct extensive and complicated economic analyses, which often makes it exceedingly difficult to apply.") (citing *Business Record Exemption of the Freedom of Information Act: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 95th Cong., 1st Sess. 2 (1977)).

63 *See* Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 399 (5th Cir. 1985).

64 *Id.*

65 *Id.*

66 *Id.*

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to be prevented.[67] In *General Electric Company v. U.S. Nuclear Regulatory Commission*, General Electric submitted to the government a report including design flaws of its own nuclear reactors.[68] But, unlike in *Sharyland*, General Electric had competitors, ones which the Seventh Circuit recognized "would no doubt be delighted to be able to flag around to their customers a report in which General Electric criticizes its own reactor design."[69] Unfortunately for General Electric, they were also a successful business. The Seventh Circuit found General Electric was dominant in the industry, Congress knew about the reactor flaws, and "the report was already five years old," and so any competitive harm was unlikely to be severe.[70] In the words of the court, "the harm likely to be done by a single document . . . is too speculative," even as opponents of nuclear energy—and General Electric's "principal competitor"—were the requesters of that single document.[71]

After decades of such decisions without legislative action, the Eighth Circuit would presume in 2001 that Congress had simply acquiesced to *National Parks*.[72] The Eighth Circuit supported that presumption by citing Congress's 1976 adoption of the *National Parks*' language into a statute on open meetings, which included a bar on disclosure "where such information must be withheld . . . in order to prevent substantial injury to the competitive position of the person to whom such information relates."[73] The Eighth Circuit left unmentioned the legislative efforts—occurring alongside the precedence cited by the court—to reform exemption four and mitigate *National Parks*'s effects,[74] as well as the complete absence of any reenactment of exemption four itself.[75]

While Congress's reform efforts never gained momentum, the jurisprudence surrounding statutory interpretation underwent the textualist revolution. In a series of decisions following *National Parks*, the Supreme Court would systematically dismantle the D.C. Circuit's form of statutory interpretation that it applied to FOIA.[76] By 1979, the Court was focusing upon terms' "ordinary, contemporary, common meaning" at the time of congressional action.[77] While exemption four avoided Supreme Court attention for decades, other exemptions, including exemption two and five would be reviewed for

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67 *See* Gen. Elec. Co. v. U.S. Nuclear Regul. Comm'n, 750 F.2d 1394, 1402 (7th Cir. 1984).

68 *Gen. Elec. Co.*, 750 F.2d at 1402–03.

69 *Id.*

70 *Id.*

71 *Id.*

72 Cont. Freighters, Inc. v. Sec'y of U.S. Dep't of Transp., 260 F.3d 858, 861 (8th Cir. 2001).

73 *See id.*; 5 U.S.C. § 552b.

74 *See* FREEDOM OF INFORMATION ACT: HEARINGS ON S. 587, S. 1235, S. 1247, S. 1730, AND S. 1751 BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess. 223–469 (1981).

75 *See Argus Leader*, 139 S. Ct. at 2366.

76 *See id*. at 2363–64.

77 Perrin v. United States, 444 U.S. 37, 42 (1979).

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plain meaning, with congressional records used only to validate a textually supported definition.[78]

Exemption four would have its day in court and be put to the test of modern interpretation techniques in the 2019 case *Food Marketing Institute v. Argus Leader Media*.[79] The case arose from a FOIA request submitted by Argus Leader, a newspaper, seeking information on food-stamp redemption for participating retail stores.[80] The government denied this request, causing Argus Leader to appeal in the Eighth Circuit.[81] The Eighth Circuit relied upon the "substantial competitive harm" standard and found exemption four did not protect the information sought by Argus Leader, placing the validity of the standard squarely within the sights of the Supreme Court.[82]

Justice Gorsuch, writing for the majority, would summarily reject both the "substantial competitive harm" standard and the interpretative method which generated it.[83] Justice Gorsuch confirmed the inclusion of the term "confidential" in exemption four did more than reiterate a protection for information carrying the same competitive value as a trade secret.[84] Finding the plain meaning of "confidential" covered information that is "private" or "spoken or written in confidence," Justice Gorsuch determined exemption four protects information that a business keeps private with the exception of confidential disclosure to the government.[85] This protection, as previously discussed here, was found by Justice Gorsuch to be instrumental in affecting "a 'workable balance' between disclosure and other governmental interests" when private parties provide information to the government.[86]

Justice Breyer dissented, arguing that protection of information without any showing of harm goes too far, upsetting that intended balance.[87] While Justice Breyer conceded that requiring a showing of competitive harm is too heavy a burden, he argued that evidence of some harm should be required to better accomplish FOIA's overall purpose.[88] This Comment shall address the

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78 *See e.g.*, Milner v. Department of Navy, 562 U.S. 562, 569 (2011); United States v. Weber Aircraft Corp., 465 U.S. 792, 804 (1984).

79 *See Argus Leader*, 139 S. Ct. at 2363–64.

80 *Id.* at 2361.

81 *Id.*

82 *See* Argus Leader Media v. U.S. Dep't of Agric., 889 F.3d 914, 917 (8th Cir. 2018), rev'd and remanded sub nom. Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019), and vacated and remanded, Argus Leader Media v. United States Department of Agric., 2019 WL 3557996 (C.A.8 (S.D.), 2019).

83 *See Argus Leader*, 139 S. Ct. at 2363–64.

84 *Id.*

85 *Id.*

86 *Id.* at 2366.

87 *Id.* at 2368.

88 *Id.* at 2367.

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merits of this policy argument in Part III, but the majority rejected Justice Breyer's reasoning and found no text within FOIA to support it.[89]

C. *Substantial Competitive Harm in the States*

Argus Leader reformed federal precedent on public disclosure of confidential information, but it also left the states behind. Following FOIA's implementation in 1966, states began adopting or modifying their laws to match FOIA's statutory language and, later, the addition of the *National Parks* standard.[90] Nearly half of state funds (49.64%) awarded to contractors in 2021were awarded by just ten states.[91] Of those ten states, all but two[92] employ the substantial competitive harm standard when reviewing whether business information is truly exempt from disclosure under their public disclosure laws.[93]

The track record of this standard at the state level is mixed and highlights the policy concerns raised by Justices Gorsuch and Breyer in *Argus*

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[89] *Argus Leader*, 139 S. Ct. at 2366.

[90] *See The "State" of Public Records Law: A 50 State Survey*, LOGIKCULL, https://www.logikcull.com/blog/state-open-records-heat-map (last visited Mar. 20, 2023); *see also* cases and statutes cited *infra* notes 92–93.

[91] *State Profiles*, USASPENDING (last visited Jan. 12, 2022), https://www.usaspending.gov/state.

[92] CAL. GOV'T CODE § 6254 (barring disclosure of "corporate financial records, corporate proprietary information including trade secrets and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company" without inclusion of the term "confidential"); VA. CODE ANN. § 2.2-3705.6(3) (barring disclosure of "[p]roprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body").

[93] TEX. GOV'T CODE ANN. § 552.1101 (barring disclosure of information submitted by a contractor if it reveals certain business approaches and gives advantage to competitors); Verizon New York, Inc. v. New York State Pub. Serv. Comm'n, 23 N.Y.S.3d 446 (N.Y. App. Div. 2016) (holding private information is only exempt from disclosure if it incurs competitive harm); Rasier-DC, 237 So. 3d (holding private information was not confidential if its disclosure would not provide an advantage to a competitor); 65 PA. STAT. ANN. § 67.102 (barring disclosure of "confidential proprietary information" if it is confidential and disclosure "would cause substantial harm to the competitive position of the person that submitted the information"); MINN. STAT. ANN. § 13.37(b) (barring disclosure of proprietary information only if it meets the requirements of trade secrets, including economic value from secrecy); IND. CODE ANN. § 5-14-3-4 (barring disclosure of trade secrets and "confidential financial information" unless submission to the state is required by statute); 5 ILL. COMP. STAT. ANN. 140/7(g) (barring disclosure of "[t]rade secrets and commercial or financial information . . . furnished under a claim that they are proprietary, privileged, or confidential, and that disclosure of the trade secrets or commercial or financial information would cause competitive harm"); KY. REV. STAT. ANN. § 61.878(c)(1) (barring disclosure of "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors").

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Leader. A competing taxicab company directly used Florida's public disclosure law to request Uber's data on their operations in Broward County in *Rasier-DC, LLC v. B & L Service, Incorporated*.[94] Uber reported this data to the government having marked it as trade secrets and signed a license agreement with the state to ensure the information would be confidential.[95] Yet, the court found no competitive advantage would be conferred by disclosure—even as a competitor was the party requesting the information.[96] The license agreement was tossed aside on the reasoning that government assurance of confidentiality does not actually mean it will be treated as confidential.[97] This result demonstrated not just the reality of competitor use of public disclosure law, but also the risk of disclosure experienced by businesses that seek to contract with the government discussed further in Part II.

Even when proprietary information is confidential and can be found to confer a competitive advantage, lengthy legal proceedings may be required to realize the protection. That cost is exemplified in *McKelvey v. Pennsylvania Department of Health*. In that case, a marijuana producer fought the disclosure of an array of information provided to the government in an effort to obtain a permit for its operations.[98] The information at issue included "financial and operational capabilities; community impact plans; site and facility plans; the verification of an applicant's principals, operators, financial backers, and employees; [and] a description of the business activities in which the applicant intended to engage."[99] The marijuana producer also alleged and supported a risk that disclosure would limit "the physical security of its facilities, including an increase in robberies and burglaries, and threats or injury to staff and customers" and harm its banking relationships.[100] Two lower courts—operating under a statutory substantial competitive harm standard—looked at these facts only to find the standard's test was not met and at least some of the information was not truly confidential or harmful if disclosed.[101] It took multiple appeals and two years of litigation for the matter to be settled in favor of the business and the information to be protected under the law.[102]

The results in *Rasier-DC* and *McKelvey* mirror the jurisprudence and litigation costs at the federal level preceding *Argus Leader*.[103] In reasoning that would later be reversed by the Supreme Court, the Eighth Circuit transcribed the rationale at the heart of these decisions: "[a] likelihood of commercial usefulness—without more—is not the same as a likelihood of

94 *Rasier-DC*, 237 So. 3d, at 375.
95 *Rasier-DC*, 237 So. 3d, at 375.
96 *Id.* at 377.
97 *Id.*
98 McKelvey v. Pa. Dep't of Health, 255 A.3d 385, 389–90 (Pa. 2021).
99 *Id.*
100 *Id.* at 412.
101 *See id.* at 396–97.
102 *Id.* at 388.
103 *See* discussion *supra* I.B.

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substantial competitive harm."[104] Under *National Parks*, a court can be confronted with evidence of business efforts to protect information, the information's competitive value to others, the risk of harm to the business, or even a contractual promise by the government to not disclose the information, and still find the information is not truly confidential under the substantial competitive harm standard.

II. NATIONAL PARKS UPSETTING THE BALANCE

The *National Parks* test, whether statutory or established in precedent, reflects an overcorrection that has unbalanced the aims of public disclosure law to open the government to oversight without harming private businesses. The effects of this imbalance can be seen in the transaction costs incurred by businesses seeking to protect their information, either via careful procedures in their contracts, or the numerous lawsuits intended to prevent disclosure when the contracting process fails. That imbalance also incentivizes unfair practices by businesses that can request their competitors' proprietary information for an advantage, leaving firms in information-sensitive markets to choose between losing out on lucrative state projects or risking their competitive position.

A. *The Cost of Doing Business with a State*

Responding to state requests for proposals (RFPs) has become a business unto itself. Law firms provide dedicated advisory services to companies hoping to perform government work, often emphasizing the complexity and risks of state projects.[105] The development of such services flows naturally from the increasing difficulty and downside of even bidding to participate on a particular contract.

A recent New York state RFP[106] demonstrates the unique challenge of such contracts, especially in a state that includes the *National Parks* standard by statute in their public disclosure law.[107] This specific RFP related to the production of driver's licenses and other identification documents, and collected information on company software, data security, production capabilities, descriptions of internal networks, data architecture, and numerous other

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104 Argus Leader Media v. U.S. Dep't. of Agric., 889 F.3d 914, 917 (8th Cir. 2018).

105 *See, e.g.*, *Gov't Contracts*, Crowell Moring, https://www.crowell.com/Practices/Government-Contracts (last visited Mar. 21, 2023).

106 STATE OF NEW YORK, DEPARTMENT OF MOTOR VEHICLES, C000957, REQUEST FOR PROPOSAL FOR DRIVER LICENSE AND IDENTIFICATION CARD SOLUTION (May 24, 2021).

107 N.Y. Pub. Off. Law § 87(2)(d) (barring disclosure of information "which if disclosed would cause substantial injury to the competitive position of the subject enterprise").

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items listed in over one hundred pages of specifications.[108] Citing New York state public disclosure law, the RFP also instructed that proprietary information could be disclosed unless a company meticulously—and successfully—claimed a "confidential" exemption.[109] That instruction was followed by a warning, underlined, in bold and all caps font:[110]

> **BY THE ACT OF SUBMITTING A PROPOSAL IN RESPONSE TO THIS SOLICITATION, BIDDERS ACKNOWLEDGE THAT (1) THE SUBMISSION OF BIDDER'S PROPOSAL SHALL BE BIDDER'S SOLE OPPORTUNITY TO CLAIM SUCH EXEMPTION FROM DISCLOSURE OR DISSEMINATION OF INFORMATION CONTAINED IN THEIR PROPOSAL, AND (2) FAILURE TO MARK SUCH INFORMATION AS "CONFIDENTIAL" WILL CONSTITUTE A WAIVER OF CONFIDENTIALITY, AND WILL RELEASE DMV AND THE STATE FROM ANY LIABILITY FOR DISCLOSURE OR DISSEMINATION THEREOF.**

As the RFP notes, the state "may deny access" to information only if disclosure "would cause substantial injury to the competitive position of the subject enterprise."[111] But it is not enough for a contractor to generally claim confidentiality for the information contained in a contract proposal. Instead, a business "must mark as 'CONFIDENTIAL' any proprietary information contained in their proposals . . . with a detailed written justification for classifying the information as 'CONFIDENTIAL.'"[112] The RFP helpfully provides clarification that a written justification must be more than "[a] conclusory declaration" to have any effect.[113]

The consequence of this standard, in practice, is that a one-hundred-page proposal containing proprietary information may need to be supported by an equally long—or longer—explanation of industry standards, intellectual property rights, and more. Failing to meet this burden at the proposal stage can result in public disclosure of proprietary information, such as areas of limited market penetration, identifying "weakspot[s]" for competitors to exploit.[114] New York courts have also incentivized more complex and

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108 *Supra* note 106.
109 *Supra* note 106.
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*
114 *See* Markowitz v. Serio, 893 N.E.2d 110, 114 (2008).

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extensive justifications by holding in favor of disclosure even when the harm is self-evident.[115]

Even if a contractor successfully labels their information as confidential and justifies that confidentiality, the risk of disclosure does not evaporate. Government bodies can still decide to disclose confidential information, leaving businesses to proceed with lengthy lawsuits, stretching out over years with hearings and appeals, just to protect information as plainly valuable and sensitive as customer lists.[116] Such costly litigation is not confined to New York, but instead is a common aspect of courts attempting to navigate the *National Parks* standard.[117]

For businesses without deep pockets to pay a team of lawyers, or those whose success depends on proprietary information staying private, the risk of participating in government contracts may outweigh any paycheck. The result is an artificial and harmful limitation on the pool of contractors providing services to states, where small businesses are cut out of the market and bigger businesses must weigh transaction costs and risks to any valuable business information.

B. *The Incentives of Legal Business Espionage*

Even as the overly strict *National Parks* standard reduces opportunities for legitimate businesses, it creates openings for those willing and able to exploit state law for their own benefit. The less a state protects a contractor's information, the more their competitors can profit. Those potential benefits have caused an industry to form around advising and assisting competitors in performing "legal business espionage"[118] to obtain whatever competitive information a government body deems to be unprotected.

In the words of one business consultant, "[l]et's explore how entrepreneurs can use FOIA's, for profit."[119] The gaps left by *National Parks*—such as the absence of protection for competitive information that a court deems unlikely to cause competitive harm[120]—have become the target of business

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115 *See, e.g.*, Verizon New York, Inc. v. Bradbury, 837 N.Y.S. 2d 291, 294 (2007) (holding that disclosure to a competitor of a company's negotiating positions was permissible because the plaintiff failed to elaborate how such disclosure would harm the plaintiff's competitive position).

116 *See* Verizon New York, Inc. v. Mills, 875 N.Y.S. 2d. 572, 574–76 (N.Y. App. Div. 2009).

117 *See* discussion *supra* I.C.

118 Sarah E. Carson, *FOIA Requests as Legal Bus. Espionage*, Smith Currie (Dec. 21, 2012), https://www.smithcurrie.com/publications/common-sense-contract-law/foia-requests-as-legal-business-espionage/ (describing a pre-*Argus Leader* case in which a competitor "[hired] the FOIA Group, Inc., a company that advertises its success in obtaining FOIA expertise by providing clients "competitive information and government documents…" through expertly-crafted FOIA requests.").

119 Issamar Ginzberg, *Using FOIA Requests for a Competitive Advantage*, Entrepreneur (Feb. 26, 2015), https://www.entrepreneur.com/article/243203.

120 *See* discussion *supra* I.B.

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operatives seeking a leg-up. As this discussion has addressed, the case law is replete with examples of competitors requesting information including competitors' customer lists[121], nuclear reactor flaws[122], and pricing methods.[123]

If a business aspires to use public disclosure law similarly, but lacks experts in crafting information requests, there are consultants ready to train them.[124] Such consultants provide how-to tutorials and step-by-step guidance, all aimed at taking advantage of mistakes by a contractor or government body in the handling of proprietary information.[125] As they note: "[A competitor's] hope is that both the FOIA contractors serving that agency and your competitor are sloppy and you get more information than you had hoped for. People have received completely uncensored proposal documents, or sloppily redacted documents, and that's capture gold."[126]

Even as competitors seize upon profiting from government transparency, other companies have stepped in to reduce the transparency of the information requests themselves.[127] Surrogate information requests, such as the request made in *Honeywell Technical Solutions v. Department of the Air Force*[128], are offered for state and federal information requests.[129] The goal of this surrogacy is to hide the identity of those seeking to profit while avoiding potential market consequences from being seen as engaging in disreputable methods.[130]

These exploitative strategies exacerbate the transaction costs and information security risks businesses experience every time they pursue a government contract.[131] Under existing law, these exploitative strategies are simply too likely to succeed under the *National Parks* standard which weighs heavily in favor of disclosure. Given FOIA and other public disclosure laws' explicit purpose to be "moderate" and balance government transparency and

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121 *See* Verizon New York, Inc. v. Mills, 875 N.Y.S. 2d. 572, 574–76 (N.Y. App. Div. 2009).

122 *See* Gen. Elec. Co. v. U.S. Nuclear Regul. Comm'n, 750 F.2d 1394, 1402 (7th Cir. 1984).

123 *See* Rasier-DC, LLC v. B & L Serv., Inc., 237 So. 3d 374, 375 (Fla. Dist. Ct. App. 2018).

124 *Competitor Analysis with a Freedom of Info. Act (FOIA) Request*, OST Global Solutions, https://www.ostglobalsolutions.com/foia-i-hardly-know-ya-yearly-report-card-on-federal-governments-efforts-to-track-and-manage-freedom-of-information-act-requests/ (last visited Jan. 12, 2022) (OST Global Operations offering a two-day training course on "competitive analysis") [hereinafter *Competitor Analysis*].

125 *Id.* Similar guides have been published for state public disclosure laws. *See, e.g.*, *How to See Your Competitor's Proposals*, Utley Strategies, https://www.utleystrategies.com/blog/competitor-proposals (last visited Jan. 12, 2022).

126 *Competitor Analysis*, *supra* note 124.

127 *State Open Record Requests*, FOIA GROUP, INC., http://www.foia.com/stateOpenRecords.aspx (last visited Mar. 21, 2023).

128 *See generally* Honeywell Technical Solutions v. Department of the Air Force, 779 F. Supp. 2d 14 (D.D.C. 2011).

129 *Competitor Analysis*, *supra* note 124.

130 *Id.*

131 *See* discussion *supra* I.A.

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business protection, [132] requiring substantial competitive harm misses the mark.

III. LEARNING FROM THE FEDERAL MODEL

Federalism is a core aspect of American political institutions, but it does have its downsides. Current disclosure law displays such a downside by showing how ideas can flow from one government to another, but so inconsistently that reforms can be neglected when badly needed. This discussion argues that the current market consequences of FOIA's state counterparts requires such an extension of the same reform provided by *Argus Leader* as the federal level.

A. *Reforming State Statute and Precedence*

As previously discussed, state public disclosure law corresponds to and often mirrors federal FOIA.[133] While this mirroring caused the problem of the introduction of the *National Parks* test into state law, the solution can arise from the same process. State courts and legislators should once more look to the federal level—and its recent abandonment of *National Parks*[134]—to reform and rebalance their laws.

The benefits of eliminating *National Parks* on a national level are multifaceted. First, if states proceed with matching federal standards, a more uniform treatment of confidential information will fall into place. Such a uniform standard would eliminate the variability for multi-government contractors and reduce in-house transaction costs spent identifying, understanding, and navigating different government protections for proprietary information.

Second, the restrictive market effects that limit access to and benefits from government contracts would be diminished. [135] Under *Argus Leader*, information is protected more broadly as that protection depends solely upon whether the information "is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy."[136] This broader protection would preclude otherwise successful attempts to obtain information that a court might find unlikely to assist a competitor, but may still harm a business due to embarrassment, security risks, or otherwise.[137]

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132 112 Cong. Rec. 13640, 13642 (1966).
133 LOGIKCULL, *supra* note 90.
134 *See Argus Leader*, 139 S. Ct. at 2363–64.
135 *See* discussion *supra* I.A.
136 *Argus Leader*, 139 S. Ct. at 2366.
137 *See* discussion *supra* I.B.

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Third, because of competitive information requests' reduced effectiveness, abuse and exploitation of government transparency would likely go down. Information requests do come with costs, including preparation time, fees,[138] and potential reputational harm.[139] If a competitor is less likely to obtain information of value unless a competitor or government agent makes a mistake, the costs of information requests may outweigh any speculative gain. At the federal level—and post-*Argus Leader*—the federal government saw a year-over-year reduction of eight percent in information requests.[140] A reduction in information requests entails its own benefit to the government as well; information requests often stress understaffed agencies and monopolize public servants' working hours.[141]

For states like Florida, the solution's implementation rests with the courts. Florida law contains no statutory version of *National Parks*;[142] instead, it has been read in by courts,[143] and can be dismissed under the same textualist reasoning as that seen in *Argus Leader*.[144] While federal precedent is non-binding upon the states, the wisdom and virtues of textualism have been widely recognized, if not universally accepted, for decades.[145] Textualism also carries particular force when a statute contains a term with a ready definition, as it leaves no legitimate space for interpretive methods to be applied.[146]

Conversely, textualism mandates enforcing the *National Parks* test in those states, such as New York,[147] where the legislature has implemented the

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138 *Competitor Analysis*, *supra* note 124.

139 *Id.*

140 In 2019, the year in which *Argus Leader* was decided, the federal government received 858,952 FOIA requests. In 2020, the federal government received 790,722 requests. *Reports for Fiscal Year 2019*, Dep't of Justice, https://www.justice.gov/oip/page/file/1282001/download#:~:text=In%20FY%202019%2C%20the%20federal,requests%2C%20received%20during%20FY%202018 (last visited Jan. 12, 2022); *Summary of Annual FOIA*, Dep't of Justice, https://www.justice.gov/oip/blog/new-annual-foia-report-data-page-and-agencies-fiscal-year-2020-data-now-available-foiagov (last visited Jan. 12, 2022).

141 For statistics on the amount of information requests at the federal level, in addition to a backlog exceeding 100,000 requests, see *Summary of Annual FOIA Reports for Fiscal Year 2018*, Dep't of Justice, https://www.justice.gov/oip/page/file/1170146/download#FY18 (last visited Jan. 12, 2022). For a discussion of the effects of information requests at the state level, *see* Meghan Rhyne, *What's Behind Increasing FOIA Fees? Email Has a Lot to Do With It* (June 13, 2019) https://www.virginiamercury.com/2019/06/13/whats-behind-increasing-foia-fees-email-in-part/.

142 FLA. STAT. ANN. § 119.01(2)(a) ("each agency . . . must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law).

143 *See Rasier-DC* at 376–77 (Fla. Dist. Ct. App. 2018); *supra* discussion I.C.

144 *See Argus Leader*, 139 S. Ct. at 2363–64.

145 Legal scholars have described the benefits of textualism—particularly in contrast to the dynamic interpretation method present in *National Parks*—even while describing textualism's drawbacks and weaknesses. *See* Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93 (1995).

146 *See Argus Leader*, 139 S. Ct. at 2363 (holding "Where, as here, that examination yields a clear answer, judges must stop.")

147 *See* discussion *supra* I.A.

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substantial competitive harm standard into their statutes.[148] In these states, the legislatures will have to remove tests for competitive harm and advantage or face continuing negative market consequences.[149] Any such removal, however, will likely be derided, as there remain proponents of *National Parks* and greater scrutiny of corporate claims of confidentiality.

B. *Whether Argus Leader Goes too Far*

As discussed here,[150] *Argus Leader* reformed federal precedent to weigh more in favor of protecting private, proprietary information. In doing so, it returned the test for confidentiality to the ones from FOIA's early days,[151] examining whether information is treated as confidential by the business or was received by the government under promise of confidentiality.[152] These tests have been criticized—similarly to *National Parks*'s—for getting the balance wrong between government transparency and business protection.[153] Post-*Argus Leader*, critics have argued that these tests are subjective and circular, and the conflation of trade secrets and confidential information is essential for government transparency.[154] But these criticisms miss the point. The *Argus Leader* tests honor the intention behind public disclosure law—as evinced since FOIA's inception—to enforce *public* disclosure, not private.

The allegation of forfeiture of judicial oversight associated with the post-*Argus Leader* tests is not new; these same objections were made when the tests were implemented pre-*National Parks*.[155] As was true then, the issue with only examining the way a business treats information, or whether the government promised confidentiality protection, is courts are left without an objective standard to determine the propriety of confidentiality.[156] Perhaps a business will treat all of its information as confidential, even when disclosure would have no material effect. Alternatively, a government agency seeking to operate in obscurity could extend promises of confidentiality to every contractor, and for all disclosed information, frustrating public oversight.

These arguments fail to recognize that public disclosure laws are not the tool with which to combat these problems. FOIA was designed to open public records for inspection so that citizens could hold government officials accountable for how they carry out their duties.[157] FOIA's text includes no

148 *See, e.g.*, statutes cited in *supra* notes 92–93.
149 *See* discussion *supra* I.
150 *See* discussion *supra* I.B.
151 *See* discussion *supra* I.B.
152 *See, e.g.*, *Grumman Aircraft Eng. Corp.*, 425 F.2d at 580, 582.
153 *See* Charles Tait Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion*, 109 GEO. L.J. 1337 (2021).
154 *Id.*
155 *See* discussion *supra* I.B.
156 *See* discussion *supra* I.B.
157 *See* discussion *supra* I.A.

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positive mandate for disclosing proprietary information. Instead, any disclosure of private information is a side effect of that information being swept up by the government. The underlying public policy justifying disclosure simply does not extend to concerns about whether a private business is being too protective of their information.

Whether a business can expect complete privacy when it performs government work is more questionable. If a business assumes a government role, information relating to how they perform that role may resemble the sort of government records FOIA was intended to reach. But requirements for the government may not necessarily work for a private business. As held in *Sharyland*, the harm from disclosure varies depending upon the competition a group may face.[158] Government officials do not face competition from other government officials. Even if they did, public disclosure laws are designed to facilitate oversight and backlash against officials, not protect them.

Conversely, every state statute analyzed in this discussion extends some protection to businesses out of recognition that their information is categorically different from pure government records.[159] The potential for harm from disclosure of private information is documented, advertised, and the source of transaction costs and exploitation.[160] Most importantly, FOIA was always intended to limit these harms.[161] Applying public disclosure law to private information betrays that intention and propagates these harms.

CONCLUSION

Legislators and courts created the problem of private exploitation of public transparency laws through a feedback loop of poor statutory drafting and interpretation. Without intervention by these government bodies, private parties will continue to be deterred from government contracts and take advantage of laws intended to help the public rather than harm it. State governments should seize the opportunity to fix this problem and eliminate the improper incentives that fuel anticompetitive and inefficient behavior.

158 *See* Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 399 (5th Cir. 1985).

159 See statutes cited *supra* notes 92–93.

160 *See* discussion *supra* I.

161 See discussion supra I.A.

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SLAVERY WITH EXTRA STEPS: WHY PRISON LABOR AS CRIMINAL PUNISHMENT ENCOURAGES GOVERNMENT RENT-SEEKING

*Aris X. Hart**

INTRODUCTION

What do states do when they do not have enough people to work on public projects, but hiring people is too expensive? Across the country, state and federal prisons provide the answer: cheap inmate labor. In 2018, nearly 14,000 firefighters battled fires in California.[1] Approximately 2,000 of these firefighters were prisoners in the California prison system, while approximately 1,500 more inmates worked in support roles for the firefighter inmates.[2] These inmates do the same work as non-inmate firefighters, but only receive one dollar per hour to fight fires.[3] Cal Fire, the state's department of Forestry and Fire Protection, also employs non-inmate firefighters starting at the California minimum wage, which was eleven dollars per hour in 2018.[4] These firefighters fight the major fires in the state, and also receive overtime pay to augment wages.[5]

This situation is just one example of a state using cheap prison labor to cut hiring costs. To save money, states compel inmate labor and reap huge windfalls in labor cost savings, but also use inmates to increase prison revenues. Under the Thirteenth Amendment, this is all perfectly legal.[6] The fact that states can profit from cheap inmate labor opens the door to perverse sentencing incentives and systemic abuse.

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[1] Abigail Hess, *California is Paying Inmates $1 an Hour to Fight Wildfires*, CNBC (Aug. 14, 2018), https://www.cnbc.com/2018/08/14/california-is-paying-inmates-1-an-hour-to-fight-wildfires.html; Cal. Dep't Indus. Relations, *Minimum Wage Frequently Asked Questions* (Dec. 2022), https://www.dir.ca.gov/dlse/faq_minimumwage.htm.

[2] *Id.*

[3] *Id.*

[4] CAL. LAB. CODE § 1182(1)(B); Jennifer Calfas, *These California Firefighters Are Getting Paid Minimum Wage to Battle Deadly Wildfires*, MONEY https://money.com/california-firefighters-minimum-wage/ (Oct. 12, 2017).

[5] *Id.*

[6] U.S. CONST. amend. XIII.

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States have a financial interest in punishment and benefit from the fruits of compulsory prison labor. States are rational actors and, accordingly, act to further their profit interests. Prisons force inmates to engage in free or cheap labor that is lucrative for states, which invites and facilitates inmates' abuse by the states.[7]

The United States has a long history of exploiting labor for profit. In the pre-Civil War era, slaves provided massive profits to southern and northern states and enabled slaveowners to get cheap raw materials at low cost.[8] At the same time, the first state prisons began cropping up and became more centralized from the late 1790s through the mid-1800s.[9] In the post-Civil War era, incarceration rates exploded, especially throughout the South.[10] This is because prisons were very profitable for states through the mid-twentieth century, and state economies were dependent on cheap labor.[11] States originally compelled inmates' labor through either private companies contracting with prisons for in-prison work or prisons leasing convicts out to private entities.[12] Currently, however, the system of profit-driven prison labor is supported by, ironically, the Thirteenth Amendment, which prohibits slavery or involuntary servitude "except as a punishment for crime."[13]

The American prison-prisoner dynamic is problematic because the government can compel people to work but also make money from forced labor. This makes the government interested in incarceration outside of general punishment goals. The government chooses to make as much money as possible for itself and any private actors contracting with states. Profit incentives for prisons create perverse punishment incentives for states and the U.S. government. Any punishment levied in connection with profit interests is a clear example of government rent-seeking.

The very fact that the government can compel free or cheap labor opens the door to abuse and flies in the face of traditional penological goals. This Comment will address the economic pitfalls of compulsory prison labor and propose a potential solution for the problem. The only permanent solution is amending the Thirteenth Amendment, removing "except as a punishment for crime whereof the party shall have been duly convicted." This would be a difficult pill for states to swallow alone, so such an amendment would need to be accompanied by independent federal legislation, paying states to offset short-term cost increases of stopping prison labor.

Part I of this Comment will address a brief economic history of prison labor, inmate production, and a contemporary analysis of the prison labor

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7 Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 282-287 (1999).

8 Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 889-891 (2012).

9 W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 91, 104 (2014).

10 Armstrong, *supra* note 8, at 877.

11 Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 359-64 (1998); Ball, *supra* note 9, at 78.

12 Garvey, *supra* note 11, at 352-55.

13 U.S. CONST. amend. XIII.

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structure. Part I will also briefly describe the regulatory background surrounding state prisons. Part I will then address prevailing government incentives for reform.

Part II will discuss why compelling prisoners to perform productive labor creates perverse punishment incentives, and why this is societally undesirable. Part II will also argue that justifications for punishment fall flat once profit incentives are introduced into punishment. Part II will then explore the implications and counterarguments for both a Constitutional amendment and the necessary payout for the amendment.

I. HISTORY OF UNITED STATES PRISON LABOR

A. *Early America through the Twentieth Century*

The first U.S. state prison was established in 1790 in Pennsylvania.[14] At the time, imprisonment was an uncommon punishment.[15] Most felonies were punished with death, and lesser crimes with forms of beating or maiming.[16] At first, most prison terms were brief, lasting less than three months on average.[17] Following a series of legislation from 1789 to 1835, states developed fully functional prison systems, rather than a number of facilities which just happened to be prisons.[18] These prison systems would increasingly rely on compulsory labor.

Before the 1830s, states wanted to operate prisons because there was support for a centralized system of punishment and because prisons were profitable.[19] Prisons were initially profitable for private actors because the governments would pay a per-prisoner fee to prison managers.[20] Prison managers would also supplement their income with fees extracted from prisoners, such as "iron fees," which inmates had to pay to remove heavy iron shackles.[21] However, shortly after the 1830s, prisons generally lost money, and states were required to support them.[22] Prisons lost money because of the rising costs of imprisonment.[23] To offset costs, states compelled inmates to work and secure revenue for the state.

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14 Garvey, *supra* note 11, at 348.

15 Ball, *supra* note 9, at 89 (quoting HARRY ELMER BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY 72 (Patterson Smith 1968) (1927)).

16 *Id.*

17 George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1265 (1995).

18 HARRY ELMER BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY 73-74 (Patterson Smith 1968) (1927).

19 Ball, *supra* note 9, at 94.

20 *Id.* at 93-94.

21 *Id.*

22 *Id.*

23 *Id.* at 95-96.

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Early state prisons broke into two camps with regard to how they made money. Private companies contracted with northern prisons to produce goods inside the prison to be introduced into the market, while southern states would engage in convict leasing.[24] Under convict leasing, prisons would lease inmates to offsite private actors for a term of years, allowing prisons to disregard housing costs.[25]

Northern contract prisons were initially profitable but were met with resistance from local labor unions throughout the nineteenth century.[26] Labor unions were strongly opposed to the contract system because prison goods were introduced into the general market and were produced with a wage-less job force.[27] By the twentieth century, contract systems only produced goods for the state, rather than introducing cheaper goods into the general market.[28]

Convict-leasing in the South has a more brutal history. After the Civil War, the government passed the Thirteenth Amendment, which prohibits slavery "except as a punishment for crime whereof the party shall have been duly convicted."[29] In response to the emancipation of African Americans from bondage, southern states enacted Black Codes.[30] Black Codes specifically criminalized vagrancy, while disallowing black ownership of property.[31] These state codes were a reapplication of the Slave Codes, which criminalized the status of being Black by disallowing actions such as being an unaccompanied slave off a plantation, vagrancy, and curfew violations.[32] Laws in the post-Civil War South, which criminalized African American homelessness while simultaneously banning Black property ownership, created an explosion in the number of African American inmates.[33]

By leasing out inmates, southern prisons could avoid the cost of housing inmates, while private businessmen could force inmates to perform work that free-market labor would not.[34] Private lessees would routinely work convicts to death, or, absent that, work convicts the hardest just before the lease ended.[35] Lessees had little regard for convicts toward the end of the lease

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24 Garvey, *supra* note 11, at 352-55.

25 *Id.* at 354; *see also* Armstrong, *supra* note 8, at 877.

26 Garvey, *supra* note 11, at 359-64.

27 *Id.*

28 *Id.*

29 U.S. CONST. amend. XIII.

30 William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 64 (2004).

31 *Id.*

32 *Id.*

33 Armstrong, *supra* note 8, at 877.

34 Garvey, *supra* note 11, at 356.

35 *Id.* at 363-65.

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because the lessee would no longer have rights to the convict; therefore, the convict would have no value to the lessee.[36]

Southern prisons were able to turn a profit off of free labor because of the mass incarceration of African Americans in the post-Civil War era and the convict leasing system.[37] African Americans were no longer slaves to private citizens but "slaves to the state."[38] Until 1940, states could lease convict labor, and lessees could sell those convict goods in the interstate market at lower prices.[39] In 1940, Congress passed the Ashurst–Sumners Act, which prohibited the transport of prison goods in interstate commerce.[40] Convict leasing would largely die out in the 1930s and disappear by the 1940s, since goods could not be shipped out-of-state, leaving convicts working for the states.[41]

In the twilight of convict leasing, the federal government would also enter the market for prison labor. The federal government authorized UNICOR (Federal Prison Industries, Incorporated), which operates as a federally owned prison business supporting the federal government.[42] The federal business employed a small fraction of federal inmates, but generally maintained large profits.[43] The presence of profit incentives in the federal and state prison systems opened the door for private actors to offer savings to states and profit off punishment.

Fast forward to the 1970s, and the formerly-profitable prisons experienced an explosion in incarceration rates, beginning with President Nixon declaring drugs "enemy number one" and continuing through President Reagan's war on drugs.[44] The incarceration spike drove the states to open themselves to the three largest private prison corporations, who offered to build and run prisons. First, Core Civic (formerly Corrections Corps of America) began partnering with federal and state prison systems in 1983.[45] Today, however, Core Civic boasts that it is "the fifth-largest corrections system in the nation, behind only the federal government and three

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36 Jennifer Roback, *Southern Labor Law In The Jim Crow Era: Exploitative Or Competitive*?, 51 U. CHI. L. REV. 1161, 1170 (1984).

37 Garvey, *supra* note 11, at 355-58.

38 Ruffin v. Commonwealth, 62 Va. 790, 796-97 (1871).

39 Ashurst–Sumners Act, 18 U.S.C. §§ 1761-62 (1935).

40 *Id.*

41 Garvey, *supra* note 11, at 365-68.

42 Michelle Chen, *Exploiting Prison Workers for Cheap Sheets*, THE NATION (Mar. 10, 2023) https://www.thenation.com/article/society/prison-workers-exploitation/.

43 *Id.*

44 Andre Douglas Pond Cummings, *All Eyez on Me: America's War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER RACE & JUST. 417, 418-25 (2012).

45 CoreCivic, *AboutUs*, CORECIVIC https://www.corecivic.com/about (last visited Mar. 23, 2023); CoreCivic, Inc., INVESTIGATE: A PROJECT OF THE AMERICAN FRIENDS SERVICE COMMITTEE (May 25, 2022) https://investigate.afsc.org/company/corecivic#:~:text=It%20owns%20or%20manages%2074%20prisons%20and%20jails,estate%20used%20by%20government%20agencies%20in%20the%20U.S.%E2%80%9D.

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states."[46] Second, GEO Group, another private company, received its first private prison contract in 1987 and operates as an international prison provider today.[47] Finally, Management and Training Corporation, a private prison company, started in 1981 and is the third largest private prison corporation behind CCA and Geo Group.[48]

The private prison model promised lower costs to house inmates; however, whether they are actually cheaper is still an open question.[49] The private companies receive a per diem amount for each inmate they hold, and states supplement this by having minimum guarantees of filled prison beds.[50] The minimum guarantee means that, even if the set number of beds are not filled, the company still receives money.[51] To supplement funds, private prisons contract with private companies to produce low-skill goods, such as uniforms.[52] The private-state-federal prison system persists today.

B. *The Regulatory Landscape*

The Thirteenth Amendment is the primary constitutional provision supporting the current prison system; however, the Eighth Amendment offers modest prisoner protections.[53] After the prisoners' rights movement, which demanded more humane prison conditions, inmates could pursue Eighth Amendment violations against prisons for cruel and unusual punishment.[54] However, until 1981, the Supreme Court had never considered whether "conditions of confinement," including labor conditions, were protected by the Eighth Amendment.[55] This meant that inmates had little recourse against prisons at all. Before 1981, prisoners could only win an Eighth Amendment

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46 *Id.*

47 *Geo Group History Timeline*, GEO GRP., https://www.geogroup.com/history_timeline (last visited Mar. 22, 2023).).

48 Management & Training Corporation, *MTC-Overview*, MANAGEMENT & TRAINING CORPORATION, (November 7, 2018) https://www.mtctrains.com/about-us/; Harrison Berry, *Idaho's Last Private Prison*, BOISE WEEKLY, (Sep. 7, 2016) https://www.boiseweekly.com/boise/idahos-last-private-prison/Content?oid=3883909.

49 André Douglas Pond Cummings & Adam Lamparello, *Private Prisons and The New Marketplace for Crime*, 6 WAKE FOREST J. L. & POL'Y 407, 429-432 (2016).

50 *Id.* at 416.

51 *Id.* at 429.

52 *E.g.*, Allisson Aubrey, *Whole Foods Says It Will Stop Selling Foods Made with Prison Labor*, NPR, (Sept. 30, 2015, 7:52 PM), https://www.npr.org/sections/thesalt/2015/09/30/444797169/whole-foods-says-it-will-stop-selling-foods-made-by-prisoners; Simon McCormack, *Prison Labor Booms As Unemployment Remains High; Companies Reap Benefits*, HUFFINGTON POST, (Dec. 10, 2012, 2:19 PM), https://www.huffingtonpost.com/2012/12/10/prison-labor_n_2272036.html.

53 Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 469 (1997).

54 *Id.*

55 Rhodes v. Chapman, 452 U.S. 337, 344-46 (1981).

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claim for egregious problems, such as refusal of medical care, indefinite solitary confinement, or under-feeding isolated inmates.[56]

Courts will not impose on prison administrators or state legislators without an objective Eighth Amendment reason.[57] The Court in *Rhodes v. Chapman* held only that prison conditions "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment."[58] Labor in prisons could only receive Eighth Amendment protections if that labor amounted to torture or deprived inmates of basic human needs, like food and water.[59] Therefore, state slavery or involuntary servitude are not cruel and unusual punishments under the Eighth Amendment.[60]

C. *The Current Prison System*

There are two types of prison labor: regular prison jobs and "correctional industry" jobs.[61] Over ninety-four percent of prisoners, on average, perform regular prison jobs.[62] Regular prison jobs include agriculture work, janitorial and laundry services, uniform manufacturing, and prison maintenance.[63] Regular prison jobs even include service projects, menial tasks ranging from washing cars to repairing graveyards, and firefighting.[64] These jobs are revenue-generators for the state. For example, in 2016, Arkansas inmates earned approximately $8.3 million in revenues for the state through agricultural work.[65]

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56 Hutto v. Finney, 437 U.S. 678, 682-84 (1978); Estelle v. Gamble, 429 U.S. 97, 103 (1976).

57 *Rhodes*, 452 U.S. at 346-47.

58 *Rhodes*, 452 U.S. at 347.

59 *Id.*

60 *Id.*; U.S. CONST. amend. VIII; U.S. CONST. amend. XIII.

61 Wendy Sawyer, *How much do incarcerated people earn in each state?*, PRISON POLICY INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/.

62 *Id.*

63 *Id.*

64 Sebastian Murdock, *Louisiana Sheriff Wants 'Good' Prisoners To Stay Jailed For Their Free Labor*, HUFFINGTON POST, (Oct. 12, 2017, 1:58 PM), https://www.huffingtonpost.com/entry/louisiana-sheriff-steve-prator-prisoners_us_59dfa0bee4b0fdad73b2cded; Sarah Holder, *The Not-So-Invisible Labor Prisoners Do in Cities*, CITYLAB, (Aug. 18, 2018, 2:56 PM), https://www.citylab.com/equity/2018/08/the-not-so-invisible-labor-prisoners-do-in-cities/568537/; Eric Levenson, *Low on Resources, Boston Turns to Prison Labor to Shovel Snow*, BOS. GLOBE, (Feb. 17, 2015), https://www.boston.com/news/local-news/2015/02/17/low-on-resources-boston-turns-to-prison-labor-to-shovel-snow; Eric Escalante, *9 things to know about California's inmate firefighters*, ABC NEWS, (Aug. 9, 2018, 5:38 PM), https://www.abc10.com/article/news/local/9-things-to-know-about-californias-inmate-firefighters/103-582161022.

65 Wendy Kelley, *Annual Report* 5 (2016), ARKANSAS DEPARTMENT OF CORRECTIONS, https://web.archive.org/web/20170808005828/https://adc.arkansas.gov/images/uploads/2016_Annual_Report_Directors_Edits_+_BOC_Approval_2_2_2017x1Final.pdf (Agricultural work includes the

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"Correctional industries" are state-owned enterprises that produce miscellaneous goods and services for both the government and private companies.[66] For example, in 2016, Texas Correctional Industries produced $89 million from sales of goods including shoes, garments, brooms, license plates, janitorial supplies, soaps, furniture, textiles, and steel products.[67] In the same year, Arkansas Correctional Industries produced approximately $8.2 million in revenues from similar goods and services.[68] Also, in 2017, Georgia Correctional Industries produced $36 million in manufacturing goods and approximately $25 million in farm goods.[69]

Prison labor has some economic value, otherwise the states would not compel inmates to work. Most states also pay inmates. An average U.S. inmate earns between $0.14 and $0.63 per hour in regular prison jobs.[70] However, inmates in Texas, Alabama, Georgia, and Arkansas are unpaid.[71] Unpaid prison systems use an allowance system for prisoners to buy goods at the commissary.[72]

The real value of the prisoner's dollar depends on how they can use that dollar. Prisons have a commissary system that allows prisoners to spend "money" on non-prison goods like stamps, soda, chips, ramen, deodorant, and even medical costs.[73] Commissaries, like any vendor, have price markups; however, in prison these markups can be upwards of thirty percent.[74] An illustrative example of how far a prison dollar actually goes is the Texas prison system.

Texas does not pay inmates but allocates $60 per inmate per quarter, with an additional $25 for the October-December quarter, totaling $265

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care, sale, and production of animals and animal products (i.e., chickens, cows, and pigs), and other agriculture products such as bales of wheat).

66 Sawyer, *supra* note 61.

67 Tex. Dep't of Crim. Justice, Annual Report (2016), https://www.tdcj.state.tx.us/documents/Annual_Review_2016.pdf.

68 Kelley, *supra* note 65.

69 Georgia Department of Corrections (2017), 2017 Fact Sheet, GEORGIA DEPARTMENT OF CORRECTIONS 1-2 http://www.dcor.state.ga.us/sites/default/files/GCI%20Fact%20Sheet%202017%20.pdf.

70 Sawyer, *supra* note 61.

71 Prison Policy Initiative, *State and federal prison wage policies and sourcing information*, PRISON POLICY INITIATIVE (Nov. 11, 2018), https://www.prisonpolicy.org/reports/wage_policies.html; Tex. Dep't of Crim. Justice, Annual Report 26 (2016), https://www.tdcj.state.tx.us/documents/Annual_Review_2016.pdf; Kelley, *supra* note 65; Daniel Moritz-Rabson, *'Prison Slavery': Inmates Are Paid Cents While Manufacturing Products Sold To Government*, NEWSWEEK (Aug. 28, 2018, 5:12 PM), https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729.

72 *E.g.*, Tex. Dep't of Crim. Justice, *Frequently Asked Questions* (2018), https://www.tdcj.state.tx.us/faq/ecomm.html.

73 *E.g.*, *id.* (describing the Texas inmate commissary program).

74 Matt Stiles, *Buyers Behind Bars*, TEX.TRIB. (Apr. 8, 2010, 5:00 AM), https://www.texastribune.org/2010/04/08/texas-prisoners-spent-95-million-at-commissaries/.

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yearly.[75] The money can only be spent at the Texas Commissary, where there is a wide range of prices on everything from hygiene products to stamps.[76] It is fairly easy to burn through the $60 quarterly allotment given the commissary prices, especially for women when feminine hygiene kits cost $24.[77] However, the real budgeting crunch happens if and when an inmate gets sick or hurt.

Texas requires that inmates pay a $100 annual copay if they see a doctor any number of times for a non-chronic issue.[78] This copay is paid from their commissary account unless they have less than $5 in their account, thereby qualifying as indigent.[79] The $100 copay is 37.7% of the inmates' $265 yearly allowance.[80] If an inmate has insufficient funds to pay the copay, half of all future quarterly commissary allowances are taken until the copay is paid.[81] This leads to inmates opting not to go to a doctor because their limited funds would be better spent on other commissary items.[82] The original copay price, before 2012 was only $3 per visit.[83] Texas' justification for the price hike to $100 yearly was solely to increase revenues by approximately $9.9 million.[84] In reality, the hike raised only $2.5 million, but was still five times the old revenues of approximately $500,000 per year.[85]

Except for the $100 medical fee, Texas' prisoners are in the same boat with prisoners across the country. The states set the wages, prices, and work hours to maximize profits.[86]

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75 *Id.*

76 *Supra* note 72.

77 *Id.*

78 Nick Wing, *Prisons And Jails Are Forcing Inmates To Pay A Small Fortune Just To See A Doctor*, HUFFINGTON POST (Apr. 19, 2017, 9:26 AM), https://www.huffingtonpost.com/entry/prison-jail-medical-copays_us_58f64bdbe4b0b9e9848ee23e (showing the next highest copay after Texas is Nevada, with a copay of $8).

79 Wing, *supra* note 78; *see also* Stiles, *supra* note 74.

80 Tex. Gov't Code Ann. § 501.063, available at https://statutes.capitol.texas.gov/Docs/GV/htm/GV.501.htm.

81 *Id*. (meaning that if an inmate becomes sick or injured on December 31 and has $5.01 in their account, thereby not indigent; the prison will take $30 from the first quarter, $30 from the second quarter, and $30 from the third quarter, and $10 from the fourth quarter. This leaves $165 from allowances plus the $5.01 in rollover funds, all for going to see a doctor.)

82 Maurice Chammah, *Some Inmates Forego Health Care to Avoid Fee*s, TEX. TRIB. (Oct. 16, 2012, 6:00 AM), https://www.texastribune.org/2012/10/16/tdcj-inmates-paying-100-fee-health-care/; *see also* Wing, *supra* note 78.

83 Chammah, *supra* note 82. ("As a result of HB26, which took effect [in 2011], [Texas Department of Criminal Justice] prisoners who seek medical care now pay a fee of $100 once a year, whether they see a doctor once or multiple times.").

84 Ioana Makris, *House Tentatively Approves Prisoner Health Care Fee*, TEX. TRIB. (June 16, 2011, 4:00 PM), https://www.texastribune.org/2011/06/16/texas-prisoners-could-be-charged-100-healthcare/.

85 Chammah, *supra* note 82.

86 *See* Cummings, *supra* note 44.

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D. *Prison Labor, Even Volunteer Labor, is Compulsory and Penological*

The key distinction states make between regular prison jobs and correctional industry jobs is that industry and out-of-prison jobs are "voluntary."[87] If work is voluntary, then it is not exploitative because a worker can choose not to perform that work. However, several federal circuits ignore this distinction on the grounds that no work performed in a prison is voluntary because an inmates' labor "belongs to the state."[88] Just because an inmate acts rationally and chooses—based on what they believe given their information—the best option, this action does not indicate any real "choice," especially when 76% of inmates report being threatened with "solitary confinement, denial of opportunities to reduce their sentence, and loss of family visitation, or the inability to pay for basic life necessities like bath soap" for not working.[89] Inmates do not contract with the state because there is no bargain; there is just a compulsion to perform, which necessarily benefits the prison.[90] Because the state owns the labor, courts conceptually prioritize penological justifications for punishment over economic issues when such penological goals exists.[91] Typical penological justifications include the deterrent effect, rehabilitative effect, or retributive reasons.

E. *Prevailing Incentives for Continuing Prison Labor*

Inmates are not the most sympathetic group. While running for office, politicians rely on "tough on crime" rhetoric to score political points with

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87 *E.g.*, Cal. Dep't of Corr. & Rehab., *Conservation (Fire) Camps*, https://www.cdcr.ca.gov/Conservation_Camps/ ("An inmate must volunteer for the fire camp program; no one is involuntarily assigned to work in a fire camp"); Marilyn C. Moses & Cindy J. Smith, *Factories Behind Fences: Do Prison 'Real Work' Programs Work?*, 257 NIJ J., 1, 1-43 (2007).

88 Vanskike v. Peters, 974 F.2d 806, 809-12 (7th Cir. 1992) (…the relationship between the DOC and a prisoner is far different from a traditional employer-employee relationship, because (certainly in these circumstances) inmate labor belongs to the institution) (citing Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1333 (9th Cir. 1991)); *see also* Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., 112 F.3d 1119, 1124-25 (11th Cir. 1997).

89 Danneskjold v. Hausrath, 82 F.3d 37, 43 (2d Cir. 1996) ("In the instant case, for example, tutoring of other inmates by prisoners who volunteer may be superior to tutoring by prisoners ordered to do so. In any event, the voluntary performance of labor that serves institutional needs of the prison is not in economic reality an employment relationship. The prisoner is still a prisoner…"); *see also Vanskike*, 974 F.2d at 809 ("Prisoners are essentially taken out of the national economy upon incarceration. When they are assigned work within the prison for purposes of training and rehabilitation, they have not contracted with the government to become its employees. Rather, they are working as part of their sentences of incarceration"); AMERICAN CIVIL LIBERTIES UNION, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 5 (2022), https://www.aclu.org/report/captive-labor-exploitation-incarcerated-workers.

90 *Vanskike*, 974 F.2d at 809.

91 Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 890-92 (2008).

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voters.[92] Since the platform of "more rights for prisoners" does not win elections, lawmakers are generally personally disinterested in pursuing prison labor reform, especially when reforms are severely hindered by private lobbying.[93] As previously mentioned, the 1980s brought us three large private prison companies who profit off incarceration.[94] To secure a steady revenue stream from the government, private prison companies lobby lawmakers for longer sentences and more stringent sentencing standards.[95]

Lawmakers are not the losers in this situation. They receive cash donations from private companies in exchange for policies that win "tough on crime" points with voters. Taxpayers, on the other hand, foot the bill for prison expenses despite dubious claims of private cost savings.[96] Given the lack of voter pushback against these long-term punishment increases, lawmakers have little personal incentive to stray from the current course.

II. THE CASE FOR AMENDING THE THIRTEENTH AMENDMENT

This Comment takes the stance that "except as a punishment for crime whereof the party shall have been duly convicted" should be removed. This is because prison labor is inherently exploitative in economic terms, creates perverse incentives to perpetuate prison labor through greater incarceration, and has no support under any traditional penological justification.

A. *Prison Labor is Economically Exploitative*

Prisons facilitate a "forced labor" market and are therefore exploitative. Economic forced labor is "when the market wage is lower than the reservation wage."[97] The reservation wage is the lowest wage where an individual will remain in the market.[98] If a laborer is compelled to work when they would otherwise drop out of the market, there is no free exit from the market.[99] Prisoners are paid at a below-market rate, and in several states are

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92 Cummings, *supra* note 44, at 420.

93 *Id.* at 437-39.

94 *Id.*

95 Cummings & Lamparello, *supra* note 49, at 419-22; Cummings, *supra* note 44, at 437-39 (showing CCA spent more than $3 million on federal lobbying in 2005. The largest U.S. private prison companies together have spent dozens of millions of dollars lobbying both state and federal legislators since the origin of the U.S. private prison corporation).

96 Cummings and Lamparello, *supra* note 49, at 422-25.

97 Roback, *supra* note 36, at 1180.

98 *Id.*

99 Roback, *supra* note 36, at 1176-77; *see also* Roger D. Blair and Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 319 (1990-1991).

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wholly unpaid.[100] Since no one freely chooses to work for a wage of zero dollars, this system is exploitative. Even assuming some kind of free exit (potentially through release programs based on prisoner behavior), this system would still be exploitative as a monopsony.

A monopsonist, in plain terms, is the buyer-version of a monopolist.[101] A monopsonist takes supply as given, but since they are the only customer in the market, they are able to demand lower prices on goods, or purchase less goods to control prices.[102] In the market for labor, a monopsonist will keep "buying" labor until the marginal market value of that worker's product is less than the marginal cost of hiring (for example, a wage).[103] Prison labor generally fits into a monopsonic model. While the state has tomust imprison everyone sentenced to a term of imprisonment, the government still can limit both the number of people sentenced, and the profit-maximizing wage for labor. Therefore, in the market for prison labor, the government will always want to keep any type of wage below the marginal benefit associated with any inmate. Because prison labor is shortchanging the laborer while reaping huge surpluses, this system is exploitative.[104]

Prison labor is therefore unequivocally exploitative because it is forced labor, and even if it waswere not, the prison-monopsonist would actively exploit inmates.

B. *Profiting Off Prison Labor Creates Perverse Punishment Incentives*

A system of punishment centered around compulsory labor unsurprisingly leads to perverse incentives. A perverse incentive occurs when an actor benefits from undesirable behavior which incentivizes more of that behavior.[105] In the context of any program, an actor has perverse incentives when they are able to benefit from the thing, behavior, or action that the program is designed to prevent. The perverse incentive leads to increased undesirable conduct based on a profit opportunity for the actor.

Applying this idea to prison labor is not, well, laborious when given the series of incentives for compulsory labor. The Thirteenth Amendment eliminated private slave labor, and slave labor is socially undesirable. However, the Thirteenth Amendment also creates a vehicle for states to profit off the same kind of labor. Because the states realized immediately that they could

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100 Sawyer, *supra* note 61.

101 *See* Natalie Rosenfelt, *The Verdict on Monopsony*, 20 LOY. CONSUMER L. REV. 402, 402-03 (2008); Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 265-66 (1998) (Analogizing a prosecutor with a monopsonist in the market for prosecutions).

102 Roback, *supra* note 36, at 1176.

103 Blair and Harrison, *supra* note 99, at 303-04.

104 Roback, *supra* note 36, at 1176-77.

105 Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKELEY J. CRIM. L. 111, 123-24 (Fall 2017).

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profit from compulsory labor, the same kind the Thirteenth Amendment stops private parties from facilitating, the states chose to further their financial interests.

The states are disincentivized against lighter criminal punishments because of significant cost-savings that inmate labor provides. A recent and highly publicized example of this is California's inmate firefighter program.[106] The program allows nonviolent offenders to sign up to fight fires for $2 daily, in addition to $1 per hour while fighting fires.[107] Additionally, for each day fighting fires, inmates receive two days off their sentence (a "2-1" credit).[108] The program employs approximately 3,700 inmates and saves approximately $100 million for California each year.[109] These savings are primarily because non-inmate firefighters obviously make more than $10 per day.[110] Jeff Johnson, a division chief with the California Department of Forestry and Fire Protection, explained that "If you had to pay [inmates the] minimum wage, the cost of these fires would generally go up quite dynamically."[111]

Lawyers for California in 2014 even argued that releasing inmates would leave the firefighter program short-staffed.[112] For context, in 2010, California's prison system held approximately 156,000 people, which is nearly double what the facilities were designed to hold.[113] A federal court ordered California to reduce its prison population to a still-overcrowded

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106 *E.g.*, Cal. Dep't, *supra* note 87; Lizzie Johnson, *Fewer prison inmates signing up to fight California wildfires*, SAN FRANCISCO CHRONICLE, September 1, 2017, https://www.sfchronicle.com/bayarea/article/Fewer-prison-inmates-signing-up-to-fight-12165598.php; Escalante, *supra* note 64; Philip Wegmann, *They fought wildfires as inmates, but California won't let them become firefighters when free*, WASHINGTON WASH. EXAMINER (Aug. 7, 2018) https://www.washingtonexaminer.com/opinion/they-fought-wildfires-as-inmates-but-california-wont-let-them-become-firefighters-when-free.

107 Luis Gomez, *For $1 an hour, inmates fight California fires. 'Slave labor' or self-improvement?*, SAN DIEGO TRIBUNE (Oct. 20, 2017) *http://www.sandiegouniontribune.com/opinion/the-conversation/sd-how-much-are-california-inmate-firefighters-paid-to-fight-wildfires-20171020-htmlstory.html*.

108 *Id.*; Nichole Goodkind, *California Wildfires: Inmates Are Risking Their Lives Working Alongside Firefighters For $2 A Day*, NEWSWEEK (Aug. 8, 2018) https://www.newsweek.com/california-wildfires-inmates-prisoners-firefighters-1061905.

109 Johnson, *supra* note 106; Alex Helmick, *Hundreds of the Firefighters Battling Sonoma Fires — Inmates*, KQED NEWS (Oct. 13, 2017) https://www.kqed.org/news/11623289/hundreds-of-the-firefighters-battling-sonoma-fires-inmates.

110 Calfas, *supra* note 4. The $10 figure assumes that inmates fight fires for eight hours and receive the $2 a day.

111 Johnson, *supra* note 106.

112 Defs.' Opp'n To Pls.' Mot. To Enforce, p. 3-4, Coleman v. Brown, No. 2:90-cv-00520 KJM DAD P (E.D. Cal.), available at http://d35brb9zkkbdsd.cloudfront.net/wp-content/uploads/2014/11/2014-11-17-CalifPrisonLaborState.pdf; Nicole Flatow, *California Tells Court It Can't Release Inmates Early Because It Would Lose Cheap Prison Labor*, THINKPROGRESS (Nov. 17, 2014) https://thinkprogress.org/california-tells-court-it-cant-release-inmates-early-because-it-would-lose-cheap-prison-labor-c3795403bae1/.

113 Brown v. Plata, 563 U.S. 493, 501 (2011).

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137.5% of its capacity, 110,000 people.[114] The Supreme Court affirmed because overcrowding violated the Eighth Amendment, and ordered California to reduce its prison population.[115]

California ultimately failed to meet the prison population deadlines set by the Court, prompting the 2014 hearing by the same 2010 plaintiffs, who demanded that a 2-1 credit be granted to low-security offenders to expedite releases.[116] The 2-1 credit originally applied for low-security offenders who fought fires, but not the general low-security population.[117] California argued that it should not expand the 2-1 to all low-security offenders because there would be less of an incentive for prisoners to fight fires, and higher release rates among these inmates would leave prison facilities short-staffed.[118] This is because if there is a general 2-1 credit available, then no would be no additional benefit to fighting fires, and prisons would not be able to use inmate labor to staff prisons since the inmates would be released sooner.[119] The state of California apparently forgot that it can hire people to perform work who are not prisoners.

The situation in California highlights the value prison labor has to the states. In fact, prisons are dependent on inmates' labor to operate. This, at a minimum, creates a state that is financially interested in how many people are punished. Add in lawmakers receiving money from prison corporations to punish people more harshly, and we have greater punishment based on profit interests of states and individual lawmakers.[120]

C. *What about Penological Interests?*

Profit-driven prison labor does not further traditional penological interests. Penological theories help examine whether a punishment is a legitimate exercise of state power. Deterrence, incapacitation, rehabilitation, and retribution are all common themes in punishment policy, and this comment will

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114 *Id.*

115 *Id.* at 501-02 (The Court noted several tools at the State's disposal, "including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs" to mitigate the impact of the order).

116 Paige St. John, *Gov. Jerry Brown's prison reforms haven't lived up to his billing*, LOS ANGELES TIMES, June 21, 2014, https://www.latimes.com/local/politics/la-me-ff-pol-brown-prisons-20140622-story.html#page=1.

117 Goodkind, *supra* note 108.

118 *Id.*

119 *See id.*

120 Cummings and Lamparello, *supra* note 49, at 419-22; Cummings, *supra* note 44, at 437-39.

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address these four ideas as they relate to prison labor.[121] Each of the following theories fails to actually apply to prison labor.

Deterrence can be disposed of fairly quickly. Deterrence theory proposes that if the state levies harsh punishments against criminals, then individuals will be disincentivized from committing crimes because the "cost" of crime has increased.[122] However, the notion that harsher punishments such as longer sentences, the death penalty, or decades of exploitative labor actually deter crime is empirically dubious.[123] In fact, harsher punishments, whatever the form, are significantly less effective deterrents than greater certainty of being caught.[124] Simply increasing a punishment has little effect on general deterrence.[125] Accordingly, free or cheap labor, as an integral part of our incarceration system, is not going to have a significant deterrent effect.

Incapacitation theory is also easily dismissed as a justification for prison labor. This theory proposes that if you sequester a criminal from society, or just execute them, then society is protected from future crimes.[126] This theory does not apply to prison labor because the theory is more of a justification for either prisons or the death penalty, not forced labor.

Rehabilitation is fairly interesting as a justification for prison labor writ large. This theory asserts that punishment should cure criminal inclinations through programs seeking to help inmates.[127] This theory took root in the U.S. early on, where labor was thought to cure idleness, which at the time was considered a cause of crime.[128] The ideology lost prevalence until the 1930s but ultimately lasted into the 1970s.[129] Interestingly, this idea gained prevalence in the U.S. in the twilight of both convict leasing and state prison profitability.[130]

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121 Alice Ristrophe, *Proportionality as a Principle Of Limited Government*, 55 DUKE L.J. 263, 271-79 (2005); Ewing v. California, 538 U.S. 11, 25 (2002) (*citing* 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5 (1986)).

122 Ristrophe, *supra* note 121; Jeffrey G. Murphy, *Symposium On Kantian Legal Theory: Does Kant Have A Theory Of Punishment?*, 87 COLUM. L. REV. 509, 517 (1987).

123 Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 252 (2013); *see also* NATIONAL INSTITUTES OF JUSTICE, *Five Things About Deterrence* (May 2016) https://nij.gov/five-things/pages/deterrence.aspx#note1.

124 *Id. at 206.*

125 NATIONAL INSTITUTES OF JUSTICE, *Five Things About Deterrence*, (May 2016) https://nij.gov/five-things/pages/deterrence.aspx#note1 ("Some policymakers and practitioners believe that increasing the severity of the prison experience enhances the 'chastening' effect, thereby making individuals convicted of an offense less likely to commit crimes in the future. In fact, scientists have found no evidence for the chastening effect").

126 Wayne R. LaFave, Substantive Criminal Law, 1 SUBST. CRIM. L. § 1.5(a)(2) (3d ed.).

127 Wayne R. LaFave, Substantive Criminal Law, 1 SUBST. CRIM. L. § 1.5(a)(3) (3d ed.).

128 William P. Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1161 (2004).

129 Gordon Hawkins, *Prison Labor and Prison Industries*, 5 CRIME AND JUST. 85, 117 (1983).

130 Garvey, *supra* note 11, at 365-68; *see also* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450-51 (2005).

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The rehabilitative effects of labor are not borne out by evidence. There is some literature suggesting that work programs (like correctional industry programs or UNICOR) may have some rehabilitative effect, but the effect is questionable because of selection bias problems.[131] However, there is significant doubt that compulsory labor has any rehabilitative effect at all.[132] The benefit of rehabilitative theory could instead lie in its ability to limit other theories of punishment.[133] However, this would only be possible where a rehabilitative effect actually exists, which is clearly not the case with prison labor.[134]

Our last penological theory is retribution, which admittedly is the most compelling of the four justifications, if only because of its very broadoverly broad application. This theory demands punishment when people deserve punishment.[135] Otherwise explained, retribution operates under the assumption that it is only right for someone who wrongs society to suffer accordingly.[136] This dynamic immediately presents the problem of what kinds of punishment are deserved? If inmates deserve "whatever the state wants," then the theory is a mere truism. The punishment is just because the state says it is just. Alternatively, the theory is just as easily painted as self-limiting through moral principles.[137] If desert is taken seriously, then criminals have tomust actually deserve whatever punishment they receive from a moral standpoint. If inmates do not receive morally just punishments, then the implication is that there is another, more perverse incentive at work.

There are two ways to apply retribution to prison labor. First, we can assume that prisoners deserve to work since it is incidental to their sentence, which is repayment for their harm to society. Second, we can recognize that the state is not disinterested in the imposition of labor and ask whether inmates deserve to be subjected to greater sentences, and by necessity more labor, because of the financial interest of private parties.[138] States are not

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131 Moses, *supra* note 87 (While there is a positive rehabilitative effect, the totality of the effect is questionable because of selection bias in participation in the programs (i.e. only people who are low-risk offenders usually join the programs)); *see also* Doris MacKenzie, *Sentencing and corrections in the 21st century: Setting the stage for the future*, at 28 (2001) https://www.ojp.gov/pdffiles1/nij/grants/189089.pdf.

132 Hawkins, *supra* note 129, at 117-18 ("Nevertheless, those seeking confirmation of the belief that 'suitable employment is the most important factor in the physical and moral regeneration of the prisoner' (Great Britain Parliament 1933/34, p. 64) will find little gold in the meager supply of evaluative studies available. Reviewers of those studies have found either that the hope that prisoners will be rehabilitated by their work experience or by the acquisition of on-the-job skills is 'not borne out by the evidence' (Taggart 1972, p.56) or at best that the empirical evidence is 'depressingly equivocal' and that 'research findings in this area . . . are riddled with inconsistencies' (Braithwaite 1980, p. 2)).

133 Ristrophe, *supra* note 121, at 278-79.

134 Hawkins, *supra* note 129.

135 Wayne R. LaFave, Substantive Criminal Law, 1 SUBST. CRIM. L. § 1.5(a)(6) (3d ed.).

136 *Id.*

137 Ristrophe, *supra* note 121, at 279-84.

138 Cummings, *supra* note 44, at 437-39.

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disinterested in sentencing decisions.[139] To take any punishment that is motivated by outside private financial interests and call it legitimate at face value would mean that private entities can help determine what punishments we receive based on their profit margins. This is not inherently deserved from an offense, so the resulting prison labor cannot be retributive.

Monetization of prison labor, and the attendant perverse incentive, invite exploitation. The states know they can compel labor under the Thirteenth Amendment, as they have always done.[140] Therefore, the states are financially invested in greater imprisonment and greater use of compulsory labor.

D. *Amending the Thirteenth Amendment*

Given the evidence of the exploitative nature of compulsory labor in the prison system, this Comment can propose a solution. This Comment proposes removing the section of the Thirteenth Amendment which reads "except as a punishment for crime whereof the party shall have been duly convicted."[141] This sub-part will first address how such an amendment would play out, then address potential counterarguments.

The immediate and obvious effect of this proposed amendment is that there would be no more exploitative labor in the prison systems. Without a cheap source of labor, prisons would immediately become significantly more expensive to operate. Every job that prisoners perform, from janitorial to industrial work, would need to be filled with an employee earning at least the minimum wage and subject to worker protections. This change in circumstances will eventually lead to long-term cost-saving changes in the way we punish.

The states will lose money in the short run. To illustrate the short-run losses to states, we can look to California, one of the most expensive prison systems in the nation.[142] For simplicity's sake, assume that there is an average of five years left on each long-term prisoner's sentence.[143] Further, until most criminal sentences run their course, the states cannot profit from productive labor. Without cost-offsetting labor programs, states like California will

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139 Cummings, *supra* note 44, at 408-18.

140 U.S. CONST. amend. XIII.

141 U.S. CONST. amend. XIII.

142 Kurt Snibbe, *California has one of the most expensive prison systems in the world*, MERCURY NEWS (May 11, 2017) https://www.mercurynews.com/2017/05/11/california-has-one-of-the-most-expensive-prison-systems-in-the-world/.

143 Janice Williams, *Serving Time: Average Prison Sentence in the U.S. is Getting Even Longer*, NEWSWEEK (July 22, 2017) https://www.newsweek.com/prison-sentences-increased-2017-jail-639952 (the average California prison sentence jumped from an average of 4.8 years to 8.2 years from 2000 to 2014).

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spend over $70,000 per inmate per year.[144] Three-quarters of these costs are for security and healthcare (which increase due to an aging prison population).[145] California held approximately 129,000 inmates in January 2017.[146] The projected cost per year would be $9.03 billion. Over five years, the total cost would be approximately $45 billion. For comparison, California's total budget in 2017 was approximately $180 billion.

The estimates in the previous paragraph were before the ballooning costs of running prisons at a market wage. California prisoners work approximately seven-hour work daysworkdays, for twenty-two days per month, on average.[147] Since the overwhelming majority of prisoners are regular laborers, this estimate will use the regular laborer wage of $0.13 an hour.[148] The original costs to California from a yearly wage are $240.24 per prisoner. If minimum wage workers filled this work time instead at the 2018 California minimum wage of $11 per hour, then wages paid to workers per year would be $20,328 (without consideration of worker benefits), or approximately 85 times the original cost. The total average wage paid to all prisoners earning the minimum wage per year would be over $2.6 billion, or a twenty-nine percent increase in overall prison costs annually. Also, California would lose $100 million a year in firefighting savings alone.[149]

Not every state would have expenses like California. Cheaper states like Arkansas, which has approximately 19,000 inmates and a 2019 minimum wage of $9.25, would simply require less money.[150] Even assuming an eight-hour work dayworkday, for five days a week, for fifty-two weeks, Arkansas would only incur approximately $84 million per year in costs, which is approximately one thirtieth of California's costs.

These costs are not fixed forever, because states would have to adjust their sentencing policy. Still assuming an average of five years left in the inmates' sentences, the costs for California total at $13 billion, and after five years, prison will simply be a less attractive economic option for punishment. If states cannot force prisoners to work, then sentences would decrease because the expense to the state would balloon.

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144 Cal. Leg. Analyst's Office, *How much does it cost to incarcerate an inmate?* (March 2017) https://lao.ca.gov/policyareas/cj/6_cj_inmatecost.

145 *Id.*

146 Cal. Leg. Analyst's Office, *The 2017-2018 Budget* (Mar. 1, 2017), https://lao.ca.gov/Publications/Report/3595.

147 Prison Policy Initiative, *supra* note 67; Cal. Code of Reg. § 3044 (2016), https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/Title15-2016.pdf.

148 CAL. CODE OF REG. § 3041.2 (2016) https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/Title15-2016.pdf

149 Johnson, *supra* note 106.

150 Kelley, *supra* note 65, at 2; Heather Long, *Arkansas and Missouri just approved big minimum wage increases, a liberal victory in red states*, WASH. POST (Nov. 6, 2018) https://www.washingtonpost.com/business/2018/11/07/arkansas-just-approved-big-minimum-wage-increase-liberal-victory-red-state/?noredirect=on&utm_term=.501bc36eb733.

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After seeing all the additional costs that states would incur, critics may ask why any state would ever agree to this. This is where the second part of this Comment's proposal kicks in: paying the states for their increased costs while they wean off inmates and readjust. Giving billions of dollars to state governments while they simultaneously attempt to cut costs is a win for state governments. States can offer boons to taxpayers such as modest tax decreases in accordance with future lower prison costs, making individuals more amenable to the amendment. Lawmakers could certainly be convinced to enact a major reform if the federal government foots the bill.

This proposed federal money grant would be well within Congress' spending power. This grant is similar to other cost-mitigating grants made by congress such as the Medicaid program.[151] The general category of "open-ended reimbursement categorical grants," which this proposed prison grant would fall under, basically allows the government to pay any given percentage of costs for a program.[152] Like other grants already used by Congress, this grant can simply cover the costs of eliminating prison labor. Overall, this would not be highly burdensome to the federal government because while California's reform would cost $2.6 billion per year as the most expensive prison system, other states like Arkansas would only cost $84 million.[153] The states are also big winners in this situation because they are receiving free money to fix their respective prison systems.

By making the states more financially neutral toward a constitutional amendment targeted at prison reform, the amendment could be argued on its merits to the states. This leaves Congress, who could be convinced with the prospect of saving all the states billions in the long-run and downsizing the monetary black hole that is prison.

The prevailing problem with our prison system is the fact that there is no non-radical way to fix it. The status quo is rife with profit-interested states, who are influenced by profit-maximizing private companies that lobby for longer sentences, and a history of exploiting labor for money. Program-centered alternatives that leave the current prison structure in place do not sufficiently increase costs to deter rent-seeking in the form of increased punishments. Also, other legislative ideas are highly likely run afoul of the Tenth Amendment, since state prisons are only bound by the constitution, not individual federal programs.

Alternatives to a constitutional amendment risk uneven application across the country. It could be possible to convince one or two states, without the boon of billions in federal dollars, to change their prison systems. However, the problem is giving states the ability to opt-out of the idea. If most states would never forego having compulsory labor without a "carrot" there

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151 Center on Budget and Policy Priorities, *Policy Basics: Introduction to Medicaid* (August 16, 2016), https://www.cbpp.org/research/health/policy-basics-introduction-to-medicaid.

152 Robert Jay Dilger, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues*, CRS (May 7, 2018) https://fas.org/sgp/crs/misc/R40638.pdf.

153 Snibbe, *supra* note 142; *see also* Kelley, *supra* note 65 at 2; Long, *supra* note 150.

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is no available "stick" besides the U.S. Constitution. States cannot opt out of the Constitution, so it would be the most surefire way to stop individual state legislatures from reversing course as soon as the program became politically inconvenient.

Accordingly, the only way to reasonably fix the problem is with a constitutional amendment. This is the only option with real permanence that could incentivize the states (with money) to go along with the idea.

This Comment is not suggesting that punishment and prison are socially undesirable, because both are desirable in appropriate doses. However, given that prison will be even more costly than before, states will want to, if not need to, explore alternative means of punishment. These alternative means, whether education programs, more extensive work release programs, or something entirely new, could not be worse or more expensive than long prison sentences that exploit prisoners to turn a profit.[154]

CONCLUSION

There is hope for ending the profit-driven exploitation of people in prison. This hope stems from the fact that the ability to compel productive labor has, in no small part, made society worse off economically. Society is worse off because the primary winners are prison companies and politicians. Taxpayers bear the burden of paying for both public and private prisons, while states have a financial interest in greater incarceration rates, which in turn increases costs to the taxpayer. Continuation of the current prison system means that states like California will continue to spend $9.03 billion per year simply housing inmates and dispensing any costs savings directly to private actors who lobby and invest for greater rates of incarceration and cheap labor.[155]

Compulsory prison labor, enabled by the Thirteenth Amendment, does not serve any penological goals, and is just a ballooning expense for taxpayers. Given that prison labor is inherently exploitative, and the perverse incentives inherent in our prison system, the Thirteenth Amendment should be amended. The portion of the Thirteenth Amendment reading "except as a punishment for crime whereof the party shall have been duly convicted" should be removed. A constitutional amendment is not just a solution, it is the only permanent solution.

154 *See generally* Joan Petersilia, *Beyond the Prison Bubble*, NIJ JOURNAL NO. 268 (Nov. 3, 2011), https://www.nij.gov/journals/268/pages/prison-bubble.aspx.

155 CAL., *supra* note 144; Cummings, *supra* note 44, at 437-39.

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A SONG OF BALANCE AND TRADE: PROTECTING CONSUMERS BY REBALANCING THE POWER TO IMPOSE TARIFFS

*Jacob D. Hopkins**

INTRODUCTION

The morning cup of coffee is a simple yet sacred routine for many Americans.[1] Yet few consumers know or notice, when paying their barista, that they pay an additional cost, a tariff on the product, due to the International Coffee Agreement of 1983.[2] A core, yet often inconspicuous element of sovereignty, the government can use tariffs to defend national security,[3] protect "infant industries,[4] or serve as leverage in foreign affairs negotiations.[5] However, tariffs diminish consumers' gain from free trade and lead to economic inefficiencies.[6] Referred to as "duties" in the Constitution,[7] tariffs

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1 NATIONAL COFFEE ASSOCIATION, *Infographic: American Coffee Consumption 2020*, https://www.ncausa.org/Industry-Resources/Market-Research/NCDT/NCDT-Infographic (last visited Oct. 27, 2020) ("75% percent of Americans had consumed coffee in the past year 2019 to 2020").

2 Implemented in the U.S. by the International Coffee Agreement Act of 1980, 19 U.S.C. § 1356k et seq.; *see also* WORLD TRADE ORGANIZATION, *United States of America and the WTO*, https://www.wto.org/english/thewto_e/countries_e/usa_e.htm (last visited Oct. 27, 2020) (stating 2018 American coffee imports had a maximum of twenty-two final bound duties applied to them). *Cf.* INT'L COFFEE ORG., 107th Sess., *The effects of tariffs on the coffee trade*, 107-7 (Aug. 22, 2011) ("Consumption in importing countries seems to be relatively unaffected by the tariffs and taxes imposed on coffee").

3 Kevin J. Fandl, *National Security Tariffs: A Threat to Effective Trade Policy*, 23 U. PA. J. BUS. L. 340, 345 (2021).

4 Marc J. Melitz, *When and How Should Infant Industries Be Protected*, 66 J. INT'L ECON. 177, 177–96 (2005).

5 Alan Wm. Wolff, *Paradigm Lost? U.S. Trade Policy as an Instrument of Foreign Policy*, LAW WIRE (Feb. 8, 2018), https://www.wcl.american.edu/impact/lawwire/paradigm-lost-us-trade-policy-as-an-instrument-of-foreign-policy ("It is a traditional use of trade policy [. . .] as leverage to seek to foster foreign policy goals.").

6 James E. Anderson, *The Relative Inefficiency of Quotas*, 19 J. ECON. EDUC. 65, 75 (1988). For the view that there is an intrinsic tradeoff between the economic growth assisted by trade liberalization and its cost due to undertaking the practice's obligations, see Gary Clyde Hufbauer & Ben Goodrich, *More Pain, More Gain: Politics and Economics of Eliminating Tariffs*, *in* INT'L ECON. POL'Y BRIEFS, at 2 (Peterson Inst. for Int'l Econ., Brief No. PB03-8, 2003).

7 U.S. CONST. art. I, § 8, cl. 1.

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relate to both the taxing[8] and foreign relations[9] constitutional powers. Congress has the primary power to impose tariffs by passing tariff legislation.[10] Congress can delegate its authority to the President to change classifications, increase or decrease rates, or base rates on American prices instead of foreign valuations.[11] In recent years, however, this separation of powers has become unbalanced as more power has been consolidated in the executive branch.[12]

In the earliest trade cases, there was a stricter nondelegation doctrine involving Congress's power to impose tariffs.[13] As trade began to intersect with the Executive's foreign affairs and national security authority, the Supreme Court granted the executive branch broad authority to set tariff rates and change classifications.[14] Tariffs have been a major part of trade policy for the last three presidencies.[15] The Bush administration used a tariff in 2002 to protect the struggling steel industry from cheaper imports.[16] This tariff sent steel prices soaring, causing Americans to pay more for automobiles, appliances, and housing.[17] The Obama administration placed a tariff on Chinese-made tires in 2009 to protect domestic manufacturers.[18] Instead of increasing domestic production and rehiring at American plants, firms continued to use overseas manufacturing, causing tire prices to rise.[19] The Trump administration utilized widespread tariffs on steel and aluminum imports to protect

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8 *Id.* ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . .").

9 *Id.* art. II, § 2, cl. 2.

10 *See* Comment, *Delegation of Powers in the Tariff Act*, 23 COLUM. L. REV. 66, 66 (1923).

11 *Id*.

12 For the view that Congress relinquished power to the President, see Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CAL. L. REV. 583, 601 (2019). For the view that market conditions and administrative efficiency created this distribution, see Michael H. Salsbury, *Presidential Authority in Foreign Trade: Voluntary Steel Import Quotas from a Constitutional Perspective,* 15 VA. J. INT'L L. 179, 181–84 (1974).

13 Cargo of the Brig Aurora v. United States, 11 U.S. 382, 387 (1813) ("The legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect.").

14 Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 570–71 (1976); *see also* Comment, *supra* note 10, at 66 ("Turning now to cases which deal directly with tariff matters, we find further evidence of a strong tendency to sustain delegation of powers to the Executive")

15 *See, e.g.*, Andrea Shalal, *Trump's Tariffs Cost U.S. Companies $46 Billion to Date, Data Shows*, REUTERS (Jan. 9, 2020 11:43 AM) https://www.reuters.com/article/us-usa-trade-economy/trumps-tariffs-cost-u-s-companies-46-billion-to-date-data-shows-idUSKBN1Z8222; Frank James, *Obama's China Tire Tariff Smells Like Politics to Some*, NAT. PUB. RADIO (Sept. 17, 2009 3:40 PM) https://www.npr.org/sections/thetwo-way/2009/09/obamas_tire_tariff_smells_like.html; David E. Sanger, *Bush Puts Tariffs of as Much as 30% On Steel Imports*, N.Y. TIMES (Mar. 6, 2002) https://www.nytimes.com/2002/03/06/us/bush-puts-tariffs-of-as-much-as-30-on-steel-imports.html.

16 Sanger, *supra* note 15.

17 *Id.*

18 James, *supra* note 15.

19 *Id.* ("According to Frank's report, Chinese tire imports have tripled since 2004.").

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domestic production.[20] Though, Congress removed these measures in 2019 to pre-imposition levels.[21] The Biden administration appears to be following the pattern of preceding administrations, using tariffs to pressure other nations' trade policies.[22] Regardless of political party, tariff use remains a constant for the Executive branch. [23]

However, its effect on the separation of powers has not gone unnoticed.[24] In 2019, Judge Gary Katzmann wrote a *dubitante* opinion in *American Institute for International Steel, Inc. v. United States* alluding to a "canary in the coal mine" for the current separation of the power to impose tariffs.[25] Judge Katzmann lamented that Section 232's interpretation provides immense tariff discretion to the President, which the Constitution reserves for Congress.[26] The lack of ascertainable standards to cabin the President's authority under Section 232 of the Tariff Expansion Act indicates that proper checks and balances are absent.[27] Judge Katzmann suggests that time has changed assumptions about the delegation's propriety and recommends promptly revisiting and correcting this separation of powers issue.[28]

The following year, the United States Court of International Trade found the President exceeded his national security tariff authority under Section 232.[29] Analyzing the use of an executive order, the court in *Transpacific Steel LLC v. United States* found the President could not increase tariff rates unilaterally on steel imported from Turkey, using the 'constitutional doubt canon,' to suggest that the President's executive order violated the

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20 Shalal, *supra* note 15.

21 Shalal, *supra* note 15.

22 *See* David Lawder, *Biden Administration to Maintain China Tariffs while Review Continues*, REUTERS (Sept. 2, 2022), https://www.reuters.com/markets/us/biden-administration-maintain-china-tariffs-while-review-continues-2022-09-02/; *see also* Jim Zarroli, *Trump Launched A Trade War Against China. Don't Look To Biden To Reverse It,* NAT. PUB. RADIO (Nov. 18, 2020), https://www.npr.org/2020/11/18/935718860/trump-launched-a-trade-war-against-china-dont-look-to-biden-to-reverse-it ("That pressure on the left–and the right–means Biden is unlikely to reverse Trump's tariffs with the stroke of a pen, leaving him with few good options to pressure China.").

23 *See* Shalal, *supra* note 15; James, *supra* note 15; Sanger, *supra* note 15; Lawder, *supra* note 22.

24 *See, e.g.*, Cameron Silverberg, *Trading Power: Tariffs and the Nondelegation Doctrine*, 73 STSAN. L. REV. 1289, 1293–96 (2021) (arguing that Section 232 of the of the Trade Expansion Act of 1962 violates the nondelegation doctrine); Arim Jenny Kim, *The Untouchable Executive Authority: Trump and the Section 232 Tariffs on Steel and Aluminum*, 28 U. MIA. BUS. L. REV. 176, 187–88 (2019) (arguing that President Trump's use of Section 232 was a violation of the separation of powers).

25 376 F. Supp. 3d 1335, 1346–47 (Ct. Int'l Trade 2019) (Katzmann, J., *dubitante*), *aff'd,* 806 F. App'x *982, *991 (Fed. Cir. 2020), *cert. denied*, No. 19-1177, 2020 WL 3405872 (U.S. June 22, 2020).

26 *Id*. at 1352 ("[S]ection 232 . . . provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress.").

27 *See* 19 U.S.C. § 1862(c)(3).

28 *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1352 ("I respectfully suggest, however, that the fullness of time can inform understanding that may not have been available more than forty years ago.").

29 Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246, 1254–55 (Ct. Int'l Trade 2020) *rev'd and remanded*, 4 F.4th 1306 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 1414 (2022).

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nondelegation doctrine.[30] The court in *Transpacific Steel* reasoned that the text of Section 232 limited the President to make decisions within a specific time[31] and that if the court read the temporal requirement out of the statute, it would enable the President to adjust tariffs under Section 232 at any time, in any manner desired.[32]

However, the Federal Circuit reversed *Transpacific Steel*, holding that this temporal requirement was not in line with the President's "history and practice" of administering Section 232 and that this "long practice of presidential action" in protecting national security outweighed any constitutional concerns.[33] This interpretation, though at odds with the plain reading of the statute,[34] rests on Congressional acquiescence to executive practice and the constitutional deference to the President as commander-in-chief to decide to impose tariffs when national security is (and, frequently, when it is not) implicated.[35]

Section 232 has been identified as the potential crux of the constitutional issues posed by the issuance of tariffs, but *Transpacific Steel* introduces a deeper problem: whether the President can impose tariffs through executive order without considering the authorizing statute.[36] The President has issued tariffs by executive order on goods like wine,[37] lobsters,[38] fish, vodka, and

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30 *See id.*

31 *See id.* at 1252 ("[T]he temporal restrictions on the President's power to take action pursuant to a report and recommendation by the Secretary is not a mere directory guideline, but a restriction that requires strict adherence. To require adherence to the statutory scheme does not amount to a sanction, but simply ensures that the deadlines are given meaning and that the President is acting on up-to-date national security guidance.").

32 *See id.* at 1253 ("As we stated previously, '[i]f the President could act beyond the prescribed time limits, the investigative and consultative provisions would become mere formalities detached from Presidential action.'") (internal citation omitted, alteration in original).

33 4 F.4th at 1326–28 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004)).

34 *See* 466 F. Supp. 3d at 1253 ("Contrary to the government's contention, there is nothing in the statute to support the continuing authority to modify Proclamations outside of the stated timelines.").

35 Daniel J. Ikenson, *Congress Acquiesces to Tariffs by Fiat*, CATO INST. (July 15, 2020), https://www.cato.org/blog/congress-acquiesces-tariffs-fiat; *see also* Mary Amiti et al., *The Impact of the 2018 Tariffs on Prices and Welfare*, 33 J. ECON. PERSPS. 187, 207 (2019) ("We find that the US import tariffs were almost completely passed through into US domestic prices in 2018, so that the entire incidence of the tariffs fell on domestic consumers and importers up to now, with no impact so far on the prices received by foreign exporters.").

36 Daniel J. Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633, 650–51 (2017) (arguing that the Constitution imposes no constraints on Congress's ability to delegate authority to the executive branch in tax law beyond the constraints that apply in other areas); *see also* Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 219–20 (1989) (holding that Congress could delegate the power to "tax" consumers through the use of pipeline safety user fees to executive agencies).

37 Exec. Order No. 12,661, 3 C.F.R. 1988 (1988).

38 Donald J. Trump, *Memorandum on Protecting the United States Lobster Industry*, THE AM. PRESIDENCY PROJECT, (June 24, 2020), https://www.presidency.ucsb.edu/node/342156.

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diamonds.[39] None of these tariffs can be considered essential to national security, yet none were challenged on those grounds. As Justice John Marshall stated in *McCulloch v. Maryland*, "the power to tax involves the power to destroy . . . ."[40] Therefore, because tariffs are indirect taxes, the power to create tariffs involves the power to destroy value gained by the economy from free trade.[41] As the power to tax is one of Congress's core powers, the nondelegation doctrine must have a stronger consideration in tariff cases because, if the Executive is not properly constrained in imposing tariffs, it usurps the "power of the purse" from Congress[42] and could use that power to reward its supporters or special interests.[43] Yet, with national security interests also invoked in tariff decisions, the executive branch must be able to act with swiftness and dispatch in protecting the country.[44] Therefore, a balance is needed between these considerations to protect citizens from improper tariffs and encroaching foreign interests.

This comment evaluates the current state of the separation of the tariff power, identifies a potential constitutional issue with the President's ability to impose tariffs by executive order on goods that are not germane to national security, and then proposes potential solutions to "rebalance" the tariff power. Though one could argue, as the Federal Circuit did in *Transpacific Steel*, that the current balance is constitutionally "liquidated," the Court of

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39 Exec. Order No. 14,068, uncodified, (Mar. 11, 2022), https://home.treasury.gov/system/files/126/russia_eo_20220311.pdf (imposing tariffs on fish, seafood, alcoholic beverages, and non-industrial diamonds).

40 McCulloch v. Maryland, 17 U.S. 316, 431 (1819). Or, when implying judicial oversight, "[t]he power to tax is not the power to destroy *while this Court sits*." Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) (emphasis added).

41 *McCulloch*, 17 U.S. at 431 ("That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create . . . .").

42 19 ANNALS OF CONG. 1330 (1809) ("Among the duties—and among the rights, too—of this House, there is perhaps *none so important as the control which it constitutionally possesses over the public purse*") (remarks of Rep. J. Randolph). The Court has recently been willing to reexamine its application of the nondelegation doctrine, leading scholars to question what form the "nondelegation" will take in future cases. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting denial of certiorari) ("I write separately because Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."); Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J. concurring); *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) ("Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What's the test?"). In discussing better delegation examples, the *Gundy* Court cites previous foreign affairs delegations as a useful arrangement model. *See Gundy*, 139 S. Ct. at 2137 (Gorsuch J., dissenting) (citing *Cargo of the Brig Aurora*, 11 U.S. 382, 387 (1813)).

43 Sean D. Ehrlich, *The Tariff and the Lobbyist: Political Institutions, Interest Group Politics, and U.S. Trade Policy*, 52 INT'L STUDS. Q. 427, 428 (2008).

44 THE FEDERALIST NO. 70 (Alexander Hamilton) ("That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.").

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International Trade's argument in the alternative below suggests that the debate about the appropriate allocation of the tariff power is still undetermined.[45] This comment concludes that, because the power to tax is a "core" legislative power under the Constitution, the President must either follow Congress's mandates to issue a tariff, or the tariff's target good must be germane to national security for the tariff to stand.

Part I of this comment will provide the legal background on tariff impositions, analysis of their economic consequences, and discussion of their current utilization by Congress, the Executive, and the Judiciary. Part II discusses the constitutionality of the current balance of the tariff power and identifies a potential constitutional concern. Part III proposes two solutions to rebalance the tariff power: (1) amending the existing tariff statutes to chamber executive discretion or (2) interpreting the Constitution to grant the Judiciary greater oversight over the Executive's foreign affairs power.

I. BACKGROUND

A. *The Imposition and the Consequences of Tariffs*

A tariff is a tax imposed on goods imported from a foreign country.[46] Tariffs are paid by an importing business to its home country's government, most commonly as a fixed percentage of the imported goods' value.[47] Typically, governments use tariffs to protect domestic industries or to provide leverage in trade negotiations and disputes.[48] Tariffs generally give a price advantage to locally-produced goods over similar imported goods and raise revenues for the imposing government.[49] This section addresses the history of tariffs, how the government imposes them, and the consequences on economic and foreign relations from tariff use.

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45 The term constitutional "liquidation" refers to the ossification or "settling" of previously undetermined constitutional interpretations through reiterated and deliberate practice. *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

46 CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IF11030, U.S. TARIFF POLICY: OVERVIEW 1 (2018); *see also* WORLD TRADE ORGANIZATION, *Tariffs*, https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm (last visited Oct. 27, 2020).

47 Tariffs are often paid by three parties, the foreign companies exporting goods to the United States; the American companies importing goods from abroad or using imported inputs in their production processes; and American households as final consumers. Geoffrey Gertz, *Did Trump's tariffs benefit American workers and national security*, BROOKINGS INST. (Sept. 10, 2020).

48 CASEY, *supra* note 46, at 1.

49 WORLD TRADE ORGANIZATION, *supra* note 46. The revenue generated from tariffs can be negated by market adjustments. Howard Gleckman, *What Is A Tariff And Who Pays It,* TAX POL'Y CTR. (Sept. 25, 2018) https://www.taxpolicycenter.org/taxvox/what-tariff-and-who-pays-it.

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1. The History of Tariff Use and Imposition

Historically, tariffs have been the focus of pivotal moments in America's history.[50] From the founding until 1930, Congress primarily set tariff rates directly through legislation.[51] Congress imposed tariffs in 1790 to provide funds to operate the government and pay back the infant nation's debt.[52] The "Tariff of Abominations" hastened along the path to Civil War due to the protectionist policies that benefitted the northern states' industry at the expense of the southern agricultural economy.[53] The Fordney-McCumber Act, passed after World War I, was a catalyst to one of the first "trade wars," as it raised tariffs over forty percent and enraged European buyers of American agricultural products.[54] As the post-war economy continued to sputter, Congress enacted the Smoot-Hawley Act,[55] its last legislation setting actual tariff rates.[56]

Responding to the decrease in American exports following the Smoot-Hawley Act, Congress authorized the President to negotiate reciprocal trade agreements to reduce tariffs through proclamation authority.[57] This power enabled the President to enter into trade agreements without legislative action.[58] Congress also delegated the ability to adjust tariff rates in response to specific trade-related concerns.[59] These concerns center on touchpoints with Executive interest issues, such as foreign policy[60] and national security,[61] or require

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50 *See, e.g.*, WILLIAM K. BOLT, TARIFF WARS AND THE POLITICS OF JACKSONIAN AMERICA, VAND. UNIV. PRESS 50 (2017) (analyzing the "Tariff of Abominations," heavy protectionist tariffs that strengthened the Northern economy and weakened the Southern economy prior to the Civil War); Tariff Act of 1930 (Smoot-Hawley Act) (imposed during the Great Depression to raise import duties to protect American businesses and farmers).

51 CASEY, *supra* note 46, at 1; CAITLAIN DEVEREAUX LEWIS, CONG. RSCH. SERV., R44707, PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES 2 (2016).

52 Peter H. Garber, *Alexander Hamilton's Market Based Debt Reduction Plan* 2 (Nat'l Bureau of Econ. Rsch.,Working Paper No. 3597, 1991).

53 BOLT, *supra* note 50, at 91, 95.

54 Tariff Act of 1922, H.R. 7456, 67 Cong. (1922). For background into the political conditions prior to the passing of the Fordney-McCumber and Smoot-Hawley Tariff Acts *see* Marc Hayford & Carl A. Pasurka, Jr., *The Political Economy of the Fordney-McCumber and Smoot-Hawley Tariff Acts*, EXPLS. IN ECON. HIST. 29, 31 (1992).

55 Tariff Act of 1930 (Hawley-Smoot Tariff Act) (Smoot-Hawley Act) (codified as amended 19 U.S.C. § 1304).

56 *See* Hayford & Pasurka, supra note 54, at 29, 31–32.

57 Reciprocal Trade Agreements Act, 19 U.S.C. § 1351 (establishing the Presidential Trade Promotion Authority ("TPA")); *see also* CASEY, *supra* note 46, at 1.

58 CASEY, *supra* note 46, at 1.

59 *Id.* at 2.

60 Trade Expansion Act of 1962 § 232, Pub. L. 87-794, 76 Stat. 872 (codified as amended at 19 U.S.C. § 1862); *see also* LEWIS *supra* note 51, at 3.

61 Trading with the Enemy Act of 1917 § 5(b)(1)(B) (codified as amended at 50 U.S.C. § 4305(b)(1)(B)); s*ee also* LEWIS *supra* note 51, at 3.

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an agency like the Office of the United States Trade Representative to make an administrative finding.[62] In 1947, to reduce international tariff rates, the United States entered into the General Agreement on Tariffs and Trade ("GATT"),[63] creating a template of rules and exceptions to regulate international trade between members[64] and lock in tariff rates.[65] Though the Executive branch was involved in negotiations,[66] Congress passed legislation to join the Agreement.[67] Joining the GATT opened avenues for the expansion of American trade.[68] To capitalize, Congress passed the Trade Expansion Act of 1962 to build foreign markets for domestic agriculture, mining, and commerce.[69] This Trade Act delegates to the President the power to cut tariffs or eliminate tariffs on specific product categories.[70] Additionally, the 1962 Act provided jurisdiction to the United States International Trade Commission[71] to conduct tariff reviews.[72]

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62 Trade Act of 1974 §123(a); *see also* LEWIS *supra* note 51, at 4–5.

63 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

64 CHAD P. BOWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 10, 11 (2009).

65 GATT, articles II, XXVIII; 19 U.S.C. § 1202; *see also* Restatement (Third) of Foreign Relations Law § 803(a) (1987) ("Together with the most-favored-nation obligation of § 802, the obligation not to increase customs duties above those at which a country has bound them is the cornerstone of the GATT system.").

66 DOUGLAS A. IRWIN, ET AL., THE GENESIS OF THE GATT 23 (2008); *see also* Restatement (Third) of Foreign Relations Law § 803 Rep. note 4 (1987) ("Most grants to the President of negotiating authority contained in the Trade Act of 1974 expired in 1979, but the Trade and Tariff Act of 1984 renewed some grants and created new ones.").

67 19 U.S.C. § 3501(a).

68 BOWN, *supra* note 64, at 19 ("Supporting the dominant market access theory of why the world trading system needs an institution like the GATT/WTO is increasing empirical evidence."). *Cf.* IRWIN *supra* note 21, at 107 ("President Truman and Prime Minister Attlee issued a joint statement congratulating themselves on having made progress "in establishing a world trading and monetary system from which the trade of all countries can benefit and within which the trade of all countries can be conducted on a multilateral, non- discriminatory basis.").

69 19 U.S.C. § 1801(1) (defining the Act's purpose "to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce").

70 CASEY, *supra* note 46, at 1 ("[The] Trade Expansion Act delegates to the President the power to cut tariffs generally up to 50% and to cut up to 80% or eliminate tariffs on certain categories of products.").

71 19 U.S.C. § 1330(a) ("The United States International Trade Commission . . . shall be composed of six commissioners who shall be appointed by the President, by and with the advice and consent of the Senate.).

72 Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1163 (E.D. Pa. 1980), *aff'd in part, rev'd in part sub nom*. In re Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 238 (3d Cir. 1983), *rev'd sub nom*. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 574 (1986) ("In an escape clause proceeding under § 301(b)(1) of the 1962 Act, the task of the Tariff Commission is to determine whether (1) as a result in major part of concessions granted under trade agreements, (2) an article is being imported into the United States in such increased quantities, (3) as to cause or threaten to cause serious injury to the domestic industry producing like or competitive articles.").

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However, conflict with the GATT arose when Congress introduced the Trade Act of 1970.[73] The Act provided a quantitative restriction on importing foreign fabric and shoes to protect domestic industries.[74] However, due to fears of starting a new trade war by violating the GATT, Congress did not pass the Act.[75] By 1986, the GATT was considered outdated and required numerous reforms calling for members to convene for the Uruguay Rounds[76] to review each GATT article.[77] Under the eventual Marrakesh Agreement, the World Trade Organization ("WTO") was established in 1994 to manage tariff schedules and advocate for open trade.[78] To correspond with the 1994 updates to the GATT, Congress recognized the WTO's role in normalizing international trade[79] by enacting 19 U.S.C. § 3501(1)(B) to account for its regulatory influence.[80]

A part of legislative-executive interplay, Congress typically imposes tariffs through legislation, while the President retains the authority to change the terms of a tariff.[81] Treaties[82] and executive orders[83] also impact how the government imposes tariffs and what products are affected.[84] These procedures previously insulated Congress from domestic interests pressure and allowed for a decline in tariff rates.[85] For Congress's tariff goals to be fulfilled,

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73 H.R. 18970, 91st Cong., 2d Sess. (1970); Carl H. Fulda, *Dam: The GATT, Law and International Economic Organization*, 69 MICH. L. REV. 783, 783 (1971); *see also Legislative Survey: 91st Congress, Second Session*, 3 L. & POL'Y INT'L BUS. 564, 565 (1971).

74 H.R. 18970, 91st Cong., 2d Sess. § 201(a) (1970) ("[The] total quantity of each category of textile articles . . . and the total quantity of each category of footwear articles . . . produced in any foreign country which may be entered in 1971 shall not exceed the average annual quantity of such category produced in such country and entered during 1967, 1968 and 1969."); *see also* Fulda *supra* note 73, at 784 ("Congressional enactment of these provisions would have violated the obligations of the United States under GATT").

75 Fulda *supra* note 73, at 785 ("This threat of a trade war, widely echoed in the press, was probably the most powerful reason for the Senate's inaction.").

76 WORLD TRADE ORGANIZATION, *The Uruguay Round*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Oct. 27, 2020).

77 19 U.S.C. § 3511(a) ("Approval and entry into force of Uruguay Round Agreements").

78 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

79 CASEY, *supra* note 46, at 1 (2018) ("By supporting the creation of the GATT and the WTO, the United States sought to reduce tariff rates globally within a rules-based trading system.").

80 19 U.S.C. § 3501(1)(B) ("GATT 1994").

81 CASEY, *supra* note 46, at 1 (2018) ("The U.S. Constitution empowers Congress to set tariffs, a power that it has partially delegated to the President.").

82 Marrakesh Agreement, *supra* note 78.

83 Presidential Memorandum, *Memorandum on Protecting the United States Lobster Industry* (June 24, 2020), https://www.presidency.ucsb.edu/documents/memorandum-protecting-the-united-states-lobster-industry.

84 CASEY, *supra* note 46, at 1.

85 *Id.* ("This delegation insulated Congress from domestic pressures and led to an overall decline in global tariff rates.").

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it relies on the President.[86] As a result, this structure depends on Congress to generate or vet tariff instruments.[87] But the choice to implement them is left to the President's discretion.[88]

2. The Citizen's Price: The Economic and Foreign Relation Consequences of Tariffs

Because they deter trade, tariffs are often frowned upon as a foreign relations tool.[89] Yet, with some exceptions,[90] most countries impose a tariff on some goods.[91] Economically, tariffs lead to consumer loss from higher prices,[92] higher costs for firms to import goods,[93] and spillover effects in domestic production.[94] Prominent economists John Maynard Keynes and Friedrich A. Von Hayek agree that tariffs are terrible for national economic policy.[95] Once imposed, tariffs are hard to remove[96] and are prone to rent-seeking

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86 *Id.* ("While Congress has set negotiating goals, it has relied on Presidential leadership to achieve those goals.").

87 Meyer & Sitaraman, *supra* note 12, at 601; *see also* Comment, *supra* note 10, at 66.

88 CASEY, *supra* note 46, at 1.

89 Matthew J. Slaughter, *Infant-Industry Protection and Trade Liberalization in Developing Countries*, USAID 8 (2004) ("Tariffs and other trade taxes almost always reduce total national income and thus welfare."); Andrew Chatzky, *The Truth About Tariffs*, COUNCIL ON FOREIGN RELS. (May 16, 2019) https://www.cfr.org/backgrounder/truth-about-tariffs ("When consumers bear the brunt of tariff costs, it makes them effectively poorer because prices are higher.").

90 Hong Kong, for example, does not impose tariffs because it is a free port. *See* THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, *Hong Kong's Trade Policy*, https://www.tid.gov.hk/english/trade_relations/trade_policy/trpolicy.html (last visited Oct. 13, 2020).

91 Chatzky, *supra* note 89.

92 Richard M. Goodman & John M. Frost, *International Economic Agreements and the Constitution,* PETERSON INST. FOR INT'L ECON. 1, 12 (2000).

93 *Id.* ("Tariffs raise the prices of imported goods, providing domestic producers with a legislated comparative advantage.").

94 *Id.* at 20–21 ("Almost every nondiscriminatory measure affecting local production—whether environmental controls, taxes, or social security levies—will affect exports and therefore would be subject to challenge.").

95 Keynes believed that an organization for free trade needed to be established to prevent tariff use and was involved with the GATT negotiations. JOHN M. KEYNES, ECONOMIC CONSEQUENCES OF THE PEACE 265 (Harper 1920); *see also* IRWIN, ET AL., *supra* note 66, at 21–22 (2008) ("Keynes strongly believed that government economic planning would be required to ensure full employment in the postwar period."). Hayek believed that state intervention in the economy would lead to negative economic effects; tariffs are a subset of this type of intervention. *See* FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM: TEXT AND DOCUMENTS 103 (2007); *see also* Aris Trantidis & Nick Cowen, *Hayek versus Trump: The Radical Right's Road to Serfdom*, 52 POLITY 159, 162 (2020).

96 Adam Smith believed that tariffs could easily escape the purpose they were implemented for and harm consumers. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 431 (Edwin Cannan ed.1776) ("[Tariffs], when they have grown up to a certain height, are a curse equal to the barrenness of the earth and the inclemency of the heavens; and yet it is in the richest and most industrious countries that they have been most generally imposed."). However, there is

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efforts to limit competition with domestic producers.[97] The benefits from comparative advantages[98] generated by free trade often outweigh the potential gains from conducting protectionist policies.[99] Still, economist Adam Smith excludes general apprehension around imposing tariffs.[100] Smith believed nations should impose tariffs to retaliate against another nation's action to impose tariffs on the principal nation's goods.[101] Under Smith's tit-for-tat theory, trade wars exist to make the trade freer,[102] accounting for the potential rent-seeking that may have created the imposing tariff interest by eventually forcing compromise on a new trade balance.[103] Yet many economists consider the plentiful economic benefits from free trade to overshadow potential losses by domestic producers from global competition, even when those losses justify starting a trade war.[104]

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disagreement if Smith's views would support tariff policies in today's economy. *Compare* Brianne Wolf, *Adam Smith Makes a Case for Higher Tariffs — but it Doesn't Work for Trump's Trade Policy*, WASH. POST (July, 12, 2019) https://www.washingtonpost.com/politics/2019/07/12/adam-smith-makes-case-higher-tariffs-it-doesnt-work-trumps-trade-policy ("Smith argues tariffs should be used only to extend markets — one of his principles of the natural liberty of the market. Restricting markets limits potential gains from commerce because the division of labor and exchange work best when more individuals can participate."), *with* Mark J. Perry, *Adam Smith Makes the Case for Free Trade and Warns Against the Sophistry of Domestic Producers Seeking Protectionism*, AM. ENTER. INST. (May, 17, 2017) https://www.aei.org/carpe-diem/adam-smith-makes-the-case-for-free-trade-and-warns-against-the-sophistry-of-domestic-producers-seeking-protectionism/ ("Even though this was written more than 200 years ago, Adam Smith's argument in favor of free trade and against protectionism is just as relevant and persuasive today as it was in 1776.").

97 SMITH, *supra* note 96, at 432–33.

98 Adam Smith and David Ricardo popularized the comparative advantage theory, describing how, under free trade, an agent will produce more of and consume less of a good for which they have a comparative advantage. *See* SMITH, *supra* note 96, at 422 ("The general industry of the country, being always in proportion to the capital which employs it, will not thereby be diminished, no more than that of the above-mentioned artificers; but only left to find out the way in which it can be employed with the greatest advantage."); DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION, 191 (Dent 1911).

99 Goodman & Frost, *supra* note 92, at 41 ("Unfortunately, [protectionist] preferences are often inefficient, in the sense that the same goods and services may be available at lower cost from a nonlocal supplier.").

100 SMITH, *supra* note 96, at 366.

101 Smith advocates for the usage of tariffs as a part of "trade wars"; however, these tariffs must easily be repealed to allow for freer trade once the war concludes. *Id.* at 374.

102 *Id.*

103 *Id.* at 432–33; *see also* Goodman & Frost, *supra* note 92, at 42.

104 SMITH, *supra* note 96, at 283 ("With the same stock, therefore, he can, without imprudence, have at all times in his warehouse a larger quantity of goods than the London merchant; and can thereby both make a greater profit himself, and give constant employment to a greater number of industrious people who prepare those goods for the market. Hence the great benefit which the country has derived from this trade."); *see also* RICARDO, *supra* note 98, at 191. For the view that tariff discussions have little to do with economic values, see James E. Hartley, *Just Tariff Theory*, PUB. DISCOURSE (Nov. 28, 2018) https://www.thepublicdiscourse.com/2018/11/46276.

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However, governments routinely use tariffs in foreign affairs negotiations and as a cornerstone of international trade policy.[105] Policy justifications for using tariffs include protecting "infant" domestic industries,[106] national economic security,[107] and raising funds for the national economy.[108] By increasing the price of imported goods, tariffs provide domestic producers with a legislatively bestowed competitive advantage.[109] Unlike other competitive restraints, tariffs operate similarly to a tax and are more economically efficient than import quotas, which entirely prevent goods from entering the market.[110]

In foreign affairs negotiations, tariffs provide a tangible "stick," offering real consequences for failure to comply with agreements.[111] Countries with a heavy exporting presence in the American market would be more sensitive to potential tariffs and would likely take precautions to prevent their imposition.[112] In cases of product "dumping,"[113] tariffs are used to force companies to internalize the externality of driving domestic producers out of business.[114] Tariffs allow the government to threaten nations that act against American interests, with the ability to relieve the duty in the future depending on the foreign policy goal.[115] When the United States wants to negotiate an agreement, tariffs may be useful.[116] However, like a "closed for renovations" sign,

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105 Amiti et al., *supra* note 35, at 207.

106 This is the original justification for the imposition of tariffs, the protection of "infant industries" is supposed to stimulate the economy in the long run and promote investments in domestic producers. *See generally, e.g.*, ALEXANDER HAMILTON, REPORT ON MANUFACTURES (1792).

107 Harold Hongju Koh & John Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L L. 715, 753 (1992) ("Notwithstanding Congress's substantial constitutional powers over import trade, the President can still resort to a reservoir of discretionary power, both constitutional and statutory, if he feels imports threaten national security.").

108 This is a method previously utilized by the United States directly after the Revolutionary War to raise income to pay off the nation's war debts. Garber, *supra* note 52, at 2.

109 Goodman & Frost, *supra* note 92, at 42.

110 Anderson, *supra* note 6, at 75 ("[N]o quota system can ever achieve in practice the efficiency of a tariff.").

111 Yifan Hu, *Economic Leverage Is the Key to a Rising China's New Foreign Affairs Strategy*, PETERSON INST. FOR INT'L ECON. 1, 9 (2013).

112 Chatzky, *supra* note 89 ("Tariffs hurt exporters by making their products more expensive.").

113 Dumping occurs when a foreign company charges less for a product it is exporting a product than the price normally charged on in own home market. WORLD TRADE ORGANIZATION, *Anti-Dumping, Subsidies, Safeguards: Contingencies, etc*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (last visited Oct. 27, 2020). One of the first American tariffs was centered around stopping this practice. FRANK WILLIAM TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES 443 (G. P. Putnam's Sons 1914).

114 U.S. INT'L TRADE COMM'N, *Antidumping and Countervailing Duty Laws Under the Tariff Act of 1930*, https://www.usitc.gov/press_room/usad.htm (last accessed Oct. 27, 2020).

115 Wolff, *supra* note 5.

116 *Id.*

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tariffs send signals[117] to the international economy, identifying the country using them as one that may not be willing to trade.[118]

For national security and revenue generation uses, tariffs protect sensitive inputs (e.g. steel and electronics),[119] supply stability to the domestic market structure,[120] and provide an extra income source.[121] If the United States developed a dependency on imported goods, it would add additional risk to the nation's economy from foreign exporters.[122] Without protections for these industries, domestic production of essential goods could be limited.[123] However, Congress intended these to be narrow uses, focusing on protecting the nation's interests.[124] National security tariffs are imposed with the "internal economic welfare" in mind, considering the loss of revenue and

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117 Michael Lusztig et al., *Signaling and Tariff Policy: The Strategic Multistage Rent Reduction Game*, 36 CAN. J. POL. SCI. 765, 781 (2003) ("[Tariffs] incorporate . . . both screening and signaling mechanisms in an effort to portray more accurately the interactions of governments and firms with respect to economic rents from protectionism.").

118 Chatzky, *supra* note 89.

119 *See* Pres. Proc. No. 9705, ADJUSTING IMPORTS OF STEEL INTO THE UNITED STATES, 83 FR 20683; LEWIS, *supra* note 51, at 2 (citing Trade Expansion Act of 1962, Pub. L. 87-794, §232(b)–(c), 76 Stat. 877 (codified as amended at 19 U.S.C. §1862(b)–(c))). The Trade Act of 1962 enumerates two alternative bases on which such a threat to national security may be found: (1) the product in question is essential to national security and imports threaten the availability of sufficient supply of that product to meet national security needs, or (2) imports of the product threaten a domestic industry sufficiently to endanger the economic welfare of the country. 19 U.S.C. § 1862(d); *see also* Richard O. Cunningham, *Leverage Is Everything: Understanding the Trump Administration's Linkage Between Trade Agreements and Unilateral Import Restrictions*, 51 CASE W. RES. J. INT'L L. 49, 56 (2019).

120 Paul I. Djurisic, *The Exon-Florio Amendment: National Security Legislation Hampered by Political and Economic Forces*, 3 DEPAUL BUS. L.J. 179, 181 (1991) ("The legislative extensions [of the Trade Act of 1930] manifested Congress's fear that foreign investment would pose a threat to national security by reducing domestic production of national security related materials and by weakening defense-related segments of the economy.").

121 Chatzky, *supra* note 89 ("Tariffs can serve several goals. Like all taxes, they provide a modest source of government revenue."). Additional revenue has not been stated as a recent reason for tariff imposition. However, in the past the United States has imposed tariffs solely for tax revenue. TAUSSIG, *supra* note 113, at 160 ("The need of additional revenue for carrying on the great struggle was immediately felt; and as early as the extra session of the summer of 1861, additional customs duties were imposed."); *see also* Garber, *supra* note 52, at 2.

122 Jessica Serrano, *In Furtherance of National Interest or A Pirate's Blockade: The Effect of the Trade War on the U.S. Steel, Aluminum, and Solar Industries*, 31 COLO. NAT. RES., ENERGY & ENV'T L. REV. 417, 425 (2020) ("Countries importing more food than they produce risk safety concerns over food security.").

123 Geoffrey Gertz, *Did Trump's Tariffs Benefit American Workers and National Security*, BROOKINGS INST. (Sept. 10, 2020), https://www.brookings.edu/policy2020/votervital/did-trumps-tariffs-benefit-american-workers-and-national-security.

124 *See* H.R. Rep. No. 85-1761, at 14 (1958); Linfan Zha, *The Wall on Trade: Reconsidering the Boundary of Section 232 Authority Under the Trade Expansion Act of 1962*, 29 MINN. J. INT'L L. 229, 250 (2020) ("The House was very straightforward with the purpose of the national security provision, stating that "the interest to be safeguarded is the security of the nation, *not the output or profitability of any plant or industry except as these may be essential to national security*.") (emphasis added).

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unemployment caused by "excessive imports."[125] Yet, a countervailing interest exists in the livelihood of employees that work for firms that depend on foreign trade.[126] National security is a broad interest that can justify the imposition of some protectionist tariffs.[127] Still, this interest must balance against the benefits of employment and the economic value that free trade provides.[128]

A final justification for imposing tariffs is the protection of "infant industries."[129] The infant industry argument, introduced by Alexander Hamilton,[130] focuses on using tariff protections for budding domestic firms. In these industries, the initial "learning costs" of production are high and initial competition from established foreign firms would be detrimental to domestic growth.[131] The additional restraints revolve around the entrepreneurs' learning costs in the budding industry.[132] Existing foreign producers are ready to compete and incur fewer costs than the domestic firm in its infant stage.[133] Tariffs are desirable to serve as temporary protection for these firms while they still make the requisite investments to compete.[134] However, this protection can lead to a moral hazard where firms have a perverse incentive to stay in the "infant" stage as long as possible to maximize the tariff's cost savings by extending the protection period or having a heavier tariff imposed on foreign competitors.[135] Consequentially, firms with lobbying power can rent

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125 S. Rep. 85-1838, 1958 U.S.C.C.A.N. 3609, 3620 ("This amendment would direct the president, in the administration of the national security amendment, to recognize that the country's national security is tied closely to its internal economic welfare. The President is to take into consideration the impact of foreign competition on the economic welfare of individual domestic industries and give attention to unemployment, loss of skills, decreases in revenue to the government, state and federal, and to other serious effects resulting from the displacement of domestic products by excessive imports.").

126 *Id.* ("A great deal has been said about the large numbers of workers dependent on foreign trade but the committee was unable to uncover any information as to the overall displacement of workers as a result of imports of commodities that otherwise might have been produced domestically. This is one problem the commission on international trade agreement policy is to look into.").

127 LEWIS, *supra* note 51, at 2 (citing Trade Expansion Act of 1962, P.L. 87-794, §232(b)–(c), 76 Stat. 877 (codified as amended at 19 U.S.C. §1862(b)–(c))).

128 Koh & Yoo, *supra* note 107, at 750 ("Trade laws include more than national security concerns; equally at stake are whether certain industries and jobs will receive protection from foreign competition.").

129 Robert E. Baldwin, *The Case Against Infant-Industry Tariff Protection*, 77 J. POL. ECON. 295, 295 (1969) ("The classical infant-industry argument for protection has long been regarded by economists as the major 'theoretically valid' exception to the case for worldwide free trade.").

130 HAMILTON, *supra* note 106.

131 Baldwin, *supra* note 129, at 296.

132 Slaughter, *supra* note 89, at 7.

133 Baldwin, *supra* note 129, at 296–97.

134 ROBERT E. BALDWIN, TRADE POLICY IN A CHANGING WORLD ECONOMY 149 (1989).

135 Slaughter, *supra* note 89, at 7 ("Even if protected firms do become more efficient, perverse political-economy incentives often compel them and other beneficiaries to seek more protection or a longer period of protection than might be warranted."); Baldwin, *supra* note 129, at 297 ("Because of this type of response [to receiving tariff protection], individual entrepreneurs will be reluctant to invest in knowledge acquisition unless they are sure they can easily prevent others from obtaining the knowledge

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seek similar protection claiming that they are an infant industry.[136] Accordingly, economists recommend that infant industry protection be provided only briefly, with limitations preventing using this power to harm international trade competition.[137]

Tariffs provide a temporary advantage to domestic producers while allowing foreign competitors to continue their exports without a quota's limits.[138] Thus, when considering national benefits from trade restraints, tariffs are less economically destructive.[139] But as tariffs are inherently harmful to the economy,[140] their use must be balanced and justified.[141] The United States currently relies on Presidential judgment in vetting tariffs.[142] This discretion is not absolute and is limited by the separation of powers.[143]

B. *Disequilibrium: The Founding Generation's Intention versus the Current Separation of the Tariff Power*

The Constitution vests Congress with the power to impose duties and imposts.[144] Tariffs were considered "duties" under Article I of the Constitution.[145] The ability to impose tariffs could relate to any monetary extraction of foreign trade revenue.[146] However, the Constitution restricts Congress's

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or can reap a sufficiently high reward during the time it takes others to copy them."). This result is possible because the Government creates "rents" through protecting certain industries; in the eyes of economic research it is likely to squander these rents making the majority of citizens worse off. Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 ECON. INQUIRY, 225–26 (1967).

136 Slaughter, *supra* note 89, at 7 ("For protected firms, the activity with the highest return can be political lobbying.").

137 Baldwin, *supra* note 129, at 297.

138 *Id*.

139 Anderson, *supra* note 6, at 75.

140 Slaughter, *supra* note 89, at 8.

141 S. Rep. 85-1838, 1958 U.S.C.C.A.N. 3609, 3620.

142 LEWIS, *supra* note 51, at 2.

143 LEWIS, *supra* note 51, at 2 ("From 1934 until 1974, Congress continued to enact legislation delegating some authority to the President to negotiate tariff rates with other countries within pre-approved levels, and to implement agreed-upon tariff rates through proclamation, rather than through congressional legislation.").

144 U.S. CONST. art. I, § 8, cl. 1; *see also* LEWIS, *supra* note 51, at 1.

145 1 WILLIAM BLACKSTONE, COMMENTARIES *311, *315 (1765) (referring to the "duty for the carriage of letters" and the "duty upon offices and pensions"); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. London 1790) (defining "duty" as a "tax, impost, custom, toll"); Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 CASE W.L. REV. 297, 321 (2015) ("In America, the word 'duties' included levies on imports and exports, whether imposed for revenue or to regulate commerce.").

146 Natelson, *supra* note 145, at 305 ("A legislature might adopt an imposition purely for regulatory purposes—by, for example, levying tariffs high enough to inhibit foreign imports and thereby protect domestic producers.").

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actions, preventing "taxes or duties" from being placed on exports.[147] The Founders had varying beliefs about the use of tariffs.[148] Still, they agreed that taxing imports would be a primary early source of revenue for the developing country[149] and that this income source would be most important in cases of emergencies.[150]

The dueling interests of protecting the developing economy while encouraging foreign commerce were at the forefront of early debates regarding American tariff policy.[151] Another less obvious concern about the imposition of tariffs was the use of tariffs to benefit special interests[152] or to reward supporters of the party in power.[153] Congress confronted both of these issues early in American history.[154] Alexander Hamilton and James Madison debated the pros and cons of tariffs at the first Congress.[155] Hamilton argued that because tariffs "ha[d] been employed with success in other countries," placing duties on foreign goods that rivaled domestic goods "intended to be encouraged."[156]

Conversely, Madison argued that "commercial shackles are generally unjust, oppressive, and impolitic; it is also a truth, that if industry and labor are generally left to take their own course, they will generally be directed to those objects which are the most productive."[157] In 1841 and 1842, these schools of thought were on full display as Congress debated the implementation of the Tariff of 1842, colloquially referred to as the "Black Tariff."[158] At the time, significant blocs of both Hamiltonian protectionists and

147 U.S. CONST. art. I, § 8, cl. 1, 5; *see also id*.

148 John A. Moore, *"The Grossest and Most Unjust Species of Favoritism" Competing Views of Republican Political Economy: The Tariff Debates of 1841 and 1842*, 29 ESSAYS IN ECON. & BUS. HIST. 59, 59 (2011).

149 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 641 (Lonang Inst. 2005) (1833) ("Imports upon foreign importations have supplied, and will generally supply, all the common wants; and if these should not furnish an adequate revenue, excises are next resorted to, as the surest and most convenient mode of taxation").

150 *Id.* § 933 ("But in many emergencies it might leave the national government without any adequate resources, and compel it to a course of taxation ruinous to our trade and industry, anti the solid interests of the country.").

151 *See* HAMILTON, *supra* note 106.

152 Ehrlich, *supra* note 43, at 428 ("In tariff making, perhaps more than in any other kind of legislation, Congress writes bills which no one intended because the procedure by which tariffs are set makes the way smooth for groups seeking to benefit by the protective system.") (internal quotation omitted); *see also generally* Richard Sherman, *Delegation, Ratification, and U.S. Trade Policy: Why Divided Government Causes Lower Tariffs*, 35 COMP. POL. STUDS. 1171–97 (2002).

153 Moore, *supra* note 148, at 62.

154 *See id.*

155 *Id.*

156 Hamilton, supra note 106.

157 1 ANNALS OF CONG. 107, 116 (1789).

158 Moore, *supra* note 148, at 59.

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Madisonian free traders existed in both the North and South, each seeking to embed their preference into the future fabric of American tariff policy.[159]

The Hamiltonian protectionists argued that "the United States could only prosper through economic strength and that required protection of key industries."[160] Their advocacy centered on passing the Black Tariff to raise additional revenues, protect domestic industries, and benefit American workers.[161] In support, New York Whig congressman Hiram Hunt stated that "[n]ot only do I believe that Congress had the constitutional power, but . . . it is their duty, to protect American labor from hostile enactments of foreign Governments."[162] Similarly, Pennsylvania Representative William Irwin's conviction in supporting tariffs was "strong ground in favor of protecting American industry against the labor of the half-starved paupers of Europe."[163] Equally incensed, Maine Senator George Evans opined that national prosperity required the protection of high wages, which could only be accomplished through high prices.[164] Virginia congressman Alexander Stuart attacked the practicality of free trade itself, explaining that "free trade never has been the policy of any country, and never would be; and therefore it is unprofitable to contend with an abstraction."[165] Illinois congressman John Reynolds proclaimed that "the protective policy of Europe renders protection here necessary" and that even if the Madisonians were in power, they would also prefer the "domestic manufacturers" of their constituency.[166] Future Secretary of State Henry Clay mocked the Madisonian position as merely "book theory and abstractions" because the "wholesome and necessary protection of manufactures" was the "universal practice of nations."[167]

In opposition, the Madisonians "primarily based their arguments on a single premise: free trade policy was essential to safeguard the American republic from excessive concentrations of economic power."[168] Pennsylvania Representative Joseph Fornance attacked the favoritism created by protection, arguing that if the tariff "a tax to aid one man or set of men who could not live without it, and who required the protection of Government to enable their business to succeed—I am opposed to it, and would deem such a system oppressive and unjust."[169] Similarly, Virginia Representative William Smith alleged that protection was "a system of plunder" and that these

159 Douglas A. Irwin, *Antebellum Tariff Politics: Coalition Formation and Shifting Regional Interests*, 51 J.L. & ECON. 715, 718 (2008).
160 Moore, *supra* note 148, at 59.
161 Moore, *supra* note 148, at 62 (quoting CONG. GLOBE, 27th Cong., 1st Sess. 650 (1842)).
162 *Id.*
163 CONG. GLOBE, 27th Cong., 1st Sess. 750 (1842).
164 Moore, *supra* note 148, at 62.
165 *Id.*
166 *Id.*
167 *Id.* at 62–63.
168 *Id.* at 63.
169 *Id.*

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manufacturers would fail to survive without government protection "because labor and capital employed in other avocations [would be] more profitable and attended with richer rewards."[170]

The Madisonians equated protectionism with "economic favoritism and privilege, which would erode American republicanism because vast economic power would accrue to a few, which inevitably would lead to corruption."[171] Notably, Representative Dixon Lewis of Alabama stated that "the system of protective tariffs . . . is the grossest and most unjust species of favoritism."[172] Lewis chastised the Hamiltonians by asserting that "they begin at the wrong end [of the tariff analysis]. Instead of asking for protection to increase the prices of their products, they should produce cheaper . . . the life of business is competition."[173] Though the Madisonians accepted that the country would need to raise additional tariff revenues from time to time, they asserted that any increase should be for the "minimal amount necessary to maintain the government and without any discriminatory characteristic."[174] The Hamiltonians won the debate as the Black Tariff passed Congress,[175] but the two schools of thought remain present in interpreting the constitutional text related to tariffs.[176]

For instance, the terms "common defense" and "general welfare" have caused controversy in the tariff context.[177] Now, members of the two interpretative schools either cabin the interpretation of these terms within narrow categories[178] or allow for broader protectionist uses.[179] Tariffs had long been used as a taxation work-around, operating as a primary source of national income at the time of the Founding because Congress was hesitant to impose direct federal taxes.[180] The lack of a clear constitutional intention for the tariff

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170 Moore, *supra* note 148, at 63.

171 *Id.*

172 Moore, *supra* note 148, at 63.

173 *Id.*

174 *Id.*

175 *Id.*

176 A.P. Winston, *The Tariff and the Constitution*, 5 J. POL. ECON. 40, 45 (1896) ("The question thus depends on an interpretation of the words, 'common defense and general welfare.'").

177 *Id.*

178 *Id.* ("Of course this claim for Congress of unchecked authority to decide what measures were for "the general welfare" meant to the states' rights party a dangerous centralization of power.").

179 *Id.* at 45–46 ("'[T]he common defense,'—military necessity,—seems to have furnished the justification for Calhoun's appearance in the protectionist column, so far as he looked to any other right than the right of self-preservation for Congress' authority to develop the home supply of articles of which the lack in war might be fatal.").

180 *See* STORY, *supra* note 149, at § 641 ("Direct taxes constitute the last resort; and (as might have been foreseen) would never be laid, until other resources had failed."); THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 493 (Merrill Jensen, John P. Kaminski, & Gaspare J. Saladino eds., 2013) (claiming that tariffs would aid agriculture and manufacturing).

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power to be delegable has been apparent.[181] However, in the Constitution's final text, the Founders made their intention explicit for Congress to regulate foreign trade.[182] Foreign relations, taxing, the establishment of treaties, and ambassador interaction are constitutionally defined functions that require an interplay between the governmental branches.[183] Thus, now that the two schools of Founding era tariff policy are explained, it is vital to know the history and shared structure of the tariff power to understand its current delegation and how it permeates each branch.[184]

1. The Legislative Tariff Power: Is Congress a Regulator or Only a Delegator?

Congress has the constitutional authority to regulate foreign commerce.[185] The Constitution vests the legislative branch with the ability to "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[186] The Uniformity Clause applies to the imposition of tariffs, but because the Constitution expressly empowers Congress to levy them, it also permits some nonuniform accompanying effects.[187] Because the Constitution could not completely enumerate the scope of potential legislation, Congress was also

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181 STORY, *supra* note 149, at § 259 ("Independent, however, of this inability to lay taxes, or collect revenue, the want of any power in congress to regulate foreign or domestic commerce was deemed a leading defect in the confederation."), § 962 ("The language of the constitution is, 'Congress shall have power to lay and collect taxes, duties, imposts, and excises.' If the clause had stopped here, and remained in this absolute form, . . . there could not have been the slightest doubt on the subject."); *see also* Wayman v. Southard, 23 U.S. 1, 42–43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.").

182 U.S. CONST. art. I, § 8, cl. 3; STORY, *supra* note 150, at § 604 ("Congress has power to regulate commerce with foreign nations and among, the several states.").

183 U.S. CONST. art. I, § 8, cl. 1, 3, 18; *id.* art. II, § 2, cl. 2; *id.* art. II, § 3; *id.* art. III, § 2, cl. 1, 2.

184 For the view that the separation of powers is inherently inefficient due to creating an oligopolistic industry see Morris Silver, *Economic Theory of the Constitutional Separation of Powers*, 29 PUB. CHOICE 95, 98 (1977). For the view that game theory principles could be used with the flexible interpretation of the separation of powers to create a new nondelegation doctrine see Sean Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229 (2018). For the view that Friedrich A. von Hayek's view that the separation of powers is economically efficient due to limiting government power see Scott Boykin, *Hayek on Spontaneous Order and Constitutional Design*, 15 INDEP. INST. 19 (2010). For the view that international law can benefit the domestic separation of powers see Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1048 (2013). For an incomplete contracts approach analysis of the separation of powers see Kira Fuchs & Florian Herold, *The Costs and Benefits of a Separation of Powers—An Incomplete Contracts Approach*, 13 AM. L. ECON. REV. 131 (2011).

185 U.S. CONST. art. I, § 8, cl. 3.

186 *Id.* art. I, § 8, cl. 1.

187 *See* Nelson Lund, Comment, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193, 1226 (1984).

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vested with power to make laws "necessary and proper" to support its enumerated powers.[188] While Congress has passed tariff legislation on a wide variety of goods,[189] historically, the boundaries of the legislative branch's power in imposing tariffs have waned through the years.[190]

Congress's authority in foreign trade was in question in one of the earliest separation of powers cases.[191] In *Cargo of the Brig Aurora*,[192] the Supreme Court faced a conflict of authority between a statute Congress wished to revive and a presidential proclamation.[193] In an early demonstration of the nondelegation doctrine, Justice Johnson found "[t]he legislature did not transfer any power of legislation to the President. It only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect."[194] Seventy-nine years later, Justice Harlan in *Marshall Field & Co. v. Clark*, applied the nondelegation rationale from *Cargo of the Brig Aurora* to a silk and clothing tariff.[195] The Tariff Act of October 1, 1890, allowed the President the discretion to suspend some of the tariff's provisions to permit free trade.[196] Adversely affected by President Benjamin Harrison's revocation of a tariff on French textiles, Marshall Field & Co. argued that the Act was an unconstitutional delegation of the legislative power.[197] Justice Harlan found no delegation had occurred and distinguished the separation of power in the President's actions.[198] "Legislative power was exercised when [C]ongress declared that the suspension should take effect upon a named contingency."[199] Justice Harlan rationalized that the President's action was

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188 U.S. CONST. art. I, § 8, cl. 18. The Necessary and Proper Clause provides that all such laws "*shall be*" necessary and proper for executing federal powers, rather than prescribing that such laws "*shall be deemed by Congress*" to be necessary and proper. *See* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 748 (1997) (emphasis added). A need from another legislative enumerated power is required to justify the means of using the Clause. *McCulloch*, 17 U.S. at 324–25.

189 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 400 (1928) (placing a tariff on barium dioxide); Latimer v. United States, 223 U.S. 501, 503 (1912) (placing a tariff on tobacco); Marshall Field & Co. v. Clark, 143 U.S. 649, 662–64, (1892) (placing a tariff on cotton cloth); United States v. Guy W. Capps, Inc., 204 F.2d 655, 657 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955) (placing tariffs on potatoes).

190 *Compare Guy W. Capps*, 204 F.2d at 659 (holding Presidential claims of independent constitutional authority to alter tariffs have been rejected), *with Marshall Field*, 143 U.S. at 697 (holding Congressional delegation to the President of the authority to amend tariff levels has been uniformly upheld).

191 *Cargo of the Brig Aurora*, 11 U.S. at 387.

192 The *Cargo of the Brig Aurora* was a suit involving an American importer, Robert Burnside, whose cargo was condemned by an embargo the President placed on British and French goods. The key question of the case considered the President's ability to place an embargo on foreign trade. *See Cargo of the Brig Aurora*, 11 U.S. at 382.

193 *Id*. at 387.

194 *Id*.

195 *Marshall Field*, 143 U.S. at 662–63 (1892).

196 *Id*. at 662–67.

197 *Id*. at 681.

198 *Id.* at 693.

199 *Id*.

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executing the Act of Congress, not making a law.[200] However, Chief Justice Lamar did not believe the distinction was necessary due to the Act's restrictions on Presidential action.[201] Lamar believed that the legislation's contingent nature transferred no power to the Executive, who could only act if the condition precedent in the statute arose.[202]

Another tariff case in 1928 allowed the Supreme Court to elaborate on Justice Harlan's approach in *Marshall Field*.[203] The J.W. Hampton, Jr., & Co. imported barium dioxide into New York assessed at the dutiable rate of six cents per pound, two cents per pound more than the statute's fixed rate.[204] A presidential proclamation within the authority of the Tariff Act of 1922, a flexible tariff provision, increased the tariff rate.[205] The provision may have been flexible, but Chief Justice Taft's view of the delegation was not, holding that Congress did not delegate its authority to the President.[206] Taft distinguished delegation from the use of legislative power, concluding: "[i]f 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."[207] This intelligible principle doctrine became the standard for measuring congressional delegation[208] and helped define limits to the "fourth branch" of government.[209]

Five years later, Justice Cardozo took a harder line in *Norwegian Nitrogen Prod. Co. v. United States*, applying *Marshall Field* to a tariff adjusted by presidential proclamation following a Tariff Commission investigation.[210] Acting under the flexible tariff provisions of the Tariff Act of 1922, the President raised a tariff on Norwegian sodium nitrate by a cent and a half following an investigation and report by the United States Tariff Commission.[211] Cardozo opined that changing the tariff rates to conform to new conditions was "in substance a delegation, though a permissible one, of the legislative process."[212] Not addressing if the Executive followed an intelligible principle from the statute, Cardozo applied Justice Harlan's distinction approach from

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200 *Id*.

201 *Marshall Field*, 143 U.S. at 698 (Lamar, C.J., concurring).

202 *Marshall Field*, 143 U.S. at 699 ("These enactments, in our opinion, transferred no legislative power to the president. The legislation was purely contingent.").

203 *J.W. Hampton*, 276 U.S. at 400.

204 *Id*.

205 *Id*.

206 *Id*. at 410.

207 *Id*. at 409.

208 Meaghan Dunigan, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today's Administrative State*, 91 ST. JOHN'S L. REV. 247, 256 (2017).

209 C. Boyden Gray, *The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine*, 5 TEX. REV. L. & POL. 1, 21 (2000).

210 Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 297 (1933).

211 *Id*. at 297.

212 *Id*. at 305.

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Marshall Field, stating that "[t]he powers of the President under the flexible tariff provisions of the act of 1922 differ in degree rather than in kind from [executive] powers."[213] Cardozo found no contingent action from an executive inquiry or report under the Tariff Act of 1922 required for the *Marshall Field* distinction.[214] However, Justice Cardozo justified the President's actions holding that the legislative branch acquiescing to broader power delegations under tariff statutes gave him greater authority to act.[215] This broad executive discretion continued to apply[216] and became the catalyst for further deference.[217]

Congress continued to influence tariff-making decisions by using concurrent resolutions to impose tariffs proposed by the executive branch.[218] The Supreme Court ruled the delegation regime's additional check to be short-lived in *Immigration and Naturalization Service v. Chadha*, where the Court found that using concurrent resolutions, also known as legislative vetoes, was unconstitutional.[219] Chief Justice Burger reasoned the use of legislative vetoes might be administratively efficient,[220] but they are in a form that violates the Constitution's Bicameralism and Presentment Clauses.[221] Chief Justice Burger opined that the return to bicameralism and presentment requirements would make Congress more cautious in its future executive delegations.[222] Justice White dissented, railing against the decision as it overturned a widely

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213 *Id*. at 308.

214 *Id.* at 309.

215 *Id*. at 313 ("Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years.").

216 *See* Fla. Avocado Growers' Exch. v. United States, 71 F.2d 309, 311 (C.C.P.A. 1934).

217 U.S. Int'l Trade Comm'n, U.S. Trade Policy Since 1934, *in* Pub. 4094, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS 60–61, 70–75 (2009).

218 Trade Act of 1974, Pub. L. No. 93–618, §§ 203(c), 302(b), 402(d), 407, 88 Stat. 1978, 2016, 2043, 2057–60, 2063–64 (2022) (codified at 19 U.S.C. § 2101) (proposing Presidential actions on import relief and actions concerning certain countries may be disapproved by concurrent resolution; various Presidential proposals for waiver extensions and for extension of nondiscriminatory treatment to products of foreign countries may be disapproved by simple (either House) or concurrent resolutions); Trade Expansion Act of 1962, Pub. L. No. 87–794, § 351, 76 Stat. 872, 899 (1962) (holding that tariffs or duties recommended by Tariff Commission may be imposed by concurrent resolution of approval).

219 462 U.S. 919, 959 (1983).

220 *Id*. at 944 ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies . . . .").

221 *Id*. at 948.

222 *Id*. at 959 ("The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.").

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used legislative tool.[223] Lamenting the loss of future checks and balances, White described the veto's use as a tool to restrain agency action in the face of increases in the legislative delegation to the President.[224]

Post *Chadha*, courts continued to reinforce the President's power in imposing tariffs,[225] with the Supreme Court adopting the view that Congress had delegated much of its tariff power.[226] However, the winds of the delegation are shifting.[227] Recently, Justice Gorsuch stated that the Supreme Court is willing to return to the nondelegation doctrine, citing *Cargo of the Brig Aurora* as an example of the proper balance of powers.[228]

2. The Executive Tariff Power: What is the Executive's Role in Imposing Tariffs?

The Constitution vests the power to make treaties—with two-thirds of the Senate's approval—in the executive branch.[229] The Founders considered the President's treaty power a minor diplomatic tool shared with the Senate.[230] Though the President could negotiate treaties ad hoc, the Executive

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223 *Id*. at 967 (White, J., dissenting) ("Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'").

224 *Id*. at 968 (White, J., dissenting) ("Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the executive branch and independent agencies."). For more information on legislative vetoes and how they were used pre-*Chadha* see David A. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982). However, Chief Justice Burger provided that constitutionality of the existing vetoes was context specific. *See Chadha*, 462 U.S. at 960 n.1 (1983) ("Whether the veto complies with the Presentment Clauses may well turn on the particular context in which it is exercised, and I would be hesitant to conclude that every veto is unconstitutional on the basis of the unusual example presented by this litigation.").

225 *See* United States v. Yoshida Int'l, Inc., 526 F.2d 560, 569–70 (C.C.P.A. 1975); Star-Kist Foods, Inc. v. United States, 169 F. Supp. 268 (Cust. Ct. 1958), *aff'd* 275 F.2d 472 (C.C.P.A. 1959); *Guy W. Capps*, 204 F.2d at 658.

226 *Algonquin SNG, Inc.*, 426 U.S. at 558–59.

227 *Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting) ("If Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'").

228 *Id*. at 2137 (Gorsuch, J., dissenting) ("Though the case was decided on different grounds, the foreign-affairs-related statute in *Cargo of the Brig Aurora* may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II.") (citing *Cargo of the Brig Aurora*, 11 U.S. at 388).

229 U.S. CONST. art. II, § 2, cl. 2.

230 Bruce Ackerman & David Golove, *Is Nafta Constitutional?,* 108 HARV. L. REV. 799, 809 (1995) ("By confiding treaty-making power exclusively in the Senate, the Convention seems, then, to have been motivated by a commitment to federalism. This was why Madison wanted to get the President involved.").

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required the Senate's advice and consent to create a binding agreement.[231] With the rise of the New Deal, the executive branch began taking more authority in negotiating treaties, including NAFTA and the United States' entry into the WTO, relying on Congress's post-signature approval.[232] The Executive's use of the treaty power requires interplay with Congress, which created robust scholarship regarding this distinct separation of power.[233]

Moreover, the executive branch may appoint ambassadors.[234] The President may also receive foreign ambassadors.[235] The President serves as commander-in-chief,[236] exerting additional constitutional power when foreign interests threaten national security.[237] This power grants the President additional authority in foreign affairs,[238] often through a treaty or trade deal's review provision.[239] The President must also "take care" that the laws are "faithfully executed."[240]

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231 *Id.* at 821–22.

232 *Id.* at 860 ("If NAFTA had been negotiated in 1937, Roosevelt would have submitted it as a treaty to the Senate without recognizing that he had a choice in the matter.").

233 For discussion on the rise of executive treaty authority post-New Deal, the negotiation of NAFTA and the constitutional concerns with the United States' entry into the WTO, see *id.* at 919. For discussion on the textual interpretation of the Treaty Power, see Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 16 (2006). For a discussion into the interplay between the executive's Treaty Power and its interplay in the separation of foreign affairs power, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 262 (2001). For a discussion of modern nontreaty agreements negotiated under Article II, Section 2 procedure, see Michael D. Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. REV. 133, 176 (1998). For an exclusivity and narrow based constitutional interpretation of the Treaty Power, see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1273 (1995). For a consequences and trade-offs interpretation of the Treaty Power, see John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1, 11 (2011). For an expansive analysis of the type of congressional-executive treaties passed from 1980 to 2000 and a discussion of how they were passed, see Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1259 (2008).

234 U.S. CONST. art. II, § 2, cl. 2.

235 *Id.* art. II, § 3.

236 *Id.* art. II, § 2, cl. 1.

237 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

238 *See* The Amy Warwick, 67 U.S. 635, 641 (1862); *see also* Paul Bettencourt, *"Essentially Limitless": Restraining Administrative Overreach Under Section 232*, 17 GEO. J.L. & PUB. POL'Y 711, 715 (2019) ("Section 232 of the Trade Expansion Act of 1962 . . . allows the President to protect industries vital to national security from import competition by imposing tariffs.").

239 LEWIS, *supra* note 51, at 3.

240 How the Take Care Clause is used in regard to the separation of powers depends on the utilization of the unitary executive theory (e.g. can the President do this without assistance). For the view that the Take Care Clause supports the unitary executive theory, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994) ("The very language of the Take Care Clause confirms that the President possesses unique powers with respect to the execution of the law."). For the view that the Take Care Clause does not support the unitary executive theory, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 68

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Within some limits,[241] the Executive branch is the "sole organ" in foreign affairs.[242] The President, as the "sole executive," can speak with "one voice," unifying opinions that would be disjointed if Congress were to act in the Executive's stead.[243] When interacting with the legislative branch, the Court evaluates the President's power against Congress's power based on the legislation's intent and authorization through the three-factor test provided in *Youngstown Sheet & Tube Co. v. Sawyer*.[244] The Court grants the President additional freedom from statutory restriction to achieve the nation's international negotiation goals.[245] Tariff cases fall within categories one and three depending on the statute's text and the context of the President's action.[246] The intelligible principle doctrine from *J.W. Hampton*[247] and the distinction

(1994) ("The history of the Take Care Clause, and the text of the Necessary and Proper Clause, further support the claim that the framers viewed executive power less uniformly than the modern unitarians now view it.").

241 *See* Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 3 (2015) ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.").

242 United States v. Pink, 315 U.S. 203, 229–30 (1942) ("Because the President is able to speak with "one voice" the Court is deferential to the executive branch in cases involving foreign affairs."); United States v. Belmont, 301 U.S. 324, 330 (1937) ("And in respect of what was done here, the Executive had authority to speak as the sole organ of that government."); *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319–20 (1936) ("It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."). For background into Justice Sutherland's decision in *Curtiss-Wright*, see generally David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).

243 *Zivotofsky*, 576 U.S. at 28 ("In this respect the Legislature, in the narrow context of recognition, on balance has acknowledged the importance of speaking 'with one voice.'"); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000) ("It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments.").

244 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

245 *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320 (1936) ("[I]f, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.").

246 Justice Jackson's three oft-cited factors are summarized as follows: (1) The President has maximum authority when acting pursuant to an express or implied authorization of Congress. (2) The President can only rely upon independent executive powers when acting in absence of either a congressional grant or denial of authority, a *zone of twilight* where the President and Congress may have concurrent or uncertain authority. (3) The President's power is lowest when taking measures incompatible with the expressed or implied will of Congress. *Youngstown Sheet & Tube*, 343 U.S. at 635–38 (1952) (Jackson, J., concurring). For an international application of Justice Jackson's factors, see Russell Dean Covey, *Adventures in the Zone of Twilight: Separation of Powers and National Economic Security in the Mexican Bailout*, 105 YALE L.J. 1311 (1996).

247 276 U.S. at 409.

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from *Marshall Field* restrained the Executive's power in imposing tariffs.[248] However, legislation would soon provide clarity and authority to the murky scenario.[249]

Turning previous acquiescence into action, as a part of the New Deal, Congress passed the Reciprocal Trade Agreements Act ("RTAA") in 1934, expressly delegating to the President the power to reduce tariffs.[250] Courts analyzing tariff cases under RTAA found mixed constitutional results.[251] *United States v. Guy W. Capps, Inc.* was the first challenge to the President's new authority under RTAA.[252] Due to a record harvest, the President enacted a tariff on Canadian potatoes to protect domestic producers.[253] Though Congress had recently passed the RTAA, Chief Judge Parker believed the Executive branch's efforts in imposing the tariff were insufficient.[254] Chief Judge Parker found that the President's actions were unjustified because the Executive failed to make the findings of fact required by statute.[255] The Executive's base requirement post-*Guy W. Capps* is to comply with the statute

248 *Marshall Field*, 143 U.S. at 693.

249 LEWIS, *supra* note 51, at 2.

250 19 U.S.C. § 1351; *see also id.* at 2.

251 *See* Marianao Sugar Trading Corp. v. United States, 29 Cust. Ct. 275, 284 (Cust. Ct. 1952) ("Under the Constitution, there is ample authority for the delegation by the Congress to the Executive of power to conclude Executive agreements brought into force by proclamations, without reference to Congress, as to tariff matters, as in the judgment of the Congress may be in the interest of American trade and commerce, and a reasonable delegation of such power, with proper limitations, and the exercise of the authority by the Executive, with proper regard for the wishes of Congress, are clearly not incompatible with the supreme law of the land."); Louis Wolf & Co. v. United States, 107 F.2d 819, 826 (C.C.P.A. 1939) ("We think it well settled that the term 'commercial convention' is broad enough not only to include commercial conventions which are ratified by the Senate when negotiated by the executive department of the Government, but that it also includes certain commercial agreements which may be authorized by Congress, if such conventions are within the powers so delegated."); Barclay & Co. v. United States, 167 F. Supp. 264, 270 (Cust. Ct. 1958) (Mollison, J., concurring) ("This, of course, depends upon whether the effect of the promulgation of new and superseding tariff rates or import restrictions is to work a repeal of the former rates or restrictions or merely to suspend the same with inherent self-generating power to return to operation without being specifically, and with respect to each rate or restriction, proclaimed by the President pursuant to some constitutionally delegated power from the Congress."). *But see Guy W. Capps*, 204 F.2d at 658 (4th Cir. 1953), *aff'd* 348 U.S. 296 (1955) ("The power to regulate foreign commerce is vested in Congress, not in the executive or the courts; and the executive may not exercise the power by entering into executive agreements and suing in the courts for damages resulting from breaches of contracts made on the basis of such agreements."); Ernest E. Marks Co. v. United States, 117 F.2d 542, 546 (C.C.P.A. 1941) ("If the act as a whole unlawfully delegates to the President legislative authority, it logically follows that the entire act must fall as being unconstitutional.").

252 *Guy W. Capps*, 348 U.S. at 295.

253 *Id*. at 297 (7 U.S.C. § 1282).

254 *Guy W. Capps*, 204 F.2d at 658 ("There was no pretense of complying with the requirements of this statute.").

255 *Id*. at 659–60 ("We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress.").

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when making a tariff rate decision.[256] Three years later, the United States Customs Court addressed the previous delegation regime with the developments of the RTAA in *Star-Kist Foods, Inc v. United States*.[257] Star-Kist Foods, Inc. challenged the new RTAA delegation regime with the Court's decisions in *Marshall Field* and *Cargo of the Brig Aurora*.[258] Judge Wilson held that the tides of fortune had ebbed out against the old regime and found the RTAA delegation constitutional.[259]

Sixteen years later, in the face of an economic crisis, the President issued emergency tariffs under Section 5(b) of the Trading With the Enemy Act ("TWEA").[260] Adversely affected by TWEA, Yoshida International, Inc. challenged the President's TWEA imposition in the Court of Customs and Patent Appeals as an unconstitutional delegation of legislative power.[261] Chief Judge Markey found no power to regulate commerce or set tariffs inherent in the Presidency absent delegation from Congress.[262] Chief Judge Markey also found the President's emergency powers operational under TWEA, but only in times of declared emergencies.[263] Yet Chief Judge Markey found the delegation constitutional even within these defined limitations.[264] However, Markey recommended a narrow construction of TWEA to prevent overboard executive actions during emergencies.[265]

The following year, the Supreme Court issued its seminal opinion on the President's trade authority in national security concerns in *Federal Energy Administration v. Algonquin SNG, Inc.*[266] Justice Marshall's question in *Algonquin SNG* was to address the power delegated to the President by

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256 *Id*. at 660 ("The executive may not by-pass congressional limitations regulating such commerce by entering into an agreement with the foreign county that the regulation be exercised by that county through its control over exports.").

257 169 F. Supp. at 268.

258 *Id.* at 273–74.

259 *Id*. at 274 ("Although the fundamental principle of reciprocal trade agreements under which certain powers have been delegated by Congress to the President of the United States has been in effect for practically the full period of our national existence, and frequent attacks have been made upon the constitutionality of reciprocal trade acts, no instance has been called to our attention in which any such act has been held unconstitutional by our courts.").

260 *Yoshida Int'l*, 526 F.2d at 569–70 ("The President's emergency power, as expressed in the Trading With the Enemy Act (TWEA), section 5(b), to 'regulate importation of any property in which any foreign country or a national thereof has any interest.'").

261 *Id.* at 570.

262 *Id.* at 572.

263 *Id.* at 581 ("It cannot be lightly dismissed that the TWEA is operative only during (war or) national emergencies, which inherently preclude prior prescription of specific, detailed guidelines.").

264 *Id*. at 584.

265 *Id.* at 583 ("The mere incantation of 'national emergency' cannot, of course, sound the deathknell of the Constitution. Nor can it repeal prior statutes or enlarge the delegation in section 5(b). The declaration of a national emergency is not a talisman enabling the President to rewrite the tariff schedules, as it was not in this case.").

266 426 U.S. at 558–59.

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Section 232(b) of the Trade Expansion Act of 1962.[267] Applying Chief Justice Taft's intelligible principle doctrine from *J.W. Hampton, Jr.*, Justice Thurgood Marshall found Section 232(b) was constitutional.[268] Justice Marshall also found that it should be construed in light of Section 232(b)'s legislative history to cover a broader range of potential activities.[269] But Justice Marshall warned the case's holding would have to be narrow to prevent more sweeping authorization of executive actions.[270]

Moreover, six years after *Algonquin SNG*, the United States Court of International Trade addressed a non-national security tariff use of executive discretion in *U.S. Cane Sugar Refiners' Association v. Block*.[271] Judge Newman found the Tariff Act of 1962's legislative history welcomed executive discretion.[272] With the legislative history and executive deference, Judge Newman held the President's authority to be constitutional.[273] Furthermore, the Court of International Trade recently held that *Algonquin SNG* applies to steel tariffs imposed under Section 232.[274] However, the court eluded a scenario where an executive action could be outside of its delegated powers, creating a weak statutory scheme.[275]

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267 *Id.* at 550.

268 *Id.*

269 *Id.* at 561 ("It is most unlikely that Congress would have provided that dangers posed by factors other than the strict quantitative level of imports can justify Presidential action, but that that action must be confined to the imposition of quotas.").

270 *Id*. at 571 ("As a consequence, our conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by s 232(b) in no way compels the further conclusion that Any action the President might take, as long as it has even a remote impact on imports, is also so authorized.").

271 544 F. Supp. 883, 891 (Ct. Int'l Trade), *aff'd*, 683 F.2d 399 (C.C.P.A. 1982) ("The issue on the merits is whether the President could validly impose the subject import quotas on sugar pursuant to section 201 of the Trade Expansion Act of 1962.").

272 *Id.* at 894 ("Congress, beginning as early as 1794 and continuing into [the Trade Act of] 1974 has delegated the exercise of much of the power to regulate foreign commerce to the Executive. . . . [T]his court, therefore, must accord appropriate deference to Presidential action which finds authority in specific statutes.").

273 *Id.* ("My conclusion that the President's quota authority under section 201 is entirely consistent with his authority under section 22 is reinforced by the legislative history of the Agriculture and Food Act of 1981.").

274 *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1343 ("Thus, there has been no change in the legal landscape since *Algonquin* as far as section 232 is concerned.").

275 *Id.* at 1345 ("One might argue that the statute allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth.").

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3. The Judicial Tariff Power: Is the Judiciary Permitted to Expound Tariff Act Interpretations to Avoid Separation of Powers Issues?

The Constitution vests power in the judicial branch to hear "cases and controversies" involving treaties and ambassadors.[276] In those cases, the Supreme Court has original jurisdiction.[277] Courts can decide if a question is a justiciable case or controversy.[278] The judicial power keeps the other branches constrained to acting in matters within their authority and determines if one branch has been improperly using another's power.[279] The Judiciary has the purview to decide to address tariff disputes by evaluating whether cases have standing or proper jurisdiction.[280] Tariff case jurisdiction is limited to the Court of International Trade with pleadings alleging harms related to import revenue losses.[281] The Court of International Trade replaced the U.S. Customs Court as the primary court for addressing tariff disputes.[282] The Court of International Trade can also control cases by deciding if the plaintiff's sought remedy is appropriate.[283]

When interpreting the Tariff Acts, the Judiciary's resolution power can fluctuate between "interpreting" the law or "constructing or expounding" it

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276 U.S. CONST. art. III, § 2.

277 *Id.* art. III, § 2, cl. 2.

278 *See* Baker v. Carr, 369 U.S. 186, 198 (1962) ("The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.").

279 *See* Luther v. Borden, 48 U.S. 1, 53 (1849) ("It is the more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the *latter* within the limits assigned to their authority.") (emphasis added).

280 Rhode Island v. Massachusetts, 37 U.S. 657, 671–72 (1838) ("To the jurisdiction of a court of the United States in every case, two circumstances must concur. [Firstly], The party, or the subject of the suit, must be one to which the judicial power of the government extends, as that power is defined by the constitution; and, [Secondly], There must be some rule of decision established by the supreme power of the country, by the administration of which the right of the parties to the matter in controversy may be determined.").

281 E. States Petroleum Corp. v. Rogers, 280 F.2d 611, 613–14 (D.C. Cir. 1960) ("The fact that the customs courts are likely to reject appellant's constitutional claims does not make this a case of unusual hardship.").

282 FED. JUDICIARY CTR., *U.S. Customs Court*, https://www.fjc.gov/history/timeline/us-customs-court (last visited Oct. 28, 2020).

283 *See* Cornet Stores v. Morton, 632 F.2d 96, 99 (9th Cir. 1980) ("This policy of uniform administration of customs laws also defeated the plaintiffs' contention that financial impossibility precluded obtaining an adequate remedy in the Customs Court"); Jerlian Watch Co. v. U.S. Dep't of Com., 597 F.2d 687, 691 (9th Cir. 1979) ("Plaintiffs assert that they come within the "remedy" exception to Customs Court jurisdiction because, while it is theoretically possible for them to pursue an administrative remedy by importing more than their duty-free quota allocation, paying the duties assessed, and then suing for a refund under 19 U.S.C. s 1514(a), it is practically impossible for them to do so").

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to reach meanings potentially beyond the text's simple meaning.[284] In its simple but famous terms, the Constitution vests the Judiciary's ability to say "what the law is."[285] But, in foreign affairs, the line of "what the law is" can blur due to the interplay between statutes and treaties.[286] Though there may be contextual differences in whether decisions implicate foreign affairs law and policy, there is evidence that the Founders considered the Judiciary the best equipped to handle issues under the "laws of the nations" and granted it powers to effectuate that purpose.[287]

For instance, in interpreting Article III's vesting of foreign affairs power, John Jay understood that a difference existed between the power to execute the law[288] and the power to *expound* it, beyond a mere textual reading.[289] As the Constitution grants admiralty and maritime jurisdiction without a parallel grant of authority to Congress in Article I, it could be argued that the interpretation of treaties and foreign affairs agreements is a *uniquely* judicial power, granting the Judiciary additional leverage in decision-making.[290] The Founders may have delegated this authority to the Judiciary to "tie" Congress and the Executive "to the mast" when writing treaties and foreign affairs agreements, a mechanism to prevent expansive policy changes not documented in these instruments.[291] Conceptually, through its most

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284 MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS 63 (2019); *see also* THE FEDERALIST NO. 3 (John Jay); THE ANTIFEDERALIST NO. 78 (Brutus).

285 Marbury v. Madison, 5 U.S. 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). Additionally, the nation's foreign affairs were one of the catalysts in the Constitution's development. FLAHERTY, *supra* note 284, at 48 ("These foreign affairs crises, far more than majoritarian tyranny at home, led nationally minded Americans to seek a genuine national constitution.").

286 Martin v. Hunter's Lessee, 14 U.S. 304, 305 (1816) ("If the validity or construction of a treaty of the United States is drawn in question, and the decision is against its validity, or the title specially set up by either party, under the treaty, this court has jurisdiction to ascertain that title and determine its legal validity, and is not confined to the abstract construction of the treaty itself."); *cf.* Bank Markazi v. Peterson, 578 U.S. 212, 249 (2016) (Roberts, C.J., dissenting) ("[H]owever difficult it may be to discern the line between the Legislative and Judicial Branches, the entire constitutional enterprise depends on there *being* such a line.") (emphasis in original).

287 FLAHERTY, *supra* note 284, at 57 ("This is not to say that separation of powers concerns applied exactly the same way in foreign as in domestic matters."); STORY, *supra* note 150, at § 266.

288 FLAHERTY, *supra* note 284, at 59 ("First, several of the president's foreign affairs powers were last-minute additions . . . . Only after the means of selecting the president became better defined was the president given the principal role of negotiating treaties, subject to Senate advice and consent. This eleventh-hour shift suggests that the Founders did not view executive power as either plenary or unconstrained unless otherwise indicated when it came to foreign affairs.").

289 U.S. CONST. art. III, § 2.

290 FLAHERTY, *supra* note 284, at 62–63 ("This understanding follows from Article III's grant of admiralty jurisdiction without a parallel grant to Congress to legislate in the field in Article I.").

291 This form of Ulyssean "precommitment" could be intended to promote stable foreign relations, but as the Executive is intended to operate with dispatch in foreign affairs as well, this interpretation has its limits.

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potent power—the ability to check the other branches—it is possible the Founders intended the Judiciary to prevent the other branches from abusing their respective foreign affairs authorities.[292] This check would be in the form of the Judiciary to use canons of interpretation and construction to provide such a check.[293] However, the Founding era sources suggest disagreement on the extent to which the Judiciary could expand its power through "expounding."[294]

John Jay had one of the broader views of the Judiciary's power and likely would have endorsed a judicial "expounding" power in foreign affairs.[295] Jay believed that the states and the federal government would have different interpretations of treaties and international law.[296] With that understanding, Jay wanted more judicial presence to prevent aggressions and provide neutral decision-making insulated from rent-seeking.[297] Under Jay's view, the Judiciary could (and potentially should) give the last word in foreign affairs.[298] Likewise, for a more contemporary endorsement of Jay's position, Justice Story opines in his *Commentaries on the Constitution of the United States* that treaties would have no effect on the states without the Supreme Court's judgment within the Founders' intent.[299] Thus, the Judiciary's involvement is essential for keeping the peace in foreign affairs.[300] Justice John Marshall illustrates this interpretation in *Martin v. Hunter's Lessee,*[301] where treaties were determined to be the "supreme law of the land," a characterization granted the Judiciary's interpretation.[302] Similarly, in Federalist No. 3, John Jay states that the protection of peace requires the Judiciary's action in foreign affairs as it is the branch most likely to resist the temptations

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292 FLAHERTY, *supra* note 284, at 42 ("The power to check the other branches, especially in the name of rights, obviously promotes balance to prevent abuse of power.").

293 *See id.*

294 *Compare id.* at 59, *with* STORY, *supra* note 150, at § 434. *Compare* THE FEDERALIST NO. 3 (John Jay) *with* THE FEDERALIST NO. 47 (James Madison) *with* THE FEDERALIST NO. 78 (Alexander Hamilton).

295 THE FEDERALIST NO. 3 (John Jay).

296 *Id.*

297 *Id.*

298 *Id.*

299 STORY, *supra* note 149, at § 266.

300 *Id.* ("In respect to this last defect, the language of the FEDERALIST [NO.] 56 contains so full an exposition, that no farther comment is required. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land.").

301 14 U.S. at 340–41.

302 *Id.* ("From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—'the supreme law of the land.'").

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to act self-interestedly.[303] Those following John Jay and Justice Story's view would support granting the Court greater deference in foreign affairs cases.[304]

Providing a modern validation to Jay's interpretation, Professor Martin S. Flaherty argues that because Jay and other members of the Founding generation foresaw problems with the separation of powers in foreign affairs between Congress, the President, and the Judiciary that by vesting the Supreme Court with original jurisdiction over claims arising under treaties that the Judiciary has the last word in foreign affairs through its "*resolution* power."[305] In supporting this interpretation, Martin Flaherty believes the Founders endorsed the court's "expounding" in foreign affairs through vesting admiralty and maritime law jurisdiction in Judiciary.[306] Flaherty asserts that because the Constitution grants admiralty and maritime jurisdiction *without a parallel grant of authority to the legislative in Article I*, these powers must be *uniquely judicial,* meaning that the Judiciary does not "expound" statutes related to these areas of law as much as it resolves them with its inherent power.[307] Thus, in applying this to tariffs, the court could draw from the interplay between domestic agreements and treaties and trade and maritime law to find it has the authority to resolve issues with the Tariff Acts through interpretation.[308]

Conversely, as a proponent of a strong separation of powers, James Madison would have advocated for a more substantial restraint on additional judicial power.[309] Madison would have likely permitted limited judicial checks through Article III against encroachment in foreign affairs if the Executive's decision would adversely affect the *people*.[310] In the same vein, Alexander Hamilton would likely have been the most opposed to the Judiciary

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303 THE FEDERALIST NO. 3 (John Jay) ("If even the governing party in a state should be disposed to resist such temptations, yet as such temptations may, and commonly do, result from circumstances peculiar to the state, and may affect a great number of the inhabitants, the governing party may not always be able, if willing, to prevent the injustice meditated, or to punish the aggressors. But the national government, not being affected by those local circumstances, will neither be induced to commit the wrong themselves, nor want power or inclination to prevent, or punish its commission by others."); STORY, *supra* note 149, at § 297 ("There were also concerns that this power would be too broad. With some the powers of the judiciary were far too extensive; with others the power to make treaties even with the consent of two thirds of the senate.").

304 THE FEDERALIST NO. 3 (John Jay); THE FEDERALIST NO. 81 (Alexander Hamilton).

305 FLAHERTY, *supra* note 284, at 252 ("Restoring the judiciary to its proper place in foreign affairs comports with Founding understandings."). This delegation ensured that the States would not undermine the infant government's ability to pay its obligations.

306 *Id.* at 48 ("These foreign affairs crises, far more than majoritarian tyranny at home, led nationally minded Americans to seek a genuine national constitution.").

307 *Bank Markazi*, 578 U.S. at 215; *see also id.* ("This connection belies a persistent historical misunderstanding that treats the Founders' commitment to separation of powers as purely a domestic story.").

308 FLAHERTY, *supra* note 284, at 62 ("The Constitution did not leave what was arguably the most important component the law of nations in any doubt.").

309 THE FEDERALIST NO. 47 (James Madison).

310 *Id.*

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having additional power in foreign affairs.[311] However, today's trade context could have convinced Hamilton to give additional judicial power to balance other branches' rent-seeking encroachments into liberty.[312] As the Antifederalists were deeply bothered by the potential of expanding judicial power, they too would oppose a constitutional interpretation granting expansive authority to the Judiciary.[313] Writing for the Antifederalists, Brutus believed the Judiciary had greater power than Congress because of its ability to render rules invalid.[314] Brutus explained that as long as power is consolidated with a few individuals, it could lead to oppression because of the relatively few checks on the Supreme Court's decisions.

Additionally, the Antifederalists believed expanding the judicial powers would create a stronger federal government and lead to more government-favorable judicial decisions.[315] Accordingly, as this interpretation would "create" additional judicial authority, the Antifederalists would be against it.[316] Thus, there is no Founding-era consensus regarding the true extent of the Judiciary's ability to "expound" statutes like the Tariff Acts but there are good arguments made for why the Judiciary would be or would not be permitted to exercise its power in this manner.

Accordingly, to quote Justice Story, "[o]urs is emphatically a government of laws, and not of men; and judicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws."[317] As the Judiciary is constitutionally vested with the power to hear questions regarding the "laws of the nations"[318] and the founders intended judges to be insulated decision-makers,[319] it may be the branch to decide the true balance of the tariff power. Accordingly, the Judiciary may be entitled to deference in its review of cases within foreign affairs where grave consequences abound for failure.[320]

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311 THE FEDERALIST NO. 78 (Alexander Hamilton).

312 *Id.*

313 THE ANTIFEDERALIST NO. 78 (Brutus).

314 *Id.*

315 *Id.*

316 *Id.* ("From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favor it; and that they will do it, appears probable.").

317 STORY, *supra* note 149, at § 377.

318 U.S. CONST. art. III, § 2.

319 THE FEDERALIST NO. 78 (Alexander Hamilton).

320 THE FEDERALIST NO. 3 (John Jay) ("Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense, and executed in the same manner . . . .").

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II. CONSTITUTIONALITY OF THE CURRENT BALANCE

George Mason argued in 1787 that "[t]he purse and the sword ought never to get into the same hands."[321] This warning would be considered unheeded if one analyzed the tariff power's current state.[322] Under Section 232, the President may impose tariffs as he sees fit, as long as they are tethered to the amorphous concept of "national security."[323] The President has used it to place tariffs on goods directly related to national security,[324] and others that have no relation to protecting this nation outside of special interests.[325] The challenges posed to the Executive's use of this power[326] can be viewed through the 1789 schools of tariffs policy, with the Hamiltonians arguing for the current balance and the Madisonians opposing it.[327]

The Hamiltonian argument that the current delegation is constitutional draws heavily from Hamilton's notion that the imposition of tariffs is within the purview of a sovereign who exercises decision-making on foreign affairs as its head of state.[328] The "Hamiltonians" of today would likely continue Hamilton's argument that as tariffs continue to be "employed with success in other countries"[329] and the President is vested with the power to act with "dispatch" in the area of foreign affairs, the power to impose tariffs is at least shared with the executive branch.[330] The justification of "national security" could be broadly construed to include economic protectionism.[331] Proponents would latch on to the fact that Congress authorized the President to amend tariff rates unilaterally through delegation, further cementing its authority.[332] Encroaching foreign economic interests can threaten the prosperity of domestic industries and drive down wages—threatening national stability through economic means.[333] Though the Constitution's text does not

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321 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139–40 (M. Farrand ed., Yale Univ. Press 1937).

322 Ackerman & Golove, *supra* note 230, at 821–22.

323 *Compare* Silverberg, *supra* note 24, at 1293, *with* U.S. CONST. art. I, § 8, cl. 1.

324 *See Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1351–52.

325 *See, e.g.*, Trump, *supra* note 38 (specifically protecting Maine fishermen from their Canadian competition).

326 *See, e.g.*, *Algonquin SNG*, 426 U.S. at 561; *Guy W. Capps*, 204 F.2d at 658; *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1343.

327 Though Madisonians were originally occupied with solely with the protection free trade, instead of constitutional interpretations that support that result.

328 HAMILTON, *supra* note 106.

329 *Id.*

330 RECORDS OF THE FEDERAL CONVENTION, *supra* note 321, at 65 (detailing that James Wilson of Pennsylvania proposed that "a single person" would provide the "most energy dispatch and responsibility to the office" of President).

331 *See* HAMILTON, *supra* note 106.

332 *Marshall Field*, 143 U.S. at 662.

333 Moore, *supra* note 148, at 62.

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specifically authorize the President to impose tariffs, the Hamiltonians would maintain that the Constitution's vesting of broad authority to the Executive in foreign affairs and national security would make the imposition of tariffs akin to making decisions as commander-in-chief on the economic battlefield, protecting Congress's purse instead of stealing it. Thus, such a delegation would be constitutionally proper as it comports with protecting the sovereign state, though it strains the Constitution's text.

Likewise, Hamiltonians would also contend that any constitutional concerns with the current balance have been "liquidated" through the passage of time and congressional acquiescence.[334] The practice of permitting the Executive's use of the tariff power began with permitting the amendment of tariff rates[335] and then progressed to allowing the branch to set and impose tariffs unilaterally, providing evidence that Congress does not view the President's involvement as encroaching on its core taxing power.[336] The courts have had the opportunity to change their interpretation,[337] but *Algonquin SNG* remains intact, even if it is solely through *stare decisis*.[338] Accordingly, even if there were a constitutional issue, the Hamiltonians would consider it benign enough that current practice and precedent preclude reevaluation.

Conversely, the Madisonians would assert that the current balance goes directly against the Constitution's text as it permits the Executive to wield, with little oversight, the power to tax citizens indirectly.[339] They would believe that the Court should regulate these types of delegations through a type of "super-strong" presumption that *Congress* is meant to be the branch to impose tariffs, after which the Executive can set the duty amount by "filling up" Congress's details. However, Madisonians would permit the Executive to impose tariffs unilaterally in cases where the tariff directly relates to an Article II power (e.g., occasions where the nation's economic defense needs tariffs). The Madisonian reasoning is derived from the position of Sir William Blackstone.[340] Taxation by the Executive (or executive-influenced body) was denounced by Blackstone when he addressed whether the House of Commons or the House of Lords should have the taxing power.[341] Blackstone reasoned that the argument for giving the House of Commons the exclusive privilege to tax was that its decisions were "raised upon the body of the people, and therefore it is proper that [the people] alone should have the right of

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334 Baude, *supra* note 45, at 49.

335 *Marshall Field*, 143 U.S. at 662; *Algonquin SNG*, 426 U.S. at 561.

336 Bruce G. Peabody & John D. Nugent, *Toward A Unifying Theory of the Separation of Powers*, 53 AM. U.L. REV. 1, 38 (2003) (detailing that the judiciary may misapply political information as it attempts to understand executive and legislative perceptions of whether their core powers are being encroached upon or not).

337 *Algonquin SNG*, 426 U.S. at 561.

338 *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1343.

339 Moore, *supra* note 148, at 62.

340 *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *163–64 (1765).

341 *Id.*

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taxing themselves."[342] In contrast, Blackstone found it would be inappropriate for the House of Lords to have taxing power because, as that House was "created at pleasure by the king," it was "supposed more liable to be influenced by the crown . . . than the commons, who are a temporary elective body, freely nominated by the people."[343] Thus, Blackstone found it "extremely dangerous" to give that house "any power of framing new taxes."[344]

The Madisonian interpretation infers that the Founders drew from Blackstone's caution around granting the power to tax to bodies more easily "influenced by the crown"[345] because consolidation would not separate the purse from the sword.[346] Significantly, Hamilton himself warned that consolidation of the purse and sword "would destroy that division of powers on which political liberty is founded, and would furnish one body with all the means of tyranny."[347] This insight provides the justifications for why the ability to impose taxes is a *core* power of the legislative branch, a conclusion evident in the Constitution.[348] Beginning with the text, the Taxation Clause vests *Congress* with authority to "lay and collect" duties.[349] These duties were to be "uniform throughout the United States"[350] and no "preference [was to be] given by any Regulation of Commerce or Revenue to the Ports of one State over those of another."[351] Further, the Foreign Commerce Clause explicitly authorizes *Congress* to "regulate *Commerce* with foreign Nations."[352] Likewise, the Constitution's other trade references to impose two limits on state financial exactions: the first is a requirement of congressional consent before a state could "lay any Duty of Tonnage,"[353] and the second is, with one exception, a similar requirement before a state could "lay any Imposts or

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342 *Id.*

343 *Id.*

344 *Id.* at *170.

345 Albert S. Miles et al., *Blackstone and His American Legacy*, 5 AUSTL. & N.Z. J.L. & EDUC. 46 (2000) (detailing Blackstone's immense impact on American jurisprudence).

346 2 THE WORKS OF ALEXANDER HAMILTON 61 (Henry Cabot Lodge ed., 1904).

347 *Id.* ("But when the purse is lodged in one branch, and the sword in another, there can be no danger.").

348 Peabody & Nugent, *supra* note 336, at 38.

349 U.S. CONST. art. I, § 8, cl. 1.

350 *Id.*

351 *Id.* art. I, § 9, cl. 6.

352 *Id.* art. I, § 8, cl. 3 (emphasis added). Though it could be argued that the Foreign Commerce Clause definitively gives Congress the power to regulate tariffs as a tariff is used to regulate foreign commerce, the Founders likely sought to the commerce power as a power distinct from the power to impose duties found in Article I, Section 9, Clause 6, because they believed that the power to impose duties was not alone an adequate means of regulating trade. *See also* Carson Holloway, *The Founders and Free Trade: The Foreign Commerce Power and America's National Interest*, HERITAGE FOUND. (May 29, 2018), https://www.heritage.org/american-founders/report/the-founders-and-free-trade-the-foreign-commerce-power-and-americas.

353 U.S. CONST. art. I, § 10, cl. 3.

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Duties on Imports or Exports."[354] But, the Constitution makes no explicit textual allowance for the Executive's exercise of this power.

Moreover, the Madisonians would also rely on British practice and the well-documented concerns with the use of tariffs to serve special interests or reward specific goods to further argue that *if* the President were delegated the ability to impose tariffs, it would have to relate to directly to a power enumerated in Article II. In England, *Parliament* was responsible for imposing tariffs, not the Crown.[355] This requirement was fought for by the English citizenry and was explicitly enumerated in the Magna Carta.[356] Thus, though the Crown had immense power, it was still required to seek the approval of Parliament when it sought to impose a tax.[357] This limitation was well known to the Founders as one of the roots of *why* the Legislative branch existed and is essential to interpreting the Executive's enumerated powers in this area.[358] Professor Julien Mortensen describes this phenomenon as the "royal residuum" theory, which interprets the Article II Vesting Clause to confer a set of substantive powers once associated with the British Monarchy, including such foreign affairs and war powers *not expressly allocated to Congress*.[359] As Congress lacked the authority to regulate commerce under the Articles of Confederation, making it unable to protect or standardize trade between the budding Republic and foreign nations,[360] it logically follows that once the Constitution was ratified, it would accomplish this goal—without a residual grant of this authority to the Executive. Accordingly, in extrapolating

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354 *Id.* art. I, § 10, cl. 2.

355 Robert G. Natelson, *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38 HARV. J.L. & PUB. POL'Y 629, 666 (2015).

356 MAGNA CARTA ch. 12 (1215), *reprinted in* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 232, 248 (1905) ("No scutage nor aid shall be imposed in our kingdom, unless by common counsel of our kingdom."); ch. 14 ("And for obtaining the common counsel of the kingdom [before] the assessing of an aid . . . or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons . . . .").

357 Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1192 (2019) ("While many Americans followed the English Whigs in imagining that Parliament's institutional identity was central to the "ancient constitution" of England, it is now understood that English parliaments emerged not so much as institutions in their own right as ad hoc gatherings summoned by the Crown, *especially when approval for taxation was needed*.") (emphasis added).

358 THE FEDERALIST NO. 71 (Alexander Hamilton) ("[The] *British House of Commons, from the most feeble beginnings, from the mere power of assenting or disagreeing to the imposition of a new tax,* have, by rapid strides, reduced the prerogatives of the crown and the privileges of the nobility within the limits they conceived to be compatible with the principles of a free government[.]") (emphasis added).

359 Mortenson, *supra* note 357, at 1181–83.

360 LIBR. OF CONG., *Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789*, https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/to-form-a-more-perfect-union/identifying-defects-in-the-constitution (last visited Nov. 11, 2021) ("Under the Articles of Confederation, Congress lacked the authority to regulate commerce, making it unable to protect or standardize trade between foreign nations and the various states.").

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historical precedent and the Constitution's text, Madisonians would conclude that Congress could not give the Executive the power to impose tariffs, because it *expressly* has the power to impose taxes and duties. In contrast, the Executive's foreign affairs powers are *implied* from the Constitution's text.

This discussion of the contrasting views of whether the Executive can unilaterally impose tariffs leads to one glaring question: if the text of the Constitution and the Founders' understanding of what powers were meant to be legislative versus executive lends itself to an interpretation that the Executive should not have power in this area, then why has it never shown up in the case law? For generations, courts have focused on Congress's delegations,[361] never touching on whether the Constitution permits Congress to delegate the power.

One of two justifications for this myopic focus is that the courts have centered their analysis on who does the regulating (e.g., Congress's foreign commerce power versus the Executive's broad power in foreign affairs), without considering the *regulating mechanism* (e.g., the indirect tax) at play when a tariff is imposed. But by framing the question in this manner, the deeper concerns underlying the analysis go missing. By framing the question as "*Who does the regulating?*", a court may be more inclined to look towards "intelligible principles" given by Congress to enable the Executive to make judgments regarding trade policy.[362] As tariffs are an important regulating mechanism in foreign policy,[363] it makes sense that it would be permissible for the Executive to have more involvement in their imposition. Thus, this justification relies on the Judiciary's focus on the Executive's ability to access foreign affairs tools to overcome constitutional concerns.

The second justification, primarily advanced by Hamilton, is that this distinction between who is performing the action and its mechanism has been liquidated. As identified by Professor William Baude in *Constitutional Liquidation*, this meaning has been settled (though conceptually, there is an argument to read it the other way) as a "course of practice."[364] Hamiltonians would argue that omission of this interpretation from judicial practice signals not only its non-existence but its elimination from future evaluation, an unfortunate side effect of "the most basic function of law," the settling disputes and disputed meanings.[365] Thus, Hamiltonians would argue that the current balance is constitutionally sound, as it has not been challenged in this manner currently, and the foundations of its challenge are rooted in Founding-era understandings, liquidated over time.

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361 *See, e.g.*, *Algonquin SNG*, 426 U.S. at 561; *Cargo of the Brig Aurora*, 11 U.S. at 387.

362 Dunigan, *supra* note 208, at 256.

363 *See* Hu, *supra* note 111, at 9.

364 Baude, *supra* note 45, at 16.

365 Soia Mentschikoff & Irwin P. Stotzky, *Law—The Last of the Universal Disciplines*, 54 U. CIN. L. REV. 695, 706 (1986) ("[T]he most basic function of law is to settle disputes well enough so that the society does not disintegrate, and so that the people whose law it is will follow its commands.")

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As illustrated by *Transpacific Steel*, there is still debate within the Judiciary about whether Section 232 violates the Separation of Powers.[366] Though unaddressed in the case, future litigation may shift the focus from whether Congress properly delegated its power to the Executive, to whether Congress is permitted to delegate this type of power. Founding-era debates and sources indicate that the juxtaposition between *who* does the regulating and *how* the regulating is accomplished is significant.[367] Accordingly, if a reviewing court adopts the Madisonian interpretation, the current balance of the tariff power could be found unconstitutional.

III. POTENTIAL SOLUTIONS

A. *Remaking Once Lost Restraints: Can the Legislative Branch Restrict the Executive's Tariff Power?*

The evolution of the tariff power has resulted in a balance that the Founders[368] and previous constitutional interpretations would likely reject.[369] Chief Justice Burger presents two feasible solutions for Congress to redelegate the tariff power.[370] One solution is for Congress to pass legislation that supplants previous delegations.[371] The other involves Congress amending the current trade statute's delegation breath or exercising existing bicameral "legislative vetoes" to constrain future executive discretion.[372] One solution relies on the formalism of the legislative process and the other provides a remedy through a functionalist approach to find forgotten "loopholes."[373]

Moreover, Congress's first approach is to repeal or amend sections of the Trade Acts to remove earlier delegations of power through *Chadha*'s bicameralism and legislative presentment requirements.[374] Such action would not be unfounded as legislators have presented concerns in the past about the

366 *See, e.g.*, *Transpacific Steel*, 4 F.4th 1306.

367 *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *164 (1765). Additionally, obvious potential for cronyism from Executive misuse of the power to impose tariffs as a means to benefit political allies also suggests that the Founders would have preferred to have tariffs imposed by Congress as it would form a greater barrier against this regulatory capture.

368 *See* STORY, *supra* note 149, at § 266.

369 *Algonquin SNG*, 426 U.S. at 571 (opining that the delegation of the tariff power was intended to be narrowly construed).

370 *Chadha*, 462 U.S. at 952.

371 *Id.* at 957–58.

372 LEWIS, *supra* note 51, at 12.

373 Theresa Wilson, *Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power*, 47 DRAKE L. REV. 141, 174 (1998) ("Although it may have appeared as though Congress ceded much of its power to regulate foreign commerce to the executive branch, Congress had, in fact, been wise enough to leave itself some loopholes for reasserting its power.").

374 *Chadha*, 462 U.S. at 948; *see also* LEWIS, *supra* note 51, at 12.

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President's delegation of power.[375] Specifically, in discussing the Trade Act of 1974, Congress lamented the delegation, declaring it has turned the President into the nation's "trade czar," giving broad discretionary power to the Executive.[376] These reservations could create a catalyst for potential legislation to regain some of the Executive's tariff power.[377]

As the President can only alter tariffs created through legislation or "adjust" imports under Section 232 of the Trade Expansion Act (which includes the use of tariffs)—"if excessive foreign imports are found to be a threat to . . . national security," legislation is a strong rebalancing mechanism.[378] However, Congress has already delegated much of its non-Section 232 tariff authority through several legislative provisions.[379] Trade negotiations have evolved from widely using tariffs[380] to supporting the standardization of non-tariff trade barriers.[381] As a result of this evolution, Congress gives less discretion to the Executive branch to impose tariffs,[382] instead providing the

375 Concerns about the original over-delegation to the Executive were raised in 1934 when the Reciprocal Trade Agreement Act was passed. *See* H.R. Rep. No. 73-1000, pt. 1, at 21 (1934) ("For the following reasons, among others, the Minority are unable to support the bill (H.R. 8687) giving the President the power to fix tariff duties and to enter into reciprocal trade agreements with foreign nations without public notice or hearing or subsequent ratification thereof by Congress."); *see also Reciprocal Trade Agreements: Hearing on H.R. 8430 Before the Committee On Ways and Means* H.R., 73rd Cong. 424 (1998) (statement of James A. Emery, Chief Counsel , National Association of Manufacturers of the United States) ("To the extent that he can receive valid authority, we say we are glad to see him attempt it, but within the valid limits in which he may exercise that authority. We believe there ought to be a limitation put upon the life of such agreements, either by permitting notice to be served which would terminate them within a period, or by saying what that period should be. But here there is no provision made for the explicit termination of the agreement. We think there ought to be, if it is to be held within experimental limitations.").

376 119 Cong. Rec. 40,533 (1973) ("There is no question that this bill would make the President of the United States the foreign trade czar of this Nation.").

377 Alex Reinauer, *Changing Trends in Trade Legislation: Toward Limiting Executive Power?*, COMPETITIVE ENTER. INST. (Nov. 2, 2020), https://cei.org/blog/changing-trends-in-trade-legislation-toward-limiting-executive-power.

378 *See* LEWIS, *supra* note 51, at 12; Trade Expansion Act of 1962, P.L. 87-794, §232(b)–(c), 76 Stat. 877 (codified as amended at 19 U.S.C. §1862(b)–(c); *see also* U.S. DEP'T OF COM., *Section 232 Investigation on the Effect of Imports of Steel on U.S. National Security*, https://www.commerce.gov/issues/trade-enforcement/section-232-steel#:~:text=Under%20Section%20232%20of%20the,threat%20to%20US%20national%20security (last visited Jan. 6, 2023).

379 *See id. See also* Tariff Act of 1930, ch. 497, §338(a), 46 Stat. 704 (codified at 19 U.S.C. §1338(a)); Trade Act of 1974, P.L. 93-618, §122, 88 Stat. 2001 (codified as amended at 19 U.S.C. §2132); *Id.* §123(a) (codified as amended at 19 U.S.C. §2133(a)); *Id.* §301 (codified as amended at 19 U.S.C. §2411); *Id.* §501 (codified as amended at 19 U.S.C. §2461).

380 LEWIS, *supra* note 51, at 12.

381 Non-tariff restraints on trade include, import bans, general or product-specific quotas, more complex or discriminatory rules of origin, additional quality conditions or packaging, labelling, product standards imposed by the importing country on the exporting countries. *See Tariff and Non-Tariff Barriers*, 3 L. OF INTL TRADE § 86:48 (Sept. 2020).

382 Limits are provided under Trade Act of 1974. *See* P.L. 93-618, §151, 88 Stat. 2001 (codified as amended at 19 U.S.C. § 2191).

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Executive branch with "Trade Promotion Authority" if it meets specific statutory criteria.[383] Changes to existing legislation could further limit the Executive's discretion[384] and Congress could strip decision-making delegations, even remove Section 232, in future legislation and amendments.[385] Recently, Congress has been active in amending the Trade and Tariff Acts.[386] Amendments have focused on strengthening American goods' international position and providing authority to prevent foreign firms from "dumping" in the American market.[387] The current legislative activity in this area indicates changing trade policies, potentially involving a legislative tariff power redelegation.[388]

But recent legislative action would suggest correcting the tariff power delegation is a low priority.[389] Congress lately *enhanced* the tariffing power of the executive branch by amending the Tariff Act of 1930 through the American Trade Enforcement Effectiveness Act in 2015 to permit the Secretary of State and the Office of the United States Trade Representative to "determine if the prices at which their goods are sold in their home market are below the cost of production."[390] Though Congress may disagree with the President's tariff decisions from time to time, it seems resigned to accept these choices as an unavoidable result of previous delegations.[391]

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383 Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More than a Name Change*, 35 GEO. WASH. INT'L L. REV. 1, 6 (2003).

384 P.L. 93-618, §151, 88 Stat. 2001 (codified as amended at 19 U.S.C. § 2191).

385 *See Chadha*, 462 U.S. at 959.

386 Congress has amended the delegation selections of the Trade Expansion Act of 1962 and Trade Act of 1974 (which are a part of the same statutory scheme) twice. Trade Act of 1974 Pub. L. 103-465, 108 Stat 4809 (amended 1994) ("Uruguay Round Agreements Act"); Trade Expansion Act of 1962 Pub. L. 93–618, 88 Stat 1978 (amended 1975).

387 Richard Weiner, *Amendments to U.S. Trade Remedy Laws Aim to Strengthen the Position of U.S. Industries and Reduce Commerce Department Workload*, SIDLEY AUSTIN LLP (Jul. 8, 2015) https://casetext.com/analysis/amendments-to-us-trade-remedy-laws-aim-to-strengthen-the-position-of-us-industries-and-reduce-commerce-department-workload.

388 William Hauk, *How Congress Lost Power over Trade Deals – and Why Some Lawmakers Want It Back*, THE CONVERSATION (Jul. 9, 2019, 7:22 AM) ("While Democrats and Republicans are largely coming at this issue from different directions, both have found reason in recent years to question the decades-old consensus that has made trade policy the prerogative of the executive branch.").

389 The Trade Act of 2002 was enacted because of a Presidential Executive Order; this Act delegated power to executive actors (e.g. Secretary of State and U.S. Trade Representative) to carry out its functions. Trade Act of 2002 (codified as 19 U.S.C. § 3801) (enacted through Exec. Order No. 13,346, 69 Fed. Reg. 41,905 (Jul. 8, 2004)).

390 *Id.* ("Second, the amendment grants the Department authority to request information from foreign respondents to calculate their costs of production, so that the Department may determine if the prices at which their goods are sold in their home market are below the cost of production. Such a determination, in turn, would lead the Department to disregard those low-priced home market sales as "outside the ordinary course of trade" in determining if the exports to the United States were dumped.").

391 119 Cong. Rec. 40,533 (1973) ("While it is conceivable that there would be times when I might agree with his actions, it is also certain that there would be many times when I would disagree. But, agree

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Because the Supreme Court has not applied *Chadha* to overturn the legislative veto provisions of several Tariff Act statutes,[392] Congress still arguably has statutory authority to "veto" certain tariff decisions.[393] However, Congress seems unlikely to utilize these statutory provisions.[394] It is likely that Congress will only utilize this power in cases where judicial standing is unlikely[395] to prevent incurring the Court's wrath. Possibly steering into a future confrontation over the application of *Chadha*, Congress included unicameral review provisions in the Trade Act of 2002.[396] As Chief Justice Burger cryptically appeared to signal in *Chadha* that the constitutionality of a legislative veto would be viewed in the context of its legislative scheme,[397] a case may be needed to determine whether the use of a "legislative veto" is truly foreclosed from Congress.

Overall, though there has been discussion of new tariff legislation,[398] it is unlikely that new or amended legislation will rebalance the tariff power

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or disagree, there would be little Congress could do, having voted in this bill to give the President of the United States a free hand to conduct this Nation's foreign trade as he determines best over the next 5 years.").

392 The bicameral review provision in Trade Act of 1974 has not been removed. *See* 19 U.S.C. § 1981(a)(2)(B) ("(B) such increase or imposition shall take effect (as provided in paragraph (3)) upon the adoption by both Houses of the Congress (within the 60-day period following the date on which the report referred to in subparagraph (A) is submitted to the House of Representatives and the Senate), by the yeas and nays by the affirmative vote of a majority of the authorized membership of each House, of a concurrent resolution stating in effect that the Senate and House of Representatives approve the increase in, or imposition of, any duty or other import restriction on the article found and reported by the United States International Trade Commission."). The authority provision of the Trade Act of 1974 has only been cited once since *Chadha*. *See* United States v. De Jesus, Crim. No. 92-229 (RLA), 1992 WL 437435, at *1 (D.P.R. Dec. 22, 1992). The East-West trade provision of the Trade Act of 1974 still bears its legislative reviewal section. 19 U.S.C. § 2432(d)(B) ("Freedom of emigration in East-West trade") ("(B) If a joint resolution is enacted into law under the provisions of this paragraph, the waiver authority applicable to any country with respect to which the joint resolution disapproves of the extension of such authority shall cease to be effective as of the day after the 60-day period beginning on the date of the enactment of the joint resolution.").

393 Trade Act of 1974, Pub. L. No. 93–618, §§ 203(c), 302(b), 402(d), 407, 88 Stat. 1978, 2016, 2043, 2057–60, 2063–64, 19 U.S.C. 2253(c), 2412(b), 2432, 2434.

394 *Chadha*, 462 U.S. at 959.

395 This limitation occurs due to it being unlikely that private parties have suffered the harm required to bring suit, making legislators a primary party have standing to challenge the provision. The court views private party litigation and conflicts between the legislative branch differently. Goldwater v. Carter, 444 U.S. 996, 1004 (1979) ("In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact."); *see also* Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227, 312 (1991).

396 19 U.S.C. § 3803(c)(5)(A).

397 *Chadha*, 462 U.S. at 960 n. 2.

398 Beth Hughes, *Without Trade Renewal, Congress Will Thank PPE Producers With Taxing Tariffs*, SOURCING J. (Nov. 10, 2020).

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because Congress has proposed less trade legislation in recent years.[399] Accordingly, since legislative action requires "clumsy, time-consuming bill procedures" or criticized methods,[400] another solution may provide more success.

B. *A Global Judiciary? Can the Judiciary Solve the Interbranch Conflict Surrounding the Tariff Power?*

Instead of focusing on legislative action, the Judiciary could adjudicate a tariff case to rebalance the power between Congress and the executive branch.[401] This second proposed solution focuses on judicial action, delineating the line where Congress and the Executive's power in imposing tariffs differ.[402] In contrast to pure judicial activism, the Judiciary's power in our system of government is to resolve "controversies" and provide "authoritative" interpretations, some of which involve interbranch conflicts.[403] As Founding-era perspectives illustrate, this rebalancing approach has potential benefits and detriments as it could be viewed as relying on judicial supremacy to remove power from the Executive Branch.[404] However, it is the purview of the Judiciary to say "what the law is" and whether it chooses to continue applying *stare decisis* or to go in a different direction when reviewing its own decisions.[405]

Moreover, as the Court in *Algonquin SNG* intended its holding to be "limited," the current Court could decide to properly "reign in" its overbroad

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399 Shawn Donnan, *Trump Trade Czar Eyes Exit Hailing Tariff Power His Critics Hate*, BLOOMBERG (updated Dec. 23, 2020) https://www.bloomberg.com/news/articles/2020-12-22/trump-trade-czar-eyes-exit-hailing-tariff-power-his-critics-hate; Reinauer, *supra* note 377 ("It is not clear why Congress has been introducing less trade legislation over the last eight years. One theory is that the legislative branch has been taking a narrower approach in light of active presidential trade agendas.").

400 *Chadha*, 462 U.S. at 959.

401 *Cf.* Bowsher v. Synar, 478 U.S. 714, 725 (1986); Buckley v. Valeo, 424 U.S. 1, 122 (1976) ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."). The court may also be able to take this initiative through its Article III power to hear cases involving "the laws of nations" as Article I, unlike Articles II and III, of the Constitution limits Congress to powers that its Vesting Clause "herein" grants, hypothetically giving the Judiciary more license to act. Richard A. Primus, *Herein of 'Herein Granted': Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers*, 35 CONST. COMMENTARY 301, 302 (2020).

402 FLAHERTY, *supra* note 284, at 252.

403 *See Bank Markazi*, 578 U.S. at 215; Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 216 (1995) ("It is true that '[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'"). *But see* Morrison v. Olson, 487 U.S. 654, 693 (1988) ("[W]e have never held that the Constitution requires that the three branches of Government 'operate with absolute independence.'").

404 THE FEDERALIST NO. 78 (Alexander Hamilton); THE ANTIFEDERALIST NO. 78 (Brutus).

405 W.M. Lile, *Some Views on the Rule of Stare Decisis*, 4 VA. L. REV. 95, 99 (1916) ("The doctrine of stare decisis therefore means not that the rule which is to be followed in the future is to be found in language of the court, but in the principle necessarily resulting from the decision.")

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application by distinguishing the decision through a new interpretation.[406] The current Court appears postured to hear cases with strong separation of powers concerns into the future.[407] It also could be drawn to this issue as it involves an interbranch conflict where *both* branches have vested powers to regulate a portion of foreign affairs, but only one has the explicit constitutional power to use the regulating mechanism (imposing indirect taxes) unilaterally.[408] So, it appears the Judiciary is likely the branch to resolve the current power imbalance. How it resolves this imbalance is another question.

When the Executive acts under one of its delegated tariff powers, the Court should determine whether there is an actual intelligible principle that chambers its action in a manner proportionate to the Executive's action.[409] This principle should focus on what discretion has been given to the Executive (e.g., determining quota amounts or product types versus imposing new constraints against products related to those provided in the Act but not substantially similar). Similar to using a nondelegation canon, the Court can consider the amount of discretion provided to the Executive (and the extent of impact on the economy) in determining whether the Executive should be permitted to take action under the Act in question. Thus, this doctrine could work like an "interbranch conflict tiebreaker" regime that the Judiciary could use to evaluate whether unilateral action by the Executive is permitted, or Congressional delegation is required.[410]

Under this solution, the controversial Section 232 could be found to be constitutional, though the Act has been found suspect by other commentators.[411] Though Section 232 defines national security vaguely, a court could focus the analysis on whether the good in question is *germane* to national security, through a conventional understanding of the term, as opposed to performing the analysis the Federal Circuit employed in *Transpacific Steel*.[412] This analysis parallels nondelegation doctrine analysis by looking at *which branch* is using *which power* to take action, strongly scrutinizing the Executive's actions that rely only on delegated Article I power without assistance

406 426 U.S. at 571 ("A final word is in order. Our holding today is a limited one.").

407 *See Paul*, 140 S. Ct. at 342 (Kavanaugh, J., respecting denial of certiorari); *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring).

408 2 WILLIAM BLACKSTONE, COMMENTARIES *164 (1765).

409 *J.W. Hampton*, 276 U.S. at 400.

410 FLAHERTY, *supra* note 284, at 63.

411 *See, e.g.*, Silverberg, *supra* note 24, at 1293 (arguing that Section 232 of the of the Trade Expansion Act of 1962 violates the nondelegation doctrine); Kim, *supra* note 24, at 187 (arguing that President Trump's use of Section 232 was a violation of the separation of powers).

412 *See generally,* Transpacific Steel LLC v. United States, 4 F.4th 1306 (Fed. Cir. 2021). This opinion appears to be relying on the "constitutional avoidance" canon to oppose an interpretation that would impede the Executive's purview. However, in applying *Algonquin SNG,* the court's interpretation fails to review "national security" through its conventional meaning, instead permitting the Executive to stretch the term to meet its desired actions.

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from Article II.[413] Under this type of analysis, the *Transpacific Steel* tariff could be constitutional because steel is a product *germane* to the Nation's security as it is used in military implements and infrastructure projects.[414] In this context, the Executive's use of a tariff is akin to a sanction, preventing the targeted country from interfering with the asset in question, affirming that the President's Article II powers can also assist this action.[415]

Although Section 232 does not provide a definition of national security, a conventional understanding of what national security means would not support a finding that stable sources of certain types of food or commercial resources may be subject to presidentially-imposed tariffs, even if they are necessary for economic stability.[416] Thus, tariffs imposed through 232 relating to goods like lobsters, fish, vodka, or diamonds would unlikely survive scrutiny under this review as these products are not genuinely *germane* to national security.[417] Even with a "broad" construction of the national security, it is likely implausible that a lobster shortage or flood of foreign vodka into the domestic market constitutes a concern implicating the nation's security. This interpretation relies on a straightforward application of the *noscitur a sociis*[418] canon in interpreting the types of products implicated by 232, permitting the Judiciary to use what is otherwise a vague and unwieldy term by constructing the term through evaluating its generally accepted meaning.[419] Conceptually, as no national security interest is implicated, the tariff must fail as Article II does not supplement the Executive's delegation, making this analysis simple and constitutionally grounded.[420]

As long as the definition of "national security" is grounded and is not permitted to be amorphous, this regime provides the rigor Section 232 currently lacks. Additionally, as this interpretation would make it harder for

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413 Koh & Yoo, *supra* note 107, at 753 ("Notwithstanding Congress's substantial constitutional powers over import trade, the President can still resort to a reservoir of discretionary power, both constitutional and statutory, if he feels imports threaten national security.").

414 Ikenson, *supra* note 35.

415 John J. Forrer & Kathleen Harrington, *The Trump Administration's Use of Trade Tariffs as Economic Sanctions*, 20 CESIFO F. 23, 23 (2019) ("Sanctions are one of many government tools available to further specified national security and foreign policy goals.").

416 19 U.S.C. § 1862 (providing no substantive definition of national security); David Scott Nance & Jessica Wasserman, *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, 11 MICH. J. INT'L L. 926, 946 (1990).

417 Trump, *supra* note 38; Exec. Order No. 14,068, *supra* note 39.

418 A word is known by the company it keeps. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 434–35 (2012).

419 Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1507 (2018).

420 The core premise of this analysis is that when a tariff truly implicates national security, the Executive's unilateral imposition operates more like sanction imposed out of Article II as opposed to an Article I tariff, eliminating concerns that the President is imposing an indirect tax without constitutional assistance. However, when this is not present, then Article II is not implicated and cannot assist the President's actions.

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tariffs to be imposed on goods unrelated to national security, fewer tariffs could be imposed in this manner, incidentally benefiting consumers and allowing them more control over tariff policy through the political process. Thus, by applying canons of interpretation and construction, even Section 232 can be reconciled in a manner that prevents the executive branch from having unlimited power to impose tariffs but enough discretion to respond to *actual* threats to the nation's security.

CONCLUSION

In conclusion, the tariff power is an interbranch conflict that directly impacts American citizens' economic welfare and raises issues with foundational separation of powers concerns over the constitutional power to tax.[421] Though the current delegation of the tariff power is in line with *stare decisis*,[422] it lacks concern for consumers who pay the tariffs yet are likely unaware of their imposition and that it runs afoul of the separation of powers.[423]

As addressed above, two potential solutions exist to rebalance the separation of the tariff power, but allowing the Courts to use an analysis based on textual canons that functions like a nondelegation regime is optimal. This regime uses judicial experience and common sense to keep Congress and the Executive in their constitutionally permitted lanes, allowing the consumer to benefit from fewer tariffs while permitting the government discretion to act when foreign interests threaten national security.[424] To evaluate this regime's national effect, more research into the true number of tariffs imposed or altered under Section 232 is needed to determine whether the tariffs actually implicate national security. Although Judge Katzmann questioned the safety of the canary in the tariff's constitutional coalmine, with the use of textual-canon-based analysis instead of the current precedent under *Algonquin SNG*, it will finally be able to sing a song of trade and balance.[425]

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421 Meyer & Sitaraman, *supra* note 12, at 601; Comment, *supra* note 10, at 66; *see also* CASEY, *supra* note 46, at 1.

422 *See Algonquin SNG*, 426 U.S. at 561; *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1352.

423 Chatzky, *supra* note 89; Gleckman, *supra* note 49.

424 Winston, *supra* note 176, at 45 ("The question thus depends on an interpretation of the words, 'common defense and general welfare.'").

425 *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1352.

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CONGRESSIONAL ACCOUNTABILITY: HOW THE CAA PERMITS CONGRESS TO EXPLOIT THE UNPAID LABOR OF STUDENTS

Mollie Jackowski[*]

INTRODUCTION

Imagine you are a student hoping to pursue a career in public policy or public office. What better place to understand how political offices, lobbying, and government work than in the nation's capital? You take an opportunity to intern for a summer or semester on Capitol Hill for a senator, representative, or committee. This position is unpaid but claims to provide valuable work experience. You picture yourself researching and drafting policies and having meaningful conversations with policymakers. However, you are stuck with many other interns in an office that can barely fit all of you.[1] There is not enough work, and substantive assignments are few and far between.[2] Instead of learning and writing policies, you stuff envelopes, answer constituent phone calls, write letters, and give tours.[3] You leave the summer having worked on very few substantive assignments and having spent nearly $6,000.[4] Nevertheless, you believe it was worth it because you will have difficulty getting your dream job after graduation without this byline on your resume.

This hypothetical is one that thousands of students encounter every year. In the summer of 2009, an estimated 20,000 interns came to Washington,

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[1] *See* ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 102 (2012). Ross Perlin provides an example of one intern, Amanda, who worked in an office with 35 interns. The interns were given work on a first-come, first-serve basis, and most people gave tours and stuffed envelopes.

[2] *See id.*

[3] *See id.*

[4] *See* CARLOS VERA & DANIEL JENAB, PAY OUR INTERNS, WHY PAID INTERNSHIPS ARE A MUST IN CONGRESS 2 (2017), https://payourinterns.org/wp-content/uploads/2018/01/Payourinternsreport.pdf. Since 2019, Pay Our Interns has released several other reports discussing unpaid Congressional internships. This Comment was written in the Fall of 2019 and will use the data from the 2017 report.

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D.C.[5] Of those 20,000, an estimated 6,000 interned for Congress.[6] For most of these interns, the average cost to intern in D.C. for a summer is $6,000.[7]

In August 2019, eleven out of twelve presidential candidates paid their interns working out of Iowa.[8] The media coverage on this highlighted a seemingly accepted norm within the public sector, that "[p]aid campaign internships have been rare in recent political history."[9] While focused on the presidential hopefuls who did pay interns, the article identifies the reality of interns within the federal political arena. Unpaid internships are not exclusive to the executive branch or the executive branch hopefuls, and they extend to another federal branch: the legislature.

In June 2017, a non-profit organization, Pay Our Interns, published a report using the data they collected from Congressional offices.[10] Titled *Why Paid Internships are a Must in Congress*, this report documented that Congress had a low percentage of paid internships compared to unpaid internships. Only 51% of Republicans and 31% of Democrats paid their interns in the Senate.[11] In the House of Representatives, a mere 8% of Republicans and 3.6% of Democrats paid their interns.[12] Interestingly enough, nine of the candidates running for president in 2019 were also members of Congress when Pay Our Interns collected its data. Of those candidates (most of whom paid their campaign interns), only two offered paid legislative internships, one pledged to start offering paid internships, and six provided unpaid internships.[13] One might ask why these candidates chose to pay interns working for their campaign and not pay interns working for their Congressional offices. The answer is simple: Congress is not required to pay legislative interns.[14]

The Department of Labor (DOL) regulates internships within the private sector by providing a seven-factor primary beneficiary test.[15] Employers and

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5 *See D.C. Interns By the Numbers*, POLITICO (July 14, 2009, 4:44 AM) https://www.politico.com/story/2009/07/dc-interns-by-the-numbers-024883.

6 *See id.*

7 For this article, I use $6,000 as the benchmark for how much it costs to intern in D.C: *see* VERA & JENAB, *supra* note 4.

8 *See* Katie Akin & Clare Ulmer, *Paying Campaign Interns, Once Rare, Is Now the Norm for Presidential Campaigns. Find Out Which Iowa Candidates Pay Thiers*, DES MOINES REG. (Aug. 26, 2019, 6:54 PM), https://www.desmoinesregister.com/story/news/elections/presidential/caucus/2019/08/26/2020-democratic-campaigns-paying-interns-minimum-wage-biden-unpaid-internships-warren-sanders/1808214001/.

9 *Id.*

10 *See* VERA & JENAB, *supra* note 4.

11 *See id.*

12 *See id*.

13 *Compare id.* at 6–15 *with* Kathryn Watson, Camilo Montoya-Galvez, Grace Segers &Caitlin Huey-Burns, *All the Democratic Candidates Who Ran for President in 2020*, CBS NEWS (June 22, 2020, 2:42 PM), https://www.cbsnews.com/media/2020-democratic-presidential-candidates/.

14 Congressional Accountability Act of 1995 § 201(d)(3), 2 U.S.C. § 1311(d)(3) (2022).

15 *See* Tareen Zafrullah, *When Are Unpaid Internships Allowed Under the FLSA? DOL Revises Test*, (Jan. 8, 2018) https://www.faegrebd.com/en/insights/publications/2018/1/when-are-unpaid-

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judges use this test to determine if an intern, based on the assignments and tasks completed, is actually an employee who must be paid under the Fair Labor Standard Act's (FLSA) minimum wage and overtime guidelines.[16] The caveat, however, to the primary-beneficiary test is that "unpaid internships for public sector and non-profit charitable organizations, where interns volunteer without the expectation of compensation, are generally permissible."[17] This carveout enables the government, particularly the legislative branch, to create its own policies surrounding interns.[18] Congress is able to make its own rules in this regard through the Congressional Accountability Act (CAA), which allows Congress to pick and choose the provisions of federal statutes it must follow. While the DOL provides a framework to determine whether an intern is, in fact, an "intern" and thus must be paid, the CAA merely provides a general definition to make this determination.[19] The contrast between the approach taken by Congress and the Department of Labor in determining the appropriateness of unpaid internships raises the question of why the policies are so different.

This Comment will analyze the nature of unpaid Congressional internships within the context of the Framework of the DOL. This Comment will also consider whether the work performed in many of these unpaid Congressional internships is providing these interns with the requisite skills or experiences that future employers would expect from such a prestigious intern opportunity. Part II of this Comment will review the relevant historical and modern background of internships. Finally, Part III will analyze unpaid Congressional internships under the freedom of contract theory and signaling theory, ultimately concluding with my position that Congressional interns should be subject to the same DOL framework when determining whether they should be paid for their work.

I. BACKGROUND

A. *Defining an Intern*

The definitions of "intern" and "internship" are ambiguous.[20] Merriam-Webster defines an intern as "an advanced student or graduate usually in a

internships-allowed-under-the-flsa-dol-revises-test; *see also Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships (Jan. 2018) [hereinafter *Fact Sheet #71*].

16 *See* Zafrullah, *supra* note 15; *Fact Sheet #71*, *supra* note 15.

17 *Fact Sheet #71*, *supra* note 15.

18 *See* Saahil Desai, *When Congress Paid Its Interns,* WASH. MONTHLY (Jan. 7, 2018) https://washingtonmonthly.com/magazine/january-february-march-2018/when-congress-paid-its-interns/.

19 *See* 2 U.S.C. § 1311(d)(3).

20 *See* PERLIN, *supra* note 1, at 23.

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professional field (such as medicine or teaching) gaining supervised practical experience (as in a hospital or classroom)."[21] In this definition, an intern is someone doing something to help them gain practical experience.

Outside of the dictionary, students can find the definition of an intern or internship on their college or university's career services website. For example, the University of Iowa outlines its definition using a list: an internship is (1) A structured work experience relating to a student's major, (2) this experience should enhance the student's development academically, personally, or career-wise, (3) it is supervised by a professional, (4) paid or unpaid, and (5) part-time or full time.[22] Somewhat broader than the dictionary, this list encompasses almost anything. This breadth makes sense, as internships come in all shapes and sizes: paid, unpaid, full-time, part-time, a passion project, or required for your major. While this definition might be helpful to some, it covers positions that might not even be labeled as internships. If a student takes a job in accounting that enhances their career experience and it is paid, full-time, and supervised, then under the University of Iowa's definition, it could be considered an internship, even if it is merely a summer job or not classified as an internship by the employer.

Congress, the subject of this article, defines an intern as someone "who provides assistance, paid or unpaid, to a Congressional office on a temporary basis."[23] In contrast to the previous definitions — which focused on practical educational experiences that enhanced someone's career — this definition does not pretend to have an educational component. Whereas the definition of an intern in the Congressional Accountability Act is "an individual who performs service for an employing office which is uncompensated by the United States to earn credit awarded by an educational institution or to learn a trade or occupation and includes any individual participating in a page program operated by any House of Congress."[24]

The National Association of Colleges and Employers (NACE) offers another alternative definition of internship: "An internship is a form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting."[25] NACE prefaces its definition of an internship by noting that there are "no guidelines by which employers, educators, and students" can use to

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21 *Definition of Intern*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/intern (last visited Oct. 23, 2019).

22 *See Internships*, UNIV. IOWA POMERANTZ CAREER CTR., https://careers.uiowa.edu/internships (last visited Oct. 25, 2019).

23 SARAH J. ECKMAN, CONG. RSCH. SERV., R44491, INTERNSHIPS IN CONGRESSIONAL OFFICES: FREQUENTLY ASKED QUESTIONS 1 (April 27, 2022), https://crsreports.congress.gov/product/pdf/R/R44491/13.

24 2 U.S.C. § 1311(d)(3) (2022).

25 *A Definition and Criteria to Assess Opportunities and Determine the Implications for Compensation*, NAT'L ASS'N COLLS. & EMPS., https://www.naceweb.org/about-us/advocacy/position-statements/position-statement-us-internships/ (Aug. 2018) (hereinafter NACE).

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define internships consistently.[26] This lack of consistent definitions explains why some entities, like the University of Iowa, more broadly define the term and why different applications are applied by Congress and the CAA.

Instead of providing a definition of an intern or an internship, the Department of Labor (DOL) provides a legal test to determine if an intern is actually an employee who then is required to be paid at least minimum wage and overtime protections set by the FLSA. As mentioned previously, this determination applies a seven-factor "primary-beneficiary test."[27] These factors help an employer determine whether it has to pay its interns.[28] These factors are (1) The extent to which the intern and the employer understand there is no compensation; (2) whether the internship provides training that would be similar to that of an educational environment; (3) whether the internship ties to the intern's formal education program; (4) if the internship accommodates the intern's academic schedule; (5) If the internship's time period is limited; (6) if the intern's work complements, rather than displaces, paid employee work; and (7) if the intern understands there is no promise of a job at the end of the internship.[29] If the factors indicate that the employer benefits more than the intern, then under the test, the intern is actually an employee, and the Fair Labor Standards Act's (FLSA) minimum wage and overtime guidelines must be followed.[30] If the factors indicate the intern is the primary beneficiary, meaning they benefit more, the employer is not required to pay the intern.[31] This test is used by courts when private-sector employers are sued by former interns who allege they were actually employees and should be compensated for their work.[32] Courts use the "primary-beneficiary test" flexibly, and no single factor is given more weight than the others.[33]

A legal test, however, is not the same as a definition. If NACE is correct about the inconsistencies in the definition of interns or internships, it makes sense for the DOL to provide a framework focused not on the label of an intern or even the job description but on the benefits derived from that internship. By strictly defining an "internship," "intern," or "employee," the DOL risks creating a definition that is under-inclusive, over-inclusive, or both, which could result in an inconsistent application. A legal test protects the variety of internships across industries, leading to a more consistent application.

The inconsistencies of the various definitions of internship make sense because, as Ross Perlin explains, "what defines an internship depends largely

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26 *Id.*

27 *Fact Sheet #71*, *supra* note 15.

28 *See id.*; Zafrullah, *supra* note 15.

29 *See* Zafrullah, *supra* note 15.

30 *See* id.

31 *See* id.

32 *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–537 (2d Cir. 2016).

33 *Id.*

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on who's doing the defining."[34] The DOL provides a legal test rather than a definition; however, that legal test does not apply to the federal government or non-profits. When left to its own devices, Congress not only exempts itself from specific provisions of the FLSA,[35] but it also provides no legal test for paid internships. Logically, one could conclude that because Congress and the DOL represent the federal government and have imposed stringent requirements on private employers in this regard that the legal tests and definitions would be similar—but they are not. The difference in definitions and applications comes from the fact that the DOL regulates private-sector, for-profit employers and attempts to hold those employers accountable as a third party. While Congress, on the other hand, holds itself accountable to federal regulations under the CAA.

B. *A Brief History of the Internship*

The first interns were not unpaid interns working for Congress; they were medical students.[36] The name developed from the fact that doctors were interned or confined at hospitals before becoming "real" doctors.[37] Hospitals borrowed the French word "interne" as a way to describe house physicians and house surgeons.[38] In the 1920s, the use of "intern" spread to other professions, like education and accounting, where students could learn practical skills.[39] One of the first areas to utilize interns outside of the medical context was the political sphere.[40]

In the 1930s, the National Institute for Public Affairs launched a program for thirty students to train in various aspects of public administration in Washington, D.C.[41] This program acted as a catalyst, and over the next fifty years, the number of internships grew considerably in Washington, D.C.[42] As the city of Washington, D.C. and the size of Congressional staff increased throughout the 1940s and 1950s, so did the use of interns working for Congress.[43] By the 1960s, universities and students advocated for more public-policy-based internships.[44] Then in the 1980s and 1990s, internships outside of the public sphere started to become commonplace.[45]

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34 PERLIN, *supra* note 1, at 25.
35 *See* 2 U.S.C. § 1311 (2022).
36 *See* PERLIN, *supra* note 1, at 30.
37 *See id.*
38 *See id*.
39 *See id.* at 31-32.
40 *See id.* at 32.
41 *See id.*
42 *See generally D.C. Interns By the Numbers*, *supra* note 5.
43 *See* PERLIN, *supra* note 1, at 32-33.
44 *See id.* at 33-34.
45 *See id.* at 34, 130-135.

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Internships have now become ubiquitous throughout universities, where even some degree programs require students to complete internships to graduate.[46] In 2012, as many as 75% of students participated in at least one internship before graduation.[47] For students, internships have become a part of higher education, allowing them to "test-drive" certain careers and gain experiential training.[48] Likewise, internships allow employers to test-drive interns.[49] For students today, not all internships are unpaid. That said, when an internship is unpaid, like in Congress and much of the federal government, student interns trade their unpaid labor for little more than a byline on a resume, the chance to land a job or to be introduced to the right people.[50] While having unpaid internships is permissible under the DOL and FLSA, the line between intern and employee is sometimes blurred, as evidenced by the implementation of the "primary-beneficiary" test.[51]

C. *A Brief History of Congressional Interns and The Current State of Congressional Internships*

Congress did not initially choose a system that relied heavily on unpaid internships. In the 1960s and 1970s, paid internships were offered throughout Congress.[52] In fact, in the 1970s, almost every member of the House offered a paid internship.[53] The Senate followed suit, albeit a few years later, and by 1980 almost 80% of the offices in Congress paid interns.[54]

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46 *See id.* at 35.

47 *See id.* at xiv.

48 *See* J. Isaac Spradlin, *The Evolution of Interns*, FORBES (Apr. 27, 2009), https://www.forbes.com/2009/04/27/intern-history-apprenticeship-leadership-careers-jobs.html#e1e09b446b7a.

49 *See id.*

50 *See generally See* PERLIN, *supra* note 1, at 99–121. This assertion is based on the anecdotal evidence provided by Ross Perlin in his book and through various accounts of Congressional interns and their experiences. This claim is not meant to assert that Congressional internships do not provide students with experience or that they are useless. Instead, it compares the economic loss of an unpaid internship with the educational or professional value of the internship. *See* Maya Eliahou and Christina Zdanowicz, *Skipping Meals and Walking Miles to Work, Unpaid House Interns Struggle to Make Ends Meet*, CNN (Sept. 5, 2018), https://www.cnn.com/2018/09/01/politics/house-interns-unpaid-struggle-trnd/index.html; Celine McNicholas, *Unpaid Congressional Internships Bad for Students, Bad for Policy*, ECON. POL'Y INST. (June 22, 2017), https://www.epi.org/blog/unpaid-Congressional-internships-bad-for-students-bad-for-policy/.

51 *See* Zafrullah, *supra* note 15; *Fact Sheet #71*, *supra* note 15.

52 *See* Desai, *supra* note 18.

53 *See id.*

54 *See id.*

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In 1973, Congress created the Lyndon B. Johnson Internship Program through a House Resolution.[55] Under this program, each House had a budget for two-month paid internships.[56] Congress continued this program until 1994, when President Clinton decided to cut the size of his White House Staff.[57] This, in turn, inspired Congress to cut the size of its staff resulting in the end of the program.[58] The ending of the LBJ Program resulted in the size of the Congressional workforce decreasing.[59] In 1993, before budget cuts, Congress employed 27,000 people; in 2015, Congress employed fewer than 20,000 people.[60] This decrease in staff sizes forced Congress to rely heavily on unpaid interns.[61] Now, the work that junior staffers once did, like answering phone calls and giving tours, are now tasks done by interns.[62]

Of the 20,000 interns that come to D.C. every summer, 6,000 of them intern in Congress, and many of the internships are unpaid.[63] Ignoring the fact that interns work for committees and other offices within Congress, there are more than one hundred interns per member of Congress.[64] The sheer number of interns suggests that those positions are an integral component of offices in the House, Senate, and Capitol Hill as a whole. Capitol tours, administrative tasks, and small research assignments might never get done without interns.[65]

Like with any company or place of work, internships in Congress have a hierarchy. That hierarchy, according to an anonymous Hill intern, is as follows: district internship, House member internship, high-ranking House member internship, Senate internship, House committee Internship, and Senate committee internship.[66] Interestingly, the intern that provided that information to Ross Perlin took the unpaid internship because they would not qualify for paying jobs in Congress without a Congressional internship.[67]

Looming over these unpaid internships is the CAA, which enables Congress to incorporate some parts of the FLSA and allows Congress to exclude

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55 *See* BARBARA HILLSON, INTERNSHIPS AND FELLOWSHIPS: CONGRESSIONAL, FEDERAL, AND OTHER WORK EXPERIENCE OPPORTUNITIES, 2 (June 2, 1997).

56 *See* Desai, *supra* note 18; VERA & JENAB, *supra* note 4.

57 *See* Desai, *supra* note 18; ECKMAN , *supra* note 23.

58 *See* Desai, *supra* note 18; Alex Gangitano, *Paid Internships Were Victim of Clinton Era Deficit Reduction*, ROLL CALL (Apr. 20, 2019), https://www.rollcall.com/news/paid-internships-victim-clinton-deficit-reduction.

59 *See* Desai, *supra* note 18.

60 *See id.*

61 *See* Desai, *supra* note 18.

62 *See* PERLIN, *supra* note 1, at 102.

63 *See D.C. Interns By the Numbers*, *supra* note 5.

64 *See id.*; PERLIN, *supra* note 1, at 100.

65 *See id* at 102, 203.

66 *See id.* at 99–100.

67 *Se id.* at 100 (This intern also would not have been able to support his summer in D.C. had it not been for his parents).

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interns from those protections.[68] Instead of following the DOL's framework for evaluating if an intern should be paid, the CAA provides a different definition without a legal test. As a result, interns are not protected under the FLSA's minimum wage and maximum hour guidelines in Congress.[69] Likewise, the CAA does not include interns in its definition of "covered employees."[70] Remember, the CAA defines an intern as an "individual who performs service for an employing office which is uncompensated by the United States to earn credit awarded by an educational institution or to learn a trade or occupation . . . ."[71] The CAA classifies interns as "uncompensated," and if an intern is not receiving college credit but is learning a trade or occupation, the intern does not have to be paid.

Congressional offices market their internships to navigate around the definition of intern provided by the CAA. For example, Pay Our Interns reported that most Congressional members used the phrase "internships in all offices are unpaid, [yet] students gain invaluable work experience."[72] Some Congressional offices place their internship applications under the "Serving You" section of their website,[73] indicating that offering unpaid internships serves their constituents rather than the office itself. Congressional interns answer phones, stuff envelopes, and give tours, but they also work on a wide array of tasks that are real, substantive work.[74] It is difficult to ascertain the "invaluable work experience" or even educational value gained from completing some of those tasks--however, many take the positions not for the work experience but for the potential to gain connections.

In 2018, the House of Representatives and the Senate passed resolutions that established allowances for interns. The House passed section 120 of Public Law 115-244 and an accompanying Resolution. In that section, the House then provided another definition of interns, who are "individual[s] who serve[] in the office of the member for not more than 120 days in 12 months and whose service is primarily for the educational experience of the individual."[75] Under Section 120, the House appropriated $8.8 million to provide interns with stipends and limited the amount any one office could use per calendar year to $20,000.[76] Within the Resolution, there was no mention of

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68 *See* Desai, *supra* note 18. It is important to note that interns at private-sector employers do not receive all the protections of the FLSA. *See* Zafrullah, *supra* note 15; *Fact Sheet #71*, *supra* note 15.

69 *See* 2 U.S.C. § 1313 (a)(1)–(2) (2022).

70 *Id.*

71 § 1311(d)(3).

72 VERA & JENAB, *supra* note 4, at 3.

73 *See also* PERLIN, *supra* note 1, at 98 (universities describe to students internships as ways of "serving the community").

74 *See id.* at 101–105.

75 2 U.S.C. § 5321(c)(2) (2022).

76 *See* Doha Madani, *Congress Finally Approves Pay for House, Senate Interns*, HUFFPOST (Sept. 13, 2018), https://www.huffpost.com/entry/senate-house-internspay_n_5b9afb80e4b013b097790353; 2 U.S.C. § 5321.

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the requirement to use the funds provided.[77] In the Senate's Resolution, in the section titled "Senate Intern Compensation," the committee allocated $5 million to pay interns.[78] The Senate allocated $50,000 per fiscal year to each senator's office and provided that any remaining funds return to the Treasury.[79]

Facially, these allowances look like a tremendous step to get Congressional offices to pay interns. In practice, however, the allowances do not require that offices pay interns when funds are available. Even after the allowances were made, the House was not able to apportion its funds until March 2019.[80] As a result, many of the internships in the Spring and Summer of 2019 were most likely not paid even though there were available funds. Further, even with the budget allowance, Congress still had mostly unpaid internship positions in the fall and winter of 2019 going into 2020.[81] When neither of the appropriations requires offices to spend the money, there is no guarantee that interns will receive what should be due to them—a portion of the $20,000 or $50,000 allocated to each office. The appropriations do not guide the offices on how much the interns should be paid in either hourly wages or stipends either. Additionally, the appropriations fail to address any instance where an office uses all its funding yet markets its internships as paid opportunities.[82] Perhaps over time, Congress will make changes to the manner in which the noted allowances must be applied to ensure that all interns are paid or that there are standards set in place so that the offices use the allotted funds.[83]

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77 *See* Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019, Pub. L. No. 115-244, § 120, 132 Stat. 2897, 2931 (September 21, 2018).

78 *See* S. REP. NO. 115-274, at 25 (2019).

79 *See id.* at 26.

80 *See* Paul Kane, *Paid Internships are a Reality Again in Congress after Public Shaming*, WASH. POST (March 12, 2019, 7:32 PM). https://www.washingtonpost.com/politics/paid-internships-are-a-reality-again-in-congress-after-public-shaming/2019/03/12/ff371f54-44e9-11e9-94ab-d2dda3c0df52_story.html.

81 *See Internship Opportunities Bulletin*, U.S. Senate, https://www.senate.gov/employment/po/internships.htm (Mar. 24, 2023, 3:16 PM).

82 *See* S. REP. NO. 115-274, at 25 (2019).

83 In March 2021, Pay Our Interns published a report outlining the impact of Appropriations given to the House and the Senate. This report found that 96% of Senate Offices and 92.5% of House offices had at least one paid intern in the Summer of 2019. While this data showed a majority of offices used the appropriates to pay interns, it highlighted disparities between race and gender. Additionally, from the payroll data, Pay Our Interns was unable to ascertain the hourly wage for interns and, using the data, calculated rates of $10.14 per hour in the Senate and $4.62 in the House. While this data highlights that paid internships on the Hill are growing, it does not change the overall argument and analysis of this paper. *See* Dr. James R. Jones, Tiffany Win & Carlos Mark Vera, *Who Congress Pays: Analysis of Lawmakers' Use of Intern Allowances in the 116th Congress*, PAY OUR INTERNS https://payourinterns.org/wp-content/uploads/2021/03/Pay-Our-Interns-Who-Congress-Pays.pdf (last visited December 14, 2021).

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II. ANALYSIS

A. *Interns and the Freedom to Contract*

The arguments contained within this Comment are a critique of the system that enables unpaid internships within Congress (and elsewhere), and not a critique of the individuals who become unpaid interns or their skills. Instead, this Comment seeks to understand why high-achieving students with impressive credentials choose to go to D.C., work for free, and spend thousands of dollars to live and work there when there is no promise of substantive work or even a future job.[84] Some proponents of unpaid internships are likely to cite the idea of freedom of contract to support the view that if interns want to participate in unpaid internships, they should be allowed to do so. In other words, why should the government impede an intern's choice to be unpaid, and why should we care when it is common practice within the public and private sectors?

Freedom to contract is the idea that every individual has the right to enter into agreements for services, employment, property, or to alter legal relationships.[85] Under this idea, unpaid interns should be allowed to work for free if they agreed (contracted) to do so. So, under this theory, the unpaid interns on the Hill ought to have the freedom to work for free in exchange for a byline on their resume, networking, or the potential of getting future jobs regardless of the benefits they provide to Congress through their work. The Supreme Court illustrates this idea in *Lochner v. New York*.[86]

Lochner arose from a New York statute that prohibited employees who worked in bakery establishments from working more than sixty hours per week.[87] The Supreme Court held that the New York Statute was unconstitutional because it "interfere[d] with the right of contract between the employer and employees."[88] The Court saw the right to contract as "the right to purchase or sell labor" as "part of the liberty protected by" the Fourteenth Amendment.[89] To the Court, if an individual baker wanted to work at a bakery for more than sixty hours per week, then it was well within that individual's

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84 There is ample academic work arguing that unpaid internships are often used by the wealthy and that unprivileged individuals are often at a disadvantage when choosing between an unpaid internship and a paying job. *See* Jessica L. Curiale, Comment, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531 (2009).

85 David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 56–57 (2013).

86 *See* Lochner v. New York, 198 U.S. 45, 53 (1905).

87 *See* Lochner, 198 U.S. at 68–69.

88 *Id.* at 54.

89 *Id.* at 53.

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liberty to do so.[90] This decision was rooted in the protection of the right to contract but also to protect parties from the government, creating or forcing individuals to enter into disadvantageous contracts.[91]

The *Lochner* era only lasted for a little over thirty years and ended in 1937.[92] In 1938, President Roosevelt's administration created the Fair Labor Standards Act.[93] The FLSA was the "New Deal's rejection of *Lochner v. New York*, and it's doctrine of freedom to contract."[94] The FLSA created a set of standards for employers and enforced mandatory minimum wages and the maximum hours an individual worked.[95] The FLSA "is designed to defeat rather than implement contractual arrangements."[96] For example, if someone wanted to work for two dollars per hour and contract with an employer for that amount, under the FLSA, that agreement would not be legal.[97]

The FLSA specifically has removed the freedom to contract by employees to allow their employers to avoid the mandatory minimum and other wage requirements of the FLSA. Quite simply, such "freedom to contract" is dead under the FLSA because the Act is designed to protect employees from exploitation by their employers. FDR wanted to ensure a "minimum standard of living necessary for health, efficiency, and general well-being…without substantially curtailing employment."[98] The FLSA was also a way to ensure "a fair day's pay for a fair day's work."[99] The FLSA is a legal protection for employees, but it does not extend the same protection for all individuals who perform work for employers. Interns are one such group that falls outside the protection of the FLSA,[100] leaving some with the freedom to contract (i.e., work for free). Assuming interns have the freedom to contract for their unpaid labor, as they fall outside of the FLSA, the contract or agreement they make would still have to meet the requirements of a valid contract.

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90 *See id.* at 54. The Court rooted its decision in the protection of parties to contract without the government creating or forcing individuals to enter into disadvantageous contracts.

91 *See* Weber, *supra* note 85, at 59.

92 *See id.*

93 *See* Curiale, *supra* note 84, at 1556.

94 Imars v. Contractors, Mfg. Servs., No. 97-3543, 1998 U.S. App. LEXIS 21073, at *15 (6th Cir. Aug. 24, 1998).

95 Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101(6) MONTHLY LABOR REV. 22, 22, 28 (1978).

96 Secretary of Labor, United States Department of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th. Cir. 1987) (Easterbrook, J. concurring).

97 *See* 29 U.S.C. § 202(a)–(b) (2022); Craig Durrant, Comment, *To Benefit or Not to Benefit: Mutually Induced Consideration as a Test for the Legality of Unpaid Internships*, 162 U. PA. L. REV. 169, 172. The federal minimum wage is $7.25 per hour. *See Minimum Wage*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/wages/minimumwage (last visited Jan. 2, 2020).

98 29 U.S.C. § 202(a)–(b); *see* Durrant, *supra* note 97.

99 *See* Curiale, *supra* note 84, at 1556 (citing S. REP. NO. 75-884, at 2 (1937); 81 CONG. REC. 4983 (1937)).

100 *See Fact Sheet #71*, *supra* note 15.

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A legally binding contract requires consideration.[101] Consideration is an exchange that is bargained for and is given by a promisee in exchange for a promise by the promisor.[102] The performance can consist of "(1) an act other than a promise, . . . (2) a forbearance, or (3) the creation, modification, or destruction of a legal relation."[103] In the case of unpaid Congressional interns, they are trading their labor in exchange for the office, providing a title for their resume, connections, and the possibility of a future job. Is that enough to meet consideration? Under the Restatement Second of Contracts, this example may be "a mere pretense of a bargain [and] does not suffice, as where there is a fake recital of consideration or where a purported consideration is merely nominal."[104] On the one hand, this instance provides no bargain for exchange. The office provides an internship and gives nothing to the intern other than the title, assuming the intern does little or no substantive work. The work done by the intern might not be as promised—the connections the intern thought they would make might not happen, and maybe the potential future job never comes to pass. The consideration given or the bargain for exchange may be nominal. On the other hand, the interns may not see the resume boost, network connections, and the possibility of a job as nominal—they may see those as ample compensation.[105] These interns may see their unpaid internship as "a form of barter (labor in exchange for training, contacts, experience, etc.), or a brilliant investment in the future."[106] If an unpaid intern's summer could open the door to a dream job, it might not matter if the Congressional office pays them or provides them with substantive work.

B. *Signaling Theory and Unpaid Internships*

The unpaid interns of Congress come to D.C. willingly and knowingly. Keeping in mind that the average student debt in 2017 was $37,172[107] and the average cost of an internship in D.C. is $6,000,[108] why would college and graduate students come to D.C. without wages while increasing their student

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101 RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981).

102 *See id.*

103 *Id*. § 71(3)(a)–(c).

104 Edmund Polubinski Jr., *The Peppercorn Theory and the Restatement of Contracts*, 10 WM. & MARY L. REV. 201, 206 (1968), https://scholarship.law.wm.edu/wmlr/vol10/iss1/12 (citing RESTATEMENT (SECOND) OF CONTS. § 71 cmt. b).

105 *See* Anthony J. Tucci, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Non-profits and Public Agencies*, 97 IOWA L. REV. 1363, 1377 (2012); *see also* Connie Sung, *Are Unpaid Internships Exploitative?*, L.A. TIMES (Dec. 30, 2000, 3:00 AM), https://www.latimes.com/archives/la-xpm-2000-dec-30-me-6350-story.html.

106 PERLIN, *supra* note 1, at 124.

107 *See* Bill Fay, *Students & Debt*, DEBT.ORG, https://www.debt.org/students/ (last visited Mar. 25, 2023).

108 *See* VERA & JENAB, *supra* note 4, at 3.,

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debt to work in a Congressional office without the promise of consistent, substantive work? Quite simply: these students need those internships to show their future employers that they are qualified and often to meet a graduation requirement.

A similar phenomenon—signaling theory—is found in education. This theory rests on the premise that levels of education increase wages because education is a signal to employers that an individual has certain skills.[109] Under signaling theory, an individual does not get paid just for the subjects they mastered in school; they get paid for the traits society *associates* with education.[110]

For some theorists, educational achievement is a societal expectation.[111] Failing to attain education marks one as a nonconformist and sends negative signals to employers.[112] And nonconformity is not necessarily what employers are looking for.[113] In education, the stronger the academic record, the more employers are convinced that an individual has the "whole package."[114] The whole package being the socially desirable traits the employer sees a person with a strong academic record as having.[115] Bryan Caplan identifies three broad traits of signaling—intelligence, conscientiousness, and conformity—which employers use to sort out candidates for positions.[116] Education signals intelligence, which employers want.[117] Education signals conformity because it shows that an individual can meet the standards required by that educational institution.[118]

Congressional internships are a method of signaling because interns use these positions to show future employers that they have what it takes to work on Capitol Hill or in politics. In addition, these internships signal to employers that the intern knows Capitol Hill and that they know how to navigate the landscape.[119] Congressional employers look for these signals because Congressional internships are often a prerequisite for a paid Congressional position.[120] As a signal to their future employers, Congressional interns trade their

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109 *See* BRYAN CAPLAN, THE CASE AGAINST EDUCATION: WHY THE EDUCATION SYSTEM IS A WASTE OF TIME AND MONEY 13, 14–15 (2018); Nidhi Tambi, *Relevance of Human Capital Theory and Signalling Theory of Education in the Indian Context*, MEDIUM (Apr. 27, 2018), https://medium.com/@nidhitambi/relevance-of-human-capital-theory-and-signalling-theory-of-education-in-the-indian-context-4141bd44206d.

110 CAPLAN, *supra* note 109, at 13.

111 *See id.*

112 *See id.*

113 *See id.*

114 CAPLAN, *supra* note 109, at 18–19.

115 *See id.*

116 *See id.*

117 *See id.* at 18.

118 *See id.* at 19–21.

119 *See* PERLIN, *supra* note 1, at 130.

120 *See id.* at 100.

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unpaid labor for a byline on a resume in the hopes that they will be introduced to the right people or be given a job after the internship.[121] Following the educational signaling theory, a strong signal of worker productivity and success is a person's academic success, and many of these interns are in college or graduate schools while completing the internship, which likely aids them in showing their academic success and productivity.[122] In reality, it does not matter if the internship supplements the intern's education; all that matters is that they can use that internship to signal to employers that they have the required skills.

There is an additional layer of signaling within Congressional internships based on where the intern is placed within the hierarchy of positions. That hierarchy is District internship, House member internship, high-ranking House member internship, Senate internship, House Committee internship, and Senate Committee internship.[123] Where an intern is located within Congress signals to future Congressional positions about that intern's worth, regardless of the interns' skill level or what they did in the position.

It is unclear what signals unpaid internships provide other Congressional offices. Is it signaling that the individual can answer phones and give tours? Does the position signal that an intern understands policy writing or can provide administrative assistance? Or does it merely signal political affiliation? What if that intern never developed the writing skills needed or the ability to understand laws and policies, even though they are using the internship to signal that they have those skills? Just like with every other job, getting an unpaid internship with Congress does not mean that a person is qualified to do that job. Fortunately, for the Congressional offices that hire former interns based on the signals they present, it generally does not take that long to identify if the employee has the skills they signaled.[124]

Is the signaling of an unpaid internship that strong or helpful outside of the Congressional sphere? One study suggests that students who complete a three-month internship before graduation receive 14% more interview requests than those who do not have internship experience.[125] In 2012, the National Association of Colleges and Employers found that 37% of students with unpaid internships were offered jobs and that 35% of students without internships were offered jobs.[126] Comparatively, 63.1% of students with paid internships were offered jobs.[127] 14% more interview requests is an incentive to take an internship. On the other hand, the two-percent difference between

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121 *See* Jordan Weissmann, *Do Unpaid Internships Lead to Jobs? Not for College Students*, THE ATLANTIC (Jun. 19, 2013), https://www.theatlantic.com/business/archive/2013/06/do-unpaid-internships-lead-to-jobs-not-for-college-students/276959/.

122 *See* CAPLAN, *supra* note 109, at 13.

123 *See* PERLIN, *supra* note 1, at 99–100.

124 *See* CAPLAN, *supra* note 109, at 25.

125 *See* John M. Nunley, et al. *College Major, Internship Experience, and Employment Opportunities: Estimates from a Resume Audit*, 38 AUBURN UNIV. DEP'T OF ECON., 37, 37 (2014).

126 *See* Weissmann, *supra* note 121.

127 *See id.*

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unpaid internships and no internships when it comes to being offered a job after graduation does not give students much incentive. Further, the near-30% difference in hiring rates between unpaid internships and paid internships begs the question of why individuals would want to take an unpaid internship. Signaling does not make up for the disparities between hiring rates and intern requests, and it opens even more questions as to why students would take an unpaid internship in Congress, spend their own money to live in Washington, D.C. if the chance of being offered a job is not substantially more if they did not take the internship. One answer to that is that "almost everyone who is anyone has had [an unpaid internship]" in Washington, D.C.[128]

C. *My Proposal: Holding Congress and Private-Sector Employers to the Same Standard Outlined by the DOL*

If private-sector, for-profit companies are required to apply the DOL's seven-factor test in determining if interns are employees and must be paid, Congress ought to be required to comply with that same test. After all, Congress employs thousands of individuals and has thousands of internships. If the protections under the FLSA were created to stop employers from exploiting their workforce,[129] then Congress should be required to follow and comply with the same test because the risk of exploitation is the same. I believe that it is imperative that Congress implement the DOL seven-factor framework for determining whether interns are employees for the purposes of being paid minimum wage. The implementation of this framework by Congress would result in the following propositions. First, Congress would have to formulate internships that fall within the primary beneficiary test and its seven factors, which might give interns more substantial experiences.[130] Second, the DOL framework provides interns who qualify as "employees" protection under the FLSA, which paid interns on the Hill currently do not receive.[131] This coverage would be consistent with the purposes of the FLSA when it was implemented.[132] Finally, by following the DOL framework, Congress would be held to the same standards as most employers, which would provide the consistency lacking in the current definitions and frameworks for internships.[133] It would also end the irony that Congress often creates in employment policies where it throws stones at private businesses by accusing

128 PERLIN, *supra* note 1, at 105. Some examples of individuals with D.C. internships are Bill Clinton, Bill Gates, and Chuck Schumer.

129 *See* 29 U.S.C. § 202(a)–(b) (2022).

130 *See Fact Sheet #71*, *supra* note 15.

131 *See* 2 U.S.C. § 1311(d)(3) (2022).

132 *See* 29 U.S.C. § 202(a)–(b) (2022).

133 *See* NACE, *supra* note 25.

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them of exploitation and pushing them to pay workers more while essentially exempting themselves from doing what they claim is "right."

The case that created the most recent test for internships within the private sector is *Glatt* v. *Fox Searchlight Pictures*, *Inc.* This new, seven-part "primary-beneficiary test" was comprised of a non-exhaustive list of factors that have three primary features.[134] The first is that it focuses "on what the intern receives in exchange for its work."[135] Second, it allows the court to examine the economic relationship between the intern and the employer.[136] Third, it recognizes that interns take positions with employers with the expectation that the intern will get education benefits.[137] When analyzing the relationship between the intern and the employer, the proper question under Glatt is who is the primary beneficiary—the intern or the employer?[138] Without knowing the specifics of any particular Congressional internship, at first glance, unpaid Congressional internships, under the three primary features of the "primary beneficiary test," benefit the Congressional offices more than the interns.

What does an unpaid Congressional intern receive in exchange for their work? The answer to this question likely depends on the office in which the person is interning. This comment has outlined that the consideration offered in exchange for the intern's work, while nominal to some, is likely sufficient to others. While this may not feel like adequate consideration, especially with the costs of spending a summer in D.C., to interns, the promises of future opportunities, resume boosters, and connections are often enough. However, anecdotally, some former Congressional interns report that they did not receive much, either education-wise or career-building-wise, from the work they completed for the office.[139] It is difficult to ascertain the educational value of dealing with angry constituents, giving tours, and stuffing envelopes. While interns take these positions to signal that they have the qualifications future employers are looking for, it is entirely possible that, in some instances, they are not adequately prepared for future jobs. Perhaps interns see this exchange as a short-term sacrifice that may be rewarded with future payoffs[140] and that any lacking skill can be quickly learned. The reality, however, is that regardless of the interns' perception, these offices get free labor in exchange for promises and skills that might never come to fruition. Unless the office promises substantive work, the office is still the beneficiary of the internship.

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134 *See Glatt*, 811 F.3d at 536–38.
135 *See id.*
136 *See id.*
137 *See id.*
138 *See id.*
139 *See* Desai, supra note 18; PERLIN, *supra* note 1, at 115.
140 *See* PERLIN, *supra* note 1, at 131–132.

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Looking at the second factor of the "primary-beneficiary test," Congress is the beneficiary of unpaid intern labor because Congress uses these interns to replace staff. Because of the decreased size of Congressional staff, many offices may push work that paid employees once did to unpaid interns.[141] Under the DOL framework, if an intern's work complements, rather than displaces, paid employee work while providing educational benefits, the FLSA might not apply to that intern.[142] In the private sector, an intern should be paid if they replace an employee's work.[143]

While anecdotal evidence suggests that Congressional interns replace employees, it is difficult to make that claim absolute because there is little to no data.[144] When Congress cut the LBJ Internship Program in the 1990s, and when Congress cut its staff size, tasks that paid employees once did became tasks for interns because the paid employees had more work to do.[145] Since the 1990s, the tasks that interns complete are only done by interns, so perhaps the interns do not replace employees anymore. Though, this is not dispositive because interns' work should still be related to educational or practical experiences. In the private sector, internship programs are advised to formulate tasks and assignments to the intern's specific situation rather than giving the intern clerical work other employees do not want or giving them general assignments.[146] According to the DOL, for an employer to not be considered the beneficiary of the internship, there needs to be an education benefit (such as college credit). For an internship to remain unpaid, the Congressional office would need to reformulate the purposes and duties of the internship to ensure educational value. In doing so, these Congressional internships would emulate internships in the private sector.

The third factor of the "primary-beneficiary test" also indicates that Congress is the beneficiary because the interns are often not given the educational and professional experience they were promised. Much of a Congressional intern's job has nothing to do with the educational or professional skills one might associate with an internship (calling constituents, giving tours, stuffing envelopes). Rather, a Congressional internship is analogous to the signaling of education in that a college degree does not necessarily indicate the person who received the degree is any more or less intelligent than a person without one.[147] However, the degree itself presents proof of productivity, conformity, and intelligence—traits employers look for in potential

141 *See* Desai, *supra* note 18; PERLIN, *supra* note 1, at 101, 203.

142 *See Fact Sheet #71*, *supra* note 15.

143 *See* Glatt, 811 F.3d at 538.

144 *See* Perlin, *supra* note 1, at 101.

145 *See* Desai, supra note 18.

146 *See* Matthew Clarke, et al., *New Rules Impact Companies Who Use Interns and Apprentices*, SMITH, GAMBRELL, & RUSSEL, LLP, https://www.sgrlaw.com/new-rules-impact-companies-who-use-interns-and-apprentices/ (last visited Dec. 29, 2019).

147 *See generally* CAPLAN, *supra* note 109, at 13.

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employees.[148] Similarly, an internship on the Hill might not prepare an intern substantively for public policy work or even a future paid position within Congress. Still, that internship is used to signal to other Congressional offices that the intern has the requisite skills and that they know the environment and can navigate it.[149] While Congressional interns may be willing to complete those things for the resume booster, connections, and potential jobs, why should they deserve less protection than unpaid interns in the private sector, where an educational component is crucial to an unpaid internship?

Yes, interns take unpaid Congressional positions to boost their resumes and hopefully help them get future jobs,[150] just like interns in the private sector do. The difference is that at least private sector interns can use the DOL framework to hold their employers accountable.[151] While the DOL framework for unpaid interns is debated because it is not always enforced,[152] the threat of enforcement and lawsuits is sometimes enough to make employers follow the guidelines.[153] For example, having unpaid internships without an educational component within the private sector is legally risky because it is often difficult to judge who benefits more from the internship, especially when the factors are non-exhaustive.[154] Nevertheless, the DOL framework allows employers to circumvent possible legal issues by making educational components or offering institutional credit.[155]

Congressional interns do not have the benefits of the DOL framework. In the absence of statutory guidance that sets minimum standards and a test for when interns ought to be paid, Congress, in the worst interpretation, is implicitly asserting that interns do not deserve protection. And, at the very best, the absence indicates ambivalence toward the struggles of unpaid interns on the Hill. While the allowances given to House and Senate offices are a leap in the right direction, the allowances do not do enough because section 120 of Public Law 115-244 and its accompanying House resolution fail to require offices to use the allowance for their interns. Instead, it states, "[each] intern who is compensated under the allowance . . ,"[156] implying that interns might not be compensated under the allowance. The provision also

148 *See id.* at 14, 18–22.

149 *See* Perlin, *supra* note 1, at 130.

150 *See* Rebecca Greenfield, *How Congress Gets Away with Not Paying Its Interns*, THE ATLANTIC (Apr. 6, 2012), https://www.theatlantic.com/national/archive/2012/04/how-congress-gets-away-not-paying-its-interns/329629/.

151 *See Fact Sheet #71*, *supra* note 15.

152 *See* David Henderson, *Limiting Unpaid Internships: One Unintended Consequence*, LIBR. ECON. & LIBERTY (Jul. 15, 2013), https://www.econlib.org/archives/2013/07/banning_unpaid.html.

153 *Id.*

154 *See* Zafrullah, *supra* note 15; *Fact Sheet* #71, *supra* note 15.

155 *See* Zafrullah, *supra* note 15; *Fact Sheet #71*, *supra* note 15.

156 Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019, Pub. L. No. 115-244, § 120, 132 Stat. 2897, 2931 (September 21, 2018).

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compensation of interns under the Members' Representational Allowance instead.[157] Congress identified an issue, tried to remedy that issue, and then failed to implement systematic change that required offices to comply.

By setting at least some standard of analysis for determining who the "primary beneficiary" of the internship is, the FLSA holds companies somewhat accountable for how they treat interns and the experiences interns receive.[158] It would likely do the same for Congress. Companies are held accountable for their internships because the FLSA attempts to protect against exploitative practices, especially when it comes to the minimum wage requirements.[159] Those requirements were meant to instill an ethical obligation for employers to pay their workers a living wage.[160] The DOL test ignores the label of the intern and focuses on the work they provide for the company. If Congress were to follow that framework, interns would likely be deemed employees who deserve payment based on their benefits to the Congressional office and the lack of educational components. If Congress were required to follow the DOL framework, perhaps more Congressional interns would be given educational experience and more substantive work rather than an opportunity to signal education to future employers.

The DOL framework would not require Congress to pay every intern. Instead, it would require Congress to create internships that benefit the intern just as much or more than the internship benefits the Congressional office. The DOL framework would also create a consistent standard across public sector and private sector internships. This is crucial because if federal labor laws are meant to protect employees and interns from exploitation by their employers, then Congressional interns also deserve that same protection.

CONCLUSION

Congress should implement the Department of Labor's seven-factor test to determine if its unpaid interns should be considered employees and protected under the FLSA. By essentially exempting themselves from the protective requirements outlined in the FLSA and exempting interns from being "covered employees," Congress exploits unpaid interns for the labor and benefits they provide to the Congressional offices. If students are using Congressional internships to signal to future employers that they have the requisite skills, then the internships should mirror the DOL's internship policies that are rooted in educational opportunities and interns receiving actual benefits. Under the signaling theory of education, individuals that are not going into Congressional positions are offered little incentive to take these internships

157 *See id.*

158 *See Fact Sheet #71*, *supra* note 15.

159 *See* Natalie Bacon, *Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet #71,"* 6(1) OHIO ST. ENTREPREN. BUS. L.J. 67, 70 (2011).

160 *See id.*

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because they do not provide students with higher rates of employment after graduation—but people take them in the hopes of securing their dream jobs. Holding Congress to the same standard as the private sector provides a consistent understanding and test for when an intern should be paid.

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OF FEDERALISM, FARMS, AND PHOSPHORUS: USING THE COMMERCE CLAUSE TO FIX THE GULF OF MEXICO DEAD ZONE

Katherine McKerall

INTRODUCTION

Imagine you work on a shrimp boat in the Gulf of Mexico. You have worked in this industry for years. For the last few years, your catch has been dwindling. There are fewer shrimp, especially large ones. At the market, the price for smaller shrimp, which are still fairly abundant, are falling. While the price for jumbo shrimp, because they are becoming scarce, is continuing to climb. The increase in jumbo shrimp prices does not make up for the decrease in the price of smaller shrimp. Every year your income is smaller and smaller. You try to get a part time job waiting tables at a beachside restaurant, but no one is hiring. The consistently poor water quality has caused people to stop visiting the beaches. The tourist trade is shrinking along with your catch. Restaurants, hotels, retail shops, vacation rentals, charter fishing boats, are all laying people off or simply shutting down.

Your community looks to local government for help. It is clear that the poor water quality is killing the fishing and tourism industries in your Gulf coast town. Even though the people in your community agree that change is needed, local officials have no answers. They have no power to solve the problem. Local officials turn to state officials. State officials throw up their hands as well. There is nothing they can do. Gulf state governments have no way to stop the flood of pollution that is destroying the way of life for millions of Gulf residents.

The pollution that's causing the dead zone in the Gulf of Mexico – an area the size of New Jersey that is so depleted of oxygen that all life must flee or die – is coming from out of state. From all across the Mississippi/Atchafalaya River Basin (MARB), which encompasses 31 states, farms are overusing fertilizers full of nitrogen and phosphorous. These chemicals are washed from the fields into creeks and streams, all flowing to the mighty Mississippi River, which carries the pollutants south, gathering more from every farm and tributary it passes, and finally depositing them at the end of the line: the Gulf of Mexico.

If your livelihood was being diminished as a result of out of state forces, how could you solve it? What can gulf states do to save the Gulf of Mexico and the economies that depend on it? If you were this shrimper, what could you do? You do what every red-blooded American does when her rights are violated: you sue. This paper will argue that Gulf states should sue upstream states under the Commerce or Dormant Commerce Clause to enjoin them

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from allowing agricultural sources to pollute the waters that flow into the Gulf of Mexico, poisoning commercial seafood stocks and negatively impacting the interstate seafood and tourism industries.

I. BACKGROUND

The summer of 2017 saw the creation of the largest dead zone ever recorded in the Gulf of Mexico.[1] This 8,776 square mile area[2] of water was so depleted of oxygen, a condition known as hypoxia,[3] that any life present suffocates to death. The cause of this massive dead zone has been known for years[4]: nitrogen and phosphorus from farms and other sources[5] throughout the 1,245,000 square mile[6] drainage basin are washed into countless streams, which flow into tributaries, which meet the mighty Mississippi, and are finally deposited in the Gulf of Mexico.

The fact that the dead zone is growing shows that the current federal regulatory framework, the Clean Water Act, is not working.[7] The Trump administration did not take up the cause of more federal environmental regulation.[8] The dead zone is already causing economic problems for Gulf States, especially for the fishing and tourism industries,[9] which provide 600,000 jobs

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[1] *See Gulf of Mexico 'Dead Zone' is the Largest Ever Measured*, NOAA (Aug. 2, 2017), http://www.noaa.gov/media-release/gulf-of-mexico-dead-zone-is-largest-ever-measured (hereinafter NOAA Article); *accord* Casey Smith, *New Jersey-Sized 'Dead Zone' is Largest Ever in Gulf of Mexico*, NATIONAL GEOGRAPHIC (Aug. 2, 2017), http://news.nationalgeographic.com/2017/08/gulf-mexico-hypoxia-water-quality-dead-zone/.

[2] *See* NOAA Article, *supra* note 1.

[3] *See Hypoxia 101*, EPA, https://www.epa.gov/ms-htf/hypoxia-101 (Feb. 13, 2023).

[4] *See* J. B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 289 (2000) (Noting that "Eighty percent of the nitrogen delivered to the Gulf originates more than a thousand miles upstream above the confluence of the Ohio and Mississippi Rivers- almost all of it from cropland runoff."); S. S. Rabotyagov, et al., *The Economics of Dead Zones: Causes, Impacts, Policy Challenges, and a Model of the Gulf of Mexico Hypoxic Zone*, 8 REV. OF ENVTL. ECON. & POL'Y 58, 58–79 (2014).

[5] *See infra* § II(b)(1) at 8–9.

[6] *See The Mississippi/Atchafalaya River Basin (MARB)*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/ms-htf/mississippiatchafalaya-river-basin-marb (Mar. 14, 2023).

[7] *See supra* this section at 2.

[8] *See generally* Jennifer A. Dlouhy, *Trump Seeks to Open Most U.S. Coastal Waters to New Drilling*, BLOOMBERG POLITICS (Jan. 4, 2018), https://www.bloomberg.com/news/articles/2018-01-04/trump-seen-urging-all-u-s-coastal-waters-be-opened-to-drilling; Steven Mufson and Juliet Eilperin, *Trump Administration to propose repealing rule giving EPA broad authority over water pollution*, THE WASHINGTON POST (June 24, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/06/27/trump-administration-to-propose-repealing-rule-giving-epa-broad-authority-over-water-pollution/?utm_term=.28fc1403682c.

[9] *See* Rabotyagov, *supra* note 4, at 58–79; Ruairi Arrieta-Kenna, *The Biggest Ever "Dead Zone" in the Gulf of Mexico is the Size of New Jersey: The Man-Made Problem is an Environmental Disaster*

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and $9 billion in annual wages.[10] If nothing changes, the dead zone will continue to grow, further depleting stocks of fish and shrimp. Therefore, Gulf states should take it upon themselves to force upstream states to internalize the cost of nutrient pollution by suing upstream states under the Commerce or Dormant Commerce Clause of the Constitution.

A. *What is the Dead Zone and why does it matter?*

"Dead zone" is a term used to describe an area of water that is suffering from hypoxia. Hypoxia is a state of very low levels of dissolved oxygen, less than 2-3 ppm (parts per million).[11] The levels of oxygen are so low in hypoxic zones that can very little life can survive.[12] While there are several, interrelated causes[13] of dead zones, the overwhelmingly dominant cause is anthropogenic nutrient runoff from human sources: factories, water treatment plants, urban stormwater, and farm runoff.[14]

The process from runoff to dead zone is straight forward and undisputed among the scientific community, policy makers, and even farmers themselves.[15] Fertilizer and livestock waste containing nitrogen and phosphorous are washed from farms and other sources into streams.[16] The streams carry these "nutrients" to the Mississippi River.[17] The River carries them to the Gulf of Mexico.[18] Algae consume the nutrients.[19] Being so plentiful, the nutrients allow the algae population to explode, creating large algae blooms.[20] When they die, these excess algae consume most of the oxygen in the water, creating the dead zone.[21] The process is exacerbated by warm water temperatures, which is why the dead zones appear and grow largest in the summer.[22]

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and an Economic Threat, VOX (Aug. 3, 2017, 2:30 PM), https://www.vox.com/science-and-health/2017/8/3/16089296/gulf-of-mexico-dead-zone.

10 *See The Ocean Economy in 2030*, OECD PUBL'G (Apr. 27, 2016), https://www.oecd.org/environment/the-ocean-economy-in-2030-9789264251724-en.htm.

11 *See Hypoxia 101*, *supra* note 3.

12 *See id.* (noting that hypoxia causes a severe decrease in life where it occurs).

13 Including temperature increases and water column stratification. *See id.*

14 *See id.*

15 *See* Rabotyagov, *supra* note 4, at 60–62; Donald Scavia, et al., *Ensemble Modeling Informs Hypoxia Management in the Northern Gulf of Mexico*, 114(33) PROC. NAT'L ACAD. SCIS U.S. 8823, 8823–28 (July 7, 2017), https://www.pnas.org/doi/10.1073/pnas.1705293114; Logan Hawkes, *Gulf of Mexico Dead Zone Research*, SW. FARM PRESS (2016), https://www.farmprogress.com/management/gulf-of-mexico-dead-zone-research.

16 *See* Rabotyagov, *supra* note 4, at 60.

17 *See id.* at 61.

18 *See id.* at 60.

19 *See id.* at 60–61.

20 *See id.*

21 *See id.* at 61.

22 *See id.* at 59.

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With dead zones causing conditions that are hostile to life, marine organisms must flee, the bottom dwelling species that cannot flee, perish.[23] These underwater refugees are doing more than temporarily evacuating the area. The dead zone is forcing changes in migratory and reproductive habits.[24] It has even been shown to cause female fish to become masculinized.[25] All this leads to a long-term decrease in the viability of individual species, permanent habitat loss, and damage to the ecosystem as a whole.[26]

This ecological damage also leads to economic damage. The National Oceanic and Atmospheric Administration (NOAA) estimates that the Gulf of Mexico dead zone costs the seafood and tourism industry $82 million per year.[27] For an industry that accounts for more than 40% of total United States seafood [28] – and 72% of the U.S. shrimp harvest[29] – the potential impact on, not only the Gulf economy but the national economy, could be devastating. In Louisiana, which ranks second in the nation in seafood production,[30] the dead zone – which covers most of Louisiana's coastline – is already causing commercial shrimpers and fisherman to sail further and longer in search of catch that have abandoned areas closer to shore.[31]

While numerous overlapping factors can make it difficult to isolate the precise effect on the dead zone on the Gulf economy,[32] one recent study shows a direct link between the dead zone and the price of brown shrimp, once the highest valued fishery in the United States.[33] The study showed a recurring pattern of spikes in the price of large shrimp relative to small ones during months when the dead zone occurred.[34] This difference in price based

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23 *See id.* at 63 (noting, "blue crabs in crab traps will die if covered with low oxygen waters because the hypoxic area moves shoreward with tidal cycles.").

24 *See id.* at 58–79.

25 *See* MISS. RIVER/GULF OF MEX. WATERSHED NUTRIENT TASK FORCE, EPA, MOVING FORWARD ON GULF HYPOXIA: ANNUAL REPORT 2011 (2011), https://www.epa.gov/sites/production/files/2015-04/documents/hypoxia_task_force_annual_report_2011.pdf.

26 *See id.*

27 *See Gulf of Mexico Dead Zone*, THE NATURE CONSERVANCY, https://www.nature.org/ourinitiatives/regions/northamerica/areas/gulfofmexico/explore/gulf-of-mexico-dead-zone.xml (last visited Mar. 24, 2023).

28 *See id.*

29 *See* Logan Hawkes, *Gulf of Mexico Dead Zone Research*, SW FARM PRESS (Nov. 8, 2016), https://web.archive.org/web/20161109170411/http://www.southwestfarmpress.com/land-management/gulf-mexico-dead-zone-research.

30 *See Gulf of Mexico Dead Zone*, *supra* note 27.

31 *See id.*

32 *See* Rabotyagov, *supra* note 4, at 66.

33 *See* Martin D. Smith & Lori Snyder Bennear, *Gulf Shrimp Prices Reveal Hidden Economic Impact Of Dead Zones*, DUKE UNIV. NICHOLAS SCH. ENV'T (Jan. 30, 2017), https://nicholas.duke.edu/about/news/gulf-shrimp-prices-reveal-hidden-economic-impact-dead-zones; Martin D. Smith et al., *Seafood Prices Reveal Impacts of a Major Ecological Disturbance*, 114(7) PROC. NAT'L ACAD. SCIS U.S. 1512, 1512–17 (Dec. 21, 2016), https://www.pnas.org/doi/10.1073/pnas.1617948114.

34 *See* Smith & Bennear, *supra* note 33.

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on the shrimp size is due to the fact that brown shrimp spend their larval phase in coastal shallows and move to deeper waters as they grow.[35] But the lack of oxygen in the deeper water keeps the young brown shrimp closer to shore, where they are easily scooped up by trawl nets, leading to an increase in the small brown shrimp at market.[36] This glut of supply causes decreased prices.[37] The larger shrimp, on the other hand, by virtue of their relative scarcity, command higher prices.

But the plight of the brown shrimp goes even deeper. The large shrimp are scarce because they are harvested before they can reach full size. This means there will be fewer full grown shrimp available to spawn, which means next season there will be fewer young brown shrimp.[38] But these young shrimps will continue to be harvested at greater rates than their larger brothers. Their numbers will dwindle as the numbers of large brown shrimp drop precipitously. And on this vicious cycle will go until what was once the highest valued fishery in the United States[39] is reduced to a near valueless husk. The Brown shrimp is not the only marketable species that has taken a hit due to the dead zone. Other popular dinner plate items, such as red snapper, are also suffering.[40]

B. *Attempts to fix the Dead Zone*

There are a number of programs, at the state, regional, and federal level, that attempt to deal with water pollution generally, and some that specifically target dead zones. While the overall quality of the nation's water has improved in the 30ish years since Congress enacted the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA),[41] the results of the CWA and the Gulf Hypoxia Task Force in shrinking the size of the dead zone are dubious at best.

1. The Clean Water Act

The CWA is the primary piece of legislation governing water pollution at the national level. It states, "it is the national goal that the discharge of

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35 *See* Rabotyagov, *supra* note 4, at 64.

36 *See id.*

37 *See id.*

38 *See id.*

39 *See* Smith et al., *supra* note 33.

40 *See* Theodore S. Switzer, et al., *Habitat Use by Juvenile Red Snapper in the Northern Gulf of Mexico: Ontogeny, Seasonality, and the Effects of Hypoxia*, TRANSACTIONS OF THE AM. FISHERIES SOC'Y (Feb. 27, 2015), http://dx.doi.org/10.1080/00028487.2014.991447 (noting that juvenile snapper are particularly vulnerable to hypoxic conditions).

41 33 U.S.C. §§ 1251-1388 (2022).

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pollutants into the navigable waters be *eliminated* by 1985."[42] To that end, it provides rigorous federal regulation for *almost* all forms of water pollution. The Act distinguishes between two types of water pollution: "point sources" and "nonpoint sources."[43] A point source is fairly easy to define and, consequently, to find.[44] It is any conveyance of water pollution that is discrete and obvious, like a pipe coming from a factory.[45] This type of water pollution is well regulated by the CWA and the regulation of such point sources accounts for most of the improvement in water quality over the last 45 years.[46]

The CWA focused primarily on point sources for several reasons. First, in 1972, when the bulk of the statute was passed, point sources were the major source of pollution.[47] Factories and plants were dumping sewage into the nation's waterways largely unchecked.[48] As a result, point sources represented the low hanging fruit of water pollution abatement. In addition, because point sources are so easy to identify, they provided much less of an administrative challenge to regulators. The CWA even provides recourse for downstream states when point sources in upstream states have a measurable impact on downstream water quality standards.[49]

In contrast, a nonpoint source (NPS) – such as farm runoff – is any source of water pollution that is not a point source.[50] In addition to agricultural runoff, sources include urban stormwater runoff, mining operations, construction activities, saltwater intrusion, forestry, roads, and marinas.[51] Nonpoint sources are diffuse, diverse, and difficult to pin down. They cannot usually be traced to individual sources.[52] They are notoriously difficult to

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42 33 U.S.C. § 1251(a)(1) (emphasis added).

43 Clean Water Act, § 301, 33 U.S.C. § 1311.

44 The Act defines point source as:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include agricultural stormwater discharges and return flows from irrigated agriculture*.

33 U.S.C. § 1362(14) (emphasis added).

45 *See id.*

46 *See* RICHARD L. REVESZ, ENVIRONMENTAL LAW AND POLCY 604 (Robert C Clark et al. eds, 3d ed. 2015) ("The regulatory regime for controlling point sources has proven highly successful, resulting in significant improvement in the quality of national watercourses.").

47 *See id.* at 558–59.

48 But not completely unchecked. *See generally* William L. Andreen, *The Evolution of Water Pollution Control in the United States – State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L. J. 215, 235-37 (2003).

49 *See* REVESZ, *supra* note 46, at 560.

50 The CWA does not define "nonpoint source" but it has been interpreted to include the set of all sources of water pollution that are not point sources. *See id.* at 605.

51 *See id.* at 605–06.

52 *See id.* at 605.

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classify[53] or measure.[54] They fluctuate wildly with the seasons and the weather.[55] For these reasons, and perhaps a few more that will be discussed later, nonpoint sources are left largely uncontrolled by the CWA.[56] This is unfortunate because the EPA estimates that nonpoint sources are the leading remaining cause of water pollution.[57] Most scientists and policy makers agree that nonpoint sources must be better controlled if our nation's water bodies are going to get any cleaner.[58]

The CWA is not completely silent on nonpoint sources. Section 208 requires "areawide waste treatment" plans for areas with water quality control problems.[59] Such plans must address both point and nonpoint sources.[60] Section 319 of the Act lays out basic requirements for State Management Programs (SMP), which are to include nonpoint sources.[61] These plans largely involve identifying waters that are failing to meet quality standards, identifying the categories of nonpoint sources that are contributing to this failure, and identifying "best management practices" (BMPs) – measures that states will take to get nonpoint sources under control.[62] While these plans must be approved by the EPA, they amount to little more than suggestions for how states should deal with nonpoint sources. The implementation of SMPs is left entirely up to the states.

If states somehow run afoul of the meager requirements concerning nonpoint sources – that is, if they simply refuse to even identify any of the required components, or do a terrible job identifying – the punishment barely rises to the level of a slap on the wrist. If states do not create their own plan, the EPA will create one for them.[63] If states do not then implement the plan that has been handed to them, they only stand to lose the partial funding they would receive to implement the pollution reduction strategies they were not going to implement anyway.[64] Thus, the CWA has very little carrot and zero sticks when it comes to enforcing limits on nonpoint sources of water

53 *See* Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114 (2d Cir. 1994), provides an excellent example of the complicated nature of classifying NPS versus point sources, even on the same field. As Revesz describes the case, "[w]hile the runoff was classified as [NPS] pollution, because the manure was never 'collected' by human activity, the court held that the vehicles used to spread the manure on the fields did constitute point sources." REVESZ, *supra* note 46, at 605.

54 *See* REVESZ, *supra* note 46, at 605.

55 *See* Water Science School, *Surface Runoff – The Water Cycle*, USGS (June 8, 2019), https://water.usgs.gov/edu/watercyclerunoff.html.

56 But not completely uncontrolled. *See* 33 U.S.C. § 1329.

57 *See Polluted Runoff: Nonpoint Source Pollution*, EPA, https://www.epa.gov/nps/what-nonpoint-source (Dec. 22, 2022).

58 *See id.*; REVESZ, *supra* note 46, at 604.

59 33 U.S.C. § 1288.

60 *See id.*

61 *See* 33 U.S.C. § 1329(b).

62 *Id.*

63 *See id.*

64 *See id.*

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pollution. Even for point sources, which are much easier to identify and have much stricter requirements, it often takes a citizen suit to force the EPA and a given state to follow through on their federally mandated obligation to police these polluters.[65] In short, if there are to be reductions in the amount of agricultural nitrogen and phosphorous reaching the Gulf, they are not going to come from the CWA status quo.

2. The Gulf Hypoxia Task Force

For the past 20 years, the Mississippi River/Gulf of Mexico Watershed Hypoxia Task Force (HTF)[66] has attempted to understand the causes and reduce the size and effects of the dead zone.[67] Their efforts have resulted in very little progress in nutrient reduction, and have shown an *increase* in nitrogen over time.[68] HTF has an admirable mission: to get Gulf states to work together to reduce nutrient runoff from agricultural nonpoint sources.[69] However, considering there are 31 states in the Mississippi/Atchafalaya River Basin, this is a monumental task. In addition, HTF can only offer recommendations to states and compliance is voluntary.[70] It cannot force the states to act on its recommendations. Under these circumstances, it is not hard to understand why a local lawmaker in Montana or Missouri does not have the inclination to spend time or money creating regulations that will burden his constituents for the benefit of communities a thousand miles away. Like the CWA, voluntary guidelines and hand holding results in no gain for the Gulf.

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65 *See e.g.,* Ohio Valley Envt'l Coalition v. Horinko, 279 F.Supp.2d 732 (S.D. W. Va. 2003); Appalachian Power Co. v. Train, 566 F.2d 451 (4th Cir. 1977).

66 Also referred to as the Mississippi River/Gulf of Mexico Watershed Nutrient Task Force.

67 *See History of the Hypoxia Task Force*, EPA, https://www.epa.gov/ms-htf/history-hypoxia-task-force (Jan. 5, 2023).

68 *See Tracking Outcomes and Metrics to Measure Progress*, EPA, https://www.epa.gov/ms-htf/tracking-outcomes-and-metrics-measure-progress (Aug. 18, 2022); *accord* NUTRIENT TASK FORCE, *supra* note 25; Lori A. Sprague, Robert M. Hirsch, & Brent T. Aulenbach, *Nitrate in the Mississippi River and Its Tributaries, 1980 to 2008: Are We Making Progress?*, ENVIRON. 45(17) SCI. TECHNOL. 2011 7209, 7209–16 (2011), http://pubs.acs.org/doi/pdfplus/10.1021/es201221s.

69 *See* EPA, CHARTER OF THE MISSISSIPPI RIVER/GULF OF MEXICO WATERSHED NUTRIENT TASK FORCE, (1998), https://www.epa.gov/sites/production/files/2015-03/documents/2008_9_10_msbasin_tfcharter_revised.pdf.

70 *See id*; Editorial, *Gulf of Mexico Dead Zone is Going in the Wrong Direction,* TIMES PICAYUNE (Aug. 6, 2017), http://www.nola.com/opinions/index.ssf/2017/08/gulf_of_mexico_dead_zone.html.

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3. Why Farms are Different

Farmers, and the nonpoint source (NPS) runoff they cause, have long been insulated from environmental regulation.[71] The reasons for this include those previously listed for all sources of NPS runoff, as well as a few that are unique to farms. They have been around a long time.[72] They hold a revered place in American ideology.[73] They have a strong lobby.[74] Regulating them is inherently different from regulating industries dominated by large corporations: there are many tiny violators instead of one "Big Bad." All these things combine to construct a massive political blockade.

Neither state nor federal lawmakers want to be labeled as "anti-farm." This is exactly the kind of scenario that the judiciary is built to address.[75] The Founders purposefully insulated the Supreme Court from the waves and whims that assault the political scene by mandating that the justices "shall hold their Offices during good Behaviour."[76] Because they are appointed for life, they are not subject to the same restraints as elected lawmakers. As such, the Supreme Court is in a unique position to be able to address this harm and do what is right but potentially unpopular.

II. THE COMMERCE CLAUSE & DORMANT COMMERCE CLAUSE

Congress has broad powers under the Commerce Clause to legislate concerning interstate commerce and to preempt any state laws that burden interstate commerce.[77] The nebulous and ambiguous obligations concerning nonpoint sources under the CWA[78] make it unclear whether Congress has really legislated for their control in any concrete way. While they are

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71 *See* J. B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 267 (2000) (demonstrating that "Congress has erected…a vast 'antilaw' of farms and the environment.").

72 *See* J. B. Ruhl, *supra* note 71.

73 *See id.* at 269.

74 *See id.* at 332.

75 The idea that an independent judiciary is essential to the proper functioning of limited democracy is not a new one. As Alexander Hamilton put it:

But it is not with a view to infractions of the Constitution only, that *the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society*. These sometimes extend no farther than to the *injury of the private rights of particular classes of citizens*, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them. THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis added).

76 U.S. CONST. art. III, § 1.

77 *See infra* § III(a) at 12.

78 *See supra* § II(b)(1) at 8–9.

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mentioned in the Act, there are no absolute mandates or prohibitions with respect to NPS, only instructions to "identify" and "describe" methods to minimize the spread of NPS.[79] And any remedies that might be available are also wanting. The good news is regardless of whether NPS are or are not an issue that Congress has acted on specifically, Gulf states may gain relief under either the Commerce Clause or the Dormant Commerce Clause.

A. *The Commerce Clause*

Article I, § 8 of the Constitution states: "The Congress shall have the power…[t]o regulate Commerce with foreign Nations, and *among the several States*, and with the Indian Tribes."[80] A thicket of judicial decisions and constitutional scholarship concerning the scope and meaning of this clause has grown up over the history of this republic.[81] It has long been the foundation supporting a wide spectrum of congressional legislation, validating federal laws – and striking down state laws – on everything from operating steamboats,[82] to civil rights,[83] to environmental laws.[84]

This paper will not go into detail concerning the ups and downs of the Commerce Clause over the years.[85] That task has been admirably handled by a number of scholars.[86] It will serve our purpose to summarize the current scope of the clause, which was outlined by the Supreme Court most recently in *United States v. Lopez*, *United States v. Morrison*, and *Gonzales v. Raich*.[87] These cases established that Congress may regulate the (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) activities that "substantially effect" interstate commerce.[88] An argument can be made that all three are implicated in this discussion.[89] However, this paper

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79 33 U.S.C. § 1329.

80 U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

81 Searching the term "the commerce clause" in the law journal database HeinOnline brings up over 66,000 results. *See* www.heinonline.org.

82 Gibbons v. Ogden, 22 U.S. 1 (1824).

83 Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

84 New York v. United States, 505 U.S. 144 (1992).

85 The amount of power conveyed to the federal government by the Commerce Clause has waxed and waned over the years depending on the current Supreme Court's interpretation, ranging from expansive in the early years, to very narrow around the turn of the twentieth century, out to nearly unlimited for most of the twentieth century, and back to moderate in its current form.

86 *See supra* note 81.

87 United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); Gonzales v. Reich, 545 U.S. 1 (2005).

88 *See Morrison*, 529 U.S. at 608–09; *Lopez*, 514 U.S. at 558–59.

89 Rivers are "channels" of interstate commerce, carrying items of commerce from state to state. The commodities produced by farms are items of commerce and the boats and barges that carry the items of commerce are all instrumentalities of commerce.

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will confine itself to the most relevant of the three: activities that substantially effect interstate commerce.

Whether an activity rises to the level of "substantially" effecting interstate commerce is a determination to be made by the courts.[90] The substantiality requirement does not rule out the regulation of activities that, viewed as individual isolated instances, seem to have little impact on interstate commerce. In two decisions made more than sixty years apart, *Wickard v. Filburn* in 1942 and *Gonzales v. Raich* in 2005, the Court determined that Congress may regulate an activity under the Commerce Clause, even if it is purely local[91] and the effects of individual instances on interstate commerce are minimal.[92] However, the activity must be part of a class of economic activities that in the aggregate have a cumulative substantial effect on interstate commerce.[93] In both cases the activity in question was the cultivation of crops that *could be* sold in interstate commerce. The fact that the commodities in both cases never became part of interstate commerce – they were never sold and never crossed state lines – was immaterial because the activities involved still exerted substantial impact on interstate commerce.[94]

However, under *Lopez* and *Morrison*, the link between the activity and its effect on interstate commerce cannot be too attenuated.[95] While it is not absolutely required that the activity itself must be economic in nature,[96] it's connection to interstate commerce must be stronger than conduct that, in the aggregate, has an effect on interstate commerce.[97] This is to avoid a "slippery

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90 *See Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557) ("[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.").

91 That is, if it is an activity that occurs entirely within one state.

92 *See* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (holding that Congress may regulate the production of wheat grown solely for private consumption because the aggregate effect of all similarly acting farmers on the commercial wheat market was substantial); Gonzales v. Raich, 545 U.S. 1, 19 (2005) (holding that Congress had a rational basis for concluding that growing marijuana for home use could have a substantial effect on the actual, but illegal, interstate market for marijuana and it was therefore within Congress' power to regulate).

93 *See Gonzales*, 545 U.S. at 17 (stating, "[o]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce . . . when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.") (internal quotations omitted).

94 *See id.*at 17 (quoting *Wickard*, 317 U.S. at 125) ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.").

95 *See Lopez*, 514 U.S. at 561–62 (1995); *Morrison*, 529 U.S. at 608-09 (2000).

96 *See Morrison*, 529 U.S. at 613 (stating, "[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

97 *See id.* at 615–17; 514 U.S. at 564.

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slope" where the chain of inference becomes too long and the distinction between what is national and what is local collapses, making all regulation national, giving Congress a general police power that has been traditionally reserved for the states, and destroying our federalist system of government.[98]

Moreover, the purpose of the Commerce Clause has always been to allow Congress the power to legislate "in all cases to which separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[99] Interstate pollution is clearly such a case. There is no lawful recourse for downstream states without federal intervention. Citizens of downstream states lack representation in the upstream states to redress the grievances caused upstream. It is possible that upstream and downstream states could negotiate an agreement that satisfies both parties without involving the federal government, but this assumes that the downstream states can provide a tempting enough incentive to get upstream states to change their ways. Without such a carrot, downstream states must resort to the sizable stick provided by the federal courts to protect their economies and the rights of their citizens.

B. *The Dormant Commerce Clause*

Even if it is determined that Congress has not regulated nonpoint sources, such as farm runoff, either because implementation of CWA requirements over NPS is left entirely to the states, or the CWA lacks the clarity and precision required to qualify as actually regulating NPS, downstream states may still seek redress for the disruption to the Gulf seafood and tourism industries under the "negative" or Dormant Commerce Clause. Though much maligned in some circles as blatant judicial overreach,[100] Dormant Commerce Clause Doctrine (DCCD) is well established in United States jurisprudence, the first inklings of it originating in 1824 in the first Supreme Court case to

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98 *See id.* at 615–16 (echoing the concern expressed by the Court in *Lopez*, see 514 U.S. at 563–64, that allowing Congress to regulate gender-related violence because of its effect on commerce would allow Congress to regulate all crime as well as other areas of traditional state sovereignty, such as family law and education).

99 THE RECORDS OF THE FEDERAL CONVENTION of 1787 25 (Max Farrand ed., rev. vol. 2 1937) http://press-pubs.uchicago.edu/founders/print_documents/a1_1s4.html (quoting a proposition put forth by the Virginia delegation of the Convention which was approved by the states and became the basis for the enumerated congressional powers, including the commerce clause); *see also* PAUL BREST, ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING CASES AND MATERIALS 197–99 (6th ed. 2015).

100 *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Camps Newfound/Owatonna Inc. v. Town of Harrison, Me., 520 U.S. 564, 610 (1997) (Thomas, J. dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.").

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examine the scope of the Commerce Clause, *Gibbons v. Ogden*.[101] The basic idea of DCCD is that even when Congress has not legislated an aspect of commerce, state laws concerning such an aspect may be challenged as unduly burdening interstate commerce.[102] In other words, Congress' silence can be seen as an intentional decision to leave an aspect of commerce unregulated, and this silence trumps any state attempt to explicitly regulate.

The justifications for DCCD are threefold: (1) historical – the framers intended the Commerce Clause to prevent the existence of state laws that interfere with interstate commerce; (2) economic – the economy is better off if state laws that are bad for interstate commerce can be invalidated; and (3) political – the laws of one state should not harm other states and their citizens who have no representation in the offending state and are thus unable to address the harm themselves.[103] While there are numerous arguments against DCCD that are worthy of debate, the scope of this paper necessarily limits the discussion to the actual state of DCCD in modern United States jurisprudence.

Dormant Commerce Clause analysis begins with a threshold question: does the state law discriminate against out-of-state actors, either on its face or by its purpose or effect?[104] If yes, then there is a presumption that the state law is invalid and it will only be upheld if it is "*necessary* to achieve an important government purpose."[105] If no, then the Court balances the law's burden on interstate commerce against its benefits to the state.[106] If the burden outweighs the benefits, then the law is invalidated.[107] This test was first laid out by the Supreme Court in *Pike v. Bruce Church, Inc.*:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the

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101 *See Gibbons*, 22 U.S. at 227 ("[T]he power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, *necessarily implies the power to determine what shall remain unrestrained*, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.") (Johnson, J., concurring) (emphasis added).

102 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 443–44, (5th ed. 2015).

103 *See* Chemerinsky, *supra* note 102, at 446.

104 *See id*. at 455–61.

105 *Id*. at 468 (emphasis added).

106 *See id.* at 461.

107 While nondiscriminatory laws are not invalidated often it does happen. *See id.* at 463–66 (discussing examples of nondiscriminatory laws that were invalidated).

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> nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[108]

Thus, for a state regulation to be struck down under the Pike test, the burden it places on interstate commerce must be "clearly excessive" in relation to the local benefit it provides.[109] This entails a two-part inquiry into (1) the nature of the local interest, and (2) whether that interest could be promoted as well with a lesser impact on interstate commerce.[110] Although some scholars question whether the "least restrictive alternative" component of the test is ever truly utilized for nondiscriminatory state laws,[111] it is an expressly articulated test component and thus should be assumed to be operational. One type of state law that the Court has consistently found to be unconstitutional is any law that has the practical effect of controlling the conduct of out-of-state actors.[112]

III. APPLYING THE COMMERCE CLAUSE (POSITIVE AND NEGATIVE) TO THE DEAD ZONE

In this section, we will examine how parties affected by the Gulf dead zone may seek to protect their rights under both the positive and negative Commerce Clause. First, we have already established that the dead zone, caused predominately by agricultural runoff, has a concrete, negative impact on interstate commerce by decreasing commercial seafood stocks and impacting market prices thereof.[113] Next, we will outline the parties who have standing to sue and whom they may sue. Third, we will apply Commerce Clause jurisprudence. Fourth, we will apply Dormant Commerce Clause jurisprudence. Fifth, we will address redressability by outlining possible remedies. Finally, we will examine relevant objections, possible complications, and policy considerations.

A. *Standing: Who May Sue Whom*

While state sovereign immunity prevents an individual or group from directly suing an upstream state,[114] the downstream states themselves may do

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108 397 U.S. 137, 142 (2004).

109 *Id.*

110 *See id.*

111 *See* Chemerinsky, *supra* note 102, at 464 (noting that the Court has only used this test component to invalidate discriminatory state laws).

112 *See id.* at 466-67; *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989).

113 *See supra* § II(a) at 5–6.

114 *See* U.S. Const. amend. 11; Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

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so.[115] The Supreme Court has said that it is constitutional for a state to obtain an injunction or monetary damages from another state in an original action.[116] However, the state must be advancing its own interests and not just providing a front to pursue the interests of its citizens.[117] That is not to say that states cannot sue if their citizens also have an interest at stake or that states cannot use resulting damages to help offset the losses those citizens experienced.[118] It only requires that the state itself have a real interest at stake, such as the "general public interest."[119] Alternatively, a state may sue another state as *parens patriae* if the state is representing the rights of all its citizens.[120]

While there are other possible lawsuit configurations,[121] State v. State is the most straightforward and is likely to have the most profound and immediate effect on the Gulf dead zone.[122] Gulf states meet the criteria required by the Court to bring a suit against upstream states.[123] It would be hard to argue that maintaining the health of the Gulf of Mexico and its seafood industry, which accounts for nearly half of the seafood sold in the United States,[124] is not in the general public interest of the states themselves. Not only does the amount of seafood sold have an effect on the overall economy of the state, but it also affects the amount of tax revenue the state can collect, which in turn affects the quality and quantity of services the state can provide. Add in the potential effects of the dead zone on the tourism industry and the Gulf states' interest in resolving the problem is robust indeed.

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115 *See* U.S. Const. art. III, § 2, cl. 1.

116 *See* Kansas v. Colorado, 533 U.S. 1, 7 (2001) (citing Texas v. New Mexico, 482 U.S. 124, 130 (1987)) ("[A] State may recover monetary damages from another State in an original action, without running afoul of the Eleventh Amendment.").

117 *Kansas*, 533 U.S. at 8 (citing Maryland v. Louisiana, 451 U.S. 725, 737 (2001)); State of Oklahoma *ex rel*. Johnson v. Cook, 304 U.S. 387, 396 (1938)) ("[A] State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens . . . The 'governing principle' is that in order to invoke our original jurisdiction, the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.").

118 *See Kansas*, 533 U.S. at 8-9 (2001) (citing *Texas*, 482 U.S. at 132) ("[I]t is the State's prerogative either to deposit the proceeds of any judgment in 'the general coffers of the State' or to use them 'to benefit those who were hurt.'")

119 *Kansas*, 533 U.S. at 8 (quoting *Texas*, 482 U.S. at 133 n.7 (1987)).

120 *See generally State's Standing to Sue on Behalf of Its Citizens*, 42 A.L.R. Fed. 23 (1979).

121 Examples include Individual/Group v. Individual/Group and Individual/Group v. County/Locality. However, these options are inefficient because they are piecemeal in nature and would produce little effect compared to the cost of litigation.

122 State v. State has the benefit of economy of scale. The upstream state has the power to make changes over its entire territory, maximizing the positive change that is possible. Given the vastness of the MARB, it is important to keep reform as streamlined as possible.

123 *See* Missouri v. Illinois, 180 U.S. 208, 239, 248 (1901).

124 *See supra* § II(a) at 5.

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B. *Applying the Commerce Clause: "Substantially Effects"*

The first step in applying the Commerce Clause is to establish that the dead zone is caused by runoff from upstream states. As stated in Part II, this is a well-established fact. The second step is to show that Congress has regulated the production of runoff and, by not following those regulations, the states are in violation of the Commerce Clause. The third step is to show that the dead zone is having a significant effect on interstate commerce.

Congress has regulated agricultural runoff through §319 of the Clean Water Act.[125] The Act requires states to create and implement plans to control runoff from nonpoint sources to achieve specified water quality standards.[126] By not adequately controlling nonpoint sources, upstream states are in violation of a federal statute and are subject to litigation under the Commerce Clause. It does not matter that the purpose of the regulation is environmental protection, not commerce.[127]

As stated in Section II. A., it is estimated that the dead zone costs Gulf industries $82 million annually.[128] While some Courts might dismiss this number as being too conjectural, there is direct conclusive evidence that the dead zone has interfered with the market prices of large and small brown shrimp.[129] As a substantial part of the Gulf seafood industry, fluctuation in brown shrimp prices necessarily has a substantial impact on this national industry. Thus, by creating the dead zone, upstream states have substantially affected interstate commerce.

Some might argue that the connection between farm runoff and depressed Gulf seafood prices is precisely the type of attenuated chain the Supreme Court wanted to avoid. However, this is not the case. In the first place, there is a strong consensus in the scientific community that polluted runoff causes and expands dead zones. Second, there is direct evidence that the dead zone in the Gulf is having a negative impact on the amount of seafood caught and the price it fetches. Third, the activity in question, farming, falls squarely into the economic class of activities the Supreme Court is most certain can be reached by the Commerce Clause.[130] The two-length chain, from too much farm runoff to too little seafood, is hardly stretching the concept of cause and

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125 *See* 33 U.S.C. § 1329.

126 *See id.*

127 The Supreme Court has repeatedly said that Congress' underlying purpose in passing a law need not be related to commerce for the use of the commerce power to be legitimate as long as the activity regulated does have a substantial effect on commerce. Congress has successfully used the Commerce Clause to reach social issues, such as illegal drugs, civil rights, and child labor. *See generally Gonzales*, 545 U.S. at 1–33; *Heart of Atlanta Hotel*, 379 U.S. at 241–68; *Katzenbach*, 379 U.S. at 294–305; *United States v. Darby*, 312 U.S. at 100, 100–26 (1941).

128 *See supra* § II(a) at 5.

129 *See supra* § II(a) at 5–6.

130 *See Gonzales*, 545 U.S. at 20; *Wickard*, 317 U.S. at 125.

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effect to its limit. There is no "pil[ing] inference upon inference," as the Court in *Lopez* feared.[131]

C. *Applying the Dormant Commerce Clause: "Clearly Excessive"*

For this exercise, we will assume that upstream states have not implemented their own legislation concerning nonpoint source agricultural runoff. As a result, there is no need to address the threshold question of whether the upstream statute discriminates against downstream states on its face because there is no face. Therefore, we skip to balancing the benefit to upstream states of allowing excess runoff against the burden the runoff places on Gulf states.

The extent of the burden tolerated depends on two factors: (1) the nature of the local interest and (2) whether it could be promoted as well with a lesser impact on interstate commerce.[132] Optimizing crop yields and livestock health, the presumptive primary local interest, are clearly valid and important considerations for any farmer. But how much nitrogen and phosphorus are required for optimization? And what benefits does the community gain by permitting farmers to use excess fertilizers and pesticides without proper mitigation? The exact answers to this question are beyond the scope of this paper. But it is important to our analysis to provide some baseline for comparison. Therefore, we will assume that using more fertilizer produces improved outcomes up to a certain point,[133] past which the law of diminishing returns[134] dictates that further improvements will drop off even if more fertilizer is used. At this point, there is zero additional benefit to the farmer. Therefore, if the farmer is using more fertilizer than is optimal then there is no benefit conferred for the extra amount used. In this case, the net zero benefit of using too much fertilizer is clearly outweighed by the burden that fertilizer places on the Gulf seafood and tourism industries.

However, using fertilizers at their optimal levels may still produce more runoff then can be processed by the waterways without a negative effect. This is one of the reasons that SMPs tend to include mitigation factors, such as planting buffer strips of grasses along the banks of streams to prevent much

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131 514 U.S. at 567.

132 *See supra* § III(b) at 16–17.

133 Exactly what point that is largely depends on the specific character of the location and crop in question. *See Crop Nutrition, Nitrogen in Plants*, THE MOSAIC COMPANY, http://www.cropnutrition.com/efu-nitrogen (last visited Mar. 6, 2023).

134 "When increasing amounts of one factor of production are employed in production along with a fixed amount of some other production factor, after some point, the resulting increases in output of product become smaller and smaller." Paul M. Johnson, "Diminishing Returns, Law of," Glossary of Pol. Eco. Terms, http://webhome.auburn.edu/~johnspm/gloss/diminishing_returns_law_of.phtml (last visited Mar. 24, 2023).

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of the runoff from entering the waterway in the first place.[135] In many cases, such mitigation techniques add very little burden to those implementing them and can actually provide their own benefits. Add to this the major benefit of improving the water quality in the upstream state and it is clear that the benefits of not mitigating nutrient runoff are small and do not outweigh the major burden it places on the economies of the Gulf states.

D. *Objections, Complications, & Policy Considerations*

This section will examine possible objections and stumbling blocks to implementing the solution proposed by this paper.

1. Objections

Perhaps the most significant objection is that, in most instances, this is a case where the states have not actually regulated or, if they have, the state regulations are compatible with the federal, not in opposition. It is the absence of regulation that is causing the interference with interstate commerce. Therefore, the argument goes, neither the Commerce Clause nor the Dormant Commerce Clause should apply.

However, the fact that the state has not legislated on the aspect of commerce in question has not stopped the Court from finding the state in violation of the Commerce Clause.[136] A parallel can be drawn between our case and the wealth of commerce clause cases dealing with a lack of state laws; from protecting labor, such as state minimum wage laws, to civil rights, the cases show that it does not matter that the state did not offer affirmative legislation opposing the federal legislation. The crucial issue is that Congress has legislated, and upstream states are not complying.

Furthermore, if the Dormant Commerce Clause is valid, operating as an unwritten negative to prevent states from interfering with interstate commerce, then that purpose will not be affected if the interference is caused by state inaction. If, by lack of action, a state causes a clearly excessive burden on interstate commerce, it should be just as liable as if it had actively sought to interfere. While it is true that most dormant Commerce Clause cases involve instances where the state has regulated and Congress has not,[137] there is no clear reason why an excessive burden on interstate commerce should be allowed to continue simply because the issue has not been regulated at the

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135 *See 15 Ways to Reduce Pollutants in Lakes and Streams*, MINN. POLLUTION CONTROL AGENCY, https://web.archive.org/web/20171214140107/https://www.pca.state.mn.us/water/15-ways-reduce-nutrients-lakes-and-streams (last visited Mar. 24, 2023).

136 In nearly all the Commerce Clause cases discussed, save *Gibbons v. Ogden*, there was no state statute in conflict with the federal statute. Rather, the question before the Court was the validity of the federal statute. *See supra* § III(a).

137 *See supra* § III(b).

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state or federal level. An omission can just as easily cause significant interference with interstate commerce as an act.

Another objection is that this solution unfairly burdens small family farms. Their individual contributions to the dead zone are too small to count as affecting interstate commerce. The counterargument to this objection involves simply looking at the case law. Going back to 1942, in *Wickard v. Filburn*, and continuing through the most recent Commerce Clause case, *Gonzales v. Raich*, the Supreme Court has acknowledged that even if the effect of one individual act is small, in the Commerce Clause analysis it's the aggregate effect that counts.[138]

Under DCCD, the fact that each farm is only contributing a small amount of the runoff that is fueling the dead zone must be assessed using the benefit/burden balancing test.[139] The contribution of each farm may be small, but so is the cost of the least impact alternative. There are many low-cost mitigation strategies and many assistance programs available to farmers who want to decrease runoff.

A third objection is that there is no way to craft an equitable remedy in this case. Some might argue that the nature of NPS runoff, that it is diffuse and difficult to trace to its source, makes it impossible for the Court to craft a remedy that is equitable. However, it is possible if the Court follows the same technique in calculating the remedy as is being used to mitigate NPS effects: look to the inputs instead of the outputs.

We can infer the nutrient output of a state from its inputs. The more inputs a state has, in the form of acres of farmland in the MARB that use unsustainable and inorganic fertilizers and pesticides without any mitigation techniques, the higher the liability for runoff. By calculating the total acreage of MARB farmland, plus the quantity of fertilizer purchased, produced, or used, minus mitigation techniques, it is possible to estimate how much runoff is produced by each state. Each state would then be liable for the percentage of the dead zone for which they are responsible. The actual dollar amount of damages would be based on how much it will cost to clean up each state's share of pollution.

The final objection we will examine is the claim that the CWA preempts seeking a remedy under the Commerce Clause because it provides a procedure that states may use to address water pollution from nonpoint sources.[140] Because the CWA addresses this issue, parties cannot seek to go around the federal statute and address the issue through other means, namely, the Commerce Clause.

While the Court has ruled that the Clean Air Act preempts lawsuits for common nuisance, the same argument cannot be applied to the Clean Water Act and the Gulf dead zone.[141] The CWA does not provide a true remedy for

138 *See supra* § III(a).

139 *See supra* § III(b).

140 *See* 33 U.S.C. § 1329(g).

141 *See* American Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410 (2011).

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redressing the damage to downstream economies affected by the dead zone. In this case, section 1329(g) of the CWA would merely provide Gulf states with a forum, in the form of an interstate conference, to negotiate an agreement with upstream states in the case that the upstream states were preventing the Gulf states from meeting water quality standards set out in their state management plans (SMP).[142] Because the SMPs only deal with the amounts of actual pollutants, this would at best have only an indirect effect on how large the dead zone will be in the future. While this would be a slight improvement, it does not address the economic damage to the seafood and tourism industries and thus does not address the harm in question.

In addition, any improvement that might be made via such a conference would be dependent on the states in question first reaching an agreement and second actually following through with the agreement. As discussed above, such interstate agreements tend to have little effect because they lack any enforcement mechanism.

2. Policy Considerations: Preserving Federalism and the Environment

A major concern of scholars and policymakers seeking to address environmental issues is how to square the interstate nature of pollution with the federalist structure of our nation.[143] Allowing Gulf states to sue upstream states under the Commerce Clause preserves federalism in a number of ways. First, states suing each other to stop the harm solves the federalism issue of the EPA exerting authority over state land use practices.[144] Because the suing state is seeking to protect its resources and the rights of its citizens, it becomes an issue of state sovereignty v. state sovereignty instead of state sovereignty v. federal authority. It also solves the problem of the EPA fearing to tread on state's rights and therefore allowing the nonattainment to continue despite its directive to carry out congressional intent.[145] This is because it is no longer the EPA issuing the directive to offending states. Instead, it is the judiciary who are unaffected by the intense political pressures the EPA must endure.[146]

In addition, there is no need to dictate the exact methods states must use to become compliant. As long as the harm to the Gulf states abates, upstream

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142 The citizen suit provision of the CWA is inapplicable because it does not apply to suits against states or to NPS pollution. *See* 33 U.S.C. § 1365.

143 *See generally* Daniel A. Farber, *Climate Change, Federalism, and the Constitution,* 50 ARIZ. L. REV. 879, 881 (2008), http://scholarship.law.berkeley.edu/facpubs/1127; Christine A. Klein, *The Environmental Commerce Clause,* 27 HARV. ENVTL. L. REV. 1, 1 (2003), http://scholarship.law.ufl.edu/facultypub/6.

144 *See* REVESZ, *supra* note 46, at 390.

145 *See id.*

146 *See supra* § II(b)(3) at 12.

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states are free to solve the problem as they see fit.[147] In this sense, the solution proposed actually bolsters federalism in practice. States are free to act as "laboratories," possibly using this moment of necessity to invent novel solutions that produce major gains in the fight against dead zones and other nutrient-induced harms.[148] This sort of "technology forcing" can reap major environmental benefits.

CONCLUSION

Despite what some might think, human beings are having a profound effect on the environment. While climate change gets most of the press, the impairment of our waterways is an equally distressing phenomenon. As with climate change, solving the problem of dead zones is time sensitive. If we do not act quickly, we may reach the tipping point where it will no longer be feasible to save the Gulf of Mexico or any other impaired body of water. The economic effects of the dead zone are just as immediate. Cooperation among states is an admirable goal, but the lack of progress over the last twenty years proves that the carrot is not much use without the stick. Therefore, Gulf states should act quickly, using the Court to demand that upstream states be held responsible for the externalities caused by their unchecked use of harmful pollutants.

147 There is a vast array of options available from regulating the type and quantity of fertilizer used, to providing assistance to farmers in installing buffer strips, to utilizing emergent technologies.

148 "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Gonzales*, 545 U.S. at 42 (O'Connor dissenting) (internal quotations omitted).

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SUPERMAJORITIES: A PROPOSAL FOR THE JUDICIARY EVALUATED

Slade Mendenhall[*]

INTRODUCTION

It is with a measure of trepidation that anyone should approach the subject of the judiciary with an eye toward reform. If we take as true the Stiglerian proposition that any longstanding institution is efficient or else it would be supplanted with another, few institutions match the common law judiciary for tenure and durability. Nonetheless, if the efficiency of an arrangement is best revealed through contestation, there must be room for proposal and debate of reforms to even sacrosanct practices if we are to declare them demonstrably efficient. In this spirit, the great gadfly of economics Gordon Tullock is to be admired for his proclivity for devising radical suggestions that, though often *sua sponte* and mentioned in passing while articulating some grander point, often carry more substance and merit than the well laid plans of many a social reformer.

Not least among these, in a 1984 article by Tullock and statistician I.J. Good, *Judicial Errors and a Proposal for Reform*, the authors issued a rather radical set of proposed reforms to the American approach to legal precedent and mandatory authority.[1] Importantly, the proposal was designed as a possible remedy for some of the shortcomings that Tullock saw in the common law. Despite his famous preference for civil law, Tullock in fact commended the classical period of the common law along many of the same lines that its proponents have.[2] Rather, he believed that subsequent reforms and doctrines, including the strictness of *stare decisis*, had led common law away from the features that once made it great. In a sense, then, Tullock's and Good's proposal can be read as an attempt to take one step back toward those virtues by loosening the grip of individual cases and jurists on subsequent jurisprudence.

To their proposal: beginning with the recognition of the trade-off in our appellate system between the timeliness of judicial decisions and their quality, Tullock and Good (henceforth "TG") proposed that the American legal system might be better off surrendering still more timeliness in exchange for

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[1] I.J. Good & Gordon Tullock, *Judicial Errors and a Proposal for Reform*, 13 J. LEGAL STUD. 289 (1984).

[2] *See generally* GORDON TULLOCK, THE CASE AGAINST THE COMMON LAW (1997).

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even higher quality precedent. Their method of achieving this: requiring supermajority appellate rulings for a decision to be considered mandatory authority.[3] In the case of the Supreme Court, only decisions enjoying the support of seven or more justices would bind lower courts. For intermediate appellate courts, they argued, only unanimous decisions of tribunals or supermajorities of en banc decisions should bind district courts.[4]

Commending TG's concern for the power of narrowly made decisions, the incidence of 5-4 decisions does appear to have risen dramatically over the twentieth century. Riggs finds that the frequency of single-vote decisions remained low and steady from 1900 through around 1930, with a more dramatic upswing beginning in 1941.[5] From 1901 to 1910, he finds, 5-4 decisions emerged in only 2.6% of all cases.[6] From 1981 to 1990, however, they had risen to twenty-three percent of all cases.[7] Intriguingly, Halpern and Vines consider the Judiciary Act of 1925 as a significant source of change, substituting certiorari (an appeal granted at the discretion of the court) for the writ of error (an appeal invoked by litigants as a matter of right) as the standard means of reaching the Court's appellate jurisdiction.[8] The new system increased the discretionary share of the Court's docket from around sixty percent in 1925 to over eighty percent in 1927 and after.[9] After this, the argument goes, came a rise in dissents, as the Court was freed of the burden of minor and straightforward cases and could devote itself more to controversial subject matter with wide public interest.[10] On the other hand, Walker, Epstein, and Dixon, looking to dissenting votes rather than dissenting opinions, find that the rise in dissent did not come until 1941.[11] Whichever the initiating change—the Judiciary Act of 1925 or some subsequent New-Deal-Era change in subject matter or attitudes—the fact is that disunity on the court is far greater after this period than before it and that changes in this period may have been no less momentous and transformative of the Court than what TG propose but in the opposite direction, *reducing* the average reliability of

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[3] Tullock and Good presumably intend this to apply both vertically (higher courts binding on lower courts) and horizontally (a given court's rulings being binding on itself over time). That is how it is understood and applied here.

[4] Tullock and Good entertained both possibilities with respect to federal circuit courts of appeal but did not state a clear preference for one over the other.

[5] Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667, 678 (1993).

[6] *Id.* at 669.

[7] *Id.* at 668.

[8] Stephen C. Halpern & Kenneth N. Vines, *Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court*, 30 W. POL. Q. 471, 475 (1977). *But see* Riggs, *supra* note 5, at 673–76.

[9] Riggs, *supra* note 5, at 673.

[10] *Id.* at 675.

[11] *See* Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 365 (1988).

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Supreme Court precedent. Subjected thus, a supermajority rule like TG's may be a well-tailored counter to its adverse effects.

Other academic arguments for supermajorities have been made beyond those of TG. A century ago, when 5-4 decisions were much rarer, a rash of narrow, controversial decisions by the Supreme Court such as *Lochner v. New York* (1905) and *Hammer v. Dagenhart* (1918) spurred a literature debating their precedential legitimacy.[12] More recently, Akhil Amar, though neither criticizing nor proposing to reform simple majority rules, contends that a simple majority rule on appellate courts was seemingly taken for granted by the Founders and was not the result of any normative debate as to why it was the best possible practice.[13] Indeed, to Amar's point, looking through the history of panel courts in English history, all seem to have used simple majority rules by default. Elsewhere, Jeremy Waldron asks, *Why Do Bare Majorities Rule on Courts?*[14] He reasons from the notion that (1) other efficient procedures are available to courts, that (2) epistemic arguments bring bare majorities into question, and that (3) normative notions of political equality and fairness may counsel in favor of supermajorities.[15] This paper accords with the first two of these, while reserving the latter question. And Jed Shugerman has elsewhere argued for a six-three majority rule based on notions of practical efficiency and a "consensus theory of truth" among experts.[16]

In analyses of legislative procedure, John McGinnis and Michael Rappaport have long been the most vocal proponents of supermajority rules, advocating them as effective bulwarks against the perverse influences of special interest groups and the problem of concentrated benefits and dispersed costs.[17] They argue that supermajority rules improve the quality of decisions made in the legislative context by preventing marginal legislation through

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12 *See* Fred A. Maynard, *Five to Four Decisions of the Supreme Court of the United States*, 54 AM. L. REV. 481 (1920); Lyda G. Shivers, Note, *Five to Four Decisions of the United States Supreme Court*, 2 MISS. L.J. 334 (1930).

13 AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 357–61 (2012).

14 Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014).

15 *Id.* at 1701.

16 Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 932 (2003).

17 *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002) [hereinafter McGinnis & Rappaport, *Our Supermajoritarian Constitution*]; John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007); John O. McGinnis & Michael B. Rappaport, *The Condorcet Case for Supermajority Rules,* 16 SUP. CT. ECON. REV. 67 (2008). *But see* Frederic Bloom & Nelson Tebbe*, Countersupermajoritarianism,* 113 MICH. L. REV. 809 (2015).

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"filtering," the process by which the quality of decisions rendered is increased through more stringent decision rules.[18] To make filtering effective, however, they note that two variables are important.[19] The first is how bad the bare-majoritarian decision would be.[20] The second is the strength of the filtering (the proportion of bad legislation blocked by a supermajoritarian rule).[21] As discussed infra, using TG's method, an objective estimate of both of those variables is discernable for appellate judicial decision making under a few basic modeling assumptions.

Beyond abstract writings, supermajority thresholds for courts have been proponed and, in some cases, realized. New Dealers once advocated a supermajority requirement for the Supreme Court to hold federal laws unconstitutional,[22] and despite the failure of that idea at the national level, at least two state constitutions have implemented it. The Supreme Court of Nebraska has a bare majority requirement for most decisions, except those involving the constitutionality of an act of the state legislature, which requires at least five out of seven judges to strike down.[23] North Dakota's high court has a similar rule but requiring four out of five justices to strike down legislation.[24] The effect of these provisions is to create a default presumption in favor of the constitutionality of legislation. The desirability of such a presumption is debatable but also distinct from a supermajority rule applied generally. Indeed, out of concern for government overreach, a supermajority rule for the Supreme Court could be engineered in precisely the opposite fashion, tilting the scale in favor of unconstitutionality under a "presumption of liberty" approach, to borrow Randy Barnett's term.[25] The possible permutations are considerable but not our focus here.

Finally, a separate literature, without expressly endorsing changes in voting rules as a solution, has argued that the Supreme Court's decisions are frequently overbroad and that it would do better to issue narrower holdings more pointedly directed at the case at bar. Sunstein has influentially advocated for such "judicial minimalism" as a valuable limitation on the Supreme Court's influence over both lower courts and its own future cases.[26] Hartnett has similarly encouraged courts to exercise a limited judgment rather than a more expansive opinion and argued that only its strictly construed judgment should

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18 McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 17, at 732.

19 McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 17, at 732.

20 *Id.*

21 *Id.*

22 ALFRED H. KELLY & WINIFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 481 (7th ed. 1991).

23 NEB. CONST. art. V, § 2.

24 N.D. CONST. art. VI, § 4.

25 *See generally* Randy E. Barnett, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2003).

26 *See generally* CASS SUNSTEIN, ONE CAST AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

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be taken as binding precedent.[27] By means further discussed below, TG's proposal would achieve that end through the mechanical operation of decision rules rather than by relying upon judges' restraint or stirring conflict between lower and higher courts.

Thirty-five years after the publication of TG's proposal, cause for reconsidering it derives not simply from intellectual curiosity or a social reformer's lust for tinkering with established institutions but from (1) this ongoing literature that presents worthwhile critiques of simple majorities; (2) a current debate over proper application of the Marks Rule for lower courts' application of 4-1-4 decisions[28] that emerged from *Hughes v. United States*[29]; (3) the increased share of Supreme Court decisions supported by bare majorities; (4) cross-ideological voting patterns that can be read as indicative of an increase in uncertainty today as to the correct jurisprudential theory for resolving constitutional, statutory, and regulatory disputes; and, not least, (5) the potential for less-constrained rule formation across time and geographic regions to better reflect divergent views about the law until such time as one view can earn the support of a supermajority of jurists on higher courts.

In light of this ongoing literature and conspicuous considerations of the rules on close cases having taken center stage recently, it seems a worthy time to consider the effects of other decision rules—even, perhaps, extreme ones. The following section gives a fuller articulation of TG's proposal and other theoretical arguments for supermajority thresholds on appellate courts. Section Three offers a hypothetical projection of how adopting TG's proposal in 1984 would have affected the thirty-five years of case law since they published and discusses the results of that projection under static and dynamic assumptions.

I. THEORY

A. *The Tullock-Good Theory Put Simply*

Briefly stated, the TG proposal for the judiciary is to increase the threshold for appellate court decisions to supermajority levels in order to increase the average quality of mandatory authority, secured at the cost of a higher volume of appellate cases that result in nonbinding decisions. Lower courts would only be required to follow decisions of at least a 7-2 or, alternatively, an 8-1 Supreme Court majority. For circuit courts sitting as a panel, unanimous decisions would establish binding precedent, but 2-1 decisions would not. Future district court cases on the same issue would continue to be decided by

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27 *See* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999).

28 *See* Marks v. United States, 430 U.S. 188 (1977).

29 138 S. Ct. 1765 (2018).

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district judges acting on their own interpretations of the law. Those decisions could then be appealed to the circuit court with a requirement that they be given full hearing and a preference that they be heard by a different set of circuit judges than those who heard the first case. The process would continue until a result is agreed upon by a unanimous decision of panel judges or a supermajority of the court sitting en banc. The predicted effect of such a reform is, according to TG, to increase the percentage of binding precedent that is "right" and decrease that which is "wrong," with "right" and "wrong" defined as the view that would be held by a hypothetical, exceedingly large court drawn at random from an infinite population of highly qualified legal professionals: lower court judges, law professors, and practicing attorneys.[30] Only nine of these would be current members of the Supreme Court.

Though not explicitly identified as such in their article, the TG model is a variant on the Condorcet Jury Theorem (CJT), in which n voters must decide between two options, one of which is correct and the other of which is incorrect, and the probability of any one voter voting for the correct option is greater than one-half, meaning that as the number of voters increases, the probability of a majority selecting the correct option converges to 1. A Polling Model version of the CJT assumes an infinite population of voters, a majority share of whom will choose the correct option and a minority of whom will choose incorrectly.[31] The majority share of correct voters ensures that by drawing even a small number of voters from the infinite population, the probability of any given voter who is drawn being correct is equal to the share of correct voters.

TG's model departs from this only somewhat. Instead of imagining an infinite pool of voters with no specialized knowledge on the subject and treating whatever a majority chooses as "right" (which dispenses with any assumption of an objectively correct answer), they implicitly assume that there are objectively correct and incorrect answers and imagine an infinite population of informed specialists who, by virtue of their specialization, have a greater-than-fifty-percent chance ($p = 0.75$ in TG's model) of getting the right answer on a given question, thus better explaining the greater-than-half chance of correctness that the standard Polling Model takes for granted. So far, these alterations only change how we think about the scenario, leaving the essential logic of the CJT in place. Most significantly, though, the TG model departs from the standard CJT models by virtue of its imposition of a

30 Good & Tullock, *supra* note 1, at 291.

31 Alternative versions of the CJT include (1) a Random Model, analogous to a coin flip, in which each voter votes randomly each time and may reach different answers to the same question when faced with it multiple times and (2) an Aggregation Model that assumes a fixed and finite set of voters with an infinite set of issues, where randomness is introduced via the choice of issue and not the selection of the voters. The Polling Model is simply more intuitive for the questions being asked and answered here. The features of the Random Model in particular are contrary to the nature of a panel of experts with individually consistent views and convictions. Mathematically, though, all of these models come to the same conclusions.

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supermajority rule for precedent creation. This can be conceived of as breaking the issue into two questions:

1. How should the present case be resolved?, and

2. Should the same answer or the same rule be applied in future cases?,

with the second question essentially left to the marginal sixth and seventh jurists. This leaves us essentially four possible outcomes, depending on which litigant prevails and whether a binding rule has been created: plaintiff-precedent, plaintiff-no-precedent, defendant-precedent, and defendant-no-precedent. Subjected thus, the logic of the standard Polling Model CJT clearly applies to the first question and, less obviously, also applies to the second. The repercussions of supermajority rules in the CJT have not been extensively discussed in the literature, but where they have, the CJT is found to hold up.[32] These conceptual changes and the supermajority threshold for precedent taken into account, the analysis should not be changed. The standard mathematics and interpretation common to all versions of the CJT still apply.

Granted: in talking about decisions as "right" and "wrong," majority opinion is often a poor lodestone of objective truth, but in considering institutional reforms meant to improve the average quality of decision making, TG rely on the assumption that in matters that are meant to be resolved by objective interpretation, two heads—or an infinite number—are better than one. Incidentally, a more-is-better assumption underlies the use of judicial panels throughout the history of appellate courts, so if the assumption is wrong, we at least proceed in good company. Those readers who remain unsatisfied by such a standard, however, need not find it destructive of the goal. This approach allows for the incorporation of some external objective standard such as textualism or purposivism so long as we assume that the judges and the broader population of legal professionals are either in general agreement on adhering to the standard or are agreed in rejecting it. If they agree, the probabilities of getting a "right" answer in this model will be correct; if not, the model will overstate the probabilities. This raises Justice Kagan's now-famous line that "we're all textualists now" to considerable statistical importance.[33]

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[32] *See* Mark Fey, *A Note on the Condorcet Jury Theorem with Supermajority Voting Rules*, 20 SOC. CHOICE AND WELFARE 27 (2003); Shmuel Nitzan & Jacob Paroush, *Are Qualified Majority Rules Special?*, 42 PUB. CHOICE 257 (1984); Ruth C. Ben-Yashar & Shmuel I. Nitzan, *The Optimal Decision Rule for Fixed-Size Committees in Dichotomous Choice Situations: The General Result*, 38 INT'L ECON. REV. 175 (1997).

[33] Richard M. Re, *Justice Kagan on Textualism's Success*, PRAWFSBLAWG (Dec. 7, 2015, 8:00 AM), https://prawfsblawg.blogs.com/prawfsblawg/2015/12/justice-kagan-on-textualisms-victory.html (last visited Sept. 11, 2019).

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Taking (r, s) as the split of a given decision, where r signifies "yes" votes, s signifies "no" votes, and $r + s = 9$, we posit that the greater the margin by which r exceeds s, the more reliable the decision. The fraction of the broader, infinite population of legal professionals who would have voted "yes" in a case is signified by p and is estimated by adopting the Bayesian assumption of a uniform prior distribution. We can then estimate the probability ($p_{r,s}$) that an exceedingly large court drawn from an infinite population would vote "yes" if $r > s$.[34] This probability can thus be calculated as

$$p_{r,s} = \frac{1}{2^{r+s+1}}\left[1 + \left(\frac{r+s+1}{1}\right) + \left(\frac{r+s+1}{2}\right) + \ldots + \left(\frac{r+s+1}{s}\right)\right].$$

TG thus provide a table (reproduced here as Table 1) representing the estimated probability of correct decisions, given the number of "yes" votes, issuing from courts ranging in size from one to nineteen. It is worth remembering that, though relied upon here for simplicity's sake, these estimates are upper limits of the probability of correctness, subject to downward deviation to the extent that legal experts are not in agreement on the proper jurisprudential theory to employ.

	s									
r	0	1	2	3	4	5	6	7	8	9
1	.7500	.5000								
2	.8750	.6875	.5000							
3	.9375	.8125	.6562	.5000						
4	.9688	.8906	.7734	.6367	.5000					
5	.9844	.9375	.8555	.7461	.6230	.5000				
6	.9922	.9648	.9102	.8281	.7256	.6123	.5000			
7	.9961	.9805	.9453	.8867	.8062	.7095	.6047	.5000		
8	.9980	.9893	.9673	.9270	.8666	.7880	.6964	.5982	.5000	
9	.9990	.9941	.9807	.9539	.9102	.8491	.7228	.6855	.5927	.5000
10	.9995	.9968	.9888	.9713	.9408	.8949	.8338	.7597	.6762	.5881
11	.9998	.9983	.9935	.9824	.9616	.9283	.8811	.8204	.7483	
12	.9999	.9991	.9963	.9894	.9755	.9519	.9165	.8654		
13	.9999	.9995	.9979	.9936	.9846	.9682	.9423			
14	1.0000	.9997	.9988	.9962	.9904	.9793				
15	1.0000	.9999	.9993	.9978	.9941					
16	1.0000	.9999	.9996	.9987						
17	1.0000	1.0000	.9998							
18	1.0000	1.0000								
19	1.0000									

Table 1 Probability of "Correct" decisions, given court size and number of "yes" votes.

[34] In the case of a circuit split or two courts resolving the same issue, so long as the facts are sufficiently similar, it is possible to add their "yes" and "no" votes to obtain a more reliable answer, though the appropriateness of doing so depends on the question being asked.

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As TG argue, citing comparable approaches to non-binding precedent in Roman civil law under the jurisconsults, British common law, and Quranic law, an approach such as this is not so radical when viewed in historical context. Indeed, as Todd Zywicki has noted, the notion of a single prior decision creating binding *stare decisis* is a very new innovation in the common law,[35] and throughout much of American legal history, judges adhered to the common law practice of treating individual prior decisions as persuasive authority, reserving special deference for legal conclusions supported by (1) a long line of independent decisions (2) by different courts (3) reasoning from very similar fact patterns and (4) arriving at the same answer or rule of decision.[36]

Beyond *stare decisis*, this reform would also play with the Court's doctrine of "ripeness," by which it decides whether or not to grant certiorari, given the state of the facts at the time when certiorari is being considered. "We suggest," TG write, "that the court take cases that are not ripe and then make nonbinding decisions on them."[37] Litigants will then have the chance for one more hearing before an appellate body, and where its decision does not secure a supermajority, the Supreme Court will produce a body of purely persuasive authority until such time as a greater consensus can be reached on the issue at hand.

B. *Argued Benefits*

1. Semi-Restoration of Anglo-Saxon Principles

One arguable benefit of this change is that it would bring the American treatment of precedent more in line with the traditional Anglo-Saxon approach, which economists broadly praise as the gold standard of institutional rulemaking.[38] The long-term evolution of rules of decision supported by independence, diversity of authority, similarity of questions, and consistency of answers has been consistently held by this literature as imbuing common law rules with the wisdom of experience, and the competitive institutional

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35 Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U.L. REV. 1551, 1565–1577 (2003).

36 *Id.* at 1577.

37 Good & Tullock, *supra* note 1, at 297.

38 The seminal source on this point is Friedrich Hayek, notably in LAW, LEGISLATION, AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY (1973). *See also* Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 523 (2001); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1138 (1998).

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setting from which those rules emerged is argued to have stamped out inherent biases toward either plaintiffs or defendants.[39]

The rules that emerge from generations of judicial deliberation have the benefit of an intertemporal consensus that insulates them from exigencies of the moment and the fleeting whims of interest groups in a manner that rules developed through legislation do not. Ironically, Tullock was the conspicuous dissident in this debate, arguing for the relative efficiency of civil law systems on the premise that common law's lauded properties as a spontaneous order could just as plausibly lead to deeply entrenched bad rules as good.[40] Tullock conceded the conventional view of the common law's efficiency during its classical period but argued that during the twentieth century, both structural and doctrinal shifts in the common law led it to promote inefficient rules that could be best overcome by reliance upon the civil code.[41]

As it stands, the sequence of cases in an issue area, when combined with *stare decisis*, can engender a path dependency that multiplies the effect of decisions generally seen as bad.[42] One case, one court, or even one judge having happened to precede another in historical sequence can alter case law for generations, often arbitrarily. And as Schauer notes, *stare decisis* has no effect when the subsequent court would have ruled consistent with its rule already; it only has effect when the court would have preferred to go against the prior case but was bound to follow it.[43] Thus, *stare decisis* is most likely to have its greatest effect over time the more disfavored it is by future courts.

2. Marks Rule Made Moot

Another sticky issue that TG's proposal would render moot is 4-1-4 decisions currently governed by the Marks Rule. The Marks Rule's prescription that 4-1-4 decisions by the Court should be construed conservatively by lower courts, treating as precedent only the "narrowest grounds" on which a

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[39] *See* George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 66–67 (1977); Rubin, *supra* note 38, at 61; ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 241 (1976 [1776]) ("In consequence of such fictions, it came, in many cases, to depend altogether upon the parties before what court they would choose to have their cause tried; and each court endeavored, by superior dispatch and impartiality, to draw to itself as many causes as it could."); Edward Peter Stringham & Todd J. Zywicki, *Rivalry and Superior Dispatch: An Analysis of Competing Courts in Medieval and Early Modern England*, 147 PUB. CHOICE 497, 520 (2011).

[40] *See generally* TULLOCK, *supra* note 2.

[41] Tullock's arguments on this point are some of his weakest, however, as he seems to conflate two separate realms of dispute: adversarial-versus-inquisitorial systems of dispute resolution on the one hand with common-versus-civil rulemaking on the other. *See* Todd J. Zywicki, *Spontaneous Order and the Common Law: Gordon Tullock's Critique*, 135 PUB. CHOICE 35, 47 (2008).

[42] Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001); *see also* Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996).

[43] FREDERICK SCHAUER, THINKING LIKE A LAWYER 37, 41 (2012).

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majority of the Court agreed, was recently challenged by the petitioner in *Hughes v. United States*,[44] whose denial of eligibility for a sentence reduction on drug and firearm charges hinged upon it. Hughes argued instead that lower courts should only be bound by a position held by a majority of justices, with a concurring position only controlling if it is found to be a "logical subset" of the majority.[45] If, however, its method of reasoning to the conclusion is based on different reasoning than the plurality, no binding precedent is created.[46] The accompanying discussion by the justices revealed an array of views, from Justice Elena Kagan's inference that such a change would create "chaos" in lower courts to Justice Ruth Bader Ginsburg's challenge, asking why in such cases lower courts should "pretend" that the Supreme Court "had an opinion that counts as precedent."[47]

Incidentally, something similar to that approach is already standard practice in the District of Columbia Circuit and the Ninth Circuit Courts of Appeals, where "when no underlying rationale gains the assent of five justices, the Supreme Court [is considered to have] announce[d] a judgment, but it does not create a holding that is binding on lower courts... in the absence of shared reasoning such that one opinion was a true 'logical subset' or 'common denominator' of the court's reasoning, a plurality decision does not create any precedent."[48] Though it may not be the answer that many critics of the Marks Rule want, the sort of interpretation issue raised by Marks and Hughes would be ameliorated by a supermajority rule. Thus, in addition to greater insurance of average precedential quality, the status of ambiguous cases such as these would be made clearer.

All of this may seem quite radical, but viewed in the context of established Court practice for *per curiam* opinions, TG's supermajority rule is perhaps not so outlandish. When the Court only has eight justices presiding in a given case and the final vote tally comes out 4-4, the judgment below is generally affirmed and the Court issues an unsigned, often one-sentence *per curiam* decision to the effect that "The judgment is affirmed by an equally divided court." Dissents may be published alongside it, but the decision is not considered to offer any kind of precedent. This rule came to public attention recently with Justice Samuel Alito's conspicuous concurrence in *Gundy v. United States*,[49] which produced a 5-3 split over the revival of the non-

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44 138 S. Ct. 1765 (2018).

45 Jimmy Hoover, *Supreme Court Resistant To New Way to Treat 4-1-4 Rulings*, LAW360 (Mar. 27, 2018, 4:57 PM), https://www.law360.com/articles/1026574/supreme-court-.resistant-to-new-way-to-read-4-1-4-rulings.

46 *Id.*

47 *Id.*

48 Justin Marceau, *Argument Preview: Narrowing the 'Narrowest Grounds' Test, or Simply Interpreting a Federal Statute?*, SCOTUSBLOG (Mar. 20, 2018, 10:42 AM), https://www.scotusblog.com/2018/03/argument-preview-narrowing-narrowest-grounds-test-simply-interpreting-federal-statute.

49 139 S. Ct. 2116, 2130–31 (2019).

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delegation doctrine, inviting future reconsideration of the Court's longstanding approach to questions of administrative law and allowing for the publication of Justice Neil Gorsuch's dissent, with which many observers interpreted Alito as being sympathetic.[50] TG write of a 4-4 decision in their day, *Common Cause v. Schmitt*,[51] that they are simply proposing that such a procedure be used more widely. To favorably amend that claim: their proposal would not render 5-4 or 6-3 decisions mere *per curiam* affirmations of lower court rulings; the higher court would still be free to overturn the lower court's decision *in the present case* with a simple majority but would not be creating binding precedent for future cases in the process.

3. Importance in a Time of Jurisprudential Division

A final consideration possibly weighing in favor of a supermajority rule is the upward trend in the number of different alignments in 5-4 and 5-3 decisions by the Supreme Court.[52] A 5-4 or 5-3 decision today is less predictably going to fit neatly along "conservative" and "liberal" lines than it did fifteen years ago, and the Roberts Court now holds the record for the greatest number of alignments in 5-4 decisions.[53]

Though this may be a boon for ideological conciliation to the extent that those ideologies correlate with justices' jurisprudential theories and methods, it could also be interpreted as an increase in collective uncertainty as to the proper approach to take in resolving constitutional, statutory, and regulatory questions. Put simply, a 5-4 decision that perfectly divides textualists and purposivists would be better described by the probability of correctness shown for 5-4 decisions in Table 1 ($p = 0.6230$); a 5-4 decision that mixes textualists and purposivists on both sides suggests that both textualism and purposivism could reasonably be employed to argue for either side of the case, making the majority's probability of correctness something decidedly less than that.

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50 John C. Eastman, *Alito's Strategic Vote Signals Reining in of 'Law by Regulation'*, REAL CLEAR POLITICS (June 25, 2019) https://www.realclearpolitics.com/articles/2019/06/25/alitos_strategic_vote_signals_reining_in_of_law_by_regulation.html (last visited Sept. 11, 2019); *Gundy*, 139 S. Ct. at 2131–48 (Gorsuch, J. dissenting).

51 455 U.S. 129 (1982).

52 Adam Feldman, *Empirical SCOTUS: Changes Are Afoot 5-4 Decisions During October Term 2018*, SCOTUSBLOG (July 8, 2019, 12:24 PM), https://www.scotusblog.com/2019/07/empirical-scotus-changes-are-afoot-5-4-decisions-during-october-term-2018.

53 *Id.*

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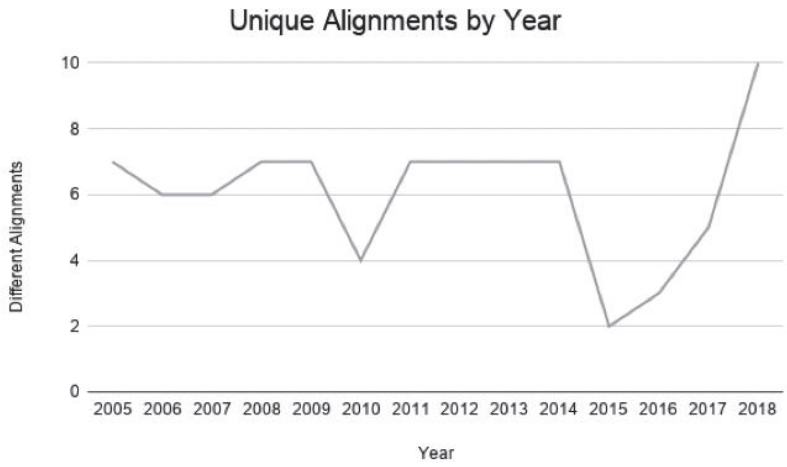

Fig. 1 Trend in different alignments among Supreme Court justices, 2005-2018 (Feldman 2019).

So, keeping in mind that the estimated probabilities of correctness given by Table 1 are upper limits and that jurisprudential heterogeneity creates downward deviations from those limits, this increased randomness in alignment on close cases suggests that the probabilities of correctness for 5-4 and 5-3 rulings shown in Table 1 are likely overstatements during this period.

II. ANALYSIS

A. *A Look at the Data*

As a first pass at examining the consequences of a supermajority requirement such as that discussed here, the immediate question to be answered is: how much case law are we considering rendering non-binding? Using data from the Supreme Court Database (SCD), which offers comprehensive recordation of Supreme Court cases and their results from 1946 to 2018, I first curtailed the dataset to look only at case law docketed from January 1, 1984 (the year of TG's proposal) to the end of 2018 and dropped any cases that were dismissed or in which certiorari was denied. For each of the remaining 3,677 cases, I assigned an objective probability that the case was "right" based on the probabilities from Table 1, adjusting for instances of recusal that would reduce the number of participating judges. Given these instances of fewer than nine participating justices, in determining whether a case would remain binding or not, I look to the probability of correctness. Since TG's proposal requires a threshold of seven- out-of-nine, and the probability of correctness for a seven-out-of-nine decision is .9453, I count as binding any

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decision with a probability of .9453 or greater (e.g., a seven-out-of-eight decision, which would have a .9805 probability of being correct).

Of the 3,677 cases, 2,187 had probabilities of correctness greater than or equal to 0.9453; approximately 59.5% percent. This would mean that 40.5% of decisions since that time would be rendered non-binding had the rule been adopted then. Raising the threshold to an equivalent of eight majority votes ($p = 0.9893$) leaves 1,726 cases (46.9%) as binding. And if we raised the threshold to be equivalent to a 9-0 unanimity standard, 1,230 (33.5%) would be binding.

The rule thus clearly proposes a dramatic diminution in the volume of binding case law created over this period. However, we must not focus only on the cost side of the equation; we must also consider the argued benefit of the reform, which, to reiterate, is to improve the average quality of mandatory authority. So how much more reliable would the average binding precedent be? Based on the objective probabilities from Table 1, the average reliability that a given Supreme Court decision from 1984 to 2018 was correct is about 87.8%. Increasing the threshold for binding precedent to the equivalent of a seven-justice supermajority would elevate that to 98.8%. So, an 11% improvement in the average probability that a Supreme Court decision is correct could be purchased at the expense of rendering 1,489 cases (40.5%) non-binding. From there, the improvements in quality of precedent are very small: moving to an 8-1 rule equivalent and giving up another 461 cases of precedent would raise it to 99.7%, and a unanimity rule would cost another 496 cases and bring the average to 99.9%. Eccentric preferences aside, the only rule change likely to have the support of even a noteworthy minority would thus be a seven-vote threshold for binding precedent.

Comparisons to alternative measures are also useful. Namely, are decisions upheld by bare majorities more likely to be subsequently overruled? Evidence from previous literature suggests so. Looking at Supreme Court case law from 1946 to 1995, Spriggs and Hansford control for various factors and find that a final vote of 5-4 increases the hazard of that case being overruled by 53.6%, and a unanimous coalition decreases that hazard by 46.9%.[54] Concurrences, too, they note, reduce the credibility of a majority opinion by offering alternative rationales for the conclusion. Thus, for each additional concurrence, they find that the hazard of the case being overruled increases by 22.4%.[55] So, we can fairly say that while a half-century of Supreme Court decisions has advantages and disadvantages relative to an abstract model that relies on numerous simplifying assumptions, the two agree on the lesser reliability of bare majorities.

54 James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1105 (2001).

55 *Id.*

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B. *Effects by Issue Area*

The next reasonable question is: what areas of law would be most affected by such a rule? If supermajority decisions are more common in some issue areas than others, those areas will preserve more of their precedential value than those that are more divisive. Fortunately, the SCD also codes cases according to fourteen issue areas.[56]

Using those, we can calculate the percentage of case law in each issue area that would be rendered non-binding for not having supermajority levels of consensus. Intriguingly, this has the added novelty of serving as an indicator of where the law is more firmly settled. As shown in Table 2, after excluding the very small-*n* areas of "Private Action" and "Miscellaneous," the hardest-hit issue areas would be First Amendment cases at 60.1% rendered non-binding, followed by cases pertaining to privacy at 48.6% non-binding and criminal procedure at 46.4% non-binding. Those with healthy survival rates include interstate relations (78.6% preserved), judicial power (72.5% preserved), and federal taxation (72.4% preserved).

In exchange for rendering those portions of issue areas non-binding and, again, excluding the small-*n* issue areas, improvements in objective reliability of case law range from 5.8% (Federal Taxation) to 16.2% (First Amendment). To capture the *per case* improvement in reliability, an index was created that measures the percentage improvement in objective reliability per case rendered non-binding. The index is described as

$$\left[\frac{OBJ_{Sup} - OBJ_{Ini}}{N_{Total} - N_{Sup}}\right] \times 10,000.$$

This "Improvement Index"[57] generates interesting results. For instance, First Amendment case law, which saw the greatest percent improvement in reliability, also did so at a high cost to its body of case law, making its Improvement Index small. By contrast, Federal Taxation case law's improvement in objective reliability was only 6.1% but, by virtue of a higher relative degree of consensus among justices issuing decisions in that issue area, has the highest *per case* rate of improvement of any category once small-*n* categories are

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[56] Those include Criminal Procedure, Civil Rights, First Amendment, Due Process, Privacy, Attorneys, Unions, Economic Activity, Judicial Power, Federalism, Interstate Relations, Federal Taxation, Miscellaneous, and Private Action. Harold J. Spaeth et al., SUP. CT. DATABASE (2022), http://scdb.wustl.edu/documentation.php?var=issueArea.

[57] The left side of the formula, it is worth noting, is similar to a semi-elasticity, except that instead of measuring the change in objective probability, this "Improvement Index" measures the raw change in the probability of correctness per case dropped. So, an improvement in an initial Objective of 86.5% to a Super Objective of 98.6% is treated as a 12.1% improvement rather than a 14% improvement. The results are simply more intuitive this way and more consistent with the discussion in this analysis.

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excluded. Other major gainers on a per-case basis include case law on attorneys, privacy, and unions.

	Total	Super	Survival Rate	Rendered Non-Binding	Initial Objective	Super Objective	Improvement per Case
Crim Pro	931	499	53.5%	46.4%	85.8%	98.4%	2.92
Civil Rights	584	332	56.8%	43.2%	86.5%	98.6%	4.80
First Am	271	108	39.9%	60.1%	82.1%	98.3%	9.94
Due Process	144	81	56.3%	43.8%	86.9%	99.1%	19.37
Privacy	72	37	51.4%	48.6%	85.9%	99.2%	38.00
Attorneys	63	34	54.0%	46.0%	87.9%	99.4%	39.66
Unions	95	53	55.8%	44.2%	86.1%	99.0%	30.71
Economic Activity	700	477	68.1%	31.9%	91.0%	99.0%	3.59
Judicial Power	448	325	72.5%	27.5%	91.6%	99.1%	6.10
Federalism	215	139	64.7%	35.3%	88.7%	98.8%	13.29
Interstate Relations	28	22	78.6%	21.4%	93.5%	99.6%	101.67
Federal Taxation	87	63	72.4%	27.6%	93.1%	98.9%	24.17
Miscellaneous	22	14	63.6%	36.4%	90.9%	97.6%	83.75
Private Action	4	2	50.0%	50.0%	72.6%	86.0%	670.00

Table 2 Effects of a supermajority decision rule on Supreme Court case law by issue area.

The takeaway from these Improvement Index results is that the marginal benefit of the Supreme Court hearing more cases and issuing more rulings in those issue areas with high Improvement Index scores is presently very high, especially for those cases where high degrees of consensus can be achieved. The Court speaking clearly and with large majorities on issues of interstate relations, privacy, attorneys, and unions, would do more to improve the overall quality of American case law than yet another 5-4 or 6-3 split on criminal procedure or economic activity.

C. *At What Cost?*

A natural follow-up question to such an analysis is, of course: at what (narrowly speaking) economic cost are we acquiring this more reliable precedent? Unfortunately, it is a far more difficult task to estimate the added costs that would be incurred in exchange for improving precedent by this means. The costs of lawsuits argued before the Supreme Court vary widely, and no average cost is publicly available. A common observation as to these costs notes that large firms with strong relationships with the Court often take them *pro bono*,[58] but the fact that clients themselves are not paying for such services does not alter the fact that valued resources are being devoted to providing them at high opportunity costs. Suffice it to say that casual observations of cases that go through the district court, circuit court of appeals, and

[58] And, by some accounts, fiercely defend their turf for doing so. *See* Erin Geiger Smith, *Big Firm Lawyers Tried to Scare Small Firm from Supreme Court Case*, BUS. INSIDER (Dec. 18, 2009) https://www.businessinsider.com/big-firm-lawyers-tried-to-scare-small-firm-lawyer-from-supreme-court-case-2009-12.

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Supreme Court stages often estimate their costs to be millions of dollars before final resolution.[59]

Further significant costs would naturally result from following TG's suggestion that, in addition to a supermajority rule, the Supreme Court hear a larger docket of cases. Even if judges and justices do not maximize "the same thing everybody else does," it does not make them impervious to the costs of a larger workload, and they are especially unlikely to support a plan that increases that workload while reducing their potential for influence.[60] To the extent that TG's model results in a larger workload for Supreme Court justices and circuit court judges, there will be costs on jurists individually and, as a result, probable effects on acceptance of nominations to those courts. It may well be that the most binding limitation on such a plan would be the difficulties it would produce in attracting potential judges and justices with high opportunity costs of accepting nominations. No plan for the judiciary can be practicable that does not account for the incentives and preferences of jurists. The burden it imposes on them is the most likely explanation for a plan like this, having never been seriously debated.

III. DYNAMIC EFFECTS

A. *Effects on the Test Case System*

Additional complications arise once we consider the dynamic effects that such a rule change would likely spur. First, given that a considerable share of cases that make it to the Supreme Court have been cherry-picked and cultivated specifically for the purpose of making binding precedent, the incentive to bring such cases would be discounted by their advocates' levels of confidence that they could secure the requisite supermajority. Bringing such a "test case" only to get a 5-4 ruling would, as a matter of precedential value, be for naught. Thus, we should expect a corresponding reduction in applications for certiorari. Whether one views this as good or bad, it should work to counteract the greater number of cases that the TG proposal would presumably lead the Supreme Court to hear. Circuit courts should also see reductions in "test case" attempts, since the incentives to engineer circuit splits in hopes of obtaining Supreme Court certiorari would be reduced. Thus, to the extent that *stare decisis* increases the present discounted value

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59 Robert Barnes, *A Priceless Win at the Supreme Court? No, it Has a Price*, WASH. POST (July 25, 2011) https://www.washingtonpost.com/politics/a-priceless-win-at-the-supreme-court-no-it-has-a-price/2011/07/25/gIQAvOsPZI_story.html; Emily Belz, *High Court, High Costs*, WORLD MAG. (Sept. 13, 2017) https://wng.org/articles/high-court-high-costs-1618203551.

60 *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993). *But see* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

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of precedent and increases "bidding" by interested parties, that bidding and the resultant cost to the legal system would be reduced.

Strategies and methods of argumentation, too, would likely change. As a matter of general practice, lawyers advance any and all legal arguments that further their client's cause, seeking to win by any means necessary. In the approach common to test cases, however, the point is not simply to win the case for the present client but to win by a particular argument or on a particular issue and not by alternative reasoning or some peripheral point. One under-discussed cost to clients in test cases is that to the extent that their advocates and sponsors are representing an argument more than a client, valid arguments in the alternative that work in the client's favor may be disfavored and not argued as thoroughly as they would be were the advocates and sponsors indifferent to the argument by which the case was won. So, to the extent that the incentive for test cases is reduced by a supermajority rule, plaintiffs in such cases would see less eagerness by third parties to sponsor their cases but might, in turn, have their cases argued more to their own private benefit. All of this would, consistent with TG's claims, make the judicial system less prone to rent-seeking litigation and path manipulation by special interests.[61] As Zywicki notes, the durability of legal precedent under *stare decisis* makes rents secured through it highly valuable, more so than rents secured through legislatures, which are in no way bound by the actions of past legislatures.[62] In price theoretic terms, imposing supermajority thresholds for precedent shifts the supply function of precedent inward, reducing the amount of it that can be secured at a given price and leading interest groups to substitute lobbying for litigation, generating, should they succeed, less entrenched forms of preferential treatment. As Stearns has noted, given this high value placed on favorable precedent, interest groups also have an incentive to engage in path manipulation, jockeying for successive decisions that can be synthesized into a rule that they wish to see applied in some later case[63], further burdening the system with cases chosen for narrow benefit and without concern for broader effects. Raising the bar for obtaining rent-seeking decisions and rules produced through path manipulation would further reduce the workload of the court system and better set its focus on cases of broad interest and applicability.

B. *Effects on Jurists' Incentives*

Second, and of considerable significance, is the dynamic effect on Supreme Court justices' voting behavior that would likely result from the

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61 *See* Zywicki, *supra* note 35; Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PENN. L. REV. 309, 313–20 (1995).

62 *See* Zywicki, *supra* note 35, at 1557–59.

63 *See* Stearns, *supra* note 61, at 319–20.

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imposition of a different threshold for precedent. What is variously described as the "Lucas critique," "Goodhart's law," or "Campbell's law" would surely come into play. Campbell's rendition puts it most simply for our purposes: "The more any quantitative social indicator is used for social decision-making, the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor."[64]

In our present scenario, assuming that justices want their decisions to be binding on lower courts, their calculus of consent is altered by the elevated threshold for precedential value. The greater the supermajority required to make precedent binding, the greater the holdout problem and the narrower Supreme Court holdings are likely to become in order to obtain that much-needed seventh vote.[65] To the extent that justices care about making law, this foreseeably could lead to longer decision times in individual cases as justices need more time to negotiate towards the supermajority level needed to create binding precedent. In this way, TG's proposal, and supermajority rules on appellate courts generally, would tend to squeeze justices from both directions, increasing the time cost of reaching the precedent threshold while simultaneously increasing their caseload. Something would have to give, and it may be justices' aspirations for making new law or at least broad changes in the law. We should expect to see more concurrences-in-part and justices more frequently signing on to portions of a majority opinion but not the whole.

If so, it is not altogether clear whether the share of Supreme Court case law that is precedential would, going forward, be dramatically reduced by the abovementioned percentages or whether the Court would significantly preserve it by issuing narrower holdings and by choosing for certiorari only those cases in which they see a reasonable probability of getting seven justices in a majority. This does not clearly constitute a loss. Indeed, as noted above, Sunstein and Hartnett have argued that the Supreme Court should issue narrower reasons for its judgments and thereby limit its effect on future cases.[66] By methods now explained, adherence to a supermajority rule such as TG's would succeed in achieving such an effect automatically, through

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64 *See* Donald T. Campbell, *Assessing the Impact of Planned Social Change*, 2 EVALUATION AND PROGRAM PLAN. 67, 84–87 (1979). *See also* Robert E. Lucas, *Econometric Policy Evaluation: A Critique*, *in* THE PHILLIPS CURVE AND LABOR MARKETS, CARNEGIE-ROCHESTER CONF. SERIES ON PUB POL'Y, 19 (K. Brunner & A. Meltzer, eds.) (1976) ("[g]iven that the structure of an econometric model consists of optimal decision rules of economic agents, and that optimal decision rules vary systematically with changes in the structure of series relevant to the decision maker, it follows that any change in policy will systematically alter the structure of econometric models"); Charles Goodhart, *Problems of Monetary Management: The U.K. Experience*, *in* INFLATION, DEPRESSION, AND ECONOMIC POLICY IN THE WEST 111 (Anthony S. Courakis, ed.) (1981) ("[a]ny observed statistical regularity will tend to collapse once pressure is placed upon it for control purposes").

65 *See generally* LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY (6th ed. 2008); EPSTEIN & KNIGHT, *supra* note 60.

66 *See* CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001); Hartnett, *supra* note 27.

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voting rules, rather than by relying on jurists' own restraint, which history has proven to buckle under the temptation to reach beyond the scope of the present case. On the other hand, this propensity may highlight the most concerning feature of TG's proposal. That is the tendency of this "squeeze" to undermine two of the most cited virtues of the common law: (1) the more detached, less rushed quality of deliberation that judges enjoy over the legislative and executive branches and (2) the lure of lawmaking as an incentive that helps to attract the most qualified legal minds to the bench.

One natural adaptation that could result from such a rule change would be for judges and justices to adopt something like "issue voting" as envisioned by Post and Salop, in which the court as a whole addresses and votes on each separate legal issue raised in a case, as opposed to "outcome voting," in which jurists vote according to their views on the proper overall disposition of a case.[67] One of their numerous arguments for issue voting is that it allows for more detailed articulation of the Court's views on various issues within a case and avoids inconsistency, thereby providing lower courts with better guidance.[68] Interestingly, though issue voting may seem in many cases to multiply the dimensions of possible disagreement, by pressing jurists to vote on issues that several of them may have declined to reach in a traditional outcome voting arrangement, it would allow an appellate court to still create precedent on a narrow portion of the judgment in which it could achieve a 7-2 majority even if it could only secure a bare 5-4 majority on the main question at issue in the case.[69] The parsing of *dicta* and holding is thereby further simplified for lower courts, litigants, and scholars trying to discern what points mattered in the court's decision making. By opting for such issue voting, courts could reclaim some of the precedential power lost by their 5-4 and 6-3 decisions being rendered non-binding. Whatever the adaptations of procedure or issue-tailoring, those portions of their decisions that emerge as precedential, though narrower, would still be, on average, "better" law than 5-4 or 6-3 decisions with broader holdings.

Finally, it must be considered whether raising the threshold for precedent creation might, in turn, affect judges' and justices' incentives to more avidly pursue the correct answer in a given case. To the extent that jurists' interest in finding the right answer in a given case is driven by the broader precedential effects that that decision will have, when the probability of the case becoming precedent is diminished, they may have less of an incentive to reason as thoroughly and exhaustively as they do when they enjoy a greater chance of affecting the law going forward. The costs of legal research and reasoning being the same to them and the expected benefits being discounted, jurists would, on the margin, resolve to invest less in the details of a 5-4 or 6-3 decision and more in influencing the reasoning of those decisions

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67 David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 744–46 (1992).

68 *Id*. at 765–72.

69 *Id*. at 746–47.

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enjoying the support of seven or more jurists. This would potentially have a positive effect on the quality of those cases that create binding precedent but would diminish the incentive to reason as carefully on close-call cases where the decision could go for either party.

CONCLUSION

Simple majorities have been the standard in appellate rulemaking for nearly a millennium. Stare decisis has much less of a history and was no part of the Anglo-Saxon common law's development for eight hundred years, nor of the development of American common law in the Founding Era and for most of the nineteenth century. To the extent that the independent arrival of multiple jurists across space and time at the same legal principle is essential to producing wise and efficient rules, stare decisis has arguably brought that development to a crawl. Tullock and Good's "Judicial Errors and a Proposal for Reform," with its suggestion of a supermajority threshold to make appellate decisions binding, is an attempt to take our present system one step back toward the argued virtues of the classical common law system while still retaining the hierarchical nature of the American court system wherever a conclusion enjoys considerable support.

It can be presumed that wherever an institutional arrangement persists over time, the costs to some party or parties of altering it exceed the benefits to others, or else it would be replaced. The present system of simple majorities and stare decisis have long persisted, so clearly they qualify as a durable institution. Perhaps, as suggested elsewhere, certain interest groups benefit from stare decisis, and the concentrated benefits they enjoy from it outweigh the dispersed costs that it imposes on society at large. Perhaps it is merely the natural rule to which hierarchical courts in a federal system converge in order for higher courts to maximize their influence on private action. Or perhaps, as has been suggested here, the greatest deterrent to a proposal like Tullock and Good's is the added burden that it would place on appellate jurists' chambers, to which we want to attract well qualified legal minds with high opportunity costs, and burdening them with more difficult jobs runs contrary to that aim.

Be that as it may, it is nonetheless worthwhile to ask what effects a proposal such as that by Tullock and Good might have on our legal system, whether to advocate for such novel reforms or to appreciate why they would be unwise. In this study, I have sought to identify, without wild conjecture, what effect their proposal would have had on the volume of binding American federal case law over the last thirty-five years and on particular issue areas within that body of law. It is worth noting, however, that not all cases are made equal. They range from the most indispensable, cornerstone constitutional law case to clarifications of obscure provisions in the Code of Federal Regulations. The dramatic variance in the frequency with which cases are relied upon in lower courts could make the nullification of binding effect

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in those cases range from being unnoticeable to profound. To the extent that the effect is profound, however, it suggests that cases decided on narrow margins have substantial effects and arguably limit the possible discovery over time of better rules.

A final implication of this study is that, going forward, even if such a proposal as Tullock and Good's is never seriously debated, there are potentially significant benefits to be gained from a small number of large-majority decisions in certain issue areas. The marginal benefit of a few supermajority decisions in those areas might yield more benefit than close decisions in saturated issue areas where well balanced and intractable sides make marginal—and, by an objective probability measure, *questionable*—improvements.

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THE INTERNET IS A SERIES OF RUBES: AN ECONOMIC MODEL OF JUDICIAL NOTICE IN THE INFORMATION AGE

Stuart Spooner[*]

> *"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals…We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."*
>
> *—Benjamin N. Cardozo, The Nature of the Judicial Process (1921)*

INTRODUCTION

Federal judges are a lot like eels. Not because they are slippery and aggressive, but because judges, like eels, have evaded our best attempts to categorize, explain, and model their fundamental behaviors.[1] Judges resist behavioral analysis so effectively, in fact, that Judge Richard Posner once described judicial behavior as "a mystery that is also an embarrassment" at the "heart" of law and economics.[2] But why? Are federal judges just *that* isolated from normal incentives? Surely not. To the contrary, this article argues that judges have more in common with ordinary, economically rational actors than we may have suspected.

Let's begin with (and build on) the radical notion that judges are people too. In short, judges are economically rational actors who act in self-interested ways that maximize judicial utility and efficiently manage trade-offs between various preferences such as leisure, community respect, and the desire to avoid being overturned by reviewing courts. But this core

[*] J.D. Candidate at George Mason University's Antonin Scalia Law School. I owe sincere thanks to Scalia Law Professors Todd Zywicki and Donald Kochan, whose generous input and guidance shaped this article and my own thinking in countless ways. Additional thanks to Henry Overos at the University of Maryland for his insight on the quantitative methodology and keen reviewing eye. Finally, enormous and heartfelt thanks to my wife, Rosie, and son, George, who cheerfully endured many hours of thinking out loud on this topic.

[1] Science has yet to provide a precise explanation for exactly how and where eels reproduce, for instance, which one could fairly call a central question in the study of any animal. *See* Brooke Jarvis, *Where Do Eels Come From*, NEW YORKER (May 18, 2020), https://www.newyorker.com/magazine/2020/05/25/where-do-eels-come-from.

[2] Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993).

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assumption conflicts with traditional models of judicial behavior, which presume instead that judicial employment removes judges from the "carrots and sticks"[3] that influence individuals in ordinary occupations.

From there, apply that economic lens to the practice of judicial notice, which allows judges to formally incorporate indisputable or widely known facts into the factual tapestry of the case, and then ask whether there is a relationship between the growth of the internet and the use of judicial notice in federal district courts using district and appellate court dockets to calculate an approximate appeal rate for judicial notice from federal district courts. That appeal rate, in turn, reveals a strong positive correlation between the increasing adoption of the internet and judicial notice. Not only does the approximate rate of appeals from federal district court decisions involving judicial notice reveal that there was an increase in the use of judicial notice in federal district courts from 1980 to 2020, but I also show that judicial leisure preferences and rapidly decreasing information costs have made the increased use of online information and judicial notice generally more attractive to judges.

Further analysis reveals that the most likely mechanisms for the increase have been an increase in both *sua sponte* notice and litigant requests for judges to take notice. These mechanisms are evident from an analysis of appeals filed in the 12 regional circuit courts from 1980 to 2020.[4] This specific period was chosen because popular consensus is that widespread adoption of the internet occurred in 2000, and because it allows a comparison between two equal, twenty-year timeframes following the formal enactment of judicial notice in the Federal Rules of Evidence in 1975.[5] I then compared the FJC's appeals data with the frequency of judicial notice in both federal district and circuit courts dockets over the same timeframe. The results of this comparison strongly support the hypothesis that the effect of the internet on the judiciary can be explained as a straightforward supply and demand problem.

The article goes like this: Section I, describes the background, relevance, and necessity of quantitative analysis of the effect of the internet on judicial notice in federal district courts. Section II, provides a brief overview of judicial notice and Federal Rule of Evidence 201 and explains why the rise of the internet looms large in the Rule 201 context. Section III, shows why and how the effect of the internet on judicial notice is best explained as a supply-and-demand problem. Section IV proves a strong correlative relationship between increasing internet use and judicial notice and offers other key insights about the effects of the internet on judicial behavior in the realm of judicial notice. Finally, Section V proposes an

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[3] *Id.*

[4] Appeals data from 1980-2000 is drawn from the Federal Judicial Center's Integrated Database (IDB), while data from 2001-2020 was obtained from the IDB and the United States Courts' Caseload Statistics Data Tables.

[5] *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

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economic model of judicial behavior as it relates to judicial notice, based on the findings in Section IV.

A quick caveat before diving in—this article is not intended to function as a policy recommendation for how Rule 201 or the Rules of Evidence need to be adjusted, reformed, or re-thought. Goodness knows there's been enough "re-thinking" in legal academia over the years. Instead, the goal is to provide academics, litigants, and maybe even judges[6] with a cogent analysis and useful model of judicial notice as it stands today, while advancing our collective understanding of judicial behavior.

I. BACKGROUND

The central problem in any analysis of judicial behavior is that the structure of judicial employment is *designed* to remove judges from standard incentives.[7] Among other factors, the protections guaranteed to federal judges under Article III of the Constitution, particularly life tenure and guaranteed pay, [8] ensure that judges are immune from political, popular, partisan, and pecuniary pressures. The intended result of this separation is, in theory, to "divorce judicial actions and incentives."[9] But the practical results are less innocuous:

> A federal judge can be lazy, lack judicial temperament, mistreat his staff, berate without reason the lawyers who appear before him, be reprimanded for ethical lapses, verge on or even slide into senility, be continually reversed for elementary legal mistakes, hold under advisement for years cases that could be decided perfectly well in days or weeks, leak confidential information to the press, pursue a nakedly political agenda, and misbehave in other ways that might get even a tenured civil servant or university professor fired; he will retain his office. His pay cannot be lowered, either-and neither can the pay of a good judge be raised. All judges of the same rank are paid exactly the same, and so the carrot is withdrawn along with the stick.[10]

While these effects may be the *unintended* result of judicial protections, it remains an open question whether this attempted divorce has the *intended* effect of producing separation between judges and ordinary costs and incentives.

The career of Justice Oliver Wendell Holmes may provide our first inklings of an answer. Justice Holmes, one of the better writers in the history of the Court (whatever you think of his jurisprudence), claimed that his standing desk was his first editor. "If I sit down, I write a long opinion and don't come to the point as quickly as I could," but "[i]f I stand up I write as

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6 As the inscription at the Delphic Oracle advised, "know thyself." *See* PLUTARCH, PLUTARCH'S MORALS 299 (William W. Goodwin ed.) (1871).

7 *See* Posner, *supra* note 2, at 2.

8 *See* U.S. CONST. art. III, § 1.

9 Posner, *supra* note 2, at 2.

10 *Id.* at 4–5.

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long as my knees hold out. When they don't, I know it's time to stop."[11] It should come as no surprise that Justice Holmes, who served on the bench until he was ninety-two, wrote increasingly shorter opinions as he aged. In fact, Justice Holmes authored just one opinion longer than three pages in his final two years on the Court.[12]

What does Justice Holmes's declining word count have to do with the economic analysis of judicial behavior? It shows that even Supreme Court justices are susceptible to the allure of comfort and convenience, or at least to the limitations of old age. And if judges are indeed rational economic actors, we can presume that they will also be affected to some degree by factors like a significant increase or decrease in the opportunity cost of a particular activity—like dissenting from a majority opinion.[13] For this reason, the seemingly obvious insight that judges are economically rational actors has real value as a useful starting place for analyzing judicial behaviors.

Given this insight, the impact of the internet on judicial notice deserves further examination. Here's why: Because judicial notice allows judges to fold factual information into the record, and because the internet fundamentally transformed the way *ordinary people* use and consume information,[14] the question of the internet's impact on *judges* and judicial notice (like the relationship between Justice Holmes's increasing brevity and age) presents an opportunity to examine practical differences between the standard legal model of judicial behavior and the law and economics model.

The standard model of judicial behavior assumes at least some separation between federal judges and incentives, and thus also assumes that judges are largely unaffected by either positive or negative shifts in those incentive structures. Taken to its rational conclusion, this model would likely predict that the advent and widespread adoption of the internet would have little or no effect on whether judges take notice.

By contrast, the analysis of judicial notice in the rest of this paper is rooted in an economic model that assumes federal district court judges, like most people, "have leisure preference or, equivalently, effort aversion."[15] Judges then "trade off [that preference] against their desires to have a good reputation," avoid being overturned or chastised by courts of appeal, reach the correct decision, assure a fair judicial process, and potentially "influence law and policy" in each case they hear.[16] Thus, this model of information consumption which assumes that judges are rational people with the same

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11 HARRY BRUCE, PAGE FRIGHT: FOIBLES AND FETISHES OF FAMOUS WRITERS 168 (2009).

12 *See* Adam J. Hirsch, *Searching Inside Justice Holmes*, 82 VIRGINIA L. REV. 385, 391–92 (1996) (book review).

13 For a fascinating analysis of the factors underlying federal appellate and Supreme Court dissents, see generally Lee Epstein, William M. Landes & Richard A. Posner, *Why (And When) Judges Dissent*, 3 J. OF LEGAL ANALYSIS 101 (2011).

14 For an in-depth discussion of the neurological and cultural effects of the internet, see NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS (Updated ed. 2020).

15 Epstein, *supra* note 13, at 102.

16 *Id.*

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self-interested wiring as everyone else,[17] points to the conclusion that judges likely responded to the drastic lowering of information costs like everyone else—by simply using more information.

II. *THE EVOLUTION OF JUDICIAL NOTICE*

While judicial notice has specific statutory parameters in American jurisprudence, it's an old practice so deeply rooted in the common law that its origins "may be traced far back in the civil and the canon law; indeed, it is probably coeval with legal procedure itself."[18] Black's Law Dictionary provides a helpful definition of judicial notice as a general matter: "A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; [and] the court's power to accept such a fact."[19]

Historically, the quintessential instance of judicial notice was a trial judge taking notice from an almanac of the time of sunrise or sunset or on what day of the week a specific date occurred.[20] But judges were also limited from exploring too far afield from the courthouse or their personal libraries, since other notice was mostly reserved for "geographic facts, scientific facts, historical facts, local facts, facts necessary to fulfill the judicial function (including interpreting words, court records, and law), and a broader (and more contestable) category of [typically local] facts that were 'commonly known.'"[21]

Despite (or more likely because of) its prevalence as a common law doctrine, judicial notice was not formally codified in the American legal system until 1975, when Rule 201 was enacted by Congress along with the rest of the Federal Rules of Evidence.[22] Under Federal Rule of Evidence 201, a court can take judicial notice of an adjudicative fact that is "not subject to reasonable dispute."[23] The term "adjudicative fact," which pre-dates the Federal Rules of Evidence, is best understood to refer to "facts concerning immediate parties—what the parties did, what the circumstances were, what

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17 *See* Posner, *supra* note 2, at 3–4.

18 James B. Thayer, *Judicial Notice and the Law of Evidence*, 3 HARVARD L. REV. 285, 286 (1890).

19 *Judicial Notice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

20 *See* JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 307 (1898) ("The doctrine that almanacs may be referred to in order to ascertain upon what day of the week a given day of a month fell in any year, to learn the time of sunrise or sunset, and the like; and that, in order to prove facts of general history, approved books of history may be consulted, may also be regarded as illustrating the taking notice of the authenticity of evidential matters[]—of certain media of proof.")

21 Jeffrey Bellin & Andrew Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NORTHWESTERN U. L. REV. 1137, 1146–47 (2014).

22 *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

23 Fed. R. Evid. 201(a) (2018).

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the background conditions were[.]"[24] Put differently, adjudicative facts are those "which relate to the [immediate] parties…who did what, where, when, how, and with what motive or intent."[25] By taking judicial notice of facts that "relate to the parties, their activities, their properties, their businesses," the court is performing an adjudicative, fact-finding function usually reserved for a jury.[26]

Judges can take notice of an adjudicative fact for two reasons—either because a party requested that they take notice of a particular fact, or because they have decided to take notice of a fact by their own initiative, known as taking notice *sua sponte*.[27] However, Fed. R. Evid. 201 limits judges to just two justifications for taking notice. First, a fact may be judicially noticed if it is "generally known within the trial court's general jurisdiction."[28] Second, a fact can be noticed if it can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[29] The practical implication of this rule is that judges, who are normally responsible for questions of law, may relieve some of the jury's fact-finding load—to that end, a judicially noticed fact is binding on the jury in civil trials.[30]

If it was not already obvious, it should be clear by now that judicial notice was ripe for disruption from the internet, perhaps more so than any other rule of evidence. Because judicial notice involves the introduction of outside information into the record, no other judicial practice or rule of evidence depends more on the ability of the judge to access, interpret, and judge the quality of external information.[31] Gone are the days of consulting an almanac for the time of sunrise; here to stay are judges with access to most of human knowledge (and twice as much nonsense) in the pocket of their robes. While this technological shift raises serious and legitimate questions, such as the meaning of "sources whose accuracy cannot reasonably be questioned,"[32] the first and most pressing unanswered question is whether the information revolution affected the judiciary in this arena at all, and if so, how?

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24 Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

25 Fed. R. Evid. 201(a) Advisory Committee's Note (citing Kenneth Culp Davis, 2 Administrative Law Treatise §15.03 (1958)).

26 *Id.*

27 *See* Fed. R. Evid. 201(c)(1)–(2).

28 Fed. R. Evid. 201(b)(1).

29 Fed. R. Evid. 201(b)(2).

30 *See* Fed. R. Evid. 201(f).

31 Judicial notice is *technically* limited to information directly relevant to the specific dispute and parties before the judge, but judges have substantial leeway in deciding what qualifies as "relevant."

32 For a helpful discussion of the history, context, and interpretations of this requirement, see 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FED. PRAC. & PROC. § 5101.2 (2d ed. 2021).

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III. *"ON THE INTERNET, NO ONE KNOWS YOU'RE A JUDGE"*[33]

Strangely, there are very few comprehensive, data-based approach analyses of the changes to judicial notice has changed since the advent of the internet. There are many examples, however, of judges using the internet in questionable, controversial, or just plain conflicting ways. Take, for an example, the many adjudications of compassionate release petitions during the Covid-19 pandemic, many of which reached contradictory conclusions about whether natural immunity resembles vaccine immunity based on online sources.

Over the course of the Covid-19 pandemic, some federal district courts denied the compassionate release petitions of medically high-risk prisoners on the basis that contracting and recovering from the virus provides natural immunity that sufficiently reduces an inmate's risks from the contracting the virus again, or from experiencing severe or life-threatening symptoms if re-infection occurs.[34] For example, one district court considered whether to grant a compassionate release to a high-risk inmate who had survived a previous Covid-19 infection, and ultimately denied the petition for release after considering online resources from several well-respected public health and research institutions, including research from the CDC, the U.S. Department of Health and Human Services, and the University of Oxford and the Oxford University Hospitals NHS Foundation Trust.[35] The court concluded its analysis by quoting a National Cancer Institute blog post stating that the "protective effect [of natural immunity] is strong and comparable to the protection afforded by effective SARS-CoV-2 vaccines…people who have a positive antibody test result using widely available assays have substantial immunity to SARS-CoV-2 and are at lower risk for future infection."[36]

But other federal district courts relied on similarly reputable online information to reach the opposite conclusion. In *United States v. King*, for example, a district court denied a request for compassionate release for other reasons, but found that a high-risk inmate who survived a bout with Covid had established "extraordinary and compelling reasons for…release" because of doubts about the efficacy of natural immunity.[37] In reaching this conclusion, the district court relied on a New York Times article about the

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33 My sincere thanks to Colleen Barger for giving us this genuinely funny neologism. *See* Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417 (2002).

34 *See, e.g.,* United States v. Tommie Rollins, No. 11-CR-251S, 2021 WL 5445772, at *3 (W.D.N.Y. Nov. 22, 2021).

35 *See* United States v. Pavao-Kaaekuahiwi, No. CR 19-00082 JMS, 2020 WL 7700097, at *3 (D. Haw. Dec. 28, 2020).

36 *Id.*

37 United States v. King, No. CR 18-318 (JDB), 2021 WL 880029, at *2, *4 (D.D.C. Mar. 9, 2021).

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risks of the Brazilian P.1 Covid-19 variant, the CDC website, and the National Institutes of Health Director's Blog.[38]

These are just two examples out of dozens of contradicting decisions on the issue of natural immunity alone—and this problem is surely not limited just to this one issue. It is more likely that this kind of disparity in the interpretation of reputable information (let alone less-than-reputable information) is present elsewhere. This raises an important question: if even reliable online sources can lead to confusion or widespread contradictory outcomes, what's a judge to do with the vast flow of other reputable and not-so-reputable online information?

This dispositional question has been the subject of extensive academic debate. For example, Professors Jeffrey Bellin and Andrew Ferguson have raised compelling arguments that the ease of accessing factual data on the internet allows judges and litigants to expand the use of judicial notice in ways that raise significant concerns about admissibility, reliability, and fair process.[39] At the very least, as judicial notice scholar Professor Ellie Margolis asserts, an increase in the judicial notice of online information and the lack of a workable, standardized framework for taking notice of online information is problematic.[40]

Other scholars assume the existence of a problem and jump straight to the solution. Professor Elizabeth Thornburg argues that the best solution to internet-related problems of judicial factfinding and research is an amendment to the Model Judicial Code of Conduct that would allow judges to research freely, as long as they disclose that research to the parties.[41] This perspective (if not the specific policy recommendation) has found some support in the judiciary and the law and economics community, finding its most notable support in Judge Richard Posner's landmark opinion in *Rowe v. Gibson*, a pro se civil rights case brought by an Indiana prison inmate who was denied access to his heartburn medication.[42] As a result of the prison staff's refusal to provide the medication, Rowe (who had previously been diagnosed with and treated for esophagitis as a result of untreated GERD) experienced significant, chronic pain, and sued prison administrators and staff for "gratuitous infliction of physical pain and potentially very serious medical harm—cogent examples of cruel and unusual punishment."[43] The prison also used the very prison doctor who denied treatment as an expert witness at trial, but failed to disclose that to the court.[44]

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38 *See id.* at *4.

39 *See* Bellin & Ferguson, *supra* note 21, at 1139.

40 Ellie Margolis, *It's Time to Embrace the New-Untangling the Uses of Electronic Sources in Legal Writing*, 23 ALB. L.J. SCI. & TECH. 191, 194 (2013).

41 *See* Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 191 (2008).

42 *See* Rowe v. Gibson, 798 F.3d 622, 623 (7th Cir. 2015).

43 *Id.*

44 *See id.* at 626.

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The Seventh Circuit reversed the lower court's grant of summary judgment for the defendants, based in part on "the cautious, limited Internet research that we have conducted in default of the parties' having done so," including citations to the Mayo Clinic, Healthline, and the Physicians' Desk Reference websites.[45] Writing for the majority, Judge Posner justified the court's extensive reliance on online medical information by declaring that "[i]t is heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence."[46]

While Judge Posner declined to go so far as to take notice of the medical facts, he observed that while "[i]t may be said that judges should confine their role to choosing between the evidentiary presentations of the opposing parties, much like referees of athletic events…[modern judges] are not like the English judges of yore, who under the rule of 'orality' were not permitted to have law clerks or other staff, or libraries, or even to deliberate."[47] According to Judge Posner, the judiciary "must acknowledge the need to distinguish between judicial web searches for mere background information that will help the judges and the readers of their opinions understand the case, web searches for facts or other information that judges can properly take judicial notice of, and web searches for facts normally determined by the factfinder after an adversary procedure that produces a district court or administrative record."[48] Judge Posner's suggestion is that contemporary doctrines of judicial notice should be updated to provide a middle ground between the "high standard for taking judicial notice of a fact, and [the] low standard for allowing evidence to be presented in the conventional way, by testimony subject to cross-examination."[49]

Other scholars recommend a more drastic response. Professor Lisa Griffin takes the argument a step further and suggests the need for an activist judicial response to the internet.[50] She argues that as a result of the cultural shift towards a "post-truth" society, the doctrine of judicial notice requires a re-evaluation of judicial ethics rules and a re-working of the fundamental design of the judiciary to empower judges "to seek out supplemental information to be shared with the parties to better identify the truth at the center of the controversy,"[51] transforming courts from "trier[s] of fact to guardian[s] of factual integrity."[52]

On the other end of the spectrum, however, are scholars like Professor Coleen Barger, whose assessment of post-internet judicial notice doctrine

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45 *Id.* at 630.

46 *Id.*

47 *Id.* at 628.

48 *Id.*

49 *Id.* at 629.

50 *See* Lissa Griffin, *Judging During Crises: Can Judges Protect the Facts?*, 50 LOY. U. CHI. L.J. 857 (2019).

51 *Id.* at 857.

52 *Id.*

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concluded that Rule 201 works essentially as-intended and that "Rule 201 is up to the task for which it was designed, even" in the face of massive technological changes.[53] Barger also emphasizes a key protection for parties, that "evidence offered via judicial notice may in fact be challenged and found inadmissible under other provisions of the Federal Rules of Evidence."[54]

These attempts to address judicial use of the internet offer valuable insights into the current state of affairs and worthwhile proposals to address these new challenges (or reminders that the rules of evidence are well-equipped to handle them). Even so, the vast majority of research and scholarship on this topic is not based on a *quantitative* assessment of judicial notice from the law and economics perspective, but on qualitative or analogical analysis. Fortunately, that is a gap which the rest of this paper will address.

IV. *JUDICIAL NOTICE AS A SUPPLY AND DEMAND PROBLEM*

It bears repeating that, if judges are truly immune from the same incentives as the ordinary person because of the nature of judicial employment, the use of judicial notice would change little, if at all, as a result of rising internet use. Yet the quantitative analysis that follows instead shows not only that the adoption of the internet increased instances of judicial notice, but that the effect of the internet on judicial notice is best explained as a simple supply and demand problem.

To begin, we can use basic economic principles to develop the following basic syllogism:

> **H1**: If a surge in access to information shifted (and is likely still shifting) the supply curve for judges outwards; and
>
> **H2**: If the increase in the supply of information decreased the information costs of taking judicial notice;
>
> **H3**: Then the result would be a corresponding increase in the use of notice by judges; and
>
> **H4**: As a corollary, the increased use of notice by federal district judges would result in at least some measurable increase in appeals of judicial notice from federal district courts.

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53 Coleen M. Barger, *Challenging Judicial Notice of Facts on the Internet Under Federal Rule of Evidence 201*, 48 U.S.F.L. REV. 43, 70 (2013).

54 *Id.*

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H4a: This is because, assuming even a constant rate of appeal (and thus no measurable positive change resulting from the internet), an increase in the raw number of instances of judicial notice alone would be enough to cause an increase in the raw number of appeals from those instances.

This hypothesis is represented by the supply and demand chart below in Figure 1.

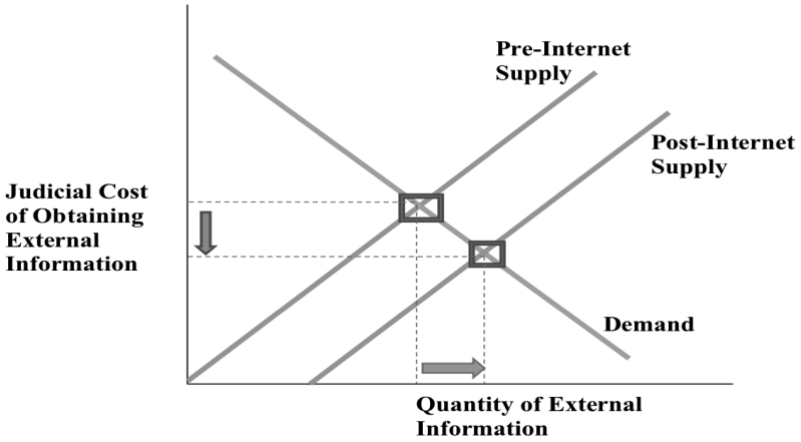

Figure 1

V. JUDICIAL NOTICE IN FEDERAL DISTRICT COURTS, 1980-2020

A. *Methodology*

In studying judicial notice from 1980 to 2020, this research assumes that 1999 is the midpoint of majority adoption of the internet, for two reasons. First, Pew did not begin tracking the presence of the internet in homes until 2000, but that initial survey found that a majority (fifty-two percent) of adult Americans were online.[55] As of 2021, Pew estimates that around ninety-three percent of Americans are online.[56] Second, this specific midpoint allows comparison between two equal, twenty-year time frames.

This research also examines judicial notice only in civil suits in federal district courts, both because notice is binding on civil juries, per Fed. R. Evid.

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[55] *See Internet/Broadband Fact Sheet* PEW RESEARCH CENTER (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

[56] *See id.*

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201(f) (and thus substantially more influential in civil litigation), and because this restriction provides a narrower, more discrete data set for analysis.

Thus, beginning with the assumption that a rise in the use of judicial notice would result in a simultaneous increase in the appeal rate for judicial notice, this data set provides a snapshot of the appeal rate for federal district court decisions involving judicial notice by combining data from the Federal Judicial Center's Integrated Database of Appeals[57] with a review of federal appellate dockets.[58] This data set was assembled in the following way:

> 1) Search of civil appellate court dockets in party filings for citations to "Fed. R. Evid. 201" and "abuse of discretion" (the standard of review for judicial notice) together.
>
> 2) Compare the number of those dockets to total civil appellate cases docketed from 1980 to 2020 by year (01/01/XX – 12/31/XX).
>
> 3) Calculate an estimate of the appeal rate for judicial notice by comparing appeals involving review of judicial notice as a percentage of total appellate cases docketed and the year-over-year change in that percentage.
>
> 4) Compare the appeal rate to the number of district court dockets containing a notice, order, or minute entry citing Fed. R. Evid. 201 per calendar year.

B. *Summary of Findings*

This data reveals two insights: First, judicial notice is a growing topic of litigation at the appellate level, and second that the growing adoption of the internet and appeals from the use of judicial notice in federal district courts are strongly correlated. While there are several possible explanations for these findings, the data shows the two most likely answers, probably working in tandem:

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57 *See Integrated Database (IDB)*, FED. JUD. CTR., https://www.fjc.gov/research/idb (click "List the IDB Datasets"; then under "Appeals," select "interactive view" for either the 1971-2007 or the 2008-present datasets; then select categories 3 and 4 of the "Type of Appeal" category; then set the docket date to "Is between" and enter January 1 and December 31 of the given year, and apply the filters.); *see also Civil and Criminal Cases Filed by Circuit and Nature of Suit or Offense (2001-2020)*, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY at https://perma.cc/32VY-M4PC.

58 *See Federal Appellate Dockets Containing a Mention of Fed. R. Evid. 201 and Judicial Notice*, BLOOMBERG LAW, bloomberglaw.com/start (select the "dockets" hyperlink; then check the "U.S. Courts of Appeal" box and select the "civil suit" dropdown box and search the "Keywords" category for "'Fed. R. Evid. 201' & 'judicial notice'") (last visited Mar. 24, 2023) [hereinafter *Federal Appellate Dockets*].

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1) The internet resulted in judges taking notice more often; and

2) the internet resulted in parties requesting judicial notice more often.

It is hard to say which of these factors is predominant without a more granular examination of the dockets, but the strength of the relationship between rising internet usage and the increase in the use of judicial notice confirms (at the very least) a positive correlative relationship between the growing ubiquity of the internet and the use of judicial notice and conveys an important insight into judicial incentives.

C. *Findings*

1. The continued rise of appellate dockets citing to Fed. R. Evid. 201 and corresponding decline in the overall number of appellate dockets confirms that use of judicial notice has increased independently from overall caseload.

First, the number of total civil appeals docketed skyrocketed from 1980 to 2006, but has since been in decline, the cause of which is unclear.[59] As shown below in Figure 2, the number of docketed appeals reached a peak of 39,809 cases in 1997 but rapidly declined the next year and has been on a downtrend ever since, reaching its lowest total since 1983 in 2020.[60]

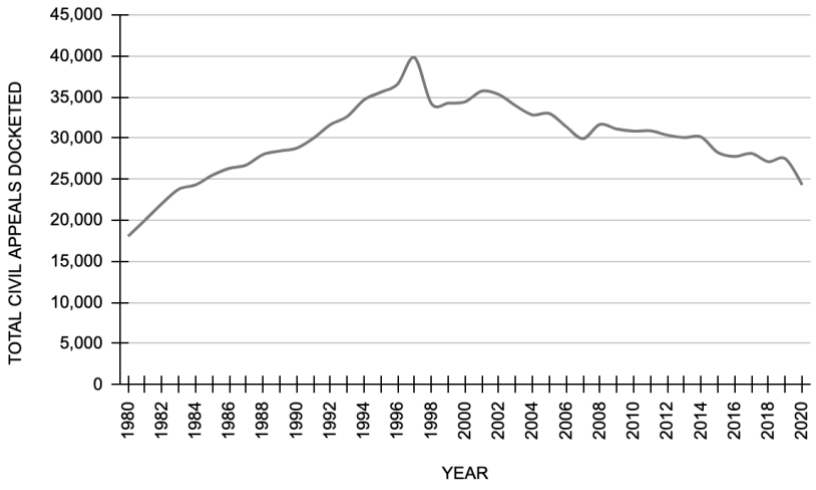

Figure 2 — Total number of civil appeals docketed per year

59 *See Integrated Database* and U.S. Courts tables, *supra* note 57.

60 *Id.*

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Despite this decline in the overall number of civil appeals, the number of appeals involving judicial notice has risen rapidly and then maintained a fairly steady average over the same period, reaching a peak of seventy-nine cases in 2014 and seventy-two cases last year, as shown below in Figure 3.

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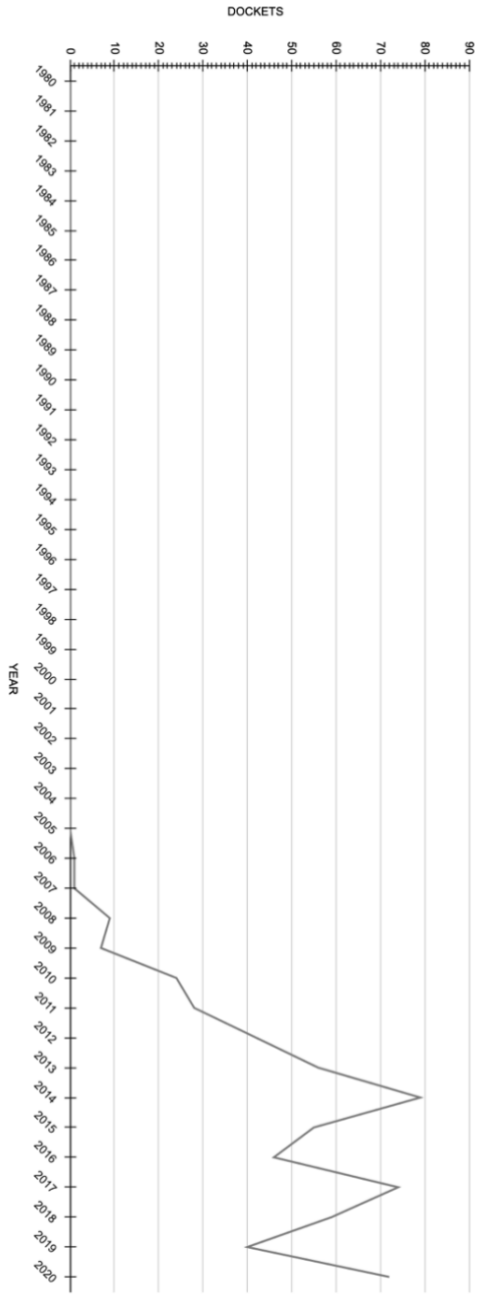

Figure 3 Number of Appellate Dockets Citing FRE 201 Per Year

While there are any number of possible explanations for this inverse relationship, it does help explain why the *percentage* of appellate dockets citing Fed. R. Evid. 201 per year rose so quickly at first. In any event, even as the number of appellate cases has steadily declined, the percentage of cases

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citing Fed. R. Evid. 201 has continued to rise as shown in Figure 4 below, indicating a genuine ongoing increase in disputes involving Fed. R. Evid. 201—last year, nearly 0.3 percent of appellate dockets contained a citation to the rule.

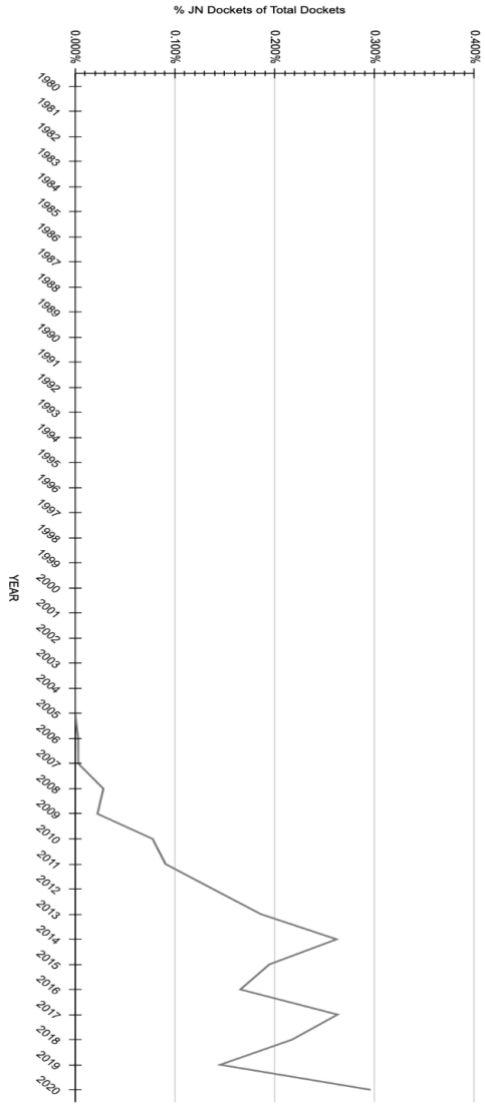

Figure 3 — Percentage of Appellate Dockets Citing Fed. R. Evid. 201 / Year

This number might seem insignificant at first glance, but context matters—not one federal appellate docket from 1980 to 1994 so much as *mentioned* judicial notice, and it was not until 2006 that a party at the

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appellate level first cited to FRE 201g.[61] In light of this history, 3 out of every 1,000 docketed appellate cases today involving some aspect of judicial notice is significant.

2. Rising internet adoption is strongly correlated with the use of judicial notice by federal district court judges.

There is also a strong correlative relationship between increasing internet adoption and judicial notice. First, a cursory review of the Pew Research Center's annual data on the percentage of Americans online,[62] compared with the total number of appellate dockets referencing Fed. R. Evid. 201, establishes at a minimum a strong correlational relationship between the growing ubiquity of the internet and instances of judicial notice. For clarity, note that Pew did not conduct this research or declined to publish the results of their research in 2017 and 2020, resulting in the gap seen below in Figure 5.

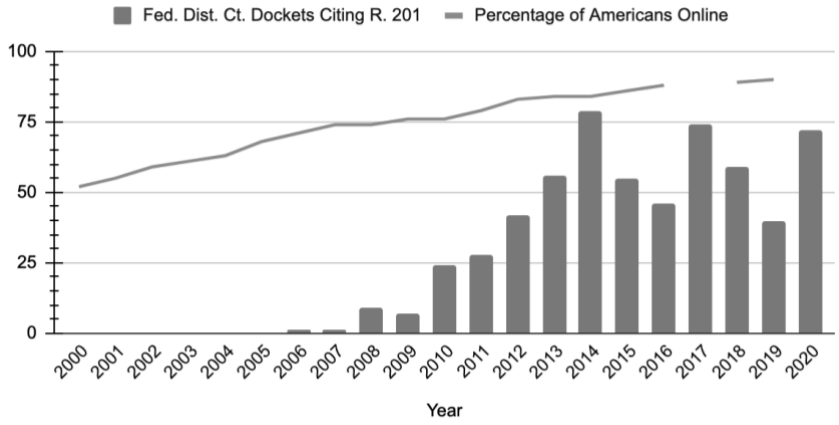

Figure 4—Comparison of Internet Usage and Judicial Notice Dockets

As shown above in Figure 5, while the first citation to Rule 201 did not occur until 2006, citations grew rapidly as soon as internet usage surpassed 75 percent of Americans. The reasons for this apparent 75 percent threshold are not immediately obvious and it raises a few interesting questions, but there is no denying the correlation between the two data points.

Second, the application of a correlation coefficient calculation reaffirms a strong relationship between internet use and the use of judicial notice by

61 *See Federal Appellate Dockets*, *supra* note 58.

62 *See Internet/Broadband Fact Sheet*, *supra* note 55.

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federal district court judges. The Pearson coefficient calculation is a formula that identifies the level of correlation between two variables. Without getting too deep into the weeds, this equation compares two distinct sets of data points and spits out a number between -1 and 1. As the number approaches -1, the variables are more negatively correlated, meaning that as one rises the other falls; as the Pearson coefficient approaches 0, the amount of correlation between variables decreases; and as it approaches +1, the correlation between the two variables becomes stronger and more positive. As a simple example, imagine two data sets (X and Y) that have a coefficient of -1. If that is the case, then X will lose the same amount Y gains, and vice versa. On the other hand, if those same data sets have a coefficient of +1, then X will game the same amount as Y gains.

Here, a comparison of Pew's internet usage data and the number of appellate dockets, with internet usage as the independent variable and instances of judicial notice as the dependent variable, produces a coefficient of 0.8246443365, which confirms a strong correlation between the two.[63] The correlation between the percentage of online Americans and docket citations to Fed. R. Evid. 201 as a percentage of total appellate dockets is similar, but even stronger—a comparison of those two data sets results in a higher correlative outcome, producing a Pearson coefficient of 0.8366.[64]

Taken together, these results show a strong positive relationship between the rise of internet usage and the rise of judicial notice that is significantly correlative and perhaps even suggestive of a causal relationship. This correlation underpins many of the core facets of the model of judicial notice proposed in the next section.

VI. PROPOSING AN ECONOMIC MODEL OF JUDICIAL NOTICE

"No one knows what it means, but it's provocative, it gets the people going"

-Will Ferrell, BLADES OF GLORY

After staring at the charts and formulas in the previous section, you may be wondering what all this means, or if it means anything at all. After all, math strikes fear into the heart of many in the legal profession, and statistics can cause even the math-capable to question their sanity. In any event,

63 As previously noted, Pew does not provide data on internet usage for 2017 or 2020, so this analysis omits any data from those years, since the equation requires an identical number of compared variables. The data used for inputs in the calculation is available at Table 3 of the Appendix at the conclusion of this article.

64 Data used for this calculation is available at Table 3 of the Appendix.

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despite the need for statistical analysis here, the resulting data reveals a few fascinating insights about judicial incentives and utility functions.

A. *Leisure preference and decreasing information costs make increased use of online information preferable to judges.*

First, this data raises an important question: Why was a rule of evidence formally enacted in 1975 unchallenged for the first 30 years of its existence, before becoming a regular (if still somewhat unusual) issue on appeal? The economic model of judicial behavior proposed at the beginning provides the best answer.

The fact that this data exactly matches the economic hypothesis discussed earlier (decreased information costs will result in the increased use of judicial notice) makes clear that information costs, rather than judicial restraint or some other uniquely judicial factor, were and still are a significant factor in a judge's decision to take notice. Thus, as the supply of information increased, information costs decreased, and consequently the median judge, who (as we posited earlier) must constantly balance a leisure preference[65] with values like the desire for professional respect or to avoid being overturned by a higher court, responded by making the rational choice to consume and utilize more information. This confirms the economic intuition that judges within a normal range of behavior are not removed from incentives but respond to lowered information costs the same way anyone else would. This may seem obvious at first, but remember that this conclusion stands in clear contrast to the standard, non-economic model of judicial behavior, which would posit that judges are largely non-responsive to external incentives and factors like decreased information costs.

B. *Increasing internet adoption most likely caused both more frequent use of notice by district court judges and parties requesting notice more often.*

Next, the question of *how* the internet caused a rise in the use of judicial notice has so far been left unanswered. There are four primary plausible explanations:

> (1) The internet resulted in judges taking notice more often;
>
> (2) the internet resulted in parties requesting judicial notice more often;

[65] Or, conversely, an aversion to strenuous effort, which I'm sure is the exceedingly rare case.

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(3) the internet resulted in judges taking notice of ineligible or inappropriate facts more often, and

(4) the internet made parties more likely to challenge judicial notice.

While all four options above remain *plausible*, the data above only supports the finding that after the widespread adoption of the internet, (1) judges take notice more often and (2) parties request notice more often. While the exact ratio of the increase is not discernible without a more granular examination of the data, it would be remarkable (and improbable) for the overall increase in judicial notice to have originated exclusively through just one of two available channels.[66] In any event, this insight is confirmed by a search of civil federal district court dockets for orders, notices, and minute entries referencing "judicial notice" and "Fed. R. Evid. 201" which shows that, broadly speaking, federal district judges issued a far greater number of interlocutory decisions related to judicial notice from 2006 onward,[67] as shown in Figure 6.[68]

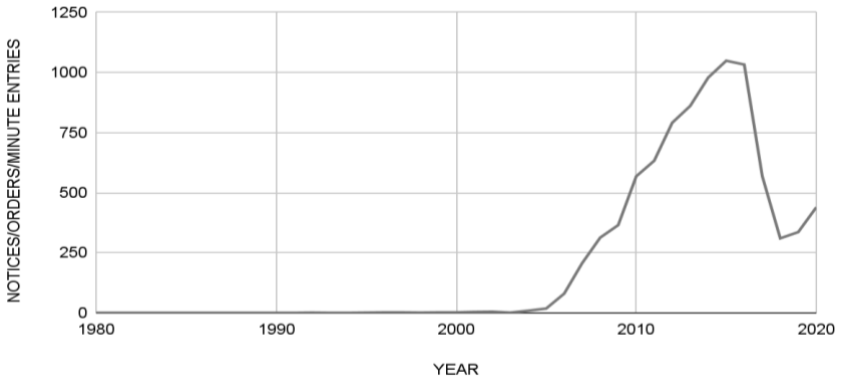

Figure 5 — Total Number of Federal District Court Citations of FRE 201

66 Note, however, that the economic calculus for requesting notice is likely very different from judicial calculus to take notice *sua sponte*.

67 That appeal citations to Rule 201 did not take off until 2006 suggests that judges were likely slower to adopt the internet than the rest of the population, although the specific reasons for that delayed adoption are a question for another time.

68 *See Federal District Court Dockets Containing a Mention of Fed. R. Evid. 201 or Judicial Notice*, BLOOMBERG LAW, bloomberglaw.com/start (select the "dockets" hyperlink; then check the "U.S. District Courts" box, select the "civil suit" dropdown box, and select the "notices," "orders," and "minute entries" filing categories; and then search the "Keywords" category for "'Fed. R. Evid. 201' & 'judicial notice'") (last visited Mar. 24, 2023) [hereinafter *Federal District Court Dockets*].

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There is no data, however, that confirms or rebuts that parties are now more likely to appeal judicial notice. Nor is there any concrete evidence that appeals are rising from judicial notice of inappropriate or ineligible facts more often, at least not without a more thorough examination of the relevant data. Still, despite concerns about judges taking notice of questionable facts, the most rational explanation is simply that challenges to judicial notice have increased because general usage of judicial notice has increased. As the economic model outlined earlier proposed, the vast increase in the information supply resulted in a corresponding decrease in information costs and an increase in the quantity of external, online information used by judges. And it's not just that uses of judicial notice have increased because the total case load has increased—the opposite is true. As reflected in Figures 2 and 3 above, judicial notice is an increasing topic of appellate litigation, even as the *overall* civil appellate caseload has declined.

C. *Much of the landscape of judicial notice remains unexplored.*

While the findings above are a crucial step towards a broader empirical model of judicial behavior and the relationship between the judiciary and the internet, there remain significant unanswered questions that would require significantly more time and space to address than available here. A comprehensive examination of the questions raised throughout this paper would require several hundred more pages and a team of research assistants, much to my disappointment.

First among the remaining questions of importance is how often judicial notice is requested by parties in federal district courts. The answer to that question could not be determined from the data here, but a more granular examination of those dockets may yield an answer that will clarify just how significant the increase of *sua sponte* judicial notice has been over the last four decades. Corollary questions include: whether plaintiffs or defendants request notice more often, and why, and whether the increase in appeals involving judicial notice consists mainly of instances of party-requested notice or *sua sponte* judicial notice.

The second question deserving further exploration is the rate of objection to the invocation of judicial notice in federal district courts. Because a decision to grant or overrule opposition to a grant of judicial notice is an interlocutory decision, it is not immediately appealable.[69] Thus, there may be substantially more objections to noticed facts than appeals involving notice, which risks underestimating the actual number of problematic incidences.

The third question is whether there is a meaningful difference between instances of judicial notice in federal and state courts with similar rules of evidence. Given the lengthy history of judicial notice as a common law

[69] *See* Fed. R. Civ. P. 54, 60 (2018).

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doctrine, comparison is likely possible given the similarities between federal and state rules of evidence governing the doctrine. And any significant difference between state and federal courts could provide valuable information about how the judicial utility functions of state and federal judges differ.

Finally, I would propose that an in-depth examination of the *specific* facts taken notice of since the widespread adoption of the internet would be a worthy enterprise, given that most concerns about the judicial notice of questionable information or "misinformation" thus far have been anecdotal. Such an inquiry would require significant resources, but would ideally seek to quantify whether the *quality* of information judges have taken notice of has measurably declined as a result of increased access to information. This would provide crucial and objective insight into how judges *actually* consume, judge, and utilize online information.

While these questions could not be answered here with the depth, time, attention, and resources they deserve, the findings here confirm the importance of further research on this topic, and will hopefully foster additional quantitative exploration of judicial notice and the further development of a robust model of judicial behavior.

CONCLUSION

This article is part of a growing body of research that seeks to analyze judicial behavior from a law and economics perspective and create an empirical model of judicial behavior by relying on the extensive statistical data available regarding the federal judiciary. The question at the heart of this paper is whether federal district court judges are so divorced from standard incentives that even the information revolution could not induce them to greater reliance on online information in taking judicial notice.

This question was posed in the shadow of the standard, traditional legal model of judicial behavior, which would posit that the typical judge takes judicial notice only when it is appropriate to do so under the Federal Rules of Evidence in the context of the requirements of a specific case, regardless of information costs. But that model does not match reality. Instead, this research shows that the rapid adoption of the internet and the corresponding rise in the use of judicial notice confirms the accuracy of an economic model of judicial behavior and shows that federal district court judges responded to the lowering of information costs by consuming and utilizing more information in the same way any rational actor would.

The data largely supports the hypotheses generated by the basic economic theory that assumes judges are economically rational actors and the application of basic supply and demand principles to judicial behavior. The central hypothesis is further buttressed and confirmed by the strong positive correlation between rising internet usage and judicial notice. While correlation does not always imply causation, the strength of the correlation,

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together with the other findings shown throughout this article, shows that judges *are* rational in the economic sense.

Thus, not only are judges more susceptible to the "carrots and sticks" of judicial employment, but they are also more rational in their decision-making than previously hypothesized. This is a valuable insight for scholars, lawyers, and litigants alike, who should experience some newfound freedom to study and argue before judges more effectively, unburdened from the assumption that judges are cold, inscrutable beings beyond our understanding.

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APPENDIX

TABLE 1: CIVIL APPEALS & FED. R. EVID. 201

YEAR	DOCKETS	TOTAL CIVIL APPEALS FILED	FRE 201 AS A PERCENTAGE OF APPEALS FILED	YEAR-OVER-YEAR % CHANGE
1980	0	18,068	0.000%	N/A
1981	0	20,024	0.000%	N/A
1982	0	22,028	0.000%	N/A
1983	0	23,792	0.000%	N/A
1984	0	24,309	0.000%	N/A
1985	0	25,493	0.000%	N/A
1986	0	26,327	0.000%	N/A
1987	0	26,722	0.000%	N/A
1988	0	28,013	0.000%	N/A
1989	0	28,437	0.000%	N/A
1990	0	28,782	0.000%	N/A
1991	0	30,003	0.000%	N/A
1992	0	31,642	0.000%	N/A
1993	0	32,638	0.000%	N/A
1994	0	34,677	0.000%	N/A
1995	0	35,598	0.000%	N/A
1996	0	36,607	0.000%	N/A
1997	0	39,809	0.000%	N/A
1998	0	34,205	0.000%	N/A
1999	0	34,266	0.000%	N/A
2000	0	34,427	0.000%	N/A
2001	0	35,739	0.000%	N/A
2002	0	35,318	0.000%	N/A

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2003	0	33,951	0.000%	N/A
2004	0	32,840	0.000%	N/A
2005	0	33,007	0.000%	N/A
2006	1	31,401	0.003%	N/A
2007	1	29,943	0.003%	0.00%
2008	9	31,686	0.028%	750.49%
2009	7	31,117	0.022%	67.44%
2010	24	30,864	0.078%	245.67%
2011	28	30,899	0.091%	16.53%
2012	42	30,374	0.138%	52.59%
2013	56	30,078	0.186%	34.65%
2014	79	30,153	0.262%	40.72%
2015	55	28,252	0.195%	-25.70%
2016	46	27,778	0.166%	-14.94%
2017	74	28,139	0.263%	37.03%
2018	59	27,138	0.217%	-20.96%
2019	40	27,504	0.145%	-49.49%
2020	72	24,314	0.296%	50.89%

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TABLE 2: DISTRICT COURT NOTICES, ORDERS, & MINUTE ENTRIES CITING FED. R. EVID. 201

YEAR	DISTRICT COURT NOTICES/ORDERS/MINUTE ENTRIES[70]
1980	0
1981	0
1982	0
1983	0
1984	0
1985	0
1986	0
1987	0
1988	0
1989	0
1990	0
1991	0
1992	1
1993	0
1994	0
1995	1
1996	2
1997	2
1998	1
1999	2
2000	2
2001	4
2002	5
2003	1

[70] *See Federal District Court Dockets*, *supra* note 68.

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2004	9
2005	18
2006	80
2007	207
2008	313
2009	365
2010	568
2011	633
2012	791
2013	861
2014	979
2015	1049
2016	1033
2017	569
2018	310
2019	336
2020	439

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TABLE 3: PEARSON COEFFICIENT INPUTS

Year	Appellate Dockets Citing R. 201[71]	Percentage of Americans Online[72]	Perc. Of App. Dockets Citing R. 201[73]
2000	0	52	0.00%
2001	0	55	0.00%
2002	0	59	0.00%
2003	0	61	0.00%
2004	0	63	0.00%
2005	0	68	0.00%
2006	1	71	0.01%
2007	1	74	0.01%
2008	9	74	0.03%
2009	7	76	0.02%
2010	24	76	0.08%
2011	28	79	0.09%
2012	42	83	0.14%
2013	56	84	0.19%
2014	79	84	0.26%
2015	55	86	0.20%
2016	46	88	0.17%
2018	59	89	0.22%
2019	40	90	0.15%

71 *See Federal District Court Dockets*, *supra* note 68.
72 *See Internet/Broadband Fact Sheet*, *supra* note 55.
73 *See Integrated Database (IDB)* and U.S. Courts Tables, *supra* note 57.

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SPACE TRASH: LEGAL AND ECONOMIC QUESTIONS ABOUT THE COLLECTION OF ORBITAL DEBRIS

Hannah Thurston

INTRODUCTION

Orbital debris refers to nonfunctional, manmade objects polluting the Earth's orbit.[1] It includes anything artificial that humans have sent into space, like inactive satellites and pieces of spacecraft.[2] Only about fourteen percent of all regularly tracked objects orbiting the Earth are active satellites.[3] Currently, an estimated 525,000 pieces of orbital debris measuring larger than one centimeter are orbiting the Earth.[4] More than an additional 100 million pieces of orbital debris smaller than one centimeter are orbiting the Earth as well.[5] Pieces this small pose risks to aerospace industry players operating in Low Earth Orbit (LEO) because they are undetectable by debris tracking systems currently in place.[6]

As a limited resource freely accessible to anyone with the means to reach it, LEO faces a tragedy of the commons problem. The growing amount of orbital debris raises two concerns. First, the greater the number of orbital debris pieces, the higher the likelihood of debris collisions. Second, every piece of orbital debris takes up a portion of LEO and limits the possibility of future launches. Currently, spacecraft operators try to mitigate the creation of more debris by pushing decommissioned spacecraft into different orbits. One approach is to propel the spacecraft into a lower orbit where the craft will burn up in the Earth's atmosphere.[7] Another approach is to propel the

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[1] Mark Garcia, *Space Debris and Human Spacecraft*, NASA (Sept. 26, 2013), https://www.nasa.gov/mission_pages/station/news/orbital_debris.html.

[2] *Id.*

[3] About Space Debris, The European Space Agency, https://www.esa.int/Space_Safety/Space_Debris/About_space_debris (last visited Mar. 30, 2023).

[4] *Frequently Asked Questions*, ORBITAL DEBRIS DEFENSE OFFICE, https://www.orbitaldebris.jsc.nasa.gov/faq/# (last visited Nov. 20, 2020).

[5] *Id.*

[6] *What Goes Up Doesn't Always Come Down*, NASA (Dec. 2, 2004), https://www.nasa.gov/audience/forstudents/9-12/features/F_What_Goes_Up_9-12.html#:~:text=Scientists%20believe%20that%20there%20are,debris%20larger%20than%2010%20cm.

[7] *DeOrbit and Closeout*, NASA, https://s3vi.ndc.nasa.gov/ssri-kb/topics/56/#:~:text=Deorbit%20is%20a%20common%20regulatory,up%20within%20the%20required%20timeframe. (last visited Jan. 16, 2023).

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spacecraft to a higher orbit where it is unlikely to make contact with functioning spacecraft.[8]

When it comes to cleaning up already-existing debris, some entrepreneurs propose a capture-and-return solution, under which a robotic-armed spacecraft would be launched to capture the debris and return it to the Earth.[9] Others suggest a miniature satellite equipped with nets and tethers.[10] Solutions such as these can help solve the space pollution problem. But the question of how to make debris removal enterprises profitable remains unanswered. One entrepreneurial solution in particular stands out: the launching of a depot into space where collected orbital debris could be sold to spacefaring nations. Even if the debris itself could not be profitably collected and resold, market incentives exist that may lead to governments, commercial space companies, and space insurance companies investing in debris removal.

This paper describes the orbital debris problem and the challenges this problem will present to spacefaring governments and commercial entities. Part I defines orbital debris and explains the state of the debris problem. Next, Part II identifies solutions currently being implemented, including mitigation strategies, avoidance maneuvers, disposal orbits, and new technologies. Part III examines the relevant portions of the governing space treaties. Part IV describes some proposed solutions that have not yet been applied. Finally, Part V explains why some of these proposed solutions are currently unworkable and how the space industry may induce entrepreneurs to innovate new solutions.

I. THE ORBITAL DEBRIS PROBLEM

Orbital debris is the natural result of space exploration. It has grown with the estimated 6,340 launches since 1957.[11] The term orbital debris covers a broad swath of objects. It may be used to refer to a derelict satellite, a centimeter-long piece of metal, a fleck of paint, or anything in between.[12] Pieces of orbital debris orbit the Earth at a speed of seven to eight kilometers per second and have an average impact speed ten times that of a bullet.[13] As the space industry grows, so too does the orbital debris problem.

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[8] *Graveyard Orbits and the Satellite Afterlife*, NESDIS (Oct. 31, 2016), https://www.nesdis.noaa.gov/news/graveyard-orbits-and-the-satellite-afterlife.

[9] Caleb Henry, *Swiss Start-up ClearSpace Wins ESA Contract to Deorbit Vega Rocket Debris*, SPACENEWS (Dec. 9, 2019), https://spacenews.com/swiss-startup-clearspace-wins-esa-contract-to-deorbit-vega-rocket-debris/.

[10] Mike Wall, *Meet OSCaR: Tiny Cubesat Would Clean Up Space Junk*, SPACE.COM (Apr. 24, 2019), https://www.space.com/space-junk-cleanup-cubesat-oscar.html.

[11] *Space Debris by the Numbers*, ESA (Dec. 22, 2022), https://www.esa.int/Space_Safety/Space_Debris/Space_debris_by_the_numbers.

[12] ORBITAL DEBRIS DEFENSE OFFICE, *supra* note 4.

[13] *Id.*

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Part I of this paper lays out the current state of the orbital debris problem in the space industry. Section A describes the current estimated quantities of orbital debris, the Kessler Syndrome theory, which hypothesizes the loss of LEO access due to orbital debris collisions, and past collisions that have contributed to growing concerns. Section B covers the development of a space insurance market in response to the threat orbital debris poses to launching parties. Finally, Section C details the growth of the space industry, particularly in the commercial sector, which has further contributed to the growth of the orbital debris problem.

A. *The Current State of the Orbital Debris Problem*

The orbital debris problem is neither remote nor fanciful. There are more than 25,000 pieces of "large" orbital debris orbiting the Earth.[14] Large pieces are those that measure at least ten centimeters in length and are trackable by satellite.[15] Many pieces are smaller. There are an estimated 500,000 pieces between one and ten centimeters and an additional 100 million piece larger than one millimeter.[16] Though small, these objects can have catastrophic effects upon collision due to their speed. Moreover, the smallest pieces of debris are difficult to track, making them more difficult to avoid and thus more dangerous.[17]

The potential hazard of orbital debris can be demonstrated via the Kessler Syndrome. The Kessler Syndrome, or the Kessler Effect, is a scenario theorized by NASA scientist Donald Kessler in which collisions between space objects in LEO-"lead[] to the growth of a belt of debris around the Earth."[18] Each collision creates more debris.[19] The proliferation of debris from continuous collisions "slowly results in an increase in the frequency of future collisions," with the potential to eventually hinder the Earth's access to space.[20]

Collisions have already occurred. In 1996, a piece of debris struck and severely damaged a French reconnaissance satellite.[21] The debris that struck the satellite was formed by a rocket explosion that occurred ten years earlier.[22] On several occasions during the Shuttle Program, flecks of paint struck NASA's space shuttles, resulting in the need to replace shuttle

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14 *Id.*

15 *Id.*

16 *Id.*

17 NASA, *supra* note 6.

18 Mike Wall, *Kessler Syndrome and the space debris problem*, SPACE: FUTURE US, https://www.space.com/kessler-syndrome-space-debris (July 14, 2022).

19 *Id.*

20 *Id.*

21 D. Mehrholz, et al., *Detecting, Tracking and Imaging Space Debris*, 129–30 ESA (2002) http://www.esa.int/esapub/bulletin/bullet109/chapter16_bul109.pdf (last visited Jan. 3, 2020).

22 *Id.*

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windows.[23] In 2016, a piece of debris less than one centimeter across chipped a window on the International Space Station.[24]

Several recent incidents have further contributed to the orbital debris problem. In 2007, China launched a missile at an old weather satellite, creating as many as 300,000 pieces of space debris through the satellite's destruction.[25] In 2009, two communication satellites collided, resulting in "almost 2,000 pieces of debris, measuring at ten centimeters (4 inches) in diameter, and many thousands more smaller pieces."[26] Then, in 2019, India launched a missile at one of its own satellites.[27] The destruction resulted in an estimated 3,000 pieces of debris.[28] In 2021, the Russian Federation tested an antisatellite device and destroyed an old U.S.S.R. satellite known as Cosmos-1408.[29] The test generated more than 1,500 pieces of trackable orbital debris and notably led to astronauts and cosmonauts aboard the ISS seeking shelter in their respective crew capsules for about two hours.[30]

B. *The Developing Space Insurance Market*

Some launching parties purchase post-launch insurance under which they can recover damages to their spacecraft if it damaged by a piece of debris.[31] For most of the Earth's space exploration history, launching parties have either self-insured or insured a government vehicle with taxpayers'

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[23] Garcia, *supra* note 1.

[24] Rachel Feltman, *A Bit of Debris Chipped the International Space Station. That's Just One Piece of a Much Bigger Problem.*, WASH. POST (May 12, 2016), https://www.washingtonpost.com/news/speaking-of-science/wp/2016/05/12/a-bit-of-debris-chipped-the-international-space-station-thats-just-one-piece-of-a-much-bigger-problem/.

[25] Marc Kaufman & Dafna Linzer, *China Criticized for Anti-Satellite Missile Test Destruction of an Aging Satellite Illustrates Vulnerability of U.S. Space Assets*, WASH. POST (Jan. 19, 2007), https://www.washingtonpost.com/archive/politics/2007/01/19/china-criticized-for-anti-satellite-missile-test-span-classbankheaddestruction-of-an-aging-satellite-illustrates-vulnerability-of-us-space-assetsspan/ae3462c4-c2d9-422b-bc17-dc040458fe64/.

[26] Brian Weeden, *2009 Iridium-Cosmos Collision Fact Sheet*, SECURE WORLD FOUND., https://swfound.org/media/6575/swf_iridium_cosmos_collision_fact_sheet_updated_2012.pdf (updated Nov. 10, 2010).

[27] *Mission Shakti: Space Debris Warning After India Destroys Satellite*, BBC (Mar. 28, 2019) https://www.bbc.com/news/world-asia-india-47729568.

[28] Loren Grush, *India Shows It Can Destroy Satellites in Space, Worrying Experts About Space Debris*, THE VERGE (Mar. 27, 2019, 3:50 PM), https://www.theverge.com/2019/3/27/18283730/india-anti-satellite-demonstration-asat-test-microsat-r-space-debris.

[29] Jeff Foust, *Russia Destroys Satellite in ASAT Test*, SPACENEWS (Nov. 15, 2021, 6:20 PM) https://spacenews.com/russia-destroys-satellite-in-asat-test/.

[30] *Id.*

[31] *Commercial Space Launch Insurance: Weakness in FAA's Insurance Calculation May Expose the Federal Government to Excess Risk*, GAO (Mar. 23, 2017), https://www.gao.gov/products/GAO-17-366.

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dollars.[32] Recently, a market for space insurance has developed alongside the growth of the commercial space industry.[33] The Federal Aviation Administration (FAA) now requires launching parties to purchase third-party liability and government property insurance plans.[34] Third-party liability insurance covers damages incurred by an accident that injures the uninvolved public.[35] Government property insurance covers damages to federal property or personnel.[36] Companies are not required to purchase third-party liability and government property insurance plans if they can demonstrate sufficient financial resources with which they could pay in the event damages were incurred.[37]

Until recently, space insurance rates were the lowest they had been they had been in thirty years.[38] Then insured parties claimed roughly $600 million U.S. dollars in 2018.[39] For three out of the past seven years, space insurance companies have failed to make a profit.[40] The world's second-largest reinsurer, Swiss Re, exited the space insurance market in 2019 due to the high-cost claims and low premiums.[41] Insurers have been steadily raising premiums to compensate for claims that cost hundreds of millions of dollars.[42] Thus, the cost of space insurance is rising for launching parties.

C. *The Rising Stakes of the Orbital Debris Problem*

The Earth's use of space is only growing. As of December 2022, approximately 9,790 satellites orbit the Earth.[43] The number of satellites launched each year is rising due to the commercialization of space. SpaceX alone plans to send up 42,000 satellites through its Starlink mission.[44] The

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32 Kevin Walsh & Robert Williams, *Covering the Increased Liability of New Launch Markets,* 32nd SPACE SYMPOSIUM AT TECHNICAL TRACK, (Apr. 2016), 1, https://www.spacesymposium.org/wp-content/uploads/2017/10/Williams-Robert-COVERING-THE-INCREASED-LIABILITY-OF-NEW-LAUNCH-MARKETS.pdf.

33 *Id.* at 5.

34 *Id.* at 2.

35 GAO, *supra* note 31.

36 *Id.*

37 *Id.*

38 Caleb Henry, *Big Claims, Record-Low Rates: Reshaping the Space Insurance Game*, SPACE NEWS (Sept. 6, 2019), https://spacenews.com/big-claims-record-low-rates-reshaping-the-space-insurance-game/.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 ESA, *supra* note 11.

44 *Starlink Satellite Constellation of SpaceX*, EOPORTAL, https://directory.eoportal.org/web/eoportal/satellite-missions/s/starlink#:~:text=Starlink%20is%20a%20satellite%20constellation,new%20spaceborne%20Internet%20communication%20system (last visited Oct. 25, 2020).

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mission's first launch took place in May of 2019.[45] As of November 2022, only three and a half years later, SpaceX has already launched 3,271 of those satellites.[46]

SpaceX is far from the only company reaching for the stars. Between 2016 and 2018, the number of launch and re-entry operations licensed and permitted by the FAA more than doubled.[47] Additionally, the number of firms actively communicating with the FAA about launch operations increased by more than 360 percent between 2014 and 2019.[48]

II. CURRENT SOLUTIONS

Part II of this paper describes solutions to the orbital debris problem, both those already in place and others which companies are currently developing. Section A describes regulations countries have enacted to ensure that further production of orbital debris is mitigated. Section B details an in-orbit measure, collision avoidance maneuvers, which governments and companies use to dodge orbital debris. Section C covers the end-of-life procedures used to safely dispose of orbiting spacecraft without creating even more debris. Lastly, Section D identifies the work of three entrepreneurial companies contributing to debris collection and removal efforts.

A. *International and National Regulations*

There would likely be far more collisions if not for the current systems in place to avoid them. Launching States[49] are required to register their space objects under the United Nations' Convention on Objects Launched into Outer Space, so that all objects orbiting the Earth are known.[50] Once launched, space objects are then tracked by satellites. The United States' Department of Defense maintains a Space Surveillance Network of satellites

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45 Loren Grush, *SpaceX Successfully Launches First 60 Satellites in Massive Starlink Internet Constellation*, VERGE (May 24, 2019, 3:35 AM), https://www.theverge.com/2019/5/15/18624630/spacex-elon-musk-starlink-internet-satellites-falcon-9-rocket-launch-live.

46 Tereza Pultarova and Elizabeth Howell, *Starlink Satellites: Everything You Need to Know About the Controversial Constellation*, SPACE.COM (Nov. 23, 2022), https://www.space.com/spacex-starlink-satellites.html.

47 *FAA Aerospace Forecast Fiscal Years 2020-2040*, FAA, 1, 39, https://www.faa.gov/data_research/aviation/aerospace_forecasts/media/Commercial_Space.pdf (last visited October 25, 2020).

48 *Id.* at 38.

49 A Launching State is defined as "(i) [a] State which launches or procures the launching of a space object; (ii) [a] State from whose territory or facility a space object is launched." Convention on Registration of Objects Launched into Outer Space art. I(a), Nov. 12, 1974, 28 U.S.T. 695, 1023 U.N.T.S. 15, T.I.A.S. No. 8480 [hereinafter Registration Convention].

50 Registration Convention art. II(1).

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that can track debris larger than a softball.[51] Europe does not have such a satellite surveillance program.[52] However, there is a large Earth-born radar facility in Germany that detects and tracks pieces of debris in LEO.[53] As of the agency's 2019 budget meeting, the European Space Agency (ESA) is also developing an automated collision avoidance system.[54] This system will "automatically assess the risk and likelihood of in-space collisions, improve the decision making process on whether or not a maneuver is needed, and may even send the orders to at-risk satellites to get out of the way."[55]

Individual nations also self-regulate. The U.S. has signed into effect its own regulations to mitigate orbital debris.[56] The U.S. Government Orbital Debris Mitigation Standard Practices focus on four distinct areas of debris mitigation: (1) restrictions on creation of debris during normal operations; (2) minimization of risk of in-orbit explosion; (3) flight and operation plans for minimizing the risk of collision with other space objects; and (4) effective disposal plans for when a spacecraft is no longer operational.[57] These regulations are binding on the U.S. government, and many U.S. based commercial entities voluntarily adhere to similar measures.[58]

Other agencies and nations have created regulations. The ESA adopted regulations largely based off the U.S. standards.[59] France has a similar standard but does not require commercial entities to comply.[60] In the U.K., all outer space activity by both government and commercial entities is subjected to risk analyses.[61] Japan developed a set of debris standards and created a committee that works with "experts from space agencies, research institutes, universities and related organizations" to coordinate nationally and internationally on space debris.[62] To prevent the creation of more orbital debris, the Russian Federation has prohibited the intentional destruction of space objects and adopted a set of mitigation standards.[63] Finally, Italy applies a code of conduct to its own space agency's projects but not to commercial Italian entities.[64]

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51 Garcia, *supra* note 1.

52 Mehrholz, *supra* note 21.

53 *Id.*

54 *Automating Collision Avoidance*, ESA (Oct. 22, 2019), https://www.esa.int/Space_Safety/Space_Debris/Automating_collision_avoidance.

55 *Id.*

56 Benjamin Jacobs, *Debris Mitigation Certification and the Commercial Space Industry: A New Weapon in the Fight Against Space Pollution*, 20 MEDIA L. & POL'Y 117, 125 (2011).

57 *Id.*

58 *Frequently Asked Questions*, NASA, https://orbitaldebris.jsc.nasa.gov/faq/# (last visited Feb. 14, 2023).

59 Jacobs, *supra* note 56, at 121.

60 *Id.* at 122-23.

61 *Id.* at 122.

62 *Id.* at 124.

63 *Id.* at 123.

64 *Id.* at 123.

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B. *Collision Avoidance Maneuvers*

Space objects with thrusters, like the International Space Station (ISS), are capable of conducting collision avoidance maneuvers. Spacecraft operators can make their crafts conduct these maneuvers by sending them a series of commands, effectively telling the craft to "get out of the way."[65] As of September 2020, the ISS has conducted 33 such maneuvers since its launch in 1999.[66] The ESA must conduct an average of more than one maneuver per satellite every year.[67] Though common, these collision avoidance maneuvers are a costly practice in the aerospace industry. Resources aboard spacecraft are limited, and the fuel required for maneuvers will eventually run out if not replenished by a satellite servicing mission.[68] When a spacecraft conducts a collision avoidance maneuver, it burns off some of its limited fuel and delays or interrupts its normal operations.[69]

C. *End-of-Life Procedures*

When a spacecraft has completed its mission, the operator of the craft may deactivate the craft's instruments and use the craft's own propulsion to move it into a disposal orbit or a graveyard orbit.[70] A disposal orbit is an orbit low enough that orbital debris will burn up by lowering into the Earth's atmosphere.[71] As a safety measure, operators lowering spacecraft into disposal orbits target the South Pacific Ocean in case the craft survives the intense heat of re-entering the Earth's atmosphere.[72] NASA used the disposal orbit approach to dispose of its first space station, Skylab.[73] SpaceX also uses the disposal orbit approach for its Starlink satellites and has successfully deorbited over 200 satellites in this fashion.[74] In contrast, a graveyard orbit is an orbit with an altitude so high that debris is unlikely to make contact with other objects.[75] Spacecraft in higher orbits use the graveyard orbit approach

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65 *Automating Collision Avoidance*, *supra* note 54.

66 Sidharth MP, *International Space Station Evaded Three Collision Risks in 2022*, WION (Jan. 16, 2023) https://www.wionews.com/science/international-space-station-evaded-three-collision-risks-in-2022-553222; *see also* Mark Garcia, *Station Boosts Orbit to Avoid Space Debris*, NASA (Sept. 22, 2020), https://blogs.nasa.gov/spacestation/2020/09/22/station-boosts-orbit-to-avoid-space-debris/.

67 *Automating Collision Avoidance*, *supra* note 54.

68 *Spacecraft Disposal*, NASA SPACE OPERATIONS LEARNING CTR., https://solc.gsfc.nasa.gov/modules/disposal/mainMenu_textOnly.php (last visited Jan. 29, 2023).

69 *Automating Collision Avoidance*, *supra* note 54.

70 *Spacecraft Disposal*, *supra* note 68.

71 *Id.*

72 *Id.*

73 *Id.*

74 *SpaceX's Approach to Space Sustainability and Safety*, SPACEX (Feb. 22, 2022), https://www.spacex.com/updates/#sustainability.

75 NASA SPACE OPERATIONS LEARNING CTR., *supra* note 69.

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because lowering into a disposal orbit would use up too much of their operational fuel.[76]

D. *Orbital Debris Entrepreneurs*

Mitigation and clean-up plans for orbital debris are more than just fanciful ideas. Some entrepreneurial businesses already have their foot in the door. In 2019, a Swiss company named ClearSpace won an ESA contract for the clean-up of old ESA rocket debris.[77] The contract is worth roughly 113 million U.S. dollars.[78] Under the contract, ClearSpace will lead several companies in building a rocket equipped with four robotic arms.[79] These arms will be used to capture the old rocket and return it to the Earth's atmosphere in 2025.[80]

Astroscale Holdings, Inc. is a start-up company headquartered in Japan and solely dedicated to the clean-up and mitigation of space debris.[81] The Japanese Aerospace Exploration Agency (JAXA) selected Astroscale for Phase I of its Commercial Removal of Space Debris Demonstration (CDR2).[82] Under Phase I, Astroscale will build and launch a satellite that will capture information about the location of the derelict upper stage[83] of a Japanese rocket.[84] Phase II will involve the actual removal of the upper stage.[85] Phase I of the contract alone is worth 4.5 million U.S. dollars.[86] Astroscale has also developed "end of life" services for satellites.[87] The company's first demonstration of this service, which involved a two

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76 *Graveyard Orbits and the Satellite Afterlife*, *supra* note 8.

77 *Swiss Start-up ClearSpace Wins ESA Contract to Deorbit Vega Rocket Debris*, *supra* note 9.

78 Stuart Clark, *SpaceWatch: ESA Awards First Junk Clean-up Contract*, GUARDIAN (Dec. 12, 2019), https://www.theguardian.com/science/2019/dec/12/237pacewatch-esa-awards-first-junk-clean-up-contract-clearspace?CMP=gu_com.

79 *Swiss Start-up ClearSpace Wins ESA Contract to Deorbit Vega Rocket Debris*, *supra* note 9.

80 *About*, CLEARSPACE, https://clearspace.today/about-clearspace/ (last visited Jan. 16, 2023).

81 *About*, ASTROSCALE, https://astroscale.com/about-astroscale/about/ (last visited Feb. 4, 2023).

82 *JAXA Concludes Partnership-type Contract for Phase I of Its Commercial Removal of Debris Demonstration (CRD2)*, JAXA (Mar. 23, 2020), https://global.jaxa.jp/press/2020/03/20200323-1_e.html.

83 An upper stage is part of a rocket that is used to propel the rocket into a high altitude. Some upper stages remain attached to a rocket for its entire life span, but others detach after completing their portion of the mission. *Upper Stages*, HISTORIC SPACECRAFT, https://historicspacecraft.com/Rockets_Upper_Stage.html#:~:text=Upper%20Stage%20Overview&text=Upper%20stages%20propel%20payloads%20on,several%20times%20while%20in%20space.

84 Max Blenkin, *Japanese Space Junk Removal Firm Astroscale to Work With JAXA on Demo Project*, SPACECONNECT (Feb. 18, 2020), https://www.spaceconnectonline.com.au/industry/4161-japanese-space-junk-removal-firm-astroscale-to-work-with-jaxa-on-demo-project

85 *Services*, ASTROSCALE, https://astroscale.com/services/active-debris-removal-adr/ (last visited Feb. 5, 2023).

86 *Id.*

87 *Id.*

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spacecraft rendezvousing in LEO for the purpose of on-orbit servicing, occurred in 2021.[88]

Another company, NorthStar Earth & Space, wants to send up a constellation of satellites to better track pieces of space debris.[89] Using the satellites, NorthStar would predict potential collisions.[90] The production of space debris clean-up and mitigation services is not some far-off concept. It is already here.

III. THE FIVE SPACE TREATIES

There are five international treaties currently governing activities in outer space: the Outer Space Treaty, the Rescue Agreement, the Liability Convention, the Registration Convention, and the Moon Agreement.[91] All but the Moon Agreement bear on how Launching States may proceed in handling orbital debris. These five treaties are often criticized as being outdated, with the most recent treaty being opened for signatures more than forty years ago in 1979.[92]

The Outer Space Treaty of 1967 (OST), colloquially referred to as the Magna Carta of space law, was the first treaty signed.[93] Under the OST, a Launching State "shall retain jurisdiction and control" over any object it launches.[94] This jurisdiction and control is unaltered by the object's location in space or its return to the Earth.[95] Articles VI and VII of the treaty cover the liability of Launching States for their space objects.[96] Further, the OST requires that a Launching State's objects "shall be returned" to the Launching State.[97] This return requirement is explained in detail in The Rescue Agreement of 1968.[98]

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88 *Astroscale's ELSA-d Mission Successfully Completes Complex Rendevouz Operation*, ASTROSCALE (Mar. 4, 2022) https://astroscale.com/astroscales-elsa-d-mission-successfully-completes-complex-rendezvous-operation/.

89 Neel V. Patel, *This Company Wants to Deal With Space Junk by…Sending More Stuff Into Space*, MIT TECHN. REV. (Sept. 16, 2019), https://www.technologyreview.com/2019/09/16/133004/this-company-wants-to-deal-with-space-junk-by-sending-up-more-space-junk/.

90 *Id.*

91 *See* Jason Krause, *Rocket Law*, 103 ABA J. 45, 49 (2017). https://www.abajournal.com/magazine/article/space_law.

92 *Id.*

93 *Id.*

94 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. VIII, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 [hereinafter OST].

95 *Id.*

96 *Id.* at art. VI, VII.

97 *Id.* at art. VIII.

98 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Dec. 3, 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599, 672 U.N.T.S. 119.

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Under the Rescue Agreement, contracting states must return a space object to the space object's Launching State if the object falls to the Earth and lands in the non-Launching State's territory.[99] In other words, if an American capsule were to land in Canadian territory, Canada would be obliged to return the capsule to the United States.

The Convention on International Liability for Damage Caused by Space Objects builds off Articles VI and VII of the OST.[100] It holds Launching States liable for the damage done by their space objects.[101] For damages incurred in airspace or on land, the Launching State with which a space object is registered bears "absolute" liability to the party injured by the space object.[102] If the injury occurs in outer space, the Launching State with which an object is registered only bears "for fault" liability.[103] The Convention has been invoked one time, when the U.S.S.R. was held liable to Canada for damages caused by a Soviet satellite crashing into the Northwest territory of Canada.[104] The Government of the Soviet Union paid the Canadian Government three million Canadian dollars in settlement.[105]

Fourth and finally, under the Convention on Registration of Objects Launched into Outer Space, parties are required to register every space object they launch into space with a national space agency.[106] National space agencies are liable for the space objects registered with them.[107] The mandated registration of objects also better enables the U.N. to track space objects.[108] Of all space objects launched into space, an estimated 88 percent are registered on the U.N.'s registry.[109]

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99 *Id.* at art. 5(3).

100 Joseph A. Burke, *Convention on International Liability Caused by Space Objects: Definition and Determination of Damages After the Cosmos 954 Incident*, 8 FORDHAM INT'L L.J., 255, 256 (1984).

101 Convention on International Liability Caused by Space Objects art. II, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762.

102 Louis de Gouyon Matignon, *Space Insurance Space Law*, SPACE LEGAL ISSUES (Aug. 6, 2019), https://web.archive.org/web/20201126090308/https:/www.spacelegalissues.com/space-insurance-space-law/.

103 *Id.*

104 Joseph A. Burke, *supra* note 100.

105 Alexander F. Cohen, *Cosmos 954 and the International Law of Satellite Accidents*, 10 YALE J. INT'L L. 78, 80 (1984).

106 Registration Convention, *supra* note 49.

107 *Id.*, art. VI.

108 *Id.*

109 Louis de Gouyon Matignon, *The 1976 Registration Convention*, SPACE LEGAL ISSUES (May 30, 2019), https://web.archive.org/web/20220215074849/https:/www.spacelegalissues.com/the-1976-registration-convention/.

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IV. PROPOSED SOLUTIONS

As the orbital debris problem has grown in magnitude, several solutions have been suggested. Thinkers have recommended everything from new treaties to individual debris limits to liability regimes.

A. *A Tradeable Allowance Scheme*

Taylor suggests that a solution to the space debris problem can be found in a tradeable allowance scheme much like the market scheme at work in carbon emissions trading.[110] In this scheme, Launching States would agree to place a cap on the amount of debris any one Launching State can have in space.[111] If a Launching State reaches its limit of space debris, it would then have to remove debris or "purchase" an unused allotment from another Launching State before sending more.[112] This scheme would create a market for space debris removal, inspiring private companies to innovate and offer debris removal services that could be bought by a Launching State that reached its debris limit.

B. *A Market-Share Liability Regime*

Sundahl proposes a market-share liability regime like the one first laid out in the famous case *Sindell v. Abbott Laboratories*.[113] In *Sindell*, a woman with cancer sued five different drug manufacturing companies who produced the drug that caused her cancer.[114] The *Sindell* Court was faced with determining which of the five companies was liable for damages caused by the woman's cancer but could not answer the question. Too much time had passed between the initial sale of the drug and the later lawsuit, so there was no way to know which company made the drug that the plaintiff actually took.[115] Instead, the Supreme Court of California imposed market-share liability, holding the drug manufacturers liable for damages in proportion to the percentage of the market each manufacturer held.[116]

Sundahl has suggested that a market-share liability regime could similarly be applied to the orbital debris problem. Under Sundahl's

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110 Jared B. Taylor, *Tragedy of the Space Commons: A Market Mechanism Solution to the Space Debris Problem*, 50 COLUM. J. TRANSNAT'L L. 253, 274-76 (2011).

111 *Id.* at 275.

112 *Id.*

113 Mark J. Sundahl, *Unidentified Orbital Debris: The Case for Market-Share Liability Regime*, 24 HASTINGS INT'L & COMP. L. REV. 125, 141 (2000).

114 Sindell v. Abbott Labs., 607 P.2d 924, 925-26 (Cal. 1980).

115 *Id.* at 929-30.

116 *Id.* at 937-38.

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suggestion, the proportion of unidentifiable debris attributed to a single Launching State would be determined according to the State's percentage of large, identifiable debris.[117] That percentage would then be applied when unidentifiable debris collides with identifiable objects, requiring a Launching State to pay its percentage of the incurred damage to the owner of the harmed hardware.[118]

C. *Treating Orbital Debris as Abandoned Property*

Munoz-Patchen argues that the definition of "space object," as it is written in the Outer Space Treaty, should not be interpreted to include orbital debris.[119] Instead, interested parties should treat orbital debris as abandoned property, assuming the Launching State has no intention of using the debris again.[120] If orbital debris is understood to be abandoned property, it will be easier for debris clean-up to begin because the sovereignty issue—you're not allowed to touch someone else's space objects—will be resolved.[121]

Nevala suggests that countries should treat debris as abandoned property and, taking it one step further, they should be able to recover debris under the rule of capture.[122] The rule of capture is a property law doctrine commonly applied to oil and gas.[123] Under this rule, "landowners have the right to produce any migratory subsurface minerals that they can capture without being liable to their neighbor, even if in doing so they deprive their neighbor of their ownership interest in the actual minerals."[124] Nevala divides space debris into two groups: (1) space components that the Launching State moves into a disposal orbit when it has finished using the component, and (2) space components that the Launching State does not move into a disposal orbit when it has finished using the component.[125] The debris could be fairly treated as abandoned property under the first group, Nevala argues, and thus subject to the rule of capture, because the Launching State has effectively declared that it no longer intends to use the components.[126]

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117 Sundahl, *supra* note 113, at 143.

118 *Id.* at 146.

119 Chelsea Munoz-Patchen, *Regulating the Space Commons: Treating Space Debris as Abandoned Property in Violation of the Space Treaty*, 19 CHI. J. INT'L L. 233, 246 (2018).

120 *Id.* at 247.

121 *Id.* at 249-50.

122 Emily M. Nevala, *Waste in Space: Remediating Debris through the Doctrine of Abandonment and the Law of Capture*, 66 AM. U.L. REV. 1495, 1529-30 (2017).

123 B Kramer & P Martin, *The Law of Pooling and Unitization*, § 2.01 (3 ed. Matthew Bender 1989).

124 *Id.*

125 Nevala, *supra* note 122, at 1530-31.

126 *Id.*

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D. *Mandating a Pigouvian Tax*

Adilov, et. al. suggests that a Pigouvian tax enforced on launching entities would help regulate the market and induce launching parties to send the socially optimal number of launches.[127] A Pigouvian tax is an economic mechanism by which producers are made to internalize their own negative externalities, like requiring a factory to pay for damages to neighboring property caused by the factory's pollution.[128] Theoretically, a factory required to pay off neighbors for its negative externalities (the pollution) is likely to work fewer hours in order to create less pollution and avoid greater pay outs.[129] Forcing the factory to internalize its negative externalities drives it to produce at a socially optimal level, instead of at the level that is most beneficial to the factory.[130] The "socially optimal level" is the production level that takes into account the costs and benefits of all parties affected, or the level at which a "social planner" would set production if they had knowledge of all the parties.[131] This same theory can be applied to the orbital debris problem, in which launching parties are the factory and orbital debris is the pollution. Launching parties would have to choose between paying the tax to send more launches, thereby creating more debris, or avoiding the tax and sending fewer launches.[132]

V. ARGUMENT

Under the text of the OST, orbital debris remains the property of the Launching State that sent it into space, regardless of the functionality of the object or how much time has passed since the launch.[133] This raises the question of how another government or private company could legally take possession of the Launching State's property. The question is even further complicated by the fact that it is impossible to know the true owner of every piece of debris. The Astroscale and ClearSpace clean-up contracts escape the legal concerns raised by orbital the OST. Both companies were hired by a national government's space agency to clean up a particular piece of space

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127 Nodir Adilov, Peter J. Alexander & Brendan M. Cunningham, *An Economic Analysis of Earth Orbit Pollution*, 60 ENVTL. & RESOURCE ECON 81, 94 (2015).

128 *Id.*at 85.

129 *See* Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. Rev. 93, 95 (2015) ("A Pigouvian tax is a tax equal to the harm that the firm imposes on third parties. For example, if a manufacturer pollutes, and the pollution causes a harm of $ 100 per unit of pollution to people who live in the area, then the firm should pay a tax of $ 100 per unit of pollution. This ensures that the manufacturer pollutes only if the value of the pollution-generating activities exceeds the harm, such that the social value of those activities is positive.").

130 *Id.*

131 *Id.* at 101.

132 *Id.* at 94.

133 OST, *supra* note 94.

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debris. The pieces being cleaned up are both large and intact, making the identification of the pieces fairly simple and escaping the ownership quandary. These large and intact debris pieces are the minority. If space agencies and companies are getting serious about debris clean-up, they will have to tackle the legal issues associated with small debris. When it comes to the millions of less-than-a-centimeter-long pieces of space junk that cannot be tracked by current satellites, things get more complex. Under the OST, the true owner of a piece of debris could charge another nation for violating the treaty if the second nation took possession of the true owner's property.

Currently, the law limits debris removal market growth, but this legal impediment may be overcome by adopting a limited application of the abandonment theory as further explained in this section. This limited application would only apply to smaller pieces of debris, avoiding some of the national security concerns Launching States might have about the reverse engineering of their inactive space objects. The limited application would also be very practical, given the near impossibility of identifying the true owner of the smallest pieces of orbital debris.

Even if the abandonment theory solves one of the legal problems, the debris market still faces economic hurdles. Many of the current and proposed solutions miss the mark for two reasons: (1) they simply do not do enough, and (2) they overlook the great benefits three sectors of the space industry would reap if orbital debris was removed. There is already a market for debris removal. Beyond creating standards and treaties to regulate the debris, leaders in all sectors of the space industry must recognize the net gain of removing orbital debris. Unlike pollution on the Earth, which does not usually bear direct costs to the companies causing it unless those costs are artificially imposed, orbital debris does and will continue to, in exponentially increasing amounts, drive up costs for spacefaring entities. As argued below, governments, space insurance providers, and commercial space companies are incentivized to invest in the debris removal market to avoid the increasing costs they face due to debris.

Part V of this paper analyzes the shortcomings of some debris mitigation approaches, suggests it is necessary to adopt the abandoned property theory regarding inactive, small pieces of debris, identifies incentives in the space industry's market driving the need for debris removal, and offers a future potential solution in the space depot concept. Section A covers several solutions that face pitfalls, including treaties, disposal orbits, a market-share liability agreement, a tradeable allowance scheme, and a Pigouvian tax. Section B argues that the abandoned property theory should be accepted in at least a limited capacity to overcome the issue of removing small pieces of inactive debris otherwise protected under the OST. Finally, Section C analyzes incentives in the space industry to create a market for orbital debris removal and Section D suggests that the most efficient solution in the future would be a space debris depot.

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A. *The Shortcomings of Treaties and Disposal Orbits*

Several of the proposed solutions are unworkable or counterproductive. Thus far, nations have been unwilling to commit to a binding debris mitigation or removal treaty. As is the nature of a tragedy of the commons, solutions that do not account for all parties accessing the resource will be incomplete. Even if the majority of Launching States agreed to binding mitigation standards, the refusal of a handful of Launching States to abide would result in destruction of LEO as a resource.

1. Market-Share Liability

Under the market share liability proposal, nations would be treated like manufacturers under *Sindell*.[134] Each nation would agree to pay a percentage of damages caused by space debris collisions.[135] A Launching State's percentage would be determined by the proportion of orbital debris that state has produced in comparison to total orbital debris.[136] This solution will not work unless every debris-creating State agrees to pay their "fair share." In the event that a State refuses, other Launching States would be stuck shouldering the non-compliant State's burden. Launching States are unlikely to agree to a treaty that could potentially leave them paying costs with no guarantee that other States will take responsible approaches to the debris problem.

2. Tradeable Allowance Scheme

Under the tradeable allowance scheme, each Launching State would have to agree to a limit on its launching activity.[137] As the commercial space industry continues to grow, States are even less likely to accept a self-imposed cap on their launching activity because their limited activity would be subject to demands from both government and commercial entities. The trouble with a market mechanism regulated by an international treaty is that it would require signing parties to voluntarily operate their aerospace industries at a level less productive than the market would demand. States with stronger commercial space industries would be likely to lose business if they crack down on launch activity. Even if these highly commercial States innovate and invest in debris removal or trade with another State for additional debris allowance, those states must eat that additional cost somehow. The additional cost would most logically be passed on to the

134 Sundahl, *supra* note 113.
135 *Id.* at 146.
136 *Id.* at 143.
137 Taylor, *supra* note 110.

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commercial companies, driving those companies to relocate to other states with less government space activity eating up the State's allowance. Thus, each signing party to such a treaty would be giving up potential individual profit to protect the future of the industry. The treaty therefore incentivizes each party to be the "rule-breaker," maximizing their own utility at the expense of the other rule-abiding parties.

3. Disposal Orbit

SpaceX's approach is also not a lasting solution. When a launched satellite fails to work, SpaceX will propel the inactive satellite into a disposal orbit and send up a replacement satellite.[138] Inevitably, the more objects companies sends into space, the more likely it is a collision will occur. Additionally, there is always the risk that an object's thrusters will fail to function properly. Pushing satellites into a disposal orbit is not in itself problematic, but it is mere mitigation—not remediation.

4. A Pigouvian Tax and Treaties

Pigouvian taxes and treaties are imperfect solutions to the space debris problem as well because they both require Launching States to do less than the free market demands. Such solutions would only be sustainable so long as governments are willing to abide by and fund them. Inevitably, individual governments will be tempted to act in their own self-interest. As is the nature of a tragedy of the commons, one entity acting in its own self-interest will throw off the effectiveness of the entire regulation. Hence, treaty solutions to the tragedy of the commons are only ever one non-compliant party away from breaking down.

B. *An Analysis of the Abandoned Property Theory*

The abandoned property solution to the legal roadblocks is more practical. This theory does raise some national security concerns that have thus far prevented its adoption. Launching States worry about the potential for rivals to reverse engineer their inactive space objects. There is a close relationship between space objects like reconnaissance satellites and national security. Launching States are unlikely to voluntarily subject themselves to such vulnerability by adopting the abandoned property theory without some limitations on the application of the theory.

A textual reading of the OST is problematic for the abandoned property theory. A Launching State "retain[s] jurisdiction and control" over its

138 SPACEX, *supra* note 74.

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property regardless of the property's location.[139] Neither the OST nor the four subsequent U.N. space treaties make exceptions for objects of a particular size, age, or function. Instead, the OST places the duty on the state which has found another state's object on the Earth to return it, and in space, to leave it alone.[140] The lack of international agreement and the reluctance of some Launching States to restrict the commercial sector will hinder efforts to make a blanket application of this theory as well, for government and private entities would have to agree on what did or did not count as abandoned.[141]

The national security concerns could be mitigated by differentiating between larger, intact pieces of orbital debris and small pieces of orbital debris, which make up the majority of debris. Nevala made a similar suggestion when examining the potential application of the rule of capture to orbital debris: separating the debris into two categories.[142] There is no national security concern for centimeter-long pieces of metal. While a Launching State may worry about another country reverse engineering one its reconnaissance satellites or the upper stage of one of its rockets, the same concern is not raised if another country manages to capture small bits of metal or fiberglass that originated from a Launching State's space object.

Finally, adoption of the abandonment theory as to small pieces of orbital debris is just plain practical. It is near-impossible to know who owns the smallest pieces of orbital debris, making it also near-impossible for litigating Launching States to prove themselves as true owners. Further, it is very unlikely that Launching States intend to make further use of small, inactive pieces of debris, and thus the "space objects" could reasonably be considered abandoned. If small pieces of orbital debris are in fact abandoned, there is no legal impediment to another government or a private company capturing them.

C. *Opened Doors for Debris Entrepreneurs*

If the abandoned property theory is accepted as outlined above, entrepreneurs in the orbital debris market can more freely innovate to meet removal needs. Companies are already willing to step into this new market: ClearSpace and Astroscale are just two examples. However, for an orbital debris market to develop beyond a government contract here and there, the collection of debris must be profitable. This section considers how the removal of debris financially benefits governments, space insurance providers, and commercial space entities. It also suggests that governments provide subsidies to debris removal entrepreneurs and that space insurance providers and commercial space entities invest in debris removal companies,

139 OST, *supra* note 94.
140 *Id.*
141 Jacobs, *supra* note 56, at 130.
142 Nevala, *supra* note 122, at 1530-31.

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all of their own accord. Treaties, taxes, and market mechanisms will likely fail when one or more party acts in its own interest. Investments and the work of entrepreneurs in the private sector, subsidized by governments with active space agencies, is the solution most likely to succeed in building a strong orbital debris market.

1. Incentives to Require Insurance

Under the Liability Convention, Launching States are incentivized to require any launching party to purchase a space insurance plan that covers damages to third parties caused by the launching party's debris. This is because every launching party must register their space object with a space agency, making a Launching State liable for any harm that object causes. It is, therefore, in a Launching State's interest to require launching parties to purchase insurance. Launching States could subsidize these insurance policies. Historically, government subsidies have been common in the space industry.[143]

2. Incentives to Lower Premiums

The likelihood of orbital debris collisions is rising, leading to a similar rise in space insurance prices as well. The cost of space insurance increases mission costs to commercial entities, and commercial space is already a costly business without high insurance premiums. Commercial entities are therefore incentivized to lower the risk of harm to their space objects, allowing insurance providers to correspondingly lower premiums. Cleaning up space debris is one way to accomplish this premium-lowering goal.

3. Incentives to Decrease Insurance Claims

Finally, the chance that debris will collide with a space object a space insurance company is covering makes orbital debris a concern for insurance providers as well. Space insurance providers are leaving the industry due to the lack of profit.[144] In recent years, providers have been collecting insurance premiums that are too low to meet the claims later made by insured parties.[145] The more debris orbiting the Earth, the more likely a debris collision will include an insured space object, leading to a high insurance claim. Therefore, both producers and consumers in the space insurance market have incentives to invest in lowering the probability of orbital debris collisions.

143 Walsh & Williams, *supra* note 32, at 1.

144 *Big Claims, Record-Low Rates: Reshaping the Space Insurance Game*, *supra* note 38.

145 *Id.*

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D. *A Space Depot*

With governments, commercial space entities, and space insurance providers incentivized to invest in orbital debris removal or collection, the next question for the future is how to best clean up the space highways of debris traffic. Thus far, only the burning up and shipping off of debris have been attempted. Spacecraft operators have accomplished both methods by using the craft's own fuel to either propel the craft low enough that it burns up in the Earth's atmosphere or propel it high enough that it reaches an altitude where it is unlikely to make contact with other space objects. If successful, the ClearSpace mission will be the first time a piece of orbital debris is moved out of orbit by a method other than self-propelling.[146]

One untried idea is a debris depot. Private companies could collect orbital debris and store it in a single location, known as a depot. Such a depot would function as an in-orbit recycling center and be a site for spacefaring nations to purchase scrap metal, a currently non-existent resource in space. This resource could be useful for making in-orbit repairs and other unforeseen needs in the future. Consider, for example, NASA's goal of returning to the moon by 2024 and building a permanent habitat.[147] Or SpaceX' goal of reaching Mars by 2026.[148] As the human presence in space expands beyond the handful of astronauts manning the International Space Station at any given time, the need for building and repair materials will also grow. Because every space launch costs millions of dollars, launching raw materials into space is not a task lightly done. The launching cost of orbital debris has already been paid. Finding uses for the orbital debris would allow nations and countries to recoup some of this sunk cost.

For orbital debris collection to be profitable, the market for debris, or scrap metal, would need to be large enough. A few decades ago, such a depot could only tempt two customers: the U.S.S.R. and the United States. Now the potential number of consumers in the market seems to multiply each day. More governments are building up their own space industries.[149] While only sixty-three U.N. members signed the OST when it was first adopted in 1967,[150] it now has 110 fully-ratified signing parties and another 89 signing parties that have not yet ratified the treaty.[151] Commercial entities have entered and continue to enter the market. If the market of consumers grows

146 *See Swiss Start-up ClearSpace Wins ESA Contract to Deorbit Vega Rocket Debris*, *supra* note 9.

147 *NASA's Lunar Exploration Program Overview*, NASA, 1, 15 (Sept. 2020), https://www.nasa.gov/sites/default/files/atoms/files/artemis_plan-20200921.pdf.

148 Michael Sheetz, *Elon Musk Is 'Highly Confident' SpaceX Will Land Humans on Mars by 2026*, CNBC (Dec. 1, 2020), https://www.cnbc.com/2020/12/01/elon-musk-highly-confident-spacex-will-land-humans-on-mars-by-2026.html.

149 FAA, *supra* note 48.

150 Daryl Kimball, *The Outer Space Treaty at a Glance*, ARMS CONTROL ASSOCIATION, https://www.armscontrol.org/factsheets/outerspace (last visited Mar. 20, 2023).

151 *Id.*

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large enough, orbital debris could nearly pay for itself instead of relying on government funding for its removal.

An orbiting debris depot would not be profitable at this time. The lack of consumers currently in space proves this point. Also, the concept is much more practically applied to larger pieces of debris. However, as the commercial space industry grows and humans take up a more permanent residence in space, the question of how to recycle old space junk for new purposes will become increasingly relevant.

CONCLUSION

The growth of the orbital debris market faces two challenges: one legal and one economic. If countries can agree to apply the abandonment doctrine to small pieces of nonfunctional debris, the legal problem would be solved. Launching States would still have the opportunity to protect any of their large, functional space objects from outside interference. Further, those large pieces are trackable and may be avoided using collision avoidance maneuvers or removed via contract with the Launching State. With a two-category application of the abandonment theory, Launching States are unlikely to have security concerns regarding the removal of small debris and would still be free to make their own decisions regarding large pieces of debris.

Second, concerning the economic impediments, the debris market is capable of flourishing on its own. An analysis of the space industry reveals the incentives for governments, space insurance providers, and commercial space companies to invest in debris removal. Entities in the space industry are already paying the price caused by growing orbital debris, and the cost will only increase. Governments will benefit from subsidizing removal because they are liable under treaty for the damages caused by any space object registered with their space agency. Space insurance providers will benefit from investing in debris removal because they can lower premiums and gain more customers. Finally, commercial entities benefit from investing in debris removal because they can lower the premiums they pay and lessen the risk that one of their own expensive space objects will be damaged by debris.

All these incentives do not even touch on the net gain of keeping LEO open for future missions. There may be opportunities in the future for the buying and selling of space debris as a useful resource once humans take up a more permanent residence in space. In that theoretical future, investments in debris removal may not even be necessary and the market could thrive on its own. Until the industry reaches some of its loftier goals, investments from the industry players are the next step and there are strong incentives for those players to remove orbital debris.

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A SAMPLE-SIZED PROBLEM: RESOLVING MARKET INEFFICIENCIES AND INCONSISTENT JURISPRUDENCE IN MUSIC SAMPLING

David Ward

INTRODUCTION

The year is 2013. The internet is ablaze with its new viral sensation: "Harlem Shake" by Baauer. By March of that year, it had reached #1 on Billboard's Hot 100[1] and amassed 40,000 related YouTube videos with over 175 million views.[2] Despite the song's meteoric rise, Baauer would not see any money coming in from his song for the foreseeable future; it featured clips of copyrighted sound recordings—or samples—from the hip-hop group Plastic Little and reggaeton star Héctor Delgado.[3] Baauer didn't get licenses for the samples, and therefore his song was infringing on others' copyrights.

If one listens to Baauer's "Harlem Shake" next to its most prominently sampled song, "Miller Time" by Plastic Little, there is no question that they are dramatically different songs.[4] Only the recorded phrase "do the Harlem shake" was taken from Plastic Little's record.[5] So why did Baauer not get a license for what was ostensibly a minor part of his own recording and composition?

When asked this question, Baauer's response underscores a fundamental problem with the current ecosystem of music sampling: "I didn't clear the samples because I was in my fucking bedroom on Grand Street. I wasn't going to think to call up [the artist], I didn't even know who it was who did that [sample]…."[6]

Music sampling, which is the process of selecting and utilizing sound sequences from an existing record and employing them in a new work,[7] is ubiquitous in today's music culture. In 2018, two-thirds of the top 50 albums

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1 Katie Bain, *Songs That Defined the Decade: Baauer, 'Harlem Shake'*, BILLBOARD (Nov. 21, 2019, 1:24 PM), https://www.billboard.com/articles/news/songs-that-defined-the-decade/8543863/baauer-harlem-shake-songs-that-defined-the-decade.

2 Kevin Allocca, *The Harlem Shake Has Exploded (Updated),* YOUTUBE TRENDS (Feb 12, 2013), http://youtube-trends.blogspot.com/2013/02/the-harlem-shake-has-exploded.html.

3 Bain, *supra* note 1.

4 *Harlem Shake,* WHOSAMPLED, https://www.whosampled.com/sample/196299/Baauer-Harlem-Shake-Plastic-Little-Miller-Time/ (last visited Mar. 22, 2023).

5 *Id.*

6 Corban Goble, *Baauer*, PITCHFORK (Aug. 16, 2013), https://pitchfork.com/features/update/9187-baauer/.

7 BOB KOHN, KOHN ON MUSIC LICENSING V loc. Ch. 24 I (5th Edition 2018) (ebook).

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contained samples, totaling 204 samples in those albums.[8] One in five of the top 100 songs in 2018 also contained samples.[9] The music business has embraced what some call a "sample culture,"[10] and these stats show this culture is taking over. So why could Baauer not just get a license like the rest of them?

The answer is elegantly stated by the owner of the independent record label Def Jux, El-P, in an interview with Professors Kembrew McLeod and Peter DiCola: "[legal sampling] only exists for the motherfuckers who can afford it."[11] Specifically, sampling requires multiple licenses negotiated with multiple parties, leading to high transaction costs on top of the actual licensing costs.

For the typical "bedroom" artist, such as Baauer, this has an extremely chilling effect on deciding whether to put the time and capital into what may or may not be a financially successful record. It is no wonder there is sentiment that only established artists can afford to sample; they often have teams of lawyers with capital from record companies to finance their prospective projects.

The results of these barriers to entry are exacerbated by the unclear legality of sampling. Circuit courts cannot agree on how much of a sample can be used without infringing.[12] This is made worse by the deep-seeded and pervasive myth among producers and artists that less than a six-second[13] sample is not infringement.[14] Not surprisingly, the combination of this misguided myth and the daunting transaction costs of sample licensing has resulted in countless scenarios like Baauer's.[15] Today's independent artists face the

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8 *See* Oskar, *State of Sampling*, TRACKLIB (Feb. 7, 2019), https://www.tracklib.com/blog/tracklib-presents-state-of-sampling/.

9 *Id.*

10 Entire works exist discussing purely discussing this "sample culture." *See e.g., The Sample Culture*, KRSM RADIO, https://www.krsmradio.org/sample-culture/ (last visited Mar. 22, 2023).

11 KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 117 (2011).

12 *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005) (denying a de minimis standard for sampling sound recordings); *contra* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016) ("[w]e find *Bridgeport's* reasoning unpersuasive. We hold that the "de minimis" exception applies to infringement actions concerning copyrighted sound recordings").

13 There are varying myths about what considered the "minimum" one can legally use in a sample, ranging from measurements in both seconds and musical bars, but none of them are based in any legal actuality.

14 *See* Sean McCauley, *Music Rights: How To Sample Legally*, OCTIIVE (Jul. 23, 2019) https://www.octiive.com/blog/music-rights-how-to-sample-legally; *Mita Carriman, The Business: Once & For All, The Truth Behind The 6-Bar Sample Myth*, OKAYPLAYER, https://www.okayplayer.com/news/beastie-boys-and-the-truth-behind-the-6-bar-sample-myth.html (last visited Mar. 22, 2023).

15 *See generally* David Opie, *10 Rappers Famously Sued For Using Unauthorized Samples*, HIGHSNOBIETY, https://www.highsnobiety.com/p/unauthorized-rap-samples/ (last visited Mar. 28, 2023); Tanay Hudson, *11 Musicians That Have Faced Lawsuits Over Songs They Sampled*, VIBE (Sep. 26, 2014,

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harsh reality that there are few, if any, completely sure-fire practical and affordable ways to properly sample the songs they wish to. This stifles creativity, increases litigation, and creates inefficiencies in the market.

This bleak landscape has become the status quo, but it doesn't need to be. The recent Music Modernization Act has created a centralized musical works database that could be used to mitigate transaction costs of sample licensing, as well as resolve the inconsistent jurisprudence of the circuit courts.

This comment will examine the nature of sampling in conjunction with current legislation and jurisprudence, and then propose a new framework for addressing these problems. Part I will provide a background of what sampling is, and how sample licenses are obtained. Part II will explore the jurisprudential and practical conflicts that exist in the current law. Part III will then provide an overview of the Music Modernization Act and the new centralized database created by it. And finally, Part IV will suggest a new framework for using the Music Modernization Act to create an open sample marketplace, and a new test that can be used by courts to resolve the current circuit split.

I. SAMPLING: WHAT IT IS, AND HOW TO LICENSE

To understand the current problem with the sample licensing "system"[16] it is important to understand two things: what is sampling, and what does sample licensing look like. This section will briefly look at the history of sampling as an artform, and then overview the practical and legal considerations that go into a typical[17] sample licensing negotiation.

A. *Sampling as an Art Form*

Sampling has had a controversial past. Many dismiss sampling as an "illegitimate creative method" because sampling borrows other artist's work, sometimes in unimaginative ways.[18] However, all music is fundamentally built on works that came before it. Musical forms are common in many

1:25 PM), https://www.vibe.com/features/vixen/11-musicians-that-have-faced-lawsuits-over-songs-they-sampled-314160/; Peter Relic, *The 25 Most Notorious Uncleared Samples in Rap History*, COMPLEX (Apr. 22, 2013), https://www.complex.com/music/2013/04/the-25-most-notorious-uncleared-samples-in-rap-history.

16 If it can be called a "system." In an interview with an artist manager, Hip Hop, Professor Kembrew asks "Do you think the licensing system is efficient or inefficient." Hip Hop responds with "I didn't even know there was a *system*." MCLEOD & DICOLA, *supra* note 11, at 168.

17 It may be argued there is no "typical" licensing path, but nonetheless there are similar aspects to all licensing discussions.

18 MCLEOD & DICOLA, *supra* note 11, at 4.

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genres; for instance, 12-bar blues formats are used in thousands of songs from blues to rock, and most every modern song follows a generic "verse-chorus-bridge" framework. Indeed, there is even an entire stand-up comedy acts around the fact that dozens of modern pop songs use the exact same chord progression, all "stealing" from baroque composer Johann Pachelbel's "Pachelbel's Canon."[19] In the words of the timeless composer Igor Stravinsky, "Good composers borrow, great ones steal."[20]

However, this is not to suggest that "stealing" copyrighted work is justified. Instead, these observations merely point out the fact that using samples to repurpose existing works is no different than the centuries of music history that preceded it. All musical artists are "standing on the shoulders of giants," as the adage goes.

That said, it is easier to outright "steal" in unimaginative ways today than it was in Stravinsky's time. While Stravinsky may have been referring to weaving other composer's themes into a full-fledged harmony of his own, sampling literally and directly copies sounds as the original artist expressed them. "Stealing" no longer requires transcribing works or even any musical knowledge; anyone can open a digital audio workstation program[21] and simply drag-and-drop another recording into their work. Technology has simply enabled more access to a storied history of musical "borrowing" and "stealing."

Beginning in the 1970's, hip-hop DJs began using turntables to manipulate sounds that were already on the records they were playing.[22] By the 1980's, producers began to use these techniques in conjunction with digital samplers to incorporate dozens of existing recordings into a single track. For instance, Mix Master Mike from the Beastie Boys said "We'd grab a conga sound. We grabbed trumpet sounds, violin sounds, drumbeat sounds, and re-manipulate[sic] [them] to create our own music."[23] This new "collage" of works transformed small sounds into something bigger than the sum of their parts. And the process was accessible to anyone with or without formal musical knowledge; all that was required was the right equipment.

Moving forward to today, this accessibility is further amplified by the current digital age. Programs and services such as iMovie, Garageband, and YouTube make it accessible and enticing for artists and hobbyists alike to experiment with existing or new sounds with nothing more than the computer they likely own already. Garageband, for instance, comes with hundreds of

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19 *Pachelbel Rant from 2006[Official High Quality Re-Post]*, YOUTUBE, (Nov. 5, 2019), https://www.youtube.com/watch?v=uxC1fPE1QEE.

20 Georg Predota, *Good Composers Borrow, Great Ones Steal!*, INTERLUDE, (July 24, 2016), https://interlude.hk/good-composers-borrow-great-ones-steal/.

21 These are known as DAWs and are primarily what modern producers use to both record new sounds and use existing sounds.

22 MCLEOD & DICOLA, *supra* note 11, at 4.

23 *Id.*

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royalty-free samples that anyone can use in their own work by dragging and dropping them from a library into a new project. In this sense, music has become "democratized" as a part of "interacting in others' lives…" through fan videos, memes, and a myriad of other user-generated content.[24] The line between producer and consumer has become blurred, if it even exists at all.

This "democratization" of music has resulted in clashes over the scope of copyright and sampling as an artform. Critics can easily cite the countless examples of clear-cut, unimaginative "stealing" of others' works to condemn sampling as a blighted corner of music culture.[25] However, this ignores the artfully constructed works made from "unrecognizable musical quotations" arranged by contemporary artists such as RZA, the Beastie Boys, DJ Shadow, El-P, and countless others.[26] It also ignores substantial data that shows Americans as a culture *really like* songs with samples in them.[27]

The takeaway is this: sampling is here to stay. Just as collages can be used in both imaginative and unimaginative ways in visual arts, sampling can be used in imaginative and unimaginative ways in musical arts. The trick then becomes walking the fine line between allowing this artform to thrive and protecting existing artist's right to control their copyrights with fair compensation for use.

B. *Why We Have Copyrights*

The roots of copyright law in the United States reach all the way back to the ratification of the Constitution in 1787. Article I, Section 8, Clause 8, also known as the "Copyright Clause," gives Congress the power to "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[28] Practically, the purpose of copyright is to motivate authors to publish their works by being compensated in return.[29] This compensation is "designed to assure contributors to the store of knowledge a fair return for their labors;"[30] it also "'dangle[s] a carrot,' called a copyright, in front of the

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24 MCLEOD & DICOLA, *supra* note 11, at 5.

25 For example, Vanilla Ice's "Ice Ice Baby" nearly directly copied the bassline from Queen and David Bowie's "Under Pressure." *Id.* at 4.

26 *Id.*

27 *See* Oskar, *supra* note 8.

28 U.S. CONST. art. I, § 8, cl. 8.

29 *See id.*; L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S.A. 365, 369 (2000).

30 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985).

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nose of those creative individuals among us to stimulate them into producing…works which will benefit society at large."[31]

The power to exclude others from using one's copyrighted work empowers the owner with the ability to authorize—or license—certain uses in exchange for payment for that privilege.[32] This income is then used by talented authors to earn a living and continue creating works, thereby increasing the amount of works available to the public, and eventually the public domain.[33] The underlying assumption is that society benefits from a larger number of works created by the most number of talented individuals. By incentivizing creative individuals to create by giving them exclusive rights in their works, copyrights "promote the progress of science and useful arts…."[34]

Critics of intellectual property have often resisted this assertion by pointing out that dense intellectual property markets create a web of use restrictions that generate uncertainty and high transaction costs.[35] This is a legitimate concern, as high transaction costs can overwhelm efficiency gains and create an inefficient market.[36] But, as this comment will address, some transaction costs are addressable without infringing on fundamental and exclusive rights granted by Congress through the Constitution. In order to do so, however, some friction and barriers to entry must be reduced in the current licensing system.

C. *The Current Sample Licensing "System"*

Despite this sub-heading, it is important to note there is no real "system" for sample licensing. For those in the industry, it is more aptly described as a "free-for-all."[37] In truth, the "system" is a series of negotiations that any sampling artist must engage in to legally use a sample. Sampling artists must receive a license from both the owner of the *composition* copyright and the *recording* copyright, which further complicates the process. These two copyrights are often owned by different parties with different priorities and rights.

In order to understand the licensing process, it is important to first understand the dichotomy of music copyrights and the legal rights associated

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31 *Copyright Law Revision: Hearings Before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. of the Judiciary on H.R. 2223*, 94 Cong. 475 (June 5, 1975) (testimony of Donald D. Merry, President, Sicom Electronics Corp.).

32 *See* KOHN, *supra* note 7 at loc. Ch. 7, II.

33 *See id.*

34 U.S. CONST. art. I, § 8, cl. 8.; KOHN, *supra* note 7 at loc. Ch. 7, II.

35 Jonathan Barnett, *The 'License As Tax' Fallacy,* 10 (December 12, 2019). USC CLASS Research Paper No. CLASS19-35, USC Law Legal Studies Paper No. 19-35, https://ssrn.com/abstract=3503148 or http://dx.doi.org/10.2139/ssrn.3503148.

36 *Id.*

37 MCLEOD & DICOLA, *supra* note 11, at 168.

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with each. They are vital in order to truly comprehend how the licensing process plays out.

1. Dichotomy of Music Copyrights

Every song recorded after 1976 has two copyrights: the music composition and the sound recording.[38] The composition copyright is usually comprised of a melody, rhythm, harmony, etcetera.[39] A sound recording, as defined by statute, is "a work that results from the fixation of a series of musical, spoken, or other sounds…."[40] In essence, the difference between the music and the recording reflects the fact that recording is in itself an art form. Two different recordings of the same song from the same people at the same time could sound completely different based on how it is recorded.[41] Because of this, both the recording and the underlying music have their own copyright. Each copyright comes with different implications for licensing, and its own nuances, which are important to understand for the purpose of this comment.

a) The Music Composition Copyright

The copyright of music itself has a storied past. Obviously, sound recordings are a more recent development than music. Musical compositions, however, have existed for hundreds of years, and were certainly an established art when our nation was formed. Since the only way to hear music in the 18th Century was to hear someone play it live from sheet music or memory of the sheet music, the copyright of music was, at first, the same as a published book.[42] In 1831, however, Congress recognized protection for music as its own category, but did not expand on exclusive rights granted to music.[43]

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38 KOHN, *supra* note 7 at loc. Ch. 11, II, A.

39 *Id.*

40 17 U.S.C. § 101.

41 There are entire courses on the art of recording, some of which this author has had both the fortune and misfortune of taking. For examples of the differences between recordings of the same song, however, think of a microphone far away versus very close; it creates a different sound. Similarly, two audio engineers given the same audio files of each instrument could create vastly different songs using different effects (such as reverb or delay), making some parts different volumes, or "panning" the sounds to the left or right ear differently. These different techniques and effects are why audio engineers get paid the big bucks, or at least some bucks (hopefully).

42 *See* Anna Shapell, *Give Me a Beat: Mixing and Mashing Copyright Law to Encompass Sample-Based Music*, 12 J. HIGH TECH. L. 519 (2011) (citing WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 30-31 n.91 (1994)); *see also* Bach v. Longman, 98 E.R. 1274, 1276 (1777) (defining music compositions as writing and subject to protection.)

43 Copyright Act of 1831, § 1 (1831); 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT, *The 1831 Act* § 8:14, Westlaw (database updated September, 2020).

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The Copyright Act of 1909 specifically recognized the exclusive right to arrange and adapt musical works, public performance of the musical work, and the right to mechanically reproduce the musical work; in other words it created a copyright for the composition itself.[44] Mechanical licenses for compositions, however, were compulsory; once the work had been mechanically reproduced, anyone could pay a statutory rate to compel the owner of a song to permit the reproduction of the song.[45] This is a "mechanical license."

The Copyright Act of 1976 added to these previous acts and provided much of the framework of today's music composition copyrights. The act expanded exclusive rights of music to include reproduction, preparation of derivative works, distribution, public performance, and transmission (which was then only via analog transmissions).[46]

As far as sampling is concerned, nearly all the exclusive rights of composition copyrights are implicated in one way or another. Sampling reproduces the underlying musical work (as well as the record) in a derivative work, almost always for distribution, public performance, and transmission (be it analog or digital). However, two of these exclusive rights are subject to compulsory statutory licensing and rates:[47] reproduction and distribution.[48] Compulsory licensing allows anyone to pay a statutory rate to reproduce a composition without requiring the owner's consent.[49]However, compulsory licensing is not available for sampling.[50] A compulsory license only grants the privilege of making a musical arrangement to the extent necessary for adapting the work to a conform to a new interpretation,[51] but the arrangement

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44 *See* Copyright Act of 1909, Pub. L. No. 60-349, §§ 1(b)-(e), 5(e).

45 *See* KOHN, *supra* note 7 at loc. Ch. 13, II, B. Kohn explains that mechanical piano roll reproductions were not considered "copies" as late as 1908 and did not infringe on the rights of the composition. In response to this, Congress passed the Copyright Act of 1909. However, Congress was concerned with monopolistic exclusivity practices of manufacturers, and as such made the mechanical license "compulsory" to negate the threat of monopoly.

46 *See* 17 U.S.C. §§ 106, 114.

47 Compulsory mechanical rates are an entire subject of their own and are not the subject of this article.

48 *See* 17 U.S.C. § 115; KOHN, *supra* note 7 at loc. Ch. 13, II, B.

49 17 U.S.C. § 115. Note that the above discussion has only been in regard to protection for the underlying composition, not the recording. One way to differentiate these two is to think of the composition copyright as the sheet music or notation of the music that artists play from. Every time a song is copied, it includes the contents of that sheet music—the composition—as well as the sounds captured by the microphones in that specific recording. Compulsory mechanical licensing only implicates the "sheet music" part, i.e. the composition, of any recorded piece of music. Compulsory licenses, therefore, do not give anyone the right to burn his favorite songs to CDs and sell them to his friends as long as he pays the song owners a few cents per copy; selling burned CDs would, among other things, infringe on the sound recording's exclusive rights too, which are not subject to compulsory licensing.

50 KOHN, *supra* note 7 at loc. Ch. 24, IV. Because the nature of sampling generally fundamentally changes the character of the work, compulsory licenses are typically not available to sampling artists.

51 Think "cover band." The meaning of "interpretation" can be quite broad. E.g. sometimes cover bands interpret good songs into bad songs.

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"shall not change the basic melody or fundamental character of the work … except with the express consent of the copyright owner."[52] Express consent is usually required to sample music[53] and it is negotiated individually on the free market with the copyright owner or owners.[54]

b) Sound Recording Copyrights

As one might expect, sound recording copyrights are a bit less storied than composition copyrights since sound recordings are a more recent development than music itself. While the first recording was made by Thomas Edison's phonograph in 1877,[55] sound recordings themselves were not granted copyright protection until the 1971 Sound Recordings Act.[56] Before this date, sound recordings were only protected by state common law or state criminal statute.[57] Concerned about piracy, Congress only granted the copyright owner the right to "duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording."[58] Congress did not, and still does not, extend the right to any independent fixation of other sounds, even if they were intended to mimic or simulate those in the copyrighted recording;[59] for example, an electric guitarist who wants to use electronic effects to emulate another guitarist's sound is freely able to do so. The 1971 act also did not include a performance right for the recording.[60]

A few years later, the Copyright Act of 1976 became law. It provides the framework for much of our current copyright law, including sound recordings and phonorecords.[61] Today, the Copyright Act of 1976 still provides the baseline for exclusive rights in sound recordings.[62] However, it is important to note that the act and current law distinguishes two terms: sound

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52 17 U.S.C. § 115(a)(2).

53 Both the composition as well as the sound recording, as will be discussed.

54 KOHN, *supra* note 7 at loc. Ch. 24, IV.

55 *History of the Cylinder Phonograph*, LIBRARY OF CONGRESS, https://www.loc.gov/collections/edison-company-motion-pictures-and-sound-recordings/articles-and-essays/history-of-edison-sound-recordings/history-of-the-cylinder-phonograph/ (last visited Oct. 4, 2020).

56 Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391.

57 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT, 1971 *Sound Recording Act* § 1:70, Westlaw (database updated September, 2020).

58 *Id. See also* S. Rep. No. 92-72 (1971); H.R. Rep. No. 92-487, (1971); Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927 Before Subcomm. No. 3, House Judiciary Comm., 92d Cong., 1-2 (1971).

59 17 U.S.C. § 1(f) (1972); *see also* U.S. v. Taxe, 380 F. Supp. 1010, 1013 (C.D. Cal. 1974).

60 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT, *The 1971 Sound Recording Amendment* § 8:20, Westlaw (database updated Sep. 2020).

61 *See* Copyright Act of 1976 Pub. L. No. 94–553, 90 Stat 2541 §§ 101, 102, 114.

62 *See* 17 U.S.C. §§ 102(a)(7), 106, 114.

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recordings and phonorecords.[63] Sound recordings are what many call the "master," and represent the intellectual property of sound recordings themselves.[64] They are defined as "works that result from the fixation of a series of musical, spoken, or other sounds … regardless of the nature of the material objects … in which they are embodied."[65] Phonorecords, however, are merely the material objects (or digital files) that hold sound recordings.[66]

As previously mentioned, sound recordings did not have an exclusive right of public performance in either the 1972 or 1976 acts. After years of lobbying, Congress recognized a public performance right for sound recordings in the Digital Performance Act of 1995.[67] However, this provided the very limited right in regard to digital transmission *only*.[68] This limitation to sound recording performance rights still exists today,[69] although the COVID-19 pandemic has reignited the debate to include analog transmissions.[70]

Currently, sound recordings have four exclusive rights: reproduction, derivative works, distribution, and digital transmission performance.[71] Sampling inevitably involves all these exclusive rights, especially that of a derivative work. Current law explicitly grants the right of derivative use in sound recordings by stating the sound recording owner has the exclusive right to "rearrange[], remix[], or otherwise alter[] in sequence or quality."[72] By definition, a use of another's recording as a sample is therefore a derivative work, because it uses, alters, and rearranges the actual fixed sounds from another sound recording. What portion of a used recording constitutes infringement, however, is a matter of much debate between musicians, rightsholders, and circuit court judges. The portion of a recording used for sampling is also of vital importance for any license negotiations, since copyright owners are free to limit the scope of licensed use.

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63 *See* 17 U.S.C. § 101.

64 *Id.*

65 *See* 17 U.S.C. § 101.

66 *Id.* Examples of phonorecords include cassettes, CDs, vinyl, or digital downloads.

67 Digital Performance Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

68 *Id.*

69 *See* 17 U.S.C. § 106(6).

70 For a more detailed look into the recent debate regarding terrestrial performance rights for sound recordings, *see* David Ward, *The AM-FM Bill and the Status of Terrestrial Music Broadcast Performance Rights*, CENTER FOR THE PROTECTION OF INTELLECTUAL PROPERTY & INNOVATION POLICY (Jun. 1, 2020), https://cpip.gmu.edu/2020/06/01/the-am-fm-bill-and-the-status-of-terrestrial-music-broadcast-performance-rights/.

71 17 U.S.C. § 114(a).

72 *Id.* § 114(b).

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2. Licensing Process

Sample licensing involves using both the actual recording as well as the underlying composition of existing works. That means that sample licensing is usually two separate licenses; one for the composition copyright and one for the recording copyright. While the process of negotiating both licenses can be similar, the actual negotiations for each license may look nothing alike depending on individual characteristics of sample use, the sampled source, musicians involved, copyright owners, and their representatives.[73] However, this comment will examine the traditional practices and structure of negotiations in order to gain a better understanding of what could happen and the barriers to entry for typical artists.

a) Licensing Deal Structures

There are five main classes of licensing deals: gratis, buyouts, royalties, co-ownership, and assignment of the copyright.[74] Some of these are somewhat self-explanatory, and others are more complex. Gratis is simply that: free. If a sampled artist likes what a sampling artist is doing, they may simply let the sampling artist do whatever they would like for free. Buyouts are also relatively straightforward: a lump sum is paid to the copyright owner in exchange for use of the work.[75] Because ongoing royalty-sharing requires administrative costs for collecting and splitting revenue, buyouts are more typical for smaller licensing agreements.[76] These lump sums typically range anywhere from $500 to $15,000 per sample but can sometimes range upwards of $50,000 to $100,000 depending on the work sampled.[77] Meanwhile, royalties provide on-going revenue sharing between the sampled artist and the sampling artist.[78] These are more typical on the music composition—or publishing—license.[79] This can range from $0.01 to $0.15 per record, or some percentage of revenues.[80]

Somewhat similarly, co-ownership deals assign a portion of the actual ownership of the new sampling artist's copyrighted work to the sampled artist. This can be complex. Motown copyright lawyer Shoshana Zisk gives an illustrative example of the complexities: "When I was working at Motown, you'd get one song and there'd be fourteen people that you had to get

73 MCLEOD & DICOLA, *supra* note 11, at 149.
74 *Id.* at 153.
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*

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permission from. And each one of them is like, 'I own 6.2 percent, I own 8.9 percent.' There's a pie graph of a song and everyone has a slice."[81]

Lastly, there is assignment of the copyright. Put simply, this assigns the entire copyright of the derivative work made by the sampling artist to the original artist. This may be done in conjunction with a buyout or royalty for the sampling artist but gives the original artist full control of the new work.

It is also important to note that some of these types of agreements are not mutually exclusive. For instance, a licensor may want a lump sum on top of a royalty.[82] Or there may be some combination of co-ownership for the composition license, but a lump sum for use of the recording.

The deal structure depends entirely on the unique circumstances of the sample used and the sampled song. However, there are several common factors, both qualitative and quantitative, used during negotiations. Professor Kembrew and DiCola provide a comprehensive, but by no means exhaustive, list of factors generally considered in licensing negotiations:[83]

- Quantitative portion of the recording or composition used
- Qualitative importance of the portion used
- Whether the sample comes from the chorus, the melody, or the background
- Whether the sample comes from the vocal portion or the instrument portion
- Recognizability of the portion sampled
- Whether the sampled musician had a major label or distributor
- Popularity of the sampled recording or composition
- Level of the sampled musician's commercial success and fame
- Number of times the sample is repeated
- Level of commercial potential for the new song
- Qualitative prominence and importance of the sample.

As is evident from this list, there is no "one-size-fits-all" license that works for every artist or any standard across the board.[84] Who is sampling is important, but just as—if not more—important is who is being sampled. And the process of identifying who owns the sampled work to begin negotiations is more troublesome than one may think.

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81 *Id.*

82 Artists may also want an *advance* on royalties. This would be a lump sum paid up front for future royalties. For instance, if a $500 royalty advance was given to a licensor up front, then the first $500 of the licensor's earned royalties would go to the licensee to recoup the $500 advance. After that advance is recouped, the normal royalty split would kick in for future royalties. Essentially, this just guarantees that a licensor gets *at least* as much as the advance payment, even if the future royalties don't amount to that much.

83 MCLEOD & DICOLA, *supra* note 11, at 154.

84 *Id.*

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b) Search and Transaction Costs

An artist cannot reach a deal without knowing who she is dealing with. Sampling artist wishing to sample a song must first find who owns the composition as well as the recording.[85] Since both copyrights must be licensed, or "cleared," prior to use, a potential licensee cannot proceed unless they know who can license the works.

Unfortunately, this is much harder than it sounds. Often times there are dozens of co-owners of works, and this is made worse by the fact that there are two copyrights that must be licensed; it is easy to imagine a scenario where a band of four artists each co-own a song, and separate record label that may or may not still exist may own the recording. In fact, this is common for older songs or recordings owned by companies that have since gone bankrupt or otherwise followed a long and confusing chain of ownership.[86] While the Copyright Office can sometimes provide assistance in locating copyright owners, it can only provide information on the registration; if the owning entity has changed or the song was never registered in the first place[87] that will not be of much use.

To combat this, specialized sample clearance firms have emerged. These specialized firms track down copyright owners for a fee and will often open up or even conduct negotiations for artists.[88] However, these firms are not cheap, since the search process can be laborious; some firms may offer a flat fee, others may charge fifty dollars per hour, while still others may be lawyers charging hundreds per hour.[89] Firms may include clearance negotiations in their services, which can add to billable hours or create additional costs.[90] Difficult searches for multiples samples can add up very quickly, creating large transaction costs on top of substantial licensing costs.

Due to these search and transaction costs, many artists forgo sample clearance and simply hope that the original artist will not care or notice;[91] this was the case with Baauer. However, this creates inefficiencies, because artists discovering the unlicensed use of their work can use potential litigation as leverage to hold up negotiations or charge exorbitant licensing fees.[92] Also, any song containing an unlicensed sample cannot be used in TV shows or video games; the inefficiencies of unlicensed samples can snowball into secondary markets.[93] Thankfully, the digital age and recent legislation have

85 *Id.* at 149-50.
86 MCLEOD & DICOLA, *supra* note 11, at 150.
87 Registration is not required for copyright protection.
88 MCLEOD & DICOLA, *supra* note 11, at 153.
89 *Id.* at 149-50.
90 *See id.*
91 *Id.* at 150-151.
92 *Id.* at 158-61.
93 *See id.* at 150-51.

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provided a new and unique way to begin the search for copyright owners in the form of the Music Modernization Act.[94] However, the typical artist is still woefully unaware of how to search for copyright owners, or even when licensing is necessary.

II. THE MYTHOLOGY AND JURISPRUDENCE OF SAMPLING

Confusion around the "do's and don'ts" of sampling is rampant in the music industry. Some artists think that if they only use a small portion of a recording, they will not get in trouble. Others think that if they don't sell the new work, they are not infringing. And still some others think that simply adding a disclaimer that "I do not own the rights to this music" somehow does anything other than admit they are infringing.[95] It is easy for legal professionals to discard these myths as absurd or at least misinformed, but in actuality the legal profession has only fanned the flame of some of these myths. In fact, the legal profession itself cannot even decide how small of a sample can be used without infringing. Any analysis of sampling, therefore, should examine the history of how the current legal and practical landscapes got so convoluted.

A. *Biz Markie and How Not to Sample*

It is not often you see the Bible cited and multiple exclamation points used in a judge's opinion. But that's exactly what happened in *Grand Upright Music Ltd. v. Warner Bros. Records*, the first case involving sampling to make it all the way through litigation.[96] Biz Markie, a rap artist, used a part of the song "Alone Again (Naturally)" by Gilbert O'Sullivan without obtaining any licenses.[97] In perhaps what was an attempt to end up in in a book of the worst legal defenses in history, Biz Markie argued that stealing is rampant in the music business, and his conduct should therefore be excused.[98] Judge Duffy of the Southern District of New York, citing the Bible's Seventh Commandment—"Thou shalt not steal"—quickly resolved what was ostensibly a slam-dunk case in favor of O'Sullivan.[99] Unfortunately, things got much more complicated after that.

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94 *See infra*, Part III.
95 It doesn't.
96 780 F. Supp. 182, 183-84 (S.D.N.Y. 1991).
97 *Id.* at 183.
98 *Id.*
99 *Id.*

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B. *Beastie Boys and the De Minimis Doctrine*

Jumping to 2003, the myths begin to take form when the Beastie Boys successfully defended their use of a semi-licensed sample in *Newton v. Diamond*.[100] The Beastie Boys obtained a sound recording license for a six-second, three-note segment of a recording of "Choir" by James Newton.[101] The Beastie Boys did not, however, get a license for the underlying composition, and Newton filed for copyright infringement for his composition.[102]

Holding that the three-note segment used by the Beastie Boys was not significant enough to constitute infringement, the Ninth Circuit held that no legal consequences followed for the use of the underlying composition.[103] The court examined the principles of the *de minimis* doctrine that relinquished liability from a copying party when the portion of the work copied was so insubstantial that the average audience would not recognize the appropriation.[104]

The *de minimis* doctrine is a well-established part of copyright law,[105] so it is easy to see how this doctrine is warped into a "bright line" rule by the layman. As far as an artist is concerned, *Newton* represents the fact that a six-second, three-note sample is fair game, even though this ignores the fact-specific legal analysis of substantial similarity. It is easy to imagine six seconds or even three notes of a song as being instantly recognizable, but that portion of the *de minimis* doctrine is lost in translation to the general public. In that way, the equity of the *de minimis* doctrine in the music sampling context is somewhat undermined by the fact it is a highly fact-specific rule in a field that craves the certainty of a bright-line rule.

C. *Campbell and the Fair Use Defense.*

Fair use is an oft-misunderstood legal term. Many artists believe that not profiting off someone else's work creates a "fair use" defense and have released free remixes of songs with explicit disclaimers that they do not own

100 Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2004).

101 *Id.*

102 *Id.*

103 *Id.* at 1195.

104 *Id.*

105 *See* Walt Disney Prod. v. Air Pirates, 581 F.2d 751, 758-59 (9th Cir. 1978) (establishing that infringement must use a substantial portion of a work before finding infringement). *see, e.g.,* Sandoval v. New Line Cinema Corp., 147 F.3d 215, 218 (2d Cir. 1998) ("the alleged infringer must demonstrate that the copying of the protected material is so trivial 'as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.'" (citing Ringgold v. Black Entertainment Television, 126 F.3d 70, 74 (2nd Cir. 1997)).

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the original song in attempts to dodge liability.[106] However, like other legal myths discussed, there is some truth to these misguided practices.

Fair use, while previously only a common-law doctrine, was codified by the 1976 Copyright Act.[107] The statute provides a fair use defense for purposes such as criticism, comment, reporting, and education. However, the fair use defense is exactly that; a *defense*. It is not an affirmative right granted to the public to freely use copyrighted works.[108] It can only be invoked once a case has already reached a court and requires the court to balance four factors.

The first factor is the character and purpose of the use.[109] This is where the commercial nature part of the myth comes from. Case law has shown that "every commercial use … is presumptively … unfair."[110] However, this factor merely creates a rebuttable presumption that requires balancing of the other three factors. It is easy to see how the trickle down of this factor to the layman results in an interpretation that non-commercial use is therefore fair, which is not the case.

The second factor requires an analysis of "the nature of the copyrighted work."[111] This examines what the type of work is; for instance, a parody or criticism of another work.

The third factor weighs "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[112] This is a highly fact-specific factor that examines the qualitative nature of the copied portion; that is, whether or not the copied portion is the "heart" of the original work .[113] For instance, a parody must not use more of the original work than required to make its point.

The fourth and final factor considers "the effect of the use upon the potential market for or value of the copyrighted work."[114] This can cut against the nature of a non-commercial use; if a work is disseminated in a non-commercial nature, but it undermines the potential market as a whole because people no longer will buy the original work, the non-commercial nature of it could give way to the harm it causes the original work's market certainty of

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106 For a discussion of these myths aimed at DJ's, *see e.g.,* Tony Fernandez, *Copyright and Fair Use for DJs: the Laws of the Land*, DJ TIMES, (Dec. 1, 2016) https://www.djtimes.com/2016/12/fair-use-copyright-laws-dj-music/.

107 17 U.S.C. § 107.

108 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT, *Fair Use Is Not An Affirmative Right* § 10:8.60, Westlaw (database updated Sep. 2020).

109 17 U.S.C. § 107(1).

110 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574 (1994) (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

111 17 U.S.C. § 107(2).

112 *Id.* § 107(3).

113 *Campbell*, 510 U.S. at 577, 586-89.

114 17 U.S.C. § 107(4).

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an *ex ante* licensing agreement that creates value for both parties in commerce rather than destroys value for both parties in litigation.

D. *Do the split: Bridgeport & VMG*

Finally, the comment comes to the headlining sample cases, and the core legal disagreement that has led to the most confusion in the industry. In *Bridgeport Music Inc. v. Dimension Films*, the group N.W.A. created the song "100 Miles Runnin" that sampled and looped a two-second guitar chord from George Clinton & The Funkadelic's song "Get Off Your Ass and Jam" without a license, and was found to be infringing.[115]

N.W.A's asserted defense was that the two-second recorded loop was *de minimis*.[116] However, the Sixth Circuit declined to extend this doctrine to sound recordings for several reasons. First, in examining the relevant statutory language of the 1976 Act and the exclusive rights granted to sound recording owners, the court found that the *de minimis* defense was not applicable.[117] The court proffered two main reasons for this: first, the *de minimis* defense is nowhere in the statute, and second, "the part taken is something of value."[118]

While many have criticized this case, the court's logic is consistent with much of the economic analysis previously discussed:

> When one considers that [judges have] hundreds of other cases all involving different samples from different songs, the value of a principled bright-line rule becomes apparent. We would want to emphasize, however, that considerations of judicial economy are not what drives this opinion. If any consideration of economy is involved it is that of the music industry. As this case and other companion cases make clear, it would appear to be cheaper to license than to litigate.[119]

The court then goes on to state "[g]et a license or do not sample," advice which would provide legal certainty to a field that desperately needs a legal certainty.[120] While many may disagree with the outcome as stifling creativity of sampling artists because of the transaction costs of licensing, the benefit of this legal clarity is nevertheless still apparent.

However, this clarity is undermined by the more lenient treatment of the *de minimis* doctrine in *VMG Salsoul, LLC v. Ciccone*.[121] There, the Ninth Circuit continued to recognize the *de minimis* doctrine it applied in *Newton*

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115 410 F.3d 792, 795-97 (6th Cir. 2005).
116 *Id.* at 797.
117 *Id.* at 799-803.
118 *Id.* at 801-02.
119 *Id.* at 802.
120 *Id.*
121 824 F.3d 871 (9th Cir. 2016).

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to sound recordings. The court found that samples of single horn hits were not infringing because the samples were not a substantial portion of the original work.[122] In examining the statutory structure of the Copyright Act and the history of the *de minimis* doctrine, the court explicitly rejected the Sixth Circuit's interpretation of the law that precluded the *de minimis* doctrine from sound recordings.[123]

As with most circuit splits, this creates a mixed bag. On the one hand, *Bridgeport* provides clarity in a field desperate for bright lines. But in doing so, it ignores the substantial transaction costs of licensing and chilling effect that has on the creation of new works. On the other hand, *VMG* carves out some sample uses that are not infringing so as not to stifle creativity too much. However, what those uses are can only be determined from litigation because it is a highly factual analysis as to what constitutes a "substantial portion." This creates legal uncertainty and inefficient litigation, but benefits creativity. The uncertainty is further exacerbated by the fact that which rule is applied depends entirely on which court hears the case.

So, which is the correct approach? The answer is obviously not so simple, as there are benefits to both approaches. However, any proffered legal rule should necessarily balance the sound logic of both rules to reach an efficient result that promotes both the creative and financial purposes of copyrights. Thankfully, the recent Music Modernization Act and its accompanying tools may help with search and transaction costs, as well as guide legislatures and jurists towards a legal rule with an efficient, happy[124] medium.

III. THE MUSIC MODERNIZATION ACT

The Music Modernization Act of 2018 (MMA) has reworked much of the framework for mechanical licensing and provided protection for sound recordings made prior to 1972.[125] The Act established a new Mechanical Licensing Collective (MLC) that allows digital music providers such as Spotify and Apple Music to obtain a "blanket license"[126] that replaces the usual compulsory mechanical license obtained on a song-by-song basis.[127] The MLC will then collect the statutory royalty rates for the compositions from digital music providers and distribute them to copyright owners.[128]

These changes to compulsory licensing, while very important for the music industry, are not entirely relevant for the subject of this comment; as

122 *Id.* at 880-885.

123 *Id.* at 874.

124 Or at least, happ*ier*.

125 *See generally* Music Modernization Act of 2018, Pub. L. No. 115-264, 132 Stat. 3676.

126 "Blanket licenses" are licenses that cover a wide range of compositions, rather than a single license for a single song.

127 *See* 17 U.S.C. § 115(d)(1); KOHN, *supra* note 7 at loc. Ch. 13, II, C.

128 17 U.S.C. § 115(d)(3)(C)(i)(II).

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mentioned previously, sampling is not subject to compulsory licensing. However, the mechanism created by the Act that facilitates these royalty and payment reworks—the MLC database—is relevant.

The Act tasks the MLC with the creation of a centralized music works database.[129] Congress' purpose behind the creation of the database echoes much of what has already been said about the licensing process as a whole:

> For far too long, it has been difficult to identify the copyright owner of most copyrighted works, especially in the music industry where works are routinely commercialized before all of the rights have been cleared and documented. This has led to significant challenges in ensuring fair and timely payment to all creators even when the licensee can identify the proper individuals to pay.[130]

While previous attempts have been made to centralize a musical works database, most notably a 2008 Global Repertoire Music Database that brought industry participants together, all have failed due to costs and data concerns.[131] Congress noted that "[m]usic metadata has more often been seen as a competitive advantage for the party that controls the database, rather than as a resource for building an industry" and that "the failure of the music industry to develop and maintain a master database has led to significant litigation…."[132]

The MLC, which launches in January of 2021, is tasked with creating and maintaining this centralized database, and includes information such as titles, copyright owners and shares thereof, contact information for copyright owners, International Standard Recording Code (ISRC), International Standard Work Code (ISWC), relevant sound recording information tied to each composition, and any other fields the Register of Copyrights may add by regulation.[133]

Another important aspect of the MLC database is that it is required to be "available to members of the public in a searchable, online format, free of charge."[134] The availability of this information is vitally important, because anyone who wants to license a song will have little to no transaction costs in searching a publicly available database for the information needed. While the purpose of this database was to facilitate mechanical licensing exclusively, the efficiencies it creates can be realized in the context of all licensing because of the comprehensive breadth of the data.

However, there is no magic wand for Congress or the MLC to wave that will match all compositions and recordings to each other with all relevant information. The MLC faces a monumental and never-ending task of

129 *Id.* § 115(d)(3)(C).
130 H.R. REP. NO. 115-651, at 7 (2018).
131 *Id.* at 8,
132 *Id.*
133 17 U.S.C. § 115(d)(3)(E); H.R. REP. NO. 115-651, at 8.
134 17 U.S.C. § 115(d)(3)(E)(v).

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matching works to their owners and collecting an astounding amount of data; the task is made even more difficult because there is no mandate for works to be registered with the MLC. Despite this, Congress stated "[w]ith only the exception of the efficient and accurate collection and distribution of royalties, [identifying musical works and copyright information] are the highest responsibilit[ies] of the collective."[135] Obviously, being paid royalties creates an incentive for copyright owners to register. However, for the vast majority of artists, these compulsory royalties are not a significant source of revenue.[136] The MLC would benefit from another "carrot" to dangle in front of artists to incentivize registration, such as the creation of a sample marketplace that adds a new source of revenue using the existing framework of the database.[137]

While the MLC and MMA have the potential to mitigate search costs, they do not fundamentally alter any part of licensing as it relates to sampling. The MMA does not fundamentally alter any of the rights of copyright owners or the legality of sampling. But it does provide useful tools that can be used to address problems in the sample licensing landscape.

IV. A STEP FORWARD

While many scholars have suggested various methods of resolving these issues,[138] few have done so with the framework of the Music Modernization Act in mind due to it being a recent development. What was once a "pipe dream" of a centralized music databased has become a reality, and as such there is a new tool available to solve these problems. This section will first examine how the MLC database can be used as a tool to facilitate sample licensing, and then how MLC registration can be used to resolve the inconsistent jurisprudence.

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135 H.R. REP. NO. 115-651, at 9.

136 *See e.g., About 1% of Artists Generate 90% of All Music Streams [report]*, THE MUSIC NETWORK (Sep. 15, 2020), https://themusicnetwork.com/few-artists-generate-most-streams/.

137 More discussion *infra* part I (B).

138 *See e.g.,* Angelo Massagli, *The Sample Solution: How Blockchain Technology Can Clarify a Divided Copyright Doctrine on Music Sampling*, 27 U. MIAMI BUS. L. REV. 129 (2018); Cody Duncan*, The Case for CAPSL: Architectural Solutions to Licensing and Distribution in Emerging Music Markets*, 13 DUKE L. & TECH. REV. 162, 177-78 (2015); Kenneth M. Achenbach*, Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187 (2004); Josh Norek, *You Can't Sing without the Bling: The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83 (2004).

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A. *Creating a Sample Marketplace Within the MLC Database*

The musical works database was passed for the very purpose of resolving many of the same inefficiencies and search costs of mechanical licensing that also exist in sample licensing. Congress was specifically concerned with reducing the significant transaction costs associated with finding copyright owners and paying them for their works.[139] This is a problem ubiquitous to music licensing, regardless of the type of license; this powerful tool should not be limited to only mechanical licensing when it can benefit licensing in the entire industry.

As previously mentioned, the MLC database attempts to match all compositions to relevant recordings, with all the metadata needed to identify all copyright owners, on a publicly accessible free database. While the statutory scheme currently only permits the MLC to administer blanket licenses for reproduction and distribution rights,[140] the use of the database for other licensing activity may fit within other MLC objectives.

1. The "Sample Marketplace"

Scholars have long dreamt of a centralized "clearing house" as a solution to the sample licensing problems.[141] Many doubted its existence would ever be feasible, but that is no longer a question that needs to be addressed. Instead, scholars and Congress must now answer how the database resolves the issues of sample license clearance as efficiently as possible with as little disruption to the current marketplace as possible.

On its face, the database provides an obvious answer to one of the greatest challenges: finding copyright owners and contact information. With the database, future "bedroom" producers like Baauer could easily search for the song he or she wishes to sample and obtain all relevant contact information.

However, this does not solve the issue in its entirety. In keeping with the example of Baauer, suppose he had found all relevant copyright owners on the database, and reached out to them. What if the copyright owners were not interested in licensing their song for samples, or did not respond? What if they were only interested in licensing their song for certain uses, or only certain parts of their song? And what if Baauer had already created his song, only to learn he could not use the samples in his song as he wished?

The solution, or at least the beginning of a solution, is staring us in the face: allow artists to "opt-in" to a "Sample Marketplace" when registering works on the database. With this simple addition to the already publicly available and searchable database, any artists wishing to sample can search what

139 H.R. REP. NO. 115-651, at 7.

140 17 USC § 115(d)(3)(C)(iii)

141 *See* MCLEOD & DICOLA, *supra* note 11, at 254.

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would become the most centralized database of songs available to sample. This would greatly expand options for creative output and reduce or negate the likelihood of unresponsive or uncooperative copyright owners; if a copyright holder chooses to opt-in, they are much more likely to be open to sample licensing negotiations.

This framework already exists at the United States Patent and Trademark Office (USPTO). In May 2020, the USPTO implemented a program called "Patents 4 Partnerships," which is described as "a meeting place that enables patent owners who want to license their IP rights to connect with the individuals and businesses who can turn those rights into solutions…."[142] The platform enables patent owners to list their patents available for licensing in a centralized, searchable marketplace to help facilitate voluntary licensing.[143]

The proposed Sample Marketplace would function similarly to the USPTO program. Copyright owners can list their songs available for licensing in a central "meeting place," and sampling artists wishing to license songs can search within certain parameters.

While this program could greatly reduce search costs, it still leaves the terms of sample licensing in the air. Sample licensing terms can vary greatly, with some artists wanting complete control over every aspect of how their songs are used, and others more lenient. Any licensing agreement must sufficiently limit the licensee's use of the work to fit within the licensor's vision of how the work will be used. There is no one-size-fits-all sample licensing agreement, as previously discussed.

While there is no standard licensing agreement for all artists, this does not mean that individual artists cannot make standard licensing agreements for their own works. A major artist such as Jay-Z may wish to individually negotiate the scope and terms of any sample license, but smaller artists may be willing to offer favorably broad terms up-front for any sample use. This is especially true for legacy artists with sound recordings fixed prior to 1972; the Music Modernization Act provides those recordings with rights for the first time,[144] and many may greet the possibility of their songs being brought back into relevance via sampling with open arms.

The beauty of this voluntary marketplace solution is that it can be tailored to fit any copyright owner, from Jay-Z to Elvis' estate. The flexibility that accompanies a free-market solution has a variety of benefits. First, artists will not be compelled to offer their songs available for sampling. Many scholars who share similar views about the problems of sample license clearance have posited that there needs to be a compulsory licensing scheme to negate transaction costs and increase creativity.[145] However, a compulsory

142 *USPTO launches platform to facilitate connections between patent holders and potential licensees in key technologies*, USPTO (May 4, 2020) https://www.uspto.gov/about-us/news-updates/uspto-launches-platform-facilitate-connections-between-patent-holders-and.

143 *Id.*

144 *See* 17 U.S.C. § 1401.

145 *See e.g.* Achenbach, *supra* note 138, at 216; Norek, *supra* note 138, at 96.

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framework would not only defeat any market efficiencies created by differentiating song value, but would provide little to no protection for artistic integrity in the instance of a sample being used in a way that is repugnant to the original artist's vision. The voluntary nature of opting into the marketplace avoids these issues, while still cutting into the overarching problem of transaction costs.

Second, copyright owners could choose how much information to provide for those interested in sampling their works. For instance, some lesser-known artists may find they will increase their song's exposure and revenue streams by offering pre-approved terms available to anyone who pays for the license; in this case, an artist would forgo individual negotiations and the artistic control that comes with those in favor of a broader, more easily accessible market and revenues. This option in the sample licensing context would allow *ex ante* clearance of samples for sampling artists before too much capital is spent on making a record, while still allowing original copyright owners at least some level of pre-approved control over their works. Meanwhile, those wishing for more control and independent negotiations to clear samples of their songs can simply post any relevant contact information explicitly for sample clearance. The copyright owner can make that decision to either relinquish some control in favor of a broader reach and revenue or maintain full control but with increased transaction costs.

Third, the new or increased revenue streams from listing a song on the Sample Marketplace would incentivize artists to register their works, and in so doing create a more robust database. This would fit neatly within the purpose of the MMA and MLC.

2. Fitting within the Statutory Scheme

The analysis of how this proposal fits into the current statutory scheme can begin with its biggest strength: creating an incentive for artists to register songs with the MLC database. The duties of the MLC explicitly require it to "engage in efforts to identify musical works (and shares of such works) embodied in particular sound recordings, and to identify and locate the copyright owners of such musical works (and shares of such works)."[146] With the exception of the MLC's main duty of collecting and paying royalties, this is the most important duty of the MLC.[147] Therefore, an initiative that furthers this goal would further the goal of the legislation.

However, the statutory language that creates the MLC explicitly limits any additional administrative licensing functions to be "only for reproduction or distribution rights in musical works for covered activities."[148] Since sampling involves more than simple reproduction and distribution of a work,

146 17 U.S.C. § 115(d)(3)(C)(i)(III).
147 H.R. REP. NO. 115-651, at 9.
148 17 U.S.C. § 115(d)(3)(C)(iii).

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using the MLC to create a Sample Marketplace would likely fall outside the current statutory authority of the MLC.

The MLC does not necessarily need to administer the marketplace, though. The MLC also "shall make [the musical works] database available in a bulk, machine-readable format, through a widely available software application" to a variety of different parties.[149] This opens the door for other entities to create said marketplace.

The Digital Licensee Collective (DLC) is another statutory entity created by the MMA that could potentially facilitate the Sample Marketplace. The DLC is tasked with assisting the MLC in educating the public about the new methods of royalty collection and distribution, as well as assisting with locating and identifying copyright owners for unmatched works.[150] The DLC is also authorized to "[e]ngage in such other activities as may be necessary or appropriate to fulfill its responsibilities under this subsection."[151]

Admittedly, it would require a broad reading of the statute to find that the suggested Sample Marketplace is an "appropriate activity" aimed at encouraging collection of mechanical royalties and identifying unmatched works. But there is merit in dangling another "carrot" in front of copyright owners to register their works and opt-in to the Sample Marketplace.

Absent a broad reading of the statutory language, further legislation would be required to grant either the MLC or DLC the authority to create a Sample Marketplace. However, it is evident that the creation of the Sample Marketplace could be used as a tool to further the existing statutory purpose of creating a comprehensive and complete musical works database.

3. Possible Pushback of the Sample Marketplace

No solution to the sample licensing issue can be perfect. In such a diverse and complex field as music, pleasing all relevant actors is nigh impossible. Some opposing interests can be addressed, however.

First, incumbent and established industry actors would likely resist reducing transaction costs because there is a market for the transactions themselves. For instance, there are firms that specialize in licensing that could see a decrease in revenues from sample clearance activity.[152]

However, by not requiring artists to opt-in to the proposed Sample Marketplace, and by allowing private parties to determine how sample licenses are administered, none of these services will necessarily be supplanted. High-profile artists who wish to maintain full control of their copyrights can simply not opt-in, or opt-in but only provide contact information. Thus, firms

149 *Id.* § 115(d)(3)(E)(v).
150 *Id.* § 115(d)(5).
151 *Id.* § 115(d)(5)(C)(i)(VIII).
152 *See e.g. DMG Clearances*, https://www.dmgclearances.com/ (last visited Nov. 2, 2020).

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specializing in license clearing may see little impact, as it is more than likely high-profile cases will continue to be done on a case-by-case basis. The availability of the Sample Marketplace in that instance would simply provide a marginal reduction in search costs, for which the MMA has provided the framework for anyways.[153] The purpose here is to reduce barriers to entry and allow more artists to legally sample, not supplant the entire industry. Lesser known artists who could not afford high-profile sample clearing costs to begin with will have viable lower-cost alternatives on the Sample Marketplace, while those already thriving in the current ecosystem can continue to use existing services.

Second, private sample licensing databases like the proposed Sample Marketplace already exist. Most notably, TrackLib maintains an impressive repertoire of songs available for licensing with fair and reasonable rates.[154] Indeed, services such as TrackLib are aimed at the very problems addressed in this comment.

In some ways, the Sample Marketplace would compete with such a service, but competition would not necessarily exist. Artists who already list their songs available for sampling on third-party services could opt-in to the Sample Marketplace when registering their work with the MLC, and merely provide the TrackLib link to their work on the marketplace. In this way, the Sample Marketplace could actually *increase* exposure to these third-party services, rather than supplant them. The nature of the database in that case would function as a search engine that merely directs users to other services. Even if that were not the case, however, the efficiencies gained by utilizing an already-existing public and centralized data source to reduce friction in an entire industry could economically justify some overlap with the private sector. The efficiencies of creating a centralized public entity for music licensing are apparent from the nature of the MMA itself.[155]

B. *Resolving the Split*

The Sample Marketplace would go a long way towards addressing many of the economic inefficiencies in the market. That indirectly will decrease litigation, as more artists would be able to obtain a license. However, litigation will inevitably still exist, and that still leaves the question of how to resolve the current circuit split. As previously mentioned, it is not such a

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153 Even without the establishment of a Sample Marketplace, the MLC database will still reduce search costs for firms. *See infra* Part III.

154 *Tracklib*, https://www.tracklib.com/ (last visited Nov. 2, 2020).

155 As discussed, the creation of the MLC was predicated upon the need of a centralized source for royalty payments and clearances, which was historically handled by private actors. *See infra* Part III.

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straightforward answer to resolve the two ideologies: "get a license or don't sample,"[156] or sample without a license as long as its *de minimis*.[157]

The unconventional answer here is that both are the right approach, and both ideologies must be properly balanced. The *Bridgeport* decision gravitates towards a bright line rule because of the efficiencies that creates for the system and artists alike; the *VMG* decision gravitates towards the *de minimis* exception because of the chilling effect that harsh bright line rules can have on expression. But the Sample Marketplace and MLC database should change the analysis.

First, the Sample Marketplace would drastically limit search and other transaction costs, making artists more capable of obtaining a license in the first place. If sample clearance is not such an insurmountable mountain to climb, the bright line rule becomes a more practical one; "get a license or don't sample"[158] would no longer be a death knell for independent sampling artists, but rather a signal that there should be a good faith effort to understand the costs—which would be lower when using the Sample Marketplace.

Second, the Sample Marketplace, and for that matter the MLC itself, would create a presumption that any person could have located relevant copyright owners had any good faith effort been used to obtain a license. The MLC database and the proposed Sample Marketplace that uses the database are publicly available tools that allow public access free of charge.[159] If a sampling artist could have taken thirty seconds to search for a song and obtain all the information needed to license, then any reasons for not doing so should be viewed with skepticism.

The proposed Sample Marketplace framework would therefore lean towards supporting the bright-line *Bridgeport* analysis of sampling. However, as this comment has discussed, the database and by extension the Sample Marketplace are not infallible and rely on private actors registering works; it will continue to be an ongoing process to build upon the database. The fact that not every song will be properly listed on the database or Sample Marketplace should be considered as well.

Because a song not registered on the database is not as easily accessible, the *Bridgeport* analysis does not properly weigh the transaction costs that may have legitimately impeded the sample clearance process. While this does not nullify liability, it should not impede creativity such that an unrecognizable, discrete sample obliterates an artist's hard work. Therefore, the *VMG* analysis would be more proper in determining whether the use of the sample was *de minimis*.

This analysis in a new framework reveals a straightforward test for judges to administer. If the work is registered on the Sample Marketplace, the *Bridgeport* analysis should be used; if the work is not registered on the

156 Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802 (6th Cir. 2005).
157 VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).
158 *Bridgeport Music*, 410 F.3d at 802.
159 17 U.S.C. § 115(d)(3)(E)(v).

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Sample Marketplace, the *VMG* analysis should be used. While it is conceded this is still not a perfect bright line test that clarifies how much of a sample can be used legally without a license, it at least is less arbitrary and therefore more predictable. It does, however, create a new bright-line guideline: artists must *look* for a license, or do not sample. If search costs are low enough that anyone could have found a licensing contact, the law can assume that there was no good-faith effort to obtain a license. And since productive licensing transactions are far more beneficial to society than damaging litigation, the legal framework should guide sampling artists towards looking for licensors *ex ante* by encouraging artists to look for and use the Sample Marketplace or MLC. However, by leaving the door open for the *de minimis* defense in some cases, this test would properly balance the rights of copyright owners to reap the benefits of their creations while also keeping truly insubstantial uses from becoming an impediment to creativity when transaction costs are high.

First, this test incentivizes artists to register their works with the MLC, which as discussed is very important for the database to function as intended. Artists who register their works on the database need not engage in a highly factual battle in court in the event of litigation; if the song is registered, summary judgment could likely resolve many disputes under the *Bridgeport* analysis as a matter of law. Those that do not register, however, would be subject to the more fact-specific battle of finding what a "substantial portion" is in the *VMG* analysis. Copyright owners should gravitate towards registering their works in order to receive the benefit of the law.

Second, this leaves an "escape valve" for creativity. Suppose a sample artist decides she wants to sample a song published in 1954, and cannot find who owns the song, let alone the sound recording, because neither are registered on the database. If the artist wants to use an insubstantial portion, there would still be a *de minimis* defense that would give any potential litigators pause in pursuing an infringement case. By leaving room for the *de minimis* defense, creativity will not be smothered in an overly strict legal regime.

Third, the incentives created by this test to register works on the database could increase creativity. The more artists that register and opt into the Sample Marketplace, the more robust and accessible the Marketplace is. And the more robust the Marketplace is, the easier it will be for artists to clear samples; the free-market solution would create healthy competition that decreases prices to acceptable market levels, as it does in other sectors.

This analysis shows that not only could the Sample Marketplace be used to facilitate a more robust and efficient license clearance ecosystem, but it could be used as a tool to resolve inconsistent jurisprudence. Even absent the establishment of the Sample Marketplace, registration on the MLC could also be used in the same way of creating a legal presumption that the sampling artist did not attempt to obtain a license.

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C. *Why the Sample Marketplace is the Best Current Solution*

Many scholars have put forth suggestions that sample licensing become compulsory to eliminate the inefficiencies of transaction costs.[160] Others have suggested the creation of a digital uniform protocol underlying music files to facilitate connecting owners and samplers.[161] And still others have argued that a decentralized blockchain solution with embedded smart contracts is the solution.[162] These high-minded solutions, in some aspects, have merits. However, they fail in practice.

1. Compulsory Sample Licensing Does Not Balance Efficiencies Properly

Compulsory licensing has been little more than a "necessary evil" in the music industry that was established over one hundred years ago in response to fears of piano roll monopolization.[163] Music publishers have continually criticized the statutory scheme of compulsory licensing because it negates all negotiating power for musicians.[164] Music may be the only product that *mandates* owners to allow others to use their work at rates set by the government.[165] Nevertheless, there are substantial efficiencies to the distribution of musical works founded within the compulsory scheme due to the nature of the industry.[166]

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160 *See e.g.* Achenbach, *supra* note 138; Norek, *supra* note 138.

161 Cody Duncan, *The Case for CAPSL: Architectural Solutions to Licensing and Distribution in Emerging Music Markets*, 13 DUKE L. & TECH. REV. 162, 177-78 (2015).

162 Angelo Massagli, *The Sample Solution: How Blockchain Technology Can Clarify a Divided Copyright Doctrine on Music Sampling*, 27 U. MIAMI BUS. L. REV. 129 (2018).

163 *See* KOHN, *supra* note 7 at loc. Ch. 13, II, B.

164 David Israelite, *NMPA President's Guest Post: Why Music Publishers Must Adopt Blanket Licensing*, BILLBOARD (Jun. 24, 2011 1:19 PM), http://www.billboard.com/biz/articles/news/publishing/1177339/david-israelite-nmpa-presidentsguest-post-why-music-publishers. ("We are laboring under a 100-plus-year-old law that says we have a compulsory license with regard to our mechanical rights. We have no negotiating power. We must license it. And we've seen what that's done in the marketplace."). There is a large body of literature focused on criticizing the current compulsory licensing scheme. *See generally* ROBERT P. MERGES, CATO INST., NO. 508, COMPULSORY LICENSING VS. THE THREE "GOLDEN OLDIES": PROPERTY RIGHTS, CONTRACTS, AND MARKETS 4-5, 9-11 (2004), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa508.pdf; Aloe Blacc et al., *A Sustainable Music Industry for the 21st Century*, 101 CORNELL L. REV. ONLINE 39 (2016).

165 Compulsory licensing rates are set by the Copyright Royalty Board. *See* 17 U.S.C. § 801; *Copyright Royalty Board*, https://www.crb.gov/.

166 For more discussion of this, see generally Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L.R. 915 (2020).

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The status-quo of the entire American economy is based on free market ideologies that allow the market to determine prices.[167] Compulsory price schemes disrupt the foundational American economic belief that "price is the central nervous system of our economy,"[168] and therefore should not be used if other free market pricing options are viable. While the current regime allows for mechanical licensing to be set at statutory rates to alleviate inefficiencies, there are substantial differences between mechanical licensing and sample licensing. Mechanical licensing is straightforward because its limited scope only allows one to copy and distribute a composition.[169] However, sample licensing involves nearly every exclusive right of a song: the right to reproduction, distribution, derivative works, and public performance.[170]

There are undoubtedly efficiencies in compulsory schemes, but the tradeoff of these efficiencies is reduced copyright owner discretion.[171] Permission and discretion have an economic dimension in a free market because obtaining permission to use something like a Tupac song will be more expensive than getting permission to use a local band's song.[172] Removing this dimension of permission destroys that value in its entirety. If this is removed, licensing prices go down; if licensing prices go down, artists and the industry would be less able to invest in new material.[173] Any compulsory scheme, therefore, would need to necessarily weigh the increased efficiencies against the value destroyed by the compulsory scheme. The efficiencies gained for compulsory music sampling, even absent the issue of creator's control, simply cannot be of a nature that overcomes the destruction of value; at the very least, there is a substantial lack of economic evidence to prove this.[174] Furthermore, any compulsory license legislation would necessarily need to strip copyright owners of many of their exclusive rights, and this simply is not a reality that is likely to survive the legislative process.[175]

Given these reasons, compulsory licensing should only be used cautiously and after all other options have been weighed and found wanting. The

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167 *See e.g.,* National Society of Professional Engineers v. United States 435 U.S. 679, 692 (1978) (explaining that "price is the central nervous system of our economy" and that interference with free-market pricing is facially illegal for antitrust purposes).

168 *Id.*

169 *See* 17 U.S.C. § 115(a).

170 *See* 17 U.S.C. § 106.

171 MCLEOD & DICOLA, *supra* note 11, at 228 ("'Sample licensing doesn't have [compulsory licensing] right now, and so there's inefficiency,' … [but also] 'efficiency, to a certain degree, reduces discretion.'").

172 *See id.* at 229 ("The bigger the artist, the more money that they can make for themselves.")

173 *See id.* ("If licensing prices decreased, record labels and publishers would lose revenue, thus reducing their ability to invest in promoting new artists.")

174 This author is not aware of any economic models comparing a compulsory sample licensing scheme to the current regime, at least. Far more economic evidence should be required to adopt any compulsory pricing scheme.

175 *See* MCLEOD & DICOLA, *supra* note 11, at 229.

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current proposal of a free-market Sample Marketplace, even if imperfect in addressing efficiencies, properly balances the economic dimension of permission as well as artist's rights better than any compulsory scheme could.

2. Smart Contracts & Standardized Protocols Are Not Realistic, Yet

Solutions aimed at creating standardized protocols and code to accompany all music files have the potential to create the most efficiencies, perhaps more so than the current Sample Marketplace proposal. However, these types of standards in many industries have been contentious.

For instance, the Digital Millennium Copyright Act (DMCA) established that online service providers would not be liable for copyright infringement for material hosted on their service if the service provider complied with "standard technical measures."[176] Congress, however, left the private market to develop a "standard technical measure" with a "broad consensus of copyright owners."[177] In the over two decades since the statute passed, no broad consensus has been reached with regards to what these "standard technical measures" should be.[178]

This example highlights the issue with these technical and code-driven solutions. They require standards, and standards require either an industry consensus or government mandate. While a standard protocol is a good solution in theory, the historical lack of technological consensus in the industry would require substantial inertia to overcome. However, this is not to say it will never be a solution, but rather that the Sample Marketplace could be a building block on the way to that solution. As the Sample Marketplace and the industry evolve further, standardized protocols and smart contracts could be implemented; the solutions are not necessarily mutually exclusive. The Sample Marketplace, however, is much more immediately practical, as it would only require small changes to an existing statutory structure.

Overall, the Sample Marketplace solution is the most practical one to reduce inefficiencies while properly balancing artist rights and the sample economy. Compulsory schemes should only be used as a last resort in special circumstances; the Sample Marketplace option shows that the music industry does not need to jump directly to the last resort. And while more complex technological solutions offer promise, they are less attainable in the short run. However, if the Sample Marketplace is adopted, the free market may adapt and build upon the framework it establishes to create even more efficient technological solutions in the future.

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176 17 U.S.C. § 512(i).

177 *Id.* § 512(i)(2)(A).

178 UNITED STATES COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS, 176-79 (May 2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf.

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CONCLUSION

Sampling is not going anywhere, nor should it. Data shows that the sample marketplace is doing well for those able to afford it, but the legal regime and transaction costs of clearing samples have failed those without the expertise or capital to engage in licensing. The Music Modernization Act has provided the framework for a centralized musical works database that could be utilized as a tool to create a more robust, predictable, and creative sample licensing market. Creating a Sample Marketplace within the MMA database would increase database registration and artist revenues while expanding viable creative options for sampling artists. The resulting tool could also be incorporated in a legal test to resolve unpredictable and inconsistent jurisprudence while still protecting exclusive rights and encouraging creativity.

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