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Editor's Note

It is my honor to introduce *Chapman Law Review's* first issue of Volume Twenty-Five. We begin this general issue with five articles from various legal scholars that analyze a wide array of topics and provide a glimpse into the extensive legal scholarship that exists today.

In our first article, Professor Benjamin C. Carpenter examines the bar's efforts to reduce the justice gap, highlighting the shortcomings of pro bono and the need for stronger legal aid support within our profession. Next, Professor Sung Eun (Summer) Kim challenges the prevailing view of shareholders as residual claimants and provides a framework for a multicriteria assessment that may be better suited for today's corporate residual claims. Mr. Michael L. Smith follows, questioning the prohibition on citing unpublished state court opinions in light of the unprecedented COVID-19 pandemic. Next, Professor Donald J. Smythe considers the claims against inclusionary housing laws and proposes the application of various tests to preserve both the Supreme Court's exactions takings jurisprudence and regulatory takings precedents. Finally, Professor Daniel Wallach challenges the procedural hurdles for legalizing sports betting in California by inquiring into the interpretation of article IV, section 19(e) of the California Constitution.

Following these articles, we present two student notes. The first note, written by Mr. Tyler Angelini, proposes the revival of the essential facilities doctrine and its applicability against Apple Inc. Next, Ms. Madeleine Dobson questions a recent Ninth Circuit case involving Section 230 immunity for website providers.

Leadership in law reviews is unique because it changes each year with the entry of new editors. While this allows for much innovation (and though I dare not minimize the wealth of knowledge passed down from past leadership), each year is faced with the formidable challenge of a learning curve. As such, it is important to acknowledge the constants that serve as the steady foundation of the *Chapman Law Review*: our faculty and administration. We are grateful for the support and guidance of our Executive Vice President and Chief Advancement Officer of Chapman University, Dean Matthew Parlow; our Interim Dean of Chapman University Dale E. Fowler School of Law and Professor of Law, Dean Marisa S. Cianciarulo; our beloved

faculty advisor, Professor Celestine Richards McConville; and our faculty advisory committee members, Professor Kurt Eggert, Professor Sherry Leysen, Professor Nancy Schultz, and Professor Kenneth Stahl. A special thank you to our Assistant Dean of Admission and Diversity Initiatives, Justin Cruz, who freely gave his time for our annual diversity training. We are also deeply indebted to our Research Librarians of the Hugh & Hazel Darling Law Library, whom we heavily rely on for source collection.

I certainly cannot conclude without highlighting that this issue was only made possible by the tireless efforts of our brilliant editors—the backbone of this publication—who rose to every occasion. The work of a journal simply cannot be achieved without a body of editors, and I am forever grateful for their dedication and camaraderie that allowed for the successful publication of this Volume. My tenure at *Chapman Law Review* has been one of few experiences in which I can attest that the reward is in the work itself. Although the goal of every year is to produce a successful volume, the knowledge and grit earned from all the late nights and early mornings are accomplishments that will live on in our careers as legal professionals.

Ji hea Oh
Editor-in-Chief

A Solution Hidden in Plain Sight: Closing the Justice Gap by Applying to Legal Aid the Market Incentives That Propelled the Pro Bono Revolution

*Benjamin C. Carpenter**

The legal profession is now thirty years into the pro bono revolution, and the bar is more committed, in both word and action, to access to civil justice than at any other time in its history. Yet for most of the sixty million Americans who cannot afford a lawyer, the bar's commitment provides little solace. Despite all the resources the bar has put into pro bono over the past thirty years, those living at or near poverty still do not receive legal help for almost eighty-six percent of their legal needs. In fact, lawyer participation in pro bono has become stagnant over the past decade, and the World Justice Project just ranked the United States 109th out of 128 countries in access to affordable civil justice. Meanwhile, law firm revenues rocket upward. In 2019, revenue at each of the nine largest law firms was greater than the combined operating budgets of the country's 700 legal aid organizations. Revenue at one firm alone doubled the combined budgets of all legal aid organizations. Yet, as the ABA advocates for additional public funding of legal aid, law firms themselves pitch in less than four one-hundredths of a percent of their revenue. A fair question is what is truly motivating the bar—is it a foundational commitment to closing the justice gap, as it professes, or protecting its own investment in pro bono for the benefit of its members. If the bar is serious about closing the justice gap, it must not simply capture and leverage its

* Associate Professor of Law at the University of St. Thomas School of Law. Thank you to Leonore Carpenter, Scott Cummings, Alan Houseman, and Rebecca Sandefur, whose great work (along with that of Justice Earl Johnson Jr., and the late Deborah Rhode) on legal aid and pro bono inspired this piece, and whose comments to earlier versions of this article undoubtedly improved it. Thank you also to Jacob M. Carpenter and my colleagues Robert Kahn and Julie Oseid for their comments and insights, and to Niki Catlin for her invaluable research assistance. Most notably, thank you to those lawyers who have dedicated their careers to serving individuals otherwise unable to have access to legal representation.

advances in pro bono, but it must also commit to increasing its support for legal aid—in action, not just words—as it has with pro bono. While history has shown that this shift will not happen simply by encouragement and aspirational appeals, there is a blueprint for accomplishing this: the market incentives that moved big firms to enthusiastically embrace pro bono over the past few decades provide a solution hidden in plain sight. This article explores those incentives, sets out a proposal for how to apply those incentives to increase legal aid funding, and calls on the bar to live up to its public commitment to equal justice.

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“[T]he failure to confront pro bono’s limitations risks privileging professional interests over concerns of social justice—promoting the image of equal access without the reality.”

SCOTT L. CUMMINGS, *THE POLITICS OF PRO BONO*¹

“It is not enough for the law to intend justice. It must be so administered that for the great body of citizens justice is actually attained. . . . If those who officially represent the law do not . . . make the administration of justice fair, prompt, and accessible to the humblest citizen, to what group in the body politic may we turn with any hope[?]”

HENRY S. PRITCHETT, *INTRODUCTION TO JUSTICE FOR THE POOR*²

INTRODUCTION

The concept is not novel: while people are inspired by high ideals, self-interest motivates actual action.³ Nor is the cognitive dissonance that follows: most attribute their actions to those ideals and, with enough time, convince themselves of their honorable intentions.⁴ And in this respect, lawyers are no exception. Indeed, given our training in persuasion, we may be particularly adept at (or susceptible to) these cognitive gymnastics. Such self-deception is not always inherently bad,⁵ but it can create a roadblock to real progress and growth.

¹ Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 149 (2004).

² REGINALD HEBER SMITH, *JUSTICE AND THE POOR*, at xi, xiv (1919).

³ See 1 ADAM SMITH, *THE WEALTH OF NATIONS* 13 (Ernest Rhys ed., E.P. Dutton & Co. Inc. 1910) (1776).

It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.

Id.; see also Deborah L. Rhode, *Rethinking the Public in Lawyers’ Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 *FORDHAM L. REV.* 1435, 1436–37 (2009) [hereinafter Rhode, *Rethinking the Public*] (citing current studies regarding enlightened self-interest).

⁴ See David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 281–82 (2003).

⁵ See generally William von Hippel & Robert Trivers, *The Evolution and Psychology of Self-Deception*, 34 *BEHAV. & BRAIN SCI.* 1 (2011) (exploring the theory of self-deception and its various advantages). Volume 34 of this journal also includes numerous responses to the article that explore these concepts further.

This dynamic is exemplified by the bar's approach to the justice gap in America: first in its reluctant embrace of legal aid, then in its enthusiastic commitment to pro bono. History reveals that neither movement was driven by the bar's awakening to a deeply held, institutional commitment to justice, but by self-interest. Nonetheless, lawyers have overwhelmingly attributed these efforts to professional values and intrinsic motivations⁶—then turned around and aggressively marketed their “selfless” deeds. In fact, there is a strong argument that those in the legal profession benefit as much from the current level of pro bono (financially, emotionally, developmentally, and reputationally) as the clients they serve.⁷ Thus, the profession as a whole has little real incentive to fight the justice gap more aggressively. Indeed, this dissonance has caused pro bono growth to plateau over the past decade. As Deborah L. Rhode observed, “The bar's pro bono commitments are, in short, a reflection of both the profession's highest ideals and its most grating hypocrisies.”⁸

This Article lays bare this dynamic, not to be critical of the bar's efforts or motivations, but to strip away the marketing around pro bono and honestly confront what has inspired the bar to action—and in doing so, to unlock further progress in fighting the justice gap. Indeed, enlightened self-interest can provide a win-win, and the pro bono revolution of the last 30 years has undoubtedly brought legal services to millions of individuals who otherwise would have gone unrepresented. The bar is undeniably more committed—in both word and action—to providing access to justice than at any other time in its history.

Yet the justice gap continues to grow. Over 60 million Americans each year remain unable to obtain legal representation for their civil legal needs.⁹ Indeed, despite a thirty-year focus on pro bono, the United States still ranked 109th out of 128 countries in access to civil justice in 2020.¹⁰ Nonetheless, the bar's response remains to double down on pro bono while looking to the public to fund legal aid. If access to justice truly is a foundational value of

⁶ See ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 18–19 (2018) [hereinafter SUPPORTING JUSTICE IV], http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.pdf [<http://perma.cc/F7JQ-476S>]; DEBORAH L. RHODE, ACCESS TO JUSTICE 163–64 (2004).

⁷ See *infra* Section III.A.

⁸ Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 413 (2003) [hereinafter Rhode, *Pro Bono in Principle*].

⁹ See *infra* Part I.

¹⁰ See *infra* note 373 and accompanying text.

this profession—as we profess it to be—is a deeper commitment to pro bono our best solution? Or, as Scott L. Cummings has asked, are we in fact “privileging professional interests over concerns of social justice—promoting the image of equal access without the reality”?¹¹

All the while, as the bar focuses on and celebrates pro bono, there is an army of unsung legal aid lawyers around the country quietly dedicating their lives to representing those in poverty—and many more who would if it were economically viable for them to do so. In most cases, these lawyers provide the most efficient, skilled, and complete representation to those in poverty. Nonetheless, law firms often require legal aid lawyers to support their pro bono efforts, rather than asking how the legal community can better support legal aid attorneys. In fact, pro bono programs often take time and resources *from* those very organizations that otherwise would be spent directly serving those in poverty.

To truly reduce the justice gap, we must flip that dynamic. While the bar should celebrate, maintain, and leverage the significant infrastructure and culture it has built around pro bono, it must make a much bolder commitment to supporting legal aid. To that point, the bar has put its full-throated support behind increased funding for legal aid—provided those increases come from the *public*.¹² For most of the bar, however, supporting legal aid from their own pockets has been a bridge too far. Little has been written about this dynamic; most have simply accepted that meaningful, direct financial support for legal aid is a burden most firms will not bear. At the same time, law firm revenue continues to increase year over year to record levels. In fact, the legal fees generated in 2019 by *each* of the nation’s nine largest law firms exceeded the entire operating budget of the country’s 700 legal aid organizations *combined*.¹³ Further, revenue at Kirkland & Ellis, which serves perhaps a few thousand clients, was twice the budget of all legal aid organizations—which serve over one-fifth of the country’s population.¹⁴ Overall, lawyers and law firms contribute just four one-hundredths of 1% of their overall revenue to legal aid.¹⁵ As we will see though, law firms are often charitable—they just do not consider *legal aid* a priority. Rather, they presently receive more return benefit by giving to other causes.

¹¹ Cummings, *supra* note 1, at 149.

¹² See *infra* notes 318–319 and accompanying text.

¹³ See *infra* note 288 and accompanying text.

¹⁴ See *id.*

¹⁵ See *infra* note 285 and accompanying text.

A shift to making legal aid a priority—not just in word, but in action—can happen, but it will not happen simply through encouragement and aspirational statements. There is, however, a blueprint for accomplishing this: the steps leading to the bar’s embrace of pro bono provides a solution hidden in plain sight. Indeed, if those in a position to influence the conduct of the largest law firms create concrete financial incentives for those firms to act, change will follow. And such incentives do not require legislative action, regulatory changes, or mandatory requirements. Specifically, change will begin if (1) *The American Lawyer* (and others that rank large firms) incorporates direct financial support to legal aid organizations into their ranking methodology; (2) the American Bar Association (ABA) and local bar associations publicly recognize and celebrate those firms that contribute financially to legal aid at a meaningful level; and (3) the legal departments of large corporate clients start to demand the law firms to which they give their business demonstrate their financial support for legal aid. These financial incentives are precisely what led big firms to embrace pro bono and ignited the unlikely pro bono revolution in the 1990s.

Part I of this Article sets the table by discussing the present scope of the justice gap in the United States. Part II then reviews the bar’s evolution regarding its two primary approaches to addressing the justice gap: first its grudging embrace of legal aid as a defensive measure to prevent outside intrusion into the profession, and then its aggressive adoption of pro bono in response to market incentives. Part III follows by acknowledging both the benefits and inherent limitations of pro bono as a tool to reduce the justice gap. Finally, Part IV reviews law firms’ charitable giving priorities, and Part V suggests how to shift these priorities by harnessing the same self-interests that propelled the pro bono revolution to ignite a new legal aid revolution.

I. THE EVER-EXPANDING JUSTICE GAP

The justice gap refers to “the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”¹⁶ Unlike criminal defendants facing imprisonment, Americans have no constitutional right to legal

¹⁶ LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 9 (2017) [hereinafter *THE JUSTICE GAP*], <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<http://perma.cc/F6JD-B78J>].

representation for civil issues.¹⁷ For those unable to afford representation, though, many civil issues such as an eviction or foreclosure, loss of parental rights, domestic abuse, or loss of benefits may have devastating long-term effects on the individual, their families, and our communities.¹⁸

Defining who falls within the civil justice gap is a blurry proposition. As one judge recently noted, “many lawyers reading this article would likely have to stretch to afford themselves in a legal problem of any substance.”¹⁹ As a starting point, though, references to the justice gap traditionally include only persons with an annual income at or below 125% of the federal poverty level—the threshold for qualifying for legal representation from a legal aid organization that receives funding from the federal government through the Lawyer Services Corporation (LSC).²⁰ For 2021, that correlates to an annual income of just \$33,125 for a family of four.²¹ As of 2019, the year for which the most recent data is available, 46.5 million Americans fell within that category.²² However, 2019 was a year of historic prosperity, as the poverty rate was the lowest it had been since 1959.²³ Indeed,

¹⁷ Compare *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963), with *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 18–19 (1981), and *Turner v. Rogers*, 564 U.S. 431, 448 (2011). In limited cases, individuals have a statutory right to representation in civil matters. See ALAN HOUSEMAN & LINDA E. PERLE, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 53–55 (2018), http://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf [<http://perma.cc/5YHD-PVY2>].

¹⁸ See HOUSEMAN & PERLE, *supra* note 17, at 7.

¹⁹ Judge Jay Quam, *Mission Possible: Pro Bono and Its Impact on the Courts and the Community*, HENNEPIN LAW., Sept./Oct. 2018, at 17, 18; see also GILLIAN K. HADFIELD, *RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY* 177–79 (2017) (listing the average legal cost to parties in many common civil disputes).

²⁰ See 45 C.F.R. § 1611.3(c)(1) (2021); see also THE JUSTICE GAP, *supra* note 16, at 10–11. Notably, LSC-funded organizations may provide services to individuals above the 125% threshold if (1) the services are not supported by LSC funding, or (2) the legal assistance is limited to certain narrow categories set out in 45 C.F.R. § 1611.5. See 45 C.F.R. § 1611.3(c)(2) (2021).

²¹ See Annual Update of the HHS Poverty Guidelines, 86 Fed. Reg. 7732, 7733 (Feb. 1, 2021); see also *Poverty Guidelines*, U.S. DEP’T HEALTH & HUM. SERVS. OFF. OF THE ASSISTANT SEC’Y FOR PLAN. AND EVALUATION, <http://aspe.hhs.gov/poverty-guidelines> [<http://perma.cc/G3UF-GKZU>] (last visited May 30, 2021).

²² See JESSICA SEMEGA, ET AL., U.S. CENSUS BUREAU, U.S. DEP’T OF COM., *INCOME AND POVERTY IN THE UNITED STATES: 2019*, at 59 tbl.B-3 (2020), <http://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf> [<http://perma.cc/3CLA-R2FE>].

²³ See *id.* at 12.

in the ten years prior to that, the number of Americans living below 125% of the poverty level averaged over 62 million.²⁴

Moreover, that cut-off greatly understates the number of individuals whose means in fact preclude them from obtaining adequate legal representation. A more accurate measure of the justice gap may include individuals at or below 200% of the poverty level, the threshold used by many legal aid organizations across the country that do not receive LSC funding.²⁵ As of 2019, 85.5 million Americans fell within that group,²⁶ though that number exceeded 100 million for most of the past decade.²⁷ While the effects of the COVID-19 pandemic are still playing out, the number of individuals who cannot afford legal representation is undoubtedly higher today, whichever metric one uses.²⁸ And, unsurprisingly, poverty disproportionately affects women, children, people of color, people with disabilities, and those with less education.²⁹

Those living near poverty have significant civil legal needs. In 2017, LSC reported that 71% of low-income households faced at least one “justiciable civil legal issue[]” each year—one that could be resolved through civil legal action.³⁰ Yet, in almost nine out of ten such cases, the individual received inadequate (and more often no) professional legal help.³¹ Those issues are often critical to one’s very livelihood. The most common legal issues

²⁴ See LEGAL SERVS. CORP., FY2021 BUDGET REQUEST 5 (2021) [hereinafter LSC 2021 BUDGET REQUEST].

²⁵ See 3 EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 878–79 (2014); see also Sherri Knuth & Drew Schaffer, *Where Does Legal Aid Funding Come From?*, 10 BENCH & BAR OF MINN. 16–17 (2019). Similarly, many legal aid organizations that do not receive LSC funding set the income threshold at 185% of the poverty level. See MINN. LEGAL SERVS. COAL., LEGAL AID’S IMPACT 5 (2015); see also *supra* note 20 and accompanying text. LSC-funded organizations may serve those above 125% of the poverty level in limited situations, though the public data available does not clarify which clients from such organizations fall above or below the 125% threshold.

²⁶ SEMEGA ET AL., *supra* note 22, at 59.

²⁷ See, e.g., CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, INCOME AND POVERTY IN THE UNITED STATES: 2014, at 17 tbl.5 (2015). For identical annual reports dating back ten years, see *Income & Poverty Publications*, U.S. CENSUS BUREAU (Nov. 21, 2021), <http://www.census.gov/topics/income-poverty/library/publications.html> [<http://perma.cc/9PYJ-5UZN>].

²⁸ *LSC Survey Finds Major Impact of COVID-19 Pandemic on Legal Aid*, LEGAL SERVS. CORP. (July 24, 2020), <http://www.lsc.gov/press-release/lsc-survey-finds-major-impact-covid-19-pandemic-legal-aid> [<http://perma.cc/P2VE-HUVK>].

²⁹ See SEMEGA ET AL., *supra* note 22, at 13, 15, 17–18; see generally NANETTE GOODMAN ET AL., FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA (2019) (exploring the intersection between race, disability, and poverty).

³⁰ THE JUSTICE GAP, *supra* note 16, at 21 (surveying those at or below 125% of the federal poverty level). Many, of course, face numerous civil legal issues annually. Over one-half of low-income households face two or more justiciable issues in a year, while almost one in four face six or more justiciable civil legal issues in a year. *Id.*

³¹ *Id.* at 30.

faced by low-income individuals relate to health (such as insurance coverage, incorrect billing, and medical debt collection), family issues (such as child custody, child support, and domestic abuse), housing issues (such as eviction, foreclosure, or unsafe living conditions), and income maintenance (such as loss of social security and other benefits).³² Thus, for millions of Americans who risk losing their housing, parental rights, or much needed benefits, or who require a restraining order from a violent partner, they must face these obstacles with no legal help. In addition, individuals in vulnerable populations, such as those with mental disabilities or for whom English is a second language, are particularly disadvantaged.³³

It is not hyperbole that simply having representation may change the course of one's life. In the State of New York in 2015, only 2% of tenants in eviction cases had legal representation.³⁴ Meanwhile, unrepresented tenants were evicted nearly 50% of the time, whereas those who had counsel were evicted in just 10% of the cases.³⁵ A similar study from Philadelphia found that tenants without representation faced "disruptive displacement" in 78% of the cases, while those represented did so only 5% of the time.³⁶ Likewise, in Minneapolis in 2018, only 3% of tenants in eviction cases had legal counsel.³⁷ Those with full representation were able to keep an eviction off their housing record 78% of the time, while those without representation were able to do so only 6% of the time.³⁸ Indeed, a recent metastudy by the National Coalition for a Civil Right to Counsel found that in urban communities where there is no enacted civil right to counsel, 3% of tenants in eviction proceedings are represented, while 82% of landlords are represented.³⁹

³² *Id.* at 22–24.

³³ LSC 2021 BUDGET REQUEST, *supra* note 24, at 10.

³⁴ THE JUSTICE GAP, *supra* note 16, at 9.

³⁵ The Editorial Board, *A Right to a Lawyer to Save Your Home*, N.Y. TIMES (Sept. 23, 2016), <http://www.nytimes.com/2016/09/23/opinion/a-right-to-a-lawyer-to-save-your-home.html> [<http://perma.cc/THS7-XJ8V>].

³⁶ STOUT RISIUS ROSS, ECONOMIC RETURN ON INVESTMENT OF PROVIDING COUNSEL IN PHILADELPHIA EVICTION CASES FOR LOW-INCOME TENANTS 7 (2018).

³⁷ Luke Grundman, Muria Kruger & Tom Tinkham, *In Eviction Proceedings, Lawyers = Better Outcomes*, 76, 2 BENCH & BAR MINN. 19, 19 (2019) (reviewing 5,182 eviction cases filed against tenants in Hennepin County, Minnesota, from July 2017 to June 2018, and finding that only 163 tenants had an attorney of record).

³⁸ *Id.* at 20. Having an eviction on one's housing record can harm their credit and prevent them from qualifying for public housing. See Susan Beck, *The Justice Gap: How Big Law Is Failing Legal Aid*, AM. LAWYER (2015), http://www.courts.ca.gov/documents/BTB_23_PRECON_Poverty_Simulation_2.pdf [<http://perma.cc/4D5T-WYUT>].

³⁹ NAT'L COAL. FOR A CIV. RIGHT TO COUNS., EVICTION REPRESENTATION STATISTICS FOR LANDLORDS AND TENANTS ABSENT SPECIAL INTERVENTION,

The story is the same with debt collection and family issues. A study from Virginia found that 94% of defendants in debt collection cases were unrepresented, though the success rate for defendants increased from 2% when unrepresented, to 23% when represented.⁴⁰ In New York, 95% of parents in child support cases were unrepresented,⁴¹ while the Philadelphia Legal Assistance organization has reported that they must turn away 95% of those who seek assistance for protection orders.⁴² Indeed, in small claims dockets, 76% of *plaintiffs* are represented.⁴³ As noted by Alan Houseman, this “suggests that small claims courts, which were originally developed as a forum for self-represented litigants to obtain access to courts through simplified procedures, have become the forum of choice for attorney-represented plaintiffs in lower-value debt collection cases.”⁴⁴

The costs, of course, are not borne only by the unrepresented litigants. Approximately 18 million families with minor children live below 125% of the federal poverty level.⁴⁵ The ripple effects of a loss of housing, lack of protective orders, and other common civil legal issues can impact those children deeply and perpetuate a cycle of poverty.⁴⁶ Moreover, the greater community suffers real economic costs when families lose their housing and individuals lose employment, income, and benefits. Studies in various states have regularly concluded that for every dollar contributed toward legal aid, the average return on investment to the state is around six dollars.⁴⁷

In addition, the court system itself suffers when individuals are not represented, as *pro se* parties generally require additional time and assistance from court personnel, are less likely to settle their cases, and increase costs to the represented

http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stas__NCCRC_.pdf#_blank [<http://perma.cc/NG8S-ZAM7>] (last visited Apr. 15, 2022).

⁴⁰ LSC 2021 BUDGET REQUEST, *supra* note 24, at 10.

⁴¹ THE JUSTICE GAP, *supra* note 16, at 9.

⁴² Beck, *supra* note 38.

⁴³ See LSC 2021 BUDGET REQUEST, *supra* note 24, at 9.

⁴⁴ Alan W. Houseman, *Country Report—USA*, in ACCESS TO JUSTICE AND THE CHALLENGE OF COVID-19 293, 293 (International Legal Aid Group (ILAG) Conference, June 2021), http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0018/44424/ILAG-Conference-Booklet-3-National-Reports.pdf [<http://perma.cc/FMU2-CL9D>]. Another study found that plaintiffs are represented in the great majority of debt collection cases, while defendants are represented less than 10% of the time. THE PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 14 (May 2020).

⁴⁵ THE JUSTICE GAP, *supra* note 16, at 51.

⁴⁶ Pamela Cardulla Ortiz, *How a Civil Right to Counsel Can Help Dismantle Concentrated Poverty in America’s Inner Cities*, 25 STAN. L. & POL’Y REV. 163, 168 (2014).

⁴⁷ See LISA MOORE & MEGAN PHYPER, RETURN ON INVESTMENT IN CIVIL JUSTICE SERVICES AND PROGRAMS 10–12 (2019) (providing a bibliography and summary of studies of various states); see also LSC 2021 BUDGET REQUEST, *supra* note 24, at 14–16 (listing additional studies).

party due to unnecessary delays and disruptions.⁴⁸ More fundamentally, the lack of meaningful access to representation for a huge portion of the population in this country, one of the richest in the world, affects public confidence in the very legal system itself.⁴⁹ As Deborah Rhode noted, “It is a shameful irony that the country with the world’s most lawyers has one of the least accessible systems of justice. It is more shameful still that the inadequacies attract so little concern.”⁵⁰

Despite this immense need, there are only about 10,500 dedicated legal aid attorneys in America.⁵¹ As of 2019, that equaled one legal aid attorney for every 8,143 individuals in America living below 200% of the poverty level.⁵² By contrast, there was one lawyer for every 181 members of the “paying” population.⁵³

⁴⁸ CONFERENCE OF CHIEF JUSTICES AND CONFERENCE OF STATE COURT ADMINISTRATORS, THE IMPORTANCE OF FUNDING FOR THE LEGAL SERVICES CORPORATION FROM THE PERSPECTIVE OF THE CONFERENCE OF CHIEF JUSTICES AND THE CONFERENCE OF STATE COURT ADMINISTRATORS 2 (2015), available at http://ccj.ncsc.org/_data/assets/pdf_file/0013/23251/lsc_whtpr.pdf [<http://perma.cc/MEP5-CAZY>]; see also LSC 2021 BUDGET REQUEST, *supra* note 24, at 11.

⁴⁹ See 3 JOHNSON JR., *supra* note 25, at 929; see also John M.A. DiPippa, *Peter Singer, Drowning Children, and Pro Bono*, 119 W. VA. L. REV. 113, 125–26 (2016) [hereinafter DiPippa, *Peter Singer*]; DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 27–28 (Stanford Univ. Press 2005) [hereinafter RHODE, IN PRINCIPLE AND IN PRACTICE].

⁵⁰ RHODE, *supra* note 6, at 422.

⁵¹ This number was determined by the National Center for Access to Justice, an independent organization housed at the Fordham University School of Law. *Attorney Access*, NCAJ, <http://www.ncaj.org/state-rankings/2020/attorney-access> [<http://perma.cc/46HS-EDSS>] (last visited May 30, 2021); see also Houseman, *supra* note 44, at 273. *But see* ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2017 79 n.88 (2018) [hereinafter CIVIL LEGAL AID IN THE UNITED STATES], <http://legalaidresearch.org/2020/01/31/civil-legal-aid-in-the-united-states-an-update-for-2017/> [<http://perma.cc/TCE6-AWQT>] (stating that an exact number of both legal aid attorneys and even legal aid organizations is unknown). One recent estimate by the National Legal Aid and Defender Association put the number of full-time equivalent legal aid attorneys at just 6,783. *Id.*; see also 3 JOHNSON JR., *supra* note 25, at 879 (approximating the number at 6,500 in 2014).

⁵² There were 85.5 million individuals below 200 percent of the poverty level in 2019. SEMEGA ET AL., *supra* note 22, at 59 tbl.B-3.

⁵³ See 2019 U.S. Population Estimates Continue to Show the Nation’s Growth is Slowing, U.S. CENSUS BUREAU (Dec. 30, 2019), <http://www.census.gov/newsroom/press-releases/2019/popest-nation.html> [<http://perma.cc/2L99-KKCV>] (citing that as of 2019, the United States Population was approximately 328,239,523); see also ABA National Lawyer Population Survey, AM. BAR ASS’N (2019), http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2019.pdf [<http://perma.cc/8V3H-LCQK>] (stating that in 2019 there were 1,352,027 licensed active lawyers in America). The 181 number was determined by first subtracting the 85.5 million individuals below 200% of the poverty level from the overall population, and then dividing that number by the number of overall lawyers less the 10,500 legal aid lawyers. Notably, this may overstate the availability of counsel for “paying” clients to some degree, because it does not account for lawyers who do not represent clients (e.g., judges, in-house attorneys, and professors).

The above actually overstates the number of legal aid attorneys available for many poor, however. First, as noted above, 2019 reflects a time of historic prosperity. The ratio of legal aid attorneys to those in need would be less favorable in any other year considered, and significantly so in 2021. Second, these attorneys are not distributed evenly. In twenty-seven states, there is less than one legal aid attorney for every 10,000 individuals living below 200% of the poverty level.⁵⁴ Third, not all legal aid attorneys are even theoretically “available” to those living in or near poverty. About 5,629 (full-time equivalent) lawyers work for the 132 legal aid organizations that receive funds from LSC, while 4,850 lawyers work for the 570 or so other legal aid organizations.⁵⁵ However, with limited exceptions, LSC funds may only be used to serve those under 125% of the poverty level.⁵⁶ Thus, those individuals whose family income is above 125% but below 200% of the poverty level in fact have access to only about one-half of the legal aid attorneys in America. At the same time, LSC-funded organizations are prohibited from representing many categories of clients, including most immigrants or housing clients with drug records.⁵⁷ Accordingly, individuals with those (and other) legal issues likewise may seek help only from attorneys at non-LSC-funded organizations.

The work of those 10,500 legal aid lawyers is supplemented by the bar’s significant pro bono contributions. Most states have neither mandatory nor voluntary reporting, so overall pro bono participation is unclear.⁵⁸ A comprehensive study from 2017, though, found that about 52% of lawyers did at least some pro bono service that year, and the average commitment per attorney was 36.9 hours.⁵⁹ If these numbers represent an accurate sample of the nation’s 1.3 million lawyers,⁶⁰ total pro bono hours would be about 48 million hours annually—over three times the hours worked by legal aid attorneys.⁶¹

⁵⁴ *Attorney Access*, *supra* note 51.

⁵⁵ *Id.*

⁵⁶ See sources cited *supra* notes 20 and 25.

⁵⁷ See *infra* Section II.A.

⁵⁸ Nine states require mandatory reporting of pro bono activity (but do not require that attorneys do pro bono), and thirteen states provide for voluntary reporting. See *Pro Bono Reporting*, AM. BAR ASS’N, http://www.americanbar.org/groups/probono_public_service/policy/arguments/ [<http://perma.cc/2WL7-JEXY>] (last updated Mar. 19, 2020) (reporting state bar options).

⁵⁹ See SUPPORTING JUSTICE IV, *supra* note 6, at 1 (polling 47,000 lawyers from twenty-four states).

⁶⁰ See *supra* note 53 and accompanying text.

⁶¹ This assumes that each of the 10,500 legal aid attorneys works thirty hours per week on direct client representation for fifty-two weeks of the year. For example, a 2014 study of Minnesota legal attorneys found that the 227 full-time equivalent legal aid

Notably, pro bono hours are provided disproportionately by the largest firms, which face significant reputational pressure to perform pro bono.⁶² For instance, attorneys at firms with 300 or more attorneys contribute on average almost seventy-three hours of pro bono representation per lawyer annually⁶³ and the participation rate approaches 80%.⁶⁴

However, a focus on hours alone overstates the impact that pro bono has on the justice gap. For one, almost 30% of pro bono hours are not dedicated to serving persons of limited means (or to organizations serving those individuals), but to supporting bar related activities or community-based nonprofits, such as churches, symphonies, or museums.⁶⁵ As recently as 2013, only 46% of pro bono hours went to low-income individuals.⁶⁶ Second, lawyers are less efficient (and likely less effective) at pro bono work than a legal aid attorney with years of experience on the relevant issues.⁶⁷ Indeed, many pro bono attorneys have an incentive *not* to be efficient, as we'll explore later.⁶⁸ Finally, legal aid attorneys must spend a considerable portion of their own time referring clients to, and then supporting, pro bono lawyers—time that would otherwise be spent (efficiently and effectively) serving clients.⁶⁹

Ultimately, despite the combined efforts of legal aid organizations and pro bono programs, the justice gap remains vast and continues to grow.⁷⁰ Low-income Americans seek legal advice for only about 20% of their civil legal problems.⁷¹ Yet, of those 20%, only one in three receive the assistance needed to fully resolve the issue.⁷² While others may receive some limited

attorneys across the state spent 354,120 hours on direct client representation (for an average of 1,560 hours annually). See MINN. LEGAL SERVS. COAL., *supra* note 25, at 5.

⁶² See generally *infra* Section II.B.

⁶³ SUPPORTING JUSTICE IV, *supra* note 6, at 33.

⁶⁴ See PRO BONO INST., 2018 REPORT ON THE LAW FIRM PRO BONO CHALLENGE INITIATIVE 9 (2018) [hereinafter 2018 REPORT ON THE PRO BONO CHALLENGE], <http://www.probonoinst.org/wpps/wp-content/uploads/2019A-Challenge-ReportV8june15-FINAL-1.pdf> [<http://perma.cc/PE85-PNJJ>]. In particular, associates at large firms contribute the greatest portion of such hours. *Id.*

⁶⁵ See PRO BONO INST., 2020 REPORT ON THE LAW FIRM PRO BONO CHALLENGE INITIATIVE 8 (2020) [hereinafter 2020 REPORT ON THE PRO BONO CHALLENGE], <http://www.probonoinst.org/2020PBILFChallengeRep> [<http://perma.cc/5D2X-5LCB>]; see also MODEL RULES OF PRO. CONDUCT § 6.1 cmt. 6, 8 (A.B.A. 2020) (recognizing service to community organizations and service to the legal profession generally as pro bono).

⁶⁶ See Beck, *supra* note 38.

⁶⁷ See *id.*

⁶⁸ See *infra* Section III.B.

⁶⁹ See *id.*

⁷⁰ See LSC 2021 BUDGET REQUEST, *supra* note 24, at 8.

⁷¹ THE JUSTICE GAP, *supra* note 16, at 29.

⁷² *Id.* at 13.

representation, four in ten receive no legal help at all.⁷³ Altogether, low-income Americans receive inadequate or no professional legal help for 86% of the civil legal problems they face in a given year.⁷⁴ In approximately 90% of the cases for which the legal aid organization could not adequately represent the client, the cause was simply insufficient resources.⁷⁵ In 2020, the World Justice Project ranked the United States last in access to affordable civil justice among thirty-seven high-income countries—and *109th* out of 128 countries overall.⁷⁶ If ensuring access to justice for all, regardless of one's means, is indeed truly a foundational value of the profession, we are objectively failing to live out that value.

II. THE BAR'S EVOLUTION ON ACCESS TO JUSTICE AS A CORE VALUE

A threshold question is not whether the justice gap exists—it does—but whether the bar has a special responsibility to address it. Many argue the bar does, primarily because it has a monopoly on the provision of legal services (and fights to maintain that monopoly), benefits most directly from that monopoly, and should therefore ensure access to representation for those simply unable to pay.⁷⁷ Others counter that access to legal representation benefits society as a whole, not simply the bar, and the bar therefore should not bear the burden of ensuring such access.⁷⁸ Certainly, there are many individuals within the profession who care deeply about the justice gap and whose actions follow. However, for many lawyers—perhaps most of the bar—ensuring those in poverty receive access to lawyers is a noble ideal, but a practical inconvenience best left to others to address.

Ultimately, then, is the legal profession truly dedicated today to the principle that all members of society should have access to representation, regardless of their means? And, if so, is ensuring such access a responsibility of the bar? My goal with this Article is

⁷³ See *id.*

⁷⁴ See *id.* at 6. Moreover, 62% of low-income individuals have no college education (and 88% have no college degree), making it even more difficult to effectively advocate for oneself in the judicial system. See *id.* at 18.

⁷⁵ See *id.* at 44–45.

⁷⁶ See *WJP Rule of Law Index*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/rule-of-law-index/country/2020/United%20States/Civil%20Justice/> [http://perma.cc/7HCU-TVU8] (last visited June 25, 2021).

⁷⁷ See DiPippa, *Peter Singer*, *supra* note 49, at 121–24; Steven Lubet & Cathryn Stewart, A “Public Assets” Theory of Lawyers’ Pro Bono Obligations, 145 U. PA. L. REV. 1245, 1246 (1997); RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 28–29.

⁷⁸ RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 35–36 (acknowledging but refuting this position).

not to debate that, but simply to take the bar at its word. Today, all levels of the bar vocally and unequivocally profess the profession's commitment to equal access to justice.⁷⁹ Rule 6.1 of the Model Rules of Professional Conduct states that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”⁸⁰ Former ABA President Patricia Lee Refo recently noted, “The belief that justice should be the same, in substance and availability, regardless of an individual’s economic status . . . is ingrained in the American Bar Association’s DNA.”⁸¹ The ABA has both a Standing Committee on Pro Bono and Public Service⁸² and a Standing Committee on Legal Aid and Indigent Defense,⁸³ and it bestows Pro Bono Publico Awards each year to individuals and institutions who demonstrate outstanding commitment to serving those in poverty. Similarly, almost all state bar associations have Access to Justice Commissions⁸⁴ and publicly celebrate pro bono contributors.⁸⁵ Over 80% of lawyers express strong support for pro bono,⁸⁶ and most major law firms trumpet their commitment to pro bono on their websites, to their clients, and to prospective attorneys. The Conference of Chief Justices and Conference of State Court Administrators have issued resolutions acknowledging the justice gap and setting an “aspirational goal of 100% access to effective assistance for

⁷⁹ See, e.g., MODEL RULES OF PRO. CONDUCT § 6.1 (AM. BAR ASS’N 2020); Patricia Lee Refo, *Justice for All*, AM. BAR ASS’N J. (Feb. 1, 2021, 2:30 AM), <http://www.abajournal.com/magazine/article/Justice-for-All> [<http://perma.cc/A73D-87W7>]; *Standing Committee on Legal Aid and Indigent Defense*, AM. BAR ASS’N [hereinafter *Standing Committee*], http://www.americanbar.org/groups/legal_aid_indigent_defense/ [<http://perma.cc/AF9B-GEK3>] (last visited May 30, 2021).

⁸⁰ MODEL RULES OF PRO. CONDUCT § 6.1 (AM. BAR ASS’N 2020).

⁸¹ Refo, *supra* note 79.

⁸² See *Standing Committee*, *supra* note 79.

⁸³ See *id.*

⁸⁴ See HOUSEMAN & PERLE, *supra* note 17, at 42; see also ABA Resource Center for Access to Justice Initiatives, *Access to Justice Commissions: March/April 2018 Updates*, AM. BAR ASS’N, (2018) http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_sclaid_atj_commission_updates.pdf [<http://perma.cc/LF2T-GPH5>].

⁸⁵ Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2369 (2010); see also *Pro Bono Publico Award*, AM. BAR ASS’N, http://www.americanbar.org/groups/probono_public_service/projects_awards/pro_bono_publico_award/ [<http://perma.cc/X6GP-8PTX>] (last visited May 30, 2021). For an example, the Minnesota state bar publishes each year a list of “North Star” lawyers, those who have contributed fifty or more hours to pro bono service. See *Saluting Our North Star Lawyers*, MINN. BAR ASS’N, <http://www.mnbar.org/resources/publications/bench-bar/columns/2020/06/30/saluting-our-north-star-lawyers> [<http://perma.cc/J548-V89F>] (last visited May 30, 2021).

⁸⁶ SUPPORTING JUSTICE IV, *supra* note 6, at 18.

effective assistance for essential civil legal needs.”⁸⁷ Law schools are now required to offer pro bono opportunities to students to retain accreditation, and many law schools require students to perform some pro bono to graduate.⁸⁸ The current American Association for Law Schools President, Darby Dickerson, defined access to justice as a “cornerstone of legal education and the legal profession.”⁸⁹ While members of the bar may dispute whether the bar has a *duty* to address the justice gap, or what is the best approach to close the gap, few would dispute that ensuring access to justice is “part of the very DNA of our justice system.”⁹⁰

Indeed, newly minted members of the bar would be forgiven for assuming that striving to provide access to justice has long been a foundational aspect of legal tradition. But they would be mistaken. The bar’s commitment to access to justice is a fairly recent development. To understand how the profession got to this point, it is necessary to trace the evolution of the bar’s embrace of and approach to ensuring access to justice, first through the legal aid movement and more recently the pro bono movement.

A. The Bar’s Grudging Embrace of Legal Aid

Despite early pronouncements of a lawyer’s duty, if not privilege, to “cheerfully” represent those unable to pay,⁹¹ such altruism did not extend to *anyone* unable to pay for representation. Rather, for most of the bar throughout the nineteenth century, this duty extended only to neighbors, family, and friends.⁹² While this view may have served the needs of most in rural communities, it left many in the growing cities—many of

⁸⁷ CONFERENCE OF CHIEF JUSTICES AND CONFERENCE OF STATE COURT ADMINISTRATORS, RESOLUTION 5: REAFFIRMING THE COMMITMENT TO MEANINGFUL ACCESS TO JUSTICE FOR ALL (2015), available at <http://ccj.ncsc.org/policy-resolutions> [<http://perma.cc/X2WN-8VST>] (last visited May 30, 2021).

⁸⁸ ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, Standard 303(b)(2) (2020); see also *Directory of Law School Pro Bono Programs*, AM. BAR ASS’N, http://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/ [<http://perma.cc/YNE3-LS23>] (last updated May 13, 2021).

⁸⁹ *AALS Survey: Law Class of 2019 Contributed More than \$111 Million Worth of Pro Bono Legal Services*, AALS NEWS 9 (Dec. 2019) <http://www.aals.org/aals-newsroom/2019-student-pro-bono-hours-survey/> [<http://perma.cc/6D25-ECCB>].

⁹⁰ *Pro Bono Publico*, FLA. BAR ASS’N (quoting William J. Schifino, Jr., president of the Florida Bar in 2016 and 2017), <http://www.floridabar.org/public/probono/probono002/> [<http://perma.cc/8KPJ-CF3M>] (last updated Dec. 14, 2020); see also Refo, *supra* note 79 (explaining that the current ABA president describes access to justice as “ingrained in the American Bar Association’s DNA”).

⁹¹ SMITH, *supra* note 2, at 232–33 (quoting from the first American code of ethics published by David Hoffman in the early nineteenth century, “I shall never close my ear or heart because my clients’ means are low . . . and they shall receive a due portion of my services, cheerfully given.”).

⁹² See Cummings, *supra* note 1, at 4.

whom were immigrants—without access to lawyers.⁹³ As Reginald Heber Smith bluntly put it: “[I]t is the fact that the bar as a whole has done almost nothing to assist the poor in securing that justice which our institutions profess to guarantee them.”⁹⁴ In fact, the bar’s first formal pronouncement of a lawyer’s duty to provide services to those in poverty, in the ABA’s 1908 Code of Professional Ethics, included a quite tepid, and limited, vision: “The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.”⁹⁵ That was hardly a resounding statement for an ethic of ensuring legal access to all of those in need.

While there were notable voices advocating for the underserved, chiefly that of Justice Louis Brandeis, no chorus could be attributed to the bar at large. Rather, the “majority of . . . judges and lawyers view[ed] this situation with indifference.”⁹⁶ Indeed, when Roscoe Pound, in a 1906 speech to the ABA, addressed the causes of popular dissatisfaction in the administration of civil justice in America, he failed even to acknowledge the lack of access to lawyers that millions of individuals experienced. Moreover, those in attendance were largely “incredulous, and . . . not a few were indignant at the intimation that our justice was not closely akin to perfection itself.”⁹⁷ As Reginald Heber Smith argued forcefully in his seminal 1919 book *Justice for the Poor*, while the “bench and the bar will vehemently deny any suggestion that there is no law for the poor,” that surely did not reflect the reality for those who were, in fact, poor.⁹⁸ And the number of those living in poverty was immense. Smith estimated that in 1918 almost 8 million persons in America were unable to secure legal assistance due to their poverty.⁹⁹

⁹³ See SMITH, *supra* note 2, at 33, 133, 188.

⁹⁴ *Id.* at 233.

⁹⁵ CODE OF PRO. ETHICS r. 12 (AM. BAR ASS’N 1908).

⁹⁶ SMITH, *supra* note 2, at 9. While Smith’s work was insightful and influential on the topic of access to lawyers, he was less perceptive regarding the role that substantive law and the application thereof played with respect to equal justice, in particular racial and gender inequality under the law. See John M.A. DiPippa, *Justice and the Poor in the 21st Century*, 40 CAMPBELL L. REV. 73, 93 (2018) [hereinafter DiPippa, *Justice and the Poor*]. For instance, Smith noted:

[T]he substantive law, with minor exceptions, is eminently fair and impartial.

In other words, the existing denial of justice to the poor is not attributable to any injustice in the heart of the law itself. The necessary foundation for freedom and equality of justice exists. The immemorial struggle is half won.

SMITH, *supra* note 2, at 15.

⁹⁷ SMITH, *supra* note 2, at 8.

⁹⁸ *Id.* at 11.

⁹⁹ *Id.* at 33.

Due to the efforts of “small and isolated groups of judges, lawyers, and laymen”¹⁰⁰ who first acknowledged, and then were moved to actually confront these issues, legal aid organizations began to spring up in the late 1800s.¹⁰¹ But even those initial organizations were limited to providing services to specific ethnic groups of immigrants, those particularly vulnerable given their limited means and understanding of American systems and language.¹⁰² The first legal aid organization, created specifically to assist German immigrants, was formed in New York City in 1876. The first legal aid organization open to all, regardless of nationality, race, or sex, was organized in Chicago in 1888. By the turn of the century, legal aid organizations existed in three cities, Chicago, New York, and Jersey City.¹⁰³ From there, expansion was steady, if not rapid, and legal aid offices opened in most major American cities.¹⁰⁴ By 1909 there were fourteen legal aid organizations, twenty-eight just four years later, and over forty by 1919.¹⁰⁵ By 1949, there were ninety-two legal aid organizations in the United States,¹⁰⁶ and there are approximately 1,000 today.¹⁰⁷

The first legal aid organization initiated by the bar itself was The Boston Legal Aid Society, organized in 1900.¹⁰⁸ The impetus for the bar’s support, however, was to “relieve private offices of their charity cases.”¹⁰⁹ In other words, the bar’s motivation, at least in significant part, was to shift pressure to do pro bono

¹⁰⁰ *Id.* at 38, 134–36. Smith expressly noted the absence of bar associations and “judges acting as a body” in the formation of legal aid organizations due to either “ignorance of, or indifference to, the disadvantages under which the poor have struggled.” *Id.* at 37.

¹⁰¹ *Id.* at 134–36.

¹⁰² *See id.*

¹⁰³ *See id.* at 139.

¹⁰⁴ *Id.* at 140.

¹⁰⁵ *Id.* at 145, 147. The law school at the University of Denver (now the Sturm School of Law) became the first law school to form a legal aid clinic in 1904, though the clinic in its initial formulation closed in 1910. *See id.* at 143–44.

¹⁰⁶ EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS’ SERVICES FOR PERSONS UNABLE TO PAY FEES* 26 (First Greenwood Reprinting 1971) (1951).

¹⁰⁷ The exact number of legal aid organizations in America is unknown. *See* CIVIL LEGAL AID IN THE UNITED STATES, *supra* note 51. Most, however, “are small entities that provide limited services in specific locales or for particular client groups . . .” *Id.* at 79. Houseman has identified approximately 660 civil legal aid programs, exclusive of law school clinics. *See id.* at 79 n.88. If law school clinics are added, the number increases to about 860. *Id.* However, the National Legal Aid and Defender Association puts the number at 1,147 staff-based programs having an average of six attorneys. *Id.* In addition, one organization may have several offices. For instance, the 132 organizations that receive LSC funding have 855 offices serving every county and territory in the United States. *See* LSC 2021 BUDGET REQUEST, *supra* note 24, at ii.

¹⁰⁸ *See* Mark Spiegel, *The Boston Legal Aid Society: 1900–1925* 20 (B.C. L. Sch. Pub. L. & Legal Theory Rsch. Paper Series, Research Paper No. 20, 2003).

¹⁰⁹ SMITH, *supra* note 2, at 141.

work¹¹⁰ from private attorneys to dedicated legal aid attorneys—in turn, permitting private attorneys to increase their profits.¹¹¹ Reginald Heber Smith observed, “The legal aid societies have recognized their position and have served the bar to the limit of their ability; the lawyers are only dimly aware that they owe a debt to legal aid work, and as yet . . . have not taken the part which may fairly be expected of them.”¹¹² Notably, when the Carnegie Foundation requested the ABA’s mailing list so that it could send a free copy of Smith’s *Justice for the Poor* to all ABA members, the ABA refused the request.¹¹³

In response to Smith’s public rebuke of the bar’s lack of support for legal aid,¹¹⁴ the ABA did establish the Special Committee on Legal Aid Work in 1921. The ABA elevated it to a standing committee the following year, which Smith himself chaired until 1938.¹¹⁵

Though the national bar now at least voiced support for legal aid, local and state groups remained slow to embrace a broader legal aid movement.¹¹⁶ While sections of the bar may have been simply ignorant or apathetic to the issue, others were directly hostile to legal aid. Some feared competition from legal aid organizations for clients. Others felt such organizations would improperly seek systemic change rather than limit their efforts to individual issues. And some may have had a racially motivated desire *not* to build up certain communities.¹¹⁷

Whatever the motivations, however, a commitment to ensuring access to the law for all was not a core value of the profession. Indeed, Emery Brownell concluded in a 1949 follow-up report to Smith’s *Justice and the Poor*:

¹¹⁰ The term “pro bono” was not used at that time; Reginald Heber Smith addressed the concept of pro bono in JUSTICE AND THE POOR as the “volunteer counsel or honorary counsel plan.” SMITH, *supra* note 2, at 220; *see also* DiPippa, *Justice and the Poor*, *supra* note 96, at 89.

¹¹¹ *See* DiPippa, *Justice and the Poor*, *supra* note 96, at 90.

¹¹² SMITH, *supra* note 2, at 226. Among other benefits, Smith noted the reputational benefit to the profession of having legal claims of the poor heard, and the offloading of the ethical responsibility and financial impact of serving the poor from those in private practice. *See id.* at 228–29.

¹¹³ *See* DiPippa, *Justice and the Poor*, *supra* note 96, at 92.

¹¹⁴ *See* Cummings, *supra* note 1, at 12.

¹¹⁵ *See* DiPippa, *Justice and the Poor*, *supra* note 96, at 92; *see also* A Century of SCLAID Timeline, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_aid_indigent_defense/about-us/sclaid-100/a-century-of-sclaid/ [<http://perma.cc/WX9T-B6VB>] (last visited December 31, 2021). That committee remains today as the ABA Standing Committee on Legal Aid & Indigent Defense.

¹¹⁶ *See* DiPippa, *Justice and the Poor*, *supra* note 96, at 94.

¹¹⁷ *See id.* at 93, 96; *see also* Cummings, *supra* note 1, at 15–17.

A major reason [for the lack of legal aid growth] has been the failure of the Bar to recognize the problem and to deal with it realistically. Whether due to the unfounded fear of competition, inherent lethargy, or mere lack of interest, the failure of the local bar associations to give leadership, and in many cases the hostility of lawyers to the idea, have been formidable stumbling blocks in the efforts to establish needed facilities.¹¹⁸

Brownell concluded starkly, “The unhappy truth is that [the legal profession] had made almost no substantial progress up to the close of 1947.”¹¹⁹

Even legal aid advocates debated who should be primarily responsible for funding the work. Smith himself vacillated between assigning responsibility to the bar and to the government. He initially asserted that members of the bar should bear the costs, chiefly because they (apart from the recipients of the services themselves) had the most to gain: legal aid programs permitted private lawyers to increase their own profits by relieving them of the “legal and moral responsibility of the legal profession in general” to provide access to justice.¹²⁰ Yet, Smith also recognized the benefits to the greater society when its members have adequate legal representation, and he saw legal aid work as an “essential public service” that should be funded, when appropriate, by the government.¹²¹ He also advocated a national approach to legal aid to ensure access and permit efficiencies of scale, to be supported both financially and logistically by the ABA, and to be placed under judicial control.¹²² Ultimately, Smith landed on the side of private support, noting in 1949 “the ever-present danger that a grant of governmental money will be followed by governmental control.”¹²³

¹¹⁸ BROWNELL, *supra* note 106, at 29.

¹¹⁹ *Id.* at 33.

¹²⁰ DiPippa, *Justice and the Poor*, *supra* note 96, at 89–90.

¹²¹ *Id.* at 90–91; *see also* SMITH, *supra* note 2, at 182, 244.

¹²² *See* SMITH, *supra* note 2, at 244–47; *see also* 1 EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 34, 35 (2014).

¹²³ Reginald Heber Smith, *Introduction* to EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES, at xvii (First Greenwood Reprinting 1971) (1951). For purposes of transparency, my own view is that the federal and state governments should bear primary responsibility for increased legal aid funding, given the direct benefit that closing the justice gap would have to society and that many of the factors that have led to the justice gap extend beyond the law. Yet, I strongly believe the bar should accept a much greater role in funding legal aid than it presently accepts given its unique relationship to the issue, including its tight control over who can represent clients its resistance. These considerations will be explored in more detail in a forthcoming piece.

Meanwhile, as both the population and complexities of an expanding industrial nation grew, the justice gap widened.¹²⁴ In 1950, the ABA passed a resolution asserting that it was “the primary responsibility of the legal profession” to establish, maintain, and support legal aid facilities “in all parts of the country”—its first formal call for such engagement.¹²⁵ The catalyst was not the Brownell report, however, but a concerning trend across the ocean. In 1950, England instituted a government-funded legal aid system that compensated private lawyers who handled cases for those unable to afford legal services.¹²⁶ Indeed, “[t]o most leaders of the American Bar, anything patterned on the British system constituted ‘socialism of the legal profession.’”¹²⁷ Robert Storey wrote in the ABA Journal in 1951, one year prior to becoming the ABA president, that a federally financed nationwide plan for legal aid services was the profession’s “greatest threat” (aside from Communist infiltration).¹²⁸ In sum, the ABA’s belated call to its members to support legal aid was not born from the profession’s commitment to justice, but “to forestall the threat to individual freedom implicit in growing efforts to socialize the legal profession.”¹²⁹ The ABA grudgingly embraced legal aid as a way to “avoid change from being ‘thrust from without upon an unwilling bar.’”¹³⁰

This incentive spurred action. In the following decade, the number of legal aid offices in the United States nearly tripled, from ninety-two in 1949 to 236 by 1961. From 1920 to 1950, the number of legal aid offices had increased by just 40% each decade.¹³¹ In the 1950s alone, the number increased by 250%.¹³² The overall financial support for civil legal aid rose from \$909,179 in 1947¹³³ to \$2,084,125 in 1959¹³⁴ to \$3,456,403 in 1962.¹³⁵ While the government provided only 7% of legal aid

¹²⁴ See BROWNELL, *supra* note 106, at 32.

¹²⁵ 1 JOHNSON JR., *supra* note 122, at 37 (quoting an ABA Resolution from September 21, 1950); Reginald Heber Smith, *Introduction* to EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS’ SERVICES FOR PERSONS UNABLE TO PAY FEES, at xx (First Greenwood Reprinting 1971) (1951).

¹²⁶ See 1 JOHNSON JR., *supra* note 122, at 36.

¹²⁷ *Id.* at 36.

¹²⁸ *Id.* at 36 (citing Robert Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 AM. BAR ASS’N J. 100, 101 (1951)).

¹²⁹ 1 JOHNSON JR., *supra* note 122, at 37 (quoting the ABA’s September 1950 resolution in support of legal aid).

¹³⁰ Cummings, *supra* note 1, at 15 (quoting Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 AM. BAR ASS’N J. 1159, 1161 (1958)).

¹³¹ BROWNELL, *supra* note 106, at 10 (Supp. 1961).

¹³² *Id.* at 10 (Supp. 1961).

¹³³ *Id.* at 233.

¹³⁴ *Id.* at 63 (Supp. 1961).

¹³⁵ 1 JOHNSON JR., *supra* note 122, at 37, 41.

support in 1959,¹³⁶ the majority came from “united funds” and “community chests,” not from the bar itself.¹³⁷

While government funding may have created autonomy concerns, the heavy reliance on community funding presented its own challenges. For instance, to retain funding, many legal aid societies declined to represent individuals in disputes against local businesses or employers.¹³⁸ Indeed, “too often those who supplied the money purchased the kind of legal aid that served their interests rather than the poor.”¹³⁹

Despite this progress, the overall funding of legal aid remained paltry. By 1962, the combined budgets of all legal aid societies was less than 0.1% of the total spent annually on legal services in the United States.¹⁴⁰ Moreover, there was only 400 full-time legal aid attorneys for the over 37 million Americans unable to afford legal services, compared to 250,000 lawyers to serve the remaining 150 million Americans.¹⁴¹ The percentage of financial support for legal aid that came from the bar rose from just 8% to 12%.¹⁴² In short, while the ABA was now formally in support of legal aid, the bar itself was slow to follow.

As a result, the ABA’s fear that the government would step in to fill the legal aid void was realized. Shortly after President Lyndon Johnson declared America’s “war on poverty” in 1964, the newly created Office of Economic Opportunity (OEO) started a legal services program to bring services to low-income neighborhoods throughout the country.¹⁴³ Though the ABA initially resisted the broad government entry into legal aid, its president (and future Supreme Court Justice), Lewis Powell, recognized the reputational risk to the profession if the ABA directly opposed it.¹⁴⁴ Thus, he negotiated a resolution whereby the ABA would formally support OEO’s efforts in return for a say in major policy decisions and a commitment from OEO to support existing bar-sponsored legal aid organizations.¹⁴⁵

¹³⁶ BROWNELL, *supra* note 106, at 63 (Supp. 1961). While the government provided 7% of the overall support for civil legal aid, the government played a much greater role (78%) in supporting public defender programs. *Id.*

¹³⁷ *Id.* at 61 (Supp. 1961).

¹³⁸ 1 JOHNSON JR., *supra* note 122, at 40.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 38.

¹⁴¹ *Id.* Beyond limited access to lawyers, the quality of representation itself was greatly compromised by the meager compensation earned by legal aid lawyers and huge caseloads. *Id.* at 39.

¹⁴² BROWNELL, *supra* note 106, at 61 (Supp. 1961).

¹⁴³ 1 JOHNSON JR., *supra* note 122, at 62–63, 69.

¹⁴⁴ *Id.* at 73–74.

¹⁴⁵ *Id.* at 73–75.

At a meeting in early 1965 to persuade ABA leadership to support OEO, William McCalpin expressly called out the bar's velleity regarding the justice gap:

It is a rather sad and at the same time an exhilarating fact that the past 60 minutes have been the most concentrated . . . and the most constructive consideration of the basic question, "How can the legal profession best serve the public?" in a quarter century. . . . It would be more encouraging if these questions arose in our midst *sui generis*. What we cannot ignore is that this self-examination has been forced upon us by the public whom we are sworn to serve. . . . Two broad paths lie before us. One is the well-trodden road of obstruction, reaction, opposition. . . . The alternative is to meet the challenge head-on, frankly with the penetrating analysis and the restless curiosity of a lawyer addressing himself to a legal problem.¹⁴⁶

The ABA subsequently approved a resolution supporting the OEO plan by unanimous vote,¹⁴⁷ and the bar and the federal government became grudging partners in the delivery of legal services to America's poor.

By 1974, when the program had morphed into the LSC, the bar's embrace of government funding for legal aid was complete. The LSC, an independent non-profit corporation with an eleven-member board appointed by the President, receives appropriations from Congress and distributes funding to qualifying civil legal aid organizations around the country.¹⁴⁸ By 1981, LSC funding from Congress reached its relative peak at \$321,300,000, just shy of \$1 billion in inflation adjusted dollars today—enough to provide a full-time legal aid lawyer for every 5,000 low-income Americans.¹⁴⁹ When President Reagan moved to abolish the LSC after his election, refused to appoint new board members, and submitted a budget with no LSC funding, the ABA, along with lawyers from all over the country and from both political parties, vigorously and publicly opposed the plan.¹⁵⁰

However, with federal funding came the loss of autonomy the bar feared. To receive LSC funding, legal aid organizations were prohibited from representing certain clients or participating in

¹⁴⁶ *Id.* at 74–75 (quoting William McCalpin's remarks at the 1965 ABA mid-year meeting).

¹⁴⁷ 1 JOHNSON JR., *supra* note 122, at 75.

¹⁴⁸ 42 U.S.C.A. §§ 2996b(a), 2996c(a) (West 2018); LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION 26 (Carl T. Donovan ed., 2010). Funds are allocated among the states based on the number of low-income individuals per capita, though organizations within each state compete among themselves for a share of that funding. *Id.* at 35.

¹⁴⁹ DiPippa, *Justice and the Poor*, *supra* note 96, at 105; 2 EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 502 (2014).

¹⁵⁰ 2 JOHNSON JR., *supra* note 149, at 512–14.

certain activities. These restrictions were born from a fear by many in Washington that legal aid organizations would push for systemic liberal reform rather than simply provide individual representation for day-to-day disputes.¹⁵¹ Initially, these restrictions prohibited organizations or their lawyers from participating in any political activities, class actions, boycotts, strikes, or demonstrations, and from representing plaintiffs in abortion, school desegregation, criminal, or military draft or desertion cases.¹⁵² Over time, LSC was required to submit to further restrictions in return for continued financial support.¹⁵³ Currently, in addition to the above restrictions, LSC grant recipients may not participate in assisted suicide activities,¹⁵⁴ represent non-citizens in any matter (with limited exceptions for victims of domestic violence or child abuse),¹⁵⁵ represent clients in eviction proceedings if the tenant had been charged with a drug-related crime,¹⁵⁶ or participate in efforts to reform a federal or state welfare system.¹⁵⁷ Notably, LSC grant recipients must agree in writing that any funds they receive from *outside* sources likewise will not be used to support many of the prohibited activities.¹⁵⁸ Finally, with limited exceptions, LSC-funded organizations may only provide assistance to those at or below 125% of the poverty level.¹⁵⁹

The creation of LSC and the support it provides to legal aid organizations has been a great step forward in reducing the justice gap, and it is an essential piece of the puzzle going forward. Yet, it is inherently subject to political winds, and the restrictions on LSC-recipients leave many without representation.

¹⁵¹ HOUSEMAN & PERLE, *supra* note 17, at 37.

¹⁵² Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378, 382–385 (to be codified at 42 U.S.C. § 2996); LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION, *supra* note 148, at 16.

¹⁵³ LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION, *supra* note 148, at 18–20; HOUSEMAN & PERLE, *supra* note 17, at 29–37.

¹⁵⁴ 45 C.F.R. § 1643.3(c) (2021); 42 U.S.C. § 2996f(b)(11) (providing that funds are not available to a corporation to provide legal assistance if doing so is inconsistent with the Assisted Suicide Funding Restriction Act of 1997).

¹⁵⁵ 45 C.F.R. §§ 1626.1, 1626.4(a) (2021).

¹⁵⁶ *Id.* § 1633.1 (2021).

¹⁵⁷ *Id.* § 1639.1 (2021); *see also* LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION, *supra* note 148, at 28. For a complete list of restrictions, *see LSC Restrictions and Other Funding Sources*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/laws-regulations-and-guidance/lsc-restrictions-and-other-funding-sources> [<http://perma.cc/8SSR-ESBU>].

¹⁵⁸ 42 U.S.C. § 2996i(c); *see also* LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION, *supra* note 148, at 16.

¹⁵⁹ 45 C.F.R. §§ 1611.3(c)(1), 1611.5 (2021).

1981 may well be considered the highwater mark for the legal aid movement in America. Although the LSC survived numerous defunding threats from the Reagan era to the Trump era, federal financial support has never recovered. In fact, in the forty years since, the average annual Congressional appropriation to LSC has been just \$343,813,000.¹⁶⁰ From a nominal standpoint, this has effectively reflected no real increase from the 1981 appropriation of \$321,300,000.¹⁶¹ When adjusted for inflation, support since 1981 has averaged just over one-half of Congress's 1981 appropriation.¹⁶² Meanwhile, since 1980 the United States population has increased by over 100 million¹⁶³ while the activities LSC-funded organizations may undertake has decreased.¹⁶⁴ As a result, the number of organizations that receive LSC support decreased from 325 in 1996 to 133 in 2018.¹⁶⁵ Nonetheless, the ABA has remained a stout advocate for legal aid since 1981—at least for “a strong, *federally funded*, community controlled program to provide legal aid to the poor.”¹⁶⁶

¹⁶⁰ See *Congressional Appropriations*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/who-we-are/congressional-oversight/congressional-appropriations> [<http://perma.cc/JYU4-DZNU>].

¹⁶¹ *Id.* Notably, LSC funding has increased modestly each year since 2013, and Congress's \$465,000,000 appropriation in 2021 was the highest nominal amount in LSC's history. *Id.*; see David Reich, *Additional Funding Needed for Legal Service Corporation*, CTR. ON BUDGET & POLY PRIORITIES (Feb. 1, 2021, 2:15 PM), <http://www.cbpp.org/blog/additional-funding-needed-for-legal-service-corporation> [<http://perma.cc/VSC7-MRZ8>]. In addition, the Biden Administration requested, and the House Committee on Appropriations approved, a \$600,000,000 appropriation to LSC for 2022. *House Appropriations Committee Approves Bill Providing \$600 Million for the Legal Services Corporation*, LEGAL SERVS. CORP. (July 6, 2021), <http://www.lsc.gov/press-release/house-appropriations-committee-approves-bill-providing-600-million-legal-services-corporation> [<http://perma.cc/7D36-96CU>]. While this recent trend is encouraging, similar trends over the past forty years have been followed by significant reductions. *Congressional Appropriations*, *supra* note 160. It remains to be seen whether the trend continues over the course of several elections.

¹⁶² More specifically, 54.5%. Calculations for each year were determined from January of each year to January 2021 using the inflation calculator available at *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm [<http://perma.cc/T9E2-G2AA>] (on file with author).

¹⁶³ The population in 1980 was about 231,000,000. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981 at 8 (102d ed. 1981).

¹⁶⁴ Cummings, *supra* note 1, at 22–23.

¹⁶⁵ HOUSEMAN & PERLE, *supra* note 17, at 40.

¹⁶⁶ *Legal Services Corporation: Latest Developments*, AM. BAR ASS'N (Apr. 2020) (emphasis added), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/legal_services_corporation/ [<http://perma.cc/TQW7-2B5P>] (“ABA Policy” near the bottom of webpage).

Overall legal aid funding since 2003 is available through the ABA Resource Center for Access to Justice Initiatives.¹⁶⁷ From 2003 to 2013, overall legal aid funding remained largely flat, increasing from \$1.31 billion to \$1.47 billion.¹⁶⁸ Since 2013, funding has steadily increased and reached \$2.16 billion in 2019.¹⁶⁹ Over those seventeen years, 58% of legal aid support came from federal and state governments, 9% from community foundations and corporate grants, and just 6% from the legal community.¹⁷⁰ The remaining funding came from Interest on Lawyer Trust Account (IOLTA) programs (9%), court fines and fees (8%), cy pres awards (2%), and “other” strategies (8%).¹⁷¹ Reginald Heber Smith’s observation 100 years ago remains true today: “The growth of legal aid work has been made possible by laymen and not lawyers.”¹⁷²

While 1981 may mark the peak of the legal aid movement, it also marks the beginning of the profession’s shift to pro bono as the primary vehicle to address the justice gap. But, as with legal aid, interest from the bar itself lagged behind the ABA’s appeals—until it became economically beneficial for large firms to embrace pro bono.¹⁷³ The impetus behind support for pro bono was less defensive than with legal aid. Rather, as we’ll see next, firms went on the offensive, driven primarily by reputational competition among firms.

B. The Bar’s Enthusiastic Embrace of Pro Bono

In 1969, the ABA replaced its 1908 Canons of Professional Ethics with a new Model Code of Professional Responsibility.¹⁷⁴ Whereas the Canons called on lawyers to give “special and kindly considerations” to the “reasonable requests of brother lawyers” and

¹⁶⁷ *U.S. Funding for Legal Aid*, ABARRAY (Jan. 7, 2022) <http://public.tableau.com/app/profile/abarray/viz/ABArrayNationalData/NationalLegalAidFunding> [<http://perma.cc/EKM9-NHDY>]. For a breakdown of funding sources specific to LSC recipients, see LEGAL SERVS. CORP., 2018 BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS 13–14 (2018).

¹⁶⁸ *U.S. Funding for Legal Aid*, *supra* note 167.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Government funding included state appropriations (10%), LSC appropriations (24%), and other public funds (24%). *Id.* Gifts from community foundations exclude gifts from law firm foundations, which are reflected in the “Legal Community” category. *Id.*

¹⁷¹ *Id.* The “other” category includes fellowships, United Way donations, individual (non-lawyer) donations, and attorney’s fees. *Id.*

¹⁷² SMITH, *supra* note 2, at 238.

¹⁷³ See Cummings, *supra* note 1, at 24.

¹⁷⁴ See *Model Rules of Professional Conduct*, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rule_s_of_professional_conduct/ [<http://perma.cc/AF2N-RHCM>] (last visited Mar. 18, 2022).

their widows and orphans,¹⁷⁵ the Model Code provided a broader vision: “[P]ersons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.”¹⁷⁶ The Model Code added that “[t]he rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer,” and “[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.”¹⁷⁷

This was the first time the ABA formally referred to pro bono work as a professional duty or obligation of lawyers. In a footnote to this rule, the ABA reinforced the importance of organized legal aid as a tool to address the justice gap, presciently noting:

[A] system of justice that attempts, in mid-twentieth century America, to meet the needs of the financially incapacitated accused through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate. . . . A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance.¹⁷⁸

The aspirational approach, however, had little effect on actual pro bono contributions by individual lawyers.¹⁷⁹ In the 1970s, only a small number of private attorneys did pro bono work; one study found “the most generous firms provided only about five hours a year” per lawyer.¹⁸⁰ And, similar to the early view of pro bono, “[m]ost uncompensated assistance went to friends, relatives and employees of lawyers and their clients, or to bar associations and middle- and upper-middle-class organizations such as Jaycees, Little League, and symphonies.”¹⁸¹ Another study from that period concluded that only 5% of lawyer volunteer work went to indigent individuals.¹⁸² In sum, it would be hard to cite much evidence that, to the vast majority of the

¹⁷⁵ AM. BAR ASS’N, FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS 578 (1908).

¹⁷⁶ AM. BAR ASS’N, CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS 6 (1969) [hereinafter 1969 MODEL CODE] (footnote omitted).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 12 n.56 (alteration in original) (quoting FRANCIS A. ALLEN, REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 42 (1963)).

¹⁷⁹ See Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 L. & SOC’Y REV. 79, 90–91 (2007).

¹⁸⁰ Rhode, *Pro Bono in Principle*, *supra* note 8, at 425 n.25 (citing JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 282 (1976)).

¹⁸¹ *Id.* at 425.

¹⁸² *Id.* at 425 n.25 (citing Joel F. Handler et al., *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A. J. 1388, 1389, 1391 (1975)).

bar, pro bono service was a fundamental value. Rather, most members of the bar were using pro bono to support their own community activities and standing, while relying on legal aid lawyers to satisfy any obligation to serve those unable to afford civil legal services.

The first significant shift toward pro bono—and toward a focus on indigent *individuals*—may be attributed not to the ABA’s aspirational call but to a financial incentive.¹⁸³ In response to the threats to LSC, the ABA in 1980 urged Congress to mandate that LSC recipients incorporate substantial participation by private attorneys in the representation of legal aid clients.¹⁸⁴ This was done, in part, to assuage conservative critics who felt staffed legal aid clinics were too focused on social change, whereas private lawyers would be more focused on individual client concerns.¹⁸⁵ Before Congress acted, the LSC itself in 1981 directed its grantees to use at least 10% of their LSC funds to support such efforts, which it increased to 12.5% in 1984.¹⁸⁶ This requirement became known as the private attorney involvement, or “PAI.”¹⁸⁷

Thereafter, to receive funding, LSC recipients had to fund efforts to incorporate pro bono services of private attorneys.¹⁸⁸ Most of these funds went toward the development and support of pro bono programs,¹⁸⁹ with legal aid organizations and local bar associations partnering to develop new volunteer recruitment and referral programs.¹⁹⁰ With legal aid funding now directly tied to pro bono participation, the ABA put its support behind pro bono, and as a result, pro bono programs around the country increased from eighty-three in 1980 to over 500 by 1985.¹⁹¹

The fuse was lit, but what truly detonated the pro bono movement was a convergence of additional economic factors in

¹⁸³ See Cummings, *supra* note 1, at 24.

¹⁸⁴ See HOUSEMAN & PERLE, *supra* note 17, at 26–27.

¹⁸⁵ Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 89 n.27 (2013).

¹⁸⁶ HOUSEMAN & PERLE, *supra* note 17, at 27; see also Cummings, *supra* note 1, at 24–25. The amount remains at 12.5% today. 45 C.F.R. § 1614.2 (2021).

¹⁸⁷ 45 C.F.R. § 1614.2 (2021).

¹⁸⁸ See Cummings, *supra* note 1, at 24.

¹⁸⁹ See HOUSEMAN & PERLE, *supra* note 17, at 27.

¹⁹⁰ Angela McCaffrey, *Pro Bono in Minnesota: A History of Volunteerism in the Delivery of Civil Legal Services to Low Income Clients*, 13 L. & INEQ. 77, 87 (1994).

¹⁹¹ See Cummings, *supra* note 1, at 25; AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 30 (2009) [hereinafter SUPPORTING JUSTICE II]. By 2009, there were over 1,000 pro bono programs. SUPPORTING JUSTICE II, *supra*, at 30.

the 1990s. Scholars have identified four primary drivers for pro bono's sudden growth: (1) the reduction of federal aid in the 1980s noted above, (2) the growth of large law firms, (3) the role of professional incentives, and (4) a focus on rankings and reputation.¹⁹² The first concrete step came in 1993 when the ABA replaced its general aspirational statement in its Model Code of Professional Responsibility that a lawyer “should render public interest legal service” with a specific goal of 50 hours of pro bono service per lawyer annually.¹⁹³ That same year, the ABA instituted the Law Firm Pro Bono Challenge—which challenged firms with fifty or more lawyers to contribute 3% to 5% of their billable hours to pro bono work—and then it publicized which firms met the challenge.¹⁹⁴

Similarly, in the early 1990s *The American Lawyer* magazine began to report pro bono data from the top law firms, and, a decade later, began incorporating pro bono activity into its rankings of the top twenty law firms (known as the “A-list”).¹⁹⁵ That incentive alone—until recently, pro bono accounted for one-third of a firm’s ranking¹⁹⁶—“dramatically altered firm behavior.”¹⁹⁷ Indeed, representatives from many

¹⁹² See Cummings & Rhode, *supra* note 85, at 2365–72. Regarding the growth of law firms, the average size of the top 100 American law firms grew from 375 in 1990, to 621 in 2001, to 820 in 2008, while profits tripled during that time. *Id.* at 2366.

¹⁹³ See CENTER FOR PRO. RESP. AM. BAR. ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 706–08. (Art Garwin ed., 2013). In its 1993 amendments, the ABA also somewhat limited the activities for which lawyers could claim pro bono credit to focus the work on indigent *individuals* or agencies that support such individuals. See *id.* at 706–10; see also Cummings, *supra* note 1, at 32.

¹⁹⁴ Cummings, *supra* note 1, at 34, 40.

¹⁹⁵ See Cummings & Rhode, *supra* note 85, at 2371. The annual Pro Bono Scorecard ranks the 200 largest firms by revenue (the AmLaw 200). *The 2020 Pro Bono Scorecard: The National Rankings*, THE AM. LAW. (Jul. 6, 2020, 5:00 AM), <http://www.law.com/americanlawyer/2020/07/06/the-2020-pro-bono-scorecard-the-national-rankings/?slreturn=20211017200607> [http://perma.cc/Y5PL-DCS2]. One half of the score reflects the average number of pro bono hours per lawyer; the other half reflects the percentage of lawyers who performed more than 20 hours of pro bono work. *Id.* The “A-list” rankings measure revenue per lawyer, pro bono commitment, associate satisfaction, diversity, and female representation among equity partners, with revenue per lawyer and pro bono commitment weighted double. See Gina Passarella, *Introducing the New and Improved A-List*, THE AM. LAW. (July 27, 2017, 2:42 PM), <http://www.law.com/americanlawyer/2017/07/27/introducing-the-new-and-improved-a-list/> [http://perma.cc/PVE3-88JM].

¹⁹⁶ Prior to 2017, four categories (revenue per lawyer, pro bono commitment, associate satisfaction, and diversity) were each scored on a 200-point scale, with revenue per lawyer and pro bono commitment then given double weight. Passarella, *supra* note 195. In 2017, *The American Lawyer* added a fifth category, female equity partner representation, while continuing to give double weight to pro bono representation and revenue per lawyer. *Id.* Thus, pro bono commitment presently accounts for 28.6% of a firm’s score.

¹⁹⁷ Cummings & Rhode, *supra* note 85, at 2371.

large firms specifically cited pressure from *The American Lawyer* rankings as the primary influence behind their newfound commitment to pro bono.¹⁹⁸ Likewise, in 2006 the National Association for Law Placement began publishing information for prospective associates about law firm commitment to pro bono,¹⁹⁹ and the influential Vault.com also published a list of the best firms for pro bono.²⁰⁰ Finally, when choosing which law firms to hire, corporate clients began to require that firms demonstrate their commitment to pro bono.²⁰¹

Together, those reputational incentives for the largest firms spurred action.²⁰² In 1995, for instance, the 135 firms that signed on to the Law Firm Pro Bono Challenge contributed 1.6 million pro bono hours.²⁰³ By 2004, the number of hours increased to 2.2 million and then more than doubled over the next five years to 4.9 million hours.²⁰⁴ Since 2009, however, the hours have remained relatively flat, totaling 5 million hours in 2019.²⁰⁵ Notably, these numbers represent those firms who have voluntarily signed onto the Pro Bono Challenge and, presumably, reflect the segment of the bar most committed to pro bono.²⁰⁶ Similarly, firms began to add dedicated pro bono managers, often full-time attorneys, to manage their pro bono programs.²⁰⁷ In 2000, only a dozen of the 200 largest American law firms (the AmLaw 200) had a pro bono coordinator; by 2008, nearly 100 of those firms did.²⁰⁸ Today, state bar associations in almost all fifty states have pro bono committees,²⁰⁹ there are over 900 formal pro

¹⁹⁸ See, e.g., Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, in 12 ACCESS TO JUST. (SOCIO. CRIME, L. & DEVIANCE) 145, 156 (Rebecca L. Sandefur ed., 2009); Cummings & Rhode, *supra* note 85, at 2374 (alteration in original) (quoting a partner at a large firm, “We had a whole [partnership] meeting on pro bono because the firm wanted to get on the ridiculous A-list . . . We made it [the next year] and since [then], there has been no utterance of the words ‘pro bono’ [at the partnership meetings].”).

¹⁹⁹ See Cummings & Rhode, *supra* note 85, at 2372.

²⁰⁰ See *Best Law Firms to Work For*, FIRSTHAND, <http://firsthand.co/best-companies-to-work-for/law/best-law-firms-to-work-for/pro-bono> [<http://perma.cc/T74L-HMS5>].

²⁰¹ See Steven A. Boutcher, *Rethinking Culture: Organized Pro Bono and the External Sources of Law Firm Culture*, 8 U. ST. THOMAS L.J. 108, 124–25 (2011); Cummings, *supra* note 1, at 108–10.

²⁰² See Cummings & Sandefur, *supra* note 185, at 97; Boutcher, *supra* note 201, at 122–27.

²⁰³ 2020 REPORT ON THE PRO BONO CHALLENGE, *supra* note 65, at 11.

²⁰⁴ See *id.* at 4.

²⁰⁵ See *id.*

²⁰⁶ See *id.* at 11 (explaining that participants are “challenge signatories”).

²⁰⁷ See Cummings & Rhode, *supra* note 85, at 2372–74.

²⁰⁸ See *id.* at 2372–73.

²⁰⁹ HOUSEMAN & PERLE, *supra* note 17, at 28.

bono programs around the country,²¹⁰ and essentially every large law firm has a portion of their website dedicated to promoting their pro bono work.²¹¹

The growth of pro bono has been an undeniable benefit to many indigent individuals and a point of pride to the legal community, as it should be. The truth, though, is that the growth was not due primarily to a commitment to our foundational values and professional duties as lawyers; rather, the “signal finding of extant research is that the organizational and economic contexts of lawyers’ work are the central, if not the determinative, factors shaping their pro bono behavior.”²¹² Likewise, Scott Cummings and Deborah Rhode noted that “[a]mong the most powerful influences on pro bono priorities are ranking systems, particularly those in *The American Lawyer*.”²¹³ That is fine, for as Cummings has pointed out, “the association of professional altruism with private gain is unremarkable.”²¹⁴ Yet, he recognized that “there is something new in the sense of openness with which large firms and the organized bar have turned to the project of connecting professional ideals with commercial gain.”²¹⁵

Enlightened self-interest may be perfectly fine, provided the result truly benefits those we profess to serve.²¹⁶ However, we must guard against a scale that tips too far toward self-interest and the cognitive dissonance that prevents honest assessment of that. For instance, one study of law firm pro bono directors found that most attribute their firm’s pro bono programs to a

²¹⁰ CIVIL LEGAL AID IN THE UNITED STATES, *supra* note 51, at 79. The American Bar Association’s Standing Committee on Pro Bono and Public Service estimated the number of pro bono programs at around 1,000 in 2009. *See* SUPPORTING JUSTICE II, *supra* note 191, at 30.

²¹¹ John Bliss & Steven A. Boucher, *Rationalizing Pro Bono: Corporate Social Responsibility and the Reinvention of Legal Professionalism in Elite American Law Firms*, in GLOBAL PRO BONO: CAUSES, CONSEQUENCES, AND CONTESTATION 101 (Scott L. Cummings et al. eds., forthcoming 2022) (noting that the websites of 98 of the 100 largest law firms include a pro bono page). For examples of law firms with a pro bono page, see *Pro Bono|Industries & Practices*, DORSEY & WHITNEY, <http://www.dorsey.com/services/pro-bono> [<http://perma.cc/4BAY-CNHL>] and *Pro Bono*, KING & SPALDING, <http://www.kslaw.com/pages/pro-bono> [<http://perma.cc/EW4K-CYVR>].

²¹² Cummings & Sandefur, *supra* note 185, at 95; *see also* Sandefur, *supra* note 179, at 102 (“As suggested by market-oriented theories of lawyer professionalism, lawyers’ participation in [pro bono work] appears highly sensitive to the dynamics of legal services markets.”).

²¹³ Cummings & Rhode, *supra* note 85, at 2340.

²¹⁴ Cummings, *supra* note 1, at 106.

²¹⁵ *Id.* at 107.

²¹⁶ *But see* Rhode, *Rethinking the Public*, *supra* note 3, at 1436 (arguing that “view[ing] public service solely in terms of professional interests is troubling on both moral and pragmatic grounds”).

longstanding culture established by their founders, that pro bono reflects a “historic, core value of the firm.”²¹⁷ Yet, few of those firms exhibited any meaningful pro bono efforts prior to the turn of this century.²¹⁸ The same could be said for the profession at large. As Leonore Carpenter has noted, “It appears that the large firms may not be grasping the shaded, complex message that materialistic concerns should be viewed as a beneficial by-product, but not a driver, of pro bono programs. Instead, they appear to have seized bottom-line motivations for pro bono with both hands.”²¹⁹

Accordingly, if the profession truly is committed to reducing the justice gap, as it professes to be, and not primarily to serving its own interests, it must acknowledge both its motivations for embracing pro bono as its primary approach and pro bono’s limitations.

III. BENEFITS AND LIMITATIONS OF PRO BONO

Pro bono provides several benefits for reducing the justice gap that legal aid alone cannot. At its best, it supplements and provides leverage for the work of legal aid attorneys. However, too often aspects of pro bono actually conflict with and dilute the work of legal aid organizations. Moreover, many of pro bono’s benefits run primarily to the lawyer providing the service or the law firm supporting that lawyer, rather than to the clients themselves. The following sections discuss these benefits and limitations.

A. Pro Bono’s Benefits

Pro bono provides many benefits to clients that legal aid cannot. For example, pro bono programs permit lawyers to represent clients that LSC-funded organizations are prohibited from representing. In that way, pro bono work may fill in the gaps and represent a broader group of interests than many legal aid organizations can represent.²²⁰ For instance, while LSC-funded legal aid organizations are precluded from representing immigrants in most actions or tenants with a drug record, pro bono attorneys are free to do so (at least those not partnering with an LSC-funded legal aid organization through the PAI program)²²¹. Moreover, large firms have the resources to take on complex, discovery-intensive lawsuits that may swamp a legal aid

²¹⁷ Boutcher, *supra* note 201, at 120–21.

²¹⁸ *Id.*

²¹⁹ Leonore F. Carpenter, “We’re Not Running a Charity Here”: *Rethinking Public Interest Lawyers’ Relationships with Bottom-Line Driven Pro Bono Programs*, 29 *BUFF. PUB. INT. L.J.* 37, 54 (2011).

²²⁰ Cummings, *supra* note 1, at 103.

²²¹ *See id.*

office.²²² Similarly, law firms often have expertise that can be leveraged in particular cases to further a legal-aid office's objectives.²²³ For instance, a legal aid office may lean on a seasoned appellate lawyer for oral argument in an important case, or on an associate with experience in bankruptcy law for a client facing bankruptcy.²²⁴

Pro bono also benefits the individual lawyer. Most notably, pro bono work can provide a sense of meaning and challenge to an individual who may have a calling to help the less fortunate but, for various reasons, chose to work at a firm. As Scott Cummings has noted, pro bono work may permit "lawyers to engage in socially significant work while enjoying the prestige and economic rewards of private practice."²²⁵ At a time when lawyer anxiety and dissatisfaction is so high, particularly among those early in their career,²²⁶ this benefit should not be discounted. Pro bono can also provide an opportunity for attorneys to gain skills and experience, both technical and interpersonal, in a way their present job may not permit.²²⁷ This is particularly true for associates at large firms, who may not get much, if any, direct client contact or courtroom opportunities in their first few years. Finally, pro bono can introduce and connect individual attorneys to aspects of society they otherwise would not experience. The personal experience may deepen an individual's commitment to addressing the justice gap in a way that only direct service can do. As Deborah Rhode noted, "Face-to-face experience with poverty-related problems is generally more effective than abstract appeals in inspiring service."²²⁸

Moreover, firms that support pro bono programs benefit from a reputational and marketing standpoint. With corporate clients demanding to see that firms are doing pro bono work, this has become a necessary aspect of marketing in today's landscape.²²⁹ Additionally, pro bono can provide relationship building opportunities with clients, as law firms and their corporate clients often partner on pro bono activities as a way to deepen their own relationship.²³⁰ In fact, while pro bono has become a necessary cost

²²² See *id.* at 105.

²²³ See *id.* at 104.

²²⁴ *Id.* at 105–06.

²²⁵ *Id.* at 102; see Rhode, *Pro Bono in Principle*, *supra* note 8, at 449.

²²⁶ See Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, *J. ADDICTION MED.* 46, 51 (2016).

²²⁷ See Cummings, *supra* note 1, at 111.

²²⁸ Rhode, *Pro Bono in Principle*, *supra* note 8, at 420.

²²⁹ See Cummings, *supra* note 1, at 108–10.

²³⁰ See Daniels & Martin, *supra* note 198, at 156.

of doing business for large firms, the “cost” is more of an investment with real returns.²³¹ Studies have shown that, for many large firms, pro bono work is “revenue neutral” at worst.²³²

Pro bono has become essential not only for marketing to clients, but to potential associates.²³³ Many pro bono “early adopters” were Northeastern firms competing against legal aid organizations to recruit prized graduates.²³⁴ They created pro bono opportunities to attract students with public interest leanings, then marketed these programs to the law schools and their students.²³⁵ Similarly, providing associates the opportunity to allocate some portion of their time to personally meaningful work helps to retain associates.²³⁶ Further, pro bono helps firms not only to recruit and retain top students, but also to train them. The training opportunities noted above are not only valuable to the associate herself, but to the firm. With many corporations now refusing to pay for first year associate work, pro bono can provide large firms a “low risk” and cost-neutral vehicle to train and evaluate their newer attorneys.²³⁷ To that point, many firms acknowledge that they select pro bono projects as much for the training opportunities they can provide their lawyers as for the benefits to the clients.²³⁸

Finally, pro bono provides a valuable counterpoint to negative stereotypes about greedy lawyers and a legal system stacked against the poor.²³⁹ To the extent that helps to instill public trust in and respect for the legal process, that is an undeniable benefit. Yet, this dynamic often steers firms towards projects that maximize publicity over impact,²⁴⁰ a result Atinuke

²³¹ See *id.* at 157.

²³² See Reena N. Glazer, *Revisiting the Business Case for Law Firm Pro Bono*, 51 S. TEX. L. REV. 563, 571 (2010); see also Jack W. Londen, *The Impact of Pro Bono Work on Law Firm Economics*, 9 GEO. J. LEGAL ETHICS 925, 925–26 (1996); Marc Galanter & Thomas Palay, *Public Service Implications of Evolving Law Firm Size and Structure*, in THE LAW FIRM AND THE PUBLIC GOOD 19, 41–46 (Robert A. Katzmann ed., 1995); Esther F. Lardent, PRO BONO INST., MAKING THE BUSINESS CASE FOR PRO BONO 3 (2000).

²³³ See Cummings, *supra* note 1, at 110–11.

²³⁴ See Cummings & Rhode, *supra* note 85, at 2370–71.

²³⁵ Boutcher, *supra* note 201, at 122–24; see Cummings & Rhode, *supra* note 85, at 2370–71.

²³⁶ See Cummings, *supra* note 1, at 113–14.

²³⁷ See Daniels & Martin, *supra* note 198, at 154–55; see also Cummings, *supra* note 1, at 112–13.

²³⁸ See Cummings & Rhode, *supra* note 85, at 2426–28.

²³⁹ See Rhode, *Rethinking the Public*, *supra* note 3, at 1441 (citing PETER D. HART & ASSOCS., A SURVEY OF ATTITUDES NATIONWIDE TOWARD LAWYERS AND THE LEGAL SYSTEM 18 (1993)).

²⁴⁰ See DiPippa, *Peter Singer*, *supra* note 49, at 131.

Adrediran has termed the “pro bono mismatch.”²⁴¹ For instance, one study of pro bono by Maryland lawyers found that while low-income individuals with family law issues had the greatest need for representation, such cases ranked seventh or eighth among pro bono causes.²⁴² One large firm pro bono coordinator left little doubt about this dynamic. When asked whether her firm would be interested in assisting same-sex couples with adoptions, she responded, “Our associates would find those sorts of cases boring. What we’re looking for are cases that we can put in our newsletter, like Guantanamo cases, or death penalty cases. Or asylum. Do you have any asylum cases?”²⁴³ Indeed, in 2014, more than twenty of the eighty firms that participated in the Pro Bono Challenge cited a death penalty case as their biggest pro bono project, and less than half reported projects that focused on “everyday” matters.²⁴⁴

To be clear, I do not argue the above are inappropriate motivations or considerations. To one facing the death penalty, representation may be life-saving. But, when considering the impact of pro bono as a tool for narrowing the justice gap—as the practicing bar’s *primary* tool—we must honestly weigh the benefits of pro bono (and *who* in fact benefits) against pro bono’s inherent limitations.

B. Pro Bono’s Limitations

One notable, but largely unappreciated, drawback of pro bono programs is the drain they can create on the already stretched resources of legal aid organizations. As noted above, LSC-funded legal aid organizations are required to involve private attorneys in the delivery of legal assistance to their clients.²⁴⁵ Similarly, many of the non-LSC funded legal aid organizations serve as referral organizations to feed private firms’ pro bono programs.²⁴⁶ The administrative aspects of doing this—and of keeping firms happy—are not insignificant. Moreover, managing the relationships with various law firms and the needs of their often inexperienced attorneys take time away from the legal aid organization that could otherwise be dedicated to direct legal representation.²⁴⁷

²⁴¹ See generally Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035, 1037–38 (2020).

²⁴² See Rhode, *Rethinking the Public*, *supra* note 3, at 1445–46.

²⁴³ Carpenter, *supra* note 219, at 61 (internal quotation marks omitted).

²⁴⁴ Beck, *supra* note 38, at 9.

²⁴⁵ See *supra* Section II.B.

²⁴⁶ See Cummings, *supra* note 1, at 142–43.

²⁴⁷ See *id.*

In effect, large firms often become more of a customer of, rather than partner with, legal aid organizations. Legal aid organizations may not simply pass along cases to a firm but are commonly expected to provide ongoing support to the pro bono attorney as well. A lawyer at a large Chicago firm noted:

[S]ome legal service providers are . . . better at accommodating the needs and preferences of law firm pro bono programs than others. What we want from a legal services provider is a regular stream of opportunities We want institutional back-up, because if they're doing work in an area and we don't have anybody in our firm who knows that subject area, we need co-counsel. . . . Every pro bono matter that comes from one of these organizations should have one person from the organization assigned to it and one person from the law firm. . . . The most frustrating organizations to deal with are those that just hand you a file and say, go do it.²⁴⁸

It does not require much imagination to appreciate the frustration many legal aid attorneys feel when working with such firms. Some legal aid attorneys in fact spend more of their time assisting pro bono volunteers than directly representing clients.²⁴⁹

Handholding aside, pro bono creates additional drains on legal aid. Legal aid organizations are often required to pass along “interesting” or otherwise rewarding cases to private attorneys, or to take on the monotonous aspects of a case and delegate to law firms the more exciting parts, such as an oral argument or deposition.²⁵⁰ Similarly, legal aid organizations may feel pressure to “protect” the private attorneys from difficult or “undeserving” clients, and to provide firms with a fresh stream of “easily packaged, time-limited, and emotionally warm cases.”²⁵¹ As a result, the highly trained and experienced legal aid attorney often ends up dealing primarily with the monotonous cases or particularly difficult clients. While this dynamic may help law firms train and retain their attorneys, it can lead to burnout and turnover among legal aid attorneys.²⁵² This dynamic can also

²⁴⁸ Daniels & Martin, *supra* note 198, at 158.

²⁴⁹ See Cummings, *supra* note 1, at 143.

²⁵⁰ See Rhode, *Rethinking the Public*, *supra* note 3, at 1445; see also Cummings, *supra* note 1, at 143–44.

²⁵¹ Cummings, *supra* note 1, at 141; see also Rhode, *Rethinking the Public*, *supra* note 3, at 1445.

²⁵² See Cummings, *supra* note 1, at 143–44; see also CHI. BAR FOUND. & ILL. COAL. FOR EQUAL JUST., *Investing in Justice: A Framework for Effective Recruitment and Retention of Illinois Legal Aid Attorneys* 8, 29–30 (2006), <http://chicagobarfoundation.org/wpcontent/uploads/2014/01/recruitment-retention-study.pdf> [<http://perma.cc/4J3A-CAE3>].

lead to a misperception among private lawyers regarding the true nature of the work that legal aid attorneys do.²⁵³

Moreover, referrals from legal aid organizations to pro bono attorneys too often result in a transfer of expertise. While some private attorneys can provide immediate expertise in a pro bono matter—perhaps expertise not available at the referring organization—that is the exception.²⁵⁴ Indeed, many attorneys seek pro bono work specifically to experience a new aspect of the law, to obtain a break from their own practice. Though some legal issues referred by legal aid organizations may not be particularly complex, they nonetheless require the lawyer to get up-to-speed on a new area of the law, and one the attorney may never use again. In such cases, which are common, it would undoubtedly be both more efficient and effective for a legal aid attorney, fully experienced in the specific area of the law, to undertake the representation. Perhaps even more important, though, the legal aid attorney would also have the experience that comes from counseling many clients on similar issues to identify not just the legal, but the social and practical aspects, that are often critical to effective client representation. One law firm pro bono coordinator noted that “there is a crushing lack of efficiency and strategic design in what we and other law firms are doing around pro bono.”²⁵⁵

This lack of experience and the attendant inefficiencies can lead to a bloated number of hours reported for pro bono work. Particularly if the attorney receives billable-hour credit from her firm for the time she commits to pro bono work, there is little incentive to do the work efficiently. Quite the opposite: since nobody is paying for the work, yet the associate may count the time toward her billable hours, there is a not-so-subtle incentive to be inefficient. At the same time, the law firm itself may have little incentive to get on top of this, as it helps the firm’s pro bono reporting as well.²⁵⁶ Indeed, firms may leverage pro bono to keep associates busy at times where billable hours are not otherwise available.²⁵⁷ As Scott Cummings and Deborah Rhode have noted,

²⁵³ See Cummings, *supra* note 1, at 141–42.

²⁵⁴ See Cummings & Rhode, *supra* note 85, at 2433 (“Law firm lawyers, however committed, generally lack the time, expertise, resources, and freedom from conflicts of interest necessary to ensure adequate access to justice.”).

²⁵⁵ Cummings & Rhode, *supra* note 85, at 2430; see also Rhode, *Rethinking the Public*, *supra* note 3, at 1446–47.

²⁵⁶ See Rhode, *Rethinking the Public*, *supra* note 3, at 1444.

²⁵⁷ See Cummings & Sandefur, *supra* note 185, at 96 (referring to “organizational slack”).

The American Lawyer and similar rankings reward “quantity, not quality or cost-effectiveness.”²⁵⁸

Importantly, pro bono representation often suffers from quality issues as well. Almost 60% of legal aid organizations express concern about the quality of the representation their clients receive from their pro bono partners.²⁵⁹ This is hardly surprising when a large portion of pro bono work is being done by busy associates at large firms who take on matters outside of their expertise with little supervision.²⁶⁰ Moreover, most firms frankly appear largely disinterested in investing additional time into monitoring the quality of their pro bono work.²⁶¹ Most do little, if any, by way of client follow-up to ensure their pro bono clients feel well represented.²⁶² Rather, firms tend to rely primarily on informal feedback from the lawyer himself or the referring organizations, which themselves may feel pressure to keep the firms happy and be hesitant to provide candid feedback.²⁶³ Others openly scoff at the idea that indigent clients could accurately assess the lawyer’s performance.²⁶⁴ Tellingly, more firms poll their own attorneys to determine whether *they* were satisfied with their pro bono experience than poll the clients themselves.²⁶⁵ This is not to suggest that firms do not *want* their attorneys to provide solid legal representation for all clients, paying or not. But, for many, *ensuring* quality is a secondary consideration.

Each of the above limitations played out in my own experience with pro bono as an associate. After representing wealthy clients in trusts and estate law at a large firm for six years, I felt a need to “do good” and wanted to experience a new area of the law. Moreover, this was during the economic and legal downturn in 2009, when substantial billable hours from paying clients were at times hard to come by. The firm’s pro bono coordinator connected me and two other associates with a young man seeking asylum. None of us had asylum or trial experience, yet we confidently believed we could represent this man well. We each spent twenty or so hours simply reading up on the basics of immigration law and the immigration court’s local rules. We made numerous calls to the legal aid organization who referred the case with fairly basic questions. When we met with our client, we had a passable understanding of

²⁵⁸ Cummings & Rhode, *supra* note 85, at 2430.

²⁵⁹ *Id.* at 2378 (citing a 2008 study by Deborah Rhode).

²⁶⁰ See Rhode, *Rethinking the Public*, *supra* note 3, at 1445.

²⁶¹ See Cummings & Sandefur, *supra* note 185, at 102–03.

²⁶² See Cummings & Rhode, *supra* note 85, at 2402–03.

²⁶³ See *id.*

²⁶⁴ See *id.* at 2404–05.

²⁶⁵ See Cummings & Sandefur, *supra* note 185, at 109.

the asylum process, though we had no ability to respond meaningfully to unanticipated questions or to advise on the more practical aspects of his situation. On the eve of our client's asylum hearing, we failed to follow a local rule unique to that immigration court and our brief was rejected by the clerk. To our relief, the judge rescheduled the hearing for eighteen months later.

Eventually, our client, with no money and frustrated by the long delay, left the country to seek relief elsewhere. My two colleagues and I spent hundreds of hours collectively on this case and, at the end of the day, provided very little quality representation to the client. That said, we received billable credit for our work, received our annual bonuses, and were never asked by a firm partner about the experience. Rather, in my annual review later that year, a partner advised me not to do any more pro bono work until after my partnership vote and to focus over the next year instead on “real” billable hours. There is no question that a single experienced attorney from the referring agency would have provided significantly better representation than the three of us “prestigious” lawyers were able to, and at a fraction of the time.²⁶⁶

Ultimately, the greatest drawback of looking to pro bono primarily to close the justice gap may be that the profession appears to have hit its ceiling. Understandably, pro bono representation tends to decrease when the economy is down (though that is when the needs of the poor increase).²⁶⁷ However, despite both one of the greatest economic cycles in American history and the bar's efforts to increase pro bono, pro bono hours decreased over the past decade. For instance, among attorneys at those firms who have signed onto the Pro Bono Challenge—presumably those firms most committed to pro bono—hours decreased from 70.0 hours per attorney in 2009 to 64.3 in 2018.²⁶⁸ While overall pro bono hours reported by those

²⁶⁶ Notably, I also assisted a client pro bono on a probate matter directly within my practice area, yet still made a significant error. I failed to clarify with my client her relationship to extended family members she raised and referred to as her children, and I thus misrepresented those relationships to the court. Indeed, good client representation requires more than just a familiarity with the law, and even those providing pro bono service within their subject matter expertise may experience challenges when first working with new client populations—challenges most legal aid attorneys would effortlessly avoid.

²⁶⁷ For instance, from 2008 to 2011, pro bono hours at the 100 largest firms decreased by over 12%. Cummings & Sandefur, *supra* note 185, at 109–10. Professors Cummings and Sandefur rightly asked, “When times are toughest for poor Americans, why does our legal services system hinge on a resource, pro bono, that contracts with the economy?” *Id.* at 110.

²⁶⁸ 2018 REPORT ON THE PRO BONO CHALLENGE, *supra* note 64, at 5.

firms increased a modest 2%,²⁶⁹ that simply reflects the growth of those firms during this relative boom. The number one reason cited by attorneys for not participating in pro bono, or not increasing their participation, is that they do not have enough time to do so.²⁷⁰ Indeed, when the climate is tough for attorneys, they will prioritize paying work over pro bono; yet, when demand from paying clients is high, that makes it harder for attorneys to “find the time” for pro bono.²⁷¹

Despite these drawbacks, the bar’s increased commitment to pro bono over the past thirty years has been a great accomplishment and should be celebrated. Yet, the fact remains that despite all the efforts, only 52% of attorneys do pro bono in a given year, only 20% meet the ABA’s aspirational standards, and 20% have never done pro bono work.²⁷² Indeed, though there is room for further pro bono growth in theory, it is hard to see what would move the needle further at this point.²⁷³ At the same time, the pro bono system involves layers of inefficiencies that both inflate the effective value of hours committed to pro bono work by private attorneys and decrease the hours of direct representation by legal aid attorneys.²⁷⁴ In fact, at many firms, pro bono is not an economic sacrifice at all; instead, it is an investment that returns in full.²⁷⁵

To be sure, the profession must capture and retain the great progress made with pro bono over the past few decades. But if the primary goal truly is to decrease the justice gap, not to serve our own interests, it is time for a substantial shift in strategy—namely, to increase legal aid funding from within the bar. Before considering the proposal to accomplish this, though, let us first consider whether firms have to capacity to do so, and to whom law firms presently contribute money.

²⁶⁹ See *id.* at 3 (showing an increase from 4.9 million hours in 2009 to 5.0 million hours in 2018).

²⁷⁰ SUPPORTING JUSTICE IV, *supra* note 6, at 20.

²⁷¹ See Rhode, *Pro Bono in Principle*, *supra* note 8, at 430 (noting that at the turn of the century, when average firm revenues at the 100 largest firms grew by 50%, pro bono participation declined by a third).

²⁷² See SUPPORTING JUSTICE IV, *supra* note 6, at 7.

²⁷³ In one creative approach to reversing this trend, John M.A. DiPippa has suggested the ABA reduce its aspirational target of fifty hours of pro bono service each year to thirty hours (along with mandatory reporting), in an effort to increase *overall* participation. DiPippa, *Peter Singer*, *supra* note 49, at 136–38. Such an approach, however, likely overestimates the role that noneconomic external motivations play in shaping lawyer conduct. If the aspirational guidelines are, in fact, a primary motivator for many lawyers, a just-as-likely result would be that lawyers who do pro bono would reduce their hours from fifty to thirty, while those presently disinclined to do meaningful pro bono would still not do so.

²⁷⁴ See Rhode, *Rethinking the Public*, *supra* note 3, at 1437.

²⁷⁵ See *id.* at 1437–38.

IV. OVERVIEW OF LAW FIRM GIVING

Large law firms are, in fact, often quite charitable. However, the great majority of this giving is directed toward community projects unrelated to legal aid. For instance, in 2013 the Kirkland & Ellis Foundation donated \$8.2 million to charities; of that, only \$1.7 million (21%) went to legal aid organizations.²⁷⁶ Likewise, the Jones Day Foundation donated \$3.5 million, though only \$270,000 (7.7%) went to legal aid organizations.²⁷⁷ Wachtell, Lipton, Rosen & Katz had the highest profits per partner of any American firm, yet its foundation made *no* contributions to legal aid.²⁷⁸ That is, of course, the prerogative of the partners. I certainly do not suggest that firms are obligated to give only to, or even primarily to, legal aid organizations. But, if ensuring access to justice is a core value, as many firms profess, and when over 85% of low-income Americans cannot get representation for critical civil issues, it would certainly seem that legal aid would fall a bit higher on most firms' charitable priority list.

Those priorities become clear, however, by looking at the organizations to whom they do donate. James Sandman, former managing partner at Arnold & Porter and president of LSC from 2011 to 2020, noted that many firm donations go to their clients' favored causes and "are more in the nature of marketing or client relationships."²⁷⁹ For instance, one of the largest gifts from the Kirkland & Ellis Foundation in 2013 went to Bain Capital Children's Charity, run by one of its largest clients, Bain Capital.²⁸⁰ Others give to law schools with close relationships to the firm. Kirkland & Ellis Foundation's largest gift in 2013 went to Northwestern University, where the firm's chairmen went to law school.²⁸¹ Likewise, Wachtell, Lipton, Rosen & Katz Foundation's largest gift in 2013 went to New York University, where one of the firm's founders was chairman of its board of trustees at the time. To that point, Kirkland & Ellis Foundation's website proudly notes that other schools receiving the Foundation's "most significant gifts include the University of

²⁷⁶ Beck, *supra* note 38. The Kirkland & Ellis Foundation donated over \$14.1 million to charitable organizations in 2020. *Charitable Giving*, KIRKLAND & ELLIS, <http://www.kirkland.com/social-commitment/charitable-giving> [<http://perma.cc/VTN3-VTJE>].

²⁷⁷ Beck, *supra* note 38.

²⁷⁸ *Id.* A Wachtell firm leader noted that the firm did donate to legal aid outside of its foundation, though he declined to say how much. *Id.*

²⁷⁹ *Id.*; see also *LSC President to Step Down*, LEGAL SERVS. CORP. (Jan. 21, 2020), <http://www.lsc.gov/media-center/press-releases/2020/lsc-president-james-j-sandman-step-down> [<http://perma.cc/D4FJ-QRDE>].

²⁸⁰ Beck, *supra* note 38, at 6.

²⁸¹ *Id.*

Chicago Law School, Columbia Law School, Harvard Law School, University of Michigan Law School, Northwestern University Pritzker School of Law and Stanford Law.”²⁸² Such giving suggests more self-interest than enlightenment. To that point, John Bliss and Stephen Boutcher have argued powerfully that law firms’ charitable priorities presently are driven more by general concepts of corporate social responsibility (CSR)—and, often, the CSR priorities of their biggest clients—than by the ethics of traditional legal professionalism.²⁸³

To be clear, the legal community does contribute *somewhat* to legal aid. The ABA has estimated that, from 2003 to 2019, donations to legal aid from the legal community averaged \$82.2 million per year (\$95.6 million when adjusted for inflation)—about 6% of overall funding for legal aid.²⁸⁴ While that raw number may seem impressive upon first glance, it represented less than *four one-hundredths of a percent* (0.04%) of overall lawyer revenue in the United States.²⁸⁵ For example, in 2017, even if the entire amount of giving from the legal community came from only the 100 largest law firms (which it did not), the total amount donated would have represented just over one-tenth of 1% of those firms’ revenue.²⁸⁶ Moreover, only about two-thirds of that giving reflected voluntary donations; the balance came from lawyer registration fees, bar dues, and general bar funds.²⁸⁷

To truly put the gulf between law firm revenue and legal aid support into perspective, consider that legal fees generated in 2019 by *each* of the nation’s nine largest law firms exceeded the entire operating budget of the country’s 700 legal aid

²⁸² *Charitable Giving*, KIRKLAND & ELLIS LLP, <http://www.kirkland.com/social-commitment/charitable-giving> [<http://perma.cc/697H-HGUM>] (last visited May 30, 2021).

²⁸³ Bliss & Boutcher, *supra* note 211, at 101.

²⁸⁴ ABA RESOURCE CENTER, *supra* note 167. Inflation calculations were determined from January of each year to January 2021 using the inflation calculator available at *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm [on file with author].

²⁸⁵ Determined by comparing overall law firm revenue to giving for the years 2012 to 2019. For revenue information, see *Legal Services Industry*, STATISTA, <http://www.statista.com/forecasts/311177/legal-services-revenue-in-the-us#statisticContainer> [<http://perma.cc/4QQN-XZUA>] (last updated Sept. 2020) (last visited June 25, 2021). For giving information, see ABA RESOURCE CENTER, *supra* note 167.

²⁸⁶ In 2017, the overall amount of giving from the legal community was \$98.2 million. See ABA RESOURCE CENTER, *supra* note 167. In comparison, the total revenue for the AmLaw 100 firms was \$91.4 billion. See Robert Ambrogio, *Annual Am Law 100 Published Today Shows Boom Year for Biglaw*, LAWSITES (Apr. 24, 2018), <http://www.lawsitesblog.com/2018/04/annual-am-law-100-published-today-shows-boom-year-for-biglaw.html> [<http://perma.cc/EA3H-9J63>].

²⁸⁷ *Resources for Legal Aid, 2016*, AM. BAR ASS’N (2018), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendan ts/ATJReports/l_s_sclaid_atj_resources_civil_legal_2016.pdf [<http://perma.cc/B44G-Q58Y>].

organizations *combined*.²⁸⁸ As noted above, revenue at Kirkland & Ellis, which serves perhaps a few thousand clients, alone was *twice* the budget of all legal aid organizations—which serve over one-fifth of the country’s population.²⁸⁹ Notably, while legal community giving increased an average of 6.2% from 2004 to 2017,²⁹⁰ giving did double from 2017 (\$98.2 million) to 2019 (\$207.5 million).²⁹¹

Consistent with those findings, studies of various states from 1993 to 2000 showed that average individual contributions by lawyers to legal aid ranged from thirty-two to eighty-two dollars.²⁹² In Florida, one of the few states with mandatory reporting of financial contributions, the average contribution per lawyer was fifty-nine dollars in 2019.²⁹³ Assuming an average billing rate of just \$250 per hour, this equals an annual financial commitment equal to about fifteen minutes of a lawyer’s billable time. Likewise, about fifty New York firms participate in a pledge program of \$600 per lawyer to The Legal Aid Society of New York²⁹⁴—equivalent to the revenue from roughly one billable hour for many New York large-firm lawyers. That amount has not increased in over twenty-five years, yet those who run the challenge note they are reluctant to raise the amount and alienate the firms.²⁹⁵

Firms often respond that the above numbers understate their actual giving, because individual gifts by their attorneys

²⁸⁸ Compare ABA RESOURCE CENTER, *supra* note 167 (showing total legal aid funding in 2019 was approximately \$2.16 billion) with ALM Staff, *The 2020 Am Law 100: Ranked by Gross Revenue*, THE AM. LAW. (Apr. 21, 2020, 9:22 AM), <http://www.law.com/americanlawyer/2020/04/21/the-2020-am-law-100-ranked-by-gross-revenue/?tokenvalue=6EFA0A05-E55B-4C29-8DB2-049A4C5D3DE0>. See generally 1 JOHNSON JR., *supra* note 122 (making this comparison as of 2014).

²⁸⁹ See ABA RESOURCE CENTER, *supra* note 167 (using 2017 as a benchmark for this discussion when the combined funds donated through IOLTA and LSC were approximately \$403.3 million); compare with Claire Bushey, *Kirkland & Ellis Reaches the Top as It Focuses on Corporate Work*, CRAIN’S CHI. BUS. (May 21, 2018) <http://www.kirkland.com/-/media/news/press-mention/2018/10/crains-chicago-business-corporate-practice-may-201.pdf> [<http://perma.cc/AV9E-RUED>] (Kirkland’s revenue totaled \$3.17 billion).

²⁹⁰ ABA RESOURCE CENTER, *supra* note 167.

²⁹¹ *Id.*

²⁹² Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1810 (2001) [hereinafter Rhode, *Access to Justice*].

²⁹³ See *Lawyer Discipline Statistics*, FLA. BAR, <http://www.floridabar.org/public/acap/lawyer-discipline-statistics/> [<http://perma.cc/6KXW-9RGR>] (last visited May 30, 2021) (noting that 108,615 lawyers were licensed in Florida during 2019); *Pro Bono Publico*, *supra* note 90, at 8 (noting that pro bono contributions totaled \$6,369,364 in 2019).

²⁹⁴ Beck, *supra* note 38, at 7.

²⁹⁵ *Id.*

cannot easily be tracked.²⁹⁶ For a profession that specializes in solving complex problems—and that enthusiastically tracks and markets its lawyers' pro bono efforts²⁹⁷—that excuse is disingenuous. Here is one idea: a simple email to lawyers requesting that they share their total individual contributions to legal aid with the pro bono coordinator so the firm can accurately capture its commitment to legal aid. If confidentiality or anonymity is a concern, a poll or similar feature on the firm's internal website would permit anonymous reporting by individual lawyers. Or, even better, establish a matching program within the firm (or its foundation, which most large firms now have) for gifts to legal aid by individual lawyers. Not only would that likely increase giving, it would also permit easy tracking. Indeed, such information certainly could be easily gathered by a law firm, if there was a desire to do so. And it would certainly be celebrated, if there was reason to celebrate it.

Notably, state bars also provide funding through IOLTA interest, court fees, bar foundation grants, and cy pres awards. Together, these sources have constituted approximately 20% of overall legal aid funding since 2003.²⁹⁸ While these reflect contributions from the profession, they can hardly be attributed to the altruism of law firms. IOLTA interest, for example, simply reflects interest on assets firms hold on behalf of their clients and is, in effect, another form of public support. Moreover, relying on IOLTA is a particularly unreliable funding source since it is so dependent on interest rates. For instance, in 2008, IOLTA accounts contributed \$240 million to legal aid; by 2013, as interest rates dropped with the recession, IOLTA accounts contributed only \$74.5 million to legal aid.²⁹⁹ IOLTA funding increased after 2013, but again plummeted in 2020.³⁰⁰ In both instances, just as the need for legal aid spiked, funding for legal aid through IOLTA dropped. In sum, voluntary contributions from law firms and individual lawyers constitute only about 4% of all legal aid funding.³⁰¹

²⁹⁶ *Id.* at 5. Notably, among those approximately 130 firms who have signed the Pro Bono Challenge, about fifty do voluntarily report their direct financial contributions to legal aid. 2020 REPORT ON THE PRO BONO CHALLENGE, *supra* note 65, at 10.

²⁹⁷ In my experience, I have noted that firms also closely track their lawyers' United Way contributions.

²⁹⁸ ABA RESOURCE CENTER, *supra* note 167.

²⁹⁹ Beck, *supra* note 38, at 6.

³⁰⁰ See Press Release, Nat'l Ass'n IOLTA Programs, \$157.4 Million Projected Loss In Critical Sources of State Funding for Civ. Legal Aid (May 29, 2020), <http://www.iola.org/all-documents/160-naip-press-release-5-29-20/file> [<http://perma.cc/BE5U-ACLS>].

³⁰¹ *Resources for Civil Legal Aid, 2016*, AM. BAR. ASS'N, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendan

V. INCENTIVIZING LARGE FIRMS TO INCREASE FUNDING TO LEGAL AID

Utah Supreme Court Justice Dino Himonas recently recognized that “[w]e cannot volunteer ourselves across the access-to-justice gap. We have spent billions of dollars trying this approach. It has not worked. And hammering away at the problem with the same tools is Einstein’s very definition of insanity. What is needed is a market-based approach”³⁰² The following section first addresses why increased “self-funding” of legal aid should be the profession’s next major step for reducing the justice gap, sets out a market-based proposal for accomplishing this step, discusses the benefits of the proposal and some obstacles to implementing it, then concludes with an illustration applying the proposal.

A. “Self-funding” Legal Aid as a Primary Tool

States are experimenting with additional options to increase access to justice for low-income individuals that do not rely on pro bono, including self-help centers, hotlines and on-line legal forums, document assembly and other technological approaches to enable self-help, and efforts to allow lay advocates to assist in certain simple cases.³⁰³ For instance, in August 2020, the Utah Supreme Court established a groundbreaking two-year program creating a “legal regulatory sandbox.”³⁰⁴ This program relaxes existing rules regulating the practice of law and permits both lawyers and nonlawyers to offer innovative approaches to reducing the justice gap and to act under the purview of the court.³⁰⁵ Similarly, one month later, the Minnesota Supreme Court approved a two-year Legal Paraprofessional Pilot Project to permit paralegals, with attorney supervision, to represent indigent clients in court in certain housing and family law disputes.³⁰⁶ Scholars have called

ts/ATJReports/ls_sclaid_atj_resources_civil_legal_2016.pdf [http://perma.cc/B44G-Q58Y] (last visited Sept. 24, 2021).

³⁰² *To Tackle the Unmet Legal Needs Crisis*, UTAH CTS. RECENT PRESS NOTIFICATIONS (Aug. 13, 2020), <http://www.utcourts.gov/utc/news/2020/08/13/to-tackle-the-unmet-legal-needs-crisis-utah-supreme-court-unanimously-endorses-a-pilot-program-to-assess-changes-to-the-governance-of-the-practice-of-law/> [http://perma.cc/7HJW-NRUV].

³⁰³ See, e.g., 3 JOHNSON JR., *supra* note 13, at 898–906; HOUSEMAN & PERLE, *supra* note 17, at 53–55; see also Jason Tashea, *Outside the Box*, 106 A.B.A. J. 52, 52–54 (2020).

³⁰⁴ UTAH SUP. CT., STANDING ORD. NO. 15, at 3–4 (Aug. 14, 2020), <http://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf> [http://perma.cc/5QBJ-T2TQ].

³⁰⁵ *Id.* at 3–4, 10.

³⁰⁶ MINN. SUP. CT., ORD. IMPLEMENTING LEGAL PARAPROFESSIONAL PILOT PROJECT (Sept. 29, 2020) <http://www.mncourts.gov/mncourtsgov/mediaAppellate/Supreme%20Court/RecentRulesOrders/Administrative-Order-Implementing-Legal-Paraprofessional-Pilot-Project.pdf> [http://perma.cc/HS56-ML6A].

for many of these same approaches, along with mandatory pro bono requirements, decreased restrictions on LSC recipients, deregulation to permit a more “corporate” practice of law,³⁰⁷ increased availability to attorneys’ fees in civil rights cases, increased access to aggregate remedies for common claims, and taxation of legal services to fund legal aid.³⁰⁸

Each of these ideas should be applauded and, many, pursued. Though each may chip away at the problem, the single greatest step to reducing the justice gap would be to increase funding for legal aid. While most, if not all, scholars agree legal aid attorneys provide the most efficient and effective delivery of legal services,³⁰⁹ they likewise seem resigned to the fact that increased funding for legal aid is simply off the table, a non-starter.³¹⁰ This may be best exemplified by Deborah Rhode: “To be sure, subsidizing additional poverty law specialists would be a more efficient way of expanding services than relying on reluctant dilettantes. But an adequate increase in government support does not seem plausible in this political climate. Nor does a major increase in voluntary contributions from the bar.”³¹¹

I agree that meaningful, sustained increases in federal funding for legal aid is unlikely. The bar has labored over the decades not only to increase congressional funding of legal aid, but to save LSC itself from numerous efforts—as recently as 2020—to disband it.³¹² While the bar has succeeded in keeping LSC alive, LSC funding has effectively been cut in half over the past forty years.³¹³ Indeed, funding fell even during Bill Clinton’s

³⁰⁷ See, e.g., Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT’L REV. L. & ECON. 43, 45–46 (2014).

³⁰⁸ See e.g., 1 JOHNSON, JR., *supra* note 122, at 4; Jeffrey Kosbie, *Donor Preferences and the Crisis in Public Interest Law*, 57 SANTA CLARA L. REV. 43, 67 (2017); DiPippa, *Peter Singer*, *supra* note 49, at 128, 141; Rob Atkinson, *A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 AM. U.J. GENDER SOC. POLY & LAW 129, 170 (2001) (proposing a tax on legal services to fund legal aid).

³⁰⁹ See Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2425 (1999); DiPippa, *Justice and the Poor*, *supra* note 96, at 107; Beck, *supra* note 38 (quoting Judge David Tatel of the United States Court of Appeals for the District of Columbia); Atkinson, *supra* note 308, at 142–43; see also Cummings & Sandefur, *supra* note 185, at 91 (noting the need for further research on this issue).

³¹⁰ *But see* DiPippa, *supra* note 49, at 138–40 (developing an argument that the bar itself should contribute more financially to legal aid).

³¹¹ Rhode, *Pro Bono in Principle*, *supra* note 8, at 435.

³¹² *LSC Submits 2021 Budget as White House Again Calls for Defunding*, LEGAL SERVS. CORP. (Feb. 10, 2020), <http://www.lsc.gov/media-center/press-releases/2020/lsc-submits-2021-budget-white-house-again-calls-defunding> [<http://perma.cc/YCR4-8BWN>].

³¹³ See *supra* Section II.A.

presidency,³¹⁴ despite that Hillary Clinton had previously been the chair of LSC's board.³¹⁵ And while LSC appropriations have increased annually since 2013, similar stretches over the past forty years have been followed by significant reductions—the classic one step forward, two steps back scenario.³¹⁶ The ABA has fought hard for these gains and must continue its outstanding advocacy on behalf of LSC, which is a critical source of legal aid funding. Given this forty-year track record, though, the expanding national deficit, and the ever-increasing polarization in Washington on seemingly all issues, one certainly cannot rely on long-term consensus support for increased federal funding of any social program.

Likewise, significant additional funding from the bar is unlikely if left simply to aspirational appeals or efforts to shame. As Rebecca Sandefur has recognized, “Attempts to activate latent values or commitments to public service may play important symbolic roles in internal debates within the bar . . . but the state-level, cross-sectional evidence does not support them as effective strategies for encouraging lawyers’ service.”³¹⁷ In short, the majority of the practicing bar simply does not view funding legal aid as its responsibility. Rather, the ABA formally supports a “strong, *federally funded* . . . program to provide legal aid,”³¹⁸ and the Pro Bono Institute, reflecting the present view of the profession, asserts that the bar should not be asked to “do more before other funding streams, particularly public ones, are tapped.”³¹⁹

However, our approach to additional legal aid funding cannot simply be one of resignation. Indeed, few in 1990 would have foreseen the success and extent of the “institutionalization” of pro bono.³²⁰ If the primary incentive for that growth was merely the ABA’s aspirational goal of fifty pro bono hours a year,

³¹⁴ *Congressional Appropriations*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/who-we-are/congressional-oversight/congressional-appropriations> [<http://perma.cc/8J64-5GVT>] (last visited May 30, 2021).

³¹⁵ 2 JOHNSON JR., *supra* note 149, at 482.

³¹⁶ See *supra* note 161 and accompanying text.

³¹⁷ Sandefur, *supra* note 179, at 102. Similarly, Judge David Tatel of the United States Court of Appeals for the District of Columbia gave an impassioned plea to increase donations to D.C. legal aid groups in 2013. When asked two years later about the response, he said simply: “I have not heard any response.” Beck, *supra* note 38.

³¹⁸ *Legal Services Corporation*, AM. BAR ASS’N, (emphasis added), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/legal_services_corporation/ [<http://perma.cc/DQ4M-Y9PD>] (last visited May 30, 2021).

³¹⁹ 2018 REPORT ON THE PRO BONO CHALLENGE, *supra* note 64, at 12.

³²⁰ Cummings, *supra* note 1, at 6.

the pro bono revolution would not have happened. But the ABA backed that up with the Pro Bono Challenge, which permitted firms to publicly measure and then market themselves against others. At the same time, *The American Lawyer* stepped in and added pro bono to its ranking methodology. Suddenly, the largest American law firms took notice, as they now had a direct financial interest in pro bono. Their reputations—and the reputations of their peers—were thereafter to be measured in significant part by their pro bono commitment. Likewise, clients started looking at these rankings and asking the same questions when hiring law firms. These economic incentives changed the conduct among those firms at the top, which eventually changed the profession's pro bono culture altogether.³²¹

Today, the legal profession stands with respect to legal aid funding where it stood with respect to pro bono in 1993: while the Model Rules encourage lawyers to support legal aid financially, it is little more than a suggestion. Moreover, the Model Rules themselves present financial support for legal aid as a secondary option to providing pro bono service, with pro bono as the gold standard. There is no direct benefit to the firms for contributing to legal aid or repercussions for failing to do so. But, just as occurred with pro bono, the following proposal would change that.

B. A Market-Based Proposal to Increase Legal Aid Funding

While the following approach would require coordination from a few sources, it would not require any change in formal bar policy, any legislation, or any mandatory obligations. Rather than *requiring* a firm or lawyer to do anything, it would instead provide them the *opportunity* to distinguish themselves from their peers from a business standpoint. But it would also create a potential economic consequence if they chose not to do so.

First, *The American Lawyer*, the *Vault*, and similar organizations that compare and rank large firms must begin to incorporate into their ranking methodology a law firm's direct financial commitment to legal aid.³²² When measuring a firm's commitment to ensuring access to justice, focusing on pro bono alone is no longer an accurate indicator, given the limitations of pro bono as previously discussed. Rather, a methodology that

³²¹ Boutcher, *supra* note 201, at 120–22; Cummings & Rhode, *supra* note 85, at 2372; 2018 REPORT ON THE PRO BONO CHALLENGE, *supra* note 64, at 13 (noting that “[m]etrics create incentives and shape behaviors”).

³²² While this paper is focused on civil legal aid, financial contributions from law firms could include those to public defender programs, as well, just as pro bono hours are counted whether the services were for civil or criminal matters.

considers both pro bono participation and financial support for legal aid (including both direct firm contributions and those of a firm's individual lawyers) would more accurately represent a firm's actual commitment to reducing the justice gap.

Though the measurement could be tied to any number of metrics, it should not be based on nominal contributions, but on a percent of the firm's economic performance, such as annual revenue, profits per partner, or profits per lawyer. This would be consistent with the pro bono metrics, which measure participation as a percent of the firm's hours rather than raw hours. In this way, firms do not get the benefit of simply being larger than others; they must contribute proportionately to be ranked accordingly. Notably, including direct financial support would also make it harder for a firm to manipulate its ranking, as firms can sometimes do with pro bono.³²³ Whatever the metric, the point is to create a standard by which to measure firms and, importantly, by which firms (and firm clients) can compare themselves against other firms. Perhaps most importantly, these organizations would also provide a vehicle to broadly publish the results and create accountability.

Second, as John DiPippa has suggested, the ABA should institute a "legal aid challenge" similar to the Pro Bono Challenge.³²⁴ Not only would this powerfully signal the ABA's commitment to addressing the justice gap, but it would also provide law firms another concrete marketing opportunity around their giving (and one that would permit them to be measured favorably against their peer institutions). While this could be a separate challenge altogether, many firms could choose to participate only in the Pro Bono Challenge and use that to market themselves still as an access to justice leader. A more effective approach would be to eliminate the Pro Bono Challenge as it presently exists and replace it with a more comprehensive "Justice Gap Challenge" that measures both a firm's pro bono participation and direct legal aid financial contributions.

³²³ Because one-half of *The American Lawyer* metric for pro bono measures the percentage of a firm's attorneys who contribute at least twenty hours of pro bono in a given year, firms sometimes focus on getting the maximum number of lawyers to commit the minimum number of hours necessary. See Cummings & Rhode, *supra* note 85, at 2407–08. Firms have also been known to cycle associates through a pro bono project to maximize that number.

³²⁴ DiPippa, *Peter Singer*, *supra* note 49, at 139–40 (referring to it as a "Pro Bono Dollar Donation Challenge").

Third, state bar associations should begin to require that firms disclose their overall direct financial contributions to legal aid each year. For this purpose, a firm could include in its totals those contributions made directly by the firm itself, from a firm foundation, and collectively by its individual lawyers. Just as with those states that require pro bono reporting, the purpose would not be to discipline lawyers or firms who do not participate (while reporting would be mandatory, giving would not be). Rather, the purpose would be to enable each state (and, ultimately, the profession overall) to measure more accurately its support for legal aid and to track progress. Indeed, any claim that ensuring access to justice is foundational to our profession rings hollow if the bar has little interest in actually measuring the extent of our commitment and, over time, progress in this regard.

This step would permit state and local bars to publish a list of firms making substantial contributions to legal aid each year and the size of such contributions. To address potential privacy concerns, the bar need not publish giving information for individual lawyers or from firms under a certain size. At a minimum, each respective bar could publish an annual report that sets out average giving by its members, average giving by firm size, the names of firms that give at a leadership level, trends in giving, and other relevant measures. This would also provide firms with comparative data points by which to market themselves, should they choose to do so. As a profession, this information could also provide another valuable response to negative stereotypes about lawyers—unless, of course, giving is so stingy as to be embarrassing.

There is some precedent for formal reporting programs relating to legal aid, and the precedent suggests mandatory reporting alone increases participation. For instance, in 1992, Florida began requiring all attorneys to certify on their annual bar membership dues statements the number of hours they contributed to pro bono and the amount of financial contributions to legal organizations.³²⁵ From 1992 to 2020, while the number of pro bono hours reported increased by 60%, financial contributions increased by 319%.³²⁶ Likewise, in the District of Columbia, after a program for reporting financial contributions from lawyers to legal aid was instituted, contributions increased by 66% in the first year alone.³²⁷

³²⁵ See *Pro Bono Publico*, *supra* note 90, at 1, 3, 6; see also Cummings & Rhode, *supra* note 85, at 2370.

³²⁶ See *Pro Bono Publico*, *supra* note 90, at 11–13.

³²⁷ Beck, *supra* note 38.

Finally, corporate clients must start requiring that the large law firms with whom they do business demonstrate their financial commitment to legal aid, just as many now demand firms demonstrate their commitment to pro bono. Indeed, the above three steps may be for naught if firms perceive that their largest clients frankly do not care.³²⁸ The first three steps are essential for raising awareness, setting expectations, and providing specific information by which to measure and compare firms. The final step, however, is what will actually motivate action. Once large corporate clients begin to demand this information, large firm culture around legal aid support will shift accordingly. And, as large firm culture shifts, so too will the culture throughout the bar. No firm could complain that this is being foisted on them or violating their autonomy. It would simply be the market talking, and firms can embrace or ignore it as they please.

C. Benefits of the Proposed Approach

Increased legal aid funding by law firms and individual lawyers would provide numerous benefits—beyond simply rankings and other reputational aspects—that other approaches aimed at reducing the justice gap cannot. First, direct financial contributions to legal aid organizations would permit a firm's partners to receive a charitable deduction for income tax purposes.³²⁹ Considering only the federal income tax, this would generate a 37% tax savings.³³⁰ In effect, a gift of \$1 million by a firm would “cost” the equity partners a net of \$630,000. And this tax benefit is already in the law; it requires no legislative action

³²⁸ An apt analogy is to law firm diversity and inclusion efforts, where corporate client demands have helped drive law firm movement. As a comprehensive 2011 study found, law firm diversity efforts reflected a lot of talk, but little action, when large corporate clients did not hold firms accountable for their diversity efforts. INST. FOR INCLUSION IN THE LEGAL PROF., *THE BUSINESS CASE FOR DIVERSITY: REALITY OR WISHFUL THINKING?* 7–9 (2011), http://theiilp.wildapricot.org/Resources/Documents/BusCaseDivReport_11_Final.pdf [<http://perma.cc/7UE2-RBJD>]. However, when corporate clients in fact *required* law firms to meet diversity standards to win or retain their business, action followed. Colleen Cochran, *Demographics as Destiny: Making the Case for Law Firm Diversity and Inclusion*, AM. BAR ASS'N (June 22, 2021), <http://www.americanbar.org/groups/journal/articles/2021/demographics-as-destiny-making-the-case-for-law-firm-diversity/> [<http://perma.cc/XZ3M-M8WS>] (citing examples from Facebook, Hewlett-Packard, and Microsoft).

³²⁹ 26 U.S.C. § 170 (2018).

³³⁰ Rev. Proc. 2020-45 § 3.01. This assumes they are in the highest individual tax bracket, which would undoubtedly be true for most equity partners at large firms, at least. *See infra* note 363 and accompanying text. For simplicity, this Article refers only to federal income taxes, but the tax savings may be significantly greater when other taxes, such as employment taxes and state income taxes, are also accounted for.

at all.³³¹ On the other hand, firms cannot take any deduction for the “economic value” of pro bono hours.³³² Not only is a direct contribution more efficient for the legal aid organization than coordinating pro bono volunteers, it also would be more tax-efficient to the firm.

Second, the proposed approach would provide law firms direct control over which legal aid organizations they support. Alternatively, a tax on legal services to support legal aid, as some have proposed, would be collected by the taxing authority and allocated among organizations through a political process. Likewise, with legal aid funding through IOLTA interest, court fees, or bar fees, firms have no direct control over which organizations receive funding. On the other hand, firms have complete control over which organizations they choose to support with direct donations. They may supplement LSC funding for organizations, fund those organizations not eligible for LSC funding, or both. They may fund legal aid organizations their clients prefer or for whom their lawyers serve as board members. The business factors behind these decisions would be largely irrelevant; the ultimate beneficiary of the gifts will be indigent individuals with legal needs.

Notably, this freedom of choice may raise concerns regarding positional conflicts associated with pro bono.³³³ For instance, firms that represent large corporate landlords may be unwilling to represent tenants, even absent an actual conflict, due to concern that such representation could create precedent detrimental to their paying client. In this context, however, the risk of upsetting a good client, or jeopardizing their interests, is significantly decreased. For one, although some legal aid organizations focus on a particular subject area, many represent clients in a variety of areas. For instance, Southern Minnesota Regional Legal Services employs over sixty staff attorneys serving clients with a wide-variety of legal issues, including those relating to custody, divorce, domestic violence, government benefits, expungements, evictions, tenant rights, consumer rights, debt collection, estate planning, immigration, education,

³³¹ Cf. Jason M. Thiemann, *The Past, The Present, and the Future of Pro Bono: Pro Bono as a Tax Incentive for Lawyers, Not a Tax on the Practice of Law*, 26 *HAMLIN J. PUB. L. & POL'Y* 331, 377 (2005) (proposing a new tax credit for pro bono work, which would require legislative action).

³³² The economic value of contributing time or services does not qualify for the charitable deduction. See I.R.S. Publ'n. 526, 7 (Mar. 3, 2021).

³³³ See generally Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 *FORDHAM L. REV.* 2279 (1999).

elder abuse, employment issues, and tax issues.³³⁴ A contribution to such an organization could be used in any number of areas; unrestricted funding would not be used to support any particular matter that could be “traced” to the law firm. Similarly, unlike pro bono, the firm is not actually representing a client, so that firm’s name will never appear on the docket of a case that could negatively affect a client. While positional conflicts could still emerge in limited situations, the benefits of an overall funding increase for legal aid would be additive, not a reallocation of existing funding, and would greatly outweigh such concerns.

Third, the proposed approach would require almost no time commitment from the firm or its individual lawyers. The number one reason lawyers cite for not doing more pro bono is a lack of time, followed by family commitments, lack of skills, unrealistic client expectations, and scheduling conflicts.³³⁵ None of these limitations apply to direct donations. Apart from a committee meeting or two to decide which organization or organizations to fund, this requires no additional lawyer time. In addition, unlike increased pro bono, it would require very little additional administrative or organizational support from the firm.

Fourth, unlike much of the pro bono that is done, direct contributions would not divert resources *from* legal aid organizations. Rather, the additional funding could be used to permit legal aid attorneys to do what inspires them and they do best: to work directly with those in need. Unlike LSC grants, which require the organization to dedicate a percentage to pro bono partnerships, such private grants would allow legal aid organizations more autonomy. In addition, they could use the funds in a way they deem best, whether that is hiring additional attorneys, increasing salaries to permit them to better recruit and retain attorneys, adding new services to expand their reach, improving their technology to provide more efficient services, or other ways to increase and improve their services. To be sure, legal aid organizations would still be accountable for how they steward these funds, as future donations may depend on their ability to show the firms’ contributions are put to good use.³³⁶

³³⁴ See *Legal Services*, SMRLS <http://www.smrls.org/get-help/legal-services/> [<http://perma.cc/N5AV-YCF6>] (last visited Sept. 24, 2021).

³³⁵ SUPPORTING JUSTICE IV, *supra* note 6, at 20.

³³⁶ Notably, one potential concern about this may be the creation of a competitive market among legal aid organizations for law firm gifts, which could create additional time to be dedicated to grant proposals and shape the behavior of legal aid organizations. Jeffrey Kosbie, *Donor Preferences and the Crisis in Public Interest Law*, 57 SANTA CLARA L. REV. 43, 46 (2017). However, these concerns represent a reality of most philanthropy these days, and it also creates accountability for the efficient and effective use of the

Fifth, by increasing funding for legal aid, the profession would also support its own by creating more employment opportunities for law school graduates. For the class of 2019, 6.5% of graduates (approximately 2,150) were unemployed and looking for work ten months after graduation.³³⁷ As discussed in the next section, many law school graduates would like to work for legal aid organizations, though it simply is not an economically viable option (particularly with student debt among law school graduates at record levels). While not all of those looking for work would choose legal aid, many would if increased funding allowed for the creation of more jobs, higher paying positions, or both.

In this regard, many law schools are stepping in to support both recent graduates and legal aid through legal aid fellowships. Over 10% of public interest jobs taken by 2019 law school graduates were fellowships funded, in part, by law schools.³³⁸ This should not be a burden born by law schools, however, and such fellowships are limited in duration. Further legal aid funding would permit those organizations to provide long-term employment for such lawyers.

To be fair, many law firms also sponsor legal aid fellowship programs.³³⁹ For some, these programs provide no direct benefit to the firm (apart from, appropriately, a valuable marketing opportunity). Most notably, Skadden Arps has funded over 900 two-year fellowships since 1988, and over 90% of those fellows continue in full-time public service work upon completion of their fellowship.³⁴⁰ For many firms, though, these serve not to provide an entry for lawyers into a potential long-term career in legal aid, but as a vehicle to increase the firm's pro bono numbers or to house promising attorneys for whom they do not currently have

funding. *See id.* Moreover, this would *increase* the funding available to organizations, not simply reallocate the limited existing funding among them. As such, an organization may choose not to compete for the additional funding if it concluded that such concerns outweighed the benefits.

³³⁷ *See* NAT'L ASS'N FOR L. PLACEMENT, JOBS & JDS: EMPLOYMENT FOR THE CLASS OF 2019—SELECTED FINDINGS 4 (2020). Though this is the lowest percent since 2007, it reflects, in part, years of smaller law school classes rather than more job openings. *See id.* Further, the authors note that the unemployment rate for graduates will most likely increase in the coming years. *See id.*

³³⁸ *See id.* at 7. For example, the University of St. Thomas School of Law partners with legal aid organizations in Minnesota through its Archbishop Ireland Justice Fellows Program. *See* Patricia Peterson, *What Happens to Those Who Can't Afford an Attorney?*, 13 ST. THOMAS LAW. 5, 20–23 (2020). Many of these do turn into full-time positions at the end of the fellowship. *See id.* at 22–23.

³³⁹ Cummings, *supra* note 1, at 80–82.

³⁴⁰ *Skadden Fellows Share the Impact of the Program After Thirty Years*, SKADDEN FELLOWSHIP FOUND., <http://www.skaddenfellowships.org/> [<http://perma.cc/AUA3-D9XX>].

the work to support.³⁴¹ As with pro bono, although the benefits of these arrangements still outweigh the costs, such programs can create a drain on the organization the firm purports to support. Indeed, “[s]ome public interest leaders cannot help but feel that if firms were motivated primarily by a desire to advance the public good, they would be helping to subsidize the nonprofit lawyers . . . not pushing to place [with them] their own untrained associates.”³⁴²

Sixth, funding from law firms would provide organizations a more predictable and stable source of income than many other sources. For instance, congressional appropriations for LSC fluctuate significantly from year to year based on many factors, both political and practical.³⁴³ Likewise, funding from IOLTA programs, which is directly tied to interest rates, consistently decreases during economic downturns.³⁴⁴ On the other hand, while the legal profession is by no means immune from economic cycles, it tends to weather them better than the overall economy due to its diversity of practice areas, which often are countercyclical.³⁴⁵ For instance, over the past three recessions (1991, 2001, 2009), revenue among the 100 largest law firms dropped only in 2009 (and, even then, less than the overall economy).³⁴⁶ In fact, despite the COVID-19 driven economic collapse, law firm revenue soared to record highs in 2020.³⁴⁷

Notably, several cities and one state (Washington) have passed statutes ensuring a right to counsel in certain civil cases, and other states are considering the same.³⁴⁸ While this represents an important step forward in theory, it will require an even greater need for lawyers’ time in practice. Such movements could put even more pressure on legal aid organizations, though

³⁴¹ See Cummings, *supra* note 1, at 80–82; see also Cummings & Rhode, *supra* note 85, at 2410–13.

³⁴² Cummings & Rhode, *supra* note 85, at 2413.

³⁴³ See *Congressional Appropriations*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/who-we-are/congressional-oversight/congressional-appropriations> [<http://perma.cc/87AU-HS8K>].

³⁴⁴ See *supra* notes 296–299 and accompanying text.

³⁴⁵ See Todd Babbitz & Albert Bollard, *COVID-19: Implications for Law Firms*, MCKINSEY & CO. (May 4, 2020), <http://www.mckinsey.com/industries/financial-services/our-insights/covid-19-implications-for-law-firms#> [<http://perma.cc/K472-X365>].

³⁴⁶ See *id.* at 2.

³⁴⁷ See Dan Packel, *Against All Odds, the Am Law 100 Were Stunningly Successful in 2020*, THE AM. LAW. 2–3 (Apr. 20, 2021), <http://www.law.com/americanlawyer/2021/04/20/against-all-odds-the-am-law-100-were-stunningly-successful-in-2020/> [<http://perma.cc/P877-NRR4>].

³⁴⁸ See Tonya L. Brito, *The Right to Civil Counsel*, 148 DAEDALUS J. AM. ACAD. ARTS & SCI. 56, 57 (2019); see also Houseman, *supra* note 44, at 274–75.

they do not have the resources to meet the need as it is.³⁴⁹ Simply put, looking to legal aid to support mandatory access programs is not a realistic option, absent increased funding. The other option to support these approaches, then, is for more pro bono. But if that requires courts to appoint attorneys, it would effectively create a sort of mandatory pro bono requirement that many within the bar have fought hard against. Rather, the above proposal would help to avoid that result by increasing the pool of available and dedicated legal aid attorneys.

The greatest benefit of this proposal, however, is its simplicity. This requires almost no structural changes at all: no legislative changes to the tax code,³⁵⁰ no mandatory obligations on lawyers, no update to the Model Rules of Professional Conduct (or state versions), no changes to the regulation of legal practice, and no disciplinary action for failure to participate. This would be purely voluntary. Firms need not make any contribution, just as they need not provide any pro bono. But if they do, they can aggressively market their philanthropy. They can show their clients, prospective clients, and prospective associates their commitment to the local legal aid community. And if their business depends on this, they will do so.

D. Obstacles to the Proposed Approach

While there are some obstacles to the approach, demand is not one of them. As discussed above, the demand for civil legal aid is both enormous and growing, and the profession will not be able to “pro bono itself” out of the justice gap. For instance, consider just those 18 million families with minor children who

³⁴⁹ See Diana Calais, *Ethical Violations Resulting from Excessive Workloads in Legal Aid Offices: Who Should Bear the Responsibility for Preventing Them?*, 16 LOY. UNIV. CHI. L.J. 589, 591–96 (1985).

³⁵⁰ Notably, a tax on legal services that went to support legal aid could, in theory, accomplish the same result. However, the complexities of such a tax would be substantial. For one, it would almost certainly have to be a state tax, not a federal tax, which would require fifty different governments to pass such legislation. Certainly, many states simply would not, and there would be considerable variance among those that did. Additionally, in those states that adopt it, firms would likely pass that tax along to their clients directly on the bill or through an attendant increase in their billable rates, effectively transferring any responsibility for legal aid funding back to the public. (Perhaps this is defensible, like a gas tax that goes toward infrastructure and is targeted to those who consume gas, but that potential result may make such a tax even less likely to be adopted). Moreover, lawyers would have a significantly different engagement with legal aid when *required* to contribute a portion of their income versus being incentivized to support the cause. That dynamic has been exhibited well by the bar’s embrace of voluntary pro bono, and the fervent objection of many within the bar to any form of mandatory pro bono. See RHODE, *IN PRINCIPLE AND IN PRACTICE*, *supra* note 49, at 15–17.

live below 125% of the poverty level.³⁵¹ If 70% of those families had a “justiciable legal issue,” as LSC has determined, and each such family had on average two such issues,³⁵² that subset of the population alone would present almost 25 million legal issues each year. Further, if each issue took on average seven hours of a lawyer’s time,³⁵³ each of the 1.3 million attorneys in the United States would have to contribute 135 hours of pro bono a year—over three times the current average commitment—to meet just that demand. Alternatively, that same demand could be met by 16,150 legal aid attorneys working 1,560 hours per year, or just 5,650 more legal aid attorneys than there are in America today.

Likewise, a (potential) supply of willing lawyers is not an obstacle. Roughly one-third of law students cite the desire to engage in social justice or prepare for public service as their primary reason for going to law school, and many note their work in a clinic as their best law school experience.³⁵⁴ At the same time, legal aid attorneys generally report the highest job satisfaction and lowest turnover rates out of all categories of lawyers.³⁵⁵ Yet only one out of 140 lawyers makes legal aid their career.³⁵⁶

³⁵¹ See THE JUSTICE GAP, *supra* note 16, at 16, 19 and accompanying text (data is as of 2017).

³⁵² See *id.* at 21.

³⁵³ I have been unable to find information stating the average hours required by legal aid attorneys to resolve an issue. For this, I am using numbers from a 2014 study of Minnesota pro bono and Judicare attorneys working on cases referred by Minnesota legal aid organizations. Those attorneys closed 16,060 such cases while reporting 108,500 volunteer hours (a 6.75 hour average per case). See MINN. LEGAL SERVS. COALITION, *supra* note 25, at 6. This may overstate the time needed per case, as legal aid attorneys are likely more efficient than pro bono attorneys. On the other hand, many cases those organizations refer to their pro bono partners may be less complex or challenging than the cases they retain. See Cummings, *supra* note 1, at 141; see also Rhode, *Rethinking the Public*, *supra* note 3, at 1445. That study also noted that the 227 legal aid attorneys served 48,344 individuals and families through 354,120 hours (a 7.33 hour per client average). See MINN. LEGAL SERVS. COALITION, *supra* note 25, at 5.

³⁵⁴ See RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 155–56. The cited study focused on lawyers who demonstrated a commitment to pro bono work, which may skew the result somewhat. See Rhode, *Access to Justice*, *supra* note 292, at 162–64 (describing the same study). Nonetheless, this cohort provides perhaps an even more telling data point because it represents a group who had an affinity toward public service, maintained that affinity, yet chose not to become legal aid lawyers.

³⁵⁵ Mike Stetz, *Where the Happiest Lawyers Work*, NAT’L JURIST, Fall 2018, at 21; GABRIELE PLICKERT ET AL., AFTER THE JD III: THIRD RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 14, 52, 53, 58, 59 (Am. Bar Found. & NALP Found. L. Career Rsch. & Educ. eds., 2014); Jerome M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 UNIV. ST. THOMAS L.J. 225, 265 (2011). Other studies, however, note higher levels of dissatisfaction and turnover among legal aid attorneys. See ROCÍO AVALES, ET AL., 2019 CALIFORNIA JUSTICE GAP STUDY 17 (State Bar Cal. ed., 2019); CHI. BAR FOUND. & ILL. COAL. FOR EQUAL JUST., INVESTING IN JUSTICE: A FRAMEWORK FOR EFFECTIVE RECRUITMENT AND RETENTION

While law students of course have various reasons for choosing careers other than legal aid—including, at many schools, a law school culture apathetic to public interest law³⁵⁷—the primary reason is undoubtedly economic.³⁵⁸ In 2018, the median starting salary for first-year legal aid attorneys was \$48,000.³⁵⁹ At the same time, the majority of legal aid positions are in urban settings, where the cost of living is relatively high. In contrast, the average starting salary for first-year associates at private firms with less than fifty attorneys was \$98,750 in 2019.³⁶⁰ And, for those graduates with the opportunity to go to large firms, first-year-associate salaries at many firms have ballooned to \$190,000 (even in smaller markets).³⁶¹ Many lawyers have noted that while “they would have preferred full-time public interest work, a well-paying private-sector job offering pro bono opportunities was the next-best alternative.”³⁶² Over one-third of recent law school graduates acknowledged they chose a job with a higher salary over a job they really wanted.³⁶³ In a 2006 study of legal aid attorneys, most responded that a salary increase of just \$10,000 would permit them to stay in their position rather than finding a higher paying job.³⁶⁴ Indeed, an increase in

OF ILLINOIS LEGAL AID ATTORNEYS 26–27 (Chi. Bar Found. & Ill. Coal. for Equal Just. eds., 2006) [hereinafter INVESTING IN JUSTICE].

³⁵⁶ As of 2019, there were about 10,479 legal aid lawyers out of 1,328,692 lawyers overall in America. See *Attorney Access—2020*, *supra* note 51, at 2; AM. BAR ASS’N, PROFILE OF THE LEGAL PROFESSION 30 (2020) [hereinafter PROFILE 2020]. Notably, while this Article is focused on legal aid, other public-interest minded students do go into similar arenas, such as public defenders or government attorneys. See Catherine Albiston et al., *Making Public Interest Lawyers in a Time of Crisis: An Evidence-Based Approach*, 34 GEO. J. LEGAL ETHICS 223, 257 (2021).

³⁵⁷ RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 158; Albiston et al., *supra* note 356, at 235–36, 266–67.

³⁵⁸ RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 158; see also AVALES ET AL., *supra* note 355, at 22; PROFILE 2020, *supra* note 356, at 24, 28 (noting the average debt for law students upon graduation in 2020 was \$120,406, and that 37% passed on the job they wanted to work at one with a higher salary); *but see* Albiston et al., *supra* note 356, at 235, 250 (noting that some research has discounted the impact of debt and attributed more weight to law school culture).

³⁵⁹ *Findings from the NALP/PSJD 2018 Public Service Attorney Salary Survey*, NALP (June 2018), <http://www.nalp.org/0618research?s=legal%20percent20aid%20percent20salaries> [<http://perma.cc/CN7V-4ACK>]. Notably, this is \$10,000 less than the median starting salary for public defenders. *Id.* Moreover, that salary would have fallen under 200% of the poverty level for a family of four in 2018 (\$50,200). See Annual Update of the HHS Poverty Guidelines, 83 Fed. Reg. 2643 (Jan. 18, 2018).

³⁶⁰ Jason Tashea, *What Lawyers Earn in 2019*, ABA J. (Sept. 1, 2019, 3:40 AM), <http://www.abajournal.com/magazine/article/what-lawyers-earn> [<http://perma.cc/22MG-KJ92>].

³⁶¹ Andrew Maloney, *As Associate Pay Scale Gets Set Across US, Market Will Feel Ripple Effects*, THE AM. LAW. (May 11, 2021, 03:50 PM), <http://www.law.com/americanlawyer/2021/05/11/as-associate-pay-scale-gets-set-across-us-market-will-feel-ripple-effects/>.

³⁶² Rhode, *Pro Bono in Principle*, *supra* note 8, at 449.

³⁶³ PROFILE 2020, *supra* note 356, at 24.

³⁶⁴ INVESTING IN JUSTICE, *supra* note 355, at 29.

legal aid funding would not simply permit organizations to support more attorney positions, it would enable them to pay their attorneys higher salaries—and thus recruit (and retain) lawyers for whom the current salary structure simply precludes a career in legal aid.³⁶⁵

Moreover, despite the claims of some, a lack of resources is not an obstacle. Total revenue for all legal services in the United States is estimated to be \$330 billion.³⁶⁶ Among the United States' 100 largest law firms alone, revenue reached \$111 billion in 2020, an increase of 6.6% from the prior year.³⁶⁷ Revenue per lawyer at those firms was \$1.05 million, while profits per equity partner increased to \$2.23 million, with over 21,000 equity partners.³⁶⁸ Yet, those at large firms often talk about giving from a position of “scarcity.”³⁶⁹ As one partner from an AmLaw 100 firm argued, presumably with a straight face: “You can’t expect a lot more than what we are already doing You can’t expect giving to be unduly high.”³⁷⁰

One real obstacle, however, may simply be a lack of general awareness of the justice gap. Recent polls have showed that almost 80% of Americans believe there is a constitutional right to counsel for civil issues, while only one in three believe low-income individuals have difficulty finding legal representation.³⁷¹ Without a greater awareness of the justice gap by the public, law firms will face little outside pressure to address it. Rather, firms can continue to trumpet their pro bono efforts and wash their hands of the remaining problem. Indeed, the profession’s aggressive

³⁶⁵ A recent New York Times article noted that about one-third of legal aid attorneys in New York work second jobs in order to make ends meet. Sonia Weiser, *Lawyers by Day, Uber Drivers and Bartenders by Night*, N.Y. TIMES (June 3, 2019), <http://www.nytimes.com/2019/06/03/nyregion/legal-aid-lawyers-salary-ny.html> [<http://perma.cc/JV3R-9KWH>]. Another approach to address the economic barriers of a legal aid career would be through loan forgiveness programs. That would require governmental action, however, and many candidates may be skeptical of such a program based on the track record of the federal Public Service Loan Forgiveness program. See Adam S. Minsky, *New Federal Report: Student Loan Servicers Often Harm Borrowers Seeking Public Service Loan Forgiveness*, FORBES (June 29, 2021, 02:57 PM), <http://www.forbes.com/sites/adamminsky/2021/06/29/report-student-loan-servicers-frequently-harm-borrowers-seeking-public-service-loan-forgiveness/?sh=5c4507c5757b> [<http://perma.cc/3LZ5-YR3H>]. Moreover, unlike increased funding, increasing the pool of potential legal aid attorneys by debt relief (or other measures) does not address the limited number of positions available. See Albiston et al., *supra* note 356, at 284.

³⁶⁶ CLAIRE O’CONNOR, DUE PROCESS: RISING BUSINESS ACTIVITY AND DISPOSABLE INCOME WILL BOLSTER INDUSTRY GROWTH 5 (IBISWorld ed., 2019).

³⁶⁷ Packel, *supra* note 347.

³⁶⁸ *Id.*

³⁶⁹ Beck, *supra* note 38.

³⁷⁰ *Id.*

³⁷¹ 3 JOHNSON JR., *supra* note 25, at 929; RHODE, *supra* note 6, at 4.

marketing and public celebration of its pro bono efforts has likely contributed to the misperception that those with limited means largely receive the representation they need.³⁷²

While most lawyers (presumably) understand the Constitution does not protect those with civil needs, many undoubtedly do not appreciate the extent of the justice gap. Looking back on my own experiences over a decade at two AmLaw 100 firms, very little thought was given to the work of legal aid organizations—apart from what cases they could refer to the firm. Indeed, even while researching this article I was startled to learn the World Justice Project ranked the United States last in 2020 among thirty-seven high-income countries for access to affordable civil justice, and 109th out of 128 countries overall.³⁷³

Earl Johnson Jr. noted that the United States' placement on the list was a "shock" to most lawyers when the rankings first appeared in 2011.³⁷⁴ While that is likely true, I suspect most lawyers simply never heard of the ranking at all. Perhaps little in this regard has changed since Reginald Heber Smith's observed 100 years ago that most of the bar was not hostile to legal aid, but wholly ignorant of the need for it.³⁷⁵

The proposed approach does not require a reeducation of the entire population, though. Rather, the message must get to those who drive policy and priorities at large law firms' most important clients: large corporations. A good place to start would be with those in general counsels' offices, who presumably would grasp the issue, have the ear of other executives, and have a say in the firms those corporations hire. If they become more aware of the scope and depth of the justice gap, and then begin to make large firms answer for their financial efforts to address it, that may provide the necessary spark.

Notably, the National Legal Aid and Defense Association has had a Corporate Advisory Committee since 1992, which "[t]hrough the leadership of its [member corporate counsel], . . . engages the corporate community to expand the availability of quality representation to those who cannot otherwise afford counsel."³⁷⁶ One of their main initiatives is to help legal aid organizations

³⁷² 3 JOHNSON JR., *supra* note 25, at 928.

³⁷³ See *WJP Rule of Law Index*, *supra* note 76 (Factor 7.1: "people can access and afford civil justice").

³⁷⁴ 3 JOHNSON JR., *supra* note 25, at 927.

³⁷⁵ See *supra* notes 97, 98, 112, and accompanying text.

³⁷⁶ *Bringing Justice from the Boardroom to our Communities*, NAT'L LEGAL AID & DEF. ASS'N, <http://www.nlada.org/issues-and-initiatives/corporate-engagement> [<http://perma.cc/NEL7-8EHM>].

obtain federal grants outside of LSC and to advocate for additional government funding for non-LSC funded legal services.³⁷⁷ In addition, general counsel from over 250 of the country's largest companies joined in letters to Congress in 2018 and 2020 to express their support for LSC funding and note the importance of civil legal aid to the community and, by extension, their own businesses.³⁷⁸ Perhaps, then, what corporate counsel need is not so much a better appreciation for the issue, but a broader vision for legal aid (apart from adopting the ABA's policy prioritizing government funding) and recognition of the role they may play in shaping law firm behavior.³⁷⁹

A second significant obstacle is simply that large firms have so embraced pro bono. They have invested significant resources to developing, staffing, and marketing their pro bono programs. And, ultimately, those pro bono programs benefit the firms directly in many ways, most of which direct financial contributions would not. As noted above, studies have found that many firms' pro bono programs are ultimately cost neutral.

At the same time, large firm partners tend to dominate leadership positions within the bar. For instance, eleven of the twelve members of the Pro Bono Institute's Law Firm Pro Bono Project Advisory Committee are partners at AmLaw 100 firms.³⁸⁰ This is not intended to be a critical statement; however, it may help explain the Institute's dubious conclusion that the amount firms give to legal aid "expose[s] as myth any perception that large law firms are not adequately supporting legal aid programs."³⁸¹ Simply put, large firms often drive bar policy and conduct, and

³⁷⁷ *Civil Legal Aid Initiative: Non-LSC Federal Resources*, NAT'L LEGAL AID & DEF. ASS'N, <http://www.nlada.org/tools-technical-assistance/civil-resources/civil-legal-aid-funding/civil-legal-aid-initiative-non> [http://perma.cc/J56J-VFER].

³⁷⁸ See LSC 2021 BUDGET REQUEST, *supra* note 24, at 3; LEGAL SERVS. CORP., 2018 ANNUAL REPORT 21 (2018).

³⁷⁹ The inside cover of a recent issue of *Bench and Bar of Minnesota* (May/June 2021) listed the names of eighty-seven in-house counsel who contributed to the Fund for Legal Aid at Mid-Minnesota Legal Aid as part of a campaign to increase giving by in-house counsel. Such campaigns are commendable, both for the individual gifts they bring in and the awareness they can bring, and they indicate an awareness of and interest in the needs of legal aid by corporations. See generally Minn. State Bar Ass'n, 78 BENCH & BAR OF MINN., May/June 2021, at 1. Real leverage would occur, though, if those same in-house counsel not only contributed themselves, but were able to require the law firms their companies hire to contribute meaningfully as well.

³⁸⁰ Compare *Law Firm Pro Bono Project Advisory Committee*, PRO BONO INST., <http://www.probonoinst.org/about-us/governance/law-firm-pro-bono-project-advisory-committee/> [http://perma.cc/EU2M-PL4B], with *The 2020 Am Law 100 Report*, THE AM. LAW. (Apr. 21, 2020, 09:22 AM), <http://www.law.com/americanlawyer/rankings/the-2020-am-law-100/> [http://perma.cc/D374-5BS2].

³⁸¹ 2020 REPORT ON THE PRO BONO CHALLENGE, *supra* note 65, at 12.

large firms have a significant self-interest in pro bono at this time; they do not presently have a similar interest in legal aid.

Ultimately, this proposal would not require firms to undo any of their pro bono investments. Rather, the goal would be to leverage the infrastructure firms have built around pro bono while supplementing that with direct contributions to legal aid. Currently, however, an increase in giving would be against their own economic interests in a way that pro bono is not. That is what must change: those who have the ability to influence large firm behavior must make it economically beneficial for firms to contribute directly to legal aid. As Adam Smith observed almost 250 years ago, to do so we must “address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.”³⁸²

A third obstacle may be resistance from *The American Lawyer* (and similar publications) to reconsider how they measure a firm’s access to justice impact, or from the ABA to adopt a broader Access to Justice Challenge—in each case, to shift from an approach based purely on pro bono hours³⁸³ to actual impact. But why would those organizations, as guardians, watchdogs, and champions of the profession, *resist* such steps? Indeed, the focus on measuring pro bono as a proxy for reducing the justice gap, while once innovative and still important, patently fails to fully capture what it really intends to measure. Apart from simple inertia—the Pro Bono Challenge is nearing its thirtieth anniversary and the Pro Bono Scorecard its twentieth—how can such organizations *not* include legal aid funding as a component when (1) the profession professes that access to justice is a core, foundational value, part of its very DNA, (2) despite laudable progress, the profession continues to fall so far short in its efforts to provide meaningful access to justice, (3) legal aid attorneys provide the most efficient and effective service for most aspects of poverty law, and yet, (4) law firm and lawyer contributions constitute less than 6% of overall legal aid funding.

Modifying *The American Lawyer* ranking criteria, or adopting an Access to Justice Challenge, would require some work and, likely, generate some resistance. But it would also generate exactly the type of attention to and discussion around the urgently needed role that legal aid can play in closing the justice gap. It would force the issue upon firms in a way that an aspirational statement or an article that a firm leader could read

³⁸² 1 SMITH, *supra* note 3, at 17.

³⁸³ See Cummings & Rhode, *supra* note 85, at 2407, 2430.

with interest, then put out of mind, cannot. It would require firm leaders to in fact reconsider their firms' position and interests regarding true access to justice—and to choose action or inaction.

E. Illustration of the Proposal

Before concluding, consider a couple examples of the impact this approach could have. In 2020, there were 21,258 equity partners at AmLaw 100 firms, and the average profits per equity partner at those firms was \$2.23 million.³⁸⁴ If those firms alone committed to donating 1% of profits per equity partner (\$22,300 each) to legal aid organizations, that would add \$474 million to legal aid budgets, more than LSC typically provides.³⁸⁵ Even if legal aid organizations increased their starting salaries from an average of \$48,000 to \$60,000, and if benefits cost organizations an additional \$15,000 per new lawyer, this would enable those organizations to hire 6,300 additional legal aid attorneys (including, in theory at least, all unemployed recent law school graduates³⁸⁶).

As previously noted, it would take approximately 16,150 legal aid attorneys to meet the needs of all 18 million families with minor children who live below 125% of the poverty level.³⁸⁷ That additional staffing, along with the 10,500 current legal aid attorneys, would permit legal aid organizations to fully serve the civil legal needs of every such family, with capacity to spare.³⁸⁸ In many cases, this would mean secure housing, maintenance of benefits, protection from domestic violence, retention of parental rights—ultimately, the elimination of many of the factors that lead to the cycle of poverty. While this alone would not

³⁸⁴ See Packel, *supra* note 347.

³⁸⁵ See *id.* As noted in Part IV, firms have contributed on average \$95.6 million (when adjusted for inflation) to legal aid annually over the past seventeen years. However, the data does not reflect what portion of that has come from the AmLaw 100 firms versus the rest of the bar. Accordingly, for purposes of this illustration, I have not reduced the \$474 million to account for existing giving. Nonetheless, even if *all* existing giving came from AmLaw 100 firms, which is not the case, the net increase would still be close to \$400 million.

³⁸⁶ See NAT'L ASS'N FOR L. PLACEMENT, JOBS & JDS: EMPLOYMENT FOR THE CLASS OF 2019—SELECTED FINDINGS, *supra* note 337 and accompanying text.

³⁸⁷ See *supra* Section IV.D.

³⁸⁸ I recognize a few obvious flaws in this example. For one, an organization could not simply increase starting attorney salaries without increasing those with some seniority, as well. Second, not all legal aid attorneys would be available to serve such families, as many legal aid organizations primarily (or exclusively) serve other populations, such as immigrants. But while any hypothetical can be critiqued as too simplistic, the larger point remains: increased funding for legal aid would provide the most immediate, efficient, and effective tool for serving those in need and reducing the justice gap. And such funding would provide the agencies who *do* this work the flexibility to increase salaries to retain staff, hire new attorneys, expand their services offered, or take other steps to most directly increase their impact.

completely close the justice gap,³⁸⁹ it would for millions of additional American families.

Again, the actual cost to firms would be significantly less. After federal income tax savings alone are considered,³⁹⁰ the average net cost in this example per equity partner would be around just \$14,000,³⁹¹ leaving profits per equity partner still north of \$2.22 million. Even the best of lawyers could not sell the argument that this would reflect giving from a position of scarcity. And this example considers the impact if only the equity partners at the 100 largest firms participated.

Alternatively, consider the potential impact of a “Justice Gap Challenge,” whereby firms are called to contribute 2% of billable hours toward pro bono and replace that third percent (under the current Pro Bono Challenge of 3–5% of a firm’s billable hours) with a contribution of 1% of revenue to legal aid. Under this approach, if firms reallocated that third 1% of their hours from pro bono work to paying client work and donated the proceeds, they would be *no worse off* economically, but it would enable *significantly* more actual legal services through legal aid.

For instance, if all AmLaw100 firms participated in such a challenge, the direct annual benefit to legal aid would exceed \$1.11 billion.³⁹² If we assume a (very) conservative average billable hourly billable rate of \$300 per hour for AmLaw 100 lawyers, that would reflect 3.7 million pro bono hours reallocated to billable work (and the related proceeds then contributed to legal aid). At the current \$48,000 average starting salary for legal aid attorneys, plus \$15,000 for benefits, this would permit legal aid organizations to hire over 17,600 additional attorneys. If each such attorney worked 1,500 hours a year on direct client representation, that would generate 26.4 million (efficient and skilled) hours. After accounting for the loss of the 3.7 million (less efficient and often less skilled) pro bono hours, this would still create a net gain of 22.7 million hours toward reducing the justice gap. At the same time, firms could retain the many benefits of their existing pro bono programs, both for themselves (such as associate training

³⁸⁹ In 1996 and 1999, scholars estimated that it would require approximately four billion dollars of funding for legal aid to fully meet the civil needs of those living in or near poverty. See Deborah Rhode, *Equal Justice Under Law*, MARKKULA CTR. FOR APPLIED ETHICS SANTA CLARA UNIV. (Jan. 1, 2020), <http://www.scu.edu/ethics/focus-areas/more-focus-areas/resources/equal-justice-under-law/> [<http://perma.cc/UJ3B-DG5S>].

³⁹⁰ See *supra* Section IV.C.

³⁹¹ Determined by taking 1% of profits per equity partner, or \$23,000, multiplied by 37%, the highest federal income tax rate.

³⁹² See *supra* text accompanying note 367.

and marketing) and for those areas where legal aid alone is less effective than pro bono (such as class actions).

Whatever the incentive, it is true that not every one of those firms would fully participate. But many would. And the ultimate goal is not necessarily full participation, but a shift in culture within the profession regarding support for legal aid. If the conduct by many of the largest firms changes, the culture among the profession itself would start to change, just as it did around pro bono. Smaller firms would incorporate this ethos, and the impact would multiply. That would start to truly reduce the justice gap in a way that pro bono, self-help, or the other approaches simply cannot.

CONCLUSION

One hundred years ago, Reginald Heber Smith shined a bright light on the justice gap and urged the bar to fully support legal aid as the profession's most effective, and efficient, tool to address it. This led to greater awareness, but little commitment. Forty-five years later William McCalpin directly challenged the ABA: "Two broad paths lie before us. One is the well-trodden road of obstruction, reaction, opposition. . . . The alternative is to meet the challenge head-on, frankly with the penetrating analysis and the restless curiosity of a lawyer addressing himself to a legal problem."³⁹³

Indeed, two broad paths lie before us again. We can double down on pro bono as our best answer to reducing the justice gap—not because it is, in fact, the best answer, but because it gives so much back to us in return. We can justify, rationalize, and defend this path, and perhaps even convince ourselves that we are not at some level "privileging professional interests over concerns of social justice—promoting the image of equal access without the reality."³⁹⁴

Or, we can live up to our creed that ensuring access to justice for all individuals, not just those who can pay us, is a foundational value of the profession, a part of its very DNA. We can capture the great progress with pro bono, but also meaningfully increase our support for legal aid. We can acknowledge that while we urge the public to increase funding for legal aid, we ourselves give less than four one-hundredths of 1% of our revenue, and less than one-tenth of 1% of our income,

³⁹³ 1 JOHNSON JR., *supra* note 122, at 74–75 (quoting William McCalpin's remarks at the 1965 ABA mid-year meeting).

³⁹⁴ Cummings, *supra* note 1, at 149.

to legal aid. We can admit that a contribution of 100 pro bono hours does not, in reality, reflect an opportunity cost of \$20,000, but is instead an investment that often returns in full. We can recognize that we often do little to support the 10,500 or so legal aid lawyers who have dedicated their professional lives to fighting the justice gap, but that we instead ask them to support our own pro bono efforts. We can accept that, though poverty is not of our creation, we stand in a unique position within the population regarding legal representation for those who are in poverty. In short, we can stop “celebrat[ing] lawyers’ ‘selfless’ pro bono contributions [while] oppos[ing] reforms that would serve the same objectives on an even broader scale.”³⁹⁵

However, this will not happen through aspirational appeals. It will happen only if those with the ability to influence the bar—primarily *The American Lawyer*, the ABA, and corporate clients—create concrete, economic incentives for large firms to more meaningfully support legal aid. Only then will conduct, and ultimately culture, change. This can be done. It has been done before, and the pro bono revolution provides the blueprint for it. Indeed, the solution is hidden in plain sight. We know right where to look—if we truly want to find it.

³⁹⁵ RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 177.

Dynamic Corporate Residual Claimants: A Multicriteria Assessment

*Sung Eun (Summer) Kim**

Corporate law provides residual claimants with key legal protections and rights, including fiduciary duty protections and voting rights. Under the conventional corporate law framework, shareholders are seen as the residual claimants of corporations because they are the parties who receive the residual profits of the corporation. This profit-oriented view of residual claimancy, however, is incomplete because it considers only one of the multiple criteria that are relevant to residual claimant analysis. In addition to profits, various other criteria have been used to identify the residual claimant of corporations over time, such as the variability of rewards, the wealth effects of one's decisions, firm-specific investments, risk of loss, and monitoring capacities. The decision to rely on a single criterion (profit) to determine that shareholders are the exclusive residual claimants of corporations is, then, a policy choice that preferences one dimension of residual claimancy over others. This policy choice has had a profound impact on how corporate power and value are distributed in our society. This Article outlines a multicriteria assessment of corporate residual claimants which contemplates a more diverse conception of the residual claim and that could be used to broaden the group of stakeholders that are entitled to enjoy residual claimant protections and rights.

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INTRODUCTION

The identity of the residual claimant has important legal consequences within the corporation. Delaware law provides that directors have a fiduciary duty to strive to maximize value for the benefit of the residual claimants,¹ and corporate law scholars have suggested that the right to vote in corporations should follow the residual claim.²

In recent decades, the dominant understanding in corporate law has been that shareholders are the sole residual claimants of corporations³ and thus the holder of various residual claimant rights and protections. In this way, residual claimant theory has been a rationale for the shareholder primacy norm in corporate law.⁴

In this Article, I argue that this conventional view that shareholders are the sole residual claimants of corporations is incomplete because it relies on only one (residual profit) among the multiple criteria that are relevant to residual claimant analysis.

A review of the literature reveals that there are at least nine considerations that have shaped our understanding of the residual claimant over time. They include: (i) the order of payment, (ii) the variability of reward, (iii) the wealth effects of one's own decisions, (iv) firm-specific investments, (v) recourse, (vi) undiversified risk, (vii) bargaining power, (viii) contracts, and (ix) monitoring capacities. The main contribution of this Article is the presentation of a multicriteria assessment of corporate residual claimants that considers these multiple dimensions of the residual claim.

In a companion paper, I trace the history of residual claimant theory to show how a variety of corporate stakeholders have been considered to be the residual claimants of corporations over time.⁵

¹ See, e.g., *Frederick Hsu Living Tr. v. ODN Holding Corp.*, No. C.A. 12108–VCL, 2017 WL 1437308, at *20 (Del. Ch. Apr. 24, 2017) (referring to directors' fiduciary duty to "strive to maximize value for the benefit of the residual claimants"); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 20 (Del. Ch. 2013) ("Directors of a Delaware corporation owe fiduciary duties to the corporation and its stockholders which require that they strive prudently and in good faith to maximize the value of the corporation for the benefit of its residual claimants.").

² Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 404 ("The right to vote . . . follows the residual claim.").

³ See, e.g., ROBERT C. CLARK, *CORPORATE LAW* 18 (Francis A. Allen et al. eds., 1986) ("[I]t is the shareholders who have the claim on the residual value of the enterprise, that is, what's left after all definite obligations are satisfied . . .").

⁴ See, e.g., Jonathan R. Macey, *Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes*, 1989 DUKE L.J. 173, 175 (1989) ("[S]hareholders retain plenary authority to guide the fate of a corporate enterprise because . . . they have the greatest stake in the outcome of corporate decision-making . . .").

⁵ See generally Sung Eun ("Summer") Kim, *Tracing the Diverse History of Corporate Residual Claimants*, 95 S. CAL. L. REV. POSTSCRIPT 43 (2022).

Depending on which of the theories of residual claimancy (rent, interest, wages, or profit) was adopted, the landlord, capitalist, laborer, or entrepreneur, respectively, has been considered the residual claimant of the corporation.⁶ This review reveals that the conventional understanding that shareholders are the residual claimants of corporations is a relatively recent understanding and that the historical record supports a more diverse and evolving conception of the residual claimant.

A multicriteria assessment of corporate residual claimants is likely to produce results that depart from the theoretical ideal of a single and unchanging residual claimant that is often assumed in the academic literature. For example, Armen Alchian and Harold Demsetz describe the classical capitalist firm as a firm with *one* central-common party who is the residual claimant.⁷ Eugene Fama and Michael Jensen have also emphasized that having a *single* group of residual claimants adds to the survival value of an organization.⁸

Although treating one group of stakeholders as the sole residual claimants of corporations has the benefit of uniformity and consistency, thus lowering transaction costs,⁹ these cost savings must be balanced against the costs that stem from the failure to recognize the residual claims held by other corporate stakeholders. The multicriteria assessment of corporate residual claimants outlined in this Article provides an analytical framework that can be used to engage in these tradeoffs.

The present moment is a timely one in which to recognize the limits of the single-criterion (profit-residual) view of residual claimants, and the attendant treatment of shareholders as the

⁶ *Id.*

⁷ Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 783 (1972). The essence of the classical firm is a contractual structure with:

(a) joint input production, (b) several input owners, (c) *one party* who is common to all the contracts of the joint inputs, (d) who has rights to renegotiate any input's contract independently of contracts with other input owners, (e) *who holds the residual claim*, and (f) who has the right to sell his central contractual residual status.

Id. (emphasis added). But they also note that “[p]rofit sharing [i.e., sharing of the residual claimant status] to encourage self-policing is more appropriate for small teams.” *Id.* at 786.

⁸ Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 303 (1983) (“Having most uncertainty borne by one group of agents, residual claimants, has survival value because it reduces the costs incurred to monitor contracts with other groups of agents and to adjust contracts for the changing risks borne by other agents.”).

⁹ The view of the firm as a transaction cost mitigation device begins with Ronald H. Coase’s article, *The Nature of the Firm*, and is continued by Oliver E. Williamson in *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS*. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (Free Press 1975).

exclusive holders of various residual claimant privileges and rights within corporations. A number of recent examples show how preferencing shareholders' interests can come into tension with human rights,¹⁰ workers' rights,¹¹ environmental sustainability,¹² and consumers' well-being.¹³ Some have argued that the 2007–2009 global financial crisis was triggered by aligning bank policy with the interest of banks' shareholders, who had a penchant for excessive risks.¹⁴ Also, multiple accounts point to how executive compensation schemes seeking to align managerial and shareholder interests tend to incentivize managers to artificially inflate the financial performance of the firms they manage.¹⁵ In the context of the banking industry, Lucian Bebchuk and Holger Spamann have explained how stock-based executive pay has led to excessive risk-taking and underestimating the downside of these risky strategies.¹⁶

¹⁰ See, e.g., Sui-Lee Wee, *China Uses DNA to Track Its People, With the Help of American Expertise*, N.Y. TIMES (Feb. 21, 2019), <http://www.nytimes.com/2019/02/21/business/china-xinjiang-ughur-dna-thermo-fisher.html> [<http://perma.cc/46C6-2C7A>] (describing how Thermo Fisher's equipment was used to analyze DNA samples of Chinese people in Xinjiang, China; however, the company ultimately voluntarily withdrew from the market citing its "values, ethics code and policies").

¹¹ See, e.g., Ken Jacobs et al., *Living Wage Policies and Big-Box Retail: How a Higher Wage Standard Would Impact Walmart Workers and Shoppers*, U.C. BERKELEY CTR. FOR LAB. RSCH. & EDUC. 1–2 (Apr. 2011), http://laborcenter.berkeley.edu/pdf/2011/bigbox_livingwage_policies11.pdf [<http://perma.cc/4MXV-GYZE>].

¹² See, e.g., EPA, *California Notify Volkswagen of Clean Air Act Violations*, CAL. AIR RES. BD. (Sept. 18, 2015), <http://ww2.arb.ca.gov/news/epa-california-notify-volkswagen-clean-air-act-violations> [<http://perma.cc/7CRE-9BK6>].

¹³ See, e.g., David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253, 266–67 (2009); Sung Eun ("Summer") Kim, *Consumer Primacy: A Dynamic Model of Corporate Governance for Consumer-Centric Businesses*, 2022 UTAH. L. REV. 1, 3–4 (2022) (highlighting the harmful consequences of a misalignment between profit and consumer welfare).

¹⁴ See Frank Jan De Graaf & Cynthia A. Williams, *The Intellectual Foundations of the Global Financial Crisis: Analysis and Proposals for Reform*, reprinted in THE EMBEDDED FIRM: CORPORATE GOVERNANCE, LABOR, AND FINANCE CAPITALISM 383, 383, 400 (Cynthia A. Williams & Peer Zumbansen eds., 2011); see also Leo E. Strine Jr., Vice Chancellor, Del. Ch., Keynote Speech at the Molengraff Institute for Private Law: Governance of the Modern Firm: The Role of Delaware in the American Corporate Governance System, and Some Preliminary Musings on the Meltdown's Implications for Corporate Law 1, 1–2 (Dec. 13, 2008) (transcript available at <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.26854.11.pdf> [<http://perma.cc/879J-L9K2>]) ("Precisely because corporate law goads directors to create wealth for their stockholders, and gives stockholders increasingly potent tools to hold directors accountable for failing to produce profits, it creates a stimulus for risk-taking up to the bounds of positive law.").

¹⁵ See, e.g., Lucian A. Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSPS. 71, 88–89 (2003).

¹⁶ Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247, 247 (2010) ("Because bank executives expect to share in any gains that might flow to common shareholders, but are insulated from losses that the realization of risks could impose on preferred shareholders, bondholders, depositors, and taxpayers, executives have incentives to give insufficient weight to the downside of risky strategies.").

There are many reasons to expect a turn in the tide. They include the emergence of business models that prioritize privacy over profits,¹⁷ that emphasize consciousness,¹⁸ and that seek shared value rather than shareholder value.¹⁹ These trends have incubated new organizational forms that state public benefit as their business purpose.²⁰ The COVID-19 global public health crisis has prompted us to reevaluate our values and priorities, including a shift from efficiency to resiliency.²¹ The digital transformation has resulted in the mass extinction and mass speciation of innovative entities with entirely new DNA in the corporate world.²² Decentralized autonomous organizations (DAOs) that are built on smart contracts to automate and democratize governance are one example of this innovation.²³ These changes all suggest that a time of reckoning has come for the corporate law paradigm that looks only to profits as the measure of corporate value and to shareholders as the sole residual claimants of corporations.

A multicriteria assessment of corporate residual claimants offers a foundation for a more diverse conception of the residual claimant that considers the interests and contributions of multiple corporate stakeholders. While recognizing multiple residual claimant interests will necessarily increase the complexity of residual claimant analysis, it is more aligned with

¹⁷ See, e.g., *LunaDNA Is Approved by the SEC to Offer Ownership Shares to Individuals for Sharing Data*, LUNADNA (Apr. 19, 2019), <http://www.lunadna.com/ownership-shares-for-sharing-data-2/> [<http://perma.cc/U5KF-LFS4>] (describing a business structure which prioritizes users' privacy rights by providing ownership rights to the users who contribute data to the platform).

¹⁸ See JOHN MACKEY & RAJ SISODIA, *CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS* 25–40 (Harv. Bus. Rev. Press 2013).

¹⁹ See Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV., Jan.–Feb. 2011, at 62, 64.

²⁰ See, e.g., DEL. CODE ANN. tit. 8, § 362(a) (2015) (creating a benefit corporation form, which is a for-profit corporate form “intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner”).

²¹ Martin Gelter & Julia M. Puauschunder, *COVID-19 and Comparative Corporate Governance*, 46 J. CORP. L. 557, 577–622 (2021) (discussing three key COVID-19 trends in corporate governance: turning from “efficient” to resilient structures, greater nationalism, and a resurgence of stakeholder models); see also Arden Rowell, *COVID-19 and Environmental Law*, 50 ENV'T L. REP. 10881, 10881 (2020) (discussing changes in behavior, demographics, values, and resources regarding approaches to environmental considerations triggered by the COVID-19 pandemic); Khalil Jebran & Shihua Chen, *Can We Learn Lessons from the Past? COVID-19 Crisis and Corporate Governance Responses*, INT'L J. FIN. & ECON. (forthcoming 2021), available at <http://onlinelibrary.wiley.com/doi/epdf/10.1002/ijfe.2428> [<http://perma.cc/N29A-325X>] (comparing different corporate governance models and their effectiveness in responding to crises such as the COVID-19 pandemic, and emphasizing the need for organizations to consider both internal and external environments).

²² See THOMAS M. SIEBEL, *DIGITAL TRANSFORMATION: SURVIVE AND THRIVE IN AN ERA OF MASS EXTINCTION* 11–30 (RosettaBooks eds. 2019).

²³ See *Decentralized Autonomous Organizations (DAOs)*, ETHEREUM, <http://ethereum.org/en/dao/> [<http://perma.cc/XR5G-Z26K>] (last visited Apr. 14, 2022).

the recent shift in corporate purpose from shareholder primacy to stakeholder capitalism.²⁴

The balance of this Article will proceed as follows: Part I examines the prevailing view of shareholders as residual claimants in corporate law, which has been foundationally shaped by what I refer to as a single-criterion profit-residual analysis of residual claimancy. Drawing from these foundations, the consensus has been that the residual claimant theory generally points to shareholder primacy in corporations. It is this consensus—and the broader implications of this consensus—that this Article responds to and critiques. Part II presents a multicriteria assessment of corporate residual claimants that draws from the multiple identities of the residual claimant that have been used to evaluate residual claimancy in the academic literature. By analyzing the common shareholder of a large, open corporation under the multicriteria assessment, I show that the common shareholder embodies some but not all of the residual claimant criteria. Part III examines the incompatibility of a fixed (single-criterion) view of residual claimancy with the evolving and multi-faceted nature of corporate residual claims, and describes some applications and extensions of the multicriteria assessment that may be more compatible with this dynamic nature of corporate residual claims.

I. CORPORATE RESIDUAL CLAIMANTS: A SINGLE-CRITERION APPROACH

In this Part, I describe the prevailing view of corporate residual claims, which I refer to as the single-criterion (profit-residual) approach to corporate residual claimant analysis. In

²⁴ See, e.g., Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK, <http://www.blackrock.com/hk/en/insights/larry-fink-ceo-letter> [http://perma.cc/E2U2-4MBA] (last visited Jan. 7, 2021) (“[A] company cannot achieve long-term profits without embracing purpose and considering the needs of a broad range of stakeholders.”); *Business Roundtable Redefines the Purpose of a Corporation to Promote “An Economy That Serves All Americans,”* BUS. ROUNDTABLE (Aug. 19, 2019), <http://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [http://perma.cc/EV5X-QRSX] (“Business Roundtable . . . announced the release of a new Statement on the Purpose of a Corporation signed by 181 CEOs who commit to lead their companies for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders.”); Rusty O’Kelley & Anthony Goodman, *2020 Global and Regional Corporate Governance Trends*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 18, 2020), <http://corpgov.law.harvard.edu/2020/01/18/2020-global-and-regional-corporate-governance-trends/> [http://perma.cc/D4M4-C9XB] (“A shift in corporate purpose from shareholder primacy to stakeholder capitalism i[s] underway, reinforced by the US Business Roundtable’s Statement on the Purpose of a Corporation.”). *But see* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 109 CORNELL L. REV. 91, 164–75 (2020) (critically examining and rejecting “stakeholderism” on the basis that it insulates corporate leaders).

Section A, I discuss how the single-criterion (profit-residual) approach to residual claimant analysis transformed residual claimant theory into a rationale for the shareholder primacy norm in corporate law. In Section B, I discuss the critiques and gradual erosion of residual claimant theory as a rationale for the shareholder primacy norm.

A. Single-Criterion Residual Claimancy and Shareholder Primacy

The modern legal conception of corporate residual claimants has been shaped by a law and economics analysis that attaches residual claimant status to the owners of the residual rights to the corporation's profits. The classic example is Frank Easterbrook and Daniel Fischel's work, which describes shareholders as the sole residual claimants of firms, relying on an implicit contract that entitles shareholders to all of the profits that remain after other claimants' claims have been satisfied.²⁵ The shareholders' presumed exclusive status as residual claimants has been used to justify shareholder voting, including the "one share, one vote" rule,²⁶ and to explain why corporate fiduciary duties of care and loyalty should generally run only to the shareholders.²⁷

While the Delaware corporation statute does not explicitly state that the purpose of the business corporation is to maximize shareholder profits, a long line of precedents points in this direction, often using shareholders' residual claimant status as their justification. As explained by Stephen Bainbridge, Delaware corporate law precedents state that "the principal obligation of corporate directors is to increase the value of the residual claim—namely, to increase shareholder wealth."²⁸ In 2010, the Delaware Chancery Court affirmatively made it difficult for for-profit corporations to pursue broader stakeholder interests at the expense of shareholder interests in realizing a return on their investments.²⁹

²⁵ FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 36–37 (Harv. Univ. Press 1991) [hereinafter *ECONOMIC STRUCTURE*].

²⁶ *Id.* at 73 ("Votes follow the residual interest in the firm, and unless each element of the residual interest carries an equal voting right, there will be a needless agency cost of management."); *see also* Easterbrook & Fischel, *supra* note 2.

²⁷ *See* sources cited *supra* note 1.

²⁸ Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 *UCLA L. REV.* 601, 605 (2006) ("According to a significant line of corporate precedents, the principal obligation of corporate directors is to increase the value of the residual claim—namely, to increase shareholder wealth.")

²⁹ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) ("Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form" and they may not disappoint "other stockholders interested in realizing a return on their investment.").

Based on this shareholder-oriented understanding of corporate purpose and residual claimancy, the residual claimant theory has primarily become a rationale for the shareholder primacy norm—a norm which views corporations as existing to maximize shareholder wealth.³⁰ In this way, the single-criterion profit-residual approach has had a profound effect on how wealth and power are distributed in our society.

B. Challenging Residual Claimancy as a Rationale for Shareholder Primacy

While the premise that shareholders are the residual claimants of corporations has been widely accepted in corporate law scholarship and under Delaware law, it is not a universally held view.³¹ Most prominent among the critics is Lynn Stout, who argues that the view that shareholders are the firm's sole residual claimants rests on empirical claims that are “demonstrably false.”³² In Stout's critique of the shareholder primacy norm, she rejects the characterization that the shareholders are *entitled* to the residual, pointing to the fact that this “entitlement” is contingent upon directors' ability and willingness to declare a dividend.³³

Some scholars have characterized the discretion given to directors as an agency cost that is necessary in order to maximize the residual claimant's interests. Eugene Fama and Michael Jensen, in their 1983 paper, *Separation of Ownership and Control*, explain that although the separation of decision-making from residual claims increases the likelihood of deviant actions, the costs of these deviant actions should be weighed against the

³⁰ See D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 277–78 (1998) (“The structure of corporate law ensures that corporations generally operate in the interests of shareholders.”).

³¹ See, e.g., Lynn A. Stout, *Bad and Not-So-Bad Arguments For Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189 (2002); Roberta S. Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156, 1156 (1993) (“The corporate law paradigm that shareholders are the owners of a corporation who elect directors to manage the corporation on the shareholders' behalf is an old-fashioned legal fiction.”); Daniel J. H. Greenwood, *The Dividend Puzzle: Are Shares Entitled to the Residual*, 32 J. CORP. L. 103, 152 (2006).

Shareholders, then, are not entitled to the residual. They do not have the legal right to take it. They do not create it. They do not have market power to demand it. They just have had the good fortune to receive part of it as a side-effect of managerial self-enrichment.

Id.; Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN'S L.J. 339, 339 (2012) (referring to the shareholder primacy model as “conceptually elegant,” but “fails to describe certain core features of the legal structure of the business corporation”).

³² Stout, *supra* note 31, at 1208.

³³ *Id.* at 1193.

benefits that come with specialization of management.³⁴ According to Fama and Jensen, although directors may not themselves be residual claimants, they can be directed to serve the best interests of residual claimants through contracts.³⁵ They hypothesize that the structure of these contracts will determine the survival of organizations; according to their hypothesis, so long as the cost savings from delegating decision-making to specialized management are greater than the agency costs of delegation, the delegation will add to the survival value of organizations.³⁶

This contractarian explanation is echoed by Easterbrook and Fischel, who characterize a shareholder's relationship with directors as a contract.³⁷ While the contractarian view offers an elegant explanation for why residual claimants own but do not control the corporation, it cannot be used to defend shareholder primacy. This is because the contractual relationship which underlies the residual claim is not fixed (and in many cases are only implied) and may change over time. Instead, any contractual relationship should be understood as one among many residual claimant criteria, which sometimes, but do not exclusively, point to shareholders as residual claimants.

II. CORPORATE RESIDUAL CLAIMANTS: A MULTICRITERIA ASSESSMENT

In this Part, I outline a multicriteria assessment of residual claimancy that draws from the residual claimant's multiple identities that have appeared in legal and economic literature. In Section A, I discuss the origins and applications of each of the residual claimant criteria, and the purposes they serve. In Section B, I apply the multicriteria assessment to evaluate a common shareholder's residual claim.

³⁴ See Fama & Jensen, *supra* note 8. According to Fama and Jensen, the benefits of specialized management become greater with the growing complexity of the organization. See *id.* at 305, 308. The residual claimants of complex organizations are not only numerous (creating collective action costs), but may also be unqualified to make management decisions. See *id.* at 308–09. The “common apex” of these organizations is that a board of directors (who are not residual claimants) ratifies and monitors important decisions on the residual claimants' behalf. See *id.* at 323.

³⁵ See *id.* at 302.

³⁶ See *id.* at 303 (“Producing outputs at lower cost is in the interests of residual claimants because it increases net cash flows, but lower costs also contribute to survival by allowing products to be delivered at lower prices.”).

³⁷ See ECONOMIC STRUCTURE, *supra* note 25, at 36 (“For most firms the expectation is that the residual risk bearers [the shareholders] have contracted for a promise to maximize long-run profits of the firm, which in turn maximizes the value of their stock.”).

A. A Multicriteria Assessment of Corporate Residual Claimants: The Criteria

1. Order of Payment

In his 1893 treatise, *First Lessons in Political Economy*, Francis Walker viewed laborers as the residual claimants because they received the benefit of the amounts that were left over *after* all the other claimants were satisfied.³⁸ Under this analysis, the stakeholder that is paid last is the residual claimant of the corporation. The simple logic underlying this analysis is that the person who is paid the last dollar has the greatest incentive to maximize the number of total dollars that the firm makes.

In modern capital structures with a residual dividend policy,³⁹ the common shareholder is generally the claimant that holds the most junior claim on the firm.⁴⁰ One exception arises when a firm is insolvent and its liabilities exceed its assets. In these cases, shareholders will receive nothing unless the senior claimants (i.e., creditors) consent, and thus the creditors will be deemed the residual claimants of these firms.⁴¹

This first residual claimant criterion is the criterion that has foundationally shaped the modern conception of residual claimants, focusing on the fact that the shareholder is generally the only party who owns the rights to the residual profits, with a narrow exception for insolvent firms. While the distribution and maximization of residual profits is an important consideration, it is not the only goal of residual claimant analysis, as

³⁸ FRANCIS WALKER, *FIRST LESSONS IN POLITICAL ECONOMY* 282 (1893) (explaining that under wage funds theory, “wages receive the benefit of all that is left over after all the other claimants are satisfied”).

³⁹ See Adam Hayes, *Residual Dividend*, INVESTOPEDIA (June 29, 2021), <http://www.investopedia.com/terms/r/residual-dividend.asp> (defining the policy as one that requires that dividends be paid only after all of the project capital requirements have been met) [<http://perma.cc/B23A-EBFF>].

⁴⁰ See Michael T. Gapen, Dale F. Gray, Cheng Hoon Lim & Yingbin Xiao, *The Contingent Claims Approach to Corporate Vulnerability Analysis: Estimating Default Risk and Economywide Risk Transfer*, in *CORPORATE RESTRUCTURING: LESSONS FROM EXPERIENCE*, 261, 263 (Michael Pomerleano & William Shaw eds., 2005) (“The value of the junior claim (equity in the case of firms) is derived from the residual value after the promised debt payments have been made.”).

⁴¹ See, e.g., Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. CHI. L. REV. 738, 738 (1988) (“When a firm owes more than its assets are worth, the shareholders receive nothing unless the creditors consent.”); G. Eric Brunstad, Jr. & Mike Sigal, *Competitive Choice Theory and the Unresolved Doctrines of Classification and Unfair Discrimination in Business Reorganizations Under the Bankruptcy Code*, 55 BUS. LAW. 1, 7–8 (1999) (referring to how, in insolvency, “the firm’s unsecured creditors usually become the firm’s ‘residual claimants’” because “the insolvent debtor’s unsecured creditors, rather than its equity holders, are entitled to the benefit of whatever value is left over after the payment of senior claims”).

demonstrated by the other residual claimant criteria discussed in the balance of this Subsection.

2. Variability of Reward

The second residual claimant criterion is concerned with the extent to which a claimant's reward varies depending on the success or failure of the corporation.⁴² It is related to the first criterion (order of payment) in that the first criterion, too, concerns rewards, but the two criteria do not necessarily move in the same direction. As an example, a claimant may be paid first in line but paid a variable amount, triggering this second criterion but not the first. A single-criterion approach that looks only to the order of payment would consider this claimant to have no entitlement to a residual claim, but a broader understanding of residual claimancy which incorporates the second criterion would recognize that this party, too, owns a residual claim.

One prominent articulation of this criterion appears in Fama and Jensen's definition of the "residual risk," which they define as "the risk of the difference between stochastic inflows of resources and promised payments"⁴³ Stochastic inflows refer to the amounts that may not be precisely predicted. Under this criterion, the parties who receive a variable reward are the residual claimants of the corporation. The logic underlying this analysis is that the uncertainty of a variable reward can motivate the claimant to act in the best interests of the corporation.⁴⁴ When one's reward is fixed, these claimants "do no better whether the firm performs 'spectacularly well' or just 'well.'"⁴⁵ As an example, bondholders are not considered to be residual claimants under this criterion, as they are compensated on a fixed basis.⁴⁶

In the large, publicly-traded, investor-owned corporation, the common stockholder benefits when the firm performs spectacularly well.⁴⁷ However, there are a number of other stakeholders who enjoy gains and suffer losses depending on whether a firm performs well or poorly.⁴⁸ Jill Fisch raises the possibility that managers could

⁴² See, e.g., Fama & Jensen, *supra* note 8, at 302.

⁴³ *Id.*

⁴⁴ See *id.*

⁴⁵ Anant K. Sundaram & Andrew C. Inkpen, *The Corporate Objective Revisited*, 15 *ORG. SCI.* 350, 354 (2004).

⁴⁶ See, e.g., Benjamin Klein, *Contracting Costs and Residual Claims: The Separation of Ownership and Control*, 26 *J.L. & ECON.* 367, 369 (1983) (explaining that bondholders are not residual claimants because their compensation is not contractually set on a profit-sharing basis).

⁴⁷ Fama & Jensen, *supra* note 8, at 303.

⁴⁸ See Bernard Black, *Corporate Law and Residual Claimants* (Stanford L. Sch. John M. Olin Program in L. & Econ., Working Paper No. 217, 2001) (noting that the

too be considered to be residual claimants, in light of the shift toward greater performance-based managerial compensation.⁴⁹ Going even further, the government, as tax collector, can also be viewed as a residual claimant under this criterion.⁵⁰

One way to narrow the wide spectrum of potential residual claimants derived from this criterion is by evaluating claimants not just on the direction but on the *degree* to which their reward is sensitive to the firm's performance. Thomas Smith engages in this analysis to conclude that the parties who are *most* sensitive to a firm's performance are call option holders.⁵¹ In contrast, Frank Partnoy has used the put option and call option perspectives to demonstrate that debtholders are the true residual owners of firms.⁵² Both authors caution, however, against a principle that would treat these holders as the beneficiaries of the fiduciary claim.⁵³ For example, Smith warns that option holders will favor high-risk projects that would increase the value of their options even if they would decrease the value of the firm.⁵⁴ These concerns can be restated, using the framework of this Article, as an acknowledgement that while call option holders satisfy one (i.e., variable reward) of the residual claimant criteria, they fail to embody others (e.g., risk of loss). It highlights the potentially harmful consequences of using a single-criterion approach to determining residual claims.

conventional contractarian explanation that only common shareholders have voting rights because they are the firm's principal residual claimants "doesn't fit the facts," and that "[o]ther claimants, including employees, creditors, preferred shareholders, option holders, suppliers, customers, and the government (as tax collector), also generally gain when a firm does well and suffer when the firm does badly").

⁴⁹ Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 636, 658 n.122 ("Indeed, one might argue that the shift toward greater performance-based compensation for management has converted managers into residual claimants, resulting in a form of managerial capitalism."). *But see* Henry L. Tosi, Steve Werner, Jeffrey P. Katz & Luis R. Gomez-Mejia, *How Much Does Performance Matter? A Meta-Analysis of CEO Pay Studies*, 26 J. MGMT. 301, 329–30 (2000) (suggesting that firm size, more so than firm performance, accounts for variance in CEO pay by showing that "firm size accounts for more than 40% of the variance in CEO pay," while firm performance accounts for less than five percent of the variance).

⁵⁰ *See, e.g.*, Black, *supra* note 48, at 7 (describing the government's "strong residual interest"); *see also* Omri Marian, *Is All Corporate Tax Planning Good for Shareholders?*, 52 U.C. DAVIS L. REV. 905, 927–42 (2018) (examining the complicated relationship between corporate tax planning and shareholder value).

⁵¹ Thomas A. Smith, *The Efficient Norm for Corporate Law: A Neotraditional Interpretation of Fiduciary Duty*, 98 MICH. L. REV. 214, 260–61 (1999).

⁵² Frank Partnoy, *Financial Innovation in Corporate Law*, 31 IOWA J. CORP. L. 799, 808 (2006) ("The put option and call option perspectives demonstrate that the legal rule could be the opposite: corporate law could assign control to debt and force equity to bargain for contractual protection.").

⁵³ *See id.* at 802; *see also* Smith, *supra* note 51, at 260–61.

⁵⁴ *See id.* at 261.

3. Wealth Effect of Own Decisions

The third residual claimant criterion looks to whether or not a claimant bears the major share of the wealth effects of their decisions. This criterion focuses on how a residual claimant's own efforts relate to the residual claimant's reward. To be considered a residual claimant under this criterion, there must be a strong correlation between the claimant's effort and reward.⁵⁵

An early articulation of this criterion appears in Jacob Hollander's 1903 paper, where he explains that the entrepreneur's status as residual claimant depends on the profit of the enterprise being large or small according to the efforts of the entrepreneur.⁵⁶ The same idea appears in the work of Fama and Jensen, who explain that those who do not bear a major share of the wealth effects of their decisions are not major residual claimants of firms.⁵⁷

The correlation between effort and reward is relevant to the design of incentives.⁵⁸ Oliver Hart and John Moore explain that those who have the ability to enhance to value of an asset will often be motivated to become owners of that asset.⁵⁹ Employee profit-sharing is based on the premise that giving employees some ownership of the enterprise will enhance labor productivity.⁶⁰

The broad authority that directors enjoy within the firm, coupled with the increasing use of performance-based executive compensation, suggests that directors, rather than shareholders, fit better with this residual claimant criterion. This logic has been used to explain why rank-and-file employees should also be

⁵⁵ See, e.g., Jacob H. Hollander, *The Residual Claimant Theory of Distribution*, 17 Q.J. ECON. 261, 277 (1903) ("Pure profit may be 'the prize of the social contest'; but the award is not by blind chance nor by uncontrollable circumstance, but a definite return for positive service.").

⁵⁶ *Id.* at 277 ("[Pure profit] will be great or small according to the success or failure of the entrepreneur in anticipating dynamic changes and in adjusting his operations accordingly.").

⁵⁷ Fama & Jensen, *supra* note 8, at 304.

⁵⁸ See, e.g., Alchian & Demsetz, *supra* note 7, at 779 (arguing that input productivity is greater when productivity and rewards are highly and accurately related).

⁵⁹ Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119, 1149 (1990) ("[A]n agent is more likely to own an asset if his action is sensitive to whether he has access to the asset and is important in the generation of the surplus . . .").

⁶⁰ See, e.g., Vikram Kumar, *Profit Shares as Virtual Equity: Short-Run Isomorphism of Share & Wage Systems*, 11 INT'L J. ECON. FIN. 45, 46 (2019) ("Profit-sharing is often administered in industry on the premise that imbuing labor with a sense of ownership of the enterprise and attaching their personal fortunes to that of the firm will enhance labor productivity."); see also Joseph Blasi, Douglas Kruse & Richard B. Freeman, *Broad-based Employee Stock Ownership and Profit Sharing: History, Evidence, and Policy Implications*, 1 J. PARTICIPATION & EMP. OWNERSHIP 38, 38 (2018).

considered residual claimants, as their gains and losses depend primarily on their own efforts.⁶¹

4. Firm-specific Investments

The fourth residual claimant criterion is concerned with a claimant's unprotected firm-specific investments. Firm-specific investments refer to investments that are of greatest value when specifically used by and within that particular firm. Pointing to the fact that many non-shareholder stakeholders make firm-specific investments, Margaret Blair and Lynn Stout have argued that shareholders cannot therefore be the only residual claimants to the firm's earnings.⁶²

In particular, Blair has been a forceful proponent of workers and their residual interests, relying on the firm-specific aspects of human capital.⁶³ Bernard Black, too, has suggested that we might consider employees to be residual claimants of firms since employees develop firm-specific knowledge, and the value of this knowledge is directly tied to the firm's success.⁶⁴ According to Black, these and other considerations produce an "employee residual interest that is of the same order of magnitude as the common shareholders' interest."⁶⁵

5. Protection Against Non-payment

The fifth residual claimant criterion defines the residual claimant as the claimant who has the least recourse in the event of non-payment. One articulation of this criterion appears in John Clark and Franklin Giddings' 1888 treatise, which depicts the residual claimant as one who waits for "rain from the clouds" that has "nothing to do but receive it . . . without appeal."⁶⁶ It should be noted that this criterion can sometimes be in tension with the third criterion (wealth effect of one's own decisions), which requires that a residual claimant's decision has a major effect on whether or not the rain falls.

⁶¹ See, e.g., Min Yan, *Agency Theory Re-examined: An Agency Relationship and Residual Claimant Perspective*, 26 INT'L CO. & COM. L. REV. 139, 143–44 (2015); see also Bruce A. Rayton, *The Residual Claim of Rank and File Employees*, 9 J. CORP. FIN. 129, 144 (2001) ("The gains of winning firms accrue not only to shareholders and CEOs, but also to average employees.").

⁶² Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. CORP. L. 719, 728 (2006) (arguing that because non-shareholder stakeholders make firm-specific investments that are not always protected through explicit contracting, shareholders are not the only residual claimants to the firm's earnings).

⁶³ MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 27 (1995).

⁶⁴ Black, *supra* note 48, at 26.

⁶⁵ *Id.* at 27.

⁶⁶ JOHN B. CLARK & FRANKLIN H. GIDDINGS, *THE MODERN DISTRIBUTIVE PROCESS: STUDIES OF COMPETITION AND ITS LIMITS* 40 (Boston, Ginn & Co. 1888).

Focusing on dividends, common shareholders are well-aligned with this criterion since their dividends depend on the performance of the company and, even in the cases where the company does well, dividends may be withheld at the discretion of the board of directors. On the other hand, a bondholder's interest payments may not generally be withheld without placing the corporation in default.

Using an externality framework that draws from the same logic as this residual claimant criterion, Yair Listokin and Inho Mun suggest that all members of the broader economy could be considered to be the residual claimants during financial crises.⁶⁷ They suggest that fiduciary duties should thus be modified to consider the interests of these members in systemically important and failing firms during crises.⁶⁸

6. Undiversified Risks

The sixth residual claimant criterion considers the extent to which a claimant is protected from risk of loss through diversification of their investment portfolio. This criterion appears in Fama and Jensen's characterization of the residual claimant as a party who has foregone risk reduction through portfolio diversification.⁶⁹

Shareholders who invest through an index fund would not be a residual claimant under this criterion. On the other hand, an investor who owns shares of only one company would clearly satisfy this residual claimant criterion.

Noting that diversification is not available as a loss protection mechanism to many stakeholders, Richard Booth has argued that these stakeholders (including employees, creditors, customers, suppliers, and the community at large) deserve additional statutory protections.⁷⁰ Notably, it is difficult for employees to hold a diversified employment portfolio. An employee will not be able to gain simultaneous employment in multiple companies with the same ease with which an investor can invest in multiple companies to achieve portfolio diversification.⁷¹ This characteristic of employees makes them a strong candidate for residual claimant status under this criterion.

⁶⁷ Yair J. Listokin & Inho Andrew Mun, *Rethinking Corporate Law During a Financial Crisis*, 8 HARV. BUS. L. REV. 349, 353–54 (2018).

⁶⁸ *See id.* at 354.

⁶⁹ Fama & Jensen, *supra* note 8, at 306 (“[R]esidual claimants forgo optimal risk reduction through portfolio diversification so that residual claims and decision making can be combined in a small number of agents.”).

⁷⁰ Richard A. Booth, *Stockholders, Stakeholders, and Bagholders (or How Investor Diversification Affects Fiduciary Duty)*, 53 BUS. LAW. 429, 432, 437 (1998) (“By diversifying, stockholders have already hedged their bets and would be overcompensated by any additional award of damages.”).

⁷¹ It should be noted, however, that the ability for employees to diversify their employment portfolios is changing with the gig economy. *See, e.g.*, Diane Mulcahy, *Who*

7. Bargaining Power

Another residual claimant criterion looks at a claimant's bargaining position compared to other claimants. For example, Jacob Hollander explained that, in industrial England, the conspicuous fact which became the breeding ground for the capital residual theory was that "the other productive factors worked *for* the capitalist, not *with* him."⁷² In the modern context, Kent Greenfield notes how large shareholders of firms have used their superior bargaining power to gain the protection of legal rules which force management to shift as much of the surplus to them as possible.⁷³

As a practical matter, we would first need to develop a measurable and comparable definition of one's bargaining strength. Russell Coff provides such a definitional framework by identifying four factors which can be used to assess the relative bargaining strength of corporate stakeholders.⁷⁴ The first is the capacity to act in a unified manner, the second is access to key information, the third is high replacement cost to the firm, and the fourth is low exit costs.⁷⁵

Shareholders of a large, open firm generally do not do well under this conception of bargaining power, as they meet only one (low exit costs) of the four criteria. They tend to be dispersed, which makes it difficult to act in a unified manner, they are often unqualified and uninformed, and the open capital markets provide firms with a stable, rotating, and replaceable source of capital.

This discussion demonstrates the challenges of using one brush to paint an entire stakeholder group. Using the example of GameStop, a "GameStop shareholder" includes both a day trader who holds a single share or a fraction thereof, as well as a hedge fund, like Senvest, which at one time owned more than five percent of the company.⁷⁶ There is a significant differential in bargaining power between these two groups of shareholders.

Recognizing the relatively strong bargaining power of employees, some have argued that employees should have equal

Wins in the Gig Economy, and Who Loses, HARV. BUS. REV. (Oct. 27, 2016), <http://hbr.org/2016/10/who-wins-in-the-gig-economy-and-who-loses> [<http://perma.cc/6BSH-EL6Y>].

⁷² Hollander, *supra* note 55, at 267 ("The conspicuous fact in the industrial England of the Ricardians was that the other productive factors worked *for* the capitalist, not *with* him.")

⁷³ Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1044 (2008).

⁷⁴ Russell W. Coff, *When Competitive Advantage Doesn't Lead to Performance: The Resource-based View and Stakeholder Bargaining Power*, 10 ORG. SCI. 119, 122 (1999).

⁷⁵ *See id.*

⁷⁶ *See, e.g.*, Douglas MacMillan & Yeganeh Torbati, *How the Rich Got Richer: Reddit Trading Frenzy Benefited Wall Street Elite*, WASH. POST (Feb. 8, 2021, 11:53 AM), <http://www.washingtonpost.com/business/2021/02/08/gamestop-wallstreet-wealth/> [<http://perma.cc/M2B4-T6BN>].

status to shareholders in firms.⁷⁷ Under the seventh residual claimant criterion, employees, just as much as shareholders, should be considered to be the residual claimants of firms.

8. Express and Implied Contracts

The eighth residual claimant criterion seeks to identify the party whose relationship with the corporation is most difficult to specify by contract.⁷⁸ While it is commonly understood that shareholder interests are hard to express via contract, this criterion is not exclusively embodied by shareholders.

Notably, the difficulty of precisely specifying employee effort via contract is well understood. For example, Benjamin Klein describes the difficulty of measuring the level and form of energy that managers must devote to a complex task.⁷⁹ Alexander Gavis notes the especial challenge that employees face in negotiating for contingencies in the context of a takeover.⁸⁰ Some have attributed these challenges to the lifecycle model of employment, which involves an implicit but unwritten arrangement that employees will receive less earlier on in exchange for additional compensation later.⁸¹ Others have pointed to the prevalence of unwritten or sparsely written employment arrangements as one of the reasons why employees may be considered to be residual claimants of firms.⁸² Fisch has also noted the ways in which employees'

⁷⁷ See J. Kaler, *An Optimally Viable Version of Stakeholder Theory*, 86 J. BUS. ETHICS 297, 304 (2009).

⁷⁸ See, e.g., Emily Winston, *Managerial Fixation and the Limitations of Shareholder Oversight*, 71 HASTINGS L.J. 699, 736 (2019) (“[U]nspecified contract terms are areas where residual control is exercised.”); see generally Frank Easterbrook & Daniel Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989).

⁷⁹ Klein, *supra* note 46, at 367–68 (describing the impossibility of writing a complete contract to prevent managerial shirking because “the number of contingencies is so large and the tasks to be performed by a manager hired by an owner of a firm so complex”).

⁸⁰ Alexander C. Gavis, *A Framework for Satisfying Corporate Directors’ Responsibilities Under State Nonshareholder Constituency Statutes: The Use of Explicit Contracts*, 138 U. PA. L. REV. 1451, 1472 (1990) (“[E]mployment contracts usually do not include consideration for employees’ expectations that exist as a result of their investment of human capital in corporations.”).

⁸¹ Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27, 40 (1996).

Besides shareholders, employees are probably the class of patrons that is least able to contract with the corporation. According to the life-cycle model of employment compensation, employees and firms enter into efficiency-enhancing implicit employment contracts in which employees agree to receive less in wages than their then-current marginal product in exchange for extra compensation later in their career.

Id.

⁸² Black, *supra* note 48, at 25–27 (explaining that wages are often back-loaded (e.g., severance, retirement benefits, seniority-based pay), and these back-loaded benefits are lost by employees if a firm fails); see also Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1917 (1996).

contracts are incomplete, illiquid, and imperfectly priced, and how employees lack hedging mechanisms, such as insurance, to protect against risk.⁸³ For these reasons, it could be said that employees, more so than shareholders, should be considered to be the residual claimants of firms under this criterion.

9. Monitoring Capacity

The ninth residual claimant criterion considers the claimant's monitoring ability. This criterion appears in Alchian and Demsetz's characterization of the residual claim as a mechanism to incentivize a monitor to effectively perform his monitoring function.⁸⁴ Their definition of the monitoring function involves not only price-setting but also observing and directing the actions or uses of these inputs. It is clear from their analysis that managers are the residual claimants of firms.⁸⁵

Shareholders are typically considered to be unsuitable monitors,⁸⁶ although a distinction should be drawn between retail investors and institutional shareholders, with the latter group possessing superior monitoring powers.⁸⁷ In addition, the capital markets and the market for corporate control are sometimes considered to be effective substitutes for shareholder monitoring.⁸⁸ Generally speaking, creditors, trustees, and suppliers are considered to be better monitors of firms than shareholders, and would be the residual claimants of firms under this criterion.⁸⁹

B. A Multicriteria Assessment of the Shareholder's Residual Claim

According to the multicriteria assessment outlined in Section A above, a corporate residual claimant embodies the nine criteria and identities listed in Table 1 below.

⁸³ Fisch, *supra* note 49, at 659.

⁸⁴ Alchian & Demsetz, *supra* note 7, at 782–83 (designating the monitor as the residual claimant will incentivize him to earn “his residual through the reduction in shirking that he brings about, not only by the prices that he agrees to pay the owners of the inputs, but also by observing and directing the actions or uses of these inputs”).

⁸⁵ *See id.* at 783.

⁸⁶ *See, e.g.*, Van Der Weide, *supra* note 81, at 35 (“Shareholders are widely dispersed and thus unable to monitor a firm's management effectively—unlike a supplier, a bank, an indenture trustee, or a union.”).

⁸⁷ *See, e.g.*, John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991).

⁸⁸ For a discussion of monitoring from the capital markets, see Fama & Jensen, *supra* note 8, at 313 (“Stock prices are visible signals that summarize the implications of internal decisions for current and future net cash flows. This external monitoring exerts pressure to orient a corporation's decision process toward the interests of residual claimants.”). For monitoring from the takeover markets, see Henry Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

⁸⁹ *See, e.g.*, Van Der Weide, *supra* note 81, at 35.

Table 1. The Nine Residual Claimant (R-C) Criteria

Criteria	R-C Identity
1. Order of Payment	Junior (last)
2. Variability of Reward	Variable
3. Wealth Effect of Own Decisions	High
4. Firm-Specific Investments	High
5. Protection against Non-Payment	None
6. Undiversified Risk	Unlimited
7. Bargaining Position	Strong
8. Contract Specification	Difficult
9. Monitoring Capacity	High

Analyzing the common shareholder of a large, open corporation under the nine criteria, I find that the common shareholder clearly and predominantly embodies only two (marked “Yes” under the second column in Table 2 below) of the residual claimant criteria. Common shareholders satisfy the first criterion (order of payment) because they are generally the claimant that holds the most junior claim on the firm. They also satisfy the fifth criterion (protection against non-payment) because a shareholder who loses money from their investment has no recourse against the company or its directors, barring a breach of fiduciary or other legal duty.

Shareholders to some extent, but other stakeholders to a greater extent, embody four (marked “Mixed” under the second column in Table 2 below) of the residual claimant criteria. For example, although there are some shareholders who embody the sixth criterion (undiversified risk) by holding an undiversified investment portfolio, it is generally and comparatively more difficult for employees to diversify their employment risks, which makes them a more likely residual claimant according to this criterion. The other “Mixed” criteria are the second criterion (variability of reward), the seventh criterion (bargaining position), and eighth criterion (contract specification).

Furthermore, the common shareholder fails to embody three (marked “No” under the second column in Table 2 below) of the residual claimant criteria. These are the third criterion (wealth effect of one’s own decisions), fourth criterion (firm-specific investments), and ninth criterion (monitoring capacity).

Table 2. Assessing the Common Shareholder under the Nine Residual Claimant (R-C) Criteria

Criteria	Embodied by Shareholders?
1. Order of Payment	Yes
2. Variability of Reward	Mixed
3. Wealth Effect of Own Decisions	No
4. Firm-Specific Investments	No
5. Protection against Non-Payment	Yes
6. Undiversified Risk	Mixed
7. Bargaining Position	Mixed
8. Contract Specification	Mixed
9. Monitoring Capacity	No

While the residual claimant theory has been used as a rationale for shareholder primacy based on a single-criterion profit-residual approach, the shareholder's status as residual claimant is unstable when evaluated through a multicriteria assessment. This instability has numerous facets and implications, which are explored in greater detail in the next Part.

III. ACKNOWLEDGING THE DYNAMIC NATURE OF CORPORATE RESIDUAL CLAIMS

The availability of multiple criteria in assessing residual claimancy reveals that residual claimant status is dynamic—it may be shared among multiple groups, only some but not all members of a group may be residual claimants, a member or group may have the characteristics of both a residual claimant and a non-residual claimant, the residual claimant may change over time, there may be no residual claimant, and it may be difficult or impossible to know who the residual claimant is. Each of these facets and proposed solutions are described in Section A. Section B further examines two analytical frameworks that may be more compatible with a dynamic understanding of corporate residual claimants.

A. The Dynamic Nature of Corporate Residual Claims

1. Multiple Residual Claimants

A multicriteria assessment will necessarily produce multiple stakeholders who satisfy the various residual claimant criteria. The observation that there may be more than one group of residual claimants in a firm is not new. Lynn LoPucki dispels the myth of the single residual owner in the context of reorganizing firms in his paper, *The Myth of the Residual Owner: An Empirical Study*.⁹⁰ LoPucki designs an empirical study to test whether it is possible to identify a single residual owner in reorganizing firms, and concludes that “no identifiable, single residual owner class exists in most reorganizing large public companies.”⁹¹ He finds that there are multiple investor priority levels in the companies’ financial structures, which suggests that investors at more than one level will share residual owner status.⁹² LoPucki confirms this by showing that in sixty-two percent of the firms he studied (forty-eight of seventy-eight cases), no identifiable single residual owner existed.⁹³ According to LoPucki: “The problem is not merely that single residual owners are difficult to identify. The problem is that they rarely exist.”⁹⁴ While LoPucki’s study was focused on reorganizing firms, this task of identifying a single group of residual owners extends to companies as a going concern.

Acknowledging this gap between the myth of a single residual claimant and a much more complicated reality, three notable alternatives have been proposed. First, Margaret Blair and Lynn Stout have suggested that in situations where multiple stakeholders’ interests are implicated, directors, whom they call the “mediating hierarchs,” should have control and balance the interests of all stakeholders.⁹⁵ Second, Simon Deakin has argued that the commons model offers a better legal structure of the firm, in which various stakeholders have overlapping claims in

⁹⁰ Lynn M. LoPucki, *The Myth of the Residual Owner: An Empirical Study*, 82 WASH. U.L.Q. 1341 (2004).

⁹¹ *Id.* at 1343.

⁹² *Id.*

⁹³ *Id.* at 1361.

⁹⁴ *Id.* at 1343.

⁹⁵ Blair & Stout, *supra* note 62, at 738.

When corporate production requires more than one individual or group to make specific investments, problems of intrafirm opportunism arise as shareholders try to exploit each other and try as well to exploit creditors, employees, customers, and other groups that make specific investments. Board authority, while worsening agency costs, may provide a second-best solution to such intrafirm rent-seeking.

Id. at 720.

relation to its assets.⁹⁶ Third, Raghuram Rajan and Luigi Zingales have proposed a structure that transfers ownership to an unaffiliated outsider when there are multiple stakeholders who have made substantial firm-specific investments over time.⁹⁷

2. The Heterogeneity Problem

Even when there is a single residual claimant group within the corporation, only some (but not all) members of that group may be residual claimants. Henry Hansmann views this heterogeneity within a claimant group as a critical determinant of the cost of ownership, and one that favors shareholders.⁹⁸ Similarly, Grant Hayden and Matthew Bodie have suggested that it is the supposed homogeneity of shareholder interests that makes the discussion of the shareholder residual meaningful as a normative theory.⁹⁹ However, Hayden and Bodie reach a different conclusion from Hansmann by noting that the claim of shareholder homogeneity has recently come under pressure, thereby eroding the normative value of residual claimant theory as a rationale for shareholder primacy.¹⁰⁰

One phenomenon that illustrates heterogeneity among shareholders is empty voting, which refers to the decoupling of voting rights from economic interests.¹⁰¹ An empty voter is able to retain their voting rights even though they have hedged away their economic interests by, for example, buying a put option to sell the shares they hold.¹⁰² In light of these derivative investments, these empty voters may stand to benefit from the firm doing worse. In that sense, they are antithetical to the values we attach to or expect from a residual claimant. In spite of

⁹⁶ Deakin, *supra* note 31.

⁹⁷ Raghuram G. Rajan & Luigi Zingales, *Power in Theory of the Firm*, 113 Q.J. ECON. 387, 422 (1998) (“[I]f all the parties involved in production (i.e., including the entrepreneur) have to make substantial specific investments over time, it may be optimal for a completely unrelated third party to own the assets.”).

⁹⁸ See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 62 (1996) (“Investor-owned firms have the important advantage that their owners generally share a single well-defined objective: to maximize the net present value of the firm’s earnings.”).

⁹⁹ Grant M. Hayden & Matthew T. Bodie, *Shareholder Voting and the Symbolic Politics of Corporation as Contract*, 53 WAKE FOREST L. REV. 511, 522 (2018) (“The argument from the residual, then, largely rests on this claim of shareholder homogeneity. It is what makes this discussion of the shareholder residual into a meaningful normative theory, rather than a simple restatement of positive corporate law.”).

¹⁰⁰ See *id.* at 522–24 (describing the heterogeneity of shareholder interests).

¹⁰¹ See Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 811–12 (2006).

¹⁰² For example, in the proposed acquisition of King Pharmaceuticals by Mylan, Perry Corporation sought to protect its economic stake in King by taking an “empty voting” position in Mylan through hedging transactions that insulated Perry from the economic risks of owning Mylan stock. Perry Corp., Exchange Act Release No. 2907, 2009 WL 2163550 (July 21, 2009).

these conflicts, empty voters have been able to use their legal status as “residual claimants” to advance their private interests at the expense of other true residual claimants of the firm.¹⁰³

LoPucki coined the term “pseudo-residual owners” to refer to holders of residual interests that differ from those of the firm.¹⁰⁴ Small deviations of the pseudo-residual owner’s interests from the firm’s interests can create significant conflicts among parties.¹⁰⁵ In the bankruptcy context, the system might be liquidating firms that should instead reorganize.¹⁰⁶ In solvent firms, even small misalignments can have an outsized impact on investment policy.¹⁰⁷

Some proposed solutions to address these misalignments include vote-buying restrictions, disclosure requirements,¹⁰⁸ governance fixes (e.g., improved record keeping), and *ex post* enforcement.¹⁰⁹ These efforts seek to align the legal and true residual claimants of firms by requiring the members of the legally designated residual claimant group to retain the attributes that made them residual claimants in the first place.

3. Mixed Residual Claimants

In addition to conflicting loyalties among individuals within a stakeholder group, there can also be conflicting loyalties within one individual. Like a permanent resident who might be a citizen of one country and a resident of another, some residual claimants have multiple allegiances, which at times might conflict with one another. Roberta Karmel has argued that stakeholder statutes were initially a reaction to the growing significance of pension funds that have such mixed interests; they hold equity, but also hold debt and represent employee interests.¹¹⁰ Hybrid instruments can further complicate this analysis.¹¹¹

¹⁰³ See, e.g., Henry T. C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1395, 1398 (2007).

¹⁰⁴ LoPucki, *supra* note 90, at 1368 (“Pseudo-residual owners have interests that differ from those of the firm.”).

¹⁰⁵ *Id.* (citing Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 788–96 (1993)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ The challenge of disclosure is that disclosure obligations hinge on materiality, which may have the unintended consequence of encouraging the undesired behavior up to the threshold that triggers the disclosure obligation. George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602, 602 (2017).

¹⁰⁹ See Hu & Black, *supra* note 101, at 819–20.

¹¹⁰ Karmel, *supra* note 31, at 1157 (“[P]ension funds, which are the largest and most influential of the institutional investors, hold debt as well as equity, represent employees, and often are political players.”).

¹¹¹ See generally William W. Bratton, Jr., *The Economics and Jurisprudence of Convertible Bonds*, 1984 WIS. L. REV. 667 (1984) (discussing convertible bonds);

One way to navigate the mixed nature of a stakeholder's interests has been to separate a stakeholder according to its different functional roles and then to assign residual claimant status to the specific role that is most pertinent to the residual claimant analysis. As an example of this approach, in his defense of the profit residual theory, Hollander viewed the entrepreneur as the residual claimant of the firm, but only in relation to his role as a merchant who bought out his partners in order to become the owner of a business operation.¹¹²

4. Shifting and Temporary Residual Claimants

Even if there were a single and homogenous residual claimant group that satisfied the applicable residual claimant criteria, the specific members of that group might change over time. A key feature of a publicly traded corporation is that its shares are freely transferable. While the costless handover of residual claimant status is essential to a well-functioning capital market, frequent turnover makes it impossible to maintain a consistent residual claimant base.

One answer to the potential problems caused by shifting and temporary residual claimants is that the efficient capital markets and the market for takeovers will compel whoever is in charge of the corporation's decision process (usually a board of directors) to serve the interests of residual claimants continually and consistently, even though the composition of those claimants will continue to change.¹¹³

5. Unknown Residual Claimants

The analysis thus far has assumed that the characteristics used to assess a claimant's fit with the residual claimant criteria are known and measurable. But these characteristics are not always observable. For example, the third criterion (wealth effect of own decisions) requires one to analyze the wealth effect of each stakeholder's decisions. However, as articulated by Alchian and Demsetz, "marginal products of cooperative team members are not so directly and separably (i.e., cheaply) observable."¹¹⁴

Another concern is that the residual claimant concept may itself be a fiction. As Thomas Jackson and Robert Scott observed

Victor Fleischer, *Taxing Founders' Stock*, 59 UCLA L. REV. 60, 72 (2011) (discussing convertible preferred stock).

¹¹² Hollander, *supra* note 55, at 277 ("[T]he mercantile activity which finds scope only under dynamic conditions—rests upon positive qualifications, and is exercised with more or less success according to the degree in which these qualifications are possessed.")

¹¹³ See Hart & Moore, *supra* note 59, at 1149–50.

¹¹⁴ Alchian & Demsetz, *supra* note 7, at 780.

in the bankruptcy context: “the objective of the collective is never entirely congruent with the objective of any of the constituent parts.”¹¹⁵ Christopher Frost has described the challenge of identifying the residual claimant in firms as “an insurmountable obstacle to the full realization of such a theoretically neat solution.”¹¹⁶ As such, some have proposed lessening the emphasis on the residual claimant concept¹¹⁷ or reconsidering its use in corporate law altogether.¹¹⁸

In my view, the residual claimant theory continues to have tremendous value for corporate law and governance, but it requires that we be transparent about which criterion we are using to designate a particular stakeholder as the residual claimant, and why. Many of the key debates in the residual claimant literature can be characterized as disputes about the appropriate criteria to be used to determine residual claimant status. The multicriteria assessment offers an analytical framework that can be used to mediate these disputes.

B. Using a Multicriteria Assessment to Evaluate Corporate Residual Claims

1. Multicriteria Assessment and the Stakeholder Model

While much of the current focus of corporate law and governance has been on the maximization of shareholder profit, the multicriteria assessment developed in this Article shows that the infra-firm relationships built by rewarding risk-taking and incentivizing firm-specific investments and monitoring have been just as important as profit generation in the history and development of residual claimant analysis.

A multicriteria assessment of residual claimants acknowledges the diverse contributions and capabilities of multiple stakeholders and opens up the possibility of a more pluralistic governance structure. This view of corporate residual claimants is more aligned with a stakeholder model of

¹¹⁵ Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 159 (1989).

¹¹⁶ Christopher W. Frost, *The Theory, Reality and Pragmatism of Corporate Governance in Bankruptcy Reorganizations*, 72 AM. BANKR. L.J. 103, 115 (1998).

¹¹⁷ See, e.g., Oliver E. Williamson, *Organization Form, Residual Claimants, and Corporate Control*, 26 J.L. & ECON. 351, 356 (1983) (contending that Fama and Jensen's argument that “the condition of residual risk bearing is fully determinative of organization form . . . assigns an unwarranted importance to residual risk bearing”) (emphasis added).

¹¹⁸ See, e.g., Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 304 (1998) (“There is nothing inherent in the nature of a residual claim that means that its holders' interest should be maximized above all others.”).

corporations that recognizes that directors have a duty to serve the interests of all corporate constituencies.¹¹⁹

While some view the stakeholder model as giving directors excessive discretion that allows them to act for their own personal interests,¹²⁰ a more balanced understanding of the model is as one that imposes a responsibility upon directors to prevent any one constituency (including the directors themselves) from usurping a corporation's wealth for its own use.¹²¹ The multicriteria assessment outlined in this Article can be used by directors to weigh and mediate the multiple and competing residual claims among various stakeholders.

At the same time, the multicriteria assessment and stakeholder model of residual claimancy present their own set of challenges. A more diverse conception of the residual claimant will necessarily increase the complexity of the analysis. Black has articulated the trade-off as follows: “[While] scattering residual interests widely has efficiency advantages . . . [it is] costly to distribute control rights as widely as residual interests.”¹²² He identifies this difficulty of allocating scarce control rights among multiple residual claimants as one of the important design problems in corporate governance.¹²³

2. Choice Among Criteria

One of the challenges of a multicriteria analysis is that it can produce varying results based on the weight one allocates to the various criteria. Furthermore, any multi-criteria analysis is susceptible to criteria-arbitrage, meaning that the analysis could be tailored, *ex post*, to fit one's preference regarding the allocation of power by reference to any one among the multiple criteria that supports the preferred allocation. Even at its

¹¹⁹ Van Der Weide, *supra* note 81, at 31–32; *see also* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1160 (1932).

¹²⁰ *See, e.g.*, Bebchuk & Tallarita, *supra* note 24; Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) (“[A] stakeholder measure of managerial accountability could leave managers so much discretion that managers could easily pursue their own agenda, one that might maximize neither shareholder, employee, consumer, nor national wealth, but only their own.”).

¹²¹ *See* Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 FORDHAM L. REV. 939, 940–41 (2019) (“Corporate law is fundamentally concerned with self-dealing—the expropriation of corporate wealth by fiduciaries.”); Karmel, *supra* note 31, at 1175 (“Future interpretations of these statutes should motivate directors to prevent any single constituency from usurping a corporation's capitalization for its own use in such a manner that other valid constituencies are significantly harmed.”).

¹²² Black, *supra* note 48, at 12.

¹²³ *Id.* (“An important corporate governance design problem, hidden by the assumption that the common shareholders are a firm's principal residual claimants, is how to allocate the scarce resource of control rights among multiple classes of residual claimants.”).

inception, the residual claimant theory was viewed skeptically by some as a physiocratic doctrine dressed up as a theory.¹²⁴

One method that could be used to manage this variance is to first identify which criterion among the various residual claimant criteria is most relevant to a particular corporate governance mechanism. Next, the analysis should focus only on the chosen criterion to determine the party to or from whom that particular governance mechanism should run.

One example of this approach can be found in Alchian and Demsetz's analysis of residual claimants.¹²⁵ According to these authors, the primary purpose of the residual claim is a monitoring function.¹²⁶ The only group that met this criterion in their view was the central employer.¹²⁷ As for shareholders, Alchian and Demsetz view them solely as investors (like bondholders), and while these shareholders receive a residual claim on earnings, this residual claim is not relevant to Alchian and Demsetz's analysis as it has no bearing on shareholders' capacity as monitors.¹²⁸ Using the framework of the multicriteria assessment presented in this Article, it can be said that Alchian and Demsetz focus only on the ninth criterion (monitoring capacity) in their residual claimant analysis.¹²⁹

Another example is the approach of Benjamin Klein, who views incentives as the primary purpose of contingent profit-sharing contracts.¹³⁰ Even though shareholders are compensated on a profit-sharing basis, this fact has no bearing on Klein's analysis, as "[t]here is no incentive reason for [a shareholder] not to be compensated on a fixed payment schedule."¹³¹ In other words, only

¹²⁴ Hollander, *supra* note 55, at 261 (referring to Francis A. Walker's residual claimant theory as "the early emergence and curious persistence, in successive guise, of a theory of distribution conveniently denominated in the phrase of one of its most distinguished expositors 'the residual claimant' theory").

¹²⁵ Alchian & Demsetz, *supra* note 7, at 782–87, 794.

¹²⁶ *See id.* at 781–86 (noting that the monitoring function is an important function in performing the residual claim analysis).

¹²⁷ *See id.* at 783–87, 794.

¹²⁸ *Id.* at 789 n.14.

Instead of thinking of shareholders as joint owners, we can think of them as investors, like bondholders, except that the stockholders are more optimistic than bondholders about the enterprise prospects. . . . The residual claim on earnings enjoyed by shareholders does not serve the function of enhancing their efficiency as monitors in the general situation. The stockholders are "merely" the less risk-averse or the more optimistic member of the group that finances the firm.

Id.

¹²⁹ *See id.* at 368–70, 372–73.

¹³⁰ *See* Klein, *supra* note 46, at 368–70.

¹³¹ *Id.* at 368–69 ("A primary purpose of contingent profit-sharing contracts is to create appropriate economic incentives. Obviously, this is not the reason outside (nonmanager) stockholders are compensated on a profit-sharing basis.").

profit-sharing that has an incentive effect is relevant to Klein's analysis of a residual claimant.¹³² Relating Klein's approach to the multicriteria framework, it can be said that Klein focuses on the third criterion (wealth effect of one's own decisions) but disregards the others in his residual claimant analysis.¹³³

Taking voting as another example, why is it that the vote follows the residual claim? Is it because the residual claimant has the most to gain? If so, then we should focus on the three criteria relating to reward calculus (order of payment, variability of reward, and wealth effect of own decisions) to set mandatory voting rules. Or is it because the residual claimant has the most to lose? If so, then we should focus on the three criteria relating to risk of loss (firm-specific investment, protection against non-payment, undiversified risk). Or is it because the residual claimant has the best capacity to exercise its vote effectively? If so, then we should focus on the three criteria that determine a claimant's relationship to the firm (bargaining power, express and implied contracts, and monitoring capacity). If more than one of these reasons explains why the vote follows the residual claim, the decision-maker would need to establish whether each of the residual claimant criteria matter equally, or if one consideration should be given greater weight than the others. In this way, the multicriteria assessment offers a framework to articulate and assess these tradeoffs.

In each of these examples, by designating the primary criteria to be used in residual claimant analysis, the group of stakeholders that are the primary residual claimant can be more precisely determined at any given time.¹³⁴ Furthermore, as the group that satisfies the primary criteria changes, the rights that attach to the residual claimant analysis should also change hands, leading to a more dynamic model of corporate governance.

CONCLUSION

The multicriteria assessment of corporate residual claimants presented in this Article is a useful tool for analyzing stakeholder relationships under changing conditions.

Notably, we are presently in the midst of a Digital Transformation, which is disrupting the core of how we live and work.¹³⁵ The World

¹³² *See id.*

¹³³ *See id.* at 368–70, 372–73.

¹³⁴ *See id.* at 372; Alchian & Demsetz, *supra* note 7, at 781–86, 794.

¹³⁵ SIEBEL, *supra* note 22.

Economic Forum estimates that the Digital Transformation could add up to \$100 trillion of new value in the next decade.¹³⁶

As we shift from a society that was primarily dependent on shareholders' financial investments to a society that is increasingly dependent on users' data and information, a single-criterion residual claimant analysis that looks only to shareholder profits will fail to fully and fairly represent the residual claims held by corporate stakeholders in the Digital Transformation era.

Instead, we should look to a multicriteria assessment of corporate residual claims which requires the analyst to consider and weigh multiple criteria to determine residual claimant status. The multicriteria assessment is a dynamic framework which can be used to reassign residual claimant status and associated legal rights and protections as underlying conditions change. By its very nature, the multicriteria assessment offers a pathway to shorten the gap of time by which law often lags behind the phenomenon it seeks to regulate.

¹³⁶ DIGITAL TRANSFORMATION INITIATIVE: UNLOCKING \$100 TRILLION FOR BUSINESS AND SOCIETY FROM DIGITAL TRANSFORMATION, WORLD ECONOMIC FORUM 2, 65 (May 2018), <http://reports.weforum.org/digital-transformation/wp-content/blogs.dir/94/mp/files/pages/files/dti-executive-summary-20180510.pdf> [<http://perma.cc/8G2X-L6XW>].

The Citation of Unpublished Cases in the Wake of COVID-19

Michael L. Smith*

California's Rules of Court prohibit the citation of unpublished state court opinions. Courts and litigants, however, may still cite unpublished federal opinions and rulings and unpublished opinions from other states' courts. This may result in problems, such as limiting courts' and parties' authorities to a skewed sample set, and the covert importation of inapplicable, stricter federal court pleading standards in state court cases.

COVID-19 was a stress-test that brought the problems with California's citation rules into focus. The pandemic led to a flood of claims for pandemic-related business interruptions by insured business owners against their insurance companies. While state courts upheld some of these claims and overturned others at the pleading stage, federal courts took a virtually uniform approach in dismissing complaints by insureds. As time went on, however, litigants in California state courts could not rely on any of the favorable state court rulings, as they were prohibited from citing those cases. Instead, courts and parties turned to the next best source of authority: California federal court rulings, which led to a skewed perspective of the caselaw.

This Article initially contemplates overturning California's prohibition on citing unpublished state court cases altogether, and evaluates the benefits and disadvantages of such a step. Ultimately, this Article concludes that a less-dramatic solution may solve some of the most acute problems with California's citation rules: the simple proposal that courts and litigants interpret the rules as written, rather than in the expansive manner that courts have interposed. Under this approach, courts and parties can cite unpublished superior court opinions, so long as they are not issued by superior court appellate divisions, as persuasive authority. In situations where an unexpected technology, disaster, or pandemic gives rise to widespread litigation, this approach would give California state courts a more complete picture of the law.

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INTRODUCTION

California’s Rules of Court generally prohibit the citation of unpublished California state court opinions.¹ While California Rule of Court 8.1115(a) specifically prohibits the citation of unpublished Court of Appeal and superior court appellate division opinions, the Court of Appeal has recently broadened the use of this rule by determining that unpublished cases from county superior courts are also not usually “citable authority.”²

Courts and parties may still cite opinions from other jurisdictions, including unpublished opinions from other states³ and unpublished federal court opinions.⁴ These cases may be cited as “persuasive” authorities, and courts may be persuaded to follow these authorities if the facts are particularly analogous.⁵

California is a large state with detailed statutes and a deep, extensive pool of published caselaw. With such a wide-ranging base of precedent to draw from, a useful case can often be found for most occasions. Sometimes, though, the published caselaw is not enough. New cases—weird cases—twist routine laws into applications beyond the wildest dreams “of the most creative, imaginative, or demented law professor.”⁶ Novel technology, unexpected disasters (or pandemics), and changing societal norms and trends may give rise to situations where there are no clear, published cases on point.

In these situations, attorneys and courts may reach for alternate sources of authority, including unpublished opinions. But if those opinions are issued by California state courts, they are off limits, even if the factual circumstances in the opinion align perfectly with the case at bar. This leaves courts and

¹ See CAL. R. CT. 8.1115(a).

² See *Aixtron, Inc. v. Veeco Instruments Inc.*, 265 Cal. Rptr. 3d 851, 881 (Cal. Ct. App. 2020) (citing California Rules of Court Rule 8.1115(a) in support of the conclusion that “an unpublished, tentative decision from the superior court in Los Angeles County” was not citable authority).

³ See *Central Laborers’ Pension Fund v. McAfee, Inc.*, 225 Cal. Rptr. 3d 249, 274 n.9 (Cal. Ct. App. 2017) (noting that citation of unpublished Delaware caselaw is not prohibited by Rule 8.1115).

⁴ See *Farm Raised Salmon Cases*, 175 P.3d 1170, 1182 n.18 (Cal. 2008) (noting parties’ discussion of “an unpublished federal district court opinion,” and finding that “[c]iting unpublished *federal* opinions does not violate” Rule 8.1115) (alteration in original).

⁵ See, e.g., *Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661, 678 n.10 (Cal. Ct. App. 2009) (citing federal caselaw as authority for the proposition adopted by the court in its reasoning and recognizing that California Rules of Court permit citation of unpublished federal cases as “persuasive, although not binding, authority”).

⁶ Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 420 (1985) (providing several hypothetical examples of such “weird cases”).

parties with federal caselaw or opinions from other jurisdictions, including unpublished opinions. Indeed, in circumstances involving litigation over new forms of technology or widespread events or disasters that have not been addressed before, recent unpublished opinions may be the only guidance available.

This raises a problem: California courts may end up reaching decisions in a particular direction on a novel issue or question of law, while federal courts and other jurisdictions go in a different direction. Attorneys and courts, however, are barred from citing those California state court opinions if they are unpublished, leaving a skewed, and potentially inaccurate, well of authority from which to draw.

The COVID-19 pandemic was a stress test that revealed this flaw in California's citation rules. Specifically, it led to a flood of complaints seeking business interruption insurance coverage across the country. Many of these cases involved identical questions of policy interpretation, as most policies used the same terms to describe what losses and damages were covered.

As the months went by, courts began reaching decisions on the coverage claims. Most courts, including California federal courts, took a restrictive view of insurance policies' coverage and granted motions to dismiss at the pleading stage. California superior courts, though, took a more mixed approach, with several California superior courts ruling in favor of insureds at the pleading stage.⁷

These superior court rulings were of little help to insureds in other state court proceedings, because California law prohibited their citation. Instead, courts and litigants at the pleading stage of COVID-19 coverage cases relied on what they saw as the next best source of authority: California federal caselaw regarding COVID-19 business interruption claims. Those cases involved virtually identical factual circumstances and highly analogous insurance policies, and filled the void in the absence of persuasive, state court authority.

The federal cases, however, provided disproportionate support for insurers, as California's federal courts had granted insurers' motions to dismiss in nearly all cases before them. The one-sided nature of the citable caselaw created a substantial

⁷ See *infra* Appendices I and II for a list of California federal court outcomes and California state court outcomes in cases involving motions to dismiss, demurrers, and motions for judgment on the pleadings in COVID-19 business interruption cases.

obstacle for insured seeking to advance business interruption claims—an obstacle that did not reflect the state of the law in California’s superior courts.

While the COVID-19 crisis is, in many ways, an unprecedented occurrence, the flaws that it revealed in California’s Rules of Court should not be ignored. Any unexpected social change, disaster, or new technology that leads to widespread litigation could result in the same problem for litigants and courts. Litigants should not be precluded from citing to persuasive superior court caselaw, particularly when that caselaw is contrary to trends in federal courts and other jurisdictions. Additionally, California’s rule against citing unpublished authorities is likely to disadvantage plaintiffs more than defendants, as decisions based on unpublished federal opinions are more likely to take defendant-friendly postures as a result of the strict federal pleading standards of *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.⁸

This Article contemplates abolishing Rule 8.1115(a) and the benefits and disadvantages that may result from permitting citation to unpublished state court authorities. Ultimately, the Article concludes that such a drastic step is unnecessary. Instead, courts should simply apply Rule 8.1115 as it is written and permit the citation of unpublished superior court opinions as persuasive authority. This would allow litigants to cite to California superior court cases in scenarios that involve widespread, sudden challenges, like those posed by the COVID-19 pandemic or other scenarios involving widespread changes, emergencies, or technologies that prompt extensive litigation. Unpublished superior court decisions may serve as a stopgap source of authority for courts and litigants as the cases work their way through the appeal process. And allowing parties and courts to cite these opinions will break up the effective monopoly that California federal court cases would otherwise hold.

I. THE PUBLICATION AND CITATION OF STATE COURT OPINIONS

Cases in California (as well as in federal courts and most other jurisdictions) may be published or unpublished. Published opinions have the honor of being reprinted in various series of

⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–80 (2009); see also William R. Slomanson, *California Federal Procedural Contrast: A Proposal*, 327 F.R.D. 1301, 1313–14 (2018) (comparing California’s pleading standards with the “‘increasingly restrictive’ plausibility standard” employed in federal courts).

bound volumes, such as West's California Reporter or the Official California Appellate Reports. These volumes are then purchased by law libraries and law offices—where they are never read—but lend an air of prestige and solemnity to wherever they are shelved.⁹ While unpublished opinions do not have the honor of being reprinted in a series of dusty tomes, many of them, particularly those issued by the California Court of Appeal, may be found online, either through courts' websites or through legal search engines like LexisNexis or Westlaw.¹⁰

In California's Court of Appeal and superior court appellate divisions, an opinion is certified for publication if "a majority of the rendering court certifies the opinion for publication before the decision is final in that court."¹¹ Criteria for determining whether an opinion should be published include whether the opinion "[e]stablishes a new rule of law," applies an existing rule to a set of facts "significantly different from those stated in published opinions," involves "a legal issue of continuing public interest," and invokes "a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision."¹² Not many opinions make the cut. For example, UCLA's law library reports that less than ten percent of Courts of Appeal decisions meet the criteria,¹³ and this percentage has declined over the years.¹⁴

Even if an opinion is one of the few selected for publication, there is no guarantee it will remain that way. California's rules also permit the depublishing of published opinion, providing a mechanism in which "any person" may send a letter to the California Supreme Court requesting that the court order that an opinion not be published.¹⁵ The court, in response to such a letter, may then order the opinion depublished or deny the request for

⁹ See, e.g., *Law & Government Antiquarian & Collectible Books*, EBAY, http://www.ebay.com/b/Law-Government-Antiquarian-Collectible-Books/29223/bn_7376997 [<http://perma.cc/JF64-EVW8>] (last visited Oct. 11, 2021).

¹⁰ See CALIFORNIA COURTS, *Opinions*, <http://www.courts.ca.gov/opinions.htm> [<http://perma.cc/D92T-9U6H>].

¹¹ Cal. R. Ct. 8.1105(b).

¹² Cal. R. Ct. 8.1105(c)(1)–(9) (listing the nine relevant factors).

¹³ See *California Case Materials Checklist: Introduction to California Cases*, UCLA SCH. OF L. HUGH & HAZEL DARLING L. LIBR. (Sept. 29, 2021, 9:57 PM), <http://libguides.law.ucla.edu/californiacases> [<http://perma.cc/Y5Z6-8LLK>].

¹⁴ Gerald F. Uelmen, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil?*, 26 LOY. L.A. L. REV. 1007, 1012 (1993) (noting a decrease in the statewide rate of publication in civil cases, going from nineteen percent during 1986–1987 to sixteen percent during 1990–1991).

¹⁵ CAL. R. CT. 8.1125(a).

depublication.¹⁶ Alternatively, the California Supreme Court, on its own motion, may order an opinion depublished.¹⁷

Published cases may be cited as precedential authority in California state court proceedings.¹⁸ Unpublished cases, on the other hand, may not be cited or relied on by courts or parties, with certain limited exceptions.¹⁹ While the text of California Rule of Court 8.1115(a) prohibits citation to unpublished opinions of the California Court of appeal or appellate divisions of California's superior courts, in practice, this ban on citation of unpublished opinions is applied to all unpublished opinions, including those of the non-appellate divisions of superior courts.²⁰

Rule 8.1115(a) says nothing against citing unpublished federal court opinions or unpublished opinions from other state courts. As a result, California courts permit the citation of both unpublished federal court opinions and unpublished opinions from other state courts as persuasive authority.²¹

II. THE IMPACTS OF RESTRICTING CITATION TO UNPUBLISHED STATE COURT OPINIONS

California's rule against citing unpublished state court opinions can lead to frustrating circumstances for litigators who, upon finding a case with identical facts and a favorable ruling, realize that the case is unpublished and therefore cannot be cited. To put it another way:

Consider the analogy to the Garden of Eden, where Adam and Eve had forbidden fruit dangling temptingly before their eyes, only to be told by God that they could not touch it. The online databases dangle the fruit, but the courts forbid its consumption. Like Eve, many lawyers would love to eat of the tree of knowledge.²²

While not everyone may equate on-point, uncitable caselaw as fruit so tempting that it is worth risking the collective souls of

¹⁶ See CAL. R. CT. 8.1125(c)(1).

¹⁷ See CAL. R. CT. 8.1125(c)(2).

¹⁸ See CAL. R. CT. 8.1115(d).

¹⁹ See CAL. R. CT. 8.1115(a).

²⁰ See *Aixtron, Inc. v. Veeco Instruments Inc.*, 265 Cal. Rptr. 3d 851, 881 (Cal. Ct. App. 2020) (citing CAL. R. CT. 8.1125(a) in support of the conclusion that an unpublished, tentative decision from the superior court in Los Angeles County was not citable authority).

²¹ See *Cent. Laborers' Pension Fund v. McAfee, Inc.*, 225 Cal. Rptr. 3d 249, 273–74 n.9 (Cal. Ct. App. 2017) (noting that citation of unpublished Delaware caselaw is not prohibited by Rule 8.1115); *Farm Raised Salmon Cases*, 175 P.3d 1170, 1182 n.18 (2008) (noting parties' discussion of an unpublished federal district court opinion and finding that citing unpublished federal opinions does not violate Rule 8.1116).

²² Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1266 (2007).

humankind to consume, knowing about such caselaw may prompt ethical concerns. Shenoa Payne notes that rules against citing unpublished opinions may result in attorneys being unable to meet their ethical obligation to provide competent representation under Model Rules of Professional Conduct, Rule 1.1, noting that “[n]o-citation rules prevent attorneys from accessing and bringing to the attention of the court an entire body of caselaw on behalf of their clients.”²³

Private and government actors may also be confused by the legal status of unpublished opinions, particularly when those opinions have been ordered depublished.²⁴ At least one court has recognized the confusion and reliance on decisions that are later depublished and felt the need to account for the potential impact of such an opinion when explaining its decision in a later case.²⁵

Courts, too, may be tempted to rely on unpublished opinions, whether they are brought to the court’s attention by the parties or if the court locates them through its own research.²⁶ The prohibition on citation to or reliance on unpublished opinions may prompt courts to employ substandard legal reasoning. For one, the court may apply the reasoning of an unpublished case without citing to it, which may result in an opinion that is conclusory or appears unsupported.²⁷ In the alternative, the court may apply a restrictive view of what it means to “rely” on a case in violation of Rule 8.1115, a tactic that may lead to uncertainty over how the cited opinion is being employed.²⁸ This also presents further problems for attorneys: even if courts may cite unpublished or

²³ Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 754 (2008).

²⁴ *Id.* at 731.

²⁵ See *Dakin v. Dep’t of Forestry & Fire Prot.*, 21 Cal. Rptr. 2d 490, 493–94 (Cal. Ct. App. 1993) (noting that the court’s prior opinion, which reached a contrary result, had been depublished by the California Supreme Court and citing reliance on the prior opinion as a reason to apply the court’s current ruling prospectively).

²⁶ See Payne, *supra* note 23, at 729 (discussing how unpublished opinions are widely available through online research systems).

²⁷ *Id.* at 739; see also Stephen R. Barnett, *Depublication Deflating: The California Supreme Court’s Wonderful Law-Making Machine Begins to Self-Destruct*, 45 HASTINGS L.J. 519, 537 (1994).

²⁸ See, e.g., *In re Marriage of Padilla*, 22 Cal. Rptr. 2d 630, 632 n.4 (Cal. Ct. App. 1993) (citing an unpublished case and stating that the court was not relying on the case, but was instead citing it “to highlight the present split of authority and to help elucidate [the court’s] agreement” with a line of cases), *vacated*, 932 P.2d 756 (Cal. 1997).

depublished cases for flexible, non-reliance reasons, an attorney's doing so could result in sanctions or antagonize a judge.²⁹

There are several potential responses to these concerns. First, California is the most populous state in the country,³⁰ and the sheer number of cases that are heard and appealed mean that California attorneys and courts have an extensive set of opinions to draw from in formulating arguments and opinions. Thus, even if only ten percent of California cases end up getting published, that still leaves a lot of cases for courts and litigants to cite to.

Second, even if litigants are unable to find a published case that involves an identical set of facts, they may still rely on arguments from analogy to make other authorities fit the needs of the case.³¹ Indeed, one may argue that the ability to make creative analogies in cases where precedent is thin is one of the several key skills that are to be expected from litigators.³²

Third, litigants who are unable to find analogous caselaw to support their arguments may resort to citing persuasive authorities, such as federal caselaw or authority from other states.³³ Litigants may even resort to citing unpublished opinions so long as they are issued by non-California state courts.³⁴

The first two responses admittedly address the problems with prohibiting citation of unpublished authority, at least to an extent. California's caselaw is extensive, and arguments by analogy may be acceptable to courts, although they may not get as much mileage with law firm partners who are convinced that there is an answer to their impossible research question because they read a case a few years ago that squarely addressed the issue.³⁵ But while California's published caselaw may suffice for many cases, there will inevitably be parties and courts who find

²⁹ See Barnett, *supra* note 27, at 563–64 (recognizing that while attorneys should be able to cite cases for reasons other than “reliance” on those cases, “it may not be either realistic or fair to expect a lawyer to take the chance”).

³⁰ Hans Johnson et al., *California's Population*, PUB. POLY INST. CAL. (Mar. 2021), http://www.ppic.org/wp-content/uploads/JTF_PopulationJTF.pdf [<http://perma.cc/WG3T-WHMY>].

³¹ See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 926–27 (1996) (noting the prominence of arguments by analogy in the field of legal arguments).

³² See Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1217–18 (2001) (describing the “context effect,” where the strategic presentation of alternative fact patterns or scenarios create arguments or inferences in favor of particular conclusions, and skillful attorneys’ use of such reasoning in drawing from other cases or scenarios to create strategic context for analogies).

³³ *Harris v. Inv.'s Bus. Daily, Inc.*, 41 Cal. Rptr. 3d 108, 112 (Cal. Ct. App. 2006).

³⁴ *Pac. Shore Funding v. Lozo*, 42 Cal. Rptr. 3d 283, 289 n.6 (Cal. Ct. App. 2006).

³⁵ In fact, they had not.

themselves in novel factual situations, addressing undeveloped areas of the law—or heaven help them—applying undeveloped areas of the law to novel factual situations.³⁶

As for turning to federal or out-of-state authorities for help, this may suffice in some situations. But in circumstances involving widespread, sudden changes that tend to lead to equally widespread litigation, this solution breaks down and reveals a deeper flaw in California’s prohibition on citing unpublished cases. The COVID-19 pandemic is such a scenario.

III. THE COVID-19 PANDEMIC AND ENSUING BUSINESS INTERRUPTION LITIGATION

The COVID-19 pandemic struck California in March 2020, prompting state and local authorities to issue orders closing businesses deemed “non-essential.”³⁷ Many businesses closed entirely.³⁸ Some businesses, like restaurants, were forced to significantly limit their operations by providing only limited services to customers, like carryout and drive-thru services.³⁹

The impact of the pandemic and closure orders prompted businesses to turn to their insurers for relief. Many businesses affected by the pandemic held commercial property insurance policies or other similar policies that provided coverage for lost

³⁶ See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 420 (1985) (explaining that even laws that typically make for “easy cases” may be difficult to apply or interpret in “weird cases” involving unusual facts or unanticipated events).

³⁷ For examples of such local authority, see *Safer at Home Order for Control of COVID-19*, CNTY. OF L.A. DEP’T OF PUB. HEALTH at 2 (Mar. 19, 2020), http://file.lacounty.gov/SDSInter/lac/1070029_COVID-19_SaferAtHome_HealthOfficerOrder_20200319_Signed.pdf [<http://perma.cc/T4K4-Y9V6>] (ordering closure of commercial properties, including “Non-Essential Retail Businesses”); Eric Garcetti, *Safer at Home: Public Order*, CITY OF L.A. EMERGENCY AUTHORITY 1–4, 7–8 (Mar. 19, 2020), <http://www.lamayor.org/sites/g/files/wph1781/files/page/file/20200527%20Mayor%20Public%20Order%20SAFER%20AT%20HOME%20ORDER%202020.03.19%20%28REV%202020.05.27%29.pdf> [<http://perma.cc/UH75-KHND>] (ordering that people and businesses cease all activities and operations deemed “non-essential,” although non-essential businesses could conduct “minimum basic operations” such as inventory, security, payroll, and other reasonable activities that maximized the ability of employees to work from home). For an example of state authority, see Gavin Newsom, *Executive Order N-33-20*, EXEC. DEP’T, STATE OF CAL. at 1–2 (Mar. 19, 2020), <http://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> [<http://perma.cc/V5EQ-GPDB>].

³⁸ See, e.g., *California Small Business Owners Report Devastating Impacts of COVID-19*, SMALL BUS. MAJORITY (Apr. 21, 2020), <http://smallbusinessmajority.org/our-research/entrepreneurship/ca-small-business-owners-report-devastating-impacts-covid-19-need-immediate-cash-assistance> [<http://perma.cc/E8NR-CX5V>].

³⁹ See Garcetti, *supra* note 37, at 4–6.

business income in the event of a business interruption.⁴⁰ Those insured under these policies claimed that they had suffered lost income as a result of the pandemic and the closure orders that forced the closures of their businesses.⁴¹

Insurers, however, took a uniformly restrictive stance against these claims.⁴² Some insurance policies contained exclusions for coverage for loss or damage resulting from viruses or pathogens, and insurers relied on these exclusions to deny coverage.⁴³ However, even where no such exclusions were present, insurers still denied coverage, claiming that the presence of a virus at an insured property does not constitute “physical loss or damage,” a coverage requirement that appears in virtually all insurance policies.⁴⁴

Faced with denials of coverage, many insured businesses took to the courts, arguing breach of contract, bad faith denial, and other claims designed to seek coverage under their policies.⁴⁵ According to the Covid Coverage Litigation Tracker operated by the Insurance Law Center and the University of Pennsylvania Carey Law School, a spike in filings of complaints related to COVID-19 business interruption claims began in April 2020, and

⁴⁰ See, e.g., Letter from National Association of Insurance Commissioners to U.S. House Committee on Small Business 2 (May 20, 2020), http://naic.org/documents/government_relations_200521.pdf [<http://perma.cc/38WM-RW5G>] (citing *Fact Sheet: COVID-19 & Business Interruption*, AM. PROP. CAS. INS. ASS'N 1 (Apr. 8, 2020), <http://www.pciaa.net/docs/default-source/industry-issues/national-faq-4-8-2020.pdf> [<http://perma.cc/Y3SJ-KRYD>]).

⁴¹ See *id.* at 1–3.

⁴² See *APCIA Releases New Business Interruption Analysis*, AM. PROP. CAS. INS. ASS'N (Apr. 6, 2020), <http://www.apci.org/media/news-releases/release/60052/> [<http://perma.cc/4QW4-BDRA>] (claiming that “[m]any commercial insurance policies, including those that have business interruption coverage, do not provide coverage for communicable diseases or viruses such as COVID-19” and asserting that pandemic outbreaks are “uninsurable”).

⁴³ See, e.g., *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 498 F. Supp. 3d 1233, 1240–42 (C.D. Cal. 2020) (granting motion to dismiss and finding that insurance policy’s exclusion of coverage for loss or damage caused by viruses precluded coverage).

⁴⁴ *Id.* at 1236; see also Madeleine Fischer & Covert J. Geary, *Physical Loss or Damage Requirement for Business Interruption and Civil Authority Insurance Coverage*, NAT’L L. REV. (Apr. 7, 2020), <http://www.natlawreview.com/article/physical-loss-or-damage-requirement-business-interruption-and-civil-authority> [<http://perma.cc/Q4B6-DGSN>] (“Commercial property policies typically provide coverage for business interruption losses that result from ‘direct physical loss or damage’ to the insured premises.”).

⁴⁵ See Christopher C. French, *Forum Shopping COVID-19 Business Interruption Insurance Claims*, 2020 U. ILL. L. REV. ONLINE 187, 188 (2020) (“As of September 15, 2020, over 1000 business interruption insurance lawsuits had been filed.”).

persisted through August 2020, with forty or more new complaints filed every week during that period.⁴⁶

Most courts across the country took a restrictive approach to these business interruption claims, including California's federal courts, which almost uniformly granted motions to dismiss complaints against insurance companies arising from COVID-19 business interruption coverage claims.⁴⁷ As of November 15, 2021,⁴⁸ the Covid Coverage Litigation Tracker included information on seventy-five California federal cases in which motions to dismiss or motions for summary judgment were filed.⁴⁹ Of these cases, fifty-seven have been dismissed with prejudice, fifteen have been dismissed without prejudice, and three motions to dismiss have been denied, either in whole or in part.⁵⁰

Insureds have been more successful in California state court—although the smaller sample size suggests that data on these cases may be incomplete. As of November 15, 2021, the Covid Coverage Litigation Tracker included information on twenty-three cases filed in California superior courts in which Defendants demurred to the complaints.⁵¹ Of these cases, courts sustained insurers' demurrers, motions for summary judgment, or motions for judgment on the pleadings with prejudice in thirteen cases and

⁴⁶ Insurance Law Center & Penn Law, *Covid Coverage Litigation Tracker*, INS. L. CTR. <http://cclt.law.upenn.edu/> [<http://perma.cc/6HJE-EXRW>] (last visited Apr. 14, 2021).

⁴⁷ See *infra* Appendix I.

⁴⁸ This Article addresses rulings up until November 21, 2021, when the first California Court of Appeal decision addressing COVID-19 business interruption was decided, thereby establishing citable, controlling precedent for California state courts. See *The Inns by the Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688 (Cal. Ct. App. 2021); see also Dina Richman, *COVID-19 Business Interruption Claims: First California Court of Appeal Decision Holds that Closure Orders Are Not "Direct Physical Loss,"* JD SUPRA (Nov. 18, 2021), <http://www.jdsupra.com/legalnews/covid-19-business-interruption-claims-4744073/> [<http://perma.cc/3YQ2-U8Q5>].

⁴⁹ This total eliminates entries on the list that describe initial motions to dismiss that were granted without prejudice, when the same court later granted a second motion to dismiss with prejudice. For citations to these cases and the dates of the rulings on the motions to dismiss, see *infra* Appendix I.

⁵⁰ See *infra* Appendix I. One case was dismissed pursuant to a stipulation between the parties after the court issued a tentative ruling dismissing the case with prejudice—this decision is included as an example of a dismissal with prejudice as the tentative ruling was published and other courts have cited it as precedent—even though it is not an operative ruling. See *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, 485 F.Supp.3d 1225, 1226 (C.D. Cal. 2020); see also *CTT Comedy v. Nautilus Ins. Co.*, No. 21-CV-03064-SK, 2021 WL 3123898, at *5 (N.D. Cal. July 13, 2021) (citing *Plan Check* and basing its decision on the reasoning in *Plan Check* and other cases).

⁵¹ See *infra* Appendix II.

overruled or denied demurrers, motions for summary judgment, and motions for judgment on the pleadings in seven other cases.⁵²

IV. CALIFORNIA’S RULE AGAINST CITING UNPUBLISHED CASES IN THE COVID-19 PANDEMIC

The legal landscape after nearly two years of COVID-19 litigation in California’s state and federal courts reveals a problem with California’s rule against citing unpublished state court caselaw. While the sample size of California state court cases is small, these courts’ treatment of COVID-19 business interruption claims is mixed—with a group of rulings favoring insureds—particularly at the earlier stages of the pandemic.⁵³ This is in stark contrast to the landscape of California’s federal court opinions, which overwhelmingly favor insurers.⁵⁴

California’s prohibition on citing unpublished state court opinions prevents courts and litigants in state court from citing the more favorable state-level cases.⁵⁵ Instead, courts and litigants are restricted to unpublished federal court opinions, or unpublished opinions from other jurisdictions.⁵⁶ While both types of authority are persuasive, rather than binding, California federal authorities are generally preferable because they purport to apply California state law to the insurer’s claims.⁵⁷

The rule against citing unpublished opinions leaves courts with a skewed picture of the law regarding business interruption coverage during the COVID-19 pandemic, with federal caselaw painting a far more restrictive picture than that of decisions in California state courts.⁵⁸ The rule also gives a disproportionate

⁵² Citations to these cases and the dates of the rulings referenced are included in Appendix II, below. *See infra* pp. 124–26.

⁵³ *See infra* Appendix II.

⁵⁴ *See infra* Appendix I.

⁵⁵ *See* Lauren S. Wood, *Out of Cite, Out of Mind: Navigating the Labyrinth That Is State Appellate Courts’ Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561, 578 (2016) (“No-citation rules serve as arbitrary barricades, preventing attorneys and courts from assessing valuable opinions merely because they were not marked for publication.”).

⁵⁶ *See* *Yvanova v. New Century Mortg. Corp.*, 365 P.3d 845, 859 (Cal. 2016) (permitting unreported federal court decisions to be cited as persuasive authority); *America Online, Inc. v. Superior Ct.*, 108 Cal. Rptr. 2d 699, 703 (Cal. Ct. App. 2001) (allowing the parties to reference unpublished opinions from out-of-state cases).

⁵⁷ Whether the courts are, in fact, applying state law remains a matter of debate. *See* Carl Salisbury, *Federal COVID-19 Insurance Decisions Ignore State Law*, LAW360 (Apr. 6, 2021, 4:12 PM), <http://www.law360.com/articles/1372499/federal-covid-19-insurance-decisions-ignore-state-law> [<http://perma.cc/ZGT5-4VRM>] (citing higher dismissal rates in federal courts and arguing that this is evidence that federal courts are not applying state law).

⁵⁸ *See infra* Appendices I, II.

advantage to insurers, who can muster a wealth of California federal authorities to claim that the status of the law is far more restrictive than it actually is (at least in state court).⁵⁹

An additional side effect of California's citation rules in the COVID-19 context is that they may import the restrictive pleading standards of federal courts into state court proceedings through reliance on federal authorities. Since the United States Supreme Court's rulings in *Twombly*⁶⁰ and *Iqbal*,⁶¹ complaints in federal court must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"⁶² No such plausibility requirement is included in California's law governing demurrers,⁶³ nor has the *Twombly-Iqbal* facial plausibility requirement been applied in California state court proceedings that do not involve claims arising from federal law.⁶⁴ Still, if California courts base their decisions on federal COVID-19 business insurance coverage claims, they are effectively importing the heightened pleading standards of those federal cases that make up the court's sole, COVID-19-specific authority.

One may argue that this effect can be mitigated by analogous California caselaw. In the COVID-19 context, however, there is a dearth of controlling authority. One of the key California cases at the center of most COVID-19 coverage disputes, *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Company*,⁶⁵ illustrates this.

In *MRI Healthcare*, the insured sought coverage for lost income after they had to power down an MRI machine, which was then unable to fully ramp up to full capacity until four months later.⁶⁶ The insured claimed that it had suffered an insured "physical loss" due to its inability to use the machine, while the insurer argued that there had been no loss, as the machine had failed to ramp up due to the "inherent nature" of the machine,

⁵⁹ See *infra* Appendices I, II.

⁶⁰ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

⁶¹ Ashcroft v. Iqbal, 556 U.S. 662 (2009).

⁶² *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570).

⁶³ See CAL. CIV. PROC. CODE § 430.10(e) (West 2021) (permitting demurrers where "[t]he pleading does not state facts sufficient to constitute a cause of action.>").

⁶⁴ California courts only apply the *Twombly-Iqbal* pleading standards when they are explicitly applying federal law to general demurrers. See, e.g., *Marowitz v. County of Mariposa*, No. F077614, 2020 WL 4033170, at *3 (Cal. Ct. App. July 17, 2020) ("In reviewing the sufficiency of a section 1983 cause of action on general demurrer, California courts apply federal law.>").

⁶⁵ 115 Cal. Rptr. 3d 27, 27 (Cal. Ct. App. 2010).

⁶⁶ *Id.* at 31–34.

along with the long time that it had been ramped up.⁶⁷ In its decision, the Court of Appeal sided with the insured and affirmed the trial court's grant of summary judgment, holding that "[f]or there to be a 'loss' within the meaning of the policy, some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property"⁶⁸

Insurers can cite *MRI Healthcare* to argue that tangible alteration to insured property is necessary for there to be covered physical loss or damage. This argument may succeed where plaintiffs do not allege that the virus was present at their property, as was often the case where the policies at issue include virus exclusions.⁶⁹ In cases where the insured argue that the virus was present at the property and rendered it infectious, however, *MRI Healthcare* may be cited in favor of finding that there was covered physical loss or damage, as the virus may be characterized as an external force that causes a physical change in the condition of the property by rendering it infectious. Beyond *MRI Healthcare*, and before November 15, 2021 when the California Court of Appeal finally issued a public opinion on whether COVID-19 and closure orders constituted a covered loss, there was little other state law on point for insureds or insurers.⁷⁰

Because California's controlling authority may be cited favorably by insureds and insurers, California state courts will likely turn to unpublished California federal cases since they involve identical factual situations and insurance policy terms.

⁶⁷ *Id.* at 32.

⁶⁸ *Id.* at 38.

⁶⁹ *See, e.g.*, *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 944 (S.D. Cal. 2020) (noting where insured's policy contained a virus exclusion, the insured denied that its losses were caused by the virus, and the court cited a case relying on *MRI Healthcare* in granting motion to dismiss).

⁷⁰ The California Court of Appeal finally issued its first published opinion regarding business interruption claims by those affected by COVID-19 and closure orders in *Inns by the Sea v. California Mutual Ins. Co.* *See* 71 Cal. App. 5th 688 (2021). The court held that the insureds could not recover, noting that even if it were conceded that the COVID-19 virus were present at the property, once the property was cleaned, business would still remain closed due to state closure orders, meaning that it was not the physical presence of the virus, but state and local orders that caused the loss. *See id.* at 704. Prior to *Inns by the Sea*, insureds could also cite *Hughes v. Potomac Ins. Co. of D.C.*, where the court found that physical loss occurred where a landslide caused a house to lose support without causing physical damage to the structure. *See* 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962). *But see* *Sabella v. Wisler*, 377 P.2d 889, 897 (Cal. 1963) (disapproving *Hughes* on other grounds). The nature of the facts in *Hughes* may prompt some courts to deem it distinguishable. *See, e.g.*, *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.*, No. 20STCV16681, 2020 WL 7346569, at *5 (Cal. Super. Ct. L.A. Cnty. Nov. 9, 2020) (rejecting the plaintiff's reliance on *Hughes* and stating that *Hughes* involved tangible physical damage to property adjacent to the insured home).

Additionally, these cases are readily available for review on legal databases such as Westlaw and LexisNexis, a characteristic that is not always shared by California state superior court cases, or unpublished cases in other jurisdictions.

VI. WHAT CAN BE DONE

COVID-19 revealed a pitfall in California's prohibition on citing unpublished opinions. The sudden, widespread pandemic prompted extensive litigation and gave rise to numerous unpublished federal court opinions in favor of insurers that may be cited in California court. Meanwhile, unpublished superior court decisions, which are generally more favorable to insureds, were not cited. As a result of the COVID-19 business interruption, the pool of available law is rich with restrictive federal court opinions, and the mixed results of California state court opinions are sparse.

A. A Dramatic Solution: Permitting Citation to All Unpublished Opinions

One possible solution is to eliminate California's rule against citing unpublished state court opinions altogether. There are some advantages to this approach. Many unpublished opinions—particularly those issued by the California Court of Appeal—are readily available online through databases such as Westlaw and LexisNexis. Critics may argue against this approach for a few reasons. First, permitting citation of unpublished opinions would reduce efficient operations of courts and litigators during court proceedings. By expanding the pool of available law, both attorneys and courts would be inundated by more research to support arguments and opinions. Second, permitting citation to unpublished opinions could result in a decline in the quality of California's caselaw, as the reasoning of unpublished opinions may not be as thorough or attentive to potentially contradictory precedent as the reasoning in published cases. Third, if courts take measures to improve the analysis and reasoning behind unpublished cases, this could result in difficulty and inefficiency for the courts by causing them to invest more time in writing opinions.⁷¹

These concerns may be overstated, particularly in light of the possibility that unpublished cases be treated as persuasive, rather

⁷¹ See Payne, *supra* note 23, at 735 (recognizing the argument that judicial efficiency may be lost if judges are not permitted to use unpublished opinions).

than binding, authority.⁷² While California trial courts remain bound by published courts of appeal opinions, this need not be the case with unpublished courts of appeal opinions (as well as superior courts opinions). This may assuage concerns that blanket allowance of citations to unpublished opinions could result in cases that are not as well analyzed or reasoned being cited as binding precedent. The lower stakes of such opinions may also mitigate the impact on judicial efficiency by still permitting unpublished opinions, with the understanding that such cases would not have the precedential effect of published opinions.

B. A Less-Dramatic Solution: Applying California Rule 8.1115 as Written

If permitting citation of all unpublished opinions is too dramatic for California's Judicial Council, a simpler, less dramatic solution can still fix the specific problems that COVID-19 reveals with California's law. COVID-19 was a sudden, widespread crisis that gave rise to numerous lawsuits around the State (and country). As time went on, numerous unpublished trial-court-level rulings were released, but only those from federal courts could be cited in California. If courts were able to cite California superior court opinions, however, this would have revealed that the restrictive California federal cases were not the entire picture.

The easiest solution to this problem is for courts and litigators to treat Rule 8.1115(a) as it is written and limit its non-citation mandate to unpublished opinions released by the California courts of appeal or superior court appellate divisions.⁷³ The text of the rule does not prohibit the citation of California superior court opinions (other than those issued by appellate divisions of those courts).⁷⁴ But Rule 8.1115(a) is perceived as a general prohibition on the citation of all unpublished California state court opinions, as demonstrated in a recent Court of Appeal opinion citing Rule 8.1115(a) as prohibiting citations of general superior court opinions.⁷⁵

⁷² See Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 16 (2002) (noting that opposing no-citation rules does not necessitate the position that unpublished opinions be treated as "binding precedents," but only that they "be acknowledged and considered").

⁷³ See CAL. R. CT. 8.1115(a).

⁷⁴ See *id.*

⁷⁵ See *Aixtron, Inc. v. Veeco Instruments Inc.*, 265 Cal. Rptr. 3d 851, 881 (Cal. Ct. App. 2020) (citing California Rules of Court Rule 8.1115(a) in support of the conclusion that an unpublished, tentative decision from the superior court in Los Angeles County was not citable authority).

This Article's modest proposal is simply to do what the rule says: refrain from citing unpublished court of appeal or appellate division cases, but to the extent that a superior court ruling or opinion may be helpful, there is no bar against citing it as persuasive authority. In unexpected situations that give rise to widespread litigation (say, COVID-19, or the advent of a new, dangerous, or controversial technology), this reading of the rule will allow California superior courts to consider what other superior courts are doing, rather than resorting to reliance on federal court opinions alone.

Permitting the citation of unpublished California superior court opinions will give litigants the opportunity to keep courts apprised of trends in other trial courts. Where federal courts take a different (likely more restrictive) approach, allowing parties to cite state superior courts will balance out the skewed picture of the caselaw that courts would otherwise have. Additionally, this incremental change will allow courts and litigants to evaluate whether citing to unpublished caselaw is workable, which would provide some much-needed practical insight into the broader debate over citing unpublished opinions.

CONCLUSION

California Rule of Court 8.1115(a) prohibits citation of unpublished opinions issued by the California courts of appeal and the appellate divisions of superior courts. In certain circumstances, including those of the COVID-19 pandemic, this restriction results in an undue limitation on the precedent that courts can consider, and promotes an overreliance on federal district court rulings. This, in turn, may result in superior courts ignoring trends that exist in California state courts, and it may also result in the inappropriate importation of stricter procedural rules that operate in the background of federal court rulings.

Perhaps COVID-19 will prompt a rethinking of California's prohibition on citing unpublished opinions. Many of these opinions are readily available, and their consideration—particularly as persuasive, nonbinding authorities—may give litigants and courts a richer background of caselaw from which to draw.

If eliminating or revising the rule is too dramatic, courts should at least apply Rule 8.1115(a) as written: as applying only to opinions issued by the California courts of appeal and appellate divisions of superior courts. This leaves court with the option to cite and consider other superior court rulings and give courts and litigants a more complete picture of the state of California's law.

APPENDIX I: CALIFORNIA FEDERAL RULINGS REGARDING MOTIONS
TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT IN COVID-19
BUSINESS INTERRUPTION CASES

The cases below were identified using the University of Pennsylvania Carey Law School's COVID Litigation Tracker's data regarding rulings on motions to dismiss, motions for judgment on the pleadings, and motions for summary judgment.⁷⁶ The list of cases has been edited to remove redundant decisions (e.g., where a case was initially dismissed without prejudice, and was later dismissed with prejudice, only the dismissal with prejudice is included). The list has been further edited to remove cases that were mislabeled or incorrectly included in the Litigation Tracker list, and it also includes cases up until November 15, 2021, when California's first published appellate decision regarding COVID-19 business interruption claims was issued.⁷⁷ At that point, there was controlling, published state authority, thereby overriding any authoritative value of unpublished superior court cases.

Date	Case Citation	Outcome ⁷⁸
November 10, 2021	<i>Kuhen v. The Hartford Fin. Servs. Grp., Inc.</i> , No. 8:21-CV-00773-JLS-ADS, 2021 WL 5577012 (C.D. Cal. Nov. 10, 2021)	Court granted motion to dismiss with prejudice.
November 9, 2021	<i>Fed. Ins. Co. v. Simon Wiesenthal Ctr., Inc.</i> , No. 2:21-CV-04069-ODW (JEMx), 2021 WL 5370751 (C.D. Cal. Nov. 9, 2021)	Court granted motion to dismiss with prejudice.
October 27, 2021	<i>Create Advert. Grp., LLC v. Fed. Ins. Co.</i> , No. CV 21-5975 DSF (Ex), 2021 WL 5002416 (C.D. Cal. Oct. 27, 2021)	Court granted motion to dismiss without prejudice.
October 15, 2021	<i>Mostre Exhibits, LLC v. Sentinel Ins. Co., Ltd.</i> , No. 20-CV-1332-BAS-BLM, 2021 WL 4819411 (S.D. Cal. Oct. 15, 2021)	Court granted motion for judgment on the pleadings without prejudice.

⁷⁶ *Covid Coverage Litigation Tracker*, *supra* note 46.

⁷⁷ See *The Inns by the Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688 (Cal. Ct. App. 2021); see also Richman, *supra* note 48.

⁷⁸ Unless otherwise noted, the motion to dismiss or other motion described in the outcome was brought by the insurer.

Date	Case Citation	Outcome ⁷⁸
October 12, 2021	<i>HP Tower Invs., LLC v. Nationwide Mut. Ins. Co.</i> , No. SACV 21-01369-CJC(KESx), 2021 WL 4841054 (C.D. Cal. Oct. 12, 2021)	Court granted motion to dismiss with prejudice.
September 28, 2021	<i>Protégé Rest. Partners, LLC v. Sentinel Ins. Co., Ltd.</i> , No. 20-CV-03674-BLF, 2021 WL 4442652 (N.D. Cal. Sept. 28, 2021)	Court granted motion to dismiss with prejudice.
September 24, 2021	<i>Ragged Point Inn v. State Nat. Ins. Co.</i> , No. 2:21-CV-05386-RGK-JPR, 2021 WL 4391208 (C.D. Cal. Sept. 24, 2021)	Court granted motion to dismiss with prejudice.
September 9, 2021	<i>7020 Van Nuys Blvd. LLC v. Nationwide Mut. Ins. Co.</i> , No. CV 21-5657 DSF (ADSx), 2021 WL 4186688 (C.D. Cal. Sept. 9, 2021)	Court granted motion to dismiss with prejudice.
September 3, 2021	<i>Palomar Health v. Am. Guarantee & Liab. Ins. Co.</i> , No. 3:21-CV-00490-BEN-BGS, 2021 WL 4035005 (S.D. Cal. Sept. 3, 2021)	Court granted motion to dismiss with prejudice.
August 27, 2021	<i>Ets-Hokin v. Sentinel Ins. Co., Ltd.</i> , No. 20-CV-06518, 2021 WL 4472692 (N.D. Cal. Aug. 27, 2021)	Court granted motion to dismiss without prejudice.
August 21, 2021	<i>Menominee Indian Tribe of Wis. v. Lexington Ins. Co.</i> , No. 21-CV-00231-WHO, 2021 WL 3727070 (N.D. Cal. Aug. 23, 2021)	Court granted motion to dismiss with prejudice.
August 17, 2021	<i>Gadi v. Nationwide Mutual Ins. Co.</i> , No. 2:21-cv-04591-SVW (C.D. Cal. Aug. 17, 2021)	Court granted motion to dismiss with prejudice.
August 16, 2021	<i>Typewritorium Co. v. Travelers Prop. Cas. Co. of Am., Inc.</i> , No. 20-cv-04816 (N.D. Cal. Aug. 16, 2021)	Court granted motion to dismiss without prejudice.
August 11, 2021	<i>Los Angeles Lakers, Inc. v. Fed. Ins. Co.</i> , No. CV 21-02281 TJH (MRWx), WL 4488591 (C.D. Cal. Aug. 11, 2021)	Court granted motion to dismiss without prejudice.
July 20, 2021	<i>Shouhouse Apparel, Inc. v. Travelers Indem. Co. of Conn.</i> , No. CV 20-11439 FMO (GJSx) (C.D. Cal. July 20, 2021)	Court granted motion to dismiss with prejudice.

Date	Case Citation	Outcome⁷⁸
July 13, 2021	<i>CTT Comedy v. Nautilus Ins. Co.</i> , No. 21-cv-03064, 2021 WL 3123898 (N.D. Cal. July 13, 2021)	Court granted motion to dismiss with prejudice.
July 7, 2021	<i>In-N-Out Burgers v. Zurich Am. Ins. Co.</i> , No. 8:20-cv-01000-JLS-ADS, (C.D. Cal. July 7, 2021)	Court granted motion to dismiss without prejudice.
July 2, 2021	<i>MGA Ent., Inc. v. Affiliated FM Ins. Co.</i> , No. CV 20-10499-MWF (JPRx), 2021 WL 2840456 (C.D. Cal. July 2, 2021)	Court granted motion to dismiss with prejudice.
June 30, 2021	<i>Park 101 LLC v. Liberty Mut. Grp., Inc.</i> , No. 3:20-cv-00972-AJB-BLM (S.D. Cal. June 30, 2021)	Court granted motion to dismiss with prejudice.
June 25, 2021	<i>Madera Group, LLC v. Mitsui Sumitomo Ins. USA, Inc.</i> , No. LA CV20-07132-JAK (AFMx), 2021 WL 2658498 (C.D. Cal. June 25, 2021)	Court granted motion to dismiss without prejudice.
June 21, 2021	<i>Another Planet Ent., LLC v. Vigilant Ins. Co.</i> , No. 20-cv-07476-VC, 2021 WL 774141 (N.D. Cal. Feb. 25, 2021)	Court granted motion to dismiss with prejudice.
May 21, 2021	<i>644 Broadway LLC v. Falls Lake Fire & Cas. Co.</i> , No. 20-cv-08421, 2021 WL 3008309 (N.D. Cal. May 21, 2021)	Court granted motion to dismiss without prejudice.
May 20, 2021	<i>Hair Perfect Int'l, Inc. v. Sentinel Ins. Co., Ltd.</i> , No. LA CV20-03729 JAK (KSx), 2021 WL 2143459 (C.D. Cal. May 20, 2021)	Court granted motion to dismiss with prejudice.
May 20, 2021	<i>Flower Sisters LLC v. Great Am. Ins. Co.</i> , No. ED CV 20-01294-DMG (SPx) (C.D. Cal. May 20, 2021)	Court granted motion to dismiss with prejudice.
May 19, 2021	<i>G & P Hosp., LLC v. Travelers Cas. Ins. Co. Am., Inc.</i> , No. CV 20-05148-DMG (ASx) (C.D. Cal. May 19, 2021)	Court granted motion to dismiss with prejudice.
May 18, 2021	<i>Garces v. Sentinel Ins. Co., Ltd.</i> , No. 5:21-cv-00189-JWH-SPx, 2021 WL 2010357 (C.D. Cal. May 18, 2021)	Court granted motion to dismiss with prejudice.

Date	Case Citation	Outcome ⁷⁸
April 27, 2021	<i>French Laundry Partners, LP v. Hartford Fire Ins. Co.</i> , No. 20-cv-04540-JSC, 2021 WL 1640994 (N.D. Cal. Apr. 27, 2021)	Court granted motion to dismiss with prejudice.
April 27, 2021	<i>Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos</i> , No. CV 20-3619 PSG (Ex), 2021 WL 1659844 (C.D. Cal. Apr. 27, 2021)	Court granted insurance company's motion for summary judgment in declaratory relief action brought by insurance company.
April 16, 2021	<i>Varel Inc. v. Hiscox Ins. Co., Inc.</i> , No. CV 20-9530-DMG (JPRX), 2021 WL 4472838 (C.D. Cal. Apr. 16, 2021)	Court granted motion for judgment on the pleadings with prejudice.
April 15, 2021	<i>Los Angeles Cnty. Museum of Nat. Hist. Found. v. Travelers Indem. Co. of Conn.</i> , No. 2:21-cv-01497-SVW-JPR, 2021 WL 1851028 (C.D. Cal. Apr. 15, 2021)	Court granted motion to dismiss with prejudice.
April 9, 2021	<i>Caribe Rest. & Nightclub v. Topa Ins. Co.</i> , No. 2:20-cv-06570-ODW (MRWX), 2021 WL 1338439 (C.D. Cal. Apr. 9, 2021)	Court granted motion to dismiss with prejudice.
April 2, 2021	<i>Islands Rests., LP v. Affiliated FM Ins. Co.</i> , No. 3:20-cv-02013-H-JLB, 2021 WL 1238872 (S.D. Cal. Apr. 2, 2021)	Court granted motion for judgment on the pleadings with prejudice.
April 1, 2021	<i>Motiv Grp., Inc. v. Cont'l Cas. Co.</i> , No. 2:20-cv-09368-ODW (Ex), 2021 WL 1240779 (C.D. Cal. Apr. 1, 2021)	Court granted motion to dismiss with prejudice.
March 31, 2021	<i>Barbizon School of San Francisco, Inc. v. Sentinel Ins. Co., Ltd.</i> , No. 20-cv-08578-TSH, 2021 WL 1222161 (N.D. Cal. Mar. 31, 2021)	Court granted motion for judgment on the pleadings with prejudice.
March 26, 2021	<i>Sky Flowers Inc. v. Hiscox Ins. Co. Inc.</i> , No. 2:20-cv-05411-ODW (MAAx), 2021 WL 1164473 (C.D. Cal. Mar. 26, 2021)	Court granted motion to dismiss with prejudice.
March 25, 2021	<i>Baker v. Oregon Mut. Ins. Company</i> , No. 3:20-cv-05467-LB, 2021 WL 1145882 (N.D. Cal. Mar. 25, 2021)	Court granted motion to dismiss with prejudice.

Date	Case Citation	Outcome⁷⁸
March 19, 2021	<i>Out West Rest. Grp/ v. Affiliated FM Ins. Co.</i> , No. 3:20-cv-06786-TSH, 2021 WL 1056627 (N.D. Cal. Mar. 19, 2021)	Court granted motion for judgment on the pleadings with prejudice.
March 19, 2021	<i>Westside Head & Neck v. Hartford Fin. Serv. Grp. Inc.</i> , No. 2:20-cv-06132-JFW (JCx), 2021 WL 1060230 (C.D. Cal. Mar. 19, 2021)	Court granted motion for judgment on the pleadings with prejudice.
March 18, 2021	<i>Monarch Ballroom, LLC v. Farmers Ins. Co., Inc.</i> , No. 2:20-cv-05493-ODW-KK (C.D. Cal. Mar. 18, 2021)	Court granted motion to dismiss with prejudice.
March 17, 2021	<i>Daneli Shoe Co. v. Valley Forge Ins. Co.</i> , No. 3:20-cv-01195-TWR (WVG), 2021 WL 1112710 (S.D. Cal. Mar. 17, 2021)	Court granted motion to dismiss without prejudice.
March 4, 2021	<i>Kingray Inc. v. Farmers Grp. Inc.</i> , No. EDCV 20-963 JGB (SPx), 2021 WL 837622 (C.D. Cal. Mar. 4, 2021)	Court granted motion to dismiss with respect to one plaintiff due to virus exclusion; Court denied motion to dismiss with respect to plaintiff who did not have a virus exclusion, finding that there could be covered physical loss or damage due to COVID-19.
February 26, 2021	<i>Sunstone Hotel Investors, Inc. v. Endurance Am. Specialty Ins. Co.</i> , No. 8:20-cv-02185-CJC (KESx), 2021 WL 1152805 (C.D. Cal. Feb. 26, 2021)	Court denied motion to dismiss, finding that insurance policy provided coverage for cleanup costs resulting from biological agent conditions, and hotel's allegation that superspreader event occurred at hotel implicated this coverage provision. ⁷⁹

⁷⁹ The court later denied the insurance company's motion to dismiss. See *Sunstone Hotel Invs., Inc. v. Endurance Am. Specialty Ins. Co.*, 522 F.Supp.3d 690, 695 (C.D. Cal. 2021).

Date	Case Citation	Outcome ⁷⁸
February 12, 2021	<i>Founder Inst. Inc. v. Hartford Fire Ins. Co.</i> , No. 20-cv-04466-VC, 2021 WL 869637 (N.D. Cal. Feb. 12, 2021)	Court granted motion to dismiss with prejudice.
February 11, 2021	<i>Fink v. Hanover Ins. Grp., Inc.</i> , No. 4:20-cv-03907-JST, 2021 WL 647374 (N.D. Cal. Feb. 11, 2021).	Court granted motion to dismiss with prejudice.
February 8, 2021	<i>Selane Prods., Inc. v. Cont'l Cas. Co.</i> , No. 2:20-cv-07834-MCS-AFM, 2021 WL 609257 (C.D. Cal. Feb. 8, 2021)	Court granted motion to dismiss with prejudice.
February 8, 2021	<i>Protégé Rest. Partners LLC v. Sentinel Ins. Co., Ltd.</i> , No. 20-cv-03674-BLF, 2021 WL 428653 (N.D. Cal. Feb. 8, 2021)	Court granted motion to dismiss without prejudice.
February 1, 2021	<i>Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.</i> , No. 3:20-cv-03750-WHO, 2021 WL 775397 (N.D. Cal. Feb. 1, 2021)	Court granted motion to dismiss with prejudice.
February 1, 2021	<i>Thomas Phan v. Nationwide General Ins. Co.</i> , No. CV 20-7616-MWF (JPRx), 2021 WL 609845 (C.D. Cal. Feb. 1, 2021)	Court granted motion to dismiss with prejudice.
February 1, 2021	<i>Gym Mgmt. Serv. Inc. v. Vantapro Specialty Ins. Co.</i> , No. CV 20-9541-GW-KSx, 2021 WL 647528 (C.D. Cal. Feb. 1, 2021)	Court granted motion for judgment on the pleadings with prejudice.
January 26, 2021	<i>Colgan v. Sentinel Ins. Co., Ltd.</i> , No. 20-cv-04780-HSG, 2021 WL 472964 (N.D. Cal. Jan. 26, 2021)	Court granted motion for judgment on the pleadings without prejudice.
January 22, 2021	<i>Unmasked Mgmt., Inc. v. Century-National Ins. Co.</i> , No. 3:20-cv-01129-H-MDD, 2021 WL 242979 (S.D. Cal. Jan. 22, 2021)	Court granted motion to dismiss with prejudice.
January 20, 2021	<i>Pez Seafood DTLA, LLC v. Travelers Indem. Co.</i> , CV 20-4699-DMG (GJSx), 2021 WL 234355 (C.D. Cal. Jan. 20, 2021)	Court granted motion to dismiss with prejudice.
January 12, 2021	<i>O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.</i> , No. 20-cv-02951-MMC, 2021 WL 105772 (N.D. Cal. Jan. 12, 2021)	Court granted motion to dismiss with prejudice.

Date	Case Citation	Outcome ⁷⁸
January 12, 2021	<i>BA LAX, LLC v. Hartford Fire Ins. Co.</i> , No. 2:20-cv-06344-SVW-JPR, 2021 WL 144248 (C.D. Cal. Jan. 12, 2021)	Court granted insurer's motion for summary judgment.
January 7, 2021	<i>Rialto Pockets, Inc. v. Certain Underwriters at Lloyds London Including Beazley Furlonge, Ltd.</i> , No. CV 20-07709-DSF (JPRx), 2021 WL 267850 (C.D. Cal. Jan. 7, 2021)	Court granted motion to dismiss with prejudice.
January 4, 2021	<i>Palmdale Ests., Inc. v. Blackboard Ins. Co.</i> , No. 20-cv-06158-LB, 2021 WL 25048 (N.D. Cal. Jan. 4, 2021)	Court granted motion to dismiss without prejudice.
December 30, 2020	<i>Jonathan Oheb MD, Inc. v. Travelers Cas. Ins. Co. of Am.</i> , No. 2:20-cv-08478-JWH-RAOx, 2020 WL 7769880 (C.D. Cal. Dec. 30, 2020)	Court granted motion to dismiss with prejudice.
December 29, 2020	<i>Tralom, Inc. v. Beazley USA Servs., Inc.</i> , No. CV 20-8344-JFW(RAOx), 2020 WL 8269539 (C.D. Cal. Dec. 29, 2020)	Court granted motion to dismiss with prejudice.
December 28, 2020	<i>Karen Trinh, DDS v. State Farm Gen. Ins. Co.</i> , No. 5:20-cv-04265-BLF, 2020 WL 7696080 (N.D. Cal. Dec. 28, 2020)	Court granted motion to dismiss without prejudice.
December 21, 2020	<i>Posh Cafe Inc. v. Amguard Ins. Co.</i> , No. CV 20-8037 FMO (PVCx), 2020 WL 8184062 (C.D. Cal. Dec. 21, 2020)	Court granted motion to dismiss without prejudice.
December 21, 2020	<i>Baldwin Acad., Inc. v. Markel Ins. Co.</i> , No. 3:20-cv-02004-H-AGS, 2020 WL 7488945 (S.D. Cal. Dec. 21, 2020)	Court denied motion to dismiss, finding that policy provided specific coverage for an "outbreak" of a communicable disease, and plaintiff's allegation that there had been an outbreak at the school after a student's parent and grandparent tested positive, and the parent had repeatedly visited the campus sufficiently pled claim for coverage under the policy.

Date	Case Citation	Outcome⁷⁸
December 21, 2021	<i>Mortar & Pestle Corp. v. Atain Specialty Ins. Co.</i> , No. 20-cv-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020)	Court granted motion to dismiss with prejudice.
December 14, 2021	<i>Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.</i> , 488 F.Supp.3d 904 (N.D. Cal. 2020)	Court granted motion to dismiss with prejudice.
December 10, 2020	<i>HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.</i> , No. 20-cv-04340-HSG, 2020 WL 7260055 (N.D. Cal. Dec. 10, 2020)	Court granted motion to dismiss without prejudice.
December 9, 2020	<i>Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.</i> , No. 20-cv-05441-CRB, 2020 WL 7247207 (N.D. Cal. Dec. 9, 2020)	Court granted motion for judgment on the pleadings with prejudice.
December 3, 2020	<i>Geragos & Geragos Engine Co. No. 28, LLC v. Hartford Fire Ins. Co.</i> , No. CV 20-4647-GW-MAAx, 2020 WL 7350413 (C.D. Cal. Dec. 3, 2020)	Court granted motion for judgment on the pleadings with prejudice.
November 13, 2020	<i>10E, LLC v. Travelers Indem. Co. of Conn.</i> , No. 2:20-cv-04418-SVW-AS, 2020 WL 6749361 (C.D. Cal. Nov. 13, 2020)	Court granted motion to dismiss with prejudice.
November 12, 2020	<i>Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.</i> , No. SACV 20-01713-CJC(JDEx), 2020 WL 6865774 (C.D. Cal. Nov. 12, 2020)	Court granted motion to dismiss with prejudice.
October 27, 2020	<i>West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.</i> , No. 2:20-cv-05663-VAP-DFMx, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020)	Court granted motion to dismiss with prejudice.
October 27, 2020	<i>Boxed Foods Co., LLC v. Cal. Cap. Ins. Co.</i> , No. 20-cv-04571-CRB, 2020 WL 6271021 (S.D. Cal. Oct. 26, 2020)	Court granted motion to dismiss with prejudice.
October 19, 2020	<i>Travelers Cas. Ins.e Co. of Am. v. Geragos & Geragos</i> , No. CV 20-3619 PSG (Ex), 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020)	Court granted motion to dismiss with prejudice.

Date	Case Citation	Outcome⁷⁸
October 2, 2020	<i>Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.</i> , 492 F. Supp. 3d 1051 (C.D. Cal. 2020)	Court granted motion to dismiss with prejudice.
October 1, 2020	<i>Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.</i> , 487 F.Supp.3d 937 (S.D. Cal. 2020)	Court granted motion to dismiss with prejudice.
September 10, 2020	<i>Plan Check Downtown III, LLC v. Amguard Ins. Co.</i> , 485 F.Supp.3d 1225, 1226 (C.D. Cal. 2020)	In a tentative ruling, Court granted motion to dismiss with prejudice. Case was taken under advisement following hearing, after which the parties entered stipulation of dismissal.
September 14, 2020	<i>Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.</i> , 487 F. Supp. 3d 834 (N.D. Cal. 2020)	Court granted motion to dismiss with prejudice.

APPENDIX II: CALIFORNIA SUPERIOR COURT RULINGS REGARDING
DEMURRERS, MOTIONS FOR JUDGMENT ON THE PLEADINGS, AND
MOTIONS FOR SUMMARY JUDGMENT IN COVID-19 BUSINESS
INTERRUPTION CASES

As with Appendix I, the information in Appendix II is based on the University of Pennsylvania Carey Law School's COVID Litigation Tracker.⁸⁰ This appendix also tracks cases up until November 21, 2021.

Date	Case Citation	Outcome
November 8, 2021	<i>AmeriMont Acad., Inc. v. Century-National Ins. Co.</i> , No. 30-2020-01158229-CU-BC-CJC (Cal. Super. Ct. Orange Cnty. Nov. 8, 2021)	Court sustained demurrer with prejudice.
November 1, 2021	<i>Best Rest Motel Inc. v. Sequoia Ins. Co.</i> , 37-2020-00015679-CU-IC-CTL (Cal. Super. Ct. San Diego Cnty. Nov. 1, 2021)	Court granted motion for summary judgment.
October 5, 2021	<i>Marina Pac. Hotel Suites LLC v. Fireman's Fund Ins. Co.</i> , No. 20SMCV00952 (Cal. Super. Ct. L.A. Cnty. Oct. 5, 2021)	Court sustained demurrer with prejudice.
October 1, 2021	<i>Anchors and Whales LLC v. Crusader Ins. Co.</i> , No. CGC-21-590559 (Cal. Super. Ct. S.F. Cnty. Oct. 1, 2021)	Court granted motion for judgment on the pleadings with prejudice.
September 28, 2021	<i>Chaos Enter., Inc. v. Hartford Fire Ins. Co.</i> , No. 20STCV33507 (Cal. Super. Ct. L.A. Cnty. Sept. 28, 2021)	Court sustained demurrer without prejudice.
September 23, 2021	<i>Hotel Adventures LLC v. Fireman's Fund Ins. Co.</i> , No. 30-2021-01188889-CU-CO-WJC (Cal. Super. Ct. Orange Cnty. Sept. 23, 2021)	Court overruled insurer's demurrer.

⁸⁰ *Covid Coverage Litigation Tracker*, *supra* note 46.

Date	Case Citation	Outcome
September 10, 2021	<i>Pac. Lodging Grp. LP v. Sequoia Ins. Co.</i> , No. 21CV376099, 2021 WL 4932693 (Cal. Super. Ct. Santa Clara Cnty. Sept. 10, 2021)	Court sustained demurrer without prejudice.
July 28, 2021	<i>Child & Marton LLP v. Sentinel Ins. Co., Ltd.</i> , No. 20STCV33799, 2021 WL 3834759 (Cal. Super. Ct. L.A. Cnty. May 12, 2021)	Court sustained demurrer with prejudice.
July 23, 2021	<i>Ross Stores, Inc. v. Zurich Am. Ins. Co.</i> , No. RG20-084158, 2021 WL 3700659 (Cal. Super. Ct. Alameda Cnty. July 13, 2021)	Court sustained two insurers' demurrers with leave to amend, with prejudice, and overruled another insurer's demurrer regarding various policy provisions.
July 1, 2021	<i>Metro Fitness, Inc. v. Vantapro Specialty Ins. Co.</i> , No. 20STCV27654, 2021 WL 3834764 (Cal. Super. Ct. L.A. Cnty. July 1, 2021)	Court granted motion for judgment on the pleadings with prejudice.
June 16, 2021	<i>Apple Annie LLC v. Or. Mut. Ins. Co.</i> , No. CGC-20-585712 (Cal. Super. Ct. S.F. Cnty. June 16, 2021)	Court granted motion for judgment on the pleadings with prejudice.
June 10, 2021	<i>2420 Honolulu Ave., LLC v. Travelers Indem. Co. of Conn.</i> , No. 20STCV14000, 2021 WL 34114038 (Cal. Super. Ct. L.A. Cnty. June 10, 2021)	Court granted motion for judgment on the pleadings with prejudice.
June 1, 2021	<i>George Gordon Enters., Inc. v. AGCS Marine Ins. Co.</i> , No. 21STCV02950, 2021 WL 3834768 (Cal. Super. Ct. L.A. Cnty., June 1, 2021)	Court overruled insurer's demurrer to cause of action for negligence. As noted below, a separate insurer defendant successfully demurred to plaintiff's breach of contract and bad faith claims several weeks before.
March 18, 2021	<i>Boardwalk Ventures CA, LLC v. Century-National Ins. Co.</i> , No. 20STCV27359, 2021 WL 1215892 (Cal. Super. Ct. L.A. Cnty. Mar. 18, 2021)	Court overruled insurer's demurrer.

Date	Case Citation	Outcome
March 10, 2021	<i>Tarrar Enterps., Inc. v. Assoc. Indem. Corp.</i> , No. MSC20-01776 (Cal. Super. Ct. Contra Costa Cnty. Mar. 10, 2021)	Court sustained demurrer with prejudice.
Feb 19, 2021	<i>Shusha Inc. v. Century-National Ins. Co.</i> , No. 20STCV25769, 2021 WL 3834761 (Cal. Super. Ct. L.A. Cnty. Feb. 19, 2021)	Court sustained demurrer with prejudice.
February 8, 2021	<i>Saddle Ranch Sunset, LLC v. Fireman's Fund Ins. Co.</i> , No. 20STCV36531 (Cal. Super. Ct. L.A. Cnty. Feb. 8, 2021)	Court sustained demurrer with prejudice.
February 4, 2021	<i>P.F. Chang's China Bistro, Inc. & PFC Assocs. LLC v. Certain Underwriters at Lloyd's</i> , No. 20STCV17169, 2021 WL 818659 (Cal. Super. Ct. L.A. Cnty. Feb. 4, 2021)	Court overruled insurer's demurrer.
January 28, 2021	<i>Goodwill Indus. of Orange Cnty, Cal. v. Philadelphia Indem. Co.</i> , No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268 (Cal. Super. Ct. Orange Cnty. Jan. 28, 2021)	Court overruled insurer's demurrer.
December 23, 2020	<i>VStyles, Inc. v. Cont'l Cas. Co.</i> , No. RIC2003415, 2020 WL 10895579 (Cal. Super. Ct. Riverside Cnty. Dec. 23, 2021)	Court sustained insurer's demurrer without prejudice.
November 9, 2020	<i>Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.</i> , No. 20STCV16681, 2020 WL 2388958 (Cal. Super. Ct. L.A. Cnty. Nov. 9, 2020)	Court sustained insurer's demurrer with prejudice.
September 20, 2020	<i>Best Rest Motel Inc. v. Sequoia Ins. Co.</i> , No. 37-2020-00015679-CU-IC-CTL, 2020 WL 7229856 (Cal. Super. Ct. San Diego Cnty. Sept. 20, 2020)	Court overruled insurer's demurrer.
August 6, 2020	<i>Inns by the Sea v. Cal. Mut. Ins. Co.</i> , No. 20CV001274, 2020 WL 5868739 (Cal. Super. Ct. Monterey Cnty. Aug. 6, 2020)	Court sustained insurer's demurrer with prejudice.

Exacting Inclusion: Property Theory, the Character of Government Action, and Implicit Takings

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Recent takings cases challenging inclusionary housing ordinances tap into an ongoing controversy about whether government interventions in the housing market do more harm than good; but they also raise much more general questions about takings law. This Article uses the controversy raised by recent housing cases to probe the relationship between the Supreme Court's regulatory takings jurisprudence and its exaction takings jurisprudence and to suggest a more coherent approach to implicit takings. The Court's exaction takings jurisprudence is well-designed if it is applied appropriately. As a general matter, it encourages the mitigation of socially harmful nuisances, incentivizes developers to make socially desirable decisions about how to develop their properties, and protects private property from overreaching administrators who might abuse their discretion to usurp surpluses from the owners' development projects. This Article offers guidelines for determining when the Court's exaction takings jurisprudence should apply. It also proposes that, in some circumstances, a property owner should be able to make an exaction takings claim and a regulatory takings claim. Finally, it offers a roadmap for analyzing implicit takings claims more coherently. Under that roadmap, whether inclusionary housing programs should be subjected to the nexus and rough proportionality tests depends upon how they are designed.

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INTRODUCTION

Recent cases challenging inclusionary housing laws have raised important questions about takings law that have divided courts and remain unanswered.¹ The inclusionary housing laws that have been challenged require property developers to include a minimum percentage of affordable (i.e., below-market price) housing in their housing developments or pay fees toward financing affordable housing developments elsewhere.² The plaintiffs in these cases have claimed that the requirements are exactions and that they amount to takings under the Supreme Court’s exaction takings jurisprudence.³ The Court’s exaction takings jurisprudence rests on the unconstitutional conditions doctrine, which holds that the government may not condition the receipt of a government benefit on an agreement to sacrifice a constitutional right.⁴ If an exaction goes “too far,” it is a taking, and just compensation is required.⁵

The claims against the inclusionary housing laws have depended on characterizing the affordable housing requirements as exactions subject to the nexus and rough proportionality tests of the *Nollan* and *Dolan* cases. In *Nollan v. California Coastal Commission*, the Supreme Court held that there must be some logical connection between an exaction and the purpose of the regulation under which the permit is required for the exaction to be constitutional.⁶ In *Dolan v. City of Tigard*, the Court held that an exaction must also be no more than roughly proportional to the adverse impact of the proposed development.⁷ The plaintiffs in these inclusionary housing cases have argued that the purpose of the laws is to increase the supply of affordable housing so that members of all socio-economic groups, races, and ethnicities may obtain housing within a given community.⁸ A new residential

¹ See Cal. Bldg. Indus. Ass’n v. City of San Jose, 351 P.3d 974, 977–78 (Cal. 2015); Cherk v. County of Marin, No. A153579, 2018 WL 6583442, at *4–5 (Cal. Ct. App. Dec. 14, 2018).

² See 351 P.3d at 977–78; 2018 WL 6583442, at *1–2.

³ See, e.g., Reply Brief, Cherk v. County of Marin, No. A153579, 2018 WL 6583442 (Cal. Ct. App. Dec. 14, 2018) (No. A153579), 2018 WL 3207522, at *18–19.

⁴ As Justice Alito explained in *Koontz*:

[T]he unconstitutional conditions doctrine . . . vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up. . . . By conditioning a building permit on the owner’s deeding over a public right-of-way . . . the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. . . . Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation.

Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604–05 (2013).

⁵ See *id.*

⁶ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836–37 (1987).

⁷ *Dolan v. City of Tigard*, 512 U.S. 374, 390–91 (1994).

⁸ See, e.g., Reply Brief, *supra* note 3, at *12.

housing development, however, does not necessarily reduce the supply of affordable housing.⁹ In fact, if anything, it likely helps to make housing in general more affordable. The requirements thus bear no logical connection to the purpose of the law under which the permit is required and cannot be roughly proportional to any adverse impact of the development. Accordingly, they amount to takings.¹⁰

The plaintiffs' argument falls apart, however, if the affordable housing requirements are not exactions subject to the nexus and rough proportionality tests. If that is the case, the multi-factor inquiry from *Penn Central Transportation Company v. City of New York*¹¹ applies to the takings claim, and as long as the affordable housing requirements do not have an unduly heavy economic impact on the owners, or significantly frustrate their investment-backed expectations, the claims are likely to fail.¹²

State courts have been divided on whether permit requirements established under legislation are subject to the nexus and rough proportionality tests,¹³ but most of them have declined to treat them as such.¹⁴ They have therefore typically applied the *Penn Central* multi-factor inquiry to takings claims against legislatively imposed conditions, rather than the *Nollan/Dolan* rough proportionality tests, and the claims have been rejected.¹⁵ To this date, the Supreme Court has denied certiorari on all appeals.

Although he has concurred in the denial of certiorari in some of the inclusionary housing cases, Justice Thomas has touched a nerve by writing a concurring opinion that raises questions about whether the nexus and rough proportionality tests should apply only in cases when the requirements are imposed

⁹ See *id.* at *20.

¹⁰ See *id.* at *19–20.

¹¹ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25, 128 (1978).

¹² Takings claims under the *Penn Central* standard are unlikely to succeed, except in rare cases where regulatory standards are applied retroactively or target some individuals unfairly to carry a disproportionate share of the burden of a government policy. Timothy M. Mulvaney, *The State of Exactions*, 61 WM. & MARY L. REV. 169, 218–19 (2019).

¹³ See *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring) (“For at least two decades . . . lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one.”).

¹⁴ Eight out of the ten courts that have been asked to address the question of whether to treat legislatively imposed conditions as exactions have declined to do so. Mulvaney, *supra* note 12, at 196.

¹⁵ See, e.g., *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 991–95, 1000 (Cal. 2015); *Cherk v. County of Marin*, No. A153579, 2018 WL 6583442, at *9 (Cal. Ct. App. Dec. 14, 2018).

administratively or whether they should also apply when the requirements are imposed legislatively.¹⁶ His concerns were motivated by a doubt that “the existence of a taking should turn on the type of governmental entity responsible for the taking.”¹⁷ In fact, Justice Thomas’ opinion reiterated concerns he and Justice O’Connor had expressed in a dissenting opinion to a denial of certiorari in a similar case twenty years earlier.¹⁸ By reiterating the concerns in the inclusionary housing case, Justice Thomas’ opinion has drawn attention to some of the inconsistencies in the Court’s implicit takings jurisprudence.¹⁹

The concerns are well-motivated. The inclusionary housing cases are important in their own right, but they also raise more general questions about the Supreme Court’s implicit takings jurisprudence. For example, why should an inclusionary housing requirement be subject to the multi-factor inquiry and not the nexus and rough proportionality tests? More generally, when should the nexus and rough proportionality tests apply? Why should an exaction that meets the nexus and rough proportionality tests allow the government to coerce from a developer an easement when a law subject to the *Penn Central* multi-factor inquiry would ostensibly deem that a taking? Why do the nexus and rough proportionality tests apply a higher standard of scrutiny than the multi-factor inquiry? Should the nexus and rough proportionality tests and the multi-factor inquiry ever both be applied? Ultimately, most of these questions are about the relationship between the Supreme Court’s regulatory takings jurisprudence and its exaction takings jurisprudence. They are both subcategories of the Court’s implicit takings jurisprudence, but the Court has neither addressed how they relate nor resolved the apparent inconsistencies.²⁰

¹⁶ *Cal. Bldg. Indus. Ass’n.*, 577 U.S. at 1179 (Thomas, J., concurring).

¹⁷ *Id.*

¹⁸ *See* *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting).

¹⁹ For a discussion on the term “implicit takings,” see James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 40–41 (2016). “Implicit takings” is a relatively new term, so many judges, attorneys, and legal scholars likely will be using the term “regulatory takings.” The term is used here to emphasize the difference between “regulatory” takings in a narrower sense and “exaction” takings.

²⁰ *Id.*; see, e.g., ROBERT MELTZ, CONG. RSCH. SERV., 97-122, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 3 (indicating that there are four categories of takings – total regulatory takings, partial regulatory takings, physical takings, and exaction takings); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) (referring to a “physical” taking, a *Lucas*-type ‘total regulatory taking,’ a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*”).

Other scholars, of course, have addressed similar questions, and some of them have been motivated by inclusionary housing cases.²¹ Many scholars have viewed the Supreme Court's exaction takings jurisprudence as a form of heightened judicial review.²² Some, especially among those who take a progressive perspective, have expressed concerns that by expanding protections for private property, the heightened review might impede governments' capabilities to advance important social agendas.²³ Most of the commentary seems to presume that the nexus and rough proportionality tests are an alternative to the *Penn Central* multi-factor inquiry.²⁴ There is nothing inherent in the Supreme Court's opinions, however, that requires that to be the case. A more coherent theory of implicit takings would incorporate the nexus and rough proportionality tests with the multi-factor inquiry into a unitary strand of jurisprudence.

This Article draws on basic property theory to outline a more coherent theory of implicit takings. It offers a test to identify when the nexus and rough proportionality tests should apply, and it proposes where the Supreme Court's exaction takings jurisprudence should fit within the Court's implicit takings jurisprudence. It illustrates how the Court's exaction takings jurisprudence encourages the mitigation of socially harmful nuisances, incentivizes developers to make socially constructive decisions

²¹ See, e.g., Mulvaney, *supra* note 12, at 218–19; see also Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 263–67 (2019); Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 TOURO L. REV. 265, 292 (2014); Tim Iglesias, *Inclusionary Zoning Affirmed: California Building Industry Association v. City of San Jose*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 409, 413 (2016).

²² Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 622 (2004); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607–08 (1988); Charles M. Haar & Michael Allan Wolf, *Commentary, Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2184–87 (2002).

²³ See Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENV'T L. REV. 137, 142 (2016); Weiss, *supra* note 21, at 275–76; Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 299–300; Michael Allan Wolf, *The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects*, 40 FORDHAM URB. L.J. 1835, 1841–42 (2013).

²⁴ See, e.g., Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403, 404 (2014) (describing exaction takings jurisprudence as a “curious carve-out from the *Penn Central* test”). Not surprisingly, this has caused those who advocate for strengthening property rights to argue for expanding the exaction takings jurisprudence at the expense of traditional regulatory takings jurisprudence and those who advocate for expanding government regulatory powers to argue for limiting the exaction takings jurisprudence. As Fenster observes, “those sympathetic with government defendants or critical of the Court's occasional efforts to expand federal constitutional property rights disdain it, while those committed to robust constitutional property rights have embraced it.” *Id.* at 403–04.

about how to develop their properties, and protects private property from overreaching administrators who might abuse their discretion to usurp surplus from the owners' development projects. It also uses the controversy about inclusionary housing laws to provide examples illustrating how the theory of implicit takings should be applied more generally. Finally, it proposes a roadmap for how to analyze implicit takings claims.

The following Part of this Article provides an overview of inclusionary housing laws and the takings cases that have arisen under them. Part II uses basic property theory to offer some insights into implicit takings and to propose a more coherent approach to implicit takings jurisprudence. The final Part concludes.

I. OVERVIEW OF INCLUSIONARY HOUSING LAWS

A. Background

Inclusionary housing laws were first enacted in the 1970s in major metropolitan areas in California, New York, and Washington, D.C.²⁵ They have proliferated across a wide range of communities, and more than 500 local jurisdictions in at least twenty-seven states now have inclusionary housing laws of some kind.²⁶ The laws vary, but they are intended to increase the supply of affordable housing in the local market, and affordable housing is usually meant to be housing that is priced below the prevailing market value.²⁷ Some local governments have enacted laws that attempt to incentivize developers to supply housing at prices below market levels, but voluntary programs have not generally been effective.²⁸ Thus, most inclusionary housing programs require developers to include a minimum percentage of affordable housing units within their developments²⁹ or, in the alternative, to pay fees to help finance the development of affordable housing elsewhere.³⁰

²⁵ Benjamin Powell & Edward Stringham, "The Economics of Inclusionary Zoning Reclaimed": *How Effective are Price Controls?*, 33 FLA. STATE U. L. REV. 471, 475 (2005).

²⁶ Lisa A. Sturtevant, *Separating Fact from Fiction to Design Effective Inclusionary Housing Programs*, CTR. FOR HOUS. POLY 1–2 (May 2016), <http://ihiusa.org/wp-content/uploads/Seperating-Fact-from-Fiction.pdf> [<http://perma.cc/2H46-ZUV4>]. However, the number may be even higher. Emily Hamilton, *Inclusionary Zoning Hurts More Than It Helps*, MERCATUS CTR., <http://www.mercatus.org/publications/urban-economics/inclusionary-zoning-hurts-more-it-helps> [<http://perma.cc/XGH6-TZTE>] (Feb. 8, 2021) (citing evidence that 886 jurisdictions in the United States have adopted inclusionary zoning laws of some kind).

²⁷ Sturtevant, *supra* note 26, at 2.

²⁸ Powell & Stringham, *supra* note 25, at 475.

²⁹ The requirement typically applies to both new for sale housing and new rental housing. *Id.* at 474–75.

³⁰ *Id.* at 475.

Inclusionary housing programs are typically targeted to provide housing that is affordable for families with incomes that are below some percentage of the median family income for the area.³¹ This means that some families with incomes that are quite high compared to a national median can still qualify for affordable housing in areas where family incomes are well above the national median. If the developer chooses to provide the affordable housing within the development, the affordable units typically must be comparable in size and quality to those that sell at the prevailing market prices.³² In turn, this means that the affordable housing may be of a significantly higher quality than housing that is sold at higher market prices elsewhere. Therefore, the way the programs are structured can result in a perception that relatively affluent families are receiving subsidies on relatively luxurious housing. Together with the “not-in-my-backyard” syndrome (“NIMBY”), this can generate resentment and undermine public support for affordable housing programs.³³

B. The Impact of Inclusionary Zoning

The impact of inclusionary housing laws is hotly debated. There appears little doubt that some of the opposition to inclusionary housing laws arises from concerns about their impact or that arguments about the adverse impact of the laws have been used in the legal challenges against them. The policy debate about their impact is thus germane to the cases. The contours of the policy debate were laid out soon after inclusionary housing programs appeared. Drawing on the conventional economic theory about how a relatively efficient market operates, Robert Ellickson argued that inclusionary zoning laws increase the costs of developing new housing and thus decrease the supply, which in turn increases the market price.³⁴ He concluded that the irony of inclusionary housing laws is that they actually turn out to be exclusionary.³⁵

³¹ *Id.* at 474.

³² *Id.* at 475.

³³ See, e.g., *Housing Matters: Affordable Housing and the Middle-Class*, WGLT.ORG (Oct. 30, 2019, 10:17 AM), <http://www.wgl.t.org/show/wglts-sound-ideas/2019-10-30/housing-matters-affordable-housing-and-the-middle-class> [<http://perma.cc/T5NA-QY4B>]; Jack Craver, *Austin Housing Advocates Must Stop Ignoring the Middle-Class*, AUSTIN POL. NEWSL. (May 25, 2021), <http://austinpolitics.net/2021/05/25/austin-housing-advocates-must-stop-ignoring-the-middle-class/> [<http://perma.cc/EBG6-NYFM>].

³⁴ Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981).

³⁵ *Id.*

Shortly after Ellickson's article was published, the Supreme Court of New Jersey revisited the famous *Mount Laurel*³⁶ case and, without citing Ellickson's article but perhaps obliquely alluding to it, observed, "[i]t would be ironic if inclusionary zoning to encourage the construction of lower income housing were ruled beyond the power of a municipality . . . when its need has arisen from the socio-economic zoning of the past that excluded it."³⁷ Thus, the New Jersey Supreme Court held that even where local governments are unable to provide affordable housing by removing restrictive barriers, inclusionary devices such as mandatory set-aside requirements are still within their zoning powers.³⁸ The court went on to observe that the failure to ensure an adequate supply of affordable housing would result in the further economic segregation of New Jersey's cities and suburbs.³⁹

The debate about the impact of inclusionary housing programs continues to the present. As one might expect, political leanings appear to play a role.⁴⁰ One of the complications is that many jurisdictions offer incentives or bonuses to developers who supply affordable housing that help to offset their costs.⁴¹ Those who favor private markets and limited government tend to see the shortcomings and adverse effects, and those who are more skeptical about private markets and welcoming of government interventions tend to see the successes and not any adverse effects.⁴² On the one hand, Emily Hamilton, who is affiliated with the market-oriented Mercatus Center, observes that critics of inclusionary housing laws tend to find that the laws raise housing prices and reduce new housing supply;⁴³ indeed, her own empirical study finds that it raises prices.⁴⁴ On the other hand, Lisa Sturtevant, who serves on the Board of Directors of Housing Forward Virginia, a nonprofit organization that seeks to ensure affordable housing is planned and purposeful,⁴⁵ concludes from her summary of the evidence that inclusionary housing laws do

³⁶ *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

³⁷ *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390, 449 (N.J. 1983).

³⁸ *Id.* at 448.

³⁹ *Id.* at 451.

⁴⁰ See Emily Hamilton, *Inclusionary Zoning and Housing Market Outcomes*, 23 CITYSCAPE: J. POL'Y DEV. & RSCH. 161., 163 (2021).

⁴¹ See *id.* at 165.

⁴² See *id.* at 163, 189.

⁴³ *Id.* at 163.

⁴⁴ Hamilton finds that inclusionary zoning laws "increase house prices but not that they reduce new housing construction." *Id.* at 189.

⁴⁵ See *About*, HOUS. FORWARD VA., <http://housingforwardva.org/about/#what-we-do> [<http://perma.cc/R8RN-BEQ8>] (last visited Aug. 7, 2021).

not increase housing prices or decrease the supply of housing.⁴⁶ One thing that most scholars who have studied the matter agree on, however, is the fact that inclusionary housing programs have often not resulted in much new affordable housing.⁴⁷

Political leanings will no doubt continue to play a role in the policy debate. Those who favor markets will probably continue to see adverse consequences and advocate for market solutions to the affordable housing problem, and those who welcome government management of markets will probably continue to see the virtues of inclusionary housing policies. While this might seem like a pessimistic forecast, the policy debate is largely a sideshow. The important legal questions are about the scope of the government's power to take private property and whether courts will interpret the law to protect private landowners and developers from bearing a disproportionate burden of providing affordable housing in their communities. The answers to those questions do not generally depend on whether affordable housing programs are effective.⁴⁸ That is probably for the better, because the courts are probably not the best branch of government to shoulder responsibility for making important social policy decisions.

C. The Underlying Cause of the Affordable Housing Problem

The Supreme Court's decision in *Village of Euclid v. Ambler Realty Company*⁴⁹ provided broad authorization for the cumulative use of zoning schemes that proliferated across the United States in the twentieth century in new municipalities and allowed white, affluent families to ensconce themselves in

⁴⁶ Sturtevant, *supra* note 26, at 1.

⁴⁷ See, e.g., *id.* at 4 (observing that many programs were found to have very low production totals); Hamilton, *supra* note 26, at 3 (observing that inclusionary housing programs have provided huge benefits but to only a small percentage of low-income and moderate-income families).

⁴⁸ The Supreme Court has held that housing is not a fundamental right and that the poor are not a protected category. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (finding that the assurance of adequate housing is a legislative responsibility not a judicial one); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18–28 (1973) (concluding that the poor do not possess the characteristics of a suspect class under the Equal Protection Clause). Therefore, under the substantive due process doctrine, affordable housing laws are subject to a rational basis test. See *id.* at 2. Under a rational basis test, a law will be upheld against a substantive due process challenge as long as it is rationally related to a legitimate state interest. See David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 626 n.290 (2009). Most affordable housing laws would likely withstand such a challenge regardless of whether they are effective. The only plausible constitutional basis for overturning most affordable housing programs, therefore, is under the Takings Clause. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 105 (1978). The Supreme Court's implicit takings jurisprudence does not normally turn on the effectiveness of the government actions. *Id.* at 130–31.

⁴⁹ 272 U.S. 365 (1926).

predominantly white, affluent suburban enclaves with safe streets, good schools, and strong tax bases.⁵⁰ Unfortunately, the high housing prices in many of those tony neighborhoods were beyond the reach of most non-white and less affluent families.⁵¹ *Village of Euclid* was, therefore, a pivotal case, and it probably contributed far more to the escalation of property values and the lack of affordable housing than any other single factor.⁵² In fact, some leading economists believe the best way to increase the stock of affordable housing would be to relax many of the restrictions under existing zoning regulations.⁵³

Zoning schemes commonly regulate the type of housing that may be developed within certain neighborhoods. Some areas are typically designated for single-family homes, others may also allow duplexes, and others still may allow duplexes and multi-family dwellings.⁵⁴ This can limit the supply of single-family homes, which Americans tend to consider most desirable for families of any size. In addition, zoning schemes commonly specify minimum floor space requirements for houses, minimum setback requirements on housing lots, and minimum frontage requirements on public streets.⁵⁵ Requirements to build big homes on spacious, wide lots no doubt help to ensure that neighborhoods will appear stately and tranquil, but they also directly increase the cost of supplying new houses and thus make affordable housing scarce.⁵⁶

This was obvious well before the Supreme Court upheld the constitutionality of Euclidian zoning. In fact, when the constitutionality of Euclidean zoning was first challenged in the trial court, it was declared unconstitutional.⁵⁷ In his opinion striking the scheme, Judge Westenhaver observed:

⁵⁰ For an overview, see Donald J. Smythe, *The Power to Exclude and the Power to Expel*, 66 CLEV. ST. L. REV. 367, 388–95 (2018). For a more detailed discussion, see MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA* 22 (2008).

⁵¹ Smythe, *supra* note 50, at 389–95.

⁵² *Village of Euclid* authorized the cumulative land use regulations that resulted in allegations of exclusionary zoning. *See id.* at 390–93. Studies by leading economists have pointed to land use regulations as the most important factor driving up land values and housing prices. *See, e.g.*, Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* 21 (Nat'l Bureau of Econ. Rsch., Working Paper No. 8835, 2002) http://www.nber.org/system/files/working_papers/w8835/w8835.pdf [<http://perma.cc/Q6MK-9B7F>]; Edward, L. Glaeser, Joseph Gyourko, & Raven E. Saks, *Why Have Housing Prices Gone Up?*, 85 AM. ECON. REV. 329, 329 (2005).

⁵³ *See, e.g.*, Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FED. RESV. BANK OF N.Y., ECON. POL'Y REV., June 2003, at 21, 23.

⁵⁴ *See* Smythe, *supra* note 50, at 394–96.

⁵⁵ *See id.*

⁵⁶ *See id.* at 395.

⁵⁷ *See* *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 317 (N.D. Ohio 1924).

The plain truth is that the true object of the ordinance in question is to place all the property in . . . a strait-jacket. . . . In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service.⁵⁸

The Supreme Court was fully aware of this when it later overruled Judge Westenhaver and upheld Euclidean zoning schemes.⁵⁹ By then, the issues had already been litigated in some state courts, several of which had also upheld the schemes.⁶⁰ There had been wide-ranging discussions and debates among planning experts, politicians, and attorneys about zoning that had led to wide-spread support for zoning across political lines as well as regions of the country.⁶¹ And, of course, the Supreme Court benefitted from extensive representations that were made by advocates and experts when it heard the case on appeal.⁶² This was long before affordable housing became an obvious social problem, and many of those who supported Euclidean zoning schemes emphasized the positive impacts they would have on property prices.⁶³ Experts generally concurred, and the media as well as political leaders welcomed the idea.⁶⁴

Contemporary economic studies have almost unanimously affirmed the adverse impact that zoning regulations have had on the affordability of housing. As economists Edward Glaeser, Joseph Gyourko, and Raven Saks have observed, the impact of zoning regulations has been manifested not only in a national increase in real housing prices since the 1950s, but also in a

⁵⁸ *Id.* at 316.

⁵⁹ See Smythe, *supra* note 50, at 396–97.

⁶⁰ See, e.g., *Clements v. McCabe*, 177 N.W. 722, 726 (Mich. 1920); *In re Opinion of the Justices*, 127 N.E. 525, 532 (Mass. 1920); *State ex rel. Morris v. City of East Cleveland*, 22 Ohio N.P. (n.s.) 549, 549 (1920); *State v. Durant*, 2 Ohio Law Abs. 75, 75 (1923).

⁶¹ See Smythe, *supra* note 50, at 388–89. Sadly, there is also evidence that racial and ethnic prejudices played a role in the diffusion of zoning schemes. *Id.*; see also WOLF, *supra* note 50, at 138–40.

⁶² See WOLF, *supra* note 50, at 58.

⁶³ *Id.* at 83–84.

⁶⁴ Progressive era reformers played an important role. See *id.* at 23. Not surprisingly, the Progressives also often advocated racial and socio-economic segregation. See, e.g., MICHAEL MCGERR, *A FIERCE DISCONTENT* 187–94 (2003). Advocates of zoning sometimes sought to publicize the virtues of comprehensive zoning laws in the media. See Smythe, *supra* note 50, at 388.

national increase in the *variance* of real housing prices.⁶⁵ In other words, the gap between the highest and lowest priced homes has risen, and, on average, real housing prices have risen overall. In a related article, Glaeser et al. have also observed that the gap between housing prices and the costs of constructing houses rose in the latter half of the twentieth century in major housing markets across the country.⁶⁶ They conclude that restrictions on the supply of new housing have been the driving force behind the escalation in real housing prices and that the restrictions were caused by government regulations and not the scarcity of land.⁶⁷ Although the affordable housing crisis has arisen primarily in pockets of the country, where there is an affordable housing crisis, Glaeser and Gyourko attribute it to land use regulations.⁶⁸ Many other scholars agree, and a host of studies have concurred.⁶⁹

D. The Real Irony of Inclusionary Housing

To paraphrase the New Jersey Supreme Court, it is ironic that courts should now be addressing the constitutionality of inclusionary housing programs, when the demand for affordable housing arose from judicial decisions upholding the constitutionality of zoning laws that *excluded* affordable housing.⁷⁰ The real irony of inclusionary housing laws is that they are a government response to a problem the government has largely created through the enactment of laws and creation of regulations that restrict the supply of housing and drive up the costs of construction.

One obvious alternative would be to deregulate land uses and allow the housing market to respond to the demand for new housing free of the restrictions that have impeded it.⁷¹

⁶⁵ Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329 (2005).

⁶⁶ See Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 11129, 2005).

⁶⁷ See *id.* at 8.

⁶⁸ See Glaeser & Gyourko, *supra* note 53, at 21, 35.

⁶⁹ See, e.g., Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265 *passim* (2008); John M. Quigley & Steven Raphael, *Regulation and the High Cost of Housing in California*, 95 AM. ECON. REV. 323 *passim* (2005); Keith Ihlanfeldt, *Exclusionary Land-Use Regulations Within Suburban Communities: A Review of the Evidence and Policy Prescriptions*, 41 URB. STUD. 261 *passim* (2004); Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J. L. & ECON. 331 *passim* (2005).

⁷⁰ S. Burlington Cnty. NAACP v. Mount Laurel, 456 A.2d 390, 449 (N.J. 1983).

⁷¹ In addition to relaxing the zoning restrictions that diminish the supply of affordable housing, housing and building codes that increase the costs of constructing new housing or refurbishing existing housing could also be relaxed. Moreover, habitability

Unfortunately, government actions are a response to political incentives and not common sense. In many communities, zoning regulations are deeply entrenched; if they are relaxed, property values will fall. Homeowners who might otherwise welcome deregulation and elimination of government restrictions may nonetheless object to any initiatives to “abolish the suburbs.”⁷² In local matters, homeowners have tremendous political clout, and the NIMBY response creates an insurmountable obstacle to addressing the root causes of the affordable housing problem by relaxing zoning restrictions.⁷³

Inclusionary housing laws, on the other hand, are politically expedient. Although the laws, in theory, might affect any landowner, in practice, the real bite is felt by those who own large parcels of land suitable for residential developments and property developers who hope to prosper from building them.⁷⁴ Property developments may initially become less profitable and, as the market responds, some land might become less valuable. As many have observed, however, market prices for housing may

requirements could be moderated, thus allowing landlords to offer rental units with fewer amenities (e.g., fewer electric wall sockets, fewer windows, central heating, hot water, etc.) at much lower rents.

⁷² The 2020 presidential election generated considerable rhetoric about the future of American suburbs, in part because some have advocated making the suburbs more inclusionary and political opponents obviously thought this might be a sore point with many suburban voters. As a result, media commentary began to appear about attempts to “end” or “abolish” the suburbs. See, e.g., John Pattison, *Nobody wants to “destroy the suburbs.” But Everyone Should Want to End the Suburban Experiment.*, STRONG TOWNS (July 30, 2020), <http://www.strongtowns.org/journal/2020/7/28/destroying-the-suburbs> [<http://perma.cc/KX52-CLTX>]; Stanley Kurtz, *Biden and Dems Are Set to Abolish the Suburbs*, NAT. REV. (June 30, 2020, 9:42 AM), <http://www.nationalreview.com/corner/biden-and-dems-are-set-to-abolish-the-suburbs/> [<http://perma.cc/N82V-FWHG>]; Thomas Beaumont, *Does Joe Biden want to ‘abolish the suburbs?’ No.*, CHI. TRIB. (Aug. 27, 2020, 8:04 AM), <http://www.chicagotribune.com/election-2020/ct-joe-biden-abolish-the-suburbs-fact-check-20200827-3lwobgvu75ajdpodsoz32tb2sm-story.html> [<http://perma.cc/JMN5-7Nfq>].

⁷³ Zoning restrictions apply to neighborhoods and homeowners have incentives to resist changes in their own “backyards.” There may be fewer impediments, however, to relaxing housing and building codes because those changes would not have much or any near-term impact on affluent middle-class suburbs. Smythe, *supra* note 50, at 375–85.

⁷⁴ Inclusionary housing programs may be structured so that they apply only in certain areas or to high density residential zones. See, e.g., *Rules for Special Areas*, N.Y.C. DEPT OF CITY PLAN., <http://www1.nyc.gov/site/planning/zoning/districts-tools/inclusionary-housing.page> [<http://perma.cc/2BPD-CF33>] (last visited July 26, 2021) (stating that New York city’s inclusionary housing program only applies to high density zones); *Inclusionary Housing Program*, CITY & CNTY. OF S.F., <http://sfmohcd.org/inclusionary-housing-program> [<http://perma.cc/7AEX-5YKZ>] (last visited July 26, 2021) (San Francisco’s inclusionary housing program only applies to residential developments of ten or more units); *Inclusionary Zoning*, D.C. ZONING HANDBOOK, <http://handbook.dcoz.dc.gov/zoning-rules/general-rules/inclusionary-zoning/> [<http://perma.cc/2ND2-MCNU>] (last visited July 26, 2021) (instructing that the purpose of Washington D.C.’s inclusionary zoning are to use private development to lessen the financial burden of producing affordable housing).

rise, especially at the moderate and higher-priced ends of the market.⁷⁵ In a well-functioning, competitive market, the developers will, as the market responds, pass the costs along to those who buy the new housing at market rates and their profit rates on new developments will return to normal. The primary beneficiaries, of course, will be those who are able to obtain housing at below-market prices.⁷⁶

Most of the affected groups have little reason to object to inclusionary housing laws, at least until an affordable housing project is planned for their neighborhood. The developers will earn their profits, and existing homeowners will benefit from the escalation in housing prices. Even those who buy new housing priced higher than it would otherwise be would not want to see prices fall, so they would have no incentive to argue for repealing the laws once they have bought their own homes. Those who obtain below-market-rate housing, of course, will be more than happy. If the critics are right, the group that might suffer the most from inclusionary housing laws is the larger group of low and moderate-income households that are not fortunate enough to benefit from the laws and thus have to pay for market-rate housing that might be even more expensive because of these laws. This group might clamor for more affordable housing, possibly even through expansions in inclusionary housing programs, but they probably would not connect their own plight to the existence of the inclusionary housing laws.

Almost all of the political incentives, therefore, incline elected officials to enact inclusionary housing laws and to keep them once enacted. The politicians are then able to point to new inclusionary housing laws as an achievement accomplished to help redress the affordable housing problem. Even long after the laws have been enacted, politicians are still able to point to the completion of new affordable housing projects as evidence of accomplishments towards addressing the affordable housing problem, even though they may have had nothing to do with the genesis of the projects.⁷⁷

⁷⁵ Of course, as the discussion above indicates, this is debated, and many advocates of inclusionary housing programs believe they do not raise housing prices. *See supra* Section I.B.

⁷⁶ Even opponents of inclusionary housing programs agree that it benefits those who receive affordable housing. *See, e.g.*, Hamilton, *supra* note 26, at 2–3, 6.

⁷⁷ The media provides profuse coverage of ribbon cutting ceremonies at new affordable housing projects and local politicians of all political stripes are happy to attend and honor the occasions. *See, e.g.*, *City Celebrates New 100 Percent Affordable Housing Complex in the Mission*, BAY CITY NEWS (July 10, 2021), <http://sfbayca.com/2021/07/10/city-celebrates-new-100-percent-affordable-housing-complex-in-the-mission/> [<http://perma.cc/Y6X6-MQ4R>] (reporting that San Francisco Mayor Breed cut the ribbon for a new affordable housing complex); Debbie L. Sklar,

Unfortunately, the “successes” of inclusionary zoning laws may help to relieve the pressures on political leaders to find more effective solutions to the affordable housing problem, urban poverty, homelessness, and related social problems.

There are less politically palatable alternatives.⁷⁸ Even if they did not want to deregulate, elected officials could raise property taxes to help finance new affordable housing projects. They could also raise (or impose) sales and income taxes. The tax revenues could then be used to subsidize affordable housing developments or to finance the affordable housing investments directly. Either way, the supply of affordable housing would increase. But raising property taxes would tend to diminish existing property values and thus face political opposition from homeowners (and other property owners whose property taxes were raised) and raising sales and income taxes would likely face an even wider base of political opposition.⁷⁹

Even if the public knew the tax revenues would be dedicated to addressing an important social problem, the costs to taxpayers would likely be more obvious than the costs of inclusionary housing laws and, absent some sea change in public attitudes, the opposition, therefore, would likely be greater.⁸⁰ Inclusionary

Affordable Apartment Complex Opens in Navajo Neighborhood, TIMES OF SAN DIEGO (May 31, 2018), <http://timesofsandiego.com/politics/2018/05/31/affordable-apartment-complex-opens-in-navajo-neighborhood/> [<http://perma.cc/7QTR-34C6>] (reporting on San Diego Mayor Faulconer celebrating the Grand Opening of an affordable apartment complex); *City Officials Join Development Partners for La Central A&B Ribbon Cutting*, N.Y.C. HOUS. DEV. CORP. (June 16, 2021), <http://www.nychdc.com/newsroom/city-officials-join-development-partners-la-central-b-ribbon-cutting> [<http://perma.cc/G39F-E64U>] (reporting that New York Mayor de Blasio took part in ribbon cutting ceremony for a new affordable development).

⁷⁸ This is not meant to suggest that these alternatives have not been pursued, at least in some municipalities and to some extent. But, inclusionary housing programs would not be necessary if they had been pursued to a much greater extent in all municipalities.

⁷⁹ A survey conducted by the Pew Research Center in 2012 found that most respondents from both political parties felt the American middle-class pays at least its fair share of taxes, while only six percent of respondents felt that the American middle-class pays too little in taxes. Interestingly, however, most respondents (fifty-eight percent) felt that upper-income Americans pay too little in taxes. This suggests that it might be more expedient for elected officials to raise taxes on the rich than the middle-class. As a practical matter, however, that is not the case. For one thing, upper-income voters may provide more campaign contributions than the middle-class. Even if they do not, they are highly mobile and attempts to squeeze them for taxes at the local level may cause them to “vote with their feet” and decamp to cities with lower taxes. Kim Parker, *Yes, the Rich Are Different*, PEW RSCH. CTR. (Aug. 27, 2012), <http://www.pewresearch.org/social-trends/2012/08/27/yes-the-rich-are-different/> [<http://perma.cc/62PN-BW3U>].

⁸⁰ According to a survey conducted by the Pew Research Center in 2019, a majority of taxpayers would not object to raising taxes on corporations or upper-income taxpayers. See *Growing Partisan Divide Over Fairness of the Nation’s Tax System*, PEW RSCH. CTR. (Apr. 4, 2019), <http://www.pewresearch.org/politics/2019/04/04/growing-partisan-divide-over-fairness-of-the-nations-tax-system/> [<http://perma.cc/MYC4-8ZUC>]. Unfortunately,

housing laws are politically more expedient than conventional tax and spend policies.

What is politically expedient does not necessarily make for the best public policy. As Glaeser and Gyourko observe:

[I]f policy advocates are interested in reducing housing costs, they would do well to start with zoning reform. Building small numbers of subsidized housing units is likely to have a trivial impact on average housing prices (given any reasonable demand elasticity), even if well targeted toward deserving poor households. However, reducing the implied zoning tax on new construction could well have a massive impact on housing prices.⁸¹

In an ideal world, therefore, it might be better if elected officials revised zoning laws to eliminate single-family only neighborhoods, large area requirements, wide frontage requirements, and setback requirements that exceed what is necessary for public safety.⁸²

Although the zoning changes would not have any immediate effects in established neighborhoods, they would help to encourage construction of lower cost housing in the longer run, and they would provide more flexibility in neighborhoods that were still developing.⁸³ Elected officials might also go a step further and relax building and housing codes. In many cases, however, if elected officials attempted to do any of that, they would not remain elected for as long as they would like. What is politically expedient is usually what will win out, even if it is not the best public policy. Frustrating though that might be, political expediency has played an important role in American democracy since its earliest days.⁸⁴

E. Courts Are Not the Policy Police

Whether a law or other government action is bad public policy is—and should be—irrelevant to takings claims. In

local governments do not have much opportunity to generate tax revenues from corporations or upper-income residents. Only a small minority of states allows local governments to levy personal income taxes and corporate taxes. See *Corporate Income Taxes*, URB. INST., <http://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/corporate-income-taxes#revenue> [<http://perma.cc/Y7HA-P7KH>] (last visited July 26, 2021); *The State of State (and Local) Tax Policy*, TAX POLY CTR., <http://www.taxpolicycenter.org/briefing-book/how-do-state-and-local-individual-income-taxes-work> [<http://perma.cc/2DQF-A87F>] (last visited July 26, 2021). Moreover, corporations and upper-income residents might relocate if subjected to higher tax rates than in other cities.

⁸¹ Glaeser & Gyourko, *supra* note 68, at 35.

⁸² Smythe, *supra* note 50, at 370–71.

⁸³ *Id.* at 398.

⁸⁴ For example, see David Brian Robertson, *Madison's Opponents and Constitutional Design*, 99 AM. POL. SCI. REV. 225 *passim* (2005) for an analysis of the expedient accommodations forced on James Madison during the U.S. Constitutional Convention.

addressing takings claims, courts' sole responsibility is to apply the Takings Clause of the United States Constitution as it has been interpreted by the Supreme Court.⁸⁵ Although the Supreme Court has indicated that the character of the government action is one of the factors for a court to consider in a regulatory takings case, that criterion has never been interpreted to allow courts to base a decision that a government action amounts to a taking because it is bad policy. The character of government action typically relates to the connection between government actions and land uses. For example, it is well-understood that a law or regulation that results in a physical invasion of land is a taking *per se*.⁸⁶ If a law or regulation results in a physical occupation, just compensation is required, without any further inquiry, regardless of whether the law or regulation is good policy or bad, or whether it results from any kind of policy at all.⁸⁷

Questions about whether laws or regulations are good public policy are generally best left to the political process.⁸⁸ Courts sometimes do base their decisions on public policy considerations and most scholars would agree that sometimes they should.⁸⁹ But basing a decision on public policy considerations is different than deciding on an inherently political question. Principles of democracy not only require the assignment of some important law-making authority to the elected officials within the legislative and executive branches, but also that the judicial branch should exhibit substantial deference to any laws created by elected officials that are within the scope of their constitutional authorities.⁹⁰

⁸⁵ Of course, to the extent that a state constitution is applied, the relevant language from the state constitution as it has been interpreted by the state supreme court should be applied.

⁸⁶ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

⁸⁷ In the majority opinion, Justice John Roberts wrote: “[G]overnment-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation.” *Id.* at 2074.

⁸⁸ This statement is in the spirit of the “political question doctrine,” but it does not formally depend upon it. The roots of the political question doctrine arguably originated in Justice John Marshall’s opinion in *Marbury v. Madison*, where he wrote “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). The doctrine rests on the idea that there are constitutional limits to the judicial power, and that inherently political questions must be left to the executive and judicial branches. See, e.g., *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 723, 726 (2016). Scholars have critiqued the political question doctrine, and it remains highly controversial. See e.g., Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 442 (2004).

⁸⁹ Edward L. Rubin & Malcom M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 619 (2003).

⁹⁰ Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 11 (1996).

As long as they are within the powers of the legislature and executive branches that create them, laws should remain the province of elected officials and the voters who elect them. The policy debate about the consequences of inclusionary housing laws is important, but it should not bear on any questions about whether any limits or requirements they place on property developments amount to takings. The sole judicial consideration in addressing takings claims should be the Takings Clause and the Supreme Court's takings jurisprudence.

II. PROPERTY THEORY AND IMPLICIT TAKINGS

A. The Bundle of Sticks Analogy

A well-defined system of property law defines a hierarchy of persons' rights in land or chattels. The dominant conception of private property rights in the United States draws on an analogy with a bundle of sticks.⁹¹ The bundle of sticks analogy provides a useful tool for analyzing the ways in which government actions affect private property rights and a framework within which it may be determined when those government actions amount to takings.⁹² Consider a fee simple absolute in land. Under the bundle of sticks conception, the property rights associated with the fee simple absolute are analogized to a "bundle of sticks." Each distinct legal right and each distinct legal obligation associated with the fee simple absolute may be conceptualized as a particular stick in the bundle.⁹³ For example, the legal rights may include the uses that may be made of the land, the actions that can be taken on the land, the actions that can be taken against others regarding the land, and the transactions that can be undertaken to convey rights in the land.⁹⁴ The legal obligations may include the duty to pay taxes on the land, affirmative duties under public laws or regulations affecting the land, obligations toward others under private law, and any affirmative duties arising under private land use servitudes.⁹⁵

It is worth emphasizing that both public and private law play a role in defining the hierarchy of private property rights. Public laws or regulations and private laws or land use servitudes that restrict land uses eliminate or diminish specific rights in the

⁹¹ See, e.g., JESSE DUKEMINIER ET AL., PROPERTY 102–03 (8th ed., 2014).

⁹² Property rights are inherently hierarchical but the focus here is on the private property rights of individuals as against the government. *Id.* at 33–34.

⁹³ See Smythe, *supra* note 50, at 369–70.

⁹⁴ See *id.*

⁹⁵ See *id.*

bundle of sticks;⁹⁶ public laws or regulations and private laws or land use servitudes that impose affirmative duties on the owner add new or augment existing obligations in the bundle of rights.⁹⁷ Laws can change, and when they do, that can affect an owner's private property rights. The fact that laws can change means that there is always some uncertainty associated with an owner's property rights.⁹⁸ Of course, when an owner's property rights are diminished through government actions under public laws, the owner may be entitled to just compensation under takings law if the owner can sustain an implicit takings claim under the Supreme Court's takings jurisprudence.

B. The Character of Government Action and Takings

The fact that the government has the authority to eliminate rights (or add obligations) in an owner's bundle implies that the government holds something similar to a right of entry against private property rights even if the regulatory authority is never exercised.⁹⁹ The scope of the government's "right of entry" is limited, of course, by constitutional restraints, such as the doctrine of substantive due process and the Takings Clause.

When a government exercises its right of entry, the elimination of rights (or addition of obligations) in the owner's bundle can give rise to a takings claim. For example, in a conventional, physical taking, the government terminates all the owner's rights, including possessory rights, and keeps them or transfers them to some other party.¹⁰⁰ In order for the government to exercise such extreme powers, the public use requirement would have to be met and the government would have to provide just compensation. The owner could challenge the exercise of the government's takings power on the grounds that it was not for a public use,¹⁰¹ or that just compensation was either not provided or not adequate.¹⁰²

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.* at 371.

⁹⁹ *See id.*

¹⁰⁰ *See id.* at 372; *see also* Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99, 101 (2012).

¹⁰¹ *See, e.g.,* *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁰² The calculation of just compensation can be tricky. The Supreme Court has held that the calculation should reflect the amount of the property owner's loss. The owner's loss, not the taker's gain, is the measure of such compensation. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 236 (2003). The Court has also indicated that the loss should be calculated with reference to market values. *See, e.g., U.S. ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266 (1943); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946).

Implicit takings are conceptually more complicated. For the sake of the analysis in this article, implicit takings include both regulatory takings and exaction takings.¹⁰³ A regulatory taking is one caused by a law or regulation that eliminates or diminishes an owner's property rights. The overarching principle of regulatory takings jurisprudence is that a law or regulation can go too far, and when it does, it amounts to a taking that requires just compensation.¹⁰⁴ Thus, when a government law or regulation eliminates too many rights of too much importance in an owner's bundle, or adds too many obligations with too many burdens¹⁰⁵ to an owner's bundle, there is a regulatory taking and the government will be required to pay the owner just compensation.¹⁰⁶ For the sake of the contrast with a taking through an exaction, the most important fact to emphasize about a regulatory taking is that it results when a law or regulation causes the immediate and nondiscretionary elimination of a right in an owner's bundle.¹⁰⁷ This is important, of course, because until the right has been eliminated, there can be no taking.¹⁰⁸

The definition of "exaction" and "exaction takings" is centrally important. Most scholars have used the term exaction quite broadly. For example, Mark Fenster defines exactions as "concessions local governments have the discretion to require of property owners as conditions for the issuance of entitlements that enable the intensified use of real property."¹⁰⁹ He elaborates

¹⁰³ As used by Krier and Sterk, the term "implicit takings" includes all takings other than conventional, physical ones, which they refer to as "explicit takings by condemnation." Krier & Sterk, *supra* note 19, at 40. Thus, it includes some takings other than regulatory or exaction takings, and even judicial takings, which have not yet been recognized by the Supreme Court. *But see* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't. Prot., 560 U.S. 702, 714–15 (2010); *see also* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1471–72 (1990).

¹⁰⁴ This was an overarching principle of takings law stated by the Supreme Court in *Pennsylvania Coal Co. v. Mahon*. 260 U.S. 393, 415 (1922). The Supreme Court provided its most definitive statement about implicit takings in *Penn Central*, but the *Penn Central* multi-factor inquiry incorporates the principle from *Penn Coal* that a law or regulation that goes too far amounts to a taking. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

¹⁰⁵ For the sake of elegance, the analysis shall from here on assume all takings arise from the elimination of rights.

¹⁰⁶ The Supreme Court has not yet required that implicit takings be for a public use. This is another respect in which the Court's takings jurisprudence has lacked coherence. That matter, however, is beyond the scope of the present endeavor. For a critique, and an argument that the public use requirement should be extended to all takings, see Donald J. Smythe, *SCOTUS in the Strait of Messina: Steering the Course Between Private Rights and Public Powers*, 25 TEX. REV. L. & POL. 437, 440 (2021).

¹⁰⁷ In other words, in a regulatory taking, the government exercises its "right of entry" immediately, thus eliminating the owner's property right immediately. *See id.* at 444.

¹⁰⁸ *See id.*

¹⁰⁹ Fenster, *supra* note 22, at 613.

that they “include mandatory dedications of land, fees required in lieu of dedication, and impact fees given by property owners in exchange for permits, zoning changes, and other regulatory clearances.”¹¹⁰ Fenster was following Vicki Breen, who, in an earlier article, defined exactions to include nondiscretionary requirements established under laws or regulations as well as discretionary ones demanded by administrative bodies.¹¹¹ More recently, Krier and Sterk, citing Fenster, define exactions as “government measures requiring land developers to provide goods and services, or pay money (impact fees) as a condition of project approval.”¹¹²

The Supreme Court itself has not expressly defined the term “exaction,” although it has used the term in addressing exactions takings claims.¹¹³ It is important to observe, therefore, that the takings claims in its three major exaction cases—*Nollan*, *Dolan*, and *Koontz*—were each brought against decisions made by a government administrative body, comprised of appointed officials¹¹⁴ exercising discretion delegated to it under a law,¹¹⁵ and required an owner to convey property rights to the government or the public in return for the granting of a permit necessary to develop the owner’s property.¹¹⁶ The Supreme Court has thus only upheld exaction takings claims against administrative bodies comprised of appointed members who exercised discretion that was granted to them under the laws that established the permit requirements in making individualized determinations about the exactions that were required.

Although the Supreme Court has never formally defined the term, we can deduce that the Court’s definition of exaction must be at least broad enough to encompass the exactions in *Nollan*,

¹¹⁰ *Id.* Such a broad definition may go too far, although that is beyond the scope of the analysis here.

¹¹¹ Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 481–82 (1991).

¹¹² Krier & Sterk, *supra* note 19, at 47.

¹¹³ See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994); see also *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013). Interestingly, Justice Scalia’s majority opinion in *Nollan* did not use the term exaction. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

¹¹⁴ The voting members of the California Coastal Commission, which demanded exactions from *Nollan*, the City Planning Commission, which demanded exactions from *Dolan*, and the St. Johns River Water Management District officials, who suggested exactions to *Koontz*, were all appointed officials or public employees exercising discretion delegated to them under law. See CAL. PUB. RES. CODE § 30301 (2017); TIGARD MUN. CODE § 2.08.110 (2021); FLA. STAT. § 373.073 (2009).

¹¹⁵ See CAL. PUB. RES. CODE § 30301 (2017); TIGARD MUN. CODE § 2.08.110 (2021); FLA. STAT. § 373.073 (2009).

¹¹⁶ See *Nollan*, 483 U.S. at 825; *Dolan*, 512 U.S. at 377; *Koontz*, 570 U.S. at 595.

Dolan, and *Koontz*. There is no reason, however, to believe that the Court would uphold takings claims against any exactions that were not within the scope of those precedents. If the term “exaction” is to be defined more broadly than the exactions in those cases, therefore, then we must allow for the possibility that some exactions might not be subjected to the nexus and rough proportionality tests. Alternatively, if we want the term “exaction” to apply only when an exaction would be subject to the nexus and rough proportionality tests, then we must limit the definition to include only exactions to which the Supreme Court has applied the nexus and rough proportionality tests.¹¹⁷ The analysis here will follow the practice in the scholarly literature and define exactions broadly. Yet nothing in the analysis depends on that definition.

Under Supreme Court jurisprudence, when an exaction is demanded in return for a permit by an administrative body exercising discretion delegated to it under a law or regulation, the nexus and rough proportionality tests will be applied to determine whether the exaction is a taking.¹¹⁸ The nexus test inquires into whether there is a logical connection between the exaction and the purpose for which the permit is required under the law,¹¹⁹ and the rough proportionality test inquires into whether there is at least rough proportionality between the extent of the exaction and the adverse impact of the proposed development.¹²⁰ If an exaction fails either or both tests, it amounts to a taking and just compensation is required.¹²¹ The mere fact that the owner may convey some alternative to a property right in the property she wishes to develop, such as a money payment, in return for the permit does not negate the fact that a taking occurs.¹²² Moreover, the mere fact that the permit has not yet been denied when it is made known that the exaction will be required does not negate the fact that a taking occurs either.¹²³ A taking thus occurs when an exaction that has been

¹¹⁷ This appears to be the way the Supreme Court of California has defined the term “exaction.” In *California Building Industry Association v. City of San Jose*, the court addressed whether the inclusionary housing requirements under a San Jose ordinance amounted to a taking and stated that “the conditions that the San Jose ordinance imposes upon future developments do not impose ‘exactions’ upon the developers’ property so as to bring into play the unconstitutional conditions doctrine under the takings clause of the federal or state Constitution.” *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974, 979 (Cal. 2015).

¹¹⁸ See *Koontz*, 570 U.S. at 605–06.

¹¹⁹ See *Nollan*, 483 U.S. at 836–37.

¹²⁰ See *Dolan*, 512 U.S. at 391.

¹²¹ As with regulatory takings, the Supreme Court has not yet imposed a public use requirement. For a discussion and critique, see Smythe, *supra* note 106.

¹²² See *Koontz*, 570 U.S. at 612.

¹²³ See *id.* at 606.

required or suggested in return for a permit by an administrative agency or tribunal authorized to exercise its discretion under a law or regulation fails one or both of the nexus and the rough proportionality tests.¹²⁴

As the Supreme Court has developed its takings jurisprudence thus far, there are some important distinctions between exactions takings and regulatory takings. An exaction taking does not occur until an administrative body demands or suggests the exaction requirement to an applicant for a permit.¹²⁵ Unlike a regulatory taking, this means an exaction taking does not occur at the time the law or regulation under which the permit is required is enacted or created.¹²⁶ The law is therefore not the target of the takings claim, the takings claim is against the exaction.

Moreover, an exaction requirement is determined by an administrative body comprised of appointed government officials acting with discretion granted to it under a law or regulation. Unlike a regulatory taking, an exaction taking occurs under the discretionary authority exercised by appointed officials, not under the legislative authority of elected officials who are directly accountable to voters. Furthermore, exaction requirements are determined on an individual basis by an administrative body, and they are not as transparent as laws or regulations, which are typically made public knowledge as soon as they are enacted or created.¹²⁷

These are important distinctions. If the term “exaction” is used broadly to include any “government measures requiring land developers to provide goods and services, or pay money (impact fees) as a condition of project approval,”¹²⁸ then it appears that only exactions required by an administrative body using its discretion to make individualized decisions on a case-by-case basis will be subjected to the nexus and rough proportionality tests.¹²⁹ This comports with basic property theory.

¹²⁴ See *Id.* at 595.

¹²⁵ In fact, it would technically only occur when the permit applicant conveyed the exaction. See *Smythe*, *supra* note 106, at 462. Therefore, an exaction taking cannot occur until the administrator has made the requirement known.

¹²⁶ Technically, a regulatory taking can only occur when a law or regulation deprives an owner of a property right. See *Krier & Sterk*, *supra* note 19, at 41. Thus, if a law is enacted that will deprive an owner of a property right at some future date, a regulatory taking could only occur at that future date, when the law becomes effective.

¹²⁷ This is emphasized by Timothy Mulvaney. See *Mulvaney*, *supra* note 12, at 198.

¹²⁸ *Krier & Spier*, *supra* note 19, at 47.

¹²⁹ See *Koontz*, 570 U.S. at 605–06.

When a law requiring a permit is enacted and discretion to grant permits is delegated to an administrator, it is not clear whether or what property rights must be conveyed by an owner to obtain a permit until the administrator exercises its discretion. Nothing is taken until the administrator demands an exaction. But when a law requiring a permit is enacted which also establishes the requirements for obtaining a permit, it is immediately clear what property rights must be conveyed by an owner to obtain a permit. Of course, a major concern when exactions are determined at the discretion of an administrator is whether the administrator might abuse its discretion and demand too much. The strongest justification for the Supreme Court's heightened scrutiny of exactions is the need to curb abuses of administrative discretion and ensure that owners are not coerced into sacrificing too much of their property in return for development permits.

C. What About Inclusionary Housing Programs?

When a regulation is challenged as a taking the courts normally apply the multi-factor inquiry prescribed by the Supreme Court in *Penn Central*.¹³⁰ When an exaction is challenged as a taking the courts normally apply the nexus and rough proportionality tests.¹³¹ Recent California cases challenging inclusionary zoning laws as takings have turned on whether the multi-factor inquiry from *Penn Central* or the nexus and rough proportionality tests from *Nollan* and *Dolan* should apply.¹³² The inclusionary zoning laws considered in the California cases required a permit for any property development that would only be granted if the development plan included a minimum percentage of "affordable" housing units below market prices or the developer paid a fee toward financing affordable housing elsewhere. The California courts rejected claims the inclusionary zoning laws effected takings on the ground that they were regulations subject to the *Penn Central* multi-factor inquiry, rather than exactions, subject to the nexus and rough proportionality tests.¹³³ The Supreme Court denied certiorari in both cases, but, in a notable concurring opinion from one of the cases, Justice Thomas observed that it raised an unsettled

¹³⁰ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

¹³¹ See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

¹³² See, e.g., *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 1001 (Cal. 2015); *Cherk v. County of Marin*, No. A153579 WL 6583442, *5 (Cal. Ct. App. Dec. 14, 2018).

¹³³ See, e.g., *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 1002; *Cherk*, WL 6583442, at *7, *9.

question under the law of takings: “whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one.”¹³⁴ In fact, in a much earlier case involving a takings claim against an Atlanta ordinance that mandated certain minimum landscaping requirements for paved parking lots, the Supreme Court of Georgia affirmed the decision of a state trial court that had rejected the application of the nexus and rough proportionality tests, and Justice Thomas and Justice O’Connor joined in an opinion dissenting from a decision of the Supreme Court to deny certiorari.¹³⁵ Confusion about when the Court’s exaction takings analysis should apply, thus, long pre-dated the California inclusionary zoning cases, and Justice Thomas’s concurring opinion merely reiterated the doubt that he and Justice O’Connor had expressed twenty years earlier that “the existence of a taking should turn on the type of governmental entity responsible for the taking.”¹³⁶

From the perspective offered, however, there is an important difference between the character of the government’s action when a property right is taken under a law or regulation and when a property right is taken as a matter of administrative discretion. When a land use regulation is enacted and establishes the requirements for a permit, it immediately removes a stick from a landowner’s bundle of rights. If the regulation goes too far, there is a taking and just compensation is required.¹³⁷ When a law is enacted to address some social problem and requires a permit from an administrative body with the discretion to demand requirements in return for granting the permit, there is no immediate removal of any stick from the landowner’s bundle. A stick is removed from a landowner’s bundle only if the administrator exercises its discretion by demanding an exaction in return for the permit. The landowner might never apply for a permit, and the administrator might not demand an exaction even if the landowner does. Only if an exaction is demanded and it goes too far because it fails one or both of the nexus and rough proportionality tests is there a taking.¹³⁸

¹³⁴ *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring).

¹³⁵ *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1116–17 (1995) (Thomas, J. and O’Connor, J., dissenting).

¹³⁶ *Cal. Bldg. Indus. Ass’n*, 577 U.S. at 1179 (Thomas, J., concurring).

¹³⁷ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (discussing regulatory takings).

¹³⁸ See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

Whether the nexus and rough proportionality tests should apply to takings claims against inclusionary housing programs therefore should depend upon how the programs are designed. If the inclusionary housing requirements are determined by an administrator exercising discretion under a law that establishes the permit requirement, any property interests demanded or suggested by the administrator in return for a permit should be subject to the nexus and rough proportionality tests. The inclusionary housing programs in the California cases were not designed this way, but some affordable housing programs do apparently give administrators broad discretion to determine affordable housing requirements on an individualized basis.¹³⁹

For example, some affordable housing replacement ordinances do not expressly limit administrators discretion over affordable housing replacement requirements.¹⁴⁰ If administrators are delegated sufficient discretion in determining affordable housing replacement requirements under an affordable housing replacement ordinance, concerns about administrative coercion, lack of transparency, and weak political accountability might justify the application of the Supreme Court's exactions jurisprudence. If so, the nexus test would probably be met if the administrators demanded affordable housing since the logical connection would be obvious. The rough proportionality test would probably also be met, unless the administrator's demand was for more affordable housing than the amount that would be destroyed under the owner's development plan.

The type of inclusionary housing ordinance that has been the focus of most of the recent litigation, however, appears to involve the exercise of legislative authority rather than the exercise of administrative discretion. The ordinances typically require that either a percentage of the units meet specific affordability criteria or that the developer pays a fee that will be used to help finance affordable housing elsewhere.¹⁴¹ The requirements are not determined on an individual basis by a regulator, and there

¹³⁹ See Hamilton, *supra* note 40, at 172.

¹⁴⁰ For an example, see County of Los Angeles, Cal., Ordinance Amending Title 8—Consumer Protection, Business and Wage Regulations, Title 21—Subdivisions, and Title 22—Planning and Zoning of the Los Angeles County Code (Apr. 6, 2021). The ordinance requires some residential housing redevelopers to replace affordable housing demolished under their redevelopment projects. *See id.* § 22.119.050.A. Moreover, it requires redevelopers subject to the ordinance to obtain permits in advance. *See id.* § 22.119.050.G.1. The ordinance, does not, however, appear to entail the exercise of much administrative discretion. *See id.* § 22.119.050.

¹⁴¹ *See* RICK JACOBUS, INCLUSIONARY HOUSING: CREATING AND MAINTAINING EQUITABLE COMMUNITIES 24, 27–28 (2015).

is no exercise of administrative discretion.¹⁴² By the reasoning developed here, the requirements should not, therefore, be subject to the nexus and rough proportionality tests. If a landowner subject to such an ordinance makes a takings claim, it should be treated as a regulatory taking, and the *Penn Central* multi-factor inquiry should be applied. As long as the requirements do not go too far,¹⁴³ the ordinance will survive the takings challenge and just compensation will not be required.

D. The Nexus and Rough Proportionality Tests May Enhance Economic Welfare

Regulatory schemes that establish permits and delegate discretion to an administrative body to decide whether to grant permits and under what conditions have commonly been established to regulate nuisance problems.¹⁴⁴ Nuisance problems typically arise in land use contexts when a landowner's land uses impose external costs on other landowners. In a rough and ready fashion, the Supreme Court's exaction takings jurisprudence has the virtue of curbing administrative excesses, limiting the impact on private property rights, and encouraging economically efficient outcomes when nuisance regulation schemes that entail significant administrative discretion are enacted.¹⁴⁵

Under nuisance regulation schemes, exactions can enhance economic efficiency by helping to abate or offset the external costs of nuisances caused by property developments.¹⁴⁶ But when

¹⁴² See *id.* at 48.

¹⁴³ In theory, an inclusionary housing ordinance could be deemed a taking under the multi-factor inquiry if the requirements for a permit were too extreme. For example, if an ordinance required all new developments in an area to supply only new affordable housing at below-market prices without providing any offsetting incentives or bonuses, a court might well decide that the law goes too far and amounts to a taking.

¹⁴⁴ For example, in *Nollan* the California statute under which an easement was demanded was intended, in part, to protect views of the coastline. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987). Property developments along the coast can obscure other property owners' views and thus decrease their properties' values. That is an external cost associated with coastline property developments. In *Dolan*, one of the purposes of the city's ordinance was to abate water runoff problems. *Dolan v. City of Tigard*, 512 U.S. 374, 378 (1994). Buildings and pavement can diminish the capacity of the land to absorb rain and thus increase water runoff. The additional water runoff from a new development can flood neighboring owners' properties, thus causing external costs.

¹⁴⁵ See, e.g., Richard P. Adelstein & Noel M. Edelson, *Subdivision Exactions and Congestion Externalities*, 5 J. LEGAL STUD. 147, 153-57 (1976); see generally William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 L. & CONTEMP. PROBS. 101 (1987); David E. Mills, *Zoning Rights and Land Development Timing*, 66 LAND ECON. 283 (1990); J. Michael Pogodzinski & Tim R. Sass, *The Economic Theory of Zoning: A Critical Review*, 66 LAND ECON. 294 (1990).

¹⁴⁶ See, e.g., Fischel, *supra* note 145; Mills, *supra* note 145; Pogodzinski & Sass, *supra* note 145.

administrators abuse their discretion by demanding exactions that do not help to abate or offset the costs of the nuisances or by demanding exactions that go beyond abatement, they can impede property developments that would be economically efficient.¹⁴⁷ The nexus and rough proportionality tests help police against exactions that do not mitigate nuisances or that are so excessive they discourage owners from investing in economically efficient property developments.

A classic example is water runoff. Property developments can create water runoff problems for neighboring properties. New buildings and more pavement can result in less water absorption into the land and hence more water runoff from the property. The additional water runoff can flood neighboring properties, damage basements, destroy gardens, erode the soil, and even undermine structures. It can also contribute to pollution and carry off sediment.¹⁴⁸ A permit requirement under a regulatory scheme can help to ensure that the external costs associated with the water runoff are internalized¹⁴⁹ and the water runoff is mitigated. In deciding whether to grant a permit the administrator can evaluate the adverse impact of the development on water runoff. It can also determine what exactions will be required, but the administrator's discretion in demanding exactions is constrained by the need to ensure the exactions meet the nexus and rough proportionality tests.

1. The Nexus Test

The nexus test ensures that an exaction is logically related to the purpose for which the permit is required and thus directly helps to mitigate the adverse impact of the proposed development. Thus, when a development increases water runoff a demand for an easement to channel the water runoff into the public sewer system would meet the nexus test because the easement would help to mitigate the water runoff problem. A demand for dedicated parking spaces for city employees would not meet the nexus test. Even if the developer was willing to convey the parking spaces, the parking spaces would not help mitigate the water runoff problem. That means the social costs of water runoff would not be abated,

¹⁴⁷ See, e.g., *id.*

¹⁴⁸ See, e.g., *Runoff: Surface and Overland Water Runoff*, USGS WATER SCI. SCH., http://www.usgs.gov/special-topic/water-science-school/science/runoff-surface-and-overland-water-runoff?qt-science_center_objects=0#qt-science_center_objects [<http://perma.cc/D7SW-XBD3>].

¹⁴⁹ For the classic discussion of internalizing externalities, see generally ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* (1920).

unless the neighbor abated them, and the neighbor might not do that. As long as the costs to the property owner of abating the water runoff were less than the costs to the neighbor of suffering the water runoff damage, it would be economically efficient to condition a development permit on the property owner conveying an easement to abate the water runoff.

A related virtue of the nexus requirement is that it may discourage excessive regulation. There has been an explosion in administrative regulations over the last fifty years, and the proliferation has been accompanied by growing concerns that the regulations are too often used to coerce property owners into making concessions to the government.¹⁵⁰ The nexus requirement ensures that any exactions demanded by regulators will be related to the adverse impact of proposed developments. It thus, ensures some minimal integrity in the regulatory process. If an exaction was simply required to be roughly proportional, the adverse impact of the development might not be mitigated even though it would be economically efficient to mitigate it.

Equally importantly, without the nexus requirement, the distribution of benefits from a property development might be different. To the extent the exactions were unrelated to the nuisance problem, neighbors would still bear the external costs, and the exactions would provide a windfall to whomever benefitted from them. There is a concern that if governments can use exactions to redistribute the benefits of property developments instead of using them to mitigate nuisance problems, they might establish even more regulations than are necessary to further their redistributive objectives.¹⁵¹ Of course, those who administer the government's regulatory apparatus might be among the biggest beneficiaries,¹⁵² as well as those who benefit from the exactions.

¹⁵⁰ The possibility of administrative "extortion" was recognized by the Supreme Court in *Nollan* and referenced in *Dolan*. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994). For articles addressing the problem, see Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 6-7 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1413 (1989).

¹⁵¹ See WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 341-51 (1995).

¹⁵² This implicates the economic theory of bureaucracy. See generally William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293 (1968) (seminal article on economic theory of bureaucracy); see also WILLIAM A. NISKANEN, JR., BUREAUCRACY AND PUBLIC ECONOMICS (1994).

2. The Rough Proportionality Test

From the developer's perspective, any exactions demanded by an administrator for a permit are the "price" the developer must "pay" to proceed with the project. The rough proportionality test helps to ensure that the price the developer pays for the permit does not grossly exceed the amount necessary to abate the adverse impact of the proposed development. For example, if the additional water runoff during a rainfall caused by an owner's proposed development is expected to be one hundred gallons of water per minute, then an easement that would have the capacity to accommodate two hundred gallons of water per minute would exceed what was proportional to the adverse impact of the proposed development and it should fail the rough proportionality test.¹⁵³ A demand for an easement with such a large capacity would thus amount to a taking. An easement with a capacity of one hundred gallons per minute, however, would pass the rough proportionality test. To the extent that an exaction is calibrated to be proportional to the adverse impact of a proposed development, the price paid for a development permit will be no more than the cost of mitigating the adverse impact on neighbors.

Rough proportionality between exactions and the external impact of a development encourages owners to make socially efficient decisions about developing their properties. For the sake of illustration, assume the costs of abating the external impact of a proposed development are less than the costs of the unabated external impact.¹⁵⁴ The maximum social surplus that could be earned from the development, therefore, would be the gross (not net of abatement costs) value the owner could expect to derive from the development minus the costs of abating the external impact of the development on neighbors. If the owner is required to provide an exaction that abates the neighbors' costs, the owner will only proceed with the development plan if the gross value the owner derives exceeds the cost of the exaction. If the cost of the exaction makes the development plan unprofitable for the owner, then the development is socially undesirable because the

¹⁵³ The formal study of stormwater runoff is very scientific and uses different terms. The fact that it is a subject to which so much careful thought has been devoted reflects its importance. See U.S. Dep't of the Interior, *U.S. Geological Survey*, USGS WATER SCI. SCH., <http://www.usgs.gov/special-topic/water-science-school> [<http://perma.cc/KR72-PBHL>] (providing a more comprehensive introduction to water issues).

¹⁵⁴ This raises the question: what if the costs of abating the external impact of the development are greater than the external costs? Of course, in that case, it would not be economically efficient to abate the external impact. There are many possibilities that could confound the example, but the example makes a simple point that is probably germane to a wide number of situations, especially in cases involving water runoff.

maximum social surplus that could be derived from it would be negative. If the exaction is proportional to the adverse impact of the development and the development project is still profitable or desirable for the owner, then the development is socially desirable because it will generate positive social surplus.¹⁵⁵

In the parlance of economic theory, an exaction helps to internalize the costs of an externality and harmonize the property owner's economic incentives with the social good.¹⁵⁶ The rough proportionality test helps to ensure that property owners are not discouraged from proceeding with socially desirable developments by exactions that are excessive and make them unprofitable. Of course, the rough proportionality test only militates against exactions that are excessive. If an administrator demands exactions that do not fully mitigate the adverse impacts of a development, the owner might be encouraged to proceed with a development that is socially undesirable because the private gain is more than offset by the external costs.¹⁵⁷ By internalizing the external costs of development projects, exactions that are appropriately calibrated can help ensure that only socially desirable developments—those that yield positive social surplus—will be undertaken.

The rough proportionality test inhibits administrators from demanding exactions that are excessive and discourage socially desirable property developments, but it does not help to inhibit administrators from demanding exactions that are inadequate to mitigate fully the adverse impacts of property developments that might therefore be undertaken even though, on balance, they are socially undesirable.¹⁵⁸ From a social perspective, if the costs of abating a nuisance are less than the costs of the nuisance, then the nuisance should be abated, so that is unquestionably a problem. Nonetheless, it could be overstated. The costs of an unabated nuisance might not be enough to make the economic surplus from a property development negative. As long as the gross value of the development to the property owner exceeded the costs of the nuisance, the property development would still make a

¹⁵⁵ This is a simple example illustrating the social benefits of “internalizing” an externality. For the classic treatment, see PIGOU, *supra* note 149, at 43.

¹⁵⁶ *See id.*

¹⁵⁷ Mulvaney, *supra* note 12, at 180 (suggesting this is commonly the case).

¹⁵⁸ The social surplus would be the gross value derived by the owner minus the costs of any exactions minus the unabated external costs to others. The owner would derive a profit if the gross value minus the costs of exactions was positive, but the social surplus could be negative if the unabated external costs were sufficiently high. Nonetheless, in many cases the unabated external costs would probably not be sufficiently high to make the economic surplus from the proposed development negative.

positive addition to social surplus, even though the distribution of the benefits might be unfair to those harmed by the nuisance.

Although the rough proportionality test might not achieve the most desirable outcomes in all cases, it still serves important purposes. The regulatory process probably should help to militate against any other parties from having to bear inordinate external costs. In ideal cases, the exactions demanded from a developer would mitigate the adverse impacts of the plan optimally and compensate others adequately for any adverse impacts that could not be mitigated. Moreover, in such cases, property owners would be able to recoup all of the social surplus generated by their development projects. In that respect, when exactions pass constitutional muster, they allow owners to derive the maximum possible value from their properties, subject to mitigating the adverse impacts they might have on others. Of course, in less-than-ideal cases, the rough proportionality test would not help to achieve such lustrous outcomes. But it might not be too much of an exaggeration to say that the Supreme Court's exactions jurisprudence tends to encourage socially constructive property developments, and it tends to protect private property from the overreaches of incompetent or self-serving administrators.

3. What About Inclusionary Housing Programs?

Inclusionary housing programs advance an important social objective, which is to make housing more affordable and neighborhoods more inclusive, but they do not address nuisance problems. The inclusionary zoning ordinances which have been the subject of recent litigation have not entailed the kind of administrative discretion that warrants application of the nexus and rough proportionality tests either. The affordable housing requirements have been established under the ordinances and have not been determined on an individualized basis. One of the concerns about the requirements, no doubt, is that they are perceived to be a way for elected officials to advance a social objective—more inclusionary housing—at the expense of a relatively small group: property developers. To that end, the requirements extract some of the surplus from property developments to advance an arguably unrelated social objective. While this may diminish the incentives for some property developments, and while it no doubt impinges on private property rights, to the extent that the affordable housing requirements are subject to any discipline, it is through the political process.

Some inclusionary housing programs, however, could involve enough administrative discretion to warrant application of the nexus and rough proportionality tests. The previous example of affordable housing replacement programs is germane.¹⁵⁹ Such programs are analogous in some ways to nuisance regulatory schemes. For example, suppose a developer wants to redevelop a city block that is fifty percent affordable housing. If the ordinance requires the replacement of any affordable housing destroyed and delegates some discretion over granting permits to an administrator, the administrator would be appropriate to demand that the redevelopment plan should include fifty percent affordable housing. The cannibalization of affordable housing would be analogous to the adverse impact of the development plan, and the nexus and rough proportionality tests would ensure that the exaction mitigated the adverse impact but did not extract excessive surplus from the redevelopment project.

E. Reconciling Exactions and Regulatory Takings

Whether an exaction should be subjected to the nexus and rough proportionality tests depends on the character of the government action that determines the exaction. This brings the analysis full circle because the character of the government action is one of the factors stated by the Supreme Court in its articulation of the multi-factor inquiry for a regulatory taking in *Penn Central*. Writing for the majority, Justice Brennan acknowledged that the Court's regulatory takings jurisprudence had developed on an ad hoc case-by-case basis, but he observed that:

[T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action.¹⁶⁰

Scholars have parsed this language and Justice Brennan's opinion to try to squeeze out of it as much guidance from it as they can. At least three factors leap from the page, and one of them is the character of the government action.¹⁶¹

¹⁵⁹ See discussion *supra* Section II.C.

¹⁶⁰ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citation omitted).

¹⁶¹ Professors Dana and Merrill identify six factors: the diminution in value; the degree to which reasonable investment-backed expectations were frustrated; whether the government action involved a physical invasion; whether the government action was a nuisance regulation; whether there was an "average reciprocity of advantage;" and

Justice Brennan explained how the character of the government action might matter by observing that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government.”¹⁶² Others have suggested that when the government action entails the regulation of a nuisance, a taking is unlikely to be found.¹⁶³ Nothing in the majority opinion, however, suggests that an inquiry into the character of the government action should be limited to whether it results in a physical invasion by the government or a nuisance regulation. In fact, the Court’s acknowledgement that it has been unable to develop any “set formula” for its takings jurisprudence¹⁶⁴ was an acknowledgement that it is possibly in need of further development and refinement.

The apparently ad hoc nature of the Court’s implicit takings jurisprudence has only been exacerbated by some of the apparent inconsistencies between the treatment of regulatory takings and exaction takings. For example, under the *Penn Central* multi-factor inquiry, when a government action results in a physical invasion, it is a taking.¹⁶⁵ That is one of the few categorical rules of modern takings law. Yet, when the nexus and rough proportionality tests from *Nollan* and *Dolan* apply, an exaction that consists of the owner conveying an easement to the public is a taking only if the easement is not logically connected to the purpose of the regulation under which a permit is required and/or the easement is not proportional to the adverse impact of the proposed development.¹⁶⁶ If the easement passes both the nexus and rough proportionality tests, the exaction is not a taking and just compensation is not required.

The other glaring inconsistency was called out by Justices Thomas and O’Connor in their dissenting opinion to the Supreme Court’s denial of certiorari in *Parking Association of Georgia*,¹⁶⁷ and it was restated by Justice Thomas in his concurrence in *California Building Industry Association*.¹⁶⁸ This Article has attempted to explain why the nexus and rough proportionality

whether the regulation destroyed a recognized property right. See DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 132 (2002).

¹⁶² *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citation omitted).

¹⁶³ DANA & MERRILL, *supra* note 161, at 133.

¹⁶⁴ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

¹⁶⁵ See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

¹⁶⁶ *Dolan v. City of Tigard*, 512 U.S. 374, 391–96 (1994).

¹⁶⁷ *Parking Ass’n v. City of Atlanta*, 515 U.S. 1116–18 (1995) (Thomas, J. and O’Connor, J., dissenting).

¹⁶⁸ *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring).

tests should be applied to exactions demanded by administrators exercising discretion delegated to them under laws, and not to the laws that establish identical or similar requirements for a permit. Justice Thomas, however, raises a bigger question: why should the likelihood that a taking is found seem to turn so heavily on whether the multi-factor inquiry or the nexus and rough proportionality tests apply?

The matter may be more complicated than it appears. Inclusionary housing programs offer a good example. Consider again an affordable housing replacement policy.¹⁶⁹ Suppose it is implemented through a law that requires property owners to replace all the affordable housing units they destroy in redeveloping their properties with an equivalent number of affordable housing units of the same size and quality. Suppose that it does not require the exercise of any administrative discretion because the definitions of affordable housing, housing size, and affordability are all clear and objectively determinable.

Suppose that a developer owns a city block comprised entirely of affordable housing. The law would require the owner to replace the entire city block with equivalent affordable housing under any redevelopment plan. That would severely constrain the owner's economic opportunities, especially if there were no incentives or bonuses to offset the owner's losses from the affordable housing. If the developer made a takings claim against the law, the claim would probably be assessed using the *Penn Central* multi-factor inquiry. Under that inquiry, the law might well be deemed a taking because it would have a severe economic impact on the value of the owner's property,¹⁷⁰ and it might also frustrate the owner's distinct investment-backed expectations. Indeed, the owner might have purchased the block for the sole purpose of redeveloping it for more profitable uses, and she might have made significant investments towards doing so by hiring architects, attorneys, and other professionals to do the planning.

Alternatively, suppose the affordable housing program is structured so that an administrator is delegated discretion to determine how much affordable housing, what size, quality, and cost, any property owner will need to replace. Faced with an application for a permit from the owner of the entire block of affordable housing, the administrator might well decide to demand that the entire block be redeveloped with affordable housing of the

¹⁶⁹ See *supra* Section II.C.

¹⁷⁰ If affordable housing means housing sold at below market prices, the only way the developer could even break even on any redevelopment is if various incentives were offered.

same size and affordability as the housing already on the block. This demand would amount to an exaction. The exaction would constrain the owner's economic opportunities in exactly the same way as the alternative law discussed above. If the owner made a takings claim, however, the exaction would be subjected to the nexus and rough proportionality tests.¹⁷¹ Given that the exaction (the requirement to replace the affordable housing) is logically related to the regulation's purpose, and that the required amount of replacement affordable housing is proportional to the amount of affordable housing to be destroyed by redevelopment, it seems unlikely that an exaction taking has occurred.

The impact on the owner of the property is the same regardless of how the program is structured. Yet, there is probably a regulatory taking if the requirements are established using objective criteria under the law, and there is probably *not* an exaction taking if the same requirements are established by an administrator exercising discretion delegated to it under the law. Should the assessment of whether a taking has occurred depend so heavily on how the program is structured? The only sensible answer is no. As Justice Thomas has implied, there is something still missing from the Supreme Court's implicit takings jurisprudence, so that it lacks coherence and consistency, and is in need of further refinement and development.¹⁷²

That said, the Supreme Court's exaction takings jurisprudence should have an important place in any further refinements and developments. There are important reasons for the Court to scrutinize government actions that involve the exercise of administrative discretion more carefully than government actions that involve the exercise of legislative authority. The exercise of administrative discretion is less transparent, less accountable, and typically involves case-by-case decisions that can result in inequities. Not least of all, there is a larger social concern about encouraging excessive exercises of discretionary administrative authority.

By all appearances, the Supreme Court's exaction takings jurisprudence is well-designed, at least within the sphere of its most appropriate application. As a general matter, it encourages the mitigation of socially harmful nuisances or other social harms, it incentivizes developers to make socially desirable decisions about how to develop their properties, and it allows property owners to derive as much value from their properties as possible

¹⁷¹ See *supra* Section II.C.

¹⁷² *Cal. Bldg. Indus. Ass'n.*, 577 U.S. at 1179 (Thomas, J., concurring).

subject to the need to pay for external costs. Perhaps most important of all, it protects private property from unelected administrative officials who might abuse their discretion to usurp surplus from the owner's development projects for other purposes.

Nonetheless, the Supreme Court's exactions jurisprudence is better regarded as a further development of implicit takings jurisprudence than as an island unto itself. If the character of the government action involves the exercise of administrative discretion to demand an exaction in return for a permit required to develop property under a law enacted by a legislature, then the nexus and rough proportionality tests should be applied. If the exaction fails one or both of the tests, it is a taking. If the exaction fails the nexus test, then there is no logical connection between the exaction and the purpose for which the permit is required. The administrative body that demands the exaction has gone too far by seeking to advance some purpose other than the one that the law was intended to serve. If an exaction fails the rough proportionality test, then the administrator has gone too far by demanding too much in return for the permit.

If an exaction passes the nexus and rough proportionality tests, it is not a taking, even though it might entail a physical invasion of an owner's land.¹⁷³ That is consistent with the multi-factor inquiry because of the character of the government action. An exaction is only demanded by an administrator in return for a permit. The permit is required under law, but the requirements for obtaining the permit, if any, are left to the administrator's discretion. A landowner's right to develop her property is thus eliminated by the law requiring the permit. If the owner applies for a permit and an exaction is demanded, then it is the price the owner must pay to "buy back" the right to develop her land. If the owner is willing to "pay" for the right to develop her land by conveying an easement, or otherwise allowing a physical invasion, the easement is not taken, rather it is consideration for a development right.

In principle, however, there is no reason why a property owner should be limited to making an exaction takings claim. The administrator is delegated discretion to demand exactions by law. The law has a purpose that is relevant in applying the nexus and rough proportionality tests and thus it limits the scope of the administrator's discretion. But what if an administrator properly exercises discretion under the law so that neither the nexus nor rough proportionality test fails, but the exactions that are properly

¹⁷³ *Dolan v. City of Tigard*, 512 U.S. 371, 391–96 (1994).

demanded under the law still go too far? Can the property owner then not also make a claim that the law amounts to a regulatory taking? There is no logical reason why not. In fact, the principles of takings jurisprudence seem to obligate courts to vindicate the owner's property rights by allowing the additional claim.

Consider again the example of an affordable housing replacement program, structured so that an administrator is delegated discretion to determine how much affordable housing a property owner will need to replace in order to obtain a development permit.¹⁷⁴ Suppose an owner whose property is devoted entirely to affordable housing units applies for a development permit. Suppose further she had purchased the property in the hope of redeveloping it for more profitable uses and had made significant concrete investments in a redevelopment plan. If the administrator demands that her new development be comprised entirely of affordable housing to replace all the affordable housing that would be destroyed, an exaction takings claim would probably fail because the nexus and rough proportionality tests would probably be met.¹⁷⁵ Of course, the exactions could nonetheless have a very severe economic impact on the owner.

If the owner was allowed to make an additional takings claim targeted not at the exaction but at the law under which the exaction was demanded, that could help to protect the owner from a law that goes "too far" even if the exaction does not. In the affordable housing replacement example, the law might amount to a taking by authorizing an exaction that has such a severe economic impact on the owner. As a general matter, the additional claim would most appropriately be assessed under a slightly modified version of the *Penn Central* multi-factor inquiry. Slight modification would be necessary to accommodate some of the special characteristics of exactions. For example, if an exaction was for an easement, the *per se* rule regulating government action that results in a physical invasion would not apply. But the other components of the *Penn Central* multi-factor inquiry could still apply.

This approach to implicit takings would incorporate the *Nollan/Dolan* nexus and rough proportionality tests into implicit takings jurisprudence, instead of treating them as an alternative to the *Penn Central* multi-factor inquiry. It would entail first determining whether the nexus and rough proportionality tests

¹⁷⁴ See discussion, *supra* Section II.C.

¹⁷⁵ See *id.*

were needed, and then applying the nexus and rough proportionality tests if they were needed. If the exaction takings claim failed, it would also allow the owner to succeed with a regulatory takings claim using the *Penn Central* multi-factor inquiry. The converse, however, would not be the case. If a regulatory takings claim failed, the owner would not then be able to make an exaction takings claim. An exaction takings claim could only be made if the criteria for applying the nexus and rough proportionality tests were met.

This would respect the special purpose of the Supreme Court's exaction takings jurisprudence: to protect private property rights from the overreaches of unelected administrative officials exercising discretion delegated to them under the law. An exaction takings claim is directed at the exactions demanded by the administrators, not at the law under which the administrators derive their authority. It is easy to imagine a scenario in which the administrators exercise their discretion appropriately under the law, thus exempting any exactions from a successful exaction takings claim, but the law establishes such wide parameters for their discretion that the owner is nonetheless unconstitutionally deprived of property. In such a case, the owner should be able to make a regulatory takings claim against the law itself.

F. A Roadmap for How to Analyze an Implicit Takings Claim

Analyzing implicit takings claims is difficult. The task may be simplified by proceeding in discrete steps, each of which prompts an important part of the analysis. The first step addresses any possible exaction takings claim. The subsequent steps begin by applying the per se rules under the *Penn Central* multi-factor inquiry and end with the balancing test. The following steps are suggested:

Step 1: Is the property right claimed to be taken through an exaction demanded or suggested by an administrative body exercising discretion delegated under a law or regulation?

- If the answer is yes, apply the nexus and rough proportionality tests. If either or both tests fail, there is an exaction taking. If neither test fails, there is no exaction taking. Proceed to Step 3.
- If the answer is no, there is no need to apply the nexus and rough proportionality tests. Proceed to Step 2.

Step 2: Does the government action cause a physical invasion of the property?

- If the answer is yes, there is a taking.
- If the answer is no, proceed to the next step.

Step 3: Does the government action consist of a law or regulation that codifies an existing common law nuisance regulation?

- If the answer is yes, there is no taking.
- If the answer is no, proceed to Step 4.

Step 4: Does the government action deprive the owner of all economically viable uses of the property?

- If the answer is yes, there is a taking.
- If the answer is no, proceed to Step 5.

Step 5: Apply the *Penn Central* balancing test¹⁷⁶ and consider the following:

- The diminution in value of the property.
- The degree to which the owner's reasonable investment-backed expectations were frustrated.
- Whether the government action was a nuisance regulation, even though it did not codify a common law nuisance regulation.
- Whether there was an "average reciprocity of advantage."
- Whether the regulation destroyed a recognized property right.

CONCLUSION

The recent cases challenging affordable housing requirements under inclusionary housing laws touch a nerve because they bear on an important social issue and address the line between state powers and private property. They tap into an ongoing controversy about whether government interventions in the housing market do more harm than good. But they also raise much more general questions about implicit takings law. The Supreme Court itself has characterized its implicit takings jurisprudence as ad hoc and lacking any set formula, but some of the questions raised by the inclusionary housing cases cut to whether it is even coherent. The Court's exaction takings cases seem to apply a much higher

¹⁷⁶ This version of the balancing test is the one suggested in *DANA & MERRILL*, *supra* note 161, at 132, with one slight modification. In light of the Supreme Court's elimination of the permanent/temporary distinction for physical invasions in *Cedar Point Nursery*, the question relating to temporary physical invasions has been eliminated. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

standard of scrutiny than its regulatory takings cases. This has made the scope of exaction takings law a battleground for the opposing sides in the endless struggle between advocates for stronger private property rights and social progressives who advocate for more expansive government powers.

Property theory, the Supreme Court's cases, scholarly commentary, and common sense all imply that takings claims against exactions demanded by unelected administrative officials—who are exercising discretion to make individualized decisions on a case-by-case basis—should be subjected to the *Nollan/Dolan* nexus and rough proportionality tests. Takings claims against exactions required under laws enacted by elected officials, however, should be subjected to the *Penn Central* multi-factor inquiry. There are important reasons for courts to scrutinize government actions that involve the exercise of administrative discretion more carefully than government actions that involve the exercise of legislative authority. The exercise of administrative discretion is less transparent, less accountable, and typically involves individualized decisions made on a case-by-case basis that can result in inequities. Moreover, the expansion in the scale of administrative discretion over the last fifty years has heightened concerns about the abuse of administrative authority. It makes sense, therefore, for exaction takings claims to be subjected to a stricter standard than regulatory takings claims.

The Supreme Court's exaction takings jurisprudence is especially efficacious in policing against administrative abuses under nuisance regulations. Nuisance problems have often been regulated under schemes that delegate discretion to administrators to decide whether to grant permits and what exactions will be required. The exactions can enhance economic efficiency by helping to abate the external costs of nuisances caused by property developments. But when the administrators abuse their discretion by either demanding exactions that do not help to abate the costs of the nuisances or going beyond what is necessary to abate them, the exactions can impede economically efficient property developments. The nexus and rough proportionality tests can help to police against exactions that do not abate nuisances or discourage owners from investing in economically efficient property developments.

Whether inclusionary housing programs should be subjected to the nexus and rough proportionality tests depends upon how they are designed. If the inclusionary housing requirements are determined by an unelected administrator exercising discretion

under a law that establishes the permit requirement, any property interests demanded or suggested by the administrator in return for a permit should be subject to the nexus and rough proportionality tests. The inclusionary housing programs that have recently been challenged were not designed that way, but some inclusionary housing programs, such as some affordable housing replacement programs, may give administrators relatively broad discretion to determine affordable housing requirements on an individualized basis.

If administrators are delegated sufficient discretion in determining affordable housing replacement requirements on an individualized basis, concerns about administrative coercion, lack of transparency, and weak political accountability might justify the application of the Supreme Court's exaction takings jurisprudence. If so, the nexus test would probably be met as long as the exactions included affordable housing requirements because the logical connection between affordable housing requirements and the purpose of the permit requirement would be obvious. The rough proportionality test would also probably be met, unless the administrator's demand was for more affordable housing than the amount that would be destroyed under the owner's development plan.

It is conceivable that exactions might survive an exaction takings claim even though they have a severe economic impact on the property owner. Such a case might arise, for example, when the exactions demanded under an affordable housing replacement program deprive the owner of almost all economically viable property rights. In such a case, the owner should be able to direct a regulatory takings claim against the law itself and not just the exactions. The claim should be subjected to a modified version of the *Penn Central* multi-factor inquiry. The first step in analyzing an implicit takings claim, therefore, should be to ask whether the nexus and rough proportionality tests should be applied. If the answer is no, the full *Penn Central* multi-factor inquiry should be undertaken. If the answer is yes, the nexus and rough proportionality tests should be applied. If either test fails, there is a taking. If neither fails, the *Penn Central* multi-factor inquiry without the *Cedar Point Nursery* per se rule should be undertaken.

Allowing property owners to make exaction takings claims against exactions—which are demanded by administrators exercising discretion delegated to them under laws, and also regulatory takings claims against the laws under which the exactions are determined—would help to achieve greater coherence in the Supreme Court's implicit takings jurisprudence.

It would preserve the virtues of the Court's exaction takings jurisprudence without compromising its regulatory takings precedents, and it would provide an additional layer of protection for property rights in some important cases. Most important of all, it would help to resolve the battle over the scope of the Supreme Court's heightened scrutiny standard in implicit takings cases and allow the important debate about state powers over private property to move forward.

A Legislative Path for Sports Betting in California: An Examination of *Hotel Employees* and the California Supreme Court's Dueling Interpretations of the Constitutional Ban on 'Casino-Style' Gaming

Daniel Wallach*

This Article addresses a timely and important issue of constitutional law in California: namely, does the California Constitution's prohibition against Nevada-and-New Jersey-style casinos expressed in Article IV, Section 19(e) prevent the California Legislature from authorizing sports betting through a statutory enactment? No prior judicial decision or law review article has directly addressed this issue, which has suddenly become relevant with the demise of the federal ban on state-authorized sports betting and increasing state efforts to legalize sports betting in recent years.

In the aftermath of the 2018 U.S. Supreme Court decision striking down the Professional and Amateur Sports Protection Act on constitutional grounds, more than thirty states have enacted new laws authorizing sports betting. However, California—projected to be the largest market for sports betting in the United States by a considerable margin—is not among this group of first-mover states. While many states have been able to proceed expeditiously, passing sports betting statutes following several months of legislative

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deliberations, California's expected ascendancy to the U.S. sports betting throne has been delayed due to the widely-held belief that an amendment to the state constitution—accomplished by way of a ballot measure or ballot initiative approved by voters during a statewide general election—is a prerequisite to the legalization of sports betting in California.

*This Article challenges that premise. Building off this author's prior testimony before the California Senate and California Assembly Governmental Organization Committees, this Article examines the Legislature's power to authorize sports wagering through the lens of the California Supreme Court's decision in *Hotel Employees & Restaurant Employees Int'l Union v. Davis*, which, to date, is the only judicial decision to break down and interpret the individual component parts of section 19(e)'s declaration that the "[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey."*

*In *Hotel Employees*, the Supreme Court identified two possible ways to interpret that constitutional language—one which is tied to the specific gambling activities that were "unique to or particularly associated with" Nevada and New Jersey casinos in 1984, and the other more broadly referring to all categories of gambling that were banned in California at that time. This Article will examine these seemingly contradictory interpretations as part of a broader inquiry into whether section 19(e) applies to sports wagering. Dissecting the Supreme Court's dual interpretations of section 19(e) in light of: (1) the facts of *Hotel Employees* and well-established principles of constitutional interpretation recognized by the California Supreme Court (including the substantial deference that must be shown to the legislative interpretation of a constitutional provision that is reasonably susceptible to two or more interpretations); (2) subsequent decisional law equating section 19(e) with a ban on "casino-style" gaming; and (3) the material differences between sports betting and casino-style gaming—both in terms of their essential characteristics and treatment under the law—this Article ultimately concludes that section 19(e)'s ban on casino-style gaming is not a barrier or obstacle to the legislative authorization of sports betting.*

This conclusion, which bucks the conventional wisdom but is deeply rooted in well-established principles of constitutional interpretation, should, in this author's view, lead to a reassessment of the appropriate mechanism—as well as an acceleration of the timeline—for the legalization of mobile sports betting in California.

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INTRODUCTION

California has been described as the “holy grail” of United States sports betting.¹ With nearly 40 million residents—by far the most populous state in the country—and nineteen professional sports teams—more than any other state—California is expected to become the largest market for sports betting in the United States.² Industry experts project that if sports betting were to become legalized in California, more than \$30 billion in wagers would be placed annually, which, in turn, would generate at least \$2 billion in annual revenues for sportsbook operators and more than \$300 million in state tax collections each year.³ To put these staggering figures into

¹ See *California Could Open Door to \$30 Billion in Annual Bets if Sports Betting is Approved, According to PlayCA.com*, PR NEWSWIRE (May 29, 2020) [hereinafter *California Could Open Door*], <http://www.prnewswire.com/news-releases/california-could-open-door-to-30-billion-in-annual-bets-if-sports-betting-is-approved-according-to-playacom-301067820.html> [<http://perma.cc/G7T7-842F>] (quoting gaming industry analyst Dustin Gouker, the chief analyst for PlayCA.com).

² See Jill R. Dorson, *California Quagmire: Sports Betting Moves, But With Heavy Opposition*, SPORTSHANDLE (June 2, 2020), <http://sportshandle.com/california-hearing-sports-betting-moves/> [<http://perma.cc/5GAQ-F85N>] (explaining California “is projected to be the biggest [sports betting] market in the U.S. and one of the biggest in the world”); Chris Murphy, *Latest California sports betting bill keeps card rooms out in the cold*, SBC AMERICAS (May 29, 2020), <http://sbcamericas.com/2020/05/29/latest-california-sports-betting-bill-keeps-card-rooms-out-in-the-cold/> [<http://perma.cc/K3D7-L2YV>] (stating California is “widely regarded as potentially the biggest market for sports betting”); see also America Counts Staff, *California Remained Most Populous State but Growth Slowed Last Decade*, UNITED STATES CENSUS BUREAU (Aug. 25, 2021), <http://www.census.gov/library/stories/state-by-state/california-population-change-between-census-decade.html> [<http://perma.cc/64U2-SQ3P>]; *Who Are the Biggest Sports Teams in Southern California?*, THE SIGNAL (Sept. 7, 2021) <http://signal.scv.com/2021/09/who-are-the-biggest-sports-teams-in-southern-california> [<http://perma.cc/ECY8-WRS3>] (noting that California has the most teams).

³ See *California Could Open Door*, *supra* note 1; see also Katherine Sayre, *Dueling Plans Vie to Put Sports Betting Before California Voters*, WALL ST. J. (Dec. 19, 2019, 5:30 AM), <http://www.wsj.com/articles/duelling-plans-vie-to-put-sports-betting-before-california-voters-11576751400> [<http://perma.cc/CXT2-78NZ>] (“A mature sports-betting market in California that included online betting would generate an estimated \$2.2 billion in annual revenue for sportsbook operators, said Chris Grove, a partner and analyst with Eilers & Krejcik Gaming.”); *Economic Impact of Legalized Sports Betting*, OXFORD ECON. 1, 39 (May 2017), <http://www.americangaming.org/wp-content/uploads/2018/12/AGA-Oxford-Sports-Betting-Economic-Impact-Report1-1.pdf> [<http://perma.cc/RE5J-DJN8>] (projecting that California would generate nearly \$36 billion in annual wagers, roughly \$2.4 billion in annual revenues, and around \$235 million in annual tax collections, assuming a 10% tax rate and convenient availability). These estimates may actually be on the low side, especially considering New York State’s record-breaking first month of online sports betting in January 2022 during which nearly \$2 billion of online wagers were made in a state that is roughly one-half of California’s population size. See Robert Linnehan, *New York Online Sports Betting Takes in Nearly \$2 Billion During First 30 Days*, ELITE SPORTS NY, (Feb. 14, 2022), <http://elitesportsny.com/2022/02/14/new-york-online-sports-betting-takes-in-nearly-2-billion-during-first-30-days/> [<http://perma.cc/2PR3-C8BL>] (“New York has taken in \$1.98 billion in bets in its first 30 days of online sports betting, according to Gov. Kathy Hochul in a press release.”). Indeed, the most recent projection by gaming industry analyst Chris

perspective, consider that New Jersey—currently the largest sports betting market in the country—processed \$6 billion in sports wagers in 2020, generating nearly \$400 million in annual operator revenues and roughly \$50 million in tax collections for the state.⁴

California could certainly use new sources of revenue, especially considering that its economy has been devastated by the COVID-19 pandemic.⁵ Unlike scores of other states that have moved quickly to capitalize on the sports betting revenue opportunity made possible by the demise of the Professional and Amateur Sports Protection Act (“PASPA”),⁶ California remains stalled in the starting blocks. As of the date of this publication, more than three years after PASPA was declared unconstitutional by the United States Supreme Court, thirty-two states plus the District of Columbia have enacted new sports betting laws.⁷ The vast majority of the remaining states have introduced bills to legalize sports betting in their respective 2021

Grove, a partner at Eilers & Krejci Gaming, suggests that a mature, online sports betting market in California could generate more than \$3 billion in annual revenues for online sports betting companies. See David Purdum, *High-stake Battle Rages over California Sports Betting Push*, ESPN, (Feb. 10, 2022), http://www.espn.com/chalk/story/_id/33254799/high-stake-battle-rages-california-sports-betting-push [<http://perma.cc/AG93-SPC5>] (“Grove’s most bullish projections suggest a mature, online sports betting market in California could generate more than \$3 billion in annual revenue.”).

⁴ See David Purdum, *Record \$6 Billion Bet with New Jersey Sportsbooks in 2020*, ESPN (Jan. 13, 2021), http://www.espn.com/chalk/story/_id/30705676/record-6-billion-bet-new-jersey-sportsbooks-2020 [<http://perma.cc/X9Y5-ZUQD>]; *DGE Announces December 2020 Total Gaming Revenue Results*, N.J. OFF. OF THE ATT’Y GEN. 1, 5 (Jan. 13, 2021), <http://www.nj.gov/oag/ge/docs/Financials/PressRel2020/December2020.pdf> [<http://perma.cc/M4X8-6LSF>].

⁵ See Margot Roosevelt, *California Economy Is Fast Losing Momentum; 327,600 Give Up on Seeking Jobs*, L.A. TIMES (Dec. 18, 2020, 5:58 PM), <http://www.latimes.com/business/story/2020-12-18/california-economy-loses-momentum-covid-19-surge> [<http://perma.cc/455C-HWFM>].

⁶ PASPA was a federal statute which made it unlawful for:

a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based on . . . one or more competitive games in which amateur or professional athletes participate . . . or on one or more performances of such athletes in such games.

Pub. L. No. 102-559, § 2, 106 Stat. 4227, 4228 (1992) (codified as amended at 28 U.S.C. § 3702). In short, PASPA prohibited most states and federally-recognized Indian tribes from enacting laws authorizing or permitting sports gambling. See *id.* On May 14, 2018, in a 6-3 decision, the Supreme Court declared PASPA unconstitutional under the Tenth Amendment’s anti-commandeering doctrine. See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478–80 (2018).

⁷ See Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK, <http://www.actionnetwork.com/news/legal-sports-betting-united-states-projections> [<http://perma.cc/EM8Q-XK42>] (last updated Feb. 12, 2022, 1:05 PM).

legislative sessions.⁸ Incredibly, California—a trailblazer in so many industries (i.e., film, entertainment, and technology, to name just a few) and long known as the “Gold Rush State”—is not in either group.

One reason why California has remained on the sidelines is because of a widely held belief that an amendment to the state constitution is a prerequisite to the legalization of sports betting.⁹ Amending the California Constitution is a time-consuming and arduous process, requiring either an extensive signature-gathering effort (in the case of a voter initiative to amend the state constitution)¹⁰ or a two-thirds vote by both houses of the California Legislature (in the case of a legislatively-referred ballot measure to amend the state constitution),¹¹ followed by a majority vote of the statewide electorate.¹² “In either case, substantial funds are required to organize and fund the statewide campaign that follows the initiative qualification procedure or requisite legislative approval.”¹³ As one California federal judge noted nearly twenty-five years ago, “the size of California make[s] this endeavor particularly expensive.”¹⁴

Despite these formidable barriers, in the year following the repeal of PASPA, California legislative leaders and a coalition of California’s Native American tribes introduced competing

⁸ See Alex Sherman, *Here’s Where Sports Betting Is Legal, and the 19 States Set to Vote on It This Year*, CNBC (Mar. 13, 2021, 2:38 PM), <http://www.cnbc.com/2021/03/13/is-sports-betting-legal-in-my-state.html> [<http://perma.cc/J3QX-4H2U>].

⁹ See Don Thompson, *California Sports Betting Would Need Constitutional Change*, AP NEWS (May 14, 2018), <http://apnews.com/article/63263205d1f74b8b9d9b583959a53c1a> [<http://perma.cc/DB22-PL2D>] (“Voters would have to change California’s Constitution before legal sports betting could come to the nation’s most populous state . . .”).

¹⁰ See CAL. CONST. art. II, § 8(b).

¹¹ See *id.* art. XVIII, § 1.

¹² See Brantley I. Pepperman, *Guilty Until Proven Innocent: California’s Prop. 50 Turns the Concept of Due Process on its Head*, 51 LOY. L. REV. 609, 644 (2018) (“The California Constitution can be amended in two ways: upon a two-thirds vote of each house, the Legislature may propose an amendment to the voters, or voters themselves may amend the Constitution through the initiative process. Either method requires statewide approval by a majority of votes.”); see also *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1498–99 (N.D. Cal. 1996) (describing the two primary methods for amending the California Constitution, independent of convening a constitutional convention), *vacated on other grounds*, 110 F.3d 1431 (9th Cir. 1997).

¹³ *Coal. for Econ. Equity*, 946 F. Supp. at 1499.

¹⁴ See *id.* The spending on statewide initiative campaigns has reached unprecedented levels in California, as evidenced by the recent campaign expenditures for Proposition 22. See Brian Melley, *Uber, Lyft Spend Big, Win in California Vote About Drivers*, AP NEWS (Nov. 4, 2020), <http://apnews.com/article/business-california-837ebb151c7aa65596537b4a5f7a2f9d> [<http://perma.cc/5M8G-F9VK>] (noting that Uber, Lyft, and other app-based ride-hailing and delivery services spent nearly \$200 million in support of a ballot initiative that would allow them to classify their drivers as independent contractors rather than employees eligible for benefits and job protections).

proposals to legalize sports betting through an amendment to the state constitution.¹⁵ The legislative ballot measure would have allowed Native American tribes and state-licensed horse racetracks to operate both in-person and online sports wagering.¹⁶ The tribal ballot initiative was more restrictive: it would allow only in-person betting at tribal casinos and state-licensed horse racetracks, but, notably, online sports betting would not be permitted under the tribal proposal.¹⁷ While presenting starkly different visions for the future of sports betting in California, both proposals sought to utilize a similar vehicle for legalization: a statewide vote of the electorate to amend section 19 of article IV of the California Constitution.¹⁸

From the vantage point of California's Native American tribes, the use of a ballot initiative to legalize sports betting through a constitutional amendment offers several important advantages. First, it enables the tribes to bypass the traditional legislative process¹⁹ (which would inevitably need to take into account the divergent interests of California's other gaming

¹⁵ See Gambling: Sports Wagering, S. Const. Amend. 6, 2019–20 Reg. Sess. (Cal. 2020), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SCA6 [<http://perma.cc/ZA24-K2CC>]; Gambling, Assemb. Const. Amend. 16, 2019–20 Reg. Sess. (Cal. 2019), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200ACA16 [<http://perma.cc/X7V9-8XPU>]; Letters from Mark Macarro, et al., Proponents, to Anabel Renteria, Initiative Coordinator, Atty. Gen. of Cal., Authorizes New Types of Gambling, Initiative Constitutional and Statutory Amendment, Att'y Gen. No. 19-0029A1, (filed Nov. 4, 2019; amended Dec. 23, 2019), <http://oag.ca.gov/system/files/initiatives/pdfs/19-0029A1%20%28Sports%20Wagering%20%26amp%3B%20Gambling%29.pdf> (last visited April 3, 2022) [<http://perma.cc/BP3Q-4FXT>] [hereinafter Tribal Retail Initiative].

¹⁶ See Matthew Kredell, *New California Sports Betting Bill Tries To Bridge Gaps for Tribes, Cardrooms*, LEGAL SPORTS REP. (May 29, 2020), <http://www.legalsportsreport.com/41316/new-california-sports-betting-bill/> [<http://perma.cc/V4K5-TLMZ>].

¹⁷ See Patrick McGreevy, *Native American Tribes Propose Initiative To Legalize Sports Betting in California*, L.A. TIMES (Nov. 13, 2019, 6:45 PM), <http://www.latimes.com/california/story/2019-11-13/native-american-tribes-initiative-legalize-sports-betting-california> [<http://perma.cc/7TRK-MX6U>].

¹⁸ See *id.*; Kredell, *supra* note 16. Section 19 of article IV houses the various state constitutional provisions relating to gambling, and includes subsections addressing lotteries, horse race wagering, tribal compacts, casino-style gambling, and charitable gaming. See CAL. CONST. art. IV, § 19. The specific subsections in section 19 either “authorize” certain types of gambling activities—as in the case of the state lottery, horse race wagering, bingo games for charitable purposes, casino-style games on tribal lands, and charitable gaming—or prohibit the legislature from authorizing certain gambling activities, such as private lotteries and “casinos of the type currently operating in Nevada and New Jersey.” See *id.*

¹⁹ See *Ballot Initiatives*, STATE OF CAL. DEP'T OF JUST., <http://oag.ca.gov/initiatives> [<http://perma.cc/K5BU-E7DH>] (last visited May 31, 2021) (“The ballot initiative process gives California citizens a way to propose laws and constitutional amendments without the support of the Governor or the Legislature.”).

stakeholders).²⁰ Second, it ensures the tribes a near-monopoly over sports betting in California.²¹ Lastly, it eliminates the potential competitive threat—and legal uncertainties—posed by online sports wagering.²²

For the state legislature, however, there are significant drawbacks to pursuing the legalization of sports betting through a proposed constitutional amendment. First, there is the issue of timing: in California, legislatively-initiated ballot measures to amend the state constitution can only appear on the ballot in primary or general elections, which are held

²⁰ The primary gaming stakeholders in California are the Native American tribal casinos, commercial card rooms, and state-regulated horse racetracks. See Steve Ruddock, *Sports Betting Is on the Menu in California but Major Hurdles Remain*, BETTINGUSA (Nov. 11, 2019), <http://www.bettingusa.com/california-sports-betting-2020-hurdles/> [<http://perma.cc/L4W2-NZM3>] (referring to California’s tribal casinos, card rooms, and horse racetracks as “[t]he [t]hree-[h]eaded [m]onster” that comprises the “trio of competing interests” in the state’s gaming industry).

²¹ Under the tribal initiative, only tribal governments and “Approved Racetrack Operators” (defined as state-licensed, privately-owned horse racing venues located in the Counties of Alameda, Los Angeles, Orange, or San Diego) would be permitted to offer sports wagering. See Tribal Retail Initiative, *supra* note 15, at §§ 3(b)–(c), 4(f), 5.1. As of the date of this publication, there were seventy-six tribal casinos in California. See *California Casinos: Updates 2021*, 500NATIONS, http://www.500nations.com/California_Casinos.asp [<http://perma.cc/8DB3-WZ2W>] (last visited May 31, 2021). Each of these venues would be permitted to offer sports betting under the tribal initiative. By contrast, only four horse racing venues—Del Mar Racetrack (San Diego County), Los Alamitos Racecourse (Orange County), Santa Anita Park (Los Angeles County), and Alameda County Fairgrounds (Alameda County)—would be eligible to offer sports betting under that proposal. In other words, seventy-six out of eighty potential sportsbook venues—or roughly 95%—would be tribally-owned-and-operated. See *id.*

²² California’s Native American tribes view sports betting as a vehicle to increase visitation to tribal casinos, many of which are located in rural areas, and there is concern that the widespread availability of mobile sports wagering throughout the state would reduce incentives to visit such facilities. See Ryan Butler, *California Sports Betting Begins to Take Shape During Wild December*, ACTION (Dec. 15, 2020, 4:57 PM), <http://www.actionnetwork.com/legal-online-sports-betting/california-sports-betting-legalization-update-2020> [<http://perma.cc/Z7EA-U9KW>]. In addition, there is serious doubt as to whether the federal law which regulates the conduct of gaming on Indian lands—the Indian Gaming Regulatory Act (“IGRA”)—would even permit tribal casinos to accept online bets from any person physically located outside of tribal lands when he or she initiates the wager. See *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 968 (9th Cir. 2018) (holding that a California tribe’s operation of a server-based bingo game over the Internet “constitutes gaming activity that is not located on Indian lands,” and, therefore, “violates the UIGEA, and is not protected by IGRA”); *West Flagler Assocs. v. Haaland*, No. 21-cv-2192 (DLF), No. 21-cv-2513 (DLF), 2021 WL 5492996, at *9 (D.D.C. Nov. 22, 2021) (holding that a tribal-state gaming compact that allows patrons to place online sports bets throughout Florida violates IGRA’s “Indian lands” requirement, even though the compact expressly “deems” the bet to take place on tribal lands where the server processing the bet is located). For a more extensive treatment of this issue, see generally Daniel Wallach, *Florida’s Gambling Compact Set Up To Fail? Federal Rejection of Mobile Sports Betting Likely To Trigger a Tribal Monopoly*, FORBES (May 10, 2021, 12:51 PM), <http://www.forbes.com/sites/danielwallach/2021/05/10/floridas-gambling-compact-set-up-to-fail-federal-rejection-of-mobile-and-off-reservation-sports-betting-likely-to-trigger-a-tribal-monopoly/?sh=4cb1261a6682> [<http://perma.cc/UPX6-SA2L>].

exclusively in even-numbered years.²³ Second, before a legislatively-referred proposed constitutional amendment can even be placed on the statewide ballot, it must first be approved in both houses of the California Legislature by a two-thirds vote.²⁴ This is “a difficult, if not impossible, task on any hotly disputed matter.”²⁵ Indeed, this numeric threshold—which is among the highest in the country—has proven thus far to be an insurmountable barrier to legislative efforts to propose a constitutional amendment that would include an authorization for online sports betting.²⁶

²³ See CAL. ELEC. CODE §§ 1200–1201 (West 2021). By contrast, a citizen-initiated ballot initiative to amend the California Constitution can be presented to the electorate during either a general election or statewide special election. See CAL. CONST. art. II, § 8(c). Unlike a general election, statewide special elections are not confined to even-numbered years. See, e.g., Kevin Shelley, *Statement of Vote*, CAL. SEC’Y OF STATE (2003), <http://elections.cdn.sos.ca.gov/sov/2003-special/sov-complete.pdf> [<http://perma.cc/34SL-C6HX>] (illustrating the recall election of Governor Gray Davis being conducted as a special election with an included citizen-initiated ballot initiative). *But see* Elections: Ballot Measures, S.B. 202, 2011–2012 Reg. Sess. (Cal. 2011), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120SB202 [<http://perma.cc/5M66-VM33>] (requiring that any citizen-led ballot initiative after July 1, 2011, be limited to general elections only). Despite its enactment, S.B. 202 may be vulnerable to a legal challenge based on the notion that statutory legislation cannot “abrogate or deny a right granted by the Constitution.” *Rose v. State*, 123 P.2d 505, 513 (Cal. 1942).

²⁴ See CAL. CONST. art. XVIII, § 1.

²⁵ PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS* 76 (Bernard Grofman ed., 4th vol. 1998) (“In California it is harder for the legislature to propose a constitutional amendment than for many initiative proponents to do so. The legislature must achieve a two-thirds vote, a difficult, if not impossible, task on any hotly disputed matter. Initiative sponsors, however, can propose constitutional amendments by obtaining signatures equal to 8 percent of the last gubernatorial vote, a task that sponsors who have enough money to pay signature gatherers generally have no trouble accomplishing.”); see also Pepperman, *supra* note 12, at 644 n.238 (“It is relatively easy to qualify [an initiative] measure on the statewide ballot.”) (citation omitted).

²⁶ Due to tribal opposition, California State Senator Bill Dodd (D-Napa) withdrew SCA-6—the most recent legislative proposal to authorize sports wagering through a voter-approved ballot measure—when it became apparent that the measure lacked the requisite two-thirds support in the Senate. See Matthew Kredell, *California Sports Betting Bill Dead After Tribal Opposition Too Strong*, LEGAL SPORTS REP. (June 22, 2020), <http://www.legalsportsreport.com/42104/california-sports-betting-bill-dead-as-tribal-opposition-too-strong/> [<http://perma.cc/294C-EKFZ>]. With a legislatively-referred proposed constitutional amendment seemingly a nonstarter, proponents of online sports betting have turned to the ballot initiative process as their preferred vehicle for legalization. Between August 2021 and December 2021, three different citizen groups filed proposed ballot initiatives to amend the California Constitution to allow online sports betting. See Letters from Helen Fiscaro, et al., Proponents, to Hon. Rob Bonta, Att’y Gen. of Cal. (Aug. 9, 2021) (proposing initiative 21-0009 to allow California Indian tribes, horse racetracks, card rooms, and professional sports venues to operate both in-person and online sports betting) (on file with author); Letter from John J. Moffatt, et al., Proponents, to Hon. Rob Bonta, Att’y Gen. of Cal., Allows Online and Mobile Sports Wagering, Initiative Constitutional Amendment and Statute, Att’y Gen. No. 21-0017A1 (Aug. 31, 2021; amended Oct. 5, 2021),

This begs the question: is a constitutional amendment even necessary for sports betting? Or put differently, does the state legislature have the power to authorize sports betting by statute without an amendment to the California Constitution? Both questions go to the heart of legislative authority and entail consideration of constitutional restrictions or limitations on the exercise of such powers. This is because “the California Constitution, unlike its federal counterpart, is a limitation or restriction on the powers of the Legislature, rather than a grant of power to it.”²⁷ Thus, as the California Supreme Court has explained, it does “not look to the Constitution to determine whether the Legislature is *authorized* to do an act, but only to see if it is *prohibited*.”²⁸ Notably, the California Constitution does not expressly prohibit the state legislature from authorizing sports betting.²⁹ However, it does prohibit the legislature from authorizing “casinos of the type currently operating in Nevada and New Jersey.”³⁰ This language, contained in article IV, section 19(e), embodies California’s constitutionally enshrined public policy against “casino-style” gambling.³¹ But does this anti-casino provision—which targets a particular type of gambling associated with two specific geographic locations—encompass wagering on sporting events?

No California judicial decision has ever addressed the applicability of section 19(e) to sports betting. And, for good reason—until mid-2018, PASPA had forbidden states from authorizing that activity.³² So, there has been no real opportunity to test the applicability of section 19(e) in that specific context. As a consequence, there has been a dearth of interpretative analysis examining whether sports betting is encompassed within section

<http://oag.ca.gov/system/files/initiatives/pdfs/21-0017%20%28Sports%20Gambling%29.pdf> [<http://perma.cc/N2KJ-9E2W>] (proposing initiative 21-0017 to allow online sports betting to be operated by California Indian tribes and qualified online sports betting operators); Letter from Bo Mazzetti et al., Proponents, to Anabel Renteria, Initiative Coordinator, Atty. Gen. of Cal., Allows In-Person and Online Sports Wagering and Other New Types of Gambling. Initiative Constitutional Amendment and Statute, Att’y Gen. No. 21-0039A1 (Nov. 5, 2021; amended Dec. 13, 2021), http://oag.ca.gov/system/files/initiatives/pdfs/21-0039A1%20%28Sports%20Wagering%202%29_0.pdf [<http://perma.cc/KR2F-Q9EP>] (original letter on file with author) (proposing initiative 21-0039 to allow California Indian tribes to operate both in-person and statewide online sports betting).

²⁷ Cal. Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 731 (Cal. 1978).

²⁸ Methodist Hosp. of Sacramento v. Saylor, 488 P.2d 161, 165 (Cal. 1971) (emphasis added) (quoting Fitts v. Superior Court., 57 P.2d 510, 512 (Cal. 1936)).

²⁹ See CAL. CONST. art. IV, § 19.

³⁰ CAL. CONST. art. IV, § 19(e).

³¹ United Auburn Indian Cmty. of Auburn Rancheria v. Newsom, 472 P.3d 1064, 1071 (Cal. 2020).

³² See Murphy v. Nat’l Collegiate Athletic Ass’n, 138 S. Ct. 1461, 1478–81 (2018).

19(e)'s scope. Further, there have been very few cases that have addressed the parameters of section 19(e)—even with respect to other types of gambling. In the nearly forty years that have elapsed since section 19(e) was enacted by the electorate, only one judicial decision—*Hotel Employees & Restaurant Employees International Union v. Davis* (hereinafter referred to as “*Hotel Employees*”)³³—has attempted to decipher the meaning of section 19(e)'s key language. That 1999 California Supreme Court decision therefore provides a critical roadmap for evaluating whether section 19(e) forbids the legislative authorization of sports betting and should be the starting point for any analysis of the issue.

In *Hotel Employees*, the California Supreme Court addressed the scope and meaning of “section 19(e)'s declaration that ‘[t]he Legislature has no power to authorize . . . casinos of the type currently operating in Nevada and New Jersey.’”³⁴ In particular, the court undertook to determine “[w]hat was meant by ‘the type’ of casino ‘operating in Nevada and New Jersey,’” since those words are not defined in section 19(e).³⁵ Significantly, the court identified two possible ways to interpret that constitutional language. First, the court consulted the legislative history of section 19(e) and determined that what the drafters and voters intended to prohibit in 1984—when that constitutional amendment was enacted—was “a type of gambling house *unique to or particularly associated with* Nevada and New Jersey.”³⁶ The court added that this is what “[t]he 1984 constitutional amenders *must have had in mind*” when they enacted section 19(e), “since they chose to define the prohibited institution by reference to those states.”³⁷ Under this interpretation, sports betting is beyond the scope of section 19(e)'s coverage since it was a type of gambling that was not available—or even permitted—in New Jersey casinos at that time.

A second possibility suggested by the California Supreme Court was to analyze the meaning of section 19(e) through the lens of California statutory law—i.e., by equating “the type’ of casino ‘operating in Nevada and New Jersey’” in 1984 with “a gambling facility that did *not* legally operate in California” at that time.³⁸ Employing equivocal language in contrast to the certainty expressed in the earlier definition, the court suggested

³³ *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 1002 (Cal. 1999).

³⁴ *Id.* at 994, 1002.

³⁵ *Id.* at 1004.

³⁶ *Id.* (emphasis added).

³⁷ *Id.* (emphasis added).

³⁸ *Id.* (alteration in original).

that “a casino of ‘the type . . . operating in Nevada and New Jersey’ *may be understood*, with reasonable specificity, as one or more buildings, rooms, or facilities, whether separate or connected, that offer gambling activities *including those statutorily prohibited in California*, especially banked table games and slot machines.”³⁹ It is the language at the tail-end of that sentence—and, in particular, the words “including those statutorily prohibited in California”—that has fueled the belief in some quarters that the Legislature is prohibited from authorizing any gambling activities that were statutorily prohibited in 1984.⁴⁰

This Article will examine these seemingly contradictory interpretations as part of a broader inquiry into whether section 19(e) applies to sports wagering. Employing well-established principles of constitutional interpretation enunciated by the California Supreme Court, this Article will explain why the existence of these alternative interpretations actually bolsters the conclusion that the California Legislature has the power to authorize sports wagering by statute. In particular, as detailed below, when a constitutional provision is capable of two or more interpretations, the state legislature’s adoption of one of those alternatives is to be accorded substantial deference, if not controlling weight, under longstanding California Supreme Court precedent.⁴¹

Significantly, under this principle, the state legislature’s choice will be respected so long as it represents “at least a *possible and not unreasonable* construction of the constitution.”⁴² Based on these interpretive principles, this Article asserts that the California Legislature can effectuate the statutory authorization of sports wagering outside of the constitutional amendment process by adopting the California Supreme Court’s initial construction of section 19(e) in *Hotel Employees* as referring only to gambling activities “unique to or particularly associated with Nevada and New Jersey” casinos in 1984.⁴³ This

³⁹ *Id.* (emphasis added).

⁴⁰ See Letter from Gen. Couns. & Att’ys Gen. of Nine Cal. Indian Tribes to the Cal. Sen. & Assemb. Comms. on Governmental Org. (Feb. 6, 2020) [hereinafter Feb. 6, 2020 Letter] (relying on the “*including those statutorily prohibited in California*” language from *Hotel Employees* in asserting that sports wagering—a form of gambling that was illegal in California in 1984—can only be authorized by a constitutional amendment) (emphasis added) (on file with author).

⁴¹ See discussion *infra* Section II.C.

⁴² *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 166 (Cal. 1971) (emphasis added).

⁴³ *Hotel Emps.*, 981 P.2d at 1004.

court-approved interpretation easily satisfies the “possible and not unreasonable”⁴⁴ standard for obvious reasons, aligns with the intent of the voters (as acknowledged by the court in *Hotel Employees*), and would empower the state legislature to authorize sports betting by statute since sports betting was not available—or even permitted—in New Jersey’s gambling casinos at that time.

But even under the California Supreme Court’s alternative definitional approach, the legislative authorization of sports betting would still not run afoul of section 19(e). As analyzed below, the court’s reference to “gambling activities including those statutorily prohibited in California, especially banked table games and slot machines”⁴⁵ must be read in the context of the facts of *Hotel Employees*, which focused exclusively on “casino-style” gambling—specifically, banked card games and slot machines—at tribal casinos. Consistent with that factual context, the court in *Hotel Employees* indicated that section 19(e) elevated to a constitutional level only those prohibitions against “casino gambling” codified in section 330 of the California Penal Code.⁴⁶ The California Supreme Court’s recent decision in *United Auburn* reaffirms that section 19(e) applies only to casino-style gaming falling within the prohibitions of California Penal Code section 330.⁴⁷

The next logical question then becomes whether sports betting constitutes casino-style gaming within the scope of section 19(e). Answering that question in the negative, this Article highlights several fundamental distinctions between “casino-style” gaming and sports betting. First, as outlined below, casino-style games are primarily games of chance where the outcomes are determined largely or wholly by chance (such as through the random distribution of cards, the roll of the dice, or the use of a random number generator), whereas wagering on sporting events is widely considered to be predominantly *skill-based*. Second, the *location* of the underlying contests further distinguishes casino-style gaming from sports wagering. Casino-style games (such as slot machines, banked card games, and dice games) are typically played—and their outcomes are usually determined—within the *four walls* of a casino. By contrast, in sports betting, the athletic competitions on which the

⁴⁴ *Methodist Hosp.*, 488 P.2d at 161.

⁴⁵ *Hotel Emps.*, 981 P.2d at 1004.

⁴⁶ See discussion *infra* Section III.B.1–2.

⁴⁷ See *United Auburn Indian Cmty. of Auburn Rancheria v. Newsom*, 472 P.3d 1064, 1068 (Cal. 2020); see also discussion *infra* Section III.B.3.

bets or wagers are placed usually occur and are decided at locations external to a casino's four walls—in many cases, hundreds or thousands of miles away from the casino floor.

For these reasons, among others, casino-style games and sports betting are treated as separate and distinct categories of gambling by the California Penal Code, federal law, gambling studies commissioned by both Congress and the State of California, and public opinion polls and surveys conducted by leading polling companies.⁴⁸ Therefore, this Article concludes that even under the California Supreme Court's alternative interpretation of section 19(e)—which looks to California's statutory prohibitions against casino-style gambling—the state legislature would have the power to authorize sports wagering through a statutory enactment without the need for an amendment to the California Constitution.

The structure of the remainder of this Article is as follows: Part I discusses the historical background and legislative history surrounding the enactment of section 19(e), and the legal disputes between California's Indian tribes and the State of California that gave rise to the *Hotel Employees* decision. Part II compares and contrasts the two distinctly different interpretations of section 19(e) that were suggested by the California Supreme Court in *Hotel Employees*, and discusses the constitutional consequences associated with the existence of multiple possible interpretations of section 19(e). Part III examines the legislative authorization of sports betting through the lens of each interpretive approach suggested by the court in *Hotel Employees* and concludes that sports wagering falls outside the scope of section 19(e)'s prohibitions regardless of the approach utilized. Part IV then examines the fundamental issue of whether sports wagering constitutes “casino-style” gambling for purposes of section 19(e) and concludes that they are separate and distinct categories of gambling.

Finally, this Article weighs the above considerations in light of the following well-established constitutional principles: (1) restrictions and limitations on legislative power are to be strictly and narrowly construed, and (2) any doubt as to the Legislature's power to act in a given case should be resolved in favor of the Legislature's action. When viewed through this lens, the suggestion that section 19(e) constitutionalized all of California's statutory prohibitions against gambling falls apart

⁴⁸ See discussion *infra* Part IV.

rather quickly and convincingly. Therefore, this Article ultimately concludes that section 19(e) is not a barrier or obstacle to the legislative authorization of sports betting.

I. BACKGROUND

A. Legislative History of Section 19(e)

At the November 6, 1984 general election, the people of California approved Proposition 37, an initiative measure which amended the California Constitution to permit the establishment of the California State Lottery.⁴⁹ Proposition 37 added two new provisions to the California Constitution. The first new clause— Subdivision (d) to section 19 of article IV—authorized the state lottery as an exception to the general prohibition on lotteries and the sale of lottery tickets that appears at article IV, section 19, subdivision (a).⁵⁰ In the same measure, the voters also added a new subdivision (e), which provides that “[t]he Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.”⁵¹

Subdivision (e) does not define the term “casino” or provide any insights as to what constitutes “the type” of casino “currently operating in Nevada and New Jersey” for purposes of that provision. However, the available legislative history surrounding Proposition 37 is helpful in ascertaining the meaning of those words. For initiative measures adopted by the voters, the ballot pamphlet prepared by the Secretary of State is the equivalent of its legislative history and may be relied upon to determine the “probable meaning of uncertain language.”⁵² While primarily addressing the establishment of a state lottery, the ballot pamphlet for Proposition 37 includes several important references to the proposed casino ban in section 19(e). The first such reference is in the “Official Title and Summary Prepared by the Attorney General,” which states that Proposition 37 “amends [the] Constitution to authorize [the] establishment of a state

⁴⁹ See *W. Telecon, Inc. v. Cal. State Lottery*, 917 P.2d 651, 653 (Cal. 1996).

⁵⁰ *Id.*; CAL. CONST. art. IV, § 19(d).

⁵¹ *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 994 (Cal. 1999) (citing CAL. CONST. art. IV, § 19(e)).

⁵² *Bd. of Supervisors v. Lonergan*, 616 P.2d 802, 808 (Cal. 1980) (“We have previously acknowledged that ballot pamphlets may constitute the only legislative history of an initiative measure adopted by the voters. . . . As such, they may properly be resorted to as a construction aid to determine the ‘probable meaning of uncertain language.’”) (citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 585 P.2d 1281 (Cal. 1978)).

lottery and to prohibit casinos.”⁵³ The next reference to the proposed casino ban—and by far the most substantive—is set forth in the “Analysis by the Legislative Analyst,” which states in relevant part:

This measure would amend the California Constitution to authorize the establishment of a statewide lottery in California. *In addition, the measure would amend the Constitution to prohibit in California gambling casinos of the type that exist in Nevada and New Jersey. (Casino gambling currently is prohibited within the state by a statute, but not by the Constitution).*⁵⁴

The only other reference to the anti-casino language in the ballot pamphlet is in the “Argument in Favor of Proposition 37,” which states, *inter alia*, that Proposition 37 “also adds a new CONSTITUTIONAL PROHIBITION AGAINST CASINO GAMBLING.”⁵⁵

Owing to the non-partisan nature of the Legislative Analyst’s Office (the “LAO”), California courts place great weight on the “Analysis of the Legislative Analyst” as an important interpretive resource for determining the intent of the voters in a ballot initiative.⁵⁶ As Ronald M. George, the former Chief Justice of the California Supreme Court, once observed, the Legislative Analyst’s analysis is “the item in the ballot pamphlet materials that voters are most likely to have viewed as objective and impartial and to have consulted as a reliable indicator of the proposition’s meaning and effect.”⁵⁷ Crucially, as highlighted in the previous paragraph, the Legislative Analyst interpreted section 19(e) consistent with its plain meaning and geographic reference points—that it only operates as a ban on a specific type of “gambling casino”—i.e., “the type that exist[s] in Nevada and New Jersey”⁵⁸—rather than as a blanket prohibition on all forms of gambling that are prohibited by California statute. The parenthetical which follows that sentence—“(Casino gambling currently is prohibited within the state by a statute, but not by

⁵³ See Ballot Pamp., Prop. 37, *State Lottery. Initiative Constitutional Amendment and Statute*, 46 (Nov. 6, 1984), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1926&context=ca_ballot_props [<http://perma.cc/V3XM-E6LY>] (last visited May 31, 2021).

⁵⁴ *Id.* (emphasis added).

⁵⁵ *Id.* at 48.

⁵⁶ See *Hi-Voltage Wire Works v. City of San Jose*, 12 P.3d 1068, 1096 (Cal. 2000) (“Past cases establish that a court properly may look to the analysis of the Legislative Analyst in determining the voters’ intent.”) (George, C.J., concurring in part); see also *Garfinkle v. Superior Court*, 578 P.2d 925, 934 n.19 (Cal. 1978) (relying solely on Legislative Analyst’s evaluation to determine voters’ intent).

⁵⁷ *Hi-Voltage Wire Works*, 578 P.2d at 1096 (George, C.J., concurring in part).

⁵⁸ See *supra* text accompanying note 54.

the Constitution)—likewise infers that section 19(e)'s reach is limited to a specific species of gambling activity—i.e., “casino gambling”—and cuts against any notion that the initiative measure elevated *all* statutory prohibitions on gambling (even those which are not considered casino-style gambling) to a constitutional level.⁵⁹

This constrained reading of section 19(e) is echoed by the 1984 legislative hearing testimony of John Vickerman, the long-time Chief Deputy of the Legislative Analyst's Office.⁶⁰ Far from suggesting an expansive interpretation of section 19(e), Mr. Vickerman's August 22, 1984 testimony before the Assembly Committee on Governmental Organization hints at a much narrower focus. First, he represented to the committee members that section 19(e) applies only to “casino-type” gambling that “exists in Nevada and New Jersey.”⁶¹ Second, and just as critically, Mr. Vickerman described section 19(e) as elevating a “statutory *provision*” regarding casino-type gambling to a constitutional level, while at the same time observing that Proposition 37's other principal objective—establishing the state-operated lottery—raised “statutory *provisions*” to a constitutional level.⁶² His use of the singular tense when describing the reach of the anti-casino language in Proposition 37, when juxtaposed against his use of the plural tense when discussing the lottery component, indicates that Mr. Vickerman, who served for 18 years as the Chief Deputy of the Legislative Analyst's Office, did not view section 19(e) as elevating all statutory prohibitions against gambling to a constitutional level. Rather, his testimony suggests that he viewed section 19(e)'s reach more narrowly—as constitutionalizing the statutory *prohibition* against casino-style gambling.

Public statements by Proposition 37's drafter and leading proponent also indicate that the measure was not intended to incorporate all existing statutory prohibitions against

⁵⁹ See *supra* text accompanying note 54.

⁶⁰ Mr. Vickerman appeared as a witness before the Assembly Committee on Governmental Organization, which held an interim hearing on August 22, 1984 to review the potential economic impact of Proposition 37. See *Fadem Lottery Initiative Prop. 37: Hearing on Prop. 37 Before the Cal. Assembly Comm. on Governmental Org.*, Transcript of Proceedings 2 (Aug. 22, 1984), http://digitalcommons.law.ggu.edu/caldocs_assembly/144/ [<http://perma.cc/UQK6-W2SH>] (statement of John Vickerman, Chief Deputy, Legislative Analyst's office).

⁶¹ *Id.*

⁶² Referring to the anti-casino language in Proposition 37, Mr. Vickerman stated that “[w]e have a statutory *provision* in current law[,] so this elevates the statutory to a constitutional provision—most of the *provisions* that govern the lottery and the statutory *measure* that is also incorporated herein. On page 2 of our statement, we go into the general part of these statutory *provisions*.” *Id.* (emphasis added).

gambling into the California Constitution. In an October 1984 interview with the Los Angeles Times, attorney Barry Fadem, who formed the organization which proposed Proposition 37 and drafted the initiative language,⁶³ explained the rationale behind including a casino ban in a ballot initiative focused principally on the establishment of a state lottery.⁶⁴ Mr. Fadem told the reporter that “[h]e put into the Constitution for the first time a prohibition against *casino gambling*, to allay the fears of individuals who think this is *the first step* down the *long road* to *other forms of gambling*.”⁶⁵ Mr. Fadem’s use of the words “the first step” and a “long road” in this context is revealing. It reasonably evinces his belief that there was a vast continuum (i.e., “a long road”) between the establishment of a state lottery—which would be a first for California (i.e., the “first step”)—and the legalization of *all* forms of gambling, with casino gambling being just one of several additional steps on the long road to full legalization. This contemporaneous statement—made by the drafter and leading proponent of Proposition 37 and expressed in one of California’s most widely-read daily newspapers just one week prior to the general election—lends further credence to the notion that the constitutional prohibition contained in section 19(e) extended only to casino-style gambling and that “other forms of gambling” were beyond its purview.⁶⁶

The limited scope of section 19(e) has been acknowledged by other relevant California legal authorities as well. For example, in *Sutter’s Place v. Kennedy*, the Second District Court of Appeal acknowledged that section 19(e) did not incorporate all of the California Penal Code’s gambling prohibitions into the state Constitution.⁶⁷ In declining to find that section 19(e) “constitutionalized” *all* statutory prohibitions against gambling in one fell swoop, the Second District Court drew upon the following canons of constitutional construction that have long been recognized in California:

⁶³ See John Hurst, *Lottery Ticket Supplier to Win Biggest Jackpot of All*, L.A. TIMES (May 16, 1985, 12:00 AM), <http://www.latimes.com/archives/la-xpm-1985-05-16-mn-17394-story.html#:~:text=On%20Jan.,executive%20officer%20of%20the%20organization> [<http://perma.cc/W7E9-PQG5>] (last visited May 31, 2021).

⁶⁴ See Paul Jacobs, *Initiative to Set Up a State Lottery Sparks One of Hottest Battles: The Pro Argument (Barry Fadem)*, L.A. TIMES, Oct. 28, 1984, 3.

⁶⁵ *Id.* (emphasis added).

⁶⁶ See *generally* McMahan v. City & Cnty. of S.F., 26 Cal. Rptr. 3d 509, 516 n.6 (Cal. Ct. App. 2005) (citing Cal. Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 733 (Cal. 1978)) (noting that “our Supreme Court has relied on [newspaper] articles in the past” when attempting to ascertain voter intent on a ballot initiative).

⁶⁷ 84 Cal. Rptr. 2d 84, 94 (Cal. Ct. App. 1999).

[T]he entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution [A]ll intendments favor the exercise of the Legislature's plenary authority: If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.⁶⁸

Applying these well-established principles of constitutional interpretation, the Second District Court of Appeal recognized that “[t]he language of section 19(e) does not purport to incorporate [all of] the California Penal Code’s gambling prohibitions into the California Constitution.”⁶⁹ Rather, the appellate court observed that, “on its face, section 19(e) prohibits the Legislature from permitting *certain types* of casinos.”⁷⁰

B. Post-IGRA Compact Disputes over “Casino-Style” Gaming on Tribal Lands Put California’s Indian Tribes on a Collision Course with Section 19(e)

Continuous legal battles between California’s Indian tribes and the State of California over gambling activities on tribal lands would eventually necessitate a more in-depth judicial examination of section 19(e)’s contours. During the early 1980’s, two California Indian tribes—the Cabazon and Morongo Band of Mission Indians—began offering high-stakes bingo and card games (including draw poker) at their reservations.⁷¹ When the State threatened criminal action against the two tribes on the basis that their games violated California’s anti-gambling laws, the tribes challenged its authority to do so.⁷² This disagreement led to the landmark United States Supreme Court decision in *California v. Cabazon Band of Mission Indians*,⁷³ which concluded that because Congress had not provided for the regulation of tribal gaming, a state could prohibit gaming on tribal lands only if the state completely prohibited all gambling

⁶⁸ *Id.* at 94 (quoting *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 165 (Cal. 1971)).

⁶⁹ *Id.*

⁷⁰ *Id.* (emphasis added).

⁷¹ See Roger Dunstan, *Indian Casinos in California*, CRB 3 (Sept. 1998), <http://www.library.ca.gov/wp-content/uploads/erb-reports/98015.pdf> [<http://perma.cc/CW8R-CF7U>].

⁷² See *United Auburn Indian Cmty. of Auburn Rancheria v. Newsom*, 472 P.3d 1064, 1068 (Cal. 2020).

⁷³ 480 U.S. 202 (1987).

within its borders.⁷⁴ Because California did not prohibit all gambling outright, but instead allowed some forms of gambling (such as the state lottery and pari-mutuel horse-race betting) to occur,⁷⁵ the Court concluded that California's laws with respect to gambling were "regulatory" in nature, rather than "prohibitory," and thus could not be enforced on tribal lands.⁷⁶ As a result of the *Cabazon* decision, states could not "restrict or otherwise regulate Indian gaming operations unless they prohibited all gaming."⁷⁷

Congress responded to *Cabazon*'s "disallowance of state regulation over Indian gaming"⁷⁸ by enacting the Indian Gaming Regulatory Act ("IGRA") in 1988.⁷⁹ IGRA created a comprehensive jurisdictional framework for the regulation of gaming activities on Indian lands.⁸⁰ One of IGRA's primary purposes was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,"⁸¹ while at the same time establishing "[f]ederal standards for gaming on Indian lands"⁸² and "granting [the] states some role in the regulation of Indian gaming."⁸³ As described by the Ninth Circuit, "IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme."⁸⁴

To accomplish those objectives, Congress divided Indian gaming into three distinct categories, each of which is subject to a

⁷⁴ See *id.* at 209; see also *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1256 (D. Kan. 2004) ("The [*Cabazon*] Court held that because Congress had not provided for the regulation of tribal gaming, a state could only prohibit gaming on tribal lands if the state completely prohibited all gaming within its borders."), *aff'd in part and vacated in part on other grounds*, 443 F.3d 1247 (10th Cir. 2006).

⁷⁵ *Cabazon*, 480 U.S. at 210.

⁷⁶ See *id.* at 211.

⁷⁷ *United Auburn*, 472 P.3d at 1068.

⁷⁸ Joshua L. Sohn, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139, 142 (2006).

⁷⁹ See *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003) ("As a response to the *Cabazon* decision, Congress enacted IGRA as a means of granting states some role in the regulation of Indian gaming."); *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 998 (Cal. 1999) ("In 1988, in the wake of *Cabazon*, Congress enacted IGRA."); see also Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721).

⁸⁰ *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014) (citing 25 U.S.C. § 2702(3) and "describing [its] purpose as establishing 'regulatory authority . . . [and] standards for gaming on Indian lands'").

⁸¹ 25 U.S.C. § 2702(1).

⁸² 25 U.S.C. § 2702(3).

⁸³ *Artichoke Joe's*, 353 F.3d at 715.

⁸⁴ *Id.* (quoting *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)).

different level of regulation. Class I gaming encompasses social games and traditional Indian games played solely for “prizes of minimal value,” and is regulated exclusively by Indian tribes without any federal or state governmental oversight.⁸⁵ Class II gaming consists primarily of bingo and “non-banked” card games, and is regulated by the tribes subject to approval and oversight by the National Indian Gaming Commission (“NIGC”),⁸⁶ a federal regulatory agency within the United States Department of the Interior.⁸⁷ The most important category, class III, encompasses all other forms of gambling⁸⁸ and “includes the types of high-stakes games usually associated with casino-style gambling,”⁸⁹ such as “slot machines, craps, roulette, and banked card games like blackjack.”⁹⁰ As “the most lucrative” of the three gaming categories,⁹¹ “[c]lass III gaming is subject to a greater degree of federal-state regulation than either class I or class II gaming.”⁹² IGRA provides that class III gaming activities on Indian lands are permissible “only if” they are: (1) duly authorized by a tribal ordinance; (2) “located in a State that permits such gaming for any purpose by any person, organization, or entity”; and (3) “conducted in conformance with a Tribal-State compact” that has been approved by the United States Secretary of the Interior.⁹³

Class III “[t]ribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes.”⁹⁴ “IGRA’s compacting requirement allows states to negotiate with tribes . . . regarding

⁸⁵ 25 U.S.C. §§ 2703(6), 2710(a)(1).

⁸⁶ See 25 U.S.C. §§ 2703(7), 2704(a)–(b), 2710(a)(2)–(b); see also *Texas v. United States*, 497 F.3d 491, 494 (5th Cir. 2007) (“Class II gaming—bingo and related activities—is subject to oversight by the National Indian Gaming Commission.”).

⁸⁷ See 25 U.S.C. § 2704(a).

⁸⁸ 25 U.S.C. § 2703(8) (“The term ‘class III gaming’ means all forms of gaming that are not class I gaming or class II gaming.”).

⁸⁹ *Artichoke Joe’s*, 353 F.3d at 715; see also *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003) (“Class III gaming . . . includes the types of high-stakes games usually associated with Nevada-style gambling.”).

⁹⁰ *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1079–80 (7th Cir. 2015); see also *Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal. v. California*, 163 F. Supp. 3d 769, 773 (E.D. Cal. 2016) (“Class III gaming includes casino-style gaming such as card games played against the house and slot machines.”); *City of Vancouver v. Hogen*, No. C08-5192BHS, 2008 WL 4443806, at *1 (W.D. Wash. Sept. 24, 2008), *aff’d*, 393 F. App’x 528 (9th Cir. 2010) (“Class III gaming . . . includes more traditional ‘casino’ games, including slot machines, roulette, poker, blackjack, etc.”).

⁹¹ *Hotel Emps. & Rest. Emps. Int’l. Union v. Davis*, 981 P.2d 990, 999 (Cal. 1999) (quoting *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299 (9th Cir. 1998)).

⁹² *In re Indian Gaming Related Cases*, 331 F.3d at 1097.

⁹³ *Id.* (citing 25 U.S.C. §§ 2710(d)(1), 2710(d)(3)(B)); see also *Amador Cnty. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011).

⁹⁴ *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996).

aspects of class III Indian gaming that might affect legitimate state interests.”⁹⁵ Through this mechanism, “[t]he compacting process gives to states civil regulatory authority that they otherwise would lack under *Cabazon*, while granting to tribes the ability to offer legal class III gaming.”⁹⁶ In exchange for a seat at the negotiating table, however, IGRA requires states to negotiate class III gaming compacts with tribes “in good faith”⁹⁷ and sets forth a detailed remedial process to enforce that obligation.⁹⁸ An Indian tribe may enforce the good faith bargaining provisions of IGRA by filing a lawsuit against the state in federal court,⁹⁹ but only if there has been a waiver of sovereign immunity by the state.¹⁰⁰ California has waived its sovereign immunity with respect to suits brought under IGRA.¹⁰¹

The passage of IGRA did not end the battle over Indian gaming in California. After the statute’s enactment, several Indian tribes in California “sought to negotiate compacts with the State to permit the operation of class III games on their respective reservations.”¹⁰² “Among the class III games over

⁹⁵ *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712, 716 (9th Cir. 2003).

⁹⁶ *Id.* (citing *Keweenaw Bay Indian Cmty. v. United States*, 136 F.3d 469, 472 (6th Cir. 1998)).

⁹⁷ *Id.* at 716 (citing 25 U.S.C. § 2710(d)(3)(A)); *In re Indian Gaming Related Cases*, 331 F.3d at 1097 (citing 25 U.S.C. § 2710(d)(3)(A)); *see also* *Rincon Band of Luiseno Mission Indians of Rincon Rsrv. v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010) (“Because the compact requirement skews the balance of power over gaming rights in favor of states by making tribes dependent on state cooperation, IGRA imposes on states the concomitant obligation to participate in the negotiations in good faith.”) (citing 25 U.S.C. § 2710(d)(3)(A)).

⁹⁸ *See* 25 U.S.C. § 2710(d)(7); *see also* *Stand Up for Cal.! v. U.S. Dep’t of the Interior*, 959 F.3d 1154, 1160–61 (9th Cir. 2020) (citing S. REP. NO. 100-446 at 13 (1988) as “noting that the remedial scheme fills the ‘need to provide some incentive for States to negotiate with tribes in good faith’”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73–74 (1996) (explaining that the state’s duty to negotiate is enforceable through “the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7)”).

⁹⁹ *See* 25 U.S.C. § 2710(d)(7)(A).

¹⁰⁰ In *Seminole Tribe of Florida*, the United States Supreme Court invalidated portions of IGRA’s enforcement mechanism in 25 U.S.C. § 2710(d)(7), holding that the Eleventh Amendment bars Indian tribes from suing states in federal district court for failing to negotiate compacts in good faith. 517 U.S. at 76. As a result of this decision, a state must waive its sovereign immunity before a tribe can file suit against the state in federal court to enforce IGRA’s good faith negotiation requirement. *See* *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 n.7 (9th Cir. 2000) (noting “[t]he practical effect of this holding is to take away from tribes the ability to force states to comply with IGRA’s compacting scheme.”).

¹⁰¹ *See Artichoke Joe’s*, 353 F.3d at 716 n.7 (citing CAL. GOV’T CODE § 98005 (Deering 1998)); *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1171 n.12 (9th Cir. 2015) (“California—unlike many states—has chosen to legislatively enact a broad statutory waiver of sovereign immunity for claims arising out of violations of IGRA.”) (citing CAL. GOV’T CODE § 98005).

¹⁰² *In re Indian Gaming Related Cases*, 331 F.3d at 1098; *see also Artichoke Joe’s*, 353 F.3d at 716.

which these tribes sought to negotiate were live banked or percentage card games and stand-alone electronic gaming machines (similar to slot machines).¹⁰³ The State refused to negotiate, pointing to language in IGRA stating that “class III gaming shall be lawful on Indian lands *only if* such activities are . . . located in a State that *permits such gaming* for any purpose by any person, organization, or entity.”¹⁰⁴ California’s argument was pretty straightforward: it asserted that the games and devices in question were illegal under its Penal Code.¹⁰⁵ In California’s view, because state law did not permit live banked or percentage card games or slot machine-like devices, California had no duty to negotiate a gaming compact with respect to them.¹⁰⁶ The tribes, on the other hand, maintained that the phrase “*permits such gaming*” (as used in 25 U.S.C. § 2710(d)(1)(B)) should be construed broadly as referring to class III gaming in general, rather than any specific class III games in particular.¹⁰⁷ In the tribes’ view, because California permitted other types of class III games (such as pari-mutuel horse race betting, nonelectronic keno, and lotto), it could not refuse to negotiate over a particular subset of class III gaming.¹⁰⁸

In *Rumsey*, the Ninth Circuit rejected the tribes’ expansive view of IGRA, holding that:

IGRA does not require a state to negotiate over one form of [c]lass III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity “for any purpose by any person, organization, or entity,” then it also must allow Indian tribes to engage in *that same activity*.¹⁰⁹

The Ninth Circuit explained, “[i]n other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.”¹¹⁰ Because California law prohibited all persons from engaging in banked or percentage card games,¹¹¹ and likewise prohibited

¹⁰³ *In re Indian Gaming Related Cases*, 331 F.3d at 1098; *see also* *Hotel Emps. & Rest. Emps. Int’l. Union v. Davis*, 981 P.2d 990, 999 (Cal. 1999) (citing *Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250, 1255 (9th Cir. 1994)).

¹⁰⁴ *In re Indian Gaming Related Cases*, 331 F.3d at 1098 (quoting 25 U.S.C. § 2710(d)(1)(B)) (alteration in original) (internal quotations omitted).

¹⁰⁵ *See Rumsey*, 64 F.3d at 1256 (citing Cal. Penal Code §§ 330, 330a, and 330b).

¹⁰⁶ *In re Indian Gaming Related Cases*, 331 F.3d at 1099 (citing *Rumsey*, 64 F.3d at 1255 n.1).

¹⁰⁷ *Id.* at 1098.

¹⁰⁸ *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712, 716 (9th Cir. 2003) (citing *Rumsey*, 64 F.3d at 1255 n.1).

¹⁰⁹ *Rumsey*, 64 F.3d at 1258 (emphasis added) (citing 25 U.S.C. § 2710(d)(1)(B)).

¹¹⁰ *Id.* (emphasis added).

¹¹¹ *See id.* at 1256 (citing CAL. PENAL CODE § 330).

anyone from possessing or operating a slot machine,¹¹² the court concluded that the State had no obligation to negotiate a compact with respect to those types of class III games.¹¹³

C. California's Indian Tribes Turn to Proposition 5, a Purely Statutory Measure, to Force the State of California's Hand on "Casino-Style" Gaming

The Ninth Circuit's decision in *Rumsey* "meant that the State of California had no obligation under federal law to negotiate with the tribes" over "the most lucrative forms of class III gaming."¹¹⁴ While the *Rumsey* appeal was pending, a number of California Indian tribes began offering class III gaming activities without a compact.¹¹⁵ Among the "uncompact" class III games being offered by the tribes were electronic gaming machines which resembled slot machines.¹¹⁶ In response, then-California Governor Pete Wilson refused to negotiate with the tribes until they ceased such unauthorized gaming activities.¹¹⁷ He also "refused to negotiate compacts covering class III games that the State *did permit*, unless and until the tribes requesting such negotiations ceased engaging in unlawful class III gaming."¹¹⁸ Rather than acquiesce to Governor Wilson's demand, a coalition of California tribes "resorted to California's initiative process [in an effort] to impose a state-law obligation on California to negotiate class III gaming compacts."¹¹⁹

In particular, the California tribes drafted and circulated a statutory initiative for the November 1998 California statewide ballot entitled "The Tribal Government Gaming and Economic Self-Sufficiency Act of 1998," otherwise known as Proposition 5.¹²⁰ This initiative, which amended the Government Code (a state statute)¹²¹ but not the California

¹¹² See *id.* (citing CAL. PENAL CODE § 330(a)–(b)).

¹¹³ See *id.* at 1260.

¹¹⁴ *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 717 (9th Cir. 2003); *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1099 (9th Cir. 2003).

¹¹⁵ *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 999 (Cal. 1999).

¹¹⁶ See Guy Levy, *Western Telecon v. California State Lottery; Will Native Americans Lose Again?*, 19 T. JEFFERSON L. REV. 361, 374–76 (1997).

¹¹⁷ See *id.* at 376; see also *Hotel Emps.*, 981 P.2d at 999.

¹¹⁸ *In re Indian Gaming Related Cases*, 331 F.3d at 1099 (second emphasis added).

¹¹⁹ *Artichoke Joe's*, 353 F.3d at 717; see also *In re Indian Gaming Related Cases*, 331 F.3d at 1099–1100.

¹²⁰ See *Artichoke Joe's*, 353 F.3d at 717; see also *Flynt v. Cal. Gambling Control Comm'n*, 104 Cal. App. 4th 1125, 1136 (Cal. Ct. App. 2002); see also *Hotel Emps.*, 981 P.2d at 994.

¹²¹ Proposition 5 added a single title to the Government Code, title 16, and a single chapter within that title, chapter 1, entitled "The Tribal Government Gaming and

Constitution,¹²² purported to authorize various forms of gambling at tribal casinos.¹²³ Specifically, Proposition 5 required the State to enter into a standardized Tribal-State Gaming Compact (the “model compact”)¹²⁴ with California Indian tribes to allow certain class III gambling activities, such as slot machines (referred to in the model compact as “Tribal gaming terminals”),¹²⁵ banked card games, lottery games, and off-track pari-mutuel horse race wagering,¹²⁶ to be conducted at tribal gaming facilities in California.¹²⁷ Proposition 5 obligated the Governor to execute the model compact on behalf of the State “as a ministerial act, without preconditions” within thirty days after receiving a request from a federally-recognized Indian tribe “to enter into such a compact.”¹²⁸ Under the measure, the compacts were deemed approved if the Governor took no action within thirty days.¹²⁹

Anticipating that the model compact’s authorization of certain casino-style games (such as the Tribal gaming terminals and banked card games) might be seen as skirting section 19(e)’s ban on Nevada-and-New Jersey-style casinos, the proponents of Proposition 5 included two specific factual findings in the initiative statute designed to counter any such suggestion. section 98001 of the Government Code, which sets forth the initiative’s findings, states, in relevant part, that “[c]asinos of the type currently operating in Nevada and New Jersey are materially different from the tribal gaming facilities authorized under’ Proposition 5 . . . in that the casinos in those states,” (1) offer “house-banked” games, in which players wager against the casino rather than against each other, as well as various other games such as roulette and craps, “none of which” are authorized under Proposition 5; and (2) are privately owned and not restricted in how their profits may be

Economic Self-Sufficiency Act of 1998,” comprised of sections 98000 through 98012. *Hotel Emps.*, 981 P.2d at 1000.

¹²² *Id.* at 994 (referring to Proposition 5 as “a purely statutory measure”); *Flynt*, 104 Cal. App. 4th at 1136 (noting that Proposition 5 “amended state law but not the State Constitution”).

¹²³ *Hotel Emps.*, 981 P.2d at 994.

¹²⁴ The model compact is set forth in its entirety at section 98004 of the Government Code. See CAL. GOV’T CODE § 98004.

¹²⁵ *Hotel Emps.*, 981 P.2d at 1001 (“‘Tribal gaming terminal’ is defined [in the model compact] as a ‘gaming device’ . . . ‘that does not dispense coins or currency and is not activated by a handle.’”) (quoting CAL. GOV’T CODE § 98004(2.21)).

¹²⁶ See *id.* (citing CAL. GOV’T CODE § 98004(4.1)(b)–(d)).

¹²⁷ See *id.* (citing CAL. GOV’T CODE § 98004(4.2)).

¹²⁸ *Id.* (quoting CAL. GOV’T CODE § 98002(a)).

¹²⁹ See *id.* (citing CAL. GOV’T CODE § 98005).

expended, whereas tribal governments must be the “primary beneficiaries” of the tribal gaming facilities and “are limited to using their gaming revenues for various tribal purposes” such as tribal government services and programs “that address reservation housing, elderly care, education, economic development, health care, and other tribal programs and needs[] in conformity with federal law.”¹³⁰

These factual findings would soon become a central issue in the ensuing state court litigation arising out of Proposition 5. On November 3, 1998, California voters approved Proposition 5.¹³¹ Within a month of Proposition 5’s passage and prior to its implementation, two groups of petitioners filed separate, but similar lawsuits challenging the constitutionality of Proposition 5. On November 20, 1998, the Hotel Employees and Restaurant Employees International Union (the “Union”)—representing the interests of over 2,000 employees of licensed card clubs and horse racetracks located off Indian land in California, and over 20,000 hotel employees¹³²—filed a petition for writ of mandate in the California Supreme Court seeking to bar Governor Wilson and then-Secretary of State Bill Jones from implementing Proposition 5 on the ground that it authorizes “casino-type” gambling prohibited by section 19(e).¹³³ The Union also requested an immediate stay of the implementation of Proposition 5 pending a final determination of the merits of its petition.¹³⁴ On that same date, Eric Cortez and four other petitioners (“Cortez”)—each of whom owned real property located near a tribal gaming facility¹³⁵—filed a similar petition for writ of mandate with the California Supreme Court, also with a request for a stay, seeking to compel Governor Wilson not to implement Proposition 5 on the ground that it purports to authorize by statute “casinos of the type currently operating in Nevada and New Jersey,” in contravention of section 19(e).¹³⁶ Both petitions named Frank Lawrence, a tribal gaming attorney who was the proponent of

¹³⁰ *Id.* at 1000 (quoting CAL. GOV’T CODE § 98001(c)).

¹³¹ *Id.* at 994; see *Flynt v. Cal. Gambling Control Comm’n*, 104 Cal. App. 4th 1125, 1136 (Cal. Ct. App. 2002).

¹³² See Petition for Writ of Mandate; Application for Stay; Memorandum in Support Thereof, at *3, *Hotel Emps. & Rest. Emps. Int’l Union v. Wilson*, 981 P.2d 990 (Cal. 1999) (No. S074850), 1998 WL 34188080 (Cal. Super. Ct. Nov. 20, 1998) (hereinafter *Union Petition*).

¹³³ *Id.* at *21–23; see also *Hotel Emps.*, 981 P.2d at 995, 1002.

¹³⁴ See *Hotel Emps.*, 981 P.2d at 995.

¹³⁵ See Petition for Writ of Mandate and Supporting Memorandum of Points and Authorities of Stay Requested, at *5–7, *Hotel Emps. & Rest. Emps. Int’l Union v. Wilson*, 981 P.2d 990 (Cal. 1999) (No. S074851), 1998 WL 34188081 (Cal. Super. Ct. Nov. 20, 1998) [hereinafter *Cortez Petition*].

¹³⁶ *Id.* at *2–3, *23–31; *Hotel Emps.*, 981 P.2d at 995, 1002.

Proposition 5, as a real party in interest,¹³⁷ and Cortez's petition also named Californians for Indian Self-Reliance, a California corporation which presented ballot arguments in favor of Proposition 5, as the other real party in interest.¹³⁸

Cortez was represented in the case by famed appellate lawyer Theodore Olson, whose legal efforts nearly two decades later on behalf of New Jersey Governor Phil Murphy led to the demise of PASPA and opened the door to state-authorized sports betting.¹³⁹ Mr. Olson's court filing in the Cortez case took aim at the statutory "finding" that the "tribal gaming facilities" authorized by Proposition 5 are "materially different" than Nevada and New Jersey casinos, calling it nothing more than an "imaginative" "earth-is-flat" declaration that is completely at odds with reality. As Mr. Olson powerfully wrote in Part II.B of the Cortez petition:

Proposition 5 . . . attempts to avoid the clear constitutional ban by including a "finding" that up is down and black is white, *i.e.*, that "casinos of the type currently operating in Nevada and New Jersey are materially different from the tribal gaming facilities authorized under this chapter," Cal. Gov't Code § 98001(c). But neither legislative bodies nor the electorate can opt out of the Constitution merely by conveniently "finding" that it does not apply to the activities they propose to reach through legislation. "Findings," imaginative declarations, and earth-is-flat declarations grafted on an initiative measure cannot repeal reality, are not controlling, and certainly cannot so easily rewrite a constitutional proscription. The Court is required to inquire into the purpose of a statute to determine its scope and effect.¹⁴⁰

Addressing the same issue, the Union's petition asserted that "[s]tatutory 'findings' cannot override the Constitutional ban on casinos,"¹⁴¹ adding that "the [California] Supreme Court is not bound by them in interpreting the Constitution."¹⁴² Along the same lines, California's Legislative Counsel, Bion M. Gregory, issued an advisory opinion prior to the vote on Proposition 5, concluding, *inter alia*, that the measure violated section 19(e)'s prohibition against "casinos of the type currently operating in Nevada and New Jersey."¹⁴³ In so concluding, the Legislative Counsel stressed that the "[f]indings and declarations . . . set forth in a statutory enactment . . . are not controlling; [rather], the [California Supreme

¹³⁷ Union Petition, *supra* note 132, at *4; Cortez Petition, *supra* note 135, at *8.

¹³⁸ Cortez Petition, *supra* note 135, at *8.

¹³⁹ See *Murphy*, 138 S. Ct. at 1478–81; see also *supra* text accompanying note 6.

¹⁴⁰ Cortez Petition, *supra* note 135, at *26–27.

¹⁴¹ Union Petition, *supra* note 132, at *23.

¹⁴² *Id.*

¹⁴³ *Hotel Emps.*, 981 P.2d at 1000.

Court] is required to inquire into the real, rather than the ostensible, purpose of a statute to determine its scope and effect.”¹⁴⁴

D. The California Supreme Court Rejects Proposition 5’s Statutory “Findings” and Invalidates the Measure as Contravening Section 19(e)’s Ban on Casinos

The Union and Cortez petitions were ultimately consolidated for purposes of oral argument and decision.¹⁴⁵ On August 23, 1999, the California Supreme Court issued its opinion in *Hotel Employees*, striking down nearly all of Proposition 5.¹⁴⁶ The court found that the provisions of the model compact authorizing slot machine-style gambling devices (euphemistically referred to as “tribal gaming terminals”)¹⁴⁷ and banked card games within tribal gaming facilities were “inconsistent with” the anticasino provision of section 19(e) “insofar as [they] authorize[] what would amount to proscribed casinos.”¹⁴⁸ The “entry into such a compact,” the court declared, “is beyond the legislative power under the law of California, conflicting as it would with [section 19(e)’s declaration that ‘[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey].”¹⁴⁹ The court concluded as follows: “Because Proposition 5, a purely statutory measure, did not amend section 19(e) or any other part of the [California] Constitution, and because in a conflict between statutory and constitutional law the Constitution must prevail[,] . . . Proposition 5’s authorization of casino gambling is invalid and inoperative.”¹⁵⁰

Importantly, the California Supreme Court declined to defer to the statutory “finding” in Section 98001(c) of the Government Code that “casinos of the type currently operating in Nevada and New Jersey” are “materially different” from the tribal gaming authorized by Proposition 5.¹⁵¹ The court did not apply the “general rule of deference” ordinarily accorded to statutory factual findings because it determined that the

¹⁴⁴ Legal Opinion Letter from Bion M. Gregory, Cal. Leg. Couns., to Assemb. Bernie Richter (Oct. 8, 1998) (on file with author) [hereinafter Op. Cal. Leg. Counsel, No. 21947].

¹⁴⁵ *Hotel Employees*, 981 P.2d at 995.

¹⁴⁶ *Id.* at 1000–11. The only part of Proposition 5 which was not invalidated by the Supreme Court was a sentence waiving the State’s immunity from suit in disputes arising out of negotiations for a new or amended tribal-state compact other than the measure’s model compact. The Court determined that such provision was severable from the invalid portions. *Id.* at 1010–11.

¹⁴⁷ *Id.* at 1006–07.

¹⁴⁸ *Id.* at 1009–11.

¹⁴⁹ *Id.* at 1009.

¹⁵⁰ *Id.* at 994.

¹⁵¹ *Id.* at 990 (quoting CAL. CONST. art. IV, § 19(e)).

findings—which focused on the private ownership of Nevada and New Jersey casinos and the absence of any house-banked games at the tribal casinos—did not “meaningfully distinguish” the casinos authorized by Proposition 5 from those prohibited by section 19(e).¹⁵² Additionally, the court determined that the distinctions highlighted in Government Code section 98001(c) were not even “findings” of “legislative fact,” or indeed any other kind of “fact,” but, rather, were an attempt to interpret the constitutional language in section 19(e).¹⁵³ Writing for the majority, Justice Kathryn Werdegar wrote, “[a]s such, it commands no deference on our part, because we construe the provisions of the California Constitution independently.”¹⁵⁴

Thus, in order to determine whether Proposition 5 was “inconsistent with section 19(e),” the California Supreme Court independently examined and interpreted “each part of section 19(e),” without according any deference to the statutory findings.¹⁵⁵ The court’s resulting interpretation of the phrase “casinos of the type currently operating in Nevada and New Jersey”—in the context of a case involving the statutory authorization of banked card games (including blackjack) and slot machines at tribal casinos—provides an analytical framework for assessing section 19(e)’s potential applicability to sports betting. The remainder of this Article examines the issue of sports betting through the lens of the Court’s construction of section 19(e) in *Hotel Employees*.

II. THE CALIFORNIA SUPREME COURT’S ALTERNATIVE INTERPRETATIONS OF “THE TYPE” OF “CASINO” “OPERATING IN NEVADA AND NEW JERSEY”

In *Hotel Employees*, the California Supreme Court analyzed the scope and meaning of section 19(e)’s declaration that “[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey.”¹⁵⁶ As

¹⁵² *Id.* at 1007–08.

¹⁵³ *Id.* at 1008.

[T]he general statement that ‘casinos of the type currently operating in Nevada and New Jersey are materially different from the tribal gaming facilities authorized under this chapter’ (Gov. Code, § 98001, subd. (c)) is not a ‘finding’ of ‘legislative fact’ or indeed of any other kind of ‘fact.’ Rather, it is a construction of the anticasinio provision of section 19(e).

Id.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1002.

¹⁵⁶ *Id.* at 1002–05.

a preliminary matter, the Court began its analysis by construing the phrase “[t]he Legislature has no power” to encompass both legislatively-enacted statutes and “the people acting through initiative statute[s].”¹⁵⁷ The Court next determined the meaning of the word “casinos” for purposes of section 19(e).¹⁵⁸ Since the term “casinos” was not defined by section 19(e) or by any other provision of state law, the Court interpreted that word in accordance with its “common usage” in 1984 (when section 19(e) was added to the California Constitution).¹⁵⁹ Relying on both a dictionary definition and a leading gambling law treatise that were in circulation at that time, the Court construed the word “casino” to simply mean “a building or room for gambling,”¹⁶⁰ and stated that its use in section 19(e) “does not appear to demand any different signification.”¹⁶¹

The California Supreme Court next addressed the meaning of the word “currently” (as used in section 19(e)) and observed that it is “potentially ambiguous” because it is susceptible to two interpretations.¹⁶² “Currently” could refer to 1984, the year that section 19(e) was added to the California Constitution, or it could refer to a later time when prohibited casinos are purportedly authorized.¹⁶³ The court adopted the former view and determined that the word “currently” necessarily refers to 1984, reasoning that section 19(e) “addresses an evil that was knowable and, in fact, known at the time the anticasinoprovision was added, that is, the kind of casino then existing in [Nevada and New Jersey in 1984].”¹⁶⁴ The court added that any suggestion the anticasinolanguage in section 19(e) could encompass gambling activities that may be legalized “from time to time” in the future (i.e., after 1984) “addresses an evil, if evil it be, that is altogether unknown and unknowable.”¹⁶⁵ The court concluded that it was “unlikely” that the amendment drafters or voters intended only such an “attenuated” effect.¹⁶⁶

¹⁵⁷ *Id.* at 1002–03.

¹⁵⁸ *Id.* at 1004.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 347 (3d ed. 1961)).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

A. “Unique to or particularly associated with Nevada and New Jersey”¹⁶⁷ in 1984

The California Supreme Court then turned to the more difficult interpretive question of “[w]hat was meant by ‘the type’ of casino ‘operating in Nevada and New Jersey’ in 1984.”¹⁶⁸ Acknowledging that section 19(e) “contains no definition of this phrase,” the court observed that both “[l]ogic and reference to legislative history” allowed the court “to see with reasonable clarity” that the framers and voters, in enacting section 19(e), intended to prohibit “a type of gambling house unique to or particularly associated with Nevada and New Jersey.”¹⁶⁹ As the court explained:

The 1984 constitutional amenders must have had in mind a type of gambling house *unique to or particularly associated with Nevada and New Jersey*, since they chose to define the prohibited institution by reference to those states. On this logic, the “type” of casino referred to must be an establishment that offers gaming activities including banked table games and gaming devices, i.e., slot machines, for in 1984 that “type” of casino was legal only in Nevada and New Jersey and, hence, *was particularly associated with those states.*¹⁷⁰

This interpretative approach—which looks to the “gaming operations” of Nevada and New Jersey casinos in 1984 to determine the precise meaning and scope of section 19(e)—is in lockstep with the California Supreme Court’s earlier construction of the word “currently” as referring to the kind of casino “*then existing*” in Nevada and New Jersey,¹⁷¹ and echoes the Legislative Analyst’s statement in the ballot pamphlet that Proposition 37 “would amend the Constitution to prohibit in California gambling casinos of the type *that exist* in Nevada and New Jersey.”¹⁷² It also ties directly back to the opening paragraph of the *Hotel Employees* opinion, wherein Justice Kathryn Werdegar, writing for the Court’s majority, stated that the anticasin language in section 19(e) addressed casino gambling activities “of the sort *then associated* with Las Vegas and Atlantic City.”¹⁷³

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (quoting CAL. CONST. art. IV, § 19(e)).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (emphasis added) (noting that Nevada and New Jersey were the only states that allowed casinos with the full range of gambling games).

¹⁷¹ *Id.* (emphasis added).

¹⁷² *Id.* at 1003 (emphasis added) (quoting Ballot Pamp., Prop. 37, *supra* note 53, at 46).

¹⁷³ *Id.* at 994 (emphasis added) (“In 1984, the people of California amended our Constitution to state a fundamental public policy against the legalization in California of casino gambling of the sort *then associated* with Las Vegas and Atlantic City.”).

The common thread among these statements is an unwavering focus on the gambling activities that were *actually in existence* and *lawfully conducted* in Nevada and New Jersey casinos in 1984.¹⁷⁴ Under this functional definition, which looks to the laws and practices in both Nevada and New Jersey at the time that Proposition 37 was approved by voters, sports wagering would unquestionably be beyond the scope of section 19(e)'s anticasinio ban for one simple (yet insurmountable) reason: it was not a form of gambling that was “*associated with*” New Jersey casinos in 1984.¹⁷⁵ At that time, the only gambling games that were available or even permitted in New Jersey casinos were slot machines, blackjack, craps, roulette, baccarat, and Big 6.¹⁷⁶ Sports betting was not even legal in New Jersey in 1984, and was certainly not a permitted form of gambling in any of Atlantic City's gambling casinos at that time.¹⁷⁷ In 1984, Nevada was the only state where casino patrons could legally wager on sporting events.¹⁷⁸ In fact, it took another thirty-four years for New Jersey casinos to even be afforded the opportunity to offer sports wagering as an amenity to their patrons.¹⁷⁹

This interpretive approach also implicitly recognizes that the phrase “casinos of the type currently operating in Nevada and New Jersey” is expressed in the conjunctive. A basic rule of construction is that where the conjunctive word “and” is inserted between two conditions in a statutory or constitutional provision, it means that *both of those* conditions must be given effect.¹⁸⁰

¹⁷⁴ *Id.*

¹⁷⁵ See *Atlantic City, New Jersey 1984 Casino Data*, UNLV CENTER FOR GAMING RSCH., http://gaming.unlv.edu/abstract/ac_1984.html [<http://perma.cc/P8V6-P4DA>] (last updated Apr. 8, 2022) (summarizing statistical information from New Jersey Casino Control Commission's 1984 Annual Report).

¹⁷⁶ *Id.*

¹⁷⁷ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1469 (2018).

¹⁷⁸ *Id.*

¹⁷⁹ See Joseph Albright, *Full-Service Gas Stations, Illegal Gambling, and Other Tidbits of N.J. History*, NJ.COM (Oct. 1, 2019, 12:11 PM), <http://www.nj.com/hudson/2019/10/full-service-gas-stations-illegal-gambling-and-other-tidbits-of-nj-history-albright.html> [<http://perma.cc/N65K-R9SH>] (“Sports betting became legal in New Jersey in 2018 when the U.S. Supreme Court threw out a federal ban that stood for more than a quarter century.”).

¹⁸⁰ See *Conservatorship of Boyes*, No. A139165, 2014 WL 1378247, at *2 (Cal. Ct. App. Apr. 8, 2014) (“The two requirements are conjunctive, not disjunctive. Both must be addressed and satisfied.”); *In re Carr*, 77 Cal. Rptr. 2d 500, 506 (Cal. Ct. App. 1998) (“The Legislature . . . used the conjunctive ‘and’ which must be given effect under traditional statutory interpretation rules.”); *McComb v. Superior Court*, 137 Cal. Rptr. 233, 237 (Cal. Ct. App. 1977) (“The section is in the conjunctive; both of the conditions must be satisfied before the act will constitute a crime.”); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 116 (2012) (“Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives.”).

Applying this basic canon of statutory construction under the California Supreme Court's initial interpretive approach guided by the intent of the 1984 constitutional amenders, section 19(e)'s ban on "the type" of casinos "currently operating in Nevada and New Jersey" would extend only to those gambling activities which were particularly associated with *both* Nevada and New Jersey casinos in 1984—and not just to those occurring in only *one* of those states.¹⁸¹

B. "Gambling activities including those statutorily prohibited in California, especially banked table games and slot machines"¹⁸²

The second interpretive approach suggested by the California Supreme Court in *Hotel Employees* shifts the focus away from the gambling activities offered in Nevada and New Jersey casinos in 1984, and, instead, looks entirely to California statutory law for guidance.¹⁸³ Under this alternative formulation, the court examined the meaning of the phrase "the type of casino currently operating in Nevada and New Jersey" through the lens of California's statutory prohibitions against gambling that were in effect in 1984 (when Proposition 37 was approved by voters).¹⁸⁴ Following its discussion of what the framers and voters "must have had in mind" when they enacted section 19(e)—i.e., "a type of gambling house unique to or particularly associated with Nevada and New Jersey"—the court began the next paragraph by stating that: "Similarly, 'the type' of casino 'operating in Nevada and New Jersey' presumably refers to a gambling facility that did *not* legally operate in California; something other, that is, than 'the type' of casino 'operating' in California."¹⁸⁵

¹⁸¹ Consistent with this basic rule of construction, the Legislative Counsel has likewise interpreted the phrase "casinos of the type currently operating in Nevada and New Jersey" to be coextensive with the lawful gambling activities that were conducted in *both* of those states in 1984. See Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 9 (construing section 19(e) by reference to "the sorts of gambling activities that were conducted in Nevada *and* New Jersey in 1984" and discussing "authorized forms [of] gambling *in those states* at that time") (emphasis added); see also *id.* (quoting CAL. CONST. art. IV, § 19(e) ("In addition, it is possible to derive a functional definition of the phrase 'casinos of the type currently operating in Nevada and New Jersey' from the laws and practices of *those states* in effect at the time [section 19(e)] was approved.") (emphasis added)); *id.* at 10–11 ("incorporating the common and essential attributes of casino gambling permitted in Nevada *and* New Jersey at the time [section 19(e)] was adopted" and adopting a definition that "is supported by the laws of Nevada *and* New Jersey extant in 1984") (emphasis added).

¹⁸² *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 1004 (Cal. 1999).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

Turning section 19(e)'s language inside out, the court stated that “the type” of “casino” legally operating in California “has commonly been called a ‘card room’ or ‘card club.’”¹⁸⁶ In contrast to the above-described Nevada and New Jersey-centric interpretive approach, which looks to the gaming activities that were *allowed* in both those states in 1984, the Court’s alternative formulation defines the scope of section 19(e) by reference to the gaming activities which California card rooms were *forbidden* from offering at that time.¹⁸⁷ Specifically, the court stated that a “California card room or card club was *not* permitted to offer gaming activities in the form of: (1) lotteries; (2) banking games . . . ; (3) percentage games . . . ; (4) slot machines; or (5) games proscribed by name, including twenty-one” because those activities were prohibited by statute.¹⁸⁸

Viewing section 19(e) through the alternative lens of what a California card room was statutorily prohibited from offering in 1984, the California Supreme Court suggested an interpretation of section 19(e) that would elevate *all* statutory prohibitions against gambling in California to a constitutional level.¹⁸⁹ The court stated: “Thus, a casino of ‘the type . . . operating in Nevada and New Jersey’ may be understood, with reasonable specificity, as one or more buildings, rooms, or facilities, whether separate or connected, that offer gambling activities including those statutorily prohibited in California, especially banked table games and slot machines.”¹⁹⁰

The language at the tail-end of the previous sentence—i.e., “*gambling activities including those statutorily prohibited in California, especially banked table games and slot machines*”—has been interpreted by some stakeholders as constituting a blanket prohibition against the legislative authorization of any form of gambling that was barred by California statute in 1984.¹⁹¹ For example, several of California’s Indian tribes have asserted that sports betting—a form of gambling which was not “particularly associated with” New Jersey casinos in 1984—is nonetheless encompassed within section 19(e)’s anticasinio language because pool-selling and bookmaking (which are synonymous with sports gambling) are prohibited by section 337a of the California Penal

¹⁸⁶ *Id.* (citations omitted).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1004–05.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

Code.¹⁹² The California tribes contend that section 19(e) “raised” the statutory prohibition against pool-selling and bookmaking (codified in Penal Code section 337a)—and *all* other Penal Code gambling prohibitions—“to a constitutional level.”¹⁹³

If that were the only interpretation suggested by the California Supreme Court in *Hotel Employees*, then the California tribes might have had a point. But the court also supplied *another* interpretation of section 19(e) and expressed it with far more certainty than the construction urged by the tribes.¹⁹⁴ As discussed in Part II, Section A above, in the same section of the *Hotel Employees* opinion—and just prior to the paragraph featuring the words “including those statutorily prohibited in California”—the court construed the phrase “casinos of the type currently operating in Nevada and New Jersey” to mean something much narrower—namely, “a type of gambling house *unique to or particularly associated with Nevada and New Jersey*” in 1984.¹⁹⁵ The court declared that this is what the framers and voters “*must have had in mind*” when they enacted section 19(e) “since they chose to define the prohibited institution by reference to those states.”¹⁹⁶ This is a significant point of departure between the two suggested interpretative approaches, given that it produces seemingly different outcomes on the issue of sports betting. However, the California Supreme Court has consistently recognized that the intent of the voters is the “paramount consideration” when construing a constitutional provision enacted by initiative.¹⁹⁷ This principle would appear to strongly favor the Supreme Court’s initial interpretation of section 19(e) as the more legally sound one.

But this is not about which of the two interpretative approaches is the more compelling or correct one. What is relevant here—and ultimately dispositive—is the *fact* that the California Supreme Court supplied *two* different possible interpretations of what was meant by the “the type” of casino

¹⁹² See Feb. 6, 2020 Letter, *supra* note 40, at 1 (“[S]ports betting is well within the reach of section 19(e)’s prohibition” against Nevada and New Jersey-style casinos because “[s]ports betting has been prohibited in California since 1909 when Penal Code section 337a was enacted.”).

¹⁹³ *Id.* at 2 (emphasis added).

¹⁹⁴ *Hotel Emps.*, 981 P.2d at 1004 (emphasis added).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (emphasis added).

¹⁹⁷ *Davis v. City of Berkeley*, 794 P.2d 897, 900 (Cal. 1990) (“When construing a constitutional provision enacted by initiative, the intent of the voters is the paramount consideration.”); see also *In re Lance W.*, 694 P.2d 744, 754 (Cal. 1985) (“In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration.”).

“operating in Nevada and New Jersey” in 1984. Even the California tribes have acknowledged that the Court initially sought to define “the type” of casino “operating in Nevada and New Jersey” by reference to the gambling activities that were endemic to Nevada and New Jersey casinos in 1984, conceding that “[i]t is true that in *defining* ‘the type’ of casino ‘operating in Nevada and New Jersey,’ the California Supreme Court analyzed the gambling activities *occurring* in those states in 1984.”¹⁹⁸ With that concession, the tribes recognized—as they must—that the court viewed section 19(e) as being reasonably susceptible to two or more interpretations: one focusing solely on those gambling activities that were “unique to or particularly associated with” Nevada and New Jersey casinos in 1984 and the other looking strictly at the inverse or “flip-side” of the issue by reference to what was statutorily prohibited in California at the time.¹⁹⁹

The California Supreme Court’s recognition that there are at least two plausible interpretations of section 19(e)’s anticasinio language is further evidenced by the court’s multiple references to the official ballot pamphlet for Proposition 37 as an essential part of its inquiry into the meaning and scope of section 19(e).²⁰⁰ In particular, the court cited the Proposition 37 ballot pamphlet in support of its statement that “the available legislative history suggests section 19(e) was designed, precisely, to elevate statutory prohibitions on a set of gambling activities to a constitutional level.”²⁰¹ Quoting directly from the “Analysis by the Legislative Analyst” and the “Argument in Favor of Proposition 37,” the Court reasoned that “[v]oters on the 1984 initiative would thus have understood the constitutional provision they added, section 19(e), as focusing on a set of statutorily prohibited activities, i.e., ‘casino gambling,’ and as endowing the existing statutory bars on that set of activities with a new, constitutional status.”²⁰² The use of the official ballot pamphlet as an interpretive tool is an implicit acknowledgment by California’s highest court that the language in section 19(e) is ambiguous and, therefore, capable of more than one interpretation.²⁰³

¹⁹⁸ Feb. 6, 2020 Letter, *supra* note 40, at 2 (emphasis added).

¹⁹⁹ *Id.*

²⁰⁰ See *Hotel Emps.*, 981 P.2d at 1003, 1005.

²⁰¹ *Id.* at 1005.

²⁰² *Id.*

²⁰³ See *City & Cnty. of S.F. v. Cnty. of San Mateo*, 896 P.2d 181, 186 (Cal. 1995) (citing *Bd. of Supervisors v. Lonergan*, 616 P.2d 802, 808 (Cal. 1980)) (“If the [constitutional] provision’s words are ambiguous and open to more than one meaning, we consult the legislative history, which in the case of article XIII A is the ballot pamphlet.”); see also *People v. Birkett*, 980 P.2d 912, 923 (Cal. 1999) (citing *Hill v. Nat’l Collegiate*

C. Where Constitutional Language Is Capable of Several Interpretations, the Legislature's Adoption of One of Those Alternatives Is Entitled to Substantial Deference

As the California Supreme Court's alternative definitional approaches plainly demonstrate, the anti-casino language in section 19(e) is reasonably susceptible to at least two possible interpretations: one tied to the specific gambling activities that were endemic to Nevada and New Jersey casinos in 1984 (i.e., "a type of gambling house unique to or particularly associated with Nevada and New Jersey"),²⁰⁴ and the other more broadly referring to *all* categories of gambling that were banned in California at that time (i.e., "including those statutorily prohibited in California, especially banked table games and slot machines").²⁰⁵

Additionally, the Legislative Counsel of California has acknowledged that there are at least three possible interpretations of the phrase "casinos of the type currently operating in Nevada and New Jersey."²⁰⁶ In a 1998 opinion letter that was issued one month prior to the vote on Proposition 5, the Legislative Counsel explained that "it is possible to derive a functional definition of the phrase 'casinos of the type currently operating in Nevada and New Jersey' from the laws and practices of those states *in effect* at the time [that section 19(e)] was approved."²⁰⁷ As part of its detailed analysis of the issue, the Legislative Counsel examined the characteristics of Nevada and New Jersey casinos in 1984.²⁰⁸ For example, the Legislative Counsel observed that both states defined casino gaming as consisting of "any banking or percentage game played with cards, dice or mechanical, electromechanical, or electronic devices or machines, for money, property, checks, credit, or any representative of value."²⁰⁹ The Legislative Counsel also noted that "[u]nder New Jersey law in force at the time [section 19(e)]

Athletic Ass'n, 865 P.2d 633, 642 (Cal. 1994) ("When an initiative measure's language is ambiguous, we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet."); *People v. Arroyo*, 364 P.3d 168, 170 (Cal. 2016) (quoting *Robert L. v. Superior Ct.*, 69 P.3d 951, 955 (Cal. 2003)) ("When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.'").

²⁰⁴ *Hotel Emps.*, 981 P.2d at 1004.

²⁰⁵ *Id.*

²⁰⁶ Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 9–11.

²⁰⁷ *Id.* at 9 (emphasis added).

²⁰⁸ *Id.*

²⁰⁹ *Id.* (citing NEV. REV. STAT. § 463.0152 (West 2021) and N.J. STAT. ANN. § 5:12-21 (West 2021)).

was approved, the term ‘casino’ referred to a ‘single room of at least 15,000 square feet in which casino gaming is conducted.’”²¹⁰

After identifying and analyzing several possible interpretative approaches—each measured by the gambling activities associated with Nevada and New Jersey casinos in 1984—the Legislative Counsel ultimately approved of a definition that “incorporat[ed] the common and essential attributes of casino gambling permitted in Nevada and New Jersey at the time [section 19(e)] was adopted.”²¹¹ Incorporating the laws and practices in effect in both states in 1984, the Legislative Counsel concluded that “the phrase ‘casinos of the type currently operat[ing] in Nevada and New Jersey’ should be construed to mean premises at which banking or percentage games involving cards, dice, or gambling devices are played for money, property, or any representative value.”²¹² The Legislative Counsel reasoned that this interpretation is: (i) “supported by the laws of Nevada and New Jersey extant in 1984”; (ii) “consistent with the phrase ‘casino-style’ gaming, used as a legal term of art to refer to games commonly offered in casinos such as slot machines, black-jack, baccarat, roulette, and craps”; and (iii) “consistent with the common usage of the term ‘casino,’ which is defined as a ‘building or room for gambling.’”²¹³

The mere existence of these alternative interpretations—each receiving the imprimatur of the state’s highest court and/or the Legislative Counsel—plainly shows that the meaning of section 19(e) is not free from doubt and is reasonably susceptible to two or more interpretations. When, as here, a constitutional provision “has a doubtful or obscure meaning or is capable of various interpretations,” the California Legislature’s adoption of one of those alternatives is accorded substantial deference, if not controlling weight, by the courts under longstanding California Supreme Court precedent.²¹⁴ In *City and County of San Francisco v. Industrial Accident Commission*, the California Supreme Court enunciated the now well-established principle that “where a constitutional provision may well have *either of two meanings*, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is *well-nigh, if not completely, controlling*.”²¹⁵

²¹⁰ *Id.* (quoting N.J. STAT. ANN. § 5:12-6 (West 2021)).

²¹¹ *Id.* at 10.

²¹² *Id.* at 11.

²¹³ *Id.* at 10–11.

²¹⁴ *Delaney v. Lowry*, 154 P.2d 674, 678 (Cal. 1944).

²¹⁵ *City & Cnty. of S.F. v. Indus. Acc. Comm’n*, 191 P. 26, 28 (Cal. 1920) (emphasis added); *see also* *Pac. Indem. Co. v. Indus. Acc. Comm’n*, 11 P.2d 1, 2 (Cal. 1932) (“Where

This principle has been recognized by the California Supreme Court for more than one hundred years, beginning with *City and County of San Francisco v. Industrial Accident Commission*²¹⁶ and continuing with the Court's decision in *Methodist Hospital of Sacramento v. Saylor*.²¹⁷ In *Methodist Hospital of Sacramento*, the California Supreme Court summarized this "fundamental rule of constitutional construction" as follows:

[There is a] strong presumption in favor of the Legislature's interpretation of a provision of the Constitution. That presumption has been phrased differently over the years, but its import remains clear. Thus in *San Francisco v. Industrial Acc. Com.*, the court held that "where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling. When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another and co-ordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the Constitution."²¹⁸

Quoting from its earlier decision in *Pacific Indemnity*, the *Methodist Hospital* Court explained that "[f]or the purpose of determining constitutionality, we cannot construe a section of the Constitution as if it were a statute, and adopt our own interpretation without regard to the legislative construction."²¹⁹

more than one reasonable meaning [of a constitutional provision] exists, it is [the Court's] duty to accept that chosen by the Legislature.").

²¹⁶ See *City & Cnty. of S.F.*, 191 P. at 28. The principle of deference enunciated in *City & County of San Francisco* is not confined to legislatively-referred constitutional amendments; it is also applicable to constitutional provisions enacted by citizen-proposed initiatives. See, e.g., *Armstrong v. Cnty. of San Mateo*, 194 Cal. Rptr. 294, 297, 306–10 (Cal. Ct. App. 1983) (finding the California Legislature's interpretation of Proposition 13 tax reform initiative controlling where ballot materials did not shed light on ambiguous language). Further, as the Legislative Counsel has acknowledged, "[t]his rule applies even when the Legislature interprets constitutional limitations on its own powers." See *The Legislature of the State of California's Opening Brief on the Merits in Californians for an Open Primary v. Shelley*, No. S126780, 2004 WL 2863090, at *13–14 (Cal. Sup. Ct. Oct. 8, 2004).

²¹⁷ *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161 (Cal. 1971).

²¹⁸ *Id.* at 166 (citation omitted).

²¹⁹ *Id.* (quoting *Pac. Indem. Co.*, 11 P.2d at 2).

Thus, “[w]here more than one reasonable meaning exists, it is [the judiciary’s] *duty* to accept that chosen by the Legislature.”²²⁰

And, finally, from its decision in *Delaney v. Lowery*,²²¹ the *Methodist Hospital* Court reiterated the longstanding principle that when a constitutional provision “has a doubtful or obscure meaning or is capable of various interpretations, the construction placed thereon by the Legislature is of very persuasive significance,”²²² stating that this rule “remains viable today.”²²³

Significantly, under this principle, the California Legislature’s interpretation does not even have to be the most reasonable reading of the constitutional language at issue, “[n]or need it be shown that the construction placed upon the constitutional provision by the Legislature is ‘*more probably than not*’ the meaning intended by those who framed or adopted the proposal.”²²⁴ Rather, it suffices that the Legislature has “adopt[ed] what is at least a *possible and not unreasonable* construction of the Constitution.”²²⁵ Under this standard, the courts may not invalidate a statute incorporating the Legislature’s construction “unless there is a *plain and unmistakable conflict* between the statute and the Constitution.”²²⁶

²²⁰ *Pac. Indem. Co.*, 11 P.2d at 2 (emphasis added); see also *Lundberg v. County of Alameda*, 298 P.2d 1, 6 (Cal. 1956) (“We cannot adopt our own interpretation of a provision of the Constitution without regard to the legislative construction, and, where more than one reasonable meaning exists, it is our duty to accept that chosen by the Legislature.”); *Brown v. Cmty. Redev. Agency*, 214 Cal. Rptr. 626, 629 (Cal. Ct. App. 1985) (“As a general rule, legislative enactments are presumed to be constitutional; if ‘more than one reasonable meaning exists, it is our duty to accept that chosen by the Legislature.’”) (quoting *Lundberg*, 298 P.2d at 6).

²²¹ 154 P.2d 674 (Cal. 1944).

²²² *Methodist Hosp.*, 488 P.2d at 166 (quoting *Delaney*, 154 P.2d at 678); accord *Mt. San Jacinto Cmty. Coll. Dist. v. Superior Court*, 151 P.3d 1166, 1170 (Cal. 2007); *Gomez v. Superior Court*, 278 P.3d 1168, 1176 (Cal. 2012).

²²³ *Methodist Hosp.*, 488 P.2d at 166 (quoting *Delaney*, 154 P.2d at 678). Further, the application of this rule is not limited to contemporaneous legislative interpretations of a constitutional provision. It is equally applicable to post-enactment interpretations of constitutional language, even in cases where the Legislature is construing a constitutional provision many years after its enactment. See, e.g., *Cal. Hous. Fin. Agency v. Patitucci*, 583 P.2d 729, 731–33 (Cal. 1978) (deferring to 1976 legislative enactment of statutory provision defining the term “low rent housing project” as used in Cal. Const., art. XXXIV, § 1, enacted by initiative in 1950) (citing *Methodist Hosp.*, 488 P.2d. at 166).

²²⁴ 488 P.2d. at 166 (emphasis added).

²²⁵ *Id.* (emphasis added); see also *City & Cnty. of S.F. v. Indus. Acc. Comm’n*, 191 P. 26, 29 (Cal. 1920) (approving a legislative interpretation that adopted “what is at least a possible and not unreasonable construction of the Constitution”); *People v. Giordano*, 170 P.3d 623, 630 (Cal. 2007) (“When the Legislature has ‘adopted a plausible interpretation of the constitutional provision,’ we defer to its determination.”) (quoting *People v. Birkett*, 980 P.2d 912, 924 (Cal. 1999)).

²²⁶ *Methodist Hosp.*, 488 P.2d. at 166 (emphasis added) (quoting *Indus. Acc. Comm’n*, 191 P. at 29); *Armstrong v. Cnty. of San Mateo*, 194 Cal. Rptr. 294, 311 (Cal. Ct. App. 1983) (quoting *Methodist Hosp.*, 488 P.2d. at 166).

III. SPORTS BETTING CAN BE LEGISLATIVELY AUTHORIZED
WITHOUT A CONSTITUTIONAL AMENDMENT UNDER EITHER
INTERPRETIVE APPROACH IDENTIFIED BY THE SUPREME COURT IN
HOTEL EMPLOYEES

It is beyond question that the phrase “casinos of the type currently operating in Nevada and New Jersey” is capable of several interpretations. As discussed above, the Legislative Counsel’s 1998 advisory opinion identified three possible interpretations of what was meant by “the type” of casino “operating in Nevada and New Jersey” in 1984 and ultimately selected a definition which “incorporat[ed] the common and essential attributes of casino gambling permitted in Nevada and New Jersey at the time [section 19(e)] was adopted.”²²⁷ In *Hotel Employees*, the California Supreme Court likewise suggested several possible interpretations of section 19(e), including one that, similar to the Legislative Counsel’s definitional approach and consistent with the intent of the 1984 constitutional amenders, is confined to the gambling activities that were “unique to or particularly associated with” Nevada and New Jersey casinos in 1984.²²⁸

A. Sports Betting was not “particularly associated with” New Jersey Casinos in 1984

A legislative construction of section 19(e) that is coextensive with the gambling activities “unique to or particularly associated with” Nevada and New Jersey casinos in 1984 would enable the California Legislature to authorize sports wagering through a statutory enactment without the need for a separate constitutional amendment. Sports wagering was not a form of gambling that was available—or even permitted—in New Jersey casinos in 1984. At that time, the only gambling activities that were available in New Jersey casinos were slot machines, blackjack, craps, roulette, baccarat, and Big 6.²²⁹ As the Legislative Counsel acknowledged, New Jersey law in effect at that time restricted the gambling that could be legally offered in Atlantic City’s gambling casinos to those games which take place “exclusively” within the casino and are played with “cards, dice or any electronic, electrical, or mechanical device or machine”:

²²⁷ Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 9–11.

²²⁸ *Hotel Emps. & Rest. Emps. Int’l Union v. Davis*, 981 P.2d 990, 1004 (Cal. 1999).

²²⁹ See *Atlantic City, New Jersey 1984 Casino Data*, *supra* note 175.

Under New Jersey law in force at the time the Act [meaning section 19(e)] was approved, the term “casino” referred to “a single room of at least 15,000 square feet in which casino gaming is conducted” and “gaming” was in turn defined as the “dealing, operating, carrying on, conducting, maintaining or exposing for pay of any game.” New Jersey law defined a “game” as “[a]ny banking or percentage game located exclusively within the casino played with cards, dice, or any electronic, electrical, or mechanical device or machine for money, property, or any representative value.”²³⁰

Sports betting does not fall within the ambit of this definition since it is not a “game” located “exclusively” within a casino (inasmuch as the underlying contests take place and are decided at locations beyond a casino’s four walls). Moreover, sports betting is not played with cards, dice, or any electronic gambling device.

This view on sports betting is also confirmed by a 1993 New Jersey court decision which upheld a state gaming regulator’s refusal to allow Atlantic City’s gambling casinos to operate sports betting as a form of “casino gambling.”²³¹ In the case of *In re Casino Licensees for Approval of a New Game, Rulemaking and Authorization of a Test* (“*In re Casino Licensees*”), a New Jersey appellate court reviewed the legislative history surrounding New Jersey’s authorization of casino gambling by constitutional amendment in 1976 and concluded that it only authorized gambling games “which take place *completely* within the confines of a casino.”²³² The appellate court also noted that the New Jersey Casino Control Act—which implemented the constitutional amendment—defined the term “game” or “gambling game[s]” to mean “[a]ny banking or percentage game *located within the casino . . .* played with cards, dice, tiles, dominos, or any electronic, electrical, or mechanical device or machine for money, property, or any representative of value.”²³³

Pointing to these constitutional and statutory constraints, the appellate court upheld the New Jersey Casino Control Commission’s determination that it lacked constitutional and statutory authority to allow sports betting in New Jersey’s gambling casinos.²³⁴ The New Jersey court also concluded that New Jersey’s casinos “may operate only those games conducted *solely* in-house” and “may not offer betting on events which take

²³⁰ Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 9 (citations omitted).

²³¹ *In re Casino Licensees for Approval of a New Game, Rulemaking & Authorization of a Test*, 633 A.2d 1050, 1051 (N.J. Super. Ct. 1993), *aff’d per curiam*, 647 A.2d 454 (N.J. 1993).

²³² *Id.* at 1054 (emphasis added).

²³³ *Id.* (emphasis added) (quoting N.J. STAT. ANN. § 5:12-21 (West 2021)).

²³⁴ *Id.* at 1051.

place or where the result is determined at a location *outside* a casino's four walls."²³⁵ Thus, the appellate court viewed sports wagering as a species of gambling that was separate and distinct from the type of casino gambling that had been authorized by New Jersey law at the time.²³⁶ As a result of this 1993 decision, New Jersey's gambling casinos were prohibited from offering sports wagering to patrons until May 14, 2018 when PASPA was declared unconstitutional by the United States Supreme Court,²³⁷ and New Jersey casinos and racetracks were *thereafter* authorized under state law to operate sports wagering.²³⁸

Since section 19(e)'s casino gambling ban is tethered—at least in part—to “the type” of casinos being operated in New Jersey in 1984 (when Proposition 37 was approved by voters),²³⁹ it is highly relevant, if not dispositive, that a New Jersey court found that the “casino gambling” authorized by that state's constitution and enabling statute did not encompass sports betting. If sports betting was not considered casino gambling under New Jersey law in 1984—and it is also uncontroverted that New Jersey casinos were not even offering sports betting at that time—then the condition precedent to the application of section 19(e) under the California Supreme Court's initial interpretative approach (i.e., that it involve the type of gambling activity that was “particularly associated with” Nevada *and New Jersey* in 1984) is plainly not satisfied in the case of sports betting.

The legal status of sports betting in New Jersey in 1984 is a matter of public record and would not require the type of subjective fact-finding that proved problematic in *Hotel Employees*, where the California Supreme Court, instead of deferring to the findings set forth in the initiative statute, exercised its own “independent judgment [of] the facts.”²⁴⁰ In contrast to *Hotel Employees*, where the proponents of Proposition 5 could only point to subtle, nonmaterial differences between their gambling games and those offered at Nevada and New Jersey casinos, there would be no need for the California Legislature to articulate *any* differences between sports wagering and the gambling activities that typified Nevada and New Jersey

²³⁵ *Id.* at 1051, 1055 (emphasis added).

²³⁶ *Id.* at 1055.

²³⁷ See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–85 (2018).

²³⁸ See N.J. STAT. ANN. § 5:12A-10–19 (West 2021).

²³⁹ See *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 1005 (Cal. 1999).

²⁴⁰ *Coral Constr., Inc. v. City & Cnty. of S.F.*, 235 P.3d 947, 964 n.20 (Cal. 2010) (“[T]he deference afforded to legislative findings does ‘not foreclose [a court’s] independent judgment on the facts bearing on an issue of constitutional law.’”) (quoting *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 825 (Cal. 1997)).

casinos in 1984. It is beyond dispute that sports wagering was not available—or even allowed—in New Jersey casinos at that time. It is an objective, easily verifiable fact about which a California state court could take judicial notice.²⁴¹

Further, in authorizing sports betting through a statutory enactment, the state legislature would not be usurping the judiciary’s role in interpreting the provisions of the California Constitution independently. To the contrary, the legislature would be adopting an interpretation that has already been endorsed by the California Supreme Court. In *Hotel Employees*, the court determined that section 19(e) was susceptible to at least two possible interpretations, including one that is measured by the gambling activities “unique to or particularly associated with” Nevada and New Jersey casinos in 1984, consistent with the intent of the voters.²⁴² It is the legislature’s adoption of *that* judicial interpretation that would be given deference today under a *different* well-established constitutional principle that was not at issue in *Hotel Employees*—the one that applies where a constitutional provision “has a doubtful or obscure meaning or is capable of various interpretations” and commands that the legislature’s adoption of one of those alternatives is of “very persuasive significance,” if not “completely controlling.”²⁴³

Importantly, a statutory finding that sports wagering is beyond the scope of section 19(e) because it was not “unique to or particularly associated with” New Jersey casinos in 1984 would align with the intent of the voters.²⁴⁴ In *Hotel Employees*, the court declared that “a type of gambling house unique to or particularly associated with Nevada and New Jersey” is what “the drafters and voters intended to prohibit in 1984 . . . since they chose to define the prohibited institution by reference to those states.”²⁴⁵ The California Supreme Court has recognized time and again that the intent of the voters is the “paramount consideration” when construing a constitutional provision enacted by initiative.²⁴⁶ Consistent with this well-established

²⁴¹ See CAL. EVID. CODE § 452(h) (West 2021) (stating that a court may take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy”).

²⁴² See *Hotel Emps.*, 981 P.2d at 1004.

²⁴³ *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 166 (Cal. 1971); *City & Cnty. of S.F. v. Indus. Acc. Comm’n.*, 191 P. 26, 28 (Cal. 1920).

²⁴⁴ See *Hotel Emps.*, 981 P.2d at 1004.

²⁴⁵ *Id.*

²⁴⁶ *Davis v. City of Berkeley*, 794 P.2d 897, 900 (Cal. 1990) (“When construing a constitutional provision . . . the intent of the voters is the paramount consideration.”); *In*

principle, the court in *Hotel Employees* repeatedly invoked the intent of the “drafters” and “voters”—sometimes referred to as the “1984 constitutional amenders”—as the polestar for interpreting section 19(e), mentioning it no fewer than eight times in the majority opinion, including:

- “That the amendment drafters or the voters *intended* only such an attenuated effect is unlikely.”²⁴⁷
- “Logic and reference to legislative history, however, allow us to see with reasonable clarity what the drafters and voters *intended* to prohibit in 1984.”²⁴⁸
- “The 1984 constitutional amenders *must have had in mind* a type of gambling house unique to or particularly associated with Nevada and New Jersey, since they chose to define the prohibited institution by reference to those states.”²⁴⁹
- “Voters on the 1984 initiative *would thus have understood* the constitutional provision they added, section 19(e), as focusing on a set of statutorily prohibited activities, i.e., ‘casino gambling,’ and as endowing the existing statutory bars on that set of activities with a new, constitutional status.”²⁵⁰
- “Nor would the voters on the 1984 constitutional amendment *likely have understood* section 19(e) to permit casinos so long as the slot machines therein were activated by buttons rather than levers, and dispensed chips or electronic credits rather than coins.”²⁵¹
- “We think it highly unlikely that the 1984 constitutional amenders, who were told the measure before them would constitutionalize California’s statutory prohibitions on ‘casino gambling,’ *were concerned with* such secondary nongambling features of casinos as their mutual proximity or service of free alcohol.”²⁵²
- “Finally, because private ownership and for-profit operation were not unique to Nevada and New Jersey gambling facilities in 1984, and, indeed, characterized permitted California facilities such as card clubs and

re Lance W., 694 P.2d 744, 754 (Cal. 1985) (“In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration.”).

²⁴⁷ *Hotel Empls.*, 981 P.2d at 1004 (emphasis added).

²⁴⁸ *Id.* (emphasis added).

²⁴⁹ *Id.* (emphasis added).

²⁵⁰ *Id.* at 1005 (emphasis added).

²⁵¹ *Id.* at 1007 (emphasis added).

²⁵² *Id.* (emphasis added).

horse racing tracks, private ownership and for-profit operation could not logically have been the characteristics to which the constitutional amenders *intended to refer* in prohibiting ‘casinos of the type currently operating in Nevada and New Jersey.’”²⁵³

- “As just discussed, however, private ownership and for-profit operation did not distinguish Nevada and New Jersey casinos from California card clubs in 1984 and, therefore, these were almost certainly not the characteristics to which the drafters and voters *intended to refer* when barring authorization of casinos ‘of the type currently operated in Nevada and New Jersey.’”²⁵⁴

As demonstrated by the foregoing passages, the California Supreme Court expressed a decidedly strong preference for resolving interpretative issues under section 19(e) through the lens of voter intent. Thus, a reasonable way to interpret section 19(e)—and one which fulfills the intent of the voters (as prioritized in *Hotel Employees*) while comporting with basic principles of statutory construction by giving effect to the conjunctive “and”—is that it extends only to those gambling activities which were associated with *both* Nevada and New Jersey casinos in 1984, and not just to those occurring in only *one* of those states.²⁵⁵ Since sports wagering was not a category of gambling “particularly associated with” *both* Nevada and New Jersey casinos in 1984—it was legal only in Nevada at that time—it would be entirely reasonable for the state legislature to construe section 19(e) as not encompassing the activity of sports wagering.

A legislative construction of section 19(e) which adopts the California Supreme Court’s initial interpretation of “the type” of casino “operating in Nevada and New Jersey” as coextensive with the gambling activities “unique to or particularly associated with Nevada and New Jersey” in 1984 easily satisfies the “possible and not unreasonable” standard enunciated in *Methodist Hospital* and earlier precedent.²⁵⁶ Quite obviously, an interpretation of the state constitution that is suggested or approved by California’s highest

²⁵³ *Id.* (emphasis added).

²⁵⁴ *Id.* at 1008 (emphasis added).

²⁵⁵ See *supra* notes 180–181 and accompanying text; see also *Whitman v. Transtate Title Co.*, 211 Cal. Rptr. 582, 587 (Cal. Ct. App. 1985) (“It is a cardinal principle of statutory construction that every word, phrase and provision of the statute is to be given meaning and that a statute will not be interpreted in such a way as to render a portion of the statutory language meaningless.”) (citing *J. R. Norton Co. v. Agric. Lab. Rels. Bd.*, 603 P.2d 1306, 1326–27 (Cal. 1979)).

²⁵⁶ See *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 166 (Cal. 1971) (quoting *City & Cnty. of S.F. v. Indus. Acc. Com.*, 191 P. 26, 29 (Cal. 1920)).

court is inherently reasonable, especially where, as here, (1) it is expressed with certainty—with the court going so far as to state that this is the interpretation that the 1984 constitutional amenders “must have had in mind” when they enacted section 19(e); and (2) it incorporates the specific geographic parameters (i.e., Nevada and New Jersey) chosen by the 1984 constitutional amenders, thereby aligning with the intent of the voters.²⁵⁷ It also adheres to the well-established principle that constitutional limitations on legislative power are to be strictly construed against the limitation.²⁵⁸ Indeed, a construction of section 19(e) that is coextensive with the gambling activities “unique to or particularly associated with Nevada and New Jersey” in 1984—inasmuch these are the only states explicitly mentioned in section 19(e)—would constitute a strict construction of the constitutional language in accordance with well-established precedent from the California Supreme Court.

B. The California Supreme Court’s Alternative Interpretation Tethered to California’s Statutory Prohibitions against Gambling Did Not Create a Wide-Sweeping Rule of General Applicability, but, Rather, Must Be Read in the Context of the Particular Facts of *Hotel Employees*, which Focused Exclusively on Banked Card Games and Slot Machines

The other interpretive approach suggested by the California Supreme Court—which looks to California’s statutory gambling prohibitions as an alternative way of analyzing section 19(e)’s scope—is riddled with equivocal and uncertain language.²⁵⁹ This is evident in the very first paragraph of the court’s discussion of that alternative approach, with the court suggesting that the phrase “‘the type’ of casino ‘operating in Nevada and New Jersey’ *presumably* refers to a gambling facility that did *not* legally operate in California; something other, that is, than ‘the type’ of casino ‘operating’ in California.”²⁶⁰ Likewise, in the subsequent

²⁵⁷ *Hotel Emps.*, 981 P.2d at 1004.

²⁵⁸ See *Cal. Hous. Fin. Agency v. Patitucci*, 583 P.2d 729, 731 (Cal. 1978) (“Any constitutional limitations on legislative power are to be narrowly construed”); *Methodist Hosp.*, 488 P.2d at 165 (quoting *Collins v. Riley*, 152 P.2d 169, 171 (Cal. 1944)) (“Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.”).

²⁵⁹ *Hotel Emps.*, 981 P.2d at 1004.

²⁶⁰ *Id.* (first emphasis added). The word “presumably” connotes something that is considered likely—i.e., probable—but is not known for certain. See *Presumably*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english/presumably> [<http://perma.cc/CJA6-UHXX>] (last visited May 31, 2021) (defining “presumably” as being “used to say what you think is the likely situation”).

paragraph, the court stated that the phrase “a casino of ‘the type . . . operating in Nevada and New Jersey’ [in 1984] *may be understood*, with reasonable specificity, as one or more buildings, rooms, or facilities, whether separate or connected, that offer gambling activities including those statutorily prohibited in California, especially banked table games and slot machines.”²⁶¹

The California Supreme Court’s use of equivocal language highlights a critical difference between the two alternative definitional approaches. While the Court uses compulsory language (i.e., “the 1984 constitutional amenders *must* have had in mind”) in construing section 19(e) as referring to the type of gambling house “unique to or particularly associated with Nevada and New Jersey” in 1984,²⁶² it later switches to the permissive “*may*” in suggesting an alternative definition that is tied to California’s statutory gambling prohibitions in effect at that time.²⁶³ That is far from an authoritative or ringing endorsement of the latter interpretive approach.²⁶⁴ If California’s highest court believed that the *only* way to interpret section 19(e) was to look to California’s statutory gambling prohibitions for guidance, it would have stated so explicitly and unambiguously, instead of suggesting two alternative definitions and then using uncertain language in describing the latter.

1. The California Supreme Court Invoked Penal Code Section 330’s Prohibition against “Casino-Style” Games to Counter the Statutory Finding that the Player-Banked Games and Tribal Gambling Terminals Authorized by Proposition 5 Were “Materially Different” than the House-Banked Games and Slot Machines Offered in Nevada and New Jersey in 1984.

When viewed out of context and disassociated from the actual facts of the case, it might be tempting to view the phrase “*including those statutorily prohibited in California*” as an indication that the

²⁶¹ *Hotel Emps.*, 981 P.2d at 1004 (emphasis added). The word “may” is “used to indicate [a] possibility or probability.” *People v. Maradiaga*, No. B271506, 2016 WL 7031545, at *2 (Cal. Ct. App. Dec. 2, 2016) (quoting *May*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/may> [<http://perma.cc/FMS5-7YAL>] (last visited May 31, 2021)).

²⁶² *Hotel Emps.*, 981 P.2d at 1004 (emphasis added).

²⁶³ *Id.* (emphasis added).

²⁶⁴ *See* *Boca Ctr. at Military, LLC v. City of Boca Raton*, 312 So. 3d 920, 923 (Fla. Dist. Ct. App. 2021) (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 112 (2012)) (“Per the ‘Mandatory/Permissive Canon,’ the word ‘may’ is commonly treated as a permissive word granting discretion.”); *see also* *Janssen v. Denver Career Serv. Bd.*, 998 P.2d 9, 16 (Colo. App. 1999) (“[W]here the term ‘may’ is used as opposed to ‘must,’ the term refers to authority which is permissive and not mandatory.”).

California Supreme Court construed section 19(e) as having elevated *all* of California's statutory prohibitions against gambling to a constitutional level. That isolated judicial statement, however, must be read in the context of the particular facts of *Hotel Employees*—a case focusing exclusively on banked card games and slot machines, which are classic “casino-style” games²⁶⁵—and should not be understood as establishing a hard and fast rule to be applied in every case.²⁶⁶ As the California Supreme Court observed more than 100 years ago in *Pearce v. Boggs*:

There is no rule better settled than that the opinion of a court is always to be read in connection with the facts of the case in which it is given, and it may often occur that in its opinion it will use expressions, either by way of argument or illustration, which are correct in their application to the case before it, but would be inapplicable in many other cases.²⁶⁷

Indeed, California's appellate courts have long recognized the hazards of taking broad or isolated judicial statements out of context and treating them as rules of general applicability.²⁶⁸ In *Bay Summit Community Association. v. Shell Oil Company*, the Fourth District Court of Appeal cautioned that “trial courts should use great care in lifting statements from opinions since such statements taken out of context may be inappropriate as a general rule of law, particularly if the facts underlying the opinion are distinguishable.”²⁶⁹ Likewise, in *Carrillo v. Helms Bakeries, Ltd.*, the Second District Court of Appeal recognized the “danger of error” in a trial court's “extraction of

²⁶⁵ See *infra* note 379 and accompanying text.

²⁶⁶ See *Coffey v. Shiomoto*, 345 P.3d 896, 908 (Cal. 2015) (cautioning that statements by an appellate court “must be read in the context of the case”); *People v. Mincey*, 827 P.2d 388, 402 (Cal. 1992) (declaring that statement by the California Supreme Court “must be read in the context of the case in which it was made”); *Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944) (recognizing that broad and general statements of law in judicial opinions must be read in the context of the facts before the court, and cannot be uncritically transposed to different factual circumstances).

²⁶⁷ *Pearce v. Boggs*, 33 P. 906, 907 (Cal. 1893); see also *Bristol-Myers Squibb Co. v. Teva Pharms. USA, Inc.*, 769 F.3d 1339, 1353 (Fed. Cir. 2014) (Taranto, J., dissenting) (“It is a well-recognized principle, and one essential to our system of precedent, that statements in opinions must be read in context, considering their role in the decision and the facts of the case.”); *Mitchell Partners, L.P. v. Irex Corp.*, 53 A.3d 39, 46 (Pa. 2012) (“We have emphasized many times, however, that a decision is to be read against its facts and will not be applied uncritically to subjects which were not directly before the Court.”).

²⁶⁸ *Bay Summit Cmty. Assn. v. Shell Oil Co.*, 59 Cal. Rptr. 2d 322, 332 n.9 (Cal. Ct. App. 1996).

²⁶⁹ *Id.*; see also *Francis v. City & Cnty. of S.F.*, 282 P.2d 496, 500 (Cal. 1955) (“The admonition has been frequently stated that it is dangerous to frame [a jury] instruction upon isolated extracts from the opinions of the court.”); *Ernest W. Hahn, Inc. v. Sunshield Insulation Co.*, 68 Cal. App. 3d 1018, 1023 (Cal. Ct. App. 1977) (“The practice of taking excerpts from the opinions of courts of last resort and indiscriminately changing them into instructions to juries has frequently been condemned.”).

a statement of an appellate court from its context in an opinion and giving it as a statement of abstract law.”²⁷⁰ Finally, in *Tait v. City and County of San Francisco*, the First District Court of Appeal recognized that “[e]ven if a statement in an opinion is made as a general rule, such rule is drafted with the special case in mind and *may in a different case prove to be inapplicable*.”²⁷¹

These admonitions are particularly appropriate here. The California Supreme Court’s reference to “gambling activities *including those statutorily prohibited in California, especially banked table games and slot machines*” was made in the context of a case focusing on a specific type of gambling—namely, “casino-style” games offered within a traditional casino environment.²⁷² *Hotel Employees* involved a challenge to Proposition 5, a statutory initiative measure which authorized various types of gambling at tribal casinos.²⁷³ The main focus of the court’s opinion was on two specific types of “casino-style” games authorized under Proposition 5’s model compact: (1) “Tribal gaming terminals” (also referred to in the model compact as “gaming or gambling device[s]”); and (2) Class III card games, including blackjack or twenty-one.²⁷⁴

California’s statutory gambling prohibitions became relevant in *Hotel Employees* because Proposition 5’s proponents—who were affiliated with California’s Indian tribes²⁷⁵—argued that the gambling activities authorized in the model compact “differed” from those offered at Nevada and New Jersey-style casinos in 1984.²⁷⁶ Pointing to language in the initiative statute,²⁷⁷ the proponents of Proposition 5 asserted that the class III card games and “tribal gaming terminals” contemplated by Proposition 5 were not like the “house-banked” games offered in Nevada and New Jersey casinos, as they would pay prizes solely

²⁷⁰ *Carrillo v. Helms Bakeries, Ltd.*, 44 P.2d 604, 606–07 (Cal. Dist. Ct. App. 1935).

²⁷¹ *Tait v. City & Cnty. of S.F.*, 300 P.2d 74, 77 (Cal. Dist. Ct. App. 1956) (emphasis added).

²⁷² *Hotel Emps. & Rest. Emps. Int’l Union v. Davis* 981 P.2d 990, 1004 (Cal. 1999).

²⁷³ *Id.* at 994, 1000–01.

²⁷⁴ *Id.* at 1002, 1005–07, 1019 n.1 (“The record does not contain an exhaustive list of the card games played at tribal casinos on or before January 1, 1998, but there is no dispute they included one or more forms of blackjack or twenty-one.”).

²⁷⁵ *Id.* at 994–95 (describing that the real parties in interest were Californians for Indian Self-Reliance, a California corporation which presented ballot arguments in favor of Proposition 5, and Frank Lawrence, a tribal gaming attorney who was the proponent of the ballot initiative).

²⁷⁶ *Id.* at 1005–08 (discussing and rejecting the claimed differences between the tribal casinos authorized by Proposition 5 and “the archetypical 1984 Nevada or New Jersey casino”).

²⁷⁷ CAL. GOV’T CODE § 98001(c) (West 2021); CAL. GOV’T CODE § 98006(a)–(b) (West 2021).

in accordance with a “players’ pool prize system” in which the house would not have any interest in the outcome of the wager.²⁷⁸ Under the proposed “players’ prize pool system,” all player wagers would be pooled and dedicated solely to the payment of prizes, and, while the house could not have any interest in those funds, it would be permitted to collect a fee from players on a “per play, per amount wagered, or time-period basis,” and could “seed” the pools in the form of loans.²⁷⁹

The California Supreme Court was unpersuaded by this asserted distinction, pointing to California’s broad statutory ban on all “banking” games involving “cards, dice, or any device”²⁸⁰ regardless of whether they are house-banked.²⁸¹ Drawing heavily on judicial decisions interpreting section 330 of the California Penal Code, the court determined that the gambling activities authorized by Proposition 5 were “banking” games because the tribal casino “through the prize pool . . . ‘pays off all winning wagers and keeps all losing wagers,’ which are variable ‘because the amount of money’ the tribal casino ‘will have to pay out,’ or be able to take in, ‘depends upon whether each of the individual bets is won or lost.’”²⁸² As the court explained, “[t]he *pool* itself functions as a bank, collecting from all losers and paying all winners.”²⁸³ The California Supreme Court reasoned that the player prize pool “is a bank in nature if not in name” because it is a “fund against which everybody has a right to bet, the bank . . . taking . . . all that is won, and paying out all that is lost.”²⁸⁴ It was therefore “immaterial” that the players’ prize pool, rather than the tribal casino operator directly, “pays all the winnings

²⁷⁸ *Hotel Emps.*, 981 P.2d at 1000, 1002.

²⁷⁹ *Id.* at 1002. Section 98006 of the California Government Code defined a “players’ pool prize system” as

one or more segregated pools of funds that have been collected from player wagers are irrevocably dedicated to the prospective award of prizes in [authorized gaming activities] and in which the house has neither acquired nor can acquire any interest. The tribe may set and collect a fee from players on a per play, per amount wagered, or time-period basis, and may seed the pools in the form of loans or promotional expenses, provided that the seeding is not used to pay prizes previously won.

CAL. GOV’T CODE § 98006(a) (West 2021).

²⁸⁰ *Hotel Emps.*, 981 P.2d at 1005–06; *see also* *W. Telcon, Inc. v. Cal. State Lottery*, 917 P.2d 651, 653–54 (Cal. 1996) (“Section 330 . . . forbids ‘any banking or percentage game played with cards, dice, or any device’”); *United States v. Roselli*, 432 F.2d 879, 887 n.9 (9th Cir. 1970) (“California Penal Code section 330 prohibits the playing for money of certain listed card games, ‘or any banking or percentage game played with cards, dice, or any device.’”).

²⁸¹ *Hotel Emps.*, 981 P.2d at 996 (citing CAL. PENAL CODE § 330 (West 2021)).

²⁸² *Id.* at 1005 (quoting *W. Telcon, Inc. v. Cal. State Lottery*, 917 P.2d 651, 657 (Cal. 1996)).

²⁸³ *Id.* at 1019 n.4.

²⁸⁴ *Id.* at 1006 (quoting *W. Telecon, Inc.*, 917 P.2d at 657).

and suffers all the losses,”²⁸⁵ since, as the court acknowledged, “a banking game, within the meaning of Penal Code section 330’s prohibition, may be banked by someone other than the owner of the gambling facility.”²⁸⁶

The California Supreme Court again turned to the California Penal Code for guidance in rejecting the argument that the “Tribal gaming terminals” were “materially different” from Nevada and New Jersey-style slot machines on the asserted basis that they “do not dispense coins or currency and are not activated by handles.”²⁸⁷ Citing the broad definition of slot machines in Penal Code section 330b, the court explained that “[a] slot machine is no less a slot machine under California law because it dispenses a ‘credit, allowance or thing of value,’ rather than money . . . or because it is ‘caused to operate’ by one ‘means’ rather than another.”²⁸⁸ Acknowledging the paramount importance of voter intent—an overarching theme running throughout the majority opinion—the California Supreme Court reasoned that “voters on the 1984 constitutional amendment likely [would not] have understood section 19(e) to permit casinos so long as the slot machines therein were activated by buttons rather than levers, and dispensed chips or electronic credits rather than coins.”²⁸⁹ Thus, the court concluded that the Tribal gaming terminals “are within the prohibition of Penal Code section 330.”²⁹⁰

As the foregoing reveals, the California Supreme Court invoked California’s statutory gambling prohibitions for a very specific (and limited) purpose: to explain why the gambling activities at issue (i.e., “Class III card games” and “Tribal gaming terminals”) were not, as the tribal representatives had claimed, “materially different” from the banked card games and slot machines operated by Nevada and New Jersey casinos in 1984.²⁹¹

²⁸⁵ *W. Telecon, Inc.*, 917 P.2d at 657 (quoting *People v. Ambrose*, 265 P.2d 191, 194 (Cal. Super. Ct. 1953)).

²⁸⁶ *Hotel Emps.*, 981 P.2d at 1006 (citing *Oliver v. County of Los Angeles*, 78 Cal. Rptr. 2d 641, 647–48 (Ct. App. 1998)).

²⁸⁷ *Id.* (citing CAL. GOV’T CODE § 98006(b) (West 2021)).

²⁸⁸ *Id.* at 1007 (citation omitted).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 1007 n.5. The proponents of Proposition 5 also argued that the Tribal gaming terminals “differ from slot machines found in Nevada and New Jersey casinos” because “they are not house-banked, but rather operate as lotteries” in that they “must be conducted according to the players’ prize pool system.” *Id.* at 1006–07. Referencing its earlier discussion of the players’ prize pool system and its finding that the “pool” itself is “the bank” for purposes of Penal Code section 330, the Court reiterated that the players’ prize pool system “does not convert a game or device into a lottery,” reasoning that “tribal gaming devices are not a lottery terminals, rather than slot machines, merely because a player’s winnings must come from, and his or her losses, go into, a particular fund.” *Id.*

²⁹¹ *See id.*

Far from creating a wide-sweeping rule of general applicability, the court turned to California law (and, in particular, Penal Code sections 330 and 330b) simply to assess whether, in substance, the gambling games authorized by Proposition 5 were materially similar to those being offered in Nevada and New Jersey at the time—and *not* to expand the reach of section 19(e) to cover gambling activities that were not “typical” of Nevada and New Jersey casinos in 1984.²⁹² Had the proponents of Proposition 5 *not* sought to differentiate their games from those offered at Nevada and New Jersey casinos by pointing to the “player-banked” nature of their games and the absence of pull-handles and coin dispensers from the Tribal gaming terminals, there would have been no reason for the court to even consider California’s statutory gambling prohibitions, inasmuch as banked card games and slot machines were the quintessential form of Nevada-and-New Jersey-style casino gambling in 1984, independent of any analysis under California law.²⁹³

This provides crucial context for understanding the California Supreme Court’s use of the words “including those statutorily prohibited in California, *especially banked table games and slot machines*.” The court’s inclusion of the adverb “especially” in that sentence denotes the specific gambling games at issue in *Hotel Employees* (i.e., banked table games and slot machines) and singles them out “over all others” as the gambling activities that are most closely associated with a “casino of ‘the type’ operating in Nevada and New Jersey” in 1984.²⁹⁴ So, while the words “including those statutorily prohibited in California” were included in that sentence as well, it bears emphasizing again that the only “statutorily prohibited” gambling activities that were actually involved and actually addressed by the court in *Hotel Employees* were banked card games (such as blackjack) and slot machines—both of which were endemic to Nevada and New Jersey casinos in 1984 and are specifically prohibited by Penal Code section 330.

Notably, the statutory offenses of pool-selling and bookmaking, which are codified at Penal Code section 337a and generally

²⁹² *Id.* at 996.

²⁹³ *Id.* at 1000–01.

²⁹⁴ *Id.* at 1006; see also *Especialty*, LEXICO, <http://www.lexico.com/en/definition/especialty> [<http://perma.cc/BZ3B-YHRX>] (last visited May 31, 2021) (defining “especially” as an adverb that is “[u]sed to single out one person, thing, or situation over all others.”).

encompass the activity of sports gambling,²⁹⁵ were not at issue before the California Supreme Court.²⁹⁶ There is no reference to section 337a or sports betting anywhere in the *Hotel Employees* opinion.²⁹⁷ Proposition 5 would not have even permitted tribal casinos to operate sportsbooks.²⁹⁸ Nor *could* it have done so in view of the federal ban on state-authorized sports betting that was still in effect in 1998.²⁹⁹ Given the specific factual context of *Hotel Employees*—a case focused solely on banked card games and slot machines (the archetypical form of “casino-style” gambling)—the court’s statement “including those statutorily prohibited in California, especially banked table games and slot machines” is, at best, non-binding obiter dictum to the extent that it implies that other forms of gambling (such as sports betting) not before the court are also within the scope of section 19(e).³⁰⁰

A careful reading of the facts of *Hotel Employees* should therefore dispel any suggestion that the California Supreme Court’s statement “including those statutorily prohibited in California, especially banked table games and slot machines”—made in the context of a case focusing solely on banked card games and slot machines—was meant to create a wide-sweeping rule of general applicability that would reach all other forms of gambling (such as sports betting) not at issue before the court,³⁰¹ when within the immediately preceding paragraph, the California Supreme Court provided an alternative interpretation of section 19(e) (i.e., gambling activities “particularly associated with Nevada and New Jersey” in 1984) that would necessarily *exclude* sports betting.³⁰² That interpretation—aligning with the intent of the constitutional amenders (as acknowledged by the court)—precludes any such sweeping generalizations from being drawn.

²⁹⁵ CAL. PENAL CODE § 337a; see *People v. Epperson*, 176 P. 702, 703 (Cal. Ct. App. 1918) (“The ultimate design of [section 337a] was to penalize and thus put a stop to pool selling on horse races and other sports usually played for money or on wagers.”).

²⁹⁶ *Hotel Emps.*, 981 P.2d at 990.

²⁹⁷ *Id.*

²⁹⁸ See CAL. GOV’T CODE § 98006 (West 2021) (listing the gambling games that were authorized under Proposition 5 with no mention of sports betting or bookmaking).

²⁹⁹ See 28 U.S.C. § 3702 (1992), *invalidated* by *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

³⁰⁰ See *People v. Vang*, 262 P.3d 581, 592 n.3 (Cal. 2011) (defining “obiter dictum,” commonly referred to as either “dicta” or “dictum,” as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)”) (quoting BLACK’S LAW DICTIONARY 1177 (9th ed. 2009)).

³⁰¹ *Hotel Emps.*, 981 P.2d at 1004.

³⁰² *Id.*

2. The California Supreme Court Indicated that Section 19(e) Elevated to a Constitutional Level Only Those Prohibitions against Casino-Style Gaming Codified in Penal Code Section 330.

But even apart from the highly specific factual context of the case, a closer examination of the California Supreme Court's detailed analysis of the constitutional language in *Hotel Employees* belies any suggestion that section 19(e) "constitutionalized" all of California's statutory prohibitions against gambling (encompassing the entirety of sections 330 through 337z of Chapter 10, Title 9, Part 1 of the Penal Code).³⁰³ For example, in the paragraph immediately following the one containing the phrase "*including those statutorily prohibited in California, especially banked table games and slot machines,*" the Court clarified that only a "set" of gambling activities was elevated to a constitutional level by virtue of section 19(e).³⁰⁴

In attempting to pinpoint the "set" of gambling activities that was encompassed by section 19(e), the California Supreme Court examined the ballot pamphlet associated with Proposition 37, highlighting the following language: "[I]n addition to establishing [a] state lottery, Proposition 37 'would amend the Constitution to prohibit in California gambling casinos of the type that exist in Nevada and New Jersey. (*Casino gambling is currently prohibited within the state by a statute, but not by the Constitution.*)'"³⁰⁵ Proposition 37 would also "ADD[] A NEW CONSTITUTIONAL PROHIBITION AGAINST CASINO GAMBLING."³⁰⁶

Relying on this straightforward ballot pamphlet language, the California Supreme Court explained that "[v]oters on the 1984 initiative would thus have understood the constitutional provision they added, section 19(e), as focusing on a set of statutorily prohibited activities, i.e., '*casino gambling*', and as endowing the *existing statutory bars* on *that set* of activities with a new, constitutional status."³⁰⁷ The court similarly observed that "the 1984 constitutional amenders . . . were told the measure before them would constitutionalize California's statutory

³⁰³ *Id.* at 996.

³⁰⁴ *Id.* (emphasis added) ("[T]he available legislative history suggests section 19(e) was designed, precisely, to elevate statutory prohibitions on a set of gambling activities to a constitutional level.")

³⁰⁵ *Id.* (emphasis added) (quoting Ballot Pamp., Prop. 37, *State Lottery. Initiative Constitutional Amendment and Statute*, UC HASTING SCHOLARSHIP REPOSITORY 46 (Nov. 6, 1984), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1926&context=ca_ballot_props [<http://perma.cc/V3XM-E6LY>] (last visited May 31, 2021)).

³⁰⁶ *Id.* at 1005 (alteration in original).

³⁰⁷ *Id.* (emphasis added).

prohibitions on ‘casino gambling.’³⁰⁸ With these clear and unequivocal statements—and there are several others as well³⁰⁹—the court left little doubt that it viewed section 19(e) as elevating to a constitutional level only those statutory prohibitions against casino gambling.

The “existing statutory bars” and “statutory prohibitions” on casino-style gambling in California are set forth in Penal Code sections 330, 330a, and 330b.³¹⁰ Section 330 prohibits eleven gambling games by name, including roulette and twenty-one (often referred to as blackjack), as well as “any banking or percentage game played with cards, dice, or any device”³¹¹ Sections 330a and 330b, in turn, separately prohibit slot machines, the other predominant form of “casino-style” gaming in California.³¹² The California Supreme Court has referred to

³⁰⁸ *Id.* at 1007 (emphasis added).

³⁰⁹ *See id.* at 994 (“In 1984, the people of California amended our Constitution to state a fundamental public policy against the legalization in California of casino gambling of the sort then associated with Las Vegas and Atlantic City.”); *id.* at 1018 n.2 (Kennard, J., dissenting) (referring to “the casino gambling prohibition of section 19(e) of article IV of the California Constitution.”).

³¹⁰ *See, e.g.*, *Reiter v. Mut. Credit Corp.*, No. SACV 09-0811 AG, 2011 WL 13175458, at *7 (C.D. Cal. Aug. 31, 2011) (“Section 330 applies to casino games”); *Oliver v. Cnty. of Los Angeles*, 78 Cal. Rptr. 2d 641, 644 (“According to expert testimony in *Tibbetts v. Van de Kamp*, . . . ‘the common thread among the games specifically listed in section 330 at the time of its enactment was that they were casino games’”) (citation omitted); *Flynt v. Shimazu*, 940 F.3d 457, 459 (9th Cir. 2019) (“California Penal Code § 330 prohibits cardrooms from engaging in casino-like activities”); 71 Ops. Cal. Att’y Gen. 139 (1988), No. 87-906, 1988 WL 385199, at *1, *5–6 (opining that a charitable organization’s “casino night” in which attendees “would be given chips . . . to play roulette, twenty-one and *similar casino games*” would violate California Penal Code section 330) (emphasis added).

³¹¹ CAL. PENAL CODE § 330 (West 2021)

Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment.

Id.

³¹² *See Hotel Emps.*, 981 P.2d at 997 (“Since 1911, section 330a of the Penal Code has prohibited all slot machines; section 330(b) of the same code, enacted in 1950, has redoubled the prohibition.”); *United Auburn Indian Cmty. of Auburn Rancheria v. Newsom*, 472 P.3d 1064, 1068 (Cal. 2020) (referring to slot machines, roulette, and blackjack as “casino-style games”); *People ex rel. v. Green*, 352 P.3d 275, 276 (Cal. 2015) (referring to slot machines as “casino-style” games).

these provisions as comprising California's statutory prohibitions against "casino-style" gaming.³¹³

Consistent with the above, and further evidencing that section 19(e) did not constitutionalize the *entirety* of California's statutory prohibitions against gambling, the *Hotel Employees* Court identified only *one* Penal Code section as having been elevated to a constitutional level by section 19(e).³¹⁴ In a footnote near the end of the majority opinion, the California Supreme Court stated that "section 19(e) was intended, in part, to constitutionalize . . . [Penal Code] section 330."³¹⁵ The court mentioned section 330 (along with the related slot machine statutory prohibitions in sections 330a, 330b, and 330.1) a grand total of fifteen times.³¹⁶ By contrast, none of the other Penal Code gambling prohibitions encompassing the entirety of sections 330 through 337z—including crimes related to sports betting (codified at section 337a)—are even mentioned at all.³¹⁷

This should not come as a surprise since the only gambling games at issue in *Hotel Employees* were those falling squarely within section 330's strictures, namely, banked card games and slot machines.³¹⁸ Viewed through that lens, the California Supreme Court concluded that "the card games and devices in question are within the prohibition of Penal Code section 330" because the tribal casino, through the player prize pool system, "pays off all winning wagers and keeps all losing wagers," rendering them "banking games" within the scope of section 330.³¹⁹

Further, to the extent that tribal casino operators would be able to "collect fees from players on a per-amount-wagered basis,"

³¹³ See *United Auburn*, 472 P.3d at 1079 ("Recall that the California Constitution and other state law once prohibited *casino-style gaming*. (See Cal. Const. art. IV, § 19, subd. (e); *Pen. Code*, §§ 330, 330a.)" (emphasis added)).

³¹⁴ *Hotel Emps.*, 981 P.2d at 1007 n.5.

³¹⁵ *Id.*

³¹⁶ *Id.* at 996–97, 1006–08, 1007 n.5.

³¹⁷ The only other Penal Code sections that are referenced in the Court's opinion are section 319 (defining "lottery") and section 326.5 (authorizing bingo games for charity). *Id.* at 996–98. Both sections are part of Chapter 9, which addresses "lotteries." See *W. Telcon, Inc. v. Cal. State Lottery*, 917 P.2d 651, 653 (Cal. 1996) ("[T]he definition of a lottery and the prohibitions on operation of lotteries have been contained in part 1, title 9, chapter 9 of the Penal Code (chapter 9), now consisting of sections 319 through 329."). The gambling prohibition at issue in *Hotel Employees*—Penal Code section 330—is part of Chapter 10, entitled "Gaming." See *McVeigh v. Burger King Corp.*, No. B220964, 2010 WL 4056857, at *19 (Cal. Ct. App. Oct. 18, 2010) ("Chapter 10 of title 9, part 1 of the Penal Code, which includes sections 330 through 337z, addresses gaming.").

³¹⁸ See *Hotel Emps.*, 981 P.2d at 996–97, 1005–07, 1007 n.5 (analyzing the gambling activities authorized by Proposition 5 through the lens of Penal Code section 330 and the interpretive caselaw).

³¹⁹ *Id.* at 1004–06, 1007 n.5 (citations omitted).

such gambling games, the Court concluded, would also be considered a “percentage game played with cards, dice, or any device” within the ambit of Penal Code section 330.³²⁰ Finally, the Court noted that the banked card games in question “are also within [Penal Code] section 330 to the extent that they include twenty-one, or blackjack: to that extent, they are prescribed by name [in section 330].”³²¹

As the majority opinion makes quite clear, *Hotel Employees* was focused squarely on a very specific type of gambling activity—namely, banked card games and slot machines—which are the archetypical forms of “casino-style” gaming.³²² As such, it was on “all fours” with the language and intent underlying section 19(e), which is to prohibit the legislative authorization of “casino-style” gaming in California.³²³ Aside from the failed attempt to factually distinguish the tribal casinos authorized by Proposition 5 from Nevada and New Jersey-style casinos—which led to the California Supreme Court analyzing the issue through the lens of Penal Code section 330’s prohibition against casino-style gaming—*Hotel Employees* was a relatively straightforward application of section 19(e).³²⁴ It involved a comparison of banked card games and slot machines that were to be offered at one type of casino facility (i.e., tribal casinos in California) and substantially the same or similar gambling games being offered at another type of casino facility (i.e., “casinos of the type currently operating in Nevada and New Jersey”).³²⁵ You cannot get much closer to a perfect one-to-one match than that.

While the California Supreme Court’s alternative interpretation of section 19(e) might be logical in a case involving banked card games and slot machines offered at Las Vegas-style casinos, it begins to make less sense the further and further one moves away from that paradigm. Applied outside of that specific context, the court’s statement “*including those statutorily prohibited in California, especially banked table games and slot machines*” can sweep too broadly and lead to absurd results.³²⁶ For

³²⁰ *Id.* at 1007 n.5; *see also* CAL. PENAL CODE § 330 (West 2021).

³²¹ *Id.*

³²² *Id.* at 1005.

³²³ *See* United Auburn Indian Cmty. of Auburn Rancheria v. Newsom, 472 P.3d 1064, 1075, 1077–79, 1081–82 (Cal. 2020).

³²⁴ *See Hotel Emps.*, 981 P.2d at 1007.

³²⁵ *See id.* at 996–97, 1005–07, 1007 n.5.

³²⁶ *See* Richmond v. Shasta Cmty. Servs. Dist., 83 P.3d 518, 523 (Cal. 2004) (quoting Carman v. Alvord, 644 P.2d 192, 197 (Cal. 1982)) (“Courts construe constitutional phrases liberally and practically; where possible they avoid a literalism that effects absurd, arbitrary, or unintended results.”); *In re Anthony R.*, 201 Cal. Rptr. 299, 302 (Cal. Ct.

example, if a court interpreted that phrase to its outer limits, a gas station or convenience store offering electronic keno games could be deemed a “casino[] of the type currently operating in Nevada and New Jersey” within the scope of section 19(e) simply because keno (when operated as a “banking game”) is prohibited by Penal Code section 330³²⁷ and Webster’s New International Dictionary defined “casino” in 1984 as “a building or room for gambling.”³²⁸ The absurdity of equating a gas station or neighborhood bodega with a Nevada and New Jersey-style casino illustrates the danger of applying a broad or isolated judicial statement completely out of context.³²⁹ This incongruous outcome—and recall that a New Jersey casino in 1984 had to be “at least 15,000 square feet”³³⁰ and did not offer keno games³³¹—is not what the constitutional amenders could have intended when they enacted section 19(e).³³²

App. 1984) (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1300 (Cal. 1978)) (“The primary goal in construing constitutional amendments is to ‘avoid absurd results and to fulfill the apparent intent of the framers.’”).

³²⁷ See *W. Telcon, Inc. v. Cal. State Lottery*, 917 P.2d 651, 653, 658–62 (Cal. 1996) (concluding that a keno game operated by the California State Lottery, in which each player placed a wager on the outcome of a “draw” of random numbers generated by computer and where the California State Lottery paid winning players a preset amount based only on the amount of wager, number of numbers selected and number of numbers matched, was a “banking game” proscribed by Penal Code section 330, and not an authorized “lottery” or “lottery game”).

³²⁸ See *Casino*, WEBSTER’S NEW INTERNATIONAL DICTIONARY 347 (3d ed. 1961).

³²⁹ If considered in isolation and out of context, the word “casino” could embrace a wide range of structures under a purely dictionary-based definition. *Hotel Emps.*, 981 P.2d at 1004. But as the United States Supreme Court has cautioned, “[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction.” *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (noting that “[a] word in a statute may or may not extend to the outer limits of its definitional possibilities”). Rather, as the Supreme Court explained in *Dolan*, the “[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.” *Id.*

³³⁰ See Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 9 (citation omitted) (“Under New Jersey law in force at the time [section 19(e)] was approved, the term ‘casino’ referred to ‘a single room of at least 15,000 square feet in which casino gaming is conducted.’”).

³³¹ See I. NELSON ROSE, *GAMBLING AND THE LAW* 4 (Gambling Times Inc. ed., 1986) (noting that “Atlantic City does not allow poker or keno”); Report of I. Nelson Rose at 8, *Hemenway v. Albion Pub. Schs.*, No. 05CV00007, 2006 WL 4725543 (W.D. Mich. Apr. 23, 2006) (“New Jersey, by statute, allowed only six games in Atlantic City casinos at the relevant time [referring to 1984]: blackjack, craps, roulette, big six, baccarat and slot machines. *No keno. No poker.*”) (emphasis added).

³³² See *Hotel Emps.*, 981 P.2d at 1004. Employing the same reasoning, one could also argue that *online* sports betting—which did not exist in 1984—is beyond the scope of section 19(e) because it is not the type of gaming activity that is conducted in “a *building or room* for gambling.” See *id.* (emphasis added). Under each of the suggested interpretations of section 19(e) proffered in *Hotel Employees*, the Court equated “the type” of “casino operating in Nevada and New Jersey” in 1984 with a *brick-and-mortar* facility, using words such as “gambling house,” “institution,” “establishment,” “gambling facility,” and “one or more buildings, rooms, or facilities” in describing what was meant by a Nevada-and-New Jersey-style casino. See *id.* After all, that was the only “type” of casino which existed at that time in both states. See *id.* Indeed, that is precisely the assessment

It also serves as an important reminder that constitutional limitations and restrictions on legislative power are to be “construed strictly” and “[i]f there is any doubt as to the legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.”³³³

3. *United Auburn* Reaffirms that Section 19(e) Applies Only to “Casino-Style” Games Falling within the Prohibitions of Penal Code Section 330.

The *United Auburn* decision should put to rest once and for all any lingering questions about the scope of section 19(e). In *United Auburn*, the California Supreme Court repeatedly characterized section 19(e) as a restriction on “casino-style gaming,” employing that phrase a staggering twenty-seven times.³³⁴ Equally important, the court identified Penal Code sections 330 and 330a as the only statutory provisions which, along with section 19(e), prohibited “casino-style” gaming in California.³³⁵ This observation follows the court’s statement—made some twenty-one years earlier in *Hotel Employees*—that “section 19(e) was intended, in part, to constitutionalize” Penal Code section 330.³³⁶ Since *United Auburn* and *Hotel Employees* are the principal California Supreme Court decisions addressing or commenting on the scope of section 19(e), it is extremely telling that both decisions characterize section 19(e) as a ban on “casino-style” gambling and link section 19(e) with Penal Code section 330 (and the related slot machine prohibitions in sections 330a and 330b) without including so much

made in a 2013 legislative staff analysis, which concluded that section 19(e)’s ban on a certain type of casinos applies only to “brick and mortar” facilities. See S. Comm. on Governmental Org., Staff Analysis of SB 1390, 2011–2012 Reg. Sess. at J (Cal. 2012) [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1351-](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1351-1400/sb_1390_cfa_20120426_101317_sen_comm.html)

[1400/sb_1390_cfa_20120426_101317_sen_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1351-1400/sb_1390_cfa_20120426_101317_sen_comm.html) [<http://perma.cc/936E-6DWJ>] (last visited May 31, 2021) (“It therefore appears that what the Legislature cannot do is authorize so-called brick-and-mortar facilities or buildings that provide roulette tables, crap tables, blackjack tables, and especially slot machines and banked card games.”).

³³³ *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 165 (Cal. 1971).

³³⁴ See, e.g., *United Auburn Indian Cmty. of Auburn Rancheria v. Newsom*, 472 P.3d 1064, 1071 (Cal. 2020) (“Notwithstanding the Constitution’s general restriction on casino-style gaming” (citing CAL. CONST. art. IV, § 19(f)); *id.* (“given the preexisting, constitutionally enshrined policy against casino-style gaming in California” (citing section 19(e))); *id.* at 1074 (referring to “[section 19(e)]’s general ban on casino-style gaming”); *id.* at 1077 (“Proposition 1A was significant because it amended the Constitution to signal a policy of greater openness toward casino-style gaming—which California had previously prohibited.” (citing CAL. CONST. art. IV, § 19(e))); *id.* at 1081 (“For decades, California imposed on itself a categorical prohibition on casino-style gaming that surely restricted not only legislative authority, but gubernatorial power.”).

³³⁵ *Id.* at 1079 (“Recall that the California Constitution and other state law once prohibited casino-style gaming.” (citing CAL. CONST. art. IV, § 19(e); CAL. PENAL CODE §§ 330, 330a)).

³³⁶ *Hotel Emps.*, 981 P.2d at 1007 n.5.

as a single reference to any of the other Penal Code prohibitions against gambling.³³⁷ It reinforces the view that section 19(e) applies only to “casino-style” gambling games falling within the prohibitions of Penal Code sections 330, 330a, and 330b, and casts further doubt on the assertion that sports betting—addressed in Penal Code section 337a (and not at issue in *Hotel Employees*)—is encompassed within section 19(e).³³⁸

This is also consistent with the Legislative Counsel’s 1998 advisory opinion, which specifically addressed whether the gaming authorized by Proposition 5 would be prohibited by section 19(e). Echoing nearly verbatim the statutory language of Penal Code section 330—which prohibits “any banking or percentage game involving dice, cards or any device”—the Legislative Counsel interpreted the phrase “casinos of the type currently operating in Nevada and New Jersey” (as used in section 19(e)) to mean “*premises at which banking or percentage games involving cards, dice, or gambling devices are played for money, property, or any representative value.*”³³⁹ This construction further supports the conclusion that the nearly-identically worded section 330 is the only Penal Code prohibition against gambling that was elevated to a constitutional level by section 19(e).

Several California Indian tribes have likewise interpreted section 19(e)’s ban against Nevada and New Jersey-style casinos as constitutionalizing Penal Code section 330’s ban against casino-style gaming. In a federal lawsuit filed in January 2019 against then-Governor of California Edmund G. Brown over the state’s alleged failure to enforce its gambling

³³⁷ See generally *id.*; see also *United Auburn*, 472 P.3d at 1064.

³³⁸ Several other California judicial opinions likewise treat section 19(e) as the constitutional equivalent of Penal Code section 330. See, e.g., *Stanley v. Cal. State Lottery Comm’n*, No. C041034, 2003 LEXIS 8296, at *67 (Cal. Ct. App. Aug. 29, 2003).

The California Constitution still forbids “casinos of the type currently operating in Nevada and New Jersey” (CAL. CONST, art. IV, § 19, subd. (e)) – which are epitomized by their banking games – and the California Penal Code prohibits “any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value. . . .” (Penal Code, § 330).

Id. Rumsey Indian Rancheria of Wintun Indians, Table Mountain Rancheria v. Wilson, No. CIV-S-92-812 GEB, 1993 U.S. Dist. LEXIS 9877, 34 (E.D. Cal. July 20, 1993) (stating that section 19(e) and Penal Code section 330, along with California Government Code section 8880.28(a), “reveal a California public policy prohibiting traditional casino gambling”).

³³⁹ Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at p. 11 (emphasis added). The Legislative Counsel’s analysis of section 19(e) was expressly adopted by the Union petitioners in *Hotel Employees*. See Union Petition, *supra* note 132, at *2 (“The Legislative Counsel’s October 8, 1998 analysis of Proposition 5 concluded that the gaming authorized by the Initiative was just like that allowed in Nevada and New Jersey in 1984 We adopt the Legislative Counsel’s analysis of this issue.”).

laws against California’s card room industry, three California tribes—the Sycuan Band of the Kumeyaay Nation, Viejas Band of Kumeyaay Indians, and Yocha Dehe Wintun Nation—made the following statement regarding section 19(e)’s relationship with Penal Code section 330:

In 1984, California voters amended the State’s Constitution to give Section 330 constitutional effect, providing that “[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey.” Cal. Const. art. IV, § 19(e); *Hotel Employees & Rest. Employees Int’l Union v. Davis*, 21 Cal.4th 585, 605-06 (1999) (1984 amendment to the California Constitution “was designed, precisely, to elevate statutory prohibitions on a set of gambling activities to a constitutional level.”).

....

... As mentioned before, Section 330 specifically prohibits the game of “twenty-one,” as well as any banked game, and that prohibition has been raised to a constitutional level.³⁴⁰

California lawmakers have also recognized the limited scope of section 19(e), as previous sports betting bills (i.e., those introduced in 2012 and 2013 before the fall of PASPA) sought to accomplish legalization solely through a legislative enactment, rather than by constitutional amendment.³⁴¹ As justification for proceeding legislatively, the staff analyses prepared for the Senate Committee on Governmental Organization quoted directly from the portion of the *Hotel Employees* opinion which interpreted section 19(e) through the lens of voter intent (i.e., the statement that “[t]he 1984 constitutional amenders must have had in mind a gambling house unique to or particularly associated with Nevada and New Jersey) since they chose to define the prohibited institution by reference to those states.”³⁴² Relying on that interpretation and recognizing, of course, that “New Jersey ha[d] never authorized sports betting [prior to 2018],”³⁴³ the legislative

³⁴⁰ Complaint at 4, 32, *Yocha Dehe Wintun Nation, et al. v. Edmund G. Brown*, No. 2:19-cv-00025-JAM-AC, 2019 WL 2513788 (E.D. Cal. Jan. 3, 2019) (emphasis added). Notably, these are the same tribes that are signatories to the letter sent to the California Senate and Assembly Committees on Governmental Organization on February 6, 2020—barely more than one year later—asserting that section 19(e) elevated *all* statutory prohibitions against gambling (and not just Penal Code section 330) to a constitutional level. See Feb. 6, 2020 Letter, *supra* note 40.

³⁴¹ See S.B. 190, 2013–2014 Cal. Leg., Reg. Sess. (Cal. 2013); S.B. 1390, 2011–2012 Cal. Leg., Reg. Sess. (Cal. 2012).

³⁴² Staff Analysis of S.B. 1390, S. Comm. on Govt. Org., 2011–2012 Cal. Leg., Reg. Sess. at I (Cal. 2012); Staff Analysis of S.B. 190, S. Comm. on Gov’t Org., 2013–2014 Cal. Leg., Reg. Sess. at F (Cal. 2013).

³⁴³ Staff Analysis of S.B. 190, S. Comm. on Gov’t Org., 2013–2014 Cal. Leg., Reg. Sess. at G (Cal. 2013).

staff analyses stated that “[i]t is therefore logical to conclude that wagering on sports events never ‘was particularly associated with’ New Jersey.”³⁴⁴ The staff analyses interpreted section 19(e)’s ban on “the type” of casino “operating in Nevada and New Jersey” in 1984 as only restricting the Legislature from authorizing “so-called brick-and-mortar facilities or buildings that provide roulette tables, crap tables, blackjack tables, and especially slot machines and banked card games”³⁴⁵—all of which fall within the prohibitions of Penal Code section 330.³⁴⁶

Finally, the enactment of Proposition 1A less than seven months after *Hotel Employees* was decided further bolsters the conclusion that section 19(e) applies only to “casino-style” gaming. Proposition 1A, approved by the voters on March 7, 2000,³⁴⁷ amended article IV, section 19(f) of the California Constitution to give the Governor the authority to “negotiate and conclude” compacts, subject to ratification by the legislature, that would allow California’s Indian tribes to operate “slot machines, lottery games . . . banking and percentage card games” on tribal lands in accordance with federal law.³⁴⁸ In *United Auburn*, the Supreme Court repeatedly characterized Proposition 1A as having authorized “casino-style” gaming on tribal lands in accordance with federal law.³⁴⁹ Since Proposition 1A authorized “casino-style”

³⁴⁴ Staff Analysis of S.B. 1390, S. Comm. on Govt. Org., 2011–2012 Cal. Leg., Reg. Sess. at I (Cal. 2012).

³⁴⁵ Staff Analysis of S.B. 1390, S. Comm. on Govt. Org., 2011–2012 Cal. Leg., Reg. Sess. at J (Cal. 2012); Staff Analysis of S.B. 190, S. Comm. on Gov’t Org., 2013–2014 Cal. Leg., Reg. Sess. at G (Cal. 2013).

³⁴⁶ See CAL. PENAL CODE § 330. SB 1390 was approved by the California Senate on May 29, 2012 with thirty-three votes in favor and only two against. See Bill Votes on S.B. 1390, 2011–2012 Cal. Leg., Reg. Sess. 1 (Cal. 2012). SB 1390 was then referred to the Assembly Committee on Governmental Organization, but was relegated to the suspense file with no further action taken. See Bill History of S.B. 1390, 2011–2012 Cal. Leg., Reg. Sess. (Cal. 2012). A similar bill, SB 190, introduced the following year, passed the Senate Committee on Governmental Organization with eleven “ayes” and zero “noes,” but was held in the Senate Committee on Appropriations and relegated to the suspense file, with no further action being taken on the bill. See Bill History on S.B. 190, 2013–14 Cal. Leg., Reg. Sess. (Cal. 2013).

³⁴⁷ See Coyote Valley Band of Pomo Indians v. California (*In re* Indian Gaming Related Cases Chemehuevi Indian Tribe), 331 F.3d 1094, 1107 (9th Cir. 2003).

³⁴⁸ CAL. CONST. art. IV, § 19(f).

³⁴⁹ See, e.g., 472 P.3d 1064, 1071 (Cal. 2020) (“Notwithstanding the Constitution’s general restriction on casino-style gaming, Proposition 1A allowed that type of gaming ‘to be conducted and operated on tribal lands subject to [tribal-state] compacts.’”); *id.* (“Proposition 1A allows casino-style gaming ‘in accordance with federal law’”); *id.* at 1072 (“Proposition 1A . . . amended the California Constitution to allow casino-style gaming ‘by federally recognized Indian tribes on Indian lands’ and ‘on tribal lands’ in California, ‘in accordance with federal law.’”); *id.* at 1073 (“[T]he most reasonable understanding of voters’ purpose in enacting Proposition 1A is that they sought to permit casino-style gaming on all Indian land in accordance with federal law”); *id.* at 1075 (“[T]he most defensible account of Proposition 1A’s purpose was to allow casino-style gaming *only* on lands associated with those compacts.”).

gaming and was enacted in direct response to *Hotel Employees*,³⁵⁰ it reinforces that *Hotel Employees* was a case addressing only “casino-style” gaming, which, as explained in Part III, Section B, provides important context for understanding the reasons underlying the Court’s alternative construction of section 19(e).

IV. SPORTS BETTING IS NOT “CASINO-STYLE” GAMBLING

Even under the California Supreme Court’s alternative definitional approach—which looks to California’s statutory prohibitions against casino-style gaming as a guidepost—the legislative authorization of sports betting would still not run afoul of section 19(e). Under California law, statutory prohibitions against “casino-style” games are addressed in Penal Code sections 330, 330a, and 330b.³⁵¹ By contrast, criminal offenses relating to sports gambling are prosecuted under California Penal Code section 337a, the statutory prohibition against pool-selling and bookmaking.³⁵² Sports betting does not fit within the section 330 paradigm because it is not a banking or percentage game played with “cards, dice, or any device.”³⁵³ Although the term “device” is not defined in Penal Code section 330, other statutes covering the same or similar subject matter³⁵⁴ define the analogous term “gambling device”³⁵⁵ as referring to

³⁵⁰ 1 WITKIN, SUM. OF CAL. LAW CONTRACTS, § 649 (11th ed. 2017) (stating that Proposition 1A was proposed “[i]n response to [the *Hotel Employees*] decision . . .”).

³⁵¹ See *Hotel Emps. & Rest. Emps. Int’l Union v. Davis*, 981 P.2d 990, 1007 n.5 (Cal. 1999) (noting that “section 19(e) was intended, in part, to constitutionalize” Penal Code section 330); *United Auburn*, 472 P.3d at 1079 (identifying Penal Code section 330 and 330a as the statutory prohibitions against “casino-style” gaming); *Reiter v. Mut. Credit Corp.*, No. 09-0811 AG, 2011 WL 13175458, at *7 (C.D. Cal. Aug. 21, 2011) (“Section 330 applies to casino games . . .”).

³⁵² See 80 Op. Cal. Att’y Gen. 98 (1997), 1997 WL 206243, at *2 (“It is evident that section 337a prohibits the placing of bets by anyone in California on any of the enumerated contests or events.”). Additionally, betting on a boxing match is prohibited by Penal Code section 412, which is part of title 11. Section 412 states, in pertinent part, that “[a]ny person who . . . lays, makes, offers or accepts, a bet or bets, or wager or wagers, upon the result or any feature of any pugilistic contest, or fight, or ring or prize fight, or sparring or boxing exhibition, or acts as a stakeholder of any such bet or bets, or wager or wagers, shall be guilty of a misdemeanor . . .” CAL. PENAL CODE § 412 (Deering 1914).

³⁵³ See *Western Telecon, Inc. v. Cal. State Lottery*, 917 P.2d 651, 654 (“Section 330 . . . forbids ‘any banking or percentage game played with cards, dice, or any device . . .’”) (emphasis added).

³⁵⁴ As stated in *Quarterman v. Kefauver*, when an undefined term appears in a statutory provision, “[courts] may attempt to gain insight into the intended meaning of [the] phrase or expression by examining use of the same or similar language in other statutes.” 64 Cal. Rptr. 2d 741, 745 (Dist. Ct. App. 1997).

³⁵⁵ The Legislative Counsel’s 1998 advisory opinion uses the phrase “gambling devices” in its definition of section 19(e), tracking nearly verbatim the “banking or percentage game” language contained in Penal Code section 330. See Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 11 (concluding that “in our view, the phrase ‘casinos of the type currently operated in Nevada and New Jersey’ should be construed to

any instrument, contrivance, component, or machine that is intended for the purpose of gambling and “affects the result of the wager by determining win or loss,” such as in the case of cards, dice, a roulette wheel, or slot machine.³⁵⁶

Reading the statutory term “device” as being synonymous with “gambling device” for purposes of Penal Code section 330 is also guided by the principle of statutory interpretation known as *noscitur a sociis* (commonly referred to as the associated-words canon).³⁵⁷ Under this canon of construction, “the meaning of a word may be ascertained by reference to the meaning of other terms which the Legislature has associated with it in the statute”³⁵⁸ Here, the term “device” appears directly alongside the words “cards” and “dice” in a California penal statute exclusively addressing the topic of gambling.³⁵⁹ Cards and dice naturally affect the result of a wager, as the roll of the dice or the random distribution of cards will determine win or loss.

In light of the context in which it is used and the associated words appearing next to it, the term “device” (as used in Penal Code section 330) must necessarily be referring to a “gambling device” that affects the result of a wager and “determin[es] win or loss,”³⁶⁰ such as in the case of a slot machine.³⁶¹ This definition logically excludes devices that are used to communicate and process wagers, but have “nothing to do in determining who should win or lose.”³⁶² By way of illustration, one could communicate or record a sports wager in person without using any “device” or “thing” other than a paper and pencil. The fact

mean premises at which banking or percentage games involving cards, dice, or gambling devices are played for money, property, or any representative value.”).

³⁵⁶ See e.g., CAL. PENAL CODE § 337t(f) (West 2003) (“‘Gambling game device’ means any equipment or mechanical, electromechanical, or electronic contrivance, component or machine used remotely or directly in connection with gaming or any game *which affects the result of a wager by determining win or loss*. The term includes . . . [a] slot machine.”) (emphasis added); NEV. REV. STAT. ANN. § 463.0155 (West 2021) (“‘Gaming device’ means any object used remotely or directly in connection with gaming or any game which affects the result of the wager by determining win or loss and which does not otherwise constitute associated equipment. The term includes, without limitation . . . [a] slot machine.”).

³⁵⁷ See *id.*; see also *Noscitur a sociis*, BLACK’S LAW DICTIONARY (11th ed. 2019).

³⁵⁸ *Grafton Partners v. Superior Ct.*, 116 P.3d 479, 487 (Cal. 2005).

³⁵⁹ See CAL. PENAL CODE § 330.

³⁶⁰ CAL. PENAL CODE § 337t(f).

³⁶¹ See *Hotel Emps. & Rest. Emps. Int’l Union v. Davis*, 981 P.2d 990, 1004 (Cal. 1999) (referring to “slot machines” as an example of a “gaming device”); *Cates v. Cal. Gambling Control Comm’n*, 65 Cal. Rptr. 3d 513, 516 (Ct. App. 2007) (equating “gaming device” to slot machines); *Davies v. Mills Novelty Co.*, 70 F.2d 424, 426 (8th Cir. 1934) (“The term ‘gambling device,’ or ‘gambling machine,’ will include ordinarily only such instruments or contrivances as are intended for the purpose of gambling, and as such are used to determine the result of the contest on which the wager is laid.”).

³⁶² *Engle v. State*, 90 P.2d 988, 992 (Ariz. 1939).

that a wager may be communicated by a paper and pencil (or even by smartphone) does not transform such items into “gambling devices,” as they obviously play no role in determining or affecting the outcome of the wager.³⁶³

Given the narrow contours of the statutory language—with sports betting not included among the eleven gambling games specifically enumerated in Penal Code section 330 or otherwise constituting a “banking or percentage game played with cards, dice or *any device*”³⁶⁴—it should come as no surprise that there do not appear to be any reported California judicial decisions in which Penal Code section 330 was invoked to prosecute a criminal offense related to sports betting. Every reported decision that this author has examined—following extensive legal research³⁶⁵—identifies section 337a as the specific Penal Code provision that applies to sports wagering.³⁶⁶

A. Location of the Underlying Contests

But even apart from its statutory categorization under California law, sports betting is not considered to be “casino-style” gambling as a basic definitional matter. There are several fundamental—and dispositive—distinctions between casino-style gaming and sports betting. One of the most obvious differences between the two species of gambling is the “location” where the underlying activities take place and the outcomes are

³⁶³ See, e.g., *Commonwealth v. Certain Gaming Implements*, 57 N.E.2d 542, 543 (Mass. 1944) (concluding that a typewriter used to record bets was not a “gaming apparatus or implement[] used or kept and provided to be used in unlawful gaming”; the Massachusetts Supreme Court reasoned that a typewriter “serves to disclose whether a bettor *has* won or lost, but not to determine whether he *shall* win or lose”); *Plotnick v. Pa. Pub. Util. Comm’n*, 18 A.2d 542, 552 (Pa. Super. Ct. 1941) (stating “that a telephone or telegraph appliance used to receive and furnish information, even in connection with a pool-selling or book-making establishment,” does not constitute a “gambling machine or device”).

³⁶⁴ CAL. PENAL CODE § 330.

³⁶⁵ See, e.g., *People v. Rooney*, 221 Cal. Rptr. 49, 51 (Ct. App. 1985) (charging defendant with bookmaking under Penal Code section 337a for accepting wagers on professional football games over the telephone); *People v. Silvers*, 16 Cal. Rptr. 489, 490 (Ct. App. 1961) (convicting defendant of violating Penal Code section 337a for recording and registering bets upon the result of a football game).

³⁶⁶ See CAL. PENAL CODE § 337a (West 2010). The Legislative Analyst also views sports betting as being outside the scope of Penal Code section 330’s prohibitions. Letter from Gabriel Petek, Legis. Analyst, Legis. Analyst Off., to Hon. Xavier Becerra, Att’y Gen. of Cal. (Jan. 3, 2020), <http://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report%2819-0029A1%29.pdf> [<http://perma.cc/D2BQ-LE7R>] (“State law limits the type of gaming that can occur in California. For example, state law prohibits wagering on the outcomes of contests between animals and/or people (including sporting events). It also prohibits banking and percentage games played with cards, dice, or other devices . . .”).

determined.³⁶⁷ In sports wagering, the athletic competitions or sporting events on which the bets or wagers are placed by patrons usually occur and are decided at locations beyond the casino's four walls.³⁶⁸ Most major sporting events—with the exception of the occasional high-profile professional boxing match or mixed martial arts competition—are held at locations external to a casino environment.³⁶⁹ By contrast, “casino-style” games (such as banked card games, roulette, craps, and slot machines) are played—and their outcomes are primarily determined—within the “four walls” of a casino.³⁷⁰

This proved to be a critical distinction under New Jersey law in effect at the time that section 19(e) was enacted. In *In re Casino Licensees*, a New Jersey court held that sports betting was not a permitted form of “casino gambling” under New Jersey law because it did not take place “completely within the confines of a casino,” as required by that state’s constitution and gambling statutes.³⁷¹ As the court explained:

The Commission’s conclusion that sports betting is not a permitted form of gambling in Atlantic City’s casinos is consistent with the constitutional and statutory scheme which, with one exception, permits only those games which take place completely within the confines of a casino. . . . Except for constitutionally-authorized simulcast horse race betting, gambling casinos may operate only those games conducted solely in-house. They may not offer betting on events which take place or where the result is determined at a location outside a casino’s four walls.³⁷²

The external location of the underlying sporting events also highlights key regulatory differences between sports betting and casino-style gaming. As Professors Miller and Cabot point out, “[r]egulatory structures in place to protect the integrity of casino gambling have limited application to sports wagering.”³⁷³ State regulators can “tightly control” the regulation of in-house

³⁶⁷ See Jennifer Roberts & Greg Gemignani, *Who Wore It Better? Federal v. State Governmental Regulation of Sports Betting*, 9 UNIV. NEV. L.V. GAMING L.J. 77, 90 (2019).

³⁶⁸ See *id.*

³⁶⁹ See *id.*

³⁷⁰ See *Boardwalk Bros., Inc. v. Satz*, 949 F. Supp. 2d 1221, 1230 (S.D. Fla. 2013) (“‘Casino-style games’ refers to the types of games that are commonly played in a casino.”); see also Roberts & Gemignani, *supra* note 367, at 90 (“[S]ports wagering is different than casino gambling because the sport event upon which wagers are made occurs outside of the four walls of the casino, unlike slot machines or table games.”).

³⁷¹ *In re Casino Licensees*, 633 A.2d, 1050, 1054–55 (N.J. Super. Ct. App. Div. 1993).

³⁷² *Id.*

³⁷³ Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNIV. NEV. L.V. GAMING L.J. 153, 166 (2018).

casino games played exclusively within the casino.³⁷⁴ By contrast, since sporting events “do not occur in the casino nor typically the jurisdiction where the casino is located . . . the integrity of the sporting event is largely outside the control of the state regulators.”³⁷⁵

B. Skill vs. Chance Distinction

A second fundamental distinction between “casino-style” gaming and sports betting centers on the essential character of the underlying activity. Casino-style games are classified as “games of chance” under most states’ laws (including California law)³⁷⁶ because the element of chance (or luck) predominates over skill.³⁷⁷ This proposition is so well-ingrained in the law that one California appellate court even took judicial notice of the fact that casino-style games offered at Lake Tahoe, Nevada gambling casinos “consist[] primarily of ‘games of chance’ insofar as the law is concerned, i.e., games which by definition are contests in which chance predominates over skill.”³⁷⁸ Courts and legislatures around the country have likewise recognized that “casino-style” gaming necessarily refers to games of chance played entirely within a casino, with blackjack, craps, roulette, baccarat and slot machines frequently cited as the paradigmatic examples of casino-style gaming.³⁷⁹

³⁷⁴ *Id.* at 166–67.

³⁷⁵ *Id.* at 167.

³⁷⁶ California courts apply the “dominant factor” test for assessing whether a particular contest is a “game of chance” or a “contest of skill.” *Bell Gardens Bicycle Club v. Dep’t of Just.*, 42 Cal. Rptr. 2d 730, 749 (Cal. Ct. App. 1995) (“[T]he test in California is whether the game is dominated by chance, not whether the winner of the game is determined solely by chance.”) (emphasis omitted).

³⁷⁷ *Nez Pierce Tribe v. Cenarrusa*, 867 P.2d 911, 916 (Idaho 1993) (referring to blackjack, craps, roulette, poker, baccarat, keno and slot machines as games involving “pure chance”); *State v. Eisen*, 192 S.E.2d 613, 616 (N.C. Ct. App. 1972) (“In the game of blackjack . . . we think the element of chance clearly dominates the element of skill . . .”); *In re Advisory Opinion to the Governor*, 856 A.2d 320, 328–29 (R.I. 2004) (recognizing that “chance is the dominant factor” in casino games such as roulette, blackjack, craps, poker and slot machines).

³⁷⁸ *In re Marriage of Shelton*, 173 Cal. Rptr. 629, 632, n.3 (Cal. Ct. App. 1981) (“Although perhaps involving some slight element of skill, successful gambling of the type afforded at the Lake Tahoe casinos depends mainly upon good luck We take judicial notice that the gambling offered at the casinos at Lake Tahoe consists primarily of ‘games of chance’ insofar as the law is concerned, i.e., games which by definition are contests in which chance predominates over skill.”); *Score Family Fun Ctr. v. Cnty. of San Diego*, 275 Cal. Rptr. 358, 361 (Cal. Ct. App. 1990) (“[W]e note that there are a number of cases holding poker and other casino games are predominantly games of chance particularly when played against a machine.”).

³⁷⁹ *See, e.g., United Auburn Indian Cmty. of Auburn Rancheria v. Newsom*, 472 P.3d 1064, 1068 (Cal. 2020) (referring to “casino-style games such as slot machines, roulette and blackjack”); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 278 (8th Cir. 1993) (including craps and blackjack as “casino-type games”); *Lac du Flambeau Band of Lake*

By contrast, wagering on sporting events is widely considered to be a contest of skill. As New York's Attorney General put it, sports betting involves "*substantial (not 'slight') skill*" including "the exercise of a bettor's judgment in trying to select the winners or losers of such contests, and to figure [out] the point spreads."³⁸⁰ In *United States v. DiCristina*,³⁸¹ the United States Attorney for the Eastern District of New York acknowledged that "[s]ports betting . . . is widely considered to require a significant amount of skill to be conducted successfully," observing that "[s]ports bettors have every opportunity to employ superior knowledge of the games, teams and players involved in order to exploit odds that do not reflect the true likelihoods of the possible outcomes."³⁸² The United States Attorney explained that "[w]hile a sports bettor cannot (legally) influence the outcome of a game, sports bettors can and do influence the 'betting line' or 'point spread' in order to improve their odds of making a successful bet."³⁸³

The question of whether sports betting is a game of chance or a contest of skill has been the subject of a number of state attorney

Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480, 482 n.1, 483 (W.D. Wis. 1991) (including blackjack and slot machines as "casino games"); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1025–1026 (2d Cir. 1990) ("[C]asino-type games of chance" that are permitted under Connecticut law for a nonprofit organization's "Las Vegas nights" fundraiser include "blackjack, poker, dice, money-wheels, roulette, baccarat"); *Dalton v. Pataki*, 780 N.Y.S.2d 47, 62 (App. Div. 2005) (listing types of "Las Vegas night casino-type gambling, such as roulette, blackjack and dice games"), *aff'd and modified*, 835 N.E.2d 1180 (N.Y. 2005); *State ex rel. Chwirka v. Audino*, 260 N.W.2d 279, 284 (Iowa 1977) (finding that "casino type games" are games such as blackjack, craps, and roulette); *Green v. Commissioner*, 66 T.C. 538, 540, 547 (U.S. T.C. 1976) (noting that "[t]he instant case does not involve bookmaking but casino style gambling," such as "dice tables," a "roulette wheel," "blackjack tables," and "slot machines"); OHIO REV. CODE ANN. § 3772.01 (West 2018) ("Casino gaming" means any type of slot machine or table game wagering, using money, casino credit, or any representative of value, authorized in any of the states of Indiana, Michigan, Pennsylvania, and West Virginia as of January 1, 2009 . . .").

³⁸⁰ N.Y. Op. Att'y Gen. 11, No. 84-F1, 1984, at *10 (1984) (noting further that "[i]n the sports betting context there is no such thing as a random chance event") (emphasis added); see also Garrett Downing, *Career Sports Bettors Battle the Betting Line*, LAS VEGAS SUN (Mar. 30, 2009), <http://lasvegassun.com/news/2009/mar/30/career-sports-bettors-battle-betting-line/> [<http://perma.cc/8NKE-5C9A>] (describing research and analysis conducted by professional sports bettors).

³⁸¹ *United States v. DiCristina*, 886 F. Supp. 2d 164 (E.D.N.Y. 2012), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013).

³⁸² Government's Memorandum of Law in Opposition to Defendant's Rule 29 Motion at 30, *United States v. DiCristina*, 886 F. Supp. 2d 164 (E.D.N.Y. 2012) (No. 1:11-CR-00414-JBW).

³⁸³ Brief & Special Appendix of the United States at 32, *United States v. DiCristina*, 886 F. Supp. 2d 164 (E.D.N.Y. 2012) (No. 12-3720) ("Specifically, a gambler intending to make a large bet on one team may first place one or more smaller, strategic bets on the other team to move the betting line and make it more favorable for the ultimate intended bet." (citing Downing, *supra* note 380 ("noting that professional sports bettors 'try to move the betting lines' to improve their odds"))).

general opinions, all of which have recognized the important role that skill plays in sports betting. For example, in a 1991 advisory opinion, West Virginia's Attorney General concluded that "the amount of skill involved in sports betting places this form of gambling outside the parameters of a lottery" (which is a game of chance).³⁸⁴ As the West Virginia Attorney General observed, "betting on sports activities is usually performed by those who either have or think they have a degree of knowledge about the game in question Those who bet on sports . . . usually take into consideration past records, who has the home field advantage, and a myriad of other factors that may influence the outcome of the event."³⁸⁵ Furthermore, the Attorney General added, "statistics and other materials pertinent to sporting events are readily available for those who wish to study them and then place an informed bet using reason and judgment."³⁸⁶ Drawing upon this array of information, "[t]he person making the bet is utilizing his knowledge about the sporting activity in order to enhance his chances of winning."³⁸⁷ The use of such knowledge, the attorney general declared, "is the employment of skill."³⁸⁸

Colorado's Attorney General reached a similar conclusion, opining that sports betting is not a prohibited lottery under the Colorado Constitution "because participants are able to exercise sufficient skill in selecting their wagers such that chance is not the 'controlling factor' in an award."³⁸⁹ As the Attorney General explained:

[S]ports bettors can use skill to choose who they believe will win a sporting event or whether some sub-event will occur (such as a point spread or the outcome of a particular portion of an event). In selecting their bets, today's sports bettors have . . . team records; players' past performance data (amateur and professional); past head-to-head data; injury reports; facility conditions; weather conditions; and more.³⁹⁰

The Colorado Attorney General ultimately concluded that "because a bettor can exercise skill in reviewing this information and selecting a wager, the element of chance is not the controlling factor in commercial sports betting."³⁹¹

³⁸⁴ Legality of Sports Betting, 64 W. Va. Op. Att'y Gen. 8 (Jan. 8, 1991), 1991 WL 628003, at *4.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ Legality of Commercial Sports Betting, Colo. Op. Att'y Gen. 18-02 (Aug. 2, 2018), 2018 WL 3873198, at *4.

³⁹⁰ *Id.* at *5.

³⁹¹ *Id.*

Tennessee's Attorney General likewise opined that some sports bets, such as "a contest that involves entrants placing bets on the outcome of an individual professional baseball game . . . would appear to fall outside the parameters of Tennessee's lottery prohibition" due to the predominance of skill involved in sports wagering.³⁹² Acknowledging the similarities between pari-mutuel betting on horse racing and betting on sporting events, the Tennessee Attorney General examined the decisional law in the horse racing context and made the following observation:

Courts have generally reasoned that chance does not control the outcome of horse races because the skill of the jockey and the condition, speed, and endurance of the jockey's horse are all factors that affect the result of the race. Moreover, bettors on horse races have sources of information that they may review before placing their bets. This information includes not only data on the actual race, but also previous records on the past performance of the jockeys and the horses. These sources allow the bettor to exercise his judgment and discretion in determining the horse on which to bet. Thus, courts generally reason that chance does not predominate.³⁹³

Drawing a straight line from horse race wagering to sports betting, the Tennessee Attorney General reasoned that "[i]n a like manner, the winner of a professional baseball game is primarily determined on the participants' skill. And persons who bet on such a game have a multitude of available sources of information to aid them in placing informed bets."³⁹⁴ Addressing the ultimate question of whether a constitutional amendment was required for the legalization of sports betting in Tennessee, the Attorney General advised Senator Brian Kelsey, the state lawmaker who requested the advisory opinion, that "[i]f skill is the dominant factor in determining the outcome of the contest, the [legislature] may legalize the contest solely through legislative action without a constitutional amendment."³⁹⁵ Less than seven months later, the Tennessee Legislature enacted the Tennessee Sports Gaming Act,³⁹⁶ necessarily reaching the conclusion that skill (rather than chance) is the "dominant factor" in determining the outcome of a sports betting contest.³⁹⁷

³⁹² Legality of Sports Betting in Tennessee, Tenn. Op. Att'y Gen. 18-48 (Dec. 14, 2018), 2018 WL 6982306, at *3.

³⁹³ *Id.* at *3, *3 n.4 (citing sixteen out-of-state authorities).

³⁹⁴ *Id.* at *3.

³⁹⁵ *Id.*

³⁹⁶ See generally TENN. CODE ANN. § 4-51-301-330 (West 2019).

³⁹⁷ See Legality of Sports Betting in Tennessee, Tenn. Op. Att'y Gen. 18-48 (Dec. 14, 2018), 2018 WL 6982306, at *3.

C. Federal Law Distinctions

The conclusion that sports wagering does not fall within the definition of “casino-style” gaming is buttressed by federal law. For example, the federal regulations governing the conduct of gaming on Indian lands—promulgated pursuant to IGRA³⁹⁸—treat sports betting as a separate and distinct form of class III gaming, mentioning it in a different subparagraph than house banked card games (such as blackjack), casino games (such as roulette, craps, and keno) and slot machines.³⁹⁹ The legislative history of IGRA likewise supports this segregation. As stated in the August 13, 1988 Senate Report on IGRA, “[c]asino gaming in the United States typically consists of card games like blackjack and poker, craps, roulette and slot machines.”⁴⁰⁰

The clear distinction between sports betting and casino-style gaming is also reflected in the Federal Wire Act, which prohibits anyone “engaged in the business of betting or wagering” from knowingly utilizing a “wire communication facility” to transmit “bets or wagers” or “information assisting in the placing of bets or wagers on any sporting event or contest” through the channels of interstate or foreign commerce (i.e., across state lines).⁴⁰¹ Every federal circuit court to have considered the issue has concluded that the Wire Act applies only to wagering on sporting events, and does not reach other forms of gambling, such as casino gambling.⁴⁰²

Federal tax law also distinguishes between sports betting and casino-style gaming. The Federal Wagering Tax Act imposes an excise tax on all “wagers,”⁴⁰³ with the applicable tax rate depending on whether or not the wager is “authorized” (i.e., legal)

³⁹⁸ See generally Indian Gaming Regulations Act, 25 U.S.C. § 2701–21.

³⁹⁹ See 25 C.F.R. § 502.4 (2012) (defining class III gaming under IGRA as, *inter alia*, “(a) [a]ny house banking game including but not limited to—(1) [c]ard games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games); (2) [c]asino games such as roulette, craps, and keno; (b) [a]ny slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance; (c) [a]ny sports betting and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai”).

⁴⁰⁰ S. REP. NO. 100-446, at 24 (1988), <http://www.nigc.gov/images/uploads/Senate%20Rept%20100-466.pdf> [<http://perma.cc/QL5E-FSD7>] (setting forth the United States Department of Justice’s position on S.555, the Senate bill which became IGRA).

⁴⁰¹ 18 U.S.C. § 1084(a).

⁴⁰² See *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014) (“The Wire Act applies only to ‘wagers on any sporting event or contest,’ that is, sports betting.”) (citing *In re MasterCard Int’l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002)); *N.H. Lottery Comm’n v. Rosen*, 986 F.3d 38, 61–62 (1st Cir. 2021) (“Like the Fifth Circuit, and the district court in this case, we therefore hold that the prohibitions of section 1084(a) apply only to the interstate transmission of wire communications related to any ‘sporting event or contest.’”).

⁴⁰³ See 26 U.S.C.A. § 4401(a) (West).

in the state in which it is made.⁴⁰⁴ This tax is imposed on each person “who is engaged in the business of accepting wagers” or “who conducts any wagering pool or lottery.”⁴⁰⁵ The federal statute and regulations define a “wager” as any bet or wager: (i) made on a *sporting event or contest* with a person engaged in the business of accepting wagers; (ii) placed in a wagering pool on a *sporting event or contest*, if such pool is conducted for profit; or (iii) placed in a lottery conducted for profit.⁴⁰⁶ While sports wagering unquestionably falls within the scope of this definition (as the italicized language indicates),⁴⁰⁷ “casino-style” games (including slot machines,⁴⁰⁸ banked card games, dice games, and roulette) are specifically exempted from the federal excise tax on wagers.⁴⁰⁹

Likewise, in the Interstate Transportation of Wagering Paraphernalia Act—which prohibits the distribution of wagering paraphernalia or other devices in interstate or foreign commerce for use in “bookmaking,” “wagering pools with respect to a sporting event,” or “numbers, policy, bolita, or similar

⁴⁰⁴ *Id.* § 4401 (a)(1)–(2) (stating that for wagers “authorized” under the law of the state in which it is accepted, the excise tax is equal to 0.25 percent of the amount wagered and for wagers that are not authorized by state law, the federal excise tax is equal to 2 percent of the amount wagered).

⁴⁰⁵ 26 U.S.C. § 4401(c).

⁴⁰⁶ 26 U.S.C. § 4421(1); 26 C.F.R. § 44.4421-1(a) (2020).

⁴⁰⁷ See Internal Revenue Service, *Sports Wagering*, SMALL BUSINESS & SELF-EMPLOYED, <http://www.irs.gov/businesses/small-businesses-self-employed/sports-wagering> [<http://perma.cc/AJW4-UN4Z>] (last visited Aug. 16, 2021) (“Sports wagering, like wagering in general, is subject to federal excise taxes, regardless of whether the activity is allowed by the state.”).

⁴⁰⁸ See 26 U.S.C. § 4402(2) (“No tax shall be imposed . . . [o]n any wager placed in a coin-operated device”); 26 C.F.R. § 44.4402-1(b)(1) (2020) (noting that coin-operated devices include “‘slot’ machines”); Miscellaneous Revenue Act of 1982, H.R. REP. NO. 97-929, at 42 (1982) (noting that the federal excise tax on wagering is not imposed on “wagers placed in coin-operated gaming devices, such as slot machines”).

⁴⁰⁹ Under the Internal Revenue Code, the term “lottery” does not include any game in which the wagers are placed, the winners are determined, and the prizes are distributed “*in the presence of all persons placing wagers in the game . . .*” 26 U.S.C. § 4421(2)(A) (emphasis added). This statutory provision is interpreted as meaning that “no tax would be payable with respect to wagers made in a bingo or keno game since such a game is usually conducted under circumstances in which the wagers are placed, the winners are determined, and the distribution of prizes is made in the presence of all persons participating in the game.” 26 C.F.R. § 44.4421-1(b)(2)(i) (2020). “For the same reason, no tax would apply in the case of card games, dice games, or games involving wheels of chance, such as roulette wheels” *Id.*; Eugene R. Thrash v. O'Donnell Etc., 1970 WL 22622, at *1 (I.R.S. Jan. 15, 1970) action on dec., 4306-66 (Oct. 29, 1969) (“The games contemplated within such exclusion were identified as card games such as draw poker, stud poker, and blackjack; roulette games; [and] dice games such as craps”) (citations omitted); see also COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, GAMBLING IN AMERICA, at 17 (1976), <http://archive.org/details/gamblinginameric00unit/page/viii/mode/2up?view=theater> [<http://perma.cc/Z6VV-QX9P>] (“The wagering taxes do not apply to . . . casino games; they apply only to sports and horse bookmaking and numbers games.”).

game”⁴¹⁰— Congress created an exemption for state-operated lotteries conducted under state law and expressly excluded sports wagering from the meaning of the term “lottery.”⁴¹¹ There is no similar exemption for casino-style games of chance.⁴¹²

D. Governmental Studies

Consistent with the above, every significant gambling study commissioned by either the federal government or the State of California has explicitly recognized that sports wagering is a different species of gambling than “casino-style” gambling. For example, the National Gambling Impact Study Commission (“NGISC”), which was established by Congress in 1996 to “conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States,”⁴¹³ made the following observations in its Final Report published in 1999:

- “[T]he gambling ‘industry’ is far from monolithic. Instead, it is composed of *relatively discrete segments: Casinos* (commercial and tribal), state-run lotteries, pari-mutuel wagering, *sports wagering*, charitable gambling, Internet gambling, stand-alone electronic gambling devices . . . and so forth.”⁴¹⁴
- “*Unlike casinos* or other destination resorts, *sports wagering* does not create other economic sectors.”⁴¹⁵
- “Most Internet gambling sites offer *casino-style gambling*, such as blackjack, poker, slot machines, and roulette. . . . *Another form of gambling* available on the Internet is *sports gambling*”⁴¹⁶

The NGISC Final Report, which was addressed to the President, Congress, State Governors, and Native American Tribal Leaders, has been described by scholars as “the most comprehensive gambling study ever conducted in the United States.”⁴¹⁷

⁴¹⁰ 18 U.S.C. § 1953(a).

⁴¹¹ 18 U.S.C. § 1953(d)(4)(B) (“[T]he term ‘lottery’ . . . does not include the placing or accepting of bets or wagers on sporting events or contests.”).

⁴¹² See generally *id.* § 1953.

⁴¹³ National Gambling Impact Study Commission Act, Pub. L. No. 104-169, § 4(a)(1), 110 Stat. 1482, 1484 (Aug. 3, 1996).

⁴¹⁴ NAT’L. GAMBLING IMPACT STUDY COMM’N., NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT, 1-2 (1999) [hereinafter NGISC FINAL REPORT] (emphasis added), <http://govinfo.library.unt.edu/ngisc> [<http://perma.cc/DRE8-25LM>].

⁴¹⁵ *Id.* at 2-14, 3-10 (emphasis added).

⁴¹⁶ *Id.* at 5-3 (emphasis added).

⁴¹⁷ R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 MISS. L.J. 565, 566 (2002).

An earlier federal gambling study, published in 1976 by the Commission on the Review of the National Policy Toward Gambling,⁴¹⁸ similarly viewed sports wagering and casino gambling as separate and distinct categories of gambling. The Final Report of the Commission—entitled *Gambling in America*—referred to “casino gambling” and “sports bookmaking” as among the “various forms of gambling” that have been sanctioned by state governments,⁴¹⁹ and treated them as separate gambling categories throughout the report.⁴²⁰ The *Gambling in America* study was cited by the California Supreme Court in *Hotel Employees* to support the court’s factual finding that “banked table games and gaming devices, i.e., slot machines” were “unique to or particularly associated” with Nevada casinos in 1984.⁴²¹

Gambling studies published by California state agencies likewise recognize sports wagering and casino gambling as separate categories of gambling. In 1997, Roger Dunstan of the California Research Bureau authored a report that examined gambling policy in California and nationally. In his report, Mr. Dunstan characterized “sports betting” as “the largest category of gambling *after casino games*.”⁴²² In another report published the following year, Mr. Dunstan explained that “casino gaming is a term used in the industry and generally means a variety of banked games including slot machines, blackjack, baccarat, roulette, and craps.”⁴²³

⁴¹⁸ The Commission on the Review of the National Policy Toward Gambling was established by Congress as part of the Organized Crime Control Act of 1970 (P.L. 91-452, 84 Stat. 922, which added section 1955 to Title 18). Its mission was “to study gambling as it exists in America and to develop recommendations for the States to follow in formulating their own gambling policies.” COMM’N. ON THE REVIEW OF THE NAT’L. POLICY TOWARD GAMBLING, *GAMBLING IN AMERICA*, at x, 12 (1976) <http://archive.org/details/gamblinginameric00unit?view=theater> [<http://perma.cc/Z6VV-QX9P>].

⁴¹⁹ *Id.* at 5.

⁴²⁰ *See id.* at 58 (“The games covered in detail were horse betting, lotteries, casinos, bingo, sports betting, and numbers.”); *id.* at 62 (including a chart denoting gambling participation by “type of game,” with “[l]egal casinos” and “[s]ports books” listed as separate gambling categories); *id.* at 71 (“Casino gambling is viewed as potentially the most dangerous form of gambling—the only one where a majority of bettors . . . think that legalization would attract racketeers They also see casinos as creating more jobs than numbers, lotteries, or sports betting”); *id.* at 62–63 (providing chart comparing different forms of gambling, with “casinos” and “sports” once again listed separately) (emphasis added); *id.* at 108 (noting “the growth of other forms of gambling such as lotteries and off-track betting, and movements to legalize forms of gambling such as sports betting and casinos.”).

⁴²¹ *Hotel Emps. & Rest. Emps. Int’l Union v. Davis*, 981 P.2d 990, 1003 (Cal. 1999).

⁴²² ROGER DUNSTAN, *GAMBLING IN CALIFORNIA I-1* (Cal. Rsch. Bureau, Cal. State Library, CRB-97-003, 1997) (emphasis added).

⁴²³ DUNSTAN, *supra* note 71, at 20 (interpreting the term “casino” in the specific context of section 19(e)’s ban against Nevada and New Jersey-style casinos).

Nearly one decade later, Charlene Wear Simmons, the Assistant Director of the California Research Bureau at the time, published a similar report at the request of the Attorney General.⁴²⁴ Page 7 of Ms. Simmons' report includes a chart listing the "21 Different Forms of Gambling" that were permitted by state governments as of 2003.⁴²⁵ Among the separately-listed gambling categories are "*Casinos and Gaming*" (denoted as permitted by fourteen states) and "*Sports Betting*" (permitted by four states).⁴²⁶ Her report also includes another chart detailing national gambling consumption habits by category for each of 1989, 1996, and 2003, with casino gambling and sports wagering again designated as separate and distinct categories of gambling.⁴²⁷

E. Public Opinion Polls and Surveys

Along the same lines, public opinion polls conducted at or near the time of Proposition 37 differentiated between casino gambling and sports betting.⁴²⁸ A 1983 survey of California residents conducted by The Field Institute (led by Mervin Field, described by one federal judge as "an eminent California political polling expert"⁴²⁹) asked respondents to indicate whether they supported the legalization of various forms of gambling, such as "casino gambling, betting on jai alai, sports betting," and "off-track horse race betting."⁴³⁰ The Field Institute's 1983 survey—the only known public opinion poll conducted in California around the time of the Proposition 37 vote—reported that public opinion was "evenly split when it comes to whether casino gambling, betting on jai-alai, sports betting and card-parlor poker gambling should be legalized on a statewide basis."⁴³¹

Other public opinion polls conducted during the late 1970's and early 1980's likewise treated casino gambling and sports betting as separate and distinct categories of gambling. For

⁴²⁴ CHARLENE WEAR SIMMONS, GAMBLING IN THE GOLDEN STATE 1998 FORWARD (Cal. State Library, Cal. Rsch. Bureau, CRB-06-004, 2006), <http://oag.ca.gov/sites/all/files/agweb/pdfs/gambling/GS98.pdf> [<http://perma.cc/UV44-EY3H>].

⁴²⁵ *Id.* at 7.

⁴²⁶ *Id.* (emphasis added).

⁴²⁷ *Id.* at 10.

⁴²⁸ See Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 120–21 (1995) (noting that courts will consult, among other sources of information, "exit polls or other opinion surveys" in determining voter intent).

⁴²⁹ Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1291 (E.D. Cal. 1997).

⁴³⁰ *State Lottery, Off-Track Horse Race Bets Gain Support in Poll*, L.A. TIMES, May 28, 1983, at 3.

⁴³¹ *Id.* (noting that "[p]roportions ranging from 42% to 52% favor legalizing and taxing these forms of gambling.").

example, a 1982 Gallup Organization survey commissioned by the trade journal *Gaming Business* showed that fifty-one percent of the public was in favor of legalizing “casino gambling at resort areas,” while only forty-eight percent favored “legal betting on sports events.”⁴³² A 1980 poll conducted by University of Connecticut Institute for Social Inquiry reported that fifty-five percent of respondents said that “casino gambling should be illegal,” and “sports betting is opposed by [fifty] percent of the respondents.”⁴³³ Finally, a statewide poll in *Gannett News Service* in the late 1970’s showed that New York State residents “narrowly oppose[d] legalizing casino gambling” by a forty-eight percent to forty-seven percent margin, but “support[ed] state-run betting on such sports as hockey, basketball and football, [fifty-nine] percent to [thirty-six] percent.”⁴³⁴

The separate categorization of casino gambling and sports betting in public opinion surveys is likely indicative of the fact that the consumer behaviors and perceptions around the two activities are markedly different. Millions of people attend or watch sporting events every year without placing a bet or wager on the outcomes. Professional and collegiate sporting events have intrinsic entertainment value independent of any gambling activity. By contrast, “casino-style” games (such as slot machines and banked table games) exist solely to facilitate gambling.⁴³⁵

F. Sports Betting Is Not Endemic to a Casino Environment

Despite the vast differences between sports wagering and casino gambling—both in terms of their essential characteristics

⁴³² Gayle Cook, *A Hard Look/Trends Towards Legal Gambling*, S.F. EXAMINER, Sept. 4, 1983, at A1, A22; see also *Most Americans Favor Some Legalized Gambling*, SANTA MARIA TIMES, Oct. 6, 1982, at 24 (noting that “[l]otteries were favored by 72 percent, followed by off track betting at 54 percent and casino gambling at 51 percent. Professional sports betting was favored by 48 percent of those surveyed and jai alai by 47 percent.”).

⁴³³ Jack Shea, *Survey Shows 82% of Residents Back High School Skills Exam*, HARTFORD COURANT, Mar. 4, 1980, at 8.

⁴³⁴ *Casino Gambling a Loser; Sports Betting Big Favorite*, JOURNAL-NEWS, Feb. 10, 1977, at 20 (stating that “New Yorkers apparently draw a fine line between gambling on a roulette wheel and placing a bet on a football game.”).

⁴³⁵ Joey Parsons, *Better Bettors: Regulatory Proposals to Reduce Societal Costs Associated with Gambling Disorder in States That Permit Legal Sports Betting*, 44 LAW & PSYCH. REV. 267, 283–84 (2020).

Sports betting is distinct from many other forms of gambling because millions of people enjoy watching sports without involving any type of betting. For instance, 98.2 million people watched Super Bowl LIII in 2019, but there is no demonstrable market for live feeds of slot machines. While slot machines and other casino games exist solely for gambling, sports betting is different because the bets enhance a form of entertainment that is already occurring.

Id.

and treatment under the law—there are some who might argue that sports wagering should still be categorized as “casino-style” gambling because an increasing number of states (such as Nevada, New Jersey, Indiana, Iowa, Michigan, Mississippi, and Pennsylvania, to name just a few) permit sportsbooks to be located within a casino environment. However, the mere fact that one can go to a casino to place a wager on professional or collegiate sporting event taking place at sports venues located beyond the “four walls” of a casino—in some cases, hundreds or thousands of miles away—does not render that activity “casino gambling” any more than having a race book inside a casino⁴³⁶ would transform pari-mutuel wagering on horse races into “casino-style” gaming simply because the bet is made at a race book located within a casino. No one who visits a race book at a casino to bet on the Kentucky Derby would seriously consider that activity to be “casino-style” gaming. Under the same logic, a sportsbook customer at the same casino venue is not engaging in “casino-style” gaming when he or she places a bet on the Super Bowl.

While sports betting can certainly take place inside a casino, it is not endemic to a casino environment. As the legislative history of PASPA made abundantly clear nearly thirty years ago, sports betting can be offered in a variety of different settings, not just at casinos.⁴³⁷ The 1991 Report of the Senate Judiciary Committee, which is the primary source of PASPA’s legislative history,⁴³⁸ observed that federal legislation prohibiting state-sponsored sports betting was warranted because many states at that time were considering or reviewing the possibility of offering sports wagering as a lottery game, on river boats, and as an amenity at horse racetracks and off-track betting parlors—even mentioning the prospect of Florida lawmakers including sports betting in that state’s pari-mutuel betting law in the early 1990’s.⁴³⁹

⁴³⁶ Several states, such as Mississippi and Nevada, allow licensed casinos to operate a race book on the premises of the licensed gaming establishment. See MISS. CODE ANN. § 75-76-89(2) (2021); NEV. REV. STAT. ANN. § 463.160 465.186 (West 2021). As distinguished from a sportsbook, a “race book” generally refers to “the business of accepting wagers upon the outcome of any event held at a [race]track which uses the pari-mutuel system of wagering.” MISS. CODE ANN. § 75-76-5(cc) (2021); NEV. REV. STAT. ANN. § 463.01855 (West 2021).

⁴³⁷ S. REP. NO. 102-248, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556 [hereinafter “SENATE REPORT 102-248”].

⁴³⁸ See *Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 730 F.3d 208, 216 (3d Cir. 2013) (noting that PASPA’s legislative history “is sparse” and referring to Sen. Rep. 102-248 as the relevant legislative history), *abrogated on other grounds by* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

⁴³⁹ S. REP. NO. 102-248, at 3556.

That observation proved to be quite prescient. In the little over three years that have elapsed since PASPA was declared unconstitutional, an increasing number of states have enacted statutes allowing sports wagering to be legally offered in a wide spectrum of “non-casino” settings, such as through the state-operated lottery⁴⁴⁰ and as an amenity at horse racetracks, professional sports venues, bars and restaurants, as well as over the Internet. For example, New Hampshire and the District of Columbia, which do not even have casinos, will allow sports betting to take place in commercial retail establishments and over the Internet.⁴⁴¹ Illinois, Arizona, Maryland, and the District of Columbia have enacted legislation allowing sportsbooks at professional sports stadia and arenas.⁴⁴² In 2019, Tennessee authorized sports wagering to take place exclusively over the Internet, with no casino affiliation or partnership required.⁴⁴³ In fact, there are more states that allow sports wagering to take place outside of a casino environment than there are states which confine it to those establishments (or through casino-affiliated websites).⁴⁴⁴

Along the same lines, the fact that several states have legalized sports betting as a constitutionally *authorized* form of

States are considering a wide variety of State-sponsored gambling schemes. Some would allow sports gambling on river boats, others would take bets on sports at off-track betting parlors, still others propose casino-style sports books. Florida’s statute authorizing parimutuel animal racing is expiring and legislators there are considering including some form of sports betting in the reauthorizing bill.

Id.

⁴⁴⁰ Delaware, New Hampshire, Montana, and Oregon are among the growing number of states—in addition to the District of Columbia—that offer sports wagering as a lottery game. See Jill R. Dorson, *Look at Sports Betting Lottery States: Do Monopolies Leave Money on the Table?*, SPORTSHANDLE (Sept. 24, 2020), [http://sportshandle.com/lottery-states-revenue-outlook/\[http://perma.cc/2M2C-FGQZ\]](http://sportshandle.com/lottery-states-revenue-outlook/[http://perma.cc/2M2C-FGQZ]).

⁴⁴¹ See N.H. REV. STAT. §§ 287-I:1, I:5. (2021); D.C. CODE § 36-621.06 (2021).

⁴⁴² See Andrew J. Silver, *Following Trend, Arizona Pro Teams Get In On Sports Wagering Action*, FORBES (Apr. 16, 2021, 10:51 AM EDT), <http://www.forbes.com/sites/andrewsilver/2021/04/16/following-trend-arizona-pro-teams-get-in-on-sports-wagering-action/?sh=756317d72d21> [<http://perma.cc/K6J4-K7ZA>].

⁴⁴³ See Natalie Allison, *Tennessee Governor to Allow Sports Betting to Become Law Without Signature*, TENNESSEAN (Apr. 30, 2019 11:49 AM CT), <http://www.tennessean.com/story/news/politics/2019/04/30/tennessee-sports-betting-gambling-bill-governor/3626390002/> [<http://perma.cc/JMJ8-W45K>] (“After a vote of approval last week in the House of Representatives, the Senate on Tuesday passed legislation that would permit online sports gambling beginning July 1, while continuing to prohibit the practice at brick-and-mortar locations.”).

⁴⁴⁴ Of the thirty-two states that have legalized sports wagering since the demise of PASPA, only five states—Mississippi, New Mexico, North Carolina, South Dakota, and Washington—confine that activity to brick-and-mortar casinos. The remaining twenty-seven states—plus the District of Columbia—allow sports betting to be offered at other types of venues or over the internet. See Rovell, *supra* note 7.

casino gambling under their respective state constitutions does not, *a fortiori*, mean that sports betting is a constitutionally *prohibited* form of casino gambling in California. To the contrary, this underscores the difference between a constitutional *authorization* and a constitutional *prohibition*. For example, under the New York Constitution, “casino gambling” is an authorized activity—it is permitted at “no more than seven facilities as authorized and prescribed by the legislature.”⁴⁴⁵ This provision affords the New York Legislature the discretionary authority—and affirmative obligation—to define the scope of gaming activities that may be conducted at state-licensed casinos, including specifying the types of gambling games that such casinos are allowed to operate.⁴⁴⁶ Acting pursuant to this direction, New York lawmakers have specified that sports betting is a constitutionally-*authorized* form of casino gambling in New York.⁴⁴⁷ Likewise, in Arkansas and Rhode Island, sports wagering was approved as part of a constitutional *authorization* of casino gambling by a statewide voter referendum.⁴⁴⁸

⁴⁴⁵ N.Y. CONST. art. I, § 9, cl. 1.

⁴⁴⁶ Daniel Wallach & Robert Rosborough, *Let New Yorkers Bet On Games Online: Restricting Sports Betting to Upstate Casinos Would Forfeit Millions in Tax Revenue*, DAILY NEWS (Feb. 22, 2019, 12:00 PM), <http://www.nydailynews.com/opinion/ny-oped-let-new-yorkers-bet-on-games-online-20190219-story.html> [<http://perma.cc/3NVB-8XYE>].

Once a form of gambling is authorized, the Constitution gives the Legislature power to regulate the details of wagering. That’s why the constitutional provisions authorizing the state lottery, pari-mutuel betting on horse races and casino gambling include the phrase “as may be authorized and prescribed by the legislature,” meaning that it’s up to lawmakers to “authorize and prescribe” how wagering on those constitutionally-permitted forms of gambling will work.

Id.

⁴⁴⁷ See N.Y. RAC., PARI-MUT. WAG. & BREED. LAW, § 1367 (McKinney 2020) (legalizing sports wagering at casinos in New York by statute); see also Letter from Gibson Dunn & Crutcher LLP to their clients and friends entitled *New York State Legalizes Online Sports Wagering*, at p. 1 (Apr. 13, 2021) <http://www.gibsondunn.com/wp-content/uploads/2021/04/new-york-state-legalizes-online-sports-wagering.pdf> [<http://perma.cc/XV6R-SKBV>] (“In 2013, New York State voters approved a constitutional amendment to allow the Legislature to authorize ‘casino gambling’ ‘at’ up to seven casinos in the State. . . . Pursuant to this constitutional authority . . . the Legislature legalized ‘sports wagering’ in New York State.”).

⁴⁴⁸ See Jennifer McDermott, *GOP Activist Sues Rhode Island Over Launch of Sports Betting*, ASSOC. PRESS (May 2, 2019, 9:21 AM), <http://abcnews.go.com/Sports/wireStory/gop-activist-sues-rhode-island-launch-sports-betting-62781306> [<http://perma.cc/95ZV-FPR8>]; David Fucillo, *Arkansas Voters Pass Issue 4, Issuing Licenses to Four Casinos That Includes Potential Sports Gambling*, SBNATION, (Nov. 7, 2018 7:03 AM EST), <http://www.sbnation.com/nfl/2018/11/7/18070884/arkansas-midterm-election-results-2018-issue-4-casino-licenses-sports-gambling> [<http://perma.cc/BUY8-79HX>].

But there are other states that have opted *not* to include sports betting within their state constitution’s definition of casino gambling. See, e.g., OHIO CONST. art. XV, § 6 (“‘Casino gaming’ means any type of slot machine or table game wagering, using money, casino credit, or any

By contrast in California, casino gambling is expressed constitutionally as a *restriction* or *limitation* on the state legislature's authority to act.⁴⁴⁹ As such, in contrast to New York, where state lawmakers have the discretion to *include* sports wagering as a constitutionally *authorized* form of casino gambling, the California constitutional *prohibition* against the legislative authorization of casino-style gambling is to be strictly and narrowly construed *against* the application of the prohibition, with any and all doubts resolved in favor of legislature's authority to act.⁴⁵⁰ Moreover, the strictly-and-narrowly construed California constitutional prohibition against casino gambling—as recognized by the California Supreme Court in *Hotel Employees*—is to be measured by the gaming activities that were operational in both Nevada and New Jersey casinos in 1984.⁴⁵¹ As such, the constitutional authorization of casino-based sportsbooks in New York, Arkansas, and Rhode Island does not bear on the distinctly different situation in California, which utilizes a different baseline for comparison and requires a strict and narrow construction.

CONCLUSION

The California Legislature's power to statutorily authorize sports betting flows from well-settled principles of constitutional interpretation that have been enshrined in California legal jurisprudence for well over a century. The application of these principles to the text of section 19(e), coupled with prior judicial interpretations of the pertinent constitutional language and a review of the available legislative history, yields a singular conclusion: that section 19(e)'s prohibition against the legislative authorization of "casinos" of "the type" that existed in Nevada and New Jersey in 1984 does not extend to sports wagering, which was not available nor even permitted in New Jersey casinos at that time. Notably, the outcome would be the same under either of the interpretive approaches suggested by the California Supreme Court in *Hotel Employees*: (1) when viewed through the lens of voter intent, sports betting is beyond the scope of section 19(e) because it is not gambling activity that was "unique to or particularly associated with" New Jersey casinos in 1984; and (2) if viewed through the lens of California statutory law, sports

representative of value, authorized in any of the states of Indiana, Michigan, Pennsylvania and West Virginia as of January 1, 2009 . . .").

⁴⁴⁹ See CAL. CONST. art. IV, § 19(e).

⁴⁵⁰ See *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 164–65 (Cal. 1971).

⁴⁵¹ See *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 1003–04 (Cal. 1999).

betting is not considered “casino-style” gaming within the parameters of Penal Code section 330. The Supreme Court’s recent decision in *United Auburn*—repeatedly equating section 19(e) with a restriction on “casino-style” gaming and citing only Penal Code sections 330 and 330a as the statutory equivalent—confirms the limited scope of section 19(e).

Those who urge a contrary result either misread *Hotel Employees*, overlook *United Auburn*, or ignore several foundational principles of constitutional interpretation that clearly apply here. There is simply no getting around the fact that the supreme court found that there were two possible ways to interpret the phrase “casinos of the type currently operating in Nevada and New Jersey,”⁴⁵² and, as such, the legislature’s action in adopting either of the Court’s alternative constructions would be entitled to controlling weight under well-established supreme court precedent (as it should be, especially considering the source). The Legislature’s adoption of a “court-approved” interpretation would also belie any assertion that the ensuing statutory enactment is “positively and certainly” opposed to, or in “plain and unmistakable conflict” with, the California Constitution.⁴⁵³ To the contrary, a statutory construction that sports wagering is beyond the scope of section 19(e)—either because it is not “casino-style” gaming or does not constitute gaming activity which was “unique to or particularly associated with”⁴⁵⁴ New Jersey casinos in 1984—would constitute “at least a possible and not unreasonable construction of the constitution”—which is all that is required under longstanding California Supreme Court precedent.⁴⁵⁵

The above constitutional principles amply support the Legislature’s power to authorize sports wagering by statutory enactment. But when you also factor in two other well-settled principles of constitutional interpretation, that (1) restrictions and limitations on legislative power are to be strictly and

⁴⁵² See CAL. CONST. art. IV, § 19(3).

⁴⁵³ *Methodist Hosp.*, 488 P.2d 161, 166 (Cal. 1971).

[C]ourts should not and must not annul, as contrary to the constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the constitution.

Id. (quoting *City and Cnty. of S.F. v. Indus. Acc. Comm’n.*, 191 P. 26, 28 (Cal. 1920)) (emphasis added); *Armstrong v. Cnty. of San Mateo*, 194 Cal. Rptr. 294, 311 (Ct. App. 1983) (“The Legislature’s interpretation cannot be declared void ‘unless there is a plain and unmistakable conflict between the statute and the constitution.’”) (emphasis in original) (quoting *Methodist Hosp.*, 488 P.2d at 166).

⁴⁵⁴ *Hotel Emps. Int’l Union v. Davis*, 981 P.2d 990, 1003 (Cal. 1999).

⁴⁵⁵ 488 P.2d at 166 (quoting *Indus. Acc. Comm’n.*, 191 P. at 29) (emphasis added).

narrowly construed, and (2) any doubt as to the legislature's power to act in a given case should be resolved in favor of the Legislature's action,⁴⁵⁶ the suggestion that section 19(e) forbids the California Legislature from authorizing *any* form of gambling that was illegal in California in 1984 becomes even less credible.

Applying a strict and narrow construction of section 19(e) and resolving all doubts in favor of the Legislature's power to act, one would be hard-pressed to interpret section 19(e) as incorporating the *entirety* of the California Penal Code's prohibitions against gambling (encompassing 44 separately numbered sections), and, in particular, sports betting, especially when:

- The text of section 19(e) does not even refer to the California Penal Code, much less purport to silently incorporate *all* of its statutory prohibitions into the California Constitution;⁴⁵⁷
- The ballot pamphlet associated with Proposition 37—the approved ballot measure which added section 19(e) to the California Constitution—described the proposed constitutional amendment as prohibiting “gambling casinos” of “the type” that “exist” in “Nevada and New Jersey;”⁴⁵⁸
- Consistent with the ballot pamphlet analysis, the Chief Deputy of the Legislative Analyst's Office testified in a legislative hearing held just prior to the vote on Proposition

⁴⁵⁶ *Id.* at 165.

⁴⁵⁷ If the 1984 constitutional amenders had intended to incorporate within section 19(e) *all* forms of gambling that were prohibited by the California Penal Code, they could have stated so explicitly. For example, they could have drafted section 19(e) to read: “[t]he Legislature has no power to authorize, and shall prohibit, *gambling of any type currently prohibited under any California statute.*” (emphasis added). Such anti-gambling language is not uncommon, as at least six states expressly prohibit “gambling” under their state constitutions subject to certain specified exceptions. *See* DEL. CONST. art. II, § 17 (“All forms of gambling are prohibited in this State except the following”); LA. CONST. art. XII, § 6(C)(1)(a) (“No law authorizing a new form of gaming, gambling, or wagering not specifically authorized by law prior to the effective date of this Paragraph shall be effective”); IDAHO CONST. art. III, § 20(1) (“Gambling is contrary to public policy and is strictly prohibited except for the following”); N.J. CONST. art. IV, § 7(2) (“No gambling of any kind shall be authorized by the Legislature . . . except that”); N.Y. CONST. art. I, § 9 (“except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling . . . shall hereafter be authorized or allowed within this state”); R.I. CONST. art. 6, § 22 (“No act expanding the types or locations of gambling which are permitted within the state or within any city or town therein or expanding municipalities in which a particular form of gambling is authorized shall take effect”). Instead, as the California Supreme Court readily acknowledged in *Hotel Employees*, the 1984 constitutional amenders “chose to define the prohibited institution”—i.e., casinos of the type currently operating in Nevada and New Jersey—“by reference to those states” i.e., Nevada and New Jersey. 981 P.2d at 1004.

⁴⁵⁸ *See supra* notes 53–59 and accompanying text.

37 that the proposed amendment applies only to “casino-type” gambling that “exists in Nevada and New Jersey;”⁴⁵⁹

- The Legislative Counsel’s 1998 advisory opinion likewise interpreted section 19(e) as “incorporating the common and essential attributes of casino gambling permitted in Nevada and New Jersey” in 1984;⁴⁶⁰
- The intent of the 1984 constitutional amenders in enacting section 19(e), as acknowledged by the Supreme Court in *Hotel Employees*, was to prohibit a type of gambling house “unique to or particularly associated with Nevada and New Jersey” in 1984;⁴⁶¹
- *Hotel Employees* identified *only one* Penal Code provision—section 330’s prohibition against “casino-style” games—as having been elevated to a constitutional level by virtue of the enactment of section 19(e); and⁴⁶²
- A more recent California Supreme Court decision—*United Auburn*—repeatedly characterized section 19(e) as a restriction on “casino-style” gaming, and identified only Penal Code sections 330 and 330a (but not any other statutory provision) as the state law statutory prohibition against “casino-style” gaming.⁴⁶³

These interpretations—coming from a variety of different sources of California law yet *all* pointing to the same limited reach of section 19(e)—provide a much fuller picture than does an isolated judicial statement (i.e., “gambling activities including those statutorily prohibited in California, especially banked table games and slot machines”)⁴⁶⁴ taken completely out of context from *Hotel Employees* and uncritically applied to a species of gambling that was not even at issue in that case. A careful review of the above diverse sources of law, applying well-settled principles of constitutional interpretation, leads to the inescapable conclusion that sports wagering—a form of gambling that was not available in New Jersey casinos in 1984 and, in any event, is not “casino-style” gaming due to its “skill-predominant” character and the external location of the underlying contests—falls outside the limited scope of section 19(e). Therefore, the California Legislature has the power to authorize

⁴⁵⁹ See *supra* notes 60–62 and accompanying text.

⁴⁶⁰ See *supra* notes 206–213 and accompanying text.

⁴⁶¹ See discussion *supra* Section II.A.

⁴⁶² See discussion *supra* Section III.B.2.

⁴⁶³ See discussion *supra* Section III.B.3.

⁴⁶⁴ *Hotel Emps. Int’l Union v. Davis*, 981 P.2d 990, 1004 (Cal. 1999).

sports wagering exclusively through a statutory enactment without the need for an amendment to the California Constitution.

The California Legislature's inaction on the policymaking front would be rare among states that have legalized sports betting. With one notable exception,⁴⁶⁵ every state that has legalized sports betting as of the date of this publication has adopted a legislatively-authorized statutory scheme.⁴⁶⁶ By contrast, in California, the legalization of sports betting is currently being pursued exclusively through the ballot initiative process, with as many as four sports betting initiatives potentially appearing on the November 2022 statewide ballot.⁴⁶⁷ As a result, important public policy considerations (i.e., establishing eligibility criteria for determining which entities are entitled to operate sports betting, whether to allow online sports betting, the taxation structure or other methodology for determining the allocation of revenues to the state, problem gambling safeguards, integrity protections, advertising restrictions, and myriad

⁴⁶⁵ In November 2018, Arkansas voters approved Issue 4, a citizen-led ballot initiative to amend the Arkansas Constitution to authorize casino-based sports betting at four locations. See Fucillo, *supra* note 448.

⁴⁶⁶ This is true even in states such as Colorado, Louisiana, Maryland, New Jersey, and South Dakota, where voters approved an amendment to the state constitution to expressly allow for sports betting. In each of those states, the legislation setting forth the details of how constitutionally authorized sports wagering would work was enacted solely by the state legislature. See Pat Evans, *Maryland Sports Betting Bill Passes Months After Voters Back Wagering*, LEGAL SPORTS REP. (Apr. 12, 2021), <http://www.legalsportsreport.com/50300/house-senate-pass-maryland-sports-betting/> [<http://perma.cc/KG8G-Y5BC>]; Matthew Waters, *South Dakota Just a Signature Away from Legal Sports Betting*, LEGAL SPORTS REP. (Mar. 5, 2021), <http://www.legalsportsreport.com/48936/south-dakota-sports-betting-bill-passes-2021/> [<http://perma.cc/YZU5-ABHJ>]; Melinda Deslatte, *Louisiana Lawmakers OK Sports Betting Rules, Send to Edwards*, AP NEWS (June 11, 2021), <http://apnews.com/article/louisiana-technology-sports-betting-personal-taxes-business-5907a676d738191548bd0599e93aef81> [<http://perma.cc/3NXZ-7C9W>]; Adam Candee, *Rocky Mountain Aye: Colorado Sports Betting Bill Approved by Senate*, LEGAL SPORTS REP. (May 3, 2019), <http://www.legalsportsreport.com/31901/colorado-sports-betting-passes-senate/> [<http://perma.cc/2ZLD-WNEX>]; Jill R. Dorsen, *Murphy Makes Sports Betting Legal in New Jersey*, SPORTSHANDLE (June 11, 2018), <http://sportshandle.com/murphy-makes-sports-betting-legal-in-new-jersey/> [<http://perma.cc/W2AD-E5XD>].

⁴⁶⁷ See *supra* notes 15, 17, 21 and 26. The tribal-sponsored ballot initiative for sports betting—which would allow only in-person wagering at tribal casinos and privately owned, state-licensed horse racetracks—has already secured the requisite number of signatures and is eligible for the November 2022 general election. See Shirley N. Weber, *November 2022 Eligible Statewide Initiative Measures*, CAL. SEC'Y OF STATE (May 27, 2021), <http://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/eligible-statewide-initiative-measures> [<http://perma.cc/63Z3-J2RW>]. The other three sports betting ballot initiatives that have been proposed for the November 2022 statewide election—each of which would permit some form of online sports betting—were still going through the signature-gathering phase as of the date of the publication of this Article.

other consumer protections) are left entirely to the discretion of the various initiative proponents. It is incumbent on the California Legislature to address these important policy issues through statutory legislation—following public hearings aided by input from all affected stakeholders—rather than rely on any single stakeholder group to chart the future public policy of this state. Through the statutory lawmaking process, the legislature can also help craft a compromise solution that avoids both a costly initiative campaign and the possibility that all four proposed ballot initiatives could fail. The recognition that there is no constitutional barrier to the legislative authorization of sports betting is, hopefully, the first step in the evolution towards the establishment of a more balanced public policy for California—one that incorporates modern technological advancements and includes robust consumer protections—and enables California to join the growing number of states that permit legal sports betting.

**Reviving the Essential Facilities Doctrine:
Revisiting *Verizon Communications, Inc. v.
Law Offices of Curtis V. Trinko, LLP* to Assert
an Essential Facilities Claim against Apple
and the App Store**

*Tyler Angelini**

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INTRODUCTION

The Apple App Store is the sole means of application (“app”) distribution for all Apple devices, and Apple maintains exclusive control over which apps can do business on its platform.¹ If developers want their apps to reach the immense number of Apple consumers, specifically iPhone users, developers must comply with all of Apple’s App Store policies.²

In recent years, Apple has expanded its role within the App Store and become a very active developer itself, launching numerous apps such as *Apple Music*, *Apple TV+*, and *Apple Arcade*.³ Now that the company has placed more of its own apps onto the App Store, Apple regularly competes with the independent apps it effectively controls.⁴ Apple’s latest app launches combined with its subjective enforcement of App Store policies have raised antitrust concerns, including scrutiny under and comparisons to “essential facilities’ doctrine” caselaw.⁵

The essential facilities doctrine generally stands for the principle that a company in control of a facility essential to its competitors is required to provide reasonable access to the

¹ See STAFF OF H.R. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 334–35 (2020) (Majority Staff Rep.) [hereinafter INVESTIGATION OF COMPETITION IN DIGITAL MARKETS], http://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 [<http://perma.cc/P9HC-RGKY>].

² See *App Store Review Guidelines: Introduction*, APPLE DEV., <http://developer.apple.com/app-store/review/guidelines/> [<http://perma.cc/4UBD-Y2CG>] (last visited Feb. 1, 2022).

³ See, e.g., Stuart Dredge, *Apple Music launches To Take on Spotify—and Traditional Radio*, THE GUARDIAN (June 30, 2015, 11:00 AM), <http://www.theguardian.com/technology/2015/jun/30/apple-music-launch-spotify-radio> [<http://perma.cc/674S-HCUX>]; *Apple TV+ Launches November 1, Featuring Originals from the World’s Greatest Storytellers*, APPLE NEWSROOM (Sept. 10, 2019) [hereinafter *Apple TV+ launches November 1*], <http://www.apple.com/newsroom/2019/09/apple-tv-launches-november-1-featuring-originals-from-the-worlds-greatest-storytellers/> [<http://perma.cc/CQ3W-BP2Y>]; Thomas Knowlton, *Apple Arcade Offers Educators Options*, SCH. LIBR. J. (Mar. 9, 2020), <http://www.slj.com/?detailStory=apple-arcade-offers-educators-options> [<http://perma.cc/V59R-BRJW>].

⁴ See Jack Nicas & Keith Collins, *How Apple’s Apps Topped Rivals in the App Store It Controls*, N.Y. TIMES (Sept. 9, 2019), <http://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html> [<http://perma.cc/YEU7-MWKC>] (“But as Apple has become one of the largest competitors on a platform that it controls, suspicions that the company has been tipping the scales in its own favor are at the heart of antitrust complaints in the United States, Europe and Russia.”).

⁵ See generally Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 (2021) (describing how the essential facilities doctrine should be expanded to apply to large technology companies in the digital age); Babu Kotapati et al., *The Antitrust Case Against Apple 1* (Yale Univ. Digit. Platform Theories of Harm, Paper No. 2, 2020), <http://ssrn.com/abstract=3606073> [<http://perma.cc/CQD3-EQG8>] (noting that Apple’s policies have raised new concerns regarding the essential facilities doctrine).

facility.⁶ And while the doctrine has remained largely undefined, for almost a century Courts employed its principles to “enable [competitors] access to critical markets.”⁷

However, during the late 1980s, the doctrine “fell prey” to judicial and theoretical criticism.⁸ Moreover, as recently as 2004, “the Supreme Court all but formally disowned the idea of curbing gatekeeper power by imposing access rights and fair dealing requirements in” *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* (“*Trinko*”).⁹ Despite the recent judicial condemnation of the essential facilities doctrine, government investigations and scholars have called for the revitalization of the essential facilities doctrine to combat the monopoly concerns within the Apple App Store.¹⁰ Upon analyzing the 100 plus years of essential facilities doctrine caselaw precedent, including the case most damning to its reputation, two propositions appear more plausible. First, the case responsible for the essential facilities doctrine’s condemnation and recent abandonment, *Trinko*, can be reconciled to support a finding that the essential facilities doctrine is still an available instrument in the antitrust “toolkit.” And second, after reconciling those cases most unfavorable to the doctrine, the Apple App Store could serve as the ideal conduit for the essential facilities doctrine’s revival.

⁶ See U.S. DEP’T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT, 127 & n.73 (2008), <http://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> [<http://perma.cc/RK8D-PYP9>] (“[C]ourts have drawn from . . . the essential-facilities doctrine—the proposition that the antitrust laws require a single firm in control of a facility essential to its competitors to provide reasonable access to the facility if possible.”).

⁷ See Guggenberger, *supra* note 5, at 287 (“The Court refrained from defining specificities of the remedy and instead threatened divestiture to induce the parties to negotiate equitable terms of access. Over the course of the following decades, the idea of mandating access to practically irreplicable bottlenecks gained steam.”).

⁸ See *id.* at 245.

[The essential facilities doctrine] fell prey to an excessive judicial trust in self-correcting markets, misguided “techtopia,” as Rebecca Haw Allensworth frames it, and the ensuing curtailment of antitrust enforcement. Following decades of anti-enforcement commentary from academics, policymakers, and industry groups, the courts clipped the doctrine’s wings beginning in the late 1980s and throughout the 1990s.

Id.

⁹ See *id.* at 245 & n.37.

¹⁰ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 398 (“Congress should consider overriding judicial decisions that have treated unfavorably essential facilities—and refusal to deal-based theories of harm.”); Guggenberger, *supra* note 5, at 246 (“It is high time to revive, renew, and expand the essential facilities doctrine to address apparent market foreclosures in the digital economy.”).

A. Apple's Business Operations

Apple has undoubtedly pushed technology forward, and its ingenuity and innovation have transformed several areas of business. Apple is the leading smartphone vendor in the United States, and its coveted iPhone accounts for almost half of the United States smartphone market.¹¹ All iPhones run exclusively on the “iOS” mobile operating system, which is preinstalled onto these devices prior to distribution. iOS is not licensed to any other smartphone or tablet manufacturers and is one of two dominant mobile operating systems in the world, the other being Google’s “Android.”¹² The iPhone’s physical design is certainly appealing, but its true appeal is derived from what it enables users to do. To accomplish almost any task on an iPhone, a user will need to use an app. iPhone apps can only be accessed and purchased through Apple’s own App Store, as Apple does not permit alternative app stores to be installed or used on iOS devices.¹³

Apple exclusively controls which apps are marketed and available on the App Store, so independent app developers looking to market their apps to the millions of iOS users can only do so on Apple’s terms.¹⁴ Most App Store policies are harmless, whereas some have placed Apple under the antitrust microscope.¹⁵

Some of Apple’s most controversial App Store policies require independent app developers to pay Apple a thirty percent commission on all revenue derived from consumers purchasing their apps from the App Store.¹⁶ The company is also entitled to a thirty percent commission on consumer “in-app purchases” (“IAP”) of digital goods and services within all apps.¹⁷ The App Store policies do not stop at commissions. For example, under the App Store Guidelines, independent apps may not provide any information “that direct[s] customers to purchasing mechanisms

¹¹ See S. O’Dea, *Manufacturers’ Market Share of Smartphone Sales in the United States from 1st Quarter 2016 to 2nd Quarter 2021*, STATISTA (Nov. 22, 2021), <http://www.statista.com/statistics/620805/smartphone-sales-market-share-in-the-us-by-vendor> [<http://perma.cc/RFK2-WXWF>].

¹² See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 334.

¹³ See *id.* at 335.

¹⁴ See *App Store Review Guidelines: Introduction*, APPLE, <http://developer.apple.com/app-store/review/guidelines/> [<http://perma.cc/YWP2-Q74U>] (last visited Feb. 1, 2022).

¹⁵ See *generally* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 330–76.

¹⁶ See *id.*

¹⁷ See Ian Carlos Campbell & Julia Alexander, *A Guide to Platform Fees*, THE VERGE (Aug. 24, 2021, 9:00 AM), <http://www.theverge.com/21445923/platform-fees-apps-games-business-marketplace-apple-google> [<http://perma.cc/JS8T-XTBU>].

other than [Apple’s] in-app purchase.”¹⁸ This policy effectively guarantees that Apple will get its thirty percent commission on all app-related purchases.

The Apple App Store has proven to be a very profitable business venture. According to a 2019 market analysis, Apple’s net revenue from the App Store was projected to be \$17.4 billion for the 2020 fiscal year.¹⁹ Independent app developers have shared in the App Store riches as well. It is estimated that the App Store has created over 1.3 million jobs in the United States and resulted in more than \$120 billion in worldwide revenue for independent app developers.²⁰ Apple’s latest business ventures, however, may ultimately harm the competition its platform previously fostered.

In the last five years, Apple has entered both the mobile music streaming app market and the mobile video streaming app market with the launch of *Apple Music* and *Apple Tv+*.²¹ Apple’s business expansion shows no signs of slowing down as they also entered the mobile video game subscription app market with the launch of *Apple Arcade* in late 2019.²² All of these apps are available on the Apple App Store and are competing directly with apps such as *Spotify*, *YouTube Music Premium*, *TIDAL*, *Pandora*, *Netflix*, *Hulu*, and other app-based video games.²³

Apple’s track record in dealing with competing apps developers is less than ideal. For example, Apple has refused to approve apps that serve similar functions to Apple’s own “Find My Friends” app.²⁴ Additionally, Apple has refused to approve an

¹⁸ *App Store Review Guidelines: 3. Business*, APPLE, <http://developer.apple.com/app-store/review/guidelines/#business> [<http://perma.cc/JNG3-XSTN>] (last visited Mar. 16, 2021); see also *App Store Review Guidelines: 3.1.3 Other Purchase Methods*, APPLE, <http://developer.apple.com/app-store/review/guidelines/#other-purchase-methods> [<http://perma.cc/U5FW-RFBB>] (last visited Mar. 16, 2021).

¹⁹ Eric J. Savitz, *App Stores Could Be Ripe for Regulation. Here’s Who Benefits if Commissions Fall*, BARRON’S (July 25, 2019, 6:45 AM), <http://www.barrons.com/articles/app-store-fees-regulation-51564019432> [<http://perma.cc/D2B9-7HMQ>].

²⁰ Brett Larson & Cortney Moore, *Apple COO Says App Store Stimulates Economy with \$120B and Tech Jobs*, FOX BUS. (Sept. 17, 2019), <http://www.foxbusiness.com/technology/apple-coo-app-store-creates-jobs-stimulates-economy-with-120b> [<http://perma.cc/7NDZ-JMWY>].

²¹ See Dredge, *supra* note 3; see also *Apple TV+ Launches November 1*, *supra* note 3.

²² Thomas Knowlton, *Apple Arcade Offers Educators Options/Tech Review*, SLJ (Mar. 09, 2020), <http://www.slj.com/?detailStory=apple-arcade-offers-educators-options> [<http://perma.cc/KF66-DNZS>].

²³ Lexy Savvides & Vanessa Hand Orellana, *Apple Music vs. Spotify: Comparing the Top Music Streaming Services*, CNET (Sept. 25, 2021, 3:00 AM), <http://www.cnet.com/tech/services-and-software/apple-music-vs-spotify-comparing-the-music-streaming-giants-best-2021/> [<http://perma.cc/9W3J-HTZU>].

²⁴ See Peter Kafka, *Spotify Says Apple Won’t Approve a New Version of Its App Because It Doesn’t Want Competition for Apple Music*, VOX (June 30, 2016, 12:45 PM),

App Store apps such as *Steam*, a popular video game service, citing a “business conflict” considering the arrival of its own video game service, *Apple Arcade*.²⁵

As Apple puts more of its own apps into the App Store, it moves farther away from its position as the “shopkeeper” of the App Store. Apple now competes directly with the products featured on its “shelves.” This puts Apple in a very advantageous position as iPhone users can only search the Apple App Store for app services like music streaming. By placing one of Apple’s apps, such as *Apple Music*, onto the App Store, Apple has inherently increased the chances that its own app will be purchased. More importantly, even if consumers decided to go with another music streaming app like *Spotify*, under the app store policies, if that customer elects to subscribe to Spotify through Apple’s IAP, Apple is entitled receive a thirty percent commission on that consumer’s monthly *Spotify* payment.²⁶ Because of the commission on IAP, Apple’s competitors have been forced to factor the commissions into their subscription pricing plans and pass the overcharge to their consumers. Accounting for the commissions can commonly result in their in-app services being priced thirty percent higher than Apple’s.²⁷ Some developers have dealt with Apple’s commission by removing the IAP purchase option all together.²⁸

B. Apple’s Recent Antitrust Scrutiny

Both iOS users and app developers have taken issue with Apple’s App Store policies, resulting in numerous allegations that these policies violate antitrust laws.²⁹

<http://www.vox.com/2016/6/30/12067578/spotify-apple-app-store-rejection>
[<http://perma.cc/RHD2-9GZL>].

²⁵ Nick Statt, *Apple Rejects Valve’s Steam Link Game Streaming App over ‘business conflicts’*, THE VERGE (May 24, 2018, 8:59 PM), <http://www.theverge.com/2018/5/24/17392470/apple-rejects-valve-steam-link-app-store-ios-game-streaming> [<http://perma.cc/33AS-UGBS>].

²⁶ *Four Fast Facts*, TIME TO PLAY FAIR (Apr. 30, 2019), <http://timetoplayfair.com/facts> [<http://perma.cc/ZU6D-NLUF>].

²⁷ *A Timeline: How We Got Here*, TIME TO PLAY FAIR, <http://timetoplayfair.com/timeline/> [<http://perma.cc/97B2-HSSW>] (last visited Mar. 10, 2022); Saidat Giwa-Osagie, *App Store vs. Google Play*, FUELED (Aug. 30, 2017), <http://fueled.com/blog/app-store-vs-google-play/> [<http://perma.cc/7X42-KQ42>].

²⁸ *Apple Payments for Spotify*, SPOTIFY (Mar. 10, 2022, 3:25 PM) <http://support.spotify.com/us/article/apple-payments/> [<http://perma.cc/Y8T7-ES46>] (“It used to be possible to pay for Premium using Apple’s in-app payment system (iAP). However, this has been discontinued for new subscribers.”).

²⁹ See, e.g., *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1518–19 (2019); *Epic Games, Inc. v. Apple Inc.*, No. 20-05640, 2020 U.S. Dist. LEXIS 154231 (N.D. Cal. Aug. 24, 2020); *Cameron v. Apple Inc. (In re Apple iPhone)*, No. 11-06714, 2020 U.S. Dist. LEXIS 188670 (N.D. Cal. Oct. 9, 2020).

Most recently, in 2020, Apple's policies regarding commissions on IAP landed it in a legal battle with video game giant Epic Games, the creators of *Fortnite*.³⁰ Epic Games' *Fortnite* was entirely free to download from the Apple App Store.³¹ *Fortnite's* profitability was derived almost exclusively from users purchasing the digital content within the game, such as character cosmetics and customizations.³² Considering *Fortnite's* massive success, Epic Games became unwilling to give thirty percent of *Fortnite's* IAP revenue to Apple and directed iOS users to available discounts on Epic Games' website from within *Fortnite's* iOS app.³³ Epic Games' actions resulted in Apple removing *Fortnite* from the App Store and Epic Games later filing a lawsuit.³⁴

Courts have recognized that the Epic Games lawsuit, and those like it, deal with "questions at the frontier edges of antitrust law in the United States" and that "no analogous authority exists."³⁵

Apple's conduct has not only drawn it into litigation, but also garnered it attention from Congress. In October 2020, the United States House of Representatives Committee on the Judiciary, specifically the Subcommittee on Antitrust, Commercial and Administrative Law, launched an extensive investigation into the digital markets within "big tech" (the "Report").³⁶ The Report specifically studied the digital markets within Amazon, Facebook, Google, and Apple and took a close look at Apple's App Store practices.³⁷ The Report cited Apple's exclusion of rival apps, self-preferencing, arbitrary policy enforcement, and commission system as a basis for finding that Apple exerts monopoly power over app distribution on iOS devices.³⁸ In conclusion, the Report called upon Congress to draw upon the "mainstay tools of the antimonopoly toolkit" to restore competition in these online markets.³⁹ One of the Report's recommendations asked Congress to revitalize "the essential facilities doctrine, or the legal requirement that dominant

³⁰ See *Epic Games, Inc.*, 2020 U.S. Dist. LEXIS 154231, at *2–3.

³¹ Akhilesh Ganti, *How Does Fortnite Make Money*, INVESTOPEDIA (Sept. 10, 2020) <http://www.investopedia.com/tech/how-does-fortnite-make-money/> [<http://perma.cc/HE27-QHDT>].

³² See *id.*

³³ See *Epic Games, Inc.*, 2020 U.S. Dist. LEXIS 154231, at *4.

³⁴ See *id.* at *4–5.

³⁵ *Epic Games, Inc. v. Apple Inc.*, 493 F. Supp. 3d 917, 832–33 (N.D. Cal. 2020) ("The questions and issues raised in this litigation concern novel and innovative business practices in the technology market that have not otherwise been the subject of antitrust litigation.")

³⁶ See generally INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1.

³⁷ See *id.* at 7, 336.

³⁸ See *id.* at 345, 352.

³⁹ See *id.* at 379.

firms provide access to their infrastructural services or facilities on a nondiscriminatory basis.”⁴⁰ Specifically, the Report suggested that “Congress should consider overriding judicial decisions that have treated unfavorably essential facilities—and refusal to deal-based theories of harm.”⁴¹

On September 10, 2021, the judge for the *Epic Games v. Apple* case, U.S. District Judge Yvonne Gonzalez Rogers, issued the “long-awaited” ruling in the *Epic Games v. Apple* case.⁴² The court’s ruling focused primarily on whether Apple had monopolized the digital mobile gaming transactions market and found that “Epic Games failed in its burden to demonstrate Apple is an illegal monopolist.”⁴³ Judge Gonzalez Rogers also briefly addressed an essential facilities claim, finding that the App Store was not “essential” given that there are “multiple avenues [that] do exist” to distribute mobile apps such as web apps, by web access, and through other games stores.⁴⁴ However, the court’s ruling only addressed Apple’s role as the operator of the App Store and did not inquire into Apple’s new expanded role of a competitor in the App Store.⁴⁵

Currently, those companies doing business on the Apple App Store may have to wait for legislation to restore competition within the App Store. However, application and enforcement of the essential facilities doctrine may present an equally effective solution, especially when aimed at Apple as a competitor in the App Store, rather than just an operator.⁴⁶

I. THE HISTORY OF THE ESSENTIAL FACILITIES DOCTRINE

Generally, companies such as Apple do not have a duty to deal with their competitors, so ordinarily, developers who compete with Apple apps would be out of luck and forced to follow to the App Store policies or leave the platform. Fortunately, in some

⁴⁰ See *id.* at 399.

⁴¹ See *id.*

⁴² See Bobby Allyn, *What the Ruling in The Epic Games v. Apple Lawsuit Means for iPhone Users*, NPR (Sept. 10, 2021) <http://www.npr.org/2021/09/10/1036043886/apple-fortnite-epic-games-ruling-explained> [<http://perma.cc/37KL-5F8J>].

⁴³ *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, 2021 U.S. Dist. LEXIS 172303, at *11–13 (N.D. Cal. Sept. 10, 2021) (“Central to antitrust cases is the appropriate determination of the ‘relevant market.’”).

⁴⁴ See *id.* at *285–86.

⁴⁵ See *id.* at *283–87.

⁴⁶ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 379–81 (calling upon Congress and the courts to “revitaliz[e] the essential facilities doctrine, or the legal requirement that dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory basis”).

instances, the law will require a company to deal with its competitors on more “reasonable terms.”⁴⁷

Under the essential facilities doctrine, a company in control of a facility essential to its competitors is required to provide reasonable access to the facility.⁴⁸ The doctrine is generally understood to be a part of a subset of “refusal to deal” cases that place limitations on a monopolist’s ability to exclude actual or potential rivals from competing with it.⁴⁹

As the Ninth Circuit has stated, the doctrine “imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.”⁵⁰

However, plaintiffs looking to invoke the doctrine face a significant challenge as the doctrine is “famously disreputable.”⁵¹ Several scholars have heavily scrutinized the doctrine, and others view the doctrine as a “useful label” rather than an established and theorized legal doctrine.⁵² Scholars’ uncompromising assessment of the doctrine may be due to the Supreme Court’s recent unwillingness to acknowledge the doctrine’s existence.⁵³ Specifically, in *Trinko*, Justice Scalia

⁴⁷ See *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 7*, U.S. DEPT OF JUST. <http://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-7> [<http://perma.cc/5J3E-JVHH>] (last updated June 25, 2015) (“[C]ourts have drawn from . . . the essential-facilities doctrine [for] the proposition that the antitrust laws require a single firm in control of a facility essential to its competitors to provide reasonable access to the facility if possible.”) (citing *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1128–29 (9th Cir. 2004); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977); *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1360–61 (D.D.C. 1981)).

⁴⁸ See *id.*

⁴⁹ See Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 446 (2002).

⁵⁰ *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991).

⁵¹ Stephen M. Maurer & Suzanne Scotchmer, *The Essential Facilities Doctrine: The Lost Message of Terminal Railroad*, 5 CAL. L. REV. CIR. 296, 298 (2014).

⁵² See *id.* (quoting Sergio Baches Opi, *The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the European Union and the United States: Are Intellectual Property Rights Still Sacrosanct?*, 11 FORDHAM INTELL. PROP. L.J. 409, 419 (2001); see also *id.* at 419 n.3).

The so-called ‘essential facility’ doctrine is one of the most troublesome, incoherent, and unmanageable bases for Sherman § 2 liability. The antitrust world would almost certainly be a better place if it were jettisoned, with a little fine tuning of the general doctrine of refusal to deal to fill any gaps.

Id. (quoting HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* (4th ed. 2011)).

⁵³ See *Verizon Commc’ns., Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 410–11 (2004).

asserted that “[w]e have never recognized such a doctrine . . . and we find no need either to recognize it or to repudiate it here.”⁵⁴

Justice Scalia was correct in asserting that the Court has never recognized the essential facilities doctrine *by name*, but the doctrine’s principles have a long history within antitrust law.⁵⁵ In fact, requiring competitors to share their “essential” resources with their competition has served as a remedy in monopoly leveraging (the extending power over the essential facility into another market) and refusals to deal cases for almost a century.⁵⁶

A. Rise of the Essential Facilities Doctrine

Courts on all levels have balanced competition within various markets by requiring competitors to share their “essential” facility with their competitors.

1. Early Supreme Court Cases

The essential facilities doctrine is believed to originate from the Supreme Court’s 1912 decision in *United States v. Terminal Railroad Association of Saint Louis* (“*Terminal Railroad*”).⁵⁷ *Terminal Railroad* involved railroad connections necessary for train-based commerce to cross the Mississippi River into the St. Louis area.⁵⁸ At the time, St. Louis constituted a gateway between the eastern and western United States and represented an invaluable epicenter for railroad-based commerce.⁵⁹ Initially, there were several independent connections available to trains transporting goods across the Mississippi River into St. Louis.⁶⁰

Nonetheless, as time went on, a group of railroad companies collectively referred to as “Terminal Railroad Association” or “Terminal Company” began to acquire all bridges and terminals providing railroad access to St. Louis.⁶¹ Due to the geographical isolation of St. Louis, it became “impossible for any railroad

⁵⁴ *Id.* at 411 (citations omitted).

⁵⁵ See Guggenberger, *supra* note 5, at 298.

Of the essential facilities doctrine, [Scalia] writes that it had never been recognized by the Court. This observation is true insofar as the doctrine had not been named in any of the Court’s previous decisions. However, *Aspen Skiing* and *Otter Tail* had been widely understood as reflecting the idea of the essential facilities doctrine and vice versa.

Id.

⁵⁶ See Maurer & Scotchmer, *supra* note 51, at 321–22.

⁵⁷ *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912).

⁵⁸ See *id.* at 390–92.

⁵⁹ *Id.* at 403 (“St. Louis is one of the largest railroad centers in the world.”).

⁶⁰ See *id.* at 392–93.

⁶¹ See *id.* at 392.

company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company.”⁶² The Terminal Company also forced any railroad company outside of the Terminal Company to pay arbitrary hauling charges to use the newly acquired connections.⁶³

The Terminal Company did not confine its business to “supplying and operating mere facilities for the interchange of traffic between railroads,” they also continued to operate their individual railroad charters through the collectively owned terminals.⁶⁴ Terminal Company membership provided a significant competitive advantage as members could access St. Louis without any hauling fees.⁶⁵

The United States took issue with the Terminal Company’s “discriminatory and extortionate” practices and filed a lawsuit under the Sherman Act of 1890.⁶⁶ The Government urged for a complete dissolution of the Terminal Company, but the Court emphasized that the law’s (the Sherman Act of 1890) intent is to “protect, not to destroy, rights of property.”⁶⁷

Instead of breaking up the Terminal Company and its control over the railroad connections, the Court aimed to put both Terminal Company members and non-members on a “plane of equality.”⁶⁸ The Court recognized the importance of St. Louis to railroad-based commerce.⁶⁹ Additionally, the Court considered the City’s geographical location, which rendered alternative routes impossible, and the waste of natural space and costs of construction that would follow if independent railroad companies were forced to build their own connections.⁷⁰

The Court ultimately ordered the Terminal Company to abolish all arbitrary hauling charges for independent railroad companies. The Terminal Company was required to allow any independent railroad company to use the connections on “just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and

⁶² *Id.* at 397.

⁶³ *See id.* at 408.

⁶⁴ *Id.* at 406–07.

⁶⁵ *Id.* at 408.

⁶⁶ *See id.* at 407.

⁶⁷ *Id.* at 409.

⁶⁸ *See id.* at 411.

⁶⁹ *See id.* at 403.

⁷⁰ *See id.* at 395, 397–98.

charges as that occupied by the proprietary companies.”⁷¹ Essentially, the Court realized that one of the primary ways to create an equal plane was to provide all competitors equal, or at least reasonable, access to the same invaluable resources. This concept of putting competitors on an “equal plane” effectively represented the birth of the essential facilities doctrine.

In the decades following *Terminal Railroad*, the Court continued to enforce the principle: “If an entity controls a facility that is necessary for other businesses to compete effectively in the marketplace, that entity must grant its competitor access to the facility.”⁷²

For example, in *Lorain Journal Co. v. United States* (“*Lorain*”), the Lorain Journal, the only daily newspaper in an Ohio city, attempted to harm a competing radio station by refusing to accept local advertisements from any Lorain County company who also advertised or was about to advertise over the local radio station.⁷³ As a result, companies could only purchase newspaper ads or radio ads, but not both.⁷⁴ In determining if the Lorain Journal’s conduct constituted an illegal attempt to monopolize interstate commerce, the Court evaluated whether “advertising in the Journal was essential for the promotion of . . . sales in Lorain County.”⁷⁵ The Journal covered ninety-nine percent of Lorain County families, and therefore, the Court believed the Journal represented an “indispensable medium of advertising for many Lorain concerns.”⁷⁶

The Court’s holding resembled *Terminal Railroad* and required the Lorain Journal to share its “essential” advertising space.⁷⁷ Furthermore, the Lorain Journal was enjoined from:

Refusing to accept for publication or refusing to publish any advertisement or advertisements . . . where the reason for such refusal or discrimination is, in whole or in part, express or implied, that the person, firm or corporation submitting the advertisement or advertisements has advertised, advertises, has proposed or proposes to advertise . . .⁷⁸

A little more than twenty years after *Lorain*, the Court grappled with another company in possession of an “essential”

⁷¹ *Id.* at 411.

⁷² Guggenberger, *supra* note 5, at 295 (“Though, over time, some of the leading considerations, and their emphasis has evolved. The notion of equal access to the marketplace and creating a level playing field stretch through the decisions.”).

⁷³ See *Lorain J. Co. v. United States*, 342 U.S. 143, 148 (1951).

⁷⁴ See Maurer & Scotchmer, *supra* note 51, at 306 (summarizing *Lorain*).

⁷⁵ See *Lorain*, 342 U.S. at 148.

⁷⁶ *Id.* at 152.

⁷⁷ See *id.* at 157.

⁷⁸ *Id.*

service in *Otter Tail Power Co. v. United States* (“*Otter Tail*”).⁷⁹ In this case, the corporation was engaged in two different businesses: the first involved selling and distributing electricity to city residents directly (the retail level), and the second involved selling and distributing electricity to municipalities (the wholesale level).⁸⁰ The cities eventually decided to construct their own power generation plants to distribute electricity at the retail level; however, they needed Otter Tail to provide them wholesale power to effectuate the distribution.⁸¹ The company’s profits primarily relied on its retail-level sales, so Otter Tail refused to sell the cities the required wholesale power.⁸² According to the District Court for the District of Minnesota, Otter Tail’s refusal to deal constituted a violation of section 2 of the Sherman Act.⁸³ And upon later review, the Supreme Court agreed.⁸⁴

The Court emphasized that “[t]here were no engineering factors that prevented Otter Tail from selling power at wholesale to those towns that wanted municipal plants.”⁸⁵ Furthermore, the Court believed that Otter Tail’s refusal to sell at wholesale was “solely to prevent municipal power systems from eroding its monopolistic position” within the retail level market.⁸⁶ In conclusion, the Court ordered Otter Tail to provide the “essential” wholesale power to its new retail-level competition at “compensatory” rates set by the Federal Power Commission.⁸⁷

The aforementioned Supreme Court cases saw an array of resources effectively deemed “essential”: railroad connections, advertising space, and wholesale electricity services. In reaching these conclusions, the Court focused on the impracticality of duplicating the essential facility, the facility’s significance to competitors in the market, and the feasibility of sharing the facility. In the years that followed, lower courts would further develop and define these factors.

2. Lower Courts Begin to Develop the Doctrine

Following this trend of Supreme Court decisions, several lower courts began to deal with cases involving access to an alleged “essential facility.”⁸⁸ These lower court cases resulted in a more refined and developed framework to apply to essential facilities

⁷⁹ *Otter Tail Power Co. v. United States*, 410 U.S. 366, 368 (1973).

⁸⁰ *See id.* at 377–79.

⁸¹ *See id.* at 371.

⁸² *See id.*

⁸³ *See id.* at 368.

⁸⁴ *See id.* at 379–82.

⁸⁵ *Id.* at 378.

⁸⁶ *Id.*

⁸⁷ *Id.* at 375, 381–82.

doctrine claims.⁸⁹ For example, in *Terminal Railroad*, the Court included the impracticability of duplicating the facility in question into its reasoning.⁹⁰ In *Hecht v. Pro-Football, Inc.*, the D.C. Circuit Court built upon *Terminal Railroad* by asserting that “where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.”⁹¹ The D.C. Circuit Court believed that it would be an “illegal restraint of trade to foreclose [such a] scarce facility.”⁹²

In 1983, the essential facilities doctrine reached its “most expansive form” to date in *MCI Communications Corporation v. AT&T*.⁹³ In this case, the Seventh Circuit officially set forth four required elements to establish liability under the essential facilities doctrine:

1. control of an essential facility by a monopolist;
2. a competitor’s inability practically or reasonably to duplicate the essential facility;
3. the denial of the use of the facility to a competitor; and
4. the feasibility of providing access to the facility.⁹⁴

The Seventh Circuit’s articulation of these elements influenced several subsequent decisions.⁹⁵

B. Decline of the Essential Facilities Doctrine

Two Supreme Court cases can be pointed to as particularly responsible for the essential facilities doctrine’s decline, the first

⁸⁸ Maurer & Scotchmer, *supra* note 51, at 308–09.

By the late 1970s the Court’s newfound willingness to find that facilities were “essential” had invited a flood of lower court litigation involving access to such disparate facilities as stock exchanges, produce markets, real estate listing services, electricity and gas networks, airports, sports stadiums, phone systems, contracting advantages, replacement parts, raw materials, IP licenses, airline reservation systems, harbor/railroad facilities, power generation or phone networks, airport landing and takeoff slots and ground services, two way billing, voice mail, cell phone roaming contracts, and short haul rail lines.

Id. (citations omitted).

⁸⁹ See, e.g., *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983); *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1128–30 (9th Cir. 2004); *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1360–61 (D.D.C. 1981).

⁹⁰ See *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383, 394–98 (1912).

⁹¹ *Hecht*, 570 F.2d at 992.

⁹² *Id.*

⁹³ Maurer & Scotchmer, *supra* note 51, at 309.

⁹⁴ *MCI Commc’ns*, 708 F.2d at 1132–33.

⁹⁵ See Maurer & Scotchmer, *supra* note 51, at 310 n.85 (citing HERBERT HOVENKAMP, *FEDERAL ANITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 337 (4th ed. 2011)) (“In *MCI*, the Seventh Circuit stated the essential facility doctrine in a way that has influenced numerous subsequent decisions.”).

being *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (“*Aspen Skiing*”).⁹⁶ And the second, being *Trinko*.⁹⁷ However, both cases are not as condemning as they may initially seem.

1. *Aspen Skiing*

The Supreme Court’s 1985 decision in *Aspen Skiing* marked the first instance in which the Court appeared reluctant to acknowledge the essential facilities doctrine.⁹⁸ Before *Aspen Skiing* reached the Supreme Court, the Tenth Circuit believed that “the substance of an essential facilities case was made,”⁹⁹ however, the Supreme Court never reached an essential facilities doctrine analysis and found liability on other grounds.¹⁰⁰ The Court’s apparent hesitancy to embrace and acknowledge the doctrine in *Aspen Skiing* casted a “long and unfortunate shadow over the essential facilities doctrine cases.”¹⁰¹ Nevertheless, *Aspen Skiing* should not be read to be inconsistent with prior essential facilities caselaw. In fact, the Court’s finding that there is an occasional duty to “assist a competitor through joint marketing has the strong aroma of the cases that invoke the essential facilities doctrine by name.”¹⁰²

Aspen Skiing involved the four major ski resorts in Aspen, Colorado.¹⁰³ All four ski resorts were independently owned, but one of the resort owners, Ski Co., acquired three of the four resorts over time.¹⁰⁴ When the resorts were all independently owned, they jointly offered the “all-Aspen” ski lift ticket, giving

⁹⁶ 472 U.S. 585, 609–11 (1985); see also Guggenberger, *supra* note 5, at 294–95. *Aspen Skiing* was widely criticized in the literature. In fact, many—erroneously—understood [the case] as a dire warning of what an expansive essential facilities doctrine would look like in practice. Lower courts applied the *Aspen* ruling but did not expand it in any meaningful way. . . . From thereon, the doctrine’s decline began—much to the detriment of businesses that rely on access to crucial infrastructure.

Id.; see also Maurer & Scotchmer, *supra* note 51, at 312 (“The most famous peculiarity of the Supreme Court’s opinion in *Aspen* is that it nowhere uses the words ‘essential facility.’ This persuaded lower courts to restyle essential facilities cases as monopolization or attempted monopolization cases.”)

⁹⁷ Guggenberger, *supra* note 5, at 298 (“The biggest blow to the practical impact of the essential facilities doctrine did not come until 2004, when the Supreme Court all but formally disowned the idea of curbing gatekeepers’ power in *Trinko*.”).

⁹⁸ See *Aspen Skiing*, 472 U.S. at 609–11.

⁹⁹ *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1521 (10th Cir. 1984), *aff’d*, 472 U.S. 585 (1985).

¹⁰⁰ See *Aspen Skiing*, 472 U.S. at 611, n.44.

¹⁰¹ See Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1207 (1999).

¹⁰² *Id.*; see *Aspen Skiing*, 472 U.S. at 609–11.

¹⁰³ *Aspen Skiing*, 472 U.S. at 587–88.

¹⁰⁴ *Id.* at 587–89, 611 nn.2 & 5.

resort guests access to all four mountains during their stay.¹⁰⁵ The “all-Aspen” pass was beloved by consumers and was a profitable venture for all companies involved.¹⁰⁶ Yet, once Ski Co. gained control of three of the four resorts, Ski Co. refused to offer the “all-Aspen” pass, allegedly in an effort to drive out the remaining resort owner, Highlands.¹⁰⁷

In light of Ski Co.’s refusal to jointly market the “all-Aspen” pass, Highlands tried desperately to offer its consumers a similar product.¹⁰⁸ The company even purchased retail lift tickets from Ski Co. to combine them with its own ticket to give the appearance of such an “all-Aspen” pass.¹⁰⁹ These passes were valid and no different from regular Ski Co. tickets, but Ski Co. refused to honor any consumer attempting to use it.¹¹⁰

Without the “all-Aspen” pass, Highlands’ share of the Aspen-area downhill skiing market fell from just over twenty percent to eleven percent within five years.¹¹¹ Additionally, Highlands could not develop other ski resorts in the Aspen area due to governmental barriers and financial difficulties.¹¹²

Highlands eventually sued Ski Co., alleging that Ski Co.’s refusal to deal constituted a violation of section 2 of the Sherman Act.¹¹³ The Court found that Ski Co. had chosen to forgo a profitable venture solely for the purpose of harming its competitor, which “provided adequate evidence to uphold the monopolization [jury] verdict.”¹¹⁴ The Court’s reasoning rested heavily on the fact that Ski Co. had no legitimate business justification for turning away consumers attempting to use a Highlands-purchased Ski Co. ticket.¹¹⁵ Along with treble damages, the Court ordered Ski Co. to again offer the “all-Aspen” pass with Highlands.¹¹⁶

¹⁰⁵ *Id.* at 605–06.

¹⁰⁶ *Id.* at 603, 605–06.

¹⁰⁷ *Id.* at 594.

¹⁰⁸ *Id.* at 605–08.

¹⁰⁹ *Id.* at 607–08.

¹¹⁰ *Id.* at 599.

¹¹¹ *Id.* at 594–95.

¹¹² *Id.* at 588–89.

Most of the terrain in the vicinity of Aspen that is suitable for downhill skiing cannot be used for that purpose without the approval of the United States Forest Service. That approval is contingent, in part, on environmental concerns. Moreover, the county government must also approve the project, and in recent years it has followed a policy of limiting growth.

Id.

¹¹³ *Id.* at 595.

¹¹⁴ See Lipsky Jr. & Sidak, *supra* note 101, at 1210–11.

¹¹⁵ *Aspen Skiing*, 472 U.S. at 608–11.

¹¹⁶ *Id.* at 598, 611 n.23.

Due to the overwhelming evidence condemning Ski Co., the Court saw no need to consider liability under the essential facilities doctrine.¹¹⁷ Nevertheless, *Aspen Skiing's* outcome was still analogous to those essential facilities cases before it. In essence, the Court required a company in control of a resource essential to its competitor to share that resource with its competitor. While the Court believed that Ski Co.'s inherent anticompetitive conduct justified this order, *Aspen Skiing* still possessed all of the traditional elements of an essential facilities case. First, Highlands could not practically duplicate access to alternative ski resorts.¹¹⁸ Second, Ski Co.'s resorts were crucial to Highland's ability to compete in their respective market.¹¹⁹ And third, Ski Co. could feasibly grant Highlands' access, as evidenced by the Court's order to do so.¹²⁰ So, although *Aspen Skiing* is viewed as an "unfortunate shadow" over the essential facilities doctrine, its holding does not actually diminish any prior caselaw. Further, *Aspen Skiing* may only represent an attempt by the Court curb inherently anticompetitive behavior on simpler and more defined grounds.¹²¹

2. *Trinko*

In 2004, the Court's opinion in *Trinko* brought any momentum the essential facilities doctrine had gathered to a screeching "halt."¹²² While *Aspen Skiing* conveyed reluctance to apply the essential facilities doctrine, *Trinko* demonstrated firm disapproval of the doctrine.¹²³ The *Trinko* decision has been

¹¹⁷ *Id.* at 611 n.44.

¹¹⁸ *See id.* at 588–89.

¹¹⁹ *See id.* at 594–95.

Without a convenient all-Aspen ticket, Highlands basically "becomes a day ski area in a destination resort." Highlands' share of the market for downhill skiing services in Aspen declined steadily after the 4-area ticket based on usage was abolished in 1977: from 20.5% in 1976-1977, to 15.7% in 1977-1978, to 13.1% in 1978-1979, to 12.5% in 1979-1980, to 11% in 1980-1981. Highlands' revenues from associated skiing services like the ski school, ski rentals, amateur racing events, and restaurant facilities declined sharply as well.

Id. (internal citations omitted).

¹²⁰ *See id.* at 598 n.23, 611.

¹²¹ *See id.* at 611 n.44.

Given our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unnecessary to consider the possible relevance of the "essential facilities" doctrine, or the somewhat hypothetical question whether nonexclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anticompetitive purpose. If, as we have assumed, no monopolist monopolizes unconscious of what he is doing, that case is unlikely to arise.

Id.

¹²² *See* Guggenberger, *supra* note 5, at 245; Verizon Commc'ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

¹²³ *See Trinko*, 540 U.S. at 399.

described to represent “the near extinction of the doctrine in the Supreme Court, in a case in which it probably should not have been discussed at all.”¹²⁴ The decision concluded by questioning the doctrine’s years of development and effectively denying the doctrine’s existence.¹²⁵

In *Trinko*, Verizon Communications, a local exchange carrier, was newly required under the 1996 Telecommunications Act (the “Act”) to share its telephone network with its competitors so that they could provide retail cellular services.¹²⁶ AT&T was a retail cellular services competitor that relied on Verizon’s exchange network infrastructure to provide its services and claimed that Verizon failed to provide adequate access to its network as required by the Act.¹²⁷ *Trinko*, an AT&T customer, asserted that Verizon had violated section 2 of the Sherman Act by discriminating against AT&T customers by providing them worse service through the network exchange than it provided to its own customers.¹²⁸ The complaint alleged that Verizon provided inadequate and subpar access “to rivals in order to limit entry,” which represented a denial of an essential facility.¹²⁹

In assessing whether Verizon’s conduct constituted an antitrust violation, the Court concluded that the complaint failed to state an antitrust claim.¹³⁰ As mentioned earlier, *Trinko* did not require an extensive essential facilities doctrine discussion.¹³¹ For example, the existence of the Act seemed to be the key differentiating factor between *Trinko* and other essential facilities

¹²⁴ Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 9 (2008).

¹²⁵ Maurer & Scotchmer, *supra* note 51, at 298 (“In 2004, the Supreme Court’s *Trinko* opinion strongly hinted that the doctrine had, at the very least, reached its ‘outer limits’ and might not exist at all.”); *see generally Trinko*, 540 U.S. at 415–16.

¹²⁶ *See Trinko*, 540 U.S. at 401–05.

¹²⁷ *See id.* at 404.

¹²⁸ *See id.* at 404–05.

¹²⁹ *See id.* at 405, 407, 411.

Trinko’s complaint alleged that Verizon had filled rivals’ orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs, thus impeding the competitive LECs’ ability to enter and compete in the market for local telephone service. According to the complaint, Verizon “has filled orders of [competitive LEC] customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for [competitive LEC] customers . . . , and has systematically failed to inform [competitive LECs] of the status of their customers’ orders.”

Id. at 404–05 (citation omitted); *see also* Maurer & Scotchmer, *supra* note 51, at 313 (citing *Trinko*, 540 U.S. at 404–05).

¹³⁰ *See Trinko*, 540 U.S. at 416.

¹³¹ *See* Frischmann & Waller, *supra* note 124, at 9 (“Although its statements on the doctrine were not ‘essential’ to the ruling, and technically dicta, the Court in *Trinko* appeared to go out of its way to restrict, and nearly reject, the essential facilities doctrine.”).

doctrine precedent.¹³² Thus, the Court could have decided *Trinko* on the basis that there is no duty to deal with a competitor when the competitor has the opportunity to appeal to a regulatory scheme other than antitrust for relief.¹³³ But, instead of deciding the case on such grounds, the Court went in a different direction, and through dicta, distinguished and diminished several essential facilities doctrine cases from *Trinko*.¹³⁴

The Court's opinion separated *Trinko* from other precedent finding a duty to deal with a competitor. In comparing *Aspen Skiing* to *Trinko*, the Court effectively limited the scope of *Aspen Skiing* to only those unique instances where a defendant ceases a *voluntary* and *profitable* venture to achieve an anticompetitive end.¹³⁵ Here, the Court highlighted that Verizon would have never *voluntarily* shared its network exchange before the Act's compulsion.¹³⁶ The Court believed that previous voluntary dealings between competitors were important because it could shed light on a defendant's motivation to suddenly refuse to deal.¹³⁷ For example, in *Aspen Skiing*, Ski Co. "turned down a proposal to sell at its own retail price," suggesting that Ski Co. believed "its future monopoly retail price would be higher."¹³⁸ Similarly, in *Otter Tail*, the company had previously provided business services and ceased such services when its status within the market was threatened.¹³⁹ Conversely, Verizon, prior to the Act, did not share its network exchange, so the Court could not ascertain whether Verizon's later regulatory lapses were prompted by "competitive zeal" or "anticompetitive malice."¹⁴⁰

The Court further distinguished *Aspen Skiing* from *Trinko*, noting that in *Aspen Skiing*, "what the defendant refused to provide to its competitor was a product that it already sold at retail . . . lift tickets."¹⁴¹ The Court differentiated *Otter Tail* from *Trinko* on the same grounds, pointing out that in *Otter Tail*, the

¹³² *See id.*

¹³³ *See Trinko*, 540 U.S. at 412.

Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's "essential facilities" argument is distinct from its general §2 argument, we reject it.

Id. at 411.

¹³⁴ *See id.* at 409–10.

¹³⁵ *See id.* at 409.

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *Id.* at 410 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)).

¹⁴⁰ *Id.* at 409. ("Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.")

¹⁴¹ *Id.* at 410.

“defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers.”¹⁴² However, in *Trinko*, the services allegedly withheld were not otherwise marketed or available to the public: “The sharing obligation imposed by the Act created ‘something brand new’—the wholesale market for leasing network elements.”¹⁴³ Considering the above differences, the Court found that “Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedents.”¹⁴⁴

But, to the disappointment of essential facilities doctrine supporters, the Court’s opinion did not stop after distinguishing previous precedent. Instead, the Court continued, expressing at length its “hostile” view of the doctrine.¹⁴⁵ To some, the Court appeared to go “out of its way to discuss the essential facilities doctrine in the harshest possible terms.”¹⁴⁶ Writing for the Court, Justice Scalia added that their conclusion in *Trinko* would remain “unchanged even if [they] considered to be established law the ‘essential facilities’ doctrine crafted by some lower courts.”¹⁴⁷ The Court dealt the biggest blow to the doctrine by directly questioning its existence, stating that “[w]e have never recognized such a doctrine . . . and we find no need either to recognize it or to repudiate it here.”¹⁴⁸

While the Court’s statements regarding the doctrine were only dicta, all essential facilities doctrine cases have been unsuccessful since *Trinko*.¹⁴⁹

II. THE REVIVAL OF THE ESSENTIAL FACILITIES DOCTRINE

The aftermath of *Trinko* caused both the legal and academic community to effectively abandon the essential facilities doctrine, leaving the impression that the doctrine never existed, or at least that it may never return.¹⁵⁰ Although *Trinko* left the doctrine’s future uncertain, a complete

¹⁴² *Id.*

¹⁴³ *Id.* (quoting *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 528 (2002)).

¹⁴⁴ *Id.*

¹⁴⁵ Maurer & Scotchmer, *supra* note 51, at 313.

¹⁴⁶ Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, WIS. L. REV. 359, 364 (2008).

¹⁴⁷ *Trinko*, 540 U.S. at 410.

¹⁴⁸ *Id.* at 411 (internal citations omitted).

¹⁴⁹ Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 9 (2008) (“[The Court’s] statements on the doctrine were not ‘essential’ to the ruling, and technically dicta.”); Waller, *supra* note 146, at 365 (noting that all post-*Trinko* essential facilities cases have been unsuccessful).

¹⁵⁰ Waller, *supra* note 146, at 365.

“overriding” of *Trinko*’s holding, as recommended by the Report, may not be necessary for a revival.¹⁵¹

The caselaw before *Trinko* has not been overruled and demonstrates that the essential facilities doctrine did have a place within the Court’s antitrust toolkit. For example, in *Aspen Skiing*, we are reminded that Ski Co.’s conduct inferred that it was “willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.”¹⁵² Ultimately, the Court condemned Ski Co. for this inherent anticompetitive behavior, but *did not* necessarily condemn Ski Co. for denying access to an “essential facility.”¹⁵³ *Aspen Skiing* actually left questions regarding the essential facilities doctrine open, stating in a footnote that “[g]iven our conclusion . . . we find it unnecessary to consider the possible relevance of the ‘essential facilities’ doctrine.”¹⁵⁴ *Aspen Skiing* demonstrates that, at the time, the essential facilities doctrine appeared to be a valid judicial tool but was simply not needed to remedy the situation at hand. And by acknowledging the essential facilities doctrine by name, albeit in a footnote, the Court seemed to indicate that the essential facilities doctrine *did* actually “exist” at that time.

Furthermore, it is *Trinko*’s obiter dicta, rather than its holding, that stands in the way of a successful revitalization.¹⁵⁵ The *Trinko* Court was clear in stating that they have never recognized the essential facilities doctrine.¹⁵⁶ However, it would be an oversight to claim that, on this basis, the essential facilities doctrine does not exist. Upon closely examining *Trinko*, the Court’s dicta leaves plenty of room for future essential facilities claims to be made.

A. Overcoming *Trinko*’s Obiter Dicta

Trinko, in hindsight, may not actually represent the nail in the coffin of the essential facilities doctrine. Rather, it may just narrow the factual circumstances in which the doctrine can be asserted. In *Trinko*, after claiming that they have never “recognized” the doctrine, the Supreme Court elaborated on what

¹⁵¹ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 399 (“Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm.”)

¹⁵² *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610–11 (1985).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 611 n.44

¹⁵⁵ See Frischmann & Waller, *supra* note 149.

¹⁵⁶ *Verizon Commc’ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) (internal citations omitted) (“We have never recognized such a doctrine . . . and we find no need either to recognize it or to repudiate it here.”).

the essential facilities doctrine's hypothetical requirements would be and why it could not be applied in this specific instance.¹⁵⁷ However, the Court's requirements and analysis are not inconsistent with any prior essential facilities precedent.

First, the Court noted that access to the facility in question must be unavailable for the doctrine to apply:

It suffices for present purposes to note that the indispensable requirement for invoking the [essential facilities] doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that "essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms."¹⁵⁸

The Court's statement here is consistent with prior essential facilities cases. In cases like *Terminal Railroad* and *Otter Tail*, a private party held access to the facility in question—the Terminal Company and Otter Tail, respectively—and before the Court's intervention, those parties were able to deny access to a competitor entirely. This is very different from the situation in *Trinko*, where the Act deprived Verizon of the ability to deny access to the "essential facility," and the plaintiff's claim centered around the quality of access, rather than access in general.¹⁵⁹

The Act not only provided access to the facility, but also served as a regulatory structure designed to deter and remedy anticompetitive behavior within the specific market.¹⁶⁰ The Court believed that antitrust enforcement could only minorly benefit competition when a regulatory structure within a specific market already exists.¹⁶¹ The Court saw antitrust as better equipped to deal with those instances where "there is nothing built into the regulatory scheme" to perform "the antitrust function."¹⁶² This added element of regulatory structure in *Trinko* was not present in cases such *Terminal Railroad* and *Lorain*, which left the Court to perform the antitrust function within those specific markets.

Trinko also warned that, in this case, because providing *adequate* access is subjective, forced sharing ran a significant risk of "false positives."¹⁶³ False positives could punish defendants for

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (quoting P. Areeda & H. Hovenkamp, *Antitrust Law*, p. 150, ¶773e (2003 Supp.)).

¹⁵⁹ *Id.* at 404–05.

¹⁶⁰ *Id.* at 412.

¹⁶¹ *Id.*

¹⁶² *Id.* (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 358 (1963)).

¹⁶³ *Id.* at 414.

refusals that have nothing to do with exclusionary behavior.¹⁶⁴ The Court was especially wary because “mistaken inferences and the resulting false condemnations” could “chill the very conduct the antitrust laws are designed to protect.”¹⁶⁵ Prior cases like *Lorain* and *Otter Tail* avoided the risk of false positives by focusing only on instances where a company refused to deal with a competitor. By focusing on a competitor’s sudden refusal to deal, the Court could better understand the company’s motives and more accurately identify exclusionary behavior.¹⁶⁶

Finally, the Court noted that, even if it required Verizon to share its networks with its competitors on more favorable terms, those requirements would be difficult to enforce effectively. Prior to *Trinko*, most ordered sharing requirements forced defendants to recommence previous dealings with competitors. Orders of this nature could be effectively enforced by the Court because, once ordered, the matter would be out of the Court’s hands. However, in *Trinko*—due to the nature of the complaint—effective enforcement would have been much more involved and would have required highly detailed and continual supervision on a day-to-day basis. The Court should not and could not reasonably implement that level of oversight and enforcement.¹⁶⁷

Due to *Trinko*’s dissimilarities with previous essential facilities cases, one could argue that the Court was correct not to apply the doctrine in *Trinko*. With that said, *Trinko*’s dicta set forth several requirements for a successful essential-facilities claim. By no means does this represent a comprehensive list of elements, but to briefly summarize, according to *Trinko*, the following factors would need to be met before an essential-facilities claim could be made:

1. The defendant refuses to provide a service that it publicly provides *voluntarily* as part of its normal business operations.

¹⁶⁴ *Id.* (“One false-positive risk is that an incumbent LEC’s failure to provide a service with sufficient alacrity might have nothing to do with exclusion.”); Maurer & Scotchmer, *supra* note 51, at 314 & n.186.

¹⁶⁵ *Trinko*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

¹⁶⁶ *See id.* at 410.

¹⁶⁷ *Id.* at 414–15 (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989)).

Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: “No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.”

Id.

2. The absence of a regulatory scheme compelling access to the essential facility and aimed at curbing anti-competitive behavior in that market.
3. A low risk of “false positives.”
4. The ability for the Court to effectively and efficiently enforce any ordered sharing requirements.¹⁶⁸

Since *Trinko* does not invalidate essential facilities precedent, revitalization seems even more probable provided that future plaintiffs can satisfy *Trinko*'s requirements.

III. APPLICATION OF THE ESSENTIAL FACILITIES DOCTRINE TO APPLE AND THE APP STORE

If *Trinko* does not truly represent the end of the essential facilities doctrine, it seems plausible that the doctrine could be revived in future antitrust lawsuits against Apple.

As mentioned previously, the Seventh Circuit has put forth the most expansive and most adopted definition of the doctrine. The general requirements being: “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”¹⁶⁹ Additionally, to assure enforcement by the Supreme Court, *Trinko*'s inherent requirements should also be included in any essential facilities analysis. Below is a brief analysis to demonstrate why Apple, on its face, can satisfy the current essential facilities doctrine requirements, including *Trinko*.

A. Satisfying the Seventh Circuit’s Requirements

1. Control of the Essential Facility/Competitor’s Inability Practically or Reasonably to Duplicate the Essential Facility

The Seventh Circuit’s first two requirements for an essential-facilities claim go hand in hand. A company needs to control an “essential” facility, and competitors must be unable

¹⁶⁸ See generally *Trinko*, 540 U.S. at 409–16.

¹⁶⁹ *MCI Commc’n Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983); see also *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977) (“The essential facility doctrine . . . states that ‘where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.’”); see Pitofsky et al., *supra* note 49, at 447–49 (stating that virtually every lower court adheres to the Seventh Circuit’s definition of essential facilities set forth in the 1983 *MCI* decision).

to practically or reasonably duplicate the essential facilities.¹⁷⁰ A company is said to control an essential facility if it controls a facility that a competitor cannot practically duplicate, and access is crucial to other competitors' ability to compete.¹⁷¹ According to the Court of Appeals for the District of Columbia Circuit, an "essential" facility "need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants."¹⁷² This discussion of feasibility is relatable to *Terminal Railroad's* consideration of the high construction costs that would have followed the construction of alternative railroad connections.¹⁷³

Here, asking independent app developers to create their own app stores appears analogous to asking independent railroad companies to build their own railroad tracks. Requesting developers to duplicate a service such as the Apple App Store would not only be economically infeasible, but also an impracticable means of reaching consumers.¹⁷⁴ Part of the App Store's draw is that it creates a central place for developers to market their products to consumers, similar to *Terminal Railroad's* indication that "all in-coming trains should reach a common focus."¹⁷⁵ Creating more app stores would eliminate a common medium for consumers to browse mobile apps and be an impracticable means of doing business.¹⁷⁶

Furthermore, denying access to the Apple App Store would create a "severe handicap" for independent app developers.¹⁷⁷ Apple does not allow alternative app stores to be used on iOS

¹⁷⁰ *MCI Commc'n Corp.*, 708 F.2d at 1132–33; see *Hecht*, 570 F.2d at 992 ("The essential facility doctrine . . . states that 'where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.'").

¹⁷¹ See *MCI Commc'ns Corp.*, 708 F.2d at 1132.

¹⁷² *Hecht*, 570 F.2d at 992.

¹⁷³ *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 395, 397 (1912).

¹⁷⁴ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 345 (estimating that Apple spends over \$100 million annually to operate the App Store).

¹⁷⁵ *Terminal R.R. Ass'n*, 224 U.S. at 403.

[N]ot only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with the many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden.

Id.

¹⁷⁶ See Kotapati et al., *supra* note 5, at 18 ("In the mobile-app market, absurdity and inefficiency would result—requiring developers to create their own app platform would hinder users' ability to discover apps and impede developers from entering in the first place, given the crushing entry costs they would bear."). See *Hecht*, 570 F.2d at 992; see also INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 341.

¹⁷⁷ See *Hecht*, 570 F.2d at 992; see also INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 341.

devices, and competing mobile app stores on other smartphones, such as Android, are not available to iOS users.¹⁷⁸ So, if Apple's rivals are denied App Store access or forced to pay commissions, independent app developers will either be completely excluded from forty-five percent of the United States smartphone market, or placed at a significant competitive disadvantage.¹⁷⁹

On this basis, it appears likely that Apple controls an "essential" facility given that its competitors cannot practically duplicate their App Store. Additionally, denying App Store access or requiring commissions imposes a "severe handicap" on Apple's rivals.¹⁸⁰

2. Denial of the Use of the Essential Facility to a Competitor

Refusing to allow competitors such as Epic Games and Steam onto the Apple App Store plainly satisfies the Seventh Circuit's denial requirement. Whether a thirty percent commission on competing apps' IAP revenue constitutes a "denial" is much more involved.

According to the Fourth Circuit, a complete denial of access to an essential facility is not required.¹⁸¹ Instead, only a denial of "reasonable" access is needed to find essential facilities liability.¹⁸² Seemingly inspired by *Terminal Railroad*, courts have interpreted "reasonable access" to mean access on "fair and reasonable terms that do not disadvantage" competitors.¹⁸³ So, to determine whether Apple's competitors have been denied access through Apple's thirty percent commission on in-app purchasing, we must look to the example set forth by *Terminal Railroad*.¹⁸⁴

Courts frequently quote *Terminal Railroad*, holding that access to an essential facility must be afforded "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be."¹⁸⁵ In *Terminal Railroad*, the

¹⁷⁸ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 341.

¹⁷⁹ See *id.* at 332.

¹⁸⁰ Kotapati et al., *supra* note 5, at 18.

¹⁸¹ See *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544–45 (4th Cir. 1991) (interpreting the third element of the essential facilities doctrine under the Seventh Circuit's definition to include a reasonable standard of access factor).

¹⁸² See *id.*

¹⁸³ *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1352–53 (D.D.C. 1981).

It may be helpful at the outset to state the applicable legal standard. Any company which controls an "essential facility" or a "strategic bottleneck" in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them.

Id.

¹⁸⁴ *Id.* at 1353 (quoting *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912)).

¹⁸⁵ *Terminal R.R. Ass'n*, 224 U.S. at 411.

Court created an “equal plane” amongst competitors by granting Terminal Company members and non-members the same terms of railroad connection access.¹⁸⁶ An “equal plane” entailed abolishing the arbitrary hauling charges imposed on non-Terminal Company members because once free of such charges, independent railroads were better able to compete with Terminal Company members.¹⁸⁷

With respect to Apple, imposing a thirty percent commission on its competitors’ IAP revenue would seem to make it much more difficult for developers to compete with Apple’s rival apps. Given that compliance with IAP commissions is required to remain on the App Store, it appears that Apple’s competitors are not afforded access on “fair and reasonable terms that do not disadvantage them.”¹⁸⁸ Therefore, charging such commissions could constitute an unreasonable denial of access to an essential facility.

3. Feasibly of Providing Access

Finally, as evidenced by its current operations, it is certainly feasible for Apple to allow all apps onto its marketplace. While Apple can argue that it cannot financially operate the App Store without IAP commissions, Apple would only be prohibited from collecting IAP commissions from its competitors. Additionally, granting competitors access does not mean eliminating all App Store-related charges. In *Terminal Railroad*, the Court required terms of access placing “every such company upon as nearly an equal plane as may be with respect to *expenses* and charges as that occupied by the proprietary companies.”¹⁸⁹ The essential facilities doctrine’s aim is to create equal or reasonable access amongst competitors, so if Apple incurs expenses operating the App Store, such expenses could be shared amongst competing app developers.

Also, Apple has recently showed its ability to adjust the App Store Guidelines and IAP commission requirements by reducing IAP commission to fifteen percent for certain developers and eliminating the commission for others.¹⁹⁰

¹⁸⁶ *See id.*

¹⁸⁷ *See id.* at 410–11.

¹⁸⁸ *Am. Tel. & Tel. Co.*, 524 F. Supp. at 1352–53.

It may be helpful at the outset to state the applicable legal standard. Any company which controls an “essential facility” or a “strategic bottleneck” in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them.

Id.

¹⁸⁹ *Terminal R.R. Ass’n*, 224 U.S. at 411 (emphasis added).

¹⁹⁰ Kif Leswing, *Apple Will Cut App Store Commissions by Half to 15% for Small App Makers*, CNBC (Nov. 18, 2020, 11:57 AM), <http://www.cnbc.com/2020/11/18/apple-will-cut-app-store-fees-by-half-to-15percent-for-small-developers.html> [<http://perma.cc/8XKN-4VTG>] (reducing IAP commission for “small developers”); Mark Gurman & Vlad Savov,

B. Satisfying *Trinko*'s Requirements

To ensure enforcement at the highest level, any essential facilities doctrine analysis must consider *Trinko*'s dicta. The Court believed several factors made the essential facilities doctrine inappropriate in *Trinko*. As stated above, under *Trinko*, the essential facilities doctrine could only be appropriate if: 1) the defendant refuses to provide a service that it publicly provides *voluntarily* as part of its normal business operations; 2) there is no regulatory scheme compelling access to the essential facility and aimed at curbing anticompetitive behavior in that market; 3) there is a low risk of "false positives"; and 4) the Court can effectively and efficiently enforce any ordered sharing requirements.¹⁹¹

The first factor relates to the business operations of the would-be defendant. In *Trinko*, the Court believed that the essential facilities doctrine was not appropriate in this instance because Verizon had not ceased a previously voluntarily business operation.¹⁹² The first factor relates to the business operations of the would-be defendant. Before the Act's obligation, Verizon's standard business operations did not include sharing its exchange network with competitors. So, Verizon's later regulatory lapses could not be construed to convey anticompetitive intent.¹⁹³

Apple's regular business operations include operating the App Store, so its motivation in any later refusals to deal can be more easily interpreted. In fact, the company does not hide its motivations for denying App Store access to certain competitors. Apple has even stated that some denials are "business" motivated. For example, with the launch of *Apple Arcade* approaching, Apple denied App Store access to those companies that would theoretically compete with *Apple Arcade*, such as Steam Link.¹⁹⁴ Given that Apple's current business operations and subsequent App Store denials can convey a lot more about its "dreams of monopoly," it seems that an antitrust lawsuit against the company would survive this part of the *Trinko* analysis.¹⁹⁵

Apple to Let Media Apps Avoid 30% Fee After Global Scrutiny, BLOOMBERG (Sept. 2, 2021, 7:03 AM), <http://www.bloomberg.com/news/articles/2021-09-02/apple-to-let-app-makers-point-users-to-web-to-pay-for-services#:~:text=Apple's%20historic%20resoluteness%20about%20maintaining,to%20%241%20million%20a%20year> [http://perma.cc/897V-PZBT] (allowing media apps to avoid thirty percent commission entirely).

¹⁹¹ See *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 409–16 (2004).

¹⁹² See *id.* at 409.

¹⁹³ See *id.*

¹⁹⁴ See Statt, *supra* note 25.

¹⁹⁵ *Trinko*, 540 U.S. at 409 ("Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.").

With regard to IAP commissions, Apple's recent conduct of charging different commission rates for certain developers would seem to create an argument that the company's selectiveness could constitute a refusal to provide a service that it normally provides: App Store access at a lowered commission rate.¹⁹⁶

Second, unlike *Trinko*, where Verizon was subject to government regulation and compelled to share its network exchange, the App Store, and "big tech" in general, remain largely unregulated.¹⁹⁷ Without a regulatory structure to compel App Store access and curb anticompetitive behavior, competitors can only ask the Court to perform "antitrust function."

The third analysis factor focused on the difficulty of defining alleged exclusionary conduct. In *Trinko*, the complaints centered around Verizon's alleged lack of alacrity in dealing, as opposed to an outright refusal to deal.¹⁹⁸ Certainly, it is easier for the Court to find exclusionary conduct when a defendant completely refuses to deal, as the defendant's motives are more apparent, rather than when the defendant lacks enthusiasm in dealing.

With Apple, it is not the quality of App Store services questioned, but rather the terms and policies related to App Store access. As touched upon in the above paragraphs, Apple's past denials of App Store access have been inspired by its motivation to have its own apps succeed.¹⁹⁹ If the courts were to focus only on the instances in which Apple denies a competitor access to the App Store or significantly inhibits a competitor's ability to compete through inherently disadvantageous App Store Guidelines, the risk of false condemnations should become considerably lower.

Finally, the Court must be able to effectively and efficiently enforce any ordered sharing requirements. Effective enforcement in *Trinko* would have required detailed and continual supervision on a day-to-day basis, and therefore, sharing requirements could not be enforced.²⁰⁰ It is far easier for

¹⁹⁶ See sources cited *supra* note 190.

¹⁹⁷ See Savitz, *supra* note 19; see also *Trinko*, 540 U.S. at 404–05.

¹⁹⁸ *Trinko*, 540 U.S. at 404–05.

¹⁹⁹ See Statt, *supra* note 25.

²⁰⁰ *Trinko*, 540 U.S. 398, 414–15 (quoting Areeda, *supra* note 167, at 853).

Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency."

Id.

the Court to effectively enforce sharing requirements when there has been an outright denial of access, as sharing only requires a competitor to resume previous dealings. For example, in *Otter Tail*, the Court was able to order Otter Tail to resume distributing wholesale power to the municipalities.²⁰¹

The Court should have no issue ordering the reinstatement of those apps that have been completely denied access to the App Store on a discriminatory basis. An order of this nature would be similar to that in *Lorain Journal*, where the Court prohibited the newspaper from refusing to publish any advertisements on a discriminatory basis.²⁰² When the App Store policies themselves are at issue, effective enforcement becomes more complex. The Court would potentially be asked to answer many questions regarding what the App Store policies should be. For example, in dealing with the IAP commission system, Apple may ask the Court what IAP commission percentage would be acceptable. In facing these questions, the Court should fall back on the principles of *Terminal Railroad*. In *Terminal Railroad*, the Court's order did not seek to set the price for "hauling charges," instead, it intended to put all competitors on an "equal plane."²⁰³

Here, an "equal plane" could be created by comparing Apple's competitors' App Store access terms with those terms Apple provides for itself and minimizing the differences in access for Apple apps and non-Apple apps. The Court could effectively enforce any ordered sharing requirements by removing any App Store policies that put Apple at an inherent advantage over its competitors. Whether that includes a removal or a reduction in the current IAP Commission, could be decided amongst the developers and Apple themselves.

On this basis, the App Store seems to be able to quell all of *Trinko's* concerns. Given that the Apple App Store could survive both a Seventh Circuit and a *Trinko* analysis, it seems that it is just a matter of time until a successful essential facilities claim is asserted against Apple.

CONCLUSION

The essential facilities doctrine likely remains a viable tool within antitrust law. While *Trinko's* essential facilities dicta may deter potential plaintiffs from asserting it, *Trinko* should only be read to limit the circumstances in which it can be applied.

²⁰¹ See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 366, 382 (1973).

²⁰² See *Lorain J. Co. v. United States*, 342 U.S. 143, 150, 157 (1951).

²⁰³ See *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 408, 411 (1912).

At this point in time, the Apple App Store appears to fit the mold of an essential facilities doctrine case. So, whether it be Congress or subsequent Supreme Court rulings, future antitrust proceedings could likely see a successful essential facilities doctrine case made against Apple.

**A Crack in the Armor: The Ninth Circuit’s
Improper Limitation on the Scope of Section
230 Immunity in *Enigma Software Group
USA, LLC v. Malwarebytes, Inc.***

*Madeleine Dobson**

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INTRODUCTION

Section 230 of the Communications Decency Act has been called the twenty-six words that created the internet.¹ In short, Section 230 provides a safe harbor to website providers for moderating² objectionable content on their sites, allowing them to avoid civil liability for much of what occurs online.³ It has been invoked by a wide-range of website providers like Twitter,⁴ Facebook,⁵ Tumblr,⁶ Myspace,⁷ YouTube,⁸ Airbnb,⁹ eBay,¹⁰ Yelp,¹¹ and Craigslist¹² to immunize against claims brought by internet users, including

¹ See JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 1–2 (2019).

² Moderation refers to both a website provider’s decision to *remove* content from their site, and well as its decision to leave the content up on its website, as claims such as defamation can be brought against it by allowing the information to remain online. See VALERIE C. BRANNON & ERIC N. HOLMES, *CONG. RSCH. SERV.*, R46751, SECTION 230: AN OVERVIEW 46 (2002) (explaining that Section 230 immunizes providers’ decisions “both to host and *not* to host user content . . .”).

³ See 47 U.S.C. § 230(c).

⁴ See *generally* *Murphy v. Twitter, Inc.*, 274 Cal. Rptr. 3d 360, 363, 369 (Cal. Ct. App. 2021) (invoking Section 230 successfully against claims for breach of contract, promissory estoppel, and violation of California unfair competition law).

⁵ See *generally* *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2d Cir. 2019) (relying on Section 230 to avoid civil liability for federal anti-terrorism claims).

⁶ See *generally* *Poole v. Tumblr, Inc.*, 404 F. Supp. 3d 637, 639 (D. Conn. 2019) (utilizing Section 230 immunity to dismiss common law claims of invasion of privacy and negligent infliction of emotional distress).

⁷ See *generally* *Riggs v. MySpace, Inc.*, 444 F. App’x 986, 987 (9th Cir. 2011) (relying on Section 230 to defend claims of negligence and gross negligence arising from Myspace’s decisions to delete user profiles).

⁸ See *generally* *Prager Univ. v. Google LLC*, No. 19-340667, 2019 WL 8640569, at *12 (Cal. Super. Ct. Nov. 19, 2019) (claiming Section 230 based on YouTube’s content restrictions).

⁹ See *generally* *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1099–1100 (C.D. Cal. 2017) (invoking Section 230 against claims related to Airbnb rentals).

¹⁰ See *generally* *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 706 (Cal. Ct. App. 2002) (using Section 230 to immunize against claims of unfair business practices, and a California memorabilia law).

¹¹ See *generally* *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1265–66 (9th Cir. 2016) (explaining that plaintiff’s “creative” pleadings trying to circumvent Section 230 were futile and awarding immunity to Yelp).

¹² See *generally* *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 965, 968 (N.D. Ill. 2009) (extending immunity to Craigslist despite “adult services” advertisements being left on the site).

defamation,¹³ breach of contract,¹⁴ misappropriation of the right of publicity,¹⁵ and even products liability.¹⁶

Historically, courts have construed Section 230 broadly in favor of a wide scope of immunity, reasoning that website providers may have an infinite number of users constantly generating large volumes of online content, making it difficult to moderate online material.¹⁷

But Section 230's expansive scope has frustrated presidents, members of Congress, and Supreme Court Justices, alike. Specifically, President Biden and former President Trump have each called for Section 230's repeal, indicating that both sides of the aisle share concerns about "Big Tech's"¹⁸ inordinate power over the internet.¹⁹ Further, there were twenty-six bills introduced during the last Congress involving Section 230, some of which sought to repeal it completely while others sought to narrow its scope.²⁰

¹³ See, e.g., *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398 (6th Cir. 2014). In fact, the majority of Section 230 decisions involve defamation claims. Elizabeth Banker of the Internet Association estimated that forty-three percent of Section 230 decisions involve claims of defamation. The next largest category of claims was related to the First Amendment, representing roughly ten percent of Section 230 decisions. See Elizabeth Banker, *A Review of Section 230's Meaning & Application Based on More Than 500 Cases*, INTERNET ASS'N 2, [http://perma.cc/86FS-WD2W](http://internetassociation.org/wp-content/uploads/2020/07/IA_Review-Of-Section-230.pdf) (last visited Mar. 20, 2022).

¹⁴ See, e.g., *Murphy v. Twitter, Inc.*, 274 Cal. Rptr. 3d 360 (Cal. Ct. App. 2021). In this case, the breach of contract claim referred to the breach of the user agreement between the user and the operator, Twitter. See *id.*

¹⁵ See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

¹⁶ *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 604 (Cal. Ct. App. 2020).

¹⁷ See *Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18–19 (1st Cir. 2016); see also discussion *infra* Section I.D.

¹⁸ "Big Tech" refers to the largest and most dominant technology companies, such as Google, Amazon, Facebook, Apple, and Microsoft. See Shannon Flynn, *What Is Big Tech and Why Is the Government Trying to Break It Up?*, MUO (Aug. 21, 2021), <http://www.makeuseof.com/what-is-big-tech-and-why-is-the-government-trying-to-break-it-up/> [<http://perma.cc/YT52-5QR4>].

¹⁹ See Bryan Pietsch, *Trump and Biden Both Want to Revoke Section 230, But For Different Reasons*, BUS. INSIDER (May 30, 2020, 4:15 AM), <http://www.businessinsider.com/trump-biden-want-to-revoke-section-230-for-different-reasons-2020-5> [<http://perma.cc/ES5Q-UWJQ>]; see also Shira Ovide, *What's Behind the Fight Over Section 230*, N.Y. TIMES (Mar. 25, 2021), <http://www.nytimes.com/2021/03/25/technology/section-230-explainer.html> [<http://perma.cc/Y6YE-9DET>] ("Republicans and Democrats are asking whether the law gives tech companies either too much power or too little responsibility for what happens under their watch."). During his campaign, President Biden expressed the need for internet reform, indicating that Section 230 should be revoked "immediately." The Editorial Board, *Joe Biden*, N.Y. TIMES (Jan. 17, 2020), <http://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html?smid=nytcore-ios-share> [<http://perma.cc/F6HA-LEC9>]. However, he has yet to make internet reform a legislative priority. See Eric Goldman, *Tech Policy in President Biden's First 100 Days*, 2021 U. ILL. L. REV. ONLINE 176, 176 (2021).

²⁰ VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 30 (2002).

Section 230 has also caught the attention of the United States Supreme Court, which has yet to consider a case under this provision.²¹ But, as discussed below, at least one justice believes this is an area ripe for judicial intervention if Congress does not act.²²

Since its enactment in 1996, there has been extensive exploration of this safe harbor by the legal and academic community, including Section 230's implications on the Fair Housing Act,²³ its interaction with the First Amendment,²⁴ and, most recently, its connection to "fake news" and the spread of disinformation.²⁵ Across subject areas, scholars have consistently questioned the broad scope of liability extended to website providers by Section 230, calling it "licensed anarchy,"²⁶ "immoral,"²⁷ and a "shield for scoundrels,"²⁸ and arguing that it has led to a "lawless internet"²⁹ by creating "monstrous"³⁰ platforms.³¹

In other words, it has become increasingly apparent that this statute, enacted two years before Google had even incorporated, is largely inadequate to address the perils of the modern-day

²¹ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 13 (2020) ("[I]n the 24 years since [Section 230's enactment], we have never interpreted this provision. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world.")

²² *See Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1088 (2022) ("Assuming Congress does not step in to clarify § 230's scope, we should do so in an appropriate case."); *see also* discussion *infra* Section III.C.

²³ *See, e.g.*, Jennifer C. Chang, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969 (2002).

²⁴ *See, e.g.*, Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019); *see also* Haley Griffin, *Laws in Conversation: What the First Amendment Can Teach Us About Section 230*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 473 (2021).

²⁵ *See, e.g.*, Erica O'Connell, *Navigating the Internet's Information Cesspool, Fake News and What to Do About It*, 53 U. PAC. L. REV. 251 (2022).

²⁶ Thomas D. Huycke, *Licensed Anarchy: Anything Goes on the Internet? Revisiting the Boundaries of Section 230 Protection*, 111 W. VA. L. REV. 581 (2009).

²⁷ Ali Grace Ziegrowsky, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307 (2009).

²⁸ David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 373 (2010).

²⁹ Colby Ferris, *Communication Indecency: Why the Communications Decency Act, and the Judicial Interpretation of It, Has Led to A Lawless Internet in the Area of Defamation*, 14 BARRY L. REV. 123 (2010).

³⁰ Natalie Annette Pagano, *The Indecency of the Communications Decency Act § 230: Unjust Immunity for Monstrous Social Media Platforms*, 39 PACE L. REV. 511 (2018).

³¹ *See* Nicole Phe, *Social Media Terror: Reevaluating Intermediary Liability Under the Communications Decency Act*, 51 SUFFOLK U. L. REV. 99, 116 (2018) (explaining that the overly broad construction of § 230 has led to an "overexpansion of immunity and resulted in near absolute invulnerability for [Internet Service Providers].").

internet.³² As the Second Circuit has observed, “[o]ver the past two decades ‘the Internet has outgrown its swaddling clothes,’ and it is fair to ask whether the rules that governed its infancy should still oversee its adulthood.”³³

Instead of allowing Congress to properly reform this antiquated statute, a recent decision from the Ninth Circuit significantly limited the scope of immunity afforded under Section 230.³⁴ The case, *Enigma Software Group USA, LLC v. Malwarebytes, Inc.* (“*Enigma*”), is one of the rare decisions where a court denied immunity to an internet provider under Section 230.³⁵ By emphasizing non-textual arguments involving the policy and purpose of the statute, the Ninth Circuit ignored the plain language of the statute, imposed an implied good faith requirement, and in essence crafted a new exception from Section 230, initiating the “first chip in the immunity armor for makers of malware software.”³⁶

This Note examines the Ninth Circuit’s unusual ruling and proceeds as follows. Part I provides a statutory overview to briefly explain the statute’s history and legislative intent, the language of the provision, and Congress’ express policy goals. Part I also addresses the foundational case of *Zango, Inc. v. Kaspersky Lab, Inc.*,³⁷ in which a prescient concurring opinion from the Ninth Circuit set the stage for the Ninth Circuit’s policy considerations in the *Enigma* case. Part II discusses the Ninth Circuit’s decision in *Enigma*, including the district court’s initial grant of immunity and the Ninth Circuit’s subsequent reversal. Part III describes the regressive results stemming from the Ninth Circuit’s decision in *Enigma*, explaining that these implications defeat the very reason that the statute was enacted. Part III also identifies a split that has been created between the Ninth Circuit and a district court within the Fifth Circuit, as well as a clear split between the federal and state courts of California. Part IV examines the ways in which the Ninth Circuit violated the principles of statutory construction, arguing that the Ninth Circuit improperly disregarded the

³² Andrew P. Bolson, *Flawed but Fixable: Section 230 of the Communications Decency Act at 20*, 42 RUTGERS COMPUT. & TECH. L.J. 1, 17 (2016).

³³ *Force v. Facebook, Inc.*, 934 F.3d 53, 88 (2d Cir. 2019) (quoting *Fair Housing v. Roomates.com*, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008)).

³⁴ See Gregory P. Szewczyk et al., *Weakened Privacy and Information Security Tools—the Unintended Consequence of Attacks on Section 230 of the CDA*, CYBERADVISER (Oct. 21, 2020), <http://www.cyberadviserblog.com/2020/10/weakened-privacy-and-information-security-tools-the-unintended-consequence-of-attacks-on-section-230-of-the-cda/> [<http://perma.cc/37BG-NK43>].

³⁵ 938 F.3d 1026 (9th Cir. 2019).

³⁶ See Szewczyk et al., *supra* note 34.

³⁷ 568 F.3d 1169 (9th Cir. 2009).

statute's plain language in favor of policy considerations, added new statutory requirements despite Congress' clear omission, and created additional carve-outs from immunity. Part IV also looks to prior decisions that served as the impetus behind new statutory exceptions and sets forth how the Ninth Circuit should have properly proceeded. Finally, this Note concludes that *Enigma* decision defeats the very reason that the statute was enacted.

I. THE HISTORY, PLAIN LANGUAGE, AND PURPOSE OF SECTION 230

A. A Brief History of Section 230 of the Communications Decency Act

The Communications Decency Act was primarily enacted to protect children from sexually explicit online content and to make the internet a more family-friendly space.³⁸ But it was also enacted as a response to cases that held website providers liable as publishers³⁹ for defamatory comments posted by users on the site.⁴⁰ Specifically, it overruled *Stratton Oakmont, Inc. v. Prodigy Services Co.* (“*Stratton Oakmont*”), where a website provider was held liable for defamatory comments posted by anonymous users on its messaging boards.⁴¹

Lawmakers worried that the *Stratton Oakmont* decision would have a chilling effect on content moderation, recognizing that providers would likely refrain from moderating online content at all for fear that they would be treated as a publisher.⁴² Indeed, “*Stratton Oakmont’s* legal conclusion created a Hobson’s choice for platforms’ content moderation: either moderate content and face liability for all posts on your bulletin board, or don’t moderate and have posts filled with obscenity.”⁴³ Without any

³⁸ See *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003); see also *Force*, 934 F.3d at 63.

³⁹ By holding a website provider liable as a “publisher,” it means that they receive the same treatment as the original content creator (i.e., the website user). See *Ardia*, *supra* note 28, at 397.

⁴⁰ See, e.g., Yaffa A. Meeran, *As Justice So Requires: Making the Case for A Limited Reading of § 230 of the Communications Decency Act*, 86 GEO. WASH. L. REV. 257, 282 (2018); *Batzel*, 333 F.3d at 1026.

⁴¹ See generally *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (holding that because the website provider was exercising some control over the bulletin boards, it should be treated as the publisher of the content and treated as the primary content creator); cf. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (refusing to hold a website provider liable for defamation based on a third-party user’s comments on the site unless the website provider knew or had reason to know that the content was defamatory).

⁴² See *Bolson*, *supra* note 32, at 5–6; see also *id.* at 7 (providing the statement by Representative Christopher Cox stating that website providers “are going to face higher . . . liability because [the providers] tried to exercise some control over offensive material”).

⁴³ Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 142 (2021).

moderation, the internet would become a dangerous environment for users, especially children.⁴⁴

Accordingly, Representatives Christopher Cox and Ron Wyden introduced the “Protection for Private Blocking and Screening of Offensive Material” bill, which was eventually codified as Section 230 in 1996.⁴⁵ Representative Cox explained that the legislation was intended to strike a balance between regulating indecent online material, while still allowing the Internet to develop without crippling regulation.⁴⁶ As one scholar has noted, the “twin goals” for Section 230 were to “foster[] open forums for online speech, while allowing users—and not courts—to dictate any restrictions on that speech.”⁴⁷

To achieve this balance, Section 230 incentivizes website providers to self-regulate indecent material on their sites by providing them with a safe harbor from civil liability based on that moderation, with certain enumerated exceptions.⁴⁸ As the First Circuit has explained, “Congress sought to encourage websites to make efforts to screen content without fear of liability.”⁴⁹

B. The Good Samaritan Provision

Section 230, which has been referred to as the “Good Samaritan” provision, contains two distinct provisions that shield internet providers from civil liability: section 230(c)(1) and section 230(c)(2).⁵⁰ Though section 230(c)(1) has been litigated and invoked much more frequently than section 230(c)(2), section 230(c)(2) is arguably the subject of much more scholarship and debate.⁵¹ section 230(c)(2) also appears to be a greater source of

⁴⁴ See Bolson, *supra* note 32, at 6.

⁴⁵ See *id.* at 5.

⁴⁶ See *id.* at 8; see also Meeran, *supra* note 40, at 266.

⁴⁷ See KOSSEFF, *supra* note 1, at 207.

⁴⁸ Congress lists five statutory exceptions where providers are not shielded from liability by Section 230: (1) criminal law, (2) intellectual property law, (3) state law, (4) communications privacy law, and (5) sex trafficking law. 47 U.S.C. § 230(e).

⁴⁹ See *Doe v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016).

⁵⁰ 47 U.S.C. § 230.

⁵¹ See Candeub, *supra* note 43, at 146 (“While section 230(c)(2) dominated the legislative discussion, section 230(c)(1) has dominated judicial decisions.”); see also Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 660 (2012) [hereinafter *Online User Account Termination*]; see also Banker, *supra* note 13, at 3 (“Section 230 protects providers who engage in content moderation, but typically through application of subsection (c)(1) rather than the good faith provision, (c)(2).”); see also Ardia, *supra* note 28, at 412 n.194 (listing cases based on 47 U.S.C. § 230(c)(2)).

The vast majority of Section 230 caselaw involves 230(c)(1), which has become the foundation of the modern Internet. In contrast, Section 230(c)(2) gets a lot less attention, for several reasons. First, content removal generally produces less litigation than continued content publication. Second, liability for content removal often can be handled through a variety of risk management techniques, including contract provisions. Third, Section 230(c)(2)(A) has a

confusion for courts, as some have collapsed the distinction between section 230(c)(2)(A) and section 230(c)(2)(B) entirely.⁵²

In short, section 230(c)(1) and section 230(c)(2) confer broad protection to companies whether they decide to keep the “objectionable” information on their site or if they decide to remove it. The immunity contained in Section 230 appears in subsection (c) as follows:

(c) Protection for “Good Samaritan” blocking and screening of offensive material.

(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken *in good faith* to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).⁵³

First, section 230(c)(1) provides that “no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided,” meaning that website providers are immune from liability and will not be treated as publishers⁵⁴ if they choose to keep user-created indecent material

“good faith” requirement that is riskier and more expensive to litigate than Section 230(c)(1), which has no parallel scienter requirement . . .

Because of this, Section 230(c)(2) has largely receded in importance. However, Section 230(c)(2)(B) still provides foundational protection in one critical context: anti-threat software.

Eric Goldman, *Terrible Ninth Circuit 230(c)(2) Ruling Will Make the Internet More Dangerous—Enigma v. Malwarebytes*, TECH. & MKTG. L. BLOG (Sept. 19, 2019) [hereinafter *Terrible Ninth Circuit Ruling*], <http://blog.ericgoldman.org/archives/2019/09/terrible-ninth-circuit-230c2-ruling-will-make-the-internet-more-dangerous-enigma-v-malwarebytes.htm> [<http://perma.cc/4RHY-H6PC>].

⁵² See BRANNON & HOLMES, *supra* note 2, at 8.

⁵³ 47 U.S.C. § 230 (emphasis added).

⁵⁴ 47 U.S.C. § 230(c)(1) addresses the publisher vs. distributor distinction that was at issue for website providers in the *Stratton Oakmont* decision. While a distributor enjoys the presumption of non-liability, a publisher is presumed to have knowledge of the content and is essentially treated the same as the primary content creator under the law. See Ardia, *supra* note 28, at 397–98.

on their websites, subject to several statutory exclusions.⁵⁵ A “classic example” of (c)(1) immunity is when:

A Facebook user posts a defamatory statement, and the defamed plaintiff sues Facebook on the theory that, by allowing the post to stay up on its site, Facebook acted as a publisher of the post. The plaintiff’s cause of action would include an element that treats the platform as “a publisher or speaker” of the user’s words. Section 230(c)(1) would bar the action against Facebook, leaving the only action available to the plaintiff to be one against the user.⁵⁶

Second, section 230(c)(2) protects website providers that choose to *restrict* access to objectionable information on their sites.⁵⁷ Within section 230(c)(2), there is a further distinction between subsections 230(c)(2)(A) and 230(c)(2)(B).⁵⁸

Section 230(c)(2)(A) is implicated when a website provider *unilaterally* restricts access to material that the provider subjectively considers to be “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”⁵⁹ For example, this paragraph is implicated when Facebook decides to remove something from the Facebook site that it deems to be objectionable.⁶⁰

On the other hand, section 230(c)(2)(B) is implicated when the internet provider merely provides users with the “technical means” to restrict access to online material (i.e., a filtering tool), and the *user* rather than the *provider* elects to filter out

⁵⁵ See 47 U.S.C. § 203(c)(1). There has been some confusion regarding the scope of subsection (c)(1) and whether it applies to content that is kept up on a website as well as content that is removed from a website. As Valerie C. Brannon and Eric N. Holmes recently explained:

One conception of these two provisions is that Section 230(c)(1) applies to claims for content that is “left up,” while Section 230(c)(2) applies to claims for content that is “taken down.” In practice, however, courts have also applied Section 230(c)(1) to “take down” claims, and courts sometimes collapse Section 230’s two provisions into a single liability shield or do not distinguish between the two provisions.

BRANNON & HOLMES, *supra* note 2, at 8. However, reading subsection (c)(1) as immunizing both content that is left up and content that is taken down would render subsection (c)(2) superfluous. See Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL’Y 863, 869–70 (2010); see also Candeub, *supra* note 43, at 151 (explaining that reading Section 230(c)(1) as protecting decisions to “take down” content essentially reads subsection (c)(2) out of the statute). A recent statement by Justice Thomas seems to clarify the meaning of (c)(1) as he wrote, “[i]n short ... if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by §230(c)(1); and if it takes down certain third-party content in good faith, it is protected by §230(c)(2)(A).” See *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020).

⁵⁶ See Candeub, *supra* note 43, at 147.

⁵⁷ See 47 U.S.C. § 203(c)(2).

⁵⁸ See *id.*

⁵⁹ See 47 U.S.C. § 203(c)(2)(A).

⁶⁰ See, e.g., *Dipp-Paz v. Facebook*, No. 18-CV-9037(LLS), 2019 WL 3205842 (S.D.N.Y. July 12, 2019).

objectionable material using the provider's technical means (e.g., YouTube gives users a filtering tool, and the user then elects to block out content by using the filtering tool).⁶¹

Notably, the language in section 230(c)(2)(A) plainly imposes a good faith limitation on the internet provider, requiring that any action taken by the website provider to remove objectionable content be taken "in good faith."⁶² However, section 230(c)(2)(B) omits the good faith language, seemingly imposing no such requirement when website providers are merely providing users with a filtering tool to block content.⁶³

In terms of policy, Congress' omission of a good faith requirement in section 230(c)(2)(B) makes good sense. Under section 230(c)(2)(A) immunity, providers are the sole decision-makers in whether to restrict user content from their website. Requiring them to act in good faith in their determination of what content qualifies as "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" ensures that content is not restricted for improper reasons.⁶⁴

However, section 230(c)(2)(B) is implicated where the *users* are electing to filter certain content, and the website providers are merely providing the filtering technology. As explained by the Internet Association:⁶⁵

[S]ubsection (B) only applies where service providers put blocking tools in the hands of users, who must independently and affirmatively decide to use those tools . . . In this scenario, Congress logically concluded it was unnecessary to include a good faith requirement or to allow Section 230's protection to turn on disputes about a service provider's motives.

⁶¹ See, e.g., Ord. After Hearing, *Prager Univ. v. Google LLC*, No. 19CV340667, 2019 WL 8640569 (Cal. Super Nov. 19, 2019); see also Brief of Internet Association as Amicus Curiae In Support of Petitioner at 3, *Enigma Software Group USA LLC v. Malwarebytes, Inc.*, 592 U.S. 1 (2020) (No. 19-1284) ("IA's members and many other online service providers regularly rely on this immunity in developing and deploying a range of user-empowering tools, including Twitter's 'block' and 'mute' features, YouTube's Restricted Mode, Reddit's user-moderated forums, and Microsoft's Office 365 Advanced Threat Protection.").

⁶² See 47 U.S.C. § 230(c)(2)(A).

⁶³ See 47 U.S.C. § 230(c)(2)(B).

⁶⁴ See Nicholas Conlon, *Freedom to Filter Versus User Control: Limiting the Scope of § 230 (C)(2) Immunity*, 2014 U. ILL. J. L. TECH. & POL'Y 105, 113 (2014) (explaining that when the provider's filtering technology does not exhibit user control, under subsection (c)(2)(A), the statute requires that the provider act in good faith in its belief that its filtering accommodates user preferences).

⁶⁵ The Internet Association was a leading lobbying group for the technology industry, representing large, global internet companies such as Google, Facebook, Yahoo!, Amazon, and others. See *The Unified Voice of the Internet Economy*, INTERNET ASS'N, <http://internetassociation.org/wp-content/uploads/2013/02/Fact-Sheet.pdf> [<http://perma.cc/CH4E-C3H2>].

Here, the user's independent choice operates as a check on the provider's decisions about what material should be filtered or blocked.⁶⁶

Under this subsection, providers rightly bear less responsibility to ensure that filtered content is objectionable because the provider has ceded power to the user and maximized user control.⁶⁷ Thus, Congress' clear distinction between subsections (c)(2)(A) and (c)(2)(B) is a "trade-off between power and responsibility," meaning that when the provider relinquishes filtering power to users, it make little sense that they should face liability predicated on the user's filtering choices.⁶⁸

Yet the Ninth Circuit seems to disagree, becoming the only decision on record to impose an implicit good faith requirement into section 230(c)(2)(B), for reasons that are explored in-depth below.⁶⁹

C. The Statute's Express Policy Goals

In addition to the grant of immunity provided in section 230(c), Congress took the somewhat unusual step of stating policy goals directly in the statute. The five policy goals, which the Ninth Circuit relies on heavily to justify its disregard of the statutory text in *Enigma*, are as follows:

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.⁷⁰

D. The Ninth Circuit's Approach to Immunity

Consistent with these policy goals, courts have traditionally interpreted the provisions of Section 230 broadly to confer wide

⁶⁶ Brief of Internet Association, *supra* note 61, at 21–22.

⁶⁷ See Conlon, *supra* note 64, at 113.

⁶⁸ See *id.*

⁶⁹ See discussion *infra* Section II.C.

⁷⁰ 47 U.S.C. § 230(b)(1)–(5).

immunity to website providers.⁷¹ Indeed, as the First Circuit has noted, there has been “near-universal” agreement that Section 230 “should not be construed grudgingly,” with the Ninth Circuit explaining that close cases should be resolved in favor of immunity.⁷²

Like other courts, the Ninth Circuit has continued to interpret Section 230 expansively.⁷³ However, the Ninth Circuit’s decision in *Zango, Inc. v. Kaspersky Lab, Inc.* (“Zango”),⁷⁴ arguably laid the foundation for the Ninth Circuit’s significant limitation on the scope of liability nearly a decade later in *Enigma*.

In 2009, the Ninth Circuit considered whether providers of Internet security software were entitled to immunity under Section 230.⁷⁵ Zango, Inc. provided internet users with a free catalog of videos, games, music, tools, etc., while Kaspersky Lab, Inc. (“Kaspersky”) provided internet users with security software that flagged certain internet programs as potentially malicious software, known as “malware.”⁷⁶ After Kaspersky designated a program as malware, users would be warned of the harmful designation and were prompted with the option to allow or reject the download of the potentially harmful program.⁷⁷

In this case, Kaspersky classified Zango Inc.’s programs as “potentially harmful” and internet users were warned that these

⁷¹ See Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POLY 863, 867 (2010) (“Courts have, from the beginning, adopted a broad view of Section 230 immunity.”); see also Ryan J.P. Dyer, *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 SEATTLE U. L. REV. 837, 842 (2014) (“[T]he first courts to interpret and apply section 230 went ‘further than was necessary to effectuate the congressional goals’ of the statute’s immunity-granting provision. Although unapparent at first, this over-expansive reading of section 230(c) laid the groundwork for broad applications of immunity by future courts in contexts blatantly incommensurate with the statutes intended scope and effect.”); see also *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019) (“In light of Congress’s objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity.”); see also *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (“The majority of federal circuits have interpreted [Section 230] to establish broad . . . ‘immunity.’”).

⁷² See *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (“[T]here will always be close cases . . . [s]uch close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230.”).

⁷³ See, e.g., *id.*; see also *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1108 (9th Cir. 2007) (stating that the Communications Decency Act provides a “broad grant of immunity”); see also *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (citing to *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), which “joined the consensus developing across other courts of appeals that § 230(c) provides broad immunity”).

⁷⁴ 568 F.3d 1169 (9th Cir. 2009).

⁷⁵ *Id.* at 1170.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1171.

programs contained possible malware.⁷⁸ While Zango, Inc. asserted claims against Kaspersky, Kaspersky invoked section 230(c)(2)(B) as immunization against liability.⁷⁹

Zango was the first time that the Ninth Circuit grappled with immunity under section 230(c)(2)(B) and is still one of the only cases throughout the circuit courts to construe this rarely-invoked subsection with some depth.⁸⁰ The Ninth Circuit focused mainly on the issue of “who” i.e., *who* was entitled to protection under Section 230 and whether immunity extended to a security software provider like Kaspersky.⁸¹ The Ninth Circuit looked to the statute’s plain language and congressional goals to conclude that the statute immunized a provider of internet security software under section 230(c)(2)(B) because they provided users with the tools to filter or screen potential malware-carrying programs, which is plainly protected under the statute.⁸²

But the Ninth Circuit declined to answer questions such as “what,” “why,” and “how,” i.e., *what* type of material may be flagged for users by security software providers, *why* may a security provider flag software, and *how far* does the scope of the immunity extend? Specifically, *Zango* raised the question of what type of material may be flagged when it asked the Ninth Circuit to define the scope of “otherwise objectionable” material.⁸³ On the other side, Kaspersky implored the Ninth Circuit to answer the question of why material may be flagged, arguing that section 230(c)(2)(B) should have an *implicit* good faith requirement that requires software providers invoking immunity under section 230(c)(2)(B) to act in good faith, as is required under section 230(c)(2)(A).⁸⁴

Both of these questions were left largely unanswered by the Ninth Circuit. While the district court in *Zango* plainly concluded that “[b]y its own terms . . . Section 230(c)(2)(B) has no good faith requirement,”⁸⁵ the Ninth Circuit appeared to leave this question open for later determination. Specifically, the Ninth Circuit seemed to agree with the district court that section 230(c)(2)(B) does not include a good faith requirement as written, recognizing

⁷⁸ *Id.*

⁷⁹ *Id.* at 1172 (noting that Zango, Inc. brought claims against Kaspersky for tortious interference with contractual rights or business expectancy, trade libel, and unjust enrichment).

⁸⁰ *Id.* at 1174–75.

⁸¹ *Id.* at 1173.

⁸² *Id.*

⁸³ *Id.* at 1178 n.1.

⁸⁴ *Id.*

⁸⁵ *Zango, Inc. v. Kaspersky Lab, Inc.*, No. C07-0807, 2007 WL 5189857, at *4 (W.D. Wash. Aug. 28, 2007).

that “[f]or present purposes, we note that subparagraph (B) comes with only one constraint: the protection afforded extends only to providers who ‘enable or make available to . . . others’ the technical means to restrict access to material that either the user or the provider deems objectionable.”⁸⁶ But the Ninth Circuit declined to decide whether section 230(c)(2)(B) imposes an implicit good faith requirement, since the parties failed to properly raise the argument.⁸⁷

The concurring opinion by Judge Fisher provided an answer to the above-question of “why” by expressing the need for an implicit good faith requirement read into section 230(c)(2)(B) and warning that without such a requirement, immunity may be extended to conduct that Congress did not intend to immunize.⁸⁸ Judge Fisher also addressed the question of “what,” cautioning that “otherwise objectionable” material is an “unbounded catchall phrase” that may extend immunity to conduct that Congress did not intend to immunize.⁸⁹

Finally, Judge Fisher predicted that “under the generous coverage of § 230(c)(2)(B)’s immunity language, a blocking software provider might abuse that immunity to block content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material ‘otherwise objectionable.’”⁹⁰ Judge Fisher’s prescient concurring opinion proved to be accurate, as a decade later this same court, the Ninth Circuit, considered whether a security software that flagged software for allegedly anti-competitive reasons is entitled to immunity under section 230(c)(2)(B).

II. THE DECISION: ENIGMA SOFTWARE GROUP USA, LLC V. MALWAREBYTES, INC.⁹¹

More than a decade later, the Ninth Circuit heeded its own warning in *Zango*, explaining that “[w]e did not hold . . . that the immunity was limitless.”⁹² Instead, the Ninth Circuit relied heavily on congressional intent to ignore the plain language of

⁸⁶ *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 (9th Cir. 2009) (citing 47 U.S.C. § 230(c)(2)(B)).

⁸⁷ *Id.* (“To the extent that *Zango* in reply raises a different issue—whether subparagraph (B), which has no good faith language, should be construed implicitly to have a good faith component like subparagraph (A) explicitly has—the argument is waived.”).

⁸⁸ *Id.* at 1179 (Fisher, J., concurring).

⁸⁹ *Id.* at 1178 (explaining that extending immunity under the “literal terms” of the statute could pose serious problems in the future).

⁹⁰ *Id.*

⁹¹ 946 F.3d 1040 (9th Cir. 2019).

⁹² *Id.* at 1045.

the statute and become one of the rare decisions that limited the scope of immunity under Section 230.

A. The Facts

Malwarebytes, Inc. (“Malwarebytes”) is a security software firm that provides internet users with a filtering tool against security threats and unwanted programs on their computer.⁹³ Specifically, Malwarebytes identifies potentially harmful internet content and sends users a pop-up alert to warn them of a potential security risk.⁹⁴ This pop-up alert allows users to either block the potentially harmful content or proceed.⁹⁵ Similarly, Enigma Software Group (“Enigma”) also provides security software that enables users to filter out security threats, thus making the two entities direct competitors.⁹⁶

The animus between Malwarebytes and Enigma began in 2016, when Malwarebytes began classifying Enigma’s software products as “threatening or unwanted” programs to its users.⁹⁷ As a result, users with Malwarebytes security software who tried to download Enigma’s security software were alerted about Enigma’s security risk—an alert which Enigma considered inaccurate, since its software was allegedly “legitimate, highly regarded, and [not a] security threat.”⁹⁸ Consequently, Enigma brought four civil liability claims against Malwarebytes.⁹⁹ In response, Malwarebytes moved to dismiss for failure to state a claim, asserting that it was immune from liability under section 230(c)(2)(B).¹⁰⁰

B. The District Court

At the district court level, Malwarebytes contended that its case was “indistinguishable” from *Zango*, and it was thus entitled to immunity under section 230(c)(2)(B).¹⁰¹ Enigma, however, advanced three main arguments to demonstrate that its case was

⁹³ *Id.* at 1047.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*; *Enigma Software Grp. USA LLC v. Malwarebytes Inc.*, No. 17-CV-02915, 2017 WL 5153698, at *1 (N.D. Cal. Nov. 7, 2017).

⁹⁸ *Enigma*, 946 F.3d at 1048.

⁹⁹ *Id.* (internal quotation marks omitted). Enigma alleged three state-law claims and one federal claim. *Id.* The first state-law claim alleged deceptive business practices by Malwarebytes, in violation of New York General Business Law § 349. *Id.* The second and third state-law claims accused Malwarebytes of tortious interference with business and contractual relations, in violation of New York common law. *Id.* The federal claim was for Malwarebytes’s allegedly false descriptions of Enigma’s product under the Lanham Act. *Id.*

¹⁰⁰ *Id.* at 1048.

¹⁰¹ *Enigma*, 2017 WL 5153698, at *2.

distinguishable from the Ninth Circuit's opinion in *Zango*.¹⁰² The district court ultimately agreed with Malwarebytes, holding that it was immunized against Enigma's claims.¹⁰³

First, Enigma advanced an ejusdem generis argument to show that its flagged software did not fall into the statute's enumerated categories of material to which the immunity applies.¹⁰⁴ Specifically, the statute requires that the material be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or *otherwise objectionable*" to afford liability to the provider.¹⁰⁵ Enigma argued that its software did not fall under the statute's broad "otherwise objectionable" catch-all because its security software is "not remotely related to the [other] content categories."¹⁰⁶ However, the court quickly disposed of this argument and clarified that the Ninth Circuit in *Zango* clearly held that immunity under section 230(c)(2)(B) applies to material that *the provider* deems objectionable, including potential malware.¹⁰⁷ Thus, if Malwarebytes subjectively designated Enigma's software as malware, it was properly within the scope of "otherwise objectionable" material.¹⁰⁸ The court emphasized that such an interpretation aligns with the plain language of the statute, reasoning that Malwarebytes, the provider, exercised its discretion to determine that the material was objectionable and was thus entitled to immunity.¹⁰⁹

Second, Enigma argued for an additional hurdle to Malwarebytes's immunity. Specifically, Enigma proposed an *implied* good faith requirement within the statute and contended that Malwarebytes was only entitled to immunity under section 230(c)(2)(B) if it acted in good faith.¹¹⁰ Once again, the court disagreed with Enigma's assertion, stating explicitly that subsection (B) does not contain a good faith requirement, and reasoning that Congress acted intentionally in its inclusion of a good faith requirement in subsection (A), and its exclusion in subsection (B).¹¹¹ In particular, the court focused on subsection (B)'s clear cross-reference to subsection (A) regarding the *types* of material to which immunity applies, but its omission of any

¹⁰² *Id.* at *2–3.

¹⁰³ *Id.* at *3–4.

¹⁰⁴ *Id.* at *2.

¹⁰⁵ 47 U.S.C. § 230(c)(2)(A) (emphasis added).

¹⁰⁶ *Enigma*, 2017 WL 5153698, at *2.

¹⁰⁷ *Id.* at *3.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at *3–4.

¹¹⁰ *Id.* at *3.

¹¹¹ *Id.*

similar reference to the good faith language in subsection (A).¹¹² Because of this clear statutory landscape, the court reasoned that Congress decidedly chose to omit a good faith requirement, concluding that the court need not consider whether Malwarebytes acted in good faith for the purposes of deciding whether it was entitled to immunity.¹¹³

Finally, unrelated to *Zango*, Enigma contended that its Lanham Act claim rendered Malwarebytes ineligible for immunity due to the statute's intellectual property exception.¹¹⁴ But the court again disagreed, explaining that the Lanham Act contains two parts,¹¹⁵ and since Enigma's complaint did not allege an intellectual property claim, Malwarebytes' immunity did not fall within the statute's intellectual property exception.¹¹⁶ After denying Enigma's arguments, the district court held that Malwarebytes was entitled to immunity and granted its motion to dismiss.¹¹⁷

C. The Ninth Circuit: A Reversal

The Ninth Circuit, however, disagreed with the district court's dismissal and reversed and remanded the case.¹¹⁸ Declaring this case an issue of first impression because the two parties were direct competitors, the Ninth Circuit narrowed the provider's discretion in deciding what material is "otherwise objectionable": the Ninth Circuit held that this broad catch-all does not include software that the provider finds objectionable for anticompetitive reasons.¹¹⁹

In its initial overview, the Ninth Circuit agreed with the district court opinion, recognizing that the provision establishes a subjective standard whereby the internet provider subjectively decides what online material is "otherwise objectionable."¹²⁰ Though the Ninth Circuit also initially acknowledged that Section 230 has a "broad recognition of immunity," it then emphasized that the immunity was not limitless.¹²¹

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*; see also 47 U.S.C. § 230(e)(2).

¹¹⁵ *Enigma*, 2017 WL 5153698, at *3 (explaining that the Lanham Act addresses two distinct claims: trademark infringement and unfair competition).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at *4.

¹¹⁸ *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1054 (9th Cir. 2019), *rev'g*, 2017 WL 5153698 (N.D. Cal. Nov. 7, 2017).

¹¹⁹ *Id.* at 1045.

¹²⁰ *Id.* at 1044.

¹²¹ *Id.* at 1045.

After explaining the history and policy goals of Section 230, the Ninth Circuit considered whether section 230(c)(2) immunizes blocking and filtering decisions that are driven by anticompetitive conduct.¹²² The court looked to three district court decisions that previously narrowed the scope of immunity,¹²³ reasoning that these decisions were “persuasive” and noting that other courts interpreting *Zango* provided unlimited immunity which “stretched our opinion . . . too far.”¹²⁴

The court validated its authority to question Malwarebytes’ determination of what content to block by explaining that *Zango* only addressed *who* may be entitled to immunity under Section 230, but did not address *what* type of material may be flagged as objectionable nor *why* it may be flagged under Section 230.¹²⁵ Thus, the court explained that this case properly provided the opportunity to address what limitations exist for a provider’s blocking decisions.¹²⁶

The court clarified the parties’ positions on this first issue as follows. In its appeal, Enigma argued that Section 230 does not provide immunity for blocking decisions driven by anticompetitive reasons.¹²⁷ On the other side, Malwarebytes contended that it was entitled to immunity regardless of any anticompetition motives, due to the broad catch-all of “otherwise objectionable.”¹²⁸ Without addressing the district court’s discussion of the statute’s plain language, the Ninth Circuit rejected Malwarebytes’ position, reasoning that “it appears contrary to the [Communications Decency Act’s] history and purpose.”¹²⁹

Instead, the court concluded that section 230(c)(2) does not immunize blocking and filtering decisions that are driven by anticompetitive motives.¹³⁰ To support its conclusion, the court leaned heavily into policy arguments.¹³¹ Specifically, the court pointed to the congressional goals articulated in the statute, explaining “Congress said it gave providers discretion to identify objectionable content in large part to protect competition, not suppress it . . . Congress wanted to encourage the development of

¹²² *Id.* at 1046–47, 1050.

¹²³ See *Song Fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 881, 884 (N.D. Cal. 2015); see also *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011); see also *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014).

¹²⁴ *Enigma*, 946 F.3d at 1050.

¹²⁵ See *id.* at 1049.

¹²⁶ *Id.* at 1050.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 1050–51.

¹³⁰ *Id.* at 1051.

¹³¹ See *id.* at 1050–51.

filtration technologies, not to enable software developers to drive each other out of business.”¹³²

The court also explained that allowing software providers to block content for anticompetitive reasons would lessen user control and create disincentives to the development of new filtering technology, which would purportedly run counter to Congress’s explicit policy goals within the statute.¹³³ Thus, the court rejected Malwarebytes’ position and refused to extend immunity.¹³⁴

Next, the court considered Enigma’s renewed *eiusdem generis* argument that the phrase “otherwise objectionable” only extends to sexual or violent online material.¹³⁵ The court quickly rejected Enigma’s position, agreeing with the district court that malware could be within the scope of objectionable material, so long as it is not classified as such for anticompetitive reasons.¹³⁶

Lastly, the court considered Enigma’s assertion that its claim for false advertising, technically codified under the Lanham Act, falls within Section 230’s exception to immunity for intellectual property claims.¹³⁷ The court again agreed with the district court, holding that the intellectual property carve-out was inapplicable since, although the Lanham Act deals with intellectual property, not all claims brought under the Lanham Act involve intellectual property.¹³⁸ Accordingly, the court held that false advertising claims do not involve intellectual property rights, and thus, Section 230’s intellectual property exception does not apply to Enigma’s false advertising claims.¹³⁹ For the foregoing reasons, the Ninth Circuit reversed the district court’s dismissal and remanded for further proceedings.¹⁴⁰

The dissent, however, disagreed with the majority’s limitation on the scope of immunity afforded under Section 230.¹⁴¹ While largely agreeing with the majority’s policy arguments, Judge Rawlinson’s dissent reasoned that the majority’s reliance on policy “cannot be squared” with the broad language of the statute.¹⁴²

¹³² *Id.* at 1051.

¹³³ *Id.*; see also 47 U.S.C. § 230(b)(3)–(4).

¹³⁴ *Enigma*, 946 F.3d at 1051.

¹³⁵ *Id.* at 1051–52.

¹³⁶ *Id.* A recent article by Adam Candeub and Eugene Volokh closely examines the meaning of “otherwise objectionable” in this statute, arguing that this catch-all category only refers to material that is regulated by other sections of the Communications Decency Act. See Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(C)(2)*, 1 J. FREE SPEECH L. 175, 180–83 (2021).

¹³⁷ *Enigma*, 946 F.3d at 1052–54.

¹³⁸ *Id.* at 1052–53.

¹³⁹ *Id.* at 1053.

¹⁴⁰ *Id.* at 1054.

¹⁴¹ *Id.* (Rawlinson, J., dissenting).

¹⁴² *Id.*

Moreover, Judge Rawlinson explained that the majority's holding conflicted with the precedent set forth in *Zango*, where the Ninth Circuit previously explained that the broad language of the Act is consistent with the Congressional goals for immunity.¹⁴³ The dissent aptly noted that "[t]he majority's real complaint is not that the district court construed the statute too broadly, but that the statute is written too broadly. However, that defect . . . is one beyond our authority to correct."¹⁴⁴

D. The Supreme Court Denies Certiorari

After the Ninth Circuit's decision, Malwarebytes promptly petitioned for certiorari to the Supreme Court, which had never previously interpreted this provision.¹⁴⁵ Numerous briefs were filed in support of Malwarebytes, including briefs from cybersecurity experts,¹⁴⁶ a non-profit civil liberties organization,¹⁴⁷ and a non-partisan technology think-tank,¹⁴⁸ demonstrating the technology community's concern over this outlier decision. However, the Supreme Court denied certiorari, leaving Malwarebytes to defend the action on remand without the benefit of Section 230 immunity.¹⁴⁹

Interestingly, in support of the Court's decision to deny certiorari, Justice Thomas issued a statement addressing the Ninth Circuit's decision.¹⁵⁰ Justice Thomas—who has historically rejected the consideration of legislative intent, legislative history, and sources outside of the text when engaging in statutory construction—rightly criticized courts that have “departed from the most natural reading of the text” and “filter[ed] their decisions through the policy argument” to grant immunity to internet providers under Section 230.¹⁵¹ Yet the Ninth Circuit, by

¹⁴³ *Id.* at 1054–55.

¹⁴⁴ *Id.* at 1054.

¹⁴⁵ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020).

¹⁴⁶ See Brief of Amici Curiae Cybersecurity Experts in Support of Petitioner at 1, *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (No. 19-1284), 2020 WL 3316789, at *1.

¹⁴⁷ See Brief of Electronic Frontier Foundation As Amicus Curiae in Support of Petitioner at 1, *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (No. 19-1284), 2020 WL 2770278, at *1.

¹⁴⁸ See Brief of Techfreedom as Amicus Curiae in Support of Petitioner at 1–2, *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (No. 19-1284), 2020 WL 3316788, at *1–2.

¹⁴⁹ See *Malwarebytes*, 141 S. Ct. at 13.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* at 16, 18; see also Judge H. Brent McKnight, *The Emerging Contours of Justice Thomas's Textualism*, 12 REGENT U.L. REV. 365, 366 (1999); see also Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring The Supreme Court's Property Rights Jurisprudence to the Constitution*, 10 AM. U.J. GENDER SOC. POL'Y & LAW 351, 351–52 (2002).

Justice Thomas' own admission, relied heavily on policy arguments to deny immunity in this case, doing exactly what Justice Thomas cautioned against in the Court's statement.¹⁵² Thus, by declining to grant certiorari, Justice Thomas and the Supreme Court allowed policy arguments to prevail over the statutory text.¹⁵³

E. The Battle Continues: A Return to the District Court and Ninth Circuit

After the Supreme Court denied certiorari, the case was remanded to the United States District Court for the Northern District of California, where Malwarebytes was ultimately granted a motion for dismissal.¹⁵⁴ Facing the same four claims as in Enigma's earlier complaint,¹⁵⁵ the district court found that Enigma failed to allege the requisite elements of its various claims.¹⁵⁶

Specifically, Malwarebytes' labeling of Enigma's software as "threats" and "PUPs"¹⁵⁷ were non-actionable, subjective *opinions* rather than false statements of fact.¹⁵⁸ Thus, Enigma's first claim, a violation of the Lanham Act, failed because a false statement of fact is a requisite element of the claim.¹⁵⁹ Enigma's second claim, a violation of New York state law for deceptive acts and unlawful business practices, similarly failed because "an opinion that is not actionable under the Lanham Act is also not actionable under [state law]."¹⁶⁰

¹⁵² See *Malwarebytes*, 141 S. Ct. at 13, 15.

¹⁵³ See *id.* at 13–14. Justice Thomas' desire to narrow the scope of Section 230 immunity has continued. In March 2022, the Supreme Court denied certiorari to another case involving subsection (c)(1) of the provision. See *Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1089 (2022). In his statement respecting the denial, Justice Thomas stated:

Here, the Texas Supreme Court recognized that '[t]he United States Supreme Court—or better yet, Congress—may soon resolve the burgeoning debate about whether the federal courts have thus far correctly interpreted section 230.' Assuming Congress does not step in to clarify § 230's scope, we should do so in an appropriate case.

Id. at 1088. (citation omitted).

¹⁵⁴ See *Enigma Software Group USA LLC v. Malwarebytes Inc.*, No. 17-CV-02915, 2021 WL 3493764, at *1, *3 (N.D. Cal. Aug. 9, 2021).

¹⁵⁵ Enigma filed suit alleging (1) violation of § 43(a) of the Lanham Act; (2) violation of New York General Business Law § 349; (3) tortious interference with contractual relations; and (4) tortious interference with business relations. See *id.* at *9–*10.

¹⁵⁶ See *id.* at *11.

¹⁵⁷ "PUP" refers to a potentially unwanted program which is akin to junkware on a computer. See Wendy Zamora, *What is a PUP?—How to Avoid Potentially Unwanted Programs*, MALWAREBYTES LABS, <http://blog.malwarebytes.com/101/2016/02/how-to-avoid-potentially-unwanted-programs/> [<http://perma.cc/6Z64-AMBX>] (Sept. 14, 2021).

¹⁵⁸ See *Enigma*, 2021 WL 3493764, at *9.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* at *10.

Third, Enigma's tortious interference with contractual relations claim was unsuccessful because Enigma "fail[ed] to identify a specific contractual obligation with which Malwarebytes interfered" and because Enigma "fail[ed] to adequately plead that Malwarebytes engaged in any independently wrongful act which interfered with a specific contractual obligation under its at-will agreements with users."¹⁶¹ Thus, Enigma's tortious interference claim was similarly dismissed.¹⁶²

Finally, Enigma's fourth claim for tortious interference with business relations was dismissed because Enigma failed to allege any intentional, wrongful conduct designed to disrupt a business relationship by Malwarebytes, which is a required element of the claim.¹⁶³ As a result, Enigma's claims were dismissed without leave to amend.¹⁶⁴

Unfortunately for Malwarebytes, Enigma has already filed its appeal, meaning that Malwarebytes will be forced to return to the Ninth Circuit yet again, and this time without any discussion of Section 230 immunity.¹⁶⁵

III. IMPLICATIONS

A. Practical Consequences

Without Section 230 immunity, Malwarebytes has been forced to defend a five-year court battle that isn't over yet. While Section 230's role in the case has ended, the Ninth Circuit's "terrible"¹⁶⁶ decision has permanently cracked the armor of immunity under section 230(c)(2)(B).

For instance, the litigation expenses spent by Malwarebytes over the last five years just to achieve dismissal—expenses which only continue to increase as Enigma remains committed to this fight—undermines Congress' express policy goal of promoting the development of the Internet by subjecting providers like Malwarebytes and others to costly and burdensome litigation.¹⁶⁷ This result is exactly why, by the Ninth Circuit's own admission, courts have consistently extended broad immunity under Section 230, explaining that "[S]ection 230 must be interpreted to protect

¹⁶¹ *Id.*

¹⁶² *Id.* at 10.

¹⁶³ *Id.* at 10–11.

¹⁶⁴ *Id.* at 11.

¹⁶⁵ See *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, No. 21-16466 2021 WL 3493764, (9th Cir. Sept. 7, 2021).

¹⁶⁶ *Terrible Ninth Circuit Ruling*, *supra* note 51.

¹⁶⁷ See *id.*

websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.”¹⁶⁸

Indeed, as the leading Section 230 scholar Eric Goldman has cautioned, “[w]hen judges reject a defendant’s motion to dismiss based on immunity and then reject the plaintiff’s claim at a later procedural stage, they risk undercutting the immunity’s principal benefit of fast, cheap, and reliable defense wins.”¹⁶⁹ In fact, Goldman has proposed removing the “good faith” requirement from Section 230 entirely, reasoning that it “invites judicial confusion and increases the chances that both parties will incur more adjudication costs only to reach the same result: a prevailing defendant.”¹⁷⁰

Further, this decision will also likely cause security software providers to be more conservative in their filtering decisions to avoid liability and litigation like Malwarebytes has faced.¹⁷¹ This is perhaps the most significant and troubling policy implication of this case—and one that the Ninth Circuit failed to recognize in its lengthy policy considerations. Namely, the Ninth Circuit’s decision in *Enigma* defeats the very objectives that Section 230 was enacted to address. Congress created this statute as a direct legislative response to *Stratton Oakmont* because legislators were concerned about the chilling of self-regulation after holding a website liable for user conduct.¹⁷² But *Enigma* now holds Malwarebytes liable for user conduct based on users deciding to filter out Enigma software. Thus, security software providers are now incentivized *not* to flag potentially harmful programs, for fear of litigation based on their users’ ultimate filtering decisions. In other words, providers are right back where they started before the Communications Decency Act, facing the very dilemma about content moderation that the Act was enacted to address more than twenty years ago.

Further, the decision could have a chilling effect on the innovation of security software, as software firms now need to spend resources assessing litigation risks associated with developing security software.¹⁷³ Since security software must continuously adapt to the evolution of malware itself, a more

¹⁶⁸ Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008); see also Levitt v. Yelp! Inc. (Nos. C-10-1321 EMC, C-10-2351 EMC), 2011 WL 5079526, at *8 (N.D. Cal. Oct. 26, 2011) (“The Ninth Circuit has made it clear that the need to defend against a proliferation of lawsuits, regardless of whether the provider ultimately prevails, undermines the purpose of section 230.”).

¹⁶⁹ See *Online User Account Termination*, supra note 51, at 671.

¹⁷⁰ *Id.*

¹⁷¹ See Szewczyk et al., supra note 34.

¹⁷² See Bolson, supra note 32, at 5.

¹⁷³ See Szewczyk et al., supra note 34.

conservative approach to blocking could present serious data privacy implications for businesses and personal users alike.¹⁷⁴ Such an outcome hinders the express policy goal of “promot[ing] the continued development of the Internet” by impairing innovation and user safety.¹⁷⁵

B. Judicial Consequences: A Clear Split in Federal and State Court

Not only does the Ninth Circuit’s ruling weaken Section 230 immunity, but it also creates inconsistent outcomes for Malwarebytes outside of the Ninth Circuit. Further, the ruling has created a clear split between California state and federal courts.

Specifically, in *PC Drivers Headquarters, LP v. Malwarebytes, Inc.* (“*PC Drivers*”), Malwarebytes faced a similar suit in Texas district court after labeling one of PC Drivers’ software as a PUP to users.¹⁷⁶ Malwarebytes asserted immunity under section 230(c)(2)(B) and, unlike the Ninth Circuit, the district court in Texas refused to read an implicit “good faith” requirement into subsection (B).¹⁷⁷ The court echoed the language from the district court in *Enigma*, reiterating that Congress could have easily included a good faith requirement in section 230(c)(2)(B) if it intended to, as evidenced by the fact that it included this requirement in section 230(c)(2)(A), but not section 230(c)(2)(B).¹⁷⁸ Thus, the court concluded that PC Drivers’ claims were barred by section 230(c)(2), leaving Malwarebytes with an entirely different outcome than it received in the Ninth Circuit, solely due to differing interpretations of section 230(c)(2)(B) immunity.¹⁷⁹

Additionally, just weeks after the *Enigma* decision was issued by the Ninth Circuit, a California superior court explicitly declined to follow the ruling.¹⁸⁰ The court in *Prager Univ. v. Google LLC* (“*Prager*”) reasoned that the majority in *Enigma* ignored the plain language of the statute and improperly read a good faith limitation into section 230(c)(2)(B).¹⁸¹ The court

¹⁷⁴ *See id.*

¹⁷⁵ 47 U.S.C. § 230(b)(1).

¹⁷⁶ *PC Drivers Headquarters, LP v. Malwarebytes, Inc.*, No. 1:18-CV-234-RP, 2018 WL 2996897 at *1 (W.D. Tex. 2018).

¹⁷⁷ *See id.* at *2–3.

¹⁷⁸ *Id.* at *3.

¹⁷⁹ *See id.* at *4.

¹⁸⁰ *Prager Univ. v. Google LLC*, No. 19CV340667, 2019 WL 8640569, at *1 (Cal. Super. Ct. Nov. 19, 2019).

¹⁸¹ *Id.* at *10. The court expressed strong disagreement with the Ninth Circuit’s decision in *Enigma*, “who ignore[d] the plain language of the statute by reading a good faith limitation into Section 230(c)(2)(B).” *Id.*

explained that a critical distinction between 230(c)(2)(A) and 230(c)(2)(B) is that subsection (A), which contains a good faith requirement, contemplates website providers that *unilaterally* restrict access to online material, whereas subsection (B), which does not have a good faith requirement, allows users to *voluntarily* restrict access to material.¹⁸² The court criticized the idea of adding a good faith requirement into subsection (B), firmly holding that such an addition is “contrary to the plain language of the statute.”¹⁸³

As Malwarebytes explained in its petition for certiorari to the Supreme Court, these conflicting approaches to section 230(c)(2)(B) in the *Enigma*, *PC Drivers*, and *Prager* cases have opened “a rift between state and federal fora in the technology center of the Nation,” adding that “plaintiffs now have every incentive to bring suit in federal courts,” thereby opening the door for forum shopping.¹⁸⁴

IV. THE NINTH CIRCUIT: DEFYING THE RULES OF STATUTORY CONSTRUCTION

In addition to these troubling practical implications, the ways in which the Ninth Circuit arrived at its decision were flawed for several significant reasons.

A. Plain Language

First, the well-established rules of statutory construction provide that courts must start with the operative text of the statute, and if the statutory text is plain and unambiguous, then the inquiry into statutory interpretation begins and ends with the language of the statute itself.¹⁸⁵ In *Enigma*, the dissent reminded the majority of the Supreme Court’s often-cited directive that

¹⁸² *Id.*

¹⁸³ *Id.* at *11.

¹⁸⁴ Petition for a Writ of Certiorari, at *4, *20, *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 592 U.S. 1 (2020) (No. 19-1284), 2020 WL 2494604.

¹⁸⁵ See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (“Our inquiry must cease if the statutory language is unambiguous.”); see also *King v. Burwell*, 576 U.S. 472, 486 (2015) (“If the statutory language is plain, we must enforce it according to its terms.”); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (“When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 24 (1997) (explaining that the plain meaning rule is not an optional canon of construction and instead is “the constitutionally compelled starting place for any statutory construction,” adding that alternative “tools of interpretation are only applicable when the plain meaning rule fails to provide the answer.”).

courts “must presume that a legislature says in a statute what it means and means in a statute what it says there.”¹⁸⁶

While the Ninth Circuit initially acknowledged that the statute plainly permits providers like Malwarebytes to block material that the provider subjectively considers objectionable, the Ninth Circuit ignored the district court’s clear holding that Section 230(c)(2)(B) does not have a good faith requirement and its refusal to read an implicit good faith requirement.¹⁸⁷ Instead, the Ninth Circuit improperly departed from the plain language and proceeded to its view of the statute’s history and policy, reasoning that Congress’ unusual step of including express policy goals justified the court’s reliance on policy.¹⁸⁸

Pointing to its own earlier warnings in *Zango*, the court explained that an overly expansive interpretation of the broad term “objectionable” would allow providers to classify content as objectionable for anticompetitive reasons.¹⁸⁹ The court reasoned that such an outcome would run counter to Congress’ express policy goals.¹⁹⁰ While the Ninth Circuit’s policy determinations have merit if Malwarebytes was seeking immunity under section 230(c)(2)(A), the Ninth Circuit’s policy rationale reveals a misunderstanding of the facts at hand. For example, the court justified its holding by stating that:

Interpreting the statute to give providers unbridled discretion to block online content would . . . enable and potentially motivate internet-service providers to act for their own, and not the public, benefit. Immunity for filtering practices aimed at suppressing competition, rather than protecting internet users, would lessen user control over what information they receive, contrary to Congress’s stated policy.¹⁹¹

However, the Ninth Circuit failed to recognize that the district court did not grant Malwarebytes “unbridled discretion” to block online content. According to the district court’s fact-finding, Malwarebytes identified potentially harmful software and notified users of the perceived threat, asking the *user* whether they wanted to remove the content from their computer.¹⁹² In other words, it was the users that were choosing whether to heed Malwarebytes’ warning and block the content or otherwise proceed with the Enigma

¹⁸⁶ *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1055 (9th Cir. 2019) (Rawlinson, J., dissenting) (quoting *Conn, Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

¹⁸⁷ *See id.* at 1045, 1054.

¹⁸⁸ *See id.* at 1044–47.

¹⁸⁹ *Id.* at 1045, 1047.

¹⁹⁰ *Id.* at 1044–47.

¹⁹¹ *Id.* at 1051.

¹⁹² *Enigma*, 2017 WL 5153698, at *1.

software. Thus, it was the users, not the provider, that were exercising their “unbridled discretion” in blocking content, fulfilling Congress’ express policy goal of maximizing user control, not running contrary to policy as the Ninth Circuit improperly stated.

Further, as the Ninth Circuit recognized earlier in *Zango*, users are *choosing* to install and utilize security software like Malwarebytes.¹⁹³ As Goldman explains in the context of *Enigma*, “if Malwarebytes’ users aren’t happy with its blocking function, the users can uninstall Malwarebytes and adopt Enigma instead. This means consumers are empowered to override Malwarebytes’ decisions.”¹⁹⁴ In other words, the user conduct that Enigma based its claims on actually furthered Congress’ desire for increased user control.

Additionally, even if the Ninth Circuit’s policy determinations were correct, it is well-established that courts are to enforce a statute as it is written, even if doing so undercuts Congressional purpose or policy.¹⁹⁵ The Ninth Circuit seemed to justify its policy-focused decision because Congress wrote this statute at a time when it was unable to identify all of the types of internet material that may be encompassed by this statute, thus opting for broad language.¹⁹⁶ But as the Supreme Court has recognized, broad language, such as the phrase “otherwise objectionable,” does not render a statute’s text ambiguous.¹⁹⁷ In fact, the Supreme Court has previously noted that congressional objectives may actually require broad, general language in a statute and that it is Congress, not the courts through the guise of statutory ambiguity, that must define the statute’s limits.¹⁹⁸

Even within the context of Section 230, lower courts have recognized that narrowing the scope of broad statutory language within this particular statute is for Congress, not courts, to

¹⁹³ *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176 (9th Cir. 2009).

¹⁹⁴ *Terrible Ninth Circuit Ruling*, *supra* note 51.

¹⁹⁵ See Shambie Singer, §46:1: *The Plain Meaning Rule*, in SUTHERLAND STATUTORY CONSTRUCTION (7th ed., 2020) (explaining that if the statute’s language is plain and unambiguous, then the “the sole function of the courts is to enforce it according to its terms”); see also *Baker Botts L.L.P. v. Asarco LLC*, 576 U.S. 121, 134–35 (2015). Even Justice Thomas has pointed out that the Supreme Court “lack[s] the authority to rewrite the statute” by stating: “Our job is to follow the text even if doing so will supposedly undercut a basic objective of the statute.” *Id.*; see also *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (“Our unwillingness to soften the import of Congress’ chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from ‘deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill.’”).

¹⁹⁶ See *Enigma*, 946 F.3d at 1051.

¹⁹⁷ See, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980).

¹⁹⁸ See *id.*

remedy.¹⁹⁹ Indeed, as the dissent wisely pointed out, even if the statute is written too broadly, it was beyond the Ninth Circuit's authority to correct.²⁰⁰ Further, more than 20 years since the statute's enactment, Congress has still declined to correct the broad scope of the term "otherwise objectionable," revealing its preference to leave the broad catch-all as written.

Under the cardinal rules of statutory construction, the Ninth Circuit should not have proceeded to policy considerations if the statutory text was clear. The court improperly jumped to these policy considerations without considering that the resulting narrow interpretation was incompatible with the operative statutory text. By doing so, the Ninth Circuit overreached its judicial authority.

B. Express Inclusion, Implied Exclusion

The Ninth Circuit's next misstep demonstrates its fundamental misunderstanding and misreading of the statute's plain text. After highlighting the policy considerations, the court clarified its view of "the legal question" in this case: whether section 230(c)(2) immunizes blocking and filtering decisions that are driven by anticompetitive animus.²⁰¹ By posing the legal question as such and determining the scope of liability under section 230(c)(2), the court failed to recognize that 230(c)(2)(A) and 230(c)(2)(B) are separate subsections, one with a good faith requirement, and one without.²⁰² Thus, the court collapsed the key distinction between the two unique subsections and read an implicit good faith requirement into subsection (B).

Generally, where Congress includes particular language in one section of a statute but omits it in another section of the same statute, it is presumed that Congress has acted intentionally in its disparate inclusion or exclusion.²⁰³ The distinction in statutory language reveals Congress' well-considered position that the two statutes carry different meaning and purpose.²⁰⁴ Further, courts are reluctant to add statutory requirements that conflict with the

¹⁹⁹ See *Barrett v. Rosenthal*, 146 P.3d 510, 529 (Cal. 2006) (Moreno, J., concurring) ("Although there may be a considerable gap between the specific wrongs Congress was intending to right in enacting the immunity at issue here and the broad statutory language of that immunity, that gap is ultimately for Congress, rather than the courts, to bridge.").

²⁰⁰ *Enigma*, 946 F.3d at 1054.

²⁰¹ *Id.* at 1045.

²⁰² *Id.*

²⁰³ See, e.g., *Keene Corp. v. U.S.*, 508 U.S. 200, 207–08 (1993).

²⁰⁴ See, e.g., *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) ("[W]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning.").

plain language of the statute, especially when Congress has included such requirements in other areas of the same statute.²⁰⁵ As the Supreme Court has explained, “[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”²⁰⁶

In this case, the Ninth Circuit explained that *Zango* only addressed *who* may be entitled to immunity under Section 230, yet the court used this case to answer *what* type of material may be blocked as objectionable and *why* it may be blocked under section 230(c)(2).²⁰⁷ While the court’s determination that subsection (A) does not immunize anticompetitive conduct is logical and convincing, Malwarebytes was entitled to protection under section 230(c)(2)(B), just like the security software provider in *Zango*. Thus, the court’s dual inquiry into *what* material and *why* it is deemed objectionable was improper under section 230(c)(2)(B) because there is no good faith language in subsection (B) as written.

Also, to justify its decision to limit the statute’s broad scope of immunity, the court cited three cases that have previously narrowed the scope of material deemed objectionable.²⁰⁸ Yet, these cases considered the scope of immunity under section 230(c)(2)(A), whereas *Enigma* considered the scope of immunity under section 230(c)(2)(B). By finding these cases comparable, the court once again conflated the fundamental distinction between subsection (A) and subsection (B), a distinction which renders these cited precedents inapposite to the case at hand.

For example, in *Song fi Inc. v. Google, Inc.* (“*Song fi*”) and *Holomaxx Technologies. v. Microsoft Corp.* (“*Holomaxx*”), the district courts considered *why* the providers removed the material to determine whether the providers rightly deemed the

²⁰⁵ See, e.g., *Russello v. United States*, 464 U.S. 16, 23 (1983) (finding that if Congress had intended to add restrictions, it would have done so, as evidenced by its restricting language in the immediately following subsection, but concluding that Congress did not write the statute that way, refusing to conclude “that the differing language in the two subsections has the same meaning in each” because the Court “would not presume to ascribe this difference to a simple mistake in draftsmanship”).

²⁰⁶ *Jama v. Immigr. & Customs Enft.*, 543 U.S. 335, 341 (2005); see also *Romag Fasteners, Inc. v. Fossil, Inc.* 140 S. Ct. 1492, 1495 (2020) (“[T]his Court [does not] usually read into statutes words that aren’t there. It’s a temptation we are doubly careful to avoid when Congress has (as here) included the term in question elsewhere in the very same statutory provision.”).

²⁰⁷ See *Enigma*, 946 F.3d at 1049–50.

²⁰⁸ See *id.* at 1050 (citing *Song fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 883 (N.D. Cal. 2015), *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104–05 (N.D. Cal. 2011), and *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014)).

material “otherwise objectionable.”²⁰⁹ These were proper inquiries, since these providers were required to act in good faith in their determination of what material was “objectionable” under section 230(c)(2)(A).

Here, however, Malwarebytes was merely providing users with technology to filter material, instead of actually filtering objectionable material as in *Song fi* and *Holomaxx*. Thus, under subsection (B), the court’s analysis should have stopped after determining whether the material was the type of material that may be blocked. The court should not have looked any further into the reasons why the provider blocked the material and whether the provider’s determination was made in good faith.

While it is true that the language in section 230(c)(2)(B) explicitly refers to section 230(c)(2)(A) in determining the *types* of material that may be removed, subsection (B) does not require that providers act in good faith in their determination. As Malwarebytes contended, a provider would still be entitled to immunity regardless of bad faith, anticompetitive motives based on the statute as written.²¹⁰ The dissent in *Enigma* made this point, explaining that “the majority holds that the criteria for blocking online material may not be based on the identity of the entity that produced it. Unfortunately, however, that conclusion cannot be squared with the broad language of the Act.”²¹¹

By citing *Song fi* and *Holomaxx* and inquiring into the anticompetitive motives of Malwarebytes in its determination of whether the content was “objectionable,” the court impermissibly collapsed the distinction between subsection (A) and subsection (B), added an implied requirement of good faith in Malwarebytes’ determination of what content is objectionable, and violated the statutory principle that, where Congress has employed a term in one place and excluded it in another, it should not be implied where excluded.²¹²

C. Statutory Exceptions

The Ninth Circuit’s conclusion that a provider may not designate online material as “otherwise objectionable” for anticompetitive reasons also violates a significant line of precedent involving statutory exceptions. As written, Congress

²⁰⁹ See *Song fi*, 108 F. Supp. 3d at 884; *Holomaxx*, 783 F. Supp. 2d at 1104–05.

²¹⁰ See *Enigma*, 938 F.3d at 1036.

²¹¹ *Id.* at 1040 (Rawlison, J., dissenting) (citation omitted).

²¹² See, e.g., *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 66–67 (1959); see also *Stewart v. Ragland*, 934 F.2d 1033, 1041 (9th Cir. 1991) (“When certain statutory provisions contain a requirement and others do not, we should assume that the legislature intended both the inclusion and the exclusion of the requirement.”).

enumerates five exceptions from immunity where providers are not shielded from liability by Section 230.²¹³

Generally, where Congress has explicitly carved out certain exceptions within a statute, courts do not have the authority to create additional exceptions.²¹⁴ Indeed, the long-standing rule of *expressio unius est exclusio alterius*, meaning the express mention of one thing excludes all others, assumes that if Congress intended to include other exceptions, it would have expressed them in the statute.²¹⁵

Courts, including the Supreme Court,²¹⁶ First Circuit,²¹⁷ Fifth Circuit,²¹⁸ Sixth Circuit,²¹⁹ and Eleventh Circuit,²²⁰ have heeded this doctrine and refused to read additional statutory exceptions where Congress has explicitly provided others within the statute.

²¹³ The five exceptions are (1) criminal law, (2) intellectual property law, (3) state law, (4) communications privacy law, and (5) sex trafficking law. Thus, website providers cannot be granted immunity against these types of claims. *See* 47 U.S.C. § 230(e).

²¹⁴ *See, e.g.*, *United States v. Johnson*, 529 U.S. 53, 58 (2000).

²¹⁵ *See, e.g.*, Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQ. L. REV. 191, 193 (1931) (discussing *State v. Regents of Univ. of Wis.*, 54 Wis. 159 (1882)) (“The student wanted to make additional exceptions to the statute, but the Court rejected the idea, stating that the enumeration of certain exceptions in the Statute excluded all other exceptions, and applied the rule . . .”); *see also* *Eliot v. Eliot*, 51 N.W. 81, 81 (1892).

It is fair to assume that, had the legislature intended other restrictions upon the right of action, it would have expressed the same in the statute. *Expressio unius est exclusio alterius*. In our opinion, it is not permissible for the court to interpolate conditions and exceptions and restrictions upon the right of action, not expressed therein, and which would thwart the plain legislative intention on the subject.

Id. (emphasis in original).

²¹⁶ *See, e.g.*, *United States v. Johnson*, 529 U.S. 53, 58 (2000) (“When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.”); *see also* *Law v. Siegel*, 571 U.S. 415, 424 (2014) (“The Code’s meticulous . . . enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions.”); *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 374 (2008) (explaining that when a statute explicitly lists a set of exceptions, Congress is unlikely to have intended additional implicit exceptions).

²¹⁷ *See, e.g.*, *Dickow v. United States*, 654 F.3d 144, 152 (1st Cir. 2011) (“[T]he explicit listing of exceptions . . . ‘indicate[d] . . . that Congress did not intend courts to read other unmentioned, open-ended, ‘equitable’ exceptions into the statute.”) (quoting *United States v. Brockamp*, 519 U.S. 347, 352 (1997)).

²¹⁸ *See, e.g.*, *In re Mirant Corp.*, 378 F.3d 511, 522 (5th Cir. 2004) (“Obviously, Congress knew how to draft an exclusion . . . when it wanted to; its failure to do so in this instance indicates that Congress intended that.”) (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522–23 (1984)).

²¹⁹ *See, e.g.*, *County of Oakland v. Fed. Hous. Fin. Agency*, 716 F.3d 935, 940 (6th Cir. 2013) (“Accordingly, because the statutes are clear, we are not in a position to second-guess Congress and create a new exception in the statute . . .”).

²²⁰ *See, e.g.*, *Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1116 n.3 (11th Cir. 2005) (“[W]here the legislature has included certain exceptions . . . the doctrine of *expressio unius* [sic] *est exclusio alterius* counsels against judicial recognition of additional exceptions.”) (emphasis in original).

But in the *Enigma* case, the Ninth Circuit disregarded the doctrine of *expressio unius est exclusio alterius* by creating a new statutory exception under the guise of “otherwise objectionable” language. Specifically, by explicitly holding that section 230(c)(2) did not immunize blocking decisions involving anticompetitive conduct, the court potentially carved out a new exception to Section 230’s immunity.²²¹

This weakens Section 230’s power because security software firms like Enigma that have their content blocked by a user utilizing competing filtering software, like Malwarebytes, can now simply allege anticompetitive conduct—even if the content by a competitor was filtered for legitimate reason—and the provider will be unable to rely on Section 230 immunity.²²² Indeed, as Malwarebytes asserted in its petition for certiorari, the Ninth Circuit “elevated its own policy considerations over Congress’s chosen words. It did exactly what [the Supreme Court] has admonished: it rewrote the statute to add a new exception from immunity” for allegations of anticompetitive conduct.²²³

Interestingly, Congress recently proposed a sixth exception for Section 230, where the statute’s immunity would not extend to website providers who fail to report suspicious online

²²¹ See Eric Goldman, *As Expected, Malwarebytes Defeats Enigma’s Lawsuit Without Section 230’s Help*, TECH. & MKTG. L. BLOG (Sept. 5, 2021), [http://blog.ericgoldman.org/archives/2021/09/as-expected-malwarebytes-defeats-enigmas-lawsuit-without-section-230s-help.htm#:~:text=Malwarebytes%20classified%20Enigma's%20software%20as,\(2\)\(B\)%20grounds](http://blog.ericgoldman.org/archives/2021/09/as-expected-malwarebytes-defeats-enigmas-lawsuit-without-section-230s-help.htm#:~:text=Malwarebytes%20classified%20Enigma's%20software%20as,(2)(B)%20grounds) [http://perma.cc/4ETR-J6RB].

[T]he Ninth Circuit created a new workaround to Section 230 based on anticompetitive animus. This workaround is completely undefined—is it coextensive with antitrust law, or does apply when competitors have anticompetitive “intent” even if their actions don’t constitute an antitrust violation? The Ninth Circuit dodged this critical issue. . . .

Should we applaud the Ninth Circuit for so carefully policing the boundaries of Section 230’s immunities, or should we criticize them for unnecessarily swiss-cheesing Section 230?

Id.

²²² See *Terrible Ninth Circuit Ruling*, *supra* note 51.

[E]ven when a software vendor actually directly competes with the anti-threat vendor, it might still be appropriate to block it. Unfortunately, the anti-threat software industry has too many sleazy players who are really in the scareware or adware business. When anti-threat vendors’ direct competitors are also threats to consumers, the court’s standards virtually ensure that Section 230(c)(2) won’t be available.

Id.

²²³ Brief of Techfreedom as Amicus Curiae in Support of Petitioner, *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (No. 19-1284), 2020 WL 3316788, at *6.

transmissions related to terrorism.²²⁴ This recent proposal demonstrates Congress' willingness to craft new statutory exceptions into Section 230. Moreover, Congress' failure to propose a statutory exception for anticompetitive practices suggests that Congress does not intend for such conduct to be excluded from the scope of Section 230's liability.

D. Alternative Course of Action

Ultimately, the Ninth Circuit's conclusion that immunity under Section 230 should not extend to anticompetitive conduct has merit. Nevertheless, instead of crafting a new carve-out from immunity that Congress did not intend, the Ninth Circuit should have followed the First Circuit and Second Circuit's approach to problematic policy outcomes. Specifically, the court should have applied the statute as written, extended immunity to Malwarebytes, and allowed Congress to amend the statute to address anticompetitive behavior, as it did to address terrorism after *Force v. Facebook* ("*Force*") and sex-trafficking claims after *Jane Doe No. 1 v. Backpage.com* ("*Backpage*").²²⁵

In *Force*, the Second Circuit extended immunity to Facebook, despite Facebook's failure to remove online content that facilitated and celebrated terrorist attacks in Israel.²²⁶ While the majority remained committed to a plain reading of the statute and did not discuss the troubling policy implications of its decision, the dissent denounced the outcome, writing "we today extend a provision that was designed to encourage computer service providers to shield minors from obscene material so that it now immunizes those same providers for allegedly connecting terrorists to one another."²²⁷ But, after a lengthy discussion, the dissent still conceded that "[w]hether, and to what extent, Congress should allow liability for tech companies that encourage terrorism, propaganda, and extremism is a question for legislators, not judges."²²⁸

Similarly, in *Backpage*, a website provider was shielded from civil liability under Section 230 against three victims of sex-trafficking who brought suit.²²⁹ While the First Circuit conceded "[t]his is a hard case . . . the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage," it applied the statute as written and extended immunity

²²⁴ See Something, Say Something Online Act of 2021, S. 27, 117th Cong. § 4 (2021).

²²⁵ See *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 23 (1st Cir. 2016); *Force v. Facebook, Inc.*, 934 F.3d 53, 81 (2d Cir. 2019).

²²⁶ See *id.* at 57.

²²⁷ *Id.* at 77 (Katzmann, C.J., concurring in part and dissenting in part).

²²⁸ *Id.* at 88.

²²⁹ See 817 F.3d at 12.

to the website provider, despite the negative policy implications that followed.²³⁰ The First Circuit justified its decision by stating that “Congress did not sound an uncertain trumpet when it enacted the [Communications Decency Act], and it chose to grant broad protections to internet publishers,” adding that, “the remedy is through legislation, not through litigation.”²³¹

Despite the highly undesirable policy implications that resulted in *Backpage* and *Force*, the First and Second Circuits adhered to the well-respected canons of statutory interpretation, refused to depart from the statute’s plain text in favor of compelling policy considerations, and criticized the results in its opinion, passing the onus to correct these problems where it belongs: on Congress.

Indeed, this approach is exactly what the Supreme Court has prescribed, as Justice Sotomayor has previously warned, “it would be improper to allow policy considerations to undermine the American Rule.”²³² Moreover, Justice Gorsuch has explained “[a]s these things go . . . the place for reconciling competing and incommensurable policy goals like these is before policymakers. This Court’s limited role is to read and apply the law those policymakers have ordained”²³³

Further, the First and Second Circuit’s approach was successful, as Congress took immediate legislative action after *Backpage* and *Force* by promptly introducing new limitations on immunity into Section 230.²³⁴ As one scholar noted, “[t]he *Backpage* cases demonstrated a flaw in the system, and Congress acted to solve that specific problem. That is precisely how the legislative process should work.”²³⁵

If its sister circuits were willing to follow the statute’s plain language even in the presence of sex-trafficking survivors and victims of international terrorism, the Ninth Circuit, too, should have been steadfast in its refusal to depart from the plain text for computer software providers. In short, the Ninth Circuit should have followed the statute as written and called for Enigma’s remedy to come through legislation, not litigation.

²³⁰ *Id.* at 15.

²³¹ *Id.* at 29.

²³² *Baker Botts L.L.P. v. Asarco LLC*, 536 U.S. 121, 135 (2015) (Sotomayor, J., concurring in part and concurring in the judgment).

²³³ *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1497 (2020).

²³⁴ See *Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, H.R. 1865, 115th Cong. § 2 (2017); see also *See Something, Say Something Online Act of 2021*, S. 27 117th Cong. § 4 (2021).

²³⁵ KOSSEFF, *supra* note 1, at 280.

CONCLUSION

At first glance, the Ninth Circuit's determination in *Enigma*—that website providers are not entitled to Section 230 immunity for anticompetitive conduct—may seem like a logical limitation on the safe harbor's broad scope. But a closer examination of the facts reveals the fundamental flaws of this decision, including a fatal misreading of the statute that conflates two unique shields of immunity and an emphasis on flawed policy considerations that now impose an implicit good faith requirement where Congress decidedly omitted one. The decision has already caused a judicial split that the Supreme Court stood unwilling to address. In doing so, the Court allowed the Ninth Circuit to usurp congressional power by improperly narrowing the statute and crafting a sixth carve-out from immunity, despite Congress' demonstrated willingness to do so in other contexts.

Above all, this decision has troubling implications for website users and providers, alike. In the area of security software, users will be forced to navigate an internet with more conservative security decisions and less filtering. At the same time, security software providers encounter an all too familiar dilemma: the exact dilemma that Congress sought to rectify when it created this safe harbor over twenty years ago. Namely, providers have two options: allow users to filter and face liability, or remove filtering tools and avoid liability, but leave harmful content online.

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