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LETTER FROM THE EDITOR-IN-CHIEF

The beginning of 2019 marked the half way point of President Trump's first term—a term full of controversies enflamed by both supporters and critics. Volume 62, Issue 2 of the *Howard Law Journal* seeks to address some of the major controversies in today's political news while also highlighting some of the issues that have been overshadowed. The articles by these prominent scholars, together with two *Howard Law Journal* student notes make up Volume 62, Issue 2 which more specifically focuses on the state of our political system, threats to fundamental rights, and the role of the judiciary in issues ranging from prosecutorial misconduct to impeachment procedures.

The Founders considered impeachment to be a key constitutional right to secure. With this strong declaration, W. Burlette Carter, in her article, "Can a Sitting President be Federally Prosecuted? The Founders' Answer," seeks to answer whether a sitting president can be federally prosecuted, and if so, what procedures did the Founding Fathers envisioned for doing so. In her article, Carter finds that while some today think of impeachment as a wholly political matter, the Founders understood impeachment as a *criminal* proceeding to address political misconduct. She concludes that the Founders would say no to the question of whether a sitting president can be prosecuted for official misconduct but that the Founders would say yes, if the action was not in the category of official misconduct. Carter closes her article by warning us that our Founders left the question of whether commencing such a prosecution is *wise* to the generations that came after them and the generations that will come after us.

In "Forget Kanye: Minority Voter Suppression is on the March," Brendan Williams points to the fact that we live in a time where it is easy to get distracted from what is truly consequential. Williams warns us that our obsession with the daily political circus can lead to us losing our most fundamental rights. For example, on the same day that Trump-apologist Kanye West held forth in a bizarre Oval Office monologue, calling for the repeal of the constitutional amendment that abolished slavery, relatively unnoticed by the national media were stories about how African American voters were being denied ballot access in Georgia. During the 2018 midterm election, Georgia placed on hold more than 53,000 voter registration applications—nearly seven-in-ten of them belonging to African Americans—because they failed to clear the state's "exact match" standard. Williams argues that threats to our most fundamental right—the right to participate in our democracy—are foreseeable consequences of the U.S. Supreme Court's 5-4 decision in *Shelby County v. Holder*, gutting the 1965 Voting Rights Act

(VRA). With the disproportionate number of African Americans, Hispanics, and Native Americans who are disenfranchised at every election, this article revisits the 2013 *Shelby County v. Holder* decision, and the consequences that followed.

Next, in “The Pound of Flesh, A Communitarian Principle,” Amitai Etzioni argues that exercising a legal right may not be right in the moral sense. As a society, we rely on moral pushback to limit such abusive behavior. Even when rights such as the first amendment allow us to speak on controversial topics, when that right would cause hurt to others, the right is trumped by a commitment to equality and justice. This is because a fundamental element of all communities is the social pressure which ensures that before one speaks one asks whether what one has to say justifies the hurt it will cause. Etzioni concludes that community membership entails a measure of sympathy for people whose profound beliefs we strongly disagree with. Thus, we are not just rights-bearing individuals, out to carry those individual rights wherever they will take us, but also members of community where self-restraint is morally commendable.

When the United States causes monetary damages by violating the Constitution or a Federal statute, or by breaching a contract, the United States’ sovereign immunity dramatically curtails the relief an injured claimant can seek. The Tucker Act which waives the United States’ immunity to claims for damages, gives the Court of Federal Claims exclusive jurisdiction over these claims. However, in 2008, the Supreme Court limited the already narrow avenue of relief for Tucker Act claimants when it decided *John R. Sand & Gravel*, which held that the statute of limitations for Tucker Act claims was jurisdictional and not subject to tolling for equitable reasons. Hadley Van Vactor, in his article, “Shifting Sands of Claim Accrual: *John R. Sand & Gravel*, Equitable Tolling, and the Suspension of Accrual in Tucker Act Cases,” analyzes the differences and similarities between equitable tolling and the accrual suspension rule and concludes that while some real differences do exist, the accrual suspension rule essentially operates to subvert *John R. Sand & Gravel*’s prohibition on equitable estoppel.

Michael Evan Gold’s article, “A Philosophical Basis for Judicial Restraint” offers a principled basis for restraint of judicial lawmaking. The basis is grounded in moral philosophy which distinguishes whether an action should be taken or judged based on duties or principles (deontology), or based on consequences (consequentialism). Gold describes that an issue arises when duty points in one direction and consequences point in the opposite direction, with no principled way to choose between them. Gold offers a basis of choice by discussing the moral philosophies of Immanuel Kant and John Stuart Mill on this issue, and conclude that consequences are the ultimate criterion, but experience yields duties which should be followed unless an exception can be justified. He then applies his suggested principle to the Supreme Court’s decision in *NLRB v. Retail Store Employ-*

ees Union (Safeco), 447 U.S. 607 (1980). Gold closes his article concluding that legislative facts must be based on evidence in the record, not judges' intuition.

Volume 62, Issue 2 also includes two articles authored by current members of the *Howard Law Journal*. First, Quiana D. Harris in "A Plea to Federal Judges: Combatting Prosecutorial Misconduct in the Cliven Bundy Era" argues that without reforming the current approach to prosecutorial misconduct, the criminal justice system will continue to harbor a playground for miscarriages of justice. Harris' Note offers a practical solution that requires the participation of federal judges. She proposes that judges take a stand against prosecutorial misconduct by publicly reprimanding attorneys when their unethical practices are evident, dismissing cases with prejudice where egregious misconduct takes place, and issuing court orders requiring disclosures of exculpatory evidence—finding attorneys in contempt when they do not comply. Harris, through her Note, encourages judges to use their power to stop prosecutorial misconduct by refusing to tolerate unethical behavior in their courtrooms.

We close Issue 2 with Johanna D. Hollingsworth's Note, "Is There a Doctor in the House?: How Dismantling Barriers to Telemedicine Practice Can Improve Healthcare Access for Rural Residents." In light of the approximate twenty-three million Americans who live in rural or remote areas and do not have access to affordable, quality healthcare, Hollingsworth analyzes several mechanisms to facilitate telemedicine implementation. She argues that telemedicine can alleviate the health access disparity between rural areas and their urban counterparts by providing healthcare via telecommunication technology. Although Congress recognized the problem of healthcare access in rural areas and passed legislation to improve the gap through research, training, and the use of health information technology, Hollingsworth argues that without removing telemedicine barriers and without requirements to ensure that technology and related infrastructure are made available to facilitate telemedicine technology use, the healthcare access problem in rural areas will remain.

On behalf of the *Howard Law Journal*, I am proud to present Volume 62, Issue 2 to you, the reader. I thank you for your support and readership. It is our hope that this Issue will be informative and thought provoking.

KARLA V. MARDUEÑO
EDITOR-IN-CHIEF
VOLUME 62

Can a Sitting President Be Federally Prosecuted? The Founders' Answer

W. BURLETTE CARTER*

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* © W. Burlette Carter, 2019. W. Burlette Carter, Professor Emerita of Law, George Washington University Law School; J.D. Harvard University; B.A., Agnes Scott College.

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ABSTRACT

This article uses the rich history of British common law, Parliamentary action, and colonial prosecutions to explore how the Founders would have answered this question: Can a sitting president can be prosecuted for *crimes* in courts of law or must he be first removed from office? In so doing, it takes a slightly different approach to impeachment than other scholars have taken. It proposes that the Founders would have considered this matter as raising a *jurisdictional* question involving the power of *courts of law*, on the one hand, and the power of Congress, acting as the national grand jury and as a *court of impeachment*, on the other. They also would not have provided us with a firm “yes” or “no” answer. Instead, they would have begun by stating that they gave the power of *removal* of a sitting President solely to Congress and that the power to modify his powers rests with the People, writ large. And so, they would have asked whether the proposed prosecution risks removal of a President from office, either in fact (e.g., by incarceration) or de facto (e.g., by substantially interfering with or modifying his exercise of his Constitutional duties or the discretion given to him under that document). I propose that the Founders would say that in any case in which a potential result of prosecutorial action is incarceration or restraint in the freedom to exercise *presidential* duties that do not merely ministerial supervision, courts of law cannot enforce the prosecution until he is removed from office by impeachment or otherwise. But that leaves a few cases in which the invasion may not be as severe.

I use history to defend the characterization of this impeachment question as jurisdictional. The Founders would have known that

courts of common law and Parliament shared jurisdiction over prosecuting crimes. They knew that the grand juries of the American colonies also theoretically had the power to prosecute royally-appointed chief-executives. But they also knew that colonial grand jury power was an empty right, because royal authorities regularly thwarted it. They also would have known that the colonies lacked the power to *impeach* (and thus, to remove) royally-appointed colonial leaders. Moreover, the Founders certainly knew that, after the Declaration of Independence, several state constitutions allowed the prosecution of a sitting Chief Magistrate and either gave prosecutorial authority to legislatures or split jurisdiction over crimes by high officials between legislatures and courts of law. Thus, they would have been familiar with the *theoretical* possibility of prosecuting a President and would certainly have assumed it possible. However, given the impracticability of such a prosecution, they would have deemed impeachment a particularly important right to secure in their written Constitution. The Founders understood impeachment as a criminal proceeding. A long history of denials of due process raised their concerns about fairness in that context. They also understood that impeachment had political implications. They knew it had been used for political retribution in England. These problems vexed their consideration of impeachment.

Their solution was jurisdictional. They split responsibility for enforcing compliance and assessing the punishment for an errant President. Under their scheme, Congress has the power to investigate and remove if necessary. On the other hand, courts of law have jurisdiction to enforce prosecutorial actions that do not pose a risk of removal and also, prosecutions after Congress has removed a convicted person from office. And in order to avoid double jeopardy, they also provided that the Senate acting as the High Court of Impeachment, could only deliver punishments that did not involve risks to life and limb.

The Founders would tell us that, under the model they crafted, prosecutors with statutory authority still can investigate crimes alleged to have been committed by a sitting president. Indeed, they must, in order to determine the nature and extent of alleged presidential involvement. However, they lack the ability to compel presidential cooperation if a President is unwilling. They cannot jail a President for contempt. Such actions would effect a removal, a responsibility that, the Founders intended to place solely within the province of Congress.

Moreover, they would say that the President can fire prosecutors without violating statutory rules for obstruction of justice. Even if the

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President uses constitutionally-delegated powers with the sole motive of foiling a prosecution, the response is impeachment proceedings to deprive him of these powers and to protect the nation's interest in the presidency. The Founders would also say that a prosecutor has a duty to exercise prosecutorial discretion in deciding whether to proceed against a sitting President through a court of law.

The Founders would have noted that, because courts of impeachment have superior jurisdiction over matters within their concern, articles of impeachment issued by the House of Representatives are an assertion of jurisdiction over the case. Properly issued, they will automatically stay any other pending federal criminal proceeding regarding the same person and conduct, including the work of a federal grand jury.

The Founders would tell us that if a President is convicted by a court of impeachment, he cannot be subsequently prosecuted for obstruction of justice with respect to acts that were, at the time they were undertaken, delegated to him under the Constitution, even if that behavior technically meets the language of a criminal obstruction of justice statute. The penalty for the misuse of an otherwise legitimate power in order to prevent a prosecution, is removal from office. However, the President can be prosecuted for the underlying crime, the investigation of which he was attempting to obstruct. And his obstruction could be the basis of conspiracy charges, if done intentionally to facilitate the misconduct of others.

Finally, the Founders would tell us that, because federal courts have concurrent jurisdiction with Congress over the potential subjects of impeachment, a federal court has the power to consider peripheral questions regarding enforcement of prosecutorial action. It has the power to stay or delay a prosecution in a court of law for good cause shown. (It could not delay a constitutionally-conducted impeachment.) This article does not delve into what "good cause," might mean, but without doubt such a case would be presented by a reasonable threat that the prosecution would interfere with Presidential duties so as to constitute a constructive partial or full removal. A federal court also has the power to condition a request for the delay of a proceeding upon the waiver of any affirmative defenses that would otherwise bar a later prosecution and to take action that is not compulsive of the President to preserve documentary evidence. However, if a President still refuses to heed a court order requiring him to act or

refrain from acting, once again, the power to enforce that order falls to Congress through impeachment proceedings.

INTRODUCTION

Special Counsel Robert Mueller has just completed his investigation into extraordinary allegations that officials or agents of Russia meddled in the 2016 U.S. presidential elections and that Americans, including members of the 2016 presidential campaign of President Donald J. Trump, may have conspired with them (the “Mueller Investigation”).¹ In his final report to Attorney General William P. Barr, the Special Counsel unequivocally cleared President Trump and other Americans of any wrongdoing on the claim of conspiracy. He chose to draw no conclusion on the question of whether the President obstructed justice by interfering with the investigation, and instead, presented the available evidence for both sides of the question. The Attorney General, in consultation with the Deputy Attorney General Rod Rosenstein, then concluded that the evidence was “not sufficient to establish that the President committed an obstruction-of-justice offense.”² The Mueller investigation, like past investigations related to Presidents, raises numerous questions about the *constitutional* vulnerability of a sitting American President to indictment and prosecution for alleged criminal behavior.³ While the Constitution allows a prose-

1. At press time, the Special Counsel’s report had not yet been made available to the public, however, Attorney General Barr provided notice of its principal conclusions in a letter to the majority and minority leaders of the House and Senate Judiciary Committees. Letter from Attorney General William P. Barr to Senator Lindsey Graham, Chairman, Senate Comm. on the Judiciary, et al. (Mar. 4, 2019) (on file with author) (“Barr Letter”). The Barr Letter further noted that Justice Department regulations allow the Attorney General to waive all or part of that confidentially if waiver is in the public interest. Barr stated that his “goal and intent is to release as much of the Special Counsel’s report as I can consistent with applicable law, regulations, and Departmental policies.” *Id.* at 4. See also e.g., Rebecca R. Ruiz & Marc Landler, *Robert Mueller, Former F.B.I. Director, is Named Special Counsel for Russia Investigation*, N.Y. TIMES, May 17, 2017, <https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html> (last visited Feb. 10, 2019). DOJ appointed Mueller pursuant to regulations allowing the appointment of a Special Counsel to avoid a conflict of interest or when such an appointment would be in the public interest. See 28 C.F.R. 600.1 et seq.

2. See Barr Letter, *supra*, at 2, 3. The Special Counsel *did* press criminal charges against a number of Russian nationals and entities. *Id.* at 2.

3. In the modern era, investigations of two other presidents have raised similar questions of presidential vulnerability to prosecution. One is the investigation of President William J. Clinton, led by Independent Counsel Kenneth Starr. *Timeline*, WASH. POST, <https://www.washingtonpost.com/wp-srv/politics/special/whitewater/timeline.htm> (last visited Nov. 11, 2018). Starr recommended impeachment of Clinton for lying to a grand jury about and engaging in other coverup with respect to a consensual extramarital affair with a 21-year-old a White House intern. Clinton was acquitted. Alison Mitchell, *The President’s Acquittal: The Overview; Clinton Acquitted Decisively: No Majority on Either Charge*, N.Y. TIMES (Feb. 13, 1999), <https://www.nytimes.com/1999/02/13/us/politics/13clinton.html>.

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cution of a former President *after* an impeachment conviction,⁴ whether it allows a *sitting* President to be indicted, subpoenaed, or prosecuted *before* an impeachment is less clear.

The Constitution's text is silent (or at best, ambiguous), on whether a sitting President can be indicted and prosecuted. The only provision mentioning an "arrest" or hinting at prosecution of a sitting officer is found in Article I, § 6. The Speech or Debate Clause states in part, "for any Speech or Debate in either House, they shall not be questioned in any other place."⁵

Noting this silence (or ambiguity) in the text, scholars and other knowledgeable commentators have expressed divergent opinions. Some have argued that a sitting President *can* be prosecuted.⁶ Others,

com/1999/02/13/us/president-s-acquittal-overview-clinton-acquitted-decisively-no-majority-for.html (last visited Feb. 10, 2019).

The other criminal investigation of a sitting President involved President Richard M. Nixon. Nixon was accused of involvement in a break-in into the Democratic National Committee headquarters, then at the Watergate Hotel. The investigation was led by Special Prosecutor Leon Jaworski. Like Starr, Jaworski made his report to Congress. The matter ended when, facing impeachment and possible conviction, President Nixon resigned from office. *See, e.g.*, Carroll Kilpatrick, *Nixon Resigns*, WASH. POST (Aug. 9, 1974), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm> (last visited Feb. 10, 2019).

4. U.S. CONST. art. I, § 3 (emphasis added) ("the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law").

5. U.S. CONST. art. I, § 6, cl. 1. The language was likely patterned on language in some state constitutions and the following language from the English Bill of Rights: "[T]he freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." *See Chapter 2, Freedom of Speech and Article 9 of the Bill of Rights (Article 9 of the Bill of Rights 1689)*. *See also e.g.*, MA. CONST., 1780, ch. 1, § 3, art x ("no member of the house of representatives shall be arrested or held to bail on mense process, during his going unto, returning from, or his attending the general assembly." Parliament.uk, <https://publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4306.htm> (last visited Feb. 10, 2019). *See also* MD. CONST., *Decl. of Rights* art. VIII (providing freedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other court or judicature).

6. *E.g.*, Laurence Tribe, *The Constitution Rules Out Immunity for Sitting Presidents*, BOSTON GLOBE (Dec. 10, 2018), <https://www.bostonglobe.com/opinion/2018/12/10/constitution-rules-out-sitting-president-immunity-from-criminal-prosecution/6Byq7Qw6TeJJPVUhlGABPM/story.html> (last visited Feb. 10, 2019); Walter Dellinger, *Yes, You Can Indict the President*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/opinion/indict-president-trial.html>; Michael Avenatti, *The Case for Indicting Trump*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/opinion/michael-avenatti-trump-indictment-stormy-daniels.html> (last visited Feb. 10, 2019); BARRY H. BERKE, NOAH BOOKBINDER, & NORMAN EISEN, PRESIDENTIAL OBSTRUCTION OF JUSTICE: THE CASE OF DONALD J. TRUMP, 151–61 (2018) (rejecting claims that President cannot be indicted); Ronald D. Rotunda, *Can Trump Be Indicted? Are Sitting Presidents Immune from Prosecution?*, NEWSWEEK (Aug. 15, 2017, 06:50 AM), <http://www.newsweek.com/can-trump-be-indicted-are-sitting-presidents-immune-prosecution-650484> (last visited Feb. 10, 2019); Garrett Epps, *The Only Way to Find Out if the President Can Be Indicted*, THE ATLANTIC (May 23, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/presidential-indictment/560957/> (discussing various views); Susan Bloch, *Can We Indict a Sitting President?* 2 NEXUS 7 (1997) (discussing views of Professors A. Amar; J. Bybee; E. Chemerinsky; T. Eastland; E. Freedman; S. Howe; B. Kalt and others; Eric M. Freedman, *Achieving Political Adulthood*, 2 NEXUS 67, 84 (1997); Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from*

however, say he cannot be. Some of those argue that he is absolutely immune, either by the Constitution directly or indirectly because an indictment and trial would so interfere with presidential obligations, that it should be barred while the President is in office.⁷ Another has argued that if performing duties delegated to him under the Constitution, the President is immune, regardless of motive.⁸ Still others question the assumptions of those who say he can be prosecuted.⁹

Even lawyers who have acted as counsel for the government are not on one accord. In 1973, the Office of Legal Counsel opined that a sitting President cannot be prosecuted.¹⁰ In 1998, during the investigation of President William “Bill” Clinton, Independent Counsel Kenneth Starr commissioned an opinion from Professor Ronald Rotunda. Professor Rotunda opined that a sitting President *could* be indicted under the Constitution, but he also said statutory authority was a prerequisite. He concluded that the then-existing Independent Counsel

Criminal Prosecution Before Impeachment? 20 HASTINGS L. Q. 7 (1992) (hereinafter “Freedman, Law as King”).

7. See Dershowitz: *Sitting Presidents Cannot Be Indicted*, FOX NEWS (June 20, 2017), <http://insider.foxnews.com/2017/06/20/alan-dershowitz-sitting-presidents-cant-be-indicted-russia-trump-impeach> (last visited Feb. 10, 2019); Keith King, *Indicting the President: Can A Sitting President Be Criminally Indicted?*, 30 SW. U. L. REV. 417, 418 (2001); Akhil Reed Amar, *On Prosecuting Presidents*, 27 HOFSTRA L. REV. 671, 671 (1999); Jay S. Bybee, *Who Executes the Executioner*, 2 NEXUS 53, 56-57 (1997); Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 11 (1997) (basing conclusion on “the best view of constitutional text, history, structure, and precedent,” citing prior governmental memos, Judge Robert Bork, and others and claiming prosecution would incapacitate a sitting President). Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL’Y REV. 53 (1999) (sitting president immune from compulsory judicial process and only subject to impeachment). But see Greenberg, Mark, *Can Trump Obstruct Justice?* NYR DAILY (Jan. 4, 2018), <https://ssrn.com/abstract=3202398> (last visited Feb. 10, 2019) (arguing that Dershowitz view would lead to almost everything a President did being constitutional).

8. Alan Dershowitz, *You Cannot Charge the President with Obstruction of Justice for Exercising his Constitutional Power*, WASH. EXAMINER (Dec. 4, 2017, 8:14 AM), <https://www.washingtont Examiner.com/alan-dershowitz-you-cannot-charge-a-president-with-obstruction-of-justice-for-exercising-his-constitutional-power> (last visited Feb. 10, 2019). However, Dershowitz says that if the President is acting *outside* those powers, he can be indicted. *Id.* See also Isenbergh, *supra* note 6.

9. E.g., Philip Bobbitt, *Can the President Be Indicted? A Response to Laurence Tribe*, LAWFARE BLOG (Dec. 17, 8:00 AM), <https://www.lawfareblog.com/can-president-be-indicted-response-laurence-tribe> (arguing Professor Tribe’s view, discussed *supra* note 6, depends on debatable assumptions).

10. Memorandum from Robert G. Dixon Jr. on Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973) (on file with Department of Justice at <https://fas.org/irp/agency/doj/olc/092473.pdf> (last visited Feb. 10, 2019) (arguing that “an impeachment proceeding is the only appropriate way to deal with a President while in office.”). The same year, then-Solicitor General Robert Bork argued in a brief that the President can be indicted. Memorandum of the United States Concerning the Vice President’s Claim of Constitutional Immunity (Oct. 5, 1973) (on file with publisher).

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statute gave such power to Starr.¹¹ But he also concluded that a President could fire his prosecutors without “obstructing justice” under a statute.¹² Later, considering the Special Counsel regulations under which Mueller operated, Rotunda opined that Mueller had no authority to indict a sitting President.¹³ In 1998, during the Clinton presidency, Congress also held hearings on the question of whether a President could be subpoenaed, indicted or prosecuted. They heard a clash of views from legal scholars and lawyers.¹⁴ And in 2000, the Office of the Independent Counsel revisited its 1973 opinion and reaffirmed that their answer was “No,” the President is not subject to ordinary prosecution.¹⁵

Those who have addressed this question have looked to a common group of sources. They have analyzed notes of debates during the Constitution’s drafting. Some have looked to state ratification convention notes.¹⁶ Many have analyzed the constitutions of the independent states prior to the founding.¹⁷ The *Federalist Papers*, are fre-

11. Memorandum of Ronald D. Rotunda, Professor of Law, to Kenneth Starr, Independent Counsel (May 13, 1998), <https://www.nytimes.com/interactive/2017/07/22/us/document-Savage-NYT-FOIA-Starr-memo-presidential.html> (last visited Feb. 10, 2019) (disclosed in response to *New York Times* reporter’s FOIA request and stating, given then existing independent counsel statute, President can face federal indictment for activities unrelated to his official duties as President, but reserving judgment on state indictments or indictments in the absence of statutory authority. The Independent Counsel statute expired in 1999). Roberto Suro, *As Special Counsel Act Expires, Power Will Shift to Reno*, WASH. POST (June 30, 1999), https://www.washingtonpost.com/archive/politics/1999/06/30/as-special-counsel-law-expires-power-will-shift-to-reno/d091aa10-16fb-4939-b8c8-ab3eacf93a25/?utm_term=.a35fc816dfd7 (last visited Feb. 10, 2019).

12. Rotunda, *supra* note 11.

13. See Ronald Rotunda, *The President Can Be Indicted, Just Not By Mueller*, WASH. POST (July 27, 2017), https://www.washingtonpost.com/opinions/the-president-can-be-indicted—just-not-by-mueller/2017/07/27/a597b922-721d-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.5077722e2942 (last visited Feb. 10, 2019; arguing the Constitution does not prohibit indictment of a president, but that the Special Counsel statute authorizing the Mueller Investigation “most likely” does not give Mueller the power to do so). For the regulations, see *supra* note 1.

14. *Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process? Hearings Before the Subcomm. On the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong (1998).

15. Memorandum Opinion for the Attorney General (Oct. 16, 2000) (on file with Department of Justice at https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf) (last visited Feb. 10, 2019; reaffirming 1973 view that indictment would “would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions.”).

16. E.g., *Freedman, Law as King*, *supra* note 6, at 17; Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L. J. 707, 728, n. 114 (1988).

17. For significant exploration of state constitutions in the impeachment context, see, e.g., Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History and Practice of Late Impeachment*, 6 TEX. REV. L. & POL’Y 13, 29-39 (2001); P. HOFFER & N. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 68-77 (1984).

quently consulted.¹⁸ Although written after the Constitution was drafted, they are, at least, close in time and authored by those directly involved in the Constitutional mission. Thus, it must be conceded that they reflect at least what *some* of the Founders thought. But those same factors might have led authors to insist on presenting only their *own* interpretations, even if in conflict with other drafters' views. Some consider Justice Joseph Story's writings to be authoritative.¹⁹ Story was born in 1779; he was, therefore, eight years old when the Constitution was signed in 1787. Though a precocious child for sure, he likely had no first-hand knowledge of the Founders' intended meaning and only indirect insight into how the people of a young nation would have understood its language, that is, its original meaning.²⁰ Alternatively, some scholars rely upon court cases decided long after the Constitution was written. But in terms of discerning how the Founding generation thought, such later-decided cases pose the same problems of other later-written commentary. Moreover, judges may face pressures to be consistent with prior doctrine, even when indications are that they are in error as a matter of original intent or original meaning.

Discerning the Founders' intent in this instance is also fraught with difficulty given the Constitution's ambiguous "silence." It is possible that the Founders did not specifically address prosecution of a sitting President in the Constitution because they could not agree on it. Or perhaps they did agree, which is why they left the subject out. Moreover, although the *office* of the Attorney General existed in colonial times and within states after independence, and while the office

18. *E.g.*, THE FEDERALIST NOS. 65, 69, 77 (Alexander Hamilton). The first of the *Federalist Papers* are much closer appearing in October of 1787, months after the Constitution was drafted. See *Primary Documents in American History: The Federalist Papers*, LIBR. OF CONGRESS (2005), <https://www.loc.gov/tr/program/bib/ourdocs/federalist.html> (last visited Feb. 10, 2019).

19. *E.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

20. Some scholars frame the constitutional meaning inquiry in terms of the "original public meaning," rather than original intent. In a nutshell, the original public meaning refers to how people would have understood the words in the relevant era. For a discussion of the debate, see, *e.g.*, Richard H. Fallon, *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015). Some also argue that how the Founders originally felt about their approach should not always govern the day. *E.g.*, Transcript of Oral Argument at 39 (ll. 14-25)-40 (ll. 1-8), *Gamble v. United States* (No.17-646) (Kagan, J., commenting that while some members of the Supreme Court may think original intent is the "alpha and omega of every constitutional question . . . there are other people on this bench who do not.") On the other hand, I suggest that even those who would eschew dogged adherence to an original intent or original public meaning analysis, would at least *begin* with that inquiry, in order to determine whether they must move beyond it and what they are trading away when they do.

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would have been quite familiar to the Founders,²¹ the federal statute authorizing the U.S. Attorney General did not exist until *after* the Constitution was signed.²²

This article takes a deep dive into the British and colonial backdrop of the Constitution to investigate how the Founders might have answered the question of whether a sitting President can be prosecuted. To these ends, in addition to consulting the commonly-consulted pool of resources, I look at some lesser-used ones: Parliamentary journals and records of Parliamentary procedures, the *Calendar of State Papers* from the British National Archives,²³ British caselaw and American and British newspapers from the eighteenth century.

Of course, scholars have debated whether we should accept that the British model for impeachment played a significant role in the Founders' discussions. I would offer several reasons why I believe it did. First, it should be remembered that in 1787, the Founders were only eleven years away from the time when they first declared their independence. The British model for impeachment was a natural starting point because it was the model with which they were all familiar. Second, *Blackstone's Commentaries*, a legal Bible for Americans of the time, focused on the British model in its discussion of impeachment. Third, several of the states had used the British model as a starting point in their constitutions after Independence.²⁴ Fourth, contrary to a common assumption that Americans had angrily "moved on" from their divorce, in fact, they frequently looked back upon England and regularly checked in. Newspapers regularly ran stories,

21. For the role of royally-appointed attorneys general during the colonial period, see discussion *infra* Section I.A. For an independent state attorney general reference, see, e.g., MA. CONST., 1780 art. IX.

22. The office of the U.S. Attorney General was established in the Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

23. The calendars are 41 volumes of summaries of handwritten correspondence from the royally-appointed colonial leaders in America and the West Indies to the British Secretaries of State, relating to colonial affairs and received between 1574 and 1739. The notations largely reflect the substance of the original papers. See CALENDAR OF STATE PAPERS, COLONIAL AMERICA AND THE WEST INDIES, 1574-1739, BRITISH HISTORY ONLINE, <https://www.british-history.ac.uk/search/series/cal-state-papers—colonial—america-west-indies> (hereinafter "CALENDAR OF STATE PAPERS") (last visited Feb. 13, 2019). Thus, they reflect the early conflicts between the colonies and the Crown.

24. E.g., MD. CONST. *Decl. of Rights*, art. III ("That the inhabitants of Maryland are entitled to the common law of England"); NY. CONST. art. XXXV (declaring "that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State").

even columns, with news of what was going on in England, thus demonstrating that ordinary Americans remained keenly interested in what was going on there.²⁵ Consider that this author's search for the word "Parliament" in *Readex's Early American Newspapers* database, between January 1, 1786 and September 16, 1787 (the day before the Constitution was signed) yielded 9,692 newspapers that used the word. Overwhelmingly, these are references to the British Parliament. That figure does not include the papers that reference the "Commons" or "House of Lords," or report the decisions of British courts. And it does not include newspapers found on other databases. Indeed, at the same time that the Americans were drafting the Constitution, they were reading in American papers about British attempts to impeach and later try British subject Warren Hastings.²⁶ This keen interest in Great Britain makes sense because as immigrants, or the children or grandchildren of immigrants, many Americans of the Founding Generation still had family in England. And America was, after all a superpower within its time. Hoping to found a new nation, the Founders naturally looked to other examples for ideas. And there is a fifth reason to look to the British model. Hamilton, in *Federalist* No. 65, tells us that the drafters looked to it.²⁷ No, the Americans were definitely not going back to their old relationship. But they did not discount it as a total loss from which nothing could be learned.

25. Every newspaper with a significantly circulation regularly ran stories of what was going on in England. *E.g.*, *European Politicks, England, London*, October 27, AMERICAN HERALD, Jan 2, 1786 at 1; *Foreign News, London, October 9*, NEW-YORK PACKET, Jan. 2, 1787, at 2. Sometimes they repeated verbatim stories from European papers. *From the London General Advertiser*, CONNECTICUT JOURNAL, July 25, 1787, at 2 (on Hastings trial); *History of the Late War in America from the British Annual Register, for 1778*, MASSACHUSETTS SPY (PUBLISHED AS THE WORCESTER MAGAZINE), Jan. 4, 1787, at 479. Newspapers often reported British news three to six months after it had happened. Much of the news came from newspapers brought by ship and from sea captains. *E.g.*, *By Tuesday's Eastern Post Paris, April 20*, U.S. CHRONICLE, July 12, 1787, at 2 (referencing news of Warren Hasting' impeachment trial from Captain Hunter of *The George*).

26. *E.g.*, *Extract from a Letter From Turin*, Feb. 10, INDEP. J., May 2, 1787, at 1 (discussing trial); *Halifax, July 12*, INDEP. GAZETTEER, Aug. 4, 1787 at 2 (letter to newspaper sending an excerpt of articles of impeachment against Hastings so that Americans could review them and noting the spectacle of the great "Nabob" on his knees for four hours as the articles were read); *see also London, House of Commons, Feb. 7, 1787*, AMERICAN HERALD, June 4, 1787, at 1; *Legislative*, BOSTON GAZETTE & THE COUNTRY J., July 2, 1787, at 2; *Legislative*, INDEP. GAZETTEER, June 23, 1787, at 2; *Legislative, British House of Lords, Monday, May 8*, NEW HAMPSHIRE-SPY, July 21, 1787, at 310; *By Tuesday's Eastern Post Paris, supra*; *Introduction to the Articles of Impeachment of High Crimes and Misdemeanors Against Warren Hastings*, NEW-YORK PACKET, Aug. 14, 1787, at 2. For more on the *Hastings* case, *see* discussion *infra* beginning at Section I.B.1.c.

27. FEDERALIST NO. 65 (Hamilton) ("The Powers of the Senate").

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Believing that we can learn more from British and colonial history, I add this supplement to the astounding body of existing constitutional and historical literature on impeachment. I seek to expand our understanding of the larger *context* in which the Founders wrote the Constitution. As part of this effort, I tie in the independent state constitutions in existence prior to the Founding. I offer here a new framework for understanding how to analyze the question, that is, that we should consider the impeachment provisions as *jurisdictional*. It is not my goal to discuss here whether or not the answers the Founders would give are *practical* or *wise* in the present day. For now, I wish to establish the relevance of British history to the question and why impeachment and removal provisions are jurisdictional. And I want to begin a discussion of how this understanding should shape our understanding of prosecutions of sitting Presidents. I do this by positing how the Founders might have answered several questions relating to the issue. Further defining the contours of this perspective, I reserve until another day.

Part I considers British approaches both to prosecution and to impeachment before American independence. It discusses tensions between the King's prosecutors and local grand juries in seeking justice against British soldiers and officials. It also discusses the ability of the King's courts and the colonies to prosecute officials for high crimes and misdemeanors and why, in the colonies' case, the possibility of prosecution was insufficient. And it discusses the efforts of the colonists to remove royally-appointed authorities from office, despite the Crown's denying them impeachment authority.

Part II notes how the courts of the common law and Parliament, acting as a court of impeachment, had concurrent jurisdiction and how the British balanced jurisdictional squabbles between these courts at home. Here, I focus on a case that produced a clash of jurisdictions between Parliament and the King's courts: the prosecution(s) of Edward Fitzharris for treason. From this and other precedent, I propose that the Founders would tell us that while concurrent jurisdiction exists, prosecutions in the two courts for the same crimes at the same time is not possible. When Parliament properly issued articles of impeachment, the proceedings in common law courts, including grand jury proceedings, were to be automatically stayed.

Part III then considers how the Founders approached impeachment in the Constitution. It considers the Convention notes and Hamilton's views. It also argues that state constitutions after indepen-

dence but before the Constitution, demonstrate that the Founders were well aware tht there were many ways to allocate jurisdiction in prosecuting a Chief Magistrate. I show how the Founders allocated criminal jurisdiction between courts of law and the High Court of Impeachment, how they separated removal from punishment, and how they dealt with the problem of double jeopardy.

Finally, Part IV offers up the Founders' answer to the various questions surrounding whether a sitting President can be prosecuted. It argues that they would say they considered the prosecution of a President as raising a jurisdictional question. And it argues that the key jurisdictional inquiry is whether or not the threatened prosecutorial action would result in removal of the President, including a partial or constructive removal, by curtailing his discretion when performing his constitutional duties.²⁸

The matter of prosecuting a sitting President raises other questions that I do not examine here. I leave to another day an exploration of the definition of "high crimes and misdemeanors;"²⁹ the questions of whether Congress can impeach for actions that are not criminal; of whether Congress can reach persons *other than* current government officials; of whether impeachment can occur after one has left office; of whether a trial after impeachment and conviction raises a possibility of issue preclusion; and of whether Congress can impose penalties other than removal and a ban from public office upon an impeached official. Certainly, some of the arguments put forth here

28. The notion that constructive removal is a central question in presidential prosecutions has been raised Judge MacKinnon of the D.C. Circuit in *Nixon v. Sirica*, 487 F.2d 700 (1973). The case concerned the investigation of a break-in into the Democratic National Committee headquarters. The Court considered whether it could enforce a subpoena duces tecum to require President Richard Nixon to produce tapes of his conversations with others in the White House. While agreeing the Court had jurisdiction to decide the question of executive privilege, MacKinnon dissented from the majority's finding that the subpoena was enforceable. He wrote:

Sound policy reasons preclude criminal prosecution until after a President has been impeached and convicted. To indict and prosecute a President or to arrest him before trial, would be constructively and effectively to remove him from office, an action prohibited by the Impeachment Clause. A President must remain free to travel, to meet, confer and act on a continual basis and be unimpeded in the discharge of his constitutional duties. The real intent of the Impeachment Clause, then, is to guarantee that the President always will be available to fulfill his constitutional duties.

Id. at 163. MacKinnon said he would recognize an absolute privilege for confidential Presidential communications. *Id.* at 81. Later, in *U.S v Nixon*, the Supreme Court held that executive privilege is not absolute but should yield to a narrowly-tailored subpoena duces tecum. *United States v. Nixon*, 418 U.S. 683 (1974).

29. *Id.* art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors"). Scholars have debated the meaning of these terms. *E.g.*, Isenbergh, *supra* note 7.

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could apply to state prosecutions. This article focuses solely on federal prosecutions.³⁰ I also do not discuss civil actions against the President. And I take no position on the propriety of the Mueller investigation; on whether or not a particular President *should* be indicted, impeached or convicted; or on whether federal courts should intervene to stay any prosecution in a given case. My goal here is to zero in on how the Founders would have understood the intersection of prosecuting a sitting president and impeaching and trying one for criminal behavior.

I. THE BRITISH BACKDROP FOR PROSECUTIONS AND IMPEACHMENTS

I contend that, despite independence, the Founders of the constitutional period would have understood prosecutorial and impeachment powers with respect to a Chief Magistrate in the context of their colonial experience and its British common law backdrop. This section thus discusses that backdrop for prosecutions and impeachments.

A. Prosecution by Common Law or Statute

1. Approaches in England/Great Britain

Under the common law, the primary means of commencing a prosecution were through (1) an indictment by a grand jury or (2) charges by way of an information presented to a judicial officer.³¹

The tradition of the grand jury began in 1166 with an edict by King Henry II, the “Assize of Clarendon”.³² The English grand jury was required to have between twelve and twenty-three people.³³ An indictment was a written statement of criminal charges against an individual, as to which a grand jury had issued its approval.³⁴

30. For exploration of many of the legal questions relating to impeachment generally, see, e.g., RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973); Cass R. Sunstein, *IMPEACHMENT, A CITIZEN’S GUIDE* (2017); Charles Black, Jr. *IMPEACHMENT: A HANDBOOK* (Philip Bobbitt, ed. 2018).

31. W.S. Holdsworth, *The History of Criminal Information*, 1 CAN. BAR REV. 300 (1923) (hereinafter, “Holdsworth, *Information*”); see also 4 WILLIAM BLACKSTONE, *COMMENTARIES* *301–07 (discussing indictments); *id.* at *308–12 (discussing informations).

32. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 321 (7th ed. 1956) (origin in 1166). For the text of the Assize, see The Avalon Project. *Assize of Clarendon*, 1166, <http://avalon.law.yale.edu/medieval/assizecl.asp> (citing WILLIAM STUBBS, *SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH LAW*, 143–146 (1913) (available at, https://archive.org/details/select_chartersa01stubgoog/page/n4) (last visited Feb. 10, 2019).

33. 4 BLACKSTONE, *supra* note 31, at *302.

34. E.g., 4 BLACKSTONE *supra* note 31, at *302 (referring to an indictment as a written statement of charges); see also SIR JAMES ASTRY, *A GENERAL CHARGE TO ALL GRAND JURIES*

In England and early America, the grand jury was sometimes called the “grand inquest.”³⁵ English grand juries had broad powers to investigate and present accusations (“presentments”) on their own, without the Attorney General.³⁶ A written statement of the charges (an indictment or “bill”) was prepared either by the Attorney General or by a judicial officer.³⁷ If convinced by evidence they had gathered or that was presented to them, the grand jury signed the bill “*vera*” (or “true”), thus indicting; if not convinced, the grand jury wrote “*Ignoramus*”, thus indicating that they deemed the evidence insufficient.³⁸ Although at first, their proceedings were in public, their deliberations were made secret in 1368 to protect them from Crown influence.³⁹

4–5 (1703); *Copy of a Presentment Made by the Grand Jury of Middlesex to the Judges of the King's Bench: Trinity Term*, STAMFORD MERCURY, July 18, 1723, at 32 (indicting persons disseminating publications critical of government-sponsored religion) (provided courtesy of the British Newspaper Archive and British Library Board).

35. *E.g.*, *London*, AM. WEEKLY MERCURY, Apr. 16–23, 1724, at 3 (American paper referring to “Grand Inquest” indictment in London).

36. See 4 BLACKSTONE, *supra* note 31, at *301; 4 WAYNE R. LAFAVE, & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 15.2 (g) (1984) (“[T]he grand jury at common law could bring charges on its own initiative through the use of the presentment. This allowed the grand jury to initiate a prosecution over the opposition of the prosecutor.”). See also BLACKSTONE, *supra* note 31, at 298 (“A presentment, *properly* speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation without any bill of indictment laid before them at the suit of the king . . .”).

For discussion of the early grand jury process, see RICHARD GUDE, I PRACTICE ON THE CROWN'S SIDE OF THE COURT OF THE KING'S BENCH AND THE PRACTICE OF THE SESSIONS, THE GENERAL RULES OF COURT. FROM THE REIGN OF JAMES I, TO THE PRESENT TIME 85–96 (1828) (discussing the “Mode of Preferring Indictments in the King's Bench”).

Some have argued the indictment was and is jurisdictional in felony cases. See Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 409 (2008) (arguing that an indictment was a jurisdictional prerequisite to prosecution of some felonies, contrary to later Criminal Procedure Rules allowing waiver of same); Renee B. Lettow, *Note, Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1337 (1994) (discussing history of grand jury presentments and indictments); see also BERNARD SCHWARTZ, THE GREAT RIGHT OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS, 76–77 (arguing that North Carolina's 1776 *Decl. of Rights* guaranteeing the right to indictment was the “direct precursor” to the Grand Jury Clause in the 5th Amendment).

37. *E.g.*, STAMFORD MERCURY, Nov. 10, 1715, at 239 (British newspaper referencing Attorney General presenting indictments for high treason to grand jury on which they wrote *vera*); 4 BLACKSTONE, *supra* note 31, at *301 (referring to an “officer of the court” framing an indictment after a grand jury takes notice of an offense).

38. *Id.*; 1 FRANCIS BACON, THE ELEMENTS OF THE COMMON LAWS OF ENGLAND 16 (1629) (noting a judge would present the grand jury with a written indictment and the grand jury would write upon it “either *Billa vera* [i.e., true bill], and then the prisoner standeth indicted, or else *Ignoramus*, & then hee is not touched”); 4 BLACKSTONE, *supra* note 31, at *305–06. Blackstone translates “*Ignoramus*” as “[w]e know nothing of it[’], intimating that, though the facts might possibly be true, the truth did not appear to them.” *Id.* at *305.

39. M. FRANKEL & G. NAFTALIS, THE GRAND JURY AN INSTITUTION ON TRIAL 7 (1977) (discussing when grand jury stopped being public). *Cf.* JOHN HAWLES, THE GRAND JURY MAN'S OATH AND OFFICE EXPLAINED AND THE RIGHTS OF ENGLISH-MEN ASSERTED, A DIALOGUE BETWEEN A BARRISTER AT LAW AND A GRAND-JURY MAN 5–6 (1680) (anonymous pamphlet

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The Crown could also proceed without a grand jury, by *information*, directly presenting evidence to a judge and asking the judge to find the evidence sufficient for a trial. In their seminal *History of English Law*, Pollack and Maitland noted broad debate over the history of criminal information.⁴⁰ The earliest instance they could find of a trial without a grand jury indictment occurred during the reign of Edward I.⁴¹ The King brought a man to trial for treason and felony.⁴²

The information is almost as old as the grand jury indictment.⁴³ Holdsworth traced it to the thirteenth century as well, but said it likely arose before formal statutes, “very naturally to the centralized royal justice of the thirteenth century.”⁴⁴ For example, he noted that if someone took property that belonged to the King, the King could inform his courts, and they could act.⁴⁵ He asserted that the informal practice was later formally developed through legislation.⁴⁶

The earliest statute allowing informations may have been the statute of Winton (or statute of Winchester) passed in 1285 at the behest of Edward I.⁴⁷ The statute expressly applied to felonies and misdemeanors alike.⁴⁸ Noting the growth in crime and difficulty of jury conviction, it allowed constables and other watchmen to keep the peace and gave them certain powers to bring perceived lawbreakers (including “strangers” and “suspicious” persons) before a Justice.⁴⁹ It pro-

referencing the secrecy obligation and oath); *see also* ASTRY, *supra* note 34, at 9 (referring to secrecy obligation & the oath).

40. *See* 2 FREDERICK POLLACK AND FREDERIC WILLIAM MAITLAND, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 662 (2d ed. 1898).

41. *Id.*

42. *Id.* (Treason and felony are separately referenced. In the seventeenth century, as the *Fitzharris* case *infra* demonstrates, a person charged with treason was denied certain rights. *See, e.g.*, note 143, *infra* (court denying Fitzharris copy of indictment because he was charged with high treason).

43. 4 BLACKSTONE, *supra* note 31, at *309 (stating the information is almost as old as the common law itself); HOLDSWORTH, *Information*, *supra* note 31, at 300;

44. Holdsworth, *Information*, *supra* note 31.

45. *Id.* at 301.

46. *Id.* at 301. Holdsworth notes that there were civil and criminal informations and, different kinds of each. *Id.* at 301–02 (discussing different types).

47. 13 Edw. I. st. 2, c. 4. (1285); *see also* 1 HANNIS TAYLOR, *ORIGIN OF ENGLISH CONSTITUTION* 503 (1904); *cf.* 2 MATTHEW HALE, ET AL., *HISTORIA PLACITORUM CORONAE. THE HISTORY OF THE PLEAS OF THE CROWN* (1st American ed.) 94–96 (1847) (discussing power of constables and watchmen; Statute of Winton authorization).

The Statute of Winton (a/k/a Statute of Winchester) also required that every person between the ages of 13 and 60, take up arms and be available to serve as watchmen, constables or other peacekeepers according to the value of their lands. 13 Edw. I, st. 2, c. 4.

48. 13 Edw. I. st. 2, c. 4. (1285).

49. *Id.*; *see also* 2 HALE, *supra* note 47, at 95, 96 (discussing different types of watchmen and constables assigned to keep the peace and their ability to bring prisoners on charges before a justice of the peace).

vided that “inquests” could be held by the “lord of the ville” (essentially the mayor).⁵⁰ Holdsworth suggests that by the time of Henry VIII’s reign, the King had “a somewhat indefinite power of proceeding by way of information for offenses under the degree of felony.”⁵¹

2. Approaches in the American Colonies

Given the separate founding histories of each colony and state sovereignty immediately after American independence, each state has its own history with respect to charging persons with crime and prosecuting them, including the evolution of grand jury authority.⁵² From the earlier times, however, colonial grand juries operated much like English grand juries in their investigative functions, dealing with a wide range of misbehavior, both misdemeanors and felonies.⁵³

Conflicts between the Crown and locals began to strain the relationship between the Crown’s attorneys and the grand juries. A regular source of American concern was the conduct of British soldiers. In

The evolution of some statutory exceptions to grand jury presentment is recounted in *King v. Bridgewater and Taunton Canal Co.*, 108 Eng. Rep. 814 (1827) (also known as *King v. Justices of Somersetshire*) discussed *infra* at note 51. The *Bridgewater & Taunton* case cites to LAMBARD EIRENARCHA 508. *E.g.*, WILLIAM LAMBARD, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF THE PEACE IN FOURE BOOKS 508 (1599).

50. 13 Edw. I. st. 2, c. 4. (1285).

51. Holdsworth, *Information*, *supra* note 31, at 307. In 1827, the King’s Bench invalidated a longstanding custom of constable presentment without a grand jury because the practice lacked statutory authorization and was deemed to be unfair to defendants. *Bridgewater & Taunton*, *supra* note 49, at 815. The judges determined that the constable’s mere offer was invalid as a presentment because it was not under oath and that if the constable could sign it, he could thus appear before a grand jury and swear to it. With other judges concurring, Chief Justice Tenterden stated “I am sorry to hear that the custom . . . has prevailed so long; it is clearly unjust and illegal and must be discontinued.” *Id.* at 815 (noting that the presentment of a justice on his own knowledge had, by force of statute, sometimes sufficed for a grand jury but a constable was not a judge and no statute authorized this practice).

52. *E.g.*, 1 PHILIP ALEXANDER BRUCE, INSTITUTIONAL HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY: AN INQUIRY INTO THE RELIGIOUS, MORAL, EDUCATIONAL, LEGAL, MILITARY, AND POLITICAL CONDITION OF THE PEOPLE BASED ON ORIGINAL AND CONTEMPORANEOUS RECORDS, 607–10 (1910) (discussing operation of constables and of the grand jury operations in early Virginia); JUDICIAL AND CIVIL HISTORY OF CONNECTICUT, 171–73 (Dwight Calhoun & J. Gilbert eds. 1895) (discussing constables and grand juries).

53. *E.g.* BRUCE, *supra* note 52, at 608–09; *see also e.g.*, *America*, *New York*, *May 4*, BOSTON EVENING-POST, May 11, 1741, at 1 (care and vigilance of grand jury has successfully discovered gangs causing crime); *Philadelphia*, Jan. 1, N.H. GAZETTE & HISTORICAL CHRONICLE, Jan. 30, 1767, at 1 (letter reporting 1766 proceeding in which Attorney General presented several bills of indictments to grand jury which then left to deliberate). For more history, *see* Ron. S. Chun, *The Right to Grand Jury Indictment*, 26 AM. CRIM. L. REV. 1457, 1461 (1989) (explaining role of attorneys generals); *id.* at 1457–67; Lettow, *supra* note 36, at 1336–37 (explaining the history; tensions with Crown); Robert Gilbert Johnston, *The Grand Jury: Prosecutorial Abuse in the Indictment Process*, 65 J. CRIM. L. & CRIMINOLOGY 157, 157–60 (1974) (discussing history).

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1769, a Boston newspaper reported that the Attorney General had entered a “noti prossiqui” plea (sic) in a case involving soldiers alleged to have assaulted American citizens. In other words, he pleaded *nolle prosequi* or “no prosecution” for the Crown, despite the local grand jury’s indictment.⁵⁴ It said that the Crown claimed the facts did not support some of the grand jury’s charges, and the Crown also insisted that some other participants in the affair, whom the grand jury did not indict, should be tried.⁵⁵ (It seems, the Crown wanted to put Americans involved in the conflict on trial.) Frustration with their inability to use grand jury powers to curb soldier misconduct was so significant that Americans complained of it within the Declaration of Independence. They stated that the King had protected soldiers “by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States”⁵⁶ In 1770, a newspaper commentator complained about pressure on the grand jury to reduce the rigor with which the grand jurymen investigated claims as well as pressure upon them to only pay attention to prosecution’s evidence.⁵⁷ Such comment suggest that grand juries did not always trust the King’s offers.⁵⁸

One letter from a royal official in the colonies to the Crown notes the tensions in the colonies. It stated that when the grand jury twice refused to issue a true bill, the Court kept adding more and more people to the grand jury until finally it got an indictment approval.⁵⁹

54. *E.g.*, *Boston*, Jan. 30, N.Y. JOURNAL; OR THE GEN. ADVERTISER (Mar. 2, 1769), at 1.

55. *Id.*

56. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

57. *See On the Importance, Privileges and Duty of Grand Juries*, N.Y. GAZETTE OR THE WEEKLY POSTBOY, Apr. 16, 1770, at 1 (celebrating the grand jury as a protector of the rights of Englishmen and complaining that judges were telling grand jurors that as accusers and not triers they should “relax the Rigour of their Enquiries, after the Truth” and that “to promote a favorite Prosecution, [some] tell them, that as *Accusers* and *not Triers*, they ought to proceed *ex parte*, and hear only the Evidence offered by the Prosecutor, and that this will be a full Discharge of their Oath).

58. Similar concerns were expressed in Canadian colonies. *Mr. Majeres, His Majesty’s Attorney General for Canada, His Letter to the Grand Jury of Montreal*; N.Y. JOURNAL; OR THE GENERAL ADVERTISER, June 30, 1768, 2 (Crown’s Attorney General responding by letter to grand jury concerns that he hid evidence from the grand jury and did not bring appropriate indictments).

59. The notation of the letter in the *Calendar of State Papers* reads:

Boston. April 15, 1700. At a Court of General Trials held at Newport, March 16, 1700, narrator was foreman of a Grand Jury, which twice returned a verdict of “Ignoramus” upon the indictments against Joseph Pemberton, John Lewis and Edward Blevin (*sic*) (xvi.). The Court had already added three more to the Jury, and now added six, and, in spite of protest and after many hours’ debate, 12 of the 21 now agreed to bring in a Billa Vera, because the Court would not receive it otherwise. The Judges constituting the Court were Governor Cranston, Dep. Gov. Green, Walter Clarke, Robert Carr, James Barker, Gyles Slocum, Joseph Sheffield, Joseph Hull, etc.

The King sometimes bypassed a colonial grand jury and proceeded by information.⁶⁰ One American colonial writer in 1770 suggested that the option of an information was especially favored by the Crown if it believed it could find no grand jury to indict.⁶¹ Americans also allowed prosecution of crimes to be presented by constables and others but these seem to have been lower level crimes or persons deemed entitled to lower justice.⁶²

This erosion of the grand jury power under Crown rule as the Crown attempted to protect its own interests, combined with their conception of the rights of British citizens, likely led the Founders to include in the Constitution a right to a grand jury in the case of a capital or “infamous” crime.⁶³

B. Prosecution by Impeachment

Historians agree that the first use of impeachment power in England occurred in 1376 under Edward III.⁶⁴ This section discusses how the British approached the issue of impeachment.

Letter, Governor the Earl of Bellomont to the Council of Trade and Plantations, Boston (June 22, 1700) (reporting details of letter Bellomont received from Capt. Christopher Almy) in 18 CALENDAR OF STATE PAPERS, *supra* note 23, at 356–70, 369, <https://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol18/pp354-380> (last visited Feb. 10, 2019) (notation “(sic) (xvi.)” in original).

60. PROVIDENCE GAZETTE, AND COUNTRY JOURNAL, March 30, 1770, at 51.

61. *Id.*

62. *E.g.*, *Sasquehanah*, May 20, 1723, NEW ENGLAND COURANT, July 8–15, 1723 (Letter referring to Justice of Peace ordering constable to bring Negro slave before him for prosecution). Slaves were deemed property and not citizens before the Fourteenth Amendment, thus, they would not have had even a common law right to a grand jury.

63. U.S. CONST. amend V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;”)

64. TAYLOR, *supra* note 47, at 503. Taylor says Lords Lattimer and Neville were accused by the commons of “fraud upon the revenue” or stealing public monies. *Id.*; see also Craig S. Lerner, *Review: Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Straford Trial*, 69 U. CHI. L. REV. 2057, 2070, note 45 (2002) (discussing early impeachments). Says Lerner, “The word ‘impeachment’ (or more precisely, its precursor in law French, ‘empeschement’) first appeared in the Parliament Roll in 1324, and the reign of Edward III (1328-77) witnessed a flurry of parliamentary efforts to punish royal advisors who had abused their powers.” *Id.* citing M.V. Clarke, *FOURTEENTH CENTURY STUDIES* 242 (Oxford 1937).

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1. Approaches in England/Great Britain

a. The Statement of “Impeachment”

Impeachments began in Parliament, in the House of Commons.⁶⁵ The written statement of impeachment was the Commons’ own version of a bill of indictment.⁶⁶ The House of Lords then had the sole power to try the defendant on the issues charged in the Commons’ impeachment.⁶⁷

b. Impeachment as a Criminal Matter: Parliament’s Broad Powers

The British understood an impeachment trial as a type of criminal trial. It ended with a conviction or acquittal.⁶⁸ As Blackstone noted, when the House of Commons prosecuted an impeachment before the House of Lords, the Lords was trying impeachments as a court of criminal jurisdiction, and not as a legislative body.⁶⁹ By the Founders’ time, common law courts and Parliament had concurrent jurisdiction to consider crimes (even high crimes) and misdemeanors at all levels.⁷⁰ Parliament’s jurisdiction was superior to other courts considering the same question and when it acted, other courts were stayed.⁷¹ While a commoner could be tried in a common law court, any “peer” or noble person had an absolute right to “remove” criminal cases involving treason and other crimes from common law courts to the

65. 4 BLACKSTONE, *supra* note 31, at *260.

66. *See, e.g.*, 4 BLACKSTONE, *supra* note 31, at *260.

67. *See* 4 BLACKSTONE, *supra* note 31, at *260.

68. *See* discussion of conviction in *Fitzharris* case *infra* Section I.C.

69. 4 BLACKSTONE, *supra* note 31, at *259.

70. *See* discussion of King’s request to Parliament to allow him to try high treason case against *Fitzharris* *infra*, beginning at Section I.C.1.b. *Cf.* 84 Eng. Rep. 1056 (*Cf. King v. Eliot*, 79 Eng. Rep. 759 (1630) (holding that King’s Bench could try a member of Parliament for assaulting the speaker of the House of Commons and forcibly detaining him in his chair, for seditious statements against the King, and rejecting defendants’ argument that the alleged behavior could only be punished by Parliament). The reporter summarized the holding as “The Court of the King’s Bench may try and punish crimes and misdemeanors committed by members in the House of Commons.”

71. 4 BLACKSTONE, *supra* note 31, at *259 (the House offers “a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom”); *id.* (calling the “high court of *parliament* . . . the supreme court in the kingdom”) (emphasis in original); SIR EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING THE JURISDICTION OF COURTS* 1 (1644) <http://lawlibrary.wm.edu/wythepedia/library/CokeFourthPartOfTheInstitutesOfTheLawsOfEngland1644.pdf> (“4TH INSTITUTE”) (last visited Feb. 10, 2019); *cf.* GUY MEIGE, *NEW STATE OF ENGLAND UNDER OUR PRESENT SOVEREIGN QUEEN ANNE*, pt. 3, 23 (4th ed. 1702) (calling Parliament in this capacity “the Grand Inquest of the Realm”). On the matter of Parliamentary action staying other judicial action, *see* discussion of the *Fitzharris* case in Section II.C.

Court of the Lord High Steward or Parliament to be tried there by “peers.”⁷²

Parliament’s impeachment power was broad. While Parliament tended to reserve impeachments for crimes involving official concerns,⁷³ legally, a target did not have to hold an official position to be impeached, nor did the crime have to be one of a uniquely official or high nature.⁷⁴ Parliament could exercise jurisdiction over a case even when a common law court was incapable, due to political pressure, malfeasance or negligence.⁷⁵ It could impeach after one had resigned⁷⁶ or even after an accused had died.⁷⁷ Spiritual Lords (i.e., those members of Parliament representing the official Church), did not usually vote in capital cases, on the religious belief that they had no power to determine life or death.⁷⁸ At the trial, members of the House of Commons were selected as “managers” to press the case before the House of Lords.⁷⁹ The King could attend parliamentary proceedings his royal capacity.⁸⁰ The Lord High Steward presided over impeachment proceedings.⁸¹ So long as at least twelve members

72. TAYLOR, *supra* note 47, at 439–41 (discussing rights of “peers” a/k/a nobles to be tried by those of their own status); *id.* at 439 (original meaning of Magna Charta references to trial by peers was to nobility’s right to be tried by nobility); cf. THOMAS ERSKINE MAY, A TREATISE UPON THE LAW, PRIVILEGE, AND USAGE OF PARLIAMENT 380-81 (1844) (“at common law, the only crimes for which a peer is to be tried by his peers, are treason, felony, misprison of treason, and misprison of felony . . .” but noting later statutory changes). Erskine May was an assistant librarian in the House of Commons when he wrote this volume. While he served in a period after the Constitution, his work reflects Parliament’s history as well.

73. ERSKINE MAY, *supra*, 375; 4 BLACKSTONE, *supra* note 31, at *259.

74. ERSKINE MAY, *supra* note 72, at 375 (noting that by practice impeachments are reserved for extraordinary crimes and extraordinary offenders[,] but “by the law of Parliament, all persons, whether peer or commoner, may be impeached for any crimes whatever”); *see also e.g.*, discussion of Fitzharris prosecution *infra* at p. 14 (discussing a general impeachment with the intent to produce specific articles of impeachment later).

75. ERSKINE MAY, *supra* note 72, at 375.

76. Thus, the impeachment of Warren Hastings continued despite his resignation. PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635–1805, at 113–14 (1984).

77. The Duke of Gloucester was impeached after death. *E.g.*, WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, 156, 223, 225 (1806) (Hurst et. al pubs. 1808) (hereinafter 1 “COBBETT, PARL. HIST.”). Parliament issued a writ that he be brought over from prison to face charges, but received a response from the marshal, on September 24 that the Duke had died in prison. *Id.* at 228–29. Thereafter, Parliament declared him guilty anyway, stating that his treason was widely known to everyone. *Id.* at 229–30.

78. MEIGE, *supra* note 71, at 23.

79. *Id.* Cf. Don Van Natta, Jr. *The President’s Trial: The Standards; House Prosecutors Compare Clinton to Judges Who Lied and Were Ousted*, N.Y. TIMES, Jan. 17, 1999 (actions of house managers in Clinton impeachment trial).

80. MEIGE, *supra* note 71, at 23 (noting King sits “in his Royalle politik *capacity*” Parliament) (emphasis in original).

81. *Id.* at 24.

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were present a majority vote of the House of Lords could convict or acquit.⁸² The House of Lords then had to request that the Commons issue judgment.⁸³ The activities of Parliament were considered matters of public record and were written down.⁸⁴

c. Conviction/Sentencing/Acquittal

Apart from removing a person from office, Parliament had broad authority to issue sentences, from fines⁸⁵ to executions.⁸⁶ In the post-mortem impeachment of the Duke of Gloucester, the judgment declared that all his lands and tenants would be forfeited to the King. It further declared that none of his heirs or issue of his body should have a right to bear royal arms or to inherit the crown.⁸⁷ Some believed that the King could never be removed because he was either appointed by God and served by divine right or that he served by absolute right due to heredity⁸⁸ In fact, Parliament did issue articles of deposition against Richard II in 1399, but there was no trial and they simply removed him.⁸⁹ He was later murdered in jail.⁹⁰ The King set the time for the start of Parliament.⁹¹ He also had the power to dissolve a Parliament if he did not like the way it was proceeding.⁹² A dissolution required a new election.⁹³ But even if the King dissolved a

82. 4 BLACKSTONE, *supra* note 31, at *256.

83. ERSKINE MAY, *supra* note 72, at 379.

84. *See infra* note 106, (references to *Journal of the House of Lords*; *Journal of the House of Commons*).

85. 1 COBBETT, *PARL. HIST.*, *supra* note 77, at 1510 (Parliament fining the Earl of Middlesex 50,000£).

86. *Id.* at 213 (Simon Burley, after impeached and convicted, was sentenced to be drawn and hanged, his head cut off, all his lands, tenets and chattels forfeited to the King, but because he was a Knight of the Order of the Garter, the King remitted his drawing and hanging and ordered only that he be beheaded the same day).

87. 1 COBBETT, *PARL. HIST.*, *supra* note 77, at 229.

88. *See* 1 BLACKSTONE, *supra* note 311, at *208–09, (discussing hereditary titles in England and the belief that “there was something divine in this right, and that the finger of providence was visible in its preservation” but arguing that Parliament accepted hereditary title not as divine, but as “inherent birthright, and lawful and undoubted succession.”).

89. *See* 1 COBBETT, *PARL. HIST.*, *supra* note 77, at 254–67 (articles of impeachment); *id.* at 265–67 (sentence of deposition). Parliament replaced him immediately with Henry IV. *Id.* at 267.

90. 2 DAVID HUME, *THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688*, 241, 274 (new ed.1762) (hereinafter “X Hume”).

91. MEIGE, *supra* note 71, at 21.

92. *See* discussion *infra* Section I.C.1.d. (dissolution of Parliament among protests to King taking *Fitzharris* case).

93. MEIGE, *supra* note 71, at 21.

Parliament, an impeachment proceeding in a former Parliament could continue into the next session of Parliament.⁹⁴

2. Approaches in the American Colonies

As noted in section I(A)(2), theoretically, American colonies had the power to enforce the criminal law on the local level, although that power was sometimes thwarted by the Crown.⁹⁵ But the Crown denied the colonies the power to impeach or to try impeachments of royally-appointed officials who oversaw them.

Having no representatives in Parliament, to remove a chief executive or other official, the colonists made their impeachment appeals to royal authorities.⁹⁶ In 1720, the colony of South Carolina sent the Crown a petition for relief, complaining that royally appointed heads of the colonies (Lords Proprietors) had violated the duties to deal fairly with colonists and to establish churches and, through their policies, had subjected colonists to undue risk from “Indians.”⁹⁷

South Carolina colonists also issued articles of impeachment of their Chief Justice, stating, “The notorious crimes and offences which immediately relate to him as Chief Justice will appear in a Remonstrance and Impeachment brought against him by the Commons house of Assembly now sent to your Majestyes judges in England.”⁹⁸

South Carolina featured prominently in another dispute in 1763. The colony sent a detailed statement to the King complaining of their Governor and alleging that he had interfered in the election of mem-

94. Though impeachments had continued before, in the Warren Hastings case, the House of Lords debated and decided this point. *Debate in the Commons on the Abatement of an Impeachment by a Dissolution of Parliament* in 28 COBBETT, PARL. HIST., *supra* note 77, at 1018–1170; *Debate in the House of Lords on the Abatement of an Impeachment by a Dissolution of Parliament*, 29 COBBETT, PARL. HIST., *supra* note 77, at 514–44 (1817); *Protest Against the Resolution for Proceeding in the Trial of Mr. Hastings*, in *id.* at 544–45.

95. See discussion *supra*, I.B.2.

96. E.g., *Address of the Council and Representatives of the Massachusetts Bay to the King. Boston in New England. 1731*, 38 CALENDAR OF STATE PAPERS, *supra* note 23, at 136–137 (Jun. 18, 1731), <https://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol38/pp134-138> (last visited Feb. 10, 2018) (seeking removal and noting they have no right of impeachment in Parliament).

97. *Petition of the Council and Assembly of the Settlements in South Carolina to the King . . .*, February 3, 1720, CALENDAR OF STATE PAPERS, *supra* note 23, at 332–43, <https://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol31/pp323-352> ((last visited Feb. 10, 2019).

98. *Id.*

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bers of their legislative body. They begged the King for the ability to determine their own leaders.⁹⁹

In 1731, the Representatives of Massachusetts complained to the King of misbehavior of royal officers. They argued that delay “can serve only to aggravate our distress, but noways helps to refund the money, or gain any relief: there being no possibility of impeachment here, as there is in such cases, in our Mother Countrey, . . . in Parliament”¹⁰⁰

In 1773, three years before the Declaration of Independence, the Massachusetts legislature issued articles of impeachment against Peter Oliver, Chief Justice of the Superior Court. The key charge was that Oliver acted as a puppet of the Crown and not in the colony’s interest.¹⁰¹ The legislature asked the royal Governor and Council overseeing the colony to hold an impeachment trial in Massachusetts. However, the Governor declined, stating that any high crime or misdemeanor, if committed, was punishable under law but that he had no concurrent power to lead an impeachment.¹⁰² Of course a punishment in courts of law would have been unsatisfactory for it had to be led by the King’s prosecutors before a judge appointed by the King.

Given the colonists’ yearning for the impeachment power, I contend that many of them would have considered impeachment to be a significant power. These facts may explain, in part, the Constitutional emphasis on *impeachment* (for removal) and the lack of reference to prosecution. For a better understanding, of how the colonists and the Founders considered the link between impeachment prosecutions and prosecutions in courts of law, the next section explains clashes in jurisdiction between common law courts and Parliament under the British model.

99. A FULL STATE OF THE DISPUTE BETWIXT THE GOVERNOR AND THE COMMONS HOUSE OF ASSEMBLY OF HIS MAJESTY’S PROVINCE OF SOUTH CAROLINA IN AMERICA (1763).

100. *Address of the Council and Representatives of the Massachusetts Bay*, *supra* note 96, at 136–37.

101. *To the House of Representatives . . .*, PENN. CHRON., July 5–12, 312 [Re Massachusetts resolution protesting dependency of local Judges upon the Crown]; *see also* MASSACHUSETTS GAZETTE & BOSTON POST-BOY & ADVERTISER, Feb. 28, 1774, 1 (referencing that Massachusetts House had resolved to impeach Peter Oliver, Esq., Chief Justice of the Superior Court before the Governor for High Crimes and Misdemeanors and that Articles of Impeachment had been prepared); *In Council March 4, 1774 . . .*, MASSACHUSETTS GAZETTE & BOSTON POST-BOY & ADVERTISER, Feb. 28, 1774, 2 (noting Massachusetts House of Representatives has impeached Oliver but tabled the matter waiting for the Governor and Council would present a time to proceed); MASSACHUSETTS SPY, OR THOMAS’S BOSTON JOURNAL, Mar. 3, 1774, 1 (Justice Oliver’s response to impeachment)).

102. BOSTON GAZETTE AND COUNTRY JOURNAL, Mar. 7, 1774, 2; *Friday, May 27, America*, KENTISH GAZETTE, May 28, 1774, 1.

C. Common Law Courts vs Parliament

1. The *Fitzharris* Trial

When impeachment talk arises during an ongoing criminal investigation, questions also arise as to how the two criminal proceedings intersect. Can a Department of Justice criminal investigation or prosecution in courts of law continue, despite the impeachment? If not, when is the operation of proceedings tied to courts of law stayed? This section explains that because an impeachment is an overlapping criminal proceeding by a higher court within the same sovereign, it would have the effect of staying any other investigation or prosecution relating to the same offenses.

The focus here is the *Fitzharris* case (1681) which arose both in the King's Bench and in Parliament. Fitzharris was impeached by the House of Commons which desired to stop a Crown prosecution. But the Crown then intervened to ask the House of Lords not to try Fitzharris, but instead, to allow a criminal trial in the common law courts.¹⁰³ The House of Lords agreed to defer, but Fitzharris sought to use the Commons' impeachment as a bar to a trial at common law. The result was a confusing precedent, and yet one that underscores both that jurisdiction was concurrent and that most people considered Parliament to be the superior court in a criminal case. The principles generally recognized in *Fitzharris* help us to understand the historical understanding of impeachment that the Founders would have brought to the question of the power of courts to prosecute a sitting President.

a. The House Impeaches *Fitzharris*

There are not many English cases discussing the conflict between impeachment and prosecution. However, the most significant is that involving Edward Fitzharris.¹⁰⁴ Fitzharris, a commoner who held no

103. See discussion *infra* Section I.C.1.b.

104. The story of Fitzharris' Parliamentary impeachment and common law trial is told in several "State Trials" collections as well as in Parliamentary journals and other books. According to the Oxford Library Guides, *State Trials* was a series of case and proceedings reports, many of which are verbatim or close paraphrase, published in various editions between the eighteenth and nineteenth centuries. The series was the main source of information about the history of English criminal procedure and evidence and early volumes were produced by various editors including Thomas Salmon, Sollom Emyln, and Francis Hargrave. Bodleian Libraries, Oxford University, *Legal History: England & Common Law Tradition: State Trials*, OXFORD LIBGUIDES, <https://libguides.bodleian.ox.ac.uk/law-histcom/sttr> (last visited Nov. 16, 2018) ("LibGuides") (citing Lindsay Farmer, *State Trials*, THE NEW OXFORD COMPANION TO LAW (2008)), <http://www.oxfordreference.com/view/10.1093/acref/9780199290543.001.0001/acref-9780199290543-e-2095> (last visited Nov. 16, 2018). According to LibGuides, in 1808 William

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official position, was both indicted and impeached for allegedly conspiring against the King with France to make the Catholic religion in England supreme over Protestantism.¹⁰⁵ Apparently in a rush, the Commons impeached him by a general statement of impeachment, with the intent to provide more specific articles later.¹⁰⁶

b. The King “Requests” to Try Fitzharris in Common Law Courts

Before the trial began in the House of Lords, the Attorney General, for the Crown, appeared before them to state that he had an order from the King, dated two weeks earlier. He asked the House of Lords to stay their proceedings so that the Crown could indict Fitzharris for treason and try him in the common law courts.¹⁰⁷ The Attorney General announced that he had already prepared a draft indictment to present to a grand jury.¹⁰⁸

Cobbett employed William Howell as editor to produce a new set of State Trials. Howell subsequently produced other volumes assisted by his son. *Id.* (citing Gordon Goodwin, *Howell, Thomas Bayly (1767–1815)*); Rev. Jonathan Harris, *Oxford Dictionary of National Biography*, (2004), <http://www.oxforddnb.com/view/article/13980>, (last visited Nov. 16, 2018).

For reports of the Parliamentary proceedings in the *Fitzharris* matter, see 13 JOURNAL OF THE HOUSE OF LORDS 755 (1675-1681) (digitized at BRITISH HISTORY ONLINE, <https://www.british-history.ac.uk/lords-jrnl/vol13/pp754-756>) and 9 JOURNAL OF THE HOUSE OF COMMONS 710-11 (digitized at BRITISH HISTORY ONLINE, <https://www.british-history.ac.uk/commons-jrnl/vol9/pp710-712#h3-0010>) (last visited Feb. 10, 2019).

Other sources also report on the trial or on both the trial and impeachment proceedings. *See, e.g.*, 3 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS IN GREAT BRITAIN (Francis Hargrave ed. 1797); *id.* at 252–95 (impeachment proceedings); *id.* at 295–331 (common law trial); 8 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783 (W. Cobbett & T.B. Howell eds. 1816) (“8 HOWELL, STATE TRIALS”).

See also DEBATES OF THE HOUSE OF COMMONS: FROM THE YEAR 1667 TO THE YEAR 1694, 1680-85 (Anchitell Grey, ed. 1769); IV COBBETT, PARL. HIST., *supra* note 77, at 1313–17, 1331–41 (Parliament’s impeachment, debate and rejection of impeachment).

At least one anonymous pamphlet was also produced on the trial. *See* the TRYAL AND CONDEMNATION OF EDW. FITZHARRIS, ESO. FOR HIGH TREASON (1681).

105. 9 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 104, at 710; *see also* 8 HOWELL, STATE TRIALS, *supra* note 104, at 224, 227.

106. *Id.* The message sent to the Lords, as recorded in the *Journal of the House of Lords* was:

The Commons of England, assembled in Parliament, having received information of divers traitorous practices and designs of Edward Fitzharris, have commanded me to impeach the said Edward Fitzharris of high treason: and I do here, in their names, and in the names of all the Commons of England, impeach Edward Fitzharris of high treason.

They have further commanded me to acquaint your Lordships, that they will, within convenient time, exhibit to your Lordships, the articles of charge against him.

13 JOURNAL OF THE HOUSE OF LORDS, *supra* note 104, at 755.

107. *Id.*

108. *Id.*

c. The Lords Decide Not to Try Fitzharris

During the House of Lords debate on the issue, the question was recorded this way: “The question was put ‘Whether *Edward Fitzharris* shall be proceeded with according to the Course of the Common Law, and not by way of Impeachment in Parliament, at this Time.’”¹⁰⁹ The House of Lords voted in the affirmative (i.e., to stay its proceedings) and Fitzharris was sent to be tried at common law.¹¹⁰

On Monday, the 28th of March 1681, several Lords protested the House of Lords’ refusal to try Fitzharris.¹¹¹ They argued that the House of Lords had no power to ignore an impeachment by the House of Commons.¹¹² They argued that the type of offense with which Fitzharris was charged (treason) was one that influenced the government: “Offenses that influence the Government are most effectually determined in Parliament.”¹¹³ And they argued that the public’s interest in such proceedings would not be as well protected in a case prosecuted at law.¹¹⁴ The *Journal of the House of Lords* reports the argument as below:

Because that in all Ages it hath been an undoubted Right of the Commons to impeach before the Lords “any Subject, for Treasons or any Crime whatsoever; “and the Reason is, because great Offences that influence the Government are most effectually determined in Parliament.

We cannot reject the impeachment of the Commons, because that Suit or Complaint can be determined no where else: For if the Party impeached should be indicted in the King’s Bench, or in any other Court, for the fame Offence, yet it is not the same Suit; for an Impeachment is at the Suit of the People, and they have an Interest in it. But an Indictment is the Suit of the King: For one and the same Offence may entitle several Persons to several Suits; as, if a Murder be committed, the King may indict at His Suit, or the Heir or the Wife of the Party murdered may bring an Appeal; and the King cannot release that Appeal, nor His Indictment prevent the Pro-

109. *Id.*

110. *Id.* Apparently, the Spiritual Lords participated in the vote to reject the impeachment, although they normally did not vote in capital cases. See, 8 HOWELL, STATE TRIALS, *supra* note 104, at 233 .

111. *Id.* See also 8 HOWELL, STATE TRIALS, *supra* note 104 at 231–32.

112. 13 JOURNAL OF THE HOUSE OF LORDS, *supra* note 104, at 755. See also 8 HOWELL, STATE TRIALS, *supra* note 104, at 231.

113. *Id.*

114. *Id.*

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ceedings in the Appeal, because the Appeal is the Suit of the Party, and he hath an Interest in it.

It is an absolute Denial of Justice, in regard it cannot be tried no where else. The house of peers, as to Impeachments, proceed by virtue of their Judicial Power, and not by their legislative; and as to that, act as a court of record; and can deny suitors (especially the commons of England that bring legal complaints before them), no more than the judges of Westminster can deny any suit regularly commenced before them.¹¹⁵

In short, this view argued that the House of Lords *had* to try the case once the impeachment was issued. Significantly, this argument *also* conceded that, at least until Parliament intervened to assert its authority, concurrent jurisdiction existed between the common law courts and Parliament.

d. The Commons' Protest/The King Dissolves Parliament

The House of Commons also protested the Lords' refusal and the King's action and insisted that it had superior jurisdiction. It resolved on March 26, 1681, that "it is the undoubted Right . . . to impeach . . . any Peer or Commoner for Treason, or any other Crime or Misdemeanour" and called the Lord's refusal to proceed to trial upon their impeachment a "Denial of Justice, and a Violation of the Constitution of Parliaments."¹¹⁶ It further resolved "for any inferior court to proceed against *Edward Fitzharris*, or any other person lying under an Impeachment in Parliament for the same Crimes for which he or they stand impeached, is a high Breach of the Privilege of Parliament."¹¹⁷

115. *Id.* (accents appearing in the original have been removed from this quotation).

116. 9 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 104, at 711 at British History Online, <https://www.british-history.ac.uk/commons-jrnl/vol9/pp710-712#h3-0010> (last visited Feb. 12, 2019).

117. *Id.* The U.S. Supreme Court has never directly addressed the question of whether the Senate could avoid an impeachment by refusing to try the case put forth by the House. But in dicta, in an unrelated 2004 gerrymandering case, a plurality did suggest that it could not. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004) plaintiffs challenged state gerrymandering as a violation of the principle of one person, one vote. The plurality held that political gerrymandering challenges therein raised nonjusticiable political questions because the Court could not discern manageable standards for determining when constitutional offenses had occurred and what the lines should be. Justice Stevens agreed that state-wide challenges were nonjusticiable, but argued, *inter alia*, that district-wide challenges to severe partisan gerrymandering were justiciable because they were incompatible with democratic principles. Regarding the democratic principles argument the Court said, "We do not disagree with that judgment, any more than we disagree with the judgment that it would be unconstitutional for the Senate to employ, in impeachment proceedings, procedures that are incompatible with its obligation to "try" impeachments. *See Nixon*, 418 U.S. at 683. [Note that the Court here cites *generally*, not specifically, to *Nixon*.] The issue we

In short order, the King took care of this resistance. He dissolved the Parliament.¹¹⁸ He kept his plan to dissolve a secret until he arrived.¹¹⁹

e. The Political Backdrop of *Fitzharris*

As noted, the conflict between the House of Commons and the House of Lords and the King in *Fitzharris* involved politics. Before the impeachment, Fitzharris had already been arrested and was in jail awaiting indictment.¹²⁰ Deeming Fitzharris of value in political wars, the Commons impeached him in order to prevent a common law prosecution and a most certain execution.¹²¹ Presumably they planned to mismanage the trial to ensure an acquittal or, because they were the ones who had to issue judgment, they planned to declare a light sentence.¹²² The King's request and the refusal of the Lords to follow through, then, was intended to thwart the Commons' plan.¹²³ (Perhaps one should not be surprised then, that persons associated with the Commons would later be involved as part of Fitzharris' defense team in asserting his jurisdictional claim.¹²⁴)

The means by which the Lords proceeded to avoid a trial arose out of a fourteenth century controversy involving King Edward III. He overlooked the House of Commons and directly appealed to the House of Lords to try several commoners who had allegedly committed crimes.¹²⁵ Initially, the Lords protested this bypass of the House

have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.”

118. 8 HOWELL, STATE TRIALS., *supra* note 104, at 242.

119. *Id.*; IV COBBETT, PARL. HIST., *supra* note 77, at 1339. Cobbett adds a note that he attributes to Burnet: “very suddenly, and not very decently, he came to the house of lords, the crown being carried between his feet in a sedan: and he put on his robes in haste, without any previous notice, and called up the commons and dissolved the parliament . . .” *Id.* at 1339n.

120. 6 HUME, *supra* note 90, at 332; *see also generally id.* at 332–34.

121. *Id.* at 334. In a what may have been a plea to Parliament for aid for her and her children after her husband's execution, Mrs. Fitzharris also stated that the impeachment was undertaken to block the common law courts. *See* 10 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 104, 61–62 (March 22, 1688), BRITISH HISTORY ONLINE, <https://www.british-history.ac.uk/commons-jrnl/vol10> (last visited Feb. 10, 2019). Her own access to a pension, based on her father's service, was blocked after her husband's execution. *Id.*, 180–81 (June 16, 1689), at <https://www.british-history.ac.uk/commons-jrnl/vol10/pp180-182>.

122. For discussion of the House of Commons' power over judgment, *see* discussion *supra*, at Section I.C.1.b.

123. *Id.* at 334; *see also* discussion *infra* note 125.

124. *See* note 139 *infra*.

125. The dispute arose out of the case of Simon de Beresford, 4th Edw. 3. *See* 8 HOWELL, STATE TRIALS, *supra* note 104, at 235–39n (editor's notes); 4 COBBETT, *supra* note 77, 1332n; ERSKINE MAY, *supra* note 72, at 375. Edward III asked the House of Lords to put on trial six commoners who, allegedly, plotted against Edward II. After some resistance, the Lords did so.

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of Commons, but eventually, they did have a trial.¹²⁶ Afterward, they adopted a resolution that this was never to be done again.¹²⁷ But from that situation, there emerged confusion about whether commoners charged with capital crimes (as opposed to misdemeanors) could be tried in the House of Lords, who were not their peers or even impeached by the Commons for a capital offense.¹²⁸

Of course, Fitzharris' counsel *had* to argue that Parliament *could* impeach commoners for treason because they needed the impeachment to be good in order to thwart jurisdiction by the King's Bench.¹²⁹ However, in light of so many later commoner impeachments, the assertion that Parliament cannot impeach a commoner was later soundly rejected.¹³⁰

The House of Commons protested this procedure, and Parliament adopted a resolution that such action was barred in the future. 8 HOWELL, STATE TRIALS, *supra* note 104, at 231–39; Blackstone describes the matter in this way:

When, in 4 Edw. III. The king demanded the earls, barons, and peers, to give judgment against Simon de Beresford [sic] who had been a notorious accomplice in the treasons of Roger earl of Mortimer, they came before the king in parliament, and said all with one voice, that the said Simon was not their peer; and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and to give judgment against him, the following protest and proviso was entered on the parliament roll. “And it is assented and accorded by “our lord the king, and all the great men, “in full parliament, that albeit the peers, “as judges of the parliament, have taken “upon them in the presence of our lord the “king to make and render the said judgment; yet the peers who now are, or “shall be in time to come, be not bound or “charged to render judgment upon others “than peers; nor that the peers of the land “have power to do this, but thereof ought “ever to be discharged and acquitted: and “that the aforesaid judgment now rendered “be not drawn to example or consequence “in time to come, whereby the said peers “may be charged hereafter to judge others “than their peers, contrary to the laws of “the land, if the like case happen, which “God forbid.” (Rot. Parl. 4 Edw. III. N 2 & 6. 2 Brad. Hist. 190. Selden. Judic. In parl. Ch. 1.).

See 4 BLACKSTONE *supra* note 31, at *259, n. b (quotation marks in original; but note that some editions omit these quotes). See *id.*; *The Avalon Project*, Yale Law School, Lillian Goldman Library, http://avalon.law.yale.edu/18th_century/blackstone_bk4ch19.asp (last visited Feb. 12, 2019).

Relying on de Beresford's case, Blackstone argued that the House of Commons could not impeach a commoner for a capital crime. See 4 BLACKSTONE *supra* note 31, at *259 (“de Beresford” case). Other treatises note disagreement. See, e.g., 2 HALE, *supra* note 47, at 84, n. 4 (stating the better view seems to be that the Lords had no jurisdiction but noting disagreement); COBBETT, PARL. HIST., *supra* note 77, at 1332n (saying the Fitzharris impeachment was rejected upon a “pretense” of a rule against impeachment by the Commons that was provided by Lord Nottingham”); ERSKINE MAY, *supra* note 72, at 375–76, 658 (noting Blackstone reliance on de Beresford's case and saying he ignored later authorities).

126. See discussion *supra* note 125.

127. *Id.*

128. *Id.*; see also note 72 (for discussion of Magna Charta right to trial by “peers”).

129. Cf. 8 HOWELL, STATE TRIALS., *supra* note 104, at 234.

130. See also EDWARD FISCHER, THE ENGLISH CONSTITUTION 499 (Richard Jeney Shee, trans., 2d ed. 1863) (noting various Parliamentary impeachments of commoners and the edict of the “supreme tribunal”); ERSKINE MAY, *supra* note 72, at 376 (*Fitzharris* of little value on issue of Commons impeachment power & noting Chief Justice Scroggs, Sir Adam Blair and other

This political context for the *Fitzharris* controversy matters to the American experience for two reasons. First, it indicates that, however speciously, the Lords ultimately refused the impeachment on the ground that they lacked *jurisdiction*. Thus, *Fitzharris* cannot support a view that the Senate, which is charged with trying impeachments in the U.S., could refuse to try a case for purely political reasons.¹³¹ Second, the legal effects of allowing impeachment of commoners by the House of Commons in capital cases was that a commoner ended up being tried by nobility, in the House of Lords, rather than by a jury of laypersons and it was believed, an accused was deprived of certain defenses.¹³² Although the Americans had no titles of nobility, that issue may have underscored the importance of trial by jury of one's peers in the American experience.¹³³

f. The Grand Jury's Indictment and the Trial at Common Law

Fitzharris was subsequently indicted by a grand jury and brought to trial before the common law courts.¹³⁴ Due to the King's dissolution, no Parliament was in session.

In Fitzharris' day, one accused of treason had no absolute right to counsel at either arrest, arraignment, or trial. He was examined without counsel while he was held a prisoner in the Tower of London.¹³⁵ Fitzharris' wife consulted lawyers on her own and brought word of their advice, back to him, but later a written plea challenging jurisdiction was rejected because no lawyer had signed the papers.¹³⁶ With

commoners impeached and tried by Lords for capital crimes afterward); A. S. Turberville, *The House of Lords Under Charles II*, 45 ENGLISH HISTORICAL R. 58, 68–69, & note 3 (1930); ERSKINE MAY, *supra* note 72, at 375–76 (saying that the issue was clearly resolved later). The *Scroggs* case mentioned in *Erskine May*, *supra*, was one of those argued in *Fitzharris* as a prior precedent. 8 HOWELL, STATE TRIALS., *supra* note 104, at 233. The *Scroggs* case appears at 8 HOWELL, STATE TRIALS., *supra* note 104, 163–224 (*Proceedings Against Lord Chief Justice Scroggs, Before the Privy Council; and Against the said Lord Chief Justice and Other Judges in Parliament*); *id.* at 195–201 (resolution & articles of impeachment).

131. It should be noted that when the “Rump Parliament,” the House of Lords also refused to try the King on the Commons' charges which they believed to have been coerced. Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 381–82 (2010).

132. 8 HOWELL, STATE TRIALS., *supra* note 108, at 240n (citing authority that, by impeachment, a commoner is “deprived of his legal challenges”).

133. U.S. CONST. amend. VII (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

134. *Id.* at 243.

135. *Id.* at 254 (Lord Chief Justice referring to sending a clerk to examine him in the Tower).

136. *Fitzharris' Case*, 86 Eng. Rep. 228 (1693) (rejecting written challenge). *See also* 8 HOWELL, STATE TRIALS., *supra* note 104, at 250 (wife telling Fitzharris to enter a plea challenging court's jurisdiction and giving him a written plea she obtained from a lawyer).

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her help, Fitzharris, though proceeding *pro se*, was able to argue that the common law courts had no jurisdiction because he had been impeached by the House of Commons.¹³⁷ Under this argument, jurisdiction lay in Parliament as long as an impeachment was pending. In the meantime, the Crown's position was represented by the Attorney General, the Solicitor General, and several other lawyers.¹³⁸

Recognizing his indigency, the court appointed four pro bono counsel (recommended by the Fitzharris' wife) to assist him pretrial. These lawyers also pressed the point.¹³⁹ They argued that Parliament was a *superior* court.¹⁴⁰ They argued that the indictment and the impeachment charge were one and the same and that, therefore, no inferior court to Parliament could now exercise jurisdiction.¹⁴¹ Yet, they were still limited to arguing only the pretrial jurisdictional point.¹⁴²

137. 8 HOWELL, *STATE TRIALS*, *supra* note 104, at 260 (Crown counsel saying Fitzharris received knowledge about how to plead jurisdiction in the first instance from his wife who must have consulted a lawyer); *id.* at 253 (wife telling Fitzharris not to talk too much); *id.* at 257 (Lord Chief Justice identifying Fitzharris' pro se plea as one challenging jurisdiction).

138. *Id.* at 332–33 (reference to Sergeant Jeffries); *id.* at 324 (reference to Sir. Francis Withins); *id.* at 361 (reference to Maynard resting the Crown's case).

139. Fitzharris' requested several prominent lawyers to serve as his pro bono counsel on the plea. These included Sir Henry Pollexfen, Sir Francis Winnington; Sir William Williams (former Speaker of the House of Commons); Mr. Wallop. *Id.* at 252. For background on these lawyers, see their respective entries at *The History of Parliament Online*, <https://www.historyofparliamentonline.org/> (last visited Feb. 10, 2019) (maintained by the UK Institute of Historical Research, School of Advanced Study, University of London). See, e.g., HENRY POLLEXFEN, <https://www.historyofparliamentonline.org/volume/1660-1690/member/pollexfen-henry-1632-91> (last visited Feb. 3, 2019). Winnington was on the Commons' committee that drafted the articles of impeachment against Fitzharris and he spoke there against the Lord's rejection. 9 *JOURNAL OF THE HOUSE OF COMMONS*, *supra* note 104, at 710–712.

140. E.g., 8 HOWELL, *STATE TRIALS*, *supra* note 104, at 284 (argument of Williams). Fitzharris' counsel challenged the Court's jurisdiction arguing four main points; (1) that Fitzharris was impeached of High Treason; (2) that the impeachment remained in full force at that time; and (3) that the High Treason for which Fitzharris was impeached is one and the same Treason that was the subject of the indictment. E.g., *Id.* at 283 (argument of Williams). Note that the record of Parliament's proceedings was not yet available to Fitzharris' attorneys, and they were relying upon notes taken; see *id.* at 265I (Sir. Francis Winnington for Fitzharris referring to effort to obtain record but House of Lords clerk out of town; Attorney General referring to his notes taken).

In insisting on the superiority of the court of Parliament, lawyers relied on Coke's *Institutes*. See 4TH INST., *supra* note 71, at 1.

141. E.g., 8 HOWELL, *STATE TRIALS*, *supra* note 104, at 233.

142. *Id.* at 263 (Attorney General warning Fitzharris' counsel, "Gentlemen, remember you have not liberty to plead anything, but to the jurisdiction of the Court"); *id.* at *id.* at 263, 279 (counsel acknowledging limitation to pleading jurisdiction). The Attorney General sought to block Fitzharris' counsel from meeting alone with him out of fear they would "step beyond bounds." *Id.* at 252; see also *id.* at 260; cf. *id.* at 332 (Crown counsel challenging whether anyone, including prisoner's wife, can assist prisoner "as to matters of fact"). After his conviction and sentencing to death, his wife was finally allowed visit him without a warden present. *Id.* at 393.

They also were not given a copy of the indictment (it was read), and were given a few days to prepare.¹⁴³

The King's prosecutors sought to have the jurisdiction plea dismissed both as to form and as to substance. They conceded that Parliament was a higher court generally as to matters before it.¹⁴⁴ But they argued that the *form of the pleading* as flawed as well as what they called the "fact" of it.¹⁴⁵ They attacked whether the two actions were the same. And relying on strict English pleading rules then in force, they said that the House of Commons' impeachment was a *general* one for treason, and that the prisoner's pleadings did not set forth with sufficient specificity the *type* of treason charged.¹⁴⁶ The Attorney General argued, that the accused's failure to plead the treason with specificity was fatal and that the accused had not shown that the treason for which he was impeached and the treason with which he was charged before the King's Bench were the same.¹⁴⁷

The Crown's counsel also challenged the meaning of Parliament's superior status. They argued that, although no indictment had issued and the common law courts were inferior, the latter had *original* jurisdiction of Fitzharris' person and subject matter, and that jurisdiction could not be ousted after it attached.¹⁴⁸ They also argued that since

143. *E.g., id.* at 255–57; (attorneys and Fitzharris complaining about limited time to prepare; argument over timing); *id.* at 274 (Lord Chief Justice resisting pleas for more time); *id.* at 279–80 (additional timing arguments; judge granting till "Saturday"); *id.* at 230–31 (moving to Saturday hearing because tomorrow, Friday, was heavily booked).

In refusing to give Fitzharris or his assigned lawyers a copy of the indictment, the court stated that such access was not granted in high treason cases. 8 HOWELL, STATE TRIALS, *supra* note 104, at 257, 258 (judge saying not allowed in treason cases); *id.* at 257–58; 262, 272, (lawyers complaining they have not seen indictment); *id.* at 259 (Wallop arguing sources suggesting that denying a copy was an abuse); *id.* at 281 (judge denying copy of indictment, but allowing copy of plea and demurrer); *see also* 86 Eng. Rep. at 228 (after assigning him lawyers; refusing Fitzharris' lawyers' request for a copy of the indictment). The indictment was read to Fitzharris before he had counsel and, apparently again on the day that appointed counsel argued the plea (but not afforded to counsel before that time). *Id.* at 249, 231.

144. *Id.* at 284 (Fitzharris' counsel stating of the King's Counsel "[H]e does allow the parliament to be a superior court").

145. *Id.*

146. *Id.* at 266 (Attorney General saying plea insufficient and frivolous); *id.* at 237 (Attorney General arguing that House issued impeachment for general treason while indictment points to violation of particular statute); *see also id.* at 241 (saying Fitzharris was impeached generally for treason); *id.* at 259–60 (Sir Francis Withins arguing the same); *id.* at 235 & n.195 (Withins saying no one can be generally impeached of treason; same).

147. 8 HOWELL, STATE TRIALS, *supra* note 104, at 273, 277.

148. *Id.* at 266 (noting the King's Bench has universal and original jurisdiction over such cases and argued that Parliament could not oust it); *id.* ("[T]here was never a thing of a Crime so great, but this Court of the *King's Bench* which hat a sovereign Jurisdiction, for commoners especially, could take Cognizance of it . . ."); *id.* at 282 (stating "it is a plea to the jurisdiction of the Court; and, with submission, there the point will be, whether a suit depending, even in a

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all courts were ultimately of the King, he could *elect* how to proceed, i.e., through Parliament or through common law courts.¹⁴⁹

Fitzharris' lawyers responded that a general impeachment was a good impeachment.¹⁵⁰ They argued that, given the fact of a general impeachment, Fitzharris' plea could not be more specific.¹⁵¹ They brought forth precedents wherein a person had been both indicted and later impeached to support their view that Parliament had superior authority.¹⁵²

The issue of parliamentary privilege¹⁵³ also arose in Fitzharris. As part of their jurisdictional argument, Fitzharris' lawyers argued that if

superior Court can take away the jurisdiction of an inferior Court, who had original jurisdiction of the cause, of the person and of the fact, at the time of the fact committed").

149. *Id.* at 431 (Attorney General stating that the King has the power to proceed by Impeachment or Indictment at his "election"). This claim arose from the view that even proceedings in Parliament were proceedings on behalf of the King. *See, e.g.,* Case of Earl of Ferrers, 168 Eng. Rep. 69, 70 (1760). Ferrers, a peer, was convicted in the House of Lords for murder. As to judgment, Parliament was unsure as to whether Ferrers could be given the same judgment as provided for in a statute prohibiting such murders (e.g., execution). They also wondered whether, a new execution date could be set if the execution could not occur on the set day, and who could set the new date. They asked the common law courts to rule on these questions. The King's Bench responded that a new date for execution may be set either by Parliament or by the King's Bench "the Parliament not then sitting." *Id.* at 69. The court stated that "Every proceeding in the House of Peers acting in its judicial capacity, whether upon writ of error, impeachment or indictment removed thither by *certiorari*, is in judgment of law a proceeding before the King in Parliament . . ." *Id.* at 70. It said the judgment was "founded upon immemorial usage, upon the law and custom of Parliament, and is part of the original system of our constitution." *Id.*

150. *E.g., id.* at 297 (Mr. Winnington).

151. *E.g., id.* at 308–10 (Mr. Pollexfen asking how else could Fitzharris have pleaded the case given the general impeachment).

152. *Id.* at 306 (Wallop arguing "that a general Impeachment without Articles is a Bar to any Indictment for the same Matter was resolv'd . . . in the Case of the *Lords in the Tower* . . .") Wallop argued that Fitzharris' case was even stronger because in *Fitzharris* Parliament impeached *before* the indictment. *Id.* (noting "the first suit was in the House of Lords by the Commons").

The reference to the *Lords of the Tower* case is to the trial of five Catholic or "Popish" Lords who were accused of treason for trying *inter alia* to overthrow the laws of England and to institute the Catholic religion, a claim similar to that in *Fitzharris*. *E.g., Proceedings Against the Five Popish Lords*, 7 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON OR MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME, at 1218–1576 (Bagshaw et al. ed. 1810); *id.* at 1215–16 (referencing the warrant and later Parliamentary involvement). Another case referenced by Fitzharris' counsel was the Case of Lord Shaftesbury. Parliament sought to impeach Shaftesbury after he had been placed in the Tower by the Crown. *See* 3 JOHN CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND FROM THE EARLIEST TIMES TILL THE REIGN OF KING GEORGE IV, 271–73, 273 (1847). They also referenced "*Northumberland's Case*." *See* 8 HOWELL, STATE TRIALS, *supra*, 104, at 311 (described as Parliament insisting that confession of treason is in their jurisdiction not that of the common law courts and cited as 5 H. IV. Fol. 426).

153. The notion refers to a host of rights Parliament and its members were deemed to possess. 4TH INSTITUTE, *supra* note 71, at p. 24–25 (recognizing the privilege); *see generally* 1 JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS; WITH OBSERVATIONS, (collection of cases on Parliamentary privilege to be free from arrest). In this case, the right seems to be jurisdiction, as the higher court, to impeach).

the common law courts assumed jurisdiction in the case while an impeachment was pending, they would invade Parliament's privileges.¹⁵⁴ The Crown's counsel argued, in response, that there was no such privilege because Parliament had done nothing.¹⁵⁵ Moreover, they stated that one can never know what Parliament would have said had it issued a more specific impeachment statement, thus one cannot say the plea addresses the impeachment.¹⁵⁶

The participants also approached the question of jurisdiction through the lens of whether Fitzharris would be subjected to *double jeopardy* in one court if tried after conviction or acquittal in the other court. Fitzharris' counsel argued that the impeachment shifted jurisdiction to Parliament and so to try Fitzharris would constitute double jeopardy.¹⁵⁷ The Solicitor General, for the Crown, responded that an acquittal in the common law courts would not bar a later impeachment by the Commons and trial.¹⁵⁸ Counsel for Fitzharris seemed to agree that the common law court could not block an impeachment, but said that an impeachment could block a common law court proceeding.¹⁵⁹

154. 8 HOWELL, STATE TRIALS., *supra* note 104, at 311 (Mr. Pollexfen stating, "it is a matter of parliament, and determinable among themselves" and referencing Parliament asserting the privilege in other cases).

155. *Id.* at 315.

156. *E.g., id.* at 324 ("Who can prove the intention of the House of Commons . . . ?"); *id.* at 324 (Commons has right to define impeachment and no one can restrict); *Id.* at 325.

157. *Id.* at 306 (Fitzharris counsel Wallop arguing, in an impeachment in Parliament, the other Side will acknowledge, that after Articles exhibited, there can be no proceedings upon an indictment for the same offense, although the defendant in the impeachment be neither convict nor acquit. Otherwise you may bring back all the Lords in the Tower to the King's Bench to be tried, which Mr. Attorney, will not, I suppose attempt"); *id.* at 300; (Sir Francis Winnington for the prisoner arguing it is "against natural justice" that after being tried at Parliament, he should be tried again at common law).

The hallmark of double jeopardy was that a second trial would twice place one at risk of life or limb. Some courts viewed the requirement strictly *See, e.g.,* Vaux's Case, 76 Eng. Rep. 992 (1591) (holding that because the indictment had been insufficient, even though the defendant had been tried in a capital case and a sentence ordered, he was never truly in jeopardy and could be retried when the error was found).

158. *Id.* at 319 (Solicitor General stating, "What if he should be acquitted here, he could not plead *auter foitz acquit*, so would be twice brought in jeopardy for the same offense"); *id.* at 313 ([a]ssume it was a good impeachment and he had been acquitted, had the Prisoner then pleaded that as a bar to this court "it would not have been a good Plea; but he had lost his advantage by mispleading, then certainly an impeachment depending singly cannot be a good plea to jurisdiction.").

159. *Id.* at 301. He said, "Suppose this Man should be try'd here, and he acquitted; is it to be presum'd that he can plead this Acquittal in bar to the impeachment before the Lords . . . ?" and suggesting he cannot). He continued, "My Lord, I say with Reverence to the Court, that should you proceed, a Man shall be twice put in danger of his life for one offense, which by the Law he cannot be, and therefore, I urge that as a Reason, why you cannot proceed here on this Indict-

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The Court repeatedly insisted that, from its view at least, the matter of concern was only the sufficiency of the pleadings, not jurisdiction, parliamentary privilege, double jeopardy or other impact of the prior impeachment.¹⁶⁰ Fitzharris' counsel did not agree but; ultimately, the Court rejected Fitzharris' challenge.¹⁶¹

For trial, Fitzharris had no counsel. The Court stated the law did not allow him counsel because the trial involved only matters of "fact."¹⁶² He was left to examine and call his witnesses himself.¹⁶³ His wife continued to help him throughout, despite being repeatedly chastised by the bench and Crown counsel.¹⁶⁴ She used the law's recognition of a wife's special relationship with her husband to help her spouse.¹⁶⁵

ment.") Later, I argue that the Founders addressed this double jeopardy difficulty by uniquely limiting the judgment in impeachment cases. See discussion *infra* Section III.C.3.

160. Stating counsel had taken up too much time on such matters, the Lord Chief Justice noted:

We have nothing to do here, whether the Commons House at this day can impeach for treason any commoner in the House of Lords; we have nothing to do with this, what the Lords' jurisdiction is, nor with this point, whether an impeachment in the Lords' House (when the Lords are possessed fully of the impeachment) does bar the bringing of any suit, or hinder the proceeding in an inferior court: But here we have a case that rises upon the pleadings; whether you have brought here before us a sufficient plea to take away the jurisdiction of the court, as you have pleaded it, that will be the sole point that is before us. And you have heard what exceptions have been made to the form, and to the matter of your pleading.

See *id.* at 325; see also *id.* at 295 (Lord Chief Justice denying that the case involved the right of Parliament to impeach, the Lord's jurisdiction, parliamentary privilege and directing counsel not to spend time on it The Court asked if counsel wished to amend the pleading. They did not. *Id.* at 325.

161. *Id.* at 325 (Lord Chief Justice stating, "For words spoken, or facts done in the Commons-House, or in the Lords, we call none to question here, nor for any thing of that nature . . .").

162. *Id.* at 329–30 (stating of counsel "we cannot allow you them anymore; for now we are come to a matter of fact only; and we cannot by the rules of law allow you counsel"); *id.* at 327 (denying him counsel before he pleads guilty or not).

163. *E.g., id.* at 346. When the Crown did not oppose, the Court allowed Fitzharris a solicitor to aid in obtaining papers he needed. *Id.* at 329–330.

164. *Id.* at 333 (Solicitor General objecting that wife has brought a brief to Fitzharris); *id.* at 331 (King's Counsel arguing wife should not be able to pass messages from counsel to Fitzharris); *id.* at 331–32 (Crown counsel complaining wife has entered courtroom with papers in her hand and court warning papers prepared by counsel are not allowed; she claiming they are mere notes, and judge saying he may refresh his recollection with notes); *id.* at 332 (Chief Justice threatening to remove her if she not be "modest and civil"); *id.* at 332 (Chief Justice warning that "if she be troublesome, we shall remove her" and wife stating "I will not be removed"); *id.* at 345 (Sergeant Jeffries, complaining "they continue to give the prisoner papers"). Fitzharris clearly viewed his wife as indispensable. *Id.* at 252, 254, 329 (Fitzharris asking for his wife).

165. *Id.* at 332–34 (Both Fitzharris and wife arguing she has a right to help her husband at trial); *id.* at 333 (Solicitor General noting a wife has a "very great privilege to protect her husband" but cannot bring instructions already drawn").

g. The Jury's and Grand Jury's Questions about the Trial

When the case was submitted for verdict, the petit jurors knew that the House of Commons had impeached Fitzharris. They also knew that the Commons had stated that the common law courts had no jurisdiction. The foreman asked the judge whether the jury should render a verdict under those circumstances.¹⁶⁶ The question demonstrated that even ordinary people understood that there were jurisdictional lines between Parliament and the common law courts.

In response, the Lord Chief Justice first urged the jury to consider the facts and not to be concerned about jurisdiction.¹⁶⁷ But he also revealed that the *grand jury*, before indicting Fitzharris, had also raised the same question. Apparently, so too did some of the judges. He said that, anticipating the grand jury's concerns, all of the judges of the King's Bench had met to consider the question. At that meeting, he said, the King's Bench, *en banc*, decided that it did indeed have jurisdiction to try the case.

But I'll tell you further, gentlemen, this doubt was moved to us by the grand jury, before the bill was found; we had an intimation that they would move such a doubt to us as seems to be your doubt now. Therefore, for their Satisfaction, and the taking away any scruple that might be in the case, all the judges of England did meet together, and seriously debate the matter and substance of all this; and it was not our opinion of this court only, but the opinion of all the judges of England that we had a jurisdiction to try this man.¹⁶⁸

Yet, this statement does not tell us *why* the King's Bench opined that they had jurisdiction. Was it because the impeachment was definitely not proceeding by a decision of the House of Lords? Was it because, as the Crown argued, the King had the power to choose? Was it because the Court believed that the House of Commons had no jurisdiction? Or was it because they concluded that, as the Crown argued, the common law courts' jurisdiction was unaffected by the subsequent assertion of jurisdiction of Parliament? One clue comes from the Lord Chief Justice's admonishment to lawyers that the case (in his view) had nothing to do with the impeachment power of Parliament "when the Lords are possessed fully of the impeachment."¹⁶⁹

166. 8 HOWELL, STATE TRIALS, *supra* note 104, at 388.

167. *Id.* at 389.

168. *Id.* at 389.

169. *See supra* note 160.

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That statement suggests that the King's Bench had determined that Parliament either had no jurisdiction or had surrendered it.

A subsequent case report broadly interpreted *Fitzharris' Case* as holding that a pending impeachment is no bar to *indictment* for the same crime.¹⁷⁰ But it also indicated in a footnote that the *en banc* court had ruled that the jury “ought not to take notices of the transaction of the House of Commons.”¹⁷¹ The reference to “take notices of the transaction” suggests that the King's Bench had concluded that the actions of the Commons was void or had been voided. As discussed in the next section, other courts used *Fitzharris* to justify providing ancillary relief when Parliament was out of session.

Despite the *Fitzharris* lawyers' efforts, the jury returned a verdict of guilty.¹⁷² *Fitzharris* was sentenced to be hanged and was executed shortly thereafter.¹⁷³

2. Common Law Courts and the Power to Issue Relief Incidental to Impeachment

Early English courts also dealt with the question of whether courts had any power to act in an impeachment case once Parliament had dissolved. In the *Case of Earl Ferrers*, the King's Bench noted that it had been formerly doubted whether a Court could proceed to set a new date for execution if the one set by Parliament could not be

170. *Fitzharris' Case*, 89 Eng. Rep. 862 (“An impeachment depending [e.g., pending] cannot be pleaded to an *indictment* for the same crime.”).

171. The note stated:

An *impeachment* for high treason was insituted [sic] against *Fitzharris* by the House of Commons. A bill of *indictment* was also, and at the same time, preferred against him; but the grand jury conceiving that they could not receive the bill while the impeachment was pending against the indietee, the question was referred to the twelve Judges, who were unanimously of opinion that the grand jury ought not to take notices of the transaction of the House of Commons, and therefore ought to hear the evidence upon the bill.

Id. at 862, n. a. (emphasis in original). The English Reports cite to 2 Show. K.B. 163. *Fitzharris' case* has also been cited as precedent in other English cases. *E.g.*, *Earl of Danby's Case*, 89 Eng. Rep. 973 (1683-84) (King's Bench using *Fitzharris* to argue for jurisdiction of common law courts to grant bail after pardon when Parliament not in session, though requiring party to reappear when Parliament resumes); *Burdett v. Abbot*, 123 Eng. Rep. 384, 386 (1812) (dismissing claim of trespass and assault brought against Speaker of House of Commons). *See also infra* note 175.

172. *Id.* at 391 (guilty verdict).

173. *Id.* at 393 (sentenced to hanging); *id.* at 396 (execution). At his execution, *Fitzharris* was encouraged to denounce his Catholic faith and confess. He refused and went to his execution leaving behind, with a religious counselor, a long letter acknowledging some errors but generally denying extensive involvement in the plot and reaffirming his Catholic religious beliefs. *Id.* at 400–12.

met.¹⁷⁴ In the *Earl of Danby* case the King's Bench held that though Danby was impeached, given that he had a King's pardon, a common law court had jurisdiction to determine his bail if Parliament was not in session. (As support, it noted that "the case of Fitzharris did go much further, and if that impeachment did not hinder this Court from trying, sure this will not hinder from bailing.¹⁷⁵) To support his plea for bail, Danby's lawyers argued that an impeachment "is a judicial proceeding in Parliament, and not relating to Parliament's legislative power." They continued:

[N]ow during no Parliament this is the Supreme Court in being for the defense of the King's prerogative; and by the dissolution of the Parliament, all the judicial proceedings there are discontinued, and the Inferior courts are let into their jurisdiction. Though proceedings in Inferior Courts are superceded during their session, yet upon a dissolution they proceed here below: and so is the law and so is the practice and this is so in cases originally beginning here.¹⁷⁶

The court must have accepted this view, because it granted bail, but it also required Danby to appear before Parliament at its next session.¹⁷⁷

3. Other Use of Impeachment as a Bar

Another use of an impeachment trial to block a common law court proceeding is found in a case involving Warren Hastings, Governor of Bengal (modern day India). The impeachment, which was go-

174. 168 Eng. Rep. 69 (1760) (Ferrers was indicted in Parliament and convicted of murder; As he was a peer (nobleman), Parliament asked the common law judges to rule on whether he could receive the same sentence for murder that the criminal statute would provide had he been tried in common law courts).

175. *E.g.* *Rex v. Danby*, 89 Eng. Rep. at 973. *See also* *Burdett v. Abbott*, 3 Eng. Rep. 1289 (1817) (in action for trespass against Speaker of the House of Commons and others for breaking into complainant's home and forcibly incarcerating him, the fact that the Commons had authorized a warrant for complainant's arrest for libel and was then sitting and had accused complainant of breach of the privileges of Parliament by libel was a sound defense and courts may determine whether or not a privilege actually belongs to the House of Commons in the case. *Id.* at 1300 (using Fitzharris to argue that the court may investigate whether party had a Parliamentary privilege that Parliament claimed); *Stockdale v. Hansard*, 112 Eng. Rep. 1112, 1143-44 (in a Parliamentary privilege matter narrowly construing Fitzharris to say that the only point determined in Fitzharris is that an impeachment in a Parliament which was dissolved did not abate an indictment in the common law courts).

176. 89 Eng. Rep. at 973 (Mr. Pollexfen arguing for Danby). Note that while Parliament was out of session, Danby's lawyers moved for a writ of habeas corpus. *Id.* at 974. He had been pardoned by the King, despite impeachment. *Id.* at 974. The Commons protested and resolved that the pardon was void. IV COBBETT, PARL. HIST., *supra* note 77, a 1129-1131. Later, in the Act of Settlement (1701), Parliament declared that a pardon could not affect impeachment. *E.g.*, BLACKSTONE, *supra* note 321, at *261. Under the U.S. Constitution, a pardon cannot apply to an impeachment. U.S. CONST. art. II, § 2.

177. 89 Eng. Rep. at 974.

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ing on when the U.S. Constitution was being drafted, charged *inter alia* that Hastings accepted money from locals and had violated British statutes prohibiting such acts. While the impeachment was proceeding (but after the Constitution was drafted), one of those locals, Nobkissen, claimed the money was a loan, not a gift, and he sued Hastings in the common law courts to recover it. When Nobkissen asked for discovery, Hastings pleaded that complying with the discovery request would incriminate him. To support his claim, he referenced his prosecution before Parliament under the impeachment and his possible vulnerability to prosecution before the common law courts, under a statute. Citing British pleading rules prohibiting inconsistent pleas, the Lord Chancellor ruled that Hastings could not plead both vulnerabilities. He said, “One part of this plea overrules the other. If the defendant relies upon the impeachment, the necessary consequence is, that, the impeachment pending, there can be no prosecution under the act.”¹⁷⁸

D. The Legacy of English/British and Colonial History

We can glean several lessons from *Fitzharris* and from British history generally. First, Parliament sitting in an impeachment proceeding was considered a criminal court. Second, the Court of Parliament and the common law courts had concurrent jurisdiction over crimes and misdemeanors, but both could not validly exercise jurisdiction at the same time. Third, Parliament’s jurisdiction was superior. Fourth, while Parliament theoretically had the power to try anyone for anything, in practice, it focused its attention on the types of crimes or misdemeanors that posed a substantial threat to government. However, as the *Fitzharris* and other cases indicate, it did not limit its jurisdiction to public officials. Fifth, special rules favored nobility over commoners; commoners also were denied certain defenses when tried in impeachment proceedings. High treason trials also had special rules. Sixth, both common law courts and Parliament had the ability to issue broad punishment and to place a person at risk of “life and limb,” and so, principles of double jeopardy applied to prevent a trial in both venues or a repeat trial. Seventh, an investigation by Parliament into impeachment did not thwart the work of the Attorney General, however, if Parliament properly assumed jurisdiction by issuing

178. See discussion *supra* Introduction. Nobkissen v. Hastings, 30 Eng. Rep. 535 (1793). See also P.J. Marshall, *Nobkissen versus Hastings*, 27 BULL. OF THE SCH. OF ORIENTAL & AFRICAN STUDIES 384, 85 (1964).

an impeachment, then proceedings in the common law courts had to give way. This was why the King had to request that the Lords defer and why the jury and grand jury in *Fitzharris* questioned the jurisdiction of the King's Bench.¹⁷⁹ Eighth, Parliament and the Crown's courts sometimes jostled over jurisdiction. Ninth, the American colonists had no power to impeach their Chief Magistrates, although they had the power, at least theoretically, to prosecute them. Because they had to rely on Crown prosecutors and Crown-controlled courts, their power to prosecute royally-appointed leaders was regularly thwarted by the Crown. This experience likely made impeachment an important right for the newly independent states, and ultimately the Founders, to secure.

II. PRESIDENTIAL IMPEACHMENT AND PROSECUTION UNDER THE CONSTITUTION

In Federalist No. 65, Hamilton stated that the Founders “borrowed” from the British model in fashioning their approach to impeachment.¹⁸⁰ He also noted awareness of the approaches of the states after independence and that the states had also borrowed from the model of Great Britain.¹⁸¹ This section discusses how, with respect to impeachment, the Founders both adopted some of the British and independent state approaches, but also deviated from them. And it shows how they reflected the harsh lessons of unfairness they had learned from the colonial experience.

Here, I propose that the Founders would have understood the relationship between impeachment and prosecution as a *jurisdictional* one between courts, i.e., the court of Congress and the federal courts, rather than a question about the power of a particular officer or department or violation of a particular statute. They would not have focused on the specific powers of an Attorney General's office that had not yet been created. They would have assumed the jurisdiction of Congress and of the courts of law to be concurrent as to allegations of significant presidential criminal activity. They would have believed that there would be times when courts of law would be insufficient vehicles for delivering justice. They assumed it to be Congress' job to step in both to protect the government's interests and to ensure a fair

179. See discussion, *supra* Section I.C.1.

180. THE FEDERALIST NO. 65 (Hamilton).

181. *Id.* (“Several of the State constitutions have followed the [British] example.”) See also discussion *infra* Section II.B.

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proceeding by impeachment proceedings. Under the scheme they adopted, Congress triggers its *exclusive* jurisdiction by issuing articles of impeachment.

The section considers the relevant convention discussions, Hamilton's comments and relevant themes in the constitutions of the states.

A. The Founders' Discussions at the Convention

It is helpful to begin with a review of the Founders' discussions about impeachment at the Constitutional Convention, as reflected in James Madison's notes. While there are several references to impeachment in his notes, the key recording is of the July 20, 1787 meeting.¹⁸² The proposed language was that the President was "to be removable on impeachment and conviction for malpractice or neglect of duty."¹⁸³

Madison's notes indicate that debates focused on whether there was a need to set forth in the Constitution a means of removing a President.

Mr. PINKNEY & Mr. Govr. MORRIS moved to strike out this part of the Resolution. Mr. P. observed. he ought not to be impeachable whilst in office

Mr. DAVIE. If he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected. He considered this as an essential security for the good behaviour of the Executive.

Mr. WILSON concurred in the necessity of making the Executive impeachable whilst in office.¹⁸⁴

This entire discussion, and Pinkney's comment—that the President ought not to be impeachable while in office—indicates an understanding that impeachment could occur, as in Parliament, once one had *left* office.¹⁸⁵ The comment confirms that, however they ended up, the Founders began with a broad view of the impeachment power.

Ben Franklin supported including a means of impeachment of a sitting President as well. He argued that without a means for "regular

182. MADISON NOTES, July 20, 1787, at THE AVALON PROJECT (Yale University, Lillian Goldman Library), http://avalon.law.yale.edu/18th_century/debates_720.asp (last visited Feb. 10, 2019) (hereinafter "MADISON NOTES"). The shorthand appearing in these notes are all by Madison.

183. *Id.*

184. *Id.*

185. For this power in Parliament, see discussion *supra* Section I.B.C. For provision in Virginia's Constitution, see discussion *infra* Section II.B.

punishment”¹⁸⁶ of the President, people would resort to drastic means of retribution or removal. To establish the point, he looked to England and the controversial trial of Charles I.¹⁸⁷ The notes reflect:

Doctr. FRANKLIN was for retaining the clause as favorable to the Executive. History furnishes one example only of a first Magistrate being formally brought to public Justice. Every body cried out agst. this as unconstitutional. What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character. It wd. be the best way therefore to provide in the Constitution for the regular punishment of the Executive where his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.¹⁸⁸

Franklin’s reference to a Chief Magistrate rendering himself “obnoxious,” in his day, meant liable to punishment.¹⁸⁹ He seemed to desire a standard procedure for removing and punishing the executive and he seemed to fear that judicial responses would not be sufficient.¹⁹⁰ As Franklin indicates, the founding generation would have known that the impeachment process had been used as a tool of political revenge in England.¹⁹¹

Franklin’s also suggests that the reason for inserting the impeachment provision was to provide a *process* that would be in place for punishing a chief executive. He refers to impeachment as a means of “regular punishment of the Executive where his misconduct should deserve it.”¹⁹² The suggestion is that punishment might *not* occur without impeachment. The obvious reason would be that, like the

186. MADISON NOTES, *supra* note 182.

187. *Id.* Scholars believe Franklin was referencing Charles I of England, as the only Western monarch to be criminally tried. He was sentenced to death after Parliament convicted him of High Treason. *See, e.g.,* Louis J. Sirico, Jr., *The Trial of Charles I: A Sesquicentennial Reflection*, 16 CONST. COMMENT 51, 52 (1999); Chafetz, *supra* note 131, at 352-67. Historians say the trial was viewed as a sham. *E.g.,* Chafetz, *supra* note 131, at 385-86. Parliament deposed Richard II by vote, apparently without a trial—but then he was murdered in jail. *See* discussion, *supra* Section I(B)(c).

188. MADISON NOTES, *supra* note 182.

189. Johnson’s 1968 dictionary defines the term obnoxious would likely have been understood as “liable to punishment.” SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768) (unpaginated).

190. Among its definitions, Johnson’s 1768 dictionary defined the term “regular” as “Agreeable to Rule; consistent with the mode prescribed” or “Governed by strict regulations.” *Id.*

191. *See* discussion *supra* p. 58; Jack N. Rakove, *Statement on the Background and the History of Impeachment*, 67 GEO. WASH. L. REV. 682, 684 (1999) (discussing use of impeachment as a political weapon in Stuart England).

192. MADISON NOTES, *supra* note 182.

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King during colonial times,¹⁹³ a President would have means to thwart it.

We find the quandary the Founders faced expressed by Gouverneur Morris (New York).

Mr. Govr. MORRIS. He can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence. Besides who is to impeach? Is the impeachment to suspend his functions. If it is not the mischief will go on. If it is the impeachment will be nearly equivalent to a displacement and will render the Executive dependent on those who are to impeach.¹⁹⁴

Morris insisted that co-conspirators could likely be punished, but seemed to imply the President could or would not be. Although some suggest that he believed the President immune, there is another reason: he knew the President, like the King, controlled the arms of power. Thus, he insisted that the penalty of impeachment had to include the Chief Executive's *removal* from office—which suggests that *other* penalties were, in his mind, at least, on the table. He too was likely thinking against the backdrop of Parliament's broad powers.

Morris' comments also demonstrate a concern about political prosecutions and a need for Chief Magistrate flexibility. He was worried about instituting too vigorous a power to impeach.

Mr. Govr. MORRIS admits corruption & some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined.¹⁹⁵

George Mason of Virginia insisted that the right of "impeachment should be continued"¹⁹⁶ and tied it the principal that no one was above the law. His emphasis on "continued" suggests that he was borrowing the notion from someplace else. But it also suggests that he thought it might be *discontinued*. (Could the provision the Founders adopted have been a compromise between those two poles?) He specifically asked, "Shall any man be above Justice?"¹⁹⁷ Again, this comment echoes the notion that without impeachment, there would be no remedy. But again, the colonial experience suggests that he feared the President would hold great power under the new Constitution. He

193. See discussion *supra* Section I.

194. *Id.*

195. *Id.*

196. It is unclear whether in referencing "continued," Mason was referring to impeachment as embraced in the state constitutions or to the British model of impeachment.

197. MADISON NOTES, *supra* note 182.

went further to insist that if a President gained election through corrupt means, it would be a double insult to then allow him to escape justice by “repeating his guilt” while in office.¹⁹⁸

Col. MASON. No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors. There had been much debate & difficulty as to the mode of chusing the Executive. He approved of that which had been adopted at first, namely of referring the appointment to the Natl. Legislature. One objection agst electors was the danger of their being corrupted by the Candidates; & this furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?¹⁹⁹

Here, again, Mason seems to be looking to a broad view of impeachment like that Parliament possessed. The notion that a Chief Magistrate should not be above justice was also emphasized by Elbridge Gerry of Massachusetts. He seemed to compare a lack of an impeachment power to the existence of a royal executive.

Mr. Gerry urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped the maxim would never be adopted here that the chief Magistrate could do no wrong.²⁰⁰

Madison argued that impeachment of the President was important because of the singular nature of a President’s status. While it was unlikely that all legislatures or other officials would join together and be able to commit crimes, the President was one person with a great deal of power. But he also seemed worried about removal of a President in noncriminal cases, such as incapacity, where there could

198. Some have made this argument with respect to President Trump, claiming that he won the election in an unfair manner and that he continues to break the law. See David Priess, *Even With Evidence of “High Crimes,” Impeaching Trump Would Probably Fail*, WASH. POST (Nov. 14, 2018), https://www.washingtonpost.com/outlook/2018/11/14/even-with-evidence-high-crimes-impeaching-trump-would-probably-fail/?noredirect=on&utm_term=.691aa2613c90 (last visited Feb. 10, 2019). However, at press time, the Special Counsel has discussed no evidence of Trump’s involvement in any such scheme and not pressed charges against him.

199. MADISON NOTES, *supra* note 182.

200. *Id.*

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be no true criminal mens rea.²⁰¹ He felt impeachment was also important as a guard against “negligence or perfidy”²⁰² of a President.

Throughout, Pinkney seemed to remain resistant to including impeachment. However, his comments underscored a fear shared by others: the fear of political prosecution.

He was sure they ought not to issue from the Legislature who would in that case hold them as a rod over the Executive and by that means effectually destroy his independence. His revisionary power in particular would be rendered altogether insignificant.²⁰³

Charles Pinkney’s concern directly raised the question of jurisdiction. What “court” should have the power to try the case to remove a president?

B. State Models With Respect to Prosecution and Impeachment

The constitutions of the independent states also provided models for the Founders. We see broad variations in how they balanced power between courts of law and legislatures. The choices were likely driven by the then-existing balances of power between the executive and legislative branches, how officers were appointed, and whether there existed a well-developed judicial branch. This section examines a few states to illustrate attention given to the division of power.

Pennsylvania. Under its 1776 “Plan or Frame of Government,” Pennsylvania placed its executive power in a President and a Council.²⁰⁴ Pennsylvania designated impeachment for “state criminals.”²⁰⁵ It allowed for impeachment of “[e]very officer of state, whether judicial or executive.” And it allowed it “for mal-administration.”²⁰⁶ Pennsylvania gave the right to impeach to its legislature.²⁰⁷ But it selected a special court to decide the matter, a panel comprised of the President of the Senate (or, in his absence including, impeachment, the Vice President) and the Council.²⁰⁸

201. *Id.*

202. By “perfidy,” he likely meant “Treachery; want of faith; breach of faith.” JOHNSON, *supra* note 189.

203. MADISON NOTES, *supra* note 182.

204. PA. CONST. 1776, § 3, http://avalon.law.yale.edu/18th_century/pa08.asp (last visited Feb. 13, 2019). Pennsylvania’s Constitution had two sections, a “Declaration of Rights” and a “Plan or Frame of Government.”

205. *Id.* § 9.

206. *Id.*, § 22.

207. *Id.*, § 22.

208. *Id.*, §§ 20, 22.

Maryland. In its 1776 constitution, Maryland hearkened back to the British model for impeachment, referring to its lower House, the House of Delegates, “as the grand inquest of this State.”²⁰⁹ It gave that body broad investigative and prosecutorial powers with respect to “any crime” and “any person.”²¹⁰ The House could “inquire on the oath of witnesses, into all complaints, grievances, and may commit any person, for any crime, to the public jail, there to remain till he be discharged by due course of law.”²¹¹ Thus, it seems, after House impeachment, the accused would be tried in courts of law.

This lower House could “expel any member, for a great misdemeanor.”²¹² The state seemed particularly concerned about bribery, fraud on the public, and related financial crimes. It delegated trials on these issues to courts of law and required conviction “by oath of two credible witnesses.”²¹³ In article 53, it proscribed such financial misdealings by the Governor, Chancellor, Judge, Attorney General, and a long list of others.²¹⁴ In both articles 39 and 53, Maryland provided that conviction for financial misdealing would void the officeholder’s position “and *he shall suffer the punishment for wilful and corrupt perjury, or be banished this State forever, or disqualified forever from holding any office or place of trust or profit, as the court may adjudge.*”²¹⁵

Maryland’s Constitution gave its legislature the power to appoint the governor.²¹⁶ And it expressed distrust of officials serving in power for long periods, stating “long continuance in the first executive departments of power or trust, is dangerous to liberty; a rotation, therefore, in those departments, is one of the best securities of permanent freedom.”²¹⁷

North Carolina. For addressing official misconduct by the Governor and other officials, North Carolina’s 1776 Constitution allowed

209. MD CONST. OF 1776, *Constitution & Form of Government*, art. 10, “http://avalon.law.yale.edu/17th_century/ma02.asp, (last visited Feb. 10, 2019). For references to the “grand inquest,” in the context of grand juries and impeachments, see discussion *supra* notes 35, 71 and Section I.A.

210. *Id.* art. 10.

211. *Id.* art. 10.

212. *Id.*

213. *Id.*; *id.* art. 39.

214. *Id.* art. 53 (applying to any Governor, Chancellor, Judge, Register of Wills, Attorney-General, Register of the Land Office, Register of the Chancery Court, or any Clerk of the common law courts, Treasurer, Naval Officer, Sheriff, Surveyor or Auditor of public accounts).

215. *Id.*

216. MD CONST., 1776, *Constitution*, art. XXV.

217. *Id.* art. XXXI.

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either impeachment by the legislature or prosecution in courts of law. It provided that “the Governor, and other officers, offending against the State, by violating any part of this Constitution, mal-administration, or corruption, may be prosecuted, on the impeachment of the General Assembly, or presentment of the Grand Jury of any court of supreme jurisdiction in this State.”²¹⁸ North Carolina provided for the annual appointment of the governor by the legislature.²¹⁹ It also imposed term limits.²²⁰ North Carolina’s approach for removing an officer was, therefore, relatively simple and not directly in the hands of the people. The legislature also appointed judges and the Attorney General; the governor “commissioned” them.²²¹

Virginia. In its 1776 constitution, Virginia targeted those “offending against the state, “either by mal-administration, corruption, or other means, by which the safety of the State may be endangered.”²²² But Virginia is particularly worth mentioning because it required that its governor be *out* of office before he could be impeached.²²³ Of course, Virginia’s governor was elected annually by the legislature.²²⁴ Thus, its legislature could simply refuse to reappoint a governor. The requirement, however, suggests great concern about impeaching a person while in office.

New York/Massachusetts. These two states have been left near the end of discussion for a reason. The Founders substantially borrowed from New York’s approach to jurisdiction, (which had, also been followed, in part, by Massachusetts).

218. 1776 N.C. CONST. ART. XXIII at http://avalon.law.yale.edu/18th_century/nc07.asp (last visited Feb. 10, 2019) (emphasis added). North Carolina followed the approach of having two sections to its Constitution: a “*Declaration of Rights*” and a “*Constitution*.”

219. *Id.* art. XV.

220. *Id.*

221. *Id.* art. XIII.

222. VA. CONST. 1776, Constitution, ¶37 http://edu.lva.virginia.gov/docs/VAConstitution_trans.pdf (last visited Feb. 10, 2019). Virginia first adopted a “*Declaration of Rights*” and then two weeks later, added a section designated “*Constitution*.” See *First Virginia Constitution*, June 29, 1776, http://edu.lva.virginia.gov/online_classroom/shaping_the_constitution/doc/va_constitution (last visited Feb. 10, 2019). The paragraphs in the “*Declaration of Rights*” were enumerated, but those in the “*Constitution or Form of Government*” were not. In citing this document, the author has added paragraph indications where none are designated. The two are collectively cited as the Virginia Constitution, with reference to the subpart and an added paragraph number.

223. *Id.* ¶37 “The Governor, when he is out of office, and others, offending against the State, either by mal-administration, corruption, or other means, by which the safety of the State may be endangered, shall be impeachable by the House of Delegates.”

224. *Id.* ¶ 27.

In Article 33 of its 1777 Constitution, New York looked to its legislature for impeachment. It provided that “the power of impeaching all officers of the State, for mal and corrupt conduct in their respective offices, be vested in the representatives of the people in assembly.”²²⁵ It required a two-thirds vote for conviction or acquittal.²²⁶

The 1777 Constitution of New York gave the power to impeach to its legislature but created a special court for the trial of impeachments made up of “the president of the senate, the senators, chancellor, and judges of the supreme court, or the major part of them” unless of course one of them were impeached.²²⁷ But New York limited the judgment that the special court could issue. Speaking of judgment, this New York Constitution read:

[N]or shall it extend farther than to removal from office and disqualification to hold or enjoy any place of honor, trust or profit under this state. But the party so convicted shall be, nevertheless liable and subject to indictment, trial, judgment and punishment according to the laws of the land.²²⁸

New York’s limitation on its special court of impeachment indicates that New York understood impeachment as primarily for the purpose of removal from public office (and securing the state from further harm). Its other courts handled punishments under the law if an impeached person were convicted.

Massachusetts’ 1780 Constitution allowed its House to issue impeachments “against any officer or officers of the commonwealth, for misconduct and maladministration in their offices.”²²⁹ Massachusetts’ Senate could convict or acquit by a majority.²³⁰ The state liked New York’s idea of limiting judgment in impeachment, but preserving prosecution after conviction and adopted it.

Art. VIII. The senate shall be a court, with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and maladministration in their offices; . . . Their judgment, however, shall not extend further than to removal from office, and dis-

225. N.Y. CONST. art. XXXIII (1777), at http://avalon.law.yale.edu/18th_century/ny01.asp (last visited Feb. 10, 2019).

226. *Id.*

227. *Id.* XXXII.

228. *Id.*

229. MA. CONST. pt. 2, ch. 1, § 3 art. VIII, at <http://www.nhinet.org/ccs/docs/ma-1780.htm> (last visited Feb. 13, 2019).

230. *Id.* pt. 2, ch. 1, § 2 art. VIII.

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qualification to hold or enjoy any place of honor, trust, or profit under this commonwealth; but the part so convicted shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land.²³¹

New York and Massachusetts both elected their governors in state-wide elections,²³² although the governor of Massachusetts was elected annually.²³³ Compared to other states, both had established judiciary systems.

From these examples of state constitutional references, we know several things. First, those who participated in the Constitutional Convention were aware not only from British history and their colonial experiences, but also from the experiences of the states, that there were several options with respect to balancing jurisdiction between courts of law and a court of impeachment. It seems reasonable to think that they expected a well-established national judiciary, although they would later battle about its contours. It seems to this author, that they were trying to decide, as a jurisdictional matter, how to divide the responsibility of prosecution to protect the office of the Presidency, afford fairness to the accused, and also have a process that would assure the people that justice had been done. The Founders looked to New York (and to Massachusetts) for their answer.

C. The Founders' Decisions

1. The General Scheme

As is well known, the Constitution divides the work of impeachment among the Congressional houses. It provides that the House of Representatives (like the British House of Commons) “shall have the sole Power of Impeachment.”²³⁴ The Founders gave the Senate (like the British House of Lords) the sole power “to try all impeachments.”²³⁵ Consistent with approach of Parliament, the House appoints “managers” to press its case in trial before the Senate.²³⁶ The Chief Justice of the Supreme Court (instead of a Lord Steward) presides over the proceedings.²³⁷ Consistent with New York’s approach

231. *Id.*

232. N.Y. CONST. art. XVII; MA. CONST., ch. II, § 1 art. II.

233. MA. CONST. pt. 2, ch. II, § 1, art. 2.

234. U.S. CONST. art. I, § 2, ¶5; THE FEDERALIST NO. 65 (Hamilton) (noting parallel with House of Commons and House of Lords).

235. *Id.* art. I, § 3, ¶6; THE FEDERALIST, NO. 65 (Hamilton), *supra*.

236. Compare discussion *supra* Section I.B.1.

237. *Id.*

they required a two-third's vote of the Senate (instead of a majority) for conviction or acquittal.²³⁸

2. Why Not the Supreme Court or Special Courts?

Although some of the states had adopted special courts for impeachment, the Founders relied upon the Senate, following the approach of Parliament (The House of Lords) and Massachusetts). Thankfully, Hamilton left future generations his own insights into how the Founders dealt with dividing jurisdiction between courts of law and Congress acting as a national grand jury and a High Court of Impeachment. In his embrace of the Senate as the correct place to try impeachments, Hamilton focused on the proceedings as a hedge against political prosecutions. This concern would have appealed to a nation that felt bruised by oppression in the administration of criminal justice. He used language that emphasized the investigative role of the Senate.²³⁹ Of an impeachment trial, he noted, "Is it not designed as a method of NATIONAL INQUEST?"²⁴⁰ The reference to "inquest" hearkens back to Blackstone's reference to impeachment as "the most solemn grand inquest of the whole kingdom."²⁴¹ It hearkens back to the notion of the grand jury as the "grand inquest."²⁴²

Hamilton also shared the concern that courts may not be able to balance impartiality and vigor in prosecutions. He noted of the Senate: "What other body would be likely to feel CONFIDENCE ENOUGH IN ITS OWN SITUATION, to preserve, unawed and uninfluenced, the necessary impartiality between an INDIVIDUAL accused, and the REPRESENTATIVES OF THE PEOPLE, HIS ACCUSERS?"²⁴³ Here Hamilton's words stressed both the criminal nature of the impeachment proceeding and the political risks to the union involved in such a trial.

Hamilton also offered the view that impeachment targets official misconduct by "public men." For him, mere allegations of serious misconduct by public officials were likely to inflame the passions of a community. This approach would have played well with a public that had only recently freed itself from royal rule in a bitter war.

238. U.S. CONST. art. I, § 3, ¶ 6. New York also required a supermajority. N.Y. Const. 1777, § 33 (requiring "two third parts of the members present").

239. *Id.*; MADISON NOTES, *supra* note 182.

240. *Id.* (capitalization in original).

241. See discussion *supra* Section I.B and note 71.

242. See discussion *supra* Section I.A.1 and note 35.

243. THE FEDERALIST NO. 65 (Hamilton) (emphasis in original).

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The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused.²⁴⁴

Although the Founders gave the right to hear impeachment cases to the Senate, we know that they *considered* other options because the states had embraced other options. Hamilton suggested that the options included (1) trying impeachment cases in the regular courts, (2) creating a separate Supreme Court for impeachments, and (3) using a court made up of the highest Court judges from each state.²⁴⁵ In *Federalist* No. 65 Hamilton discussed at least his own view of why these other options fell short.

Could the Supreme Court have been relied upon as answering this description? It is much to be doubted, whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public tranquillity.²⁴⁶

As a remedy for the “hazard” he feared, Hamilton stressed the need for a large number of judges in impeachment cases, a need met by placing the power in the Senate.

The hazard in both these respects, could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments, is equally dictated by the nature of the proceeding. *This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges*, as in common cases serve to limit the discretion of courts in favor of personal security. There will be no

244. *Id.* (emphasis in original).

245. See, e.g., Brendan Fox, *Justiciability of Challenges to the Senate Rules of Procedure for Impeachment Trials*, 60 GEO. W. L. REV. 1275, 1277–78 (1992); THE FEDERALIST No. 65 (Hamilton).

246. THE FEDERALIST No. 65 (Hamilton).

jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.²⁴⁷

Hamilton's statement also tells us something about the judges of his day. He mentions "personal security" as a factor that might affect their judgments. In other words, in backing the Senate as the place of trial, he believed there was safety in numbers and a greater ability of representatives to convince the people to accept the trial's outcome.

3. Splitting Jurisdiction/Dividing "Punishments"/ Avoiding Double Jeopardy

But the Founders did not want the Senate, the High Court of Impeachment, to have all of the power. They also wanted to split jurisdiction in the criminal trial, allowing a second trial in courts of law. Hamilton proffered some reasons for this approach in *Federalist* No. 65. He argued that the Senate, having convicted a person, if allowed to impose a broader sentence, might well register a bias in the sentence. On the other hand, he proposed that a jury might be able to take a fresh look at a case if the person has already been disgraced by removal from public office.

The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who had disposed of his fame, and his most valuable rights as a citizen in one trial, should, in another trial, for the same offense, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know anything of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a

247. *Id.* (emphasis added).

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great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismissal from a present, and disqualification for a future, office. It may be said, that the intervention of a jury, in the second instance, would obviate the danger.²⁴⁸

But other defendants in criminal trials faced the difficulty of juries acting as both factfinder and the party delivering a sentence. Others faced public humiliation. Was Hamilton concerned that political officers would extract political revenge for personal slights? Or perhaps the Founders wanted the split in jurisdiction, to give the public its red meat, but only after Congress had saved the Republic from further damage. But a two-trial split with equal opportunities for punishment would also possibly have exposed a convicted defendant to double jeopardy. The Founders found a solution by borrowing language from the state of New York, (the same language that had also been adopted by Massachusetts). They wrote:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.²⁴⁹

Not long thereafter, the Founders would also expressly state the longstanding common law principle against double jeopardy in their Constitution. The Fifth Amendment states: “[N]or shall any person be subject for the same offence to be twice put in *jeopardy of life or limb*. . . .”²⁵⁰

Justice Story later opined that the limitation on sentencing in impeachment was intended to curb the Congressional incentive to heavily punish one’s political enemies.²⁵¹ But he also recognized the provision to be necessary for the avoidance of double jeopardy.²⁵²

Why didn’t Hamilton mention double jeopardy or jurisdiction as descriptions or explanations in these writings? Perhaps his target audience would not have easily understood such references. Perhaps

248. *Id.*

249. U.S. CONST. ART. 1, § 3, ¶ 7. *See* discussion *supra* Section II.B.

250. *Id.* amend. V (emphasis added). *See also* discussion of double jeopardy at pp. 41–42.

251. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES: CONTAINING A BRIEF COMMENTARY OF EVERY CLAUSE, EXPLAINING THE TRUE NATURE, REASONS, AND OBJECTS THEREOF; DESIGNED FOR THE USE OF SCHOOL LIBRARIES AND GENERAL READERS § 116, 79 (1865).

252. *Id.*

these aspects were not the most important features of the provisions to him. But also, here Hamilton is making a psychological argument that anyone in his day could understand. A person's reputation as to character was considered to be incredibly important in the world in which he lived. He notes above the risk of *ostracism* of one brought down from such a high tower of official position. He refers to acquittal as an honorable acquittal. Remember that Franklin used similar language in speaking of how impeachment proceedings could be a benefit to a President as well as to a nation.²⁵³ One could argue that these same notions of reputation and honor are less prevalent in modern society. Yet, in this context, they resonated with the Founders who hoped future public servants to the Republic would bring that high respect for reputation and honor to their tasks.

4. Must Impeachment Always Come First? Hamilton's View

On the point of whether impeachment must come before a prosecution of a sitting President, the Founders somewhat left us hanging. Always ready to talk, Hamilton has offered us an idea. Hamilton suggested that, at least where "high crimes and misdemeanors" are involved (whatever those terms mean), removal must precede prosecution. In *Federalist* No. 65, he stated:

The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. *After* having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.

And in *Federalist* No. 69, he added:

The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would *afterwards* be liable to prosecution and punishment in the ordinary course of law.²⁵⁴

There is still a wee bit of wiggle room in Hamilton's comments. If, for example, the term "high crimes and misdemeanors, means really *big* crimes or crimes that harm the state, then there is room for a President to still be prosecuted in courts of law for offenses that only subject him to fines or probation and that, while obnoxious, are not so awful that we would remove him. But there is no wiggle room in

253. See discussion *supra* Section II.A.

254. THE FEDERALIST NO. 69 (Hamilton) ("The Real Character of the Executive")

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Hamilton's belief that *removal* was the sole province of Congress. Thus, considering a prosecutorial act from the view of whether or not it would *effect* a removal makes sense.

III. THE FOUNDERS ANSWER

This article began by delving into the history of impeachment in Great Britain and in the American colonies. It established that impeachment was understood as a type of criminal proceeding, although it had political attributes. Parliament was considered the highest court of the land when it assumed impeachment jurisdiction. It established that Parliament had the power to prosecute any crime and any person, although in the colonial period, it tended to focus its attention on treason and other felonies against the national interest.

The article established that the American colonies had no impeachment powers. Although they did have prosecutorial powers these powers were weakened by the Crown's ability to overrule local grand jury decisions. I argued that the theoretical existence of a power to prosecute a President would have been presumed by the Founders as they were writing the Constitution, but they would also have assumed prosecution of a sitting President would be impracticable.

The article moved on to discuss how the Americans incorporated parts of British model of impeachment and the approaches of the independent American states. I emphasized their concern about political prosecutions and protecting the Presidency through removal. And I argued that their solution was to divide jurisdiction, a split that placed removal power solely in Congress as the grand inquest and the High Court of Impeachment and allowed a second trial to proceed in courts of law if the accused were convicted and removed.

In this final section, I will purport to discern how the Founders would have answered key questions relating to whether a President can be prosecuted. With the aforementioned, backdrop, I draw the following conclusions.

A. The Founders Would Have Believed that, at the Outset of a Criminal Investigation, Common Law Courts and Courts of Impeachment Have Concurrent Jurisdiction Over Matters That Could Be the Subject of Impeachments

The Founders would tell us that before impeachment, courts of law on the one hand, and Congress, as a grand jury (the House) and court of impeachment (the Senate) on the other, have *concurrent* jurisdiction over criminal claims that *might* come within the impeachment power. The Founders would have drawn this design of concurrent powers from the long history of concurrent jurisdiction shared by Parliament and common law courts, as well as from confirmation of this approach in the various state law approaches to impeachment.

The question of what constitutes a removal and raises a jurisdictional question is beyond the reach of this article but obviously there are degrees of concern. This author believes that beginning a prosecution of any serious charges that pose the risk of a president being incarcerated certainly satisfy the standard. The Founders are quite clear that, when the target is the President, protecting the national interest cannot be seen merely through the lens of a prosecutor's eye. There are many other matters to consider. At the same time, the production of papers depending on their nature may raise fewer concerns. Concerns may even arise when a President is not directly targeted.

Federal courts are equipped to determine, in the first instance, when enjoining behavior or applying prosecutorial pressure to convince an accused to comply with a prosecutor's request constitutes a removal. A long history of considering privilege claims and Supreme Court precedent clearly establishes that Courts have the power to decide claims of executive privilege.²⁵⁵ Presidential communications can be viewed *in camera* for an additional layer of protection for both sides although *in camera* review can raise concerns.

255. Nixon, 418 U.S. at 683. I do not mean here to suggest a view on Nixon.

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- B. The Founders Intended that Impeachment Be the Only Way to *Remove* a Sitting President; Thus, the President is Immune from Prosecution in Federal Courts if a Prosecution, or Prosecutorial Action, Pose the Threat of Directly or Constructively to Removing Him from Office

In response to our question regarding whether a sitting president can be prosecuted, the Founders would have posed a different question. They would have told us to focus upon the word *removal*, and they would have asked whether one potential result of the proposed prosecution or prosecutorial conduct is to remove the president either directly or indirectly by curtailing in whole or in part his discretion to exercise of constitutionally-appointed duties. They would disregard whether this curtailment was intended by a prosecutor. They would not care whether a prosecutor has no intention to seek jail time. The Founders would focus upon the effect of the prosecution or prosecutorial action. They would not only be concerned that a President would have his power to affect the public interest curtailed, but also they might fear that he might turn against the country to save himself. Prosecutorial pressure might lead a President to act in a way that protects his personal interest, rather than the interests of the nation.

With these thoughts in mind, they would say a prosecutor has no power to accomplish removal: not by prosecution, not by plea bargain, not by arrest, not by personal injunction, or not by incarceration of a President. A court has no jurisdiction to recognize, grant, or enforce such actions. The risks to the nation are too great. The president must be first removed from office. Thus, it seems that the Founders would say that any charge that puts the President in jeopardy of restraint or forced action to avoid further penalty is a charge that is outside the jurisdiction of courts of common law to enforce. I believe, therefore, that the overwhelming number of cases that put the President in jeopardy of incarceration or other restraint or enjoin him to act, a prosecutor has no ability to press beyond the investigative stage.

C. The Attorney General Can Investigate Charges to Ascertain the Nature and Extent of an Alleged Crime Despite the Inability to Remove a President, But Has Limited Ability to Force Presidential Compliance

Because concurrent jurisdiction between courts of law on the one hand and Congress, acting as a grand jury and a court of impeachment on the other, does exist, an inability to remove a President or to curtail presidential power does not prevent a Congressionally-authorized prosecutor from investigating allegations of criminal misconduct. Historically, as demonstrated in *Fitzharris*, discussed in Part II(C), the Crown's counsel maintained a power to investigate crimes (and Crown courts maintained jurisdiction), even as Parliament was considering impeachment. Note that were there no concurrent jurisdiction for courts of law, a prosecutor could not even begin an investigation. He would have nowhere to file his papers or obtain his subpoenas. However, when directed toward the President, a criminal investigation should be to ascertain the nature and the extent of Presidential involvement.²⁵⁶

When it becomes clear to the prosecutor that removing the President (including curtailing his freedom to act on behalf of the nation) is in view, that prosecutor has a duty to consider *which* court should consider the issue. The fact that Congress declines to exercise jurisdiction does not mean that courts of law can then proceed. They have no power to remove a sitting President.

D. A Prosecutor Has a Duty to Exercise Prosecutorial Discretion in Deciding Whether or Not to Press a Prosecution Against a President in Courts of Law

The Founders would say that, having sworn to uphold the Constitution, a prosecutor is constitutionally required to use discretion in the consideration of prosecuting a sitting President in courts of law. The office of "Attorney General" was a position with which the Founders were well familiar. Discretion was also a notion that was known to them. They expected that all officers of the law should keep in mind the welfare of the Republic.

256. See, e.g., Rotunda, *supra* note 11.

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E. The President Can Fire Prosecutors Without Committing
Statutory Obstruction of Justice; The Answer is
Impeachment

The Founders would tell us that a President can fire at will federal prosecutors pursuing claims against him. He can order the Department of Justice not to investigate a matter. He cannot be prosecuted in federal courts for statutory obstruction of justice based on this conduct either when he acts or after an impeachment conviction. However, he could be prosecuted for any underlying offenses that he sought to cover up.²⁵⁷ And he could be prosecuted if he obstructed as part of a conspiracy to facilitate misconduct by others.

To understand this answer, one must return to history. The office of the Attorney General was created by statute in 1789, two years after the Constitution was signed.²⁵⁸ Some have attributed the President's power to appoint the Attorney General to merely an assumption that he had this power in the absence of designation in the statute.²⁵⁹ But in England throughout the colonial period and even in the independent states, such appointment and the corollary of removal, was understood to be part of the inherent power of the Chief Magistrate. In colonial Massachusetts, the Governor appointed authorities, upon advice from local councils.²⁶⁰ After independence Massachusetts provided that its Governor would appoint the Attorney General, with the advice and consent of the legislature.²⁶¹ No obstruction of justice *statute* can define the exercise of a constitutional

257. *Accord* Dershowitz, *supra* notes 7 & 8; Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005) (As a matter of original understanding, the President has the power to control federal prosecutors); Rotunda, *supra* note 11. A more complex case might arise if the firing of the officer, or a pattern of firing, violates the rights of third parties protected by another Constitutional provision, such as the Fourteenth Amendment, and civil rights statutes based upon it.

258. The Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

259. Bruce Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 4 (2018).

260. The approach was followed in Massachusetts. In 1733, a newspaper noted that a General Council for Nominating and Appointing Civil Officers had met and that the Governor then nominated several individuals to judgeships on the Court of Common Pleas, as “Indian judges” and as justices of the peace “To which Nominations his Majesty’s Council did Advise and Consent.” *Boston, May 10*, BOSTON NEWSLETTER, May 3–10, 1733, at 2; *Boston, NEW ENGLAND WEEKLY JOURNAL*, July 1, 1734, at 2 (same regarding Coroner, Surveyors and Justice of the Peace with similar advise and consent. Note the similar language used in the Constitution regarding nominating Supreme Court justices, ambassadors, and others with advice and consent of the Senate. U. S. CONST. art. II, § 2.

261. MA. CONST. ch. 2, § 1, art. IX (providing governor shall nominate and appoint “with the advice and consent of the council, “[a]ll judicial officers, the attorney-general, the solicitor-general” and others).

power as obstruction of justice. The answer to any misbehavior lies in impeachment which, is, one must be reminded, also considered a criminal prosecution.

The Founders knew that Presidents might misuse their powers to thwart prosecutions.²⁶² They had lived these experiences under a King. But they also knew (1) that a President needed flexibility in order to protect the nation's interest and (2) that Chief Magistrates have long looked to their nation's chief lawyers to advise them on important legal matters.²⁶³ The risk of prosecution for crimes offering serious punishment also might conflict with the nation's interest. While the prosecutor is focused on a single case with respect to the presidency, the President may need advice on a host of others, but may be reluctant to include the Attorney General or a larger staff in his circle.

In the decades after the Constitution was signed and ratified, some of the Founders expressed thoughts consistent with the view that the President has the power to remove an Attorney General at will. In a letter to President Monroe in 1820, James Madison, looking back on the Constitutional promise, criticized an Act of Congress that limited the terms of certain officers, including Attorneys General, to four years.²⁶⁴ Therein, he took a broad view of appointment power as including the exclusive right to remove.

Is not the law vacating periodically the described offices an encroachment on the Constitutional attributes of the Executive? The Creation of the office is a Legislative Act. The appointment of the officer the joint act of the President and Senate, the tenure of the office the judiciary excepted, is the pleasure of the P. alone so decided at the commencement of the govt. so acted on since, and so expressed in the commission. After the appointment has been made neither the Senate nor H. of Reps. have any power relating to it unless in the event of an impeachment by the latter and a judicial decision by the former or unless in the exercise of a legislative

262. See discussion of King's use of power to thwart colonial prosecutions *supra* Section I.C.1.b.

263. Mr. Wirt to Mr. Adams, AUGUSTA CHRONICLE, Dec. 15, 1824, 1 (Attorney General's opinion to President Adams that S.C. statute seeking to punish vessels who bring "free negroes" into the state and migrant blacks seeking employment is constitutionally void).

264. *Laws of the United States*, AMERICAN DAILY ADVERTISER, May 20, 1820, 3 (applying four-year term to district attorneys, naval officers, surveyors of the customs, navy agents, receivers of public monies lands, and others). See also *stat. at large* 582, 16th Cong. 1st Sess. Ch. 102, § 1-2 (Act to Limit the Term of Office of Certain Officers, Therein Named and for Other Purposes, May 15 1820). Subsequent, laws purporting to restrict terms also were passed. See *United States v. Parsons*, 167 U.S. 324 (1897) (citing 16 Stat. 6 (1869)).

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power by both abolishing the office itself by which the officer indirectly loses his place and even in this case if the office were abolished merely to get rid of the tenant and with a view by its re-establishment to let in a new one on whom the Senate would have a negation it would be a virtual infringement of the Constitutional distribution of the powers of Government. If a law can displace an officer at every period of four years, it can do so at the end of every year or at every session of the Senate and the tenure will then be the pleasure of the Senate as much as of the President and not of the President alone.²⁶⁵

In 1897, in *Parsons v. United States*, the Supreme Court addressed how bills that purported to provide term limits for officers affected the Presidential power to remove the officers before the limits were up.²⁶⁶ The case involved President Grover Cleveland's attempt to remove a district attorney before the statutorily-prescribed four-year term had expired.²⁶⁷ The district attorney moved for a writ of mandamus to compel the President to allow him to serve out his term and to pay him.²⁶⁸ The Court rejected the request.

At issue in *Parsons* was the fact that earlier statutes specifically referenced a Presidential power of removal, but later ones did not.²⁶⁹ The Court interpreted such statutes as only a limitation on the *length* of an appointment and not a reduction of the inherent power of the President to terminate before the assigned period was up.²⁷⁰

The *Parsons* court extensively reviewed appointment and removal power as discussed in various Congressional discussions and initiatives up to that time. It concluded that Congress would have assumed that the power to appoint included the power to remove. Thus, regarding why the 1789 act did not mention Presidential power to remove officers before four years, the *Parsons* Court stated "No provision was made in the act for the removal of such officer" and that "In the view held by that Congress as to the power of the President to

265. Letter from James Madison (Founding Father) to James Monroe (President), Dec. 28 1820 in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1816-1828 (1867).

266. 167 U.S. at 324-41.

267. *Id.* at 324 (prior history).

268. *Id.*

269. The Court noted that the Judiciary Act of 1789, which established federal district attorneys, had no provision for removal of the officers. *Id.* at 338. The 1820 act then was passed, providing for four-year terms, but said that the officers were removable "at his pleasure." *Id.* at 338 (citing 3 Stat. 582). Then on March 2, 1867, Congress passed the first "Tenure" act. *Id.* at 339 (citing 14 Stat. 430 (1867)). It also passed an army appropriations act that appeared to restrict Presidential powers to remove generals. *Id.*

270. 167 U.S. 324 (1897).

remove, it was unnecessary.”²⁷¹ The Court further said that the President had the power to remove “when in his discretion he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office.”²⁷²

In another case, *Blake v. United States* the Supreme Court punted on the question. It narrowly construed a statute to avoid it.²⁷³

President Monroe’s own approach also provides an example. He appointed his own Attorney General, William Wirt, in 1817, by replacing the prior Attorney General Richard Rush.²⁷⁴ Wirt was later reappointed by President John Adams after the 1820 term limit statute was passed.

Indeed, if the Attorney General were independent of the President, then he, an unelected official, could have the power to displace a civil officer at will through prosecution. The President’s tenure and that of other officers would then be at the will of the Attorney General, not at the will of the people as indicated through their votes or as represented in Congress.

Some have argued that if the President has a “motive” to obstruct justice then he has done so.²⁷⁵ But the President has a constitutional right (not merely a statutory one) to appoint members of the execu-

271. *Id.* at 338.

272. *Id.* at 343.

273. In *Blake v. United States*, 103 U.S. 227, 236–37 (1881), the Court narrowly construed term language in the Appropriations Act of 1866 to avoid the question of whether Congress can restrict Presidential appointment power not spelled out in the Constitution. It read the statute’s language narrowly to require how a President might remove and replace an officer, but not limiting his power to do so. It left open the question of whether an attempt to limit Presidential appointment or removal power would be constitutional. The Court said, “If the power of the President and Senate, in this regard, could be constitutionally subjected to restrictions by statute (as to which we express no opinion), it is sufficient for the present case to say that Congress did not intend by that section to impose them.” The Court held, “It is, in substance and effect, nothing more than a declaration, that the power theretofore exercised by the President, without the concurrence of the Senate . . . shall not exist, or be exercised, in a time of peace, except in pursuance of this sentence of a court-martial, or in commutation thereof. There was, as we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their places.”

274. *E.g.*, *The American Beacon and Commercial Diary*, Nov. 19, 1827, 3 (“William Wirt, of Virginia, has received from the President the appointment of Attorney General of the United States.”); *Mr. Monroe’s Cabinet*, *THE TIMES*, Jan. 1, 1817, 3 (noting rumors that Monroe intended to move then Attorney General Richard Rush to Secretary of State).

275. Daniel Hermer and Eric Posner, *Presidential Obstruction of Justice*, 106 *CAL. L. REV.* 1277 (2018) (claiming President’s firing of prosecutors pursuing legitimate claims against him would violate the “take care” and other clauses and thus constitute obstruction of justice); Berke, et al., *supra* note 6 (firing would constitute obstruction); Green & Roiphe, *supra* note 259 (arguing Department of Justice is “independent” of the President and immune from presidential interference).

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tive branch.²⁷⁶ It flows, as Madison suggested, from his inherent authority as the chief executive. Attaching a “motive” requirement to a constitutional right is an impermissible attempt to amend the Constitution by statute. If a motive requirement exists, it exists in the “Take Care” Clause.²⁷⁷ But an Attorney General has no authorization to enforce that clause.

Thomas Jefferson might also disagree with the motive theory. In 1801, Jefferson ordered his Justice Department to stop a prosecution of journalist William Duane under the Sedition Act.²⁷⁸ Duane was the editor of the *General Advertiser, or Aurora*. The Senate alleged he had libeled them.

Jefferson’s clear intent is memorialized in a letter to Duane.²⁷⁹ He asked Duane for a list of any public prosecutions against him “over which I might have a control” and promised that “in the line of my functions” he would treat the Sedition Act as “a nullity.” Thus, he said, “even in the prosecution recommended by the Senate, if founded on that law I would order a *nolle prosequi*.” He added, however, that “out of respect to that body should be obliged to refer to the attorney of the district to consider whether there was ground of prosecution in any court and under any law acknowledged of force.”²⁸⁰ Did Jefferson obstruct justice? He acted with the motive to stop a prosecution. But he seemed to assert that his action was a legitimate exercise of his power over prosecutors because he believed the Sedition Act to violate the Constitution. Clearly many in the Senate disagreed with him. But they did not move to impeach him.

276. U.S. CONST. art. II, § 2 (referencing Presidential power . . . [to] nominate, and by and with the Advice and Consent of the Senate . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .”).

277. U.S. CONST. art II, § 3 (The President “shall take Care that the Laws be faithfully executed.”).

278. CHARGES UNDER THE SEDITION ACT https://www.archives.gov/exhibits/treasures_of_congress/Images/page_5/19b.html (last visited Feb. 3, 2019).

279. Letter from Thomas Jefferson (President) to William Duane (Lawyer/Publisher) (May 23, 1801), in *Founders Online*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-34-02-0130> from 34 THE PAPERS OF THOMAS JEFFERSON, 169–170 (Barbara B. Oberg, ed 2007) (last visited Feb. 10, 2019).

280. *Id.*

F. Courts Have the Power to Stay or Narrow Presidential Prosecutions Undertaken in Courts of Law and When the Matter Raises a Prospect of Constructive Removal, the Balance Should Always Tip in the President's Favor

Conceiving removal as a *jurisdictional* problem affects the balancing that courts do in determining whether or not a particular prosecution or prosecution strategy should be enforced against a sitting President. By making removal jurisdictional, the Founders would say, they intended to tip the balance in the President's favor.

Such a tipping may justify granting a stay. It is axiomatic that courts *do* have the power to affect ordinary prosecutorial proceedings. Before granting a Presidential request for a stay, a court could require the waiver of affirmative defenses such as the statute of limitations. It may also see a need to reach agreements or impose rules for the preservation of evidence as a prerequisite. But again, courts may be limited in how much they can enforce without imposing an unconstitutional requirement upon the President.

G. A Formal Impeachment Will Automatically Stay Federal Prosecution Proceedings Addressing the Same Allegations

Even if a prosecution has begun, when the House issues a bill of impeachment, it takes a jurisdictional act that automatically stays any other proceedings in any other courts considering the same questions.²⁸¹ It will also stay the work of a federal grand jury. This stay principle is consistent with British common law, which treated an impeachment trial and a trial under the common law as mutually exclusive.²⁸² It is consistent with the notion of the High Court of Impeachment as a superior court on the question of Presidential removal. Indeed, without such a stay, the whole point of placing the power of removal in Congress is lost.

CONCLUSION

Some who urgently feel that a particular President must be removed from office for what they perceive to be political or legal misconduct may find the afore-mentioned conclusions personally unsatisfactory. Those who yearn for bright lines may be equally dis-

281. See discussion *supra*, note 152 (lawyer stating in *Fitzharris* that Parliament file the first "suit" because it impeached).

282. See discussion *supra* Section I.C.

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mayed. The Founders certainly appreciated the risk that a President would act contrary to the country's interest. But they also feared that impeachment could be misused for political purposes. And they understood that the future of the country rested on the need for broad consensus before reversing the results of an election. They believed that power to select a President rests in the people, not in the Courts or in unelected prosecutors. The framework they set forth in the Constitution represents a system of checks and balances that ensures that power over the Republic and its people remains in those people writ large, and not in advocacy groups, lobbyists, powerful individuals or powerful families. The framework also mimics a pattern of flexibility that is reflected throughout the Constitution.

Forget Kanye: Minority Voter Suppression is on the March

BRENDAN WILLIAMS*

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“There are a lot of things affecting our mental health that makes us do crazy things that puts us back into that trapdoor called the 13th Amendment,” West said, as Trump sat across from him smiling.

“I did say abolish with the hat on because why would you keep something around that is a trap door?” West asked. “If you are building a floor — the Constitution is the base of our industry. . . . of our country. . . of our company. Would you build a trap door that if you mess up and you accidentally — something happens — and you fall, and you end up next to the Unabomber? You’ve got to remove the trapdoor out of the relationship—the 13th Amendment out of our relationship. The way the universe works is perfect. You don’t have 13 floors. Do we?”¹

Kanye West meeting with President Donald Trump, Oct. 11, 2018.

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1. DeNeen L. Brown, *What is the 13th Amendment? A Kanye-inspired history lesson.*, WASH. POST (Oct. 12, 2018), https://www.washingtonpost.com/history/2018/10/12/what-is-th-amendment-kanye-inspired-history-lesson/?utm_term=.fd7261d13860.

INTRODUCTION

We live in a time where it is easy to get distracted from what is truly consequential. As Adam Gabbatt wrote about President Trump: “Bad – or embarrassing – news emerges, then Trump either blurts out some tweets, or makes spurious claims elsewhere, in an attempt to change the narrative.”² Chris Cillizza of CNN writes that “[t]he best way to understand Donald Trump’s presidency is this: He views himself as the producer and star of a daily reality show, a show in which the only connection from day to day is the presence of Trump himself.”³

Yet, in our obsession with this daily circus,⁴ we risk losing our most fundamental rights. On the same day that Trump-apologist Kanye West held forth in a bizarre Oval Office monologue,⁵ calling for the repeal of the constitutional amendment that abolished slav-

2. Adam Gabbatt, *No, over there! Our case-by-case guide to the Trump distraction technique*, GUARDIAN (Mar. 21, 2017), <https://www.theguardian.com/us-news/2017/mar/21/donald-trump-distraction-technique-media>. Although at least one observer argues that Trump’s distractions are less purposeful than attributable to the possibility that he is “an undisciplined, lazy man who likes to rant on Twitter and doesn’t think much about what he’s saying.” Noah Berlatsky, *Trump’s Tweets Aren’t A Distraction Tactic. They’re Who He Is.*, HUFFINGTON POST (July 29, 2018).

3. Chris Cillizza, *Donald Trump’s dream presidency is happening now*, CNN (Oct. 12, 2018), <https://www.cnn.com/2018/10/12/politics/donald-trump-reality-tv/index.html>.

4. A columnist writes of the “repulsively grotesque spectacle” of Trump belittling an alleged sexual assault survivor, generating “applause and roars of approval” at one of his “rock-and-rage rallies[.]” Charles Blow, *The Trump Circus*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/opinion/the-trump-circus.html>. He has come to conclude that “the entire Trump presidency is a show,” and that “[l]ike-minded people with look-alike faces populate [Trump rallies].” *Id.* “They are orgies of sameness in which crowd dynamics produce and escalate a tornado of affirmation and acceptance until it is perfectly admissible to surrender any remaining morality to the mob.” *Id.* And adulation for Trump makes suspect any reporting, or inconvenient facts, he might disagree with. *See, e.g.*, Christal Hayes, *Nearly half of Republicans think Trump should be able to close news outlets: poll*, USA TODAY (Aug. 7, 2018), <https://www.usatoday.com/story/news/politics/2018/08/07/trump-should-able-close-news-outlets-republicans-say-poll/925536002/>.

5. *See* Jelani Cobb, *Kanye West, Donald Trump, and the Truth About Chicago*, NEW YORKER (Oct. 13, 2018), <https://www.newyorker.com/news/daily-comment/kanye-west-donald-trump-and-the-truth-about-chicago> (“It’s worth pointing out that Trump has consistently drafted black celebrities—not elected officials, scholars, or policy analysts—into his discussions of African American interests.”). More succinctly, a CNN commentator said, “[t]his was Trump’s black people meeting.” Nia-Malika Henderson, *Why the Kanye West-Jim Brown lunch with Trump was a disaster*, CNN (Oct. 12, 2018), <https://www.cnn.com/2018/10/11/politics/kanye-west-jim-brown-donald-trump/index.html>. In 2016, “Trump’s racial appeals played to the part of his base he needed to turn out while not turning off enough people who held it against him.” Chris Cillizza, *3 clear signs that Donald Trump is playing the race card. Again.*, CNN (Nov. 5, 2018), <https://www.cnn.com/2018/11/05/politics/donald-trump-race-gillum-abrams-obama/index.html>.

ery,⁶ relatively unnoticed by the national media were stories about how African American voters were being denied ballot access in Georgia in an election cycle featuring an African American Democratic candidate, Stacey Abrams, running for governor against the secretary of state, Brian Kemp, in charge of the election itself.⁷

Abrams's campaign demanded that Kemp resign his elected office following "an Associated Press report on records it obtained showing Georgia has put a hold on more than 53,000 voter registration applications—nearly seven-in-ten of them belonging to African Americans—because they failed to clear the state's 'exact match' standard."⁸ Kemp had "placed blame on the New Georgia Project, which was founded by Abrams when she was the Georgia House minority leader, and ahead of the 2014 elections set out to sign up 800,000 new young and minority voters."⁹ But Kemp had also expunged "more than a million 'inactive' voters from Georgia's rolls since becoming the state's chief elections officer in 2010."¹⁰

States that deny the restoration of voting rights to convicted felons who have served their sentences also disproportionately disenfranchises African Americans. Although it was too late to make a difference in the 2018 election, where Republicans won close races for governor (over African American Democrats) and the U.S. Senate, Florida voters in that election approved restoring voting rights to roughly 1.5 million Floridians—under the existing system "[m]ore

6. See U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.")

7. Gregory Krieg, *Stacey Abrams campaign demands GOP's Kemp resign as Georgia secretary of state amid voter registration uproar*, CNN (Oct. 12, 2018), <https://www.cnn.com/2018/10/11/politics/georgia-governor-election-voter-registration-abrams-kemp/index.html>.

8. *Id.*

9. *Id.*

10. *Id.* The issue of a secretary of state supervising the counting in his own race for governor also surfaced in Kansas in 2018. See Eric Bradner, Adam Levy & Eli Watkins, *Kobach says he'll recuse himself as vote count discrepancies found in Kansas GOP primary*, CNN (Aug. 10, 2018), <https://www.cnn.com/2018/08/09/politics/kris-kobach-kansas-republican-governor-primary/index.html>. In Kansas, Kobach even moved "a polling station in Dodge City out of bus range for a huge immigrant population there." Annie Gowen, *Lack of proof aside, Kris Kobach can't stop talking about voter fraud in Kansas governor's race*, WASH. POST (Oct. 27, 2018). According to a description of a Kobach rally:

Every time an alien votes, it cancels out the vote of a U.S. citizen!" Kobach said at a rally here earlier this month as Trump beamed approvingly at his side, to a rousing chant of "U.S.A.! U.S.A.!" He called for other states to require proof of citizenship, too — "Just like Kansas!"

Id. Kansas voters rejected Kobach and elected a Democrat. See Mitch Smith, *Laura Kelly, a Kansas Democrat, Tops Kobach in Governor's Race*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/us/laura-kelly-wins-kansas-governors-race.html>.

than 20 percent of otherwise eligible African American adults” had been unable to vote.¹¹

It is not just African Americans being disenfranchised. Hispanics are also largely affected. According to a national voter survey, “[n]ine percent of black respondents and 9 percent of Hispanic respondents indicated that, in the last election, they (or someone in their household) were told that they lacked the proper identification to vote. Just 3 percent of whites said the same.”¹² Moreover, “[10] percent of black respondents and 11 percent of Hispanic respondents reported that they were incorrectly told that they weren’t listed on voter rolls, as opposed to 5 percent of white respondents.”¹³

As one writer noted:

In Texas, a group called True the Vote, has been on a quixotic mission to prove that there is a systemic problem with vote fraud, but the result, and intent, has always been a systematic attempt to attack the voter rights of Latinos. Their ham-fisted investigation into vote fraud has actually been an intimidation tactic against Latinos.¹⁴

11. Tim Mak, *Over 1 Million Florida Felons Win Right To Vote With Amendment 4*, NPR (Nov. 7, 2018), <https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4>; see also German Lopez, *Florida votes to restore ex-felon voting rights with Amendment 4*, VOX (Nov. 6, 2018), <https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results> (noting that “Florida had disenfranchised more potential voters than any other state, with more than 10 percent of all potential voters and more than 21 percent of potential black voters in Florida unable to vote due to felony records.”). An investigation showed that Florida’s Republican governor restored voting rights to the lowest percentage of African Americans, and the highest percentage of Republicans, in a half-century. See Lulu Ramadan, Mike Stucka & Wayne Washington, *Florida felon voting rights: Who got theirs back under Scott?*, PALM BEACH POST (Oct. 25, 2018), <https://www.palmbeachpost.com/news/20181025/florida-felon-voting-rights-who-got-theirs-back-under-scott> (noting “Scott’s system of restoring voting rights has for years discriminated against black felons, boosting his own political prospects and those of other Republicans throughout the state, a Palm Beach Post analysis has found.”).

12. Van R. Newkirk II, *Voter Suppression Is Warping Democracy*, THE ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/>.

13. *Id.* The problem is likely compounded by the fact that in viewing them as infrequent voters, Democrats are also not aggressively seeking the Hispanic vote, running the risk that “this dynamic has created a dangerous cycle of futility: The party needs to engage millions of young Hispanic voters to win tomorrow, but pursuing them means less time spent on voters who are likely to show up and decide elections today.” Alex Seitz-Wald & Benjy Sarlin, *Democrats have a Latino problem. Can they fix it in time?*, NBC NEWS (Oct. 14, 2018), <https://www.nbcnews.com/politics/elections/democrats-have-latino-problem-can-they-fix-it-time-n919711>.

14. Stephen A. Nuño, *Opinion: The Future of the GOP Lies in Suppressing the Latino Vote*, NBC NEWS (May 19, 2017), <https://www.nbcnews.com/news/latino/opinion-future-gop-lies-suppressing-latino-vote-n760706>. A 2018 article shared an example: “Alan Vera, the chair of the Harris County Republican Party’s Ballot Security Committee, put on a patriotic necktie, walked into the voter registration office in Houston and challenged the registrations of some 4,000 voters — there were duplicates — in his county.” Dana Liebelson, *One Republican Official Challenged Thousands of Voter Registrations In His County. It Could Happen Elsewhere.*, HUFFINGTON POST (Sept. 17, 2018), <https://www.huffingtonpost.com/entry/republican-challenge-voter->

In North Dakota, Native Americans fought voter ID restrictions after the Supreme Court voted “to leave in place a state law that requires residents to provide an ID displaying a residential address rather than a P.O. box number to vote.”¹⁵ As the *Washington Post* noted, “tribal officials and Democrats say it appears aimed at making it harder for thousands of Native Americans to vote, particularly those who live on reservations without conventional street names.”¹⁶ For the 2018 election, North Dakota had one of the nation’s most imperiled Senate Democrats in Heidi Heitkamp, and

Native Americans were widely credited with delivering Heitkamp’s last win, which set in motion a six-year legal war of attrition pitting the GOP-run statehouse in Bismarck against tribal leaders and voting rights groups. Census Bureau records show 46,000 Native Americans live in North Dakota, including 20,000 on tribal reserves. According to court filings, at least 5,000 of those on reservations do not have conventional addresses.¹⁷

A Native American advocacy group was forced to work “with tribal leaders in North Dakota to have a tribal government official available at every polling place on reservations to issue a tribal voting letter that includes the eligible voter’s name, date of birth and residential address.”¹⁸

registration-houston_us_5b9fb69ce4b046313fbd65d3. Vera, “a former national poll-watcher trainer for True the Vote,” claimed to have a staff of seven monitoring voting. *Id.* The consequences, targeting Democrats, were unsettling: “Harris County mistakenly placed more than 1,700 voters on its suspension list in response to a local Republican official’s challenge of nearly 4,000 voter registrations[.]” Zach Despart, *Harris County mistakenly suspends voter registrations after GOP challenge*, HOUSTON CHRON. (Aug. 28, 2018), <https://www.chron.com/news/houston-texas/houston/article/Harris-County-mistakenly-suspends-voter-13175685.php>. The *Houston Chronicle* noted that True The Vote was a “tea party group that advocates for stricter voter registration and identification laws, and that supported President Donald Trump’s unproven claims that millions of illegal votes were cast in the 2016 election.” *Id.*

15. Gabriel Pogrud & Felicia Sonmez, *In Senate battleground, Native American voting rights activists fight back against voter ID restrictions*, WASH. POST (Oct. 12, 2018), https://www.washingtonpost.com/politics/in-senate-battleground-native-american-voting-rights-activists-fight-back-against-voter-id-restrictions/2018/10/12/7bc33ad2-cd60-11e8-a360-85875bac0b1f_story.html?utm_term=.2d56c5501f5f.

16. *Id.*

17. *Id.*

18. Amy Dalrymple, *Native voting rights group aims to remove hurdles in North Dakota*, BISMARCK TRIB. (Oct. 12, 2018), https://bismarcktribune.com/news/native-voting-rights-group-aims-to-remove-hurdles-in-north/article_d1d42d63-0356-5e9d-b2d4-97f4593aac4d.html. According to one account:

Tribes have extended their office hours and worked around the clock to find efficient ways to assign addresses and issue identification. They are providing hundreds of free IDs when they would normally charge at least \$5 to \$10 apiece. The Turtle Mountain Band of Chippewa Indians printed so many IDs that the machine overheated and started melting the cards.

Navajos faced a similar predicament voting in Utah's San Juan County:

Since 2016, the Navajo tribal government has successfully sued the county in federal court over Voting Rights Act violations. Their victories have forced the county to redraw commission and school board district boundary lines, provide in-person translators and audio ballot recordings for Navajo voters and open two new satellite voting locations on the Navajo Nation to cut travel time in half.¹⁹

According to an attorney at the Native American Rights Fund: [In] Montana counties limit the number of registration forms for reservations, others in Wisconsin put heavily Native American polling locations in sheriff's offices to intimidate, in Nevada and South Dakota local elections administrators deny polling locations on reservations, and in Arizona disability compliance was used to justify shutting down tribal polling locations.²⁰

These threats to our most fundamental right—the right to participate in our democracy—are foreseeable consequences of the U.S. Supreme Court's 5–4 decision in *Shelby County v. Holder*,²¹ gutting the 1965 Voting Rights Act (VRA). This article revisits that 2013 decision, and the consequences that followed.

I. *SHELBY COUNTY V. HOLDER*: UNLOCKING VOTER DISCRIMINATION

As Professor Samuel Issacharoff wrote:

If ever a statute rose to iconic status, a superstatute amid a world of ordinary legislation, it was the VRA. In the course of not quite half a century, the Act was pivotal in bringing black Americans to the broad currents of political life—a transformation that shook the foundations of Jim Crow, triggered the realignment of partisan politics, and set the foundation for the election of an African American President.²²

Maggie Astor, *In North Dakota, Native Americans Try to Turn an ID Law to Their Advantage*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/us/politics/north-dakota-voter-id.html>.

19. Matt Vasilogambros, *Tribes strike back: Native Americans work to overcome voter laws they say diminish their influence*, TUCSON SENTINEL (Oct. 15, 2018), http://www.tucson sentinel.com/nationworld/report/100918_tribes_vote/tribes-strike-back-native-americans-work-over-come-voter-laws-they-say-diminish-their-influence/.

20. *Id.*

21. 570 U.S. 529 (2013).

22. Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013) (footnote omitted).

Yet, in *Shelby County*, Chief Justice John Roberts complained of the VRA's protections that "[n]early 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."²³ While he found that African American voter registration had significantly increased since 1965, he acknowledged that "voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements."²⁴ He wrote that "despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process."²⁵

Those favoring the act did "not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect" of the VRA.²⁶ Roberts rejected that theory, stating it would make the VRA "effectively immune from scrutiny; no matter how 'clean' the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior."²⁷ The Court held the preclearance standard unconstitutional, meaning states could enact discriminatory laws with no Department of Justice scrutiny, which made meaningless the majority's claim that the "decision in no way affects the permanent, na-

23. *Shelby County*, 570 U.S. at 535. A ProPublica study actually found that "Chief Justice John Roberts used erroneous data to make claims about comparable rates of voter registration among blacks and whites in six southern states." Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, PROPUBLICA (Oct. 17, 2017), <https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find>. As their analysis of a chart that Roberts incorporated into the opinion showed:

There is no question great strides had been made in black voter registration in Georgia, which reached 64.2 percent in 2004. However, white registration was 68 percent, not 63.5 percent, as Roberts' chart claimed. The rate of registration for whites exceeded that of blacks by 4 percent, rather than trailing it.

Similarly, the chief justice's chart asserted that in Virginia, the rate of registration for whites was just 10 percent higher than the rate of registration for blacks, a narrowing that would have reflected enormous progress. But the actual gap, removing erroneously counted Hispanics, was 14.2 percent.

Id. These are material errors.

24. *Shelby County*, 570 U.S. at 536.

25. *Id.* at 544–45.

26. *Id.* at 550.

27. *Id.*

tionwide ban on racial discrimination in voting”— that ban had become toothless.²⁸ The Court punted to a Congress paralyzed by partisanship to come up with a new preclearance coverage formula: “Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”²⁹ Nothing has been done since.³⁰

For the four dissenters, Justice Ruth Bader Ginsburg wrote that: the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation’s history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions—those States and localities where opposition to the Constitution’s commands were most virulent—the VRA provided a fit solution for minority voters as well as for States. Under the preclearance regime established by § 5 of the VRA, covered jurisdictions must submit proposed changes in voting laws or procedures to the Department of Justice (DOJ), which has 60 days to respond to the changes.³¹

Ginsburg noted that “[t]here was extensive evidence that, due to the preclearance mechanism, conditions in the covered jurisdictions had notably improved. And there was evidence that preclearance was still having a substantial real-world effect, having stopped hundreds of discriminatory voting changes in the covered jurisdictions since the

28. *Id.* at 557. Justice Clarence Thomas would have struck down that ban too. *See id.* at 557 (Thomas, J., concurring) (“I would find § 5 of the Voting Rights Act unconstitutional as well.”).

29. *Id.*

30. Nor, given the results-oriented ruling in *Shelby County*, is it clear how a new enforcement regime could be fashioned. As one scholar mused:

Will the holding of *Shelby County* be expanded to include all regulatory statutes that facially discriminate between states, as Justice Ginsburg worried about in her dissent? Perhaps a law exempting some states from its regulatory requirements without any explanation would at least raise questions under rational basis review. But the VRA set out its formula explicitly. And yet the Court held that the record amassed by Congress when the Voting Rights Act was renewed in 2006 was insufficient to justify that facial discrimination between the states. So it is not merely about rational basis at all. Why was that evidence inadequate? Is there a reason to distinguish Congress’s power pursuant to the Commerce Clause from its powers under the Reconstruction Amendments? Or is there something special about state authority over voting that calls for more demanding judicial scrutiny?

Vik Kanwar, *A Fugitive from the Camp of the Conquerors: The Revival of Equal Sovereignty Doctrine in Shelby County v. Holder*, 16 BERKELEY J. AFR.-AM. L. & POL’Y 272, 309 (2015). Fundamentally, as one professor notes, the problem is this: “*Shelby County* is falsely minimalist in two ways. First, the opinion purports to decide less than it could have, pretending to leave room for Congress to respond to the decision with a new preclearance regime. Second, the opinion is brief and breezy, eliding rather than confronting serious jurisprudential hurdles in the way of its decision.” Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 726 (2014).

31. *Shelby County*, 570 U.S. at 562 (Ginsburg, J., dissenting).

last reauthorization.”³² And indeed, she noted, “second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that originally triggered preclearance in those jurisdictions.”³³ In other words, states had simply become more imaginative in their voter suppression, moving beyond such crude means as poll taxes or tests.³⁴ As Ginsburg stated, “the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.”³⁵

Roberts position had been predictable, even though *Shelby County* “purports to be a modest decision written with reluctance and humility.”³⁶ As an attorney for the Reagan Administration, Roberts wrote several memoranda that attacked the VRA. In his writings, he argued the “widely accepted practices” used by states should not be subject to attack in federal courts. In other memoranda, Roberts contended that Congress’s effects-based test would “provide a basis for the most intrusive interference imaginable by federal courts into the state and local processes.”³⁷ Yet 22 Democrats had voted in 2005 to confirm him as chief justice despite “Roberts’s record of opposing expansion of the Voting Rights Act[.]”³⁸

Nor was Roberts the only justice with obvious bias. In oral argument, “Justice Antonin Scalia attributed Congress’s nearly unanimous vote in 2006 to reauthorize the Voting Rights Act to ‘a phenomenon that is called the perpetuation of racial entitlement,’ adding rather sardonically, ‘it’s been written about.’”³⁹

32. *Id.* at 591–92 (Ginsburg, J., dissenting).

33. *Id.* at 592 (Ginsburg, J., dissenting).

34. “In 1965, the primary method for effectuating intentional racial discrimination in voting involved the use of a test or device to prevent African Americans from registering to vote.” Cody Gray, *Savior Through Severance: A Litigation-Based Response to Shelby County v. Holder*, 50 HARV. C.R.-C.L. L. REV. 49, 59 (2015).

35. *Shelby County*, 570 U.S. at 593 (Ginsburg, J., dissenting).

36. Hasen, *supra* note 30, at 713.

37. Adam Bolotin, *Out of Touch: Shelby County v. Holder and the Callous Effects of Chief Justice Roberts’s Equal State Sovereignty*, 49 J. MARSHALL L. REV. 751, 763–64 (2016).

38. John Nichols, *Roberts Draws 22 Democratic Votes*, NATION (Sept. 29, 2005), <https://www.thenation.com/article/roberts-draws-22-democratic-votes/> (noting, in a bit of foreshadowing now evident in hindsight, that “[t]he most interesting ‘no’ vote came from Obama. The Illinois senator, who delivered the keynote address at last summer’s Democratic National Convention and arrived in Washington amid high expectations on the part of liberals, has tended to be a cautious player.”).

39. Kareem Crayton & Jane Junn, *Five Justices, Section 4, and Three Ways Forward in Voting Rights*, 9 DUKE J. CONST. L. & PUB. POL’Y 113, 114 (2013). No stranger to entitlement, Scalia died at a luxury resort. Elise Viebeck, *Inside Cibolo Creek Ranch, the luxury resort where*

II. BEYOND *SHELBY COUNTY*: NEW THREATS TO VOTING RIGHTS

As Justice Ginsburg had characterized them, “second-generation barriers to minority voting rights” have proliferated, largely unchecked.

Writing in *The Atlantic*, Vann R. Newkirk II opined that “[j]ust five years after the landmark *Shelby County v. Holder* decision, it’s become clear that the decision has handed the country an era of renewed white racial hegemony. And we’ve only just begun.”⁴⁰ As he wrote: “There is functionally now no preemptive federal oversight of state and local voting laws. This will likely be the status quo for the foreseeable future.”⁴¹

With the 2018 midterm elections closing in, the *Los Angeles Times* editorialized in September 2018 that “[f]ive years after the Supreme Court gutted a key provision of the 1965 Voting Rights Act, a new report from the U.S. Commission on Civil Rights has confirmed predictions that the ruling would hobble enforcement of that landmark law.”⁴² They stated that “[t]he term ‘judicial activism’ is thrown around, but if a decision ever deserved it, *Shelby County* did.”⁴³ The editorial relates some findings from the Commission’s report:

The report notes that within two hours of the decision, Texas’ attorney general tweeted that the state would reinstitute a strict photo ID law, which had been previously struck down by a court during the pre-clearance process. The day after the ruling, North Carolina’s legislature voted to make its voter ID law stricter, and eliminated or restricted rules that had made it easier for minorities to vote. The report notes that both states’ actions were ultimately found by courts to be acts of intentional racial discrimination, but

Scalia died, WASH. POST (Feb. 13, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/02/13/inside-cibolo-creek-ranch-the-luxury-resort-where-scalia-died/?noredirect=on&utm_term=.fe0dde6bbc07.

40. Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, ATLANTIC (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>.

41. *Id.*

42. Editorial Board, *A clarion call to restore protections of the Voting Rights Act*, L.A. TIMES (Sept. 22, 2018), <https://www.latimes.com/opinion/editorials/la-ed-voting-rights-20180922-story.html>. In a book, Carol Anderson persuasively writes that “ever since Obama’s election and the subsequent *Shelby County v. Holder* decision, the GOP, controlling the majority of state governments, had worked assiduously to close of African Americans’ access to the ballot box.” CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* 163 (2017).

43. Editorial Board, *supra* note 42.

only after years of litigation. It almost certainly wouldn't have come to that if the old pre-clearance formula had remained in place.⁴⁴

The *New York Times* had similarly editorialized in April 2018 that

the idea that the American fixation on race and power had magically evaporated in just a few decades was, at best, strikingly naïve. It was also disproved within hours of the court's ruling, when Republican lawmakers in Texas and North Carolina, both states that had been covered by the Voting Rights Act, rammed through discriminatory new voting laws that they had been gunning to pass for years, including some that had been blocked under the act.⁴⁵

Furthermore, the editorial pointed out that “[i]f this wasn't enough evidence that things have not, in fact, changed dramatically, the point was driven home by the election of Donald Trump in 2016, and the resurgence of overt racism and white nationalism that has followed, with no meaningful pushback from the president.”⁴⁶

Since *Shelby County*, courts have stopped some egregious infringements upon voter rights while most have slipped through.

In *North Carolina State Conference of NAACP v. McCrory*,⁴⁷ the Fourth Circuit Court of Appeals overturned a District Court ruling upholding a North Carolina election law, noting that “[i]n holding that the legislature did not enact the challenged provisions with discriminatory intent, the court seems to have missed the forest in carefully surveying the many trees.”⁴⁸ The court noted:

Before enacting that law, the legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.

In response to claims that intentional racial discrimination animated its action, the State offered only meager justifications. Although *the new provisions target African Americans with almost surgical precision*, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not

44. *Id.*

45. Editorial Board, *What the Supreme Court Doesn't Get About Racism*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/opinion/supreme-court-racism-suppression.html>.

46. *Id.*

47. 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

48. *Id.* at 214.

exist. Thus, the asserted justifications cannot and do not conceal the State's true motivation.⁴⁹

The court pointed out that “[i]n this one statute, the North Carolina legislature imposed a number of voting restrictions. The law required in-person voters to show certain photo IDs, beginning in 2016, which African Americans disproportionately lacked, and eliminated or reduced registration and voting access tools that African Americans disproportionately used.”⁵⁰ Prior to *Shelby County* the law had “provided that all government-issued IDs, even many that had been expired, would satisfy the requirement as an alternative to DMV-issued photo IDs.”⁵¹

After obtaining data on the racial breakdown of early voters—data that showed “African Americans disproportionately used the first seven days of early voting”—North Carolina legislators had “amended the bill to eliminate the first week of early voting, shortening the total early voting period from seventeen to ten days.”⁵² They eliminated same-day voter registration upon finding that African Americans were often same-day registrants, as such registration “allowed those with low literacy skills or other difficulty completing a registration form to receive personal assistance from poll workers.”⁵³ Because a disproportionate number of African Americans cast “provisional ballots” outside of their precincts, “the General Assembly altogether eliminated out-of-precinct voting.”⁵⁴

Yet, while this decision was a win for voting rights, Chief Justice Roberts went so far as to pen an odd opinion in denying Supreme Court review, writing “it is important to recall our frequent admonition that ‘[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case.’”⁵⁵ He appeared to suggest that review was not accepted simply because a new (Democratic) governor and attorney general had dropped the appeal.⁵⁶

In *Frank v. Walker*,⁵⁷ the Seventh Circuit Court of Appeals upheld Wisconsin's voter ID law, even though it noted that “voter im-

49. *Id.* (emphasis added).

50. *Id.* at 216.

51. *Id.*

52. *Id.*

53. *Shelby County*, 831 F.3d at 217.

54. *Id.*

55. *North Carolina vs. North Carolina State Conference of the NAACP*, 137 S. Ct. 1399, 1400 (2017).

56. *Id.* at 1399.

57. *Frank v. Walker*, 768 F.3d 744, 745 (7th Cir. 2014).

personation is rare if not nonexistent[.]”⁵⁸ In doing so, it overruled a district court judge: “If the public thinks that photo ID makes elections cleaner, then people are more likely to vote or, if they stay home, to place more confidence in the outcomes. These are substantial benefits. One district judge’s contrary view is not enough to condemn a state statute as unconstitutional.”⁵⁹

Yet, following the 2016 election, “[t]he head of the Milwaukee Elections Commission says thousands of people in the City of Milwaukee didn’t vote because of laws that restricted voting.”⁶⁰ He reported, for example, “about a 30 percent drop in parts of Milwaukee’s north side, where there’s a high poverty rate among black people.”⁶¹ In response, the architect of the law, Gov. Scott Walker (R., Wis.), called the claim “a load of crap.”⁶² Yet, contrary to Walker’s eloquent defense, a post-election study did find that “[n]early 17,000 registered Wisconsin voters—potentially more—were kept from the polls in November by the state’s strict voter ID law.”⁶³ The voter turnout rate was the lowest in a presidential election since 2000.⁶⁴

A Milwaukee hearing in July 2018 brought forth concerns about voter suppression:

Mary Pirrello, after moving back to Milwaukee from Bloomington, Illinois, after six months, applied at a DMV to switch her Illinois driving license back to Wisconsin. She was told that a new rule in-

58. *Id.* at 749.

59. *Id.* at 751. Voter ID laws are hard to overturn, as the Supreme Court upheld an Indiana voter ID law in an uncommonly-split decision that generated four opinions. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

60. *Milwaukee Election Official and Gov. Walker Spar Over Voter ID Impact*, CBS58 (Nov. 11, 2016), <https://www.cbs58.com/news/milwaukee-election-official-and-gov-walker-spar-over-voter-id-impact>.

61. *Id.*

62. *Id.*

63. Michael Wines, *Wisconsin Strict ID Law Discouraged Voters, Study Finds*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/us/wisconsin-voters.html>.

64. *Id.* Some have claimed this denied Wisconsin’s electoral votes to Hillary Clinton. *See, e.g., Ari Berman, Rigged: How Voter Suppression Threw Wisconsin to Trump*, MOTHER JONES (Nov./Dec. 2017), <https://www.motherjones.com/politics/2017/10/voter-suppression-wisconsin-election-2016/> (“The impact of Wisconsin’s voter ID law received almost no attention. When it did, it was often dismissive.”). We will never know for sure how decisive voter suppression was in the outcome. *But see Philip Bump, The case that voter ID laws won Wisconsin for Trump is weaker than it looks*, WASH. POST (Oct. 20, 2017), https://www.washingtonpost.com/news/politics/wp/2017/10/20/the-case-that-voter-id-laws-won-wisconsin-for-trump-is-weaker-than-it-looks/?noredirect=on&utm_term=.d94ef16a8003 (“Berman’s likely not wrong that voter ID laws nationally and in Wisconsin likely tamped down support that would have gone to Hillary Clinton. What we don’t really know, though, is the extent to which those laws may have affected the outcome of the race.”).

stituted under Gov. Scott Walker meant that she would be mailed her new license rather than receiving it directly over the counter.

A series of unclear legal complications resulted in Pirello's [sic] mail being held up "somewhere" for several months. Despite applying in January, she was not able to acquire her new license until May. In the meantime, she was unable to vote in the February and April primaries, she said.⁶⁵

Another woman, "Mercedes Hidalgo, 56, noted that the instructions for renewing her driver's license 'looks like they're asking for a curriculum vitae.' While she was fine because she was fluent in English, she noted that someone who wasn't would be intimidated."⁶⁶

A Texas voter identification law was upheld by the Fifth Circuit Court of Appeals in 2018,⁶⁷ after prior versions had been struck down as unconstitutional.⁶⁸ Writing for the majority, Judge Edith Jones overturned a district court permanent injunction against the law as an abuse of discretion.⁶⁹ Jones found that the lower court "erred first in concluding that SB 5 must be invalidated as the tainted fruit of SB 14,

65. Ahmed Elbenni, *Residents testify on voter suppression at Milwaukee hearing*, MILWAUKEE J. SENTINEL (July 21, 2018), <https://www.jsonline.com/story/news/local/milwaukee/2018/07/21/residents-testify-voter-suppression-milwaukee-hearing/813742002/>.

66. *Id.*

67. *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

68. Of a prior version, one author wrote: "The biggest economic burden for most voters without approved photo ID is the \$22 cost of a certified birth certificate. For a minimum wage worker making \$7.25 per hour, the worker must work approximately three hours just to pay for the certified birth certificate." See Brandon S. Baker, *Texas v. Holder: How Texas Can Enact a Stringent Voter ID Law and Avoid Section 3(c) Preclearance*, 8 LIBERTY U. L. REV. 371, 402–03 (Spring 2014) (footnote omitted). With respect to Indiana's law in *Crawford*, Justice David Souter had also taken exception to "the travel costs and fees necessary to get one of the limited variety of federal or state photo identifications needed to cast a regular ballot under the Voter ID Law." *Crawford v. Marion County Election Bd.*, 553 U.S. 181 at 211 (2008) (Souter, J., dissenting). He felt that "it matters that both the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile." *Id.* at 216 (Souter, J., dissenting); see also C.S. Hagen, *State strips then delays Native voting rights*, HPR1 (Oct. 13, 2018), <http://hpr1.com/index.php/feature/news/state-strips-then-delays-native-voting-rights/>, (noting that for Native Americans, who are disproportionately homeless, "[a]nother aspect of obtaining the proper identification is the money, needed for internet, telephone, transportation, or even a home or apartment.").

69. *Abbott*, 888 F.3d at 795–96. Judge Jones was accused in sworn affidavits of making racist remarks before a Federalist Society meeting:

one quoted Judge Jones as saying, "Sadly, some groups seem to commit more heinous crimes than others." When asked to elaborate, Judge Jones "noted there was no arguing that 'blacks' and 'Hispanics' far outnumber 'Anglos' on death row and repeated that 'sadly' people from these racial groups do get involved in more violent crime," the affidavit said.

Ethan Bronner, *Complaint Accuses U.S. Judge in Texas of Racial Bias*, N.Y. TIMES (June 4, 2013), <https://www.nytimes.com/2013/06/05/us/federal-judge-in-texas-is-accused-of-racial-bias.html>.

which the court again found unconstitutionally discriminatory.”⁷⁰ She dismissed the plaintiffs’ argument as “speculation” which, to her, proved “the prematurity of the court’s decision to invalidate SB 5 in 2017, well before the law took effect in 2018.”⁷¹ Concurring only in the conclusion that the appeal was not moot, Judge James A. Graves, Jr. sardonically quoted a proverb: “*A hog in a silk waistcoat is still a hog.*”⁷² He stated: “S.B. 14 is an unconstitutional disenfranchisement of duly qualified electors. S.B. 5 is merely its adorned alter ego.”⁷³

The Trump Administration had abandoned the Obama Administration’s challenge to the Texas law.⁷⁴ It also switched positions on an Ohio law that resulted in voters being disenfranchised, successfully arguing before the U.S. Supreme Court that the Sixth Circuit Court of Appeals should be reversed in having struck down Ohio’s practice.⁷⁵ In its effort to purge voters, Ohio would send return cards to registered voters who had not voted for two years, based upon the (questionable) assumption that they had moved.⁷⁶ Ruling for the Court in a 5–4 decision, Justice Samuel Alito wrote that it did not matter “whether the Ohio Legislature overestimated the correlation between nonvoting and moving or whether it reached a wise policy judgment about when return cards should be sent.”⁷⁷

In dissent, Justice Stephen Breyer wrote:

[T]he streets of Ohio’s cities are not filled with moving vans; nor has Cleveland become the Nation’s residential moving companies’ headquarters. Thus, I think it fair to assume (because of the human tendency not to send back cards received in the mail, confirmed

70. *Abbott*, 888 F.3d at 801.

71. *Id.* at 803.

72. *Id.* at 807 (Graves, J., concurring in part and dissenting in part).

73. *Id.* One can argue that the standard today in determining whether a voter suppression law violates the VRA is simply whether the law’s proponents were foolish enough to, say, wave Confederate flags during deliberations or, as did the North Carolina legislators, make it clear every element of their efforts was based upon race. This encourages covert racism. As City Councilmember Wes Bellamy of Charlottesville, Virginia, describes it, “covert racism – not the overt kind, but the kind of racism that is subtle, the kind that doesn’t directly call you the N-word in your face, but it perpetuates systemic injustices as well as policies and practices that keeps a lot of people behind.” *Charlottesville Has Become ‘Ground Zero For The Awakening’ Of Covert Racism*, NPR (Aug. 11, 2018), <https://www.npr.org/2018/08/11/637865131/charlottesville-has-become-ground-zero-for-the-awakening-of-covert-racism>.

74. Manny Fernandez & Eric Lichtblau, *Justice Dept. Drops a Key Objection to a Texas Voter ID Law*, N.Y. TIMES (Feb. 27, 2017), https://advance.lexis.com/document/?pdmfid=1000516&crd=6aa2fa5d-7a1f-4eaa-8cae-5b4a1155739f&pdactivityid=4ec198e8-87af-42be-b8b7-0deab479e8c5&pdtargetclientid=-None-&ecomp=g7r_k&prid=a2dc970e-9f8e-4cfe-bc6b-bb0997ca1d69.

75. *See Husted v. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

76. *See id.* at 1840.

77. *Id.* at 1847.

strongly by the actual numbers in this record) the following: In respect to change of residence, the failure of more than 1 million Ohio voters to respond to *forwardable notices* (the vast majority of those sent) shows nothing at all that is statutorily significant.⁷⁸

In her own dissent, Justice Sonia Sotomayor noted:

Amici also explain at length how low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them particularly vulnerable to unwarranted removal under the Supplemental Process.⁷⁹

Ohio's Republican secretary of state celebrated the Court's decision in a press release:

Today's decision is a victory for election integrity, and a defeat for those who use the federal court system to make election law across the country. This decision is validation of Ohio's efforts to clean up the voter rolls and now with the blessing nation's highest court, it can serve as a model for other states to use.⁸⁰

Legal commentator Jeffrey Toobin took a less sanguine view:

By a vote of 5–4, the Justices upheld Ohio's purge of less-frequent voters from its rolls. That ruling is bad enough on its own terms, but what makes Justice Samuel Alito's opinion so chilling is the way that it invites other states to continue and to expand this anti-democratic practice.⁸¹

Among the various voter suppression techniques, Toobin deemed this one as “the most pernicious”: “For a variety of reasons associated with their socioeconomic circumstances, Democrats may encounter difficulties in record keeping and may miss postcard reminders to re-register. This law, in other words, is a cynical device to remove Democrats from the voting rolls.”⁸²

He noted that “[w]hat makes the Ohio law especially odious is that it's a cure for which there is no disease. Some people don't vote

78. *Id.* at 1856–57 (Breyer, J., dissenting).

79. *Id.* at 1864 (Sotomayor, J., dissenting).

80. Press Release, Ohio Sec'y of State, *Statement from Secretary Husted on the U.S. Supreme Court Upholding Ohio's Process for Maintaining Accurate Voter Rolls* (June 11, 2018), <https://www.sos.state.oh.us/media-center/press-releases/2018/2018-06-11/#gref>.

81. Jeffrey Toobin, *The Supreme Court's Husted Decision Will Make It More Difficult for Democrats to Vote*, *NEW YORKER* (June 11, 2018), <https://www.newyorker.com/news/daily-comment/the-supreme-courts-husted-decision-will-make-it-more-difficult-for-democrats-to-vote>.

82. *Id.*

in off-year elections, or in every Presidential-election year. That's no indication of voter fraud, nor a reason to punish them with disenfranchisement."⁸³

Consider what Secretary of State Kemp managed to pull off in Georgia, purging more than 1.4 million voters since 2012, and freezing 53,000 voter registrations for discrepancies "as simple as a dropped hyphen in a name or a transposed number in an address."⁸⁴

A rare win for voters was chalked up when a Missouri judge set aside his state's voter ID law for the 2018 election: "[w]ith the Nov. 6 election less than a month away, Senior Judge Richard Callahan scolded Missouri Secretary of State Jay Ashcroft's office for circulating misleading advertisements about the law."⁸⁵ He was unsparing in his critique: "'[a]s desirable as a Missouri-issued photo ID might be, unlike an American Express card, you may leave home without it, at least on election day,' Callahan wrote in his six-page decision."⁸⁶

In Georgia, Stacey Abrams' electoral strategy depended on motivating irregular voters, particularly voters of color.⁸⁷ For example, according to an analysis of the first 45,265 returned ballots:

Of the early voters, 41 percent are black, while 44 percent are white. With Latinos and Asian-Americans, nonwhites have outvoted

83. *Id.* In Wisconsin's 2018 primary, the State Journal reported that "[a] state purge of an as-yet-unknown number of voters from the voting rolls caused headaches at the polls in Tuesday's spring primary — including for some voters whose information was removed even though it was current." Mark Sommerhauser, *Voting roadblock: Some Wisconsin voters found their registrations purged when they arrived to vote Tuesday*, STATE J. (Feb. 22, 2018), https://madison.com/wsj/news/local/govt-and-politics/voting-roadblock-some-wisconsin-voters-found-their-registrations-purged-when/article_6682a20f-6bab-5275-96fc-6a7386738825.html. As the article noted:

The problems reported Tuesday stemmed from a state initiative last year to remove from state voting rolls anyone who had moved recently. Such voters either needed to update their voter registration information or — if they moved out of state — are no longer eligible to vote in Wisconsin.

But some voters learned Tuesday that they'd been removed from the registration rolls despite not having moved.

Id. (emphasis added).

84. Vanessa Williams, *Stacey Abrams urges a massive turnout to fight what she says is voter suppression in Georgia*, WASH. POST (Oct. 16, 2018), https://www.washingtonpost.com/politics/2018/10/15/stacey-abrams-urges-massive-turnout-fight-what-she-says-is-voter-suppression-georgia/?noredirect=on&utm_term=.2685143d2b66.

85. Kurt Erickson, *Judge calls Missouri voter photo ID advertising 'misleading'*, ST. LOUIS POST-DISPATCH (Oct. 10, 2018), https://www.stltoday.com/news/local/govt-and-politics/judge-calls-missouri-voter-photo-id-advertising-misleading/article_1da8fc35-fce2-5692-994d-671e557d21ef.html.

86. *Id.*

87. Bill Barrow, *Inside Stacey Abrams' strategy to mobilize Georgia voters*, U.S. NEWS (Oct. 12, 2018), <https://www.usnews.com/news/politics/articles/2018-10-12/inside-stacey-abrams-strategy-to-mobilize-georgia-voters>.

whites so far. Blacks usually comprise about 28 percent of the Georgia electorate.

More noteworthy, 45 percent of the early voters did not cast ballots in 2014. Of those, more than half are black and another quarter record their race as something other than white.⁸⁸

Obviously, Kemp's efforts to suppress the African American vote were of no help to this strategy.⁸⁹ And the voting suppression was a touchy subject for Georgia Republicans, as the *Washington Post* reported:

An attempted conversation between a Georgia Tech student and Sen. David Perdue (R-Ga.) ended abruptly with the lawmaker snatching the student's cellphone away while he was being asked about possible voter suppression in the state. The senator's office has said the exchange, part of which was captured on video, was a misunderstanding.⁹⁰

88. *Id.*

89. See, e.g., Paul Waldman, *Republicans may be about to steal an election in Georgia*, WASH. POST (Oct. 11, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/10/11/republicans-may-be-about-to-steal-an-election-in-georgia/?utm_term=.33d2e9266206 ("It isn't often you get to watch an election being stolen in real time, but that might be what is happening right now in Georgia."). Waldman noted that "[i]f Kemp wins, Republicans around the country will celebrate it as further proof of the efficacy of their vote suppression strategy. And knowing that the Supreme Court is likely to endorse whatever new suppression tactics they come up with, they'll move even more aggressively to restrict access to the ballot." *Id.* Inevitably, race was an omnipresent issue in Georgia. Abrams "all but opened her campaign by demanding that the iconic carvings of Jefferson Davis, Robert E. Lee and Stonewall Jackson be sandblasted off Stone Mountain." Kevin Sack & Alan Blinder, *In Georgia Governor's Race, a Defining Moment for a Southern State*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/us/politics/georgia-governor-race.html>. President Trump unsbtly referred to the first African American woman to be a gubernatorial nominee as "crime loving" – a puerile, racist dog-whistle that ignored the fact that Abrams "worked with outgoing Republican Gov. Nathan Deal on a criminal justice overhaul that earned broad bipartisan support." Bill Barrow & Ben Nadler, *Georgia governor's matchup sets a battle for the middle*, YAHOO.COM (July 25, 2018), <https://www.yahoo.com/news/georgia-governor-nominees-show-polar-opposite-parties-071945188—election.html>. And Kemp ran a Trump-style campaign designed to widen divisions, as one story during the Republican primary noted: "Georgia gubernatorial candidate Brian Kemp, who sparked outrage with a campaign ad in which he threatens his daughter's teen suitor with a shotgun, is making headlines again with an ad where he says he owns a truck 'in case I need to up round criminal illegals.'" William Cummings, *Georgia gubernatorial candidate Brian Kemp suggests truck is for rounding up 'illegals'*, USA TODAY (May 10, 2018), <https://www.usatoday.com/story/news/nation/2018/05/10/brian-kemp-illegals-ad/600212002/>.

90. Amy B. Wang, *A senator snatched a student's phone while being asked about Georgia voter registration uproar*, WASH. POST (Oct. 14, 2018) (Sen. Perdue appears to have an anger issue: "The senator drew attention this month when he compared those protesting then-Supreme Court nominee Brett M. Kavanaugh to Nazis after protesters cornered him in a Washington airport.").

As the election approached, Kemp laid out a chilling blueprint of voting suppression for other states to follow.⁹¹ As one columnist wrote, “Georgia’s gubernatorial race wasn’t an election. It was an attempted strong-arm robbery.”⁹² On the weekend before the election, Kemp went so far as to accuse the Democratic Party of trying to “hack” into the election database, without offering evidence of his claim, announcing his “investigation” Sunday morning with an all-caps headline that appeared directly below a voter’s guide on a government website:

AFTER FAILED HACKING ATTEMPT, SOS LAUNCHES INVESTIGATION INTO GEORGIA DEMOCRATIC PARTY.⁹³

This fabrication, among the corrupt tactics pivotal to Kemp’s narrow, bitterly-contested “win,”⁹⁴ came after two federal judges had entered injunctions against Kemp and Georgia voter registration practices.⁹⁵ As one judge declared, “Preliminarily, the Court does not

91. Renée Graham, *Brian Kemp’s voter suppression in Georgia*, BOSTON GLOBE (Nov. 8, 2018), <https://www.bostonglobe.com/opinion/2018/11/06/brian-kemp-voter-suppression-georgia/tcycVrH5m0pJ9SQC7XwiWP/story.html>.

92. *Id.*

93. Avi Selk, Vanessa Williams & Amy Gardner, *Brian Kemp’s office orders ‘hacking’ probe of Georgia Democrats on eve of election he’s competing in*, WASH. POST (Nov. 4, 2018), https://www.washingtonpost.com/politics/2018/11/04/brian-kemps-office-orders-hacking-probe-georgia-democrats-eve-election-hes-competing/?utm_term=.f66cc8c3047e.

94. See Greg Bluestein, *Kemp resigns as secretary of state, Abrams readies legal action*, ATLANTA J.-CONST. (Nov. 8, 2018), <https://www.ajc.com/news/state—regional-govt—politics/kemp-resigns-secretary-state-abrams-readies-legal-action/P2uLS0c3GWILYObVqKuUDK/> (stating that the result was within runoff range, and lawsuits were flying even as Kemp declared victory: “The state chapter of the NAACP filed a pair of lawsuits claiming that students at Spelman College and Morehouse College were improperly forced to vote with a provisional ballot - or dissuaded from voting at all - because their names didn’t show up on voter registration lists”).

95. *Id.*; see also Jim Galloway, Greg Bluestein & Tamar Hallerman, *The Jolt: The Democratic emails behind Brian Kemp’s allegations*, ATLANTA J.-CONST. (Nov. 5, 2018), <https://www.ajc.com/blog/politics/the-jolt-the-democratic-emails-behind-brian-kemp-allegations/dS6BMcMhPLuJgvUNviHQbJ/> (providing an analysis from the *Atlanta Journal-Constitution* noting “[n]o matter what happens in the next 48 hours, one thing is certain: This weekend fundamentally changed the debate over whether a sitting secretary of state should oversee his/her own election to higher office”). They found Kemp was bizarrely reacting to Democrats making his office aware of flaws in its cybersecurity; thus, “[a] white-hat effort to make authorities aware of a security vulnerability resulted in an attempt to shoot the messenger.” *Id.*; See Editorial Board, *All the ugliness of the Trump campaign is on display in Georgia*, WASH. POST (Nov. 5, 2018), https://www.washingtonpost.com/opinions/all-the-ugliness-of-the-trump-campaign-is-on-display-in-georgia/2018/11/05/5420e71e-e141-11e8-8f5f-a55347f48762_story.html?utm_term=.16b858bb9c12 (stating “THE REPUBLICAN campaign for governor in Georgia has been marked by dehumanizing immigrant phobia, invidious vote suppression, conspiratorial accusations about Democratic vote tampering, and racism. In other words, it shows in microcosm the direction President Trump would take the GOP”); Alan Judd, *How Brian Kemp turned warning of election system vulnerability against Democrats*, ATLANTA J.-CONST. (Dec. 14, 2018), https://www.ajc.com/news/state—regional-govt—politics/how-brian-kemp-turned-warning-election-system-vulnerability-against-democrats/iLOkpHK3ea39t8Eh4PCGxM/?ecmp=pg&utm_medium=social&utm_source=pg_tw. A December 2018 *Journal-Constitution* investigation determined that “no evi-

understand how assuring that all eligible voters are permitted to vote undermines integrity of the election process. To the contrary, it strengthens it.”⁹⁶

But such judicial commonsense is rare these days. And based upon what has already been countenanced by the federal courts, which have only become more conservative,⁹⁷ what more can we expect heading into the 2020 election?⁹⁸ Florida Republicans are already engaged in efforts to undo the 2018 ballot measure restoring voting rights to former felons, despite the fact that voters had overwhelmingly approved undoing “a feature of state law, enacted after the Civil War by racist white lawmakers, designed to disenfranchise African Americans.”⁹⁹ President Trump has made it clear, with outlandish lies, that voters producing Democratic outcomes are not welcome at the polls. For example, at what had been billed as a tax roundtable discussion, Trump veered off topic to assert that “[i]n

dence supported the allegations against the Democrats at the time, and none has emerged in the six weeks since, the Journal-Constitution found.” *Id.* As the article observed: “In Georgia’s closest race for governor since 1966, any voters swayed by a purported Democratic cyberattack could have tipped the election.” *Id.*

96. *Martin v. Kemp*, 2018 WL 5276242, at *10 (N.D. Ga. Oct. 24, 2018); But perhaps it was to no avail, given Kemp’s shenanigans:

Several precincts in one Georgia county suffered so many technical glitches that voters were forced to use paper ballots. Others waited more than four hours in lines that twisted around voting sites. NBC News reported that, in another location, voting machines ran out of battery power because they had not been equipped with power cords.

Graham, *supra* note 91. See also Ontario Woods, *We waited almost 5 hours to vote in my Georgia precinct. How convenient for Kemp.*, WASH. POST (Nov. 6, 2018) (she noted that “[i]t was the kind of situation where you didn’t have to ask someone to hold your spot — the line wasn’t going anywhere.”). One voter, an African American woman, told of waiting from 7:05 a.m. to 11:45 a.m. at her polling site to be able to vote. *Id.*

97. Mike DeBonis, *Senate heads for exits as vulnerable Democrats get campaign time and McConnell gets his judges*, WASH. POST (Oct. 11, 2018), https://www.washingtonpost.com/power-post/senate-heads-for-exits-as-vulnerable-democrats-get-campaign-time-and-mcconnell-gets-his-judges/2018/10/11/32da51be-cd85-11e8-a3e6-44daa3d35ede_story.html?utm_term=.2804839422

87. In addition to Trump’s two Supreme Court appointments, by October 2018 it was reported “roughly one of every six circuit judges will be a Trump nominee.” *Id.*; Carrie Johnson, *One Year In, Trump Has Kept A Major Promise: Reshaping The Federal Judiciary*, NPR (Jan. 21, 2018), <https://www.npr.org/2018/01/21/579169772/one-year-in-trump-has-kept-a-major-promise-reshaping-the-federal-judiciary> (providing statements from a January 2018 article on Trumps’ judicial nominees, “‘More than 91 percent of them are white, and nearly 77 percent of them are men,’ said Kristine Lucius, executive vice president at the Leadership Conference on Civil and Human Rights.”).

98. Berman, *supra* note 64, observes, “the request by Trump’s Presidential Advisory Commission on Election Integrity for the voter data of every American has led thousands of voters to un-register in swing states like Colorado and sparked fears that the administration will propose new policies to undermine access to the ballot at the federal and state levels.”

99. See Editorial, *Florida restored voting rights to former felons. Now the GOP wants to thwart reform.*, WASH. POST (Jan. 13, 2018) (noting that Republicans “in a state with a notorious history of electoral squeakers, may fear the consequences should even a small fraction of those 1.4 million eligible former felons exercise their franchise.”).

many places, like California, the same person votes many times — you’ve probably heard about that.”¹⁰⁰ He added: “They always like to say ‘oh that’s a conspiracy theory’ — not a conspiracy theory folks. Millions and millions of people.”¹⁰¹

Trump made a similarly-false claim about another state he lost: President Trump made front-page news when he explained to a small group of senators that he lost New Hampshire in the general election because there were “thousands” of people who were “brought in on buses” from neighboring Massachusetts to “illegally” vote in the Granite State, according to a person briefed on the meeting.¹⁰²

Following the 2016 election, Trump, though victorious, immediately made the pursuit of alleged voting illegalities the focus of a commission chaired by Vice President Mike Pence, which eventually fizzled out of existence.¹⁰³ Maine’s secretary of state, Matthew Dunlap, described it as “the most bizarre thing I’ve ever been a part of.”¹⁰⁴ He went on to make a comparison:

“We had more transparency on a deer task force than I had on a presidential commission,” he said. “We had probably a dozen meetings. They were all public. We published everything we did in the

100. Miles Parks, *FACT CHECK: Trump Repeats Voter Fraud Claim About California*, NPR (Apr. 5, 2018), <https://www.npr.org/2018/04/05/599868312/fact-check-trump-repeats-voter-fraud-claim-about-california>.

101. *Id.*

102. James Pindell, *N.H. says once and for all that no one was bused in to vote*, BOSTON GLOBE (June 1, 2018), <https://www.bostonglobe.com/metro/2018/06/01/says-once-and-for-all-that-one-was-bused-vote/bQxQPQxyrvEOUzXTirnwDP/story.html>; see also Jane C. Timm, *New Hampshire makes it tougher for students to vote. Democrats call it ‘devious’ suppression.*, NBC NEWS (July 21, 2018), <https://www.nbcnews.com/politics/donald-trump/n-h-makes-it-tougher-students-vote-democrats-call-it-n892906>. With a 2018 law, New Hampshire Republicans made it harder to vote for college students, in what was referred to by one observer as “generational voter suppression”:

The new law will force permanent residents to comply with laws such as state motor vehicle registration. Students with cars, for example, would have to pay for a new, in-state driver’s license and register their cars in the state, a cost critics argue could deter the historically Democratic voting bloc from the ballot box.

Id.; see also Casey McDermott, *Gov. Sununu: ‘I Will Never Support Anything That Suppresses The Student Vote’*, NHPR (Dec. 12, 2017), <https://www.nhpr.org/post/gov-sununu-i-will-never-support-anything-suppresses-student-vote> (stating that upon being asked about the bill while it was pending, the state’s Republican governor, Chris Sununu, was recorded guaranteeing students he would not sign it: “No. I hate it. I know what you’re talking about. I’m not a fan,” Sununu says. “I’m hoping that the Legislature kills it. I’m not a fan at all.”).

103. See, e.g., Eli Rosenberg, *‘The most bizarre thing I’ve ever been a part of’: Trump panel found no widespread voter fraud, ex-member says*, WASH. POST (Aug. 3, 2018), https://www.washingtonpost.com/news/politics/wp/2018/08/03/the-most-bizarre-thing-ive-ever-been-a-part-of-trump-panel-found-no-voter-fraud-ex-member-says/?utm_term=.60f3a3e9d4a8 (discussing the presence of voter fraud).

104. *Id.*

newspaper and published results, including information we got from the public.”

In contrast, the voting fraud panel was marked by obfuscation, secrecy and confusion related to the work the panel was engaged in.¹⁰⁵

Accordingly, as the 2018 election approached, President Trump did all he could to scare voters: “Trump tweeted . . . that ‘all levels of government and law enforcement are watching carefully for VOTER FRAUD,’ even though cases of voter fraud are vanishingly rare. ‘Cheat at your own peril,’ he said, even though his own voter fraud commission was dissolved in January.”¹⁰⁶ On election-eve he doubled-down, tweeting that “Law Enforcement has been strongly notified to watch closely for any ILLEGAL VOTING which may take place in Tuesday’s Election (or Early Voting). Anyone caught will be subject to the Maximum Criminal Penalties allowed by law. Thank you!”¹⁰⁷ Obliging, Attorney General Jeff Sessions followed up with a press release stating “fraud in the voting process will not be tolerated. Fraud also corrupts the integrity of the ballot.”¹⁰⁸ Maniacally,

105. *Id*; see also Trump voter fraud commission chief casts doubt on result, BBC (July 19, 2017), <https://www.bbc.com/news/world-us-canada-40663687> (discussing the commission’s chair, Kansas Secretary of State Kris Kobach, stating publicly that he believed Trump “absolutely correct when he says the number of illegal votes cast exceeds the popular vote margin between him and Hillary Clinton.”).

106. Brian Stelter & Lauren Dezenski, *President Trump’s remarkable, misinformation-filled midterms media blitz*, CNN (Oct. 22, 2018), <https://www.cnn.com/2018/10/22/politics/trump-mis-truths/index.html>; Margaret Sullivan, *Voter suppression is a crucial story in America, but broadcast news mostly shrugs*, WASH. POST (Oct. 29, 2018), https://www.washingtonpost.com/life-style/style/voter-suppression-is-a-crucial-story-in-america-but-broadcast-news-mostly-shrugs/2018/10/29/4f610768-db74-11e8-b3f0-62607289efee_story.html?utm_term=.2010b7ee5889. *Washington Post* media columnist Margaret Sullivan called voter suppression the biggest story that the broadcast media, from which most people derive their news, had failed to cover:

Obsessed with all things Trump — caravan invasion, anyone? — and occupied with breaking news about hurricanes and mass shootings, the networks have almost ignored voter suppression.

With the consequential midterm elections only a week away, the near silence is deafening.

Id; see also Oliver Darcy & Brian Stelter, *NBC and Fox News pull Trump campaign’s racist ad after ‘Sunday Night Football’ backlash*, CNN (Nov. 5, 2018), <https://www.cnn.com/2018/11/05/media/nbc-trump-immigration-ad/index.html>. However, CNN refused to run a racist anti-immigration Trump ad in the days before the 2018 election, and even FOX News pulled it in the face of backlash from angry viewers “stunned” to see it run during NBC’s “Sunday Night Football.” *Id*.

107. Maegan Vazquez, *Trump keeps warning of voter fraud despite lack of evidence*, CNN (Nov. 5, 2018), <https://www.cnn.com/2018/11/05/politics/donald-trump-illegal-voting-midterms/index.html>.

108. Press Release, U.S. Dep’t of Justice, Justice Department to Monitor Compliance with Federal Voting Rights Laws on Election Day (Nov. 5, 2018), <https://www.justice.gov/opa/pr/just>

Trump even alleged Democrats were “openly encouraging undocumented immigrants to vote.”¹⁰⁹

CONCLUSION

In conclusion, all of the actions described in this article, whether overt laws suppressing voting or misleading rhetoric, are clear efforts to undermine the public’s faith in elections.¹¹⁰ Why even try to vote? As Stacey Abrams has said: “The miasma of fear that is created through voter suppression is as much about terrifying people about trying to vote as it is about actually blocking their ability to do so.”¹¹¹

ice-department-monitor-compliance-federal-voting-rights-laws-election-day (citing no actual cases of “fraud”).

109. Peter Baker, Michael D. Shear & Katie Rogers, *Trump Closes Out a Campaign Built on Fear, Anger and Division*, N.Y. TIMES (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/us/politics/trump-election-maga-rally.html>; Glenn Kessler, *Fact-checking President Trump’s wild Daily Caller interview*, WASH. POST (Nov. 16, 2018), https://www.washingtonpost.com/politics/2018/11/16/fact-checking-president-trumps-wild-daily-caller-interview/?utm_term=.7569812973a6 (providing that Trump doubled-down on this lie after the election, asserting, with his usual unique grammar: “This is a problem in California that’s so bad of illegals voting”); Drew Harwell, Tony Romm & Craig Timberg, *Why false narratives about the migrant caravan and mail bombs won’t go away on social media*, WASH. POST (Oct. 25, 2018), https://www.washingtonpost.com/business/economy/why-false-narratives-about-the-migrant-caravan-and-mail-bombs-wont-go-away-on-social-media/2018/10/25/f506cc5e-d889-11e8-a10f-b51546b10756_story.html?utm_term=.99ed94f2ae80 (stating that those spreading false anti-immigrant messages included “Ginni Thomas, a conservative activist who is the wife of Supreme Court Justice Clarence Thomas”).

110. Ariel Malka & Yphtach Lelkes, *In a new poll, half of Republicans say they would support postponing the 2020 election if Trump proposed it*, WASH. POST (Aug. 10, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/10/in-a-new-poll-half-of-republicans-say-they-would-support-postponing-the-2020-election-if-trump-proposed-it/?utm_term=.61a93b2062db. Based upon Trump’s false claims of voting fraud, according to a 2017 poll, half of all Republicans would support cancelling the 2020 presidential election, until imagined problems can be fixed, at President Trump’s behest. *Id.* The poll found that 68% of Republican believed “millions of illegal immigrants voted” in 2016. *Id.* But see Allison Graves, *Fact-check: Did 3 million undocumented immigrants vote in this year’s election?*, POLITIFACT (Nov. 18, 2016), <https://www.politifact.com/punditfact/statements/2016/nov/18/blog-posting/no-3-million-undocumented-immigrants-did-not-vote/> (citing that no evidence supports this – in fact, “a national investigative reporting project funded by the Carnegie Corporation of New York and the John S. and James L. Knight Foundation, found just 56 cases of noncitizens voting between 2000 and 2011.”).

111. Kelsey Tamborrino, *Georgia Democratic candidate: State law about scaring people out of voting*, POLITICO (Oct. 14, 2018), <https://www.politico.com/story/2018/10/14/georgia-governor-abrams-kemp-voting-rights-898742>; Greg Bluestein, *Abrams jabs Kemp on CNN, NBC – and gets slammed on Fox News*, ATLANTA J.-CONST. (Oct. 14, 2018), <https://www.ajc.com/blog/politics/abrams-jabs-kemp-cnn-nbc-and-gets-slammed-fox-news/dcTV6U1gXegBCPUK0bUrcL/>. Predictably Abrams was then misleadingly attacked by President Trump’s favorite TV show, “Fox & Friends,” which falsely asserted she was encouraging undocumented immigrants to vote. *Id.*; see also Anne Gearan & Felicia Sonmez, *Trump says Democrat Abrams would turn Georgia into a “sanctuary city”*, WASH. POST (Nov. 4, 2018), https://www.washingtonpost.com/politics/trump-says-democrat-abrams-would-turn-georgia-into-a-sanctuary-city/2018/11/04/719dd164-deb0-11e8-85df-7a6b4d25cfbb_story.html?utm_term=.d2010347f66d (noting that Abrams was also accused of wanting to “turn Georgia ‘into a giant sanctuary city for criminal aliens’” by President Trump in one of his race-baiting 2018 election rallies).

This may not matter to Kanye West, who did not even bother voting in 2016,¹¹² but it matters to millions of Americans. A more enlightened Supreme Court once wrote that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”¹¹³

112. See Euan McKirdy & M. Daniel Allman, *Kanye West: I didn't vote but if I did, 'I would have voted for Trump'*, CNN (Nov. 18, 2016), <https://www.cnn.com/2016/11/18/entertainment/kanye-west-donald-trump-trnd/index.html> (discussing West's incoherent rantings about the 13th Amendment have overlooked the 15th); See U.S. Const. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

113. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

The Pound of Flesh, a Communitarian Principle

AMITAI ETZIONI*

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When deliberating culturally sensitive topics, both sides often feel that they are concerned with absolutes and that the other side has neither moral nor legal foot to stand on. The question arises: How can one contain conflicts when core values are at stake? Part of the answer lies in leaving some contested matters out of the public realm. Indeed, some advocate that marriage, for instance, should not be defined by the state and that each couple be left free to form their own marriage contract.

Some issues, such as whether abortion should be legal and what constitutes discrimination, the state cannot avoid. If the opposing sides have a strong sense of community on other grounds this may well help them to deal with these differences. However, culture war

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topics are likely to remain divisive. The answer might be found in leaving these matters to the courts, which in the past worked out middle grounds most citizens learned to live with. Others, though, hold that leaving these matters to the courts exacerbates rather than lessens the divisions, as the “losing” side feels the courts’ adjudication (“legislation from the bench”) foists its decisions without genuine public debate and consensus.¹ The courts may often be the only place these issues can be worked out, however poorly. In either case, all parties involved should show a measure of self-restraint.

I. LEGAL RIGHTS VS. WHAT IS MORALLY RIGHT

The law allows landlords to evict tenants who do not pay rent for many months on any day, including Christmas Eve, as long as proper eviction notices have been served and court judgements have been rendered.² However, our moral values hold that an eviction on such a holiday would be indecent and morally inappropriate. Indeed, in a considerable category of situations our values teach us that restraining enforcement of legal rights to the full limit is morally wrong. There are (and ought to be) clear moral limits on sacrifices for legal entitlements and that legal self-restraint is often fostered by intangible moral forces.

The basic moral idea before us has been captured in the phrase “a pound of flesh,” signifying conditions where an individual should not exact what is due even if they are fully entitled to do so. The expression comes from Shakespeare’s *Merchant of Venice* (circa 1599) in which a merchant, Antonio, borrows money from Shylock.³ The terms of repayment hold that the loan will be interest-free under the condition that if Antonio does not meet his commitment, he will have to pay a pound of his own flesh to Shylock. Antonio’s maritime business goes under, and he is forced to default on the loan. In response, Shylock, motivated by mutual enmity, sets out to collect his pound of flesh. “The pound of flesh which I demand of him is dearly bought, ‘tis mine, and I will have it.”⁴ Shylock is depicted not as someone who made a fair deal and intends to claim what is rightfully his, but as a heartless, cruel banker.

1. See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

2. See generally Eviction, LEGAL INFORMATION INSTITUTE CORNELL LAW SCHOOL, <https://www.law.cornell.edu/wex/eviction>.

3. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

4. *Id.*

In the 18th century, the phrase started to take on its modern, figurative meaning: to take a pound of flesh is to demand of someone recompense that is legal, yet unreasonable, merciless, or inhumane.⁵ For instance, an 1887 newspaper article read, “All the other Great Powers want their pound of flesh from Turkey.” A French romantic novel from 1905 used it similarly: “That relentless and stern France which was exacting her pound of flesh, the blood-tax from the noblest of her sons.”⁶

The same basic concept is reflected in a court case concerning Walker-Thomas Furniture, a rent-to-own furniture store. Its contracts stipulated that none of the furniture was owned by customers until all of it was paid off. When customers defaulted on payments, the store tried to repossess all of their previous purchases. The District of Columbia Court of Appeals ruled that courts could refuse to enforce contracts deemed unconscionable, sending the case back to the trial court for such a determination.⁷

Although the term has historically been employed to characterize interpersonal relations, it also has a profound communal implication. It suggests that when community members deal with one another, they ought to make some concessions to each other, because they are dealing with people with whom they have bonds of affection and commitment, as well as people they will need to work with, indeed live with, another day. This holds not only for workplaces, neighborhoods, or towns, but even for nations. Nations serve as imagined communities that forge deep bonds, indicated by how strongly people feel when national sports teams win or lose and when their nation is celebrated or demeaned—and by their willingness to die for their country.

The article moves next to examine two situations in which this concept applies on the national level. One concerns free speech, and the other concerns discrimination.

II. FREE SPEECH: A RIGHT DOES NOT MAKE IT RIGHT

A crucial difference exists between the *right* to say highly offensive things—to use the n-word, to employ ethnic slurs, to argue that soldiers died in battle because their nation tolerates homosexuality—

5. Pound of flesh, *n.* “something strictly or legally due, but which it is ruthless or inhuman to demand.” OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/149023?redirectedFrom=%22pound+of+flesh%22#eid29089420>.

6. BARONESS ORCZY, *THE SCARLET PIMPERNEL* 50 (1905).

7. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965).

and the *rightness* of saying these things. It is the difference between a legal right to free speech and what we consider morally appropriate speech. All of us are not only citizens with a whole array of rights, but also members of various communities comprised of people with whom we reside, work, play, pray, take civic action, and socialize. These communities, in effect, inform one that if someone engages in offensive speech—which, granted, is one’s right—the person better have a sound reason to so express themselves. For instance, offensive speech may be essential for an artistic work that depicts the perspective of the oppressed. Otherwise, people who engage in offensive speech without a good cause are considered morally flawed.

Many democracies deal with this dilemma by enacting laws that limit free speech, such as banning hate speech. In the U.S., however, we have, in effect, decided to rely on our communitarian sensibilities to prevent—and, as I show next, informally curb—hate speech rather than to legally prohibit it.

In many situations, the notion that one should not engage in offensive speech unless there is a particularly compelling reason to do so is supported by informal social mechanisms. Those who express their right to free speech to the full limit by wantonly offending other community members are subject to social pressure, condemnation, suspensions, and even job loss. Even unintended offense is sometimes censured. For example, Lawrence Summers, former president of Harvard University, resigned after the public outcry following his remarks that women’s underrepresentation in the sciences may reflect their intellectual shortcomings.⁸

In 2017, June Chu, a dean at Yale University, was placed on leave for writing demeaning Yelp reviews, and later left her position. “If you are white trash, this is the perfect night out for you!”⁹ Chu wrote in a review of a restaurant. In a review of a movie theater, she described employees as “barely educated morons trying to manage snack orders for the obese and also try to add \$7 plus \$7.”¹⁰ Chu apologized, saying her comments had been “wrong” and “insensitive.”¹¹ Kenneth Storey, a visiting assistant professor, was fired from

8. Alan Finder et al., *President of Harvard Resigns, Ending Stormy 5-Year Tenure*, N.Y. TIMES, (Feb. 22, 2006), <https://nyti.ms/XVm7Yn>.

9. Christine Hauser, *A Yale Dean Lost Her Job After Calling People ‘White Trash’ in Yelp Reviews*, N.Y. TIMES, (June 21, 2017), <https://www.nytimes.com/2017/06/21/us/yale-dean-yelp-white-trash.html>.

10. *Id.*

11. *Id.*

the University of Tampa after he tweeted: “I don’t believe in instant karma but this kinda feels like it for Texas. Hopefully this will help them realize the GOP doesn’t care about them,”¹² in reference to the destruction caused by Hurricane Harvey in 2017. After receiving a chorus of condemnation, he deleted the tweet and issued an apology.¹³

In 2014, Elizabeth Lauten, communications director for former U.S. Representative Stephen Fincher (R-Tenn.), resigned after the critical remarks she made on Facebook about Malia and Sasha Obama went viral and prompted backlash. “Act like being in the White House matters to you. Dress like you deserve respect, not a spot at a bar,”¹⁴ wrote Lauten of the first daughters, then sixteen and thirteen years old. She quickly apologized and admitted she “judged the two young ladies in a way that I would never have wanted to be judged myself as a teenager.”¹⁵

When faced with a community’s pushback, free speech advocates sometimes complain, calling it soft or outright censorship. For example, some users of the social media site Reddit wanted its CEO fired for censorship after five forums (out of thousands) were deleted for racial or other forms of harassment.¹⁶ Facebook has been criticized, and even sued, for censorship because it bans users who display pictures of women’s breasts.¹⁷ Twitter was criticized for introducing content filters and temporary account suspensions for abusive messages and “indirect threats of violence,”¹⁸ in what one user said, “can only be described as heavy-handed censorship.” And in response to a Har-

12. Jeff Weiner, *Winter Park-based Tampa Professor Fired After Harvey 'karma' Tweet*, ORLANDO SENTINEL, (Aug. 29, 2017, 4:30 PM), <http://www.orlandosentinel.com/news/politics/political-pulse/os-tweet-harvey-storey-20170829-story.html>.

13. *Id.*

14. Jose A. DelReal & Ed O’Keefe, *Hill staffer Elizabeth Lauten Resigns After Remarks About Obama Daughters*, WASH. POST (Dec. 1, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/12/01/embattled-hill-staffer-elizabeth-lauten-reportedly-resigns-after-controversial-remarks/?utm_term=.ac0e0d1d2f5d.

15. *Id.*

16. Caitlin Dewey, *These are the 5 Subreddits Reddit Banned Under its Game-Changing Anti-Harassment Policy – and Why it Banned Them*, WASH. POST (Jun. 10, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/06/10/these-are-the-5-subreddits-reddit-banned-under-its-game-changing-anti-harassment-policy-and-why-it-banned-them/?utm_term=.455143845556.

17. Eloïse Bouton, *Breasts on Facebook: Stop the Censorship, Mark Zuckerberg!*, HUFFINGTON POST (Feb. 3, 2015, 5:32 PM), https://www.huffingtonpost.com/eloise-bouton/breasts-on-facebook-stop-_b_6608052.html.

18. Alex Hern, *Twitter Announces Crackdown on Abuse with New Filter and Tighter Rules*, THE GUARDIAN (Apr. 21, 2015, 11:00 AM), <https://www.theguardian.com/technology/2015/apr/21/twitter-filter-notifications-for-all-accounts-abuse>.

ris Poll showing that seventy-one percent of Americans want a rating system for books to protect children from inappropriate content, like those that exist for movies and games, free speech campaigners likewise argued that such a proposal would “raise serious concerns about censorship.”¹⁹

These champions of free speech, unwittingly or deliberately, use the horror that the term “censorship” evokes to object to social reactions to offensive speech. In doing so, they attempt to delegitimize social pressure, which is a fundamental element of all communities. Censorship, by definition, takes place when the government exercises its coercive powers to prevent speech by jailing dissenters, closing newspapers, taking over TV stations, and so on. Social pressure merely ensures that before one speaks one asks whether what one has to say justifies the hurt it will cause, often to people who have already been hurt greatly.

One can readily imagine communities in which the social pressure to limit speech is much too high. However, in the U.S. and other nations in which social media is widespread and easily accessible, situations of excessive moral fostering of self-restraint are relatively rare, while instances of exercising free speech with very little concern for others seem quite common. The Supreme Court has ruled that the Westboro Baptist Church (which believes that God is punishing the U.S. for its acceptance of homosexuality) is allowed to picket the funerals of military service members, displaying signs with statements such as “Thank God for dead soldiers” and “You’re Going to Hell.”²⁰ The Supreme Court also struck down a Massachusetts law that created a thirty-five-foot buffer zone around abortion clinics which protesters were not allowed to enter.²¹ Protesters often follow patients to the doors of clinics, shout phrases such as “baby killers,” and even threaten patients and physicians.²² These legal rights are morally beyond the pale—and a decent human being will not exercise such rights.

19. Alison Flood, *Are Americans Falling in Love with Censorship?*, THE GUARDIAN (Aug. 7, 2015, 11:45 AM), <https://www.theguardian.com/books/2015/aug/07/are-americans-falling-in-love-with-censorship>.

20. *Snyder v. Phelps*, 562 U.S. 443, 447–48, 454 (2011).

21. *McCullen v. Coakley*, 134 S. Ct. 2518, 2525 (2014).

22. Molly Redden, *12 Horror Stories Show Why Wednesday’s Big Supreme Court Abortion Case Matters*, MOTHER JONES (Jan. 14, 2014, 11:00 AM), <http://www.motherjones.com/politics/2014/01/abortion-horror-stories-supreme-court-massachusetts-mccullen-coakley/>.

One may argue that there is no clear line between speech that is offensive and vital for a thriving democracy, and speech that is merely hurtful and advances no cause other than hate and humiliation. Indeed, there is a continuous debate over whether the social mechanisms that curb abusive speech are too powerful or not powerful enough (for instance, there are often debates on college campuses on whether certain speakers should be invited, or if “safe zones” and trigger warnings should be provided). And societies may over-steer in one direction or the other (a common failing of all societies, which drive as if the steering wheel were a very loose one, tending to overshoot in one direction and then overcorrect in the opposite one). However, these correct observations do not invalidate our basic moral sense that not all legally entitled speech is morally appropriate. We argue about where the boundaries lie and grant that the lack of clarity may lead people to cross the line—however, in the process we, in effect, acknowledge the premise that some self-restraint is morally commendable.

III. GAY RIGHTS: CAKES, FLOWER ARRANGEMENTS, AND MAKE-UP ARTISTS

The question of whether a devout Christian baker can legally refuse to make a wedding cake for a gay couple, especially with such an inscription as “For the marriage of Jim and John,” provides an illuminating example of the issue at hand.

In 2012, Jack Phillips, the owner of Masterpiece Cakeshop, declined on religious grounds to bake a wedding cake for Dave Mullins and Charlie Craig’s wedding reception in Colorado before their marriage in Massachusetts.²³ According to Phillips, he told the couple he would make them other baked goods, but he “just can’t make a cake for a same-sex wedding.”²⁴ Although Colorado did not recognize same-sex marriage at the time, the Colorado Anti-Discrimination Act (CADA) was in place, which prohibits discrimination based on sexual orientation. An Administrative Law Judge ruled in favor of Mullins and Craig, and in 2014, the Colorado Court of Appeals also sided with the couple. After Phillips’ case was denied by the Colorado Supreme Court, Phillips petitioned the U.S. Supreme Court, which agreed to

23. *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723–24 (2018).

24. Adam Liptak, *Cake Is His ‘Art.’ So Can He Deny One to a Gay Couple?*, N.Y. TIMES (Sept. 16, 2017), <https://www.nytimes.com/2017/09/16/us/supreme-court-baker-same-sex-marriage.html?mcubz=1>.

hear the case in 2017. In the meantime, rather than make cakes for both same-sex and opposite-sex couples, Phillips stopped making wedding cakes entirely. In June 2018, the Supreme Court ruled 7-2 in favor of Phillips. However, the decision was narrowly based and did not clearly address whether First Amendment rights allow businesses to refuse service to gay couples on religious grounds.²⁵ Instead, the court offered a largely procedural, case-specific ruling by finding that a member of the Colorado Court of Appeals expressed religious hostility toward Phillips.²⁶

One should note Phillips' refusal of service was not an isolated incident. Aside from Phillips himself admitting that he had refused service to other gay couples in the past,²⁷ there was another nationally-recognized case regarding an Oregon bakery whose owner refused to make a cake for a same-sex couple. The couple owning the bakery was ordered to pay \$135,000 in damages, to be collected when the ongoing appeals process is over.²⁸ A gay couple in Texas was also in the news for being refused a wedding cake.

Oregon, like Colorado, has anti-discrimination legislation that includes sexual orientation as a protected class. In total, twenty-three states and the District of Columbia have legislation that prohibits discrimination on the basis of sexual orientation in public accommodations.²⁹ There is no federal law that specifically prohibits discrimination based on sexual orientation. Because Texas does not have legislation that protects against sexual orientation discrimination, the couple in Texas had no legal recourse when they were denied service.³⁰

Furthermore, the issue at hand is actually broader. For example, the Supreme Court in Washington state heard a case in which a florist

25. Adam Liptak, *In Narrow Decision, Supreme Court Sides With Baker Who Turned Away Gay Couple*, N.Y. TIMES (June 4, 2018), <https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html>.

26. *Id.*

27. *Bakery Will Stop Making Wedding Cakes After Losing Discrimination Case*, CBS DENVER (May 30, 2014, 3:26 PM), <http://denver.cbslocal.com/2014/05/30/bakery-will-stop-making-wedding-cakes-after-losing-discrimination-case/>.

28. Shelby Sebens, *Oregon Bakery Pays Damages in Lesbian Wedding Cake Case*, REUTERS (Dec. 29, 2015, 1:50 PM), <http://www.reuters.com/article/us-oregon-gaymarriage-idUSKBN0UC1JV20151229>.

29. *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Jan. 30, 2019).

30. Curtis M. Wong, *Texas Couple Feel 'Dehumanized' After Bakery Refuses Wedding Cake*, HUFFINGTON POST (Feb. 25, 2016, 4:12 PM), http://www.huffingtonpost.com/entry/texas-bakery-gay-wedding_us_56cde7d8e4b041136f19156a.

refused to make floral arrangements—regardless of whether the designs were hers—for a gay couple’s wedding because it went against her religious beliefs. According to the florist, Baronelle Stutzman, making floral arrangements for a same-sex wedding, or allowing employees of her store to do so, amounts to participation in, and therefore endorsement of, same-sex marriage. She would, however, be willing to sell bulk flowers and raw materials.³¹ The case has similarities to that of Jack Phillips—just as Phillips offered other baked goods, the florist offered to sell individual or prearranged flowers to the couple.³² Also, like Phillips, since the lawsuit began, she has stopped selling flowers for all weddings.³³

As I see it, many who read about these cases have conflicting judgments. On the one hand, they realize that law prohibits people who serve the public from discriminating on the basis of race, religion, and—most agree—sexual orientation (though legally it is not as protected). On the other hand, they sense that compelling behavior that violates someone’s religious conscience is not a matter one should consider lightly. Moreover, they wonder why gay people would wish to force someone who treats them as abject sinners to make them a cake. In other words, would a gay couple truly want flowers at their wedding from someone they feel hates them? Why give their business to such people? Various attempts have been made to resolve this conflict between the legal and the social/moral intuition. Those are next briefly reviewed and my suggestion added.

IV. RELIGIOUS EXEMPTION?

We allow people to discriminate (or do not consider it discrimination) if the differences made are essential for religious expression. Thus, the law allows synagogues to only retain select Jewish people as rabbis. With respect to the Masterpiece Cakeshop case, the Colorado Court of Appeals pointed out that although CADA has an exemption for “places primarily used for religious purposes,” the primary function of Masterpiece is not for religious purposes; therefore, it is not exempt.³⁴ The appeals court also draws a parallel between the case at

31. *Washington v. Arlene’s Flowers*, 389 P.3d 543, 550 (Wash. 2017).

32. Steven Nelson, *Gay Wedding Flowers Case Heard by State Supreme Court*, U.S. NEWS & WORLD REPORT (Nov. 15, 2016, 3:41 PM), <http://www.usnews.com/news/articles/2016-11-15/gay-wedding-flowers-case-heard-by-state-supreme-court>.

33. *Id.*

34. *Mullins v. Masterpiece Cakeshop*, 370 P.3d 272, 289 (Colo. App. 2015).

hand and a challenge to the Civil Rights Act of 1964, in which a district court ruled that religious beliefs do not give someone the right to discriminate on the basis of race.³⁵

Undoubtedly [the] defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This Court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishment upon the ground that to do so would violate his sacred religious beliefs.³⁶

According to the Colorado Court of Appeals, “CADA does not compel Masterpiece to support or endorse any particular religious views. The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation.”³⁷ The court further noted that “CADA does not prevent Masterpiece from posting a disclaimer in the store or on the internet, indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA.”³⁸ In the terms used here, making a business owner serve people in ways that he considers a gross violation of his faith is not exacting a pound of flesh; violating his strongly held beliefs is trumped by the commitment to equality and justice. To yield on these matters would amount to giving up a whole lot more than a pound; it would compromise basic rights and principles.³⁹

On the other hand, some are concerned about equal protection of religious beliefs and practices. Kerri Kupec, one of the florist’s lawyers, posited that “Under this kind of rationale, that’s happening in

35. *Id.* at 291.

36. *Id.* (quoting *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 945 (D.S.C. 1966)).

37. *Id.* at 292.

38. *Id.* at 288.

39. This is what James Oleske, Jr., Associate Professor of Law, means when he discusses that even if one were to carve out exemptions that would allow the refusal of service on religious grounds, it would not hold up because people have a constitutional right to equal protection under the laws. James Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 146 (2015). Oleske adds that “Although many Americans had religious objections to interracial marriage in the 1960s, and although some still do today, federal and state antidiscrimination laws have not included exemptions that would allow business owners to deny services based on those beliefs. Likewise, although the New Testament quotes Jesus explicitly condemning divorce . . . state laws prohibiting discrimination based on marital status do not contain exemptions allowing commercial businesses to refuse to facilitate the remarriages of divorced people.” *Id.* at 144.

Washington state, a gay singer could be forced by the government to perform at a religious conference that is promoting marriage as a man-woman union.”⁴⁰ Richard Epstein, a law professor at New York University, maintains that it is the American left that is intolerant: “The people who are bigots are on the other side.”⁴¹ Epstein supports a religious exemption for business owners in cases like these and believes that the free market takes care of the problem of discrimination against gay individuals.⁴² Viewed this way, the issue of exacting a pound of flesh does not arise, because those who seek to force service on those who hold that such service violates their beliefs do not have a case to begin with.

V. A FORM OF SPEECH?

According to Phillips, wedding cakes have an inherent “communicative nature,” which conveys celebration.⁴³ If forced to make a cake for a gay couple’s wedding celebration, he would be compelled to make speech he does not feel comfortable making.⁴⁴ According to Phillips’ lawyers, “The wedding cakes that Jack designs and creates . . . are very clearly a method of communication . . . Jack could not just bake a cake and pretend it did not mean anything.”⁴⁵ The appeals court recognized that “a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated.”⁴⁶ However, this was a non-issue for the court because Phillips refused to serve the couple without discussing the design of the cake or any written inscriptions the couple may have wanted. There was no communicative content.⁴⁷

In contrast to this opinion, the Department of Justice (DOJ) stated in a 2017 amicus brief on behalf of Jack Phillips that “A custom

40. Anna King, *Washington High Court Hears Case Of Florist Who Refused To Serve Gay Wedding*, NPR (Nov. 15, 2016, 5:08 AM), <http://www.npr.org/2016/11/15/502111408/washington-state-court-case-religious-liberty-versus-anti-discrimination>.

41. Nelson, *supra* note 32.

42. *Id.*

43. Brief in Opposition to Complainants’ Motion for Summary Judgment and in Support of Jack Phillips’ Cross Motion for Summary Judgment at 18, *Mullins v. Masterpiece Cakeshop*, 370 P.3d 272 (Colo. App. 2015) (No. 2013-0008).

44. *Id.* at 16.

45. *Id.* at 18.

46. *Mullins v. Masterpiece Cakeshop*, 370 P.3d 272, 288 (Colo. App. 2015).

47. *Id.*

wedding cake is a form of expression”⁴⁸ and “Forcing Phillips to create expression for and participate in a ceremony that violates his sincerely held religious beliefs invades his First Amendment rights.”⁴⁹

The DOJ’s opinion is thus in line with the arguments of Phillips’ lawyers, who insist that the Colorado Court of Appeals “considered the wrong question”⁵⁰ when it determined that “designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings.”⁵¹ They contend that the proper question is whether the wedding cakes made by Phillips qualify as “expressive conduct,” whereas the Colorado Court of Appeals “looked for expression only in Phillips’ *decision* not to create a wedding cake celebrating a same-sex marriage.”⁵² The DOJ holds that Phillips’ cakes do qualify as expressive conduct and thus the Free Speech clause applies in this case. One could limit this claim to customers’ requests to add a specific inscription that could be read as an explicit endorsement of gay marriage; this might be considered a pound of flesh—but not just making cakes or otherwise serving people. In other words, requiring a cake maker to bake a blank cake is acceptable, but not to write an inscription supportive of the marriage. Further on, I will show more compelling ways to discern what constitutes a fair demand and when making such demands becomes analogous to exacting a pound of flesh.

VI. FAIR WARNING?

Still another way out of the box is for businesses to post their religious preferences and thus avoid the conflict altogether. According to Andrew Koppelman, law professor at Northwestern University, “[t]he most sensible reconciliation of the tension would permit business owners to present their views to the world, but forbid them either to threaten to discriminate or to treat any individual customer worse than others.”⁵³ He elaborates, asserting that:

If proprietors who object to same-sex marriage could make their views known, then even if they have no statutory right to refuse to

48. Brief for the United States as Amicus Curiae Supporting Petitioners at 8, *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2018) (No. 16-111).

49. *Id.*

50. Brief for Petitioners at 24, *Masterpiece*, 137 S. Ct. 2290 (No. 16-111).

51. *Id.*

52. *Id.* at 29 (emphasis added).

53. Andrew Koppelman, *A Free Speech Response to The Gay Rights/Religious Liberty Conflict*, 110 Nw. U.L. REV. 1125, 1128 (2016).

facilitate ceremonies they regard as immoral, they are unlikely to be asked to participate in those ceremonies. On the contrary, same-sex couples will almost all want nothing to do with them. Announcements of the proprietor's views will not absolutely guarantee that service will not be demanded, but it will make such demands rare.⁵⁴

The issue with Koppelman's solution is that several states prohibit businesses from displaying announcements that, in effect, assert that a protected class is unwelcome. In the case of Jack Phillips, the Colorado Court of Appeals stated that a business cannot post a notice stating intent to refuse service to those who participate in a same-sex marriage, or stating that those who participate in a same-sex marriage are not welcome. On the other hand, in the case of a photographer in New Mexico, the New Mexico Supreme Court held that "businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws."⁵⁵ Koppelman himself is doubtful that such a solution would be allowed to stand by the Supreme Court, as it may be understood as an explicit form of discrimination.

VII. NOTCHING THE SLOPE

A good part of the give-and-take on the issues at hand, including the line of questioning the Supreme Court judges engaged in when they heard the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in 2017, included weighing in on what constitutes a pound of flesh versus a fair demand. The questions of some judges seem to indicate that while they thought allowing refusal of services may be acceptable under some limited conditions, they feared such exceptions would open the floodgates to widespread discrimination. The issue hence is: How can one ensure that such an opening will not be excessive?

This challenge is a very familiar one, often referred to as the slippery slope. One recognizes that some limited change might be called for, but one also fears that a shift from the status quo will lead to the lower—wrong—end of a deep slope. The argument in the case at hand takes two major forms. One, if bakers can refuse to make cakes,

54. *Id.* at 1128–29.

55. *Id.* at 1138.

should other business owners be allowed to refuse their services? As Washington Supreme Court Justice Mary Yu asked, “Is it the landscape architect next? The barber?”⁵⁶ According to Oleske, “proposed exemptions would not only allow businesses to withhold wedding-day services, but would also ‘threaten to subject same-sex couples to discrimination in employment, public accommodations, and housing across time and in situations far removed from the marriage celebration.’”⁵⁷

The second slope concerns the implications of refusing service to gay people on potential discrimination against other groups of people, such as African Americans. According to Washington Attorney General Bob Ferguson, “once you go down the road of allowing this exception . . . you can refuse service to an interracial couple based on your religious beliefs.”⁵⁸

As I have suggested previously, if one adheres to this position, then any changes, however justified, must be avoided. I have argued that instead one needs to find places to notch the slope, to ensure that one can move to a limited extent but not beyond a point clearly marked. What are the appropriate markers? One possible criterion courts often use in other contexts concerns the scope of the harm. If a refusal to sell cakes by one shop inflicts very limited harm, it should be tolerated. This might be said to be the case as cakes are readily available from other sources, especially in this era of e-commerce. Wedding cakes are ordered way ahead of time and hence differ, say, from an immediate need like medication. Also, the cakes are merely one marginal feature of wedding ceremonies compared to that of exchanging vows, wedding bands, and so on. The same holds for the services of the florist and makeup artists—but not for those of lodging, catering, employment, credit, transportation, and not to mention medical treatment. One may say that there are plenty of eateries and hence there is no harm in rejecting food service. However, there are many conditions under which this is not the case—for instance, when seeking food late at night or in isolated areas or when one has special dietary requirements such as Halal, Kosher, vegan, gluten-free, diabetic, or infant-friendly. If service is refused in the one place in town that provides these foods at a particular time of day, one may well have difficulties finding another. The same holds for lodging; denial

56. Nelson, *supra* note 32.

57. Oleske, *supra* note 39, at 102.

58. Nelson, *supra* note 32.

of service late in the day, on a holiday eve, major sports or musical event, and so on, may pose considerable harm on a person seeking to find an alternative.

The U.S. Supreme Court declined to hear a challenge to the Protecting Freedom of Conscience from Government Discrimination Act, a Mississippi law that critics argue “lets government clerks refuse to issue same-sex marriage licenses and lets adoption and foster-care organizations decline to place children with LGBT families.”⁵⁹ This clearly is on the wrong side of the “notch” this article suggests.

A counterargument is that at issue is not the provision of service per se, but the normative principle regulating the provision. The harm, one may well argue, is not to the supply of cakes but to the principle that all people are to be treated equally. To push the point: a gay couple may well not want a wedding cake from someone who strongly disapproves of their conduct—and may even think that a service obtained through coercive measures of the law would mar their happy celebration and that they may as well feed the cake to the dogs—but still insist on the service, to uphold the nondiscrimination principle and to stave off pernicious precedents. I refer to such concerns as “symbolic,” by which I mean that the issue is not the object at hand but what it stands for.

If one believes that to compromise even at the margin weakens the legal principle, then the moral precept of not asking for a pound of flesh does not apply because to allow for exceptions, even if they cause little or no substantive harm, violates the principle involved. However, if one holds that insisting on the pound of flesh undermines support for the legal principle, because it makes its advocates look like rabid ideologues lacking in sympathy, one would favor making exceptions when the refusal causes little or no substantive harm. Thus, one can readily imagine a gay couple feeling that the last thing they wish is to purchase a wedding cake from someone who views them as sinners—but hold that they ought to insist to get the cake, to uphold and promote the principles involved, even if they later feed the cake to their dog. The question before us is under what conditions does such a position amount to going for a pound of flesh?

59. Greg Stohr, *U.S. Supreme Court Leaves Intact Mississippi Law Curbing Gay Rights*, BLOOMBERG (Jan. 8, 2018, 9:33 AM), <https://www.bloomberg.com/news/articles/2018-01-08/u-s-high-court-leaves-intact-mississippi-law-curbing-gay-rights>.

The following case, discussed in the *Washington Post*,⁶⁰ provides an example of how North Carolina reached a middle-ground solution that tries to respect both religious and LGBT rights. In 2014, Gayle Myrick resigned as a magistrate in North Carolina because she was unwilling to perform civil marriages for same-sex couples.⁶¹ Myrick's supervisor suggested that Myrick could be excused from performing marriages but someone higher-up said that Myrick's schedule could not accommodate such a change. Myrick says she "didn't want to stop anyone from getting married" but knew her "religious convictions would not allow [her] to perform [same-sex] marriages personally."⁶² She reached a settlement with the government after a federal judge sided with her. North Carolina has since passed a law that allows magistrates to excuse themselves from performing marriages if they have religious objections, but at the same time stipulates that other magistrates—willing to perform marriages for same-sex couples—be available in such a case.⁶³

One should recognize the cardinal communitarian observation that we are not just rights-bearing individuals, out to carry those individual rights wherever they will take us, but also members of communities. And that such membership entails a measure of sympathy for people whose profound beliefs we strongly disagree with. We should recognize that they hold their beliefs just as strongly as we hold ours. This is *not* to suggest moral equivalency, but to help appreciate that those who hold values we consider morally flawed did not choose these values but were perhaps brought up to believe in them, and that those values were reinforced by their religious leaders and those they personally know—and that until very recently—were reaffirmed in the law of the land! One ought to recall that it was President Clinton who, in 1996, signed the Defense of Marriage Act, which defined marriage as the union of a man and woman.⁶⁴ And that even when President Obama came to office in 2009, he was reluctant to support gay

60. Sarah Pulliam Bailey, *Can LGBT Rights and Religious Rights Coexist? Kim Davis-like Case Tests the Waters*, WASH. POST (Feb. 7, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/02/07/can-lgbt-rights-and-religious-rights-coexist-kim-davis-like-case-tests-the-waters/?utm_term=.3ad7e74d08e7.

61. *Id.*

62. *Id.*

63. *Id.*

64. W. Scott Lamb, *20 Years Ago, Bill Clinton signed Defense of Marriage Act*, WASH. TIMES (Sept. 21, 2016), <https://www.washingtontimes.com/news/2016/sep/21/20-years-ago-bill-clinton-signed-defense-of-marria/>.

marriage.⁶⁵ Our fellow community members need to be helped to transition and given some time to adapt—as long as the harm to those who grant them some leeway is minimal or basically symbolic and does not undermine the legal principle involved, because clearly delineated exceptions were carved out.

David Brooks takes this communitarian approach to a much higher level and suggests that the gay couple should have said to the baker:

Fine, we won't compel you to do something you believe violates your sacred principles. But we would like to hire you to bake other cakes for us. We would like to invite you into our home for dinner and bake with you, so you can see our marital love, and so we can understand your values. You still may not agree with us, after all this, but at least we'll understand each other better and we can live more fully in our community.⁶⁶

Brooks carries the communitarian idea several steps further than I do; however, the thesis he draws on is the same. Confronting, and exercising all the legal rights one may be entitled to, is not always the preferred way to conduct oneself, especially if one cares about the other and the community.

CONCLUSION

Society uses several mechanisms to order behavior, which is not pro-social otherwise.⁶⁷ When society draws on the legal system to provide such order, this leads segments of the citizenry to implement their rights to a point where it violates what is considered morally appropriate. In the case of abusing the right to free speech—to be offensive without serving any social or moral purpose (such as using the n-word to insult)—the society relies on moral pushback to limit such abusive behavior. Whether these moral balancing forces are sufficient or excessive, or under what conditions they oversteer in one direction or another, is a subject that commands volumes and is not here encompassed. This article merely seeks to point out that (a) exercising a (legal) right may not be right (in the moral sense); i.e. that

65. Becky Bowers, *President Barack Obama's shifting stance on gay marriage*, POLITIFACT (May 11, 2012, 4:19 PM), <https://www.politifact.com/truth-o-meter/statements/2012/may/11/barack-obama/president-barack-obamas-shift-gay-marriage/>.

66. David Brooks, *How Not to Advance Gay Marriage*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/opinion/gay-marriage-cake-case.html>.

67. See generally DENNIS H. WRONG, *THE PROBLEM OF ORDER: WHAT UNITES AND DIVIDES SOCIETY* (1994).

one should not seek a pound of flesh, and (b) that society provides ways to encourage people not to proceed in this abusive way.

The right to prevent discrimination can also be implemented to the point that it raises questions about unduly and arguably unnecessarily offending people. Several suggestions have been made as to how to draw a line in order for some limited level of discrimination to be tolerated, without undermining the right. For instance, when a person's freedom of religious expression would be violated—or when that person is forced to make speech that violates their beliefs. I suggest that in seeking such a line one should take into account the harm done to those who do not seek the pound of flesh. If there is little or none or the harm is mainly symbolic, they may yield, taking into account the values, feelings, and the need for time to adapt by their fellow community members. Such a limit can be considered only as long as there are clearly delineated boundaries to how much ground those entitled to the pound of flesh are expected to yield, out of consideration for the humanity of the other and for the community they share with each other.

Shifting Sands of Claim Accrual: *John R. Sand & Gravel*, Equitable Tolling, and the Suspension of Accrual in Tucker Act Cases

HADLEY VAN VACTOR*

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INTRODUCTION

When the United States causes monetary damages by violating the Constitution or a federal statute or by breaching a contract, the United States' sovereign immunity dramatically curtails the relief an injured claimant can seek.¹ A claimant cannot seek damages from the United States for these claims in state court and can only seek damages of less than \$10,000 in federal district courts.² However, these claimants do have one potential avenue for more significant relief: the United States Court of Federal Claims.³ The Tucker Act, which waives the United States' immunity to claims for damages arising from violations of the Constitution or a federal statute or for breaches of government contracts, gives the Court of Federal Claims essentially exclusive jurisdiction over these claims.⁴

Because of the Court of Federal Claims' unique role in providing a forum for litigants who could not otherwise seek a remedy for their injuries, some have called the Court of Federal Claims "the People's Court" or "the conscience of the federal government."⁵ Others have focused on the court's role in awarding damages against the United States, calling it "the clearing house where the government must settle up with those it has legally wronged."⁶ Indeed, the financial impact of the "settling up" between the government and those it has legally wronged is significant. In fiscal year 2017, for example, the Court of Federal Claims awarded nearly 1.3 billion dollars in damages against the U.S. government.⁷

Given the court's role in facilitating recovery for claimants injured by the government, consistent access to the court is particularly important. However, in 2008, the Supreme Court limited the already

1. *United States v. Lee*, 106 U.S. 196 (1882) (holding that sovereign immunity protects the United States from suits to which it did not consent).

2. 28 U.S.C. § 1346 (2017) (providing original and concurrent jurisdiction to district courts for Tucker Act claims for damages of \$10,000 or less).

3. Through the Tucker Act, the Court of Federal Claims has jurisdiction over claims against the United States based on the Constitution, federal statutes, regulations, and contracts. Tucker Act, 28 U.S.C. § 1491 (2017).

4. While the Court of Federal Claims' jurisdiction over these claims is not technically exclusive, the United States' sovereign immunity would bar nearly all of these claims if brought in a different court. *See infra* notes 31-35 and accompanying text.

5. The Honorable Loren A. Smith, *Why A Court of Federal Claims?*, 71 GEO. WASH. L. REV. 773, 773 (2003).

6. *Id.*; *Id.* at 785-86 (describing the role of the Court of Federal Claims in entering judgments for monetary damages against the United States).

7. *Statistical Report for the Fiscal Year October 1, 2016 - September 30, 2017*, UNITED STATES COURT OF FEDERAL CLAIMS, <https://www.uscfc.uscourts.gov/sites/default/files/FY17%20stats%20for%20website.pdf>.

narrow avenue of relief for Tucker Act claimants when it decided *John R. Sand & Gravel*,⁸ which held that the statute of limitations for Tucker Act claims—§ 2501⁹—was jurisdictional and not subject to tolling for equitable reasons. Not surprisingly, the immediate effect of *John R. Sand & Gravel* was to prevent equitable tolling arguments in subsequent Tucker Act cases. Given its language about the jurisdictional and inflexible nature of § 2501, *John R. Sand & Gravel* also seemed likely to have the effect of preventing claimants from asking courts to extend § 2501’s six-year limitations period more generally.

However, even in the aftermath of *John R. Sand & Gravel*, Tucker Act claimants have continued to argue for extension of the statute of limitations using a doctrine called the accrual suspension rule, which suspends the accrual of a claim until a claimant knows or should have known that the claim exists.¹⁰ This doctrine has allowed claimants to proceed with claims brought well after the six-year limitations period.¹¹ In 2016, for example, a California raisin grower was able to proceed with a claim that he conceded he was aware of 14 years earlier, in 2002.¹² Though the court determined the claim was timely using the accrual suspension rule, not equitable tolling, the rationale—that it would have been unreasonable under the circumstances to expect the claimant to bring the claim earlier¹³—was similar to a rationale that might justify equitable tolling.

Courts have repeatedly emphasized that the accrual suspension rule and equitable tolling are distinct doctrines, and indeed, the standards are facially different.¹⁴ In general, equitable tolling is available when a claimant has pursued the claimant’s rights diligently but “some extraordinary circumstance prevents the claimant from bringing a

8. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132 (2008).

9. 28 U.S.C. § 2501 (2017).

10. *Ciapessoni v. United States*, 129 Fed. Cl. 332, 335 (2016) (describing accrual suspension rule).

11. *See, e.g., Ciapessoni*, 129 Fed. Cl. at 335 (2016) (holding that the accrual suspension rule extended the limitations period for raisin farmer’s claim that agricultural marketing order constituted a taking); *Banks v. United States*, 741 F.3d 1268, 1279-80 (2014) (holding that the accrual suspension rule extended limitations period for lakefront property owners’ claim that erosion caused by construction and maintenance of jetties constituted a taking).

12. *Ciapessoni*, 129 Fed. Cl. at 335-36 (2016).

13. *Id.* at 335.

14. *E.g. Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc).

(explaining that the accrual suspension rule is an interpretation of the statutory term “accrues,” making it distinct from equitable tolling); *Ingrum v. United States*, 81 Fed. Cl. 661, 667 n.6 (2008), *aff’d*, 560 F.3d 1311 (Fed. Cir. 2009) (stating that invoking the accrual suspension rule versus equitable tolling is “a distinction with a difference”).

timely action;”¹⁵ the accrual suspension rule, on the other hand, applies when information about a claim has been concealed from a claimant or when a claimant’s claim is “inherently unknowable.”¹⁶

Despite this facial difference, however, the reality is that until recently, both litigants and courts have often treated equitable tolling and accrual suspension interchangeably in Tucker Act cases.¹⁷ Moreover, though *John R. Sand & Gravel*, not surprisingly, had an immediate chilling effect on equitable tolling arguments in Tucker Act cases, its impact on accrual suspension arguments has been, if anything, the opposite: the Court of Federal Claims and the Federal Circuit appear to consider (and allow) suspension of accrual more frequently now that equitable tolling is unavailable. This leads to the question this article contemplates: if the statute of limitations for Tucker Act claims cannot be equitably tolled due to the jurisdictional nature of § 2501, should it nonetheless be extended by the accrual suspension rule, a doctrine that has the same effect on the limitations period and for decades was treated as essentially equivalent to equitable tolling?

Part I of this article describes the role of the Court of Federal Claims and the Tucker Act in creating an important exception to sovereign immunity’s general prohibition of monetary claims against the United States. Part II of this article introduces § 2501, the statute of limitations for Tucker Act claims, and provides an overview of the primary claim accrual doctrines that provide possible exceptions to § 2501’s application. Part III of this article analyzes the differences and similarities between equitable tolling and the accrual suspension rule and concludes that while some real differences do exist, the accrual suspension rule essentially operates to subvert *John R. Sand & Gravel*’s prohibition on equitable estoppel in Tucker Act cases. Part IV of this article discusses potential paths forward, concluding that because proscribing the accrual suspension rule would unfairly deprive many claimants of a remedy, courts should continue using the accrual suspension rule to extend the statute of limitations in appropriate Tucker Act cases unless and until *John R. Sand & Gravel* is overturned or clarified.

15. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (describing standard for equitable tolling).

16. *Martinez*, 333 F.3d at 1319.

17. *See, e.g., Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1571 (Fed. Cir. 1993) (relying on *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89 (1990), for the proposition that equitable tolling can be available in cases against the United States but identifying the standard as what later cases would call the accrual suspension rule).

I. THE COURT OF FEDERAL CLAIMS AND THE TUCKER ACT

The significance of the role that the Court of Federal Claims plays is best understood against the backdrop of the United States' sovereign immunity.¹⁸ In general, sovereign immunity protects the United States against suits to which it does not consent;¹⁹ the existence of such consent is thus a prerequisite for a court's jurisdiction over a suit against the United States.²⁰ In practice, this means a litigant cannot sue the United States unless the United States has consented to suit through a statute or other waiver of sovereign immunity,²¹ even if the litigant would have an otherwise valid claim for damages.

One of the most significant exceptions to the United States' general immunity from monetary damages claims is the jurisdiction of the Court of Federal Claims, a specific forum for litigants to pursue some claims for damages against the United States.²² Congress created the Court of Federal Claims alongside the earliest "significant grant of permission by the sovereign United States to its citizens to seek relief against it in the courts."²³ Through the Act of February 24, 1855, Congress gave the court jurisdiction over claims against the United States based on federal statutes, regulations, and contracts.²⁴ In 1877, Congress passed the Tucker Act, which confirmed and expanded the court's jurisdiction to include monetary actions based on the Constitution.²⁵ Before the Act of February 24, 1855 and the Tucker Act, sov-

18. The United States' sovereign immunity, while broadly accepted, is not explicitly set forth in the Constitution. For a discussion of this anomaly and the history and development of the United States' sovereign immunity, see Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 523–27 (2003); Elana Wexler, *Section 2401(b) Reconfigured: Irwin v. Department of Veterans Affairs Leads to the Right Result for the Wrong Reasons*, 74 FORDHAM L. REV. 2927, 2930–35 (2006). For a critique of sovereign immunity in its historic and modern form, see generally Sarah L. Brinton, *Three Dimensional Sovereign Immunity*, 54 SANTA CLARA L. REV. 237 (2014).

19. *Lee*, 106 U.S. at 204 (1882) (holding that the United States cannot be sued without its consent).

20. *United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

21. *See id.*

22. 28 U.S.C. § 1491 (2017).

23. GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT, 226 (2006).

24. Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612 (1855).

25. Tucker Act of 1887, ch. 359, 24 Stat. 505.

foreign immunity barred monetary damages claims against the United States, leaving these claimants without any judicial remedy.²⁶

As a result of the Tucker Act and its amendments, today the Court of Federal Claims has jurisdiction over claims for liquidated or unliquidated damages in non-tort cases founded on the Constitution, a federal statute or regulation, or a contract with the federal government.²⁷ In addition, through the Indian Tucker Act, the Court of Federal Claims has jurisdiction over damages claims brought by Indian tribes, when those claims arose after 1946 and are otherwise cognizable by the court.²⁸ The Court of Federal Claims also has jurisdiction over contract bid disputes through the Contract Disputes Act²⁹ and vaccine claims through the National Childhood Vaccine Injury Act.³⁰

The Court of Federal Claims has, for the most part, exclusive jurisdiction over Tucker Act claims.³¹ In theory, a claimant *could* proceed in federal district court rather than the Court of Federal Claims *if* both independent subject matter jurisdiction and a waiver of sovereign immunity existed.³² However, few such waivers exist as to the types of claims over which the Court of Federal Claims has jurisdiction through the Tucker Act, and those that do exist are helpful only for a fraction of claimants.³³ For example, district courts do have con-

26. *Mitchell*, 463 U.S. at 212–13 (1983). For a more in-depth discussion of these statutes (and the procedures in place prior to their passage), see Gregory C. Sisk, *The Continuing Drift Of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 530–33 (2008) (discussing the origin of statutory waivers of sovereign immunity, including the Tucker Act); Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 175 (1998) (noting that prior to 1855, the sole remedy available to individuals with monetary claims against the United States was to petition Congress to pass a bill appropriating funds to pay their claim).

27. 28 U.S.C. § 1491 (2017).

28. 28 U.S.C. § 1505 (2012).

29. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2391 (1978).

30. 42 U.S.C. § 300aa-12 (2016).

31. See SISK, *supra* note 23, at 237 (describing the Court of Federal Claims' jurisdiction over claims as exclusive); ALAN WRIGHT ET AL., § 3657 STATUTORY EXCEPTIONS TO SOVEREIGN IMMUNITY—ACTIONS UNDER THE TUCKER ACT, 14 Fed. Prac. & Proc. Juris § 3657 (4th ed. 2018) (noting that the Court of Federal Claims has exclusive jurisdiction only over cases that no other court has authority to hear and describing instances in which Congress has displaced Tucker Act jurisdiction).

32. *Wyodak Res. Dev. Corp. v. United States*, 637 F.3d 1127, 1130 (10th Cir. 2011) (noting that the Court of Federal Claims' jurisdiction is only exclusive over claims that no other federal court has authority to hear and that a plaintiff could proceed in district court if an independent source of subject matter jurisdiction and a waiver of sovereign immunity other than the Tucker Act existed).

33. See *C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 903 F.2d 114, 119 (2d Cir. 1990) (“The jurisdiction of the Court of Federal Claims is not exclusive; rather, there is rarely any statute available that waves sovereign immunity for suits in the district court, other than the Tucker Act with its \$10,000 limit.”).

current jurisdiction for Tucker Act claims under \$10,000 through the so-called Little Tucker Act.³⁴ However, this narrow exception, with its low cap on monetary damages, does not enable litigants with more substantial claims to receive complete relief in a district court. Thus, in practice, the Court of Federal Claims is the exclusive recourse for nearly all claimants with non-tort monetary damages claims against the United States.³⁵

The United States Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction over all Tucker Act appeals, whether those appeals are from “Big” Tucker Act cases in the Court of Federal Claims or Little Tucker Act³⁶ cases in district courts.³⁷ Moreover, the Federal Circuit has exclusive jurisdiction over appeals in cases that include a Tucker Act claim along with another claim, such as a claim under the Federal Tort Claims Act.³⁸

Though the Court of Federal Claims does not specialize in any specific subject matter or type of case,³⁹ the court is unique in that it is an expert “in litigation between citizen and sovereign.”⁴⁰ Indeed, all the claims it hears are, “in one form or another, claims against the sovereign United States.”⁴¹ The Court of Federal Claims hears cases across a wide range of subject areas; breach of contract, takings, tax, and civilian or military pay claims make up the bulk of the court’s caseload,⁴² but the Court of Federal Claims also plays an important role as a forum for copyright and patent cases and cases brought by

34. 28 U.S.C. § 1346 (2012).

35. See *C.H. Sanders Co.*, 903 F.2d at 119; *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 313 (2011) (“The CFC is the only judicial forum for most non-tort requests for significant monetary relief against the United States.”).

36. 28 U.S.C. § 1346 (granting district courts original and concurrent jurisdiction over the same class of claims as the Tucker Act as to claims not exceeding \$10,000).

37. 28 U.S.C. § 1295 (2012) (granting the Federal Circuit exclusive jurisdiction over appeals from a district court case based on the Little Tucker Act and appeals from the Court of Federal Claims); *Sisk*, *supra* note 23, at 251–52 (2006) (discussing the Federal Circuit’s exclusive jurisdiction over Tucker Act appeals).

38. *United States v. Hohri*, 482 U.S. 64, 71–76 (1987) (holding that the Federal Circuit had exclusive jurisdiction over a “mixed” case including Tucker Act and Federal Tort Claims Act claims); *Sisk*, *supra* note 23, at 251–52 (2006) (discussing the Federal Circuit’s exclusive jurisdiction over Tucker Act appeals).

39. *Smith*, *supra* note 5, at 782–83.

40. *Id.*

41. *Sisk*, *supra* note 23, at 237.

42. Statistical Report for the Fiscal Year October 1, 2016 – September 30, 2017, UNITED STATES COURT OF FEDERAL CLAIMS WEBSITE, <https://www.usfc.uscourts.gov/sites/default/files/FY17%20stats%20for%20website.pdf>.

Indian tribes.⁴³ In many of these areas, the voice of the Court of Claims “appropriately dominate[s],” with the court’s decisions carrying more weight than its caseload statistics alone would indicate.⁴⁴

The Court of Federal Claims is also different from other federal courts in that in general, the Court of Federal Claims does not have authority to grant equitable remedies.⁴⁵ While it can grant limited equitable relief—such as that incident to a monetary judgment or with respect to nonmonetary disputes arising from the Contract Disputes Act⁴⁶—the prohibition on equitable relief more broadly further narrows the scope of the court’s focus.

As noted above, another significant aspect of the Court of Federal Claims is its role in awarding monetary damages against the United States. While the 2017 figure of nearly 1.3 billion dollars in damages awarded against the U.S. government in the highest in recent years,⁴⁷ the court has awarded upwards of \$800 million in damages in each of the last five years.⁴⁸

II. ACCRUAL DOCTRINES IN TUCKER ACT CASES

The statute of limitations for all Tucker Act cases is six years, as provided by 28 U.S.C. § 2501.⁴⁹ Section 2501 provides that any claim not filed within six years of when the claim “first accrues” will be barred.⁵⁰ A Tucker Act claim “first accrues” for the purposes of § 2501’s limitations period when all events have occurred to fix the

43. In 2017, the most recent year for which statistics are available, 1132 cases were pending in the Court of Federal Claims, including 264 takings cases, 135 tax cases, 128 cases concerning civilian or military pay, 31 copyright or patent cases, and 19 cases brought by Indian tribes. Statistical Report, *supra* note 42. See also Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 548–53 (2003) (describing historic general breakdown of Court of Federal Claims cases by type).

44. SISK, *supra* note 23, at 240.

45. *Tohono O’Odham Nation*, 563 U.S. at 322 (2011) (Sotomayor, J., concurring) (noting that the CFC has no general power to provide equitable relief).

46. 28 U.S.C. § 1491(a)(2) (2011).

47. Statistical Report, *supra* note 42.

48. Statistical Report, *supra* note 42; Statistical Report for the Fiscal Year October 1, 2015 – September 30, 2016, UNITED STATES COURT OF FEDERAL CLAIMS, <https://www.usfc.uscourts.gov/sites/default/files/Statistical%20Report%20for%20FY2016.pdf>; Statistical Report for the Fiscal Year October 1, 2014 – September 30, 2015, UNITED STATES COURT OF FEDERAL CLAIMS, <https://www.usfc.uscourts.gov/sites/default/files/FY15-Annual-Judgment-Report.pdf>; Statistical Report for the Fiscal Year October 1, 2013 – September 30, 2014, UNITED STATES COURT OF FEDERAL CLAIMS, <https://www.usfc.uscourts.gov/sites/default/files/AO2014Stats.pdf>; Statistical Report for the Fiscal Year October 1, 2012 – September 30, 2013, UNITED STATES COURT OF FEDERAL CLAIMS, <https://www.usfc.uscourts.gov/sites/default/files/AO2013Stats.pdf>.

49. 28 U.S.C. § 2501 (2016).

50. *Id.*

government's liability.⁵¹ Thus, a cause of action accrues as soon as all events that are necessary for a plaintiff to sue have occurred,⁵² even if damages are not fully calculable or if the claimant does not understand his or her legal rights.⁵³ In other words, the statute of limitations begins to run once a claimant is "on inquiry" of a potential claim.⁵⁴

Though the limitations period of § 2501 is specific to Tucker Act claims, the standard for determining accrual under § 2501 is not unique.⁵⁵ In *Franconia Associates v. United States*, the Supreme Court described the language of § 2501 as "unexceptional" and dismissed an argument that § 2501's "first accrues" language suggested a distinct accrual standard.⁵⁶ Instead, accrual under § 2501 standard is similar to the "standard rule" for limitations periods generally: that the period commences when a plaintiff "has a complete and present cause of action."⁵⁷

Section 2501 contains just one explicit exception, for claimants "under legal disability or beyond the seas" at the time the claim accrues.⁵⁸ Courts have interpreted "under legal disability" to mean a physical or mental state that would interfere with a claimant's ability to file or pursue a claim effectively.⁵⁹ Courts have interpreted the legal disability exception narrowly; only a "personal handicap"⁶⁰ or "mental derangement" that prevents a plaintiff from understanding his or her legal rights is sufficient.⁶¹

51. *White v. United States*, 101 Fed. Cl. 673, 677 (Fed. Cl. 2011) (describing § 2501's accrual standard).

52. *Id.*

53. *Rosales v. United States*, 89 Fed. Cl. 565, 578 (Ct. Cl. 2009) (noting the focus is on the time of the defendant's acts, not the consequences of those acts).

54. *Japanese War Notes Claimants Ass'n of Philippines v. United States*, 373 F.2d 356, 359 (Ct. Cl. 1967).

55. *Franconia Assocs. v. United States*, 536 U.S. 129, 144–45 (2002).

56. *Id.* In addition to making clear that § 2501's accrual standard is not unique, *Franconia* reinforced the notion that limitations principles "should generally to the Government 'in the same way' they apply to private parties." *Id.* at 145.

57. *Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016) (stating that a limitations period commences when a plaintiff "has a complete and present cause of action"); *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (same).

58. 28 U.S.C. § 2501 (2016).

59. *Goewey v. United States*, 612 F.2d 539, 544–45 (Ct. Cl. 1979).

60. *Coon v. United States*, 30 Fed. Cl. 531, 539–40 (Fed. Cl. 1994) (holding that despite plaintiff's diagnosis with chronic paranoid schizophrenia, he did not have a disability within the meaning of § 2501).

61. *Goewey*, 612 F.2d at 545–46 (holding that a plaintiff who was competent to file an application for correction of military records was competent to file a lawsuit to protect his rights).

Courts applying § 2501 frequently emphasize the need to construe the six-year limitations period strictly and narrowly⁶² and have cautioned against “engrafting”⁶³ or implying additional exceptions beyond that for disabilities included in the statutory language.⁶⁴ And indeed, § 2501 itself states that any claims not brought within a six-year period “shall be barred.”⁶⁵

However, despite the clear language of the Tucker Act and an array of precedents holding that its limitation period should be interpreted strictly, Tucker Act claimants have routinely argued that the six-year limitation period should be tolled or extended for reasons other than a disability. Although claimants have used a variety of arguments—including the continuing claims doctrine, the stabilization doctrine, and a special accrual standard for some breach of trust cases—the two most significant doctrines that claimants have relied upon are the accrual suspension rule and the equitable tolling doctrine.⁶⁶ Exploring the standard for these two doctrines and the way each has developed illustrates a fundamental inconsistency in how courts have applied these doctrines in Tucker Act cases.

62. See, e.g., *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576–77 (Fed. Cir. 1988) (noting that because the six-year limitations period is a condition of the United States’ waiver of its sovereign immunity, it must be strictly construed).

63. *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990) (“exceptions cannot be engrafted on the statute of limitations so as to allow claims to be asserted beyond the six-year time limit set forth in Section 2501.”).

64. *Soriano v. United States*, 352 U.S. 270, 276 (1957) (stating that additional exceptions to conditions under which the United States has consented to be sued “are not to be implied”).

65. 28 U.S.C. § 2501 (2016).

66. Although claimants have argued (sometimes successfully) that § 2501’s limitations period should be extended through the continuing claims doctrine, the stabilization doctrine, or the special standard for some breach of trust cases, each of these doctrines are quite narrow. The continuing claims doctrine only applies when the claim is “inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages.” *Rosales*, 89 Fed. Cl. at 579. The stabilization doctrine, on the other hand, applies only to takings claims involving gradual physical processes like erosion. See, e.g., *Banks*, 741 F.3d at 1281. Similarly, the special accrual standard for some breach of trust cases, which primarily arises in cases involving Indian tribes, is also quite narrow, as it only applies where a trust relationship between a claimant and the United States exists. Moreover, several cases have held that there is no special accrual standard for breach of trust cases, and that accrual in these cases occurs when a plaintiff knows or has reason to know of the breach that gives rise to the cause of action. See, e.g., *Blackfeet Hous. Auth. v. United States*, 106 Fed. Cl. 142, 149 (Fed. Cl. 2012) (stating that even where a trust relationship exists, the appropriate standard “is whether plaintiff was or should have been aware of the material facts underlying the claim”); *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1351 (Fed. Cir. 2011) (holding that regardless of a trust relationship, a claim accrued when the Tribe had reason to know of the claim based on terms of consent decree).

A. The Accrual Suspension Rule

One of the primary doctrines that Tucker Act claimants have relied upon as a basis for tolling or extending § 2501's limitations period is the accrual suspension rule. This doctrine prevents the limitations period from running "when an accrual date has been ascertained, but the plaintiff does not know of the claim."⁶⁷ The accrual suspension rule applies where (1) the government concealed acts such that plaintiff was unaware of their existence *or* (2) the injury was "inherently unknowable."⁶⁸ Though courts have at times referred to accrual suspension as tolling the limitations period, the accrual suspension rule does not pause or toll a limitations period that has already begun, but instead suspends the initiation of the limitations period before it begins.⁶⁹

1. Historical Development of the Accrual Suspension Rule

Unlike most other accrual doctrines that claimants have attempted to use to avoid § 2501's strict limitations period, the accrual suspension rule developed in the specific context of Tucker Act cases. The roots of this doctrine are traceable to the 1967 case *Japanese War Notes Claimants Association of Philippines v. United States*,⁷⁰ in which the claimant argued that precedent existed for extending § 2501's limitations period in some circumstances. The Court of Federal Claims accepted the claimant's argument and conceded that precedents indeed demonstrated that in certain instances, "the running of [§ 2501] will be suspended when an accrual date has been ascertained, but plaintiff does not know of his claim."⁷¹ Drawing from treatises on sales and fraudulent concealment, the Court of Federal Claims announced that in order to suspend the running of the limitations period, a plaintiff would have to show "that defendant has concealed its acts with the result that plaintiff was unaware of their existence" or that "its injury was 'inherently unknowable' at the accrual date."⁷²

67. *Ram Energy, Inc. v. United States*, 94 Fed. Cl. 406, 411 (Fed. Cl. 2010) (describing the accrual suspension rule).

68. *Ladd v. United States*, 713 F.3d 648, 653 (Fed. Cir. 2013) (stating the standard for the accrual suspension rule).

69. *See Hopland*, 855 F.2d at 1577–78 ("the distinction that must be drawn is . . . between tolling the commencement of the running of the statute (a tolling of the accrual) and tolling the running of the statute once commenced (a tolling of the statute)").

70. *Japanese War Claimants*, 373 F.2d at 356.

71. *Id.* at 358–59.

72. *Id.* at 359.

Describing the latter, the court provided the example of a defendant delivering the wrong type of fruit tree to a plaintiff who cannot determine the wrong until the tree bears fruit.⁷³ Though *Japanese War Notes* did not refer to the standard it articulated as the accrual suspension rule, the *Japanese War Notes* standard is identical in language to most modern cases applying the accrual suspension rule standard.⁷⁴

Following the lead of the *Japanese War Notes* claimants, many Tucker Act claimants began to argue that accrual of § 2501 could be suspended due to government concealment or a claimant's "inherently unknowable" injury. Although courts in subsequent cases continued to acknowledge that accrual of the limitations period *could* be suspended, accrual was actually suspended in very few cases in the decades after *Japanese War Notes*. Moreover, as discussed more fully below, there was significant confusion in this era about the relationship between the yet-to-be-named accrual suspension rule and equitable tolling, with many cases treating the *Japanese War Notes* standard as the measure of whether to equitably toll § 2501.⁷⁵

On one hand, the cases in the decades following *Japanese War Notes* demonstrate significant consistency in that in many instances, these early cases reaffirm the standard first announced in that case and clarify the meaning of the standard by applying it to many different factual scenarios. For example, nearly all cases in this era discussing the suspension of accrual use *Japanese War Notes*' language about concealment and "inherently unknowable" claims.⁷⁶

On the other hand, these early cases also created significant inconsistencies and demonstrated a lack of clarity about where the doctrine relied upon in *Japanese War Notes* fit in with other accrual standards and doctrines. For example, some cases discussed the "knew or should have known" or "inherently unknowable" standard as an exception to the general standard rule that a claim accrues for the purposes of § 2501 when all events fixing the government's liabil-

73. *Id.*

74. *See, e.g., Welty v. United States*, 135 Fed. Cl. 538, 545 (Fed. Cl. 2017) (describing the accrual suspension rule as applying in cases of government concealment or an inherently unknowable claim).

75. *See, e.g., Catawba Indian Tribe*, 982 F.2d at 1571–72 (stating that tolling for equitable reasons is appropriate in some cases but identifying the standard as what later cases would call the accrual suspension rule).

76. *See, e.g., Hopland*, 855 F.2d at 1577.

ity have occurred.⁷⁷ However, other cases, in describing the standard for § 2501 accrual, stated that a claim accrues for the purposes of § 2501 when all events that fix liability have occurred *and* when a claimant knew or should have known of a claim.⁷⁸

Hopland Band of Pomo Indians v. United States is a good illustration of the latter inconsistency. In *Hopland*, a Band of Indians sought monetary damages from the United States for allegedly breaching a trust relationship⁷⁹ by, among other things, unlawfully conveying the Band's property and failing to provide benefits and services to the Band following an unlawful termination of the Band's status as an Indian tribe.⁸⁰ In analyzing whether the Band's lawsuit was timely, *Hopland* observed that because § 2501 can be tolled when the government fraudulently conceals material facts, "for the purposes of section 2501, it would appear more accurate to state that a cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence."⁸¹ For this proposition, *Hopland* cites to a footnote in an earlier Federal Circuit case,⁸² which in turn cites to *Jones v. United States*.⁸³ While *Jones* does indeed use a "knew or should have known" standard, it does so in the specific context of announcing the standard for accrual in a breach of trust case.⁸⁴ Despite the apparent distinction between the general accrual standard for a breach of trust claim and a specific exception to the accrual standard for other Tucker Act cases, the result of *Hopland* is that many subsequent cases have essentially engrafted a "knew or should have known" gloss onto all questions of accrual,

77. See, e.g., *Clear Creek Cmty. Serv. Dist. v. United States*, 100 Fed. Cl. 78, 81 (2011) (stating that a claim accrues for the purposes of § 2501 when all events that fix the government's liability have occurred, without reference to the plaintiff's knowledge of those events).

78. See, e.g., *Hopland*, 855 F.2d at 1577–78 (describing the § 2501 accrual standard as including a "knew or should have known" component).

79. *Id.* at 1581. Many Tucker Act claims brought by Indian tribes or tribal members are framed as allegations that the United States has breached its trust obligations to the tribe or tribal members. For a more in-depth discussion of these claims, including the problem of forum shopping in claims involving equitable relief, see Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. L.J. 83 (2013).

80. *Id.* at 1575–76.

81. *Id.* at 1577.

82. *Id.* (citing *Kinsey v. United States*, 852 F.2d 556, 557 n.* (Fed. Cir. 1988)).

83. *Kinsey*, 852 F.2d at 557 n.* (citing *Jones v. United States*, 801 F.2d 1334, 1335–36 (Fed. Cir. 1986)).

84. *Jones*, 801 F.2d at 1335–36 (holding that "generally, an action for breach of fiduciary duty accrues when the trust beneficiary knew or should have known of the breach.").

whether or not claimants have suggested that the purportedly narrow accrual suspension rule should apply.⁸⁵

In 2003, the Federal Circuit decided *Martinez v. United States*, which dispelled at least some of the confusion evident in prior cases. In *Martinez*, the Federal Circuit for the first time used the term “accrual suspension rule” to refer to the doctrine used in *Japanese War Notes* and subsequent cases.⁸⁶ In *Martinez*, the court acknowledged that the doctrine providing that accrual of a claim against the United States should be suspended until a claimant knew or should have known the claim existed—which it termed the accrual suspension rule—was “well settled” in prior Tucker Act cases.⁸⁷ Nonetheless, the Federal Circuit rejected the claimant’s argument, finding that he was aware of his injury and the facts underlying his claim, even though facts revealed later provided him with “additional ammunition with which to pursue his claim.”⁸⁸

Martinez was also significant in that it explicitly held that the accrual suspension rule was distinct from equitable tolling, a doctrine that up until that point many cases had treated as interchangeable with the accrual suspension rule.⁸⁹ *Martinez* explained that the term accrual suspension came “directly from the meaning of the term ‘accrues,’ as used in section 2501, and, therefore, is viewed as a matter of statutory interpretation, rather than a form of equitable tolling.”⁹⁰

Since *Martinez* identified the accrual suspension rule as a specific and distinct doctrine, claimants have continued to use it in attempting to extend the limitations period of § 2501, sometimes in place of equitable tolling arguments and sometimes in conjunction with them.⁹¹ However, in the fifteen years since the Federal Circuit explicitly recognized that the accrual suspension rule is a distinct doctrine from equitable tolling, the Court of Federal Claims and Federal Circuit have shown an increased willingness to use the rule that to extend

85. This commingling is significant because if the standard for claim accrual under § 2501 is “knew or should have known,” then the accrual suspension rule is not really an exception to normal accrual but simply a duplication of it.

86. *Martinez*, 333 F.3d at 1319.

87. *Id.*

88. *Id.*

89. *Id.*; see *infra* section III.B.

90. *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 61 (2009), *aff’d*, 862 F.3d 1370 (Fed. Cir. 2017) (same); see also *Martinez*, 333 F.3d at 1319.

91. This was particularly the case between 2003, when the Federal Circuit decided *Martinez*, and 2008, when the Supreme Court decided *John R. Sand & Gravel*. However, many claimants continued to make equitable tolling arguments in the immediate years after *John R. Sand & Gravel*, though the Court of Federal Claims would no longer consider them.

§ 2501's six-year limitations period. A close look at accrual suspension cases illustrates the circumstances under which courts are (or are not) willing to apply the rule—and how courts' analyses of those circumstances compares or overlaps with equitable tolling standards.

2. How the Accrual Suspension Rule Applies in Tucker Act Cases

As noted previously, the accrual suspension rule applies in two circumstances: when concealment has occurred or when a claim is inherently unknowable. In practice, the Court of Federal Claims and the Federal Circuit are most likely to use the accrual suspension rule to extend the limitations period in cases involving intentional concealment or the inherent unknowability of a claim due to a change in the law. However, courts have also applied the rule in other “unknowable” circumstances.

a. Concealment

With respect to suspension of the limitations period due to government concealment, a claimant must demonstrate that the government has concealed its acts such that the claimant was unaware of their existence.⁹² Mere silence is not sufficient.⁹³ Instead, for a claimant to be successful in using concealment to justify suspension of accrual, the claimant must demonstrate some “trick or contrivance intended to exclude suspicion and prevent inquiry.”⁹⁴ For example, in *Spevack v. United States*, accrual of the limitations period was suspended during the time that an engineer did not have any access to confidential information about the United States' operation of secret heavy water plants.⁹⁵ Suspension of accrual of the limitations period was justified because the United States had deliberately concealed information from the claimant.⁹⁶ In contrast, in *LaMear v. United States*, the accrual suspension rule did not apply to a claim that the United States had breached its fiduciary duty to a member of an Indian tribe in approving the exchange of a piece of property with mineral rights for a piece of property without such rights.⁹⁷ Although the

92. *Ross-Hine Designs, Inc. v. United States*, 139 Fed. Cl. 44, 460–61 (2018) (holding that government did not conceal information about a robotic hand that was featured in educational videos and was discussed in scholarly papers and news articles).

93. *LaMear v. United States*, 9 Cl. Ct. 562, 570 (1986).

94. *Id.*

95. *Spevack v. United States*, 390 F.2d 977, 889–90 (Ct. Cl. 1968).

96. *See id.*

97. *LaMear*, 9 Cl. Ct. at 563.

United States admitted in a discovery response that it did not have any record of documents that would have alerted the claimant to the absence of mineral rights on the exchanged-for property, the admission was insufficient to prove that the government intentionally concealed the absence of mineral rights from the plaintiff.⁹⁸

Another example of concealment justifying extension of the limitations period is *L-3 Communications Integrated Systems, L.P. v. United States*, in which commencement of the limitations period was suspended when a procurement officer acted improperly in awarding a contract to a company she was planning to work for after leaving the Air Force.⁹⁹ In that case, the Court of Federal Claims found that the officer “hoarded information” and kept her decision making process a secret such that her inappropriate actions were concealed not only from the plaintiff but also from the Air Force itself.¹⁰⁰ Because the concealment involved not mere silence but overt acts, the accrual suspension rule applied and operated to extend the limitations period.¹⁰¹

b. Inherent Unknowability

The other circumstance potentially justifying the accrual suspension rule, the inherent unknowability of a claim, arises more frequently in Tucker Act cases. This inquiry is objective, not subjective; a claimant’s “access to the facts,” not actual knowledge of the facts, is most significant,¹⁰² and ignorance of a claim a plaintiff should have been aware of will not suspend accrual.¹⁰³ Although some cases continue to use a “knew or should have known” standard to determine whether the rule applies, courts have clarified that “knew or should have known” is interchangeable with “inherently unknowable” for the purposes of the accrual suspension rule and have stated that the “in-

98. *Id.* at 570.

99. *L-3 Commc'ns. Integrated Sys., L.P. v. United States*, 79 Fed. Cl. 453, 455 (2007).

100. *Id.* at 459.

101. *Id.* at 463–64.

102. *Cent. Pines Land Co. v. United States*, 61 Fed. Cl. 527, 534 (2004) (holding that a party will be charged with knowing any facts that are discoverable in the public record and noting that tolling the statute of limitation is not appropriate when a claimant could have asserted a claim if the claimant had “sought advice, launched an inquiry, or otherwise taken steps to discover available information”).

103. *Ingrum*, 560 F.3d at 1317 (holding that physical damage to property was not inherently unknowable when claimant would have known about it if he had visited his property, even though claimant was unaware of the damage and property was remote and extremely difficult to access).

herently unknowable” standard is more precise.¹⁰⁴ And, as noted previously, while some cases explicitly discuss the accrual suspension rule as a distinct doctrine that provides an exception to normal accrual of § 2501’s limitations period, other cases treat whether the plaintiff “knew or should have known” of the events triggering accrual as part of § 2501’s traditional accrual standard.¹⁰⁵

One apt illustration of a plaintiff’s subjective lack of knowledge is *Ingrum v. United States*, in which a landowner was not aware that the Department of Defense had created a large pit on his property as part of road repair work.¹⁰⁶ Because the property’s primary access road was inaccessible due to flooding, the claimant’s property could only be accessed through a significantly longer route over an unimproved road, which the claimant described as “prohibitively lengthy, arduous, and inconvenient.”¹⁰⁷ Despite the fact that the claimant could not easily access his property, the Federal Circuit affirmed that the injury was not inherently unknowable, given that the pit would have been obvious to the claimant if he had undertaken the difficult but not impossible journey to inspect his property.¹⁰⁸

In determining whether a claim is “inherently unknowable” such that the accrual suspension rule should apply, the Court of Federal Claims and Federal Circuit have at times described the standard as requiring the “sheer impossibility” of notice¹⁰⁹ or the “complete absence of relevant evidence.”¹¹⁰ In practice, this has often meant that the arrival of painful and unanticipated consequences is not sufficient to indicate that the claim was in fact inherently unknowable. For example, in *Rosales v. United States*, the accrual suspension rule did not apply to a claim by members of an Indian tribe who sought damages from the United States for consequences of the United States’ wrongful acceptance of land in trust for a community of Indians rather than for the claimants individually.¹¹¹ In rejecting the claimants’ argument,

104. See, e.g., *Holmes*, 657 F.3d at 1320 (acknowledging that the “knew or should have known test” has been used interchangeably with the “inherently unknowable test” and stating that the latter is more common and more precise); *Ingrum*, 560 F.3d at 1315 n.1 (stating that the “concealed or inherently unknowable” standard is both “more common and more precise” than the “knew or should have known” standard).

105. See *supra* section II.A.1.

106. *Ingrum*, 560 F.3d at 1313.

107. *Ingrum v. United States*, 81 Fed. Cl. 661, 662 (2008), *aff’d* 560 F.3d 1311 (Fed. Cir. 2009).

108. *Ingrum*, 560 F.3d at 1315–16.

109. *Rosales*, 89 Fed. Cl. at 578.

110. *Ram Energy, Inc. v. United States*, 94 Fed. Cl. 406, 411 (Fed. Cl. 2010)

111. *Rosales*, 89 Fed. Cl. at 578.

the Court of Federal Claims held that their claim accrued at the moment the land was accepted in trust, even though consequences of the government's act—which ultimately included eviction from the land—did not materialize until decades later.¹¹² The court explained that a claim accrues when all events have occurred to fix the government's liability, not when the consequences became both apparent and most painful.¹¹³

Examining other cases that apply the inherently unknowable (or knew or should have known) standard similarly demonstrate that the bar for establishing that a claim is inherently unknowable is high. As noted above, accrual suspension does not apply when a claimant is unaware of his or her legal rights, the law, or even the facts.¹¹⁴ For example, in *Jones v. United States*, the accrual suspension rule did not apply to takings and breach of trust claims arising from the United States' failure to enforce a decree enjoining taxation of a plaintiff's property or to prevent a county from evicting the plaintiff and selling the property in a tax sale.¹¹⁵ Though the consequences of the United States' actions (or inactions), including a substantial reduction in a damages award for the plaintiff due to the government's delay, were unknown to the plaintiffs at the time of the actions, the actions nonetheless fixed the government's liability, triggering accrual of the claim without suspension.¹¹⁶

The irrelevance of a claimant's knowledge of his or her legal rights or understanding of the law or facts holds true even if neither the claimant *nor* the government understands the legal consequences of an act.¹¹⁷ This principle is perhaps best illustrated by *Catawba Indian Tribe of South Carolina v. United States*. In that case, the accrual suspension rule did not apply to a claim regarding misrepresentations about the legal effect of a congressional act terminating the relationship between a tribe and the government.¹¹⁸ Almost immediately after Congress adopted the act, confusion arose about the act's meaning, setting off more than twenty years of litigation, which culminated in a Supreme Court decision.¹¹⁹ Despite the fact that the

112. *Id.* at 580–81.

113. *Id.* at 578.

114. *Jones v. United States*, 9 Cl. Ct. 292, 295 (1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986).

115. *Id.* at 296.

116. *Id.*

117. *Catawba Indian Tribe*, 982 F.2d at 1570.

118. *Id.* at 1571.

119. *Id.* at 1567.

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meaning of the act did not fully become clear to either the tribe or the United States for more than two decades, the Federal Circuit held that the claim was not inherently unknowable because the adoption of the act objectively fixed its meaning and effect, thus triggering accrual.¹²⁰

Despite the strictness with which courts interpret the “inherently unknowable” standard, it does include a reasonableness component.¹²¹ In contrast to *Rosales* or *Catawba*, which suggest that a claim is knowable even in circumstances where it would have been nearly impossible for the parties to have recognized their claims at the time of accrual, other cases have suggested a claim may be inherently unknowable when a claim is merely incapable of detection through the “exercise of reasonable diligence.”¹²² For example, in *Texas National Bank v. United States*, a claim was not inherently unknowable given that a contractor could have, through reasonable diligence, discovered that the United States was not honoring an agreement.¹²³

And indeed, the Court of Federal Claims has suspended accrual of the statute of limitations in cases where a claimant has little evidence to put the claimant on notice that a claim exists.¹²⁴ For example, in *Mesa Grande Band of Mission Indians v. United States*, accrual of a takings and breach of fiduciary duty claim was suspended for over 30 years due to the claimants’ lack of notice that their property had been wrongfully conveyed, in large part due to the fact that the property was remote and accessible only by foot over “extremely rough terrain.”¹²⁵ Similarly, in *Holmes v. United States*, accrual of a former Navy employee’s claim for breach of a settlement agreement was suspended during the time period when the Navy had made assurances that it was complying with the agreement and had complied with some terms of the agreement; based on those actions, the claimant had no way of knowing that other terms of the agreement had been breached.¹²⁶

120. *Id.* at 1572–73.

121. *Holmes*, 657 F.3d at 1320.

122. *Tex. Nat’l Bank v. United States*, 86 Fed. Cl. 403, 414 (2009).

123. *Id.*

124. *See, e.g., Mesa Grande Band of Mission Indians v. United States*, 121 Fed. Cl. 183, 192 (2015).

125. *Id.*

126. *Holmes*, 657 F.3d at 1320. *See also* *Perez v. United States*, 141 Fed. Cl. 566, 583 (2019) (holding that accrual suspension rule applied to external limitation period where claimant had no reason to be aware that Air Force was not complying with its regulatory obligation to provide compensation to claimant).

c. Changed Circumstances

In the fifteen years since *Martinez*, the Court of Federal Claims has shown an increased willingness to use the accrual suspension rule to extend the limitations period of § 2501. One situation in which the Court of Federal Claims has been willing to apply the accrual suspension rule is when “a change of circumstance arises out of a decision that overrules or alters prior precedent.”¹²⁷ *Ciapessoni*, discussed in the introduction to this article, is one example, although other claimants also have been successful in arguing that a change in law or precedent requires suspension of the accrual of the limitations period. For example, in *Lion Farms, LLC*, another raisin grower argued for application of the accrual suspension rule on the grounds that the grower did not know or have reason to know of his claim given the unfavorable precedent in *Evans*.¹²⁸ As in *Ciapessoni*, the Court of Federal Claims agreed with the claimant, noting that “courts must look to the reality of a decision’s effect, not just to the formal question of whether the decision is binding precedent.”¹²⁹ Observing that it was unreasonable to expect a claimant to pursue a claim that was likely legally indefensible, the court stated that courts must “look not only to the letter of the law, but also to *principles of equity* in making determinations.”¹³⁰

B. Equitable Tolling

Another doctrine that Tucker Act claimants frequently asserted as a rationale for extending § 2501’s limitation period prior to *John R. Sand & Gravel* was equitable tolling. Understanding how claimants sought to use equitable tolling in Tucker Act cases helps illustrate the convergence between equitable tolling and the accrual suspension rule.

At a basic level, equitable tolling is a doctrine that has the effect of preserving a plaintiff’s claims by pausing or “tolling” a statute of limitations when strict application of the statute of limitations would be inequitable.¹³¹ In general, equitable tolling applies to toll a statute of limitations when a litigant has pursued his rights diligently, but

127. *Petro-Hunt*, 90 Fed. Cl. at 62.

128. *Lion Farms, LLC v. United States*, 129 Fed. Cl. 521, 524 (2016).

129. *Id.* at 525.

130. *Id.* (emphasis added).

131. *Larry v. Dretke*, 361 F.3d 890, 896 (5th Cir. 2004) (discussing the purpose and effect of equitable tolling).

“some extraordinary circumstance prevents him from bringing a timely action.”¹³² Thus, equitable tolling allows a plaintiff to proceed with a lawsuit even though the statute of limitations has technically expired if, despite due diligence, the plaintiff could not have obtained the information the plaintiff needed in order to determine whether a claim existed.¹³³

Generally, equitable tolling is only appropriate in “rare and exceptional circumstances” in which a plaintiff is “prevented in some extraordinary way from exercising his rights.”¹³⁴ The rationale for allowing equitable tolling is that barring a claim when “extraordinary circumstance[s],” not lack of diligence, prevented a plaintiff from pursuing a claim does not further a statute of limitation’s purpose of encouraging diligence.¹³⁵

1. Equitable Tolling in Cases Against the United States

Though equitable tolling has been used in many different contexts, there has been some confusion about its applicability in cases where the government is the defendant. Before 1990, there was significant disagreement about whether (and when) equitable tolling was available against the United States.¹³⁶

In 1990, however, the Supreme Court clarified some of the confusion regarding equitable tolling in cases against the government in *Irwin v. Department of Veteran’s Affairs*. *Irwin* held that “the same rebuttable presumption” of equitable tolling in private suits should apply in suits against the government.¹³⁷ *Irwin* explained that equitable tolling should be granted only “sparingly” and suggested it would be justified in two circumstances: “where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or

132. *Waldburger*, 134 S. Ct. at 2183.

133. *Flight Attendants Against UAL Offset v. Comm’r*, 165 F.3d 572, 576–77 (7th Cir. 1999) (holding that equitable tolling did not apply to association’s claim against the Internal Revenue Service where, despite the IRS’ “foot dragging,” association could have proceeded with its suit without an IRS response); *see also* *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099–100 (9th Cir. 2005) (noting that equitable tolling will be applied when a plaintiff is unable to obtain vital information bearing on the existence of the claim).

134. *Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 80–81 (2d Cir. 2003) (holding plaintiff’s Title VII claim was not equitably tolled given that she received notice instructing her to file a claim with the EEOC within 300 days).

135. *Waldburger*, 134 S. Ct. at 2183.

136. *See, e.g., Irwin*, 498 U.S. at 94, 96 (stating that previous cases dealing with the availability of equitable tolling against the government “have not been entirely consistent”).

137. *Id.* at 95–96.

tricked by his adversary's misconduct into allowing a filing deadline to pass."¹³⁸

Irwin also laid out a clear framework for determining when a court can equitably toll a statute of limitations in a lawsuit against the United States.¹³⁹ According to *Irwin*, to determine whether equitable tolling is permitted in suits against the government, courts engage in a two-part inquiry: (1) whether such tolling is available in a sufficiently analogous private suit; and (2) if so, whether Congress expressed a "clear intent" that equitable tolling not apply.¹⁴⁰

In the period following *Irwin*, many cases used this framework to determine whether equitable tolling was available for various federal statutes, with mixed results. On one hand, courts concluded that many statutes of limitation, like that in *Irwin*, were not jurisdictional and were subject to equitable tolling. These statutes include the limitations provisions for the Federal Tort Claims Act,¹⁴¹ Social Security claims,¹⁴² appeals of Board of Veterans' Appeals decisions,¹⁴³ and the Suits in Admiralty Act.¹⁴⁴ On the other hand, courts concluded that other statutes of limitation are jurisdictional, including those for tax refund claims¹⁴⁵ and the Quiet Title Act.¹⁴⁶ In concluding that the statutes of limitation for tax refund claims and the Quiet Title Act were jurisdictional—and thus rebutting the presumption in favor of

138. *Id.* at 96 (describing standard for equitable tolling). While *Irwin's* language is somewhat different from more recent cases, such as *Menominee Indian Tribe of Wisconsin v. United States*, the essential standard—requiring diligence and something extraordinary (such as an adversary's misconduct)—is essentially unchanged. See *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (stating that a plaintiff must establish two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing").

139. *Irwin*, 498 U.S. at 95–96.

140. *Id.*

141. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1638 (2015) (holding that statute of limitations for the Federal Tort Claims Act is not jurisdictional and is subject to equitable tolling).

142. *Bowen v. New York*, 476 U.S. 467, 481–82 (1986) (holding that the limitations period for disability benefit claims under the Social Security Act is not jurisdictional and may be equitably tolled).

143. *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (allowing equitable tolling of time limit for appealing Board of Veterans' Appeals decision).

144. *Henderson v. United States*, 517 U.S. 654, 667–68 (1996) (holding that statute of limitations for the Suits in Admiralty Act was not jurisdictional).

145. *United States v. Brockamp*, 519 U.S. 347, 348 (1997) (rejecting equitable tolling for tax refund claims governed by § 6511 of the Internal Revenue Code); *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1463 (Fed. Cir. 1998) (rejecting equitable tolling for tax refund claims governed by 26 U.S.C. § 6532(a)).

146. *United States v. Beggerly*, 524 U.S. 38, 48–49 (1998) (rejecting equitable tolling as inconsistent with the Quiet Title Act).

equitable tolling created in *Irwin*—courts focused on the specific language of the statutes in question, such as their inclusion of explicit exceptions or other tolling provisions.¹⁴⁷

In 2008, the Supreme Court departed somewhat from the trend reflected in *Irwin* when it held in *John R. Sand & Gravel* that unlike the statute at issue in *Irwin*, § 2501 is a “system-related” or “jurisdictional” statute of limitation—that is, the type of limitation *not* susceptible to equitable tolling.¹⁴⁸ In reaching this decision, *John R. Sand & Gravel* spent little time applying the framework identified in *Irwin* and applied in many subsequent cases. Though the Court acknowledged *Irwin* and the general prospective rule it announced,¹⁴⁹ it did not explicitly analyze the questions raised in *Irwin*’s two-part framework.¹⁵⁰ Instead, the primary basis for its conclusion that § 2501 is jurisdictional was that prior precedents, which had not been overruled, had said it was.¹⁵¹ The Court also noted that the statutory language had not changed significantly since those prior decisions, implying that those prior decisions had in effect already answered the second part of *Irwin*’s query—whether Congress had expressed a clear intent that equitable tolling not apply—in the negative.¹⁵²

As a result of *John R. Sand & Gravel*, § 2501 is one of a relatively few statutes for which courts have completely proscribed equitable tolling.¹⁵³ It is worth noting that some commentators see *John R. Sand & Gravel* (and its holding that § 2501 is jurisdictional and not subject to equitable tolling) as an outlier in an otherwise consistent trend toward construing statutory waivers of sovereign immunity less strictly.¹⁵⁴ Indeed, as discussed above, many if not most other modern

147. See *Brockamp*, 519 U.S. at 348 (rejecting equitable tolling for tax refund claims governed by § 6511 of the Internal Revenue Code); *RHI Holdings*, 142 F.3d at 1463 (rejecting equitable tolling for tax refund claims governed by 26 U.S.C. § 6532(a)); *Beggerly*, 524 U.S. at 48–49 (rejecting equitable tolling as inconsistent with the Quiet Title Act); see also *Sisk*, *supra* note 26, at 582–83 (discussing the “retreat” from the *Irwin* presumption evidenced by *United States v. Brockamp* and *United States v. Beggerly*).

148. *John R. Sand & Gravel*, 552 U.S. at 133–34.

149. *Id.* at 136–37 (noting that *Irwin* adopted a “more general rule” to replace the Court’s “prior ad hoc approach”).

150. See *id.* at 133–38.

151. *Id.* at 139.

152. See *id.* at 136.

153. See *supra* section II.B.1; see generally *Sisk*, *supra* note 23, at 105 (describing cases in which courts have determined whether federal statutes of limitation are jurisdictional).

154. *Sisk*, *supra* note 23, at 105 (noting that “the arc of federal sovereign immunity jurisprudence is away from strict construction of statutory waivers”); Jacob Damrill, *Waves of Change Towards a More Unified Approach: Equitable Tolling and the Federal Tort Claims Act*, 50 *TULSA L. REV.* 271, 280 (2014) (describing *John R. Sand & Gravel* as an “abnormality” vis-à-vis previous cases disfavoring strict construction of sovereign immunity waivers); *John R. Sand & Gravel*,

decisions analyzing whether statutes of limitation should be treated as jurisdictional have declined to construe such statutes as jurisdictional, finding instead that limitations period against the United States, like other defendants, are subject to equitable tolling.¹⁵⁵ In fact, Professor Gregory C. Sisk describes § 2501 as standing “nearly alone” in having jurisdictional force and proscribing equitable tolling¹⁵⁶ and criticizes the authority upon which the Supreme Court based *John R. Sand & Gravel* as “largely ill-considered dicta” ignoring legislative history and the “ubiquitous legal understanding of the period that a statute of limitation was a waivable affirmative defense.”¹⁵⁷

Whether the authorities upon which *John R. Sand & Gravel* relies are sound is beyond the scope of this article. However, the increasingly lonely position § 2501 holds as a jurisdictional statute that is not subject to waiver or equitable tolling underscores the contradiction in allowing § 2501 to be extended through other means like the accrual suspension rule.

2. How Equitable Tolling Applied in Tucker Act Cases

In contrast to the relatively consistent application of equitable tolling standards in other contexts, equitable tolling has been applied in various and sometimes inconsistent ways in Tucker Act cases. In particular, the standard courts used in determining whether to equitably toll a claim equivocated between an equitable tolling standard similar to the standard used in other contexts¹⁵⁸ and a standard much like (if not identical to) the accrual suspension standard articulated in

552 U.S. at 142 (Stevens, J., dissenting) (describing *John R. Sand & Gravel* as “a carveout” from the approach in other modern cases).

155. See, e.g., *Irwin*, 498 U.S. at 95–96 (holding that the statute of limitation for Title VII employment claims is not jurisdictional and is subject to equitable tolling); *Henderson*, 517 U.S. at 667–68 (1996) (holding that statute of limitations for the Suits in Admiralty Act was not jurisdictional); *Kwai Fun Wong*, 135 S. Ct. at 1636 (holding that statute of limitations for the Federal Tort Claims Act is not jurisdictional and is subject to equitable tolling); see also Sisk, *supra* note 23, at 102–03.

156. Sisk, *supra* note 23, at 257; but see, *supra*, Section II.B.1, discussing cases in which courts have concluded that several other federal statutes of limitations are also jurisdictional.

157. Sisk, *supra* note 26, at 550–51 (arguing that suggestions that the statute of limitations for cases in what would become the Court of Federal Claims were jurisdictional were unnecessary dicta that did not carefully analyze the text of the statute, the legislative history, or the legal understanding of the day).

158. As noted elsewhere in this article, most equitable tolling cases use some variation of the standard recently reaffirmed by the Supreme Court in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014)—namely, that equitable tolling is available when a claimant has pursued his rights diligently, but some extraordinary circumstance prevents the claimant from bringing a timely action. For an example of a court using this standard in the Tucker Act context, see *George F. Miller Farms, Ltd. v. United States*, 27 Fed. Cl. 672, 675 (Fed. Cl. 1993), discussed below.

Japanese War Notes and subsequent cases.¹⁵⁹ In addition, until 2008, when the Supreme Court decided *John R. Sand & Gravel*, there was also considerable confusion about whether Tucker Act claims could be equitably tolled.¹⁶⁰

In the Tucker Act context, one of the first cases to explicitly discuss equitable tolling was *Hopland Band of Pomo Indians v. United States*.¹⁶¹ Though the Federal Circuit did not directly decide whether equitable tolling was available, the language of *Hopland* suggested that in that court's view, equitable tolling was probably not available for Tucker Act cases—though some other forms of “tolling” were.¹⁶² Somewhat confusingly, the court emphasized that § 2501 must be strictly construed and that courts should not imply additional exceptions to it, but also observed that “despite the apparent unavailability of waiver and estoppel, the statute of limitations can be tolled in proper circumstances.”¹⁶³

Shortly after *Hopland*, the Supreme Court decided *Irwin*, discussed above, which provided some additional insight about the role that equitable tolling might play in Tucker Act cases. *Irwin*, though not a Tucker Act case, discussed the precursor statute to § 2501 in reaching its ultimate holding that a rebuttable presumption of equitable tolling existed even in cases against the United States.¹⁶⁴ The Court compared the two statutes, noting that while the earlier version of § 2501 was “more stringent” than the statute before the Court in *Irwin*, the Court was nonetheless “not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling.”¹⁶⁵

159. See, e.g., *Welty*, 135 Fed. Cl. at 545 (applying the standard first articulated in *Japanese War Notes Claimants Ass'n of Philippines v. United States*, 373 F.2d 356, 359 (Cl. Ct. 1967)).

160. See *Frazer v. United States*, 288 F.3d 1347, 1352 (Fed. Cir. 2002) (noting that the law regarding equitable tolling against the government is “less than clearly settled”).

161. *Hopland Band of Pomo Indians*, 855 F.2d at 1577–78.

162. *Id.* at 1578. The court noted that a distinction must be drawn “between tolling the commencement of the running of the statute (a tolling of the accrual),” which is “routinely” allowed and “tolling the running of the statute once commenced (a tolling of the statute),” which is “rarely” allowed. *Id.*

163. *Id.* at 1577. In terms of what constituted “proper circumstances,” the court seemed particularly concerned with concealment, stating “[t]hus, the statute of limitations can be tolled where the government fraudulently or deliberately conceals material facts relevant to a plaintiff's claim so that the plaintiff was unaware of their existence and could not have discovered the basis of his claim.” *Id.* at 1577.

164. *Irwin*, 498 U.S. at 95–96 (comparing the statute of limitations at issue in *Soriano v. United States*, 352 U.S. 270 (1957) (an earlier version of § 2501) to the statute of limitation before the Court).

165. *Id.* at 95.

While *Irwin's* language about the Tucker Act statute of limitations provided fodder for arguments both for and against equitable tolling of § 2501,¹⁶⁶ it did provide clarity in some other respects. In particular, *Irwin* clarified the landscape by articulating a specific standard for when equitable tolling was available in a claim against the United States: “where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary’s misconduct into allowing a filing deadline to pass.”¹⁶⁷

Perhaps in response to *Irwin*, in *George F. Miller Farms, Ltd. v. United States*, a claimant argued that § 2501 should be equitably tolled and the Court of Federal Claims—unlike in *Hopland* and other earlier cases—applied *Irwin's* equitable tolling standard to find that equitable tolling did in fact warrant extension of the six-year limitation period.¹⁶⁸ In *Miller Farms*, landowners alleged that flooding caused by the government resulted in the taking of their property interest.¹⁶⁹ Though the landowners filed a lawsuit in the Court of Federal Claims within the limitations period, the court dismissed the lawsuit because the landowners had previously filed an identical lawsuit in a district court in violation of 28 U.S.C. § 1500.¹⁷⁰ Because the claimants had been diligent in filing a lawsuit, the Court of Federal Claims found it appropriate to construe the action as timely, even though the claimant had re-filed the action in the Court of Federal Claims more than six years after their claim had accrued.¹⁷¹

The Court of Federal Claims also used *Irwin's* standard in *Arakaki v. United States*.¹⁷² In that case, the Court of Federal Claims utilized *Irwin's* equitable tolling standard in considering the timeliness of a breach of contract claim against the Department of Housing and Urban Development that was originally (and perhaps incorrectly) filed in state court.¹⁷³ While *Arakaki* acknowledged the unsettled law regarding whether equitable tolling was applicable to § 2501, the court stated that it believed the “Federal Circuit [had] left the door open for a sufficiently compelling set of facts which would equitably toll section

166. See *infra*, n.178-79 and accompanying text.

167. *Irwin*, 498 U.S. at 95–96.

168. *Miller Farms*, 27 Fed. Cl. at 672–73, 675.

169. *Id.* at 672.

170. *Id.* at 673.

171. *Id.* at 672–73, 675.

172. *Arakaki v. United States*, 62 Fed. Cl. 244, 251 (Fed. Cl. 2004).

173. *Id.* at 246, 251.

2501.”¹⁷⁴ And indeed, *Arakaki* held that the claimant’s circumstances were sufficiently compelling to warrant application of equitable tolling as an alternative ground to construe the claim as timely.¹⁷⁵

However, *Miller Farms* and *Arakaki* would mostly prove to be exceptions, rather than the rule. The same year as *Miller Farms*, in *Catawba*, the Court of Federal Claims based its equitable tolling analysis on the concealment/inherently unknowable standard announced in *Japanese War Notes* rather than the more common equitable tolling standard from *Irwin*.¹⁷⁶ In affirming the Court of Federal Claims decision that the statute of limitations was not tolled, the Federal Circuit also relied upon the *Japanese War Notes* standard.¹⁷⁷ The Federal Circuit also suggested that avoiding “penalizing a plaintiff simply because under the circumstances plaintiff did not and could not have known of the facts upon which the claim is based” was “a traditional ground for equitably tolling a statute. . . .”¹⁷⁸

Another inconsistency in Tucker Act cases in the period after *Irwin* was regarding whether § 2501 was subject to equitable tolling at all, irrespective of which standard applied. While cases like *Miller Farms*, *Arakaki*, and *Catawba* interpreted *Irwin* as supportive of equitable tolling of § 2501,¹⁷⁹ many other cases questioned whether equitable tolling was permissible and noted the unsettled nature of the law.¹⁸⁰

Much (but not all) of the confusion about equitable tolling versus accrual suspension and the availability of equitable tolling in Tucker Act cases was resolved by *Martinez*,¹⁸¹ which clarified that equitable tolling is distinct from accrual suspension, and *John R. Sand & Gravel*,¹⁸² which established that § 2501 could not be equitably tolled.

174. *Id.* at 251.

175. *Id.* at 260.

176. *Catawba Indian Tribe of S.C. v. United States*, 24 Cl. Ct. 24, 31 (Cl. Ct. 1991), *aff'd*, 982 F.2d 1564, 1572–73 (Fed. Cir. 1993) (holding that the statute of limitations was not tolled when the facts underlying the claim were neither concealed nor inherently unknowable).

177. *Catawba Indian Tribe*, 982 F.2d at 1571.

178. *Id.* at 1572.

179. *See, e.g., George F. Miller Farms*, 27 Fed. Cl. at 674 (1993) (describing *Irwin* and *Catawba* as “leaving no doubt that § 2501 is subject to tolling”); *Catawba Indian Tribe*, 982 F.2d at 1571 (relying on *Irwin* for the proposition that equitable tolling is available against the United States and for § 2501); *Arakaki*, 62 Fed. Cl. 244, 251 (stating that the door had been “left open” for equitable tolling in an appropriate case).

180. *See, e.g., Frazer*, 288 F.3d at 1352–53 (stating that the court had “not previously determined whether § 2501 may ever be tolled or waived” and noting that the law regarding equitable tolling against the government is “less than clearly settled”).

181. *Martinez*, 333 F.3d at 1302–03.

182. *John R. Sand & Gravel*, 552 U.S. at 133–34.

In reaching the latter decision, the Supreme Court distinguished system-related (or jurisdictional) statutes of limitation—that is, statutes of limitation designed for a purpose such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency—from statutes whose purpose is merely to protect defendants against stale claims.¹⁸³ Implicit in this analysis is the rationale that when a statute of limitation has a system-based purpose like limiting the scope of a waiver of sovereign immunity, allowing equitable tolling operates as an extension of the waiver of such immunity and is therefore inappropriate.¹⁸⁴

Another key rationale for the *John R. Sand & Gravel* holding was *stare decisis*.¹⁸⁵ The Court emphasized that it was bound to follow prior Supreme Court precedents like *Kendall v. United States*,¹⁸⁶ *Finn v. United States*,¹⁸⁷ and *Soriano v. United States*¹⁸⁸ that treated § 2501 as being among the category of statutes of limitation setting a “more absolute” limitations period.¹⁸⁹ In the Court’s view, the existence of those precedents created an important distinction from the statute of limitation at issue in *Irwin*, despite the similar language of the two statutes, because the statute at issue in *Irwin* had not been subject to a “definitive earlier interpretation.”¹⁹⁰ More recent cases underscore this reasoning, observing that the distinction between *Irwin* and *John R. Sand & Gravel* “[comes] down to two words: *stare decisis*.”¹⁹¹

Not surprisingly, *John R. Sand & Gravel* had an immediate chilling effect on equitable tolling arguments; both the Court of Federal Claims and the Federal Circuit began refusing to consider claimants’ equitable tolling arguments, noting that *John R. Sand & Gravel* had

183. *Id.*

184. See *Levy v. United States*, 83 Fed. Cl. 67, 73 (Fed. Cl. 2008); *United States v. Kubrick*, 444 U.S. 111, 117–18 (1979) (stating that courts must be cautious of interpreting time bars in a manner that would “extend the waiver beyond that which Congress intended”).

185. *John R. Sand & Gravel*, 552 U.S. at 139.

186. *Kendall v. United States*, 107 U.S. 123 (1883) (holding that a predecessor to § 2501 could not be equitably tolled).

187. *Finn v. United States*, 123 U.S. 227 (1887) (holding that the principle that a defendant must plead the limitations period as a defense had “no application” to suits against the United States).

188. *Soriano*, 352 U.S. at 273–74 (rejecting claimant’s argument that § 2501 was suspended by war and stating that courts do not have any authority to add to the enumerated exception for disabilities in the statute).

189. *John R. Sand & Gravel*, 552 U.S. at 134–35 (citing *Finn*, 123 U.S. 227; *Kendall*, 107 U.S. 123; *Soriano*, 352 U.S. 270).

190. *Id.* at 137–38.

191. *Kwai Fun Wong*, 135 S. Ct. at 1635–36.

“foreclosed” equitable tolling of § 2501.¹⁹² However, it is also worth noting that though courts routinely cite *John R. Sand & Gravel* for the proposition that § 2501 cannot be waived or equitably tolled, the opinion’s analysis and holding have little to say about the equitable tolling doctrine itself. Though the correct accrual date was the subject of significant argument before both the Court of Federal Claims and the Federal Circuit, the claimant never argued that the limitations period should be tolled or suspended in any way, and the Court’s opinion does not contemplate whether the claimant’s circumstances could warrant equitable tolling if it were available.¹⁹³ Thus, while a prescription on equitable tolling is an inevitable consequence of *John R. Sand & Gravel*’s conclusion that § 2501 is jurisdictional, *John R. Sand & Gravel* does not provide much clarity about the complex and often confusing interplay of claim accrual standards and exceptions in Tucker Act cases.

In contrast to the clear impact on equitable tolling arguments, *John R. Sand & Gravel* did not have a similar chilling effect on the assertion of accrual suspension arguments. In fact, one perhaps unanticipated effect of the *John R. Sand & Gravel* decision was that the Court of Federal Claims began to *more* frequently consider whether superficially untimely cases might be resurrected through the accrual suspension rule. This is in part because with equitable tolling prohibited, in many cases the Court of Federal Claims applied the accrual suspension rule standard to any tolling argument. In other words, *John R. Sand & Gravel* amplified rather than minimized use of the accrual suspension rule.

III. RECONCILING EQUITABLE TOLLING AND THE ACCRUAL SUSPENSION RULE

A decade after *John R. Sand & Gravel*, which held that the limitations period for Tucker Act cases was not subject to equitable tolling, courts in the Federal Circuit have continued to consider whether the limitations period should nonetheless be extended by application of the accrual suspension rule. The justification for this approach is that these two doctrines are distinct, so extending the limitations period through the accrual suspension rule is not technically equitably

192. *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (stating that equitable tolling is foreclosed by *John R. Sand & Gravel*).

193. *See John R. Sand & Gravel Co. v. United States*, 57 Fed. Cl. 182 (2003); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345 (2006); *John R. Sand & Gravel*, 552 U.S. at 133-39.

tolling the rule. However, while the doctrines do have some differences, an examination of their purposes, application, and historical usage in Tucker Act cases reveals that these two doctrines are sufficiently functionally similar that allowing the accrual suspension rule is essentially an end run around the prohibition on the equitable tolling doctrine.

A. Comparing the Doctrines on Their Face

On their face, the accrual suspension rule and the equitable tolling doctrine are different doctrines, and indeed, there are certainly some significant differences between the doctrines. The doctrines have different standards, a different effect on the statute of limitation, and to some degree, different applications. On the other hand, the doctrines also bear significant similarities in their application and effect. There is substantial overlap in the respective standards of the doctrines and similarity in terms of how they apply, and in the specific context of the Tucker Act, many cases have treated the doctrines as essentially interchangeable in application and purpose.

One of the most obvious sources of support for the argument that the accrual suspension rule and equitable tolling should be seen as distinct is that courts have repeatedly emphasized that the doctrines *are* distinct—though it is worth noting that these assertions usually occur as a justification for using the accrual suspension rule despite the proscription on equitable tolling. *Martinez*, for example, explained that even though courts and claimants sometimes use the word “tolling” to describe the accrual suspension rule, the rule is distinct from the question of whether equitable tolling is available.¹⁹⁴ More specifically, *Martinez* explained that accrual suspension derives from the term “accrues,” and, therefore, is a matter of statutory interpretation, not equitable tolling. Similarly, in *Ingrum*, the Court of Federal Claims noted that in light *John R. Sand & Gravel*, invoking equitable tolling rather than the accrual suspension is “a distinction *with a difference*,”¹⁹⁵ given that accrual suspension was permissible while equitable tolling was not.

On the other hand, other cases emphasize the similarities between the two standards. One such similarity is that both doctrines seek to address unfairness: “Equitable tolling is an exception similar

194. *Martinez*, 333 F.3d at 1303.

195. *Ingrum v. United States*, 81 Fed. Cl. 661, 666 n.6 (2008), *aff'd*, 560 F.3d 1311 (Fed. Cir. 2009) (emphasis added).

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to accrual suspension in that it addresses instances of unfairness where misconduct of a party is evident; it requires a showing of compelling justification amounting to misconduct.”¹⁹⁶ The doctrines are also similar in that both are intended to be applied only narrowly and sparingly.¹⁹⁷

Another distinction between the doctrines is simply that the standards, on their face, are different. In particular, the accrual suspension rule applies where the United States has concealed a claim from a claimant or where the claimant’s claim is “inherently unknowable.” Equitable tolling, on the other hand, permits a plaintiff to avoid the limitations period if “despite all due diligence,” the plaintiff is unable to obtain “vital information bearing on the existence” of the claim.¹⁹⁸ More specifically, equitable tolling applies (at least against the United States) “where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period” or where the claimant “has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.”¹⁹⁹ The obvious divergence in these two standards is that equitable tolling would provide relief to some claimants that would not benefit from the accrual suspension rule and vice versa. For example, while equitable tolling can extend the limitations period for a claimant who has filed a defective pleading within the statutory period, the accrual suspension rule would not provide similar relief, as a claim that was the subject of a filed pleading (defective or not) would certainly not be unknowable. Similarly, while accrual suspension could provide relief to a claimant who had no reason to know that a claim existed, equitable tolling—at least as described in *Irwin*—would not provide an obvious means for relief for that same claimant unless the claimant’s lack of knowledge was due to a defendant’s misconduct.

Despite the divergences in the standards, however, the standards share significant commonalities. The concealment prong of the accrual suspension rule, which requires deliberate or fraudulent action by the United States, overlaps substantially with the availability of eq-

196. *Raytheon Co. v. United States*, 104 Fed. Cl. 327, 331–32 (2012).

197. *See, e.g., Welty*, 135 Fed. Cl. at 545 (stating that the accrual suspension rule must be applied strictly and narrowly); *Massard v. Sec’y of Dept. of Health & Human Serv.*, 25 Cl. Ct. 421, 424 (1992) (noting that waivers of sovereign immunity must be construed narrowly, and that equitable tolling is extended “only sparingly”).

198. *Land Grantors in Henderson, Union, & Webster Ctys., Ky. v. United States*, 64 Fed. Cl. 661, 711–13 (2005).

199. *Irwin*, 498 U.S. at 96.

uitable tolling where a claimant was “induced or tricked” by a defendant’s conduct.²⁰⁰ And, as alluded to above, both doctrines would theoretically protect a claimant who had no reason to know of a claim before the filing deadline in cases where the claimant’s lack of knowledge was a result of a defendant’s misconduct.

A final distinction between the doctrines is that they operate slightly differently in terms of how each extends the limitations period. As discussed in more detail above, the accrual suspension rule operates to suspend accrual of a claim where accrual “has been ascertained but a claimant does not yet know of the claim.”²⁰¹ Thus, while tolling suspends the limitations period “during the pendency of the claim, that is, once the claim has accrued,” the accrual suspension rule extends the limitations period by delaying the *commencement* of the accrual period, even though the point of accrual has objectively occurred.²⁰² In other words, equitable tolling freezes a ticking clock, whereas accrual suspension prevents the clock from ticking in the first place.²⁰³ However, despite this difference, both doctrines have the same ultimate effect: each extends the limitations period, allowing cases not filed within § 2501’s six-year limitation period to proceed.

B. How the Doctrines Have Been Treated in the Tucker Act Context

The overall similarities between equitable tolling and accrual suspension are more pronounced in the specific context of Tucker Act cases. While equitable tolling and the accrual suspension rule may be distinct, the reality is that courts have used them interchangeably in many Tucker Act cases. Understanding the trends in and interplay between these doctrines illustrates that for the purpose of Tucker Act claims, equitable tolling and the accrual suspension rule, though different in some respects, are means to the same end.

The similarities are particular apparent when examining the evolution of the approaches of both claimants and the Court of Federal Claims to these accrual doctrines have over time. In doing so,

200. *Id.*

201. *Ram Energy*, 94 Fed. Cl. at 411.

202. *Stanley v. United States*, 107 Fed. Cl. 94, 99 (2012) (explaining the distinction between tolling a limitations period and suspending accrual). *See also* *Uniglobe Gen. Trading & Contracting Co., W.L.L. v. United States*, 107 Fed. Cl. 423 (2012) (noting that while accrual suspension might delay the commencement of a limitations period, a jurisdictional statute of limitations cannot be equitably tolled once a claim has accrued).

203. *Stanley*, 107 Fed. Cl. at 99.

two decisions stand out in terms as demarcation points. First, in 2003, the Federal Circuit decided *Martinez v. United States*,²⁰⁴ which first gave a name to the accrual suspension rule and suggested that this rule was in fact distinct from equitable tolling. Second, in 2008, the Supreme Court decided *John R. Sand & Gravel*,²⁰⁵ which held that equitable tolling was not available in Tucker Act cases. Thus, the trends in application of these accrual doctrines can be roughly broken into three eras: from the mid-twentieth century through the early 2003, when the Federal Circuit decided *Martinez*; from 2003 through 2008, when the Supreme Court decided *John R. Sand & Gravel*; and from 2008 until the present.

From the mid-twentieth century through the early 2003, Tucker Act claimants often presented—and the Court of Federal Claims considered—arguments that § 2501’s limitations period could be tolled or extended through either equitable tolling or suspension of accrual (or less commonly, both).²⁰⁶ However, though a minority of cases treated these doctrines distinctly, many more commingled or conflated the analysis and application of these doctrines, and at times courts treated them as essentially interchangeable.²⁰⁷ In particular, most cases in this era that purportedly considered equitable tolling did so by applying the accrual suspension standard; in other words, courts seemed to take the position that the standard for equitable tolling in Tucker Act cases was what courts would later call the accrual suspension rule.²⁰⁸

Beginning in 2003, the Federal Circuit explicitly recognized accrual suspension as a separate doctrine from equitable tolling, and most cases began to treat equitable tolling and accrual suspension more distinctly.²⁰⁹ Unlike in the previous era, courts considering whether equitable tolling was available began to do so using the traditional equitable tolling standard used in other contexts. At the same time, a significant number of cases in this era began to question whether equitable tolling should be available for § 2501 at all, though most opinions declined to reach that issue.²¹⁰

204. *Martinez*, 333 F.3d at 1319.

205. *John R. Sand & Gravel*, 552 U.S. at 133–34.

206. *See supra* section III.

207. *See supra* discussion in section III.B.

208. *Id.*

209. *See, e.g., Martinez*, 333 F.3d at 1319.

210. *See, e.g., Frazer*, 288 F.3d at 1352 (stating that the court had “not previously determined whether § 2501 may ever be tolled or waived” and noting that the law regarding equitable tolling against the government is “less than clearly settled”).

In 2008, the landscape changed significantly as *John R. Sand & Gravel* made clear that equitable tolling was in fact not available for § 2501.²¹¹ As a result, courts began to reject equitable tolling arguments outright and often construed any tolling argument as an argument for suspension of accrual.²¹² As claimants adjusted to the post-*John R. Sand & Gravel* landscape and stopped making equitable tolling arguments, both claimants and courts began to focus more on accrual suspension. Indeed, the Court of Federal Claims has continued to consider extending the limitations period for Tucker Act claims using the accrual suspension rule²¹³—the same doctrine that many cases has treated as interchangeable with equitable tolling in the not-so-distant past.

Examining cases that confuse or conflate equitable tolling and accrual suspension standards demonstrate that in the context of Tucker Act cases, these doctrines are not sufficiently different as to justify such different treatment.²¹⁴ For example, in discussing a claimant's equitable tolling argument in *D'Andrea v. United States*, the Court of Federal Claims noted that federal courts had only sparingly allowed equitable tolling against the United States, but listed concealment or an unknowable claim as “additional circumstances” that would allow a statute of limitations to be suspended.²¹⁵ Similarly, in *Campbell v. United States*, the Court of Federal Claims stated that the claimant's request that the court toll the statute of limitations due to government concealment merited “careful thought.”²¹⁶ Despite the purported consideration of “tolling,” the Court of Federal Claims relied upon and cited to the standard from *Japanese War Notes* in ultimately rejecting the argument.²¹⁷

211. *John R. Sand & Gravel*, 552 U.S. at 132–34.

212. *Levy*, 83 Fed. Cl. at 75 (stating that equitable tolling is not available “at all” in Tucker Act cases after *John R. Sand & Gravel*).

213. *See, e.g., Ladd v. United States*, 713 F.3d 648, 652–53 (Fed. Cir. 2013) (holding that the accrual suspension rule applied to extend the limitations period).

214. While some courts have noted that the word “tolling” is sometimes used in conjunction with the accrual suspension rule, even though that doctrine technically involves suspension of accrual not tolling, it is not the case that the conflation evidence in this area is mere semantics. Though some cases certainly use the word “tolling” innocuously instead of accrual suspension, many others refer explicitly to “equitable tolling” and rely on other precedents related to equitable tolling before ultimately relying upon a standard related to suspension of accrual.

215. *D'Andrea v. United States*, 27 Fed. Cl. 612, 615 (Fed. Cir. 1993), *aff'd*, 6 F.3d 786 (Fed. Cir. 1993).

216. *Campbell v. United States*, 16 Cl. Ct. 690, 698–99 (1989).

217. *Id.*

Conflation of suspension of accrual and equitable tolling persisted even in much more recent cases, such as the 2001 Court of Federal Claims decision (affirmed by the Federal Circuit in 2003) *Callahan v. United States*.²¹⁸ In *Callahan*, the Court of Federal Claims responded to the plaintiff's assertion that equitable tolling excused his failure to comply with the statute of limitations by stating the accrual suspension standard *and* the more typical equitable tolling standard from *Irwin*.²¹⁹ In concluding that tolling was not warranted, the court commingled the standards even more directly, explaining that the claimant had not established that the government fraudulently induced the claimant (an aspect of both equitable tolling and accrual suspension), that the claim was inherently unknowable (an aspect of accrual suspension), or that the claimant had filed a timely but defective pleading (an aspect of equitable tolling).²²⁰

Similar conflation is evident in other relatively recent cases as well. In *Central Pines Land Co. v. United States*, decided in 2004, the court stated that “as an equitable matter,” the court had “discretion to toll the statute of limitations where the facts giving rise to the claim were either inherently unknowable or intentionally concealed at the accrual date.”²²¹ In *Bolduc v. United States*, in 2007, the Court of Federal Claims stated that it had “recognized the applicability of equitable tolling to section 2501,” explaining that the limitations period is tolled when a plaintiff “did not and could not have known of the facts upon which a claim is based.”²²² And in *Voisin v. United States*, in 2008, the Court of Federal Claims accepted the United States' assertion that equitable tolling of § 2501 is only permissible when a plaintiff shows government concealment or an inherently unknowable injury.²²³

Another way to interpret this conflation is that—at least in this context—most historical equitable tolling cases *are* accrual suspension cases. And in some instances, courts have essentially acknowledged as much. For example, in *Banks v. United States*, the Court of Federal Claims called the accrual suspension rule “a form of equitable tolling

218. *Callahan v. United States*, 49 Fed. Cl. 555, 558 (2001), *aff'd*, 56 F. App'x 947 (Fed. Cir. 2003).

219. *Id.*

220. *Id.*

221. *Cent. Pines Land Co. v. United States*, 61 Fed. Cl. 527, 533 (2004).

222. *Bolduc v. United States*, 72 Fed. Cl. 187, 194–95 (2006), *aff'd*, 248 Fed. Appx. 162 (Fed. Cir. 2007).

223. *Voisin v. United States*, 80 Fed. Cl. 164, 171–72 (2008).

with broader application.”²²⁴ Similarly, in *Sette v. United States*, the Court of Federal Claims observed that few if any Tucker Act claimants had successfully argued for equitable tolling except for instances of fraud or defective pleading.²²⁵ Based on that observation, the court concluded that “with respect to section 2501, in other words, equitable tolling means no more than that the more traditional concepts of fraudulent concealment and inherent unknowability will be applied.”²²⁶ But if in the context of Tucker Act cases, equitable tolling means no more than the accrual suspension rule, must not *John R. Sand & Gravel*’s proscription of equitable tolling also prohibit the suspension of accrual?

As discussed above, *John R. Sand & Gravel* based its ruling that equitable tolling was impermissible in Tucker Act cases on the rationale that a system-related and jurisdictional statute of limitation cannot be equitably tolled or waived.²²⁷ This rationale is grounded in the theory that when a statute of limitation has a system-related purpose like preserving sovereign immunity, allowing additional exceptions to the statute beyond those included in the statute operates as an additional (and impermissible) waiver of that immunity.

Given the rationale of *John R. Sand & Gravel* and given the intertwined history of equitable tolling and the accrual suspension rule in Tucker Act cases, using the accrual suspension rule to extend the limitations period implicates the same principles of sovereignty that *John R. Sand & Gravel* sought to protect. While suspension of accrual remains rare and thus arguably has a limited impact on the United States’ immunity, its potential to impermissibly infringe on such immunity nonetheless violates the spirit of *John R. Sand & Gravel*, which sought to avoid expanding the United States’ waiver of sovereign immunity.

IV. CHARTING A PATH FORWARD

If one accepts that use of the accrual suspension rule indeed violates the spirit of *John R. Sand & Gravel*, there are several potential paths forward.

First, in recognition of the substantial historical overlap between equitable tolling and the accrual suspension rule in the Tucker Act

224. *Banks v. United States*, 120 Fed. Cl. 29, 37 n. 4 (2015).

225. *Sette v. United States*, 42 Fed. Cl. 37, 39 (1998), *aff’d*, 217 F.3d 855 (Fed. Cir. 1999).

226. *Id.*

227. *John R. Sand & Gravel*, 552 U.S. at 133–34.

context, courts could refuse to allow claimants to extend the limitations period using the accrual suspension rule (at least as long as *John R. Sand & Gravel* remains good law). While this would respect the spirit of *John R. Sand & Gravel*'s concerns about infringement on the sovereignty of the United States, a consequence of this approach would be that claimants with legitimate reasons for missing the statutory deadline would be without any remedy for legitimate claims. For example, even when it was virtually impossible for a claimant to become aware of a claim at the time of accrual, the claimant would be unable to pursue the claim when information became available. With respect to situations where information about a claim was concealed, the implications are even more startling: a claimant would not have a remedy even if the reason for the claimant's delay in filing was that the government had *intentionally* concealed information about a claim from the claimant. In addition to appearing unjust on its face, this outcome flies in the face of the Tucker Act's purpose of allowing claimants to recovery from the United States for legitimate claims.

A second option is for courts to ignore the inconsistency between use of the accrual suspension rule and *John R. Sand & Gravel*'s prescription on equitable tolling and to continue to use the accrual suspension rule to provide relief to claimants. On one hand, this approach is appealing because it would continue to ensure that claimants with a valid claim against the United States have a means to recover, even when their claims are delayed due to circumstances outside their control. As is the case now, a claimant would be able to proceed with a claim despite the expiration of the statutory period in cases where the claimant's delay in filing was due to government concealment or a lack of notice sufficient to make the claim inherently unknowable.

On the other hand, this approach is problematic because it perpetuates the very inconsistencies and concerns that gave rise to this article. For example, a claimant who believes that the government concealed information about his claim cannot argue that the claim should be equitable tolled, but *can* argue that accrual of the claim should be suspended. While there is a distinction between the technical mechanism of tolling the statute of limitations versus suspending accrual of the claim, the reality nonetheless is that the same facts regarding concealment would allow the claimant to proceed with his claim under one doctrine but not the other. While the discrepancy in the outcome of a claimant's choice to argue one doctrine over the

other can be resolved as a practical matter—for example, by a court interpreting an argument for equitable tolling as one for accrual suspension—that practical resolution does not resolve the problem that simply using different terminology allows a claimant to obtain the very relief that *John R. Sand & Gravel* foreclosed. More generally, this approach does not address the continuing discrepancy of refusing to allow equitable tolling but continuing to consider whether to extend the limitations period in what essentially amount to equitable circumstances. In this sense, this approach does not address the concern that the Federal Circuit’s use of the accrual suspension rule directly undermines the Supreme Court’s holding in *John R. Sand & Gravel*.

Given the potential pitfalls of the previous options, a third and more preferable option is to advocate for overturning or at least clarifying *John R. Sand & Gravel*. If *John R. Sand & Gravel* were overturned, reversing its holding that § 2501 is jurisdictional, the discrepancy between prohibiting equitable tolling while allowing accrual suspension would be eliminated. In addition, this option would avoid a situation in which claimants with legitimate but delayed claims are left without a remedy, as would be the case if courts began recognizing that the accrual suspension rule is essentially equitable tolling by another name. Overturning *John R. Sand & Gravel* would resolve a significant practical conflict between precedent and practice. One rationale for reversing *John R. Sand & Gravel*, in addition to resolving the practical conflict noted above, is that it is an outlier in many respects from an otherwise consistent trend toward treating statutes of limitation as non-jurisdictional and interpreting waivers of immunity less strictly.²²⁸

Short of overturning *John R. Sand & Gravel*, it is also possible to resolve the conflict between the prohibition on equitable tolling and the continued use of the accrual suspension rule by clarifying *John R. Sand & Gravel*’s holding and meaning. As discussed above, *John R. Sand & Gravel*, though universally interpreted as proscribing equitable tolling, actually gave little attention to that doctrine in its holding.²²⁹ Because neither the litigants nor the lower courts discussed equitable tolling at any length, the Court’s ruling was not directed at any concrete equitable tolling argument, and it is unclear exactly what

228. See *supra* notes 153–55 and accompanying text.

229. See *supra* note 192 and accompanying text.

types of arguments the Court actually intended to preclude. For example, did the Court intend to proscribe tolling of the limitations period for the most traditional category of equitable tolling claims—situations in which a plaintiff has timely filed a defective pleading—while leaving the door open for arguments regarding active government concealment of information (which could presumably be construed as arguments for fraudulent concealment or the discovery rule or accrual suspension)? Or did the Court truly intend to bar equitable tolling in the broadest sense, which would have the practical consequence of limiting the use of these latter doctrines instead? To resolve this uncertainty, advocates should raise these issues in future cases, giving the Court an opportunity to clarify the distinction between the broad array of arguments that potentially fall within the equitable tolling umbrella.

CONCLUSION

The jurisdiction of the Court of Federal Claims serves an important purpose in our legal system. Without the Court of Federal Claims and the jurisdiction given to it by the Tucker Act, many claimants injured by their own government not would be able to seek any meaningful recovery for their injuries.

When *John R. Sand & Gravel* concluded that equitable tolling is not available for Tucker Act cases, it took away a remedy from past and future claimants with a valid claim who did not (or will not), due to a variety of extraordinary circumstances, file a lawsuit within the six-year limitations period. While the accrual suspension rule has helped maintain an avenue for relief for some of those claimants, allowing suspension of accrual while prohibiting equitable tolling creates an unfair and unsustainable dichotomy. In order to remedy this inconsistency, courts must clarify the differences (if any) between these two doctrines and ensure that claimants who are victims of concealment, lack of notice, or other extraordinary circumstances are nonetheless able to pursue a remedy. This could be accomplished by overturning *John R. Sand & Gravel* or by simply revisiting and clarifying the doctrine in future cases.

A Philosophical Basis for Judicial Restraint

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“Judges ought to remember that their office is jus dicere, and not jus dare; to interpret law, and not to make law or give law.”

Francis Bacon, 1626

The purpose of this article is to establish a principled basis for restraint of judicial lawmaking. The principle is that all findings of fact, whether of legislative or adjudicative facts, must be based on evidence in the record of a case. This principle is grounded in moral philosophy. I will begin with a discussion of the relevant aspect of moral philosophy, then state and defend the principle, and finally apply it to a line of cases.

I. MORAL PHILOSOPHY

A profound issue in law and in ethics is whether to judge a case or an act by considerations *a priori* or *a posteriori*.¹ Once the choice is made, a principled way to constrain judicial lawmaking emerges.

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1. See generally Bruce Russell, *A Priori Justification and Knowledge*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 19, 2014), <https://plato.stanford.edu/entries/apriori/>; Michael DePaul & Amelia Hicks, *A Priorism in Moral Epistemology*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 28, 2016), <https://plato.stanford.edu/archives/fall2016/entries/moral-epistemology-a-priori>.

To judge *a posteriori* (Latin for “from what comes after”) is to judge based on the future, in other words, based on consequences.² In law, a policy argument is *a posteriori*: “If the court rules in favor of my client, children will go to bed on time without protest, and peace will come to the Middle East; but if the court rules against my client, birds will no longer sing, and husbands and wives will argue endlessly.” In ethics, a utilitarian argument is *a posteriori*: “Given the choice between drinking champagne or contributing to the home for retired professors, the latter is the moral choice because it will produce more happiness for more persons.”

To judge *a priori* (Latin for “from what comes before”) is to judge based on the past, in other words, rules or standards.³ In law, an argument based on precedent is *a priori*: “*Up v. Down* is analogous to *Back v. Forth* and therefore should have the same outcome.” A contract is *a priori*: “The creditor was entitled to assess a late fee because the contract requires payment by the twenty-fifth of each month and adds a fee of thirty-nine dollars for a late payment, and the debtor’s check reached the creditor on the twenty-sixth.” In ethics, a deontological argument is *a priori*: “One has a duty to show respect to one’s teachers.”

Arguments *a priori* and *a posteriori* are equally legitimate, and I know of no generally accepted method of choosing between them when such arguments point in opposite directions in a case. In this essay, I will propose a method to make such a choice.

Before explaining this method, however, I must consider two common ways of choosing between arguments, whether they be of the same type (e.g. *a priori* versus *a priori*) or of different types (*a priori* versus *a posteriori*). One common way of choosing between arguments is to identify a flaw in one of the arguments: “*Left v. Right* is not a precedent for the case at bar because the cases are distinguishable in that . . .” or “The rule advocated by the plaintiff will not lead to . . ., but will lead instead to . . .” This method of choosing between arguments is legitimate (though I will have a few words to say below on predictions). A flawed argument is no basis for decision.

A second common way of choosing between competing arguments occurs when the arguments are not flawed. Indeed, they are forcible and, upon reading them, for example, in majority and dissent-

2. Russell, *supra* note 1.

3. *Id.*

ing opinions, a reasonable, informed, and disinterested person says to oneself, “I don’t know why the judges voted as they did.” Typically, the judges write (if they write anything at all on the choice), “Argument *A* outweighs argument *B*” or “*A* is stronger than *B*” or “*A* is more convincing than *B*.” Of course, this is not an explanation, but a choice without a justification. The choice may be based on a reason present in the judge’s mind, but the judge prefers not to express it. The choice may be based on a reason inchoate in the judge’s mind, though not formed sufficiently for the judge to articulate. The choice may be based on no reason at all other than a feeling. Whatever the reason, a choice based on it is not exposed to the adversarial process and, as a result, is subject to error, bias, and caprice, and has no place in reasoned discourse. If a judge is confronted with competing, unflawed arguments and cannot, or will not, articulate a reasoned basis for choosing between them, the judge should recuse oneself from the case. If all judges of a court recuse themselves, resolution of the issue may better be left to another court or agency of government.

Now suppose that an argument *a priori* and an argument *a posteriori* stand in competition, and neither is flawed. Must an honest judge recuse oneself from the decision? The answer is no. A principled method exists for choosing between such arguments.

As I stated at the outset of this essay, the struggle between arguments *a priori* and arguments *a posteriori* is profound. It is also longstanding, and it is enshrined in competing schools of thought. Consequentialists hold that decisions should be grounded on *a posteriori* facts, that is, consequences of actions.⁴ Deontologists (New Latin for “those who study duty”) hold that decisions should be grounded on *a priori* principles, that is, duties or norms.⁵ Not surprisingly, hybrid or mixed schools exist, which I will call “non-consequentialism.” Non-consequentialists hold that decisions may be grounded on consequences, on duties, or on both.⁶ I intend to show that, correctly understood, the differences among these schools disappear.

4. See Larry Alexander & Michael Moore, *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 17, 2016), <https://plato.stanford.edu/entries/ethics-deontological/> (“Consequentialists hold that choices—acts and/or intentions—are to be morally assessed solely by the states of affairs they bring about.” § 1, Deontology’s Foil: Consequentialism); see also Michael Slote, *Satisficing Consequentialism*, in PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUMES 140–142 (Blackwell Publishing 1984).

5. Alexander & Moore, *supra* note 4 (“For such deontologists, what makes a choice right is its conformity with a moral norm.” § 2, Deontological Theories.”).

6. *Id.*

Nonetheless, conflict between arguments *a priori* and *a posteriori* will continue to occur. I will show that, based on a correct understanding, a method exists to weigh deontological and consequential arguments against one another.

Every moral theory has two elements: a theory of the good and a theory of right action that leads to the good.⁷ For a utilitarian, the good is happiness and right action maximizes happiness.⁸ (“Utility” is a synonym for “happiness.”) Thus, utilitarianism is a consequentialist theory: an act is right or wrong depending on whether it has the consequence of maximizing happiness. I am agnostic on utilitarianism’s theory of the good, but I embrace consequentialism because of three insights in John Stuart Mill’s essay *Utilitarianism*.

A.

The first insight is that, however vigorously a deontologist may eschew arguments *a posteriori*, in the end, the only reason a deontologist can provide for a moral law is consequential:

Nor is there any school of thought which refuses to admit that the influence of actions on happiness is a most material and even predominant consideration in many of the details of morals, however unwilling to acknowledge it as the fundamental principle of morality and the source of moral obligation. I might go much further, and say, that, to all those *à priori* moralists who deem it necessary to argue at all, utilitarian arguments are indispensable. It is not my present purpose to criticize these thinkers; but I cannot help referring, for illustration, to a systematic treatise by one of the most illustrious of them—the “Metaphysics of Ethics,” by Kant. This remarkable man, whose system of thought will long remain one of the landmarks in the history of philosophical speculation, does, in the treatise in question, lay down an universal first principle as the origin and ground of moral obligation. It is this: “So act, that the rule [or maxim] on which thou actest would admit of being adopted as law by all rational beings.” But, when he begins to deduce from this precept any of the actual duties of morality, he fails, almost

7. See, e.g., David Lyons, *Utilitarianism*, in *ENCYCLOPEDIA OF ETHICS* 1261, 1262 (Lawrence Becker & Charlotte Becker eds., 1992) (“A utilitarian theory may be seen as combining (1) a conception of ‘intrinsic’ value, or fundamental good, which says how consequences are basically to be appraised, with (2) a view about the relation between ‘rightness’ and ‘goodness,’ i.e., between morally required or defensible conduct and the intrinsic value that can be realized”); STEVEN CAHN & ANDREW FORCEHIMES, *PRINCIPLES OF MORAL PHILOSOPHY* 4, 6 (2017).

8. See Julia Driver, *The History of Utilitarianism*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Sept. 22, 2014), <https://plato.stanford.edu/entries/utilitarianism-history/>.

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grotesquely, to show that there would be any contradiction, any logical (not to say physical) impossibility, in the adoption by all rational beings of the most outrageously immoral rules of conduct. All he shows is, that the *consequences* of their universal adoption would be such as no one would choose to incur.⁹

Mill does not accomplish what he essays. His rendition of “Kant’s ‘universal first principle’” is accurate enough. (Kant himself calls it the “categorical imperative,” and renders it, “Act only in accordance with that maxim which you at the same time can will that it become a universal law.”¹⁰) Then Mill asserts that utilitarian arguments are indispensable to the theories of *a priori* moralists, a group that includes Kant.¹¹ This assertion is ambiguous. It could mean that utilitarian arguments are indispensable to establishing that the categorical imperative is the universal first principle. Alternatively, the assertion could mean that a duty that can be deduced from the categorical imperative cannot be justified on the ground that the opposite of that duty would be physically or logically impossible, but can be justified only on the ground that the opposite duty would have intolerable consequences. Regrettably, Mill disappoints us with whichever interpretation we choose, for he offers neither evidence nor argument to support the assertion. Yet support for one or the other of these interpretations seems essential to the viability of consequentialism. I shall not attempt to support the first interpretation (that consequential arguments are indispensable to establishing the categorical imperative). I think that this meaning is the less plausible interpretation of Mill’s assertion, and, even if Mill intended this meaning, I doubt that it is true because I suspect that the categorical imperative rests on intuition. Instead, I will stand on a proposition, the truth of which Mill evidently thinks, and I agree, is self-evident: Kant’s attempt to defend a system of ethics based solely on reasons *a priori* would be significantly weakened by the second interpretation (that Kant’s own applications of the categorical imperative are justifiable only by their consequences). My goal will be to prove that Kantian duties are justifiable only by reasons *a posteriori*.

9. JOHN STUART MILL, UTILITARIANISM 8–9 (The Floating Press 2009) (1879) [hereinafter UTILITARIANISM].

10. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS, 119 (Allen W. Wood ed., 2002)(1797) (emphasis deleted) [hereinafter METAPHYSICAL FOUNDATIONS].

11. UTILITARIANISM, *supra* note 9, at 9.

In the treatise which Mill mentions (the title of which has been variously translated¹²), Kant applies the categorical imperative to four cases. Suicide is the first:

1. A man, while reduced to despair by a series of misfortunes and feeling wearied of life, is still so far in possession of his reason that he can ask himself whether it would not be contrary to his duty to himself to take his own life. Now he inquires whether the maxim of his action could become a general law of nature. His maxim is: Out of self-love I consider it a principle to shorten my life when continuing it is likely to bring more misfortune than satisfaction. The question then simply is whether this principle of self-love could become a general law of nature. Now we see at once that a system of nature, whose law would be to destroy life by the very feeling designed to compel the maintenance of life, would contradict itself, and therefore could not exist as a system of nature; hence that maxim cannot possibly be a general law of nature and consequently it would be wholly inconsistent with the supreme principle of all duty.¹³

Mill claims correctly that Kant fails to show a physical or logical impossibility. Obviously, suicide is not physically impossible. Is it a logical contradiction? One may doubt that suicide is based on “self-love”; perhaps self-loathing and despair are better candidates. One may also doubt that self-love is “designed to compel the maintenance of life.” The obvious response to this teleological, indeed, religious argument in disguise, is to ask, by whom or what was self-love designed, and how do we know that it was designed for this purpose? A Kantian today might improve the argument by casting it in evolutionary terms: humans have evolved self-love, and it promotes life. But even accepting that suicide is based on self-love and that self-love promotes life, I find no contradiction in believing that we have no duty to express an evolved trait. Humans have evolved to take revenge on those who injure us, but we have no duty to act on this instinct. Nor do I find a contradiction in believing that self-love promotes life only so long as life is valuable. Would self-love prohibit suicide if one were suffering from a terminal and painful illness, or if the sacrifice of one’s life would save the lives of several others? Mill also claims that Kant shows only that the consequences of what he condemns would be un-

12. See, e.g., METAPHYSICAL FOUNDATIONS, *supra* note 10; IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS (Thomas Kingsmill Abbott, trans., Global Grey 2018) (1785) [hereinafter METAPHYSICS OF MORALS].

13. METAPHYSICAL FOUNDATIONS, *supra* note 10, at 170–71.

acceptable, and again Mill is correct.¹⁴ Kant's conclusion about suicide—but not his reasoning—is right because a duty or “principle to shorten [one's] life” when one is in despair would have intolerable consequences.¹⁵

I will discuss Kant's second application of the categorical imperative below. His third application is developing one's talents:

3. A third man finds in himself a talent which with the help of some education might make him a useful man in many respects. But he finds himself in comfortable circumstances, and prefers to indulge in pleasure rather than to take pains in developing and improving his fortunate natural capacities. He asks, however, whether his maxim of neglecting his natural gifts . . . agrees also with what is called duty. He sees that nature could indeed subsist according to such a general law, though men (like the South Sea Islanders) let their talents rust and devote their lives merely to . . . enjoyment. Be he cannot possibly *will* that this should be a general law or nature. . . . For, as a rational being, he necessarily wills that his faculties be developed, since they have been given to serve him for all sorts of possible purposes.¹⁶

Let us ignore the unsavory implication that South Sea Islanders, and others who do not develop their talents, are not rational beings, and instead focus on Kant's reason that duty requires us to develop our faculties. The reason is that a rational being “necessarily wills that his faculties be developed, since they have been given to serve him for all sorts of possible purposes.”¹⁷ This argument, like the one about suicide, is teleological, if not religious, and my response to its modernized form is similar: that a trait has evolved does not entail that it be expressed. In addition, I see no reason why a rational being could not live by the maxim, “I will pursue my pleasure as long as I do not interfere with another's doing the same.” On this maxim, one has no duty to develop one's talents. Kant is right that developing one's talents is desirable, not because one cannot rationally fail to do it, but because the consequences of developing one's talents are usually better for oneself and others.

Charity is another application of the categorical imperative:

4. A fourth, prosperous man, while seeing others whom he could help having to struggle with great hardship thinks: What concern is

14. *Id.*

15. *Id.*

16. *Id.* at 171–72.

17. *Id.*

it of mine? Let everyone be as happy as heaven pleases or as he can make himself. I will take nothing from him nor even envy him, but I do not wish either to contribute anything to his welfare or assist him in his distress. There is no doubt that if such a way of thinking were a general law, society might get along very well But although it is possible that a general law of nature might exist in terms of that maxim, it is impossible to *will* that such a principle should have the general validity of a law of nature. For a will which resolved this would contradict itself, inasmuch as many a time one would need the love and sympathy of others and by such a law of nature, sprung from one's own will, one would deprive himself of all hope of the aid he desires.¹⁸

Kant acknowledges that Ayn Rand's world is not a physical impossibility, but argues that one could not logically will it to exist because "many a time one would need the love and sympathy of others and . . . one would deprive himself of all hope of the aid he desires."¹⁹ This argument is superior to the ones about suicide and developing talents because this one does not assume the existence of a grand design or designer. Nonetheless, the argument depends on another assumption: everyone needs love and sympathy. Although this assumption is questionable—surely some persons never need charity—I will accept it *arguendo*.

The question becomes, could a rational being live by the maxim, "I will take nothing from him . . . [and] I do not wish either to contribute anything to his welfare or assist him in his distress"²⁰ Kant concedes that "it is possible that a general law of nature might exist in terms of that maxim."²¹ However, he adds, "[I]t is impossible to *will* that such a principle should have the general validity of a law of nature."²² I suspect that many persons would indeed will such a law in exchange for freedom from incessant requests for charity. Kant must mean that one cannot with logical consistency desire such a law to exist. Why not? Because, he says, we all need help, and one who needs help also wants it.²³ I disagree. Quite a few independent souls reject charity however desperate their need. The youth says, "I want to do it myself." The adult says, "I did it my way." The force of the

18. *Id.* at 172.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

example of charity springs from a belief, which most of us hold, that the world is better with charity than without it. This argument is plainly consequential.

Let us turn now to the best of Kant's applications of the categorical imperative, namely, the false promise:

2. Another man finds himself forced by dire need to borrow money. He knows that he will not be able to repay it, but he also sees that nothing will be lent him unless he promises firmly to repay it within a definite time. . . . [T]he maxim of his action would then be expressed thus: When I consider myself in want of money, I shall borrow money and promise to repay it although I know that I never can. . . . I then realize at once that [such a maxim] could never hold as a general law of nature but would necessarily contradict itself. For if it were a general law that anyone considering himself to be in difficulties would be able to promise whatever he pleases intending not to keep his promise, the promise itself and its object would become impossible since no one would believe that anything was promised him but would ridicule all such statements as vain pretenses.²⁴

Kant is correct that a false promise would tend to undermine, and in this sense would contradict, the system of reliance on promises. Accordingly, this is Kant's most successful example. Nonetheless, it fails for the same reason that the example of charity fails.

A world without promises could exist. As Kant certainly knew, promises meant little in the world of the *Iliad* and the *Odyssey*,²⁵ also, I know of functioning societies today which may value truth less than our society does (and in recent months I have begun to doubt how much we value truth).²⁶ Therefore, Kant does not mean that a world without the system of reliance on promises could not exist. Rather, he means that a rational being could not want such a world to exist. Therefore, the contradiction of the false promise matters to us only

24. *Id.* at 171.

25. Perhaps the best example is Odysseus, who deceived Clytemnestra by telling her that Iphigenia would be married to Achilles, conceived the idea of the Trojan Horse, and tricked his way out of the grasp of the cyclops Polyphemus. *See generally* HOMER, *THE ODYSSEY* VIII, IX (Samuel Butler, trans.) (700 B.C.); VIRGIL, *AENEID* (John Dryden, trans.) (19 B.C.) (The story of the Trojan Horse is told in book VIII of the *Odyssey* and in book II of the *Aeneid*. The tale of the escape from the cyclops Polyphemus appears in book IX of the *Odyssey*). *See also* EURIPIDES, *IPHIGENIA AT AULIS* (410 B.C.) (wherein the deceit of Clytemnestra is dramatized).

26. WARREN L. D'AZEVEDO & MICHAEL EVAN GOLD, *SOME TERMS FROM LIBERIAN SPEECH* L-3 (1979) (In the speech of the majority of the population, the word "lie" can mean either a mistake or an intentional falsehood. If the distinction between mistakes and prevarications does not matter, the intent to tell the truth is somewhat less important to Liberians than to Americans.).

because we value the system of reliance on promises. He is right: our world is better with such a system than without it. But this is a consequential argument.

Kant provides another version of the categorical imperative: “Act so as to treat man, in your own person as well as in that of anyone else, always as an end, never merely as a means.”²⁷ The word “merely” is important. We all use other persons as means to our ends. For example, when an employer pays a worker to perform a job, the employer uses the worker as a means to get tasks performed, and the worker uses the employer as a means to get money. But if both parties enter into the relationship freely and treat one another respectfully (the employer pays a living wage and provides decent working conditions; the worker returns a day’s work for a day’s pay), each also treats the other as an end by facilitating the fulfillment of the other’s end.

However appealing this version of the categorical imperative may be, it does not dispose of Kant’s four examples. Consider suicide. If I kill myself to stop my suffering, one could say that I am using myself as a means to an end. Yet if I exercise in order to strengthen my heart, am I not also using myself as a means to the end of living longer? In both cases, the end is mine: I am using myself to achieve my own end. *A fortiori*, I am not using myself merely as a means; I am also fulfilling my ends.

The same reasoning applies to failing to develop my talents. Perhaps in some vague way I am using myself via inaction to achieve the end of enjoying leisure, but the end of leisure is mine. As for failing to give charity, I cannot see how hoarding my sympathy and my money is using another person as a means in any way. But if it is, the end is my own.

Once again, the false promise is Kant’s best example. A lender would not lend money to a borrower who the lender knew would not pay the debt. Therefore, the borrower’s deceit disrespects the lender’s dignity by compromising the lender’s autonomy. Autonomy has been valuable since the rise of individualism in the West in the last few centuries, but in earlier centuries, a person’s identity rested on the groups to which one belonged (e.g., Greek or Roman, pagan or Christian, noble or commoner) and individual autonomy was not a para-

27. METAPHYSICAL FOUNDATIONS, *supra* note 10, at 178 (emphasis deleted).

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mount value.²⁸ This statement is true even today among many non-Western peoples, among whom one's tribe or religion is far more important than one's autonomy. A Kantian might reply that, even if autonomy is not valuable *a priori*, it remains true that everyone wishes to be treated with respect. Thus, the question becomes, is a false promise disrespectful *a priori*? The answer is no. The harm of a false promise depends on context and consequences. In a community that values social connections and mutual welfare, autonomy is unimportant, and a false promise is not disrespectful. In such a community, if the borrower puts the money to good use, perhaps even repays it with generous interest (though repayment was not foreseeable at the time of the loan)—in other words, if the consequences of the loan are good—the lender will be satisfied. A modern Westerner might also be satisfied on these facts.

That Kant ultimately relies on consequences is apparent from his response to the case of lying to a miscreant. Suppose an armed man asks you menacingly, "Where is your friend?" Kant says that you should tell the truth because if you lie, but your friend has moved from the place where you think he is to the place where you say he is, you would be responsible for his death.²⁹ Thus, Kant believes that you would be responsible for lying because the consequence might be bad. Should you not also be responsible for telling the truth because the consequence might be good?

I have argued that Mill is correct regarding Kant's examples of *a priori* duties—they are, upon analysis, grounded on their consequences—thereby weakening Kant's theory considerably. If Kant can't illustrate it, who can? Consequentialism, therefore, is the more plausible method of justifying moral claims.

B.

Now I will turn to the second insight in *Utilitarianism* that makes me a consequentialist. Mill says that when duties conflict, the choice between them rests on consequences. He may be mistaken in the case in which a higher-order duty takes precedence over a lower-order duty (for example, a constitution takes precedence over a statute, re-

28. John Christman, *Autonomy in Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 9, 2015), <https://plato.stanford.edu/entries/autonomy-moral/>.

29. See generally James Edwin Mahon, *The Truth About Kant on Lies*, in THE PHILOSOPHY OF DECEPTION 211–224 (Clancy W. Martin ed. 2009), <https://philpapers.org/archive/MAHTTA.pdf>.

ardless of consequences), but he is right in the far more common case in which duties of equal rank (or duties the relative rank of which is indeterminate) point in opposite directions. Mill writes:

There exists no moral system under which there do not arise unequivocal cases of conflicting obligation If utility is the ultimate source of moral obligations, utility may be invoked to decide between them when their demands are incompatible. Though the application of the standard may be difficult, it is better than none at all: while in other systems, the moral laws all claiming independent authority, there is no common umpire entitled to interfere between them; their claims to precedence one over another rest on little better than sophistry; and unless determined, as they generally are, by the unacknowledged influence of considerations of utility, afford a free scope for the action of personal desires and partialities.³⁰

Once again focusing on the consequentialism of Mill's argument, while remaining agnostic on happiness as the ultimate good, I believe that Mill is correct. Kant does not admit that duties can conflict, and it may seem plausible that maxims by which all rational beings can live would be consistent with one another. Yet duties derived from the categorical imperative do conflict. Consider suicide. I must not commit suicide because it would be motivated by self-love, a principle that promotes life. At the same time, I must honor the duty of charity by providing for my dependents after my death. Surely, I would violate that duty by allowing a lengthy incurable disease to consume the assets that I have saved for the benefit of my family. The way to resolve this and other conflicts of duty is to weigh the good against the bad that observance of the conflicting duties would cause.

C.

The third insight in *Utilitarianism* that makes me a consequentialist is Mill's response to the venerable criticism of consequentialism that a moral agent cannot weigh the consequences of every decision.³¹ An agent has neither the time nor the information, and perhaps not the capacity, to perform the appropriate calculations.³² I will deepen this criticism by noting that weighing the consequences of a decision requires predictions about the future, and predictions are problem-

30. UTILITARIANISM, *supra* note 9, at 45–46.

31. *Id.*

32. *Id.*

atic.³³ For easy decisions, we may be certain of our predictions. If *A* punches *B* in the nose, we can be sure that *B* will not like it. But for difficult decisions, especially decisions regarding social policy, predictions are uncertain. If I keep my reservations for a long-planned trip to Europe and miss my sister's recently announced wedding, will she understand or bear a grudge, and will Mother take Sister's side or mine? If the tax on gasoline, which is generating decreasing revenue due to more fuel-efficient cars, is replaced with a tax on miles driven, will the public's incentive to purchase efficient vehicles be diminished? Decisions should not be based on uncertain predictions, which are open to error and to influence by interest, bias, unexamined assumptions, and so forth.

Although Mill seems to have in mind only the first of these criticisms, what he says defeats them both.

The answer to the objection is, that there has been ample time; namely, the whole past duration of the human species. During all that time, mankind have been learning by experience the tendencies of actions, on which experience all the prudence as well as all the morality of life are dependent. People talk as if the commencement of this course of experience had hitherto been put off, and as if, at the moment when some man feels tempted to meddle with the property or life of another, he had to begin considering for the first time whether murder and theft are injurious to human happiness. . . . It is truly a whimsical supposition, that [mankind] would remain without any agreement as to what *is* useful, and would take no measures for having their notions on the subject taught to the young, and enforced by law and opinion [M]ankind must by this time have acquired positive beliefs as to the effects of some actions on their happiness; and the beliefs which have thus come down are the rules of morality for the multitude, and for the philosopher, until he has succeeded in finding better. . . . Whatever we adopt as the fundamental principle of morality, we require subordinate principles to apply it by: the impossibility of doing without them, being common to all systems, can afford no argument against any one in particular. . . .³⁴

A consequentialist cannot puzzle over the effects of every decision. Instead, one may rely on "subordinate principles" or the "rules of morality," which are the product of "experience [as to] the tendencies of

33. Aaron Lester, *The Problem with Predictions*, HARV. GAZETTE (Apr. 25, 2013), <https://news.harvard.edu/gazette/story/2013/04/the-problem-with-predictions/>.

34. UTILITARIANISM, *supra* note 9, at 42–44.

actions” to promote the good.³⁵ And one who relies on principles need not make troublesome predictions, for principles grow out of past experience.

May a consequentialist deviate from a moral rule? May an agent perform an act that a secondary principle or corollary forbids if the agent believes the act would be beneficial in this instance? Mill’s answer is unclear:

In the case of abstinences indeed—of things which people forbear to do from moral considerations, though the consequences in the particular case might be beneficial—it would be unworthy of an intelligent agent not to be consciously aware that the action is of a class, which, if practiced generally, would be generally injurious, and that this is the ground of the obligation to abstain from it. The amount of regard for the public interest implied in this recognition is no greater than is demanded by every system of morals; for they all enjoin to abstain from whatever is manifestly pernicious to society.³⁶

Mill may hold that the agent should always follow a moral rule: performing the forbidden act would violate “the obligation to abstain from it.”³⁷ Yet, he also recognizes that moral principles improve. He wrote, “The corollaries from the principle of utility, like the precepts of every practical art, admit of indefinite improvement; and, in a progressive state of the human mind, their improvement is perpetually going on.”³⁸ Perhaps the most common way for a principle to improve, or begin to improve, is for exceptions to be recognized. Also, Mill states that the reason for following a rule is that “the action is of a class, which, if practiced generally, would be generally injurious.”³⁹ If Mill would allow sub-classes within a class—after all, nearly every class of act is a sub-class of a larger class—he would recognize exceptions because an act can be injurious in other sub-classes (even in all other sub-classes), but not injurious in the sub-class at hand. For example, as a general rule, one should tell the truth, but not in the sub-class of cases in which a lie would make happier all concerned agents (and not merely the liar). An exception is simply another, typically more specific corollary, to the fundamental principle.

35. *Id.*

36. *Id.* at 35.

37. *Id.*

38. *Id.* at 43.

39. *Id.* at 35.

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In sum, the ultimate test of whether an act is right or wrong is the consequences of the act. We should not attempt to predict the consequences of each act that we contemplate performing. The facts are too uncertain; the calculations are too complex and time consuming; and our interests and biases are too likely to affect our predictions. In fact, we rarely attempt such predictions. Instead, we follow moral principles which we derive from experience. Moral principles lead us to the right action most of the time, but not always, and improvement (as via exceptions) is ongoing.

Another way to express this conclusion is that the major premise of a practical syllogism is not an *a priori* truth, but a principle that is an inference or conclusion of inductive reasoning using experience.

1

INDUCTIVE REASONING

EXPERIENCE

In the large majority of cases in which someone lied, the consequences would have been better if the agent had told the truth.

INDUCTIVE INFERENCE

Following the principle of telling the truth usually leads to a good outcome.

PRACTICAL SYLLOGISM

MAJOR PREMISE

Following the principle of telling the truth usually leads to a good outcome.

MINOR PREMISE

Nothing is unusual about the present situation.

CONCLUSION

I should tell the truth.

2

INDUCTIVE REASONING

EXPERIENCE

In unusual cases in which someone lied, the consequences for all concerned agents were better than if the agent had told the truth.

INDUCTIVE INFERENCE

An exception to the principle of telling the truth arises in the unusual case in which a lie would make all concerned agents happier.

PRACTICAL SYLLOGISM

MAJOR PREMISE

An exception to the principle of telling the truth arises in the unusual case in which a lie would make all concerned agents happier.

MINOR PREMISE

The present situation is unusual because lying would make all concerned agents happier than telling the truth would.

CONCLUSION

I should lie in this situation.

This analysis obliterates the lines between the three schools of thought that I mentioned above. Deontologists, as well as non-consequentialists to the degree that they rely on arguments *a priori*, must recognize that a principle is a summary of experience and, therefore, principles derive from consequences. Deontologists remain free to base their moral decisions on principles; they may continue to follow the rules and do their duty. However, recognizing that principles can change, deontologists must be prepared to create exceptions to principles or create new ones. Consequentialists, as well as non-consequentialists to the degree that they rely on arguments *a posteriori*, must usually refrain from attempting to predict the consequences of each act and basing a decision on that prediction. Instead, they must (as they are inclined to do) base nearly all of their moral decisions on principles, but, knowing that principles can change, must be prepared to recognize exceptions and new principles. Properly understood, “reformed deontologist” and “reformed consequentialist” are two names for the same moral agent.

II. JUDICIAL RESTRAINT

A. A Principle of Judicial Restraint Grounded in Moral Philosophy

How should an agent deal with arguments *a priori* and *a posteriori* that conflict with one another? Before answering this question, I need to state the distinction drawn by Kenneth Culp Davis between

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two types of fact: adjudicative and legislative.⁴⁰ An adjudicative fact is used to decide the dispute between the parties to the case at hand.⁴¹ An adjudicative fact, therefore, pertains only to these parties and is either true or false (more precisely, proven or unproven).⁴²

An adjudicative fact may have happened in the past or may be a prediction of the future.⁴³ For example, “A harassed and intimidated B on six occasions in the past two months and, unless enjoined by this court, is likely to continue doing so.” Predictions of adjudicative facts are permissible because they are limited to the parties to the case and are grounded on the parties’ own behavior.⁴⁴

In contrast, a legislative fact is used to create, amend, or rescind rules or principles.⁴⁵ A legislative fact, therefore, pertains to society as a whole, or a significant part of it. A legislative fact need not be true of all persons in all circumstances, but is usually true.⁴⁶ For example, “smoking cigarettes causes cancer” is a legislative fact, though many persons smoke for years and never develop cancer. A legislative fact may have happened in the past or may be a prediction of the future.⁴⁷ For example, in the second half of the twentieth century, children from disadvantaged environments scored lower on college admission tests than did children from advantaged environments and, without purposeful intervention, this discrepancy will continue in the future.

Both findings of past legislative facts and predictions of future legislative facts should be based on appropriate evidence, not on common knowledge or intuition.⁴⁸ The appropriate evidence for a finding of a legislative fact of the past might be historical accounts or the testimony of experts.⁴⁹ The appropriate evidence for a prediction of a legislative fact might be a theory.⁵⁰ In this event, the theory must be identified, meet the criterion of acceptability in the discipline, and be subject to rebuttal. The evidence for a prediction might also be a se-

40. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

41. *Id.*

42. *Id.* Adjudicative facts operate at a low level of abstraction. See Michael Evan Gold, *Levels of Abstraction in Legal Thinking*, 42 S. ILL. U. L.J. 117 (2018).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* Legislative facts operate at a high level of abstraction. Gold, *supra* note 42.

47. *Id.*

48. *Id.* at 408–09.

49. *Id.* at 410.

50. *Id.*

ries of decided cases in which the existing law leads to arguably unjust results. Prediction of this sort is fair because those cases are available to all parties to comment upon. A prediction may also be the result of applying a theory to a specific situation. Such a prediction should always be left to experts. All legislative facts must be subject to the adversarial process. Each party should have the opportunity to refute the other party's evidence.

My comments about finding legislative facts apply to administrative tribunals as well as to courts. An administrative tribunal should not find legislative facts based on the experience of its members. Members of an administrative tribunal, although knowledgeable, are not necessarily experts in any given theory. They cannot be cross-examined. The theories and applications that may appear in their opinions have not been exposed to contradiction by expert testimony. In consequence, their knowledge helps them understand evidence in the record, but their knowledge must not itself be evidence. Moreover, the members of the tribunal are supposed to be neutral, but they can hardly be neutral about theories, and applications of theories, which they themselves introduce into a case.⁵¹

The boundary between adjudicative and legislative facts is not so sharp as I have drawn it. An adjudicative fact that occurs frequently becomes a legislative fact; how else could a legislative fact be found? Furthermore, a legislative fact may be useful in determining whether an adjudicative fact is true in the present case; what usually happens probably did happen in this case. Nevertheless, a rule should not be grounded on a small number of adjudicative facts—most certainly not on the adjudicative facts of a single case—and the general truth of legislative facts may help, but never suffice, to prove the adjudicative facts in a given case.

Now I can answer the question stated at the outset of this essay: how should an agent deal with an argument *a priori*, grounded on principle that conflicts with an argument *a posteriori*, grounded on consequences? The argument *a priori* (most commonly, a precedent) is presumptively stronger. It is grounded on legislative facts of the past which experience has confirmed to be true.⁵² If for no other reason than that parties have conformed their behavior to principles, the predictions intrinsic to principles have been confirmed.

51. Thus, I disagree with Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). See generally *id.*

52. Davis, *supra* note 40.

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In some cases, however, the argument *a posteriori* is appealing. An argument *a posteriori* may justify creating an exception to a rule if the facts of the case at hand demonstrate that the exception would produce better consequences for the concerned parties than the rule would produce. Being grounded on the adjudicative facts of the case at hand, an exception does not require predictions, or makes predictions about the parties based on their own behavior in the past. Such an exception may operate in subsequent cases if the adjudicative facts of those cases, both facts of the past and predictions of the future, are analogous to the adjudicative facts of the case at bar. This reasoning also applies to a case *sui generis*, the disposition of which should apply only to the case at hand and to analogous subsequent cases.

When may a tribunal overturn an existing rule or standard, amend, or create a new one, on the basis of arguments *a posteriori*? The evidence must match the scope of the rule.⁵³ It is obvious that the adjudicative facts of a single case should not displace the experience of many cases that support the existing rule; at most, an exception may be justified in this circumstance. But suppose new legislative facts demonstrate that the existing rule has led to injustice in many prior cases? Such evidence is *a posteriori* in the sense that it is based on consequences in prior cases, but the evidence is not grounded on predictions; rather, the unjust consequences have occurred and are facts to be proved in the case at hand. In this circumstance, a tribunal would have adequate reason to overturn an existing rule or standard or create a new one. These are the easy cases.

The harder cases involve challenges to a rule or standard based on predictions of legislative facts. Two aspects of such predictions are relevant: the theory on which a prediction is based, and the application of the theory to the facts at hand. With regard to theory, whether it be common sense or scientific, the theory must be presented as evidence in the case. Too often, an advocate or a judge understands only part of a theory or misunderstands it altogether. Thus, justice requires that a theory be presented as evidence in order that it be open to the adversarial process. With regard to application of a theory, this task must be left to experts. Application by an advocate or a judge is far too likely to demonstrate the truth of the old saying that a little knowledge is dangerous.

53. See Gold, *supra* note 42, at 136–37.

B. Application of the Principle

Let us apply the foregoing ideas to the Supreme Court's opinions in *National Labor Relations Board v. Retail Store Employees Union, Local 876 (Safeco)*.⁵⁴ The Safeco Title Insurance Company insured buyers and lenders against defects in the titles to real estate which the buyers acquired.⁵⁵ Customers desiring title insurance did not deal directly with Safeco or its agents; instead, customers dealt with independent brokers, called "title companies," which performed escrow and other services as well as brokering title insurance.⁵⁶ The title companies dealt almost exclusively with Safeco; over ninety percent of their gross income derived from selling Safeco's policies.⁵⁷

Local 1001 of the Retail Store Employees Union represented some of Safeco's employees.⁵⁸ When collective bargaining between Safeco and the union reached an impasse, the union went on strike and set up picket lines not only at Safeco's offices, but also at the title companies' offices.⁵⁹ For reasons that I will explain below, the picket signs were carefully worded. They did not urge customers of the title companies to cease doing business with the companies.⁶⁰ Instead, the picket signs said that Safeco was a non-union firm and it did not have a contract with Local 1001.⁶¹ The union also distributed handbills asking customers to cancel their Safeco policies.⁶² The handbills were lawful and not an issue in the case. The issue was the picketing.

Safeco and one of the title companies accused the union of engaging in a secondary boycott.⁶³ A secondary boycott occurs when a union that has a labor dispute with an employer (the "primary employer") directs economic force against another employer (the "secondary employer") with the object of forcing the secondary employer to cease doing business with the primary employer.⁶⁴ Another term for "secondary employer" is "neutral employer."⁶⁵ The latter term is

54. See generally *NLRB v. Retail Store Employees Union, Local 876 (Safeco)* 447 U.S. 607 (1980) [hereinafter *Safeco*].

55. *Id.* at 609.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Safeco*, 447 U.S. at 609.

61. *Id.* at 609–10.

62. *Id.* at 610.

63. *Id.*

64. *Id.*

65. *Id.* at 612–13.

so plainly loaded—surely neutral firms deserve protection from damage caused by other parties’ labor disputes—that I will refrain from using that term, but I will reproduce it when a judge used it. Perhaps the most typical case involves a primary employer who sells goods or services to the secondary employer.⁶⁶ If the union can isolate the primary employer from its customers, the cost to the primary employer of continuing the labor dispute increases.⁶⁷ For example, suppose the primary employer, *P*, makes fur hats. The union has a dispute with *P* and goes on strike. *S*, the secondary employer, is a retail store that sells *P*’s fur hats. When the strike against *P* is unsuccessful, the union pickets *S*’s store. *S*, afraid of losing trade, stops selling *P*’s hats, and the pickets disappear. Having lost *S* as a customer, *P* feels increased pressure to settle with the union.⁶⁸

The National Labor Relations Act outlaws secondary boycotts,⁶⁹ but suppose a union pickets, not a secondary employer’s *business*, but a primary employer’s *product* which the secondary employer sells. Consider the example in the preceding paragraph. The union concedes that it may not picket *S*’s store with the object of turning away customers, but argues that it may picket the struck product, *P*’s fur hats, thereby urging customers not purchase those hats while leaving customers free to buy other items in *S*’s store.

The Supreme Court first ruled on product picketing in *National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen’s Union, Local 760 (Tree Fruits)*.⁷⁰ Local 760 of the Fruit Packers Union went on strike against employers that packed apples and sold them to Safeway grocery stores under the brand “Washington State Apples.”⁷¹ The employers continued to pack and ship apples in spite of the strike, and so Local 760 also picketed the Safeway stores.⁷² The picket signs were directed at the struck product, not at the stores: the

66. For example, in *NLRB v. Denver Building & Construction Trades Council (Gould & Preisner)*, 341 U.S. 675 (1951), the secondary employer was a general contractor who purchased services from a subcontractor who was the primary employer. Similarly, in *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) [hereinafter *Tree Fruits*], discussed below, the secondary employer, a grocery store, purchased apples from the primary employer, a fruit packer. In *Safeco*, 447 U.S. at 609, also discussed below, the secondary employer, an insurance broker, purchased insurance policies from the primary employer, an insurance company.

67. ROBERT GORMAN & MATTHEW FINKIN, *BASIC TEXT ON LABOR LAW* 313–14 (2d ed. 2004).

68. This example is drawn from *Loewe v. Lawlor*, 208 U.S. 274 (1908).

69. See GORMAN & FINKIN, *supra* note 67, at chapter xii.

70. *Tree Fruits*, 377 U.S. at 58.

71. *Id.* at 59–60.

72. *Id.* at 60.

signs urged customers not to buy Washington State Apples, but did not urge customers to shop at other grocery stores.⁷³ The Court held that the pickets were lawful.

In *Safeco*, the union's basic argument was *a priori*: the precedent of *Tree Fruits* controlled the case at bar. The picket signs were lawful, argued the union, because its signs, like those in *Tree Fruits*, targeted the struck product, not the secondary employers.⁷⁴ Safeco and the title company advanced an argument *a posteriori*: because over ninety percent of the title companies' revenue came from Safeco's policies, the pickets could put the title companies out of business.⁷⁵ The majority of the Court, moved by the argument *a posteriori*, outlawed the picketing; the dissent, moved by the argument *a priori*, would have allowed the picketing.⁷⁶ Let us examine those two opinions, attending to the nature of the rules and the arguments, not to labor policy.

But first, a word about the relevant statute is necessary. The relevant section of the National Labor Relations Act reads:

(b) It shall be an unfair labor practice for a labor organization or its agents

...

(4)(i) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

...

(B) forcing or requiring any person to cease . . . selling . . . the products of any other producer . . . or to cease doing business with any other person. . . .⁷⁷

Two comments on the construction of this section are in order. First, the words "threaten, coerce, or restrain" suggest rather violent action. However, as *Tree Fruits* and *Safeco* demonstrate, these words have been interpreted to encompass peaceful picketing.⁷⁸ Second, the words "an object thereof" indicate a subjective standard in which the union's intent is crucial. However, the National Labor Relations Board and the courts have made the standard objective by applying the doctrine that one intends what is reasonably foreseeable: "the Union's secondary appeal against the central product sold by the title

73. *Id.*

74. *Id.*

75. *Safeco*, 447 U.S. at 607.

76. *Id.* at 615-16.

77. 29 U.S.C. § 158(b)(4)(i)(B).

78. *Safeco*, 447 U.S. at 616.

companies in this case is ‘reasonably calculated to induce customers not to patronize the neutral parties at all.’ . . . Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of § 8(b)(4)(ii)(B).”⁷⁹

It will be convenient to begin with the dissent, which Justice Brennan wrote. He argued that the precedent of *Tree Fruits* should be honored.⁸⁰ Accordingly, I will first examine *Tree Fruits*, and then I will turn to Justice Brennan’s dissent in *Safeco*.

The reader will recall that the union in *Tree Fruits* had a dispute with the packers of Washington State Apples and picketed Safeway stores with signs that urged customers to boycott the apples, but not the stores.⁸¹ In an opinion by Justice Brennan, the Court held that the picketing was lawful:

We come then to the question whether the picketing in this case, confined as it was to persuading customers to cease buying the product of the primary employer, falls within the area of secondary consumer picketing which Congress [intended] to prohibit under § 8 (b)(4)(ii). We hold that it did not fall within that area, and therefore did not “threaten, coerce, or restrain” Safeway.⁸²

Thus, the standard in *Tree Fruits* was that a union could picket a secondary employer as long as the picketing was aimed only at the struck product.⁸³ This was an *a priori* standard because it focused on the intent of the picketing, not on its effects.

As the standard in *Tree Fruits* was *a priori*, so were the reasons for the standard. (It would be interesting to inquire whether *a priori* reasons and *a priori* rules tend to be associated, and likewise for *a posteriori* reasons and rules.) Justice Brennan examined the legislative history at length and concluded:

It does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an “isolated evil” believed to require proscription of peaceful consumer picketing at secondary

79. *Id.* at 614–15 (footnotes omitted).

80. *Id.* at 620 (Brennan, J., dissenting).

81. *Tree Fruits*, 377 U.S. at 60.

82. *Id.* at 71.

83. *Id.*

sites, was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute. This is not to say that this distinction was expressly alluded to in the debates. It is to say, however, that the consumer picketing carried on in this case is not attended by the abuses at which the statute was directed.⁸⁴

The purpose of a statute (the "abuses" at which it is aimed) and its legislative history are *a priori* reasons because they occur before the statute is passed and before the acts of the parties to the case.

As Justice Brennan wrote the Court's opinion in *Tree Fruits* and the dissent in *Safeco*, we should not be surprised that both the rule and the reasons for it were *a priori* in the latter opinion as well. Justice Brennan wrote in *Safeco*:

[T]he pivotal question in secondary site picketing is determining when the pressure imposed by consumer picketing is illegitimate, and therefore deemed to "coerce" the secondary employer. *Tree Fruits* addressed this problem by focusing upon whether picketing at the secondary site is directed at the primary employer's product, or whether it more broadly exhorts customers to withhold patronage from the full range of goods carried by the secondary retailer, including those goods originating from nonprimary sources. The *Tree Fruits* test reflects the distinction between economic damage sustained by the secondary firm solely by virtue of its dependence upon the primary employer's goods, and injuries inflicted upon interests of the secondary firm that are unrelated to the primary dispute. . . .⁸⁵ *Tree Fruits* expressly rejected the notion that the coerciveness of picketing should depend upon the extent of loss suffered

84. *Id.* at 63-64.

85. *Safeco*, 447 U.S. at 620 (Brennan, J., dissenting).

A Philosophical Basis for Judicial Restraint

by the secondary firm through diminished purchases of the primary product.⁸⁶

Justice Brennan relied on precedent, a species of *a priori* argument, and the rule he advocated turned on the intent of the picketing, an *a priori* standard.⁸⁷ The legislative facts undergirding Justice Brennan's opinion were facts in the record of *Tree Fruits*, not predictions. Nonetheless, he did not pay sufficient attention to more recent experience, as I will show after discussing the opinion of the majority of the Court.

Justice Powell's opinion for the majority held that the legality of product picketing depends on its effect on the secondary employer.⁸⁸ This holding operated *a posteriori* because the effects occurred after the picketing occurred. Justice Powell stated the rule thus: "Since successful secondary picketing would put the title companies to a choice between their survival and the severance of ties with Safeco, the picketing plainly violates the statutory ban on the coercion of neutrals"⁸⁹ That liability under this rule depends on the consequences of the picketing is clear from the following passage:

The picketing in *Tree Fruits* and the picketing in this case are relatively extreme examples of the spectrum of conduct that the Board and the courts will encounter in complaints charging violations of § 8(b)(4)(ii)(B). If secondary picketing were directed against a product representing a major portion of a neutral's business, but significantly less than that represented by a single dominant product, neither *Tree Fruits* nor today's decision necessarily would control. The critical question would be whether, by encouraging customers to reject the struck product, the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss. Resolution in each case will be entrusted to the Board's expertise.⁹⁰

As the rule of *Safeco* was *a posteriori*, so also were the reasons for the rule. Although Justice Powell referred to the text, purpose, and legislative history of the statute, the most influential reason, I believe, was the effect of product picketing on the title companies. He wrote: "Although *Tree Fruits* suggested that secondary picketing against a struck product and secondary picketing against a neutral party were

86. *Id.* at 622.

87. *Id.*

88. *Id.*

89. *Id.* at 615 (majority opinion).

90. *Id.* at 616, n.11.

‘poles apart,’ the courts soon discovered that product picketing could have the same effect as an illegal secondary boycott.”⁹¹ He continued:

The product picketed in *Tree Fruits* was but one item among the many that made up the retailer’s trade. . . . In [*Safeco*,] on the other hand, the title companies sell only the primary employer’s product and perform the services associated with it. Secondary picketing against consumption of the primary product leaves responsive consumers no realistic option other than to boycott the title companies altogether. . . . As long as secondary picketing only discourages consumption of a struck product, incidental injury to a neutral is a natural consequence of an effective primary boycott. But the Union’s secondary appeal against the central product sold by the title companies in this case is “reasonably calculated to induce customers not to patronize the neutral parties at all. 226 N.L.R.B., at 757. The resulting injury to their businesses is distinctly different from the injury that the Court considered in *Tree Fruits*. . . . [S]uccessful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco . . . (citation omitted). We do not disagree with Mr. Justice Brennan’s dissenting view that successful secondary product picketing may have no greater effect upon a neutral than a legal primary boycott. But when the neutral’s business depends upon the products of a particular primary employer, secondary product picketing can produce injury almost identical to the harm resulting from an illegal secondary boycott. Congress intended § 8 (b)(4)(ii)(B) to protect neutrals from that type of coercion. Mr. Justice Brennan’s view that the legality of secondary picketing should depend upon whether the pickets “urge only a boycott of the primary employer’s product” would provide little or no protection.⁹²

A posteriori arguments usually incorporate predictions of the future, and three predictions were embedded in the foregoing passage. Only the first of them was justified.

Justice Powell’s first prediction was that secondary picketing against consumption of the primary product leaves responsive consumers no realistic option other than to boycott the title companies altogether.⁹³ This prediction is not supported by evidence in the record but is obviously correct. Given that the title companies sold only

91. *Safeco*, 447 U.S. at 612 (citation omitted).

92. *Id.* at 613–16, n.8 (citations and other footnotes omitted).

93. *Id.* at 611.

Safeco policies, boycotting Safeco policies could only mean boycotting the title companies.⁹⁴

Justice Powell's second prediction lay in this sentence: "[S]uccessful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco"⁹⁵ This prediction is not supported by any evidence in the record, and the prediction is not obviously correct. Indeed, it seems false. Even if the picketing turned away all potential buyers of Safeco's insurance policies, the title companies would not have needed to sever their ties to Safeco. The companies could simply have added to their inventory other insurance companies' policies, just as they would have done if they had lost trade because other insurance companies offered customers better policies at lower prices or offered the title companies higher commissions. But this is my prediction, and it is as unimportant as Justice Powell's was unless supported by evidence in the record.

Justice Powell's third prediction was implicit throughout his opinion: he implied that the picketing would be successful and that it might reduce the title companies' revenue by as much as ninety percent.⁹⁶ To have been this successful, the picketing would have had to persuade every customer to patronize other title companies that sold other insurance policies. The likelihood of such perfection approaches zero. Indeed, as between the extremes—all customers honored the picket line, no customers honored the picket line—the latter was more likely. Once again, however, these are my predictions, which are no better and no worse than Justice Powell's. Evidence was needed, not intuition. Yet the reports of the case contain no evidence that the picketing caused the title companies to lose any revenue.

Evidently recognizing that a precedent should not be overruled on the basis of a single case, Justice Powell invoked a line of cases in which the primary employer's product merged into the secondary employer's product so that a consumer could not boycott only the primary's product ("merged-product" cases).⁹⁷ For example, in *American Bread*,⁹⁸ which Justice Powell cited in a footnote, Local 327

94. *Id.* at 610.

95. *Id.* at 615.

96. *Id.* at 609–10.

97. *Safeco*, 447 U.S. at 613, n.7.

98. *American Bread Co. v. NLRB*, 411 F.2d 147, 150 (6th Cir. 1969).

of the Teamsters had a labor dispute with a company that made bread under the label “Sunbeam” and sold it to restaurants.⁹⁹ The union engaged in product picketing at the restaurants; the picket signs read, “Attn: Customers. Sunbeam bread sold here. Local 327.”¹⁰⁰ But Sunbeam bread had lost its identity in the restaurants; a customer could not identify and avoid it, for it was merged into the meals the restaurant served.¹⁰¹ Therefore, as a practical matter, the picket signs called for a boycott of the restaurants. In *Cement Masons*,¹⁰² which Justice Powell discussed in the text of his opinion, Whitney, a general contractor (the primary employer), built houses in a subdivision owned by Shuler (the secondary employer), who sold the houses to customers.¹⁰³ A dispute arose between Whitney and the union because Whitney paid non-union masons less than union scale, and the union picketed the only entrance to the subdivision.¹⁰⁴ The picket signs mentioned the dispute between Whitney and the union, then added, “PLEASE DO NOT PURCHASE THESE HOMES.”¹⁰⁵ The picketing was illegal because it asked customers to boycott Shuler. (I believe the outcome of *Cement Masons* would have been the same if the picket signs had read, “PLEASE DON’T PURCHASE HOMES BUILT BY WHITNEY” or “PLEASE DON’T PURCHASE HOMES BUILT BY UNDERPAID MASONS” because Whitney’s underpaid masons had worked on all of the houses in the subdivision.) Justice Powell quoted from the opinion of the Court of Appeals: “[W]hen a union’s interest in picketing a primary employer at a “[merged-] product” site [directly conflicts] with the need to protect . . . neutral employers from the labor disputes of others,’ Congress has determined that the neutrals’ interests should prevail.”¹⁰⁶

My goal is not to criticize the cases I have just discussed on the ground of labor policy; therefore, I will accept *arguendo* that the picketing in *American Bread* and *Cement Masons* violated the statute. My goal is to consider whether these cases provided the Court with sufficient reasons *a posteriori* to overrule the precedent of *Tree Fruits*. I have argued above that the evidence in support of a new rule (or any

99. *Safeco*, 447 U.S. at 610, nn.2–3.

100. *American Bread Co.*, 411 F.2d at 150.

101. *Id.*

102. *Hoffman ex rel. NLRB v. Cement Masons Local 337*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 983 (1973).

103. *Safeco*, 447 U.S. at 612–13.

104. *Hoffman*, 468 F.2d at 1190.

105. *Id.*

106. *Safeco*, 447 U.S. at 612–613 (quoting *Hoffman*, 468 F.2d at 1191) (citation omitted).

rule, for that matter) should match its scope. To overturn an existing rule, the new legislative facts must show that the rule has led to injustice in many prior cases. But the evidence for the new rule in *Safeco* was a narrow line of cases in which the secondary employers offered products from which the struck product could not be isolated.¹⁰⁷ Sunbeam's bread could not be separated from the restaurants' meals. Whitney's underpaid masonry could not be separated from Shuler's houses. Safeco's insurance policies could not be separated from the title companies' services. As a result, the experience captured in the cases on which Justice Powell relied, justified creating an exception to the rule of *Tree Fruits*, but did not justify abandoning that rule. By overruling *Tree Fruits*, Justice Powell implicitly predicted that the new rule promulgated in *Safeco*, which yielded better results in merged-product cases than the rule of *Tree Fruits* would have yielded, would also yield better results in all other product-picketing cases; but he had no basis in the record for this prediction—no theory, no expert testimony, no experience extracted from prior cases.¹⁰⁸ He had only his intuition, which was not open to the adversarial process.

One might reply to my arguments that Justice Powell simply deferred to the expertise of the Labor Board.¹⁰⁹ The argument is that the members of this administrative tribunal are chosen for their knowledge of labor relations, and they are entitled to find legislative facts based on their experience. Thus, continues the reply, it was the Board, not Justice Powell, that predicted the legislative facts on which *Safeco* overruled *Tree Fruits*. But this reply is mistaken. Neither explicitly nor implicitly did the Board find the legislative facts or make the predictions that Justice Powell did.

In contrast to both the majority of the Supreme Court and the dissent, the Labor Board took a correct approach to *Safeco*.¹¹⁰ Continuing to assume that the picketing put unfair pressure on the title companies, I believe that Justice Brennan's dissent unjustly ignored this harm: following *Tree Fruits* would have allowed the picketing to continue. As well, the majority unjustifiably overruled *Tree Fruits*; the record did not contain evidence of the legislative facts necessary to take this step. Only the Labor Board found a solution that was both just and justifiable.

107. *Id.*

108. See generally *Tree Fruits*, 377 U.S. at 58; *Safeco*, 447 U.S. at 607.

109. *Id.* at 615, n.11.

110. *Id.* at 616.

The Board followed its precedent in *Dow Chemical*.¹¹¹ A union had a dispute with an oil refinery and picketed the gasoline stations that sold the refinery's product.¹¹² Although the picket signs asked consumers to boycott the gasoline, not the stations, the Board ruled that the picketing was a secondary boycott.¹¹³ *Dow Chemical* was a merged-product case: the oil refinery's product was merged into the business of the service stations. *Safeco* was analogous to *Dow Chemical*, *American Bread*, and *Cement Masons* because Safeco's insurance policies were merged into the business of the title companies, and so the picketing put unfair pressure on the companies.¹¹⁴ By prohibiting the picketing, the Board relieved the companies of this pressure. In addition, advocates before the Board in *Safeco* had ample opportunity to criticize the line of merged-product cases and to offer new evidence.¹¹⁵ The Board chose to rely on the experience reflected in those cases to maintain the merged-product exception to *Tree Fruits*.¹¹⁶ The Board had before it no evidence of the application of the *Tree Fruits* doctrine to product picketing in cases not involving a merged product, and, quite properly, the Board did not question that doctrine.

Based on evidence, not on speculative prediction, the Board created a warranted exception to a precedent and did justice in the case at hand. Justices Powell and Brennan should have done the same.

111. See *Local 14055, United Steelworkers (Dow Chemical Co.)*, 211 N.L.R.B. 649, 649 (1974), *enf. denied*, 173 U.S. App. D.C. 299, 524 F.2d 853 (1975).

112. *Id.*

113. *Id.* at 651.

114. *Safeco*, 447 U.S. at 610.

115. *Id.* at 616, n.7.

116. *Id.* at 613, 615.

The American Law Institute: A Selective Perspective on the Restatement Process

NORMAN L. GREENE*

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The American Law Institute is the leading independent organization
in the United States producing scholarly work to clarify,
modernize, and improve the law.¹

* * *

An unelected body like the American Law Institute has limited
competence and no special authority to make major innovations in
matters of public policy. Its authority derives rather from its com-
petence in drafting precise and internally consistent articulations of
the law.²

* * *

It is not a government agency. Hence, the Institute has no govern-
ment powers, despite the “authority” attributed to it. . . .Its work
product is offered into the marketplace of legal ideas and receives
whatever weight it may be given by the authoritative organs of gov-
ernment—judicial and legislative.³

INTRODUCTION

This article provides a selective perspective on the American Law
Institute, a private law reform organization established in 1923, and
particular processes by which it performs its work in developing re-
statements of the law.⁴ The Institute creates restatements through a
form of “group scholarship” using multi-layer drafting, review and
comment processes, culminating in approval by voting;⁵ it leaves to

1. *About ALI*, AM. LAW INST., <https://www.ali.org/about-ali/> (last visited Jan. 10, 2019).

2. AM. LAW INST., *CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK* 6 (2015), [hereinafter, *Handbook*].

3. Geoffrey C. Hazard, Jr., *The American Law Institute is Alive and Well*, 26 *HOFSTRA L. REV.* 662, 664 (1998).

4. See Bennett Boskey, *The American Law Institute: A Glimpse at its Future*, 12 *GREEN BAG 2D* 255, 256 n.1 (2009) (collecting literature on origins, history, and activities of the Institute). See also Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 *WASH. U. L.Q.* 283, 285 (1951).

5. See Goodrich, *supra* note 4, at 287 (“A final restatement of a subject would thus be the product of highly competent group scholarship subjected to a searching criticism of equally learned and experienced members of the bench and bar.”). Participants in the group endeavor include the reporters, council, advisers, and participating membership.

the courts and legislatures to decide whether to follow the restatements or not; and many times they do.⁶

The article focuses, among other things, on the significance and validity of voting as a means of Institute decision-making in reaching correct decisions as opposed to merely final decisions; and it recommends review and assessment of the Institute's procedures relating to voting. Specific suggested modifications are in the form of by-law changes on the representations made by voters by the act of voting, retention and disclosure of certain voting records, availability of dissents and other matters. Finally, the article identifies selected challenges in drafting restatements, including in identifying majority rules and following Institute drafting guidelines.

I. OVERVIEW: AN INTRODUCTION TO THE AMERICAN LAW INSTITUTE

The organization in question could well have said Who asked you?, but it instead has reacted with the utmost cooperation [with Brooklyn Law School's symposium on the Institute]. . . .

Throughout the near century of its existence, the ALI has been open to reassessing what it does, a stance that suggests stakeholders can—and I argue here should—opine on the possibility of both expansions and contractions in the Restatement agenda.⁷

The Institute is an important entity in the history of American jurisprudence, many of whose products have been recognized as authoritative by the courts.⁸ Cataloging tributes to the Institute and its

6. See, e.g., Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 436 (2004) (“Because of the high level of respect that the American Law Institute has earned, the Restatements’ taking a certain position is likely to influence the development of the law.”). The Virgin Islands, however, “by statute have adopted the Restatements in their entirety as the Islands’ de facto common law.” *Id.* at 424. But see, e.g., *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 980 (2011). Accordingly, some statements made about the effect of the restatements in this article and elsewhere have been historically inapplicable to the Virgin Islands. Professor Adams’ article declined to address the history of the American Law Institute because it is amply covered elsewhere. See Adams, *supra* note 13, at 432 (“The history of the American Law Institute has been examined too well by too many others for me to undertake that same task here.”). Nor, for the same reason, will this article undertake that task.

7. Anita Bernstein, *Onlookers Tell an Extraordinary Entity What to Do: “Restatement of . . .” Symposium Introduction*, 79 BROOK. L. REV. 381, 382 (2014) (introducing Brooklyn Law School’s symposium on the Institute).

8. Words like “prestigious,” “distinguished,” and “influential” as applied to the Institute are generally avoided in this article as overused, although still inevitable when writing about the

work would itself be a prodigious task. In an afterword to a 2014 Brooklyn Law Review symposium on the ALI process called “Restatement of . . .”, a former director of ALI called it “the most significant private law-reform organization in the world.”⁹ Fine lawyers belong to and seek to join it and be with other distinguished lawyers. The membership is selective: not everyone can join.¹⁰ ALI determines its own membership through a formal nominations process.¹¹ Selectivity does not guarantee collegiality or any particular qualities, but it works well enough.¹² Many have (or had) interesting careers, stories to tell. Turn to the right at an annual meeting, there is someone you would like to meet or already know. Turn to the left, the same.¹³

Institute. See, e.g., Lawrence J. Latta, *The Restatement of the Law Governing Lawyers, A View from the Trenches*, 26 HOFSTRA L. REV. 697, 698 (1998) (“The Institute, created in 1923, is one of the most distinguished legal organizations in the United States, perhaps the most distinguished.”); Victor E. Schwartz and Christopher E. Appel, *Encouraging Constructive Conduct by Policyholders in the Restatement of the Law of Liability Insurance*, 68 RUTGERS U. L. REV. 455, 455 (2015) (“It is no exaggeration to say that the American Law Institute (‘ALI’) is the most influential private organization in the development of American law.”); and Charles Silver and William T. Barker, *The Treatment of Insurers’ Defense-Related Responsibilities in the Principles of the Law of Liability Insurance: A Critique*, 68 RUTGERS U. L. REV. 83, 83 (2015) (“The ALI’s Restatements exert great influence on judges, all of whom take these volumes seriously and some of whom rely on them reflexively.”). Of course, not everyone agrees. See, e.g., Tiger Joyce, *Tort Lawyers Take Over the American Law Institute*, WALL ST. J. (June 29, 2017 6:40 PM), <https://www.wsj.com/articles/tort-lawyers-take-over-the-american-law-institute-1498776033>.

9. Lance Liebman, *Law Reform Agenda As ALI Approaches Its Centennial: “Restatement of . . .” Symposium Afterword*, 79 BROOK. L. REV. 821, 830 (2014); Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212, 1216 (1993) (“The ALI is perhaps the most elite group of lawyers in the United States.”). See also Marshall S. Shapo, *Private Organization, Public Responsibilities*, 23 LAW & SOC. INQUIRY 651, 651 (1998) (“To invoke another idealized image, but one that I believe is shared by many judges and lawyers even today, the picture I as a law student had of the ALI was one of the dispassionate issuance of holy writ by a priestly caste of lawyers without anchors to established interests.”). Cf. Jay M. Feinman, *The Restatement of the Law of Liability Insurance as a Restatement: An Introduction to the Issue*, 68 RUTGERS U. L. REV. 1, 21 (2015) (referencing “ALI’s adulatory self-descriptions.”). The Feinman article and others referenced in it relate to a conference at Rutgers University Law School held in February 2015 on the restatement (but initially a principles) project in question.

10. Bernstein, *supra* note 7, at 384 (“The ALI is for better or worse an elite entity, expecting participants in the dialogues it establishes to possess ‘the highest qualifications’ and ‘possessing the highest qualifications and sharing in an agenda to clarify, modernize, and improve the law.’”).

11. *Guidelines for Proposing a Candidate*, AM. LAW INST., <https://www.ali.org/members/membership-proposal-process/guidelines-proposing-candidates/> (last visited Jan. 9, 2019).

12. Cf. Paul A. Simmons, *Government by an Unaccountable Private Nonprofit Corporation*, 10 N.Y.L. SCH. J. HUM. RTS. 67, 83 (1992) (mentioning author’s perception at the time of the article in 1992, ALI membership was dominated by graduates from the same two schools, Harvard and Yale).

13. But the attractiveness of ALI membership cannot be taken for granted. See Nicholas S. Zeppos, *Reforming a Private Legislature: The Maturation of the American Law Institute as a Legislative Body*, 23 LAW & SOC. INQUIRY 657, 664 (1998) (discussing that if the value of the ALI products were discounted, “it will become that much more difficult to enlist lawyers, judges,

ALI's success has also spawned imitators, notably the European Law Institute.¹⁴

Its work is important: the Institute is making a type of model law (termed restatements) for courts and legislatures to consider, and often they do. As the Institute notes:

By participating in the Institute's work, its distinguished members have the opportunity to influence the development of the law in both existing and emerging areas, to work with other eminent lawyers, judges, and academics, to give back to a profession to which they are deeply dedicated, and to contribute to the public good.¹⁵

Besides the restatements and other ALI products, such as its publications and CLE services, the American Law Institute also serves an important purpose as a public policy forum.¹⁶ The ALI has the power

and academics to work on ALI matters.”). Nor can it be assured by virtue of a prominent members list. Cf. Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 213 n. 39 (2007) (citing Herbert F. Goodrich, *What Would Law Teachers Like to See the Institute Do?*, 8 AM. L. SCH. REV. 494, 497 (1936) (“A list of prominent names as window dressing for an enterprise is too well known an American phenomenon to excite comment or surprise.”)).

14. See generally *About the ELI*, EUR. LAW INST., <https://www.europeanlawinstitute.eu/about-the-eli> (last visited Jan. 8, 2019). Of course, where the countries involved did not follow the common law system, exact replication would be impossible and impractical. But the spirit of the organization is apparently the same. See *id.* (“Founded in June 2011 as an entirely independent organization, the European Law Institute (ELI) aims to improve the quality of European law, understood in the broadest sense. It seeks to initiate, conduct and facilitate research, to make recommendations, and to provide practical guidance in the field of European legal development.”).

15. AM. LAW INST., *supra* note 1. See Goodrich, *supra* note 4, at 304 (“For the privilege of helping to improve the law, Institute members and officers are required to pay their dues annually, incur the expenses of travelling to and attending Institute meetings, and spend considerable hours doing their homework for such meetings.”).

This is a rare opportunity for lawyers, accustomed to working with the law as it is, to be able to influence the development of the law while working with other eminent lawyers. In the case of ALI, advisers and ALI members may engage directly with the reporters and fellow members in high level meetings over the texts of restatement drafts. Additional benefits of the process include collegiality, friendship, and other professional relationships through shared experience; the development or enhancement of skills of argument, negotiation, and leadership; and substantive legal education, especially in the subject at issue. ALI even makes available continuing legal education credits for attending its annual meeting. The rewards of collective law reform account in part for the spread of legal organizations such as the Institute and many other legal and bar associations throughout the country. This is not to suggest, of course, that all members of these organizations are like-minded or that the organizations are free from controversy and debate.

The Uniform Law Commission, although also engaged in collective law reform, is different. It is typically established by state statute, such as N.Y. Executive Law Sec. 165; and its members are commonly appointed by the governors of each state, and either have terms of office or serve at the will of the appointing authority. Dues are paid to the Commission by member states, not by individual commissioners. Neither the ALI nor typical state bar associations commonly have such a public component, let alone terms of office.

16. See generally *Publications*, AM. LAW INST., <https://www.ali.org/publications/> (last visited Jan. 8, 2019).

to convene and bring people together to discuss key legal issues, ranging from small group sessions to discussions of restatements with nearly a thousand individuals at a typical ALI annual meeting: a meeting packed with formal and informational lunches, a dinner, distinguished guest speakers, and a reception.¹⁷ I asked an ALI colleague, leaving on the second day of the annual meeting, why she came if she was leaving so early. The response made perfect sense. She came to see friends and colleagues that she had not seen all year.

The Institute has been subjected to thoughtful scrutiny over time; merely cataloguing the commentary from inside and outside the organization would be a substantial task. Given the nature of such an organization of lawyers, analyses, comments, and critiques of various kinds should be anticipated.¹⁸ Indeed, making such comments may even be “close to obligatory” on ALI membership.¹⁹ For example, in the late 1990’s then ALI life member Alex Elson called for a study of the Institute which led to articles pro, con and in-between, though no study was ever commissioned.²⁰ Elson’s 1998 article begins by reiterating that the Institute “has made a substantial contribution to the development of the law,” and states that “[f]or the most part, the ALI is portrayed in positive terms.”²¹ But Elson notes various critical commentary which “if valid, raise serious questions about the ALI” and concludes that “a reasonable response to such questions is to subject the institute to study.”²² Even though no formal study was com-

17. At ALI’s annual meeting in May 2018, one lunch featured a riveting presentation by Professor Bryan Stevenson of New York University School of Law and the Equal Justice Initiative on a host of important themes, including his coming of age, his experiences in criminal defense, and victims of white supremacy, including lynching victims. *See generally* EQUAL JUST. INITIATIVE, <https://eji.org/bryan-stevenson/> (last visited Jan. 8, 2019). *See also* Nat’l Memorial for Peace and Just., Incarceration, <https://museumandmemorial.eji.org> (including a memorial to the victims of lynching, and a museum called The Legacy Museum: from Enslavement to Mass Incarceration) (last visited Jan. 8, 2019).

18. *See* Bernstein, *supra* note 7, at 385 (“But this Symposium is hardly the first occasion of onlookers telling this extraordinary entity what to do. As the ALI enters its next century, it will not be the last.”).

19. *Id.* at 383 (“Helping to guide the Institute through the expression of opinions is close to obligatory [on members] . . .”). Of course, “individuals may fulfill their membership obligation by alternative means.” *Id.*

20. *See generally* Alex Elson, *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625 (1998). *See also* Geoffrey C. Hazard, Jr., *Reflections on Self-Study*, 23 LAW & SOC. INQUIRY 641 (1998) (explaining why the ALI decided not to undertake the study); Alex Elson, *Self-Evaluation Is Not a Serious Alternative to an Independent Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 673 (1998).

21. Elson, *supra* note 20, at 625.

22. *Id.* at 626–27. The Institute obviously changes over time with changes in membership and leadership, among other things, and criticisms from one era may be inapplicable to another. *Cf.* Simmons, *supra* note 12.

missioned, many informal studies have taken place—including the 1998 symposium on the Institute consisting of some 10 articles published by the Hofstra Law Review, Volume 6, Issue 3 and other serious articles.²³

II. THE RESTATEMENT PROCESS—SELECTIVE OBSERVATIONS ON HOW RESTATEMENTS ARE MADE

In the days when law clerks were uncommon and computer-aided research nonexistent, the Restatements must have been invaluable tools.²⁴

* * *

*No one else was in
The room where it happened
The room where it happened
The room where it happened
No one else was in
The room where it happened
The room where it happened
The room where it happened
No one really knows how the game is played
The art of the trade
How the sausage gets made
We just assume that it happens
But no one else is in
The room where it happens.²⁵
The Room Where It Happens (excerpts of lyrics, refrain),
Hamilton, 2015.*

23. See generally Kristen David Adams, *The American Law Institute: Justice Cardozo's Ministry of Justice*, 32 S. ILL. UNIV. L. J. 173 (2007) and her other two articles cited *supra*. Alex Elson's critiques of the Institute were predated by many, a sizeable number of which are collected in Professor Adams' articles. His were by no means the first. Other symposia cited in this article, besides the 1998 Hofstra symposium, include Brooklyn Law School (2014) and Rutgers Law School (2015).

24. See Herbert P. Wilkins, *Symposium on the American Law Institute, Process, Partisanship, and the Restatements of Law: Foreword*, 26 HOFSTRA L. REV. 567, 567 (1998).

25. Lin-Manuel Miranda, *The Room Where It Happens*, GENIUS (2015), <https://genius.com/Lin-manuel-miranda-the-room-where-it-happens-lyrics>. Cf. Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817, 817 (1998) (paraphrasing the supposed words of Otto von Bismarck, "if you wish to enjoy either laws or sausages, don't watch them being made.") (footnote omitted). (Professor Wolfram served as Chief Reporter for the Restatement of The Law Governing Lawyers of the American Law Institute. *Id.* at 817.) The lyrics of the song relate to Aaron Burr's desire to be at the center of political action, referencing a meeting between Hamilton, Jefferson, and Madison. See Jonathan P. Raymond, *The Room Where It Happens*, VUNELA (Nov. 15, 2017), <https://magazine.vunela.com/the-room-where-it-happens-b847e7c8e440>:

* * *

The American Law Institute (ALI) is a prestigious organization that counts as its members federal and state judges, leaders of the bar, and prominent law professors.²⁶

A. The Restatement Process and the Significance of Restatement Voting

As a private organization, ALI is not required to use voting as part of its internal approval process for Restatements and other products. But since it has done so, it is open to fair comment as to how it has done so.

1. The Process of Voting

The restatement process involves one or more reporters, playing an “outsized” role as principal draftspersons and experts in the subject matter, sometimes (but not always) receiving a measure of deference²⁷ from advisers²⁸ and members acting independently and

One of my favorite scenes from the Broadway musical *Hamilton* is when Aaron Burr’s jealousy toward Alexander Hamilton, and his urge to be at the center of political action spills into the show-stopping song, “The Room Where It Happens.” It theatrically describes the dinner table bargain between Thomas Jefferson, James Madison, and Hamilton that moved our capital to D.C. and created our first national bank.

Id.

26. Zeppos, *supra* note 13, at 657.

27. In his article introducing the 2015 Rutgers symposium on the Restatement of the Law of Liability Insurance, Jay Feinman states:

The successive drafts of each Restatement are prepared by one or more Reporters. The Reporters are academics chosen for their expertise in the subject matter and, one suspects, for a variety of other abilities, including facility of writing in the disciplined Restatement form, the willingness to do the work over an extended period of time, and the combination of a thick skin and an open mind to withstand and absorb the comments of dozens or hundreds of critics.

Although the ALI process is deliberative and involves many participants, the Reporters obviously have an outsized role. The business lawyer’s aphorism that there is always an advantage to writing the first draft of a document is equally true of a Restatement. Advisers, members, and Council are always responding to the Reporters’ draft, so the draft frames the debate.

Feinman, *supra* note 9, at 21–22.

William T. Barker also indicates as to the reporter’s role:

While the Reporters sometimes choose to defer to the weight of opinion expressed at one or another of these meetings [such as advisers or members consultative group meetings] or submitted in written comments, they are purely advisory. Indeed, the Reporters need not change anything and will generally do so only when persuaded that such change is proper.

William T. Barker, *Lobbying and the American Law Institute: The Example of Insurance Defense*, 26 HOFSTRA L. REV. 573, 576 (1998). Identifying when and how much deference reporters receive or received in any given circumstance from advisers or MCG members is beyond the scope of this article; furthermore, it is likely to vary from meeting to meeting.

through member consultative groups, the council,²⁹ and the director of the Institute. Drafts are prepared by the reporters and submitted in sequence to these groups for review and comment, and in the case of the council and membership, approval through votes.³⁰ As former ALI Director Geoffrey Hazard summarized:

As is well known to members of the institute, after a project has been undertaken, it proceeds by topical stages in annual drafting cycles. These consist of a preliminary draft presented to an advisory committee of experts who have diverse professional experience and to a Members Consultative Group, in which all members of the institute can elect to participate; a council draft, which is a revision of the preliminary draft undertaken in light of the discussions with the advisory committee and members group; and a tentative draft, which is a further revision in light of the discussions with the council; and in many projects, particularly ones involving controversial subject matter, there is a proposed final draft, a full text of the whole product that is still open to revision on specific points. Throughout, the director and council members follow the development of the text in detail.³¹

28. Cf. American Law Institute, *Member Spotlight, Neil B. Cohen*, THE ALI REPORTER, Vol. 41, Issue 1 (Winter 2018) (quarterly newsletter of the American Law Institute), p. 12 (quoting Professor Cohen on the valuable role played by advisers, including as follows: “One of the enjoyable things about being a Reporter is that you not only *need* to pay attention to everything the Advisers say, but it’s so exciting that you *want* to pay attention to everything they say.”), https://www.ali.org/media/filer_public/7b/39/7b39695d-8440-4123-a3b9-ed07f430a68d/ali_winter_reporter-3148-web.pdf (last visited Jan. 14, 2019) (emphasis in original).

29. The council is the governing board of the Institute:

The Institute is governed by its Council, a volunteer board of directors that oversees the management of ALI’s business and affairs. Made up of no fewer than 42 and no more than 65 members, the Council consists of lawyers, judges, and academics, and reflects a broad range of specialties and experiences. Council members are elected from the Institute membership for terms of five years. The Council ordinarily meets in January, May, and October.

Officers, and Council, AM. LAW INST., <https://www.ali.org/about-ali/officers-council/>.

30. Former ALI President Michael Traynor identified the “[c]riteria for the selection of an able Reporter [which] include mastery of the subject matter; leadership qualities; standing among peers, although not necessarily eminence (Beale after all was eminent but wrong); writing ability; being able to take and commit the time necessary to prepare drafts and to see the project through to publication; and the ability to listen to and respect the views of others, while not necessarily agreeing with them.” Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U. L.J. 145, 163 (2007). See also Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1675 (1995) (“The prestige of a restatement effort often impels participants to donate their time or, in the case of ALI reporters, to work for much less money than their efforts would otherwise command.”) (reviewing JANE STAPLETON, PRODUCT LIABILITY (1994)).

31. Hazard, *supra* note 20, at 647. This article will not address Principles or other products of the Institute than restatements.

Email comments on drafts are officially solicited, and they are another way that members of the Institute may provide input.³² The Director may also invite outside organizations to appoint liaisons to participate in the review of drafts.³³

Although this article notes the impressive vetting process and public scrutiny each restatement receives, it focuses on only one aspect of the process—restatement voting—and suggests remedies.

2. The Meaning and Meaningfulness of Restatement Voting

The following sections introduce some of the logical implications of voting on restatements. Sections B through E below then consider some of the literature on restatement voting, including, among other things, articles by Professor and former ALI reporter Charles W. Wolfram³⁴ and others. After a concluding section on the long debate over whether the restatements should be aspirational or not, this article ends with suggestions for ALI to consider, should it be so inclined, particularly through by-law changes, to address at least some of the issues identified in the literature.

The restatement process depends, among other things, on votes of members and council members—which may be more or less depending on meeting quorums, overall attendance when the votes are taken, and otherwise on who may be in the room at the time.³⁵ Specifically, a decision on restatement text requires approval by the Institute, which in turn depends on separate votes of the members and

32. The RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM, Tentative Draft No. 3, states:

Comments and Suggestions Invited. We welcome written comments on this draft. They may be submitted via the website project page or sent via email to RTLELcomments@ali.org. Comments will be forwarded directly to the Reporter, the Director, and the Deputy Director. You may also send comments via standard mail; contact information appears below.

See, e.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM p. iv (AM. LAW INST., Tentative Draft No.3, 2018), https://www.ali.org/smedia/filer_private/0f/da/0fda4490-13e0-4bda-95ae-196bc383d5e9/torts_liab_for_economic_harm_td_3_-_project_page.pdf (last visited Jan. 14, 2019).

33. Handbook, *supra* note 2, at 17 (“[L]iaisons will be asked to attend either the meetings of the Advisers or those of the [MCG] or in some instances they may meet as a separate group with the Reporter.”)

34. See generally Wolfram, *supra* note 25, at 817.

35. See AM. LAW INST. BYLAWS § 3 (2016), https://www.ali.org/media/filer_public/a0/ba/a0ba4d8e-cd11-4dde-a113-686ddf197c49/bylaws-2016-05.pdf.

council.³⁶ Proxy votes are not permitted at council or member meetings.³⁷

Although democracies rely on votes to decide political elections (and in many other organizations for other purposes, including corporations, with shareholders' and directors' meetings and more), it is quite different to have decisions on what is right and wrong as a matter of law—or even what is an appropriate restatement provision as a matter of scholarship—by votes, including by voting ALI members and council.³⁸

Although appellate courts do just that by voting, appellate decision-making is also a different process, typically involving trained judges and law clerks; written records; the judges being bound by precedent (sometimes) and written procedural rules, their oath of office, and rules of judicial conduct; there are typically written opinions and sometimes concurrences and dissents³⁹; and with the exception of judgments of the Supreme Court, errors are appealable to a higher court (by permission or as of right); and where the court sits in a panel, sometimes they may be considered by the full court sitting en banc.⁴⁰

The Institute is not alone in using votes to approve or disapprove its products. The Uniform Law Commission likewise uses voting to approve or disapprove uniform and model legislation.⁴¹ So do bar associations use voting to approve or disapprove committee reports and

36. *See id.* § 6 (“Publication of any work as representing the Institute’s position requires approval by both the membership and the Council.”).

37. *Id.* §§ 3.06, 4.13.

38. Technically, ALI votes are not votes on the law, per se, but rather on the influential restatements on which courts frequently rely, affecting the rights and obligations of many. This article does not generally consider problematic voting or elections in other organizations or suggest remedies for them, except to note that they do or may exist and perhaps should be considered.

39. *See generally* Bernice B. Donald, *The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality and Dissent in Multi-Member Courts*, 47 U. OF MEM. L. REV. 1123 (2017).

40. *Cf.* E.R. Shipp, *Friess Is Barred From Ever Being New York Judge*, N.Y. TIMES (Apr. 7, 1983), <https://www.nytimes.com/1983/04/07/nyregion/friess-is-barred-from-ever-being-new-york-judge.html> (discussing that judge “asked courtroom spectators to vote on which of two litigants to believe in a harassment case”).

41. Uniform and model legislation may be voted up or down by a vote of the states, with each state having a single vote, regardless of the number of commissioners that state has. Such legislation as is ready for a vote is typically voted upon during the same session at the annual meeting during a vote of the states. Motions made at annual meetings are decided by majority vote of the commissioners’ present, although at certain times a vote of the states may be requested. UNIF. LAW COMM’N, RULES OF PROCEDURE FOR MEETINGS OF THE NATIONAL CONFERENCE, ART. 45, <https://www.uniformlaws.org/aboutulc/constitution>.

policies, although sometimes the final say is with the bar president who “speaks for” the association⁴² or with a house of delegates or board of governors.⁴³ But Institute voting is different since the votes are frequently on what the restatement should say on what the law is or even should be, but in either case, on what law should be considered by a legislature for passage or by a court to be applied in a case.⁴⁴

Some changes in voting rules would not correct this. For example, one might require higher quorums for voting, more than a simple majority to prevail (e.g., some type of supermajority). There is no assurance that however large the size of the quorum and numbers voting, the quality of the result will change. For example, it is unclear that the larger the vote in favor, the better the restatement provision. Otherwise put, there is no assurance that counting hands or estimating voice votes are the surest way (or even a reasonable way) to a *correct* result, as opposed to simply a final result.

A more creative approach might be to require some evidence (or comfort) that the voters were knowledgeable about what they voted on (some sort of pre- or post-vote survey, or even an affirmation to that effect), assuming such a system could be designed at a reasonable cost, if at all; assuming that they were knowledgeable, determining that the voters were not unduly influenced by clients or interest groups;⁴⁵ and even establishing a procedure providing for appeal of adverse votes.

Votes are also subject to interpretation. One interpretation is that voting members who read the draft restatement or a motion directed to the restatement, listened to and understood the floor arguments for and against, including the comments of the ALI reporters, engaged in some level of preparation before the meeting, and came to a reasonable conclusion that the matter at hand is meritorious or not.

42. See AM. BAR ASS'N, CONSTITUTION AND BYLAWS, § 29.2, https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/aba_constitution_and_bylaws_2017-2018.authcheckdam.pdf (“The President shall preside at meetings of the Board of Governors and is the principal spokesperson of the Association.”).

43. AM. BAR ASS'N, POLICY AND PROCEDURES HANDBOOK: 2017-2018 (2017), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2017_2018_green_book_electronic_version.pdf.

44. Unlike restatements, the uniform acts of the Uniform Law Commission are not intended to have legal effect (or take effect) until passed by a state legislature and signed into law. The restatements can begin influencing courts and legislatures as soon as completed.

45. See Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641, 641 (1998) (“The American Law Institute’s reputation for impartial judgment in formulating Restatements of the Law has been compromised by conflicts of interest on the part of ALI members who vote on Restatement provisions.”).

But that is not the only interpretation. Sometimes a vote may mean nothing more than that members who happened to be on the floor of the members meeting announced their support of the provision (or not), leaving the rationale ambiguous, and says nothing about their knowledge of the subject, except for what can be inferred from the credentials of the membership and ALI's member selection process.⁴⁶ No reasons, of course, need be given for the votes.⁴⁷

There is no requirement or finding that the voters are or be knowledgeable or have read and understood the materials which are the subject of the vote beforehand or reason to assume that they have not done so either. The voting is open, not by secret ballot, but no comprehensive record is kept of how individual members voted.⁴⁸

The use of voting may obscure rather than reveal the true opinions of the voters, especially where the voting is yes or no and the subject of the vote is a multi-faceted document with numerous provisions, such as a restatement. Does a yes vote mean the voter accepts each provision or most provisions and if most, which ones? Does a no vote mean that the voter rejects all parts of the restatement? Or just any parts?⁴⁹ It may also be questionable to use voting for deciding the

46. Membership votes are not by secret ballot but commonly are done by an open voice vote or show of hands. This may have a natural intimidating effect when an insurgent minority wishes to raise an issue and members are put in a position of having to oppose the position of sometimes long-time friends and colleagues. See Wolfram, *supra* note 27, at 832 (“[s]ome Council members seem to command much more respect than others, a respect that is hardly always proportional to either sheer brain power or degree of acquaintanceship with the material.”). See also RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WELFARE, AND HAPPINESS* 53 (2009) (chapter entitled “Following the Herd.”). See also *id.* at 57 (“If everyone in the room accepts a certain proposition, or sees things in a certain way, you might conclude that they are probably right People become more likely to conform when they know that other people will see what they have to say.”).

47. This does not mean that no possible reasons for the vote can be surmised. On the one hand, the record may be replete with comments by members, both oral and written, and debate and other input from the ALI reporters and others, including elaborate motions. On the other hand, the record may be silent.

48. Shapo, *supra* note 9, at 654 (noting various reforms for consideration, including one in which “[i]ndividual members’ votes would be recorded on each issue on which a vote is taken at the annual meeting.”). See also Charles Silver, *The Lost World: Of Politics and Getting the Law Right*, 26 *HOFSTRA L. REV.* 773, 792 (1998) (“The ALI does not record how individual members vote. To take revenge on lawyers who voted for section 215 [of the Restatement (Third) of The Law Governing Lawyers], the industry would have needed a web of spies on the floor of the ALI. To my knowledge, the industry had no one there taking names.”).

49. The use of voting in society to make group decisions is itself a complex subject and involves “social choice” theory. See e.g., Cheryl D. Block, *Truth and Probability – Ironies in the Evolution of Social Choice Theory*, 76 *WASH. U. L. Q.* 975 (1998). See *id.* at 977 (“Social choice theory explores the ways in which individual preferences or choices translate into group choices.”) (footnote omitted); David Luban, *Social Choice Theory as Jurisprudence*, 69 *S. CAL. L. REV.* 521 (1996). See also Silver, *supra* note 48 at 797 (“But no single member controls the content of a Restatement or is likely to agree with everything in it [A]lthough the ALI

correctness of legal propositions in general, outside of appellate judicial and legislative circles.⁵⁰ Otherwise put, voting is not the best way to do the job.⁵¹

One may argue that by the time of a vote, a restatement has already been substantially vetted, commented upon and generally tinkered with, so that a vote is just an afterthought that does not much matter. If that is all true then, the reason for a vote diminishes, except in the event some lingering problem may be caught.⁵²

But the Institute is not required to use any particular procedures to arrive at restatements or even the best decision-making. The same is true of any other voluntary organization. ALI is permitted to use whatever form of decision-making it wants—including voting—and to declare to the courts or legislatures, as it has: “This is what we have created, this is how we created it, use it as you see fit.”

B. Non-Controversial Restatement Votes

Where provisions of the restatement are not controversial, it is unlikely that anyone would call attention to votes, voting margins, knowledgeable or unknowledgeable voters, small quorums, or any is-

stands behind a Restatement, no individual may be willing to vouch for the entire package in the manner that an author vouches for the whole of a scholarly work.”).

50. Charles Silver poses the question of whether the restatements are legislative or scholarly in nature. As Professor Silver observes:

[W]ithout some level of consensus, there cannot be a Restatement, for a Restatement becomes final when approved by the ALI. The consensus need not be complete. A majority of the Council and the voting members can bind the ALI. This raises interesting questions. First, is a Restatement a scholarly writing or a piece of legislation. Second, what incentives does the ALI’s approval mechanisms create, and are its voting rules, like other social choice mechanisms, manipulated for the sake of self-interest? *Id.*

Silver, *supra* note 48, at 791. *See also id.* at 796 (concluding that they are less like “scholarly works” and more like “statutes, regulations and political outputs.”). Professor Silver also notes without much explanation, but as a possible “radical” reform, “eliminating [ALI] voting processes . . .” *Id.* at 799.

51. This raises the question of the role of consensus in legal thinking. Would a professor, for example, defer to a consensus opinion on what is the right legal answer in a classroom? Would a law review article writer defer to a consensus in writing her article? Probably not in either case, but it may depend on the circumstances. *Cf.* John Kay, *Science is the Pursuit of Truth, not Consensus*, FINANCIAL TIMES, Oct. 9, 2007, <https://www.ft.com/content/c49c8472-767b-11dc-ad83-0000779fd2ac> (“Science is a matter of evidence, not what a majority of scientists think. . . . Statements about the world derive their value from the facts and arguments that support them, not from the status and qualifications of the people who assert them.”).

52. *See* John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615, 627 (1998) (discussing that even if member participation is low [when it comes to a vote], the reporters are “excellent,” council review is “meticulous,” drafts “are distributed throughout the country in advance of the meetings, written comments are invited, and many come in.”).

sues whatsoever.⁵³ Perhaps no one would even notice or care if they did notice whether the provisions in question declared the law as it is or, for example, as the ALI reporters wanted it to be. But once controversy is injected into the process, when there are winners and losers and close questions that matter, then the process gets higher scrutiny.⁵⁴

C. Voting and Knowledgeable Restatement Voting by the Institute Membership

The next section focuses on some of the literature on restatement votes and voting which are relevant to the questions above, starting with voter knowledge.

Professor David Logan observes that “ALI positions are not the result of anything close to a democratic process” and approval is in practice the result of small group action of the few parties who prepare for the meetings “by reading the voluminous materials beforehand and who are willing, despite their busy schedules, to sit through hours of debate.”⁵⁵ Once again, inadequate preparation can be a problem because some unspecified number of the all-volunteer members of the ALI do not have the time to spend on these projects.⁵⁶

53. See Barker, *supra* note 27, at 574 (“The ALI and its Restatements are enormously influential in the courts. If the ALI is going to take a position on a matter you care about, it is likely to be much more effective to try to persuade the ALI to your own views than to later try to persuade courts, one by one, to reject a Restatement which takes an opposing view.”).

54. See also John Fund, *A Powerful Legal Group Changes the Law While Nobody’s Looking*, NAT’L REV. (May 13, 2018), <https://www.nationalreview.com/2018/05/american-law-institute-restatements-politically-correct-agenda/> (referencing the restatement on liability insurance, quoting commentator to the effect that it creates a new liability, viz. makes “an insurer liable whenever its defense counsel lacks ‘adequate’ malpractice insurance No court has ever adopted such a liability theory.”); John Fund, *Here’s Hoping that Kavanaugh Will Also Be Asked About THIS*, FOX NEWS (Sept. 5, 2018), <http://www.foxnews.com/opinion/2018/09/04/john-fund-heres-hoping-kavanaugh-will-also-be-asked-about-this.html>.

55. David A. Logan, *When the Restatement Is not a Restatement: The Curious Case of the “Flagrant Trespasser,”* 37 WM. MITCHELL L. REV. 1448, 1481–82 (2011). Whether or not there are hundreds of ALI members packed into the annual meeting ballroom is irrelevant, as was the case concerning a recent session in 2018 on the liability insurance restatement. *American Law Institute Approves Restatement of the Law, Liability Insurance*, AM. LAW INST. (May 22, 2018), <https://www.ali.org/news/articles/american-law-institute-approves-liability-insurance/>. The issue being identified is how many are truly knowledgeable, however knowledgeable is defined. Professor Logan does not appear to have cited independent research on this matter but instead cites Prof. Wolfram’s article, despite the number of years between the two articles. See Logan, *supra* note 55, at 1481–82.

56. This problem of actual or potential unpreparedness is most acute for private practitioners who either do not have salaries or whose employers do not recognize the hours spent on the ALI projects. This is not resolved by pointing to the number of ALI members in general, the number of ALI members who signed up for the project at hand, or the number voting. This is also not to underestimate sacrifices made by academics, corporate counsel, attorneys in the not-

Advisers⁵⁷ and the council also play key roles in ALI's work, but according to Professor Logan, they are also volunteers limited because of lack of time, and under certain circumstances expertise.⁵⁸ To remain as a member of the Institute, one must contribute to the Institute's work, but there are many ways to contribute; and there is no requirement of reading all drafts, let alone drafts on which the member votes.⁵⁹ Similarly, Professor Hylton commented on "rational" voter "apathy" likely to affect the process, reducing voter incentives to research the issues at hand.⁶⁰

for-profit sector, and government attorneys, including judges, to work on ALI projects. *See also* G. Edward White, *From the Second Restatements to the Present: The ALI's Recent History and Current Challenges*, 16 GREEN BAG 2D 305, 318 (2013) ("The fact that it is going to be challenging for the ALI to recruit legal academics or practitioners to work on ALI projects, and difficult for those who have been recruited to devote the majority of their scholarly time to ALI work, is not news to those involved with the ALI's internal governance.").

57. The role of advisers is described by the Institute as follows:

Advisers are recommended to Council by the Reporter(s), Director, and Deputy Director. This diverse group of subject matter experts makes a commitment to review the Drafts and provide input to Reporters. Input may be provided at project meetings or by email to the Reporters. Email comments usually are shared with other participants.

How ALI Works, AM. LAW INST., <https://www.ali.org/about-ali/how-institute-works/> (last visited Jan. 8, 2019).

58. Logan, *supra* note 55, at 1481.

59. ALI Council Rule 4 states the obligations of Institute members:

4.01. A. Elected members are obligated to pay annual dues as provided in Rule 3 and to participate in the work of the Institute in some significant way as provided in Rule 4.02. B. All members are expected to exercise independent judgment as provided in Rule 4.03.

4.02. Membership participation sufficient to satisfy Rule 4.01 includes, but is not limited to, the following activities:

- A. attending an annual meeting of the Institute's membership;
- B. serving as an appointed reporter, adviser, or consultant on an Institute project or as a member of a standing, special, or other committee of the Institute;
- C. serving as an Institute appointee on the Permanent Editorial Board for the Uniform Commercial Code;
- D. participating in a members consultative group meeting on an Institute project;
- E. participating in an invitational conference sponsored by the Institute;
- F. submitting comments on an Institute project draft;
- G. delivering invited remarks to an annual meeting of the membership or other Institute event;
- H. authoring an article for an Institute publication; and
- I. planning, teaching, or preparing materials for a course, publication, or other program of ALI CLE.

AM. LAW INST., RULES OF THE COUNCIL §§ 4.01, 4.02 (2012), https://www.ali.org/media/filer_public/9a/9f/9a9f5c57-0bb8-48e5-bbde-9c8f4fa7cf64/council-rules.pdf.

60. *See* Keith N. Hylton, *The Economics of the Restatement and of the Common Law*, 79 BROOK. L. REV. 595, 603–04 (2014):

Of course, the ALI has to approve the Reporter's work, which constrains the Reporter's freedom. But the ALI as a body is similar to a population of voters in an election process. The typical voter does not have a strong incentive to spend resources in determining the validity of any particular claim put to a vote. Indeed, if the voter believes that his vote is not pivotal, he either has weak incentives to replicate the Reporter's research or can easily be persuaded by any side of the issue. The problem of rational apathy, apparent in most voting processes, is likely to be present to some degree in the ALI approval process.

Because the question of voter knowledge in any particular case may not be easily answered; the next question is whether voter knowledge matters if the product is a good one? The answer is probably not.⁶¹ However, an organization that were to depend on or permit partly uninformed voting, as might be the case if the situation envisioned by Professors Wolfram⁶² and Logan were to persist, might eventually experience problems when quality is questionable.

D. Voting and Knowledgeable Restatement Voting by Council Members

Members of the ALI council may or may not have been reviewing all draft restatements. According to Professor Wolfram, at the time that he was writing: “I strongly suspect that most Council members do not read all drafts,” yet still vote on drafts “only or largely on the discussion at the meeting” or “general regard” for the views of the few vocal council members, but not with personal familiarity with the material.⁶³ This is understandable, he noted, because of the “inherently impossible demands placed on public-spirited men and women who all lead very active professional lives.”⁶⁴ (Of course, there is no evidence that council members who read and understand all drafts do a better job (however defined) than council members who decide on the basis of having read some but not all drafts and listen to the discussion.) Similarly, he observes, because advisers are entirely volunteers, “one could hardly insist upon or expect uniformly high levels of preparation for meetings or pervasive impact on a Reporter’s product.”⁶⁵

It is possible that less informed council members less familiar with the subject matter of a vote could come up with, by chance, a better decision than informed council members. Yet no one would seriously advance the proposition that important decisions should be entrusted to insufficiently informed voters, even if such voters were

61. From an organizational standpoint, uninformed decision-making, should it exist, may increase the risk of an unfortunate decision. Despite Professor Wolfram’s strong suspicion, confirmed by others, research has not disclosed any empirical evidence, however, such decision-making has been going on at the Institute. See Wolfram, *supra* note 25, at 832.

62. See generally Wolfram, *supra* note 25.

63. Wolfram, *supra* note 25, at 832. Professor Wolfram did not state the basis of his suspicion. He added, as noted above, that “[s]ome Council members seem to command much more respect than others, a respect that is hardly always proportional to either sheer brain power or degree of acquaintanceship with the material.” *Id.*

64. *Id.* These demands observed by Professor Wolfram may likewise be similar today.

65. Wolfram, *supra* note 25, at 830.

ALI council members; and Professor Wolfram's statements aside, there is no concession that they are.

It may be unreasonable to insist that all council members read all drafts because the extensive workload might make prospective members unwilling to serve. But it is somewhat uncomfortable to consider council members voting on drafts which they have not read, and if votes by council members are to be taken, the Institute may wish to consider whether abstentions under some circumstances may be the more appropriate course of action. There may be other reforms, *e.g.*, a by-law asserting that a member's vote is a representation that such member is familiar with the material on which she has voted.⁶⁶

Furthermore, no one may assert the general truth of these pronouncements by Professor Wolfram, beyond the proceedings which he observed, and it might not be true from council meeting to council meeting either, let alone from advisers meeting to advisers meeting or members meeting to members meeting.⁶⁷ (There is also no formal mechanism for evaluating the performance of council members, members, and advisers in terms of preparation and in the case of members and council members, decision-making ability either.)⁶⁸

Confident—if somewhat cautious—pronouncements remain: for example, Professor Wolfram asserts that “[l]ike many other long-standing and successful organizations, the ALI at times seems to work well in spite of itself.”⁶⁹ The broad comparison to unnamed “successful” organizations and the concept of working well “in spite of” itself, leads to other questions. Namely, which organizations are being compared, and moreover, what is the definition of “working well,” and what is precisely meant by “in spite of itself?”⁷⁰

66. See *Suggested Supplemental Institute By-Laws*, *infra* at app., para.1. This article does not consider whether such a rule would be appropriate for other organizations where voting might be problematic.

67. Some of Professor Wolfram's assertions appear to fall into the category of war stories or anecdotal evidence. Further research would be needed to ascertain whether the phenomena he observed are widespread and continuing, and if so, when and where. This article is in no position to accept or reject the accuracy of his assumptions or assertions. Despite the mention of advisers above, of course, non-member advisers do not formally vote.

68. Some may contend that no formal mechanism is needed, and the nomination process of ALI and screening of new members ensures high performance of the members.

69. Wolfram, *supra* note 25, at 834.

70. Professor Wolfram also references the importance of agenda control, since the restatement being discussed on the last day of the annual meeting, for example, might only have “a withering membership in attendance,” although “binding votes [may be] taken.” Wolfram, *supra* note 25, at 832.

E. Small Group Decision-Making on Restatements

The ALI does not function as a committee of the whole with every member participating, of course, but sometimes through smaller groups, such as MCGs, council, adviser, and member meetings. For example, Professor Wolfram notes that “[m]eetings of the [members consultative groups (MCGs) he observed] are very well attended but only by the standards of a voluntary organization.”⁷¹ Such a criticism invites other questions: are they well attended or not? Are there standards of attendance for voluntary organizations that make poor attendance into acceptable attendance? What is meant by a voluntary organization? Still, other questions: is this still true and, and if so, for which other MCG’s, and how would that be determined?⁷²

Decisions by small quorums at membership meetings are authorized by ALI By-Law 3.04 (which also recognizes the votes of the majority voting as the decision of the entire membership), and by setting the voting quorum low by By-Law 3.02 (at 400 registrants whether or not in the meeting room, unless otherwise modified by the council).⁷³ Similarly, a low 1/3 quorum governs council meetings.⁷⁴ (Query

71. Wolfram, *supra* note 25, at 831. MCGs are not decision-making bodies and do not bind the Institute or even the membership. ALI defines them as follows:

Members Consultative Group (MCG) participants are ALI members who volunteer to join project discussions at any stage of a project’s life cycle. MCGs members are not necessarily experts in the project’s area of law, but provide a vital perspective, as they read the drafts the way the project’s intended audience would read the drafts. MCG participants may provide input by attending project meetings and/or submitting email comments.

72. See *How ALI Works*, AM. LAW INST., <https://www.ali.org/about-ali/how-institute-works/> (last visited Jan. 8, 2019).

Binding votes are not taken at MCG meetings, but the meetings may influence the drafting process and are therefore addressed here. “Like the Advisers, the Members Consultative Groups have no formal drafting authority but provide valuable sources of informative criticism and advice for Reporters.” Handbook, *supra* note 2, at 17. With respect to advisers, “[a]lthough the Reporter need not defer to the views of the Advisers, Adviser uneasiness with a particular draft should cause the Reporter carefully to reconsider.” *Id.* at 16.

73. Latta, *supra* note 8, at 700 (“Although the Institute has over 2,700 members, less than 150 will actually participate in the debate. Furthermore, important motions respecting the substance of the black letter are often decided by a vote of less than 250 members, many of whom have not given thoughtful consideration to the issue prior to the limited debate. Indeed, it is surprising that this procedure is as effective as it is in carrying out what is, after all, a scholarly enterprise.”).

74. American Law Institute By-Laws § 4.10 provides for council meeting quorums as follows at 1/3 council membership, but the 1/3 may vary during the meeting:

One-third of all Council members constitutes a quorum for a Council meeting, but one-third need not be present at all times. Except as provided by applicable law, a majority vote of those present when the vote is taken on any matter at a duly constituted Council meeting is effective as the Council’s action.

See AM. LAW INST., BYLAWS § 4.10 (2015), https://ali.org/media/filer_public/ba/94/ba94175cd1c3-4400-9709-3017395ed321/bylaws.pdf.

whether if the ALI were more “democratic” and voting quorums set higher, its products would be better, and what evidence supports this.?)⁷⁵ Lawrence Latto noted fewer than 150 participating in a debate and important motions being decided by fewer than 250 members.⁷⁶ John Frank referenced votes ranging up to 513 participants.⁷⁷

Apart from the quality of attendance, any observation as to size of attendance obviously does not hold from one MCG, membership or council meeting to another, or from one year to the next, and to conclude that it does would require gathering extensive data and empirical study.⁷⁸ (Query who would pay for this study and what difference it would make?) Furthermore, Professor Wolfram was only speaking as of one moment in time, and the attendance for each restatement meeting (e.g., MCG, adviser, council, and membership) (a) differs, (b) has the potential of differing from the last, or (c) of being different from those in the future.⁷⁹

Of course, larger groups need not necessarily come up with better decisions or advice than smaller groups, controlling for other variables. It depends on who is in the group and their level of knowledge, preparation, and motivation, among other things. For example, a small group of ALI members—whether at an MCG meeting, advisers

75. In answering these questions, one may have an implicit bias in favor of democratic decision-making and larger numbers of decision-makers, but showing that these are better procedures or lead to better results is more difficult. Such favorable assumptions or biases, moreover, may resemble heuristics. “With respect to heuristics, the basic claim is that in answering hard factual questions, those who lack accurate information use simple rules of thumb.” Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1560 (2004).

76. Latto, *supra* note 8, at 700 (writing in 1998).

77. John P. Frank, *supra* note 52, at 627 (writing in 1998).

78. An example of the type of empirical evidence required appears in Frank’s article: Membership does not necessarily mean active participation. It is the vote on the floor at the Annual Meeting that determines what the work product of the Institute will be But attendance, in the sense of functioning as a working member, is highly variable Most conclusions are approved on the floor by voice vote or show of hands without the necessity of counting votes; but occasionally there are formal divisions of the House. The largest vote recorded [at an annual meeting] between 1978 and 1992 was on an issue in Corporate Governance, when 513 members participated. The smallest was on an issue concerning Mortgages in which thirty-one members participated.

Id. See also Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641, 643–44 (1998) (“The ALI has about 3,600 members, but only a small fraction of that number goes to the meetings at which Restatements are debated and voted on. At one meeting dealing with the Restatement (Third) of The Law Governing Lawyers, for example, attendance varied from a high of 390 to a low of 150, and an important vote was decided by a vote of 110–80. Thus, the issue was determined by approximately five percent of the ALI membership”).

79. Wolfram, *supra* note 25, at 832. Query whether better attended meetings in general are more or less likely to produce legally sound results, assuming one can agree on legal soundness. Further query whether that depends on who happens to be attending, not merely numbers of persons.

meeting or elsewhere—highly motivated and knowledgeable on the subject matter⁸⁰—may be more likely to come up with a better decision or advice than a larger group who is not; and, a group adhering to the ALI conflict of interest policy might make better decisions or give better advice than one voting in alignment with particular client interests.⁸¹ Of course, larger groups may in some circumstances be more representative of the total ALI membership, depending on their size and other factors, but representativeness is no guarantee of quality either.⁸²

This article does not take the position that good uniform, model legislation or restatements (or any sort of scholarship) may only be produced by large organizations. That is not the case. For example, the Uniform Law Commission⁸³ has been very successful in proposing uniform or model legislation, some of which have gained wide acceptance; yet, it is a fraction of the size of the American Law Institute. Theoretically, a good draft model could be produced by a single draftsman.

Nonetheless, it might be noteworthy for a court, in assessing the efforts of either organization, whether a particular restatement or uniform or model act was passed by members at a low-attended meeting with a fraction of total membership present, on a close vote of the membership or otherwise with a narrow margin in the face of strong and credible opposition or dissenting views. For example, the court

80. Indeed, one may not discount the presence of highly motivated and well-informed MCG or advisory committee members politely confronting the reporter(s) at any such meeting and pressing such reporter(s) to defend the reporter(s)'s work product. This may or may not happen. Cataloging the frequency of such meetings would require empirical evidence which is beyond the scope of this article.

81. Certain conduct by ALI membership, of course, may go so far as to violate the Institute's conflict of interest policy. See AM. LAW INST., RULES OF THE COUNCIL § 4.03, <https://www.ali.org/about-ali/governance/>. Cf. Feinman, *supra* note 9, at 26 ("Thus whether a participant in the Restatement drafting process leaves the client at the door is largely irrelevant . . . ALI members seldom will vote against the interests of long-term, important clients because the members have internalized those interests."). Also, the benefits of increasing the numbers of voters might have to be balanced against the need to keep quorum requirements within reason so quorums are realistically achievable and meetings can be conducted. Excessive quorum requirements might have the effect of blocking any council or membership action from taking place and preventing any Institute action at all.

82. To the author's knowledge, no one has contended that ALI membership, consisting of an elite group of lawyers, is ever representative of the public at large; nor could they validly do so.

83. See *Overview*, UNIF. LAW COMM'N <http://www.uniformlaws.org/aboutulc/overview> (stating there are more than 300 uniform law commissioners) (last visited Jan. 8, 2019). See also *Members*, AM. LAW INST., <https://www.ali.org/members/> (stating there is an ALI membership limitation of 3,000 members) (last visited Jan. 8, 2019). The author is a member of the Uniform Law Commission.

may wish to know whether a vote on a particular restatement or part of one was 90 to 70 rather than 159 to 1 and so forth or whether it was taken with a “withering attendance”⁸⁴ on the floor because it took place during the last day of the meeting when attendance is expected to be low or otherwise. One potential reform is to keep an easily accessible public record of all votes where it is practical to do so.⁸⁵

III. DRAFTING RESTATEMENTS: NOT JUST ABOUT IDENTIFYING THE MAJORITY RULE (OR NOT)

Where jurisdictions disagree on a particular point, the Restatements do not purport to count jurisdictions and adopt the majority rule. Rather, the standard is to adopt the rule that a rational court, faced with the issue for the first time, would find most persuasive.⁸⁶

* * *

In such cases, unthinking reliance on the Institute’s position, simply because of the perceived force of its views, would be inappropriate.⁸⁷

* * *

Its work product is offered into the marketplace of legal ideas and receives whatever weight it may be given by the authoritative organs of government—judicial and legislative.⁸⁸

Other criticisms of the restatement process are that the Institute has proclaimed from time to time not what the law is but what it ought

84. See Wolfram, *supra* note 25, at 832. Scheduling a meeting for the last day when bad attendance is a given has been referenced as “agenda control.” *Id.* It can also be referred to as a predictable problem endemic to scheduling overlong meetings with overstuffed agendas.

85. See *Suggested Supplemental Institute By-Laws*, *supra* note 66, para. 2.

86. Harvey S. Perlman, *The Restatement Process*, 10 KAN. J.L. & PUB. POL’Y 2, 4 (2000). See also Liebman, *supra* note 9, at 822 (“Like that of some religions, cults, and cabals, the ALI’s existence and work revolve around a single, but nebulous word; in our case, Restatement. I remain astonished that our founders used that word and am equally astonished that it has been applied to so many different ways of recommending improved legal principles.”).

87. Wilkins, *supra* note 24, at 569. Although then Chief Justice Wilkins (Massachusetts Supreme Judicial Court) limits his position to certain cases, unthinking reliance on any source would appear to be inappropriate. See also Adams, *supra* note 6, at 473 (“Courts that apply the Restatements should not do so without analyzing their substantive merit.”) (citing with approval the approach of *Ramirez v. Health Partners of Southern Arizona*, 972 P.2d 658 (Ariz. Ct. App. 1998)).

88. Hazard, *supra* note 3, at 664.

to be under certain circumstances.⁸⁹ Justice Scalia commented critically in an opinion focused on the well-known debate of whether the restatements are creating aspirational documents on what the law should be, not documents declaring what the law actually is.⁹⁰

A. The Majority Rule and How to Find It (Or Not)

To begin, it may sometimes be difficult for certain restatements to state the law as it “is” since it is not always the case that “an issue has been addressed by a well delineated corpus of case law, neatly divided into majority and minority positions.”⁹¹ “Sometimes, of course, the cases are clear, and there is no marked division of authority, which could arguably lessen the salience of the ‘is-ought’ dichotomy. But, often the state of the law is not clear or discernible or has not produced well-delineated majority and minority positions. The case law often is unclear, ambiguous, or inconclusive so that a court’s approach to a question simply cannot be deduced from the opinion.”⁹² “Some jurisdictions may have barely hinted at resolution of a question, while others may have produced an impressive line of cases that address the question.”⁹³ “[P]recedent rarely speaks with a single voice.”⁹⁴ “Cases

89. This article shall not attempt to resolve whether the restatements are required to state the law as it is or as it ought to be, since as a private organization, the Institute can obviously do either. Cf. Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute the Fairchild Lecture*, 1995 WIS. L. REV. 1, 17. (“Should it simplify and state the law that is, or should it prescribe the law that ought to be? This division between the ‘is’ and the ‘ought’ appears in the ALI’s founding documents and continues to this day.”) As noted previously, however, to avoid confusion, ALI should specify what it is doing; and according to the Handbook, that is ALI’s policy.

90. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part). *But see* Richard L. Revesz, *The American Law Institute and the U.S. Supreme Court* (Dec. 14, 2016), <https://www.ali.org/news/articles/american-law-institute-and-us-supreme-court/> (“It seems fair to conclude that Justice Scalia depended a good deal on the Restatements and generally admired the work product of the ALI. His concern that the Reporters might impose their own normative vision has been addressed in recent years by the requirement, contained in our Style Manual, that if a Restatement “declines to follow a majority rule it should say so explicitly and explain why.”). *See also* John Fund, *A Powerful Legal Group Changes the Law While Nobody’s Looking*, NAT’L REV. (May 13, 2018), <https://www.nationalreview.com/2018/05/american-law-institute-restatements-politically-correct-agenda/>. *See also* Adams, *supra* note 13, at 206 (“Criticism of the American Law Institute and the Restatement movement is a common phenomenon and comes from two sides. The critique from one side is that the Restatements are too activist, stating the law as the Institute believes it should be, rather than the law as it is. The critique from the other side is that the Institute is too conservative. . .and fails to incorporate the best contemporary practices in the study of law.”) (footnotes omitted).

91. Joseph H. King, *The Torts Restatement’s Inchoate Definition of Intent for Battery, and Reflections on the Province of Restatements*, 38 PEPP. L. REV. 623, 661–62 (2011).

92. *Id.* Although the quotations from Professor King’s article are extensive, his points are accurate and well-stated, and extensive quotation is appropriate.

93. *Id.* Even if a majority can be determined, how many cases constitute a significant majority? Should a 40-state majority be treated the same as a 10-state majority? What about a 5-

also may vary by level of the court and date or currency, and there may also be significant differences in the quality and rigor of the courts' reasoning" and the reputation of the courts.⁹⁵

ALI can define its mission in whatever way it chooses.⁹⁶ However, for the benefit of those who rely on ALI products, the ALI might best be clear about which approach it is taking (stating the law as it is or as it should be). Doing that is already official ALI policy, and ALI reporters should pay special attention to putting this policy into practice.⁹⁷

state majority, where 10 states go one way and 5 go another? Or suppose only 5 states have said anything on the subject and the rest are silent? See Wolfram, *supra* note 25, at 818 (“[O]ften heard in debates is the cry that the ALI should hew to the majority of decisions. (This is often asserted without regard to the fact that only a handful of jurisdictions has passed on the point in question.)”). See also *id.* at 819 (questioning what should count, for example, a “reported trial court decision in New York?”).

94. Feinman, *supra* note 9, at 14. To the same effect, see Tom Baker and Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 GEO. MASON L. REV. 767, 772 (2017) (footnotes omitted):

[T]he concept of what constitutes a majority rule in the context of state-based common law is often disputed. Is it defined by the ratio of jurisdictions that have adopted the rule to the total number of jurisdictions? Or should the ratio be adjusted so that the jurisdictions with larger populations receive greater weight, as in the federal electoral process? Presumably decisions of the highest court in a state count more than the decisions of lower courts within that state, but how much more? And what about decisions of federal courts interpreting the state law? Also, what if a question of insurance law has been addressed by only a handful of courts? If three out of the only four states that have addressed a question reached result A, does that mean result A is “the majority rule,” even though 47 jurisdictions have not yet had an occasion to address the issue? What if the trend of recent decisions conflicts with older decisions? What if courts commonly recite a standard that has one meaning in common parlance but the courts routinely give that standard a different meaning, so much so that commentators generally remark upon it? That none of these questions have simple answers suggests that, in the process of drafting a Restatement of a given area of law, the drafters should not give the concept of the majority rule more weight than it is due.

95. King, *supra* note 91, at 662. Some have challenged the quality of elective judiciaries as opposed to judges picked by commission-based appointment systems for the selection of judges. See, e.g., Norman L. Greene, *How Great Is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 887–88 (2010).

96. Denise E. Antolini describes an interesting example of how the restatement process worked on one occasion:

Little did Prosser know that, at the 1970 [ALI] Annual Meeting, an unprecedented “legal drama” would unfold that would significantly alter his carefully crafted special injury rule. The events would prove to be the final straw prompting his resignation [as reporter]. After an emotional debate, the ALI membership voted to override Prosser's draft statement of the special injury rule in order to infuse into public nuisance the principles of standing rapidly developing in new federal administrative law cases.

Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L. Q. 755, 828 (2001) (describing rebellion of parts of membership against the views of the then Reporter William Prosser).

97. See Revesz, *supra* note 90; Handbook, *supra* note 2, at 6 (“The Institute, however, needs to be clear about what it is doing. For example, if a Restatement declines to follow the majority rule, it should say so explicitly and explain why”).

B. The Restatement as Art Not Science—A Note on Subjectivity

The restatement process, according to the ALI Handbook,⁹⁸ rejects a mechanical approach in drafting these documents, but rather weighs four elements, in a procedure described as “being art and not science.”⁹⁹ The process involves finding the majority rule, ascertaining trends, finding which rule fits best with the law “as a whole” and leads to “more coherence,” and ascertaining the “relative desirability of competing rules.”¹⁰⁰

This weighing process gives rise to more questions which are identified here but not answered. Which law are we talking about when we consider “law as a whole” and how is that determined? And once one describes the process as being more art than science, does that raise a concern whether there are discernable rules or that the process sometimes is heavily, and unavoidably, subjective? Furthermore, what is meant by achieving greater coherence in the law¹⁰¹ and how does a rule add to that; what does it mean for a rule to fit best, and what steps does one take to ascertain relative desirability? Desirability to whom is another question to answer: suppose a rule is good for some stakeholders, bad for others?

CONCLUSION

Professors Schwartz and Scott, writing in 1995, before a significant onset of commentary on ALI such as in the Hofstra Law Review (1998) and elsewhere, referenced a lack of commentary about ALI as an institution. According to the authors, restatements were at one point considered to be the creation of “rule-generating black boxes” made by “disinterested legal experts who pursue only the public good.”¹⁰² “ALI . . . products sometimes receive severe criticism while

98. The nature of the restatement process as set forth in the Handbook is reproduced in the front of drafts in process. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM p. xii–xiii (AM. LAW INST., Tentative Draft No. 3, 2018), https://www.ali.org/smedia/filer_private/0f/da/0fda4490-13e0-4bda-95ae-196bc383d5e9/torts_liab_for_economic_harm_td_3_-_project_page.pdf (last visited Jan. 14, 2019).

99. Handbook, *supra* note 2, at 6.

100. Handbook, *supra* note 2, at 5. “A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole.” *Id.*

101. *Id.*

102. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislation*, 143 U. PA. L. REV. 595, 596–7 (1995) (discussing the now named Uniform Law Commission as well as ALI).

ALI . . . procedures are ignored.”¹⁰³ To the same effect, another commentator observed: “Working toward the laudable goal of simplifying and clarifying the law, the ALI epitomized reasonable men pursuing reasonable goals reasonably.”¹⁰⁴ “Lawyers, as part of the professional class, were entrusted to use their specialized knowledge and expertise toward altruistic ends.”¹⁰⁵ To the contrary, the extent of commentary on the ALI processes today is substantial, and this article synthesizes and analyzes some of it.

Restatements should be understood in light of the methods of their creation as a form of group scholarship. This scholarship consists of or results from: *e.g.*, decisions made by the reporter(s) to draft one way or another, and deference to those decisions (or not) by council members or members; input of advisers, council members and members, and the reporter(s)’ response to the input; and the votes representing votes of membership (both on motions and on interim and final work product) and of the council. These are acts of those who happen to have been in the “room” where “it happens,” in the words of the play *Hamilton*—*e.g.*, who happen to be in attendance or otherwise involved with creating or approving one draft or another, all of which may affect the quality of the document, including its aspirational (or non-aspirational) nature. How the work was done may matter, not always, but sometimes. As observed by Professor Wolfram, from time to time one should “strip down the machinery of a Restatement’s production process to see whether the product it produces is worthy of being served up to nourish the body politic.”¹⁰⁶

Although analyzing the restatement production process may be useful and may lead to its refinement, it may not be determinative of the value of the restatement. Good drafts, in whole or in part, may be produced by inferior processes, and lesser drafts by superior processes. Ultimately, the “level of influence accorded a restatement rule . . . is determined in the rough and tumble of litigation in coming years . . . and will stand or fall in the marketplace of ideas.”¹⁰⁷

103. *Id.* at 650.

104. Zeppos, *supra* note 13, at 659.

105. *Id.* at 660.

106. Wolfram, *supra* note 25, at 817–18. *See also* Schwartz & Scott, *supra* note 102, at 651 (“[T]here should be more theory and more evidence relating to how private law-making groups [including ALI] function.”).

107. Logan, *supra* note 55, at 1482. *See also* Harvey S. Perlman, *The Restatement Process*, 10 KAN. J.L. & PUB. POL’Y 2, 6 (2000) (“The ultimate test of any Restatement is its acceptance by the courts.”). *Cf.* Logan stating as follows:

The American Law Institute has played an important role in the development of the American legal system, despite criticism of particular projects.¹⁰⁸ Professor Wolfram and others have occasionally laid out actual or potential flaws and controversies at the time of their articles, including controversies over how specific restatements should be drafted. Such controversies and different ones are to be expected in the future just as in the past. It is nonetheless anticipated that the American Law Institute will be an important contributor to American law for years to come as in years past – as well as a highly desired membership among prominent American lawyers.

NOTE ON SOURCES

This article does not rely on contemporary empirical studies of ALI (although mentioning some informal studies) and does not do any independent study of its own.¹⁰⁹ The article does rely on the scholarly writings of others on the ALI process, a good number of whom are professors, judges, or practicing lawyers, and past or present members of ALI, including ALI leadership. A fair number of quotes come from statements that ALI has made about itself, including through its Handbook and website. That this study is not scientific or mathematical is not troubling; science and math are not the only way to study things; and not every study needs to be reduced to numbers to be valuable. The focus has been kept on restatements, rather than other Institute projects, such as Principles, in order to keep the article within manageable bounds.

Such a closed loop of a system would be unacceptable if the end result of ALI projects were binding on courts, which, of course, they are not. Nevertheless, this is an area of concern because of this combination of high influence and low representation. (footnote omitted). This critique is especially persuasive in the context of the exercise of judicial power, because federal judges, and many state judges, constitute the least democratic branch of government, largely immune from the discipline provided by the need to regularly stand for general election (often termed “the counter[-]majoritarian difficulty.” (footnotes omitted).

Logan, *supra* note 55, at 1482.

With respect to Professor Logan’s favorable reference to judicial elections as providing some sort of discipline, see extensive criticism of judicial elections, *e.g.*, at Greene, *supra* note 95 (passim) and other sources there cited; *see also* Norman L. Greene, *Advancing the Rule of Law Through Judicial Selection Reform: Is the New York Court of Appeals Judicial Selection Process the Least of Our Concerns in New York*, 72 ALBANY L. REV. 633, 647 (2009).

108. Freedman, *supra* note 45, at 641.

109. Among other things, of course, it might be difficult to define a study as truly contemporary since the Institute changes, and even a recent study applicable to a certain event, time, or circumstance, such as a meeting or vote, may be inapplicable to a different event, time, or circumstance.

APPENDIX

AMERICAN LAW INSTITUTE, BYLAW 3¹¹⁰

MEMBERSHIP MEETINGS AND ACTION

3.01 The Council shall call an annual meeting of the membership of the Institute and may call additional meetings of the membership. Notice of the time, place, and proposed agenda of any meeting of the membership must be provided to the members at least 30 days before the meeting.

3.02 A quorum for any session of a meeting of the membership is established by registration during the meeting of 400 members, or such other number as may be established by the Council before the meeting.

3.03 The Council may authorize concurrent sessions during any meeting of the membership to consider different matters.

3.04 A majority vote of members voting on any question during any meeting of the membership or any session of such meeting is effective as action of the membership.

SUGGESTED SUPPLEMENTAL INSTITUTE BY-LAWS

This article poses the following draft supplemental Institute by-laws for consideration:

1. Voting on any Restatement draft or provision or on any motion with respect to the draft or provision shall be a representation by the member voting that the member is familiar with the subject matter of the vote. Members shall not vote on matters with which they are unfamiliar.
2. All votes shall be totaled unless a voice vote. The outcome of the voice vote shall be recorded, but the number of persons voting for and against need not be totaled. All records of votes shall be publicly available.
3. A vote other than a voice vote shall be taken upon the request of the chair of the meeting or [insert a number] or more members present at the meeting.

110. AM. LAW INST., BYLAW 3 (2016), https://www.ali.org/media/filer_public/a0/ba/a0ba4d8e-cd11-4dde-a113-686ddf197c49/bylaws-2016-05.pdf.

4. Appeals from the grant or denial of any motion at a meeting with respect to any Restatement draft or portion thereof may be taken to the council or a committee thereof designated for that purpose in accordance with council rules.
5. Any member may file a concurring or dissenting statement with the Institute with respect to any Restatement or draft or portion thereof. All such statements shall be publicly available unless the member designates otherwise.

Cutting Pension Rights for Public Workers: Don't Look to the Courts for Help

RONALD H. ROSENBERG*

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ABSTRACT

Every day we rely on public employees to provide us with a broad range of services necessary to daily life. These workers include public school teachers, fire and police, emergency medical technicians, park rangers, nurses just to name a few. As public employees, these people work for local and state government and they are compensated by us for their services through the taxes we pay. In general, these are modestly paid workers who also receive pensions when they retire after many years of work. Following the financial crisis of 2008–2009, government retirement trust funds significantly lost value and their long-term rates of return fell from levels necessary to pay benefits. With a more accurate assessment, the true costs of honoring these longstanding retirement promises became much more clearly in focus and future pension shortfalls appeared imminent. With little political appetite for raising tax rates to cover this shortage, state and local governments adopted “pension reforms” to meet the impending financial challenges.

Pension reforms were carried out in many states and localities through legislative and administrative action. While they followed no uniform pattern, these policy changes had the overall effect of modifying existing public employee retirement rights in a way that reduced benefits, made benefits more difficult to earn or they completely overhauled existing pension systems. Not surprisingly, public employee

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and retiree groups found these changes to be harmful to their retirement expectations and they considered them a breach of trust. In over 2/3s of our states litigation followed challenging pension reform policies claiming that they were illegal or unconstitutional in their impairment of pension rights. This struggle is the principal focus of this article.

After reviewing the history of American public employee pensions, describing the current state of pension systems and setting forth their structure, this article considers the last decade of litigation to pension reform policies. In more than 100 state and federal case decisions, workers and retirees have challenged the popularly-supported policy changes to their pension rights using a variety of legal theories and forms of argumentation. The review of these cases analyzes them from a theoretical perspective and it draws conclusions about the effectiveness of using a litigation strategy to overturn democratically-adopted employment policies. The overarching conclusion resulting from this study is that both state and federal courts have overwhelmingly upheld state and local pension reforms and they have refused to find statutory or constitutional rights violations for government workers. The secondary conclusion is that in order to protect their future retirement income, these employees must build better popular support and legislative protection for their contributions to the public welfare in order to avoid future cutbacks in benefits.

INTRODUCTION

Throughout American history, all levels of government have employed people to serve the public in a myriad of ways: teachers, police, fire, and other workers. At the creation of America, private citizens were asked to support the new country by joining as soldiers in the army of the rebellious colonies during the Revolutionary War. In exchange for this dangerous loyalty, these courageous people were to be compensated by their colonies and later, by the Continental Congress. As in modern times, these military “public employees” were offered current wages and, sometimes, future income with pensions or land in order to induce their service and to discourage desertion during the lengthy and dangerous war.¹ Pension incentives were thought to be

1. Revolutionary War Pension and Bounty-Land-Warrant Application Files, National Archives and Records Service, pamphlet describing M804 (1974), <https://www.archives.gov/files/research/microfilm/m804.pdf>. The practice of offering pensions for soldiers and their widows was a longstanding practice.

crucial for the colonies to attract soldiers willing to risk their lives for this dangerous and uncertain cause. The need for this support was apparent since injured soldiers could spend their elderly years impoverished and disabled by their war injuries. Even then this policy of attempting to mitigate economic dependence of elderly workers recognized a public goal of shifting the main responsibility of supporting older, injured soldiers to the general public and away from the soldiers and their families.² Such a policy was thought to be necessary for the public welfare and, at the same time, humane.

However, then as now, such public promises were easy to make and, occasionally, they were found to be difficult to honor. Foreshadowing today, these promised Revolutionary War benefits were either not paid in a timely way or, occasionally, they were not paid at all.³ Not surprisingly, this resulted in tremendous dissatisfaction among soldiers. Over 200 years ago, renegeing on military pensions nearly had catastrophic results and almost triggered a mutiny of colonial officers threatening the impending colonial military victory.⁴ In this stark example, denying pensions could have affected the course of American history. These eighteenth century conflicts pitting soldiers against their government employer anticipated a serious, twenty-first century problem that is growing in significance - whether, and to what degree,

For more than a century before the beginning of the Revolutionary War, British colonies in North America provided pensions for disabled soldiers and sailors. During and after the Revolutionary War, three principal types of pensions were provided by the U.S. Government for servicemen and their dependents. "Disability" or "invalid pensions" were awarded to servicemen for physical disabilities incurred in the line of duty; "service pensions," to veterans who served for specified periods of time; and "widows' pensions," to women whose husbands had been killed in the war or were veterans who had served for specified periods of time. *Id.* at 1.

Following the American Revolution, Thomas Paine called for a land inheritance tax that that would pay all citizens reaching the age of fifty an annual pension of ten pounds sterling. Thomas Paine, *Social Insurance History*, U.S. SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/history/paine4.html>.

2. See *Historical Background and the Development of Social Security*, U.S. SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/history/briefhistory3.html> (last visited July 1, 2018).

3. See generally ROBERT L. CLARK ET AL., *A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES* (2003).

4. Even then promises of current wages and future retirement pensions presented fiscal demands on the newly-created government that could not be met. See generally EMILY J. TEIPE, *AMERICA'S FIRST VETERANS AND THE REVOLUTIONARY WAR PENSIONS* (2002). Colonial government defaults actually enraged the Revolutionary officers and soldiers inspiring them to threaten the Continental Congress with a virtual mutiny in 1783. *Id.* This threat was leveled by officers at a meeting in Newburgh, New York in March of 1783 after soldiers had not been paid wages for nearly a year. *Id.* The timely intervention of George Washington quelled this revolt after an emotional speech known as the Newburgh Address of March 15, 1783, promising to use his best efforts to have the soldiers' claims met. *Id.*

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public employers may reduce or change earlier retirement promises made to their workers.

This article considers the current legal and policy changes that have been mandated at the state level of government affecting nearly twenty million American workers and millions of current retirees. New state policies have far-reaching consequences affecting a surprisingly large component of the American workforce representing almost 1-in-8 American employees.⁵ These are the teachers, police officers, firefighters, emergency technicians, and other state and local government workers we are familiar with and upon whom we rely every day. Having been promised benefits by prior politicians whose successors would now determine those promises to be too generous, these workers find themselves facing a less financially secure retirement future than they expected.

Honoring these retirement promises has become a serious problem across the nation becoming a hotly contested political issue in many states.⁶ Since the financial crisis of 2009, legal and policy changes have been adopted in the face of some extremely alarming financial predictions about the long-term financial solvency of state retirement systems.⁷ Accurate actuarial projections have given more precision to the extent of this problem with recent estimates of the current unfunded liabilities of most state and local government pension ranging from nearly \$4 trillion⁸ to more than \$6 trillion.⁹ These

5. In 2017, the American civilian, non-institutional workforce numbered approximately 155.5 million workers with state and local government employees comprising 19.54 million or 12.6% of the total. Public teachers and other workers counted for 53% of the state and governmental workers or nearly 7% of the American civilian workforce. *Labor Force Statistics from the Current Population Survey*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, <https://www.bls.gov/cps/cpsaat18b.htm> (last updated Jan. 19, 2018).

6. See, e.g., Joel Fox, *Is a Battle Brewing Over Prop. 13?* L.A. TIMES (Nov. 17, 2016); Tina Sfondeles & Fran Spielman, *Pension Battle Between 'Gov. Gridlock' and 'Madigan's Mayor'?* CHI. SUN-TIMES (Jan. 10, 2017), <https://chicago.suntimes.com/news/city-hall-dubs-rauner-gov-gridlock-for-pension-bill-stance/>; Tom Loftus, *Bevin Warns Tax Reform Will be Tough*, THE COURIER-JOURNAL, Feb. 8, 2017, at A2; Tina Sfondeles, *'Frustrated' Rauner to Push for 'Grand Bargain' in Budget Address*, CHI. SUN-TIMES (Feb. 14, 2017), <https://chicago.suntimes.com/news/frustrated-rauner-to-push-for-grand-bargain-in-budget-address/>.

7. The issue of state retirement cutbacks has arisen at the same time when the solvency of the major federal social benefit programs of Social Security and Medicare affecting millions of retirees and other recipients has also been questioned. However, this looming federal issue which currently is unaddressed by our political leaders is beyond the scope of this article.

8. Joshua D. Rauh, *Hidden Debt, Hidden Deficits: 2017 Edition: How Pension Promises Are Consuming State and Local Government Budgets 1*, HOOVER INSTITUTION 1, 1 (2017), <https://www.hoover.org/research/hidden-debt-hidden-deficits-2017-edition>.

9. Thurston Powers et al., *Unaccountable and Unaffordable: Unfunded Pension Liabilities Exceed \$6 Trillion*, AMERICAN LEGAL EXCHANGE COUNCIL 1, 3 (2017), https://www.alec.org/app/uploads/2017/12/2017-Unaccountable-and-Unaffordable-FINAL_DEC_WEB.pdf.

staggering sums have grown year to year and they currently represent twice the general revenues collected by these state and local governments.¹⁰ Put into another perspective, this unfunded pension liability dwarfs all of the outstanding bonds of these jurisdictions forming an “off-the-books” debt that governments have refused to recognize.¹¹

The realization that state pension plans have offered retirees benefits that may be financially impossible to honor has led numerous state legislatures to make policy changes and to enact new laws altering the existing array of public retirement benefits for public workers and retirees. Justified by limited state and local revenues, by more compelling public spending priorities, and by an aversion to increasing taxes, state after state has attempted to rein in these benefits. These new policies have been highly controversial and have been intensely resisted by employee groups and retirees.¹² The cutbacks on employee pensions have been the subject of numerous court challenges in at least 70% of the states.¹³ This high level of court challenge reflects the deep dissatisfaction of government workers with these new policies as well as the belief that their trust in their government employer had been violated.

This article analyzes pension reform challenges occurring over the past decade in both the state and federal courts. It categorizes the patterns of legal attack employed to challenge these new policies and it evaluates the actual legal and constitutional constraints faced by policymakers in reforming their state’s policies. The central questions presented here are “what are the legal boundaries for public policy making in this area” and “how does law limit public policy choices?” This analysis also assesses the litigation outcomes to determine the relative success of workers resisting lawfully-adopted pension policy changes. The general conclusion reached from this analysis is that although the law in this area follows no uniform pattern, state governments have been overwhelmingly successful in defending the changes even when they have negative effects on workers. Such a conclusion

10. See Rauh, *supra* note 8, at 3.

11. See Rauh, *infra* note 43.

12. See Chris Butera, *Kentucky Judge Deems Governor’s Pension Law Unconstitutional*, Chief Investment Officer, (June 22, 2018), <https://www.ai-cio.com/news/kentucky-judge-pension-law-unconstitutional/louisville-kentucky-usa-2/> (describing the challenge to legislation passed in 2018 in Kentucky’s pension reform efforts with intense resistance from school teachers to benefit cuts).

13. Marcia Robiou, *How States Have Tried to Close their Pension Funding Gaps*, FRONTLINE (Oct. 23, 2018), <https://www.pbs.org/wgbh/frontline/article/how-states-have-tried-to-close-their-pension-funding-gaps/>.

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runs counter to the commonly-held beliefs of public employees who think that they have stable and secure pension rights that are free from subsequent legislative claw back. Such beliefs are incorrect and unfounded and government pension policy may be adjusted to reduce benefits when the popular will supports the cutbacks. Employee and retiree “rights” are truly subject to the changing winds of public opinion and political support.

I. PROVIDING A RETIREMENT INCOME FOR AMERICAN GOVERNMENT WORKERS

A. Pensions in American History

Post-employment compensation has been an American tradition for public workers since the founding of our nation. Following the Revolutionary period, military pensions in some format were provided to soldiers and sailors throughout the 19th and 20th centuries and continues to this day.¹⁴ The American government and the services it provided slowly expanded throughout the 19th century tracking the growth of population, the economy and the changing needs of the nation.¹⁵ During this time, the number of public workers expanded and, over time, their functions became familiar and expected parts of both urban and rural life. As part of this expansion of governmental services, public employers slowly began to provide pensions first for disability and later for service as a part of employee compensation.¹⁶

In contrast, private industrial employers adopted retirement benefits much more slowly than did the public sector. Large companies began to offer pensions first in 1875 by the American Express Company and later by railroad companies.¹⁷ Private employers in non-railway fields were slower to adopt worker pensions but by 1920 many large employers had started plans.¹⁸ These large employers saw pen-

14. Congress recognized the purposes of offering military pensions as providing replacement income for injured or disabled soldiers, encouraging retirements of older soldiers, and to attract new recruits into the military service. *See generally* ROBERT L. CLARK, ET AL., A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES 43–62, 122–153 (2003).

15. *Id.* at 128–29.

16. *Id.*

17. MURRAY WEBB LATIMER, INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA 21–22 (1933). The Baltimore and Ohio Railroad Company established the second private sector retirement plan in 1880 but over the next twenty-five years only twelve more railroad companies joined in the practice. *Id.* at 25.

18. Following the railroads, a small number of banks and urban trolley systems offered pensions as did a small number of manufacturing firms and later large steel and oil & gas compa-

sions, along with mandatory retirement ages, as methods of removing older workers who they believed had reduced productivity without alienating their remaining employees. Finally, federal government workers were the last employee group to be covered by a comprehensive pension system, only gaining that benefit in 1920.¹⁹ Gradually, over the 20th century, the concept of employers making specific provision for workers' post-employment income became a common industrial practice of large employers and a broadly-accepted popular ideal.

B. Expanding Public Pensions: Police, Firefighters and Teachers

Cities began to provide retirement income for their employees in the 19th century. Public employee pensions began at the local government encompassing three discrete categories of workers: police, fire fighters and teachers. In 1857 the New York City became the first municipality to provide disability pensions for its police officers injured in the line of duty.²⁰ Twenty-one years later this benefit was expanded to provide police retirement pensions based on service.²¹ Not surprisingly, firefighters, who were increasingly important to the safety of growing American cities, soon began to receive similar compensation to that of police and they were also recruited and compensated with pensions similar to those of police.²² This phenomenon began in the growing American cities where these public safety workers were necessary to provide a desirable, safe, and orderly urban life.

nies. *Id.* at 39–41 (mentioning Carnegie Steel and Standard Oil). Some large firms including U.S. Steel, General Electric, AT&T, Goodyear Tire and Rubber, Bethlehem Steel, American Can, and Eastman Kodak had pensions by 1930. See CHARLES ELLIS ET AL., FALLING SHORT: THE COMING RETIREMENT CRISIS AND WHAT TO DO, 130–31 n. 9 (2014).

19. The Federal Employees Retirement Act, enacted on May 22, 1920, promised minimum pensions that were small by modern standards (\$180 to \$360 per year) but provided income security even during the Depression. At that time approximately 3 million American private, nonfarm workers (13% of the total) were covered by private pension plans. ROBERT L. CLARK ET AL., *supra* note 3, at 154, 163–64.

20. In 1858 there were over 1400 police covered by a New York City pension plan which was called the Police Life and Health Insurance Fund. The funding of this early pension system was composed of a motley combination of sources including permits for dancing schools, boxing contests, street entertainment, fees for physician and private detective licenses, dog tag fees, unclaimed property, and fines imposed on police officers for disciplinary infractions. See ROBERT L. CLARK ET AL., *supra* note 3, at 175.

21. In 1878 New York City's plan began to provide a retirement pension to police officers of one-half of final pay upon completion of twenty-one years of service. *Id.* at 167. After New York City, the cities of Chicago, Detroit, Indianapolis and St. Louis joined in having police pensions. See ROBERT L. CLARK ET AL., *supra* note 3, Table 10.1 (list of municipal police pensions and their features in 1920). This list substantially grew by the beginning of the 20th century. *Id.* at 176.

22. *Id.* at Table 10.2.

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In addition to urban public safety workers, school teachers were also early recipients of pensions. American public education expanded quickly in the late 19th and early 20th centuries with the number of students attending public schools nearly tripling from 1870 to 1920.²³ Not surprisingly, the number of teachers, employed by city or county governments, grew to reach high levels over a relatively short period of time.²⁴ Funded and organized in local communities, public schools first provided a structured elementary education to American children and later, in the 20th century, expanded to give a high school education to pupils training them as workers for the industrial workforce.²⁵ Pensions for public school teachers became increasingly common as a component of the employee's compensation package. By the beginning of the 20th century, nearly one-third of all American teachers had pension rights and by 1916, 33 states had some retirement system for their public school teachers.²⁶ By 1930 at least 12 major cities also had pension plans for their teachers.²⁷ Today, state and local government educational employment have the largest number of public employees at any level of government constituting nearly 7% of the total American civilian workforce.²⁸ This pattern of broad pension coverage for public school teachers and continues to the present.

C. Extending Retirement Income to Other Public Workers

During this period other government employees were less fortunate. By 1930 only 6 states had established pension plans for their non-education or public safety workers. Massachusetts led the nation

23. The Statistical Abstract of the United States reported the number of students enrolled in public school students rising from about 7.5 million in 1871 to 20.8 million in 1918- an increase of 277%. *Education No. 73. - Summary of School Population*, BUREAU OF EDUC., DEP'T OF INTERIOR, (July 15, 2018) <https://www2.census.gov/library/publications/1921/compendia/statab/43ed/1920-03.pdf>.

24. In the post-Civil War period the 1880 Statistical Abstract of the United States registered 220,225 public school teachers for 7.5 million students in 1871. *Id.* By 1900 the number of teachers had grown to 415,660 with an enrolled student population of 15.1 million. This represented a growth of teachers of 89% and pupils of 100%. *Id.* The next 20 years would show a growth in public school teachers to 650,709 (56.5% increase) and public-school students to 20.8 million (38%). *Id.*

25. Claudia Goldin, *A Brief History of Education in the United States* 10-11, National Bureau of Economic Research, (Aug., 1999) www.nber.org/papers/h0119.pdf.

26. WILLIAM GRAEBNER, *A HISTORY OF RETIREMENT-THE MEANING AND FUNCTION OF AN AMERICAN INSTITUTION, 1885-1978* at 93 (1980). Professor Graebner noted that "most [of these school systems] were in the Midwest and Northeast, were statewide, and the same number were contributory- supported by both public and private (teacher) contributions." *Id.*

27. CLARK ET AL., *supra* note 3, at 182, Table 10.4, 188; Table 10.5.

28. *See supra* note 5.

by adopting its pension plan for all state workers in 1911.²⁹ The Massachusetts plan which also required employee contribution served as a model for other states and cities and was considered by Congress when it created the federal Civil Service retirement system in 1920.³⁰ As the concept of retirement income replacement in the form of pensions became more pervasive in the public sector, states and localities began to offer their workers' pension often in conjunction with the federal Social Security retirement benefit. The economic Depression of the 1930s focused political support behind the idea of a publicly-provided old age pension and in 1935 Congress established the Social Security system providing retirement benefits for workers.³¹

Initially, state and local employees were excluded from Social Security coverage. Following World War II there was a continued expansion of state and local governmental activities resulting in the increase in public workers. The Social Security pension system expanded during these years and by 1960 it reached nearly 80% of the nation's workers.³² In the decade of the 1950s, Social Security was extended to include state public sector employers and, by 1961, most states had their own public pension plans with most also providing Social Security coverage.³³ At that time a number of states chose to exit Social Security making their state and local plans the exclusive retirement benefit for workers.³⁴ Recent changes have cut back these

29. The six states were Connecticut, Maine, Massachusetts, New Jersey, New York and Pennsylvania and by 1930 they covered nearly 30,000 state employees who were not school teachers. CLARK ET AL., *supra* note 3, at 201-02, Table 10.6.

30. KATELIN P. ISAACS, CONG. RESEARCH SERV., 98-972, *Federal Employees' Retirement System: Summary of Recent Trends* 1 (2018).

31. Congress passed the Social Security Act (P.L. 74-271, 49 Stat. 620) on August 14, 1935 to provide retirement security for American workers. Social Security Act, 42 U.S.C § 1 (1935). This law was a part of the New Deal legislation during the Depression of the 1930s. Larry DeWitt, *The Development of Social Security in America*, 70 SOCIAL SECURITY BULLETIN No. 3 (2010). In its initial scope, the law only applied to approximately 43% of the American workforce and it was structured much like a private insurance plan paying benefits from a dedicated trust fund. *Id.* Amendments in 1939 significantly changed the program by adding dependent and survivor benefits making Social Security a family economic security program without a clear source of employee contributions supporting the added benefits. *Id.* at Table 2.

32. See DORA L. COSTA, *THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY* 174 (Claudia Goldin ed. 1998).

33. OLIVIA S. MITCHELL & GARY ANDERSON, *THE FUTURE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS* 9-10 (2009).

34. In 1991, Congress made Social Security coverage mandatory for state and local government employees except those participating in a public retirement system. As a result, some states with these systems opted out of Social Security making the state retirement benefit the primary source of retirement income. It has been estimated that 25% of state and local government workers do not have Social Security coverage but must rely on state pensions with teachers faring even worse. In 2013 a study noted,

state and local pensions have made these workers even more vulnerable since they do not also have Social Security. It is this cutting back of state and local retirement benefits that are the subject of this article.

II. MODERN STATE AND LOCAL RETIREMENT PENSION SYSTEMS

A. State Autonomy in Pension Policy Making

States are largely free to fashion the terms and conditions of employment for their workers. Labor market conditions and longstanding payment practices guide the government employers in formulating their compensation policies. Each state determines the legal structure and the funding mechanism of its own employee pension plan and they maintain near-total autonomy in devising their state policy. Not surprisingly, there is no uniform federal law driving the policy discussion and, importantly, there is no federal mandate requiring any state-level retirement benefits or any kind of benefit protection.³⁵ When Congress enacted the Employee Retirement Security Act of 1974 (ERISA)³⁶ it was responding to failures of private sector pension

Teachers constitute one of the largest groups of uncovered workers. Nationwide, approximately 1.2 million teachers (about 40 percent of all public K–12 teachers) are not covered. Those teachers are concentrated in 15 states— Alaska, California, Colorado, Connecticut, Georgia, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Nevada, Ohio, Rhode Island, and Texas—and the District of Columbia, where many or all public school teachers neither pay into nor receive benefits from the system.

See Leslie Kan & Chad Alderman, *Uncovered: Social Security, Retirement Uncertainty and 1 Million Teachers*, Teacher Pensions, 1 (2014), <https://www.teacherpensions.org/sites/default/files/UncoveredReportFinal.pdf>. Not only is the absence of Social Security a major problem for teachers but also those working in states having teacher pension programs receive little or no benefits due to worker mobility, vesting rules and policies favoring ultra-long term employees. *Id.* at 7.

35. In fact, the main federal law governing retirement policy- ERISA- does not apply to state and local government retirement benefits. Employee Retirement Income Security Act, 29 U.S.C. § 1003(b)(1) (1974). Section 4(b)(1) of ERISA provides that Title I of ERISA does not apply to an employee benefit plan that is a “governmental plan” as defined in ERISA §3(32). *Id.* ERISA §3(32) defines a governmental plan as “a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.” *Id.* at § 3(32).

36. The U.S. Department of Labor describes the general scope of ERISA in the following terms:

ERISA is a Federal law that sets standards of protection for individuals in most voluntarily established, private-sector retirement plans. ERISA requires plans to provide participants with plan information, including important facts about plan features and funding; sets minimum standards for participation, vesting, benefit accrual, and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a claims and appeals process for participants to get benefits from their plans; gives participants the right to sue for benefits and breaches of fiduciary duty; and if a defined benefit plan is terminated, guarantees payment of certain

plans and not public plans.³⁷ The law required private-sector retirement plans to satisfy minimum coverage, participation, vesting, funding, and fiduciary requirements as a means of improving retirement income security for employees. However, ERISA intentionally excluded government pension plans from important sections of the statute.³⁸ Concerns about federalism values and the limits of federal legislative authority persuaded Congress not to extend ERISA to the states.³⁹ As a result, even after ERISA was enacted there has been no nationally-consistent rule structure for sub-federal governmental retirement plans.⁴⁰ Without the discipline of uniform federal pension program rules imposing uniform standards, state and local pension plans have been structured and administered under state law following state and local political direction.⁴¹ This autonomy has had highly varied results: benefitting some state and local government workers

benefits through a Federally chartered corporation, the Pension Benefit Guaranty Corporation (PBGC).

Employee Retirement Income Security Act, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/topic/retirement/erisa> (last visited on July 14, 2018).

37. In 1963 bankrupt carmaker Studebaker Motors closed its South Bend, Indiana plant. James A. Wooten, 'The Most Glorious Story of Failure in the Business: The Studebaker-Packard Corporation and the Origins of ERISA, 49 BUFF. L. REV. 683, 683-84 (2001). It took Congress eleven years to enact ERISA establishing private sector pension rules and creating the Pension Benefit Guaranty Corporation, which provided insurance to protect worker benefits should a pension plan end with insufficient assets. *See id.* at 684.

38. 29 U.S.C. §1003(b)(1) ("The provisions of this [title] shall not apply to any employee benefit plan if—such plan is a governmental plan (as defined in §1002(32). . ."). Additionally, ERISA § 1002(32) provides that, "The term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." *Id.* § 1002(32).

39. In *Rose v. Long Island R.R. Pension Plan*, the Second Circuit added 3 other reasons: The governmental plan exemption [to ERISA] was included for several reasons. First, it was generally believed that public plans were more generous than private plans with respect to their vesting provisions. Second, it was believed that "the ability of the governmental entities to fulfill their obligations to employees through their taxing powers" was an adequate substitute for both minimum funding standards and plan termination insurance. Finally, there was concern that imposition of the minimum funding and other standards would entail unacceptable cost implications to governmental entities. *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 914 (2d Cir. 1987).

40. Paul M. Secunda, *Litigating for the Future of Public Pensions*, MICH. ST. L. REV. 1353, 1363-64 (2014) (author noting that "Federalism concerns also played a dispositive role as far as Congress not trying to assume power over public plans.").

41. Noting this difference, two observers have written that a pension plan subject to ERISA "must design, structure, and fund its plan in accordance with federal rules," whereas public pension plans "are largely free to structure their pension plans as they see fit and are not subject to any funding requirements other than what state law might impose." Amy B. Monahan & Renita K. Thukral, *Federal Regulation of State Pension Plans: The Governmental Plan Exemption Revisited*, 28 A.B.A. J. LAB.& EMP. L. 291, 292 (2013). *See also* Amy B. Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions*, 2015 U. ILL. L. REV. 117, 127-28 ("state and local plans are exempt from [ERISA]. . . , and therefore it is entirely up to a state or city to determine how it will fund its pension plans").

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with well-run and sufficiently-funded plans while employees in other jurisdictions facing substantial uncertainty about their post-retirement future due to poor plan design and funding. Some commentators have even recommended the extension of ERISA or ERISA-like rules to apply to these governmental retirement systems,⁴² but as of now, none of these recommendations has been implemented.

This decentralized state control over pension design and funding, as well as the absence of uniform plan requirements, has had widely disparate effects on the sustainability of state pension plans and their ability to meet future pension payments. Some states have consistently funded their retirement systems adequately to provide a high degree of coverage for future pension costs.⁴³ Others have made inadequate annual payments or have even completely skipped making yearly contributions when it was expedient to do so.⁴⁴ This state autonomy has provided each state with the independence to fashion its own response to the financial aspects of operating their retirement systems. These responses have run the gamut of being courageous, well-designed, ill-informed, and in some cases truly dishonest. All have been highly controversial.⁴⁵

The recent state legal and policy changes have been adopted in the face of some alarming financial predictions. In 2017, state and local government retirement systems controlled \$3.96 trillion in financial assets in trust funds for workers' pensions.⁴⁶ However as sizable as these funds appear, the Federal Reserve calculated that these pension entitlements were underfunded by 32% in 2017.⁴⁷ Analysts fear

42. Paul M. Secunda, *supra* note 40, at 1402–04.

43. Powers, *supra* note 9, at 3; Six states have reported exemplary pension funding ratios exceeding 90%. These include: South Dakota (100%); Wisconsin (100%); Tennessee (99%); New York (95%); North Carolina (94%); and Nebraska (91%). *Id.* at 12. These high coverage ratios fell considerably when future pension liabilities were assessed using risk free discount rates. *Id.*

44. *Id.* at 3. Five states demonstrated weak pension fund coverage ratios of less than 50%. These include: Kentucky (44%); Connecticut (47%); Illinois (47%); Mississippi (54%); and Hawaii (55%). *Id.* at 8.

45. See K.C. Becker, *Putting PERA on a Path to Prosperity*, DENVER POST (June 15, 2018, 12:13 PM), <https://www.denverpost.com/2018/06/15/putting-pera-on-a-path-to-prosperity/>; Blake Brickman, *AG Andy Beshear's Lawsuit Threatens Future of Kentucky Teachers' Pensions*, KY. (June 13, 2018, 6:36 PM), <https://www.kentucky.com/opinion/op-ed/article213057319.html>.

46. BOARD OF GOVERNORS OF THE FED. RES. SYS., FINANCIAL ACCOUNTS OF THE UNITED STATES: FLOW OF FUNDS, BALANCE SHEETS, AND INTEGRATED MACROECONOMIC ACCOUNTS, FIRST QUARTER 9 (2017), <https://www.federalreserve.gov/releases/z1/20170608/z1.pdf>.

47. *Id.* The Society of Actuaries analyzed 130 state and large city public pension plans covering 27 million workers and retirees and concluded that the unfunded liability in this sample was 27% in 2014. SOC'Y OF ACTUARIES, U.S. PUBLIC PENSION PLAN CONTRIBUTION INDICES, 2006-2014, (2017), <https://www.soa.org/research-reports/2017/public-pension-indices>.

that existing retirement trust funds in some states may be so seriously underfunded that they may not be able to provide the retirement payments promised to workers.⁴⁸ Although the health of these plans is unevenly distributed across the nation, the overall shortfall is truly astounding reaching trillions of dollars.⁴⁹ So large are these shortfalls, in some states, that the financial health of the entire state and major localities has also been called into question.⁵⁰ Some analysts have predicted catastrophic effects without changes in current policies,⁵¹ while others have concluded that sizable shortfalls will be avoidable with careful pension plan management and judicious modifications.⁵² With pension expenses growing so quickly, legislators view pension costs as crowding out other budget priorities.⁵³ This realization has motivated the recent policy changes.

Regarding pension reforms, states and local governments have sorted themselves into three broad categories. Group One jurisdictions are those that have invested in expert assessments of the pension funds current condition and future glide path. These places are well-

48. State and local government pensions represent a huge future liability. Recent estimates have estimated the future unfunded liability of state and local government pensions to be \$4 trillion and some think that these liabilities have been greatly underestimated. Robert Novy-Marx & Joshua D. Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 J. FIN. 1207, 1207-08 (2010). Viewing these governmental pension promises as deferred compensation and a debt of governmental employers, this number dwarfs all existing state and local bond liability by a 4 to 1 ratio.

49. See PEW CHARITABLE TRUST, *The State Pensions Funding Gap: Challenges Persist* 8 (2015), https://www.pewtrusts.org/~media/assets/2015/07/pewstates_statepensiondebt_brief_final.pdf; Powers, *supra* note 9, at 12.

50. The State of Illinois presents the most vivid current conflict between a state's governor and legislature with its employee unions and its Supreme Court. See Bruce J. McNeil & Jack E. Karns, *Illinois Supreme Court Deal Says to the Government: The Price is Right for the Pension Prize*, J. Pension Planning & Comp. 35-65 (2015); David R. Godofsky & Emily Hootkins, *Illinois Supreme Court Affirms Constitutional Protection of State Pensions*, 28 BENEFITS L.J. 79 (2015).

51. George F. Will, *America's Utterly Predictable Tsunami of Pension Problems*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/Opinions/americas-utterly-predictable-tsunami-of-pension-problems/2017/02/22/1e5de00e-f869-11e6-9845-576c69081518_story.html (claiming that each American household is responsible for \$19,000 government pension debt).

52. One recent analysis concluded that the total costs for the long term commitments of pensions, other post-employment benefits and government debt service "appear under control in many jurisdictions." A number of states, counties and cities are facing a much more extreme future where they must raise taxes, cut spending significantly or hope for much higher investment returns. Alicia H. Munnell & Jean-Pierre Aubry, *Will Pensions and OPEBs Break State and Local Budgets* at 6, CTR. FOR RETIREMENT RES. (Oct. 2016), http://crr.bc.edu/wp-content/uploads/2016/10/slp_51.pdf (pension costs >30% of state revenue in Illinois and only 1% in Wisconsin).

53. See e.g., Joe Nation, *Pension Math: Public Pension Spending and Service Crowd Out in California, 2003-2030*, STANFORD INST. FOR ECON. POL'Y RES. (Oct. 2, 2017), https://siepr.stanford.edu/sites/default/files/publications/17-023_1.pdf.

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informed and have taken financially responsible action. They have attempted to shore up the financial underpinnings of their existing retirement systems with increased employer and employee contributions to their pension fund,⁵⁴ and they have made necessary administrative changes to their fund management that will likely keep them well positioned.⁵⁵ Some have even issued long term pension bonds to shore up their pension funds.⁵⁶

Group Two jurisdictions are well-informed but they are not financially responsible. These places have received clear actuarial information about necessary financial steps that they should take to provide for timely pension payments, but they have not taken the hard steps to add to pension reserves. Unfortunately, in these states' policies, autonomy has permitted short-term political judgments to ignore the clear path dictated by actuarial projections requiring increased current contributions to return to the proper financial path.⁵⁷ Through this non-action, these states have delayed the difficult, yet necessary, steps needed to be taken to solidify their public pension plans enabling them to perform as promised for workers.⁵⁸ The promises made so

54. In Great Britain, the Bank of England, a governmental entity, was forced to pay 55% of its payroll in 2016 on pension costs to offset unfunded liability caused by falling bond interest rates and the drop in stock prices following the nation's Brexit vote. *Pensions: Fade to Grey*, THE ECONOMIST Working Paper No. 17-023, (Sept. 24, 2016), <https://www.economist.com/briefing/2016/09/24/fade-to-grey>.

55. In New Jersey, the 2018 budget contained a \$2.5 billion contribution to the state's pension fund representing a 35% increase from the prior year and added the New Jersey State Lottery as a pension system asset going forward. The state's treasurer estimated that the lottery would add \$37 billion to the pension system over the next 30 years and improve the pension fund's funding ratio by 14%. See Robert Steyer, *New Jersey Approves Budget, Shifting State Lottery Pension Fund*, PENSIONS & INVESTMENTS (July 5, 2017), <https://www.pionline.com/article/20170705/ONLINE/170709972/new-jersey-approves-budget-shifting-state-lottery-to-pension-fund>.

56. Houston, Texas was one jurisdiction to issue \$1 billion in pension obligation bonds after receiving voter approval in late 2017. See Newsmakers, *Houston issues \$1 Billion in Pension Obligation Bonds*, CHIEF INVESTMENT OFFICER (Jan. 3, 2018), <https://www.ai-cio.com/news/houston-issues-1-billion-pension-obligation-bonds/>.

57. The most common tactic employed by retirement fund managers to understate the degree of their plan's underfunding is to calculate the present value of future benefits while using a discount rate that is higher than private plans and higher than might be reasonably obtainable with investments over future fund growth. See Jeffrey R. Brown & David W. Wilcox, *Discounting State and Local Pension Liabilities*, 99 AM. ECON. REV. 538, 539-542 (2009); Donald J. Boyd & Peter J. Kiernan, *The Blinken Report: Strengthening the Security of Public Sector Defined Benefit Plans 2-23*, THE NELSON ROCKEFELLER INST. OF GOVERNMENT (Jan. 2014), http://rockinst.org/wp-content/uploads/2018/02/2014-01-Blinken_Report_One.pdf.

58. See Michael Martz, *With Investment Income Key- Richmond Retirement System Faces Funding Challenges*, RICHMOND TIMES DISPATCH (Aug. 20, 2016), http://www.richmond.com/news/local/city-of-richmond/article_9caa46a8-288e-50bb-b5da-0f972ba13e62.html (noting unfunded liabilities and poor investment returns over two years much below assumed discount rate of 7.5%).

easily in the past are not dealt with and the financial obligation is treated as a future problem.⁵⁹

Group Three jurisdictions have received the same actuarial predictions of needed change to their employee retirement benefit problems. However, these places have taken another approach to the problem: they have taken legislative steps to reduce the state's future retirement benefit liability by making significant pension for new and, sometimes, existing workers through pension plan and retirement benefit changes.⁶⁰ It is the litigation challenging these recent legal and policy changes that constitute the main focus of this article.

B. Governmental Retirement Pensions Formats

At present, about 69% of all American workers have access to some form of employer-sponsored retirement system with only 28% having the defined benefit option.⁶¹ In the private sector, defined benefit pensions have definitely become much less common. In comparison, approximately 90% of state and local government employees receive retirement benefits with 84% having the defined benefit option.⁶² This striking difference reflects the departure of the private sector away from the defined benefit (DB) format and its gradual shift towards the defined contribution (DC) method like the popular 401(k) accounts where any pension would be offered.⁶³ Fluctuating employer contributions and the relatively higher employer costs were

59. In *Booth v. Sims*, the West Virginia Supreme Court identified the central political problem with the public pensions when it wrote, “[i]t is a recurrent problem of government that today’s elected officials curry favor with constituents by promising benefits that must be delivered by tomorrow’s elected officials.” In reality these “promised benefits” must be paid for by future tax paying residents, not the future elected officials. *Booth v. Sims*, 456 S.E.2d 167, 183 (W. Va. 1994).

60. See *infra* pp. 36–42.

61. Thomas E. Perez, *National Compensation Survey: Employee Benefits in the United States, March 2015*, BUREAU OF LABOR STAT., tbl.2 (Sept. 2015), <https://www.bls.gov/ncs/eb/benefits/2015/ebbl0057.pdf>.

62. Government employees do not receive this retirement benefit for free; rather, on average, they must contribute 6.9% of their annual earnings to their pension plan. Higher paid workers and teachers, on average, contribute even more at 7.4% and 7.7% respectively. *Id.* at tbl.4.

63. Karen Steffen, *State Employee Pension Plans in PENSIONS IN THE PUBLIC SECTOR* (Olivia S. Mitchell & Edwin C. Husted eds.) (2001); See also *Workers with Pension Coverage by Type of Plan, 1983, 1992, 2001, 2013*, CTR FOR RET. RES. AT BOSTON COL. (Sept. 2014), <http://crr.bc.edu/wp-content/uploads/1012/01/figure-15.pdf>; In the private sector defined benefit pension plans provides benefits to significantly fewer private employees over the last two decades (35% to 17%) with only 10% of private employers offering it. See *The Last Private Industry Pension Plans*, BUREAU OF LABOR STAT. (Jan. 3, 2013), https://www.bls.gov/opub/ted/2013/ted_20130103.htm.

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the driving forces behind this shift towards defined contribution pensions.⁶⁴ Running contrary to the private sector, it became the 20th century practice to bundle defined benefit retirement income into government workers' compensation packages primarily to attract and retain higher-quality workers.⁶⁵ It was also thought that public employment compensation should contain retirement income in order to avoid the earlier social ill of having impoverished elderly citizens. However, in recent times these governments have begun to follow the private sector practice by significantly shifting away from defined benefit pensions and moving towards the defined contribution or hybrid models for new workers.

C. Comparing the Features of Defined Benefit and Defined Contribution Pension Plans

In order to fully appreciate the extent of the serious financial problem confronting American states and localities, it is necessary to understand the structural design of most governmental pension systems. As a general matter, retirement income is provided through two major forms of pension plans: 1) Defined Benefit (DB) plans and 2) Defined Contribution (DC) plans.⁶⁶ The basic differences between these two pension formats are straightforward and easily understood.⁶⁷ The following chart summarizes the differences:

1. Defined Benefit Pension Plans

- a. Representing a traditional pension format offered by employers.
- b. Guarantees a specific pension amount based on a formula considering longevity of service and average final salary.

64. *Beyond the Numbers: Retirement Costs for Defined Benefit Plans Higher Than for Defined Contribution Plans*, BUREAU OF LABOR STAT. (Dec. 2012), <https://www.bls.gov/opub/btn/volume-1/pdf/retirement-costs-for-defined-benefit-plans-higher-than-for-defined-contribution-plans.pdf> (defined benefit/defined contribution plans compared at \$2.53/\$1.46 per employee hour).

65. Alice H. Munnell et al., *Recruiting and Retaining High-Quality Workers: Do Pensions Matter?* Ctr. for Ret. Res. at Boston Coll., Working Paper 2015-1 (2015) (explaining that reductions in benefits could lead to a reduction in the maintenance of a high quality work force).

66. See generally Erik Carter, *Choosing Between A Defined Benefit and Defined Contribution Retirement Plan*, FORBES (Sept. 16, 2018, 10:00 AM), <https://www.forbes.com/sites/financialfinesse/2018/09/16/should-you-choose-a-defined-benefit-or-defined-contribution-plan/#742d64c567ca>.

67. See Barbara A. Butrica et al., *The Disappearing Defined Benefit Pension and its Potential Impact on the Incomes of Baby Boomers*, SOC. SECURITY ADMIN., <https://www.ssa.gov/policy/docs/ssb/v69n3/v69n3p1.html> (last visited July 2, 2018).

c. The employer and the employee contribute to the plan during the period of employment.

d. An employer-managed fund for paying future retirement benefits is established with contributions to pre-fund future pension payments.

e. The employer manages the pension fund investing the fund assets to grow them over time in order to reach a level sufficient to pay future promised pension benefits.

f. Employer assumes the risk that contributed fund assets and their investment growth will be adequate to pay future pension liabilities when they must be paid.

2. Defined Contribution Retirement Plan

a. This format represents the modern trend in private and public retirement benefit plans and is found in § 401(k), § 403(b), and § 457 plans.

b. The employer and the employee make annual contributions to the employee's retirement fund often set as a fixed percentage of the employee's annual salary.

c. The retirement fund investment decisions are made by the employee without control or responsibility of the employer.

d. The employee generally has a portable retirement account that follows the employee's employment and may be combined other with similar accounts.

e. The employee's retirement income is determined by the amounts contributed over time, the retirement fund investment choices, the length of pre-retirement employment and the long-term growth of the retirement fund investments.

f. Once annual contributions have been funded by the employer, there is no continuing employer obligation to guaranty any retirement benefit amount and no employer responsibility for providing future retirement income.

Modelled after the early private sector industrial corporation pensions, the public workers have been covered with the defined benefit pension described in the discussion above. Generous provisions obligating the governmental employers to pay lifetime retirement pensions often with health insurance benefits have made the defined benefit pension a costly employment benefit. As indicated, the em-

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ployer bears all of the financial risk when offering employees defined benefit pensions.

D. A Snapshot of Public Workers

In May 2018 the American civilian labor force numbered approximately 161.5 million people with about 155.5 million in full or part-time employment.⁶⁸ Of this number, 153 million were employed as non-agricultural salaried workers in full-time jobs with another 2.3 million agricultural workers.⁶⁹ State and local government employees numbered 19.5 million representing about 13% of the 153 million civilian employees;⁷⁰ more than half of them worked as educators, school administrators and non-instructional support personnel, reflecting the large employment in K-12 education.⁷¹ Other job categories employed by state and local governments in large numbers ran the gamut of police and corrections officers, firefighters, hospital and public health employees, transportation workers and social workers.⁷² In our daily lives we come into contact with many of these government workers who often supply vital services necessary to the normal functioning of modern life.

The main characteristics of this work force differ from those in the private sector in a number of interesting ways. The personal attributes of these government workers paint a picture of an older, more female, more racially and ethnically diverse and more highly educated

68. Bureau of Lab. Stat., U.S. Dep't of Lab., *Employment Situation Summary*, tbl.B (2018), <https://www.bls.gov/news.release/empsit.nr0.htm>.

69. *Id.* at tbl.A-8.

70. U.S. BUREAU OF LAB. STAT., THE EMPLOYMENT SITUATION - JUNE, 2018, USDL-18-0916, Establishment Data Table B-1 (2018). Nearly 8 million people worked in local government education while 2.4 million were employed in education at the state level. The U.S. collectively spends \$664.7 billion per year on K-12 education with California, New York and Texas leading the way. See U.S. Census, 2016 Public Elementary-Secondary Education Finance Data, Table 1. Summary of Public Elementary-Secondary School System Finances by State: Fiscal Year 2016 (last visited on 07/04/18 at <https://www.census.gov/data/tables/2016/econ/school-finances/secondary-education-finance.html>); Education, both public and private, is a major employer with nearly 13.8 million workers in 2017 representing almost 9% of the American workforce. See U.S. BUREAU OF LAB. STAT., Labor Force Statistics for the CPS, chart 18b (last visited on 07/04/18 at <https://www.bls.gov/cps/cpsaat18b.htm>).

71. U.S. BUREAU OF LAB. STAT., EMPLOYMENT SITUATION SUMMARY, JUNE 1, 2018, USDL-18-0916, Table A-1, (last visited on 07/04/18) The lion's share of these educational employees work at the local government level (7.9 million) with 2.4 million serving at the state level. *Id.* See also "Where do state and local government employees work?" See U.S. Census Bureau, 2013 Annual Survey of Public Employment & Payroll., (last visited on 07/04/18), <https://www.census.gov/content/dam/Census/library/visualizations/2015/econ/g13-asep-visual.pdf>.

72. *Id.* Educational workers dominate public employment constituting 10 times the number of the next numerous category- workers who work in hospitals.

work force than that which is found in the private employment. In terms of age, 52.1% of local government workers and 49.7% of state workers were between the ages of 45 and 64 while 42.4% of private sector employees were in this age range.⁷³ Considering public education, the median age of K-12 teachers was 44.7⁷⁴ with 25.5% of them being 55 years old or older.⁷⁵ By comparison, the overall median age of all American workers was 42.2 years with 23% being 55 years old or older.⁷⁶ Public workers are disproportionately female (57.7%), a fact perhaps reflecting the emphasis of public school workers in local employment, while overall 46.9% of American workers are female.⁷⁷ As for racial characteristics, full-time public school workers are 82.7% are white, 11.8% are African American, and 13% are Hispanic while overall U.S. employees are 78.4% white, 12.1% African American, and 16.9% Hispanic.⁷⁸ In terms of educational attainment, over three quarters of government workers have a college degree or some college education with 50.9% possessing a college degree and an additional 26.7% with at least some college education.⁷⁹ As a whole, private sector workers have significantly fewer college degrees with 35% in 2015.⁸⁰

One important difference between the two groups of employees is the comparison in cash compensation where in 2017 state and local government employees had an average salary of \$53,352 while private sector workers had an average of \$55,338.84.⁸¹ Differences between

73. Gerald Mayer, *Selected Characteristics of Private and Public Sector Workers* 8, FEDERATION OF AMERICAN SCIENTISTS (Mar. 21, 2014), <https://fas.org/sgp/crs/misc/R41897.pdf>. Female local government workers also were found to have a statistically greater longevity than private sector employees but that was largely attributed to those workers having a higher level of education which is positively correlated to longer life. Alicia H. Munnell, *Does Mortality Differ Between Public and Private Sector Workers*, CTR. FOR RET. RES. AT B.C., fig.2 (2015), http://crr.bc.edu/wp-content/uploads/2015/05/slp_44.pdf.

74. Joshua Franzel, *The State and Local Workforce: Analysis and Forecast*, GOV'T FIN. REV. 46, 47 (June 2015), <http://www.gfoa.org/sites/default/files/615GFR46.pdf>.

75. *Labor Force Statistics from the Current Population Survey- Household Data Annual Averages*, U.S. BUREAU OF LAB. STAT., tbl.18b (2018), <https://www.bls.gov/cps/cpsaat18b.htm>.

76. *Id.*

77. John Schmitt, *Wage Penalty for State and Local Government Employees* 3, CTR. FOR ECON. AND POL'Y RES. (May 2010), <http://cepr.net/documents/publications/wage-penalty-2010-05.pdf>.

78. *Id.*

79. Schmitt, *supra* note 78, at 3.

80. *Comparing the Compensation of Federal and Private Sector Employee 2011-2015* 6, CONGRESSIONAL BUDGET OFFICE (Apr. 2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf>.

81. U.S. BUREAU OF LAB. STAT., QUARTERLY CENSUS OF EMPLOYMENT AND WAGES TABLES PRIVATE OWNERSHIP, STATE GOVERNMENT, AND LOCAL GOVERNMENT (2016) available at <https://www.bls.gov/cew/cewbultncur.htm>. The state and local government annual average repre-

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public and private employees continue to be observed when non-cash benefits are considered but the overall balance shifts in favor of the public workers where benefits, including those for retirement, make a noticeable difference.⁸² Ninety-one percent of state and local employees have access to pension plans and 80% participate with a large number having access to defined benefit programs and participating.⁸³ Currently, there are 14.7 million contributing members and 6.3 million current beneficiaries to state and local pension systems.⁸⁴ By comparison, in the private sector, only 48% of employers offer any retirement benefits with most defined contribution plans.⁸⁵ With these numbers in mind, it is not surprising that current workers, both public and private, have serious concerns about their post-retirement living standards.⁸⁶

sents a 40%/60% averaging of state compensation (\$57,168) and local compensation (\$48,440). U.S. BUREAU OF LAB. STAT., QUARTERLY CENSUS OF EMPLOYMENT AND WAGES TABLES PRIVATE OWNERSHIP, STATE GOVERNMENT AND LOCAL GOVERNMENT (2017) available at <https://www.bls.gov/cew/cewbultn17.htm>. The state and local government annual average represents a 40%/60% averaging of state compensation (\$58,802) with local government compensation (\$49,720) in proportion to the number of workers. *Id.*

82. In 2017, full time private sector workers had total hourly compensation of \$33.26 per hour worked with state and local government workers earning \$48.06 per hour worked. The major differences was in benefit costs earned where the public workers had 37.3% of their compensation in benefits while the private employees had only 30.4% of their compensation benefits. This was a substantial difference resulting in \$7.83 per hour more compensation public workers. See U.S. BUREAU OF LAB. STAT., EMPLOYER COSTS FOR EMPLOYEE COMPENSATION-JUNE, 2017 available at https://www.bls.gov/news.release/archives/ecec_09082017.pdf.

83. U.S. BUREAU OF LAB. STAT., RETIREMENT BENEFITS: ACCESS, PARTICIPATION, AND TAKE-UP RATES (Mar. 2017), <https://www.bls.gov/ncs/ebs/benefits/2017/ownership/govt/table02a.htm>. A large part of the remainder have access to defined contribution programs.

84. Phillip M. Vidal, *Annual Survey of Public Pensions: State- and Locally-Administered Defined Benefit Data Summary Brief: 2016*, U.S. CENSUS BUREAU 2 (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/econ/g16-aspp-sl.pdf>. Average teacher pensions vary greatly in both average amount and the number of teachers who collect them. See Leslie Kan, *What is the Average Teacher Pension in My State?*, TEACHER PENSIONS BLOG, <https://www.teacherpensions.org/blog/what-average-teacher-pension-my-state>.

85. U.S. BUREAU OF LAB. STAT., BENEFITS SURVEY (2017), <https://www.bls.gov/ncs/ebs/benefits/2017/ownership/private/table01a>.

86. A recent appraisal summarized the problem in these terms:

The bottom line is that half of today's households will not have enough retirement income to maintain their pre-retirement standard of living, even if they work to age 65 and annuitize all their financial assets, including the receipts from a reverse mortgage on their homes. This analysis clearly confirms that many of today's workers need to save more and/or work longer to achieve a secure retirement.

Alicia H. Munnell, Wenliang Hou, & Geoffrey T. Sanzenbacher, *Nat'l Retirement Risk Index Shows Modest Improvement in 2016*, CTR. FOR RETIREMENT RESEARCH AT BOSTON COLLEGE, at 7 (2018), available at http://crr.bc.edu/wp-content/uploads/2017/12/IB_18-1.pdf.

III. THE PERILS OF EMPLOYER OVERPROMISING
AND WORKER OVERRELIANCE—
THE GROWING ANXIETY

In the struggle between workers and their employers, employer action eliminating or cutting back on pension promises has also been a recognized feature of American labor history in the private sector with industrial corporations. As a result, this has been a serious problem in the private sector over time.⁸⁷ The danger of failing pension systems is not only an American problem since this important issue appears to be global in nature affecting workers in many countries of the economically-developed world.⁸⁸ The American 20th century public policy response to this problem was to impose national private sector standards and to create federally-managed insurance fund to partially cover the risk of failed company plans. In 1974, Congress responded to these private sector problems by enacting the Employment Retirement and Income Security Act (ERISA), a federal law which regulated, and to a limited extent, insured the payment of private sector pensions.⁸⁹ By design, ERISA applied only to the private sector and not to state and local governmental pensions. As a conse-

87. Significant private pension failures had been noted in the early 20th century. A major two volume study of the private sector pension systems in 1932 eerily anticipated the present public pension shortfall situation:

There can be no doubt concerning the importance of the subject of this study. In no other field of industrial relations has management assumed a financial burden at all comparable with the liabilities of pension systems. Their total, mounting into billions, is even more formidable than the mere figures indicate, for many corporations not fully aware of the cumulative character of pension costs are not establishing adequate reserves against future payments. Not a few have already suffered from this lack of foresight and have been forced to deliberalize their plans

Bryce M. Stewart, *Foreword* to MURRAY WEBB LATIMER, *INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA* (1932). Now it is state and local government employers that are attempting to “deliberalize” their plans.

88. In 2016, Citibank estimated that the total value of the unfunded or underfunded government pensions for 20 OECD nations is \$78 trillion which is nearly twice the \$44 trillion national debt of those same countries. Citi Global Perspectives & Solutions, *The Coming Pensions Crisis* 3 (2016), available at <https://www.citivelocity.com/citigps/coming-pensions-crisis/>.

89. Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ERISA requires plans to provide participants with plan information including important information about plan features and funding; sets minimum standards for participation, vesting, benefit accrual and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; gives participants the right to sue for benefits and breaches of fiduciary duty; and, if a defined benefit plan is terminated, guarantees payment of certain benefits through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation. U.S. DEPT. OF LABOR, Employee Retirement Income Security Act (ERISA), <https://www.dol.gov/general/topic/retirement/erisa> (last visited July 14, 2018). In 2018, the PBGC guarantees private pension plans up to a maximum of \$65,045 for a single employer plan and \$12,870 for multi-employer plans. See PENSION BENEFIT GUARANTY CORPORATION, *Maximum Monthly Guaranty*

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quence, this federal law does not protect any pension of these public workers and they are left to whatever state law or constitutional protections that might exist.

Employer-sponsored retirement benefits exist in both the private and the public sectors. However, employers are not legally required to offer pensions and pension coverage in the private sector has declined over the last forty-five years.⁹⁰ Public employee pensions have been more stable. Currently, approximately 70% of American workers have access to retirement income plans offered by their employers.⁹¹ However, overall only 54% of these employees actually decide to participate in the plans that are offered.⁹² The result is that only 38% of all American civilian workers actually choose to participate in their employer's retirement plans with most workers having access to defined contribution plans.⁹³ Only 33% of private sector employees participate in these plans, while 73% of state and local government employees participate in their plans.⁹⁴ This striking disparity between private and public sector employee behavior is best explained by the fact that public employees have more generous defined benefit pensions that are perceived to be good retirement income sources. Current changes to public pension systems limiting these benefits or making them more difficult to obtain stokes worker anxiety and motivates employee groups to challenge the shifts in policy.

Increasing human longevity extending life expectancy and the need for adequate post-employment income combined with inadequate retirement trust funds build-up has led to numerous discouraging predictions of the sufficiency of pension funds to meet their obligations. Most often the national media highlights the future exhaustion of trust fund assets in the two large federal retirement pro-

Tables, <https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee> (last visited July 02, 2018).

90. Alicia H. Munnell, Rebecca Cannon Fraenkel, & Josh Hurwitz, *The Pension Coverage Problem in the Private Sector*, CENTER FOR RETIREMENT RESEARCH 2 (2012), http://ctr.bc.edu/wp-content/uploads/2012/09/IB_12-16-508.pdf (noting the decline in participation from 50% in 1979 to 42% in 2010).

91. U.S. BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN THE UNITED STATES – MARCH 2017, (2017), https://www.bls.gov/news.release/archives/ebs2_07212017.pdf.

92. *Id.* at 2.

93. *Id.* at Table A.

94. U.S. BUREAU OF LABOR STATISTICS, ECONOMICS NEWS RELEASE, TABLE 1. RETIREMENT BENEFITS: ACCESS, PARTICIPATION, AND TAKE UP RATES (March, 2017), <https://www.bls.gov/news.release/ebs2.t01.html>.

grams: Social Security and Medicare.⁹⁵ Resolution of this national retirement policy has yet to be resolved. As part of the growing concerns about income inequality, the possibility of inadequate retirement income for large groups of Americans is increasingly a source of anxiety. Confidence that workers could retire at predetermined ages and be able to live their post-employment life with dignity and economic security has recently been shaken by the fear of having inadequate retirement income and suffering higher future medical costs.⁹⁶

Americans across the political divide are unified both in their anxiety about economic security during their retirement years⁹⁷ and their frustration with the lack of political leadership in resolving this important issue.⁹⁸ Many factors help to explain why Americans have this insecurity about retirement income although much of it is attributable to having insufficient savings. However, the statistics reveal two different groups of American retirees: those with retirement savings and those without. Recent research by the U.S. GAO has indicated that 52% of American households aged fifty-five and older have no retirement savings in a retirement account or an IRA, but rely on Social Security for most of their retirement income.⁹⁹ The other 48% of this age group having some retirement savings has, on average, \$109,000 in savings which generating \$409 per month at current rates for a sixty-five year old.¹⁰⁰ More depressing is the fact that 41% of all American households in this age range have absolutely no retirement savings and other financial resources.¹⁰¹ With so little retirement savings, this 40% of the older American population views Social Security

95. U.S. SOCIAL SECURITY AND MEDICARE BOARDS OF TRUSTEES, A SUMMARY OF THE 2017 ANNUAL REPORTS 1 (2017), <https://www.ssa.gov/oact/TRSUM/tr17summary.pdf> (noting that depletion of existing trust funds is predicted to occur in 2035 for the Old Age and Survivors Insurance, 2028 for Disability Insurance, and 2029 for Medicare Hospital Insurance).

96. Suzanne Woolley, *Retirement Dread Is Replacing the American Dream*, BLOOMBERG-PERSONAL FINANCE (July 18, 2017), <https://www.bloomberg.com/news/articles/2017-07-18/retirement-dread-is-replacing-the-american-dream> (noting the anxiety caused by limited Social Security trust funds, higher future medical costs and general income inequality).

97. A recent public opinion research study found that 76% of respondents were concerned about economic conditions affecting their ability to have a secure retirement and that 88% perceived that the nation faces a “retirement crisis.” Diane Oakley & Kelly Kenneally, *Retirement Security 2017: A Roadmap for Policy Makers*, NAT’L INST. ON RET. SEC. 5 (2017), https://www.nirsonline.org/wp-content/uploads/2017/06/2017_opinion_nirs_final_web.pdf.

98. *Id.* at 9 Fig. 3; *Id.* at 10 Fig. 4.

99. U.S. GOV’T ACCOUNTABILITY, GAO-15-419, RETIREMENT SECURITY: MOST HOUSEHOLDS APPROACHING RETIREMENT WITH LOW SAVINGS (2015), available at <https://www.gao.gov/assets/680/670153.pdf>.

100. *Id.*

101. *Id.* at 9. This group has a median net worth of \$21,000 with only \$1,000 in non-retirement financial resources.

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payments as its main retirement income although in 2018 the average Social Security retirement payment was \$1,412.14 per month or \$16,945 per year.¹⁰² As it approaches retirement age, the economic prospects for this group planning to rely on Social Security engenders justifiable anxiety. In this anxious environment, those Americans currently having employer-sponsored retirement pensions view them as a crucial lifeline protecting their economic futures. Pension reforms cutting future retirement income just makes matters worse.

A. For State and Local Government Workers, How Bad is the Problem?

Even more uncertain is the adequacy of the retirement plan funds to pay out the future benefits. Employers and employees both contribute to a trust fund to pay these benefits, but these funds are not adequate, by themselves, to pay the promised benefits if trust fund investment gains do not consistently add to the fund. While it is possible for governments to pay employee pension costs on a “pay as you go” system, nearly all states have adopted a “trust fund” method of making annual contributions into a fund that is invested in assets for growth. The pension trust fund, usually designed according to actuarial standards, is then expected to grow with the reinvestment of trust fund profits. These growth assumptions have been based upon historic investment returns that are assumed to continue for decades¹⁰³ enlarging the size of the trust fund to pay future pension.

Unfortunately, due to the underfunding of current employer contributions and, more importantly, the earning of lower than expected financial returns on trust fund assets, many of these pension trust funds have not steadily risen in value needed to pay promised benefits.¹⁰⁴ Although investment returns vary from year to year based on

102. This is the average amount paid to retirees. See SOCIAL SECURITY ADMINISTRATION, MONTHLY STATISTICAL SNAPSHOT, DECEMBER 2018, at Table 2, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/.

103. A study of 649 the largest pension systems in the U.S. found that the average of expected returns used by these systems was 7.6%. This assumption assumes that state and local governments can invest money today, obtain an average of 7.6% that would keep compounding and that it would double in value every 9.5 years. See Rauh, *supra* note 8, at 1–2. However, there can be year-to-year variations in the retirement trust fund rates of return. For instance, the North Carolina Retirement System reported a 13.5% return on its \$98.3 billion of assets in 2017. See Hazel Bradford, *North Carolina Retirement Systems Sees 13.5% Return in 2017*, PENSION & INVESTMENTS (Feb. 6, 2018), <https://www.pionline.com/article/20180206/ONLINE/180209869/north-carolina-retirement-systems-sees-135-return-in-2017>.

104. The U.S. Census Bureau reported in June, 2016 that the 100 largest state and local government employee pension systems had cash and financial assets totaling \$3.25 billion in the

investment choices, managerial skill and market performance, each pension system makes long term assumptions on expected investment returns believed to be necessary to meet future obligations. Underperformance in any one year or in a number of years can set the growth of the fund back below asset levels that were assumed and that are needed to reach future pension pay-out levels.¹⁰⁵ When this happens these funds are said to carry substantial “unfunded liabilities” meaning that the retirement trust fund has not accumulated sufficient assets to pay future benefits even assuming that investment growth actually rebounds to assumed rates.¹⁰⁶

Once the fund falls below the assumed growth curve, it must be supplemented with additional contributions to bolster the trust fund, or it must achieve investment results above, or even well above, the plan’s assumed rate of growth. The trust fund must greatly increase in value or else it will not be large enough to meet future payments. Should this negative underperformance pattern continue, the expected retirement income generated by these trust funds could be insufficient to pay the full, promised benefits to retirees.¹⁰⁷ When this looming pension unfunded liability is considered in conjunction with governmental debt service costs on usual borrowing and other, non-pension benefits, the results in some states have appeared to be finan-

first quarter of 2016. As large as this appears to be, it represents growth of only .1% over the prior quarter and was 4% less than the assets held a year earlier. With expected rates of growth commonly assumed to be from 7% to 8% over 20 to 30 year periods, these low returns could spell disaster. U.S. DEPARTMENT OF COMMERCE CENSUS BUREAU, G16-QSPP1, SUMMARY OF THE QUARTERLY SURVEY OF PUBLIC PENSIONS FOR 2016: Q1 (2016), available at <https://www.census.gov/content/dam/Census/library/publications/2016/econ/g16-qspp2.pdf>.

105. Fluctuation of investment returns can be highly variable. One recent report analyzing 164 state and local government pension funds indicated that returns for 2017 were 7.8% while those for 2016 were only 1.5%. See NATIONAL CONFERENCE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS, 2017 NCPERS Public Retirement Systems Study 20 (2018), <https://www.ncpers.org/files/2017%20NCPERS%20Public%20Retirement%20Systems%20Study%20Report%20-%20Final.pdf>.

106. Research has noted that jurisdictions with significant unfunded future pension liabilities “assume higher portfolio returns. . .and are more likely to do so through higher inflation assumptions rather than higher real returns.” Aleksandar Andonov & Joshua Rauh, *The Return Expectations of Institutional Investors*, SSRN (Dec. 28, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3091976 (criticizing pension fund managers’ assumptions about both expected rates of return from unreliable historical patterns and the use of exaggerated future inflation expectations).

107. Whether a municipality would honor its pension commitments has surfaced in the small number of Chapter 9 bankruptcies in Detroit, Michigan, Stockton, San Bernadino, Vallejo, California, and Jefferson County, Alabama. See James E. Spiotto, *How Municipalities in Financial Distress Should Deal with Unfunded Pension Obligations and Appropriate Funding of Essential Services*, 50 WILLAMETTE L. REV. 515, 520 & 545–48 (2014). Chapter 9 of the federal Bankruptcy code only provides relief for municipalities, not states.

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cially overwhelming.¹⁰⁸ Many of these jurisdictions have attempted to reckon with this looming disaster by adopting a range of “pension reform” tactics.

The seriousness of the pension funding shortfall is best understood by focusing on the structure of most state and local government pension systems. Traditionally, these plans have adopted the defined benefit (DB) method of pensions where the employer promises a level of retirement income based on longevity on the job, average final salary and an investment percentage. This three-part multiplication defines a lifetime annuity for the retiring worker and obligates the governmental employer to have sufficient funds available to make all payments. This format puts the responsibility of future performance in paying retirement income squarely on the employer. Because it is not structured as a “pay-as-you-go” payment system, government pension planning also entails a considerable amount of estimation uncertainty and risk. All retirement systems employ actuarial estimation to determine their future pension payment liabilities and the sufficiency of their retirement trust funds to provide timely payments.

The structure of the defined benefit retirement income system focuses on a superficially simple calculus, which combines annual employer and employee contributions to a managed retirement trust fund. This money is invested in a range of financial and other assets. Investment income and capital gains made by these assets provide the long-term expansion that will enhance the trust fund’s size and will allow for payment of future pensions. Long, sustained investment earnings for retirement trust funds are crucial to the viability of this system. A recent study put the relative effect of employer and employee trust fund contributions as well as trust fund investment returns into stark perspective. The report analyzed public pension sources of revenue from 1986 through 2015 and concluded that these trust funds totaled \$6.3 trillion in 2015 with a) 12% coming from employee contributions, b) 25% given by employers, and c) 63% generated by investment earnings. The striking conclusion of this study was that investment performance was twice as important to pension trust fund growth as employer and employee contributions combined.

108. Alicia H. Munnell & Jean-Pierre Aubry, *WILL PENSIONS AND OPEBS BREAK STATE AND LOCAL BUDGETS?*, *CTR. FOR RETIREMENT RES.*, 4–5 figs. 5, 6, & 7 (2016), available at http://crr.bc.edu/wp-content/uploads/2016/10/slp_51_rev.pdf (illustrating the wide variation of required payments for pensions, OPEBs and debt service as a percentage of state revenue in FY2014).

With nearly two-thirds of the trust fund's future size being derived from their investment yield, managers must be consistently successful over decades and must reinvest gains for the high compounded results needed to pay pensions. Any underperformance from predicted levels of return would result in inadequate funds to fully pay all pension claims when due.

The recent pension reform legal and policy changes have been adopted in the face of some alarming financial predictions. In 2017, state and local government retirement systems controlled \$3.96 trillion in financial assets in trust funds for worker's pensions.¹⁰⁹ However, the Federal Reserve calculated that nationwide these pension entitlements were underfunded by 32% in 2017.¹¹⁰ Although pension liabilities differ from state to state, the highest unfunded liabilities exist in New Jersey, Illinois, Alaska, Kentucky and Connecticut.¹¹¹ Some analysts fear that existing retirement trust funds in a number of states may be so seriously underfunded that they may not be able to provide the promised benefits.¹¹² If that were to occur either retirement benefits would have to be cut or future budgets would have to pay retirees the missing portion. Although the health of state retirement plans is unevenly distributed, the overall shortfall is truly astounding in degree-reaching trillions of dollars.¹¹³ In some states, these shortfalls are so large that the financial health of the entire state and local govern-

109. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FINANCIAL ACCOUNTS OF THE UNITED STATES: FIRST QUARTER 99 tbl. L. 120 (2017).

110. *Id.* A study by the Society of Actuaries analyzed 130 state and large city public pension plans covering 27 million workers and retirees and concluded that the unfunded liability in this sample was 27% in 2014. Lisa Schilling & Patrick Wiese, U.S. PUBLIC PENSION PLAN CONTRIBUTION INDICES, 2006–2014, SOCIETY OF ACTUARIES (2017).

111. In New Jersey and Illinois, the unfunded liability reached \$12,656 and \$12,413 respectively for each and every person living in those states. On the other end of the spectrum, residents of North Carolina and Oregon had per capita unfunded liabilities of \$73 and \$43 in the same year. Wisconsin and South Dakota actually had retirement trust fund surpluses. See Chris Edwards, FISCAL POLICY REPORT CARD ON AMERICA'S GOVERNORS 2016 10–11 tbl. 2, CATO INST. (2016).

112. Collectively, state and local government pension obligations represent a huge future liability. Some recent estimates have estimated the future unfunded liability of state and local government pensions to be \$4 trillion and some believe that pension liabilities have been greatly underestimated. Robert Novy-Marx & Joshua D. Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 J. FIN. 1 (2010) (Viewing these pension promises as deferred compensation and as debt, this number dwarfs all existing state and local bond liability by a 4 to 1 ratio).

113. See Elizabeth Campbell, *Reckoning Comes for U.S. Pension Funds as Investment Returns Lag*, BLOOMBERG (Sept. 21, 2016), <https://www.bloomberg.com/news/articles/2016-09-21/reckoning-comes-for-u-s-pension-funds-as-investment-returns-lag> (unfunded liability of state and local government pension systems estimated at \$1.9 trillion and predicted to grow with continued low interest rates).

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ments has also been called into question,¹¹⁴ with predictions of catastrophic economic and social effects without changes in current policies.¹¹⁵ With pension expenses growing so quickly legislators see pension expenses as crowding out other state and local budget priorities and devouring huge percentages of public revenues.

The second uncertain aspect of pension plan design is the amount and duration of the retirement pension payments. The expansion of the trust fund caused by investment income is simultaneously reduced by the financial benefits paid out to retiring employees and by the expenses incurred in managing the fund. As simple as this system may appear, these defined benefit retirement plans promise specific financial benefits whose size is difficult to estimate. There is a great deal of uncertainty in these important financial plans. How long will employees work? What will be their final compensation level? How long will retirees live? All of these factors combine to make meeting the government's future pension obligations a daunting estimation problem.

Finally, as the public workforce ages and reaches retirement age, the adequacy of state and local governmental retirement systems will be challenged as the financial demands of paying benefits mount. Complexity is added to this system by the long time period separating the contributions to the fund from the withdrawals in the payment of benefits. Retirement funds pay core benefits in the form of a pension payments payable as a monthly annuity and often this income support is increased through post-retirement benefit adjustments called cost of living increases. The entire retirement system is predicated on the idea that an adequately-funded trust fund will grow to pay these benefits. With the financial collapse in 2008–2009 shrinking trust funds, the sustainability of the current system was certainly in doubt.

114. The State of Illinois presents the most vivid current conflict between a state's governor and legislature with its employee unions and its Supreme Court. See Bruce J. McNeil & Jack E. Karns, *Illinois Supreme Court Deal Says to the Government: The Price is Right for the Pension Prize*, J. PENSION PLANNING & COMP. 35–65 (2015). Illinois is not alone with an array of state legislatures have embarked upon highly divisive reform strategies. See e.g., Brian Eason, *Colo. Lawmakers Face Their Most Costly Issue in Years*, THE DENVER POST at A1, March 13, 2018; Tom Loftus, *Bevin Posts Message to Make Case for Pension Bill*, THE COURIER-JOURNAL (Mar. 18, 2018), <https://www.courier-journal.com/story/news/politics/2018/03/18/kentucky-gov-matt-bevin-social-media-pension-bill/436152002/>

115. George F. Will, *America's Utterly Predictable Tsunami of Pension Problems*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/opinions/americas-utterly-predictable-tsunami-of-pension-problems/2017/02/22/1e5de00e-f869-11e6-9845-576c69081518_story.html?utm_term=.1695e8a93b6d (claiming that each American household is responsible for \$19,000 government pension debt).

IV. RECENT STATE POLICY RESPONSES TO FEARS OF PENSION TRUST FUND INADEQUACY

States and local governments have begun to recognize the serious deficiencies in their retirement systems and the funds dedicated to pay future benefits. They have started to take action. Over the last several years a large number of states and localities have begun to address these difficult questions through the adoption of a range of measures subsumed under the general heading of “pension reform.”¹¹⁶ Reflecting the universality of this social and economic problem, similar reform measures have been recently proposed in other nations as well.¹¹⁷ These changes are widespread throughout the nation with a recent study of nearly 260 state and local government pension plans finding that from 2009 through 2014, 74% of state plans and 57% of large local plans reduced retirement benefits and/or raised employee contributions.¹¹⁸ Most frequently, new employees have been affected most by these program changes, although in some places current workers also have had their retirement plans changed.

Many different pension reform policies have been adopted across the United States. These retirement benefit changes run the gamut from making technical retirement calculation adjustments to the imposition of whole-scale revisions to existing retirement systems. The most common reforms have fallen into the following patterns:

1. Requiring current employees to make higher rates of employee pension contributions and applying higher rates to new hires. Public employees contribute a portion of their salaries to the state’s retire-

116. See Jeffrey R. Brown, *Reforming Public Pensions Subject to Political and Legal Constraints: The Illinois Experience*, 67 NAT. TAX REV. 941–64 (2014); Maria O. Hylton, *The Case for Public Pension Reform: Early Evidence from Kentucky*, 47 CREIGHTON L. REV. 585–609 (2014); Andre S. Digou, *A View of the Rhode Island Pension Landscape: The Potential Reform of Local Pension Plans Under the Preemption Doctrine*, 19 ROGER WILLIAMS L. REV. 740–66 (2014). See also THE PEW CHARITABLE TRUSTS, *ROADS TO REFORM: CHANGES TO PUBLIC SECTOR RETIREMENT BENEFITS ACROSS STATES* 1 (2010), <http://www.pewtrusts.org/en/research-and-analysis/reports/2010/11/11/roads-to-reform-changes-to-public-sector-retirement-benefits-across-states>.

117. See, e.g., Lans Bovenberg & Raymond Gradus, *Reforming occupational pension schemes: the case of the Netherlands*, 18 J. ECON. POL. REFORM 244–257 (2015); Richard Disney, *Pension Reform in the United Kingdom: An Economic Perspective*, 237 NAT’L. INST. ECON. REV. R6–R12 (2016).

118. Jean-Pierre Aubry & Caroline V. Crawford, *STATE AND LOCAL PENSION REFORM SINCE THE FINANCIAL CRISIS*, CTR. FOR RETIREMENT RES. 3 (2016). The major plan changes were increased employee contributions to pension plans, reduced cost of living adjustments in received pensions, calculations for the final average salary, reduction in the benefit factor used to calculate pension benefits, increasing the retirement age or pension vesting time, and the shift to a defined contribution or hybrid system of pensions.

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ment fund and this contribution is matched by a contribution made by the state or local government employer. Pension reforms have shifted more of the costs of funding the governmental defined benefit retirement plans on to the employees with legislation mandating increased deductions from employee salaries in differing amount.¹¹⁹ In some instances, these higher retirement benefit costs were imposed solely on new hires and not on current workers; but in some jurisdictions, they were charged to both categories of workers. Some jurisdictions totally abandoned defined benefit retirement plans for newly hired workers, replacing them with 401k-like defined contribution systems.¹²⁰

2. Requiring increased age and service requirements before pension eligibility for new hires and existing workers. Government pensions require workers to satisfy minimum age and length of service requirements before they can be eligible for receiving retirement benefits. Recent changes have extended those minimum requirements for current workers making the terms required for earning the pensions more onerous and longer to achieve. New hires have also been subject to lengthier “vesting” requirement establishing the minimum working time needed for being determined eligible for even a small pension.

3. Reducing pension benefits by reducing the defined benefit pension multiplier “factor.” Defined benefit pensions are usually determined by multiplying three elements together: the number of years of work, the average final salary, and the pension multiplier factor. The pension multiplier is a percentage that is multiplied by the number of years of service resulting in a percentage of the final average salary that will be received as the pension. This final element is described with many different terms, but it has the potential to greatly affect the

119. See generally PENSION LITIGATION TRACKER, <http://pensionlitigation.org/category/all/topics/increased-employee-contribution/> (Last visited Jan. 27, 2019); Christina McFarland, *Making Informed Choices About Public Sector Pension Plans*, NAT'L LEAGUE OF CITIES, <https://www.nlc.org/sites/default/files/2017-03/MakingInformedChangestoPublicSectorPensionPlans.pdf>. On the federal level, the proposed FY2019 budget proposal includes a new requirement that federal employees contribute 6% of their salary to their federal pensions; Eric Yoder, *Budget Provides No Raise, Targets Retirement Benefits for Employees*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/02/12/budget-provides-no-raise-targets-retirement-benefits-for-federal-employees/?utm_term=.6b31039ba953.

120. See Tom Loftus, *Kentucky pension crisis: Are 401(k) Plans the Solution*, THE COURIER-JOURNAL (Sept. 15, 2017, 6:17PM), <https://www.courier-journal.com/story/news/politics/2017/09/15/kentucky-pension-crisis-401-k-plans-solution/626423001/>.

size of the defined benefit pension received by the employee.¹²¹ As the percentage rises, the final pension payment increases and when it falls the final pension decreases. Different categories of employees may be awarded different multiplier factors as a reflection of their job characteristics or their political power.

4. Increasing the number of years to determine the employees “average final salary.” Since most defined benefit pensions are determined by multiplying the number of years of credited employment by the average final salary, determining this second factor can affect the resulting pension payments. Many states had previously adopted a three year “average final salary” metric which computed an average over a continuous thirty-six month period with the highest compensation.¹²² To lower future pension benefits, some states have increased the averaging period for the “average final salary” to five years which has had the effect of lowering the average final salary by adding lower salary years to the expanded average.¹²³ By reducing this factor in the three part calculus, the final annual pension would be made lower.

5. Disallowing employees from using accrued sick leave, vacation leave or overtime pay to augment their number of years of work or final average income. Some pension systems have allowed employees to receive pension credit for unused leave and final year’s overtime pay to increase their income and extend their work time in the final years of employment. This has been called pension “spiking” and has been widely targeted as one form of pension abuse where workers

121. See, e.g., PHILADELPHIA BOARD OF PENSIONS AND RETIREMENT, SUMMARY PLAN DESCRIPTION (2015) <https://www.phila.gov/pensions/PDF/Summary%20Plan%2010.pdf> (last visited Jan. 29, 2019); TEACHER’S RETIREMENT SYSTEM KENTUCKY, <https://trs.ky.gov/active-members/membership/plan/> (last visited Jan. 27, 2019).

122. Pennsylvania’s retirement system employs a 3-year averaging period. See EMPLOYEES RETIREMENT SYSTEM, MEMBER HANDBOOK: RETIREMENT BENEFIT CALCULATION STATE 11 http://sers.pa.gov/pdf/SERS_Member_Handbook.pdf (last visited Jan. 29, 2019). Some states like New York have multiple final average salary averaging periods for different “tiers” of employees. See *NYSLRS Basics: Final Average Salary*, NEW YORK RETIREMENT NEWS (Sept. 27, 2017), <http://nyretirementnews.com/nyslrs-basics-understanding-final-average-salary/>. Contrary to popular belief, Congressmen and Senators draw their pensions with this same 3-year average and they must have at least 5 years of service to draw any pension. See Katelin P. Isaacs, CONG. RESEARCH SERV. RETIREMENT BENEFITS FOR MEMBERS OF CONGRESS, CRL REPORT RL 30631 (Dec. 5, 2017).

123. The FY2019 proposed federal budget changes the average final salary calculation from 3 years to 5 years and the elimination of Cost of Living Adjustments. Ian Smith, Substantial Cuts to Federal Employee Benefits Proposed in FY 2019 Budget, FEDSMITH (Feb. 12 2018), <https://www.fedsmith.com/2018/02/12/substantial-cuts-federal-employee-benefits-proposed-fy-2019-budget/>.

have been able to substantially raise their final average income above their actual earnings.¹²⁴ This has been disallowed or limited.

6. Reducing or eliminating pension cost of living (COLA) adjustments.¹²⁵ Government pension benefits often are supplemented by cost of living adjustments that annually raise pension cash payments to keep them in line with inflation. The cost of living adjustment, often tracking the CPI, raises retiree pension payments each year and thereby increases the long-term costs to the pension system.¹²⁶

The stakes in this public policy conflict could not be higher having serious consequences for government employees and for taxpayers. How will governmental employers deal with their long-term employees who have served them well and who have relied on earlier promises regarding their retirement pensions and other benefits.¹²⁷ A reciprocal problem exists for state legislators and policy makers since finding financial resources to honor these promises made by their predecessors may pose serious questions since meeting existing pension promises may impose higher present and future costs diverting

124. See, e.g., Natanya Friedheim, *Pension Spiking Costs Taxpayers Millions — Now The Push Is On To Stop It*, HONOLULU CIVIL BEAT (Sept. 15, 2017), <http://www.civilbeat.org/2017/09/pension-spiking-costs-taxpayers-millions-now-the-push-is-on-to-stop-it/>; Mary Jo Webster, *Public Pension 'Spiking': Overtime Hours Soar for St. Paul Fire Supervisors*, TWIN CITIES (Dec. 8, 2012), <https://www.twincities.com/2012/12/08/public-pension-spiking-overtime-hours-soar-for-st-paul-fire-supervisors/>; NORTH CAROLINA DEP'T OF STATE TREASURER, NORTH CAROLINA RETIREMENT SYSTEMS ANTI-PENSION SPIKING CONTRIBUTION-BASED BENEFIT CAP (2014), <https://www.nctreasurer.com/ret/Board%20of%20Trustees/AntiPensionSpikingContributionBasedBenefitCap.pdf#search=pension%20spiking>; Catherine Saillant, Maloy Moore & Doug Smith, *Salary 'spiking' Drains Public Pension Funds, Analysis Finds*, LA TIMES (Mar. 3, 2014), <http://articles.latimes.com/2014/mar/03/local/la-me-county-pensions-20120303>; Mike Baker, *State Feels Bite of Workers' Pension Spiking*, SEATTLE TIMES (Apr. 6, 2013), <https://www.seattletimes.com/seattle-news/state-feels-bite-of-workers-pension-spiking/>.

125. In Kentucky, public school teachers threatened to strike if the Kentucky legislature reduced the retiree cost of living adjustment from 1.5% to 1% annually. See Tom Loftus, *State Pension Fight Nears End; Fate of Big School Cuts Also Hangs in Balance*, THE COURIER-JOURNAL 2 (Mar. 27, 2018).

126. See California's cost of living adjustment policy found at California Public Employees Retirement System. CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Cost-of-Living Adjustment (COLA)*, <https://www.calpers.ca.gov/page/retirees/cost-of-living/cola>. Some states have pension reform proposals that cap future COLA payments and tie their availability to the overall funding level of the state's pension system. See Michael Katz, *Louisiana Proposes Pension Reform Bill*, CHIEF INVESTMENT OFFICER (Apr. 4, 2018), <https://www.ai-cio.com/news/louisiana-proposes-pension-reform-bill/> (pension system would have to be 65% funded for COLAs to be granted).

127. This article will focus its discussion on retirement income provided by pensions. State and local governments have made similar post-employment promises with regard to retiree health insurance and other benefits. Analysis suggests that rapid health care cost escalation may also make these retirement benefits underfunded and the next target for cost-cutting governmental employers. See Marc E. Fitch, *Connecticut Has \$36 Billion in Unfunded OPED Liabilities*, YANKEE INST. FOR PUB. POL'Y (Mar. 29, 2018), <http://www.yankeeinstitute.org/2018/03/connecticut-has-36-billion-in-unfunded-opeb-liabilities/>.

scarce financial resources from other much-needed public expenditures. Without supporting tax increases, how will basic governmental services be provided if employee pension costs greatly increase?

With assessments of pension funds indicating that existing plans would not be sufficient to meet their obligations, each state has been confronted with a series of policy and legal choices. How would this ever-expanding future financial obligation be met? Would future employee retirement income and other benefits be reduced? Would employees and/or employers be required to contribute more into the pension trust fund? Would the defined benefit plan design be abandoned to limit future governmental pension exposure? These important, and highly controversial, questions have surfaced in many state-level political conflicts and they have been examined in academic policy analyses.¹²⁸ Unfortunately, there appears to be no “perfect” answer about how to proceed. Finding ways to meet existing pension obligations will undoubtedly impose serious financial demands on state and local government budgets crowding out other important government programs.¹²⁹ This occurs at a time when virtually no political will exists to increase state or local taxes.¹³⁰ In this political environment, policymakers have been left with one alternative – cutting back on current employee costs and making public retirement benefits less generous.

Finding a way to reduce pension costs has been a primary concern of state and local governments. With this cost-saving goal, these new policies also have been associated with providing reduced benefits to public workers or making it more difficult for them to qualify.¹³¹ The overall goal of these varied changes has been to lower

128. Juan Perez Jr., *CPS Slates 4 Furlough Days to Aid Budget Gap: District Says Move Will Save \$35M, Won't Cut Class Time*, CHI. TRIB., at C1 (Jan. 14, 2017) (Governor's veto of bill granting \$215 million to teacher pension fund since it did not broadly reform the pension system).

129. *Id.*; *supra* note 45, at x–xi.

130. In its 2017 ranking of the states by fiscal condition, the Mercatus Center at George Mason University evaluated the fiscal solvency of the states and determined that unfunded pension liabilities drive the states into “fiscal peril.” See Eileen Norcross & Olivia Gonzalez, *Ranking States by Fiscal Condition 2017 Edition*, MERCATUS CENTER: GEORGE MASON UNIV. (July 11, 2017), <https://www.mercatus.org/statefiscalrankings2017>. See also Elise Young, *Hoboken Crash Tests a Railroad Beset by N.J. Fiscal Crisis*, BLOOMBERG (Sept. 29, 2016, 1:48 PM), <https://www.bloomberg.com/news/articles/2016-09-29/beleaguered-n-j-transit-gets-another-round-of-rail-hardship> <https://www.bloomberg.com/news/articles/2016-09-29/beleaguered-n-j-transit-gets-another-round-of-rail-hardship>

131. Michael Corkery, *Pension Crisis Looms Despite Cuts*, WALL ST. J. (Sept. 21, 2012, 8:02 AM), <https://www.wsj.com/articles/SB10000872396390443890304578010752828935688> (stating that 45 states had reduced public pension benefits).

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present and future benefit costs to government employers making these future obligations sufficiently funded and more likely to be honored.¹³² Pension reform policies affect three categories of workers: (1) currently retired former employees; (2) members of the existing workforce; and (3) prospective workers who will be hired in the future. The strongest claim to pension stability rests with currently retired persons since they have begun to receive their earned benefits. The weakest claim to prior pension rights appears to be with new workers who have accepted a less generous package of benefits as they entered employment. The second category – existing workers – presents the most difficult group to assess since their benefits have been reduced after being previously more generous. Not surprisingly, these new state policies have been extremely unpopular with existing public employees, often resulting in legal challenges most often in state court.¹³³ As a result, state and local employees have been presented with pension policy changes that work to reduce expected and retirement benefits or to increase employee costs for expected retirement income.¹³⁴ Not surprisingly, widespread court challenges have been made. The outcome of this litigation has varied and these case decisions are the main subject of the next section of this article.

132. A secondary benefit of implementing pension reform has been to improve the credit worthiness of the state or city as reflected in maintaining or raising the quality of their governmental debt and lowering their borrowing costs. See Amanda Albright, *Memphis No Longer Sings Pension Blues Ahead of Biggest Bond Sale*, BLOOMBERG LAW: BENEFITS & EXECUTIVE COMPENSATION NEWS (Apr. 17, 2018) (describing the Memphis, Tennessee experience). *But see* James Comtois, *Connecticut's High Unfunded Pension Liabilities Leads to Credit Downgrade*, PENSIONS & INV. (Apr. 17, 2018, 2:42 PM), <https://www.pionline.com/article/20180417/ONLINE/180419841/connecticuts-high-unfunded-pension-liabilities-leads-to-credit-downgrade> (describing Connecticut's bond rating downgrade).

133. There are also many cases challenging restrictive interpretations of state or local government retirement law. In these cases, courts are asked to interpret the meaning of state or local government retirement statutes in a conventional manner. See, e.g., *Office of Admin. & Pa. State Police v. State Emp. Ret. Bd.*, 180 A.3d 740 (Pa. 2018) (Pennsylvania Supreme Court upholding ruling that union service pay was retirement pension compensation) and *McGlynn v. State*, 230 Cal. Rptr. 3d 470, 473 (Cal. Ct. App. 2018) (upholding trial court holding that state retirement statute applied to judges elected under prior law).

134. Similar warning alarms have recently sounded with regard to retiree health care benefits which nearly 77% of all local governments pay for their retirees and whose unfunded liability has recently been estimated at \$1 trillion or about 1/3 of all state and local government annual revenue. See Byron Lutz & Louise Sheiner, *The Fiscal Stress Arising from State and Local Health Obligations*, 38 J. HEALTH ECON. 130, 130-46 (Dec. 2014) (constituting 1/2 of the unfunded liability of retirement pensions).

V. SEEKING JUDICIAL PROTECTION FOR PUBLIC
EMPLOYEE PENSION “RIGHTS”

A. What State Pension Reforms Triggered Litigation by
Employees and Retirees?

Pension reforms have taken a range of forms as state and local governments have attempted to shore up the financial foundations for their employee retirement benefits by redesigning the benefits offered to new workers and by modifying features of existing programs. With these changes being considered adverse to collective employee and retiree financial interests, it is not surprising that litigation has ensued. The resort to court review of pension reform policies also represents a response to the changing political fortunes of public employees. As such, these lawsuits represent political statements of protest as much as attempts to use legal principles to invalidate or limit the benefit changes that have been enacted. This litigation history is important to understand for both its symbolic significance as well as its practical importance.

Disappointed and dissatisfied with changes made to their benefits by current political leaders, workers and their representatives have elected to litigate their claims in an effort to vindicate their “rights” which the current political system has refused to respect. They have also accused state pension officials of mismanagement and poor judgment.¹³⁵ As the discussion below will reveal, much of the recent litigation challenging the pension benefit changes have been unsuccessful for employees and retirees.¹³⁶ These unsuccessful cases often reflect workers’ misperceptions about the true nature of their employment “rights” – many times believing that they are permanent and unchangeable. This belief has turned out to be a mistake as the courts

135. Tom Loftus, *Lawsuit: Retirement Systems Gambled on Hedge Funds, Concealed its Financial Mess*, LOUISVILLE COURIER J. (Dec. 27, 2017, 2:25 PM), <https://www.courier-journal.com/story/news/politics/2017/12/27/lawsuit-kentucky-retirement-systems-gambled-hedge-funds/982740001/> (accusing retirement officials, consultants, hedge funds of entering a “civil conspiracy” on poor investment choices that were concealed from employees.); Michael Katz, *Hedge Fund Tells Kentucky Pension to Take a Hike, Chief Investment Officer* (July 5, 2018), <https://www.ai-cio.com/news/hedge-fund-tells-kentucky-pension-take-hike/> (hedge fund refused to comply with CFA Institute’s codes of ethics and professional conduct that was part of a Kentucky pension transparency bill).

136. The article concentrates on litigation brought to challenge systematic changes in state and local government retirement benefit plans. Other cases not the main focus of this article consider individual claims based on complaints based on the administration of existing pension systems. See, e.g., *Kendall v. Gov’t V.I.*, 596 F. App’x 150 (3d Cir. 2015) (affirming district court judgment against retired judge’s challenge to pension calculation).

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have been unwilling to strike down many of these recent reform measures adopted in the face of the looming financial crisis facing the governmental employers. The cases ultimately illustrate the futility of using courts to rectify these kinds of political decisions.

This review of selected state and federal litigation from 2008-2018 has been comprised of a total of 100 reported case decisions from 35 states reflecting a wide national distribution.¹³⁷ Twenty-seven of these decisions were from the federal district courts, courts of appeals, and bankruptcy courts while 72 of them were rendered in state supreme courts, courts of appeals, and trial courts. Each year saw some decisions although the peak frequency in decisions was in 2014 through 2016.¹³⁸ This distribution probably reflects the lag time between the adoption of the pension reform, litigation, and the issuance of a reported decision.

The analysis of these decisions revealed patterns in the nature of the retirement policy changes that led employee and retiree groups to seek judicial review and their potential invalidation.¹³⁹ Obviously, this litigation was triggered by the executive and legislative branches of government adopting the challenged pension reforms. The challengers were seeking to have the popularly-supported reform measures invalidated as being contrary to specific statutory standards or particular constitutional principles. Viewed in this light, the court

137. In selecting the cases for review there was a conscious effort to avoid merely procedural decisions related to pension reform challenges. *See, e.g.*, *Wood v. Unified Gov't Athens-Clarke Cty.*, 818 F.3d 1244 (11th Cir. 2016) (reversing district court on statute of limitations issue to retiree benefits change).

138. The pension reform litigation analyzed in this review had the following distribution:
 Total number of cases reviewed: 100.
 Total number of states involved: 35.
 Level of courts:
 State Supreme Court: 36 cases.
 State Appellate Court: 33 cases.
 U.S. Circuit Court of Appeals: 17 cases.
 U.S. District Court: 10 cases.
 U.S. Bankruptcy Court: 1 case.

FREQUENCY OF DECISIONS-YEAR BY YEAR:

2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008
13 cases (until July 6, 2018)	12 cases	20 cases	18 cases	14 cases	4 cases	7 cases	7 cases	3 cases	case	cases

139. The group of cases chosen for review in this analysis is a representative sample of reported litigation of pension reform policies in the eight-year period from 2010 through early 2018 does not constitute an exhaustive survey but rather it seeks to provide a general description of the most common forms of pension reform challenges.

challenges attempted to use legal concepts to block democratically-adopted policy choices that disadvantaged workers and retirees. Examples of the most common policies triggering litigation challenges were:

- i. The State Amended Existing Retirement Plans by Either Cutting Retirement Benefits or Reducing the State Contributions.¹⁴⁰
- ii. The State Modified the Retirement Benefit Calculation Formula.¹⁴¹
- iii. The State Required Employees to Increase Their Contributions to the Pension Plan for Retirement Benefits.¹⁴²
- iv. The State Decreased the Cost of Living Adjustment (COLA) to Retirement Pension Benefits.¹⁴³

140. See, e.g., *Cherry v. Mayor & City Council of Balt.*, No. MJG-10-1447, 2011 WL 11027560 (D. Md. Sept. 6, 2011); *Metcalfe v. State*, 382 P.3d 1168 (Alaska 2016); *San Joaquin Cty. Corr. Officers Ass'n v. Cty. of San Joaquin*, 211 Cal. Rptr. 3d 822 (Cal. Ct. App. 2016); *S.D. Police Officers Ass'n v. S.D. City Emps.' Ret. Sys.*, 568 F.3d 725 (9th Cir. 2009); *Awdziejewicz v. City of Meriden*, 115 A.3d 1084 (Conn. 2015); *Jones v. Mun. Emps.' Annuity & Benefit Fund*, 50 N.E.3d 596 (Ill. 2016); *Heaton v. Quinn*, 32 N.E.3d 1 (Ill. 2015); *Welch v. Brown*, 935 F. Supp. 2d 875 (E.D. Mich. 2013); *Coal. of State Emp. Unions v. State*, 870 N.W.2d 275 (Mich. 2015); *Moro v. State*, 351 P.3d 1 (Or. 2015); *Dodd v. City of Chattanooga*, 846 F.3d 180 (6th Cir. 2017); *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590 (6th Cir. 2016); *Alameda Cty. Sheriff's Ass'n v. Alameda Cty. Emps. Ret. Ass'n.*, 227 Cal. Rptr. 3d 787 (Cal. Ct. App. 2018).

141. See, e.g., *Fields v. Elected Officials' Ret. Plan*, 320 P.3d 1160 (Ariz. 2014); *Hall v. Elected Officials' Ret. Plan*, 383 P.3d 1107 (Ariz. 2016); *S.D. City Firefighters v. Bd. of Admin.*, 141 Cal. Rptr. 3d 860 (Cal. Ct. App. 2012); *Cty. of Orange v. Ass'n of Orange Cty. Deputy Sheriffs*, 121 Cal. Rptr. 3d 151 (Cal. Ct. App. 2011); *Deputy Sheriffs' Association of S.D. v. Cty. of S.D.*, 182 Cal. Rptr. 3d 759 (Cal. Ct. App. 2015); *Stoker v. Milwaukee Cty.*, 857 N.W.2d 102 (Wis. 2014); *Marin Ass'n of Pub. Emps.' v. Marin Cty. Emps.' Ret. Ass'n*, 206 Cal. Rptr. 3d 365 (Cal. Ct. App. 2016); *City of Hollywood v. Bien*, 209 So. 3d 1 (Fla. Dist. Ct. App. 2016); *Puckett*, 833 F.3d 590; *Cloutier v. State*, 42 A.3d 816 (N.H. 2012); *Am. Fed'n of Teachers v. State*, 111 A.3d 63 (N.H. 2015); *Local 101 of Am. Fed'n & Mun. Emps. v. Brown*, No. 14-cv-05640-BLF, 2017 U.S. Dist. LEXIS 130988 (N.D. Cal. Aug. 16, 2017); *Valde v. Emp. Appeal Bd.*, No. 17-0266, 2017 Iowa App. LEXIS 953 (Iowa Ct. App. Sept. 13, 2017); *Cranston Firefighters, IAFF Local 1363, AFL-CIO v. Raimondo*, No. 16-130-ML, 2017 WL 899948 (D.R.I. Mar. 7, 2017); *Cranston Firefighters, IAFF Local, 1363 AFL-CIO v. Raimondo*, 880 F.3d 44 (1st Cir. 2018).

142. See, e.g., *Taylor v. City of Gadsden*, 767 F.3d 1124 (11th Cir. 2014); *Borders v. City of Atlanta*, 779 S.E.2d 279 (Ga. 2015); *Prof'l Fire Fighters of N.H. v. State*, 107 A.3d 1229 (N.H. 2014); *Teamsters Local 97 v. State*, 84 A.3d 989 (N.J. Super. Ct. App. Div. 2014); *Andrews v. Lombardi*, No. KC-13-1129, 2017 R.I. Super. LEXIS 31 (R.I. Super. Feb. 2, 2017); *Bishop v. City of Columbia*, 738 S.E.2d 255 (S.C. Ct. App. 2013).

143. See, e.g., *Protect Our Benefits v. City & Cty. of S.F.*, 185 Cal. Rptr. 3d 410 (Cal. Ct. App. 2015); *Justus v. State*, 336 P.3d 202 (Colo. 2014); *Me. Ass'n of Retirees v. Bd. of Trs.*, 758 F.3d 23 (1st Cir. 2014); *Berg v. Christie*, 137 A.3d 1143 (N.J. 2016); *Bartlett v. Cameron*, 316 P.3d 889 (N.M. 2013); *Frazier v. City of Chattanooga*, 151 F. Supp. 3d 830 (E.D. Tenn. 2015); *Frazier v. City of Chattanooga*, 841 F.3d 433 (6th Cir. 2016); *Van Houten v. City of Fort Worth*, 827 F.3d 530 (5th Cir. 2016); *Wash. Educ. Ass'n v. Wash. Dept. of Ret. Sys.*, 332 P.3d 439 (Wash. 2014); *Cherry*, 762 F.3d 366.

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v. The State Denied Employees the Right to Purchase Credited Service to Enhance Pension Benefits.¹⁴⁴

vi. The State Changed/Reduced/ Refused to Increase Health Benefits.¹⁴⁵

vii. The State Increased Premiums for Retiree Health Care Benefits or the State Removed Health Care Benefits from Pension Plans.¹⁴⁶

B. How Does the Law Characterize Employee Retirement Benefits?

Citizens often believe that they have “rights” in many things—free speech, voting, and fair treatment under the law. They consider these rights in the abstract assuming that they have some form of legal protection grounded in a general conception of “the law.” Most public employees consider their compensation and other employee benefits to be earned and once earned to be their property or at least something that they “own.” Workers look to their representatives and to their employers to explain these complicated future rights and often they have been given concrete verbal or written predictions of their retirement benefits. Consequently, when state and local officials act to change the expected terms of these pension “rights,” many of these workers feel that their trust has been betrayed and they must act to take legal action challenging the change.

When these challenges move from the arena of public opinion and employee belief to the state and federal courts, the legal charac-

144. *See, e.g.*, *Pendergast v. Ariz. State Ret. Sys.*, 323 P.3d 1186 (Ariz. Ct. App. 2014); *Cal Fire Local 2881 v. Cal. Publ. Emps.’ Ret. Sys.*, 212 Cal. Rptr. 3d 471 (Cal. Ct. App. 2016).

145. *See, e.g.*, *Sacramento Cty. Retired Emps. Ass’n v. Cty. of Sacramento*, No. CIV S–11–0355 KJM–EFB, 2012 WL 1082807 (E.D. Cal. March 31, 2012); *Fry v. City of L.A.*, 199 Cal. Rptr. 3d 694 (Cal. Ct. App. 2016); *Requa v. Regents of Univ. of Cal.*, 152 Cal. Rptr. 3d 440 (Cal. Ct. App. 2012); *Dannenberg v. State*, 383 P.3d 1177 (Haw. 2016); *Underwood v. City of Chi.*, 779 F.3d 461 (7th Cir. 2015); *Kanerva v. Weems*, 13 N.E.3d 1228 (Ill. 2014); *Matthews v. Chi. Transit Auth.*, 51 N.E.3d 753 (Ill. 2016); *AFT Mich. v. State*, 866 N.W.2d 782 (Mich. 2015); *Retired Pub. Emps. Ass’n v. Cuomo*, 123 A.D.3d 92 (N.Y. App. Div. 2014); *R.I. Council 94 v. R.I.*, 705 F. Supp. 2d 165 (D.R.I. 2010); *Vallejo Police Officers Ass’n v. City of Vallejo*, 223 Cal. Rptr. 3d 280 (Cal. Ct. App. 2017); *Weaver v. Town of N. Castle*, 153 A.D.3d 531 (N.Y. App. Div. 2017); *Wood v. Unified Gov’t Athens-Clarke Cty.*, No. 3:14-CV-43, 2018 U.S. Dist. LEXIS 9476 (M.D. Ga. Jan. 22, 2018).

146. *See, e.g.*, *Hussey v. Milwaukee Cty.*, 740 F.3d 1139 (7th Cir. 2014); *Retired Emps. Ass’n of Orange Cty., Inc. v. Cty. of Orange*, 266 P.3d 287 (Cal. 2011); *Christiansen v. Cty. of Douglas*, 849 N.W.2d 493 (Neb. 2014); *State Emps.’ Ass’n of N.H. v. State*, 20 A.3d 961 (N.H. 2011); *Gamel v. Cincinnati*, 983 N.E.2d 375 (Ohio Ct. App. 2012); *N.Y. State Corr. Officers & Police Benevolent Ass’n v. N.Y.*, 911 F. Supp. 2d 111 (N.D.N.Y. 2012); *Roberts v. N.Y.*, 911 F. Supp.2d 149 (N.D.N.Y. 2012).

terization of employee retirement benefits becomes a central focus strongly affecting the resolution of the legal challenge. What exactly does the employee own and what rights are actually associated with these retirement benefits? In the absence of federal preemption, the states have been free to fashion their own law and policy to answer these questions. Often a state's formal legal characterization of employee pensions provides a structured analysis that can determine the ultimate lawfulness of pension reform measures.¹⁴⁷ While fitting into a group of patterns, each state has fashioned its own jurisprudence on this subject, often blending both federal and state law.¹⁴⁸ It is also common for litigants to plead multiple legal theories simultaneously seeking the invalidation of some pension benefit policy change.¹⁴⁹

Legal analysis has broken the states down into 5 theoretical categories:¹⁵⁰

1. Pensions are the employer's gratuity or gift to the employee when made.

2. Pension rights are governed by promissory estoppel principles focusing on justifiable reliance.

3. Pension benefits are property rights when earned and are protected under Due Process and Takings principles.

4. Pensions are employee contract rights when earned and protected by general contract law principles as well as constitutional "impairment of contract" prohibitions.

5. Pensions are employee contract rights when earned and have additional protection under specialized state constitutional provisions.

147. Some cases are judicial review of administrative decisions about operation of a retirement plan. *See, e.g.*, *Pub. Emp. Ret. Admin. Comm'n v. Contrib. Ret. Appeal Bd.*, 90 N.E.3d 744 (Mass. 2018) (upholding decision that sick pay and vacation pay are not regular compensation) and *Worcester Reg'l Ret. Bd. v. Contrib. Ret. Appeal Bd.*, 88 N.E.3d 1169 (Mass. App. Ct. 2017) (upholding decision to allow purchase of additional work credit).

148. *See generally*, Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC. FIN. & POL'Y (2010); JENNIFER STAMAN, CONG. RESEARCH SERV., R41736, STATE AND LOCAL PENSION PLANS & FISCAL DISTRESS: A LEGAL OVERVIEW (2011).

149. *Cranston Firefighters, IAFF Local 1363, AFL-CIO v. Raimondo*, No. 16-130-ML, 2017 U.S. Dist. LEXIS 32327, at *25 (D.R.I. Mar. 7, 2017) (Contracts clause, Takings clause and Due Process clause theories in complaint); *Teamsters Local 97 v. State*, 84 A.3d 989 (N.J. Super. Ct. App. Div. 2014) (arguing Contract, Due Process, and Takings Clauses).

150. *See* Alicia H. Munnell & Laura Quinby, *Legal Constraints on Changes in State and Local Pensions*, *CTR. FOR RETIREMENT RES. AT B.C.: STATE AND LOCAL PENSION PLANS 2* (No. 25, Aug. 2012) and William T. Payne, Joel R. Hunt & Ruairi McDonnell, *The Constitutional Limitations on Public Employee Pension Reform Legislation*, 25 *PUB. LAW.* 10, 12-13 (2017).

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1. The Gratuity Approach

Perhaps the most unrealistic view of public employee pension rights is the view taken in the states of Texas and Indiana which view the pension as a gratuity or gratuitous allowance.¹⁵¹ The gratuity approach advances the idea that the public employer should have unfettered discretion in determining the amount and availability of retirement benefits.¹⁵² In the 19th and early 20th century, public and private employers considered this form of deferred compensation to be truly discretionary and dependent on the continuing good will and financial solvency of the employer.¹⁵³ The main legal theory supporting this view was that the employer's current promise of future retirement income was a current gratuitous promise to make a future gift of money.¹⁵⁴ Viewed from the Texas perspective, the existence and character of pension rights would be a subject of legislative supremacy that is: "made subject to the reserved power of the Legislature to amend, modify, or repeal the law upon which the pension system is erected, and this necessarily constitutes a qualification upon the anticipated pension and a reserved right to terminate or diminish it."¹⁵⁵

This position has been applied in an array of cases including one holding that retiree pensions actually being received could legally be reduced or terminated because they had "no vested rights in future installments."¹⁵⁶

151. IND. CONST. art. X, § 5; *id.* art. XI, § 12. See *Bd. of Trs. of the Pub. Emps.' Ret. Fund v. Hill*, 472 N.E.2d 204 (Ind. 1985) and *Ballard v. Bd. of Trs. of Police Pension Fund*, 324 N.E.2d 813, 815 (Ind. 1975) ("The Court of Appeals correctly held that in Indiana pensions under a state compulsory contribution plan like the Police Pension Fund have traditionally been considered gratuities from the sovereign involving no agreement of the parties and, therefore, creating no contractual rights.") This characterization generally applies to benefits received from "involuntary" retirement plans where "voluntary" plans are considered contract benefits. See also *Kern v. State*, 10 N.E.2d 915 (Ind. 1937); *Klamm v. State*, 126 N.E.2d 487 (Ind. 1955).

152. R.D. Hursh, Annotation, *Vested Right of Pensioner to Pension*, 52 A.L.R.2d 437 (1957); See also *Pennie v. Reis*, 132 U.S. 464, 470-72 (1889) (employee had no property interest in public pension benefits because state retained the contribution in its retirement fund).

153. See, e.g., *Eddy v. Morgan*, 75 N.E. 174, 178 (1905) (Public pensions are "a bounty springing from the graciousness and appreciation of sovereignty.").

154. Norman Stein, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, EMP. BENEFITS COMMITTEE NEWSLETTER (Summer 2014).

155. This view was expressed by the Texas Supreme Court in *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937) and recently affirmed in *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 16 (Tex. 2015). The Fifth Circuit has consistently followed this view. See also *Van Houten v. City of Fort Worth*, 827 F.3d 530 (5th Cir. 2016) and *Kunin v. Feofanov*, 69 F.3d 59, 63 (5th Cir. 1995).

156. *Trammell*, 101 S.W.2d at 1012-13. See also *Klumb*, 458 S.W.3d at 17; *Devon v. City of San Antonio*, 443 S.W.2d 598 (Tex. Civ. App. 1969); *Jud v. City of San Antonio*, 313 S.W.2d 903 (Tex. Civ. App. 1958).

Curiously, the theory of “gratuity” pensions has not been attacked as being unconstitutional under state laws; making gifts of government funds to private persons would seemingly violate the prohibition on these gratuities.¹⁵⁷ It would appear that unless some superior state or federal constitutional rights were identified as protecting retirement benefits, the legislatures of Texas and Indiana would seemingly be empowered to make restrictive pension policy changes with great freedom, constrained mainly by limits of public opinion.

2. The Promissory Estoppel View

Taking a unique legal view that is grounded in a sense of fundamental fairness towards employees, Minnesota has established a legal framework for assessing public employee pension rights under the theory of promissory estoppel. Recognized in the 1983 case of *Christensen v. Minneapolis Municipal Employees’ Retirement Board*,¹⁵⁸ the Minnesota Supreme Court established the doctrine in a case where a municipal employee had existing pension benefits be suspended under a new state law requiring a minimum age for retirement pensions and applying it retroactively to the employee.¹⁵⁹ Rather than adopting the gratuity approach or the prevalent contractual view, the Minnesota court announced a new approach and one that remains identified with the state to this day.¹⁶⁰ It holds that a reviewing court must examine two questions in considering the lawfulness of a benefit change: (1) what has been promised by the state; and (2) to what degree and to what aspects of the promise has there been reasonable

157. TEX. CONST. art. 3, §51 (“The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever . . .”) When a governmental entity is not liable on a claim, the payment of that claim constitutes “a pure gift or donation” and violates the constitution. See *Tompkins v. Williams*, 62 S.W.2d 70, 71 (Tex. Comm’n App. 1933); *State v. City of Austin*, 331 S.W.2d 737, 742 (Tex. 1960). But see *Spina v. Consol. Police & Firemen’s Pension Fund Comm’n*, 197 A.2d 169, 175–76 (N.J. 1964) (pension benefits not a gratuity within state’s constitutional prohibition on donations).

158. *Christensen v. Minneapolis Municipal Employees Retirement Bd.*, 331 N.W.2d 740 (Minn. Mar. 18, 1983).

159. *Public Employee Pension Benefits—A Promissory Estoppel Approach—Christensen v. Minneapolis Municipal Employees’ Retirement Board*, 331 N.W.2d 740 (Minn. 1983), 10 Wm. MITCHELL L. REV. 287, 288–289 (1984).

160. The Minnesota promissory estoppel approach has been adopted in a small number of decisions outside of Minnesota. See *City of Long Beach v. Mansell*, 476 P.2d 423 (Cal. 1970); *Crumpler v. Bd. of Admin.*, 108 Cal. Rptr. 293 (Cal. Ct. App. 1973); *Shafer v. State*, 521 P.2d 736 (Wash. 1974).

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reliance on the part of the employee?¹⁶¹ As the two-part framework reveals, the promissory estoppel eschews a rigid and formalistic contractual approach to existence of employee benefits to a more flexible and contextual analysis. The *Christensen* viewpoint has been followed since it was announced and it appears to be tied to the equity principles mentioned in the Restatement (Second) of Contracts.¹⁶² Occasionally Minnesota's idiosyncratic promissory estoppel analysis has been argued in cases arising in other jurisdictions but usually without success.¹⁶³ Counsel for the challengers appear willing to advance a range of theoretical arguments challenging pension benefit changes hoping that the reviewing court will find one or more persuasive.¹⁶⁴ Some of these arguments have been extremely creative even if they have not been successful.¹⁶⁵

3. The Property Approach

There are six states that are believed to have taken a Property law approach to characterizing retirement benefits.¹⁶⁶ Since state law defines the existence and the features of individual ownership of

161. *Christensen*, 331 N.W.2d at 749.

162. Restatement (Second) Contracts §90 (1981).

163. *See, e.g.*, *Weaver v. Town of N. Castle*, 153 A.D.3d 531 (N.Y. App. Div. 2017) (no reliance and no promise for retiree health insurance); *Vallejo Police Officers Ass'n v. City of Vallejo*, 223 Cal. Rptr. 3d 280 (Cal. Ct. App. 2017) (promissory estoppel theory derivative to failed contract theory regarding retiree health insurance coverage); *Christiansen v. Cty. of Douglas*, 849 N.W.2d 493 (Neb. 2014) (equitable estoppel did not prevent increased in health insurance premiums); *Gamel v. City of Cincinnati*, 983 N.E.2d 375, 379 (Ohio Ct. App. 2012) (promissory estoppel could not be invoked to challenge a city exercising a governmental function under state law); *S.D. City Firefighters, Local 145, AFL-CIO v. Bd. of Admin.*, 141 Cal. Rptr. 3d 860 (Cal. Ct. App. 2012) (benefit adopted by city was void and the resolution enacting it did not give rise to promissory estoppel right); *Bishop v. City of Columbia*, 738 S.E.2d 255 (S.C. Ct. App. 2013) (estoppel claims rejected based on employee handbook and benefits booklet but accepted based representations by supervisors); *Myers v. W. Va. Consol. Pub. Ret. Bd.*, 704 S.E.2d 738 (W.Va. 2010) (10 years of government service leads to presumption of detrimental reliance on benefits).

164. *Hall v. Elected Officials' Ret. Plan*, 383 P.3d 1107 (Ariz. 2016) (multiple legal theories advanced but the case decided under state constitutional pension clause); *Awdziewicz v. City of Meriden*, 115 A.3d 1084 (Conn. 2015) (multiple contract, equitable and constitutional theories advanced but decided under the facts).

165. *Moro v. State*, 351 P.3d 1, 40–41 (Or. 2015) (legislation eliminating income tax offset benefits to non-resident state retirees did not violate the U.S. Constitution's Privilege and Immunities Clause); *Myers*, 704 S.E.2d at 738 (W.Va. 2010) (theory of contractual detrimental reliance recognized although not found to exist in the case).

166. These states are: Maine, Wyoming, Connecticut, New Mexico, Ohio, and Wisconsin. However, careful examination of opinions reveals some confusion over the accuracy of this summary. *See Pierce v. State*, 910 P.2d 288, 298 (N.M. 1995) (finding Connecticut, Maine, Minnesota, New Jersey, and Rhode Island had recognized pensions as "important property interest(s) or right.") Courts in other states occasionally will characterize retirees' benefits as property rights. *See N.Y. State Corr. Offs. & Police Benevolent Ass'n v. N.Y.*, 911 F. Supp. 2d 111 (N.D.N.Y. 2012).

things of value, it is hardly surprising that these jurisdictions have used this conceptual framework to analyze the employee retirement rights. Most often this property characterization must be discerned from court opinions that use terms such as “vested rights” or “statutorily created property interest(s)” to describe the pension rights under review.¹⁶⁷ The property rights analysis is frequently undertaken as a second-tier alternative discussion in court opinions concluding that employees do not have contract rights to pension benefits. In this way it replaces the contract characterization.

It is not difficult to apply this property view to retirees who currently receive pension income since they are enjoying the financial transfer from an annuity “paid-for” by a working career. Considering the situation presented by non-retired, currently employed workers creates a more nuanced situation where the property is “earned” in increments over time as basic pension rights first vest and then later, additional units accrue. The concept of property is not bound to the limited list of conventional forms including land, buildings, financial assets, and personal property since as a legal concept, property is a flexible idea dealing with the relationship between owners and the assets they own expanding to meet new situations.¹⁶⁸ Due to this flexibility, making the property concept applicable to protect employee and retiree pension rights is clearly within the prerogative of the courts. As Professor Charles A. Reich wrote over 50 years ago in his prescient article entitled, *The New Property*, “one of the most important developments. . . has been the emergence of government as a major source of wealth.”¹⁶⁹

The states adopting the property view of retirement benefits adopted this idea in a small number of court decisions the 1980s and

167. *Pierce*, 910 P.2d at 299–300, 302 (property rights that could later be made taxable).

168. Concerning the breadth of the property concept in American law, Justice Stanley Mosk wrote a notable dissent in *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 509 (Cal. 1990) saying,

The concepts of property and ownership in our law are extremely broad. . . . A leading decision of this court approved the following definition: “The term “property” is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.”

169. Robert A. Reich, *The New Property*, 73 *YALE L. J.* 733, 733 (1964). He noted that “no form of government largesse is more personal or individual than an old age pension No form is more obviously a compulsory substitute for private property; No form is more relied on, and more often thought of as property. No form is more vital to the independence and dignity of the individual.” *Id.* at 769. His prescription was to accord these new forms of property legal protection.

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1990s.¹⁷⁰ This property classification has often been done in a muddled fashion with minimal analytical rigor. Finding the existence of a property right is the predicate for the analysis under federal and state constitutional law theory¹⁷¹ although many cases end at the start through dismissal with the courts not finding that a property right exists.¹⁷² These property-based challenges arise under the authority of the fifth and the fourteenth amendments to the federal constitution as well as state constitutional analogues.¹⁷³ While state law is the source of property rights through their statutes, common law rules, constitutions, and judicial opinions, the federal constitution imposes a floor that limits how states and localities can affect these property rights. These protections have been made applicable to the states for over a century and there is no modern precedent for finding any state immunity from these federal constitutional norms.¹⁷⁴

When considering a retirement policy change under substantive due process, the first necessary element is the establishment of the existence of an individual's property right that has been diminished or adversely affected by some government action. While some state courts have explicitly found pensions and other retirement benefits to

170. See *Pineman v. Oechslin*, 488 A.2d 803, 810 (Conn. 1985) (property interest in the existing state retirement fund which is protected from arbitrary state treatment by the Due Process clause); *Ass'n of State Prosecutors v. Milwaukee Cnty.*, 544 N.W.2d 888, 889 (Wis. 1996); *Peterson v. Sweetwater Cnty. Sch. Dist. No. One*, 929 P.2d 525, 530 (Wyo. 1996); *Spiller v. State*, 627 A.2d 513, 515 n.12 (Me. 1993) (vague suggestion that pension benefits "may" constitute property rights; no clear holding); *Pierce*, 910 P.2d at 302-03 (the right to receive benefits confers a property right upon vesting but may be subject to later taxation); *State ex rel. Horvath v. State Teachers Ret. Bd.*, 697 N.E.2d 644, 655 (Ohio 1998).

171. See *Van Houten*, 827 F.3d at 539-40 (all aspects of the pension system were made subject to the reserve power of the legislature to amend, there was no vested property right). *Accord Klumb*, 458 S.W.3d at 15-16.

172. *Clifford v. Raimondo*, 184 A.3d 673, 678 (R.I. 2018) (upholding a judgment approving a class action settlement affecting retirement age and COLAs); *Puckett v. Lexington-Fayette Urban Cnty. Gov't*, 60 F. Supp. 3d 772, 778 (E.D. Ky. 2014); *Frazier v. City of Chattanooga*, 151 F. Supp. 3d 830, 839 (E.D. Tenn. 2015) (no property right exists in cost of living or COLA pension adjustments), and *Dodd*, 846 F.3d at 187 (if the state has total discretion to award or remove a benefit, a person cannot claim entitlement to the benefit). Both district court cases mentioned were later affirmed by the 6th Circuit. See *Puckett*, 833 F.3d at 602-03; *Frazier v. City of Chattanooga*, 841 F.3d 433, 439 (6th Cir. 2016) (abandoning property arguments, the COLA is not a vested financial benefit that is a contract right). However, some courts will ignore the entire property rights issue to permit the plaintiff's case to survive a motion to dismiss. See *Roberts*, 911 F. Supp. 2d at 183.

173. U.S. Const. amend. V ("nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"); U.S. Const. amend. XIV, § 1 ("... nor shall any state deprive any person of life, liberty, or property, without due process of law").

174. See *Chi., B. & Q.R. Co. v. Chi.*, 166 U.S. 226, 239 (1897) (incorporation of the fifth amendment through the fourteen amendment).

constitute property,¹⁷⁵ in many cases the due process inquiry ended at this initial stage with a decision that no vested property right existed in the employees or retirees that made the challenge.¹⁷⁶ As crucial as this issue is to the property-based constitutional analysis, many courts have struggled in their reasoning and often they have failed to provide a coherent explanation of why the right does or does not exist.¹⁷⁷ Since property is not created by constitutions, judges must look to state law to answer questions about its existence. The U.S. Supreme Court in *Board of Regents v. Roth* found that property interests were “defined by existing rules or understandings that stem from . . . state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”¹⁷⁸

Identifying these “understandings” in specific cases appears to be extremely difficult when governments act to change the rules. Some courts have been clearer than others in setting forth when property interests exist although the analysis is often conclusory and not very explanatory.¹⁷⁹ As straightforward as this inquiry might appear in states with a tradition of property characterization for pensions, some courts do not extend the “property” label to policies which are considered to be peripheral to core pension benefits. This is especially true with pension cost of living adjustments (COLAs), health insurance, and tax exemptions for pension income. Narrowly construing the definition of a vested property right, only the base retiree pension has been found to be a vested property right.¹⁸⁰ Some court opinions

175. See, e.g., *Peterson*, 929 P.2d at 530 (legitimate retirement expectations may constitute property rights that may not be deprived without due process of law); *Madison Teachers, Inc. v. Walker*, 11CV3774*26–27 (Dane Cnty. Cir. Ct. 2012) (challenge to state law shifting pension contributions to workers a “legitimate claim” but no due process arbitrariness or irrationality shown); *Konicki v. Ill. Mun. Ret. Fund*, No. 4-17-0056, 2018 Ill. App. Unpub. LEXIS 334 **2, at *7 (Ill. March 2, 2018) (total confusion about whether an employee had a vested property or contract right to a pension system feature).

176. *Duncan v. Muzyn*, 833 F.3d 567, 583–84 (6th Cir. 2016) (reducing COLA found not unconstitutionally taken since they are not a “cognizable property interest” because COLAs are not “vested”); *Frazier v. City of Chattanooga*, 151 F.Supp.3d at 838–39 (no legally cognizable contract or property right in a higher COLA found); *N.Y. State Corr. Officers & Police Benevolent Ass’n v. N.Y.*, 911 F. Supp. 2d 111, 148 (N.D. N.Y. 2012) (no property interests found even though the employees constitutional claim survives a motion to dismiss).

177. For examples of a more thoughtful consideration of the property interest existence as well as the due process issues, see *Puckett*, 833 F.3d at 603; *Hussey v. Milwaukee Cty.*, 740 F.3d 1139, 1142–43 (7th Cir. 2014).

178. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

179. See, e.g., *Pierce*, 910 P.2d at 302 (concluding that state statutes “create vested property rights” that do not “mature” until the final statutory condition is met).

180. *Bartlett v. Cameron*, 316 P.3d 889, 896 (N.M. 2013) (retirement benefits protected by the state constitution are property rights but COLAs or tax emptions for pensions are not).

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have restricted the recognition of property rights created by statutes in the same way they have limited the finding of contractual pension rights- by setting a high presumption against finding the existence of these rights.¹⁸¹ Without showing an “unmistakable” legislative intention to create a binding right, no cognizable property interest might be found, thereby terminating the due process and takings analysis.¹⁸² Without finding a vested property right, courts effectively conclude that the governmental employer may change the retirement benefit to the employee’s disadvantage. With so many cases not finding the existence of a property right, it is not surprising that these fifth and fourteenth amendment challenges largely have failed.¹⁸³

a. Pension Reforms as Unconstitutional Denials of Property Rights without Due Process of Law

Once courts have recognized a property right in a pension benefit, they use two forms of constitutional analysis to evaluate the lawfulness of the government actions restricting it. These are: 1) due process and 2) the taking of property principles derived from the fourteenth and fifth amendments of the U.S. Constitution and their state constitutions.¹⁸⁴ Due process arguments have been the most common form of “property-based” constitutional review with courts using both substantive and procedural branches of due process analysis.¹⁸⁵ Both

181. *Berg v. Christie*, 137 A.3d 1143, 1163 (N.J. 2016) (vested rights created by statute requires a “clear indication” to meet the “heightened standard”); *Borders v. City of Atlanta*, 779 S.E.2d 279, 284 (Ga. 2015) (no legislative statement recognizing vested pension rights nor a reduction or termination of existing pension rights); *Dodd*, 846 F.3d at 187 (no property right in a death benefit because there was no entitlement due to the fact that the city had the discretion to remove the benefit).

182. *Duncan*, 833 F.3d at 583. *But see Degan v. Bd. Of Trs. Of the Dal. Police and Fire Pen. Sys.*, Civil Action No. 3:17-CV-01596-N (U.S. Dist. Ct. N.D. Tex., Mar. 14, 2018) (retirement plan balance considered to be a vested property right).

183. *Degan*, Civil Action No. 3:17-CV-01596-N (U.S. Dist. Ct. N.D. Texas, March 14, 2018) (no procedural or substantive due process or takings claim shown in retirement fund change).

184. This argument has also been used in private sector pension cases reaching the U.S. Supreme Court. *See, e.g., Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984) (applying due process rational basis review on changes to private sector pension benefits). Some recent cases have even employed refinements to these two property-based constitutional theories. *See AFT Mich. v. State*, 866 N.W.2d 782, 785 (Mich. 2015) (whether a state retiree healthcare insurance policy change imposed an unconstitutional condition and finding none).

185. For examples of a procedural due process claim, *see Hipsher v. L.A. Cty. Emps. Ret. Ass’n*, 234 Cal. Rptr. 3d 564, 569 (Cal. Ct. App. 2018) (retirement benefit forfeiture of vested pension denied procedural due process); *Puckett*, 833 F.3d at 606–08 (rejected a claim that legislation was improperly adopted by the state); *Frazier*, 151 F. Supp. 3d at 839 (failed claim since the pension policy was adopted by legislative action and that was all the “process” required); *Pierce*, 910 P.2d at 304 (usual legislative process provides adequate notice of change and opportunity to participate through the political process). *But see Leff v. Clark Cty. Sch. Dist.*, 210 F.

federal and state constitutional arguments have been made often with a blend of federal and state constitutional provisions cited.¹⁸⁶ While the substantive due process approach has been more common than the procedural due process theory, it has employed a variety of “rational basis” approaches with each testing the sufficiency of the justifications provided for retirement benefit program alterations.¹⁸⁷ With economic and social values at stake, low-level due process scrutiny usually has been applied by the courts,¹⁸⁸ which has been a relatively easy standard for state policy changes to satisfy. As the Michigan Supreme Court noted, substantive due process claims face “an exceedingly high hurdle of demonstrating that the law is unreasonable” and that the government policy is “not reasonably related to a legitimate government interest.”¹⁸⁹ Justifications offered by the government based on the state or locality’s need to maintain its pension fund solvency and to resolve financial deficiencies have provided courts with an adequate “rational basis.”¹⁹⁰ As a result, due process scrutiny has been consistently undemanding and courts have been unwilling to question policy judgments shifting financial resources away from worker benefits and towards other priorities.¹⁹¹

Supp. 3d 1242, 1250 (D. Nev. 2016) (upholding claim that loss of property right in post-probationary status without notice or due process).

186. In *Klumb*, 458 S.W.3d at 15, the Texas Due Course of Law provision found in Tex. Const. art. I, § 19 was argued while the Texas Supreme Court equated the federal due process norms with the Texas Due Course of Law constitutional concept. See also *Hussey*, 740 F.3d at 1142 (takings theory is the same under both United States and Wisconsin constitutions).

187. A few courts have also used an equal protection critique when programs have distinguished between different categories of employees or retirees in pension benefits and while others have added § 1983 claims seeking damages and attorneys’ fees. See *In re Request for Advisory Opinion Regarding Constitutionality of 806 N.W.2d 683, 706* (Mich. 2011) (advisory opinion on a statute reducing or eliminating a state tax exemption on public pensions). See also *Teamsters Local 97 v. State*, 84 A.3d 989, 1006–08 (N.J. Super. Ct. App. Div. 2014) (law requiring employees to make contributions for health benefits did not violate equal protection); *Awdziejewicz*, 115 A.3d at 1088 (suit in response to reduction in pension benefits include constitutional claims enforced by 42 U.S.C. § 1983).

188. Under the fifth and fourteenth amendments to the U.S. Constitution, government action may not deny an individual liberty or property interests without providing the equal protection and due process of law. Laws impacting fundamental freedoms or making suspect classifications may be reviewed under a tightened strict scrutiny review. Under rational basis review, a law or policy having adverse social or economic effects may be challenged requiring the government to justify its action by showing that the law advances a legitimate government objective. Generally, this is an easy standard to meet and most rational basis challenges fail. See generally Erwin Chemerinsky, *Constitutional Law- Principles and Policies* § 9.2.1–§ 9.2.3 (5th ed.2015).

189. *AFT Mich.*, 866 N.W.2d at 808 & 810 (requiring mandatory employee salary contribution for retiree health care benefit).

190. See *Puckett*, 833 F.3d at 608–609. But see *Welch v. Brown*, 935 F. Supp. 2d 875, 886–87 (E.D. Mich. 2013) (entitlement to health care benefits protected by due process).

191. *AFT Mich.*, 866 N.W.2d at 810.

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Even though pension benefits have been publicly viewed as crucial elements to worker's retirement income and health insurance support, they have never been found to be "fundamental rights" by judges. The "fundamental rights" characterization would allow courts to impose a strict scrutiny standard of review requiring higher levels of government justification for restrictive policy changes. It would also shift the burden to the government for demonstrating a greater necessity. It seems doubtful that in the future state courts would wish to insert themselves in the contentious political battle over pension reform cut backs.

b. Pension Reforms as an Unconstitutional Taking of Private Property

Arguments have also been made that state pension reform policies reducing or changing benefits have unconstitutionally taken employee and retiree property rights.¹⁹² Borrowing from the late twentieth century U.S. Supreme Court case precedent principally applying the fifth amendment takings doctrine to land use and environmental regulation, this constitutional argument has claimed that recent pension reform policies have "taken" the property rights of employees and retirees.¹⁹³ These fifth amendment cases have usually focused on regulatory takings or regulatory condition issues and any use of them in pension benefit cases would require careful analysis and argument by analogy to be effective.

As with the substantive due process claims, the taking arguments against pension reform must begin with the identification of a private property interest owned by the plaintiffs that has been "taken" by the defendant governmental employer. Plaintiffs often fail at this stage in

192. *Cherry*, 762 F.3d at 369; *Van Houten*, 827 F.3d at 539; *Hussey*, 740 F.3d at 1142; *Dodd*, 846 F.3d at 180; *Frazier*, 841 F.3d at 438; *City of Hollywood v. Bien*, 209 So.3d 1, 3 (Fla. Dist. Ct. App. 2016); *AFT Mich.*, 866 N.W.2d at 802; *Bartlett v. Cameron*, 316 P.3d 889, 896 (N.M. 2013); *Scott v. Williams*, 107 So.3d 379, 381 (Fla. 2013); *Puckett*, 833 F.3d at 610; *Crosby v. City of Gastonia*, 635 F.3d 634, 641 (4th Cir. 2011); *Welch*, 935 F. Supp. 2d at 886–887 (claim that lifetime health care benefits were property).

193. *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 123–38 (1978) (setting forth a three factor test for finding a governmental taking of real property); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (applying a per se takings test for physical appropriation of real property); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–31 (1992) (defining a taking as regulation that inflicts a total taking or destruction of real property); *Dolan v. City of Tigard*, 512 U.S. 374, 391–93 (1994) (government conditions on property use must bear rough proportionality to harm caused by property use); *Kelo v. City of New London*, 545 U.S. 469, 484–90 (2004) (allowing the use of government eminent domain to take property for public purposes and not public use).

establishing a property interest. Since the fifth amendment only applies to governmental action, the pension reform policy must be shown to destroy an existing private property right in order to be held an unconstitutional takings of property for which “just compensation” must be paid.¹⁹⁴ In comparison to the due process attacks which consider the adequacy of the “rational basis” for the government’s action and weigh the sufficiency of the policy basis, the takings argument focuses on the destructive effect of the governmental action on a property right owned by the employee or retiree.

In the few recent cases considering this property-based claim, very few courts do a careful analysis under the prevailing takings law precedent.¹⁹⁵ These takings challenges are often argued in cases asserting multiple litigation theories; in most circumstances, these cases are usually resolved on other grounds with limited legal analysis of the taking issue.¹⁹⁶ One theme mentioned in a number of the taking decisions has been that the benefit change to be a permissible prospective change to the retirement plan and that no taking or contract infringement had occurred.¹⁹⁷ Another view was that since no enforceable contract right existed in a benefit, there could be no property interest that could be taken in violation of the fifth amendment.¹⁹⁸ None of this property rights oriented litigation has been successful in invalidating new pension reform policies with both federal and state courts usually rejecting both procedural and substantive due process as well as taking arguments.

In conclusion, recent case holdings indicate that a property characterization of retirement benefits provides workers and employees very little legal protection from policy changes that reduce employee

194. U.S. Const. Amend. V (“nor shall private property be taken for public use, without just compensation.”)

195. *But see Degan*, Civil Action No. 3:17-CV-01596-N, 13–19 (Mar. 14, 2018) (reasoned analysis finding no per se or regulatory taking of property in a change to the city’s deferred retirement option plan); *State ex rel. Horvath*, 697 N.E.2d at 651 (completing a Penn Central analysis). In one situation the government attempted to use federal takings law to delay a court decision. In *Welch v. Brown*, the government employer argued that the employees’ due process and takings claims were not ripe because they had not sought compensation through a state inverse condemnation procedure. 935 F. Supp. 2d at 886–887. The district court rejected that defense finding “no case law to support” the state position. *Id.*

196. *Moro*, 357 Ore. at 233 (case decided without considering federal and state constitution Takings Clause claims); *City of Hollywood*, 209 So. 3d at 3; *Hall*, 383 P.3d at 1117 (decided without reaching the takings analysis).

197. *Duncan*, 833 F.3d at 583–84 (no property interest found); *City of Hollywood*, 209 So.3d at 3; *Scott*, 107 So.3d at 381–82.

198. *Cherry v. Mayor of Balt. City*, 2012 U.S. Dist. LEXIS 134772 (D. Md. Sept. 20, 2012), rev’d in *Cherry*, 762 F.3d at 374.

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benefits.¹⁹⁹ This legal categorization is relatively uncommon and litigation rarely applies the usual constitutional law protections that have been accorded to conventional forms of property like land and buildings.

4. The Contract Approach

The most natural and most common interpretation of a public employee's pension rights is that they represent an element of deferred compensation that has been paid to the worker as an implied or express benefit included in their contract of employment. The clear majority of states categorize public employee pensions and retirement benefits as a form of contract right. However, there is great variation in the legal theory employed as the basis for these important rights and sometimes there are differences in explanations within the same state's jurisprudence. Three explanatory categories have emerged in state law defining the existence of retirement benefits as contract rights: 1) a state constitutional recognition of public employee retirement benefits as contract rights,²⁰⁰ 2) state statutes identifying these forms of worker employment compensation as contracts,²⁰¹ and 3) court decisions finding contracts to exist employing a "facts and circumstances" type of analysis considering many factors including collective bargaining agreements.²⁰² A court's conclusion that retirement benefits are contractual in nature only begins the analysis.²⁰³ Once that conclusion has been made, complex interpretive questions follow often requiring courts to analyze litigated issues in terms of an interwoven pattern of state constitutions, statutes, regulations, and prior case decisions.

199. Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, University of Minnesota Law School Legal Studies Research Paper No. 10-13 at 30 (Mar. 17, 2010).

200. *See infra* note 192.

201. *See, e.g.*, Ky. Rev. Stat. Ann. § 61.692(1) (LexisNexis 2018) (benefits pre-2014 hired employees constitute an inviolable contract of the Commonwealth, and the benefits provided therein shall, except as provided in KRS § 6.696, not be subject to reduction or impairment by alteration, amendment, or repeal.); Wis. Stat. § 40.19(1) (2013) (rights exercised and benefits accrued to an employee under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act.).

202. *Ambrose v. City of White Plains*, No. 10-CV-4946, 2018 U.S. Dist. LEXIS 56309, at *1–6, *29–40, *39 (S.D.N.Y. 2018) (no contract found to exist).

203. A number of judicial decisions end with a finding that no contract right exists and no analysis of the legality of the benefit change is justified. *See Dodd*, 846 F.3d at 185 (no contract right to a default death benefit). *But see Roberts*, 911 F. Supp. 2d at 176 (plaintiffs proved the existence of a contract right to survive a motion to dismiss).

Litigation in these “contract” jurisdictions usually focuses on two important questions: 1) what is the scope or content of the contract related to retirement benefits and 2) are the modifications of pre-existing benefits providing less generous or more restricted worker entitlements lawful and, ultimately, enforceable? The first of these questions addresses a myriad of practical issues affecting all aspects of public employee retirement pensions and other benefits. What are the elements of the employment contract and what is its term? Several recent cases provide examples of these content questions and they have considered a range of issues including what working income is includible when calculating pension amounts,²⁰⁴ which retirement system applies when there has been a change,²⁰⁵ does a new collective bargaining agreement increase retiree health insurance premiums,²⁰⁶ and what terms of pension calculations apply to certain employees?²⁰⁷ Questions related to the employment contract’s period of coverage also presents courts with a range of challenging issues. Is the agreement permanent providing for continuous and long-lasting employee benefits or does it represent a segmented series of contracts each possessing different terms?²⁰⁸ These cases raise complicated interpretive issues of contractual composition and often require courts to undertake a wide ranging analysis.²⁰⁹

The second question that courts have confronted in pension reform litigation in these “contract” states deals with the legality of legislation or administrative action reducing worker retirement benefits. Lawsuits challenging the lawfulness of these reductions have been common and have occurred widely since 2008. This legal issue as-

204. *Office of Admin. v. State Emps. Ret. Bd.*, 180 A.3d 740, 753 (Pa. 2018) (are union stipends income).

205. *Lynch v. City of N.Y.*, 162 A.D.3d 589, 591 (N.Y. App. Div. 2018) (no service credit is given for correction officer’s child care leave); *McGlynn v. Cal.*, 230 Cal. Rptr. 3d 470, 478 (Cal. Dist. Ct. App. 2018) (do pre-PEPRA or post-PEPRA amendment rules apply to state judges). Along these lines, some cases have challenged the procedure required for the adoption of a pension policy. See *City of Danville v. Garrett*, 803 S.E.2d 326, 328-29 (Va. 2017) (non-application of state statute requiring police 2/3 disability pension).

206. *In re New Brunswick Mun. Emps. Ass’n*, 182 A.3d 394, 402–03 (N.J. Super. Ct. App. Div. 2018) (can a CBA impose higher retiree premiums in excess of statutory maximum).

207. *New Orleans Fire Fighters Pen. & Relief Fund v. City of New Orleans*, 242 So. 3d 682, 696 (La. Ct. App. 2018) (upholding trustee’s decision to apply a higher compensation percentage to the calculation).

208. *Wood*, 818 F.3d at 1248–49 (finding that vested contract for retiree health care was a series of contracts and not one lifetime contract).

209. Sometimes courts simply treat the matter as a breach of contract action and award damages if they find a breach. See *Bd. of Trs. of Harvey Firefighters’ Pension Fund v. City of Harvey*, 96 N.E.3d 1, 49 (Ill. App. Ct. 2017) (city failed to adequately fund pension fund and damages were awarded).

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sumes clarity in the meaning of the terms of the revised employment contracts but these cases consider challenges to the legality of the action changing benefits. Rather than directly suing the government employer for breach of contract,²¹⁰ the overwhelming majority of these “legality” cases presents a state or federal constitutionally-based claim that the pension policy change “impairs” an existing contract right of workers and, therefore, violates the Contract Clause of the relevant constitution.²¹¹ The remedial result sought by the employees challenging the state pension policy change is a judicial declaration that the modification is unconstitutional and, presumably, a nullity or void. Using the federal Contracts Clause also seeks to use federal supremacy principles to invalidate state policy decisions²¹² although state contract clause cases generally follow a similar analysis but sometimes employ a state constitutional rationale.²¹³

The Contract Clause analysis requires that a valid contract providing worker benefits exists and that the contract has been unconstitutionally “impaired” by state action. Recent case holdings have demonstrated that a very large number of courts wish to avoid the entire Contract Clause inquiry holding that workers or retirees do not have an enforceable contract right to pension and retirement bene-

210. The availability of a state law breach of contract damage remedy would presumably bar a Contracts Clause claim and several federal courts have so held. *See e.g., Cherry*, 762 F.3d at 371; *Horwitz-Matthews, Inc. v. City of Chi.*, 78 F.3d 1248, 1252 (7th Cir. 1996); *TM Park Ave. Assocs. v. Pataki*, 214 F.3d 344, 349 (2d Cir. 2000); *Crosby v. City of Gastonia*, 682 F.Supp.2d 537, 543–44 (W.D. N.C. 2010). Another line of cases has held changing state and local law affects a breach of contract that constitutes an impairment of contract. *See E&E Hauling, Inc. v. Forest Pres. Dist.*, 613 F.2d 675, 680–81 (7th Cir. 1980). Perhaps the best legal outcome would be to avoid the constitutional question if a statutory or common law remedy were available.

211. U.S. Const. art. I, § 10, cl. 1 (No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . .). State constitutions also contain versions of the federal constitutional clause. *See Tex. Const. art. 16, § 66(d)*. *See also* GEORGE D. BRADEN ET AL., *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* (1977) (37 other state constitutions have contract impairment clauses).

212. Some have speculated that the U.S. Constitution’s 11th Amendment sovereign immunity concepts limit the use of the federal courts for this purpose. *See* Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1111 n.59 (2008) (“[S]tate employers may be able to avail themselves of sovereign immunity under the Eleventh Amendment, and responsible agents of the employers may be able to avoid individual damages liability if they show they are eligible for qualified immunity, though they may still be subject to injunctive relief”). Recent federal cases ignore this potential defense often citing *Carter v. Greenhow*, 114 U.S. 317, 322 (1885) (stating that the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation).

213. *See, e.g., Dannenberg v. State*, 383 P.3d 1177, 1180 (Haw. 2016) (under state Contracts Clause), *Moro v. State*, 351 P.3d 1 (Or. 2015) (state Contracts Clause analysis of COLA change); *AFT Mich. v. State*, 866 N.W.2d 782, 802 (Mich. 2015) (federal and state constitutions considered in health care and pension challenge); *Vaughn v. Pub. Emps. Ret. Sys. of Miss.*, 182 So.3d 433, 437 (Miss. 2015).

fits.²¹⁴ Courts reach this conclusion in a wide variety of ways including: finding a lack of clarity in legislation creating the contract right,²¹⁵ a temporary nature or unenforceability of the benefit,²¹⁶ the prospective nature of the right,²¹⁷ the employee's ability to opt out of the impaired system,²¹⁸ and an unsatisfied contractual vesting requirement.²¹⁹ It is striking just how many recent court decisions employ this tactic to deny employees recovery and to completely avoid Contracts Clause analysis.

Once a contract right is found to exist, the Contracts Clause claim will be analyzed focusing on the following two principal questions: (1) is there proof that a state policy or law change has affected a "substan-

214. *Justus v. State*, 336 P.3d 202, 211 (Colo. 2014) (no contract right to COLA); *Underwood v. City of Chi.*, 779 F.3d 461, 464 (7th Cir. 2015) (no contract right to enduring health care benefits); *Puckett v. Lexington-Fayette Urban Cnty. Gov't.*, 833 F.3d 590, 600 (6th Cir. 2016) (no vested contract right to COLA); *Me. Ass'n. of Retirees v. Bd. of Trs.*, 758 F.3d 23, 31 (1st Cir. 2014) (no contract right to COLA); *Christiansen v. Cty.*, 849 N.W.2d 493, 508 (Neb. 2014) (no contract right to maintaining health care premium); *Am. Fed. of Teachers v. State*, 111 A.3d 63, 73 (N.H. 2015) (no contract right to calculating earnable compensation); *Berg v. Christie*, 137 A.3d 1143, 1164 (N.J. 2016) (no contract right to COLA); *R.I. Council 94 v. R.I.*, 705 F. Supp. 2d 165, 182-83 (D.R.I. 2010) (no contract right to health benefits); *Bishop v. City of Columbia*, 738 S.E.2d 255, 258 (S.C. Ct. App. 2013) (no contract right to health benefits); *Frazier v. City of Chattanooga*, 841 F.3d 433, 439 (6th Cir. 2016) (no contract right to COLA); *Dodd v. City of Chattanooga*, 846 F.3d 180, 185 (6th Cir. 2017) (no contract right to COLA); *Schwegel v. Milwaukee Cty.*, 859 N.W.2d 78, 90 (Wis. 2015) (no contract right to Medicare reimbursement); *In re Request for Advisory Opinion Regarding Constitutionality of 2011 P.A. 38*, 806 N.W.2d 683, 698-702 (Mich. 2011) (no contract right to tax exemption for pension income).

215. *See, e.g.*, *Cranston Firefighters v. Raimondo*, 880 F.3d 44, 49-50 (1st Cir. 2018) (unmistakability doctrine not satisfied); *Leff v. Clark Cty. Sch. Dist.*, 210 F. Supp.3d 1242 (D. Nev. 2016) (no statutory text offered to prove contract); *Frazier v. City of Chattanooga*, 841 F.3d 433, 436 (6th Cir. 2016) (no unmistakable contract right to COLA); *Me. Ass'n. of Retirees v. Bd. of Trs.*, 758 F.3d 23 (1st Cir. 2014) (no unmistakable intent to create a contract right); *Am. Fed'n of Teachers v. State*, 111 A.3d 63 (N.H. 2015) (presumption is that no legislative intent to create a contract right); *Prof'l Firefighters of N.H. v. State*, 107 A.3d 1229, 1234-35 (N.H. 2014) (no unmistakable intent to create a contract right); *N.J. Educ. Ass'n. v. State* 989 A. 2d 282 (N.J. Super. App. 2010) (no contract right absent clear indication of legislative intent to create a contract right); *Berg v. Christie*, 137 A.3d 1143 (N.J. 2016) (no finding of legislative unequivocal intent to create a contract right); *Retired Public Emps. Ass'n., Inc. v. Cuomo*, 123 A.D.3d 92 (N.Y. App.Div. 2014) (no words of contract to signal an intent to create a contract right); *Gamel v. Cincinnati*, 983 N.E.2d 375 (Ohio App. 2012) (no clear indication of legislative intent to contract); *Fry v. City of L.A.*, 199 Cal. Rptr.3d 694 (Cal. App. 2016) (legislative intent to create a contract must clearly appear and all doubts resolved in favor of the power of government).

216. *Aquirre v. State*, 891 N.W.2d 516, 526-27 (Ct. App. Mich., 2016); *AFT Mich. v. State*, 866 N.W.2d 782, 806-07 (Mich. 2015).

217. *City of Hollywood v. Bien*, 209 So.3d 1, 5-6 (Fla. Ct. App. 4th Dist. 2016).

218. *AFT Mich. v. State*, 866 N.W.2d 782, 803 (Mich. 2015).

219. *Borders v. City of Atlanta*, 779 S.E.2d 279, 286 (Ga. 2015) (stating that increased employee contribution to pension plan was not unconstitutional since it worked prospectively); *see also Rieder v. Milwaukee Cty.*, No. 2014AP496, 2015 Wisc. App. LEXIS 465, at *12 (Wis. Ct. App. June 30, 2015) (stating that contract right to health care benefit does not vest until retirement).

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tial impairment of a contractual relationship,”²²⁰ and (2) is the state law “appropriate . . . and reasonable” and designed to advance a “significant and legitimate public purpose.”²²¹ Recent U.S. Supreme Court Contract Clause decisions have reinforced the analytical approach using these twin inquiries.²²²

The first hurdle that must be overcome is successfully proving that the pension reform measure constitutes a “substantial impairment of a contractual relationship.” There could be many kinds of contract changes both large and small that could constitute an impairment of the contract. The critical point would be a court’s finding that the contract modification was “substantial” in nature since a “non-substantial” impairment would not be barred by the Contract Clause. As Justice Kagan wrote in *Sveen v. Melin*, the substantiality of the impairment should be evaluated by “the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding . . . his rights.”²²³ In one case, a federal court granted a preliminary injunction after finding a substantial impairment when an employer imposed large increases in deductibles and co-payments for retiree health care benefits under an agreement.²²⁴ Another case found that the plaintiffs had proved both that a contract right to retiree health insurance existed and that the right had been substantially impaired by retiree cost increases sufficiently to survive a motion to dismiss.²²⁵ Many other decisions fail to find substantial impairment with little discussion or sometimes confusing analysis unrelated to the Contracts Clause.²²⁶ Although sounding as though it requires a careful judicial appraisal of

220. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

221. *Energy Reserves Grp., Inc. v. Kan. P.& L. Co.*, 459 U.S. 400, 411–12 (1983).

222. *See Sveen v. Melin*, 138 S. Ct. 1815, 1818 (upholding a Minnesota statute automatically revoking a life insurance beneficiary designation upon divorce).

223. *Id.* at 1822 (citing *Allied Structural Steel Co.*, 438 U.S. at 244). Some state courts also apply a gloss to the “substantial impairment” element by negating that conclusion if the pension benefit reduction is offset by a corresponding benefit. *See Cloutier v. State*, 42 A.3d 816, 826 (N.H. 2012) (adopting the offset standard).

224. *Welch v. Brown*, 935 F. Supp. 2d 875, 882 (E.D. Mich. 2013). *See also Andrews v. Lombardi*, No. KC-13-1128, 2017 R.I. Super. LEXIS 31, at *65 (R.I. Super. Feb. 2, 2017) (COLA reductions represented substantial impairments).

225. *Roberts v. N.Y.*, 911 F. Supp. 2d 149, 177–78 (N.D.N.Y. 2012).

226. *Ambrose v. City of White Plains*, No. 10-CV-4946, 2018 U.S. Dist. LEXIS 56309, at *16–19 (S.D.N.Y. Apr. 2, 2018) (finding no substantial impairment hypothetically after finding no impairment due to the availability of damages). Other cases use the Contract Clause language of “substantial impairment” but completely fail to undertake the usual constitutional analysis. *See e.g., Borders v. City of Atlanta*, 779 S.E.2d 279, 287 (Ga. 2015); *AFT Mich. V. State*, 866 N.W.2d 782, 802 (Mich. 2015); *Scott v. Williams*, 107 So.3d 379, 386–89 (Fla. 2013).

the impact of a change in benefits, this test actually has presented the courts with a great deal of discretion in making their judgment call about “substantiality.” Relying on the Supreme Court’s statements that contractual impairment occurs when “[l]egislation . . . alters the contractual relationship between the parties”²²⁷ and “deprives one of the benefit of a contract, or adds new duties or obligations thereto. . .,”²²⁸ decisions from the 1980s and 1990s appeared to make this element relatively easy to satisfy with state changes to public pension systems triggering this factor.²²⁹ Case decisions during the last decade have been highly variable in their results but the clear trend has been away from finding “substantial impairment” when public employee retirement rights are narrowed²³⁰ making this first prong of the Contracts Clause argument very difficult to prove.

Ruling that a state or local government pension benefit change does constitute a “substantial impairment” of workers’ and retirees’ contract rights is merely the initial step in the Contract Clause analysis. A court’s determination that such an adverse change had occurred does not by its own force require the finding of a constitutional violation. Assuming that a “substantial impairment” has been found, the second factor in this analysis places the burden on the government employer to demonstrate that the policy change is “reasonable and necessary to serve an important public purpose.”²³¹ Such an open-ended standard is obviously subject to a wide range of judicial interpretation with some courts simply ruling that adverse changes were

227. *Allied Structural Steel Co.*, 438 U.S. at 240.

228. *N. Pac. Ry. Co. v. State*, 208 U.S. 583, 591 (1908).

229. See *Valdes v. Cory*, 139 Cal. App. 3d 773, 783 (Cal. App. 1983); *Deonier v. State*, 760 P.2d 1137, 1143 (Id. 1988).

230. See generally *Wash. Educ. Ass’n v. Wash. Dept. of Ret. Sys.*, 332 P.3d 428, 436 (Wash. 2014); *Kendall v. Gov’t. of the V.I.*, 596 F. App’x 150 (3d Cir. 2015); *Bd. of Admin. v. Wilson*, 52 Cal. App. 4th 1109 (Cal. Ct. App. 1997); *Calabro v. City of Omaha*, 531 N.W.2d 541 (Neb. 1995).

231. *U.S. Tr. Co. v. N.J.*, 431 U.S. 1, 25 (1977). This decision is frequently cited for the analytical framework for pension policy changes reducing benefits. The case notes that “reasonableness” should be determined considering the degree of contractual impairment, the unforeseeable effects of the existing contract, and that no less drastic change could have achieved the same legislative policy objective. *Id.* at 27, 29-31. Its standard suggests much greater protection of retirement benefits than actually exists in the recent cases.

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reasonable²³² and a few others scrutinizing legislative policy alternatives much more rigorously.²³³

Earlier analysis of the Contracts Clause litigation challenging pension reform measures suggested that this approach of constitutional theory might impose serious limits to state and local government policy flexibility in dealing with pension reform.²³⁴ Some cases even repeated the *U.S. Trust v. New Jersey* dicta indicating that the Contracts Clause should be more rigorously enforced against a state when it seeks to impair its own contracts with its workers.²³⁵ However, this has not been the case over the last decade. Advocates for public workers and retirees have continued using this “impairment of contract” Contracts Clause approach in their ongoing challenges to changing law and policy in more than 60 reported cases since 2009. Unfortunately for their clients, employing this most common and previously successful litigation theory has been a largely futile effort achieving very few court victories with 85-90% of the reported decisions upholding the states’ policies against these constitutional challenges and rejecting worker claims.

5. State Constitutional Protections

Several states have adopted constitutional provisions specifically giving security to public employee pension benefits.²³⁶ These provi-

232. *Marin Ass’n. of Pub. Emps. v. Marin Cty. Emps.’ Ret. Ass’n.*, 2 Cal. App. 5th 674, 708-09 (Cal. App. 2016). Some decisions use terms like “reasonableness” in a general sense untethered to the Contracts Clause to reach their holdings. *See Dannenberg v. State of Haw.*, 383 P.3d 1177, 1196 (Haw. 2016).

233. *See generally* *Moro v. State*, 351 P.3d 1, 41 (Or. 2015), *Roberts v. N.Y.*, 911 F. Supp. 2d 149, 180-82 (N.D.N.Y. 2012); *Stone v. N.C.*, 664 S.E.2d 32, 43 (N.C. App. 2008); *Andrews*, 2017 R.I. Super. LEXIS at *72-85.

234. Amy Monahan, *Understanding the Legal Limits on Public Pension Reform* at 2, American Enterprise Institute, (May 2013) (“once a court finds an employee’s right to her public retirement benefits to be contractual, it is generally unconstitutional for a state to take any action that substantially impairs the employee’s benefits”).

235. *U.S. Trust Co.* further noted that “a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives.” *U.S. Tr. Co.*, 431 U.S. at 30-31. It continued “complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.” *Id.* at 25-26.

236. Alaska Const. art. XII, §7 (“membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired”); Ariz. Const. art. XXIX, §1 (“membership in a public retirement system is a contractual relationship that is subject to [the state impairment of contracts clause]”); Haw. Const. art. XVI, §2 (membership in any employees’ retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired); Ill. Const. art. XIII, §5 (membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the bene-

sions, often similarly phrased, are focused upon the specific worker retirement rights and they do not rely upon the more general constitutional prohibitions against the impairment of contracts that were discussed in the prior section.²³⁷ The language employed in these state constitutional provisions is often surprisingly direct and unambiguous. For example, Hawaii's constitution provides that "membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired."²³⁸ The power of this constitutional provision obviously lies in the meaning of the words "diminished or impaired." In this example, the Hawaiian provision has been interpreted as only protecting past accruals of pension rights as they are earned while reserving the right of state employers to change, and possibly reduce, future benefits.²³⁹ Texas has a similar provision.²⁴⁰ Although these provisions are constitutional in nature, akin to similar provisions of law, they find specific meaning through court decisions interpreting them. Interpretation of state constitutional protections and parsing of the state's jurisprudence has enormous social and economic impact making dry pension rights decisions infused with powerful political implications.²⁴¹

fits of which shall not be diminished or impaired); Mich. art. IX, §24 ("the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby"); N.Y. Const. art. V, §7 ("membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired"); Tex. Const. art. XVI, §66 (service retirement benefits may not be reduced or impaired except on a prospective basis).

237. See e.g., Colo. Const., art. II, §11; Fla. Const., art. I, §10; Ga. Const., art. I, §1, ¶X; Miss. Const. art. 3, §16. *But see* Neb. Const., art. III, §19 ("nothing in this section shall prevent local governing bodies from reviewing and adjusting vested pension benefits periodically as prescribed by ordinance").

238. Mich. Const. art. IX, §24 (the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.); Haw. Const. art. XVI, §2 ("membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired"); La. Const. art. 10, §29 (A) ("membership in such a retirement system shall be a contractual relationship between employee and employer, and the state shall guarantee benefits payable to a member or retiree or to his lawful beneficiary upon his death").

239. See *Ass'n. of Prof'l & Tech. Emps. v. City of Detroit*, 398 N.W.2d 436, 454 (Mich. Ct. App. 1986); *Smith v. Bd. of Tr. of La. State Emps. Ret. Sys.*, 851 So. 2d 1100, 1105 (La. 2003).

240. Tex. Const. art. XVI, §66 (service retirement benefits may not be reduced or impaired except on a prospective basis).

241. Not all court decisions under these constitutional provisions favor the employees. See *Eddington v. Tomasovic*, No. 05-15-00839-CV, 2016 Tex. App. LEXIS 13204, at *1 (Tex. App. 5th Dec. 13, 2016) (holding that Texas constitutional pension protection does not extend to future interest rate applied to benefits).

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Not all constitutions are alike in their coverage. Several other states' constitutional provisions have even broader reach asserting protections for both accrued and future benefits having the effect of "freezing" benefits at the level expected on the first day of employment. This sweeping policy means that a retirement system could not be altered in a manner that would reduce or lessen employee retirement benefits from the level that would have been received in the plan in place on the first day of employment. Such a provision would have a tremendous benefit to employees when later state legislation reduces retirement benefits available to workers and several recent cases have so held.²⁴² The states of Illinois and New York have constitutional provisions specifically setting forth this policy.²⁴³ The Illinois Constitution provides that "membership in any pension or retirement system . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."²⁴⁴ Alaska and Arizona have constitutional sections that have been interpreted in the same fashion.²⁴⁵ The result is that in these states with strong pension-protecting constitutional norms, until these strong constitutional sections are amended or repealed, the policy choices available to state legislatures and executives will be restricted by the language and the interpretation of the state's constitution.²⁴⁶ With the observed decline in the utility of Contracts Clause attacks on pension reforms, these aspects of state constitutional law will take on even greater impor-

242. *See* *Fields v. Elected Officials' Ret. Plan*, 320 P.3d 1160, 1164–65 (Ariz. 2014) (Pension Clause confers additional, independent protection beyond the Contract Clause). This has been a much-litigated issue in Illinois with the protection of the Illinois Constitution's pension protection clause being found to apply only when the employee has "entered the [retirement] system." *Konicki v. Ill. Mun. Ret. Fund*, No. 4-17-0056, 2018 Ill. App. (4th) 170056-U, at *18 (Mar. 2, 2018).

243. A number of other states have reached the same policy position by statute. *See* Ky. Rev. St. §61.692(1) (finding public pension rights for pre-2014 employees to constitute an "inviolable contract" and that benefits shall not be subject to reduction or impairment by alteration, amendment, or repeal.); Wis. Stat. §40.19(1) (shall be due as a contractual right and shall not be abrogated by any subsequent legislative act for accrued benefits).

244. Ill. Const., art. XIII, §5. *See also* N.Y. Const., art. V, §7 ("membership in any pension or retirement system. . . shall be a contractual relationship, the benefits of which shall not be diminished or impaired"). Illinois courts have actively enforced this clause. *See generally* *Jones v. Mun. Emps.' Annuity & Ben. Fund of Chi.*, 50 N.E.3d 596 (Ill. 2016); *Matthews v. Chi. Transit Auth.*, 51 N.E.3d 753 (Ill. 2016); *Heaton v. Quinn* (In re Pension Reform Litigation), 32 N.E.3d 1 (Ill. 2015); *Kanerva v. Weems*, 13 N.E.3d 1228 (Ill. 2014).

245. *Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 (Alaska 1981). *See generally* *Mun. of Anchorage v. Gallion*, 944 P.2d 436 (Alaska 1997); *Yeazell v. Copins*, 402 P.2d 541 (Ariz. 1965).

246. *See In re Pension Reform Litigation*, 32 N.E.3d 1, 98 (Ill. 2015) (statute lowering pension benefits declared unconstitutional under state pension protection clause).

tance as a crucial protector of public employee pension rights in the states having this law.

VI. CONCLUSION: HAVE THE COURTS PROTECTED
PENSION RIGHTS THAT LEGISLATURES HAVE
ATTEMPTED TO CUT?

The subject of this article is a difficult one asking how to reconcile the competing interests of public employees against the larger interest of state and local governments and their taxpaying citizens. On the purely economic level, this conflict could be characterized as an ordinary struggle between two competing constituencies attempting to determine who should bear the deferred cost of service. But this is more than a tussle between employers and their workers since these employees are people who serve us as our teachers, police, fire-fighters, first responders and others providing critical services for long periods, sometimes for their entire working lives. While public worker salaries do vary, in general they support a modest, middle class existence for people who work every day.²⁴⁷ The recently-adopted pension reforms have created great anxiety about the future in these workers striking a visceral chord - will I have stable retirement income? How will I live when I can no longer work? These are critically important issues for all people, but they are even more significant for modestly-paid public workers.

This is also a story about competing misunderstandings both on the part of public workers and of the government employers. Employees frequently believed that they had earned stable retirement income through their work and they strongly felt that once earned, these “rights” were permanent and not subject to later reduction. This was a hopeful belief that drove workers’ groups to court to defend their perceived rights. It is also a tale about government leaders’ misunderstandings of the implications of employee work agreements and pension promises. Over many years, retirement benefits have been offered with little serious consideration of their long-term costs.

247. In May, 2017 the U.S. Bureau of Labor Statistics set the average annual salary for all local government employees at \$52,980 and the average state worker salary at \$55,820. *See* U.S. DEP’T OF LABOR, Occupational Employment Statistics, Local Government, NAICS 999300; State Government, NAICS 999200 (May, 2017), https://www.bls.gov/oes/2017/may/naics4_999300.htm. Some teacher annual teacher salaries for 2016-17 were far less than these averages: South Dakota (\$42,668), Mississippi (\$42,925), Oklahoma (\$45,245), and West Virginia (\$45,701). *See* NATIONAL CTR. FOR EDUCATION STATISTICS, 2017 Tables and Figures, Table 211.60, https://nces.ed.gov/programs/digest/d17/tables/dt17_211.60.asp.

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The granting of benefits without providing for their actual payment also reveals a willful ignorance of the economic consequences of prior promises. As history shows us, it is easy for politicians to make current promises that will have to be honored by others in the future.

Both of these misunderstandings (or policy errors) have led to the pension “reforms” that have recently been adopted. In every instance, government policy changed employee benefits in a way that was adverse to workers’ interests usually at times of fiscal stress and after the precise costs of providing existing benefits had become better understood. These episodes also demonstrate another theme of the eroding public support for funding the true costs of state and local government services.²⁴⁸ The reform of pension systems for fiscal reasons has succeeded in state legislatures following the usual democratic process with the citizens giving tacit approval. It is not clear that these cut backs are the result of any deep animus towards state and local workers but rather they reflect an increased resistance to higher taxation to fund the existing pension system.²⁴⁹ This anti-tax trend and shifting support against public employees have recently triggered a backlash from some public workers that has occasionally been successful.²⁵⁰

248. Media portrayals of abusive and unreasonable public employee pension practices in some parts of the country have harmed public perceptions of worker entitlement to their retirement benefits even though these episodes distort average public worker’s conduct. *See, e.g.*, Jan Hefler, “*Double Dipping*”- *Collecting a Government Pension and Salary Banned in Burlington County*, PHILADELPHIA INQUIRER, (September 30, 2016), http://www.philly.com/philly/news/politics/20160930_Double_dipping_-_collecting_a_government_pension_and_salary_-_banned_in_Burlington_County.html; Editorial, *Audit Port Authority for Pension Scams—And while we’re at it, New Jersey*, STAR LEDGER, (June 27, 2016), https://www.nj.com/opinion/index.ssf/2016/06/audit_port_authority_for_pension_scams_and_while_w.html; Mary Williams Walsh and Amy Schoenfeld, *Padded Pensions Add to New York Fiscal Woes*, N.Y. TIMES, (May 21, 2010), <https://www.nytimes.com/2010/05/21/business/economy/21pension.html>. *See also*, *Pisani v. City of Springfield*, No. 4-16-0417, 2017 Ill. App. LEXIS 113, *8–9 (App. Ct. Mar. 3, 2017) (upholding city policy against use of vacation leave to “spike” pensions).

249. Although public attitudes towards the federal government have declined, state and local governments score consistently higher on surveys of favorability. *See generally*, *State Governments Viewed Favorably as Federal Rating Hits New Low*, PEW RESEARCH CTR. (2013), <http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/>; *Republicans Like State Government, Especially in GOP-Led States: Growing Gap in Favorable Views of Federal, State Governments* PEW RESEARCH CTR. (2012), <http://www.people-press.org/2012/04/26/growing-gap-in-favorable-views-of-federal-state-governments/>.

250. Michael Hansen, *Hidden Factors Contributing to Teacher Strikes in Oklahoma and West Virginia, and Beyond*, *Brown Center Chalkboard*, THE BROOKINGS INSTITUTION, (Apr. 6, 2018), <https://www.brookings.edu/blog/brown-center-chalkboard/2018/04/06/hidden-factors-contributing-to-teacher-strikes-in-oklahoma-kentucky-and-beyond/>. *See also* Danielle Haynes, *Teacher Strikes Highlight Widening U.S. Pay Gap*, UNITED PRESS INTERNATIONAL (Apr. 12, 2018), <https://www.upi.com/Teacher-strikes-highlight-widening-US-pay-gap/1091523033985/> (describing low teacher pay and 9 days strikes in Oklahoma and West Virginia).

As a reaction to their failure in the legislative and administrative arena, public employees have asked federal and state courts to moderate the impacts of these reform policies through judicial review. In order to do this, employee groups have had to prove that their “rights” to the affected pension system benefits have been unlawfully damaged. In cases where states have had strong constitutional protections for pension benefits or when state statutes undeniably limited government retrenchment of existing rights, the courts have been willing to rebuff the policy changes. However, when asked to “stretch” the meaning of statutes or prior interpretive precedent to block these reforms, most often courts have said “no.”²⁵¹ Interestingly, this has been especially true with regard to claims based upon constitutional rights theory where judicial interpretation and the exercise of discretion have rarely been exercised in favor of workers or retirees.²⁵² Perhaps all this reveals is that retirement claims have been considered economic in nature and not protected by stronger constitutional or statutory norms.

Judges have been extremely reluctant to intervene into what they perceive as a socio-economic conflict between employees and their employer. Such non-interventionist judicial attitudes have been consistent with the majoritarian decisions made by elected officials. These courts have also been very careful not to challenge the authority of the legislature and with their narrow rulings they have protected themselves from “activism” criticism.²⁵³ The clear import of this analysis has been that public workers must look to the political process for protection of their work-related rights- and not to the courts.²⁵⁴ These

251. Some exceptions do exist, and some state supreme courts have made expansive readings of state pension rights statutes. *See, e.g.*, *Milwaukee Police Ass’n. v. Milwaukee*, No. 2015AP2375, 2018 Wisc. LEXIS 314 (July 6, 2018) (stating that city home rule power does not include the city’s authority to change employee voting or representation on Annuity and Pension Board protected as “other rights” under state statute).

252. Compare demanding judicial review of state legislative restrictions on the exercise of public employee First Amendment constitutional rights.

253. Perhaps state courts are less inclined to challenge legislative choices perceiving legislatures to be more willing to cut back on the judicial role. *See, e.g.*, *Legislative Assaults on State Courts 2018*, BRENNAN CTR. FOR JUSTICE (Feb. 6, 2018) <https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2018> (Legislatures in at least 16 states considering legislation that would diminish the role or independence of state courts); Editorial, *Courts Shouldn’t be Partisan Punching Bags*, N.Y. TIMES, (Apr. 9, 2018), <https://www.nytimes.com/2018/04/08/opinion/judicial-independence.html>.

254. There was no completely uniform pattern in all case decision and a small number of state courts like Arizona and Illinois clearly demonstrated a pro-worker/retiree emphasis.

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employees must build public understanding, appreciation, and support for the important work that they do. Litigating to overcome legislative defeats is ultimately a losing game.

A Plea to Federal Judges: Combatting Prosecutorial Misconduct in the Cliven Bundy Era

QUIANA D. HARRIS*

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* J.D. Candidate, 2019; Executive Notes & Comments Editor, Howard Law Journal Vol. 62; B.A. Political Science, Winston-Salem State University, 2016. Thanks to my mother, Starlet, little sister, Natajah, and grandparents, Frog and Bird, for being all I needed when you were all I had. Special thanks to Professor Sarah Vanwye, the Howard Law Journal, and the Honorable Judge Emmet. G. Sullivan for your help in making this piece one I am proud of. I dedicate this article to the millions who have become victims of our criminal justice system.

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INTRODUCTION

“You’re going to have to arrest us all, or shoot us all!”¹ One member of Cliven Bundy’s militia shouted during the armed stand-off against federal officers of the Bureau of Land Management.² Since 1998, Bundy, a Nevada rancher, has accumulated an alleged one-million dollars’ worth of fines for grazing his cattle on federally-owned land without paying trespassing and grazing fees.³ Due to his outstanding fees and refusal to comply with a court order to remove his cattle, officers arrived at Bundy’s ranch in Baskerville, Nevada on April 12, 2014, attempting to confiscate over 100 of his cattle, but officials were in for quite the surprise. When agents arrived, they were greeted by a mob of Bundy’s supporters armed with cowboy hats, pocket constitutions, cellphones, and weapons on their waists, refusing to allow Bundy’s cattle to be removed.⁴ The standoff was reported to have been initiated by a post on Cliven Bundy’s ranch website stating “[t]hey have my cattle and now they have one of my boys. Range War

1. Noodlehorn, *Historic! Feds Forced to Surrender to American Citizens*, YOUTUBE (Apr. 3, 2015) https://www.youtube.com/watch?v=L_KBDgCa-Bc.

2. *Id.*

3. Morgan Whitaker, *Bundy Owes The Government More Than All Other Ranchers Combined*, MSNBC (Jun. 6, 2014, 1:09 PM), <http://www.msnbc.com/politicsnation/cliven-bundy-hefty-bill#52097>. This is not the first time Bundy has had a run-in with the Bureau of Land Management about grazing his cattle on government-owned land. The United States District Court of Nevada held in 1998 that “Bundy is permanently enjoined from grazing his livestock within the Bunkerville Allotment and shall remove his livestock from this allotment on or before November 30, 1998,” and the “United States shall be entitled to trespass damages from Bundy in the amount of \$200.00 per day per head for any livestock belonging to Bundy remaining on the Bunkerville Allotment after November 30, 1998.” *United States v. Bundy*, 1998 U.S. Dist. LEXIS 23835, at *19 (1998).

4. For footage from the actual Bundy standoff see Noodlehorn, *Historic! Feds Forced to Surrender to American Citizens*, YOUTUBE (Apr. 3, 2015) https://www.youtube.com/watch?v=L_KBDgCa-Bc; *The Video the Feds Don’t Want You to See #BundyStrong*, YOUTUBE (Apr. 13, 2015), <https://www.youtube.com/watch?v=BCBKlxoNesY>. No one was hurt during the stand-off at the Bundy ranch as federal officers eventually retreated because they were vastly outnumbered and did not want to “risk bloodshed.” Reuters, *Mistrial Declared in Cliven Bundys Armed Standoff with Feds*, NY POST (Dec. 20, 2017, 3:11 PM), <https://nypost.com/2017/12/20/mistrial-declared-in-cliven-bundys-armed-standoff-with-feds/>.

begins tomorrow.”⁵ Cliven Bundy’s post was in response to his son’s arrest, David Bundy, the weekend before the stand-off took place when federal officials confiscated 100 of Cliven Bundy’s cattle and arrested David Bundy, who refused to leave the area that had been temporarily closed off.⁶ Cliven Bundy argued that the public land belonged to the state, not the U.S. government, and he and his supporters made clear that he would not be paying a dime while his cattle continue to graze.⁷

Cliven Bundy, alongside two of his other sons, Ammon and Ryan, were arrested stemming from the 2014 stand-off, charged by the state of Nevada with 15 counts of criminal conspiracy, assault, threats against federal officers, firearms counts, obstruction and extortion.⁸ After three years of incarceration while awaiting trial for the stand-off, on December 20, 2017, Cliven Bundy and his sons walked out of a Nevada jail; but not because the court found that cattle should be able to graze wherever their owners see fit.⁹ Instead, Chief Judge of the United States District Court for the District of Nevada, Judge Gloria Navarro, declared a mistrial in the case against Bundy due to “flagrant misconduct” on the part of state prosecutors and the FBI.¹⁰ The judge said that prosecutors had “willfully withheld evidence” that could prove that “the government, not the Bundys, were the ones actually doing the instigating leading up to the tense standoff.”¹¹ Ryan Bundy testified at trial that they were antagonized days leading up to the stand-off, alleging to have “see[n] government snipers and surveil-

5. Andrew Prokop, *The 2014 Controversy Over Nevada Rancher Cliven Bundy, Explained*, Vox, <https://www.vox.com/cards/nevada-rancher-cliven-bundy-explained/what-exactly-happened-with-the-standoff-between-bundy-and-the>.

6. *Id.*

7. *Id.* Although Bundy had solicited support from those who were in attendance for the stand-off, he also received support from many conservative Congress members for his resolve against the government during the 2014 standoff, however, many supporters reneged after racist comments made by Bundy subsequent to his new-found notoriety. See Whitaker, *supra* note 3 (reporting that Bundy stated “African Americans might have been better off as slaves” and “[t]he question is, are they slaves the way they are, where they live as slaves to the charity and government-subsidized homes, and are they slaves when their daughters are having abortions and their sons are in the prisons?”).

8. Reuters, *supra* note 4.

9. See *Editorial: Ruling in Bundy Case is Not Vindication*, THE BULLETIN (Jan. 12, 2018), <http://www.bendbulletin.com/opinion/5914074-151/editorial-ruling-in-bundy-case-is-not-vindication> (“U.S. District Judge Gloria Navarro made clear, her dismissal came not because the Bundys were right, but because the federal prosecutors had gotten so much so wrong.”).

10. Kirk Siegler & Colin Dwyer, *Judge Dismisses Federal Case Against Cliven Bundy and Sons, Bars Retrial*, NPR (Jan. 8, 2018) <https://www.npr.org/sections/thetwo-way/2018/01/08/576502739/judge-dismisses-federal-case-against-cliven-bundy-and-sons-bars-retrial>.

11. Kirk Siegler, *Mistrial Declared in Bundy Ranch Standoff Case*, NPR (Dec. 21, 2017) <https://www.npr.org/2017/12/21/572550575/mistrial-declared-in-bundy-ranch-standoff-case>.

lance cameras positioned on hilltops surrounding his family home in the days before armed supporters answered his family's calls for help."¹²

Judge Navarro ruled that there were various discovery violations by the DOJ which included the presence of an FBI camera on a hill overlooking the Bundy ranch, after the DOJ mocked allegations by the defendants that there were such devices.¹³ It was also discovered that there were maps and threat assessments that seemed to support the public statements by the Bundys that they were being surrounded.¹⁴ The production of this evidence would have substantially supported the Bundys claims that they were receiving threats from the government. Prosecutors challenged Judge Navarro's dismissal asserting that the court failed to "consider less drastic remedies" in light of the discovery violations.¹⁵ However, on January 8, 2018, Judge Navarro was unconvinced by the government's arguments and announced that the case against Bundy and his co-defendants was dismissed with prejudice.¹⁶ Judge Navarro explained that, because "[t]he court [found] that the universal sense of justice has been violated," she would not allow a retrial of the case against the Bundys.¹⁷ The court's decision was based primarily on the prosecution's failure to turn over exculpatory evidence, violating the Supreme Court's discov-

12. *Case Against Cliven Bundy, Nevada Rancher Involved In 2014 Armed Standoff, Declared A Mistrial*, FOX NEWS (Dec. 20, 2017), <http://www.foxnews.com/us/2017/12/20/mistrial-declared-in-case-against-nevada-rancher-cliven-bundy.html>.

13. Jonathan Turley, *Judge Dismisses Bundy Case with Prejudice After Finding of Extensive Unethical Conduct by Federal Prosecutors*, JOHNATHAN TURLEY (Jan 9, 2018), <https://jonathan-turley.org/2018/01/09/judge-dismisses-bundy-case-with-prejudice-after-finding-of-extensive-unethical-conduct-by-federal-prosecutors/>. The Bundys' lawyer, Bret Whipple, told the New York Times that "[t]here were approximately 3,000 pages that were provided to us only after we started trial . . . I personally have never seen anything like this, especially in a case of such importance." Tim Pearce, *Unsealed Court Docs Show How Prosecutors Tried to Rig Bundy Trial*, THE DAILY CALLER (Dec. 29, 2017, 2:34 PM), <http://dailycaller.com/2017/12/29/unsealed-court-docs-show-how-prosecutors-tried-to-rig-bundy-trial/>.

14. Turley, *supra* note 13.

15. See Conrad Wilson, *Nevada Prosecutors Ask Judge to Reconsider Dismissal of Bundy Case*, OPB, (Feb. 7, 2018, 3:35 PM), <https://www.opb.org/news/article/cliven-bundy-nevada-judge-reconsider-case/> (The appellate chief for the U.S. Attorney's Office for the District of Nevada asserted "even assuming its findings of discovery violation were correct, the Court failed to consider less drastic remedies" and "[t]he government believes the Court's ruling is clearly erroneous[.]").

16. Turley, *supra* note 13.

17. Siegler, *supra* note 10.

ery requirements as established by *Brady v. Maryland*,¹⁸ resulting in an inability of the Bundys to receive a fair trial.¹⁹

The mistrial in the Bundys' case comes subsequent to recent studies finding that prosecutorial misconduct in the United States occurs at an alarming rate.²⁰ Sadly, the Supreme Court and state bars are of little help in addressing the issue because they fail to adequately reprimand unethical prosecutors, allowing many to go unpunished when their misconduct is exposed.²¹ The Supreme Court has historically relied on legal doctrines such harmless error and the separation of powers to avoid addressing prosecutorial misconduct, as well as remaining silent on the debate concerning developing an encompassing federal discovery rule.²² Coupled with the Court's inadequate response to unethical prosecutors is the reluctance of most state bars to properly sanction prosecutors found guilty of misconduct. Thus, prosecutors have been empowered to abuse their discretion because they know they will "get away with it."

Without reforming the current approach to prosecutorial misconduct, the criminal justice system will continue to harbor a playground for miscarriages of justice. This Note offers a practical solution that requires the participation of federal judges. I propose that judges take a stand against prosecutorial misconduct by publicly reprimanding attorneys when their unethical practices are evident, dismissing cases with prejudice where egregious misconduct takes place, and issuing court orders requiring disclosures of exculpatory evidence—finding attorneys in contempt when they do not comply. Even in the face of an unmoved Supreme Court and lackadaisical state bars, judges have the power to stop prosecutorial misconduct by refusing to tolerate unethical behavior in their courtrooms. By adopting my recommendations, judges across the country can effectively address prosecutorial misconduct. If judges uniformly take a stand against unethical attorneys appearing before them, like Judge Navarro in the Cliven Bundy

18. See generally *Brady v. Maryland*, 373 U.S. 83 (1963) (the landmark case that requires prosecutors to turn over evidence that may be favorable to the defense).

19. Siegler, *supra* note 10.

20. See, e.g., *The Recidivists: New Report on Rates of Prosecutorial Misconduct*, FAIR PUNISHMENT PROJECT (July 13, 2017) <http://fairpunishment.org/new-report-on-rates-of-prosecutorial-misconduct/>; THE NATIONAL REGISTRY OF EXONERATIONS, *Exonerations in 2017* (Mar. 14, 2018), <https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf> ("[W]e know of official misconduct in 84 exonerations in 2017.")

21. See *infra*, Part III–IV.

22. Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L. Q. 713, 718–733 (1999).

case, we may enter an era where prosecutors are no longer shielded from accountability, and justice will be founded on the merits of a case—not the ability to obtain a conviction by any means necessary.

Part I of my Note will provide background establishing the presence of prosecutorial misconduct in the United States criminal justice system as evidenced in recent news, academic studies, and statistics. Part II of my note will analyze the application of 42 U.S.C. § 1983 to prosecutorial misconduct and how the statute has been made null and void by the judge-made rule of absolute civil immunity. Part III will analyze the impact of the Supreme Court’s application of the separation of powers and harmless error doctrines, causing increasing difficulty in holding unethical prosecutors accountable. Further, Part III will also address the ongoing debate concerning the proposed amendment of the Federal Rule of Criminal Procedure 16 to increase discovery obligations. Part IV will discuss the diminished role of state bars in holding unethical prosecutors accountable when their misconduct is exposed, including some states’ initiatives to mitigate prosecutorial misconduct on their own. Finally, Part V will discuss the role I propose federal judges should play in addressing prosecutorial misconduct in their courtrooms to counter the ineffectiveness of the Supreme Court and state bars.

I. BACKGROUND

While the Bundys were lucky enough to have the prosecutorial misconduct in their case exposed and addressed before they were convicted and sentenced, many are not as fortunate. Misconduct manifests in various ways, from discovery violations and improper contact with witnesses, to prosecuting cases not supported by probable cause.²³ Misconduct in some cases has led to convictions of innocent men and women for crimes they did not commit. Luckily, recent waves of exonerations have led to the release of many wrongfully convicted men and women after years of imprisonment, but most importantly, has exposed the unethical prosecutors on their cases.²⁴ The

23. Neil Gordon, *Misconduct And Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct*, CENTER FOR PUBLIC INTEGRITY (Jun. 26, 2003), <https://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment>.

24. To be “exonerated” is to be vindicated or proven innocent after being found guilty of a crime. “Exonerate”, MERRIAM-WEBSTER.COM, Merriam-Webster. Sadly, exonerees spend an average of at least 14 years imprisoned before they are vindicated and released. *Compensating The Wrongly Convicted*, THE INNOCENCE PROJECT, <https://www.innocenceproject.org/compensating-wrongly-convicted/>; see also Marti Hause and Ari Melber, *Jailed but Innocent: Record*

National Registry of Exonerations reported that in 2017, 139 people were exonerated, compared to the 171 exonerations in 2016. The number of exonerations in 2016 set a new record for the United States, and 70 of the 171 exonerations involved “official misconduct.”²⁵ In 2017, “official misconduct” was found in 84 of the 139 exonerations, also a record number.²⁶ These numbers are indicative of a major problem in our criminal justice system because most exonerations are due to the discovery of exculpatory DNA evidence, which excludes convictions that did not rely on scientific evidence.²⁷ Thus, “exoneration data says little about ‘the vast number of wrongful convictions we don’t see[.]’”²⁸

Official misconduct occurs, as defined by the National Registry of Exonerations, when “[p]olice, prosecutors, or other government officials significantly abuse[] their authority or the judicial process in a manner that contribute[s] to [an] exoneree’s conviction.”²⁹ While va-

Number of People Exonerated in 2015, NBC NEWS (Feb. 3, 2016, 12:20 AM), <https://www.nbcnews.com/news/us-news/jailed-innocent-record-number-people-exonerated-2015-n510196> (reporting that in 2015 “149 people spent an average of 15 years in prison before being cleared”).

25. THE NATIONAL REGISTRY OF EXONERATIONS, *supra* note 20.

26. THE NATIONAL REGISTRY OF EXONERATIONS, *Exonerations in 2017*, at 2 (Mar. 14, 2018), <https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf>.

27. See Mythili Sampathkumar, *Record Number of Innocent Prison Inmates Released Last Year Over Misconduct by Police, Prosecutors or Government Officials*, THE INDEP. (Mar. 14, 2018), <https://www.independent.co.uk/news/world/americas/prison-innocent-police-misconduct-prosecutors-inmates-released-exonerations-2017-a8256521.html>. (explaining that although “the largest percentage of the exonerated cases have DNA evidence at the centre of the investigation . . . the same issues that caused wrongful convictions in those cases . . . could [] also apply to cases that do not have DNA evidence at the centre of them.”).

28. *Id.* “Considering infrequent reporting and a culture of secrecy and indifference by regulatory agencies . . . the problem of prosecutorial misconduct in our nation’s criminal justice system is much greater than the official numbers reflect.” Christopher Zoukis, *Prosecutorial Misconduct: Taking the Justice Out of Criminal Justice*, PRISON LEGAL NEWS (Nov. 8, 2014), <https://www.prisonlegalnews.org/news/2014/nov/8/prosecutorial-misconduct-taking-justice-out-criminal-justice/>.

29. THE NATIONAL REGISTRY OF EXONERATIONS, *Glossary*, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx>. “Official misconduct encompasses a range of behavior—from police threatening witnesses to forensic analysts falsifying test results to child welfare workers pressuring children to claim sexual abuse where none occurred. But the most common misconduct documented in the cases in the Registry involves police or prosecutors (or both) concealing exculpatory evidence.” THE NATIONAL REGISTRY OF EXONERATIONS, *Exonerations in 2016* (March 7, 2017), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf. The Model Rules of Professional Conduct 8.4 also provides a definition for “professional misconduct.” It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

rious forms of misconduct have been identified as contributing to unlawful prosecutions and wrongful convictions in the United States, some officers of the court continue to develop innovative ways to miscarry justice.³⁰ Furthermore, the increasing number of exonerations of those wrongfully convicted due to unethical practices of government officials, is causing official misconduct to emerge at the forefront of criminal justice issues.³¹ This Note, however, focuses on prosecutorial misconduct specifically. “While certainly the majority of prosecutors are ethical lawyers engaged in vital public service, the undeniable fact is that many innocent people have been wrongly convicted of crimes as a result of prosecutorial misconduct.”³² “Over 2,000 people have been exonerated from criminal convictions since 1989. But to blame mere incompetence or simple negligence would be a mistake.”³³

While the increasing number of reports detailing misdeeds by prosecutors makes prosecutorial misconduct an issue worthy of attention, there is an ongoing debate surrounding the frequency that prosecutorial misconduct actually occurs. Some describe the occur-

(e) state or imply an ability (1) to influence improperly a government agency or official or (2) to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) fail without good cause to cooperate with the Bar Counsel or the Board of Bar Overseers as provided in S.J.C. Rule 4:01, § 3 ; or

(h) engage in any other conduct that adversely reflects on his or her fitness to practice law. See MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 1983).

30. See e.g., Brian Saady, *Fighting Corruption in the U.S. Criminal Justice System*, THE AM. CONSERVATIVE (Dec. 13, 2018), https://www.theamericanconservative.com/articles/fighting-corruption-in-the-u-s-criminal-justice-system/?fbclid=IWAR24yYLcsDkNaQp4wYw-Xnr819N4ltclphzOB1jB4sMR_JKqsknfcHC21c (reporting over 146 cases where tainted informants were used to secure convictions in Orange County); Charles Maldonado, *Top employee in Orleans Parish DA's Office Ordered Staff to Use Fake Subpoenas*, THE LENS (Jan. 24, 2018), <https://the.lensnola.org/2018/01/24/top-employee-in-orleans-parish-das-office-ordered-staff-to-use-fake-subpoenas-email-shows/> (prosecutors reportedly ordering police to use fake subpoenas).

31. “[M]isconduct by police and prosecutors occurs with such frequency that it has become one of the primary causes of wrongful convictions[.]” Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, HUFFINGTON POST (Feb. 11, 2016), https://www.huffingtonpost.com/entry/prosecutor-misconduct-justice_us_56bce00fe4b0c3c55050748a.

32. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 53 (2005). See also Evan Bernick, *Its Time to End Prosecutorial Misconduct*, HUFFINGTON POST (Aug. 12, 2015, 5:47 PM), https://www.huffingtonpost.com/evan-bernick/its-time-to-end-prosecuto_b_7979276.html (“There is compelling evidence that significant numbers of innocent people have been convicted and even sent to death row as a result of prosecutorial misconduct that virtually always goes unsanctioned and unpunished.”).

33. Brian Saady, *Fighting Corruption in the U.S. Criminal Justice System*, THE AM. CONSERVATIVE (Dec. 13 2018), https://www.theamericanconservative.com/articles/fighting-corruption-in-the-u-s-criminal-justice-system/?fbclid=IWAR24yYLcsDkNaQp4wYw-Xnr819N4ltclphzOB1jB4sMR_JKqsknfcHC21c.

rence of prosecutorial misconduct as a “rare event,”³⁴ or “few and far between,”³⁵ while others, like former Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, describe it as an “epidemic.”³⁶ This debate is the result of the various ways in which misconduct manifests, making its actual occurrence a difficult issue to dissect.³⁷ For instance, “[i]t is impossible to know for sure how often a specific prosecutor . . . bends or breaks the rules [because] at least 95 percent of the cases that pour in from the police never reach a jury, which means any misconduct occurs away from public view.”³⁸ In 2018, a New York Times report entailing 25 cases of police perjury included a quote from one unnamed officer stating, “There’s no fear of being caught. You’re not going to go to trial and nobody is going to be cross-examined.”³⁹

Furthermore, due to society’s obvious disdain for prosecutorial misconduct, as evidenced across various outlets, the difficulty in addressing and reforming prosecutorial misconduct does not lie in convincing others that it exists.⁴⁰ Rather, the unfettered power

34. Henry Grass, *Cliven Bundy Case: How Big a Problem is Prosecutorial Misconduct?*, THE CHRISTIAN SCI. MONITOR, (Jan. 8, 2011) <https://www.csmonitor.com/USA/Justice/2018/0111/Cliven-Bundy-case-How-big-a-problem-is-prosecutorial-misconduct>.

35. Mark Curriden, *Harmless Error? New Study Claims Prosecutorial Misconduct is Rampant in California*, ABA JOURNAL (Dec. 2010), http://www.abajournal.com/magazine/article/harmless_error_new_study_claims_prosecutorial_misconduct_rampant

36. *See, e.g.*, *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting).

37. “Prosecutorial misconduct remains a largely underdeveloped research issue in large part because of the challenges of defining what constitutes misconduct, but also because some misconduct never comes to light. For example, it is impossible to know the extent to which prosecutors engage in misconduct, especially if it involves suppressing potentially exculpatory evidence that never gets disclosed at trial.” Dr. Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases*, INNOCENCE PROJECT (2010), https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf.

38. Steve Weinburg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, PUBLIC INTEGRITY (June 23, 2003) <https://www.publicintegrity.org/2003/06/26/5517/breaking-rules>.

39. Brian Saady, *Fighting Corruption in the U.S. Criminal Justice System*, THE AM. CONSERVATIVE (Dec. 13, 2018), https://www.theamericanconservative.com/articles/fighting-corruption-in-the-u-s-criminal-justice-system/?fbclid=IWAR24yYLcsDkNaQp4wYw-Xnr8I9N4ltclphzOB1jB4sMR_JKqsknfcHC21c.

40. *See* Brian Ornduff, @brianornduff (Dec. 31, 2017) “Prosecutorial misconduct is one of the cases where I wish I believed in a hell. There’s something particularly heinous about being entrusted with such responsibility and through ill-will, stubbornness, or the desire to maintain a record destroy a human being’s life or end it.”; @RealRandyCohen (Dec. 24, 2017) “Unfortunately prosecutorial misconduct is a bipartisan issue. Gung ho attorneys get a hard on for convictions at any cost to many innocent defendants. Charges r often overstated, witnesses encouraged to lie and exculpatory evidence either ignored or hidden.”; Mike Novak, @manovark (Dec. 24, 2017) “Prosecutorial misconduct seems to be standard operating procedure these days. Lawlessness and unaccountability with SO MANY ‘acting’ US Attorneys. Isn’t it funny that they can

prosecutors are given in our criminal justice system, and inadequate approaches traditionally employed in an attempt to resolve the issue, have made prosecutorial misconduct difficult to effectively remedy.⁴¹ Knowing such, misconduct is debatably inevitable because attorneys are unpoliced and self-governing as they participate in the competitive adversarial game that makes up our criminal justice system.⁴² Once one accepts the reality that “[p]rosecutors are arguably the most powerful actors in the [criminal justice] system” it’s irrefutable that “having to provide evidence to a defendant while also seeking to beat them in court understandably can lead to temptation[.]”⁴³

While some reduce prosecutorial misconduct to innocent mistakes made by overburdened prosecutors, in 2017, the United States Department of Justice’s Project on Government Oversight reported that in over 650 cases of misconduct, more than 400 were defined as instances where attorneys “recklessly disregarded an obligation to comply with that obligation or standard” or “intentionally violated a clear and unambiguous obligation or standard” between 2002 and 2013.⁴⁴ In acting both intentionally and recklessly, the attorneys in those cases blatantly abused their discretion. Finding that prosecutors

violate our laws and oaths (with intent) and yet face no jail time. #irony”; @thelawanon (Dec. 24, 2017) “If the allegations of prosecutorial misconduct are true, every American should distrust the Feds. It is time those who commit misconduct be held accountable. How can we ever expect anything to change until there is accountability for misconduct, especially of a public official?”

41. “What appears to have been at the heart of the Justice Department’s unconscionable behavior [in the Cliven Bundy case] was sheer hubris; the arrogance that comes from a superior sense of status and power, built on decades of legislative and judicial decisions concluding that the federal government can do whatever it wants, whenever it wants, to whoever it wants and that its actions are not to be questioned.” Bob Barr, *Outrageous Prosecutorial Misconduct Comes Home to Roost in the Cliven Bundy Case*, TOWNHALL (Jan. 10, 2018) <https://townhall.com/columnists/bobbarr/2018/01/10/outrageous-prosecutorial-misconduct-comes-home-to-roost-in-the-cliven-bundy-case-n2432312>.

42. See Henry Grass, *Cliven Bundy Case: How Big a Problem is Prosecutorial Misconduct?*, THE CHRISTIAN SCIENCE MONITOR, (Jan. 8, 2011) <https://www.csmonitor.com/USA/Justice/2018/0111/Cliven-Bundy-case-How-big-a-problem-is-prosecutorial-misconduct> (comparing the extreme discretion of prosecutors to a basketball game, “[i]t’s like making your own calls . . . ‘That wasn’t a foul on me . . .’”).

43. Grass, *supra* note 34.

44. See *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards*, PROJECT OF GOVERNMENT OVERSIGHT 2 (2014), <http://pogoarchives.org/mga/opr-report-20140312.pdf>. (“An internal affairs office at the Justice Department has found that, over the last decade, hundreds of federal prosecutors and other Justice employees violated rules, laws, or ethical standards governing their work.”); *Federal Prosecutors Need a Watchdog, Too*, N.Y. TIMES, (Dec. 25, 2018), https://www.nytimes.com/2018/12/25/opinion/editorials/prosecutors-justice-inspector-general.html?utm_source=attorneys++Yonkers&utm_campaign=7374f51bd0-Weekly_Newsletter_August_26_2015_COPY_01&utm_medium=email&utm_term=0_2278b6b852-7374f51bd0-136784957 (“In effect, this means there are two tracks of justice at Justice: one for prosecutors and other lawyers and another for every other employee.”).

have “abused their discretion,” however, often means nothing because of “vague ethics rules that provide ambiguous guidance,” and a lack of real repercussions when they fail to adhere.⁴⁵ For instance, the Model Rules of Professional Conduct,⁴⁶ the Criminal Justice Section of the American Bar Association,⁴⁷ and the United States Attorneys Manual,⁴⁸ all provide guidelines and standards for attorney conduct, however, none of them are binding and all lack enforceable repercussions for attorneys who fail to comply. The ABA defines the standards for prosecutors’ conduct as “aspirational or describ[ing] ‘best practices,’ and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.”⁴⁹ “The absence of meaningful standards and effective methods of accountability has resulted in widely accepted [prosecutorial misconduct] that play[s] a significant role in producing [miscarriages of justice].”⁵⁰ Thus, we can only *hope* prosecutors follow the various rules and standards in place.⁵¹

45. Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400 (2006).

46. While the ABA’s Model Rules are applicable to all attorneys, “Rule 3.8 is notable because it’s the only rule specific to prosecutors. As such, most commentators view Rule 3.8 as the starting point for prosecutorial ethics.” Christopher Zoukis, *Prosecutorial Misconduct: Taking the Justice Out of Criminal Justice*, PRISON LEGAL NEWS (Nov. 8, 2014), <https://www.prisonlegalnews.org/news/2014/nov/8/prosecutorial-misconduct-taking-justice-out-criminal-justice/>.

47. According to Standard 3-1.2 of American Bar Association’s Criminal Justice Standards for the Prosecution Function, “the primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.” Standard 3-1.2(b), CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, AMERICAN BAR ASSOCIATION (4th ed. Feb 13, 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents.html.

48. United States Attorneys Manual provides guidance for attorneys of the United States Department of Justice that prosecute under federal law. The manual is non-binding, meaning “is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.” United States Attorneys Manual, 1-4.000, DEP’T OF JUSTICE, <https://www.justice.gov/jm/jm-1-4000-standards-conduct#1-4.100> (last updated Sept. 2018).

49. Standard 3-1.1(a), CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, AMERICAN BAR ASSOCIATION (4th ed. Feb 13, 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html

50. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 16 (2007). Alongside a lack of effective enforcement of rules and standards, also lies the fact that some defendants do not know that are a victim of prosecutorial misconduct because of the conduct within a prosecutor’s office we are unaware of as well as defense attorneys’ reluctance to “stir the pot.” See Ephiram Unell, *A Right Not To Be Framed: Preserving Civil Liability Of Prosecutors In The Face Of Absolute Immunity*, 23 GEO. J. LEGAL ETHICS 955, 961 (2010).

51. Concerning the Model Rules of Professional Conduct, they are non-binding and merely interpretations of various committees on ethics. See *infra* MODEL RULES OF PROFESSIONAL CON-

The wrath of a prosecutor's power is displayed daily in courtrooms across the country. Describing her experience as a former criminal defense attorney at the Public Defender Service for the District of Columbia, Professor Angela J. Davis stated that she "challenged prosecutorial misconduct on many occasions" but was granted a dismissal only once, for prosecutorial vindictiveness.⁵² Due to the important role that prosecutors play in criminal proceedings, any allegation of prosecutorial misconduct should beg investigation to substantiate or refute the claim. However, in reality, even where a report of misconduct is warranted, prosecutors are unlikely to be reprimanded for misconduct.⁵³ A 2017 study conducted by the New England Center for Investigative Reporting found that in Massachusetts alone there were over 1,000 rulings following allegations of prosecutorial misconduct from 1980 through February 2017. Although "the Supreme Judicial Court and Appeals Court had reversed convictions at least 120 times in whole or in part because of prosecutors' misconduct or error," based on the study, there was no "apparent consequence for the prosecutors."⁵⁴ In fact, the NECI's study revealed that "many of the prosecutors found by appellate courts to have committed misconduct went on to higher office[.]"⁵⁵

Professor Davis, in her book *Arbitrary Justice*, detailed a two-year investigation of a U.S. attorney in the District of Columbia that exposed the prosecutor's unlawfully excessive payments to cooperat-

DUCT 8.4. "As the name implies, the ABA Model Rules of Professional Conduct have no binding effect in themselves, but they are the primary basis for the ethics codes that regulate lawyers at the state level." Richard Acello, *New York Makes Itself a 'Model' State*, ABA JOURNAL (Sept. 2009), http://www.abajournal.com/magazine/article/new_york_makes_itself_a_model_state. Instead, states adopt, revise, interpret, and enforce their own Rules of Professional Conduct as they see fit.

52. ANGELA J. DAVIS, *supra* note 50, at 125. "A defendant may seek to have his charges dismissed because of prosecutorial vindictiveness, offering to show that more serious charges were placed against [him] in retaliation for the exercise of a constitutional or statutory right in violation of due process and equal protection." NEIL P. COHEN, ET. AL., *CRIMINAL PROCEDURE: THE INVESTIGATIVE PROCESS* 59 (4th ed. 2014).

53. See e.g., Kathleen Ridolfi, et al., *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, 2 NORTHERN CALIFORNIA INNOCENCE PROJECT PUBLICATIONS 1, 16 (Oct. 2010), <http://digitalcommons.law.scu.edu/ncippubs/2> ("Only six of the prosecutors in the 707 cases where misconduct was found were disciplined by the California State Bar.")

54. Shawn Musgrave, *Scant Discipline Follows Prosecutors' Impropriety in Massachusetts*, THE NEW ENGLAND CENTER FOR INVESTIGATIVE REPORTING (Mar. 6, 2017), <https://www.necir.org/2017/03/06/scant-discipline-follows-prosecutors-impropriety-massachusetts/>.

55. Radley Balko, *Another Study Finds Few Consequences for Prosecutor Misconduct*, WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/03/08/another-study-finds-few-consequences-for-prosecutor-misconduct/?utm_term=.ccb6f6cf079f; see also DAVIS, *supra* note 50, at 138 ("Most prosecutors who engage in misconduct not only escape punishment but also advance their careers.").

ing witnesses and their families.⁵⁶ Instead of prosecuting the attorney, however, the U.S. Department of Justice reduced the sentences of the defendants where misconduct was found in their cases.⁵⁷ The investigated prosecutor later became a partner at a large firm in California.⁵⁸ Similarly, in Cooke County, Illinois, where three prosecutors' misconduct was exposed, "[a]ll three were promoted to supervisor positions, and [eventually] all three became judges."⁵⁹

Succeeding in one's legal career despite evidence of prosecutorial misconduct is not uncommon, and in fact, has taken place historically.⁶⁰ For example, while serving as district attorney three decades earlier, former-Chief Justice Ronald Castille of the Pennsylvania Supreme Court, authorized the death penalty of Terrance Williams, who was convicted of first degree murder in 1984.⁶¹ The prosecutors on Williams' case were found to have "engag[ed] in multiple, intentional *Brady* violations during the prosecution."⁶² In 2012, Williams repeatedly asked for Justice Castille's recusal during his sentencing rehearing because he was the same district attorney that authorized the death penalty for Williams in 1984.⁶³ The Philadelphia Common Pleas Court issued a stay of execution and vacated Williams' sentence due to the finding of prosecutorial misconduct; however, Castille rein-

56. DAVIS, *supra* note 50, at 138.

57. *Id.*

58. *Id.*

59. *Id.*

60. In as early as 1936, in *Brown v. Mississippi*, a United States Supreme Court case, three Black men were brutally beat by officers until they falsely confessed to the murder of Raymond Stewart. During the trial, the court allowed the jury to decide whether the heinously obtained confessions were voluntary or not. As a result, the men were convicted, and the Supreme Court granted review, finding that admitting confessions obtained through torture is a violation of the Fourteenth Amendment's Due Process Clause. *See generally* *Brown v. Mississippi*, 297 U.S. 278 (1936). While the facts of *Brown* are disturbing, it is important to note that the prosecutor on the case, John Stennis, subsequently served as a United States Senator for Mississippi from 1947 until his retirement in 1989—42 years later. Stennis is one of the longest serving senators in U.S. history, and was the most senior senator during his last eight years in office. *John Stennis, 1901–1995*, Biographical Directory of the U.S. Congress, http://bioguide.congress.gov/scripts/bio_display.pl?index=S000852. Just as disturbing, the three men who were tortured in *Brown*, accepted plea bargains rather than risking a retrial following the Supreme Court's remand. Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 82 (2000).

61. *See Williams v. Pennsylvania*, 136 S.Ct. 1899, 1910 (2016) ("In 1986, Ronald Castille, then District Attorney of Philadelphia, authorized a prosecutor in his office to seek the death penalty against Terrance Williams. Almost 30 years later, as Chief Justice of the Pennsylvania Supreme Court, he participated in deciding whether Williams's fifth habeas petition . . . could be heard on the merits or was instead untimely.").

62. *Id.* at 1908.

63. *Id.* at 1904–05, 1907.

stated the death penalty for Williams on appeal.⁶⁴ Castille's decision was unsurprising as "an affirmation of the lower court's [finding of prosecutorial misconduct] would necessarily impugn the reputation of the office Castille had led and thus his own reputation as well."⁶⁵

In 2016, the Supreme Court held that Chief Justice Castille violated the due process clause by failing to recuse himself from Williams' case.⁶⁶ However, "[w]hat both the majority and the dissenters failed to adequately address . . . was the gross injustice that brought the case to their doorstep to begin with."⁶⁷ The Court made sure to include in their opinion that they did not know if Chief Judge Castille "knew" prosecutorial misconduct took place during Williams' prosecution,⁶⁸ despite his aggressive advocacy for Williams' execution. Yet, Castille faced no public reprimand by the Supreme Court nor was he disciplined by the state bar, as he had already retired in 2014 due to reaching the mandatory retirement age of 70.⁶⁹ Instead, the case was merely remanded for decision, without Castille's consideration, on Williams' death sentence.⁷⁰

Thus, when considering (1) the empirical evidence surrounding prosecutorial unaccountability; (2) the commonality of misconduct like that of which was entangled in Terrance Williams' prosecution

64. See Paula Ward, *U.S. Supreme Court Weighs Former Pa. Justice Castille's Role in Murder Case*, PITTSBURGH POST-GAZETTE (Mar. 1, 2016, 12:01 AM), <http://www.post-gazette.com/news/state/2016/03/01/Supreme-Court-weighs-Justice-Castille-recusals/stories/201603010042> ("On Sept. 28, 2012, the Philadelphia Common Pleas Court issued a stay of execution and vacated Williams' sentence, finding prosecutorial misconduct."); Anna Arceneaux, *Because the Prosecutors Withheld Evidence, This Man Has Spent 30 Years on Death Row*, ACLU (Jun. 30, 2016) <https://www.aclu.org/blog/capital-punishment/prosecutorial-misconduct-and-capital-punishment/because-prosecutors-withheld> ("Under Castille's lead, the court reversed the lower court's decision and reinstated Terry's death sentence.").

65. Brianne Gorod, *Ronald Castille's Role in Death-Row Appeal Violated Constitution*, THE MORNING CALL (Mar. 2, 2016) <http://www.mcall.com/opinion/yourview/mc-supreme-court-murder-bias-castille-gorod-yv-20160302-story.html>.

66. See *Williams*, 136 S.Ct. at 1905 ("This Court now holds that because Chief Justice Castille made a 'critical' decision as a prosecutor in Williams's case, there is a risk that he 'would be so psychologically wedded' to his previous decision that it would violate the Due Process Clause for him to decide the distinct issues raised in the habeas petition.").

67. Andrew Cohen, *Supreme Court Silent on Prosecutorial Misconduct*, BRENNAN CENTER (June 10, 2016) <https://www.brennancenter.org/analysis/scotus-decision-williams-v-pennsylvania-silent-prosecutorial-misconduct>.

68. *Williams*, 136 S.Ct. at 1910–11.

69. Jeremy Roebuck, *U.S. Supreme Court: Castille Should Have Recused Himself from Pa. Death-Row Case*, PHILADELPHIA INQUIRER (Jun. 10, 2016, 1:08 AM), http://www.philly.com/philly/news/20160610_U_S_Supreme_Court_Castille_should_have_recused_himself_from_Pa_death_row_case.html; Peter Hall, *Retiring Chief Justice Castille Says he Kept Faith in Fellow Jurists*, THE MORNING CALL (Jan. 21, 2019), <https://www.mcall.com/news/nationworld/pennsylvania/mc-pa-supreme-court-castille-20150110-story.html>.

70. See *Williams*, 136 S.Ct. at 1909.

and post-conviction proceedings; and (3) the various types of official conduct exposed that contributes to wrongful convictions, these events prove that even where prosecutorial misconduct is exposed, prosecutors are seemingly more likely to be promoted to state supreme court justice or elected district attorney, than reprimanded. Knowing such, why, or how, do prosecutors escape punishment? In answering, this Note will first look to the current remedies in place for victims of prosecutorial misconduct, mainly 42 U.S.C. § 1983, and analyze its ineffectiveness. Then, this Note will analyze the harmless error doctrine's role, under Federal Rule of Criminal Procedure 52(a), in perpetuating misconduct, and Federal Rule of Criminal Procedure 16's failure to mitigate misconduct due to its inadequacy. Then, this Note will highlight some state-specific approaches to combatting prosecutorial misconduct. Finally, this Note will discuss the role that federal judges can play in combatting prosecutorial misconduct as our last resort.

II. WHY § 1983 DOES NOT WORK FOR VICTIMS OF PROSECUTORIAL MISCONDUCT

A. § 1983?

It is the unfortunate reality that one could find himself a victim of prosecutorial misconduct. 42 USC § 1983, however, provides a remedy for those found at the receiving end of misconduct by government officials, allowing one to bring suit against that official for conduct that caused them to suffer damages—such as years of wrongful imprisonment or police brutality. Unfortunately, when a *prosecutor* commits said misconduct “in their official capacity,” § 1983 hardly ever works due to the judge-made doctrine of absolute civil immunity. Originally enacted as part of the Ku Klux Klan Act of 1871 to provide relief for African Americans who were terrorized by members of the KKK,⁷¹ 42 U.S.C. § 1983 allows compensatory and punitive damages against state and local officials, in their individual capacity, who deprive plaintiffs of constitutional rights.⁷² In bringing a § 1983 claim,

71. See CENTER FOR CONSTITUTIONAL RIGHTS AND THE NATIONAL LAWYERS GUILD, THE JAILHOUSE LAWYERS HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON 5 (5th ed., 2010), https://ccrjustice.org/sites/default/files/assets/files/Report_JailHouseLawyersHandbook.pdf (“Section 1983 does not mention race, and it is available for use by people of any color, but it was originally passed specifically to help African Americans enforce the new constitutional rights they won after the Civil War.”).

72. § 1983 reads in full:

the plaintiff (or victim of prosecutorial misconduct for the purposes of this Note) must prove each element of the statute by a preponderance of the evidence.⁷³ First, the plaintiff must demonstrate that they were deprived of a constitutional right. Second, the plaintiff must prove that the person who deprived them of that right, acted “under color of law,”⁷⁴ meaning, the defendant was using power possessed by virtue of state law, to violate the plaintiff’s rights.⁷⁵ Courts and legal experts have coined § 1983 as complex legal jurisprudence due to its required examination of multi-faceted issues,⁷⁶ and amidst its complexity is the reality that plaintiffs are unlikely to be successful in bringing this type

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983.

73. For a detailed guide to asserting claims under § 1983, *see generally* United States Court of Appeals for the Third Circuit, Model Jury Instructions (Oct. 2017), *Instructions for Civil Rights Claims Under Section 1983*, <http://www.ca3.uscourts.gov/sites/ca3/files/chapter%20four%20to%20be%20posted%20October%202017%20meeting.pdf>.

74. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Circuits are split concerning whether or not the plaintiff must also prove the mens rea of the official who violated their rights. *See e.g.*, *Board of County Com’rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 405 (1997) (“Section 1983 itself ‘contains no state-of-mind requirement independent of that necessary to state a violation’ of the underlying federal right”); *Jordan v. Fox*, 20 F.3d 1250, 1277 (3d Cir. 1994) (noting that “section 1983 does not include any mens rea requirement in its text, but the Supreme Court has plainly read into it a state of mind requirement specific to the particular federal right underlying a § 1983 claim”).

75. Under § 1983, “state law,” includes any statute, ordinance, regulation, custom or usage of any state. In other words, “if a defendant’s conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action ‘under color of state law’ for § 1983 purposes.” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 n.2 (2001).

76. *See, e.g.*, Martin A. Schwartz, *Section 1983 Litigation* at 3, <https://www.casd.uscourts.gov/Attorneys/CJAAppointments/SiteAssets/docs/FJCSection1983Outline.pdf> (“Section 1983 litigation often requires courts to examine complex, multifaceted issues.”); United States Code Section 1983 & Civil Rights Litigation California Civil Rights Lawyers, SHOUSE CALIFORNIA LAW GROUP <https://www.shouselaw.com/1983.html> (describing a § 1983 suit as “a complicated area of law”). In light of § 1983’s complexity, the Huffington Post provides “A Brief Section 1983 Litigation Checklist” that categorizes the requirements of 1983 into a series of questions for easy understanding:

1. Has there been a violation of a Constitutional or statutorily protected right?
2. Is the actor a person that is subject to Section 1983?
3. Did this person act under color of law or local governmental custom or practice?
4. Are the actions complained of connected to the deprivation of rights in a reasonably foreseeable manner (proximate causation)?
5. Are there defenses to liability such as immunity, lack of standing to sue, or a lack of ripeness?
6. Is a monetary judgment collectable from a governmental entity or, in the case of an individual defendant, personal assets or personal insurance policies?

of claim against prosecutors, thanks to the doctrine of “absolute civil immunity.”

Absolute civil immunity has made the application of § 1983 virtually null and void because it often prevents civil lawsuits against prosecutors for actions taken during the prosecution of a defendant, even when those actions are “malicious” or “dishonest.”⁷⁷ Erwin Chemerinsky, Professor of Law and Political Science at Duke University Law School, provides three important principles in understanding how absolute immunity works.⁷⁸ First, when granting immunity, “the Court focused on the functional considerations of the frequency of suit and the interference with the function of the office.”⁷⁹ Second, absolute immunity attaches to the “task” and not the official conducting the task, which means prosecutors cannot be held civilly liable for things they do in a prosecutorial capacity, but can for other things.⁸⁰ Finally, “absolute immunity claims are for money damages, not for injunctive relief,”⁸¹ meaning, beyond a check being written out to the victim, there is likely nothing that can be done to a prosecutor found in violation of § 1983.

B. The Supreme Court Has Picked Its Side

To eliminate any confusion about the remedies for plaintiffs against prosecutors, the Supreme Court has made clear that where a prosecutor faces suit for civil liability, he or she “enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties.”⁸² The Court, however, has not made clear exactly what “prosecutorial duties” encompasses, leaving individual courts to determine whether a prosecutor was acting in his official ca-

Brad Reid, *A Legal Overview Of Section 1983 Civil Rights Litigation* (Apr. 14, 2017 11:12 AM), https://www.huffingtonpost.com/entry/a-legal-overview-of-section-1983-civil-rights-litigation_us_58f0e17ee4b048372700d793.

77. See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (“[absolute] immunity leaves the genuinely wronged criminal defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.”).

78. See generally Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 *TORO L. REV.* 473, 473 (2008) (“This discussion focuses on the general principles of absolute immunity and then on the cutting-edge issues and recent developments with regard to absolute immunity.”).

79. *Id.* at 475.

80. *Id.* (“A [] general principle is that absolute immunity goes to the task, not to the office . . . For instance, prosecutors have absolute immunity, but only for prosecutorial actions.”).

81. *Id.* at 476.

82. *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976).

capacity, warranting immunity from suit, or not, creating inconsistencies across jurisdictions in resolutions of § 1983 claims.⁸³

The Supreme Court's leading case on the doctrine of absolute immunity as applied to prosecutors, *Imbler v. Pachtman*, held that prosecutors are fully immune from civil liability for their conduct while executing their governmental duties. In *Imbler*, the prosecutor, a Deputy District Attorney, knowingly used false testimony during the trial and suppressed evidence favorable to the defendant. The defendant, Imbler, was eventually released from prison and filed suit against the prosecutor under § 1983. Unfortunate for Imbler, the Supreme Court held that because the prosecutors were acting in their official capacity, under the doctrine of absolute civil immunity, they could not be found liable for Imbler's wrongful conviction.⁸⁴ Although the Supreme Court recognized in *Imbler*, that absolute civil immunity leaves "wronged defendants without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," § 1983 was still amended to ensure the doctrine was fully enforced in criminal and civil actions.⁸⁵ Accompanying absolute immunity's ability to protect prosecutors from liability when they act unethically in executing their duties, in 1994, the Supreme Court in *Heck v. Humphrey*, made it even more difficult for defendants wishing to bring suit against unethical prosecutors. In *Heck*, the Court held that one "must prevail in proving his conviction wrongful or his trial unfair in criminal court before he can even attempt to file a lawsuit under § 1983."⁸⁶

83. Chemerinsky, *supra* note 78, at 477 ("the Court [in *Imbler v. Pachtman*] did not elaborate as to what constitutes prosecutorial action versus what makes action administrative or investigative. This is a distinction courts continue to apply and struggle with, though the *Imbler* Court found the use of testimony at trial, even perjured testimony, was prosecutorial in nature.").

84. *Id.*

85. *Imbler*, 424 U.S. at 427. See also Henning, Karen McDonald, *The Failed Legacy of Absolute Immunity Under Imbler: Providing a Compromise Approach to Claims of Prosecutorial Misconduct*, 48 GONZ. L. REV. 219, 219 (2013) ("The Court has continued to adhere to this broad grant of immunity, notwithstanding the fact that the rationale employed by the *Imbler* Court has been largely discredited and the fact that doing so has created significant moral hazard concerns.").

86. Bidish Sarma, *After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, AMERICAN CONSTITUTION SOCIETY (July 19, 2016), <https://www.acslaw.org/acsblog/after-40-years-is-it-time-to-reconsider-absolute-immunity-for-prosecutors/>; see also *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994) ("in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus").

Following *Imbler* and *Heck*, in 1999, Congress added the language “except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable[,]” to § 1983.⁸⁷ The amendment solidified the notion that prosecutors will not be held liable for any constitutional rights they may violate while acting within the scope of their duties.⁸⁸ The Court explained that the purpose of the immunity for prosecutors is to ensure they are able to properly perform their duties without having to worry about possible litigation stemming from “doing their job.”⁸⁹ Furthermore, the Court in *Imbler* assumed that professional discipline would protect defendants from prosecutorial misconduct—but they were wrong.⁹⁰ Instead, the protection provided by absolute immunity has effectively made unethical prosecutors “untouchable.”

C. Lower Courts Apply the Supreme Court’s Rationale With Full Force

Following the Supreme Court’s jurisprudence surrounding absolute immunity, lower courts have applied the doctrine with full force. For example, the United States Court of Appeals for the Second Circuit has held that “the falsification of evidence and the coercion of witnesses . . . [are] prosecutorial activities for which absolute immunity applies.”⁹¹ Despite courts’ broad application of absolute immunity, John Thompson tried his luck with § 1983 after being wrongfully convicted and spending 18 years imprisoned, 14 of which were on death row, all due to unethical prosecutors.⁹² Following his exoneration, Thompson brought suit under § 1983 against five prosecutors who failed to disclose exculpatory evidence, claiming that their misconduct “caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed.”⁹³ The district court found the district at-

87. 42 U.S.C. § 1983.

88. See *Imbler*, 424 U.S. at 431.

89. Ephiram Unell, *A Right Not To Be Framed: Preserving Civil Liability Of Prosecutors In The Face Of Absolute Immunity*, 23 GEO. J. LEGAL ETHICS 955, 955 (2010).

90. See Joel B. Rubin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, 538-43 (2011).

91. Taylor v. Kavanagh, 640 F.2d 450, 452 (2d Cir. 1981).

92. See generally *Connick v. Thompson*, 563 U.S. 51 (2011).

93. *Id.* at 56.

torney's office liable for failing to train the prosecutors, and the jury awarded Thompson \$14 million in damages.⁹⁴

The Supreme Court, however, *reversed* the district court's judgment, finding that Thompson's allegations of misconduct on behalf of the prosecutors did not establish an adequate "pattern of violations [required] to prove deliberate indifference in § 1983 actions [that] alleg[e] failure to train."⁹⁵ Thus, Thompson's suit under § 1983 was ultimately proven futile. Thompson's prosecution, wrongful conviction, and failed § 1983 claim exemplify "not only [] how the justice system permits abuses by prosecutors, but also how little recourse is accorded to victims of such misconduct."⁹⁶ Knowing such, although plaintiffs are able to file suit against a prosecutor for conduct that blatantly violates their constitutional rights, they will likely be unsuccessful in court.

Moreover, the Supreme Court is unlikely to be of much help in addressing prosecutorial misconduct in the future.⁹⁷ The Court has suggested that resolving attorney misconduct is not a task for the courts, but rather state bars. In *Connick v. Thompson*, the Court held that "[a]n attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment."⁹⁸ However, the Court failed to recognize that any disciplinary review of attorney misconduct is only triggered by referrals to the state bar by judges, attorneys or interested parties, "and such referrals happen infrequently . . . [making] the system useless before it has even begun."⁹⁹ Most telling, in the last five years, the Supreme Court has issued a number of opinions reversing federal courts where damages for plaintiffs under § 1983 were awarded.¹⁰⁰

94. See *John Thompson, Cleared After 14 Years on Death Row, Dies at 55*, N.Y. TIMES (Oct. 2017), <https://www.nytimes.com/2017/10/04/obituaries/john-thompson-cleared-after-14-years-on-death-row-dies-at-55.html?mtrref=www.google.com&gwh=D63C1D7425EA1D176309E6C02F814A29&gwt=pay>.

95. *Connick v. Thompson*, 563 U.S. 58, 71–72 (2011).

96. Christopher Zoukis, *Prosecutorial Misconduct: Taking the Justice Out of Criminal Justice*, PRISON LEGAL NEWS (Nov. 8, 2014), <https://www.prisonlegalnews.org/news/2014/nov/8/prosecutorial-misconduct-taking-justice-out-criminal-justice/>.

97. Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U.L. REV. 623, 650 (2017).

98. *Connick v. Thompson*, 563 U.S. 51, 66, (2011).

99. *Thompson*, 563 U.S. at 650.

100. *White v. Pauly*, 137 S. Ct. 548, 551–52 (2017).

The Supreme Court recently considered three cases involving deliberate misconduct by local prosecutors that resulted in wrongful convictions . . . Given the fact that the § 1983 plaintiffs had prevailed in the lower courts, the Court's decision to grant certiorari in these cases itself signaled a reluctance to permit § 1983 actions involving prosecutors. Additionally, in the two cases in which the Court issued a decision . . . the Court

D. The Supreme Court's Interpretation Is Outdated & Unfounded

Despite the Court's unwillingness to address prosecutorial misconduct under the guise of absolute civil immunity, legal scholars' critiques reveal that the doctrine is confusing, unworkable, and inconsistent with the statute's original intent.¹⁰¹ The Supreme Court's historical argument that Congress meant to retain the common-law doctrine of absolute prosecutorial immunity when they originally adopted § 1983 in 1871 has proven to be unfounded by various legal scholars—including Margaret John of the University of California at Davis School of Law.

[A]bsolute prosecutorial immunity was not the established law in 1871. In fact, the first case affording prosecutors' absolute immunity was not decided until 1896. Congress could not have intended to retain this immunity when it adopted § 1983 because it simply did not exist at that time. Rather, in 1871 prosecutors would have been accorded qualified immunity, not absolute immunity. Thus, the historical argument for absolute prosecutorial immunity is unfounded.¹⁰²

Professor Chemerinsky further explains that although the Supreme Court has said that judges also “have absolute immunity under § 1983 because the statute was written against the backdrop of common law immunity and judges had absolute immunity in 1871,” research has revealed that in 1871, only a minority of states provided absolute immunity.¹⁰³ However, the Supreme Court still “extrapolated from those facts the rule of absolute immunity for judges today.”¹⁰⁴ Furthermore, considering how the proper application of absolute civil immunity is at the root of circuit splits, and empirical evidence proves

prevented the victim of prosecutorial misconduct from seeking redress from either the supervisors or the district attorney's office.

Karen McDonald Henning, *The Failed Legacy Of Absolute Immunity Under Imbler: Providing A Compromise Approach To Claims Of Prosecutorial Misconduct*, 48 GONZ. L. REV. 219, 222–25 (2012).

HOWEVER, THE SUPREME COURT HAS SHOWN *some* remorse for victims of prosecutorial misconduct by refusing to extend prosecutorial immunity beyond the judicial phase of the criminal process. *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 275–76 (1993) (finding that a prosecutor's fabrication of evidence during the preliminary investigation of a case, prior to the plaintiffs' arrest, was not afforded absolute immunity).

101. *See generally* Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509 (2011).

102. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 55 (2005).

103. Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 Touro L. REV. 473, 474 (2008).

104. *Id.*

that prosecutorial misconduct is a significant factor contributing to wrongful convictions, inarguably, the doctrine “undermin[es] the goals it was designed to achieve.”¹⁰⁵

42 USC § 1983 is supposed to be a vehicle of protection against governmental abuse by individuals given the task of executing the vital functions of our government; however, the Supreme Court has tainted its functionality using the doctrine of absolute immunity. Judge Frederic Block, a federal district court judge for the Eastern District of New York, stated “It seems to me that the time has come to create some level of accountability for prosecutors.” Judge Block provides three suggestions in holding prosecutors accountable, eliminating absolute immunity as the first order of business.¹⁰⁶

First, the cloak of absolute immunity should judicially or legislatively be lifted. Police officers do not have it and they are held accountable in courts of law for their egregious behavior. We wisely do not give our law enforcement officers, or even the President, *carte blanche* to do as they please; bad prosecutors should similarly be accountable.¹⁰⁷

Absolute civil immunity has grave consequences, for some more than others. In its current form, it is particularly problematic for African Americans who are disproportionately criminally prosecuted in the United States, making up only 13% of the American population but 47% of the 1,900 exonerations listed in the National Registry of Exonerations in 2017.¹⁰⁸ Research has also found that African Americans are seven times more likely than their white counterparts to be wrong-

105. See Johns, *supra* note 102, at 57.

106. Frederic Block, *Let's Put an End to Prosecutorial Immunity*, THE MARSHALL PROJECT (Mar. 13, 2018), <https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity>.

107. *Id.* Judge Block's other 2 suggestions include:

Second, steps can be taken by the legal establishment to punish such behavior. All prosecutors are lawyers and their licenses to practice law require them to abide by legally prescribed canons of ethics enforceable by the bar and the courts. Admirably, just a few months ago, the Indiana Supreme Court suspended the chief deputy prosecutor of LaPorte County, Indiana from the practice of law for a minimum of four years with no automatic right of reinstatement for eavesdropping on an attorney-client conversation. As in Collins' case, the court described this conduct as “deplorable.” Other states should follow this lead.

Third, prosecutors who intentionally withhold exculpatory evidence resulting in a wrongful conviction should be prosecuted for obstruction of justice. The good ones need not be concerned, but the bad “deplorable” ones should know that there might be civil, and even criminal, consequences for misconduct.

Id.

108. Samuel R. Gross, *Race and Wrongful Convictions in the United States*, NATIONAL REGISTRY OF EXONERATIONS (Mar. 7, 2017), https://www.law.umich.edu/special/exoneration/documents/race_and_wrongful_convictions.pdf.

fully convicted.¹⁰⁹ In totality, the doctrine of absolute civil immunity is nothing more than a court-enforced denial of the right to relief, benefiting none other than unethical prosecutors. One can be assured, however, that the Supreme Court will not overturn the long-established jurisprudence preserving prosecutors' immunity because it is also rooted in the historical doctrine of separation of powers.¹¹⁰ Unfortunately, the doctrine is only one of the barriers to addressing the epidemic of prosecutorial misconduct perpetuated by the highest court in the land.

III. THE SUPREME COURT'S CONTINUED ROLE IN PERPETUATING PROSECUTORIAL MISCONDUCT

The highest court in the land has sided with prosecutors in the fight against prosecutorial misconduct. Alongside the roadblocks to proper discipline that would deter prosecutorial misconduct in the first place, the Supreme Court's interpretation and application of three legal doctrines has made it difficult to challenge convictions obtained by prosecutorial misconduct. Specifically, the Court's application of the separation of powers doctrine, the harmless error doctrine, and their silence concerning the need for an adequate federal discovery rule, have all made eradicating the criminal justice system of prosecutorial misconduct unattainable.

A. The Historically Impenetrable Excuse: Separation of Powers

The Supreme Court has consistently revered the doctrine of separation of powers as the cornerstone of prosecutorial discretion, leaving the wrath of unethical prosecutors almost impenetrable. Article I, § 1, of the United States Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹¹¹ Article III, § 1, provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹¹² Art. II, § 1, cl. 1, provides that “[t]he executive Power shall

109. Tanzina Vega, *Study: Black People More Likely to be Wrongfully Convicted*, CNN (Mar. 7, 2017), <https://www.cnn.com/2017/03/07/politics/blacks-wrongful-convictions-study/index.html>.

110. *See infra* Part III-A.

111. U.S. CONST. art. I, § 1.

112. U.S. CONST. art. III, § 1.

be vested in a President of the United States of America.”¹¹³ These three articles establish what we know as the “separation of powers doctrine,” coined by the Framers of the Constitution as the “absolutely central guarantee of a just Government.”¹¹⁴ Ironically, the same doctrine has become a barrier to eradicating the criminal justice system of unjust prosecutors due to the Supreme Court’s characterization of prosecutors as members of the Executive Branch.¹¹⁵

The Supreme Court enforces the separation of powers doctrine by determining “whether . . . one branch has overstepped its proper boundaries.”¹¹⁶ Under the separation of powers doctrine, “[t]he primary concerns are whether one branch gives or takes too much control over another; whether one branch performs a function allocated to another; or whether one branch impairs another’s performance of its functions.”¹¹⁷ However, ironically, “[o]nce a power is found to be executive, neither Congress nor the judiciary may limit it.”¹¹⁸ Thus, due to the Supreme Court’s opposition to the “blending of powers” among the judicial, legislative, and executive branch, especially as it relates to criminal law, this separation of powers doctrine makes it difficult for one branch to act when its purpose is to remedy the defects of another.¹¹⁹ Due to the stringent interpretation of the separa-

113. *Morrison v. Olson*, 487 U.S. 654, 697–98 (1998) (Scalia, J., dissenting).

114. *Id.* at 697 (Scalia, J., dissenting) (“Without a secure structure of separated powers, our Bill of Rights would be worthless.”).

115. See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 3 (2009) (“According to federal case law, the separation of powers doctrine is the “primary ground” upon which courts abstain from reviewing prosecutorial decisions.”). “Since the exercise of prosecutorial discretion is at the very core of the executive function,” limiting that discretion by imposing judicial review “would invade the traditional separation of powers doctrine.” *Id.* at 10.

116. STEVEN D. JAMAR, *CONSTITUTIONAL LAW: POWER, LIBERTY, EQUALITY* 441 (2017).

117. *Id.*

118. Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL’Y REV. 361, 363 (1993). Shane argues that this type of categorical approach to separation of powers, “tends to subvert, rather than encourage, executive conformity to law.” *Id.*; see also Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989) (“[separation of powers] is not really accurate as a description of how our government works—the phrase “shared powers” says it better.”).

119. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 991 (2006) (“The price of separation is that it makes it more difficult for the federal government to act—whether for good or bad purposes.”).

[U]nlike the administrative law context, where agencies must adhere to the structural and process protections of the [Administrative Procedures Act] and their decisions are subject to judicial review, the government faces almost no institutional checks when it proceeds in criminal matters. The only safeguards come from the individual rights provisions of the Constitution, but those checks act as poor safeguards against structural abuses and inequities.

Id. at 993.

tion powers doctrine that the Court applies in criminal law, most dismissals of prosecutions by lower courts are prohibited, absent satisfaction of difficult standards like “plain error.” This includes cases where prosecutors have been found to have acted unethically, but because they are deemed an arm of the executive branch, the separation of powers doctrine protects them from adequate reprimand by the judicial branch.¹²⁰

The Court has looked to Article II of the Constitution as the source of the “power to prosecute,” and contends that to challenge those decisions infringes on the Executive’s power. This rationale has created the widely accepted justification for prohibiting judicial review of prosecutorial decision-making.¹²¹ However, the Supreme Court’s interpretation of the separation of powers doctrine is terribly flawed.¹²² In fact, while the Court’s application of the separation of powers doctrine claims to protect executive power through checks and balances, this application is redundant because preventing review of prosecutorial decisions trumps the exact purpose of the doctrine: to prevent one branch from becoming too powerful.¹²³ Meanwhile, the Court has essentially barred the courts from doing just that. The Supreme Court has the ultimate ability to “check” prosecutors, pursuant to its constitutionally provided power to supervise lower court procedures. Using its power, the Court *could* properly resolve misconduct by government officials by empowering lower courts to address misconduct. However, the Court has used its power, instead, to “drastically curtail” lower courts’ ability to counter prosecutorial misconduct by relying on the separation of powers doctrine in cautioning lower courts to refrain from meddling in the business of law enforcement.¹²⁴

Even where a defendant’s life depends on the Court’s susceptibility to relaxing their application of separation of powers in criminal

120. See Krauss, *supra* note 115 (“Contemporary federal cases attribute prosecutorial discretion to the separation of powers doctrine: federal prosecutors are said to be agents of the executive branch, and for that reason the courts cannot review their decisions.”).

121. See *id.* at 12 (citing cases from various jurisdictions all holding that courts should not interfere with the decisions of the executive branch).

122. See *id.* at 2 (“[T]he constitutional separation of powers doctrine does not adequately account for expansive prosecutorial discretion.”). Rebecca Krauss thoroughly critiques the Supreme Court’s reliance on the separation of powers doctrine by providing the historical formulation of the doctrine and identifying the gap in the Supreme Court’s analysis in application to prosecutorial power. See *generally id.*

123. *Id.* at 27–28 (describing the Supreme Court’s use of the separation of powers doctrine as “nascent”).

124. See *generally* *United States v. Slone*, 969 F. Supp. 2d 830, 832 (E.D. Ky. 2013).

matters, they refuse. In *U.S. v. Slone*, the defendant asked the court to “impose a schedule for his presentation of mitigating evidence to federal prosecutors so he could convince them not to seek the ultimate punishment.”¹²⁵ Citing the separation of powers doctrine, the court said “no” to the defendant’s request, finding Sloan’s last effort to spare his life futile, because “[t]he Court does not have the authority to manage the DOJ’s internal processes.”¹²⁶ The 2013 decision in *Sloan* offers clear insight into the Supreme Court’s stance that courts “may not direct the Executive Branch how to exercise its traditional prosecutorial discretion. That discretion includes the decision whether to seek the death penalty.”¹²⁷ While it is recognized that the courts have an “inherent power to supervise the administration of criminal justice,” as evidenced in cases like *Sloan*, that supervisory power has been construed to merely apply to administrative duties.¹²⁸

The type of unfettered discretion provided to prosecutors is unheard of in other areas of the law.¹²⁹ For example, in administrative law, agencies—many of which are part of the executive branch—are subject to judicial review and reversal for “arbitrary and capricious” actions. When challenged, agencies must articulate rational, legally acceptable reasons for their decisions.¹³⁰ Prosecutors, however, have no such obligation “because” they are situated in the executive branch—but so are most administrative agencies.¹³¹ This means the discretion of prosecutors is unprecedented and the Court protects this discretion by invoking the separation of powers doctrine seemingly by “name only.”¹³² The Court has yet to provide a coherent explanation

125. *Id.*

126. *Id.* at 833. The Court explained in *Slone*, “[t]he DOJ’s decision to pursue a death sentence is directly analogous and equally within its unreviewable discretion. Ordering the Justice Department to consider Slone’s presentation of mitigating evidence on a particular timeline would obliterate that discretion by imposing judicially-mandated procedures for deciding whether to seek death. Court intervention would interfere with prosecutors’ position in our constitutional structure.” *Id.* at 837–38.

127. *Id.* at 834.

128. *Id.* at 833–34. “The Court has inherent power to manage its docket and to some extent supervise the administration of criminal justice, it may not direct the Executive Branch how to exercise its traditional prosecutorial discretion . . . Absent a violation of law, however, those powers are restricted to internal housekeeping.” *Id.* at 833-35.

129. See Krauss, *supra* note 115, at 5–6. (highlighting the stark difference in how the courts view police discretion in administrative law to that of prosecutors in criminal law.)

130. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 991 (2006).

131. *Id.* at 995.

132. See Krauss, *supra* note 115, at 13 (“The federal judiciary has avoided confronting the tension between prosecutors’ broad discretion and opportunity for abuse by invoking the separation of powers doctrine in name only.”).

as to why and, in practice, how the separation of powers doctrine allows prosecutors to have unpoliced and unreviewable discretion to do as they please.

B. A Floodgate For Prosecutorial Misconduct: The “Harmless” Error Rule

Another barrier to holding prosecutors accountable for misconduct is exposed, and then challenging a resulting conviction, is the harmless error doctrine. If prosecutorial misconduct is found to be so egregious that it prevented a defendant from obtaining a fair trial, and thus violating a constitutional right, a conviction *may* be overturned.¹³³ An error that requires a conviction to be overturned is considered a “plain error,” under Federal Rule of Criminal Procedure 52(b).¹³⁴ However, courts are required to run all issues potentially yielding a reversal through a “harmless error” analysis, and the Supreme Court has clearly held that the want to chastise unethical prosecutors does not outweigh the interest preserved by the harmless error doctrine.¹³⁵ Under Federal Rule of Criminal Procedure 52(a), prosecutorial misconduct may be excused if the government can prove, beyond a reasonable doubt, that the error did not affect the judgment; thus, it was “harmless.”¹³⁶ This means that the defendant must prove that there was a constitutional error of some sort, and then the burden switches to the government, requiring a showing that the error was harmless beyond a reasonable doubt.¹³⁷

The Supreme Court has recognized that the “harmless-error rule[] can work very unfair[ly] and [yield] mischievous results.”¹³⁸ However, the Court has overlooked such “mischievous results” by relying on its rationale that the overarching purpose of the rule is to “block

133. Lorraine Morey, *Keeping The Dragon Slayers In Check: Reining In Prosecutorial Misconduct*, 5 PHOENIX L. REV. 617, 630 (2012).

134. *United States v. Giese*, 597 F.2d 1170, 1199 (9th Cir. 1979), *cert. denied*, 444 U.S. 979 (1979) (“A plain error is a highly prejudicial error affecting substantial rights.”). Plain error is invoked to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process. *United States v. Smith*, 962 F.2d 923, 937 (9th Cir. 1992).

135. *See United States v. Hasting*, 461 U.S. 499, 507 (1983) (“the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching.”).

136. *See id.*; *Chapman v. California*, 386 U.S. 18, 24 (1967) (The harmless error standard requires “the beneficiary of a constitutional error [to] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”).

137. Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, And Due Process: There’s More To Due Process Than The Bottom Line*, 88 COLUM. L. REV. 1298, 1302 (1988).

138. *Chapman*, 386 U.S. at 22.

setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.”¹³⁹ In the Court’s attempt to balance the possibility of yielding unfair and mischievous results with preserving convictions despite minuscule errors, the harmless error doctrine has become a burden to obtaining justice in the face of unethical prosecutors. In practice, this allows appellate courts to affirm a conviction, even when there was blatant prosecutorial misconduct, as long as there was evidence supporting the defendant’s guilt.¹⁴⁰ In applying the harmless error doctrine where prosecutorial misconduct is exposed causes some scholars to argue that the Supreme Court has forgotten that “prosecutorial misconduct is an important issue for us as a society, regardless of the guilt or innocence of the criminal defendants involved in the individual cases.”¹⁴¹

Thus, the harmless error doctrine encourages prosecutors to weigh their unethical conduct against the evidence in a trial to predict whether an appellate court will find their action harmless and affirm the conviction anyway.¹⁴² Prosecutors are essentially able to secure convictions, by any means necessary, when appellate courts refuse to reverse convictions obtained under ill-pretenses due to the “harmlessness” of their conduct. “Such rulings inherently minimize the problem of prosecutorial misconduct and error, effectively signaling to prosecutors that error or misconduct is acceptable—completely disregarding that an ethical violation has likely occurred—as long as it would not have altered the case’s result.”¹⁴³ Thus, the harmless error doctrine “seriously undermines deterrence of misconduct.”¹⁴⁴

Although reviewing courts express disapproval with prosecutorial misconduct and unethical practices, they often still affirm the conviction without any focus on the prosecutor’s ill-motives.¹⁴⁵ Under the infamous “*Brady* rule” as established by the Supreme Court in *Brady*

139. *Id.*

140. DAVIS, *supra* note 50, at 127.

141. Ridolfi, *supra* note 53, at 4.

142. Morey, *supra* note 135, at 631; *See also* Vilija Bilaisis, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457, 468 (1983) (“Prosecutorial errors often occur because the prosecutor is trying unconditionally to secure a conviction.”).

143. *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson*, THE INNOCENCE PROJECT 16 (2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf.

144. Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L. J. 97, 1509, 1515 (2009).

145. Bilaisis, *supra* note 142, at 468; *see also* Angela Davis, *Prosecutors Who Intentionally Break the Law*, 1 AM. UNIV. CRIM. LAW BRIEF 16, 17 (2006) (“In hundreds of additional cases,

v. Maryland, “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.*”¹⁴⁶ The Court’s refusal to consider a prosecutor’s intent when making errors in criminal proceedings also encourages improper conduct to continue, despite admonitions for attorney misconduct by the courts.¹⁴⁷ While some propose that it is the defendant and his attorney’s job to uncover evidence or highlight questionable conduct by the prosecutor, such an assertion does not address the underlying issue. The true fault lies where prosecutors with knowledge of a defendant’s innocence—with or without the presence of evidence that the defendant might “discover” or conduct the defense could “expose”—zealously prosecute to obtain convictions of the innocent while lying and concealing the very evidence they are insisting that the defendant should provide.

The power of the American prosecutor cannot be overstated, as their actions, at every stage of a case, can impact a defendant’s ability to receive a just trial. However, courts often overlook unethical behavior of prosecutors if it can be justified under the harmless error standard. The California Commission on the Fair Administration of Justice reported that of 444 California state court convictions where prosecutorial misconduct was found, 390 (or 88%) were affirmed on appeal because the “misconduct was harmless error.”¹⁴⁸ Only fifty-four of the 444 cases resulted in reversal of the conviction.¹⁴⁹ Following, pursuant to a California statute, there should have been a report to the California State Bar in each of the fifty-four cases in which prosecutorial misconduct resulted in a reversal. However, Chief Trial Counsel Scott Drexel of the California State Bar found that after searching for reports concerning the fifty-four reversals, not a single report of misconduct to the state bar was found.¹⁵⁰ From 1999 to 2007, the Northern California Innocence Project conducted a comprehensive analysis of “publicly available cases of prosecutorial miscon-

judges believed that the prosecutorial behavior was inappropriate, but affirmed the convictions under the “harmless error” doctrine.”).

146. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (emphasis added). *Brady* is the leading case on prosecutors’ obligations to turn over exculpatory evidence to the defendant.

147. *Bilaisis*, *supra* note 148, at 469.

148. CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE FINAL REPORT 71–72 (2008), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs>.

149. *Id.*

150. *Id.* at 71.

duct in California,” finding 707 cases “in which courts explicitly found that prosecutors committed misconduct.”¹⁵¹ Of the 707 cases, in 548 of them, the courts nevertheless “upheld the convictions, ruling that the misconduct was harmless” and in only 159 cases was the misconduct found to be “harmful.”¹⁵²

The Center for Public Integrity reported that in 11,452 cases, from across all fifty states, where prosecutorial misconduct was alleged, in 2,012 of them, “appellate court judges reversed or remanded indictments, convictions or sentences due, in whole or in part, to prosecutorial misconduct.”¹⁵³ The Center further reported that in “thousands” of cases, where judges found the prosecutorial behavior “inappropriate,” they allowed the trial to continue or upheld the conviction because the misconduct was a “harmless error.”¹⁵⁴ In some cases, even if convictions are overturned, they are not dismissed with prejudice, thus allowing the defendant to be tried again by the same prosecutor.¹⁵⁵ “Having a case reversed on appeal may be perceived as a sanction for prosecutors because the state must re-try the case or lose the conviction, but many argue that it does little to effectively deter misconduct.”¹⁵⁶ In reality, reversals punish the criminal justice system instead because substantial resources have to be used to retry

151. KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 2 (2010), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs>. The Northern California Innocence Project’s study included reviewing “more than 4,000 state and federal appellate rulings, as well as scores of media reports and trial court decisions, covering the period 1997 through 2009 . . . The [] 707 are just the cases identified in review of appellate cases and a handful of others found through media searches and other means.” *Id.* at 2–3.

152. *Id.* at 3.

153. METHODOLOGY, THE TEAM FOR HARMFUL ERROR 4, THE CENTER FOR PUBLIC INTEGRITY (June 26, 2003, 12:00 AM), <https://www.publicintegrity.org/2003/06/26/5530/methodology-team-harmful-error>.

154. See STEVE WEINBURG, *Breaking the rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, THE CENTER FOR PUBLIC INTEGRITY (June 26, 2003, 12:00 AM), <https://www.publicintegrity.org/2003/06/26/5517/breaking-rules> (“In the majority of cases, the allegation of misconduct was ruled harmless error or was not addressed by the appellate judges, and the conviction stood.”).

155. See generally *e.g.*, THE TRIALS OF DARRYL HUNT (HBO 2006). Darryl Hunt, who was wrongfully convicted for rape and murder in 1985, is a perfect example of how prosecutors who obtain convictions based on unlawful evidence and other misconduct, are allowed to retry the same case, even after their misconduct is exposed, even using the same evidence! *Darryl Hunt*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/darryl-hunt/>. At 19 years old, Darryl Hunt was arrested, charged, and convicted of a 1984 North Carolina murder he did not commit. Although DNA results proved his innocence in 1994, it took another 10 years of legal appeals to exonerate him in 2004, only after he was retried and convicted twice. *Id.*

156. *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson*, THE INNOCENCE PROJECT 16 (Mar. 2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf.

cases, also pushing court calendars back for weeks. As result, judges may be reluctant to grant mistrials or dismissals due to misconduct,¹⁵⁷ making a judge's ability to find misconduct a "harmless error" extremely attractive because the convenience of resolving a case in its first instance will likely outweigh any interest in conducting an entirely new trial.

Vialja Bilaisis, a leading expert in criminology and author of *Harmless Error: Abettor of Courtroom Misconduct*, proposes doing away with the harmless error rule in its entirety, and substituting it with automatic reversals where deliberate violation of ethics rules are revealed.¹⁵⁸ Bilaisis asserts that affirming convictions where prosecutorial misconduct is exposed increases the likelihood of future misconduct.

The affirmance of convictions obtained in violation of these rules discourages adherence to the rules. This lack of incentive for lawful behavior gives rise to repeated violations resulting in a systematic erosion of justice in the form of a high incidence of non-trivial errors. An automatic reversal standard for these errors would motivate prosecutors and trial judges to guard against such errors.¹⁵⁹

While Bilaisis' recommendation has gained increased support since 1983, one can be assured that the Supreme Court will not overturn the concrete jurisprudence that preserves prosecutors' limitless power. There is, however, a direct way to effectively address prosecutorial misconduct stemming from evidentiary violations, but it also requires unlikely action from the Supreme Court: amending Federal Rule of Criminal Procedure 16.¹⁶⁰

C. Silent Where It Matters: Unlikely Amendment Of Federal Rule Of Criminal Procedure 16

Amending Federal Rule of Criminal Procedure 16, which governs prosecutors' evidentiary disclosure requirements, to include the re-

157. *See id.* ("reversals for misconduct punish the criminal justice system but not the individual who is causing the problem. Because of that, judges are often reluctant to find misconduct even though they might see it and would want it correctly addressed."); *see also* SIDNEY POWELL, LICENSED TO LIE: EXPOSING CORRUPTION IN THE DEPARTMENT OF JUSTICE 54 (2014) ("Judges are loath to overturn criminal convictions" especially those that are high-profile).

158. Bilaisis, *supra* note 142, at 459.

159. *Id.* at 470.

160. "The Supreme Court considers the proposals and, if it concurs, officially promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules." *How the Rulemaking Process Works*, UNITED STATES COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works>.

quirements of *Brady v. Maryland* and its progeny would necessitate compliance by prosecutors, or else, they could be held in contempt of court or sanctioned for violating a rule of criminal procedure. Rule 16 currently does not “require the government to provide exculpatory and impeachment evidence to the defendant.”¹⁶¹ Although many jurisdictions have adopted their own local rules requiring adherence to *Brady* and increased discovery production requirements by the government, a federal discovery rule would create a uniform standard of compliance, thus, improving the integrity of the criminal justice system as a whole when every jurisdiction adheres to the same rules.¹⁶² This proposed amendment would accomplish four major goals, as describe by Judge Emmet G. Sullivan of the United States District Court for the District of Columbia: “(1) help to avoid unlawful convictions and unlawful sentencings; (2) be judicially enforceable; (3) help to ensure that a defendant’s waiver of the right to trial is both knowing and voluntary; and (4) bring more consistency to compliance with disclosure obligations in federal prosecutions nationwide.”¹⁶³

Unfortunately, efforts to amend Rule 16 have been unsuccessful since 2003.¹⁶⁴ The Advisory Committee on the Rules of Criminal Procedure and the Department of Justice (DOJ) have consistently resisted amending Rule 16, citing a lack of necessity in the need for a changed rule and highlighting the DOJ’s “initiatives aimed at improving prosecutors’ compliance with the their discovery obligations.”¹⁶⁵ Asserting that *Brady* and current DOJ initiatives are adequate in addressing disclosure concerns on behalf of prosecutors, ignores the numerous exonerations that are due to the discovery of exculpatory evidence after the government’s failure to turn said evidence over to the defense.¹⁶⁶ Thus, considering the lack of support from the Advi-

161. Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138, 139 (2016).

162. *See id.* (“Some of the ninety-four district courts nationwide have taken action on their own and have adopted local rules and/or standing orders setting forth the disclosure requirements for prosecutors practicing before those courts.”).

163. *Id.* at 150.

164. *See id.* at 141–47 (“There have been concerted efforts to amend the federal rules to incorporate *Brady*’s disclosure requirements, but to date they have not resulted in an amendment to Rule 16.”).

165. *See id.* 145–46 (“[T]he Committee stated that it ‘was not convinced that the problem is so severe as to warrant a rule change when existing Supreme Court authority on a prosecutor’s disclosure obligations is clear and for which substantial sanctions are available for non-compliance.’”).

166. *See* Mark Godsey, *For the First Time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man*, HUFFINGTON POST (Nov. 8, 2013, 4:12 PM), https://www.huffingtonpost.com/mark-godsey/for-the-first-time-ever-a_b_4221000.html (“government

sory Committee and DOJ, which is necessary to draft a proposed rule, it is seemingly unlikely that a proposed rule will reach the Judicial Conference. The Judicial Conference “recommends changes to the Supreme Court. The Court considers the proposals and, if it concurs, officially promulgates the revised rules.”¹⁶⁷ Until the conflicts are resolved that currently prevent an amendment of Rule 16, it seems as if this means of addressing prosecutorial misconduct is also foreclosed.

Alongside the inability to draft a federal discovery rule, the Supreme Court’s failure to address prosecutorial misconduct seems unlikely to change. Knowing this, can we depend on state bars to address the epidemic by holding the attorneys they admit to practice in their jurisdictions accountable?

IV. STATES’ CURRENT ROLE IN ADDRESSING PROSECUTORIAL MISCONDUCT

“State judges are supposed to refer errant lawyers, including prosecutors, to the state bar for discipline, but they rarely do[.]”¹⁶⁸ Some believe that fear of backlash from a state judge’s potential voters cause them to be less likely to take the forefront of addressing prosecutorial misconduct.¹⁶⁹ The reluctance of state judges to address prosecutorial misconduct head-on leaves discipline from state bars virtually non-existent. Each state bar has a disciplinary system that is supposed to enforce policies and local standards governing attorneys’ professional conduct to ensure compliance. In California, for example, citizens can submit complaints concerning attorneys’ conduct and the State Bar’s prosecution office and Office of Chief Trial Counsel investigates the complaints.¹⁷⁰ During an investigation, attorneys whose conduct has been reported may receive a letter from the State Bar requesting an explanation for their conduct.¹⁷¹ Next, the Office of Chief Trial Counsel follows a three-step procedure in evaluating the complaint and deciding whether they wish to prosecute the attorney

misconduct—including disclosure breaches known as Brady violations—occurs so frequently that it has become one of the chief causes of wrongful conviction”).

167. *How the Rulemaking Process Works*, UNITED STATES COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works>.

168. Maura Dolan, *U.S. Judges See ‘Epidemic’ Of Prosecutorial Misconduct In State*, LA TIMES (Jan. 31, 2015, 7:20 PM), <http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html>.

169. *Id.*

170. David Cameron Carr, *State Bar Discipline: What the New Lawyer Needs to Know*, SAN DIEGO BAR ASSOCIATION (May 2017), <https://www.sdcbba.org/index.cfm?pg=FTR-May-2017-2>.

171. *Id.*

or not. “In most cases the answer is ‘no.’”¹⁷² If the Office of Chief Trial Counsel does decide to prosecute the attorney complained of, the case will be tried in the State Bar Court, which is the adjudication arm of the California State Bar.

Most states have a disciplinary system for attorneys that mirrors California’s, where complaints are received through a central intake office and the determination is made about the viability of the claim. “In most jurisdictions, the majority of complaints are dismissed at this [first] stage.”¹⁷³ Thus, prosecutors are unlikely to face reprimand from their state bars, even when their misconduct may have contributed to a wrongful. In fact, Cydney Batchelor, a State Bar of California prosecutor, offers comfort for attorneys receiving disciplinary complaints: “I want to tell all of you that I know for a fact that if you do incur professional discipline—at any level—you will survive it and can go on to prosper.”¹⁷⁴ Batchelor further explains that lawyers should not allow disciplinary complaints to make them feel so ashamed that it destroys them, rather, she provides encouragement: “Remember that we are not defined by the worst thing that we have ever done. In the words of one of my personal heroes, Maya Angelou, ‘When we know better, we do better.’ Take whatever discipline you may receive as a learning opportunity, and then put it behind you.”¹⁷⁵

Batchelor’s advice has proven to be true, as studies show a lack of discipline for prosecutors accused of misconduct and reported to the state bar. In a 2010 study conducted by the Northern California Innocence Project, spanning 13 years, reported that of 4,000 federal and state criminal cases in California where defense raised prosecutorial misconduct as an issue on appeal, the California State Bar only took disciplinary action in six.¹⁷⁶ The study’s results revealed that “those empowered to address the problem—California state and federal

172. *See id.* (“A very small percentage of California lawyers are disciplined.”). In 2015, the California State Bar received 15,796 complaints concerning attorney conduct and as result, 485 California attorneys were suspended or disbarred. *Id.*

173. *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson*, THE INNOCENCE PROJECT 15 (Mar. 2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf.

174. Cydney Batchelor, *Disciplinary Actions: When Bad Things Happen to Good Lawyers*, AMERICAN BAR ASSOCIATION 50 (Oct./Nov. 2006), <https://www.jstor.org/stable/pdf/23673299.pdf?refreqid=excelsior%3Ae3a612483776f5ce26d812649f481159>.

175. *Id.*

176. Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009*, NORTHERN CALIFORNIA INNOCENCE PROJECT 12 (Oct. 1, 2010), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1001&context=ncippubs>.

courts, prosecutors, and the California State Bar—repeatedly fail to take meaningful action.”¹⁷⁷ In fact, only one percent of the prosecutors found to have participated in prosecutorial misconduct were publicly disciplined by the State Bar.¹⁷⁸ A 2010 study by the Veritas Initiative from the Santa Clara School of Law, reviewed 10 years of prosecutorial misconduct in California and found that “courts fail to report prosecutorial misconduct (despite having a statutory obligation to do so), prosecutors deny that it occurred, and the California State Bar almost never disciplines it.”¹⁷⁹ In 2013, *ProPublica* conducted an analysis of over ten years’ worth of state and federal court rulings in the state of New York, finding “more than two dozen instances in which judges explicitly concluded that city prosecutors had committed harmful misconduct.”

In each instance, these abuses were sufficient to prompt courts to throw out convictions. Yet the same appellate courts did not routinely refer prosecutors for investigation by the state disciplinary committees charged with policing lawyers. Disciplinary committees, an arm of the appellate courts, almost never took serious action against prosecutors. None of the prosecutors who oversaw cases reversed based on misconduct were disbarred, suspended, or censured except for [one]. . . In fact, personnel records obtained by *ProPublica*, show several received promotions and raises soon after courts cited them for abuses.¹⁸⁰

These studies show, overall, that prosecutors are unlikely to be held accountable for their misconduct because state bars fail to reprimand them.¹⁸¹

The power of the prosecutor is increasingly dangerous because very few cases of misconduct result in disciplinary sanctions, and those that do, merely amount to a slap on the wrist.¹⁸² When innocent peo-

177. *Id.* at 3.

178. *Id.*

179. *Id.* at 12.

180. See Joaquin Sapien, *ProPublica* & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, *PROPUBLICA* (Apr. 3, 2013, 5:30 AM), <https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody> (“The innocent can wind up in prison. The guilty can be set free. But New York City prosecutors who withhold evidence, tolerate false testimony or commit other abuses almost never see their careers damaged.”).

181. See Christopher Zoukis, *Prosecutorial Misconduct: Taking the Justice Out of Criminal Justice*, *PRISON LEGAL NEWS* (Nov. 8, 2014), <https://www.prisonlegalnews.org/news/2014/nov/8/prosecutorial-misconduct-taking-justice-out-criminal-justice/> (“Overall, the consensus across these studies is that very few cases of prosecutorial misconduct result in disciplinary sanctions—and most sanctions amount to a proverbial slap on the wrist.”).

182. *Id.*

ple can be zealously prosecuted and wrongfully convicted by knowing prosecutors, allowing those same prosecutors to be immune from criminal or civil liability and left unscathed by state bars “emboldens” those prosecutors who lack respect for their duty to pursue justice.¹⁸³ Moreover, the reluctance of state bars to reprimand attorneys causes some judges to be just as reluctant to report attorney misconduct when faced with unethical attorneys in their courtrooms.¹⁸⁴ As result, the discretion of prosecutors goes truly unfettered. “Prosecutors need to know that someone is watching over their shoulders—someone who doesn’t share their values and eat lunch in the same cafeteria.”¹⁸⁵ Meaning, the magnitude of power and responsibility bestowed upon prosecutors requires more than blind trust, but instead requires effective oversight, or else, one can only anticipate abuse. This harsh reality has compelled some states to take matters into their own hands to stop prosecutorial overreach.

A. State-Specific Initiatives Combating Official Misconduct

With a lack of binding ethical standards for prosecutors to adhere to, and state bars reluctance to discipline attorneys, some states have attempted to address prosecutorial misconduct using their own initiatives. For example, Philadelphia launched an internal investigation into their District Attorney’s Office for misconduct, after the 2016 exonerated of Anthony Wright, who served 25 years for a rape and murder that DNA evidence proved he did not commit.¹⁸⁶ Due to Wright subsequently filing a civil law suit against the city of Philadelphia and police officers involved in his prosecution, 10,000 pages of documents were discovered that “may have proved [Andrew] Swain-

183. See *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson*, THE INNOCENCE PROJECT 4, (Mar. 2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf (“Unfortunately, today’s ruling [in *Connick v. Thompson*] only threatens to further embolden those prosecutors who are willing to abandon their responsibility to seek justice in their zeal to win convictions.”).

184. See *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson*, THE INNOCENCE PROJECT 17, (Mar. 2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf (“If state bar authorities are hesitant to bring disciplinary actions against prosecutors, it is not surprising that judges are equally reluctant.”).

185. See Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., at xxxii (2015), <https://georgetownlawjournal.org/assets/kozinski-arcp-preface-9a990f08f3f006558eaa03ccc440d3078f5899b3426ec47aaedb89c606caae7.pdf>.

186. Robert Moran, *Inmate Exonerated After 25 Years in Prison Sues Philadelphia and the Police Department*, PHILADELPHIA INQUIRER (Sept. 21, 2016), http://www.philly.com/philly/news/20160922_Inmate_exonerated_after_25_years_in_prison_sues_Philadelphia_and_the_Police_Department.html.

son's and [Willie] Veasy's innocence of crimes" that they have currently served over 20 years for.¹⁸⁷ The domino-like effect of Wright's exoneration led Philadelphia District Attorney, Larry Krasner, to enlist Texas-attorney, Patricia Cummings, to revive the Conviction Review Unit, a unit dedicated to reviewing problematic criminal cases and accusations of prosecutorial misconduct dating back to the 1990s.¹⁸⁸ Krasner appointed Cummings in hopes of discovering and addressing longstanding misconduct throughout Philadelphia's District Attorney's office, but also has launched other initiatives "to end mass incarceration and bring balance back to sentencing."¹⁸⁹ Similarly, organizations like the American Civil Liberties Union in various states have attempted to tackle misconduct in the criminal justice system by focusing on first responders—the police.¹⁹⁰

Other states have taken innovative approaches to exposing and addressing misconduct in the courtroom. In New York, court watchers have been enlisted to "watch" prosecutors in everyday proceedings to ensure compliance with certain practices.¹⁹¹ After accusations of requesting cash bails disproportionately for minority defendants, the district attorneys in Manhattan and Brooklyn promised their offices would no longer request cash bails to be set for misdemeanor offenses.¹⁹² Court watchers are attempting to hold prosecutors account-

187. Chris Palmer, *Could One Philly Man's Exoneration Prompt Krasner to Examine Other Decades-Old Murders?*, PHILADELPHIA INQUIRER (Feb. 16, 2018, 10:41 AM), <http://www.philly.com/philly/news/crime/conviction-review-philly-da-krasner-anthony-wright-patricia-cummings-20180216.html>

188. *Id.*

189. *Philadelphia District Attorney Advances Criminal Justice Reforms* (Mar. 19, 2018), EQUAL JUSTICE INITIATIVE, <https://eji.org/news/philadelphia-district-attorney-advances-criminal-justice-reforms>.

190. See, e.g., MARYLAND ACLU, *Police Practices*, <https://www.aclu-md.org/en/issues/criminal-justice/police-practices>; Dillon Nettlets, *We Need to Address Police Brutality in Alabama* (Dec. 17, 2018), ACLU, <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/we-need-address-police-brutality-alabama>. In some states, however, one cannot expect police officers that lack adequate training or understanding of the law, to be the guardians of justice in courtrooms when they are not required to have even a proficient grasp of basic legal concepts before entering the field. See, e.g., Kevin Rector & Justin Fenton, *Baltimore Police Recruits Set to Hit the Streets with Poor Understanding of Law, Academy's Legal Instructor Says*, THE BALTIMORE SUN (Feb. 2, 2018, 6:20 PM), http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-recruits-law-understanding-20180202-story.html?utm_source=in+Justice+Today+Newsletter&utm_campaign=4979442776-&utm_medium=email&utm_term=0_0331e33901-4979442776-58356943 ("We're giving them a badge and a gun tomorrow, the right to take someone's liberty, ultimately the right to take someone's life if it calls for it, and they have not demonstrated they can meet basic constitutional and legal standards.")

191. Beth Schwartzapfel, *[Watch] the Prosecutors*, THE MARSHALL PROJECT (Feb. 26, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/02/26/the-prosecutors>.

192. *Id.*

able by sitting in court to determine which prosecutors are not adhering to their offices' policy, otherwise, in New York, the only information available to the public concerning pre-trial procedure is whether a judge sets bail or not. Thus, being present in the courtroom is the only way the public will know whether prosecutors are acting within an ethical scope.¹⁹³

Some states, like California, have resorted to enacting criminal sanctions for prosecutorial misconduct. In 2016, California Governor Jerry Brown signed a bill into law making it a felony for prosecutors to falsify evidence, the first of its kind.¹⁹⁴ The law comes after California Assembly members expressed their disdain for rampant misconduct in the California criminal justice system. Assemblywoman Patty Lopez stated, "Those individuals who are willing to win a case at all costs, who abuse their power as officers of the court, must answer for their actions."¹⁹⁵ California's law could serve as a model for other states who have had enough of the unreviewable abuse of discretion on the part of prosecutors, and the Supreme Court's turning of the other cheek, by criminally prosecuting them for misconduct.¹⁹⁶ While prosecuting prosecutors for misconduct is a solution often proffered to address prosecutorial misconduct, it is an approach unlikely of widespread support or effectiveness, partly due to the difficulty in proving "mens rea" in criminal prosecutions.¹⁹⁷

193. *Id.* ("The only way to determine other information, such as racial disparities in what bail DAs request or how prosecutors influence a judge's decisions, is to sit there . . .").

194. The California law reads in full:

A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

Cal. Assemb. B. No. 1909 (2016), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1909.

195. Tony Saavedra, *New Law: Prosecutors Face Felonies if They Falsify or Withhold Evidence*, THE ORANGE COUNTY REG. (Oct. 2, 2017, 7:35 AM), <https://www.ocregister.com/2016/10/02/new-law-prosecutors-face-felonies-if-they-falsify-or-withhold-evidence/>.

196. See Gretel Kauffman, *Is California's New Law a Model for Curbing Prosecutorial Misconduct*, CS MONITOR (Oct. 5, 2016) <https://www.csmonitor.com/USA/Justice/2016/1005/Is-California-s-new-law-a-model-for-curbing-prosecutorial-misconduct> ("Prosecutors in California who intentionally withhold or tamper with evidence may now face felony charges as a result of a new law.").

197. Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U.L. REV. 623, 652 (2017).

The strides taken by states like California, Texas, New York, and Pennsylvania, to combat prosecutorial misconduct, although commendable, I submit, are not enough to eliminate misconduct in the criminal justice system. No matter the state-led effort, because initiatives will rarely result in attorney disbarment and courts will continue to avoid holding prosecutors accountable based on various legal doctrines, prosecutors realistically have nothing to fear. Furthermore, states are also at an extreme disadvantage in ridding their courthouses of prosecutorial misconduct due to the low voter engagement in local elections. With over 2,400 elected prosecutors across the country, incumbents who engage in unethical practices are repeatedly re-elected.¹⁹⁸ Those seeking to convince prosecutors to pursue reforms, or the community to elect new reform-minded prosecutors, have historically had a hard time communicating just how important local elections are.¹⁹⁹

Given these realities, although some states are trying to combat prosecutorial misconduct on their own, due to the current approach of most state bars, states are unlikely to meaningfully contribute to eradicating prosecutorial misconduct. The fact still remains that prosecutors know: if they act unethically, they will get away with it. Even in the face of increased reports of exonerations and willful and intentional misconduct on the part of its judicial officers, it seems as if strengthening disciplinary action is of no interest for most state bars. Thus, we are in dire need of an alternate approach to addressing prosecutorial misconduct. Knowing this, we must enlist the help of federal judges—our last resort.

V. OUR LAST RESORT: FEDERAL JUDGES

While some states have employed initiatives attempting to combat prosecutorial misconduct, due to the detrimental impact abuse by prosecutors can have on a defendant, misconduct is most appropriately cured in a court forum—before a conviction is obtained. “Only judges can put a stop to it,” explained former Ninth Circuit Court of Appeals Chief Judge, Alex Kozinski, when describing the epidemic of

198. KATHERINE K. MOY ET AL., STANFORD CRIMINAL JUSTICE CENTER, RATE MY DISTRICT ATTORNEY: TOWARD A SCORECARD FOR PROSECUTORS’ OFFICES, 5 (2018).

199. *Local Voter Drop-Off*, KNIGHT FOUNDATION, <https://knightfoundation.org/features/votelocal/>. See also Mike Maciag, *Millennials Let Their Grandparents Decide Local Elections*, GOVERNING.COM (Jan. 2017), <http://www.governing.com/topics/elections/gov-voter-turnout-generations-millennials.html> (“Disparities in turnout—already vast in presidential and congressional elections—are even greater in contests that decide who runs the nation’s cities.”).

Brady violations across the country.²⁰⁰ Judge Kozinski shares my exact sentiments. The fight against prosecutorial misconduct is best fought where it directly manifests: the courtroom. This section of my Note focuses on the role I propose federal judges should take in combatting prosecutorial misconduct.²⁰¹

Judge Gloria Navarro dismissed the federal case against Cliven Bundy with prejudice, prohibiting the Department of Justice from ever retrying the case, citing discovery violations under *Brady*. Judge Navarro's decision to dismiss the case against the Bundy's after exposing the prosecution's flawed conduct is a prime example of how judges can use their discretion to combat prosecutorial misconduct effectively, specifically federal judges. Federal judges are not elected. Instead, they are nominated by the President and confirmed by the Senate. Judge George Levi Russell III of the United States District Court of Maryland, who was appointed by President Barack Obama in 2011, describes the vetting and interview process following his application for federal appointment, as "intense." Requiring a virtually "hiccup free" personal background, prohibiting any conduct over his lifetime that would reflect poorly on the President of the United States as his judicial appointee.²⁰²

The thorough vetting process of all potential federal judges is warranted, as they are appointed for life, or until they die or resign, creating less room for political influence that state judges may face, and more room to employ practices in their courtrooms that honor their duty to uphold the law.²⁰³ The lifetime appointment and absence of political influence allows federal judges to tackle prosecutorial misconduct without fearing harm to any odds of re-election; but first, judges must abandon the reluctance to even suspect prosecutors of wrongdoing.²⁰⁴ As empirical evidence proves, not all

200. See *U.S. v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting).

201. This section focuses on federal judges, specifically, because state judges are elected, producing, what I consider, an "easy fix" to prosecutorial misconduct in state courts if the constituency merely votes for judges that promise to address prosecutorial misconduct using similar means as discussed in this section.

202. Interview with Judge George Russell, United States District Court for the District of Maryland (June 2017). See also *George L. Russell, III, District Judge*, US DISTRICT COURT OF MARYLAND, <http://www.mdd.uscourts.gov/george-l-russell-iii-district-judge> ("The Senate confirmed his nomination on May 14, 2012 and Judge Russell took the oath of office on May 24, 2012."). I also served as Judge Russell's judicial intern during the summer of 2017.

203. *Comparing Federal & State Courts*, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts>.

204. See Hon. Alex Kozinski, Preface, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. at xxxv (2015), ("[J]udges seem reluctant to even suspect prosecutors of improper behav-

prosecutors adhere to their ethical duties, and many are failing to do so at the cost of imprisoning innocent men and women. Thus, we need judges to take a realistic approach to courtroom policing and stand up against the individual attorneys disregard their ethical duties as officers of the court, like Judge Emmet G. Sullivan.

A. Leading By Example: Judge Emmet Sullivan

In an interview with Judge Emmet Sullivan of the United States District Court for the District of Columbia, he revealed his passion for justice and accountability in his courtroom. Judge Sullivan has taken a hard stand against prosecutorial misconduct and exemplifies zero tolerance for such conduct.²⁰⁵ Stemming from the 2008 prosecution of then-Alaska Senator, Theodore Stevens, egregious prosecutorial misconduct on the federal level was exposed and gained national attention after Judge Sullivan publicly shared his disappointment for the “systematic concealment of evidence” by prosecutors that would have proven Senator Stevens’s innocence. “No one in the Department of Justice . . . gave any thought to the toll their tactics and decision took on others—until [] Judge Sullivan turned the tables.”²⁰⁶ His public disdain for the conduct of prosecutors on Stevens’ case caused him to launch an internal investigation into the DOJ as he considered holding the prosecutors criminally liable for their actions.²⁰⁷

As it appeared to me that prosecutorial misconduct had tainted the proceedings in my courtroom, where I have sworn, for over thirty

ior, as if they were somehow beyond suspicion.”). Some judges also share implicit biases for both prosecutors, as well as the police. Howard University School of Law professor, Lenese Herbert, describes the biases she witnessed some judges display, favoring police, in court:

As an eager young Assistant United States Attorney who “papered” countless complaints, conducted numerous hearings, and tried a substantial number of cases . . . [b]efore court appearances, I would often question police officers about [characterizing areas as “high crime”]. In court, however, judges rarely challenged the proffered label or required its definition. Judges never asked officers for data to support assertions that an area was high-crime. Even defense counsel seldom explored what this classification meant, the bases for it, or its relevance. Nor did counsel challenge the way this label simultaneously tarred clients and prompted judges—who happily deferred to the officers’ superior knowledge of the jurisdiction’s “mean streets”—to absolve the police for their use of questionable law enforcement tactics.

Lenese C. Herbert, *Can’t You See What I’m Saying? Making Expressive Conduct A Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL’Y 135, 135 (2002).

205. Interview with Judge Sullivan, United States District Court for the District of Columbia (Mar. 21, 2018). “Judge Emmet Sullivan is a judge who “believes that all lawyers should practice by the code—especially federal prosecutors whose only real job [is] to seek justice in the highest sense.” POWELL, *supra* note 157, at 192.

206. POWELL, *supra* note 157, at 10.

207. Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138, 140 (2016).

years on the bench, that every defendant will receive a fair trial, I appointed a highly regarded lawyer and former Assistant United States Attorney, Henry F. Schuelke, III, to investigate what went wrong in the investigation and prosecution of the Stevens case, and to recommend whether there was a basis to prosecute the prosecutors for criminal contempt of court.²⁰⁸

Tragically, during Schuelke's investigation, one of the prosecutors under investigation committed suicide.²⁰⁹ Ultimately, criminal charges were never brought against any of the subject prosecutors in Stevens' case because the independent investigator ruled that "without disobedience of a 'clear and unequivocal' order, the prosecutors could not be charged with criminal contempt."²¹⁰ Mr. Schuelke produced a 500-page report detailing the specific actions of prosecutors on Stevens' case that led to his wrongful conviction, following, the government unsuccessfully requested that the report be sealed from the public.²¹¹

Judge Sullivan produced a 55-page memorandum opinion in response to the government's motions to permanently seal Mr. Schuelke's report, chastising prosecutors for their egregious misconduct during Stevens' prosecution:

[A]ttorneys repeatedly represented to the Court and to the public that there was no wrongdoing and no cause to question the integrity of either the indictment or the verdict. Only when faced with uncontroverted evidence that the attorneys had committed *Brady* viola-

208. *Id.*

209. *See In re Special Proceedings*, 842 F. Supp. 2d 232, 236–37 n.4 (D.D.C. 2012) ("Nicolas Marsh died on September 26, 2010, while Mr. Schuelke's investigation was ongoing."); *see also* Charlie Savage, *Stevens Case Prosecutor Kills Himself*, N.Y. TIMES (Sept. 27, 2010), <https://www.nytimes.com/2010/09/28/us/politics/28stevens.html> ("A Justice Department lawyer involved with the botched corruption trial of former Senator Ted Stevens committed suicide over the weekend."); POWELL, *supra* note 157, at 8 ("Nick came to realize that being a target of a criminal investigation felt very different from running one [and his] gruesome suicide . . . sent another shock wave of distress through the department . . .").

210. Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138, 141. *See also In re Spec. Proceedings*, 842 F. Supp. 2d 232, 244 (D.D.C. 2012) ("in order to prove criminal contempt beyond a reasonable doubt under 18 U.S.C. § 401(3), the contemnor must disobey an order that is sufficiently 'clear and unequivocal at the time it is issued'"). To date, none of the prosecutors on the Stevens case have faced discipline for their misconduct. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. at xxxii (2015).

211. *See generally In re Spec. Proceedings*, 842 F. Supp. 2d 232, 234 (D.D.C. 2012) ("For the reasons discussed herein, the Court DENIES the motions and ORDERS that Mr. Schuelke . . . file his Report on the public docket.").

tions did the government come before the Court and publicly move to dismiss the indictment and vacate the verdict.²¹²

Following the “corrupted” prosecution of Senator Ted Stevens and the inability to prosecute the participating prosecutors, Judge Sullivan issued a standing *Brady* order in his courtroom that compels the government to comply with the federal disclosure rules under *Brady v. Maryland* and all other applicable law.²¹³ “Entering such an order holds prosecutors personally responsible to the court and will doubtlessly result in far greater compliance,” because failure to do so will subject counsel to criminal contempt of court and possible public reprimand as displayed in the Senator Stevens case.²¹⁴ Judge Sullivan is confident that his standing order is the most effective way to hold prosecutor’s accountable for intentional misconduct related to discovery disclosures.²¹⁵

Often it takes years for a wrongly convicted defendant to discover that exculpatory evidence was withheld. By that time, the statute of limitations for bringing disciplinary or criminal charges against the prosecutor may have already expired. If a *Brady* order is in place, however, the prosecutor can be held in contempt of court or subjected to other judicial sanctions.²¹⁶

Judge Sullivan is not alone in his plight to fight prosecutorial misconduct. In New York, a “groundbreaking rule” issued by Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence Marks, beginning on January 1, 2018, requires trial judges statewide to issue *Brady* orders, like that of Judge Sullivan’s, in all criminal proceedings.²¹⁷ “This is the first rule of its kind in the nation,” and hopefully, federal judges across the country follow suit.²¹⁸ This aggressive ap-

212. *Id.* at 235. Sullivan included in his opinion remarks made by the prosecuting attorneys to the media ensuring the public that they had acted with the upmost integrity in Stevens’ prosecution. *See id.* at 240 (“On the day of the verdict, Mr. Friedrich stood with the trial team outside the courthouse and pronounced to the television cameras that ‘the Department is proud of this team, not only for this trial, but for the investigation that led to it.’”).

213. *See* “Standing Brady Order”, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, http://www.dcd.uscourts.gov/sites/dcd/files/StandingBradyOrder_November2017.pdf (“Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, the government has a continuing obligation to produce all evidence required by the law and the Federal Rules of Criminal Procedure.”).

214. Kozinski, *supra* note 210, at xxxiv.

215. *See* Emmet G. Sullivan, *How New York Courts Are Keeping Prosecutors in Line*, WALL STREET JOURNAL (Nov. 17, 2017, 6:09 PM), <https://www.wsj.com/articles/how-new-york-courts-are-keeping-prosecutors-in-line-1510953911> (“A *Brady* order also ensures that prosecutors who commit intentional misconduct can be held accountable.”).

216. *Id.*

217. *Id.*

218. *Id.*

proach to ensuring compliance with discovery obligations in criminal proceedings is the ultimate safeguard against the most cited form of prosecutorial misconduct—failure to disclose exculpatory evidence—which has led to excessive numbers of wrongful or unlawful convictions.²¹⁹

As discussed in Part II of this Note, the Supreme Court and state bars are of little help in addressing prosecutorial misconduct, leaving federal judges in the perfect position to deal with the problem until either entity decides to adequately address the issue. In the interim, strides like that of Judge Sullivan’s provide adequate protection for defendants facing the unfettered discretion of prosecutors in the midst of daunting criminal charges. Due to the national attention Judge Sullivan’s decision in the Stevens case gained, it procured a dismissal of all charges against Senator Stevens by the Attorney General himself.²²⁰ Thus, Judge Sullivan’s public reprimand of the attorneys not only vindicated Senator Stevens, but also forced the United States DOJ to do their job—pursue justice, not a conviction.²²¹ The resulting events stemming from Sullivan’s decision exemplify just how effective judges’ merely speaking up and out against unethical prosecutors can be in addressing misconduct, as well as preventing its occurrence in the future.²²²

Stevens’ case proves that judges are best equipped to address and remedy the epidemic of prosecutorial misconduct that has festered for

219. See Eugene Volokh, *Judge Kozinski on What Judges Can Do to Improve the Criminal Justice System*, WASH. POST (June 20, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/20/judge-kozinski-on-what-judges-can-do-to-improve-the-criminal-justice-system/?utm_term=.39d413854caa (“Brady and its progeny [] impose important obligations on prosecutors, obligations that are too frequently ignored.”).

220. “It was only the extraordinary persistence and the courageous intervention of District Judge Emmet Sullivan, who made it clear that he was going to dismiss the Stevens case and then ordered an investigation of the government’s misconduct that forced the Justice Department to admit its malfeasance—what else could it do?—and move to vacate the former senator’s conviction.” Kozinski, *supra* note 210, at xxiv. “In truth, and what most people would not realize, Judge Sullivan left [the Attorney General Eric] Holder with no choice whatsoever. The judge was going to dismiss the Stevens case and excoriate the Justice Department if Holder had not dismissed it himself.” SIDNEY POWELL, LICENSED TO LIE: EXPOSING CORRUPTION IN THE DEPARTMENT OF JUSTICE 201 (2014).

221. See *id.* (“There were no circumstances under which any institution pretending to seek justice could proceed with the prosecution.”).

222. See Kozinski, *supra* note 210, at xxxvi (“Naming names and taking prosecutors to task for misbehavior can have magical qualities in assuring compliance with constitutional rights.”). See generally Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U. CAL. DAVIS L. REV. 1059, 1059 (2009) (“The naming of prosecutors will shame bad actors, provide a valuable pedagogical lesson for junior prosecutors, and signal to trial judges that certain prosecutors must be monitored more closely to avoid future misconduct.”).

too long. Stevens' defense counsel, Brenden Sullivan, called Judge Sullivan a "hero" for making the decision to relay to the public just how serious the behavior of prosecutors in Stevens' case was.²²³ Brendon Sullivan explained that if Judge Sullivan would have accepted the word of government prosecutors, as is done often in our courts, the extraordinary misconduct in Senator Steven's case would never have been uncovered, and the trial verdict might have survived appellate review. "Judge Sullivan prevented such a tragic outcome."²²⁴

Judges across the country are using their discretion to fight prosecutorial misconduct like Judge Sullivan. For example, in Suffolk County, New York, State Court Justice, William J. Condon, dismissed the case against Shawn Lawrence due to prosecutors withholding forty-five items of evidence from the defense.²²⁵ Thanks to Judge Condon, Lawrence walked out of court a free man, after six years of imprisonment for a murder he did not commit.²²⁶ Judge Condon described the prosecutorial misconduct in Lawrence's case as "absolutely stunning," and following the judge's public admonishment for the misconduct on the case, the trial prosecutor—Glenn Kurtzrock—was forced to resign due to him "cherry-pick[ing] evidence to withhold from the defense" to obtain Lawrence's conviction.²²⁷ In Texas, a district attorney's failed bid for re-election has been attributed to a judge's public reprimand of his misconduct. Judge Doug Shaver of Waco County, Texas addressed the District Attorney, Abel Reyna's misconduct in open court:

The way you have handled this case is absolutely shameful and misleading to the citizens of this county. So I know the election is tomorrow, and we can't do anything about it up to this point. But you should be ashamed of yourself, and if I could . . . I would put you in custody. But since I can't, you are excused.²²⁸

223. POWELL, *supra* note 220, at 203.

224. *Id.* at 203. *See also id.* at 205–27 for a detailed recount of the April 7, 2009 hearing where Judge Sullivan reprimanded the prosecutors in open court for their behavior.

225. Andrew Smith, *Judge Dismisses Shawn Lawrence's Murder Case Over Misconduct*, NEWSDAY (Feb. 15, 2018, 7:44 PM), <https://www.newsday.com/long-island/suffolk/judge-dismisses-shawn-lawrence-s-murder-case-over-prosecutorial-misconduct-1.16788521>.

226. *Id.* Like most decisions where prosecutorial misconduct is the reason for dismissal, the Suffolk County Supreme Court's opinion is unpublished but available at <https://law.justia.com/cases/new-york/appellate-term-second-department/2017/2017-ny-slip-op-50265-u.html>. *People v. Lawrence*, No. 2012-1968 S CR, slip op. 50265(U) (N.Y. App. Div. 2017).

227. Smith, *supra* note 225.

228. Tommy Witherspoon, *Judge Refuses Twin Peaks Dismissal Motion; Tells DA Reyna He Should Be Ashamed for Campaign Ads*, WACO TRIBUNE-HERALD (Mar. 5, 2018), https://www.wacotrib.com/news/courts_and_trials/judge-refuses-twin-peaks-dismissal-motion-tells-da-reyna-he/article_7aeedf29-5bbd-5349-b561-d38b5374ddd2.html.

Reports suspect that voters were influenced by the prosecutor's exposed poor performance, as Reyna had previously served as the incumbent District Attorney for eight years.²²⁹

The discretion judges have in their courtroom can be used to eradicate misconduct in all forms, not just to enforce compliance with discovery rules, but also to counter poor prosecutorial decisions. In Philadelphia, under a judge's order, prosecutors were compelled to turn over a list of police officers prosecutors avoided putting on the stand in court due to their "wide-range of wrongdoing, including lying, racial bias, and brutality."²³⁰ The list included sixty-six police officers. Twenty-nine of them had misconduct that was problematic to being used as a witness, while the other thirty-seven could testify but under stringent conditions.²³¹ This discretionary, yet appropriate, response to police misconduct in Philadelphia also exemplifies how effective judges can be in ensuring the criminal justice system no longer permits a playground for miscarriages of justice, by merely issuing simple court orders that attorneys must comply with.

229. See Avia Shen, *DA's Loss in Texas Primary Pinned to Prosecutorial Misconduct in Biker Shootout Case*, THE APPEAL (Mar. 21, 2018), <https://theappeal.org/das-loss-in-texas-primary-pinned-to-prosecutorial-misconduct-in-biker-shootout-case-e83ce47e69d/> ("The loss seems connected to Reyna's mishandling of a high-profile Waco biker shootout in 2015.").

230. The Associated Press, *Philly Prosecutors Release List of Problem Officers to Keep Off Stand*, WITF (Mar. 7, 2018, 12:03 PM), <http://www.witf.org/news/2018/03/philly-prosecutors-release-list-of-problem-officers-to-keep-off-stand.php>. Prosecutors across the country are beginning to take a "black list" approach to police accountability. See, e.g., Justin George, *One Way To Deal With Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT (Jan. 17, 2019), https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-black-list-them-some-das-say?ref=HP-2-111&utm_source=the+Marshall+Project+Newsletter&utm_campaign=4b5de53c26-EMAIL_CAMPAIGN_2019_01_23_02_53&utm_medium=email&utm_term=0_5e02cdad9d-4b5de53c26-174456673&fbclid=IWAR03dvz0__qqHL9EVYP714sHCiZbkY1qPu-2n-1gU8cv0xz_MSf_o6n0DU (reporting that prosecutors in Houston, Philadelphia, and Seattle have employed the practice in an effort to "to protect their prosecutors from bringing cases built on faulty evidence").

231. The Associated Press, *Prosecutors Release List of Problem Cops to Keep Off Stand*, FOX NEWS (Mar. 7, 2018), <http://www.foxnews.com/us/2018/03/07/prosecutors-release-list-problem-cops-to-keep-off-stand.html>. In popular Philadelphia rapper, Meek Mill's case, the arresting officer was reported among the list of unreliable police officers that the District Attorney refers to as the "Do Not Call" list for in-court testimony due to their misconduct. The officer, Reginald Graham, also testified in the trial that led to Meek Mill's conviction. Janice Williams, *Meek Mill Prison Update: Rapper's Arresting Officer Named On Philly's 'Do Not Call' List*, NEWSWEEK (Mar. 7, 2018, 1:13 PM), https://www.newsweek.com/meek-mill-prison-arrest-sentence-835264?utm_source=In+Justice+Today+Newsletter&utm_campaign=89af026247-&utm_medium=email&utm_term=0_0331e33901-89af026247-58356943.

CONCLUSION

“A prosecutor does play God.”²³² Due to the immense power of prosecutors, “[i]n the hands of the wrong people, the damage that power can cause is beyond measure.”²³³ Knowing this, proper oversight and accountability is necessary to protect the integrity of our judicial system—and federal judges are exceedingly qualified and obligated to accomplish this because “courts themselves are instruments of law enforcement. They must preserve their own integrity.”²³⁴ This Note does not ask much more of judges beyond what they are already required of by the 4 Canons of the Model Code of Judicial Conduct. Canon 1 states “A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”²³⁵ Canon 2 states “A judge shall perform the duties of judicial office impartially, competently, and diligently.”²³⁶ Canon 3 states “A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.”²³⁷ Canon 4 states “A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”²³⁸ Asking judges to merely play an active role in conducting their courtrooms so that the rights of both plaintiffs and defendants are protected clearly embodies all four of the canons. Thus, I do not submit that judges make sweeping in-court proclamations like that of Judge Sullivan’s to comply with the suggestions of my Note. Instead, simple precautionary or protective measures can do the job as well.

We are all familiar with the notion that “no one is above the law,” and prosecutors who abuse their discretion and fail to uphold their duties should not be an exception. Judges who encounter misconduct by those appearing before them, especially prosecutors who wield great power and have increased ethical responsibilities, should feel empowered to appropriately address such misconduct and hold it up to the light of public scrutiny. After all, who wants to live in a society where our judiciary provides more protection from prosecutorial mis-

232. POWELL, *supra* note 157, at 38.

233. *Id.*

234. Bilaisis, *supra* note 142, at 470.

235. MODEL CODE OF JUDICIAL CONDUCT § 1 (AM. BAR ASS’N 2010).

236. MODEL CODE OF JUDICIAL CONDUCT § 2 (AM. BAR ASS’N 2010).

237. MODEL CODE OF JUDICIAL CONDUCT § 3 (AM. BAR ASS’N 2010).

238. MODEL CODE OF JUDICIAL CONDUCT § 4 (AM. BAR ASS’N 2010).

conduct for Cliven Bundy's cattle, than human beings who could be wrongfully convicted, incarcerated, and killed by the actions of those same prosecutors?

Is There a Doctor in the House?: How Dismantling Barriers to Telemedicine Practice Can Improve Healthcare Access for Rural Residents

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INTRODUCTION

Three months into a six-month mission, an International Space Station crewmember started experiencing knee pain from using resistive exercise training equipment available on board for the astronauts.¹ Treatment with acetaminophen and ibuprofen was unsuccessful and the pain persisted for two days without relief.² To determine the cause of the knee pain, the National Aeronautics and Space Administration (“NASA”) arranged a medical conference between the astronaut in space and a physician on the ground.³ Assisted by NASA specialists, including an orthopedic radiologist not located at the NASA site, crewmembers were given real-time, step-by-step instructions on how to perform a thorough ultrasound examination of the astronaut’s knee.⁴ Using telemedicine technology, NASA specialists on the ground were able to view the ultrasound imaging of the affected area as it was being done, evaluate the downloaded ultrasound images within an hour of the preliminary real-time exam, and receive feedback about the injury from a radiologist specialist located

1. Anil S. Menon, et al., *How NASA Uses Telemedicine to Care for Astronauts in Space*, HARV. BUS. REV., July 6, 2017, <https://hbr.org/2017/07/how-nasa-uses-telemedicine-to-care-for-astronauts-in-space>.

2. *Id.*

3. *Id.*

4. *Id.*

remotely.⁵ As a result, NASA specialists were able to prescribe an effective course of treatment for the knee pain, and the astronaut could resume his normal exercise and complete the mission without further discomfort.⁶

In Lame Deer, Montana, an emergency room nurse placed a call to another nurse located about 600 miles away in Sioux Falls, South Dakota.⁷ A television screen in Montana lit up to reveal an image of the woman in scrubs sitting at a desk in South Dakota.⁸ Using a small web camera, the nurse in South Dakota was able to see a patient lying in bed in an emergency room in Montana.⁹ The Montana nurse needed assistance with diagnosing a patient, so she called the backup specialist for a teleconference.¹⁰ Because the patient in Montana and the astronaut were located remotely from essential medical services, necessary clinical assessments and required medical care would not have been possible without using telemedicine procedures.

Providing medical care remotely by telemedicine can address the severe shortage of physicians predicted to take place by 2030.¹¹ About 44 million Americans live in what is known as Primary Care Shortage Areas (“PCSA”).¹² PCSAs refer to areas where there is a shortage of primary care physicians.¹³ Of those who have limited ac-

5. *Id.*

6. *Id.*

7. Jayme Fraser, *Telemedicine Brings Doctors to Indian Health Hospitals with Recruitment Challenges*, BILLINGS GAZETTE, May 8, 2016, https://billingsgazette.com/news/state-and-regional/montana/telemedicine-brings-doctors-to-indian-health-hospitals-with-recruitment-challenges/article_c4971d8a-70f4-5949-90ce-46f558440133.html; Driving Directions from Lame Deer, Mont., to Sioux Falls, S.D., Google Maps, www.google.com/maps (follow “Directions” hyperlink; then search starting point field for “Lame Deer, MT” and search destination field for “Sioux Falls, SD”).

8. Fraser, *supra* note 7.

9. *Id.*

10. *Id.*

11. See generally ASS’N OF AM. MED. COLLS., THE COMPLEXITIES OF PHYSICIAN SUPPLY AND DEMAND: PROJECTIONS FROM 2016 TO 2030 FINAL REPORT 3–6 (2018), https://aamc-black.global.ssl.fastly.net/production/media/filer_public/85/d7/85d7b689-f417-4ef0-97fb-ecc129836829/aamc_2018_workforce_projections_update_april_11_2018.pdf [hereinafter AAMC REPORT].

12. UNITED HEALTH GRP., ADDRESSING THE NATION’S PRIMARY CARE SHORTAGE: ADVANCED PRACTICE CLINICIANS AND INNOVATIVE CARE DELIVERY MODELS 1 (2018), <https://www.unitedhealthgroup.com/content/dam/UHG/PDF/2018/UHG-Primary-Care-Report-2018.pdf>.

13. Primary Care Shortage Areas are defined as having less than one primary care physician per 2,000 people. *Id.* For a short discussion on related Medical Deserts and Primary-Care Deserts, respectively, see Sahar Ashrafzadeh, *Medical Deserts in America: Why We Need to Advocate for Rural Healthcare*, HARV. GLOBAL HEALTH INST. BLOG (Mar. 1, 2017), <https://globalhealth.harvard.edu/blog/medical-deserts-america-why-we-need-advocate-rural-healthcare>; Emma Court, *America’s Facing A Shortage of Primary-Care Doctors*, MARKET WATCH (Apr. 4,

cess to primary care physicians, approximately 23 million live in remote or rural areas.¹⁴ The shortage also includes specialists, so the demand for specialty care for residents in rural areas is also predicted to increase by 2030.¹⁵

Telemedicine can improve access to health care in rural areas by facilitating access to remote medical guidance and patient monitoring in situations where local expertise or specialty services are lacking.¹⁶ It can give rural patients the ability to not just visit a primary care physician, but to see other specialists and healthcare practitioners they may not otherwise be able to see.¹⁷

President Obama made rural America a priority and created the White House Rural Council to improve the economic health of rural communities, which included improving rural health care.¹⁸ Congress further highlighted the importance of telemedicine access in rural communities when it passed the Health Information Technology for Economic and Clinical Health (“HITECH”) Act in 2009.¹⁹ The HITECH Act promotes health information technology (“HIT”) and included a specific provision for the use of telemedicine technology in rural areas.²⁰ Additionally, the Federal Communications Commission (“FCC”) created the Rural Health Care Program (“RHCP”) because it recognized that access to health care in rural areas necessitated access to a “robust broadband network.”²¹ The RHCP was designed to ensure access to critical telecommunication and broadband services and was funded through the Telecommunications Act of 1996.²²

2012, 11:24 AM), <https://www.marketwatch.com/story/americas-1-million-doctor-shortage-is-right-upon-us-2016-04-01>.

14. UNITED HEALTH GRP., *supra* note 12.

15. AAMC REPORT., *supra* note 11, at 7.

16. Menon, *supra* note 1.

17. See *Live Video*, CTR. FOR CONNECTED HEALTH POL’Y, <https://www.cchpca.org/about/about-telehealth/live-video-synchronous> (last visited Jan. 12, 2019) [hereinafter *CCHP Video*].

18. TRACY A. LUSTIG, THE ROLE OF TELEHEALTH IN AN EVOLVING HEALTH CARE ENVIRONMENT: WORKSHOP SUMMARY 6, 8 (2012), www.ic4n.org/wp-content/uploads/2014/06/IoM-Telehealth-2012-Workshop-Summary.pdf. “Telehealth is also an area of focus for the White House Rural Health Council . . .” *Id.* at 9.

19. *Id.* at 73.

20. See generally Hitech Act, Pub L. No. 111-5, tit. XIII, § 3001(c)(6)(C), 123 Stat. 226, 232–233 (2009) (codified at 42 U.S.C. § 300jj–11 (2010)). An example of a provision for rural or remote areas states: “[i]n making recommendations under subparagraph (A), the HIT Policy Committee may consider the following additional areas: . . . iii) Telemedicine technologies, in order to reduce travel requirements for patients in remote areas.” Hitech Act, Pub L. No. 111-5, tit. XIII, § 3002(b)(2)(C), 123 Stat. 226, 235 (2009) (codified at 42 U.S.C. § 300jj–12 (2010)).

21. *Rural Health Care Program*, FCC, <https://www.fcc.gov/general/rural-health-care-program> (last updated Dec. 28, 2018).

22. *Id.*

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Although Congress and the FCC have requirements for telemedicine access and telecommunications in rural areas respectively,²³ there is no specific requirement for rural broadband, a technology necessary for that access.²⁴ Additionally, current restrictions on physician licensure and reimbursement also present barriers to telemedicine access in rural communities.²⁵ To meet Congress's aim of providing accessible healthcare to rural communities through telemedicine, existing barriers to physician licensure, reimbursement costs, and adequate technology,²⁶ specifically access to rural broadband, must be addressed.

This note evaluates telemedicine and its role in providing affordable and quality healthcare in rural communities, and how this can be facilitated by addressing certain barriers to telemedicine and ensuring access to reliable and adequate broadband in rural and remote areas. Part I provides a background for telemedicine and broadband, including definitions, history, purpose, and benefits, and describes key federal regulations that helped shape telemedicine. Part II discusses state and federal regulations and barriers to telemedicine practice, evaluates proposed solutions to overcome those barriers, and describes and

23. The Telecommunications Act of 1996 states the following:

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

Telecommunications Act of 1996, Pub. L. No. 104-104, § 254 (h)(1)(A), 110 Stat 56, 73 (codified at 47 U.S.C. § 254 (2011)).

24. For example, Michael P. Adcock, FACHE Executive Director, Center for Telehealth University of Mississippi Medical Center testified before Congress that broadband is essential for telemedicine access. See *Advancing the Internet of Things in Rural America: Hearing Before the Subcomm. On Commc'ns, Tech., Innovation, & the Internet of the S. Comm. on Commerce, Sci., & Transp.*, 105th Cong. (2017) (statement of Michael P. Adcock, FACHE Exec. Dir., Ctr. for Telehealth Univ. of Miss. Med. Ctr.), https://www.commerce.senate.gov/public/_cache/files/0f576911-7956-4510-a436-eb38ac24ee6e/F8FBFECB0AEA21FDACF393C8C31033F9.adcock.pdf. See also *Impact of Broadband on Health Care Access and Outcomes in Rural Areas: Hearing Before the Senate Utilities Committee* (Ka. 2018) (statement of Linda J. Sheppard, J.D., Team Leader for Health Reform, Kan. Health Inst.), http://www.khi.org/assets/uploads/news/14823/testimony_jack_broadband.pdf.

25. See generally Cynthia LeRouge & Monica J. Garfield, *Crossing the Telemedicine Chasm: Have the U.S. Barriers to Widespread Adoption of Telemedicine Been Significantly Reduced?*, 10 INT'L J. OF ENVTL. RESEARCH & PUB. HEALTH 6472, 6474-76 (2013).

26. Telemedicine technology requires broadband that has the capacity and speed to effectively transmit and receive large amounts of data necessary for providing quality healthcare. *Id.*

evaluates pilot telemedicine programs, including the Alaska program and the Indian Health Service. Part III concludes by recommending ways states and the federal government can improve access to health care in rural areas through telemedicine. These include modifying state law to require adoption of state compact agreements, expanding Medicare's geographic area for telemedicine coverage, implementing successful rural health telemedicine programs, and amending federal legislation to enable access to rural broadband.

I. BACKGROUND

A. Telemedicine and Broadband Defined

1. Telemedicine

In general, telemedicine is “the use of electronic communication and information technologies to provide or support clinical care at a distance.”²⁷ Telemedicine is most commonly delivered via video or video conferencing over the internet,²⁸ and telemedicine technology can be used to (1) consult with patients and other medical specialists remotely, (2) observe patients who live in rural and underserved areas, (3) provide psychiatric evaluations of individuals who do not or cannot come to a mental health practitioner's office, (4) assess patients with limited mobility directly in their homes or physician's office, and (5) provide language interpretation services.²⁹ Though the terms “telemedicine” and “telehealth” are often used interchangeably,³⁰ telemedicine refers specifically to the use of technology that delivers “traditional clinical diagnosis and monitoring”³¹

In some cases, the definition of telemedicine depends on its context. For example, the telemedicine definition used in Medicare and Medicaid reimbursement is important to determine which services will be covered.³² Medicare does not have a specific definition for telemedicine and uses the term telehealth to include real-time or live

27. See NAT'L TELECOMM. & INFO. ADMIN., TELEMEDICINE REPORT TO CONGRESS: BACKGROUND (1997), <http://www.ntia.doc.gov/legacy/reports/telemed/execsum.htm>.

28. CCHP *Video*, *supra* note 17.

29. *Id.*

30. LUSTIG, *supra* note 18, at 3 (discussing that telehealth and telemedicine is often used interchangeably because both refer to the exchange of medical information by telecommunication).

31. *About Telehealth*, CTR. FOR CONNECTED HEALTH POL'Y, <https://www.cchpca.org/about/about-telehealth> (last visited Jan. 13, 2019) [hereinafter *CCHP Telehealth*].

32. *Id.*

video, store-and-forward, and remote patient monitoring,³³ whereas Medicaid defines telemedicine as “two-way, real-time interactive communication” between a patient and a physician at a distant site using audio and video telecommunication equipment.³⁴ In these instances, the specific applicable definition should be consulted, rather than depending on a general one.³⁵

2. Broadband

Congress defines broadband as “‘high-quality’ capability that allow[s] users to ‘originate and receive high-quality voice, data, graphics, and video’ services.”³⁶ Broadband is measured in megabits per second (“Mbps”), and Mbps refers to “the speed with which information packets are downloaded from, or uploaded to, the internet.”³⁷ The current minimum speed established by the FCC is twenty-five Mbps download speed and three Mbps upload speed.³⁸ Adequate broadband refers to broadband that meets the minimum download and upload speeds set by the FCC.

B. Telemedicine Administration and Practice

1. Administration

Telemedicine is administered through four main types of technology: real-time (live video), store-and-forward, remote patient moni-

33. See 42 C.F.R. § 410.78 (2015).

34. *Telemedicine*, MEDICAID, www.medicaid.gov/medicaid/benefits/telemed/index.html (last visited Mar. 26, 2018).

35. For example, Medicare uses the term “telehealth,” but its telehealth definition is closer to the traditional definition of telemedicine. See 42 C.F.R. § 410.78(a) (2015); cf. CCHP *Telehealth*, *supra* note 31.

36. See *2018 Broadband Deployment Report*, FCC (Feb. 2, 2018), <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report> [hereinafter *FCC 2018 Report*]. Note that the FCC changed the word “broadband” to “advanced telecommunications capability;” however, both have the same definition. Advanced Telecommunications Capability is now used to refer to high-speed internet. Compare *2015 Broadband Progress Report*, FCC (Feb. 4, 2015), <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2015-broadband-progress-report> [hereinafter *FCC 2015 Report*] (defining the term “broadband”), with *FCC 2018 Report*, *supra* (defining the term “advanced telecommunication capability”). See also *Types of Broadband Connections*, FCC, <https://www.fcc.gov/general/types-broadband-connections> (last updated Feb. 6, 2018) (stating that broadband “commonly refers to high-speed Internet access that is always on and faster than the traditional dial-up access”).

37. *Household Broadband Guide*, FCC, <https://www.fcc.gov/research-reports/guides/household-broadband-guide>.

38. *FCC 2015 Report*, *supra* note 36.

toring (“RPM”), and mobile health (“mHealth”)³⁹. Real-time telemedicine is live, two-way interaction between a patient and a provider using the internet, video, or audiovisual telecommunications technology.⁴⁰ Live, two-way video allows real-time examinations, diagnoses and treatments, and consultations for patients who cannot visit the doctor face-to-face.⁴¹ It usually includes video devices, computers, and monitors, and is the most common type of telemedicine care.⁴² Real-time telemedicine is useful for patients in rural areas because rural residents’ access to physicians is limited.⁴³

Store-and-forward telemedicine allows medical information like X-rays, magnetic resonance imaging (“MRIs”), digital photos, and video-clips to be captured, stored, and transferred electronically.⁴⁴ Unlike real-time or interactive telemedicine, store-and-forward gives providers access to pre-recorded data or data that has already been collected, and does not require the patient to be present for the doctor to provide consultation or diagnosis.⁴⁵ Store-and-forward technology is frequently used in dermatology, pathology, and radiology health-care where analysis of digital images is often required to determine proper treatment.⁴⁶ This type of telemedicine is especially useful for rural areas because often specialists are not immediately or locally available.⁴⁷

RPM collects personal health and medical data from patients in one location and securely transfers that information electronically to a physician or other healthcare professional in another location.⁴⁸ Information that can be collected by RPM includes vital signs, blood

39. See CCHP *Telehealth*, *supra* note 31; see also NIH *Supports Development of a Mobile Health Research Platform*, NAT’L INST. OF BIOMEDICAL IMAGING & BIOENGINEERING (Oct. 8, 2015), <https://www.nibib.nih.gov/news-events/newsroom/nih-supports-development-mobile-health-research-platform> [hereinafter NIBIB-NIH].

40. CCHP *Video*, *supra* note 17.

41. See CCHP *Video*, *supra* note 17; see also Amy E. Zilis, *The Doctor Will Skype You Now: How Changing Physician Licensure Requirements Would Clear the Way for Telemedicine to Achieve the Goals of The Affordable Care Act*, 2012 U. ILL. J.L. TECH. POL’Y, 193, 196 (2012).

42. CCHP *Video*, *supra* note 17.

43. TELEHEALTH AND RURAL HEALTHCARE DELIVERY, NAT’L CONFERENCE OF STATE LEGISLATURES 1 (2011), <http://www.ncsl.org/Portals/1/documents/health/RHTelehealth.pdf> [hereinafter NCSL Report].

44. See *Store and Forward*, CTR. FOR CONNECTED HEALTH POL’Y, <https://www.cchpca.org/about/about-telehealth/store-and-forward-asynchronous> (last visited Jan. 13, 2019).

45. *Id.*

46. *Id.*

47. NCSL Report, *supra* note 43.

48. See *Remote Patient Monitoring*, CTR. FOR CONNECTED HEALTH POL’Y, <https://www.cchpca.org/about/about-telehealth/remote-patient-monitoring-rpm> (last visited Jan. 19, 2019).

pressure, blood sugar, heart rate, weight, and electrocardiograms.⁴⁹ The information is usually collected wirelessly over the internet, sent to another physician for evaluation, and used primarily to monitor older, disabled individuals, and people with chronic diseases.⁵⁰ RPM permits healthcare providers to monitor patients in their homes, or other places outside of an office or healthcare facility.⁵¹ This type of telemedicine helps patients in rural areas who require chronic disease management but have difficulty accessing physicians face-to-face.⁵²

The fourth and final type of telemedicine—mobile health (“mHealth”)—is health care delivery in medical and public health practice supported by mobile technology like smartphones and mobile applications.⁵³ It is a newer, less popular form of telemedicine that is gaining popularity and is predicted to become the preferred method of telemedicine delivery.⁵⁴

2. Practice

Telemedicine’s role in providing increased access to healthcare in remote areas, reducing doctor visits, and lowering overall healthcare costs can be traced back to the late 19th century.⁵⁵ Telemedicine programs were initially created to address limited access to medical care in remote populations,⁵⁶ and although there were several telemedicine programs in use as early as the 1950’s, NASA paved the way for what telemedicine has become today.⁵⁷

The first recorded use of telemedicine occurred in 1950 when a radiological image was transmitted approximately twenty-four miles

49. *Id.*

50. See Zilis, *supra* note 41, at 197; see also DEP’T OF HEALTH AND HUM. SERVS., REPORT TO CONGRESS: E-HEALTH AND TELEMEDICINE 4 (2016), <https://aspe.hhs.gov/system/files/pdf/206751/TelemedicineE-HealthReport.pdf>.

51. Zilis, *supra* note 41.

52. *Id.* at 204.

53. NIBIB-NIH, *supra* note 39. Although the FCC has no standard definition of a smartphone, the FCC generally describes a smartphone as having “an HTML browser that allows easy access to the full Internet; an operating system that provides a standardized interface and platform for application developers; and a larger screen size than on a traditional handset.” STEVE WALMAN, FCC, THE INFORMATION NEEDS OF COMMUNITIES REPORT 135 (2011), <https://transition.fcc.gov/osp/inc-report/INoC-5-Mobile.pdf>.

54. NIBIB-NIH, *supra* note 39.

55. See WORLD HEALTH ORG., TELEMEDICINE OPPORTUNITIES AND DEVELOPMENTS IN MEMBER STATES: REPORT ON THE SECOND GLOBAL SURVEY ON eHEALTH 9 (2010), http://www.who.int/goe/publications/goe_telemedicine_2010.pdf.

56. *Id.* at 15.

57. Yoon Sang Kim, *Telemedicine in the U.S.A with Focus on Clinical Applications and Issues*, 45 YONSEI MED. J. 761, 761 (2004).

by telephone wire between the cities of West Chester and Philadelphia, Pennsylvania.⁵⁸ Later, telemedicine was expanded to transmitting neurological images using a closed-circuit television and transmitting electrocardiographs, blood-pressure data, and blood smears through television microwaves.⁵⁹ In 1959, Norfolk State Mental Hospital used two-way, closed-circuit television to observe psychiatry patients and to consult face-to-face with psychiatry students at the Nebraska Psychiatric Institute, located 112 miles away.⁶⁰

A decade later in 1968, physicians in Massachusetts General Hospital used television microwave links to conduct about 1000 medical examinations on sick airport personnel located at Boston's Logan Airport.⁶¹ Dartmouth Medical College, along with the University of Vermont, started providing medical services to ten rural clinics located in Vermont and New Hampshire through the INTERACT program,⁶² which caused the National Library of Medicine to establish a pilot telemedicine program through the Lister Hill National Center for Biomedical Communication.⁶³ The program tested whether the use of satellite video would improve the quality of healthcare in rural Alaska and showed that satellite was a reliable communication method that could be used by health personnel at various remote locations for any medical problem except emergencies.⁶⁴

In 1977, the use of a joint Canadian/US satellite eventually become the model for low-cost, effective telemedicine without the need for higher-end, costly videoconferencing equipment.⁶⁵ However, while these programs proved low-cost equipment was sufficient to provide telemedicine to local areas, programs previously developed by

58. See INST. OF MED., A GUIDE TO ASSESSING TELECOMMUNICATIONS IN HEALTH CARE (1996).

59. *Id.*

60. See Sang Kim, *supra* note 57, at 762; John Schleicher, *UNMC: A Pioneer in Telemedicine*, UNIV. OF NEB. MED. CTR. (Feb. 10, 2015), <https://www.unmc.edu/news.cfm?match=16468>.

61. Sang Kim, *supra* note 57, at 762, 772.

62. *Id.* at 762.

63. *Id.*

64. *Id.* The National Library of Medicine later renamed the program "Alaska ATS-6 Satellite Biomedical Demonstration" and the satellite was first launched by NASA in 1974 then decommissioned in 1979. *Id.*

65. *Id.*

NASA showed that greater bandwidth⁶⁶ was required to transmit information of a higher quality to greater distances.⁶⁷

NASA was one of the first agencies to use technology in medicine when it used telemetric links to monitor the health of its astronauts in space.⁶⁸ The ability to transfer medical information to and from space was essential when a quick return to earth was not possible.⁶⁹ Using telemedicine, space crewmembers could perform basic, guided medical care and rely on medical information sent from earth to space.⁷⁰ This was the beginning of a focused practice of telemedicine that eventually made way for use of the three most commonly used technologies that form telemedicine today: real time, store, and, forward, and remote monitoring.⁷¹

C. Purpose and Benefits of Telemedicine

Telemedicine in rural areas allows patients to see a healthcare provider without having to visit a doctor's office or a healthcare facility.⁷² Healthcare facilities and doctor's offices in rural areas are often located at distances away from the general population, making it inconvenient for rural residents to see their physicians.⁷³ Additionally, rural populations typically have older residents who have less income than their counterparts in urban areas, and who are therefore less likely to visit the doctor regularly.⁷⁴

66. In general, bandwidth refers to the speed and amount of data that can be transmitted through a network or the internet. See *Bandwidth*, MERIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/bandwidth> (last visited Jan. 13, 2019). Broadband, in turn, is usually defined as internet having a high bandwidth or speed measured in Mbps. See sources cited *supra* note 36 and accompanying text.

67. Sang Kim, *supra* note 57, at 762.

68. Andrew T. Simpson, *A Brief History of NASA's Contributions to Telemedicine*, NASA (Aug. 16, 2013), <https://www.nasa.gov/content/a-brief-history-of-nasa-s-contributions-to-telemedicine>.

69. *Id.*

70. *Id.*

71. These technologies are real-time, store-and-forward, and remote patient monitoring. See CCHP *Telehealth*, *supra* note 31; Zilis, *supra* note 41, at 196.

72. Zilis, *supra* note 41, at 197. According to the World Health Organization, the general purpose of telemedicine is "to provide clinical support, . . . to overcome geographical barriers, . . . [and] to improve health outcomes [through the use of] various types of ICT." In addition to improving access to quality, cost-effective healthcare, telemedicine can encourage greater patient input, reduce travel times, and foster an overall better continuity of care. WORLD HEALTH ORG., *supra* note 55, at 8; Patient Protection and Affordable Care Act, Pub. L. 111-148, tit. V, § 5001, 124 Stat. 119, 588 (2014) (codified at 42 U.S.C. § 294(q) (2010)).

73. See generally LUSTIG, *supra* note 18.

74. *Id.* at 6.

Not being able to go to the doctor regularly can negatively impact individuals who live in rural areas because these individuals are also more likely to have chronic diseases which require routine monitoring by a physician to ensure positive health outcomes.⁷⁵ In part, rural residents visit their doctors less frequently due to transportation barriers,⁷⁶ and telemedicine can help overcome these barriers by putting rural patients in contact with physicians and specialists who may be located far away.⁷⁷ Telemedicine healthcare also has the potential to expand specialty care in rural areas.⁷⁸ Patients and primary care physicians can access specialists regardless of each parties' location, and specialists can review difficult or special patient cases remotely.⁷⁹ For example, radiologists working in rural hospitals with minimal hospital equipment, can send MRIs to major medical centers for interpretation.⁸⁰

Efficiency for health care services is another overall benefit of telemedicine because it can reduce wait times for specialty care.⁸¹ A medical specialist using telemedicine can receive patient medical information without requiring the patient to be present.⁸² The information can then be reviewed at a time and place convenient to the specialist.⁸³ Ideally, this will allow the specialist to give a quicker turnaround for the medical evaluation than if the patient had to wait for a face-to-face appointment.⁸⁴ For rural communities this is especially important, since there are few specialists in rural areas and seeing a specialist may mean traveling long distances, or extended wait times for a specialist to come to the area.⁸⁵

75. *Id.*

76. See generally Samina T. Syed et al., *Traveling Towards Disease: Transportation Barrier to Health Care Access*, 38 J. CMTY. HEALTH 976 (2014). Transportation has been cited as a barrier to health care access in rural communities and includes lack of access to a vehicle or public transit, travel burdens due to time and distance, and lack of reliable transportation. *Id.* For rural patients with chronic illnesses, transportation barriers lead to missed or rescheduled appointments, missed or delayed medication use, and delayed care, and this can worsen health outcomes. Since telemedicine minimizes the need for transportation, patients in remote and rural areas with transportation difficulties can still access the care they need. *Id.*

77. *Id.*

78. CCHP Video, *supra* note 17.

79. *Id.*; see also Zilis, *supra* note 41, at 196.

80. See Zilis, *supra* note, at 196–97.

81. *Id.* at 197.

82. *Id.*

83. See generally Robert Pearl, *What Will It Take to Reduce Physician Wait Times?*, KEVINMD (Dec. 23, 2014), <https://www.kevinmd.com/blog/2014/12/will-take-reduce-physician-wait-times.html>.

84. *Id.*

85. *Id.*

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Primary care physicians “tend to cluster” in big cities which results in physician shortages in remote and rural areas.⁸⁶ Because remote and rural areas attract and retain fewer physicians, these areas are more likely to be medically underserved.⁸⁷ Telemedicine can expand the physician network in underserved rural areas by increasing access to the number of available physicians. Since telemedicine does not require physicians to be physically present to render care,⁸⁸ patients are not bound to using the services of local doctors. Having more choices gives rural patients the benefit of having greater input in their own health management and promotes continuity of care.⁸⁹

Further, providing healthcare at a distance decreases costs for both providers and beneficiaries.⁹⁰ In general, patients whose diseases are managed remotely visit their physicians less and save money on transportation and other health expenditures.⁹¹ Remote monitoring also decreases the use of hospital resources because patients stay at home instead of at the hospital.⁹² The hospitals benefit by spending less on in-hospital patient care.⁹³

D. Key Federal Regulations

Several key federal regulations have helped to shape and influence telemedicine, some of which have also had implications for rural health.⁹⁴ In 1997, the Balanced Budget Act (“BBA”) was passed to

86. Court, *supra* note 13.

87. *See generally* LUSTIG, *supra* note 18.

88. *See id.*

89. Stephen Agboola & Joseph Kvedar, *Telemedicine and Patient Safety*, PATIENT SAFETY NETWORK: AHRQ (2016), <https://psnet.ahrq.gov/perspectives/perspective/206/telemedicine-and-patient-safety>.

90. Zilis, *supra* note 41, at 196.

91. *Id.*

92. *Id.*

93. *Id.* An example of cost saving benefits is demonstrated by the New England Healthcare Institute and the Massachusetts Technology Collaborative (“NEHI-MTC”). NEHI-MTC studied chronically ill patients who received medical services and monitoring remotely from their homes instead of at an Intensive Care Unit. The study concluded that patients who were monitored from home spent less than they would have if they were required to stay in the hospital or make frequent visits to a hospital or doctor’s office to manage their diseases. Hospitals were financially benefitted when patients were monitored at home because money was saved on resources and emergency services that would have otherwise been used to treat patients. *Id.* at 208. *See generally*, NEHI-MTC, TELE-ICUS: REMOTE MANAGEMENT IN INTENSIVE CARE UNITS 5 (2010), https://www.nehi.net/writable/publication_files/file/tele_icu_final.pdf.

94. Sarah Jacobson & Teresa Wang, *How Laws and Policies Are Shaping Telemedicine*, ROCKHEALTH (Feb. 18, 2015), <https://rockhealth.com/how-laws-policies-shaping-telemedicine-market/>.

reconcile the federal budget,⁹⁵ and contained provisions for Medicare reimbursements for practitioners who practiced telemedicine in rural areas.⁹⁶ In 2002, the Benefits Improvement and Protection Act (“BIPA”) was promulgated to broaden the telemedicine reimbursement scheme outlined in BBA.⁹⁷ For example, BIPA expanded the telemedicine coverage area, and increased the instances in which physicians could be paid individually for their telemedicine services.⁹⁸

In 2009, the HITECH Act was created, in part, to promote and encourage the adoption and use of HIT.⁹⁹ It specifically addressed the technological barrier to healthcare because it mandated formation of a HIT policy committee charged with providing recommendations to improve (1) “[t]elemedicine technologies, in order to reduce travel requirements for patients in remote areas,” and (2) “[t]echnologies that facilitate home health care and the monitoring of patients recuperating at home.”¹⁰⁰ The 21st Century Cures Act was passed in 2016 and affects telemedicine because it requires Medicare and Medicaid to analyze benefits and impediments to using Medicare/Medicaid and to determine how beneficiaries are affected by telemedicine use.¹⁰¹ Us-

95. See generally Balanced Budget Act, Pub. L. 105-33, tit. IV, § 4206(a)–(b), 111 Stat. 251, 377–378 (1997) (codified at 42 U.S.C. § 1395l).

96. The law affected telemedicine because it allowed partial Medicare reimbursement for telehealth services taking place in rural or remote areas with healthcare professional shortages. However, reimbursements were restricted to Medicare practitioners who were present with their patients during examination, and the payments were required to be shared between the consulting physician and the referring one. Ultimately, because of the restricted payment provision, telemedicine practiced in rural areas did not receive the economic boost expected from BBA since “live services” only made up 10% of telemedicine services. See *id.*; Jacobson & Wang, *supra* note 94.

97. Jacobson & Wang, *supra* note 94; see generally Benefits Improvement and Protection Act, Pub. L. 106-554, § 233, 114 Stat. 2763A-187–88 (2000).

98. See generally § 233. The Benefits Improvement and Protection Act of 2000 affected telemedicine because it eliminated previous requirements under BBA which restricted payment for telemedicine services. The new Act (1) removed the requirement for referring and consulting physicians to share fees, which meant that each physician would receive an individual fee for the service rendered, (2) removed the requirement to have the Medicare practitioner present during telemedicine examinations, (3) provided for reimbursement of telemedicine services for direct patient care, and consultations, and (4) expanded the definition of eligible geographic areas to include rural “health professional shortage areas.” *Id.*; *Health Professional Shortage Areas*, HRSA, <https://bhwh.hrsa.gov/shortage-designation/hpsas> (last reviewed Oct. 2016).

99. See Hitech Act, Pub. L. No. 111–5, tit. XIII, §§3001, 123 Stat 226, 230 (2009) (codified at 42 U.S.C § 300jj–11 (2010)) (requiring establishment of a Health Information Technology Coordinator within DHHS to facilitate healthcare research and quality); see also § 3002 at 234 (codified at 42 U.S.C § 300jj–12 (2010) (requiring recommendations from HIT coordinator on how to implement HIT and associated infrastructure nationwide.)

100. *Id.*

101. Jacqueline LaPointe, *21st Century Cures Act to Boost Medicare Telehealth Use*, MHEALTH INTELLIGENCE (Dec. 16, 2016), <https://mhealthintelligence.com/news/21st-century->

ing information from the studies, the Act seeks to increase adoption of telemedicine in healthcare.¹⁰²

II. REGULATIONS AND BARRIERS

Several state and federal barriers exist that threaten the capacity of telemedicine to bridge the gap between patients in rural areas and access to quality, affordable health care.¹⁰³ These include legal, financial, and technological obstacles.¹⁰⁴ Additionally, while technology has also been an impediment to telemedicine practice for decades,¹⁰⁵ recently, limited access to adequate broadband has also been recognized as a barrier to telemedicine and its potential to reach rural areas.¹⁰⁶

A. State Regulation and Barriers

By far, one of the biggest barriers to telemedicine practice in the United States is restrictive state regulation.¹⁰⁷ While telemedicine has been identified as a means to provide access to quality, efficient, and cost-effective healthcare in remote and rural underserved areas,¹⁰⁸ state laws addressing licensure, reimbursement, and privacy continue to inhibit widespread growth of telemedicine.¹⁰⁹

1. State Licensure

Physician medical licenses are granted state-by-state, so to provide care in multiple states, a physician must be licensed in each state

cures-act-to-boost-medicare-telehealth-use. See generally 21st Century Cures Act, H.R. Res. 34, 114th Cong. (2016) (enacted).

102. LaPointe, *supra* note 101.

103. See generally *State Laws and Reimbursement Policies*, CTR. FOR CONNECTED HEALTH POL'Y, <https://www.cchpca.org/telehealth-policy/current-state-laws-and-reimbursement-policies> (last visited Jan. 13, 2019); *National Policy*, CTR. FOR CONNECTED HEALTH POL'Y, <https://www.cchpca.org/telehealth-policy/national-policy> (last visited Jan. 13, 2019).

104. See LeRouge & Garfield, *supra* note 25. See also TELEHEALTH RESOURCE CTRS., NAT'L ORG. OF STATE OFFICES OF RURAL HEALTH, <https://nosorh.org/wp-content/uploads/2016/11/NOSORH-Telehealth-Policy-Barriers-Fact-Sheet-FINAL.pdf> (last updated Sept. 2016).

105. See generally David L. Paul, et al., *Assessing Technological Barriers to Telemedicine: Technology-Management Implications*, 46 IEEE TRANSACTIONS ON ENGINEERING MANAGEMENT 279 (1999).

106. Eric Wicklund, *FCC Under Pressure to Boost Broadband Support for Rural Telemedicine*, MHEALTH INTELLIGENCE (Feb. 7, 2018), <https://mhealthintelligence.com/news/fcc-under-pressure-to-boost-broadband-support-for-rural-telemedicine>.

107. TELEHEALTH RESOURCE CTRS., *supra* note 104.

108. WORLD HEALTH ORG., *supra* note 55, at 11.

109. Amar Gupta & Seth Sao, *The Constitutionality of Current Legal Barriers to Telemedicine in the United States: Analysis and Future Directions of Its Relationship to National and International Health Care Reform*, 21 HEALTH MATRIX 385, 393 (2011).

where she wants to practice medicine.¹¹⁰ Multistate licensure can be very expensive—requiring both a licensing and application fee—depending on where licensure is sought.¹¹¹ Medical licensure is also time-consuming since an application must be filed in each state and can include fingerprinting, undergoing criminal background checks, and successfully completing licensing exams.¹¹² The financial and administrative burdens associated with multi-state licensure often discourage physicians from getting licenses in more than one state.¹¹³

To overcome the barrier of state licensure, certain states have adopted the Federation of State Medical Boards (“FSMB”) model which proposes to regulate the practice of medicine across state lines.¹¹⁴ These states have agreed to limit the requirements for obtaining medical licenses in their respective states, as compared to requiring full state licensure.¹¹⁵ Other states have opted to endorse licenses from other states, provided additional state-required documentation and qualifications are met.¹¹⁶ As previously indicated, meeting the additional requirements provides a disincentive for physicians to practice telemedicine across state lines.

Individual states with similar or identical licensing requirements have also sought to address the barrier of state licensure by forming compacts through reciprocity agreements.¹¹⁷ In theory, this model has

110. Michael S. Young & Rachel K. Alexander, *Recognizing the Nature of American Medical Practice: An Argument for Adopting Federal Medical Licensure*, 13 DEPAUL J. HEALTH CARE L. 145, 166 (2010).

111. For example, as of March 2018, Rhode Island’s full medical license fee was \$1,090, whereas Alabama’s fee was \$175. PHYSICIAN INITIAL LICENSURE QUALIFICATIONS AND APPLICATION INSTRUCTIONS, RHODE ISLAND DEP’T OF HEALTH, <http://health.ri.gov/publications/requirements/PhysicianApplicationRequirements.pdf> (last visited Jan 13, 2019); cf. *Schedule of Fees*, ALA. BD. OF MED. EXAMINERS & MED. LICENSURE COMM’N OF ALA., <http://www.albme.org/fees.html> (last visited Jan 13, 2019).

112. See *Criminal Background Checks by State*, FED’N OF STATE MED. BDS., <http://www.fsmb.org/siteassets/advocacy/key-issues/criminal-background-checks-by-state2.pdf> (last visited Jan. 13, 2019).

113. Young & Alexander, *supra* note 110, at 166.

114. See generally FED’N OF STATE MED. BDS., REPORT OF THE FSMB WORKGROUP ON INNOVATIONS IN STATE BASED LICENSURE 7 (2014), <http://www.fsmb.org/siteassets/advocacy/policies/innovations-in-state-based-licensure.pdf>.

115. Avery Schumacher, *Telehealth: Current Barriers, Potential Progress*, 76 OHIO STATE L. J. 409, 428 (2015).

116. MARY K. WAKEFIELD, TELEHEALTH LICENSURE REPORT, U.S. HEALTH RESOURCES AND SERVICES ADMINISTRATION 28, <https://web.archive.org/web/20131204111506/https://www.hrsa.gov/healthit/telehealth/licensertpt10.pdf>.

117. Young & Alexander, *supra* note 110, at 172. Physicians validly licensed in a member state could practice in other member states without having to obtain a license from that state if they meet certain eligibility requirements. The application process is expedited because the applying physician is not required to reenter information from their state of principal license. See

the potential to relieve the burden of multistate licensure,¹¹⁸ but practically, it is ineffective if not all states are onboard or if states are slow to adopt it.¹¹⁹ In the long run, rural areas are affected by state physician licensing laws because physicians are less likely to offer cross-border telemedicine services if they have to overcome additional barriers associated with multistate licensure.¹²⁰ As a result, opportunities to use telemedicine in rural areas is limited and access to affordable, quality healthcare in rural areas is not realized.

2. Reimbursement for Telemedicine Services

Another significant barrier to accessing telemedicine is payment for telemedicine services.¹²¹ Federal Medicaid and Medicare give limited reimbursement for telemedicine services, but states can elect whether to accept this coverage and can determine the scope of covered services.¹²² Private insurance coverage is also limited, if it is offered at all.¹²³ There is no requirement for reimbursement from private payers for telemedicine practice. Many providers who cannot be certain of the amount of coverage or what services are covered, elect to forgo offering telemedicine services.¹²⁴

Telemedicine is covered by Medicaid in most states, but because there is no federal law that addresses telemedicine coverage under Medicaid (like there is for Medicare), states have wide discretion with regard to how they structure their programs.¹²⁵ In fact, no two states

generally *Interstate Medical Licensure Compact*, IMCL, <http://www.imlcc.org/> (last visited Jan 13, 2019).

118. Gil Siegal, *Enabling Globalization of Health Care in the Information Technology Era: Telemedicine and the Medical World Wide Web*, 17 V.A. J. L. & TECH. 1, 16–17 (2012). In the span of 15 years (2000–2015), only 24 states have adopted a reciprocity compact. *Id.*

119. See Ross D. Silverman, *Regulating Medical Practice in the Cyber Age: Issues and Challenges for State Medical Boards*, 26 AM. J. L. & MED. 255, 269 (2000).

120. *Id.*

121. *State Telehealth Laws and Reimbursement Policies*, CTR. FOR CONNECTED HEALTH POL'Y, <https://www.cchpca.org/telehealth-policy/state-telehealth-laws-and-reimbursement-policies-report> (last visited Jan. 13, 2019) [hereinafter *CCHP Reimbursement*]. See also *State Coverage for Telehealth Services*, NAT'L CONFERENCE OF STATE LEGS., <http://www.ncsl.org/issues-research/health/state-coverage-for-telehealth-services.aspx> (last updated Jan. 2016).

122. NAT'L CONFERENCE OF STATE LEGS., *supra* note 121. As of Jan. 2018, forty-nine states and the District of Columbia cover telemedicine under Medicaid, with thirty-nine states covering telemedicine under private insurance. *CCHP Reimbursement*, *supra* note 121.

123. Gupta & Sao, *supra* note 109, at 405.

124. *Id.*

125. See generally *CCHP Reimbursement*, *supra* note 121. For example, forty-nine Medicaid programs reimburse for live video, twenty reimburse for remote patient monitoring, and only eleven reimburse for store-and-forward service. *Id.*

operate their telehealth programs in the same way.¹²⁶ States can determine what telemedicine service is covered and how much that coverage will be.¹²⁷ For example, some states like Arizona have an extensive telemedicine reimbursement program which covers a variety of store-and-forward and real-time services.¹²⁸ Other states, like Ohio, cover telemedicine services in only very special situations.¹²⁹ State-wide discretion results in non-uniform telemedicine reimbursement and a wide difference in the types of telemedicine which may or may not be covered by each state.

When reimbursement for telemedicine services is not guaranteed, physicians are not likely to offer the services. In rural areas, where there is already a shortage of physicians, limits on telemedicine services further limits access to healthcare. Moreover, if patients have private insurance that guarantees payment for non-telemedicine services, patients may choose to not to use telemedicine, even though it may be more inconvenient, and they may be required to pay out-of-pocket for the service.¹³⁰

B. Federal Regulations and Barriers

Although telemedicine is largely regulated at the state level, the federal government still plays a role in the use of telemedicine by providing limited reimbursement under Medicare and Medicaid.¹³¹ Further, federal legislation like the Patient Protection and Affordable Care Act (“ACA”) affects telemedicine by offering states incentives to develop and use telemedicine programs.¹³²

1. Medicare and Medicaid

There is no federal law requiring states to reimburse telemedicine services through Medicaid; however, certain types of telemedicine services delivered in specific geographical regions are eligible for reim-

126. CCHP *Reimbursement*, *supra* note 121.

127. *See id.*

128. Arizona covers services that are provided by telemedicine, telephone, or email. Examples of covered services include behavioral health; inpatient consultation; medical nutrition therapy; office, out-patient, and surgery follow-up consultations; pain management; and pharmacy management. These services can be provided by store-and-forward, live two-way video conferencing, and patient monitoring. *Id.*

129. Ohio only covers mental health services provided by live, videoconferencing, and mental health and speech pathology provided by store-and-forward telemedicine. *Id.*

130. Gupta & Sao, *supra* note 109, at 393.

131. *Id.*

132. Zilis, *supra* note 50, at 199.

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bursement through Medicare.¹³³ Medicare currently reimburses telemedicine services that are similar to existing covered services, like office visits and consultations, which are delivered in-person with a qualified health professional.¹³⁴ Coverage is limited to consults occurring between the Medicare beneficiary and a doctor in “real time,” via two-way, live video conferencing.¹³⁵

To be eligible for reimbursement, Medicare requires that telemedicine services take place in specific regions: (1) rural Health Professional Shortage Areas (“HPSA”), and (2) Centers for Medicare and Medicaid Services (“CMS”) telehealth originating sites.¹³⁶ These sites include, but are not limited to, doctor’s offices, hospitals, rural health clinics, community mental health centers, and federally qualified health centers.¹³⁷ At this time, Medicare does not reimburse telemedicine services that are received in patients’ homes.¹³⁸

Many rural residents are classified as poor and nearly 25% rely on Medicare or Medicaid to meet their long-term medical care needs.¹³⁹ Medicare coverage of particular telemedicine services could potentially result in a financial benefit for rural recipients because it could lower out-of-pocket costs associated with travel and health care visits. However, restricted Medicare telemedicine coverage may still be an obstacle to healthcare access in rural areas if residents must travel to an approved CMS site located away from their homes.¹⁴⁰ Transportation barriers may still prevent use of telemedicine for fol-

133. Gupta & Sao, *supra* note 109, at 404–05.

134. *Your Medicare Coverage: Telehealth*, MEDICARE, <https://www.medicare.gov/coverage/telehealth>, (last visited Jan. 13, 2019); *see also* CMS, NEXT GENERATION ACO MODEL TELEHEALTH EXPANSION WAIVER FREQUENTLY ASKED QUESTIONS (Jan. 2018), <https://innovation.cms.gov/Files/x/nextgenaco-telehealthwaiver.pdf>.

135. MEDICARE, *supra* note 134.

136. The Health Resources and Services Administration (HRSA) defines HPSAs as areas with health care provider shortages in primary care, dental health, or mental health. *Health Professional Shortage Areas*, HEALTH RES. AND SERVS. ADMIN., <https://bhwh.hrsa.gov/shortage-designation/hpsas> (last visited Jan. 13, 2019). CMS telehealth originating sites refer to the place the patient is located when he/she receives telemedicine services. CMS, *supra* note 134.

137. MEDICARE, *supra* note 134.

138. *Id.*

139. *See* JACOB WARREN & K. BRYANT SMALLEY, RURAL PUBLIC HEALTH: BEST PRACTICE AND PREVENTIVE MODELS 248 (2014); *Medicaid Works for People in Rural Communities*, CTR. ON BUDGET AND POLICY PRIORITIES (Jan. 19, 2018), <https://www.cbpp.org/research/health/medicaid-works-for-people-in-rural-communities>. Long-term care typically refers to extended medical and social services required by people with chronic conditions to help them live as independently as possible despite significant challenges. David Brown, *Acute Care Vs. Chronic Care Vs. Long-Term Care*, LIVESTRONG (Aug. 14, 2017), <https://www.livestrong.com/article/148329-acute-care-vs-chronic-care-vs-long-term-care/>.

140. AM. HOSP. ASS’N, TELEHEALTH: HELPING HOSPITALS DELIVER COST-EFFECTIVE CARE 1 (Apr. 22, 2016), <https://www.aha.org/system/files/content/16/16telehealthissuebrief.pdf>.

low-up care, or to manage chronic diseases, even if the telemedicine service may be covered. This effectively means that even with Medicare or Medicaid assistance, rural residents still cannot access or afford reliable healthcare.¹⁴¹

2. The Patient Protection and Affordable Care Act (“ACA”)

The ACA was created to improve the quality of healthcare and reduce costs through the use of technology.¹⁴² It included four provisions specific to Medicare and Medicaid to promote the use of technology as part of health care reform.¹⁴³ The first provision, section 2703, addressed enhancing the quality of health care for Medicaid recipients,¹⁴⁴ and provided funding for “health homes” for Medicaid recipients who have chronic diseases.¹⁴⁵

Section 3021 established a Center for Medicare and Medicaid Innovation (“CMMI”) within CMS that was tasked with providing grants to states that use health information technology to provide better health care to Medicare and Medicaid patients.¹⁴⁶ CMMI was also required to “research, develop, test, and expand innovative payment and delivery arrangements” to determine whether states have incorporated technology like remote monitoring systems into health care delivery models.¹⁴⁷ Models that are identified as improving quality of

141. JACOB WARREN & K. BRYANT SMALLEY, RURAL PUBLIC HEALTH: BEST PRACTICE AND PREVENTIVE MODELS 248 (2014).

142. *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2012). An important goal of ACA is to “reduce the growth of healthcare costs while promoting high-value, effective care” and to promote the adoption and “meaningful use of health information technology.” *FY 2017 Annual Performance Plan and Report - Goal 1 Objective D*, DHHS (Feb. 2016) <https://www.hhs.gov/about/budget/fy2017/performance/performance-plan-goal-1-objective-d/index.html>; *FY 2017 Annual Performance Plan and Report - Goal 1 Objective F*, DHHS (Feb. 2016), <https://www.hhs.gov/about/budget/fy2017/performance/performance-plan-goal-1-objective-f/index.html>.

143. Patient Protection and Affordable Care Act, §§ 2703, 3021-22, 3024.

144. *Id.* § 2703.

145. *Id.*; *see also* MEDICAID, HEALTH HOMES (1945 OF SSA/SECTION 2703 OF ACA) FREQUENTLY ASKED QUESTIONS SERIES II (Dec. 2015), <https://www.medicaid.gov/state-resource-center/medicaid-state-technical-assistance/health-home-information-resource-center/downloads/health-home-faq-1-21.pdf>. A health home is a health care provider or team of providers that coordinate all aspects of a chronically ill patient’s medical care to provide better quality care at reduced cost; the providers are required to use health information technology to coordinate and integrate clinical and non-clinical services to address a person’s health-related needs. KAISER FAMILY FOUND., MEDICAID’S NEW “HEALTH HOME” OPTION 2 (2011), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8136.pdf>. Such services include chronic disease and comprehensive care management, and individual and family support. *Id.*

146. Patient Protection and Affordable Care Act, § 3021.

147. SUNDAY E. UBOKUDOM, UNITED STATES AND HEALTH CARE POLICYMAKING: IDEOLOGICAL, SOCIAL, AND CULTURAL DIFFERENCES AND MAJOR INFLUENCES 250 (2012). For ex-

care and lowering or maintaining costs could then be expanded nationwide.¹⁴⁸

Section 3022 provides savings for collaborations of certain physicians, hospitals, and other healthcare providers, Accountable Care Organizations (“ACO”), who provide comprehensive health services to Medicare patients.¹⁴⁹ ACOs are required to be accountable for three years and those that deliver quality coordinated care at reduced costs will receive a specified percentage of the savings and continue in operation.¹⁵⁰

Section 3024 of the ACA addresses healthcare delivery to chronically ill patients through RPM by requiring testing of new delivery models for at-home care of Medicare patients with multiple chronic conditions through the Independence at Home Demonstration Program.¹⁵¹ The Program was slated to last three years and qualifying medical practices must have physicians and nurse practitioners available to patients at all times to provide patients with individualized care via videoconferencing.¹⁵² Medical practices that provide quality care at a cost lower than expected receive incentive payments.¹⁵³

C. Technology Barriers

Telemedicine relies on technology to be effective, and technological barriers can hinder telemedicine’s ability to deliver quality health care to rural areas.¹⁵⁴ For example, technological concerns about HIPAA, Privacy, and Security are barriers which can affect telemedicine practice.¹⁵⁵ Securing personal health information (“PHI”) is challenging when sensitive information is sent electroni-

ample, Congress suggested that CMMI evaluate the tele-ICU delivery model. Patient Protection and Affordable Care Act § 3021(b).

148. Patient Protection and Affordable Care Act § 3021(c).

149. *Id.* § 3022.

150. *Id.*

151. *Id.* § 3024.

152. *Id.*

153. *Id.*

154. Barriers include (1) the technological capability of the equipment to meet the provider needs; (2) the equipment ease of use; (3) the quality of images transmitted and whether it is sufficient to meet clinical requirements; (4) equipment capability to ensure safety and security of confidential data; and (4) equipment and broadband infrastructure availability. LeRouge & Garfield, *supra* note 25. Where the barriers to using technology are largely user-based, provider and patient training on the use of telemedicine equipment is effective. *See generally* Paul et al., *supra* note 105.

155. NAT’L ORG. OF STATE OFFICES OF RURAL HEALTH, TELEHEALTH POLICY BARRIERS (2016), <https://nosorh.org/wp-content/uploads/2016/11/NOSORH-Telehealth-Policy-Barrier-Fact-Sheet-FINAL.pdf>.

cally via phone or video.¹⁵⁶ Telemedicine transmissions can be vulnerable to signal errors, transmission outages, and interference.¹⁵⁷ Because HIPAA does not have specific regulations for telehealth and telemedicine, telemedicine providers must meet the same HIPAA requirements for medical services delivered in-person.¹⁵⁸ These requirements are usually set by federal standard, but states have the discretion to require more stringent security measures.¹⁵⁹

Overall, however, rapid technological advancements in telemedicine have “changed the landscape to the point where technology is no longer the barrier, but the enabler.”¹⁶⁰ Despite the reduction or near-elimination of technological barriers associated with equipment use and capability, a primary obstacle to effective telemedicine use in rural areas still remains: access to adequate, low-cost broadband internet.

Over 19 million Americans who live in rural and remote areas do not have access to reliable broadband,¹⁶¹ and half of rural Americans do not have broadband due to lack of adequate broadband infrastructure where they live.¹⁶² Broadband internet is used in nearly every aspect of life, and many households increasingly use the internet to access and obtain health care and health information.¹⁶³ Studies show that when broadband is available, rural residents adopt and use it at a rate and in ways similar to their suburban counterparts.¹⁶⁴ This suggests that if rural patients had access to reliable broadband, they too would likely use it to access healthcare and health information.

156. Brady Ranum, *Keeping Telemedicine HIPAA Compliant*, HIT (June 20, 2017), <https://hitconsultant.net/2017/06/20/keeping-telemedicine-hipaa-compliant/>.

157. AM. HOSP. ASS'N, *REALIZING THE PROMISE OF TELEHEALTH: UNDERSTANDING THE LEGAL AND REGULATORY CHALLENGES* 10 (2015), www.aha.org/system/files/research/reports/tw/15may-tw-telehealth.pdf.

158. *Id.*

159. Schumacher, *supra* note 115, at 427–28.

160. Heather Landi, *Top Ten Tech Trends 2017: Telehealth Reaches the Tipping Point*, HEALTHCAREINFORMATICS (Mar. 22, 2017), <https://www.healthcare-informatics.com/article/telemedicine/telehealth-reaches-tipping-point>.

161. Georgina Torbet, *Can Microsoft's Airband Initiative Close Broadband Gap for 25M Americans?*, DIGITAL TRENDS (Dec. 9, 2018, 6:39 AM), <https://www.digitaltrends.com/web/fcc-report-broadband-access/>.

162. See John B. Horrigan, *Broadband Adoption and Use in America: 7* (FCC, Working paper No. 1, 2010), <https://transition.fcc.gov/national-broadband-plan/broadband-adoption-in-america-paper.pdf>.

163. *Id.* at 16. Access to broadband is quickly becoming a necessity in every part of life. For example, people use the internet to search for jobs, apply to colleges, complete homework, and do errands like banking and shopping that would normally be completed outside the home. *Id.* at 16.

164. See generally Horrigan, *supra* note 162.

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People access the internet in a number of ways, including on wireless devices.¹⁶⁵ However, having wireless capabilities is not the same as having access to a broadband connection.¹⁶⁶ “The productivity levels of a desktop or laptop are unparalleled.”¹⁶⁷ Also, there are usually caps on the amount of data that can be used for wireless connections.¹⁶⁸ Telemedicine involves the exchange of information that requires a lot of data. Patients who use telemedicine must have the means to accept that data. Rural communities are saturated with smartphone and mobile phone use, but wireless data plans offered in these areas are usually not robust enough to meet the demands of effective telemedicine technology.¹⁶⁹ Broadband has the adequate speeds that can meet the demand.¹⁷⁰ Having reliable broadband is therefore necessary to access health care.¹⁷¹

D. State and Federal Programs

1. The Alaska Program

Alaska has been a model for the development and use of telemedicine for over four decades.¹⁷² Almost all of Alaska is desig-

165. People access the internet at home, work, or the library, using personal computers, laptops, or smart phones. *Id.* at 2.

166. Teresa Mathew, *Broadband Is Largely Inaccessible to Those Who Need it Most*, CITY-LAB (Sept. 18, 2017), <https://www.citylab.com/equity/2017/09/broadband-is-the-most-inaccessible-to-those-who-need-it-most/539880/>. Critics assert that since rural residents may have wireless access to the internet on their phones, conceivably they do not need to rely on the limited availability of broadband for internet use. Sharon Strover, *Reaching Rural America With Broadband Internet Service*, PHYSORG (Jan. 17, 2018), <https://phys.org/news/2018-01-rural-america-broadband-internet.html>.

167. Mathew, *supra* note 166.

168. *Id.*

169. Juliet Van Wagenen, *Rural Connectivity Stands as One of Telehealth's Last Hurdles*, HEALTHTECH (2008), <https://healthtechmagazine.net/article/2018/01/rural-connectivity-stands-one-telehealths-last-hurdles>.

170. Richard Bennett, et al., *The Whole Picture: Where America's Broadband Networks Really Stand*, THE INFO. TECH. & INNOVATION FOUND. (Feb. 2013), <https://itif.org/publications/2013/02/12/whole-picture-where-america%E2%80%99s-broadband-networks-really-stand>.

171. Broadband is a utility and is as essential as electrical power and phone service. Cecilia Kang, *Court Backs Rules Treating Internet as Utility, Not Luxury*, N.Y. TIMES (June 14, 2016), <https://www.nytimes.com/2016/06/15/technology/net-neutrality-fcc-appeals-court-ruling.html>.

Providing the means to access a utility that has become a necessity is already in place for telephone service. The federal government has a Lifeline program that provides discounted telephone service for low-income communities through the Federal Communications Commission (“FCC”). The FCC recognizes that phone service is essential to secure job opportunities, to connect with family and community, and most importantly, to access emergency services. Access to broadband is essential for similar reasons. See *Lifeline Program for Low-Income Consumers*, FCC WIRELINE, <https://www.fcc.gov/general/lifeline-program-low-income-consumers> (last updated Dec. 21, 2018).

172. See THOMAS S. NESBITT, THE EVOLUTION OF TELEHEALTH: WHERE HAVE WE BEEN AND WHERE ARE WE GOING?, in THE ROLE OF TELEHEALTH IN EVOLVING HEALTH CARE

nated as a primary care physician Health Professional Shortage Area, so in many Alaskan communities, access to a physician occurs on an itinerant basis only.¹⁷³ Telemedicine has been used as the primary tool to address health professional shortages, address lack of access to medical specialists, and improve access to health care in Alaska with great success.¹⁷⁴

Historically, health care in Alaska was delivered to remote areas by nurses who traveled by foot.¹⁷⁵ Today, Alaska delivers healthcare to its rural areas through collaboration with participating hospitals, physicians, federal agencies, and the Alaska Native Tribal Health Consortium (“ANTHC”), the largest telemedicine project which serves most of remote Alaska.¹⁷⁶ For example, ANTHC effectively links community health aides at local clinics with distant primary care and specialty providers through partnerships with the Department of Defense and the Indian Health Service.¹⁷⁷

Alaska covers a wide range of telemedicine services and effectively manages to address and minimize barriers that are common to most telemedicine programs, namely reimbursement and licensure.¹⁷⁸ Alaska Medicaid reimburses an exhaustive list of medical services delivered by telemedicine if that service is covered under traditional,

ENVIRONMENT 11, 12 (2012); Chris Patricoski, *Alaska Telemedicine: Growth Through Collaboration*, 63 INT’L J. OF CIRCUMPOLAR HEALTH 365, 365 (2004).

173. Many communities in Alaska are remote, isolated, and located away from road systems. See MARK A. FOSTER & SCOTT GOLDSMITH, ALASKA’S HEALTH-CARE BILL: \$7.5 BILLION AND CLIMBING 8 (2011), <http://www.iser.uaa.alaska.edu/Publications/RevisedHealthcare.pdf>. “Alaska’s vast size, rural/frontier nature and arctic climate add a unique level of complexity in providing health care services to its residents.” THE KAISER COMM’N ON MEDICAID AND THE UNINSURED, THE HENRY J. KAISER FAMILY FOUND., PUTTING MEDICAID IN THE LARGER BUDGET CONTEXT: AN IN-DEPTH LOOK AT THREE STATES IN FY 2015 AND 2016 4 (Oct. 2015), <http://files.kff.org/attachment/issue-brief-putting-medicare-in-the-larger-budget-context-an-in-depth-look-at-three-states-in-fy-2015-and-2016>. Much of Alaska is frontier and about 32% of Alaska’s population live in rural areas without access to a local hospital. *State Guides: Alaska*, RHIHUB, <https://www.ruralhealthinfo.org/states/alaska> (last updated Apr. 10, 2018). HEALTH PLANNING AND SYS. DEP’T, ALASKA 2015-2016 PRIMARY CARE NEEDS ASSESSMENT I-3 (May 20, 2016), http://dhss.alaska.gov/dph/HealthPlanning/Documents/Primary%20Care%20Needs%20Assessment/AlaskaPrimaryCareNeedsAssessment_2015-2016.pdf.

174. See generally HEALTH PLANNING AND SYS. DEP’T, *supra* note 173, at III-18.

175. *Id.* at I-4.

176. See generally *Overview*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, <https://anthc.org/who-we-are/overview/> (last visited Jan. 13, 2019).

177. See generally Howard Hays et al., *State of the Art and Science: The Success of Telehealth Care in the Indian Health Service*, 16 AM. MED. ASS’N J. ETHICS 986 (2014).

178. See generally *Current State Law and Reimbursement Policies: Alaska*, CTR. FOR CONNECTED HEALTH POL’Y <https://www.telehealthpolicy.us/telehealth-policy/current-state-laws-and-reimbursement-policies?jurisdiction=31&category=all&topic=all> (last visited Jan. 13, 2019).

non-telemedicine methods.¹⁷⁹ Senate Bill (“SB”) 74 addresses licensure restrictions for telemedicine practice because it permits licensed Alaska physicians located out-of-state to provide telemedicine in the same manner as licensed Alaska physicians located in-state.¹⁸⁰ Additionally, SB 74 prohibits clinician licensure boards from sanctioning licensees for practice via telemedicine and creates a Telemedicine Business Registry.¹⁸¹

Recently, Alaska recognized the need for greater broadband capability to ensure telemedicine services continue to be effectively delivered to its rural communities.¹⁸² In mid-2016, Alaska passed House Joint Resolution 14 which asks the FCC to “increase the Rural Health Care Universal Service Support Fund, which could then be used to invest in new broadband technology in the nation’s most remote state.”¹⁸³ This request acknowledges the essential role access to broadband has on telemedicine and healthcare delivery in rural and remote areas.

2. The Indian Health Service

The United States Federal Indian Health Services telemedicine model stemmed from early collaboration with NASA and NASA’s success with telemedicine technology.¹⁸⁴ NASA’s space medicine program, which was really a telemedicine model of practicing medicine, prompted the United States Indian Health Service to initiate a program to provide medical care by satellite to an “isolated” Indian reservation.¹⁸⁵ The Space Technology Applied to Rural Papago Advanced Health Care (“STARPAHC”) program was in place from 1972–1977

179. Also, Alaska Medicaid does not restrict the modality used to deliver telemedicine services. It covers real-time, store-and-forward, and remote patient monitoring and is only one of three states to do so. *Id.*

180. Letter from Fed. Trade Comm’n to Representative Steve Thompson, FTC (Mar. 25, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-alaska-state-legislature-regarding-telehealth-provisions-senate-bill-74-which/160328alaskatelehealthcomment.pdf. Previous telemedicine legislation allowed physicians licensed and located in Alaska to prescribe drugs without doing a physical examination under certain circumstances. There were no provisions for out-of-state telemedicine practice. ALASKA STAT. § 08.64.364 (2014).

181. Letter from Fed. Trade Comm’n to Representative Steve Thompson, *supra* note 180.

182. See generally H.R.J. Res. 14, 30th Leg., 1st Sess. (Alaska 2017), <http://www.legis.state.ak.us/PDF/30/Bills/HJR014A.PDF>.

183. Eric Wicklund, *Alaska Lawmakers Link Telehealth Growth to Better Broadband*, MHEALTH INTELLIGENCE (Apr. 6, 2017), <https://mhealthintelligence.com/news/alaska-lawmakers-link-telehealth-growth-to-better-broadband>.

184. Sang Kim, *supra* note 57, at 761.

185. *Id.* at 762.

and during that time delivered healthcare remotely to the Papago Indian Reservation in Arizona.¹⁸⁶

The STARPAHC system included “a control cent[re] located in the Indian Health Service Hospital . . . , a remote clinic in the village of Santa Rosa located 50 Km away . . . , a mobile health unit . . . , and a referral cent[re] at the Indian Health Service hospital located in Phoenix.”¹⁸⁷ The mobile health unit was staffed by a physician assistant and a laboratory technician, and was equipped with two-way video and audio devices.¹⁸⁸ Mobile unit personnel were able to telecommunicate with the hospitals and referral centers via microwaves, VHS radio, and telephone.¹⁸⁹

The STARPAHC program tested the effectiveness of collaborative medicine and whether providing healthcare to rural populations by telecommunication using a public-private partnership was feasible.¹⁹⁰ Although the program was terminated after only five years, STARPAHC proved that telemedicine was not only feasible, but effective for providing remote healthcare, consultation, and teleretry.¹⁹¹ It showed that telemedicine could provide adequate clinical training and education for non-medical personnel to deliver healthcare in rural populations.¹⁹² STARPAHC informed the design of future telemedicine models for remote areas and showed that with planning and cooperation, rural communities can be successfully served by telemedicine technology.¹⁹³

III. RECOMMENDATIONS

A. Reducing Licensure Restrictions

1. State Reciprocity Compacts

To overcome the licensure barriers to practicing telemedicine, states should enact legislation which requires state medical boards to adopt and implement reciprocity agreements under the Interstate Medical Licensure Compact (“IMLC”). IMLC is an agreement be-

186. *Id.*

187. Gary Freiburger, et al., *The STARPAHC Collection: Part of an Archive of the History of Telemedicine*, J. TELEMEDICINE TELECare 221, 221 (2007).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 221–22.

192. *Id.* at 223.

193. *Id.*

tween sovereign states to provide an expedited pathway to physician licensure in multiple states.¹⁹⁴ IMLC streamlines the process for multi-state medical licensure because it does not require physicians to apply in each state where they wish to practice.¹⁹⁵ Instead, physicians submit their information to their state of principal license and it is shared and verified with states that are members of the Compact.¹⁹⁶

IMLC ensures that physicians only qualify to practice medicine in other member states in the Compact if they meet agreed upon qualifications for eligibility.¹⁹⁷ Although physicians can waive licensure to practice in another state, individual states still have control over licensing requirements.¹⁹⁸ The Compact is only an agreement between member states, but it can become “a binding statutory agreement among states where it has become state law.”¹⁹⁹ Currently, twenty states accept applications for multi-state licensure and six states have introduced compact legislation.²⁰⁰ In addition, at least three states already have laws that allow out-of-state physicians to practice telemedicine (provided they are validly licensed) and nine others issue special licenses that allow out-of-state providers to practice telemedicine in a state other than where the providers are located.²⁰¹ The benefit of a compact agreement is that investigative and disciplinary information is available to all member states, and each member state is reassured that physicians practicing under the compact are qualified to do so.²⁰²

194. See *The IMLC*, INTERSTATE MED. LICENSURE COMPACT, <http://www.imlcc.org/> (last visited Jan.13, 2019).

195. Eric Wicklund, *Telehealth Licensing Compact Goes Live in 7 Member States*, MHEALTH INTELLIGENCE (Apr. 7, 2017), <https://mhealthintelligence.com/news/telehealth-licensing-compact-goes-live-in-7-member-states>; INTERSTATE MED. LICENSURE COMPACT, *supra* note 194.

196. INTERSTATE MED. LICENSURE COMPACT, *supra* note 194.

197. *Id.*

198. *Id.*

199. Wicklund, *supra* note 195.

200. States and territories that have active compact legislation either in process or delayed include, Pennsylvania, Maryland, Michigan, Vermont, Guam, and Washington, D.C. INTERSTATE MED. LICENSURE COMPACT, *supra* note 194.

201. Eric Wicklund, *On Telehealth License Portability, Each State Follows Its Own Path*, MHEALTH INTELLIGENCE (Jan. 28, 2016), <https://mhealthintelligence.com/news/on-telehealth-license-portability-each-state-follows-its-own-path> (discussing that Florida, New Mexico, and Missouri all have laws that permit out-of-state physicians to practice telemedicine within their states); CTR. FOR CONNECTED HEALTH POL’Y, STATE TELEHEALTH LAWS AND REIMBURSEMENT POLICIES REPORT 10 (2018). In addition, Maryland, Washington, D.C. and Virginia allow licensure reciprocity from bordering states. *Id.*

202. INTERSTATE MED. LICENSURE COMPACT, *supra* note 194.

2. Uniform Licensure Program

Alternatively, states could administer a uniform telemedicine license. In order to practice medicine in the United States, physicians are required to take the United States Medical Licensing Examination to test their ability to apply the knowledge and concepts learned in medical school.²⁰³ States should develop a similar uniform licensing exam for telemedicine. Fourteen state boards already issue a special purpose telemedicine license to practice across state lines.²⁰⁴ Similar to a license compact agreement, a uniform special purpose telemedicine license removes the barrier of having to obtain multiple licenses to practice in multiple states. The difference is that under a compact license agreement physicians apply for different licenses, but under a uniform license, physicians are applying for the same license regardless of the state where they apply. A uniform license would further decrease some of the administrative burden associated with multi-state licensure because physicians would not have to apply to waive in to separate states. Physicians who wish to practice telemedicine would take the same exam regardless of where they are located and would be permitted to practice in any state that also administers that exam.

Being able to practice across state lines without having to apply for licensure in each state would incentivize healthcare professionals to provide telemedicine services. This would increase the availability of physicians and specialists in rural areas because it removes the administrative licensing barriers to practicing telemedicine that is present in many states.

B. Removing Reimbursement Barriers

To address the reimbursement barrier that prevents telemedicine from improving healthcare access in rural communities, Medicare (and Medicaid) should expand the locations eligible for coverage of telemedicine services to include any area where telemedicine can be delivered effectively. Examples of these areas include, but are not limited to, residences and homes, schools and libraries, and clinics and mobile health units. Medicare may have the potential to alleviate

203. *Who is USLME?*, U.S. MED. LICENSE EXAMINATION, <https://www.usmle.org/about/> (last visited Jan. 13, 2019).

204. *Telemedicine Policies: Board by Board Overview*, FED'N OF STATE MED. BDS. (Jan. 23, 2018), http://www.fsmb.org/globalassets/advocacy/key-issues/telemedicine_policies_by_state.pdf.

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some of the financial burden of accessing reliable health care in rural areas, and it may make it easier for physicians to offer telemedicine if they know the service will be reimbursed. However, these benefits cannot be fully realized if rural residents must still overcome the transportation barrier to access telemedicine care.

Enlarging Medicare's coverage area for telemedicine can improve healthcare access in several ways. Transportation barriers will be reduced because rural patients will not be required to travel since they can access health care in their homes directly. Additionally, it can reduce out-of-pocket healthcare costs because patients would not need to pay for travel or lose pay from being absent from work. Arguably, since convenience is a factor in accessing healthcare in rural areas, if telemedicine is more convenient, rural residents may be more likely to use it. Health outcomes would also improve for rural patients with chronic diseases because they would be more likely to access reimbursable health care services which are directly available in their homes.

Further, telemedicine can deliver healthcare anywhere as long as technology is available that can handle and receive the health information.²⁰⁵ Because telecommunication technology now has the potential to reach almost anywhere in the world, locations where telemedicine can deliver healthcare is expanding as well.²⁰⁶ The internet is available in a variety of non-traditional places where health practitioners could offer their services and patients could receive them. For example, school healthcare practitioners could offer telemedicine services through the internet to patients who could receive it at a local library, or clinics with internet capability could offer telemedicine services to patients receiving care at a mobile health unit.²⁰⁷

Medicare should increase its coverage area for telemedicine to keep up with telemedicine's changing landscape. Expanding the coverage area where health care providers can deliver telemedicine ser-

205. See generally Robert Hume and Jeff Looney, *Designing for Telemedicine Spaces*, AM. SOC'Y FOR HEALTHCARE ENG'G (Feb. 3, 2016), <https://www.hfmmagazine.com/articles/1889-designing-for-telemedicine-spaces>.

206. See generally *Calling A Country Far, Far Away*, TELECOMM. HISTORY GROUP, <http://www.telcomhistory.org/vm/scienceLongDistance.shtml> (last visited Jan. 13, 2019).

207. "Mobile clinics are customized vehicles that travel to the heart of communities, both urban and rural, and provide prevention and healthcare services where people work, live, and play. They overcome barriers of time, money, and trust, and provide community-tailored care to vulnerable populations." Caterina F. Hill, et al., *Mobile Health Clinics in the Era of Reform*, 20 AM. J. MANAGED CARE 261, 261 (2014).

vices could also help to alleviate the physician shortage in rural areas. Physicians who know their services will be covered no matter where they are offered, may be more likely to offer them in areas where rural patients are located. This could lead to access to more physicians in rural and medically underserved areas.

C. Adopting Model Rural Health Programs

Improved access to telemedicine in rural areas can be accomplished by states adopting Alaska's rural telemedicine program. Alaska faces unique challenges to providing health care to residents in remote and rural areas because of travel and weather restrictions. However, Alaska's telemedicine program provides services for almost 20 percent of its rural population.²⁰⁸ The Alaska program uses telemedicine to provide remote consultations and access to specialists, to monitor chronically-ill patients and do health screenings, and to train health professionals and provide health education.²⁰⁹ The Alaska model is an example of a proven method of providing quality health care to rural communities.

The Alaska model also benefits Alaskan residents who are not located remotely, but who may not be able to access healthcare due to other barriers like cost and ethnicity. About 17 percent of Alaska's population is native and the rural health care program provides healthcare to the native population in partnership with the Indian Health Service.²¹⁰ By following the Alaska program states can similarly benefit.

D. Implementing Mobile Health Units

The Indian Health Service ("IHS") successfully provided healthcare to residents in Arizona using a mobile health unit ("STARPHAC") in the early 1970's.²¹¹ The mobile unit was effective in delivering healthcare to remote areas, but was phased out as tech-

208. Letter from Fed. Trade Comm'n to Representative Steve Thompson, *supra* note 180.

209. See generally Sarah Freeman, *Health Practitioner Education in a Rural Alaskan Telemedicine System*, AFHCAN ALASKA NATIVE TRIBAL HEALTH CONSORTIUM (May 1, 2014), <http://www.nationalacademies.org/hmd/~media/Files/Activity%20Files/Global/InnovationHealthProfEducation/2014-MAY-01/Workshop%20Presentations/Freeman-IOM-HPE-AFH-CAN.pdf>; Stewart Ferguson & John Kokesh, *The AFHCAN Telehealth Program*, AFHCAN Alaska Native Tribal Health Consortium (June 2012), <http://dhss.alaska.gov/ahcc/documents/meetings/201206/ferguson%20afhcan%20telehealth%20presentation.pdf>.

210. *Alaska Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/AK> (last visited Jan. 13, 2019).

211. Freiburger, et al., *supra* note 187.

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nology improved and became too expensive to maintain.²¹² Today, with funding from the federal government, states could use mobile health units to reach their rural residents since it is a proven method of providing health care to rural areas. The mobile health unit can solve the problem of limited access to specialists and physicians by using vehicles in rural areas equipped with telecommunications technology as substitute hospitals or doctor's offices.

When STARPHAC was dismantled there was no legislation to provide funding for projects centered on providing health care in rural areas.²¹³ However, about thirty years later, the federal government designated money for rural health projects and supporting technology. States have access to this money through the Rural Health Care Program and can apply to receive federal grants for projects affecting rural health care, like use of mobile units.²¹⁴

E. Amending Federal Legislation to Address Technological Barriers

To address the main technological barrier to telemedicine practice in rural areas, lack of access to adequate broadband, federal legislation for health information technologies should be amended to specifically include broadband as a supporting technology for health care providers and recipients. The HITECH Act currently requires the HIT committee to consider and implement “[t]elemedicine technologies” for use in remote areas to improve healthcare access.²¹⁵ “Telemedicine technologies” should be amended to include “adequate broadband and broadband infrastructure.” A definition of broadband should also be included that describes broadband as meeting the current acceptable speed for broadband as outlined by the FCC. Updating legislation on health information technology in this way reflects broadband as necessary for successful delivery of telemedicine services. It will also make telemedicine more accessible by requiring a reliable means of accessing it.

Other federal legislation addressing broadband connectivity has been introduced to Congress, but it addresses agricultural activity and

212. *Id.*

213. The STARPHAC program ended in the 1970's and the FCC designated money for rural health care telecommunication support almost 30 years later in 1997. *Id.*

214. *Rural Health Care Program*, FCC WIRELINE (Apr. 5, 2018), <https://www.fcc.gov/general/rural-health-care-program>.

215. See LUSTIG, *supra* note 18.

does not specifically provide for rural broadband access for health-care.²¹⁶ In addition, legislation requiring broadband access on the state level may be slow to develop due to constitutional provisions which require “a clear statement” that would authorize the FCC to preempt state laws forbidding municipal broadband providers from expanding beyond their jurisdictions into rural and remote areas.²¹⁷

Funding for broadband expansion as a health information technology in rural areas should be increased under the Telecommunications Act of 1996 to provide broadband access for rural healthcare providers and recipients nationwide. Such funding is currently administered by the FCC to the Rural Health Care Pilot program (“RHC”), but funding has not been updated since the Telecommunication Act’s creation in 1996 and is currently capped at \$400 million annually for participating entities.²¹⁸ Increasing funding specifically earmarked for addressing telecommunication needs for rural health care is especially important because Congress has proposed creating a permanent rural health program.²¹⁹ Based on the success of the pilot, additional rural health care program applications are being considered.²²⁰

CONCLUSION

Rural America with its rolling hills, its solitary Alaskan beauty, and its lush, fertile farmland is often lauded for its natural beauty. However, its striking aesthetic beauty hides a not so pretty picture: rural and remote communities in the United States lag behind their urban counterparts when it comes to providing effective, quality, and affordable healthcare. Telemedicine seeks to eliminate this disparity by improving access to quality healthcare using telecommunication

216. *Rural Broadband Legislation A Priority At State, Federal Level*, OHIO FARM BUREAU (Feb. 28, 2018), <https://ofbf.org/2018/02/28/rural-broadband-legislation-priority-state-federal-level/>.

217. See generally Adrian Perkins, *A Cure to Rural Healthcare Access: Telemedicine, High-Speed Internet, and Local Government*, JOLT DIGEST (Jan. 16, 2018), <https://jolt.law.harvard.edu/digest/a-cure-to-rural-healthcare-access-telemedicine-high-speed-internet-and-local-government>. Clear statement rules bar administrative agencies in the executive branch from passing any regulation that preempts state regulations absent a “clear, unambiguous statement” by Congress showing that they intentionally delegated preemptive power to the agency. *Tennessee v. Fed. Comms. Comm’n*, 832 F.3d 597, 610 (6th Cir. 2016).

218. *Rural Health Care Program: Supporting Broadband Connectivity to Health Care Providers*, FCC WIRELINE COMPETITION BUREAU, <https://www.fcc.gov/general/rural-health-care-program>, (last updated Dec. 28, 2018).

219. *Rural Health Care Pilot Program*, FCC WIRELINE COMPETITION BUREAU, <https://www.fcc.gov/general/rural-health-care-pilot-program#faqNPRM4> (last visited Jan. 13, 2018).

220. *Id.*

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technology. However, many barriers exist at both the state and federal levels which makes providing telemedicine as a means for health-care access very burdensome.

These barriers can be diminished and even eliminated by employing the following: (1) states should enact laws to make it easier for physicians to practice across state lines and to incentivize physicians to set up employment in rural areas; (2) Medicare and Medicaid should expand the eligible geographical regions for reimbursement for telemedicine services so physicians shortages could be relieved; (3) states should adopt and model successful rural health programs; and (4) the federal government should amend its legislation to provide funds for telecommunication infrastructure in rural and remote areas and to require provision of adequate and reliable rural broadband.

By implementing these solutions, telemedicine can accomplish Congress' goal of providing low-cost, affordable healthcare to people who have limited access and who need it most. Improved health for rural individuals means improved quality of life and an improved landscape for America overall.

