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ARTICLES

Building the World We Want in an Era of Climate Anxiety
Rebecca Bratspies 1

"Individually Minor But Collectively Significant": The Right to Cumulative Impact Analyses and Substantive Protections in Wilmington, California
James Crisafulli 27

Major Questions in Crisis Governance
Catherine F. Le 69

A Corpus Linguistic Analysis of "Possessions" in American English, 1760-1776
James C. Phillips 143

NOTES

The BEPS "Revolution" and the Future of Corporate Income Taxation
Grace LeBlanc 165

Crayons, Contests, & Copyright: Contracting to Use a Child's Creative Work
Kaelyn Timmins-Reed 215

Protecting Personal Dignity: Advocating for a Federal Right of Publicity Against Pornographic Deepfakes
Tyler von Denlinger 247

IN MEMORIAM: PROFESSOR NANCY L. SCHULTZ

Remembering Nancy
John Bishop 283

Nancy Schultz, Legal Scholar
Lawrence Rosenthal 285

Editor's Note

Chapman Law Review is delighted to release the first Issue of Volume Twenty-Seven. The Issue comprises scholarship covering a diverse range of subjects across numerous legal domains.

In our first article, Professor Rebecca Bratspies embarks with the notion that we must reject "climate doomism" and highlights how grassroots action and local laws, like those enacted in New York, can effectuate positive change in combatting climate change. Professor Bratspies's article is based on a presentation she gave at Chapman's 2023 Contemporary Conversations in Climate Change Symposium. Next, James Crisafulli evaluates the disproportionate air pollution impacts on the residents of Wilmington, California, and argues that procedural and substantive mechanisms should be applied to relieve them of cumulative impact burdens from several neighboring sources of pollution. His article evaluates gaps in applicable federal and state environmental impact assessment mechanisms—and draws on cumulative impact protection mechanisms in other countries—to propose an innovative and compelling response to a pressing environmental justice issue in Southern California. Catherine Le follows with her article, which retheorizes the major questions doctrine as rooted in presidential plebiscitary legitimacy. She argues that this modified major questions doctrine will be capable of upholding the administrative ability to respond effectively to unprecedented, rapidly evolving emergencies (e.g., COVID-19) while preventing overreach by meaningfully cabining executive power.

In the final article, Professor James Phillips presents a corpus linguistic analysis of the term "possessions" in the context of state constitutional provisions that arguably expand the U.S. Constitution's Fourth Amendment and include *possessions* as protected from unreasonable searches and seizures. Professor Phillips's article is especially timely because there is litigation in various state courts, including the Pennsylvania Supreme Court, over the meaning of this constitutional protection.

The Issue then includes notes written by J.D. Candidates currently in their third year at Chapman University Dale E. Fowler School of Law and members of the *Chapman Law Review*.

The first note, written by Grace LeBlanc, reviews how tax-motivated profit shifting by multinational corporations is regulated within national and global tax systems. It argues that despite recent radical changes in the tax treatment of multinational corporations, tax competition and the entrenchment of power dynamics between wealthy and developing countries continue to undermine international cooperation toward tax fairness. Next, Kaelyn Timmins-Reed examines the law surrounding contracting with minors to license a copyrighted work or create a work made for hire and suggests solutions to empower minors to protect their copyrights. Finally, Tyler von Denlinger's note examines the prevalent issue of pornographic deepfakes, exploring their rise, impact on victims, and the flaws of existing regulations, which are inadequate because of the broad immunity granted to internet service providers who host such content. This note proposes a federal right to privacy and aims to provide victims with a legal avenue to remedy the dissemination of deepfake pornography.

This Issue concludes with two tributes to Chapman's late professor, Nancy L. Schultz, known to her students simply as Nancy. In the first piece, Professor John Bishop touches on Nancy's lasting impact as the head of Chapman's competition teams, including Mock Trial, Moot Court, and Alternative Dispute Resolution, for nearly three decades. The second piece, written by Professor Lawrence Rosenthal, discusses Nancy's scholarship, and her transformative solutions for teaching and training law students. I had the privilege of being coached by Nancy and traveling around the world with her to compete. My law school experience would not have been the same without Nancy and I am forever grateful for her. This Issue is dedicated to Nancy's memory and her lasting legacy. We miss you, Nancy.

Chapman Law Review expresses profound gratitude towards the faculty and administration who have contributed to the realization of this Journal. Notably, we are immensely appreciative of our faculty advisor, Professor Celestine McConville, who has been an invaluable asset throughout the Journal development process, offering guidance and expertise at every turn. Furthermore, we extend our gratitude to the Dean of Chapman University's Dale E. Fowler School of Law, Paul D. Paton, and our esteemed faculty advisory committee, including Professor Carolyn Larmore, Professor Matthew Tymann, Professor Daniel Bogart, and Professor Kurt Eggert. We also would like to thank the Research Librarians of the Hugh & Hazel

Darling Library, whose expertise have been a vital resource for source collection. I would also like to acknowledge the invaluable contributions of our Executive Managing Editor, Sandra Aguilar, and our Executive Production Editor, Brianna Denbo, for their unwavering commitment to producing an exemplary publication. Finally, I express my utmost gratitude to our brilliant editors—the heart of this publication—who worked tirelessly to bring this Issue to fruition. Without them, our work would not be possible. Working with you all has been the honor of my law school career, and I take great pride in what we have achieved together this past year. I am humbled to have been a part of this amazing team, and I am grateful for your unwavering commitment to the journal. Long live the three F's: Family, Fun, and Footnotes.

Darian Nourian
Editor-in-Chief

Building the World We Want in an Era of Climate Anxiety

Rebecca Bratspies[*]

> "[W]e're playing Russian roulette with the climate. Every increase in temperature . . . makes the risks of bad impacts that much higher."[1]

INTRODUCTION 1
I. WE MUST START BY REJECTING CLIMATE DOOMISM 5
II. WE MUST TREAT CLIMATE CHANGE AS A SUPER WICKED PROBLEM 9
III. THINK GLOBALLY, ACT LOCALLY.....16
IV. LESSONS FROM "WE ARE STILL IN" 17
A. What Did "We Are Still In" Mean in New York? 18
V. CONCRETE STEPS IN NEW YORK STATE.....18
A. Climate Action in New York City 21
CONCLUSION: JUSTICE IS A CLIMATE STRATEGY!.....23

INTRODUCTION

It is "unequivocal" that human activity is driving climate change.[2] For clarity, unequivocal means "leaving no doubt: clear, unambiguous[.]"[3] The mean global temperature is already more

[*] Professor, CUNY School of Law and Director Center for Urban Environmental Reform. This paper benefited from discussions with students in my Spring 2023 Environmental Justice Seminar and feedback from the participants at the 2023 Chapman Law School Contemporary Conversations in Climate Change Symposium. Thanks particularly to Sarah Lamdan, Deepa Badrinaryana, and Randall Abate for helpful feedback.

1 Shannon Osaka, *Why Climate 'Doomers' Are Replacing Climate 'Denier,'* WASHINGTON POST (Mar. 24, 2023, 10:00 AM), https://www.washingtonpost.com/climate-environment/2023/03/24/climate-doomers-ipcc-un-report [https://www.perma.cc/4QTA-SBFE] (quoting climate researcher Zeke Hausfather).

2 *Synthesis Report of the IPCC Sixth Assessment Report (AR6): Summary for Policymakers*, Intergovernmental Panel on Climate Change, at 4 (2023) [hereinafter IPCC, ARC6 Synthesis Report].

3 *Unequivocal*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/unequivocal [https://www.perma.cc/FYZ3-QE3T] (last visited Oct. 29, 2023).

than 1.1ºC above pre-industrial levels.[4] And the trajectory is heading in the wrong direction. Keeping temperature increases below 1.5ºC, the level generally agreed on as essential for preventing the worst climate catastrophes,[5] seems increasingly out of reach.[6] Moreover, even at current levels of warming, the global climate appears to have gone completely off the rails. Widespread, rapid changes ranging from extreme temperatures,[7] violent storms,[8] accelerating ice melt,[9] and expanding wildfire zones[10] have become commonplace.

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4 *World of Change: Global Temperatures,* NASA EARTH OBSERVATORY, https://earthobservatory.nasa.gov/world-of-change/global-temperatures [https://www.perma.cc/4PVG-BJSD] (last visited Oct. 29, 2023).

5 *See Global Warming of 1.5ºC*, Intergovernmental Panel on Climate Change (2018).

6 *See* J.B. Ruhl and Robin Craig, *4ºC*, 106 MINN. L. REV. 191, 198–201 (2021) (claiming that the Paris Accord goal of keeping warming well below 2°C is unreachable and arguing for transformational adaptation measures as radical as the pace and intensity of the changes we face).

7 *See, e.g.*, Andrew Freedman, *Earth Saw Hottest Day yet Thursday, the Fourth Straight Global Record*, AXIOS (July 7, 2023), https://www.axios.com/2023/07/07/earth-four-hottest-days-thursday [https://perma.cc/FJ7B-XATX]; Brad Plumer and Elena Shao, *Heat Records Are Broken Around the Globe as Earth Warms, Fast*, N.Y. TIMES (July 16, 2023), https://www.nytimes.com/2023/07/06/climate/climate-change-record-heat.html [https://perma.cc/8FKS-3GUF]; @extremetemps, TWITTER (July 16, 2023, 6:51 AM), https://twitter.com/extremetemps/status/1680576009513435136?s=20 [https://perma.cc/6XVA-F3RR] (describing reports circulating on Twitter that Sanbao, China had reached a new global record of 52.2°C).

8 *See, e.g.*, Rebecca Falconer, *In Photos: Damage from Catastrophic Flooding in Vermont and New York*, AXIOS (July 10, 2023), https://www.axios.com/2023/07/11/photos-flood-damage-new-york-vermont [https://perma.cc/XCC3-ZPTF]; *South Korea Flood Death Toll Hits 40, Prompting President to Vow Climate Change Prep "Overhaul"*, CBSNEWS (July 17, 2023, 6:40 AM), https://cbsnews.com/news/south-korea-flood-deaths-tunnel-trapped-climate-change-overhaul-yoon [https://perma.cc/HHT3-MB6L]; Paulina Smolinski, *Pakistan, Still Recovering from Last Year's Floods, Braces for More Flooding This Year*, CBSNEWS (May 5, 2023, 12:14 PM), https://www.cbsnews.com/news/pakistan-more-floods-expected-2023 [https://perma.cc/FD79-YTX8].

9 *See Antarctic Ice Levels Undergo 'Massive Decrease,' Data Shows,* REUTERS (Jul. 10, 2023, 9:38 AM), https://www.reuters.com/world/antarctic-ice-levels-undergo-massive-decrease-data-shows-2023-07-10/ [https://perma.cc/5JWF-L249]; *The Sun Sets on the Arctic Melt Season*, NAT'L SNOW & ICE DATA CTR. (Oct. 4, 2023), https://nsidc.org/arcticseaicenews/ [https://perma.cc/J5FM-ZEEE] (reporting short-term and long-term ice decreases); Michalea D. King et al., *Dynamic Ice Loss from the Greenland Ice Sheet Driven by Sustained Glacier Retreat*, 1 COMMC'NS EARTH & ENV'T 1, 1 (2020).

10 *See Spreading like Wildfire: The Rising Threat of Extraordinary Landscape Fires*, U.N. ENV'T PROGRAMME (Feb. 23, 2022), https://www.unep.org/resources/report/spreading-wildfire-rising-threat-extraordinary-landscape-fires [https://perma.cc/GA8G-37ED].

For much of the United States, the summer of 2023 was calamitous. With Maui in ruins,[11] Vermont flooded,[12] Phoenix topping 110º F for a month,[13] and Southern California facing its first tropical storm in nearly a century,[14] the belief that we have crossed planetary boundaries or irreversible climate tipping points gains plausibility by the day.[15] Climate scientist James Hanson has long cautioned that without urgent action, we face an apocalyptic future,[16] and each successive Intergovernmental Panel on Climate Change ("IPCC") report offers ever more detailed support for his bleak assessment. This past summer, UN Secretary-General António Guterres put it bluntly, "The era of global warming has ended and 'the era of global boiling has arrived.'"[17] These are chilling words (no pun intended). The message from all sides seems like "we're f[*]cked. The only questions are only how soon and how badly?"[18]

While awareness of the climate crisis is essential, overdoing the negativity can be problematic. Michael Mann draws attention to what he calls "climate inactivism"—a cynical ploy by the fossil fuel industry to use frightening climate messages to blunt rather

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11 *See* Chris Cameron, *Hawaii Wildfires: Maui Death Toll Climbs to 93,* N.Y. TIMES (Aug. 21, 2023), https://www.nytimes.com/live/2023/08/13/us/maui-wildfires-hawaii-news [https://perma.cc/3QHQ-TEF9].

12 *See* Peter Banacos, *The Great Vermont Flood of 10-11 July 2023: Preliminary Meteorological Summary,* NAT'L WEATHER SERV. (Aug. 5, 2023, 8:45 AM), https://www.weather.gov/btv/The-Great-Vermont-Flood-of-10-11-July-2023-Preliminary-Meteorological-Summary [https://perma.cc/D7JK-57WD].

13 *See Phoenix Ends 31-Day Streak of Highs at or Above 110 Degrees—By Reaching 108,* NPR (Aug. 1, 2023, 12:08 AM), https://www.npr.org/2023/08/01/1191238086/phoenix-ends-31-day-streak-of-highs-at-or-above-110-degrees-by-reaching-108 [https://perma.cc/Q849-QJTG].

14 Gina Martinez, *Hilary Drenches Southern California with Record-Breaking Rainfall as Storm Wreaks Havoc,* CBS NEWS (Aug. 21, 2023, 8:24 PM) https://www.cbsnews.com/news/tropical-storm-hilary-southern-california-nevada-rain-flooding/ [https://perma.cc/4GMK-VYHT].

15 *See, e.g.*, Timothy M. Lenton et al., *Climate Tipping Points—Too Risky to Bet Against*, 575 NATURE 592, 592–95 (2019); Marten Scheffer et al., *Early-Warning Signals for Critical Transitions*, 461 NATURE 53 (2009).

16 *See, e.g.,* JAMES HANSON, STORMS OF MY GRANDCHILDREN: THE TRUTH ABOUT THE COMING CLIMATE CATASTROPHE AND OUR LAST CHANCE TO SAVE HUMANITY (2009).

17 Ajit Niranjan, *"Era of Global Boiling Has Arrived," Says UN Chief as July Set to Be Hottest Month on Record,* THE GUARDIAN (Jul. 27, 2023, 9:31 AM), https://www.theguardian.com/science/2023/jul/27/scientists-july-world-hottest-month-record-climate-temperatures [https://perma.cc/V7SK-ZH29].

18 ROY SCRANTON, LEARNING TO DIE IN THE ANTHROPOCENE 9 (2015).

than galvanize calls for changes.[19] Their grim strategy has a name—climate doomism.

Instead of using information to spur action, climate doomism deploys IPCC findings to send the message "it's too late," with the sometimes spoken but always present corollary, "so why bother."[20] Rebecca Solnit called this "surrendering in advance."[21] Writers like Roy Scranton have crafted elegies to climate doom.[22] Scranton describes New Orleans in the wake of Hurricane Katrina as 'chaos and collapse" with "the machinery of civilization breaking down, unable to recuperate from shocks to its system."[23] For Scranton, this is our future, and it "is not going away."[24]

Having lived through 9/11 and the COVID-19 crisis in New York City, I beg to differ. Where Scranton sees only "a collective-action problem of the highest order," my experience in New York City taught me that mutual aid can spring up quickly and in unlikely places and that social solidarity can provide pathways forward for seemingly intractable collective action problems.[25] I am not naïve. I recognize the enormity of the physical, social, economic, and political challenges we face. The world is warming rapidly. The rise in fascism dovetails with consolidating corporate control of media and with the means of producing and distributing goods, including foods. Precarity has ordinary people turning to drugs and looking for scapegoats.

Mounting evidence shows that continuing with business as usual is a utopian (dystopian) fantasy, not a viable option.[26] It is clear that Black and brown communities face the most risk. Indeed, it is precisely because most of the costs are borne by people

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19 *See* Richard Schiffman, *Climate Deniers Shift Tactics to 'Inactivism'*, SCI. AM. (Jan. 12, 2021), https://www.scientificamerican.com/article/climate-deniers-shift-tactics-to-inactivism/ [https://perma.cc/B99H-CEPA] (interviewing climate researcher Michael Mann).

20 *See, e.g.*, Jennifer R. Marlon et al., *How Hope and Doubt Affect Climate Change Mobilization,* 4 FRONTIERS IN COMMC'N 1, 13 (2019), (describing how various forms of hope and doubt shape beliefs with regard to climate change).

21 Rebecca Solnit, *We Can't Afford to Be Climate Doomers*, THE GUARDIAN (Jul, 26, 2023, 6:05 AM) https://www.theguardian.com/commentisfree/2023/jul/26/we-cant-afford-to-be-climate-doomers [https://perma.cc/96L7-7SAF].

22 *See* SCRANTON, *supra* note 18, at 12.

23 *Id.* at 82.

24 *Id.*

25 For an exploration of this idea, see Penn Loh, Neenah Estrella-Luna & Katherine Shor, *Pandemic Response and Mutual Aid as Climate Resilience: Learning From Community Responses in the Boston Area*, 1 J. CLIMATE RESILIENCE & CLIMATE JUST. 8 (2023).

26 *See* JAMES GUSTAV SPETH, THE BRIDGE AT THE END OF THE WORLD xiii–xiv (2008) (making this point).

deemed "surplus" to racial capitalism that policies catastrophic to the planet have continued.[27] But nothing is inevitable except change. Our future is not predestined.

We need not continue down roads of destruction. We need not perpetuate the racialized injustices of climate colonialism.[28] We can, if we choose, come together to address these pressing intertwined issues of climate change and climate justice. I say address rather than solve because I am realistic. There is a whole lot of climate change baked into our current conditions, even if today, right now, every single person, corporation, and country stopped using fossil fuels. As Professor Carmen Gonzalez reminds us, "racism and capitalism [have been] inextricably intertwined" for centuries."[29]

This essay is about how to build the "we" that is capable of doing all those things, including making the "rapid, deep and immediate" cuts in greenhouse gas emissions that the IPCC tells us can help avoid the worst impacts of climate change. It is about how to build a social movement capable of translating collective opinions about climate change into effective, on-the-ground action.[30] And, doing so in a fashion that centers justice. As Naomi Klein points out, what gets declared a crisis is as much an expression of power as it is a recognition of facts.[31] In short, this article is about power—how to build it and how to use it.

I. WE MUST START BY REJECTING CLIMATE DOOMISM

The essence of climate doomism is captured in the sentiment "if it's game over regarding climate change, what's the point of trying to fight it?"[32] This defeatist attitude is extremely convenient

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27 For an explanation of racial capitalism and its impact on climate policies, see Carmen G. Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 OÑATI SOCIO-LEGAL SERIES 108, 113–19 (2021).

28 *See* Farhana Sultana, *The Unbearable Heaviness of Climate Coloniality,* 99 POL. GEOGRAPHY 1, 3–6 (2022).

29 Gonzalez, *supra* note 27, at 114 (citing the work of political theorist Cedric Robinson and sociologist Aníbal Quijano).

30 A social movement is a set of "actors and organizations seeking to alter power deficits and to effect transformations through the state by mobilizing regular citizens for sustained political action." Edwin Amenta, et al., *The Political Consequences of Social Movements*, 36 ANN. REV. OF SOCIO. 287, 288 (2010).

31 *See* NAOMI KLEIN, THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE (New York, Simon & Schuster Paperbacks, 2014).

32 u/Pondy001, *Alarmist Article or Not?,* REDDIT (Aug. 22, 2023) https://www.reddit.com/r/climatechange/comments/15y5a46/comment/jxa14ou/?utm_source=share&utm_medium=web3x&utm_name=web3xcss&utm_term=1&utm_content=share_button [https://perma.cc/K96K-2AND].

for those looking to maintain business as usual even as the evidence of climate change becomes clearer.[33] It is unequivocal (that word again) that there are already sweeping climate changes across the globe. The Great Salt Lake is drying up.[34] Arctic sea ice is retreating,[35] the Greenland ice sheets are melting,[36] and sea level is rising.[37] Scientists now float collapse of the Atlantic Meridional Overturning Circulation as a near-term possibility,[38] and point out that we have extracted so much groundwater from aquifers that we have shifted the earth's axis.[39] Many of these changes are irreversible.

Climate doomers seize on these developments to project an apocalyptic future as inevitable.[40] But, in many ways, climate doomism is just climate denial repackaged for a new reality.[41] By spreading fatalistic doubt, climate doomers demotivate engagement on climate change because if nothing can be done,

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33 *See, e.g.*, Guy McPherson, NATURE BATS LAST (2023), (illustrating that Guy McPherson, who has been called a "doomist cult hero" and "a denialist of a different stripe" is one of the most visible faces of climate doomism, with his website and podcast), https://guymcpherson.com [https://perma.cc/4G5V-RRHG]; *see also* Michael Tobias, *McPherson's Evidence That Doom Doom Doom*, PLANET 3.0 (Mar. 13, 2014) (characterizing McPherson as "a denialist . . . of a different stripe"), https://planet3.org/2014/03/13/mcphersons-evidence-that-doom-doom-doom [https://perma.cc/XR4E-HBJ3]; *see also* Michael E. Mann, Susan Joy Hassol, & Tom Toles, *Doomsday Scenarios as Harmful as Climate Change Denial,* WASH. POST (July 12, 2017), https://www.washingtonpost.com/opinions/doomsday-scenarios-are-as-harmful-as-climate-change-denial/2017/07/12/880ed002-6714-11e7-a1d7-9a32c91c6f40_story.html [https://perma.cc/2ACE-NFVS] (calling McPherson a "doomist cult hero").

34 *See* Katherine S. Walter, *The Great Salt Lake Is Becoming Too Salty to Support Life*, THE NATION (Aug. 21, 2023), https://www.thenation.com/article/environment/dust-great-salt-lake/ [https://perma.cc/K7B2-TYGF].

35 *See* NAT'L SNOW & ICE DATA CTR., ARCTIC SEA AND ICE NEWS & ANALYSIS (Aug. 16, 2023), https://nsidc.org/arcticseaicenews/ [https://perma.cc/WNK3-PAQV].

36 *See* NAT'L SNOW & ICE DATA CTR., GREENLAND ICE SHEET TODAY (Aug. 26, 2023), https://nsidc.org/greenland-today/ [https://perma.cc/TC23-962B] (reporting record melting).

37 *See* Rebecca Lindsey, *Climate Change: Global Sea Level*, NOAA (Apr. 19, 2022), https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level [https://perma.cc/6J2X-MXMU] (reporting that global average sea level has already risen by 8-9 inches).

38 *See* Peter Ditlevsen & Susanne Ditlevsen, *Warning of a Forthcoming Collapse of the Atlantic Meridional Overturning Circulation*, 14 NATURE COMMC'N 4254 (2023).

39 Will Sullivan, *Humans Have Shifted Earth's Axis by Pumping Lots of Groundwater*, SMITHSONIAN MAGAZINE (Jun. 22, 2023).

40 *See* Shannon Osaka, *Why Climate 'Doomers' Are Replacing Climate 'Deniers,'* WASH. POST (Mar. 24, 2023), https://www.washingtonpost.com/climate-environment/2023/03/24/climate-doomers-ipcc-un-report/ [https://perma.cc/7VLB-5E5R]; Marco Silva, *Why is Climate 'Doomism' Going Viral—and Who's Fighting It?*, BBC (May 23, 2022), https://www.bbc.com/news/blogs-trending-61495035 [https://perma.cc/DH9V-8LRE].

41 *See, e.g.*, Cara Buckley, *'Ok Doomer' and the Climate Advocates Who Say It's Not Too Late*, N.Y. TIMES (Mar. 22, 2022), https://www.nytimes.com/2022/03/22/climate/climate-change-ok-doomer.html [https://perma.cc/V47G-PT6L].

there is no point in trying.[42] The paralysis embedded in "it's too late" [43] can be as effective at stymying climate action as "it's not proven" was for so long.[44] Both stances impede measures to reduce emissions, even though those measures would, in turn, stem the scope and scale of climate change. Faced with widespread support for climate action,[45] climate doomers' deploy climate defeatism to undermine action as surely as climate denial did in the past.[46]

Climate doomism is as wrong as climate denial.[47] Where there is virtually unanimous agreement among scientists that human activity is driving climate change,[48] not a single reputable climate scientist thinks we are doomed.[49] In fact, renewable energy

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42 *See* Marlon, *supra* note 20, at 9.

43 *See, e.g.*, Pilita Clark, *The Scourge of Climate Doomism*, FIN. TIMES (Aug. 15, 2023) (explaining that climate doomism breeds paralysis, thereby empowering the forces of climate inaction), https://www.ft.com/content/60f6e94a-eb3b-4a3e-9ef6-273262967121 [https://perma.cc/V4WV-NUSH].

44 NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT 246 (2011) (describing how the fossil fuel industry marshaled doubt to block climate action).

45 Two studies showed that individuals were willing to make lifestyle changes to respond to climate change. *See, e.g.*, Alec Tyson, Cary Funk, & Brian Kennedy, *What the Data Says About Americans' Views of Climate Change*, PEW RSCH. (Aug. 9, 2023) (reporting that 69% of Americans support the United States taking steps to become carbon neutral by 2050), https://www.pewresearch.org/science/2022/03/01/americans-largely-favor-u-s-taking-steps-to-become-carbon-neutral-by-2050/ [https://perma.cc/5EDF-GVKQ]; *Three-Quarters of Adults in Great Britain Worry About Climate Change,* OFF. OF NAT'L STAT. (Nov. 5, 2021), https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/articles/threequartersofadultsingreatbritainworryaboutclimatechange/2021-11-05 [https://perma.cc/P4HY-XCBX].

46 *See also* SARAH JAQUETTE RAY, A FIELD GUIDE TO CLIMATE ANXIETY 35 (2020) (asserting that "[d]oomsayers can be as much a problem for the climate movement as deniers, because they spark guilt, fear, apathy, nihilism, and ultimately inertia").

47 For example, ExxonMobil spent decades obscuring public discourse with spurious claims that the link between fossil fuel use and climate warming was uncertain, even as their own internal projections clearly documented the relationship. *See* Geoffrey Supran et al., *Assessing ExxonMobil's Global Warming Projections*, 379 SCI. 115, 153 (2003), https://www.science.org/doi/10.1126/science.abk0063 [https://perma.cc/3JXR-67W2] (concluding that ExxonMobil accurately foresaw the threat of human-caused global warming, in direct contradiction to their lobbying and propaganda campaigns which emphasized uncertainty in order to mislead the public and delay climate action).

48 *See* Mark Lynas et al., *Greater than 99% Consensus on Human Caused Climate Change in the Peer-Reviewed Scientific Literature*, ENV'T RSCH. LETTERS (Nov. 2021), at 1, 4, https://iopscience.iop.org/article/10.1088/1748-9326/ac2966 [https://perma.cc/U7HM-QZ9H].

49 *See, e.g.*, Aaron Hagey-Mackay, *Yes, Climate Change Is Bad. No, We're Not Doomed*, CARBON NEUTRAL CLUB, https://www.carbonneutralclub.com/article/the_truth_behind_climate_doom [https://perma.cc/HJ4J-7DS6] (last visited Dec. 14, 2023); Hannah Ritchie, *We Need the Right Kind of Climate Optimism*, VOX (Mar. 21, 2023, 7:53 AM), https://www.vox.com/the-highlight/23622511/climate-doomerism-optimism-progress-environmentalism [https://perma.cc/K3WT-XMJM]. As climate scientist Michael Mann noted, "[i]f" the science objectively demonstrated it was too late to limit warming below catastrophic levels, that would be one thing and we scientists would be faithful to that. But

systems experts continually state that we *can* make the needed sweeping changes and that we can do it quickly.[50] Moreover, messages about the realistic solutions that already exist to reduce climate impacts have been shown to build constructive hope that motivates climate action.[51]

In addition to mischaracterizing the science, and undermining hope, climate doomism also overemphasizes the massive collective action problems for responding to climate change.[52] This stance is particularly ironic because the fossil fuel industry spent years deflecting attention from the need for systemic change by emphasizing individual responsibility.[53] That very same narrative of individual action, once touted as the answer to the climate crisis,[54] is now trotted out as an insurmountable barrier to success.[55] Were it really true that "[t]he entire world has to work together to solve global warming,"[56] then climate doomers might have a point. But, looking at whose actions are driving the climate crisis, and whose actions really need to change, the problem

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science doesn't say that." Jonathan Watts, *Climatologist Michael E Mann: "Good People Fall Victim to Doomism. I Do Too Sometimes"*, THE GUARDIAN (Feb. 27, 2021, 11:00 AM), https://www.theguardian.com/environment/2021/feb/27/climatologist-michael-e-mann-doomism-climate-crisis-interview/ [https://perma.cc/FB5W-WEWH].

50 A research group at Stanford recently collected an array of studies making this point from across the globe. *See Abstracts of 89 Peer-Reviewed Published Journal Articles From 37 Independent Research Groups With Over 210 Different Authors Supporting the Result That Energy for Electricity, Transportation, Building Heating/Cooling, and/or Industry Can Be Supplied Reliably With 100% or Near-100% Renewable Energy at Different Locations Worldwide*, STANFORD (July 18, 2023), https://web.stanford.edu/group/efmh/jacobson/Articles/I/CombiningRenew/100PercentPaperAbstracts.pdf [https://perma.cc/V7N9-JQYP]; *see, e.g.*, Mark Z. Jacobson et al., *Impacts of Green Hydrogen*, 11 SMART ENERGY, no. 100106, (2023).

51 *See* Marlon *supra* note 20, at 12. *See generally*, JAQUETTE RAY, *supra* note 46 (offering what the author calls "an existential tool kit" for climate activism).

52 For a discussion on this point, see u/CowsRetro, *Growing Rise of Climate Doomerism*, REDDIT (June 28, 2023, 3:46 PM), https://www.reddit.com/r/climatechange/comments/13y0vnt/growing_rise_of_climate_doomerism/ [https://perma.cc/R8UU-DYKL].

53 *See* Mark Kaufman, *The Carbon Footprint Sham*, MASHABLE, https://mashable.com/feature/carbon-footprint-pr-campaign-sham [https://perma.cc/XRF4-2GUD] (last visited Dec. 14, 2023) (noting that BP created the concept of individual carbon footprints as propaganda to divert attention from the core problem that fossil fuels "are the basis for the energy system").

54 *See* Brielle Arnold, *Let's Ditch Individualism in the Climate Change Fight*, THE DAILY (Apr. 19, 2022), https://www.dailyuw.com/special_sections/earth_day_2022/let-s-ditch-individualism-in-the-climate-change-fight [https://perma.cc/8AG3-VQQD] (describing the focus on individual action as "a fossil fuel industry strategy to shift blame").

55 *See* Säde Hormio, *Collective Responsibility for Climate Change*, 14 WILEY INTERDISC. REVS. CLIMATE CHANGE 1, 4, 11 (2023).

56 SCRANTON, *supra* note 18, at 61.

quickly becomes more manageable.[57] Rather than requiring the full cooperation of 198 nations and 7.4 billion people, sweeping climate change really depends on getting a much smaller subset to agree and act.[58] This reality, along with the recognition that there are available solutions, can buttress constructive climate hope, which in turn spurs support for climate action.[59]

Yet, even when we reject climate doomism, the super wicked nature of climate change does pose immense challenges to action.[60]

II. WE MUST TREAT CLIMATE CHANGE AS A SUPER WICKED PROBLEM

Climate change is a classic example of what has come to be known as a "wicked" problem.[61] The term, coined in the 1970s by design theorist Horst Rittel and city planner Melvin Webber, distinguishes certain intractable problems from the more typical "tame" problems that engineers and scientists routinely face.[62]

Make no mistake; calling a problem tame is not to say it is easy. Tame problems can be extremely complex and challenging.[63] However, even the most difficult tame problems are marked by relatively well-defined and stable problem statements.[64] In other words, there is agreement on what the problem is. Tame problems also have defined endpoints—a clear moment at which the problem has been resolved.[65] This kind of problem typically involves identifying and obtaining missing information that is

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57 *See* Henry Shue, *Responsible for What? Carbon Producer CO2 Contributions and the Energy Transition*, 144 CLIMATE CHANGE 591, 593 (2017).

58 *See* MARK Z. JACOBSON, NO MIRACLES NEEDED: HOW TODAY'S TECHNOLOGY CAN SAVE OUR CLIMATE AND CLEAN OUR AIR 318 (Cambridge University Press ed., 2023).

59 *See* Marlon et al., *supra* note 20, at 1–2 (describing constructive hope in this context); *see also* Nicholas Smith & Anthony Leiserowitz, *The Role of Emotion in Global Warming Policy Support and Opposition*, 34 RISK ANALYSIS 937, 946 (2014) (finding that worry, interest, and hope are strongly associated with increased support for climate action).

60 *See* Buckley, *supra* note 41 (describing how advocates are simultaneously fighting climate change and climate doomism).

61 Horst W. J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCIS. 155, 160–61 (1973) (explaining that "wicked"‟ in this context does not mean "ethically deplorable" but "tricky" or "vicious" and not amenable to engineering solutions).

62 *Id.* Some experts argue that wicked problems are the norm. Richard Coyne, *Wicked Problems Revisited*, 26 DESIGN STUD., no. 1, 5, 12 (2005).

63 *See* Joseph C. Bentley, *From Wicked to Tame and Vice Versa*, TAMING WICKED PROBS. (June 2, 2017), https://tamingwickedproblems.com/from-wicked-to-tame-and-vice-versa/ [https://perma.cc/5X2T-5F93].

64 *See* Tom Ritchey, *Wicked Problems: Modelling Social Messes with Morphological Analysis*, 2 ACTA MORPHOLOGICA GENERALIS, no. 1, Jan. 2013, at 1.

65 *See id.* at 1–2.

then used to develop clear, workable solutions.[66] These solutions can then be vetted for their ability to achieve the defined endpoint and accepted or rejected accordingly. In short, tame problems are amenable to the ordinary tools of analysis.

Wicked problems, by contrast, are open-ended and intractable.[67] They are marked by complexity, uncertainty, and an intricate interplay between social, economic, and environmental factors. This makes wicked problems exceptionally challenging to address.

There are four basic attributes that make a problem wicked. First, the problem is constantly changing.[68] With key information not only missing but often unobtainable, there is no way to clearly define a wicked problem except through the process of solving it. As a result, the problem statement becomes a moving target. Second, because of their complexity and ever-changing nature, wicked problems are not amenable to linear, causal chain reasoning. As a result, there are no definitive solutions to wicked problems, only answers that seem better or worse.[69] Competing values shape which solutions seem desirable.[70] Third, there is no clear endpoint and no obvious solution to a wicked problem.[71] This means there is no way to be done with solving it. Finally, every wicked problem is unique.[72] This means that there can be little extrapolation between wicked problems, and the learning curve must be repeated anew for each such problem.[73]

Climate change clearly qualifies as a wicked problem. Because our understanding of climate change is constantly changing, framing the problem appropriately is difficult. Rather than a single problem, climate change is a constellation of intersecting dynamic problems with intricate feedback loops and cascading effects that compound the crisis. Just articulating what is happening involves working across multiple disciplinary boundaries. Knowledge gaps are legion. Moreover, there is no

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66 *See* Robert Farrell & Cliff Hooker, *Design, Science and Wicked Problems*, 34 DESIGN STUD., no. 6, 681, 688 (2013); Marshall W. Kreuter et al., *Understanding Wicked Problems: A Key to Advancing Environmental Health Promotion*, 31 HEALTH EDUC. & BEHAV. 441, 442 (2004).

67 *See* Brian W. Head, *Wicked Problems in Public Policy*, 3 PUB. POL'Y 101, 101 (2008).

68 *See* Rittel & Webber, *supra* note 61, at 161.

69 *See id.* at 163.

70 *See id.*

71 *See id.*

72 *Id.* at 164.

73 *See id.*

definitive climate answer or solution. Indeed, the IPCC scenarios posit an array of likely outcomes under a range of different behavior models. Economic obstacles, including the need to balance short-term costs with long-term benefits, compound the challenge of identifying and prioritizing solutions. There is no point at which the climate crisis will be "solved." Moreover, the lack of a clear endpoint compounds the psychological difficulties inherent in motivating action to respond to abstract, seemingly distant threats.

The wicked nature of climate change introduces multiple barriers to effective action. However, as a team of Yale School of Forestry researchers pointed out a decade ago, calling climate change a wicked problem does not fully capture the magnitude of the challenge. They instead coined the term *super* wicked,[74] reflecting additional confounding factors. Specifically, they noted that, in addition to the wicked characteristics described above: 1) "time is running out," 2) those who caused the problem are also the ones tasked with solving it, 3) the central authority needed to address the problem does not exist, and 4) "irrational discounting" pushes responses out into the future.[75]

Climate change checks on all four points. Addressing the last factor first, irrational discounting has allowed an array of interested parties to make the case that taking immediate actions to stave off future climate impacts did not make economic sense. They justify this claim by applying financial forms of valuation to environmental outcomes.[76] This financialization of climate policy involves conducting a cost-benefit analysis of investments in clean energy or other climate change responses to determine their so-called true value.[77] Because the costs are incurred in the near term while the benefits extend out over time, economic theory requires that the benefits of averting climate catastrophe be discounted to determine their net present value. This net present value is then

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74 Kelly Levin et al., *Overcoming the Tragedy of Super Wicked Problems: Constraining Our Future Selves to Ameliorate Global Climate Change*, 45 POL'Y SCIS. 123, 124 (2012).

75 *Id.*; *see also* Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159–61 (2009) (applying this notion to climate legislation to conclude there is no legal authority with the necessary jurisdictional reach to solve global climate change).

76 Brian C. Prest et al., *Improving Discounting in the Social Cost of Carbon*, RESOURCES, Fall 2021, at 12 (demonstrating how radically the selected discount rate shifted the social cost of carbon calculations used in United States' regulatory cost-benefit analyses).

77 *See* Fabian Muniesa & Liliana Doganova, *The Time that Money Requires: Use of the Future and Critique of the Present in Financial Valuation*, 6 FIN. & SOC'Y 95, 102–03 (2020).

fed into the cost benefit analysis to decide whether climate investments should be made. However, there is a catch. The more heavily future benefits are discounted, the smaller their net present value.[78] And, the smaller the net present value, the less likely investments, or actions to mitigate climate change become. The choice of discount rate becomes outcome determinative.[79]

This trope of economic rationality stalled government climate initiatives for decades.[80] During the early 2000s, Sir Nicholas Stern conducted a review of the economics of climate change at the behest of the British government.[81] In his review, Stern had the temerity to depart from conventional economics and urge rapid action to stave off the looming climate crisis.[82] Stern concluded, "[t]he scientific evidence is now overwhelming: climate change presents very serious global risks, and it demands an urgent global response. . . . [T]he benefits of strong, early action considerably outweigh the costs."[83] Fellow economists roundly criticized the Stern Review for the "error" of using a discount rate of 1.4% rather than the 3–5% rate of return on capital that economists typically use.[84] The choice of discount rate dictated the conclusion—either urgent measures should be taken, or even modest steps could not be justified. And unfortunately, short-term gain at the expense of the climate seems to be the rule, never mind the long-term pain it will bring. [85]

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78 For an explanation of what discounting is and how it impacts decision making, see Stephen Polasky & Nfamara K. Dampha, *Discounting and Global Environmental Change*, 46 ANN. REV. ENV'T & RES. 691, 692–93 (2021).

79 *See* LILIANA DOGANOVA, DISCOUNTING THE FUTURE (forthcoming Feb. 2024) (on file with author); *see also* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 179, 189, 195 (The New Press ed., 2004) (describing the impacts of discounting in a chapter titled "Honey I Shrunk the Future").

80 For example, the Bush Administration adopted a plan of reducing carbon emission intensity per unit of GDP, rather than committing to actual carbon emission reductions. *Bush Unveils Voluntary Plan to Reduce Global Warming*, CNN: INSIDE POL. (Feb. 14, 2002, 11:08 PM), https://www.cnn.com/2002/ALLPOLITICS/02/14/bush.global.warming/index.html [https://perma.cc/VV99-EEUB].

81 NICHOLAS STERN, STERN REVIEW: THE ECONOMICS OF CLIMATE CHANGE i–ii (2006).

82 *Id.*

83 *Id.*

84 William D. Nordhaus, *A Review of the Stern Review on the Economics of Climate Change*, 45 J. ECON. LITERATURE 686, 688, 691, 694 (2007); Jerry Taylor, *Nordhaus vs. Stern*, CATO INST. (Nov. 28, 2006, 5:03 PM), https://www.cato.org/blog/nordhaus-vs-stern [https://perma.cc/4Q7T-STQK]. For an explanation of why these critiques miss their mark, see Frank Ackerman, *Climate Economics in Four Easy Pieces*, 51 DEV. 325 (2008).

85 *See, e.g.*, Robert O. Mendelsohn, *A Critique of the Stern Report*, 29 REGUL. 42 (2006) (noting that "[e]conomists have long argued that stabilizing greenhouse gases at 550 ppm is not efficient because the costs far outweigh the benefits").

Even as irrational discounting of future climate impacts lulled governments into a false sense of security, facts on the ground underscored ever more clearly that we do not have the luxury of time. For climate action, time is running out. In 2018, the IPCC issued a Special Report on keeping climate change below 1.5ºC.[86] The report found that limiting global warming to 1.5ºC will require a "rapid and far-reaching" transition[87] and estimated that global society had a narrow window in which to act to stave off catastrophic climate outcomes.[88] Specifically, the IPCC stated that to keep warming under 1.5ºC, nations would have to cut 2010 emissions levels nearly 50 percent by 2030[89] and achieve net-zero by 2050.[90] That report was five years ago. Since then, emissions have reached new highs.[91] Even though there are some encouraging developments in renewable energy, we are nowhere near halving emissions by 2030. Every year of delay brings us closer to the precipice. Even now, while we still remain below 1.5ºC, the impacts of climate change "are already ferocious.[92] Already relentless. Already deadly."[93]

The super wicked factor that those who created the problem are tasked with solving it has been the bane of climate activists everywhere. The Framework Convention on Climate Change elected to hold its 28th Conference of the Parties ("COP") in the United Arab Emirates ("UAE"), a country that produces more than

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86 Intergovernmental Panel on Climate Change [IPCC], *Special Report: Global Warming of 1.5°C: Summary for Policymakers* (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_HR.pdf [https://perma.cc/CE6C-R5S6] [hereinafter IPCC 1.5 Report].

87 *Id.* at 15.

88 *See* Press Release, General Assembly, Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn During General Assembly High-Level Meeting, U.N. Press Release GA/12131 (Mar. 28, 2019) (quoting General Assembly President María Fernanda Espinosa Garcés).

89 IPCC 1.5 Report, *supra* note 86, at 12.

90 *Id.*

91 *See* Zhu Liu et al., *Monitoring Global Carbon Emissions in 2022*, 4 NATURE REVS. EARTH & ENV'T 205, 205–06 (2023).

92 July 2023 became the first month to surpass 1.5ºC warming. *See July 2023: Global Air and Ocean Temperatures Reach New Record Highs*, COPERNICUS CLIMATE CHANGE SERVS. (Aug. 8, 2023), https://climate.copernicus.eu/july-2023-global-air-and-ocean-temperatures-reach-new-record-highs [https://perma.cc/Y52Q-CPVY].

93 Inger Andersen, Exec. Dir. United Nations Env't Programme [UNEP], The Urgency of Transformative Climate Adaptation Action (Sept. 1, 2023), *in* UNEP, https://www.unep.org/news-and-stories/speech/urgency-transformative-climate-adaptation-action [https://perma.cc/VGQ4-3YPH] (last visited Dec. 14, 2023).

four million barrels of oil each day.[94] The UAE selected oil company executive Sultan Ahmed Al Jaber to head the COP, drawing praise from OPEC, but condemnation from most others.[95] But putting an oil executive in charge of the COP merely made manifest the significant control that fossil fuel has over the entire process of climate response. At the two prior COPs, in Sharm el-Sheikh and Glasgow respectively, hundreds of oil and gas lobbyists swarmed the meeting. In fact, in Glasgow, these lobbyists were the largest delegation, outnumbering the representatives of any single country.[96] As mentioned earlier, ExxonMobil stands accused of funding a decades-long climate denial campaign that directly contradicted its own internal research.[97]

During the Trump administration, former ExxonMobil CEO Rex Tillerson served as Secretary of State. In that capacity, Tillerson oversaw the United States delegations to COP23 in Bonn, even as the administration announced plans to withdraw from the Paris Agreement.[98] Tillerson was only one of a slew of fossil fuel executives to serve in the Trump administration. Climate skeptic Scott Pruitt was Trump's first EPA administrator, followed by coal industry lobbyist turned EPA administrator

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94 *See Oil Production in the United Arab Emirates from 1998 to 2022*, STATISTA (Aug. 25, 2023), https://www.statista.com/statistics/265191/oil-production-in-the-united-arab-emirates-in-barrels-per-day/ [https://perma.cc/NZT8-S3M8].

95 *Compare OPEC Offers Its Full Support to the UAE COP28 Presidency*, ORG. PETROL. EXPORTING COUNTRIES (May 29, 2023), https://www.opec.org/opec_web/en/press_room/7153.htm [https://perma.cc/4E8K-KGEM], *with* Lara Williams, *An Oil Exec Running COP? This Isn't a Joke*, WASH. POST (Jan. 15, 2023, 4:17 PM), https://www.washingtonpost.com/business/energy/an-oil-exec-running-cop-this-isnt-a-joke/2023/01/13/2511ec92-9304-11ed-90f8-53661ac5d9b9_story.html [https://perma.cc/P4ZL-6WDG].

96 Ruth Michaelson, *'Explosion' in Number of Fossil Fuel Lobbyists at COP27 Climate Summit*, THE GUARDIAN (Nov. 10, 2022, 4:32 AM), https://www.theguardian.com/environment/2022/nov/10/big-rise-in-number-of-fossil-fuel-lobbyists-at-cop27-climate-summit [https://perma.cc/W263-B57R].

97 *See* Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago*, SCI. AM. (Oct. 26, 2015), https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/ [https://perma.cc/5EYE-PS3A]. In fact, not only was ExxonMobil aware that its industry was driving anthropogenic climate change, but its internal predictions were remarkably accurate, predicting global warming "correctly and skillfully." *See* Supran et al., *supra* note 46, at 153.

98 *See* Justin Catanoso, *COP23: Trump, U.S. Govt. Seen as Irrelevant to Global Climate Action*, MONGABAY (Nov. 7, 2017), https://news.mongabay.com/2017/11/cop23-trump-u-s-govt-seen-as-irrelevant-to-global-climate-action/ [https://perma.cc/335C-FGJ7]. Negotiated in 2015 at COP21, the Paris Agreement is the international framework for responding to climate change. It included a commitment to keeping climate change well below 2ºC and to pursue efforts to keep climate change below 1.5ºC.

Andrew Wheeler.[99] In the capacity of administrator, both had the power to advance or block climate initiatives designed to lower carbon emissions and reduce fossil fuel use. Guess which option they chose.[100]

The final super wicked factor, the lack of a central authority capable of addressing the problem, is the super wicked attribute most clearly related to law. Climate change is a global issue with conduct that occurs within nation states, driving impacts that transcend national borders. Indeed, this feeds directly into a common critique of international law—is it really law?[101] Without police power or a way to enforce compliance, what exactly is international law?[102] What does that mean for the Paris Agreement? Under that agreement, each state party self-identified so-called nationally determined contributions ("NDCs").[103] These were the carbon reduction targets states chose for themselves. Even assuming legal and foreign policy scholar Louis Henkin's description of international law is true—that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,"[104] the actions that drive climate change lurk in the interstices. The Paris Agreement NDCs fell far short of the reductions needed to keep climate change below 1.5ºC. And, it is not clear that states are meeting even these self-imposed targets. Institutional limitations abound. The lack of an overarching superstructure of

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99 *EPA's Administrators*, U.S. EPA, https://www.epa.gov/history/epas-administrators [https://perma.cc/QA6X-T4ZB] (last visited Jan. 17, 2024). *See* Daniel Bush, All of the Ways Scott Pruit Changed Energy Policy, PBS (July 5, 2018, 7:12 AM), https://www.pbs.org/newshour/nation/all-of-the-ways-embattled-epa-chief-scott-pruitt-has-changed-energy-policy#:~:text=Pruitt%2C%20a%20noted%20climate%20change,major%20cause%20of%20climate%20change [https://perma.cc/T44Y-LMNX]; *see also* David Malakoff, Trump Picks Prominent Climate Skeptic as EPA Chief, SCIENCE (Dec. 7, 2016), https://www.science.org/content/article/trump-picks-prominent-climate-skeptic-epa-chief#:~:text=As%20Oklahoma's%20attorney%20general%2C%20Scott%20Pruitt%20led%20legal%20challenges%20to%20climate%20rules&text=President%2Delect%20Donald%20Trump%20is,)%2C%20according%20to%20media%20reports. [https://perma.cc/UEG6-FACR].

100 *See* Lisa Friedman, *Andrew Wheeler, Who Continued Environmental Rollbacks, Is Confirmed to Lead E.P.A.*, N.Y. TIMES (Feb. 28, 2019), https://www.nytimes.com/2019/02/28/climate/andrew-wheeler-epa-confirmation.html [https://perma.cc/A7BP-QRQZ].

101 *See, e.g.*, Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U. L. REV. 1293, 1293 (1985) (posing the question and the critique that it is difficult to "enforce a rule of law against an entire nation").

102 *See id.* at 1295–96.

103 *Nationally Determined Contributions (NDCs)*, U.N. CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs [https://perma.cc/K5LD-CFUB] (last visited Dec. 22, 2023).

104 LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted).

authority poses a clear problem in responding to climate change. Yet, as we have seen within the United States, as the national government wobbles between denial and dysfunction, enforceability of law does not simplify the problems that climate change poses. Merely having an overarching superstructure of nominally enforceable law does not get us that far.

The reality of inadequate government structures is both terrifying and liberating. If there is no central authority, no world government, what makes the Paris Agreement enforceable? At COP28, hosted by the UAE, there was a global stock-taking to assess progress since the Paris Agreement. Even if every state met its target, the progress would still be inadequate. But, the stock-taking did provide a reality check of what is happening and what still needs to be done to reduce carbon emissions.

III. THINK GLOBALLY, ACT LOCALLY

Recognizing that climate change is super wicked need not feed into climate doomism. Instead, cultivating constructive climate hope can actually promote policies that advance climate mitigation and adaptation. The answer for how to cultivate that constructive hope may lie in thinking smaller rather than bigger, locally rather than globally. At the same time that the wicked and super wicked attributes of climate change act as constraints, they are also liberating. If there is no "right" answer, that means we are all free to try things. If there is no overarching legal authority, that creates room to experiment.

Moreover, even when national governments are stymied at international negotiations, it is worth remembering that there are other actors with legal authority and capacity to affect climate policies. Indeed, during the Trump years, when United States policies were full-on climate denial, many subnational entities, including local governments and state governments, stepped into the void. These legal actors developed their own climate policies, frequently rooted in radically restructuring the economy to simultaneously reduce carbon emissions while increasing social justice. Because there is so much focus on federal policies, these local stories often go untold. By shifting focus away from climate stagnation on the national level, and instead centering the ever-growing array of emerging ground-up climate initiatives, it becomes easier to imagine a path forward. The more we tell this alternative story rooted in local, place-based actions, the easier it becomes to build a platform for further, wider climate action.

IV. LESSONS FROM "WE ARE STILL IN"

During the Trump era, activists determined to make climate progress embraced the bumper sticker slogan "think globally, act locally."[105] On June 1, 2017, Trump announced that he was withdrawing the United States from the Paris Agreement.[106] While his supporters probably celebrated, Americans generally were not pleased.[107] Former New York City Mayor Michael Bloomberg led the American Cities Climate Challenge,[108] a coalition of United States cities working to meet the Paris Accord commitments under the banner "We Are Still In."[109] The idea was to make progress on the ground that would add up to the Paris Agreement NDCs regardless of what the federal government did or did not do. The very day that Trump made his announcement, the Governors of New York, Washington, and California announced formation of the United States Climate Alliance.[110] The organization rapidly grew to represent states and territories containing more than 50% of the United States' total population,

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105 *See* Paul Kingsnorth, *The Lie of the Land: Does Environmentalism Have a Future in the Age of Trump?*, THE GUARDIAN (Mar. 18, 2017, 4:00 AM), https://www.theguardian.com/books/2017/mar/18/the-new-lie-of-the-land-what-future-for-environmentalism-in-the-age-of-trump [https://perma.cc/BN64-WQLZ].

106 *President Trump Announces U.S. Withdrawal from the Paris Climate Accord*, TRUMP WHITE HOUSE ARCHIVES (June 1, 2017), https://trumpwhitehouse.archives.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/ [https://perma.cc/T8AQ-V6QJ]. Of course, Trump could not do that under the terms of the Paris Agreement, which required three years to pass from the date of its ratification, and twelve months' notice by the country wishing to leave. Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement*, BBC (Nov. 4, 2020), https://www.bbc.com/news/science-environment-54797743 [https://perma.cc/44Z4-JAJ5]. The date on which the United States could withdraw from the Paris Agreement fell after Trump lost the 2020 election. *Id.* One of President Biden's first acts on his first day in office was to rejoin the Paris Agreement. Oliver Milman, *Biden Returns US to Paris Climate Accord Hours After Becoming President*, THE GUARDIAN (Jan. 20, 2021, 5:28 PM), https://www.theguardian.com/environment/2021/jan/20/paris-climate-accord-joe-biden-returns-us [https://perma.cc/RT52-S3G5].

107 *See* Morning Consult & Politico, *National Tracking Poll*, POLITICO (May 1, 2018), https://www.politico.com/f/?id=00000163-1d83-d977-a7e7-9d8b23190001 [https://perma.cc/9YSB-2HHZ]. In a sample size of 1,991 respondents, 53% stated that they disapprove of former president Donald Trump's performance. *Id.*

108 *See American Cities Climate Challenge*, BLOOMBERG PHILANTHROPIES, https://www.bloomberg.org/environment/supporting-sustainable-cities/american-cities-climate-challenge/ [https://perma.cc/V7B5-R75L].

109 *"We Are Still In" Declaration*, WE ARE STILL IN, https://www.wearestillin.com/we-are-still-declaration [https://perma.cc/4UMF-R8F9].

110 *See* Press Release, Jay Inslee, Governor, Washington, Inslee, New York Governor Cuomo, and California Governor Brown Announce Formation of the United States Climate Alliance (Jun. 1, 2017), https://governor.wa.gov/news/2017/inslee-new-york-governor-cuomo-and-california-governor-brown-announce-formation-united-states [https://perma.cc/Q62T-AVS6].

and responsible for more than 60% of the United States' total economic activity.[111] New York was one of the leaders taking up the challenge of filling the void left by the federal government. The next section describes some of the measures New York has taken since then to reduce its carbon emissions.

A. What Did "We Are Still In" Mean in New York?

At the time Trump made his announcement, New York's then-Governor Andrew Cuomo was in the middle of a long-running feud with New York City's Mayor Bill de Blasio.[112] Nevertheless, both men were on the same page about the ill-advised nature of Trump's move. Both spoke out immediately to proclaim that leaving the Paris Agreement was a bad idea. Denouncing Trump's move as a "reckless" move with "devastating repercussions for the planet," then-Governor Andrew Cuomo signed an executive order reaffirming the Paris Agreement and redoubling New York's fight against climate change.[113] New York City Mayor Bill de Blasio signed an executive order adopting the goals of the Paris Agreement for New York City.[114] Characterizing Trump's actions as "put[ting] millions of Americans at risk," the executive order declared that "New York City must step up to stop climate change."[115] Since then, both New York State and New York City have taken significant steps to turn this rhetoric into reality.

V. CONCRETE STEPS IN NEW YORK STATE

In 2019, the New York legislature enacted, and Governor Cuomo signed, the Climate Leadership and Community Protection Act ("CLCPA").[116] This ambitious climate legislation significantly

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111 *See* States United for Climate Action, U.S. CLIMATE ALLIANCE, https://usclimatealliance.org/ [https://perma.cc/QR9L-PH9T].

112 *See* Ross Barkan, *A Brief History of the Cuomo-de Blasio Feud,* THE NATION (Apr. 17, 2020), https://www.thenation.com/article/politics/cuomo-deblasio-covid-feud/ [https://perma.cc/W35W-DYS5].

113 Press Release, Jay Inslee, *supra* note 110. *See* N.Y. COMP. CODES R. & REGS. tit. § 9, § 8.166 (2021).

114 *See* Press Release, Bill de Blasio, Mayor, City of New York, Mayor de Blasio Signs Executive Order to Adopt Goals of Paris Climate Agreement for New York City (Jun. 2, 2017), https://www.nyc.gov/office-of-the-mayor/news/386-17/mayor-de-blasio-signs-executive-order-adopt-goals-paris-climate-agreement-new-york-city#/0 [https://perma.cc/Z2TG-E2PA].

115 *Exec. Order 26, Climate Action Exec. Order*, OFFICE OF THE MAYOR, THE CITY OF N.Y. (Jun. 2, 2017) https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2017/eo_26.pdf [https://perma.cc/VB5M-GAEZ].

116 *See* S. 6599, A. 8429, 2019 S. Assemb., Reg. Sess. (N.Y. 2019) (Climate Leadership and Community Protection Act).

ratcheted up the state's climate commitments that had previously been set out by executive order.[117] Specifically, the CLCPA committed the state to 100% carbon-free energy by 2040[118] and a net-zero carbon economy by 2050.[119] By requiring that at least 35% of the benefits of clean energy investment flow to disadvantaged communities, this legislation embeds environmental justice and climate justice at its core.[120] The law is having a real impact on the ground. For example, pursuant to both the carbon-free energy mandate and the environmental justice mandate of the CLCPA, New York's Department of Environmental Conservation denied two permits for fossil fuel peaker plants in New York City in 2021.[121] The New York Public Service Commission approved construction of a transmission line to import more than ten terawatt-hours of hydropower to New York City from Quebec.[122] The state has embraced offshore wind, with projects expected to generate 4,032 megawatts of green power currently under active development.[123]

In the years since the CLCPA was enacted, New York has also passed the All-Electric Building Act, banning fossil fuel

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117 *See* N.Y. COMP. CODES R. & REGS. tit. § 9, §8.166 (2021). New York's climate goals had previously been set by executive order "as reducing greenhouse gas emissions from all sources within the State eighty percent (80%) below levels emitted in the year nineteen hundred ninety (1990) by the year twenty-thousand fifty (2050)." N.Y. COMP. CODES R. & REGS. tit. § 9, § 7.24 (2021) (continuing N.Y. COMP. CODES R. & REGS. tit. § 9, § 8.2 (2021)).

118 Climate Leadership and Community Protection Act sec. 4, § 66–p(2), 2019 N.Y. Laws at 871 (codified at N.Y. PUB. SERV. LAW § 66–p(2) (McKinney 2023)).

119 *Id*. sec. 2, § 75–0103(11), 2019 N.Y. Laws at 863 (codified at ENV'T CONSERV. § 75–0103(11)).

120 *Id.* sec. 2, § 75–0117, 2019 N.Y. Laws at 869 (codified at ENV'T CONSERV. § 75–0117). For more information on this point, see N.Y. State Climate Action Council, *Climate Justice Working Group*, N.Y'S CLIMATE LEADERSHIP & CMTY. PROT. ACT, https://climate.ny.gov/Resources/Climate-Justice-Working-Group [https://perma.cc/9W62-4MNE].

121 Marie J. French, *New York Denies Gas Plant Permits in First-Ever Decision Citing Climate Law*, POLITICO (Oct. 27, 2021, 4:28 PM), https://www.politico.com/states/new-york/albany/story/2021/10/27/hochul-administration-denies-permits-for-two-gas-plants-under-new-climate-law-1392062 [https://perma.cc/YXZ6-KMUJ].

122 Press Release, Lynn St-Laurent, Senior Commc'ns Advisor, Hydro-Québec, Final Approval Obtained in the U.S. – Hydro-Québec's Exp. Project to New York City: Green Light from the Pub. Serv. Comm'n (Apr. 14, 2022), https://news.hydroquebec.com/en/news/236/final-approval-obtained-in-the-us-hydro-quebecs-export-project-to-new-york-city-green-light-from-the-public-service-commission [https://perma.cc/UDK9-FPSV].

123 *Offshore Wind Projects*, N.Y. STATE ENERGY RSCH. & DEV. AUTH., https://www.nyserda.ny.gov/All-Programs/Offshore-Wind/Focus-Areas/NY-Offshore-Wind-Projects [https://perma.cc/3CZ5-SJ2T].

connections in new housing and commercial construction,[124] and the Build Public Renewables Act, requiring, *inter alia*, that all state-owned properties use 100% renewable energy by 2030.[125]

Perhaps most importantly, in 2021, the citizens of New York voted overwhelmingly (by roughly 3 to 1) to amend the state constitution by adding an environmental rights provision. The environmental amendment, added as section 19 of Article I, the State Bill of Rights, provides: "Each person shall have a right to clean air and water, and to a healthful environment."[126]

The new constitutional provision is both sweeping and simple. It guarantees all New Yorkers the constitutional right to live, work, and play in communities that are safe, healthy, and free from harmful environmental conditions. As Steve Englebright, the amendment's primary sponsor in the State Assembly, explained: "the right to clean air and clean water and a healthful environment is an elementary part of living in this great state."[127] By overwhelmingly approving the Environmental Rights Amendment, New York voters sent a clear message that environmental justice is central to how New York law should be understood and implemented.[128] The legislature followed this

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124 *New York Passes Law Banning Fossil Fuel Equipment in Most New Buildings*, NPR (May 4, 2023, 4:45 AM), https://www.npr.org/2023/05/04/1173910706/new-york-passes-law-banning-fossil-fuel-equipment-in-most-new-buildings [https://perma.cc/7VYT-DFKS].

125 Aliya Uteuova, *New York Takes Big Step Toward Renewable Energy in 'Historic' Climate Win*, GUARDIAN (May 3, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/may/03/new-york-renewable-energy-public-utilities [https://perma.cc/88LV-RHVP].

126 N.Y. CONST. art. I, § 19.

127 Assemblyman Steve Englebright, Statement Explaining His Vote in Favor of the Environmental Rights Amendment Before the New York State Assembly (Apr. 30, 2019) (transcript available at https://nyassembly.gov/av/session). I have elsewhere written extensively about how this constitutional amendment could transform environmental protection in New York. *See, e.g.*, Rebecca Bratspies, *Administering Environmental Justice: How New York's Environmental Rights Amendment Could Transform Business as Usual*, 41 PACE ENVTL. L. REV. (forthcoming 2023); Jaclyn Spencer & Rebecca Bratspies, *Avoiding Mistakes in Implementing New York's Green Amendment*, 43 N.Y. ENV'T LAW. 35 (2023); Rebecca Bratspies, *This Changes Everything: New York's Environmental Amendment*, 33 N.Y. ENV'T LAW. 95 (2022).

128 The ballot initiative that added environmental rights as Section 19 of Article I of the New York Constitution was supported by more than 70% of voters. *New York Proposal 2: Environmental Rights Amendment (2021)*, BALLOTPEDIA (2021), https://ballotpedia.org/New_York_Proposal_2,_Environmental_Rights_Amendment_(2021) [https://perma.cc/PL4Z-2N76]. Support for the measure cut across the usual political divides. Indeed, in their opposition to the proposal, the New York Business Council acknowledged widespread political support for adding environmental rights to the state constitution. *The Business Council Opposes Proposition 2—Environmental Rights Amendment*, THE BUS. COUNCIL (Oct. 27. 2021), https://www.bcnys.org/news/business-

constitutional amendment with the 2022 Cumulative Impacts Law,[129] requiring that state regulators consider environmental justice in all permitting decisions. Each one of these laws takes concrete steps toward meeting New York's climate commitments.

New York City has been equally busy enacting local climate legislation. The next section describes some of the most significant city initiatives intended to meet or exceed New York City's climate commitments under the Paris Agreement.

A. Climate Action in New York City

Even before New York State enacted the CLCPA, New York City was already moving forward aggressively to combat climate change. Just before Earth Day in 2019, New York's City Council passed the Climate Mobilization Act, an ambitious legislative package aligned with the 1.5°C Climate Action Plan developed under Mayor de Blasio's Paris Agreement executive order.[130] Central to the Climate Mobilization Act is Local Law 97, first-of-its-kind legislation placing emissions limits on New York City's large buildings, both commercial and residential.[131] This law imposed enforceable carbon emissions caps for 50,000 large buildings (more than 25,000 square feet) that collectively contribute to 30% of the City's' overall carbon footprint. When fully implemented in 2050, these emission caps will reduce carbon emissions from New York City buildings by 80%.[132] The law also imposes an interim target of 40% emissions reductions by 2030.[133]

For perspective on how big the impact of this law will be, consider that the avoided emissions just from meeting Local Law 97's interim 2030 target will be equivalent to all of San Francisco's

council-opposes-proposition-2-environmental-rights-amendment [https://perma.cc/UVV5-X228]. Moreover, before being added to the ballot, the proposed amendment first had to be approved by both houses of the state legislature in two separate legislative sessions. N.Y. CONST. art. XIX § 1. Only after two successive legislatures approved the amendment (which they did by overwhelming margins) was the proposal presented to the voters for ratification.

129 *See* Lisa Whitely Coleman, *New York's Cumulative Impacts Law*, EHS DAILY ADVISOR, https://ehsdailyadvisor.blr.com/2023/02/new-yorks-cumulative-impacts-law/ [https://perma.cc/SK6X-T7ZG] (last updated Feb. 21, 2023).

130 *See 1.5° C: Aligning New York City With The Paris Climate Agreement*, NYC (Sept. 2017), https://www.nyc.gov/assets/sustainability/downloads/pdf/publications/1point5-AligningNYCwithParisAgrmt-02282018_web.pdf [https://perma.cc/K5QP-8YK5].

131 N.Y.C., N.Y., LOCAL LAW No. 97 (2019).

132 *Id.* For an explanation of the provisions, see *Local Law 97*, NYC SUSTAINABLE BLDG, https://www.nyc.gov/site/sustainablebuildings/ll97/local-law-97.page [https://perma.cc/R864-GS35] (last visited Nov. 18, 2023).

133 *See* sources cited *supra* note 132.

current emissions.[134] Even more importantly, New York City's Local Law 97 offers a proof of concept that building retrofits can be done–both politically and technically. If this plan can succeed in New York, climate initiatives focusing on building retrofits will likely become more common across the country and around the world.

In addition to Local Law 97, the Climate Mobilization Act included several other laws geared towards reducing New York City's carbon footprint. These laws include requiring green, solar, or high albedo roofs on most new construction,[135] requiring prominent display of letter grades assessing building energy performance,[136] establishing financing tools to support the required retrofits,[137] and directing the Department of Buildings to investigate wind energy.[138] While the Climate Mobilization Act will not single-handedly reverse the effects of climate change, it "will be the largest emissions reduction policy in the history of New York City or any city anywhere."[139]

There are too many additional initiatives designed to reduce New York City's carbon footprint to list them all. A few of the most significant include Renewable Rikers,[140] congestion pricing,[141] and the complete streets plan which prioritizes pedestrians, buses, and protected bike lanes in the city's transit planning.[142]

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134 *See* Ric Dragon, *NYC Building Emissions Law Summary*, STILL N.Y. (Nov. 14, 2020), https://stillnewyork.nyc/nyc-building-emissions-law-summary/ [https://perma.cc/HZ7U-2LQ5].

135 N.Y.C., N.Y., LOCAL LAW 94 (2019); *see also* N.Y.C., N.Y., LOCAL LAW 92 (2019).

136 N.Y.C., N.Y., LOCAL LAW 95 (2019).

137 N.Y.C., N.Y., LOCAL LAW 96 (2019).

138 N.Y.C., N.Y., LOCAL LAW 98 (2019).

139 Caroline Spivack, *NYC Passes Its Own "'Green New Deal'" in Landmark Vote*, CURBED (Apr. 22, 2019, 4:32 PM), https://ny.curbed.com/2019/4/18/18484996/nyc-council-passes-climate-mobilization-act-green-new-deal [https://perma.cc/JFM5-JMFE] (quoting Costa Constantinides, the Climate Mobilization Act's prime sponsor in city council).

140 I have elsewhere written extensively about the plan to convert Rikers Island from New York City's main jail to a center for renewable energy generation and storage. *See generally* Rebecca Bratspies, *What Makes It a Just Transition? A Case Study of Renewable Rikers*, 40 PACE ENV'T. L. REV. 1 (2023); Rebecca Bratspies, *Decarceration with Decarbonization: Renewable Rikers and the Transition to Clean Power*, 13 SAN DIEGO J. CLIMATE & ENERGY L. 1 (2022); Rebecca Bratspies, *Renewable Rikers: A Plan for Restorative Environmental Justice,* 66 LOY. L. REV. 371 (2020).

141 *See* Ginia Bellafante, *Congestion Pricing Is Coming. It Doesn't Have to Be Painful*, N.Y. TIMES (Sept. 8, 2023, 11:50 PM), https://www.nytimes.com/2023/09/08/nyregion/congestion-pricing-.html [https://perma.cc/464F-8WHG].

142 N.Y.C., N.Y., LOCAL LAW 195 (2019) (requiring that the city install 250 miles of protected bike lanes by 2026); *see also* N.Y.C. DEP'T OF TRANSP., NYC STREETS PLAN UPDATE 2023 (implementing Local Law 195).

I shared these details about New York not to convince you that New York is great (though it is), but to demonstrate how multiple small changes can combine to become social transformation.

CONCLUSION: JUSTICE IS A CLIMATE STRATEGY!

In presenting the most recent climate assessment report, the IPCC emphasized the importance of transformational change built around climate justice.[143] They pointed to multiple feasible and effective options to reduce greenhouse gas emissions and adapt to human-caused climate change, while putting human rights, justice, and equity at the center of policymaking.[144] There is no question that those suffering first and most have contributed the least to the climate crisis.[145] Recent research documents that pollution disproportionately impacts populations of color across the United States and around the world.[146] These are often the same communities most vulnerable to climate change. The good news buried in this realization is that the link between larger exposure to pollution and heightened vulnerability to climate change opens a clear path for achieving broader climate results by prioritizing climate justice. The surest and fastest way to reduce emissions is to focus on reducing the pollution exposures of the most impacted and vulnerable populations. By making choices that focus on protecting those most clearly in harm's way, we deploy resources in a fashion that most effectively addresses the overall problem.

As you join the struggle against climate change, there are some important lessons to remember. Do not give way to climate doomism. Climate anxiety is real and growing, but constructive climate hope helps us visualize a path forward. Climate doomism preys on climate anxiety to generate climate paralysis and climate despair. Remembering all the real, on-the-ground actions that can happen (and that are happening in New York) helps ward off

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143 IPCC, *Sixth Assessment Report*, at 57, (Mar. 19, 2022), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf [https://perma.cc/N3DC-YE3A].

144 *See* Press Release, IPCC, Urgent Climate Action Can Secure a Livable Future for All (Mar. 20, 2023).

145 *See* BARBARA ADAMS & GRETCHEN LUCHSINGER, CLIMATE JUSTICE FOR A CHANGING PLANET: A PRIMER FOR POLICY MAKERS AND NGOS 5 (U.N. Non-Governmental Liaison Services, 2009) (articulating the global justice concern that those who suffer most from climate change are those who have done the least to cause it).

146 *See* Christopher W. Tessum et al., *PM2.5 Polluters Disproportionately and Systematically Affect People of Color in the United States*, 7 SCI. ADVANCES, 1 (Apr. 28, 2021).

climate doomism. But to be productive rather than delusional, climate hope must be rooted in recognition of the super wicked nature of the climate problem.

I will end with some advice and a personal story. First, the advice: find ways to make meaningful change on a small scale in your own community. The pathway forward will be different for each of us, as we all have different skills, talents, and desires. Bring your whole self to this work, and do not be afraid to be creative. For example, in 2014, I began a collaboration with artist Charlie LaGreca to make *The Environmental Justice Chronicles*, a series of environmental justice comic books.[147] Our goal was to use storytelling and research to promote environmental justice by building a new generation of environmental leaders focused on the urban environment. The third book in the series, *Troop's Run,* directly speaks to climate activism. In 2023, the EPA awarded our comic book project its Clean Air Act Excellence Award for Education/Outreach. As Charlie and I accepted the award at EPA Headquarters in Washington D.C., we had the opportunity to reflect on the project. What started out as a small, unconventional idea that played to our unique talents, morphed into a much bigger project. To date, these books have reached thousands of young people in New York City, across the country, and around the world.

We also began a project funded by the United Nations to create *The Earth Defenders*, a graphic novella composed of short, illustrated chapters depicting the dangers that environmental defenders face around the world.[148] As of this writing, the first three stories are available online. *The Keepers* tells the story of the Sengwer People, Kenyan forest dwellers being evicted from their lands so that their traditional territories can become conservation lands included in the REDD program.[149] *The Song of the Sunderbans* tells of the grassroots resistance to Bangladesh's decision to build an enormous coal-fired power plant in the largest

147 The comic books in the Environmental Justice Chronicle can be accessed at the Rebecca Bratspies website. Rebecca Bratspies, *Environmental Justice Chronicles*, https://www.rebeccabratspies.com/environmental-justice-chronicles [https://perma.cc/H7TR-V7UW] (last visited Oct. 31, 2023). .

148 *Earth Defenders – A Graphic Novella,* UN ENV'T PROGRAMME (Aug. 19, 2022), https://www.unep.org/resources/publication/earth-defenders-graphic-novella [https://perma.cc/VR3D-P65].

149 See CHARLIE LA GRECA VELASCO & REBECCA BRATSPIES, THE KEEPERS 1-8 (Rebecca Bratspies ed. 2022), *available at* https://wedocs.unep.org/bitstream/handle/20.500.11822/40492/TKWeb.pdf?sequence=4 [https://perma.cc/F5KE-JRKP] for a preview of the forthcoming graphic novel.

intact mangrove forest in Asia.[150] The *Prey Lang Patrollers* shows how indigenous people in Cambodia's Prey Lang forest have organized themselves into forest patrols to combat illegal logging.[151] The next, soon-to-be published installment, *Cadena de Colombia,* tells of Afro-Colombian women resisting displacement and land grabs perpetrated in the name of economic development.

These stories have been the result of a decade of hard work. By bringing our whole selves to the struggle against climate change, we wound up making a unique contribution to the ongoing climate and environmental justice dialogue. This is the kind of thing that anyone reading this article can do— find a way to use their own talents and gifts as part of truly grassroots local action for environmental justice.

To change everything, we need everyone.

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150 See JEFF LA GRECA, SONG OF THE SUNDARBANS 1-8 (Rebecca Bratspies ed., 2022), *available at* https://wedocs.unep.org/bitstream/handle/20.500.11822/42071/song_sundarbans.pdf?sequence=3&isAllowed=y [https://perma.cc/L3W5-JS7N] for a preview of the forthcoming graphic novel.

151 *See* JEFF LAGRECA & CHARLIE LAGRECA VELASCO, PATROLLERS OF THE PREY LANG (Rebecca Bratspies ed., 2023), *available at* https://wedocs.unep.org/handle/20.500.11822/43685 [https://[perma.cc/249M-WQVM].

"Individually Minor But Collectively Significant": The Right to Cumulative Impact Analyses and Substantive Protections in Wilmington, California

*James Crisafulli**

INTRODUCTION 28
I. POLLUTION BURDENS AND HUMAN SUFFERING IN WILMINGTON 31
A. Environmental Racism and Pollution Sources in Wilmington 32
B. Cumulative Impacts Kill 34
II. SUBSTANTIVE AND PROCEDURAL SAFEGUARDS FOR WILMINGTON RESIDENTS 35
A. Substantive Protections 36
B. The National Environmental Policy Act 40
C. The California Environmental Quality Act 45
III. LESSONS FROM GUATEMALA AND SOUTH AFRICA 49
A. Guatemala's Environmental Impact Assessment Law 50
B. South Africa's Environmental Impact Assessment Law 52
IV. STATUTORY REFORMS AND ENVIRONMENTAL RIGHTS FOR WILMINGTON RESIDENTS 54
A. Expanding NEPA's Scope 56

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B. Giving CEQA Environmental Justice Teeth 60
C. An Environmental Rights Amendment in California 63
CONCLUSION 66

INTRODUCTION

In Wilmington, California, a neighborhood in Los Angeles, one oil refinery has been a fixture of the area since 1919.[1] The refinery has been in operation for over one hundred years and currently produces more than 139,000 barrels of crude oil per day.[2] Two-thirds of the toxic chemicals emitted in Wilmington since 2000 have come from this refinery, now owned by Phillips 66.[3] The refinery has been plagued by leaks, and the site has consistently underreported its emissions.[4] Wilmington residents sued the facility and the local air quality management authority in 2017.[5] The California Air Resources Board also pursued a case against the refinery.[6] While these actions resulted in minor penalties for Phillips 66 and written commitments to reduce emissions, the benefits have been severely restricted.[7] Both cases ended in meager settlements.[8] Meanwhile, the Wilmington refinery helped

1 *See* Sam Gnerre, *Wilmington's Phillips 66 Oil Refinery Has Been a Fixture Since Union Oil Opened It in 1919*, S. BAY HISTORY (May 6, 2022), https://sbhistoryblog.wordpress.com/2022/05/06/wilmingtons-phillips-66-oil-refinery-has-been-a-fixture-since-union-oil-opened-it-in-1919 [https://perma.cc/T8DQ-6G3W].

2 *See id.*

3 *See* Adam Mahoney, *A Community Poisoned by Oil*, HIGH COUNTRY NEWS (June 22, 2022), https://www.hcn.org/issues/54.8/south-pollution-a-community-poisoned-by-oil [https://perma.cc/BKH2-JR3F].

4 *See* Adam Mahoney, *In the Shadow of Refineries, a Southern California Community Endures a Long History of Pollution*, USC ANNENBERG CTR. FOR HEALTH JOURNALISM (Oct. 21, 2021), https://centerforhealthjournalism.org/2021/10/09/shadow-refineries-southern-california-community-endures-long-history-pollution [https://perma.cc/FC72-6TU9].

5 Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, Cmtys. for a Better Env't v. S. Coast Air Quality Mgmt. Dist., 2018 Cal. Super. LEXIS 11371, No. BS 169841 (Super. Ct. L.A. Jun. 14, 2017).

6 *See Phillips 66 Company, Los Angeles Refinery Case Settlement*, CAL. AIR RES. BD. https://ww2.arb.ca.gov/phillips-66-company-los-angeles-refinery-case-settlement [https://perma.cc/LKW9-4DKG] (last visited Apr. 16, 2023).

7 *See* Mahoney, *supra* note 3.

8 *See* CAL. AIR RES. BD., *supra* note 6; *see also* Nick Green, *Phillips 66 Settles Lawsuit with Environmental Group, Agrees to Find and Fix Leaks to Prevent Gases from Escaping*, DAILY BREEZE (Feb. 20, 2021, 6:00 AM), https://www.dailybreeze.com/2021/02/20/phillips-66-settles-lawsuit-with-environmental-group-agrees-to-find-and-fix-leaks-to-prevent-gases-from-escaping [https://perma.cc/8LFH-R6GY].

Phillips 66 secure record revenues in 2022, and both the refinery and the company show no signs of decline.[9]

This refinery—which has contributed to negative health outcomes in Wilmington[10] and has cost residents significant time and money as a result of litigation, activism, and organizing—is only one of a plethora of facilities polluting Wilmington's air.[11] Refineries, major interstate highways, the world's busiest ports, numerous oil drilling operations, waste management facilities, sewage treatment plants, and a variety of industrial facilities like chrome plating facilities all occupy and surround Wilmington,[12] pumping pollutants into the air. To put Wilmington's pollution woes in context, major stationary sources in the District of Columbia, which has a population more than ten times that of Wilmington, emitted just one-sixth the quantity of the most prominent air pollutants as sources in Wilmington did in 2020.[13] As a result, Wilmington possesses nearly the worst air quality of all the neighborhoods in one of America's most polluted cities—Los Angeles.[14] Meanwhile, government at all levels has not sufficiently attended to the cumulative burdens that these pollution sources place on Wilmington residents.

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9 *See* Consumer Watchdog, *Two California Refiners Reveal Windfall Profits for 2022, Continuing in Footsteps of Chevron, Consumer Watchdog Says*, CISION PR NEWSWIRE (Jan. 31, 2023, 3:14 PM), https://www.prnewswire.com/news-releases/two-california-refiners-reveal-windfall-profits-for-2022-continuing-in-footsteps-of-chevron-consumer-watchdog-says-301735252.html [https://perma.cc/T6G6-KE55].

10 *See* JOHAN MELLQVIST ET AL., EMISSION MEASUREMENTS OF VOCS, NO_2 AND SO_2 FROM THE REFINERIES IN THE SOUTH COAST AIR BASIN USING SOLAR OCCULTATION FLUX AND OTHER OPTICAL REMOTE SENSING METHODS (2017), https://www.aqmd.gov/docs/default-source/fenceline_monitroing/project_1/fluxsense_scaqmd2015_project1_finalreport(040717).pdf [https://perma.cc/59U5-PL2W]; *see also Benzene Pollution at Facility Fencelines*, ENV'T INTEGRITY PROJECT (Aug. 8, 2023), https://storymaps.arcgis.com/stories/9cc8aa37cb34444dbb053a097c22ba07 [https://perma.cc/59U5-PL2W].

11 *See infra* Part I.

12 *See* CMTYS. FOR A BETTER ENV'T, WILMINGTON RESOURCE GUIDE 5–6 (2012), https://www.cbecal.org/wpcontent/uploads/2012/05/WilmingtonResourceGuideRevised6_24_11Revised.pdf [https://perma.cc/3SK2-NPWX].

13 *See* MONITORING AND ASSESSMENT BRANCH, AIR QUALITY DIV., D.C. DEP'T OF ENERGY AND ENV'T, DISTRICT OF COLUMBIA AMBIENT AIR QUALITY TRENDS REPORT 1996-2019 (2020), https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/2020%20Ambient%20Air%20Quality%20Trends%20Report.pdf [https://perma.cc/3KBR-5Z9H].

14 *See CalEnviroScreen 4.0*, CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT (May 1, 2023), https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40 [https://perma.cc/WZ2R-Y86A] (displaying Wilmington in the ninety-ninth percentile for air pollution in California); *see also Most Polluted Cities*, AM. LUNG ASS'N, https://www.lung.org/research/sota/city-rankings/most-polluted-cities [https://perma.cc/X5NA-PMDB] (last visited Apr. 16, 2023) (ranking L.A. as the most polluted city in the U.S. for ozone and the fourth-most for year-round particle pollution).

When environmental impact statements—which are required by federal and state law[15]—are prepared for new projects in Wilmington, these documents often trivialize the cumulative pollution burdens that Wilmington residents already confront. For example, in one document analyzing the effects of a major expansion of a container terminal in the Port of Los Angeles, which abuts Wilmington, a government agency declared that the expansion's impacts would be "significant and unavoidable" because greenhouse gas emissions from the project "would contribute to the causes of global climate change."[16] The agency fails to discuss any specific existing sources of air pollution in Wilmington or how the container expansion will add to existing pollution burdens on residents.[17] Sometimes, like in the environmental impact report for a marine oil terminal project at the Port of Los Angeles, a more thorough consideration of cumulative impacts does occur.[18] That consideration carries little force, though, as projects like this may conclude that cumulative impacts would be extremely significant but still gain approval and undergo construction.[19]

As the concept of environmental justice has increasingly permeated law and policy debates around the world, a heightened awareness of communities facing disproportionate pollution burdens has emerged. In Wilmington, residents—the vast majority of whom are Hispanic—largely find themselves without legal solutions to the cumulative pollution burdens they endure.[20] Part I of this Article describes the origin and nature of the pollution sources harming residents of Wilmington and the negative health consequences that have resulted from cumulative pollution impacts. Part II first identifies the limited substantive legal protections available to Wilmington residents and then turns

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15 *See infra* Part II.

16 *See Berths 136-147 Terminal Final Environmental Impact Report*, PORT OF L.A. 4-2 (Nov. 14, 2007), https://kentico.portoflosangeles.org/getmedia/875727ad-7c7e-4792-aece-57d9a883142e/FEIR_3I_Chapter_4_Cumulative_Analysis [https://perma.cc/DH8S-9LK5].

17 *See id.*

18 *See Berths 167-169 [Shell] Marine Oil Terminal Wharf Improvements Project: 2018 Draft Environmental Impact Report (DEIR)*, PORT OF L.A. 5-16 (Mar. 2018), https://kentico.portoflosangeles.org/getmedia/469841ec-6e3b-486d-96b5-4551f5eb5146/05_Shell-MOTEMS_DEIR_CH-5_Cumulative_March2018 [https://perma.cc/AYY7-AH7U].

19 *See* City News Service | Los Angeles, *LA Harbor Commission Approves $1.9B Budget for Port of LA*, SPECTRUM NEWS 1 (June 8, 2022), https://spectrumnews1.com/ca/la-west/transportation/2022/06/08/la-harbor-commission-approves—1-9-billion-budget-for-port-of-la [https://perma.cc/SNK3-MRWP] (reporting that a portion of new Port of LA budget will be used for the approved Shell marine oil terminal project).

20 *See* Augusta Saraiva, *What Supply-Chain Woes Mean When You Live Next to a Port*, BLOOMBERG: CITYLAB (Dec. 20, 2021, 1:00 PM), https://www.bloomberg.com/news/articles/2021-12-20/the-local-impact-in-wilmington-of-a-global-shipping-crisis [https://perma.cc/4LUD-8Y7U].

to existing procedural mechanisms for deterring environmental harms. These include the National Environmental Policy Act ("NEPA"), which requires the preparation of an environmental impact statement ("EIS") prior to the initiation of any major federal actions in the United States, and the California Environmental Quality Act ("CEQA"), which imposes similar obligations for state-supported actions in California.[21] Environmental impact assessment ("EIA") requirements exist in jurisdictions around the world. Accordingly, Part III compares NEPA and CEQA with EIA laws in Guatemala and South Africa, spotlighting the virtues of the Guatemalan and South African laws given their broader scope and substantive force.

Part IV first investigates the shortcomings of existing proposals and then offers a three-part solution to the legal barriers faced by Wilmington residents. Federally, Congress should amend NEPA to require the consideration of cumulative impacts in environmental documents and give agencies discretion to apply NEPA to preexisting projects. In California, the legislature should amend CEQA to allow petitions for environmental assessments of existing projects and include substantive environmental justice requirements. Lastly, the limitations built into largely procedural statutes like NEPA and CEQA necessitate more fundamental substantive protections for frontline communities. Therefore, California should adopt an environmental rights amendment ("ERA") protecting residents' rights to a healthy environment.

I. POLLUTION BURDENS AND HUMAN SUFFERING IN WILMINGTON

Wilmington epitomizes a community overburdened with air pollution from a variety of sources. This Part begins by surveying the sources of pollution in Wilmington. Importantly, these sources were all sited in one concentrated location because of a history of redlining and environmental racism in Los Angeles, whereby city planners and agencies deliberately located industrial and waste management facilities in Black and Latinx neighborhoods.[22] This Part then turns to the deadly effects of this pollution, identifying the negative health consequences in Wilmington, including disease and death, that are attributable to poor air quality.

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21 *See* GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, NEPA AND CEQA: INTEGRATING FEDERAL AND STATE ENVIRONMENTAL REVIEWS 7 (2014), https://opr.ca.gov/ceqa/docs/NEPA_CEQA_Handbook_Feb2014.pdf [https://perma.cc/5S5Y-ZEFK].

22 *See* Sidney Ramos, Amanda Morales & Precious Padilla, *Environmental Racism: Wilmington, California*, CAL. STATE UNIV. LONG BEACH ENV'T SOCIO.: CRITICAL ENV'T JUST. BLOG PROJECT (Dec. 17, 2019), https://environmentalsociology589636439.wordpress.com/2019/12/17/environmental-racism-wilmington-california/ [https://perma.cc/XHK4-ZXAW].

A. Environmental Racism and Pollution Sources in Wilmington

Wilmington is a neighborhood within the city of Los Angeles and adjacent to the city of Long Beach. It is located on the coastline, and the city covers 9.14 square miles with a population of 53,815 people.[23] Between 82% to 93% of Wilmington's population is of Hispanic origin.[24] About 20% of the city's population lives in poverty.[25] Wilmington residents are exposed to air pollution from over 400 sources, ranging in structure, use, and pollutant emitted.[26]

First, the neighborhood is home to five oil refineries, largely because Wilmington sits atop the third most historically productive oil field in the continental United States.[27] In 2020 alone, the five oil refineries in and around Wilmington emitted over 6,000 tons of criteria pollutants—carbon monoxide, ground-level ozone, lead, nitrogen dioxide, particulate matter, and sulfur dioxide—and over 1.3 million pounds of toxic pollutants such as benzene.[28] Because it is completely surrounded by oil wells and refineries, Wilmington has previously been dubbed "an island in a sea of petroleum."[29] In 2016, the average distance between an oil drilling operation and a school or home was 139 feet.[30]

Second, Wilmington is located next to the Port of Los Angeles and the Port of Long Beach, which together account for 29% of all

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23 U.S. CENSUS BUREAU, UNITED STATES CENSUS 2010 (2011).

24 *2020 Census Demographic Data Map Viewer*, U.S. CENSUS BUREAU, https://www.census.gov/library/visualizations/2021/geo/demographicmapviewer.html (last modified Sept. 28, 2023).

25 *See* Adam Mahoney, *A Reporter Goes Home to L.A.'s 'Industrial Dumping Ground' to Find Residents Dying at Alarming Rates*, USC ANNENBERG CTR. FOR HEALTH JOURNALISM (May 5, 2022), https://centerforhealthjournalism.org/2022/05/04/reporter-goes-home-la-s-industrial-dumping-ground-find-residents-dying-alarming-rates [https://perma.cc/V7VY-WYDZ].

26 *See* Adam Mahoney, *'Slow Violence That Drives Death': A California Port City's Struggle with Pollution and Shootings*, THE GUARDIAN (Mar. 31, 2022, 6:00 AM), https://www.theguardian.com/us-news/2022/mar/31/california-port-city-pollution-gun-violence [https://perma.cc/3CMF-KMTD].

27 *See* Mimi Kirk, *The Kids Trying to Green One of L.A.'s Most Polluted Neighborhoods*, BLOOMBERG: CITYLAB ENV'T (May 7, 2018, 10:08 AM), https://www.bloomberg.com/news/articles/2018-05-07/how-to-green-one-of-l-a-s-most-polluted-neighborhoods [https://perma.cc/H7Y2-PQ3R].

28 *See* Erica Yee & Hanah Getahun, *A Hot Spot for Polluted Air: By the Numbers*, CALMATTERS (Feb. 1, 2022), https://calmatters.org/environment/2022/02/california-environmental-justice-by-the-numbers/ [https://perma.cc/QDU2-DSWP].

29 Joe Mozingo, *A Wilmington Neighborhood is an Island in a Sea of Petroleum*, L.A. TIMES (Mar. 6, 2016, 3:00 AM), https://www.latimes.com/science/la-me-refinery-neighbors-20160305-story.html [https://perma.cc/VEZ2-8VUY].

30 *See* Lauren Valdez, *Oil Drilling Lawsuit: Wilmington Youth vs. City of Los Angeles*, LAUREN VALDEZ (Feb. 2, 2016), https://laurenvaldez.com/blog/2019/9/22/oil-drilling-lawsuit-wilmington-youth-vs-city-of-los-angeles [https://perma.cc/U475-FKBM].

containerized international trade in the U.S.[31] These two ports are the largest fixed sources of air pollution in Southern California and are responsible for more daily emissions than six million gas-powered cars.[32] Freight systems associated with the ports, including boats, trucks, and trains,[33] account for half of the air pollution in the entire state of California.[34] Between 400 and 600 trucks pass through Wilmington every hour, spewing nitrogen oxide that contributes to asthma, lung failure, and cancer.[35]

Third, hazardous waste and toxic chemicals have plagued Wilmington for years. Thirteen facilities releasing toxic chemicals—including the century-old Phillips 66 oil refinery—call Wilmington home, mostly emitting ammonia and hydrogen cyanide into the air.[36] Releases of toxic chemicals have increased since 2011 despite regulatory efforts.[37] Waste management companies in Wilmington have a poor history of mitigating these harms, as evidenced by a settlement reached between the U.S. Environmental Protection Agency ("EPA") and Clean Harbors Wilmington LLC in September 2022, after the company failed to monitor or detect leaks and inadequately maintained air pollution control equipment.[38] Finally, the EPA tracks two Superfund sites in Wilmington and has archived forty-three former Superfund sites in the city, demonstrating a history of contamination surrounding residents.[39]

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31 *See Facts and Figures*, THE PORT OF L.A., https://www.portoflosangeles.org/business/statistics/facts-and-figures [https://perma.cc/825C-KFK7] (last visited Aug. 28, 2023).

32 *See* Mahoney, *supra* note 3.

33 *See, e.g.*, *Pacific Harbor Line*, ANACOSTIA, https://www.anacostia.com/our-companies/phl/ [https://perma.cc/J29B-XWR9] (last visited Aug. 26, 2023).

34 *See Update on California Actions to Minimize Community Health Impacts from Freight*, CAL. AIR RES. BD. (Mar. 21, 2019), https://ww2.arb.ca.gov/sites/default/files/barcu/board/books/2019/032119/19-3-2pres.pdf [https://perma.cc/KGH5-RCFW].

35 *See* De'Von Jennings, *Diesel Truck Traffic in Wilmington and Long Beach*, ARCGIS STORYMAP (Nov. 13, 2019), https://storymaps.arcgis.com/stories/729e7a5a60be4ffe846ffdddbaf91927 [https://perma.cc/SMN8-WPHN].

36 *See 2020 TRI Factsheet: City – Wilmington, CA*, EPA (May 2023), https://enviro.epa.gov/triexplorer/tri_factsheet.factsheet?pZip=&pCity=WILMINGTON&pCounty=&pState=CA&pYear=2020&pDataSet=TRIQ1&pParent=TRI&pPrint=1 [https://perma.cc/F9W7-NQEX].

37 *See id.*

38 *See EPA Settles with L.A.-Area Clean Harbors for Claims of Improper Monitoring of Hazardous Waste*, EPA (Sept. 26, 2022), https://www.epa.gov/newsreleases/epa-settles-la-area-clean-harbors-claims-improper-monitoring-hazardous-waste [https://perma.cc/3ZAN-UPHC].

39 *See Wilmington, Los Angeles County, CA Environmental Hazards Report - Superfund Sites*, HOMEFACTS, https://www.homefacts.com/environmentalhazards/superfunds/California/Los-Angeles-County/Wilmington.html [https://perma.cc/D5SB-A5LX] (last visited Aug. 27, 2023).

CalEnviroScreen 4.0, a tool created by California's state government that quantifies overall exposure to environmental harms in communities across California, shows that Wilmington contains census tracts that are in the 99th percentile for exposure to environmental hazards and in the 98th percentile for air pollution burdens specifically.[40] Most tracts in Wilmington lie above the 90th percentile for both.[41]

B. Cumulative Impacts Kill

The array of sources bombarding Wilmington with harmful pollutants, chemicals, and toxins has resulted in severe negative health outcomes for the neighborhood's residents. The California Healthy Places Index lists one of the census tracts in the heart of Wilmington as less healthy than 98% of the state's population, and many other tracts in Wilmington fall in the bottom 10%.[42] The air toxics cancer risk experienced by Wilmington residents is 664 parts per million, which has declined in recent years but is still higher than 98% of the neighborhoods in Southern California.[43] Most of this risk is caused by emissions of diesel particulate matter, which predominantly comes from diesel trucks traversing the roads and highways near Wilmington with freight from the nearby ports.[44] Researchers estimate that air pollution from the city's two ports alone causes 1,300 premature deaths annually, most of which are concentrated in and around Wilmington.[45]

Non-cancer-related health risks are abnormally high in Wilmington, and elevated air pollution levels have been linked to higher rates of heart disease, diabetes, and high blood pressure.[46] An anecdotal survey of seventy-five households in Wilmington found that one-third of households reported an individual with cancer, more than half reported an individual with asthma, and

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40 *See CalEnviroScreen 4.0*, *supra* note 14.

41 *See id.*

42 *See California Healthy Places Index*, PUB. HEALTH ALL. OF S. CAL. (2022), https://map.healthyplacesindex.org/?redirect=false [https://perma.cc/H5UW-D8ZJ].

43 *See MATES V Data Visualization Tool: Cancer Risk*, S. COAST AIR QUALITY MGMT. DIST. (Aug. 2021), https://experience.arcgis.com/experience/79d3b6304912414bb21ebdde80100b23/page/Main-Page/?views=Click-tabs-for-other-data%2CCancer-Risk [https://perma.cc/ZX9X-TUEB].

44 *See id.*

45 *See* Alissa Walker, *L.A.'s Backed-up Port is Smothering Neighborhoods in Smog*, CURBED (Dec. 10, 2021), https://www.curbed.com/2021/12/los-angeles-port-supply-chain-smog.html [https://perma.cc/E9JA-JCHC].

46 *See* Adam Mahoney, *One Family, Three Generations of Cancer, and the Largest Concentration of Oil Refineries in California*, GRIST (June 22, 2022), https://grist.org/equity/wilmington-california-public-health-survey/ [https://perma.cc/5A5L-AC6G].

70% reported an individual experiencing depression.[47] The impacts of these pollution burdens are apparent: "Of the city of Los Angeles' 35 community plan areas, Wilmington has the sixth-lowest life expectancy."[48] Air pollution in Wilmington has been linked to other causes of death—namely gun violence, as more polluted air functions as an environmental stressor.[49] Wilmington residents also consistently document headaches, nosebleeds, and other symptoms attributable to air pollution exposure.[50]

While some of the health consequences of air pollution have been dampened in recent decades because of improving air quality in Los Angeles, the last few years reversed that trend.[51] From 2020 to 2021, Wilmington experienced 236 more deaths relative to mortality experienced in previous years, and only some of those deaths were caused by the COVID-19 pandemic.[52] More than one-third of the excess deaths are attributable to factors that correlate with high levels of air pollution.[53] Wilmington residents are suffering from devastating acute health impacts, and they face the prospect of a variety of long-term health conditions caused by chronic exposure to air pollution.[54] The pollution causing these adverse health outcomes has been ongoing for generations, and its persistence has catalyzed vigorous activism and advocacy from residents seeking legal redress.

II. SUBSTANTIVE AND PROCEDURAL SAFEGUARDS FOR WILMINGTON RESIDENTS

The litany of environmental woes that Wilmington residents face severely hinders quality of life, and these developments have forced many residents and community groups to search for any possible form of relief. Residents have filed suit in court; petitioned

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47 *See id.*

48 Adam Mahoney, *Deaths Have Spiked in this Polluted Port Community. COVID is Only Part of the Story.*, GRIST (Mar. 31, 2022) https://grist.org/health/excess-deaths-wilmington-california-covid-pollution// [https://perma.cc/XR2Z-C796].

49 *See* Adam Mahoney, *How a California Port Community Embodies the Deadly Link Between Pollution and Gun Violence*, GRIST (Mar. 31, 2022), https://grist.org/article/gun-violence-pollution-wilmington-california// [https://perma.cc/FZ49-NR6G].

50 *See* Anakaren Andrade et al., *Urban Oil Drilling and Community Health: Results from a UCLA Health Survey*, UCLA INST. OF THE ENV'T SUSTAINABILITY, https://www.ioes.ucla.edu/project/stand-la/ [https://perma.cc/5PW4-764N] (last visited Mar. 20, 2023); *see also* Kirk, *supra* note 27.

51 *See Emissions Impact of Ships Anchored at Ports of Los Angeles and Long Beach*, CAL. AIR RES. BD. (Nov. 9, 2021), https://ww2.arb.ca.gov/sites/default/files/2021-11/SPBP_Congestion_Anchorage_Emissions_Final.pdf [https://perma.cc/5FCT-ZYCH].

52 *See* Mahoney, *supra* note 48.

53 *See id.*

54 *See, e.g.*, Ewa Konduracka & Pawel Rostoff, *Links Between Chronic Exposure to Outdoor Air Pollution and Cardiovascular Diseases: A Review*, 20 ENV'T CHEMISTRY LETTERS 2971, 2974–75 (2022).

local boards, commissions, and councils; lobbied state government; and launched protests. A review of the potential paths for Wilmington residents to obtain redress reveals that each of these options involves significant challenges. Consequently, one of the most powerful tools available to environmental advocates is a procedural mechanism: environmental impact assessments.

A. Substantive Protections

In the context of pollution sources, substantive protections might include restrictions on the kinds of facilities that can be built, enforceable emissions limitations, civil rights or anti-discrimination laws preventing disproportionate impacts, and common law doctrines like nuisance.[55] Wilmington residents have attempted to utilize all of these available mechanisms. Environmental activists sued the City of Los Angeles in 2015 for a "pattern or practice of rubber stamping oil-drilling applications" in violation of an anti-discrimination provision in California's state code.[56] The plaintiffs asked the court for extensive injunctive relief to prohibit the city from approving oil extraction activities with disparate impacts.[57] The city settled the lawsuit in September 2016 and agreed to environmental assessments for proposed oil and gas drilling sites and public hearings on new oil and gas facilities, but the city and environmental activists became embroiled in countersuits by the oil and gas industry for the next five years.[58] Moreover, the city did not agree to—and the court did not grant—the more ambitious injunctive relief sought by community members.[59]

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55 *See, e.g.*, Dan Tarlock, *Is a Substantive, Non-Positivist United States Environmental Law Possible?*, 1 MICH. J. ENV'T & ADMIN. L. 159, 168–94 (2012) (describing limited substantive protections before proposing principles to strengthen and enact new substantive laws).

56 Verified Complaint and Petition for Writ of Mandate at 2, Youth for Env't. Just. v. City of L.A., 2015 Cal. Super. WL 6856983, No. BC600373 (Super. Ct. L.A. Nov. 6, 2015).

57 *See id.* at 41.

58 *See* Kirk, *supra* note 27; Ashley Braun, *After Los Angeles Youth Sued City for Discriminatory Drilling Practices the Oil Industry Sued Back*, DESMOG (Apr. 3, 2017), https://www.desmog.com/2017/04/03/youth-color-lawsuit-los-angeles-drilling-discrimination-oil-industry [https://perma.cc/UXF9-D6SR]; Youth for Env't. Just. v. City of Los Angeles, No. B282822, 2019 Cal. App. Unpub. LEXIS 1110 (Cal. Ct. App. Feb. 15, 2019).

59 *See* Kirk, *supra* note 27. A similar case was brought against Southern California's regional air quality authority regarding the Phillips 66 refinery in Wilmington, again with injunctive relief denied. *See* Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, Cmtys. for a Better Env't v. S. Coast Air Quality Mgmt. Dist., 2018 Cal. Super. LEXIS 11371, No. BS 169841 (Super. Ct. L.A. Jun. 14, 2017). Some scholars note that securing injunctive relief after an environmental harm has occurred, especially when the harm involves some form of disproportionate impact, has become "practically impossible." Claire Glenn, *Upholding Civil Rights in Environmental Law: The Case for Ex Ante Title VI Regulation and Enforcement*, 41 N.Y.U. REV. OF L. & SOC. CHANGE 45, 70 (2017).

California's anti-discrimination law used by Wilmington litigants resembles Title VI of the Civil Rights Act of 1964[60] at the federal level. Title VI prohibits any person from being "subjected to discrimination under any program or activity receiving Federal financial assistance" on the basis of their race, color, or national origin.[61] Because so many organizations, developers, and municipalities receive federal financial assistance,[62] Title VI could be a comprehensive blockade against environmental injustice.[63] In 2001, the Supreme Court eliminated that possibility, holding that Title VI confers no private right of action on individuals for claims involving disparate impacts.[64]

Disparate impact lawsuits under Title VI must now be filed by federal agencies.[65] In recent years, the EPA accrued a hefty backlog of Title VI claims submitted to the agency by individuals and groups—that the agency did not have the capacity to file in court.[66] Many of these claims involved cumulative pollution burdens similar to those experienced in Wilmington.[67] The EPA backlog has finally been eliminated, but critics maintain that the requirement that individuals pursue accountability indirectly through a federal agency hampers enforcement, takes discretion and autonomy away from community members, and leads to fewer cases being brought.[68]

The Clean Air Act ("CAA") is the primary federal law regulating air pollution.[69] The CAA itself has been credited with

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60 *See* 42 U.S.C. § 2000d.

61 *Id.*

62 *See* Bradford Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787, 794 (1999) ("Because the EPA provides grants to almost all state and regional siting or permitting agencies, Title VI clearly applies to these agencies.").

63 *See* Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENV'T L. 285, 289 (1995) ("Title VI can be an important weapon against environmental racism.").

64 *See* Alexander v. Sandoval, 532 U.S. 275, 292 (2001).

65 *See Title VI of the Civil Rights Act of 1964: Roles of Complainants and Recipients in the Title VI Complaints and Resolution Process*, U.S. ENV'T PROT. AGENCY (May 4, 2015), https://www.epa.gov/sites/default/files/2020-02/documents/roles-complainants_recipients_title_vi_complaints_and_resolutions_2015.05.04.pdf [https://perma.cc/2FJN-KHXB].

66 *See* U.S. COMM'N ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 at 110 (2016).

67 *See External Civil Rights Docket, 2014-Present*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/external-civil-rights/external-civil-rights-docket-2014-present [https://perma.cc/YMR9-MM6W].(last visited Mar. 28, 2023).

68 *See* Julie Narimatsu et al., *Improved EPA Oversight of Funding Recipients' Title VI Programs Could Prevent Discrimination*, U.S. ENV'T PROT. AGENCY, OFF. OF INSPECTOR GEN. (Sept. 28, 2020).

69 *See* 42 U.S.C. §§ 7401–7675.

substantial air pollution reductions nationwide, but its reliance on regional and representative air pollution metrics has subdued its ability to address localized disparities in air quality, like those that exist in Wilmington.[70] Despite the CAA's defects regarding the local distribution of pollution, the comprehensive nature of the statute led the Supreme Court to conclude that the CAA displaces all federal nuisance claims based on air pollution impacts, eliminating another potential form of substantive relief.[71] State nuisance claims are still available whereby residents can sue polluters for substantially impairing the use and enjoyment of private property or of a public space.[72] Many obstacles make this litigation difficult, though, such as establishing standing, causation, and attribution;[73] proving substantial harm or impairment; obtaining adequate remedies[74]; overcoming statutes of limitation; and bypassing state exemptions.[75]

California offers its own slate of potential substantive protections. To many observers, California has become a national model for climate legislation.[76] Several pieces of landmark legislation in the state, including the California Global Warming Solutions Act of 2006,[77] require dramatic emissions reductions, and the state has policies in place to achieve a goal of carbon neutrality by 2045.[78] To address oil and gas production in communities, the state voted to prohibit new oil wells within 3,200 feet of residential neighborhoods,[79] but the law does not apply to

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70 *See* MEREDITH FOWLIE ET AL., BROOKINGS ECON. STUD., CLIMATE POLICY, ENVIRONMENTAL JUSTICE, AND LOCAL AIR POLLUTION 7 (2020) (citations omitted) ("The problem is that regionally representative monitor measurement can mask enormous differences in air quality across neighborhoods within the region. Thus, there are communities in areas that the Environmental Protection Agency (EPA) deems in 'attainment' (a.k.a. compliance) that regularly experience pollution levels above the regulatory standard.").

71 *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 415 (2011).

72 *See, e.g.*, Kate Markey, *Air Pollution as Public Nuisance: Comparing Modern-Day Greenhouse Gas Abatement with Nineteenth-Century Smoke Abatement*, 120 MICH. L. REV. 1535, 1539–40 (2022).

73 *See* David Bullock, *Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems*, 85 MODERN L. REV. 1109, 1138–40, 1154 (2022).

74 *See* Matthew Russo, *Productive Public Nuisance: How Private Individuals Can Use Public Nuisance to Achieve Environmental Objectives*, 5 U. ILL. L. REV. 1969, 2001–04 (2018).

75 *See* NEB. REV. STAT. § 2-4403 (West 2019).

76 *See* AIMEE BARNES ET AL., CTR. FOR AM. PROGRESS, *Learning from California's Ambitious Climate Policy* (Apr. 16, 2021), https://www.americanprogress.org/article/learning-californias-ambitious-climate-policy/ [https://perma.cc/6LG9-4K26].

77 *See* CAL. HEALTH & SAFETY CODE §§ 38500–99 (West 2019).

78 *See California Releases World's First Plan to Achieve Net Zero Carbon Pollution,* OFF. OF GOVERNOR GAVIN NEWSOM (Nov. 16, 2022), https://www.gov.ca.gov/2022/11/16/california-releases-worlds-first-plan-to-achieve-net-zero-carbon-pollution/ [https://perma.cc/SW98-KXM6].

79 *See* CAL. PUB. RES. CODE §§ 3280–91 (West 2023).

existing oil wells.[80] Los Angeles has also set ambitious emissions reduction goals through its Sustainable City pLAn,[81] and the city announced a ban on new oil and gas wells and a phaseout of existing drilling operations.[82] These efforts address city- or statewide emissions levels but, like the CAA, they often do not account for disproportionate localized pollution burdens.[83] Further, Los Angeles' measure to curtail oil and gas drilling may not survive litigation, as oil companies allege it violates state law, the state constitution, and the federal constitution.[84]

Some of California's substantive environmental actions have singled out Wilmington. Legislators passed a law in 2017 directing the California Air Resources Board ("CARB") to protect overburdened communities from disproportionate air pollution by developing monitoring programs.[85] In 2018, Wilmington was selected as one community to be included in CARB's Community Air Monitoring Plan and Community Emissions Reduction Program.[86] While this inclusion channeled important attention and resources to Wilmington, the programs are limited to monitoring, community engagement, and economic incentives.[87] In the words of environmental justice activists in Wilmington, the program "do[es] not require or propose to require the development

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80 *See* Emma Newburger, *California Lawmakers Move to Ban New Oil Wells Within 3,200 Feet of Homes and Schools*, CNBC (Sept. 1, 2022, 11:47 AM), https://www.cnbc.com/2022/09/01/california-moves-to-ban-new-oil-wells-within-3200-feet-of-homes.html [https://perma.cc/FW73-C5R5].

81 *See* ERIC GARCETTI, L.A.'S GREEN NEW DEAL SUSTAINABLE CITY PLAN 11 (2019), https://plan.lamayor.org/sites/default/files/pLAn_2019_final.pdf [https://perma.cc/LUP8-3HAL].

82 *See Oil and Gas Drilling Ordinance*, L.A. CITY PLAN., https://planning.lacity.org/plans-policies/oil-and-gas-drilling-ordinance [https://perma.cc/83MQ-7Q44] (last visited Oct. 8, 2023).

83 *See, e.g.*, Vien Truong, *Addressing Poverty and Pollution: California's SB 535 Greenhouse Gas Reduction Fund*, 49 HARV. C.R.-C.L. L. REV. 493, 525 (2014) (explaining that statewide climate legislation "is not perfect and is not the silver bullet to solve decades of dumping and pollution in our communities").

84 *See* Emma Newburger, *Oil Companies Sue Los Angeles Over Ban on Oil and Gas Drilling*, CNBC (Jan. 17, 2023, 11:41 AM), https://www.cnbc.com/2023/01/11/oil-companies-sue-los-angeles-over-ban-on-oil-and-gas-drilling.html [https://perma.cc/UD7J-FDSX].

85 *See* A.B. 617, 2017 State Assemb., Reg. Sess. (Cal. 2017).

86 *See Wilmington, Carson, West Long Beach*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/community-air-protection-program/communities/wilmington-carson-west-long-beach [https://perma.cc/6ATD-ZBHG] (last visited Apr. 15, 2023).

87 *See* AB 617 COMMUNITY AIR PROTECTION PROGRAM: ANNUAL PROGRESS REPORTS FOR COMMUNITY EMISSIONS REDUCTION PROGRAMS, WILMINGTON, CARSON, WEST LONG BEACH, S. COAST AIR QUALITY MGMT. DIST. 2, 5, 9 (2022), https://ww2.arb.ca.gov/sites/default/files/2022-12/WCWLB%202022%20CARB%20Annual%20Progress%20Report%20Qualitative%20Assessment_v4%20Final.docx [https://perma.cc/9K2H-HJYA].

of quantifiable, permanent, and enforceable emissions reductions beyond what is already required by existing law."[88]

Finally, assisted temporary relocation has occurred for California residents impacted by wildfires,[89] but this has not been extended to residents in communities overburdened by air pollution. Many residents also repudiate relocation because of their desire to preserve their communities, and some argue that relocation circumvents accountability for those responsible for causing environmental harms.[90] In light of the impediments to substantive redress for disproportionate and harmful pollution burdens, individuals and community groups have had to get creative with the legal strategies they pursue.[91] Some are turning to consumer protection statutes,[92] or constitutional law theories,[93] or the public trust doctrine[94] in the hopes of preserving the possibility of direct substantive relief. These approaches are all fairly novel and have not been fully embraced by courts.[95] Two long-standing procedural statutes, though, afford community members the opportunity to deter or delay developments by mandating an evaluation of environmental impacts.

B. The National Environmental Policy Act

NEPA was passed in 1970 in response to worsening environmental damage, a lack of information about the environmental impacts of industrial activity, and growing public outcries for environmental action.[96] Although some scholars have argued that Congress drafted NEPA with substantive obligations

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88 DEBORAH BEHLES ET AL., LESSONS FROM CALIFORNIA'S COMMUNITY EMISSIONS REDUCTION PLANS: AB 617'S FLAWED IMPLEMENTATION MUST NOT BE REPEATED 6 (2021), https://caleja.org/wp-content/uploads/2021/05/CEJA_AB617_r4-2.pdf [https://perma.cc/R4M9-M34X].

89 *See* FED. EMERGENCY MGMT. AGENCY, FEDERAL ASSISTANCE FOR CALIFORNIA WILDFIRES TOPS $103M, (2021), https://www.fema.gov/press-release/20210223/federal-assistance-california-wildfires-tops-103m [https://perma.cc/DFP7-4HHM].

90 *See* Cresencio Rodriguez-Delgado, *California's 'Climate Migrants' and the Difficulty of Finding a New Home*, PBS NEWS HOUR (Aug. 25, 2022, 1:48 PM), https://www.pbs.org/newshour/nation/as-fires-rip-through-california-and-the-west-some-find-it-hard-to-stay-in-their-communities [https://perma.cc/Z422-3WJN].

91 *See* JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2022 SNAPSHOT (2022), http://eprints.lse.ac.uk/117652/1/Global_trends_in_climate_change_litigation_2022_snapshot.pdf [https://perma.cc/HJS6-MDSC].

92 *See, e.g.*, Commonwealth v. Exxon Mobil Corp., 187 N.E.3d 393 (Mass. 2022).

93 *See, e.g.*, Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016).

94 *See, e.g.*, Juliana v. U.S., 947 F.3d 1159, 1165 (9th Cir. 2020).

95 *See, e.g.*, Jessica A. Wentz & Benjamin Franta, *Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages*, 52 ENV'T L. REP. 10995, 11001–05 (2022).

96 *See* Jennifer Wieman, *The Reality of NEPA: Can the Act Realize its Potential?* Great Rivers Habitat Alliance v. U.S. Army Corps of Engineers, 14 MO. ENV'T L. & POL'Y REV. 393, 397–98 (2006) (discussing origins and purposes of NEPA).

in mind,[97] courts have interpreted it to be a purely procedural statute.[98] Agencies and individual actors are under no substantive obligations to refrain from any particular activity or project so long as NEPA's procedures are followed.[99]

NEPA requires the preparation of an EIS for all "major Federal actions significantly affecting the quality of the human environment,"[100] meaning the law only applies where there is federal government involvement, such as constructing, funding, or permitting a project.[101] NEPA also created the Council on Environmental Quality ("CEQ") in order to assist and counsel the president on issues of environmental policy.[102] Because NEPA itself does not thoroughly prescribe the procedural steps involved in preparing an EIS, CEQ promulgated regulations in 1978 to specify what agencies must do.[103] Ever since, NEPA's requirements have been dictated by CEQ regulations.[104]

CEQ regulations have been amended in recent years, but the core procedures under NEPA have remained the same.[105] If an agency action is not categorically excluded from NEPA, then the agency prepares a brief environmental assessment ("EA").[106] An EA concisely summarizes the environmental impacts of a proposed action and lists alternative actions considered.[107] If the EA concludes that environmental impacts will not be significant, the agency writes a finding of no significant impact ("FONSI") and need not prepare a full EIS.[108] The decision not to prepare an EIS

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97 *See* Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND, RES., & ENV'T L. 245, 253 (2000) (writing about NEPA that "[t]he link between procedure and substance was of utmost importance"); *see also* Phillip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Adaptations from NEPA's Progeny*, 16 HARV. ENV'T L. REV. 207, 210–13 (1992).

98 *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

99 *Id.* ("Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

100 42 U.S.C. § 4332(2)(C).

101 *See* 40 C.F.R. § 1508.1(q) (2022).

102 *See* 42 U.S.C. § 4342 (1970).

103 *See* National Environmental Policy Act – Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978) (to be codified at 40 C.F.R. § 1508.7).

104 *See* Jim Murphy, *Restoring NEPA for the Twenty-First Century*, ABA (Aug. 30, 2022), https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2022-23/summer/restoring-nepa-the-twentyfirst-century [https://perma.cc/HG6Q-2HN7].

105 *Compare CEQ NEPA Regulations*, NEPA.GOV, https://ceq.doe.gov/laws-regulations/regulations.html [https://perma.cc/65F4-VZUN] (last visited Oct. 5, 2023), *with* 40 C.F.R. § 1501.5 (2020).

106 *See* 40 C.F.R. § 1501.5 (2020).

107 *See id.*

108 *See id.*

is a frequent target for litigation.[109] Alternatively, agencies can use a categorical exclusion ("CE") to exempt an entire category of actions from the NEPA process.[110]

If the agency concludes that the environmental impacts of an action will be significant, it can either identify potential mitigation efforts sufficient to render those impacts insignificant,[111] or it must prepare a lengthy EIS discussing the affected area of the environment, the environmental impacts of the project, and alternatives the agency considered.[112] An EIS must discuss all environmental impacts of a proposed action—and any connected actions[113]—about which the agency can reasonably obtain information.[114] The severity of the environmental impacts of a project, therefore, is relevant both in deciding whether or not an EIS is required and in determining the scope of an EIS.[115] Ultimately, the agency must publish a record of decision that conveys what action the agency is taking and recounts alternatives considered and any mitigation efforts the agency hopes to pursue.[116]

Notably, NEPA's procedural mechanisms only apply to "new and continuing activities" by the federal government and not to past activities or projects,[117] meaning that preexisting pollution sources like those that have occupied Wilmington for generations are immune from the NEPA process.[118] CEQ regulations do provide that once an agency has submitted an EIS, it may later have to submit a supplemental EIS if the "agency makes

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109 *See* NAT'L ASS'N OF ENV'T PROS., 2021 ANNUAL NEPA REPORT OF THE NATIONAL ENVIRONMENTAL POLICY ACT WORKING GROUP 29 (Charles P. Nicholson ed., 2022) [hereinafter 2021 ANNUAL NEPA REPORT] (finding that of the eighteen substantive NEPA cases brought in 2021, only five challenged an EIS that had already been prepared).

110 *See* 40 C.F.R. § 1501.4 (2020).

111 Agencies that identify these mitigation efforts prepare documents known as mitigated findings of no significant impacts ("mitigated FONSIs"). *See* Samuel X. Frank, *Is NEPA Still the Best Model for Environmental Protection? A Case for the NEPC*, GEO. ENV'T L. REV. (Nov. 8, 2020), https://www.law.georgetown.edu/environmental-law-review/blog/is-nepa-still-the-best-model-for-environmental-protection-a-case-for-the-nepc [https://perma.cc/Q978-JU5F].

112 *See* 40 C.F.R. § 1502 (2020); *see also* Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir. 1998) ("The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal.").

113 *See* 40 C.F.R. § 1501.9(e) (2020).

114 *See* 40 C.F.R. §§ 1502.16(a)(1), 1502.21 (2020).

115 *See, e.g.*, Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 401 F. Supp. 2d 1298, 1311, 1333 (S.D. Fla. 2005) (explaining that EIS for road expansion project had to consider cumulative impacts of the entire road, not just one segment).

116 *See* 40 C.F.R. § 1502.2 (2020).

117 *See* 42 U.S.C. § 4332(2)(C) (2021). The requirement for a "major Federal action" to trigger the NEPA process only applies to "new and continuing activities," so a preexisting facility would not need to prepare a new EIS. 40 C.F.R. § 1508.1(q) (2020).

118 *See, e.g.*, *Fla. Wildlife Fed'n*, 401 F. Supp. 2d at 1311, 1333.

substantial changes to the proposed action"[119] or if "significant new circumstances or information relevant to environmental concerns" arise.[120] NEPA does not include any monitoring requirements, meaning agencies need not ascertain whether their predictions of project impacts end up accurately reflecting actual environmental outcomes.[121]

Current CEQ regulations require that an EIS to discuss "cumulative effects" or impacts, defined as "effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions."[122] These impacts "can result from individually minor but collectively significant actions taking place over a period of time," and they must be assessed regardless of who caused them.[123] The text of NEPA itself does not mention cumulative impacts at all; they have only been addressed via regulations. CEQ's initial 1978 regulations required agencies to consider a project's contribution to cumulative environmental impacts.[124] In 2020, CEQ deleted any mention of cumulative impacts from the NEPA regulations, leaving agencies free to ignore them.[125] CEQ restored the previous version of the regulations in 2022,[126] resulting in the current definition of cumulative impacts cited above. CEQ is in the process of comprehensively updating the NEPA regulations.[127] Although cumulative impacts will almost certainly be included in the new regulations, these frequent regulatory modifications leave cumulative impacts requirements vulnerable in the future.

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119 40 C.F.R. § 1502.9(d)(1)(i) (2020).

120 40 C.F.R. § 1502.9(d)(1)(ii) (2020); *see also* Coal. on W. Valley Nuclear Wastes v. Chu, 592 F.3d 306, 312 (2d Cir. 2009) ("Agencies have wide discretion to change the scope of an EIS as 'significant new circumstances or information arise.'" (citation omitted)).

121 *See* Ronald Bjorkland, *Monitoring: The Missing Piece: A Critique of NEPA Monitoring*, 43 ENV'T IMPACT ASSESSMENT REV. 129, 130–31 (2013).

122 40 C.F.R. § 1508.1(g)(3) (2022).

123 *Id.*

124 *See* Protection of Environment, 43 Fed. Reg. 55,978, 56,004 (Nov. 29, 1978) (to be codified at 40 C.F.R. § 1508.7).

125 *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. § 1508).

126 *See* National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022) (to be codified at 40 C.F.R. § 1508).

127 *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49,924 (July 31, 2023) (to be codified at 40 C.F.R. § 1500 et seq.).

Some commentators have argued that categorical exclusions ("CEs") render NEPA meaningless.[128] Bolstering that critique, CEQ estimated in 2014 that "about 95 percent of NEPA analyses are CEs, less than 5 percent are EAs, and less than 1 percent are EISs."[129] Regardless, when NEPA has included a cumulative impacts requirement, the law has helped deter environmental harms by incentivizing the government and polluting facilities to invest in emissions controls or other environmental benefits rather than risk a lengthy and costly EIS process.[130] Pollution reductions have also been seen within the EIS process: NEPA has led to "reductions . . . for the air quality parameters PM10, PM2.5, and NOx, which all saw initial impacts reduced by 23% or more between draft EIS" and the agency's record of decision.[131] Thus, solidifying the cumulative impacts requirement in NEPA would seemingly serve emissions reduction goals.

When NEPA lawsuits are filed, litigants often base their claims on cumulative impacts failures by a government agency.[132] Twelve out of eighteen NEPA cases in courts of appeal in 2021 and five out of twenty-four cases in 2020 centered on cumulative impacts.[133] Court cases have elucidated the nature and breadth of the NEPA cumulative impacts requirement. For example, one court held that considering cumulative impacts requires analyzing the effects of suburbanization and urban sprawl on a community where a proposed project would be located.[134] The Ninth Circuit recently held that the discussion of cumulative impacts even in an initial EA must be "more than perfunctory" and required the

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128 *See* Diane Katz, *Time to Repeal the Obsolete National Environmental Policy Act (NEPA)*, THE HERITAGE FOUND. (Mar. 14, 2018), https://www.heritage.org/government-regulation/report/time-repeal-the-obsolete-national-environmental-policy-act-nepa [https://perma.cc/R7DW-GUFS].

129 U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-369, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 7 (2014).

130 *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 935–36 (2002) (arguing EIS production serves as a "penalty default" imposing the "price" of disclosure on regulated entities that they can avoid by mitigating adverse environmental impacts in the first place).

131 John C. Ruple & Mark Capone, *NEPA—Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 GEO. WASH. J. ENERGY & ENV'T L. 39, 46 (2016).

132 *See* 2021 ANNUAL NEPA REPORT, *supra* note 109, at 27, 31.

133 *See id.*; NAT'L ASS'N OF ENV'T PROS., 2022 ANNUAL NEPA REPORT OF THE NATIONAL ENVIRONMENTAL POLICY ACT WORKING GROUP 26, 31–32 (Charles P. Nicholson ed., 2022).

134 *See* Highway J Citizens Grp., U.A. v. U.S. Dep't of Transp., No. 05-C-0212, 2010 U.S. Dist. LEXIS 27297, at *10–11 (E.D. Wis. Mar. 23, 2010).

agency to redo its analysis.[135] These interpretations indicate that, while purely procedural, NEPA's requirements meaningfully constrain the federal government's ability to harm the environment.[136]

C. The California Environmental Quality Act

While NEPA governs federal actions, many states have enacted laws that impose similar procedural requirements on proposed state actions—so-called "Little NEPA[s]."[137] Sixteen states and several localities have enacted NEPA-like laws, and twenty-one other states require some form of environmental review in more limited circumstances.[138] California has arguably one of the strongest and most comprehensive Little NEPAs.[139] CEQA dictates the procedures that must be followed for projects undertaken, funded, or approved by a state agency.[140] CEQA requires the preparation of an environmental impact report ("EIR")—analogous to an EIS—when "there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment."[141] Demonstrating its strength, CEQA contains a substantive component, stating that each "public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so."[142] CEQA's requirements, like NEPA's, only apply to newly proposed projects and not existing ones.[143] Unlike under NEPA, though, if an agency

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135 Killgore v. SpecPro Pro. Servs., LLC, 51 F.4th 973, 989 (9th Cir. 2022); *see also* Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1141 (9th Cir. 2011) ("An EA must fully assess the cumulative impacts of a project.").

136 Bolstering that argument, the Ninth Circuit recently held that an agency must consider cumulative impacts from greenhouse gas emissions even if an individual project's contribution to climate change is not precisely discernable or is small relative to global emissions. *See* 350 Montana v. Haaland, 50 F.4th 1254, 1269–70 (9th Cir. 2022).

137 *First Annual "Little NEPA" Conference: State-Level Environmental Impact Assessment*, ENV'T L. INST. (Apr. 2005), https://www.eli.org/news/first-annual-little-nepa-conference-state-level-environmental-impact-assessment [https://perma.cc/CL9N-XJPZ].

138 *See* Zhao Ma et al., *Barriers to and Opportunities for Effective Cumulative Impact Assessment Within State-Level Environmental Review Frameworks in the United States*, 55 J. ENV'T PLAN. & MGMT. 961, 965 (2012); *States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, NEPA.GOV, https://ceq.doe.gov/laws-regulations/states.html [https://perma.cc/8KAW-8YJA] (last visited Sept. 25, 2023).

139 *See* David Pettit, *California's Landmark Environmental Law in Action - It Works*, NAT'L RES. DEF. COUNCIL (Jan. 16, 2013), https://www.nrdc.org/bio/david-pettit/californias-landmark-environmental-law-action-it-works [https://perma.cc/5PV4-ETAJ].

140 *See* CAL. CODE REGS. tit. 14, § 15002(b)–(c) (2023).

141 *Id.* § 15064(a)(1).

142 CAL. PUB. RES. CODE § 21002.1(B) (West 2023); *see also* CAL. PUB. RES. CODE § 21002 ("[P]ublic agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.").

143 *See* CAL. CODE REGS. tit. 14, §§ 15060, 15377–78 (2023).

chooses not to prepare an EIR because it plans to mitigate environmental effects, a reporting or monitoring program must be implemented to ensure that mitigation occurs.[144]

CEQA contains provisions requiring the consideration of the cumulative impacts of a project. First, CEQA defines cumulative impacts in a way that closely resembles how the federal CEQ regulations currently define them.[145] Second, CEQA requires the completion of a full EIR if the "project has possible environmental effects that are individually limited but cumulatively considerable."[146] Third, when writing an EIR, agencies must discuss significant cumulative impacts—including their severity and likelihood of occurrence—or explain why such impacts are not significant.[147] The report must also "examine reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects."[148] Unlike with NEPA, a cumulative impacts analysis is required by both CEQA's statutory language and its implementing regulations.[149] One concern that courts have expressed, though, is that both of the methods that CEQA guidelines provide for analyzing cumulative impacts involve worrying downsides.[150] Using a list of currently planned projects in the area (option one) will omit future projects not yet in the planning stages, while using environmental projection models (option two) entails uncertainty and is limited by gaps in available data.[151]

CEQA offers specific guidance on the significance of greenhouse gas emissions as environmental impacts, explaining that a project can incrementally contribute to greenhouse gas emissions in a way that is cumulatively considerable and directing the relevant agency to focus on "the reasonably foreseeable incremental contribution of the project's emissions to the effects of climate change."[152] Courts have subsequently required agencies to take reasonable future greenhouse gas emissions into account,[153]

144 *See* CAL. PUB. RES. CODE § 21081.6.

145 *See* CAL. CODE REGS. tit. 14, § 15355 (2023).

146 *Id.* § 15065(a)(3).

147 *See id.* § 15130.

148 *Id.* § 15130(b)(5).

149 *See* CAL. PUB. RES. CODE §§ 21083, 21100, 21156, 21158 (West 2023).

150 *See* CAL. CODE REGS. tit. 14, § 15130(b)(1)–(b)(2) (2023).

151 *See League to Save Lake Tahoe*, 290 Cal. Rptr. 3d at 286.

152 CAL. CODE REGS. tit. 14, § 15064.4(b) (2023).

153 *See* Golden Door Props., LLC v. County of San Diego, 264 Cal. Rptr. 3d 309, 359–61 (Ct. App. 2020) (holding that cumulative impacts analysis in an EIR was inadequate because agency failed to consider greenhouse gas impacts of pending general plan amendments).

but courts have clarified that this does not obligate agencies to consider the generalized impacts of climate change on a community.[154]

Some scholars argue that CEQA, due to its substantive force, has effectively promoted environmental well-being,[155] and community groups in California consistently defend CEQA as a key tool in advancing environmental justice.[156] For example, one court, after finding an EIR inadequate, enjoined ongoing construction of an oil refinery.[157] CEQA litigation also prevented a school from being built on a hazardous waste site containing toxic chemicals in the city of Cudahy, California, just twenty miles north of Wilmington.[158] These victories have partially stemmed from expansive interpretations of cumulative impact requirements in California, under which very small individual contributions become significant when compounded with increasing preexisting pollution levels.[159] One court specifically addressed cumulative impacts in the context of environmental justice communities like Wilmington, insisting that "[t]he magnitude of the current air quality problems in the [community] cannot be used to trivialize the cumulative contributions" of new projects.[160] Another court recently strengthened CEQA's environmental justice implications by holding that every EIR must "make[] a reasonable effort to substantively connect a project's air quality impacts to likely health consequences."[161] Notably for this Article's proposal, these courts conducted reviews

154 *See League to Save Lake Tahoe*, 290 Cal. Rptr. 3d at 289 ("[C]limate change in its nature and global scope is fundamentally different from other types of cumulative impacts reviewed under CEQA, and CEQA in its language and structure does not lend itself well to evaluating impacts caused by something other than a physical project.").

155 *See* Ferester, *supra* note 97, at 230–31.

156 *See* Letter from Kathryn Phillps, Dir., Sierra Club Cal., et al., to Cal. Senate, et al. (Apr. 2, 2019), https://www.pcl.org/media/prior-p/Pro-CEQA-letter-to-legislature-and-governor-April-2019-3.pdf [https://perma.cc/VRW3-628D]; *see, e.g.*, *Case Studies: The California Environmental Quality Act (CEQA)*, CAL. GREEN ZONES (2021), https://calgreenzones.org/ceqa-case-studies/ [https://perma.cc/XR8E-5V98].

157 *See* Cmtys. for a Better Env't v. City of Richmond, 108 Cal. Rptr. 3d 478, 484 (Ct. App. 2010).

158 *See* Heather Dadashi, *Why CEQA Is a Useful Tool for Environmental Justice Communities in California*, LEGAL PLANET (Feb. 23, 2022), https://legal-planet.org/2022/02/23/why-ceqa-is-a-useful-tool-for-environmental-justice-communities-in-california/ [https://perma.cc/54PB-59SJ].

159 *See* Cmtys. for a Better Env't v. Cal. Res. Agency, 126 Cal. Rptr. 2d 441, 455, 457 (Ct. App. 2002).

160 Bakersfield Citizens for Loc. Control v. City of Bakersfield, 22 Cal. Rptr. 3d 203, 231 n.10 (Ct. App. 2004).

161 *See* Sierra Club v. County of Fresno, 241 Cal. Rptr. 3d 508, 510 (Cal. 2018).

of CEQA challenges under a mixed "abuse of discretion" standard.[162]

CEQA has been the subject of harsh criticism due to the perception that it has been used to block affordable housing and even renewable energy in California, with opponents arguing CEQA has been a bulwark for not-in-my-backyard ("NIMBY") residents.[163] But these critics often overstate CEQA's reach. Fewer than 200 CEQA cases have been litigated per year since 2002, and only about two percent of all development projects that are subject to CEQA review have been taken to court over CEQA.[164] Further limiting CEQA's reach, state agencies have ample discretion to determine when cumulative impacts qualify as significant and set the relevant geographic scope.[165] A conclusion that cumulative impacts are not significant need only be briefly explained.[166] Where an agency issues a finding of no significant impact, it does not have to mention cumulative impacts at all.[167] Lastly, the California legislature has carved out certain exceptions to CEQA for residential projects that are consistent with local land use laws[168] and for "ministerial projects" that require "little or no personal judgment by a public official."[169]

Relevant to this Article's proposal, California has not joined the recent trend of states adopting ERAs, a term for state constitutional amendments guaranteeing the right to a clean or healthy environment.[170] Some ERAs have been held to require

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162 *See* CAL. PUB. RES. CODE § 21168.5 (West 2023). An agency's factual conclusions need only be supported by substantial evidence, while an agency's compliance with proper CEQA procedures is reviewed de novo. *See Sierra Club*, 241 Cal. Rptr. 3d at 512; *infra* Section IV.B.

163 *See* M. Nolan Gray, *How Californians Are Weaponizing Environmental Law*, THE ATLANTIC (Mar. 12, 2021), https://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264/ [https://perma.cc/4UZM-C4R2].

164 *See* Jennifer Ganata, *CEQA Advances Environmental Justice, so Why All the Hate?*, CALMATTERS (Feb. 16, 2022), https://calmatters.org/commentary/2022/02/ceqa-advances-environmental-justice-so-why-all-the-hate/ [https://perma.cc/957E-CXLT].

165 *See* S. of Mkt. Cmty. Action Network v. City & County. of San Francisco, 245 Cal. Rptr. 3d 174, 189–93 (Ct. App. 2019) (discussing significant deference to and discretion for agencies in defining what to include in a cumulative impacts analysis).

166 *See* CAL. CODE REGS. tit. 14, § 15064(h)(2) (2023).

167 *See id.* § 15071.

168 *See* CAL. PUB. RES. CODE § 21159.28(a) (West 2023).

169 *When Does CEQA Apply?*, CAL. STATE PARKS OFF. OF HIST. PRES., https://ohp.parks.ca.gov/?page_id=21723 [https://perma.cc/J4KV-K376] (last visited Apr. 16, 2023); *see* CAL. CODE REGS. tit. 14, § 15268. (2023).

170 *See generally* Johanna Adashek, *Do It for the Kids: Protecting Future Generations from Climate Change Impacts and Future Pandemics in Maryland Using an Environmental Rights Amendment*, 45 PUB. LAND & RES. L. REV. 113 (2022) (describing how enactments of ERAs in several states since the 1970s codify, with varying success, environmental rights for future generations).

consideration of cumulative impacts at the state level,[171] but this requirement would be duplicative in California given CEQA's existing cumulative impacts provisions. An ERA in California, though, would go far beyond requiring the consideration of cumulative impacts by creating substantive individual rights and offering "protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term."[172]

III. LESSONS FROM GUATEMALA AND SOUTH AFRICA

Outside of the U.S., the practice of requiring the preparation of an EIA has been permeating the international community for decades. NEPA motivated many other countries to adopt similar EIA laws requiring projects to undergo an environmental review process, and now such laws proliferate in a variety of forms.[173] The United Nations (U.N.) has partially defined the purpose of an EIA law as "mak[ing] sure that all critical information to predict future impact on the environment is supplied and considered in the decision-making process."[174] EIA laws exist in nearly all U.N. member nations.[175] In a study of EIA laws in 186 countries,[176] 113 of those laws were found to contain cumulative impact provisions.[177] Numerous international human rights and environmental treaties, as interpreted by international courts, similarly require states to assess the environmental impacts of significant actions in various contexts, frequently mandating the consideration of cumulative impacts.[178] The adoption of EIA

171 Sullivan v. Resisting Env't Destruction of Indigenous Lands, 311 P.3d 625, 637 (Alaska 2013) ("[W]e hold that the State is constitutionally required to consider the cumulative impacts at later phases of an oil and gas project.").

172 Robinson Twp. v. Commonwealth, 83 A.3d 901, 959 (Pa. 2013).

173 *See* Tseming Yang, *The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law*, 70 HASTINGS L.J. 525, 538–45 (2019).

174 *See* UNEP, ASSESSING ENVIRONMENTAL IMPACTS- A GLOBAL REVIEW OF LEGISLATION vi (2018).

175 *See id.*

176 *See id.* at vii.

177 *See* Rebecca Nelson, *The Latent Potential of Cumulative Effects Concepts in National and International Environmental Impact Assessment Regimes*, 12 TRANSNAT'L ENV'T L. 150, 154, 160 (2022).

178 *See, e.g.*, Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309; U.N. Convention on the Law of the Sea, art. 206, Dec. 10, 1982, 1833 U.N.T.S. 3; Convention on Biological Diversity, art. 14, Dec. 29, 1993, 1760 U.N.T.S. 79; U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 17, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992); Environmental Impact Assessment art. 8, Oct. 4, 1991, Protocol on Environmental Protection to the Antarctic Treaty, Annex I, 2941 U.N.T.S. 5778.

requirements has become so widespread that many scholars and jurists believe the obligation to prepare an EIA has become customary international law.[179] Today, "[i]t is increasingly recognized that states are under a general obligation to assess the environmental impacts of their activities, regardless of where those activities are located or where impacts will take place,"[180] and "[t]he duty of a state to conduct an EIA has gradually gained the status of a fundamental principle in international law."[181] Thus, in Wilmington and elsewhere, access to information about the environmental impacts of government decisions is properly seen as a human right.[182]

Implementation of EIAs has been more successful in some countries than in others, and any call to reform NEPA or CEQA in the U.S. should look to the best practices of other nations. As established, laws like NEPA and CEQA have built-in constraints.[183] If these procedural tools are to be bolstered to empower Wilmington residents to ameliorate disproportionate pollution burdens, these laws must borrow from EIA models from other countries. This Article highlights two such models in Guatemala and South Africa, both of which have enacted EIA laws that require the consideration of cumulative impacts and expand the scope of EIA responsibilities beyond what NEPA and CEQA mandate.

A. Guatemala's Environmental Impact Assessment Law

In 2003, the Guatemalan legislature enacted a law regulating environmental evaluation, control, and monitoring.[184] The law—Reglamento de Evaluación, Control y Seguimiento Ambiental ("RECSA")—was amended several times,[185] and the version of the law currently in force was passed in 2016.[186] RECSA requires the government to compile a list of "[a]ny project, work, industry or any other activity which can produce deterioration of renewable

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179 *See* Yang, *supra* note 173, at 563–64.

180 SUMUDU A. ATAPATTU, EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 307–08 (2006).

181 Amrit Kaur Pannu, *Law Governing Environmental Impact Assessments at the International Level*, *in* CONSERVATION, SUSTAINABILITY, AND ENVIRONMENTAL JUSTICE IN INDIA 113 (Alok Gupta ed., 2021).

182 *See* Svitlana Kravchenko, *Procedural Rights as a Crucial Tool to Combat Climate Change*, 38 GA. J. INT'L & COMP. L. 613, 618–20 (2010).

183 *See supra* Sections II.B–C.

184 Reglamento de Evaluación, Control y Seguimiento Ambiental, Acuerdo Gubernativo Numéro 23-2003 (2003) (Guat.).

185 *See, e.g.*, Reglamento de Evaluación, Control y Seguimiento Ambiental, Acuerdo Gubernativo Numéro 431-2007 (2007) (Guat.).

186 *See* Reglamento de Evaluación, Control y Seguimiento Ambiental, Acuerdo Gubernativo Número 137-2016 [hereinafter RECSA] (Guat.).

natural resources or the environment; or which modifies landscapes or cultural national heritage."[187] An EIA must be prepared for any project on that list that is undertaken in the country.[188] The level of detail necessary in an EIA is determined by a tiering system in which RECSA categorizes actions as high impact, moderate impact, moderate to low impact, or low impact.[189] Projects must prepare environmental management plans which describe how a project will prevent or mitigate its negative environmental impacts.[190] Government-certified officials then conduct environmental audits to ensure compliance with those mitigation plans,[191] going beyond CEQA's monitoring requirements. RECSA also defines cumulative impacts[192] and requires their inclusion in any EIA.[193] Substantively, RECSA directs agencies to reject a project when its cumulative impacts will exceed the empirically established carrying capacity ("la capacidad de carga") of the affected environment.[194]

Importantly, RECSA also provides that EIAs can be required for existing projects. The law outlines two environmental evaluation documents that apply to preexisting projects which have adverse environmental impacts and clarifies that these documents are meant to determine what corrective actions must be taken to mitigate environmental harms.[195] RECSA then authorizes fines against existing projects that fail to implement these corrective actions, offering an enforcement mechanism that NEPA and CEQA lack.[196] This coverage of existing projects likely accounts for the fact that the Guatemalan government conducts about 2,000 EIAs annually, while the U.S. government only completes 530.[197] Moreover, Guatemalan courts have consistently upheld RECSA. One court affirmed the validity and utility of the

187 *Guatemala: ESIA Profile*, NETH. COMM'N FOR ENV'T ASSESSMENT (Sept. 2, 2019), https://www.eia.nl/en/countries/guatemala/esia-profile [https://perma.cc/CFK6-M5CB]; *see* RECSA art. 18.

188 *See* RECSA art. 3(62), 21.

189 *See id.* art. 19, 23–26.

190 *See id.* art. 3(73), 15(d).

191 *See id.* art. 88–90.

192 *See id.* art. 3(20).

193 *See id.* art. 15(c).

194 *Id.* art. 33(f).

195 *See id.* art. 3(18)–(19).

196 *See id.* art. 109(b).

197 *See* Ernesto Sanchez-Triana & Santiago Enriquez, *A Comparative Analysis of Environmental Impact Analysis Systems in Latin America: Draft*, *in* ANN. CONF. OF THE INT'L ASS'N FOR IMPACT ASSESSMENT 4 (2007).

law while framing it as a part of "the obligation to satisfy the right to a healthy environment that the State has."[198]

RECSA has experienced some implementation challenges. Part of the law mandates strategic environmental assessments ("SEAs"),[199] which involve the government incorporating environmental analyses into how it designs national programs and policies.[200] No system has been implemented to conduct such assessments, and no SEAs have been completed as of 2020.[201] The law also purports to promote transparency and public participation, but scholars have noted that the government frequently excludes the public from the EIA process under RECSA due to agency resource constraints and manipulation by companies and their hired consultants.[202]

B. South Africa's Environmental Impact Assessment Law

In 1998, the South African government enacted the National Environmental Management Act ("NEMA").[203] NEMA requires the consideration, investigation, and assessment of the environmental, socio-economic, and cultural impacts "of activities that require authorisation or permission by law and which may significantly affect the environment."[204] Similar to RECSA, the government proactively compiles a list of activities that require the preparation of an EIA.[205] The EIA prepared through this process must evaluate cumulative impacts when determining an

198 Corte de Constitucionalidad [Constitutional Court] Oct. 5, 2017, Expediente Número 5956-2016, at 48, *translated in* Sentencia de Corte de Constitucionalidad (Expediente nº 5956-2016), 05-10-2017, VLEX JUSTIS ("[T]he Court stresses the importance of the obligation to satisfy the right to a healthy environment that the State has; that is, to take the actions necessary to prevent and eradicate pollution and other causes that affect the ecological balance. That is why it is established that this state duty is not . . . isolated to be fulfilled by the Congress of the Republic, but the Executive branch must also take part in the issuance of regulations that regulate the actions of human beings when using natural resources.") (Guat.).

199 *See* RECSA art. 3(29), 13.

200 *See Strategic Environmental Assessment (SEA)*, ORG. FOR ECON. COOP. AND DEV., https://www.oecd.org/dac/environment-development/strategicenvironmentalassessment.htm [https://perma.cc/9NZB-NBFR] (last visited Apr. 16, 2023).

201 *See* Javier Rodrigo-Ilarri, Lidibert González- González, María-Elena Rodrigo-Clavero & Eduardo Cassiraga, *Advances in Implementing Strategic Environmental Assessment (SEA) Techniques in Central America and the Caribbean*, 12 SUSTAINABILITY 4039, 4047–50 (2020).

202 *See* Mariel Aguilar-Stoen & Cecilie Hirsch, *Bottom-up Responses to Environmental and Social Impact Assessments: A Case Study from Guatemala*, 62 ENV'T IMPACT ASSESSMENT REV. 225, 228–29 (2017).

203 *See* National Environmental Management Act, GN 107 of GG 19519 (27 Nov., 1998).

204 *Id.* § 24(1).

205 *See id.* § 24(2).

activity's potential effect on the environment.[206] Mirroring the broader application of Guatemala's law, NEMA can apply to existing projects, but the law defers to agency officials on whether this tool should be used.[207] Specifically, NEMA allows the Minister of Environmental Affairs and Tourism to "identify existing authorised and permitted activities which must be considered, assessed, evaluated and reported on."[208] Like RECSA, NEMA requires agencies to provide for "the monitoring and management of impacts"[209] after the EIA stage.[210] In a rarity for EIA laws and unlike RECSA, NEMA expressly references environmental justice: "Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons."[211]

Another key distinction between RECSA and NEMA is their background legal frameworks. South Africa's constitution provides all people with the right "to an environment that is not harmful to their health or well-being" and directs the government to "secure ecologically sustainable development and use of natural resources."[212] This national guarantee has aided the Constitutional Court of South Africa in interpreting NEMA to "embrace[] the concept of sustainable development" and to require an assessment of existing socio-economic conditions and cultural heritage affected by a proposed project.[213] The Court broadly held that "NEMA requires all developments to be socially, economically, and environmentally sustainable."[214] This decision affirmed the substantive nature of NEMA when paired with South Africa's constitution, and it essentially requires the consideration of environmental justice implications in all government decision-making. Again, however, South Africa has experienced implementation challenges. Some scholars have argued that EIAs under NEMA have mutated into devices for rubber stamping development, including environmentally harmful mining projects.[215]

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206 *See id.* § 24(7)(b).

207 *See id.* § 24(2)(d).

208 *Id.*

209 *Id.* § 24(7)(f).

210 *See id*.

211 National Environmental Management Act 107 of 1998 § 2(4)(c) (S. Afr.).

212 S. AFR. CONST., ch. 2, art. 24, 1996.

213 *Fuel Retailers Ass'n of S. Afr. v Director-General: Env't Mgmt., Dep't of Agric., Conservation and Env't, Mpumalanga Province* 2007 (13) ZACC 1 (CC) at 33 (S. Afr.).

214 *Id.* at 42.

215 *See, e.g.*, Llewellyn Leonard, *Examining Environmental Impact Assessments and Participation: The Case of Mining Development in Dullstroom, Mpumalanga, South Africa*, 19 J. ENV'T ASSESSMENT POL'Y & MGMT. 1, 3–4 (2017).

The EIA laws on the books in Guatemala and South Africa offer a model for a more expansive and protective deterrent against environmental harms in the U.S. While criticisms of the Guatemalan and South African EIA systems abound given their failures to generate transparency and involve affected communities, those flaws are often the result of a lack of government resources or overt corruption and conflicts of interest.[216] The implementation challenges that these laws face would be mitigated in the U.S. because of the greater financial resources available to the government and the more stringent enforcement of anti-corruption laws.[217]

IV. STATUTORY REFORMS AND ENVIRONMENTAL RIGHTS FOR WILMINGTON RESIDENTS

Communities like Wilmington that are subjected to disproportionate pollution burdens can utilize procedural statutes like NEPA and CEQA, but holes in the scope and enforceability of those statutes limit their power. This Article proposes amendments to NEPA and CEQA to better address the pollution burdens in communities like Wilmington, offer some substantive redress, and reflect a modern understanding of human rights.

Existing proposals for reform to mitigate cumulative impacts either fail to sufficiently expand statutory frameworks to cover preexisting facilities or pose political impossibilities due to their overambition. Some scholars propose revising CEQ regulations to improve cumulative impacts analyses or account for climate change,[218] but these proposals overlook the political vulnerabilities inherent in relying on CEQ regulations that can vary by administration. Other scholars propose amending NEPA to include substantive requirements that would block particularly harmful projects,[219] or amending NEPA or CEQA to simply require

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216 *See, e.g.*, Aled Williams & Kendra Dupuy, *Deciding Over Nature: Corruption and Environmental Impact Assessments*, 65 ENV'T IMPACT ASSESSMENT REV. 118, 120 (2017).

217 *See* John J. Loomis et al., *Environmental Federalism in EIA Policy: A Comparative Case Study of Paraná, Brazil and California, US*, 122 ENV'T SCI. & POL'Y 75, 80 (2021) (highlighting the greater financial resources and lower levels of corruption in EIA implementation in the U.S. compared to Brazil).

218 *See* Lauren Giles Wishnie, *NEPA for a New Century: Climate Change & the Reform of the National Environmental Policy Act*, 16 N.Y.U. ENV'T L.J. 628, 644–46 (suggesting amending NEPA regulations to eliminate cumulative impacts in the context of greenhouse gas emissions given that these emissions are not geographically bound).

219 *See* Karkkainen, *supra* note 130, at 945–48; Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. LAND USE & ENV'T L. 275, 290–93 (1997); Marissa Tripolsky, *A New NEPA to Take a Bite out of Environmental Injustice*, 23 B.U. PUB. INT. L.J. 313, 336–37 (2014) (recommending amending NEPA to require consideration of the distribution of

an environmental justice analysis in every statutorily required document.[220] These proposals would achieve laudable aims but possess key shortcomings in isolation. First, an expansion of NEPA or CEQA to integrate more substantive requirements would still leave preexisting pollution sources untouched.[221] Second, adding a substantive component to NEPA would result in political hurdles that are likely insurmountable.[222] Circumventing NEPA entirely, some have argued that "cumulative impacts are so centrally relevant to environmental and natural resources law that failure to account for those impacts when making regulatory decisions is arbitrary and capricious,"[223] meaning that a cumulative impacts analysis would be required independent of NEPA's provisions. This proposal would necessitate a dramatic shift in the way courts have interpreted NEPA and have reviewed agency compliance with the statute.[224] It would also do nothing to target the preexisting pollution sources excluded by NEPA.[225]

Recognizing and learning from the deficiencies in these proposals, this Article first suggests amending NEPA to explicitly cover cumulative impacts and allow agencies to require an EIS for preexisting projects like the decades-old pollution sources in Wilmington. This Article then recommends the California legislature amend CEQA to create a process for residents to petition for CEQA review of preexisting projects and block projects that exacerbate environmental injustice. Lastly, to firmly enshrine environmental rights in the law, California should enact an environmental rights amendment.

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environmental harms from a project and prohibit projects where harms outweigh benefits or distribution is inequitable); Jack K. Haugrud, *Perspectives on NEPA: Let's Bring a Bit of Substance to NEPA - Making Mitigation Mandatory*, 39 ENV'T L. REP. 10638, 10639 (2009) (proposing that Congress amend NEPA to require actual mitigation of environmental impacts for a project to continue).

220 *See, e.g.*, Lena Freij, *Centering Environmental Justice in California: Attempts and Opportunities in CEQA*, 28 HASTINGS ENV'T L.J. 75, 109 (2022) (proposing a new, independent environmental justice category of analysis in CEQA documents).

221 *See supra* Section II.B.

222 *See* Emma Dumain & Kelsey Brugger, *The House Democrat Trying to Move His Party on NEPA Reform*, E&E NEWS (Feb. 17, 2023, 6:27 AM), https://www.eenews.net/articles/the-house-democrat-trying-to-move-his-party-on-nepa-reform/ [https://perma.cc/Q7TB-XTUA] ("The reason [a House Democrat advocating for NEPA reform] could become all but radioactive, however, is because he is saying the quiet part out loud: Reopening NEPA will almost certainly be necessary for passing permitting reform legislation.").

223 Sanne H. Knudsen, *The Flip Side of* Michigan v. EPA*: Are Cumulative Impacts Centrally Relevant?*, 2018 UTAH L. REV. 1, 5 (2018).

224 *See* NINA M. HART, CONG. RSCH. SERV., R47205, JUDICIAL REVIEW AND THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, at 6–11 (2022).

225 *See supra* Section II.B.

A. Expanding NEPA's Scope

Wilmington residents were deprived of a significant portion of NEPA's protections in 2020 because cumulative impacts were no longer a necessary part of an EIS.[226] They also remain unable to obtain any NEPA review of existing projects—like the oil wells and refineries, ports, waste management facilities, and highways permeating the community[227]—despite the enormous environmental impacts these sources cause. NEPA needs reform to address these and other flaws.

First, Congress should amend Section 102(2)(C)(i) of NEPA to read "the environmental impact, including the cumulative impacts, of the action."[228] Congress should then define cumulative impacts in the statute—likely in a new Section 106 of the Act—to codify the current CEQ definition.[229] The primary legal effect of this amendment would be that no subsequent administration could use CEQ regulations to preclude agencies from considering cumulative impacts in an EIS. Because almost all countries around the world have an EIA requirement and most of these laws incorporate cumulative impacts in their text, the consideration of cumulative impacts in an EIA can be viewed through a rights-based framework.[230] EIA obligations have been treated as "customary international law"[231] and as a "fundamental principle in international law,"[232] yet an EIA that does not analyze cumulative impacts "does not capture the whole picture."[233] Environmental documents that omit cumulative impacts assessments misconstrue the environmental toll of a project on communities like Wilmington rife with preexisting pollution sources,[234] so codifying the inclusion of cumulative impacts will

226 *See supra* Section II.B.

227 *See supra* Section I.A.

228 42 U.S.C. § 4332(2)(C)(i) (2018 & Supp. 2021). The word "proposed" has been removed from this NEPA provision. This is to accommodate this Article's proposal to apply NEPA requirements to preexisting pollution sources. *See infra* notes 236–40 and accompanying text.

229 *See* 42 U.S.C. § 4370m (2018 & Supp. 2021); 40 C.F.R. 1508.1(g)(3) (2022).

230 Yang, *supra* note 173, at 563–64.

231 *Id.*

232 Pannu, *supra* note 181, at 113.

233 Romina Sciberras, Effectiveness of Environmental Impact Assessment Process in the Maltese Islands 28 (Apr. 2013) (M.S. dissertation, James Madison University) (Environmental Sciences Commons).

234 *See* George Alexeeff et al., *Cumulative Impacts: Building a Scientific Foundation*, CAL. EPA 2 (Dec. 2010), https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf [https://perma.cc/V26N-BLF2].

guarantee that NEPA analyses are thorough, accurate, and protect human rights.[235]

Second, Congress should amend NEPA to authorize agencies to apply NEPA review processes to existing projects in a manner resembling South Africa's NEMA. NEMA gives the Minister of Environmental Affairs and Tourism, in conjunction with the appropriate local government official, the discretion to apply the EIA process to existing activities.[236] EIAs under NEMA are undertaken by the private owner or operator of a project—usually through an independent environmental specialist hired as a consultant—and submitted to a government agency for approval.[237] Similarly, NEPA should be amended to give the secretaries of all federal agencies the authority to order an EIS to be conducted for a particular preexisting project. A sentence could be added in Section 102(2)(C) stating: "Any Federal agency may require such a detailed statement for any past or ongoing project significantly affecting the quality of the human environment when the head of such agency concludes that such a statement would be appropriate."[238] This amendment would not radically alter NEPA

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235 Access to accurate and comprehensive information about the environmental impacts of projects in a community is increasingly seen through a human rights lens. The breadth of scholarship on that trend is beyond the scope of this Article, but for initial insights into the trend, see Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized*, 35 DENV. J. INT'L L. & POL'Y 129, 134–39 (2006) (explaining how the right to environmental information like that contained in an EIA is incorporated in human rights treaties and has been enforced by entities like the European Court of Human Rights).

236 National Environmental Management Act 107 of 1998 § 24(1), (2)(d).

237 *See* S. AFR. DEP'T OF HEALTH, MANAGEMENT OF ENVIRONMENTAL IMPACT ASSESSMENTS (EIA) OF PROPOSED DEVELOPMENT ACTIVITIES: A GUIDING HANDBOOK FOR ENVIRONMENTAL HEALTH PRACTITIONERS (EHPS) 6–7 (2017), https://www.health.gov.za/wp-content/uploads/2021/09/Manual-EIA-2017-compressed.pdf [https://perma.cc/RP23-8TNG].

238 Together with the previous proposed NEPA amendment, see *supra* text accompanying note 228, § 102(2)(C) would now read (with added language in italics and omitted language indicated by empty brackets): "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact*, including the cumulative impacts,* of the [ ] action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the [ ] action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. *Any Federal agency may require such a detailed statement for any past project significantly affecting the quality of the human environment when the agency concludes such a statement would be appropriate* . . . ." 42 U.S.C. § 4332(2)(C) (2018 & Supp. 2021).

procedures but would broaden the pool of projects that could fall under NEPA's purview.

For example, if the EPA—after investigating potential enforcement actions against a pollution source, hearing public complaints, and conducting site visits—concludes that a source is significantly affecting the environment or human health, it could direct the operator to prepare an EIS, even if a supplemental EIS would not have been required. The EIS should be written by an independent environmental specialist, like under NEMA, to eliminate conflicts of interest and to avoid the disincentives agencies would have to order a new EIS if they were required to shoulder all the costs of preparing it. Currently, an EIS under NEPA often includes information largely compiled by a project proponent or a government contractor, so this delegation would not be unfamiliar to the NEPA system.[239] This process would conclude with something akin to a record of decision.[240] Instead of announcing whether or not the agency will approve the project, though, the record of decision would discuss how the new EIS informs the agency's ongoing work, including enforcement priorities, future permitting processes, and funding decisions.

This amendment would vastly expand the potential scope of NEPA while maintaining the administrability of the statute by preserving agency discretion. Projects would not be paused or enjoined because, without a "major Federal action," these preexisting sources would not necessarily have any pending agency permit approval or funding that a court could order the agency to halt.[241] Nevertheless, the enforcement capabilities of agencies would vastly improve, as agencies like the EPA or the Bureau of Land Management contemplating enforcement actions against companies could leverage this new power to gather useful information and data.[242] In Wilmington, for example, the EPA could conduct an environmental assessment of Phillips 66's

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239 *See* 40 C.F.R. § 1506.5(b) (2022) (authorizing an agency to require information from a project proponent, to direct the project proponent to prepare an EIS, or to hire a consultant to do so); Ezekiel J. Williams, *The Role of the Project Proponent in the NEPA Process*, FAEGRE DRINKER, https://www.faegredrinker.com/webfiles/Role%20of%20the%20Project%20Proponent%20in%20the%20NEPA%20Process.pdf [https://perma.cc/9UVU-PKSP] (last visited Apr. 13, 2023).

240 *See supra* Section II.B.

241 *See* Wesley B. Hazen, *The Birds, the Bees, and Equitable Relief: Limitations and Restrictions on Judicial Relief Under NEPA, Through the Lens of* Lakes and Parks All. of Minneapolis v. Fed. Transit Admin.*, F.3d 759 (8th Cir. 2019)*, 7 OIL & GAS, NAT. RES., & ENERGY J. 127, 134–35 (2021) (discussing the federal action component of projects under NEPA review and how courts allow actions to proceed if there is no federal-action-like funding).

242 *See Law Enforcement*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., https://www.blm.gov/programs/law-enforcement [https://perma.cc/452D-GAZ3] (last visited Apr. 16, 2023).

Wilmington refinery, and the Department of Transportation could evaluate the roads in and out of the Ports of Los Angeles and Long Beach. These analyses would not shut down projects but could catalyze future agency enforcement action, equip Wilmington residents with the data and science they need to hold polluters accountable, and signal to Wilmington residents—who have felt "put down," "overlooked," and "squelched" by the government for generations[243]—that the federal government is working to correct historical injustices.

In the context of civil rights, the EPA has signaled an increased investment in Title VI cases by creating a new Office of Environmental Justice and External Civil Rights,[244] releasing guidelines on environmental justice and permitting,[245] and announcing several Title VI investigations.[246] But the EPA still routinely gets inundated with Title VI complaints and needs more resources to effectively investigate and manage claims, let alone negotiate or litigate the cases that proceed.[247] The ability to order an EIS for existing projects that otherwise would not fall under NEPA—increasing the information available to the EPA—would reduce and streamline the investigatory burden on the agency and ultimately improve Title VI enforcement, allowing a procedural amendment to inform substantive rights.

Both of these suggested amendments to NEPA would benefit Wilmington residents, and they would help the statute fulfill its bold commitment "to use all practicable means . . . [to] assure for

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243 Saraiva, *supra* note 20.

244 *See EPA's New Office of Environmental Justice and External Civil Rights: A Moment in History*, U.S. ENV'T PROT. AGENCY (Oct. 6, 2022), https://www.epa.gov/perspectives/epas-new-office-environmental-justice-and-external-civil-rights-moment-history [https://perma.cc/Y9L2-VJ5E]; *About the Office of Environmental Justice and External Civil Rights*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/aboutepa/about-office-environmental-justice-and-external-civil-rights [https://perma.cc/4ZXK-PDDG] (last updated June 30, 2023).

245 *See Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions*, U.S. ENV'T PROT. AGENCY (Aug. 2022), https://www.epa.gov/system/files/documents/202208/EJ%20and%20CR%20in%20PERMITTING%20FAQs%20508%20compliant.pdf [https://perma.cc/V2TQ-72ZG].

246 *See* Kelsey Brugger, *EPA Launches Civil Rights Probes of Texas Regulator*, E&E NEWS PM (Aug. 9, 2022, 4:35 PM), https://www.eenews.net/articles/epa-launches-civil-rights-probes-of-texas-regulator/ [https://perma.cc/NHN9-CTNX]; Michael Phillis & Brittany Peterson, *EPA Investigating Colorado for Discriminatory Air Pollution*, AP NEWS (Dec. 28, 2022, 1:01 PM), https://apnews.com/article/politics-colorado-climate-and-environment-us-environmental-protection-agency-pollution-04eb8c47fccbc32789c1499186651d77 [https://perma.cc/CMV3-RFB8].

247 *See* Stephen Lee, *Aggressive Civil Rights Office Reinvents EPA Discrimination Work*, BLOOMBERG LAW (Mar. 16, 2022, 3:00 AM), https://news.bloomberglaw.com/environment-and-energy/aggressive-civil-rights-office-reinvents-epa-discrimination-work [https://perma.cc/88UL-W8BJ].

all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings [and] attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."[248]

B. Giving CEQA Environmental Justice Teeth

CEQA imposes more rigorous procedural requirements than NEPA, and it has been interpreted to possess some substantive components. But CEQA's scope is still limited, and its incorporation of environmental justice concerns is weak. Wilmington residents have attempted to use CEQA to address existing pollution sources but have mostly encountered roadblocks.[249] Thus, two CEQA reforms are needed. First, CEQA should be amended to create a process through which individuals or organizations can petition state agencies for a CEQA environmental review of an existing pollution source. State agencies should be required to review and investigate all petitions.[250] If the agency concludes, mirroring RECSA in Guatemala, that the source significantly deteriorates natural resources, the environment, or community and cultural welfare,[251] the agency would be required to evaluate the preexisting source under the CEQA process. Pursuant to judicial interpretations of CEQA, that evaluation would have to include the "health consequences" of the source's operations.[252]

The objective of this amendment, similarly to the NEPA amendment described above, is to expand CEQA's scope and address preexisting pollution sources like the ones besetting Wilmington. This amendment differs from the NEPA amendment in that it would provide community members an opportunity to directly identify harmful pollution sources and petition the government to gather more information by preparing an EIR. This amendment is suggested for California and not NEPA because it will be more politically possible in California, an environmentally ambitious and progressive state, and because this participatory

248 42 U.S.C. § 4331(b).

249 *See supra* Section II.A., II.C.

250 This requirement would resemble the EPA's obligation to "promptly investigate" all Title VI complaints filed with the agency. *See* 40 C.F.R. § 7.120 (2023).

251 *See* RECSA art. 3, 5, 18.

252 *Cnty. of Fresno*, 431 P.3d at 1158.

petition process is best managed by state and local governments, not federal agencies.[253]

Once the state establishes this petition process, state agency decisions to deny such petitions could be reviewed by courts under CEQA's "abuse of discretion" standard.[254] Factual conclusions the agency made would receive deference, but an agency's compliance with newly required procedures would be reviewed de novo.[255] This judicial review process would incentivize agencies to conduct thorough evaluations of petitions and accept plausible ones to avoid litigation risk, meaning that Wilmington residents would have more opportunities to present evidence of environmental harms and that state officials would more frequently scrutinize decades-old polluting infrastructure. Crucially, this process would then trigger CEQA's mitigation requirements.[256]

After CEQA's provision directing state agencies to mitigate effects,[257] a new subsection should be added stating that "[e]ach owner or operator of a private project required to comply with the provisions of this division shall mitigate or avoid the significant effects on the environment projects that it owns or operates whenever it is feasible to do so." With this substantive force, sources like Wilmington's oil refineries or hazardous waste facilities, if subjected to CEQA after a public petition, would be required to reduce their air pollution impacts or point to specific "economic, social, or other conditions [that] make it infeasible to mitigate."[258] As seen in prior CEQA cases,[259] if a source fails to comply, a court could order the project to suspend operations until feasible mitigation is achieved, delivering tangible emissions relief to Wilmington residents. Imitating RECSA,[260] this amendment could even go further and authorize fines against projects that fail to mitigate.

Second, for new projects, the California legislature should amend CEQA to explicitly require an environmental justice

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253 *See, e.g.*, *Governor Newsom Signs Sweeping Climate Measures, Ushering in New Era of World-Leading Climate Action*, OFF. OF GOVERNOR GAVIN NEWSOM (Sep. 26, 2022), https://www.gov.ca.gov/2022/09/16/governor-newsom-signs-sweeping-climate-measures-ushering-in-new-era-of-world-leading-climate-action/ [https://perma.cc/LQ8H-EJTZ]; *see* U.S. DEP'T OF HOMELAND SEC., OFF. OF INSPECTOR GEN., OIG-17-42, H-2 PETITION FEE STRUCTURE IS INEQUITABLE AND CONTRIBUTES TO PROCESSING ERRORS (Mar. 6, 2017) (specifying numerous errors and inequities in federal DHS petition process).

254 CAL. PUB. RES. CODE § 21168.5 (West 2023).

255 *See Cnty. of Fresno*, 431 P.3d at 1159.

256 *See supra* Section II.C.

257 *See* CAL. PUB. RES. CODE § 21002.1(b) (West 2023).

258 CAL. PUB. RES. CODE § 21002.1(c) (West 2023).

259 *See City of Richmond*, 108 Cal. Rptr. 3d at 484.

260 *See supra* Section III.B.

analysis in every CEQA document, and to impose a substantive environmental justice obligation. Using NEMA as inspiration,[261] CEQA should be amended to expressly incorporate environmental justice. An independent environmental justice analysis should be required for every EIR and finding of no significant impact.[262] This additional duty would ensure that impacts on overburdened communities like Wilmington are always considered and that new projects cannot skirt the CEQA process by ignoring environmental justice implications. Again, this requirement would implicate other CEQA provisions, requiring agencies to mitigate any significant effects identified in these environmental justice analyses and to consider feasible alternatives.[263]

Further, CEQA should emulate NEMA and require that a state agency shall not approve, fund, or permit a new project or a project modification if it will create or exacerbate an intolerable level of environmental harms in disadvantaged communities.[264] Just as NEMA and its judicial interpretations obligate all development to be socially and environmentally sustainable, CEQA should adopt a firm, substantive barrier to prevent the kinds of deadly cumulative burdens that are seen in Wilmington. "Disadvantaged communities" in California are already defined by the California Environmental Protection Agency ("CalEPA") pursuant to statewide legislation, so CEQA should adopt this definition and prohibit disproportionate cumulative impacts in those areas.[265] CalEPA would likely be best equipped to set the

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261 *See supra* Section III.B.

262 These provisions would likely be located at CAL. PUB. RES. CODE § 21002.1 (West 2023) for EIRs and CAL. CODE REGS. tit. 14, § 15071 (2023) for so-called "negative declarations," finding no significant impacts.

263 *See* CAL. PUB. RES. CODE § 21002 (West 2023). Such an explicit focus on environmental justice also comports with and complements recent federal actions, such as the Environmental and Climate Justice Block Grant Program created by the Inflation Reduction Act and the Justice40 Initiative spearheaded by the White House. *See Inflation Reduction Act Environmental and Climate Justice Program*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/inflation-reduction-act/inflation-reduction-act-environmental-and-climate-justice-program [perma.cc/MM8A-DZ9F] (last updated Aug. 30, 2023); *see also Justice40*, THE WHITE HOUSE, https://www.whitehouse.gov/environmentaljustice/justice40/ [https://perma.cc/J8ZW-G2ZN] (last visited July 1, 2023).

264 New Jersey's recently enacted Environmental Justice Law requires an "environmental justice impact statement" and directs the state to deny permits where cumulative impacts will disproportionately harm an overburdened community. *See* N.J. STAT. ANN. § 13:1D-160(4)(a)(1) (West 2020). New York also recently enacted a law with very similar requirements. *See* N.Y. ENV'T CONSERV. LAW § 70-0118(3)(b) (McKinney 2023). These two laws are important and merit more discussion in future scholarship.

265 *See* CAL. ENV'T PROT. AGENCY, FINAL DESIGNATION OF DISADVANTAGED COMMUNITIES PURSUANT TO SENATE BILL 535, at 1 (2022), https://calepa.ca.gov/wp-content/uploads/sites/6/2022/05/Updated-Disadvantaged-Communities-Designation-DAC-May-2022-Eng.a.hp_-1.pdf [https://perma.cc/4MBH-QNJH]; *SB 535 Disadvantaged*

level at which cumulative impacts become intolerable. Another holistic approach would be to replicate RECSA's provision mandating that the government reject a project when its cumulative impacts exceed the carrying capacity of the affected environment.[266]

Despite CEQA's potential to incorporate powerful substantive duties, seeking to significantly reduce pollution burdens through a largely procedural statute possesses inherent challenges. CEQA's plethora of exemptions and carve-outs also hampers its utility. More importantly, even the most ambitious CEQA reforms do not legally recognize the rights of Wilmington residents and others to live in a clean and healthy environment. This Article therefore seeks to briefly connect the dialogue around procedural environmental obligations with the increasingly prominent discussion of a substantive human right to a healthy environment.[267]

C. An Environmental Rights Amendment in California

California does not have an explicit right to a healthy or clean environment in its state constitution. Given the historical importance of water rights in California, the state constitution does provide that all water in the state must be "put to beneficial use" and that the state must prevent "waste or unreasonable use."[268] The state constitution also includes a right to fish,[269] it codifies the public trust doctrine for navigable waters,[270] and it declares a public interest in "protecting the environment."[271] Regardless, courts in California have confirmed that "[n]either the state nor federal Constitution guarantees a right to a healthful or contaminant-free environment."[272] California has refrained from joining other states that have adopted state constitutional

Communities, CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT (2023), https://oehha.ca.gov/calenviroscreen/sb535 [https://perma.cc/W82R-KBM3] (last visited Sept. 5, 2023; *see also* Tripolsky, *supra* note 219, at 336–37.

266 *See supra* Section III.B. Along with CalEPA's definition, the Inflation Reduction Act and the Justice40 Initiative define and direct resources to disadvantaged communities. *See Inflation Reduction Act* & *Justice40*, *supra* note 263 These definitions should be consulted if California does incorporate environmental justice directly into CEQA.

267 *See* G.A. Res. 76/300, ¶ 20 (July 28, 2022) (recognizing "the right to a clean, healthy and sustainable environment as a human right").

268 CAL. CONST. art. X, § 2; *accord* United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 186–88 (Cal. Ct. App. 1986) (holding that impairing water quality was a sufficient basis for concluding that a water use was unreasonable under the state constitution).

269 CAL. CONST. art. I, § 25.

270 CAL. CONST. art. X, § 4; *see also* Friends of Martin's Beach v. Martin's Beach 1, 201 Cal. Rptr. 3d 516, 532 (Cal. Ct. App. 2016).

271 CAL. CONST. art. I, § 7.

272 Coshow v. City of Escondido, 34 Cal. Rptr. 3d 19, 31 (Ct. App. 2005) (holding there is no fundamental right in California to contaminant-free public drinking water).

amendments enshrining such a right.[273] These constitutional provisions or ERAs have been adopted by seven states but range in their scope, specificity, and subsequent interpretation by courts.[274] New York's ERA, approved in 2021, simply reads: "Each person shall have a right to clean air and water, and a healthful environment."[275] Massachusetts' ERA involves more particular rights: "The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment."[276] Despite the differences between ERAs, they all generally spur on and streamline the legislature's ability to enact environmental legislation, aid courts in broadening interpretations of environmental statutes, and increase access to justice.[277]

Importantly for the residents of Wilmington, ERAs can help address cumulative impacts in several ways. First, although ERAs do not provide a cause of action to every citizen of a state, ERAs support standing for individuals and public interest groups,[278] thereby lowering the barriers to legal redress faced by residents in overburdened communities.[279] In the face of all of the obstacles to obtaining substantive legal relief experienced by Wilmington residents, including the judicial interpretation of Title VI,[280] an ERA in California would greatly assist Wilmington residents in bringing claims for pollution-related harms in court. Second, courts have interpreted ERAs to require the consideration of a broader range of impacts than NEPA or CEQA require, including remote interstate greenhouse gas emissions.[281] Thus, an ERA in California could expand the spectrum of cumulative impacts considered for any new project in Wilmington.

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273 *See* Michayla Savitt, *An Amendment to the State Constitution Could Give Conn. Residents Legal Right to a Healthy Environment*, WBUR (Mar. 6, 2023), https://www.wbur.org/news/2023/03/06/connecticut-green-amendment-right-to-healthy-environment [https://perma.cc/9KS9-DQUG] (noting that three states – Pennsylvania, New York, and Montana – have passed the "Green Amendment").

274 *See* Adashek, *supra* note 170, at 130 n. 117 (listing the seven states as Hawaii, Illinois, Massachusetts, Montana, New York, Pennsylvania, and Rhode Island but acknowledging that there is debate over how many states have ERAs based on how an ERA is defined).

275 N.Y. CONST. art. I, § 19.

276 MASS. CONST. art. XCVII.

277 *See* Adashek, *supra* note 170, at 131–33.

278 *See id.* at 145–47.

279 *See* Sam Jones, *Can a 'Green Amendment' Deliver Environmental Justice?*, NEXUS MEDIA NEWS (Aug. 22, 2022), https://nexusmedianews.com/green-amendment-environmental-justice/ [https://perma.cc/F2FG-X2JJ].

280 *See supra* Section II.A.

281 *See* In re Gas Co., 465 P.3d 633, 647–48 (Haw. 2020).

Third and most importantly, ERAs provide extensive substantive protections to communities like Wilmington. The ERA enacted in Montana, which California should use as a blueprint,[282] illustrates this protection. Montana's ERA, which establishes "the right to a clean and healthful environment" for "[a]ll persons,"[283] was held to confer a "fundamental right" that cannot be violated by state nor private actors.[284] Courts in Montana "will apply strict scrutiny to state or private action which implicates" the right, meaning the action will rarely be upheld.[285] With an ERA like Montana's in California, no new or existing facility could violate an individual's right to clean and healthy air, and no triggering federal or state action—such as funding or permitting—would be required as it is under NEPA and CEQA. While procedural statutes like NEPA and CEQA may require the consideration of cumulative impacts, ERAs impose obligations on governments and companies alike to refrain from overburdening communities in the first place.[286] In a ruling that could be applied to any number of pollution sources in Wilmington and across California, one court interpreting New York's ERA concluded that "the [l]andfill is still causing [o]dors and [f]ugitive [e]missions which plague the community, therefore more needs to be done to protect [the plaintiffs'] constitutional rights to clean air and a healthful environment."[287]

There have been some legislative efforts in California to codify environmental rights for children,[288] and several bills have asserted a right to a healthy environment in definitions or in aspirational preamble language.[289] But no real movement has

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282 Many argue that the use of the word "healthy" rather than "healthful" provides stronger environmental protection and avoids anthropocentrism. *See* Adashek, *supra* note 170, at 139–41. Thus, California should use the word "healthy."

283 MONT. CONST. art. II, § 3.

284 Montana Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1246 (Mont. 1999) (holding that Montana statute which exempted incidental leakage from public water and sewage systems from a general policy against water quality degradation violated the state constitution).

285 *Id.*; *accord* Park Cnty. Env't Council v. Mont. Dep't of Env't Quality, 477 P.3d 288, 310–11 (Mont. 2020).

286 ERAs also increase the willingness of courts to find cumulative impacts analyses inadequate, as seen in Montana. *See* Matthew Brown & Amy Beth Hanson, *Judge Cancels Montana Gas Plant Permit Over Climate Impacts*, AP NEWS (Apr. 7, 2023, 12:32 PM), https://apnews.com/article/yellowstone-power-plant-permit-climate-3e62811661f5fa00ee81a02a5d4d8d31 [https://perma.cc/9YEU-CLQ9].

287 Fresh Air for the Eastside, Inc. v. State, No. E2022000699, 2022 N.Y. Misc. LEXIS 8394, at *29 (Sup. Ct., Dec. 20, 2022).

288 *See* S. 18, 2017–18 Leg., Reg. Sess. (Cal. 2017); S. Con. Res. 41, 2017–18 Leg., Reg. Sess. (Cal. 2017).

289 *See* CAL. GOV'T CODE § 56668(p), 65040.12(e)(2)(A) (West 2020); Assemb. 3030, 2019–20 Leg., Reg. Sess. (Cal. 2020).

coalesced in California to pass an ERA, which belies the state's status as a bastion for climate action. In fact, a ballot initiative was proposed in 2012 that would have amended California's constitution and "[e]stablishe[d] new inalienable rights to produce, distribute, use, and consume air, carbon dioxide, water, food, habitat for humanity, universal heal thyself care, and energy generating natural resources,"[290] essentially codifying a right to pollute. California politicians, organizations, and voters should now follow the example set by other state environmental leaders and enact an ERA that will undeniably guarantee the right of Wilmington residents and Californians at large to breathe clean air.

CONCLUSION

Wilmington residents have to live and work in their community every day in a toxic environment. They are surrounded by industries and polluting facilities that were sited in Wilmington deliberately over decades. Wilmington's people often do not share in the benefits of these industries and production processes. But they do experience the burdens. Highways, ports, oil wells, refineries, Superfund sites, and waste management facilities make every breath in Wilmington a liability. It is incumbent upon society, particularly political leaders, to offer some sort of path toward redress for this community.

Substantive legal safeguards for Wilmington residents fall well short, rarely preventing projects from being built or continuing to operate even where the air quality proves deadly. NEPA and CEQA have surely served laudable roles in defending against environmental abuses. Both statutes have reorganized government functioning such that environmental impacts must be considered throughout the decision-making process, and both have resulted in tangible emissions reductions. Yet these statutes do not do enough. NEPA is purely procedural, and CEQA is rife with exemptions. Neither law applies to the preexisting sources of pollution that make Wilmington an air pollution catastrophe. Both statutes must be shored up by legislatures in order to maximize their efficacy, address the cumulative impacts wrought by preexisting pollution sources, and ensure environmental justice is integrated into any environmental review process.

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290 *See California Initiative to Eliminate Environmental Protection Laws and Agencies (2012)*, BALLOTPEDIA, https://ballotpedia.org/California_Initiative_to_Eliminate_Environmental_Protection_Laws_and_Agencies_(2012) [https://perma.cc/Q4M9-WXFC] (last visited Apr. 16, 2023).

Countries around the world continue to enact and bolster their own EIA laws. The U.S. can learn from the best practices of other nations and import the most effective portions of others' EIA statutes. First, Guatemala's EIA law expressly incorporates cumulative impacts, applies to preexisting facilities, and prohibits projects that environmentally overburden communities. Second, South Africa's EIA statute performs similar functions and also requires post-project monitoring, specifically addresses environmental justice, and carries substantive force when read in tandem with the country's constitution.

The U.S. should borrow from these statutes to improve air quality in communities like Wilmington and correct for the inevitable drawbacks of substantially relying on procedural laws to ensure environmental well-being. Congress should amend NEPA to reflect the positive attributes of Guatemala's and South Africa's laws, including by allowing NEPA's application to preexisting facilities and defining cumulative impacts within the language of the statute rather than in administrative regulations. In California, CEQA must be reformed to apply to preexisting sources like those in Wilmington and to embrace environmental justice. Such reforms would be possible and fitting in a state that has led the charge on environmental protections and repeatedly shone a light on environmental injustice.

Ultimately, though, reducing devastatingly harmful cumulative pollution burdens should not depend on a few provisions in procedure-based EIA statutes. If human rights and environmental law overlap at all, Wilmington residents and others like them lie at the heart of that intersection. Any reasonable rights-based framework should acknowledge that the basic rights of these residents are being violated. An ERA in California, and a growing movement for more ERAs around the country, would be a tremendous step towards a more equitable future.

Major Questions in Crisis Governance

Catherine F. Le[*]

ABSTRACT

What do student loan forgiveness, a vaccine-or-test mandate, and a nationwide eviction moratorium all have in common? They are all federal administrative crisis governance measures, issued under statutory emergency authorization during the COVID-19 pandemic, that were invalidated by the Supreme Court under the major questions doctrine.

The major questions doctrine bars agencies from regulating "major" issues without express prior statutory authorization from Congress. But this is fatal to administrative crisis governance. For as the German legal theorist Carl Schmitt observed, a true emergency will always engender the unexpected, and ex ante legislation will inevitably fall short. Congress cannot see emergencies coming and, for each unique crisis, issue specific instructions to administrative agencies in advance. Yet, this is what the Supreme Court expects when it applies the major questions doctrine to administrative emergency regulations. Thus, the doctrine in its current form contains a major flaw: by denying agencies sufficient flexibility, it effectively prohibits the rapid public crisis responses that administrative agencies are uniquely equipped to supply. This is no mere bureaucratic inconvenience, but a serious threat to public safety and welfare in states of emergency.

This Article presents a solution to this problem. It is the first to propose a retheorization of the major questions doctrine as rooted in presidential plebiscitary legitimacy, drawing on the work of Schmitt and Max Weber. It then argues that if courts apply this retheorization when reviewing administrative responses to emergencies, the fact that an emergency regulation addresses a "major question" will no longer be a death blow to administrative

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crisis governance. Instead, this modified major questions doctrine will be capable of upholding the administrative ability to respond effectively to unprecedented, rapidly-evolving emergencies, while also preventing overreach by meaningfully cabining executive power.

INTRODUCTION 71
I. EMERGENCIES AND JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCIES.....75
A. *NFIB v. Department of Labor* and the Question of Emergency Decisional Sovereignty.....75
B. Madisonian Versus Schmittian Approaches to Congressional Emergency Responses.....81
II. THE MAJOR QUESTIONS DOCTRINE AND ITS RATIONALES 84
A. The Major Questions Doctrine 84
B. Scholarly Variations on Nondelegation 86
C. The Judicial Struggle to Explain the Major Questions Doctrine.....89
D. Legality and Plebiscitary Legitimacy 96
III. PRESIDENTIAL PLEBISCITARY LEGITIMACY.....101
A. Presidential Plebiscitary Legitimacy and the Separation of Powers 101
B. The President's Plebiscitary Advantages Over Congress 104
C. Incorporating Presidential Plebiscitary Legitimacy into the Major Questions Doctrine.....105
1. Visibility, Fair Notice, and Public Engagement106
a. The Inadequacy of Notice-and-Comment 106
b. The Required Platform: A Presidential Election 107
2. Applications to Emergencies 111
3. The *Youngstown* Framework and Forms of Emergency Judicial Review 114
IV. THE JUDICIAL APPLICATION OF THE MAJOR QUESTIONS DOCTRINE TO EMERGENCY REGULATIONS.....118
A. Does the Organic Statute Give Emergency Powers to the Agency? 119
B. Is the Regulation Time-Limited and of Temporary Substantive Impact? 120

C. Does the Emergency Regulation Fall Within the Expertise of the Agency? 122
D. Does the Agency Action Have Plebiscitary Legitimacy? 131
CONCLUSION 141

INTRODUCTION

The major questions doctrine prohibits federal administrative agencies from regulating matters of "vast economic and political significance" without express statutory authorization.[1] It hearkens back to the Supreme Court's 2000 decision in *FDA v. Brown & Williamson Tobacco Corp.*, which held that the Food and Drug Administration ("FDA") lacked authority to regulate tobacco products, since the tobacco industry was a "significant portion of the American economy," and the Food, Drug, and Cosmetic Act did not contain clear authorization for the FDA to regulate it.[2] This doctrine thus forms a presumption against the delegation of major regulatory authority to administrative agencies: the idea is that if Congress wants an agency to regulate a major question, it must "speak clearly."[3]

But the major questions doctrine runs into significant problems in the area of administrative crisis governance: regulatory measures taken by administrative agencies to address ongoing emergencies. Statutory authority will always lag behind the exigencies of crises, as Eric Posner and Adrian Vermeule have argued, drawing on the work of the German legal theorist Carl Schmitt.[4] The congressional legislative process is long and slow, and ill-equipped to respond rapidly to emergencies,[5] because, as Schmitt noted, emergencies are fundamentally and inherently unprecedented.[6] Congress cannot possibly prescribe, ex ante,

1 West Virginia v. EPA', 142 S. Ct. 2587, 2605 (2022) (quoting Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

2 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

3 *Utility Air*, 573 U.S. at 324.

4 *See* Eric Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1614 (2009).

5 *See id.* at 1641 (reading Carl Schmitt as describing courts and legislatures as "continually behind the pace of events in the administrative state").

6 *See* CARL SCHMITT, POLITICAL THEOLOGY 6 (George Schwab trans., University of Chicago Press 2005) (1922) (observing that the "state of exception" cannot be "circumscribed factually and made to conform to a preformed law").

detailed statutory directions for how agencies should act in specific crisis situations that were not contemplated at the time of a statute's enactment. But emergencies nonetheless present major and urgent problems to which administrative agencies could respond with quick, informed administrative measures—if it were not for the major questions doctrine's impossible demand that such actions, even in a state of emergency, have express prior statutory authorization. This demand is simply unworkable, because statutes will inevitably "come too late" to effectively address crises, as Posner and Vermeule have noted.[7] Administrative agencies thus have the upper hand over Congress when it comes to effective crisis governance, but the major questions doctrine in its current form presents a complete roadblock.

For example, consider the fate of two recent, high-profile administrative crisis governance measures. Faced with an unprecedented crisis in the form of the rapidly-spreading and highly-contagious COVID-19 pandemic, the Court employed the major questions doctrine to invalidate both the Occupational Safety and Health Administration's ("OSHA") vaccine-or-test mandate for workplaces with more than 100 employees, and the Centers for Disease Control and Prevention's ("CDC") nationwide eviction moratorium.

In *Alabama Ass'n of Realtors v. Department of Health and Human Services*, a "shadow docket"[8] case, the Court vacated a stay of judgment, rendering a lower court's judgment against the CDC's COVID-19 eviction moratorium enforceable. The majority declared, "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance,"[9] noted that "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction, [fell] within the moratorium," and determined that Congress had not authorized the CDC to exercise "such sweeping power."[10]

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7 Posner & Vermeule, *supra* note 4, at 1640.

8 See William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015), for the origin of the term "shadow docket" to describe non-merits opinions. See Stephen I. Vladeck, *Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019), for a discussion of how the Supreme Court's recent shadow docket decisions are increasingly resembling merits determinations.

9 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141S. Ct. 2485, 2489 (per curiam) (first quoting Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); then FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

10 *Id.*

Similarly, the major questions doctrine was applied in *NFIB v. Department of Labor*, staying the OSHA emergency temporary standard (ETS) that workplaces of at least 100 employees require their workforces to be fully vaccinated or test for COVID-19 at least once a week.[11] There, the Court held that because the OSHA mandate was "a significant encroachment into the lives—and health—of a vast number of employees," it was exercising "powers of vast economic and political significance" that were not "plainly authorize[d]" by the Occupational Health and Safety Act ("OSH Act").[12] And like its fellow COVID-19 shadow docket decision, *Alabama Ass'n of Realtors*, it was later cited in *West Virginia v. Environmental Protection Agency* as precedential authority for the application of the major questions doctrine.

The Court's position is that these COVID-19 major questions decisions implicated the major questions doctrine in exactly the same way as major questions cases that did not involve administrative crisis governance measures, with all of them constituting "an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[13] From the majority's jurisprudential perspective, the Court merely conducted routine major questions analyses of the two COVID-19 cases and determined the agency actions in each to be impermissible because of a lack of clear congressional authorization.[14] But what the Court's major questions jurisprudence fails to recognize is that these cases were different—not because they were shadow docket decisions, but because effective crisis governance requires a flexible administrative apparatus that can rapidly respond to urgent, rapidly-evolving crises. Thus, the major questions doctrine in its current form is wholly unsuitable for judicial review of emergency agency actions, unless it undergoes a considerable theoretical and practical modification.

This Article provides that modification. Scholars have long debated the unique exigencies of judicial review in states of

11 *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S.Ct. 661 (2022).
12 *Id.* at 665.
13 West Virginia v. EPA, 597 U.S. 697, 722 (2022).
14 *See generally id.*

emergency,[15] and the major questions doctrine has been widely criticized as lacking in theoretical justification,[16] or being "made-up,"[17] but these two lines of scholarship have not yet been brought together to investigate the major questions doctrine's harmful implications for administrative crisis governance.[18] This Article is thus the first to fill this gap in the literature by retheorizing the major questions doctrine and showing that this retheorization solves the problem of the doctrine's incompatibility with emergencies. In it, I argue that there is a yet to be articulated theory underlying the Court's recent major questions jurisprudence: that of plebiscitary legitimacy. This retheorization is important because, while it does not necessarily change the outcome of most major questions cases arising in normal circumstances, it radically alters the effect of judicial review on major regulations issued by federal administrative agencies responding to an ongoing emergency. Further, I propose a specific method of incorporating a plebiscitary legitimacy factor into the judicial review of such regulations that empowers agencies to respond to emergencies effectively and swiftly, while also limiting the potential for executive overreach.

This Article proceeds in four parts. Part I highlights the classic jurisprudential question of decisional sovereignty in emergency, most famously posed by Carl Schmitt and raised by

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15 *See, e.g.*, David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010); Amanda Tyler, *Judicial Review in Times of Emergency: From the Founding Through the COVID-19 Pandemic*, 109 VA. L. REV. 489, 496 (2023).

16 *See* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266, 315 ("To inflict a consequence of this scale on the political branches demands a *justification* from the Court, not a rain check. Yet a rain check is all we got.");" Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 780 (2017) ("The Court has provided little guidance about the values that justify the [major questions doctrine]."); Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 265 (2016) (quoting Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2197 (2016)) ("The Court's major question jurisprudence 'has never been justified by any coherent "rationale."').

17 Biden v. Nebraska, 600 U.S. 477, 549 (2023) (Kagan, J., dissenting).

18 *See, e.g.*, Jed H. Shugerman, *Major Questions and an Emergency Question Doctrine: The Biden Student Debt Case Study in the Pretextual Abuse of Emergency Powers* 4 (Fordham L. Sch. Working Paper, Paper No. 4345019, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4345019 [https://perma.cc/LD5D-TXUB] (observing that the major questions doctrine impedes emergency administrative action, but not addressing the doctrine's lack of theoretical justification).

the Supreme Court in *NFIB v. Department of Labor*. It considers *NFIB* as a particularly illustrative example of the unique pressures that emergencies place on normal judicial review of administrative action, and of two different approaches to those pressures: the clear-statement domestication model and the deferential suspension model. It then draws on the work of Eric Posner and Adrian Vermeule, who have argued for a Schmittian understanding of administrative crisis governance,[19] to provide a theoretical framework for approaching the issue of emergency judicial deference to administrative agencies. Part II describes scholarly and judicial rationales that have been offered for the major questions doctrine, and, employing theories of legitimacy advanced by Schmitt and Max Weber, introduces plebiscitary legitimacy as a new and more convincing justification. Part III presents a retheorization of the major questions doctrine that incorporates presidential plebiscitary legitimacy. It argues that plebiscitary legitimacy for major-question regulation is best sourced in the President, rather than Congress. It also identifies indicators of presidential plebiscitary legitimacy and explains why such legitimacy is particularly implicated in emergencies, and thus bears special benefits for crisis governance cases. Then, it delineates its approach to preventing executive overreach. Finally, Part IV sets forth precisely how the retheorized major questions doctrine should be applied by courts evaluating administrative responses to emergencies.

I. EMERGENCIES AND JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCIES

A. *NFIB v. Department of Labor* and the Question of Emergency Decisional Sovereignty

"Sovereign is he who decides on the exception,"[20] Carl Schmitt's *Political Theology* famously begins. Schmitt goes on to describe the exception as something that cannot be "codified in the existing legal order"[21] or "circumscribed factually and made to conform to a preformed law."[22] No one can plan ahead for an

19 *See* Posner & Vermeule, *supra* note 4, at 1614.
20 SCHMITT, *supra* note 6, at 5.
21 *Id.* at 6.
22 *Id.*

exception, or spell out what it constitutes or how to address it.[23] So the question that then arises for Schmitt is: "[W]ho can act"?[24] Who has the authority to deal with the exception?

The Supreme Court raised this exact question in *NFIB v. Department of Labor*, which stayed OSHA's emergency rule mandating that employers with at least 100 employees require either vaccination against COVID-19 or weekly COVID-19 testing.[25] The decision cited the major questions doctrine, arguing that the rule involved "powers of vast economic and political significance,"[26] and was not clearly authorized by the OSH Act.[27] The emergency rule, the Court decided, fell outside the scope of the Act, because it attempted to regulate public health rather than narrowly confine itself to specific workplace dangers.[28]

NFIB was not a full opinion on the merits,[29] and the per curiam opinion was accordingly terse. However, the concurrence, authored by Justice Gorsuch and joined by Justices Thomas and Alito, and the dissent, authored by Justices Breyer, Sotomayor, and Kagan, warrant particular attention as apt illustrations of emergency pressure points. They both explicitly invoked the Schmittian question of "Who decides?"[30] and they reveal two contrasting approaches to conceptualizing judicial review in emergencies.

Justice Gorsuch wrote of the OSHA mandate's unconstitutional aggrandizement of both federal and state

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23 *See id.* at 6–7.

24 *Id.* at 7.

25 *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S.Ct. 661 (2022).

26 *Id.* at 665, (citing Ala. Assn. of Realtors v. Dep't of Health and & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (*per curiam*)).

27 *See id.*

28 *See id.*

29 However, note that the Court ordered oral argument in *NFIB*. *See* Amy Howe, *Justices Will Hear Arguments on Jan. 7 in Challenges to Biden Vaccine Policies*, SCOTUSBLOG (Dec. 22, 2021, 8:55 PM), https://www.scotusblog.com/2021/12/justices-will-hear-arguments-on-jan-7-in-challenges-to-biden-vaccine-policies [https://perma.cc/A3F6-8F28]. Oral argument proceeded for more than two hours. *See* Transcript of Oral Argument, Nat'l Fed'n. of Indep. Bus. V. Dep't of Lab., OSHA, 142 S. Ct. 661 (2022) (Nos. 21A244 & 21A247) (noting that argument commenced at 10:00 am and ended at 12:09 pm). Even the issuance of a per curiam opinion, concurrence, and dissent, as in *NFIB*, is atypical for a "shadow docket" ruling, which usually features no reasoning or opinion at all. *See Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary* 2, 117th Cong. 2 (2021) (Testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law). Therefore, *NFIB* seems to warrant a closer reading than one might ordinarily give non-merits opinions.

30 *See NFIB*, 142 S. Ct. at 667 (Gorsuch, J., concurring); *id*. at 676 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

legislative power.[31] He cautioned that "[t]he question before us is not how to respond to the pandemic, but who holds the power to do so"[32] and warned against emergency suspensions of constitutional norms, concluding that "if this Court were to abide [the law's demands] only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little."[33] According to this view, Congress is the only proper sovereign in this situation.

The dissent argued that COVID-19 is a workplace danger, that the mandate was clearly authorized by the Act, and that the Court failed to show appropriate deference to the fact-finding and expertise of the agency.[34] It described the majority as having imposed an extra-textual, judicially-created limitation on the emergency regulatory powers explicitly granted to OSHA by statute,[35] and noted that the Court had "substitute[d] judicial diktat for reasoned policymaking."[36] And it asked:

> Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID–19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?[37]

The dissent concluded, "When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise."[38] This is the specter of the Schmittian question once again: Who decides in the state of emergency? The dissent appears to suggest that in this case, the Supreme Court, not Congress or the President, took upon itself the role of decisional sovereign.

Yet, a precise characterization of the legal nature of the COVID-19 emergency requires further explication. While COVID-19 undisputedly presented an emergency that required quick

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31 *See id.* at 667 (Gorsuch, J., concurring).
32 *Id.* at 670 (Gorsuch, J., concurring).
33 *Id.*
34 *See id.* at 676 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
35 *See id.* at 673 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
36 *Id.* at 674 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
37 *Id.* at 676 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
38 *Id.*

decisions to be made, with only the identity of the proper decisionmaker being disputed in *NFIB v. Department of Labor*, was it truly a pure form of the Schmittian exception? Could it be domesticated and decided within the "existing legal order,"[39] or did it at any time require stepping wholly outside the bounds of our constitutional and legal system? The *NFIB* concurrence suggests that it indeed posed a serious threat to our constitutional and legal system—that absent the restraining power of the Supreme Court, the OSHA mandate would have led to the erosion and ultimate destruction of our constitutional liberties.[40] Under this view, we stood on the brink of a truly Schmittian situation in which the executive attempted to suspend the constitutional separation of powers in order to effectively address the pandemic. Yet the fact that OSHA withdrew its emergency temporary standard thirteen days after the Supreme Court decided *NFIB v. Department of Labor*[41] demonstrates that as much of an emergency as the COVID-19 pandemic presented, it was never as much of a full-on Schmittian threat to the existing legal regime as the concurrence suggested. The executive branch might disagree with the Supreme Court's decision, but it did not challenge the Court's right to be the ultimate arbiter of the constitutionality of measures enacted in response to the pandemic. Constitutional suspension was never in question—and because of that, the emergency did not exist wholly outside the law.

But Schmitt observed that the question of decisional sovereignty is present even in states of emergency that fall short of calling into question the entire existing legal order,[42] and the COVID-19 pandemic thus remained an emergency with Schmittian implications in the form of the unprecedented questions it raised about the allocation of the authority to decide. The dissent rightly pointed out that the pandemic, "an infectious disease that ha[d] already killed hundreds of thousands and

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39 SCHMITT, *supra* note 6, at 6.

40 *See NFIB*, 142 S. Ct. at 670 (Gorsuch, J., concurring).

41 COVID–19 Vaccination and Testing; Emergency Temporary Standard, 87 Fed. Reg. 3928 (Jan. 26, 2022) (to be codified at 29 C.F.R. pt. 1910).

42 SCHMITT, *supra* note 6, at 12 ("If measures undertaken in an exception could be circumscribed by mutual control, by imposing a time limit, or finally, as in the liberal constitutional procedure governing a state of siege, by enumerating extraordinary powers, the question of sovereignty would then be considered less significant but would certainly not be eliminated.").

sickened millions,"[43] posed a nationwide "emergency unprecedented in [OSHA's] history."[44] Indeed, the COVID-19 pandemic posed an emergency unprecedented in the entire history of the modern administrative state. The only other pandemic to approach COVID-19's death toll in the United States was the 1918 influenza outbreak,[45] well before the post-New Deal proliferation of administrative agencies. Thus, the Schmittian exceptionalism of the COVID-19 pandemic is contained in the fact that it required extraordinary solutions within legal frameworks created many years before that had never been contemplated and could not specifically encompass the actions necessary to combat this particular emergency. As Justices Breyer, Sotomayor, and Kagan wrote, "[t]he enacting Congress of course did not tell the agency to issue this Standard in response to this COVID–19 pandemic—because that Congress could not predict the future."[46]

NFIB v. Department of Labor thus lies at the conceptual crossroads of the Schmittian state of exception and "ordinary jurisprudence."[47] Because the Biden administration never questioned the authority of the Supreme Court to decide the constitutionality of the OSHA emergency temporary standard, and because it never laid claim to unchecked, unlimited emergency authority, the existing legal order remained preeminent and unchallenged. For that reason, OSHA's response to the COVID-19 pandemic did not represent a Schmittian exception in its pure form, which Schmitt described as a situation in which the "state remains, whereas law recedes."[48] However, "the question of sovereignty" was indeed "not … eliminated."[49] It remained in the form of the allocation of decisional authority, and the divided Court, exercising its ordinary jurisprudence, was hard-pressed to grapple with it. The per curiam opinion tersely deemed the OSHA vaccine-or-test mandate a major question and proffered only a thin and tenuous argument that COVID-19 represented a public health

43 *NFIB*, 142 S. Ct. at 675 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

44 *Id.*

45 *See* Helen Branswell, *COVID-19 Overtakes 1918 Spanish Flu as Deadliest Disease in American History*, STAT (Sept. 20, 2021), https://www.statnews.com/2021/09/20/COVID-19-set-to-overtake-1918-spanish-flu-as-deadliest-disease-in-american-history/ [https://perma.cc/4FDY-SJL4].

46 *NFIB*, 142 S. Ct. at 674 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

47 *See id*.

48 SCHMITT, *supra* note 6, at 12.

49 *Id.*

hazard, not a workplace one.[50] The concurrence feared that upholding the OSHA mandate would lead to a complete and unending state of exception in which the executive would be unchecked and left free to seize unlimited authority.[51] The dissent argued for reading the OSH Act "in the ordinary way," which it believed would authorize the emergency standard,[52] but also stressed the importance of judicial deference to the judgment of experts during an emergency.[53]

The per curiam opinion and the concurrence, therefore, feared what the emergency might do to the existing legal order, with the concurrence in particular opining that OSHA was asking for nothing less than "almost unlimited discretion"[54] and that but for the Court's application of the major questions doctrine, the executive branch's emergency powers would effectively result in the nullification of the Constitution.[55] This is the view that the OSHA mandate could not and should not be treated differently because of its status as a crisis governance measure, that the major questions doctrine is simply a "clear statement rule" requiring specific and explicit congressional authorization,[56] and that no special deference is due administrative agencies in a state of emergency. I will call this "clear-statement domestication" because it represents the position that an emergency is of no legal significance and must be domesticated to fit within the everyday legal order.

On the other hand, the dissent believed that although ordinary statutory interpretation of the OSH Act would suffice to uphold the vaccine-or-test mandate, the COVID-19 pandemic was an emergency situation that called for particular deference to OSHA's expertise.[57] This is the view that quickly and effectively

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50 *See NFIB*, 142 S. Ct. at 665 (per curiam).

51 *See id.* at 669–670 (Gorsuch, J., concurring).

52 *Id.* at 673 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

53 *See id.* at 676.

54 *Id.* at 668 (Gorsuch, J., concurring).

55 *Id.* at 670 ("Respecting [the law's] demands may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little.").

56 *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012 (2023) (manuscript at 3) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724), (citing *West Virginia* v. EPA, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring)).

57 *See NFIB*, 142 S. Ct. at 676 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

responding to crises requires generalist judges to be restrained in reviewing the actions of administrative agencies that possess expert knowledge and specialized competence. I will refer to this as "deferential suspension" because it is the position that in emergency situations involving crisis governance, ordinary judicial review must be tempered with respect for superior administrative subject-matter expertise, which results in the ordinary legal regime being slightly suspended, by way of greater judicial deference than would normally be granted.

B. Madisonian Versus Schmittian Approaches to Congressional Emergency Responses

Eric Posner and Adrian Vermeule have argued that there are two ways of viewing Congress's role in responding to emergencies: a "Madisonian view" and a "Schmittian" view".[58] The Madisonian view is essentially what Justice Gorsuch advocated in the *NFIB* concurrence: the understanding that whatever the crisis, Congress is the "deliberative institution par excellence," and the executive may not act without clear congressional authorization, to be followed by judicial review.[59] But Posner and Vermeule suggest that this is "hopelessly optimistic in times of crisis," declaring that under the Schmittian view, "the deliberative aspirations of classical parliamentary democracy" no longer function according to Madisonian ideals but are rather "a transparent sham under modern conditions of party discipline, interest-group conflict, and a rapidly changing economic and technical environment."[60] Caught up in partisan politics, legislatures do not have the motivation to pass crisis legislation in advance, even if they could foresee such crises ahead of time,[61] and in the moment of crisis itself, legislatures "can rarely act swiftly and decisively as events unfold."[62]

Posner and Vermeule observe that under the Schmittian view, legislatures and courts inevitably "come too late" to emergencies.[63] Drawing on Schmitt's observation that the Montesquieuian separation of powers creates a situation in which legislation can never be more than abstract rules or general norms that are

58 *See* Posner & Vermeule, *supra* note 4, at 1642.
59 *Id.*
60 *Id.* at 1643.
61 *See id.* at 1643–44.
62 *Id.* at 1645.
63 *Id.* at 1640.

fundamentally retrospective, and in which courts are likewise bound to the past and backward-looking,[64] they note that legislatures and courts will always lag temporally behind the "pace of events in the administrative state."[65] In crises, therefore, Posner and Vermeule believe administrative agencies will be first responders, legislatures will likely be asked to grant them new delegations of authority ex post, and the exigent nature of the crisis will ensure that legislators will "give the executive much of what it asks for."[66] As for courts, Posner and Vermeule are convinced that they will come even later to the crisis, be minimally involved or not at all, "and essentially do mop-up work after the main administrative programs and responses have solved the crisis, or not."[67]

Posner and Vermeule then examine 9/11 and the 2008 financial crisis as paradigmatic examples of this Schmittian approach to administrative crisis governance. With respect to both crises, they find that the executive did not wait for Congress to pass specific authorizing legislation before they responded to the crisis unfolding in real-time: the Treasury and Federal Reserve employed a "strained reading" of a 1932 statute to bail out AIG in 2008, and the Bush administration relied on a 1977 statute with a wholly different legislative purpose to restrict al Qaeda's funding after 9/11.[68] Courts likewise played a minimal role. Post-9/11, courts dealing with administrative law cases have tended more towards deference than searching review,[69] and the judicial review provisions in the Emergency Economic Stabilization Act ("EESA") of 2008 effectively preclude injunctive or any other form of equitable relief except for constitutional violations.[70]

There is, of course, a difference between the self-imposed judicial deference of the post-9/11 national security cases and the

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64 Carl Schmitt, *Die Rechtswissenschaft im Führerstaat*, 7 ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT 438–39 (1935).

65 Posner & Vermeule, *supra* note 4, at 1641.

66 *Id*.

67 *Id*.

68 *See id*. at 1646.

69 *See* Cass Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269, 280–82 (2008); *see also* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1143–45 (2009).

70 Emergency Economic Stabilization Act § 119(a)(2)(A) (2008); *see also* Archit Shah, *Emergency Economic Stabilization Act of 2008*, 46 HARV. J. ON LEGIS. 569, 579 (2009); William Perdue, Note, *Administering Crisis: The Success of Alternative Accountability Mechanisms in the Capital Purchase Program*, 29 YALE L. & POL. REV. 295, 312 (2010).

congressionally-imposed judicial deference required by the EESA. But Posner and Vermeule believe that judicial deference to administrative agencies in crisis situations is the norm rather than the exception because lower courts will be loath to challenge executive decisions, the Supreme Court will find the issues raised too numerous and too fact-bound,[71] and searching judicial review would likely impair the effectiveness of crisis responses.[72] Posner and Vermeule present the fundamental problem as one of legitimacy: courts, they argue, certainly may have strong legal grounds for reviewing agency action in emergencies, but they "lack the political legitimacy needed to invalidate" emergency regulations, and therefore "pull in their horns."[73]

The Madisonian view is indeed not well-suited to crisis governance, and courts and legislatures do inevitably address emergencies too late. The Schmittian view of the administrative state is far more cognizant of the practical reality of administrative crisis governance: that administrative agencies will inevitably be the first to respond because they do not suffer from the time lags structurally inherent in Congress and the judiciary. But Posner and Vermeule's assumption that courts would show increased deference, for reasons of pragmatism and political legitimacy, has been disproven by the Supreme Court's major questions jurisprudence during the COVID-19 emergency. The Court now insists that whatever the practical costs of invalidating administrative agency action, there is no substitute for clear-statement congressional authorization.[74] And it does not appear troubled by its lack of political legitimacy because it does not appear to consider its major question decisions to be "invalidations" of agency regulations as much as "passive-virtue"[75] decisions to return the matter to Congress, which possesses the politically legitimating quality of being a democratically-elected

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71 *See* Posner & Vermeule, *supra* note 4, at 1657.

72 *See id.* at 1658.

73 *Id.* at 1659.

74 *See* Ala. Assn. of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2490 (2021) ("It is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends . . . . It is up to Congress, not the CDC, to decide whether the public interest merits further action here.").

75 *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (coining the term).

body—unlike administrative agencies.[76] Political legitimacy has thus become an indispensable requirement for agency regulation, and in the Court's view, it can have no other source than clear and specific congressional authorization.

Thus, Posner and Vermeule's hypothesis that courts are reluctant to strike down emergency agency actions on political legitimacy grounds simply does not survive in the face of the major questions doctrine as deployed in *Alabama Ass'n of Realtors* and *NFIB v. Department of Labor*. Political legitimacy is indeed a critically important consideration in the Supreme Court's major questions jurisprudence, but not in the way Posner and Vermeule think: it is not a reason for increased judicial deference to agency action in states of emergency, but instead provides the basis for increased *scrutiny*.

II. THE MAJOR QUESTIONS DOCTRINE AND ITS RATIONALES

A. The Major Questions Doctrine

In its 2022 *West Virginia v. EPA* decision, the Supreme Court applied the "major questions doctrine" to strike down the Environmental Protection Agency's Clean Power Plan, a regulation that required existing coal-fired power plants to either decrease their electricity production or "generation shift" to cleaner energy sources.[77] It was the first time the Supreme Court explicitly referred to the doctrine by that name in a merits opinion,[78] and the dissent characterized the majority opinion as "announc[ing] the arrival of this 'major questions doctrine."[79]

But the major questions doctrine—the judicial requirement that for questions of great political or economic significance, administrative agency action must be grounded in express congressional authorization—predates *West Virginia v. EPA*. As the majority in *West Virginia* observed, the idea of decreased

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76 *See* NFIB v. Dep't of Lab., 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (highlighting the importance of the major questions doctrine in ensuring governance by "the people's elected representatives"); *see also* West Virginia v. EPA, 597 U.S. 697, 749 (2022) (Gorsuch, J., concurring) ("[W]hile we all agree that administrative agencies have important roles to play in a modern nation, surely none of us wishes to abandon our Republic's promise that the people and their representatives should have a meaningful say in the laws that govern them.").

77 *West Virginia*, 597 U.S. at 697.

78 Deacon & Litman, *supra* note 56, at 4.

79 *West Virginia*, 597 U.S. at 763–64.

deference to agencies in major questions was clearly stated in *FDA v. Brown & Williamson Tobacco Corp.*, in which the Court ruled that the FDA lacked authority to regulate tobacco products, since the Food, Drug, and Cosmetic Act did not contain clear authorization for the FDA to do so.[80] The FDA had argued that the Act did authorize it to regulate tobacco, and the Court noted that in reviewing an administrative agency's interpretation of a congressional statute, it must be governed by *Chevron* deference.[81] First, it must ask whether Congress has "directly spoken to the precise question at issue," in which case it must defer to congressional intent. But if the court determined that the statute does not directly speak to the issue, then the court must "respect the agency's construction of the statute so long as it is permissible."[82] The Court ultimately found that Congress had spoken directly to the issue, and that it had not authorized the FDA to regulate tobacco products.[83] But in doing so, the Court acknowledged that it had not applied the normal *Chevron* analysis, but modified its inquiry, "at least in some measure," because of "the nature of the question presented."[84] It explained that normal *Chevron* deference assumed a congressional delegation to the agency to fill in the gaps of ambiguous statutes, but that in "extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[85] And *FDA v. Brown & Williamson*, the Court reasoned, was an extraordinary case because the tobacco industry "constitut[ed] a significant portion of the American economy."[86]

As the majority in *West Virginia* put it, the Court's decision in *FDA v. Brown & Williamson* emphasized the jurisprudential approach that in extraordinary cases, courts may decide not to accept a reading that "would, under more 'ordinary' circumstances, be upheld."[87] *West Virginia* also approvingly cited to language in *Utility Air Regulatory Group v. EPA* to support the proposition that the Supreme Court "'typically greet[s]' assertions

80 *Id.* at 722.
81 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).
82 *Id.*
83 *Id.* at 133.
84 *Id.* at 159.
85 *Id.*
86 *Id.*
87 *West Virginia*, 597 U.S. at 722.

of 'extravagant statutory power over the national economy' with 'skepticism.'"[88] In *Utility Air*, the Supreme Court applied *Chevron* analysis to strike down the EPA's interpretation of the Clean Air Act as allowing it to include greenhouse gases in two statutory permitting requirements. The Court found the statute ambiguous, but rejected the EPA's interpretation at *Chevron* step two, saying that the EPA's interpretation was unreasonable, because it was "laying claim to extravagant statutory power over the national economy."[89] The Court used a form of the major questions doctrine to explain its rationale: "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[90]

Consequently, the Court announced in *West Virginia*, it was not plausible that Congress had given the EPA the authority to issue the Clean Power Plan.[91] The Plan was "[a] decision of such magnitude and consequence" that it could be made only by Congress or "an agency acting pursuant to a clear delegation from that representative body."[92] Absent a clearer statement of congressional delegation, therefore, the Court found it entirely impermissible for an administrative agency to regulate such a major issue.

B. Scholarly Variations on Nondelegation

Scholarship has proffered a number of rationales for the major questions doctrine. Most center around the nondelegation doctrine, which is the principle that Congress may not delegate its Article I lawmaking power to others.[93] One such rationale has been referred to as "implied nondelegation"—the idea that if a statute is ambiguous, Congress may have intended an implied delegation to the administrative agency, but not if the legal question at issue

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88 *Id.*, (citing Utility Air Regul. Group v. EPA, 573 U.S. 302, 324 (2014)).

89 *Utility Air*, 573 U.S. at 324; *see also* Cass R. Sunstein, *There Are Two "Major Question" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021) (arguing—pre-*West Virginia*—that there were two different forms of the major questions doctrine that interacted with *Chevron* in different ways).

90 *Utility Air*, 573 U.S. at 324 (citing *Brown & Williamson*, 529 U.S. at 160).

91 *See West Virginia*, 597 U.S. at 735.

92 *Id.*

93 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested.").

is of great significance.[94] The Supreme Court's decisions have frequently followed this line of reasoning in explaining its applications of the major questions doctrine,[95] and the Court invoked this approach again in *West Virginia v. EPA*, stating, "We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies[]"[96]—but without providing much theoretical grounding for this presumption.[97] Instead, the Court simply pointed to its previous major questions decisions, ranging from *MCI* to *Brown & Williamson*, and stated that they all shared the "common thread[]" of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted,"[98] and concluded without much further explication that only Congress or an agency with a "clear delegation" from Congress could make such major decisions.[99]

Another explanation for the implied nondelegation theory is that Congress writes legislation with the major questions doctrine in mind and that the Court is, therefore, right to infer that if Congress wanted to delegate a major question to an agency, it would have clearly stated that in the organic statute.[100] There is some empirical support for this theory: a 2013 study by Abbe Gluck and Lisa Schultz Bressman found that 60% of the congressional drafters they interviewed corroborated the assumption that "drafters intend for Congress, not agencies, to resolve [major] questions."[101] However, this assumes that Congress can identify, ex ante, the gaps courts will later find in its

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94 *See* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 364 (2016) (citing Mayburg v. Sec'y of Health and Hum. Servs., 740 F.2d 100, 106 (1st Cir. 1984)).

95 *See id.* at 390 (citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); then FDA v. Brown & Williamson, 529 U.S. at 159; and then King v. Burwell, 576 U.S. 473, 485 (2015)).

96 *West Virginia*, 597 U.S. at 722 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) (internal quotation marks omitted)).

97 *See* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708 [https://perma.cc/3C27-SV2K] ("[A]s the [major questions] doctrine now stands, if it is indeed a clear-statement rule, and even if it might be justifiable, it remains significantly undertheorized and underdeveloped.").

98 *West Virginia*, 597 U.S. at 722.

99 *Id.* at 735.

100 *See* Richardson, *supra* note 94, at 392.

101 Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1003 (2013).

statute,[102] which may not always be possible, particularly with respect to the inevitable major gaps that necessarily arise from unprecedented states of emergency.

Another view, the "nondelegation canon" theory, posits that no matter what Congress intended in its statute, it cannot constitutionally delegate authority to regulate major questions to agencies.[103] Yet "[a]gencies administer large sectors of the economy on a regular basis, often larger than those at issue in the major questions cases."[104] And even if the nondelegation canon theory is merely read as limiting an agency's discretion to interpret ambiguous statutes, it seems to protect the judiciary's primacy as interpreter of statutes rather than Congress's primacy as legislator.[105]

Blake Emerson has suggested a different theory. He also believes the nondelegation doctrine underlies the major questions doctrine but suggests that the real justification for it is democratic legitimacy. The animating concern here, he argues, is first and foremost the idea that "legislation itself . . . [has] special democratic credentials."[106] For Emerson, Congress is "the preeminent voice of the people as a whole," and thus has the unique normative authority to make value-based decisions that direct regulatory policy.[107] He suggests, therefore, that the major questions doctrine is motivated by the desire to "protect and . . . strengthen the connection between the people and governmental action by presuming that a popular and deliberative process settles major questions of policy."[108] He argues that this has "constitutional, institutional, and discursive dimensions:"[109] "the people's constitutional choice to vest legislative power primarily in Congress must be preserved; Congress's special institutional competencies to represent electoral constituencies and investigate

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102 *See* Richardson, *supra* note 94, at 392.

103 *See id.* at 394 (citing Cass R. Sunstein, *Beyond* Marbury: *The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2607–08 (2006); then Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000); and then Cass R. Sunstein, *Chevron* Step Zero, 92 VA. L. REV. 187, 245 (2006)).

104 *Id.* at 395.

105 *See id.* at 395–96.

106 Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2045 (2018).

107 *Id.* at 2046.

108 *Id.* at 2048.

109 *Id.*

social problems must be respected; and the People's ongoing engagement with the government in the form of public debate and interbranch dialogue must be fostered."[110]

Emerson also adds that insofar as the major questions doctrine requires courts, rather than agencies, to resolve statutory ambiguity, this is because administrative agencies are traditionally seen as Weberian technocrats who should not have the authority to determine major questions, which implicate political values.[111] Only the legislature is thought to have the power to make these political value choices, and the courts ensure that Congress does not delegate this responsibility to agencies.[112]

The democratic-legitimacy rationale for the major questions doctrine thus rests on the idea that major questions are political, and that political decisions of significance must be made by Congress, the democratically-elected deliberative body *par excellence*. But while the political nature of major questions cannot be denied, it is not deliberation in itself that is key to the Supreme Court's modern major questions jurisprudence. Rather, the Court cares about popular sovereignty—it appears to hold a belief in the people's ability to direct their government's decisions with respect to the regulation of politically significant questions. The modern major questions doctrine is not, in fact, about what Congress thinks, but about what the people think. It is not merely an expression of democratic legitimacy, but of a specifically plebiscitary form of that legitimacy. It is for this reason, as I will demonstrate, that the Supreme Court's most recent major questions arguments about the separation of powers, elections, and congressional accountability are analytically weak and full of logical inconsistencies. For what they implicitly express but have thus far not explicitly identified is a plebiscitary legitimacy rationale for the major questions doctrine.

C. The Judicial Struggle to Explain the Major Questions Doctrine

While majority opinions have largely declined to theoretically justify the major questions doctrine, concurring members of the Court have offered a variety of explanations for the Supreme Court's recent applications of the doctrine. Justice Gorsuch

110 *Id.*
111 *See id.* at 2048–59.
112 *See id.* at 2059.

asserted in the *NFIB* concurrence that the major questions doctrine protected Article I's vesting of the legislative power in the hands of Congress, "the people's elected representatives."[113] The concurrence likened the major questions doctrine to the nondelegation doctrine, which it claimed preserves democratic accountability and avoids legislative responsibility-shirking by prohibiting lawmakers from foisting unpopular decisions onto unelected bureaucrats.[114] Justice Gorsuch then argued that the OSH Act did not provide clear authorization for OSHA to issue a vaccine mandate, but that even if the Act had provided such authorization, that would likely have been an unconstitutional delegation of legislative authority from Congress to the agency.[115] The point of the major questions doctrine, the concurrence declared, was to preserve "government by the people," as opposed to "government by bureaucracy."[116]

Yet as the *NFIB* dissent pointed out, OSHA had not issued a vaccine mandate, but a vaccine-or-test mandate.[117] The per curiam opinion, while invoking the major questions doctrine, had strangely failed to note this, arguing that the majorness of OSHA's action was premised in part on the fact that a "vaccination . . . cannot be undone at the end of the workday."[118] Indeed, it closed by stating that "[r]equiring" the vaccination of 84 million Americans"[119] was *too major* a question to fit into OSHA's statutory authority. But the mischaracterization of the ETS as a mandate exclusively requiring vaccination, when it in fact provided a testing alternative, reveals what exactly the Court found *major* about the agency action at issue here, namely its scope: it reached 84 million Americans. The Court was thinking about "the people," concerned that this might be precisely one of the scenarios Justice Gorsuch described, in which bureaucrats—allegedly undemocratic, unaccountable, and unelected—imposed potentially unpopular measures on a significant part of the citizenry.

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113 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring).

114 *See id.* (citing Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147, 154 (2016)).

115 *Id.* at 125–26.

116 *Id.* at 125 (citing Antonin Scalia, *A Note on the Benzene Case*, AM. ENTER. INST., J. ON GOV'T & SOC'Y, July–Aug. 1980, at 25, 27).

117 *Id.* at 136 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

118 *Id.* at 118 (per curiam) (quoting *In re* MCP No. 165, 20 F.4th 264, 274 (6th Cir. 2021)).

119 *Id.* at 120 (per curiam).

But the strange irony of this view is that, as the dissent again articulated, bureaucrats are not unaccountable; they are a part of the executive branch, which is headed by the President.[120] The ETS, wrote Justices Breyer, Sotomayor, and Kagan, had not only expertise to recommend it, but also "political accountability:" "OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public."[121] And even more strangely, the dissenting Justices observed, the accountability rhetoric chimed discordantly against the reality that, by invoking the major questions doctrine to invalidate the ETS, the Court, itself an unelected, unaccountable body, was displacing an accountable agency's judgment for its own.[122]

The Court then spoke again in *West Virginia*, fleshing out and doubling down on the structure it had laid out in *NFIB*. The majority opinion declared that it could not uphold the EPA's Clean Power Plan because "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[123] Note again the emphasis on the idea that Congress is a *representative* body, and that only a body that represents the people may authorize a decision of such political "magnitude and consequence."[124] Furthermore, Justice Gorsuch again wrote separately, joined in his concurrence by Justice Alito, to develop the theoretical justifications for the Court's major questions doctrine in its current form. As in *NFIB*, he linked it to the nondelegation doctrine, stating that the major questions doctrine serves to "protect the Constitution's separation of powers" by ensuring that the executive may only limit itself to filling the gaps in existing congressional regulatory schemes.[125]

The theory behind this is ultimately one of accountability to the public: "It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'"[126] Justice Gorsuch then described the

120 *Id.* at 138 (Breyer, Sotomayor, & Kagan, JJ., dissenting).
121 *Id.*
122 *Id.*
123 West Virginia v. EPA, 597 U.S. 697, 735 (2022).
124 *Id.*
125 *Id.* at 737 (Gorsuch, J., concurring).
126 *Id.* (citing THE FEDERALIST No. 11, at 85 (C. Rossiter ed., 1961).

parade of horribles that the major questions doctrine is intended to prevent: legislation "becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to [them;]"[127] administrative agencies regulating areas that should be left to state governments, which are likely to be "more local and more accountable[;]"[128] and administrative encroachment onto the "lawmaking power [of] the people's elected representatives."[129]

Then, in *Biden v. Nebraska*, the Supreme Court again invoked the major questions doctrine in striking down the Biden administration's attempt to ameliorate some of the financial impact of the COVID-19 emergency by forgiving student loans, in the amount of $10,000 per borrower, under the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act").[130] The Court declared, "[t]he question here is not whether something should be done; it is who has the authority to do it."[131] And citing *West Virginia*, the Court argued that since the Secretary of Education had never before invoked the HEROES Act to exercise "powers of this magnitude," defined as "the authority, on his own, to release 43 million borrowers from their obligations to repay $430 billion in student loans," the HEROES Act did not support such a reading.[132] *Biden v. Nebraska* also noted that the estimated economic impact of the student loan forgiveness plan was "ten times the 'economic impact' . . . we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine."[133] But while *Biden v. Nebraska* attempted to ground its holding in analysis of the statutory text,[134] it only served as further illustration of what Justice Gorsuch's *NFIB* and *West Virginia* concurrences indicated—namely, that the major questions doctrine serves more as an expression of the Court's vision of the separation of powers than textual interpretation. Justice Barrett addressed this in her *Biden v. Nebraska* concurrence, admitting that the "'clear statement'

127 *Id.* at 739.
128 *Id.* (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012)).
129 *Id.* at 737–38.
130 Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).
131 *Id.* at 2372.
132 *Id.*
133 *Id.* at 2373.
134 *See id.* at 2368–70.

version of the major questions doctrine 'loads the dice' so that a plausible antidelegation interpretation wins even if the agency's interpretation is better,"[135] and dedicating her analysis to an attempt to construct a more plausibly textual justification of the major questions doctrine. She argued that the major questions doctrine was a textualist "tool for discerning—not departing from—the text's most natural interpretation."[136] She also described the doctrine as "situat[ing] text in context," and that context "includes common sense," as opposed to textual "literalism."[137] But Justice Barrett wrote alone, joined by no other member of the Court.[138] And as Vermeule has observed, this approach is "untenable," since "[t]he very maxims that Justice Barrett wants to describe as common-sensical 'historical and governmental context' or 'background legal conventions' are indistinguishable from the ones she wants to describe as problematic substantive 'values external to the statute.'"[139] This interpretive indeterminacy in fact led Justice Kagan to suggest that it might better support the dissenting position than the majority.[140]

But while these concurrences are unsatisfying as theoretical justifications for the major questions doctrine, we can nonetheless discern from them that a majority of the Court in recent cases appears to be less concerned with its inconsistent textual arguments regarding the textual limits of a given statutory delegation, than with the structural question of who has the constitutional authority to decide a question deemed to be major. As the *Biden v. Nebraska* majority explicitly stated, "this is a case about one branch of government arrogating to itself power belonging to another," namely, "the Executive seizing the power of the Legislature."[141] Yet what is curious is that the separation of powers and accountability to "the people" have merged in the

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135 *Id.* at 2378 (Barrett, J., concurring).

136 *Id.* at 2376.

137 *Id.* at 2378–79.

138 *See id.* at 2376.

139 Adrian Vermeule, *Text and "Context"*, YALE J. ON REGUL. (July 13, 2023), https://www.yalejreg.com/nc/text-and-context-by-adrian-vermeule/ [https://perma.cc/N3L5-UWE9]. See also Kevin Tobia, Daniel E. Walters & Brian G. Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. ___ (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520697 [https://perma.cc/6JQX-QUL6], for another critical view of Justice Barrett's description of the major questions doctrine as "common sense" textualism.

140 *Biden*, 143 S. Ct. at 2398 n.3 (Kagan, J., dissenting) ("I could practically rest my case on Justice Barrett's reasoning.").

141 *Id.* at 2373 (majority opinion).

Court's major questions jurisprudence. No one questions that the text of Article I vests all federal lawmaking power in Congress, but the separation of powers argument on its own does not answer the question of why agencies may regulate minor questions but not major ones—even assuming the Court's determination of majorness could be objectively fixed. If the major questions doctrine assumes that agency regulation of "major" questions is tantamount to unconstitutional lawmaking, how is that constitutional separation of powers concern obviated when agencies regulate smaller matters? As Nathan Richardson has observed, "[a]gencies administer large sectors of the economy on a regular basis, often larger than those at issue in the major questions cases."[142] And Mila Sohoni has suggested that the major questions doctrine appears to be selectively enforcing the nondelegation principle without actually fully committing to it by declining to invalidate minor delegations that "fill up the details."[143] The Court has applied this doctrine,[144] instead of "articulating a rule-like nondelegation principle that would logically apply across *all* statutory delegations to *all* agencies."[145]

The reality behind the Court's separation of powers gloss is that it does not reflect a formalist structural concern about an idealized tripartite system. Rather, its concern is a pragmatic one, illustrated by the *West Virginia* majority's acknowledgement that "in certain extraordinary cases, *both* separation of powers principles *and* a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[146] Principles are rhetorically contrasted with practicality because strictly formalist separation of powers principles do not in fact motivate the analysis at all. Rather, the Court is once again tying its practical concerns to the nondelegation doctrine and using the major questions doctrine as a vehicle because it is fundamentally concerned about "the people," and whether the will of the governed is being reflected in the regulation of major issues.

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142 Richardson, *supra* note 94, at 395.

143 Sohoni, *supra* note 16, at 295 (citing Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting)).

144 *Id.*

145 *Id.* at 294–95.

146 West Virginia v. EPA, 597 U.S. 697, 723 (2022) (emphasis added) (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

For as much respect as the Court gives to Congress as an elected body that represents the people, as quick as Justice Gorsuch is to articulate popular sovereignty rationales for the major questions doctrine, and as often as political accountability is repeatedly invoked, these analyses are grounded neither in the text of the congressional statutes at issue nor in special solicitude for historical congressional practices.[147] Instead, they are a judicially created revival of the nondelegation doctrine, which has been dormant since 1935[148] and on whose continued weakness as legal grounds for statutory invalidation Congress may well have learned to rely. These analyses have ignored the fact that in the OSH Act, Congress explicitly gave OSHA the authorization to develop emergency temporary standards in order to react quickly to emerging new dangers.[149] And they have disregarded normal statutory interpretation in favor of extratextual major questions invalidation—an approach that carries with it a strong flavor of policy rather than law. The major questions doctrine after *West Virginia* is no longer the simple exception to *Chevron* deference it once was, in which judges merely interpreted statutes with fresh eyes and without special deference to the agency's interpretation.[150] Rather, it is now distancing itself from textual analysis altogether: the *West Virginia* dissent noted that the majority did not begin to discuss the meaning of the statutory provision at issue until the last few pages of the opinion,[151] and the majority itself acknowledged that its "approach under the major questions doctrine is distinct."[152]

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147 *See id.* at 782 (Kagan, J., dissenting) (noting that Congress has had a long history of delegating broad authority to administrative agencies, and that that delegation "helped to build a modern Nation" by enabling agencies to "fill[] in—rule by rule by rule—Congress's policy outlines"); *see also* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 *passim* (2021); Nicholas Parillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 *passim* (2021).

148 The Supreme Court has not invalidated any act of Congress on nondelegation grounds since A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). *See* Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring).

149 *See* 29 U.S.C. § 655(c)(1).

150 *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 482 (2021) ("[T]he *Chevron* carve-out theory of the major questions doctrine . . . insists that courts, and not agencies, should interpret ambiguous provisions in 'extraordinary cases' . . . [This] does not necessarily mean that the agency will lose; it means only that the question of law will be resolved independently by courts.").

151 *West Virginia*, 597 U.S. at 766 (Kagan, J., dissenting).

152 *Id.* at 724 (majority opinion).

Why are major questions so different? There are legal and logical holes in every justification members of the Court have thus far offered for its strangely policy-oriented, atextual major questions jurisprudence. The Justices speak of nondelegation, of the separation of powers, of accountability and elections. But it is all rhetoric; there is no clear or consistent principle that unites all these threads, except for "the people," to whom these justifications inevitably return. The Court seems unable to articulate the major questions doctrine as anything but an exception to its normal textualist approach to statutes. It also seems to struggle to locate its rationale in anything but a vague concern that decisions of major political import have closer ties to "the people" than administrative agencies are thought to possess. The reason for all this is, at its core, political rather than strictly legal: the major questions doctrine is rooted in the Court's consideration of political legitimacy.

D. Legality and Plebiscitary Legitimacy

Carl Schmitt provided a particularly apt distinction between legality and legitimacy. He described the former as the basis of the legislature, a representative, elected body, and contrasted it with the plebiscitary-democratic legitimacy of "the people," realized in the Weimar Constitution through direct-democratic measures such as referenda.[153] The elected legislature, he noted, is based on indirect democracy and must therefore be considered democratically inferior to direct democracy, rendering the people "an extraordinary, superior lawmaker," while the legislature is an "ordinary, subordinate one."[154] The people as "lawmaker" thus "give expression to *voluntas*, not *ratio*, demanding legitimacy and not legality."[155]

Yet modern administrative agencies in the United States are creatures of expertise and technocratic specialization, and are frequently characterized as embodiments of the Weberian rational bureaucratic type of legality.[156] For Weber, bureaucracy obtains its legitimacy through its reliance on the formal legality of statutory authority[157] and the impersonality, precision, and rationality of its

153 *See* CARL SCHMITT, LEGALITY AND LEGITIMACY 59–66 (Jeffrey Seitzer ed. & trans., 2004) (1932).

154 *Id.* at 59.

155 *Id.* at 62.

156 *See* Emerson, *supra* note 106, at 2052–53.

157 *See* MAX WEBER, ECONOMY AND SOCIETY 341–42 (Keith Tribe ed. & trans., 2019) (1921).

application of that authority.[158] But rule-bound and rational bureaucracy is contrasted with what Weber referred to as charismatic authority, which he believed to be "specifically irrational since it is alien to all rules."[159] Weber noted that charismatic authority, though "authoritarian in principle," could be refashioned into anti-authoritarian democratic legitimacy.[160] In particular, he described plebiscitary democracy as a "a form of charismatic rule concealed by the formality that legitimacy is derived from the will of the ruled, and is only by virtue of this capable of being sustained."[161] However, Weber was careful to note that plebiscitary legitimacy's derivation from the consent of the governed might not actually reflect "an expression of popular will."[162] Rather, the importance of the plebiscite is that it provides the legitimating basis for charismatic rule.[163]

Within this framework, the bureaucratic administrative state can fairly be seen as encapsulating rational rule and the application of formal legality with statutes and regulations. But, of course, it is not an elected body of government. The Supreme Court has called out the unelected nature of the administrative state in numerous ways,[164] but its only solution in major questions cases has been to hand over the matter to Congress in the name of being accountable to "the people."[165]

Yet accountability itself is only a proxy for a more fundamental concern underlying the major questions doctrine. At

158 *See id.* at 343–51.

159 *Id.* at 376–77.

160 *Id.* at 405.

161 *Id.* at 407 (emphasis omitted).

162 *Id.* at 406.

163 *Id.*

164 *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020) ("The [CFPB] Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is."); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) ("Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."); West Virginia v. EPA, 597 U.S. 697, 735 (2022) ("[I]t is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that *representative* body.") (emphasis added); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 120 (2022) (emphasizing that it is not the Court's or OSHA's role to weigh the costs and benefits of the OSHA vaccine-or-test mandate, but that of "those chosen by the people through democratic processes").

165 *West Virginia*, 597 U.S. at 737–38 (Gorsuch, J., concurring).

its core, the Court's concern with accountability to the people is not as much about "accountability" as it is about "the people." The major questions doctrine rests on the understanding that democratic lawmaking must be sourced in the people as a legitimating entity. In other words, the Supreme Court's insistence on congressional clear statement authorization for agency regulation of major questions is fundamentally about plebiscitary legitimacy. For as Justice Gorsuch's *West Virginia* paean to Congress indicates, the major questions doctrine is justified by federal legislation's plebiscitary value:

> [B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure "not only that all power [w]ould be derived from the people," but also "that those [e]ntrusted with it should be kept in dependence on the people" . . . ." The Constitution, too, placed its trust not in the hands of "a few, but [in] a number of hands," so that those who make our laws would better reflect the diversity of the people they represent and have an "immediate dependence on, and an intimate sympathy with, the people." Today, some might describe the Constitution as having designed the federal lawmaking process to capture the wisdom of the masses.[166]

Yet this does not reflect the reality of the democratic legislative process. Schmitt correctly observed that legislatures in a democratic system are only indirectly democratic: they may be valued for their deliberative processes involving "discussion and openness,"[167] but they do not solve the question of legitimacy. Rather, the legislature's authority might well be described as charismatic in the Weberian sense but legal in the Schmittian sense. Legislators are elected and they claim legitimacy from that fact, but the exercise of their authority is the passing of statutes, a formal, slow process that involves the distinctly non-direct-democratic elements of lobbying, partisan conflict, and interest group capture—in recent years to an increasingly dysfunctional degree.[168] In fact, it is the perfect example of Weber's distinction

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166 *Id.* (second, third, and fourth alteration in original) (citations omitted).

167 SCHMITT, *supra* note 153, at 64.

168 *See, e.g.*, UNIV. CHI. PRESS, CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM 2 (Timothy M. LaPira et al. eds., 2020) (describing Congress as unable to keep up with increasingly complex policy and growing demands from lobbyists and special interest groups, as well as from constituents); LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE 1–3 (2015) (describing the growth of the congressional corporate lobby since the 1970s); THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT

between the plebiscite as the basis for legitimacy and the actual expression of popular will. Congress does not have direct democratic processes and does not at all represent Schmittian plebiscitary democracy, but in the *West Virginia* concurrence's view,[169] it nonetheless may lay claim to Weberian plebiscitary authority because its members are elected. Thus, the assertion that "the people" are "intimate[ly]" connected with Congress, that congressional legislation is "derived from the people," and that the federal lawmaking process "capture[s] the wisdom of the masses"[170] relies on a somewhat contorted fiction of plebiscitary legitimacy.

This fiction is all the more doubtful because under the Weberian view, individual members of Congress may well have plebiscitary legitimacy, but that is unlikely to extend to Congress as a whole. The defining feature of Weberian charismatic authority, of which plebiscitary democracy is one form,[171] is that it is fundamentally personal: an individual has charismatic authority if others see some extraordinary personal quality in him that renders him a leader they are willing to follow.[172] In keeping with this view, political scientists have observed that representatives' perceived personal qualities are of particular importance to voters evaluating them,[173] but also that public approval of Congress tends to be substantially lower than constituents' approval of their own elected representatives.[174] Thus, while it may well be accurate to say that individual members of Congress enjoy a localized form of plebiscitary legitimacy through the process by which they are elected, this cannot be said to reach Congress itself in the same way. Congress is the sum of multiple mini-plebiscitary processes that lend legitimacy to individuals, but Weberian plebiscitary legitimacy is not something that survives aggregation into a collective body. Nor does Congress involve Schmittian plebiscitary legitimacy in the form of direct democracy for essentially the same reasons.

BACK ON TRACK 13, 216 (2006) (describing extreme partisanship as having "broken" the modern Congress and led to a "decline in the quantity and quality of [its] deliberation").

169 *See West Virginia*, 597 U.S. at 737–38 (Gorsuch, J., concurring).

170 *Id.*

171 WEBER, *supra* note 157, at 407.

172 *Id.* at 374, 376–77.

173 Glenn R. Parker, "*Can Congress Ever Be a Popular Institution?*", *in* THE HOUSE AT WORK 31, 41 (Joseph Cooper & G. Calvin Mackenzie eds., 1981).

174 *See* Robert H. Durr et al., *Explaining Congressional Approval*, 41 AM. J. POL. SCI. 175, 176 (1997); Parker, *supra* note 173, at 33.

Congress as a whole is elected in bits and pieces that, added together, are said to represent the people of the entire nation, but it has no institutional structures. Furthermore, no electoral claims to represent the will of the plebiscite, because as a body, conceptually distinguished from its individual members, it is not popularly elected, it does not run on any platform of any particular set of issues, and it legislates through compromises that are largely inscrutable, if not invisible, to the very people whose electoral choice to follow certain representatives lent them legitimacy.

But the major questions doctrine's reliance on the fiction of Congress's plebiscitary legitimacy, while theoretically unsound, is not necessarily practically fatal under ordinary circumstances. It is not controversial to assert that the legitimacy of laws in a democracy should rely on the consent of the governed. While consent to government by a particular Congress may be substantially different from consent to government by a particular representative, the major questions doctrine could do worse than ground itself in a sense of plebiscitary legitimacy, even a vague and contorted version of it.[175] And even if the lawmaking process is an imperfect reflection of the popular will, this is not necessarily a bad thing if the procedural complexities and slowness of its deliberative, compromise-prone nature encourage "reason and moderation,"[176] rather than unreasoned and imprudent legislative action in the heat of the moment. The realities of a Madisonian government thus work together with a Weberian plebiscitary legitimacy rationale to create the Supreme Court's current major questions jurisprudence.

Yet the plebiscitary legitimacy justification for the major questions doctrine overlooks another critically important source of such legitimacy, namely the President. The major questions cases suggest that the Supreme Court is presented with a choice between upholding rule by unelected bureaucrats or rule by elected congressional representatives. When Congress is not deemed to have clearly authorized agency regulation on a major issue, the choice is simple: unelected bureaucrats lack plebiscitary legitimacy, so the Supreme Court invalidates the administrative rule. But what is difficult to comprehend is why the Court does not

175 See Emerson, *supra* note 106, at 2021, for another discussion of the major questions doctrine's roots in democratic legitimacy.

176 SCHMITT, *supra* note 153, at 64.

acknowledge that the President has an even greater claim to plebiscitary legitimacy than Congress, and that since administrative agencies are under the control of the executive branch, this legitimacy must filter down to their actions as well. The agencies are not unaccountable—they are generally accountable to the President,[177] who is alone an elected official with Weberian charismatic-plebiscitary authority. Why does this not satisfy the Court in its application of the major questions doctrine? Indeed, why does the major questions doctrine "ignor[e] presidential influence altogether"?[178]

III. PRESIDENTIAL PLEBISCITARY LEGITIMACY

A. Presidential Plebiscitary Legitimacy and the Separation of Powers

It has been suggested that a plebiscitary presidency is, "if anything[,] too weak a description of the executive in the administrative state."[179] Citing the extent of congressional delegations of power to the executive, Posner and Vermeule have argued that the separation of powers has been substantially eroded, and that this is nothing to fear: the president is sufficiently restrained by public opinion.[180]

Public opinion is indeed an important plebiscitary constraint on elected officials such as the president. But Posner and Vermeule's position here would place a dangerous amount of authority in the hands of a single charismatic-plebiscitary leader. In addition to Schmitt's well-known assertions that such a leader could wield essentially unlimited authority in states of exception,[181] Weber noted that authoritarianism is the underlying principle of charismatic legitimacy, if not reinterpreted as democratic legitimacy.[182]

These perils are well illustrated by Schmitt's pro-authoritarian critique of *A.L.A. Schechter Poultry Corp. v. United*

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177 Independent agencies are an exception, as discussed below in Part IV.D. There is also a vast literature on the presidential theory of agency accountability. *See infra* note 219 and accompanying text.

178 Emerson, *supra* note 106, at 2080.

179 ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 204–05 (Oxford Univ. Press ed., 2010).

180 *Id.* at 209.

181 *See* SCHMITT, *supra* note 6, at 11–12.

182 *See* WEBER, *supra* note 157, at 405–06.

States as a paradigmatic example of the problem with liberal constitutional concepts of law.[183] In *Schechter Poultry*, the Supreme Court struck down a provision of the National Industrial Recovery Act that authorized the President to approve fair competition codes for certain industries, declaring it unconstitutional on nondelegation grounds.[184] For Schmitt, this was the perfect example of separation of powers-based jurisprudence being not only tied to the past, but also opposed to any large-scale social and economic plan adaptable to a changing situation.[185] "Plan-opposed" (*planfeindlich*), Schmitt called such a concept of law, arguing that whatever emergency or executive-strengthening measures Montesquieuian separation-of-powers constitutionalism might create to obviate the problems of inadaptability and retrospectivity, only the complete collapse of the legislative and executive powers into each other could support the governmental "plans" necessary to meet the challenges of the modern state.[186] What this meant in concrete terms, Schmitt said, was an executive government that arrogated the entire legislative function to itself—specifically, a Nazi *Führerstaat* in which "law is the plan and will of the *Führer*."[187]

This is the logical end of the uncabined, unrestrained embrace of plebiscitary legitimacy as all-sufficient. And it is precisely this type of unlimited executive power that the major questions doctrine seems designed to prevent.[188] For this reason, a democratic-constitutional, anti-authoritarian solution to the major questions doctrine's crisis-situation shortcomings must not

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183 Carl Schmitt, *Die Rechtswissenschaft im Führerstaat*, 2 ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT 435, 439 (1935) ("*Die berühmte Entscheidung des höchsten Gerichtshofes der Vereinigten Staaten vom 27. Mai 1935, die das ganze Gesetzeswerk des National Recovery Act für verfassungswidrig erklärt, ist ein geradezu schulmäßiges Paradigma dieses vergangenheitsbezogenen, rückwärts gerichteten Gesetzesdenkens*.") ("The famous decision of the United States Supreme Court on May 27, 1935, which declared the entire National Recovery Act to be unconstitutional, is a virtually textbook example of this past-oriented, backward way of thinking about law.").

184 A.L.A. Schechter Poultry Corp., v. United States, 295 U.S. 495, 541–42 (1935).

185 Schmitt, *supra* note 183, at 439.

186 *Id.*

187 *Id.* ("*Gesetz ist für uns nicht mehr eine abstrakte, auf einen vergangenen Willen bezogenen Norm; Gesetz ist Plan und Wille des Führers*.") ("Law is, for us, no longer an abstract norm oriented towards a past intention; law is the plan and will of the Führer.").

188 *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 124–25 (2022) (Gorsuch, J., concurring) ("[T]he doctrine is 'a vital check on expansive and aggressive assertions of executive authority.'" (citing U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

give up on the structural integrity of the separation of powers altogether, but instead remain committed to the project of finding an approach to robust judicial review that recognizes presidential plebiscitary legitimacy while also upholding the integrity of our tripartite constitutional structure.

On the other end of the scale from Posner and Vermeule, Emerson envisions a deliberative role for the President, recognizing them as a "spokesperson for public opinion to guide administrative implementation of statutory mandates."[189] This proposal is careful to note that it does not consider presidential control of administration to constitute democratic legitimacy,[190] and that the President's input should influence but not bind agencies.[191] But this falls into the same trap as the major questions doctrine—that of effectively ignoring the President's claim to plebiscitary legitimacy. A theory of executive power in which the President has merely a discourse-fostering function in the administrative state impales itself on the opposite horn of the separation of powers dilemma Schmitt raised: it weakens the presidential role so substantially and elevates an independent bureaucracy so greatly that it subordinates the major questions doctrine's search for legitimacy rooted in the people. Rather, it effectively creates an administrative state that has the power to regulate issues of major political significance without either the President's plebiscitary or Congress's indirect-democratic sources of legitimacy.

What is needed, then, is a limiting principle for involving presidential plebiscitary legitimacy in the major questions doctrine that falls between placing too much faith in structurally unbridled executive power and effectively neutralizing the President's authority over their own administration's regulatory policy. The questions we must ask in fashioning such a principle are: What value and practical advantages can presidential legitimacy add that congressional legitimacy cannot, and how can we determine if the plebiscite has spoken on a major question?

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189 Emerson, *supra* note 106, at 2076.

190 *Id.* at 2078.

191 *Id.* at 2079.

B. The President's Plebiscitary Advantages Over Congress

The President has a better claim than Congress to plebiscitary legitimacy in both the Weberian and Schmittian forms. As I have discussed above, Congress's claim to plebiscitary legitimacy is tenuous at best and simply inaccurate at worst, but even individual members of Congress lack a connection between the body of voters who elect them and the laws they enact. This is because the mini-plebiscite of the particular district or state that elects them is not the entirety of the nation for which they subsequently legislate. Therefore, even if plebiscitary legitimacy could somehow be extended to Congress as a whole from its members as individuals, there would still be a gaping chasm between the national plebiscite and the nationwide scope of Congress's legislation.

But the President is uniquely positioned to close this gap, because they are elected as an individual, by voters across the nation, to govern in matters of nationwide scope.[192] It is true that because of the Electoral College system, the President's claim to plebiscitary legitimacy in its most direct, Schmittian form is still imperfect,[193] but the claim nonetheless remains far stronger than Congress's. For despite the Electoral College and the fact that we do not have referenda or similar direct democratic measures in the federal system, the President can lay effective claim to Schmittian plebiscitary legitimacy because there is no more direct way for the national plebiscite to express its views on national matters than through the election of the President. And in keeping with the Weberian view, the President is a leader for whom charismatic authority is critical to election: voters' views of the President's personal characteristics are critically important in presidential

192 *See, e.g.*, Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 630 (2016) (describing presidential elections as "plebiscites, in which the electorate chooses a leader based on [their] personal qualities and the political program that he offers"). See also *infra* notes 213 and 219 for further literature discussing presidential elections and administrative action.

193 *See, e.g.*, Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1832–33 (2019) (observing that "[b]ecause of the electoral college, a nominee can win the presidency and still lose the popular vote"); Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, 12 CONST. COMMENT. 143, 143, 145 (1995) (describing the "dreaded specter of a clear popular loser becoming the electoral college winner" as a "constitutional accident waiting to happen").

elections[194] and for presidential approval.[195] It has been observed that the President is unique as "the one figure who draws together the people's hopes and fears for the political future."[196] The President is an individual who is elected because of personal characteristics the plebiscite decides render them worthy of being followed,[197] and the President provides the best and highest-profile example of charismatic-plebiscitary authority in the American political system.

The President, therefore, has clear plebiscitary legitimacy advantages over Congress. But in the context of the administrative state, we run into a problem similar to that we encountered with Congress as a whole versus Congress's individual members—namely, the problem of trickle-down plebiscitary legitimacy and the impossibility of aggregating it. Does the President's authority, derived from the people, extend to the actions of administrative agencies with respect to major questions?

For similar reasons as with Congress, it is hard to make a sweeping claim that administrative agencies possess plebiscitary legitimacy through the President. Yet agencies, unlike Congress, are not an aggregation of elected individual leaders, but are instead controlled and supervised by one. So we are faced with the trickle-down form of the problem. And unlike the aggregate form, it is not insuperable. The critical factors in determining whether plebiscitary legitimacy may extend to the regulation of major questions are public visibility and presidential control.

C. Incorporating Presidential Plebiscitary Legitimacy into the Major Questions Doctrine

The nature of a major question—the fact that it is an issue of great political or economic significance—renders it far more likely to attract public interest than the bulk of administrative regulation. But for plebiscitary legitimacy to come into the calculus at all, there must at least be some match between the substantial public interest in the issue and the visibility given to

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194 *See* Scott Clifford, *Reassessing the Structure of Presidential Character*, 54 ELECTORAL STUD. 240, 242–43 (2018).

195 *See* Steven Greene, *The Role of Character Assessments in Presidential Approval*, 29 AM. POL. RSCH. 196, 196 (2001).

196 JAMES DAVID BARBER, THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE 2 (Routledge ed., 5th ed. 2020).

197 Mathews, *supra* note 192.

it in the administrative agency's regulatory process. In other words, is the public aware that the executive branch is regulating the major question? And can the plebiscite reasonably be thought to have expressed a view on that?

1. Visibility, Fair Notice, and Public Engagement

a. The Inadequacy of Notice-and-Comment

It has been argued that administrative rulemaking is a deliberative process, in which the public has ample opportunity to participate through notice-and-comment.[198] Yet this has also been criticized as an overly idealistic view of public participation: too often public comments are not particularly well-informed; commenters form a very small, self-selected group with a particular interest in the topic that may not be representative of the larger public; and ordinary citizens tend not to have the technical knowledge or resources to write comments as thorough and well-researched as those of corporations and other special interest groups.[199] Moreover, in an era in which interest groups increasingly encourage supportive members of the public to utilize form letters and mass emails during notice-and-comment, it has

198 *See, e.g.*, Emerson, *supra* note 106, at 2081–82 (describing notice-and-comment as "creating a deliberative process between agency officials and the affected public" and serving a "democratic function"); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 65–66 (La. State Univ. Press ed., 1969) (lauding notice-and-comment as "one of the greatest inventions of modern government," in part because of its democratic value in allowing all interested parties to participate); Donald J. Kochan, *The Commenting Power: Agency Accountability through Public Participation*, 70 OKLA. L. REV. 601, 601 (2018) (describing the public's ability to participate in notice-and-comment as "critical in our democratic republic," giving "ordinary citizens, as much as sophisticated interest groups, opportunities to participate in and have opinions heard on the development of regulations").

199 *See, e.g.*, Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RSCH. & THEORY 103, 119 (2006) (discussing an empirical study finding that agency regulations are often changed after notice-and-comment to accommodate preferences expressed in interest group comments); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RSCH. & THEORY 245, 265 (1998) (discussing an empirical study finding significant business and interest group participation but a "virtual absence of actual citizen participation" in notice-and-comment processes); Thomas A. Bryer, *Public Participation in Regulatory Decision-Making: Cases from Regulations.gov*, 37 PUB. PERFORMANCE & MGMT. REV. 263, 263 (2013) (analyzing citizen comments on regulations.gov and finding them to be generally uninformed and of poor quality); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 137 (2006) (observing that business commenters have more influence than non-business commenters on the final versions of agency rules, and that "business comments contain higher quality information than comments from other kinds of rule-making participants").

become increasingly easy to submit large numbers of cursory and superficial comments that add little deliberative-democratic value.[200] And the regulatory understanding of the notice-and-comment process is that it is a means of ventilating relevant and novel issues not previously raised.[201] It is fundamentally not a plebiscitary undertaking in which each voice has inherent participatory weight.[202]

And as unsatisfactory as notice-and-comment is in ordinary times, it is extremely unsuited for states of emergency. It will inevitably lag far behind the emergency, leaving the administration's hands completely tied and unable to respond to the rapidly developing crisis, while providing no deliberative advantage at all beyond a number of comments that cannot be fairly said to represent a broad swathe of the public's view on anything. Notice-and-comment, therefore, is both too slow and too poor a form of deliberative public engagement to provide an adequate forum for public participation in the emergency regulation of a major issue.

b. The Required Platform: A Presidential Election

Particularly because the issue is major, and its regulation is therefore likely to affect "the daily lives and liberties of millions of Americans,"[203] millions of Americans must also have had a fair opportunity to engage with the idea of such regulation if it is to lay claim to plebiscitary legitimacy. If we want the major questions doctrine to enable the capturing of the "wisdom of the masses,"[204] insisting on clear-statement congressional authorization is not the only way of achieving that. Rather, there is a more direct way of consulting the public on a major issue: ventilating it during a presidential election.

Prominent ventilation is closely linked to fairness under this plan. The presidential candidate should do more than briefly mention their interest in regulating the major issue a few times throughout his campaign. Rather, the major regulatory question

200 *See* Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23, 25–28 (2009).

201 *Id.* at 34.

202 *Id.*

203 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring).

204 West Virginia v. EPA, 597 U.S. 697, 738 (2022) (Gorsuch, J., concurring).

should be a high-profile, easily visible, and frequently-reiterated part of the President's policy platform. However, the candidate need not imitate the notice-and-comment process and release a draft rule. On the contrary, because the average voter is unlikely to possess the technical knowledge, interest, or time necessary to read the entirety of a jargon-filled, abstruse proposed regulation that may well extend to hundreds of pages, releasing a draft rule may in fact serve to obfuscate and conceal the candidate's regulatory aims from the public. For this reason, it should be considered fair notice to the public if the presidential candidate talks about their regulatory goals in some level of generality, as long as they are clear about how the proposed regulations will impact voters' "daily lives and liberties."[205] For example, under this view, a general statement about wanting to lessen the impact of the COVID-19 pandemic would not be considered fair notice of the vaccine-or-test mandate at issue in *NFIB*, but frequent discussions about the need for robust federal regulatory action to limit transmission of the virus could well be understood as fair notice of the candidate's regulatory interest in such a mandate. Ultimately, what is of critical importance is whether the presidential candidate gave fair warning that they planned to regulate in the area of a major question, and whether voters could reasonably infer that some substantial effect on their "daily lives and liberties"[206] would likely result. If these criteria are satisfied, voters should be considered to have had an opportunity to weigh in, decide whether they wanted that regulatory agenda or not, and give a plebiscitary stamp of approval or rejection accordingly.

It is true that there are several issues with using a presidential election to obtain plebiscitary legitimacy for the regulation of a major issue. Firstly, the President, because of the plebiscitary-charismatic nature of their authority, may be judged by some voters primarily on their personal characteristics, rather than their policies. Yet a presidential candidate's issue competence has been shown to be a significant factor in elections as well,[207] and it may even be intertwined with voters' perceptions of the candidate's moral character.[208] So the plebiscitary

205 *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 124 (Gorsuch, J., concurring).

206 *Id.*

207 *See, e.g.*, Clifford, *supra* note 194, at 240–46; Carolyn L. Funk, *Bringing the Candidate into Models of Candidate Evaluation*, 61 J. POL. 700, 700–01 (1999).

208 Clifford, *supra* note 194, at 245.

legitimacy of the President cannot be wholly divorced from the issues on which they run, and their positions on those issues may in fact be part of the personal characteristics that win them followers in the Weberian charismatic model.

But it could happen that the presidential candidate did not clearly state their position on the major issue until after the election. In the latter case, the President would have no claim to plebiscitary legitimacy to regulate the matter: the President would be taking advantage of underinformed voters and their campaign's lack of forthrightness to effectively "hide elephants in mouseholes."[209] This would be a mendacious abuse of the President's claim to political legitimacy that the major questions doctrine would do well to prevent.[210]

Another problem would arise if voters did not sufficiently appreciate the majorness of the issue before voting. It has been observed that voters are not always well-informed about the issues before them.[211] And voters may always fall short of an idealized deliberative-democratic Habermasian view of the public sphere.[212] Yet this has never been enough to settle the debate over optimal political input into administrative agencies. Scholarship remains divided over the normative desirability of agency responsiveness to the positions of voters,[213] and I do not attempt to relitigate that

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209 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

210 *Id.*

211 Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2079 (2005).

212 *See generally* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (Mass. Inst. of Tech. Press ed., Thomas Burger & Frederick Lawrence trans., 1989) (1962) (describing a deliberative "public sphere" in which private citizens engage in rational discussions with each other on matters of public concern).

213 *See, e.g.*, Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 56–57, 59–60, 63 (2008). *See generally* Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1399 (1975) (discussing regulatory "failure"); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520 (1985) (applying "comparative institutional analysis"); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 183 (1986) (discussing President Reagan's approach to regulatory bodies); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 103 (1994) (discussing the original constitutional view of policymaking authority); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463–64 (2003) (exploring the "presidential control model"); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN L. REV. 1, 29–32 (2007) (discussing the role of the President); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 200 (1995) (comparing Congress and the President).

here. Instead, I will only note that the question of whether voters are sufficiently informed is linked to the question of fair, prominent ventilation, and grasping the majorness of an issue does not require a perfect grasp of its full technical complexity.

But there is also a bundling problem in elections. Because there are usually two viable candidates to choose from (the nominees of the Democratic and Republican parties), and because each candidate is running on a platform that is a bundle of different policy issues, it is hard to tell what exactly voters are voting for, and their vote cannot necessarily be translated into support for every issue in a particular bundle.[214] However, while the bundling problem may well be a serious objection to a President claiming plebiscitary authority to regulate in obscure areas of administrative law, the calculus is different for a sufficiently major question. The nature of a major question is that the issue is high-profile: politically and economically significant, and capable of directly and practically impacting the daily lives of millions of Americans. For that reason, it should be difficult for a presidential candidate with a particular major-question regulatory goal to hide that issue in a bundle. Likewise, the majorness of the issue should render it of particular importance in voter decision-making. If voters agree that the issue is major enough to affect their daily lives on the scale described by the major questions doctrine, that can reasonably be supposed to weigh heavily against the assumption that they adamantly disapproved of this key issue in the bundle yet voted for the bundle anyway.

However, even if plebiscitary legitimacy indicators are difficult to measure in normal circumstances, this is not true of emergencies to the same extent. It could happen that every "normal," non-emergency major questions case under this retheorized major questions doctrine reaches the same result as under the current major questions doctrine because clear congressional authorization is still needed in the absence of indicators that voters recognized the question at issue to be major and gave it an electoral stamp of presidential plebiscitary

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214 *See, e.g.*, Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 998 (1997) ("In order to get the policy 'sticks' they value most highly, voters have to take whatever other sticks come in the bundle. Thus, progressives voting in 1996 got stuck with Clinton's support of welfare 'reform,' just as many who voted for Reagan or Bush got stuck with a more extreme position on abortion than they personally espoused.").

approval. But plebiscitary legitimacy for major-question regulation is far easier to locate in presidential elections conducted during ongoing emergencies. The COVID-19 pandemic again provides an illustrative example: a massive event resulting in 8 million cases and over 220,000 deaths by the November 2020 presidential election, it changed the course of the political narrative, ultimately costing the incumbent President the election.[215] Because of the "physical, economic, and psychological threats [it] posed to millions of voters,"[216] the pandemic was the "dominant issue on many voters' minds."[217] And as Posner and Vermeule observed with respect to the 9/11 security and 2008 economic crises, in emergencies, "the public . . . demands that *something* be done."[218]

The nature of an emergency is simply such that it dominates other political issues. It poses such grave dangers to the public that it cannot help but be a major issue in a presidential election that takes place while it is ongoing—and not merely one major issue among many, or a major issue that the public fails to notice, but a genuinely pressing matter of such urgency that it becomes politically predominant. Plebiscitary legitimacy, therefore, is particularly strongly and clearly implicated when the major question is one of crisis.

2. Applications to Emergencies

Thus, the plebiscitary legitimacy model of deriving major questions regulatory authority from a presidential election bears the most novel potential for application in emergencies. Because Congress cannot act swiftly enough to deal with rapidly-unfolding crises, the executive branch will inevitably be the first to respond. This is a source of major discomfort for the major questions doctrine as it currently exists. For ignoring presidential plebiscitary legitimacy as it does, it cannot comprehend the reality that Congress is not structurally suited to react swiftly to emergencies, and thus it is wholly unequipped to address crisis governance. In contrast, the executive branch is not subject to

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215 Leonardo Baccini et al., *The COVID-19 Pandemic and the 2020 US Presidential Election*, 34 J. POPULATION ECON. 739, 740–41 (2021).

216 Harold Clarke et al., *Did Covid-19 Kill Trump Politically? The Pandemic and Voting in the 2020 Presidential Election*, 102 SOC. SCI. Q. 2194, 2197 (2021).

217 *Id.* at 2206.

218 Posner & Vermeule, *supra* note 4, at 1649.

partisan bickering and haggling, benefits from the significant particularized expertise of administrative agencies, and provides an easily identifiable symbol of political accountability to the public: the President.[219]

But if we view the major questions doctrine through the proper lens of its search for plebiscitary legitimacy in the regulation of major questions, and if we understand that plebiscitary legitimacy is more readily sourced in the President than Congress, the major questions doctrine no longer cripples crisis governance but facilitates it while remaining true to its underlying value of locating authority in "the people."

Jed Shugerman has proposed an "emergency questions doctrine" that is not grounded in any particular theoretical conceptualization of the major questions doctrine, but he shares the concern that the major questions doctrine may result in "weakening the executive's capacity to address emergencies."[220] Consequently, he suggests that courts reviewing administrative

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219 See, for example, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001), for an argument that "presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former," and that "[t]he Presidency's unitary power structure, its visibility, and its 'personality' all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate." See also Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985), for a description of the unique nature of presidential elections: "[I]ssues of national scope and the candidates' positions on those issues are the essence of presidential politics. Citizens vote for a president based almost wholly on a perception of the difference that one or another candidate might make to general governmental policies." Mashaw argues that this supports broad delegations to administrative agencies because such delegations are well-suited to "facilitat[e] responsivenes [sic] to voter preferences expressed in presidential elections." *Id.* at 95–96. Kagan discusses this argument and is not entirely convinced by it, briefly noting, for instance, that it can be difficult to tell which policy preferences voters have articulated in an election. Kagan, *supra*, at 2334. She suggests, alternatively, that the President, because of [their] national constituency, prospectively considers the policy "preferences of the general public, rather than merely parochial interests." *Id.* at 2335. But ultimately she acknowledges that while both concepts of presidential responsiveness to voter policy preferences have their weaknesses, the President is still the most politically accountable figure we have on a national level:

> Take the President out of the equation and what remains are individuals and entities with a far more tenuous connection to national majoritarian preferences and interests: administrative officials selected by the President [ ]; staff of the permanent bureaucracy; leaders of interest groups, which whether labeled "special" or "public" represent select and often small constituencies; and members of congressional committees and subcommittees almost guaranteed by their composition and associated incentive structure to be *un*representative of national interests.

Id. at 2336 (footnote omitted).

220 Shugerman, *supra* note 18, at 1.

actions that invoke emergency authorization do three things: (1) look to "congressional context and purpose," rather than "superficial open-ended textualism" to discern "whether Congress had delegated measures for the imponderable" emergency at hand,[221] (2) dispense with *Chevron* deference,[222] and (3) avoid "clear statement" rules and instead "focus on whether the means fit the emergency ends as a check on pretextual uses or overbroad abuses."[223]

Yet while Shugerman senses that the current major questions doctrine cannot in any way effectively cope with emergencies, his solution does not offer a real remedy, as is further discussed in Part IV, *infra*. The purposive approach he suggests, with its overdependence on the congressional intent and legislative context behind a particular emergency-granting clause in a federal statute, may well be an effective check on executive interpretive overreach, but it does not alter the fact that any focus on the particular circumstances of a statute's enactment will inevitably fail to encompass the utterly novel, unprecedented Schmittian emergency. Congress simply cannot explicitly stipulate in advance what Congress did not anticipate—and a real Schmittian emergency is never fully anticipated. Thus, Shugerman's approach, while identifying the major questions doctrine's incompatibility with effective crisis governance, ultimately joins the Supreme Court's current approach in choosing to domesticate the emergency instead of fully confronting it.

My proposed plebiscitary-legitimacy approach to the major questions doctrine confronts the unprecedented nature of emergencies directly and avoids the domestication trap. It is unquestionably true, however, that any such proposal must also avoid the constitutional suspension Schmitt notoriously advocated.[224] A wholly Schmittian approach simply renders the risk of a presidential dictatorship, echoing the concerns of the *NFIB* concurrence,[225] too great. We do not want a President who takes advantage of an emergency to exercise unconstrained and unlawful power. Nor do I even suggest what I have termed

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221 *Id.* at 7.

222 *Id.* at 2.

223 *Id.*

224 SCHMITT, *supra* note 6, at 12.

225 Nat'l Fed'n of Indep. Bus v. Dep't of Lab., OSHA, 595 U.S. 109, 126 (2022) (Gorsuch, J., concurring).

"deferential suspension," the approach the *NFIB* dissent favored, in which judges defer to the superior specialized expertise of administrative agencies in crisis situations.[226] Indeed, I do not argue for any form of "suspension" at all. On the contrary, I argue below that the plebiscitary-legitimacy understanding of the major questions doctrine makes suspension unnecessary: it enables quick and effective administrative agency responses to ongoing emergencies, while remaining faithful to rigorous judicial review in the tradition of *Youngstown Sheet & Tube Co. v. Sawyer*.

3. The *Youngstown* Framework and Forms of Emergency Judicial Review

The issue in *Youngstown* was whether the President might "take possession of and operate most of the Nation's steel mills" during wartime.[227] The Court in *Youngstown* held that such a seizure was not authorized either by the Constitution or by congressional statute.[228] And Justice Jackson's famous concurrence delineated three zones of Presidential authority, relative to that authority's sourcing in congressional authorization.[229] The President's authority is deemed to be at its maximum when they are acting "pursuant to an express or implied authorization of Congress."[230] It is at its minimum when the President "takes measures incompatible with the expressed or implied will of Congress."[231] And in between are situations in which the President acts solely on their own independent powers, when Congress is silent and has neither denied nor granted the President authority.[232] In this "zone of twilight," "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[233]

Perhaps this was a high watermark of judicial scrutiny, in which the Court was particularly firm in its refusal to allow the prospect of a crisis, in this case a steelworker strike during the Korean War, to alter its determination that the President lacked

226 *See id.* at 138 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
227 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).
228 *Id.* at 585.
229 *Id.* at 635 (Jackson, J., concurring).
230 *Id.*
231 *Id.* at 637.
232 *Id.*
233 *Id.*

the authority to seize the steel mills. And perhaps judicial scrutiny of executive crisis governance has been less searching in the recent past than it was in *Youngstown*. Posner and Vermeule have found courts to be exceedingly deferential to administrative action in recent national security and economic crises.[234] Amanda Tyler has also observed that "it is the rare exception that witnesses the Court apply rigorous judicial scrutiny in . . . times [of war and emergency]."[235] Yet the COVID-19 emergency has reinvigorated judicial "anti-deference,"[236] and after the Supreme Court's decisions in *NFIB* and *Alabama Ass'n of Realtors*, it can no longer be said that the judiciary allows the executive free rein in matters of crisis governance. Rather, it is more accurate to say that we have returned to a *Youngstown*-type model, in which emergencies do not trigger any form of suspension, deferential or otherwise.[237]

One might view this as an appropriate approach to ensuring the rule of law even in crisis situations, and it has been argued that COVID-19, and emergencies in general, should not be a reason for courts to suspend rigorous judicial review.[238] And it is the infamous case of *Korematsu v. United States*, in which the Supreme Court upheld the internment of Japanese Americans during World War II, that is invariably invoked as the paradigmatic example of the danger such judicial deference poses to civil liberties.[239] With respect to the COVID-19 pandemic in particular, Lindsay Wiley and Stephen Vladeck have, for example, drawn on *Korematsu* to argue that if the judiciary abdicates its independent role in an emergency, courts may "sustain gross violations of civil rights because they are either unwilling or unable to meaningfully look behind the government's purported

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234 *See* Posner & Vermeule, *supra* note 4, at 1642; *see generally* POSNER & VERMEULE, *supra* note 179.

235 Tyler, *supra* note 15, at 496.

236 Nathan Richardson, Essay, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 177 (2022).

237 *See* Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (Gorsuch, J., concurring) (describing the *Youngstown* Court as "concluding that even the Government's belief that its action 'was necessary to avert a national catastrophe' could not overcome a lack of congressional authorization") (citing *Youngstown*, 343 U.S. 579 at 585–86).

238 *See* Lindsay F. Wiley & Stephen I. Vladeck, Essay, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 182 (2020).

239 *See, e.g.*, Laurence H. Tribe and Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1801 (2004); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 20–21 (2004); Ackerman, *supra* note 15, at 1042; Wiley & Vladeck, *supra* note 238, at 183.

claims of exigency."[240] This is similar to the concern Justice Gorsuch articulated in his *NFIB* concurrence, and in theory, what the application of the major questions doctrine in that case was said to prevent.[241]

But the problems of *Korematsu* extend far beyond the major questions doctrine's prophylactic capacities. One might think of the internment of Japanese Americans as a case of purely executive infringement on civil liberties—but what is missing from this picture is the fact that Congress itself, in passing "the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066," which the President relied on as authority for his program of relocation and internment.[242] Indeed, in upholding both the Act and the Executive Order in *Hirabayashi v. United States*, the Supreme Court gave great weight to the fact that *Congress* had explicitly contemplated the purpose of the Act as being the "regulation of citizen and alien Japanese alike."[243] The wrong of Japanese internment, therefore, is far from being a violation of constitutional liberties solely to be laid at the door of executive overreach, but rather falls squarely into the first *Youngstown* zone, when presidential authority is supposed to be at its maximum, because the President is acting with authorization from Congress. As the *Hirabayashi* Court noted, the case did not involve a nondelegation issue: "[t]he question . . . is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, *acting in cooperation*, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of."[244]

Thus, insofar as the major questions doctrine is viewed as a judicial check on executive action without clear-statement congressional authorization, it is important to realize that, had it existed in 1943, it would have been ineffectual against the internment of Japanese Americans, which Congress clearly authorized. The separation of powers is by no means a magic wand that prevents constitutional wrongs, and the major questions doctrine in its current form would do nothing at all to prevent

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240 Wiley & Vladeck, *supra* note 238, at 183.

241 Nat'l Fed'n of Indep. Bus v. Dep't of Lab., OSHA, 595 U.S. 109, 126 (2022) (Gorsuch, J., concurring).

242 Hirabayashi v. United States, 320 U.S. 81, 91 (1943).

243 *Id.*

244 *Id.* at 91–92 (emphasis added).

another *Korematsu* or *Hirabayashi*. Thus, while the suspension model of emergency judicial review should indeed be rejected, the major questions doctrine in its current form is completely inadequate to prevent the violation of liberties that the *NFIB* concurrence fears.

In addition, normal judicial review of constitutional rights is far superior to the major questions doctrine as a way of checking any potential executive overreach in states of emergency. The major questions doctrine is fundamentally about an administrative agency's *authorization* to enact a certain regulation; it says nothing about whether or not the *substance* of that regulation is in fact constitutional. The latter inquiry should not be suspended simply because the regulation passes the muster of the major questions doctrine; and conversely, the mere fact that a regulation does not run afoul of the major questions doctrine should not automatically be taken to mean that it is constitutionally permissible. And a constitutional challenge to a regulation need not implicate the major questions doctrine at all. Extending the *Korematsu* analogy, suppose a federal administrative agency were to attempt to intern all Chinese Americans, offering the rationale that since the COVID-19 virus was first detected in Wuhan, China,[245] such internment camps would lessen the risk of contagion within the United States. This would properly be struck down under an equal protection challenge. The major questions doctrine might well also be implicated, but as *Hirabayashi* has shown, it cannot and should not be relied upon to be a "silver bullet" that safeguards executive overreach into the constitutional rights of individuals and protected classes. Indeed, the current Supreme Court has set good precedent for such challenges by clearly demonstrating, in several religious liberty cases arising during the COVID-19 pandemic, that judicial review should be searching and skeptical, rather than deferential, in matters involving governmental emergency measures that affect constitutionally protected rights.[246]

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245 *See Archived: WHO Timeline – COVID-19*, WORLD HEALTH ORG., https://www.who.int/news/item/27-04-2020-who-timeline---covid-19 [https://perma.cc/P3T4-W768] (last visited Mar. 18, 2024).

246 *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021); Harvest Rock Church v. Newsom, 141 S. Ct. 889 (2020); Gish v. Newsom, 141 S. Ct. 1290 (2021); Tandon v. Newsom, 593 U.S. 61 (2021); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021). *See also* Cass R. Sunstein, *Our Anti-Korematsu*, 1 AM. J. L. & EQUALITY 221, 222 (2021)

But on the level of federal administrative law and the major questions doctrine, considering merely the statutory *authority* of federal agencies to enact certain regulations in states of emergencies, a more nuanced approach is required. While the deferential suspension of judicial review is not the ideal model, neither is the "actively hostile" anti-deference"[247] of *NFIB* and *Alabama Ass'n of Realtors*, which renders impossible any rapid, meaningful administrative response to nationwide crises. Rather, the major questions doctrine will naturally prove itself both applicable and effective in emergency situations if it embraces its underlying value of plebiscitary legitimacy, understands that this can come through the President even more directly than through Congress, and recognizes that the highly specific type of congressional clear-statement authorization currently demanded is not only impossible in emergencies but also unnecessary—all without requiring that the judiciary abandon its *Youngstown* commitment to searching review of agency action even in times of crisis.

IV. THE JUDICIAL APPLICATION OF THE MAJOR QUESTIONS DOCTRINE TO EMERGENCY REGULATIONS

If an agency emergency regulation implicating a major question comes before the judiciary, and if Congress has not given clear, explicit statutory authorization to the agency to issue the regulation, courts should exercise neither clear-statement domestication nor deferential suspension. On the contrary, they should inquire (1) whether the organic statute gives emergency powers to the agency; (2) whether the regulation is time-limited and of temporary substantive impact; (3) whether the regulation falls within the agency's area of expertise; and, critically, (4) whether there is plebiscitary legitimacy for the measure. In determining the fourth factor, courts should consider whether the regulation implicates a matter over which there has been recent "earnest and profound debate"[248] across the nation, and whether the plebiscite has had a fair opportunity to declare its views on that matter.

(arguing a similar point with respect to the Court's decision in Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020), which Sunstein describes as an "anti-*Korematsu*").

247 Richardson, *supra* note 236, at 177.

248 Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

A. Does the Organic Statute Give Emergency Powers to the Agency?

An emergency regulation, like the vaccine-or-test mandate in *NFIB*, should be authorized by a specific statutory provision granting the agency the power to issue such regulations.[249] This serves to ensure that the President's authority will be at its *Youngstown* maximum, that the legislative function of Congress remains inviolate, and that the judiciary does not allow the President to become a wholly Schmittian sovereign who "suspen[ds] . . . the entire existing order."[250]

Yet at the same time, a simple grant of temporary emergency authority to an agency, as in the OSH Act,[251] should be sufficient. The Supreme Court currently favors an anti-novelty principle with respect to the major questions doctrine, suggesting that if an agency has never issued a similar major regulation in the past, this strongly suggests the agency lacks the statutory authority to do so.[252] But if the anti-novelty principle constrains agencies' adaptability under normal circumstances, it renders them altogether ineffective in emergencies. It is a complete

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249 *See* 29 U.S.C. § 655(c)(1) ("The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.").

250 SCHMITT, *supra* note 20, at 12.

251 29 U.S.C. § 655(c)(1).

252 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 120 (2022) (per curiam) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010))); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021) (per curiam) ("Originally passed in 1944, this provision has rarely been invoked—and never before to justify an eviction moratorium. Regulations under this authority have generally been limited to quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease."); West Virginia v. EPA, 597 U.S. 697, 701 (2022) ("Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. It had never devised a cap by looking to a 'system' that would reduce pollution simply by 'shifting' polluting activity 'from dirtier to cleaner sources.'") (citations omitted); *see also* Deacon & Litman, *supra* note 56, at 1070–71 (noting that, to the Supreme Court, "the" novelty of an agency's regulatory approach is an indication that the policy is major and therefore likely not authorized by statute," and observing that the regulatory anti-novelty principle "has now hardened into a central principle guiding the application of the [major questions] doctrine").

misunderstanding of the nature of states of emergency to think that they can be specifically prepared for ex ante via statute—that Congress must anticipate every unprecedented catastrophe in the future in order for agencies to be allowed to respond to them in real time. What the anti-novelty principle thus creates is a complete vacuum in government. Because legislators will inevitably "come too late" to the crisis, as Posner and Vermeule have noted,[253] and because the major questions doctrine now ties the hands of any agency response that is not clearly authorized by a statute predating the emergency, which is essentially impossible, the crisis must be allowed to run effectively unchecked, as there is no judicially-sanctioned emergency responder other than Congress—slow-acting both by institutional design and development. The anti-novelty conception must thus be rejected and simple congressional grants of temporary emergency authority must be accepted for what they are if the major questions doctrine is to be made suitable for crisis governance.

B. Is the Regulation Time-Limited and of Temporary Substantive Impact?

It is worth emphasizing that such statutory grants of emergency authority must be temporary in two senses: they must be limited in duration and of temporary substantive impact. The OSH Act again provides a useful model with respect to duration: it allows an emergency temporary standard to take effect immediately upon publication in the Federal Register, but it is only valid for a maximum of six months.[254] Meanwhile, the emergency standard serves as a proposed permanent rule subject to normal notice-and-comment procedures, and the agency must decide by the end of the six-month period whether to formally promulgate it as a rule or not.[255] It is entirely possible that by the end of those six months, the emergency might cease to exist or be substantially mitigated, rendering a permanent rule unnecessary. More importantly, the OSH Act's time limit on emergency authority does not allow the agency to indefinitely arrogate emergency powers to itself. Rather, the only special emergency prerogative granted by statute is the ability to have the emergency standard take effect immediately without the inherent

253 Posner & Vermeule, *supra* note 4, at 1640.
254 29 U.S.C. § 655(c)(1)–(3).
255 *Id.*

deliberative delay of the ordinary notice-and-comment process[256]—a prerogative that is carefully circumscribed by the fact that it may last no longer than six months at most.[257]

Furthermore, because the emergency standard, once published in the Federal Register, is simultaneously a proposed permanent rule,[258] it invites notice-and-comment at the same time it goes into effect.[259] For thirty days thereafter, any interested person may submit comments[260] or file objections and request a public hearing,[261] thus ensuring that the emergency temporary standard is not wholly hidden from public view without some opportunity for public participation.

But public comments and objections do not, of course, stay the actual enforcement of the emergency standard, which was issued without the public's input. For this reason, the *substantive* impact of the regulation must also be temporary. Had OSHA, in *NFIB*, actually issued the vaccine-only mandate the per curiam opinion accused it of issuing (instead of the vaccine-or-test mandate it *did* issue), this would indeed have been problematic under this temporariness factor. The regulation would not have included a testing alternative to vaccination, and vaccines, as the Court pointed out, cannot be "undone" once injected.[262] Thus, the ETS's impact would have lasted long beyond the six-month shelf life granted it by statute; and the temporariness of the mandate would have had little practical meaning, as there would be no way of reversing its effects at the end of the statutory period. One might well describe such regulations as limited in duration but permanent in effect, which gives a troubling amount of unilateral discretion to the executive. Similarly, the student loan forgiveness plan at issue in *Biden v. Nebraska*, unlike previous agency forbearance, measures freezing student loan interest and suspending repayments during the COVID-19 pandemic.[263] It was proposed to not merely pause existing financial obligations, but

256 *See supra* Section III.C.1.a.

257 29 U.S.C. § 655(c)(1)–(3).

258 *Id.* § 655(c)(3).

259 *Id.* § 655(b)(2).

260 *Id.*

261 *Id.* § 655(b)(3).

262 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 118 (2022) (per curiam) (quoting *In re* MCP No. 165, 20 F.4th 264, 274 (6th Cir. 2021) (Sutton, C.J., dissenting)).

263 Biden v. Nebraska, 600 U.S. 477, 486–87 (2023).

also to eliminate up to $10,000 per borrower[264]—an action whose effects would also not be reversed at the end of the emergency period.

Fundamentally, preventing executive abuse of simple, non-specific statutory grants of emergency authority requires that any administrative crisis governance measure enacted pursuant to that authority be temporary—both by being time-limited, and by being capable of being substantively "undone"[265] at the end of the crisis period. Emergency regulatory changes enacted under emergency authority cannot last forever. For if they do, they run the risk of becoming policy overhauls that use the cloak of crisis governance to enact permanent changes to non-emergency and emergency conditions alike, rather than responses carefully crafted by administrative expertise to address rapidly-evolving, time-sensitive crises.

Consequently, the grant of statutory authority to issue a temporary emergency regulation does not alone obviate every concern about the legitimacy of such a rule, particularly when it regulates a major issue. Thus, in considering how to apply the major questions doctrine to emergencies, courts should be particularly careful in their consideration of this proposed second factor: whether the emergency regulation is both time-limited and of temporary substantive impact. Then, courts should proceed to the third and fourth factors: whether the emergency regulation falls within the expertise of the agency, and whether the emergency regulation has plebiscitary legitimacy.

C. Does the Emergency Regulation Fall Within the Expertise of the Agency?

Gonzales v. Oregon, cited in *West Virginia* and *Biden v. Nebraska*, was a 2006 Supreme Court decision invalidating a Department of Justice ("DOJ") interpretive rule in which the Attorney General asserted the authority under the Controlled Substances Act to deregister physicians who prescribed controlled substances for assisted suicide, even in states where that was legal.[266] The rule relied on the Attorney General's determination

264 *Id.* at 488.

265 *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 118 (quoting *In re MCP No. 165*, 20 F.4th at 274 (Sutton, C.J., dissenting)).

266 West Virginia v. EPA, 597 U.S. 697, 722 (2022) (citing Gonzales v. Oregon, 546 U.S. 243 (2006)).

that assisted suicide was not "a 'legitimate medical purpose.'"[267] However, the Court found that the Attorney General was improperly attempting to make medical judgments that were "both beyond his expertise and incongruous with the statutory purposes and design."[268]

While *Gonzales* was not explicitly decided on major questions grounds, *West Virginia* describes it as an example of a major questions case and cites it as support for the proposition that where an agency lacks comparative expertise to make a policy judgment, Congress presumably did not authorize it to do so.[269] And *Biden v. Nebraska* follows *West Virginia*'s reasoning, arguing that because the student loan forgiveness program would have "sweeping and unprecedented impact," "it would seem more accurate to describe the program as being in the 'wheelhouse' of the House and Senate Committees on Appropriations."[270]

Gonzales did not deal with a state of emergency, but its emphasis on the specific competence of the agency issuing the regulation is a particularly important principle that must be applied in an emergency case because it provides an important way of ensuring that agencies do not abuse their position as first responders to exceed the bounds of their competence.[271] Furthermore, an oft-cited comparative advantage of administrative regulation is the specialized subject-matter expertise agencies have at their disposal.[272] Indeed, Weber

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267 *Gonzales*, 546 U.S. at 254 (quoting Dispensing of Controlled Substances To Assist Suicide, 66 Fed. Reg. 56607, 56608 (Nov. 9, 2001)).

268 *Id.* at 267.

269 *West Virginia*, 597 U.S. at 729 (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019)).

270 Biden v. Nebraska, 600 U.S. 477, 504 (2023). Justice Barrett's concurrence also noted:

> Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse. For instance, in *Gonzales v. Oregon*, we rebuffed an interpretive rule from the Attorney General that restricted the use of controlled substances in physician-assisted suicide. This judgment, we explained, was a medical one that lay beyond the Attorney General's expertise, and so a sturdier source of statutory authority than an "implicit delegation" was required.

Id. at 518 (Barrett, J., concurring) (citations omitted).

271 *See Gonzales*, 126 S. Ct. at 267.

272 *See, e.g.*, William N. Eskridge Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 420–23 (2013); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 739–41 (2002); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1771–74 (2012).

described rational legitimacy as exemplified in bureaucratic administration's uniquely specialized knowledge and technical competence.[273] But the expertise advantage, and thus the administrative claim to legitimacy, is severely reduced or even negated if agencies attempt to regulate matters wholly outside the area in which they specialize. But courts should also refrain from interpreting an agency's area of expertise so narrowly that they make distinctions without a difference. For instance, regulating workplace health risks, as OSHA attempted to do in *NFIB*, should not be summarily dismissed as "a broad public health measure[]," [274] when OSHA did not assert the authority to regulate outside of the workplace environment traditionally falling within its remit. In contrast, while the *West Virginia* concurrence equates OSHA's mandate in *NFIB* with the CDC's eviction moratorium in *Alabama Ass'n of Realtors*,[275] the latter, unlike the former, was a regulatory foray into housing and the landlord-tenant relationship, outside the CDC's particular area of expertise, because it lacked an immediately apparent public health dimension, as I discuss further below.

It has been suggested that the Supreme Court's jurisprudence in these cases forms a coherent "emergency question doctrine," by virtue of their "focus[] on the match between congressional purposes for the delegation of an emergency power and the executive branch's invocation and application of the emergency power."[276] This view supports the Court's conclusion that the eviction moratorium in *Alabama Ass'n of Realtors* was problematic because of the "breathtaking amount of authority" it gave the CDC,[277] and that the vaccine-or-test mandate in *NFIB* was a public health rather than workplace safety measure, which therefore "create[d] a risk of using the emergency for a policy goal beyond the statute's purpose."[278] This implies that the mandate was pretextual: it was not part of the federal government's plan to make workplaces safer, but rather an attempt to increase the

273 Weber, *supra* note 157, at 341, 350–52.

274 Nat'l Fed. of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 142 (2022); *see also West Virginia v. EPA*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

275 *West Virginia v. EPA*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

276 Shugerman, *supra* note 18, at 7.

277 *Id.* (quoting Alabama Ass'n. of Realtors v. Dept. of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).

278 *Id.*

national vaccination rate.[279] But this argument, like the per curiam opinion, overlooks the fact that the mandate included a testing alternative to vaccination; and it declines to precisely address why the mandate can so readily be declared overbroad. Nor does it answer the question of how, when "the priorities [of workplace safety and increasing vaccination] had a significant overlap," the per curiam position on overbreadth can be justified without specifying how, in cases involving such substantial "overlap,"[280] courts should distinguish between a purpose that is appropriate for agency regulation and a purpose that is not.

It is true that there must not be a "[m]eans-[e]nds [m]ismatch" between the agency action and the authorizing statute.[281] But this is not new: it has long been the Court's practice to evaluate "the fit between the power claimed, the agency claiming it, and the broader statutory design."[282] The test, as the *West Virginia* dissent described it, is a rather straightforward, "common-sensical . . . eyebrow-raise."[283] And the majority has not disclaimed the "eyebrow-raise" label,[284] but rather explained by way of example:

> We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," . . . even though reducing generation at coal plants would reduce workplace illness and injury from coal dust.[285]

Yet these examples demonstrate the *West Virginia* majority's misapplications of its own test: they display the Court's confusion between the scope and subject matter area of the agency regulation at issue. If the Department of Homeland Security ("DHS") were to regulate foreign policy or trade, that would be an area clearly outside its expertise, as suggested by the fact that there are other agencies with subject-matter specialization more obviously suited to the task, such as the Department of State or the Office of the U.S. Trade Representative. It would be asserting

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279 *Id.* at 9–10.

280 *Id.* at 10.

281 *Id.* at 9–10.

282 West Virginia v. EPA, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting); *see generally* Gonzales v. Oregon, 546 U.S. 243 (2006); Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); *Alabama Ass'n. of Realtors*, 141 S. Ct. at 2488–89.

283 *West Virginia v. EPA*, 142 S. Ct. at 2634, 2636 (Kagan, J., dissenting).

284 *Id.* at 2613, 2636 ("Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly 'raise[s] an eyebrow.'").

285 *Id.* at 2613.

authority over a new subject matter area in order to achieve certain goals within its own. And the important question is not one of scope—the issue is one of comparative expertise, skill, knowledge, and competence, not of whether the agency has issued a regulation affecting too many people.[286]

The limited utility of a scope-centered analysis is again illustrated by the *West Virginia* majority's assertion that "no one would consider generation shifting a 'tool' in OSHA's 'toolbox.'"[287] The Court noted that OSHA does not have the subject matter expertise to order changes in energy production simply because that might have effects in certain workplaces. But it begged the real question at issue in the case, which was whether the EPA, specifically tasked with protecting the environment, could require generation shifting as a proper exercise of expertise-based administration. Instead, the Court used a scope-based argument to justify its holding that the EPA did not possess that authority, holding that the regulatory change's "magnitude and consequence" was simply too great.[288]

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286 Shugerman presents a different view of scope. He argues that "if the policy is broader in scope than the emergency … the agency has gone beyond the congressional delegation from that statute." Shugerman, *supra* note 18, at 10. He appears to define scope as the emergency for which a particular statute was defined. For instance, he believes the Biden administration's student loan forgiveness plan lacked sufficient statutory authorization under the HEROES Act of 2003 because that statute was enacted in the context of "the September 11 terrorist attacks and the subsequent wars in Afghanistan and Iraq." *Id.* at 11. Given that these were the crises contemplated at the time of the statute's enactment, Shugerman is convinced that the Act should not be read to authorize emergency actions that do not arise out of "active" emergency situations "comparable to post-9/11 and the military action that followed." *Id.* at 12. But even if scope were understood not in the sense of persons affected but in Shugerman's sense of specific events in the background of the authorizing statute's enactment, courts should still focus instead on agency subject matter expertise, for no administrative emergency regulation can survive the "comparable emergency" test, as that approach is itself an anti-novelty principle akin to that Shugerman decries. *Id.* at 3 (criticizing the Supreme Court's post-2022 major questions jurisprudence). It denies the essence of the Schmittian emergency, which is that the statute will inevitably "come too late." Posner & Vermeule, *supra* note 4, at 1640. We cannot legislate for emergencies in advance, because emergencies are unprecedented by their very nature. And what if there was no specific, contemporaneous crisis in the background of a statute's enactment? The comparable-scope inquiry is not applicable to non-emergency statutes like the OSH Act that nonetheless contain emergency provisions.

287 *West Virginia v. EPA*, 142 S. Ct. at 2613.

288 *Id.* at 2616 ("Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day.' *New York v. United States*, 505 U.S. 144, 187, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

The Court likewise confused scope and subject matter area in *NFIB*, claiming that the vaccine-or-test mandate was too "broad"[289] to be a workplace-safety regulation within OSHA's area of expertise.[290] There, the Court raised the concern that the regulation affected too many people—that it improperly "impos[ed] a vaccine mandate on 84 million Americans"[291] and was insufficiently "targeted"[292] to be a valid exercise of OSHA's authority. The majority neglected to mention that the mandate had a testing option as well as a vaccination option; but even leaving that important distinction aside, the real question the majority should have asked was whether OSHA possessed the expertise to regulate health risks within workplaces of 100 or more employees. OSHA did not attempt to require that every person in the United States be vaccinated or tested, although that would certainly have reduced the risk of COVID-19 transmission to employees falling under OSHA's remit; and the mere fact that 84 million Americans were affected by the regulation is a question of scope rather than subject matter expertise. Rather, OSHA in this case is more fairly characterized as regulating workplace safety risks occurring specifically within the workplace in the form of employee-to-employee contact and transmission, rather than attempting to set overarching public health goals for a large number of Americans who happened to have contact with the working population.

The Court's analysis was more cursory but also more fortunate in *Alabama Ass'n of Realtors*. In evaluating the CDC's eviction moratorium, the majority considered scope,[293] but did not reach the question of subject matter expertise, merely noting briefly that "[t]he moratorium intrudes into … the landlord-tenant relationship."[294] But that implicates an important point: an agency with expertise in public health reached into the area of housing regulation in order to achieve the vague public health goal of "facilitat[ing] self-isolation [and self-quarantine] by people who

289 Nat'l Fed. of Indep. Bus. v. Dep't of Lab., OSHA, 595. U.S. 109, 117, 119 (2022).

290 *Id.* at 118.

291 *Id.*

292 *Id.* at 119.

293 Ala. Ass'n of Realtors v. Dept. of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021) ("This claim of expansive authority under § 361(a) is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.").

294 *Id.*

become ill or who are at risk [of transmitting COVID-19]."[295] The CDC thus did not issue a public health regulation, but a housing regulation that would have positive effects in the public health arena. This agency action, therefore, properly fails the "raised-eyebrow" test articulated in *West Virginia*: it reaches outside of its area of subject matter expertise to regulate in another area, hoping for a causal effect that will benefit its area of competence. That, as the *West Virginia* majority's hypothetical DHS and OSHA examples show, places no limiting principle on the agency's claims to regulatory authority, and may even intrude upon the regulatory authority of other administrative agencies. For those reasons, the CDC's eviction moratorium was properly struck down. While the Court should not have relied on a scope rather than subject matter rationale, the moratorium would also have failed the inquiry of whether the CDC possessed subject matter expertise sufficient to regulate in this area.

But the confusion between scope and subject matter becomes even more apparent—and more problematic—in *Biden v. Nebraska*. Here, the Court insisted that the student loan forgiveness program was too major to conceivably fall within the HEROES Act's statutory delegation to the Secretary of Education. The majority described the program as "staggering,"[296] "sweeping and unprecedented,"[297] and benefitting "[p]ractically every student borrower . . . regardless of circumstances."[298] The majority also did not find it plausible that Congress would have authorized the Secretary to "abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers,"[299] and rejected the idea that the Secretary of Education could "unilaterally alter large sections of the American economy"[300] without clearer congressional authorization. The emphasis, for the majority, thus fell squarely on scope: not merely the sheer monetary amount implicated by the program, but its inclusion of every student loan borrower in the country. It covered too many people, which made it too "staggering"[301] to fall within an administrative agency's

295 85 Fed. Reg. 55292 (Sept. 4, 2020).
296 Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023).
297 *Id.* at 2374.
298 *Id.* at 2373.
299 *Id.* at 2374.
300 *Id.* at 2375.
301 *Id.* at 2373.

"wheelhouse," as opposed to "the 'wheelhouse' of the House and Senate Committees on Appropriations."[302]

But scope was again the incorrect focus. Justice Barrett seems to have noticed the incongruence of the majority, citing *Gonzales* to support an expertise-based inquiry while employing a scope-based one. Justice Barrett's concurrence acknowledges that "this is not a case where the agency is operating entirely outside its usual domain."[303] The HEROES Act did in fact authorize the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency."[304] And the Department of Education, as the dissent pointed out, clearly is the agency generally tasked with exercising expertise in the matter of student financial assistance, while the HEROES Act explicitly delegated some emergency flexibility to the Secretary to use in the service of that expertise-based administration.[305] But Justice Barrett's admission of the scope versus subject-matter expertise problem goes no further than the statement that a loan forgiveness program was not "entirely outside [the agency's] usual domain."[306] Instead, her concurrence, like the majority opinion, elides the distinction by relying once again on scope and asserting that it is only "common sense" to understand that the program's "economic and political magnitude"[307] was too great to have been delegated to the agency by the statutory provision at issue.

It is one thing to say that the Department of Education may not issue a regulation of such scope, but to cloak a scope-based analysis in the *Gonzales* subject-matter expertise rationale is entirely another. Here, it is implausible, as Justices Barrett and Kagan both observed, to think that the Department of Education did not have the necessary expertise to issue an emergency regulation affecting student loans. Had the CDC attempted to do such a thing, that would properly have failed the "raised-eyebrow"

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302 *Id.* at 2374.

303 *Id.* at 2384 (Barrett, J., concurring).

304 20 U.S.C. § 1098bb(a)(1).

305 Biden v. Nebraska, 143 S. Ct. at 2384, 2391–93, 2397 (Kagan, J., dissenting).

306 *Id.* at 2384 (Barrett, J., concurring).

307 *Id.* at 2378–79 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

test of *West Virginia*, just as its attempt to regulate housing did in *Alabama Ass'n of Realtors*. But here, there is no other agency with more expertise-based competence and experience in the subject matter area of student financial assistance. That lies at the core of the Department of Education's remit, and the HEROES Act by its own terms tasked the Department with authority in that specialized area. In short, "[s]tudent loans are in the Secretary's wheelhouse"[308]—a point the majority does not rebut but rather evades by turning to the red herring of scope.

It is important to note that scope is inevitably a part of the major questions doctrine, and should not be altogether discarded. It fundamentally implicates the question of plebiscitary legitimacy, as I have discussed above, and is an important factor in determining whether or not the issue at hand is a major question. But in determining whether an agency has the *expertise* to regulate an issue, particularly a novel one raised by an emergency, the question cannot turn on whether Congress has explicitly stated or contemplated that the agency may regulate on precisely such an issue because Congress cannot detail the particular exigencies of a crisis ex ante. Rather, a reviewing court should acknowledge that when it has determined that the major questions doctrine applies, and when the organic statute predating the emergency is ambiguous about whether or not an agency may issue a certain regulation, the question of whether the agency has permissibly exercised its subject-matter expertise must come into play. And the inquiry should be one that passes the "raised-eyebrow" test applied straightforwardly—which is to say that it should not join *West Virginia* and *Biden v. Nebraska* in drawing strained parallels between agencies with different regulatory purposes (such as comparing generation-shifting by OSHA and the EPA), confusing scope with subject matter expertise, or otherwise evading the question. Rather, once the court has considered scope as part of its determination that the major questions doctrine applies, it must very simply ask whether the *subject-matter* of the agency's regulation veers significantly outside of its area of expertise. If it does, that must invalidate the measure; but if it does not, the court must then consider whether the agency action at issue has plebiscitary legitimacy.

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308 *Id.* at 2398 (Kagan, J., dissenting).

D. Does the Agency Action Have Plebiscitary Legitimacy?

Plebiscitary legitimacy should be the ultimate deciding factor in any analysis of whether to uphold an agency's emergency regulation of an issue of "vast 'economic and political significance.'"[309] To decide this question, courts should consider whether the emergency issue "has been the subject of an 'earnest and profound debate' across the country,"[310] and whether the plebiscite has had a fair opportunity to declare its views on it. As I have discussed above, the simplest and best way of satisfying this test is a recent presidential election in which differing approaches to addressing the emergency were prominently pitted against each other.

The 2020 presidential election provides an excellent example of this. Empirical studies have shown that public disapproval of the incumbent President's pandemic response played a decisive role in costing him reelection.[311] The issue of pandemic management and each candidate's approach to it were particularly well-ventilated by Trump's frequent public statements downplaying the COVID-19 risk, suggesting that it amounted to little more than a political "hoax," and criticizing mask-wearing.[312] In addition, Trump indicated that his approach would leave the states, rather than the federal government, as the primary responders to the COVID-19 pandemic, with his administration acting only as a "back-up" and "supplier of last resort."[313] Biden, in contrast, advocated for a more robust federal administrative

309 Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (citing *Brown & Williamson*, 529 U.S. at 160).

310 Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (citing Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

311 *See, e.g.*, Leonardo Baccini et al., *The COVID-19 Pandemic and the 2020 US Presidential Election*, 34 J. POPULATION ECON. 739 (2021), https://link.springer.com/article/10.1007/s00148-020-00820-3 [https://perma.cc/XV93-8SXZ]; *see also* Harold Clarke et al., *Did COVID-19 Kill Trump Politically? The Pandemic and Voting in the 2020 Presidential Election*, 102 SOC. SCI. QUARTERLY 2194 (2021), https://onlinelibrary.wiley.com/doi/epdf/10.1111/ssqu.12992 [https://perma.cc/ENM9-9LRR]; Anja Neundorf & Sergi Pardos-Prado, *The Impact of COVID-19 on Trump's Electoral Demise: The Role of Economic and Democratic Accountability*, 20 PERSPECTIVES ON POL. 170 (2022), https://www.cambridge.org/core/journals/perspectives-on-politics/article/abs/impact-of-covid19-on-trumps-electoral-demise-the-role-of-economic-and-democratic-accountability/9EE4FE61B2AFB3F7548C5F0AA657B2CC [https://perma.cc/LFH7-E6EP].

312 Toby Bolsen & Risa Palm, *Politicization and COVID-19 Vaccine Resistance in the U.S.*, 188 PROGRESS IN MOLECULAR BIOLOGY & TRANSLATIONAL SCI. 81, 83–84 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8577882/ [https://perma.cc/L55H-KSV6].

313 Jennifer Kates et al., *Comparing Trump and Biden on COVID-19*, KAISER FAMILY FOUND. (Sept. 11, 2020), https://www.kff.org/coronavirus-COVID-19/issue-brief/comparing-trump-and-biden-on-COVID-19/ [https://perma.cc/5VVH-G9SJ].

response. He posited that the federal government "must act swiftly and aggressively,"[314] that it, rather than the states, should assume primary responsibility for the nation's COVID-19 response, and that such a response should involve mask mandates, increased testing and contact tracing, and strong nationwide standard setting.[315]

It has been suggested that because COVID-19 posed "physical, economic, and psychological threats . . . to millions of voters,"[316] it was a particularly prominent "valence issue"; there was broad agreement that the pandemic must be managed, with political debate centering around the best approach to doing so.[317] And in the five months preceding the 2020 election, polls showed that the percentage of Americans disapproving of Trump's pandemic management remained relatively stable at about 60%.[318]

Consequently, it is reasonable to say that in the 2020 election, the plebiscite had an opportunity to vote on two different, well-ventilated approaches to the COVID-19 pandemic. And the nature of the pandemic as a particularly pressing emergency and high-profile valence issue provides theoretical backing for the empirical findings that pandemic management was a central concern for voters. It did not get lost in a bundling problem, because it was, quite simply, too major an issue, of too great political and economic significance, to play anything other than a dispositive role in voters' decision making.

This is why the bundling argument does not work for emergency major questions and why the major questions doctrine must consider plebiscitary legitimacy in crisis governance situations. Unlike many issues that are regulated by administrative agencies, emergency major questions, by definition, are not niche matters of marginal or even insignificant public interest. Rather, they are questions that address pressing matters such as how best to respond to the COVID-19 pandemic. Any answers to such questions must consider what the public has said on the issue, which is a more direct, high-profile, and

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314 Press Release, Joseph R. Biden, President of the United States, The Biden Plan to Combat Coronavirus (COVID-19) and Prepare for Future Global Health Threats (Mar. 12, 2020), https://www.presidency.ucsb.edu/documents/biden-campaign-press-release-the-biden-plan-combat-coronavirus-covid-19-and-prepare-for [https://perma.cc/4724-5YJ6].

315 *See* Kates et al., *supra* note 313.

316 Clarke et al., *supra* note 311, at 2197.

317 *Id.*

318 Baccini, *supra* note 311, at 743.

plebiscitarily legitimate method of public engagement than ordinary notice-and-comment procedures or even the congressional legislative process.

What a court applying the major questions doctrine to OSHA's emergency temporary standard should have derived from the 2020 presidential election is that the measure did have plebiscitary legitimacy because the plebiscite had voted for a presidential administration that made it very clear it envisioned a robust role for administrative agencies in leading a nationwide response that would involve "aggressive[]"[319] federal standard-setting.[320] The election afforded voters a clear and well-publicized opportunity to choose a very different approach—one in which the federal government would employ light-touch regulation, largely deferring to the states.[321] But that is exactly what the plebiscite rejected: in an election in which pandemic management was a particularly hotly-debated issue, and one at the forefront of voters' minds,[322] voters across the nation chose a presidential candidate who promised a stronger, more aggressively regulatory role for the federal government in responding to the unfolding emergency.

In such a situation, the current major questions doctrine as employed by the Supreme Court in *NFIB* does not preserve "government by the people," as opposed to "government by bureaucracy."[323] What happens to the primacy of "the people" when the plebiscite sends a strong signal that it wants a pressing emergency to be addressed through a strong federal administrative response? The simple answer is the correct one: it must be respected. And courts should be loath to employ the major questions doctrine to strike down emergency regulations issued under that plebiscitary mandate.

But there are, of course, several objections that might be raised to this approach: some regarding feasibility and others regarding comparative optimality. Turning first to feasibility, it is true that presidential elections and major emergencies will not always occur contemporaneously, as they did in 2020. Specifically,

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319 Kates et al., *supra* note 313.

320 *Id.*

321 *See id.*

322 *See* Clarke et al., *supra* note 311, at 2197.

323 Nat'l Fed. of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring) (citing Antonin Scalia, *A Note on the Benzene Case*, AM. ENTER. INST., J. ON GOV'T & SOC'Y 25, 27, (1980)).

there are two situations that might particularly complicate the application of the plebiscitary legitimacy factor. Firstly, suppose an emergency arises several years before or after the nearest presidential election. How, then, should courts determine the plebiscitary legitimacy of a given emergency administrative measure when it was never debated in the course of a presidential election? Secondly, suppose the emergency arises during a presidential election year and approaches to it are prominently litigated during the course of the presidential campaign season, but both candidates share roughly similar ideas with respect to the administrative measures best suited to combat the emergency, affording voters little meaningful choice with respect to a preferred mode of crisis governance. Can plebiscitary legitimacy still be inferred when voters had essentially only one option?

Some might argue that the first situation presents a stronger case for straightforwardly applying the ordinary, clear-statement version of the major questions doctrine, since, in the absence of a presidential election as a platform for debating potential emergency responses, there is unlikely to be a viable method of registering whether or not there is plebiscitary legitimacy for the emergency regulation the President plans to enact. However, courts should still resist the temptation to default to domesticating the emergency through the clear-statement rule. Rather, in conducting a major questions analysis of the emergency regulation in such a case, courts should acknowledge that when the plebiscitary legitimacy factor absolutely cannot be established as weighing one way or another in the case at hand, the other three factors should control: whether the organic statute gives emergency powers to the agency, whether the regulation is time-limited in effect and duration, and whether the regulation falls clearly within the agency's particular area of expertise.

However, courts should not be too quick to dismiss the plebiscitary legitimacy factor merely because the emergency had not yet occurred at the time of the most recent presidential election. Depending on the constellation of events, plebiscitary legitimacy might not entirely disappear from the table. Consider Bruce Ackerman's example of the 1936 presidential and congressional elections in which Franklin D. Roosevelt and the New Deal Congress won "the greatest victory in American

[electoral] history."[324] For Ackerman, this electoral victory was a resounding plebiscitary endorsement of the New Deal's massive new administrative regime—of a President's plan to achieve "freedom … through democratic control of the marketplace."[325] It was "decisive support" by "the People."[326] It is possibly expecting too much to suggest that an electoral indication of similarly overwhelming plebiscitary support for a given regulatory program might occur in the near future. And I will not attempt to draw direct parallels between the relationship between the New Deal and the 1936 elections on the one hand and the modern regulatory state and contemporary presidential elections on the other. However, there is an important kernel of guidance to extract from Ackerman's example. If a very robust administrative state is prominently advocated by one presidential candidate, for instance in the most recent presidential election before an emergency, and a lighter approach to federal regulation is prominently advocated by the other, and if subsequent empirical evidence reveals that the candidates' varying positions on this issue was in fact significant to the outcome of the election, this should weigh into a court's determination of plebiscitary legitimacy. While it is certainly preferable for voters to have had the opportunity to debate approaches to specifically *emergency* administration, as opposed to general, non-crisis approaches to regulation, a clear indication of electoral preferences with regard to the latter can and should bear some weight in the court's analysis of whether or not the emergency regulation at issue satisfies the plebiscitary legitimacy factor.

With respect to the second situation raised above, if the emergency was well-litigated during a presidential election, but the presidential candidates shared a similar approach to it, it is not inaccurate to say that voters were not afforded a particularly meaningful choice, and this may well give rise once again to the bundling argument that voters were forced to take their policy bundles as they found them. They could not select a mode of crisis governance that was not offered by either candidate. On the other hand, however, plebiscitary legitimacy does not entirely disappear in this situation either. If the major question regulation is on a particularly prominent issue, as approaches to administering

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324 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 310 (1998).

325 *Id.*

326 *Id.* at 311.

ongoing crises are likely to be, it is not unreasonable to infer that candidates may have adopted a consensus position because it is not controversial to the public. The question of how best to address a major ongoing emergency is unlikely to fall beneath the public radar, and in applying the major questions doctrine to such an emergency regulation, courts should consider that the plebiscitary pressure of a presidential election is such that two candidates from opposing parties are unlikely to adopt the same position if it is broadly unpopular. Posner and Vermeule apply their argument about plebiscitary checks and balances based on public opinion to presidents already in office,[327] but it bears even better application to presidential candidates. In an inherently plebiscitary contest between two candidates vying for a claim to Weberian plebiscitary legitimacy as the basis for the exercise of presidential authority, the power of public opinion to shape policy positions should not be underestimated. If the two major presidential candidates kept the same position on a high-priority issue, such as an ongoing emergency, that is likely to factor strongly in voters' choices and be well-ventilated throughout the campaign. It may not be unreasonable for courts to assume that voters were not particularly opposed to that position. So while plebiscitary legitimacy will never be as clearly indicated in this scenario as it would have been if the two candidates had differing approaches to the emergency, it should not be altogether discounted. The stamp of plebiscitary legitimacy is not explicitly bright and clear in this case, but neither is it altogether absent, and courts should consider that the public's disinclination to express significant disapproval of that common position suggests some modest degree of plebiscitary legitimacy, even if only in the form of mild tacit approval. In such circumstances, courts should naturally give greater weight to the three other factors of my proposed test, but the plebiscitary legitimacy factor should still be an important and possibly outcome-determinative part of the analysis.

Turning next to comparative optimality, one may well ask whether it is desirable for a president's plebiscitary authority, rather than a bureaucrat's expertise-based rational authority, to control the actions of administrative agencies' crisis governance measures. What if the President's favored approach is technically suboptimal and based on an unsophisticated understanding of the

327 *See* POSNER & VERMEULE, *supra* note 179, at 209.

crisis, rather than the technical rigor a bureaucrat might be able to provide? And what about independent agencies, such as the Securities and Exchange Commission, which are purposely designed by Congress in such a way as to be insulated from presidential control?

Independent agencies are commonly understood as those governed by heads that are not subject to at-will removal by the President.[328] These heads are frequently multi-member commissions, often statutorily required to be bipartisan in composition.[329] Sometimes they have funding sources separate from congressional appropriations and executive budgets.[330] As Lisa Schultz Bressman and Robert Thompson have pointed out, "[a]t the broadest level, the structural characteristics of independent agencies are aimed at insulating them, to some degree, from politics."[331] Some agencies are thus designed by Congress so as to be insulated from political pressure. The work they do is, by the terms of their organic statutes, in some way unsuitable for the more common model of a single political appointee directing the agency according to the wishes of the President, and removable by the President at will.

Independent agencies, therefore, are in the unique position of not being particularly appropriate subjects of plebiscitary legitimacy inquiries. They are, by congressional design, not structurally intended to be responsive to the vicissitudes of partisan politics and national elections, but rather to pursue a nonpartisan, expertise-informed course of action governed by a comparatively technocratic body that can, in general, only be removed for "inefficiency, neglect of duty, or malfeasance in office."[332] Simply put, the President is not supposed to exercise the type of political control over an independent agency that the structure of other agencies permits. From this, we may infer two things. Firstly, independent agencies should be excluded from analysis under the plebiscitary legitimacy factor I laid out above. They are structurally not intended to be fast-moving reflections of

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328 *See* Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority Over Independent Agencies*, 109 GEO. L.J. 637, 638 n.1 (2021).

329 *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610 (2010).

330 *See id.* at 611.

331 *Id.*

332 Sunstein & Vermeule, *supra* note 328, at 640 (citations omitted).

plebiscitary will or Presidential vision at any time, including times of crisis. Thus, if they undertake to issue emergency regulations that are properly evaluated under the major questions doctrine, courts should still apply the first three factors of my proposed test, namely: (1) whether the applicable statute gives emergency powers to the agency; (2) whether the regulation is time-limited in both duration and substantive effect; and (3) whether the regulation falls within the agency's wheelhouse of expertise. But the fourth factor, whether there is plebiscitary legitimacy for the emergency measure, should not apply to agencies that Congress expressly shielded from political and electoral influence.

However, the second inference to be made from the structure of independent agencies is that because ordinary "non-independent" agencies are *not* expressly shielded from political and Presidential influence and control, their emergency regulations are rightly subject to analysis under the plebiscitary legitimacy factor. The nature of their statutory structure is such that the work with which they are tasked by Congress is not deemed to require special solicitude in the matter of political independence and insulation from Presidential control. They do not have separate funding sources, their heads are not protected by special removal protections, and the political nature of their leadership is clear. The President may appoint an agency head of their choosing, whom they are free to remove at will. This is an implicit recognition of the fact that such agencies are fundamentally political creatures and that this is not improper. On the contrary, the structure of these agencies is designed to be particularly responsive to electoral considerations. If the President is elected on a promise to have an ordinary, "non-independent" agency take a particular regulatory approach to an issue, that agency is statutorily structured so that it will be able and well-suited to do exactly that—and this is the case both in crises and in ordinary times. The lack of special provisions for the agency's political independence is an acknowledgment of that agency's political foundation.

Such a structure mandates that presidential control take priority over bureaucratic expertise. This does not mean that under my proposed major questions analysis for crisis governance measures, courts should allow an agency, under the direction of the President, to issue emergency regulations that infringe upon the constitutional rights of individuals or protected classes. As I

have argued above,[333] the major questions doctrine does not alone determine the constitutionality of an emergency administrative regulation. But if a President directs the agency to issue an emergency regulation that is otherwise constitutional and that satisfies my proposed four-factor test for applying the major questions doctrine to crisis governance measures, the courts should uphold that regulation, even if it is not ideal in a strictly technocratic sense.

This does not mean that the President will automatically be free to respond to emergencies by enacting patently absurd and irrational regulations in the name of plebiscitary legitimacy. Recall that the plebiscitary legitimacy factor requires not only that the presidential candidate proposing such regulations be elected (and that the proposals be prominently ventilated during the campaign), but also that there be evidence to support the fact that voters specifically approved the candidate's position on the emergency. It is highly unlikely that a genuinely irrational proposal would win sufficient support to satisfy either of those requirements. A presidential candidate suggesting, for instance, that their administration will address the COVID-19 pandemic by requiring healthcare workers to dress in green is likely to raise concerns about their competence and fitness for office. Even if they were nonetheless elected to the presidency, empirical results would be unlikely to show that voter approval of that proposal played a significant role in his election. But even supposing they did, there is still another safeguard.

As Anya Bernstein and Cristina Rodríguez have shown, "political[] [appointees] and career[] [civil servants] must consistently present and defend their ideas to one another."[334] Within this discursive network, the President must find an agency head willing to issue the irrational regulation, and the agency head, although a political appointee, must be able to justify this to the career civil servants whose rational, technical expertise support their leadership. Within such a dialogic accountability framework mingling expertise and political influence, it is unlikely that the irrational regulation would survive. Rather, the Weberian rational legitimacy that is bureaucracy's chief comparative

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333 *See supra* Part III.C.3.

334 Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1628 (2023).

advantage should come into play to discourage and prevent the promulgation of absurdities. But absurdities should be understood to mean the genuinely irrational and logically unjustifiable, not merely approaches that strike some experts as somewhat suboptimal in comparison with measures recommended by a larger proportion of expert voices. On the contrary, when such a comparison arises in an agency that is structurally designed to be political rather than "independent,"[335] the President's plebiscitarily legitimate, not-irrational measure should prevail and be upheld by courts under the major questions doctrine as applied to administrative crisis governance.

One might object that the crisis governance version of the major questions doctrine will allow highly suboptimal emergency regulations to stand, whereas in ordinary times such suboptimal regulations would be invalidated under the regular version of the major questions doctrine, and that this will lead to objectively worse administrative decisionmaking in emergency situations (seen from the rational-technical standpoint of a bureaucratic subject-matter expert). However, recall that the major questions doctrine in its ordinary form does not evaluate the relative technical optimality of one regulatory approach versus another. On the contrary, it merely looks at (1) the "majorness" of the regulated issue and (2) the agency's authority to issue such a major regulation. Thus, whether the regulation is enacted during an emergency or during ordinary times, its substance will be subject to the same agency-internal dialogic accountability framework Bernstein and Rodríguez describe.[336] And the major questions doctrine itself, no matter what version, will not act to substantively validate one regulatory approach over another. That is the task of Congress and administrative agencies, not the courts.[337] But even assuming *arguendo* that the agency-internal accountability framework did not work, and that a regulation issued as crisis governance was substantively more suboptimal than it would have been if issued in ordinary times, a notable benefit of the retheorized major questions doctrine as applied to crisis governance is that it requires temporariness: the emergency regulation, unlike an ordinary regulation, must be both time-

335 Sunstein, *supra* note 328.

336 Bernstein & Rodríguez, *supra* note 334 at 1628.

337 *E.g.*, Biden v. Nebraska, 143, S. Ct. 2355, 2372 (2023) ("The question here is not whether something should be done; it is who has the authority to do it.").

limited and of temporary substantive impact. Thus, even in the unlikely event that a uniquely substantively suboptimal emergency regulation is upheld that would have been struck down under major questions analysis in normal circumstances, any negative impact will be both temporary and easily reversible.

This does not mean, of course, that courts should rely so heavily on the time-limitation and plebiscitary legitimacy factors of my proposed approach that they adopt the deferential suspension model of washing their hands of the major questions inquiry altogether and reflexively deferring to agency action. On the contrary, precisely because the major questions doctrine is best understood as rooted in plebiscitary legitimacy, applying the doctrine to emergency situations in a responsibly circumscribed way should involve the recognition that where an emergency regulation at issue reflects a plebiscitary mandate and meets the criteria of the four-factor test laid out above, it should be upheld. This is not deference in the sense that the judiciary is required to engage in interpretative subordination to the agency. Nor is it a judgment by the judiciary on the technical, scientific, or policy merits of a given regulation. Rather, my four-factor proposal serves the principle that courts nondeferentially examine the question of the agency's authority to issue the regulation, but with the added understanding that when the judiciary invokes the major questions doctrine, it is not guarding its own primacy or that of any particular branch of government, but rather that of the voting public who have a direct plebiscitary voice, as well as an indirect congressional one, that should be respected.

CONCLUSION

Ultimately, both the deferential suspension and clear-statement domestication models of judicial review are theoretically unsatisfactory and practically ineffective approaches to a major emergency regulation issued by an administrative agency. We do not need the major questions doctrine in its current form, which comprehends neither the nature of an emergency for which detailed statutory rules cannot be prescribed ex ante, nor the existence of plebiscitary legitimacy outside of an indirect congressional version. But neither do we need to suspend judicial inquiry in the name of deference to superior agency expertise when an issue of significant import to daily lives across the nation is being regulated. Rather, the major questions doctrine can be made

both coherent and effective for crisis governance purposes by recognizing that the roots of the doctrine are plebiscitary and that it is possible to constrain administrative power and prevent full-on Schmittian executive overreach without depriving agencies of their essential, structurally-inherent ability to respond quickly to complex, rapidly-unfolding emergencies within their areas of specialized competence.

A plebiscitary legitimacy rationale for the major questions doctrine, as incorporated into the four-factor analysis I have proposed, is thus the first theoretically coherent and democratically responsible proposal for evaluating administrative crisis governance measures that avoids the twin pitfalls of judicially sanctioning excessive deference at the potential cost of bureaucratic overreach and judicially disclaiming responsibility for practical consequences while tying the hands of the very agencies best equipped to deal with crises. By acknowledging that the major questions doctrine serves an important plebiscitary purpose, that congressional legislation is an imperfect vehicle of plebiscitary legitimacy and that a plebiscitary voice can be heard through presidential elections, particularly during ongoing emergencies, the major questions doctrine can be both theoretically and practically modified to enhance its crisis-situation ability to deliver on its most fundamental underlying value. In this way, emergency agency regulations of major issues will no longer depend exclusively on impossibly specific ex ante authorization by a representative body in "intimate sympathy with . . . the people,"[338] but may draw carefully delimited authorization from the plebiscitary voice of "the people"[339] themselves.

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338 West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (citing THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961)).

339 *Id.*

A Corpus Linguistic Analysis of "*Possessions*" in American English, 1760-1776

James C. Phillips[*]

INTRODUCTION 144
I. BACKGROUND 146
A. Current Litigation 146
B. The Constitutional Text 147
C. The Weakness with Traditional Methods and Tools of Constitutional Interpretation 149
1. The Limitations of Dictionaries 149
a. Dictionaries as "museum[s] of words" and linguistic intuition 149
b. "Lexicographical prescriptivism" 150
c. Dictionary piracy and idiosyncrasy 151
2. Non-Systematic Usage Sampling 152
II. A BRIEF INTRODUCTION TO CORPUS LINGUISTICS 153
III. CORPUS LINGUISTIC ANALYSIS OF "*POSSESSIONS*" 156
A. Corpus of Founding Era American English (COFEA) 156
B. Collocate Analysis 156
C. Concordance Line Analysis 157
D. Sample of "*Possessions*" 162
CONCLUSION 164

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INTRODUCTION

The U.S. Constitution's Fourth Amendment protects against unreasonable searches and seizures of persons, houses, papers, and effects.[1] Yet state constitutions often use different language, thus providing a different scope of protection. Specifically, starting with Pennsylvania in 1776, sixteen states have constitutional provisions that include *possessions* as protected from unreasonable searches and seizures.[2] And currently there is litigation in various state courts, including the Pennsylvania Supreme Court, over the meaning of this constitutional protection.

Possessions potentially implies more than houses, papers, or effects—arguably covering anything one possesses, including private land, which would significantly expand the coverage of such constitutional protection.[3] But traditional tools of constitutional interpretation, such as dictionaries or etymology, often fall short in uncovering the original public meaning of constitutional text. Hence, courts (including U.S. Supreme Court Justices) increasingly have looked to corpus linguistics to better answer the linguistic questions that judges face in interpreting the

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1 U.S. CONST. amend. IV.

2 ALA. CONST. art. I, § 5 ("possessions" language dates back to CONST. of 1819, art. I, § 9); CONN. CONST. art. I, § 7 ("possessions" language dates back to CONST. of 1818, art. I, § 8); DEL. CONST. art. I, § 6 ("possessions" language dates back to CONST. of 1792, art. I, § 6); ILL. CONST. pt. I art. XIVI, § 6 ("possessions" language dates back to CONST. of 1780, pt. I, art. XIVI, § 6); KY. CONST. art. I, § 10 ("possessions" language dates back to CONST. of 1792, art. XII, § 9); ME. CONST. art. I, § 5 ("possessions" language dates back to CONST. of 1820, art. I, §5); MASS. CONST. art. XIV, pt. I ("possessions" language dates back to CONST. of 1780, pt. I, art. XIV); MI. CONST. art. I, § 11 ("possessions" language dates back to CONST. of1835, art. I, § 11); MS. CONST. § 23 ("possessions" language dates back to CONST. of 1817, art. I, § 9); N.H. CONST. pt. I, art. XIX ("possessions" language dates back to CONST. of 1784, pt. I, art. XIX); OHIO CONST. art. I, § 14 ("possessions" language dates back to CONST. of 1802, art. VIII, § 5); PA. CONST. art. I, § 8 ("possessions" language dates back to 1776 Pa. Decl. of Rights, § 10); R.I. CONST. art. I, § 6 ("possessions" language dates back to CONST. of 1842, art. I, § 6); TENN. CONST. art. I, § 7 ("possessions" language dates back to CONST. of 1796, art. XI, § 7); TEX. CONST. art. I, § 9 ("possessions" language dates back to CONST. of the Repub. of Tex. of 1836, Decl. of Rights, § 5); VT. CONST. ch.1, art. XI ("possessions" language dates back to CONST. of 1777, ch. 1, art. XI).

3 The U.S. Supreme Court has held that the Fourth Amendment does not protect private land. *See* Hester v. United States, 265 U.S. 57 (1924). But in some states where "possessions" is part of their Fourth Amendment equivalent, state supreme courts have held that the term extends to private land, thus protecting such from warrantless searches. *See, e.g.*, State v. DuPuis, 197 A.3d 343 (Vt. 2018); Welch v. State, 289 S.W. 510 (Tenn. 1926); Falkner v. State, 98 So. 691, 692–93 (Miss. 1924). Other states have held that people can expect privacy on their land. *See, e.g.*, State v. Bullock, 901 P.2d 61 (Mont. 1995); People v. Scott, 593 N.E.2d 1328 (N.Y. 1992); State v. Dixson, 766 P.2d 1015 (Or. 1988).

words of the law.[4] Understandably, judges use economic tools to tackle economic questions and historical tools to answer historical questions. Should they not use linguistic tools for linguistic questions? As Justice Frankfurter observed, "words are . . . the material of which laws are made. Everything depends on our understanding of them."[5] We can and should use the right tools for seeking this understanding.

This article will proceed in four parts. Part I introduces the question at issue in the context of the first state constitution to include the term: the Pennsylvania Constitution. It does so, at least in part, because other state constitutions arguably copied the Pennsylvania Constitution, and thus the meaning of that constitution likely sheds light on the state constitutions that followed it. Part I also describes the litigation where the issue of the meaning of *possessions* comes up. Part II highlights shortcomings of the traditional tools usually employed in constitutional interpretation. Part III explains how the tools of corpus linguistics can address these shortcomings. And Part IV presents a corpus linguistic analysis of the term *possessions*. This approach, more rigorous than that usually undertaken, provides data on the linguistic question that undergirds the legal issue—which reading of these state constitutions is more probable than the other. After all, a "problem in [legal interpretation] can seriously bother courts only when there is a contest between probabilities of meaning."[6] Corpus linguistics can help with that contest.

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4 At the Supreme Court level, see Carpenter v. United States, 138 S. Ct. 2206, 2238–39 n.4 (2018) (Thomas, J., dissenting) (running a search in the Corpus of Founding-Era American English); Lucia v. SEC., 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring, joined by Gorsuch, J.) (citing Jennifer Mascott, Who Are "Officers of the United States?" 70 STAN. L. REV. 443 (2018)); Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring) (citing Thomas R. Lee & Stephen C. Mouritsen, Judging Ordinary Meaning, 127 YALE L. J. 788 (2018)); Bostock v. Clayton County, 140 S. Ct. 1731, 1769 n.22 (2020) (Alito, J., dissenting) (citing James C. Phillips, The Overlooked Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality 3 (May 11, 2020) (unpublished manuscript), (https://www.supremecourt.gov/opinions/URLs_Cited/OT2019/17-1618/17-1618-3.pdf [https://perma.cc/X2HZ-VC2R])). Numerous lower federal and state courts have cited to, discussed, or even done their own corpus linguistic analysis.

5 Garson Kanin, *Conversations with Felix*, READER'S DIGEST, June 1964, at 116–17 (noting that Justice Felix Frankfurter replied to counsel and said a question from the bench was just a matter of semantics).

6 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

I. BACKGROUND

A. Current Litigation

The Pennsylvania Constitution provides that "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures."[7] This constitutional clause is currently being litigated before the Pennsylvania Supreme Court.[8] The case involves two private hunting clubs that own thousands of acres of land.[9] Only members of the clubs may use the land, and they do so "to hunt, vacation, and enjoy nature."[10] For privacy, the properties are gated, and "no trespassing" signs are posted.[11]

However, state game wardens have entered and traversed the properties without permission, probable cause, or a warrant.[12] And they do so because state statutes authorize game wardens "unfettered discretion" to come and go on this private property as they see fit.[13] Specifically, these statutes give game wardens "the right and authority to go upon or enter any property, posted or otherwise, outside of buildings" when "exercis[ing] . . . their powers and duties."[14] So these officers of the state may "[g]o upon any land or water outside of buildings, except curtilage, posted or otherwise, in the performance of [their] duty."[15]

The hunting clubs argued that these statutes are in conflict with the Pennsylvania Constitution because the term *possessions* includes land.[16] Therefore, when property owners "signal that their land is not open to the public," they "have a reasonable expectation of privacy and must be entitled to protection under [the Pennsylvania Constitution]."[17] And "game wardens who want to search it must obtain consent or a warrant, or show a warrant

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7 PA. CONST. art. I, § 8.

8 *See* Punxsutawney Hunting Club, Inc. v. Pa. Game Comm'n, Dkt. 23, No. 456 M.D. 2021, 2023 Pa. Commw. Unpub. LEXIS 541.

9 Punxsutawney Hunting Club, Inc. v. Pa. Game Comm'n, No. 456 M.D. 2021, 2023 Pa. Commw. Unpub. LEXIS 541, at *2 (Pa. Commw. Ct. Sept. 29, 2023).

10 *Id.*

11 *Id.*

12 *See id.*

13 *Id.*

14 34 PA. CONS. STAT. § 303(c) (2023).

15 *Id.* § 901(a)(2) (2023).

16 *Punxsutawney Hunting Club, Inc.*, 2023 Pa. Commw. Unpub. LEXIS 541, at *3–4.

17 *Id.* at *4.

exception."[18] Yet the challenged statutes "authorize warrantless searches of land that is used and marked as private," and so, the argument goes, are unconstitutional.[19]

B. The Constitutional Text

The Pennsylvania Constitution prohibits "unreasonable searches" of "persons, houses, papers and possessions."[20] *Possessions* could have at least three meanings in the Pennsylvania Constitution. First, it could mean anything one possesses.[21] Such a meaning would make *houses* and *papers* surplusage, as a house and papers are also things one possesses—and by that broad meaning, also possessions. This would violate the canon against surplusage,[22] but it may be that the common meaning of *possessions* in this context is the broad meaning and does violate the canon, as the canon is not absolute.[23]

Second, in the Pennsylvania Constitution, *possessions* could mean a subset of anything one owns, referring just to certain things one owns. We see this sense used currently in phrases like, "all of your worldly possessions," "all of her possessions," etc., wherein the word *possessions* appears to be used to refer to movable things one owns, other than land or a house: one's belongings—personal property as opposed to real property. If that were the sense being used in the constitution, then it would not turn *houses* into surplusage, but arguably would still turn *papers*

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18 *Id.*

19 *Id.*

20 PA. CONST. art. I, § 8.

21 *See, e.g.*, SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773), https://tinyurl.com/y23jf6jn [https://perma.cc/9X7F-7FVB] ("The state of owning or having in one's own hands or power; property . . . . The thing possessed."); THOMAS SHERIDAN, 2 A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 39 (3d ed. 1790), https://tinyurl.com/578kbd53 [https://perma.cc/8D4E-CUA6] ("To have as an owner . . . to enjoy, or occupy actually . . . ."); NOAH WEBSTER, 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 328 (1828), https://tinyurl.com/ypb826b4 [https://perma.cc/F6PC-UW8N] ("[P]roperty in one's power or command; actual seizin or occupancy . . . The thing possessed; land, estate or goods owned. . . .").

22 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("If possible, every word and every provision is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.")

23 *Id.* at 176–77 ("Put to a choice, however, a court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage. So like all other canons, this one must be applied with judgment and discretion, and with careful regard to context. It cannot always be dispositive because (as with most canons) the underlying proposition is not *invariably* true.").

into surplusage, unless somehow one's papers were just not seen as a possession in this narrower sense.

Third, there may be an implied "other" before *possessions*. This taps into the concept of *implicature*, wherein "what is said implicitly includes something else that is closely related."[24] For example, the brackets in the examples below show what was implied:

"Jack and Jill are married [to each other].

Bill insulted his boss and [as a result] got fired.

Nina has had enough [to eat]."[25]

An example from the U.S. Constitution is Article I, Section 9: "No Bill of Attainder or ex post facto Law shall be passed [by Congress]."[26]

If such implicature is contained in the Pennsylvania Constitution, so that it should read "persons, houses, papers, and [other] possessions,"[27] it would provide a reading between the broad first one and the narrow second one just noted above, both of which have surplusage problems. The "other" would mean that the word *possessions* includes all other possessions except those already listed, meaning that all types of possessions are covered without a surplusage problem. There is also some historical support for this implied "other" in lists that ended in the term *possessions*, as shown in search results below.

Additionally, it may not be technically accurate that this implied "other" triggers the ejusdem generis canon, wherein general, catch-all words that follow a list of specific words are limited by that specific list.[28] That is because the list includes an item that may not be property—persons—depending on natural rights theories prevalent at the Founding.[29] Still, if one applied the canon to the last two items on the list, which are types of possessions, we see that one is real property and one is personal

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24 Lawrence B. Solum, *Legal Theory Lexicon 086: Context and Meaning*, LEGAL THEORY LEXICON (last modified Sept. 18, 2022), https://lsolum.typepad.com/legal_theory_lexicon/2019/01/legal-theory-lexicon-086-context-and-meaning.html [https://perma.cc/7Z32-UA3H].

25 *Id.*

26 *Id.*

27 PA. CONST., art. I, § 8.

28 SCALIA & GARNER, *supra* note 22, at 199 ("Where general words follow an enumeration of two ore more things, they apply only to persons or things of the same general kind or class specifically mentioned (*ejusdem generis*).").

29 Would a right to protect one's body be found in the right to property? Right to liberty? Right to life?

property. This arguably means the broad catch-all term *possessions* should include both types—and thus includes property in the form of land.[30]

C. The Weakness with Traditional Methods and Tools of Constitutional Interpretation[31]

1. The Limitations of Dictionaries

a. Dictionaries as "museum[s] of words" and linguistic intuition

Dictionaries do not declare which sense of a word is the ordinary one as dictionaries often struggle to deal with context. Perhaps that should not be surprising since dictionaries are just "museum[s] of words"[32]—"historical records (as reliable as the judgment and industry of the editors) of the meanings with which words have in fact been used by writers of good repute."[33] Thus, dictionaries "are often useful in answering hard questions of whether, in an appropriate context, a particular meaning is linguistically *permissible*," not what is linguistically *probable* in a particular context.[34]

So choosing one dictionary definition over another as the ordinary meaning of a word or phrase reveals more about one's own linguistic intuition than objective ordinary meaning because it is that intuition that analytically closes the gap from dictionary evidence to the interpretive conclusion. Individual intuition lacks transparency, which is particularly problematic when that individual is a judge. Additionally, individual linguistic intuition suffers from at least two problems given it is informed by exposure

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30 The Oxford English Dictionary provides the following senses of *possession*:

> 2a. That which is possessed or held as property; something belonging to one, a piece of property; (in *plural*) belongings, property, wealth. . . . 2b. *Scottish*. A tenancy; a small farm, etc., held under lease, a smallholding. *Obsolete*. . . . 2c. A territory subject to a sovereign ruler or state; (now chiefly) any of a country's foreign dominions.

Possession, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/possession_n# [https://perma.cc/HP2Y-ETGJ] (last visited Feb. 20, 2024).

31 Part I.C draws somewhat upon James C. Phillips & Jesse Egbert, *A Corpus Linguistic Analysis of "Foreign Tribunal"*, 108 VA. L. REV. ONLINE 207, 213–19 (2022).

32 Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994).

33 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1375 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

34 *Id.* at 1375–76 (emphasis added).

to language over one's lifetime. First, most lawyers, scholars, and judges are not representative of ordinary members of society, as they usually come from higher socioeconomic levels and have experienced significantly more education. These demographic factors affect the language to which they are exposed.

Second, people are still products of their time. This limits their linguistic intuition regarding times during which they did not live, evidenced by the phenomenon of linguistic drift.[35] If English never changed, then laws written prior to one's lifetime could be interpreted by relying on a later person's linguistic intuition. But English does change, sometimes significantly and speedily. For example, the constitutional term *domestic violence*, from the 1770s through the 1970s, meant insurrection, rebellion, or rioting within a state.[36] Yet starting in the 1980s, that rapidly began to change. And within about a decade, *domestic violence* was almost always used to mean "violent or aggressive behaviour within the home, esp[ecially] violent abuse of a partner."[37] The older sense, used almost exclusively for two centuries, has now almost completely disappeared. And that change occurred very quickly, in about a decade. Thus, relying on one's own linguistic intuition formed in a time after a constitution was adopted may cause someone to miss that linguistic drift has occurred and so inaccurately understand a constitutional word or phrase.

b. "Lexicographical prescriptivism"

Dictionaries can either define words according to proper usage or actual usage. Normative, or prescriptive, dictionaries "establish[] what is right in meaning and pronunciation," providing readers with what the dictionary editor considers the "proper" usage of each entry.[38] Thus, "the prescriptive school of thought relie[d] heavily on the editors of dictionaries to define and publish the proper meaning and usage of the terms."[39] By contrast,

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35 *See generally* Anne McCrary Sullivan, *Basic Students, Linguistic Drift, and the Language of the Future*, ENG. J., 1991, at 43–47.

36 Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 298–300 (2019).

37 *Domestic Violence*, OXFORD ENGLISH DICTIONARY (Mar. 2006) (emphasis omitted), https://www.oed.com/view/Entry/56663?redirectedFrom=domestic+violence#eid41827739 [https://perma.cc/A5ZN-RQRV]; Lee & Phillips, *supra* note 36, at 300.

38 *Webster's Way Out Dictionary*, BUS. WK., Sept. 16, 1961, at 89, *reprinted in* JAMES SLEDD & WILMA R. EBBITT, DICTIONARIES AND THAT DICTIONARY 57 (1962).

39 Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 242 (1999).

"[t]he editors of a descriptive dictionary describe how a word is being used and, unlike their prescriptive counterparts, do not decide how a word should be used."[40]

Historically, American dictionaries invoked proper usage. "Lexicographical prescriptivism in the United States is exactly as old as the making of dictionaries, because of the role played by the dictionary in a society characterized by a great deal of linguistic insecurity."[41] That changed in the 1960s when Webster's Third International Dictionary controversially shifted to defining words based on actual usage.[42] Thus, American dictionaries before the 1960s are less useful for determining how people actually used language.[43] Hence, dictionaries from the 1700s and 1800s may reflect more about their editor's sense of what is proper American English as opposed to how people ordinarily used and understood the language.

c. Dictionary piracy and idiosyncrasy

Dictionaries produced around the American Founding have additional weaknesses not found in modern dictionaries that flow from the fact that usually just one or two people created most dictionaries at the time. The epitome of these are the two most famous founding-era dictionaries: the dictionaries of Samuel Johnson and Noah Webster. As one scholar noted, "Johnson and Webster stand as the ultimate personifications of the solo artiste."[44] While "Johnson had his amanuenses" and "Webster had a single proof-reader, enlisted toward the end of the project[,] . . . these assistants were secondary figures. In neither case did the man whose name adorns the title page allow such helpers to influence his end product."[45]

This solo-artiste style of dictionary-making creates at least two problems. First, it makes founding-era dictionaries rather

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40 *Id.*

41 HENRI BÉJOINT, TRADITION AND INNOVATION IN MODERN ENGLISH DICTIONARIES 116 (1994) (citation omitted).

42 *See* Norman E. Isaacs, *And Now, the War on Words*, THE LOUISVILLE TIMES, Oct. 18, 1961, *reprinted in* JAMES SLEDD & WILMA R. EBBIT, DICTIONARIES AND THAT DICTIONARY 79 (1962) (reporting that the editor-in-chief of Webster's Third stated that "the dictionary's purpose was to report the language, not to prescribe what belonged in it").

43 True, to the extent people rely on dictionaries, even a prescriptive definition could somewhat reflect how people understood language, or influence how people used language, though it is second-best evidence.

44 JONATHON GREEN, CHASING THE SUN: DICTIONARY-MAKERS AND THE DICTIONARIES THEY MADE 15 (1996).

45 *Id.*

idiosyncratic. Thus, any particular definition may reflect more on that individual's understanding than society's understanding and usage of the language. After all, "dictionaries do not emerge from some lexicographical Sinai; they are the products of human beings. And human beings, try as they may, bring their prejudices and biases into the dictionaries they make."[46]

The second problem is plagiarism. Perhaps because creating an entire dictionary oneself is a Herculean task, dictionary writers often plagiarized earlier dictionaries.[47] As one author described, "[t]he history of English lexicography usually consists of a recital of successive and often successful acts of piracy."[48] This tendency to plagiarize "can create a false consensus whereby it looks like all of the dictionaries independently agree, and thus reflect contemporaneous linguistic reality, but in actuality only reflect the views . . . of a few dictionary makers."[49] Plagiarism also means that later dictionaries may miss linguistic drift because they are copying definitions from dictionaries published as long ago as a century previously. Hence, idiosyncrasy and plagiarism undermine the utility of founding-era dictionaries in discerning how the ordinary public understood and used words.

2. Non-Systematic Usage Sampling

To avoid the weaknesses of dictionaries, one can sample actual usage from the relative time period. But one would need to do so in a systematic way and in sufficient numbers to have confidence in the results. However, much like dictionaries, examples of contemporaneous usage of a term in question often suffer from the same defect of relying on legislative history—looking out among the crowd and calling on one's friends. Put another way, there is a temptation to cherry-pick usage examples that support one's position. The methods below help overcome these shortcomings.

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46 *Id.* at 11.

47 *See, e.g.*, ALLEN REDDICK, THE MAKING OF JOHNSON'S DICTIONARY, 1746–1773, at 11 (Cambridge Univ. Press rev. ed. 1996); Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 383–84 (2014).

48 SIDNEY I. LANDAU, DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY 35 (1984).

49 James C. Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from 1760–1799*, 59 S. TEX. L. REV. 181, 191 (2017).

II. A BRIEF INTRODUCTION TO CORPUS LINGUISTICS[50]

Corpus linguistics is the empirical study of language using samples (or bodies) of texts called corpora (in the plural). A corpus is constructed in order to study a particular register (variety of texts associated with a situational context) or speech community (group of language users who share the same dialect or language norms).[51] Corpus linguistics is premised on the idea that "the best way to find out about how language works is by analy[z]ing real examples of language as it is actually used."[52] In studying naturally occurring language use, corpus linguistics can avoid the observer's paradox—the phenomenon whereby people tend to change their behavior when they are aware they are being studied (i.e., the Hawthorne Effect).[53]

Corpus linguistics is founded on two premises: (1) that a corpus of texts can be constructed to be sufficiently representative of a particular register or speech community, and (2) that one can "empirically describe linguistic patterns of use through analysis of that corpus."[54] So corpus linguistics "depends on both quantitative and qualitative analy[sis]."[55] And corpus linguistics results "in research findings that have much greater generalizability and validity than would otherwise be feasible."[56] Because "a key goal of corpus linguistics is to aim for replicability of results, [researchers and] data creators have an important duty to discharge in ensuring . . . the data they produce is made available to analysts in the future."[57]

A corpus can be made of any kind of naturally occurring texts. Common examples include collections of samples of newspaper articles, books, or legal documents. The utility of a corpus will depend on the degree to which it represents the target language

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50 Part II draws somewhat upon Phillips & Egbert, *supra* note 31, at 219–24.

51 *See* TONY MCENERY & ANDREW HARDIE, CORPUS LINGUISTICS: METHOD, THEORY AND PRACTICE 1–2 (Cambridge Univ. Press 2012).

52 PAUL BAKER ET AL., A GLOSSARY OF CORPUS LINGUISTICS 65 (Edinburgh Univ. Press 2006).

53 *See* HENRY A. LANDSBERGER, HAWTHORNE REVISITED: *MANAGEMENT AND THE WORKER*, ITS CRITICS, AND DEVELOPMENTS IN HUMAN RELATIONS IN INDUSTRY 14, 23 (Cornell Univ. 1958).

54 THE CAMBRIDGE HANDBOOK OF ENGLISH CORPUS LINGUISTICS 1 (Douglas Biber & Randi Reppend eds., Cambridge Univ. Press 2015).

55 Douglas Biber, *Corpus-Based and Corpus-driven Analyses of Language Variation and Use*, *in* THE OXFORD HANDBOOK OF LINGUISTIC ANALYSIS 159, 160 (Bernd Heine & Heiko Narrog eds., Oxford Handbooks Online 2015).

56 *Id.* at 159.

57 MCENERY & HARDIE, *supra* note 51, at 66.

domain of interest. Corpus representativeness depends on two key considerations—"what types of texts should be included in the corpus and how many texts are required."[58] What is true for computing is true for corpus linguistics: "garbage in, garbage out," as corpus-based results can be no better than the corpus being used (and it can be worse if the corpus data is not properly analyzed).[59] If a corpus does not adequately represent the texts used within the register or by the speech community one wants to make observations about, then other features of the corpus, such as its size, will make little difference.

One tool often used in corpus linguistic research is collocation. Some words "co-locate" more frequently than other words. One can think of this phenomenon as "word neighbors." These semantic patterns of word association can sometimes be intuitive: we expect *dark* to appear more often in the same semantic environment as *night* than with *perfume*. But sometimes the patterns are surprising. This linguistic phenomenon has long been recognized in the law in the canon of construction called *noscitur a sociis*: "it is known by its associates."[60] Linguists just put it a slightly different way: "[y]ou shall know a word by the company it keeps."[61]

By seeing which words are collocates of each other, we can sometimes get additional insight into how people understand those words. This can be done in a corpus by searching for a word and indicating (1) how many words to the left or right (or both) of the search term one wants to examine, and (2) which statistical measure (e.g., frequency, MI score, T score) will be used to measure the strength of association.[62] In this way, researchers are able to estimate how common it is for words to co-occur in close proximity. We can also use collocate analysis to see how usage patterns change. For instance, as I and a co-author showed in a paper, the top five collocates (in raw frequency) of the term *domestic violence* from 1760-1979 were (1) *against*, (2) *state(s)*, (3)

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58 JESSE EGBERT ET AL., DESIGNING AND EVALUATING LANGUAGE CORPORA: A PRACTICAL FRAMEWORK FOR CORPUS REPRESENTATIVENESS i (2022).

59 United States v. Esquivel-Rios, 725 F.3d 1231, 1234 (10th Cir. 2013) ("Garbage in, garbage out. Everyone knows that much about computers: you give them bad data, they give you bad results.").

60 *Noscitur a sociis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

61 John Rupert Firth, *A Synopsis of Linguistic Theory, 1930–1955*, STUD. LINGUISTIC ANALYSIS 1, 11 (1957).

62 *See* JESSE EGBERT ET AL., DOING LINGUISTICS WITH A CORPUS: METHODOLOGICAL CONSIDERATIONS FOR THE EVERYDAY USER 25–29 (2020).

protect, (4) *convened*, and (5) *invasion*.[63] This reflects the sense, as used in the Constitution, of a rebellion or insurrection within a state. But the top five collocates of *domestic violence* from 1980-2009 showed a radical shift: (1) *women*, (2) *abuse(d)*, (3) *honor*, (4) *national*, and (5) *victims*.[64] These collocates reflect the sense of violence against a member of one's household. However, collocation tends to be more exploratory than confirmatory in nature. Why words are collocating with each other is not explained by the fact that they are doing so.

Another corpus method commonly used in legal interpretive research is concordance line analysis. Concordance lines can be used for qualitative analysis or in order to obtain frequency data. Concordance lines are excerpts from texts centered on a search term. In cases where there are many hits resulting from a corpus query, researchers can extract a random sample of concordance lines from the corpus.

To get meaning out of the concordance lines often requires classifying or categorizing (often referred to as "coding") the search results. For instance, one could search for a particular word, then classify each result presented in a concordance line according to a particular sense of that word. Additionally, if greater context than one sentence is needed, one can expand the size of the text excerpt surrounding the search hit to account for more context. In this way, one could analyze the results to determine something a dictionary cannot usually convey: which sense is more common in a given context (i.e., the distribution of senses). This particular exercise, using concordance lines to classify senses, has proven to be an effective method for addressing questions regarding the meaning of words and phrases in legal texts. Further, the nature of the search results prevents one from cherry-picking examples. Of course, classifying senses involves a measure of subjectivity in considering the context to properly classify (or code) a sense. To mitigate this subjectivity, one can either use multiple, independent coders or one can make public ones, coding so that anyone can check it.

63 *See* Lee & Phillips, *supra* note 36, at 298–300.

64 *See id*.

III. CORPUS LINGUISTIC ANALYSIS OF "*POSSESSIONS*"

A. Corpus of Founding Era American English (COFEA)

This study will use the Corpus of Founding Era American English, or COFEA (rhymes with "Sophia"). COFEA is the only large corpus of American Founding Era materials in existence, with over 127,000 texts and 138 million words.[65] COFEA "covers the time period starting with the reign of King George III, and ending with the death of George Washington (1760-1799)."[66] The corpus "contains documents from ordinary people of the day, the Founders, and legal sources, including letters, diaries, newspapers, non-fiction books, fiction, sermons, speeches, debates, legal cases, and other legal materials."[67] Most of the texts "have been pulled from the following six sources: the National Archive Founders Online; William S. Hein & Co., HeinOnline; Text Creation Partnership (TCP) Evans Bibliography (University of Michigan); Elliot's Debates; Farrand's Records; and the U.S. Statutes-at-Large from the first five Congresses."[68]

B. Collocate Analysis

To perform collocate analysis for this study, I searched in COFEA over the years 1760-1776 for all collocates six words to the right and left of *possessions*, eliminating what linguists call "stop words."[69] As can be seen, *lands* is the second most frequent collocate.

Rank	Collocate	Frequency	Rank	Collocate	Frequency
1.	rights	37	6.	America	21
2.	lands	35	6.	crown	21
3.	titles	31	8.	own	20
4.	great	29	9.	confirmed	18
5.	majesty	24	10.	part	18

However, being frequently collocated with *possessions* does not explain the connection between *lands* and *possessions*. It could be that lands are a type of possession, or it could be that *lands* are

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65 *See About the Corpus,* CORPUS OF FOUNDING ERA AMERICAN ENGLISH (COFEA) https://lawcorpus.byu.edu/cofea/concordances [https://perma.cc/J2HR-YBS8] (last visited Jan. 30, 2024).

66 *Id.*

67 *Id.*

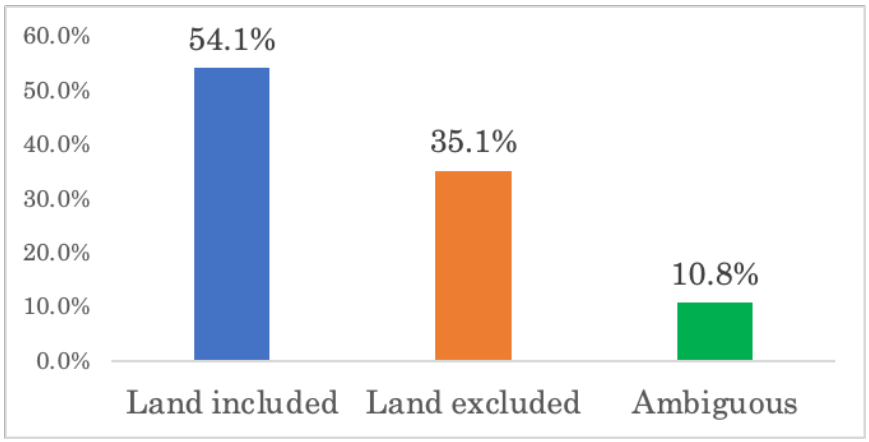
68 *Id.*

69 Stop words are words deemed insignificant to meaning, such as *the*, *is, which*, etc. *See* Kavita Ganesan, *What Are Stop Words?*, OPINOSIS ANALYTICS, https://www.opinosis-analytics.com/knowledge-base/stop-words-explained/ [https://perma.cc/D9A8-6DV4] (last visted Feb. 1, 2024). There is no agreed upon list of such words. *Id.*

contrasted with *possessions* and thus excluded. To explore this relationship, one must look at concordance lines.

C. Concordance Line Analysis

For this study, I next examined all instances of *land* occurring within six words of *possessions* in COFEA from 1760-1776.[70] This resulted in 37 instances, because besides *land* that search formulation included *lands* and *landed*. I coded the results into one of three categories: encompassing land, excluding land, or ambiguous. I found no overwhelmingly dominant category, though the land-included category was the majority of usage:



The following 20 passages I coded as the land-included category (I have copied and pasted from COFEA, including with typos, non-standardized spelling, and punctuation errors):

> 1. persdhs who have had the occupation , or have been in the quiet possession , of any houses , lands , tenements , or other **possessions** , for the space of three whole years next before , and his or their estate or estates therein , is not ended
>
> 2. any other manner , by due form of law , that he or they entered into his house , lands , tenements or other **possessions** , by force . Provided always , that this act shall not extend to any person or persdhs who have had the occupation
>
> 3. assistant or assistants , jnstice or justices reside ; or of any wrongful detainer of any such houses , lands , tenements , or other **possessions** , by force , or strong handst that is to say , by , or with , such violent words or actions , as have a

70 As this is not a sample, but all instances, there is no need to report a confidence interval for the following results.

4. the same are held by force ; then such assistants , or justices , shall cause the same houses , lands , tenements , or other **possessions** , to be re - seized , and the party to be put in possession thereof , who in such manner was put or

5. new Canadian Subjects, That nothing in the Order of that Date contained, should affect the Property of such as had **possessions** under proper Titles in Lands on the South Side of the Line, the Dominion of which was not disputed on

6. if it be found on such enquiry , that a forcible entry hath been made into houses , lands , tenements , or other **possessions** , or that the same are held by force ; then such assistants , or justices , shall cause the same houses , lands , tenements

7. or more assistants or justices of the peace , of any forcible entry made in any house , lands , tenements , or other **possessions** , lying within the county where such assistant or assistants , jnstice or justices reside ; or of any wrongful detainer of any

8. to cause to come before them , eighteen sufficient and indifferent persons , dwelling near unto the houses , lands , tenements , or other **possessions** , so entered upon or held as aforesaid , whereof fouvrteen shall be sworn well and truly to enquire of such forcible

9. government of this state , for the time being , touching or concerning the ratifying , confirming and quieting any titles to , or **possessions** of , lands within the district aforesaid , in cases not provided for by this act , and of and concerning the mode

10. happen, the farmers will be better off, than other people. Many of those that made up the Congress have large **possessions** in land, and may, therefore be looked upon as farmers themselves. Can it be supposed, they would be careless about

11. and House our assessed by the assessors appointed by the said Proprietors , and n 125 . r ; ce for quieting the **possessions** of such Persons who hold Lands there 8aw , as 2 ; under the said sales , notwithstanding there were some circumstanae

12. much, as to render it well worth the testator's attention to change his will when he changes his landed **possessions** , and to be too great to be thrown into a sweeping residuary clause. Now lítese reasons are applicable to property

13. inhabitants were too few for the country, and want of people and money gave men no temptation to enlarge their **possessions** of land, or contest for wider extent of ground, are little more than generals of their armies; and though they

14. gentry, and an infantry of the commons. See 13 Edw. I. cap. 6, for arming the people according to their **possessions** in lands *. In the •ower are the records of the militia grants for cu•••dy

15. collecting. My thoughts therefore on the subject you propose will be merely extempore. The opinion that our lands were allodial **possessions** is one which I have very long held, and had in my eye during a pretty considerable part of my

16. both lasting and scarce, and so valuable to be •oarded up, there men will be apt to enlarge their **possessions** of land, were it never so rich, never so free for them to take: for I ask, what would a

17. was not the ge|nius of the feudal policy to encourage cities, or to shew any regard for their **possessions** and immunities, these lands had been seized, and shared among the conquerors. The barons to whom they were grant

18. or Houshold, such necessaries, as may be raised on the Lands of the Company. 5. That any Lands, or other **possessions** of the said Philip Mazzei, which he may at this time have, and which are proper for the purposes of

19. in such manner that their location would remain permanent , fixed , and certain , would prevent disputes , differences , and law fults , quiet **possessions** , and of course render lands more valuable . Section I . Be it therefore enaced by the Senate and House of Representatives

20. happen, the farmers will be better off, than other people. Many of those that made up the Congress have large **possessions** in land, and may, therefore be looked upon as farmers themselves. Can it be supposed, they would be careless about

There are several ways that it becomes clear that the use of the term *possessions* in the excerpts above included land. Sometimes, the term was modified by an adjective indicating that it was only referring to possessions of land, such as "allodial possessions" or "landed possessions." Likewise, sometimes the term was part of a larger phrase with the same effect as the adjectives just noted: "possessions of land" or "possession in land." Of course, the term as used in the Pennsylvania Constitution neither has an adjective before nor is followed by a prepositional phrase that clarifies that it is only referring to land.

A third way the excerpts above show that land was included in *possessions* was by context, where reading additional material before and after shows that the type of *possessions* being referred to are landed ones. The fourth way *possessions* included land was when it was the last item in a list that included lands, usually preceded by the term "other." The Pennsylvania Constitution does not include "other" before *possessions*, though it may be implied.

Finally, some of the excerpts above seem particularly relevant to the context of unreasonable searches, wherein they speak of forcible entry by government officials.

The 13 results below I placed in the land-excluded category:

1. not chargeable or liable, nor have not been bounden, charged or hurt of their bodies, liberties, franchises, lands, goods, nor **possessions** within the same county, but by such laws as they have agreed unto— and also, they have no knights, citizens

2. the hoidfe , lands , or possessions of any other person , or being entered peaceably , thall forceably hold the house , lands or **possessions** of any olher person within this government , thall be proceeded against and punished as by the several fratutes made against

3. Thou shalt not covet, &c." He coveting, did take the Saw-Mill-Logs, Boards, and also, the Lands, Labours, **possessions** , Farms, Tene|ments, &c. &c. from the rightful Owners, Pro|prietors, and first Occupants thereof, without

4. be convinc'd, it seems, that the Bishops of the English church, ought to enjoy the church "livings, lands and **possessions** ," have seats in parlia|ment, and even become members of the board of TRADE. We doubt not indeed, but

5. namely the manner of government, from time to time, to be used, the ordering and disposing of the lands and **possessions** , and the settling and establishing of a trade there, or such like, there shall be held and kept, every year

6. It is storied in their own history, that when the Emperor Con|stantine endowed the church with lands and **possessions** , the voice of an Angel was heard in the air, crying, Hodie venenum infun|ditur in ecclesiam. This day

7. do right upon writs of assise brought before them by such as are wrongfully thrust out of their lands and **possessions** , &c. 4. Of nisi prius, directed to the judges and clerk of assise, by which civil causes grown to

8. minds Religion was precious in their eyes; they were willing to leave houses and lands, and many dear and valuable **possessions** , for the sake of enjoying it in its purity. But they were men, and like other good men they were

9. to distress him by all the ways they can think of, such as the seizing on his Castles, Lands, and **possessions** , provision being only made for the safety of the persons of the King and Queen, and of their children.

10. namely the manner of government, from time to time, to be used, the ordering and disposing of the lands and **possessions** , and the settling and establishing of a trade there, or such like, there shall be held and kept, every year

11. have Means by which they might effectually perform these Duties.—Considering these Things, they liberally set apart Livings, Lands and **possessions** , for the Use of the Church; and tho' these have been invaded by the avaricious Hand of Persecution, and mangled

12. of any of the inheritors or inheritance of the said county, of their bodies, liberties, franchises, goods, lands, tenements or **possessions** , being within the said county. For if any such act should be made, it were clean contrary to the liberties

13. failing of redress, shall lawfully distress and aggrieve the king all manner of ways, as by taking his castles, lands, **possessions** , &c. till redress is granted. After the restoration comes the corporation-act, and declares all resistance unlawful. The same

Here we can tell that *possessions* does not include land because it is listed separately from it without something like "other" or "nor" preceding the term. And the sense of *possessions* seems to be something like personal property, as opposed to real property, as often other items in the list—castles, houses, tenements, lands, etc.—are real property.

Finally, I found four instances sufficiently ambiguous to categorize them as such:

> 1. in Edward the Confessor's time." So that the Norman King• claim no other right in the lands and **possessions** of any of their subjects, than according to English law and right. And so tender were they of p[ro]perty

While at first glance this seems to be an instance of land-excluded *possessions*, in reading the broader context before and after this excerpt, it could be referring to houses and tenements, so I coded it as ambiguous.

> 2. they were called to govern and protect. Our fathers would never have forsook their native land, delightsome habitations and fair **possessions** , and in the face of almost every danger and distress, sought a safe retreat, for the enjoyment of religious and

I could not tell whether *possessions* was being used as a synonym for *land* and *habitations* since the latter can mean a land where one dwells, and thus for rhetorical flourish it was a list of three very similar things. Alternatively, the word *habitations* could have been used in the sense of houses, and thus we have a list of three different things wherein *possessions* likely means personal property.

> 3. General Afembly met , and by the authority of the fame , That whosoever shall forcibly enter into the hoidfe , lands , or **possessions** of any other person , or being entered peaceably , thall forceably hold the house , lands or possessions of any olher person

On the one hand, this seems to be treating *possessions* as distinct from real property, indicating a reference to personal property, but on the other hand, one cannot forcibly enter into personal property, so this could mean other real property, such as tenements.

> 4. Complaint for the Future , may remain , that any unjust Measures are used to defraud the Indians of their Lands or **possessions** ; and agreeable to their Request at said Treaty ; Be It Enacted by the . 4uthority ajorejaid , That no Sale , Conveyance , or

I could not tell whether this was referring to personal property, as would be implied by the phrasing, or whether the "or" was being used in the sense of "or, in other words, their," whereby *possessions*

is just another way to describe lands. Perhaps my uncertainty was driven by a question of what possessions "Indians" had that they were defrauded of other than lands.

D. Sample of "*Possessions*"

Because *possessions* in the context of *land* differs from the language of the Pennsylvania Constitution, I next searched for all instances of *possessions* from 1760-1776 in COFEA.[71] This returned 507 results. I downloaded these to a spreadsheet and then randomly selected a number[72] for the first concordance line to code and coded every fifth line in order to sample 100 concordance lines.[73] I coded each line into one of four categories:

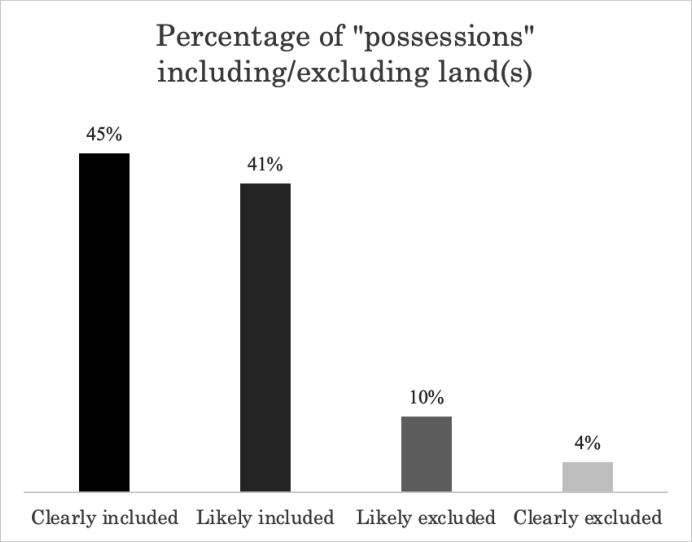
(1) Clearly includes land

(2) Likely includes land

(3) Likely excludes land

(4) Clearly excludes land

As can be seen in the following chart, the results were overwhelmingly in favor of the term *possessions* including land.

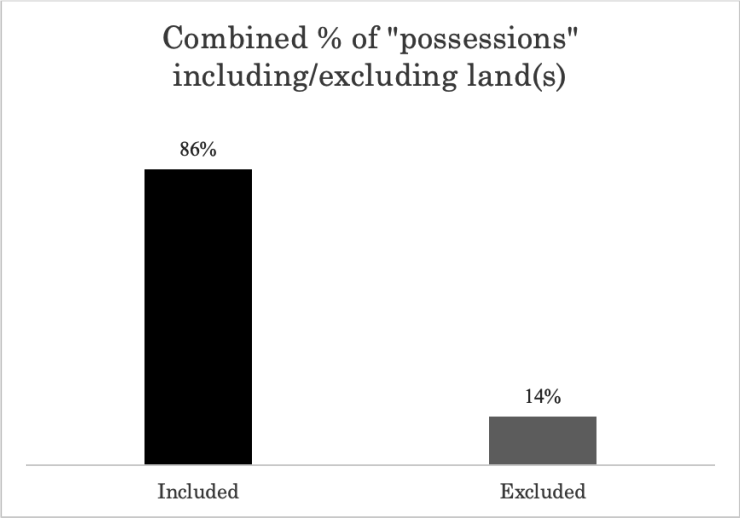


71 This time period covered 28,182,558 words and 19,342 documents.

72 *See* Appendix, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4780581 [https://perma.cc/G8XQ-Q5SZ].

73 This resulted in 99 coded lines. So, I randomly selected a 100th line to make the sample complete (line 421). If a line to be coded was not readable or was quoting a similar constitutional provision, as a few were, I coded the next line.

In nearly half of the sample (45%), *possessions* clearly included land. And in another two-fifths of the sample (41%), land was likely included in the term *possessions*. Yet only 10% of the time was land likely excluded, and just one of every twenty-five instances, (4%) of the term results, was land clearly excluded. By collapsing the "clearly" and "likely" categories, the pattern becomes even more stark.



A full 86% of the time *possessions* likely or clearly included land and 14% of the time, *possessions* likely or clearly excluded land.[74] In other words, it was over six times more likely that *possessions* included land than that it did not (and over 11 times more likely when just looking at the instances where land was either clearly included or excluded).[75] In fact, sometimes the word *possessions* was being used as a synonym for *lands*.

This analysis is arguably more relevant than the first analysis above where the term *possessions* is used in the context of *land* since that is not how these constitutional provisions are worded. Thus, it appears in the sample taken of language usage from 1760-

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74 Clearly included (45%), likely included (41%), likely excluded (10%), clearly excluded (4%).

75 With a confidence level of 95%, and assuming an equal population proportion, a sample size of 100 from a population of 507 yields an 8.79% margin of error. Thus, there is a 95% chance that the real value in the underlying population ranges from 77-95% including land and 5-23% excluding land.

1776, when the term *possessions* was used, it overwhelmingly included land.

CONCLUSION

Founding Era Americans tended to use the word *possessions* to include land one owned. In the context of the lemma *land*, a majority of the time the word *possessions* appeared to include land as property. More significantly, when looking more broadly at any instance of the term *possessions*, whether or not the lemma *land* was used nearby, early Americans used the term to include land approximately 86% of the time. This is evidence, then, that the Pennsylvania Constitution, and likely other early state constitutions, were originally understood to protect against unreasonable searches of one's land—thus providing broader protection than the U.S. Constitution's Fourth Amendment.

The BEPS "Revolution" and the Future of Corporate Income Taxation

Grace LeBlanc[*]

INTRODUCTION 166
I. BACKGROUND 168
A. Tax Competition and Profit Shifting 168
B. The Role of Transfer Pricing and Historical Responses to Profit Shifting 171
1. The Arm's Length Principle 172
2. Tax Havens 174
3. MNC Investment and Profit Shifting from Developing Countries 176
C. Evolution of the OECD's Attempts to Curb Profit Shifting 178
II. THE UNITED STATES' ROLE IN THE INTERNATIONAL TAX SYSTEM AND PROFIT SHIFTING BEHAVIOR WITHIN ITS BORDERS 179
A. Profit Shifting by U.S. MNCs 179
B. The Arm's Length Principle and the U.S. Shift Toward a Minimum Tax 181
C. Delaware 186
III. PROFIT SHIFTING IN THE CASE OF DEVELOPING COUNTRIES 189
A. Tax Competition Pressures in Developing Countries 190
B. Unequal Footing in the International Tax System 191
IV. THE BEPS TRAJECTORY AND ITS IMPACTS ON DEVELOPING COUNTRIES 194

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A. BEPS 194
1. Country-by-Country Reporting 194
2. Two-Pillar Solution 197
B. Post-BEPS Reality for Developing Countries 200
V. THE U.S. PATH FORWARD AND SOLVING INTERSTATE PROFIT SHIFTING 202
A. The United States in a Two-Pillar World 202
B. U.S. States' Successes in Fighting Interstate Profit Shifting 207
CONCLUSION 211

INTRODUCTION

Certain tax-motivated behaviors of multinational corporations ("MNCs") have left governments perplexed. MNCs conduct a significant amount of business among their own related entities, and they can manipulate the prices of transactions between these entities to achieve lower effective tax rates. These behaviors—often termed "profit shifting"—have garnered a growing amount of attention in the last couple of decades as MNCs have taken advantage of the lack of cooperation among governments and their tax laws. Globally, while wealthy countries like the United States have struggled to rein in corporate profit shifting, poorer, developing countries tend to struggle more because, historically, they lack an adequate seat at the table in international tax discussions. Profit shifting takes place not only across international borders but within the United States as well. The difficulties that U.S. states face in trying to control profit shifting resemble the same roadblocks that have plagued international tax reform efforts.

For decades, the international tax community has failed to meaningfully address how MNCs exploit the tax laws of sovereign nations. This is partially due to the inherent difficulties in coordinating cross-border tax rules, but it is also a result of wealthy countries maintaining aggressive positions to protect their tax sovereignty. The tax strategies discussed in this Note, while executed lawfully, foment distrust in government and corporate institutions. As major corporations saw a 41% increase in profit over the first years of the COVID-19 pandemic, and workers saw only a 5% increase in their wages, it should not come

as a surprise that "low-wage workers [are] quitting at near-record rates."[1] The strategies also disproportionately harm the least developed countries that are often major exporters of valuable resources but, somehow, have failed to develop economically.[2]

This Note contributes to the wide range of economic and legal literature discussing the United States and the Organization for Economic Cooperation and Development's ("OECD") responses to profit shifting in the modern world. This Note seeks to fill a gap in the literature by arguing that, while the most recent shifts in the treatment of MNC tax behavior have been radical in some ways, the United States' role as the chief influencer in international corporate tax reform has frustrated true progress.

The Note proceeds in seven parts. Following this introduction, Part I provides an overview of tax-motivated profit shifting via transfer pricing. It addresses how, over time, MNCs have created a geographical chasm between their profit-making activities and their actual profits and how developing countries have experienced a disparate amount of harm as a result. It also provides a brief historical discussion of the OECD's responses to MNC tax planning prior to the launch of its monumental Base Erosion and Profit Shifting ("BEPS") project. Part II first discusses the United States' position in the international tax system as a key influencer of global policy and then explores Delaware's role as a tax haven and how U.S. states are impacted by this system.

Part III provides a closer look at the factors that have contributed to developing countries' unequal role in international tax reforms. Part IV outlines the OECD BEPS project, with a specific focus on its two-pillar solution, and then examines the likely impact the BEPS project will have on developing countries. Part V assesses the United States' uncertain role in a two-pillar world, and its states' success in reforming their tax laws to prevent artificial profit shifting and tax base erosion. Finally, this Note provides concluding comments on the power shifts exemplified by

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1 Juliana Kaplan & Madison Hoff, *5 Major Companies Together Saw Their Profits Increase 41% During the Pandemic, 8 Times Faster Than Their Workers' Wages, According to a New Brookings Report*, BUS. INSIDER (Apr. 26, 2022, 9:42 AM), https://www.businessinsider.com/major-companies-together-saw-profits-grow-faster-than-real-wages-2022-4 [https://perma.cc/P7D6-83NP]. The companies studied included Amazon, Walmart, CVS, Target, and Kroger, and the data reflects profits and wages from January 2020 to October 2021. *Id.*

2 *See* discussion *infra* Part I.B.3.

the two-pillar solution and speculates on what the solution's likely fate indicates about the state of the global tax order.

I. BACKGROUND

A. Tax Competition and Profit Shifting

Technological development and the resulting globalization of economic activity have led to the massive growth of MNCs.[3] National governments have struggled to regulate certain cross-border business activities of MNCs due to their "aggressive tax planning," which results in revenue gaps for tax authorities.[4] In 2013, the OECD, the leading organization on international tax policy, launched its BEPS project to address the competitive advantage held by MNCs because of their tax planning strategies.[5] The vast success of these strategies has raised questions of fairness in terms of treatment under the law and has been subject to massive public scrutiny.[6]

In conflict with the goal of international tax fairness is the desire of individual countries to lower their corporate tax rates to attract investment.[7] On average, the statutory corporate tax rate of OECD countries declined from 41% to 23% between 1981 and

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3 *See* Connor L. Smith, *Reflections from the Brink of Tax Warfare: Developing Countries, Digital Services Taxes, and an Opportunity for More Just Global Governance with the OECD's Two-Pillar Solution*, 63 B.C. L. REV. 1797, 1803–04 (2022).

4 OECD, BEPS PROJECT EXPLANATORY STATEMENT: 2015 FINAL REPORTS 4 (2015), https://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf [https://perma.cc/ZKQ4-GJDE] [hereinafter BEPS Explanatory Statement].

5 *See What Is BEPS?*, OECD, https://www.oecd.org/tax/beps/about/ [https://perma.cc/6N8R-CLRU] (last visited Nov. 11, 2023). The OECD's stated purpose is to, "develop policy standards to promote sustainable economic growth." *The Organization for Economic Cooperation and Development (OECD)*, U.S. DEP'T OF STATE, https://www.state.gov/the-organization-for-economic-co-operation-and-development-oecd/ [https://perma.cc/62BZ-5FRH] (last visited Nov. 11, 2023).

6 *See, e.g.*, Megan Cerullo, *60 of America's Biggest Companies Paid No Federal Income Tax in 2018*, CBS NEWS (Apr. 12, 2019, 11:15 AM), https://www.cbsnews.com/news/2018-taxes-some-of-americas-biggest-companies-paid-little-to-no-federal-income-tax-last-year/ [https://perma.cc/J64M-AEA8]; Luke Harding, *What Are the Panama Papers? A Guide to History's Biggest Data Leak*, THE GUARDIAN (Apr. 5, 2016, 5:42 AM), https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers [https://perma.cc/7ARK-NSBV] (explaining the whistleblower documents known as "The Panama Papers" which revealed widespread use of offshore tax havens).

7 *See* Kimberly A. Clausing, *Taxing Multinational Companies in the 21st Century*, *in* TACKLING THE TAX CODE 240 (Jay Shambaugh & Ryan Nunn eds., Brookings 2020) [hereinafter Clausing, *Taxing Multinational Companies*].

2014.[8] Commenting on the phenomenon of corporate tax competition, economist Kimberly Clausing stated:

> In many countries policymakers have responded to tax competition pressures by slowly and steadily lowering corporate tax rates and shifting more of the tax burden onto labor and consumption. These trends are troubling for a number of reasons. In a larger economic context of increasing economic inequality and a declining labor share of income, such tax policy trends risk both exacerbating income concentration and reducing possible public revenue sources. There are also risks to the larger integrity of income tax systems.[9]

While corporate profits in the United States spiked between 2000 and 2015, U.S. corporate tax revenue remained relatively static over the same period.[10] This discrepancy between profits and tax revenue reflects that, through policy preference or accepted practice, the United States has taxed less corporate profit than what its statutory rate portends to apply. One explanation for the divergence is profit shifting.[11]

When MNCs shift profits, the taxes they pay to one tax authority may not reflect the extent of their "real economic activities" in that jurisdiction.[12] Instead, profits generated from real economic activities are moved, usually between affiliates of the same MNC, to low-tax jurisdictions where the income-generating activity does not take place.[13] One method of profit shifting that takes place between intra-firm affiliates is through transfer pricing.[14] Transfer pricing is the process of MNC affiliates transacting with one another, and the transfer price is the price charged for the transaction.[15] Profit shifting is achieved when transfer prices are manipulated in these transactions to reflect an artificially

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8 Kimberly A. Clausing, *The Nature and Practice of Capital Tax Competition*, *in* GLOB. TAX GOVERNANCE 6 (Peter Dietsch & Thomas Rixen eds., ECPR Press 2015) [hereinafter Clausing, *The Nature and Practice of Capital Tax Competition*].

9 Clausing, *Taxing Multinational Companies*, *supra* note 7, at 238.

10 *See Hearing on Increasing U.S. Competitiveness and Preventing American Jobs from Moving Overseas: Hearing Before the H. Comm. on Ways & Means*, 115th Cong. 1–3 (2017) (statement of Kimberly A. Clausing, Thormund A. Miller and Walter Mintz Professor of Economics, Reed College) [hereinafter Clausing, 2017 Testimony].

11 *Id.* at 3.

12 Clausing, *The Nature and Practice of Capital Tax Competition*, *supra* note 8, at 9.

13 *Id.* at 9–10; Markus Henn, *Tax Havens and the Taxation of Transnational Corporations*, FRIEDRICH-EBERT-STIFTUNG 4 (June 2013), https://library.fes.de/pdf-files/iez/global/10082.pdf [https://perma.cc/E3FU-RFSV].

14 *See Action Plan on Base Erosion and Profit Shifting*, OECD 19, https://www.oecd.org/tax/action-plan-on-base-erosion-and-profit-shifting-9789264202719-en.htm [https://perma.cc/GM94-898G] (last visited Nov. 13, 2023) [hereinafter OECD 2013 Action Plan]; Henn, *supra* note 13, at 12.

15 Henn, *supra* note 13, at 4.

low or high price.[16] This process allows MNCs to move costs to high-tax jurisdictions while moving profits to low-tax jurisdictions.[17]

Consider the following example. In 2010, tax authorities in Zambia conducted an independent audit to assess the tax information of copper and cobalt mines owned by Glencore, one of the world's largest mining multinationals.[18] The audit revealed several inconsistencies in Glencore's transactions between its Zambian mining affiliate and other related affiliates. The tax authority found it suspicious that the Zambian affiliate reported $90 million in labor *costs*, double what it reported in the previous year, "without any increase in the number of employees."[19] The audit also uncovered that the mines' cobalt production and copper and cobalt sale prices reported in transactions with Glencore affiliates were unreasonably low when compared to the production rates of similar mines and the international exchange rate of similar minerals.[20] At first glance, it appears that the Zambian affiliate got a bad deal for these exports, but because it sold to a Swiss-based Glencore affiliate subject to a lower tax rate than the Zambian entity, Glencore achieved a tax benefit from this transfer pricing strategy.[21] This example demonstrates that distortions in transfer prices can occur not only in transactions of tangible commodities, like copper and cobalt, but also with transactions of intangible goods, like labor costs.

This transfer price manipulation was apparently executed for the purpose of reducing taxable income in the source country where the profits were technically generated. The OECD and its members have made strides toward international cooperation to undermine and disincentivize this kind of profit shifting. Still, the pressures from tax competition play a major role in determining the extent and scope of this cooperation. The OECD defines base erosion and profit shifting as MNCs "exploit[ing] gaps and mismatches or loopholes in the international tax rules to

16 JANE G. GRAVELLE, CONG. RSCH. SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 1 (2022).

17 Henn, *supra* note 13, at 4.

18 *Id.* at 5; M. Garside, *2023 Global List of Leading Mining Companies Based on Revenue*, STATISTA (Oct. 30, 2023), https://www.statista.com/statistics/272707/ranking-of-top-10-mining-companies-based-on-revenue/#:~:text=Mining%20company%20Glencore%20was%20ranked,In%20second%20place%20was%20BHP [https://perma.cc/Q9MM-QX5Q].

19 Henn, *supra* note 13, at 5.

20 *See id.* at 6.

21 *See id.*

artificially shift profits to lower the amount of tax they pay."[22] These loopholes have persisted because of the pressures of tax competition. Tax competition-driven policy choices result in a vacillating approach toward international reforms, even though the United States and other similarly situated countries acknowledge that profit shifting is a problem warranting international cooperation.

B. The Role of Transfer Pricing and Historical Responses to Profit Shifting

To be sure, transfer pricing is a widely used mechanism by MNCs in a global economy where a significant portion of "trade" occurs between related entities.[23] The exchange of intangible and tangible goods between members of the same MNC is not "trade" as it is traditionally understood.[24] Instead of goods and services being traded between independent entities, intra-firm trade, as it suggests, involves moving goods and services between related affiliates of the same MNC.[25] Because the MNC exercises significant control over these intra-firm transactions and because of the many different tax rules governing cross-border trade, ensuring that profits are appropriately taxed presents challenges to tax authorities.[26] Hypothetically, one MNC affiliate could sell to a related party "worthless goods for millions" and thereby allocate those inflated profits to a low-tax jurisdiction, reaping major tax benefits.[27] More commonly, though, transfer pricing manipulation happens on a smaller scale, making it difficult both to detect and to regulate.[28]

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22 *See Combatting International #Tax Avoidance: Ending Offshore Profit Shifting*, OECD, https://www.oecd.org/about/impact/ending-offshore-profit-shifting.htm [https://perma.cc/VK4M-VPG9] (last visited June 17, 2023).

23 *See* Tim Hirschel-Burns, *Countering Complexity's Corporate Bias: Tax Simplification as a Strategy to Reduce Profit Shifting in the African Extractive Sector*, 47 YALE J. INT'L L. 165, 170 (2022); Henn, *supra* note 13, at 4; Nick Shaxson, *Over a Third of World Trade Happens Inside Multinational* Corporations, TAX JUST. NETWORK (Apr. 9, 2019), https://taxjustice.net/2019/04/09/over-a-third-or-more-of-world-trade-happens-inside-multinational-corporations/ [https://perma.cc/WQM9-7E3A]; *SOI Tax Stats – Country by Country* Report, IRS, https://www.irs.gov/statistics/soi-tax-stats-country-by-country-report [https://perma.cc/EL68-9KT6] (last visited June 17, 2023).

24 *See* Henn, *supra* note 13, at 4–5.

25 *See id.* at 4.

26 *See id.* at 5; OECD 2013 Action Plan, *supra* note 14, at 9.

27 *See* Henn, *supra* note 13, at 5.

28 *See, e.g.*, *id.*; Richard Thompson Ainsworth, *IT-APAs: Harmonizing Inconsistent Transfer Pricing Rules in Income Tax – Customs – VAT*, 34 RUTGERS COMPUT. & TECH. L.J. 1, 6–7 n.12 (2007); Hirschel-Burns, *supra* note 23, at 171.

1. The Arm's Length Principle

The line between legal tax avoidance and illegal tax evasion is quite fine in the context of transfer pricing.[29] An MNC establishing a business in a low-tax country "to take advantage of low foreign corporate tax rates is engaged in avoidance," but an individual U.S. citizen failing to report income in an offshore account is considered tax evasion.[30] Because intra-firm transactions are purposefully structured, in most cases, to be legally compliant, transfer pricing that benefits an MNC's tax position is often classified as technically legal *tax avoidance*.[31] However, when price setting between MNC affiliates is manipulated to an artificial level to benefit the MNC's tax standing, it may be more accurately viewed as evasion.[32]

Generally, transfer prices are evaluated by tax authorities under the arm's length principle, where MNC subsidiaries are treated as separate entities for accounting purposes despite their fundamental commonality.[33] If the price paid in an intra-firm transaction is reasonably comparable to the price of a similar transaction between unrelated parties, the transfer price is at arm's length.[34] In practice, though, even if MNCs are brought to court over suspect instances of transfer pricing, MNCs can distinguish comparable transactions to justify their chosen transfer price.[35] Therefore, profits being shifted through abusive transfer pricing are elusive. It is difficult to classify transfer pricing as abusive in the first place because of the limitations inherent in using the arm's length standard, which further complicates any attempts to measure the extent of profits shifted by means of manipulated transfer prices.[36]

Tax-motivated transfer pricing in transactions exchanging tangible goods, like oil or cobalt, presents difficulties for developing economies in terms of regulation and enforcement.[37] However, when intra-firm transactions involve intangible goods,

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29 *See* Hirschel-Burns, *supra* note 23, at 172; GRAVELLE, *supra* note 16, at 1.

30 GRAVELLE, *supra* note 16, at 1.

31 *See id.*

32 *See id.*

33 *See* Yariv Brauner, *Value in the Eye of the Beholder: The Valuation of Intangibles for Transfer Pricing Purposes*, 28 VA. TAX REV. 79, 96 (2008).

34 *See id.*

35 *See* Hirschel-Burns, *supra* note 23, at 171.

36 *See id.* at 171–72; *see also* GRAVELLE, *supra* note 16, at 1.

37 *See* Hirschel-Burns, *supra* note 23, at 176–77.

the difficulties faced by both developed and developing countries in addressing profit shifting are much greater.[38] The arm's length price for a tangible good can be more objectively determined "because there are standardized and easily observable international prices" for such commodities.[39] Transactions of intangibles, on the other hand, often involve industry or entity-specific goods and services that lack market comparables.[40] Some examples of intangibles that intra-firm affiliates might exchange include patents for mineral extraction processes,[41] licenses for the use of certain technologies,[42] and general management services.[43] Technology MNCs, for example, have sold the intellectual property underlying their most crucial technologies to subsidiaries established in Ireland and Bermuda for tax purposes.[44] Once the subsidiary owns the technology in the low-tax country, other affiliates of the same MNC in high-tax countries "pay billions of dollars in royalties" to the subsidiary.[45] This reduces the taxable

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38 *See id.* at 171; *see also* Henn, *supra* note 13, at 5.

39 Hirschel-Burns, *supra* note 23, at 194.

40 *See* U.N. Dep't Econ. & Soc. Affs., *Practical Manual on Transfer Pricing for Developing Countries*, 29, U.N. Doc. ST/ESA/ (2017) https://www.un.org/esa/ffd/wp-content/uploads/2017/04/Manual-TP-2017.pdf [https://perma.cc/29KL-JQSX].

41 *See* Hirschel-Burns, *supra* note 23, at 171–72.

42 *See* EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY 74–75 (2019).

43 *See* Monica Iyer, *Transferring Away Human Rights: Using Human Rights to Address Corporate Transfer Mispricing*, 15 NW. J. HUM. RTS. 1, 4 (2017).

44 *See* SAEZ & ZUCMAN, *supra* note 42, at 74–75. Not long before Google was listed as a public company in August of 2004, it sold the technology underlying its search and advertising features to its Irish-incorporated subsidiary, "Google Holdings," which "for Irish tax purposes [was] a resident of Bermuda." *Id.* at 74. While the amount Google Holdings paid for this technology is not publicly known,

> [I]t's easy to conjecture that the price paid . . . was modest. Why? Because if it had been high, Google would have paid a substantial tax in the United States in 2003. But that year, according to the prospectus it filed in 2004 with the Securities and Exchange Commission, it paid $241 million globally. Even if the company's entire tax bill resulted from the sale of Google's intangibles to its Bermuda subsidiary (which is unlikely, as Google probably paid taxes for other reasons), it would imply a sale price for the intangibles of less than $700 million. That's not much for an asset that has generated dozens of billions in revenue since then.

Id. at 74–75. Similarly, Skype sold its important voice-over technology to a Skype affiliate incorporated in Ireland in 2004. *See id.* at 75. Financial documents that were leaked in 2014 revealed that Skype's Ireland affiliate paid 25,000 euros for this technology, a dubious amount considering eBay purchased Skype for $2.6 billion only a few months later. *See id.* at 75. For context, Bermuda has a corporate tax rate of 0%, and Ireland has a legal tax rate of 12.5%, though "in practice [it is] often much less." *Id.* at 73, 75.

45 *Id.* at 75.

income of the affiliate in the higher-tax jurisdiction while shifting profits to the subsidiary in the low-tax jurisdiction.[46]

2. Tax Havens

The primary mechanism that makes profit shifting effective for avoiding or evading taxes is the use of shell entities in tax havens.[47] Tax havens are usually countries with low populations and effective governments that impose minimal tax rates on foreign investors.[48] Coupled with having low or zero foreign corporate tax rates, tax havens have historically offered a level of secrecy "with varying degrees of refusal to co-operate with other jurisdictions in exchanging information."[49] A notable characteristic of tax havens highlighted by the OECD is the lack of a requirement that incorporated entities have substantial economic activity in the haven jurisdiction.[50] It is this segregation between true economic activities and profit allocation by MNCs that requires international cooperation to address unfair MNC tax practices.[51]

Data on MNC activity in the lowest tax jurisdictions tend to validate that MNC affiliate establishment in these jurisdictions is almost wholly tax-motivated. In tax havens, non-domestic corporations record substantially greater profits than entities domestic to that haven jurisdiction.[52] In high-tax jurisdictions, however, foreign corporations "are slightly *less* profitable than local firms."[53] Foreign firms surpassing the profits of domestic firms is a trait unique to haven jurisdictions.[54] Moreover, in 2011, seven out of the ten countries with the highest foreign profits for

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46 *See id.*

47 *See* Kimberly Clausing, *Five Lessons on Profit Shifting from the US Country by Country Data*, 169 TAX NOTES FED. no. 6 925, 926 (2020) [hereinafter Clausing, *Five Lessons*].

48 Dhammika Dharmapala & James R. Hines Jr., *Which Countries Become Tax Havens?*, 93 J. OF PUB. ECON. 1058, 1058 (2009) ("Indeed, there are almost no poorly-governed tax havens.").

49 Nicholas Shaxson, *Explainer: What Is a Tax Haven?*, THE GUARDIAN (Jan. 9, 2011), https://www.theguardian.com/business/2011/jan/09/explainer-what-is-tax-haven [https://perma.cc/YL8P-PXAX].

50 *See* Org. for Econ. Coop. and Dev. [OECD], *Harmful Tax Competition: An Emerging Global Issue*, 22, ¶ 52 (1998), https://www.oecd.org/ctp/harmful/1904176.pdf [https://perma.cc/P8YT-ZU2K].

51 *See* OECD 2013 Action Plan, *supra* note 14, at 10.

52 *See* Thomas Tørsløv, Ludvig Weir, & Gabriel Zucman, *The Missing Profits of Nations,* REV. OF ECON. STUD. 3 (2022).

53 *Id.* (emphasis added).

54 *See id.* at 3.

U.S. MNCs had an effective tax rate of less than 6.5%.[55] Out of all U.S. MNC foreign profits for that year, 46.5% were earned in those seven countries, but only 5% of U.S. MNCs' foreign employment was attributed to them.[56]

In contrast, in the top ten countries where U.S. MNCs employ the most people, none have a tax rate lower than 6.5%.[57] These higher-tax countries wherein U.S. MNCs employ the most people "are the obvious large market countries where one would expect U.S. multinational corporations to have operations abroad for economic purposes."[58] However, the disproportionate profits recorded in countries with minimal employment suggests that there are other nonoperational reasons for an MNC to establish and allocate profits there. The contrast between higher tax rates where U.S. MNC real economic activity is located and the lower tax rates where profits are found indicates that tax-motivated behaviors are at play.

Several jurisdictions located in the Caribbean, West Indies, and Europe have been identified by various authorities and experts as tax havens.[59] Understanding the role that tax havens play in global tax competition, the OECD launched its "harmful tax practices" project in 1996[60] and published its first tax haven list in 2000.[61] Over time, some jurisdictions originally identified by the OECD as havens were removed from its list due in part to the OECD's renewed focus on cooperation and transparency.[62] Despite the assumed progress associated with greater cooperation with haven jurisdictions, some point out that the reduction in the number of havens on the OECD's list did not correlate with a reduction in tax haven activity.[63]

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55 *See* Clausing, *The Nature and Practice of Capital Tax Competition*, *supra* note 8, at 10. The seven low-tax countries in 2011 wherein U.S. MNCs recorded some of their highest foreign profits were the Netherlands, Ireland, Luxembourg, Bermuda, Switzerland, the Cayman Islands, and Singapore. *Id.* at fig. 3.

56 *Id.* at 10.

57 *Id.* The ten higher-tax countries where U.S. MNCs employ the most people are the U.K., China, Canada, Mexico, India, Germany, Brazil, France, Japan, and Australia. *See id.* at fig.4.

58 *Id.* at 10.

59 GRAVELLE, *supra* note 16, at 4.

60 JAMES K. JACKSON, CONG. RSCH. SERV., R40114, THE OECD INITIATIVE ON TAX HAVENS 9 (2010).

61 GRAVELLE, *supra* note 16, at 4.

62 *Id.* at 5.

63 *Id.*

The United States had rejected the OECD's characterization of "harmful tax practices" in 2001 when the Treasury Secretary under the George W. Bush Administration described those practices as "provid[ing] a more attractive investment climate without facilitating noncompliance with the tax laws of any other country."[64] In response, the OECD tempered its approach from targeting "harmful tax practices" to "improving exchanges of tax information between member countries."[65] Therefore, tax havens continued to contribute to unfettered tax competition because attempts at increasing transparency did not deter MNCs' use of them, and the incentives to use them for tax-motivated profit shifting remained.[66] Tax competition, in this sense, describes tax havens' ability to set rock-bottom corporate tax rates and the inclination of MNCs to shift their taxable income to the lowest tax jurisdiction available.[67] The former Treasury Secretary communicated the United States' view at the time that this type of tax competition should not be discouraged—it should be applauded because it spurs economic investment. The OECD's retreat from a more potent response exhibits the OECD's willingness to capitulate because of these concerns about tax competition. It demonstrates the United States' sway over the organization and, in turn, the magnitude of any collective condemnation of unfair tax practices.

3. MNC Investment and Profit Shifting from Developing Countries

Developing countries—countries classified as low or middle-income with underdeveloped economies—tend to suffer from the effects of profit shifting at a higher degree than their further developed counterparts.[68] This unique harm results, in part, from developing economies having generally weaker "fiscal capacity" and a greater reliance on corporate tax revenue than developed countries.[69] When developing countries with weak tax authorities lose out on corporate tax revenue, they are unable to improve

64 JACKSON, *supra* note 60, at 11.

65 *Id.*

66 *See* GRAVELLE, *supra* note 16, at 5.

67 *See* Dharmapala & Hines, *supra* note 48, at 1059.

68 Niels Johannesen et al., *Are Less Developed Countries More Exposed to Multinational Tax Avoidance? Method and Evidence from Micro-Data*, 34 THE WORLD BANK ECON. REV. 790, 792 (2020).

69 *Id.*; *see also* BEPS Explanatory Statement, supra note 4, at 4.

their government infrastructure.[70] Revenue loss has also been found to correlate with a greater accumulation of debt, as tax base erosion compels governments to find external sources of capital for public investments.[71]

Interestingly, many countries classified as developing countries—countries with lower GDPs, income, and political accountability, and higher rates of poverty and government corruption—are often "resource-rich."[72] For example, African countries produce a significant portion of the world's cobalt, platinum, diamond, chromium, and gold supply, which attracts substantial MNC investment.[73] Additionally, 66% of African exports are natural resources, including minerals, oils, and gas.[74] But at the same time, the "rates of poverty [in Africa] are unmatched by any other continent."[75] Though levels of poverty and revenue loss cannot be entirely attributed to MNC profit shifting, the concentration of high-value resources, a heavy reliance on taxing investing MNCs, and the power imbalance between developing country tax authorities and MNCs make resource-rich developing countries highly susceptible to profit shifting and its harms.[76]

The extensive use of subsidiaries in secrecy jurisdictions by oil and mining multinationals makes it difficult for the tax authorities of developing countries to track and assess the related party transactions of these MNCs. Indeed, in 2010, ten of the

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70 *See* Samuel D. Brunson, *The U.S. as Tax Haven? Aiding Developing Countries by Revoking the Revenue Rule*, 5 COLUM. J. TAX. L. 172, 174 (2014) ("A country that cannot effectively collect taxes faces significant limitations on 'the extent to which [it] can provide security, meet basic needs or foster economic development.'").

71 *See id.* at 174 n.14.

72 Patrick J. Keenan, *International Institutions and the Resource Curse*, 3 PENN ST. J. L. & INT'L AFF. 216, 223, 252 (2014); TOM BURGIS, THE LOOTING MACHINE: WARLORDS, OLIGARCHS, CORPORATIONS, SMUGGLERS, AND THE THEFT OF AFRICA'S WEALTH 4, 6 (2015).

73 *See* Hirschel-Burns, *supra* note 23, at 177; Pietro Guj et al., *Transfer Pricing in Mining With a Focus on Africa: A Briefing Note* 1 (WORLD BANK Grp., Working Paper No. 112344, 2017), https://documents1.worldbank.org/curated/en/213881485941701316/pdf/112344-REVISED-Transfer-pricing-in-mining-with-a-focus-on-Africa-a-briefing-note-Web.pdf [https://perma.cc/FYS5-47DH].

74 BURGIS, *supra* note 72, at 7; Charles J. Lundgren et al., *Boom, Bust, or Prosperity? Managing Sub-Saharan Africa's Natural Resource Wealth*, IMF, 2013, at 4, https://www.imf.org/external/pubs/ft/dp/2013/dp1302.pdf [https://perma.cc/XFJ6-D2QR].

75 Hirschel-Burns, *supra* note 23, at 177. Developing countries in Africa are not the only developing countries that are considered resource-rich; however, the African continent is home to most of the least developed countries identified by the U.N. *The Least Developed Country Category: 2021 Country Snapshots*, U.N. DEP'T OF ECON. AND SOC. AFFS. & COMM. FOR DEV. POL'Y (2021), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/Snapshots2021.pdf [https://perma.cc/Q7JT-6YPW].

76 *See* Hirschel-Burns, *supra* note 23, at 177–78.

world's largest oil and mining MNCs had a total of over 6,000 subsidiary companies, "a third of which were registered . . . in tax havens, where all but the most basic company information can be concealed."[77] Chevron, which operates extensively across the African continent, had 62% of its subsidiary companies registered in secrecy jurisdictions.[78] Nearly 30% of Chevron's subsidiaries in 2010 were incorporated in Delaware, which imposes no state corporate tax on profits derived from intangible assets.[79] The significance of subsidiary establishment in secrecy jurisdictions is that many of these jurisdictions overlap with those classified as tax havens. When a jurisdiction requires minimal transparency and provides bank secrecy, financial information about MNC subsidiaries is difficult or impossible to obtain. These difficulties in assessing the financial information of an MNC undermine developing countries' attempts to tax the economic activity of MNC affiliates operating within their borders. This certainly implies that the opportunity for tax haven-related benefits exists for MNCs operating in resource-rich countries.

C. Evolution of the OECD's Attempts to Curb Profit Shifting

In the last couple of decades, the OECD has attempted to combat profit shifting and its harmful effects. The post-World War II OECD focused on "facilitating economic relationships between its member states and boosting those states economically."[80] While the organization's incentives are largely the same today, advising members on fiscal investment has evolved into addressing concerns about gaps in international tax laws.[81] In the 1990s, the OECD promulgated modern transfer pricing guidance and issued an important report on "harmful tax practices."[82] Transfer pricing guidance was necessary in a world of increasing intra-group transactions. And on a broader scale, tax laws, and the gaps between them, were facilitating and incentivizing the use of tax

77 BURGIS, *supra* note 72, at 168–69.

78 NICK MATHIASON, PIPING PROFITS 8 (2011), https://ciperchile.cl/wp-content/uploads/Piping-profits.pdf [https://perma.cc/9PKL-W7FF].

79 *See id.*; Xuan-Thao Nguyen, *Promoting Corporate Irresponsibility? Delaware as the Intellectual Property Holding State*, 46 IOWA J. CORP. L. 717, 719 (2021). For a more detailed discussion of Delaware's role as a tax haven, see *infra* Part II.

80 Nana Ama Sarfo, *How the OECD Became the World's Tax Leader*, FORBES (Aug. 11, 2020, 9:01 PM), https://www.forbes.com/sites/taxnotes/2020/08/11/how-the-oecd-became-the-worlds-tax-leader/?sh=1770d53f6628 [https://perma.cc/G89X-X6WR].

81 *Id. See also* OECD 2013 Action Plan, *supra* note 14, at 9.

82 Sarfo, *supra* note 80.

havens and "promot[ing] unfair tax competition."[83] So, the OECD embarked on several projects to increase transparency among tax jurisdictions, including the Model Tax Convention and the 2002 Model Agreement on Exchange of Information on Tax Matters.[84] Despite these efforts to enhance transparency and reporting, the amount of profits shifted to tax havens continued to increase.

Concerned about MNCs' seemingly unstoppable tax planning capabilities in a more digital and globalized economy, the OECD launched the BEPS project in 2013.[85] In the initial action plans and reports, G20 and OECD countries reaffirmed their acknowledgment that international cooperation to address profit shifting is necessary.[86] Otherwise, applying the tax rules of independent nations without proper coordination could result in double taxation or gaps in the taxation of certain corporate income.[87] According to the OECD, "[n]o or low taxation is not *per se* a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it."[88] These sentiments demonstrate that while fairness is implied as a basis for its calls for tax cooperation, the OECD has tempered its calls for fairness to assuage its most influential members who have concerns about the competitiveness of their nations' MNCs.

II. THE UNITED STATES' ROLE IN THE INTERNATIONAL TAX SYSTEM AND PROFIT SHIFTING BEHAVIOR WITHIN ITS BORDERS

A. Profit Shifting by U.S. MNCs

The ability of MNCs to outmaneuver tax authorities has expanded over time. Toward the end of the twentieth century, a growing focus on shareholder satisfaction in an exponentially globalizing economy made profit shifting more appealing and feasible as a tax planning strategy.[89] At least with respect to U.S. MNCs, a change in corporate culture in some ways contributed to the rise of profit shifting. Corporate leaders today "consider it their

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83 *Id.*

84 *See id.*; JACKSON, *supra* note 60, at 4.

85 *See* ORG. FOR ECON. COOP. AND DEV., BACKGROUND BRIEF: INCLUSIVE FRAMEWORK ON BEPS 6 (2017), https://web-archive.oecd.org/2017-01-17/425229-background-brief-inclusive-framework-on-beps.pdf [https://perma.cc/6BMY-CXFZ].

86 *See id.*; OECD 2013 Action Plan, *supra* note 14, at 13.

87 *See* OECD 2013 Action Plan, *supra* note 14, at 9.

88 *Id.* at 10.

89 *See* SAEZ & ZUCMAN, *supra* note 42, at 72.

duty to maximize shareholder value," whereas before the 1970s, U.S. corporations generally held a more holistic view in terms of their stakeholders.[90] The older view considered "a broad[er] class of stakeholders beyond [corporate] owners: employees, customers, communities, and governments."[91] The goal that corporations be "responsible business enterprises" has evolved to where the "principal objective" is "generat[ing] economic returns to its owners."[92] This evolution of the focus of corporate duty may partially explain the rise of tax-motivated profit shifting as "[l]ess tax paid means more after-tax profits that can be distributed in dividends to shareholders or used to buy back shares."[93]

The growth of MNCs and the corresponding increase in cross-border economic activity also made profit shifting more accessible. For example, U.S. entities in the 1980s "made less than 15% of their earnings abroad."[94] When much of a corporation's revenue was made domestically, relocating profits to foreign shell entities might have provoked unwanted scrutiny by U.S. tax authorities.[95] However, in the late 1990s and the early twenty-first century, U.S. corporate revenues made abroad increased dramatically, paving the way for U.S. MNCs to seize the gaps in the international tax system.[96] MNCs also began exchanging more intangible goods and services where a fair market price was difficult or impossible to determine.[97] Assets like Apple's logo, Nike's "iconic 'swoosh,'" and Google's technology, for example, are unique to those MNCs in that they "are never traded externally" and have no clear price that can be used to calculate the arm's length tax.[98]

Despite the challenges associated with calculating profit shifting and its effect on tax revenue, several economists have concluded that

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90 *Id.* at 69.

91 *Id.*

92 Jia Lynn Yang, *Maximizing Shareholder Value: The Goal that Changed Corporate America*, WASH. POST (Aug. 26, 2013), https://www.washingtonpost.com/business/economy/maximizing-shareholder-value-the-goal-that-changed-corporate-america/2013/08/26/26e9ca8e-ed74-11e2-9008-61e94a7ea20d_story.html [https://perma.cc/PEV2-ND6D].

93 *See* SAEZ & ZUCMAN, *supra* note 42, at 69.

94 *Id.* at 72.

95 *See id.*

96 *See id.*; *see also* Gabriel Zucman, *Taxing Across Borders: Tracking Personal Wealth and Corporate Profits*, 28 J. ECON. PERSPS. 121, 124–25 (2014).

97 *See* SAEZ & ZUCMAN, *supra* note 42, at 73–74 ("Assets and services such as logos, trademarks, and management services have no observable market value, thus making the arm's-length principle impossible to enforce.").

98 *Id.* at 74.

the impacts are significant. One study examining U.S. MNCs produced estimates of over $100 billion in lost U.S. tax revenue in 2017.[99] Another estimated that in 2015, U.S. corporate tax revenues were reduced by 14% due to profit shifting by U.S. MNCs.[100] More recent data shows that in 2018, U.S. revenues were reduced by as much as 23%, and on average, twenty-one high-tax countries lost 10% of their tax revenue to profit shifting.[101] While not all this lost tax revenue can be attributed to tax-motivated transfer pricing, several studies have found that it is a major contributor.[102]

B. The Arm's Length Principle and the U.S. Shift Toward a Minimum Tax

The United States' influence on key aspects of international tax policy indicates that the effects of the BEPS project will depend on the coherence of the United States' position regarding profit shifting. The United States has, for decades, imparted significant influence on OECD tax policy.[103] The OECD adopted the separate entity approach and the arm's length principle in 1963 in the OECD Draft Model, influenced by the 1933 League of Nations' Carroll Report.[104] The separate entity approach and the arm's length principle work in tandem: MNC subsidiaries are to be treated as separate entities, and any transactions made between them should be compared to unrelated party transactions to assess their reasonableness.[105] While the United States was not a member of the League of Nations, a leading U.S. tax expert, Mitchell B. Carroll, was appointed by the intergovernmental organization to address the problems of transfer pricing and income allocation in a growing global economy.[106] The resulting

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99 *See* Kimberly A. Clausing, *How Big Is Profit Shifting?* (May 17, 2020) (manuscript at 12, 16), https://ssrn.com/abstract=3503091 [https://perma.cc/E9W5-DRGL].

100 Tørsløv et al., *supra* note 52, tbl.3.

101 Thomas Tørsløv, Ludvig Weir, & Gabriel Zucman, *The Missing Profits of Nations: 2018 Figures*, at 1–2 (2021), https://missingprofits.world/wp-content/uploads/2021/08/TWZUpdate.pdf [https://perma.cc/86GL-49KT]. The twenty-one high-tax countries observed in this study were: Germany, the United Kingdom, France, the United States, Italy, Spain, Greece, Brazil, Denmark, Portugal, Mexico, South Africa, Australia, Canada, Israel, Turkey, India, Russia, China, Japan, and Korea. *Id.* at fig.3.

102 *See* GRAVELLE, *supra* note 16, at 25.

103 *See* Eduardo Baistrocchi, *The International Tax Regime and Global Power Shifts*, 40 VA. TAX REV. 219, 244–47 (2021).

104 *See id.*

105 Zucman, *supra* note 96, at 123.

106 *Id.* at 242; *see also* Madeline Woker, *Global Taxation Is a Mess. Here's How to Start Fixing It.*, NATION (Dec. 20, 2019), https://www.thenation.com/article/archive/france-tax-wine-tariff/ [https://perma.cc/K3LF-9KYP] (providing a deeper historical context of Carroll's work for the OECD).

Carroll Report advocated for the separate entity approach and the arm's length principle as the solution to profit shifting achieved through transfer pricing.[107] Meanwhile, the United States had itself endorsed the arm's length principle when it incorporated the standard into its federal tax statutes in 1935.[108]

The highly impactful Carroll Report failed to consider the lack of available comparable transactions for intangibles like technology patents or brand logos. Decades later, realizing difficulties in applying the arm's length standard to intangibles, U.S. Congress amended its transfer pricing statute, section 482 of the Internal Revenue Code, to require that the transfer price of intangibles be "commensurate with income."[109] However, the commensurate with income ("CWI") requirement was difficult to reconcile with the arm's length principle, and instead of abandoning the latter, the United States interpreted the former in such a way that allowed the previously ineffective arm's length standard to prevail.[110]

Still, the OECD implemented the CWI requirement in 1995, and it has remained in the OECD's transfer pricing guidelines through its 2017 version.[111] This apparent synergism is not coincidental—"it is the consequence of long-standing U.S. tax policy to export section 482 regulations to OECD countries and beyond, via the OECD model, with a view to creating international consensus on the application of the [arm's length principle]."[112] Despite the CWI requirement's attempt to modernize the arm's length standard, in the United States, the result was that transfer prices merely had to be within a wide range of "reasonable (rather than exact) comparables,"[113] giving MNCs broad leeway to comply with the rule. The OECD also "openly acknowledged substantial difficulties" in applying the modified standard.[114]

The nature of intangible transactions between MNC affiliates makes the arm's length standard an ineffective method for evaluating transfer prices. Firms often keep the value of their intangible property highly confidential to maintain their

107 *See* Baistrocchi, *supra* note 103, at 242–43.
108 *See* Brauner, *supra* note 33, at 96.
109 *Id.* at 96–97.
110 *See id.* at 101.
111 *See* Baistrocchi, *supra* note 103, at 245.
112 *Id.* at 246–47.
113 Brauner, *supra* note 33, at 97.
114 Baistrocchi, *supra* note 103, at 247.

competitive edge, which further frustrates tax authorities' ability to find market comparables.[115] The strategic organization of MNC transactions, as compared to transactions between unrelated firms, also calls into question why market comparables were ever chosen as a mechanism for MNC transfer pricing enforcement. Describing this enigma, tax professor Yariv Brauner stated:

> The issue is that MN[C]s specifically choose to internalize the costs of and take advantage of their hierarchical structure rather than engage in market transactions, so comparing the transactions of MN[C]s to transactions by players who choose the market as an efficient transactional medium may be attempting to compare the incomparable.[116]

Because the arm's length approach is extremely difficult to apply to intangibles, the current approach by the United States and the OECD fails by attempting to tweak that difficult standard to produce fair outcomes.[117]

More recently, instead of focusing on making the arm's length principle more compatible with modern MNC transactions, the United States has changed its tax code to reduce profit shifting incentives. An important factor in how individual countries influence the tax behaviors of their resident multinationals is the treatment of foreign-derived income. Before the enactment of the Tax Cuts and Jobs Act ("TCJA") in 2017, taxation of foreign corporate income in the United States operated under a worldwide system in which, upon repatriation of income, U.S. corporate profits were taxed at the U.S. rate of 35%, no matter where the income was earned.[118] Although, in reality, repatriation and, thus, U.S. taxation of income in low-tax jurisdictions, could be deferred indefinitely.[119] Clausing explains, "[w]hile such income could not be used for U.S. investments or be returned to shareholders, it could (and frequently was) held in U.S. assets, thus making the funds available to U.S. capital markets."[120] This treatment of

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115 *See* Brauner, *supra* note 33, at 106.

116 *Id.* at 107–08.

117 *See id.* at 108. In the United States, courts deciding transfer pricing disputes have required MNCs to use transfer prices within an acceptable range to account for a lack of adequate comparable transactions. *Id.* But, "[t]here are sufficient degrees of uncertainties within the 'reasonable' price ranges, so the clear incentive created by the system is to push the envelope and reach the price that is most aggressive, yet still within the very wide margin of reasonability." *Id.*

118 Clausing, *Taxing Multinational Companies*, *supra* note 7, at 247.

119 *Id.* at 243.

120 *Id.* Some of this unrepatriated income was technically taxable under the Revenue Act of 1962, which prevented deferral of income earned from passive investments, or

foreign income, while on its face appearing to reduce foreign profit shifting incentives, left open many avenues for profit shifting in its execution.

The worldwide aspect of the U.S. tax system was basically abandoned upon the passage of the TCJA, which changed the tax treatment of U.S. MNCs' foreign income to reflect a more territorial system.[121] This move toward a territorial system is manifested in a 100% deduction of foreign-derived income for many U.S. MNCs.[122] Generally, U.S. MNCs are now taxed at the statutory rate of 21% "only [on] income derived within [the United States'] borders."[123] On one hand, a territorial system might make U.S. MNCs more competitive in foreign markets. If a U.S. MNC does not have to pay taxes on income earned abroad, it has an advantage over foreign-based competitors that are subject to taxes on foreign-derived income in their home jurisdiction.[124] But, even with a reduced home tax rate of 21%, U.S. MNCs that can use low or no-tax havens to accumulate foreign income are still incentivized to do so. While pre-TCJA U.S. MNCs were incentivized to accumulate foreign income abroad *and* avoid repatriation through deferral, the territorial system encourages the same foreign income accumulation without concerns about repatriation when making distributions to U.S. shareholders.[125]

This territorial shift—grounded in a desire for greater U.S. MNC competitiveness—was at odds with the TCJA's simultaneous

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"subpart F" income. Joshua Ashman & Nathan Mintz, *GILTI and Subpart F Treatment of Distributions of Appreciated Property*, TAX ADVISER (Feb. 1, 2021), https://www.thetaxadviser.com/issues/2021/feb/gilti-subpart-f-distributions-appreciated-property.html [https://perma.cc/8U44-JXG6]. But taxation pursuant to subpart F lost much of its steam when the Treasury Department enacted the check-the-box rules in 1997. Thomas L. Hungerford, *The Simple Fix to the Problem of How to Tax Multinational Corporations – Ending Deferral*, ECON. POL'Y INST. 4 (Mar. 31, 2014), https://www.epi.org/publication/how-to-tax-multinational-corporations/ [https://perma.cc/SAB6-NX6N]. The goal of subpart F was to reduce the extent of deferred income that went untaxed, but the check-the-box rules allow a controlled foreign corporation to designate a tax-paying affiliate as a "disregarded entity (DRE) by literally checking a series of boxes on IRS form 8832." *Id.* The effect is that the tax-paying affiliate in a high-tax jurisdiction is considered a branch of a non-tax-paying affiliate in a low-tax jurisdiction, a branch that can be relieved of its tax liability. *See id.*

121 *See* Clausing, *Taxing Multinational Companies*, *supra* note 7, at 247.

122 *Tax Cuts and Jobs Act: A Comparison for Large Businesses and International Taxpayers*, IRS (May 1, 2023), https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-a-comparison-for-large-businesses-and-international-taxpayers [https://perma.cc/QMF9-4UVH].

123 Alex Trostorff & B. Trevor Wilson, *Worldwide Tax System vs. Territorial Tax System*, NAT'L L. REV. (Feb. 1, 2017), https://www.natlawreview.com/article/worldwide-tax-system-vs-territorial-tax-system [https://perma.cc/BY79-43AV].

124 *See* Clausing, *Taxing Multinational Companies*, *supra* note 7, at 241.

125 *See id.* at 243.

implementation of some fundamentally worldwide provisions. Although the TCJA exempted foreign income from taxation at the new 21% corporate rate, it included some measures designed to collect tax on foreign corporate profits.[126] In a clear attempt to combat U.S. tax base erosion, the TCJA effectively "applies limited worldwide taxation as a backup to territorial taxation."[127] The global intangible low-taxed income ("GILTI") tax is a minimum tax of 10.5% (13.125% after 2025) imposed on untaxed or undertaxed foreign profits after a 10% deduction in overall foreign profits is applied.[128] The Base Erosion and Anti-Abuse Tax ("BEAT") taxes income derived from payments for certain intangibles between related foreign parties.[129]

The GILTI and BEAT taxes are a meaningful step for the United States as it attempts to control out-of-control profit shifting, but some of the rules' complexities provide paths for MNCs to reduce their liability. Foreign tax credits granted under GILTI allow U.S. MNCs to offset their GILTI tax owed.[130] So, a U.S. MNC with profits allocated in haven jurisdictions can reduce the GILTI tax owed by receiving credits for taxes paid on income in a higher-tax foreign country. U.S. MNCs, then, are encouraged to allocate profits strategically in both low or no-tax countries and higher-tax *foreign countries* to achieve a balance between the right amount of foreign credits and GILTI-taxed haven income. Like before the TCJA, the incentive is to allocate profits anywhere but here. As for the BEAT tax, MNCs can deduct payments for "cost of goods sold" ("COGS"), which may encourage MNCs to "reclassify

126 *See id.* at 247.

127 *Briefing Book*, TAX POL'Y CTR., https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book-may2022.pdf [https://perma.cc/MXZ6-HQJ8] (May 2020).

128 *Id.*; *see also* GRAVELLE, *supra* note 16, at 11. The 10% deduction is "aimed at approximating income from tangible investments" by subtracting an estimated 10% of returns on physical assets, apparently targeting the extensive profit shifting that MNCs achieve with intangible goods. *Id.*

129 *IRC 59A Base Erosion Anti-Abuse Tax Overview*, IRS (Aug. 9, 2021), https://www.irs.gov/pub/irs-utl/irc59a-beat-overview.pdf [https://perma.cc/5BFZ-M8J8]. A U.S. MNC's BEAT tax rate is dependent on the MNC's base erosion payments, or the amount paid in a taxable year to a related foreign entity for royalties, interest, and services. *Id.* Base erosion payments under the BEAT tax also include "amount[s] paid or accrued . . . to [a foreign related party] in connection with the acquisition of depreciable or amortizable property" and payments for reinsurance premiums. *Id.*

130 Kimberly Clausing, *Options for International Tax Policy After the TCJA*, CTR. FOR AM. PROGRESS (Jan. 30, 2020), https://www.americanprogress.org/article/options-international-tax-policy-tcja/ [https://perma.cc/8QJY-YDQS].

certain related-party payments as COGS," reducing their BEAT tax liability.[131]

The recent evolution of the United States' treatment of foreign income illustrates an equivocating approach regarding MNC profit shifting. Again, a GILTI tax of 10.5% on haven income that before was taxed as little as 0% is a step toward strengthening the U.S. corporate tax base and combating profit shifting more effectively.[132] At the same time, though, the foreign credits allowed under GILTI create an incentive to attribute more MNC income to foreign rather than U.S. branches and, therefore, still encourage the foreign accumulation of profits.[133] The BEAT's COGS exception similarly leaves profit shifting incentives on the table for many MNCs.

This incremental and sometimes contradictory approach to disincentivizing MNC profit shifting raises questions about the United States' position on these kinds of MNC tax behaviors. The TCJA implements essentially a minimum tax on MNCs to discourage many profit shifting behaviors, including manipulative transfer pricing. Such a move is a significant departure from the United States' steadfast obedience to the arm's length principle, which has been, until recently, the United States' and the OECD's preferred method of tackling transfer pricing abuses.[134] But the gaps left open by GILTI and BEAT, and the United States' indecisive position regarding the two-pillar solution,[135] also indicate that the United States has not resolved its internal struggle between its desire for fair corporate taxation and unbridled tax competition. Considering the United States' influence on the international approach to profit shifting, its unsettled position threatens international cohesion in resolving the power imbalance between MNCs and the governments that tax them.

C. Delaware

The profit shifting behavior discussed so far has focused on transnational intra-firm transactions and the global and domestic attempts at regulating them. The same tax behavior, however, is also observable within the United States' borders. State

131 Jeff Hoopes, *Did the BEAT Work?*, UNC TAX CTR. (Apr. 8, 2021), https://tax.unc.edu/index.php/news-media/did-the-beat-work/ [https://perma.cc/DS6K-NSY9].

132 *See supra* notes 126–130 and accompanying text.

133 Clausing, *supra* note 130.

134 *See supra* notes 103–110, 117–125 and accompanying text.

135 *See infra* Part V.A.

governments face their own set of barriers in attempting to restrain profit shifting from their states to states with low or zero corporate tax rates. Historically, Delaware was not "known as [a] center [for] technological innovation and creation."[136] Despite this and its size and population being smaller than many other states, Delaware has evolved into a hub for *holding* valuable intellectual property assets that contribute to corporate profit margins in a major way.[137] Delaware is attractive to MNCs and multistate corporations ("MSCs") because of its 0% state tax rate on profits derived from intellectual property held within its borders.[138]

Not unlike MNCs that benefit from holding trademarks or patents in foreign tax haven countries,[139] MSCs can develop intellectual property outside of Delaware, sell it to its Delaware-incorporated subsidiary, and then generate profits from the intellectual property by charging non-Delaware affiliates royalties to use it.[140] Instead of paying corporate income tax in the state where the intellectual property was developed, is frequently used, or where most of the MSC's profit-generating activity takes place, the Delaware branch of the MSC pays 0% tax in Delaware.[141] The non-Delaware affiliates have historically been allowed to deduct from their state taxable income those payments of royalties to the Delaware subsidiary and "thus avoid a large share of the state income taxes it would have otherwise owed."[142]

As a result of attracting intellectual property holding companies, Delaware's state government benefits by receiving substantial incorporation and franchise fees.[143] Delaware officials have asserted that the state can afford not to tax profits from intangibles *because of* the significant revenue it generates from these fees.[144] But these claims ignore the fact that Delaware's 0% tax on intellectual property holding income is, in large part, *why*

136 Nguyen, *supra* note 79, at 719.

137 *See id.*

138 *Id.*

139 *See supra* notes 44–46 and accompanying text.

140 Nguyen, *supra* note 79, at 719.

141 *Id.* at 719–20 ("The parent essentially parks its income within the subsidiaries in Delaware, free from other states' taxation. Whenever the parents need access to the parked monies, they can obtain 'loans' or 'dividend payments' from the subsidiaries. Often the parents don't pay back the loans.").

142 Alana Semuels, *Loose Tax Laws Aren't Delaware's Fault*, ATLANTIC (Oct. 5, 2016), https://www.theatlantic.com/business/archive/2016/10/dont-blame-delaware/502904/ [https://perma.cc/QXF7-N89F].

143 Nguyen, *supra* note 79, at 739.

144 *Id.* at 746.

Delaware is able to generate this revenue in the first place. MSCs choose to incorporate their holding affiliates in the state and are willing to pay capped fees and franchise taxes[145] to preserve what they see as critical tax benefits.

Delaware burgeoned as a tax haven as MSCs (and MNCs) acquired and developed an increasing amount of valuable intangible assets.[146] As a measure of its share of national GDP, "Delaware dominates all other states in U.S. firm subsidiary incorporations."[147] Delaware is also home to "more than four times the number of patents" than what would be expected from states with a similar share of national GDP.[148] Toys "R" Us took advantage of Delaware's laws in the 1980s, not long after they went into effect.[149] The company had its stores in different states pay Geoffrey LLC, a Delaware-incorporated subsidiary, to use the company's logo as well as "trade names such as the store's mascot, Geoffrey the Giraffe."[150] Toys "R" Us had sold the intellectual property to Geoffrey LLC and arranged for its stores to pay royalties to the Delaware affiliate calculated as a percentage of the stores' sales.[151]

The South Carolina Tax Commission subsequently taxed Geoffrey LLC's royalty income earned from Toys "R" Us in its state, prompting Geoffrey LLC to sue the tax commissioner for a refund.[152] The South Carolina Supreme Court held that it was proper for the state to tax the "portion of Geoffrey's income generated within its borders," considering the relationship, or nexus, between South Carolina stores and the Delaware subsidiary.[153] Despite this ruling, however, the company could

145 Sandra Feldman, *Delaware Corporations' Annual Franchise Report and Tax Is Due March 1*, WOLTERS KLUWER (Feb. 6, 2023), https://www.wolterskluwer.com/en/expert-insights/delaware-corporations-annual-franchise-report-and-tax-requirement [https://perma.cc/8UWH-XLHD] (explaining that "[l]arge corporate filers" pay a flat $250,000 franchise tax and others pay a maximum of $200,000).

146 Nguyen, *supra* note 79, at 721.

147 Scott D. Dyreng, Bradley P. Lindsey & Jacob R. Thornock, *Exploring the Role Delaware Plays as a Domestic Tax Haven*, 108 J. FIN. ECON. 751, 760 (2013).

148 *Id.*

149 Nguyen, *supra* note 79, at 733; *see also* Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13, 15 (1993).

150 Semuels, *supra* note 142.

151 *Geoffrey Inc.*, 437 S.E.2d at 15.

152 *Id.*

153 *Id.* at 22–24. Notably, the court described MSCs' strategy of holding intangibles in Delaware by stating "[t]he net effect of this corporate structure has been the production of 'nowhere' income that escapes all state income taxation." *Id.* at 17 n.1 (citation omitted).

continue using this practice in other states.[154] Some state courts followed South Carolina's lead and employed a similar "substantial nexus" approach. Courts in Louisiana, Massachusetts, and Oklahoma allowed their state tax authorities to collect tax from Toys "R" Us's Delaware affiliate on profits made from intellectual property used in those states.[155]

Delaware's role as an intellectual property holding mecca has contributed to an uneven apportionment of tax liability on MSCs among U.S. states. One study found that MSCs likely to implement the Delaware tax strategy reduce their state income taxes by $3 to $4 million annually compared to companies that do not employ such strategies.[156] But the Delaware strategy and its effect on other states' revenues cannot be entirely attributed to Delaware's choices.[157] These strategies "are effective only because of the tax policies in other states."[158]

Generally, if a state has separate filing requirements, then the Delaware affiliate's royalty income is not taxable income in that state simply because the Delaware affiliate is not physically present there and is considered a wholly separate entity.[159] Separate filing states may enforce taxation on certain intangible-created income if their tax authority can successfully argue in court that the nexus between the holding company and the affiliates operating in their jurisdiction is sufficient.[160] But such a piecemeal method of enforcement is costly and inefficient for tax authorities.

III. PROFIT SHIFTING IN THE CASE OF DEVELOPING COUNTRIES

Some U.S. states may rely on corporate tax revenue more than others, and thus, those states may suffer more in fiscal terms when

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154 *See* Semuels, *supra* note 142.

155 *See* Dyreng et al., *supra* note 147, at 768; *see also* Bridges v. Geoffrey, Inc., 984 So. 2d 115, 128–29 (La. Ct. App. 2008); *cf.* Robinson v. Jeopardy Prods., Inc., No. 2019 CA 1095 (La. Ct. App. Oct. 21, 2020) (finding no nexus between a holding company and the businesses operating in Louisiana because the Louisiana entities were merely contracted third-parties)

156 *See* Dyreng et al., *supra* note 147, at 763. By incorporating the effects of states implementing combined reporting and economic nexus rules, Dyreng concluded these state actions reduced the tax savings of MSCs through the Delaware strategy. *Id.*

157 *Id.* at 769.

158 *Id.*

159 *See* Bradley P. Lindsey et al., *Delaware and the Passive Investment Company*, CPA J. (Oct. 2016), https://www.cpajournal.com/2016/10/01/delaware-and-the-passive-investment-company/ [https://perma.cc/TQB3-JHXR].

160 *See* Michael J. McIntyre et al., *Designing a Combined Reporting Regime for a State Corporate Income Tax: A Case Study of Louisiana*, 61 LA. L. REV. 699, 707–08 (2001).

firms operating in their state use Delaware as a tax haven. U.S. states can, however, implement certain judicial and legislative rules to curtail tax-motivated profit shifting.[161] On the other hand, there are countries that lack the tax infrastructure and institutional support that U.S. states and the United States as a nation enjoy. These countries are at a heightened financial risk when MNCs operating within their borders use profit shifting tax strategies, and they are the most in need of substantial changes in international tax rules. This Part explores some of the major drivers for this inequity, including tax competition and developing countries' historically unequal bargaining position within the international tax regime.

A. Tax Competition Pressures in Developing Countries

Countries with less-developed economies are in a precarious position when dealing with MNCs operating within their borders. If these tax authorities assess the transfer prices of MNCs with too much scrutiny, they risk losing much-needed MNC investment.[162] Alternatively, failing to scrutinize transfer prices of intangibles that are used in the industries making up developing countries' economies undercuts these countries' ability to fairly tax the MNCs that operate there.

Because corporate tax revenue constitutes a large percentage of developing countries' government revenues, these countries rely more on corporate tax revenue than developed countries.[163] When less developed countries provide incentives or low tax rates to MNCs because of "pressures from tax competition," the constriction of their tax revenues is exacerbated.[164] Not only are these countries compelled to treat MNCs operating in their jurisdiction favorably in terms of tax enforcement, but tax treaties

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161 *See infra* Part V.

162 Charles R. Irish, *Transfer Pricing Abuses and Less Developed Countries*, 18 U. MIA. INTER-AM. L. REV. 83, 91 (1986).

163 Ivan Ozai, *Two Accounts of International Tax Justice*, 33 CAN. J.L. & JURIS. 317, 323 (2020); Isaac Agyiri Danso et al., *The Future of Resource Taxation: A Roadmap*, INTERGOVERNMENTAL F. ON MINING, MINERALS, METALS, AND SUSTAINABLE DEV. 5–6 (2020), https://www.iisd.org/system/files/2020-10/future-resource-taxation-roadmap.pdf [https://perma.cc/QD28-PDVB] (describing how corporate income tax "represents almost 19% of all tax revenues in Africa and 16% in Latin America and the Caribbean, compared to 9% in developed nations").

164 Ozai, *supra* note 163, at 323–24 ("Most estimates of the revenue losses suffered by developing countries due to tax avoidance and tax competition exceed by some distance the amount these countries receive in development aid.").

with developed countries often induce developing countries "to forgo taxing economic activity in their country."[165]

There is an ongoing tension between capital-importing (developing) and capital-exporting (developed) economies in terms of corporate taxation.[166] Developed countries were at the center of the creation of the international tax system as it exists today, at a time when most developing countries were under colonial rule "or had not yet been penetrated by significant amounts of foreign investment."[167] Upon decolonization, the governments of developing countries had tax systems driven by colonial rules, donors, lenders, and foreign aid.[168] These external factors influenced government choices about how "to raise and spend revenue."[169] Foreign aid, for example, may make a developing government feel less pressured to raise tax revenue from its citizens.[170] Further, "there is a lower capacity to raise revenue through the taxes used by higher-income countries: a much smaller proportion of their population is in formal employment and earning enough to pay personal income tax, the main source of revenue for higher-income countries."[171] While developing countries often have higher statutory corporate tax rates than developed countries, to attract investment, lower-income countries routinely provide tax incentives to MNCs, making the effective tax rate much lower.[172] In spite of their goal, the OECD concluded that such incentives do not attract more investment than what "would have been undertaken even without them."[173]

B. Unequal Footing in the International Tax System

To understand the current impact that international tax treaties have on developing countries, it is helpful to understand the origins of perhaps the most influential tax treaty: the OECD model treaty. In the League of Nations' early years, the United

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165 Eric M. Zolt, *Tax Treaties and Developing Countries*, 72 TAX L. REV. 111, 119–20 (2018).

166 MARTIN HEARSON, IMPOSING STANDARDS: THE NORTH-SOUTH DIMENSION TO GLOBAL TAX POLITICS 31 (Cornell Univ. Press ed., 2021).

167 *Id.* at 35.

168 *Id.*

169 *Id.* at 35–36.

170 *See id.* at 37.

171 *Id.*

172 *Id.*

173 OECD et al., *Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment*, at 3 (Oct. 15, 2015), https://www.oecd.org/tax/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment.pdf [https://perma.cc/HP7J-N6KQ].

Kingdom was exporting capital to post-World War I mainland Europe.[174] Around this time, the League of Nations was drafting reports on issues of international taxation, and the United Kingdom successfully influenced these reports to include the U.K.'s preferred residency-based approach, rather than a source-based system desired by the other indebted European countries.[175] The OECD—then the Organisation for European Economic Co-operation (OEEC)—initially "began to elaborate the basis of the modern consensus on international tax," and it eventually adopted the League of Nations' residence-based approach when it established the OECD Model Tax Convention in 1963.[176] Despite periodic opposition to the residence-based approach by lesser developed, "source" economies, the OECD continued to prefer this approach with some caveats.[177] The OECD's goal of cooperation manifested when, by 1963, "around two hundred bilateral tax treaties had been signed."[178]

A study of 2,200 treaties where at least one party was a lower-income economy revealed that OECD-model, residence-focused provisions were implemented more frequently than the United Nations' provisions, despite the latter being "explicitly designed" for agreements between higher and lower-income economies.[179] This is not surprising because as "the OECD model reflects the preferences of OECD states, it [also] reflects the power balance in negotiations: greater asymmetries in capabilities and investment

174 HEARSON, *supra* note 166, at 39.

175 *Id.* at 39–40.

176 *Id.* at 42–43; *see 75th Anniversary of the Creation of the OEEC*, OECD, https://www.oecd.org/about/history/oeec/ [https://perma.cc/DH3V-ER4T] (last visited Nov. 10, 2023).

177 *See* HEARSON, *supra* note 166, at 43. For example, in 1943, Latin American countries, the United States, and Canada met in Mexico to agree on the "Mexico Draft" convention which was modeled after the League of Nations model, "but gave much stronger taxing rights to source countries." *Id.* at 40. The first draft of the OECD Model Tax Convention on Income and Capital, completed in 1963, rejected the stronger source country rights considered in the Mexico Draft and instead advocated for shared taxation over dividends and interest payments, and residence taxation over royalty payments. *Id.* at 42–43. The U.N. Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries published its own model tax treaty in 1980. *Id.* at 43. Originally, the U.N. model was "closely based on the OECD model," but its 2017 version demonstrates a divergence from the residency approach. *Id.* Lower-income countries have advocated for this recent U.N. approach, "seeking to upgrade it to an intergovernmental body and agreement," an idea OECD members have staunchly opposed. *Id.* at 44.

178 *Id.* at 44. Recent estimates show that about one hundred new treaties are entered into each year. *Id.*

179 *Id.*

positions lead to more OECD-type treaties."[180] What is more surprising is that in 46% of agreements between non-OECD members, OECD model provisions still prevailed, demonstrating the organization's broad influence.[181]

Both lower and higher-income countries desire cooperation to ensure non-resident businesses operating within their borders are adequately taxed.[182] But MNCs are most often headquartered in higher-income countries, giving these countries better access to MNC financial information.[183] This helps explain why wealthy countries prefer the residence-based approach—capital-exporting MNCs are disproportionately domiciled in their jurisdictions, and residence-favored taxation attributes MNC tax revenue to the resident jurisdiction. Higher-income countries also have more bargaining power when requesting cooperation from tax havens.[184] Lower-income countries "that lack this coercive power must piggyback on initiatives designed by others" or concede to treaty provisions that limit their overall taxing ability.[185]

One way developing countries have felt compelled to limit their taxing ability in treaty negotiations is by decreasing or removing withholding tax on MNC income generated in their jurisdictions.[186] Waiving a withholding tax on payments for interest, dividends, and royalties benefits MNC subsidiaries that make these payments out of the source-developing country in which they operate and, at the same time, reduces the developing country's tax base.[187] Treaty provisions requiring the abdication of withholding taxes on nonresident MNCs reflect the OECD model's residence-preferred approach and, conversely, its repudiation of source taxation.[188] Developing countries receive "more capital inflows from non-resident taxpayers" than developed countries and, therefore, rely on withholding taxes to a greater extent.[189]

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180 *Id.*

181 *Id.*

182 *Id.* at 47.

183 *Id.* at 47–48.

184 *Id.* at 48.

185 *Id.*

186 Diane Ring, *Developing Countries in an Age of Transparency and Disclosure*, 2016 BYU L. REV. 1767, 1801 (2016).

187 *See id.* at 1795, 1801 (explaining "source country taxation" as the ability of a country to "tax multinationals and others doing business" in its jurisdiction, which matters for the taxing country especially if it does not have many tax residents earning income).

188 *See id.*

189 *Id.* at 1800.

While these concessions benefit MNCs adept at tax-motivated profit shifting, they also benefit the highly developed countries that have established the prevailing residence-focused approach. For example, under the United States' GILTI framework, profits of a U.S. parent-MNC that are generated in a developing country and not subject to a source withholding tax may then be taxed by the United States under GILTI. As the next section will discuss, the global minimum tax under the OECD's two-pillar solution mimics GILTI and its commitment to a residence-based system. International cooperative efforts that do not readjust this source-residence divide are doomed to perpetuate the power imbalance between developing and wealthier countries in terms of their authority to tax MNCs.

IV. THE BEPS TRAJECTORY AND ITS IMPACTS ON DEVELOPING COUNTRIES

The OECD's BEPS project is a major global tax cooperation initiative aimed at controlling harmful profit shifting behaviors. Part IV first details the OECD's two-pillar solution and one of its foundational elements, country-by-country reporting. It then discusses how the two-pillar solution, despite embodying some truly significant shifts in the OECD's approach, will likely not improve developing countries' position in terms of addressing profit shifting harms.

A. BEPS

1. Country-by-Country Reporting

A major achievement of the BEPS project has been significant global participation in the required exchange of financial information through country-by-country reporting ("CbCR"). CbCR is a tool for increasing transparency around MNC transactions so that tax authorities are better equipped to determine where taxable income is being generated and the extent it is being taxed.[190] Tax Justice Network, a progressive think tank, advocated for CbCR as early as 2003.[191] The Extractive Industries Transparency Initiative, a nongovernmental organization focused on

190 *See* Nicholas Shaxson, *Corporate Taxation – Momentum is Building*, SOC. EUROPE (Dec. 21, 2020), https://www.socialeurope.eu/corporate-taxation-momentum-is-building [https://perma.cc/Q7XC-QHQT].

191 *Id.*

resource-rich developing countries, backed CbCR starting in 2002.[192] Around this time, the OECD was promoting information exchange by request through Tax Information Exchange Agreements ("TIEAs") between OECD states and haven jurisdictions.[193]

But one of the characteristics that make tax havens appealing to MNCs is their anonymity. So, a tax authority seeking information under a TIEA is hamstrung because it "do[es] not have sufficient information to request the relevant taxpayer information in the first place."[194] The OECD's promotion of TIEAs was a feature of the organization's overall tepid approach during that era. Concerned about pushback from wealthy member states[195] and the MNC community, the OECD, for a long time, extolled voluntary cooperation and transparency over compulsory commitments and disclosures. Eventually, the OECD, acknowledging the need for the latter, began to shift course.

The 2016 BEPS recommendations included guidelines for CbCR, a concept OECD members eschewed as utopian just a decade prior.[196] The CbCR subverts the separate entity approach that has been deeply entrenched in international tax policy decisions. CbCR requires MNCs to report "to home and foreign tax *authorities* their tax and other payments in every country where they operate."[197] In 2022, more than 100 tax jurisdictions had CbCR rules in place.[198] The United States adopted CbCR in 2016, reflected in T.D. 9773.[199] The final U.S. rule provides that CbCR data "will be used for high-level transfer pricing risk identification and assessment," but cannot be used as the sole means to trigger the adjustment of suspect transfer prices.[200]

In 2021, the European Union took CbCR a step further by enacting a *public* reporting requirement for EU-based MNCs *and*

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192 *See* Arthur J. Cockfield, *How Countries Should Share Tax Information*, 50 VAND. J. TRANSNAT'L L. 1091, 1105–06 (2017).

193 *Id.* at 1104.

194 *Id.*

195 *See supra* notes 64–65 and accompanying text.

196 *OECD Releases Additional Guidance on Implementation of Country-by-Country Reporting*, EY (Jun. 29, 2016), https://globaltaxnews.ey.com/news/2016-1157-oecd-releases-additional-guidance-on-implementation-of-country-by-country-reporting [https://perma.cc/K74Z-CKT6]; Shaxson, *supra* note 190.

197 Cockfield, *supra* note 192, at 1107 (emphasis added). The reporting requirement applies to MNCs with consolidated revenues of greater than $850 million. *Id.*

198 Susanne Verloove, Peter Hoving, & Roberto Aviles Gutierrez, *European Union: EU Public Country-by-Country Reporting*, 29 INT'L TRANSFER PRICING J. 1, 2 (2022).

199 *See* Clausing, *Five Lessons*, *supra* note 47, at 926 n.2.

200 *Id.*

non-EU-based MNC affiliates operating in the EU that have consolidated revenues above a specified threshold.[201] Since 2015, the EU has required European financial firms to publicly report country-by-country data, and one study found that firms complying with the reporting requirement had a 3.7% higher effective tax rate than those not in compliance.[202] This suggests that public reporting, rather than the OECD's CbCR, which is limited to tax authorities, may increase MNC accountability in terms of tax planning. The impending public CbCR mandate for MNCs operating in the EU is set to take effect in the 2024 fiscal year, with a public reporting deadline of December 31, 2026.[203]

A separate non-government-directed method to increase MNC tax transparency may be through internal pressure from MNC shareholders. Certainly, in financial terms, shareholder appeasement is a primary driver of tax-motivated profit shifting decisions. But these decisions may conflict with shareholder demands that MNCs commit to principles of corporate social responsibility.[204] Indeed, shareholders of some of the largest MNCs have proposed resolutions to require public reporting of the MNCs' country-by-country data.[205] In 2022, nearly one-quarter of Amazon shareholders voted in favor of requiring public disclosure of the enterprise's country-by-country financials.[206] Although the resolution did not pass, "achieving 21 [percent] shareholder support paved the way for investors in other companies to be more vocal about what information they want made publicly available."[207]

It is possible that shareholder pressure on MNCs to commit to more socially responsible practices could eventually make voluntary public CbCR the norm rather than the exception. And in light of the increased tax compliance of European financial firms under the EU's mandate, a public reporting standard may very well result in similarly stronger compliance. In addition,

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201 Verloove et al., *supra* note 198, at 4.

202 Mary McDougall, *Cisco Urges Shareholders to Reject Tax Transparency Proposal*, FIN. TIMES (Sept. 22, 2022), https://www.ft.com/content/93e030e7-f70a-46f7-9853-1972f791a1da [https://perma.cc/C875-JQ4K].

203 Verloove et al., *supra* note 198, at 5.

204 *See* Jacqueline Lainez Flanagan, *Holding U.S. Corporations Accountable: Toward a Convergence of U.S. International Tax Policy and International Human Rights*, 45 PEPP. L. REV. 685, 731 (2018).

205 *See* McDougall, *supra* note 202.

206 *Amazon Investors Push Company on Global Tax Transparency*, FACT COAL. (May 27, 2022), https://thefactcoalition.org/amazon-investors-push-company-on-global-tax-transparency/ [https://perma.cc/E9YH-9FS4].

207 McDougall, *supra* note 202.

public CbCR would serve to balance the power differentials both between citizens and their representative governments as well as between governments and the MNCs operating within their jurisdictions. Better access to MNC tax information allows citizens to organize and vocalize specific concerns to their governments, thereby creating political motivation to address obvious gaps in tax policies. If public CbCR indeed results in better MNC tax compliance, national governments stand to benefit from a reassertion of their taxing authority, bringing their taxing relationship with MNCs back into balance.

2. Two-Pillar Solution

More recently, BEPS 2.0, the newest phase of the BEPS Project, established a two-pillar solution to implement BEPS Action 1—the action addressing tax challenges in the age of digitalization.[208] Action 1, now Pillars One and Two, seeks to address the conundrum of taxing large tech-focused MNCs based on physical presence as well as the continuing difficulties in applying the arm's length standard to intangible assets.[209] Pillar One, the implementation of which was originally forecast to be 2023 but has been pushed to 2024, significantly upends the principles of residence-based taxation so engrained in the OECD model.[210] Pillar One does this by proposing the reallocation of taxing rights to jurisdictions where certain goods and services are sold and used, made effective through a multilateral treaty.[211] Certain industries, including natural resource extraction and financial services, are exempt from Pillar One, as are MNCs with profit margins and global revenue turnovers below a fixed threshold.[212] Pillar One establishes taxation over MNCs engaged in digital businesses "that do not have any physical presence in market countries," ostensibly targeting major technology MNCs

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208 Reuven Avi-Yonah, Young Ran (Christine) Kim, & Karen Sam, *A New Framework for Digital Taxation*, 63 HARV. INT'L L.J. 279, 289 (2022); *see also* Grant Wardell-Johnson, *OECD'S Pillar One and Pillar Two – A Question of Timing*, BLOOMBERG TAX (June 14, 2022 12:00 AM), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report-international/XC2A5EIG000000?bna_news_filter=daily-tax-report-international#jcite [https://perma.cc/RMM9-TXTK]; *Action 1: Tax Challenges Arising From Digitalisation*, OECD https://www.oecd.org/tax/beps/beps-actions/action1/ [https://perma.cc/3SK5-P9LH] [hereinafter Action 1].

209 *See* Action 1, *supra* note 208.

210 Wardell-Johnson, *supra* note 208.

211 Avi-Yonah et al., *supra* note 208, at 294, 298.

212 *Id.* at 294.

that have come under intense scrutiny in recent years for their intricate and successful tax planning methods.[213]

Where Pillar One strengthens source taxation rights, Pillar Two reinforces residence taxation.[214] Pillar Two proposes a global minimum tax embodied in the Global Anti-Base Erosion ("GloBE") rules, which would apply to MNCs with at least €750 million in annual revenue.[215] The framework operates through "two interlocking domestic rules"—the income inclusion rule ("IIR") and the undertaxed payment rule ("UTPR").[216]

The IIR requires an MNC's residence country to apply a top-up tax on the MNC's "ultimate parent entity" that has subsidiaries operating in jurisdictions subject to a less than 15% tax rate.[217] The IIR takes effect only if the jurisdiction of incorporation implements a sub-15% rate (like a tax haven) and declines to raise its rate to the minimum of 15%. The jurisdiction where an entity is incorporated has the first claim under the GloBE rules to tax the entity; this taxing privilege is the qualified domestic minimum top-up tax ("QDMTT").[218] For example, if a U.S.-based MNC has a subsidiary in a country with 0% corporate income tax, the United States would be required to impose at least a 15% top-up tax to meet the global minimum under the IIR, assuming the 0% country does not exercise the QDMTT.[219]

The UTPR, now often called the undertaxed *profit* rule, serves as a backstop to the IIR by allowing the source jurisdiction wherein an MNC subsidiary operates to collect a "top-up tax equivalent" if the residence country collects no IIR tax.[220] This "equivalent" tax may be levied by refusing deductions for payments made to an affiliate in a low-tax jurisdiction or by taxing the payment at its source.[221] The aforementioned deductions would ordinarily be allowed in, for example, developing countries

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213 *Id.* at 293; *see also* Hirschel-Burns, *supra* note 23, at 174–75.

214 Avi-Yonah et al., *supra* note 208, at 297.

215 Reuven Avi-Yonah & Young Ran (Christine) Kim, *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, 43 MICH. J. INT'L L. 505, 530–31 (2022).

216 *Id.* at 530.

217 *Id.* at 531.

218 *See* Allison Christians & Tarcísio Diniz Magalhães, *Undertaxed Profits and the Use-It-or-Lose-It Principle*, TAX NOTES (Nov. 7, 2022), https://www.taxnotes.com/featured-analysis/undertaxed-profits-and-use-it-or-lose-it-principle/2022/11/04/7f9n0 [https://perma.cc/RW4S-5YHR].

219 *See id.*

220 *Id.*

221 *Id.*

that have entered bilateral treaties that oblige them to forgo taxing such payments.[222]

As of February 2023, 142 countries have agreed to enact Pillar Two.[223] Not all these countries agreed to implement *their own* minimum tax, but they have agreed "not to introduce inconsistent rules."[224] Thus, the GloBE tax's success "does not rely on all countries agreeing to a minimum tax," but just that enough do so.[225] The GloBE tax is a significant achievement, and, as the GILTI and BEAT taxes are predicted to grow U.S. tax revenue, it is expected to do the same for non-U.S. resident jurisdictions. Indeed, "[t]he OECD estimates that pillar 2 would generate about $220 billion in global revenue gains based on 2018 data."[226]

The GloBE rules, therefore, would establish a corporate tax floor for the largest MNCs. A global minimum tax essentially removes the incentive to use tax havens, at least for MNCs with global revenues above GloBE thresholds.[227] The GloBE rules also properly abandon the separate entity-arm's length approach to a large extent. The assumption made decades ago that related entities behave like unrelated entities instead of behaving in a way that benefits the ultimate parent entity was never a sound basis for fair transfer pricing policy. The minimum tax circumvents the need to directly address transfer pricing manipulation by

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222 *See supra* Part III. There is much debate surrounding whether the UTPR, in practice, would violate existing bilateral tax treaty provisions. *See, e.g.*, Peter Hongler et al., *UTPR – Potential Conflicts With International Law?*, TAX NOTES (July 10, 2023), https://www.taxnotes.com/special-reports/digital-economy/utpr-potential-conflicts-international-law/2023/07/07/7gy40 [https://perma.cc/ZMQ8-GXHN] (arguing that the UTPR is an income tax and therefore subject to tax treaty constraints); *cf.* Allison Christians & Stephen E. Shay, *The Consistency of Pillar 2 UTPR with U.S. Bilateral Tax Treaties*, TAX NOTES (Jan. 23, 2023), https://www.taxnotes.com/featured-analysis/consistency-pillar-2-utpr-us-bilateral-tax-treaties/2023/01/20/7fvmc [https://perma.cc/5DBW-STUS] (characterizing the UTPR as "not in nature an income tax" and "excluded from the scope of taxes covered by existing U.S. bilateral income tax treaties"). Nonetheless, given the likelihood that MNC parent jurisdictions will implement the IIR, and thus prevent triggering any UTPR tax, and the flexible methods allowed for implementing a UTPR equivalent tax, UTPR-related treaty restraints may be "of secondary importance" in the Pillar Two debate. Avi-Yonah & Kim, *supra* note 215, at 553.

223 Press Release, U.S. Dep't of the Treasury, Treasury Welcomes Clear Guidance on Pillar Two Glob. Minimum Tax, Tax Credit Prots. (Feb. 2, 2023), https://home.treasury.gov/news/press-releases/jy1243 [https://perma.cc/7H7B-QGGD].

224 Wardell-Johnson, *supra* note 208.

225 *Id.*

226 Nana Ama Sarfo, *OECD Sets the State for Two-Pillar Tax Reform Revenue Estimates*, FORBES (Jan. 30, 2023, 1:46 PM), https://www.forbes.com/sites/taxnotes/2023/01/30/oecd-sets-the-stage-for-two-pillar-tax-reform-revenue-estimates/?sh=cba06e912de5 [https://perma.cc/D2ZE-F6M2].

227 *See* Avi-Young & Kim, *supra* note 215, at 548.

establishing a matrix of incentives for tax authorities that nearly guarantee covered MNCs will be taxed at the minimum rate.[228]

Under Pillar Two, the OECD acknowledges that properly assessing the tax liability of individual subsidiaries requires an examination of the MNC's tax behaviors at a global level.[229] Despite this notable break with the past, however, Pillar Two continues the OECD's legacy of preferring residence taxation over source taxation to the detriment of many developing countries.[230] In addition, even though Pillar One strays from this residence approach by authorizing source country taxation of non-resident tech companies, this milestone of the BEPS project is likely to have a minimal impact because of staunch opposition from the United States.[231] The probable fate of Pillar One illustrates the continuance of the United States' decisive role in determining the direction and scope of international corporate tax reforms.

B. Post-BEPS Reality for Developing Countries

Without the OECD's support for public CbCR and an international consensus on Pillar One, developing countries are in a similar position compared with where they stood before the BEPS project. Considering the OECD's historically wealthy membership, when developing model treaties, combatting tax competition, and endorsing tax standards, it has, for the most part, prioritized the concerns of developed countries.[232] As BEPS 1.0 took shape, the OECD and G20 members acknowledged the need for non-member country participation in order to make meaningful progress.[233] This led to the creation of the Inclusive Framework in 2016 to include developing and other non-OECD countries in the reform effort.[234]

CbCR is one of the four minimum standards to which Inclusive Framework members are required to commit.[235] However, because CbCR is not public and its use is limited to risk

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228 *Id.* at 530.

229 *Id.* at 555.

230 *Id.*

231 *See infra* notes 265–271 and accompanying text.

232 *See* Shu-Yi Oei, *World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership*, 47 YALE J. INT'L L. 199, 209 (2022).

233 *See* Yariv Brauner, *Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument*, 25 FLA. TAX REV. 1, 25–26 (2022).

234 *See* Oei, *supra* note 232, at 11.

235 *Id.* at 11–12.

assessment and auditing by tax authorities, its benefits for developing countries are limited.[236] The country-by-country data provided to developing country tax authorities cannot "be directly used for tax calculations and imposition," which would effectively be formulary apportionment.[237] Formulary apportionment is a form of taxation that generally favors the country where economic activity occurs. A tax authority, applying formulary taxation, would assess a corporate taxpayer's payroll, assets, and sales and determine a portion of the MNC's profits attributable to its jurisdiction.[238] The tax authority would then impose its corporate tax rate on that portion of profits.

Outside of Pillar One, which would implement a type of formulary taxation on a defined set of digital-related businesses, the OECD has opposed adopting such a system for remaining MNCs.[239] This rejection of formulary apportionment on a broader scale clearly follows from the OECD's longstanding allegiance to residence taxation. But as Professor Brauner queried, "[i]t is difficult to understand, normatively, why would the OECD resist formulary taxation by source or market economy beyond the digital context?"[240] In light of the OECD's radical shift *toward* source taxation for a portion of MNCs, it is conceivable that it may extend support for formulary taxation to all industries in the future. However, the path to Pillar One implementation is uncertain at best,[241] which further reduces the likelihood that OECD members will support a formulary system in the foreseeable future.

Because of its preference for residence taxation, Pillar Two's benefits are mostly going to be received by wealthy developed countries where MNCs are headquartered. Formally, the UTPR gives source countries the authority to tax payments made to related parties or to refuse deductions for such payments. But "the

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236 *See* Brauner, *supra* note 233, at 20–21. Public CbCR would likely help level the playing field for developing countries as it would invite better-informed scrutiny by the "public, media and independent experts." *Id.* at 20.

237 *Id.*

238 THORNTON MATHESON ET AL., FORMULARY APPORTIONMENT IN THEORY AND PRACTICE 283, 284 (IMF, 2021).

239 *See* Brauner, *supra* note 233, at 20–21.

240 *Id.* at 21.

241 *See infra* notes 266–271 and accompanying text.

country trying to enforce UTPR does not have first dibs."[242] In effect, the UTPR is more likely to encourage the jurisdictions of incorporation and residency to implement their own minimum tax so as not to lose the chance to collect tax revenue to the UTPR jurisdiction.[243] The United States' progress toward implementing its own domestic GloBE rules—though their mechanics are not entirely fleshed out—demonstrates that MNC-heavy resident countries are keen to participate and collect top-up taxes on their globetrotting MNCs.

A global minimum tax is an effective tool against MNC profit shifting because it reduces the incentives to engage in convoluted tax planning in order to receive favorable tax treatment in low or no-tax jurisdictions. Because wealthy countries, including the United States, are concerned about the gaps in the international tax system that have cost them corporate tax revenue, they are eager to exercise the IIR and collect top-up taxes not collected by tax havens. Therefore, this residence-focused approach of the GloBE rules, an approach founding OECD members have been faithful to for nearly a century, makes the imminent achievement of a global minimum tax one that maintains the power dynamic between wealthy and developing countries.

V. THE U.S. PATH FORWARD AND SOLVING INTERSTATE PROFIT SHIFTING

A. The United States in a Two-Pillar World

The base protection measures in the TCJA are essentially the United States' GloBE rules. In fact, the TCJA's GILTI and BEAT provisions served as a model from which Pillar Two was drawn and demonstrated to the OECD that unilateral measures by member countries could achieve the goal of combatting profit shifting and tax competition.[244] But as it stands, the GILTI tax rate of 10.5% does not satisfy the Pillar Two 15% minimum.[245] And if the United States does not implement its own GloBE rules, it risks losing the opportunity to impose top-up tax on its MNCs to

242 Robert Goulder, *Defending the Undertaxed Profits Rule*, FORBES (Jan. 11, 2023, 3:38 PM), https://www.forbes.com/sites/taxnotes/2023/01/11/defending-the-undertaxed-profits-rule/?sh=36fbda255bc3 [https://perma.cc/VP7W-PG5X].

243 *See id.*

244 *See* Avi-Yonah & Kim, *supra* note 215, at 509, 529.

245 *Id.* at 543.

source countries that would be next in line to collect those taxes under the UTPR.[246]

The Build Back Better ("BBB") Act, a major Democrat-led spending bill, was passed in the House of Representatives in late 2021 and proposed several spending initiatives ranging from childcare accessibility to climate change investment.[247] The BBB Act also proposes several corporate tax reform measures "represent[ing] the United States' plan to implement Pillar Two."[248] The proposed reform built on the TCJA's GILTI and BEAT framework by raising the GILTI rate to 15% and the rate on applicable BEAT payments to 15% starting in 2024.[249] GILTI would also be amended to be imposed on a country-by-country basis, rather than its current worldwide basis, to align with GloBE requirements.[250] This iteration of the BBB Act passed in the House has not been passed in the Senate; however, the Senate did agree on a significantly curtailed version of the bill in August 2022 when it passed the Inflation Reduction Act.

The Inflation Reduction Act did not include the Pillar Two compliant minimum tax rate, though it did implement a corporate alternative minimum tax ("CAMT"). The CAMT applies to far fewer MNCs than GILTI because it only applies to MNCs that have an average annual profit of more than $1 billion calculated over a three-year period.[251] The GILTI tax applies to *all* U.S.-based MNCs, and the proposed GloBE rules would apply to MNCs with *revenues* exceeding $770 million.[252] Because of the CAMT's high threshold requirement and other exemptions, it is "expected to apply to fewer than 150 corporations."[253] Senior Specialist in Economic Policy, Jane G. Gravelle stated that, with respect to the new CAMT and the unchanged GILTI and BEAT rules, "[i]t is unclear how these taxes would interact with GloBE."[254] The

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246 *See id.*

247 *Build Back Better Act*, BALLOTPEDIA, https://ballotpedia.org/Build_Back_Better_Act [https://perma.cc/7UUT-FZQY] (last visited Jan. 31, 2024).

248 Avi-Yonah & Kim, *supra* note 215, at 535.

249 *Id.* at 535–36, 540.

250 JANE G. GRAVELLE, CONG. RSCH. SERV., R47328, THE 15% CORPORATE ALTERNATIVE MINIMUM TAX 8 (2023).

251 *Id.* at 9.

252 *Id.*

253 Michelle P. Scott, *Corporate Alternative Minimum Tax (CAMT): What It Requires, How It Works*, INVESTOPEDIA (Jan. 17, 2023), https://www.investopedia.com/corporate-alternative-minimum-tax-7092893 [https://perma.cc/8VHS-FLZU].

254 GRAVELLE, *supra* note 250, at summary.

CAMT, as adopted in the Inflation Reduction Act, is yet another revelation of the United States' oscillating role in international corporate tax cooperation. It simply adds to the unilaterally implemented GILTI framework, leaving the United States out of step with the OECD's attempt at conformity.

To assess the likelihood of the United States' eventual approval of Pillar Two, the policy motives behind the United States' recent shifting treatment of international corporate taxes are instructive. One of the driving political forces behind the territorial shift in the United States' treatment of foreign income established by the TCJA was to preserve U.S. MNCs' competitiveness in foreign markets.[255] Cutting the corporate tax rate to zero for U.S.-MNC foreign source income—or to around 10.5%, assuming the MNC is subject to the GILTI tax—presumably put U.S. MNCs at an economic advantage compared to foreign MNCs with higher tax burdens. The GloBE tax significantly undercuts this argument because, under Pillar Two, the largest and most competitive MNCs across the globe would be "subject to the same minimum tax rate."[256]

Some U.S. lawmakers have, therefore, shifted their attacks from targeting the supposed competitive harms of taxing foreign income to vilifying any U.S. involvement in an international agreement that stands to shore up *foreign countries'* tax bases.[257] Senator Mike Crapo and Representative Jason Smith released a statement equating the Biden Administration's commitment to eventual Pillar Two implementation with "hand[ing] each foreign country a model vacuum to suck away tens of billions from our tax base."[258] Providing some necessary context to this position, economist Kimberly Clausing pointed out that "[w]hen foreign governments also tax lightly taxed income, that will unsurprisingly, and mechanically, lower GILTI revenue."[259] It is unrealistic to believe that foreign countries will not "also protect their own corporate tax bases from international tax avoidance" when the United States exercises that same right through

255 Avi-Yonah & Kim, *supra* note 215, at 546–47.

256 *See id.* at 547.

257 *See JCT: U.S. Stands to Lose Revenue Under OECD Tax Deal*, U.S. SENATE COMM. ON FIN. (June 20, 2023), https://www.finance.senate.gov/ranking-members-news/jct-us-stands-to-lose-revenue-under-oecd-tax-deal [https://perma.cc/S37C-GTPN].

258 *Id.*

259 Kimberly A. Clausing, *The Revenue Consequences of Pillar 2: Five Key Considerations*, 180 TAX NOTES FED. 555, 557 (2023) [hereinafter, Clausing, *The Revenue Consequences of Pillar 2*].

GILTI.[260] It is also hypocritical for U.S. lawmakers to endorse the use of GILTI[261] and, at the same time, effectively deny the legitimacy of other countries using their own minimum taxes.[262]

This pushback on U.S.-international collaboration most likely will not completely thwart the United States' participation in Pillar Two, primarily because the United States will not want to give away the opportunity to tax U.S. MNCs to countries eager to apply the UTPR. Notwithstanding this reality, the congressmen's message illustrates the continuing command that tax competition has over the United States' policy moves in the realm of international corporate tax. This criticism of international cooperation because of its supposed threat to U.S. tax sovereignty[263] does not take into account the long-term benefits of raising the corporate tax floor on the integrity of the global tax system.[264] In a globalized economy where MNCs wield substantial power through their highly evolved tax planning strategies, this floor must also be globalized if profit shifting is ever to be controlled.

The United States' reticence surrounding Pillar Two implementation threatens the integrity of the U.S. corporate tax base and the United States' role as an international tax leader as other Pillar Two countries move forward. Moreover, with presidential and congressional elections looming in late 2024, the United States' role at this juncture of momentous international tax reform hangs in the balance. While the Trump Administration expressed interest in eventual Pillar Two implementation, it strongly opposed Pillar One because of concerns about the competitiveness of U.S. tech MNCs.[265] If former President Trump is elected again in 2024, it is unclear whether his administration's position toward the two-pillar solution will be more conciliatory, considering that "few think a global compromise is possible without an agreement on both pillars."[266]

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260 *Id.*

261 *See JCT: U.S. Stands to Lose Revenue Under OECD Tax Deal*, *supra* note 257.

262 *See* Clausing, *The Revenue Consequences of Pillar 2*, *supra* note 259, at 557.

263 *See JCT: U.S. Stands to Lose Revenue Under OECD Tax Deal*, *supra* note 257.

264 *See* Clausing, *The Revenue Consequences of Pillar 2*, *supra* note 259, at 557 ("The one instance in which tax sovereignty is impaired is when the policy desire is to have rock-bottom effective tax rates on the most profitable companies in the world.").

265 *See, e.g.*, Avi-Yonah et al., *supra* note 208, at 292; *see also* Sam Fleming , Jim Brunsden, Chris Giles & James Politi, *US Upends Global Digital Tax Plans After Pulling out of Talks with Europe*, FIN. TIMES (June 17, 2020), https://www.ft.com/content/1ac26225-c5dc-48fa-84bd-b61e1f4a3d94?desktop=true&segmentId=d8d3e364-5197-20eb-17cf-2437841d178a [https://perma.cc/ZAJ6-TFNQ].

266 Fleming et al., *supra* note 265.

Pillar One's assigning tax liability on digital businesses in the locations where digital goods and services are purchased and used has been highly disfavored by the United States. Of the 100 companies that would be subject to Pillar One, more than half are U.S.-based.[267] The United States, therefore, has stalled Pillar One progress because of concerns that the new taxing right unfairly discriminates against U.S. tech companies.[268] Because Pillar One would be implemented by a multilateral treaty and its provisions would conflict with existing bilateral treaties between the United States and other countries, its adoption by the United States depends on a two-thirds ratification by the U.S. Senate.[269] Some have suggested a possible treaty override to implement Pillar One; however, such action would be a "double-edged sword for proponents of international tax law" as it would undermine the overall integrity of international cooperative agreements.[270] U.S. Pillar One adoption is thus unlikely to move forward due to the necessary but improbable bipartisan support for the multilateral treaty.[271]

These potential impediments to U.S.-international cooperation may not prevent the United States from acting unilaterally to protect its tax base. However, the United States' failure to participate in both pillars would have deleterious effects on both individual countries and the overall cohesion of international tax reform. Because a substantial portion of MNCs affected by Pillar One are U.S. firms, Pillar One's intended effect—to essentially level the playing field between source and resident jurisdictions—would be significantly watered down without U.S. participation. Moreover, countries that have agreed to suspend digital service taxes on large tech firms as a condition of Pillar One will almost certainly pull out of the agreement and instead

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267 *See* Tax Notes Staff, *Bringing Order to Chaos? Digital Service Taxes and Pillar 1*, FORBES (Mar. 14, 2023, 3:50 PM), https://www.forbes.com/sites/taxnotes/2023/03/14/bringing-order-to-chaos-digital-services-taxes-and-pillar-1/?sh=6d95c7152638 [https://perma.cc/XK9M-9Z6C].

268 *See* Avi-Yonah et al., *supra* note 208, at 292.

269 *See id.* at 299.

270 *Id.* at 304.

271 *See* Reuven S. Avi-Yonah, *After Pillar One*, 247 L. & ECON. WORKING PAPERS 1, 1 (2022) ("But despite the support of the Biden administration, since the Republicans are adamantly opposed, an MTC implementing Pillar One cannot be ratified by the Senate (which requires 67 votes) or enacted as a Congressional Executive Agreement (which requires passage in the Republican controlled house).").

unilaterally impose digital taxes.[272] The United States has threatened tariffs in the past on countries that impose digital service taxes on U.S. tech companies, and a lack of international consensus on Pillar One makes U.S. trade retaliation more likely, especially if a Republican president is elected in 2024.[273] Finally, a failure to implement Pillar One would have an especially negative impact on developing countries that stand to benefit more from Pillar One than from Pillar Two.

B. U.S. States' Successes in Fighting Interstate Profit Shifting

Many U.S. states have acted to reinforce their corporate tax base in response to multistate businesses using the Delaware strategy. As discussed in Part II.C, some U.S. states, including South Carolina and Louisiana, successfully reclaimed corporate tax revenue from Toys "R" Us's Delaware-based holding company that should have been collected on profits derived from activity in their states. The North Carolina Supreme Court subsequently adhered to the *Geoffrey* court's reasoning to find an economic nexus with a Delaware intellectual property holding company, as did courts in New Jersey and Oklahoma.[274]

One problem with states using economic nexus arguments against taxpayers in court is that different state courts resolve challenges by corporate taxpayers differently.[275] Furthermore, "with the assistance of specialist state tax litigators, [MSCs] are not hesitant to litigate all the way [up] to the state's highest court," resulting in high costs on both sides of the dispute.[276] Some states, notably West Virginia, have taken nexus too far, finding grounds for taxation of a non-resident intellectual property holding company that had virtually no connection with the taxing jurisdiction.[277] The Supreme Court has not directly analyzed the

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272 *See id.* Digital Service Taxes ("DSTs") are unilateral taxes applied to both free and paid-for digital services used in the taxing jurisdiction. *See* Avi-Yonah et al., *supra* note 208, at 282.

273 *See* Samantha Handler & Chris Cioffi, *Global Tax Deal Moves Ahead Sparking New Republican Resistance*, BLOOMBERG TAX (Mar. 24, 2023, 9:16 AM), https://news.bloombergtax.com/daily-tax-report-international/global-tax-deal-moves-ahead-sparking-new-republican-resistance [https://perma.cc/X92C-9KBV].

274 *See* JEFFREY A. MAINE & XUAN-THAO N. NGUYEN, THE INTELLECTUAL PROPERTY HOLDING COMPANY: TAX USE AND ABUSE FROM VICTORIA'S SECRET TO APPLE 96–98 (Lionel Bently et al. eds., 2017).

275 *See id.* at 92.

276 *Id.*

277 *Id.* at 127 ("These cases represent a new frontier of state taxing power that has rather attenuated constitutional support.").

constitutional limits of a state's authority to impose corporate income tax based on economic nexus.[278] This leaves state economic nexus rules vulnerable to constitutional challenges.

Because of these limits on nexus and economic substance rules, many states have enacted combined reporting requirements. From this perspective, U.S. states that have enacted combined reporting are motivated by principles like those inherent in the OECD BEPS framework. Mandatory CbCR, for example, increases transparency and benefits countries' tax authorities by allowing them to audit related-party transactions more effectively. Combined reporting requirements by U.S. states similarly benefit state tax authorities by giving them a more complete picture of MSC profit-generating activities as well as any red flags indicating tax-motivated profit shifting. Generally, under state combined reporting rules, an MSC group that is a "unitary business" is assessed, for tax purposes, as a single enterprise rather than as separate entities.[279] States that implement combined reporting assess the group's total income, including income recorded in their state and income recorded elsewhere, like in Delaware, and determine the appropriate taxable income attributable to their state.[280] In this respect, U.S. states go further than the OECD's CbCR, as CbCR rules prohibit tax authorities from determining tax liability based on CbCR data alone.[281]

However, because not all combined reporting states define unitary business the same, an MSC may be subject to combined reporting in one state and not in another, even though both states have combined reporting rules in place.[282] There are also constitutional limits on how liberally states may define a unitary

278 *See generally* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); *see* Joe Garrett, et al., *Income Tax Nexus Limitations in a Post-Wayfair World*, 100 TAX NOTES STATE 787, 788 (2021). However, the *Wayfair* decision's erasure of the physical presence requirement for sales tax might have implications for states' ability to tax intangible income earned by affiliates that lack a physical presence inside a state's borders. Indeed, "most tax professionals that specialize in state taxes feel that the implication is that Wayfair does support economic nexus for corporation tax/income tax as well." Brian Gordon, *The Wayfair Decision and Its Effect on Income Tax Nexus*, NYSSCPA (Jan. 1, 2019), https://www.nysscpa.org/most-popular-content/the-wayfair-decision-and-its-effect-on-income-tax-nexus#sthash.ezRJ8T6b.dpbs [https://perma.cc/943J-C75D].

279 *See* MAINE & NGUYEN, *supra* note 274, at 92; Bret N. Bogenschneider & Ruth Heilmeier, *Google's "Alphabet Soup" in Delaware*, 16 HOUSTON BUS. & TAX'N L.J. 1, 16–17 (2016).

280 *See* Bogenschneider & Heilmeier, *supra* note 279, at 16–17.

281 *See* Brauner, *supra* note 233, at 515.

282 *See* Bogenschneider & Heilmeier, *supra* note 279, at 12–15.

business.[283] Furthermore, the benefits of combined reporting may be circumscribed because such required reporting often reaches only the "water's edge," meaning firms are only required to report the income of their affiliates *within U.S. borders*.[284] The water's edge limitation allows both MSCs and MNCs to move income to foreign tax havens while remaining in compliance with state combined reporting rules. Notwithstanding these limitations, the trend is that more and more states are moving toward combined reporting. In early 2023, twenty-nine states and the District of Columbia had combined reporting rules in effect.[285] As more states enact combined reporting to protect their tax bases, the number of separate filing states decreases, as do the opportunities for interstate profit shifting.

The next step for states that want to reinforce their corporate tax base is worldwide combined reporting, which would involve eliminating the water's edge limitation. While "[c]ombined reporting with a water's edge election is still an excellent idea for combatting income stripping within the United States," firms may respond to more states requiring combined reporting by moving profits beyond U.S. borders.[286] In *Container Corp. of America v. Franchise Tax Board*, the Supreme Court upheld the constitutionality of California's then-existing tax code, which gave the state's tax authority access to the worldwide tax information of MNCs considered a unitary business under the state's laws.[287] Despite this favorable constitutional ruling, however, states' attempts at enacting worldwide reporting have been futile in the face of extreme corporate and political backlash. In the years following *Container Corp.*, California faced pressure from MNCs and MSCs, the U.S. Treasury Department, and foreign

283 *See* DARIEN SHANSKE, WHITE PAPER ON ELIMINATING THE WATER'S EDGE ELECTION AND MOVING TO MANDATORY WORLDWIDE COMBINED REPORTING 4 (2018). Bogenschneider & Hellmeier, *supra* note 279, at 24. The Multistate Tax Commission has created a model unitary business definition "up to the constitutional limit." *Id*. at 13, 24.

284 Aidan Davis, Matthew Gardner & Richard Phillips, *3 Percent and Dropping: State Corporate Tax Avoidance in the Fortune 500, 2008 to 2015*, INST. ON TAX'N & ECON. POL'Y (Apr. 27, 2017), https://itep.org/3-percent-and-dropping-state-corporate-tax-avoidance-in-the-fortune-500-2008-to-2015/ [https://perma.cc/KZ8Y-8XP8].

285 *See* Angélica Serrano-Román, *Combined Corporate Tax Reporting on the Table Again in Maryland*, BLOOMBERG TAX (Feb. 8, 2023, 4:00 AM), https://news.bloombergtax.com/daily-tax-report-state/combined-corporate-tax-reporting-on-the-table-again-in-maryland [https://perma.cc/SK3F-492E].

286 SHANSKE, *supra* note 283, at 4.

287 Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 168 (1983).

governments, leading California and other states to implement water's edge election provisions.[288]

Minnesota's legislature recently considered a mandatory worldwide combined reporting requirement, but like California's experience post-*Container Corp.*, resistance from the MNC and MSC communities made the move politically untenable. Critics of the proposed law argue that such worldwide reporting requirements are not only politically risky, but they may harm states in another way: corporations might respond by "avoid[ing] or decreas[ing] connections with the state," which could result in reduced investments.[289] But if other states can overcome the political barriers to enacting worldwide reporting, this would reduce the opportunities for MNCs and MSCs to simply move their operations to water's edge states because there will be fewer of them available.

Certainly, in an extreme case, MNCs could respond by moving their operations outside of the United States entirely, but this is an unlikely scenario for two reasons. First, notwithstanding valid concerns about increased offshoring and outsourcing in certain industries,[290] U.S.-based MNCs still conduct a significant portion of their operations in the United States and, indeed, rely on U.S. labor and domestic companies for various reasons.[291] U.S.-based MNCs that added to their foreign workforce between 1982 and 2017 "added exactly the same number of workers (9.4 million) to their payrolls in the United States."[292] Over roughly the same time period, U.S. MNCs accounted for about 70% of research and

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288 *See* Stephen P. Kranz et al., *Be Careful What You Wish For: Minnesota May Be on the Precipice of Enacting Worldwide Combined Reporting at the Worst Possible Time*, LEXOLOGY (May 4, 2023), https://www.lexology.com/library/detail.aspx?g=34525d51-22d9-48ef-9830-d26a77040be7 [https://perma.cc/4DGS-Z9GA]; McIntyre et al., *supra* note 160, at 732–33.

289 Kranz et al., *supra* note 288.

290 *See* Arielle Pardes & Vittoria Elliott, *Tech's Offshore Hiring Has Gone into Overdrive*, WIRED (Aug. 12, 2022, 7:00 AM), https://www.wired.com/story/techs-offshore-hiring-has-gone-into-overdrive/ [https://perma.cc/QC9L-GENB] (tech jobs); Kenneth Rapoza, *GM Leads in Shipping Jobs to Mexico; Company Shifting Focus to China*, FORBES (Sep. 1, 2020, 11:44 AM), https://www.forbes.com/sites/kenrapoza/2020/09/01/gm-leads-in-shipping-jobs-to-mexico-company-shifting-focus-to-china/?sh=4aca2aef4dfa [https://perma.cc/Q92A-4ABA] (manufacturing jobs).

291 *See* MATTHEW J. SLAUGHTER, HOW U.S. MULTINATIONAL COMPANIES STRENGTHEN THE U.S. ECONOMY 20 (2009), https://www.uscib.org/docs/foundation_multinationals.pdf [https://perma.cc/84HZ-Y35B].

292 C. FRITZ FOLEY ET AL., MULTINATIONAL CORPORATIONS IN THE 21ST CENTURY ECONOMY 10 (2021), https://www.brookings.edu/wp-content/uploads/2021/04/GG_Ch1_Summary.pdf [https://perma.cc/JZZ8-JKJX].

development conducted in the United States.[293] This data suggests that U.S. MNCs depend on the United States' innovative business infrastructure as well as its workforce. Any cost savings from avoiding taxation by individual states is likely overshadowed by the desire and need to maintain operational strongholds in the United States.

Second, with the existing U.S. GILTI-BEAT framework and a 15% global minimum tax looming, U.S. MNCs have even less of an incentive to move the totality of their operations offshore for tax purposes. The tax savings available to an MNC before GILTI and GloBE may have been tempting because the difference between the total effective U.S. tax rate (state plus federal) where the MNC operates, and some low-tax foreign jurisdictions was likely significant. That difference is made smaller, though, under the GILTI tax on foreign income, which would apply to an MNC that moves most of its activity offshore but maintains its U.S. residency. The gap will be even smaller if most countries adopt the GloBE rules, raising the MNC's foreign income tax liability from 10.5% under GILTI to 15% under GloBE. Even if the MNC were to change its residency, the GloBE minimum tax—whether imposed under the QDMTT, the IIR, the UTPR, or a combination of the three—would almost certainly attach. With these new global minimum taxes, the burden of uprooting an MNC's U.S. presence becomes much greater than any realized tax benefit.

Therefore, it is possible that, in addition to benefitting individual countries, raising the global corporate tax floor may also provide political capital at the state level to eventually allow U.S. states to enact worldwide combined reporting. But the same problems hindering the United States' commitment to standing firm against runaway tax competition arise when states consider stronger anti-profit shifting measures.

CONCLUSION

There are three important ratios of power among stakeholders in corporate income tax policy. First, MNCs (and MSCs) have established a remarkably powerful position over the governments that have the legal authority to tax them. Tax planning has become a crucial factor influencing MNCs' organizational

293 *Id*. at 11; *see also* BUREAU OF ECON. ANALYSIS, ACTIVITIES OF U.S. MULTINATIONAL ENTERPRISES IN 2019 12 (2021), https://apps.bea.gov/scb/issues/2021/12-december/pdf/1221-multinational-enterprises.pdf [https://perma.cc/S4V8-J93V].

decisions, and national and state governments have struggled to create concerted regulatory apparatuses that can keep up with MNC profit shifting strategies.

Second, the OECD and its members have maintained their position of power in determining which countries' priorities deserve the most deference in international tax policy. In the mid-20th century, the OECD solidified residence-focused taxation as the dominant approach in its model treaty, which has pervaded the vast majority of tax treaties to this day despite its troublesome effects on developing countries. These treaties disproportionately benefit wealthier resident countries at the expense of poorer source countries. The launch of the OECD BEPS project and the Inclusive Framework is a start toward curing this historical power disparity between developing and developed countries.

But there is a third relationship of power that seems to be dispositive in the current international struggle for corporate tax fairness. The most recent global corporate tax reforms—aimed at curtailing tax-motivated profit shifting by MNCs—have resulted from an incremental approach over the last several decades. Although this incrementalism is surely a product of a wide variety of geopolitical forces, the United States is one such force that has historically wielded massive influence over the speed and direction of international tax policy reform. Thus, it is critical to consider the United States' preferences when assessing proposed changes to international corporate taxation.

The United States toned down the OECD's progress at the beginning of the 21st century when the organization was evaluating what it initially called "harmful" tax practices. The OECD also adopted and perpetuated the United States' use of the arm's length standard to assess transfer prices, even though the standard relied on the dubious assumption that related entities behave the same way as unrelated parties.

Pillar Two of the BEPS project was modeled after the United States' GILTI and BEAT rules and preserves residence-favored taxation to the detriment of source developing countries.[294] And even though the United States created the framework leading to this global minimum tax, U.S. lawmakers continue to stall full Pillar Two

294 *See supra* Part III.B.

adoption because of concerns that such a cooperative effort unfairly shares foreign corporate tax revenue with other countries.[295]

Pillar One, the portion of the BEPS project that would balance out this residence focus by giving source countries more taxing authority, has been rejected by the United States because it would affect a large number of U.S.-based companies and transfer part of its taxing authority over these MNCs to other countries. This dismal prognosis for U.S. Pillar One adoption will reduce much of the BEPS project's promised benefits to developing countries. Even on a national level, tax competition pressures U.S. state governments and has undermined state progress toward mandatory worldwide combined reporting.

To the OECD's credit, its abrupt shift away from the arm's length principle and separate entity approach in Pillar Two and from residence taxation in Pillar One has, in a sense, established a more progressive standard for countries seeking to fight base erosion and profit shifting. Such a departure could set in motion greater political will to further balance the power discrepancies between MNCs and their governments and between international tax leaders and developing countries. But even as the United States mirrored some of these radical shifts in the TCJA, its hesitancy toward full international cooperation reflects the continuing influence that tax competition—enforced by the power of MNCs—has over progress. Current goals of fairness in corporate taxation, at the national and even state level, are undermined by a strict adherence to uninhibited tax competition. This adherence continues to shape the United States' position to its and other nations' detriment, undermining the integrity of international tax cooperation.

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295 *Id.*

Crayons, Contests, & Copyright: Contracting to Use a Child's Creative Work

*By Kaelyn Timmins-Reed**

> "[A child] is not only an object of care and concern but also a subject whose rights should be respected."[1]

INTRODUCTION 216
I. COPYRIGHT AND CONTRACT LAW 222
A. Copyright Overview and Registration 222
B. Copyright Preemption and Contract Law Gap Fillers 224
C. Infant Contract Doctrine 227
D. State Coogan Laws 234
E. Disaffirmance of a "Work Made for Hire" Contract ...234
F. Copyright Act Section 203 235
II. SOLUTIONS 237
A. Expand Protection of Minors by Amending Section 203 237
B. Do Not Let Second-Graders "Work" 239
C. Expand State Coogan Laws 241
D. Informal Solutions 243
CONCLUSION 245

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1 OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., LEGIS. HIST. OF THE CONVENTION ON THE RTS. OF THE CHILD, at I-xxxvii, U.N. Doc. ST/HR/PUB/07/1, U.N. Sales No. 07.XIV.3 (2007) [hereinafter U.N. LEGIS. HIST.].

INTRODUCTION

From crayon drawings on a parent's refrigerator to an award-winning short film by a fourteen-year-old, children and young people under the age of eighteen are constantly creating.[2] Society encourages children to create: there are many programs, including Youth Communication and Kids in the Spotlight, discussed in greater detail below, that encourage and empower youth to express themselves by writing or making films in order to heal, grow, and advocate for themselves.[3] Though children have no affirmative legal "right to create," the United Nation's Convention on the Rights of the Child states that, subject to certain restrictions, children "shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds . . . either orally, in writing or in print, in the form of art, or through any other media of the child's choice."[4] The legislative history behind the Convention suggests that it was intended to recognize a core concept of contemporary childhood—that a child "is not only an object of care and concern but also a subject whose rights should be respected."[5] One member of the committee for the adoption of the Convention on the Rights of the Child noted, "[g]enuine effort should be made to seek out the positive aspects of youthful expression and channel it to useful ends."[6]

Companies and organizations try to "seek out the positive aspects of youthful expression and channel it" through contests or other use of minors' copyrights.[7] For example, as of this writing, Google is holding its fifteenth annual "Doodle for Google" contest, inviting students in kindergarten through twelfth grade to submit artwork using the letters in the Google logo.[8] Google holds the contest as "an opportunity to experience

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2 *See, e.g.*, Tierra Carpenter, *Teenage Award-Winning Director Kalia Love Jones Signs Deal for Animated Series*, WISHTV (Feb. 22, 2022, 05:25 PM), https://www.wishtv.com/news/allindiana/teenage-award-winning-director-kalia-love-jones-signs-deal-for-animated-series/ [https://www.perma.cc/GVW4-F24W].

3 *See, e.g.*, Jane M. Spinak, *They Persist: Parent and Youth Voice in the Age of Trump*, 56 FAM. CT. REV. 308, 318–19 (2018). *See also Represent Magazine*, YOUTH COMMC'N, https://youthcomm.org/represent-stories [https://perma.cc/BY74-MYGL]; *see also About KITS*, KIDS IN THE SPOTLIGHT, https://www.kitsinc.org/about [https://perma.cc/UC43-SV34].

4 G.A. Res. 44/25 art. 13 (Nov. 20, 1989).

5 U.N. LEGIS. HIST., *supra* note 1.

6 *Id.* at 265.

7 *See id.*

8 *See How It Works*, DOODLE FOR GOOGLE, https://doodles.google.com/d4g/how-it-works [https://perma.cc/5DC4-ZYFC].

the creativity, thoughtfulness and talent of younger generations."[9] However, the "Doodle for Google" contest entry form contract, which the entrant and the parent or guardian must sign, gives Google wide latitude to use and potentially profit from designs made by minor entrants.[10]

The contract states in part: "Entrant grants Google a perpetual, irrevocable, worldwide, transferable, royalty-free, and non-exclusive license to use, reproduce, adapt, modify, publish, distribute, publicly perform, create a derivative work from, and publicly display the doodle for any purpose, including display on the Google website, without any attribution or compensation to Entrant."[11]

This could produce unfair results for minor creators. Another precarious example of a minor-company interaction is *Cooley v. Target Corp.* (the "*Target* Case"). In that case, a 14-year-old minor diagnosed with autism, N.O.C., had posted several of his multi-color crayon designs on social media.[12] Target employees then reached out to N.O.C. via Instagram to say that his artwork "caught [their] eye."[13] Target invited N.O.C. to a company workshop aimed at empowering young creative voices.[14] A few months later, Target began selling merchandise bearing designs similar to N.O.C.'s artwork.[15] N.O.C. and his mother sued Target, alleging infringement.[16] Though the court did not find infringement,this case sheds light on the potential issues that arise when minors and companies interact.[17]

When minor creators and companies interact, there is a risk that companies will exploit minors' creativity, as seen in the *Target* Case. Minors of this generation are "digital natives," and their online presence makes them more vulnerable to copyright

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9 *See* Selly Sallah, *The Doodle for Google Student Contest Turns 15*, GOOGLE (Feb. 28, 2023), https://blog.google/products/search/the-doodle-for-google-student-contest-turns-15/ [https://perma.cc/J9WA-PVQY].

10 *See Contest Rules*, DOODLE FOR GOOGLE, https://doodles.google.com/intl/en_us/d4g/rules/ [https://perma.cc/X5HW-G7H7].

11 *Id.* at ¶ 29.

12 *See* Plaintiff's First Amended Complaint at 2–3, Cooley v. Target Corp., 2022 U.S. Dist. LEXIS 175623 (D. Minn. Sept. 28, 2022) (No. 8:20-cv-00876-DOC-JDEx).

13 *Id.* at 3; *see also* Tiffany Hu, *Target Beats Copyright Suit Over Autistic Teen's Artwork*, LAW360 (Sept. 29, 2022), https://www.law360.com/articles/1535082/target-beats-copyright-suit-over-autistic-teen-s-artwork [https://perma.cc/R4J8-43ZP].

14 *See* Plaintiff's First Amended Complaint, *supra* note 12, at 3.

15 *See id.* at 4; *see also* Hu, *supra* note 13.

16 *See* Hu, *supra* note 13; *see also* Plaintiff's First Amended Complaint, *supra* note 12, at 4.

17 *See* Hu, *supra* note 13.

infringement.[18] With technology and the internet, children are creating and disseminating visual and graphic works, often unaware of how to protect their copyright ownership.[19] For example, there are nonprofit programs that prompt children to create stories, art, choreography, and screenplays, but no one to instruct the children (or their parents or guardians) on how to protect these copyrightable works.[20] There are also online classes that teach today's minors how to design websites and create graphic designs, but these classes do not include resources that teach minors how to protect their creations.[21] Additionally, much of the current legislation surrounding children and their internet usage involves protecting their online privacy or preventing commercial sexual exploitation rather than protecting minors' creative works.[22] Compounding this issue is minors', parents', and guardians' lack of copyright knowledge. Minors and those supporting them may not

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18 *See* Andrea M. Matwyshyn, *Generation C: Childhood, Code, and Creativity*, 87 NOTRE DAME L. REV. 1979, 1979–81 (2012). Eric Goldman, a professor of internet and intellectual property law, noted that minor "copyright owners need to consider the implications of posting their works online, because they might be unable to show that infringers accessed the [copyrighted work]." Eric Goldman, *When Do Defendants Have Access to Copyrighted Works Posted to the Internet?—Cooley v. Target Corp.*, TECH. & MKTG. LAW BLOG (Oct. 2, 2022), https://blog.ericgoldman.org/archives/2022/10/when-do-defendants-have-access-to-copyrighted-works-posted-to-the-internet-cooley-v-target-corp.htm [https://perma.cc/84WQ-7N6Q].

19 *See, e.g.*, Julie Cromer Young, *From the Mouths of Babes: Protecting Child Authors from Themselves*, 112 W. VA. L. REV. 431, 432 (2010) ("[T]he minor author is often all too willing to expose the work to infringement by publishing . . . the copyrightable work online . . . .").

20 *See, e.g.*, Spinak, *supra* note 3, at 318–19. For example, Youth Communication's *Represent Magazine* and *YouthComm Magazine* hire teenagers to write articles, blog posts, and poetry about their real-life experiences. *Youth Stories*, YOUTH COMMC'N, https://youthcomm.org/youth-stories/ [https://perma.cc/7BNZ-TUWN] (last visited Sept. 14, 2023); *see also* Telephone Interview with Keith Hefner, Founder and Senior Advisor, Youth Commc'n (Jan. 28, 2023) [hereinafter Hefner Interview]. Additionally, Kids in the Spotlight (KITS) is a Los Angeles-based nonprofit that runs programming for foster youth ages 12–17 to write scripts and make films. Telephone Interview with Tige Charity, CEO, Kids in the Spotlight (Feb. 16, 2023) [hereinafter Charity Interview]. Though Youth Communication and KITS staff informally support program participants, there is no formal legal advising. *See* Hefner Interview, *supra*; *see also* Charity Interview, *supra*.

21 *See* Matwyshyn, *supra* note 18, at 1979–81; *see also* Cornell Cooperative Extension for Madison County, *Canva for Kids with Courtney, Episode 1: Making a Poster*, YOUTUBE (Apr. 14, 2020), https://www.youtube.com/watch?v=Q4_RZV0eMo8 [https://perma.cc/JL3E-MSNE]; *Modern Website Design with Wix Class*, CREATE&LEARN, https://www.create-learn.us/cloud-computing/wix [https://perma.cc/6Q2F-L5XD] (last visited Sept. 14, 2023).

22 *See, e.g.*, Erin Carpenter, *How Social Media is Affecting the Lives of Minors Including Current Legal Safeguards and Their Weaknesses*, 5 CHILD & FAM. L.J. 75, 77–80 (2017) (exploring minors' pervasive social media usage and content creation and cautioning the hazards of "pedophiles[] and child pornographers"). *See also* Emily DiRoma, *Kids Say the Darndest Things: Minors and the Internet*, 2019 CARDOZO L. REV. DE NOVO 43 (2019) (discussing the federal Children's Online Privacy Act and California's "Online Eraser Law").

understand the significance of whether a company licenses or owns a minor's copyright.

These minor-company interactions also present risks for companies. As seen in the *Target* Case, companies wishing to work with minor creators face the potential peril of costly litigation and bad publicity.[23] And while some companies seeking to work with a minor's copyrighted work may require the minor to contractually grant the company an irrevocable license to use the work,[24] making a license contract with a minor remains risky because of the infant contract doctrine.[25] The infant contract doctrine is the common law rule that minors can void a contract for goods or services that are not necessities.[26] The purpose of the doctrine was "the protection of minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace."[27] In many states today, minors can disaffirm, or void, their contracts.[28] Companies have tried to get around this doctrine by having a parent or guardian sign the license contract,[29] or by contractually providing that the artwork is a "work made for hire."[30] Both of these approaches create challenges because neither license contracts nor "work made for hire" contracts are immune to disaffirmance under the infant contract doctrine, and there are inconsistencies in how courts approach cases involving minors and copyright—especially when contracts are involved. Additionally, attempts to circumvent the infant contract doctrine, such as having a parent or guardian co-sign a minor's contract, may prove futile in some states. The variability among courts as to when and how minors are allowed to disaffirm contracts produces inconsistent results in copyright cases

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23 For example, after Target's run-in with N.O.C., an article was published entitled "Target Beats Copyright Suit Over Autistic Teen's Artwork." *See* Hu, *supra* note 13.

24 *Contest Rules*, *supra* note 10.

25 *See, e.g.*, 1 HENRY CAMPBELL BLACK, TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS § 306 (1916) [hereinafter BLACK ON RESCISSION] ("An adult who enters into a contract with an infant [someone who has not reached the legal age of majority] does so at his own risk and remains bound by the contract unless the infant elects to disaffirm it.").

26 *See* Victoria Slade, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613, 614, 617 (2011); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 14 (Am. L. Inst. 1981).

27 Halbman v. Lemke, 99 Wis. 2d 241, 245 (Wis. 1980).

28 *See, e.g.*, CAL. FAM. CODE § 6710 (West).

29 *See, e.g.*, *Contest Rules*, *supra* note 10 (requiring parent or guardian signature).

30 *See, e.g.*, I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196, 207 (S.D.N.Y. 2015).

involving minors. Companies need a workable solution to allow them to control the underlying copyright. Otherwise, the risks associated with working with minors will be too great.

The lack of conversation, law, and policy around potential infringement of minors' works may be because, unlike profitable child actors who receive great legislative attention,[31] there is little money to be made from a youth's writing, artwork, or other tangible artistic expression. "Unless you're Malala [Yousafzai]," said Keith Hefner, founder and senior advisor of the nonprofit Youth Communication, "you're never going to make a penny from IP [intellectual property]."[32] While Hefner's statement may be true for most child authors and artists, companies *have* stood to gain from children's creative expressions, as further discussed below. Though no infringement was proven in the *Target* Case, Target no doubt made money on its merchandise.[33]

Additionally, much of the existing literature focuses on children as copyright infringers, while less focuses on children as those who are being infringed upon.[34] Furthermore, there is little-to-no guidance on how companies can protect themselves while working with minor creators. In a landscape in which children are viewed as copyright infringers or worse—an infant who can void a whole contract—the law needs an approach that honors minor creators' rights, encourages minors' creativity, and provides an effective, mutually beneficial way for companies to work with them. Because of minors' increased presence and autonomy online, analysis of these minor-company interactions and the legal issues they raise is increasingly important.[35] The goal of this Note is to shed light on often-overlooked minors as creators, identify variability in how copyright law and contract law are applied, and lend solutions.

Part I of this Note examines the legal systems undergirding minor-company interactions: copyright and contract law, particularly the infant contract doctrine. Part I also explains the circuit split as to the Copyright Act's preemption of state

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31 *See, e.g.*, *California Coogan Law*, BIZPARENTZ FOUND. (Mar. 24, 2018), https://www.bizparentz.org/california-coogan-law/ [https://perma.cc/5BTX-NWHK].

32 Hefner Interview, *supra* note 20.

33 *See* Plaintiff's First Amended Complaint, *supra* note 12, at 3–4.

34 *See, e.g.*, *id.* One article addresses the issue of minors as creators and minors' presence online, but it does not take the company's perspective into account. *See* Young, *supra* note 19; *see also* discussion *infra* Part II.A.

35 *See, e.g.*, Matwyshyn, *supra* note 18, at 1979–81.

contract law and how courts vary in analyzing when a minor can disaffirm a contract.

Accepting the variability of contract claims and copyright preemption, Part II suggests four solutions. First, Part II builds upon a previously proposed solution for Congress to amend the Copyright Act to allow minors to terminate their license agreements sooner.[36] Second, Part II argues "work made for hire" contracts involving minors below working age should be unenforceable.

Third, Part II urges states to independently extend so-called Coogan Laws to cover written and pictorial works or to enact Coogan Laws if no such laws exist. States such as California and New York have Coogan Laws protecting child actors from employers and even from their parents and guardians.[37] Under these laws, courts act as neutral third parties to evaluate the fairness of contracts; once a contract is court-approved, the minor is prevented from disaffirming it.[38] Though Coogan Laws apply to employment contracts for "artistic or creative services," the laws have not been extended to companies' contracts for minors' written or pictorial works.[39] Extending these laws to copyright license contracts would not only allow courts to approve contracts pertaining to other creative works, but it would also protect any financial gains made by the minor creators.[40]

Finally, Part II suggests informal solutions for minors, parents and guardians, and companies. Parents, guardians, educators, and the community can inform themselves about

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36 *See* Young, *supra* note 19.

37 *See* CAL. FAM. CODE §§ 6750–51(a) (West); *see also* Danielle Ayalon, *Minor Changes: Altering Current Coogan Law to Better Protect Children Working in Entertainment*, 35 HASTINGS COMMC'NS & ENT. L. J. 353, 354 (2013) ("Coogan Law is a popular name for sections 6750 through 6753 of the California Family Code."); *California Coogan Law*, *supra* note 31 (describing similar laws in other states).

38 *See* CAL.FAM. CODE §§ 6750–51(a) (West); *see also* Warner Bros. Pictures, Inc. v. Brodel, 31 Cal. 2d 766, 774–75 (Cal. 1948) ("The provisions . . . regarding the submission of contracts of minors for court approval are based on a policy different from [the policy] which underlies the right of minors to disaffirm their contracts. In professions in which one frequently begins a career at a tender age, it is to the interest of minors that they be able to make contracts with employers reasonably protecting the interests of both parties. To accomplish this purpose broad discretion has been vested in the court to which such contracts are submitted. The court may consider whether the terms of the contract are reasonable in the light of the then financial and educational interests of the minor as well as the proper development of his talents and his chances for success in the profession. This discretion, . . . has been vested in the court to enable the parties to adjust their contract relations to their needs . . . .").

39 CAL. FAM. CODE §§ 6750–51(a) (West); *see also* Ayalon, *supra* note 37, at 358.

40 Coogan Laws provide for a portion of the child's earnings to go into a trust to protect against parents embezzling funds from their children. *See, e.g.*, Ayalon, *supra* note 37, at 358–59.

copyright law and teach minors about their rights. Companies can give minors more control over their copyrights than the minors would otherwise have under existing law.

I. COPYRIGHT AND CONTRACT LAW

A. Copyright Overview and Registration

Under the Copyright Act, as soon as an idea is fixed in a tangible form of expression, it is subject to copyright protection.[41] The United States Copyright Office, in a pdf written for a child audience, explicitly declares that "even a child's original fingerpainting" is subject to copyright protection.[42] This makes sense because (1) authorship and ownership of a copyright immediately vest with the creator of the work (unless it is a "work made for hire," discussed below) whether or not the work is registered and (2) the standards of creativity and originality that are necessary for a work to be copyrightable are very low.[43] Though the Copyright Act does not explicitly state that authors of copyrighted works can be minors, it defines authors as natural persons, and the Copyright Office grants copyright registration to minors.[44] Copyright is accessible to minors in that artistic works need not be registered with the United States Copyright Office to receive protection; however, registration "enhance[s] the protections of copyright."[45]

A situation in which a person does not own the copyright in a work they have made is when the work is "made for hire."[46] Under the "work made for hire" doctrine, the authorship of a work (the

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41 *See, e.g.,* U.S. COPYRIGHT OFF., CIRCULAR 1: COPYRIGHT BASICS, 1 (rev. Sept. 2021) [hereinafter CIRCULAR 1].

42 *See* U.S. COPYRIGHT OFF., *Copyright for Kids* (Jan. 2021). *See also* Nicole Lamberson, *Six Copyright Concepts Your K-12 Students Should Know*, LIBR. OF CONG. BLOGS (Nov. 19, 2020), https://blogs.loc.gov/copyright/2020/11/six-copyright-concepts-your-k-12-students-should-know [https://perma.cc/AQW8-MYA3].

43 *See* CIRCULAR 1, supra note 41, at 1; *see also* I.C. *ex rel.* Solovsky v. Delta Galil U.S.A, 135 F. Supp. 3d 196, 213–15 (S.D.N.Y. 2015) (holding a second-grader's simple hi/bye smiley face design was sufficiently original to survive a motion to dismiss).

44 *See* 17 U.S.C. § 201(a); *see also Who Can Register?*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-who.html [https://perma.cc/DVP6-AM3L] (last visted Sep. 8, 2023). Thus far, only a monkey has been found to be outside the definition of an author for copyright purposes. *See* Susannah Cullinane, *Monkey Does Not Own Selfie Copyright, Appeals Court Rules*, CNN (Apr. 24, 2018, 9:27 AM), https://www.cnn.com/2018/04/24/us/monkey-selfie-peta-appeal/index.html [https://perma.cc/9M44-3TDB].

45 *See* CIRCULAR 1, *supra* note 41, at 4.

46 *See, e.g.,* U.S. COPYRIGHT OFF., CIRCULAR 30: WORKS MADE FOR HIRE 1 (rev. Mar. 2021) [hereinafter CIRCULAR 30].

copyright) automatically vests in the employer of the author, if the author (1) created the work during the scope of employment or (2) contractually agreed that the work was "made for hire."[47] As the Supreme Court has noted, classifying a work as "made for hire" is profoundly significant because it has implications not only for copyright authorship and ownership but also the copyright duration[48] and termination rights, discussed in greater detail below.[49] Under the first category of works created during the scope of employment, Congress envisioned a traditional employer-employee relationship in which the employee surrenders authorship of the work in exchange for a regular salary and other employment benefits.[50] It would be unusual for a minor to be a traditional employee under the first category because of child labor laws.[51] However, it is not uncommon for companies to contractually require minors to agree that their work is "made for hire" under the second category.[52]

Assuming the minor is the copyright owner, defending a copyright is logistically challenging for minors. Registration of a copyright is a prerequisite to suing an alleged copyright infringer.[53] Minors may register their own copyrights, provided they can pay the required filing fee "by credit card, debit card, bank account, or deposit account," which they may not have

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47 *Id.*; *see also* DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 5.03 (2023) [hereinafter 1 NIMMER] (explaining the statutory requirement that a work under category two be "specially ordered or commissioned" and the courts' abandonment of requiring those "talismanic words" in "work made for hire" contracts).

48 *Compare* CIRCULAR 30, *supra* note 46, at 4 ("The term of copyright protection in a "work made for hire" is 95 years from the date of publication or 120 years from the date of creation, whichever expires first.") *with* CIRCULAR 1, *supra* note 41, at 4 ("In general . . . the term of copyright is the life of the author plus seventy years after the author's death.").

49 *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

50 *See* 133 CONG. REC. 12,957 (1987) (statement of Sen. Cochran). The "work made for hire" doctrine is akin to the "shop right" doctrine for patents: an employee who uses an employer's resources or is under an employer's control must give patent ownership to the employer. *See* H.R. REP. NO. 94–1476, at 5737 (1976); *see also* 132 A.L.R. Fed. 301 § 2[a] (1996) ("The rationale behind the "work for hire" doctrine is that when an employer hires an employee to create a copyrightable work, the fruits of the employee's endeavors properly belong to the employer.").

51 *See, e.g.*, U.S. DEP'T OF LAB., WAGE AND HOUR DIV., CHILD LAB. BULL. NO. 101, CHILD LABOR PROVISIONS FOR NONAGRICULTURAL OCCUPATIONS UNDER THE FAIR LABOR STANDARDS ACT 3 (2016) [hereinafter CHILD LABOR].

52 *See, e.g.,* I.C. *ex rel.* Solovsky v. Delta Galil U.S.A., 135 F. Supp. 3d 196, 207–08 (S.D.N.Y. 2015). *See also Contest Rules*, *supra* note 10.

53 *See* 17 U.S.C. § 411.

access,[54] or minors may appoint "a parent, guardian, or other qualified agent" to register the copyright on their behalf.[55] Once a work is registered or in the process of registration, a copyright holder may sue an alleged infringer for an unauthorized exercise of the copyright holder's right, such as copying, using, or disseminating the copyrighted work.[56] The Federal Rules of Civil Procedure dictate that minors bringing suit must be represented by an adult, so a minor will need a parent, guardian, or other representative to bring the suit on his or her behalf.[57] Thus, unlike an adult copyright holder, a minor whose work has been infringed is at the mercy of caring adults in her life.[58] After meeting these logistical hurdles, minors seeking to defend their copyright must confront differing state laws regarding minors and copyright—and the extent to which the Copyright Act preempts state law.[59]

B. Copyright Preemption and Contract Law Gap Fillers

Federal copyright law is a legal scheme, rooted in the United States Constitution, intended to further the arts.[60] Copyright law encourages people to make creative works "by attaching enforceable property rights to them."[61] The Copyright Act, passed in 1976, is the law in the United States today.[62]

Congress's overall intent in codifying a federal copyright scheme was to substitute the "anachronistic, uncertain,

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54 *See* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFF. PRACS. § 405.2 (3d ed. 2021) [hereinafter COMPENDIUM]; *see also id.* ("[T]he U.S. Copyright Office will accept applications submitted either by or on behalf of a minor."); *see also* CIRCULAR 2: COPYRIGHT REGISTRATION, U.S. COPYRIGHT OFF. 2 (rev. May 2022).

55 COMPENDIUM, *supra* note 54, at § 405.2.

56 *See* 17 U.S.C. § 411.

57 *See* FED. R. CIV. P. 17; *see also* Cooley v. Target Corp., No. 20-2152, 2022 U.S. Dist. LEXIS 175623, at *2 (D. Minn. Sept. 28, 2022). However, the Copyright Act is clear that the minor, not the adult representative, is the one with standing to sue. *See* 17 U.S.C. § 501(b).

58 *But see* FED. R. CIV. P. 17(c)(2) (directing courts to appoint a guardian ad litem to represent a minor who does not have an adult to represent her).

59 *See Who Can Register?*, *supra* note 44 ("Minors may claim copyright, and the Copyright Office issues registrations to minors, but state laws may regulate the business dealings involving copyrights owned by minors.").

60 *See, e.g.*, Alison Hall, *Promoting Progress: Celebrating the Constitution's Intellectual Property Clause*, LIBR. OF CONG. BLOGS (Sept. 17, 2020), https://blogs.loc.gov/copyright/2020/09/promoting-progress-celebrating-the-constitutions-intellectual-property-clause/ [https://perma.cc/U9WY-6RVB].

61 Diamond v. Am-Law Publ'g Corp., 745 F.2d 142, 147 (2d Cir. 1984).

62 *See* H.R. REP. NO. 94–1476, at 5660 (1976); *see also id.* at 5660–62 (explaining the technological advances such as radio and television which made necessary numerous amendments to the Copyright Act of 1909).

impractical, and highly complicated" copyright common law for a "single system of Federal statutory copyright" and thereby promote uniformity and predictability.[63] The congressional committee involved in writing the Copyright Act of 1976 noted this intent:

> One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.[64]

By providing uniformity and predictable outcomes, Congress sought to further the aims of the Copyright Act and encourage people to create copyrightable works.[65] Moreover, the plain language of section 301 of the Copyright Act states that "all legal or equitable rights" in a copyrighted work—including rights of a copyright holder against infringers—are "governed exclusively" by the Copyright Act.[66] It asserts that "no person is entitled to any such right or equivalent right in any such [copyrighted] work under the common law or statutes of any State."[67] Simply stated, one's rights and infringement claims for copyrighted works are governed by the Copyright Act—not by state law. The legislative history for section 301 unequivocally states that the legislative intent is to preempt state law.[68] Thus, the Copyright Act was intended to preempt state law in regard to copyright claims, including those involving copyright infringement.

However, the Copyright Act does not adequately address copyright infringement cases involving contracts. Various aspects

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63 H.R. NO. 94–1476, at 5745 (1976). Because the United States Constitution's Supremacy Clause provides that, in general, federal law preempts or overrides state law, and the Copyright Act is federal law, the Copyright Act should preempt state law. U.S. CONST. ART. VI; *see also* DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 11.07 (2023) [hereinafter 3 NIMMER].

64 H.R. REP. NO. 94–1476, at 5745 (1976).

65 *See id.*

66 17 U.S.C § 301 (2018). See also H.R. REP. NO. 94–1476, at 5746 (1976), and 17 U.S.C. § 106 (2002), for a list of the "bundle of rights" of a copyright holder.

67 17 U.S.C. § 301; *see* H.R. REP. NO. 94–1476, at 5746 (1976).

68 *See* H.R. REP. NO. 94–1476, at 5746 (1976) ("[S]ection 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.").

of copyright law interact with contract law, including grants of licenses and contractual "work made for hire."[69] Additionally, section 201(d) of the Copyright Act provides for partial or complete transfers of copyright ownership,[70] which may be made contractually.[71] Professor David Nimmer explains that because the Copyright Act is silent on contractual issues, "the vast bulk of copyright issues must be resolved under state law."[72] Accordingly, courts have used state contract law to "fill in the gaps" left by the Copyright Act, as long as the state law does not otherwise conflict with the Copyright Act.[73] Courts use a two-prong test to determine when the Copyright Act preempts state law. First, is the work in question within the scope of the Copyright Act?[74] Second, is there an "extra element that changes the nature of the action so [that] it is qualitatively different from a copyright infringement claim"?[75] Courts generally agree about the works that fall within the scope of the Copyright Act and satisfy the first prong of the test; the second prong is the more controversial one.[76] There is a circuit split as to when the Copyright Act preempts state contract law under the second prong, and there are even varying outcomes within circuits.[77]

Sometimes, courts do not even apply the two-prong test. For example in *I.C. ex rel. Solovsky v. Delta Galil USA*, discussed in

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69 *See, e.g.*, U.S. COPYRIGHT OFF., CIRCULAR 16A: HOW TO OBTAIN PERMISSION 1 (rev. Mar. 2021); s*ee also* CIRCULAR 30, *supra* note 46, at 1.

70 17 U.S.C. § 201(d).

71 For example in the T-Shirt Design Case, discussed in Part I.C *infra*, one of the clothing company's arguments was that by signing the contest entry form, the second-grader assigned, or transferred, the t-shirt design copyright to the company. *See* I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196, 202 (S.D.N.Y. 2015).

72 3 NIMMER, *supra* note 63, § 10.03 (citation omitted).

> [T]he vast bulk of copyright issues must be resolved under state law, given the silence of the Copyright Act in addressing such issues as what persons are competent to enter into binding contracts (minors, the insane, defunct corporations, *etc.*), how to construe ambiguous contractual language, and what circumstances warrant recission of a previously entered contract.

Id.

73 *See, e.g.*, Foad Consulting Grp., Inc. v. Musil Govan Azzalino, 270 F.3d 821, 827 (9th Cir. 2001).

74 *See* Guy A. Rub, *Copyright and Contracts Meet and Conflict: Copyright Preemption of Contracts*, NORTHWESTERN PRITZKER SCH. OF L. at 18, https://wwws.law.northwestern.edu/research-faculty/clbe/events/roundtable/documents/rub_copyright_and_contracts_meet_and_conflict.pdf [https://perma.cc/PW7E-RJZU].

75 *See id.* at 19 (citation omitted).

76 *See id.* at 18–19.

77 *See also id.* at 20 ("There are . . . more than 200 reported decisions that applied the extra element test to a contractual cause of action. . . . [T]hose decisions include numerous examples of internally conflicting reasoning or decisions that deviated, typically without notice, from binding precedents . . . ."). *See generally id.*

further detail below, the district court analyzed the second-grader's disaffirmance claim, a contract formation issue, before reaching her copyright infringement claim.[78] Furthermore, in *A.V. ex rel. Vanderhye v. iParadigms, LLC*, discussed in further detail below, a district court within the Fourth Circuit failed to use the two-prong test to determine whether the state's infant contract law was preempted by the Copyright Act; instead, the court simply began its analysis of the state law claims before reaching its copyright analysis.[79] Because of these inconsistencies, the outcomes of copyright cases involving minors hinge not on the Copyright Act, as was intended by Congress, but on states' varying contract laws regarding infants.[80] Despite Congress's intent, cases involving minors and copyright are anything but uniform.

C. Infant Contract Doctrine

At common law, minors could void contracts for goods or services that were not necessities.[81] The Restatement (Second) of Contracts section 14 takes this approach, citing the age of majority as eighteen.[82] The purpose of the doctrine was "the protection of minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace."[83] Or to put it more delicately, the common law infant contract doctrine developed "to resolve . . . inequities and afford children the protection they require to compensate for their immaturity."[84] The decades-old treatise BLACK ON RESCISSION recognized an unequivocal right of minors to void or disaffirm a contract, and minors could do so quite easily by taking an act consistent with disaffirmance or initiating a lawsuit.[85]

Today, many states allow minor children to disaffirm or void their contracts, but with an important exception.[86] Minors may not

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78 *See* I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196, 207 (S.D.N.Y. 2015).

79 *See* A.V. v. iParadigms Ltd. Liab. Co., 544 F. Supp. 2d 473, 480–84 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom.* A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009).

80 *See, e.g.*, 42 AM. JUR. 2D *Infants* § 45 (2023).

81 *See* Slade, *supra* note 26, at 614, 617.

82 RESTATEMENT (SECOND) OF CONTS. § 14 (Am. L. Inst. 1981).

83 *See* Halbman v. Lemke, 298 N.W.2d 562, 564 (Wis. 1980).

84 *See* Shields v. Gross, 448 N.E.2d 108, 113 (N.Y. 1983) (Jasen, J., dissenting).

85 *See* BLACK ON RESCISSION, *supra* note 25, § 304.

86 *See* CAL. FAM. CODE § 6710 (West 1994); *see also* 42 AM. JUR. 2D, *supra* note 80, § 45; *see also* Slade, *supra* note 26, at 617–18 (discussing the benefits exception).

void a contract when they have retained the benefit of the bargain and disaffirmance would put the other party in a worse position than the minor.[87] Another way courts explain this is using "status quo" or "fruit of the contract" language: minors must return the other party to the status quo or return the fruit of the contract in order to disaffirm.[88] In this way, courts are obfuscating the distinction between a minor voiding a contract and an adult voiding a contract.[89] Courts attribute this "benefits exception" to children's growing sophistication and a need to "ensur[e] fairness to adult parties contracting with minors."[90] However, some argue that the infant contract doctrine is still necessary and that the so-called "benefits exception" can produce inequitable results for children.[91]

In two cases involving minors and copyright, the courts' disaffirmance analyses produced differing and inequitable results. First, in *I.C. ex rel. Solovsky v. Delta Galil USA* (the "T-shirt Design Case"), the court did not allow a minor to disaffirm a contract involving copyright. There, a second-grader submitted a t-shirt design to a children's clothing company as part of a school-sponsored contest.[92] To enter the contest, both the second-grader and her mother signed the clothing company's entry-form agreement, which provided that the t-shirt design constituted a "work made for hire" (meaning ownership of the copyright would immediately vest with the clothing company rather than with the second-grader)[93] and alternately assigned the second-grader's

87 *See* Slade, *supra* note 26, at 617–18.

88 *See, e.g.*, Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 494–95 (1994); *see also* Francis v. N.Y. & B.E.R. Co., 15 N.E. 192, 193 (N.Y. 1888).

89 At common law, cases involving an adult's right to void a contract had a higher bar than cases involving a child's right to void. *See* BLACK ON RESCISSION, *supra* note 25, § 197. An adult could not void her contract if she could not restore the other party to the situation it was in prior to the contract. *See id.* For an adult to void a contract, "restoration of the status quo [was] an essential pre-requisite." *Id.*

90 *See* Slade, *supra* note 26, at 617–18.

91 *See, e.g.*, *id.* (arguing that children are still vulnerable and in need of protection by the doctrine, especially with the rise of companies with great bargaining power and children's online presence); *see also id.* at 638 ("Without the threat of disaffirmance, there is little reason [for companies] not to entice minors into contracts that are not in their best interests."). This accords with Supreme Court decisions that have relied on brain development research to find "that the hallmark features of adolescence—including immaturity, a lack of experience, impetuosity, and less ability to weigh risks and consequences, along with young people's lack of control over their own environment and choices" afford minors different protections than adults. *See* Spinak, *supra* note 3, at 312.

92 I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196, 202–03 (S.D.N.Y. 2015).

93 *See supra* Part I.A.

copyright to the clothing company.[94] The second-grader's simple "hi/bye" t-shirt design won the contest.[95] The second-grader received a $100 gift card, but she received none of the profits from national sales of the t-shirts, socks, purses, headphones, and other merchandise bearing the t-shirt design.[96] The court did not allow the second-grader to disaffirm the contract under the infant contract doctrine, reasoning that allowing the second-grader to disaffirm in this case would run counter to the underlying policy of the infant contract doctrine.[97] If the second-grader were allowed to disaffirm and then own the copyright in designs currently printed on hundreds of t-shirts, the second-grader would be in a superior position than she was prior to disaffirmance.[98] She would be impermissibly retaining the "fruit of the contract."[99]

In *A.V. ex rel. Vanderhye v. iParadigms, LLC* (the "Turnitin Case"), the Fourth Circuit barred minors from disaffirming their copyright contract.[100] In that case, a group of minor high school students did not want to agree to the software company Turnitin's license agreement, which allowed Turnitin access to use and archive their essays for its anti-plagiarism software.[101] The agreement granted Turnitin a "non-exclusive, royalty-free, perpetual, world-wide, irrevocable license" to use the essays.[102] But in order to submit their essays and receive a grade from their school, the students had to agree.[103] The students later sued Turnitin for copyright infringement.[104] When Turnitin asserted that the students had agreed to the license agreement, the students unsuccessfully attempted to void the contract under the infant contract doctrine.[105] The court rejected this argument, reasoning that the students retained the benefits of the agreement; they received a grade for their work because it was

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94 *See I.C. ex rel. Solovsky*, 135 F. Supp. 3d at 207–08.

95 *Id.* at 203.

96 *Id.* at 203–04.

97 *See id.* at 209–10.

98 *Id.*

99 *Id.* at 210.

100 *See* A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 645 (4th Cir. 2009).

101 *Id.* at 634–35.

102 Slade, *supra* note 26, at 620.

103 *A.V. ex rel. Vanderhye*, 562 F.3d at 635.

104 *Id.* at 633–34.

105 *Id.* at 636 n.5; *see also* A.V. v. iParadigms Ltd. Liab. Co., 544 F. Supp. 2d 473, 480–81 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom.* A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009).

verified as non-plagiarized by Turnitin.[106] However, as intellectual property law professor and legal scholar Andrea M. Matwyshyn notes, the court's disaffirmance analysis was tenuous: "it is not entirely clear how the company's generating revenue for itself from archiving the children's work benefits these particular children. Requiring that the children grant a perpetual, irrevocable license to use their work against their will seems of dubious benefit to the children."[107] Though the court acknowledged that the essays were "education[al] and creative expression[s]," the court found that Turnitin's use of the essays constituted fair use, rendering Turnitin not liable for copyright infringment.[108]

These two examples show the unpredictable and sometimes inequitable nature of courts' disaffirmance analyses using the benefits exception.[109] Despite the minors' immaturity and the

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106 *A.V. ex rel. Vanderhye*, 562 F.3d at 636 n.5; *see also A.V.*, 544 F. Supp. 2d at 480–81.

107 Matwyshyn, *supra* note 18, at 1991; *see also* Michael G. Bennett, *The Edge of Ethics in iParadigms*, B.C. INTELL. PROP. & TECH. F., 2009, at 15 (characterizing the Turnitin Case as promoting a "cynical vision" of youth as "Bad Seed[s]").

108 *A.V.*, 544 F. Supp. 2d at 482 ("[The students] originally created and produced their works for the purpose of education and creative expression."); *see also A.V. ex rel. Vanderhye*, 562 F.3d at 645. In his comment on this case, Michael G. Bennett notes that in terms of copyright law, the case "represents a profound legal defeat for the student plaintiffs" because the court prioritized protecting educators from plagiarism above protecting minors' creative expression. Bennett, *supra* note 107, at 15.

109 A further issue in a court's disaffirmance analysis is whether a transfer of copyright should be seen as irrevocable. A comment to the Restatement of Contracts, Second, section 14 states that a minor's "disaffirmance *revests* in the other party the title to any property received by the infant under the contract." RESTATEMENT (SECOND) OF CONTS. § 14 cmt. c (AM. L. INST. 1981) (emphasis added). But the comment further provides: "The problems arising when an infant seeks to disaffirm a *conveyance or executed contract* are beyond the scope of the Restatement of this Subject, whether the disaffirmance is attempted before or after he comes of age." *Id.* (emphasis added). In 1966, Charlie Chaplin's 19-year-old son Michael made a contract with a book publisher to write a memoir and received a hefty advance. *See* H. J. Hartwig, *Infants' Contracts in English Law: With Commonwealth and European Comparisons*, 15 INT'L & COMPAR. L.Q. 780, 820 n.188 (1966); *see also* Bob Tarantino, *A Minor Conundrum: Contracting with Minors in Canada for Film and Television Producers*, 29 HASTINGS COMMC'NS & ENT. L.J. 45, 60–61 (2006). The age of majority at the time was 21. *Id.* at 60. Later, desiring to shirk his responsibility to write the book, Michael craftily sought to disaffirm the contract. *See* Hartwig, *supra*, at 820 n.188; *see also* Tarantino, *supra*, at 60–61. The court ultimately held that he could not disaffirm the contract. *See* Hartwig, *supra*, at 820. Regardless of whether Michael could disaffirm, the English court reasoned that Michael's transfer of copyright (in this case, the transfer of an exclusive license) to the publisher was irrevocable as if it were a conveyance of real property. *See* Tarantino, *supra*, at 60–61. However, some courts have allowed infants to disaffirm conveyances of real property. *See* 5 TIFFANY REAL PROP. § 1363 (3d ed. 1939). The court also reasoned that even though the book had not yet been published, the copyright had vested with the publishers and could not be revoked. *See* Tarantino, *supra*, at 61. The court in the T-Shirt Design case also implicitly supported this idea of vesting when it cited *Francis v. New York & B.E.R. Co. See* I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp.

disparities in bargaining power, the infant contract doctrine did not protect the minors. The second-grader lost out on profits from her artwork, and the student essayists were stripped of control of their copyright in exchange for arguably no benefit.

Furthermore, regardless of one's views on the sophistication of minors and whether they should be able to disaffirm contracts, the outcomes of these cases were not ideal for the companies. The clothing company in the T-Shirt Design Case undoubtedly suffered bad publicity. Despite the company in the Turnitin Case requiring students to contractually grant it a license, the court found that the company did not hold a license for the students' work. The use of the essays was simply fair use, meaning the company would have to prove any additional, different uses of the essays were fair use as well.[110] The unpredictable results of the infant contract doctrine and the way courts analyze its exceptions make companies' contracts for minors' copyrights risky.

Because of the uncertain outcomes of the infant contract doctrine, some companies seek protection by having a parent co-sign the minor's contract.[111] The rationale is that a parent or guardian, as an adult, can be bound by the contract. States agree that if a parent co-signs a contract with a minor, the parent's duties will survive the minor's disaffirmance.[112] But because laws differ on whether a parent can bind the child contractually, having a parent sign a minor's contract is not an effective solution. Under common law, a parent's approval of a contract had no effect on whether the minor could disaffirm the contract.[113] For example,

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3d 196, 209–10 (S.D.N.Y. 2015). Interestingly, the *Francis* court held that infants could not disaffirm a contract because restitution was not possible: stocks had already been transferred to the minors, and the stock title had vested. *See* Francis v. N.Y. & Brooklyn El. R.R. Co., 15 N.E. 192, 193 (N.Y. 1888). In this way, the T-Shirt Design Case court equated a company producing merchandise, or a copyright being exploited, with title to stock ownership vesting.

110 *See A.V. ex rel. Vanderhye*, 562 F.3d at 645; *see also U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF. (Feb. 2023), https://www.copyright.gov/fair-use/ [https://perma.cc/C9RX-VBL7] ("Courts evaluate fair use claims on a case-by[-]case basis, and the outcome of any given case depends on a fact-specific inquiry.").

111 *See I.C. ex rel. Solovsky*, 135 F. Supp. 3d at 209 (discussing the clothing company's argument that the second-grader was precluded from disaffirming the contract because her mother signed it).

112 *See, e.g.*, Bonnie E. Berry, *Practice in a Minor Key*, 25 L.A. LAW. 28, 31 (2002); *see also* Ayalon, *supra* note 37, at 358–59 (discussing how a child's and parent's interests can be in direct conflict when the child disaffirms the contract but the parent's contractual duties survive).

113 *See* E.C.B., Annotation, *Parent's Approval or Sanction of Infant's Contract as Affecting Latter's Liability on, or Right to Disaffirm, It*, 9 A.L.R. 1030 (1920).

in the 1920 case of *Bombardier v. Goodrich*, the court stated that "the assent of the father added nothing to the binding force of the infant's promise."[114] Today, state laws differ on whether a parent may contractually bind a child, particularly with respect to releasing an entity from liability for negligence; some courts have reasoned that giving parents this authority furthers public policy.[115] These courts trust that the parent knows how to best protect the interests of the child.[116] But other courts, recognizing that sometimes parents' interests are at odds with their children's interests, have held that "a minor is not bound by a release executed by his parent."[117] New York Court of Appeals Judge Jasen recognized a minor's broad right to disaffirm a contract—even one signed by a parent—as an act of judicial parens patriae[118] to protect minors from their own immaturity and inexperience.[119] He reasoned that allowing a minor to disaffirm was a way for the *state* to "put the interests of minors above that of adults, organizations, or businesses" and "afford an infant protection against exploitation from adults," even, it would seem, from parents.[120]

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114 *See id.* (citing Bombardier v. Goodrich, 94 Vt. 208 (1920)).

115 *See, e.g.*, Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 205 (Ohio 1998).

116 *See id.*

117 *See* Alexander v. Kendall Cent. Sch. Dist., 634 N.Y.S.2d 318, 319 (1995) ("[A] minor is not bound by a release [from liability] executed by his parent."); *see also* Hojnowski v. Vans Skate Park, 901 A.2d 381, 383 (N.J. 2006) (finding a contract signed by a parent on behalf of a minor releasing an entity from prospective negligence was not enforceable).

118 Latin for "parent of his or her country," this legal concept involves the state acting "as provider of protection to those unable to care for themselves." *Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

119 *See* Shields v. Gross, 448 N.E.2d 108, 113 (N.Y. 1983) (Jasen, J., dissenting); *see also Hojnowski*, 901 A.2d at 383 (discussing the court's "parens patriae" duty to protect the best interests of the child).

120 *See Shields*, 448 N.E.2d at 113 (Jasen, J., dissenting). The T-Shirt Design Case, decided under New York law, similarly recognized a minor's right to disaffirm a contract even when the contract was also signed by a parent. *See* I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196, 202, 208–09 (S.D.N.Y. 2015). Thus, the second-grader's mother's signature was not fatal to the second-grader's attempt to disaffirm. *Id.* at 207, 209. Later, however, the court factored the mother's signature into its unconscionability analysis. *Id.* at 211–12. One of the second-grader's arguments was that the contest contract was unconscionable because it was made between a child who was too young to understand that she was signing away copyright ownership and a "sophisticated business." *Id.* at 202, 207, 211. If a contract is found to be unconscionable, it can be voided apart from the infant contract doctrine. *See, e.g.*, *id.* at 210. Contract unconscionability is determined under state law, and it often involves a sliding scale of procedural and substantive unconscionability. *Id.* at 210–12. Procedural unconscionability involves the relative bargaining power of the parties and whether there was a "lack of meaningful choice" by the party claiming unconscionability. *Id.* at 211. The T-Shirt Design Case court

New York and California have statutorily determined circumstances in which a parent's signature is binding on the child, but these statutes can leave children without a voice.[121] In *Shields v. Gross*, the court applied New York Civil Rights Law section 51 and held that model Brooke Shields could not disaffirm a prior contract—under which a photographer took nude photos of her as a ten-year-old—because her mother had consented.[122] Shields' mother had provided the photographer broad consent, producing the "unanticipated and untoward" result that 17-year-old Shields was barred from limiting the photographer's use of the photos.[123] A similar case decided under California Civil Code section 3344 involved a parent authorizing nude photographs of her children (ages four and six) that ultimately ended up in the hands of *Hustler Magazine*.[124] The court did not allow the minors in that case to disaffirm that contract because the proper consent had been obtained from the parent, in accordance with the statute.[125] Laws such as these provide greater certainty to companies working with youth in that the contracts, once approved by a parent or guardian, are disaffirmance-proof. However, these laws can be problematic for youth with negligent or unscrupulous parents or guardians and ignore the child's rights and wishes.[126]

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considered the unequal bargaining power of the sophisticated company and a second-grader and the fact that the company "conduct[ed] the contest through the auspices of the [second-grader's] school," which induced her to participate and found sufficient facts to support procedural unconscionability. *Id.* at 211. The court noted it would consider the fact that the second-grader's mother had "advised and supervised" her daughter, as evidenced by the mother signing the contract, when evaluating procedural unconscionability at trial. *Id.* at 212. The court in the T-Shirt Design Case doubted whether there was substantive unconscionability since no one could have anticipated the merchandise sales at the execution of the contract. *Id.* However, since unconscionability operates on a sliding scale, the court found sufficient facts to let the claim proceed to trial. *Id.*

121 *See, e.g.*, Faloona by Fredrickson v. Hustler Mag., Inc., 799 F.2d 1000, 1005 (5th Cir. 1986) (applying California Civil Code section 3344); *see also* CAL. CIV. CODE § 3344 (West 1971).

122 *See Shields*, 448 N.E.2d at 109.

123 *See id.* at 112; *see Shields*, 448 N.E.2d at 112 (Jasen, J., dissenting); *see also* Christopher Turner, *Sugar and Spice and All Things Not So Nice*, THE GUARDIAN (Oct. 2, 2009, 7:05 PM), https://www.theguardian.com/theguardian/2009/oct/03/brooke-shields-nude-child-photograph [https://perma.cc/5WSE-F9ML] (opining that Shields felt like "a victim of her mother's poor judgment").

124 *See Faloona by Fredrickson*, 799 F.2d at 1002–04.

125 *See id.* at 1005. This horrifying outcome is perhaps why the legislature has proposed 2023 California Assembly Bill No. 1394, an amendment which would limit California Civil Code section 3344 to avoid commercial sexual exploitation of minors. Assemb. B. 1394, 2023 State Assemb., Reg. Sess. (Cal. 2023).

126 *See* Marc R. Staenberg & Daniel K. Stuart, *Children as Chattels: The Disturbing Plight of Child Performers*, 32 BEVERLY HILLS BAR ASS'N J. 21, 22–24 (1997).

D. State Coogan Laws

Contracts are not subject to a minor's disaffirmance when a court, rather than a parent or guardian, approves the contract.[127] California's Coogan Laws, for example, state that a contract to render "artistic or creative services" that is entered into by a minor cannot be disaffirmed if it has been certified by a county superior court.[128] These laws were passed to protect companies *and* children. Coogan Laws addressed film studios' concerns that child actors would disaffirm their contracts, leaving studios exposed to risk and monetary loss.[129] The laws also protect child actors from unwise or unscrupulous parents who would misappropriate the child's earnings.[130] Coogan Laws apply to minors rendering "services as an actor, actress, dancer, musician, comedian, singer, stuntperson, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer."[131] But because the laws only apply to entertainment-related *employment* contracts, the laws do not protect contracts like the ones seen in the T-Shirt Design Case or "Doodle for Google."[132]

E. Disaffirmance of a "Work Made for Hire" Contract

Some companies and organizations, such as the clothing company in the T-Shirt Design Case, seek to mitigate the risk of contracting with a minor by specifying that the work is "made for

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127 *See* 42 AM. JUR. 2D, *supra* note 80, § 45.

128 CAL. FAM. CODE §§ 6750–51(a) (West 2020); *see also* Ayalon, *supra* note 37, at 352 ("Coogan Law is a popular name for sections 6750 through 6753 of the California Family Code."); *see also California Coogan Law*, *supra* note 31 (describing similar laws in other states).

129 *See* Staenberg & Stuart, *supra* note 126, at 25.

130 *See* BURTON, CALIFORNIA BILL ANALYSIS, S. 1999-1162, Reg. Sess. at 3 (1999) (protecting the child's income and explicitly stating that earnings are "the sole property of the minor"). However, some criticize Coogan Laws' inability to adequately protect child performers financially. *See generally* Ayalon, *supra* note 37 (discussing the laws' shortcomings, such as the inadequate requirement that only fifteen percent of gross earnings be placed in the child's trust account).

131 CAL. FAM. CODE § 6750(a)(1). It is important to note that Coogan Laws seek to protect the parties' finances rather than the child performers' copyrights. *See* Ayalon, *supra* note 37, at 353–57. Actors generally cannot hold a copyright in their performances. *See* Garcia v. Google, Inc., 743 F.3d 1258, 1262–1265 (9th Cir. 2014) (reasoning that an actor's copyright only extends to the minimal creativity she adds to the existing script and that most actors provide services as "works made for hire"). Similarly, photographers, rather than models, hold the copyright in a photograph. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884).

132 *See* Ayalon, *supra* note 37, at 358.

hire."[133] However, "work made for hire" contracts are not immune to disaffirmance. Professor Nimmer theorizes that in a "work made for hire" scenario, the authorship of the copyright vests in the employer "not simply by reason of his status as an employer," but because there is an express or implied agreement between the employer and the employee.[134] Thus, if the employer materially breaches the agreement by, say, failing to pay the employee, the employee is entitled to void the contract and reclaim the copyright.[135] Using this reasoning, a minor could potentially disaffirm a "work made for hire" contract and reclaim their copyright. Though companies seek to protect themselves by using the "work made for hire" doctrine, such use could potentially be fraught with consequences.[136]

F. Copyright Act Section 203

To counteract the disparities in bargaining power between creators and publishers, the Copyright Act authorized a copyright holder to recapture her copyright in narrow circumstances.[137] In his treatise on copyright, Professor Nimmer notes: "From its earliest manifestations, copyright law has struggled to deal with the equitable and efficient division of value and control between creators and the enterprises that distribute their works."[138] Before the advent of the internet, publishers were the only ones who could disseminate copyrighted work.[139] To offset the financial risk of disseminating the work, these publishers would often pay a low fee in exchange for the copyright owner's full assignment of the copyright to the publishers forever.[140] At the time of assignment,

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133 *See* I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196, 207–08 (S.D.N.Y. 2015); *see also* Hefner Interview, *supra* note 20.

134 1 NIMMER, *supra* note 47, § 5.03.

135 *See id.*; *see also* Chau Vo, *Finding a Workable Exception to the Work Made for Hire Presumption of Ownership*, 32 LOY. L.A. L. REV. 611, 636–49 (1999).

136 The outcome of such a case would be difficult to predict considering varying views on copyright preemption. For example, the Second Circuit has held that cases involving mere copyright ownership are usually not preempted, but copyright infringement claims are preempted. *See* Vo, *supra* note 135, at 633. If a minor disaffirmed a "work made for hire" contract, it is difficult to predict whether the court would find the case involved mere ownership or ownership and infringement for preemption purposes. *See* Young, *supra* note 19, at 461.

137 *See* S. REP. NO. 94–473, at 108–10 (1975); *see also* 3 NIMMER, *supra* note 63, § 11.07[A] ("[F]or almost as long as copyright has existed, there has been concern about creators getting the short end of the stick in their dealings with distributors."); 17 U.S.C. § 203.

138 3 NIMMER, *supra* note 63, § 11.07[A].

139 *See id.*

140 *See id.*

it was impossible to determine the work's value.[141] But years later, a book manuscript licensed for one dollar could be a bestseller, grossing hundreds or thousands of dollars.[142] For decades, copyright law sought to protect copyright holders by allowing them to recapture their rights after several decades and guard against these "unremunerative" or unprofitable transfers.[143]

Today, this recapture or termination provision is codified in section 203 of the Copyright Act.[144] Essentially, if a copyright owner transfers, assigns, or licenses her copyright, her surviving family member may send notice to the transferee after thirty-five years that they are terminating the copyright.[145] This allows her to make a fairer transfer of the work if she initially received a low license fee.[146] The plain language of section 203 clearly states it cannot be contractually waived at the time the initial license is made; this is significant because every copyright holder was intended to have this section 203 termination right.[147]

Section 203 is even more important for minor creators because of the wide gap in bargaining power between minors and companies. Though the legislative history of section 203 does not expressly contemplate minor creators, this Note argues that the congressional intent to protect against disparities in bargaining power is even stronger when it comes to minor creators.[148] In fact, for minor creators, the section 203 termination right is in addition to the right to disaffirm a contract under the infant contract doctrine; nothing in the section was "intended to change the existing state of the law of contracts concerning the circumstances in which an author may cancel or terminate a license, transfer, or assignment."[149]

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141 *See* H.R. REP. NO. 94–1476, at 124 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5740.

142 *See id.*

143 3 NIMMER, *supra* note 63, § 11.07[B]–[D].

144 17 U.S.C. § 203.

145 *Id.*

146 *See* S. REP. No. 94–473, at 108.

147 17 U.S.C. § 203(a)(5) ("Termination of the grant may be effected notwithstanding any agreement to the contrary . . . ."); *Notices of Termination*, U.S. COPYRIGHT OFF., https://www.copyright.gov/recordation/termination.html#:~:text=Section%20203%20applies%20to%20grants,before%20or%20after%20that%20date [https://perma.cc/QD46-M983] (last visited Oct. 26, 2023) ("Section 203 applies to grants executed by the author on or after January 1, 1978, regardless of whether the copyright in the author's work was secured before or after that date.").

148 *See* Young, *supra* note 19, 459–60.

149 H.R. REP. NO. 94–1476, at 128 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5743.

However, minors who create "works made for hire" do not have this section 203 termination right. Section 203 only applies to transfers, and "works made for hire" are not transfers.[150] This means minors with work for hire contracts are excluded from Congress's intended section 203 protection.

II. SOLUTIONS

Minor creators and companies need clearer, less risky, and more effective outcomes when working together. To that end, Congress and the Supreme Court should resolve the circuit split on what constitutes an extra element for copyright preemption and provide guidance on how to reconcile copyright and contract law claims. In the meantime, accepting this has not yet happened, this Part suggests four solutions. First, Congress should amend section 203 to allow minors to terminate their license agreements sooner than thirty-five years after the transfer. Second, under common law, courts should find most "work made for hire" contracts involving minors unenforceable to ensure the minor's authorship of the copyright. Third, states can pass Coogan Laws to protect minor creators or—if they have existing Coogan Laws—extend the laws to written and pictorial works. Finally, this Part suggests informal solutions for minors and companies to work together in good faith.

A. Expand Protection of Minors by Amending Section 203

Section 203 was intended as a "practical compromise . . . recognizing the problems and legitimate needs of all interests involved."[151] In addition to protecting copyright holders, section 203 protects companies; even if the copyright holder elects to terminate after thirty-five years, the company-transferee retains the right to utilize the work and any derivative works the company produced prior to termination.[152] For example, assume the second-grader in the T-shirt Design Case was the copyright holder and the entry form provided that she contractually assigned her copyright to the clothing company and it was not a "work made for hire." If the second-grader terminated the license after thirty-five years, the clothing company could argue the t-shirts and

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150 17 U.S.C. § 203(a). The "employee" who creates a "work made for hire" is seen as never holding the copyright to begin with, so they cannot have transferred it to someone else. *See supra* Part I.A.

151 H.R. REP. NO. 94–1476, at 124.

152 *See id.*

merchandise based on the design were derivative works. The clothing company could not produce any more merchandise, but it could safely sell any previously produced merchandise as lawful derivative works. If the merchandise were still profitable, the clothing company might wish to enter into a new license agreement with the (now-adult) second-grader, and the parties could strike a more fair and remunerative balance. Section 203 is a clear sign of Congress's intent to strike a balance between copyright holders and the distributors of the works, but thirty-five years is too long for a minor to wait.[153]

In her law review article published over a decade ago, Professor Julie Cromer Young suggested that Congress amend section 203 to allow minors to terminate their transfer or license agreements "within a five-year window after the execution of the transfer, if the author has not yet reached the age of majority, or within five years of the author's attaining the age of majority if the author would not in fact attain that age within the five-year period."[154] Professor Young also proposed that when the minor terminates the agreement in this way, the company-transferee must cease using derivative works.[155] There are several issues with this solution. First, this proposal seeks to cut through the confusion of copyright act preemption and state contract law gap fillers by amending the Copyright Act directly.[156] However, courts have still been able to erode the effectiveness of section 203 by allowing state contracts to interfere with termination rights, despite the section's plain language that termination rights exist notwithstanding "any agreement to the contrary."[157] For example, courts have held contract renegotiations extinguish termination rights.[158] Amending section 203 alone will not impact how courts decide

153 *See, e.g.*, 3 NIMMER, *supra* note 63, § 11.07.

154 Young, *supra* note 19, at 459.

155 *Id.*

156 *See id.* at 458–59.

157 17 U.S.C. § 203(a)(5). *See* 3 NIMMER, *supra* note 63, § 11.07. The Second Circuit's decision in *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008) imports the different legal regime of state law, such that federal termination becomes inoperative when publishers have engaged in re-granting, rescission, or novation that meet an ill-defined and inherently subjective "fairness test." *Id.* § 11.07[D][3] ("The availability of termination rights, federally granted property interests, is made to turn on whether there has been a superseding agreement under state contract law.").

158 *See* 3 NIMMER, *supra* note 63, § 11.07[D][2]–[3] (explaining the circuit split over "whether and in what circumstances a renegotiated grant extinguishes the right to terminate the original transfer").

cases involving termination rights. Second, because section 203 does not apply to "works made for hire," amending the section would still leave minors with "work made for hire" contracts unprotected.[159] Finally, Professor Young's solution would make companies even less likely to work with minors. If a minor could not only terminate an agreement with a company *within* five years but also bar a company from using any previously produced derivative works, it would be too risky for companies to invest in working with minors. Companies would be uncertain of how much time they would have under the license or transfer agreement before a minor chose to terminate, and they would not be able to utilize derivative works after termination. Professor Young's solution is perhaps too favorable to minors.

Consequently, this Note, like Professor Young's article, would support allowing a minor to terminate a transfer or license sooner than thirty-five years. However, this Note would propose greater certainty for companies by allowing a minor to terminate *after* five years of execution or *after* five years of reaching majority.[160] This would benefit the company-transferee by providing at least five years of certainty in which the license contract could not be disaffirmed. This solution would also allow minors to have more control over their copyrights as well as the opportunity to renegotiate with more bargaining power, just as Congress intended. Additionally, unlike Professor Young's proposal, this Note would keep section 203(b)(1) undisturbed, allowing a company to continue to utilize previously made derivative works.[161] This would enable companies to safely invest in utilizing minors' art, which serves the purpose of channeling minors' creativity. However, it is important to note that Congress has not acted to amend section 203 in the decade since Professor Young suggested her solution. Accordingly, this Note suggests other solutions that can be employed concurrently.

B. Do Not Let Second-Graders "Work"

"Work made for hire" contracts involving minors under legal working age should not be enforced because there is no employment quid pro quo. As previously discussed, in codifying the "work made for hire" doctrine, Congress intended a quid pro quo:

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159 *See* 17 U.S.C. § 203(a).

160 This Note's proposal assumes that the Supreme Court or Congress resolves the erosion of section 203 discussed above.

161 *See* 17 U.S.C. § 203(b)(1).

employers get authorship and ownership in employees' works in exchange for providing a salary and benefits to employees.[162] With an organization like Youth Communication, the "work made for hire" doctrine fits; minors of legal working age are commissioned and paid to write stories for a publication.[163] In cases like this, the "work made for hire" contract should be enforced.[164]

However, in the T-Shirt Design Case, there was no employment quid pro quo: the second-grader was obviously not of working age, and in exchange for her design, she received a mere $100. The second-grader neither had a traditional employment relationship with the company nor did she meet the factors set out in case law to fall within the scope of employment.[165] For example, apart from the second-grader drawing her design on the company's entry form, the company had no right to control the second-grader's work.[166] The court in the T-Shirt Design Case did not consider whether there was an employer-employee relationship to properly support a "work made for hire;" instead, whether the design was a "work made for hire" hinged on contract formation

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162 *See* 133 CONG. REC. 12,957–58 (1987) (statement of Sen. Thad Cochran).

163 *See* Hefner Interview, *supra* note 20.

164 On the other hand, with an organization like Kids in the Spotlight (KITS), a Los Angeles-based nonprofit that runs programming for foster youth ages 12–17 to write scripts and make films, "work made for hire" may not serve this legislative intent—or even the intent of KITS leadership. *See* Charity Interview, *supra* note 20; *see also About*, KIDS IN THE SPOTLIGHT, https://www.kitsinc.org/about [https://perma.cc/9FNQ-LUAA] (last visited Oct. 31, 2023). To protect the rights of the minors involved, KITS registers the minors' creative works as "works made for hire" with the United States Copyright Office. *Id.* This means that ownership of the copyright vests in KITS, rather than with the minors. *See, e.g.*, CIRCULAR 30, *supra* note 46, at 1. KITS CEO Tige Charity's intent, however, is for the minors to have control over their copyrighted scripts. *See* Charity Interview, *supra* note 20. KITS registers the short scripts with the Writer's Guild of America, with the intent to pave a path for a minor who wants to become part of the Guild later in life. *See id.* Charity sees it as her job to counsel the youth in the program and guide them through any potential encounters with movie studios regarding copyrights. *Id.* For Charity, the organization's mission, to encourage minors in foster care to tell their own stories, is important because "they have a voice." *Id.* There are so many stories about youth, especially foster youth, but she wants to encourage them to tell their own stories. *Id.* "[There is] no greater agony than bearing an untold story inside you," Charity said, quoting Maya Angelou. *Id.*

165 *See, e.g.*, CIRCULAR 30, *supra* note 46, at 3.

166 *See id.*; *see also* I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196, 203 (S.D.N.Y. 2015). But unlike in the T-Shirt Design Case, KITS does provide resources for program participants to create their works, so despite the age of some KITS program participants, the relationship might meet some of the statutory factors for "works made for hire." *See* Charity Interview, *supra* note 20; *see also* CIRCULAR 30, *supra* note 46, at 3.

issues.[167] It is unfair to ask a minor below working age to make the same cost-benefit analysis a working adult would be asked to make. A second-grader is not equipped to determine whether $100 is a fair trade for her t-shirt design. It is also logically inconsistent for society to bar some minors from working (e.g., minors under the age of 16 in some states), yet enforce "work made for hire" contracts for those same minors.[168]

The "work made for hire" doctrine is also problematic as applied to minors because of the infant contract doctrine. The issue of whether a minor can disaffirm a "work made for hire" contract and retain the copyright ownership is an open question, and it would be detrimental to companies if a minor could disaffirm a "work made for hire" contract and recapture the copyright.[169] There is too much uncertainty for companies to be contracting with minors for "works made for hire." Therefore, Congress should amend the Copyright Act to provide that "work made for hire" contracts can only be entered into by individuals of working age. Alternatively, under common law, courts should find unenforceable—or readily allow disaffirmance of—"work made for hire" contracts entered into by minors below working age. These solutions would keep authorship and ownership of the copyright with the minor creator and channel contracts involving such copyright into license or transfer agreements, which allow for a section 203 termination right.[170]

C. Expand State Coogan Laws

Courts are understandably conflicted when it comes to calculating whether children should be allowed to disaffirm their contracts. On the one hand, minors are vulnerable, and it is crucial to protect them. As the Supreme Court recognized, minors' mental and social maturity is still developing.[171] At the same time, it is

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167 *See I.C. ex rel. Solovsky*, 135 F. Supp. 3d at 210–12 (discussing whether the underlying contract was unconscionable and therefore void). The case's subsequent history is unilluminating. The court held an evidentiary hearing on the issue of unconscionability, but it was cut short when the second-grader argued instead that no contract had ever been formed. I.C. *ex rel.* Solovsky v. Delta Galil USA, 2016 WL 6208561, at *1 (S.D.N.Y. Oct. 24, 2016) (mem.). The court directed the second-grader to file another amended complaint alleging this new theory. *Id.* at *3; *see also* Second Amended Complaint and Jury Demand, I.C. *ex rel.* Solovsky v. Delta Galil USA, 2016 WL 7838530, at *9 (S.D.N.Y. Oct. 26, 2016) (alleging no contract was formed and copyright infringement).

168 *See, e.g.*, CHILD LABOR, *supra* note 51, at 3.

169 *See supra* Part I.E.

170 17 U.S.C. § 203.

171 *See* Spinak, *supra* note 3, at 312.

understandable that a company working with a child to create a product (e.g., a t-shirt design) would want a child to be an adult in the eyes of the law. If a child is seen as an adult, the company would want the child to meet an adult standard for contract disaffirmance: return the company to the status quo. Coogan Laws strike this balance by accommodating vulnerable child actors who work in the realm of adults. Though Coogan Laws seek to protect the parties' finances rather than copyrights,[172] Coogan Laws' court certification framework can help minor creators as well.

Companies that currently wish to work with minors, like the film studios of old, may find more security in Coogan Laws that enable courts to certify a contract and guard against a minor's disaffirmance. Though Coogan Laws apply to employment contracts for "artistic or creative services," the laws have not been extended to companies' contracts for minors' written or pictorial works. The plain language of the law includes "designer" and "writer," leading to an inference that a t-shirt design, screenplay, "Doodle for Google," or an essay could potentially be encompassed by Coogan laws and subject to court certification. Legislatures in states with Coogan Laws can expand the laws to allow for certification of non-employment-related contracts involving "artistic or creative services." This would not only allow courts to approve contracts pertaining to these services, but it would also protect any financial gains made by the minor creators.[173] States without Coogan Laws can add similar laws to their books. After all, a minor need not live in New York or California to create a t-shirt design, write an essay, draw a "Doodle for Google," or design a website.

This Note acknowledges that this proposed solution will require a feasibility study. Under existing Coogan Laws, most child actor contracts are not brought before courts for approval because it is seen as impracticable, especially for short-term projects.[174] Additionally, some courts have reasoned that it does

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172 *See supra* Part I.D.

173 *See* Ayalon, *supra* note 37, at 352.

174 *See id.* at 355; *see also* Amanda Bronstad, *Coogan Law Loophole Leaves Child Actors at Financial Risk*, NAT'L L.J., Apr. 18, 2011 (quoting a lawyer who works with child actors as estimating most contracts involving minors are not brought to courts for approval). Instead, many producers prefer to contract with the minor's parents or guardians, perhaps under the mistaken belief that parents contractually bind their children. *Compare* Ayalon, *supra* note 37, at 358 *with* Berry, *supra* note 112, at 31 ("[A] parental signature does not validate an entertainment contract with a minor that has not been court approved. If the

not make sense to expend court resources on certification of a child's contract when the child is not an athlete or actor, working for long stretches, and making large sums of money.[175] This Note disagrees with that reasoning. As seen in the T-Shirt Design Case, it is often difficult to predict how profitable a minor's copyright can be.[176] This Note urges that, in expanding Coogan Laws, legislatures should allow all contracts for artistic or creative services to be court-certified, regardless of their monetary value. Expanding court certification to copyright license contracts may place additional burdens on courts. State legislatures (and perhaps film studio legal departments concerned about potential litigation) should consider researching the reasons why approvals are not sought for child actor contracts and study the feasibility of expending judicial resources on certifying copyright license contracts. Expanding Coogan Laws to cover copyright contracts could involve setting up specialized administrative law judges to certify such contracts efficiently.[177]

D. Informal Solutions

While minors and companies wait for legislatures and courts to act, they can take steps to work together in good faith. Parents and guardians can empower minors to stand up for their rights, rather than seeking to protect the minors.[178] This Note argues that because children should not merely be protected but rather empowered to enforce their own rights, it is important for

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legislature intended that a parent's signature would serve the same purpose as obtaining court confirmation pursuant to [California] Family Code Section 6751, it is highly unlikely anyone would ever need to petition the court for approval. The intent of the legislature was to allow judicial scrutiny of entertainment agreements involving minors in order to determine the reasonableness and fairness of the provisions contained in each agreement. If a parent's acceptance and execution of the agreement were sufficient, there would be no need for the judicial supervision mandated by the legislature.").

175 *See* Shields v. Gross, 58 N.Y.2d 338, 346 (1983). The *Shields* court reasoned that the legislative intent behind New York Civil Rights section 50 (the law barring a child's disaffirmance when a parent signs the contract) was to substitute the parent's judgment for the court certification where the service being rendered was sporadic (one modeling session) and produced a "relatively modest" fee ($450). *Id.*

176 *See supra* Part I.C.

177 *See, e.g.*, Administrative Law Judges, 85 Fed. Reg. 59207 (proposed Sept. 21, 2020) ("ALJs serve as independent impartial triers of fact in formal proceedings requiring a decision on the record after the opportunity for a hearing. . . . ALJs rule on preliminary motions, conduct pre-hearing conferences, issue subpoenas, conduct hearings (which may include written and/or oral testimony and cross-examination), review briefs, and prepare and issue decisions, along with written findings of fact and conclusions of law.").

178 *See* Spinak, *supra* note 3, at 313 (explaining the dangers of "protectionism" of youth).

minors to control, register, and defend their own copyright.[179] To that end, parents, guardians, educators, and the community can inform themselves about copyright law and teach minors about their rights under copyright law.[180] Parents and guardians can show older minors how to register their works with the United States Copyright Office, and parents of younger minors or minors with disabilities can register works on their behalf. Parents and guardians can do their best to remain aware of their minors' engagement with companies, such as by monitoring when their children submit artwork to company-sponsored contests. Because minors will need assistance from an adult representative to sue an infringer, parents, guardians, and other adults in a minor's life can listen to children and be ready to represent them when their rights have been infringed.

As seen in the T-Shirt Design Case, even schools have a role to play.[181] Schools can be wary when a company wants to sponsor a contest that affords a winner little-to-no money and asks them to surrender virtually all their creative rights. Schools and educators can look for programs that empower minors to create while allowing the minors to retain control of their copyright. Finally, educators and school social workers can stand in the gap for youth without access to caring adults in their lives by teaching them about their rights under copyright law.

Companies can compensate minor copyright holders more fairly, give them more control over their copyright, and communicate clearly. For example, the nonprofit Youth Communication shares unanticipated profits with minor writers even though it owns the copyright in the works as "works made for hire."[182] Both Youth Communication and the

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179 *See supra* Part I.

180 The United States Copyright Office produces circulars which are accessible for a layperson to read and understand. *See generally*, CIRCULAR 1, *supra* note 41.

181 *See supra* Part I.C.

182 *See* Hefner Interview, *supra* note 20. About 30–40 times per year, Youth Communication receives requests from outside publications for a license to reprint the stories. *Id.* When that happens, Youth Communication reaches out to the writers and gives the licensing fees to them, even though it (owning the copyright) is not obligated to do so. *Id.* There are other times when Youth Communication compiles stories and uses commercial publishers to print anthologies, in which case it retains the license fees to offset staffing costs incurred by creating the anthologies. *Id.* If a more lucrative licensing opportunity presented itself, Hefner would gather a group of alumni to decide how to handle any money associated with the project. *Id.* "We own [the copyright], but what's the ethical part?" Hefner asked rhetorically. *Id.* For Hefner and Youth

nonprofit Kids in the Spotlight allow minors informal control of their copyright by letting them "shop around" their works or use them in other projects.[183] Finally, both organizations keep an open line of communication with program alumni, which fosters transparency about how the copyrights are used and how potential profits can be shared with the creators.

CONCLUSION

Cases involving contracts and minors' copyrights have varying outcomes in different courts, leaving potential for minors to be creatively and financially exploited, as well as companies to be harmed. These varying results run counter to the legislative intent behind the Copyright Act—to protect creators.[184] Congress and state legislatures can create more certain, fairer outcomes for minors and companies by amending the Copyright Act and enacting comprehensive Coogan protections for minor creators. Companies and organizations can work with parents, guardians, educators, and minor creators to find informal solutions that allow minors more control of their copyright. Consequently, minors and companies will find it more predictable and fairer to work together to channel minors' creativity and further the business goals of companies.

Communication, it's not about the money: it's about giving minors a chance to tell their stories on their terms. *Id.* He and Youth Communication seek to encourage youth creativity and honor minors' rights while retaining the copyright to the works. *Id.*

183 *See id.* Youth Communication encourages writers to license their stories to third parties and can keep the money from doing so, but writers rarely make these licenses. *Id.*

184 *See supra* Part I.B.

Protecting Personal Dignity: Advocating for a Federal Right of Publicity Against Pornographic Deepfakes

*Tyler von Denlinger**

"[It] [s]hould be illegal to profit off of somebody's likeness in sex work without consent [whether] its fake or not." – Valkyrae[1]

INTRODUCTION 248
A. What are Deepfakes? 250
B. The Current Rise of Pornographic Deepfakes and Its Impact on Victims 251
I. SHORTCOMINGS IN CURRENT DEEPFAKE REGULATIONS: LIMITED PROTECTION FOR PORNOGRAPHIC DEEPFAKES 255
A. Federal Deepfake Laws Fail to Recognize the Threat of Pornographic Deepfakes 256
B. State Deepfake Laws Diverge on their Definition of "Deepfake," What Type of Material is Prohibited, and the Punishment 259
1. Virginia's Legislation on Deepfakes Imposes a High Evidentiary Burden on Plaintiffs 259
2. Exemptions in New York's Deepfake Legislation Raise Concerns About Nonconsensual Sexual Deepfake Distribution 261
3. Strategic and Feasible: California's Approach to Combat Deepfakes 262
II. SECTION 230 LIMITS VICTIMS' ABILITY TO RECOVER UNDER CURRENT STATE DEEPFAKE LAWS 264
A. Recent Internet Case Study Demonstrates Victim's Redress and Remedy Obstacles 265

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1 Rae (@Valkyrae), TWITTER (Jan. 30, 2023, 6:37 PM), https://twitter.com/Valkyrae/status/1620249935529803777?lang=en [https://perma.cc/BT6K-AMLU].

B. Section 230 and Total Immunity of Internet Service Providers.....267
III. A FEDERAL RIGHT OF PUBLICITY WOULD GRANT VICTIMS THE ABILITY TO SUE AND RECOVERY REMEDIES FROM ICSPS 269
A. What is the Right of Publicity? 270
B. A Federal Right of Publicity Would Provide All Victims Equal Standing and Right to Remedies Against ICSPs, Regardless of Jurisdiction.....272
1. Right of Publicity Statutes May Fall Under the Intellectual Property Exemption to Section 230 ...272
2. Resolving State Right of Publicity Challenges and Circuit Splits Through a Federal Right of Publicity 275
C. The Federal Right of Publicity Must Prohibit Only Obscene Material to Avoid First Amendment Challenges.....277
CONCLUSION 280

INTRODUCTION

We are currently in a new chapter of the Communication Age. Rapid advancements in information technologies have created new methods in the distribution of digital information. Included in this is the phenomenon of "deepfakes." "Deepfake" describes a "digitally forged image or video of a person that makes them appear to be someone else" through the use of machine-learning algorithms.[2]

Deepfakes use artificial intelligence to create convincing artificial images, audio, and video hoaxes. While some deepfakes are used to make humorous parodies of celebrities and politicians, the most common use of deepfake technology is for sexually explicit media.[3] In 2022, 13,000 pornographic deepfake videos were uploaded to just one well-known deepfake porn site, which accrued a monthly view count of 16 million, with men making up

2 *What is Deepfake Technology?*, TECHSLANG (Sept. 22, 2023), https://www.techslang.com/what-is-deepfake-technology [https://perma.cc/WD5P-MVDB].

3 *See* Kat Tenbarge, *Found Through Google, Bought with Visa and Mastercard: Inside the Deepfake Porn Economy*, NBC NEWS (Mar. 27, 2023, 8:56 AM), https://www.nbcnews.com/tech/internet/deepfake-porn-ai-mr-deep-fake-economy-google-visa-mastercard-download-rcna75071 [https://perma.cc/DC9T-SBGT] [hereinafter *Found Through Google*].

84% of the website's audience.[4] In recent years, the demand for deepfake pornography has exploded. In March of 2023, Meta faced backlash after Facebook hosted an ad campaign for a deepfake app where the ad depicted female celebrities in a suggestive manner.[5] In this advertising campaign, the video began by displaying a model in a suggestive position, and then showing the model's body with a female celebrity's face.[6] The barrier to creating these images is nominal. Most platforms only cost around $5 for individuals to create their personal deepfake image, video, or audio.[7] Others, who do not possess the technology, skills, or effort to create their own, can commission others to create pornographic deepfakes, with some offering to create a five-minute video of a "personal girl"—anyone with fewer than two million Instagram followers—for $65.[8]

With the rapid increase in the availability of nonconsensual pornographic deepfakes, everyone—celebrities and average citizens—should be concerned about this epidemic. As evidenced above, no one is safe from pornographic deepfakes, and they may not know they are a victim until their image is trending on X, formerly known as Twitter. While some states have passed deepfake legislation, many do not address pornographic deepfakes, and legislation that does address this topic does not adequately protect victims of deepfake porn.[9] Further, victims who want to punish the website platforms that host deepfake porn are precluded by federal law.[10]

For these reasons, a federal right of publicity must be adopted to protect victims from pornographic deepfakes. A federal right of publicity would give victims the legal standing to sue online platforms that host nonconsensual media and a remedy to remove the deepfakes from these websites.

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4 *See* Moira Donegan, *Demand for Deepfake Pornography Is Exploding. We Aren't Ready for this Assault on Consent*, THE GUARDIAN (Mar. 13, 2023, 6:16 AM), https://www.theguardian.com/commentisfree/2023/mar/13/deepfake-pornography-explosion [https://perma.cc/9XFG-SYKN]; *see also Mrdeepfakes.com*, SIMILARWEB (Oct. 2023), https://www.similarweb.com/website/mrdeepfakes.com/#overview [https://perma.cc/N7PK-E4ZA].

5 *See* Kat Tenbarge, *Hundreds of Sexual Deepfake Ads Using Emma Watson's Face Ran on Facebook and Instagram in the Last Two Days*, ABC NEWS (Mar. 7, 2023, 12:10 PM), https://www.nbcnews.com/tech/social-media/emma-watson-deep-fake-scarlett-johansson-face-swap-app-rcna73624 [https://perma.cc/3NES-Y4SK].

6 *See id.*

7 *See Found Through Google*, *supra* note 3.

8 *Id.*

9 *See infra* Part I.

10 *See infra* Part II.

A. What are Deepfakes?

Deepfakes are created using digital software, AI machine learning, and face-swapping technology.[11] Creators employ AI technology to combine images to create media depicting statements or actions that did not occur. One example is "face swapping," where the faces between two images or videos are swapped while the rest of the body and environment remains unchanged.[12] For example, researchers trained an AI algorithm using videos of Hillary Clinton, Bernie Sanders, Donald Trump, and Elizabeth Warren.[13] The algorithm was then given videos of comedic impersonators, which then produced videos of them with their faces swapped with their respective political leaders.[14]

Face swapping is only one method to produce a deepfake. Others include speech synthesis and Generative Adversarial Networks ("GAN").[15] Text-to-Speech ("TTS") involves the computer-generated emulation of a person's speech.[16] Earlier versions of TTS had difficulty mimicking a person's cadence;[17] however, the modern technology of "voice cloning" has made it possible to resemble a targeted voice.[18] Similar to face swapping, voice cloning aims to generate an original voice.[19] Voice cloning requires acoustic data sets from an original voice to train a model

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11 *See* Dave Johnson & Alexander Johnson, *What Are Deepfakes? How Fake AI-Powered Audio and Video Warps Our Perception of Reality*, BUSINESS INSIDER (June 15, 2023, 7:58 AM), https://www.businessinsider.com/guides/tech/what-is-deepfake [https://perma.cc/GK7E-XMWJ].

12 *See generally* Tomasz Walczyna & Zbigniew Piotrowski, *Quick Overview of Face Swap Deep Fakes*, APPLIED SCIS., May 31, 2023, at 1 (detailing the rapid development of facial swapping technology in recent years).

13 *See* Shruti Agarwal et al., *Protecting World Leaders Against Deep Fakes*, COMPUT. VISION FOUND., https://openaccess.thecvf.com/content_CVPRW_2019/papers/Media%20Forensics/Agarwal_Protecting_World_Leaders_Against_Deep_Fakes_CVPRW_2019_paper.pdf [https://perma.cc/38L7-Z33T] (last visited Oct. 9, 2023).

14 *See id.*

15 *See* Betül Çolak, *Legal Issues of Deepfakes*, INST. FOR INTERNET & THE JUST SOC'Y (Jan. 19, 2021), https://www.internetjustsociety.org/legal-issues-of-deepfakes [https:/perma.cc/3GGR-TZDE].

16 *See* Naroa Amezaga & Jeremy Hajek, *Availability of Voice Deepfake Technology and Its Impact for Good and Evil,* THE 23RD ANN. CONF. ON INFO. TECH. EDUC. 23, 24 (2022), https://dl.acm.org/doi/pdf/10.1145/3537674.3554742 [https://perma.cc/B6SL-N6Q7].

17 *See id.*

18 *See* Dave Johnson, *Audio Deepfakes: Can Anyone Tell If They're Fake?*, HOW TO GEEK (Aug. 3, 2020), https://www.howtogeek.com/682865/audio-deepfakes-can-anyone-tell-if-they-are-fake/ [https://perma.cc/KZ5V-QBT7]; *see also* Mohit Saini, *Voice Cloning Using Deep Learning*, MEDIUM (Feb. 6, 2020), https://medium.com/the-research-nest/voice-cloning-using-deep-learning-166f1b8d8595 [https://perma.cc/4JYZ-ME28].

19 *See* Amezaga & Hajek, *supra* note 16, at 24.

capable of generating new audios that sound alike.[20] Recent examples of TTS include voice assistants like Apple's Siri and Amazon's Alexa.[21] Now, there are websites where anyone can create accounts and produce human-quality voice recordings of celebrities and politicians.[22] In February 2023, there was a recent TikTok trend where users would use Voice Lab, a platform created by the AI startup ElevenLabs, to produce fake audio clips of President Joe Biden making provocative statements.[23]

GANs are unique in that this method produces startling, realistic photos and videos of nonexistent individuals.[24] For example, in another research study, photos of nonexistent celebrities were created from thousands of images of real celebrities.[25] These are only some of the methods used to produce deepfakes. As technology continues to develop, so does the advancement of deepfake creation.

B. The Current Rise of Pornographic Deepfakes and Its Impact on Victims

Deepfake technology has been used for decades in generally non-malicious ways. The entertainment industry has widely used such technology in its productions, including dubbing, de-aging actors, and resurrecting deceased actors.[26] The healthcare

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20 *See id.*

21 *See Conversational AI Examples: How Siri, Alexa & Google Assistant Have Human-Like Conversations*, CFTE (Feb. 11, 2021), https://blog.cfte.education/conversational-ai-examples-how-siri-alexa-google-assistant-have-human-like-conversations/ [htpps://perma.cc/T9VB-Q9EJ].

22 *See* Saini, *supra* note 18 (discussing Lyrebird's services).

23 *See* Miles Klee, *Fake Biden Speeches Are the Hottest Trend in AI Voice Tech*, ROLLING STONES (Feb. 22, 2023), https://www.rollingstone.com/culture/culture-news/joe-biden-voice-fake-ai-speeches-1234683601/ [https://perma.cc/WH8Z-VCK9] ("'I'm from Scranton,' the simulated Biden said. 'What I'm smoking is dirt. So let's get that straight, Jack. Pure brick. Ass. Okay?'").

24 *See, e.g.*, Karras et al., *Progressive Growing of GANs for Improved Quality, Stability, and Variation*, ICLR 1, 18 (2018), https://research.nvidia.com/sites/default/files/pubs/2017-10_Progressive-Growing-of/karras2018iclr-paper.pdf [https://perma.cc/SM6T-4U3Y].

25 *See id.* at 7–8 (looking at Figure 5's images of imaginary celebrities produced using a random number generator from a dataset that included hundreds of low-resolution photos and a GAN to generate these images).

26 *See* Cooper Hood, *How Deepfake Technology Can Change the Movie Industry*, SCREENRANT (Aug. 29, 2021), https://screenrant.com/movies-deepfake-technology-change-hollywood-how/ [https://perma.cc/EEE4-YLKW]; Jeremy Kahn, *Forget Disinformation. It's Hollywood and Madison Avenue Where Deepfakes Are About to Wreak Havoc*, FORTUNE (June 22, 2021, 8:43 AM), https://fortune.com/2021/06/22/deepfakes-tom-cruise-chris-ume-metaphysic-hollywood-madison-avenue-eye-on-ai/ [https://perma.cc/6SCY-4BNQ]; Tamara Kneese, *How Data Can Create Full-On Apparitions of the Dead*, SLATE (Nov. 2, 2020, 6:14

industry has also started using deepfakes to detect tumors.[27] Individuals have also used deepfake technology for personal, non-malicious reasons, including to co-star in their favorite movie[28] or have a TV character apologize for its franchise's controversial series ending.[29]

While some deepfake creation still requires a sophisticated coder and complex machinery, the democratization of the internet and deepfake technology's rapid rate of improvement mean even regular individuals can create manipulated digital content. This is especially true as some commercial applications have begun to offer individuals the ability to face swap content from their phone or home computer.[30] This includes such software programs as the DeepFaceLab program available via GitHub, FaceSwap, or FaceIt.

In 2017, a Reddit user by the username "deepfakes" created the first modern version of the deepfake.[31] On Reddit, the user posted deepfake creations where he swapped the faces of celebrities, including Gal Gadot, Taylor Swift, and Scarlett Johansson, onto the faces of adult video stars.[32] The Reddit user's creations became massively popular, kicking off the modern

PM), https://slate.com/technology/2020/11/robert-kardashian-joaquin-oliver-deepfakes-death.html [https://perma.cc/2DTB-HEUJ].

27 *See* Jackie Snow, *Deepfakes for Good: Why Researchers Are Using AI to Fake Health Data*, FAST CO. (Jul. 22, 2020, 11:44 PM), https://www.fastcompany.com/90240746/deep-fakes-for-good-why-researchers-are-using-ai-for-synthetic-health-data [https://perma.cc/3BAF-T53L].

28 *See* Ryan Gilbey, *A 'Deep Fake' App Will Make Us Film Stars – but Will We Regret Our Narcissism?*, THE GUARDIAN (Sep. 4, 2019, 12:08 PM), https://www.theguard-ian.com/technology/2019/sep/04/a-deep-fake-app-will-make-us-film-stars-but-will-we-re-gret-our-narcissism [https://perma.cc/C6E7-8VSF].

29 *See* Emily Smith, *Watch a 'Deepfake' Jon Snow Apologize for Final Season of 'Game of Thrones*', PAGE SIX (June 16, 2019, 6:03 AM), https://pagesix.com/2019/06/16/watch-a-deepfake-jon-snow-apologize-for-final-season-of-game-of-thrones/ [https://perma.cc/FHH4-6URD].

30 *See* Matt Binder, *Deepfakes Are Getting Easier to Make and the Internet's Just Not Ready*, MASHABLE (Jan. 17, 2020), https://mashable.com/article/deepfake-impersonation-tech-easy-to-make [https://perma.cc/DJ4Q-FXLA]; *see also* Ivan Mehta, *New Deepfake App Pastes Your Face onto GIFs in Seconds*, THE NEXT WEB (Jan. 13, 2020), https://thenextweb.com/artificial-intelligence/2020/01/13/new-deepfake-app-pastes-your-face-onto-gifs-in-seconds/ [https://perma.cc/J8R6-B89L].

31 *See* Ian Sample, *What Are Deepfakes – and How Can You Spot Them?*, THE GUARDIAN (Jan. 13, 2020, 5:00 AM), https://www.theguardian.com/technol-ogy/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them [https://perma.cc/YR62-5LYC].

32 *See id.*

deepfake trend. Experts predict that as much as 90% of online content could be synthetically generated within the next few years.[33]

However, as deepfake technology progresses rapidly, these deepfakes present a massive threat to individuals' privacy. There have already been manipulated videos of celebrities spewing hate speech[34] or their images on pornographic websites.[35] In 2019, a study found that 96% of the deepfake videos posted online were pornographic in nature, and 99% of them were of female celebrities mapped on the faces of adult video stars.[36] However, this threat is not exclusive to celebrities. This technology is also targeting many average women. In 2019, a report found that the website messenger Telegram allowed a deepfake bot DeepNude, to share images of virtually undressed women.[37] DeepNude allowed users to upload photos of women and for $50, they would receive a photo of the subject undressed.[38] While the app was eventually taken down, a new investigation indicates that a similar application has already targeted 100,000 young women, and most were unaware this was done to them.[39]

This case is not unique. As deepfake technology has become widespread, it creates more opportunities for individuals to post nonconsensual deepfake porn. Since 2018, there are now dozens of apps and programs to create pornographic deepfakes, with many of these apps offering free memberships or free trials.[40] Anyone now could easily create deepfake porn from their home computer or mobile phone. With this democratization, more and more people have been targeted by pornographic deepfakes. Now, non-

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33 *See* Shirin Ghaffary, *What Will Stop AI from Flooding the Internet with Fake Images?*, VOX (June 3, 2023), https://www.vox.com/technology/23746060/ai-generative-fake-images-photoshop-google-microsoft-adobe [https://perma.cc/W5NE-PEUG].

34 *See* Klee, *supra* note 23 ("One snippet sounded like actor Emma Watson reading from Hitler's *Mein Kampf.*"); Joseph Cox, *Voices for Abuse*, VICE (Jan. 30, 2023, 10:12 AM) https://www.vice.com/en/article/dy7mww/ai-voice-firm-4chan-celebrity-voices-emma-watson-joe-rogan-elevenlabs [https://perma.cc/YG7L-KMQQ] (mentioning a video where someone saying "trans rights are human rights" is strangled).

35 *See* Rory Cellan-Jones, *Deepfake Videos 'Double in Nine* Months', BBC (Oct. 7, 2019), https://www.bbc.com/news/technology-49961089 [https://perma.cc/4DSB-GFBQ].

36 *See* Sample, *supra* note 31; *see also* Johnson, *supra* note 11.

37 *See* Karen Hao, *A Deepfake Bot Is Being Used to "Undress" Underage Girls*, MIT TECH. REV. (Oct. 20, 2020), https://www.technologyreview.com/2020/10/20/1010789/ai-deepfake-bot-undresses-women-and-underage-girls/ [https://perma.cc/X6GP-ZUVH] (noting that only women were targeted as the technology did not work on men).

38 *See id.*

39 *See id.*

40 *See Found Through Google*, *supra* note 3.

celebrities are more likely to be sexually preyed upon without their knowledge.[41]

Deepfakes also present a new method of executing revenge porn.[42] By allowing individuals greater access to the technology that digitally unclothes primarily women, it gives rejected men the power to punish women through revenge porn, making more women victim of these acts. Revenge porn has a devasting toll on victims. Many have had to remove themselves from the internet altogether—the so-called "silencing effect."[43] Others have had to change their names, and some have tragically taken their own lives.[44] These women's careers and livelihoods have been substantially impacted by deepfake porn campaigns. Even after these images and videos have been removed, there is a constant fear of re-traumatization because, at any moment, these images and videos could resurface and once again ruin their lives. Deepfake pornography presents a real threat to women.[45]

This article will examine the necessity of a federal right of publicity to protect victims from pornographic deepfakes. A federal right of publicity would give victims the legal standing to sue online platforms that host nonconsensual media and a remedy to remove the deepfakes from these websites.

Part I of this Note will address the current federal and state laws and legislation that address deepfakes and grant standing for

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41 *See* Hao, *supra* note 37; Ministry of Justice & The Rt Hon Dominic Raab MP, *New Laws to Better Protect Victims from Abuse of Intimate Images*, GOV.UK (Nov. 25, 2022), https://www.gov.uk/government/news/new-laws-to-better-protect-victims-from-abuse-of-intimate-images [https://perma.cc/DHT9-SWVH].

42 *See* Sample, *supra* note 31.

43 Sophie Compton, *More and More Women Are Facing the Scary Reality of Deepfakes*, VOGUE (Mar. 16, 2021), https://www.vogue.com/article/scary-reality-of-deepfakes-online-abuse [https://perma.cc/9PP8-RFVK].

44 *See* Karen Hao, *Deepfake Porn Is Ruining Women's Lives. Now the Law May Finally Ban It.*, MIT TECH. REV. (Feb. 12, 2021), https://www.technologyreview.com/2021/02/12/1018222/deep-fake-revenge-porn-coming-ban/ [https://perma.cc/PTE4-ZBG2].

45 *See* Sample, supra note 31 (quoting Danielle Citron, a professor of law at Boston University, saying: "Deepfake technology is being weaponised against women."); *see also* Rory Cellan-Jones, *Deepfake Videos 'Double in Nine Months',* BBC (Oct. 7, 2019) https://www.bbc.com/news/technology-49961089 [https://perma.cc/WD34-V2VH] ("The debate is all about the politics or fraud and a near-term threat, but a lot of people are forgetting that deepfake pornography is a very real, very current phenomenon that is harming a lot of women."); Drew Harwell, *Fake-Porn Videos Are Being Weaponized to Harass and Humiliate Women: 'Everybody Is a Potential Target*', WASHINGTON POST (Dec. 30, 2018, 10:00 AM), https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target/ [https://perma.cc/U4LK-782R] (describing the plight of Ayyub after she was featured in a deepfake without her consent, including rape threats and being doxxed).

victims to sue. This section of the Note will also discuss the limitations of these bills. Many of these laws do not focus on deepfake revenge pornography. The few laws that do only allow victims to seek relief from the creator or poster, who, as stated above, remain anonymous, making it difficult for victims to seek relief and justice. Part II of this Note will discuss a significant federal law that limits victims' standing to sue internet service providers ("ISPs") for deepfake revenge porn, section 230 of the Communications Decency Act ("Section 230"). Section 230 generally immunizes interactive computer services ("ICSs")[46] from failure to moderate claims. Therefore, victims of deepfake pornography would not be able to punish website hosts who host their nonconsensual image and fail to remove it from their website.

Finally, this Note will briefly explain the right of publicity and examine select states that have passed this right, including California. This section will also address how a federal right of publicity would fall under Section 230's intellectual property exception. The intellectual property carve out would grant victims standing to sue website hosts and provide the remedy of an injunction and damages. A federal right of publicity will also resolve ambiguity between the states regarding the definition of deepfakes, who is protected, and the punishment for their creation. This exception will also explain why the statute's definition of pornographic deepfake must be carefully defined to avoid First Amendment challenges.

I. SHORTCOMINGS IN CURRENT DEEPFAKE REGULATIONS: LIMITED PROTECTION FOR PORNOGRAPHIC DEEPFAKES

There seems to be a "technological arms race" between deepfake creation and regulation.[47] As more legislation is passed and media companies refine their detection of the altered content, deepfake creators have repeatedly found ways to circumnavigate these restrictions. Because the tech industry's detection technology has failed to outpace the ingenuity of deepfake creators, much of the legislation passed is toothless as it becomes

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46 Section 230 defines interactive computer services as entities that serve multiple users over the Internet, including ICPs and ISPs. *See* 47 U.S.C. § 230(f)(2).

47 *See* Aasha Shaik, *Deepfake Pornography: Beyond Defamation Law*, YALE CYBER LEADERSHIP F. (July 20, 2021), https://www.cyber.forum.yale.edu/blog/2021/7/20/deepfake-pornography-beyond-defamation-law [https://perma.cc/PDF5-EYX5] ("Deepfakes are yet another example of technology growing exponentially faster than our laws, leaving people already at greater risk of harm without legal protection.").

obsolete at the time of its passing. The current deepfake laws fail to address any harm caused by manipulated explicit content.

A. Federal Deepfake Laws Fail to Recognize the Threat of Pornographic Deepfakes

In 2019, the U.S. House Intelligence Committee held hearings exploring the threat posed by deepfakes on U.S. security.[48] By December 2019, President Trump endorsed the federal deepfake legislation as part of the National Defense Authorization Act ("NDAA") for Fiscal Year 2020.[49] The 2020 NDAA ordered (1) a comprehensive report on the foreign weaponization of deepfakes, (2) the executive branch to notify Congress of "foreign deepfake-disinformation activities targeting US elections," and (3) the creation of a "Deepfakes Prize" competition that seeks to encourage the research of deepfake-detection technologies.[50]

The 2021 NDAA built upon its predecessor. Unlike the 2020 NDAA, which was primarily concerned with the foreign weaponization of deepfakes, the 2021 NDAA hinted at Congressional concern with the "rising epidemic of nonconsensual deepfake pornography."[51] The 2021 NDAA directed the Department of Homeland Security ("DHS") to study not just deepfakes' harm to national security but broader dangers, including fraud, harm to vulnerable groups, and violation of civil rights laws.[52]

The 2020 and 2021 NDAAs represent noteworthy initial strides undertaken by the executive branch to comprehensively investigate the landscape of deepfake technology and its associated detection mechanisms. Nevertheless, it is imperative to underscore that these legislative measures do not furnish immediate redress for victims of deepfake pornography. Their primary focus revolves around the exploration and examination of deepfake technology—they are devoid of any provisions for

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48 *See generally Open Hearing on Deepfakes and A.I., Before the House Permanent Select Comm. On Intelligence,* 116th Cong. (2019), https://www.youtube.com/watch?v=tdLS9MlIWOk.

49 *See* Jason Chipman et al., *First Federal Legislation on Deepfakes Signed into Law*, JDSUPRA (Dec. 24, 2019), https://www.jdsupra.com/legalnews/first-federal-legislation-on-deepfakes-42346/ [https://perma.cc/FKF5-NXBE].

50 *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 113 Stat. 1198 (2020).

51 Matthew F. Ferraro, *Congress's Deepening Interest in Deepfakes*, THE HILL (Dec. 29, 2020), https://thehill.com/opinion/cybersecurity/531911-congresss-deepening-interest-in-deepfakes/ [https://perma.cc/6LSA-FPFN].

52 *See id.*

regulatory frameworks or recommendations for prosecution. Furthermore, it is worth noting that the 2020 and 2021 NDAA do not explicitly address the specific issue of pornographic deepfakes. While the 2021 NDAA might indirectly encompass pornographic deepfakes within its purview by directing a DHS investigation into potential violations of civil rights laws, the 2021 NDAA remains exclusively committed to investigative efforts.[53] This underscores the perception that, apart from a limited number of recent publications addressing public awareness campaigns centered on pornographic deepfakes, this concern does not currently occupy a prominent position on the federal government's agenda.

Several legislative proposals have sought to impose regulatory measures and penalties on digitally manipulated media. In 2019, and again in 2021, House Representative Yvette D. Clarke introduced the Defending Each and Every Person From False Appearances by Keeping Exploitation Subject to Accountability ("DEEP FAKES Accountability") Act.[54] The primary objective of this legislation was to institute protective provisions and establish legal penalties for infractions related to deepfake creation.[55] Specifically, the DEEP FAKES Accountability Act would have required deepfake creators to put watermarks or identifying labels on their deepfake creations.[56] In addition, the Act aimed to define new criminal offenses associated with the production of deepfakes that failed to adhere to these watermark and disclosure requisites, as well as those involving the alteration of deepfakes to eliminate such disclosures.[57] Noncompliance with these provisions would render deepfake creators subject to criminal liability for a fine, up to five years in prison, or both.[58] However, despite multiple attempts, this bill encountered Senate resistance and has yet to be reintroduced for further consideration.

The Senate's cautious approach may be justified. Establishing legislation contingent upon identifying deepfakes appears

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53 *See id*.

54 *See* Tiffany Hsu, *As Deepfakes Flourish, Countries Struggle with Response*, THE NEW YORK TIMES (Jan. 22, 2023, 12:39 PM), https://www.nytimes.com/2023/01/22/business/media/deepfake-regulation-difficulty.html [https://perma.cc/4SBH-ZRNJ]; *see also* DEEP FAKES Accountability Act, H.R. 3230, 116th Cong. (2019); DEEP FAKES Accountability Act, H.R. 2395, 117th Cong. (2021).

55 *See* H.R. 3230; H.R. 2395.

56 *See* H.R. 3230 § 1041(a); H.R. 2395 § 1041(a).

57 *See* H.R. 3230 § 1041(f)(1); H.R. 2395 § 1041(f)(1).

58 *See* H.R. 3230 § 1041(f)(1); H.R. 2395 § 1041(f)(1).

premature,[59] considering the absence of robust and reliable deepfake detection technologies.[60] Without a reliable detection method, it is harder to claim that an unflattering image, video, or audio is manipulated. This is especially true for the average citizen. Presently, deepfake targeting is predominantly skewed toward celebrities, who, owing to their extensive public presence, possess a wealth of documented evidence to disprove the authenticity of manipulated content.[61] The comprehensive documentation of a celebrity's life, image, and activities provides them with ample resources to counter any allegations stemming from deepfake misrepresentations. Conversely, refuting a deepfake is a formidable and daunting task for individuals outside the celebrity sphere. Without direct evidence establishing malicious intent, individuals will likely find it difficult to contest the authenticity of deepfake content.

In addition, deepfake federal law has been slow to establish a clear and comprehensive definition of "deepfake" that aligns with the contemporary understanding of deepfake technology within the tech industry. This failure in accurately defining "deepfake" introduces the risk that these legal provisions may become outdated or irrelevant shortly after their enactment.[62] This issue is illustrated in the Ninth Circuit's decision in *Perfect 10, Inc. v. Google, Inc.,* where the Court gave a now outdated explanation of how the internet works.[63] Adopting a more expansive definition of "deepfake" may accommodate for future advancements in the creation of manipulated digital content, thereby mitigating the risk of the law being rendered obsolete as new technological developments emerge. On the other hand, a broad definition of "deepfake" may open the door for bad actors to exploit the term as

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59 *See* Hsu, *supra* note 54.

60 Even the Deepfake detection technology winner had difficulties determining whether an image was manipulated, with an error rate of 1/3 of the time. *See* Stephen Shankland, *Deepfake Detection Contest Winner Still Guesses Wrong a Third of the Time*, CNET (June 12, 2020, 8:00 AM), https://www.cnet.com/culture/deepfake-detection-contest-winner-still-guesses-wrong-a-third-of-the-time/ [https://perma.cc/QKX3-V47Y]. Another algorithmic detection system was only 65% accurate. *See* Annie Rauwerda, *Are Humans Better Than AI at Detecting Deepfakes? It's Complicated.*, INPUT (Jan. 11, 2022), https://www.inverse.com/input/tech/are-humans-better-than-ai-at-detecting-deepfakes [https://perma.cc/YM2M-GKMN]. *See also* Kahn, *supra* note 26.

61 *See* Sample, *supra* note 31.

62 *See* Julia Griffith, *A Losing Game: The Law Is Struggling to Keep Up with Technology*, J. HIGH TECH. L. (Apr. 12, 2019), https://sites.suffolk.edu/jhtl/2019/04/12/a-losing-game-the-law-is-struggling-to-keep-up-with-technology [https://perma.cc/RG22-4SWN].

63 Perfect 10, Inc. v. Google, Inc., 653 F.3d 976, 978 (9th Cir. 2011).

a pretext to dismiss unfavorable media coverage as "fake news."[64] While this argument has some merit, it underemphasizes the broader positive impacts that more precise and concrete deepfake legislation would deliver. Enacting a federal deepfake law would provide immediate assistance to victims, rather than deferring solutions and waiting for a potentially more technologically literate Congress in the future and when a definitive definition of "deepfake" is agreed upon.

B. State Deepfake Laws Diverge on their Definition of "Deepfake," What Type of Material is Prohibited, and the Punishment

Only a handful of states have introduced and successfully enacted deepfake legislation, including Virginia, New York, and California.[65] These bills differ in their definition of "deepfake" and offer varying degrees of protection to individuals.

1. Virginia's Legislation on Deepfakes Imposes a High Evidentiary Burden on Plaintiffs

In March 2019, Virginia was the first state to enact legislation explicitly addressing the issue of deepfakes.[66] The Virginia legislature passed section 18.2-386.2 of the Virginia Code.[67] The section addresses the "[u]nlawful dissemination or sale of images of another."[68] VCA section 18.2-386.2 criminalizes the distribution of pornographic deepfakes portraying individuals nude or undressed, exposing private parts of the body.[69] The strength of this law lies in its definition of an "individual," which encompasses

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64 *See* James Vincent, *Why We Need a Better Definition of 'Deepfake'/Let's Not Make Deepfakes the Next Fake News*, THE VERGE (May 22, 2018, 11:53 AM), https://www.theverge.com/2018/5/22/17380306/deepfake-definition-ai-manipulation-fake-news [https://perma.cc/SND2-D46F] ("At one point 'Trump' even says: 'We all know climate change is fake, just like this video.'").

65 *See* Korey Clark, *'Deepfakes' Emerging Issue in the State Legislatures*, LEXISNEXIS: STATE NET (June 4, 2021), https://www.lexisnexis.com/en-us/products/state-net/news/2021/06/04/Deepfakes-Emerging-Issue-in-State-Legislatures.page [https://perma.cc/P7CH-QVPE]. Other states have introduced bills but have failed—Illinois SB 3171 and HB 5321. *See id.* New Jersey also introduced a deepfake pornography bill at the beginning of 2023. *See* Brad Schnure, *Corrado Introduces Legislation Prohibiting Non-Consensual "Deepfake" Pornography*, N.J.'S 40TH LEGIS. DIST., SENATOR KRISTIN CORRADO (Mar. 6, 2023), https://www.senatenj.com/index.php/corrado/corrado-introduces-legislation-prohibiting-non-consensual-deepfake-pornography/59969 [https://perma.cc/52WK-L5BP].

66 *See* Clark, *supra* note 65.

67 *See* VA. CODE ANN. § 18.2-386.2 (2019).

68 *Id.*

69 *Id.*

both public and private figures.[70] In addition, this statute penalizes not only manipulated videos but also still images.[71] Moreover, this law explicitly covers content created with the intent to "coerce, harass, or intimidate" others.[72] This precise delineation of prohibited content helps mitigate future challenges encountered by broader deepfake laws, such as potential First Amendment conflicts and the substantial operational costs imposed on ISPs and content creators.[73]

Section 18.2-386.2 requires specific intent.[74] Under this Virginia law, deepfake creators must post explicit content with the "intent to depict an actual person . . . recognizable . . . by the person's face, likeness, or other distinguishing characteristic" and with the additional "intent to coerce, harass, or intimidate."[75] This intent requirement substantially limits the effectiveness of the legislation, as it necessitates that victims overcome a formidable burden of proof that may, based on the nature of intent crimes, make it difficult to satisfy. In one instance, political publicist Trevor Fitzgibbon sued the whistleblower lawyer Jesselyn Radack for defamation after Radack accused him of rape.[76] In his complaint, Fitzgibbon included partially explicit photos as evidence of the consensual nature of their relationship, and, in turn, Radack claimed Fitzgibbon's disclosure of these photos violated section 18.2-386.2.[77] However, the D.C. Court disagreed and held that Fitzgibbon's testimony failed to establish the intent element required by the Virginia statute.[78] Requiring specific

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70 *See* § 18.2-386.2(A) ("For purposes of this subsection, 'another person' includes a person whose image was used in creating, adapting, or modifying a videographic or still image with the intent to depict an actual person and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic.").

71 *See* § 18.2-386.2.

72 *Id.*

73 *See* MATTHEW FEENEY, DEEPFAKE LAWS RISK CREATING MORE PROBLEMS THAN THEY SOLVE, 5, 6, 8, 11, (Regul. Transparency Project ed., 2021).

74 *See* § 18.2-386.2.

75 *Id.*; *see also* Abigail Loomis, *Deepfakes and American Law*, DAVIS POL. REV. (Apr. 20, 2022), https://www.davispoliticalreview.com/article/deepfakes-and-american-law [https://perma.cc/HH6A-NWCE].

76 *See* Eugene Volokh, *Limits of "Revenge Porn" Laws*, REASON: THE VOLOKH CONSPIRACY (Jul. 11, 2019), https://reason.com/volokh/2019/07/11/limits-of-revenge-porn-laws/ [https://perma.cc/PA53-SMXH]; Amended Complaint, Radack v. FitzGibbon, No. 3:18-cv-00247-REP (D. Va. Apr. 29, 2018).

77 *See* Complaint, Fitzgibbon v. Radack, No. 3:18-cv-00247-REP (E.D. Va. Apr. 13, 2018); Order at 3, Radack v. Fitzgibbon, No. 3:18-cv-00247-REP (D.C. Super. Ct. Aug. 22, 2018).

78 *See* Order at 3, Radack v. Fitzgibbon, No. 3:18-cv-00247-REP (D.C. Super. Ct. Aug. 22, 2018) ("Respondent [Fitzgibbon] credibly testified that he filed the lawsuit in order to

intent may inadvertently protect malicious individuals, as the evidentiary requirement to establish such intent is difficult to demonstrate.

2. Exemptions in New York's Deepfake Legislation Raise Concerns About Nonconsensual Sexual Deepfake Distribution

In November 2020, New York Governor Andrew Cuomo signed Senate Bill S5959D into law.[79] A portion of this bill amended New York's civil rights laws to include a private right of action for the "unlawful dissemination or publication of a sexually explicit depiction of an individual."[80] The law defines "depicted individual" as any individual who appears, "as a result of digitization, to be giving a performance they did not actually perform," or that was performed but then later altered.[81] Notably, this legal provision defines "digitization" as "to realistically depict" someone undressed, with "computer-generated nude body parts," or engaging in sexual conduct.[82] Under this law, a depicted individual is entitled to pursue various forms of legal relief, including injunctive remedies, compensatory and punitive damages, as well as the recovery of attorney's fees.[83]

The statute includes two exemptions of concern. First, the law grants immunity to law enforcement personnel who disseminate manipulated media within the scope of their official duties, including presentation at trials or other legal proceedings.[84] While the statute is silent in who may view the media at trial, it needlessly broadens the audience for potentially malicious and nonconsensual content.[85] Second, the statute allows for the publication of pornographic deepfakes under specific circumstances, such as when they pertain to matters of "legitimate

clear his name. Respondent did not testify that he intended to publish the photos maliciously or with the 'intent to coerce, harass, or intimidate' Petitioner [Radack]. Petitioner did not testify and did not put forth any evidence of Respondent's malice or intent to 'harass or intimidate.'").

79 Jodi Benassi, *To Die For – New York Recognizes Publicity Rights of Deceased Performers*, IP UPDATE (Dec. 17, 2020), https://www.ipupdate.com/2020/12/to-die-for-new-york-recognizes-publicity-rights-of-deceased-performers/ [https://perma.cc/66CD-PSXR].

80 Matthew F. Ferraro & Louis W. Tompros, *New York's Right to Publicity and Deepfakes LawBreaks New Ground*, COMPUT. & INTERNET LAW., April 2021, at 1–2; N.Y. CIV. RIGHTS LAW § 52-c (McKinney 2021) (as amended by S. 5959D, 2019-2020 Leg., Reg. Sess. (N.Y. 2020)).

81 § 52-c(1)(a).

82 § 52-c(1)(b).

83 § 52-c(5).

84 *See* § 52-c(4)(a)(i).

85 *See* § 52-c.

public concern," possess inherent "political or newsworthy value," or serve as a "commentary, criticism, or disclosure that is otherwise protected by" the New York State Constitution or the First Amendment.[86] However, the statute does not provide clarity regarding the types of situations that fall within this second exemption.[87] Its inclusion ultimately protects the content poster more than the victim.

3. Strategic and Feasible: California's Approach to Combat Deepfakes

In 2019, the California Legislature passed Assembly Bill 602, which established a private right of action that empowers individuals to take legal action against those who generate or disclose another's sexually explicit content to which the depicted individual did not consent or that was created through deepfake technology.[88] This statute allows victims to pursue "injunctive relief and recover reasonable attorney's fees and costs."[89] This law closed the gap between California's existing criminal and civil revenge porn laws, which had previously lacked provisions explicitly addressing digitally manipulated images and videos.[90]

Codified at section 1708.86, California Assembly Bill 602 is unique because it explicitly avoids using the term "deepfake" in its text. Instead, the statute employs the terms "altered depiction," "depicted individual," and "digitization."[91] "Depicted individual" includes "an individual who appears, as a result of digitization, to be giving a performance they did not actually perform" or appears in an altered representation.[92] The statute defines "digitalization" to include: "(A) The nude body parts of another human being as the nude body parts of the depicted individual. (B) Computer-generated nude body parts as the nude body parts of the depicted individual. (C) The depicted individual engaging in sexual conduct in which the depicted individual did not engage."[93]

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86 *See* § 52-c(4)(a)(ii).

87 *See id.*

88 *See* 2019 Cal. Stat. 491 (A.B. 602) (codified at CAL. CIV. CODE § 1708.86 (West 2022)).

89 *Id.*

90 *See* Douglas E. Mirell & Joshua Geller, *AB 602 and AB 730: Curbing "Deepfakes" in Pornography and Elections*, DAILY J. (Jan. 8, 2020), https://www.dailyjournal.com/articles/355794-ab-602-and-ab-730-curbing-deepfakes-in-pornography-and-elections [https://perma.cc/CAY7-JM6N].

91 CIV. § 1708.86.

92 *Id.*

93 *Id.*

This expansive language makes section 1708.86 of the California Civil Code one of the most inclusive deepfake laws. It extends the private right of action to various forms of digitally altered content, including shallowfakes.[94] Remarkably, this legislation does not incorporate terms related to machine learning or artificial intelligence, thus avoiding a narrow definition that might become outdated in the face of advancements in deepfake technology.[95] Section 1708.86 also references digital "depiction[s]" of individuals generally. This approach protects all individuals rather than exclusively targeting politicians or celebrities, as seen in legislation enacted by other states.[96]

Like section 18.2-386.2 of the Virginia Code, section 1708.86 of the California Civil Code requires an intent to disclose and to harm.[97] As discussed previously, an intent requirement has its limitations, as it imposes a higher evidentiary burden on victims, which may inadvertently shield bad-faith actors. In addition, the statute broadly defines "[c]onsent" as "an agreement written in plain language signed knowingly and voluntarily by the depicted individual."[98] However, there is little explanation for these terms.[99] It is unclear what "plain language" means in the context of a complex legal contract or how a litigant might prove that the defendant was aware of the lack of consent. The section additionally imposes restrictions on injunctive relief by essentially limiting it to actions against the creator alone, excluding any action against the hosting website where the deepfake was posted due to the impracticability of proving knowledge of a lack of consent.[100] This limitation arises from the statute's alignment with Section 230, which shields interactive computer service providers (ICSPs) from content moderation or the failure to moderate its

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94 *See id.* Shallowfakes are digitally manipulated videos designed "to exploit an individual's cognitive biases which can result in damage to a target person's reputation even if the fake is of a low quality." HENRY AJDER ET AL., THE STATE OF DEEPFAKES: LANDSCAPE, THREATS, AND IMPACT 11 (Deeptrace ed., 2019). Categories of shallowfakes include "missing context," "deceptive editing," and "malicious transformation." *Id.*

95 *See* CIV. § 1708.86.

96 *Compare id.*, *with* 2019 Tex. Sess. Law Serv. Ch. 1339 (S.B. 751) (West) (protecting only those running for office, not the general public). However, the enacted Texas Senate Bill 751, which was codified as Texas Election Code section 255.004(b), was later held unconstitutional. *See Ex parte* Stafford, 667 S.W.3d 517, 532 (Tex. App. 2023), *petition for discretionary review granted* (Aug. 23, 2023).

97 *See* VA. CODE ANN. § 18.2-386.2(A) (2019); CIV. § 1708.86.

98 CIV. § 1708.86(a)(3)(A).

99 *See id.*

100 *See id.*

content adequately.[101] Due to Section 230, under the state statute, if the creator is difficult to find or judgment proof, victims may face challenges in seeking meaningful compensation for the relief of their injuries, especially if the creator or discloser proves elusive or financially insolvent.[102]

These state statutes differ on the scope of digital content they protect against, the definition of sexually explicit material within their purview, and the severity of the penalties. The inconsistencies may make it difficult for victims to assert their claims against those responsible for their exploitation.

II. SECTION 230 LIMITS VICTIMS' ABILITY TO RECOVER UNDER CURRENT STATE DEEPFAKE LAWS

While the aforementioned state deepfake laws provide potential plaintiffs with a private right to action, the majority of these laws necessitate that the potential litigant possesses the identity of the deepfake creator, discloser, or disseminator. Unfortunately, individuals responsible for generating deepfakes often employ various tactics to evade detection, including the use of encrypted browsers and Virtual Private Networks (VPNs).[103] Because of this difficulty in identifying the deepfake creators and disclosers, victims instead turn to the ICSPs that host the manipulated media to recover.[104] However, these victims cannot recover against ICSPs, primarily due to the protective provisions

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101 *See If Signed by Governor, California Bill AB-602 Will Provide Private Right of Action for Victims of Sexually Explicit 'Deepfakes'*, BAKERHOSTETLER: DATA COUNSEL (Sept. 26, 2019), https://www.bakerdatacounsel.com/blogs/if-signed-by-governor-california-bill-ab-602-will-provide-private-right-of-action-for-victims-of-sexually-explicit-deepfakes/ [https://perma.cc/KPJ4-LMB6] [hereinafter "DATA COUNSEL"] (explaining the California law "is likely preempted by the federal Communications Decency Act, 47 U.S.C. § 230, which protects internet content providers from liability for unlawful content posted by users of its service"). Section 230's shield provision protects ICSPs from being classified as publishers, and therefore, ensures that they are not liable for taking or not taking down content on its platform, whether that content be illegal, defamatory, etc. *See* 47 U.S.C. § 230(c); *see also infra* Section II.B.

102 *See* DATA COUNSEL, *supra* note 101.

103 *See generally* Alexandra Tashman, *"Malicious Deepfakes" - How California's A.B. 730 Tries (and Fails) to Address the Internet's Burgeoning Political Crisis*, 54 LOY. L.A. L. REV. 1391, 1396–97, 1418 (2021); Tiffany Hsu, *As Deepfakes Flourish, Countries Struggle with Response*, N.Y. TIMES (Jan. 22, 2023), https://www.nytimes.com/2023/01/22/business/media/deepfake-regulation-difficulty.html [https://perma.cc/EH3E-3PQB]; Andy Greenberg, *It's About to Get Even Easier to Hide on the Dark Web*, WIRED (Jan. 20, 2017, 7:00 AM), https://www.wired.com/2017/01/get-even-easier-hide-dark-web [https://perma.cc/5TUK-RWV7].

104 *See, e.g.*, Tashman, *supra* note 103, at 1396–97.

outlined in Section 230.[105] This legal framework renders pursuing legal action against ICSPs an untenable option for victims.

A. Recent Internet Case Study Demonstrates Victim's Redress and Remedy Obstacles

On January 26, 2023, during a stream on Twitch, a live streaming video website, the content creator "Atrioc" was caught with a browser tab displaying a website offering explicit deepfake content featuring popular content creators.[106] This website allows visitors to pay to access pornographic deepfakes of (primarily female) well-known Twitch streamers, including Pokimane, Maya Higa, and QTCinderella.[107] Immediately, fans alerted the affected content creators, with some finding out while they were in the middle of their streams.[108] Many of those depicted—including Pokimane, QTCinderella, and Valkyrae—took to the internet to speak out and demand removal of that deepfakes website.[109]

It was not until the controversy hit the mainstream internet that Atrioc addressed the controversy. On January 30, 2023, Atrioc went online on Twitch to apologize.[110] During his apology, Atrioc attempted to provide context by stating that he had only briefly explored the content.[111] Atrioc characterized his behavior

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105 47 U.S.C. § 230; *see also* Barbara Ortutay, *What You Should Know About Section 230, the Rule that Shaped Today's Internet*, PBS (Feb. 21, 2023, 10:55 AM), https://www.pbs.org/newshour/politics/what-you-should-know-about-section-230-the-rule-that-shaped-todays-internet [https://perma.cc/4DNE-E7AK].

106 *See* Jason Parker, *What Happened to Atrioc? The Entire Streamer Deepfake Debacle Summarized*, SPORTSKEEDA (Sept. 17, 2023, 11:53 AM), https://www.sportskeeda.com/esports/what-happened-atrioc-the-entire-streamer-deepfake-debacle-summarized [https://perma.cc/WVK7-8P7D].

107 *See* Bianca Britton, *They Appeared in Deepfake Porn Videos Without Their Consent. Few Laws Protect Them*., NBC NEWS (Feb. 14, 2023, 12:48 PM), https://www.nbcnews.com/tech/internet/deepfake-twitch-porn-atrioc-qtcinderella-maya-higa-pokimane-rcna69372 [https://perma.cc/Z9SJ-9TJU].

108 *Id.* The British live-streamer "Sweet Anita" was live on Twitch when her viewers notified her about the website and her likeness in the videos. *See id.*

109 *See* Parker, *supra* note 106; Aarnesh Shirvastava, *"I'm Going to F***king Sue You!" - QTCinderella Addresses the Community Following the Streamer Deepfake Controversy*, SPORTSKEEDA (Jan. 31, 2023, 7:38 AM), https://www.sportskeeda.com/esports/news-i-m-going-f-king-sue-you-qtcinderella-addresses-community-following-streamer-deepfake-controversy [https://perma.cc/MDX9-CL23]; Shreyan Mukherjee, *"Should Be Illegal to Profit Off of Somebody's Likeness in S*x Work" - Valkyrae Provides Her Take on the Streamer Deep Fake Controversy*, SPORTSKEEDA (Jan. 31, 2023, 11:54 AM), https://www.sportskeeda.com/esports/news-should-illegal-profit-somebody-s-likeness-s-x-work-valkyrae-provides-take-streamer-deep-fake-controversy [https://perma.cc/5RMR-PW8M].

110 Joshua Robertson, *Streamer Atrioc Apologises After Watching Pokimane Deepfakes*, THEGAMER (Jan. 30, 2023), https://www.thegamer.com/atrioc-pokimane-maya-apology/?newsletter_popup=1 [https://perma.cc/27YL-RW2F].

111 *See id.*

as "morbid curiosity," emphasizing that he just "clicked something" without further thought.[112] However, Atrioc acknowledged that his behavior was "gross" and stated that he was sorry.[113]

On January 31, 2023, Atrioc posted a TwitLonger[114] in which he specifically apologized to Maya and Pokimane.[115] However, some streamers expressed dissatisfaction with the delay in Atrioc's apology and the overall situation.[116] In her livestream on January 31, 2023, QTCinderella addressed the deepfake controversy to shed light on the emotional distress it caused.[117] QTCinderella emphasized that it was deeply problematic that individuals were "able to look at women who are not selling themselves or benefiting off of being seen s[e]xually . . . . If you're able to look at that, you are the problem."[118] QTCinderella then pledged to pursue legal action against the deepfake website.[119]

However, QTCinderella hit a dead-end. Her lawyers informed her that she had no viable case to pursue against the deepfake website, primarily due to the legal protections afforded to ICSPs under both state and federal law, including Section 230.[120] This case shows how women targeted by pornographic deepfakes have few legal options available for recourse. Instead of placing sole accountability on the creators, the platforms that host the nonconsensual media must also share the burden of blame, especially as the deepfake content continues to circulate even after

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112 *Id.*

113 *Id.*

114 TwitLonger is a website that allows X users to create posts over 140 characters and share these longer messages to X. *See* TWITLONGER, https://www.twitlonger.com/about [https://perma.cc/K469-KYWM] (last visited May 8, 2023).

115 *See* Brandon Ewing (@Atrioc), TWITLONGER (Feb. 1, 2023), https://www.twitlonger.com/show/n_1ss80dv [https://perma.cc/MM6D-SWZR].

116 *See* Parker, *supra* note 106.

117 *See* Shirvastava, *supra* note 109 ("This is what it looks like to feel violated. This is what it looks like to feel taken advantage of. This is what it looks like to see yourself naked against your will. Being spread all over the internet. This is what it looks like.").

118 *Id.*

119 *See id.*

120 *See* Britton, *supra* note 107 ("Every single lawyer I've talked to essentially have come to the conclusion that we don't have a case; there's no way to sue the [website host]."); Nicholas Wilson, *QTCinderella's Deepfake Lawsuit Just Hit a Heartbreaking Wall*, SVG (Feb. 15, 2023, 12:44 PM), https://www.svg.com/1200585/qtcinderellas-deepfake-lawsuit-just-hit-a-heartbreaking-wall/ [https://perma.cc/RXX9-LXRE]; *see also* discussion *infra* Section II.B.

takedown requests have been issued.[121] Potential plaintiffs face substantial legal challenges and require careful legal maneuvering in their attempts to hold ICSPs accountable.

B. Section 230 and Total Immunity of Internet Service Providers

During the 1990s, ICSPs frequently faced legal actions and were held liable for their users' speech.[122] The pattern eventually changed following the pivotal case of *Stratton Oakmont, Inc. v. Prodigy Services Co.*[123] Prodigy was an early online hosting website that hosted a bulletin board called *Money Talk,* which allowed anonymous users to post messages about finance and investments.[124] In October 1994, an anonymous user on *Money Talk* created a post alleging that the securities investment banking firm, Stratton Oakmont and its president had committed fraud in connection with an initial public stock offering.[125] Stratton Oakmont and its president sued Prodigy and the anonymous user for defamation.[126] On the plaintiffs' motion for partial summary judgment, the New York Supreme Court held that Prodigy's representations and policies were sufficient to classify Prodigy as a "publisher" of the user's statements.[127] The court particularly cited the editorial control exercised by Prodigy's Board Leaders in monitoring messages, setting it apart from platforms like CompuServe's, which merely functioned as an "electronic for-profit library."[128]

The introduction of the Communications Decency Act of 1996 ("CDA"), which includes Section 230, was driven by the intention to counteract the precedent set by *Prodigy*.[129] Section 230 recognized the benefits of the internet, including access to educational resources, a forum for political discourse, and

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121 *See* Britton, *supra* note 107("If you really want to tackle this problem, go upstream . . . That's where all the power is.").

122 *See The Supreme Court's Google Case Has Free Speech on the Line*, FORBES (Feb. 22, 2023, 8:19 AM), https://www.forbes.com/sites/qai/2023/02/22/the-supreme-courts-google-case-has-free-speech-on-the-line/ [https://perma.cc/9ZTD-BYFS].

123 Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *1 (Sup. Ct. May 24, 1995).

124 *See* DMLP Staff, *Stratton Oakmont v. Prodigy*, DIGIT. MEDIA L. PROJECT (Oct. 15, 2007, 10:45 AM), https://www.dmlp.org/threats/stratton-oakmont-v-prodigy [https://perma.cc/TM3U-8MBD].

125 *See id.*

126 *See id.*

127 *Prodigy*, 1995 N.Y. Misc. LEXIS 229, at *1.

128 *Id.* at *8–13 (distinguishing Prodigy from CompuServe).

129 *See* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

opportunities for cultural development and exchange.[130] However, the drafters felt it was unfair to hold ICSPs liable for their good faith efforts to moderate user content.[131] Therefore, Section 230's purpose was "to promote "the continued development of the Internet and other interactive computer services," preserving "the vibrant and competitive free market" for digital services, and maximizing user control over the content they consume.[132] To accomplish this, Congress established that websites would not be designated as "publishers" of the online content they host.[133] Consequently, ICSPs would not be liable for content moderation decisions made in response to material considered by the provider or user as "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[134]

Section 230's protective shield has fostered an open internet environment, granting users access to a vast array of content.[135] However, it has also enabled online platforms to host problematic content, including misinformation, calls for genocide, and various instances of civil and human rights abuses, all without facing significant consequences.[136] Many of these platforms view the fines imposed as a cost of doing business.[137] Officials have raised concerns about the sustainability of these extensive legal immunities enjoyed by tech platforms and whether there is need for reform.[138]

While Section 230 appears to grant ICSPs almost total immunity, this shield features particular vulnerabilities. There are three common exceptions to Section 230: (1) if the ICSPs

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130 *See* 47 U.S.C. § 230(a) (1996) (amended 1998, 2018).

131 *See* Emily Stewart, *Ron Wyden Wrote the Law that Built the Internet*, VOX (May 16, 2019, 9:50 AM), https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality [https://perma.cc/4A76-GVZR].

132 § 230(b).

133 § 230(c)(1).

134 § 230(c)(2).

135 Sixty percent of the world's population was online in 2020; this equals 4.70 billion users worldwide and 480.34 million users in North America alone. Hannah Ritchie et al., *Internet*, OUR WORLD IN DATA, https://ourworldindata.org/internet [https://perma.cc/EL2T-JDGM] (last visited May 13, 2023).

136 *See* Marguerite Reardon, *Section 230: How It Shields Facebook and Why Congress Wants Changes*, CNET (Oct. 6, 2021, 5:00 AM), https://www.cnet.com/news/politics/section-230-how-it-shields-facebook-and-why-congress-wants-changes/ [https://perma.cc/243W-PHCV].

137 *See, e.g.*, David Shepardson, *Facebook to Pay Record $5 Billion U.S. Fine over Privacy; Faces Antitrust Probe*, REUTERS (July 24, 2019, 5:35 AM), https://www.reuters.com/article/us-facebook-ftc/facebook-to-pay-record-5-billion-u-s-fine-over-privacy-faces-antitrust-probe-idUSKCN1UJ1L9 [https://perma.cc/TN2M-DLG7].

138 *See id.*

induced or contributed to the development of the illegal content (i.e., discriminating based on protected characteristics);[139] (2) if the claim does not arise from the ICSPs' publishing or content moderation decisions (i.e., promissory estoppel in a breach of contract claim);[140] or (3) if the ICSPs' content-removal decision was not made in "good faith" (i.e., filtering or blocking content for anticompetitive reasons).[141]

These exceptions likely do not apply to deepfake pornography. Development of illegal content or breach of contract claims rarely align with the circumstances faced by victims of deepfake pornography, although there may be some limited relevance, as exemplified by *Barnes v. Yahoo!, Inc.*[142] Moreover, as *Enigma Software Group USA v. Malwarebytes, Inc.* suggests, Section 230 protects ICSPs when they moderate content considered obscene, lewd, or lascivious, a category under which deepfake pornography invariably falls.[143]

There is one possible avenue for victims of pornographic deepfakes. Section 230 does not shield platforms that violate intellectual property rights.[144]

III. A FEDERAL RIGHT OF PUBLICITY WOULD GRANT VICTIMS THE ABILITY TO SUE AND RECOVERY REMEDIES FROM ICSPS

Congress should adopt a tailored federal right of publicity. This statute should grant individuals intellectual ownership of their name, voice, signature, photograph, and likeness. Additionally, this statute should adopt California's section 1708.86's structure, expressly omitting a specific definition of "deepfake" and embracing an inclusive definition of "digitalization."

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139 *See* Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1165 (9th Cir. 2008).

140 *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1107 (9th Cir. 2009). The Ninth Circuit held that despite Yahoo!'s immunity under Section 230, the plaintiff could sue the company for promissory estoppel because it promised to remove the fake profile but did not do so. *See id.*

141 *See* E-Ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1269, 1273, 1277, 1279 (M.D. Fla. 2016) (denying Google's motion to dismiss because E-Ventures provided sufficient evidence to show that Google may have acted anticompetitively, including showing that E-Ventures directly competed with Google's AdWords); *see also* Enigma Software Grp. USA v. Malwarebytes, Inc., 946 F.3d 1040, 1051–52 (9th Cir. 2019) (holding that § 230(c)(2) protects ICSPs moderating obscene or lewd content, not blocking access to content for anticompetitive reasons).

142 *See Barnes*, 570 F.3d at 1107.

143 *See Enigma Software Grp. USA*, 946 F.3d at 1051–52.

144 *See* 47 U.S.C. § 230(d)(2) (1996) (amended 1998, 2018); *see also infra* Part III.

This statute would safeguard individuals against sexually explicit and obscene technological impersonations, which generate revenue for online platforms. Here, the prohibition of digitally altered media must be confined to pornographic deepfakes that meet the *Miller* obscenity framework.[145] By instituting this statute, victims would be able to directly sue and seek remedies against ICSPs for third-party content. Importantly, this approach aims to circumvent the feasibility challenges and First Amendment concerns that the state-level deepfake laws face.

A. What is the Right of Publicity?

The right of publicity is an intellectual property right that protects an individual from the misappropriation of his or her name, likeness, or other indicia of personal identity—such as voice or likeness—for commercial benefit.[146] The right of publicity was first recognized as an economic right in a case concerning the use of baseball players' images on trading cards.[147] In his opinion, Judge Frank articulated that "a man has a right in the publicity value of his photograph . . . [as] many prominent persons . . . would feel sorely deprived if they no longer received money for authorizing advertisement[]."[148] To date, thirty-six states recognize the right of publicity, through statutory law, common law, or both.[149] No federal statute or common law grant this right to individuals.[150] The states that have adopted the right of publicity vary in their treatment of these rights. Differences among these statutes include whether these rights are encompassed within the state's privacy laws, the extent to which

145 *See infra* Part III.C.

146 *Right of Publicity*, INT'L TRADEMARK ASS'N, https://www.inta.org/topics/right-of-publicity/ [https://perma.cc/PR4H-2ZWJ].

147 *See* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) ("We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph . . . [and] to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross.'").

148 *Id.*

149 As of 2019, thirty-six states have recognized the right of publicity in some manner, including statutory and common law. *See* RIGHT OF PUBLICITY (ROP) COMM., INT'L TRADEMARK ASS'N, RIGHT OF PUBLICITY STATE OF THE LAW SURVEY (2019), https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf [https://perma.cc/VAT6-RA4A].

150 However, federal unfair competition laws protect against false endorsement, association, or affiliation. *Right of Publicity*, *supra* note 146.

they endure posthumously, and whether they can be inherited or assigned.[151]

California has one of the most robust right of publicity frameworks, encompassing both statutory and common law protections. California's recognition of the right of publicity first emerged through common law and stands as a distinct and valid claim.[152] To pursue a common law claim, a plaintiff must establish the following: (1) defendant used plaintiff's identity; (2) defendant appropriated plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.[153] California's common law right of publicity is broader than its statutory counterpart. It encompasses claims pertaining to a person's name, likeness, persona, voice, signature, biographical information, sound-alike voice, and overall identity.[154] The common law right of publicity differs from the statute in that it does not mandate the demonstration of a commercial purpose as a prerequisite for legal action. The two claims diverge in terms of post-mortem rights. Under common law, no post-mortem right exists when the deceased individual did not exploit his or her identity during his or her lifetime.[155] This distinction arises from the common law right of publicity's roots in privacy law, and, as such, the cause of action does not survive beyond the death of the individual whose identity was exploited.[156]

Within its right of publicity statute, California extends protection to a person's name, voice, signature, photograph, and likeness against unauthorized commercial use.[157] In determining the scope of "likeness," courts have applied the "readily identifiable" test,[158] concluding that even drawings and robots, if

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151 *See* Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 TRADEMARK REP. 1202, 1202–03 (2004).

152 *See* Eastwood v. Superior Court, 198 Cal. Rptr. 342, 342 (Cal. Ct. App. 1983).

153 *Id.*

154 *See id.*; *see also* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824–27 (9th Cir. 1974) (including protection of persona).

155 *See* Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979).

156 *See* Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 797 (Cal. 2001).

157 *See* CAL. CIV. CODE § 3344(a) (Deering 1978).

158 Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998) (explaining that a person is "readily identifiable" if someone can "reasonably determine that the person depicted…is the same person who is complaining of its unauthorized use").

sufficiently detailed, constitute "likeness" under this statute.[159] To initiate a claim under this statute, a plaintiff must prove the elements of a common law claim,[160] that the defendant "knowingly" used plaintiff's likeness, and that there is a direct link between the alleged use and commercial purpose.[161] The California statute provides statutory damages of $750 or actual damages, whichever is greater, as well as attributable profits.[162]

California also recognizes the statutory post-mortem right of publicity, which lasts for seventy years after an individual's death.[163] Though the post-mortem right of publicity is freely transferable and heritable, whether a plaintiff may enforce those rights statutorily depends on the decedent's domicile at the time of death.[164]

B. A Federal Right of Publicity Would Provide All Victims Equal Standing and Right to Remedies Against ICSPs, Regardless of Jurisdiction

1. Right of Publicity Statutes May Fall Under the Intellectual Property Exemption to Section 230

Section 230(c)(2) immunizes ICSPs from liability when they make good-faith decisions to moderate content that the ICSP or its users find objectionable.[165] However, Section 230(e)(2) introduces a critical exception to this immunity, explicitly stating that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property."[166] This exception has prompted arguments from plaintiffs contending that a state's right of publicity statute could supersede an ICSP's Section 230

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159 Newcombe v. Adolf Coors Co., 157 F.3d 686, 692-93 (9th Cir. 1998) (drawing constitutes likeness); *see also* Wendt v. Host Int'l, Inc., 125 F.3d 806, 810 (9th Cir. 1997) (robot constitutes likeness); *but see* White v. Samsung, 971 F.2d 1395, 1397 (9th Cir. 1992) (holding that less detailed robots may fall short of the "likeness" test).

160 *See* Eastwood v. Superior Court, 198 Cal. Rptr. 342, 342 (Cal. Ct. App. 1983).

161 Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001).

162 CIV. § 3344(a).

163 *Id.* § 3344.1.

164 *See* Cairns v. Franklin Mint Co., 292 F.3d 1139, 1149 (9th Cir. 2002) (holding that an estate may not file a cause of action under section 3344.1 if the decedent was not domiciled in California at the time of death); Bravado Int'l Grp. Merch. Servs., Inc. v. Gearlaunch, Inc., No. 16-CV-8657-MWF(CWx), 2018 WL 6017035, at *9 (C.D. Cal. Feb. 9, 2018) (interpreting Ninth Circuit precedent to mean that, if the decedent's domicile at the time of death recognizes a statutory post-mortem right of publicity, the estate may bring a claim under section 3344.1).

165 47 U.S.C. § 230(c)(2) (2018 & Supp. 2021).

166 *Id.* § 230(e)(2).

immunity.[167] The intellectual property exception creates an avenue through which victims of pornographic deepfakes may potentially hold ICSPs accountable for content posted by third parties on their platforms and seek remedies for any misconduct on the part of these ICSPs. The Supreme Court has acknowledged the right of publicity as being "closely analogous to the goals of patent and copyright law."[168] Federal courts have also indicated or expressly affirmed that right of publicity statutes convey an intellectual property right within the purview of the exception outlined under Section 230(e)(2).[169]

Section 230(e)'s explicit mention of state law suggests the incorporation of state right of publicity laws.[170] These references to state law suggest that "when Congress wanted to cabin the interpretation of state law, it knew how to do so."[171] Therefore, the text and structure of Section 230(e) indicate that intellectual property laws fall under this exception. Further, while Congress's purpose for enacting Section 230 was to create a "pro-free-market policy," it was not to "erase state intellectual property rights as against internet service providers."[172] Incorporating state intellectual property law, including the right of publicity, into Section 230(e)(2) aligns seamlessly with Congress's overarching goal of promoting a free-market environment.

However, this proposed solution encounters challenges with state right of publicity laws. One significant point of contention is a circuit split regarding the interpretation of Section 230's intellectual property exception. Some circuits, including the Ninth Circuit, do not extend a state's right of publicity into the scope of

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167 *See, e.g.*, Hepp v. Facebook, 14 F.4th 204, 210 (3d Cir. 2021).

168 Zacchini v. Scripps-Howards Broad. Co., 433 U.S. 562, 573 (1997).

169 *See* Ford Motor Co. v. GreatDomains.com, Inc., No. 00-CV-71544-DT, 2001 WL 1176319, at *1 (E.D. Mich. Sept. 25, 2001) (construing § 230(e)(2) to preclude application of CDA immunity to claims based on the violation of federal trademark laws); Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001) (holding that § 230(e) applies to "any law pertaining to intellectual property," including state right of publicity statutes); Hepp v. Facebook, 14 F.4th 204, 206 (3d Cir. 2021) (holding that § 230(e) allows state right of publicity claims). *But see* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1119 (9th Cir. 2007) (holding § 230(e) applies to federal intellectual property only); Doe v. Friendfinder Network, Inc., No. 07-cv-286-JL, 2008 WL 2001745, at *1 n.1 (D.N.H. May 8, 2008) (noting that § 230 "does not bar the plaintiff's common law right of publicity by virtue of [section 230]'s intellectual property exception").

170 § 230(e)(3) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.").

171 *Hepp*, 14 F.4th at 211.

172 *Id.*

Section 230's intellectual property exemption.[173] In contrast, other circuits have cast doubt on whether the right of publicity qualifies as an intellectual property right at all.[174] While the Supreme Court has expressly linked the right of publicity to patent and copyright law, some lower courts have ruled differently based on their respective state statutory scheme.[175] For example, a district judge in the Southern District of New York barred a plaintiff's claim against some of the defendant ICSPs, contending that Section 230(e)(2)'s intellectual property exception did not apply to a New York statutory right of publicity claim, as it was construed as a privacy claim rather than an intellectual property claim.[176]

Furthermore, there is the possibility that deepfakes could fall under the "fair use" doctrine, thus not constituting copyright infringement.[177] Fair use serves as a defense in copyright infringement claims, permitting the unlicensed use of copyrighted material in specific contexts.[178] Courts evaluate fair use based on various factors, with a key consideration being the purpose and character of the use.[179] As to purpose and character, courts assess whether the media is "transformative"—if the new media injects

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173 *See Perfect 10*, 488 F.3d at 1119 (holding section 230(e) applies to federal intellectual property only); *but see Gucci Am.*, 135 F. Supp. 2d at 413.

174 *See* Joshua Dubnow, *Ensuring Innovation As the Internet Matures: Competing Interpretations of the Intellectual Property Exception to the Communications Decency Act Immunity*, 9 NW. J. TECH. & INTELL. PROP. 297, 307 (2010).

175 *See Zacchini*, 433 U.S. at 573; *see also* Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 302—03 (D.N.H. 2008); Estate of Presley v. Russen, 513 F. Supp. 1339, 1352–54 (D.N.J. 1981).

176 *See* Ratermann v. Pierre Fabre USA, Inc., No. 22-CV-325 (JMF), 2023 U.S. Dist. LEXIS 8028, at *15 (S.D.N.Y. Jan. 17, 2023) ("[T]he right [of publicity] 'parallels' the common law right of publicity…[b]ut 'the two causes of action' are distinct, and New York does not recognize the common law right of publicity…[i]nstead, 'the "right of publicity" is encompassed under the Civil Rights Law as an *aspect of the right of privacy*.'") (citations omitted). The plaintiff was granted leave to amend her complaint as to her right of publicity claim against two of the defendants; after filing an amended complaint, the District Court of the Southern District of New York dismissed the defendants' new motion to dismiss, allowing the case to continue. *Id.*; Ratterman, v. Pierre Fabre USA, Inc., 2023 WL 7627425, at *1 (S.D.N.Y., Nov. 14, 2023).

177 Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1793 (2019) ("Whether the fake is sufficiently transformed from the original to earn fair use protection is a highly fact-specific inquiry for which a judicial track record does not yet exist.").

178 *See U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, https://www.copyright.gov/fair-use/ [https://perma.cc/7F68-RXBW] (last updated Feb. 2023).

179 *See id.* The fair use factors, as outlined by section 107 of the Copyright Act, that courts look at are: "purpose and character of the use," "nature of the copyrighted work," "amount and substantiality of the portion used in relation to the copyrighted work as a whole," and "effect of the use upon the potential market for or value of the copyrighted work." *Id.*

new elements without a "substitute for the original use of the work."[180] The greater the degree of transformation, the higher the likelihood that a court will recognize it as fair use.[181] Some deepfake creators have successfully argued that, despite a victim's ownership rights, their pornographic deepfake qualifies as fair use due to its transformative nature, as it involves altering the original pornographic content to create something new using someone else's likeness.[182] However, this defense may not be available to ICSPs, as they were not the originators of the deepfake media—ICSPs did not transform the media, they only hosted it. Therefore, this defense may not be raised against victims suing ICSPs that merely host the deepfake content.

2. Resolving State Right of Publicity Challenges and Circuit Splits Through a Federal Right of Publicity

The proposed federal right of publicity statute would establish uniform standing and legal remedies for victims nationwide, irrespective of their residence. It would effectively eliminate discrepancies stemming from the varied right of publicity statutes existing across different states. Currently, the nation's right of publicity framework is a patchwork, with thirty-six states recognizing this right through different mechanisms.[183] Some states have codified the right into their statutes, others regard it as freely transferable upon death, and some restrict its applicability to certain category of individuals.[184] Additionally, only a fraction of states have taken steps to address the threat of pornographic deepfakes and protect their citizens against them.[185]

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180 *Id.*

181 *See id.* ("'[T]ransformative' uses are more likely to be considered fair.").

182 *See* Douglas Harris, *Deepfakes: False Pornography Is Here and the Law Cannot Protect You*, 17 DUKE L. & TECH. REV. 99, 109 (2019) ("[P]ublishing" personal deepfakes makes fair use of another's copyrighted images because it is transformative."); Winston Cho, *Does Kendrick Lamar Run Afoul of Copyright Law by Using Deepfakes in "The Heart Part 5"?*, THE HOLLYWOOD REPORTER (May 12, 2022, 1:05 PM), https://www.hollywoodreporter.com/business/digital/does-kendrick-lamar-run-afoul-of-copyright-law-by-using-deepfakes-in-the-heart-part-51235145596/ [https://perma.cc/W3A7-H42B] ("Copyright attorney Alan Friedman . . . says that the deepfakes in the video appear 'highly transformative' and that 'fair use would be a strong defense to a copyright challenge.'"); Tiffany C. Li, *Kim Kardashian vs. Deepfakes*, SLATE (June 18, 2019, 8:34 PM), https://slate.com/technology/2019/06/deepfake-kim-kardashian-copyright-law-fair-use.html [https://perma.cc/Y2TG-LUYY] (analyzing the Kim Kardashian deepfake and concluding the deepfake likely falls under fair use).

183 *See Right of Publicity State of the Law Survey*, INT'L TRADEMARK ASS'N (2019), https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf [https://perma.cc/7CP2-HL89] (last visited Jan. 30, 2024).

184 *See supra* Part I.

185 *See supra* Part I.

As previously mentioned, these state laws vary significantly in what digital content they cover, the scope of those protected, and the associated penalties. Introducing a single federal statute would bring consistency, extending protection universally and ensuring that all individuals legal have the ability to seek justice and legal remedies for ICSPs' gross negligence and misconduct online.

Additionally, a federal statute would resolve the existing circuit splits pertaining to the interpretation of the right of publicity statutes. By satisfying Section 230's intellectual property exception, a federal right of publicity statute would resolve the ongoing discord regarding the statutory interpretation of Section 230. The Ninth Circuit, for instance, has interpreted that the intellectual property exception to Section 230 applies to federal intellectual property law *only*.[186] Given the absence of any federal statute or case law recognizing a right of publicity within the Ninth Circuit, those types of claims are currently excluded from Section 230's intellectual property exception. This ruling precludes millions of potential plaintiffs in California, Nevada, Washington, and Arizona from piercing Section 230 immunity to hold ICSPs accountable for hosting malicious deepfakes on their platforms. In contrast, the First Circuit (albeit in dicta),[187] the Third Circuit,[188] and the Southern District of New York[189] have expanded the reach of publicity rights to encompass the intellectual property exemption stipulated in Section 230.

Introducing a federal right of publicity statute that explicitly emphasizes its nature as an *intellectual property* right, not a *privacy* right, would resolve the ongoing legal debate within the New York court system. In *Ratermann*, the district court judge determined that the state's right of publicity statute was not covered under Section 230's intellectual property exception, citing established legal precedent.[190] In his opinion, Judge Frank noted that New York courts have continuously construed the state's Civil Rights Laws, encompassing publicity rights, to provide a statutory right to privacy, therefore rendering them ineligible for inclusion within the exception.[191] A federal publicity right would reaffirm

186 *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1119 (9th Cir. 2007).

187 *See, e.g.*, Universal Cmty. Sys. v. Lycos, Inc., 478 F.3d 413, 418–20 (1st Cir. 2007).

188 *See* Hepp v. Facebook, 14 F.4th 204, 206 (3d Cir. 2021).

189 *See* Gucci Am., Inc. v. Hall & Assocs, 135 F.Supp.2d 409, 413 (S.D.N.Y. 2001).

190 Ratermann v. Pierre Fabre USA, Inc., No. 22-CV-325 (JMF), 2023 U.S. Dist. LEXIS 8028, at *14 (S.D.N.Y. Jan. 17, 2023).

191 *See id.*

the Supreme Court's classification of the right of publicity as an *intellectual property right* and the substantial body of legal precedent supporting it. Further, a federal statute would allow prospective plaintiffs to sue under this federal law when their state's legal precedent precludes them from pursuing actions against ICSPs under the intellectual property exception.

C. The Federal Right of Publicity Must Prohibit Only Obscene Material to Avoid First Amendment Challenges

Critics of both right of publicity statutes and deepfake laws argue that these laws impede individuals' freedom of speech. Proponents of this view argue that overly broad deepfake legislation would lead to an overregulation of edited content and free speech, potentially leading to constitutional issues, particularly in the case of deepfake laws governing elections.[192] These individuals primarily focus on deepfake bills that regulate speech related to government officials or political candidates and argue that regulated manipulated content, even if false, goes beyond the target of intentionally deceptive content and would suppress political speech.[193] Content moderation concerning politicians or candidates would "not solve the problem of deceptive political videos; it will only result in voter confusion, malicious litigation, and repression of free speech."[194] In addition, these advocates argue election-related deepfake legislation contradicts established First Amendment principles.[195] They emphasize the fact that the Supreme Court has consistently protected false

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192 *See* Alex Baiocco, *Political "Deepfake" Laws Threaten Freedom of Expression*, INST. FOR FREE SPEECH (Jan. 5, 2022), https://www.ifs.org/research/political-deepfake-laws-threaten-freedom-of-expression/ [perma.cc/G6BY-A3J4]; *see also* Matthew Feeny, *Deepfake Laws Risk Creating More Problems than They Solve*, THE REGUL. TRANSPARENCY PROJECT OF THE FEDERALIST SOC'Y (Mar. 1, 2021), https://rtp.fedsoc.org/paper/deepfake-laws-risk-creating-more-problems-than-they-solve/ [perma.cc/L4KT-MJ8Y].

193 *See California Becomes the Second State to Restrict Political "Deepfakes"*, FIRST AMEND. WATCH (Oct. 9, 2019), https://firstamendmentwatch.org/california-becomes-the-second-state-to-restrict-political-deepfakes/ [perma.cc/XRL9-VPDX].

194 Kathleen Ronayne, *California Bans 'Deep Fakes' Video, Audio Close to Elections*, ASSOCIATED PRESS (Oct. 4, 2019, 1:35 PM), https://apnews.com/article/4db02da9c1594fd1a199ee0242c39cc2 [perma.cc/H786-HB5Z].

195 *See* Baiocco, *supra* note 192; *see also* Kari Paul, *California Makes 'Deepfake' Videos Illegal, but Law May Be Hard to Enforce*, THE GUARDIAN (Oct. 7, 2019, 6:42 PM), https://www.theguardian.com/us-news/2019/oct/07/california-makes-deepfake-videos-illegal-but-law-may-be-hard-to-enforce [perma.cc/YC3T-JPDQ].

political speech,[196] even when there is misuse by government officials during an election season.[197]

These critics also maintain that this argument extends to other categories of deepfakes. Deepfakes, they argue, fall under the protection of the First Amendment when it safeguards the media.[198] Some scholars have suggested that the right of publicity would permit the unlawful moderation of popular culture and public discourse.[199] Alarmingly, they argue that even pornographic deepfakes could be protected by the First Amendment.[200] For these reasons, they argue that broader legislation regulating speech would be unconstitutional.[201]

If narrowly defined and tailored, a federal right of publicity statute may sidestep potential First Amendment challenges. The federal statute must focus on speech falling outside the scope of constitutionally protected speech.[202] The First Amendment does not protect obscene material.[203] If pornographic deepfakes are categorized within the Supreme Court's definition of "obscenity," then a narrowly tailored regulation targeting their nonconsensual use could withstand the rigorous strict scrutiny standard set forth

196 *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 727 (2012).

197 *See* Feeny, *supra* note 192.

198 *See* Chesney & Citron, *supra* note 177, at 1806; *see also* Russell Spivak, "*Deepfakes": The Newest Way to Commit One of the Oldest Crimes*, 3 GEO. L. TECH. REV. 339, 357–58 (2019).

199 *See* Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 929–30 (2003) ("[T]here is good reason to think . . . that the right of publicity is unconstitutional as to all noncommercial speech, and perhaps even as to commercial advertising as well."); *see also* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 184–96 (1993) (questioning justifications for the right of publicity statutes).

200 *See* United States v. Playboy Ent. Group, Inc., 529 U.S. 803, 812 (2000); *see also* Ashcroft v. Free Speech Coalition, 535 U. S. 234, 239–40 (2002) (upholding First Amendment rights, thereby striking down portions of the federal Child Pornography Prevention Act ("CPPA") of 1996 that banned "virtual child pornography" because the computer-generated images do not classify as obscene or child pornography, categories of unprotected speech).

201 Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) ("[C]ontent-based restrictions on speech [are] presumed invalid . . . the Government bear[s] the burden of showing their constitutionality.") (citations omitted).

202 *See* Rebecca Green, *Counterfeit Campaign Speech*, 70 HASTINGS L.J. 1445, 1486 (2019) (suggesting that a narrowly tailored counterfeited candidate speech—including an intent element and highlight a compelling government purpose—may survive the First Amendment's strict scrutiny test); *see also* Roth v. United States, 354 U.S. 476, 485 (1957) (permitting a criminal obscenity statute a obscenity is not a category of protected speech of the First Amendment).

203 Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

by the Supreme Court in *Reed*.[204] In *Miller*, the Supreme Court outlined factors to determine whether a piece of media was obscene.[205]

The Supreme Court has not directly addressed whether deepfake pornography is obscene, which leaves some uncertainty in this area. However, in *Miller*, the Supreme Court provided examples of obscene content regulation that would not violate free speech, such as "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" or "[p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[206] Under this reading, regulation targeting pornographic deepfakes would likely survive a First Amendment challenge if the pornographic deepfake falls within the constraints of obscenity.

Nevertheless, in *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down a bill prohibiting virtual child pornography.[207] In *Ashcroft*, Justice Kennedy, writing for the Court, held that the Child Pornography Prevention Act of 1996 ("CPPA") violated the First Amendment and ignored the *Miller* framework.[208] Justice Kennedy distinguished virtual child pornography and child abuse, remarking that virtual child pornography did not result in actual physical harm to victims.[209] However, there is a distinction between the virtual child pornography depicted in *Ashcroft* and deepfake pornography. Unlike child pornography in *Ashcroft*, deepfake pornography portrays the likeness of individuals.[210] In addition, deepfake pornography does pose actual harm to its victims.[211] While it was

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204 Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

205 *See Miller*, 413 U.S. at 24 (articulating that the trier of fact must consider: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.") (citations omitted).

206 *Id*. at 25.

207 Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

208 *Id*. at 246, 255–258 ("The CPPA, however, extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements.").

209 *Id*. at 250 (holding that the CPPA overreached by "prohibit[ing] speech that records no crime and creates no victims by its production").

210 *See* Harris, *supra* note 182, at 106 (questioning "whether obscenity lies in the reality of thing deemed obscene or in the depiction of what registers as real").

211 *See, e.g.,* Vasileia Karasavva & Aalia Noorbhai, *The Real Threat of Deepfake Pornography: A Review of Canadian Policy*, 24 CYBERPSYCHOLOGY, BEHAV., & SOC.

not until recently that researchers have begun to study the systematic harm to primarily women due to pornographic deepfakes, the current case studies do give us a good insight. Deepfakes now provide a new instrument for revenge porn, which we have seen ruin careers and reputations, as with former California Representative Katie Hill.[212] Deepfakes have been used to facilitate the exploitation of children[213] and reduce women to sexual objects, leading to great psychological harm.[214]

Given these distinctions, a federal right of publicity statute regulating deepfake pornography in accordance with the *Miller* framework would likely circumvent First Amendment concerns.

CONCLUSION

There has been an exponential rise in the number of pornographic deepfakes since the first modern iteration was posted on Reddit in 2017. Since then, only a few states have passed laws to prohibit or regulate deepfake pornography, but with little success. Many victims of deepfake pornography, the majority featuring women, find themselves without viable legal recourse or remedies, as existing laws often restrict claims to the creators or posters of these deepfakes. This legal impasse is primarily a consequence of Section 230, which curtails the liability of online service providers for content posted by third parties. However, a possible avenue exists through Section 230's intellectual property exemption.

NETWORKING 3 (2021), https://doi.org/10.1089/cyber.2020.0272 [https://perma.cc/R86W-9DNV]; Ashish Jaiman, *Deepfakes Harms & Threat Modeling*, TOWARDS DATA SCI. (Aug. 19, 2020), https://towardsdatascience.com/deepfakes-harms-and-threat-modeling-c09cbe0b7883 [https://perma.cc/8A2U-NUYF]; Rob Toews, *Deepfakes Are Going to Wreak Havoc on Society. We Are Not Prepared*, FORBES (May 25, 2020, 11:54 PM), https://www.forbes.com/sites/robtoews/2020/05/25/deepfakes-are-going-to-wreak-havoc-on-society-we-are-not-prepared/?sh=3fc4fd157494 [https://perma.cc/D8EG-CE8R].

212 *See* Andrew Blankstein, *Former Rep. Katie Hill Sues Ex-Husband, Daily Mail, Redstate.com Over 'Nonconsensual Porn',* NBC (Dec. 22, 2020, 12:30 PM), https://www.nbcnews.com/politics/congress/former-rep-katie-hill-sues-ex-husband-daily-mail-redstate-n1252098 [https://perma.cc/2KBY-AXZ9].

213 In 2021, AI Dungeon, an online game that uses AI-generated text to create choose-your-own-adventure stories from user inputs, depicted scenes that sexually exploited children. *See* Tom Simonite, *It Began as an AI-Fueled Dungeon Game. It Got Much Darker*, WIRED (May 5, 2021, 7:00 AM), https://www.wired.com/story/ai-fueled-dungeon-game-got-much-darker/ [https://perma.cc/H7N7-X2D8]. A moderation system found some user prompts generated "stories depicting sexual encounters involving children." *Id.* Latitude, the creator of AI Dungeon, implemented a more rigid moderation system to root these types of prompts, angering some of its users for limiting their speech. *Id.*

214 Pornographic deepfakes "force individuals into virtual sex" and "can transform rape threats into a terrifying virtual reality." *See* Chesney & Citron, *supra* note 177, at 1773.

The right of publicity is an intellectual property right that protects individuals from the misappropriation of their name, voice, signature, photograph, and likeness. While thirty-six states have introduced some form of the right of publicity, there is an urgent need for a federal law to address this issue comprehensively. Such legislation would harmonize the inconsistencies stemming from various state right of publicity statutes and provide equal legal recourse for all citizens seeking to hold online service platforms accountable. By structuring the statute to specifically target technologically deceptive impersonations that generate revenue for online platforms and by requiring the deepfake pornography to meet the *Miller* obscenity framework, this legal framework ensures that it operates within the bounds of the First Amendment. A federal right of publicity is needed to protect women from the profound harm inflicted by deepfake pornography and to convey a strong message to online platforms about the repercussions of their failure to exercise responsibility and moderation in the face of this malicious content.

Remembering Nancy

John Bishop[*]

If law students are the lifeblood of a law school, Professor Nancy Schultz was the beating heart of Chapman's Fowler School of Law. For twenty-seven years she ran the Competitions Program at Chapman with passion and humility. Her loss is devastating.

Nancy had a deep love for keeping things simple. Despite having studied and practiced legal advocacy for more than forty years in total, she distilled her core principles to the basics—"slow down," "words matter," "figure out what you want and ask for it"—and refused to let students lose themselves in the weeds of legal jargon.[1]

On these simple building blocks Nancy built a palace of champions. She directed moot court, mock trial and dispute resolution teams to hundreds of trophies, but she was deeply opposed to taking credit for them. She never wanted to be photographed and intentionally omitted her name from publications, competition problems, seminar materials, and anything else she could get away with. She coached her final competition team to an international victory over more than thirty countries from around the world in Dubai, and she commemorated it with a simple email to her faculty colleagues extolling the character of her victorious students, without a word about the deep sacrifices she made to coach the team to glory. It was her final email to the faculty before her passing and it contained a simple attachment: a photo of the three victors with their trophy.

In her deep humility, she became a hero. She made hundreds of friends in dozens of countries—she could speak with authority on the quality of jazz in New Orleans, the quality of food in Rio de

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* John Bishop is a Visiting Professor at Chapman University, Fowler School of Law, and a partner at Ray & Bishop, PLC in Newport Beach, California. He earned his JD *cum laude* from the Fowler School of Law in 2011, where he served as President of the Moot Court team. He now coaches ADR, Mock Trial, and Moot Court, and directs the Competitions Program. He expresses his sincere gratitude to Nancy's children, Lindsay and Kyle Lee, for allowing him to share in their grief; and to Celestine McConville and Darian Nourian for allowing him to honor Nancy's memory in this space.

1 Nancy would have used the word "bullsh*t" here, and if this word survives the editing process and appears in a legal journal, it would have been to Nancy's great and mischievous delight.

Janeiro, the quality of traditional folk music in Ireland, and the quality of musicals on Broadway. She was also fearless, with a biting sense of humor and a distinct lack of patience for those who thought they would be heard because of their many words. She inspired profound awe in her students, who wanted nothing more than to make her proud. Yet, her pride would only come to fruition when she beheld the lawyers they would become: judges, partners, prosecutors, public defenders, public interest lawyers, negotiators, mediators, coaches, and program directors. No statement gave her greater joy than to say "they are just such great people."

The author is unremarkable and not unique, except insofar as Nancy only had one successor. In an effort to say exactly what I mean and nothing more: Chapman is now two months into a future without Nancy. As the new director, I find myself watching dedicated Nancy-trained alumni coach Chapman students to nationwide success. The program is doing very well, but the success is bittersweet: I find it devastating that I can't call Nancy and tell her about every team, every judge, every coach, every close finish, and every award. Celebrating is not the same without her. I think part of me will always feel like we are all doing it for her. I hope Nancy is proud of us.

Nancy Schultz, Legal Scholar

Lawrence Rosenthal[*]

I would like to take a few moments to discuss a subject that may be surprising to some—the legal scholarship of Nancy Schultz. [Audience laughs] I knew that sentence was going to get a laugh. The reason you laughed is illuminating.

Nancy, especially for a law professor, was a person of unusual modesty. She would brag until the cows came home about her students, but never about herself. Even so, Nancy's legal scholarship was extraordinary. I want you to know about it.

Like Nancy, I made a mid-career switch. I left the full-time practice of law to teach. Like many practitioners who come to teach law, I had agenda. I had become convinced that law school was failing all too many students by neglecting to provide them the set of practical skills necessary to succeed as entry-level lawyers.

For the biggest, most profitable firms, servicing the biggest, most powerful clients, this really is not a problem. These firms have the resources to train lawyers and prefer to do it themselves, rather than leaving something this important to a bunch of law professors they don't really know or trust, and who are likely have limited experience in the practice of law.[1] But for smaller firms, or government and public interest firms with far more limited resources that can be devoted to training, and that is where I practiced, this was a huge problem. I wanted to address it, but I soon discovered that I did not know how.

When I started teaching, like most new law professors, I defaulted to the pedagogy that was used when I was in law school—some version of the Socratic method, which I now have come to refer to as a form of inefficient lecture. Over time, it became clear to me that I was failing in my agenda to reform law

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1 For a helpful discussion of the trend toward hiring law faculty with ever-declining experience in the practice of law, see Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEG. EDUC. 506 (2016).

school pedagogy, and I started looking for scholarship on the issue that could offer some insight. After reading a number of largely unhelpful articles, I found one that had appeared in the Journal of Legal Education in 1992, fortuitously written by my colleague, Nancy Schultz. It was revelatory. I commend it to all of you. It is called *How Do Lawyers Really Think?*[2]

In her article, Nancy put her finger on the problem that I had not even been able to define—what is the root of the problem with legal pedagogy that causes it to fail to produce lawyers possessing the set of knowledge, skills, and abilities necessary for success even at the entry level? Nancy identified the culprit as the dichotomy in legal pedagogy between so-called doctrinal courses in which what you are supposed to learn legal doctrine—holdings, black-letter rules, and so-forth, and apply them in a variety of hypothetical situations—and so-called skills courses that purport to teach the skills that lawyers need in order to solve their clients' problems.

No law firm in the country has a doctrinal department and a skills department, but that is how we organize legal education. Yet, in law schools, this distinction between teaching doctrine and skills is strictly regimented. The doctrinal professors greatly resent having to teach skills. They believe that this is like teaching mechanics how to fix a car. The skills professors resent anyone intruding on their turf, and anything that suggests that they are some kind of appendage to the doctrinal courses. Nancy's great insight was that doctrine and skills have to be holistically combined in every course because that is how lawyers practice law. That is how they help their clients.

I had many conversations on these issues with Nancy over the years and she produced a pretty good-sized bookshelf of articles and books advocating this agenda for the reform of legal pedagogy.[3] During these conversations, there is another thing that she said to me that hit me as if I were thunderstruck. Nancy told me: You can do one of two things when you are a law teacher. You can sort your students—give them tasks and assessment mechanisms designed to figure out which of your students come to

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2 Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEG. EDUC. 57 (1992).

3 *See, e.g.*, NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS (6th ed. 2014); NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., PERSUASIVE LEGAL WRITING (4th ed. 2015); Nancy Schultz, *The Integrated Curriculum of the Future: Integrating First-Year Legal Writing with Other Lawyering Skills*, 7 ELON L. REV. 405 (2015); Nancy L. Schultz, *What Do Lawyers Really Do?*, 50 CAP. L. REV. 1 (2022).

you with the best skills for succeeding on exams and other assessment mechanisms—and if you sort them properly, the ones who arrive as the best students will get the best grades. Your other choice is to actually train them, and enable them to develop professional skills that they do not yet have. Training is harder than sorting, and a lot of professors do not want to do it, but that is what law students need to succeed in this profession.

Of course, Nancy was exactly right. Even worse, sorting your students only exacerbates existing educational inequalities. For a group of people who largely claim to care about inequality, law professors do not do much in their pedagogy to actually remediate educational inequality and its effects on the legal profession.

Nancy's 1992 article was written more than 30 years ago. Today, it still sounds radical, daring, and cutting-edge. The ABA is currently considering a proposal to expand the role of experiential education and legal pedagogy[4]—a proposal that Nancy first made in her pathbreaking article more than 30 years ago.[5] The world is finally starting to catch up with Nancy.

Wherever Nancy is, I know exactly what she is doing. She's saying, "Rosenthal's talking about legal scholarship? Give me a break." And she is rolling her eyes. Nobody perfected the eye roll, not even my teenage daughter, the way that Nancy did. But I will tell you, despite the eye rolling I know Nancy is doing up there, her legal scholarship was revelatory. I am profoundly grateful for it, and for her.

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4 Karen Sloan, *ABA Eyes Increasing Hands-On Learning Requirement for Law Schools,* REUTERS (Nov. 21, 2023), https://www.reuters.com/legal/legalindustry/aba-eyes-increasing-hands-on-learning-requirement-law-schools-2023-11-21/ [https://perma.cc/G6VY-WUWK].

5 *See* Schultz, *supra* note 2, at 67–70.

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