

On the Origins of the Modern Libertarian Legal Movement

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The growing influence of the modern libertarian legal movement in America and beyond was no better illustrated recently than during the two-year run-up to the Supreme Court's "Obamacare" decision, which came down on the Court's final day last June.¹ Marginalized for years by many conservatives²—to say nothing of the long dominant liberal establishment that dismissed their arguments out of hand³—libertarians offered a principled vision⁴ that resonated not only with judges who over that period decided several challenges to the Act's massive expansion of government,⁵ but with a large part of the American public as well—and, in the end, with a majority on the High Court itself.⁶ And why not: The vision was grounded in the nation's First Principles.

The movement did not come out of nowhere, however. Its roots are deep and often subtle, the product of decades of thought and work by philosophers, economists, lawyers, and others, all toward securing the legal foundations for liberty. An entire volume would be needed to adequately

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¹ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

² For the most recent example, see J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012).

³ Among countless examples, see Akhil Reed Amar, Op-Ed., *Constitutional Showdown*, L.A. TIMES, Feb. 6, 2011, at A17.

⁴ See ROBERT A. LEVY, THE CASE AGAINST PRESIDENT OBAMA'S HEALTH CARE REFORM: A PRIMER FOR NONLAWYERS (2011); Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010); Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FLA. INT'L U. L. REV. 29 (2010).

⁵ See, e.g., Florida ex rel. Att'y. Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2566 (2012); Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff'd in part, rev'd in part*, 648 F.3d 1235 (2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2566 (2012); Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (2011).

⁶ See James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011–2012 CATO SUP. CT. REV. 67 (2012); David B. Rivkin Jr. et al., *NFIB v. Sebelius and the Triumph of Fig-Leaf Federalism*, 2011–2012 CATO SUP. CT. REV. 31 (2012).

treat the origins and course of the movement.⁷ In the limited compass I'm afforded here I will be able simply to scratch the surface, touching on some of the main themes, actors, and events—largely from my own perspective and experience as one who was there toward the beginning, seeing and living events that younger members of the movement today have only read or heard about, if that. My aim is to give those members at least a glimpse of that history, the better to appreciate the value of the work that lies before them.

I. BACKGROUND: THE RISE AND FALL OF CLASSICAL LIBERALISM

The place to begin, however, is with the context from which the movement arose. And for that we need to reach far back: to the natural law of antiquity, grounded in reason; to the Roman law, with its development of property and contract; to the English common law, especially, its judges drawing on reason and custom to craft the theory of rights, captured in the positive law of an evolving Magna Carta; to John Locke, who would conceptualize those rights as natural rights and order them systematically within a larger theory of moral and political legitimacy; and to America's Founders and Framers, including the Framers of the Civil War Amendments, who would institutionalize the principles that emerged from that long tradition.⁸ Covering first private then public law, those principles and the regime the Framers secured over time spoke simply of individual liberty under limited constitutional government—the vision that inspired the modern libertarian movement, especially in its legal manifestations.

As with all human institutions, the regime that followed from those principles was far from perfect. But it enabled unprecedented liberty and prosperity for countless millions already living in America as well as those drawn here by the principles. With the rise of Progressivism, however, the vision faced a frontal assault, grounded in the idea that government planners could better order human affairs than could individuals pursuing their own ends as if guided by Adam Smith's invisible hand.⁹ So attractive was that collectivist idea, especially among Western elites, that by the middle of the twentieth century there were few advocates of the older view to be found, at least among the elites who would come to run the affairs of nations. And that is where our story begins, first with the slow reemergence of the classical view, then with the more specifically legal cast of it.

⁷ On the broader conservative legal movement, see STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008); BRINGING JUSTICE TO THE PEOPLE: *THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT* (Lee Edwards ed., 2004).

⁸ For a learned overview of this history, see Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928-1929). For the Civil War Amendments, see Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993).

⁹ See RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

II. FROM OUT OF THE ASHES: ANSWERING THE NEW DEAL

No event precisely marks the rebirth of modern libertarianism¹⁰—remnants of the classical view endured, to be sure—and its specifically legal aspect would emerge only in time from a mélange of writings by economists, philosophers, political theorists, lawyers, literary figures, journalists, and others, all part of a broadly “conservative” response to the modern liberalism that dominated the mid-century world of ideas. But a useful marker is of course the 1944 publication of F.A. Hayek’s *The Road to Serfdom*, a withering critique of central planning. An Austrian economist but in truth a polymath, Hayek would go on to publish broadly philosophical works—*The Constitution of Liberty* in 1960 and the three-volume *Law, Legislation, and Liberty* in the 1970s, among much else—but over that stretch a great deal more would unfold to bring into being the modern American conservative movement in which libertarianism could be found growing, if not always comfortably.

Here, let me simply list but a few of those developments as they underpinned and eventually led to the modern libertarian *legal* movement that began to emerge in the mid-1970s. The Austrian and Chicago economists such as Hayek and Milton Friedman were seminal libertarian influences, of course, as were the philosophical novels of Ayn Rand for many, and the variety of writers who found a sympathetic home after William F. Buckley Jr. established his *National Review* in 1955.¹¹ But as important as those and other such individuals were—too many to recount here—the institutions that emerged during those early years were perhaps even more important, starting with the Mount Pelerin Society that Hayek founded in 1947; the Foundation for Economic Education (FEE), founded a year earlier by Leonard Read, which in the mid-1950s would begin publishing *The Freeman* as we know it today; the Intercollegiate Society of Individualists, founded by Frank Chodorov in 1953, which would later become the rather more conservative Intercollegiate Studies Institute, but not before helping to launch the *New Individualist Review*¹² at the University of Chicago in 1961; the Philadelphia Society, established in

¹⁰ For the theory and history of libertarianism, see respectively, DAVID BOAZ, *LIBERTARIANISM: A PRIMER* (1997), and *THE LIBERTARIAN READER: CLASSIC AND CONTEMPORARY READINGS FROM LAO-TZU TO MILTON FRIEDMAN* (David Boaz ed., 1997). For the recent history, see BRIAN DOHERTY, *RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT* (2007).

¹¹ For a useful anthology of some twenty-four authors from this early period, see *AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY* (William F. Buckley Jr. ed., Transaction Publishers 2011), *originally published sub nom. DID YOU EVER SEE A DREAM WALKING? AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY* (William F. Buckley Jr. ed., 1970). For my introduction to the 2011 edition, which places the volume in a contemporary context, see Roger Pilon, *Introduction to the Transaction Edition* (2011), available at <http://www.cato.org/pubs/books/Pilon-Buckley-Book-Intro.pdf>.

¹² In 1981, in 991 pages, the Liberty Fund Press republished the entire run of the *New Individualist Review*, from April 1961 to Winter 1968. See *NEW INDIVIDUALIST REVIEW: VOLS. 1–5*, (Liberty Press ed., 1981).

1964, whose annual meetings drew together a variety of conservative and libertarian intellectuals for debate and discussion; and, most important for our purposes, the Institute for Humane Studies, founded by F.A. “Baldy” Harper in 1961, which in time would become a significant force in bringing the modern libertarian legal movement into being. Also to be noted of course is the establishment of several conservative and libertarian think tanks, most prominently the Heritage Foundation in 1973 and the Cato Institute in 1977.

The importance of those and similar institutions cannot be overstated: They served to stimulate the debate that would eventually change the climate of ideas, bringing the classical liberal vision back to the fore. In those early years, however, to oversimplify considerably in the interest of economy, the domestic policy debate on the Right tended to involve cultural conservatives and economic libertarians more than the focused legal and constitutional debates we think of today. Conservatives and libertarians, sometimes at loggerheads, more often together, were working out responses to the liberalism that had dominated public discourse since the Progressive Era, overwhelmingly since the New Deal. But insofar as law was at issue, the early debate eventually took two main tracks. First, economic consequentialists sought to show that the liberals’ programs, far from achieving their purported ends of helping the poor and the like, accomplished just the opposite results. From that effort emerged the law and economics movement, emanating from the University of Chicago under such early proponents as Aaron Director, Ronald Coase, Henry Manne, Richard Posner, and many others. But second, quite apart from that effort there arose another critique of the liberal legal order, a conservative attack on the “rights revolution” of the Warren Court and the “judicial activism” that many conservatives thought they saw being practiced by that Court and, later, by the Burger Court as well.¹³

That brings us closer to our main subject. But before reaching it we should note that, in an important sense, both the libertarian law and economics consequentialists and the conservative critics urging judicial deference to the political branches were operating *within* the political confines instituted by the New Deal’s “constitutional revolution”—a Congress, freed from the doctrine of enumerated powers, exercising effectively unlimited power; an executive branch increasingly infused with “legislative” powers delegated to it by Congress; and courts unwilling to engage in checking the vast redistributive and regulatory schemes that were flowing from the political branches and the states (except, later on, when those schemes implicated certain “fundamental” rights).¹⁴ For their part in

¹³ This latter strain was captured much later and most prominently by Robert H. Bork in his book, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). For a critique, see Roger Pilon, *Constitutional Visions*, REASON, Dec. 1990, at 39, and Roger Pilon, Op-Ed., *Rethinking Judicial Restraint*, WALL ST. J., Feb. 1, 1991, at A10.

¹⁴ I discussed this revolution more fully in ROGER PILON, *THE UNITED STATES CONSTITUTION*:

that post-New Deal constitutional milieu, the law and economics people sought to show legislators not that their efforts were without constitutional authority but, as noted just above, that they were counterproductive or perhaps inefficient; but insofar as those consequentialists brought their arguments to the courts, as they increasingly did, they were often seen as urging judges to make *policy* calls concerning economic efficiency, which judges have no authority to do. By contrast, conservatives were criticizing the Court not for invoking economic values like efficiency but for invoking social values, especially “evolving” liberal social values, thus to make *policy* judgments that should be left to the legislative branch, they said.¹⁵ Yet in neither case did either camp come to grips with the challenge posed by the New Deal constitutional revolution itself. Both camps railed, mostly, against the Leviathan that the revolution had enabled; but neither seemed willing to tackle it at its core.

III. THE MODERN LIBERTARIAN LEGAL MOVEMENT EMERGES

Enter, therefore, the modern libertarian legal movement, animated by liberty and hence by the need to revive the constitutional principles that had secured it, which the New Deal Court had ignored as it opened the constitutional floodgates, allowing the modern welfare state to pour through. Not that the new movement did not draw from the two legal strains just outlined: law and economics consequentialism has a role to play in adjudication, of course, especially in line-drawing contexts involving nuisance, risk, and the like; and the conservatives were often right in critiquing the Court’s activism, even if they often misidentified or overstated the problem. But they were surely wrong in calling for far-reaching judicial deference to the political branches.¹⁶

In fact, it was precisely that conservative call for judicial restraint and, even more, the underlying criticism of the Court’s “rights-revolution” that sparked my own interest in pursuing the issues more deeply. After all, I thought, wasn’t the nation founded in the name of rights—*natural* rights, which conservatives dismissed as no business for the courts? And wasn’t it the duty of the courts, in the name of such rights, to protect individuals against majoritarian tyranny? Still, I paused, because the conservative critique and those questions were arising in the context of a galloping

FROM LIMITED GOVERNMENT TO LEVIATHAN (2005), available at <http://www.cato.org/pubs/articles/CT05.pdf>.

¹⁵ I discussed this strain more fully in Roger Pilon, *Lawless Judging: Refocusing the Issue for Conservatives*, 2 GEO. J.L. & PUB. POL’Y. 5 (2001), available at http://www.cato.org/pubs/articles/pilon_gtwnfs_lawlessjudging.pdf.

¹⁶ See, e.g., Lino A. Graglia, *Judicial Activism of the Right: A Mistaken and Futile Hope*, in LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 65, 66–67 (Ellen Frankel Paul & Howard Dickman eds., 1990) (“The Constitution places very few restrictions on the exercise of the federal government’s enumerated powers As a result, examples of enacted law clearly in violation of the Constitution are extremely difficult to find.”). For a much earlier version of this view, see L. Brent Bozell, *The Unwritten Constitution*, in AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY, *supra* note 11, at 52–75.

welfare state at home—Lyndon Johnson’s Great Society—and an intellectual climate that called for greater protection for “social and economic rights”—welfare rights—both at home and abroad,¹⁷ which hardly seemed consistent with the Framers’ plan for *limited* government.

And so I, and others too who at the time were studying philosophy, dove more deeply into the theory of the matter, especially the theory of rights. And as luck would have it, long dormant normative theory was just then starting to reemerge in Anglo-American analytical philosophy. Two books in particular, both by Harvard philosophers, animated our thinking: John Rawls’ *A Theory of Justice*, which arrived in 1971 and was generally understood as an apology for the modern welfare state, and Robert Nozick’s *Anarchy, State, and Utopia*, which appeared in 1974 as a critique of Rawls and, more fully, as a sophisticated defense of libertarianism and limited government. But Nozick had erected his argument on the assumption that people had rights, which meant that there was a good deal of more fundamental work to be done—a project that I and others were only too willing to take on. In my case, it culminated finally in 1979 in a doctoral dissertation at Chicago entitled *A Theory of Rights: Toward Limited Government*, which drew on everything from Aristotle’s *Metaphysics* to Isaiah Berlin’s “Two Concepts of Liberty” to my mentor Alan Gewirth’s *Reason and Morality*. Others, too, from the mid-1970s and beyond were at work establishing the philosophical foundations for liberty and limited government—through the Liberty Fund in Indianapolis, at the Reason Foundation in Los Angeles, the Pacific Institute for Public Policy Research and the Cato Institute (at that time) in San Francisco, the Social Philosophy and Policy Center in Bowling Green, Ohio, and elsewhere.

But the lawyers also were at work at their end of the project, and none more productive or insightful than the man who arrived across the Midway a year after I got to Chicago, Richard Epstein. No stranger to philosophy—his undergraduate major at Columbia, my own alma mater—Epstein was at the time developing his theory of strict liability in torts, which dovetailed nicely with the Lockean understanding of rights, even as it contrasted with his colleague Richard Posner’s negligence approach to torts. We struck up a collaborative relationship that has continued to this day,¹⁸ beginning with my 1976 review¹⁹ of his first four tort essays,²⁰ placing them in a Hayekian and Nozickian context. The Institute for Humane Studies (IHS) had commissioned the piece for their *Law & Liberty*, which reached some

17 See Maurice Cranston, *Human Rights, Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 47 (D. D. Raphael ed., 1967); Inga Markovits, *Socialist vs. Bourgeois Rights—An East-West German Comparison*, 45 U. CHI. L. REV. 612 (1978).

18 See, e.g., EPSTEIN, *supra* note 9.

19 Roger Pilon, *Liberty and the Law of Tort*, 2 L. & LIBERTY 1 (1976).

20 Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975).

8,000 lawyers, judges, and scholars, I was told. And right there is a crucial piece of the story.

Located at the time in Menlo Park, California, next door to Stanford, and led by Leonard Liggio, a historian, and Davis Keeler, a lawyer who headed up their Law & Liberty project, IHS and its people had an exceptionally keen appreciation of the need to establish not simply the economic arguments for liberty, including economic liberty, but the moral and legal arguments as well. Thus, even before I'd finished my dissertation they put me and many others on the speaking circuit, spreading the ideas that were the beginnings of what in time would constitute "the movement." One such effort stands out: it was a 1979 conference in San Diego on the theory of rights, underwritten by the Liberty Fund, which I organized through IHS at a time when I was teaching at the Emory University Law School. The conference, examining the theory of rights systematically, drew together some of the leading scholars on the subject. Its proceedings and more were published that year in a special edition of the *Georgia Law Review*,²¹ copies of which were then used for years thereafter by IHS in its teaching and training programs for budding and newly minted libertarian academics, including law professors, who needed all the help they could get to penetrate the too often hostile academic walls. Those kinds of multiplier effects were crucial for building a movement.

But others, too, were engaged in the same kinds of efforts. Thus a young Harvard Law student, Randy Barnett, himself a philosophy undergraduate major at Northwestern, was exploring the criminal law side of things with a conference he organized on the subject and an important essay on restitution that followed in 1977 in *Ethics*, published by the University of Chicago.²² And on the constitutional side, the late Bernard Siegan, another Chicago product who taught for years at the University of San Diego School of Law and attended that 1979 IHS rights conference, was at work at that time on his much needed *Economic Liberties and the Constitution*, published in 1980, also by Chicago. The mid- to late-'70s was a fertile period for developing the foundations for what would become the modern libertarian legal movement.

But it would take sustained effort to become a true movement, to say nothing of a successful one. Fortunately, that effort was forthcoming, although the events that went into it are so varied and numerous that I can mention only a few—and again, only those with which I am most familiar. They begin, in the 1980s, with the election of Ronald Reagan and the subsequent appointment to the bench of numerous judges and justices, many of whom came from the legal academy or were otherwise conversant with the developing intellectual currents as they pertained to the law. But

²¹ Symposium, *Perspectives on Rights*, 13 GA. L. REV. 1117 (1979).

²² Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977). But see Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 ETHICS 348 (1978).

the differences between conservatives and libertarians were lying just below the surface, so for those of us in the libertarian camp, especially on the question of the proper role of the courts, it was a matter of charting a slow but methodical course aimed at changing the climate of ideas to one that would be more sympathetic to the idea that judges should be more engaged in defending constitutional liberties than most conservatives at the time, fearing judicial activism, were inclined to support. To accomplish that, quite simply, we got involved—with our fellow conservatives, and with the Left as well, where doing so would advance our ideas.

Thus, just after the 1980 elections I worked with George Pearson, at that time with Koch Industries, to help plan the agenda for the annual meeting of the Philadelphia Society, which took place in early April 1981 near the start of the Reagan administration that I would be joining only weeks later. The subject of the meeting was the philosophy of law. By design, my own address at the meeting, subsequently published by the then quite conservative Intercollegiate Studies Institute,²³ gently called into question the conservatives' approach to the courts. Those efforts to work with people of different views continued, but so did efforts to refine our work among ourselves while at the same time promoting it to others. A good example was Cato's 1984 conference on "Economic Liberties and the Judiciary," the outline for which I had sketched on a paper napkin a year earlier over lunch with Ed Crane, Cato's president, and Jim Dorn, editor of the *Cato Journal*. At that conference we reached across the aisle in at least one instance, with the spirited opening debate between then-Judge Antonin Scalia and Richard Epstein, whose response to Scalia's defense of judicial restraint was somewhat short of gentle.

Here too there were multiplier effects. The Scalia-Epstein debate was soon published as a pamphlet by the conservative American Enterprise Institute, while the entire conference proceedings were published in the *Cato Journal* a year later²⁴—and republished two years after that by the George Mason University Press with a foreword, "The Judiciary and the Constitution," by Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit.²⁵ Meanwhile, the *Cato Journal* edition garnered invitations to Bernie Siegan and me to speak on the subject of economic liberties and the judiciary at the ABA convention's 1987 showcase program celebrating the Bicentennial of the Constitution. And to top it all off, my ABA speech, published subsequently in *The Freeman*,²⁶ received the Bicentennial Commission's Benjamin Franklin Award, presented to me in 1989 by recently retired Chief Justice Warren Burger—all this from that paper napkin! Multiplier effects indeed!

23 Roger Pilon, *On the Foundations of Justice*, 17 INTERCOLLEGIATE REV. 3 (1981).

24 Symposium, *Economic Liberties and the Judiciary*, 4 CATO J. 661 (1985).

25 ECONOMIC LIBERTIES AND THE JUDICIARY (James A. Dorn & Henry G. Manne eds., 1987).

26 Roger Pilon, *On the Foundations of Economic Liberty*, 38 THE FREEMAN 338 (1988).

There were many other such events during the 1980s, of course, but doubtless none was more important than the 1982 creation of the Federalist Society, which has grown exponentially since then. For three decades, first through law school student chapters, then through lawyers chapters and practice groups, and over time through several other means, not least its annual student and lawyer conventions, the society has encouraged and facilitated a robust exchange of ideas through which libertarians have been able to present their views to an increasingly receptive audience. Considerably more conservative than libertarian at its inception, the society and its officers were nonetheless admirably open to a variety of ideas, the central one being that truth will eventually prevail. Thus it has hosted countless events featuring libertarian themes—such as its own symposium on “Constitutional Protections of Economic Liberty,” held at the George Mason University School of Law in 1987.²⁷ And numerous books setting out various aspects of the libertarian legal vision, books by Richard Epstein, Randy Barnett, Gary Lawson, Chip Mellor, Clint Bolick, Robert A. Levy, David Bernstein, Walter Olson, and others, have enjoyed a warm reception at Federalist Society events, as a result of which the society is considerably more libertarian today, especially in its younger ranks, than it was in its early years.

Again, therefore, it is the institutions that have been so crucial for advancing the ideas of the individuals who have worked in and through them. For that reason, when I left the Reagan administration toward its conclusion in 1988 it was to establish Cato’s Center for Constitutional Studies, the purpose of which was to help change the climate of ideas to one more conducive to liberty under limited constitutional government. For nearly twenty-five years now, through books, monographs, op-eds, conferences, forums, lectures, amicus briefs, media appearances, and, especially, the annual *Cato Supreme Court Review*, we have worked to bring that change about—mostly with others, such as with our friends at the Institute for Justice,²⁸ which came on the scene a few years after we arrived. And we have seen that change come about—slowly and haltingly, to be sure, but clearly too, as in the Court’s last Term. When judges finding Obamacare “a bridge too far” cite James Madison, assuring skeptics, in *Federalist 45*, that the powers of the new government would be “few and defined,” that is a change worth noting, and worth celebrating as well.

²⁷ Symposium, *Constitutional Protections of Economic Activity*, 11 GEO. MASON L. REV. 1 (1988).

²⁸ The Institute for Justice now has a Center for Judicial Engagement, under the direction of senior attorney Clark Neily, dedicated to encouraging courts to enforce constitutional limits on government. *Center for Judicial Engagement*, INSTITUTE FOR JUSTICE, <http://www.ij.org/cje> (last visited Nov. 7, 2012).

CONCLUSION

Twenty-five years and more ago, most conservatives had made their peace with the New Deal Court's rejection of the very centerpiece of the Constitution, the doctrine of enumerated powers, from which the document derives such legitimacy as it can have as positive law. "A lost cause," they said. Their concern instead, from fears about judicial activism, was that courts might recognize rights not enumerated in the document. Yet the plain text of the Constitution, together with its structure, should make it clear to any textualist that countless rights, only a few of which could have been *enumerated* in the document, are nevertheless recognized by and hence "in" the Constitution because, as it plainly says, they are "retained by the people"—and you cannot "retain" what you do not first have to be retained. Thus the fundamental importance of understanding the theory of rights that has stood behind the Constitution from before the time the Bill of Rights made explicit what was always implicit in the doctrine of enumerated powers—that where there is no power there is a right, belonging either to the states (as powers) or to the people.

At a second ABA convention showcase program, this one in 1991 celebrating the Bicentennial of the Bill of Rights, Randy Barnett and I addressed both of those issues—both the powers and the rights issues—in speeches we gave on "The Forgotten Ninth and Tenth Amendments."²⁹ In the years since, the limits imposed by both enumerated powers and enumerated and unenumerated rights have been rediscovered—not entirely, to be sure, far from it—but in ways we could only have imaged decades ago. There is much more to be done, but the foundations for doing it are now in place.

Yet those foundations are hardly new. They have been refined substantially, for sure, and that is no small matter. But they rest on principles that have been understood over the ages, even if too often forgotten or ignored over the past century. Progressives thought they could improve the lot of mankind by ordering vast areas of life through law. America's Founders knew better. They understood that liberty, under the rule of law, was the path to both prosperity and dignity. That is the path the modern libertarian legal movement is taking.

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ADDENDUM

After I had sent my symposium essay in to the *Chapman Law Review*, Professor Todd Zywicki was kind enough to send me his essay for this symposium³⁰ with the idea that I might wish to respond since it took a

²⁹ Roger Pilon, *The Forgotten Ninth and Tenth Amendments*, 13 CATO POL'Y REP. 1 (1991).

³⁰ Todd J. Zywicki, *Libertarianism, Law and Economics, and the Common Law*, 16 CHAP. L.

somewhat different position than my own. I do wish to, briefly. Before continuing here, however, the reader should first read Professor Zywicki's essay below.

As will be seen, Zywicki's main aim is to distinguish libertarian legal theory from the common law and modern law and economics, despite their vast commonalities, and in the process to explain how he himself moved gradually from the former to the latter as the sounder approach to legal questions. Granting that the common law and law and economics are not exactly alike, he focuses on those few occasions where he believes they deviate from libertarian theory, which

has traditionally been deontological and normatively-oriented, typically grounded in natural rights theory and reasoning to normative statements about the content of the law. Law and economics, by contrast, purports to be foremost a positive theory of the common law, while also providing a normative justification for the common law as well (namely, social wealth maximization as a normative value).³¹

And he takes as his libertarian foil a 1982 *Cato Journal* essay by Murray Rothbard,³² the libertarian economist who was a prolific writer on all manner of subjects right up to his death in 1995.

Rothbard's fecundity aside, I would note first that while he may be a particularly useful foil for his having argued directly against the law and economics approach, there are many in the normative libertarian law tradition, as I noted above,³³ who take a broader view than Rothbard did, finding a place for both the common law and the law and economics approaches *within* the underlying libertarian theory.³⁴ In fact, not only do the rights-based libertarian and efficiency-based law and economics approaches most often reach the same conclusions, but properly related they complement each other, as we will see shortly.

But second, in explicating Rothbard's—and “the libertarian”—approach to “allocating” rights and liability in a nuisance context—his main focus—Zywicki charges Rothbard with “retreating” and eventually with “drift[ing] quite far from his initial premise that any physical invasion of land is an abatable nuisance and anything else is not actionable.”³⁵ Yet a careful reading of Rothbard's essay, including passages Zywicki himself quotes, will show that Rothbard, as he goes along, is simply “refining” his

REV. 309 (2013).

³¹ *Id.* at 309.

³² Murray Rothbard, *Law, Property Rights, and Air Pollution*, 2(1) CATO JOURNAL 55–99 (1982).

³³ *See supra* text accompanying note 16.

³⁴ Three years before Rothbard's essay appeared, in fact, I myself argued for conclusions not unlike those Zywicki urges, though within a rights-based libertarian normative context, not an efficiency context. *See* Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171, 1193–96 (1979); Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245, 1332–39 (1979). *See generally* RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* (2008).

³⁵ Zywicki, *supra* note 30, at 314.

“concept of invasion to mean not just boundary crossing, but boundary crossings that in some way interfere with the owner’s use or enjoyment of this property. What counts,” Rothbard concludes, “is whether the senses of the property owner are interfered with.”³⁶ Thus, in defining property rights and setting liability rules, Rothbard would allow the “invasion” of radio waves or airplane flights at 35,000 feet, but not such standard nuisances as noise, odors, vibrations, and the like, at least if they are above a level that interferes with the owner’s quiet enjoyment of his rights.³⁷

Seizing on Rothbard’s refinement of his position, Zywicki next brings us closer to his own thesis, that the Coase Theorem³⁸ is the better approach to nuisance disputes:

Thus, despite his best efforts to avoid Coase, Rothbard has in fact implicitly come to concede the core premise that underlies the Coase Theorem—that what matters are incompatible and competing uses of scarce resources, and as a result, costs are reciprocal. It is only because *both* parties want to use the same scarce resource that incompatible uses arise.³⁹

. . . .

Despite his best efforts to articulate simple bright-line rules, Rothbard’s clear rules inevitably collapse under the weight of a multitude of *ad hoc* exceptions. But the myriad of exceptions illustrates the central problem—it is precisely the problem of incompatible uses that gives rise to the need to define property rights in the first place If the problem is incompatible uses among *people* then there is no obvious reason (as Rothbard implicitly admits) that it must be intrinsically tied to particular parcels of land or that the concept of physical invasion takes on some particular normative primacy.⁴⁰

Having reduced the matter to incompatible uses, the solution Zywicki (and Coase) offer to this dilemma then follows naturally. Where there are low transaction costs, how a court allocates the rights does not matter, because either way the parties can bargain to an allocation of rights that maximizes total wealth. But where transaction costs are high, the initial allocation of rights might well matter, because the parties, for any number of reasons, may be unable to negotiate an efficient solution. In the stock example, a plaintiff suffering small losses from the actions of a defendant will seek to enjoin those actions, the effect of which, if the injunction is issued, will impose huge losses on the defendant. In such cases, Zywicki argues, “the law should try to *replicate* the bargain that the parties *likely*

³⁶ *Id.*

³⁷ Regrettably, Rothbard sees no place for defining those levels through public, statutory law, even in large number contexts like automobile pollution. At the same time, after citing Rothbard to the effect that supersensitive plaintiffs do not get relief (“Those who have a special desire for quiet, Rothbard observes, must build their own soundproof room.”), Zywicki then implies that Rothbard does *not* take that position (“Nor would nuisance arise [on the Rothbard view] if, for example, Mr. Burns [in Zywicki’s example] only had a normal, and not a highly sensitive, sense of smell.”) *Id.* at 315.

³⁸ Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

³⁹ Zywicki, *supra* note 30, at 314.

⁴⁰ *Id.* at 315.

would have struck had they been able to sit down and bargain out the terms, but are unable to do so because of the high transaction costs.”⁴¹

Well what is wrong with that approach? Not a lot, really, assuming we can approximate individual and social costs—no small assumption. But we are not home free yet. First, Zywicki writes that “what matters” is that we have incompatible and competing uses of scarce resources. But clearly, more than that matters. In particular, *causality* matters. And the efficiency approach effectively ignores that issue as it considers alternative ways to “allocate” rights and liability. Thus, in the first of Zywicki’s examples it is the polluting vaccine factory, not its downstream victim, that is causing the harm, but for which that victimized owner would not be seeking an injunction, the effect of which, if issued, would *then* harm the factory. Ignore the temporal aspects of that causal sequence and, indeed, it becomes then a matter simply of incompatible and competing uses of scarce resources, the solution to which could very well turn on “maximizing social wealth” as one among several possible values. But if a court initially, in the name of efficiency, allocated the right to the factory by refusing to grant the injunction, that result would be achieved at the expense of the no-harm principle, properly qualified, that most people think fundamental to justice. The factory would not be internalizing the full costs of its actions but would be imposing some of those costs on unwilling strangers. Thus, again, “what matters” here is more than incompatible and competing uses.⁴²

Second, although Rothbard does not accept the idea that a court might have to impose an efficient solution on the parties where transaction costs are high—as in the decisions Zywicki cites, *Ploof v. Putnam*⁴³ and *Alaska Packers v. Domenico*⁴⁴—his refinements of his initial “physical invasion” premise do not amount to “a multitude of *ad hoc* exceptions,” as Zywicki asserts. In fact, it is causation, a factual matter, and not incompatibility that enables the libertarian to distinguish legitimate from illegitimate uses of property, whereas incompatibility alone leaves one with only an evaluative criterion for making such distinctions. Quiet uses by adjacent owners are compatible because they are causally inefficacious. Active uses are causally efficacious and hence are compatible with quiet uses or with other active uses only if active users internalize the costs they impose on others, including through compensation agreements, for which a bedrock causal analysis is essential.⁴⁵

41 *Id.* at 317 (emphasis in original).

42 I discuss some of these issues more fully in Roger Pilon, *Property Rights and a Free Society* in *RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL, AND THE PUBLIC INTEREST*, 369–401 (M. Bruce Johnson ed. 1982); reprinted as *Property Rights, Takings, and a Free Society*, 6 *HARV. J.L. & PUB. POL’Y* 165 (1983).

43 81 Vt. 471 (1908).

44 117 F. 99 (9th Cir. 1902).

45 I discuss these issues more fully in *Property Rights*, *supra* note 42.

But finally, if Rothbard's approach does not amount to a multitude of *ad hoc* exceptions, Zywicki's "law of necessity"—the very law that common law courts have fashioned in decisions like *Ploof* and *Alaska Packers*—does operate, by Zywicki's own admission, "as an exception to the general rule of property and tort that your property is yours to keep"—and rightly so, as the facts in those decisions should make clear. The old common law judges who fashioned such exceptions over the years may not have invoked the language of "bilateral monopolies" or "negative-sum rent-seeking transactions," but their intuitions were on the mark.

Libertarian legal theory, at its best, does not hold that rights are absolute, for the world is too complex and varied to allow for such a conclusion. But it does rest on reason, from which rights themselves are derived, and it takes reason as far as it will go, after which evaluative considerations like those that are inherent in the Coase Theorem, as applied in necessity and other such contexts, come into play. It is crucial to appreciate, however, just what the order is. It is not that "social wealth maximization" is a free-standing base line, as many in the law and economics movement would have it. Rather, that criterion comes into play in the context of a prior, normatively grounded property rights foundation, where pre-existing rights are held "by nature," to be *recognized*, not "assigned," by legislatures and courts. And it comes in toward the end, as an exception to the normal rules. Deciding precisely *when* to invoke exceptions like the law of necessity is another matter, of course, as is the underlying theory of natural rights, but those are matters for another day.

The Constitution as if Consent Mattered

*Tom W. Bell**

INTRODUCTION

How should respect for liberty inform constitutional theory? At present, libertarians favor an originalist approach, joining the Right in trying to reconstruct the understandings of those people, now long dead, who first ratified the Constitution's provisions. Libertarians tend to reject the other major theory—the so-called “living” constitutionalism generally favored by the Left—on grounds that it strays from fidelity to the Constitution's text. This brief paper offers a third approach, one that combines the best of originalism and living constitutionalism in order to maximize the consent of the governed and, thus, render constitutional authority as justified as possible.

Its focus on consent makes this *a* libertarian constitutional theory, not *the* libertarian one. No single theory can plausibly claim that title, given the fractious nature of libertarians. These pages aim to show, however, that originalism does not deserve a monopoly on libertarians' allegiance and that they will find an attractive alternative in trying to maximize the consent of the governed—what we might call a “consensualist” approach to the Constitution.

Part I explains why libertarians, who transcend the traditional left-right political spectrum, should also transcend the false dichotomy between originalism and living constitutionalism, combining the best of both in a distinctly libertarian, consensualist theory. That has the advantage, as Part II explains, of maximizing the consent of those governed by the Constitution, rendering its authority as justified as possible. Part III offers some consoling words to libertarians who hesitate to move beyond originalism. No constitutional theory can honestly be all things to all people. By way of full disclosure then, Part IV discusses some areas where a consensualist approach might generate policy results that libertarians disfavor. Part V airs some objections to consensualism and briefly answers them.

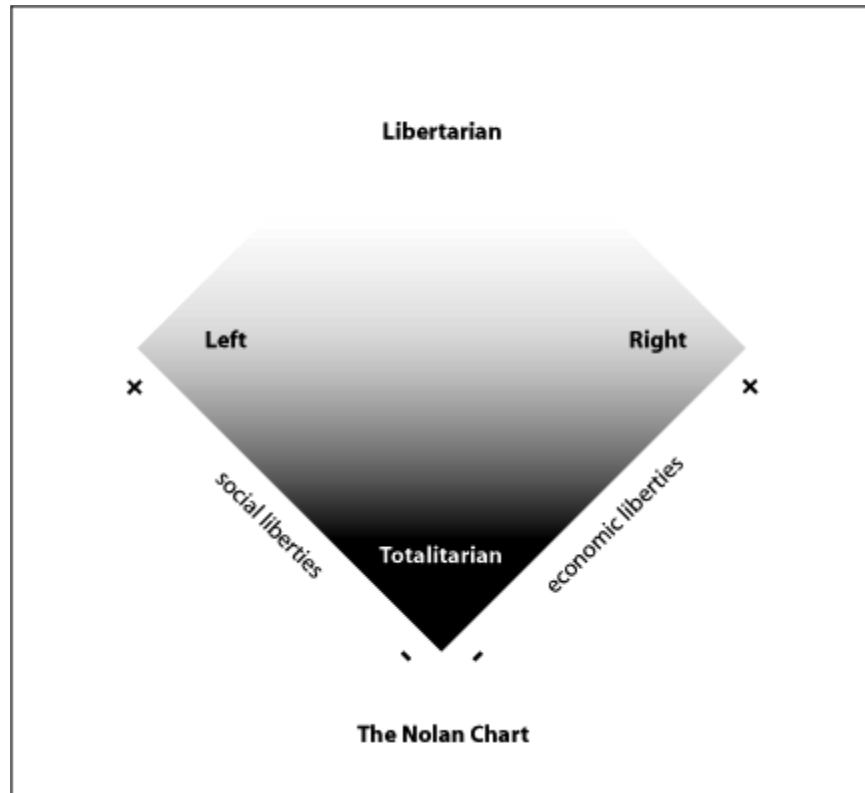
* This draft paper expands on a presentation given at the *2010 Students for Liberty Southern California Regional Conference*, October 23, 2010, Malibu, California. For the PowerPoint presentation that accompanied that presentation, see www.tomwbell/writings/SFL2010talk.ppt. I thank Alexander (“Sasha”) Volokh, Joel Boyce, Tim Kowal, Larry Rosenthal, Larry Solum, Glen Whitman, Eugene Volokh, Mike Rappaport, Randy Barnett, Nicholas Quinn Rosenkranz, Gary Lawson, Tom G. Palmer, Aeon Skoble, and Ilya Somin for comments.

I. CONSTITUTIONAL THEORY IN 2-D

Most libertarians have encountered the Nolan Chart, an expository device that neatly explains how they transcend the typical left-right political spectrum.¹ The Nolan Chart graphs out two kinds of rights: *social rights*—e.g., freedom of expression, religion, and personal autonomy—on one axis, and *economic rights*—e.g., freedom to own and exchange property—on the other. The traditional, one-dimensional, left-right spectrum straddles the middle of the two-dimensional Nolan Chart. Totalitarians, who disregard all rights but their own, anchor the chart's bottom. Libertarians, because they respect both social and economic rights—indeed, because they generally regard social and economic rights as fundamentally indistinguishable—hold the high ground at the top of the Nolan Chart. Figure 1 illustrates.

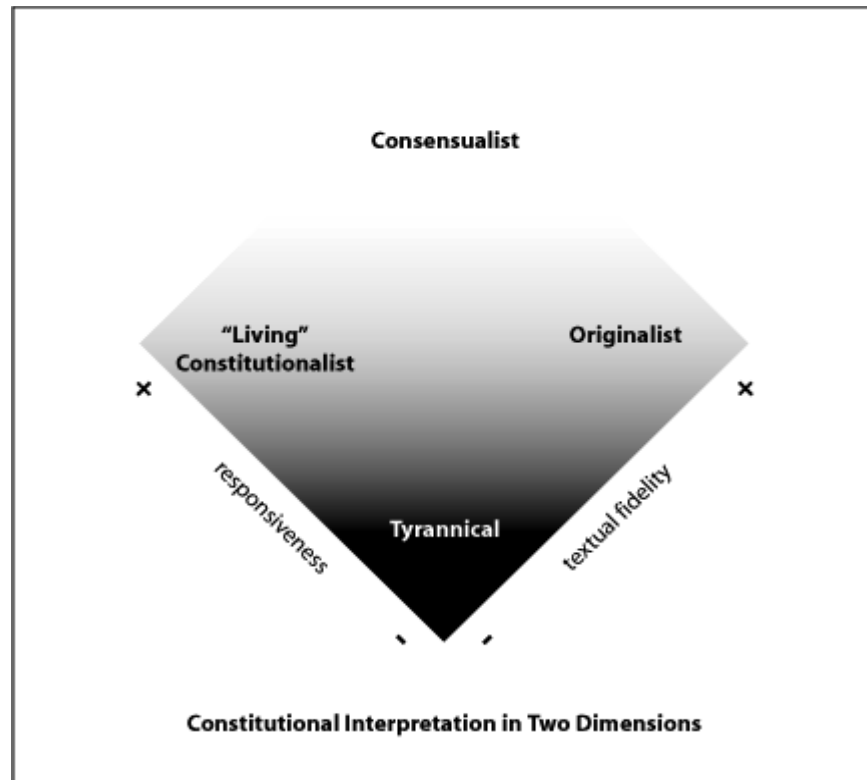
¹ See NOLAN CHART, http://en.wikipedia.org/wiki/Nolan_Chart (last visited Feb. 11, 2013). Although I use the popular nomenclature here, it bears noting that Nolan popularized the chart but did not originate it. See BRIAN DOHERTY, RADICALS FOR CAPITALISM 321 n.92 (2007) (attributing the chart to Maurice Bryson and William McDill).

Figure 1



We can understand the bipolar character of contemporary constitutional law with a similar device. We begin by graphing *responsiveness to the understandings of living people* on one axis and *fidelity to constitutional text* on the other. Just as in the Nolan Chart, the chart's middle band approximates the traditional, left-right spectrum. The left-hand side of the spectrum corresponds to living constitutionalism, which aims to render the Constitution relevant to current conditions by encouraging judges to read its text loosely. The right-hand side of the spectrum corresponds to originalism, which prefers the meaning of those who first ratified the Constitution's text over its present meaning, but who at least take the text seriously. At the chart's bottom lies tyranny, where the Constitution means whatever those in power say. At the top, on the far side of the left-right divide, rises a distinctly libertarian position—one that aims to maximize the consent of those governed by the Constitution. This it does by seeking the plain, present, public meaning of the Constitution, an approach both responsive to present understandings and faithful to the text. Figure 2 illustrates.

Figure 2



Reading a constitution typically calls both for *interpretation* (finding the meaning of the text) and *construction* (applying contestable interpretations to particular problems).² A consensualist approach *interprets* the Constitution's words according to their plain, present, public meaning—the meaning that we, the living, faced with claims of federal authority, give to the Constitution's text. Consensualism *constructs* the words of the Constitution, applying them to the problem at hand, so as to maximize the consent of the governed. Specifically, a consensualist approach follows the same sort of rules of construction that common law courts routinely apply in cases involving standardized form agreements that allegedly bind individual consumers. In other words, we should not reify the Constitution, or indeed any founding political document, but should instead regard it as akin to a standard form agreement offering governing services on a take-it-or-leave-it basis to many relatively powerless individual citizen-customers.

² Lawrence Solum, *Legal Theory Lexicon 063: Interpretation and Construction*, LEGAL THEORY LEXICON (Apr. 27, 2008), http://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-le.html.

Why pursue both responsiveness and textual fidelity? In order to maximize the consent of the governed. As the next Part explains in more detail, the consensualist approach derives from a theory linking the justifiability of subjecting someone to the jurisdiction of a constitution to the degree to which that person has consented to it.³ From the point of view of contract law—an instrument finely tuned to assess the justifiability of enforcing consensual agreements—constitutions look like standard form agreements (albeit ones formed under dubious circumstances). At least with regard to those provisions affecting liberties, rights, privileges, or immunities,⁴ applying contract law to the Constitution helps to maximize the consent of the governed. As a further safeguard and as a remedy for the ills of self-judgment, consensualism also calls for giving those who litigate constitutional rights a direct say over who will decide their disputes—a process already routinely utilized in private arbitrations.⁵

Consensualism is not the only libertarian way to read the Constitution; many aspects of both living constitutionalism and originalism—indeed, their *best* aspects—also protect our liberties from political insults. Consensualism offers a compromise to those contesting views while drawing on both for inspiration. It moreover offers something new: a theory of justification designed to make exercises of Constitutional authority more normatively attractive than either originalism or “living” constitutionalism can claim.

II. MARGINALLY JUSTIFYING THE CONSTITUTION

Few but those who have taken oaths of office have expressly agreed to the Constitution’s terms. That raises hard questions about the justifiability of federal power. As Lysander Spooner wryly observed:

Where would be the end of fraud and litigation, if one party could bring into court a written instrument, without any signature, and claim to have it enforced, upon the ground that it was written for another man to sign? that this other man had promised to sign it? that he ought to have signed it? that he had had the opportunity to sign it, if he would? but that he had refused or neglected to do so? Yet that is the most that could ever be said of the Constitution.⁶

In Spooner’s view, the Constitution has no legal authority because it makes no provision for individual citizens to sign on the dotted line (or, more pointedly, to *refuse* to sign it). Perhaps Spooner set too high a bar for

³ See Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RES. L. REV. 17 (2010).

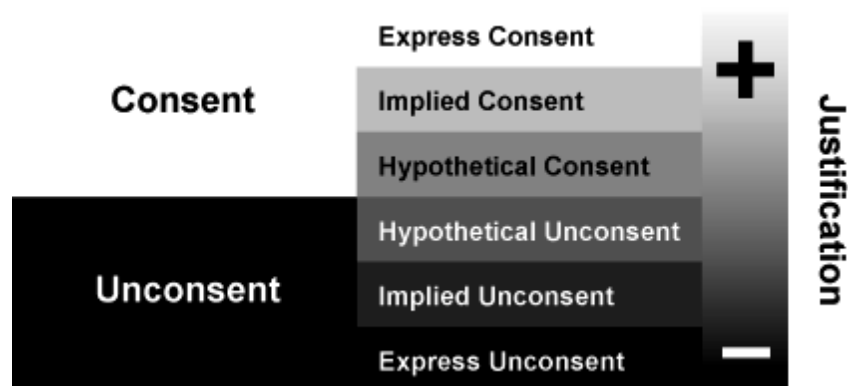
⁴ Provisions pertaining to relations between government bodies, so long as they do not affect individual rights, privileges, or immunities, do not always raise the same concerns. A conflict between the executive and legislative branches, for instance, does not necessarily raise the problem of a vast difference in bargaining power; the two branches, in contrast to interactions between the federal government and an individual citizen, meet more or less as equals.

⁵ I refer here to citizen courts, an institution discussed in more detail below.

⁶ LYSANDER SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY 24 (1870), reprinted in LYSANDER SPOONER, NO TREASON AND A LETTER TO THOMAS F. BAYARD 24 (1973).

the Constitution by demanding it satisfy the strictures of contract law. Regardless, his complaint illustrates how the ideal of an expressly consensual exchange negotiated between equals serves as the measure when we have to calculate the justifiability of imposing constitutional authority on someone who at best only impliedly or hypothetically consents to it.

Where Spooner saw only black or white, the discerning eye can detect shades of grey. A study of the common law demonstrates that we typically evaluate the justifiability of a social institution's exercise of authority over an individual as not simply a matter of whether the person has consented to the institution's jurisdiction, but how strongly the person has consented to it. Consent, and thus justification, varies by degrees. Application of this graduated consent theory generates assessments of justification that apply both *relative to particular parties* (rather than relative to the whole undifferentiated mass of humankind) and *relative to alternative institutions* (rather than relative to an unrealized ideal). Figure 3, below, illustrates.

Figure 3: The Scale of Consent and its Relation to Justification

Because it failed to satisfy the requirements to create a binding agreement under contract law, Spooner concluded that the Constitution had no legal authority. Graduated consent theory offers a more tempered and precise analysis, explaining that the U.S. Constitution may have a more justified claim to authority over a specific subject than institutions touting only weaker proofs of consent. That is not to say that the Constitution is flatly justified, completely and for everyone. Unless it can claim the same sort of consent that makes an express agreement negotiated between equals so indisputably binding—and as Spooner noted, it cannot—the Constitution can always stand to win more consent. Good patriots, ardent to make their country as justified as possible, would thus aspire for it to win as much consent as possible from those it governs.

We can increase the justifiability of the Constitution by interpreting it in a manner most likely to maximize the consent of those it governs. How do we do that? By borrowing the interpretive tools that contract law (predominantly) and tort law (secondarily) have developed, over hundreds of years and through thousands of cases, to discern the proper boundaries of consensual transactions and the remedies for violating them. Applied to the Constitution, those rules suggest that we should interpret the document according to the understanding of the parties allegedly bound by it—the citizens and residents of the U.S. We should, in other words, give the Constitution its present, plain, public meaning.

Though that approach to interpretation might strike legal academics as too simple-minded to guide the subtleties of Constitutional jurisprudence, the Supreme Court itself has repeatedly avowed that “we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”⁷ Whether we should recur to the

⁷ *Dist. of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

plain and public meaning of the words at the time of their ratification, as originalism would have it, or at the present, as consensualism would, remains a separate and contestable question.⁸ In either case, though, the Supreme Court at least nominally eschews giving the Constitution's text a meaning discernable only in the case law rather than on the document's face.

Constitutional scholars distinguish between interpretation—the art of discerning the meaning of the Constitution's text—and construction—the practical problem of figuring out what to do when that meaning proves elusive.⁹ I've thus far written about interpretation, explaining why graduated consent theory tells us we should read the Constitution's text in light of the plain, present, public meaning of its words. The same graduated consent theory also tells us how to *construct* the Constitution when its words evade interpretation. Basically, to again treat the Constitution as much as a contract as possible, we should construct it as we would a standard form agreement, offered by its writer on a take-it-or-leave-it basis, from an awesomely powerful party to a comparatively powerless one. Courts enforcing contracts formed in similar circumstances routinely read vague terms in favor of the party—usually a sole individual person—presented the agreement on a take-it-or-leave-it basis by the other party—usually a soulless collective legal person, such as a corporation or a state. In the Constitutional context, that basically gets us to the presumption of liberty that Randy Barnett has eloquently defended (albeit on other grounds).¹⁰

Another interesting result from consensualist constitutional theory: We should explore using citizen courts as an alternative to courts where only federal employees do the judging. No federal court would uphold a term of a standard form agreement, one offered by a gargantuan and powerful legal entity to a single natural person, providing that any disputes between the parties would be judged and enforced by its employees. If that holds true of commercial disputes between corporations and consumers, it also holds true of constitutional disputes between the federal government and those of us subjected to its authority. In no case can a party—be it a person, corporation, or State judge—judge his, her, or its own cause.

It follows, then, that we can do better than having federal judges alone decide disputes between those who claim authority from the Constitution and those subjected to their claims. We could adopt any of several remedies, but it seems most prudent to simply adopt the same sort of procedure routinely adopted in commercial contexts: Have a panel of three

⁸ The passage from *Heller* continues a vein that makes its originalist leanings evident: "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Id.* at 576–77.

⁹ See Solum, *supra* note 2.

¹⁰ See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

adjudicators, one chosen by one party, the other by the other party, and the third by those two adjudicators, decide the dispute. I have said more on that point elsewhere;¹¹ it here suffices to note that consensualism tells us not only how to interpret and construct the Constitution, but also how to improve our mechanisms for judging it.

III. FOR RECOVERING ORIGINALISTS

Most libertarians, to the extent they adopt any particular approach to the Constitution, tend to adopt some version of originalism—specifically, the original public meaning version.¹² Randy Barnett, for instance, has argued, “the words of the Constitution should be interpreted according to the meaning that they had at the time they were enacted.”¹³ This section explains why libertarians should reconsider their allegiance to originalism.

Originalism offers a relatively objective and certain means of interpreting the Constitution, especially when compared to the usual alternatives, which favor precedents and judicial discretion over plain language. The virtues of originalism stem more from its fidelity to the words of the Constitution, however, than to its fidelity to what those words *used* to mean. Textualism, not historicism, gives originalism its charms.

For friends of freedom, originalism has the virtue of generating such substantively attractive results as limited government, the rule of law, and respect for individual rights. We can credit that both to the Constitution’s bold and timeless words as well as to the supermajoritarian constraints imposed on its ratification proceedings.¹⁴ Query, though, whether we should pick our preferred theory of constitutional meaning based solely on its substantive results. If so, we would favor libertarian philosopher kings over a Constitutional republic. Not just the results, but also the justifiability of our interpretive theory matters.¹⁵

At any rate, it is not so evident that originalism offers the best way to maximize liberty. Reading the Constitution today from a pretended eighteenth century point of view sometimes bolsters individual rights, granted, as when *District of Columbia v. Heller* gave an originalist interpretation to the Second Amendment.¹⁶ In other areas, however,

¹¹ See Bell, *supra* note 3.

¹² Lawrence Solum, *Legal Theory Lexicon 019: Originalism* (Jan. 18, 2004), http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html.

¹³ BARNETT, *supra* note 10, at 89. Barnett so argues because the Constitution is written and “[o]riginal meaning follows naturally, *though perhaps not inevitably*, from the commitment to a written text.” *Id.* at 100 (emphasis added). That caveat suggests that Barnett at least sensed that respect for the written nature of the Constitution might entail not originalism, but something more responsive to the understandings of living subjects.

¹⁴ John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J. L. & PUB. POL’Y 917, 925 (2008).

¹⁵ *But see* Frank H. Easterbrook, *Pragmatism’s Role in Interpretation*, 31 HARV. J. L. & PUB. POL’Y. 901, 905 (2008).

¹⁶ *But see* below for an argument that a consensualist approach to the Second Amendment

resurrecting linguistic usages from over 200 years ago would threaten our twenty-first century rights, as when courts seek the meaning of such words as “speech” (arguably mere public oral presentations in the Founding era) or “cruel and unusual” (a phrase that evidently *did* not, and therefore in Justice Scalia’s view *does* not, bar public floggings).¹⁷

Consensualism offers all the textual fidelity of originalism without getting stuck in imagined understandings from long, long ago. Indeed, by relying on the plain, present, public meaning of the Constitution’s text, consensualism can achieve greater exactitude than originalism—which relies crucially on a limited set of various and variously interpreted written documents to try to recreate patterns of linguistics—could ever offer. Originalism limits itself to long-dead authors. Today, in contrast, we can invoke a wide variety of mechanisms—polls, publicly edited encyclopedias, empirical studies of word counts and associations—to discern how the Constitution’s *living* subjects understand its words. And only our understanding—not the understandings of our long-dead predecessors—can bind us.¹⁸

Originalists evidently admire the Founders, and rightly so. We can all appreciate the boldness of Thomas Jefferson, the wisdom of James Madison, and the independence of Benjamin Franklin. Those and others of their generation did not demand our allegiance to their reading of the Constitution, however. They realized that we would read it by our own lights, for our own times. They doubtless hoped that we would share their courage in casting off the dead chains of distant rulers for the living bonds of self-governance. Consensualism honors the Founders not by enthroning their opinions but by following their example.

IV. WHAT DOES A CONSENSUALIST GIVE UP?

Eugene Volokh once observed that every constitutional theory ought to make its proponents sacrifice some policy that they care about deeply.¹⁹ If not—if your constitutional theory generates all of and only your substantive preferences—the rest of us have reason to doubt its objectivity. What does a consensualist approach to the Constitution ask libertarians to give up?

generates more powerful protections for rights to keep and bear arms than the originalist approach used in *Heller*.

¹⁷ Scott Baker, ‘Providential’: *Scalia Defends Constitution in Lively Debate With Breyer*, THE BLAZE (Nov. 13, 2010, 7:38 AM), <http://www.theblaze.com/stories/2010/11/13/scalia-breyer-bandy-about-how-to-decide-cases/> (describing “a rare public debate” in which Justice Breyer proclaimed public flogging as unconstitutionally cruel and unusual, while Justice Scalia countered that because such punishments were common in the Founding era, they would remain constitutional—though “stupid”—today).

¹⁸ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880 (1996) (describing as “the central problem of written constitutionalism” the problem of binding present generations with the judgments of prior ones).

¹⁹ Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 813 (1998) (“Interpretation means sometimes having to say you’re sorry.”).

This section discusses three areas where a consent-based approach to the Constitution risks generating results that libertarians might find regrettable: with regard to the right to keep and bear arms, with regard to the federal welfare rights, and with regard to the proper scope of the Privileges or Immunities Clause of the Fourteenth Amendment. In the first case, consensualism arguably generates a stronger right to keep and bear arms than does the originalist approach—a result that might make even libertarians, to say nothing of other political persuasions, blanch. In the second case, consensualism arguably proves more receptive to the constitutionality of federal welfare than originalism does, a result that some libertarians would rue. In the last case, while its meaning remains somewhat shrouded in mystery, a consent-based approach to the Privileges or Immunities Clause would suggest a more parsimonious reading than some libertarians have voiced.

A. The Right to Keep and Bear Arms

At first glance, a consensualist reading of the Constitution appears to threaten the individual right to keep and bear arms—a matter about which libertarians care profoundly. The problem arises because the Second Amendment’s first two clauses—“A well regulated Militia, being necessary to the security of a free State”—arguably qualify its last two clauses, “the right of the people to keep and bear Arms, shall not be infringed.” The recent decision in *District of Columbia v. Heller*,²⁰ because it affirmed that the Second Amendment protects an individual’s right to keep and bear arms, somewhat eases practical concerns on that front. Because that case relied on an originalist reading of the Constitution, however, it leaves open the worrying possibility that consensualism poses a theoretical challenge to libertarians’ preferred policy.

Or perhaps not. Under an argument I first encountered in the writing of Erwin Hass, the Second Amendment ensures the sanctity of an individual’s right to keep and bear arms even on a consent-based approach. Hass recognized in the Second Amendment a “gerundive construction” of the sort that classical Latin uses to highlight the tension between two contrasting clauses. With that in mind, Hass read the Second Amendment to say, “Because, on the one hand, the state needs an armed militia, the people, on the other hand, shall retain their own weapons to counteract the state.”²¹

That interpretation, by recognizing the reference to militias to serve a cautionary role, comports nicely with the consensualist argument that we should interpret the Constitution’s language in conformity with the plain, present, public meaning of its text. Whatever its meaning in statute, case

²⁰ *Dist. of Columbia v. Heller*, 554 U.S. 592 (2008).

²¹ Erwin Hass, *Arms and the Man*, LIBERTY, Sept. 2010, at 12–13, available at www.libertyunbound.com/sites/files/printarchive/Liberty_Magazine_September_2010.pdf.

law, and commentary, “Militia,” as used elsewhere in the Constitution, evidently refers to a military body subject to tight federal control. Article I, Section 8, Clause 16 includes among the powers of Congress, “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States”²² Article II, Section 2, Clause 1 begins, “The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States”²³ Even if, as the Constitution provides, each of the several states has authority to appoint officers and to train the ranks, they would carry the burden of “training the Militia according to the discipline prescribed by Congress”²⁴ (Note well the use of the singular; the Constitution evidently favors to view the Militia as a single body, even if made up of parts from various states.)

A citizen might thus reasonably fear Militias as a potential instrument of federal tyranny. That well-founded apprehension would shape the public understanding of “Militia,” as used in the Second Amendment, which would in turn help determine the plain and present meaning of the word. On that reading, the Second Amendment guarantees each subject’s right to keep and bear arms in order to pose a credible threat *in extremis*, and thus to discourage in due course, the overweening ambition of tyrants-in-waiting.²⁵ On that view, consensualism would require libertarians to give up their preferred approach to gun rights—basing them in the need for citizen militias—though it might leave them happy about the policy results—liberal access to arms.

B. Federal Welfare Rights

A consent-based approach to the Constitution threatens to generate another result that libertarians might find hard to welcome: A reading favoring generosity of benefits doled out by the federal government. Libertarians tend to favor a stingy government in any case, and one at all events limited to a few narrowly defined categories of expressly Constitutional expenditures, such as to “establish Post Offices and Post Roads;”²⁶ to “raise and support Armies,”²⁷ and to “provide and maintain a Navy”²⁸ Arguably, though, a consensualist reading of the Constitution

22 U.S. CONST. art. I, § 8, cl. 16.

23 U.S. CONST. art. II, § 2, cl. 1.

24 U.S. CONST. art. I, § 8, cl. 16.

25 This is not quite the same reading of “Militia” favored by proponents of what Glenn Reynolds calls the “Standard Model” of the Second Amendment, which instead claims that “the purpose of the Second Amendment is to ensure an armed citizenry, from which can be drawn the kind of militia that is necessary to the survival of a free state.” Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 473 (1995). Though Reynolds wrote those lines well before *Heller*, that recent opinion confirms that “the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia.” *Heller*, 544 U.S. at 599.

26 U.S. CONST. art. I, § 8, cl. 7.

27 U.S. CONST. art. I, § 8, cl. 12.

28 U.S. CONST. art. I, § 8, cl. 13.

would tell us that the plain, present, public meaning of “general Welfare,” first in the Preamble and then again in Article I, Section 8, Clause 1, which grants Congress the power to provide for “the General Welfare of the United States,” equates to something very much like a federal dole.

To that, a libertarian might well reply that the plain, present, public meaning of “general Welfare” in the Preamble and Article I, Section 8, far from authorizing special benefits for particular individuals or groups, limits the federal government to providing only such boons as help the United States as a whole. That counterargument probably carries at least enough weight to give “general welfare” a contestable interpretation, making further understanding of its meaning a matter of construction. Problematically for libertarians, however, that move arguably supports a reading of the Constitution that favors those who plead for the receipt of government benefits. Here as with standard form agreements generally, we should construe the terms of the putative agreement against federal power and in favor of individual citizens.

Libertarians can and should reply that “*general Welfare*” precludes special legislation, that the Constitution’s express terms sharply limit the ways in which the federal government can collect revenue for redistribution, and that powers enumerated in Article I do not include anything so far reaching as the sort of federal welfare state we now witness. Still, it seems at least possible that a consensualist reading of the Constitution authorizes the distribution of certain benefits to which any given citizen might qualify. That will make libertarians uneasy, given their well-placed worry that bread and circuses beget declines and falls. Even if some system of “general welfare” qualifies as Constitutional, however, that does not make it mandatory or even prudent. Wise—and constrained—lawmakers might realize that they cannot afford to buy the consent of the governed, but instead must earn it by modest restraint and effective action.

C. The Privileges or Immunities Clause of the Fourteenth Amendment

The Fourteenth Amendment says, in relevant part, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”²⁹ What would a consent-based understanding of that clause entail? That somewhat confounding and obscure phrasing of the Privileges or Immunities Clause makes it easier to say how a consensualist would approach the problem than to say exactly what answer would result. It looks far from certain, however, that the interpretation favored by such libertarian stalwarts as Roger Pilon³⁰ and

²⁹ U.S. CONST. amend. XIV, § 1.

³⁰ See, e.g., Kimberly Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, CATO POLICY ANALYSIS (Nov. 23, 1998), available at <http://www.cato.org/publications/policy-analysis/reviving-privileges-or-immunities-clause-redress-balance-among-states-individuals-federal-government>.

Tim Sandefur,³¹ in which the Privileges or Immunities Clause protects fundamental natural rights against state interference, would necessarily follow from a consequentialist approach.

Although the plain, present, and public meaning of the Privileges or Immunities Clause hardly leaps from the Constitution's text, applying to the clause the same sort of interpretative tools that courts routinely apply to standard form agreements brings out several salient features. Note first that "privileges or immunities" do not evidently mean the same thing as "rights or liberties," but instead generally refer to special exemptions from generally applicable limits or obligations. Thus does Black's define "privilege" as "[t]hat which releases one from the performance of a duty or obligation,"³² and immunity as "exemption from penalty, burden, or duty."³³ Presumably then, the Privileges or Immunities Clause does not apply to fundamental natural or constitutional rights or liberties.

Further evidence that "privileges and immunities" means something special appears in the Constitution's frequent use elsewhere of "right,"³⁴ "liberty,"³⁵ and "freedom"³⁶—different words that presumably have different meanings. Indeed, in the text immediately following the Privileges or Immunities Clause, the Due Process Clause shifts to speaking of "life, liberty, or property."³⁷ The plain, present, public meaning of "privileges and immunities" thus points to special statutory or constitutional dispensations rather than to fundamental and universal rights or freedoms—to such things as the "Privilege of the Writ of Habeas Corpus"³⁸ or the privilege against self-incrimination³⁹ rather than to "freedom of speech"⁴⁰ or "the right of the people to keep and bear Arms."⁴¹

Alas for clarity, though, still other provisions of the Constitution cloud the matter. Prior to ratification of the Fourteenth Amendment, the Constitution already provided, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."⁴² Any narrow reading of the Privileges or Immunities Clause thus faces the trenchant critique of Justice Stephen J. Field, dissenting in the Slaughter-House Cases, who complained that if the clause refers only

31 See generally TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* (Cato Inst. 2010).

32 BLACK'S LAW DICTIONARY 1197 (6th ed. 1990).

33 *Id.* at 751.

34 See, e.g., U.S. CONST. amends. I, IV, VI, VII, & IX.

35 See, e.g., U.S. CONST. amends. V, XIV.

36 See, e.g., U.S. CONST. amend. I.

37 U.S. CONST. amend. XIV, § 1.

38 U.S. CONST. art. I, § 9, cl. 2.

39 U.S. CONST. amend. V.

40 U.S. CONST. amend. I.

41 U.S. CONST. amend. II.

42 U.S. CONST. art. IV, § 2, cl. 1.

to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character.⁴³

Suffice it to say for now that the meaning of the Privileges or Immunities Clause defies easy interpretation and that its mysteries have persisted despite long arguments over the question. Respect for the consent of the governed suggests that we should follow the model adopted by contract law, which generally construes doubtful terms in favor of a consumer allegedly bound by a standard form agreement. Here, though, we construct uncertain Constitutional terms so as to safeguard the consent of consumers of governing services. The result: A broad reading of the Privileges or Immunities Clause.

That may look like a standard libertarian result, but it comes from a consensualist approach rather than an originalist one. It also relies on some contestable assumptions; perhaps the plain, present, public meaning of the Privileges or Immunities Clause is not so hard to discern, after all. We should not look to academic musings to settle the question, however; we should see how objective courts would cope with the problem of interpreting the Privileges or Immunities Clause. I have elsewhere described how citizen courts could help remediate the problem of judicial bias in favor of state power over individual rights. Here, it suffices to say that the deliberations of citizen courts could tell us a lot about what the Privileges or Immunities Clause should mean.

V. OBJECTIONS AND ANSWERS

A. What if the plain public meaning of the Constitution's words changes between the time of its ratification and the time of its interpretation?

Linguistic drift sounds troubling in theory, but would not likely have much impact in practice. The plain public meaning of most of the Constitution's terms has changed little over recent centuries. "We the People," still means those who "ordain and establish" the Constitution; "no law" remains "no law." *Judicial* drift—far more than *linguistic* drift—poses a much worse threat to textual fidelity. Witness such absurdities as holding that "commerce" covers eating the fruits of your own labor,⁴⁴ or that "for public use" allows private gifts.⁴⁵

⁴³ Slaughter-House Cases, 86 U.S. 36, 96 (1873) (Field, J., dissenting).

⁴⁴ Wickard v. Filburn, 317 U.S. 111 (1942).

⁴⁵ Kelo v. New London, 545 U.S. 469 (2005).

Linguistic drift—or more accurately, linguistic *expansion*—does happen, though. Witness “domestic violence,” a term now heard more often in reference to spousal abuse and related, intensely local, disruptions. The Founders evidently used the phrase in Article IV, Section 4 to mean something quite different: homegrown violent insurrection. Does it follow that a consensualist, applying one of the more recent and arguably the more common meanings of “domestic violence” would read Article IV, Section 4 very differently today from the way the Founders read it over 200 years ago? No.

As throughout legal interpretation, we must put the phrase in context; in this case, the tail end of Article IV, Section 4. Any contemporary reader of the words surrounding “domestic Violence” (to recur to the original capitalization) would understand immediately that the sentence refers to duties owed by the federal government to every state of the union. It does not make much sense to read the sentence as, “The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against *violence in a household and between household members*.” Does the Constitution really guarantee that, say, if Idaho’s legislature but asks, the federal government will protect the state from family squabbles? It beggars belief—especially when a much more sensible interpretation appears on the face of the text.

But what if semantics have drifted so far over centuries as to completely obscure the original meaning of the Constitution’s text? Suppose, for instance, that in the fashion of some dystopic novel “freedom” had come to mean “restriction.” Our unfortunate future counterparts would then find that, to put it in present terms, the First Amendment says, “Congress shall make no law . . . prohibiting the *restricted* exercise [of religion]; or abridging the *restriction* of speech, or of the press, or the right of the people peaceably to assemble . . .” That nightmarish perversion of the First Amendment renders it nearly senseless; indeed, the words arguably embody a self-destructing contradiction. Suppose they actually made some sort of sense to future folks, though. What then?

In such a hypothetical world of upside-down semantics, a well-intentioned originalist would presumably impose on the surprised and puzzled People a meaning exactly opposite to the one that they find in the text. Violating the plain, present, public meaning of a dystopic anti-Constitution would in that case protect freedoms of expression, granted. That happy result should not blind us, however, to the risks inherent in empowering judges to run roughshod over what subjects *now* bound by the Constitution naturally understand its words to mean. Indeed, thanks to cultural and moral progress, the originalist approach to semantic drift looks more likely to generate unseemly results than welcome ones. Compare, for

instance, the current meaning of “cruel and unusual punishment” with the meaning prevalent in late eighteenth century America.

A consensualist can thus respond to the puzzle of semantic drift by saying, “The People get the Constitution as *they* read it now—not necessarily as the Founders read it centuries ago.” Because the public (as opposed to judicial) meaning of the Constitution’s text has not changed much over hundreds of years, linguistic drift does not look very worrying in practice. But if everyday people start using “freedom” for what the Founding generation condemned, in the Declaration of Independence, as “Despotism,” they will have no grounds to complain that the Constitution has been misinterpreted 180 degrees off. Indeed, those poor souls would not even notice the semantic flip-flop that hypothetically worries us. They would, however, notice the results of that sort of anti-Constitution, a document that attacks rather than defends the rights of the People, and would probably end up writing a “Declaration of Submission” overthrowing the “Republic” and instituting a “restriction-loving Despotism.” Were we to watch that drama with the sound turned off, those odd-speaking revolutionaries would look just like American patriots fighting to protect their liberties from tyranny.

The People—not judges or academic commentators—ordain and establish the Constitution. We should thus take seriously the People’s understanding of the Constitution’s text. If semantic drift has in effect given them a new Constitution, then it should stand or fall on its own merits.

B. Suppose that the Constitution’s subjects wrongly believe something about it not consistent with the plain, present, public meaning of the text. Should the legal meaning of the Constitution—its application under threat of force—then accord with what the public expects politicians to do, or instead, with how, if presented with the Constitution, the public would understand that text?

It bears noting that this hypothetical concern will not likely arise under a consensualist approach because, insofar as we can discern the public meaning of the Constitution’s words, it will almost always accord with public belief about the proper application of the Constitution. The public has ready access to the Constitution’s text and, while they might not know its contents in detail, the public understands—indeed, reveres—the fact that the Constitution exists in a physical document that has legal effect. If we take seriously the notion that “We the People . . . do ordain and establish” the Constitution, we must take the words following that preamble seriously, too. If some portion of the public expects from the political process something that the rest of us, having read the Constitution, understand it not to say, we can quickly and easily disabuse our fellow subjects of their ignorance by quoting the text. No gap between public expectations and public understandings would likely stretch wide or last long.

For the sake of the hypothetical, though, let us suppose that some member of the public zealously but erroneously believes that the Constitution guarantees something in fact not in the text—that fluffy puppies will never want for chew toys, say—or something expressly contradicted by it—that Congress can establish a national church, for instance. What then?

Holding all else equal, we should want the legal meaning of the Constitution—its effective, nuts-and-bolts, coercively-backed implementation—to accord with public expectations. With regard to legal meaning, after all, the Constitution gains in justification the more it conforms to the consent of the governed. In cases where the public expectation about how the Constitution will be applied varies from the public understanding of the Constitution’s text, however, we have to choose between two different measures of consent. Apart from recurring to the ballot box—itself a method fraught with epistemological peril—we have no reliable way to measure unfounded and uninformed hunches among members of the public about what they expect from constitutional government.

The consensualist approach thus favors borrowing from contract and tort law time-tested tools of interpretation and construction—tools well designed to measure and maximize consent. Those tools teach us to look first to the objective public meaning of a text, turning to such ancillary proofs as course of performance, past dealings, or (the closest analog to the sort of public expectations as issue here) parol evidence only secondarily. Such back-up proofs cannot trump plain meaning; they can at best only sharpen fuzzy meanings. If, then, some fool thinks that the Constitution guarantees chew toys for puppies and authorizes a U.S. Government Church, we rightly set aside that expectation as not consistent with the Constitution’s plain, present, public meaning.

C. Does the consensualist approach err by bringing normative considerations to bear in deciding the meaning of the Constitution’s text?

The supposed problem, here—tying meaning to normative considerations—merits some explanation. “When we make assertions about what an utterance means, we are making factual assertions about the world,” Professor Lawrence Solum cautions.⁴⁶ “What words mean is one thing; what we should do about their meaning is another.”⁴⁷ The objection thus arises: Consensualism breaches the fact/value firewall, letting normative considerations taint what should be a purely factual inquiry into meaning.

⁴⁶ Lawrence Solum, *Semantic Originalism*, ILL. PUB. L. AND LEGAL RES. SERIES NO. 07-24, Nov. 2008, at 1, 28.

⁴⁷ *Id.* at 30.

The reply: Consensualism at most merely offers good reasons to interpret the Constitution in a manner likely to maximize the consent of the governed; it does not mandate any particular meaning. While normative considerations guide consensualism's choice of interpretive strategies, in other words, the strategy, once chosen, determines the Constitution's meaning in a value-neutral manner. In that, consensualism relies on normative considerations to the same degree as any other theory of constitutional meaning. We cannot avoid choosing when it comes to the difficult and contested problem of how to understand the Constitution. Most choose living constitutionalism or originalism, evidently because they think it best to do so. Consensualism offers a different option, one supported by different reasons.

Why choose consensualism over alternative theories of constitutional meaning? Note first that the normative aspects of consensualism operate only hypothetically, on the assumption that we value consent. I have offered a transcendental argument why no moral agent can deny that claim, but even short of an undeniable proof, consent qualifies as at least a *prima facie* good in every leading moral theory.⁴⁸ In that approach, I follow Randy Barnett, who carefully explains that his theory of liberty assumes certain preferences with regard to social ordering.⁴⁹ Normative considerations in that approach operate not as mandates, all too likely to rouse objections from those who like to think for themselves, but rather as dry if-then explanations, offered solely as guides to those who share certain commonplace goals.

Second, note that even if the choice between semantic theories does not ordinarily come freighted with moral considerations (itself a considerable assumption), the same does not evidently hold true for the choice between theories of constitutional meaning. Because our approach to constitutional meaning has coercive effects, our choice bears normative burdens not at risk when we wonder over how to understand such things as poems or news reports. A man might risk his fortune, life, and good name on what "Treason against the United States" means in the Constitution's usage.⁵⁰ I will not pretend to instruct linguists and literary theorists as to how they should determine the meaning of novels, songs, or the like, but neither should they claim that we must remain indifferent to the coercive impact of the choice between different theories of constitutional meaning.

Third, even accepting the dryly positivist view that meaning is determined solely by patterns of usage, rather than by heartfelt normative preferences, we still face the question: Which pattern of usage counts for Constitutional meaning? What data set, in other words, should the

⁴⁸ Bell, *supra* note 3.

⁴⁹ BARNETT, *supra* note 10.

⁵⁰ U.S. CONST. art. III, § 3, cl. 1. I argue for the narrowest plausible reading of those words in my article, *Treason, Technology, and Freedom of Expression*, 37 ARIZ. ST. L. J. 999 (2005).

linguistically-minded jurists draw upon when interpreting the Constitution? An originalist will call for reviewing public speech patterns during ratification, whereas a “living” constitutionalist will call for charting usage in the opinions written by black-robed judges. The tyrant demands that we hew to the way he uses the Constitution’s words, narrowing the data set down to a single source. Consensualism adds yet another option to the mix: Interpret the Constitution according to prevailing usage among contemporary citizens and subjects of the United States.

Even if any given semantic theory should operate free of normative influences, we still face a choice between various theories. Linguistics stand ready to help us discern meaning from the data set we feed into it, from Founding era texts (for originalism) to court opinions (for living constitutionalism) to a dictator’s ranting (for totalitarianism) to contemporary public usage (for consensualism). *It remains for us, however, to decide which data set matters.* Although we could decide the question by casting lots, that would represent an abdication of responsibility in instances, such as with regard to legal texts generally or to the Constitution in particular, where our choice will influence the application of coercive force. Normative considerations thus can and should come into play when it comes to choosing between various semantic theories, even if the theory we finally choose runs, machine-like, in a value-free manner.

D. Doesn’t “meaning” mean something other than what consensualism suggests?

The response to the prior objection explained why we face a choice between several theories of constitutional meaning. That opens the door to a follow-up objection: “meaning” has only one meaning—specifically, it refers to the way in which a word or statement fits into the linguistic behavior of a particular community. Which community wins the privilege of defining the Constitution? A living constitutionalist might claim, “the Constitution means what the Supreme Court says it means.”⁵¹ An originalist might favor the patterns of linguistic usage among those who first ratified the Constitution and its various amendments. A consensualist suggests looking for the Constitution’s plain, present, public meaning.

Reasonable people evidently disagree about what “meaning” means. We cannot simply define away these honest differences of opinion. The matter calls for persuasive argument, not mere stipulation.

Consider, therefore, whether Professor Solum’s argument for original meaning works. Solum asserts that “the meaning (or ‘semantic content’) of a given Constitutional provision was fixed at the time the provision was

⁵¹ The sentiment, offered nowadays as a lawyerly maxim, appears to have originated with Chief Justice Charles Evans Hughes, who said “the Constitution is what judges say it is” Charles Evans Hughes, *Speech at the Elmira Chamber of Commerce (May 3, 1907)*, in *ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916* at 179, 185 (2nd ed., G.P. Putnam’s Sons 1916).

framed and ratified.”⁵² He offers that as a non-normative claim, asserting that “it would simply be a linguistic mistake to interpret the” Constitution by light of the usage in any other community of speakers.⁵³ It is not clear why only the linguistic usage among a text’s initial audience qualifies to establish the meaning of “meaning,” however. At the very least, that limitation does not appear required by the philosophy of language espoused by Paul Grice, whose “sentence meaning” Solum analogizes to his own public meaning of originalism.⁵⁴ To the contrary, Solum himself admits that “texts and speeches can have ‘sentence meaning’ irrespective of whether the utterance is read or heard in spatial and temporal proximity to the occasion of writing or saying.”⁵⁵ By analogy, the Constitution can have meaning when read by light of today’s usage, even though it was first written long, long ago.

Rather than fixing the Constitution’s meaning to the time of its framing and ratification, therefore, it seems more plausible to understand both sentence meaning and Constitutional meaning as variables that depend on the usage of whatever linguistic community we care about. When asked about the Constitution’s meaning, in other words, we should seek the clarification, “To whom?” Consensualism replies, “To those currently subjected to the Constitution’s legal authority.”

Why adopt the plain, present, public meaning of the Constitution? To maximize the consent of those it governs. Common law courts have long struggled with the related problem of trying to respect both the *power to enter into* legally binding agreements *and the right to avoid* unwanted ones, and have wisely chosen to generally read a contract according to the meaning adopted by its parties. Consensualism applies that same general approach to the Constitution, favoring an interpretation that will maximize the consent of those governed by it, here and now, by seeking their understanding of the Constitution’s meaning.

With regard to a contract or constitution, we should favor a meaning—more precisely, a *theory of meaning*—that will maximize the consent of those purportedly bound by the document. Making a legal relation more consent-rich increases its justifiability, helping to excuse coercive enforcement of the instrument. Preferring that outcome reflects a normative preference for mutual consent over unjustified bloodletting, granted, but that preference comes naturally to most social creatures.

One might fairly say, then, that normative considerations lead consensualism to look for meaning in the usage patterns of living subjects, a mechanism that *finds* but does not preordain Constitutional meaning. In

⁵² Solum, *supra* note 46, at 2.

⁵³ *Id.* at 4.

⁵⁴ *Id.* at 34–39.

⁵⁵ *Id.* at 35.

that, consensualism recognizes that nobody can justly claim the privilege of defining the meaning of “meaning.”

E. Isn't consensualism just a sort of originalism—one that uses present meanings because they largely concur with the original ones?

As explained in the answer immediately above, consensualism makes a considered judgment in favor of seeking Constitutional meaning in the plain, present, public meaning of the document's text. It thus expressly rejects the alternative, favored by originalists, of seeking the Constitutional meaning in the speech patterns of those who ratified it, centuries ago. Consensualism takes inspiration from the originalist's fidelity to the Constitution. When it comes to understanding that text, however, consensualism stays in the present whereas originalism remains embedded in a particular historical period.

We might thus understand consensualism as something like a livelier version of originalism, though both grow from common roots. Originalism once functioned very well at determining the plain, present, public meaning of the Constitution's text—not just in the 1790s, but for many decades thereafter. In those early days, consensualism and originalism perfectly overlapped; the Founding generation could hardly help but rely on its own usage in interpreting the Constitution. Even today, the public meaning of the Constitution's text remains much as it was two hundred years ago, making originalism and consensualism agreeable neighbors. But whereas originalism's search for meaning remains wedded to the public usage at ratification, consensualism keeps moving forward, constantly updating the data set that determines meaning and always vying for the consent of the governed.

CONCLUSION

This paper has argued that to maximize the consent of those governed by the Constitution, we should read it according to its plain, present, public meaning, and construe vague provisions in favor of individual subjects. By combining the responsiveness of living constitutionalism with the textual fidelity of originalism, a consent-based approach captures the best features of both. At the same time, however, consensualism avoids the public choice pitfalls of vesting agents of the federal government with the sole authority to define the Constitution (a salient flaw of living constitutionalism) as well as the confusion and inequity that would follow from defining the Constitution according to a reconstructed understanding of those who first ratified it (originalism's quixotic goal). We, too, ratify the Constitution; only our mutual consent keeps that grand bargain alive. So, too, then, should our meaning imbue the Constitution with such authority as it can justly claim.

We must choose between various semantic theories of the Constitution. That choice has consequences. Should we empower unelected

federal agents to alone define the Constitution? The question answers itself. Should we instead define the Constitution in terms of how long-dead Ratifiers understood it? That strategy at least offers comparative certainty and some protection against inequity;⁵⁶ originalism does have its virtues. It lacks, however, a convincing justification. Why, apart from those instrumentally useful ends, should meanings hidden in historical mist trump the Constitution's plain, present, public meaning? When it comes to justifying contemporary government action, the consent of those who first ratified the Constitution counts for less than the consent of "We the People"⁵⁷ who live under it here and now.

⁵⁶ See McGinnis & Rappaport, *supra* note 14.

⁵⁷ U.S. CONST. pmbl.

Libertarianism and Judicial Deference

Ilya Somin *

INTRODUCTION

Over the last thirty years, libertarian constitutional theory has risen from near-total obscurity to a significant role in debates over constitutional interpretation and judicial review. Libertarian scholars such as Randy Barnett, Richard Epstein, and the late Bernard Siegan have had a major influence on scholarship over a wide range of constitutional issues.¹ Ideas developed by libertarians have also had a substantial impact on court decisions in the fields of federalism, property rights, and gun rights, among others.

Georgetown University law professor Randy Barnett and other libertarian scholars played an important role in developing the arguments behind the recent challenge to the constitutionality of the Obama health care plan individual mandate.² The recent revival of “public use” jurisprudence on property rights was in large part stimulated by cases brought by the libertarian Institute for Justice.³ Libertarians also brought the lawsuit that led to the Supreme Court’s recognition of an individual right to bear arms under the Second Amendment, in *District of Columbia v. Heller*,⁴ and its application against the states two years later.⁵ More generally, libertarian ideas have had a major influence in both the academy and in developing a number of successful public interest law firms that have won notable victories in both courtrooms and the court of public opinion.⁶

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¹ See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) [hereinafter BARNETT, *RESTORING THE LOST CONSTITUTION*]; RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

² See Josh Blackman, *Back to the Future of Originalism*, 16 *CHAP. L. REV.* 325 (2013).

³ See especially *Kelo v. City of New London*, 545 U.S. 469, 500 (2005) (O’Connor, J., dissenting), where four Justices embraced a restrictive interpretation of “public use” long advocated by libertarians.

⁴ 554 U.S. 570 (2008). For an account of the key role of libertarians in bringing this case and developing the arguments behind it, see BRIAN DOHERTY, *GUN CONTROL ON TRIAL: INSIDE THE SUPREME COURT BATTLE OVER THE SECOND AMENDMENT* (2008).

⁵ *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Prominent libertarian lawyer Alan Gura litigated the *McDonald* case and relied on considerable libertarian scholarship on gun rights.

⁶ See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

These are impressive achievements for a relatively small group of scholars and activists that remains heavily outnumbered by left-liberals in both the academy and the legal profession more generally.⁷ But it is still not entirely clear whether libertarianism as such can make a distinctive contribution to constitutional theory. Individual libertarian scholars and activists have developed important and influential ideas about constitutional interpretation. But many of those ideas are not distinctively libertarian. There is no doubt that *libertarians* can make a distinctive contribution to constitutional theory. But whether *libertarianism* can do so is a different question.

In this article, I suggest that libertarian thought can make at least one distinctive contribution to constitutional theory: greater skepticism about doctrines of judicial deference to the supposedly superior expertise of the political branches of government. I do not here seek to prove that libertarian ideas definitively refute the case for such deference. But they are an important contribution to the debate over the subject.

In Part I, I briefly describe the kind of deference my analysis focuses on: cases where judges allow the legislature or the executive to determine the scope of its own authority under some part of the Constitution because of the political branches' superior knowledge of the relevant issues. Although the judges in question recognize that the Constitution limits government power over the issue in question, they defer to legislative or executive interpretations of the scope of those limits. A major rationale for such deference is the superior judgment or expertise of the political branches of government. This argument for deference is seen in many areas, including federalism, property rights, and criminal defendants' rights, among others.

Part II explains why libertarian thought casts doubt on the expertise rationale for judicial deference. That rationale implicitly assumes that the legislature and executive have benevolent motives and superior expertise to which judges should defer. Libertarian thought poses a strong challenge to both assumptions, even if it does not definitively refute them in all possible cases.

Finally, in Part III, I explain why skepticism about judicial deference is a distinctively libertarian contribution to constitutional theory. It is a logical extension of libertarian skepticism about government power and the political process. Much more than originalism—the idea with which libertarian constitutional theory is principally associated—it is a natural extension of libertarian political thought.

Despite the title, this book focuses mostly on libertarians rather than social conservatives. Cf. Ilya Somin, *Lessons From the Rise of Legal Conservatism*, 32 HARV. J.L. & PUB. POL'Y 415 (2009) (reviewing Teles' book).

⁷ In the legal profession overall, libertarians are probably outnumbered by conservatives as well as liberals.

I. JUDICIAL DEFERENCE AND THE CONSTITUTION

There are many situations where courts defer to the legislature or the executive and refuse to strike down their actions as unconstitutional. Here, I focus on one major form of deference: cases where courts recognize that the Constitution limits government power in some way, but largely defer to the legislature or the executive in determining the scope of those limits.

One noteworthy example is the Supreme Court's treatment of the Public Use Clause of the Fifth Amendment, where the Court recognizes that private property may not be condemned for a purely private purpose but also adheres to a "policy of deference to legislative judgments in this field,"⁸ thereby essentially allowing the legislature to determine for itself which kinds of condemnations genuinely advance "public purposes," as the Court held is required by the Fifth Amendment.⁹

Similar deference is common in Supreme Court decisions determining the scope of congressional power under the Commerce Clause and Necessary and Proper Clause.¹⁰ The Commerce Clause gives Congress the authority to regulate interstate and foreign commerce, and commerce with the Indian tribes.¹¹ Modern jurisprudence interprets the Clause as giving Congress the authority to regulate any economic activities that, in the aggregate, "substantially affect" interstate commerce.¹² Even in *Gonzales v. Raich*,¹³ the Supreme Court's most expansive interpretation of commerce power, the Court recognizes that there are some limits to congressional authority.¹⁴ But it also allows Congress to determine whether the "economic" activity it seeks to regulate really does substantially affect interstate commerce, so long as Congress has a minimal "rational basis" for its conclusion.¹⁵ Even in the case of noneconomic activity, Congress is allowed to regulate, so long as it has a rational basis for concluding that doing so is necessary to implement a broader "regulatory scheme" aimed at controlling interstate commerce.¹⁶ In analyzing assertions of congressional authority under the Necessary and Proper Clause, the Supreme Court also

⁸ *Kelo*, 545 U.S. at 480.

⁹ See also *Berman v. Parker*, 348 U.S. 26, 32 (1954) (holding that "[t]he role of the judiciary in determining whether [eminent domain] is being exercised for a public purpose is an extremely narrow one," and if the "legislature has spoken, the public interest has been declared in terms well-nigh conclusive"); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240–41 (1984) (holding that a taking is constitutional under the Public Use Clause if "the exercise of the eminent domain power is rationally related to a conceivable public purpose").

¹⁰ U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 8, cl. 18.

¹¹ U.S. CONST. art. I, § 8, cl. 3.

¹² See, e.g., *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

¹³ 545 U.S. 1 (2005).

¹⁴ *Id.* at 9–10 (seeking to distinguish *Raich* from previous cases striking down laws as beyond Congress' Commerce Clause authority).

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 19. For a more detailed discussion of these two aspects of *Raich*, see Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL.'Y 507 (2006).

defers to Congress' judgment on whether legislation is "necessary" for "carry[ing] into execution" one of Congress' other powers.¹⁷

Such deference occurs in many other areas of constitutional law and is used as a justification for many judicial decisions.¹⁸ Other notable examples include deference to legislative judgment on the Eighth Amendment and criminal procedure,¹⁹ judicial deference to Congress' decisions on what legislation is needed to implement the Fourteenth Amendment under its Section 5 authority to enact "appropriate" legislation for that purpose,²⁰ judicial deference on constitutional issues involving foreign affairs,²¹ and others.²² Eric Posner and Adrian Vermeule have argued for broad judicial deference to the executive on issues relating to terrorism and war.²³

The standard rationale for this kind of judicial deference is the need to give scope for the political branch's superior expertise. As Justice John Paul Stevens' majority opinion in *Kelo* puts it, "the needs of society have varied between different parts of the Nation," thereby justifying "a strong theme of federalism [in the Court's property rights jurisprudence], emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs."²⁴ That superior expertise may involve both technical knowledge of policy issues and superior understanding of public values and public opinion.²⁵ In the former category, superior expertise might involve both Congress' understanding of policy in general, and state or local governments' superior knowledge of local conditions.²⁶

¹⁷ See *United States v. Comstock*, 130 S. Ct. 1949, 1956, 1970 (2010) (holding that necessity is satisfied if Congress adopts "a means that is rationally related to the implementation of a constitutionally enumerated power").

¹⁸ See generally KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* (2006) (arguing that the issue of expertise-based deference justifies a wide range of Supreme Court decisions).

¹⁹ Dru Stevenson, *Judicial Deference to Legislatures in Constitutional Analysis*, 90 N.C. L. REV. 2083 (2012); Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1 (2010).

²⁰ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 652–56 (1966) (concluding that Congress need only have a rational basis for believing that a given law is appropriate under Section 5).

²¹ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–21 (1936) (noting that the president's superior information and expertise on foreign policy justifies judicial deference to congressional delegations of power to him on foreign affairs issues).

²² See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 230–31 (2006) (claiming that "[j]udges should thus defer to legislatures on the interpretation of constitutional texts that are ambiguous, can be read at multiple levels of generality, or embody aspirational norms whose content changes over time with shifting public values").

²³ See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

²⁴ *Kelo v. City of New London*, 545 U.S. 469, 482 (1998) (quoting *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606–07).

²⁵ For the latter argument, see, e.g., VERMEULE, *supra* note 22, at 225 (arguing that the legislature and the executive are better at discerning societal values than courts); Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93, 110–30 (2007).

²⁶ See Ilya Somin, *Federalism and Property Rights*, 2011 *U. CHI. LEG. F.* 53, 53–54, 66–67

It is important to distinguish deference to superior legislative or executive expertise from cases where the courts do not defer, but make their own independent judgment that the Constitution allows another branch of government to make a particular decision. For example, the Court has ruled that the Senate has the sole power to determine the procedures to be used in impeachment trials, even though there is no reason to believe that that institution has greater expertise than the courts on issues of judicial procedure.²⁷ Even if the courts never defer to legislative or executive expertise at all, they could still uphold many assertions of government power on other grounds, including the text of the Constitution, the original meaning, or a variety of “living Constitution” theories.²⁸

Nonetheless, the alleged need to defer to legislative or executive expertise is an important argument that recurs in many contexts. It is one of the major reasons cited to justify judicial deference to the legislature on property rights and federalism issues, among others.²⁹ For these reasons, it is central to debates over many disputed constitutional questions.

II. THE LIBERTARIAN CRITIQUE OF JUDICIAL DEFERENCE

Libertarian thought creates a basis for a wide-ranging critique of judicial deference to the supposedly superior expertise of the legislature and the executive. The case for judicial deference to legislative and executive expertise rests on two implicit assumptions that are vulnerable to criticism: that the political branches of government are applying their expertise for the purpose of promoting the public interest, and that they really do have greater expertise than the private sector or lower level governments. Libertarian political and economic thought casts serious doubt on both.

These two assumptions may not be relevant to non-expertise based rationales for judicial passivity. For example, one can argue that judges should generally let legislatures do as they wish because the legislature represents the will of political majorities, and majorities have an inherent right to rule, regardless of whether their decisions are informed by superior knowledge. As Robert Bork puts it, “in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities.”³⁰ This and some other justifications for judicial nonintervention do not depend on superior knowledge and expertise on the part of the political branches of government. But the expertise justification for deference is often advanced

[hereinafter Somin, *Federalism and Property Rights*] (describing widespread deployment of the latter argument to justify judicial deference to state legislatures on property rights issues).

²⁷ See *Nixon v. United States*, 506 U.S. 224, 229–41 (1993).

²⁸ For a recent defense of the latter, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

²⁹ See Somin, *Federalism and Property Rights*, *supra* note 26, at 53–54, 66–67 (describing use of deference arguments to justify judicial deference to state legislatures on property rights issues).

³⁰ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 139 (1990). For my critique of this argument, see ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE* (Stanford University Press, forthcoming 2013) [hereinafter SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*] (on file with author).

and plays a major role in a number of important constitutional doctrines. The libertarian critique of its assumptions therefore has significant implications for constitutional theory.

A. The Assumption of Benevolence

There is little point in deferring to expertise if that expertise is not being applied in an objective manner intended to promote the public interest. If, for example, government officials are using their superior expertise to expand their own power or to benefit some narrow interest group, there is little justification for judicial deference to their expertise. Indeed, superior expertise in the service of evil ends may be even worse than a government pursuing the same malign purposes with lesser competence. Other things equal, a competent and knowledgeable evildoer is likely to cause more harm than one who is ignorant and ineffective.³¹ When such is the case, judges may actually need to be *less* deferential in cases where the government's expertise is unusually great because giving the government free rein is likely to cause unusually great harm.

Even if the government is simply morally neutral, as opposed to actively malevolent, the case for judicial deference is relatively weakened. If the government is morally neutral, then whether its constitutionally suspect actions serve good purposes or not is essentially random. Cases where judicial review ends up curbing beneficial government actions are likely to be offset by those where it prevents harmful ones, and vice versa. In that situation, there is no reason to prefer deference to nondeferential judicial review.

The calculus does not change if we define the relevant moral considerations not in terms of harm and benefit to the public, but in terms of adherence to the Constitution. A government with evil purposes is unlikely to give unbiased consideration to the constitutional issue on which the courts have deferred to it. For example, it is unlikely to use its expertise to objectively consider whether a challenged condemnation really does promote a "public purpose."³² It will instead pursue its real objective while paying no more than lip service to constitutional issues.

The morally neutral government will be little better on this score. It may not be actively hostile to constitutional constraints on its power. But it is likely to be indifferent to them. Since serious expert consideration of constitutional issues requires affirmative effort, the morally neutral government might simply not bother with it.

The case for judicial deference to legislative expertise is therefore implicitly based on what libertarian public choice scholars call "the

³¹ Cf. SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 2) (explaining how a knowledgeable electorate with evil values might be even worse than an ignorant electorate with the same deplorable goals).

³² For a discussion of this issue see *supra* Part I.

benevolent despot model of politics and government,”³³ which assumes that government is a unitary entity pursuing benevolent objectives. If the government is pursuing evil purposes or is morally neutral, the case for judicial deference to its superior expertise is greatly weakened.

In this, as in other areas of political economy,³⁴ libertarian scholars can perform a useful service simply by pointing out that a key argument implicitly relies on the benevolent despot assumption. Once the crucial role of the assumption is exposed, we can begin to consider the extent to which it is valid.

Some will likely resist this conclusion on the ground that there is no objective morality on the basis of which we can assess the government’s actions. If we embrace moral relativism or believe that judges should do so,³⁵ perhaps there is no basis for ignoring the government’s expertise on the grounds that it might be in the service of evil ends.

Unfortunately, the moral relativist case for judicial deference collapses into contradiction. If there is no objective standard for judging the morality of our actions, then there is no case for deferring to legislative or judicial expertise. After all, there is no way of knowing whether such deference is good, bad, or morally indifferent. Indeed, for moral relativists, there is no case for adherence to any notion of judicial duty. A consistent moral relativist has no basis for censuring a judge who makes decisions based on his own political preferences or even simply flipping a coin.

Libertarian political theory offers several reasons to doubt the validity of the benevolent despot assumption underlying judicial deference to legislative expertise. First and most obviously, government often acts to benefit narrow interest groups at the expense of the general public. Libertarian public choice scholars have been at the forefront of those studying interest group “rent-seeking” and its influence over public policy.³⁶ Small interest groups can often outmaneuver the general public because a smaller group is easier to organize for political action than a larger one, facing fewer collective action problems.³⁷

In addition to lobbying by private sector interest groups, government is also heavily influenced by the self-interest of government bureaucrats

³³ See, e.g., GEOFFREY BRENNAN & JAMES BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* 55 (1985) [hereinafter BRENNAN & BUCHANAN, *THE REASON OF RULES*] (“[T]he benevolent despot model of politics and government has promoted and sustained monumental confusion in social science, and social philosophy more generally.”).

³⁴ See, e.g., GEOFFREY BRENNAN & JAMES BUCHANAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* 7, 14 (1980) (exposing the implications of dropping that assumption in discussions of federalism and tax policy).

³⁵ For defenses of moral relativisms, see generally DAVID B. WONG, *MORAL RELATIVITY* (1984); DAVID B. WONG, *NATURAL MORALITIES: A DEFENSE OF PLURALISTIC RELATIVISM* (2006).

³⁶ For a survey of the relevant public choice literature on interest group influence, see DENNIS C. MUELLER, *PUBLIC CHOICE III* 333–59 (2003).

³⁷ For the classic statement of this problem, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (rev. ed. 1971).

and other officials, who form powerful lobbies of their own.³⁸ The role of teachers' unions in inhibiting education reform is a notable and remarkably persistent example.³⁹ Government officials even often pressure private interests to contribute money to their campaigns and programs, threatening them with hostile legislation if they refuse.⁴⁰

Obviously, outside interest group pressure and self-dealing by government officials themselves is to some degree constrained by public opinion. If elected officials cave in to interest groups too much—especially in ways that are visible to the voters—there may be retribution at the ballot box.⁴¹ But that kind of democratic accountability is often undermined by the reality of widespread political ignorance among voters. Often, the public is unaware of interest group activities, or even misperceives them as beneficial.⁴² Moreover, to the extent that relatively ignorant public opinion has a major influence on public policy, it diminishes the extent to which that policy is controlled by knowledgeable officials and experts. That, in turn, undermines the assumption of superior knowledge, the second key pillar of judicial deference to expertise.

Few libertarians would argue that government *never* acts out of benevolent motives. But the prevalence of nonbenevolent ones in many situations undercuts the expertise rationale for deference, which assumes that benevolence is present as a general rule, and not just in some particular cases.

B. The Assumption of Superior Knowledge

There can be no expertise justification for judicial deference if the challenged government policies are not in fact based on superior knowledge. There is little doubt that legislatures and executive branch officials often have superior knowledge relative to federal judges. If that were the only relevant comparison, it could justify judicial deference on a wide range of issues.⁴³ In many cases, however, judicial deference ends up transferring decision-making authority to actors who are less

³⁸ See MUELLER, *supra* note 36, at 359–85; WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38–39 (1971); WILLIAM C. MITCHELL & RANDY T. SIMMONS, BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY 58–62, 114–16 (1994).

³⁹ See TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS 7–10 (2011) (explaining why union lobbying is possibly the single biggest obstacle to improving education quality).

⁴⁰ See generally FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997).

⁴¹ Such “retrospective voting” is often emphasized by scholars who are relatively optimistic about voter competence. See, e.g., MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981). For my critique, see SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 4).

⁴² See the discussion of political ignorance in Part II.B.

⁴³ See, e.g., Somin, *Federalism and Property Rights*, *supra* note 26, at 80–86 (explaining why the expertise rationale for judicial deference on property rights issues can also apply to a wide range of other issues).

knowledgeable than those who would decide the issue if the judiciary were to strike down the law in question.

When the judiciary strikes down a law because it violates some constitutionally protected individual right, it allows private individuals to decide for themselves what they wish to do. A decision protecting property rights, for example, enables property owners to decide for themselves what they are going to do with their possessions. A decision protecting freedom of speech allows people to decide for themselves what speech they will engage in.

Often, private sector actors have better knowledge than the government about decisions of theirs that the government seeks to restrict. As Nobel Prize-winning libertarian economist F.A. Hayek famously emphasized, participants in markets and civil society have “local knowledge” that is unavailable to government officials and planners.⁴⁴ Such local knowledge includes “knowledge of the particular circumstances of time and place” with respect to which “practically every individual has some advantage over all others” because “he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions depending on it are left to him or are made with his active cooperation.”⁴⁵ As a general rule, government regulators are less likely to have such detailed local knowledge, especially when establishing a regulatory rule that will apply to the entire nation or a large state.⁴⁶

Moreover, a great deal of valuable information about potential opportunities and opportunity costs is contained in a market price system.⁴⁷ Prices convey information about the relative value of a wide range of goods and services, and their inputs. When government regulation restricts market transactions, it disrupts the price system and often prevents it from transmitting that information to private sector actors.⁴⁸

If judicial protection of individual rights constrains government action and lets private sector actors make decisions for themselves, it can help ensure that those decisions are made by parties who have *greater* knowledge rather than lesser. Far from undermining well-informed decision-making, such judicial review might actually facilitate it.

This conclusion is reinforced by the reality of widespread voter ignorance.⁴⁹ Many studies show that public opinion has a significant

⁴⁴ F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

⁴⁵ *Id.* at 521–22.

⁴⁶ For a discussion of why this is likely to be true in the case of regulation of property rights, see Somin, *Federalism and Property Rights*, *supra* note 26, at 66–71.

⁴⁷ Hayek, *supra* note 44, at 521–29 (arguing that too much government restriction can prevent the use of valuable information, as those who control only know a small percentage of the potential opportunities).

⁴⁸ See *id.* For a more detailed exposition, see THOMAS SOWELL, KNOWLEDGE AND DECISIONS (1980).

⁴⁹ For a detailed discussion of the relevance of political ignorance to issues of judicial deference

influence on policy.⁵⁰ Unfortunately, a great deal of data also shows that the public tends to be highly ignorant about a wide range of policy issues.⁵¹ For example, most Americans have little idea that entitlements such as Medicare, Medicaid, and Social Security are by far the biggest items of domestic spending in the federal budget, despite the ongoing debate over budgetary issues over the last few years.⁵²

Such ignorance is actually rational behavior for most voters. If one's only reason to become informed about politics is to influence the outcome of an election, that turns out to be not much reason at all, given the low probability of a vote being decisive.⁵³ In a presidential election, for example, the odds vary from state to state, averaging out to about 1 in 60 million.⁵⁴

In addition, voters who do acquire some political knowledge—often for reasons unrelated to becoming a “better” voter—have little incentive to rationally evaluate whatever information they learn. Like acquiring information in the first place, evaluating it in a logical and unbiased way requires time and effort. It can also be psychologically painful if the new information ends up undermining cherished partisan or ideological commitments. Given the low probability that their vote will be decisive, voters have little incentive to sacrifice time, effort, and psychological comfort for the sake of evaluating political information more logically. Instead, they tend to evaluate political information in a highly biased way that overvalues anything that reinforces their preexisting views, while ignoring or undervaluing evidence that cuts the other way.⁵⁵ Libertarian economist Bryan Caplan calls this pattern “rational irrationality.”⁵⁶ Because the incentive for rational evaluation of political information is so low, it is

to expertise in the context of property rights cases, see Somin, *Federalism and Property Rights*, *supra* note 26, at 71–77.

⁵⁰ For citations to the relevant literature, see SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at chs. 1–4).

⁵¹ See *id.* (manuscript at ch. 1) (presenting extensive evidence). For further discussion and evidence regarding extensive voter ignorance, see also SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS (2003); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996); RICK SHENKMAN, JUST HOW STUPID ARE WE?: FACING THE TRUTH ABOUT THE AMERICAN VOTER (2008); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290–1304 (2004); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 413–19 (1998).

⁵² SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 1).

⁵³ The idea of rational political ignorance was first introduced by Anthony Downs. See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238–59 (1957); see also SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 4) (providing a detailed recent discussion).

⁵⁴ SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 4).

⁵⁵ See generally BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (2007) [hereinafter CAPLAN, THE MYTH OF THE RATIONAL VOTER]; see also SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 4) (citing relevant studies).

⁵⁶ See CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 55, at 122–23; Bryan Caplan, *Rational Ignorance versus Rational Irrationality*, 54 KYKLOS 3, 4 (2001).

actually rational behavior for voters to make little or no effort to be logical and unbiased in making political judgments.

The implication for judicial deference to expertise is significant. In cases where legislation is influenced by public opinion, it is also likely to be influenced by political ignorance and irrationality. That does not necessarily mean that the legislation in question is harmful. But it does mean that judges and others should not assume that it is the result of unbiased expert judgment, or even judgment that reflects greater expertise than that possessed by the average judge. After all, most judges are probably far more educated and politically informed than the median voter.⁵⁷

The above critique of the superior knowledge assumption should not be overstated. It does not apply nearly as strongly in cases where judicial invalidation of legislative or executive action protects not individual decision-making, but decisions by other branches or levels of government. Such cases include judicial decisions on issues involving federalism and separation of powers, among others. For example, when the Supreme Court invalidated a congressional statute allowing a single-house “veto” of executive action,⁵⁸ the net effect was to give more power to the executive, not to empower private choice. Similarly, if a federal law preempting state or local law is invalidated, then state and local governments will control the ultimate resolution of the issue at hand.

But it is worth noting that some invalidations of federal law indirectly empower private actors if the activity in question is not regulated by state governments, or state regulations are less sweeping than the federal ones. Had the Supreme Court invalidated the federal ban on possession of medical marijuana in *Gonzales v. Raich*,⁵⁹ it would have empowered private decision-makers in the many states where medical marijuana is legal.⁶⁰

The knowledge point developed here also does not apply to cases where judicial invalidation of legislative or executive action leads to judicial management of government institutions such as prisons and public schools, rather than empowerment of private decision-makers.⁶¹ Such

⁵⁷ I am not aware of any studies that compare judges' political knowledge to that of the general public. However, knowledge is highly correlated with both education and interest in politics. See SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at Appendix); DELLI CARPINI & KEETER, *supra* note 51. And it is probably a safe assumption that the average federal judge has a high level of education and much greater interest in politics than the average voter.

⁵⁸ *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983).

⁵⁹ 545 U.S. 1 (2005).

⁶⁰ According to a survey conducted by a pro-medical marijuana group, medical marijuana use is legal in 18 states and the District of Columbia. See *18 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG (Jan. 7, 2013, 1:42 PM), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

⁶¹ See, e.g., *Missouri v. Jenkins*, 495 U.S. 33 (1990) (partially upholding district court decision that took control of Kansas City school district away from local government and ordered tax increases

judicial intervention may be justified on various grounds, including the need to combat longstanding violations of constitutional principles. But taking advantage of the superior knowledge of private actors is not likely to be one of them.

Similar issues may arise in cases where judicial review forces other government actors to expand their interventions in the economy or civil society. In these situations, judicial intervention might actually exacerbate knowledge problems associated with government decision-making. While such cases are more common in constitutional systems with judicially enforceable “positive” socioeconomic rights,⁶² they are quite rare in the U.S. constitutional system, where the national Constitution contains few, if any, such rights.⁶³ Such issues do arise more often at the state level, where many state constitutions contain positive rights, such as the right to education, which has led some state courts to force the government to increase education spending, often with little or no improvement in student performance.⁶⁴

C. Implications

The libertarian critique of the implicit “benevolent despot” assumption underlying judicial deference is an important contribution to the debate over the subject. Obviously, my summary of that critique in this article is not enough to prove that judicial deference to expertise is always unwarranted. The extent to which actual government decision-making departs from the assumptions of benevolent purpose and superior knowledge may well vary among issue areas. Also, as noted above, the critique of the superior knowledge assumption is much weaker in cases that do not involve judicial protection of individual rights.

Nonetheless, the libertarian critique does raise issues that jurists and legal scholars must carefully consider. Both critics and defenders of judicial deference would do well to take account of them.

for purposes of alleviating school segregation); MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1999) (describing judicial management of prison systems found to be in violation of the Eighth Amendment). The Supreme Court limited judicial control of Kansas City schools in a follow-up case, *Missouri v. Jenkins*, 515 U.S. 70, 100–01 (1995).

⁶² See, e.g., CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 221–38 (2001) (discussing judicial enforcement of positive socioeconomic rights in the case of South Africa).

⁶³ Efforts to interpret the Fourteenth Amendment as mandating positive rights have met with little success in the courts. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973) (rejecting claims that it establishes a positive right to equal education funding).

⁶⁴ See ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S PUBLIC SCHOOLS* 145–70 (2009) (surveying the results of judicial intervention in this field, and concluding that it has been largely ineffective).

III. A DISTINCTIVELY LIBERTARIAN CONTRIBUTION TO CONSTITUTIONAL THEORY

In addition to its substantive significance, the libertarian critique of judicial deference is notable as a distinctively libertarian contribution to constitutional theory. While non-libertarians certainly can, and sometimes do, endorse many parts of it, the critique is closely tied to libertarian suspicion of government and the political process. It is no accident that libertarian scholars have taken a leading role in developing public choice theory, the branch of economics devoted to analyzing interest group influence over public policy in a way that does not assume that government actors have benevolent motivations.⁶⁵ They have also emphasized the deleterious consequences of rational political ignorance and irrationality.⁶⁶

In recent debates over constitutional theory, libertarian scholars are probably best known for their advocacy of originalism. Libertarians such as Randy Barnett, Gary Lawson, and Michael Rappaport have made major contributions to the literature explicating and defending originalism as a tool of constitutional interpretation.⁶⁷

But there is no necessary inherent connection between libertarianism and originalism. Certainly, the original meaning of the Constitution could mandate extremely non-libertarian results. A socialist state, for example, could have a constitution whose original meaning is completely antithetical to libertarianism.⁶⁸ The same goes for a constitution that reflects extreme social conservative or nationalist values. It is not surprising, therefore, that originalism has been advocated by leading conservative and liberal scholars, as well as libertarian ones.⁶⁹ Moreover, the idea of a consistent

⁶⁵ See BRENNAN & BUCHANAN, *THE REASON OF RULES*, *supra* note 33, at 55; MUELLER, *supra* note 36, at 333–35; OLSON, *supra* note 37, at 2; MCCHESENEY, *supra* note 40, at 61–62.

⁶⁶ See especially CAPLAN, *THE MYTH OF THE RATIONAL VOTER*, *supra* note 57.

⁶⁷ See BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 1, 89–117; Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOYOLA L. REV.* 611 (1999); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *CONST. COMMENT.* 47, 48 (2006) (arguing that the Constitution should be interpreted as understood by the “reasonable American” of 1788, at the time of ratification); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U. L. REV.* 751 (2009); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 *NW. U. L. REV.* 383 (2007).

⁶⁸ The Soviet Constitution is a good real-world example. See Ilya Somin, *Ginsburg and Scalia on Foreign Constitutions*, *VOLOKH CONSPIRACY* (Feb. 8, 2012, 4:56 PM), <http://www.volokh.com/2012/02/08/ginsburg-and-scalia-on-foreign-constitutions/> (explaining why “[a] careful reading of the Soviet Constitution . . . leaves little doubt that it was written for a totalitarian communist state”).

⁶⁹ See James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 *VA. L. REV.* 1523, 1524–26 (2011) (arguing for a liberal version of originalism and describing “original meaning” as the newly dominant view in constitutional theory). For other prominent liberal versions of originalism, see Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *CONST. COMMENT.* 427, 444–49 (2007); Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291 (2007); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 *HARV. L. REV.* 26 (2000). For conservative defenses of originalism, see BORK, *supra* note 30, at 144; Steven G. Calabresi, *Introduction*, in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 1, 12, 35 (Steven G. Calabresi ed., 2007) (arguing that constitutional interpretation should be based on the “the original

moral obligation to obey the original meaning of the Constitution is far from clearly consistent with libertarianism. Libertarians who believe that people are not morally bound to obey the dictates of government unless they freely consented to do so probably must reject the idea that we have any intrinsic duty to obey the Constitution—to which most modern Americans never gave any meaningful consent.⁷⁰ Libertarian writer Lysander Spooner emphasized this point in the nineteenth century,⁷¹ and it remains relevant today.

The libertarian case for originalism is necessarily contingent. It could turn out that some other approach will be a more effective way to promote a libertarian society. Obviously, a libertarian could defend originalism on grounds independent of the real-world libertarian effects of originalist decisions. For example, he or she might value adherence to the integrity of legal texts above promoting freedom. But such a defense of originalism, even if valid, would not be a specifically libertarian defense. In my view, libertarians may still have good reason to embrace originalism, partly because the available alternatives are worse, and partly because the supermajoritarian process by which the original meaning was created is one that is likely to produce good laws, on average.⁷² But, these are contingent judgments. One can easily imagine constitutions for which they would not hold.

By contrast, the relationship between libertarianism and skepticism about judicial deference is much tighter than that between libertarianism and originalism. While one need not be a thoroughgoing libertarian to accept some or even all of the libertarian critique of deference, it does rest on skepticism about government that is a vital component of libertarian thought. It is surprising, therefore, that libertarian constitutional theorists have devoted relatively little systematic attention to the subject.

CONCLUSION

Libertarian political and economic thought provides some important grounds for skepticism about judicial deference to legislative and executive

meaning of the constitutional text”); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1144–45 (2003); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL’Y 991 (2008).

⁷⁰ For a good discussion of libertarian consent theory, see A. John Simmons, *Consent Theory for Libertarians*, 22 SOC. PHIL. & POL’Y 330 (2005); see also A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 57–74 (1979). For explanations of why the “tacit consent” created by living in a territory controlled by a government is not sufficient to create an obligation to obey, see id. at 75–100; Ilya Somin, *Creation, Consent, and Government Power Over Property Rights*, CATO UNBOUND (Dec. 13, 2010, 8:56 AM), <http://www.cato-unbound.org/2010/12/13/ilya-somin/creation-consent-and-government-power-over-property-rights/>.

⁷¹ See generally LYSANDER SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY (1870).

⁷² See McGinnis & Rappaport, *A Pragmatic Defense of Originalism*, supra note 67, at 383; John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695 (2010).

expertise. These ideas represent a distinctively libertarian contribution to constitutional theory.

In this article, I have not attempted to comprehensively evaluate the libertarian critique of deference. I merely sought to outline that criticism and explain its relevance to debates over deference. The ongoing debate over judicial deference will surely continue. As it does, both sides would do well to take account of relevant libertarian ideas.

Libertarianism, Law and Economics, and the Common Law

*Todd J. Zywicki**

Libertarian legal theory has long had admiration for, but also distrust of, the common law and law and economics. This distrust is partly methodological. Libertarian legal theory has traditionally been deontological and normatively-oriented, typically grounded in natural rights theory and reasoning to normative statements about the content of the law. Law and economics, by contrast, purports to be a positive theory of the common law foremost, while providing a normative justification for the common law as well (namely, social wealth maximization as a normative value). Indeed, it is this primarily positive thrust of law and economics that accounts to a large extent for its influence on legal thinking, while its normative arguments have been much more heavily contested.

To be sure, there is a long and deep affinity between libertarianism, law and economics, and the common law—libertarians clearly appreciate the pivotal historical importance of the English common law in the historical emergence of a free and commercial society. Moreover, in the vast run of cases—including issues such as the enforceability of contracts and the basic value of clear property rights—libertarian philosophy, law and economics, and the common law converge on similar results. Still, I submit that libertarians remain wary of the pragmatism and contextualism that historically has defined common law reasoning. Moreover, conflicts occasionally do arise between libertarianism on the one hand, and the common law and law and economics on the other.

At the outset, I note that for purposes of this essay I will generally use the common law and law and economics interchangeably. This is not because I think that they are actually interchangeable—they are not. In this essay, however, I am going to focus on those issues where it seems to me that the common law deviates from libertarian theory (or where libertarian theory provides indeterminate answers) but the result can be explained as being consistent with law and economics principles, such as the doctrine of

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necessity. This is not to say that there are other areas in which common law doctrine deviates from economic analysis but is consistent with libertarian theory (I am not aware of any), or where the common law deviates from both economics and libertarianism (such as perhaps modern liability law). It is just to focus on those areas of disagreement between two different approaches to law.

To be sure, the generalized descriptions I attach to the competing approaches paint with a broad and crude brush—I hope that those who know me and my work will grant that I have deep sympathies for both approaches to the law, and I have no agenda or desire to misrepresent either. Indeed, to some extent this essay is autobiographical, charting the course of a libertarian who came to embrace the common law and law and economics. This essay describes the kind of questions that prompted my gradual conversion, and in those particular situations where they conflict, I place more faith in the common law and law and economics than philosophical libertarianism and its implications. So while one may in the end contest the frameworks that I have constructed around these two competing visions of law, be aware that these are *my* constructs in the sense that I am an advocate for neither but rather a somewhat disinterested answer-seeker about the world. I have no agenda, other than to come up with the system of law that I think is most conducive to coordination and human flourishing in society.

I. LAW AND ECONOMICS V. LIBERTARIANISM IN A WORLD WITHOUT TRANSACTION COSTS

A. Law and Economics

Consider a common hypothetical that illustrates differing approaches to legal questions. A factory operates upstream and is the world's sole manufacturer of a children's vaccine that saves, say, one million children worldwide every year. Assume we estimate that the value to "society" of this vaccine is \$1 billion. Downstream lives an old man we will call Mr. Montgomery Burns. Assume that one day each year, the vaccine manufacturer releases a byproduct into the stream that causes a mild smell if Mr. Burns happens to be outside overlooking the stream that day. Let us also assume, then, that Mr. Burns suffers \$100 of harm on average each year from the manufacturing process. Mr. Burns comes into court and sues to enjoin the factory's operation. What should the court do?

The court has two different choices to make. First, it must ask whether the factory is liable to Mr. Burns—in other words, who holds the property right, Mr. Burns to use the water for his aesthetic enjoyment or the factory to produce vaccines for children? Note that I am aware that I have stacked the deck in favor of the vaccine to challenge the common assumption that it is obvious that one might assign the property right to Mr. Burns in this case. Second, if the factory is liable, the question becomes whether Mr.

Burns should be able to enjoin the operation of the factory or whether Burns should be able to simply get damages for the harm he suffers.

Now, one way to get at this answer would be to simply look at other similar cases from the past and apply the precedent to the case and determine whether liability should lie. Assume it does and assume that this gives Burns the right to sue for an injunction and shut down the plant. “So be it,” the classic common law lawyer might say, if that is what precedent mandates. But the mere statement of fact that the common law holds this result is not entirely *normatively* satisfying without some justification for that result.

One justification of the common law rule would be to simply defer to the wisdom of the common law process as having some meta-justification, and thus, justifying the rule itself by reference to the normative justification of the common law superstructure that produces the rule. This is essentially the line of justification pursued by the historical school of jurisprudence associated with thinkers such as Henry Maine¹, Savigny², and Carlton Kemp Allen.³ Most notably for current purposes, this justification of particular common law rules by reference to the normative common law process is fundamentally the mode of justification offered by Hayek in *Law, Legislation and Liberty*.⁴ Hayek’s argument essentially tracks that of the historical school but with a normative justification: he argues that the common law is a benevolent spontaneous order, and as such, the normative justification resides in the tacit knowledge and unarticulated wisdom embedded in the legal doctrines produced by the evolution of the common law.⁵ The justification for individual rules, therefore, lies not in each rule’s individual merits as justified by reference to some normative external benchmark (such as “efficiency” or “egalitarianism”), but rather to propensity of the common law system itself to produce rules that benefit those living within the relevant society to further coordination among them. Moreover, Hayek views the relevant level of selection for common law rules as being at the level of *group selection*—the overall system of rules—not individual selection of particular rules.⁶ Each of the individual rules of the common law are interlaced and enmeshed with numerous other rules and sets of private expectations and private orderings that have grown up around those rules. At root, Hayek suggests that rules demonstrate their normative merit through their survival properties: rules co-evolve within some overall order of rules that are subject to a quasi-Darwinian process of

1 HENRY SUMNER MAINE, *ANCIENT LAW* I (1920).

2 FRIEDRICH KARL VON SAVIGNY, *VON SAVIGNY’S TREATISE ON POSSESSION* (Sir Erskine Perry trans., Lawbook Exchange 6th ed. 2003) (1848).

3 CARLETON KEMP ALLEN, *LAW IN THE MAKING* (Oxford Univ. Press 6th ed. 1958) (1927).

4 See generally FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY, VOLUME 1: RULES AND ORDER* (Univ. of Chicago Press 1983) (1973).

5 Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559, 581–83 (2008).

6 *Id.* at 583–84.

selection.⁷ Common law rules that have evolved from this process of selection can be assumed to have valuable survival properties demonstrated by the relative prospering of the groups that have adopted them and have thus stood the test of time. Therefore, one could pursue a normative justification for common law rules by following this line of argument; however, that is not the one I will pursue here.

A legal realist might say, “Woah, see, here is the problem. The common law kills children. We need to update the common law to keep up with the times. The Court should take into account social values, yada, yada, yada, and if it decides it is best for Burns to suck it up, then so be it. Perhaps the justification is economic or Rawlsian or whatever, but children’s vaccines are more important than a selfish old man having to smell an unpleasant aroma once a year.” This attitude appears to be the prevailing ethos among many judges beginning with the New Deal and continuing today.⁸ However, this article is not addressed to this question either.

The law and economics approach to the problem, à la Coase, is now well understood. Coase says that in a world with low transaction costs, it really does not matter how the rights are initially allocated as to whether the vaccine factory will remain in operation or not.⁹ Assume you give the property right to the factory to pollute. In that case, social wealth is maximized and aggregate efficiency is maximized because using the stream to manufacture the vaccine is worth much more than Burns’ inconvenience. Assume you give the right to Burns to prohibit pollution—does that mean the plant will cease operation and kids will die? No. Why not? Because if the operation of the plant generates a value of \$1 billion, and Burns suffers only \$100 of harm, then in a world without transaction costs (i.e., where parties can easily bargain and contract), the factory will be willing to “buy” the right to pollute from Burns for some price between \$101 and \$1 billion, and then pass along the cost to those who buy the product. The end result will match social efficiency—the stream will be used for the production of the vaccine—regardless of whether the initial property right is given to the factory or Burns. Under either initial allocation of the right, the end result is the same—the vaccine is made—regardless of whether the judge applies precedent or tries to advance “social justice.”

B. Libertarianism

What about the libertarian approach? I will draw on Murray Rothbard as an exemplar of the standard libertarian perspective, which is a natural rights approach to property rights.¹⁰ Rothbard is particularly useful in that

⁷ *Id.* at 585–86.

⁸ *See, e.g.*, James E. Krier, Book Review, 122 U. PA. L. REV. 1664, 1668–69, 1694 (1974) (reviewing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972)).

⁹ *See generally* R.H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960).

¹⁰ Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2 CATO J. 55, 57 (1982).

his argument was made as a direct counterargument to the prevailing Chicago School of Law and Economics' arguments of the time, including Coase.¹¹ Rothbard makes several arguments in response to the Chicago School argument. Part of Rothbard's critique is not expressly libertarian, such as the observation that wealth effects might matter. Part of Rothbard's critique is that Mr. Burns might have subjective value that should be protected—perhaps he really cares more about not having to close his window one day per year than all of the lives that are saved through manufacturing children's vaccines. Rothbard notes that if these are serious concerns—and they undoubtedly are—then they undermine the strength of the claim by standard law and economics scholars to know how to best allocate property rights to one party or the other.

But so far Rothbard's argument merely deconstructs that of standard law and economics. Rothbard, and the libertarian, must offer a competing rule for allocating property rights and liability in this case. Rothbard offers the principle of physical invasion as his competing normative theory:

The normative principle I am suggesting for the law is simply this: No action should be considered illicit or illegal unless it invades, or aggresses against, the person or just property of another. Only invasive actions should be declared illegal, and combated with the full powers of the law. The invasion must be concrete and physical. There are degrees of seriousness of such invasion, and hence, different proper degrees of restitution or punishment. "Burglary," simple invasion of property for purposes of theft, is less serious than "robbery," where armed force is likely to be used against the victim. [Here], however, we are not concerned with the questions of degrees of invasion or punishment, but simply with invasion *per se*.

If no man may invade another person's "just" property, what is our criterion of justice to be? There is no space here to elaborate on a theory of justice in property titles. Suffice it to say that the basic axiom of libertarian political theory holds that every man is a self-owner, having absolute jurisdiction over his own body. In effect, this means that no one else may justly invade, or aggress against, another's person. It follows then that each person justly owns whatever previously unowned resources he appropriates or "mixes his labor with." From these twin axioms—self-ownership and "homesteading"—stem the justification for the entire system of property rights titles in a free-market society. This system establishes the right of every man to his own person, the right of donation, of bequest (and, concomitantly, the right to receive the bequest or inheritance), and the right of contractual exchange of property titles.¹²

From these basic premises of "just" property ownership derived from the principle of self-ownership, Rothbard goes on to derive a number of corollary conclusions. For example, he denounces the law of defamation and the common law right to privacy as restricting the principle of freedom of speech with no countervailing physical invasion.¹³ Moreover, Rothbard

¹¹ *Id.* at 57–58.

¹² *Id.* at 60–61.

¹³ *Id.* at 62.

(like most libertarian theorists) also concludes that libertarianism requires that the principle of strict liability be followed rather than negligence.¹⁴

But having staked out an absolutist position, Rothbard soon retreats a bit. For example, he asks, why is it that the invasion of one's property by radio waves does not constitute an actionable nuisance? The reason, he argues, is that these boundary crossings of invasion by radio waves

do not interfere with anyone's exclusive possession, use or enjoyment of their property. They are invisible, cannot be detected by man's senses, and do no harm. *They are therefore not really invasions of property, for we must refine our concept of invasion to mean not just boundary crossing, but boundary crossings that in some way interfere with the owner's use or enjoyment of his property. What counts is whether the senses of the property owner are interfered with.*¹⁵

He thus concludes,

[s]o we see that the proper distinction between trespass and nuisance, between strict liability per se and strict liability only on proof of harm, is not really based on "exclusive possession" as opposed to "use and enjoyment." The proper distinction is between visible and tangible or "sensible" invasion, which interferes with possession and use of the property, and invisible, "insensible" boundary crossings that do not and therefore should be outlawed only on proof of harm.¹⁶

Moreover, Rothbard goes on to acknowledge that when it comes to actions for nuisance for noise, property owners do not have a right to be protected from all noise but instead may be protected only from *excessive* noise.¹⁷ Those who have a special desire for quiet, Rothbard observes, must build their own soundproof room.¹⁸ He also would permit high-flying airplanes to violate the airspace above one's home so long as they do not fly too low or too loudly to unreasonably disturb the landowner.¹⁹

By this time, Rothbard has drifted quite far from his initial premise that any physical invasion of land is an abatable nuisance and anything else is not actionable. In particular, at this point it is not clear what work the concept of "physical invasion" is doing at all in his model—he has provided no explanation for why *physical* invasion is different from any other sort of interference with quiet use and enjoyment. Thus, despite his best efforts to avoid Coase, Rothbard has in fact implicitly come to concede the core premise that underlies the Coase Theorem—that what matters are incompatible and competing uses of scarce resources, and as a result, costs are reciprocal. It is only because *both* parties want to use the same scarce resource that incompatible uses arise. And those costs, broadly defined, arise *only* within a social context. Robinson Crusoe has no need for a law

¹⁴ *Id.* at 64–68.

¹⁵ *Id.* at 81 (emphasis added).

¹⁶ *Id.* at 82.

¹⁷ *Id.* at 83.

¹⁸ *Id.*

¹⁹ *Id.* at 84–87.

of tort, contract, or property. The need for law arises only when incompatible uses arise. Where resources are not scarce as an economic matter, there is no need for property rights or other laws. So if, for example, Mr. Burns did not live downstream or the vaccine factory did not operate upstream, then there would be no nuisance. Nor would nuisance arise if, for example, Mr. Burns only had a normal, and not a highly sensitive, sense of smell. Should it matter to whether the factory should be liable that Mr. Burns' sense of smell is unusually sensitive? For if the vast majority of people lived in his house, there seemingly would be no nuisance under Rothbard's own terms. It is only because of the *combination* of Mr. Burns and the factory that the need for a liability rule arises. And yet Rothbard's simple rule of physical invasion seems to say little about whether the proper rule would be to essentially tell Mr. Burns to close his window one hour a year or the vaccine factory to board up shop.

Despite his best efforts to articulate simple bright-line rules, Rothbard's clear rules inevitably collapse under the weight of a multitude of *ad hoc* exceptions. But the myriad of exceptions illustrates the central problem—it is precisely the problem of incompatible uses that gives rise to the need to define property rights in the first place. And in the end, it seems he has to resort to redefining the principle of physical invasion to exclude radio waves. But it is not clear why physical invasion would not include invasion by radio waves but would include invasion by a tasteless, odorless, colorless liquid dumped into a stream. If the problem is incompatible uses among *people* then there is no obvious reason (as Rothbard implicitly admits) that it must be intrinsically tied to particular parcels of land or that the concept of physical invasion takes on some particular normative primacy.

Of course, Coase and his followers offer one solution to this dilemma—where transaction costs are low, it does not matter in which party the property right is vested. Once allocated, they can then bargain to an efficient allocation of rights. Moreover, forcing the parties into a market transaction also has the benefit of protecting subjective value. If Mr. Burns really does favor the ability to be free of all smells at all times, then in theory he would be willing to out-bid the desires of the vaccine manufacturers and its customers to bring that result about.

II. LIBERTARIANISM VS. LAW AND ECONOMICS IN A WORLD WITH POSITIVE TRANSACTION COSTS

The real issue then becomes, “Well what about those situations where transaction costs are not negligible, and as a result, the initial allocation of rights *does* or *might* matter because the parties will have difficulty contracting around the rule established by the court?” Then you must have some way of deciding how to allocate rights and how those rights are enforced by the parties.

Consider, for example, a situation where transaction costs are high. In the case of *Ploof v. Putnam*, the plaintiff went sailing on a lake with his wife and two children and was caught in a sudden and unexpected storm.²⁰ Plaintiff came up to defendant's dock to escape the storm and tied up his boat to the dock. An employee of defendant unmoored the boat, and it drifted back out to the lake where it was destroyed by the storm. Plaintiff and his family were cast into the lake and injured. Plaintiff sued for damages for the injuries sustained and the destruction of the boat. Who wins? Plaintiff wins—defendant was required to allow the plaintiff to tie up his boat. The cost to the defendant of preventing the wreck was small while the boat was quite valuable. So the ruling is that defendant was required to allow plaintiff to tie up his boat, and plaintiff would be liable for any damage caused by the boat to the dock.

Now if you are a Rothbardian libertarian then presumably you would say, "Hey, the dock is defendant's property and he can do whatever he wants and plaintiff has no right to tie up his boat." And if you have been paying attention you might say, "Hey it does not matter whether plaintiff has the right to tie up to the dock, because even if he doesn't he can enter into a contract with the dock owner to 'rent' the dock for the duration of the storm." But what is the problem with that view? Here transaction costs may be high, not low. The boat is in an emergency situation and defendant has plaintiff over a barrel. Defendant may use that leverage to drive a hard bargain with plaintiff. Now note that there is nothing wrong with that—the initial cost of the boat is a sunk cost (so to speak) and now the bargaining range is between the rental price of the dock and the total value of the boat, and as a result, there seems to be nothing more than a wealth or distributional effect here, not an efficiency effect. So if the dock owner drives a hard bargain and makes money, there is nothing necessarily wrong with that.

So why does *Ploof* say that the boat owner essentially can "take" the dock for the duration of the storm and pay compensation for it? Because the bargaining process itself may be expensive. The time and energy that the parties spend bargaining over the division of spoils may be expensive and result in delay that could prove harmful to the ship or its crew. In the end, hard-bargaining by both parties might lead to a bargaining breakdown in which the ship itself does not get tied up in time and as a result is pushed out to sea and destroyed. For example, the parties just might not reach an agreement. Or the dock owner might decide to invest in a reputation as a hard bargainer and be willing to lose a bargain in this situation in order to capture a larger surplus in the future.

The key concern that implicitly underlies the ruling is that the transactional context is a bilateral monopoly situation that converts this from a positive-sum market transaction to a zero-sum or even negative-sum

²⁰ *Ploof v. Putnam*, 81 Vt. 471 (1908).

rent-seeking transaction. The two parties are using real resources—their time and energy—bargaining over the division of the spoils within a bilateral monopoly context—they are not bargaining for an efficiency-enhancing transaction.

So what law and economics scholars suggest is that in situations such as this one, where transaction costs are high, the law should try to *replicate* the bargain that the parties *likely would have struck* had they been able to sit down and bargain out the terms, but are unable to do so because of the high transaction costs. And we expect that absent transaction costs, the bargain would have been that plaintiff could tie up at the dock but would be required to compensate the dock owner for any damage that the boat ended up doing to the dock. To be sure, we do not and cannot know for sure what the parties would have done, but there is strong intuition that this would be the result.

Does this mean on a perfectly sunny day you can just pull up to some guy's dock and tie up and then force him to sue you for rent for using his dock? No. In that situation you have to bargain between yourselves and reach a voluntary deal. Why—what is the difference? In this situation you are not in distress and you could conceivably tie your boat up somewhere else, so there is no need to use this particular dock.

So note the insight of law and economics here—it ends up operating as both a positive and a normative theory. First, as a positive theory, it purports to correctly explain what the law actually *is*—the law of necessity operates as an exception to the general rule of property and tort that your property is yours to keep. It also purports to explain, as a positive matter, the limits on the rule—you can do this only if you are in duress and need to do it as a matter of necessity. If the parties *can* bargain with some degree of ease, then they *must* bargain. Moreover, law and economics offers a normative justification for the rule. The law is trying to cut through the waste of resources that could arise from either a complete bargaining breakdown (from the boat being wrecked) or the rent-seeking costs of bargaining over a purely distributional issue. So it is asserted that we maximize social wealth and interpersonal coordination by replicating the bargain the parties would have struck (applying the logic of the Coase Theorem) and simply use the force of the law to involuntarily “force” the parties to act *as if* they had voluntarily entered into that transaction.

To be sure, there are potential costs from this “hypothetical bargain” approach, and thus, one should be cautious about invoking it. One potential cost is that there might be efficiency concerns as well as distributional concerns. For example, it might be the case that docking slips are scarce, in that there are more boats needing to be docked than docking slips available, in which case *Ploof* essentially creates a “first come, first served” rule for allocating the docking slip. As a result, it is possible that a more valuable boat might come along later and would be willing to pay a higher price for the docking slip than the first boat that arrives. But it turns out that even if

this were to occur—a big if, of course, in the face of a brewing storm—it is not clear that this is an effective rejoinder to the doctrine of necessity rule. For just as the first boat owner and dock owner could bargain (but might not because of the transaction costs and bilateral monopoly situation), the second boat owner equally could bargain to “buy” the right to dock from the dock owner and first boat owner. True, the bilateral monopoly problem could arise again, but that is not fundamentally different from the original problem that was presented.

A second objection might be that the dock owner could have subjective value about his dock and leasing it to this individual. While that is possible, and subjective value might be present in more situations than is conventionally thought,²¹ in this case, the likelihood that the dock owner has serious subjective value is low, and even if he does, it seems unlikely that the subjective value is large.

Third, there might be a moral hazard problem. But one suspects that it is probably small as well. It is possible that at the margin, boat owners as a class will be slightly less careful about checking the weather or braving ominous weather in a world where the doctrine of necessity exists. However, it is difficult to believe that this incentive effect for moral hazard will be large if the boat owner is required to compensate the dock owner for the fair usage of the dock and any damage caused. Moreover, the alternative rule might, at the margin, encourage *overprecaution* by boat owners—if they know that in the face of a storm they run the risk of paying a monopoly price for the right to dock their boat in a storm, then boat owners may avoid taking out their boats when the weather is hardly threatening at all.

All of these objections crystallize a larger potential objection to the common law rule: the law and economics analysis of this situation rests on a series of armchair empirical assessments. In particular, law and economics is assuming on one hand that the potential cost of rent-seeking, which arises from bargaining under the potentially high-transaction cost environment of a bilateral monopoly situation, is high and that under these narrow situations the benefits of channeling interactions through voluntary market exchanges is relatively low. Forcing the parties to bargain expressly will protect subjective value and might address the problem of efficient allocation of resources; however, the potential for waste of resources and potentially even a complete bargaining breakdown are thought to warrant invocation of the doctrine of necessity in circumscribed circumstances.

Now consider the flip side of *Ploof*—a situation where the parties enter into a voluntary transaction but it nonetheless is not enforceable. The case is *Alaska Packers v. Domenico*.²² Here are the facts. The year is 1900.

²¹ See Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law*, 46 CASE W. RES. L. REV. 961 (1996) (discussing the ubiquity of subjective value).

²² *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902).

The company charters a salmon fishing vessel and has just made a huge capital investment in building a big salmon cannery factory up in Alaska. The way the industry works is that the salmon fishing season is only a couple of months long, so all of the salmon must be caught during that time. Then the fish are delivered to the cannery for smoking and packaging, which need to be done within a short time after the salmon are caught. The salmon company, of course, is counting on the salmon harvest to provide them with the revenues to pay off the cannery. If the salmon do not come in, then the investment in the factory will be squandered.

The company hires a crew of fishermen in San Francisco before the season actually starts. They get on the boat and cruise up to Alaska to start fishing. Once the fishermen get there they make a demand—we are not fishing any more unless you give us a raise (the actual facts are actually more interesting but asking for a raise basically captures the essence of the demand). In response to this demand, the captain of the boat originally refuses, but after the fishermen stay on strike the captain finally relents. The fishermen then go back to work and finish out the season. The fishermen return to San Francisco at the end of the season and the owner of the company pays them only what they were *originally* contracted to be paid, not the modified deal for double salary. The fishermen sue, saying that they had a valid contract for the higher wage rate.

What is the holding? Fishermen lose. Why? Well, the common law doctrine is the “pre-existing duty rule” which says that once you contract to do something, you cannot then refuse to do what you contracted to do unless the other side gives you more money (what we call “consideration”). Now this doctrinal resolution in and of itself begs the real question, which is “why” does it matter whether the party gives additional consideration? And if you take a rights-based approach of “enforce contracts” it is not obvious which of the two contracts to enforce—the first one or the second modified one? Both were freely consented to.

One might try to argue that the second contract was invalid because there was a lack of free consent by the employer—essentially that the modification was extracted under duress. But, of course, this argument amounts merely to an effort to escape the conundrum by way of *ipse dixit*—by simply defining the second contract to be invalid or caused by duress. In fact, the second contract was not formed under what common law would consider as duress. A mere threat to breach a contract does not constitute duress to the non-breaching party. Otherwise, every time an employer provided a raise to an employee who was considering leaving to take another job at higher pay, it would constitute duress. Moreover, there simply is no reason why parties cannot voluntarily agree to enter into a contract but then also voluntarily agree to modify the contract later if the relevant information about the world changes.

Law and economics, however, provides a mechanism for understanding why the court’s decision in *Alaska Packers* makes sense

(leaving aside the hoary fiction of the pre-existing duty rule). For *Alaska Packers* is essentially *Ploof* in reverse, and the proper answer is also *Ploof* in reverse. What is the difference between the stormy day and the sunny day in the *Ploof* scenario? On the sunny day, we make you bargain because if you do not like the first guy's deal, you can go to the next dock and ask to tie up there. Both dock-owners and boat-owners are interacting in what is basically a competitive market with substitutes available for both sides. On the stormy day you cannot, so we invoke necessity to "force" a bargain. Here it is the opposite. Why do we treat the bargain struck in San Francisco as the "real" bargain as opposed to the bargain on the boat in Alaska? Because in San Francisco, there is a competitive labor market. In Alaska there is not. And why can the fishermen succeed in getting a higher price for their work in Alaska? Because of the exigencies of time and the ability of the fishermen essentially to hold hostage the company's investment in the salmon cannery. The company needs them to work in order to get enough fish to recover its capital investment in the construction and operation of the salmon cannery. So like *Ploof*, what is driving the fishermen's actions in *Alaska Packers* is rent-seeking behavior where the fishermen are expending real resources (the opportunity cost of remaining idle and the canning factory remaining idle) that are designed to expropriate the company's investment in the cannery to raise their wages. By not working, they can essentially destroy the value of the cannery by there being no fish. In this way it is like the dock owner in *Ploof* who knows he can drive a hard bargain because the alternative is the destruction of the boat. And like in *Ploof*, we do not want to encourage people to invest real resources in what is primarily rent-seeking activity designed just to extract a larger distributional share rather than an efficiency gain by the fishermen essentially trying to capture some of the value of the cannery itself. So again, the transaction costs are high—but here the transaction costs are high because of the threat of strategic behavior by the fishermen. Once more it appears that law and economics gives us both the positive and normative explanations—wherever possible, we want parties to bargain in situations with competitive markets, such as on the dock in San Francisco rather than on the boat in Alaska. So here, rather than essentially creating a forced transaction, we are nullifying a freely-bargained transaction.

A. The Limiting Principle

But the libertarian might respond, "This analysis proves too much: if we are concerned about transaction costs, why not get rid of market exchanges completely? Rather than having parties negotiate and use up transaction costs, why not have courts come in and order how assets should be allocated?" Consider an example. I own a photograph of "The Immaculate Reception" autographed by Franco Harris himself. Assume its market value would be \$100 on eBay but there are currently no others listed for sale. And assume you come to me and offer me \$125 for it and I turn you down. You sue and you say to the court, "Look Your Honor, it is

clear what is going on here. Zywicki is like the dock owner in *Ploof*. There are very few of these things, so if I cannot buy it from Zywicki, then I cannot buy it from anyone else. And look it is only worth \$100, but he is refusing to take \$125 for it. Obviously he is taking advantage of my situation to try to extort a higher price out of me than it is worth. So I want you to order him to give it to me and I will give him \$101 and social welfare will be maximized.”

Does this work? No. Why not? Because it is not true that this is like *Ploof*. Why not? Because the real reason I am not selling is because the picture truly is worth more to me than \$100 or \$125. Why? Because I received my autographed picture as a gift, so it has idiosyncratic or subjective value to me, making it worth more to me than the market price. On the other hand, I might be acting strategically—perhaps I say it has subjective value but it does not and I really am just trying to get you to pay more, so I am “holding out” on you and trying to act like the dock owner in *Ploof*. Is this plausible? No, because there are in fact substitutes or close substitutes for this particular picture, it is just a matter of finding them. So I do not actually have hold out power over you.

So what does this mean? In general, we have a default preference for individuals to make exchanges via a voluntary market setting rather than having courts engage in “forced” transactions. Why? In part because we are concerned about the presence of idiosyncratic or subjective value. For courts to coerce transactions where transaction costs are low and bilateral monopoly problems nonexistent risks sacrificing the benefits of market exchanges.

Forced transactions along the lines of *Ploof* therefore, should be a narrow exception to the general rule that economic activity should be organized through voluntary market exchanges and not by asking courts to circumvent the market process and thereby to “force” transactions when market processes are fully capable of providing a consensual and economically efficient means for allocating resources. Admittedly, *Ploof* can create a temptation to turn judges into central planners and to be unduly deferential to market exchanges. The same principle explains why the “on the dock” transaction should prevail over the “at sea” transaction in *Alaska Packers*.

And one can easily point to situations at law where judges—often instigated by law and economics scholars themselves—have done exactly that. Consider the imposition of strict products liability in tort and the displacement of contractual warranty law for products liability with tort law. The rise of strict products liability in tort was one of the early innovations conjured up by law and economics scholars, most notably then-professor and now-judge Guido Calabresi.²³ And, to be sure, strict

²³ See generally GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (Yale Univ. Press 1970).

adherence to libertarian freedom of contract principles likely would have averted this intellectual dead-end by honoring the right of the parties to enter into consensual risk allocation arrangements regarding these products.

In retrospect, however, it is evident that strict products liability in tort was predicated on faulty economics. For quite plainly the intellectual error at the root of strict products liability is the central planner's fallacy that the judge (or any other central planner) can accurately anticipate and weigh all of the possible effects of the rule. Consider an easy example. It has been estimated that the cost of liability and liability insurance now comprises thirty percent of the cost of a stepladder.²⁴ All the better, a naïve lawyer-economist might think: stepladders can be dangerous and if people are injured by stepladders economic efficiency requires that they must "internalize" the costs of those injuries. So if a person is injured by a foreseeable use of a stepladder, say by falling off it, then stepladder manufacturers should be liable. Moreover, perhaps it makes sense for stepladder manufacturers to bear the cost of compensating stepladder consumers, and "spread" the cost of those injuries across many stepladders simply by raising the price.

But this analysis is faulty in two ways. First, the effect of making the ladder company liable essentially compels every consumer to purchase a personal injury liability policy with every stepladder that they purchase—and given the administrative cost of running the tort system, it would be an exceedingly expensive insurance policy. But the overwhelming number of consumers already have health insurance policies, and thus, forcing them to buy an *additional* insurance policy is simply a waste of money. They already have insurance, and thus, it is perfectly rational that they might want to forego a mandatory purchase of an insurance policy from the ladder company. Moreover, there is no reason to believe that the ladder company is in a better position to provide health insurance to a consumer at a lower cost than an actual insurance company. Thus, the effect is to coerce consumers to buy *both* a ladder and an insurance policy when they often will only want the ladder itself.

But there is a second and larger problem that arises. Once the price of a ladder is increased by thirty percent, many consumers will not purchase a ladder who otherwise would. But the burned out light bulb in the ceiling still needs changing regardless of whether the consumer has a stepladder or not. So we know what happens next—rather than standing on a stepladder, the consumer stands on a chair which then topples over and causes injury. Yet everyone knows you are not supposed to use a chair for changing a light bulb, thus the consumer is unlikely to be able to recover against the chair-maker for injuries caused from that use of the chair. The net result, therefore, is not to cause the ladder-maker to internalize the costs of the ladder, it simply is to shift consumer behavior away from relatively more

24 PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 3 (1990).

safe ladders to relatively less safe chairs increasing the overall number of injuries suffered.

Does this unfortunate doctrinal development demonstrate that law and economics is thus an inferior mode of analysis compared to libertarian contractarianism? Perhaps, and one reasonably could make that case. On the other hand, I think it is more reasonable to observe that just because there is a potential for bad economic analysis, it does not necessarily mean that it would be worthwhile to throw out the baby with the bathwater and abandon well-grounded economic analysis.

Instead, what the example of the misuse of economics to support the rise of strict liability and the abandonment of contract law really cautions against is overindulgence in the central planner's fallacy. The real lesson taught by this unfortunate intellectual error is that judges should be humble when considering constructing new legal rules that would supplant longstanding contractarian and voluntary solutions.²⁵ Stepladders are bought and sold in a competitive market after all, and thus, consumers can choose among a variety of ladder companies potentially offering a variety of different "insurance" policy riders for their ladders. Consumers could thus choose whether to buy a ladder with or without the insurance rider. One suspects that most would prefer a cheaper ladder and to supply their own health insurance, rather than a more expensive ladder sold with implicit insurance. And most certainly, many marginal consumers who are priced out of the ladder market and forced to stand on a chair (thereby dramatically increasing their chance of injury) will almost certainly have preferred the less-dangerous and less-expensive option to be able to buy a ladder.

III. LIBERTARIANISM AND LAW AND ECONOMICS COMPARED

Although this article has focused on examples of situations in which libertarianism and law and economics are in conflict, it should not be forgotten that as a general rule they strongly agree. The libertarian emphasis on the protection of property rights and nuisance is sound economics as well as clear articulation of property rights, and general enforcement of contractual exchanges are generally good for economic efficiency and interpersonal coordination as well.

Nevertheless, there are times where the pragmatic, contextual, economically-animating logic of the common law reaches conclusions different from that of libertarianism. From my personal perspective, I have come to conclude that the common law and law and economics approaches provide rules superior to that of libertarian philosophy. Admittedly, I am smuggling in normative intuitions to support this conclusion: that the implicit normative purpose of the common law is to further interpersonal coordination and maximize the surplus of social living more than it is the

²⁵ Zywicki & Sanders, *supra* note 5.

protection of individual rights. The particularities of that debate go beyond the scope of this article.

But in the end there are two basic ideas that have led me away from the Rothbardian natural rights vision of law toward a more Hayekian and law and economics view of the common law. First, I am unable to escape the logical conclusion that at root, costs are reciprocal—that conflicts arise over incompatible uses of scarce resources because the parties are mutually interfering with *each other's* use of those resources. And that second, the purpose of law is to maximize the gains of social living by maximizing the benefits of interpersonal coordination and minimizing waste. In the end, I find that cases like *Ploof* and *Alaska Packers* strike me as correctly decided and the economic principles that underlay them are sound as well—and between those outcomes and the outcomes provided by libertarian philosophy I find the results of law and economics and the common law superior to libertarianism.

Back to the Future of Originalism

*Josh Blackman**

INTRODUCTION

In the blink of the jurisprudential eye, the Affordable Care Act (“ACA”) went to the brink of unconstitutionality and back. Along that rapid journey, lawyers and scholars from across the philosophical spectrum who were focused on developing, refining, and advancing constitutional arguments at breakneck speeds, were often unable to pause and appreciate the monumental importance of what was happening. This essay, as part of a symposium issue for the *Chapman Law Review*, takes a step back, and reflects on the legal challenge’s impact on originalism and constitutional law.¹

In *NFIB v. Sebelius*,² originalists, who for decades have sought to restore the original meaning of the Constitution, shied away from that task, and advanced a strategy that would excise the individual mandate alone without disturbing any New Deal-era precedents. Rather than asserting an originalist challenge, the challengers turned to appeals to popular constitutionalism and led a concerted effort to create, and then draw attention to, the law’s unpopularity and unconstitutionality. This was a concerted effort to move the argument from “off-the-wall” to “on-the-wall.” These two moves—the decision not to assert the originalist case for the unconstitutionality of the individual mandate and to appeal to popular constitutionalism—have gone largely unrecognized and unappreciated. Both of these choices speak to the potential limitations of originalism in a world bound by entrenched precedents and the potential strength of fostering social movements intent on restoring the “lost Constitution.”

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¹ See also JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (forthcoming 2013) (discussing *NFIB v. Sebelius*).

² Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

Through such social movements, advanced by groups like the Tea Party, society witnessed a rededication, however convenient, to the Constitution. Although the Affordable Care Act was ultimately upheld, one of the greatest takeaways from the case was its contribution towards our collective constitutional culture. This challenge has contributed to the growing sentiment that the powers of the federal government are in fact constrained, and that the New Deal cases may not have definitively resolved the scope of federal power. Larry Solum has referred to this shift in thinking as our now-unsettled “constitutional gestalt.”³

What does this unsettled gestalt portend for originalism? In *NFIB*, the challengers made a conscious decision not to advance the originalist argument. This choice may have costs. Namely, any immediate gains that could have been obtained by striking down the mandate may in the long run undermine originalist jurisprudence. This decision may risk harming originalism, and open up originalist scholars to criticisms of being “faint-hearted.” Perhaps *NFIB* represents a short-term victory for the ends, but a long-term loss for the means.⁴

Yet, the litigation strategy in *NFIB* has shown that it is possible to advance originalism without using originalism. Even when originalism is not at the forefront, this jurisprudence exudes a *gravitational pull* that tugs at the Constitution, and prevents it from drifting too far away its original meaning. It is this pull that brought the Rehnquist Court’s “New Federalism” back into the orbit of the original understanding, even if cases such as *Lopez*,⁵ *Morrison*,⁶ and *Printz*⁷ were not by themselves originalist challenges.

The challenge to the ACA was successful in unsettling our constitutional gestalt because it seamlessly blended a theory of constitutional law and the social movements that backed the theories. Both of these avenues gravitated around the original understanding of the Constitution. First, the theories were grounded in the Constitution’s structural protections of individual liberty, and second, the movements sought to restore what they viewed as the original Constitution. This strategy provides a how-to manual for constitutional litigation. Learning how to replicate this dual-focused phenomenon of *popular originalism* may be the most enduring lesson for future constitutional challenges.

³ Lawrence B. Solum, *The Legal Effects of NFIB v. Sebelius and The Constitutional Gestalt, passim* (Georgetown Pub. Law Research Paper No. 12-152, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152653.

⁴ Such a calculus may have also influenced Chief Justice Roberts’ decision-making process, though, he likely feared a short-term gain for federalism, paired with a long-term loss for the Court’s institutional credibility. See Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBSNEWS.COM (July 1, 2012 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

⁵ *United States v. Lopez*, 514 U.S. 549 (1995).

⁶ *United States v. Morrison*, 529 U.S. 598 (2000).

⁷ *Printz v. United States*, 521 U.S. 898 (1997).

I. THE ORIGINALIST CONSTITUTION

This Part explores how the originalist constitution evolved in the challenge to the Affordable Care Act. First, I consider the significance of the non-originalist challenge to the ACA. Second, I look at how originalists were instrumental from moving the challenge to the ACA from “off-the-wall” to “on-the-wall.” Third, I query what this challenge means for the originalist goal of restoring the lost Constitution.⁸

A. The Non-Originalist Challenge to the Affordable Care Act

1. Originally Originalist

Unlike earlier conservative or libertarian constitutional arguments, the challenge to the ACA did not mobilize around the text and the history of the Constitution. While the two-decades-long path to *District of Columbia v. Heller*⁹ was paved with deep probing into the original understanding of the Second Amendment,¹⁰ the challenge to the ACA, blazed in record time, was grounded purely in terms of whether the mandate could be squared with existing precedents of the Court or whether it was unprecedented.¹¹ Originalism and textualism served only as secondary, backup arguments; however, Justices both in the majority and in the dissent made numerous originalist arguments.¹² The genius of the strategy was to conform the

⁸ In this section, I focus quite heavily on the views of Randy Barnett as representative of broader originalist and libertarian sentiments. Barnett, whom the *New York Times* dubbed the “intellectual godfather” of the legal challenge of the mandate, was the leading legal voice in this challenge from this outset, was responsible for, and should receive credit for many of the key strategic and jurisprudential decisions in this case. See Kate Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES, (Dec. 19, 2010), http://www.nytimes.com/2010/12/20/us/politics/20states.html?_r=0 (dubbing Barnett the “intellectual godfather”). Barnett has written a number of noted works, including: RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* (2008); RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998).

⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁰ See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 924, 926 (2009) (discussing the Court’s focus on the idea that the Constitution should be interpreted based on its “original meaning”); see also Josh Blackman, *Originalism for Dummies*, (Dec. 19, 2008), <http://ssrn.com/abstract=1318387>.

¹¹ See, e.g., *Precedents cited in health care battle*, USA TODAY (Mar. 20, 2012, 9:12 PM), <http://usatoday30.usatoday.com/news/washington/judicial/story/2012-03-20/precedents-supreme-court/53674608/1> (listing the four cases most likely to be cited by both sides of the debate); Randy Barnett, Nathaniel Stewart & Todd F. Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, THE HERITAGE FOUND. (Dec. 9, 2009), <http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional> (arguing that the mandate is unprecedented); David Orentlicher, *Precedents for Upholding Health Care Law*, CNN (March 27, 2012, 8:25 AM), <http://www.cnn.com/2012/03/27/opinion/orentlicher-health-care/index.html> (arguing there is ample precedent to support the mandate).

¹² See, e.g., Michael Ramsey, *Originalism in the Health Care Case: What is a Direct Tax?*, THE ORIGINALISM BLOG (July 8, 2012, 7:00 AM), <http://originalismblog.typepad.com/the-originalism-blog/2012/07/originalism-in-the-health-care-case-what-is-a-direct-tax-michael-ramsey.html> (discussing direct taxes); Michael Ramsey, *Originalism in the Health Care Decision: The Federal Government’s “Problem-Solving Powers,”* THE ORIGINALISM BLOG (July 6, 2012, 7:00 AM),

argument within the Court's existing precedents: to strike down the mandate would not require overturning a single precedent. Indeed, five Justices accepted this position, entirely consistent with the Court's jurisprudence from *M'Culloch v. Maryland*¹³ to *Wickard v. Filburn*¹⁴ to *Gonzales v. Raich*.¹⁵ However, the originalist dog that did not bark speaks volumes about the potency of originalism in significant constitutional challenges such as this.

In late 2009, even before the enactment of the ACA, most prominent constitutional theorists who focused on originalist scholarship readily conceded that the individual mandate was not consistent with the original understanding of the Constitution—namely the Commerce Clause and the Necessary and Proper Clause.¹⁶ On September 18, 2009, six months before the law's enactment, Randy Barnett, in noting that “the Supreme Court has certainly not limited either the enumerated commerce power or the implied spending power to the original meaning of the text,”¹⁷ wondered aloud whether the Court could strike down Obamacare based on original meaning: “[s]tranger things have happened. After all, without any precedent standing in their way, a majority of the Supreme Court decided to follow the original meaning of the text of the Second Amendment in *District of Columbia v. Heller*.”¹⁸

Barnett, along with Todd Gaziano and Nathaniel Stewart, authored a seminal report for The Heritage Foundation laying out the case against the mandate.¹⁹ In addition to developing the activity/inactivity distinction—an argument entirely consistent with modern Supreme Court precedent—the report also asserted that an originalist challenge to the law was a possible route.

[T]he 2008 case of *District of Columbia v. Heller* shows that a majority of the current Court takes the text and original public meaning of the Constitution quite

<http://originalismblog.typepad.com/the-originalism-blog/2012/07/originalism-in-the-health-care-decision-the-federal-governments-problem-solving-powersmichael-ramsey.html> (highlighting exchange between Justice Ginsburg and the joint dissent).

¹³ *M'Culloch v. Maryland*, 17 U.S. 316, 359–60 (1819) (holding Congress has the power to incorporate a bank even when such is not a power enumerated within the Constitution).

¹⁴ *Wickard v. Filburn*, 317 U.S. 111, 123–24 (1942) (holding that even a wheat farmer's trivial contribution to the market, when combined with the contributions of other similarly situated farmers, was subject to federal regulation under the Commerce Clause because the commerce power “extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce” (citation omitted)).

¹⁵ *Gonzales v. Raich*, 545 U.S. 1, 24 (2005) (holding Congress “had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in [Congress's Application of Controlled Substance Act (CSA)].”).

¹⁶ Barnett et al., *supra* note 11.

¹⁷ Randy Barnett, *Healthcare: Is “mandatory insurance” unconstitutional?*, POLITICO (Sept. 18, 2009), http://www.politico.com/arena/perm/Randy_Barnett_8256A4EF-01E6-4207-B4E8-C761F2FDB5BF.html.

¹⁸ *Id.* (italics added).

¹⁹ Barnett et al., *supra* note 11.

seriously, especially when considering issues not controlled by existing precedent. A constitutional challenge to an individual health care mandate would be considered an opportunity by the Justices who made up the *Heller* majority to further vindicate their commitment to text and history in evaluating claims of federal power.²⁰

2. The Move Away from Originalism

Ultimately the challengers to the Affordable Care Act decided not to ground their arguments in originalism, and did not seek the reversal of precedents concerning the scope of federal power stretching from *Wickard v. Filburn*²¹ to *Gonzales v. Raich*.²² Randy Barnett explained this decision in some detail. First, Barnett acknowledged that, based on his understanding of the original meaning of the Constitution, the individual mandate is clearly unconstitutional.²³ In his 2010 article, *Commandeering the People*, Barnett wrote, “[U]nder the original meaning of the Commerce Clause, as affirmed by the Court, Congress lacks any power over the health insurance business. The insurance business, like the businesses of manufacturing or agriculture, is to be regulated exclusively by the states.”²⁴ Or, more clearly stated in a footnote, “As suggested in Part I, both the regulations imposed on insurance companies, and the insurance mandate imposed on individuals, most likely exceed the original scope of the enumerated powers of Congress.”²⁵

Second, Barnett concedes that a key non-originalist precedent stands in the way of restoring the original understanding of commerce with respect to insurance contracts—a matter that should be left for the states. In *United States v. South-Eastern Underwriters Association*²⁶—a decidedly unoriginalist opinion—Justice Black reversed *Paul v. Virginia*,²⁷ which had held that “[i]ssuing a policy of insurance is not a transaction of commerce.”²⁸ In September of 2012—three months after *NFIB v. Sebelius*—Barnett made similar points during his address at the Cato Institute’s Constitution Day Symposium: “Doctrines certainly constrained us in our challenges to the Affordable Care Act. We might like to have contested the insurance company regulations as outside the bounds of the original meaning of the Commerce Clause but we were definitively foreclosed by such an argument by the 1944 case of *U.S. v. South-Eastern*

²⁰ *Id.*

²¹ *Wickard v. Filburn*, 317 U.S. 111 (1942).

²² *Gonzales v. Raich*, 545 U.S. 1 (2005).

²³ Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 586–87 (2010).

²⁴ *Id.* at 585.

²⁵ *Id.* at 624 n.154.

²⁶ *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

²⁷ *Paul v. Virginia*, 75 U.S. 168 (1869), overruled by *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 543–50 (1944).

²⁸ *Id.* at 183.

Underwriters.²⁹ Or, stated more precisely, “Under the original meaning of the Constitution, for example, Congress would have no power to regulate the health insurance business since insurance contracts—like the practice of medicine—are not ‘commerce,’ which is why both activities have traditionally been regulated by the states.”³⁰

Third, without acknowledging that these non-originalist precedents are correct, Barnett still contends that under current Supreme Court law, the individual mandate is unconstitutional.³¹ “Existing doctrine reveals the individual mandate is unconstitutional even if we assume that Congress has the power to regulate the insurance business that the New Deal Supreme Court gave it in *South-Eastern Underwriters*.”³² Rather, solely for the purposes of this case, the challengers were willing to forego this originalist argument and focus on how the Supreme Court—for better, but mostly for worse—has developed the doctrine.³³ Barnett wrote quite clearly that he has not “rested [his] claim that the individual insurance mandate was unconstitutional on the original meaning of the Constitution, and neither did the parties to the lawsuit.”³⁴

“This entire case was pursued under *existing* post-New Deal Commerce Clause and Necessary & Proper Clause doctrine.”³⁵ “[M]y claim is that the mandate is unconstitutional in the second sense: based on what the Supreme Court has said in its Commerce and Necessary and Proper Clause decisions . . . and also in its tax power decisions . . .”³⁶ Because the mandate was unprecedented, in that it went beyond anything Congress had attempted before or anything the Supreme Court had considered, its constitutionality was not settled.

Importantly, this “second” sense must be distinguished from what Barnett has described as the first and third senses of constitutionality. The first sense focuses on “what the Constitution says and means,” while the third sense asks “whether there are five votes on the Supreme Court to uphold or invalidate the action.”³⁷

29 Randy Barnett, Address at the Cato Institute’s Constitution Day Symposium: The Supreme Court: Past and Prologue: A Look at the October 2011 and 2012 Terms, Panel I: Obamacare and Enumerated Powers (Sept. 18, 2012), available at <http://www.cato.org/events/ccs2012/index.html>.

30 *Id.*; see also Josh Blackman, *Originalism and Obamacare*, JOSH BLACKMAN’S BLOG (Oct. 11, 2012), <http://joshblackman.com/blog/2012/10/11/originalism-and-obamacare/> (quoting Randy Barnett on his opposition to the Affordable Care Act) (transcribing the quoted text).

31 Barnett, *supra* note 23.

32 *Id.* at 587.

33 *Id.* at 586.

34 Randy Barnett, *Elhauge Replies to Hamburger*, VOLOKH CONSPIRACY (Apr. 22, 2012, 11:52 AM), <http://www.volokh.com/2012/04/22/elhauge-replies-to-hamburger/>.

35 *Id.*

36 Barnett, *supra* note 23, at 586.

37 Randy Barnett, *In What Sense is the Personal Health Insurance Mandate “Unconstitutional”?*, VOLOKH CONSPIRACY (Apr. 16, 2010, 11:27 AM), <http://www.volokh.com/2010/04/16/in-what-sense-is-the-personal-health-insurance-mandate-unconstitutional/>.

To argue that the Court should roll back unoriginalist precedents would be a nonstarter. As Larry Solum put it, “[y]ou cannot argue to a District Court that it should overrule a recent decision of the United States Supreme Court—the move is ‘off the wall,’ ‘out of bounds,’ and ‘beyond the pale [sic].”³⁸ There were not enough votes to accomplish this position—this is the “third” sense of Barnett’s understanding of constitutionality.³⁹ As Justice Brennan was fond of saying, “Five votes can do anything around here.”⁴⁰ In order to advance this argument, the challengers had to move the argument from off-the-wall to on-the-wall.

B. Moving the Argument from Off-The-Wall to On-The-Wall

How the arguments went from being taken seriously by a small cadre of libertarian scholars to garnering five votes on the Supreme Court is a fascinating story of constitutional persuasion on related fronts: legal and populist. This narrative is well encapsulated in a series of back-and-forths between Barnett and Yale Law Professor Jack Balkin (who are in fact excellent friends).

1. Of Theories and Movements

To Balkin, Barnett’s strategy was two-fold: on the one hand, Barnett was advancing a theory about constitutional law that was largely deemed frivolous; yet, at the same time, Barnett was also trying, through his own gravitas as a noted constitutional scholar, to convince people that his argument is not frivolous.

Randy Barnett wants you to know that his argument was not frivolous. But he is not simply reporting a fact about the world. He is engaged in a performative utterance. He is trying to make this statement true by the fact that he, a prominent constitutional theorist and litigator, is saying it. And he is trying to get enough people to agree with him so that what he says is true will actually become true.⁴¹

There is something of a chicken-and-the-egg dynamic at play in Balkin’s view. A constitutional theory only becomes non-frivolous when people accept it. But, before people accept a constitutional theory, it must be non-frivolous. “If Randy and his allies are successful in changing public and professional opinion, then they will move these ideas from off the wall to on the wall. They will make arguments that were once considered frivolous serious arguments, and possibly even winning arguments.”⁴² Barnett was indeed successful about moving the idea from off-the-wall to on-the-wall. Although Barnett was not successful in winning the ultimate

³⁸ Solum, *supra* note 3, at 16.

³⁹ See Barnett, *supra* note 37.

⁴⁰ H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16 (2008). See generally Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

⁴¹ Jack Balkin, *Randy Barnett Wants Us to Know that His Commerce Clause Argument is not Frivolous*, BALKINIZATION (July 19, 2010, 1:48 PM), <http://balkin.blogspot.com/2010/07/andy-barnett-wants-us-to-know-that-his.html>.

⁴² *Id.*

case, his success in moving the argument onto the wall “would work a significant change in existing law”: to Balkin he “changed the practical meaning of the Constitution, and changed it a great deal.”⁴³ This change, in effect, is the change that Larry Solum has referred to as the “constitutional gestalt.”⁴⁴

According to Barnett, when Balkin calls his constitutional arguments “off-the-wall” and associates them with libertarian attempts to restore an originalist vision of constitutional law, Balkin “is trying to marginalize the challenge to the individual mandate by connecting the argument about its constitutionality to [Barnett’s] and others [sic] ‘off-the-wall’ departures from conventional constitutional argument.”⁴⁵ Implicitly, Barnett concedes that popular libertarian constitutional goals are still “off-the-wall,” and are not ready to be accepted.

I can tell you what an ‘off-the-wall’—but in my view constitutionally sound—challenge to ObamaCare would look like: it would contest whether Congress has the power to regulate insurance companies under the Commerce Clause, given that the original meaning of ‘commerce’ did not extend to insurance contracts, which is why for 100 years the insurance business was regulated state by state.⁴⁶

The notion of “off-the-wall” is descriptive of the current acceptance of an argument by the Supreme Court, not its soundness or its normative appeal. Barnett would maintain that this originalist challenge is accurate, but not the argument to make. “Contending that the Court enforce the original meaning of the Commerce Clause and refuse Congress the power to regulate health insurance would be an accurate reading of the Constitution in my view, but it would also be ‘off-the-wall’ at this point.”⁴⁷ Thus, while maintaining that “off-the-wall” notions of originalism are still sound and normatively appealing, libertarians can still advance a non-originalist argument that has the potential of moving to on-the-wall.

Barnett and other libertarians did not make the “off-the-wall” originalist argument. “But here is the thing. No one is making this argument. Not me, not ‘the large group of conservative and libertarian lawyers, politicians, and activists who want [sic] to change the public’s mind about the powers of the federal government,’ and certainly not the Attorneys General of 21 states.”⁴⁸ Rather, they look solely “at the law as it currently exists and [observe] that the Supreme Court has never upheld the use of the commerce power to mandate that everyone engage in economic activity.”⁴⁹ Because all that the Court “has ever done is [to] regulate or

⁴³ *Id.*

⁴⁴ Solum, *supra* note 3, at 3.

⁴⁵ Randy Barnett, *Balkin “Flips,”* VOLOKH CONSPIRACY (July 20, 2010, 5:07 PM), <http://www.volokh.com/2010/07/20/balkin-flips/>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

prohibit those who choose to engage in economic activity. . . . [T]here is no existing authority for extending the Commerce Clause this far.”⁵⁰

2. Popular Constitutionalism

To move this argument “onto the wall,” and to change the constitutional gestalt, the challengers employed tools of popular constitutionalism. The legal challenge to the Affordable Care Act, although short of total success, represents an unexpectedly effective social movement. Through a series of influential Op-Eds, speeches, and blog posts, conservative and libertarian lawyers and professors advanced a simple reason why the ACA is unconstitutional—namely, it is *unprecedented* for Congress to force a person to engage in commerce.⁵¹ Epitomized by the now-infamous image of broccoli, the challengers asked whether Congress could compel people to buy that flowery green.⁵²

The challengers advanced a very simple constitutional idea: a mandate forcing people to engage in commerce is unprecedented.⁵³ In a very short time, a movement mobilized around this new way of looking at the Constitution; from the halls of the Ivory Tower, to the halls of Congress, and, ultimately, to the halls of the federal courts—taking this idea from “off-the-wall” to “on-the-wall.”⁵⁴ Almost lost amidst the Court’s opinion in *NFIB v. Sebelius*, which upheld the Affordable Care Act under Congress’s taxing power, was the fact that a majority of the Court unexpectedly accepted the challenger’s primary argument.⁵⁵ This way, paved by decades of conservative and libertarian scholarship,⁵⁶ fortified by the New Federalism precedents of the Rehnquist Court,⁵⁷ and advanced by the then-burgeoning Tea Party, “[a] constitutional gestalt shift [snuck] up on the community of constitutional actors.”⁵⁸

At first, most constitutional scholars ridiculed the challenge to the ACA.⁵⁹ Balkin and a select few others took it more seriously, very much

⁵⁰ *Id.*

⁵¹ Blackman, *supra* note 1.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*; see generally JACK M. BALKIN, *LIVING ORIGINALISM* 17–18 (2011) (defining “off-the-wall”). For my review of Balkin’s book, see Josh Blackman, *Originalism at the Right Time?*, 90 TEX. L. REV. 269 (2012).

⁵⁵ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593 (2012); see also *id.* at 2649–50 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). Arguably, Justices Scalia, Kennedy, Thomas, and Alito did not join Chief Justice Roberts’s opinion, but Roberts did by reference agree with the four joint-dissenters. Thus, broadly stated, there were five votes for this position.

⁵⁶ Solum, *supra* note 3, at 22 (“The constitutional challenge to *Sebelius* began its journey to the Supreme Court in an intellectual environment shaped by a constitutional gestalt that structured the field of constitutional argument.”).

⁵⁷ *Id.* at 23 (“The New Federalism cases decided by the Rehnquist Court posed a challenge to the constitutional gestalt that read the New Deal Settlement as creating plenary and unlimited national legislative power.”).

⁵⁸ *Id.* at 19.

⁵⁹ Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went*

cognizant of how a social movement could advance after it got “onto the wall.” Balkin was uniquely positioned to augur the potential outcome of this case, for he “observed . . . that politics and political parties played an important role, perhaps the crucial role, in combination with intellectuals and social movements.”⁶⁰ Balkin asserted, “Randy and his allies are trying to change people’s minds through op-eds, speeches, protests, and litigation. They are trying to move things from ‘off the wall’ to ‘on the wall.’ And this is not the first time people have tried to do this.”⁶¹ This process of constitutional contestation had the effect of causing “a constitutional gestalt shift Arguments may occur in the public sphere, in the legal academy, in legislative and executive forums within both state and national political institutions—and in the courts of law.”⁶²

Barnett reflected on the social movement that enabled the challenge to *NFIB v. Sebelius*, noting that “[t]here is for the first time a popular political movement on behalf of the written Constitution, especially its power-constraining clauses. This ‘constitutional conservative’ movement is famously associated with the Tea Party, but extends well beyond.”⁶³ If the same legal argument had been presented without the groundswell of support, it would not have made it before. Rather, this popular constitutional support nearly pushed the argument over the broccoli finish line.

Randy Barnett further commented on the nature of the political movements behind the challenge, when he addressed the American Constitution Society’s 2011 National Convention:

[I] do want to get back to . . . the politics of [the Affordable Care Act] for a minute because I understand you had a very lively panel yesterday on original meaning But I take it that the valence in this room is kind of not all that sympathetic with original meaning. Original meaning, as far as I understand it, says the meaning of the Constitution must remain the same until it’s properly changed . . . but the opposite of [originalism], or the different position of that, is that the meaning of the Constitution evolves over time to respond to changing conditions and also to respond to political initiatives, or what my friend Jack Balkin calls social movements. That is what the alternative to original meaning is, which is the evolution of constitutional meaning according to political

Mainstream, THE ATLANTIC (June 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

⁶⁰ Solum, *supra* note 3, at 22; see also Balkin, *supra* note 59. For further discussion of Balkin’s views on popular constitutionalism, see Josh Blackman, *The Affordable Care Act and Popular Constitutionalism*, 26 Public Affairs Quarterly ___ (forthcoming 2013).

⁶¹ Balkin, *supra* note 41.

⁶² Solum, *supra* note 3, at 19.

⁶³ Randy Barnett, *The Mirage of Progressive Originalism: A New Legal Theory Attempts—and fails—to Unite Leftist Politics with Constitutional Fidelity*, WALL ST. J. (Sept. 7, 2012), <http://online.wsj.com/article/SB10000872396390444914904577619763983330558.html> (reviewing AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION (2012)).

movements. *Well, look if you guys believe in that, then obviously you may be looking at a political movement in the face.*

Political movements sometimes will go in your direction, and political movements will sometimes not go in your direction. If political movements don't go in your direction, it is difficult to rush in with that copy of the Constitution . . . and say no, no, no, it's the Constitution . . . that stops you guys from doing it. Not if you at the same time think it's political movements that causes [sic] the meaning of the Constitution to change . . . through judicial appointments . . . confirmed or not confirmed by a politically representative Senate. That is just the way business is done.

*Not only should you not be surprised. You should also not complain. Except . . . if that day were ever to come . . . you are simply on the losing end of a democratic process, and then we have judicial restraint to fall back on. You guys have judicial restraint to fall back on in protecting the outcome of this . . . political debate that you may have lost. I just want to suggest that maybe, just maybe, the original Constitution might have something to offer you guys if and when you are ever on the losing end of a political movement.*⁶⁴

In other words, what's good for the goose is now good for the gander. This case turned the tables on much more than just our Commerce Clause jurisprudence. More recently, Randy Barnett has described the realist nature of this reversal more bluntly:

We also have the realist fact that five Justices embraced the entirety of our Commerce Clause and Necessary and Proper Clause arguments. Critics like Charles Fried can dismiss this as emanating from the leaderless Tea Party . . . but it is now embraced by what is called the 'Rule of Five.' Even if the Tea Party played a role, we have long been told that this is how the living Constitution—by which is meant constitutional doctrine—evolves in response to social movements. *So unless it is a living constitutionalism for me, but not for thee, if the outcome of this case was indeed impelled by popular constitutionalism, that would make it more, not less legitimate on living constitutionalist grounds.*⁶⁵

Balkin was more cynical of the nature of this change.⁶⁶

All social and political movements that seek to change the Constitution in practice do something like this, although the exact strategies and methods may differ. Attempting this is part of the process of constitutional change. It is an aspect of living constitutionalism. (This is one of the greatest ironies of modern conservative originalism—it is a perfect example of how living constitutionalism actually works in practice).⁶⁷

⁶⁴ See *National Power to Address the Nation's Problems: The Constitutionality of the Affordable Care Act*, AMERICAN CONSTITUTION SOCIETY (June 18, 2011), <http://www.acslaw.org/news/video/national-power-to-address-the-nations-problems-the-constitutionality-of-the-affordable-ca> (beginning at 1:31:30). Please note, the above is the author's rough translation and emphasis has been added.

⁶⁵ *Cato Institute Reviews Supreme Court's Recent Term*, C-SPAN (Sept. 18, 2012), <http://www.c-span.org/Events/Cato-Institute-Reviews-Supreme-Courts-Recent-Term/10737434182/> (beginning at 18:50) (emphasis added).

⁶⁶ Balkin, *supra* note 41.

⁶⁷ *Id.*

This sentiment is indeed quite ironic, especially in light of how critical conservatives have been for decades about the Justices reacting to political and social movements instead of focusing solely on the Constitution.

A. Restoring the Lost Constitution?

Although Barnett publicly distanced himself from bringing an originalist challenge to the Affordable Care Act, detractors and critics—buoyed by Barnett’s decade-long originalist scholarship trail—assailed Barnett, claiming that *NFIB* was in fact an attempt to restore the Lost Constitution, or more pejoratively, to bring back the Constitution in Exile.⁶⁸ Professor Jeffrey Rosen, far more cynical of Barnett’s motives than Balkin, said, “[l]et’s not pretend that this is just a modest case of applying existing precedents,” and asked, largely rhetorically, “[t]he question is: [a]re you going to reverse decades of judicial deference in economic matters?”⁶⁹ In response, Barnett insists “[n]othing about existing Supreme Court doctrine needs to change for us to prevail in this case.”⁷⁰ In fact, Barnett argues that he and the plaintiffs in *Gonzales v. Raich*⁷¹ did not seek to overturn *Wickard v. Filburn*⁷² outright, but instead sought to distinguish that “wheaty” case.⁷³ “While devoting pages to this argument,” Barnett recalled, “in a single sentence we did ask that *Wickard* be reconsidered ‘if the Court were to conclude that *Wickard* is controlling’ (i.e. if it rejected our distinctions), but this is an obligatory request never mentioned in oral argument.”⁷⁴

In a response to a similar point made by Ian Millhiser at ThinkProgress,⁷⁵ Barnett commented, “[A] decision to invalidate the individual insurance mandate would not require the Supreme Court to overturn ANY of these precedents you like. If it did, we would not have so good a chance to prevail as we do.”⁷⁶ Barnett asserted that the fact that

⁶⁸ Randy Barnett, *Academic Reaction to Oral Argument on the ACA Challenge*, VOLOKH CONSPIRACY (April 30, 2012, 10:55 AM) <http://www.volokh.com/2012/04/30/academic-reaction-to-oral-argument-on-the-aca-challenge/>.

⁶⁹ Nina Totenberg, *Health Care Decision Hinges On A Crucial Clause*, NPR (June 11, 2012, 4:34 AM), <http://www.npr.org/2012/06/11/154583824/health-care-decision-hinges-on-a-crucial-clause> (internal quotation marks omitted).

⁷⁰ *Id.* (internal quotation marks omitted).

⁷¹ *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁷² *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁷³ Randy Barnett, *Jeff Rosen Responds to Critics*, VOLOKH CONSPIRACY (May 29, 2012, 12:01 PM), <http://www.volokh.com/2012/05/29/jeff-rosen-responds-to-critics/>.

⁷⁴ *Id.*

⁷⁵ See Ian Millhiser, *Architect of Anti-Health Care Lawsuit Admits To His Broader Agenda—No National Child Labor Laws, No Minimum Wage*, THINKPROGRESS (June 12, 2012, 5:00 PM), http://thinkprogress.org/justice/2012/06/12/498288/randys-fake-constitution/?fb_comment_id=fbc_10150862594781078_22609833_10150864646626078#f3b8e0dd74 (discussing Barnett’s alleged views).

⁷⁶ Randy Barnett, Comment to *Architect of Anti-Health Care Lawsuit Admits To His Broader Agenda—No National Child Labor Laws, No Minimum Wage*, THINKPROGRESS (June 13, 2012, 3:08 PM), http://thinkprogress.org/justice/2012/06/12/498288/randys-fake-constitution/?fb_comment_id=fbc_10150862594781078_22609833_10150864646626078#f3b8e0dd74.

originalists are not making originalist arguments is not important: “That I hold *other* views, such as a commitment to originalism, that [sic] are not being put forward in this challenge is irrelevant to the merits of the arguments we *are* making in court (as they were in *Raich*).”⁷⁷

However, Rosen may be somewhat correct, albeit indirectly. The aim of the strategy was not to reverse decades of precedents, but rather to jolt a rethinking of those precedents going forward. It is not necessary to overturn precedents in order to change the law. The underlying victory, I think, is what Larry Solum has referred to as the “constitutional gestalt.”⁷⁸

II. THE SHIFTED “CONSTITUTIONAL GESTALT”

Though the Affordable Care Act survived, in the words of Justice Ginsburg, “largely unscathed,”⁷⁹ the impact of *NFIB v. Sebelius* extends far beyond the constitutionality of the individual mandate. In a path-breaking article about the state of constitutional law following *NFIB*, Professor Larry Solum identifies a change in our constitutional landscape—what he calls the *constitutional gestalt*.⁸⁰ The social movement against the ACA had the effect of unsettling many constitutional assumptions that have existed since the New Deal, and it created grounds for contestations of the scope of federal power.⁸¹ This—and not the Chief Justice’s curious vote—may be the important contribution for the future of constitutional law and our Constitution. Yet, this change in the gestalt, independent of originalism, also speaks to the importance of originalism as a tool in these future contests. I conclude by speculating about possible end games of libertarian constitutional thought.

A. *NFIB*’s Unsettling of Our Constitutional Gestalt

The state of our constitutional law does not merely consist of rules and precedents. Professor Larry Solum has written that “[at] the very highest level of abstract, our constitutional theories and narratives reflect and contain what might be called the constitutional gestalt—a holistic picture that organizes the constitutional materials (the text, cases, and practices) and the norms of constitutional argument.”⁸² As Solum observed, “In *NFIB*, five Justices of the Supreme Court endorsed a view of the commerce clause [sic] that is inconsistent with the constitutional gestalt associated with the New Deal Settlement. A fissure has opened in constitutional

⁷⁷ See Barnett, *supra* note 73 (emphasis added).

⁷⁸ See *infra* Part V; see also Solum, *supra* note 3, at 2.

⁷⁹ See Adam Liptak, *Justices, By 5–4, Uphold Health Care Law; Roberts in Majority; Victory For Obama*, N.Y. TIMES, June 29, 2012, at A1, available at <http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all>.

⁸⁰ Solum, *supra* note 3, at 26.

⁸¹ See *id.* at 2.

⁸² See *id.* at 16 (describing a constitutional gestalt as “an overall picture of the constitutional landscape”) (quote from original article, on file with author).

politics, creating space for an alternative constitutional gestalt.”⁸³ Now, what were once “[u]ndisputed norms” about the scope of federal power can now be questioned, and arguments which “once were ‘off the wall’ are now seen as ‘on the wall.’”⁸⁴ The notion of the unsettled gestalt accurately captures how our system of law changed after *NFIB*—even though the ACA survived.

In a July 2010 blog post, two years before the Supreme Court’s decision, Jack Balkin honed in on the challenger’s efforts to change our constitutional landscape:

Randy is part of a large group of conservative and libertarian lawyers, politicians, and activists who want to change the public’s mind about the powers of the federal government. They want the public and the courts to rethink the assumptions of the activist state that came with the New Deal. They want to restrain the growth of the federal government and push it back, because they believe that this is more faithful to the Constitution as they understand it.⁸⁵

Solum recognized that “[a] shift in the gestalt can only occur with support developments in constitutional politics off and on the Court.”⁸⁶

Barnett was correct in refuting Balkin’s claim that the challenge *directly* sought to return to pre-New Deal era precedents. But Balkin’s prescient claim was much broader. The challenge, whether successful or unsuccessful in killing the ACA, had the much deeper objective of affecting how people think about the Constitution, the federal government, and individual liberty. Or, as Solum stated it, “[t]he most important *indirect* effect of *NFIB* is that it enables constitutional contestation over the content of the gestalt and the meaning of the New Deal Settlement.”⁸⁷

After *NFIB v. Sebelius*, our society has gone through just such a rethinking. Putting aside the issue of whether there was a five-vote block to strike down the mandate as a violation of the Commerce Clause,⁸⁸ or if the Chief’s discussion of the Commerce Clause was holding or dictum,⁸⁹ the long-term victory of this case was changing how the Constitution is viewed by the people—and this is likely what concerned Balkin far more than the

⁸³ *Id.* at 2–3.

⁸⁴ *Id.* at 20.

⁸⁵ Balkin, *supra* note 41.

⁸⁶ Solum, *supra* note 3, at 27.

⁸⁷ *Id.* at 3 (emphasis added).

⁸⁸ *See id.* at 3 (“The technical analysis leads to the conclusion that on the Commerce-Clause issues, *NFIB* is unlikely to produce *stare decisis* effects that are clear and uncontested—one way or the other.”).

⁸⁹ Ilya Somin, *A Simple Solution to the Holding vs. Dictum Mess*, VOLOKH CONSPIRACY (July 2, 2012, 3:47 PM), <http://www.volokh.com/2012/07/02/a-simple-solution-to-the-holding-vs-dictum-mess/>; *see also* Randy Barnett, *Quin Hillyer: “John Roberts’ Travesty, Point by Point”*, VOLOKH CONSPIRACY (July 9, 2012, 2:23 PM), <http://www.volokh.com/2012/07/09/quin-hillyer-john-roberts-travesty-point-by-point/>; Randy Barnett, *Quote of the Week*, VOLOKH CONSPIRACY (July 1, 2012, 12:41 PM), <http://www.volokh.com/2012/07/01/quote-of-the-week/>.

Affordable Care Act's fate. And with this sea change of thought, a new tide has arrived, drawn in by the currents of "constitutional contestation."⁹⁰

The long-term effects of *NFIB* are uncertain. However, we know that "grounds of constitutional contestation will have been changed—the dominant constitutional gestalt has become open to challenge through formal legal argument in ordinary litigation."⁹¹ Future challenges to the scope of federal power will no longer be scoffed at as ridiculous—consider the drastic change in reactions to the challenge in 2009 and 2012. Scholars will be able to put forth ideas about laws that may be suspect after *NFIB*.⁹² Movements will continue to advance understandings of constitutional norms consistent with a federal government of enumerated powers. Politicians will incorporate constitutionalist ideals in legislative debates over the scope of federal power. And, perhaps most importantly, judges at all levels will now have a precedent upon which to act based on these cases.

B. *NFIB*'s Implications for Originalism

Barnett's concession that an originalist challenge to the ACA would be "off-the-wall"⁹³ speaks volumes about the limits of originalism when unmoored from a popular constitutional backing. When confronted with perhaps the largest and most significant constitutional law challenge of a generation, rather than advancing an "off-the-wall" argument that is consistent with originalism—the predominant jurisprudence of modern-day libertarians—the challengers turned to something else, and it was not just an argument about the extent of the Court's precedents. Rather, as Balkin acknowledges, the challengers aimed to change public opinion, and bring the unprecedented argument into the realm of plausibility.⁹⁴ Once the argument crossed that threshold, it was off to the races—and it only partially crossed the finish line when Chief Justice Roberts seized defeat from the jaws of victory.

1. The Means of Originalism and the Ends of Libertarianism

NFIB reveals that fidelity to originalism must take a back seat when more lofty goals can be obtained—goals that are unobtainable through

⁹⁰ See Solum, *supra*, note 3, at 3.

⁹¹ *Id.* at 26.

⁹² See *id.* at 27 ("*NFIB* has opened the space for constitutional contestation—and that space is already being occupied, in the blogs, at academic conferences, in position papers, water cooler discussions, email exchanges, briefs, and judicial opinions. Competing doctrinal arguments, theories, and narratives are already in play.>").

⁹³ See Barnett, *supra* note 45.

⁹⁴ See Barry Friedman & Dahlia Lithwick, *Justice by the Numbers: When it Comes to Deciding the Future of Obamacare, the Supreme Court Should Ignore Public Opinion*, SLATE (Apr. 24, 2012, 2:56 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/the_supreme_court_and_obamacare_the_justices_should_be_careful_not_to_let_public_opinion_guide_their_decisions_single.html#pagebreak_anchor_2 (suggesting that the Court should ignore public opinion).

originalism. The decision to not advance the originalist argument was grounded in the fact that the challengers wanted to win the case. As Solum has observed, “[m]any originalists believe that the New Deal cases expanded Congress’s Commerce Clause power beyond the limits of original meaning [Although] as a practical matter, it would be impracticable and costly to undo New Deal and Great Society or to amend the Constitution to authorize these programs.”⁹⁵

But, this strategic decision may have costs. The short-term gains for freedom (striking down the mandate) may be in tension with undermining constitutionalism (a jurisprudence supporting a libertarian Constitution).⁹⁶ This constitutionalism is an important protection for freedom in the long term. By not advancing these ideas when it counts the most, the jurisprudence may be somewhat undermined. By refraining from advancing originalist arguments in support of originalist ends, the methodology may become divorced from, and in effect dilute the theory.

Perhaps *NFIB* represents a short-term victory for the ends, but a long-term loss for the means. Solum observes that this approach might “mitigate the damage done to original meaning by precedent and practice.”⁹⁷ However, if limited government can be achieved without primarily pursuing originalism (such as the ACA case), a cynic could argue that originalism is merely a front for what libertarians seek. In other words, when libertarianism becomes unmoored from originalism, the objective nature of the libertarian Constitution becomes weaker.⁹⁸

By not advancing their signature methodology, libertarians risk undermining, and perhaps sacrificing, the normative appeal of originalism as an objective school of constitutional thought. Should libertarians simply try to achieve the goals of a freer society and limited government without concerns for how the arguments are made? Or should libertarians seek to achieve limited government through originalism?

2. Faint-Hearted Originalism?

In an article criticizing Justice Scalia’s “faint-hearted” originalism, Randy Barnett found objectionable Scalia’s “willing[ness] to avoid objectionable outcomes that would result from originalism by invoking the precedents established by the dead hand of nonoriginalist Justices.”⁹⁹ However, Barnett rejected the premise that “if so lion-hearted a jurist as [Scalia] shrinks in practice from the implications of a theory he so

⁹⁵ Solum, *supra* note 3, at 25.

⁹⁶ I credit Ilya Somin for this formulation. *See generally* Somin, *supra* note 89.

⁹⁷ Solum, *supra* note 3, at 25.

⁹⁸ *See also* Josh Blackman, *Originalism at the Right Time?*, 90 TEX. L. REV. 269, 282 (2012) (“Such a theory unmoors originalism from things that are original by relying on occurrences that postdate the enactment of the law.”).

⁹⁹ Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13 (2006).

vociferously defends . . . [then] originalism itself ought to be rejected as unworkable and ultimately unwise,” in that “Justice Scalia is simply not an originalist.”¹⁰⁰

The challengers to the ACA were afflicted with a related strain of faint-heartedness as advocates. Barnett concedes that “[c]onstitutional conservatives don’t yearn for a bygone age of Supreme Court rulings.”¹⁰¹ In other words, they do not seek the wholesale repeal of six decades of precedents. It may just be that the end goal of enforcing the entire Constitution requires the concession—though not acquiescence—of a number of nonoriginalist precedents. This sounds, however, somewhat faint-hearted.

While professing a deeply-held belief in restoring the lost Constitution, the challengers were willing to rely on—but not acknowledge—nonoriginalist precedents, to achieve what is in effect an originalist goal.¹⁰² By focusing on this one law, the challengers were able to move the constitutional goalposts somewhat, to effect a change on the legal landscape, without a wholesale reversal of many twentieth century precedents.

Maybe we can call this approach “incremental originalism”—moving the Constitution towards original meaning without even arguing that non-originalist precedents should be overturned. Solum refers to this concession as “‘originalist second best’: given the practical impossibility of the first-best originalist interpretation of the Commerce Clause, the originalist might argue for doctrines that limits departures from original meaning to those required by practical necessity.”¹⁰³ Incremental originalism may be a pragmatic theory to reconcile constitutional originalism with faint-hearted originalism.

3. Advancing Originalism without Originalism

Perhaps this utilitarian calculus may indeed indirectly benefit originalism. By using non-originalist arguments to move the law toward originalist ends, the challengers ultimately strengthened our fidelity to the original meaning of the Constitution in a roundabout way. By garnering five votes to cabin the power of Congress, originalists accomplished just this task. In fact, the opinions of Chief Justice Roberts, and those of the joint dissenters, were replete with citations to founding-era sources, such as the *Federalist* and the ratification debates—this demonstrates originalism’s *gravitational pull*.¹⁰⁴

¹⁰⁰ *Id.*

¹⁰¹ Barnett, *supra* note 63.

¹⁰² See Solum, *supra* note 3.

¹⁰³ *Id.* at 25.

¹⁰⁴ I thank Randy Barnett for helping me develop this formulation. See <http://joshblackman.com/blog/2012/11/18/originalisms-gravitational-pull-towards-original-meaning/>. This topic will be discussed in Barnett’s Dunwoody Lecture at the University of Florida in March 2013.

III. ORIGINALISM'S GRAVITATIONAL PULL

A. Three Views of Federalism

In order to understand how a non-originalist argument advances originalism, we must first consider the nature of existing precedents. Randy Barnett explained that there are three views of federalism (and, I would add, relatedly, federalism's structural protection of individual liberty).¹⁰⁵

First, there is the pre-1937 view, where the Court, unbound by modern precedents, can rule in accordance with the original public meaning of the Constitution.¹⁰⁶ Second, there is the New Deal-era view of federalism, wherein Congress has a plenary police power to do whatever it deems necessary, and any law that fits within the New Deal's ambit will be upheld.¹⁰⁷ Third, there is the "New Federalism" of the Rehnquist and now Roberts Court.¹⁰⁸

This third strand can be best characterized as "this far, but no farther."¹⁰⁹ In other words, the New Federalism did not repudiate the New Deal view of federalism, nor did it effect a return to the pre-1937 view of federalism. Rather, it asserted that if the federal government seeks to assert a power that goes beyond what had already been upheld, it must justify that extension for an unprecedented assertion of power. Even under the New Federalism, the Court does not adjudge the constitutionality of the new law purely based on originalism, but instead based on what Chief Justice Rehnquist referred to as "first principles."¹¹⁰ It is noteworthy that Justice Thomas's originalist opinion in *Lopez* was *not* joined by Justice Scalia (same for *Morrison*).¹¹¹ This tripartite taxonomy helps to explain why originalism has, and has not been, used successfully in recent cases.

Perhaps the best examples in the first category are *District of Columbia v. Heller*¹¹² and *McDonald v. Chicago*.¹¹³ In these cases, the

See also STEPHEN GUEST, RONALD DWORKIN 89 (3d ed. 2013) (discussing how case precedents exert a degree of "gravitational force" of fairness that is considered when deciding later cases).

¹⁰⁵ Josh Blackman, *Recording: Video and Recap: Randy Barnett, Neil Katyal, & Paul Clement on Federalist Society Panel on Obamacare #FedSoc2012*, JOSH BLACKMAN'S BLOG (Nov. 17, 2012), <http://joshblackman.com/blog/2012/11/17/video-and-recap-randy-barnett-neil-katyal-paul-clement-on-federalist-society-panel-on-obamacare-fedsoc2012/>; see also *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (holding that "individual liberty secured by federalism is not simply derivative of the rights of the States").

¹⁰⁶ See *Carter v. Carter Coal*, 298 U.S. 238 (1936); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹⁰⁷ See *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁰⁸ See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁰⁹ See John Valauri, *Baffled by Inactivity: The Individual Mandate and the Commerce Power*, 10 GEO. J.L. & PUB. POL'Y 51, 63 (2012) (describing the "thus far method and justification of constitutional line drawing").

¹¹⁰ *Lopez*, 514 U.S. at 552.

¹¹¹ *Id.* at 584.

¹¹² *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹¹³ *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020 (2010).

Court was largely writing on a blank slate—precedential *open fields*, as opposed to deep in the *thicket*.¹¹⁴ The Court was in no way bound by any sort of New Deal compromise, as the precedential slate was clear. Thus, the Court was free to receive, and did apply originalist arguments. In fact, both the majority and dissent in *Heller* and *McDonald* advanced originalist arguments.¹¹⁵

For decades, until *Lopez* and *Morrison* and other Rehnquist-era precedents, the Supreme Court was steadfastly locked in the second zone of the New Deal vision of Federalism. To paraphrase Larry Solum, that gestalt had crystallized. However, originalism’s gravitational pull would crack that chrysalis.

B. Tugging Originalism, Wobbling Constitution

With my most sincere apologies to Judge Wilkinson, this *cosmic constitutional theory*¹¹⁶ (quite literally) is instructive. In our solar system, eight planets orbit around the Sun. The gravitational pull of our nearest star keeps the planets in orbit. But (to grossly oversimplify), gravity pulls both ways.¹¹⁷ Our planet exerts a pull, however small, on our star. To the extent that the planet exerts a pull on the star, the star will wobble a bit *towards* the planet.¹¹⁸ This principle of physics has enabled astronomers to locate planets outside of our solar system (extrasolar planets).¹¹⁹ Astronomers are only able to detect extrasolar planets—which are too small to be visible even with advanced telescopes—by measuring shifts in the movement of stars. If a star “wobbles,” that is a sign that a planet’s gravitational forces is pulling on it.

In our jurisprudential solar system, think of our star as our Constitution. Various planets that orbit the star represent different constitutional theories. The strength of the theory can be viewed as a

¹¹⁴ See Josh Blackman, *Originalism in Open Fields and In The Thickets*, JOSH BLACKMAN’S BLOG (Jan. 25, 2013), <http://joshblackman.com/blog/2013/01/25/originalism-in-open-fields-and-in-the-thickets/>.

¹¹⁵ Josh Blackman, Alan Gura & Ilya Shapiro, *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163 (2010); Josh Blackman, *Originalism for Dummies* 2–17 (Working Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1318387.

¹¹⁶ J. HARVIE WILKINSON, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012). My review of Judge Wilkinson’s book, titled *A Brief History of Judging: From the Big Bang to Cosmic Constitutional Theory*, is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179073 and <http://www.concurringopinions.com/archives/2013/01/book-review-a-brief-history-of-judging-from-the-big-bang-to-cosmic-constitutional-theory.html>.

¹¹⁷ Newton and Planetary Motion, UNIV. OF LA.-LINCOLN, http://astro.unl.edu/naap/pos/pos_background2.html (last visited Feb. 3, 2013).

¹¹⁸ Phil Plait, *A tiny wobble reveals a massive planet*, DISCOVER (May 29, 2009, 7:00 AM), <http://blogs.discovermagazine.com/badastronomy/2009/05/29/a-tiny-wobble-reveals-a-massive-planet/>.

¹¹⁹ *NASA’s Hubble Reveals a New Class of Extrasolar Planet*, HUBBLESITE (Feb. 21, 2012, 9:00 AM), <http://hubblesite.org/newscenter/archive/releases/2012/13/full/>; CAL. INST. OF TECHNOLOGY, *PlanetQuest: The Search for Another Earth*, NASA Jet Propulsion Laboratory, <http://planetquest.jpl.nasa.gov/> (last visited Feb. 3, 2013).

function of the gravitational pull the planet places on the star. If a theory has some pull on the star, even if the theory is not that close to the star itself, it still has some influence.

The tug of originalism, ever so slight, has been the force that has helped to break federalism free from its New Deal-imposed chrysalis.

Originalist scholarship began to emerge in the 1970s and 1980s that showed that the Court had departed from the original understanding of the Constitution in the New Deal cases, particularly with respect to federalism and structural protections of individual liberty. This scholarship exerted a pull on the Court's jurisprudence, ever so subtle at first, but soon enough the law, like a star being attracted to a planet, began to wobble.

Progressives observed this wobble, worried, and hoped that the Constitution would remain in the sole-orbit of the New Deal. Cases like *New York v. United States*,¹²⁰ *United States v. Lopez*,¹²¹ *Printz v. United States*,¹²² *United States v. Morrison*,¹²³ *Seminole Tribe v. Florida*¹²⁴ and others collectively dubbed part of the "New Federalism," have proven otherwise.

Importantly, none of these cases were argued in terms of restoring the original meaning of the Constitution. The advocates did not need to. It was sufficient for the Justices to know that errors were made, those errors would not be fixed—in Justice Scalia's words, they were "water over the dam."¹²⁵ However, with this understanding, the Court should *go no further* from the Constitution's original meaning without a sufficient justification from the government. In each case, the government failed to meet that burden, and the Court would go *this far, but no further*.

Consider *Gonzales v. Raich*,¹²⁶ where Randy Barnett—one of the most prominent originalists—did not advance an originalist argument. He did not ask the Court to overturn *Wickard* (other than in a perfunctory sentence in the brief).¹²⁷ Barnett's arguments accepted the legitimacy of *Wickard*, but asked the Court to go no further. But Barnett did not need to advance an originalist argument in *Raich*. I think it was not satisfactory to simply say that advancing an originalist argument would be a losing argument. The constitutional force of originalist scholarship documenting how the

¹²⁰ *New York v. United States*, 505 U.S. 144 (1992).

¹²¹ *United States v. Lopez*, 514 U.S. 549 (1995).

¹²² *Printz v. United States*, 521 U.S. 898 (1997).

¹²³ *United States v. Morrison*, 529 U.S. 598 (2000).

¹²⁴ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

¹²⁵ Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U.L. REV. 169, 191 (2012).

¹²⁶ *Gonzalez v. Raich*, 545 U.S. 1 (2005).

¹²⁷ Josh Blackman, *Randy Barnett's Changed Tune on Precedents and Unprecedentedness?*, JOSH BLACKMAN'S BLOG (MAY 29, 2012), <http://joshblackman.com/blog/2012/05/29/randy-barnetts-changed-tune-on-precedents-and-unprecedentedness/>.

New Deal Court got the Commerce Clause wrong exerted the necessary pull on the Court.

Raich, ultimately, did not turn out in Barnett's favor as the Justices saw that it did not go further than *Wickard*, so no further justification was necessary.¹²⁸ In other words, while *Lopez* and *Morrison* went too far, *Raich* was still in the New Deal settlement's inner-orbit. Perhaps one of the most misunderstood lessons after *Raich* was whether this case presented a repudiation of the New Federalism.¹²⁹ Viewed in terms of the "this far, but no farther" lens, the answer is no. The "New Federalism" did not go up in smoke with *Raich*.¹³⁰

C. "New Federalism" and *NFIB*

NFIB v. Sebelius continues the movement of the "New Federalism." Though the law ultimately survived, I would caution you not to get too hung up on counting the votes (the challengers got fourteen out of the necessary fifteen votes in the words of Paul Clement¹³¹), which very well may have changed. Rather than considering how it was ultimately decided, instead we should look at how the case was litigated over the course of two years from the district court all the way to the Supreme Court. Was this a case where the government was able to easily argue that the ACA was covered by the New Deal precedents like *Wickard*? Well they tried, but failed, as most judges, even those that ruled in favor of the government, acknowledged that this case was different, in at least one or more respects.¹³² Academics who stated that this was an open-and-shut case soon had to change their tune and refine their arguments when its failings were highlighted.

Instead, the government tried to justify why this law was constitutional, beyond simply citing *Wickard* and *Raich*. They did this by focusing on the importance of regulating the costs of the health care market, and stressing how Congress had the power to address this national problem.¹³³ In other words, the government's behavior acknowledged that this law was going beyond what Congress had done before, and the United States was attempting to justify this departure.

¹²⁸ *Id.*

¹²⁹ Indeed, there was a "generational" divide within the Solicitor General's office as to how to treat *Raich*, and whether it represented a repudiation of *Lopez* and *Morrison*. This divide is evident in the brief Acting Solicitor General Neal Katyal submitted to the 4th, 6th, and 11th Circuit Courts of Appeals, and the briefs Solicitor Donald Verrilli submitted to the D.C. Circuit Court of Appeals and the United States Supreme Court. The former position stressed that *Lopez* and *Morrison* were the outer bounds of the government's power, while the latter eschewed those limiting principles. For further discussions of the government's evolving view of the scope of the "New Federalism," see BLACKMAN, *supra* note 1.

¹³⁰ See CHEECH AND CHONG'S UP IN SMOKE (Paramount Pictures 1978).

¹³¹ Blackman, *supra* note 105.

¹³² See generally Nat. Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

¹³³ See *id.* at 2584–85.

This is the modus operandi for governmental litigation under the New Federalism: this far, but no farther, without a sufficient justification. As much as the government would hate to admit it, this case was not an open-and-shut case of simply applying existing precedents. The United States' unwillingness to identify a limiting principle in terms of *Lopez*, *Morrison*, and *Raich* is evidence of that fact. The government's decision not to rely on existing precedents was due to a fear that *Lopez* and *Morrison* proved "too capacious," and "wouldn't seem robust enough of a limiting principle under these circumstances." In other words, the Court's precedents did not resolve this matter, and the government assumed the burden of going further.¹³⁴ *NFIB* fits squarely (roundly?) within the third ring of federalism.

D. Originalism's Righting of Our Constitutional Lodestar

Because we are dealing with the "New Federalism," where unlike *Heller* or *McDonald*, it is infeasible to advance originalist arguments in the absence of countervailing precedents, in *NFIB*, originalism was only needed to have an indirect effect. It was clear that the ACA was not supported under the original understanding of the Commerce Clause. Barnett and others conceded this at the outset, but argued not in terms of originalism. Rather they argued why this case went further than the New Deal precedents (this is really what "unprecedented" means), and how the government failed to meet its burden of justification. But, the years of originalist scholarship demonstrating how the Commerce Clause was originally understood imposed the burden on the government to demonstrate this further departure from 1787.

In other words, the originalist scholarship placed a mild pull on the star, and created the sense that perhaps it should not be pulled in the other direction. The Chief Justice's vote was not the only thing wobbling in *NFIB*.

The potency of originalism cannot be measured simply by assessing whether originalist arguments are advanced, and ultimately accepted in any given case. Originalism's strength can be seen as a factor of what view of federalism and liberty the Court is laboring under. Originalism lays the intellectual groundwork for understanding how a particular law deviates from what has come before. Sensing how that theory pulls and tugs on our constitutional lodestar provides enough of an indication that an act of Congress has gone too far, and there needs to be an adequate justification.

So, in this sense, with the "New Federalism," originalism's gravitational pull tugs the Constitution towards original meaning, even if originalism is not directly advanced in a case. Originalism is the hidden force that causes other things to shift, even if we do not directly see why.

¹³⁴ BLACKMAN, *supra* note 1.

This is why “this far and no further” works, even when originalist arguments need not be made.

IV. POPULAR ORIGINALISM?

The unsettling of our constitutional gestalt between 2009 and 2012 may be attributed to two important, and interrelated factors inherent in the challenge to the Affordable Care Act: legal theories and the social movements supporting them. I do not assert that the popular support for the challenge solely determined the constitutionality of the mandate. Nor do I claim that the theories of the Commerce and Necessary and Proper Clauses were adequate to render the mandate unconstitutional.

Neither approach was by itself enough. Here, the whole was greater than the sum of its parts. The popular constitutionalist movement, along with the theoretical arguments were both necessary, but not sufficient conditions to advance the challenge. However both fronts, when engaged in tandem proved quite potent—particularly because the original understanding of the Constitution animated both avenues.

Originalism’s tug was felt in both aspects of this challenge. The legal arguments, though grounded in terms of the Court’s modern jurisprudence—acquiescing to many nonoriginalist precedents—gravitated towards an originalist understanding of enumerated powers, federalism, and individual liberty. Likewise, the social movement opposed to the law, embodied most prominently in the Tea Party, was organized *loosely* around an originalist vision of the Constitution and founding of the United States.¹³⁵ In this sense, the two-pronged approach of popular constitutionalism and legalism were in the orbit of originalism, even if originalism was not at the fore of the challenge. This approach is similar to what Rebecca Zietlow has referred to as *popular originalism*.¹³⁶

Indeed, some of the most successful constitutional movements in our nation harkened back to our foundational charter. The Abolitionist Movement, led prominently by Lysander Spooner, cited the Declaration of

¹³⁵ See Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. COLLOQUY 288, 298 (2011) (“The Tea Party movement is a surprising hybrid of these two positions, a sort of popular originalism, a popular movement that purports to advance originalist interpretations.”).

¹³⁶ See Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 487 (2012) (“Finally, and perhaps most importantly, originalism and popular constitutionalism can lead in very different directions when determining the relationship between democratic participation and constitutional development. The popular originalism of the Tea Party raises the issue of whether it is possible to be faithful to the original meaning of the Constitution while engaging in democratic politics. If not, popular originalism could paradoxically lead to a reduction of the role of democracy in constitutional interpretation.”); see also Lee Strang, *Originalism as Popular Constitutionalism?*, 87 NOTRE DAME L. REV. 253, 254 (“[T]here is no necessary analytical connection or disjunction between” originalism and popular constitutionalism); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 672 (2009); see generally Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism: Theoretical Possibilities and Practical Differences*, 53 ARIZ. L. REV. 827 (2011).

Independence's promise of equality, and the Constitution's omission of any reference to slavery to support the legal argument that slavery was unconstitutional.¹³⁷ Susan B. Anthony, leader of the Suffrage Movement, broadly read the 14th Amendment to guarantee equality to "all persons."¹³⁸

In many respects, *District of Columbia v. Heller* could be understood as a product of popular originalism.¹³⁹ The legal theories that supported the individual right to keep and bear arms were supported by originalism. Likewise, the social movement buttressing firearm ownership—led most prominently by the National Rifle Association (NRA)—waxed nostalgic for the liberties of the revolutionary-era minutemen (though the NRA tried repeatedly to sabotage the case).¹⁴⁰

What made the evolution of *NFIB v. Sebelius* so *unprecedented*, at least as far as constitutional litigation goes, is the seamless union of the theories and the movement at all levels of government and the populace. The political and social climate in which this challenge came of age created a veritable perfect storm for this popular originalist case. Learning how to replicate this dual-focused phenomenon may be the most enduring lesson for future constitutional challenges.

¹³⁷ Helen J. Knowles, *Seeing the Light: Lysander Spooner's Increasingly Popular Constitutionalism*, available at <http://hknowles.typepad.com/files/knowles---ls-and-popular-constitutionalism---law-and-history-review-final-draft-1.pdf>.

¹³⁸ Jose Felipe Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 34, 36 n.159 (2008).

¹³⁹ For a related, but different take on *Heller's* popular constitutionalism, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192–93 (2008) ("*Heller's* originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism. It situates originalism's claim to ground judicial decision making outside of politics in the constitutional politics of the late twentieth century, and demonstrates how *Heller* respects claims and compromises forged in social movement conflict over the right to bear arms in the decades after *Brown v. Board of Education*.").

¹⁴⁰ See generally ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2011); Josh Blackman, *Book Reviews: The Supreme Court's New Battlefield*, 90 TEX. L. REV. 1207 (2012) (reviewing Winkler's work).

Afterword: The Libertarian Middle Way

Randy E. Barnett*

Libertarians are often portrayed as radicals and, in a sense, this is accurate. The three senses of “radical” could each be said to characterize libertarianism: (1) “(especially of change or action) relating to or affecting the fundamental nature of something; far-reaching or thorough,” (2) “characterized by departure from tradition; innovative or progressive,” and (3) “of or relating to the root of something.”¹ Libertarians do make claims about the fundamental nature of things, and strive to be thorough in the application of their principles. Libertarian policies often are a departure from tradition, though as we shall see, libertarianism is deeply rooted in the classical liberal western tradition associated with the Enlightenment (and its roots could easily be traced still farther back in time).² Libertarians do strive to go to the root of how society should be structured, and they claim that root to be liberty.³

But, although libertarians sometimes appear to place a primacy on liberty in the political sphere, to the exclusion of other ends, this appearance is deceptive and easily mischaracterized. As I will explain in this essay, while some libertarians may promote liberty as an end in itself, for most, liberty is a means to other ends. Liberty enables the individual who is living in society with others to pursue happiness, or the good life. The good life is an ultimate end consisting of a myriad of subordinate ends, from love to charity to excellence in one’s intellectual and physical powers. While all humans share a nature in common with others—the nature that differentiates us from other creatures—no human’s potential is exactly the same as any other. And our common nature requires that our virtues be developed from our own choices, not imposed from above. As my teacher Henry Veatch instructed, living a good life is a do-it-yourself affair.⁴

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¹ *Radical Definition*, OXFORDDICTIONARIES.COM, http://oxforddictionaries.com/definition/american_english/radical (last visited Jan. 25, 2013).

² See DAVID BOAZ, *LIBERTARIANISM: A PRIMER* 27–52 (1997) (exploring the early history of libertarianism); GEORGE H. SMITH, *THE SYSTEM OF LIBERTY: THEMES IN THE HISTORY OF CLASSICAL LIBERALISM* (2013) (describing the basic tenets of classical liberalism).

³ On the origins of modern libertarianism, see BOAZ, *supra* note 2, at 52–58; BRIAN DOHERTY, *RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT passim* (2007).

⁴ See, e.g., HENRY B. VEATCH, *RATIONAL MAN: A MODERN INTERPRETATION OF ARISTOTELIAN ETHICS* (Liberty Fund, Inc. 2003) (1962); see also HENRY B. VEATCH, *FOR AN ONTOLOGY OF MORALS:*

So most libertarians hold the “radical” views they do for the very same types of reasons that others hold theirs: they believe that people will be better off in the highest sense if their liberties are acknowledged and respected. Libertarians would not bother to hold and advocate their views if they did not care about the well-being of others; they would just go about their business. Instead, they expend their scarce energy and resources learning which social structures work best, and which worse, and then advance their answers against the contending alternatives.

In this sense, then, libertarians are no more “radical” than others who advocate societal reform by identifying goals towards which they think social structures should strive. They just have a different view of how society should be structured so as to make people better off. But the point I want to make in this essay is that libertarianism is the *opposite* of radical, if by radical, you mean *extreme*. Libertarianism today is actually a moderate middle ground between two contemporary extremes: the social justice crowd on the Left, and the legal moralists on the Right (though both positions have much in common, there is no logical reason why one cannot hold both at the same time, as some do, and what is considered “left” and “right” will vary over time).

THE SOCIAL JUSTICE AND LEGAL MORALIST EXTREMES⁵

The social justice crowd holds some version of the view that everyone is entitled to some quantum of stuff; and if they do not have whatever it is that a particular social justice theorist thinks they ought to have, we need a coercive government with the power to take from those who have this stuff and give it to those who do not. This sometimes also entails that no one should have any, or too much, more stuff than anyone else. Whether the standard be absolute or comparative, however, social justice consists of everyone having whatever they are supposed to have according to the advocate of social justice.

There are at least three fundamental problems associated with this position. The first is that there is no single and salient answer to what everyone is supposed to have. Almost everyone who advocates for social justice has either a different view of this or, more commonly in my experience, no firm view they are willing to articulate. For example, try asking someone who says that “the rich” are not paying their “fair share” of

A CRITIQUE OF CONTEMPORARY ETHICAL THEORY (1971).

⁵ In this section, I offer some generalizations about the approaches I label as “social justice” and “legal moralism.” These descriptions are based on my experience as an academic listening to such views being offered by my colleagues, and in more popular discourse, and I do not offer any specific iterations by particular advocates. Instead, I paint with a broad brush. The persuasiveness of this critique will turn on whether the descriptions I offer seem to match the reader’s own exposure to these views. For example, if, unlike me, the reader is aware of specific structural proposals (apart from invocations of democracy) by advocates of these views to ensure that the correct conception of either social justice or legal moralism is initially adopted and maintained over time, then my claim that there are no such generally-accepted proposals will be undermined.

taxes, “OK, what *is* the “fair share?” You will either get a blank look or a single word answer: “more.” Whatever the “well-off” are now paying, they should be paying *more*. Whatever the less-well-off have, they should have *more*. How much more? Not saying. Just *more*.

This lack of specificity makes crafting actual policies extremely unstable. There is no core position around which any political consensus may be formed. There is no identifiable limit beyond which the policy of redistribution can be deemed unjust. Even if the existence of consensus is an unrealistic demand to make of social justice advocates, in its absence, whatever policy may actually be implemented will be politically unstable. Only the subgroup that favors the prevailing plan will be satisfied that social justice is being done. No matter how much redistribution of income or wealth is adopted, there will always be cries for more or different forms, which will greatly undermine the security of everyone’s possessions, and the ability to plan. Then there are the many who will persist in objecting to using force to achieve social justice. This is not a recipe for a peaceful and contented society.

A second problem is that achieving *any* particular pattern of distribution will require enormously intrusive government administrative mechanisms. Some subset of a society will need to be given special powers to collect the information of everyone’s wealth or income. This is not some accidental occurrence that can somehow be avoided; it is absolutely necessary to know from whom to take the wealth and to whom to give it according to the approved pattern of social justice. Collecting this information will necessarily be privacy invasive, and the existence of a database with such information can lead to the intimidation of dissidents.

Finally, a third problem was identified most prominently by Robert Nozick: whatever level of redistribution is adopted will require the continual use of force to achieve and maintain over time. The natural outcome of liberty will inevitably destroy whatever pattern of holdings is adopted as the socially “just” one.⁶ In addition to collecting the relevant information to discover how actual holdings differ from this pattern, some subset of persons will need to be empowered to use force to continually adjust holdings so they conform.

These three fundamental problems lead to the following mega-problem with social justice policies: Any institution powerful enough to gather this information and enforce the pattern will be highly intrusive and enormously dangerous. Not only will it have the exceptional power to violate the background rights that libertarians advocate as the prerequisite for pursuing happiness in a social context, it will also have the power to deviate from the pattern favored by any particular social justice advocate. These institutions of coercion may adopt a different vision of social

⁶ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 160–64 (1974) (describing how liberty upsets patterns).

justice—or other ends entirely, such as legal moralism—that will violate the conception of social justice favored by any given proponent. And when one acknowledges realistically that there is no uniquely salient pattern of distribution, the highly contested nature of social justice makes the potential for abuse even greater. Because one cannot prove one's conception is the right one, a perpetual struggle to control the institutions of coercion becomes inevitable, unless dissenters are somehow suppressed or eliminated, which historically is what happens to dissidents in societies committed to some conception of social justice.

It is not enough, therefore, for social justice advocates to identify a uniquely salient pattern of holdings as the socially just one, though this is essential. They must also identify the structural features of a legal system that can assure that the just pattern—and *only* the just pattern—will be adopted, and that the powers required to monitor and perpetuate the just pattern will not be captured and abused to the detriment of social justice. I am not even asking for an ironclad guarantee, but merely a reasonable assurance that some approximation of the right pattern of social justice will be adopted initially and maintained over time. In my experience, such assurances have not been forthcoming.

Legal moralists have a comparable set of problems. Indeed, we can simply port much of the above analysis of social justice over to legal moralism. Legal moralists focus their attention, not on how much stuff each person has, but on how each person ought to act when living his or her life. Each person should behave just the way legal moralists believe he or she ought to behave or be sanctioned by law. However, like social justice proponents, legal moralists disagree among themselves about the correct set of moral behaviors.

Of course, all legal moralists would maintain that acts like murder, rape, robbery, and theft, which violate the rights of others, should be banned—a belief they share in common with libertarians. For this reason, to preserve the distinction between libertarianism and legal moralism, it is important to distinguish between *justice*—which consists of prohibiting “wrongful” conduct that violates the rights of others—and *morality* or *ethics*, which evaluates the full gamut of human action to distinguish good from bad conduct.

All libertarians, and most everyone else, believe that force is justified to prohibit unjust or wrongful behavior; but legal moralists would extend the use of force to reach some or all immoral or unethical conduct as well. But while the consensus that murder, rape, robbery and theft are wrongful and may be legally forbidden is widespread—indeed universal—there is no comparable consensus about how all people ought to act, or which moral code should be imposed on a society.

Assuming some uniquely salient moral code was identified, however, like social justice advocates, legal moralists require a powerful and

intrusive set of legal institutions to gather information on how everyone is behaving in public or private to detect whether they are behaving morally or not. Any institution that is powerful enough to accomplish this would be susceptible to enormous abuse. And this potential for abuse is even greater than it would be if a uniquely salient moral code were capable of being identified, which is a prerequisite for confining those who hold power to those identifiable limits.

IS DEMOCRACY THE ANSWER?

When confronted by these inherent and fundamental problems with their positions, both social justice advocates and legal moralists tend to offer the same response: democracy. We just let people vote on the correct pattern of distribution, the correct moral code, or both. But this is simply avoiding the issue by creating a “black box” solution. Although majority rule might arrive at *some* outcome, given the contested nature of both concepts, it is not likely to be a stable outcome as winners must continually fend off losers. And this solution assumes, of course, that democracy is maintained after the initial vote, which is not typically the case in countries pursuing either a social justice or legal moralist agenda.

More fundamentally, how exactly is majority rule supposed to arrive at policies of either social justice or morality that are *correct* according to the theories of social justice or morality advanced by any particular proponent? What sorts of arguments about the right outcome could political advocates even make? What would a legislative debate about the right distribution or correct morality look like beyond a mere assertion of one’s conclusion in the form of one’s vote? In short, what exactly makes the majority’s vote (on any given day) the *right* outcome from the standpoint of either social justice or morality?

Yet, if there is no assurance that a majority of a group of individuals who are denominated “legislators” or “representatives,” or a majority of the body politic voting in a referendum, will vote for the right outcome, then how exactly is democracy the solution to the problem of the radical indeterminacy of the social justice or legal moralist perspectives? Far from being a solution to the problem of arriving at the right conception of social justice or legal morality, the appeal to democracy either disguises or merely restates the problem and then sweeps it under the rug.

In the end, both social justice and legal moralism assume a “God’s eye view” of either how all physical resources in a given society should be allocated or how all persons should behave in their personal and public lives. Indeed, one could easily conclude that social justice proponents and legal moralists are simply substituting a secular government for an interventionist God to create their own heaven on earth. But any such project is simply beyond the capacity of the actual human beings we must rely upon to devise and implement such a scheme. Hypothesizing about the demos does not solve, or even seriously address, this problem.

Moreover, because both social justice and legal moralist visions are *comprehensive* approaches to social arrangements, any preferred position necessarily implies the rejection of all competing positions. To adopt any one pattern of distribution is to reject all other contending patterns; to adopt any one moral code is to reject all alternative moral codes. Not only do the comprehensive natures of both approaches make them inherently unstable—as those who favor alternative conceptions continue to agitate for their view of “justice” or “morality”—but this very instability has historically engendered highly coercive and often brutal measures to suppress dissent from the prevailing position. Whether enforced brutally or not, however, every loser of this perpetual struggle must be forced to live their life in a regime that he or she takes to be unjust or immoral. The inevitable result of this dynamic is a Hobbesian war of all against all.

THE ROOTS OF CLASSICAL LIBERALISM IN RELIGIOUS TOLERATION

While I wish I could claim that any of the foregoing analysis is new or original, the recognition of these problems is as old as liberalism itself. Indeed, the origin of classical liberalism, which begat modern libertarianism, can be traced to the devastating consequences of religious wars during which comprehensive religious views fought violently against each other. And why should contending religions not take up arms against their rivals? If eternal salvation is at stake, and salvation requires living in a society in which others all believe accordingly, why should religion not be fought over to the death? Nor has this stance been eradicated from modernity. We see it today in the radical Islamist jihadist movement that is gaining steam in a large part of the world, both in its deadliest form and in its drive to adopt Sharia law in “democratic” societies that is then coercively imposed on believers and nonbelievers alike.

The classical liberal solution to the problem of religious wars was religious toleration: the view that matters of conscience were matters of individual choice.⁷ Notwithstanding that one’s eternal soul might be at stake, these proto-liberals contended that it was better for individuals to be free to choose their religions than to adopt a comprehensive one-religion-for-all policy that led to perpetual and deadly domestic and foreign strife.

Those favoring toleration need not, and did not, deny that one religion was right and the rest were wrong; in other words, they need not adopt the stance of religious relativism. Instead, they needed only to recognize that the determination of which religion was the true one was sufficiently contestable, and inevitably contested, as to make the imposition of one religion on all a highly unstable and destructive approach to social ordering. Even from the point of view of religious truth, while the best outcome might be to have one’s own true religion imposed on others, the

⁷ See, e.g., JOHN LOCKE, A LETTER CONCERNING TOLERATION 18 (Prentice-Hall, Inc. 1950) (1689) (advocating for religious toleration).

worst outcome would be to have another's false religion imposed on you. Everyone's second-best outcome is to be free to exercise his or her own religion without imposing on others, which makes this policy the most stable and conducive to social peace.

For this reason, rather than have one religion imposed coercively by a monarch, the liberal solution to religious strife was for each individual to be considered the King or sovereign of his own conscience. Each individual was to live side-by-side with other individual sovereigns of their own conscience, the way monarchs of countries under the Treaty of Westphalia were supposed to live in peace with their neighbors and to refrain from forcibly interfering with the internal affairs of other sovereign monarchs.

For Westphalian monarchical sovereignty to work, however, the geographical borders within which each monarch was free to determine internal domestic policies without outside interference must be identifiable and established. By the same token, the individual sovereignty entailed by religious toleration requires the identification and establishment of boundaries within which individuals have the jurisdiction to choose how to worship. While matters of conscience lie entirely within one's mind, the practice or free exercise of religion requires action, and action requires the use of physical resources.

What physical resources are properly within the boundaries of individual sovereigns? The liberal answer to this jurisdictional question was the concept of private property: property in one's own person, and also in external possessions. As Locke put it, the commonwealth is "a society of men constituted only for the procuring, preserving, and advancing their own civil interests."⁸ These interests are "life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like."⁹

It is the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people in general, and to every one of his subjects in particular, the just possession of these things belonging to this life. If anyone presume to violate the laws of public justice and equity, established for the preservation of those things, his presumption is to be checked by the fear of punishment consisting of the deprivation or diminution of those civil interests or goods which otherwise he might and ought to enjoy. But seeing no man does willingly suffer himself to be punished by the deprivation of any part of his goods, and much less of his liberty or life, therefore is the magistrate armed with the force and strength of all his subjects, in order to the punishment of those that violate any other man's rights.¹⁰

With this conception of the proper scope of civil government, Locke concluded that, because "the whole jurisdiction of the magistrate reaches

⁸ *Id.* at 17.

⁹ *Id.*

¹⁰ *Id.*

only to these civil concernments . . . all civil power, right and dominion is bounded and confined to the only care of promoting these things” and “it neither can nor ought in any manner to be extended to the salvation of souls.”¹¹

Nor could the power to impose religious belief “be vested in the magistrate by the consent of the people.”¹² This is because some rights are inalienable, meaning they cannot be surrendered to government even by consent.

[N]o man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. For no man can, if he would, conform his faith to the dictates of another. All the life and power of true religion consist in the inward and full persuasion of the mind; and faith is not faith without believing.¹³

In this way, individual sovereignty with respect to matters of conscience took priority over any collective consent.

In sum, the liberal solution to the Hobbesian war of all-against-all created by comprehensive religious claims was not to posit a sovereign monarch or Leviathan to settle on the true religion for all—indeed that was the *source* of religious wars—but instead to shift the conception of sovereignty over religious belief and exercise from the monarch to the people, with “the people” referring to the plural of individual persons, each with his or her own conscience. As explained by Locke, “one man does not violate the right of another by his erroneous opinions and undue manner of worship, nor is his perdition any prejudice to another man’s affairs, therefore, the care of each man’s salvation belongs only to himself.”¹⁴

Building upon this insight, the Lockean jurisdictional solution to the social strife created by comprehensive religious claims came gradually to be adopted to handle lesser conflicts over mere moral disagreements. Just as the jurisdictions of sovereign monarchs are limited to their respective geographical territories, the jurisdiction of sovereign individuals is limited to their bodies and their justly acquired physical possessions. As in international relations, force is justified to keep everyone within their boundaries but, so long as they are operating within their respective jurisdictions and not invading the rightful jurisdiction or domains of others, individuals should be free to make their own moral choices. Just like the King.

The more decisions that are viewed as matters of individual sovereignty, the more “libertarian” this approach becomes. Indeed, modern libertarianism can be viewed as the push to see how many types of decisions can feasibly be delegated to the realm of individual sovereignty.

¹¹ *Id.*

¹² *Id.* at 18.

¹³ *Id.*

¹⁴ *Id.* at 46.

The debate between libertarians and others, and among libertarians themselves, is precisely about how far this process of delegation can be taken.

It is inaccurate to characterize this argument for delegation as premised on some “atomistic individualism” that assumes that each man is an island independent of others in society, any more than did Westphalian monarchical sovereignty assume atomistic nation states. To the contrary, what is sought are the prerequisites of peaceful social coexistence in a world in which each person’s actions are very likely to affect others. As with conflicts between contending nation states that are resolved by recognizing political sovereignty, the problems of social conflict and interdependence are solved, rather than denied, by the recognition of individual sovereignty.

True, historically, in the United States as elsewhere, whole categories of persons were denied the individual sovereignty that this approach favors. African slaves were under the jurisdiction of their masters, as were white indentured servants from Europe. Daughters were deemed to be under the jurisdiction of their fathers and wives of their husbands, with legally independent single adult women considered anomalies. This did not entail that the individual sovereignty approach was wrong, but merely that the delegation of jurisdiction was incomplete. Having devolved from the paternal King to the slaveholder or to the father of the family, it needed to go still farther to recognize the sovereignty of each adult, regardless of the irrelevant characteristics of race or sex.

As we know, the partial delegation that existed at the time of the Founding of the United States was merely a way station to the completely egalitarian devolution of jurisdiction to the individual. Indeed, the liberal case for the “natural rights” of private property and freedom of contract provided a potent argument against both slavery and legal paternalism.¹⁵

This is not to say that no person today remains under the jurisdiction of others. Children are under the jurisdiction of their guardians, and the mentally incompetent can be the wards of others as well. But these exceptions are fully consistent with the fundamental premise that all *competent* persons *sui juris* are the proper rulers of themselves. Indeed, any scheme by which the properly defined jurisdiction of fully competent persons is overridden by the will of others treats sovereign individuals as though they were children or mentally infirm (or women under coverture or slaves). And any scheme that denies or disparages individual sovereignty also presupposes that whoever is given the authority to rule individual adults—whether a monarch or some faction of society—is superior in some manner to the individual *sui juris*, a claim that begins to replicate the

¹⁵ See Randy E. Barnett, *Whence Comes Section One?: The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011) (discussing abolitionist constitutionalism).

dynamic that led to the religious wars, and was used to justify slavery and the subordination of women.

THE MODESTY OF MODERN LIBERTARIANISM

It should now be clear that modern libertarianism merely takes individual sovereignty seriously, and tries to push this concept as far as it can feasibly go. For libertarians, as for Locke, “private property” is the concept that defines the proper jurisdiction of each sovereign person who is *sui juris* or competent to manage his or her own affairs. And freedom of contract governs the transfers of these property rights from one person to another. The proposition that one should not have one’s justly acquired property taken by others without one’s consent is inimical to schemes of social justice.

“Liberty” for a libertarian, then, is not the Hobbesian freedom to do whatever you will. Instead, it is the Lockean freedom to do whatever you will *with what is yours*. There is simply no libertarianism without jurisdictional limits on freedom of action; the concept of property defines these limits and is what differentiates liberty from license. Libertarianism is distinctive in its attempt to limit coercion to the protection of these jurisdictional boundaries to the greatest practicable extent. Forcible interference by some with the liberty that is within the sovereign jurisdiction of others is as offensive to libertarianism as the unprovoked forcible interference of one national sovereign within the boundaries of another is offensive to the prevailing view of international relations.

However “radical” this might sound in the abstract, it is actually a far more modest approach than either social justice or legal moralism. Although the line between “mine and thine” must be drawn, doing so is far more practical than specifying the morality of the entirety of human action. Although rules and principles governing the just acquisition, use, and transfer of property must be identified, this is a far more manageable and less divisive and dangerous a task than continually readjusting the distribution of holdings, suppressing the acquisition of property altogether, or identifying a stable principle of “fair share.”

Moreover, because proponents of social justice and legal moralism typically propose superimposing their schemes onto existing structures of private property and freedom of contract, rather than supplanting them altogether, these stances are necessarily more ambitious than simply limiting legal coercion to the libertarian core that must still be ascertained and enforced. Put another way, no matter how challenging the task of properly defining the proper jurisdictions of individual sovereigns may be, *adding* considerations of social justice, legal moralism, or both, to this task is that much more challenging. In this sense, libertarianism is necessarily more modest than either social justice or legal moralism.

In contrast with the tyrannies we have witnessed in the social justice of the U.S.S.R. and the legal moralism of the Muslim world, the most objectionable version of a libertarian political system we have experienced, in which the sovereignty of a portion of the citizenry was denied, evolved in a more, rather than less, egalitarian direction. The recognition of individual sovereignty creates a virtuous circle that tends to eliminate whatever irrelevant legal discrimination was inherited from a more ancient and illiberal legal tradition.

DO SOCIAL DEMOCRACIES PROVIDE A BETTER MIDDLE WAY?

What about the social democracies of Western Europe or, to a lesser but increasing extent, the now-expanding social welfare state in the United States? Do not these political systems combine the individual sovereignty of private property with the redistribution of social justice, as well as some degree of legal moralism? Do these not represent the true “middle ground”—or what was once called the Third Way—between an unconstrained system of either social justice or legal moralism on the one hand and the unconstrained liberty of libertarianism on the other? If these types of political arrangements are feasible, does this not undermine the libertarian objection to social justice, legal moralism, or both?

In some ways, the answer to this last question is “yes.” Superimposing a degree of wealth or income redistribution, or morals legislation, on a robust base of private property is infinitely preferable to the radical, single-minded pursuit of either social justice or legal moralism. But this response to the case for libertarianism is really a concession, rather than a genuine objection. For it concedes that libertarian principles of property provide a necessary baseline upon which some less-than-total scheme of redistribution or moral regulation can be superimposed, notwithstanding that the existence of this baseline is often contested by intellectuals on the Left.

Moreover, the challenge posed to libertarianism by social democracy assumes its feasibility. But what if such an approach is infeasible? What if superimposing social justice or legal moralism on the individual sovereignty defined by private property and freedom of contract is ultimately unstable? Why might this be?

Perhaps institutions with sufficient power to effectuate social justice or to impose morality will inevitably be captured by the more powerful forces in society and put to other ends. Perhaps they will inevitably be used for a purpose that does not conform to the proper conception of social justice or morality. After all, as noted above, what realistic assurances have we ever been offered that such power can be limited to whatever theory is being advanced to justify its creation?

What happens in a social democracy when 51% of the voters discover it can vote to “redistribute” the wealth of—or impose their moral vision

upon—the other 49%? Or more likely, what happens when political entrepreneurs inspire, say, 80% of the electorate to confiscate the income or wealth of the 20%? When this happens, how will social democracy preserve the individual sovereignty that the Third Way approach concedes is needed as a baseline? What realistic mechanisms are proposed by advocates of the Third Way superimposition of social justice or legal moralism on the libertarian rights of property and contract to ensure against this outcome?

I have been teaching law and writing about liberty for over thirty years now, and I have yet to hear any such proposal from any of my colleagues. It would be genuinely enlightening to hear how advocates of supplanting or overriding the libertarian rights that define individual sovereignty propose to limit the coercive powers they seek to the particular vision of social justice or morality that they offer to justify this claim of power. It would be equally enlightening to hear proponents of social democracy tell us how it will not eventually devour the individual rights that provide the foundation for their additional schemes of redistribution or morals regulation. Is this not a reasonable request?

LIBERTARIAN APPROACHES TO LIMITING GOVERNMENTAL POWER

In contrast, libertarians do offer a solution or two to the problem of limiting government power to the protection of individual sovereignty. Like their classical liberal ancestors, most modern libertarians favor constitutionally-limited government, in which power is structurally divided among different branches of a federal or national government, and between the limited powers of the national government and the broader police powers of states and municipalities.

These libertarians also typically favor the enforcement of these limits by what Madison called, “independent tribunals of justice.” In particular, they believe that, although state legislatures have a general police power to prohibit the actions of some individuals that violate the sovereignty of others, when legislatures wish instead to “regulate” the otherwise rightful exercise of liberty by sovereign individuals, these regulations must be justified as reasonably necessary to protect the rights, health, and safety of other sovereign individuals. When disputes about whether such regulations are reasonably necessary to protect the right of others arise between the individuals who comprise a “legislature” and the sovereign individuals whose actions are the subject of these regulations—that is between the agents and their principals—the benefit of the doubt ought to go to the principals rather than those who are supposed to be their agents.

In short, these libertarians favor something very much like, if not identical to, the original meaning of the Constitution of the United States—the *whole* Constitution, including those parts that protect the unenumerated rights retained by the people and the privileges or immunities of citizens of the United States. In this, however, they are today opposed to their left by

“progressives” who wish to achieve their vision of social justice at the national level by “interpreting” federal power broadly enough to address any problem they deem to be “national” in scope—which is to say every problem.

To their right, libertarians are also opposed by social conservatives some of whom maintain that majorities in state legislatures have the right to enact their moral preferences into law, unconstrained by any judicially-enforced limits on their ability to restrict the liberty of the sovereign individual citizen.¹⁶ These conservatives deny that judges have the power to protect the liberty of the individual by ensuring that legislatures are truly exercising a proper conception of their textually unenumerated police power. Since the Constitution contains few express limitations on the legislative power of states—and what limits it does provide have largely been interpreted out of existence—these conservatives contend that states have a virtually unlimited power to legislate morality.

Put more positively, libertarians side with progressives against the legal moralism of the social conservatives, and with the conservatives against the social justice agenda of progressives. In this regard, they can be viewed as an independent or “swing” vote between the left and right. Indeed, many progressives would prefer living in a libertarian world to having the moral code of social conservatives imposed upon them. And many social conservatives would prefer the libertarian world in which they are left alone to practice their religion than to have the progressive’s vision of social justice (or secular morality) imposed upon them. Like religious toleration, for many who favor a comprehensive social system, the libertarian vision is their second-best option, with the first best being their own comprehensive vision of social justice or morality being imposed on everyone, and their last best being their opponent’s comprehensive vision imposed upon them.

But libertarians have not one but two responses to how the coercive power needed for individual sovereignty can be confined to its only proper function of protecting individual sovereignty. Having observed the continued decline of respect for the limits on state and federal power contained in the U.S. Constitution, some libertarians favor a more radical alternative. They would see law enforcement and adjudication be handled competitively rather than by monopolistic government agencies.¹⁷ They favor consumer choice and competition as the best check on the abuse of the powers of law enforcement.¹⁸ While this alternative is highly controversial, even among libertarians, it should at least be mentioned in a

¹⁶ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 124 (1990) (“Moral outrage is a sufficient ground for prohibitory legislation.”).

¹⁷ See, e.g., MURRAY N. ROTHBARD, *FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO* 215–41 (rev. ed. 1996) (discussing police protection and judicial services provided by free market).

¹⁸ See, e.g., RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 257–83 (1998) (discussing feasibility of a polycentric legal order).

discussion of institutional mechanisms favored by libertarians to keep the use of power within the boundaries that libertarians, along with most others, take to be just.

In contrast with advocates of social justice or legal moralism, then, libertarians and their classical liberal forbearers have paid considerable attention to how government power can be limited to the protection of the rights defining individual sovereignty that libertarians favor. However persuasive their responses to this problem may be, they cannot be accused of ignoring it or treating it with less than the seriousness this problem deserves.

LIBERTARIANISM AND LAW

With all this as background, we are in a better position to understand the contribution that libertarianism can make to law. The first contribution is to identify the proper boundaries of individual sovereignty. Historically, this has been done by the private law subjects of property, contract, and torts. At the risk of oversimplification, the law of property governs the acquisition of land and possessions, the law of contract governs the consensual transfer of entitlements from one person to another, and the law of torts defines the proper use of property. For better or worse, these common-law subjects have historically provided the positive law that identifies the scope of individual sovereignty. Although the existing law of these subjects may not be perfectly libertarian, they have nevertheless been libertarian to a remarkable degree.

Libertarianism is an abstract theory, in the sense that the principles of private property and freedom of contract that define liberty are derived from an abstract description of human beings and the social context in which they exist. By this I mean that libertarianism is essentially egalitarian insofar as it is based on those abstract qualities that all humans share in common with each other, rather than on the particularities that differentiate one person from another. Because these principles are derived from an abstracted understanding of human beings, however, libertarian principles are themselves highly abstract—often too abstract to handle anything but the most basic social conflicts. Murder, rape, robbery, theft and the like are unjust and to be legally prohibited. But one learns quickly in law school and in practice that the particularities of human social interaction are often far too complex to be regulated by these abstract principles of justice alone.

For this reason, we not only need an abstract and often underdeterminate conception of justice, but also a rule of *law*. We need largely conventional rules and principles to apply to the particularities of the actual conflicts that arise in complex societies. While these legal rules and principles are constrained by the abstract principles of justice, they cannot be logically derived from them.¹⁹

¹⁹ See *id.* at 108–14 (discussing the underdeterminacy of abstract principles of justice).

Libertarian legal theorists therefore operate within the private law pretty much the same way other legal theorists do. Their distinctive perspective is the stress they place on the overriding social importance of defining the individual's sovereignty by means of property, contract, and tort, preserving the discretion of individual choice within the boundaries that these concepts provide, and resisting the effort to override these concepts with claims based on social justice or legal moralism.

So, for example, my contracts scholarship has stressed the role of the consent of the parties, as opposed to using contract law to effectuate other social ends.²⁰ As someone who has participated in the debate over the proper basis of contractual obligation for several decades, I can testify that the libertarian position is a meaningful alternative to those that would have consent discounted, or disregarded altogether, in favor of other objectives, be they social justice, morality, or efficiency.

Libertarian legal theorists typically conceive the protection of these, the basic private law rights of individual sovereignty, as the ultimate justification for the public law. Conceptually they advance the proposition that “first comes rights, and then comes government”—or as the Declaration of Independence affirmed, all men are equally endowed “with certain unalienable Rights” and that “to secure these rights, Governments are instituted among Men.”²¹

As discussed above, they view a written constitution as one means, among others, of confining the coercive power of government to its proper function of protecting the individual's private law rights. To this end, some libertarians defend the importance of a written constitution that is enforced by an independent judiciary.²² They evaluate the legitimacy of any constitution, including the Constitution of the United States, by this criterion: how well does it protect the private rights of all persons in the jurisdiction in which it governs?²³ Many, if not most, libertarians believe that if the original meaning of the U.S. Constitution—as amended to extend the equal protection of the laws to women and those who had previously been enslaved—was actually followed, it would largely keep government within its proper powers.

²⁰ See, e.g., Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (discussing consent theory of contract). For a later and more developed summary, see RANDY E. BARNETT, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CONTRACTS* (2010).

²¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Of course, the full quote reads as follows:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed

²² See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 100–12 (2004) (discussing the importance of a written constitution).

²³ See, e.g., *id.* at 32–52 (discussing constitutional legitimacy without consent).

THE LIBERTARIAN FOCUS ON MEANS RATHER THAN ENDS

In the end, there emerges a fundamental contrast between social justice and legal moralism on the one hand and libertarianism on the other: Advocates of social justice and legal moralism are concerned with “ends” to the exclusion of any serious consideration of means. *All* persons should have *X* amount of stuff. *All* persons should act, or refrain from acting, in certain ways. In addition to the failure to reach anything close to consensus—even among themselves—on what these ends should be, what is principally lacking is any serious attention to (a) the means by which one’s favored end will be achieved, and (b) how the coercive institutions will be limited to just these correct ends without being perverted to pursue other ends that are deemed by any particular social justice or legal moralist to be unjust and immoral.

In contrast, libertarianism is concerned almost exclusively with means rather than with ends. Even the fundamental rights of private property and freedom of contract that principally define liberty are conceived by libertarians as means to the pursuit of happiness while living in society with others, rather than as ends in themselves. To be sure, the protection of these rights is treated as the end *of government*, but only because government itself is perceived by many libertarians as a regrettably necessary means of protecting property and contract.

Of course, libertarians are seriously concerned with one end: the pursuit of the good life, or what the Declaration referred to as “the pursuit of happiness.” It is this end that motivates their commitment to such means as private rights and constitutionally-limited government. But, as was described above, most libertarians believe that liberty is necessary precisely because the end of happiness will vary with the uniquely varying circumstances, goals and aspirations of particular individuals, and because living the good life is a do-it-yourself affair. Therefore, just as something like the private law concepts of property, contract and torts are an inescapable means to the pursuit of happiness in a social context, the search for effective means of limiting the exercise of governmental power to the protection of just these private law rights is the proper subject of the public law.

Imprecations to the contrary notwithstanding, libertarians are far more concerned with the actual real-world practicalities of using legal coercion than those who only focus on the ends of social justice or legal moralism. Real world experience, libertarians maintain, has demonstrated that governmental implementation of either social justice or legal moralism has led to dystopias almost beyond our ability to imagine. In contrast, even an imperfect commitment to private individual rights and limited constitutional government has led to the greatest prosperity in human history.

Of course, none of this is easy to prove. If it were, libertarianism would have either vanquished its intellectual foes or been defeated by them. But consider what may be the ultimate empirical proof of the superiority of even imperfectly adhering to libertarian principles: Which way do the refugees run? Which countries need to restrict the exit of their citizens? Were people clamoring to get into or out of the U.S.S.R.? Are they lined up to enter the Mullocracy of Iran? To the extent they can, people vote with their feet for the increased prosperity and choice made possible by the more robust protection of property as compared with other governmental systems. Persons who are capable of relocating tend to leave societies preoccupied by the pursuit of social justice or legal morality, and beat a path to the door of societies who pursue some semblance of the libertarian middle way. As empirical proofs go, this one is probably as good as any other.

Given that there is no truly libertarian society, this is a comparative matter. Which societies better protect the rights of property and contract than others? But, in the end, this too is why libertarianism is modest. Libertarians formulate and advance their models of complete liberty as a means of incrementally inching existing societies in a more libertarian direction. Libertarians believe that good things will happen as this progress is made, and if we ever reach a point where the protection of property rights is having a counterproductive effect, we can stop there. In the meantime, we have a long way to go before we reach that point. Or so says the libertarian middle way.

ROBO SIGNERS: The Legal Quagmire of Invalid Residential Foreclosure Proceedings and the Resultant Potential Impact upon Stakeholders

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INTRODUCTION

Reports began erupting through the press during the latter half of 2010 exposing a potentially virulent financial mishap in the banking and mortgage related industry wherein some of the largest mortgage companies in this country used the same document processor to process foreclosure paperwork.¹ This document processor, Ally Financial, admitted to

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¹ See Ariana Eunjung Cha, *Ally Financial Legal Issue with Foreclosures May Affect Other Mortgage Companies*, WASH. POST (Sept. 22, 2010, 5:37 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/21/>

AR2010092105872.html (asserting that because some of the largest mortgage companies used the same document processor as Ally Financial, they may have some of the same document processing problems as Ally Financial).

processing (or signing off on) the foreclosure paperwork without reading the documents.² Indeed, Ally Financial had to stop evictions of homeowners in a number of states.³ It was reported at that time that many hundreds of other companies, including Fannie Mae and Freddie Mac, also used Ally Financial to service their loans.⁴ In addition to Ally Financial, there have been revelations involving other document processors acting as what have been termed “robo-signers.”⁵

A *New York Times* article dated February 4, 2012, entitled: “A Mortgage Tornado Warning, Unheeded,”⁶ brought to light an internal confidential Fannie Mae document forewarning of the practice of “robosigning.” This report was in direct response to a personal investigation conducted by an individual who lost his family home to foreclosure.

[A]fter losing a family home to foreclosure, under what he thought were fishy circumstances, Mr. Lavallo, founder of a consulting firm called the Sports Marketing Group, began a new life as a mortgage sleuth. In 2003, when home prices were flying high, he compiled a dossier of improprieties on one of the giants of the business, Fannie Mae.

In hindsight, what he found looks like a blueprint of today’s foreclosure crisis. Even then, Mr. Lavallo discovered, some loan-servicing companies that worked for Fannie Mae routinely filed false foreclosure documents, not unlike the fraudulent paperwork that has since made “robo-signing” a household term. Even then, he found, the nation’s electronic mortgage registry was playing fast and loose with the law—something that courts have belatedly recognized, too.

You might wonder why Mr. Lavallo didn’t speak up. But he did. For two years, he corresponded with Fannie Mae executives and lawyers. Fannie Mae later hired a Washington law firm to investigate his claims. In May 2006, that firm, using some of Mr. Lavallo’s research, issued a confidential, 147-page report

² See Deposition of Jeffrey Stephan at 5, 7, 10, GMAC Mortgage, L.L.C. v. Neu, No. 50-2008-CA-040805XXXX-MB (Fla. Cir. Ct. Dec. 10, 2009), available at <http://www.tinyurl.com/yz6jgsj> (showing that Jeffrey Stephan admitted to signing approximately 10,000 foreclosure documents per month under oath that he had personally reviewed the foreclosure documents when he had, in fact, not personally reviewed the foreclosure documents).

³ See Cha, *supra* note 1 (asserting that Ally Financial halted evictions of mortgagors in twenty-three states in order to investigate possible document signing irregularities).

⁴ See *id.* (asserting that hundreds of mortgage companies, including some of the largest, used the same document processing service as Ally).

⁵ See Deposition of Beth Ann Cottrell at 10–11, Chase Home Finance, L.L.C. v. Koren, No. 50-2008-CA-016857 (Fla. Cir. Ct. May 17, 2010), available at <http://www.propublica.org/documents/item/may-2010-deposition-by-beth-ann-cottrell-of-chase-home-finance> (showing that Beth Ann Cottrell admitted that she and others signed foreclosure documents attesting to personal knowledge of said document closures); see also Marian Wang, *GMAC’s ‘Robo-Signers’ Draw Concerns About Faulty Process, Mistaken Foreclosures*, PRO PUBLICA (Sept. 29, 2010, 12:49 PM), <http://www.propublica.org/blog/item/gmacs-robo-signers-draw-concerns-about-faulty-process-mistaken-foreclosures>.

⁶ Gretchen Morgenson, *A Mortgage Tornado Warning, Unheeded*, N.Y. TIMES, Feb. 5, 2012, at BU1, available at <http://www.nytimes.com/2012/02/05/business/mortgage-tornado-warning-unheeded.html>.

corroborating many of his findings.

And there, apparently, is where it ended. There is little evidence that Fannie Mae's management or board ever took serious action.⁷

"Robo-signing" has become a term of art. One court has defined robo-signing as "complet[ing] affidavits and other essential foreclosure documents without personal knowledge of the documents' veracity and without verification of the documents' contents."⁸ Attorneys General in all fifty states investigated these improper foreclosure practices, and entered into a settlement agreement with the five largest banks in America that is estimated to be worth between twenty-six and thirty-nine billion dollars.⁹ Further, in light of these practices, courts have gone to the extent of dismissing foreclosure cases.¹⁰ For a time, various financial institutions had even placed a moratorium on foreclosures.¹¹ However, these moratoria were gradually lifted.¹² A report of the Special Master regarding Bank of America filed on August 15, 2011 concluded with a determination that:

[Bank of America Home Loans] has shown, on a Prima Facie basis, that it has processes and procedures in place which, if adhered to, will ensure that the information set forth in affidavits or certifications submitted in foreclosure proceedings is . . . properly executed and is based upon knowledge gained through a personal review of relevant records which were made in the regular course of business as part of BAC Servicing's regular practice to make such records.¹³

⁷ *Id.*

⁸ *Beals v. Bank of America, N.A.*, No. 10-5427, 2011 WL 5415174, at *3 (D.N.J. Nov. 4, 2011).

⁹ This \$26 to \$39 billion settlement is estimated to affect approximately two million homeowners and primarily is to cover the liability sustained by the five largest banks (Bank of America, JP Morgan Chase, Wells Fargo, Citigroup and Ally Financial) in their failure to use due diligence in monitoring the signing of documents related to foreclosure proceedings. *See* Nelson D. Schwartz & Shaila Dewan, *States Negotiate \$26 Billion Settlement for Homeowners*, N.Y. TIMES (Feb. 9, 2012), <http://www.nytimes.com/2012/02/09/business/states-negotiate-25-billion-deal-for-homeowners.html?pagewanted=all>. The settlement is not designed to cover any criminal liability, fraud in the securitization and selling of mortgages, or insurance or tax fraud. Further, the settlement covers only the loans owned by the banks and, therefore, excludes loans owned by government mortgage companies, Fannie Mae and Freddie Mac, which own over half the mortgages in the United States. *See id.* In addition, this settlement does not cover the activities of the Mortgage Electronic Registration System (MERS) and its alleged robo-signing abuses. *Id.* The \$39 billion upper estimate could grow if other banks sign on. *See id.*

¹⁰ *See, e.g., infra* notes 144–46 (showing Ohio and New York cases that were dismissed because of document signing irregularities).

¹¹ Charles Riley, *Bank of America Halts All Foreclosure Sales*, CNN MONEY (Oct. 8, 2010), http://www.money.cnn.com/2010/10/08/real_estate/bank_america_50/index.htm.

¹² Alejandro Lazo, *Bank of America Ramps Up Foreclosure Proceedings*, L.A. TIMES BLOG (Sept. 14, 2011, 6:30 PM), http://latimesblogs.latimes.com/money_co/2011/09/bank-of-america-ramps-up-foreclosure-proceedings.html.

¹³ Report of the Special Master Concerning Bank of America d/b/a BAC Home Loan Servicing, LP, at 28, *In re Residential Mortgage Foreclosure Pleading and Document Irregularities*, No. F-059553-10 (N.J. Super. Ct. Ch. Div. Aug. 15, 2011), *available at* http://www.judiciary.state.nj.us/superior/report_bank_of_america.pdf.

Yet, financial institutions appear to be proceeding cautiously to assure compliance with foreclosure requirements.¹⁴ Such caution may be warranted because some companies and at least one executive have been indicted on criminal charges as a consequence of the practice of robo-signing.¹⁵

In the midst of this controversy federal lawmakers fashioned a short bill to address some of the issues raised by this burgeoning foreclosure crisis.¹⁶ The bill would have required courts to accept all out-of-state notarizations, including those stamped en masse by computers in a practice that critics say has been improperly used to expedite foreclosure orders.¹⁷ However, President Obama refused to sign the bill after realizing that certain foreclosure documentation standards would actually be loosened by this proposed legislation.¹⁸

This paper explores the impact of the use of robo-signers and the resulting effect this practice may have upon the stakeholders. A closely related issue explored in this article, albeit on a limited basis, is the use of the Mortgage Electronic Registration Systems (“MERS”). MERS considered itself both a servicer for millions of loans in this country, and a proper party in both foreclosure proceedings and motions for relief from the stay in bankruptcy cases.¹⁹ Due to the sheer volume of foreclosures

¹⁴ See Nick Timiraos & Alan Zibel, *Reviews Begin for Borrowers Disputing Foreclosures*, WALL ST. J. (Nov. 2, 2011), <http://online.wsj.com/article/SB10001424052970203707504577012130274478996.html>.

¹⁵ While a discussion of the criminal charges is beyond the scope of this article, it is worth noting because the threat of jail time to an individual generally leads to more cooperation and the exposure of new facts. See Roger Bull, *Nevada Indicts 2 LPS Employees on 606 Counts in Robo-Signing Scandal*, FLA. TIMES-UNION (Nov. 17, 2011), <http://jacksonville.com/news/crime/2011-11-17/story/nevada-indicts-2-lps-employees-606-counts-robo-signing-scandal>. In Nevada, two title officers employed by Lender Processing Service, a Jacksonville, Florida-based company, were indicted on multiple felony charges. See *id.* Both were indicted on charges of offering false documents for recording and false certification on certain instruments. Missouri indicted both DocX, a large foreclosure servicing company, and its founder and former president, Lorraine O. Brown, on charges of forgery. See Gretchen Morgenson, *Company Faces Forgery Charges in Mo. Foreclosures*, N.Y. TIMES (Feb. 6, 2012), <http://www.nytimes.com/2012/02/07/business/docx-faces-foreclosure-fraud-charges-in-missouri.html>. Further, the City of San Francisco commissioned an audit of the foreclosures conducted between January 2009 and November 2011 and found that eighty-four percent of said foreclosures contained apparent violations of law. OFFICE OF THE ASSESSOR-RECORDER S.F., FORECLOSURE IN CALIFORNIA: A CRISIS OF COMPLIANCE I (2012).

¹⁶ H.R. 3808, 111th Cong. (2010).

¹⁷ *Id.*

¹⁸ See Jia Lynn Yang & Ariana Eunjung Cha, *Obama Won't Sign Bill that Would Affect Foreclosure Proceedings*, WASH. POST (Oct. 7, 2010, 11:31 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/07/AR2010100704254.html> (stating that President Obama vetoed legislation concerning the foreclosure crisis).

¹⁹ The issue of standing, which has been the subject of litigation in numerous cases where MERS asserts itself as a proper party in these proceedings, is not within the scope of this paper. In motions for relief from the stay in bankruptcy cases, MERS is seeking to be allowed to proceed with a foreclosure, which has been stayed due to the filing of a bankruptcy proceeding by the mortgagor/borrower. See generally 11 U.S.C. § 362 (2010).

processed through MERS, mass processing of documents seems inherently problematic absent adequate controls—the solution for which may be as simple as increased staffing along with other controls.

We begin with a general discussion of foreclosure law to provide the framework for the discussion including types of foreclosures, redemption of property rights, and state and federal statutory/regulatory requirements. We then discuss how courts have dealt with the failures to comply with foreclosure procedures, looking at the types of defects that may have existed in those cases, and particularly where those legal deficits result from the use of robo-signers. This paper emphasizes the legal implications of such deficits, whose negative implications are exacerbated by the passage of time, unraveling transactions that have a direct impact upon people's lives. That is, we explore the impact upon the stakeholders in this system, from the lenders, to the title insurers, to a possible lessor of premises whose legal underpinnings have unraveled. Or, like a stack of cards, each standing precariously and leaning upon the other—when one falls, a total collapse results.

I. THE LAW OF FORECLOSURE

A. Types of Foreclosure Proceedings²⁰

Real estate law is primarily state-law specific, particularly with respect to foreclosure proceedings.²¹ The two main types of foreclosure

²⁰ It is noteworthy to refer to the history of foreclosure discussed by Justice Scalia:

The history of foreclosure law also begins in England, where courts of chancery developed the “equity of redemption”—the equitable right of a borrower to buy back, or redeem, property conveyed as security by paying the secured debt on a later date than “law day,” the original due date. The courts’ continued expansion of the period of redemption left lenders in a quandary, since title to forfeited property could remain clouded for years after law day. To meet this problem, courts created the equitable remedy of foreclosure: after a certain date the borrower would be forever foreclosed from exercising his equity of redemption. This remedy was called strict foreclosure because the borrower’s entire interest in the property was forfeited, regardless of any accumulated equity. The next major change took place in 19th-century America, with the development of foreclosure by sale (with the surplus over the debt refunded to the debtor) as a means of avoiding the draconian consequences of strict foreclosure. Since then, the States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the needs of lenders and borrowers. All States permit judicial foreclosure, conducted under direct judicial oversight; about half of the States also permit foreclosure by exercising a private power of sale provided in the mortgage documents. Foreclosure laws typically require notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures. Many States require that the auction be conducted by a government official, and some forbid the property to be sold for less than a specified fraction of a mandatory presale fair-market-value appraisal.

BFP v. Resolution Trust Corp., 511 U.S. 531, 541–42 (1994) (citations omitted).

²¹ See Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 698 (2008) (stating that “[s]tate law . . . controls the overwhelming

proceedings can be categorized as either judicial or non-judicial.²² Twenty states allow only judicial foreclosures,²³ five states allow only non-judicial foreclosures,²⁴ with the remaining states allowing for both procedures.²⁵ States nevertheless each may have distinct procedural requirements.²⁶

Judicial foreclosures are generally far more time consuming since court hearings may be scheduled, and other court notification processes are involved. Yet, the procedures from state to state can vary significantly.²⁷ The process may occur generally as follows:

the filing of a foreclosure complaint and *lis pendens* notice; the service of process on all parties whose interests may be prejudiced by the proceedings; a hearing before a judge or a master in chancery who reports to the court; the entry of a decree or judgment; the notice of sale; a public sale, usually conducted by a sheriff; the post sale adjudication as to the disposition of the foreclosure

majority of foreclosures”).

²² See *id.* at 699. A third type of foreclosure proceeding, which is actually a sub- category of a judicial foreclosure, is “strict foreclosure.” Only two states, New Hampshire and Vermont, currently allow strict foreclosures. For strict foreclosure proceedings, the lender uses the judicial process to bring an action against the defaulting borrower. If the borrower does not pay the mortgage within a court ordered specified time, the property goes directly back to the lender, without necessity of a sale. See *id.* at 700; see also *BFP*, 511 U.S. at 541.

²³ See *Foreclosure Laws and Procedure by State*, REALTYTRAC, <http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp> (last visited Feb. 13, 2012) (giving a state-by-state synopsis of foreclosure procedures).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See, for example, *supra* note 22, where the differences in the judicial foreclosure statutes are discussed.

²⁷ For example, in New York the foreclosure process takes an average of 900 days. See *Foreclosure Activity at 40-Month Low*, REALTYTRAC (May 12, 2011), <http://www.realtytrac.com/content/press-releases/foreclosures-activity-at-40-month-low-6578>. In contrast, in Texas, the process typically can be completed in as little as twenty-seven days. See *Texas Foreclosure Laws*, REALTYTRAC, <http://www.realtytrac.com/foreclosure-laws/texas-foreclosure-laws.asp> (last visited June 3, 2011) (stating that the foreclosure process in Texas can take as little as twenty-seven days but the process generally takes about three months). New York does not allow non-judicial foreclosures. See *supra* note 23. New York had provided for non-judicial foreclosures under limited conditions, however, this provision was repealed in 2009; the automatic repeal of this non-judicial foreclosure provision was included in a 1998 law and apparently had nothing to do with the current financial crisis. Act of July 7, 1998, ch. 231, § 2, 1998 N.Y. Sess. Laws 701 (McKinney). On the other hand, Texas allows non-judicial foreclosures where there is a “power of sale” clause in the mortgage document. See TEX. PROP. CODE ANN. § 51.002 (West Supp. 2012); see also Brandon Bennett, *Secured Financing in Russia: Risks, Legal Incentives, and Policy Concerns*, 77 TEX. L. REV. 1443, 1466 (1999) (stating that power of sale clauses are required for non-judicial foreclosures). Commentators suggest that much of the backlog in New York likely relates to the backlog in the court system since only judicial foreclosures are normally conducted in New York due to the intricacies of the prior non-judicial foreclosure process. Yuki Nogichi, *Foreclosure Influx Causes Backlog in Some States*, NPR (March 16, 2012), <http://www.npr.org/2012/03/16/148685887/foreclosure-influx-causes-backlog-in-some-states>. In addition, in October of 2010, New York courts began imposing an “affirmation rule” as a result of the concerns, which are the subject of this paper, requiring attorneys to affirmatively attest to the accuracy of their court submissions. See Andrew Keshner, *Foreclosures Plunge as Lawyers Adjust to New Affirmation Rule*, N.Y. L.J. (Dec. 16, 2010), available at <http://vaughnweberlaw.com/2010/12/16/foreclosures-plunge/> (reviewing the changes in foreclosure filing because of the affirmation rule).

proceeds; and if appropriate, the entry of a deficiency judgment.²⁸

Non-judicial foreclosures, on the other hand, tend to be less involved and time consuming.²⁹ Normally, if there is a “power of sale” clause³⁰ contained in the deed of trust or mortgage instrument, this clause provides the authority for the lender to proceed with foreclosure through a streamlined auction process.³¹ “After varying degrees of notice, the mortgaged property is sold at a public sale by a third party, such as a sheriff or a trustee, or by the mortgagee.”³²

Nevertheless, even non-judicial foreclosures can be involved and complex.³³ Furthermore, in all states there are additional time periods involved where the debtor is allowed opportunities for redeeming the property prior to,³⁴ and in some cases even after, the date of the scheduled foreclosure.³⁵

B. Equity of Redemption and Statutory Redemption Periods

States that allow the debtor an opportunity to redeem the property prior to foreclosure through what is termed the “equity of redemption,” give the debtor an opportunity to become current on the payments in arrears before the date and time scheduled for the foreclosure.³⁶ Once the foreclosure sale is completed the debtor’s “equity of redemption” is extinguished.³⁷

²⁸ Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1403 (2004).

²⁹ See Brian M. Heaton, Note, *Hoosier Inhospitability: Examining Excessive Foreclosure Rates in Indiana*, 39 IND. L. REV. 87, 91 (2005) (asserting that the “power of sale” clause allows for the sale of the defaulted property without going through a court proceeding, and instead only requires the proper advertising of the property before a foreclosure sale).

³⁰ See Melissa B. Jacoby, Essay, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2271 (2008) (asserting that a non-judicial foreclosure is allowed when a “power of sale” clause is in the original loan agreement).

³¹ See Nelson & Whitman, *supra* note 28, at 1403 (stating that non-judicial foreclosures are generally less complicated and less costly than judicial foreclosures).

³² See *id.* at 1403–04 (giving the general steps to non-judicial foreclosure proceedings).

³³ The previous non-judicial foreclosure process in New York was so complex that it was rarely utilized. See *Q&A: Foreclosing Outside of Court*, N.Y. TIMES, Aug. 9, 1998, <http://www.nytimes.com/1998/08/09/realestate/q-a-230251.html>.

³⁴ This is typically referred to as the “equity of redemption.” See Morris G. Shanker, *Will Mortgage Law Survive? A Commentary and Critique on Mortgage Law's Birth, Long Life, and Current Proposals for Its Demise*, 54 CASE W. RES. L. REV. 69, 75 (2003) (stating that equity of redemption is the debtor’s absolute right to pay the underlying debt prior to foreclosure and keep the property).

³⁵ This is commonly known as the “statutory redemption” period. See Dale A. Whitman, *Chinese Mortgage Law: An American Perspective*, 15 COLUM. J. ASIAN L. 35, 72 (2001) (asserting that statutory redemption is a debtor’s statutory right to redeem property after foreclosure and is available in about twenty states).

³⁶ All states allow the debtor to become current on the mortgage prior to the date and time scheduled for foreclosure, so long as the full payment is tendered in a form acceptable to the lender (usually certified funds). See Shanker, *supra* note 34, at 74–81 (giving a thorough discussion of the history of the equity of redemption). The mortgage instrument then becomes reinstated and is in full force and effect as if the debtor had not fallen behind in the payments. See *id.*

³⁷ *Id.* at 76 (explaining that once the debtor defaulted by failing to pay the mortgage debt by the

In addition to the additional time frame allowed by the “equity of redemption,” about twenty states afford the debtor the opportunity to redeem the property after the foreclosure has actually been completed.³⁸ This is known as “statutory redemption.”³⁹ Through the statutory redemption process there is an established timeframe within which the debtor must cure any default by tendering payment to the lender in an acceptable form.⁴⁰ Usually certified funds will be required.

C. Federal Governmental Requirements

In addition to these state-defined foreclosure processes, there may also be federal governmentally-prescribed requirements affecting the foreclosure of mortgages. For example, for loans insured by the Federal Housing Administration (“FHA”) lenders are required to mail a booklet to borrowers entitled “How to Avoid Foreclosure,” and offer the debtor an opportunity for an interview.⁴¹

In addition to FHA requirements, for the extra protection of debtors who may be on active duty in the military, the Service Members Civil Relief Act⁴² requires the filing of an affidavit averring that the affected mortgagor is not on active duty.⁴³ If the mortgagor is on active duty at the time of the default, then a court hearing may be conducted and other protective provisions apply as well.⁴⁴

legal terms of the mortgage, the creditor had the right to foreclose but the debtor could still retain the property by paying the mortgage debt in full prior to the effective foreclosure).

³⁸ See Whitman, *supra* note 35, at 72.

³⁹ See *id.*

⁴⁰ See Nelson & Whitman, *supra* note 28, at 1438–39 (stating that the statutory periods of redemption commonly range from six months to two years).

⁴¹ 24 C.F.R. § 203.602 (2011) (requiring the mortgagee to send the mortgagor a delinquency notice on an HUD form or a form approved by HUD no later than two months after any delinquency).

⁴² Servicemembers Civil Relief Act, Pub. L. No. 108–189, 117 Stat. 2835 (codified as amended at 50 U.S.C.A. § 501–596(b) (West 1990)).

⁴³ 50 U.S.C.A. app. § 521 (West Supp. 2012).

⁴⁴ § 533. Mortgages and trust deeds

(a) Mortgage as security. This section applies only to an obligation on real or personal property owned by a servicemember that—

- (1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and
- (2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage.

(b) Stay of proceedings and adjustment of obligation. In an action filed during, or within 9 months after, a servicemember's period of military service to enforce an obligation described in subsection (a), the court may after a hearing and on its own motion and shall upon application by a servicemember when the servicemember's ability to comply with the obligation is materially affected by military service—

- (1) stay the proceedings for a period of time as justice and equity require, or
- (2) adjust the obligation to preserve the interests of all parties.

(c) Sale or foreclosure. A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, or within 9 months after, the period of the servicemember's military service except—

- (1) upon a court order granted before such sale, foreclosure, or seizure with a return

Finally, one of the most powerful federal governmental requirements that impacts foreclosures is Title 11 of the U.S. Bankruptcy Code⁴⁵ (“the Code”). Specifically, section 362(a) of the Code contains a provision for automatically staying a foreclosure proceeding (among numerous other creditor actions).⁴⁶ Note, however, that there are exceptions and limitations to the automatic stay such that it does not apply in every case.⁴⁷ In addition, after notice and a hearing, a creditor can request that the stay be lifted, annulled, modified, or conditioned under certain defined circumstances,⁴⁸

made and approved by the court; or

(2) if made pursuant to an agreement as provided in section 107 [section 517 of this Appendix].

(d) Misdemeanor. A person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by subsection (c), or who knowingly attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

50 U.S.C.A. app. § 533 (West Supp. 2012).

⁴⁵ 11 U.S.C. §§ 101–1532 (2006).

⁴⁶ Section 362 states (in pertinent part):

a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C.A. § 362(a)(1) (West 2012).

⁴⁷ 11 U.S.C.A. § 362(a) (West 2012).

⁴⁸ Section 362(d) states that:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2) [11 USCS § 363(c)(2)], be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate

including where the creditor's interest is not adequately protected.⁴⁹ Most pertinent to this discourse is that disputes regarding the validity of the foreclosure process often arise in the context of a bankruptcy proceeding, particularly where MERS is the party seeking relief from the automatic stay, and there is a challenge on the basis of "standing."⁵⁰

II. DEFECTS IN THE FORECLOSURE PROCESS

As has been discussed, the procedures required to be performed in connection with effectuating a valid foreclosure can be complex in many jurisdictions. These procedures reflect the need to assure that rights to property ownership are neither extinguished nor created in an environment with inadequate legal circumscriptions. It is not difficult to perceive that there may be inexorable consequences where faulty attendance to mandated requirements results in a foreclosure done in error. And, unfortunately, as the scenarios in Part IV depict, these consequences can be viral if they are not remedied before spreading from the borrower to other parties having an interest in the subject property.⁵¹

A. Exercising Due Diligence

Mortgage lenders and their servicers have a general responsibility to exercise due diligence when initiating and processing documentation for foreclosures.⁵² However, there are a myriad of opportunities to fail to diligently comply with, or fail to conform to, processes requisite to a valid

(other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property. If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

11 U.S.C.A. 362(d) (West Supp. 2012).

⁴⁹ 11 U.S.C.A. 362(d)(1) (West 2012).

⁵⁰ See *supra* note 19.

⁵¹ See *infra* Part IV.

⁵² See *Jones v. Flowers*, 547 U.S. 220, 225, 239 (2006).

foreclosure proceeding. Generally, proper parties must be established;⁵³ the property description must be accurate;⁵⁴ financial information must be analyzed and validated;⁵⁵ the circumstances adherent to justifying the foreclosure process itself must be assessed and confirmed;⁵⁶ parties must be notified;⁵⁷ and the person(s) assuring all requirements have been met must indeed do those things, and aver through a notarization process that all was done as stated.⁵⁸

It is difficult to believe that due diligence has been consistently achieved when some mortgage companies employ only one person to sign up to 10,000 foreclosure affidavits per month.⁵⁹

B. Relevant Causes of Action Against Defective Foreclosure Proceedings

A person alleging a foreclosure was conducted improperly may do so based upon various legal theories, regardless of whether the foreclosure process is judicial or non-judicial. For one, a borrower may claim lack of due process of law because the lender failed to send proper notice of the foreclosure proceeding to the borrower.⁶⁰ In the case of *Jones v. Flowers*,⁶¹ the borrower alleged that the lender failed to send proper notice of the borrower's redemption rights. However, notice had been mailed, but the certified mail notice was returned unclaimed.⁶² The court held that since the notice was returned unclaimed, other reasonable steps should be taken to notify the owner in order for the notice to comport with the requirements of the Due Process Clause of the Fourteenth Amendment.⁶³

⁵³ See *In re Maisel*, 378 B.R. 19, 21 (Bankr. D. Mass. 2007) (filing motion for relief from automatic stay because documents showed that the creditor had no interest in the property until four days after the filing of the motion for relief of the automatic stay).

⁵⁴ See generally Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1395 (2010) (stating that there are many cases where a faulty property description has rendered a mortgage invalid).

⁵⁵ See generally *Mielke v. Bank of Am. Home Loans Servicing, LP*, No. 2:10-cv-11576, 2011 U.S. Dist. LEXIS 41617, at *21–22 (E.D. Mich. 2011).

⁵⁶ See generally *U.S. Bank Nat'l Ass'n v. Spencer*, No. BER-F-10591, 2011 N.J. Super. LEXIS 746, at *35–36 (N.J. Super. Ct. Ch. Div. Mar. 22, 2011).

⁵⁷ See generally *Jones*, 547 U.S. at 234, 238 (showing that proper notice to interested parties is crucial).

⁵⁸ See generally Peterson, *supra* note 54, at 1394–95.

⁵⁹ See Cha, *supra* note 1 (reporting that the head of the Ally Financial foreclosure document processing team hand-signed 10,000 affidavits per month, not in the presence of a notary).

⁶⁰ See *United States v. Ford*, 551 F. Supp. 1101, 1102–05 (N.D. Miss. 1982) (alleging that lender failed to provide personal notice of foreclosure proceedings which court notes is a due process claim); *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 886 (5th Cir. 1989) (alleging that lender foreclosed without actual notice after borrower's request for notice which amounted to lack of due process of law).

⁶¹ 547 U.S. 220 (2006).

⁶² *Id.* at 224.

⁶³ See *id.* at 234–35.

Proper notice is of prime importance in foreclosure actions. Notice of both the foreclosure action and any rights of redemption, along with other types of notices are required in varying degrees in different jurisdictions.⁶⁴

Another claim available to borrowers pertains to unfair⁶⁵ and deceptive trade practices.⁶⁶ Violations of state laws that prohibit unfair and deceptive trade practices fall within the purview of different regulatory bodies and the states' attorneys general offices.⁶⁷ In light of the existence of the various regulating bodies, those who service mortgage loans in a manner that is considered unfair and deceptive—for instance, by not verifying defaults sufficiently or failing to adequately notify borrowers of a looming foreclosure—may face the possibility of impending legal action.⁶⁸

An action closely related to the concept of unfair and deceptive trade practices is an action for fraud.⁶⁹ Although more difficult to prove since intent to defraud would have to be shown,⁷⁰ fraud is among the causes of action for which such claims are being brought, particularly by individual borrowers.⁷¹ In addition to these claims, negligence is a cause of action individual claimants use as a basis in these types of cases.

⁶⁴ See *id.* at 225–27.

⁶⁵ See Henry N. Butler & Jason S. Johnson, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 74 (2010) (“The current FTC definition of an unfair act is one that ‘causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.’”) (citing Federal Trade Commission Act Amendments of 2006, Pub. L. No. 109-455, § 3, 120 Stat. 3372 (codified at 15 U.S.C. § 45(n))).

⁶⁶ See *id.*

The definition of a deceptive act currently involves the examination of a series of factors: “First, there must be a representation, omission or practice that is likely to mislead the consumer. . . . Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. . . . Third, the representation, omission, or practice must be a ‘material’ one.”

(citing Letter from James C. Miller III, Chairman, to Rep. John D. Dingell, Chairman of House Comm'n on Energy & Commerce, FTC Policy Statement on Deception (Oct. 14, 1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>).

⁶⁷ See Bob Cohen, Annotation, *Right to Private Action Under State Consumer Protection Act—Preconditions to Action*, 117 A.L.R. 5th 155, at *2a (2004) (acknowledging the existence of various regulating bodies that attempt to address unfair or deceptive business practices, including the FTC, the legislature through enactment of laws, and the attorney general).

⁶⁸ See Press Release, Attorney General Tom Miller, Miller Statement on 50 State Mortgage Foreclosure Group (Oct. 13, 2010), http://www.state.ia.us/government/ag/latest_news/releases/oct_2010/robo_signing.html (“Attorney General Tom Miller is leading a 50-state bipartisan mortgage foreclosure working group, as part of a coordinated national effort by states to review the practice of so-called ‘robo-signing’ within the mortgage servicing industry.”).

⁶⁹ See Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1323 n.103 (“That the defendant has made a representation in regard to a material fact . . . [t]hat such representation is false; . . . [t]hat such representation was not actually believed by the defendant, on reasonable grounds, to be true; . . . [t]hat it was made with intent that it should be acted on[;] . . . that it was acted on by [the plaintiff] to his damage; and . . . [t]hat in so acting on it the [plaintiff] was ignorant of its falsity, and reasonably believed it to be true.”) (emphasis added) (quoting *Dev. Co. v. Silva*, 125 U.S. 247, 250 (1888)).

⁷⁰ See *id.*

⁷¹ See *GMAC Mortg. v. McKeever*, No. 08-459-JBC, 2011 U.S. Dist. LEXIS 53983, at *6 (E.D.

The case of *Beals v. Bank of America*⁷² concerns, in part, systemic flaws in the country's mortgage foreclosure practice relating to alleged instances of robo-signing.⁷³ The plaintiffs' claims arose out of allegations that the defendant bank and loan servicer did not fulfill a contractual agreement to modify the payment schedule as it had agreed.⁷⁴ In this case, the plaintiffs raised seven counts as a basis of the claim for relief, including

- (1) breach of contract[;]
- (2) breach of the covenant of good faith and fair dealing[;]
- (3) fraud and intentional misrepresentation[;]
- (4) constructive fraud and negligent misrepresentation[;]
- (5) negligent processing of loan modifications and foreclosure[;]
- (6) violation of the New Jersey Consumer Fraud Act . . . and
- (7) violation of the Fair Debt Collection Practices Act ("FDCPA").⁷⁵

The *Beal* court made several rulings in connection with the motion to dismiss filed by the defendants. Significantly, the court concluded that plaintiffs had not stated a claim for negligence, and that defendants "owe[d] plaintiffs no duty independent of the contract."⁷⁶ The court stated that "even if defendants were negligent, plaintiffs' damages 'do not arise from any duty imposed by law but rather result from [the] alleged breach of contract.'"⁷⁷ Plaintiffs had asserted that the defendant's duty

emanate[d] from the testimony of Bank of America executives before Congress, in which one stated that Bank of America ha[d] a responsibility to be fair . . . and [that] those who work[ed] with [the company] in connection with foreclosure proceedings, also ha[d] an obligation to do [their] best to protect the integrity of those proceedings.⁷⁸

The court did not agree with plaintiff's contention that the statement created a duty and, thereby, a basis for a cause of action in negligence.⁷⁹

With respect to the causes of action for breach of contract and breach of the covenant of good faith and fair dealing, the court denied the motion to dismiss where it had found a contract actually existed.⁸⁰ In addition, with respect to all claims for fraud the court denied the motion to dismiss.⁸¹ The basis for the court's denial was that the plaintiffs put forth a sufficient claim for fraudulent and negligent misrepresentations in connection with actions by the defendants to modify the loan agreement.⁸²

Ky. May 19, 2011) (pleading that MERS committed fraud in forging a foreclosure document but failing to prove that MERS possessed the document with intent to defraud).

⁷² *Beals v. Bank of Am., N.A.*, No. 10-5427 KSH, 2011 WL 5415174 (D.N.J. Nov. 4, 2011).

⁷³ *See id.* at *3.

⁷⁴ *Id.* at *2.

⁷⁵ *Id.* at *4.

⁷⁶ *Id.* at *16.

⁷⁷ *Id.* (quoting *Saltiel v. GSI Consultants*, 788 A.2d 268, 281 (2002)).

⁷⁸ *Id.* at *15.

⁷⁹ *Id.* at *16.

⁸⁰ *Id.* at *19.

⁸¹ *Id.*

⁸² *Id.* at *14–15.

With respect to allegations by one of the plaintiffs that the assignment of the plaintiff's mortgage involved a known robo-signer, the court noted that the plaintiff did not allege that the assignment was substantively defective.⁸³ Nonetheless, the court acknowledged that "the validity and legitimacy of assignment documents are an important part of the foreclosure process"⁸⁴ From the plaintiff's perspective, the court viewed this defect essentially as part and parcel of causing the plaintiff to be "led down a path to believe that he was subject to foreclosure but that defendants would agree to (or at least seriously consider) a modification."⁸⁵ Further, as pertains to the specific cause of action for misrepresentation, the court found sufficient basis for the plaintiff's claims that he was led to believe that a modification of the loan terms would be agreed to.⁸⁶ With respect to the claim for violation of the Fair Debt Collection Practices Act, the court determined that the defendants were not "debt collectors" within the meaning of the FDCPA⁸⁷ since the mortgage was not in default at the time it was assigned to defendant bank or at the time the mortgage servicer began servicing the loan.⁸⁸

In a Florida foreclosure case, the District Court of Appeals reversed an order of summary judgment in favor of the lender, finding that the evidence was insufficient to support a judgment of the amount due and owing on the note and mortgage.⁸⁹ In this case the court found that the affidavit of the "specialist" for the loan servicer was inadmissible hearsay since the servicer had no personal knowledge regarding the veracity or accuracy of the data which was obtained from the bank computer.⁹⁰ This case puts loan servicers on notice that courts are closely scrutinizing the processes these servicers use to verify loan foreclosure documents.

It must also be noted that several courts have dismissed claims by homeowners bringing actions against lenders in connection with robo-signing.⁹¹ In a class action suit in Maine, the district court dismissed three

⁸³ *Id.* at *14.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at *18.

⁸⁸ *Id.*

⁸⁹ *See* Glarum v. LaSalle Bank Nat'l Ass'n, 83 So. 3d 780, 783 (Fla. Dist. Ct. App. 2011).

⁹⁰ *Id.* at 782.

⁹¹ *See* Bass v. Ameriquest Mortg. Co., 2011 U.S. Dist. LEXIS 148729 (D. Haw. Dec. 27, 2011) (granting defendant lenders summary judgment for plaintiff's claims for breach of contract, negligent infliction of emotional distress, and mortgage fraud related to alleged robo-signing); Cerecedes v. U.S. Bankcorp, 2011 U.S. Dist. LEXIS 75559 (C.D. Cal. July 11, 2011) (granting defendant's motion to dismiss plaintiff's claims that defendant was negligent and committed unfair business practices in connection with unsubstantiated allegations of robo-signing); Davis v. Countrywide Home Loans, 2011 U.S. Dist. LEXIS 22270 (S.D. Ind. March 4, 2011) (dismissing the plaintiff's claim—that defendant violated the Racketeer Influenced and Corrupt Organizations Act by using robo-signers—for lack of subject matter jurisdiction); Wells Fargo Bank v. Kosar, 2011 Pa. Dist. & Cnty. Dec. LEXIS 244 (Pa. Cnty. Ct. Sept. 15, 2011) (allowing lender to cure the defect in a verification form upon which

of the four claims against GMAC Mortgage.⁹² GMAC Mortgage filed affidavits in foreclosure cases without personal knowledge of the facts contained in the affidavits. The court ruled that the proper method of attacking an existing judgment is to seek a reversal.⁹³ The court did allow a fourth claim, which is based upon the Maine Unfair Trade Practices Act.⁹⁴

And in Florida, the first robo-signing case that was scheduled to go to court was settled.⁹⁵

The first robo-signing case scheduled to get to the Florida Supreme Court for oral arguments has been settled out of court by Bank of New York Mellon and the homeowner.

The settlement comes as a disappointment to homeowners in foreclosure who have been trying to challenge the use of fraudulent documents used by banks to expedite foreclosure orders for Florida circuit courts.

Enrique Nieves III of Ice Legal in Royal Palm Beach had been preparing for oral arguments in *Roman Pino v. BNY Mellon* after the Fourth District Court of Appeal upheld the bank's right to voluntarily dismiss the case

With the settlement, the Fourth District Court of Appeal ruling remains the law in every court in Florida. In *Pino v. BNY Mellon*, the homeowner requested an evidentiary hearing when the bank tried to re-initiate a foreclosure that had been stalled because of a questionable assignment of mortgage documents.

The bank was trying to go forward with a cured document and Nieves was arguing they could not proceed until the original fraud allegation was aired on its merits.

Palm Beach Circuit Judge Meenu Sasser noted the bank had voluntarily dismissed the original foreclosure petition and that case could not be reopened. She treated the second foreclosure petition as an entirely separate matter, and Nieves appealed.

The Fourth District Court of Appeal sided with Sasser in an *en banc* decision. But there was a dissent, mainly on grounds that an attempt to perpetrate a fraud on the court was still actionable. The majority panel acknowledged the issue was of great public importance due to the rampant use of questionable documents; that certification helped Nieves put the case before the Supreme Court.⁹⁶

These cases illustrate the kinds of issues courts are facing in regard to systemic flaws in the robo-signing debacle. Although robo-signing per se may not always be directly related to the cause of action arising in each case, it certainly has a tangential impact. As was stated by the *Beals* court,

plaintiff's sued over an instance of robo-signing).

⁹² *Bradbury v. GMAC Mortgage*, 780 F. Supp. 2d 108, 111 (D. Me. 2011) (ruling that the proper way to attack an existing judgment is get the existing judgment reversed).

⁹³ *Id.* at 111.

⁹⁴ *Id.* at 112.

⁹⁵ Adolfo Pesquera, *Key Robo-signing Case Ends With Settlement*, FLA. BUS. REV., July 29, 2011, available at LEXIS, Doc. No. 1202508929895.

⁹⁶ *Id.*

“the validity and legitimacy of assignment documents are an important part of the foreclosure process.”⁹⁷

C. MERS

It is a common practice in the mortgage industry for mortgages to be assigned to multiple, successive parties.⁹⁸ More often than not, the assigned mortgage becomes but a segment of a bundled package of usually homogenous mortgage documents in which investors take a shared interest. This process is known as securitization.⁹⁹

The Mortgage Electronic Registration Systems, Inc. (“MERS”) was created as a vehicle to track mortgage securitization transactions.¹⁰⁰ MERS was created because many of the state recording systems were deemed by the major lenders as slow, costly, and antiquated.¹⁰¹ The problem with state recording systems is not new. Many title insurance companies have maintained their own private records of real estate transactions since the 1960s to combat foreseeable problems with the state systems.¹⁰² Lenders saw an opportunity to speed up recording procedures with MERS while at the same time reducing the cost of each transaction; costs were reduced by computerizing the tracking of each assignment transaction, and MERS eliminated the need to pay recording fees for each assignment transaction since the “recording” is accomplished within the computerized system instead of within the public land records.¹⁰³ MERS was also supposed to make foreclosures more efficient.¹⁰⁴ However, ultimately, MERS may have made the foreclosure process more inefficient by sacrificing reasonable documentation for increased speed of the transaction.¹⁰⁵ Originally,

⁹⁷ *Beals v. Bank of America*, No. 10-5427, 2011 U.S. Dist. LEXIS 128376, at *42 (D. N.J. Nov. 4, 2011).

⁹⁸ See Tanya Marsh, *Foreclosures and the Failure of the American Land Title Recording System*, 111 COLUM. L. REV. SIDEBAR 19, 23 (2011) (asserting that the great volume of mortgage assignments caused the county recording systems to become too untimely and costly; therefore, failing to meet the needs of mortgage banking).

⁹⁹ Robin S. Golden & Sameera Fazili, *Raising the Roof: Addressing the Mortgage Foreclosure Crisis Through a Collaboration Between City Government and a Law School Clinic*, 2 ALB. GOV'T L. REV. 29, 37–38 (2009) (“The mortgage backed securities are extremely sophisticated financial instruments governed primarily through contractual arrangements, known as pooling and servicing agreements (PSAs), negotiated between all the parties to the transaction.”).

¹⁰⁰ See Peterson, *supra* note 54, at 1361 (describing the purpose for the creation of MERS).

¹⁰¹ See Marsh, *supra* note 98, at 20 (citing the perceived deficiencies of land title recording procedures).

¹⁰² Peterson, *supra* note 54, at 1366 (explaining the historical problems with the state recording systems).

¹⁰³ *Id.* at 1368–69; see also Gerald Korngold, *Proposed Regulatory Solution: Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727, 741–43 (2009) (discussing some of the benefits of MERS).

¹⁰⁴ See Peterson, *supra* note 54, at 1362.

¹⁰⁵ See *id.* at 1361–62. Compounded with the concern regarding robo-signing is the issue of whether MERS is a proper party in a foreclosure action. One major line of attack being used in cases attacking the validity of foreclosures is whether the party bringing the foreclosure action is indeed a proper party. That is, does the entity whose name the foreclosure is brought under have standing to

mortgages were recorded with public land records in the names of the lenders and then assigned to MERS to make all subsequent assignments within the MERS system. However, later lenders decided they could save even more money by making the first public record recording in the name of MERS as the mortgagee.¹⁰⁶ Probably no one took a really serious look at the speed versus reasonable documentation problem in the early 1990s when MERS was being conceived. However, now many courts are closely analyzing the dichotomy and flaws that are being exposed, and due to this scrutiny, MERS now prohibits members from filing foreclosures in the name of MERS.¹⁰⁷

The problem of reasonable documentation became more exacerbated in the mid-1990s when lenders and brokers began the securitization of subprime loans.¹⁰⁸ No one could have predicted in the mid-1990s the magnitude of the financial meltdown in 2007, which would precipitate the need to foreclose on 8.1 million loans.¹⁰⁹ Because there may be multiple assignments on each loan, there are tens of millions of unrecorded assignments on the potential foreclosures. These unrecorded assignments can cause problems because of a lack of transparency, especially for the borrower. The nonpublic MERS records make it extremely difficult, if not impossible, for distressed borrowers to know whom to deal with in order to work out their problems.¹¹⁰

bring the action? The problem is this: MERS considers itself both a “nominee of the lender,” although they never actually lent money, and “their successors and assigns,” although they have not entered into a formal assignment agreement, and a “beneficiary,” even though MERS does not have any interest in the underlying note. *See id.* at 1375–87 (discussing the issue of standing relative to the issues of being a nominee and a successor and assigns). MERS also normally assigns the deed of trust and note to a securitized loan trust which argues that it is the owner of the loan. *See In re Vargus*, 396 B.R. 511, 515–16 (Bankr. C.D. Cal. 2008).

Courts have grappled with the issue of whether MERS has standing to foreclose. Some courts in interpreting state statutes have ruled that MERS was not a proper party. In *In re Salazar*, the U.S. Bankruptcy Court for the Southern District of California determined that MERS was only a nominal beneficiary and was not the beneficiary at the time of the foreclosure sale and thus did not satisfy the requirement that the bank have a recorded beneficial interest in the property. *In re Salazar*, 448 B.R. 814, 819–22 (Bankr. S.D. Cal. 2011), *rev'd*, *In re Salazar*, 470 B.R. 557 (S.D. Cal. 2012) (finding that both U.S. Bank and MERS are entitled to invoke the power of sale). Other courts have validated MERS as a proper party. In *Gomez vs. Countrywide*, the U.S. District Court held that MERS as a nominee was essentially an agent and thus gave MERS the right to foreclose on the deed of trust. *See Gomez v. Countrywide*, No. 2:09-cv-01489-RJ-LRL, 2009 U.S. Dist. LEXIS 108292, at *6, *7 (D. Nev. Oct. 26, 2009).

¹⁰⁶ *See* Peterson, *supra* note 54, at 1371.

¹⁰⁷ *Foreclosures and Bankruptcies*, MERS, <http://www.mersinc.org/foreclosures/index.aspx> (last visited Feb. 11, 2012) (stating that “MERS System Membership Rule 8 prohibits Members from initiating foreclosure proceedings in the name of Mortgage Electronic Registration Systems, Inc. (‘MERS’)”).

¹⁰⁸ *See* Peterson, *supra* note 54, at 1367–68 (showing the typical process of securitizing a subprime loan).

¹⁰⁹ *See* David R. Greenberg, Comment, *Neglected Formalities in the Mortgage Assignment Process and the Resulting Effects on Residential Foreclosures*, 83 TEMP. L. REV. 253, 253 (2010) (commenting on the vast number of potential foreclosures created by the economic meltdown).

¹¹⁰ *See* Korngold, *supra* note 103, at 743–46 (discussing transparency and efficiency problems

By 2007, MERS had sixty million loans and sixty percent of new loan originations.¹¹¹ With this high volume of new loan originations and 8.1 million potential foreclosures, coupled with tens of millions of unrecorded assignments, it is a small wonder that MERS, and mortgage service companies in the name of MERS, had to resort to an assembly line process whereby agents of MERS signed affidavits regarding the propriety of foreclosure documentation without reviewing the loan file.

Two Ohio cases brought to the forefront some serious problems with how some financial institutions dealt with the documentation of assignments in foreclosure actions.¹¹² These cases were dismissed without prejudice because the lenders could not document that the assignments of the notes and mortgages were executed prior to the filing of the foreclosure actions as required by law.¹¹³ A more troubling problem was an appearance of a cavalier attitude of the mortgage lending industry toward compliance with foreclosure procedures.¹¹⁴ As Judge Boyko stated, “[t]he [financial] institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate.”¹¹⁵

The furor created by the robo-signing put the spotlight on MERS and the practices of its members, which have been characterized as shoddy workmanship.¹¹⁶ In *Bank of New York v. Mulligan*,¹¹⁷ the court ordered the bank to provide three documents as follows:

(1) [A]n affidavit of facts either by an officer of plaintiff BNY or someone with a valid power of attorney from plaintiff BNY and personal knowledge of the facts; (2) an affidavit from Ely Harless describing his employment history for the past three years, because Mr. Harless assigned the instant mortgage as Vice President of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS) and then executed an affidavit of merit for assignee BNY as Vice President of BNY’s alleged attorney-in-fact without any power of attorney; and, (3) an affidavit from an officer of plaintiff BNY explaining why it purchased the instant nonperforming loan from MERS, as nominee for DECISION ONE

with MERS); *see also* Peterson, *supra* note 54, at 1398–99 (discussing the problem of identifying the proper note holders and the actual amount of the debt owed).

¹¹¹ Peterson, *supra* note 54, at 1373–74.

¹¹² *See In re Foreclosure Cases*, Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 07CV2631, 07CV2638, 07CV2681, 07CV2695, 07CV2920, 07CV2930, 07CV2949, 07CV2950, 07CV3000, 07CV3029, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007); *see also In re Foreclosure Cases*, Nos. 07-cv-166, 07-cv-190, 07-cv-226, 07-cv-279, 07-cv-423, 07-cv-534, 07-cv-536, 07-cv-642, 07-cv-670, 07-cv-706, 07-cv-714, 07-cv-727, 07-cv-731, 07-cv-963, 07-cv-999, 07-cv-1047, 07-cv-1091, 07-cv-1119, 07-cv-1150, 2007 U.S. Dist. LEXIS 90812 (S.D. Ohio Nov. 27, 2007).

¹¹³ *In re Foreclosure Cases*, Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 07CV2631, 07CV2638, 07CV2681, 07CV2695, 07CV2920, 07CV2930, 07CV2949, 07CV2950, 07CV3000, 07CV3029, 2007 WL 3232430, at *3 (N.D. Ohio Oct. 31, 2007).

¹¹⁴ Judge Boyko opined, “[p]laintiff’s, ‘Judge, you just don’t understand how things work,’ argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process.” *Id.* at *3 n.3.

¹¹⁵ *Id.*

¹¹⁶ *See* Marsh, *supra* note 98, at 24.

¹¹⁷ *Bank of N.Y. v. Mulligan*, 28 Misc. 3d 1226A (N.Y. Sup. Ct. 2010).

MORTGAGE COMPANY, LLC [].¹¹⁸

The court dismissed the foreclosure action, with prejudice, in response to the bank's failure to provide proper documentation of an assignment.¹¹⁹

Thus, the MERS system presents a potentially infectious issue. With such vast numbers of documents being processed through this system in an abbreviated period of time, is it endemic to such a system that summary and shallow controls will be employed? And if the aforementioned defect causes a loosening of the threads, to what consequence? To determine the answers to these and other questions, Eric T. Schneiderman, Attorney General of New York, recently filed suit against MERS, banks, and lending servicing companies.¹²⁰ This suit is not affected by the landmark settlement reached by the states and the five large mortgage services.¹²¹ The suit avers that MERS, in conjunction with the banks, filed foreclosures with no legal right to do so, and indiscriminately used "certifying officers" to execute and file with courts defective documents which rendered said documents false, deceptive, and/or invalid.¹²² The suit asks the court to declare said practices illegal, to enjoin said practices, to mandate that the parties correct all defects in title caused by said practices, and for money damages.¹²³ Furthermore, the states of Massachusetts and Delaware have filed deceptive practices suits, which are not affected by the settlement.¹²⁴

III. THE STAKEHOLDERS

Barbara Borrower, recently widowed, has been thrust into the role of being not only the sole breadwinner but the family financier as well. Finances befuddle her simply because she is untrained and inexperienced. Her focus had always been on raising her and her deceased husband's two children and making sure they were properly educated. She lived in her home with her family for more than 20 years. Mr. Borrower had recently

¹¹⁸ *Id.* at *1–2.

¹¹⁹ *Id.* at *25.

¹²⁰ Press Release, N.Y. Att'y Gen. Eric T. Schneiderman, A.G. Schneiderman Announces Major Lawsuit Against Nation's Largest Banks For Deceptive & Fraudulent Use Of Electronic Mortgage Registry (Feb. 03, 2012), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-major-lawsuit-against-nation%E2%80%99s-largest-banks-deceptive> (last visited Feb. 11, 2012) (delineating the legal and factual bases for said suit).

¹²¹ See Schwartz & Dewan, *supra* note 9.

¹²² See *A.G. Schneiderman Announces Major Lawsuit Against Nation's Largest Banks For Deceptive & Fraudulent Use Of Electronic Mortgage Registry*, *supra* note 120.

¹²³ *Id.*

¹²⁴ Press Release, Att'y Gen. Martha Coakley, Five National Banks Sued by AG Coakley in Connection with Illegal Foreclosures and Loan Servicing (Dec. 01, 2011), <http://www.mass.gov/ago/news-and-updates/press-releases/2011/five-national-banks-sued-by-ag-coakley.html> (last visited Feb. 12, 2012) (announcing a comprehensive suit against large banks due to the mortgage crisis alleging robo-signing); Press Release, Att'y Gen. Joseph R. "Beau" Biden, III, Biden: Private National Mortgage Registry Violates Delaware Law (Oct. 27, 2011), <http://attorneygeneral.delaware.gov/media/releases/2011/law10-27.pdf> (announcing a suit against MERS for deceptive trade practices).

refinanced the mortgage loan and used the equity they had built up in the family home, Greenacres, to purchase his long desired cabin cruiser. Unfortunately, as fate would have it, he only got to use it a few times before expiring from a massive heart attack while out on the cabin cruiser. Mrs. Borrower sold the cabin cruiser but lacking the sophistication to negotiate beneficial terms, she received far less for it than they paid.

Mrs. Borrower has decided to move out of Greenacres and into an apartment, signing a one-year lease. She has realized that she can rent Greenacres for more than the cost to rent the apartment. And besides, Greenacres is more house than she needs since her children are now grown. However, sentimentality and the current market conditions restrain her from selling. With her low paying clerical job, combined with the rent she will receive, she is able to continue making the mortgage payments on the home. Mrs. Borrower rented Greenacres to Lisa Lessee and her family of three children. Unfortunately, due to the market downturn, the tenant, Lisa Lessee, lost her job. Because tenants were difficult to find in the existing market climate, and out of sympathy, Mrs. Borrower decided to let Lisa Lessee stay in Greenacres for a reduced rent. As one might expect, Mrs. Borrower found herself struggling to make her mortgage payments.

Mrs. Borrower received a notice from a bank whose name she did not recognize, initiating a non-judicial foreclosure process. After fretting for many weeks with no apparent solution, Mrs. Borrower contacted her children and they agreed to help. Mrs. Borrower sent the funds to Big Bank to stop the foreclosure process. To her shock and horror, Mrs. Borrower received a notice in the mail stating that the foreclosure process had been completed and that any opportunity to redeem the property had long since expired. She tried to contact Big Bank but was told her mortgage was sold to another bank (for various reasons much of her mail did not get forwarded to her new apartment). When she finally reached the bank to whom her note and mortgage had been sold, she was informed that the funds she sent were insufficient to cure the default and that the funds were not received on time.

Bob and Betty Buyer purchased Greenacres at the foreclosure proceeding, taking out a loan with American Bank.¹²⁵ The Buyers evict Lisa Lessee and her family. Confident that they will prevail in a pending action to quiet title, Mr. and Mrs. Buyer, with their three children in tow, move in to Greenacres as their primary residence.

¹²⁵ An empirical study done in 1985 of foreclosure sales in Onondaga County, New York, during 1979, gives us a factual backdrop of who buys at the actual foreclosure sale, what happens to the proceeds and who benefits from a foreclosure. See generally Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850 (1985).

There are numerous stakeholders whose interests can be affected by the unraveling of the cords that once seemed tightly woven and enmeshed to construct and complete a real estate transaction. A primary purpose of the legal process for completing a real estate transaction in this country is to provide societal stability and durability.¹²⁶ It is unlikely that the resulting impact of “undoing what has been done” in these matters will be a positive one for all of the parties involved. Indeed, there can be a direct, far reaching and consequential negative impact upon a variety of parties and positions. Metaphorically, once the cords are unconstrained, they quickly whip out, or with determined and minimal effort steadily unravel, until the cord becomes nothing more than a loose conglomeration of bare thread—weakened and fragile.

Arguably, but not necessarily, the most affected by such a calamitous event is the borrower/homeowner. The borrower presumably precipitated the process by failing to meet her contractual obligations. Yet the borrower may shift from being the victimizer, i.e. the naughty debtor who apparently failed to meet her contractual obligations, to the victim of an illegal ousting from what is, in most cases, one’s most vital and inestimable material possession—the place of residence.¹²⁷ On the other hand, the pre-eviction, foreclosed-upon homeowner may rejoice in the extra time allowed by the legal deficits exposed in the foreclosure process. For the homeowner who has indeed caused a default in his or her contractual obligations, time can be a coveted commodity—allowing that extra breathing space to make necessary arrangements and adjust to the trauma of being dispossessed of his or her abode.

Barbara Borrower

In the case of Barbara Borrower, she no longer resides at Greenacres. Thus, she does not have to suffer the consequence of no longer having a place to live. Nonetheless, she will suffer repercussions. First of all, she loses Greenacres and the tangible reminders of the cherished memories it holds. Secondly, she will no longer be the beneficiary of any equity that might have remained or been recovered when market conditions possibly

¹²⁶ See *Social Benefits of Homeownership and Stable Housing*, NAT. ASS’N OF REALTORS (Aug. 2010), <http://www.realtor.org/sites/default/files/social-benefits-of-stable-housing-2012-04.pdf> (studying and assessing the social benefits of stability within the housing market).

¹²⁷ The Washington Post reported that a study by the University of Pennsylvania’s School of Medicine found that forty-seven percent of the homeowners going through foreclosure showed signs of depression, and thirty-seven percent showed signs of severe depression. *Study Centers on Foreclosure’s Stress on Family Life*, WASH. POST (Feb. 16, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/12/AR2010021204156.html>. Anecdotally, *USA Today* reported a tragic event in Prineville, Oregon, where an elderly couple, faced with the prospect of post foreclosure eviction, closed themselves and their four retriever dogs up in their home, allowing it to be filled with toxic fumes from their car. See Stephanie Armour, *Foreclosures Take an Emotional Toll on Many Homeowners*, USA TODAY (May 16, 2008), http://www.usatoday.com/money/economy/housing/2008-05-14-mortgage-foreclosures-mental-health_N.htm.

improved in the future. In this case, however, any equity that existed was quickly consumed by transaction costs involved with the foreclosure process. Thirdly, although the landlord-tenant relationship between Mrs. Borrower and Lisa Lessee has been terminated upon foreclosure, Mrs. Borrower may be liable to Ms. Lessee for breach of contract and for the return of any security deposit she may have obtained.¹²⁸

Lisa Lessee and Her Children

Lisa Lessee and her three children moved in with her sister. Lacking a substantial source of income, she had no alternative. The sporadic child support she receives from her ex-husband is insufficient to pay a normal rent. As a victim of a foreclosed-upon landlord, Ms. Lessee is not alone.¹²⁹ Professor Rodriguez-Dod states, “[r]eportedly, approximately 40% of families being evicted—about 70,000 renters—have been displaced because their landlords’ properties were foreclosed. It is estimated that in the northeastern United States up to 50% of foreclosures involve renters. And in the Chicago area, foreclosure-related tenant evictions tripled from 2007 to 2008.”¹³⁰

But Ms. Lessee, and others similarly situated, are not without rights. On May 20, 2009, President Obama signed into law the Protecting Tenants at Foreclosure Act of 2009 (“PTFA”).¹³¹ By this law, Ms. Lessee, as a bona fide tenant, would be entitled to ninety days notice prior to being evicted from the foreclosed upon property; however, in this case since the Buyer family will be living on the property as their primary residence, Ms. Lessee is not entitled to remain in possession of the premises after the ninety-day period.¹³² In addition to the PTFA, the foreclosure crisis has spawned other laws, both federal and state, to ameliorate the impact upon tenants in varying degrees of forcefulness.¹³³

The Buyer Family

¹²⁸ If Lisa Lessee had been a tenant at the time Barbara Borrower had executed the mortgage, such as where Borrower refinanced the property while Lessee was a tenant, then Lessee’s right would have priority over the mortgagee. See Vicki Been & Allegra Glashauser, *Tenants: Innocent Victims of the Nation’s Foreclosure Crisis*, 2 ALB. GOV’T L. REV. 1, 10–11 (2009) (giving an overview of parties’ priorities in foreclosure).

¹²⁹ See generally Eloisa Rodriguez-Dod, *Stop Shutting the Door on Renters: Protecting Tenants from Foreclosure Evictions*, 20 CORNELL J. L. & PUB. POL’Y 243 (2010).

¹³⁰ *Id.* at 245. Professor Rodriguez-Dod further notes:

Anecdotes abound about foreclosures and consequent evictions of renters. Tenants dutifully paying their monthly rent have found themselves forced out of their rental homes because landlords defaulted on their mortgages. Many have been low-income tenants who receive little notice before being uprooted and have little savings to afford a move to new housing.

Id. at 245.

¹³⁰ *Id.*

¹³¹ Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632 (2009).

¹³² § 702(a)(2)(A).

¹³³ See generally Rodriguez-Dod, *supra* note 129, at 248–65 (reviewing the environment of federal and state eviction laws).

Although not quite the untainted purchaser, since the pungent reflux from the agitated foreclosure process cannot reasonably escape notice of one so intricately involved, the purchaser of the foreclosed-upon property nonetheless has a reasonable expectation that correct legal processes were complied with, particularly in a court-ordained foreclosure proceeding. Furthermore, the Buyers have been assured that title has been quieted through that separate judicial process. Mr. and Mrs. Buyer realized that they must give the Lessee family ninety-days notice.¹³⁴ They did so with some reluctance and marginal compunction, being fully aware of the circumstances surrounding the underlying default by Mrs. Borrower and the impact upon her tenant. Yet they too had a family to provide for and needed Greenacres since it was within walking distance of the school they preferred for their children, and was just a few blocks from the city subway system to facilitate both of them getting to and from work. Greenacres was perfect.

Big Bank and its Assignees

Mrs. Borrower was foreclosed upon through a non-judicial foreclosure process based upon a power of sale clause in the deed of trust between the Borrowers and Big Bank. Big Bank, consistent with its recapitalization model, assigned the note and mortgage to an assignee. Because of the volume of mortgage loans Big Bank makes, it had subscribed to MERS soon after it was established in the mid 1990s, thus minimizing the transaction costs involved in the assignments. As the nominee for Big Bank and its assigns, MERS was responsible for assuring that all the necessary documents relating to foreclosure are processed and that the affidavits averred to by its document processors are properly done. Because of the age of the original loan from the Borrowers, the loan originated in the name of Big Bank and was later assigned to MERS. Since MERS was the mortgagee of record in the county land records, the foreclosure proceedings were commenced on behalf of Big Bank's assignee by MERS.

Big Bank's assignee was thankful that the Buyers purchased the property since they had a bulging inventory of bank-owned properties. The assignee was not interested in being in the real estate business. The homes they owned barely sold for the outstanding balance on the mortgage loan.

The Title Insurance Companies

WeGotYourBack Title Insurers provided title insurance to the Buyers in connection with the mortgage loan they used to purchase Greenacres. However, the title insurance policy contained an exception for anything pertaining to defects in the foreclosure process itself.

¹³⁴ Protecting Tenants at Foreclosure Act § 702(a)(1).

Guaranty Title Insurers provided title insurance to American Bank, the Buyers' lenders. The policy specifically covered any defects in connection with the foreclosure process.

American Bank

American Bank provided a loan to the Buyers to purchase the property at foreclosure.

IV. THE CORD UNRAVELS: DEFECTIVE FORECLOSURES AND THEIR
IMPACT UPON STAKEHOLDERS

It has been discovered through testimony made by a document processor for MERS in connection with the action to quiet title that the affidavits in connection with the foreclosure on Greenacres were not actually verified in the presence of a notary. Far more significantly, after this revelation, a careful review of the documentation was made and the assignee realized that indeed the payments sent by Mrs. Borrower from the funds her children gave her were not timely recorded to her account, causing invalid late fees to accrue. Had they been properly recorded, Mrs. Borrower clearly would have cured the default on her loan prior to the expiration of the statutory period for redemption. In spite of the fact that Mrs. Borrower did not contest the foreclosure, due to the egregious behavior of both MERS and the assignee for Big Bank, the court denies the action to quiet title, deeming the foreclosure process defective. The threads rapidly begin to whip apart.

Who ends up in actual possession of Greenacres depends upon the law of the jurisdiction in which the property is located. In a case where it is a "technical" defect, such as failure to properly notarize an affidavit or obtain proper service as well as underlying facts justifying a foreclosure, it is likely the court will allow a party to re-foreclose with any necessary damages being paid by the offending party.¹³⁵ In these cases the foreclosure action might be dismissed without prejudice.¹³⁶ However, as in the facts of this case, where the homeowner actually was not in default of the mortgage obligation, a court may reinstate her status as the owner of Greenacres in a suit to set aside the foreclosure action, and void the mortgage on Greenacres obtained by the Buyers in favor of American Bank.¹³⁷

¹³⁵ See Marvin N. Bagwell & Robert F. Bedford, *What Is the Probable Effect of Defective Foreclosure Documents Under New York Law?*, ONE ON ONE, Summer 2011, at 26 (asserting that the courts will most likely not return the property to the former property owner).

¹³⁶ See Chris Markus, Ron Taylor & Blake Vogt, *From Main Street to Wall Street: Mortgage Loan Securitization and New Challenges Facing Foreclosure Plaintiffs in Kentucky*, 36 N. KY. L. REV. 395, 397 (2009) (discussing the circumstances under which Judge Boyko dismissed Ohio cases without prejudice, e.g. failing to provide proper documentation of the assignment); see also Boyko cases cited *supra* note 113.

¹³⁷ See *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 106 (2011) ("Other grounds for setting aside a trustee's sale in the case law include assertions that . . . the borrower was not in default . . ."); see also *Bank of N.Y. v. Mulligan*, No. 51509U, slip op., 2010 N.Y. Misc. LEXIS 4056, at *1-2, *8, *12-

If the foreclosure action is set aside, American Bank might seek recourse from Guaranty Title Insurance Company, which in turn might seek recourse from Big Bank, the original lender. Or American Bank can seek relief directly from Big Bank and its assigns for the monies these institutions received to pay off the debt owed by Mrs. Borrower.

The Buyers might suffer the greatest hardship of all since they may be forced to leave Greenacres. Also, since their title policy excluded defects in the foreclosure process itself, they lack that protection. Of course, since American Bank may obtain satisfaction from Guaranty Title for the amount of the loan it extended to the Buyers, they may be free from that debt obligation (assuming there is no deficiency). The Buyers may also be able to bring an action for unjust enrichment against Big Bank and its assigns for the monies received in the foreclosure action, which might include any down payment made by Buyers to purchase the property.¹³⁸ Nevertheless, the Buyers must endure the hardship of relocating and finding a new home. There are a variety of causes of action, rights to subrogation, indemnification and defenses thereto that the various parties may have, and this article does not portend to address them. Rather, its purpose is to highlight the complexities that can result when the cord begins to unravel.

V. THE TIE THAT BINDS: REMEDIES AND ENFORCEMENT ACTION

Certainly it would benefit most stakeholders, and, generally, the country's economy as a whole to have a real estate foreclosure system with ingrained stability—a system where due process is given its greatest opportunity to thrive, and where trade practices promote fairness and full disclosure—or at least one which minimizes the opportunity for structural disintegration.¹³⁹

Recent changes have been made in the court system, by state statute, and internally by financial institutions in response to the practice of robo-signing that would have a positive impact on the system. For example, North Carolina passed the Mortgage Debt Collection and Servicing Act in April of 2008¹⁴⁰ to improve mortgage servicing. In Nevada, the State Assembly enacted a law on October 1, 2011, to prevent robo-signing.¹⁴¹

13 (N.Y. Sup. Ct. Aug. 25, 2010) (denying the bank's application for an order of reference with prejudice and cancelling the notice of pendency because of the repeated failure of the bank to provide proper and timely documentation of the loan).

¹³⁸ See *Rankin v. Satir*, 171 P.2d 78, 80–81 (Cal. Ct. App. 1946) (holding that constructive trusts are based on the equitable principle that one should not benefit from his own wrongdoing and that this equitable principle should apply to any case where such wrongful benefit is had). Under the equitable unjust enrichment discussed in *Rankin*, the court may impose a constructive trust, which would hold that Big Bank possesses the monies for the benefit of Buyers.

¹³⁹ See generally Marsh, *supra* note 98 (giving an overview of the problems within the land title recording system which may have led to a lack of confidence in the land title recording system and contributed to the mortgage companies deciding to create another system).

¹⁴⁰ N.C. GEN. STAT. §§ 45-90–95 (2011).

¹⁴¹ A.B. 284, 76th Leg., Reg. Sess. (Nev. 2011). According to a *Wall Street Journal* blog,

The law imposes both civil and criminal penalties for misrepresentations regarding real estate titles.¹⁴²

Two title officers in Nevada employed by Lender Processing Service, a Jacksonville, Florida-based company, were indicted on multiple criminal charges.¹⁴³ Both were indicted on charges of offering false documents for recording and false certification on certain instruments.¹⁴⁴ The Michigan Attorney General filed criminal subpoenas to out-of-state mortgage processing companies in June 2011 after twenty-three county registers of deeds filed a criminal complaint in connection with robo-signed documents.¹⁴⁵ And the New York Attorney General is conducting a banking probe against certain financial executives that could lead to criminal charges.¹⁴⁶ In Missouri, both DocX, a large foreclosure servicing company, and its founder and former president, Lorraine O. Brown, were indicted on charges of forgery.¹⁴⁷ The California, Delaware and Illinois Attorneys General are also conducting similar investigations.¹⁴⁸

The New Jersey court system promulgated what have been termed “anti robo-signing” rules to better ensure that a foreclosure is effectuated properly, and in an environment that lessens the opportunity for defects.¹⁴⁹ These rules place heightened responsibilities upon both the financial institutions and the attorneys who represent the financial institutions. In announcing this administrative order, the New Jersey court stated:

foreclosure filings plummeted by 88% the month after the new law went into effect. See Nick Timiraos, *Nevada Foreclosure Filings Dry Up After ‘Robo-Signing’ Law*, WALL ST. J. BLOG (Nov. 7, 2011, 2:24 PM), <http://blogs.wsj.com/developments/2011/11/07/nevada-foreclosure-filings-dry-up-after-robo-signing-law/>.

¹⁴² A.B. 284, 76th Leg., Reg. Sess., §§ 6, 9, 13, 14 (Nev. 2011).

¹⁴³ See Roger Bull, *Nevada Indicts 2 LPS Employees on 606 Counts in Robo-Signing Scandal*, FLA. TIMES-UNION JACKSONVILLE (Nov. 17, 2011, 7:41 PM), <http://jacksonville.com/news/crime/2011-11-17/story/nevada-indicts-2-lps-employees-606-counts-robo-signing-scandal>.

¹⁴⁴ *Id.*

¹⁴⁵ See “*Robo-signing*” of Mortgages Still a Problem, CBS NEWS (July 18, 2011, 8:54 PM), www.cbsnews.com/2100-201_162-20080533.html.

¹⁴⁶ *Id.*

¹⁴⁷ See Gretchen Morgenson, *Company Faces Forgery Charges in Mo. Foreclosures*, N.Y. TIMES (Feb. 6, 2012), <http://www.nytimes.com/2012/02/07/business/docx-faces-foreclosure-fraud-charges-in-missouri.html>.

¹⁴⁸ See “*Robo-signing*” of Mortgages Still a Problem, *supra* note 145.

¹⁴⁹ Residential Mortgage Foreclosure Pleading and Document Irregularities, Admin. Order 01-2010 (N.J. Dec. 20, 2010) (Glenn, Judge); see N.J. CT. R. 4:64-1(2)

In all residential foreclosure actions, plaintiff’s attorney shall annex to the complaint a certification of diligent inquiry: (a) that the attorney has communicated with an employee or employees of the plaintiff who (i) personally reviewed the documents being submitted and (ii) confirmed their accuracy; and (b) the name(s), title(s) and responsibilities in those titles of the plaintiff’s employee(s) with whom the attorney communicated pursuant to paragraph (2)(A) of this rule.

See also Andrew Keshner, *New Rule Says Attorneys Must Verify Foreclosure Papers*, N.Y. L.J., (Oct. 21, 2010), available at LEXIS (doc-id #1202473628860#) (showing similar requirements now exist in New York).

This order addresses several steps taken by the Judiciary today in an effort to ensure the integrity of the residential mortgage foreclosure process: (1) Judge Jacobson's order directing six lenders and service providers who have been implicated in irregularities in connection with their foreclosure practices to show cause why the processing of uncontested residential mortgage foreclosure actions they have filed should not be suspended; (2) administrative action directing twenty-four lenders and service providers who have filed more than 200 residential foreclosure actions in 2010 to demonstrate affirmatively that there are no irregularities in their handling of foreclosure proceedings, via submissions to retired Superior Court Judge Walter R. Barisonek, who has been recalled to temporary judicial service and assigned as a Special Master; and (3) the adoption of amendments to the Rules of Court and a Notice to the Bar which require plaintiff's counsel in all residential foreclosure actions to file certifications confirming that they have communicated with plaintiff's employees who have (a) personally reviewed documents and (b) confirmed the accuracy of all court filings, and which remind all counsel of their obligations under the New Jersey Rules of Professional Conduct.¹⁵⁰

In addition, in September 2011, a settlement agreement was reached between the New York State Department of Financial Services and New York Banking Department and Goldman Sachs ("Goldman"), owner of Litton Loan Servicing ("Litton"), providing conditions by which Goldman could sell Litton to Ocwen Financial Corp., a mortgage servicing company.¹⁵¹ The purpose of the settlement was to make changes in the mortgage servicing industry, such as the practice of robo-signing.¹⁵² The settlement agreement specifically calls for an end to the practice of robo-signing and requires services to withdraw any pending foreclosure action where affidavits may have been robo-signed.¹⁵³

New court rules, statutes, and other efforts are essentially creating a means by which the lack of due process in such situations can be measured. Although there cannot be a perfect solution in an imperfect world (and courts most assuredly will have to continue in their role of determining failures to comply with the system), these efforts may aid in binding the transactional cord of the foreclosure process.

MERS itself will no doubt need to revise its procedures so that its role in the foreclosure process is of a less menacing nature. As stated earlier, MERS is ending the practice of allowing its members to file foreclosure actions in the name of MERS in cases involving assignments.¹⁵⁴ In the future, the lenders are to record mortgage assignments with the county

¹⁵⁰ See Residential Mortgage Foreclosure Pleading and Document Irregularities, *supra* note 149.

¹⁵¹ See Agreement on Mortgage Servicing Practices, State of N.Y., Dep't of Fin. Serv., Banking Dep't, available at www.banking.state.ny.us/clocwen.pdf.

¹⁵² *Id.* at 1.

¹⁵³ *Id.* at 2.

¹⁵⁴ See *supra* note 113.

clerks responsible for recordation of mortgage instruments before bringing an action for foreclosure.¹⁵⁵

It seems MERS is having to reinvent itself. Will these changes be adequate? Robo-signing, as it has come to be known, surely will have to cease.

CONCLUSION

We refer to the well-known maxim: “if it ain’t broke, don’t fix it.” We apply the converse: “if something’s bad wrong, fix it.” If the reader will excuse the colloquialisms, there is something “bad wrong” with a system that would allow a document processor to review, sign, and verify the voluminous documents necessary to document a foreclosure process in an average of 1.5 minutes. The stability and security of our real estate system demands better. There can be no valid argument against the fact that the numbers of real estate transactions occurring daily have outpaced the historical mechanisms designed to accommodate them. Technological advances should be fully exploited to promote efficiency. Yet, the system should not be allowed to advance at a pace that loosens the threads of its existence.¹⁵⁶

¹⁵⁵ Martha Neil, *MERS Changes Rules, Says Mortgage Servicers Must File Assignments with County Before Foreclosing*, A.B.A. J. (July 27, 2011, 6:36 PM), http://www.abajournal.com/news/article/mers_changes_rules_says_mortgage_servicers/.

¹⁵⁶ See *Massachusetts Supreme Judicial Court Unanimously Voids Foreclosure Sales Because Securitization Trusts Could Not Demonstrate Clear Chains of Title to Mortgages*.—U.S. Bank National Ass'n v. Ibanez, 941 N.E.2d 40 (Mass. 2011), 125 HARV. L. REV. 827, 834 (2011).

But perhaps the most important lesson of *Ibanez* is that even in an age of rapid innovation in mortgage lending and securitization, mortgage lenders and other participants in the mortgage loan market must still comply with state property law, even if that law has been infrequently examined for over a century and no longer corresponds with widespread mortgage lending industry practices.

See also U.S. Bank Nat. Ass'n v. Ibanez, 941 N.E.2d 40, 55 (2011) (“The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs’ apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities.”)

Chapman University School of Law

Transcription of the Chapman Dialogue: “Chasing Leadership Impunity: The Rapid Evolution of International Criminal Law”

Tuesday, November 13, 2012

Speaker:

*Ambassador David Scheffer**

My remarks in part will draw from my book *All the Missing Souls: A Personal History of the War Crimes Tribunals*. My address today is about the accelerated pace of international justice over the last 20 years. Every day the personal history recorded in *All the Missing Souls* resonates in contemporary international politics and law. Understanding why the highest political and military leaders are increasingly at risk of prosecution today and why the mission of accountability grows with every passing year requires looking back at least to the 1990s when, as I write in my book,

One of the most ambitious judicial experiments in the history of humankind—a global assault on the architects of atrocities—found its purpose as mass killings and ethnic cleansing consumed entire regions of the earth. The grand objective since 1993 has been to end impunity at the highest levels of government and the military not only for genocide, which captures the popular imagination with its heritage in the Holocaust, but also for the far less understood offenses of crimes against humanity and war crimes.

* Ambassador Scheffer is the Robert A. Helman Professor of Law and the Director of the Center for International Human Rights at Northwestern University School of Law in Chicago. In early 2012, Ambassador Scheffer was appointed the U.N. Secretary-General's Special Expert on United Nations Assistance to the Khmer Rouge Trials, and was selected by Foreign Policy Magazine as one of the "Top Global Thinkers of 2011." He has published extensively on international legal and political issues and appears regularly in the national and international media. Ambassador Scheffer is the former United States Ambassador-at-Large for War Crimes Issues, serving in that post from 1997-2001.

The building of institutions of international justice has had a lot to do with that new reality, namely, that impunity is on the losing side of history now.

Understanding why Moammar Gaddafi and his son Saif al-Islam and intelligence chief, al-Sanoussi, were indicted by the International Criminal Court last year, why Sudan's current president, Omar Al-Bashir, was indicted for genocide in Darfur, and defies to this day the authority of the same court, why Radovan Karadžić and Ratko Mladic are finally standing trial in The Hague before the Yugoslav tribunal, why former Liberian President Charles Taylor has been convicted and sentenced before of the Special Court for Sierra Leon, why three of the surviving top Khmer Rouge leaders of the Pol Pot regime are on trial today in Phnom Penh, and why the United Nations and U.S. Government are focusing more of their attention on atrocities prevention strategies today, takes us back to the 1990s when major failures occurred in reacting to atrocities, when the five major criminal tribunals were negotiated to lock in leadership accountability, and atrocities preventions gained a foothold within the federal bureaucracy.

I had the lead American job in building the international criminal tribunals for the former Yugoslavia, Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the permanent International Criminal Court. *All the Missing Souls* is the story of this transformational moment in history about the creation and rise of five war crimes tribunals in the 1990s.

That task occupied all eight years in the Clinton Administration for me, so I want to spend a few moments talking about my own role as it does frame a personal part of the history in this book and the modern story of international criminal justice. I was the "Ambassador to Hell," but also the "Ambassador to Hell and Back." In my more optimistic moments, I considered myself as a carpenter of war crimes tribunals. These courts would be the international community's frontal assault on impunity and often had to begin their work amidst ongoing atrocities.

I was on the Deputies Committee of the National Security Council, which thrust me into every major foreign policy decision in the Clinton Administration's first term, and had the first ever ambassadorship on war crimes during President Clinton's second term. I had the support of Madeleine Albright, who was a true leader on accountability for atrocity crimes. I had the privilege for eight years to work with the most powerful woman in the world, both when she was at the United Nations and then as the Secretary of State during those eight years. It was a tremendous privilege, and for those women in the room who will rise to such power in the future, I congratulate you, and I want to tell the men in the room that it is okay. You can work for them. It will be just fine. With Albright's support, I was able to press ahead, often against almost impossible resistance—from the Pentagon, from budget conscious and always-

questioning members of Congress, from foreign allies and foes, from the United Nations even, and from the intelligence community. I also describe in the book those situations where Albright and I had our disagreements.

I wanted to wait to write this memoir, which I prefer to describe as a personal history, because I quite purposefully wanted to describe the rapid evolution of international justice during the 1990s through my own lens because I was there, and I also wanted to reflect upon it for a good number of years before I wrote it.

I realized from the very beginning of my tribunal-building years in 1993 that there are many ways to approach the issue of evil. And there are now many books that brilliantly examine the sources of evil, not only for the Holocaust, but for the atrocities of our own time. How do men, and sometimes women, of power so readily and efficiently embrace evil and decimate vast numbers of human beings and inspire hundreds and thousands to join them in doing so? My book is not designated to answer that mega-question in part because many others have focused on that issue and because I think the answers are so complex and varied from one atrocity situation to another that singular formulas are folly. There is one exception: The former prosecutor of the International Criminal Court, Luis Moreno-Ocampo, often observes that leaders who commit atrocity crimes keep doing so to maintain their power. I firmly believe that this is a driving force behind evil of our time, just as it has been throughout recorded history.

The challenge that I faced, as did many others, in Washington and overseas, was how to discover the right formula in ever-changing circumstances to confront monstrous evil in the courtroom. Consider the realities of the early 1990s: Mass atrocities, leadership perpetrators, usually an ongoing and vicious armed conflict or at least a potentially resurgent one, a destroyed or failed court system, unwilling political leaders and a skeptical international community, much more focused on the peace or war equation of the conflict itself. That was the scenario facing us in so many atrocity zones, including the Balkans, Rwanda, and Sierra Leone in the 1990s. Cambodia was different only in that the atrocities had long ended in the 1970s, but the infrastructure was lacking and political landmines were all over the place. We were not starting from scratch because of the legacy of the Nuremberg and Tokyo military tribunals decades earlier, but ours was a very different challenge under far more complex circumstances. This would not be victors' justice, although some have viewed it as the powerful imposing justice upon the weak. Modern international justice is no simple code of criminal procedure either. The quest for justice meanders back and forth between international and domestic courts and between common law and civil law principles. Yet, the search for evil aimed for the civility of the courtroom and gained from the growing resolve that removing war criminals from politics and military leadership would make a difference.

We have witnessed a transformational era in confronting what I call “atrocious crimes”—genocide, crimes against humanity, war crimes, and pretty soon, there will be an operational crime of aggression in the jurisdiction of the International Criminal Court. The last twenty years have been nothing but revolutionary in how the world responds to atrocious crimes. I do not mean to say that we have come to learn how to effectively confront atrocities or the threat of them, and my book describes our failures in Rwanda, Bosnia and Herzegovina, and Sierra Leone. But I believe we have learned some lessons from those failures. Our actions in Kosovo in 1999, as described in the book, and in Libya in 2011 provide a new understanding of the value of military intervention or other measures under the fast-evolving responsibility to protect principle. Syria stands in stark contrast today to the momentum of both international justice and the responsibility to protect and it is a profoundly disturbing and regressive contrast. We also need to recognize, however, that in our lifetimes where so many transformational events have radically altered our lives and our societies—the collapse of the Soviet Empire and the end of the Cold War, cyberspace and a radically modernized social media market, the Arab Spring, Amazon, and an unimagined economic collapse in a much-heralded deregulated marketplace, there also was a transformation in international and national justice for atrocious crimes. What happened? To put it simply, we emerged from the old world into a new world. But what was the old world, namely that world before 1993?

In the old world we endured hundreds of international and internal armed conflicts after World War II. My colleague, Professor Cherif Bassiouni of DePaul University College of Law calculated that close to one hundred million people were killed in criminal acts far outside any legitimate use of military force during that post-World War II period. But only about 820 people were indicted for such crimes since World War II and most of those have flown under the radar, hardly known to the international community as examples of justice, and certainly with no known deterrent value in their face, which is all before national courts.

There were no international criminal courts, there was only the memory of Nuremberg and Tokyo and they were collecting dust, usually on law school library shelves. The exception to that that I will never forget is the book that I was reading every night during the first two months of the Clinton Administration. It was Telford Taylor’s *The Anatomy of the Nuremberg Trials*, which had just been published in 1992. It reminded me that Nuremberg happened, and it happened big time, and with tremendous input by the United States of America. And that actually inspired me in those very early months when we were building the Yugoslav tribunal.

In the old world, there was official impunity and only a few senior perpetrators had been prosecuted in domestic courts. The vast majority escaped any legal scrutiny: Pol Pot, Josef Stalin, Idi Amin, Papa Doc Duvalier, Hafez al-Assad, Nicolae Ceaucescu in Romania, Hale Mariam

Mengistu of Ethiopia, Sukarno and Suharto for the atrocities in Indonesia, only a Truth and Reconciliation Commission to account for the apartheid in South Africa, and only a handful of Argentinean officials domestically prosecuted for the “Dirty War.” The entire era of the Soviet Empire, which had just collapsed a few years earlier, remained essentially unaccounted for in any courts of law, and that remains the case today. The Communist world had scorned any true commitment to the rule of law and the free world exercised it with very great discretion.

We have poorly understood atrocity crimes. What did we really know about the crime of genocide, about crimes against humanity, and about war crimes? Yes, we have the records of the Nuremburg and Tokyo tribunals, but we have very little else. Crimes against humanity remained uncodified and dangerously vague. Genocide was tied to the Holocaust and the Genocide Convention of 1948, which had never been enforced. War crimes were tied to the Geneva Conventions in 1949, and yet, were rarely the object of court martials, and never, since Nuremburg and Tokyo, prosecuted internationally.

There also was weak national enforcement. Few states incorporated atrocity crimes into their domestic criminal codes, including the United States. And we had no experience in international jurists. There was no body of jurists to draw upon who understood how to integrate international criminal law, international humanitarian law, international human rights law, and the law of war into a valuable prosecutorial instrument in a war crimes tribunal. The experience just simply did not exist in the legal academy or the legal profession.

So then we have the new world, 1993 onwards. And things started to change in the 1990s and definitely have changed fundamentally by 2012. First, obviously the Soviet Empire is gone as is its anti-legal ideology. The rule of law has more of a fighting chance with new alliances of liberated nations seeking legitimacy through allegiance to international law, although performance often lags behind that allegiance.

There are now the international courts: the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leon, the Extraordinary Chambers in Courts of Cambodia, and the International Criminal Court. These are the five tribunals that frame so much of the narrative in the last twenty years. There also are special courts in East Timor, Sarajevo, Kosovo, and Bangladesh, with others being debated for Sri Lanka and Senegal today. The book that I have written is about the five major ones that were conceived in the 1990s and built. What I had to leave out of the book were my exhaustive efforts to build tribunals or jumpstart national prosecutions of the atrocity crimes that enveloped south Sudan, the Democratic Republic of the Congo, Burundi, Iraq under Saddam Hussein in the 1980s and 1990s, and Chechnya. All of those were on deck in the 1990s and consumed an enormous amount of my time as Ambassador, and yet, I ultimately failed to build tribunals for any one of

those mass atrocities. Nor did I write about East Timor in the book due to space and the fact that the Indonesian government refused to issue a visa for me to travel there because, as I understood it, they simply did not like my title, Ambassador at Large for War Crimes Issues. I did sometimes wonder if I should just change my title—so attractive to many of our allies, the NGOs, journalists and many members on Capitol Hill—to Ambassador at Large for Peace and Humankind, and just grab the damn visas and run with them.

But we now have the beginning of the end of impunity. Leaders have been indicted and some prosecuted—Slobodan Milosevic, Jean Kambanda (the Prime Minister of Rwanda during the genocide), Charles Taylor of Liberia, the top surviving Khmer Rouge leaders, Radovan Karadžić, Ratko Mladic, Moammar Gadhafi, Omar al-Bashir—so it is becoming more normal than abnormal to achieve accountability, at least through a level of indictment, if not ultimately a prosecution. President Omar al-Bashir of Sudan has been under indictment for several years by the International Criminal Court for genocide and other atrocity crimes in Darfur, and yet, he remains the leader of his country and has long been wreaking havoc in south Sudan. I think one way of looking at that is the failure for the international community to secure the arrest of President al-Bashir has left him free to wreak havoc on south Sudan, and he is doing it. As long as he remains outside of the reach of this court, because we cannot get to him, that situation continues. Yet, there has been a firm effort by many in the international communities to stand firm on the al-Bashir indictment despite the wishes of the African Union. The Security Council has not agreed to suspend the indictment on him, which they have the power to do under Article 16 of the Rome Statute of the International Criminal Court. The Security Council could actually instruct: “Put the indictment aside for a year at least; al-Bashir please come to the table and let’s talk; you are free to travel anywhere in the world without the threat of arrest; so will you now be a good guy?” There are enough members of the Security Council that do not trust him and have refused to use Article 16 authority, and I do not think they ever will for al-Bashir.

So far, from 1993 through July 1, 2012, the individuals, mostly leaders, charged with atrocity crimes before the tribunals already number in the hundreds: there have been 301 indictees; 253 surrendered or captured; 20 indicted fugitives still on the run; 156 defendants tried and convicted, while 23 have been acquitted; 24 defendants are in trial as 8 others await the judge’s opening gavel. A total of forty-eight indictees either had indictments withdrawn or they died while in custody prior to judgment. Thirteen cases were transferred by the Yugoslav tribunal to Sarajevo and the war crimes chamber there and were domestically prosecuted, while the Rwanda tribunal has transferred four cases to Kigali for trial there. Not a single indictee of the Yugoslav tribunal, the Special Court for Sierra Leon, or the Extraordinary Chambers in the Courts of Cambodia remains at large,

and nine indicted fugitives remain, as of July 1, at large for the Rwanda tribunal. Ten indictees remain at large with respect to the International Criminal Court at present.

Another big development in this rapid evolution of international justice has been our understanding of atrocity crimes. What are these crimes? What have the tribunals been doing to adjudicate these crimes, to elaborate upon them, to interpret them, to give them broader and more substantial meaning beyond the bare words of the statute? Just as our federal and state courts do with our statutes and our Constitution, what do these words actually mean? While the tribunals have been at it now for twenty years, I cannot keep up with it all at all times. I have students who write summaries for me. It is like, “Give me a memo that briefs me on the totality of decisions last month so I can get up to speed,” because it is a massive undertaking to keep up with the jurisprudence of all the tribunals now. There have been thousands of decisions, namely procedural decisions through the course of trials, and there certainly have been hundreds of judgments, all of those dealing with either procedural issues or with substantive law issues in the trials themselves.

Some examples: we now have a much better understanding of rape as part of genocide; aiding and abetting as part of genocide; gravity requirements for the commission of these atrocity crimes; command responsibility; specific intent and inferred intent; new or better understood crimes against humanity such as forced marriage, apartheid, forced pregnancy; persecution and modern forms of ethnic cleansing; and how to understand and prosecute the crime of torture.

We also now have an evolving understanding, although it has not been litigated yet, of the crime of aggression because in 2010 the States Parties of the International Criminal Court agreed to amend the Rome Statute so as to include a definition and an operational basis for the crime of aggression. That is not part of the court’s operational capacity yet—we have to wait until 2017 and thirty State Party ratifications of that amendment for it actually to kick in and not for all States, as it is a very complex formula of how the crime of aggression has been inserted into the Rome statute—but future work in this area is very much going to focus on the crime of aggression.

It is important to use and understand atrocity crimes as a preventative tool as well as an accurate description of what the tribunals are prosecuting. It is preventative in order to avoid the paralyzing consequences of awaiting genocide to spur policy makers into either action or retreat.

Arising from atrocity crimes, I have argued that a sophisticated body of law also has begun to emerge. I call it “atrocity law,” which is the law applied by, and developed further by, the war crimes tribunals. It is an intersection of international criminal law, of international humanitarian law, of international human rights law, and of the law of war. The common

mistake heard daily is to describe the law of the tribunals, or what is being violated in the field, as international humanitarian law. That is not necessarily the case. International human rights law is too broad as is international criminal law, which covers an enormous amount of criminality around the world. The law of war is too narrow for these tribunals. Any study of the war crimes tribunals and the law they are using has to recognize that it is of unique character, and should be described as such.

We do have stronger international enforcement now. Witness what has transpired in Bosnia and Herzegovina, namely the War Crimes Chamber in Sarajevo, and in Serbia, in Croatia, in Rwanda, and in the tens of countries that have upgraded their criminal codes as part of implementing the Rome Statute. Even in the United States there is a beginning, with Senator Dick Durbin's Genocide, Child Soldiers and Human Trafficking Accountability Acts, which were all enacted by Congress in the late 1980s. In fact, all were enacted in the last few years of the George W. Bush Administration. There is recently President Obama's executive order on war criminals of August 2011 and then in Spring 2012 he created the Atrocities Prevention Board.

My great hope in the next Congress is that the bill that Senator Durbin drafted a few years ago, namely the Crimes against Humanity Accountability Act, somehow could be resurrected in the new Congress and move forward. The reason I say that is because there are a lot of gaps in U.S. law with respect to the atrocity crimes. If one thinks one can enter a federal court today and prosecute someone for the crime of persecution, namely ethnic cleansing, that essentially is not possible. The international crime of persecution is not in the U.S. federal code, it is not in Title 18, it is not in the Uniform Code of Military Justice, it is just not there. I think it is extremely important that the United States have the capacity within its own courts, to get up to speed, to modernize its federal law so that we are capable of prosecuting these crimes in our courts. The more we are capable of doing so, the more we actually insulate ourselves from the reach of the International Criminal Court because under the principle on complementarity, the court has to defer to the national system if that country has the capacity in its courts to prosecute atrocity crimes and is genuinely able and willing to do so. Those nations that have ratified the Rome Statute, particularly America's European allies, Latin American allies, and Japan, have revised their criminal codes and they say, "We are not really worried about the ICC with respect to our country because we have a criminal code that covers all of this and if there is any suspicion on the part of the International Criminal Court with respect to one of our nationals, you bet we are going to get on top of this in our own courts and this thus compel the International Criminal Court to back off." I strongly believe that the United States should have that same capability.

There are experienced jurists now. I have had twenty years of excellent relationships with a large body of lawyers, investigators, and

judges from all around the world who have sat in these tribunals, have prosecuted, or have been defense counsel. This is grown into a very large legal academy now. They should create some association or something so we can keep track of them all. And our Justice Department now has scores of American lawyers, who as federal lawyers, joined the staffs of the tribunals and spent some time prosecuting or acting as defense counsel or as investigators. I gave a speech in Chicago a few years ago at the Drake Hotel, before a Justice Department annual conference of Justice Department lawyers. After I gave my speech I saw this group of lawyers approached me and said, "Ambassador Scheffer, hello, do you remember us?" Well, I had arranged for employment of so many of them in the tribunals back in the 1990s. And I had sort of forgotten faces, but it was an astonishing moment. They said, "This is what we are doing now in the Justice Department; we are actually dealing with human rights; we are dealing with war crimes in the Justice Department." And so we have this very rich reservoir of legal talent now not only in the United States but elsewhere that just did not exist twenty years ago.

Finally, there has been the influence of international politics. During the negotiations for the Rome Statute for the International Criminal Court in the 1990s, there was a lot of concern about the extent to which the Security Council would influence the work of this independent court. The United States position, as I write about in my book, was that the referrals that go to the International Criminal Court should be from the Security Council. Other countries wanted them also to be referred by State Parties and by an independent prosecutor that investigates and then convinces the judges to proceed with a case. The United States' position was that we wanted this court, but we wanted the Security Council referrals to frame the jurisdiction of the court. Why? A simple reason is that as a permanent member of the Security Council, the United States can exercise considerable control of the Security Council.

So much of the politics in the 1990s was this angst in the international community about Security Council control of the court and the United States had to keep pushing back on that fear. It is one of the great ironies in history that if one reads the debate from October 2012 in the Security Council, the President of the Security Council that month was the Permanent Representative of Guatemala. Guatemala is the latest State Party, the 121st State Party to the Rome Statute of the International Criminal Court. And as President of the Security Council, the Guatemalan Permanent Representative called a special one-day session on the relationship between the ICC and the Security Council. Reading through those statements, one discerns that there is a tremendous amount of angst these days by countries that the Security Council is not doing *enough* to help the court. It is not intervening to refer Syria to the International Criminal Court. It is not following through once it has made a referral of either Libya or Darfur. It is not following through to ensure the cooperation

of the States with the court to ensure that the prosecutor can investigate the crimes and follow through on the mandate given to her by the Security Council. There is no mandatory cooperation clause in those resolutions other than for the target country itself, and many other countries must be involved in cooperating with investigations. So, it is fascinating to observe this ironic twist that fourteen years later, from 1998 when the Rome Statute was finalized, there are countries seeking the help of the Security Council, because the Security Council actually has some clout and it actually can force governments to do things.

I want close with two basic arguments that are presented with respect to international justice today. One is the unending argument about deterrence and whether or not these courts actually achieve the goal of deterrence of these crimes. Well, I think the question of whether international tribunals *must* deter the killing is a straw man often used to actually denigrate international justice. One observes this in one article after another where scholars ask, because the Yugoslav tribunal did not actually deter the 1995 Srebrenica massacre, what is the worth of this tribunal?

The primary purpose of the international and hybrid criminal tribunal is to render justice and reveal some of the truth about what transpired in the commission of atrocity crimes in ravaged societies. That means investigating massive crimes and leadership suspects, indicting and prosecuting some of them and rendering judgment followed by either conviction or acquittal. It is a false burden to place on the shoulders of the tribunals to assess their legitimacy and utility by whether they have stopped the killing or deterred further on-going atrocity crimes or the commencement of future atrocity crimes. Such deterrence is a tremendous bonus if it occurs, and we hope for it, but that is not the primary purpose of the tribunals. Victims want top perpetrators to suffer punishment and that is precisely what criminal courts are designed to achieve. This is particularly true where there are tens and hundreds of thousands of victims and those responsible for such horrors controlled the levers of power.

Nonetheless, I argue that international tribunals have a generational impact on war-ravaged societies that ultimately impact societal norms and behavior. Professor Kathryn Sikkink of the University of Minnesota, in her book, *The Justice Cascade*, which I reviewed for the *New Republic* September 2011, uses comparative empirical research over the last three decades to demonstrate how human rights prosecutions at the domestic and international level in fact have influenced the decline in human rights abuses and atrocity crimes in the relevant nations and even in neighboring countries over the long term. I believe we will see similar results in the Balkans, several regions of Africa, and Cambodia in decades to come.

It is also very important to ask whether in the absence of tribunals and indictments, tyrants and atrocity lords are coming to the peace table and negotiating settlements to stop the killing. Does that empirical evidence

stand up to scrutiny any better than many examples in the last two decades where leaders under investigation or indictment lost their international legitimacy and ultimately their power? Consider the ultimate fates of Slobodan Milosevic, Jean Kambanda, Charles Taylor, Radovan Karadžić, Ratko Mladic, Moammar Gadhafi, and even President Omar al-Bashir of Sudan. Al-Bashir remains in power, but with far less legitimacy and influence internationally and a very limited flight pattern. President Bashar al-Assad of Syria has not relented anything in the absence of an indictment. Indeed, he seems to grow more defiant by the day. But I would argue that if the International Criminal Court obtained jurisdiction over the Syrian situation, following a Security Council referral, al-Assad's departure from Damascus would be accelerated and respect for human rights more likely for the Syrian people. International justice does not guarantee political defeat, and neither does the use of military force for that matter, but it has built an impressive record since 1993.

In the final analysis we need both tools—international justice and military force—to confront most effectively the challenges of atrocity crimes. How we use each tool and under what circumstances is the challenge of wise policy-making that is far removed from a knee-jerk resort to go-it-alone U.S. firepower that some continue to advocate.

Searching for an Answer: Defensible E-Discovery Search Techniques in the Absence of Judicial Voice

Harrison M. Brown*

“No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”¹

The past two decades have seen a widespread shift from original physical information storage technologies, to new, digital information technologies, resulting in an exponential rise in the amount of information that is created, processed, and stored.² This “inflationary dynamic” has caused written information to increase to never-before-seen levels, resulting in a new landscape which makes it prohibitively expensive, if not impossible, for litigation to carry on as it has up until now.³

“Today, most litigation includes electronically stored information (ESI)⁴ as a critical aspect of the discovery and production phase.”⁵ Because

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¹ *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

² See GEORGE L. PAUL & BRUCE NEARON, *THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 1* (2006) (“Society stores information in a profoundly different way than it did in 1990.”).

³ See George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 1–2 (2007), <http://law.richmond.edu/jolt/v13i3/article10.pdf> (deriving the term “inflationary dynamic” from ALAN H. GUTH, *THE INFLATIONARY UNIVERSE: THE QUEST FOR A NEW THEORY OF COSMIC ORIGINS* (1997)).

⁴ “ESI includes e-mails, webpages, word processing files, and databases stored in the memory of computers, magnetic disks (such as DVDs and CDs), and flash memory (such as ‘thumb’ or ‘flash’ drives).” BARBARA J. ROTHSTEIN ET AL., *FED. JUDICIAL CTR., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 2* (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/\\$file/eldscpkt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf); see also *HANDBOOK OF DIGITAL FORENSICS AND INVESTIGATION* 63–64 (Eoghan Casey ed.) (2009) (distinguishing between “e-discovery,” defined as the “exchange of data between parties in civil or criminal litigation,” and “ESI,” which is the electronic data that itself is the subject of litigation).

⁵ *Is ‘Manual’ Collection of ESI Defensible?* INT’L ASS’N FOR INFO. MGMT. PROF’LS (Apr. 10, 2010), <http://www.arma.org/news/enewsletters/index.cfm?ID=4270>.

ESI is produced in such large quantities and the increase in ESI easily adds to the cost of review, manual or linear review has significantly decreased in e-discovery cases.⁶ In its place, attorneys have frequently used legacy search techniques, such as keyword searches,⁷ to filter data for producing responsive documents in discovery.⁸ These search methods, however, are not without their own problems and are increasingly coming under attack.⁹

Instead, advanced automated search methods such as concept searching¹⁰ and predictive coding¹¹ have emerged as efficient ways to comb ESI for responsive documents and are “more likely to produce the most comprehensive results.”¹² Although progress has been made in recent

⁶ See, e.g., Herbert L. Roitblat et al., *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. AM. SOC'Y. FOR INFO. SCI. AND TECH. 70, 70 (2010) (advising that exhaustive manual review, conducted linearly, requires one or more persons to examine each document in a collection and to code it as responsive or non-responsive); see also Sedona Conference Working Grp. on Best Practices for Document Retention and Prod., *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 194–195 (2007) [hereinafter *Best Practices Commentary*] (“In many settings involving electronically stored information, reliance solely on a manual search process for the purpose of finding responsive documents may be infeasible or unwarranted. . . . A consensus is forming in the legal community that [manual] review of documents in discovery is expensive, time-consuming, and error-prone.”); see also *infra* Part I. Electronic discovery (“e-discovery”) refers to discovery of documents produced in electronic formats rather than hardcopy for litigation. *Definition of Electronic Discovery*, ELECTRONIC DISCOVERY REFERENCE MODEL, <http://www.edrm.net/resources/glossaries/glossary/e/electronic-discovery> (last visited Oct. 18, 2012).

⁷

A *keyword search* is a basic search technique that involves searching for one or more words within a collection of documents. Typically, a keyword search involves a user typing their search request, or query, into a search engine . . . which then returns only those documents that contain the search terms entered.

Search Methodologies, ELECTRONIC DISCOVERY REFERENCE MODEL, <http://www.edrm.net/resources/guides/edrm-search-guide/search-methodologies> (last visited Nov. 27, 2011); see also *infra* Part II.D.

⁸ See *In re Lorazepam & Clorazepate*, 300 F. Supp. 2d 43, 47 (D.D.C. 2004) (requiring the use of keyword search terms as a reasonable means of narrowing production in e-discovery).

⁹ See *infra* Part II.D.

¹⁰ “Concept search allows a legal professional to specify a concept and documents that describe that concept to be returned as the search results Concept search solutions rely on sophisticated algorithms to evaluate whether a certain set of documents match a concept.” *Search Methodologies*, *supra* note 7; see also *infra* Part III.A.

¹¹ Predictive coding is

a combination of technologies and processes in which decisions pertaining to the responsiveness of records gathered or preserved for potential production purposes . . . are made by having reviewers examine a subset of the collection and having the decisions on those documents propagated to the rest of the collection without reviewers examining each record.

E-Discovery Institute Survey on Predictive Coding, ELEC. DISCOVERY INST., 2 (Oct. 1, 2010), <http://www.ediscoveryinstitute.org/pubs/PredictiveCodingSurvey.pdf>; see also *infra* Part III.B.

¹² See *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 148 (D.D.C. 2007) (suggesting the parties consider “concept searching, as opposed to keyword searching”); see also Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11, 3 (2011), <http://law.richmond.edu/jolt/v17i3/article11.pdf> (“[A] technology-assisted process, in which humans examine only a small fraction of the document collection, can yield higher recall and/or precision than an exhaustive manual review process . . .”).

years, many attorneys remain reluctant to move away from less reliable manual review and legacy search methods and embrace advanced search techniques; this is in part due to a lack of consensus on which particular technology should be used.¹³ While the bench is at times supportive of advanced search techniques,¹⁴ it has yet to expressly endorse one type.¹⁵

Rather than wait for judicial approval of a particular kind of technology, which may not come, counsel should cooperate throughout the entire process of electronic discovery.¹⁶ Cooperating with opposing counsel in developing search protocols will help avoid disputes that may later arise about the appropriateness and sufficiency of search efforts taken by each party, which in turn will reduce discovery deficiencies.¹⁷ Developing and documenting a defensible search methodology prepares a party to defend the reasonableness of search protocols should a dispute arise and assures quality control in e-discovery.¹⁸

Part I of this Note describes the modern information inflationary epoch and how traditional manual document review and production cannot keep pace with the demands inherent in this sea of change. Part II surveys institutional attempts to streamline e-discovery and investigates the efficacy of commonly used legacy search methodologies. Part III introduces two of the most promising alternative search techniques in practice today. Part IV examines recent case law and other authorities on whether e-discovery experts are needed to support a party's search protocols. Lastly, Part V discusses steps parties can take to create defensible search protocols in light of the bench's silence on its preferred search methodologies.

I. MANUAL REVIEW—FROM GOLD STANDARD TO OBSOLETE

Although the way people communicated through written media remained unchanged for many years, the world has recently seen evolutionary changes in the way people write and communicate.¹⁹ This shift is primarily a result of the advent of the personal computer as well as

¹³ See WILLIAM WEBBER, RE-EXAMINING THE EFFECTIVENESS OF MANUAL REVIEW 8 (2011), available at <http://www.umiacs.umd.edu/~wew/papers/w11sire.pdf> (noting that it still remains uncertain which method can most thoroughly and reliably meet supervising attorneys' document review goals).

¹⁴ See, e.g. William A. Gross Const. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134–36 (S.D.N.Y. 2009) (“strongly” endorsing the Sedona Conference methods of ESI retrieval and admonishing attorneys for using “seat of the pants” methods instead).

¹⁵ See Victor Stanley, Inc. v. Creative Pipe, Inc. 250 F.R.D. 251, 259 n.9 (D. Md. 2008) (discussing how alternative electronic search methods “can enhance the accuracy and reliability of [a] search,” but not going so far as to offer a preference for a particular type of search method).

¹⁶ See *infra* Part VI.

¹⁷ See *infra* Part VI; see also Gross, 256 F.R.D. at 136.

¹⁸ See *infra* Part VI.

¹⁹ Information technology remained “simple” and in “equilibrium for over 5200 years;” however, advances in technology have quickly lead to “an evolutionary burst in writing technology.” Paul & Baron, *supra* note 3, at 4–5.

the growth of interconnected global networks.²⁰ Consequently, the total amount of written information has multiplied to previously unimaginable levels.²¹ This growth in volume has had a profound impact on litigation as “it places at severe risk the justice system’s ability to achieve the ‘just, speedy and inexpensive’ resolution of disputes, as contemplated by Rule 1 of the Federal Rules of Civil Procedure.”²² As such, manual review, once considered the “gold standard” of document review,²³ is now infeasible and obsolete in an increasing number of cases.²⁴

A. Information Inflation

Information technology, simple and static for more than fifty centuries, has drastically changed in recent years as an evolution in writing resulted in information inflation. This is primarily attributable to the emergence of a “‘digital realm’ . . . created by an accretion of technological advances, each built on preceding advances.”²⁵ These advances “include digitization; real time computing; the microprocessor; the personal computer, email; local and wide-area networks . . . the evolution of software . . . [and] the World Wide Web”²⁶

The past two decades have seen an exponential rise in the amount of information that is created, processed, and stored. “Computers have enabled the [large-scale] creation of [] information . . . and unleashed an unprecedented deluge of data,”²⁷ the results of which are staggering.²⁸ In

²⁰ PAUL & NEARON, *supra* note 2, at 2–3.

²¹ See Paul & Baron, *supra* note 3, at 1–2 n. 2 (noting that “[o]rganizations now have thousands if not tens of thousands of times as much information within their boundaries as they did 20 years ago” (quoting PAUL & NEARON, *supra* note 2, at 4)).

²² *Best Practices Commentary*, *supra* note 6, at 197; see also Fed. R. Civ. P. 1 (2012).

²³ *Best Practices Commentary*, *supra* note 6, at 199 (

[T]here appears to be a myth that manual review by humans of large amounts of information is as accurate and complete as possible—perhaps even perfect—and constitutes the gold standard by which all searches should be measured [However], the relative efficacy of that approach versus utilizing newly developed automated methods of review remains very much open to debate.)

²⁴ See, e.g., Robert W. Trenchard & Steven Berrent, *Can Technology ‘De-Commoditize’ Document Review?*, LAW TECH. NEWS (Apr. 28, 2011), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202491954188&slreturn=1> (“[I]n the modern age, when computers create and retain far more information than was ever before thought possible, the old model of manual document review is becoming increasingly unworkable.”).

²⁵ *Best Practices Commentary*, *supra* note 6, at 197.

²⁶ Paul & Baron, *supra* note 3, at 5–6.

²⁷ Bennett B. Borden, *The Demise of Linear Review*, ST037 ALL-ABA 277, 279 (2011).

²⁸ “By 2012, 20 typical broadband households will generate more traffic than flowed across the entire internet in 2008.” Dave Evans & Rick Hutley, *The Explosion of Data: How to Make Better Business Decisions by Turning “Infolution” Into Knowledge*, CISCO INTERNET BUS. SOLUTIONS GRP., 1 (2010), http://cco.cisco.com/web/about/ac79/docs/pov/Data_Explosion_IBSG.pdf. Evans and Hutley also noted that an amount of digital data equivalent to the entire Library of Congress is created every five minutes. *Id.*; see also John F. Gantz et al., *The Diverse and Exploding Digital Universe: An Updated Forecast of Worldwide Information Growth Through 2011*, INT’L DATA CORP. (Mar. 2008), <http://www.emc.com/collateral/analyst-reports/diverse-exploding-digital-universe.pdf>.

2006 alone, the world “created, captured and replicated enough digital information to fill all of the books ever created in the world, 3 million times.”²⁹ Society simply stores information in a profoundly different way than it did previously.³⁰ Because of advances in technology and the integration of society into cyber-networks, the world has been forced to adapt to an ever-changing digital frontier.

In the legal world, the various types of discoverable materials in digital form are proliferating. ESI covers data similar to previous hard-copy documents, but also includes more types that were never found in the pre-electronic world, such as e-mail messages.³¹ An estimated 247 billion e-mail messages were sent in 2009, a number expected to more than double by 2013.³² As of 2010, the average corporate worker sends and receives upwards of 110 e-mail messages per day.³³ Other types of information now discoverable as ESI include “instant messaging, word processing with hyperlinks, integrated voice mail, . . . structured databases of all kinds, Web pages, blogs, and e-data in all conceivable forms.”³⁴ With the types and volume of ESI continuing to expand to enormous levels, the use of manual review as a viable tool in litigation is seemingly in doubt.

B. Manual Review is Ill-Suited for Today’s Legal World

The traditional “discovery review process is poorly adapted to much of today’s litigation.”³⁵ Manual review is being forced out of the litigation process as a result of time constraints and skyrocketing costs associated with the information inflation.³⁶ With the amount of ESI in lawsuits expanding greatly, “[t]he cost of manual review . . . is prohibitive, often exceeding the damages at stake.”³⁷ Moreover, large data sets often make it impossible to complete manual review in a timely manner.³⁸ Lastly, the efficacy of manual review has been greatly called into question.³⁹

²⁹ *The Sedona Conference Commentary on ESI Evidence and Admissibility*, SEDONA CONFERENCE WORKING GRP. ON ELEC. DOCUMENT RETENTION AND PROD. (Mar. 2008), available at http://www.thosedonaconference.org/dltForm?did=ESI_Commentary_0308.pdf.

³⁰ See PAUL & NEARON, *supra* note 2, at 2–3.

³¹ See JAMES N. DERTOUZOS ET AL., RAND INST. FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY: OPTIONS FOR FUTURE RESEARCH 1 (2008), available at http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.sum.pdf.

³² Masha Khmartseva, *Email Statistics Report*, RADICATI GRP., 2009–2013, 3 (Sara Radicati ed., May 2009), <http://www.radicati.com/wp/wp-content/uploads/2009/05/email-stats-report-exec-summary.pdf>.

³³ *Email Statistics Report*, RADICATI GRP., 3 (Sara Radicati ed., Apr. 2010), <http://www.radicati.com/wp/wp-content/uploads/2010/04/Email-Statistics-Report-2010-2014-Executive-Summary2.pdf>.

³⁴ See Paul & Baron, *supra* note 3, at 14.

³⁵ See *Best Practices Commentary*, *supra* note 6, at 198.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

C. Manual Review Cannot Keep Up With the Demands of Modern Litigation

The huge volume of available ESI poses unique challenges—both in terms of cost and time to complete the review—which traditional document review simply cannot meet. Prior to the recent information inflation, complying with discovery requests evoked a familiar image of young attorneys wading through “mountains of boxes filled with dusty, poorly organized documents.”⁴⁰ Confronted with such a task, the only practical action that could be taken was to read each document linearly, or in a serial fashion.⁴¹

While the presence of hundreds of boxes of documents may have been concerning to young associates just a few years ago, today that same amount of data might be found on a single computer hard drive.⁴² Additionally, as the ability to create and store copious amounts of data rapidly increases, the cost to store that information falls.⁴³ Consequently, “more individuals and companies are generating, receiving and storing more data, which means more information must be gathered, considered, reviewed and produced in litigation.”⁴⁴ Whereas a small business may have once had a single file cabinet full of paper records, a typical small business today stores the digital equivalent of as many as 2,000 file cabinets.⁴⁵

Accordingly, manual review is becoming neither workable nor economically feasible. As the court remarked in *Pension Committee v. Banc of America*, we live in “an era where vast amounts of electronic information is available for review,” and therefore “discovery in certain cases has become increasingly complex and expensive.”⁴⁶ E-discovery accounts for as much as 25% of the total cost of litigation, and the biggest single cost in the process is attorney review time of voluminous data.⁴⁷ “[T]o the extent that a particular document is likely to be the object of a discovery request, it potentially can also represent a very real liability. The cost of collection, review and production often exceeds \$2 per document—

⁴⁰ Borden, *supra* note 27, at 279.

⁴¹ *Id.*

⁴² “[O]ne gigabyte of electronic information can generate approximately 70,000–80,000 of text pages, or 35 to 40 banker’s boxes of documents (at 2,000 pages per box). Thus, a 100-gigabyte storage device . . . could hold as much as the equivalent of 3,500 to 4,000 banker’s boxes of documents.” *Best Practices Commentary*, *supra* note 6, at 192 n.2.

⁴³ “Over the last 30 years, space per unit cost has doubled roughly every 14 months.” Matthew Komorowski, *A History of Storage Cost* (July 24, 2009), <http://www.mkomo.com/cost-per-gigabyte> (emphasis omitted). Whereas a five megabyte (MB) hard drive cost as much as \$3,500.00 in 1981 (the equivalent of \$700,000.00 per gigabyte (GB)), a modern hard drive retails for less than \$0.10 per GB. *Id.*; see also John Gantz & David Reinsel, *Extracting Value From Chaos*, INT’L DATA CORP., 4 (June 2011), <http://idedocserv.com/1142> (showing a projected decrease in cost per GB from 2005 to 2015).

⁴⁴ *Best Practices Commentary*, *supra* note 6, at 192.

⁴⁵ See PAUL & NEARON, *supra* note 2, at 4–5.

⁴⁶ *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010).

⁴⁷ See Roitblat et al., *supra* note 6, at 70.

and corporations produce and store many billions of documents annually.⁴⁸ As such, it is not unusual for the cost of reviewing information to exceed the damages at stake,⁴⁹ forcing companies to settle cases out of necessity, rather than based on the merits.⁵⁰

Moreover, large amounts of ESI make it impossible to meet the time constraints imposed in litigation. For example, it would take approximately fifty-four years to complete the review of a dispute with one billion e-mails, with one hundred reviewers working ten hours per day, seven days a week.⁵¹ Limiting review to just one percent of the total universe of documents would still take twenty-eight weeks to complete.⁵²

This scenario is increasingly becoming a reality, as seen recently in *In Re Fannie Mae Securities Litigation*, where the D.C. Court of Appeals affirmed the district court's order holding the Office of Federal Housing Enterprise Oversight (OFHEO)—the federal agency that regulates Fannie Mae and Freddie Mac—in contempt for failing to comply with a discovery deadline to which it agreed.⁵³ In 2006, individual defendants who were former Fannie Mae executives subpoenaed thirty categories of documents from OFHEO, a nonparty to the litigation.⁵⁴ In 2007, after the OFHEO claimed that it had produced all the documents requested, the defendants later conducted a Rule 30(b)(6) deposition⁵⁵ of OFHEO and learned that OFHEO had failed to search all of its off-site records.⁵⁶ Later, after OFHEO failed to produce additional documents, the individual defendants moved to hold OFHEO in contempt.⁵⁷ After the contempt hearing began, the parties stipulated that OFHEO would continue to conduct searches and provide all responsive documents by January 2008.⁵⁸

Requiring them to review approximately 660,000 documents, “OFHEO undertook extensive efforts to comply with the stipulated order, hiring [fifty] contract attorneys solely for that purpose. The total amount OFHEO spent on the individual defendants’ discovery requests eventually

⁴⁸ Borden, *supra* note 27, at 279; *see also Best Practices Commentary, supra* note 6, at 198 n.13 (noting that for an associate reviewing an average of fifty documents at ten pages in length each hour, it would take the associate 160 hours to review one gigabyte of data at a billable rate of \$200 per hour, for a total cost of \$32,000).

⁴⁹ *Best Practice Commentary, supra* note 6, at 198.

⁵⁰ *See* Steven Hunter, *E-Discovery: Cutting Costs With Predictive Coding*, INSIDE COUNSEL (Sept. 7, 2011), <http://www.insidecounsel.com/2011/09/07/e-discovery-cutting-costs-with-predictive-coding>.

⁵¹ Jason R. Baron & Michael D. Berman, *Designing a “Reasonable” E-Discovery Search: A Guide for the Perplexed*, in *MANAGING E-DISCOVERY AND ESI: FROM PRE-LITIGATION THROUGH TRIAL* 479, 481 (Berman et al. eds., 2011).

⁵² *Id.*

⁵³ *In re Fannie Mae Sec. Litig.*, 552 F.3d 814 (D.C. Cir. 2009).

⁵⁴ *Id.* at 816.

⁵⁵ Fed. R. Civ. P. 30(b)(6) (2012) (providing for depositions of adverse organizations through designated representatives).

⁵⁶ *In re Fannie Mae*, 552 F.3d at 817.

⁵⁷ *Id.*

⁵⁸ *Id.*

reached over \$6 million, more than 9 percent of the agency's entire annual budget."⁵⁹ Despite this, after moving for and receiving two extensions, OFHEO failed to meet the deadline.⁶⁰ The district court granted the individual defendants' renewed motions for contempt, finding that "OFHEO's efforts at compliance were 'not only legally insufficient, but too little too late.'"⁶¹ The district court imposed sanctions on OFHEO, and the Court of Appeals upheld the sanctions.⁶²

Fannie Mae highlights the problem with manual review: parties using this method will have to commit time and resources that are simply not available. The volume and associated complexity in having to search through large amounts of ESI will only worsen as time goes on, and manual review is ill-equipped to confront the problem. As such, "automated search methods should be viewed as reasonable, valuable, and even necessary."⁶³

II. THE MYTH OF MANUAL REVIEW AS THE GOLD STANDARD IN DISCOVERY

Prior to the information inflation, manual review was long considered the "gold standard" in discovery.⁶⁴ However, as discussed above, manual review is increasingly becoming more challenging by the sheer amount of data typically generated and stored by almost every organization that uses computer technology.⁶⁵ Even assuming, *arguendo*, that practitioners had the resources and time to undertake manual review of voluminous sets of ESI, studies demonstrate that manual review of large data sets is imprecise and fails to live up to its billing.⁶⁶

A widely-cited study on the efficacy of manual review, conducted by David Blair and M.E. Maron in 1985, shows the problems inherent in the use of human language among the various persons who can be involved in a dispute, and how difficult it can be to take this into account in a search for informational records.⁶⁷ The Blair and Maron study involved a manual review of about 40,000 documents spanning 350,000 pages of text captured in an IBM database to be used in a large corporate lawsuit.⁶⁸ Attorneys collaborated with paralegal search specialists to find all of the relevant

⁵⁹ *Id.*

⁶⁰ *Id.* at 817–18.

⁶¹ *Id.* at 818.

⁶² *Id.* at 823–24.

⁶³ *Best Practices Commentary*, *supra* note 6, at 194.

⁶⁴ *See supra* text accompanying note 23.

⁶⁵ *See supra* Part I.B.

⁶⁶ *See, e.g.*, Grossman & Cormack, *supra* note 12, at 3; *see also 2010 Legal Track Results*, UNIV. OF MD. INST. FOR ADVANCED COMPUTER STUDIES, <http://trec-legal.umiacs.umd.edu/#2010> (last visited Nov. 23, 2011); *see also* Roitblat et al., *supra* note 6, at 72.

⁶⁷ *See generally* David C. Blair & M. E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System*, 28 COMM'NS OF THE ACM 289 (1985).

⁶⁸ *Id.* at 290–91.

documents.⁶⁹ The attorneys estimated that they had found 75.5% of the relevant documents, however Blair and Maron's more detailed analysis found that the actual recall value was 20.26%, meaning that the attorneys believed that they were retrieving a much higher percentage of relevant documents than they actually were.⁷⁰

Blair and Maron found that the different parties in the case used different words in their search for relevant documents, depending on their point of view.⁷¹ For example, the attorneys representing "[t]hose who were personally involved in the event, and perhaps culpable, tended to refer to it euphemistically as, *inter alia*, an 'unfortunate situation,' or a 'difficulty.'"⁷² However, "[t]hose who discussed the event in a critical or accusatory way referred to it quite directly—as an 'accident.'"⁷³

Blair and Maron also found that the efficacy of manual review is directly tied to the amount of documents to be evaluated.⁷⁴ Notably, they found that "the value of Recall decreases as the size of the database increases, or, from a different point of view, the amount of search effort required to obtain the same Recall level increases as the database increases, often at a faster rate than the increase in database size."⁷⁵ Thus, manual review is plagued not only by time and expense constraints, but becomes a less effective tool as document universes grow, making it ill-suited for modern litigation.

The information inflation we are experiencing as a result of the incorporation of technology and new tools in society presents new challenges to litigation. While technology may be the source of the problem in e-discovery, it also appears to be the best possible solution.⁷⁶ As lawyers began to realize that manual review could not keep pace with the demands of e-discovery, the legal community began to collaborate and establish working models to assist in the discovery process.⁷⁷ Attorneys also utilize tools like optical character recognition (OCR)⁷⁸ technology to digitize paper documents in order to make use of search methodologies

⁶⁹ *Id.* at 291.

⁷⁰ *Id.* at 293.

⁷¹ *Id.* at 295.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 296.

⁷⁵ *Id.* "Recall measures how well a system retrieves *all* the relevant documents" in a given set, and is represented as a proportion of relevant documents retried by a system. *Id.* at 290.

⁷⁶ *Best Practices Commentary*, *supra* note 6, at 192.

⁷⁷ *See id.*

⁷⁸ "Optical character recognition is the conversion of a scanned document into searchable text and the rendering of its text" into a form that a computer can manipulate. *Definition of Optical Character Recognition*, ELECTRONIC DISCOVERY REFERENCE MODEL, <http://www.edrm.net/resources/glossary/o/ocr> (last visited Dec. 2, 2011). Printed material is scanned and converted into electronic files that "can then be searched for specific words or phrases." *Id.*

such as keyword and Boolean searches that increase efficiency and reduce costs.⁷⁹

A. Attempting to Bring Order to a Disorderly Problem

E-discovery experts and consultants George Socha and Tom Gelbmann co-founded the Electronic Discovery Reference Model (“EDRM”) in “May 2005 to address the lack of standards and guidelines in the e-discovery market.”⁸⁰ Since then, “over 900 e-discovery experts, vendors, and end-users from more than 250 organizations have worked together to develop standards and frameworks for addressing e-discovery challenges.”⁸¹ By supplying guidelines, standards, whitepapers, research materials, webinars, news, data sheets and other items,⁸² the EDRM’s model has become “widely accepted and employed by most e-discovery specialists.”⁸³

EDRM’s nine-step flowchart is a conceptual, non-linear, and iterative model of the e-discovery process.⁸⁴ The steps include: information management, identification, preservation, collection, processing, review, analysis, production, and presentation.⁸⁵ Each step works toward the ultimate goal of translating an excessive volume of documents into relevant and usable material in litigation.⁸⁶ The EDRM flow chart “illustrates how the volume of data decreases and the relevance increases as the work progresses.”⁸⁷ The three steps of processing, reviewing, and analyzing are performed concurrently.⁸⁸ While the initial steps of culling data and the final steps of incorporating those materials in a coherent way in litigation are important and present unique challenges in and of themselves, the middle three steps tend to be the areas in which the problems of the data explosion are most often felt and dealt with.⁸⁹

The goal of the processing step is to reduce the volume of ESI and convert it, if necessary, to forms more suitable for review and analysis.⁹⁰

⁷⁹ See, e.g., *In re Aspartame Antitrust Litig.*, 817 F.Supp.2d 608, 614-615 (E.D. Pa. 2011) (in deciding whether to assign the cost of making documents OCR searchable, the court praised the use of OCR in conjunction with keyword searches, which reduced the pool of potentially responsive documents by 87% and 38.5%, for “allowing discovery to be conducted in an efficient and cost-effective manner.”).

⁸⁰ *Frequently Asked Questions*, ELECTRONIC DISCOVERY REFERENCE MODEL, <http://www.edrm.net/joining-edrm/frequently-asked-questions> (last visited Dec. 2, 2011).

⁸¹ *Id.*

⁸² *Id.*

⁸³ RALPH C. LOSEY, *E-DISCOVERY: CURRENT TRENDS AND CASES 4-5* (2008).

⁸⁴ See *Electronic Discovery Reference Model Flow Chart, v2.0*, ELECTRONIC DISCOVERY REFERENCE MODEL, <http://www.edrm.net/resources/edrm-stages-explained> (last visited Dec. 2, 2011) [hereinafter *EDRM Flow Chart*].

⁸⁵ *Id.*

⁸⁶ See *id.*

⁸⁷ LOSEY, *supra* note 83, at 5.

⁸⁸ *EDRM Flow Chart*, *supra* note 84.

⁸⁹ See LOSEY, *supra* note 83, at 11-12.

⁹⁰ *Processing Guide*, ELECTRONIC DISCOVERY REFERENCE MODEL,

To achieve this, practitioners may “reduce the overall set of data collected by filtering out files that are duplicates or known to be irrelevant after further investigation.”⁹¹ Duplicate files are removed here,⁹² and “[f]iles that are probably not relevant because of factors such as date, type, or origin may also be excluded at this step, if they were not previously excluded” by technicians working during the first four steps.⁹³ Hot files, or potentially adverse or embarrassing materials, may also be flagged at this stage, as they might have an immediate impact on litigation or make finding similar relevant materials among the remaining files easier.⁹⁴

In processing, practitioners are encouraged to “consider the relationships between the files or documents obtained to better understand what data has been collected and determine whether additional data extraction may be required.”⁹⁵ The processing step is presented in a linear fashion: moving from assessing to preparing data, to selecting and normalizing, to validating output and exception handling, and then to preparing output and export of the data.⁹⁶ Employment of this step is intended to be on an “iterative basis,” which means that practitioners often have to make changes to prior tasks and do them again.⁹⁷

The seventh step is the analysis stage.⁹⁸ Once relevant materials have been identified, this is the stage where litigation teams attempt to make heads or tails of the information they have, hoping to make informed decisions about strategy and scope through reliable methods based on verified data.⁹⁹ Here, litigators identify information such as “key issues, witnesses, specific vocabulary and jargon, and important individual documents.”¹⁰⁰ Of course, “[t]his is a traditional legal step that competent trial lawyers are already qualified to perform.”¹⁰¹ Analysis becomes uniquely challenging when large quantities of ESI are produced.¹⁰²

Accordingly, when dealing with large quantities of ESI, the review step becomes the most important and the most difficult. The review step is the point where ESI collected in the previous stages is studied and sorted

<http://www.edrm.net/resources/guides/edrm-framework-guides/processing> (last visited Dec. 2, 2011).

⁹¹ LOSEY, *supra* note 83, at 11.

⁹² *Id.* De-duplication is “[t]he process of identifying (or some vendors include actually removing) additional copies of identical documents in a document collection.” *E-Discovery Glossary*, FIOS, <http://www.fiosinc.com/e-discovery-knowledge-center/electronic-discovery-glossary.aspx?cid=DG> (last visited Dec. 12, 2011).

⁹³ LOSEY, *supra* note 83, at 11.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *Id.*

⁹⁸ *EDRM Flow Chart*, *supra* note 84.

⁹⁹ *Analysis Guide*, ELECTRONIC DISCOVERY REFERENCE MODEL, <http://www.edrm.net/resources/guides/edrm-framework-guides/analysis> (last visited Dec. 12, 2011).

¹⁰⁰ LOSEY, *supra* note 83, at 12.

¹⁰¹ *Id.*

¹⁰² *Id.*

for use in the latter stages.¹⁰³ Here, practitioners “review for relevance, confidentiality and privilege, and related activities such as redaction.”¹⁰⁴

Litigation is made more difficult today by the gigantic hurdles that must be overcome in the document review stage.¹⁰⁵ As practitioners become consumed by this process and expend copious resources to identify usable materials, review becomes an end, rather than a means, to arrive at a legal solution that all parties can agree upon.¹⁰⁶ However, the EDRM model provides a good starting point and has at least alleviated some of the problems caused by large data sets.¹⁰⁷

B. Legacy Search and Identification

Although the use of technology in the search and identification phase is not mandated by any court rules, technology is practically required to reduce the amount of manual effort, time, and expense involved in searching for and identifying potentially relevant ESI. Legacy search¹⁰⁸ and identification techniques represent some of the first attempts to harness technology in order to manage large sets of ESI, and are the most widely used today.¹⁰⁹

C. Keyword Search Models

Keyword and Boolean search methods are widely used and vetted techniques for filtering data in order to produce responsive documents in discovery.¹¹⁰ This has much to do with the legal profession’s longtime familiarity with major internet legal retrieval services that allow for searches of databases containing statutes and case precedents.¹¹¹ However, as recent cases and studies have shown, there are pitfalls to using this

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 32–33.

¹⁰⁶ *See id.*

¹⁰⁷ *Review Guide*, ELECTRONIC DISCOVERY REFERENCE MODEL, <http://www.edrm.net/resources/guides/edrm-framework-guides/review> (last visited Dec. 12, 2011).

¹⁰⁸ *Sedona Conference Glossary: E-Discovery & Digital Information Management*, SEDONA CONFERENCE WORKING GRP. SERIES & WGS MEMBERSHIP PROGRAM, 30 (2007), <http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf> [hereinafter *Sedona Conference Glossary*] (defining a legacy search as a search of a legacy system, which is “ESI in which an organization may have invested significant resources, but has been created or stored by the use of software and/or hardware that has become obsolete or replaced”).

¹⁰⁹ *See Best Practices Commentary*, *supra* note 6, at 200.

¹¹⁰ *See In re CV Therapeutics, Inc. Sec. Litig.*, No. C-03-3709 SI, 2006 WL 2458720, at *2 (N.D. Cal. Aug. 22, 2006) (endorsing search terms to aid in narrowing production); *Windy City Innovations, LLC v. Am. Online, Inc.*, No. 04 C 4240, 2006 WL 2224057, at *3 (N.D. Ill. July 31, 2006) (promoting keyword searching as a means to search a document more efficiently); *In re Lorazepam & Clorazepate Antitrust Litig.*, 300 F. Supp. 2d 43, 47 (D.D.C. 2004) (“The glory of electronic information is not merely that it saves space but that it permits the computer to search for words or ‘strings’ of text in seconds.”); *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 559 (W.D. Tenn. 2003) (ordering defendant to use search terms propounded by plaintiff).

¹¹¹ *See Paul & Baron*, *supra* note 3, at 21–22.

technique as it often fails to uncover a large portion of potentially relevant data.¹¹²

A keyword search, in its simplest form, searches for documents possessing a specific term specified by a user.¹¹³ Keyword searches are most often used to identify documents that are either responsive or privileged, and for large-scale culling and filtering of documents.¹¹⁴ There are limitations with basic keyword searches, however, as they can fail to uncover variants of a word and will not find documents with typographical errors or misspelled words in either the document or query.¹¹⁵ To address some of the limitations of keyword searches, many databases allow for the use of “wildcards”¹¹⁶ that enable a user to search for different forms of a certain word.¹¹⁷

Boolean searches¹¹⁸ add another dimension to keyword searches, allowing users to search for multiple keywords together,¹¹⁹ or exclusive of each other,¹²⁰ or within a certain distance from each other.¹²¹ This method “allows multiple keywords or search terms to be linked together to improve the relevancy of the documents identified by this methodology.”¹²² Other

¹¹² See *Best Practices Commentary*, *supra* note 6, at 200.

¹¹³ *The EDRM Glossary*, ELECTRONIC DISCOVERY REFERENCE MODEL, http://www.edrm.net/wiki2/index.php/keyword_search#endnote_vinsonglossary (last visited Oct. 31, 2011); see also *Kroll Ontrack Legal Glossary*, KROLL ONTRACK, <http://www.krollontrack.com/glossary/terms> (last visited Oct. 31, 2011).

¹¹⁴ See Gregory L. Fordham, *Using Keyword Search Terms in E-Discovery and How They Relate to Issues of Responsiveness, Privilege, Evidence Standards, and Rube Goldberg*, 15 RICH. J.L. & TECH. 1, 13, available at <http://law.richmond.edu/jolt/v15i3/article8.pdf>.

¹¹⁵ See *Autonomy's Technology: Limitations of Other Approaches*, AUTONOMY CORP., <http://www.autonomy.com/content/Technology/autonomys-technology-limitations-of-other-approaches/index.en.html> (last visited Oct. 31, 2011).

¹¹⁶ See *Sedona Conference Glossary*, *supra* note 108, at 54 (defining a wildcard operator as “[a] character used in keyword searching that assumes the value of any alphanumeric character and permits more options, such as alternative spellings, to be identified quickly”).

¹¹⁷ KAREN SCHULER ET AL., *E-DISCOVERY: CREATING AND MANAGING AN ENTERPRISEWIDE PROGRAM: A TECHNICAL GUIDE TO DIGITAL INVESTIGATION AND LITIGATION SUPPORT 217* (Cathleen P. Peterson & Eva Vincze eds., 2009). The typical wildcard symbol is represented either by an asterisk or an exclamation mark. *Id.* For example, in a sexual harassment case, a search for documents and e-mails containing the wildcard “sex*” or “sex!” might reveal related words such as “sex,” “sexual,” “sexist,” and “sexism.” *Id.*

¹¹⁸ “Boolean” refers to the system of logic developed by computer mathematician George Boole. *Best Practices Commentary*, *supra* note 6, at 217.

¹¹⁹ Using the Boolean operator “AND” between two keywords or phrases results in a search that “specifies that both of the items be present for the expression to match.” *Search Methodologies*, *supra* note 7.

¹²⁰ The Boolean operator “OR” used between two keywords or phrases “specifies that either of the two items be present for the expression to match.” *Id.*

¹²¹ The Boolean operator “W/N” “connects keywords and/or phrases by using a nearness or proximity specification. The specification states that the two words and/or phrases are within *n* words of each other, and the two words/phrases can be in either order.” *Id.*

¹²² See SCHULER ET AL., *supra* note 117.

operators include fuzzy searching which can find misspelled terms,¹²³ and stemming, which search for variations on word endings.¹²⁴

D. E-mail or Conversation Threading

The goal of e-mail or conversation threading is “to find and organize messages that should be grouped together based on reply and forwarding relationships.”¹²⁵ Typically, an e-mail thread will link together a series of e-mail responses and/or forwards that are created from an original message.¹²⁶ This technique may be useful if a particular topic is potentially relevant because responses or forwards of the original message may also contain relevant data.¹²⁷ This method is limited, however, when a response to a message changes the subject heading or adds additional information.¹²⁸

E. Shortcomings of Legacy Searches and the Need for Alternatives

Practitioners have adopted legacy search methodologies in earnest, particularly keyword and Boolean searches, to address the expanding universe of information and its associated problems. Courts accept the use of keyword searching to “define discovery parameters and resolve discovery disputes.”¹²⁹ Despite the widespread use of these techniques, like manual review, keyword searches can be surprisingly inaccurate.¹³⁰

As noted above, the Blair and Maron study revealed a significant gap or disconnect between lawyers’ perceptions of their ability to ferret out relevant documents and their actual ability to do so.¹³¹ New research reaffirms the findings of Blair and Maron as applied to keyword searches.¹³² In one such study conducted by the Text Retrieval Conference (TREC), researchers found that Boolean keyword searches could only locate between 24% and 57% of the total number of relevant documents.¹³³ Additionally, these searches produce many false positives, and it is not

¹²³ *Id.* at 218.

¹²⁴ Stemming is a Boolean specification that will “match all morphological inflections of the word.” *See Search Methodologies*, *supra* note 7.

¹²⁵ Sachindra Joshi et al., *Auto-Grouping Emails for Faster E-Discovery*, 4 PVLDB 1284, 1288 (2011), available at <http://www.vldb.org/pvldb/vol4/p1284-joshi.pdf>.

¹²⁶ *See id.*

¹²⁷ *See* SCHULER ET AL., *supra* note 117, at 220.

¹²⁸ *Id.*

¹²⁹ *See Best Practices Commentary*, *supra* note 6, at 200; accord *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (suggesting that a party might satisfy its duty to preserve documents in anticipation of litigation by conducting system-wide keyword searching and preserving a copy of each “hit”).

¹³⁰ *See Best Practices Commentary*, *supra* note 6, at 194.

¹³¹ *See* discussion *supra* Part II.

¹³² *See, e.g.*, Grossman & Cormack, *supra* note 12, at 18–20; *see also 2010 Legal Track Results*, *supra* note 66; *see also* Roitblat et al., *supra* note 6, at 72.

¹³³ *See* Douglas W. Oard et al., *Overview of the TREC 2008 Legal Track*, in NIST SPECIAL PUBLICATION: SP 500-277, THE SEVENTEENTH TEXT RETRIEVAL CONFERENCE (TREC 2008) PROCEEDINGS 8–9 (2008), available at <http://trec.nist.gov/pubs/trec17/papers/LEGAL.OVERVIEW08.pdf>.

uncommon for a poorly chosen keyword to return more “junk” than responsive documents.¹³⁴

Not only are these search methodologies inaccurate, but the adversarial manner by which attorneys use them increases the likelihood that the search will fall short of its target.¹³⁵ In an interesting analogy, the method by which most attorneys employ legacy search techniques is similar to the children’s game of “Go Fish.”¹³⁶ When a party requests ESI, the responding party is entitled to privacy and does not have to grant unfettered access to its document database.¹³⁷ Yet at the same time, the requesting party is able to make requests for production without revealing what it is that they are looking for.¹³⁸ Absent cooperation, the requesting party guesses which keywords might produce evidence to support its case without having much, if any, knowledge of the responding party’s “cards,” or the terminology used by the responding party’s custodians.¹³⁹ “This process involves as much chance as skill,” takes too long, produces a vast quantity of false positives, and misses many relevant documents.¹⁴⁰

III. ALTERNATIVE SEARCH TECHNOLOGIES

Cognizant of the fact that manual review is unworkable and that legacy search methodologies are broken, the Sedona Conference acknowledged that “[t]he legal profession is at a crossroads: the choice is between continuing to conduct discovery as it has ‘always been practiced’ . . . or, alternatively, embracing new ways of thinking in today’s digital world.”¹⁴¹ Indeed, lawyers are gradually beginning to use alternative forms of review with promising results.¹⁴² At the same time, studies demonstrate that these methods, such as concept searching and predictive coding, are able to achieve increasingly higher levels of recall and precision.¹⁴³ Moreover, courts are beginning to take notice of the potential

¹³⁴ *Id.* at 7.

¹³⁵ See, e.g., Ralph Losey, *Child’s Game of “Go Fish” Is a Poor Model for E-Discovery Search*, e-Discovery Team Blog (Oct. 4, 2009), <http://e-discoveryteam.com/2009/10/04/childs-game-of-go-fish-is-a-poor-model-for-e-discovery-search> (suggesting that iterative exchanges of key words and search terms results in poor precision and “a vast quantity of false hits.”).

¹³⁶ *Id.*

¹³⁷ See, e.g., *Omnicare, Inc. v. Mariner Health Care Mgmt. Co.*, No. 3087-VCN, 2009 WL 1515609, at *3 (Del. Ch. May 29, 2009) (“Document discovery must be limited in scope to the production of documents relevant to the subject matter of the litigation between the parties.”); *Frank v. Engle*, No. C.A. 13323, 1998 WL 155553, at *3 (Del. Ch. Mar. 30, 1998) *order clarified sub nom. Lee v. Engle*, No. C.A. 13323-NC 1998 WL 409163 (Del. Ch. June 19, 1998); see also JOHN M. BARKETT, *E-DISCOVERY: TWENTY QUESTIONS AND ANSWERS* 13, 71–77 (2008).

¹³⁸ Losey, *supra* note 135.

¹³⁹ See *id.*

¹⁴⁰ *Id.* (emphasis omitted).

¹⁴¹ *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 10 SEDONA CONF. J. 299, 302 (2009).

¹⁴² See *infra* text accompanying notes 163–166.

¹⁴³ See generally Bruce Hedin et al., *Overview of the TREC 2009 Legal Track*, in NIST SPECIAL PUBLICATION: SP 500-278, THE EIGHTEENTH TEXT RETRIEVAL CONFERENCE (TREC 2009) PROCEEDINGS (2009), available at <http://trec.nist.gov/pubs/trec18/papers/>

these new methods have to offer.¹⁴⁴ While technology is the source of many of the problems with e-discovery today, technology also represents the solution.¹⁴⁵

A. Concept Searching

Concept searching allows users to “specify a concept and documents that describe that concept to be returned as the search results.”¹⁴⁶ This technique examines the context in which a term appears and looks for similar terms or concepts—a method that is particularly useful in identifying “potentially relevant documents when a set of keywords are not known in advance.”¹⁴⁷ When conducted in tandem with legacy search methods such as keyword and Boolean searches, the chance of finding relevant ESI greatly increases.¹⁴⁸

Concept searches have gained the attention of the courts as well as seen in *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority* (WMATA), a case involving a claim by disabled persons that the WMATA violated the Americans with Disabilities Act and other federal laws.¹⁴⁹ WMATA used an e-mail program that automatically deleted all non-archived e-mail messages every sixty days, and it failed to suspend the deletion program until more than two years after the original complaint was filed.¹⁵⁰ Plaintiffs sought restoration and review of backup tapes to find relevant deleted messages, but WMATA objected, arguing that the backup tapes were not reasonably accessible.¹⁵¹ The court, however, found support for the plaintiffs’ request, determining that the benefit of production outweighed the burden to WMATA,¹⁵² and subsequently ordered the restoration and search of the backups according to a protocol that the parties were directed to negotiate.¹⁵³ In doing so, the court suggested that the parties consider using concept searching as opposed to other methods.¹⁵⁴

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¹⁴⁴ See *infra* text accompanying notes 149–154.

¹⁴⁵ See Hon. Andrew J. Peck & David J. Lender, *10 Key E-Discovery Issues in 2011: Expert Insight to Manage Successfully*, METRO. CORP. COUNSEL, Apr. 2011, at 5, available at <http://www.metrocorp.counsel.com/pdf/2011/April/01.pdf> (“Since technology created the volume, lawyers have turned to technology to attempt to solve the review problem . . .”).

¹⁴⁶ *Search Methodologies*, *supra* note 7.

¹⁴⁷ *Id.*

¹⁴⁸ SCHULER ET AL., *supra* note 117, at 220.

¹⁴⁹ See, e.g., *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139 (D.D.C. 2007).

¹⁵⁰ *Id.* at 145.

¹⁵¹ *Id.* at 147.

¹⁵² *Id.* at 148 (applying Rule 26(b)(2)(C)’s balancing test, the magistrate judge determined that there was no other place to find the documents due to WMATA’s failure to impose a litigation hold, that the discovery was important to the outcome of the litigation, and the plaintiffs had no meaningful financial resources).

¹⁵³ *Id.*

¹⁵⁴ See *id.* (Magistrate Judge Facciola questioned the search methods of the restored data as follows:

B. Predictive Coding

Another automated search method that has recently gained attention is predictive coding, or computer-assisted coding.¹⁵⁵ These coded documents are then used by the computer system in an iterative process to code additional documents across the full collection.¹⁵⁶ This process merely accelerates the discovery process; it does not replace manual review by humans, but optimizes it.¹⁵⁷

The reviewing human typically codes a controlled sample group of documents based on a series of “yes” or “no” questions, such as whether each document is responsive, relevant, or privileged.¹⁵⁸ “The system builds an ontology in the background as it learns from the expert and presents subsequent samples.”¹⁵⁹ After running enough iterations, the system will have “sufficiently built the ontology to the point where it can ‘predict’ what the human will” pick out in the sample he or she is reviewing.¹⁶⁰ Considering that manual review can be effective in small samples,¹⁶¹ predictive coding efficiently combines a human’s analytical assessments with the processing power of a computer.¹⁶²

As mentioned above, the results of the TREC 2008 Legal Interactive Task study suggest that predictive coding may in fact be able to improve upon manual review and legacy search methods.¹⁶³ One participant in the study employed predictive coding in response to a mock request to produce documents from a collection of 6,910,192 documents.¹⁶⁴ By coding a

how will they be searched to reduce the electronically stored information to information that is potentially relevant? In this context, I bring to the parties’ attention recent scholarship that argues that concept searching, as opposed to keyword searching, is more efficient and more likely to produce the most comprehensive results.)

(citing Paul & Baron, *supra* note 3).

¹⁵⁵ See, e.g., Baron & Berman, *supra* note 51, at 7 (citing *E-Discovery Institute Survey on Predictive Coding*, e-DiscoveryInst. (2010), http://www.ediscoveryinstitute.org/publications/ediscovery_institute_survey_on_predictive_coding (describing predictive coding as a combination of technologies and processes in which decisions pertaining to the responsiveness of records gathered or preserved for potential production purposes . . . are made by having reviewers examine a subset of the collection and having the decisions on those documents propagated to the rest of the collection without reviewers examining each record.

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

¹⁵⁸ Tom Groom, *Applying Predictive Coding to Reduce Costs and Increase Quality in Document Review*, D4 DISCOVERY, <http://www.d4discovery.com/2012/02/applying-predictive-coding-to-reduce-costs-and-increase-quality-in-document-review/> (last visited Oct. 3, 2011).

¹⁵⁹ *Id.* An ontology is “[a] collection of categories and their relationships to other categories and to words.” *Sedona Conference Glossary*, *supra* note 108, at 37.

¹⁶⁰ Groom, *supra* note 158.

¹⁶¹ *See generally* Blair & Maron, *supra* note 67.

¹⁶² *See* Joe Dysart, *A New View of Review: Predictive Coding Vows to Cut E-Discovery Drudgery*, ABA J., Oct. 2011, at 26.

¹⁶³ *See generally* Oard et al., *supra* note 133.

¹⁶⁴ *See* Grossman and Cormack, *supra* note 12, at 19-20 (citing Christopher Hogan et al., *H5 at TREC 2008 Legal Interactive: User Modeling, Assessment & Measurement*, available at <http://trec.nist.gov/pubs/trec17/papers/h5.legal.rev.pdf>).

smaller sample of documents and inputting them into the computer, the researchers examined only 7,992 documents, approximately 860 times fewer than would have been necessary to complete an exhaustive manual review.¹⁶⁵ Still, the results compared favorably to the other search methods, as the researchers achieved recall rates ranging between 62.4% and 81.0%, far exceeding the 20.26% average recall rate in the Blair and Maron study.¹⁶⁶

IV. RECENT CASE LAW ON REASONABLE SEARCH PROTOCOLS

Courts have yet to embrace any of the new search technologies, instead only generally alluding to potential benefits they offer, but not going so far as to expressly endorse a particular method. In the meantime, lawyers must still meet their discovery obligations and defend the decisions they made when challenged on their selection of relevant materials. While keyword searching may be the most widely available and employed option, it is still quite possible to use an inadequate Boolean search.¹⁶⁷

Until only recently, few cases offered guidance on the reasonableness of electronic searches in e-discovery. In 2006, Congress passed a set of amendments to the Federal Rules of Civil Procedure,¹⁶⁸ sometimes known as the “ESI Amendments,” however these did not mention the use of electronic searches.¹⁶⁹ Decisions regarding manual review only offered nominal guidance since they did not address the technological complexities of electronic searches.¹⁷⁰

Before 2007, the Sedona Conference’s *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* was

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*; see generally Blair & Maron, *supra* note 70.

¹⁶⁷ See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 256–57 (D. Md. 2008). In a case where a keyword search was designed to locate ESI and not privileged materials, the court held that by voluntarily, yet inadvertently, producing a series of ESI to the opposing party, the party waived attorney-client privilege and work product protection for the documents. *Id.* at 253–54. The court noted “while it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI, all keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying exclusively on such searches for privilege review.” *Id.* at 256–57; see also, e.g., *ClearOne Commc’ns, Inc. v. Chiang*, 2008 WL 920336, at *5–7 (D. Utah, Apr. 1, 2008).

¹⁶⁸ See FED. R. CIV. P. 16, 26, 33, 34, & 45 (2006).

¹⁶⁹ *Id.*

¹⁷⁰ See FED. R. CIV. P. 26(b)(2) (2006). The Rule dictates a two-tiered approach to the production of ESI, only making a distinction between that which is reasonably accessible and that which is not. *Id.* The Advisory Committee notes that “[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression,” and intended Rule 26(b)(2) “to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery.” FED. R. CIV. P. 26 (Advisory Committee’s note on 1993 amendments); see also *Am. Int’l Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401, 412 (N.D. Ill. 2007) (holding that a party would not be required to review 19,000 boxes of documents where both the issues and the resources of the parties were limited); cf. *Alexander v. FBI*, 194 F.R.D. 305, 315–16 (D.D.C. 2000) (finding that a search of indices of about sixty boxes of documents, rather than reviewing every document, was inadequate).

the only significant resource concerning the reasonableness of e-discovery search methods.¹⁷¹ The commentary's goal was to provide a guide on the "nature of the search and retrieval process."¹⁷² However, while the commentary discusses keyword searches as a useful method to find particular documents, it notes its shortcomings in certain contexts and does not suggest a particular alternative search method.¹⁷³

More recently, however, a few opinions have attempted to provide guidance on what methods constitute reasonable searches. *United States v. O'Keefe*, *Equity Analytics, LLC v. Lundin*, and *Victor Stanley, Inc. v. Creative Pipe, Inc.* all suggest that keyword searching may not be sufficient.¹⁷⁴ Moreover, *Victor Stanley* goes on to trumpet alternative search methods in certain circumstances, but does not expressly endorse a preferred technique.¹⁷⁵ Common throughout all three cases is the requirement that attorneys be prepared to defend their search methods if challenged, and that such preparation may involve the use of a technical expert, or at least someone with the qualifications needed to design and implement an effective search methodology.¹⁷⁶

A. *United States v. O'Keefe*

O'Keefe suggests that expert evidence may be required to evaluate the efficacy of a keyword search in identifying responsive documents.¹⁷⁷ In *O'Keefe*, the court found a number of inadequacies in the government's search for records and concluded that it had failed to comply with a discovery order.¹⁷⁸ Despite this, the court rejected the defendants' argument regarding the adequacy of the search terms used by the government, holding that the defendants would have had to specifically contend that the search terms used by the government were insufficient in a separate motion to compel, which would be based on evidence rising up to the requirements of Rule 702 of the Federal Rules of Evidence.¹⁷⁹

¹⁷¹ See *Best Practices Commentary*, *supra* note 6.

¹⁷² *Id.* at 191.

¹⁷³ *Id.* at 201–04; see also *supra* text accompanying notes 129–140.

¹⁷⁴ *U.S. v. O'Keefe*, 537 F. Supp. 2d 14, 23–24 (D.D.C. 2008); *Equity Analytics v. Lundin*, 248 F.R.D. 331, 332–33 (D.D.C. 2008); *Victor Stanley v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 (D. Md 2008).

¹⁷⁵ *Victor Stanley*, 250 F.R.D. at 259 n.9 (noting that electronic search methods "can enhance the accuracy and reliability of the search.").

¹⁷⁶ See *infra* Part IV, A, B, and C.

¹⁷⁷ *O'Keefe*, 537 F. Supp. 2d at 24.

¹⁷⁸ *Id.* at 17–22.

¹⁷⁹ *Id.* at 24; FED. R. EVID. 702 (requiring that for an expert to testify,

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.);

see also FED. R. EVID. 702 advisory committee's note (2000) (noting that Rule 702 provides "general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.").

Defendant O'Keefe, a Department of State employee, was indicted for allegedly receiving gifts from co-defendant Agrawal in return for expediting visa requests for employees of Agrawal's company.¹⁸⁰ Whether such requests were expedited routinely by various consulates without receipt of anything of value became an issue, and the court ordered the government to search both its hard copy and electronic files for responsive documents.¹⁸¹

After receiving the government's production, the defendants filed a motion to compel, protesting that the government had not met the judge's order.¹⁸² The defendants expressed concern that the government had not had its employees search their own electronically stored information for documents, making it "impossible to identify the source or custodian of [each] document."¹⁸³ Moreover, they contended that the government had not revealed what steps it had taken to preserve documents.¹⁸⁴

The court concluded that the defendants' concern over deficiencies in the government's production of electronically stored information was "an insufficient premise for judicial action."¹⁸⁵ By analogy, Rule 37(e) of the Federal Rules of Civil Procedure provided that sanctions were inappropriate if loss of such information was the result of the "routine, good-faith operation of an electronic information system."¹⁸⁶ Thus, if the defendants intended to charge that the government destroyed evidence that should have been preserved, the claim would have to be based on direct evidence.¹⁸⁷ It would not be enough to surmise that they should have received more than they did.¹⁸⁸

The court also held that any contention of the defendants that search terms used by the government were ineffective would have to be made in a motion to compel supported with expert testimony pursuant to Rule 702 of the Federal Rules of Evidence.¹⁸⁹ The sufficiency of search terms was "a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics."¹⁹⁰ The court also cited the Sedona Conference's *Best Practices Commentary*¹⁹¹ and noted the limitations of keyword searches, but went on to explain that evaluating particular search methodologies is not easy:

¹⁸⁰ *O'Keefe*, 537 F. Supp. 2d at 15–16.

¹⁸¹ *Id.* at 16.

¹⁸² *Id.*

¹⁸³ *Id.* at 18.

¹⁸⁴ *Id.* at 22–23.

¹⁸⁵ *Id.* at 20 (referencing *Hubbard v. Potter*, 247 F.R.D. 27, 30–31 (D.D.C. 2008)).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 22–23.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 24.

¹⁹⁰ *Id.* (referencing Paul & Baron, *supra* note 3).

¹⁹¹ *Id.* (referencing *Best Practices Commentary*, *supra* note 6).

[F]or lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread. This topic is clearly beyond the ken of a layman and requires that any such conclusion be based on evidence that, for example, meets the criteria of Rule 702 of the Federal Rules of Evidence.¹⁹²

Thus, the court declined to address the question of the reliability of the search method without a motion to compel, supported by expert testimony under Rule 702 of the Federal Rules of Evidence.¹⁹³

B. *Equity Analytics, LLC v. Lundin*

Similarly, the *Equity Analytics* court suggests that Rule 702 expert evidence may be required to evaluate the methods employed to collect documents.¹⁹⁴ The court in *Equity Analytics* stated that determining whether “a particular search methodology, such as keywords, will or will not be effective certainly” requires “knowledge beyond the ken of a lay person (and a lay lawyer) and requires expert testimony that meets the requirements of Rule 702 of the Federal Rules of Evidence.”¹⁹⁵

In *Equity Analytics*, the court was asked to resolve the dispute between the parties in their attempt to develop a search protocol for examination of the defendant’s computer.¹⁹⁶ The plaintiff alleged that the defendant had gained illegal access to the plaintiff’s electronically stored information after the defendant was fired by the plaintiff.¹⁹⁷ The defendant’s computer contained a wide range of materials, many having nothing to do with the lawsuit.¹⁹⁸ The defendant opposed production of the data and proposed that only certain file types be searched but the plaintiff objected.¹⁹⁹

The court declined to determine whether the proposed search was adequate based on the arguments of the attorneys alone, instead requiring the plaintiff to submit an affidavit from an expert explaining why the narrow search proposed by the defendant was not enough.²⁰⁰ The court reasoned that such expert testimony would provide the information needed to best assess how to balance the plaintiff’s need for information with the privacy of the defendant.²⁰¹

These two cases suggest that expert evidence may be required to assess the searches, and that experts may be needed prior to and during

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 332.

¹⁹⁷ *Id.* at 331–32.

¹⁹⁸ *Id.* at 332.

¹⁹⁹ *Id.* at 332–33.

²⁰⁰ *Id.* at 333.

²⁰¹ *Id.*

litigation to design search techniques to ensure that the searches will be defensible.

C. *Victor Stanley, Inc. v. Creative Pipe, Inc.*

Like *O'Keefe* and *Equity Analytics*, *Victor Stanley* requires qualified persons to craft an effective search methodology, but it does not go so far as to require an expert.²⁰² However, through discussion of electronic searches, the court offers a more practical standard for assessing search protocols.²⁰³

The issue in *Victor Stanley* was whether the defendants had waived attorney-client privilege for documents that counsel had accidentally produced.²⁰⁴ The defendants had used keyword searches to identify non-privileged documents.²⁰⁵ One of the defendants, and two of the defendants' lawyers, chose about seventy keywords for their expert to use in searching for protected documents in the defendants' ESI through use of a search protocol agreed upon with the plaintiff.²⁰⁶ They did not, however, manually review any of the results of that search for privilege.²⁰⁷ In addition, the defendants did a manual privilege review of the titles of some documents that were reportedly not text-searchable.²⁰⁸ Despite the expert's search for protected documents, the plaintiff alerted the defendants to documents in the production that appeared to be privileged or protected.²⁰⁹ The defendants sought the return of these documents, but the plaintiff countered that the defendant had waived privilege.²¹⁰

Since the case was decided before Rule 502 of the Federal Rules of Evidence was adopted,²¹¹ the court used a five-factor test from *McCafferty's, Inc. v. Bank of Glen Burnie* to evaluate whether the defendant had waived privilege.²¹² The factors in *McCafferty's* include: "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) any delay in measures taken to rectify the disclosure, and (5) overriding interests in justice."²¹³ Of particular note in *Victor Stanley* is the reasonableness factor, which is similar to the requirement in Rule 502(b)(2)

²⁰² See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260–61 n.10 (D. Md. 2008).

²⁰³ *Id.* at 259–61 nn. 9 & 10.

²⁰⁴ *Id.* at 253, 255.

²⁰⁵ *Id.* at 256.

²⁰⁶ *Id.* At 255–56.

²⁰⁷ *Id.* at 257 (“[I]t appears from the information that they provided to the court that they simply turned over to the Plaintiff all the text-searchable ESI files that were identified by the keyword search Turner performed as non-privileged . . .”).

²⁰⁸ *Id.* at 256–57.

²⁰⁹ *Id.* at 255.

²¹⁰ *Id.* at 255, 257.

²¹¹ See FED. R. EVID. 502 (2008) (limiting the consequences of waiver when privileged documents are disclosed).

²¹² *Victor Stanley*, 250 F.R.D. at 259.

²¹³ *McCafferty's, Inc. v. Bank of Glen Burnie*, 179 F.R.D. 163, 167–68 n.9 (D. Md. 1998).

of the Federal Rules of Evidence, which requires analysis of whether “the holder of the privilege or protection took reasonable steps to prevent disclosure” in assessing whether a disclosure results in waiver.²¹⁴

Victor Stanley went on to hold that the defendants had waived privilege, finding they had failed to meet their burden to establish that their search was satisfactory because of their failure to identify the keywords they used to conduct the searches, to explain why they chose the keywords, and to explain what type of search was done.²¹⁵ The court spent considerable space discussing this latter failure, stating that “for the benefit of future cases,” parties should state the procedures they follow in the process of conducting searches, and the court then further provided a lengthy footnote summarizing search methodologies discussed in the Sedona Conference’s Best Practices Commentary.²¹⁶

One aspect of the defendants’ failure of proof was that they did not show how the defendants and their attorneys were qualified to design the search that they used and analyze the results of the search to assess its reliability, appropriateness, and implementation.²¹⁷ The court observed that when it comes to keyword searches, the “proper selection and implementation obviously involves technical, if not scientific knowledge.”²¹⁸ *Victor Stanley* does not go as far as *O’Keefe* and *Equity Analytics* in suggesting that the person who makes a search protocol must be an expert under Rule 702 of the Federal Rules of Evidence, but *Victor Stanley* nevertheless holds that for a contested search to withstand judicial scrutiny, a party must be able to justify the steps it undertook.

V. MOVING FORWARD

E-discovery decisions should always be based on honoring the goal of Rule 1 of the Federal Rules of Civil Procedure: “the just, speedy, and inexpensive determination of every action and proceeding.”²¹⁹ One way to accomplish this is by adopting advanced search methodologies. While advanced search techniques are becoming more ubiquitous, progress remains slow.

Litigators may accept simple keyword searching, yet be reluctant to use alternative search techniques. They may not be convinced that the chosen method would withstand a court challenge. They may perceive a risk that problem documents will not be found despite the additional effort; and an opposite risk that

²¹⁴ See FED. R. EVID. 502(b)(2) (2011).

²¹⁵ *Victor Stanley*, 250 F.R.D. at 258–59.

²¹⁶ *Id.* at 259 n.9, 264; see also *supra* Part III.

²¹⁷ *Victor Stanley*, 250 F.R.D. at 259–60 (citing *U.S. v. O’Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008); *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008)).

²¹⁸ *Victor Stanley*, 250 F.R.D. at 260.

²¹⁹ See FED. R. CIV. P. 1 (2007); *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 333 [hereinafter *Cooperation Proclamation*].

documents might be missed which would otherwise be picked up in a straight keyword search.²²⁰

Compounding this problem, however, is the lack of express judicial approval for these search technologies.²²¹ For example, to date, no reported case, federal or state, has ruled on the use of predictive coding. It is possible that many attorneys are reluctant to act as the proverbial “guinea pig[s],” waiting for official guidance on how to proceed in these types of searches first.²²² Magistrate Judge Andrew Peck pondered this issue in a recent editorial, offering the following:

Perhaps they are looking for an opinion concluding that: “It is the opinion of this court that the use of predictive coding is a proper and acceptable means of conducting searches under the Federal Rules of Civil Procedure, and furthermore that the software provided for this purpose by [insert name of your favorite vendor] is the software of choice in this court.” If so, it will be a long wait.²²³

Aside from possible breaches of judicial ethical rules, there are presumably various reasons for this. As the Sedona Conference’s Practice Point 3 states, “[t]he choice of a specific search and retrieval method will be highly dependent on the specific legal context in which it is to be employed.”²²⁴ Formal support for a particular search technique is an impractical one-size-fits-all approach²²⁵ that ignores variables that change from case to case, including how the search application was used, by whom, the type of case, alternatives that were or should have been considered, and cost.²²⁶

This is not to say that the bench does not support the use of innovative search methodologies in discovery; in fact, the reality is quite the opposite. Judge Peck himself expresses support for judicial decisions critiquing keyword searches, particularly *O’Keefe*, *Equity Analytics*, and *Victor Stanley*.²²⁷

In *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, Judge Peck notably issues “a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or ‘keywords’ to be used to produce emails or other electronically

²²⁰ *Best Practices Commentary*, *supra* note 6, at 203.

²²¹ *See id.*

²²² Hon. Andrew Peck, *Search, Forward: Will Manual Document Review and Keyword Searches be Replaced by Computer-Assisted Coding?*, L. TECH. NEWS (Oct. 1, 2011).

²²³ *Id.*

²²⁴ *Best Practices Commentary*, *supra* note 6, at 194.

²²⁵ *See* Matthew Prewitt, *E-Discovery: One Size Does Not Fit All*, INSIDE COUNSEL (Sept. 20, 2011), <http://www.insidecounsel.com/2011/09/20/e-discovery-one-size-does-not-fit-all>.

²²⁶ Chris Dale, *Judge Peck and Predictive Coding at the Carmel E-Discovery Retreat*, E-DISCLOSURE INFO. PROJ. (Aug. 2, 2011), <http://chrisdale.wordpress.com/2011/08/02/judge-peck-and-predictive-coding-at-the-carmel-ediscovery-retreat>.

²²⁷ *See* Peck, *supra* note 222.

stored information.”²²⁸ The problem in *William Gross* was not the keyword technology that was used, but the failure of the parties to come to an agreement on a list of keywords.²²⁹ When the responding party deployed overbroad and imprecise keyword search terms to respond to a discovery request, Judge Peck bemoaned the case as “the latest example of lawyers designing keyword searches in the dark, by the seat of the pants, without adequate . . . discussion with those who wrote the emails.”²³⁰

The court ordered a multi-step framework that the litigators must use when selecting a keyword search strategy.²³¹ Judge Peck ordered that the attorneys “at a minimum must carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of ‘false positives.’”²³²

Judge Peck’s opinion in *William Gross* demonstrates how courts are developing factors to assess the reasonableness of a litigant’s search methodology on a case-by-case basis rather than assessing search methodologies individually and out of context. The two most important factors are “cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI.”²³³

VI. COOPERATION IS KEY

Cooperation is being touted by an increasing number of courts as an effective way to reduce the costs and risks of e-discovery.²³⁴ As the court in *Mancia v. Mayflower Textile Services Company* explains, cooperation among counsel “will almost certainly result in having to produce less discovery, at lower cost . . . [and] will almost certainly result in getting helpful information more quickly” for the requesting parties.²³⁵

Parties should attempt to cooperate with opposing counsel to agree on a discovery plan that sets forth specific protocols for identifying responsive

²²⁸ William A. Gross Constr. Assoc., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134 (S.D.N.Y. 2009).

²²⁹ *Id.* at 134–35.

²³⁰ *Id.*

²³¹ *See id.* at 136.

²³² *Id.*

²³³ *Id.*; see also *Cooperation Proclamation*, *supra* note 219; Part IV, *supra* (discussing the use of e-discovery experts in order to maintain a defensible position in litigation).

²³⁴ See, e.g., SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 414 (S.D.N.Y. 2009) (finding the SEC’s “refusal to negotiate a workable search protocol . . . ‘patently unreasonable’”); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 365 (D. Md. 2008) (stating that cooperation is advantageous to both parties). See generally, *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dep’t of Homeland Sec.*, 255 F.R.D. 350 (S.D.N.Y. 2008); *Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 47-48 (S.D.N.Y. 2009); *Ford Motor Co. v. Edgewood Prop., Inc.*, 257 F.R.D. 418 (D.N.J. 2009); *Newman v. Borders, Inc.*, 257 F.R.D. 1 (D.D.C. 2009); *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96 (E.D. Pa. 2010); *Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541 (N.D. Cal. 2009).

²³⁵ *Mancia*, 253 F.R.D. at 365.

and privileged documents.²³⁶ Courts are just as quick to reward parties that cooperate as they are to punish those that do not.²³⁷

In terms of developing search protocols, a party's failure to cooperate can have dramatic effects beyond driving up the cost of litigation²³⁸ and overburdening the justice system.²³⁹ For example, the court in *William A. Gross* did not willingly decide to order its own search protocol—instead, the court opined that the parties' inability to agree put the court "in the uncomfortable position of having to craft a keyword search methodology for the parties, without adequate information from the parties."²⁴⁰ Moreover, a court may even be motivated to shift discovery costs to uncooperative parties.²⁴¹

Perhaps the benefits of cooperating are best realized if parties are able to work together from the outset, as this may decrease the chance that a dispute about the search efforts taken by each party will later develop.²⁴² With regard to search terms protocols, parties can further this goal by collaborating on which search process to use, the terms to be used in that process, and by agreeing to participate in an iterative process where successive searches can be modified and improved upon.²⁴³ On a more fundamental level, parties are encouraged to come to the table armed with knowledge of likely sources of ESI, its custodians, and understanding of the steps and costs required to access the ESI.²⁴⁴ A party's own preparation in this area can help facilitate cooperation and smooth discovery.²⁴⁵

²³⁶ See *Best Practices Commentary*, *supra*, note 6, at 211.

²³⁷ See, e.g., *In re Seroquel Prods. Liab. Litig.*, 224 F.R.D. 650, 664–65 (M.D. Fla. 2007) (finding sanctions were warranted because party failed to produce reasonably accessible documents); *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 359 (2009 Supp.) (discussing the strategic benefits of cooperation).

²³⁸ *Mancia v. Mayflower Textile Services. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008) (noting that "failure to engage in discovery . . . is one reason why the cost of discovery is so widely criticized as being excessive—to the point of pricing litigants out of court.").

²³⁹ *The Case for Cooperation*, *supra* note 239, at 343 (describing how a lack of cooperation between parties may "prevent[] adjudication of meritorious claims").

²⁴⁰ *William A. Gross Construction Assoc., Inc. v. Am. Mfrs Mutual Ins. Co.*, 256 F.R.D. 134, 135 (S.D. NY 2009).

²⁴¹ See *Surplus Source Grp., LLC v. Mid Am. Engine, Inc.*, 2009 U.S. Dist. LEXIS 29260, *4-5 (E.D. Tex. 2009) (shifting costs to the plaintiff where although the defendant demonstrated "a persistent willingness to aide [sic] the Plaintiffs in crafting an ESI search," the plaintiff unreasonably delayed in responding to defendant's attempt to negotiate.).

²⁴² "Early agreement . . . makes it much less likely that a party will be ordered to supplement its production . . . because its opponent convinces a court that the producing party's unilateral choices were too narrow or otherwise inappropriate." *The Case for Cooperation*, *supra* note 239, at 358.

²⁴³ Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 Sedona Conf. J. 363, 371 (2009).

²⁴⁴ *The Case for Cooperation*, *supra* note 239, at 344.

²⁴⁵ See *Covad Commc'ns Co. v. Revonet, Inc.*, 254 F.R.D. 147, 151 (D.D.C. 2008) (stating that "the courts have reached the limits of their patience with having to resolve electronic discovery controversies that are . . . so easily avoided by the lawyers' conferring with each other on such a fundamental question as the format of their productions of electronically stored information.").

VII. QUALITY CONTROL OF DEFENSIBLE SEARCH PROTOCOLS

Despite its strong support for advanced electronic search tools, the Sedona Conference notes that “[t]echnologically advanced tools, however, ‘cutting edge’ they may be, will not yield a successful outcome unless their use is driven by people who understand the circumstances and requirements of the case, as guided by thoughtful and well-defined methods, and unless their results are measured for accuracy.”²⁴⁶ This underscores the importance of strategically planning, documenting, and supervising the entire e-discovery process. Also, as the Sedona Conference makes clear, “parties should expect that their choice of search methodology will need to be explained . . . in subsequent legal contexts (including depositions, evidentiary proceedings, and trials).”²⁴⁷

A party should be ready to place its discovery plan’s effectiveness on the line by including a method for testing and assessing the effectiveness of their search protocols, and evaluating recall and precision rates either by sampling supposed nonresponsive documents and/or documents reviewed during the primary review phase.²⁴⁸ If parties wish, they may also employ third party professionals to sample the effectiveness of a set of search protocols.²⁴⁹ As discussed above, parties should consider retaining experts to develop, execute, and defend a protocol when appropriate.²⁵⁰

Aside from enabling a party to more adequately defend itself should a dispute over discovery arise, such practices promote self-policing and quality control.²⁵¹ In doing so, parties will more reliably know at the end of the discovery stage how accurate and complete their methods were, and will not be left to question whether they violated the duty to preserve, uncover, or disclose relevant evidence and the possibility that privilege or confidential information may have been inadvertently produced.²⁵²

The message to be taken from the cases of *O’Keefe*, *Equity Analytics*, and *Victor Stanley* is clear: when parties decide to use a particular ESI search method, it needs to be aware of the intricacies of its own storage system and craft a discovery plan accordingly. Should an opposing party challenge the method selected, the discovery proponent should then expect to support its position with this information, perhaps with the assistance of discovery experts.

²⁴⁶ *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, *supra* note 141, at 306.

²⁴⁷ *See Best Practices Commentary*, *supra* note 6, at 212.

²⁴⁸ *See The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, *supra* note 141, at 310–12.

²⁴⁹ *Id.* at 310.

²⁵⁰ *See supra* Part IV.

²⁵¹ *See generally id.* at 309–10.

²⁵² *See generally id.*

CONCLUSION

The information inflation shows no signs of slowing down. Parties to litigation have the choice of confronting this problem head on by embracing newer and more technologically advanced search methodologies, or proceeding at their own risk as they have before.²⁵³ In doing so, they face rising expenditures of time and money because their search and retrieval method is unlikely to be the most efficient or reliable possibility. Regardless of which method they choose to adopt, parties should unquestionably engage in cooperative efforts to arrive at agreeable search protocols, and develop and document thoughtful discovery plans from the ground up so as to best defend their own discovery practices and decisions.²⁵⁴

POSTSCRIPT/UPDATE TO E-DISCOVERY NOTE

Following completion of the drafting of this Note in December 2011, computer assisted review has steadily gained attention and, for the first time, acceptance in the legal community.²⁵⁵

As discussed above, in October 2011, Magistrate Judge Andrew Peck suggested that despite a number of judicial opinions highly critical of keyword searching, one reason many attorneys have been slow to adopt new search technology is that they apparently “are waiting for a judicial decision approving of computer-assisted review. . . . If so, it will be a long wait.”²⁵⁶

Interestingly, this “long wait” turned out to be just over four months. In February 2012, Judge Peck issued an opinion approving the use of predictive coding.²⁵⁷ In doing so, Judge Peck specifically noted that his opinion in *Da Silva Moore v. Publicis Groupe* “appears to be the first in which a Court has approved of the use of computer-assisted review.”²⁵⁸

In his October 2011 periodical, Judge Peck set forth guidelines for handling discovery challenges to any proposed use of computer-assisted review that came before him.²⁵⁹ In this situation, Judge Peck stated that he would pay close attention to the process and results of the search:

²⁵³ *Supra* Part I.

²⁵⁴ *Supra* Part IV.

²⁵⁵ *See, e.g.*, *Da Silva Moore v. Publicis Groupe*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 607412, at *1 (S.D.N.Y. Feb. 24, 2012) (approving the use of computer assisted review); Order Approving the Use of Predictive Coding for Discovery, *Global Aerospace, Inc. v. Landow Aviation, L.P.*, No. CL 61040, 2012 WL 1431215 (2012), at *1 (ordering defendants to proceed with predictive coding); *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, No. 10 Civ. 3488 (SAS), 2012 WL 2878130, at *12 (S.D.N.Y. July 13, 2012) (discussing the effectiveness of computer assisted coding).

²⁵⁶ *See* Peck, *supra* note 222.

²⁵⁷ *See generally* *Da Silva Moore v. Publicis Groupe*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012).

²⁵⁸ *Id.* at *12.

²⁵⁹ *See* Peck, *supra* note 222.

[I]f the use of predictive coding is challenged in a case before me, I will want to know what was done and why that produced defensible results. I may be less interested in the science behind the ‘black box’ of the vendor’s software than in whether it produced responsive documents with reasonably high recall and high precision That may mean allowing the requesting party to see the documents that were used to train the computer-assisted coding system Proof of a valid ‘process,’ including quality control testing, also will be important.²⁶⁰

Judge Peck’s opinion in *Da Silva Moore* closely mirrored the reasoning he set forth in the periodical. In *Da Silva Moore*, a Title VII action, the plaintiffs objected to defendant MSLGroup’s use of predictive coding “to cull down” over three million documents involved in discovery.²⁶¹ The parties agreed to use computer-assisted review but disagreed over how it should be implemented, with the plaintiffs claiming that MSL’s proposal to use a number of rounds to test and refine the searches and review software, and to share the seed documents and documents flagged as relevant or irrelevant, was not reliable or transparent.²⁶²

Noting his earlier writings to the contrary, Judge Peck plainly held that “[t]his judicial opinion now recognizes that computer-assisted review is an acceptable way to search for relevant ESI”²⁶³ However, Judge Peck cautioned that this does not mean computer-assisted review should be used in all cases, or that the exact ESI protocol approved in *Da Silva Moore* will be appropriate in all future cases that utilize computer-assisted review. Rather, he noted “computer-assisted review is not a magic, Staples–Easy–Button, solution appropriate for all cases.”²⁶⁴ While admitting that it is “not perfect,” Judge Peck determined that computer-assisted review was better than the alternatives in the case at bar.²⁶⁵ Judge Peck further encouraged parties to “seriously consider[] [computer-assisted review] for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review.”²⁶⁶

With *Da Silva Moore* leading the way, a number of other courts have quickly followed suit and have begun to entertain predictive coding as a viable tool in discovery.²⁶⁷ In the plaintiffs’ challenge to *Da Silva Moore*, Judge Andrew Carter approved Judge Peck’s ruling and written order supporting computer-assisted review.²⁶⁸ Furthermore, a Virginia state court approved a computer-assisted review protocol proposed by the defendants

²⁶⁰ *Id.*

²⁶¹ *Moore*, 2012 WL 607412, at *3.

²⁶² *Id.* at *3–8, *1 n.1.

²⁶³ *Id.* at *1.

²⁶⁴ *Id.* at *8.

²⁶⁵ *Id.* at *11.

²⁶⁶ *Id.* at *12.

²⁶⁷ See *supra* note 255 and accompanying text.

²⁶⁸ *Moore*, 2012 WL 1446534, at *2.

in their protective order for purposes of processing and producing ESI.²⁶⁹ Yet another court criticized the shortcomings of keyword searches and endorsed predictive coding to “allow humans to teach computers what documents are and are not responsive to a particular FOIA or discovery request and . . . [to] significantly increase the effectiveness and efficiency of searches.”²⁷⁰ Finally, in discussing a scheduling order from the Delaware Court of Chancery, a judge even instructed the parties, without any outside cues, to adopt a predictive coding strategy or demonstrate good cause to avoid it.²⁷¹

In addition to merely lending judicial legitimacy to computer-assisted review, the trend affirms this Note’s emphasis on cooperation between parties and transparency in all aspects of preservation and production of ESI.²⁷² Citing the Sedona Conference, Judge Peck reiterated in *Da Silva Moore* that “the best solution in the entire area of electronic discovery is cooperation among counsel.”²⁷³ One reason why Judge Peck ordered computer-assisted review protocols was that MSL’s “transparency allow[ed] the opposing counsel (and the Court) to be more comfortable with computer-assisted review, reducing fears about the so-called ‘black box’ of the technology.”²⁷⁴ In upholding Judge Peck’s order, Judge Carter further trumpeted cooperation and transparency as key ingredients in computer-assisted discovery, stating that since the “ESI protocol . . . builds in levels of participation by Plaintiffs,” the plaintiffs will have opportunity to shape the process and thus ensure it meets their needs.²⁷⁵ Furthermore, in resolving a dispute surrounding a party’s interrogatories and document requests, another court channeled the principles of cooperation of the Sedona Conference, urging counsel not to “confuse advocacy with adversarial conduct” in addressing discovery obligations.²⁷⁶ Additionally, the use of experts is cited as a valuable tool to evaluate the efficacy of a search protocol in furtherance of these efforts.²⁷⁷

With support for technology-assisted review gaining momentum among the judiciary, parties can better position themselves to ride the coming wave by cooperating actively with opposing counsel, developing sensible discovery plans and being prepared to defend them, and sharing these protocols openly and transparently as appropriate.

²⁶⁹ Order Approving the Use of Predictive Coding for Discovery, 2012 WL 1431215 (2012).

²⁷⁰ *Nat'l Day Laborer Org. Network*, 2012 WL 2878130, at *11–12.

²⁷¹ See *EORHB, Inc., et al v. HOA Holdings, LLC*, C.A. No. 7409-VCL (Del. Ch. 2012).

²⁷² See *supra* Part VI.

²⁷³ *Moore*, 2012 WL 607412, at *11 (quoting *Cooperation Proclamation*, *supra* note 220).

²⁷⁴ *Id.*

²⁷⁵ *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534, at *2 (S.D.N.Y. Apr. 26, 2012).

²⁷⁶ *Kleen Prods. LLC v. Packaging Corp. of Am.*, 2012 U.S. Dist. LEXIS 139632, *6 (N.D. Ill. 2012) (citing *Cooperation Proclamation*, *supra* note 219).

²⁷⁷ See *Moore*, 2012 WL 607412, at *12 (“[T]he Court found it very helpful that the parties’ ediscovery vendors were present and spoke at the court hearings where the ESI Protocol was discussed.”).

A Preemptive Copyright Ghost Lurking in Breach of Contract Claims: Resolving the Copyright Preemption Analysis

Jessica Nguyen *

INTRODUCTION

Supernatural activity has overtaken copyright law, reigniting the pressure to resolve significant legal issues after a period of quiet unrest.¹ *Ghost Hunters*, a Syfy channel reality show following investigators as they study paranormal activity, has provided more than intrigue to viewers every Wednesday night; it has intensified an ongoing debate among the thirteen judicial circuits.² While a paranormal team investigates the ghost of a colonel lurking in a Kentucky distillery on next week's *Ghost Hunters* episode,³ parapsychologist Larry Montz continues to wage his legal battle against NBC Universal (NBC) and Pilgrim Films & Television.⁴ Montz

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¹ Anna Buono, *Ninth Circuit Revives California Idea Submission Claims*, MEDIA LAW MONITOR (June 13, 2011), <http://www.medialawmonitor.com/2011/06/ninth-circuit-revives-california-idea-submission-claims> (noting that the decision of the en banc panel in *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975 (9th Cir. 2011), revived state law claims that had been regarded as preempted by copyright law).

² See *Montz*, 649 F.3d at 977–78.

³ *Ghost Hunters, Episode: "Distillery of Spirits,"* TV GUIDE, <http://www.tvguide.com/tvshows/ghost-hunters-2011/episode-23-season-7/distillery-of-spirits/191528> (last visited Nov. 5, 2011).

⁴ See *Petition for Writ of Certiorari, Pilgrim Films & Television, Inc. v. Montz*, No. 11–143, 2011 WL 3380764, at *2 (U.S. Aug. 2, 2011) (requesting the Supreme Court to grant certiorari and to rule on an issue of law that will provide guidance to lower courts because this type of conflict continually arises); *Pilgrim Films & Television, Inc. v. Montz*, 132 S. Ct. 550, 550 (2011) (denying certiorari to hear the *Montz* case). The acceptance or denial of certiorari is a strategic move by the Supreme Court. See RICHARD L. PACELLE, JR., BRETT W. CURRY & BRYAN W. MARSHALL, *DECISION MAKING BY THE MODERN SUPREME COURT* 40–41 (2011).

A justice who may wish to reverse a lower court decision nevertheless votes to deny *certiorari* because she realizes that her preferred case outcome is unlikely to prevail at the merits stage. . . . [H]er strategic action of defensively denying *cert* may have prevented an affirmance that would have taken on precedential value. . . . Alternatively, a strategic

claims that he first pitched the idea of a show following paranormal investigators to NBC and the Syfy channel.⁵ But both declined to use the idea.⁶ NBC then produced *Ghost Hunters* for the Syfy channel, which resulted in *Montz v. Pilgrim Films & Television, Inc.*⁷ *Montz* wound its way up to the Supreme Court where the entertainment industry rushed to have its say.⁸ The immediate issue in the *Montz* case was whether *federal* copyright law preempted *Montz's* state claims for breach of implied contract and breach of confidence.⁹ The test that many courts employ to resolve whether state claims are worthy of surviving preemption has left plaintiffs, defendants, writers, and the media industry with little guidance. This Comment proposes a new test with a clear set of factors to determine what it takes for a state law claim to avoid preemption.

Part I will explain the dynamics of the entertainment industry, the formation of implied contracts in the entertainment industry, and the industry's business structure, which favors media companies and established producers. Part II will discuss the basic foundation of federal copyright law, the necessity of preemption to maintain copyright law, and the role of the "extra element" test in parsing out preempted claims. Part III will examine how the "extra element" test has been applied in different ways among the courts. Finally, Part IV will propose a new test with a distinct set of factors that should be used in lieu of the "extra element" test.

I. CONTRACTING FOR IDEAS IN THE ENTERTAINMENT INDUSTRY

The entertainment industry regularly strikes deals, allowing innovators to create the products consumers enjoy most: movies, television shows, music, and video games.¹⁰ The transactions are fluid and efficient because

justice may vote to hear a case—or pursue an 'aggressive grant' of *certiorari*—when he thinks his preferred policy outcome will be reflected in the Court's ultimate decision on the merits.

Id.; see also Eriq Gardner, *Supreme Court Deals Setback to Hollywood, Won't Hear Key 'Ghost Hunters' Case*, THE HOLLYWOOD REPORTER (Nov. 7, 2011, 1:59 PM), <http://www.hollywoodreporter.com/thr-esq/ghost-hunters-trial-syfy-nbc-universal-258280> (noting that the denial of *certiorari* of the *Montz* case leaves studios open to more lawsuits).

⁵ *Montz*, 649 F.3d at 978.

⁶ *Id.*

⁷ *Id.*

⁸ See Press Release, Kelley Drye Files Amicus Brief for U.S. Supreme Court Review of *Montz* Case (Sept. 16, 2011), available at http://www.kelleydrye.com/news/press_releases/2254 (announcing that a Los Angeles law firm filed an amicus brief on behalf of the defendants, asking the Supreme Court to review the *Montz* case because the law firm constantly faced litigation in the areas of copyright and idea submission claims).

Many parties are affected by a decision such as this and if the Supreme Court had granted review, its finding would have had broad implications. See *Decision Against NBC Universal for Use of Pitched Television Show Concept Without Compensation/Credit Being Appealed to Supreme Court*, ARENT FOX, (Oct. 10, 2011), http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content_id=3353 ("Multiple parties are seeking leave to file amicus briefs in the matter.").

⁹ *Montz*, 649 F.3d at 977–79.

¹⁰ See MARK LITWAK, DEALMAKING IN THE FILM & TELEVISION INDUSTRY 11 (2d. ed. 2002)

the entertainment industry is built on relationships, custom, and courses of dealing through the repeated interactions of writers, producers, actors, directors, and studios.¹¹ For example, studios will typically only accept ideas for new films, television shows, or books from writers who use an agent.¹² The agent acts as a gateway, regulating the relationship between idea creators and the studio.¹³ Any unsolicited ideas submitted without representation by an agent are returned to the writer.¹⁴ An agent has an established reputation in the entertainment industry allowing him to negotiate on behalf of a writer to get the best deal possible.¹⁵ Therefore, a person's reputation in the entertainment industry is a crucial component of maintaining expectations, transacting in business, and making deals.¹⁶

A key component to exchanges in the entertainment industry is acceptance of the implied contract.¹⁷ The implied contract recognizes a

(noting that there is more dealmaking than ever before in the movie industry).

There are a wide range of deals available in the entertainment industry such as cash up front (money is guaranteed), back-end deal (a portion of the cash is taken up front but a share of the product's profit is also taken), working for scale (taking a large pay cut and accepting only the mandated minimum amount of money proscribed by organizations like guilds and unions), and tit for tat (trading something for another). See Daniel Fierman, *Terms of En-deal-ment*, ENTERTAINMENTWEEKLY.COM (Mar. 3, 2000), <http://www.ew.com/ew/article/0,,275563,00.html>.

¹¹ See Kirk T. Schroder, *Entertainment Law: Some Practice Considerations For Beginners*, 13 ENT. & SPORTS LAW. 8, 10 (1996) (“[T]he entertainment industry thrives on relationships.”); STEPHEN F. BREIMER, ESQ., *THE SCREENWRITER’S LEGAL GUIDE* 172–73 (2d ed. 1999) (establishing that “relationship protection” exists in the entertainment industry: “Agents would not submit material or set up meetings if there was a substantial risk that their clients might be ripped off as a result of such pitch meetings”).

A course of dealing refers to the conduct before the agreement in question. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 161 (4th ed. 1998). It is the series of previous conduct between two parties to a particular transaction that “establish[es] a common basis of understanding for interpreting their expressions and other conduct.” *Id.* (quoting UCC § 1–205(1)). See also LITWAK, *supra* note 10, at 251 (“[A]gents, attorneys, studio executives and producers regularly conduct business with one another and observe an unwritten code of behavior.”).

¹² See Neta-Li E. Gottlieb, *Free To Air?—Legal Protection For TV Program Formats*, 51 IDEA: THE INTELL. PROP. L. REV. 211, 230 (2011) (observing that the relationship between agent and the studio/producer is mutual because the producers rely on the agents to get new ideas).

¹³ See LITWAK, *supra* note 10, at 353 (describing how agents will not push too hard on some deal terms because they will have to negotiate with that same person again in the future); MIKE MEDAVOY ET AL., *THE MOVIE BUSINESS BOOK* 100 (Jason E. Squire ed., 2d ed. 1992) (“The agent can help to keep lines of communication open between writer and buyer and to work out problems that might arise from misunderstandings or differences of opinion.”).

¹⁴ See Jonathan H. Anshell, Jennifer B. Hodulik & Allison S. Rohrer, *The Whole Enchilada: Wrench LLC v. Taco Bell Corp. and Idea Submission Claims*, 21 COMM. LAW., no. 4, 2008, at 1, 27 (indicating that a defendant is in a good position to challenge a state law idea submission claim if the plaintiff's submission was unsolicited).

¹⁵ See LITWAK, *supra* note 10, at 353 (describing how agents can negotiate routine deals for clients without the help of a lawyer).

¹⁶ See Gottlieb, *supra* note 12, at 230 (noting that an “agent’s livelihood is based on her reputation”); PHILIP H. MILLER, *MEDIA LAW FOR PRODUCERS* 29 (4th ed. 2003) (“Like any business, the business of media production involves managing many working relationships.”). The success of a project depends on how the relationships are managed. *Id.* Entertainment industry professionals take pride in keeping their word. LITWAK, *supra* note 10, at 251.

¹⁷ See Anna R. Buono & Alonzo Wickers IV, *Montz v. Pilgrim Films & Television, Inc.: Copyright Preemption and Idea Submission Cases*, 28 COMM. LAW., no. 2, 2011 at 4, (recognizing that

mutual agreement between a producer and writer:¹⁸ if the producer uses the writer's idea, then the writer will be compensated.¹⁹ This agreement may not be captured in written form, but is merely understood by all the parties involved. The implied contract is a useful tool to get around a written agreement.²⁰ No express written agreement is necessary, or even preferred, given that the fast-paced nature of the entertainment business calls for efficiency and speed.²¹ The process of negotiating and drafting long-form contracts for every deal impedes the flow of business.²² Similarly, if the implied contract is breached, most cases settle to ensure business

California law accepts the custom where a producer and author approach a pitch meeting with the "mutual understanding that the author will be compensated and credited if the producer uses her ideas"; see also *Stanley v. Columbia Broad. Sys.*, 221 P.2d 73, 85 (Cal. 1950) (Traynor, J., dissenting) (noting that it is not unreasonable to imply "that one would obligate himself to pay for an idea that would otherwise be free to use").

There are two types of implied contracts in contract law: the implied-in-fact contract and the implied-in-law contract. The words or conduct demonstrating the agreement of the parties to a contract give rise to an implied-in-fact contract. See 1 RICHARD A. LORD, WILLISTON ON CONTRACTS 35 (4th ed. 2007). An implied-in-law contract, on the other hand, does not require a meeting of the minds but is a concept imposed by the fiction of law for reasons of justice. See *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001); RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981); see also *Caroline Cnty. v. Dashiell*, 747 A.2d 600, 606 (Md. 2000) (citing BLACK'S LAW DICTIONARY 324 (6th ed. 1990)) (defining an implied-in-law contract as one where circumstances justify implying a contract where none existed, especially in cases where parties place others in the wrong and equity commands that the situation should not have taken place).

¹⁸ See *Forest Park Pictures v. Universal Television Network, Inc.*, No. 10 Civ. 5168(CM), 2011 WL 1792587, at *1 (S.D.N.Y. May 10, 2011) (alleging that the defendants knew at all times that ideas are pitched to studios in order to sell those ideas in return for payment and that it is a standard in the entertainment industry that ideas are pitched with "the expectation of compensation in the event of use"); *Thompson v. Cal. Brewing Co.*, 12 Cal. Rptr. 783, 786 (Cal. Dist. App. 1961) (holding that it is possible for a payment agreement to be implied from the circumstances); *Desny v. Wilder*, 299 P.2d 257, 270 (Cal. 1956) (stating that the circumstances are known to the idea receiver before the idea is conveyed and the receiver accepts the idea disclosure with the conditions that accompany it, i.e. payment); *Chandler v. Roach*, 319 P.2d 776, 780 (Cal. Ct. App. 1958) (describing the writer's assent as submitting his idea to the producer and the producer's assent as his acceptance of the materials).

¹⁹ *Desny*, 299 P.2d at 269 (clarifying that where a producer is the beneficiary of an author's idea and the producer profits from that idea, there is no reason why the producer should not be able to agree to pay for that idea).

Ideas conveyed to a producer or studio can be bargained for and constitute "valuable consideration" because the producer holds it as his own and may use it as he sees fit after the acquisition. *Id.*; see also *High v. Trade Union Courier Publ'g Corp.*, 31 Misc. 2d 7, 8 (N.Y. Sup. Ct. 1946) (noting that even if an idea is common knowledge, it can constitute consideration in a promise to pay if the disclosure of the idea is protected by contract).

²⁰ See Michael S. Bogner, Comment, *The Problem with Handshakes: An Evaluation of Oral Agreements in the United States Film Industry*, 28 COLUM. J.L. & ARTS 359, 359 (2004) (stating that the film business is a "handshake business" and relationships in the film industry are based on the handshake); see also BROOKE A. WHARTON, THE WRITER GOT SCREWED (BUT DIDN'T HAVE TO) 53 (1997) (stating that while most contracts are not enforceable unless they are signed, the entertainment industry has nothing to do with those types of contracts).

²¹ See Bogner, *supra* note 20, at 377 (reasoning that the speed of deals requires an agreement between parties even before lawyers can negotiate and execute a written contract); see also IATSE LOC. 336, <http://www.iatse-336.org/> (last visited Jan. 6, 2012).

²² See Bogner, *supra* note 20, at 375 (finding that complex deal points are negotiated for long periods of time until they are reduced into a long-form contract and that lawyers may stunt quick deal resolutions because they demand more detail); see also WHARTON, *supra* note 20, at 52 (noting that most contracts do not have to be in writing to be enforceable). The contracts in the entertainment industry that *must* be in writing are work-for-hire contracts, assignments, and licenses. *Id.* at 54.

consistency.²³ Therefore, the implied contract is important to the proper functioning and maintenance of the entertainment industry.

While it would be ideal for writers and studios to hold an equal share of the power in an entertainment industry business relationship, this is simply not the case.²⁴ The lion's share of power is in the hands of producers and well-established media companies.²⁵ This imbalance is due to several circumstances: (1) the disproportionate number of writers to producers/studios;²⁶ (2) the use of releases by studios and producers to limit the amount of ideas they receive;²⁷ and (3) the "independent creation" defense available to producers when they are sued.²⁸

First, the number of people clamoring to get into the entertainment industry is staggering.²⁹ Studios have their pick of ideas and personnel. The nature of supply and demand weighs heavily against the writers.

Second, producers and studios are at liberty to demand that a writer sign a release before submitting an idea, which waives a writer's rights to his material.³⁰ A producer or studio manages the number of submissions they receive by refusing to accept *unsolicited* ideas unless a release has been signed.³¹ But a writer who submits his ideas through an agent usually does not have to sign a release.³² Therefore, writers without an agent are in the feeble position of either waiving their rights or not having their ideas

²³ Brian Devine, *Free as the Air: Rethinking the Law of Story Ideas*, 24 HASTINGS COMM. & ENT. L.J. 355, 380 (2001). Lawsuits cost a lot of money and the amount of money at stake may not justify expending legal fees to proceed to litigation. LITWAK, *supra* note 10, at 342–43.

²⁴ See Camilla M. Jackson, "I've Got This Great Idea for a Movie!" *A Comparison of the Laws in California and New York That Protect Idea Submissions*, 21 COLUM.-VLA J.L. & ARTS 47, 58 (1996) ("No one in Hollywood has as little power as the aspiring writer . . . and television and film studios have absolutely no incentive—legal or otherwise—to bargain fairly.").

²⁵ See Jonathan D. Cohen, Note, *Remedies for Misappropriation of Motion Picture and Television Story Ideas*, 7 HASTINGS COMM. & ENT. L.J. 85, 102 (1984) ("A free-lance writer dealing with a major independent producer does not do so on an equal footing.").

²⁶ See Jackson, *supra* note 24, at 58 ("Due to the small number of major television and movie studios, there is a limited number of people to whom the creator of an idea can submit his or her work. But the number of writers and other creative people who wish to sell ideas is virtually unlimited."); see also BREIMER, *supra* note 11, at 8 (observing that there is a lot of competition in submitting ideas to movie studios).

²⁷ Devine, *supra* note 23, at 385–86.

²⁸ See Allison S. Brehm, *Creative Defense*, 33 L.A. LAW 28, 30 (2010) (noting how the "independent creation" defense plays a great role in defeating idea submission claims).

²⁹ See Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 328 (2010) ("[T]here is no shortage of new entertainment ideas or creators striving to break into the entertainment industry.").

³⁰ See Robert Yale Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735, 764 (1966) (clarifying that a "release form" is a contract of adhesion that waives all right to sue).

³¹ See Devine, *supra* note 23, at 364–65 (discussing how the release is used as a tactic to protect producers/studios from liability in a lawsuit).

³² See WHARTON, *supra* note 20, at 25–26 ("In order to prevent the possibility of a lawsuit, most people in the entertainment business have decided to accept unsolicited work only from agents or lawyers, or after receiving a signed release form from the writer."). An agent is an individual licensed to obtain work for individuals in the entertainment industry. *Id.* at 75. Agents play an important role as intermediaries for the writer and producer. Devine, *supra* note 23, at 365.

heard at all.³³ Producers and studios can make their demands, knowing that they possess greater bargaining power than their writer counterparts.³⁴ Producers and studios are also better positioned to advantageously alter industry customs because they perpetually hold the upper hand.³⁵ Writers are therefore left at the whim of the top “players” in the entertainment business.³⁶

Lastly, an independent creation defense arms studios and producers with a tool to rebut a writer’s breach of implied contract claim.³⁷ The independent creation defense rebuts the plaintiff’s claim if a defendant can show he thought of the idea on his own.³⁸ Even if the defendant produced the disputed work *after* he had access to the plaintiff’s idea, the defendant can still use the defense to defeat an idea submission claim.³⁹ Once again, the studio and the producer win.

A writer that voluntarily chooses to venture into the entertainment business faces an ongoing struggle.⁴⁰ He is forced to adhere to rules dictated by the opposing side.⁴¹ But in abiding by those rules, one of the strongest forms of protection that a writer can have over his work is a copyright.

³³ Devine, *supra* note 23, at 386. *See also* WHARTON, *supra* note 20, at 29 (noting that signing a release will put writers in the position of feeling as if they are giving their work away).

³⁴ Devine, *supra* note 23, at 386.

³⁵ *Id.* at 385 (observing that producers can adjust their behavior in response to legal rules that could potentially affect their liability).

³⁶ *See* Cohen, *supra* note 25, at 102 (noting that the relationship between a writer and producer is unbalanced); MARK LITWAK, CONTRACTS FOR THE FILM & TELEVISION INDUSTRY 5 (1998) (mentioning that it is difficult for writers to get in the door to see producers); LITWAK, *supra* note 10, at 251 (referring to the top Hollywood dealmakers as “players”).

³⁷ Allison S. Brehm, *What’s the Use? A Primer on the Defense of Independent Creation to Combat Allegations of Idea Theft*, 1 ARIZ. ST. SPORTS & ENT. L.J. 94, 96–97 (2011). To prevail on a breach of implied contract claim, a plaintiff must prove: (1) he prepared the work; (2) he disclosed the work to the defendant; (3) the defendant voluntarily accepted the disclosure with knowledge of the circumstances; (4) the reasonable value of the work; and (5) the defendant used the plaintiff’s work. *Star Patrol Enters., Inc. v. Saban Entm’t, Inc.*, 129 F.3d 127, at *1 (9th Cir. 1997) (citing *Klekas v. EMI Films, Inc.*, 198 Cal. Rptr. 296, 304 (Cal. Ct. App. 1984)). *See also* *Mann v. Columbia Pictures, Inc.*, 180 Cal. Rptr. 522, 533 (Cal. Ct. App. 1982) (including an additional element that the defendant used the plaintiff’s idea, meaning that the defendant substantially based his work on the plaintiff’s ideas).

³⁸ Brehm, *supra* note 37, at 96–97.

³⁹ *See id.* at 110 (explaining that defendants can still use the independent creation defense even *after* the defendant has heard the plaintiff’s idea by showing that the defendant created the work without access to the plaintiff’s idea through producing declarations or showing the work was made from other sources).

⁴⁰ *See* Cohen, *supra* note 25, at 102 (observing that where a producer and writer contract with each other, an enormous amount of power lays in the hands of the producer). “It is difficult to imagine any producer agreeing to terms that are substantially favorable to the writer, as the producer has access to a veritable sea of ideas, generated both by other outside free-lance hopefuls and by inside production personnel.” *Id.*

⁴¹ *See* Cohen, *supra* note 25, at 102.

II. THE BASICS OF COPYRIGHT, PREEMPTION, AND THE EXTRA ELEMENT TEST

A copyright protects the labor and investment a person has put into a particular piece of work⁴² by granting the author “a series of exclusive rights.”⁴³ To prevail on a copyright infringement claim, a plaintiff must prove: (1) ownership of a valid copyright⁴⁴ and (2) the infringing party copied original elements of the copyrighted work.⁴⁵ The second requirement will be more challenging for the plaintiff to prove than the first. Without direct evidence of copying,⁴⁶ the plaintiff has a heavy burden⁴⁷ to show that his work and the infringing work are “substantially similar” in both idea and expression.⁴⁸ The test of substantial similarity is

42 *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1145 (9th Cir. 2006). See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991)) (clarifying that copyright does not act as an award for the author's labor, but assures his “right to original expression”).

43 *Buono & Wickers IV*, *supra* note 17, at 5. Section 102 of the Copyright Act grants protection to works that are fixed in any tangible medium of expression including (1) literary works, (2) musical works, (3) dramatic works, (4) pantomimes and choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures and other audiovisual works, (7) sound recordings, and (8) architectural works. 17 U.S.C. § 102 (1976).

Section 106 grants the exclusive right (1) to reproduction of the work, (2) to preparation of derivative works based on the copyrighted work, (3) to distribution of the work to the public, (4) to performance of the work publicly, and (5) to display of the work publicly. 17 U.S.C. § 106 (1976).

Article I, section 8 of the Constitution authorizes Congress to grant rights to authors for the work in furtherance of the “Progress of Science and useful Arts.” U.S. CONST. art. I, § 8, cl. 8.

44 To register a copyright, one must file an application with the Copyright Office, pay the fee, and deposit the required number of copies or phonorecords. ROBERT B. CHICKERING & SUSAN HARTMAN, *HOW TO REGISTER A COPYRIGHT AND PROTECT YOUR CREATIVE WORK* 13 (1980). The copyright registration becomes effective on the day when the Copyright Office receives all the materials. *Id.*

45 *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); see also *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977) (“The real task in a copyright infringement action, then, is to determine whether there has been copying . . .”), *superseded on other grounds* by 17 U.S.C. § 504(b), as recognized in *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983 (9th Cir. 2009).

46 See *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir. 1976) (observing how difficult it may be to obtain direct evidence of copying).

47 See *Muller v. Twentieth Century Fox Film Corp.*, 794 F. Supp. 2d 429, 447 (S.D.N.Y. 2011) (deciding for summary judgment in favor of the defendant because the similarities were insubstantial); *Smith v. Weinstein*, 578 F. Supp. 1297, 1302 (S.D.N.Y. 1984) (finding dissimilarity because even though there were some similarities, they were “too general or too insignificant to be protectable”); *Buono & Wickers IV*, *supra* note 17, at n.15 (admitting that the court usually finds for the copyright defendant on summary judgment) (citing *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990)).

48 *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985); *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006); *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164 (stating that there must be “substantial similarity not only of the general ideas but of the expressions of those ideas as well.”), *superseded by statute on other grounds*, 17 U.S.C. § 504(b); see also *Reyher*, 533 F.2d at 92–93 (“Since both [works] present only the same idea, no infringement as to protected expression occurred.”); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 913 (2d Cir. 1980) (“[S]imilarity of idea or function must be distinguished from similarity of artistic expression.”); *Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 123 (2d Cir. 1994) (distinguishing between the plaintiff's demonstration of “similarity,” which applies to the entire work, including idea and expression, not just the protectable elements, and the plaintiff's demonstration of “illegality,” meaning that the plaintiff proves the defendant took the plaintiff's means of idea expression, not merely that the defendant expressed the same idea); *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995)

“whether the accused work is so similar to the copyrighted work that the ordinary reasonable person would conclude that the defendant unlawfully” used the plaintiff’s work.⁴⁹ Even if the similarity is a small part of the entire work, substantial similarity can be found if the similarity is “qualitatively” important.⁵⁰

The courts have applied different tests to guide them in determining the adequate level of similarity between two works necessary to meet the substantial similarity test.⁵¹ For example, the Ninth Circuit test employs a

(discussing the analysis of a work that contains protectable and unprotectable elements requires isolating the unprotectable elements and asking “whether the *protectable elements, standing alone*, are substantially similar”).

The “idea/expression dichotomy” is the distinction between an unprotectable idea and its protectable expression. Jonathan S. Caplan, *Copyright Infringement—Application of the Originality Requirement and the Idea/Expression Merger Doctrine to Compilations of Data*—Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991), 65 TEMP. L. REV. 275, 275–76 (1992). It limits copyright protection in the case of facts, principles, and ideas. 2 JAY DRATLER, JR. & STEPHEN M. MCJOHN, *INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY* § 5.01[2], at 5–9 (Law Journal Press 2012).

⁴⁹ See Russel J. Frackman, *Litigating Copyright Cases*, PLI Order No. G4 –3954, 419 PLI/Pat 7, 27 (1995); see also Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (explaining that a casual observer would overlook the differences between a plaintiff and defendant’s work unless he actually intended to find the disparities).

⁵⁰ See Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir. 1985); Meeropol v. Nizer, 560 F.2d 1061, 1071 (2d Cir. 1977) (finding that even though only less than one percent of the copyrighted letters were copied, they were relevant); Horgan v. MacMillan, Inc., 789 F.2d 157, 163 (2d Cir. 1986) (noting that “[a] snapshot of a single moment . . . may communicate a great deal”). *But see* Concrete Machinery Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 608 (1st Cir. 1988) (stating that copyright infringement will not be found only when slight or trivial variations are found between the two works).

⁵¹ See Frackman, *supra* note 49, at 28.

A sample of the tests to define “substantial similarity” include:

The “abstractions” test: A defendant may take an abstract of the whole copyrighted work.

Many patterns of generality can fit around a copyrighted work and the number of patterns increases as specifics are omitted from the abstract until all that may be left is a title or a summary of the work.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). A point exists where the copyrighted work is no longer protected because the similarity lies in the idea rather than the expression of the idea. *Id.*; see, e.g., Walker v. Time Life Films, Inc., 784 F.2d 44, 49 (2d Cir. 1986) (holding that no substantial similarity existed between a film and a book beyond generalized and nonprotectible ideas because they “differ radically in pace and dramatic structure,” even though they both tell the same story).

The “patterns” test: The “pattern” of a work is protected. Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513–14 (1945). “Pattern” includes the “sequence of events and the development of the interplay of characters.” *Id.*

“Comprehensive nonliteral similarity” and “fragmented literal similarity”: “Comprehensive nonliteral similarity” is a situation where the offending work copies the fundamental essence or structure of another work. 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.03[A][1], at 13-39 (Matthew Bender 2012). See, e.g., Feder v. Videotrip Corp., 697 F. Supp. 1165, 1173 (D. Colo. 1988) (holding that a videotape and travel guide did not meet the standard because the similarities in structure and essence are inherent in other travel guides reviewing similar subjects). The “fragmented literal similarity” test entails a situation where pieces of a copyrightable work are taken and used, but the fundamental substance of the work is not copied. The test examines when the similarity becomes so substantial as to constitute infringement. 4 NIMMER, *supra* note 51, § 13.03[A][2], at 13-54. The question becomes “whether the similarity relates to matter that constitutes a substantial portion of plaintiff’s work—not whether such material constitutes a substantial portion of defendant’s work.” *Id.* at 13-54.1 (emphasis added).

two-step process.⁵² The first step is an “extrinsic test”⁵³ that examines whether the general *ideas* are substantially similar, using specific criteria, such as the type of artwork, the materials, the subject matter, and the setting of the story.⁵⁴ Satisfying this objective test⁵⁵ can be difficult because the analysis depends on the availability and complexity of the evidence.⁵⁶ If the extrinsic test is satisfied and the ideas are substantially similar, the analysis progresses to the second step, labeled the “intrinsic test.” This focuses on the *expression* of the idea, such as the final version of a movie or the aired version of a television show.⁵⁷ This test is subjective⁵⁸ and relies on the perceptions, observations, and impressions of an ordinary, reasonable person who can respond to the expression.⁵⁹ Therefore, the extrinsic test resolves whether a defendant has taken the actual idea while

The “total concept and feel” test: The degree to which it appears to an observer that the defendant captured the total concept and feel of the plaintiff’s copyrighted work. *See* Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (finding that the characters in the art work, the mood the characters portrayed, the totality of the art work “conveying a particular mood with a particular message,” and the word arrangement are substantially similar to the copyrighted work), *superseded by statute*, 17 U.S.C. § 411(a); Warner Bros. Inc. v. Am. Broad. Cos., Inc., 654 F.2d 204, 211 (2d Cir. 1981) (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[E][3], at 13-48 (Matthew Bender rev. ed. 1980)) (finding that the total concept and feel of the two works are different because the plaintiff attempts to meet his burden of proof in an analysis that changes the “actual sequence or construction” of his work to achieve greater similarity with the defendant’s product); Reyher v. Children’s Television Workshop, 533 F.2d 87, 92 (2d Cir. 1976) (holding that the works are not similar in “total feel” because the copyrighted work develops the characters and the allegedly infringing work is void of setting or character development in presenting the theme).

⁵² *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) (concluding that the requirement of substantial similarity in a copyright infringement claim imposes a two-step analytic process), *superseded by statute on other grounds*, 17 U.S.C.A. § 504(b).

⁵³ It is labeled the extrinsic test because the resolution of the test does not depend on a judge or jury’s determination but on specific evidence. As such, expert testimony is relevant. *Id.*

⁵⁴ *Id.*; *see also* Jason v. Fonda, 526 F. Supp. 774, 777 (C.D. Cal. 1981) (adding to the list of specific expressive elements in a substantial similarity analysis: plot, themes, dialogue, mood, setting, pace, characters, and sequence of events); Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985) (explaining that the substantial similarity test compares “actual concrete elements” that are part of the storyline and the major characters, rather than analyzing the similarities between the basic plot ideas).

⁵⁵ Kouf v. Walt Disney Pictures and Television, 16 F.3d 1042, 1045 (9th Cir. 1994).

⁵⁶ *See* Scott Hervey, *The Complexity of Proving Copyright Infringement*, WEINTRAUB GENSHEA CHEDIAK: THE IP LAW BLOG, (Feb. 20, 2007), <http://www.theiplawblog.com/archives/-copyright-law-the-complexity-of-proving-copyright-infringement.html> (opining that the extrinsic test focuses on “articulable similarities between protectable elements,” rather than the basic plot ideas).

⁵⁷ *See* Sid & Marty Krofft Television Prods., Inc., 562 F.2d at 1164 (noting that “[i]f there is substantial similarity in ideas, then the trier of fact must decide whether there is substantial similarity in the expressions of the ideas so as to constitute infringement”).

⁵⁸ *See* Shaw v. Lindheim, 919 F.2d 1353, 1357 (9th Cir. 1990) (noting that “judicial determination under the intrinsic test is now virtually devoid of analysis, for the intrinsic test has become a mere subjective judgment as to whether two . . . works are or are not similar.”).

⁵⁹ Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579, 582 (9th Cir. 1944). Since the test is a subjective one, the intrinsic test is usually left in the hands of a jury to decide. *See* Shaw, 929 F.2d at 1360 (commenting on how the subjective assessment is better suited for the jury than for a judge because subjectivity is not a legal conclusion but one that depends on each individual person’s interaction with the two pieces of work in dispute); Matthew Joseph, *The Unsolicited Screenplay Cometh — Copyright infringement claims by unpublished authors*, LAW OFFICES OF MATTHEW A. JOSEPH, Vol. 2004, No. 4, <http://www.josephlaw.com/notes/archives/april04.html> (noting that the jury is a “proxy” audience).

the intrinsic test determines whether the expression of the idea has been pilfered.⁶⁰ Satisfying both the extrinsic test and the intrinsic test constitutes copyright infringement.⁶¹

The two-part substantial similarity test demonstrates that copyright protection does not extend to ideas alone; the idea must be accompanied with an expression of the idea to be eligible for copyright protection.⁶² Idea purveyors,⁶³ such as Larry Montz, who have not yet embodied their ideas in an expression before the alleged infringement took place must therefore seek recourse through other legal causes of action.⁶⁴ Copyright preemption responds to these alternatives by moderating the relationship between federal and state law.⁶⁵ It ensures that protecting ideas through state law causes of action does not interfere with federal copyright law.⁶⁶ And where

⁶⁰ *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1165. See *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996) (finding that if the similarity lays in noncopyrightable elements then there is no substantial similarity).

⁶¹ See Nicholas R. Monlux, *An Invitation for Infringement: How the Ninth Circuit's Extrinsic and Intrinsic Similarity Tests Encourage Infringement: An Analysis Using* *Reece v. Island Treasures Art Gallery*, 56 J. COPYRIGHT SOC'Y U.S.A. 543, 544 (2008) (noting that the test used in analyzing copyright infringement claims is a two-part test).

⁶² See 17 U.S.C. § 102 (1976) (clarifying that copyright does not cover "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work"); *Blakeman v. The Walt Disney Co.*, 613 F. Supp. 2d 288, 305 (E.D.N.Y. 2009) (quoting *Kregos v. Assoc. Press*, 3 F.2d 656, 663 (2d Cir. 1993) (stating that "[t]he law is clear that 'a copyright does not protect an idea, but only the expression of an idea')"); *LITWAK*, *supra* note 10, at 17 (stating that "ideas are not copyrightable because they are not considered 'an expression of an author'").

As applied specifically to the *Montz* case, copyright law does not protect Larry's Montz's idea for a television show. *Muller v. Twentieth Century Fox Film Corp.*, 794 F. Supp. 2d 429, 440 (S.D.N.Y. 2011).

Even though the author is not afforded copyright protection for his idea, the producer and author can contract to supply such protection. See *Minnear v. Tors*, 266 Cal. App. 2d 495, 503 (Cal. Dist. Ct. App. 1968) (citing *Chandler v. Roach*, 319 P.2d 776, 781 (Cal. Ct. App. 1957)) (explaining that even though the material is unprotected, the producer and writer are free to make whatever contract they want to transact in the exchange of ideas regardless of whether the producer later finds that he could have contrived the exact ideas without paying money for them).

⁶³ "Idea men" try to market the products of their minds and have a difficult time doing so because of their poor bargaining position. Arthur R. Miller, *Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come*, 119 HARV. L. REV. 703, 708 (2006). The term "idea man" is used in scholarship concerning the protection of ideas. Samuel M. Bayard, Note, *Chihuahuas, Seventh Circuit Judges, and Movie Scripts, Oh My!: Copyright Preemption of Contracts to Protect Ideas*, 86 CORNELL L. REV. 603, 604 n.5 (2001).

⁶⁴ See *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1057 (C.D. Cal. 2000) (quoting *Stanley v. Columbia Broad. Sys.*, 221 P.2d 73, 85 (Cal. 1950)) (noting that "[t]he use of ideas unprotected by copyright may provide the basis for a breach of contract claim because 'the policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract'").

⁶⁵ See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 375 (7th ed. 2004) ("The Court must consider the federal law and its operation and compare the state statute and its operation."). Preemption is based on the Supremacy clause of the U.S. Constitution, requiring that federal law override state regulation where there is an actual conflict between the two sets of laws. *Id.* at 374.

⁶⁶ See MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 523 (4th ed. 2005) (recognizing that the overlap and coexistence between common law copyright and federal copyright laws has created tension).

a conflict exists, federal law controls.⁶⁷ A state law claim is preempted if two requirements are met: (1) the “subject matter requirement”—the work to be protected falls within one of the categories protected by the Copyright Act,⁶⁸ and (2) the “general scope requirement”—the state law claim asserts rights (i.e., reproduction, distribution, display, etc.) that are equivalent to one of the exclusive rights granted protection under the Copyright Act.⁶⁹ This Comment will focus on the second prong of this test as it has been the central source of conflict for idea submission cases like that of Larry Montz.⁷⁰ Resolving these cases requires determining whether the asserted

⁶⁷ See Christina Bohannon, *Copyright Preemption of Contracts*, 67 MD. L. REV. 616, 619 (2008) (describing how under preemption, courts consider whether a state law claim interferes with the purposes of federal law).

⁶⁸ *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 848 (2d Cir. 1997). Copyright protection is available to original works of authorship fixed in a tangible medium of expression. Works of authorship include: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” 17 U.S.C. § 102 (1976). Ideas are not included in these categories but would still be able to meet the “subject matter” requirement for preemption because copyrightable material can contain uncopyrightable elements such as ideas, thereby applying preemption to uncopyrightable and copyrightable elements. See *Nat'l Basketball Ass'n*, 105 F.3d at 849; see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 200 (2d Cir. 1983) (noting that even though an original work of authorship contains uncopyrightable elements, the work as a whole is not taken outside of preemption). A plaintiff will try to argue against preemption by claiming that ideas captured in a body of work do not fall under the Copyright Act because the Act specifically denies protection to ideas. See *U.S. Ex Rel. Berge v. Trs. of Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997). The umbrella that encompasses what is included in preemption is wider than the umbrella encompassing what is protected by the Copyright Act. *Id.* (holding that “scope and protection are not synonyms” and that “the shadow actually cast by the Act’s preemption is notably broader than the wing of its protection”); *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 455 (6th Cir. 2001) (focusing on the Second, Fourth, and Seventh Circuits that have held subject matter to include not only tangible expressions but also elements of expression that are not protected under the Copyright Act). Even though ideas are not covered under federal copyright law, they do not automatically fail the subject matter requirement. See *Murray Hill Publ'ns v. ABC Commc'ns, Inc.*, 264 F.3d 622, 636 (6th Cir. 2001) (emphasizing that the expression of an idea is the “essence of the subject matter” of copyright); *Nat'l Basketball Ass'n*, 105 F.3d at 849 (noting that uncopyrightable and copyrightable elements of state law claims can be preempted); *Boyle v. Stephens Inc.*, No. 97 CIV 1351(SAS), 1998 WL 690816, at *5 (S.D.N.Y. Sept. 29, 1998) (clarifying that preemption extends beyond copyrightable and protected works of authorship and encompasses uncopyrightable elements).

⁶⁹ *Nat'l Basketball Ass'n*, 105 F.3d at 848. See *Kabehie v. Zoland*, 125 Cal. Rptr. 2d 721, 727 (Cal.Ct.App. 2002) (stating that if the claim based on a state-protected right is infringed by “reproduction, performance, distribution or display,” then it is equivalent to a federal exclusive right) (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, §1.01 [B] [1], at 1-12 (Matthew Bender 2002)).

When violation of a state law is based on an act incorporating elements beyond those of the exclusive rights under copyright law, then the rights are not equivalent and the second prong fails. *Harper & Row Publishers, Inc.*, 723 F.2d at 200. See also *Wrench LLC*, 256 F.3d at 455 (“asking whether the state common law or statutory action at issue asserts rights that are the same as those protected under § 106 of the Copyright Act”); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (noting that equivalent rights to the exclusive rights granted under the Copyright Act are established in the laws of each state).

⁷⁰ *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 980 (9th Cir. 2011); see also Nathan Smith, Comment, *The Shrinkwrap Snafu: Untangling the “Extra Element” in Breach of Contract Claims Based on Shrinkwrap Licenses*, 2003 BYU L. REV. 1373, 1393 (2003) (observing how courts do not “normally struggle” with the subject matter requirement but the equivalency prong is still debated); Peter K. Yu, Note, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*,

state claim masks what is truly a copyright claim.⁷¹ The courts have predominantly utilized the “extra element” test to answer that question.⁷² The “extra element” test measures the degree of equivalency between state law claims and copyright claims.⁷³ Furthermore, it determines whether there is some factor that changes the “nature of the action so that it is *qualitatively* different from a copyright infringement claim,” thereby taking the claim outside the bounds of copyright law and avoiding preemption.⁷⁴

A copyright holder has the right to reproduce, perform, distribute, and display his work.⁷⁵ Federal copyright infringement occurs when the infringer obstructs those rights by reproducing, performing, distributing, or displaying the copyright holder’s work.⁷⁶ At the state level, if an act of reproduction, performance, distribution, or display will *by itself* infringe a state-created right on which the plaintiff brings a case, the state claim is preempted.⁷⁷ But if another element is required, instead of, *or* in addition to, reproduction, performance, distribution, or display, to prove the state claim, then there is an “extra element.”⁷⁸

20 CARDOZO L. REV. 355, 370 (1998) (“Although the subject matter prong does not pose much difficulty . . . the equivalent right prong is ambiguous.”).

⁷¹ See *Kabehie v. Zoland*, 125 Cal. Rptr. 2d 721, 737 (Cal. Ct. App. 2002) (Mosk, J., concurring) (“[T]he ‘fact-specific analysis’ is not easily workable, for it entails an evaluation in each case of the nature of the claims”); Scott Faust, *NLRB Acting General Counsel Clarifies Duty to Provide Information in Bargaining*, PROSKAUER (May 18, 2011), <http://www.laborrelationsupdate.com/nlr/nlr-acting-general-counsel-clarifies-duty-to-provide-information-in-bargaining/> (“[C]ase-specific analysis has led to seemingly inconsistent results . . .”). But see *Groubert v. Spyglass Entm’t Group*, No. CV 02–01803–SVW, 2002 WL 2031271, at *3 (C.D. Cal. 2002) (quoting *Fisher v. Viacom Int’l, Inc.*, 115 F. Supp. 2d 535, 542 (D. Md. 2000) (recognizing that a fact-specific approach was the sensible method to resolve the “general scope requirement” of preemption)).

⁷² See *Sefton v. Jew*, 201 F. Supp. 2d 730, 745 (W.D. Tex. 2001) (citing *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 787 (5th Cir. 1999)); *Mayer v. Josiah Wedgwood & Sons, Ltd.* 601 F. Supp. 1523, 1535 (D.C.N.Y. 1985) (noting that the “extra element” test is the prevailing test).

⁷³ See Jay Rubin, Note, *Television Formats: Caught in the Abyss of the Idea/Expression Dichotomy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 661, 671 (2006) (stating that when the court determines whether a state law claim asserts rights qualitatively different from the rights protected under the Copyright Act, it does so under the “extra element” or “equivalency” test).

⁷⁴ *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985) (emphasis added). See *Wrench LLC*, 256 F.3d 446, 455–456 (6th Cir. 2001) (explaining that the extra element operates as an addition or substitute to the acts as defined in the exclusive rights of the Copyright Act, which would satisfy the state-created cause of action); *Ritchie v. Williams*, 395 F.3d 283, 287 n.3 (6th Cir. 2005) (noting that most circuits referred to the determination of equivalency as the “extra element test”).

⁷⁵ See 17 U.S.C. § 106 (1976).

⁷⁶ See LEAFFER, *supra* note 66, at 407 (“Copyright infringement occurs when a third party violates one or more of the copyright owner’s exclusive rights as enumerated in § 106 of the 1976 Act.”).

⁷⁷ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.01[B][1], at 1-12 (Matthew Bender 2011) (emphasis added).

⁷⁸ *Id.* at 1-12 to 1-13 (emphasis added).

III. THE PROBLEM WITH THE “EXTRA ELEMENT” TEST

The “extra element” test has invoked much criticism⁷⁹ and attention because of its uncertainty⁸⁰ and lack of guidance.⁸¹ The test has been criticized for giving the courts too much discretion,⁸² and inconsistent results justify the intense scrutiny.⁸³ This Comment focuses on the “extra element” test in breach of implied contract claims.⁸⁴ Three perspectives

⁷⁹ *Ritchie*, 395 F.3d at 288 n.3.

⁸⁰ See LEAFFER, *supra* note 66, at 540 (noting that the “extra element” test can’t be applied with certainty); see also David B. Sandelands, Advisory, *When Does Federal Copyright Law Preempt State Contract Law?*, ENTERPRISE COUNSEL GROUP (July 24, 2003), <http://www.enterprisecounsel.com/WhenDoesFederalCopyrightLaw2003.pdf> (noting that what exactly constitutes an “extra element” is unclear).

⁸¹ See Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 VAND. J. ENT. & TECH. L. 1, 37 (2007) (“[J]udicial application of the [“extra element”] test to the large number and variety of claims has given rise to a host of interesting, controversial, oftentimes troubling, and, not surprisingly, inconsistent decisions.”).

⁸² See Schulyer M. Moore, *Straightening Out Copyright Preemption*, 9 UCLA ENT. L. REV. 201, 204 (2002) (stating that a court that wants to find preemption can do so because there is always a difference, no matter how small, between state law and copyright law). See also Robert W. Clarida & Robert J. Bernstein, *New York and California Courts Split on Preemption of Idea Claims*, N.Y. L.J. (July 15, 2011), available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202501070033&New_York_and_California_Courts_Split_on_Preemption_of_Idea_Claims (“Unless and until [this] Court provides a uniform interpretation for federal courts to follow, the outcome of preemption challenges to idea-submission claims may be determined less by the intent of Congress than by the iron law of real estate: location, location, location.”); Bayard, *supra* note 63, at 628 (proposing that Congress might have intended to give discretion to courts in determining what state claims should survive preemption); Patrick McNamara, Note, *Copyright Preemption: Effecting the Analysis Prescribed by Section 301*, 24 B.C. L. REV. 963, 972 (1983) (stating that judicial interpretation dominated the realm of copyright and copyright preemption).

⁸³ If a plaintiff brought a breach of implied contract claim based on idea submissions in the Second or Fourth Circuit state courts, the court generally found the claim to be preempted. For Second Circuit cases, see, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983) (preempted), *rev’d on other grounds*, 471 U.S. 539 (1985); *Forest Park Pictures v. Universal Television Network*, 10 Civ. 5168, 2011 WL 1792587, at *3 (S.D.N.Y. May 10, 2011) (preempted), *vacated*, 683 F.3d 424 (2d Cir. 2012); *Muller v. Twentieth Century Fox Film Corp.*, 794 F. Supp. 2d 429, 448 (S.D.N.Y. 2011) (preempted); *Smith v. New Line Cinema*, 03 Civ. 5274, 2004 WL 2049232, at *5 (S.D.N.Y. 2004) (preempted). For Fourth Circuit cases, see, e.g., *Nichols Agency, Inc. v. Enchanted Child Care, Inc.*, 537 F. Supp. 2d 774, 783 (D. Md. 2008) (preempted); *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 351 F. Supp. 2d 436, 445 (M.D. N.C. 2005) (preempted); *U.S. ex. rel. Berge v. Board of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1465 (4th Cir. 1997) (preempted); *Fischer v. Viacom Int’l, Inc.*, 115 F. Supp. 2d 535, 542 (D. Md. 2000) (preempted). In the Ninth Circuit, courts found that breach of implied contract claims were not preempted. See, e.g., *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th Cir. 2004) (not preempted); *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620 (9th Cir. 2010) (not preempted); *Minnear v. Tors*, 72 Cal. Rptr. 287 (Cal. Ct. App. 1968) (not preempted); *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1128 (N.D. Cal. 2001) (not preempted).

The Sixth Circuit has taken both sides and found some breach of implied contract claims preempted while finding others are not preempted. See, e.g., *Murray Hill Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 264 F.3d 622, 638 (6th Cir. 2001) (preempted), *abrogated by Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237 (2010); *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 459 (6th Cir. 2001) (not preempted).

⁸⁴ The analysis will focus on breach of implied-in-fact contracts as opposed to breach of implied-in-law contracts since implied-in-law contracts are not promises manifested by the intentions of two parties. See 4 NIMMER, *supra* note 51, at 19D-14. Implied-in-law contracts are imposed for reasons of justice based on a derived benefit. *Id.* The implied-in-law contract merely depends on unauthorized use, requiring no “extra element” of a promise to pay that would take such a claim outside of preemption.

characterize the application of the “extra element” test to breach of contract claims: (1) the minority view where breach of contract claims concerning reproduction, performance, distribution, or display of a copyrighted work are never preempted;⁸⁵ (2) an alternative view that finds state breach of contract actions are always preempted;⁸⁶ and (3) the majority view where breach of contract causes of action are not preempted when they enforce rights *qualitatively* different from those exclusively protected by copyright law.⁸⁷

A. Breach of Contract Claims Are Never Preempted

A few courts have held that a breach of contract case based on reproduction, performance, distribution, or display of copyrighted material is never preempted. The inherent promise in a contract is the “extra element” that sets a contract claim apart from a copyright case.⁸⁸

In *ProCD, Inc. v. Zeidenberg*,⁸⁹ the court emphasized that “[a] copyright is a right against the world,” restricting strangers in what they can do.⁹⁰ An equivalent state right would have the power to restrict strangers from acting.⁹¹ But state rights created by a contract affect only their parties, not strangers outside the contract.⁹² A right enforceable against a particular party is not equivalent to a right enforceable against the world.⁹³ A contract therefore does not create rights equivalent to the exclusive rights granted in federal copyright law because a contract right cannot be enforced against strangers to the contract.⁹⁴ Even though the court intends to avoid adopting a blanket statement that every contract claim escapes preemption,⁹⁵ the court’s holding does exactly the opposite. It establishes that contract rights are different from rights under copyright law in *all* cases.⁹⁶ The court’s opinion asks, “[a]re rights created by contract

Wrench LLC, 256 F.3d at 459.

⁸⁵ See *infra* Part III(A) (discussing the reasoning of a number of courts for finding an extra element in every breach of contract cause of action).

⁸⁶ See *infra* Part III(B) (discussing how a court can presumptively find preemption in all breach of contract cases).

⁸⁷ See *infra* Part III(C) (discussing how a majority of courts are not quick to conclude that every breach of contract cause of action is preempted).

⁸⁸ See Sandelands, *supra* note 80; Aileen Brophy, *Whose Idea Is It Anyway? Protecting Idea Purveyors and Media Producers After Grosso v. Miramax*, 23 CARDOZO ARTS & ENT. L.J. 507, 522 (2005) (“[C]ontract rights are inherently different from the rights granted by copyright.”).

⁸⁹ 86 F.3d 1447 (7th Cir. 1996).

⁹⁰ *Id.* at 1454.

⁹¹ *Id.*

⁹² *Id.* See also CALAMARI & PERILLO, *supra* note 11, at 170 (explaining that a contract requires the offeree to exchange a requested performance or promise for the offeror’s promise); JEFFREY FERRIELL & MICHAEL NAVIN, UNDERSTANDING CONTRACTS 7 (LexisNexis 2004) (observing how the freedom of contract is based on the principle that every individual “is in the best position to know what is in his or her own best interest, and should be free to pursue that interest”).

⁹³ Brophy, *supra* note 88, at 522.

⁹⁴ *Id.*

⁹⁵ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996).

⁹⁶ See Bayard, *supra* note 82, at 617 (“[T]he opinion’s [(*ProCD*)] language and logic tell a

‘equivalent to any of the exclusive rights within the general scope of copyright?’ The court answers “no.”⁹⁷ The court’s answer is absolute and without qualification, leaving little possibility for overlap between copyright and contract rights.⁹⁸ The court thus renders the preemption mechanism inoperative.

Academics in the copyright field, such as Professor Paul Goldstein,⁹⁹ also support the reasoning portrayed in *ProCD*. Professor Goldstein takes *ProCD* a step further,¹⁰⁰ saying, “contract law is a good example of a state law that will be *immune* from preemption under the extra element test. . . . [C]ontract law requires the plaintiff to prove the existence of a bargained-for exchange—something it need not prove in a cause of action for copyright infringement.”¹⁰¹ Just like the court in *ProCD*, Professor Goldstein does not otherwise qualify his statement with exceptions to immunity, appearing to infer that contract claims will always be immune.¹⁰² Under this line of reasoning, the “bargained-for exchange” part of every contract¹⁰³ is the “extra element” that allows a breach of contract claim to avoid preemption in every case.¹⁰⁴

The danger in following this rationale is that anything labeled “contract” will escape preemption.¹⁰⁵ This includes contracts, which promise to refrain from doing what copyright law already prohibits: contracts promising not to reproduce, distribute, perform, or display a work.¹⁰⁶ Plaintiffs are therefore given a free pass to circumvent federal copyright law, pursue a state claim, obtain a remedy under state law, and virtually nullify the preemption mechanism.¹⁰⁷ It is the court’s duty to

different story, in which it is indeed hard to imagine a contract claim not considered qualitatively different.”).

⁹⁷ *ProCD, Inc.*, 86 F.3d at 1454.

⁹⁸ Bayard, *supra* note 82, at 617.

⁹⁹ Professor Paul Goldstein is a recognized scholar in the field of intellectual property law and has authored a volume of books about the field including a treatise on copyright law, a casebook, and a number of other books. *Paul Goldstein, Stella W. and Ira S. Lillick Professor of Law*, STANFORD LAW SCHOOL DIRECTORY, <http://www.law.stanford.edu/node/166390> (last visited Jan. 6, 2012).

¹⁰⁰ See *Kabehie v. Zoland*, 125 Cal. Rptr. 2d 721, 737 (Cal. Ct. App. 2002) (Mosk, J., concurring) (“Professor Paul Goldstein, in his highly-regarded work on copyright, presents an even broader concept of the contract exemption from federal copyright preemption.”).

¹⁰¹ *Id.* (quoting 3 PAUL GOLDSTEIN, COPYRIGHT §15.2.1, at 15:12 (2d ed. 2002 supp.)).

¹⁰² See *id.*

¹⁰³ See CALAMARI & PERILLO, *supra* note 11, at 170 (explaining that consideration is generally required in agreements and then describing that consideration is “bargained for by the promisor, and exchanged by the promisee in return for the promisor’s promise”).

¹⁰⁴ See *Kabehie*, 125 Cal. Rptr. 2d at 737 (Mosk, J., concurring).

¹⁰⁵ See I NIMMER, *supra* note 77, at 1–23 (footnotes omitted) (“[P]re-emption should continue to strike down claims that, though denominated ‘contract,’ nonetheless complain directly about the reproduction of expressive materials.”); LEAFFER, *supra* note 66, at 539 (stating that *ProCD* takes an extreme view of “freedom of contract,” allowing no contract to be preempted).

¹⁰⁶ See *Kabehie v. Zoland*, 125 Cal. Rptr. 2d 721, 732 (Cal. Ct. App. 2002); see also *Wrench LLC v. Taco Bell Corp.* 256 F.3d 446, 457 (6th Cir. 2001) (“Under [the] rationale, a contract which consisted only of a promise not to reproduce the copyrighted work would survive preemption even though it was limited to one of the exclusive rights enumerated in 17 U.S.C. § 106.”).

¹⁰⁷ See *Kabehie*, 125 Cal. Rptr. 2d at 732; see also *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532,

avoid drawing a quick conclusion from the pleaded “laundry list” of elements in state law claims and to analyze whether an “extra element” truly exists.¹⁰⁸

B. Breach of Contract Claims Are Always Preempted

At least one court has found that breach of contract claims are always preempted by federal copyright law, and another court came very close to reaching that conclusion.¹⁰⁹

In *Wolff v. Institute of Electrical and Electronics Engineers, Inc.*,¹¹⁰ a photographer sued an engineering society for exceeding the rights that the photographer originally granted to the society for use of a photograph.¹¹¹ The court held that copyright law preempted the plaintiff’s state law claim for breach of contract,¹¹² relying heavily on congressional intent and Congress’s actions when enacting the preemption provision of the Copyright Act.¹¹³

The current preemption section of the Copyright Act describes preempted claims in a generalized way.¹¹⁴ However, the House of Representatives Committee Report to the Copyright Act illustrates that an earlier draft of the preemption provision explicitly listed specific causes of actions that would *not* be preempted, including breach of contract.¹¹⁵ That portion of the Act was eliminated on the floor of the House and does not

1550 (11th Cir. 1996) (observing how a plaintiff can dress up a copyright infringement claim with a state law claim by “artful pleading and presentation of evidence”); LEAFFER, *supra* note 66, at 539 (observing that the balance copyright law strikes is at risk).

¹⁰⁸ *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1190 (C.D. Cal. 2001); *see* *ProCD v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (holding courts should not presumptively conclude that anything labeled as “contract” avoids preemption); *Wrench LLC*, 256 F.3d at 457 (distinguishing that even though some state contract claims avoid preemption does not mean that all state contract actions do the same simply because they have the additional element of a promise); *Endemol Entm’t B.V. v. Twentieth Television, Inc.*, 48 U.S.P.Q.2d 1524, 1528 (C.D. Cal. 1998) (stating that the promise not to benefit from a copyrighted work, without more, is an insufficient “extra element”); *Petition for Writ of Certiorari at *14, Miramax Film Corp. v. Grosso*, 383 F.3d 965 (2004) (No. 04–1682), 2005 WL 1403156 at 3 (observing the necessity of courts to look beyond the label and the conclusory allegations of a state law cause of action).

¹⁰⁹ *See Kabehie*, 125 Cal. Rptr. 2d at 731 n.6 (stating that several authorities have ascribed this classification to a case).

¹¹⁰ 768 F. Supp. 66 (S.D.N.Y. 1991).

¹¹¹ *See id.* at 67 (showing that the invoice containing the conditions of use had a “time limit on use,” but the defendant went on to use the photograph beyond the time limit without the plaintiff’s consent).

¹¹² *Id.* at 69.

¹¹³ *Id.*; *see also* *Architectronics, Inc. v. Control Sys.*, 935 F. Supp. 425, 440 (S.D.N.Y. 1996) (explaining that *Wolff* rests almost entirely on legislative history).

¹¹⁴ *Mayer v. Josiah Wedgwood & Sons, Ltd.* 601 F. Supp. 1533, 1535 (D.C.N.Y. 1985).

¹¹⁵ *See* H.R. Rep. No. 94–1476, at 132 (1976) (“Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract . . .”). The preemption statute allows the pursuit of claims under state law including: “misappropriation . . . breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices.” *Id.* at 24.

appear in the final version of the Copyright Act.¹¹⁶ The removal arguably illustrates that Congress intended those causes of action to be preempted.¹¹⁷

The *Wolff* court, in fact, inferred “[w]here Congress includes limiting language in an earlier version of a bill, but deletes it prior to enactment, it may be presumed that the limitation was not intended.”¹¹⁸ The court interpreted Congress’ deletion of the provision protecting breach of contract claims from preemption to mean that such claims should always be preempted.¹¹⁹

But subsequent courts have indicated that *Wolff* goes too far in interpreting congressional intent.¹²⁰ One possible explanation that has been offered for Congress’ action is that House members were concerned that an explicit list would cause confusion about the scope of preemption, especially since the list was non-exhaustive.¹²¹ The purported danger was that clearly identifying non-preempted rights would give states a green light to pass laws concerning those rights, thereby rendering preemption useless.¹²² The bill was therefore revised to account for the possibility of ambiguity and to maintain the power of preemption.¹²³

The courts have been reluctant to follow *Wolff*’s dispositive determination of congressional intent derived from the omission of examples of non-preempted rights from the final version of the Copyright Act.¹²⁴ Rather, courts have regarded *Wolff* as standing for the proposition

¹¹⁶ 17 U.S.C. § 301.

¹¹⁷ *Russello v. U.S.*, 464 U.S. 16, 21 (1983).

¹¹⁸ *Wolff*, 768 F. Supp. at 69 (citing *Russello v. U.S.*, 464 U.S. 16, 21 (1983)).

¹¹⁹ *See id.* at 69; *see also* *Architectronics, Inc.*, 935 F. Supp. at 440 (noting that the *Wolff* court held *all* contract claims preempted without considering whether a promise could ever be the “extra element” to take a state claim outside of preemption).

¹²⁰ *See Architectronics, Inc.*, 935 F. Supp. at 441 (“However, there is nothing in the legislative history or elsewhere to suggest that this was the motive behind the deletion.”); LEAFFER, *supra* note 66, at 535 (noting that the legislative history in this particular situation is too ambiguous to provide any insight to determine whether a right is equivalent); 1 NIMMER, *supra* note 77, at 1–16 (indicating that the *Wolff* court’s logic was faulty because under that logic, it could be argued that the originally enumerated claims would be deemed non-preempted but then the non-enumerated causes of action could be held to be preempted).

¹²¹ *See Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 433 (8th Cir. 1993) (explaining how congressional members were concerned about the tort of misappropriation that was added to the list of the examples and thus decided to do away with the list altogether to avoid confusion).

¹²² *Id.* at 434 n.5 (stating that the inclusion of a specific example of a non-preempted cause of action like misappropriation could be interpreted by the courts as authorizing states to pass misappropriation laws).

¹²³ *Id.* (noting a concern presented by a representative that the inclusion of “misappropriation” would inadvertently nullify the preemption section of the Copyright Act because its inclusion would indicate to courts that the states are authorized to pass misappropriation laws and such laws would render preemption meaningless). The main concern with “misappropriation” sounded a death knell for the entire list altogether. *Id.* (stating that the amendment to strike the examples list was “merely to remove the specific reference to misappropriation”).

¹²⁴ *See Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1533 (S.D.N.Y. 1985) (“[I]t seems that no inference as to Congress’s intent may be drawn from the fact that the illustrative list was dropped from the statute as it was finally enacted.”).

that a breach of contract claim is preempted when a plaintiff alleges that copyright infringement caused the breach of contract.¹²⁵

The case of *Endemol Entertainment B.V. v. Twentieth Television, Inc.*,¹²⁶ came dangerously close to articulating a categorical rule similar to *Wolff*: a breach of an *implied* contract, in particular, is always preempted.¹²⁷ The plaintiff in this case hoped to license his television program concept and format.¹²⁸ The defendant expressed an interest in the concept and format.¹²⁹ During negotiations, both parties understood that the plaintiff would be paid for any use of his ideas.¹³⁰ The defendant started to market the television series without the plaintiff's permission.¹³¹ The plaintiff and defendant later broke off negotiations when no agreement could be reached.¹³² The defendant then produced a pilot based on the format and concept of the plaintiff's program.¹³³ The court found that the plaintiff's claim alleged no rights beyond the defendant's promise not to benefit from the plaintiff's copyrighted work, which did not rise to the level of an "extra element."¹³⁴ The promise not to benefit was not an "extra element" because copyright law already protects a copyright holder from an infringer who benefits from the work.¹³⁵ The defendant in this case received the benefit of the plaintiff's work.¹³⁶ Copyright law alone could effectively protect the plaintiff's rights and therefore preempted the breach of contract claim.¹³⁷

Citing Professor Nimmer for the proposition that "quasi-contracts" are preempted, the *Endemol* court concluded that implied contracts are a species of quasi-contracts and should therefore be preempted in all cases.¹³⁸ A number of courts have followed the same line of thought.¹³⁹ However,

¹²⁵ *Nat'l Car Rental Sys., Inc.*, 991 F.2d at 431.

¹²⁶ 48 U.S.P.Q.2d 1524 (C.D. Cal. 1998).

¹²⁷ *See id.* at 1528 (stating that an implied contract is an exception to the assertion that contract claims are not preempted). One of the concerns expressed by those who support preemption of implied-in-fact contract claims is that the Copyright Act will become obsolete as the states' power grows. *See Daboub v. Gibbons*, 42 F.3d 285, 290 (5th Cir. 1995) (stating that "if the language of the act could be so easily circumvented, the preemption provision [of the Copyright Act] would be useless, and the policies behind a uniform Copyright statute would be silenced."); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (noting how states will interfere with the national objectives and regulatory systems of the national government).

¹²⁸ *Endemol Entertainment B.V.*, 48 U.S.P.Q.2d, at 1525.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 1528.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See id.* ("Plaintiff's claim asserts no violation of rights separate from those copyright law was designed to protect and, consequently, is preempted by federal law.").

¹³⁸ *See id.* at 1528 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1][a], [g] at 1-19, 1-34 (Matthew Bender 1997) ("[C]ontract causes of action themselves are not typically pre-empted," but . . . implied contracts as a species of quasi contract 'should be regarded as an equivalent right and pre-empted insofar as it applies to copyright subject matter.'").

¹³⁹ *See, e.g., Chesler/Perlmutter Prods., Inc. v. Fireworks Entm't*, 177 F. Supp. 2d 1050, 1059

courts have mistakenly interpreted Professor Nimmer's work because a "quasi-contract" is merely a *type* of implied contract rather than a term incorporating all implied contracts. A "quasi-contract" is an implied-in-law contract, as opposed to an implied-in-fact contract.¹⁴⁰ The focus of cases like *Endemol* has been the implied-in-fact contract where the parties' actions reflect a mutual understanding of a promise to pay for the use of ideas.¹⁴¹ The "quasi-contract" has little value in analyzing situations where implied-in-fact contracts are in dispute. Professor Nimmer addresses the distinction: "[Q]uasi-contract refers to an obligation imposed by law to avoid unjust enrichment. It is therefore . . . pre-empted Unfortunately, courts often refer to 'implied-in-fact' contracts as pre-empted, when they mean to declare *implied-in-law* (*i.e.*, quasi-) contract[s]" as preempted.¹⁴² Professor Nimmer further clarifies that "implied-in-fact" contracts survive preemption.¹⁴³ As a result, the *Endemol* court's analysis became misguided when it introduced quasi-contract theories to its preemption analysis of an implied-in-fact contract.

The critical difference between an implied-in-fact contract and an implied-in-law contract is the existence of an "extra element."¹⁴⁴ The "extra element" in an implied-in-fact contract claim is the promise to pay, while an implied-in-law contract does not require an "extra element" beyond reproduction, performance, distribution or display.¹⁴⁵ The former typically avoids preemption and the latter results in preemption of state claims. Therefore, the interchangeable use of the term "implied contract" in reference to both an "implied-in-fact" contract and an "implied-in-law"

(C.D. Cal. 2001) ("Implied contracts are more often found to be preempted."); *Fischer v. Viacom Int'l Inc.*, 115 F. Supp. 2d 535, 541 (D. Md. 2000) (noting that a majority of courts have found implied contracts preempted by the Copyright Act); *Worth v. Universal Pictures, Inc.*, 5 F. Supp. 2d 816, 822 (C.D. Cal. 1997) (holding that the plaintiff's breach of implied contract based on meetings and discussions to market a film screenplay was preempted because the implied contract was a species of quasi contract).

¹⁴⁰ See Ferriell & Navin, *supra* note 92, at 9–10 (stating that a contract implied in law is sometimes called a "quasi-contract").

¹⁴¹ See *Balt. & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923) (describing an "implied in fact" agreement as inferred from the conduct of the parties showing their mutual understanding and meeting of the minds and an "implied in law" agreement as imposed by the fiction of law to perform a legal duty).

¹⁴² 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 19D.03[C][2], at 19D-33 (Matthew Bender, rev. ed. 2011) (footnotes omitted).

¹⁴³ See *id.* at 19D-33 n.71.

¹⁴⁴ *Celestial Mechanix, Inc. v. Susquehanna Radio Corp.*, No. CV 03-5834-GHK, 2005 WL 4715213, at *7 (C.D. Cal. 2005).

¹⁴⁵ *Id.*, see also *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1127 (N.D. Cal. 2001) ("[A] plaintiff seeking to establish that a defendant breached an implied-in-fact contract would also have to prove elements beyond unauthorized use, including that the defendant made an enforceable promise to pay and breached that promise."); LORD, *supra* note 17, at 41 (commenting on how language is susceptible to vagueness so that the same words could be used to convey different meanings).

contract can distort the preemption analysis.¹⁴⁶ Courts and commentators must be careful to keep the two distinctly separate.¹⁴⁷

Rather than conducting an intensive analysis of the facts, the *Wolff* and *Endemol* courts adhered to the view that breach of contract claims are always preempted by federal copyright law. A fact-heavy analysis of the rights that each plaintiff claimed may have yielded different results and offered guidance to courts navigating similar claims.

C. Breach of Contract Claims Are Not Preempted When They Enforce Rights Qualitatively Different From the Exclusive Rights of Copyright Law

Many courts have gravitated away from adopting a bright-line rule and towards a fact-specific analysis to determine whether a breach of contract claim protects rights that are qualitatively different from rights under copyright law.¹⁴⁸ Courts are valuing substance over form so that plaintiffs can no longer disguise a federal copyright claim as a state law claim.¹⁴⁹

In *Wrench LLC v. Taco Bell Corp.*,¹⁵⁰ Taco Bell expressed an interest in using a “Psycho Chihuahua” cartoon from a licensing trade show.¹⁵¹ In later discussions with Taco Bell, one of the cartoon creators suggested using a live dog that would be given personality through computer imaging.¹⁵² The two parties discussed how much it would cost to use the “Psycho Chihuahua” character and Taco Bell understood that if it chose to use the Psycho Chihuahua concept, it would have to pay the cartoonists.¹⁵³ The creators’ licensing agency sent a proposal to Taco Bell, laying out the fees.¹⁵⁴ Taco Bell did not accept the proposal nor did Taco Bell explicitly reject it or indicate that it would stop any further discussions.¹⁵⁵ The cartoonists then gave a formal presentation to Taco Bell’s marketing department where they submitted prospective promotional materials focused on the “Psycho Chihuahua” and orally conveyed specific ideas for

¹⁴⁶ See *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 109 n.14 (Cal. Ct. App. 1998) (noting that the difference between an implied-in-fact contract and an implied-in-law contract is “fuzzy”).

¹⁴⁷ See *LORD*, *supra* note 17, at 41 (noting how the use of “implied contract” causes great confusion in cases and among lawyers).

¹⁴⁸ See *Anschell et al.*, *supra* note 14, at 24; see also *Murray Hill Publ’ns, Inc. v. ABC Comm’ns, Inc.*, 264 F.3d 622, 636 (6th Cir. 2001) (emphasizing that a preemption analysis is dependent largely on the facts and the claims presented by each of the parties); *Chesler/Perlmutter Prods., Inc. v. Fireworks Ent’mt, Inc.*, 177 F. Supp. 2d 1050, 1057 (C.D. Cal. 2001) (noting that a copyright preemption analysis is a “claim-by-claim inquiry”); *Fischer v. Viacom Int’l, Inc.*, 115 F. Supp. 2d 535, 542 (D. Md. 2000) (finding that a “categorical rule for preemption of implied-in-fact contracts would be inappropriate”).

¹⁴⁹ *Anschell*, *supra* note 14, at 24.

¹⁵⁰ 256 F.3d 446 (6th Cir. 2001).

¹⁵¹ *Id.* at 449.

¹⁵² *Id.* at 450.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

television commercials.¹⁵⁶ Taco Bell later hired a different advertising agency and sent the hired agency all of the “Psycho Chihuahua” materials from Taco Bell’s advertising department.¹⁵⁷ Taco Bell later aired a Chihuahua commercial and based its marketing efforts around a Chihuahua without compensating the designers of “Psycho Chihuahua.”¹⁵⁸

The *Wrench* court found that the “extra element” in the state law breach of implied contract claim was the promise to pay.¹⁵⁹ The court examined the action that violated the implied contract and concluded that the violating act was not one of reproduction, performance, distribution or display *by itself*, but of the failure to pay.¹⁶⁰ A copyright holder retains rights of reproduction, performance, distribution, or display,¹⁶¹ but noticeably absent from this list is the right to payment.¹⁶² Failing to pay does not violate federal copyright law.¹⁶³ Therefore, the court held that together, the use of the work (which could infringe on copyright) *and* the failure to pay violated the contract.¹⁶⁴ However, the use of the work alone could not violate the contract.¹⁶⁵

The court emphasized that the qualitative difference from a copyright infringement claim arose from the required elements to prove the state breach of contract claim: an enforceable promise, a breach, proof of mutual assent, consideration, the value of the work, and the defendant’s use of the work.¹⁶⁶ It was significant, therefore, that the elements necessary to prove

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 451. The materials most likely consisted of art boards the creators put together; Psycho Chihuahua shirts, hats, and stickers for promotional purposes; materials the designers’ newly-hired licensing agent sent to the employee for presentation to Taco Bell’s outside advertising agency, which described the Chihuahua as “irreverent,” edgy,” and “spicy,” with a craving for Taco Bell food; the ideas and examples from a Taco Bell marketing department meeting; and samples of uniform designs, shirts, food wrappers, posters, and cup designs based on the proposed ideas at the marketing meeting. *Id.* at 450–51.

¹⁵⁸ *Id.* at 451. During the Taco Bell marketing meeting, the creators came up with the idea for a television commercial where a male dog would pass up a female dog to get to Taco Bell food. *Id.* at 450. The new advertising agency claimed that it came up with the idea for the broadcasted Taco Bell commercial, where a male Chihuahua passes a female Chihuahua to get to a person eating Taco Bell food, while two of the creative directors were eating Mexican food at a café and saw a Chihuahua walking down the street “on a mission.” *Id.* at 451. Thus, Taco Bell used the independent creation defense to show that it came up with the commercial independently from the creators of the “Psycho Chihuahua.” *Id.* at 459.

¹⁵⁹ *Id.* at 456.

¹⁶⁰ *Id.*

¹⁶¹ See 17 U.S.C. § 106.

¹⁶² *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001).

¹⁶³ See *id.* (“[T]he state law right is not abridged by an act which in and of itself would infringe one of the exclusive rights granted by § 106, since the right to be paid for the use of the work is not one of those rights.”).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (“It is not the use of the work alone but the failure to pay for it that violates the contract and gives rise to the right to recover damages.”).

¹⁶⁶ *Id.*

the state breach of implied contract were distinct from the elements of a copyright infringement claim.¹⁶⁷

The court also looked at the different remedies available through the state law claim versus a copyright claim to find a qualitative difference.¹⁶⁸ The court took note of the fact that breach of implied contract actions in the state allowed for recovery of the reasonable value of services rendered.¹⁶⁹ The remedies for a copyright infringement action, on the other hand, include injunctions,¹⁷⁰ impounding and destruction of infringing articles,¹⁷¹ damages and profits,¹⁷² and costs and attorney's fees.¹⁷³ For the plaintiffs to receive the remedy of reasonable value of services rendered, they had to sue under a breach of contract claim.¹⁷⁴ In *Wrench*, the reasonable value of services rendered would most likely consist of the time spent to develop, (1) the promotional materials submitted to Taco Bell's advertising department, and (2) the ideas that were designed to appeal to the Taco Bell marketing team.¹⁷⁵ The creators undertook their work with the expectation that they would be paid.¹⁷⁶ Therefore, the remedies under the state law

¹⁶⁷ See Bohannon, *supra* note 67, at 625 (explaining how the elements in state law claims are not ostensibly identical to the elements of a copyright infringement claim); see also *Chandler v. Roach*, 319 P.2d 776, 780 (Cal. Ct. App. 1957) (stating that the elements of an implied-in-fact contract are mutual assent and consideration); *Architectronics, Inc. v. Control Sys., Inc.*, 935 F. Supp. 425, 438 (S.D.N.Y. 1996) (stating that protection for a breach of contract is not the same as copyright protection).

¹⁶⁸ See *Wrench LLC*, 256 F.3d 446, 456 (6th Cir. 2001). But see 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1], at 1-12 (Matthew Bender, rev. ed. 2011) (footnote omitted) ("Even if additional remedies might exist under state law, the claim is pre-empted absent a showing of different rights."); *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 435 (8th Cir. 1993) (holding that the state law cause of action cannot be preempted merely because the remedy for the breach of contract is identical to a remedy in copyright).

¹⁶⁹ *Wrench LLC*, 256 F.3d at 456.

¹⁷⁰ See 17 U.S.C. § 502 (2006) (stating that a court can grant a temporary or final injunction to prevent or restrain copyright infringement).

¹⁷¹ See 17 U.S.C. § 503 (2006) (stating that a court can impound the copies made or used as part of the copyright infringement as well as the means used to produce the copies, and a court can order the destruction of the copies and means used in copyright infringement); see also 17 U.S.C. § 503 (2006), House Report no. 94-1476, Historical and Revision Notes ("[T]he court could order the infringing articles sold, delivered to the plaintiff, or disposed of in some other way that would avoid needless waste and best serve the ends of justice.").

¹⁷² See 17 U.S.C. § 504 (2006) (stating that a copyright infringer is liable for (1) actual damages and any additional profits, or (2) statutory damages).

In the case of actual damages, the copyright owner just has to prove the infringer's gross revenue. See 17 U.S.C. § 504(b) (2006). The copyright owner can elect to take actual damages or statutory damages. *Id.* The damages are granted to make the copyright owner whole from the losses suffered by infringement, and profits are given to prevent the infringer from wrongfully benefitting from his actions. 17 U.S.C. § 504 (2006), House Report no. 94-1476, Historical and Revision Notes.

¹⁷³ See 17 U.S.C. § 505 (2006).

¹⁷⁴ The payment of reasonable value of services rendered is a remedy available for breach of implied contracts. *Young v. Young*, 191 P.3d 1258, 1268 (Wash. 2008).

¹⁷⁵ "Reasonable value" is what the other party "received in terms of what it would have cost him to obtain it from a person in the claimant's position." RESTATEMENT (SECOND) OF CONTRACTS § 371 (1981). It is usually based on market value. *Id.* at cmt. a.

¹⁷⁶ See *Cascaden v. Magryta*, 225 N.W. 511, 511-12 (Mich. 1929) (holding that the plaintiffs could not recover under an implied-in-fact contract because the work was not done, which would have allowed the plaintiffs to form an expectation of payment from the defendants).

claim made it qualitatively different from a copyright infringement claim.¹⁷⁷

The *Wrench* court did not adhere to a bright-line rule to resolve the preemption issue, but instead, went through a step-by-step analysis of the infringing action, the elements of proof, and the available remedies to conclude that the claim was qualitatively different as to avoid preemption.¹⁷⁸

*Fischer v. Viacom International, Inc.*¹⁷⁹ also follows the fact-specific approach by looking at the particular rights at issue to determine if the claim is preempted.¹⁸⁰ The plaintiff in *Fischer* developed an animated character team of “a guy named ‘Steve’ and his blue dog named ‘Bluey.’”¹⁸¹ He drafted a written proposal for an animated television series based on the character team and submitted it to Nickelodeon U.K.¹⁸² Nickelodeon asked for permission from the plaintiff to allow Viacom, Nickelodeon’s parent company, to keep “the details of the series on file for future reference.”¹⁸³ The plaintiff responded by sending a more detailed description, a script for a pilot of the animated show, a sheet that displayed the characters in different poses, and character descriptions.¹⁸⁴ The plaintiff and Viacom continued their exchanges, and Viacom purportedly expressed interest in the character team and encouraged the plaintiff to continue developing it.¹⁸⁵ The plaintiff was then told to “pursue the production of his series” and he was given people to contact.¹⁸⁶ Based on this encouragement, the plaintiff produced a five-minute video and sent it to Nickelodeon.¹⁸⁷ The plaintiff was then sent a release to sign,¹⁸⁸ whereupon he broke off all contact with Nickelodeon so that he could retain the rights to his work.¹⁸⁹ Nickelodeon never returned any of the plaintiff’s materials.¹⁹⁰ The plaintiff subsequently discovered a show similar in design

¹⁷⁷ See *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001) (concluding that the qualitative difference is reflected in the different remedy granted under a state law claim). *But see* *Am. Movie Classics Co. v. Turner Entm’t Co.*, 922 F. Supp. 926, 932 n.5 (S.D.N.Y. 1996) (noting that there is “no authority for the novel proposition that a ‘qualitative difference’ between the state law claim and the copyright claim may be supplied by a difference in damages claimed for the same basic wrong”).

¹⁷⁸ See Steven T. Lowe, *Preemptive Strike*, 26 L.A. LAW 37, 38 (2003) (“The majority of federal and state courts that have addressed preemption defenses to breach of contract claims have required a fact-specific analysis that inquires whether the promise underlying the contract is essentially nothing more than a promise not to violate federal copyright law.”).

¹⁷⁹ 115 F. Supp. 2d 535 (D. Md. 2000).

¹⁸⁰ See *id.* at 542 (stating that the better approach is to look at the contractual rights to determine equivalency).

¹⁸¹ *Id.* at 537.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 537–38.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See *supra* notes 30–36 and accompanying text (discussing releases).

¹⁸⁹ *Fisher*, 115 F. Supp. 2d at 538.

¹⁹⁰ *Id.*

to his animated character team of Steve and Bluey had aired on Nickelodeon.¹⁹¹

Similar to *Wrench*, the *Fischer* court examined the payment right created by the implied contract and the plaintiff's expectation of payment if his idea was used.¹⁹² However, unlike *Wrench*, the court found that the rights in the implied contract were equivalent to the rights under copyright law, focusing on the implied contract's role as a tool to restrict use by someone other than the plaintiff.¹⁹³ The court appeared to not place too much emphasis on "payment," as it regarded the contract as pure regulation of "use" rather than regulation of payment.¹⁹⁴

Similarly, in *Selby v. New Line Cinema Corp.*,¹⁹⁵ the court scrutinized the nature of the plaintiff's allegations to conclude that copyright law preempted the implied-in-fact contract claim.¹⁹⁶ The plaintiff alleged that the defendant agreed to pay him and give him screen credit if his ideas were used to produce and distribute a film.¹⁹⁷ The plaintiff had submitted his screenplay for a movie entitled "Doubletime" to New Line Cinema, whereupon "New Line informed [him] that it had recently produced a 'time-travel' film and 'it was therefore reluctant to produce another film that employed transitions in time as a central element.'"¹⁹⁸ New Line sustained a relationship with the plaintiff by requesting any future drafts of "Doubletime,"¹⁹⁹ and New Line later purchased a screenplay entitled "Frequency" with the same premise.²⁰⁰ The court found that any restriction on use of the plaintiff's ideas strictly fell within the Copyright Act.²⁰¹ The court believed that the plaintiff alleged no additional rights beyond the right to use his own work as he pleased.²⁰² The implied contract, as framed by the court, did not control conduct beyond the use of the plaintiff's ideas.²⁰³ The court overlooked the plaintiff's demand for compensation, finding that the right to use the plaintiff's idea was equivalent to the rights granted under federal copyright law and therefore preempted.²⁰⁴

The court in *Idema v. Dreamworks*²⁰⁵ also emphasized the appropriateness of a fact-specific analysis, focusing on the *actual*

¹⁹¹ *Id.*

¹⁹² *Id.* at 542.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 96 F. Supp. 2d 1053 (C.D. Cal. 2000).

¹⁹⁶ *Id.* at 1061–62.

¹⁹⁷ *Id.* at 1061.

¹⁹⁸ *Id.* at 1055.

¹⁹⁹ *See id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1061–62.

²⁰² *See id.*

²⁰³ *Id.* at 1062.

²⁰⁴ *Id.*

²⁰⁵ 162 F. Supp. 2d 1129 (C.D. Cal. 2001).

allegations at issue and the “gravamen” of the state law claim.²⁰⁶ The plaintiff’s claim for breach of implied contract was based on the studio’s understanding that the plaintiff’s story could only be used if the plaintiff was paid and on the studio’s knowledge that the plaintiff already prepared book and movie proposals.²⁰⁷ Unlike *Selby* and *Fischer*, the court concluded that the “extra element” was the exchange of promises, relying on more than acts of reproduction, copying, distribution, or performance.²⁰⁸

It is apparent from the varied applications of the “extra element” test that the courts’ conclusions were primarily shaped by how they framed their analyses and how they chose to perceive the allegations—focusing on prohibiting use or focusing on compensation.²⁰⁹ Even the *Idema* court recognized that it could have held the breach of contract claim preempted, stating:

Though it is certainly possible that this claim is preempted, in whole, or in part, by the Copyright Act, that preemption is not clear to this Court (a subsequent state court is certainly empowered, with greater elucidation of the factual allegations underpinning the claim, to make its own findings about preemption under copyright).²¹⁰

A fact-specific analysis, therefore, will yield different results.²¹¹ As depicted above, similar factual situations have led to conflicting findings, yet the courts have not established a consistent, factually-based method to determine whether there is an “extra element.” The division among the circuits will further deepen as courts commit to applying their own tests and theories to copyright preemption cases.²¹² The uncertainty in the court system trickles down to impact business operations as writers, producers, and studios become apprehensive of their legal rights.²¹³ A coherent procedure to analyze state law claims for an “extra element” is necessary to sustain the flow of everyday business and to guide the courts in their decision-making.²¹⁴

²⁰⁶ See *id.* at 1190 (describing how the court looks at the *asserted* state law claims in comparison to a federal copyright claim).

²⁰⁷ *Id.* at 1172–73.

²⁰⁸ *Id.* at 1191.

²⁰⁹ See Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000) (“[T]he Supreme Court’s numerous preemption cases follow no predictable jurisprudential or analytical pattern.”).

²¹⁰ *Idema*, 162 F. Supp. 2d at 1195

²¹¹ See Dinh, *supra* note 209, at 2085 (observing that the nature of the preemption analysis partly explains the indeterminacy of court decisions).

²¹² *Pilgrim Films & Television, Inc. v. Montz*, No. 11–143, 2011 WL 3380764, at *11 (U.S. Aug. 2, 2011) (noting that the court’s holding that the breach of contract claim was not equivalent to any of the rights under copyright law would further deepen a longstanding circuit split).

²¹³ Brophy, *supra* note 88, at 515.

²¹⁴ *Circuit Split Warrants Review of Copyright Act Preemption, TV Studios Say*, 20 MEALEY’S LITIG. REP. INTELL. PROP. 25 (2011) (noting that nationwide copyright uniformity is important).

IV. *SELBY* CHARTS THE PATH FOR A DEFINITIVE APPLICATION OF THE
“EXTRA ELEMENT” TEST

The significance of *Selby* is not its holding, but its review of the *ProCD* decision, which, as explained in Part IIIA, articulated that breach of contract claims are never preempted.²¹⁵ The *Selby* court essentially criticized the characterization of a promise to pay as an “extra element” in the preemption analysis.²¹⁶ The *Selby* court stated, “the very promise is so *inextricably entwined* with the copyright that to permit the promisee to sue upon it would undermine the preemption feature of the Copyright Act.”²¹⁷ In other words, allowing a copyright holder to pursue a breach of contract claim would weaken the power of copyright preemption because payment for the benefit of a copyrighted work is already embodied in the rights granted to a copyright holder and thus governed by copyright law. The *Selby* court does not go so far to say that a payment promise preempts a breach of contract claim in every case, but only that under the particular facts of *Selby*, the promise was woven into the screenplay owner’s copyright. The *Selby* court’s use of the words “inextricably entwined” shapes this Comment’s proposal for a better copyright preemption system based on the facts of any given case.

A. Connecting “Inextricably Entwined” to Constitutional Law

Similar to the way that *Selby*’s use of the term draws attention, the Supreme Court heavily relied on the term “entwine” in a notable decision. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*,²¹⁸ the phrase “pervasive entwinement” was coined as a way to determine if state action existed when a constitutional question was brought before a court. State action is any action that is taken by the government, or on behalf of the government, especially in the context of constitutional law.²¹⁹ The “pervasive entwinement” test evaluated whether the conduct of a private actor, such as an individual or business, was so closely tied to the state as to attribute the private actor’s conduct to that of the state.²²⁰ If the private actor’s conduct was so pervasively entwined with the state, then state action existed and the private actor is deemed to have essentially acted

²¹⁵ See *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1059 (C.D. Cal. 2000).

²¹⁶ *Id.* at 1060. See *supra* notes 107–109 and accompanying text (discussing the dangers with following the courts and commentators who find that breach of contract claims are *never* preempted).

²¹⁷ *Selby*, 96 F. Supp. 2d at 1060 (emphasis added). The hypothetical that the *Selby* court lays out is: “Suppose, *e.g.*, that the defendant promised ‘I will not infringe any copyright or copyright protection in the script you are proposing to show me.’” *Id.* The promise is one to follow federal copyright law.

²¹⁸ 531 U.S. 288 (2001).

²¹⁹ BLACK’S LAW DICTIONARY 1538 (9th ed. 2009).

²²⁰ See Dionne L. Koller, *Frozen in Time: The State Action Doctrine’s Application to Amateur Sports*, 82 ST. JOHN’S L. REV. 183, 186 (2008); see also Lisa Mastrogiovanni, Case Note, *Brentwood Acad. v. Tenn. Secondary School Athletic Ass’n*, 121 S. Ct. 924 (2001), 12 SETON HALL CONST. L.J. 711, 713 (2002) (stating that the Supreme Court implemented a new method to find state action).

as the state.²²¹ Significantly, the test analyzed when one type of action resembled another action in such a striking way that one took on the character and identity of the other.²²² Even though the Supreme Court did not specifically define “entwinement,”²²³ it illustrated what entwinement looks like in a heavily fact-centered inquiry.²²⁴

The defendant in the case was Tennessee Secondary School Athletic Association (the “Association”), a membership organization set up to regulate interscholastic sports among public and private schools in Tennessee.²²⁵ The plaintiff was Brentwood Academy, a private school and a member of the Association.²²⁶ Brentwood Academy challenged a rule prohibiting the use of undue influence in recruiting athletes,²²⁷ claiming that the Association’s enforcement of the rule constituted state action.²²⁸ The Court focused on the organization and composition of the Association to conclude that it was “overborne by the pervasive entwinement of public institutions and public officials”²²⁹ In other words, the Association, a seemingly private institution, operated as a public, state organization, composed of officials that were treated like state employees.²³⁰ The Court recognized that the Association could not operate without the public school officials who overwhelmingly managed the Association.²³¹

Furthermore, Tennessee’s State Board of Education used its statutory authority to expressly delegate power to the Association to regulate interscholastic sports among Tennessee public schools.²³² The State Board of Education later dropped its endorsement of the Association.²³³ But the Court found this irrelevant because a strong relationship still existed between the Association and the State. The extensive involvement of public

²²¹ The “state action” doctrine: private conduct does not have to comply with the Constitution while actions of the state have to do so. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 486 (2d ed. 2002). The rights and liberties granted to individuals by the U.S. Constitution are protected only against the government. STEVEN EMANUEL & LAZAR EMANUEL, *CONSTITUTIONAL LAW* 417 (Aspen Publishers 26th ed. 2008). Where an individual asserts that his constitutional rights have been violated, a court can hear a case only if there has been some participation by the government in the challenged activity. *Id.*

²²² *Brentwood Acad.*, 531 U.S. at 303 (stating that pervasive entwinement can be shown by relevant facts that point to overlapping identity).

²²³ *Id.* at 312 (Thomas, J., dissenting).

²²⁴ *Id.* at 298 (noting that the inquiry is necessarily fact-bound). The Court made clear that the character of an entity is not determined by its characterization in statutory law. *Id.* at 296.

²²⁵ *Id.* at 291.

²²⁶ *Id.* at 293.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 298.

²³⁰ *Id.* at 300.

²³¹ *Id.*

²³² *See id.* at 292 (observing that the State Board of Education had acknowledged the Association’s functions by adopting a rule that designated the Association as “the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis”). The State Board had the power to revoke that designation by its own will. *Id.*

²³³ *Id.* at 300.

employees at every level of the Association was a meaningful indicator of entwinement.²³⁴ The private character of the Association merely masked the State's role, as the Association was acting as an arm of the State through the Board of Education. The particular facts of *Brentwood* are not significant to this Comment's analysis of copyright preemption, but the Court's logic of how the private athletic association came to be "charged with a public character" provides insight into how a copyright claim can be masked as a state claim.²³⁵

The *Brentwood* court determined that "entwinement" is appropriate when the facts justify labeling "an ostensibly private action as public instead."²³⁶ "[T]he relevant facts [may] show pervasive entwinement to the point of largely overlapping identity"²³⁷ In other words, complete entwinement might render two identities completely indistinguishable.²³⁸ But the Court also suggested that entwinement could be unwound if there was an offsetting reason to differentiate the two identities.²³⁹ The Court appears to indicate that an element may exist that takes private action out of the public sphere in the same way that an "extra element" can save a state law claim from federal copyright preemption. The Court's reasoning might be summed up with the duck test: "If it looks like a duck, swims like a duck, and quacks like a duck, then it is probably a duck."²⁴⁰ If it looks like state action, and acts like state action, then it is probably state action.

Focusing on the *Brentwood* court's interpretation of what it means for two separate entities to be so entwined as to be inseparable, this Comment proposes to apply the "pervasive entwinement" test to the analysis of copyright preemption. The central question is whether copyright law is so

²³⁴ *Id.* at 301–02.

²³⁵ *Id.* It is particularly relevant that the *Brentwood* case did not set out any concrete factors or elements as part of the "pervasive entwinement" test. *See id.* at 303 ("[N]o one criterion must necessarily be applied."). It focuses on the facts themselves to determine the real character of the entity and describes entwinement as a general concept in an indirect way. *Id.* at 295 ("[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient").

²³⁶ *Id.* at 303.

²³⁷ *Id.*

²³⁸ *See id.* at 300 (explaining that the minority of *private* schools kept the private organization from being characterized as "public," which kept total entwinement—where the identities of the private organization and the State are totally indistinguishable—from occurring).

²³⁹ *Id.* at 291, 303 (holding that the private organization's activity should be treated as that of the State due to the pervasive entwinement of state officials in the organization and the absence of any reason to see the organization's actions in any other way).

²⁴⁰ *See* Bruce W. Jentleson, *Beware the Duck Test*, 34 WASH. QUARTERLY 137, 137 (Summer 2011) available at http://esis.org/files/publication/twq11summerjentleson_0.pdf (explaining the origins of the duck test). The duck test was proposed by a U.S. ambassador to explain why the United States was scheming to take down the Guatemalan government: "Many times it is impossible to prove legally that a certain individual is a communist; but for cases of this sort I recommend a practical method of detection—the 'duck test' [I]f a bird certainly looks like a duck. Also, he goes to the pond and you notice he swims like a duck Well, by this time you've probably reached the conclusion that the bird is a duck, whether he's wearing a label or not." *Id.* (quoting WALTER LAFEVER, *INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA* 115–16 (W.W. Norton & Company 2d ed. 1993)).

entwined with a state law claim as to subject the claim to preemption. Similar to its application in *Brentwood*, the entwinement test will continue to uphold the fact-specific analysis used by many courts to find an “extra element” and thus refrain from adopting a bright-line rule.²⁴¹

The entwinement test will measure the degree to which federal copyright law overcomes the identity of a state law cause of action.²⁴² Complete entwinement would occur where copyright law completely subsumes the state law claim, resulting in automatic preemption. For example, in an action for breach of confidence where the plaintiff’s *only* claim is that the defendant took the plaintiff’s materials and copied the content and ideas thereby breaking the plaintiff’s confidence, copyright law overrides the breach of confidence claim.²⁴³ Without showing any evidence that a confidential relationship existed, copyright law is the only source of authority that the plaintiff can rely on to assert his grievance in court. A breach of confidence action requires a confidential relationship, but if no such relationship exists, the plaintiff cannot use it as a weapon for protection against a defendant’s unlawful use.²⁴⁴ Copyright law would be the plaintiff’s most powerful resource, which he could employ to obtain a remedy and reclaim his rights. It dictates the outcome where a copyright thief impedes the plaintiff’s ability to control how his work is used.²⁴⁵ Copyright law, therefore, takes over the state law claim and preempts it when complete entwinement occurs. The complete opposite takes place when the two claims are not entwined: state law rules and there is no preemption.

As an alternative to the “extra element” test, the entwinement test will not necessarily draw a conclusion of whether a definitive “extra element” exists or not. Instead, the “extra element” test will be folded into the “pervasive entwinement” test. If a fact or set of facts unveils something

²⁴¹ See Bohannon, *supra* note 67, at 619 (“Categorical approaches to the issue of contract preemption are antithetical to preemption law.”). A categorical rule based on the type of state law claim is not helpful because it is possible for a state law claim to be found preempted in some situations and not preempted in other situations, depending on the facts at hand. For example, a claim for conversion is usually a distinct tort, but it can be preempted if it is alleged that a defendant used and distributed the work. *Dielsi v. Falk*, 916 F. Supp. 985, 992 (C.D. Cal. 1996).

²⁴² See *supra* note 222 and accompanying text.

²⁴³ See *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1191 (C.D. Cal. 2001) (examining the plaintiff’s allegations of a breach of confidence claim where no “extra element” was found, even though many courts have found that in a breach of confidence claim, the “extra element” is the confidential relationship or mutual understanding between the parties).

²⁴⁴ “An actionable breach of confidence will arise when an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree . . . [and used] for purposes beyond the limits of the confidence without the offeror’s permission.” *Tele-Count Eng’rs, Inc. v. Pac. Tel. & Tel. Co.*, 214 Cal. Rptr. 276, 279 (Cal. Ct. App. 1985). A breach of confidence claim focuses on the nature of the relationship between the parties to the agreement. *Rokos v. Peck*, 227 Cal. Rptr. 480, 489 (Cal. Ct. App. 1986).

²⁴⁵ See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 557 (2008) (noting that the structural format of the Copyright Act “leans toward protection”).

akin to an “extra element,” entwinement is unwound as the state law claim becomes more distinct from a copyright claim. But if the facts show no “extra element,” the analysis does not end there. The “pervasive entwinement” test will measure the *degree* to which a state-created right is established, rather than whether it exists or not (which is what the “extra element” test does). In other words, if it looks like copyright infringement and acts like copyright infringement, then it probably is copyright infringement.²⁴⁶

B. The Meaning of “Pervasive Entwinement” for Implied Contracts of Payment in the Entertainment Industry

Applying the “pervasive entwinement” test to breach of implied contract cases means evaluating the extent to which an implied contract has created a right distinct from the rights asserted under copyright law. The test will measure the strength with which the right to be paid has been established. This will essentially come down to the expectations of payment (the expectation of receiving payment and the expectation of giving payment) between the parties involved.²⁴⁷ A plaintiff who has proven a mutual understanding of the circumstances surrounding payment in exchange for use would be justified in utilizing contract law to assert his right to payment. In such an instance, contract law is the more appropriate authority to obtain a remedy because it governs a bargained-for exchange between two parties where expectations are thwarted.²⁴⁸ Copyright law does not completely account for the situation because the right to regulate the use of a work is only one component of the dispute; the mutual expectation of the right to be paid is the other component.²⁴⁹ Where the dual expectations of payment have not been recognized, or only minimally established as part of an exchange, copyright law governs the reclamation of rights to use a work.²⁵⁰ Copyright law is more pervasively entwined in the alleged state law claim and preemption occurs. Therefore, the pervasive entwinement test in the context of implied contracts will require an analysis of each party’s expectations.

This Comment proposes not only to advance the entwinement test utilized in constitutional law but also to set forth factors to guide the analysis. The absence of a clear road-map in fact-specific, “extra element”

²⁴⁶ See *supra* note 240.

²⁴⁷ See BREIMER, *supra* note 11, at 168 (concluding that a contract can be established if it is *clear* that the person disclosing an idea will be paid if the idea is used).

²⁴⁸ See MILLER, *supra* note 16, at 35 (explaining that under contract law, the party who made the offer receives goods or services and the party who accepts the offer receives payment).

²⁴⁹ See Bohannon, *supra* note 67, at 643 (explaining that contracts usually contain an additional promise that is different in some way from the promise to not infringe an exclusive right of copyright).

²⁵⁰ See *Copyright Basics*, U.S. COPYRIGHT OFFICE, 2, <http://copyright.gov/circs/circ1.pdf> (last reviewed May 2012) (stating that copyright protection begins at the time the work is created and the copyright immediately becomes the author’s property so that only the author or those that receive rights through the author can rightfully claim copyright).

preemption cases have led to the distinct split among the circuits.²⁵¹ The courts, employing a fact-specific analysis, have not articulated any method of how they arrived at their conclusions.²⁵² As previously stated, categorical rules are the closest mechanism to a formulaic approach of preemption: state law claims are always or never preempted.²⁵³ This Comment resists the categorical rules in favor of a factual analysis and further proposes four factors in considering whether a state law claim is equivalent to a copyright infringement claim: (1) the history of the relationship between the plaintiff and defendant, (2) the extent to which the plaintiff and defendant are close to finalizing a deal, (3) the components of the plaintiff's allegations, and (4) the predominant rights to be protected in the implied contract claim. The first two factors focus on the relationship between the plaintiff and defendant rather than explicitly on whether a copyright infringement claim and a state law claim intersect. But resolving the state of the plaintiff's and defendant's expectations contributes to measuring the extent to which a contract claim and a copyright claim are entwined. The expectation levels of each party influence the type of claim the plaintiff can pursue and the area of law under which the plaintiff can best achieve relief.

1. First Factor: Course of Dealing Between the Plaintiff and Defendant

An implied contract for payment is based on the circumstances surrounding the idea disclosure.²⁵⁴ One such circumstance is the history of the relationship between a plaintiff and defendant.²⁵⁵ As two parties come into frequent contact with each other and engage in business deals, each develops a better understanding of what the other expects from a transaction.²⁵⁶ Included in those expectations are the details surrounding compensation.²⁵⁷ The payment terms are controlled by the relationship

²⁵¹ See Bohannon, *supra* note 67, at 643 (stating that the “extra element” test is malleable and provides little guidance to courts in determining whether claims should be preempted).

²⁵² *Id.* at 627–28 (noting that it is unclear if the courts have done away with the “extra element” test or have applied the “extra element” test in a different way, but it is clear that courts have not analyzed equivalency in a technical way).

²⁵³ See *id.* at 629 (noting that the court's analysis of preemption in breach of contract claims is more categorical than the analysis of preemption in other state law claims).

²⁵⁴ See *Thompson v. Cal. Brewing Co.*, 12 Cal. Rptr. 783, 786 (Cal. Ct. App. 1961) (stating that the person who suggests an idea has a right to be paid when the circumstances of disclosing the idea demonstrate that an agreement to be paid can be implied); *Desny v. Wilder*, 299 P.2d 257, 270 (Cal. 1956) (explaining that a breach of contract claim can arise in a context where a contract can be implied from the circumstances before and after disclosure, conveying the conduct of the offeree or offeror who suggest they understand there is an obligation to pay at stake).

²⁵⁵ See *supra* notes 10–16 and accompanying text.

²⁵⁶ See *Vanderpool v. Higgs*, 690 P.2d 391, 392 (Kan. Ct. App. 1984) (“Contract law protects the expectation interest of contracting parties based on a voluntary agreement that defines their relationship.”).

²⁵⁷ See *Lowe*, *supra* note 178, at 37, 40 (explaining that people with ideas do not want to prevent the use of ideas but simply want to be paid for the use of that idea).

between both parties and how they have negotiated in the past.²⁵⁸ If the plaintiff brings a cause of action where the right to payment is in dispute, but the right has been recognized and successfully executed in similar past circumstances, the plaintiff should be justified in using contract law to enforce the right of payment because the expectations are clear.²⁵⁹ Entwinement is weak because copyright law does not govern the entire transaction; copyright law is only one piece of the transaction.²⁶⁰ Contract law is therefore necessary to protect the established right of payment, a right that is nowhere included in copyright law.²⁶¹ The plaintiff and defendant's course of dealing implicates the plaintiff's payment right because the defendant's understanding and past acceptance of the right distinguishes the contract claim from a copyright claim.

A plaintiff who has had no prior course of dealing with the defendant has neither established an expectation of payment nor arranged an accepted payment procedure.²⁶² The mutual understanding that accompanies the formation of an implied contract is demonstrated by words and actions.²⁶³ But if a plaintiff and defendant have never transacted with one another, the plaintiff has no basis on which to interpret the defendant's words and actions. Such foundational knowledge would typically help the plaintiff decipher the defendant's expectation to pay for the use of an idea.²⁶⁴ The plaintiff cannot use contract law to protect a right that the defendant does not know exists. As a result, it appears as if the plaintiff is merely protecting his rights as a copyright holder. Any state law claim the plaintiff asserts will have the identity of a copyright claim. Copyright law therefore becomes the primary foundation of the plaintiff's claim and preempts the cause of action.

²⁵⁸ See Stephen W. Ranere, Note, *Charting a Course: How Courts Should Interpret Course of Dealing in a Battle-of-Forms Dispute*, 41 SUFFOLK U. L. REV. 671, 675–77 (2008) (explaining that “course of dealing” can help interpret ambiguous terms of a contract based on evidence of prior dealings and that “course of dealing” can supply additional terms to the contract).

²⁵⁹ See *Citizens Util. Co. v. Wheeler*, 319 P.2d 763, 769 (Cal. Ct. App. 2d 1957) (“The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.”); see also GUNNAR ERICKSON, HARRIS TULCHIN & MARK HALLORAN, *THE INDEPENDENT FILM PRODUCER’S SURVIVAL GUIDE* 59 (2d ed. 2005) (“What makes contracts potent is that our legal system is designed to support contracts by providing a mechanism—lawsuits—to enforce them if one side does not fulfill its promise.”).

²⁶⁰ See *supra* notes 161–162 and accompanying text.

²⁶¹ See *Vanderpool*, 690 P.2d at 392 (noting that where a breach is found, the fulfillment of the expectation interest gives the injured party the benefit of the bargain and puts him in the position he would have been in if there had been no breach).

²⁶² See *Citizens Util. Co.*, 319 P.2d at 769 (finding the court cannot set a price when there was no established market price, prior course of dealings, or industry practice); see also *Baumgold Bros., Inc. v. Allan M. Fox Co., E.*, 375 F. Supp. 807, 813 (N.D. Ohio 1973) (demonstrating that the understanding of the parties is established by prior course of dealing).

²⁶³ See *Johnson v. Nasi*, 309 P.2d 380, 383 (Wash. 1957) (“An implied contract or mutual understanding to pay for services rendered is not established in the absence of particular facts indicating such mutual understanding . . .”).

²⁶⁴ See JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 166 (5th ed. 2003) (“[B]ehavioral patterns under prior contracts and under the contract are of enormous importance in interpreting and supplementing the contract.”).

Analyzing the past course of dealing between a plaintiff and defendant will determine how expectations are managed between the two parties and thus contributes to establishing the identity of a state law claim.

2. Second Factor: The Proximity to Making a Deal

As the plaintiff and defendant approach a finalized deal, the expectations of payment become clearer.²⁶⁵ Where a defendant expresses his interest in the plaintiff's idea and encourages the plaintiff to further expand the idea or to take action beyond merely disclosing the idea, the defendant would be foolish to assume the plaintiff would perform those services for free.²⁶⁶ The defendant's affirmative step to actively involve the plaintiff in development demonstrates an understanding that the plaintiff would eventually have to be compensated.²⁶⁷ The plaintiff rightfully has an expectation that the work he completed specifically for the defendant would result in payment.²⁶⁸

The plaintiff and defendant would rely on contract law rather than copyright law to protect these expectations. For the plaintiff, copyright law will sufficiently protect a plaintiff's work only up to the point that a payment right becomes clear. When the plaintiff has initiated work for the defendant beyond idea disclosure, contract law ensures that the plaintiff will get paid for performing the work. For the defendant, contract law protects the defendant's right to receive the plaintiff's work *in exchange for* money. Therefore, as the payment right becomes clear, copyright law is unwound from entwinement with the state law claim, leaving the plaintiff free to pursue a breach of implied contract claim.

Furthermore, as the contact between the plaintiff and defendant becomes frequent, negotiations progress, and the business relationship develops, the likelihood of discussing payment becomes unavoidable. The frequency, extent and nature of contact between the plaintiff and defendant contribute to the likelihood that "the defendant knows or should know the plaintiff expects payment," an element of an implied-in-fact contract.²⁶⁹ As the right of payment starts to become more defined between both parties,

²⁶⁵ See KELLY CHARLES CRABB, *THE MOVIE BUSINESS* 28 (2005) (explaining that if the defendant accepts the material, there is some understanding that he will give something of value to the submitter and the details are left to hash out at a later time).

²⁶⁶ See Anschell, Hodulik & Rohrer, *supra* note 14, at 26 (explaining that if a plaintiff can demonstrate that the defendant went beyond attending a pitch meeting but took affirmative steps to accept the idea or form a written agreement, the claim has a better chance of surviving preemption); see also Miller, *supra* note 16, at 34 (explaining that in addition to a basic offer of "We want you to write and produce a theme song for our current production[,] the offer will indicate how much the company is willing to pay).

²⁶⁷ See Anschell, Hodulik & Rohrer, *supra* note 14, at 26–27 ("The closer the parties come to reaching an agreement on the terms of an express contract, the more likely it is that the idea submission claims will survive a preemption challenge.").

²⁶⁸ See PERILLO, *supra* note 264, at 840 (stating that "[a] contractual duty is discharged by performance" and that "[a] frequent method of performance is payment").

²⁶⁹ Young v. Young, 191 P.3d 1258, 1263 (Wash. 2008).

contract law becomes a natural tool to protect the plaintiff if the right is infringed.²⁷⁰ Copyright law would no longer be the proper mechanism to protect the plaintiff's rights over his work.²⁷¹

Fischer might have turned out differently if it was analyzed using this factor. The plaintiff developed materials (script, character description, five-minute video for the defendant) for his animated character team, "Steve & Bluey," with the influence of the defendant.²⁷² Nickelodeon's interest in the plaintiff's idea and inducement to expand the idea indicated that the defendant wanted the plaintiff to perform a service for the defendant.²⁷³ The average person who performs a service in a business transaction would expect payment.²⁷⁴ The series of correspondence between the plaintiff and defendant slowly built up expectations of what the parties wanted from each other. Copyright law cannot protect this expectation in a business transaction.²⁷⁵

Where the plaintiff may have only submitted his idea without any response from the defendant or received an outright refusal of the submission, the plaintiff will probably find himself in the same situation as the *Selby* plaintiff with no acknowledgement from the defendant of the payment right.²⁷⁶ Without the payment right, the plaintiff's only remaining claim would be the defendant's improper use of the work without authorization.²⁷⁷ Copyright law would constitute the governing authority, thereby preempting any breach of contract claim.²⁷⁸ Regardless, the plaintiff would most likely fail in his state claim because it would be difficult for the plaintiff to prove one of the elements of an implied-in-fact contract in the entertainment industry: that the defendant *accepted* the

²⁷⁰ See ERICKSON ET AL., *supra* note 259, at 59 ("If there is doubt about what terms the parties agreed to or whether they ever created a contract by simultaneously agreeing on the terms, a judge is unlikely to enforce the deal.")

²⁷¹ See *Lowe*, *supra* note 178, at 41–42 (observing that the plaintiff is not seeking copyright remedies but contract remedies such as "the benefit of the bargain").

²⁷² *Fischer v. Viacom Int'l, Inc.*, 115 F. Supp. 2d 535, 538 (D. Md. 2000).

²⁷³ See LITWAK, *supra* note 36, at 2 (noting that "if a party makes what appears to be an offer, and the other party accepts it, the offerer will be bound by the contract even if he doesn't want to make a contract"); MILLER, *supra* note 16, at 34 (describing how an offer initiating a transaction is as simple as saying, "We want you to do this for us.").

²⁷⁴ See *supra* note 268 and accompanying text.

²⁷⁵ Copyright law generally does not include the right to be paid. See Kenneth D. Crews, *Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 795, 826 (2012).

²⁷⁶ See CRABB, *supra* note 265, at 26 (noting that a producer will always clarify that "no agreement is created by the submission alone; there must be a future negotiation and a written agreement"); ERICKSON ET AL., *supra* note 259, at 59 (finding that if the most critical term of the contract, the amount to be paid, is missing, a judge will not set the price and enforce the contract).

²⁷⁷ See MILLER, *supra* note 16, at 102 (stating that as part of the copyright holder's right to control his work, the owner can authorize others to "copy, distribute, and adapt their work"); CRABB, *supra* note 265, at 26 (clarifying that the producer has no obligation to the submitter).

²⁷⁸ See MILLER, *supra* note 16, at 102 (explaining that a copyright protects a producer's rights to control and profit from their work).

disclosure *knowing* the conditions.²⁷⁹ If the plaintiff has received a denial or no response from the defendant, the defendant most certainly has not accepted the disclosure.

Focusing on the timeline of the transaction and examining the eventuality of a deal closing would guide the courts in determining how each party's expectations are defined. The closer that the parties are to closing a deal, the more likely that one of the parties will be paid. The further away they are from reaching a deal, the less likely the payment terms will be defined.

3. Third Factor: Components of the Plaintiff's Allegations

The plaintiff's allegations will reveal the true nature of the plaintiff's contract claim and whether copyright law is entwined with the claim. Since the court only looks at the facts presented by the plaintiffs and defendants, the court can determine whether an exchange exists between the parties. The pervasiveness of an exchange finds more support in contract law than copyright law. Copyright law does not purport to regulate the circumstances of an exchange; contract law does. A clear exchange between two parties would distinguish a state claim from the principles of copyright.

The court should look to whether the plaintiff's complaint is focused towards proving the elements of a contract such as mutual assent and consideration (money in exchange for rights), or whether the complaint concentrates on proving the plaintiff's right to control his allegedly infringed work. If the plaintiff's complaint is overborne by facts that cater to the latter, any breach of contract claim the plaintiff alleges will be entwined with copyright. It would be difficult to separate a copyright claim from a breach of contract claim where the plaintiff predominantly alleges he can no longer use the work as he wishes. The plaintiff should, therefore, rely on copyright law to assert his grievance because his state law claim will be preempted. But if a plaintiff's complaint asserts an exchange that was supposed to take place, it may be easier to separate any copyright issues from breach of contract issues. The plaintiff could then look to the tenets of contract law to assert his claim. Nevertheless, whether a plaintiff can look to state law or federal copyright law will depend on an intensive examination of the allegations asserted in the complaint.

4. Fourth Factor: The Predominant Rights Protected in an Implied Contract Claim

This last factor relies on other circumstances or facts of a case that may establish dual expectations of payment. Where the plaintiff can prove that the right of payment has assumed a distinct identity from the right to

²⁷⁹ See *supra* note 37 and accompanying text.

control use of the copyrighted work, the plaintiff will have a stronger chance of escaping preemption. No matter how the plaintiff labels the state claim on the pleading or describes the rights he seeks to be protected, the deciding court must focus its analysis on the actual relationship between the rights asserted under state law and copyright.²⁸⁰ The plaintiff's goal should be to distinguish the rights asserted under state law from federal rights under copyright law as much as possible.²⁸¹

5. Balancing the Factors

This Comment proposes that the factors discussed above be examined together in totality to conclude whether preemption is proper. For example, if there is no history of a relationship between the plaintiff and defendant, the plaintiff will have a greater burden to prove that the parties are close to reaching a deal. Or if the parties are nowhere close to reaching a deal but the circumstances demonstrate knowledge by each party that payment is to occur at some point in the future, the balance will tip towards enforcement of the right under state law. This is to ensure that the parties actually recognize the right of payment. The factors will require courts to look at all the circumstances of a particular case rather than resorting to a bright-line rule. The more heavily the factors weigh in favor of pervasive entwinement and an indistinguishable identity shared between state-created rights and federal copyright, the greater the chances of preemption. Conversely, the more distinct and recognized the state rights become, the greater chance that the state claim survives preemption.

Although the "pervasive entwinement" test in the context of constitutional law has been criticized for being unclear and vague,²⁸² it can be argued that any fact-specific analysis potentially carries the same issues. For example, one criticism of the "extra element" test is that it lacks guidance since there is always some difference between state law and copyright law to take the claim out of preemption.²⁸³ A small difference can be grounds for finding an "extra element," allowing many state claims to survive preemption and potentially rendering preemption useless. The "pervasive entwinement" test attempts to address this problem by examining the degree to which an "extra element" exists rather than if one exists or not. This Comment uses the "pervasive entwinement" test as a jumping off point. It attempts to offset the concerns of the "pervasive

²⁸⁰ See *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 307 (2d Cir. 2004) (concluding that the *underlying* right the plaintiff seeks to vindicate takes the claim outside of preemption).

²⁸¹ The plaintiff's goal is to "un-entwine" and to find an offsetting reason that would distinguish the two claims.

²⁸² See *Mastrogiovanni*, *supra* note 220, at 740 (stating that the Supreme Court does little to clarify entwinement, which leads to the theory's vague scope).

²⁸³ See *Moore*, *supra* note 82, at 204 (concluding that the "extra element" to avoid preemption can be a small difference between state law and copyright).

entwinement” test by using factors that will lend some clarity and serve as a blueprint to the preemption analysis.

CONCLUSION

Copyright preemption of a state law claim has plagued the courts and entertainment industry professionals for quite some time. The split among the circuits regarding which test to apply and how to apply the test has led to inconsistent results. Some courts have tried to adopt categorical rules, which only frustrates the quest for guidance. Many courts have followed a fact-heavy analysis without offering any guideposts as to how they synthesized the facts to achieve their conclusion. A clear test focused on the facts but with defined factors to structure the analysis is necessary. The “pervasive entwinement” test used in constitutional law describes a situation where two entities are so alike that they are indistinguishable. By merging the two areas of constitutional law and copyright law, constitutional law could facilitate development in an area of copyright that courts have been unable to resolve. The “pervasive entwinement” test could be customized to copyright law with the use of factors to guide the test. The proposed factors to be utilized in analyzing breach of implied contract claims for preemption are tailored to the entertainment industry. While it is not for the judiciary to predict the future, it can examine the course of dealing between the two parties, the extent of the parties’ working relationship on the particular project, the plaintiff’s immediate allegations, and other facts or circumstances that contribute to demonstrating that a mutual expectation of payment exists. The proposed test will maintain an emphasis on the facts of each particular case while providing courts with a touchstone that they can use time and time again.

No *Payne*, No Gain?: Revisiting Victim Impact Statements After Twenty Years in Effect

Damon Pitt*

INTRODUCTION

Twenty-four years ago in *Booth v. Maryland*'s five-to-four decision,¹ Justice Scalia recognized a growing social and political movement, now commonly referred to as "victims' rights."² Justice Scalia considered the movement a popular reaction to a perceived failure by courts properly to account for the damage that murderers caused not just to their victims, but to other innocent members of society, particularly victims' families.³ In the majority opinion, however, the Supreme Court held that victim impact testimony at capital sentencing proceedings constituted cruel and unusual punishment under the Eighth Amendment.⁴ Four years and two new Justices later, in *Payne v. Tennessee*,⁵ the Supreme Court overturned *Booth*,

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¹ *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

² *Id.* at 520 (Scalia, J. dissenting); *see also* John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 260 (2003) (noting Justice Scalia's recognition of the victims' rights movement).

³ *See Booth*, 482 U.S. at 520 (Scalia, J., dissenting) (claiming that many citizens considered it "one-sided and hence unjust" that a "parade of witnesses" could "testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced").

⁴ *Id.* at 502-03, 509 (majority opinion). Victim impact testimony, commonly referred to as a "victim's impact statement," is a "statement read into the record during sentencing to inform the judge or jury of the financial, physical, and psychological impact of the crime on the victim and the victim's family." BLACK'S LAW DICTIONARY 1598 (8th ed. 2004). At least thirty-three states admit victim impact statements at the sentencing phase of a capital trial. Blume, *supra* note 2, at 267. The scope of victim impact statements range from state to state, each "ensur[ing] that a crime victim has the opportunity to be an active participant in at least some phases of the criminal case" and to "influence the way in which the defendant is treated." Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 234 (1991). For example, California requires that victims be heard, upon request, at any sentencing proceeding. CAL. CONST. art. 1, § 28(b)(8); *see also* § 28(b)(10) (allowing victims to provide information to probation officials "conducting pre-sentencing investigations concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant").

⁵ *Payne v. Tennessee*, 501 U.S. 808 (1991).

holding that the Eighth Amendment presented no *per se* bar to the admission of victim impact evidence.⁶ This time, Justice Scalia joined the majority in a six-to-three decision, and he again noted a “public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement.”⁷ In a spirited dissent, Justice Stevens also acknowledged the movement but questioned the majority’s susceptibility to a politically appealing argument that had “no proper place in a reasoned judicial opinion.”⁸

The Supreme Court’s sharp turn from *Booth* to *Payne* in only four years set the stage for a continuing debate over the role of victims’ rights in determining criminal sentences.⁹ What may have begun as a reactive social or political movement ultimately found its voice in the Supreme Court of the United States.¹⁰ The movement has transformed crime victims and their families from witnesses into participants at sentencing hearings, thus altering the constitutional analysis of victim impact evidence in criminal proceedings.¹¹

⁶ *Id.* at 808, 827, 830 (emphasis in original). In 1987, the *Booth* majority included Justices Powell, Brennan, Marshall, Blackmun, and Stevens; Chief Justice Rehnquist, and Justices White, O’Connor, and Scalia dissented. *See Booth*, 482 U.S. at 496–97. In 1989, the majority in *S. Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991) (discussed below) again included Brennan, Marshall, Blackmun, and Stevens, with White then concurring. 490 U.S. at 812 (White, J., concurring) (“Unless *Booth* . . . is to be overruled, the judgment . . . must be affirmed.”). In *Gathers*, Chief Justice Rehnquist, along with Justices O’Connor and Scalia, again dissented. *Id.* Justice Kennedy, replacing Justice Powell in 1988, also dissented. *Id.* Thus, Justice White moved from the dissent in *Booth* to the majority concurrence in *Gathers*, while Justice Powell’s majority opinion in *Booth* was displaced by Justice Kennedy’s dissenting opinion in *Gathers*, maintaining the balance at five-to-four against victim impact testimony. *See id.* In 1990, Justice Souter succeeded Justice Brennan. *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/members.aspx> (last visited Sept. 14, 2012). In the six-to-three *Payne* decision in 1991, Chief Justice Rehnquist now wrote for the majority, along with Justices White, O’Connor, Scalia, Kennedy, and Souter. *Payne*, 501 U.S. at 810–11. Justices Marshall, Blackmun, and Stevens dissented. *Id.* at 844 (Marshall, J., dissenting); *id.* at 856 (Stevens, J., dissenting).

⁷ *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

⁸ *Id.* at 859 (Stevens, J., dissenting).

⁹ *See, e.g.*, Mary L. Boland & Russell Butler, *Crime Victims’ Rights: From Illusion to Reality*, 24 CRIM. JUST. 4, 9–11 (2009) (contending that law practitioners, local bar associations, and the ABA should continue to press governments to enforce victims’ rights); Andrew Ashworth, *Restorative Justice*, in PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 302 (Andrew von Hirsch & Andrew Ashworth eds., Oxford 2d ed. 1998) (noting the theory that crime does wrong to both the victim and the community). *But see* Joe Frankel, Comment, *Payne, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of Decency*, 12 N.Y. CITY L. REV. 87, 128 (2008) (“Victim impact statements have no place in capital decisions.”).

¹⁰ *See Payne*, 501 U.S. at 827; *id.* at 834 (Scalia, J., concurring); *see also* Boland & Butler, *supra* note 9, at 5 (contending that the victims’ rights movement emerged from the civil rights movement of the 1960s and 1970s in response to increased attention to crime and its effects).

¹¹ Douglas Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 283 (2003). Since *Payne*, “crime victims’ status in the criminal process has changed.” *Id.* at 285. Victims are no longer “witnesses providing opinion evidence,” but rather participants in the criminal procedure with “state constitutional and statutory rights to give sentencing recommendations.” *Id.* “[A]ny constitutional challenge to victim sentencing recommendations” must now be made “against the constitutionality of *participants* recommending sentences, not as *witnesses* giving *opinions*.” *Id.* at 283 (emphasis in original). Victims, however, do not have *party* status. *See United States v. Rubin*, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008).

Part I of this Comment revisits *Booth* and *South Carolina v. Gathers*,¹² the Supreme Court decisions overruled by *Payne*, and draws particular attention to the conflicting philosophies among the Justices over the course of the three decisions. It focuses on how different Justices frame the issues surrounding victim impact testimony and the influence of victim impact testimony on juries. Part I also briefly looks at the rise of victims' rights as a socio-political movement, a movement which has often caused intense discord between state legislatures and courts in the sentencing phases of capital cases.¹³ This tension seemingly culminated with the Supreme Court twice ruling against the movement,¹⁴ only to overturn both decisions shortly thereafter in what is now the law of the land.¹⁵

Part II addresses the fallout from the Supreme Court's about-face in *Payne* by surveying the empirical research conducted in the wake of the *Payne* decision and examining the competing philosophical concerns in relation to the statistical findings. This Part also surveys how states that allow for the death penalty have reacted to *Payne*, and dwells primarily on the effects of victim impact statements ("VIS") on the rates of death sentences handed down in capital cases.

After examining the fallout, Part II revisits the original philosophical tension embedded in the VIS decisions and questions whether *Payne* has impacted sentencing in the ways hoped for by proponents of VIS and feared by skeptics.¹⁶ The question again is whether the Court struck the right balance between the State's interests in presenting to a jury the full impact of a killer's actions and protecting against the danger of unfairly influencing the jury to rule with emotion rather than reason.¹⁷ This Part explores whether or not *Payne* adequately accounts for the indigent or unsavory victim with no family to speak on his or her behalf, and whether this problem is perhaps counterbalanced by the justice system's competing desire to offset a defendant's mitigating testimony.¹⁸

¹² *S. Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

¹³ *See generally* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009) (addressing the tension between legal academia and the citizenry at large with regard to victims' rights).

¹⁴ *See Gathers*, 490 U.S. at 812 (affirming the Supreme Court of South Carolina's decision excluding VIS offered by the prosecutor in his closing argument); *see also* *Booth v. Maryland*, 482 U.S. 496, 507 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991) (rejecting the emotional distress of a victim's family as "proper sentencing considerations in a capital case").

¹⁵ *See Payne*, 501 U.S. at 827; *id.* at 834 (Scalia, J., concurring).

¹⁶ Chief Justice Rehnquist's concern was that disallowing VIS "unfairly weighted the scales" in favor of the defendant, tipping the balance in a defendant's favor and barring insight into the life that was taken. *Id.* at 822 (majority opinion). Justice Marshall, however, feared that admitting VIS created an "unacceptable risk of sentencing arbitrariness." *Id.* at 846 (Marshall, J., dissenting).

¹⁷ *See supra* note 16.

¹⁸ *See Payne*, 501 U.S. at 856 (Marshall, J., dissenting) ("Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent."); *see also id.* at 857 (Stevens, J., dissenting) (noting that "all would recognize immediately that the evidence was irrelevant and inadmissible" if a defendant offered evidence about the immoral character of his victim, thus illustrating the inherent double standard for evidence offered about a victim's good

Embedded in the Part II discussion is a survey of the competing arguments regarding whether VIS, if not closely safeguarded by courts, unfairly influences juries to arbitrarily recommend harsher sentences by placing harm to a victim's loved ones above the harm committed against the State. Part II also explores whether, in the absence of character evidence presented to assert a victim's good moral standing, juries fail in their role as the "conscience of the community."¹⁹ By allowing consequences incidental to murder to determine the degree of the violation of the public trust, are juries tempted to give less regard to the inherent value of human life by considering the communal standing of the victim rather than the personal responsibility of the murderer? Does putting the victim's character to the test degrade the victim by pandering to a jury's sense of moral approval? Was Justice Powell justified in his concern that a jury's decision to impose the death penalty would "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character"?²⁰ This Part puts these abstract questions in context by surveying the existing empirical research and statistical analyses to see what answers are given when tested by professionals in the field.

Finally, Part III turns the focus from the debate over the merits of *Payne* to the continuing questions surrounding its implementation in criminal courtrooms. Part III examines several proposed safeguard measures intended not to overturn the decision, but to ensure that the use of VIS strikes the balance between protecting the "faceless" victim and preventing arbitrary and capricious sentences.²¹ Scholars have proposed several protective measures in recent years to be applied to lingering concerns about the effects of *Payne* in the courtroom, and Part III questions their continued need in light of a significant decline in death sentences over the past decade.²² With death sentences dropping by nearly two-thirds since

qualities); *Gathers*, 490 U.S. at 811 (limiting what a jury could consider when deciding to impose the death penalty to factors about which the defendant was aware, and not those that were "irrelevant to the decision to kill") (quoting *Booth*, 482 U.S. at 505); *Booth*, 482 U.S. at 505 (noting the problem of a victim who leaves behind no family, and also the "danger of allowing juries" to consider information given by family members who may be "less articulate in describing their feelings even though their sense of loss is equally severe"). Justice Powell also highlighted the jury's requirement in capital cases to make an "individualized determination" whether a defendant should be executed based on mitigating factors such as the "character of the individual and the circumstances of the crime." *Id.* at 502 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis in original)). *But see Payne*, 501 U.S. at 825 (reaffirming the State's "legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in") (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)).

¹⁹ *Booth*, 482 U.S. at 504; *Witherspoon v. State of Ill.*, 391 U.S. 510, 519 (1968).

²⁰ *See Booth*, 482 U.S. at 506.

²¹ *See Gathers*, 490 U.S. at 821 ("Nothing in the Eighth Amendment precludes the community from considering its loss in assessing punishment nor requires that the victim remain a faceless stranger at the penalty phase of a capital trial."). *But see Booth*, 482 U.S. at 502-03 (addressing the risk of arbitrariness that VIS pose in capital cases).

²² *Death Sentences in the United States From 1977 By State and By Year*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Sept. 14, 2012) [hereinafter DEATH PENALTY INFORMATION]; *see also Capital Punishment*,

1996,²³ both proponents and critics of *Payne* might seek to re-examine their assumptions about the effects of VIS on juries.²⁴ Has the State's interest in balancing the scales adequately been weighed against the need to safeguard defendants from arbitrary sentencing? Has a defendant's characterization in court become the determining factor in sentencing recommendations meted out by juries whose heartstrings have either been tugged too far or, conversely, ignored altogether? This Comment reflects on twenty years of VIS and explores their role in the current capital punishment debate.

I. THE FOUNDATION

Any analysis of the *Payne v. Tennessee* decision requires a discussion of two previous Supreme Court decisions, both of which provide the foundation and context necessary to fully understand *Payne*. As this Comment illustrates, significant legal analysis has been dedicated to the following three cases and their collective impact on sentencing decisions. While much of the scholarship has included brief overviews of the cases as background for related issues, this Comment brings the opinions to the foreground, giving the philosophical underpinnings more attention than their conclusions.

A. *Booth v. Maryland*

In *Booth v. Maryland*, the Supreme Court considered whether the Constitution prohibits a jury from considering VIS during the sentencing phase of a capital murder trial.²⁵ The defendant was convicted at trial on two counts of first-degree murder and the jury sentenced him to death.²⁶ At trial, defense counsel moved to suppress VIS compiled from interviews of the victims' family members on the ground that the information was "both irrelevant and unduly inflammatory, and that therefore its use in a capital case violated the Eighth Amendment of the Federal Constitution."²⁷ The

BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/> (select "Corrections;" then select "Capital Punishment").

²³ DEATH PENALTY INFORMATION, *supra* note 22. The number of death sentences given in capital cases has dropped from 315 in 1996 to 112 in 2009, declining every year but two—1998 and 2002—during that period. *Id.* In 2010, 104 new inmates were sentenced to death, perhaps illustrating a stabilization, though one that is statistically minimal. *Id.*

²⁴ For example, Justice White assumed and expected that "[m]any if not most jurors . . . will look less favorably on a capital defendant when they appreciate the full extent of the harm he caused, including the harm to the victim's family." *Booth*, 482 U.S. at 516. A reasonable inference to draw from this assumption is that death sentences would increase rather than decline post-*Payne*. As the statistics show, this has not been the case, leaving open the question of *Payne*'s actual impact on death sentences overall.

²⁵ *Id.* at 497.

²⁶ *Id.* at 498, 501. Defendant robbed and murdered an elderly couple in their home. *Id.* at 497–98. The defendant was a neighbor of the victims and knew they could identify him. *Id.* at 498. The victims were bound, gagged, stabbed repeatedly, and their bodies were discovered two days later by the victims' son. *Id.*

²⁷ *Id.* at 500–01. The VIS consisted of interviews with the victims' son, daughter, son-in-law, and granddaughter, all testifying to the victims' "outstanding personal qualities," the resulting emotional and personal problems suffered by the family members, and the likelihood that none of the family

trial court denied the motion and ruled that the jury could hear any evidence bearing on the sentencing decision.²⁸ The trial court rejected the defense's claim that VIS were "arbitrary factor[s]" added to the sentencing decision, holding instead that VIS serve an "important interest by informing the sentencer of the full measure of harm caused by the crime."²⁹

The Supreme Court overturned the decision, noting that a jury's "discretion to impose the death sentence must be 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'"³⁰ The Court highlighted the jury's requirement to "make an 'individualized determination' whether the defendant in question should be executed, based on 'the character of the individual and the circumstances of the crime.'"³¹ The Court has long recognized that in determining sentences, justice requires "that there be taken into account the circumstances of the offense together with the character and propensities of the offender."³² Therefore, the Court further determined that the personal characteristics of the victims, the emotional impact of the crimes on the family, and the family members' opinions and characterizations of the crime and defendant were "irrelevant to a capital sentencing decision," creating an "unacceptable risk" that the information leads to unfairly prejudicial, arbitrary, or capricious sentences.³³

B. *South Carolina v. Gathers*

Two years later in *South Carolina v. Gathers*,³⁴ the Court again addressed the issue of statements admitted in a capital case concerning a

would "ever be able to fully recover from [the] tragedy." *Id.* at 499–500.

²⁸ *Id.* at 501.

²⁹ *Id.*

³⁰ *Id.* at 502 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *California v. Ramos*, 463 U.S. 992, 999 (1983)).

³¹ *Id.* at 502 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis in original)); see *Furman v. Georgia*, 408 U.S. 238, 249, 255–57 (1972) (holding that because the death penalty was unique among punishments, it was therefore different in kind and could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary or capricious manner, or in a manner allowing a jury to discriminate unfairly); see also *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary or capricious action.>").

³² See *Gregg*, 428 U.S. at 189 (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)); see also *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959); *Williams v. New York*, 337 U.S. 241, 247 (1949)). The Court had feared that without the noted considerations in capital sentencing, the "system cannot function in a consistent and a rational manner." *Gregg* at 189 (quoting the American Bar Association Project on Standards for Justice, Sentencing Alternatives and Procedures § 4.1(a), Commentary, p. 201 (App. Draft 1968). But see Scott W. Howe, *Furman's Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 435 (2007) ("[C]onsistency is implausible as an Eighth Amendment aspiration and . . . the Court has never seriously pursued consistency after *Furman*.").

³³ See *Booth*, 482 U.S. at 502–03.

³⁴ *S. Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

victim's personal characteristics.³⁵ There, the jury found the defendant guilty of murder and first-degree criminal sexual conduct for his brutal physical and sexual assault of a mentally disabled man in a public park.³⁶ The prosecutor's closing argument included remarks about the victim's Christian beliefs, community involvement, and mental disability.³⁷ Relying on *Booth*, the Supreme Court of South Carolina found the prosecutor's comments to the jury "unnecessary to . . . the circumstances of the crime."³⁸ The court therefore reversed Gathers' death sentence and remanded the case for a new sentencing proceeding.³⁹ Upon granting certiorari, the Supreme Court affirmed its reasoning in *Booth*, holding again that the Eighth Amendment barred admission of victim impact evidence during the penalty phase of a capital trial.⁴⁰ The *Gathers* majority opinion was a mere six pages, essentially noting: (a) the distinction that the prosecutor offered the VIS in this case, while the victim's family members did so in *Booth*; and (b) that the issue and reasoning in this case were otherwise "indistinguishable" from *Booth*.⁴¹ The dissent, however, was over twice as long—much of it would later constitute the bulk of the *Payne* majority opinion.⁴²

C. *Payne v. Tennessee*

In 1991, just four years after *Booth* and two years after *Gathers*, the Court changed course, overturning both cases and holding that the Eighth Amendment permits the admission of victim impact evidence in capital cases.⁴³ In *Payne v. Tennessee*, the jury convicted the defendant on two counts of first-degree murder and one count of attempted murder, and sentenced him to death.⁴⁴ At trial, the defendant proffered several character

³⁵ *Id.* at 811.

³⁶ *Id.* at 807–08. The victim referred to himself as the "Reverend Minister" despite no religious training, and carried with him several bags of religious articles. *Id.* at 807. After beating and kicking the victim, the defendant smashed a bottle over his head, beat him again with an umbrella, and sodomized the victim with the same. *Id.* The defendant apparently returned to the scene sometime later and stabbed the victim with a knife. *Id.*

³⁷ *Id.* at 808–10. The prosecutor also read aloud a religious tract entitled, "the Game Guy's Prayer," which used football and boxing metaphors to promote the virtues of being a good sport, team player, hardworking, and the like. *Id.* at 808–09.

³⁸ *Id.* at 810 (quoting *State v. Gathers*, 369 S.E.2d 140, 144 (1988), *aff'd sub nom.* *S. Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991)). The Supreme Court of South Carolina concluded that the prosecutor "conveyed the suggestion appellant deserved a death sentence because the victim was a religious person and a registered voter." *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 811.

⁴¹ *Id.*

⁴² *See id.* at 812–25 (O'Connor, J., dissenting); *see also* *Payne v. Tennessee*, 501 U.S. 808 (1991).

⁴³ *See Payne*, 501 U.S. at 827.

⁴⁴ *Id.* at 811. The defendant in *Payne* inflicted over eighty wounds on a mother in her home with a butcher knife, while stabbing her two-year-old in the chest, stomach, back, and head, killing both. *Id.* at 811–13. The surviving three-year-old son sustained stab wounds that "completely penetrated through his body from front to back," yet he survived. *Id.* at 812.

witnesses to attest to his non-violent disposition.⁴⁵ The State, in response, offered victim impact evidence pertaining to the defendant's actions and their impact on the victims' parents, grandparents, and surviving child.⁴⁶ The Tennessee Supreme Court affirmed the sentence and the defendant appealed the admission of the VIS.⁴⁷ The Supreme Court affirmed, holding that a misreading of its own precedent had "unfairly weighted the scales in a capital trial" by placing no limits on mitigating evidence offered by a defendant of his own circumstances, while not giving similar parity to testimony on behalf of victims.⁴⁸

Chief Justice Rehnquist characterized the precedent as merely mandating that courts hear testimony offered about a defendant's character as a mitigating factor, rather than as *barring* testimony of a *victim's* character from the courtroom during sentencing.⁴⁹ Because of the alleged misreading, he concluded, the State was "barred from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide."⁵⁰ With this in mind, and in consideration of the fact that both *Booth* and *Gathers* were "decided by the narrowest of margins, over spirited dissents challenging the basic

⁴⁵ *Id.* at 814 (bringing testimony in from defendant's mother, father, girlfriend, and a clinical psychologist, all testifying to defendant's caring nature, politeness, and low IQ).

⁴⁶ *Id.* at 814–15 (focusing on the surviving son's life without his mother, the traumatic effect of witnessing the murder of his mother and sister, and the opportunity for the jury to answer his subsequent question of "what type of justice" would be done for him—the implication being that the harsher the sentence the greater the justice done).

⁴⁷ *Id.* at 816–17.

⁴⁸ *Id.* at 822. *Booth* directed juries to "focus on the defendant as a 'uniquely individual human being[.g.]'" *Booth v. Maryland*, 482 U.S. 496, 504 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991) (quoting *Woodson v. N. Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion)). The *Payne* decision cited language from another Supreme Court case handed down the same day as *Woodson*, stating that "[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions" on the evidence a jury may use "when it makes the sentencing decision." *Payne*, 501 U.S. at 821 (quoting *Gregg v. Georgia*, 428 U.S. 153, 203–04 (1976)); *see also* *S. Carolina v. Gathers*, 490 U.S. 805, 817 (1989), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991) (O'Connor, J., dissenting) ("[T]his case illustrates the one-sided nature of the moral judgment that the Court's broad reading of *Booth* would require of the capital sentencer.").

⁴⁹ *See Payne*, 501 U.S. at 822 ("The language quoted from *Woodson* in the *Booth* opinion was not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received." (emphasis in original)); *see also* *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death" (emphasis in original)).

⁵⁰ *See Payne*, 501 U.S. at 822 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)). Chief Justice Rehnquist added that the *Booth* court was wrong to state that victim impact evidence leads to the "arbitrary imposition of the death penalty," particularly when considering the State's "legitimate interest" in reminding a sentencer that the victim of a homicide is an individual representing a "unique loss to society" and to his family. *Id.* at 825; *see* *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (noting that retribution is a valid penological goal of the death penalty); *Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."). Thus, "one essential factor in determining the defendant's culpability is the extent of the harm caused." *Gathers*, 490 U.S. 805 at 818 (O'Connor, J., dissenting).

underpinnings of those decisions,” the Court reconsidered its decisions and overruled them, holding that they had been wrongly decided.⁵¹

Justice Marshall issued a vigorous dissent focused on the fact that nothing justified abandoning *Booth* since neither the law nor the facts had changed significantly from one case to the next—only the personnel of the Court had.⁵² “Power, not reason,” he said, “is the new currency of this Court’s decisionmaking.”⁵³ Justice Stevens’ dissent added that even if *Booth* and *Gathers* had never been decided, “today’s decision [in *Payne*] would represent a sharp break with past decisions” and would provide no support for the majority’s conclusion that “the prosecutor may introduce evidence that sheds no light on the defendant’s guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.”⁵⁴ Ultimately, *Payne* justified VIS in two ways: (a) by offsetting the defendant’s right to offer mitigating character evidence on his or her own behalf; and (b) by providing a jury with information enabling it to calculate the specific harm resulting from the crime.⁵⁵ While VIS are not required, the Eighth Amendment provides no *per se* bar.⁵⁶ *Payne* did not, however, depart from *Booth* and *Gathers* with regard to the admission of family members’ characterizations or opinions about the *crime* or the *defendant*.⁵⁷ Any character testimony provided by a family member must

⁵¹ See *Payne*, 501 U.S. at 828–30. Members of the Court had questioned both *Booth* and *Gathers*, and lower courts applied them inconsistently. *Id.* at 829–30; see *Gathers*, 490 U.S. 805 at 813 (O’Connor, J., dissenting); *Mills v. Maryland*, 486 U.S. 367 at 395–96 (Rehnquist, C.J., dissenting); see also *State v. Huertas*, N.E.2d 1058, 1070 (1990) (Moyer, C.J., concurring) (“The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area.”). The *Payne* Court limited its holding to the holdings in *Booth* and *Gathers*, namely that “evidence and argument relating to the victim and the impact of the victim’s death on the victim’s family are inadmissible at a capital sentencing hearing.” *Payne*, 501 U.S. at 830 n.2. (finding that since no evidence was admitted regarding the victim’s family members’ “characterizations and opinions about the crime, the defendant, and the appropriate sentence,” the Court need not issue an opinion on whether such evidence would violate the Eighth Amendment). The Court further qualified its opinion, adding that “[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.” *Id.* at 825.

⁵² *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

⁵³ *Id.* at 844–45. Marshall further opined that the reversal of *Booth* and *Gathers* “ominously” suggested that more Court precedent would be subject to “upheaval,” considering that the “implications of this radical new exception to the doctrine of stare decisis are staggering.” *Id.* at 844–45. Marshall noted the Court’s “unmistakable course” toward “an even broader and more far-reaching assault upon this Court’s precedents.” *Id.* at 856.

⁵⁴ *Id.* (Stevens, J., dissenting). Justice Stevens goes on to say that “[e]vidence that serves no purpose other than to appeal to the sympathies or emotions of the jurors has never been considered admissible.” *Id.* at 856–57. While Justice Stevens does not cite any cases in that sentence to support his claim that *Payne* represents a “sharp break with past decisions,” he later references several cases to support the assertion, including *Williams v. New York*, 337 U.S. 241 (1949); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991); *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Edmund v. Florida*, 458 U.S. 782, 801 (1982). *Id.* at 857–58.

⁵⁵ *Payne*, 501 U.S. at 825; see also Blume, *supra* note 2, at 266.

⁵⁶ *Payne*, 501 U.S. at 827.

⁵⁷ *Id.* at 830 n.2 (emphasis added). *But see Ledbetter v. State*, 933 P.2d 880, 891 (Okla. Crim.

be limited to the victim or the specific emotional impact on the family member.⁵⁸

The Court responded to the main concerns raised by (a) the indigent victim with no family or loved ones to parade into court on his or her behalf during sentencing, and (b) the unsavory victim who presents to a jury very little reason to believe his or her death is worth rectifying in the first place:

Payne echoes the concern voiced in *Booth*'s case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.⁵⁹

The reasoning goes that if the defense can present character witnesses to testify on the convicted defendant's behalf as *mitigating* factors to be considered in the determination of the sentence, then there is neither a public policy argument against nor a constitutional ban on the State's right to present character witnesses on behalf of the victim as *aggravating* factors to be balanced in the sentencing calculus.⁶⁰ If a capital defendant must be treated as a "uniquely individual human being,"⁶¹ then so should the defendant's victim.

While *Booth* lasted four years and *Gathers* only two, *Payne* appears to be solidly entrenched as the law twenty years later.⁶² Though it may have

App. 1997) (holding that a victim impact witness may offer an opinion regarding the appropriate sentence, but the case will then be subject to increased scrutiny upon appeal); *Hyde v. State*, 778 So. 2d 199, 213–14 (Ala. Crim. App. 1998) (allowing victim impact witness to recommend what he considered an appropriate sentence so long as the testimony did not overly prejudice the jury and was not considered by the trial court when rendering the actual sentence); *State v. Gideon*, 894 P.2d 850, 863–64 (Kan. 1995) (admitting victim impact testimony that was interpreted as "an emotional appeal to bias or prejudice" but was not "in any way" considered by the trial court when determining defendant's sentence).

⁵⁸ See *Payne*, 501 U.S. at 830 n.2 (noting that the *Payne* holding is limited to the holdings in *Booth* and *Gathers*, as *Booth* held, "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence [still] violate[] the Eighth Amendment").

⁵⁹ *Id.* at 823 (emphasis in original) (internal citations omitted).

⁶⁰ *Id.* at 826; see also *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Skepper v. S. Carolina*, 476 U.S. 1, 5 (1985); *Mills v. Maryland*, 486 U.S. 367, 374–75 (1988).

⁶¹ *Booth v. Maryland*, 482 U.S. 496, 504 (1987) (plurality opinion) (quoting *Woodson v. N. Carolina*, 428 U.S. 280, 304 (1976)), overruled by *Payne v. Tennessee*, 501 U.S. 808 (1991).

⁶² See Jeremy Blumenthal, *Affective Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements*, 46 AM. CRIM. L. REV. 107, 110 (2009) [hereinafter Blumenthal, *Affective Forecasting*] (opining that the abolition of *Payne* is unlikely, as are VIS in some form); see also Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCHOL. PUB. POL'Y & L. 492, 492–94 (2004); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 177 (1999); José Felipé Anderson, *Will the Punishment Fit the Victims? The Case for Pre-*

settled the law, the fallout and subsequent academic debate is ongoing and varied. In fact, much of the debate has moved from lamenting or applauding the decision to investigating its impact and offering suggestions to prevent both victim anonymity and unfair jury prejudice.⁶³ It is the evolution of this movement to which this Comment now turns.

II. THE FALLOUT

Fallout from *Payne* has varied, with states essentially determining for themselves the extent to which parties may offer evidence and the forms VIS may take.⁶⁴ The Court's decision was a "major victory" for what had been at that time a ten-year-old movement to "empower victims in the criminal justice system."⁶⁵ The decision also further highlighted the ideological and philosophical divide that existed in the Court, which had

Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing, 28 RUTGERS L.J. 367, 430 (1997).

⁶³ See Blumenthal, *Affective Forecasting*, *supra* note 62, at 110–11.

⁶⁴ Blume, *supra* note 2, at 267–69. Blume, asserting that "*Payne* is not going away," also notes that VIS are highly unregulated and politically popular, making it "difficult to imagine" that state or federal courts would limit their admissibility. *Id.* at 278. Blume further contends that the "increasing power" of the victims' rights movement has resulted in nearly all death penalty jurisdictions now authorizing some form of VIS. *Id.* at 267; Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 312–13 (2003) (contending that after the *Payne* decision, each state was "left to decide for itself whether it would follow *Booth* and *Gathers*, or *Payne*," and referring to VIS in capital cases as "routine" since the *Payne* decision); see also *Pickren v. State*, 500 S.E.2d 566, 568 (Ga. 1998) (refusing to place "rigid limitations on the volume of [VIS]" while upholding the State's admission of eight such statements in the sentencing hearing); *People v. Gonzales*, 673 N.E.2d 1181, 1183 (Ill. App. Ct. 1996) (refusing to place any limits on the number of witnesses offering VIS). For forms of VIS, see, for example, *People v. Zamudio*, 181 P.3d 105, 134 (Cal. 2008) (allowing a fourteen minute video with 118 photographs of the victims as part of VIS); *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007) (allowing a twenty minute video compilation of the victim's life with music playing in the background); *Noel v. State*, 960 S.W.2d 439, 446–47 (Ark. 1998) (permitting the mother of three child murder victims to read a poem about her children to the jury); *State v. Basile*, 942 S.W.2d 342, 358–59 (Mo. 1997) (en banc) (allowing the victim's sister to read a poem, and the victim's mother to read from a laudatory diary she kept about her now-deceased daughter); see also *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994) (en banc) (playing a videotape of a family Christmas-gathering); *State v. Roberts*, 948 S.W.2d 577, 604 (Mo. 1997) (en banc) (displaying hand-crafted items made by the victim); *State v. Ard*, 505 S.E.2d 328, 331 (1998) (allowing, in an extreme example of VIS, the jury to see a photograph of a dead fetus wearing clothes picked out by the mother, who was also killed, to be worn home from the hospital).

⁶⁵ Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 427 (2003). Nadler & Rose recognized President Reagan's Task Force on Victims of Crime, which issued a report concluding that there was a "serious imbalance" in the criminal system between defendants' and victims' rights to be heard. *Id.* (quoting PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982) (emphasis omitted)). Nadler & Rose contend that the momentum and influence of the victims' rights movement, though controversial, intensified after *Payne*. *Id.*; see also John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 689–90 (2002) (calling the victims' rights movement "one of the most successful civil liberties movements of recent times"); Susan Elizabeth Anitas, Note, *The Status of Victim Impact Statements in Ohio Capital Offense Sentencing*, 57 OHIO ST. L.J. 235, 238–39 (1996) (recognizing the controversial history of VIS during the capital sentencing phase and contending that Ohio passed its own Victims' Rights Act in response to the "rise in victims' rights awareness"). For a more recent analysis of VIS in state courts, including an enlightening history of the victims' rights movement from its genesis in America, see Boland & Butler, *supra* note 9, at 6.

resulted in the reversal of two prior decisions in four years, and was exacerbated by the appointment of two new Justices in that time.⁶⁶ The following section addresses the philosophical divide, raising again the question of whether a convicted murderer's moral blameworthiness rests on the quality of the individual who was murdered, and exploring how this question has been examined through post-*Payne* empirical research.

A. The Philosophical Divide

The problem addressed in this Comment, while highlighting the philosophical underpinnings, rests on two public policy questions left open by the *Payne* decision⁶⁷ when read in light of *Booth* and *Gathers*: Do VIS entice juries to recommend sentences in an arbitrary or capricious manner? If so, does the risk of creating “faceless” victims outweigh that concern? Legal academia has been “almost uniformly critical” of allowing VIS during the sentencing phase of a capital trial.⁶⁸ When presented on behalf of a victim, VIS are an attempt to force a jury to connect emotionally with the victim or victim's family in a way that does not directly reflect blameworthiness in the same way a defendant's character does.⁶⁹ Testimony on behalf of a defendant's character is different *in kind* than testimony offered to ensure a victim's treatment as a “uniquely individual human being.”⁷⁰ The result is an emotional appeal to a jury's sympathy for the victim based on extrinsic testimony of how “good” or “bad” of a person the victim happened to be. The jury's role as the “conscience of the community”⁷¹ thus collapses, and a jury becomes little more than the conscience of the victim's family.

The reasoning posited is as follows: A defendant's background and life-experience, including how he or she is perceived by peers, family,

⁶⁶ Nadler & Rose, *supra* note 65, at 428–29; *see also supra* text accompanying note 6.

⁶⁷ Blume, *supra* note 2, at 279. Blume explores several issues left open after *Payne*, one of which is the prosecution's invitation to a jury to consider the value of the victim's life (based on third-person impact testimony) when making sentencing determinations. *Id.*; *see also* Vivian Berger, *Payne and Suffering: A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 46 (1992) (arguing that the intention of VIS is to invite “comparative judgments” of the victim's life, as evidenced by the absence of a prosecutor's focus “on the dead person's vices”).

⁶⁸ Eisenberg et al., *supra* note 64, at 320; *see also* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365–66 (1996); Berger, *supra* note 67, at 21–22; Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85, 86–87 (1993); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 78 (1991); Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17, 18 (2000); Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 518 (2000); Logan, *supra* note 62, at 144–45. *But see* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 864–65 (1996).

⁶⁹ *See* Nader & Rose, *supra* note 66, at 429; *see also* Blumenthal, *Affective Forecasting*, *supra* note 62, at 109 (noting criticism by both courts and commentators that VIS has a tendency to bias capital jurors in favor of a death sentence and distract them from relevant evidence).

⁷⁰ *See Payne v. Tennessee*, 501 U.S. 808, 822–23 (1991) (quoting *Woodson v. N. Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion)).

⁷¹ *See Booth v. Maryland*, 482 U.S. 496, 504 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991); *Witherspoon v. Ill.*, 391 U.S. 510, 519 (1968).

loved-ones, etc., are relevant in a criminal court because they help inform a jury as to *why* a defendant may have committed the crime or *how* social disadvantages (for example) may have resulted in a lack of moral fortitude. A defendant with a severely tumultuous upbringing may be less culpable than a person with no evident “excuse” for his or her conduct.⁷² Either way, evidence of the defendant’s character or past conduct speaks directly to the moral blameworthiness at the moment the crime is committed (notwithstanding intoxication, etc.); the blameworthiness rests on what a defendant internally brought to the criminal act, not on who ends up the victim of such depravity.⁷³ Evidence of a particular defendant’s background is relevant, therefore, to offer a jury the opportunity to mitigate the impending sentence if justified under the given circumstances.⁷⁴

Chief Justice Rehnquist addresses this reasoning head-on in *Payne*, underlying the main thrust of the once-dissenting, now-majority philosophical attitude toward the admissibility of VIS: “*Booth* and *Gathers* were based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim’s family do not in general reflect on the defendant’s ‘blameworthiness,’ and that only evidence relating to ‘blameworthiness’ is relevant to the capital sentencing decision.”⁷⁵ Chief Justice Rehnquist, however, claims that the “assessment of harm caused by the defendant” is an important concern in criminal law, “both in determining the elements of the offense and in determining the appropriate punishment.”⁷⁶ Noting the different natures of murder and attempted murder, he illustrates how “two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. . . . [M]oral guilt in both cases is identical, but . . . responsibility in the former is greater.”⁷⁷ Moral culpability, therefore, rests on the actual *consequences* of the act, not merely the intention behind it. Permitting jurors to hear the full spectrum of resulting damage allows them to fully—and for *Payne* supporters, more accurately—assess and weigh the extent of the damage against any character evidence offered on the defendant’s behalf. The underlying

⁷² Society has “long held” the belief that “defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” *S. Carolina v. Gathers*, 490 U.S. 805, 817 (1989) (O’Connor, J., dissenting) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113–15 (1982) (holding that the sentencer may not refuse, as a matter of law, any relevant mitigating factors including, in this case, evidence of the defendant’s age (sixteen-years-old), turbulent family history, physical abuse, and severe emotional disturbance).

⁷³ *See Booth*, 482 U.S. at 504–05. When a jury hears testimony that “may be wholly unrelated to the blameworthiness of a particular defendant,” this diverts the jury’s attention “away from the defendant’s background and record, and the circumstances of the crime.” *Id.*

⁷⁴ *Id.*

⁷⁵ *Payne*, 501 U.S. at 819.

⁷⁶ *Id.*

⁷⁷ *Id.* (citation omitted).

theory is that a defendant cannot be judged properly without considering the full scope of the damage caused.

In contrast, however, as many commentators contend,⁷⁸ testimony lauding the character of a victim or detailing the emotional impact inflicted on each testifier forces a jury to first judge the *victim*. It follows that if a jury thinks the victim is worthy, it will hand down the harshest recommendation possible. If the victim is less sympathetic, or at least lacks a close network of loved ones willing to testify, the victim becomes the “faceless stranger” the Supreme Court seeks to protect.⁷⁹ The jury ultimately judges the defendant based on its opinion of the *victim*, rather than on a rational independent determination of blameworthiness stemming from the criminal act. An assessment of the victim’s character promotes ethical-consequentialism,⁸⁰ weighing on the one hand the “quality” of the victim, and on the other evidence of the defendant’s character prior to the act at issue.⁸¹ Thus, a defendant’s character is determined by factors over which he or she could not have had any control, rather than on factors for which the defendant is immediately responsible. This deep-rooted philosophical divide within the Supreme Court dominated all three opinions and their dissents, and set the stage for not only further debate, but for extensive empirical research to test the underlying assumptions.

B. The Research

In 2003, Cornell University held a symposium on victims and the death penalty.⁸² Several of the articles focused on the leading research testing how the inclusion of VIS would affect death penalty sentencing.⁸³ At that time there were four published studies exploring the effect information regarding victims had on “variables relevant to capital

⁷⁸ See *supra* note 66.

⁷⁹ See *Payne*, 501 U.S. at 825 (quoting *S. Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (O’Connor, J., dissenting)), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

⁸⁰ Without triggering a thorough discussion of Kantian deontology or Jeremy Bentham’s consequential utilitarianism, the author intends this term to mean, roughly, judging the severity of a criminal act based on its consequences rather than the intentions of the criminal actor. Contrary to tort law, where a proceeding aims to make a victim whole, the criminal court is not similarly situated. “Ethical-consequentialism,” as envisioned here, suggests there is no difference in moral culpability between a murder and an attempted murder, where the perpetrators’ actions are otherwise identical; pointing a gun at a person and pulling the trigger with the intent to kill is the act that must be punished, not the resulting damage the bullet causes. To hold otherwise would reward the “failing” criminal whose aim is not as good as the “successful” one, but whose willingness to murder is no different.

⁸¹ See, e.g., Nadler & Rose, *supra* note 65, at 421–22 (noting the common concern that VIS “highlight the perceived relative worth of the victim,” and that the jury’s judgment will be influenced by this “inappropriate factor”); see also Amy K. Phillips, Note, *Thou Shall Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 105–06 (1997).

⁸² Symposium, *Victims and the Death Penalty: Inside and Outside the Courtroom*, 88 CORNELL L. REV. 257 (2003).

⁸³ See, e.g., Blume, *supra* note 2, at 257; Beloof, *supra* note 11, at 282; Eisenberg et al., *supra* note 64, *passim*; Nadler & Rose, *supra* note 65, *passim*.

sentencing.”⁸⁴ The first major study tested the hypothesis that the introduction of VIS would increase the number of subjects who voted for the death penalty.⁸⁵ College students were given two different first-degree murder scenarios, with only half receiving VIS at the sentencing phase.⁸⁶ The study supported the hypothesis, finding that fifty-one percent of those who heard VIS elected a death sentence, while only twenty percent of those not hearing VIS elected death.⁸⁷

Edith Greene⁸⁸ conducted two other studies following *Payne*, focused not on sentencing outcomes, but rather on VIS and its relation to a variety of “intermediate” variables.⁸⁹ Her 1998 study played videotapes for participants during the mock sentencing phase, with one tape depicting the victims as a respectable elderly couple and the other showing them as less respectable.⁹⁰ The study concluded that jurors who saw the tape about respectable victims “rated those victims as more likable, decent, and valuable; felt more compassion for the victims’ family; believed that the emotional impact of the murders on survivors was greater; and rated the crime as more serious.”⁹¹ Greene’s 1999 study supported the findings of her first study, reaffirming that subjects exposed to “high-respectability” conditions thought more highly of victims and rated the suffering of the victim’s survivors more highly than the subjects exposed to a low-respectability condition.⁹²

In the same year as Greene’s 1999 study, a fourth leading study tended to support the conclusion that the admission of VIS would affect sentencing

⁸⁴ See Eisenberg et al., *supra* note 64, at 317.

⁸⁵ James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1, 9 (1995).

⁸⁶ *Id.* at 7. The subjects consisted of ninety-nine undergraduate students at North Carolina State University, none of whom were vetted for any propensity for or against the death penalty. *Id.* Each read descriptions of two crimes, one with a “moderately aggravated murder” involving the shooting of an innocent bystander during a robbery (the facts were unclear as to whether the shooting was intentional), and the other depicting a “severely aggravated murder” where the defendant tied an elderly man to a chair during a robbery and stabbed him multiple times. *Id.* at 6–7. All students were told that the defendants were convicted of first-degree murder. *Id.* at 7. Half in each group then read VIS modeled after *Booth*, which was used for both crimes and described “the reactions of the victim’s children and grandchildren to the victim’s death, their description of the qualities of the victim, as well as their opinions about a person who would commit such a murder.” *Id.* at 7.

⁸⁷ *Id.* at 9.

⁸⁸ Edith (Edie) Greene is a Professor of Psychology at the University of Colorado, Colorado Springs (UCCS), Director of the Graduate Concentration in Psychology and Law, and Director of the Psychology Honors Program. *Edie Greene—Biographical Sketch*, U. OF COLO., COLO. SPRINGS, <http://www.uccs.edu/egreene/biographical-sketch.html> (last visited Sept. 14, 2012).

⁸⁹ Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors’ Judgments*, 5 PSYCHOL., CRIME & L. 331, 336–37 (1999) [hereinafter Greene, *Many Guises*]; Edith Greene, et al., *Victim Impact Evidence in Capital Cases: Does the Victim’s Character Matter?*, 28 J. APPLIED SOC. PSYCHOL. 145, 149–52 (1998) [hereinafter Greene, *Character*]. “Intermediate” variables, in this context, refers to the different ways subjects react to VIS without testing directly whether that reaction produces a tendency toward harsher punishment. *Id.* at 154–55. The “intermediate” variable is essentially the link between cognizing the VIS and making a sentencing recommendation. *Id.* at 155.

⁹⁰ Greene, *Character*, *supra* note 89, at 150–51.

⁹¹ *Id.* at 154.

⁹² See Greene, *Many Guises*, *supra* note 89, at 345.

determinations, producing harsher penalties upon conviction.⁹³ This study grouped 416 mock jurors into forty-eight juries and asked them to deliver a verdict on both guilt *and* sentencing.⁹⁴ The authors of the study concluded that, consistent with the existing empirical research, “victim impact evidence . . . increased the likelihood that individual jurors would recommend the death penalty.”⁹⁵

Empirical studies conducted in the wake of *Payne* and up to the time of the Cornell symposium⁹⁶ appeared to support the fears of arbitrary and capricious capital sentencing resulting from placing a victim’s quality of character at issue over a defendant’s criminal act.⁹⁷ Two more studies in 2003 reopened the discussion and challenged some of the assumptions underlying VIS and their impact on capital sentencing.⁹⁸ While one study reinforced the theory that VIS would influence juries to recommend harsher sentences,⁹⁹ the other claimed that this theory was not supported when tested on actual jurors who had served in real death penalty cases.¹⁰⁰ Both, however, suggested that perhaps not all forms of VIS produced the direct sentencing results that Justice Powell and others had feared.¹⁰¹

Janice Nadler and Mary R. Rose¹⁰² tested the hypothesis that the “severity of emotional harm described by a victim in a criminal proceeding is directly related to the severity of the sentence imposed on the defendant.”¹⁰³ Specifically, this study focused not on the effect of testimony from a victim’s family about the crime’s effect on *them*, but rather on how testimony regarding a victim’s own ability to cope with the effects of a crime would, in turn, determine the harshness of the

⁹³ Bryan Myers & Jack Arbuthnot, *The Effects of Victim Impact Evidence on the Verdicts and Sentencing Judgments of Mock Jurors*, 29 J. OFFENDER REHABILITATION 95, 95 (1999).

⁹⁴ *Id.* at 99–100. The study involved undergraduate students in a psychology course at Ohio University, who were divided into four groups. *Id.* at 99. Group one watched a videotaped version of a capital trial with strong evidence of guilt and admissible VIS; group two with strong evidence of guilt but no VIS; group three with VIS but weak evidence of guilt; group four with weak evidence and no VIS. *Id.* at 100.

⁹⁵ *Id.* at 108. An interesting wrinkle in the discussion emerged, however, from this study; while “jurors who were exposed to the victim impact evidence tended to apply harsher sentences than jurors not exposed,” this tended to occur “only after deliberating with other jurors.” *Id.* The authors guessed that individual juror confidence as to the guilt determination increased during deliberations with other similarly-minded jurors, which in turn increased their confidence in their verdicts; “those who felt the defendant deserved the death penalty may have been more willing to express it.” *Id.*

⁹⁶ See Eisenberg et al., *supra* note 64, at 317–19.

⁹⁷ See, for example, the Supreme Court’s *Booth* and *Gathers* majority opinions, and *Payne*’s dissenting opinions, as noted and detailed exhaustively throughout this Comment.

⁹⁸ See Nadler & Rose, *supra* note 65, at 431–32; Eisenberg et al., *supra* note 64, at 308.

⁹⁹ See Nadler & Rose, *supra* note 65, at 434–35.

¹⁰⁰ See Eisenberg et al., *supra* note 64, at 308.

¹⁰¹ Nadler & Rose, *supra* note 65, at 431–32.

¹⁰² While conducting their research, Janice Nadler was a Professor of Law at Northwestern University School of Law and a Research Fellow for the American Bar Foundation. *Id.* at 419 n.a1. Mary Rose was an Assistant Professor of Sociology and of Law, University of Texas at Austin, and a Research Fellow for the American Bar Foundation. *Id.* at 419 n.a.a1.

¹⁰³ *Id.* at 432.

sentence.¹⁰⁴ Nadler and Rose tested participants' reactions to reading about either a robbery or a burglary, and randomly assigned one of three different VIS within each crime.¹⁰⁵ Two VIS described either "Severe Emotional Injury" or "Mild Emotional Injury", while the third VIS was the Control condition, which contained "no information about how the victim was coping with the crime."¹⁰⁶ Participants were not told that there were different VIS; rather, "each participant read and made judgments about only one version of the crime."¹⁰⁷ The Control condition allowed for the comparison between the average sentence judgment when no VIS were present and the average sentence judgment when VIS were present.¹⁰⁸

The results confirmed the hypothesis that the "emotional severity of victim impact evidence influenced the severity of sentences imposed on defendants."¹⁰⁹ Participants, on average, chose longer prison terms when the VIS described Severe Emotional Injury.¹¹⁰ In addition, the study revealed that mock jurors experienced more intense feelings of sympathy when a victim suffered Severe Emotional Injury; however, there were "no significant differences" in the reported feelings of "disgust or anger" based on the severity of the VIS.¹¹¹ Nadler and Rose concluded that "[t]hese data show that as the victim describes increasingly severe emotional harm, the sentence imposed on the defendant likewise increases."¹¹² Conversely, the defendant who "had the 'luck' of committing his crime on a victim who coped well benefitted from a shorter sentence" as compared even with the Control condition where the participant was given no information about the victim.¹¹³ These results reinforce the theory that jurors are "more punitive

¹⁰⁴ *Id.* at 433–34. The study did not focus on capital murder, but rather on crimes where the victim lives, to ask "whether the emotional severity of victim impact evidence influenced the severity of sentences imposed on defendants," i.e., whether sentencing would increase or decrease depending on how well a victim "handled" the experience psychologically. *Id.* at 435.

¹⁰⁵ Three-hundred-and-two adults, varying "widely along various demographic features," were given questionnaires during lunch hour in the lobby of a university administration building in downtown Chicago. Nadler & Rose, *supra* note 65, at 432–33.

¹⁰⁶ *Id.* at 433–34. The Severe Emotional Injury statement stated that as a result of the crime the victim was then "afraid, vulnerable, depressed, [was] having problems sleeping, and [could not] stop thinking about the crime." *Id.* at 433. The Mild Emotional Injury statement claimed the victim was "angry when the crime first happened, but now has returned to her normal activities and no longer thinks too much about the crime." *Id.* at 433–34.

¹⁰⁷ *Id.* at 433.

¹⁰⁸ *Id.* at 434.

¹⁰⁹ *Id.* at 435.

¹¹⁰ *Id.* For the burglary vignette, participants sentenced the defendant to 4.4 years versus 2.7 years, and in the robbery vignette the sentences were 4.8 years to 3.1 years, each with the longer term associating with Severe Emotional Injury and the shorter term correlating with Mild Emotional Injury. *Id.*

¹¹¹ *Id.* at 435–36. Further, the percentage of participants rating the crime as "very serious" was much higher when VIS were Severe than when they were Mild, even though the average rating of crime seriousness did not differ significantly based on severity. *Id.* at 436.

¹¹² *Id.* at 436 ("Even when all other circumstances . . . are held constant, the punishment is more severe when the victim is psychologically less able to deal with the crime in its aftermath.").

¹¹³ *Id.* The troubling inference here is that when a jury learns the crime victim copes well with the effects of the crime, the defendant's sentence is shorter, thus making the victim's reaction to the crime the determining factor in judging the severity of a crime rather than the criminal's actions or even

when the outcome of the crime reflects greater emotional harm to the victim.”¹¹⁴

A second symposium study, while acknowledging that very little research existed, criticized the existing empirical studies as having “often-rehearsed limitations that stem primarily from a lack of verisimilitude.”¹¹⁵ While the existing research might have suggested certain tendencies in human behavior, it relied on data gathered in simulation studies rather than practical application in actual capital cases.¹¹⁶ Eisenberg, Garvey, and Wells¹¹⁷ therefore surveyed interviews of over two hundred jurors who sat on capital trials in South Carolina between 1985 and 2001 to analyze the influence of VIS on death sentence recommendations.¹¹⁸ Several questions were posed to jurors that were “designed to assess” how VIS operated in that state, and to determine whether VIS affected sentencing outcomes in capital cases.¹¹⁹

The results varied. While there was “some correlation between victim admirability and jurors’ perceived seriousness of the crime,” the study found no “significant relation between the introduction of VI[S] and sentencing outcomes.”¹²⁰ According to the study, even though VIS led to “increased empathy for victims and their families,” it did “not appear to have been directed to, or to have had a direct and material effect on, sentencing outcomes.”¹²¹ These findings appeared to rebut earlier assumptions that increased VIS would result in increased rates of death penalties in capital cases.¹²² While the study supported previous research concluding that jurors do often personally view victims in a more favorable light after VIS, and therefore view the crime as more serious,¹²³ it failed to show that these feelings translated to votes for the death penalty among real

intention.

¹¹⁴ *Id.*

¹¹⁵ Eisenberg et al., *supra* note 64, at 307.

¹¹⁶ *Id.* at 307–08. While not expressly stated, the reasonable inference is that while mock-juror testimony might be helpful in pinpointing general reactions to hypothetical VIS, this data relies on a perhaps faulty assumption that hypothetical analysis will remain constant when jurors are actually faced with the real-life decision of whether to put another human being to death.

¹¹⁷ While conducting the research, Theodore Eisenberg and Stephen Garvey were Professors of Law at Cornell Law School. *Id.* at 306 n.a1–aa1. Martin Wells was a Professor of Statistics at Cornell University and Elected Member of the Law Faculty, Cornell Law School. *Id.* at 306 n.aaa1.

¹¹⁸ *Id.* at 307. The sample included thirty-three cases resulting in death sentences and thirty cases resulting in life sentences, with a total number of 214 jurors and a data set containing over 750 variables. *Id.* at 309–10.

¹¹⁹ *Id.* at 310–11. Questions included, for example: (1) how many of the victim’s loved ones testified during the sentencing phase; (2) who testified; (3) what they testified about; (4) how jurors reacted emotionally to the testimony; and (5) how important such testimony was in sentencing deliberations. *Id.* at 311.

¹²⁰ *Id.* at 308. While jurors tended to discuss the victim’s suffering and reputation as presented by VIS during deliberations, they all but ignored recommendations by family members as to what sentence should be given. *Id.* at 313–16.

¹²¹ *Id.* at 316.

¹²² *Id.* at 316–19.

¹²³ See *supra* notes 85–88, 89–92, 98–101 and accompanying text.

jurors tasked with making that ultimate and final determination.¹²⁴ Eisenberg and his associates ultimately conclude that the “modest effects” of VIS reflect real juries’ reliance on “salient facts” rather than their opinions of the victim when deciding whether to vote for the death penalty or a life sentence.¹²⁵ Their findings thus call into question the role of the previous research that did not utilize actual jurors in real death penalty cases.¹²⁶

III. MOVING FORWARD

As noted previously in this Comment, the *Payne* decision will not likely be overturned in the near future, and VIS will remain commonplace in the sentencing stages of capital trials.¹²⁷ As such, much of the recent literary focus has turned to finding means of “counteracting or reducing the influence of VIS on the capital jury.”¹²⁸ Part III now turns its focus to recent proposals for states to consider when determining the role of victims’ rights in criminal cases. The Comment concludes with the author’s own suggestion for a possible approach to balancing the competing interests detailed in the foregoing sections.

A. A Survey of Recent Proposals Illustrates How Different States Approach VIS

Some scholars call for courts to narrow the scope of what is considered admissible information contained in VIS in order to “reduce the inherent arbitrariness of their effects,” and recommend they not be used at all in death penalty hearings.¹²⁹ For example, until 1999, Maryland limited victim impact testimony to written form and barred live testimony.¹³⁰ While Maryland now allows live testimony under oath by a victim or victim representative,¹³¹ the content of the testimony is subject to cross-

¹²⁴ See Eisenberg et al., *supra* note 64, at 340 (noting that none of the data studied “generate[d] evidence that victim admirability affects South Carolina sentencing outcomes”).

¹²⁵ *Id.* at 341. The study challenges the idea that the use of VIS since 1991 made it easier to obtain death sentences; if that were so, post-1991 death sentence rates should have increased. *Id.* at 340. However, “[they] observe[d] no such increase and believe that this evidence supports the straightforward interpretation . . . that VI[S] ha[ve] a modest effect, if any, on sentencing outcomes.” *Id.*

¹²⁶ *Id.* at 307. Eisenberg et al., however, recognized some possible limitations in their research, namely (a) “erroneous recall,” and (b) a “possible lack of candor” by some interviewees. *Id.* at 311. Since jurors were interviewed sometime after their sentencing votes, they could have tailored their answers to fit their vote. *Id.* at 339.

¹²⁷ See *supra* notes 62, 64.

¹²⁸ Blumenthal, *Affective Forecasting*, *supra* note 62, at 110–11; see also Nadler & Rose, *supra* note 65, at 452 (contending that “the political reality is that the use of victim impact statements in criminal trials is not likely to disappear entirely, at least not in the foreseeable future,” and noting that “the victims’ rights movement is already politically powerful and continues to gain momentum”).

¹²⁹ Nadler & Rose, *supra* note 65, at 452–53. Nadler and Rose focus on their concern that *Payne* places “virtually no limits” on the scope of VIS, and caution against overly-broad use, but fall short of offering more detailed solutions beyond simply “narrowing” the scope. *Id.* at 453.

¹³⁰ MD. CODE ANN., Art. 41, § 4-609(d) (West 1997) (repealed 1999).

¹³¹ MD. CODE ANN., CRIM. PROC. § 11-403(b) (West 2012).

examination by defense counsel.¹³² Another scholar suggests incorporating “credible expert testimony”¹³³ at the sentencing stage to explain how individuals often “overestimate the emotional impact” traumatic events have on their lives.¹³⁴ The purpose would be to remind jurors of the tendency to overreact to emotionally wrenching testimony and to consider the consequences of irrationally or arbitrarily voting for a death sentence.¹³⁵ Such a suggestion, however, faces serious obstacles when applied in an actual capital sentencing situation; jurors may bristle at being told that the death penalty is merely an overreaction to a brutal homicide.¹³⁶ This problem gains even more traction considering capital jurors are often vetted by prosecutors for their willingness to impose the death penalty.¹³⁷

Other suggestions include prior judicial approval of VIS, restrictions on who can present the testimony in court, and restrictions on the number of those who may testify.¹³⁸ New Jersey, for example, provided all three safeguards prior to abolishing the death penalty in 2007,¹³⁹ having limited VIS to a statement by only a single family member, subject to judicial approval.¹⁴⁰ California allows only “the next of kin if the victim has died,” but allows them to appear personally and to “reasonably express . . . their views concerning the crime, the person responsible, and the need for restitution.”¹⁴¹ Once admitted into evidence, however, a court may require

¹³² *Id.* § 11-403(c).

¹³³ See Blumenthal, *Affective Forecasting*, *supra* note 62, at 125.

¹³⁴ *Id.* at 112–13.

¹³⁵ *Id.* at 112–13, 115. Blumenthal’s study supported the theory that VIS “increased the likelihood that mock jurors would impose a death sentence,” but suggested that “the presence of expert testimony about affective forecasting tended to ameliorate that effect” and may help eliminate any resulting bias. *Id.* at 120.

¹³⁶ *Id.* at 112 n.34. Blumenthal originally suggested several ways of conveying such information including “defense counsel argument, cross-examination of family members giving VIS, judicial instruction, or expert testimony.” *Id.*; Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 *IND. L.J.* 155, 192 (2005) [hereinafter Blumenthal, *Law and the Emotions*]. He conceded, however, that expert testimony was the most feasible of the group due to fact that most attorneys would not seriously consider the prospect of cross-examining a murder victim’s family member on the status of his or her character. Blumenthal, *Law and the Emotions*, *supra* note 136, at 192.

¹³⁷ See *Witherspoon v. State of Ill.*, 391 U.S. 510, 519–20 (1968) (expressing the concern that juries do not accurately reflect a full range of community values when prosecutors dismiss potential jury members based on their views of capital punishment: “Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority”).

¹³⁸ *State v. Muhammad*, 678 A.2d 164, 180 (N.J. 1996) (holding that VIS must be subject to these procedural requirements prior to entering evidence).

¹³⁹ Press Release, State of N.J., Office of the Governor, Governor Corzine Signs Legislation Eliminating Death Penalty in N.J. (Dec. 17, 2007); Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, *N.Y. TIMES* (Dec. 17, 2007), <http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html>.

¹⁴⁰ *Id.*

¹⁴¹ CAL. PENAL CODE § 1191.1 (West 2004). The court “shall consider the statements” when determining the sentence, and this statute may not be amended by the Legislature unless passed in each house by a two-thirds margin, or by plebiscite. *Id.*

the victim's family member to attend the "mitigation/aggravation phase of the hearing for the purposes of cross-examination."¹⁴²

A different approach suggests that, rather than try to overturn *Payne*, states may simply impose their own prohibitions against VIS under the doctrine of "evolving standards of decency," which the Supreme Court uses to distinguish between "right expanding and right constricting" precedent.¹⁴³ Since *Payne* poses no *per se* bar against VIS, it does not create a constitutional right and may therefore be narrowed or eliminated by state statute.¹⁴⁴ Indiana, for example, limits VIS to only relevant information pertaining to mitigating and aggravating factors.¹⁴⁵ Mississippi remains consistent with *Payne* in that the state poses no *per se* bar on VIS, but it restricts evidence to that which is relevant to establishing aggravating (as well as mitigating) circumstances.¹⁴⁶ Other states, like Wyoming, reject the reasoning behind *Payne* outright, making its general victim impact statute inapplicable in capital cases.¹⁴⁷

In contrast, many other commentators suggest that the Court struck the appropriate balance between competing interests, and VIS properly ensure that juries weigh the victim's individuality against the defendant's individualized sentencing determination.¹⁴⁸ Others even call for further and more consistent expansion of victims' rights in all stages of trial.¹⁴⁹ With the Crime Victims' Rights Act of 2004 ("CVRA"),¹⁵⁰ crime victims now have a codified federal right to receive timely notice of upcoming proceedings, the right not to be excluded from public proceedings, and the right to be heard at those proceedings within reason.¹⁵¹ Some scholars laud the CVRA as evidence that "the public consensus is right and the law professors are wrong."¹⁵² This claim is bolstered further by the adoption of

¹⁴² CAL. ST. B. P. R. 5.107(B).

¹⁴³ See Frankel, *supra* note 9, at 126–28. Frankel contends that contrary to sound reasoning, "the *Payne* Court used a devolving standards argument to expand the pool of those that [sic] might be executed." *Id.* at 127. For more on the "evolving standards of decency" doctrine, see *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁴⁴ Frankel, *supra* note 9, at 126–28.

¹⁴⁵ *Holmes v. State*, 671 N.E.2d 841, 848 (Ind. 1996).

¹⁴⁶ *Berry v. State*, 703 So. 2d 269, 275 (Miss. 1997).

¹⁴⁷ *Olsen v. State*, 67 P.3d 536, 594–95 (Wyo. 2003).

¹⁴⁸ See generally Boland & Butler, *supra* note 9, at 8–9, 11 (contending that state victim impact statutes should align themselves with the provisions of the Crime Victims' Rights Act of 2004, which include the "right to be reasonably heard at any public proceeding in the district court").

¹⁴⁹ Cf. Megan A. Mullett, *Fulfilling the Promise of Payne: Creating Participatory Opportunities for Survivors in Capital Cases*, 86 IND. L.J. 1617, 1617–19 (2011) (arguing that the "haphazard and inconsistent manner" in which crime victims are allowed to participate fails both federal and state victims' rights statutes by "re-victimizing survivors through exclusion and silencing," and proposing ways of avoiding exclusion based on due process concerns in order to maximize victim participation).

¹⁵⁰ 18 U.S.C. § 3771 (2011).

¹⁵¹ 18 U.S.C. § 3771(a)(2–4) (2011).

¹⁵² Cassell, *supra* note 13, at 611 (contending that legal academics have given no support to what is already a "near-universal feature of criminal sentencing," and that VIS have "received such widespread support because they promote justice without interfering with any legitimate interests of criminal defendants").

the CVRA in federal cases and the fact that some form of VIS exist in “virtually all state sentencings.”¹⁵³ Whether for or against the admission of VIS, this Comment illustrates how state legislatures, the courts, and legal scholars continue to address the *Payne* decision, now twenty years old. With that in mind, this author offers yet another suggestion.

B. Allowing But Limiting VIS Strikes the Right Balance Between Competing Interests

This Comment addresses two primary competing interests concerning VIS: (a) the risk of arbitrary and capricious sentencing if used; and (b) the risk of creating faceless victims if not used. While research generally suggests that VIS do contribute to harsher sentences in criminal cases,¹⁵⁴ decreasing overall death penalty rates suggest they have not had a substantial effect on death sentences on a large scale.¹⁵⁵ This observation, however, says nothing about the reality of VIS in an individual case. When one jury convicts one defendant of capital murder, what impact, if any, will the admission of VIS have on *that defendant's* life? This is the moment *Payne* matters most, and it is the reason this author revisits the underlying philosophies behind it.

The problem of victim anonymity in capital cases is serious. The Supreme Court's argument that a victim has as much of a right as a defendant to be presented as a “uniquely individual human being” is compelling.¹⁵⁶ This author is not convinced, however, that unbridled admission of VIS is the solution. The risk of unfair prejudice is as great during the sentencing phase as it is during the guilt or innocence phase. If not restricted in some way, VIS do not merely balance the scale by “counteracting the mitigating evidence,”¹⁵⁷ but rather they tip the scale the other way, as the leading empirical research illustrates.¹⁵⁸ However, as noted in this Comment, *Payne* will not likely be overturned in the near future.¹⁵⁹ In addition, VIS remain politically popular enough that state legislatures will maintain their viability. But what still drives the VIS discussion is that *Payne* gives no instruction for their implementation. As such, the Supreme Court may one day soon have to decide what forms VIS may or may not take. The balance between the competing interests will likely be at the heart of that decision.

¹⁵³ *Id.*

¹⁵⁴ See *supra* notes 93, 99.

¹⁵⁵ See *supra* Part II.B. The author does not suggest that death sentence rates are directly linked to VIS. There are myriad factors contributing to the national attitude toward the death penalty. The point, rather, is that death sentence rates have gone down since the *Payne* decision, which suggests that *Payne* alone did not open the door to more death sentences.

¹⁵⁶ See *Payne v. Tennessee*, 501 U.S. 808, 822–23; *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991); *Woodson v. N. Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

¹⁵⁷ *Booth*, 482 U.S. at 517 (White, J., dissenting).

¹⁵⁸ See *supra* Section II.B.

¹⁵⁹ See *supra* notes 62, 64.

With that “balance” in mind, this author suggests a “proportionality test,” which would limit the admissibility of VIS only to cases where a defendant offers others’ testimony on his or her own behalf as a mitigating factor. Even in those circumstances, VIS should be limited, at the court’s discretion, to an extent proportional to the defendant’s proffered testimony. In other words, the *Payne* rationale is respected by allowing VIS, but the fears highlighted in *Booth* and *Gathers* are safeguarded by promoting balance. If a defendant chooses not to offer mitigating testimony, this lessens the need to counterbalance it with VIS. Victim anonymity may still persist in murder cases, but not as a result of the defendant’s mitigating evidence. Further, when a defendant *does* offer mitigating testimony, VIS still could be admitted to counterbalance the testimony, but not to overpower it with a parade of horrors. A court may consider factors such as (a) the number of people admitted to testify on the defendant’s behalf, (b) the nature of the testimony offered,¹⁶⁰ and (c) the physical form of the evidence.¹⁶¹ The defendant, in a sense, sets the stage for the VIS—whatever the defendant offers, the victim’s loved ones can counter-offer, proportionally.

Imagine a case where defense counsel for a convicted murderer presents the defendant’s single working parent, who offers testimony that the defendant was a troubled youth who never had a fair opportunity to succeed in life due to hardship. The parent bolsters the testimony with a handwritten poem by the defendant as a child describing how, one day, he or she wanted to be a schoolteacher. This type of testimony unquestionably humanizes the defendant and aids in an individualized determination of his or her fate. It is difficult to argue, however, that a murder victim’s parent ought to be denied the opportunity to tell a similar story on behalf of a murdered son or daughter. Allowing a proportional response meets the burden of finding an appropriate balance. A defendant who benefits from having family members willing to testify at trial may decide to offer their testimony as a mitigating factor. But, under the proportionality test, the understanding that a victim’s family may provide a response would temper that decision and prevent a tipping of the scales in favor of one over the other. In addition, where a defendant offers no favorable character testimony, the proportionality test also would bar a victim’s family from offering testimony, thus keeping the scales balanced. This approach would

¹⁶⁰ “Nature” is intended to reference the content of the testimony. Testimony could include anecdotes about a defendant’s childhood, a list of good deeds the defendant performed, or an explanation of unfortunate events in a defendant’s life that may have contributed to poor judgment or susceptibility to violent behavior. The point is that depending on the offered testimony, a prosecutor could tailor the admission of VIS to respond in kind to the defendant’s offering.

¹⁶¹ Considering the various forms of VIS illustrated in this Comment, a court might allow physical exhibits in VIS only when the defendant offers physical exhibits, etc. in order to promote consistency in what a jury perceives in court. Courts may also, and likely will, place restrictions on what types of physical exhibits parties may present in order to avoid the most extreme examples noted in this Comment.

aid in protecting an indigent defendant from an arbitrary or capricious sentence at the hands of a jury overwhelmed by disproportionate VIS.

Even the proposed “proportionality test,” however, fails to account for the indigent or unsavory victim with no family or loved ones to offer testimony. If a defendant exercises his or her constitutional right to offer mitigating testimony, a victim in this category still has no response. For example, prostitutes, victims involved in criminal activity, and certain subsets of homeless, mentally disabled, merely reclusive, or otherwise marginalized members of society will remain faceless victims in murder cases. While courts could offer jury instructions to mitigate any suggestive effect that an absence of VIS might create, they still open the door to a degrading judgment of the victim’s character as a determinative factor in punishing the defendant. As long as character testimony is offered at all in capital sentencing phases, this may be an unavoidable problem.

Despite its inability to account for every variable, the “proportionality test” provides parity in several important ways: It (1) upholds a convicted defendant’s right to offer mitigating testimony on his or her own behalf; (2) lessens the risk of victim anonymity when a defendant offers mitigating evidence; (3) gives deference to the victims’ rights movement and its political force without abandoning the justice system’s interest in providing rational and consistent sentencing methods; (4) provides states that allow VIS a more structured framework for implementation; and (5) addresses the Supreme Court Justices’ philosophical divisions in a practical and balance-driven manner.

CONCLUSION

It is difficult to determine the actual effect of VIS on juries, and even more difficult to determine *Payne*’s overall influence on the imposition of death sentences in general. While much of legal academia remains opposed to VIS,¹⁶² the political strength of the victims’ rights movement suggests the court of public opinion may have aligned itself indefinitely with the Supreme Court of the United States. Doing so adds yet another variable to the already complicated struggle to determine which of the two competing interests—the risk of arbitrary and capricious sentencing and the problem of victim anonymity—matters most. Exhaustive legal scholarship has speculated at great length on the reasoning behind the reversal of *Booth* and *Gathers*.¹⁶³ Was it bad reasoning by a newly-stacked Court? Or, did the Court rightly overturn bad precedent in response to a shifting public view of the role of the criminal justice system? If the latter, has public opinion shifted again, considering drastic drops in death sentences across the country? Answers to these questions are beyond the scope of this current inquiry. This Comment merely explores the competing philosophies and

¹⁶² See *supra* note 68.

¹⁶³ See, e.g., Nadler & Rose, *supra* note 65, at 426–27.

suggests that a “proportionality test” may offer a solution for both sides. For a conversation on capital punishment that is bound to continue, however, it surely may be said that we cannot learn without *Payne*.¹⁶⁴

¹⁶⁴ Adapted from a quote attributed to Aristotle: “Learning is not child’s play; we cannot learn without pain.” See ARISTOTLE, *THE NICOMACHEAN ETHICS* bk. II, at 71–78 (H. Rackham trans., Harvard Univ. Press rev. ed. 1962) (c. 384 B.C.E.).