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PREFACE

This second Issue of Volume 42 of the *Harvard Journal of Law & Public Policy* contains three Articles and an Essay. Professor Lyn Entrikin opens the issue with an article heralding the death of American common law. She argues that although we have long since entered an age of statutes and agency regulations, legal academics continue to pretend we live in a world driven by judge-made case law, thereby failing to prepare their students for the practice of law. Professor Bruce Johnsen questions the utility of the focus on reducing externalities in traditional cost-benefit analysis and suggests that instead regulations are justified when they can be shown to reduce transaction costs between parties. Christine Minhee and Professor Steve Calandrillo argue that the United States cannot adequately address the opioid crisis without ending the War on Drugs. Lastly, a very timely Essay by Paul Larkin and Elizabeth Slattery take on *Auer* and *Seminole Rock*. Larkin and Slattery call for an end to *Auer* deference and offer a blueprint for what a post-*Auer* world would look like.

I am also pleased to present two student notes. Ryan Folio argues that the rise of textualism has undermined the intellectual foundations of the constitutional avoidance and severability doctrines in statutory interpretation, and Grant Newman outlines how the Tax Code can both intentionally and inadvertently threaten the financial health of religious organizations.

I would like to express thanks to all the editors and staff of the *Journal* for all their many hours of hard work. Without them this forum for conservative and libertarian legal scholarship could not exist.

Ryan M. Proctor
Editor-in-Chief

THE DEATH OF COMMON LAW

J. LYN ENTRIKIN*

> The supremacy in law of statute over judicial decision-making remains in a democracy, in an oligarchy, in a monarchy, and even in a tyranny. Even when a court declares a statute unconstitutional, this relationship between legislature and court is unaltered; the court is merely declaring that the statute is inconsistent with higher legislation. In an age of statutes, both judges and legislators make law, but they do not make it in the same way or even in the same sense. Specifically, judge-made law is subordinate law.
>
> Alan Watson, *The Future of the Common Law Tradition*, 9 DALHOUSIE L.J. 67, 80 (1984).

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INTRODUCTION

In October 2017, a proposed initiative captioned "The Consumer Right to Privacy Act of 2018" was filed with the Califor-

nia Attorney General for voters' consideration in the November 2018 general election.[1] The filing occurred soon after big business interests had managed to block action by the 2017 California Legislature on Assembly Bill 375, which would have strengthened state laws protecting personal information privacy.[2]

Section 3 of the proposed initiated statute stated its purpose:

> [I]t is the purpose and intent of the people of the State of California to further the [California] constitutional right of privacy by giving consumers an effective way to control their personal information, thereby affording better protection for their own privacy and autonomy, by:
>
> A. Giving California consumers the right to know what categories of personal information a business has collected about them and their children.
>
> B. Giving California consumers the right to know whether a business has sold this personal information, or disclosed it for a business purpose, and to whom.
>
> C. Requiring a business to disclose to a California consumer if it sells any of the consumer's personal information and al-

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1. *See* Letter from Mary Ross to Office of the Attorney General, Initiative Coordinator (Nov. 17, 2017), https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0039%20%28Consumer%20Privacy%20V2%29.pdf [https://perma.cc/7836-H9PE] (submitting amendments to the original Initiative Measure No. 17-0039, filed Oct. 12, 2017). For reasons described below, the initiative proposal was withdrawn on June 28, 2018. *See California Consumer Personal Information Disclosure and Sale Initiative (2018)*, BALLOTPEDIA, https://ballotpedia.org/California_Consumer_Personal_Information_Disclosure_and_Sale_Initiative_(2018) [https://perma.cc/D6B8-2XUZ] (last visited Mar. 29, 2019); *see also* Bryan Anderson, *California's new consumer privacy law isn't as sweeping as you might think*, SACRAMENTO BEE (July 5, 2018), https://www.sacbee.com/news/politics-government/capitol-alert/article214064999.html [https://perma.cc/9DJE-HV4M].

2. *See* Alastair Mactaggart, *This is how Californians take back their privacy*, SACRAMENTO BEE (Sept. 20, 2017, 3:13 PM) https://www.sacbee.com/opinion/op-ed/soapbox/article174256331.html [https://perma.cc/RUZ7-F3BG] (describing motivation for proposed initiative measure). Mr. Mactaggart described himself as a California businessman, father, and the "lead sponsor" of the measure. *Id.* According to public records, he personally contributed $3.2 million to Californians for Consumer Privacy in support of the initiative. *See Initiatives and Referenda Failed to Qualify*, CAL. FAIR POL. PRAC. COMM'N, http://www.fppc.ca.gov/transparency/top-contributors/nov-18-gen/initiatives-referenda-failed-to-qualify.html [https://perma.cc/8S5P-49MV] (last visited Mar. 29, 2019). Top contributors in opposition to the measure included AT&T, Google, Facebook, Comcast, Verizon, Amazon, and Microsoft. *Id.*

> lowing a consumer to tell the business to stop selling the consumer's personal information.
>
> D. Preventing a business from denying, changing, or charging more for a service if a California consumer requests information about the business's collection or sale of the consumer's personal information, or refuses to allow the business to sell the consumer's personal information.
>
> E. Requiring businesses to safeguard California consumers' personal information and holding them accountable if such information is compromised as a result of a security breach arising from the business's failure to take reasonable steps to protect the security of consumers' sensitive information.[3]

If approved by voters, the initiated legislation would have added several new sections to the California Civil Code imposing sweeping obligations on certain for-profit businesses operating in the state.[4] In addition, it would have authorized any consumer to sue a business for violating the Act.[5] And it would have authorized state and local prosecutors to file civil actions to recover monetary penalties from business violators.[6]

As might have been expected, the initiative proposal spawned a broad hue and cry from the California business community, prompting opponents to negotiate compromise amendments to Assembly Bill 375.[7] The 2018 California Legislature debated and ultimately enacted the compromise legislation with the unanimous vote of both chambers. Immediately after then-Governor Jerry Brown signed the bill into law,[8] Californians for Consumer Privacy withdrew the initiative proposal.[9]

---

3. Initiative Measure No. 17-0039, The California Consumer Privacy Act of 2018, Version 2, § 3.

4. *See id.* § 4.4–4.6.

5. *See id.* § 4.9.

6. *See id.* § 4.10.

7. California Consumer Privacy Act, 2018 Cal. Legis. Serv. Ch. 55 (A.B. 375) (West). The bill had carried over from the 2017 legislative session after business interests blocked its enactment.

8. Then-Governor Brown signed the legislation on June 28, 2018. *Id.* The legislation takes effect on January 1, 2020, on the condition that the November 2018 ballot initiative is withdrawn. *See id.* § 3.

9. Californians for Consumer Privacy, the political action committee sponsor, agreed to withdraw the proposed initiative measure on the same day the Governor signed the compromise legislation. *See* Derek Hawkins, *The Cybersecurity 202: Why California could be the bellwether for the privacy movement*, WASH. POST (June 29,

While the California legislative debate was ongoing, two major global events gave heightened political salience to concerns about personal data privacy. The first was the prominent news story concerning the unauthorized use of more than eighty-six million Facebook clients' personal information by Cambridge Analytica, a British political consulting company, to "microtarget" political advertising for the purpose of influencing voters in the 2016 U.S. presidential election.[10] Mark Zuckerberg, CEO of Facebook, Inc., testified before two congressional committees in April 2018 in response to the scandal.[11] The second was the General Data Protection Regulation (GDPR), which took effect in the European Union's twenty-eight member states on May 25, 2018.[12] The GDPR made sweeping revisions to EU laws pro-

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2018), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/06/29/the-cybersecurity-202-why-california-could-be-the-bellwether-for-the-privacy-movement/5b34d50e1b326b3967989d01 [https://perma.cc/P6KG-B7CT].

10. *See, e.g.*, Matthew Weaver, *Social media 'micro-targeting' of voters on the increase, MPs told*, GUARDIAN (Jan. 23, 2018, 10:10 AM) https://www.theguardian.com/media/2018/jan/23/social-media-micro-targeting-of-voters-on-the-increase-mps-told [https://perma.cc/2TKT-6WXK] (describing evidence regarding "extensive use of behavioural advertising techniques in politics . . . without public awareness or discussion," which may have influenced the outcome of the 2016 Brexit referendum). Not long after news of the scandal broke, Cambridge Analytica ceased business and declared bankruptcy. *See, e.g.*, Nicholas Confessore & Matthew Rosenberg, *Cambridge Analytica to File for Bankruptcy After Misuse of Facebook Data*, N.Y. TIMES (May 2, 2018), https://www.nytimes.com/2018/05/02/us/politics/cambridge-analytica-shut-down.html [https://nyti.ms/2FBrxRk].

11. *See* Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018) https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html [https://nyti.ms/2GBQ4Lm] (summarizing key events leading up to Zuckerberg's congressional testimony). In May, Zuckerberg testified before a committee of the European Parliament. *See* Tony Romm, *European lawmakers told Mark Zuckerberg they could regulate—or break up—Facebook*, WASH. POST (May 22, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/05/22/zuckerberg-european-parliament-facebook-testimony [https://perma.cc/Q5TZ-Z4WM].

12. *See generally* Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1. Article 99 provides that the Regulation takes effect on May 25, 2018. *Id.* at 87; *see A new era for data protection in the EU: What changes after May 2018*, EUROPEAN COMM'N, https://ec.europa.eu/commission/sites/beta-political/files/data-protection-factsheet-changes_en.pdf [https://perma.cc/3JNZ-LEML] (last visited Mar. 29, 2019). *See generally 2018 reform of EU data protection rules*, EUROPEAN COMM'N, https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-

tecting data privacy. Global in reach, the new regulations apply to any person, business, or organization—no matter where located—that gathers, processes, manages, or stores the personal data of natural persons located in European Union member states.[13]

These news stories illustrate the rapid globalization of law in a contemporary, ever-changing world. Not until 2018 did we learn that for-profit foreign enterprises gathered massive amounts of personal information about American citizens without authorization, and then used that data to microtarget potential voters with digital content to achieve nefarious purposes—including influencing elections on momentous issues. The California legislative initiative and the compromise legislation that followed reflect the realities of modern lawmaking in response to rapid developments in a global marketplace.

Now imagine, just for a moment, how long it would have taken a common law legal system to meaningfully respond to the many complex and interrelated issues related to global information privacy. Judge-made law develops incrementally over time on a case-by-case basis, offering the time-tested advantages of stability and predictability. On the other hand, the slow pace of common law evolution is ill-suited for the rapidly developing technological world of the twenty-first century and its novel legal issues that demand immediate resolution. By its very nature, the common law judicial process resolves issues at the most granular level based on fact-specific cases and controversies. But the complex legal issues of today call for policy-driven solutions on a global scale. The European Union's GDPR, the California initiative proposal, and California Assembly Bill 375 all reflect legislative attempts to address compelling social and technological issues that affect virtually everyone and every nation. The critical issues of the day simply cannot realistically be resolved by the slow pace of incremental, case-specific, common law adjudication.[14]

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protection/2018-reform-eu-data-protection-rules_en [https://perma.cc/4ZRX-LRC8] (last visited Mar. 29, 2019).

13. *See* Justin Jaffe & Laura Hautala, *What the GDPR means for Facebook, the EU, and you*, CNET (May 26, 2018, 8:58 AM), https://www.cnet.com/how-to/what-gdpr-means-for-facebook-google-the-eu-us-and-you/ [https://perma.cc/9SAS-FSMQ].

14. *Cf.* Richard A. Posner, *Bentham and Blackstone*, 19 J.L. & ECON. 569, 594 (1976) (referring to English common law rulemaking as "quintessentially incremental,

My premise is that for all practical purposes—whether we like it or not—American common law is dead.[15] Yet the legal academy, by continuing to teach law students primarily common law reasoning tied to subject-matter silos, invented long ago in an unsuccessful effort to "scientize" law,[16] remains root-

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indeed glacial"). Indeed, some American legal scholars have recognized the deficiencies of common law for addressing modern legal issues. *E.g.*, Frank P. Grad, *Legislation in the Law School*, 8 SETON HALL LEGIS. J. 1, 15 (1984).

> Legislation is the only purposeful form of lawmaking we know. It is the primary task of the legislative branch of our democratic government. By comparison, the common law is a mere incidental result of the rendering of decisions in individual cases by judges not responsible to a constituency for policy formulation. Thus, if instruction in legislation is to be meaningful, it must deal with the essential task of lawmaking by the legislative branch in our form of government. It is the task of the legislative branch to meet the kinds of public need which can only be resolved by legislation. We have looked to legislation to resolve the emerging contemporary problems that the common law is inherently unable to resolve. The need for general legislation, for legislation of a programmatic and prospective nature, has become more clearly apparent since the turn of the [twentieth] century . . . .

Id.

15. At the very least, its death is imminent. As this Article will demonstrate, both jurists and scholars have presaged the demise of American common law. For example, nearly a half-century ago, the Wisconsin Supreme Court rejected an argument that it should exercise its judicial power to recognize pure comparative negligence, contending that the legislature's 1931 enactment of the "49% rule" precluded it from doing so. Vincent v. Pabst Brewing Co., 177 N.W.2d 513, 516–17 (Wis. 1970) ("Without passing judgment upon the merits of pure comparative negligence . . . , we think that the legislature is the body best equipped to adopt the change advocated by the appellant." (citing WIS. STAT. ANN. § 895.045)). The Chief Justice filed a strong dissent, asserting the court's inherent power to develop tort law notwithstanding the legislature's "partial repudiation of contributory negligence." *Id.* at 519 (Hallows, C.J., dissenting). Finding "nothing in [the statute's] history or in its language which evinces any intent to pre-empt this field of common law," he warned, "[t]he doctrine of pre-emption applied to common-law areas should rest only on affirmative [legislative] action; otherwise, the death of the common law is near at hand." *Id.* at 522–23. Soon after, the Wisconsin Legislature amended the statute, but only so far as to allow recovery so long as the plaintiff's negligence does not exceed the proportion attributed to the defendant (commonly known as the "50% rule"). *See* Delvaux v. Vanden Langenberg, 387 N.W.2d 751, 756, 758 (Wis. 1986) (citing 1971 Wis. Laws 47, but reserving the court's "inherent common law authority to reconsider matters that stem from judicial creation[, which] has not been eroded by the passage of the comparative negligence act").

16. *See, e.g.*, Joseph Lavitt, *Leaving Contemporary Legal Taxonomy*, 90 DENV. U. L. REV. 213, 215–16 (2012).

> [T]he contemporary doctrinal categories of contract and tort are the product of a relatively recent advent and did not take root in American courts until the latter half of the nineteenth century. Encrusted now like

ed in the common law myth of eighteenth-century Blackstonianism[17] and the "law is science" myth of nineteenth-century Langdellianism.[18] But today's law students will be tomorrow's lawyers, who will practice in what legal scholars long ago de-

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> barnacles, supposed distinctions between tort and contract law render almost entirely unrecognizable the structure of a system better suited to vindicate the violation of primary rights . . . ."

Id. (citing, *e.g.*, GRANT GILMORE, THE DEATH OF CONTRACT 161 (1995) ("Until the late nineteenth century, the dividing line between 'contract' and 'tort' had never been sharply drawn . . . .")).

17. William Blackstone, an eighteenth-century University of Oxford Professor of English Common Law, published four volumes of *Commentaries* in the late 1760s. *See* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5 (1996) (citing DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 133–34 (1938)). Blackstone was a strong proponent of "a full-fledged system of common law." James McCauley Landis, *Statutes and the Sources of Law*, 2 HARV. J. ON LEGIS. 7, 10 (1965) ((originally published in HARVARD LEGAL ESSAYS (1934)). Before the 1772 publication of the American edition of Blackstone's *Commentaries*, American colonists had already purchased more than a thousand copies of the English edition, and many more leading American lawyers secured advance subscriptions to the American edition. *See* Alschuler, *supra*, at 45 (citing LOCKMILLER, *supra,* at 170); *see also* Randy J. Holland, *Anglo-American Templars: Common Law Crusaders,* 8 DEL. L. REV. 137, 148 (2006) (explaining the popularity of Blackstone among nineteenth-century American lawyers and jurists). Professor Alschuler explained in detail the pervasive influence of Blackstone's *Commentaries* on the development of American common law and legal thinking. Alschuler, *supra,* at 2, 4–19; *see also* ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 110–12 (1921) (discussing Blackstone's influence on American law).

18. *See, e.g.*, ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 92–93 (1998) (discussing Langdell's perspective that his educational method of studying cases resembled the study of empirical science, in particular evolutionary biology); David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 138–39 (1988) ("[C]ontrary to Christopher Langdell's claim that law is a science, both judicial thought and American legal scholarship based on that thought fit nearly without exception into the realm of noncumulative or 'soft' knowledge."); Edward A. Purcell, Jr., *Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, 66 FLA. L. REV. 1457, 1472 (2014) ("Harvard's dean, Christopher Columbus Langdell, emerged as the leading proponent of this 'analytical' [jurisprudence] approach, which also became known to its subsequent critics as 'Langdellianism,' 'conceptualism,' 'formalism,' and eventually 'mechanical' jurisprudence"); Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 905 (1997) (explaining the "continued hold of the Langdellian paradigm"); *see also, e.g.*, Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 168 (2008) (noting that "the vast majority of [American] law schools modeled their pedagogy—whether directly or indirectly—on the methods of Harvard's famous Dean from 1870 to 1895, Christopher Columbus Langdell").

nominated the "age of statutes."[19] Over the last century, the corpus of American law has expanded to encompass not only statutes but also court rules, state and federal administrative regulations, executive orders, international treaties, supranational conventions, common market legislation, and interstate compacts.[20] Legal academics must stop pretending that we live and work in a common law legal system driven by judge-made law.[21] Otherwise they do a disservice to their students as well

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19. *E.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163 (1982) (describing the role of courts in the "age of statutes"). Roscoe Pound presaged Calabresi in 1908 by declaring the existence of "an industrial community and an age of legislation." Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908). But unlike Pound, who had anticipated legal developments with pragmatic optimism, Calabresi bemoaned the "statutorification" of law and proposed that judges should be able to disregard statutes they deem inconsistent with the current "legal landscape." CALABRESI, *supra*, at 1–2. It would not be long before Calabresi drew criticism for his radical proposal. *See infra* notes 298–301 and accompanying text. Calabresi was certainly not the first or even the second legal scholar to recognize the shift from common law to statutes. At the height of the New Deal era, scholars recognized the radical change the legal system had been undergoing since the Industrial Age of the late nineteenth century. *See, e.g.*, Frank E. Horack, Jr., *The Common Law of Legislation*, 23 IOWA L. REV. 41, 45 (1937) ("[T]he lawyer's function today is not limited to litigation. The understanding of administrative action and the prediction of legislative action are chief responsibilities of many lawyers . . . . To achieve a capacity for legislative prediction the lawyer must organize legislative materials along systems similar to the judicial digests."). Professor Horack would go on to publish one of the earliest legislation casebooks. *See* Willard Hurst, *The Content of Courses in Legislation*, 8 UNIV. CHI. L. REV. 280, 280 (1941) (critiquing FRANK E. HORACK, JR., CASES AND MATERIALS ON LEGISLATION (1940)).

20. *See* 2 NORMAN SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 36:7 (7th ed. 2007 & Supp. 2017) ("Interstate compacts are the state counterparts of treaties."). Indeed, the proliferation of written law in all its forms was noted by scholars more than a half century ago as a motivating rationale for codification. As one scholar observed:

> [M]odern law is written law whether it be found in the reported opinion of a court, the words of a statute, the ruling of an administrative agency or the executive order of the president. As the multiplicity of law increases, a demand for orderly presentation begins to be made. Even with its defects, mainly of man himself, the method of codification, newly adapted to our age, with provision for periodic revitalization, still appears to be the most useful tool for the doing of the task of stating the law clearly and concisely that man may know the rules and principles that are to govern his actions.

Ferdinand Fairfax Stone, *A Primer on Codification*, 29 TUL. L. REV. 303, 310 (1955).

21. English scholars have long since acknowledged the same developments in the United Kingdom, as well as the legal academy's failure to acknowledge that "legislation is the single most important source of law." David Miers & Alan Page,

as the bench and the bar. Indeed, a significant reason modern legal scholarship goes largely unread is that today's scholars have lost sight of the needs of both jurists and the practicing bar in an increasingly complex and interconnected statutory domain.[22]

One scholar recently observed that "[t]he relationship between positively enacted legislation and uncodified, 'unwritten' law is a perennial source of puzzles."[23] This Article aims to shed light on some of those puzzles, and to urge the legal academy to come to terms with American law *as it is* today, not as it once *might have been* or even as scholars *wish it were*. Part I defines common law and distinguishes it from other sources of law. Part II addresses the evolution of the American legal system to the present day, emphasizing its heavy reliance on statutes, codes, rules, and other positive law. Part III describes the often-misleading taxonomy that comparative law scholars have devised to classify legal systems and explains how it often mis-

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Teaching Legislation in Law Schools, 1980 STATUTE L. REV. 23, 28 (underscoring the "pervasiveness of legislation as an instrument of control").

22. *See* Willard Hurst, *Legislation as a Field of Legal Research*, 2 HARV. J. ON LEGIS. 3, 3 (1965) ("[C]ompared with the importance which legislative decision making and legislation have in the contemporary legal order, legal education and legal scholarship still fall far short of what they should do in this field . . . . Legal scholarship must adopt new emphases in order to come to grips with these changes in the sources of law."); *see also, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) ("The 'impractical' scholar . . . produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner. As a consequence, . . . judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy."); *id.* at 50, 62 (calling on law schools to hire more "practical" scholars); Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 50 (2015) ("[L]egal scholarship, in its present form, is a massive and unsupportable investment in what benefits a few people in a narrow universe."); Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 113–26 (2010) (critiquing "impractical law review scholarship"); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1331 (2002) ("Baldly stated, the uncomfortable fact is that too much of the legal scholarship now produced is of too little use to anyone."). *See generally* Diane P. Wood, *Legal Scholarship for Judges*, 124 YALE L.J. 2592, 2603–07 (2015) (documenting the disconnect between most legal scholarship and judicial decisionmaking using empirical research). At the time of writing, the author was the Chief Judge of the U.S. Court of Appeals for the Seventh Circuit. *Id.* at 2592.

23. Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 FORDHAM L. REV. 1689, 1691 (2014).

characterizes the ever-changing, cross-fertilizing nature of legal communities. Part IV addresses the entrenchment of common law in the American legal academy, the need for reform, and the beginnings of innovation by a few forward-thinking law schools. Part V briefly concludes, demonstrating that for all practical purposes, American common law is dead.

For the legal academy to claim that the American legal system of today is a common law system is to perpetuate a legal fiction.[24] Recognizing that enacted law has long since become the driving force of modern American law—and reforming legal education accordingly—would better serve law students, attorneys, judges, and ultimately the American people.

I. DEFINING AND DISTINGUISHING COMMON LAW

Before proceeding with my primary argument, let me clarify what I mean by "common law"—a term often misused and misunderstood, even by members of the American legal acad-

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24. Jeremy Bentham declared a legal fiction "a willful falsehood, having for its object the stealing of legislative power, by and for hands which durst not, or could not, openly claim it; and, but for the delusion thus produced, could not exercise it." JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 243 (1838), *quoted in* Paul S. Gillies, *Fictions of Law*, VT. B.J., Spring 2015, at 8, 8. More than a century later, Lon Fuller defined a legal fiction more pragmatically as "a statement propounded with a complete or partial consciousness of its falsity, or a false statement recognized as having utility." LON FULLER, LEGAL FICTIONS 7 (1967), *quoted in* Gillies, *supra*, at 8. One scholar has speculated that "the very pervasiveness of legal fictions . . . camouflages them and keeps us from seeing and evaluating a phenomenon which permeates our legal culture." Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 876 (1986). Indeed, with respect to the common law tradition, "legal fictions . . . preserve a notion of continuity with the past, yet . . . help short-circuit attempts to comprehend the complexity behind the assumptions a legal fiction conveys." *Id.* at 877.

More recently, Professor James Maxeiner has made a compelling (if somewhat hyperbolic) case that the legal profession, the legal academy, and the judiciary together have been responsible for creating and perpetuating the common-law myth beginning in the last quarter of the nineteenth century. *See* James R. Maxeiner, *A Government of Laws Not of Precedents 1776–1876: The Google Challenge to Common Law Myth*, 4 BRIT. J. AM. LEGAL STUD. 137, 140 (2015). But then-Professor Roscoe Pound developed the same argument—more convincingly—over a century ago in his masterful work *Common Law and Legislation*. *See* Pound, *supra* note 19, at 396–402 (concluding, with tongue in cheek, that "this wise and ancient rule of the common law [that statutes in derogation of common law should be strictly construed] is, in substance, an American product of the nineteenth century.").

emy.[25] Over the centuries the term has developed a multitude of meanings.[26] Professor Morris Cohen, after consulting a variety of lexicographical and historical resources, enumerated six distinct conceptual meanings associated with the term.[27] Summarized, they describe: (1) any community's general or central law, as distinguished from local laws and customs;[28] (2) the centralized body of law developed by the King's bench in England beginning in the twelfth century; (3) English law as developed by the King's ordinary bench, as distinguished from equity law developed by chancery courts and other specialized bodies of law, including admiralty and mercantile law; (4) the "whole law of England," as distinguished from the law of other nations, in particular those that follow the civil law tradition; (5) the rights, powers, prohibitions, and remedies derived from judicial decisions in England and America, as opposed to those derived from enacted statutes; and (6) with respect to the United States, the body of English legal doctrine comprising the foundation of American law and its later development.[29]

Virtually every definition has one feature in common: all distinguish common law from its counterparts by focusing on the

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25. *See* Bernard F. Deutsch, *Common Law*, 27 JURIST 37, 51 (1967) ("[C]ommon law is a relative term—it means many things to many people.").

26. *See* Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 LAW LIB. J. 13, 14 (1989) ("It is surprising to discover how the familiar words *the common law* have come to mean so many different things and to be treated in so many different ways."). Other scholars have similarly noted the confusion surrounding the meaning of the term "common law." *E.g.*, Nuno Garoupa & Andrew P. Morriss, *The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements*, 2012 U. ILL. L. REV. 1443, 1444 ("[N]either common law nor 'statutes' are well-specified terms within either the theoretical or the empirical literatures. They are used with different and diffuse meanings. As both types of law come in a wide variety of forms, this lack of definitional clarity contributes to a lack of precision in specifying models and testing hypotheses.").

27. *See* Cohen, *supra* note 26, at 17–18.

28. This was apparently the earliest meaning of the term, borrowed from canon law. "The phrase 'common law' was borrowed from the canonists in the thirteenth century, meaning, both in its lay and in its ecclesiastical use, general, as opposed to local, law and custom. The use of 'common law' in contrast to 'statute law' [came] later, arising from the circumstance that statutes were rare." Pound, *supra* note 19, at 390 n.1 (citing FREDERICK W. MAITLAND, CANON LAW IN THE CHURCH OF ENGLAND 4 (London, Methuen 1898)).

29. Cohen, *supra* note 26, at 18.

primary source of legal authority.[30] Common law relies primarily if not exclusively on written judicial decisions, sometimes known as "judge-made" law. In this Article, "common law" means the legal rights, duties, powers, prohibitions, and remedies derived exclusively from published caselaw—decisions of common law courts in the United States and England.[31] That definition distinguishes common law from the legal rights, duties, powers, prohibitions, and remedies derived from statutory enactments (including but not limited to codes), and other kinds of positive law enacted or adopted by governmental institutions with expressly granted lawmaking power. This defi-

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30. *See, e.g.*, Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 25 (2007) ("The common law, in its ideal, evolves from the decision of individual cases and resultant steady accretion and emendation of decision rules as new situations develop."); Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1, 40 (2003) ("The core distinction between civil law and common law is their approach to authoritative documents."). As one English scholar observed:

> Much ink has been spilled on the question "what is 'the common law,'" but for present purposes a brief and familiar answer can be given. The hallmark of a common law system is the importance accorded to the decisions of judges, and in particular appellate judges, as sources of law. So the common law is that part of the law which it is within the province of the courts themselves to establish.

Jack Beatson, *Has the Common Law a Future?*, 56 CAMBRIDGE L.J. 291, 295 (1997); *see also* Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 75 (2001) ("The common law is a law defined in terms of past judicial decisions . . . . [C]ommon law perpetually is in flux, always in a process of further becoming, developing, and transforming, as it cloaks itself with the habits of past decisions, tailored to the lines of the pending situation."). Somewhat less eloquently, a Canadian scholar posited:

> [C]ommon law adjudication is viewed as an exercise in principled justification in which the body of previous legal decisions is treated as an authoritative resource of available arguments, analogies, and axioms. Judges are considered to judge best when they distil [sic] the principled spirit of the past and rely upon it to develop the law in response to future demands.

Allan C. Hutchinson, *Work-in-Progress: Evolution and Common Law*, 11 TEX. WESLEYAN L. REV. 253, 254 (2005).

31. *Cf., e.g.*, *The Common Law and Civil Law Traditions* (2010), ROBBINS RELIGIOUS & CIV. L. COLLECTION, SCH. OF L. (BOALT HALL), U.C. BERKELEY, https://www.law.berkeley.edu/wp-content/uploads/2017/11/ CommonLaw-CivilLawTraditions.pdf [https://perma.cc/6EW8-KC5E] (defining "common law" as "generally *uncodified*" and therefore lacking a "comprehensive compilation of legal rules and statutes"; although it relies on "scattered statutes," common law is "largely based on [judicial] *precedent*").

nition combines the fifth and sixth meanings enumerated by Professor Cohen.[32]

A. Law in the American Colonies

From an historical perspective, "common law" refers to the corpus of English legal doctrine that represents the foundation of law in subnational jurisdictions colonized by English settlers, along with the subsequent development of that body of law.[33] But English common law was never unilaterally imposed on the American Colonies. As one scholar has observed, "[t]he evidence indicates that the British government, in practice, did not play a strong role in enforcing the common law in the colonies," and "English legal authorities never decided for themselves in theory the extent to which the common law should be enforced."[34] Certainly "there was no common law in America on 12 May 1607," when the first permanent English settlement was established.[35] Instead, over time, each colony and later each state decided for itself the extent to which its legal system would adopt English common law as its foundation.[36] Even Blackstone, the venerable defender of English common law, acknowledged that "the common law of England, as such, has no allowance or authority [in the American Colonies]."[37]

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32. *See supra* notes 26–29 and accompanying text.

33. *See* Cohen, *supra* note 26, at 18 (referring to the English Colonies in pre-revolutionary America).

34. *See* William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 420 (1968).

35. *Id.* at 395.

36. *See id.* at 401 ("[E]ach colony developed its own legal system."). Several of the Royal charters, including the Massachusetts Bay Charter of 1629, authorized colonists to adopt laws not repugnant to the laws and statutes (and sometimes customs) of England. *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 791–92 (1951). However, for various reasons, the historical record does not make clear whether any of these provisions were actually enforced or even the extent to which the colonists complied. *See id.* at 793–95.

37. Stoebuck, *supra* note 34, at 418 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *107–08); *see also* W. Hamilton Bryson, *Introduction*, *in* ESSAYS ON LEGAL EDUCATION IN 19TH CENTURY VIRGINIA 28 (W. Hamilton Bryson ed., 1998) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *105); William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 935–36 (1988) ("Blackstone thought that the common law did not extend to the 'American plantations.'" (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *109)).

In contrast to English common law, positive law played an influential role in American history well before the Revolution.[38] The earliest colonists rejected the "unwritten" constitution of England in favor of their own written "compacts," which were to become the forerunners of colonial, and later state and federal, constitutions.[39] The Mayflower Compact, which political scientists have analogized to the religious "covenants" adopted by the Protestant dissenters who colonized the northeastern states, made explicit reference to positive law.[40] John Winthrop wrote in 1635 of the colonists' concerns "that the [colonial] magistrates 'for want of positive laws, in many cases, might proceed according to their discretions.'"[41]

By 1648, a compilation of Massachusetts law was published that would provide the foundation for later statutory enactments in the Colonies.[42] Although the authors acknowledged that the *Book of the General Lawes and Libertyes* did not represent "a perfect body of laws sufficient to carry on the Government established for future times," the preface declared it a remark-

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38. *See* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 498 (2000) ("Colonial law was, to a striking extent, code law.").

39. *See* Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21, 40 (1990) ("The Declaration of Independence and the statements of fundamental rights, values and commitments found in almost all of our political covenants and compacts stand as the ground upon which the figure of the Constitution is traced.").

40. The Mayflower Compact reads in part as follows:

> We . . . solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid: And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience.

Id. at 25 (quoting The Mayflower Compact).

41. DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 21 (1958) (quoting John Winthrop). "The legislative history of early New England is the story of successive attempts to provide, first, a 'Magna Charta' for the inhabitants of Massachusetts Bay Colony and, later, a handy compilation of their laws." *Id.* Yet Boorstin opined that the colony's leaders were "not eager to embody its institutions in an all-embracing code." *Id.*

42. *Id.* at 23; *see* THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETS (1648) [hereinafter 1648 BOOK], http://puritanism.online.fr/puritanism/sources/lawslibertyes1648.html [https://perma.cc/PB2T-NNCW] (online transcription).

able feat indeed to have produced such a volume in such a short time, especially when compared to the then-incomplete or nonexistent law compilations of either England or the European states, even after centuries of effort.[43]

The 1648 compilation has been described as "the first legal code established by European colonists."[44] By its own terms, the publication was a true codification of general colonial law, systematically organized and indexed by subject matter for ease of reference, which superseded all previous laws of a comparable nature:

> These Lawes which were made successively in divers former years, we have reduced under severall heads in an alphabeticall method, that so they might the more readilye be found, & that the divers lawes concerning one matter being placed together the scope and intent of the whole and of every of them might the more easily be apprehended: we must confesse we have not been so exact in placing every law under its most proper title as we might, and would have been: the reason was our hasty indeavour to satisfie your longing expectation, and frequent complaints for want of such a volume to be published in print: wherin (upon every occasion) you might readily see the rule which you ought to walke by. And in this (we hope) you will finde satisfaction, by the help of the references under the severall heads, and the Table which we have added in the end. For such lawes and orders as are not of generall concernment we have not put them into this booke, but they remain still in force, and are to be seen in the booke of the Records of the Court, but all generall laws not heer inserted nor mentioned to be still of force are to be accounted repealed.[45]

The *Book* is the well-known product of what one scholar called "the earliest attempt to enact a kind of code" in the Colonies.[46] As the quoted passage reflects, Massachusetts colonists

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43. BOORSTIN, *supra* note 41, at 23 (quoting 1648 BOOK, Preface).

44. *Massachusetts Body of Liberties*, MASS. EXEC. OFFICE FOR ADMIN. & FIN., http://www.mass.gov/anf/research-and-tech/legal-and-legislative-resources/body-of-liberties.html [https://perma.cc/2VAD-3PAP] (last visited Mar. 29, 2019).

45. 1648 BOOK, *supra* note 42, Preface (addressed "to our beloved brethren and neighbours"). The compilation was revised in 1660 and again in 1672. *Massachusetts Body of Liberties*, *supra* note 44.

46. Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2 ST. LOUIS U. L.J. 335, 347 (1953) (citing the 1648 BOOK but noting that it was not truly "a codifi-

pressed for codification of colonial law in part as an expression of their concern about royal magistrates wielding arbitrary authority.[47]

Less well known is a remarkable 1661 preamble to an enactment in Jamestown, the earliest permanent English settlement, located on the east coast of what would become colonial Virginia.[48] Its wording reflects many of the features of codification as enumerated and described by comparative law scholars in modern times:[49]

> Whereas, the late unhappy distractions causing frequent changes in the government of this country, and those produced soe many alterations in the lawes that the people knew not well what to obey nor the judge what to punish, by which meanes injustice was hardly to bee avoyded, and the just freedome of the people by the incertainty and licentiousness of the lawes hardly to bee preserved. This assembly taking the same into their serious consideration, . . . have by settling the laws diligently endeavored to prevent the like inconveniencies, by causing the whole body of the laws to be reviewed, all unnecessary acts and chiefly such as might keep memory our inforced deviation from his majesties obedience, to be repealed, and expunged, and those that are in force to be brought into one volume, and at least any prejudice might arise by the ignorance of the times from whence those acts were in force, they have added the dates of every act, to the end that courts might rightly administer justice and give sentence according to law for anything happening at any time since any law was in force, and have also endeavored in all things (as neere as the capacity and constitution of this country would admitt) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all due obedience and reverence. And

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cation in the modern meaning of the word," suggesting instead that it was akin to a restatement); *see also* James R. Maxeiner, *Costs of No Codes*, 31 MISS. C. L. REV. 363, 375 (2013) (describing the 1648 BOOK as one example of early American codes).

47. *See* Lauren Benton & Kathryn Walker, *Law for the Empire:* The Common Law in Colonial America *and the Problem of Legal Diversity*, 89 CHI.-KENT L. REV. 937, 939 (2014) (discussing Volumes I & II of WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA (2008 & 2012)).

48. Louis E. Zuckerman, *The Common Law of America*, 53 AM. L. REV. 577, 581 (1919).

49. *See infra* notes 354–59 and accompanying text (describing the features of codification that distinguish it from other methods and forms of legislation).

> that the laws made by us are intended by us, but as breife memorialls of that which the capacity of our courts is utterly unabled to collect out of such vast volumes . . . .
>
> Be it therefore enacted by the Governor Councell and Burgesses of this Grand Assembly, That all the following laws continued or made by this Assembly shall hereafter be reputed the laws of this country by which all courts of judicature are to proceed in giveing sentence and to which all persons are strictly required to yeild all due obedience, and that all other acts not in this collection mentioned be to all intents and purposes utterly abrogated and repealed unles suite for anything done be commenced when a lawe now repealed was in force, in which case the produceing that law shall excuse any person for doeing anything according to the tenor thereof.[50]

Like the Massachusetts *Book*, the Jamestown preamble reflects the colonists' concerns about the instability of colonial government and the resulting uncertainty of laws by which they would be governed.[51] Those concerns motivated them to simplify and codify in one volume the laws still in force, along with the date of each enactment. Although the preamble professed allegiance to "those excellent and often refined laws of England," the colonists enacted their own laws as "breife memorialls" of English laws that were in "such vast volumes" as to be effectively inaccessible to the colonists and the royal magistrates.[52] The passage reflects the earliest American colonists' desire for a simplified, readily accessible compilation of laws then in force—in effect, a codification. Any laws not included in the volume of codified laws were declared "to all intents and purposes utterly abrogated and repealed."[53]

In the South, a practical problem arose that starkly illustrates colonial Virginians' willingness to deviate from English common law when deemed necessary to suit their needs.[54] Under

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50. Zuckerman, *supra* note 48, at 581–82 (quoting 2 HENING'S STATUTES AT LARGE 41).

51. *See* Benton & Walker, *supra* note 47, at 939 ("In Virginia, the politics of property created incentives for clear legal rules.").

52. Zuckerman, *supra* note 48, at 581–82 (quoting 2 HENING'S STATUTES AT LARGE 41).

53. *Id.*

54. *See* Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 560 (2004) ("The issue arose . . . because white men were fathering children with black

the English common law primogeniture system, a child's lineage depended on the father's bloodline, even those born out of wedlock.[55] However, that would have meant that the children of enslaved mothers and slave-owning fathers could claim freedom on the basis of English common law—and some did.[56] The Virginia colonial assembly found a solution by borrowing the civilian law doctrine of *partus sequitur ventrum*, which made the legal status of a "mulatto" child dependent on the mother's legal status.[57] The law was enacted in December 1662, apparently in part to discourage slaveholders from fathering mixed-race children:

> WHEREAS some doubts have arrisen whether children got by any Englishman upon a Negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly,* that all children borne in this country shalbe held bond or free only according to the condition of the mother, *And* that if any christian shall committ ffornication with a Negro man or woman, hee or shee soe offending shall pay double the ffines imposed by the former act.[58]

Most other colonies (and later states) that relied on the institution of slavery would follow Virginia's example by enacting

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women, creating a pressing social problem as Virginia eased into a society in which blackness meant slavery and whiteness meant freedom.").

55. PAMELA BARNES CRAIG, *State Law Resources*, *in* AMERICAN WOMEN: RESOURCES FROM THE LAW LIBRARY (Barbara Bavis & Janeen Williams eds., Library of Congress Mar. 19, 2019), https://guides.loc.gov/american-women-law/state-laws#s-lg-box-wrapper-22569020 [https://perma.cc/NFY9-PHZP] (under the heading "Property Law" select "Slavery and Indentured Servants").

56. *See* Warren M. Billings, *The Cases of Fernando and Elizabeth Key: A Note on the Status of Blacks in Seventeenth-Century Virginia*, 30 WM. & MARY Q. 467, 468–69 (1973) (telling the tale of Elizabeth Key, an enslaved mulatto woman (fathered by white slaveholder Thomas Key, then a member of the colonial assembly), who in 1655 filed a lawsuit seeking her freedom based in part on the English common law rule); *id.* at 472 ("Elizabeth Key's fate suggests a customary practice in some courts of freeing from slavery mulattoes who could prove English paternity. Judges who ruled favorably in these cases evidently rested their decision upon the common law dictum that a child inherited his or her father's condition.").

57. "ESTEEMED BOOKES OF LAWE" AND THE LEGAL CULTURE OF EARLY VIRGINIA 22 (Warren M. Billings & Brent Tarter eds., 2017).

58. CRAIG, *supra* note 55 (quoting 2 HENING'S STATUTES AT LARGE 170); *see* Billings, *supra* note 56, at 473 ("The act's preamble demonstrates that litigation like the Elizabeth Key case had caused the Assembly to rectify the inconsistencies regarding the legal use of the word *slave*.").

similar statutes.[59] One consequence, whether intended or not, was that white slaveholders had a financial incentive to impregnate female slaves (or look the other way when other white men did so) because the offspring simply added to the masters' slave holdings. This and similar laws "would have a profound effect on the continuance of slavery, especially after the slave trade was abolished—and on the future descendants of these women."[60]

As these examples illustrate, even when colonists professed allegiance to the Crown, they were quite willing, when expedient, to deviate from English common law by legislating to address unique local conditions, protect property, or advance economic interests.[61]

Colonial courts were generally established by royal governors, who represented the British Crown.[62] Even chancery

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59. CRAIG, *supra* note 55; *see* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 47–49 (1996); *see also* ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY 46–47 (2009). Gordon-Reed explains the deeply troubling implications of these and similar statutes for the seven children of Sally Hemings and Thomas Jefferson, as well as other mixed-race children fathered by white slaveholders. The modern concept of rape was unknown with respect to a white slaveholder's conduct with his own female "property," whether or not the sexual relationships were consensual. *Id.*

60. CRAIG, *supra* note 55; *see* Gillmer, *supra* note 54, at 560–61 ("[T]he rule worked as much to the economic advantage of the planter class as it did to perpetuate white dominance and the patriarchal system, ensuring as it did that slave mothers, no matter who the father, would only give birth to slave children.").

61. *See* Billings, *supra* note 56, at 473–74 (explaining that overriding English common law by enacting a civil law doctrine "broke with tradition, thereby freeing Virginia lawmakers from the past's restraining influences," illustrating "how the legislators wished to adapt their legal heritage to a new situation"). Indeed, over the last four decades legal scholars have documented the significant influence of colonial slave codes in "provid[ing] the foundation for the initial racial classification system in America." Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 296–97 (2017); *see also* Billings, *supra*, at 474 ("[T]he [colonial Virginia] laws also became the precedents for future legislation that governed an emerging slave system."); William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1773–90 (1995) (discussing origins of "slave law" in the American colonies and enumerating examples). *See generally* MORRIS, *supra* note 59.

62. *See* Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 262 (1967) (explaining that throughout most of the seventeenth century, the King had exclusive prerogative to establish courts; in the Colonies, the King's prerogatives were exercised by royal governors, typically authorized by royal charter); *see also* Hall, *supra* note 36, at 797 n.28 ("One of the most critical legal problems of the times was the question of the maintenance of the royal prerogative in the American colonies[, including] the broad questions of what English

courts, in the handful of colonies where established, were under the control of the royal governors.[63] Not surprisingly, colonial courts were a constant source of complaints to the Crown.[64] Complaints ranged from concerns about delays, irregular procedure, and jury tampering to the lack of qualified judges and court personnel.[65] One complaint even alleged that a royal governor had fraudulently altered court records to contravene the court's opinion.[66]

As the colonial period drew to a close, the Declaration of Independence asserted that "these Colonies . . . are Absolved from all Allegiance to the British Crown," declaring that "all political connection between them and the State of Great Britain is and ought to be totally dissolved."[67] By these emphatic words, the Declaration surely did *not* mean that the colonists would yield their independence to the yoke of English common law made by colonial judges under direct supervision of royal governors, themselves merely extensions of the British Crown.

Indeed, history reveals that one of the many unresolved issues at the time of signing the Declaration was the source of law early American courts would apply to decide legal disputes among the colonists:[68]

> Across the colonies, settlers sought to establish clear and written legal rules. Many were anxious to limit the prerogatives of colonial governors or local elites, while most recognized that the absence of established precedents meant that their communities could not rely solely on the slow devel-

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general law was applicable and to what extent acts of parliament governed . . . ."); Gordon S. Wood, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 49, 50–51 (2018) (discussing the desire of American colonists at the time of the Revolution to strictly limit royal magistrates' discretion by simplifying and codifying portions of the common law; "Once the legislatures had clarified and written down the laws, then judges would presumably no longer have any justification for following their own inclinations and pleasure in interpreting the law . . . .").

63. *See* Surrency, *supra* note 62, at 271.

64. *See id.* at 254.

65. *Id.*

66. *Id.* at 255.

67. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

68. *See* Hall, *supra* note 36, at 798 (acknowledging the unresolved issue at the time of signing the Declaration as to the applicable law American courts would use to decide disputes).

> opment of an indigenous common law . . . . Moreover, as disputes with England arose and recurred, the colonists often sought to defend their claimed rights and prerogatives by appealing to the provisions of their colonial charters. Then, as they gradually recognized the need for increased intercolonial cooperation, they produced a series of charters designed to accomplish that goal [including] the Constitution itself. After Independence, too, they altered their colonial charters or drafted—and frequently redrafted—constitutions for the governments of the individual states. In codifying their laws, appealing to charter rights, and drafting state and national constitutions, [the American colonists] pursued a kind of legal positivist enterprise, seeking to establish formal "sources" of an authoritative law that was known, written, accessible, and clearly settled.[69]

Another scholar observed, "At an early date there seems to have prevailed in every [colonial] settlement a popular demand for codification of the law."[70]

Not long after the Declaration of Independence was signed, however, Virginia's colonial assembly enacted an ordinance that would become the foundation for similar statutes in a few other colonies[71] and later many states:[72]

> [T]he common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations and resolutions of the general convention, shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of the colony.[73]

But the majority of the thirteen Colonies enacted reception statutes similar in wording to the original New Jersey Constitution, which declared that "the common law of England, as well

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69. Purcell, *supra* note 18, at 1462–63 (footnotes omitted). Nevertheless, the author added, "Americans never committed to the completeness and exclusivity of written laws." *Id.* at 1463.

70. Hall, *supra* note 36, at 795.

71. *See id.* at 798. Georgia and Rhode Island enacted reception statutes similar to Virginia's ordinance, with slight variations. *Id.* at 798 n.32.

72. *Id.* at 798.

73. *Id.* (quoting 9 LAWS OF VIRGINIA 126 (Hening 1821)).

as so much of the statute law, as have been heretofore practiced in this colony" would "remain in force, until they shall be altered by a future law . . . ."[74] Compared to Virginia's ordinance, these provisions were more restrictive, essentially incorporating only those aspects of English law that had already been "practiced" in each colony, which of course varied considerably.[75]

Apparently, the codification trend in colonial America ceased by the mid-eighteenth century, perhaps in part because of the increasing influx of lawyers trained in England's common law legal tradition.[76] By then, as English-trained lawyers arrived in the Colonies and the Crown was more apt to set aside colonial legislation as contrary to English law, English common law had achieved enough of a foothold in colonial soil "to withstand the popular hostility to England and anything English . . . which reached its greatest outcry during the Revolutionary War and the post-Revolutionary Period."[77]

B. *Post-Revolution Reception Statutes*

After the Revolution, several former colonies enacted statutes or constitutions explicitly adopting English common law, at least in part.[78] Some simply continued pre–Revolutionary War statutes enacted during colonial times. The earliest colonies to do so were South Carolina in 1712 and North Carolina in 1715, both declaring English common law to be in force.[79]

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74. Hall, *supra* note 36, at 799 (quoting N.J. CONST. of 1776, art. XXII). Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina, and Pennsylvania followed the approach outlined in the New Jersey Constitution. *Id.*

75. *See id.* at 800.

76. *See* Maxeiner, *supra* note 46, at 375; *see also* Catherine Skinner, *Codification and the Common Law,* 11 EURO. J.L. REFORM 225, 238 (2009) ("Despite some early rudimentary codifying legislation and a political desire to break away from the legal system of the old world, American legal culture was firmly anchored in the English common law tradition by the [nineteenth] century.").

77. Hall, *supra* note 36, at 797.

78. *See id.* at 798–800. The author of a 1921 Carnegie Foundation study of American legal education observed, "It is hardly an exaggeration to say that what we actually took over from England was simply Blackstone." REED, *supra* note 17, at 111.

79. *See* Hall, *supra* note 36, at 796 n.22; *see also* S.C. CODE ANN. § 14-1-50 (originally enacted 1712).

But some states, including Connecticut, never enacted reception statutes or comparable constitutional provisions.[80] Even those that did "received" English common law only to the extent it was deemed suitable to American conditions.[81] A few states even enacted statutes or court rules prohibiting the citation of English legal authorities in state courts.[82] Moreover, neither the federal Constitution nor any congressional enactment ever "received" English common law.[83] One scholar concluded that "there was an incomplete acceptance in [colonial] America of English legal principles, and [the] indigenous law which de-

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80. Connecticut was the only one of the thirteen original Colonies that never adopted a reception statute or any comparable state constitutional provision. *See* Hall, *supra* note 36, at 800; *id.* at 821–22 (noting that a minority of states west of the Allegheny Mountains followed Connecticut's practice by leaving it to the courts to decide the scope of the states' reception of English common law in the absence of controlling legislation). Neither Michigan nor Minnesota enacted any reception statute or constitutional provision, although in each of those states the courts took it upon themselves to adopt English common law without any sort of legislative authority. *Id.* at 802–03.

81. *Id.* at 805; *see* Seminole Tribe v. Florida, 517 U.S. 44, 132, 136–37 (1996) (Souter, J., dissenting); Van Ness v. Pacard, 27 U.S. 137, 144 (1829) ("The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."); *see also* Hall, *supra* note 36, at 825 ("[F]rom colonial times up to the present day, American jurists have declared that English law bound us only so far as suited or adaptable to our local circumstances."); Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 575–76 (2016).

82. *See* Hall, *supra* note 36, at 806 (referring to Pennsylvania, New Jersey, and Kentucky statutes and New Hampshire court rules).

83. *See* Young, *supra* note 81, at 576 (noting that the Framers debated but rejected such a provision; "[n]or is there any federal statute receiving the common law *en masse* into national law . . . ."); Zuckerman, *supra* note 48, at 578 ("[O]ur Federal Government has never adopted or promulgated a common law."); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."); Wheaton v. Peters, 33 U.S. 591, 658 (1834) ("It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.").

veloped in America remained as a significant source of law after the Revolution."[84]

The Framers sought to strike a balance of powers among the three branches of American government, emphasizing Congress's plenary authority to legislate.[85] James Madison, writing about the Constitution's distribution of power among the departments and the need for checks and balances, observed that "[i]n republican government, the legislative authority, necessarily, predominates,"[86] which provided the rationale for dividing Congress into two chambers. The Constitution expressly embodies the principle that the republican legislature is the nation's lawmaker.[87] No evidence exists that the Founders designed the American democracy with the idea that judges and judge-made law would reign supreme. Nor has Congress ever enacted a statute adopting, incorporating, or otherwise endorsing English common law.[88] To the contrary, the nation was founded on the novel premise that the People—through their

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84. Hall, *supra* note 36, at 796.

85. Indeed, as one scholar observed in 1836, the U.S. Constitution itself is an exemplar of legislation.

> Our Constitution seems to be a happy exemplar of the practicableness and utility of philosophical codefication [sic], which ought never to have been understood by any one, as aiming at the exclusion of judicial interpretation, or the just application of the concisely expressed law to numerous facts, and to their infinite combinations and modifications. If a code, of small extent, can be so formed as to embrace within its terms, or obvious spirit, every circumstance that shall arise during the lapse of ages, its authors have proved themselves wise legislators; have conferred on their country a great and lasting benefit; and established in the science of legislation, a truth of the highest importance: and this . . . has been eminently accomplished in the Constitution of these United States.

2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 566 (Philadelphia, Thomas, Cowperthwait & Co. 1836).

86. THE FEDERALIST NO. 51, at 253 (James Madison) (Terence Ball ed., 2003).

87. U.S. CONST. art I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); *see* THE FEDERALIST NO. 73, at 359 (Alexander Hamilton) (Terence Ball ed., 2003) (referring to "[t]he superior weight and influence of the legislative body in a free government"). *But see* Holland, *supra* note 17, at 151–52 ("The commitment of the American legal system to the rule of law and to English common law principles is reflected in the United States Constitution. [Its] underlying spirit . . . is the common law belief expressed to James I by Jamestown founder, Edwin Sandys—that certain fundamental rights are immutable and must not be subordinated to the changing will of the executive or the legislature.").

88. *See* Young, *supra* note 81, at 576.

elected representatives—would enact the laws by which they would be governed.[89]

The fact that the nation has never been a true "common law" legal system does not mean it qualifies as a civil law system.[90] Without question, the United States federal legal system evolved primarily from a common law heritage and continues in many ways to reflect its cultural origins.[91] What it does mean

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89. *E.g.*, THE FEDERALIST NO. 37, at 170 (James Madison) (Terence Ball ed., 2003) ("The genius of Republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people . . . ."); THE FEDERALIST NO. 84, at 418 (Alexander Hamilton) (Terence Ball ed., 2003) (noting that the constitutional prohibition on titles of nobility is "the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people").

Writing about "the scheme of government established by the Constitution of the United States," one scholar wrote:

> The independent sovereign is the state. By the term *sovereign* is meant the person or body of persons within the territory of a state, over whom there is, politically, no superior power. Sovereignty is that ultimate power of governing a people from which there is no appeal and beyond which there is nothing but revolution. In the United States this independent sovereignty rests with the people of the United States . . . . And the sublime declaration of the Constitution is: "We, the People of the United States . . . do ordain and establish this Constitution for the United States of America."

Charles Willis Needham, *Disappearance of the Educational System of the Inns of Court*, 69 U. PA. L. REV. 201, 236 (1921) (quoting U.S. CONST. pmbl.).

90. The terms are by no means dichotomous. Scholars have long noted the oversimplification of the classic taxonomy of legal systems. *See, e.g.*, Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1091 (1999) (identifying several flaws in the traditional classification methodology used in comparative law); *id.* at 1093 ("conventional taxonomies tend to focus on a limited number of comparative variables"); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 10–11 (1997) (critiquing current classifications of legal systems as "largely Euro-American centric" and in need of revision; noting that the comparative law community "has rethought the traditional distinction between common law and civil law by emphasizing similarities rather than differences" and that "the sharp contrast of this traditional distinction among legal systems has been fading"); *see also* Roscoe Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361, 369 (1913) (explaining that neither common law nor civil law, the two traditional theories, "expresses the whole truth").

91. *See, e.g.*, Richard K. Neumann, Jr., *Legislation's Culture*, 119 W. VA. L. REV. 397, 442 (2016) ("Legislatures in common law countries have [traditionally used] fussy, over-conceptualized statute-drafting to subdue courts [from interpreting] statutes to mean what the judges would have voted for if they had been in the legislature themselves."); *see also* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 603 (2002)

is that the American legal system has evolved and matured over the last two centuries to the point that it has become *more like* civil law systems than it is *unlike* them.

State and federal constitutions in the United States grant plenary lawmaking power to *legislatures*, not courts. If a written rule of law applies to a legal issue that is properly before a court, it is bound to interpret and enforce the rule of law to resolve the issue, so long as the enactment does not conflict with written constitutional constraints.[92] Such a conflict may occur either because the law conflicts with the substance of the federal or a state constitution, or because the process of its enactment or adoption exceeded the lawmaking power conferred (directly or indirectly) by a written constitution. Nothing in the federal Constitution or any act of Congress expressly authorizes the Supreme Court—or any other federal court, for that matter—to find or create the law of the land.[93] While federal courts

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(quoting one legislative drafter who jokingly explained that the statute-drafter's goal is to "put[] a federal judge into a box with a wall so high he can't get out"); Jane S. Schacter, *Putting the Politics of "Judicial Activism" in Historical Perspective*, 2017 SUP. CT. REV. 209, 258 (describing "court-curbing legislation" as a "congressional vehicle for political responses to perceived judicial activism," meaning legislation "designed to modify judicial behavior in various ways").

92. Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401, 425 (1968) ("If [a statute] is constitutional it governs all cases within its scope, regardless of its wisdom. The very constraint upon a judge to follow the legislative policy in such cases precludes him from even considering alternatives. Only when a case is not governed by a statute is the court free to work out its own solution."); *see* DOUGLAS E. EDLIN, JUDGES AND UNJUST LAWS: COMMON LAW CONSTITUTIONALISM AND THE FOUNDATIONS OF JUDICIAL REVIEW 6–7 (2008).

> Just as stare decisis requires judges to apply case law, legislative supremacy requires judges to enforce statutes . . . . [T]he judicial recognition of legislative authority to enact binding law results in the force of legislative supremacy as a legal constraint and not just as a political fact . . . . [A]ttempts to avoid legislative supremacy are merely attempts to reconstitute legislative supremacy, usually through the pretext of statutory interpretation, rather than efforts to meet the doctrine head-on.

EDLIN, *supra*, at 6–7. Edlin argues that judges can supersede binding statutes only if warranted by the "judicial obligation to develop the law." *Id.* at 6.

93. To the contrary, Article I grants to Congress the power to "make all laws . . . necessary and proper for . . . execut[ing] the foregoing powers, and all such other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. CONST. art. I, § 8, cl. 18; *see, e.g.*, Dickerson v. United States, 530 U.S. 428, 440–41 n.6 (2000) (holding that because *Miranda* was grounded in the Constitution, a federal statute governing admissibility of "voluntary" confessions was unconstitutional as authorizing an alternative procedure less effective than the Court-prescribed *Miranda* warning in

have the authority to study and recommend court rules to govern procedure in the federal courts, that authority too is a creature of *statute*—specifically, the Judiciary Acts beginning in 1789.[94] Even today, any procedural rules developed by the federal courts are subject to approval or modification by Congress.[95]

Courts are instrumental in interpreting, construing, and applying written law,[96] and in filling in the "gaps"—the diminishing common law white space on the legal canvas overlaid by the multi-faceted tapestry of local, state, and federal written laws.[97] As American law becomes increasingly associated with

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protecting Fifth Amendment rights). In other words, *Dickerson* did not strike down the federal statute because it *differed* from the prophylactic rule of *Miranda,* but rather because the statutory alternative did not protect arrestees from compelled confessions *at least as effectively* as the *Miranda* warning. *See also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."). The Supreme Court's power of judicial review is grounded not in common law but in the Constitution itself, which expressly empowers the Court to decide "all cases, in law and equity" arising under the federal Constitution and statutes. *See* U.S. CONST. art. III, § 2.

94. *See, e.g.*, Judiciary Act of 1789, ch. 20, 1 Stat. 73. In 1934, Congress enacted the Rules Enabling Act, now codified at 28 U.S.C. §§ 2071–2077 (2012), which expressly authorized the federal courts to formulate procedural rules. Assuming statutory procedures are followed, rules promulgated by the federal courts have the force of law. *How the Rulemaking Process Works*, U.S. COURTS, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works [https://perma.cc/R6KR-9UBP] (last visited Mar. 29, 2019). The Conference of Senior Circuit Judges, later renamed the Judicial Conference of the United States, was first established in 1922 by congressional enactment. *Governance & the Judicial Conference*, U.S. COURTS, http://www.uscourts.gov/about-federal-courts/governance-judicial-conference [https://perma.cc/ZP4R-GKE4] (last visited Mar. 29, 2019); *Judicial Conference of the United States: Members*, FED. JUD. CTR., https://www.fjc.gov/history/ administration/judicial-conference-united-states-members [https://perma.cc/2AZR-JNPP] (last visited Mar. 29, 2019); *see* 28 U.S.C. § 331 (2012) (establishing Judicial Conference of the United States and designating its powers and duties).

95. *See* 28 U.S.C. §§ 2071–2075 (2012) (authorizing United States Judicial Conference to promulgate rules governing federal court procedure, evidence, and bankruptcy cases, subject to amendment or rejection by Congress).

96. *See* Frank Gahan, *The Codification of Law,* 8 TRANSACTIONS GROTIUS SOC'Y 107, 108 (1922) ("Case-law, interpretation, and development cannot be shut out, however skilful [sic] the draughtsman, as the history of the French Code shows.").

97. *See* J. Lyn Entrikin & Richard K. Neumann Jr., *Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More*, 55 DUQ. L. REV. 9, 38 (2017) ("The courts approached early legislation as 'situational edicts' overlaying a common

statutes and codes, the courts also have an essential role in harmonizing statutory enactments with one another and with what remains of the diminishing common law background.[98] For example, to what extent does a statute expressly or implicitly supplant its common law forebears?[99] To what extent does a statutory enactment simply restate and clarify a common law rule? To what extent does a statute intentionally address a novel legal issue that judge-made rules are ill-equipped to address on a piecemeal, case-by-case basis? These are precisely the kinds of questions judges must answer as they strive to fulfill their "role to make sense rather than nonsense out of the *corpus juris*."[100]

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law canvas, and traditional canons of statutory interpretation treated them accordingly."); Grant Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 466 (1967) (uniform commercial codes "were to be, so to say, engrafted on the parent stock of the common law in the hope that graft and stock would continue, both vital, to grow together"); Andrew Kull, *Common-Law Restitution and the Madoff Liquidation*, 92 B.U. L. REV. 939, 941 (2012) (referring to the "common-law background and its statutory overlay").

98. *See* Gilmore, *supra* note 97, at 472 (referring to the discrepancies and self-contradictions in the U.C.C.: "Thus the courts will still have work to do in reconciling the irreconcilable, harmonizing the disharmonies and so on. In this there is nothing surprising: it is what judges are paid to do."); Traynor, *supra* note 92, at 402 ("The hydraheaded problem is how to synchronize [statutes] with a going system of common law."); *see also* Beatson, *supra* note 30, at 313.

> It is the task of commentators and judges to realise "the idea of a unified system of judge made and statute law woven into a seamless web by the processes of adjudication." Given the size of the statute book this is no easy task . . . . The enterprise will require great care if we are not to lose sight of the wood for all the trees. But unless we do so, studying the common law will eventually be like shining an ever brighter light on an ever shrinking object.

Id. See generally The Honorable Mr. Justice Scarman, *Codification and Judge-Made Law: A Problem of Coexistence*, 42 IND. L.J. 355 (1967) (discussing the anticipated impact of England's Law Commission, established in 1965, on English common law).

99. "Where a statute governs, it replaces the common law, although common law principle may, of course, be relevant in interpreting it." Beatson, *supra* note 30, at 302. *But cf.* Denise E. Antolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,114, 10,127 (2008) ("Despite the advent of modern environmental statutes in the 1970s, most common law remedies remain viable and vital, and have been used with significant success over the past three decades.").

100. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991).

Although American courts certainly perform a critical role when they presume to declare "what the law is"[101] by interpreting, applying, and harmonizing the law,[102] they no longer purport to make substantive law.[103] If they ever did, it was the re-

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101. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* But even Chief Justice John Marshall's premise, often recited in justification of the judicial power of American courts to declare "what the law is," overstates his point. *See, e.g.*, Edward Dumbauld, *Dissenting Opinions in International Adjudication*, 90 U. PA. L. REV. 929, 933 & n.31 (1942) (quoting the *Marbury* passage in support of the "Anglo-American" notion that "the very essence of the judicial office [is] to ascertain and determine what the law is").

The immediate context of Marshall's often-quoted statement belies any judicial intent that the Court assumed the power to *create* the law as opposed to deciding *which of two conflicting laws to apply*. Immediately after the quoted phrase, Marshall explained his point clearly: "Those who *apply the rule* to particular cases, must of necessity *expound and interpret that rule*. If two *laws* conflict with each other, the courts must decide on the operation of each." *Marbury*, 5 U.S. (1 Cranch) at 177 (emphases added). The judicial functions of resolving issues in applying written rules, and resolving conflicts between "laws," are both perfectly consistent with the approach federal courts could be expected to take in an evolving democracy focused on the "rule of law." Indeed, *Marbury* held that a federal statute, specifically a provision of the Judiciary Act of 1789, was void because it conflicted with a provision of the written Constitution.

> [T]he framers of the [C]onstitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature . . . . The [judicial] oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject [by requiring judges to discharge duties consistent with] "*the [C]onstitution*, and laws of the United States." . . .
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> [I]n declaring what shall be the *supreme* law of the land, the *[C]onstitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the [C]onstitution, have that rank.
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> Thus, the particular phraseology of the [C]onstitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the [C]onstitution is void; and that *courts*, as well as other departments, are bound by that instrument.

Id. at 179–80. But the principle of judicial review to resolve conflicts between a statute and the Constitution—both examples of *positive* law—is a far cry from assuming judicial power to unilaterally *create* the law itself.

102. One scholar noted, "That a code necessarily needs interpretation does not lessen its accomplishment." Jeremy M. Miller, *A Comparative Analysis of Codification*, 12 W. ST. U. L. REV. 93, 111 (1984).

103. James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, 65 J. LEGAL EDUC. 3, 8 (2015) ("[U]nlike the practice of law in the nineteenth and early twentieth centuries, . . . common law developments tend to be interstitial to statutes and regulations rather than part of a steady or uninterrupted flow of judicial decisions.").

sult of a nascent legal system that declared its independence from the mother country and threw off the shackles of its monarchy, while borrowing English law (both written and unwritten) until such time as Congress and state legislatures could map out America's own course of representative democracy.

C. The Myth of American Common Law

The notion that the United States legal system revolves around a body of common law—meaning "unwritten" judge-made law descended from an amorphous body of English law—is deeply rooted in American jurisprudence.[104] But that

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104. *See, e.g.*, Murray v. Chicago & N.W. Ry. Co., 92 F. 868 (8th Cir. 1899).

> For more than a century the federal courts, in the absence of a statute or other obligatory rule of decision, have had recourse to the common law for rules of decision in the trial of causes in those courts, and have, in cases where that law furnished an appropriate rule of decision, rested their judgments upon it. The same may be said of the admiralty law, the law merchant, the principles of equity jurisprudence, and, in a restricted and qualified sense, of the civil law. It never was supposed that the federal courts were denied the privilege of resorting to any or all of these sources of information for the purpose of enlightening their judgment upon any question presented for their determination in the trial of a cause. It has always been assumed that the federal courts were endowed with a power and jurisdiction adequate to the decision of every cause, and every question in a cause, presented for their consideration, and of applying to their solution and decision any rule of the common law, admiralty law, equity law, or civil law applicable to the case, and that would aid them in reaching a just result, which is the end for which courts were created. If a case is presented not covered by any law, written or unwritten, their powers are adequate, and it is their duty to adopt such rule of decision as right and justice in the particular case seem to demand. It is true that in such a case the decision makes the law, and not the law the decision, but this is the way the common law itself was made and the process is still going on. A case of first impression, rightly decided to-day, centuries hence will be common law, though not a part of that body of law now called by that name. It was implied in the very act of their creation that the federal courts would appeal to the common law as their guide in cases where it was applicable.

Id. at 870; *see also* Holland, *supra* note 17, at 138 ("[H]istory reflects that the common denominator of the Anglo-American legal system is the English common law. The fundamental principles found in the Magna Carta, 1628 Petition of Right, 1689 English Bill of Rights, United States' Bill of Rights, and the rights set forth in our respective written and unwritten constitutions all have common law origins."). *But see* Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (recognizing that "the prevailing conception of the common law has changed since 1789").

> [Then,] the accepted conception was of the common law as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." Now, however, in most

myth has long outlived its useful life.[105] It is high time for the legal academy to acknowledge that the American legal system, like that of nearly every other developed nation in the world, relies almost exclusively on positive law—*written* laws in the form of constitutions, codes, statutes, and rules.[106] And except

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> cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.

Id. (internal citation omitted).

105. *See, e.g.*, Maxeiner, *supra* note 24, at 140. Indeed, as long ago as 1922, an American legal scholar acknowledged the longstanding myth of English common law:

> Every American knows that the common law of England is the common law of the United States. But not every American knows that England has very largely repudiated its common law, and that we today occupy the uncertain position of having adopted a system of laws from England that [has] completely broken down in that country, having been discarded by the English more than fifty years ago. We commonly cite in our courts English laws that would not be accepted in any part of England.

JAMES HANNIBAL CLANCEY, THE LAW AND ITS SORROWS: AN EXOTERIC OF OUR LEGAL WRONGS 73 (1922); *see* Wagner, *supra* note 46, at 339 (noting that by 1953 it was "no longer disputed . . . in England that Parliament has the primary role in law-making, [but] the traditional approach [of courts as primary lawmakers] seems to be dominant in the United States even now"); *see also* Stone, *supra* note 20, at 305 ("[I]n this day and age the amount of unwritten law is infinitesimal as compared to written law."); Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12 (1936) ("[It is] increasingly our habit to look for the formulation of legal doctrine suited to new situations, not to the courts, as through most of the life of the common law, but to the legislatures, and the primary record of the most important changes in the law in our own time is to be found in the statute books.").

To illustrate the absurdity of American courts' undue reliance on English common law, Clancey cited *Rogers v. Brooks*, 30 Ark. 612 (1875). One of the issues on appeal was whether the trial court had erred when it refused to suppress depositions taken on July 4th—Independence Day—over the objection of opposing counsel. The court rejected the argument:

> The fourth of July was unknown to the common law as a holliday [sic], and though venerated by the Americans, as a memorable day in their political history, is, perhaps, but little reverenced by the English, from whom we obtained the common law. It is a legal day (except when it happens to fall on Sunday) for the transaction of all business, unless otherwise provided by statute . . . . We have no statute prohibiting the taking of depositions on the fourth of July, though it is not in good taste for litigants to fix upon that day for taking their depositions, unless required by some emergency.

CLANCEY, *supra*, at 629.

106. *See* George L. Priest, *The Constitutionality of State Tort Reform Legislation and* Lochner, 31 SETON HALL L. REV. 683, 686 (2001) ("[T]he survival of the myth of the sacred common law is somewhat surprising because we have witnessed over the last century so many areas in which legislation at the state or federal level has

for court rules, the written laws that comprise our modern corpus of law are not "made" or even "discovered" by judges.[107] Instead, they are enacted and adopted by various governmental entities that Congress and state legislatures have constitutionally authorized, either directly or indirectly, to "make" the law by legislative delegation of their respective plenary lawmaking powers.[108] That many jurists and scholars continue to ignore that truth does not make it any less true.[109]

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preempted or displaced common law rules."). Professor Priest attempted to explain why the myth has persisted:

> There is a long and venerable intellectual tradition [in the United States] of regarding the common law as in some way sacred, as autonomous and independent of legislation, not simply in terms of content but in an almost religious sense. Many regard the common law as somehow sacred in contradistinction to political legislation regarded as profane.

Id. at 684.

Even England, the progenitor of the common law as that term is generally understood, has long since abandoned the myth. In 1965, Parliament's enactment of the Law Commissions Act spelled doom for English common law as an insular legal system. The Act established a Law Commission and charged it "to take and keep under review all the law . . . with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, [and] the reduction of the number of such enactments." Scarman, *supra* note 98, at 356 (quoting Law Commissions Act of 1965, § 3(1)); *see* Reed Dickerson, *A Note on England's Law Commission and Its Chairman*, 42 IND. L.J. 369, 369–71 (1967) (describing the establishment and early work of England's Law Commission). The Chair of the Law Commission predicted that "[t]he English legal world can never be quite the same again: . . . this statute destroyed the fiction of the common law's isolation from the practice and thinking of other legal systems." Scarman, *supra* note 98, at 355; *see also* H.R. Hahlo, *Here Lies the Common Law: Rest in Peace*, 30 MOD. L. REV. 241, 254–55 (1967) (explaining that the English Law Commission elected to embark on codification by the "instalment system" and explaining the advantages and disadvantages of that approach, noting that "[t]he choice between codification in one piece and codification on the instalment system is somewhat like choosing between having all one's teeth out in one go or one by one").

107. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 10 (Amy Guttman ed., new ed. 2018) (referring to the "uncomfortable relationship of common-law lawmaking to democracy," which was "one of the principal motivations behind the law-codification movement of the nineteenth century"). Even the procedural rules made by the federal judiciary are subject to final approval, rejection, or modification by Congress. *See* 28 U.S.C. §§ 2071–2075 (2012); *see also supra* note 95 and accompanying text.

108. *E.g.*, Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 80–81 (2017). "Across the modern regulatory state, national policy decisions increasingly are made by agency officials, notwithstanding the constitutional mandate vesting legislative authority exclusively with Con-

No doubt the myth is also a product of early American lawyers and jurists' heavy reliance on Coke and Blackstone, whose treatises condensing and explaining English common law were fundamental law texts in the first century of the developing United States.[110] Both Englishmen decried early statutory law

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gress . . . . Congress today routinely delegates the power to promulgate wide-ranging policy decisions to administrative agencies . . . ." *Id.* Since 1984, the Supreme Court has recognized that Congress sometimes *implicitly* delegates law-making and law-interpreting power to administrative agencies. Under the *Chevron* doctrine, Congress does so when it enacts ambiguous statutes together with authorizing legislation designating one or more administrative agencies to issue secondary legislation in the form of regulations. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); *see* Auer v. Robbins, 519 U.S. 452 (1997) (deferring to administrative agencies' authority to interpret their own ambiguous regulations). The many scholarly critiques of *Chevron* and its progeny have apparently not yet dissuaded the Supreme Court from invoking administrative deference. *Cf.* SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018) (Gorsuch, J., writing for a 5-4 majority) ("But whether *Chevron* should remain is a question we may leave for another day," suggesting that the Court may be inclined to revisit the doctrine.).

109. *Cf.* Barnhizer, *supra* note 18, at 131 (explaining that because "American legal scholars take the judicial decision as their primary source, they engage in much the same kind of thinking as judges"). Barnhizer posits that American legal scholars have an "inferiority complex" as "a by-product of the judiciary's approach to knowledge. Judges seek knowledge that is useful, that 'works.' Judicial decisions tend to be limited to 'immediate causes.' Judicial thinking is in many ways a logic of justification rather than intellectual penetration intended to find universal truths." *Id.* at 184.

110. *See* Alschuler, *supra* note 17, at 5–9 (discussing significant influence of Blackstone's *Commentaries*); Roscoe Pound, *The Influence of the Civil Law in America,* 1 LA. L. REV. 1, 14–15 (1938) (discussing Coke's *Second Institute* and Blackstone's *Commentaries* as influential in transmitting English common law to colonial America); *see also* 2 HOFFMAN, *supra* note 85, at xv (urging that "[n]o part of the Course is of more value to the student, than the selected cases in *[L]ord Coke's Reports*"); 2 HOFFMAN, *supra,* at 152 (discussing the "elegance, taste, and genius" distinguishing *Blackstone's Commentaries,* while conceding that "there are some who have questioned its utility"); Bryson, *supra* note 37, at 13–14, 32–33 (noting that the first American edition of Blackstone's *Commentaries*, published in Philadelphia in 1771, was an "immediate success" and became "the foundation of legal education in Virginia from 1775 to 1875"). Bryson explained the popularity of the *Commentaries* for educational purposes:

> It was Blackstone's succinct and well-written survey of the entire law of England that made it so attractive as a textbook for law students. It was at the same time an outline and an encyclopedia. It was clearly written and could be read by a beginning law student with relative ease of comprehension in a fairly short period of time. Of course, there were errors here and there and occasional overgeneralizations, but they were relatively few . . . . While it was not perfect, it was far better than anything that had gone before. It most certainly aided in the learning of the law and resulted in a better trained bar.

for its complexity and incomprehensibility, and for good reason.[111] Blackstone in particular blamed the lack of professional training for legislative drafters:

> [I]t is perfectly amazing, that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws; but every man of superior fortune thinks himself *born* a legislator.[112]

English statutes of the time were drafted with little or no punctuation, excruciatingly long sentences, and weak or nonexistent structure. Only English barristers could hope to decipher them. English statutes were certainly not laws "for the People"—they were comprehensible only to the elite bench and bar. Although the art of legislative drafting still has far to go in the United States, state and federal legislation in modern America is nothing like England's enacted law in the eighteenth and nineteenth centuries.[113] As early as 1845, one noted English lawyer observed:

> There is apparently a notion amongst amateurs, that legislative language must be intricate and barbarous. Certain antick phrases are apparently thought by them to be essential to law writing. A readiness in the use of 'nevertheless,' 'pro-

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Id. at 32.

111. *E.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *10 ("[T]o say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other, courts of justice,) owe their origin[] not to the common law itself, but to innovations that have been made in it by acts of parliament, 'overladen (as Sir Edward Coke expresses it) with provisoes and additions, and many times [hurriedly] penned or corrected by men of none or very little judgment in law.'").

112. *Id.* at *9–10; *see* David Lieberman, *Blackstone's Science of Legislation*, 27 J. BRITISH STUD. 117, 120 (1988) (observing that "[f]ew features of the *Commentaries* have suffered such unfortunate neglect as Blackstone's stated aim that his work should furnish guidance in legislative theory"; charting "the nature and content of this regularly overlooked Blackstonean 'science of legislation'").

113. *See, e.g.*, GEORGE COODÉ, ON LEGISLATIVE EXPRESSION: OR, THE LANGUAGE OF THE WRITTEN LAW 68 (London, William Benning & Co. 1845) (describing English statutes of the time as for the most part "an ill-connected mass of ill-expressed provisions," and proposing a method of legislative drafting to simplify and clarify enacted law).

> vided always,' 'it shall and may be lawful, and he is hereby authorised, empowered, and required to,' 'anything in any Acts or Acts to the contrary notwithstanding,' &c. &c., seem to be admitted to constitute the qualification for drawing Acts of Parliament. The merit appears to mount higher in proportion as the author can succeed in including a greater number of limitations, qualifications, conditions, and provisoes, between the nominative case and its verb, or any other pair of dependent words. It is, however, a clear mistake to think that this absurd style, prevalent as it is, and much as we sacrifice to adhere to it, has the sanction of authority . . . .
>
> If it could be made to be generally recognised that the essentials of every law are simple, and that their direct expression is the perfection of law writing, the greatest defects of our statute law would cease.[114]

Yet more than 150 years later, legislation and statutory drafting remain a much-neglected element of American legal education.[115]

Positive law is the hallmark of the contemporary American legal system, as it has been for at least the better part of the past century.[116] The common law myth is, and always has been, nothing more than an elaborate, self-serving legal fiction.[117] The perpetuation of the myth has elevated American courts to a level of influence the Framers never anticipated,[118] and it ne-

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114. *Id.* at 67–68.

115. *See, e.g.*, Reed Dickerson, *Legislative Drafting and the Law Schools,* 7 J. LEGAL EDUC. 472, 472 (1955) ("The tender shoots of legislative enlightenment in America barely show above the ground. Whether they will bloom depends, in large part, on what the law schools decide to do about the problem. These facts are significant because they relate not only to legislative drafting but to legal drafting generally."). For a contemporary effort encouraging more law schools to offer legislative drafting and other legal drafting courses, and offering a unified approach to drafting private and public laws, see RICHARD K. NEUMANN JR. & J. LYN ENTRIKIN, LEGAL DRAFTING BY DESIGN: A UNIFIED APPROACH (2018).

116. *See* Joseph Dolan, *Law School Teaching of Legislation—A Report to the Ford Foundation*, 22 J. LEGAL EDUC. 63, 71 (1969) ("The primary instrument of ordered social change is legislation. But our law schools have, in general, maintained an orientation that the primary body of the law is the common law, and the primary instrument of change is the evolution of common law decisions.").

117. *See* Maxeiner, *supra* note 24, at 153.

118. *See* THE FEDERALIST No. 78 (Alexander Hamilton) (Terence Ball ed., 2003).

> [I]n a government in which [the different departments of power] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure

gates one of the fundamental principles of our nation: that the law should serve the interests of the People, not the legal profession or the judiciary.

America's complex system of written laws includes state and federal constitutions[119] and statutes; local charters, ordinances, and resolutions; state and federal codes; state and federal rules of court procedure; agency rules and regulations; and executive orders. As our legal system has evolved over the nation's first two-and-a-quarter centuries, our body of law is increasingly represented by positive law—written rules enacted or adopted by governmental entities consistent with state and federal constitutions and statutes. The remaining white space on the canvas of American law that once called on courts to fill the interstices has rapidly diminished, and the trend will most likely continue unabated.[120]

> them. . . . The judiciary . . . may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments . . . . [T]he judiciary is beyond comparison the weakest of the three departments of power.

Id. at 378. One of the ways the U.S. Constitution constrains federal judicial power is the "case or controversy" prerequisite for federal court jurisdiction. *See* U.S. CONST. art. III, § 2. At least in theory, the "actual controversy" must continue throughout every phase of the litigation. Hollingsworth v. Perry, 570 U.S. 693, 705 (2013). Yet even the "case or controversy" constraint enjoys a considerable degree of elasticity as interpreted by the courts. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) ("The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.'").

119. While generally overlooked by the legal academy as a source of fundamental written law, state constitutions were already in place when the federal Constitution was drafted and ratified. By express reference to the States in numerous parts of the Constitution, the Framers made clear that the idea of federalism included a state and federal legal partnership. *See* Lutz, *supra* note 39, at 22 ("We operate under a constitutional *system*, in the sense of an interlocking set of constitutions.").

120. *See* Thomas M. Cooley, *Codification*, 20 AM. L. REV. 315, 338 (1886).

> There is a reason for codification which grows in force from day to day, and may in time become controlling. This reason is that statutory law is constantly encroaching on the domain of the common law, and taking more and more to itself. Some of the legislation is made necessary in order to provide adequately for new conditions. Some of it is enacted in improvement of the common law, and some of it, though claiming to be improvement, is crude, inconsiderate and harmful. The process of encroachment will continue to go on, perhaps with accelerated speed, until there will be need for consolidating and revising the statutes, and so much of the law will then be found to be in statutory form, that it may be

American lawmakers and courts still have much work to do to systematize and harmonize the many different layers of positive law in our federation that interact in complex and sometimes confounding ways with other sources of law. But the perpetuation of the common law myth distracts lawmakers, judges, and scholars from collaborating on that hard work. Instead, the common law myth encourages courts to strike down, "rewrite," or "construe" statutes to harmonize them with the judiciary's ever-changing and often indeterminate view of substantive constitutional requirements. Indeed, judicial activism, as that term is commonly understood,[121] is a direct result of the common law myth.[122]

> advisable all should be. When the Legislature is satisfied of this, the time for codification will have arrived, if the competent person for the labor is obtainable, or if the Legislature itself has the wisdom to adopt a satisfactory code already prepared. Whether or not that time has already arrived for some States we do not undertake to say.

Id. But cf. Gilmore, *supra* note 97, at 472.

> In what has now become the American tradition of codification, the [Uniform Commercial] Code incorporates the same form of common law saving clause which was included in the earlier statutes. Even without the saving clause we may assume that the tradition would have imposed itself: the idea that a codifying statute comes not to supersede the common law but to coexist with it has become a part of our heritage, not to be gainsaid.

Id.

121. *See generally* Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441 (2004). While "judicial activism is not a monolithic concept," *id.* at 1476, "[j]udges are labeled judicial activists when they 'legislate from the bench,'" *id.* at 1471.

122. *See* Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1223 (2009) (observing that "unsupervised judging is inherent in any system that (like ours) leaves certain important decisions exclusively to judges"); *see also* G. EDWARD WHITE, III–IV THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 785–86 (abridged ed. 1991):

> [T]he Marshall Court's cases furnish additional evidence of the impressive discretion of the Justices to function as substantive rulemakers. No Court in American history was freer to make up its own rules of law. No Court had more first impression cases of constitutional interpretation; none had greater opportunities to fashion common law rules; none enjoyed to as great an extent the singular freedom that comes from pressing business and the absence of decisive precedent . . . . It is, of course, a puzzle to moderns how judges could simultaneously be granted the discretion to make substantive law and yet not fully be perceived as lawmakers. That puzzle . . . remains rooted in intellectual assumptions we no longer share.

II. POSITIVE LAW AS PRIMARY LEGAL AUTHORITY

> What is the effect of statute on subsequent common law development? How should the common law function in what Dean Calebresi has called the age of the statutes? This is by no means a new question. But it is undoubtedly a difficult one and, although it has been asked a number of times, . . . we have as yet only a very partial set of answers and even those have not made a systemic mark on the application of the law in the courts.
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> Jack Beatson, *Has the Common Law a Future?*, 56 CAMBRIDGE L.J. 291, 298–99 (1997).

In 1908, Dean Roscoe Pound[123] published an article in the *Harvard Law Review*[124] demonstrating that the "indifference, if not contempt," courts and lawyers had for the increasing output of legislation was unjustified and contrary to legal history.[125] A full century ago, a majority of the Supreme Court expressly rejected "the dead hand of the common-law rule" when it held that state common law rules of evidence in effect in 1789 no longer governed the competence of witnesses to testify in

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123. At the time the article was published, Pound was a law professor at Northwestern University, having served as dean of the University of Nebraska School of Law, his alma mater, from 1903 to 1907. Two years after the *Harvard Law Review* published his article, he joined the Harvard Law School faculty. In 1916 he was appointed Dean of Harvard Law School, a position he held for more than two decades. Richard W. Smith, *Dean Roscoe Pound,* 44 NEB. L. REV. 1, 2, 3–4 (1965). Dean Pound's affiliation with Harvard Law School continued until 1954. *Id.* at 3–4.

124. Pound, *supra* note 19.

125. *Id.* at 383. Dean Pound rejected the notion that judicial "antipathy toward legislative innovation is a fundamental common law principle." *Id.* at 403.

> American legislatures have been conspicuously active from the beginning. Moreover, our constitutional polity expressly contemplates a complete separation of legislative from judicial power. And this is in accord with the whole course of legal history. Not only is a doctrine in variance with that polity inapplicable to American conditions, but if it ever was applicable, the reasons for it have ceased and it should be abandoned.

Id.; *see also* HENRY SIDGWICK, THE ELEMENTS OF POLITICS 203 (London, Macmillan & Co. 2d ed. 1897) ("[A]s the development of Law goes on, the function of the judge is confined within ever narrowing limits; the main source of modifications in legal relations comes to be more and more exclusively the Legislature.").

federal trial courts.[126] Soon after, Professor Arthur Corbin, the noted Yale contracts scholar, wrote about the case:

> It may be surprising to some to see the common law referred to as a "dead hand" and to see it deliberately disregarded by our highest court; but the fact is that the living hand of the present judge does not write like the dead hand of the judges of 1789 or 1851.[127]

In 1921, Benjamin Cardozo bemoaned the isolation of the courts from legislatures, calling for the establishment of a "Ministry of Justice" to study legal developments, issue reports, and make recommendations for improvements.[128] And in

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126. Rosen v. United States, 245 U.S. 467, 471 (1918) ("Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here . . . ."). The "dead hand" rule was the product of the Court's opinion in *United States v. Reid*, 53 U.S. 361 (1852), holding that the competency of federal court witnesses in criminal trials must be decided based on state evidence rules in force at the time of enacting the Judiciary Act of 1789. *Id*. at 366. The *Rosen* Court's reasoning turned in part on its analogy from a 1908 federal statute that had removed the disability of witnesses once convicted of perjury. *Rosen*, 245 U.S. at 471 (citing REV. STAT. § 5392, Comp. St. § 10295 (repealed 1909)).

127. Arthur Corbin, *The Dead Hand of the Common Law*, 27 YALE L.J. 668, 670 (1918).

128. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113–14 (1921).

> To-day courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them.

Id. Congress responded in 1922 by establishing the Conference of United States Senior Circuit Judges, which would later become known as the Judicial Conference of the United States. In the states, the judicial council movement of the early twentieth century served the same purpose, and that model survives in many states today. *See* J. Lyn Entrikin Goering, *The Life and Times of the Kansas Judicial Council*, 78 J. KAN. B. ASS'N, Feb. 2009, at 19, 19 (summarizing the history of the movement and attributing it primarily to Judge Cardozo's 1921 article); *see also* Landis, *supra* note 17, at 25 ("Judicial councils exist with the function of acting as

1932, James Landis, who would later succeed Pound as Harvard Law School Dean, observed that "the wide scope of judicial review exercised since the Fourteenth Amendment has . . . generated in the [legal] profession something of contempt for the legislative process."[129] Landis criticized the judiciary's disregard for legislation as a "source of 'common law,'"[130] by which he meant that courts tended to confine their reliance on statutes as rigid rules rather than representing more general legal principles and policies, inaccurately assuming that legal innovations and development of the law were "beyond the scope of legislative power."[131] This unfortunate judicial attitude, Landis suggested, failed to take into account the advances in the early twentieth century in the professionalization of legislating, including both legislative drafting and deliberation processes.[132]

By the mid-1950s, those advances included, among other things, widespread efforts to compile and consolidate state statutes, the development and adoption of uniform state laws, and the states' increasing exercise of "police power[s]" by enacting and implementing regulatory legislation.[133] The dramatic

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ministries of justice to call to the attention of the legislature weaknesses in existing judge-made law.").

129. Landis, *supra* note 17, at 12.

130. *Id.*

131. *Id.* at 13, 15 ("A course of legislation dealing continuously with a series of instances can be made to unfold a principle of action as easily as the sporadic judgments of courts."); *see also id.* at 14 ("The judgments of legislatures as expressed in statutory rules often represent a wider and more comprehensive grasp of the situation and yet are practically neglected [by courts as a foundation for legal reasoning in analogous cases].").

132. *Id.* at 13.

> [T]he last few decades have seen the steady development of better methods of legislation. Not only has there been progress in the art of draftsmanship, but the growing use of experts and the committee system, itself tending toward an empiric efficiency, has meant much in the advancement of legislative method . . . . Also, there is a growing comprehension that wide modifications have been effected by recent legislation in the structural content of the law . . . . Clearly these factors negative the possibility of relegating the legislative process to the role of mere rule-making . . . .

Id.; *see also id.* at 25 (referring to "[e]xpert legislative draftsmen . . . operating to prevent the unfortunate incidents that characterized the legislation of early democratic assemblies").

133. Shelden D. Elliott, *The Role of Legislatures in the Development of Substantive Law*, 43 A.B.A. J. 72, 74 (1957).

transformation of American law can be traced to the codification movements of the nineteenth century.[134] The still-developing story of the Age of Positive Law begins there.

A. Influence of Philosophers Bentham and Austin

In 1804, after the French Revolution, Napoleon Bonaparte adopted the French Civil Code, which remarkably had been drafted in just four months.[135] It would become the prototype of codification on the European continent and later among developing nations around the globe.[136] Although it was not the earliest of the modern codes,[137] it was undoubtedly the most influential.[138] The first "wave" included not only France, but also Prussia in 1794[139] and Austria in 1811.[140] After considerable push-back from its opponents in other European nations, the second wave of codification included Germany in 1900[141] and

134. Earlier codification reforms in Scandinavia were effected beginning in the late seventeenth century, and less successful efforts were undertaken even in England. *See infra* note 137; *see also* Wagner, *supra* note 46, at 344 (noting that England's first codification project was advanced in the early sixteenth century by Henry VIII, and the second in 1614 by Sir Francis Bacon).

135. *See* James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459, 460 (1994); Wagner, *supra* note 46, at 342.

136. *See, e.g.*, Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 936 (1982) ("France presents the model of the civil law tradition. It set the pattern with the Napoleonic Code, a format now followed by all civil law jurisdictions."); Olivier Cachard, *Translating the French Civil Code: Politics, Linguistics and Legislation*, 21 CONN. J. INT'L L. 41, 42 (2005) ("[T]he French Civil Code was the matrix of many other codes, both in Europe and around the world."); Wagner, *supra* note 46, at 342–43 (listing numerous European and Latin American nations whose codes were modeled after the French Civil Code, as well as Louisiana and Quebec in North America).

137. *See* Weiss, *supra* note 38, at 453 (crediting Scandinavia for having adopted the earliest of the modern civil codes beginning with Denmark's code enacted in 1683); *accord,* Wagner, *supra* note 46, at 341 (honoring Denmark's code as the "first code in the modern sense of the word"). After Denmark, Norway followed in 1688 and Sweden in 1736. Wagner, *supra,* at 341 (noting that Scandinavia codified the criminal law in the nineteenth century).

138. *See, e.g.*, John W. Head, *Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America*, 13 DUKE J. COMP. & INT'L L. 1, 43 (2003) (referring to the French Civil Code as "the premier example of legal codification"); Wagner, *supra* note 46, at 342 (concluding that France was the "first in performing [codification] work in so outstanding a manner as to assure the victory of codification in all civil law jurisdictions").

139. Wagner, *supra* note 46, at 341 (crediting Frederick the Great).

140. *Id.* at 343.

141. *Id.* (noting that while Germany adopted the code in 1896, it did not take effect until 1900). While the German Civil Code is "radically different in concep-

Switzerland in 1912.[142] From World War II to the end of the twentieth century, more than forty other nations enacted codes.[143] Some, including the French Civil Code, have been revised several times since their initial enactment.[144]

The first wave of modern codification provided a springboard for the first American codification movement,[145] which began around 1820 and lasted for some three decades.[146] A major instigator for that effort was Jeremy Bentham, an English philosopher, jurist, and contemporary of William Blackstone.[147] Bentham has been considered the strongest and most important proponent of codification[148] and perhaps the greatest critic of common law.[149] As a philosopher and social reformer,

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tion," it too has influenced codification in several other nations and thus "has gradually become [the French Civil Code's] chief competitor." Guy Canivet, *French Civil Law Between Past and Revival*, 20 CONN. J. INT'L L. 111, 117 (2004); Stone, *supra* note 20, at 305, 306 (noting that French and German codes have often served as models for other nations' codification efforts).

142. Wagner, *supra* note 46, at 343 (reporting that the Swiss Civil Code was adopted in 1907 and took effect in 1912).

143. Weiss, *supra* note 38, at 454. Weiss offers a comprehensive and well-documented review of the history of codification on the European continent. *See id.* at 448–70.

144. *See, e.g.*, F.H. Lawson, *A Common Law Lawyer Looks at Codification,* 2 INTER-AM. L. REV. 1, 5 (1960); Andre Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459, 460 (1975–1976).

145. *See* Head, *supra* note 138, at 67–68 (describing French codification as "an immediate and compelling source of inspiration" and "a hard act to follow").

146. CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 69–70 (1981); *see* 2 HOFFMAN, *supra* note 85, at 672–88 (discussing codification movements in Europe and the United States in the first half of the nineteenth century).

147. Bentham was born in 1748 and died in 1832. Blackstone, born in 1723, died in 1780. During the years Bentham studied law at the University of Oxford, Blackstone was among his professors. Posner, *supra* note 14, at 569. When the precocious young Bentham heard Professor Blackstone pontificate about the glories of English common law, "Bentham . . . had listened with a rebel heart." Charles Noble Gregory, *Bentham and the Codifiers*, 13 HARV. L. REV. 344, 344 (1900). Bentham would later become Blackstone's "severest critic." Posner, *supra,* at 569.

148. Weiss, *supra* note 38, at 474–75; *see also* Wagner, *supra* note 46, at 344 (referring to Bentham as the "most famous, although not the wisest representative" of the codification trend "that was accentuated at the end of the eighteenth century").

149. Frederick Schauer, *The Path-Dependence of Legal Positivism*, 101 VA. L. REV. 957, 960 (2015) ("As one of history's great haters, Bentham was unrelenting in his hatred of the English legal system, especially its common law design and the lawyers and judges who populated it."); *see also* Frederick N. Judson, *A Modern View of the Law Reforms of Jeremy Bentham,* 10 COLUM. L. REV. 41, 42 (1910) (quoting Bentham as referring to English common law as "fathomless and boundless chaos

Bentham espoused utilitarianism: the best social policy is the one that achieves the "greatest happiness" for the greatest number.[150] But he devoted much of his life to critiquing English common law and advocating for its codification.[151]

Bentham believed, for example, that British subjects who were expected to comply with the law should be able to readily access and understand the laws by which they were governed. The common law of the time was so complex that only lawyers and judges could hope to decipher it. And in any event, published reports were so few in number that judge-made common law and any alterations to it were virtually inaccessible to the average person.[152] On the other hand, codes, if properly drafted and enacted, could be understood by everyone without the need to consult "Judge & Co.," Bentham's favorite euphemism for the bench and bar.[153]

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made up of fictions, tautology and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery which maximized delay and denial of justice"). *See generally* John V. Orth, *Jeremy Bentham: The Common Law's Severest Critic*, 68 A.B.A. J. 710 (1982).

150. *See, e.g.*, Judson, *supra* note 149, at 41 ("Bentham's philosophy—that of Utilitarianism, the greatest happiness of the greatest number,—made a profound impression upon the public thought of his own and succeeding generations."); Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 557 n.88 (1987) ("[Bentham's] 'greatest-happiness' or utility principle posited that 'the test of sound social policy was whether it promoted the greatest happiness of the greatest number of people.'" (quoting RICHARD POSNER, THE ECONOMICS OF JUSTICE 33 (1981)); Kenneth Shuster, *Because of History, Philosophy, the Constitution, Fairness & Need: Why Americans Have a Right to National Health Care*, 10 IND. HEALTH L. REV. 75, 111 (2013) ("'It is the greatest happiness of the greatest number that is the measure of right and wrong.'" (quoting JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 3 (Wilfrid Harrison ed., Oxford Univ. Press 1967) (1776)); *see also* Dave Fagundes, *Why Less Property Is More: Inclusion, Dispossession, & Subjective Well-Being*, 103 IOWA L. REV. 1361, 1371 (2018) (interpreting "greatest happiness" to mean, in contemporary terms, "the highest net increase in subjective well-being" (citing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, at ccv (London, T. Payne & Son 1789))).

151. *See* Judson, *supra* note 149, at 41–42; Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 4, 19–22 (2011). Professor Resnick emphasized Bentham's penchant for "publicity," *id.* at 5, which might be better understood as the concept of "open government" espoused by proponents of Rule of Law initiatives. *See* WORLD JUSTICE PROJECT, *infra* note 306.

152. *See* Hall, *supra* note 36, at 806–07 (noting the scarcity of law reports as one reason early American courts failed to follow English judicial decisions).

153. *See* H.L.A. Hart, *Bentham and the United States of America*, 19 J.L. & ECON. 547, 565–66 (1976); Resnick, *supra* note 151, at 19–21; Schauer, *supra* note 149, at

His efforts were not limited to reforming English law. Bentham famously wrote to President James Madison in 1811 offering to draft a complete codification of United States law to free the young nation from "the yoke" of English common law.[154] He made the same offer to a number of American states and several other nations.[155] But Bentham's codification proposals were radical[156] for their time, even eccentric at times.[157] Nevertheless, history remembers him now as the "Father of Legal Positivism."[158]

John Austin, an English jurist, was a disciple of Bentham's utilitarian philosophy and positivist jurisprudence.[159] Like Ben-

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964 (noting that Bentham "mocked the bar and the judiciary by using the label 'Judge & Co.'"). For example, in 1827, Bentham sarcastically observed that "English judges have taken care to exempt the professional members of the partnership from so unpleasant an obligation as that of rendering service to justice." Schauer, *supra*, at 964 n.26 (quoting 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 302 (London, Hunt & Clarke 1827)).

154. Resnik, *supra* note 151, at 20. Madison waited five years before politely declining the offer. *See* Hart, *supra* note 153, at 565–66. In response to Madison's long-delayed but courteous letter, Bentham wrote back more than a year later, "subjecting to microscopic examination every evasive word used by Madison." *Id.* at 566.

155. Resnik, *supra* note 151, at 20.

156. Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239, 270 (1979) (observing that "[b]ecause Bentham's proposals were radical [and] represent[ed] an attack on the legal profession, the bar was practically unanimous in its opposition"); Posner, *supra* note 14, at 599 ("Seeing legislation as the swiftest route to implementation of his reform ideas, [Bentham] proposed to abolish the common law, the natural rights of Englishmen, and the independent judiciary.").

157. *See, e.g.*, Gregory, *supra* note 147, at 345 (noting that Bentham adhered to "the principle of utility as a test of moral precepts and legislation, [which he applied] with great boldness, and, it may be often said, eccentricity, to all departments of morals, law, and government until his death"); Hart, *supra* note 153, at 565 ("[Bentham's] enthusiasm for codification had become a passion and his hatred of the uncodified formless 'uncognoscible' common law had become very near a mania."); Wagner, *supra* note 46, at 344 (noting that one English scholar declared Bentham "a curious man, with his complete neglect of all nobler elements of thought and feeling").

158. Schauer, *supra* note 149, at 960. Yet Bentham never described himself as a positivist. The term was not used in a legal context until the early twentieth century, long after Bentham's time. *Id.* at 967.

159. *See, e.g.*, Wilfrid E. Rumble, *Divine Law, Utilitarian Ethics, and Positivist Jurisprudence: A Study of the Legal Philosophy of John Austin*, 24 AM. J. JURIS. 139, 145–47 (1979); *id.* at 146 (quoting 1819 letter from Austin to Bentham that "percolates with the language of an ardent disciple").

tham, he was strongly committed to codification of law[160] and is credited with the founding of analytical jurisprudence.[161] Austin defined the proper scope of jurisprudence as including only positive law—meaning laws of command or duty established by political superiors to govern political inferiors.[162] In Austin's view, the term excluded the traditional meaning of "natural law" in the sense of the deity's edicts, and it excluded "positive morality."[163] In effect, Austin's positivist jurisprudence narrowed the focus of law's proper domain to rules derived from and enforceable by a secular political authority (government), as distinguished from the religious connotations of natural law and the societal norms of morality.

Both Bentham's and Austin's conceptions of positive law provided the theoretical basis for their advocacy of codification: A "rule of law" is jurisprudentially legitimate and enforceable only if it derives from governing authority (law enacted by one's political superiors to advance a specific purpose or policy) as distinguished from religious authority or moral approbation.[164] But those same theoretical underpinnings apply

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160. Wagner, *supra* note 46, at 344 ("Austin (1790–1859) was next to gain fame [after Bentham] as an advocate of the reform by statutory enactment of laws regulating human relations.").

161. Michael Freeman & Patricia Mindus, *Preface* to THE LEGACY OF JOHN AUSTIN'S JURISPRUDENCE, at i, v (Michael Freeman & Patricia Mindus eds., 2013).

162. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1 (London, John Murray 1832). Austin distinguished positive law from natural law—meaning laws given by God to govern man—and positive morality, which distinguishes rules not made by God but rather other human beings (but not political superiors). *Id.* at 2–4; *see* SEBOK, *supra* note 18, at 23–24, 30–32 (explaining Austin's classical positivism as developing in reaction to Blackstone's classical common law theory). The federal Constitution is the preeminent example of positive law. *See* Needham, *supra* note 89, at 226–27 *(*"Constitutions are legislation by the sovereign . . . . The people of the United States . . . acting for the entire territory of the United States, may prescribe by their Constitution the form and jurisdiction of every government within the territory. The governments are the creatures of the sovereign.").

163. AUSTIN, *supra* note 162, at 2–4; Wagner, *supra* note 46, at 343–44 (explaining that England's common law focused on "'[f]undamental law' which was nothing else than a version of natural law embodied to a great extent in customs [and that] was believed to exist irrespective of any legislative enactments, to be binding on the king, the courts, and the whole society, and to [be] best discoverable by the courts").

164. *See* SEBOK, *supra* note 18, at 30–31 (describing the "separability thesis" of Bentham and Austin's classical positivism, which rejects the concept that law and morals are necessarily connected); Stanley L. Paulson, *Introduction* to HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, at xvii, xxiv (Bonnie

not just to exclusive, complete codifications of the sort Bentham advocated, but also to statutes, rules, treaties, constitutions, or any other "laws" enacted by a superior political authority.

That Bentham himself coined the term "codification"[165] may be one of the reasons for later resistance to the concept by common law jurists and practicing lawyers. Opponents of codification in the United States likely understood the term to mean the radical, absolutist form that Bentham advocated.[166] And no doubt Austin's disassociation of jurisprudence from natural law and morality alienated nineteenth-century Americans who felt a strong allegiance to common law's religious and moralistic connotations.[167]

Although England never achieved codification of the sort advocated by Bentham and Austin, Parliament gradually enacted more and more statutes governing specific areas of the law, including the Bills of Exchange Act in 1882 and the Sale of Goods Act in 1894.[168] As the authority of English statutes slowly gained recognition, the nineteenth century witnessed what

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Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 1992) (1934) (defining "separability thesis" to mean "the separability of law and morality" and describing it as the "antithesis" of the "morality thesis").

165. Scarman, *supra* note 98, at 357; Weiss, *supra* note 38, at 448 & n.42 ("Jeremy Bentham coined this neologism. The term itself appeared for the first time in June 1815 when Bentham wrote a letter to Tsar Alexander I, in which he distinguished 'codification' from normal 'legislation.'" (citing Letter from Jeremy Bentham to Tsar Alexander I (June 1815), *in* 8 JEREMY BENTHAM, THE CORRESPONDENCE OF JEREMY BENTHAM 464, 468 (Stephen Conway ed., 1988) (explaining "the case (it may be called) of Codification")); *see* Judson, *supra* note 149, at 50 ("The word 'codification' was of [Bentham's] own coinage.").

166. *Cf.* Iain Stewart, Mors Codicis*: End of the Age of Codification?*, 27 TUL. EUR. & CIV. L.F. 17, 18–19 (2012) (positing a typology for codification, whose "differences are of degree rather than of kind"). Stewart invited readers to "swim under the mythology that has attached to the [French] Code civil and, through it, to the idea of codification in general." *Id.* at 37. In a sense, "codification" became the straw man for opponents of legislative supremacy. *See* Christine Hurt, *The Windfall Myth*, 8 GEO. J.L. & PUB. POL'Y 339, 373 n.108 (2010) ("The 'straw man' argument refers to an argument in which the speaker creates an unnamed critic to espouse an idea, then refutes the idea. Many times, the characterization of the straw man's argument is a simplification or overstatement of real-world criticism."); Jonathan K. Van Patten, *Skills for Law Students*, 61 S.D. L. REV. 165, 173 n.21 (2016) ("Criticism of a 'straw man' is self-serving non[]sense.").

167. *See* Wagner, *supra* note 46, at 345–46 (referring to the "powerful idea of natural law, in its eighteenth century form, [which] dominated well into the second half of the nineteenth century in the United States").

168. *Id.* at 344–45.

one scholar called "a victory of the written over the unwritten law."[169]

B. American Codification Initiatives

The first of the early American codifiers was Edward Livingston, a New York native with a colorful history who relocated to Louisiana in the early nineteenth century.[170] Livingston was instrumental in drafting the Louisiana Civil Code, which was modelled closely after the French Civil Code but also reflected Spain's historical influence in what would later become the Louisiana Territory after its purchase from France in 1803.[171] In 1806, the territorial legislature passed a bill that would have formally adopted pre-existing Spanish and Roman laws, but the bill was vetoed.[172] Two years later, the territorial government enacted a codification of existing law known as the Digest of 1808.[173]

The State of Louisiana was admitted to the Union in 1812.[174] A decade later, the Louisiana Legislature appointed three at-

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169. *Id.* at 343. As explained later, the term codification has come to mean many things and has taken many different forms. Stewart, *supra* note 166, at 18 ("The name 'code' has been given to so many types of legislation that there is little consistency in its use."). The term "codification" in the legal sense was unknown before the early nineteenth century because Bentham himself coined the term in 1815. Weiss, *supra* note 38, at 448 & n.42; *see supra* note 165 and accompanying text.

170. *See* Warren M. Billings, *Mixed Jurisdictions and Convergence: The Louisiana Example*, 29 INT'L J. LEGAL INFO. 272, 284 (2001) (describing Livingston's background in New York before arriving in Louisiana Territory in 1804).

171. *See* Shael Herman, *The Louisiana Code of Practice (1825): A Civilian Essai Among Anglo-American Sources*, 23 TUL. EUR. & CIV. L.F. 51, 56 (2008) (referring to both French and Spanish influence in the Louisiana Territory, and noting that while "French and Spanish branches of the civilian tradition might have intrafamilial differences, their common ancestry in Roman experience made them broadly compatible 'subtraditions'"); Agustín Parise, *Codification of the Law in Louisiana: Early Nineteenth-Century Oscillation Between Continental European and Common Law Systems*, 27 TUL. EUR. & CIV. L.F. 133, 134 (2012) ("Louisiana was both a French and Spanish colony, where the laws of each empire applied accordingly."). For a brief overview of Louisiana's history leading up to 1803, see *id.* at 137–39.

172. Agustín Parise, *A Constant Give and Take: Tracing Legal Borrowings in the Louisiana Civil Law Experience*, 35 SETON HALL LEGIS. J. 1, 4–5 (2010).

173. *Id.* at 7.

174. John E. McAuliffe, Jr., *Louisiana's Legal Legends*, 65 LA. B.J. 391, 391 (2018); *see also id.* at 392 (referring to Edward Livingston as one of Louisiana's legal legends for "successfully advocat[ing] for preserving the colonial legal system based on Roman civil law even though the legal codes of the rest of the United States were derived from the English system of common law").

torneys to draft a civil code. Enacted in 1825, the Civil Code expressly retained "Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States."[175] Edward Livingston was at the forefront of Louisiana's codification movement and was one of the three attorneys who participated in drafting the Code.[176] But given Louisiana's somewhat unique heritage as a colony of both Spain and France, its somewhat equivocal adherence to its civil law heritage[177] was not surprising, and most likely its embrace of codification did not influence other territories to consider a similar path.

1. Antebellum Codification Efforts

Charles M. Cook authored the primary text that comprehensively addresses the increasing interest in codification in America beginning in the early nineteenth century.[178] At that time, debates about the feasibility and merits of codification were widespread.[179] Although none of the early debates or undertakings yielded a codification product, they were nevertheless influential and "set the intellectual stage" for successful efforts later in the century.[180]

As early as 1821, Joseph Story, then a Supreme Court Justice, expressed an interest in codifying common law. In an address to the Suffolk Bar, he "pleaded" for moderate reform, avoiding

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175. Parise, *supra* note 172, at 19 (citing LA. CIV. CODE § 1112 (1825)); *see* Louis F. del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. 1, 19–20 (2010) (describing French and Spanish influences in developing Louisiana's legal system).

176. Parise, *supra* note 172, at 15. However, Louisiana never enacted the Criminal Code drafted by Livingston. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 191 n.7 (1985) ("Livingston's penal code for Louisiana was never adopted, despite his success in codifying other fields of law.").

177. *See* Ilijana Todorovic, *The Uniqueness of Louisiana's Legal Heritage: A Historical Perspective*, 65 LA. B.J. 378, 380 (2018) ("While most of Louisiana's private law retained a civil law orientation that existed during the colonial rule of France and Spain, Louisiana's public law, criminal law and civil procedures are modeled after Anglo-American common law norms that were brought to the United States from England . . . .").

178. *See* COOK, *supra* note 146.

179. Erwin C. Surrency, *The Georgia Code of 1863 and Its Place in the Codification Movement*, 11 J. SO. LEGAL HIST. 81, 83 (2003) (citing COOK, *supra* note 146).

180. Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355, 360 (1999).

the term "codification" to sidestep any perception that he supported the sort of radical reform Bentham had advocated.[181] Two years later, William Sampson spoke to the New York Historical Society advocating for codification, also without using that specific term. Instead, he identified successful codes that had been recently enacted and cited English legal authorities who had supported codification, including Francis Bacon[182] and Matthew Hale.[183] According to Cook, Sampson's address was widely reported and sparked an intense debate over the idea of codification.[184]

In 1821, the South Carolina Governor asked the Legislature to undertake a comprehensive revision of state law, referring to the French Civil Code as an example of what he had in mind. Later governors repeated the call for reform, and other political leaders joined the effort.[185] But no state code was forthcoming.[186]

In 1825, Henry Wheaton, one of Story's friends and the third Supreme Court reporter of decisions, was then serving as a New York revisor of statutes.[187] Wheaton had written a letter to Story describing his duties, which amounted to tinkering rather than comprehensive statutory revision. In response, Story urged Wheaton and his fellow revisors to codify the common

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181. Weiss, *supra* note 38, at 501 ("[Justice Story's concept of] reform would be gradually advanced under legislative authority by first reducing the principles of law to a text and organizing them into a general code.").

182. *Id.* Francis Bacon was an early proponent of codifying English common law. Jonathan Teasdale, *Codification: A Civil Law Solution to a Common Law Conundrum?*, 19 EURO. J.L. REFORM 247, 249 (2017) (citing FRANCIS BACON, PROPOSITION TOUCHING THE AMENDMENT OF THE LAW (1606)).

183. Weiss, *supra* note 38, at 501 (citing William Sampson, *An Anniversary Discourse Delivered Before the Historical Society of New York, on Saturday, December 6, 1823; Showing the Origin, Progress, Antiquity, Curiosities, and Nature of the Common Law*, *in* SAMPSON'S DISCOURSE, AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS UPON THE HISTORY OF THE LAW, WITH THE ADDITION OF SEVERAL ESSAYS, TRACTS, AND DOCUMENTS, RELATING TO THE SUBJECT (Washington, Gales & Seaton 1826)).

184. Weiss, *supra* note 38, at 501 (citing COOK, *supra* note 146, at 108–18).

185. *Id.* at 502 & n.338.

186. *Id.* (citing COOK, *supra* note 146, at 130).

187. *See* Craig Joyce, *Statesman of the Old Republic*, 84 MICH. L. REV. 846, 856 n.48 (1986) (reviewing R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985)).

law, or "at least the part which is most reduced to principles & is of daily extensive application."[188] He continued,

> "I am in favour of a Code . . . because I think it may reduce to certainty, method, & exactness much of the law, already passed by judicial tribunals & thus give to the public the means, with[in] a reasonable compass, of ascertaining their own rights & duties in many of the most interesting concerns of . . . life." In addition, [Story wrote,] a code might greatly abridge "the labours & exhausting researches of the profession."[189]

Across the United States after 1830, codification was increasingly the focus of debate by laymen and lawyers alike, perhaps in part as an outgrowth of Jacksonian democracy.[190] Massachusetts was the first state to seriously consider the idea after Louisiana enacted its Civil Code in 1825.[191] Consistent with a resolution adopted by the Legislature seeking to make the law more accessible, the Governor appointed a commission in 1836 to study the possibility of codifying the common law.[192] One of the five appointees was Justice Joseph Story, a native son of Massachusetts.[193]

The commission, chaired by Story, issued a comprehensive report to the Governor in January 1837[194] that generally favored codification,[195] giving "limited endorsement" to the proposal. The report thoughtfully and comprehensively explained the great advantages of codification and responded to many of its opponents' primary arguments. While concluding that com-

188. *Id.* (quoting Letter from Joseph Story to Henry Wheaton (Oct. 1, 1825), Henry Wheaton Papers).

189. *Id.* (quoting Letter from Joseph Story to Henry Wheaton (Oct. 1, 1825), Henry Wheaton Papers (internal alteration and second omission by Joyce)).

190. Weiss, *supra* note 38, at 502.

191. Morriss, *supra* note 180, at 360; Weiss, *supra* note 38, at 503.

192. Morriss, *supra* note 180, at 360; *see also* Weiss, *supra* note 38, at 503.

193. Joyce, *supra* note 187, at 848–49.

194. Joseph Story et al., *Codification of the Common Law of Massachusetts: Report of the Commissioners Appointed to Consider and Report Upon the Practicability and Expediency of Reducing to a Written and Systematic Code the Common Law of Massachusetts, or Any Part Thereof*, 17 AM. JURIST & L. MAG. 17, 17–51 (1837) [hereinafter Story Commission Report].

195. *See* Joseph Story et al., *Codification of the Common Law*, *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 698 (William W. Story ed., 1852); *see also* Joyce, *supra* note 187, at 856 n.48; *Report of the Commissioners to the Governor of the Commonwealth of Massachusetts*, *reprinted in* THE GOLDEN AGE OF AMERICAN LAW 249, 249–56 (Charles M. Haar ed., 1965).

plete codification of the state's common law was not feasible,[196] the report urged that certain parts of the common law could and should be codified: specifically, laws pertaining to personal civil rights, property, and contracts; commercial law; criminal law; and evidence law.[197] The report also described the personnel and other resources the anticipated undertaking would require.[198]

After the report was released, yet another commission was appointed to begin codifying Massachusetts criminal law. Its work was completed in 1841, but state authorities rejected even this small part of the original reform project.[199] Massachusetts elected not to proceed with codification, and the movement in that state ultimately died.[200]

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196. The Report encapsulated its findings as follows:

> I. The Commissioners are, in the first place, of opinion, that it is not expedient to attempt the reduction to a Code of the entire body of the common law of Massachusetts, either in its general principles or in the deductions from, or the applications, of those principles, so far as they have been ascertained by judicial decisions, or are incontrovertibly established.
>
> II. The Commissioners are, in the next place, of opinion that it is expedient to reduce to a Code those principles, and details of the common law of Massachusetts in civil cases, which are of daily use and familiar application to the common business of life, and the present state of property and personal rights and contracts, and which are now so far ascertained and established as to admit of a scientific form and arrangement, and are capable of being announced in distinct and determinate propositions. What portions of the common law properly fall under this predicament will be in some measure considered hereafter.
>
> III. The Commissioners are, in the next place, of opinion, that it is expedient to reduce to a Code the common law, as to the definition, trial and punishment of crimes, and the incidents thereto.
>
> IV. The Commissioners are, in the next place, of opinion, that the law of evidence, as applicable both to civil and criminal proceedings, should be reduced to a Code.

Story Commission Report, *supra* note 194, at 33.

197. *See id.*

198. *Id.* at 49–50; *see* Morriss, *supra* note 180, at 361.

199. Weiss, *supra* note 38, at 503.

200. Morriss, *supra* note 180, at 361; Joyce, *supra* note 187, at 856 n.48. One scholar has surmised that Story's report to the Massachusetts Governor, "while presenting excellent reasoned arguments for codification," was actually "an attempt to forestall a general codification in Massachusetts." Andrew P. Morriss, *"This State Will Soon Have Plenty of Laws"—Lessons from One Hundred Years of Codification in Montana*, 56 MONT. L. REV. 359, 427 n.339 (1995) [hereinafter Morriss (1995)] (quoting DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW 47 (1986)).

Other states toyed in varying degrees with the notion of codification. For example, the 1846 Virginia Legislature formed a commission to review its statutes with an eye to repeal outmoded statutes and point out gaps and contradictions. When the commission's report was presented the next year, the prevailing conclusion was that the civil and penal codes should be unified into a single code. The result was the Legislature's adoption of the Virginia Code in 1849.[201] In 1850, the Alabama Legislature appointed a commission and charged it with organizing its statutes into "proper chapters and sections" within which to organize, condense, and consolidate "all the public laws appertaining to the subject."[202] The report was to be submitted to the Governor for review and any alterations deemed necessary.[203] And during Kentucky's 1849 Constitutional Convention, the issue of codification was debated in response to a proposal to appoint a commission to compile and revise the state's laws. The new Constitution required the General Assembly to appoint two commissions: one to revise and consolidate the civil and criminal statutes, and the other to draft a code of civil and criminal procedure.[204]

But despite the widespread interest in codification, none of these early efforts resulted in a comprehensive codification of state law outside Louisiana. It was New York's codification project that would become the focus of similar initiatives in other states during the second half of the nineteenth century.

2. Field Codes

The major undertaking in favor of American codification in the nineteenth century was led by David Dudley Field in New York, known "by far [as] the most persuasive and articulate advocate of codification in nineteenth-century America."[205] When the New York Constitution was revised in 1846, it included a provision for the appointment of two commissions—one to reform court procedure and the other to codify the entire

201. Surrency, *supra* note 179, at 85.
202. *Id.* at 86 (quoting 1850 Ala. Laws (enacted Feb. 5, 1850)).
203. *Id.* The result was the Alabama Code of 1852. *See id.* at 89.
204. *Id.* at 86 (citing KY. CONST. of 1850, art. VII, § 22).
205. Morriss, *supra* note 180, at 357.

body of substantive state law.[206] The saga that followed has a decades-long history.[207] Ultimately, Field's efforts in New York met with mixed success primarily because James C. Carter, a persistent foe of codification and Field's "arch-antagonist,"[208] used his political connections, backed by a spurious defense of the common law,[209] to defeat Field's proposed Civil Code—not just once, but several times.[210]

Because a rich scholarship exists on the influence of David Dudley Field and his codification efforts,[211] a lengthy recitation

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206. David Dudley Field, *Codification in the United States*, 1 JURID. REV. 18, 18–19 (1889).

207. *See generally, e.g.*, *id.* at 18–23.

208. Benjamin Kaplan, *David Dudley Field Centenary Essays*, 63 HARV. L. REV. 721, 722 (1950) (book review).

209. *See* Aniceto Masferrer, *Defense of the Common Law Against Postbellum American Codification: Reasonable and Fallacious Argumentation*, 50 AM. J. LEGAL HIST. 355, 357 (2010).

> In order to defend the common law from codification, Carter presented to some extent a disfigured or distorted face of the common law tradition, emphasizing only those aspects which could provide him with the most powerful legal argument against the appealing and increased interest in codifying the American law wholesale. In this regard, the emotional intensity with which that debate developed is apparent, as is the strong personal and political interest of the majority of debaters.

Id.

210. *E.g.*, *id.* at 416 ("Despite the paradoxes in Carter's legal theory, he succeeded in persuading the institutional authority (governors) to deny final approval to Field's Code, even after it had already been passed twice by the legislature.").

> The most important part of the reform, the Civil Code, passed the House of Assembly four times and both houses twice . . . . On the two occasions on which the Civil Code had passed both houses, the governors, influenced by the bar, refused their signatures. When in 1885 and in 1886 the Civil Code was again introduced into the legislature, the opposition, led by Carter, prevailed. Finally, the Civil Code died and the private law of New York remained uncodified.

Weiss, *supra* note 38, at 508.

211. *See generally, e.g.*, DAVID DUDLEY FIELD: CENTENARY ESSAYS (Alison Reppy ed., 1949); Garoupa & Morriss, *supra* note 26, at 1470–93 (discussing insights from the nineteenth-century codification debates from an economic perspective); Shael Herman, *The Fate and Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 421–25 (1996) (discussing Field's codification proposals); Aniceto Masferrer, *The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An Approach to Its Legal Argumentation*, 40 ARIZ. ST. L.J. 173, 174 (2008) (focusing on debates surrounding Field's Civil Code); Morriss, *supra* note 180, at 356 (concentrating on debate provoked by Field's draft codes prepared for New York during the 1860s); Weiss, *supra* note 38, at 503–11 (discussing Field's concept of codification, his proposed codes, and the reasons for the failure of Field's Civil Code in New York); *see also* Rodolfo Batiza, *Sources of the Field Civil Code: The Civil*

of that history is unnecessary here. Despite the extended controversy his codification projects engendered in New York, they broadly influenced several other states to follow his lead.[212]

Without question, Field's Civil Procedure Code represented the first comprehensive code of its kind other than Louisiana's Civil Code.[213] Better known to historians as the "Field Code,"[214] it would become a model for simplifying and clarifying the archaic minutiae carried over from English common law procedure. Enacted in New York in 1848,[215] it was the prototype for procedural reforms in twenty-four other states by 1870.[216] The Federal Code of Civil Procedure, first adopted in 1938, reflects the substantial and continuing influence of the Field Code well into the twenty-first century.[217]

Law Influences on a Common Law Code, 60 TUL. L. REV. 799, 802 (1986) (examining sources of inspiration for Field's proposed Civil Code).

212. *E.g.*, Field, *supra* note 206, at 21–25; *see also* Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132–33 (2018) (applying digital text analysis to assess the widespread influence of the Field Code and its emulators).

213. Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 10 (1989).

214. *See, e.g.*, Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 311–13 (1988) (analyzing the influence of the "Field Code" on the Federal Rules of Civil Procedure); *id.* at 317 (citing A. LOOMIS, HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS 22 (Little Falls, J.R. & G.G. Stebbins 1879)) (noting that Field's "partial procedural code of 1848 became known as the 'Field Code'") .

215. An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State (Code of Procedure), 1848 N.Y. Laws 497 (adopted April 12, 1848, with most provisions taking effect on July 1, 1848).

216. Bone, *supra* note 213, at 10 n.14 ("By 1870, at least twenty-four states had adopted some version of the Field Code [of Civil Procedure]."). One scholar estimated that "some thirty states" eventually adopted Field's Civil Procedure Code. Arthur T. von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 U.C. DAVIS L. REV. 659, 668 (1998); *see also* Weiss, *supra* note 38, at 506 (reporting that by 1897, 31 states and territories had adopted civil procedure codes patterned on the Field Code).

217. Weiss, *supra* note 38, at 506 ("In the realm of civil procedure, the idea of codification was successful and has remained successful . . . . [T]he next major [codification] reform, the 1938 Federal Rules of Civil Procedure, renewed Field's legacy."). *But cf.* Subrin, *supra* note 214, at 313 ("[I]t is ahistoric and untenable to argue that twentieth-century procedure is only a minor modernization of the Field Code.").

3. Other State Codification Initiatives After 1850

Perhaps inspired by Field's success with the New York Code of Civil Procedure, still other states considered the advantages of codification. Georgia, the last established of the original thirteen Colonies, embarked on a major codification project beginning in 1858.[218] After years of work, the Legislature enacted the much-revised Georgia Code to take effect on January 1, 1863. One of its celebrated accomplishments was to ensure that the entire body of state law was "within reach of the people."[219] Georgia is the only one of the original Colonies to have successfully codified its entire body of law.[220] In 1889, Field himself concluded that the Georgia Code "was drawn up with care and precision . . . and, according to all accounts, is working well."[221]

Four other "Western" territories and states were heavily influenced by the codes Field had drafted for New York. In 1866, the Dakota Territory adopted Field's Civil Code in full.[222] California followed by enacting four codes, including Field's Civil Code, in 1872.[223] Finally, Montana adopted four codes in 1895, supplanting the entirety of the state's then-existing body of law.[224]

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218. Surrency, *supra* note 179, at 89 (citing Ga. Laws 95 (Nov. 29, 1858)).

219. *Id.* at 91 (quoting Hines Holt et al., *Preface* to CODE OF THE STATE OF GEORGIA vi (1861)). Surrency's article describes Georgia's codification process in detail. *See* Surrency, *supra* note 179.

220. For a full discussion of the Georgia codification process, see Marion Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178, 178–89 (1930).

221. Field, *supra* note 206, at 19. Field noted that the New York Commissioners were unaware of Georgia's codification work at the time it was underway, "owing, it is supposed, to the breaking out of the Civil War." *Id.*

222. *See* David Dudley Field, *Codification of the Law*, 2 ALB. L.J. 465, 465 (1870) (crediting Dakota Territory, "one of the youngest, but most vigorous, of our territories" with "the honor of being the first to enact a code of the common law of England"); Morriss (1995), *supra* note 200, at 372–75 (noting that Field's codification efforts first took hold in Dakota Territory and discussing its codification process).

223. Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617 (1994) ("[I]n 1872, California had moved to the forefront of American legal reform by becoming one of the first states in the nation to codify its complete body of laws."); Cooley, *supra* note 120, at 317 (noting that California enacted four codes embracing the entirety of state law as it then existed: the Penal Code, the Code of Civil Procedure, the Political Code, and the Civil Code, all in February and March 1872); Morriss (1995), *supra* note 200, at 377 (same).

224. Morriss (1995), *supra* note 200, at 378–97 (describing and critiquing events leading up to the enactment of Montana's four codes in 1895). Over the last two

4. Post–Civil War Codification Movement: 1865–1900

For understandable reasons, the debate over codification stalled during the Civil War, but it resumed in full force after the war was over and Reconstruction began.[225] The literature of the period is replete with books and articles discussing the issue.[226] In the midst of the debate, the American Bar Association was founded in 1878, motivated in part by concerns among the practicing bar about the increasing variations in state law—meaning common law, legislation, and codes.[227]

In 1886, after a spirited debate on the merits of codification and the distinction between codes and statutes, the Governors of the American Bar Association adopted the following resolution on a vote of 58 in favor to 41 against: "The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute."[228] During the debate that preced-

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decades, some respected Montana scholars have argued that what remains of the 1895 Codes should be repealed. *See, e.g.*, Scott J. Burnham, *Let's Repeal the Field Code!*, 67 MONT. L. REV. 31, 31–32 (2006) ("The Montana [L]egislature should continue its good work by repealing the remaining Field Civil Code statutes that were enacted in Montana."); *see also* Andrew P. Morriss, Scott J. Burnham & James C. Nelson, *Debating the Field Civil Code 105 Years Late*, 61 MONT. L. REV. 371, 405 (2000) (recording debate among two scholars and a jurist over whether Montana's Field Codes should be repealed). *But see* Scott J. Burnham, *Let's Restore Freedom of Contract to the Montana Code*, 36 MONT. LAW. 27, 27 (Apr. 2011) (explaining why he was "now in the position of advocating that in order to improve Contract Law by permitting more robust freedom of contract, a part of the Field Code should be enacted in Montana").

225. Morriss (1995), *supra* note 200, at 360–64 (noting that codification was debated across the country (citing COOK, *supra* note 146)).

226. *E.g.*, J. BLEECKER MILLER, DESTRUCTION OF OUR NATURAL LAW BY CODIFICATION (New York, H. Cherouny 1882); M.D. Chalmers, *Experiment in Codification*, 2 L.Q. REV. 125, 134 (1886); Cooley, *supra* note 120; Field, *supra* note 206, at 25; David Dudley Field, *Codification—Mr. Field's Answer to Mr. Carter*, 24 AM. L. REV. 255, 266 (1890); Seaton Gordon, *Codification of the Law*, 3 CAN. L. TIMES 139 (1883); J. Bleecker Miller, *The Fight against the Civil Code*, 2 COUNSELLOR 82, 84 (1892); Martin F. Morris, *The Code System*, 1 WASH. L. EXCH. 65, 67 (1890); *Mr. Dudley Field on the New York Codes*, 31 L. MAG. & L. REV. 112, 117 (1871); A.P. Sprague, *American Codification and the English Judicature Acts*, 5 L. MAG. & REV. 59, 67 (1879); J. Dove Wilson, *Recent Progress of Codification,* 3 JURID. REV. 97 (1891); Note, *Codification*, 1 MANITOBA L.J. 163 (1884); *see also* Masferrer, *supra* note 211, at 173.

227. *See* Crystal, *supra* note 156, at 263 (noting that the ABA in 1889 appointed a committee to consider uniformity of state legislation); Robert A. Stein, *Strengthening Federalism: The Uniform State Law Movement in the United States*, 99 MINN. L. REV. 2253, 2255–56 (2015) (noting that the ABA appointed a Committee on Uniform State Laws in 1889).

228. *Transactions of the Ninth Annual Meeting of the American Bar Association*, 9 A.B.A. REP. 3, 74 (1886) [hereinafter 1886 ABA Report]. The resolution was offered

ed the vote, one member of the body noted that "every bar association in the country for the last two years has been discussing this subject."[229] Two years later, the ABA adopted a resolution endorsing the codification of civil and criminal procedure rules for use in federal courts.[230]

Hence the years following the Civil War witnessed renewed and widespread debate about the merits of codification, and prominent members of the American bar weighed in as staunch proponents.

5. Uniform Law Commission

In the wake of the great debates over codification in the late nineteenth century, a meeting was held in the late summer of 1892 at Sarasota Springs, New York, by a group that would later become the National Conference on Uniform State Laws, known more informally as the Uniform Law Commission.[231] The purpose was to discuss alternatives by which to achieve some degree of uniformity in state laws, recognizing that the capacity of Congress to unify national law was seriously limited.[232] The group also believed that achieving uniformity by interstate agreements was an "almost insuperable" goal.[233] Certainly the Field Codes and the nationwide debates over codifi-

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by the ABA Committee on Delays and Uncertainty in Judicial Administration, chaired by none other than David Dudley Field. *Id.* at 11. A spirited debate preceded the vote on the resolution. *See id.* at 11–74. Interestingly, just before the final resolution was adopted, a motion was offered to add the following sentence: "This Association does not, however, favor or oppose what is known as codification." The amendment failed on a 29-49 vote. *Id.* at 73. For a more detailed summary of the ABA's positions on codification specifically, see Crystal, *supra* note 156, at 261–63.

229. 1886 ABA Report, *supra* note 228, at 38.

230. Crystal, *supra* note 156, at 263 (citing 11 A.B.A. REP. 79 (1888)).

231. Fred H. Miller, *The Uniform Commercial Code: Will the Experiment Continue?*, 43 MERCER L. REV. 799, 799 (1992) (citing WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 11 (1991)); Stein, *supra* note 227, at 2255 ("This codification process marked the beginning of the movement toward uniform state laws."). The meeting was apparently held in conjunction with the annual meeting of the American Bar Association. *See* Crystal, *supra* note 156, at 263.

232. Miller, *supra* note 231, at 799. Seven states were represented at the initial meeting: Delaware, Georgia, Massachusetts, Michigan, New York, New Jersey, and Pennsylvania. Stein, *supra* note 227, at 2256.

233. Miller, *supra* note 231, at 800.

cation were among the factors that instigated the founding of the Commission.[234]

The Commission got right to work on various projects, recommending in its first year of existence uniform laws dealing with a variety of topics, including various issues dealing with wills executed or probated in another state, and a uniform table of weights and measures.[235] The first commercial law proposed for enactment was the Uniform Negotiable Instruments Law in 1896, which was ultimately adopted nationwide.[236] Soon after, Professor Samuel Williston drafted the Uniform Sales Act, initially modelled after England's Sale of Goods Act but later revised considerably.[237]

The organization grew rapidly in the last decade of the nineteenth century, and by 1900, thirty-five states and territories were represented among its membership.[238] In the 125 years of the Commission's existence, its most heralded success has been the Uniform Commercial Code, finally adopted in 1951 after several decades of work.[239]

Although many of the Commission's uniform laws proposed for state enactment bear a striking resemblance to codes,[240] most comparative scholars distinguish them from true codes in the civil law sense. One reason is that most uniform laws do not purport to supplant state common law in the subject area, but rather supplement it. Provisions routinely appear in uniform codes with the effect of preserving state common law (and other relevant laws) while encouraging judges in enacting states to interpret the code with the goal of unifying state law.[241]

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234. Stein, *supra* note 227, at 2255.

235. *Id.* at 2257.

236. *Id.* at 2258. The Law is said to have been modelled after England's 1882 Bills of Exchange Act. Crystal, *supra* note 156, at 264 n.144; *see* Francis M. Burdick, *A Revival of Codification*, 10 COLUM. L. REV. 118, 123 (1910).

237. Stein, *supra* note 227, at 2263.

238. *Id.* at 2256.

239. *Id.* at 2262 (referring to the Uniform Commercial Code as the "crown jewel" of the Commission's work).

240. *See* Judson, *supra* note 149, at 53–54 (referring to uniform laws as a form of codification; "Every legislative Act which declares the rule upon a specific subject, thus making a rule of action therein, is in so far codification.").

241. *See, e.g.*, UNIF. PROBATE CODE § 1-103 (UNIF. LAW COMM'N 1969) (amended 2010) ("Unless displaced by the particular provisions of this [Code], the principles of law and equity supplement its provisions."); UNIF. TRUST CODE § 106 (UNIF.

Moreover, the Uniform Law Commission is a private entity lacking government authority. Its influence is therefore heavily dependent on the credibility of its work products and the capacity to communicate effectively through its membership with state legislatures to motivate them to consider enactment. Nevertheless, the work of the Commission has increasingly influenced states to enact more and more statutes over the years that have enhanced, if not guaranteed, comparable statutory enactments across state lines.[242] Professor Karl Llewelyn's leadership in drafting major portions of the Uniform Commercial Code lent credibility to the codification effort, and his intimate familiarity with the German Civil Code no doubt heavily influenced the final product to resemble civil codes on the European continent.[243]

The Uniform Law Commission continues its work today, encouraging states to enact statutes that would have the effect of codifying and unifying state laws in a wide range of subject

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LAW COMM'N 2005) (amended 2010) ("The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.").

242. *See, e.g.*, Amelia H. Boss, *The Future of the Uniform Commercial Code Process in an Increasingly International World*, 68 OHIO ST. L.J. 349, 349 (2007) ("Despite initial questions about whether uniformity might best be achieved by federal enactment of the Uniform Commercial Code . . . , its widespread enactment on a state-by-state basis has made it the poster child for the uniform law process."); Eric Stein, *Uniformity and Diversity in A Divided-Power System: The United States' Experience*, 61 WASH. L. REV. 1081, 1101 (1986) (noting that scholars and practitioners "who provide the principal brain power in drafting uniform laws are at times concerned with the need for systematization of a particularly fragmented field of law," and that "the Conference on Uniform State Laws has scored some significant successes by having its uniform laws widely adopted in state legislatures"); Traynor, *supra* note 92, at 422–23 (discussing the standardizing influence of the Uniform Commercial Code and related uniform laws); *cf.* Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 331 (2009) (noting that states tend to adopt proposed uniform laws when interstate uniformity appears to serve the goal of efficiency, and questioning whether uniform laws dealing with limited liability companies do so).

243. *See, e.g.*, William D. Hawkland, *The Uniform Commercial Code and the Civil Codes*, 56 LA. L. REV. 231, 240, 242 (1995) (discussing Llewelyn's role in drafting the U.C.C. and its resemblance to civilian codes).

areas.[244] More than 170 uniform laws have been proposed by the Commission,[245] and more are under development.[246]

6. American Law Institute

The American Law Institute was founded in 1923 by a group of American jurists, lawyers, and academics known as the Committee on the Establishment of a Permanent Organization for the Improvement of the Law.[247] Several members of the Uniform Law Commission took part.[248] Its mission, according to its charter, is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."[249]

The Institute embarked on a plan to "restate" the principles of the common law pertaining to various subjects. It did so in a form that appeared statute-like to many observers, although the proposals themselves were designed to state common law principles in a format that would be suitable for state courts to readily adopt and incorporate by decision into state common law. Some have likened the undertaking to a continuation of the codification reform initiatives that began in the nineteenth century.[250] Others opposed the project as an effort to shore up the common law against attacks by the codification movement.[251]

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244. *About the ULC*, UNIFORM L. COMM'N, http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC [https://perma.cc/5TBK-YUP2] (last visited Mar. 29, 2019).

245. *Acts*, UNIFORM L. COMM'N, http://www.uniformlaws.org/Acts.aspx [https://perma.cc/R7F8-ZSCH] (last visited Mar. 29, 2019).

246. *ULC Project List by Category*, UNIFORM L. COMM'N (July 31, 2017), http://www.uniformlaws.org/Shared/ProjectsList/ProjectsList.pdf [https://perma.cc/8WCA-HYKL].

247. Crystal, *supra* note 156, at 239 & n.1.

248. Stein, *supra* note 227, at 2263.

249. *About ALI: Creation*, AM. L. INST. (quoting charter), https://www.ali.org/about-ali/ [https://perma.cc/Q8KL-X9V9] (last visited Mar. 29, 2019).

250. *E.g.*, Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 228 (2007) ("[O]thers—both inside and outside the movement—saw the Restatements as a necessary first step toward codification or some other significant reform."); Crystal, *supra* note 156, at 265 ("The Restatement project, begun in 1923 by the ALI, represents a continuation and modification of the late nineteenth century codification movement.").

251. *E.g.*, Adams, *supra* note 250, at 226 ("One view of the Restatement movement is that it was an attempt to protect the common law against codification.").

The American Law Institute has met with substantial criticism over the years, but its continued influence on unifying state common law is undeniable. One scholar thoughtfully summed up the American Law Institute's impact and influence as follows:

> The Restatement movement was the outgrowth of a conservative codification movement which developed in the last quarter of the nineteenth century. Although this movement failed to achieve success at the state level because it was opposed by members of the bar who had traditional values, the movement was supported by two new groups in the profession, law professors and corporate lawyers. Those two groups ultimately produced the Restatements, a code like response to the problems of the legal system.[252]

7. Demise of Federal Common Law

The United States Supreme Court put a very large nail in the coffin of American common law when it decided *Erie Railroad Co. v. Tompkins*[253] in 1938. The essential holding in that case was consistent with what many scholars had surmised for years: Neither the federal Constitution nor Congress had ever authorized the federal courts to create federal "general" or common law.[254]

Erie overruled a nineteenth-century case, *Swift v. Tyson*,[255] authored by Justice Joseph Story. The issue in both cases was whether a federal court, sitting in a diversity case, was required to apply state common law to resolve a legal issue on which the state legislature had not spoken. Interpreting the relevant language in the Judiciary Act of 1789, the *Swift* Court had held that federal courts in that circumstance were bound by state positive law, such as statutes, but not state common law.[256] In the absence of a state statute on point, *Swift* authorized the federal courts to fashion a federal "general" or common law rule

252. Crystal, *supra* note 156, at 273.

253. 304 U.S. 64 (1938).

254. *Id.* at 78–79; *see supra* notes 62 & 73 and accompanying text.

255. 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

256. *See id.* at 12.

to apply, which of course would preempt state common law by virtue of the Supremacy Clause.[257]

Nearly a century later, *Erie* held just the opposite. Its holding required federal courts sitting in diversity to apply state law, whether codified, customary, or common, to resolve issues of state law.[258] The *Erie* holding was a watershed in federal court jurisprudence, eliminating (at least in theory) the federal courts' assumed authority to develop a national common law to apply in the absence of state positive law.[259]

As a result of *Erie*'s holding that federal courts had no power to develop their own rules of "general" or common law, the

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257. *See id.* at 12–13. Given Story's reputation as at least a lukewarm proponent of codification in the 1830s, it may seem surprising that he would have reasoned as he did in *Swift v. Tyson.* But a closer reading of the opinion suggests that his reasoning in fact may have implicitly supported codification of state law. *See id.* at 18–19. Under Story's reasoning, the word "law" in the Judiciary Act referred only to state *positive law* (or its settled customary equivalent), which would be treated as controlling by federal courts sitting in diversity. Story's reasoning may have been colored by his view favoring codification of state law; the *Swift* holding and its reasoning would have made it much easier for federal courts sitting in diversity to identify and apply relevant state law.

258. *See Erie*, 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."); *see also* Rules of Decision Act, 28 U.S.C. § 1652 (2012) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

259. Notwithstanding *Erie*, the Supreme Court "has recognized several 'enclaves of federal judge-made law which bind the States.'" Collins v. Virginia, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)). Those narrow "enclaves" include foreign affairs, admiralty, lawsuits between states, and some aspects of labor law. *Id.*

At first blush, that observation may appear to contradict the premise that federal common law is essentially dead. But as Justice Thomas has correctly observed, some of those subjects are within the scope of federal court jurisdiction by virtue of *express constitutional or statutory delegations* to the federal judiciary. *Id.*; *see, e.g.*, U.S. CONST. art. III, § 2 (conferring jurisdiction over admiralty and maritime cases; controversies between states; controversies involving foreign states or citizens; and "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties"); *see also, e.g.*, 29 U.S.C. § 185(a), (c) (2012) (conferring jurisdiction to federal courts over alleged violations of collective bargaining agreements). Indeed, with respect to subject matter jurisdiction not expressly delegated to the federal courts, the preemptive authority of their decisions in those areas is "questionable." *Collins*, 138 S. Ct. at 1679 (Thomas, J., concurring); *see also* Scalia, *supra* note 107, at 13 ([I]n the federal courts, . . . with a qualification so small it does not bear mentioning, there is no such thing as common law.").

holding in *Swift* was expressly overruled.[260] While the common law wings of the federal courts were thus severely clipped, the *Erie* holding required federal courts sitting in diversity cases to search for relevant *state* common law in the absence of state positive law on point.[261] For this reason, *Erie* may have had the inadvertent effect of encouraging the continued development of state common law, even while subverting federal common law.

8. Enactment of United States Code Titles as Positive Law

Perhaps less influential, but nevertheless significant in the incremental movement toward codification of American law, are the ongoing efforts of the House Office of Law Revision Counsel to revise and consolidate titles of the United States Code for enactment as positive law.[262] The slow process began in 1947.[263] At the time of this writing, fewer than half the total number of United States Code titles have been so enacted, and the process is ongoing.[264]

Until 1875, federal statutes were not organized in any systematic way. Public laws were published chronologically in the *Statutes at Large*, while private laws were not published at all. Researching public laws required tedious hunting through the

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260. *Erie*, 304 U.S. at 79 (expressly disapproving *Swift v. Tyson* as "an unconstitutional assumption of powers by courts of the United States").

261. *See id.* at 78. *See generally* CHARLES ALAN WRIGHT ET AL., 19 FEDERAL PRACTICE AND PROCEDURE § 4507 (3d ed. 2018).

262. Office of the Law Revision Counsel, *Positive Law Codification*, U.S. HOUSE OF REPRESENTATIVES (explaining the process of enacting titles as positive law and defining that term), http://uscode.house.gov/codification/legislation.shtml [https://perma.cc/E2Z8-B7CL] (last visited Mar. 29, 2019); *see also* Office of the Law Revision Counsel, *Positive Law Codification in the United States Code*, U.S. HOUSE OF REPRESENTATIVES, http://uscode.house.gov/codification/positive_law_codification.pdf [https://perma.cc/2AUP-BPYM] (last visited Mar. 29, 2019).

263. Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 137 (2010) ("In 1947, Congress began a new effort to gradually convert the entire Code into positive law." (citing Act of July 30, 1947, ch. 388, 61 Stat. 633, 638)). The project resulted after multiple errors and omissions were discovered in early codifications of federal statutes, prompting Congress to enact a statute providing that subsequent codifications were merely presumptive evidence of the laws themselves. *See* 1 U.S.C. § 204(a) (2012); *infra* note 270 (quoting § 204(a)).

264. Office of the Law Revision Counsel, *Positive Law Codification*, *supra* note 262. The *Code* for many years had fifty titles, although that number has recently increased to fifty-seven. *See id.*

growing number of *Statutes at Large* volumes, which were neither indexed nor organized by subject matter. Comparable to state session laws, the *Statutes at Large* are simply bound volumes of the public laws enacted by Congress in each two-year session, collected and published in chronological order. The *Statutes at Large* were the sole source for researching federal statutes until 1875, when the first edition of the *Revised Statutes* appeared in print. Congress published the *Revised Statutes* in an effort to consolidate all federal statutes in force as amended through December 1, 1873.[265]

The first version of the *Revised Statutes* was almost immediately criticized as incomplete and possibly unreliable.[266] Complaints were also directed at the arrangement and numbering of the titles, chapters, and sections.[267] A second edition, published in 1877, included enactments after December 1, 1873. Supplements were periodically published in later years.[268]

Not until 1926 was the *United States Code* as we know it today first published in multiple volumes known as titles.[269] The codification was organized by subject matter and contained detailed indices, greatly improving accessibility. Even now, however, the codified version is by law merely prima facie evidence of federal law, unless contained in a title that Congress has definitively enacted as positive law.[270] Otherwise, federal laws can be found only in the official *Statutes at Large*.[271]

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265. Margaret Wood, *The Revised Statutes of the United States: Predecessor to the United States Code*, LIBRARY OF CONG. (July 2, 2015) (citing REVISED STATUTES OF 1874), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/ [https://perma.cc/GL39-56VL].

266. *Summary of Events, The Revised Statutes*, 9 AM. L. REV. 762, 767–68 (1875) [hereinafter *Summary of Events*]; *see* Tress, *supra* note 263, at 135 ("Numerous complaints about mistakes and omissions in the 1873 Revised Statutes led to the publication of an amended and updated version in 1878.").

267. *Summary of Events*, *supra* note 266, at 768 (referring to the arrangement as "inconvenient and clumsy"). The 435-page index to the 1092 pages of revised statutes was also critiqued as untrustworthy and inconvenient. *Id.* Even the typography was criticized as "not positively bad, but . . . by no means well executed, and [it] compares very unfavorably with work of the same kind done for the governments of other countries." *Id.*

268. *See* Tress, *supra* note 263, at 136 ("The difficulties with the Revised Statutes seem to have thoroughly dampened congressional enthusiasm for codification.").

269. *See id.*; *see also* Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 L. LIBR. J. 545, 550–52 (2009) (explaining history and development of the 1926 Code).

270. *See* 1 U.S.C. § 204(a) (2012).

Although the *United States Code* is nominally a codification of federal statutes, comparative law scholars would not classify it as a code in the civil law sense of that term. Its length, complexity, and detail, however, certainly reflect that statutes have become ubiquitous in the United States.

C. International Treaties, Conventions, and Agreements

Legal education in the United States has traditionally paid little heed to the role of international treaties and supranational conventions.[272] Yet the federal Constitution expressly incorporates treaties,[273] together with federal statutes, as the supreme law of the land.[274] The twentieth century witnessed a significant

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> The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

Id.

271. *See* 1 U.S.C. § 112 (2012).

> The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

Id.

272. "Multilateral conventions and institutions [create] certain reciprocal commitments among nations and [subject] countries to supranational norms that implicate realms traditionally considered to be under purely local control." Amnon Lehavi, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 439 (2010). Perhaps the most salient supranational institution in modern times is the European Union. *See, e.g.*, Johannes Saurer, *The Accountability of Supranational Administration: The Case of European Union Agencies*, 24 AM. U. INT'L L. REV. 429, 487 (2009) ("The system of European [Union] administration is undergoing a profound transformation.").

273. "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument." Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.), *overruled in part on other grounds*, United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

274. *See* U.S. CONST. art. VI.

increase in the number of treaties the United States has joined as a ratifying party.[275] In fact, one scholar, apparently with a wink and a nod to Calabresi's so-called "Age of Statutes," has referred to the twentieth century as the "Age of Multilateral Treaties."[276]

Despite the clear language in Article VI of the Constitution providing that treaties, once ratified by the United States,[277] are just as much part of the supreme law as the Constitution and federal statutes,[278] the Supreme Court has exhibited considerable reluctance to directly enforce them under the prevailing "doctrine of non-self-execution."[279] First recognized by name[280]

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the Authority of the United States,* shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. (emphasis added). *But cf.* Medellin v. Texas, 552 U.S. 491, 504 (2008) (6-3 opinion) (distinguishing "treaties that automatically have effect as domestic law" from "those that—while they constitute international law commitments—do not by themselves function as binding federal law" (citing *Foster*, 27 U.S. (2 Pet.) at 314)). *Medellin* has been called "the Supreme Court's leading non-self-execution decision." Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. REV. 1639, 1639. Another scholar observed that *Medellin* "contains the most extensive discussion of treaty self-execution in the Court's history." Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 132.

275. Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 646 (2007) (noting the proliferation of international agreements to which the United States became a party beginning in 1939).

276. *Id.* at 630.

277. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

278. *See* Wu, *supra* note 275, at 577.

> A first-time reader of the United States Constitution might consider the intended role of treaties in the American system as fairly straightforward. Article VI of the Constitution declares in one breath that valid treaties and statutes are the "supreme Law of the Land." The text suggests a rough equivalence in the legal status of the two, and the simple equivalence view is supported by much, particularly early, Supreme Court writing.

Id.

279. *Id.* at 648. "History is littered with treaties with direct language that were nonetheless not enforced by the judiciary for want of Congressional action." *Id.* at 595; *see* Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 90 (2012) ("The courts of the United States are today less willing than at any previous time in history to directly enforce the Article II treaty obligations of the United States through a private right of action."); *see also* John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C.

in an opinion for the Court authored by Chief Justice John Marshall in 1829,[281] the non-self-execution doctrine holds that some treaties are not directly enforceable by the federal courts. Specifically, unless a treaty is "self-executing"—meaning that its terms are not contingent on the subsequent enactment of federal legislation—the courts will decline to directly enforce it.[282] The doctrine has been criticized by scholars for years.[283]

L. REV. 433, 434–36 (2015) (explaining that "the judiciary has taken steps to limit the direct role played by international law in the U.S. legal system," concluding that the "persistent judicial reluctance to directly enforce international law rules is normatively undesirable," and proposing codification as a solution); Manley O. Hudson, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers, 1910–1923 Sen. Doc. No. 348, 67th Cong., 4th Sess.*, 37 HARV. L. REV. 790, 790 (1924) (bemoaning the lack of an accessible and authoritative source for international treaties: "Some day the United States must have an adequate and worthy publication of all treaties, together with the necessary documents for understanding them.").

280. Wu argues that the doctrine was first recognized in *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393 (Pa. Ct. Comm. Pleas 1788). Wu, *supra* note 275, at 578 n.21, 607. Even so, the facts (and the treaty) at issue in that case predated ratification of the federal Constitution on June 21, 1788.

281. Medellin v. Texas, 552 U.S. 491, 504 (2008) (citing Foster v. Neilson, 27 U.S. (2 Pet.) 253, 315 (1829) (Marshall, C.J.)).

282. *See id.* at 527 ("A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force."); Republic of Marshall Islands v. United States, 865 F.3d 1187, 1192 (9th Cir. 2017) ("In simple terms, a self-executing treaty is one that is judicially enforceable upon ratification. In contrast, a non-self-executing treaty requires congressional action via implementing legislation or, in some cases, is addressed to the executive branch."); U.S. Senator Ted Cruz, *Essay: Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 93 (2014) (distinguishing self-executing treaties, which have the effect of domestic law, from non-self-executing treaties, which by themselves do not have binding effect); Wu, *supra* note 275, at 578 ("'Self-executing treaties' become a domestic law of the United States immediately upon ratification. 'Non-self-executing treaties,' by contrast, create no domestic law rules [absent legislation] and cannot be directly enforced in American courts."). Because a non-self-executing treaty is not judicially enforceable, a court will dismiss a claim to enforce it as nonjusticiable. *Republic of Marshall Islands*, 865 F.3d at 1193.

283. *E.g.*, STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., NO. 7-5700, RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 16–17 (2018) ("[T]here is significant scholarly debate regarding the distinction between self-executing and non-self-executing provisions, including the ability of U.S. courts to apply and enforce them . . . . At present, the precise status of non-self-executing treaties in domestic law remains unresolved." (internal footnotes and citations omitted)); Wu, *supra* note 275, at 573; *id.* at 575 ("[T]he rule of self-execution has been stretched beyond recognition in the twentieth century into a loose doctrine that blocks judicial enforcement of treaties on a seemingly ad hoc basis."); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 (2018).

Over the last century, the nature of international compacts has changed. They are now commonly known as "congressional-executive agreements."[284] Under this arrangement, the President and both chambers of Congress enact legislation that simultaneously approves the treaty along with implementing statutes, thus avoiding the Article II process requiring the President's approval subject to ratification by a two-thirds vote of the Senate.[285]

Whether framed as Article II treaties or congressional-executive agreements, bilateral and multi-lateral international agreements have expanded the supreme law of the land well beyond the "Age of Statutes." Agreements with foreign nations are an increasingly important component of the positive law that governs Americans in the twenty-first century.[286] The fed-

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> (1) Treaties made under the authority of the United States are part of the laws of the United States and are supreme over State and local law.
>
> (2) Cases arising under treaties fall within the judicial power of the federal courts.
>
> (3) Treaties create international legal obligations for the United States, and limitations on the domestic enforceability of treaties do not alter the United States' obligation under international law to comply with relevant treaty provisions.

Id. (superseding RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987) (defining and distinguishing "non-self-executing" agreement from "international law or international agreements" and providing that "a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation")).

284. *Wu*, *supra* note 275, at 646, 648.

285. *Id.* at 646. "[T]he congressional-executive agreement is an international agreement made by the President and approved by a simple majority of each House of Congress. It has the status of a treaty as a matter of international law, and the status of a [federal] statute as a matter of domestic law." Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1626 (2006); *see* Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1210 & tbl. 1 (2018) (illustrating the "steady and ultimately sharp rise in the number and relative frequency of executive agreements and in their dominant role in U.S. agreement making"); *see also* CONG. RESEARCH SERV., SEN. COMM. PRINT NO. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 5, 39 tbls. II-1 & II-2, 40–41 (2001) (explaining congressional-executive agreements and detailing the dramatic increase in their use compared to Article II treaties beginning in the late 1930s), https://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf [https://perma.cc/YE7T-DTNR].

286. *E.g.*, Bradley, *supra* note 274, at 162–63 ("In the modern era, both statutes and treaties have proliferated, and . . . treaties are often the vehicle for broad-based legislative efforts. These developments mean . . . that statutes and treaties are much more likely to overlap with one another and to express potentially dif-

eral courts' reluctance to enforce them is most likely symptomatic of the "judicial jealousy" first theorized by Roscoe Pound in 1908 as the underlying rationale for courts' reluctance to acknowledge the expanding role of statutes (and other positive law) in modern times.[287]

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ferent policy choices."); Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 TUL. L. REV. 1103, 1107 (2001) (noting the "rise of numerous legal systems outside of, and above, the national ones" in the second half of the twentieth century: "Since the founding of the United Nations, international law has developed into a complex legal regime with rulemaking bodies, a multitude of written provisions, a court, and enforcement mechanisms . . . ."); Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 921 (2004) (examining "the depth and breadth of the influence of self-executing treaties in the modern U.S. legal system"); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1956 (1999) ("We live in a world of treaties. Today, treaties regulate aspects of politics, economics, and law that affect the everyday lives of many Americans."); Ernest A. Young, *Treaties as "Part of Our Law,"* 88 TEX. L. REV. 91, 141 (2009) ("The line between foreign and domestic affairs is becoming increasingly difficult to draw in a globalized world, and treaties in particular are coming to look more like domestic regulatory statutes in their institutional structure, substantive concerns, and impact on the domestic legal system.").

> Perhaps the most striking observation that emerges from a comprehensive examination is the sheer number of existing self-executing treaties. The number of treaties that contain self-executing provisions is now over four hundred (even excluding treaties with Native American tribes). Moreover, many of these treaties are multilateral and thus may apply to dozens of countries. Equally remarkable is their substantive law coverage. Self-executing treaties now address such diverse fields as commercial law, criminal law, property law, tax law, civil procedure, administrative law, and family law.

Van Alstine, *supra*, at 921–22.

287. Pound, *supra* note 19, at 387–88 (speculating that "judicial jealousy of the [codification] reform movement" was the true reason for the unjustifiable "proposition that statutes in derogation of the common law are to be construed strictly," which "assumes that legislation is something to be deprecated," an attitude he considered "wholly inapplicable to and out of place in American law of today"); *see* Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 268 (1961) (referring to the "discredited maxim that statutes in derogation of the common law should be strictly construed," which "expresses an attitude of hostility to an innovating statutory purpose"); *see also* Scalia, *supra* note 107, at 29 ("The rule that statutes in derogation of the common law will be narrowly construed seems like a sheer judicial power-grab."). Perhaps judges resent the intrusion of treaties into foreign relations matters that courts have become accustomed to resolving. *But cf. infra* note 318 (citing recent scholarship explaining the declining scope of federal common law in the area of foreign relations).

D. The Age of Positive Law

In 1982, while a member of the Yale law faculty, Professor Guido Calabresi, who would later serve on the Second Circuit Court of Appeals, published a provocative book that bemoaned the proliferation of legislation. In particular, he complained about the "statutorification" of American law over time and the proliferation of old statutes still in place that (in his opinion) no longer made sense in the modern world.[288] Calabresi proposed that the judiciary should exercise the authority to disregard black-letter laws that had become outmoded and out of step with what judges viewed as the contemporary "legal fabric" of the law.[289] Calabresi called for a "legislative-judicial collo-

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288. CALABRESI, *supra* note 19, at 1–7. For a similar viewpoint about the proliferation of statutes in Australia, see S.J.C. Wise, *"Disfigured by Statute,"* 7 AMPLA BULL. 183, 186 (1988) (bemoaning the proliferation of statutes, not only for expanding the "number of words that have the force and standing of law" but also for their "incomprehensibility"). *But cf.* DAVID M. WRIGHT, COMMON LAW IN THE AGE OF STATUTES: THE EQUITY OF THE STATUTE (2015) (acknowledging the increasing influence of statutes in Australia's inherited common law system; addressing the possibility that its statutory regime may render irrelevant significant parts of traditional law of contract, tort, and equity).

289. CALABRESI, *supra* note 19, at 82. *But see* Brudney, *supra* note 103, at 9 (criticizing the legal academy's "failure to appreciate that legislatures and agencies function as lawmaking enterprises in ways that are methodologically distinct from courts—distinct but not therefore unprincipled or dishonorable.").

Judge Posner recently articulated an interpretive doctrine not far off the mark of Calabresi's radical theory. Judge Posner added a concurring opinion to the Seventh Circuit's *en banc* decision holding that Title VII of the Civil Rights Act barred discrimination "on the basis of sex" against homosexuals. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 352–59 (7th Cir. 2017) (Posner, J., concurring). Posner suggested that the majority could have reached the same result in a more "straightforward" way by resorting to "judicial interpretive updating"—a strategy he considered appropriate given the long interval between the 1964 enactment of Title VII and the date the court "reinterpret[ed]" and applied it. *Id.* at 353. *But see* Reed Dickerson, *Statutes and Constitutions in an Age of Common Law*, 48 U. PITT. L. REV. 773, 779–80 (1987).

> [One] result of the [judiciary's] lack of communicative understanding is the widespread notion that lexicographical change can affect the meaning of existing statutes. Where lexicographical change happens to produce a meaning more congenial to a current social objective, the notion is highly appealing. The trouble is that lexicographical change usually results from forces only marginally subject to human control. Thus, permitting it to affect the handling of existing statutes is often to substitute the blind forces of social drift for the considered views, however adequate, of a democratically selected body constitutionally authorized to affect the future. The textual integrity of a constitutionally authorized statute can only be preserved by adhering to the connotations it generated at the time of its enactment.

quy,"[290] which he believed would necessarily result if courts were to give the legislature an opportunity to take a "second look" at enactments that the courts deemed ill-advised and difficult to reconcile with precedent and other components of the "legal fabric."[291]

Id. As Dickerson observed (notably without mentioning Calabresi's theory), Judge Posner failed to acknowledge that Congress has plenary legislative power. U.S. CONST. art. I.

Far from disregarding Title VII since its original enactment, Congress has amended it over the years. *E.g.*, Pregnancy Discrimination Act of l978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. §§ 2000e, 2000e-2 (2012)) (amending Title VII to expressly bar discrimination on the basis of pregnancy). Directly relevant to the interpretive issue presented in *Ivy*, Congress has more than once considered proposed legislation that would have amended Title VII to *expressly* prohibit discrimination based on a person's sexual orientation or gender identity. *See, e.g.*, Employment Non-Discrimination Act, S.815, 113th Cong. (2013). The Senate passed the bill in 2013, but it failed to clear the House before the end of the session. *See* S. Rept. No. 113-105, *The Employment Non-Discrimination Act of 2013*, 113th Cong., 1st Sess. (Sept. 12, 2013); *see also S.815—The Employment Non-Discrimination Act of 2013*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/senate-bill/815 [https://perma.cc/D9V2-M5BJ] (last visited Mar. 29, 2019).

As Professor Dickerson pointed out, the notion that federal courts might assume authority to amend longstanding, constitutionally sound legislation by "judicial interpretive updating" raises the same troubling concerns about democratic norms as did Calabresi's radical proposals in 1982. That is especially so in light of unsuccessful congressional efforts to amend the statutory text to accomplish the same laudable social purpose.

290. CALABRESI, *supra* note 19, at 42. The first two-thirds of Calabresi's lengthy proposal attempted to explain why other solutions would not accomplish his purpose. *Id.* at 8–80 (discussing various alternatives to remedy his perceived problems with obsolescent statutes); *id.* at 7 (declaring that "none of these [alternative] approaches is satisfactory").

But Calabresi failed to acknowledge the significant developments following Judge Cardozo's 1921 article calling for a "ministry of justice" to bridge the institutional divide between legislatures and courts. *See* Cardozo, *supra* note 128 and accompanying text. For example, Cardozo's article provided the impetus for Congress to establish the forerunner of what is now the United States Judicial Conference (along with circuit judicial councils), and for state legislatures to establish judicial councils. Long before 1982, both innovations provided a formal institutional mechanism for legislative-judicial discussions and joint projects to resolve issues relevant to improving the operation of the legal system. *See supra* note 133. Calabresi failed to acknowledge the judicial council movement and its positive influence in encouraging dialogue between the judicial and legislative branches. Instead, he dismissed the contributions of what he called "law review commissions" with a passing reference to Cardozo's "justly celebrated article that took some thirteen years to bear fruit." CALABRESI, *supra* note 19, at 63–64.

291. CALABRESI, *supra* note 19, at 136. Ironically, Jeremy Bentham, the great proponent of statutes and codification, called for a similar process by which courts might refer issues to the legislature when no clear answer was apparent from the codified statutes. *See* Xiaobo Zhai, *Bentham on the Interpretation of Laws,* 38 J. LEGAL

But the underlying theme of Calabresi's 1982 text was more suggestive of what Dean Roscoe Pound had long before called "judicial jealousy"[292] than a serious attempt to propose a workable methodology for "rebalancing" America's reliance on statutory enactments in favor of judge-made law.[293] Professor Grant Gilmore, writing in 1967, had acknowledged the "museum aspect of codification," a term he used to describe the natural tendency of codes to recreate and preserve their forebear laws. Gilmore saw nothing objectionable about that trait of codes; indeed, he thought it "not without charm" to have "lovingly preserved" the nineteenth-century rules that were already obsolete in 1900, six years before the Uniform Sales Act was proposed.[294] In fact, Gilmore acknowledged that the true function of codification is "to reduce the past to order and certainty—and thus, to abolish it."[295]

> The future will, by and large, take care of itself—if the courts won't, the legislatures will do whatever may be necessary. A well-drafted codifying statute can greatly simplify this process [of legal evolution]. If the codifiers can perceive a unifying principle which underlies a surface diversity . . . the resulting simplification will be dramatic. The statute provides a new starting point from which further exploration can be

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HIST. 282, 282 (2017) (explaining one of Bentham's three primary theses underlying his theory of statutory interpretation: when a law can be interpreted in different ways, "the authoritative interpreter ought to be the sovereign legislature").

292. Pound, *supra* note 19, at 387–88.

293. *But see* Pierson v. Ray, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting) ("But Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law. It cannot be presumed that the common law is the perfection of reason, is superior to statutory law . . . , and that the legislature always changes law for the worse.").

294. Gilmore, *supra* note 97, at 473. "We may confidently expect that these Code innovations will, like their Victorian predecessors, lose interest as new and unexpected issues become the focus of future litigation." *Id.* at 474; *see also id.* at 474–75 ("The problems of living with the [Uniform Commercial] Code will, as in the past, to a considerable degree solve themselves as new issues appear with respect to which the Code's positive provisions will, increasingly, have little relevance."); *see also* Grant Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1028 & nn.1–2 (1975) [hereinafter Gilmore (1975)] (describing the Negotiable Instruments Law (1896) and the Uniform Sales Act (1906) as two of the first uniform laws promulgated by the National Conference of Commissioners on Uniform State Laws, then under the auspices of the American Bar Association).

295. Gilmore, *supra* note 97, at 476 & n.30 (citing Joseph Story, *On the Progress of Jurisprudence* (1821), *in* MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 195, at 198, 238).

> undertaken. The law will continue to evolve; new issues will appear in litigation; the statute will in time be buried under an accumulation of cases; the flood of cases will once again threaten to overwhelm us. The time will have come for another round of codification, in the course of which the recodifiers will point out that the old statutes were obsolescent, if not obsolete, when they were drafted. As indeed they were. If they had not been, they would have done a considerable amount of harm instead of, by way of simplification, a modest amount of good.[296]

More recently, Professor Alan Watson has acknowledged that the primary distinction between common law and civil law systems rests not on the balance between judge-made law and statutory law, but rather on the primary *source* of law.[297] He has also pointed out some of the serious flaws in the reasoning underlying Calabresi's radical proposal for reform.[298] In particular, Calabresi's proposal failed to acknowledge the fundamental difference between legislative lawmaking, which operates generally and looks to the future, and case-by-case issue resolution, which "makes law" incrementally in a retrospective manner to solve legal disputes that arose sometime in the not-too-distant past.[299] Judge-made law has never been, and in fact by

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296. *Id.* at 476–77.

297. *See* Alan Watson, *The Future of the Common Law Tradition*, 9 DALHOUSIE L.J. 67, 70 (1984). Watson's central premise is sound: In comparing civil law and common law legal systems, he observed that "the rules of substantive law that are accepted are of less importance than the attitude taken toward, and the relative importance of, the sources of law." *Id.* at 74.

298. *Id.* at 78, 80–81, 84; *see also* Samuel Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for A Statutory Age*, 57 N.Y.U. L. REV. 1126, 1172 (1982) (criticizing Calabresi's proposal as reflecting the "uniquely American penchant . . . to devote enormous creative energies to the study and practice of the courts, with comparatively little attention paid to product and potential of the legislature"); Edward J. Imwinkelried, *A More Modest Proposal Than A Common Law for the Age of Statutes: Greater Reliance in Statutory Interpretation on the Concept of Interpretative Intention*, 68 ALB. L. REV. 949, 963–64 (2005) (criticizing Calabresi's proposal as "problematic" with respect to the doctrine of legislative supremacy).

299. *See* Watson, *supra* note 297, at 80. "Calabresi, who wished that the courts would, in certain circumstances, be able to overrule statutes even without declaring them unconstitutional . . . misconceive[d] the relationship between lawmaking by statute and lawmaking by judicial decision, a relationship . . . inherent in the nature of legislation and precedent." *Id.; see also id.* at 109 ("[T]he judge's concern is concrete individual justice, while the legislator's concern is with the enactment of general policies." (citing J. MAYDA, FRANCOIS GÉNY AND MODERN JURISPRUDENCE 83–84 (1978)); Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 763 (2012) ("Adjudication is inherently backward-looking. It

definition could not be, a legal method that anticipates complex social and economic problems and seeks to resolve them beforehand. Legislative frameworks, on the other hand, reach broadly into the future, anticipating legal issues and providing broad-based roadmaps for resolving them.[300]

Although Professor Watson agreed with Calabresi's call for legal reform in an age of statutes, Watson recognized that true reform must begin with statutory lawmaking to enable "rational judging," meaning judicial interpretation and application of statutory law.

> The starting point for radical reform of the common law systems must lie in a new approach to statute-making that will ensure that statute law is kept up to date and relatively certain. In addition to enabling judges to reach decisions rationally, this scheme should reduce the ambiguity of the law and reduce the case load of judges.[301]

Watson also predicted in 1984 that the "shared common law tradition" would eventually come to an end, albeit incrementally:

> I think that we should not be so pessimistic about the demise of the shared common law tradition. For satisfactory lawmaking in the common law systems, drastic reform of the sources of law is needed, a reform that will also end the shared common law tradition. Reform will come, but I am almost sure that it will not be drastic. Law exists and flourishes not only in the practical world, but also at the level of ideas, as part of culture . . . . Finally, the means for creating law are more deeply embedded in the culture than are the individual rules.[302]

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addresses past events, and it does so primarily in light of previously existing law."); Wistrich, *supra*, at 781 (observing that "common law decision-making proceeds incrementally and typically is retroactive [while] statutory change, though more difficult to achieve, can be avulsive, and usually operates entirely prospectively. A statute can erase in a day legal doctrine that required centuries to evolve.").

300. Some significant examples include married women's statutes, workers' compensation statutes, the Social Security Act, mandatory no-fault automobile liability insurance statutes, copyright and patent statutes, and tax statutes.

301. Watson, *supra* note 297, at 83.

302. *Id.* at 85. Professor Gilmore made a similar prediction in 1967. "[By 1900, w]e had traveled a considerable distance along the road which has led us from what was conceived as essentially a common law system, somewhat eroded by statu[t]es, to what we have come to think of as essentially a statutory system in

Long before 1982, when then-Professor Calabresi described modern American law as having entered the "age of statutes,"[303] other scholars had acknowledged the primacy of statutes and other positive law as legal authority. Three quarters of a century earlier, Roscoe Pound questioned the disdain with which judges, lawyers, and scholars then regarded legislation.[304] In 1965, one author declared, "It is time for the legal profession to recognize the central place of statutes and of executive or administrative determinations in the modern legal order."[305] Indeed, if the United States legal system truly adheres to the "Rule of Law" ideal, how can it be otherwise?[306]

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which the few remaining common law enclaves are no doubt destined to be gradually absorbed." Gilmore, *supra* note 97, at 461.

303. CALABRESI, *supra* note 19, at 163.

304. Pound, *supra* note 19, at 383–84.

> Formerly it was argued that common law was superior to legislation because it was customary and rested upon the consent of the governed. Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action. We recognize that legislation is the more truly democratic form of lawmaking. We see in legislation the more direct and accurate expression of the general will.

Id. at 406 (citations omitted).

305. Hurst, *supra* note 22, at 3.

306. A common refrain in political discourse is that the United States is governed by "the Rule of Law, not of men." *See* Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT'L L. 293, 296, 299 (2009). The phrase has been attributed to Aristotle. *Id.* at 297 (citing FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 162 (1960)). Several scholars have observed that "Rule of Law" is an inherently elastic concept. *Id.* at 296 ("The phrase has become chameleon-like, taking on whatever shade of meaning best fits the author's purpose."); David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 169 (2018) (referring to the term as a "stretchy jurisprudential concept"). But "[a]t its core, the rule of law requires adherence to validly enacted law." Rubenstein, *supra*, at 169 (citing FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72–73 (1944)).

The so-called "Rule of Law Index," devised by the ABA-sponsored World Justice Project, identifies "four universal principles" defining the term: (1) accountability of both government and private actors, (2) just laws (meaning laws that are "clear, publicized, stable, and just; are applied evenly; and protect fundamental rights"); (3) open government (meaning that the "processes by which laws are enacted, administered, and enforced are accessible, fair, and efficient"); and (4) accessible, impartial dispute resolution. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2017–2018, at 11 (2018), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf [https://perma.cc/5FA3-5FKP]. The most recent report ranks the United States nineteenth of thirty-five "high-income" nations in the Rule of Law Index. *Id.* at 6–7, 29, 153. *See generally* Juan Carlos Botero, *The Rule of Law Index: A Tool to Assess Adherence to the Rule of Law Worldwide*, N.Y. ST. B.J., Jan. 2018, at 30.

We should bury the myth once and for all that America remains a "common law" legal system.

There is no turning back to the days when the unwritten common law, together with uncodified state and federal statutes drafted without professional assistance, required common people who had legal disputes to hire lawyers to navigate the maze of court reports and the mishmash of uncodified positive law.[307] In our nation's first century, no West key number system existed to organize the growing body of judge-made law by subject matter. Nor, until the 1870s, did Shepard's citators exist.[308] The earliest court "reports" were the product of private "reporters" who transcribed their own notes of judicial proceedings.[309] Statutes were accessible only in the form of session laws, chronological piles of individual laws enacted each legislative session and bound into books, often without subject-matter indices. Before the Field Codes of the mid-1800s,[310] no

307. *See* Samuel Williston, *Written and Unwritten Law,* 17 A.B.A. J. 39, 41 (1934).

308. Frank Shepard first introduced his innovative product in 1873 in the form of notations identifying overruling cases that were printed on gummed paper, which were cut apart and affixed directly onto the published opinion in the print reporters. Years later, when Shepard began publishing his notations in print volumes, they would become known as *Shepard's Citators*. Laura C. Dabney, *Citators: Past, Present, and Future*, LEGAL REF. SERVS. Q. 165, 166–67 (2008); *see also* Patti Ogden, *Mastering the Lawless Science of our Law: A Story of Legal Citation Indexes*, 85 L. LIBR. J. 1, 27–28 & n.116 (1993) (noting uncertainty in the literature whether Shepard's first citators were issued in 1873 or 1875).

309. *See* Denis P. Duffey, Jr., *Genre and Authority: The Rise of Case Reporting in the Early United States*, 74 CHI.-KENT L. REV. 263, 264–65 (1998) (explaining rationale of early American case reports as countering "the potentially destructive effects of post-Revolutionary legal ideology," including "persistent calls for codification of the common law"); *see also id.* at 273 (speculating that "in the particular environment of the early Republic, print [reports] helped fortify the claim of American decisional law to being 'common' at a time when the traditional meaning of that component of 'common law' had been undermined by the break with England"). Duffey credits the development of official print reports in the early nineteenth century as enabling American common law not only to "protect itself against the codifiers, but also to establish conditions under which courts could exercise more power than common law courts ever had before . . . . Administered in a form resembling statute, judicial legislation was easier to swallow." *Id.* at 275.

310. Herman, *supra* note 211, at 422; Roscoe Pound, *The Great Lawyer in History*, 3 HASTINGS L.J. 1, 8 (1951) (explaining why the Field Codes, while adding strength to the codification movement, were unsuccessful because by then "the common law was thoroughly received and well established and was able to resist it"); *see also* Williston, *supra* note 307, at 39–40 (describing Field's proposed codes as the "most ambitious attempt" made to codify American law, and criticizing objections to the codification effort by Field's primary New York opponent, James C. Carter).

statutory codes, organized by subject matter, existed in this country.[311] In short, positive law was inaccessible, even to lawyers and judges, and reports of judicial proceedings were generally not much better.

Curiously, Calabresi identified a problem with outdated statutes but failed to give fair consideration to a legislative solution,[312] perhaps because many judges (and even some scholars) perceive that any legislative solution would threaten judicial supremacy.[313] Indeed, the most significant benefit of

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311. Gilmore, *supra* note 97, at 465–66 & n.5 (referring to the Field Codes, drafted in the 1850s for New York, as having been "very much in the European or civil law tradition"; giving examples and noting that statutes codifying commercial law were "statutes of a type we had not theretofore known").

312. *See* Samuel Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for A Statutory Age*, 57 N.Y.U. L. REV. 1126, 1173 (1982) ("Statutory obsolescence, if a problem, has only one real cure that is consistent with the legal topography: legislative reform."). Calabresi devoted just ten pages to possible "legislative responses" to his perceived statutory obsolescence problem. But his analysis of legislative alternatives was shallow at best, and much of the discussion reflected a startling lack of understanding about the inner workings of legislatures and the process of legislative deliberation. *See* CALABRESI, *supra* note 19, at 59–68.

313. Richard A. Posner, *Statutory Interpretation—In the Classroom and the Courtroom*, 50 U. CHI. L. REV. 800, 821–22 (1983) [hereinafter Posner (1983)]. Judge Posner, in characteristically pithy but insightful prose, spotted the underlying theme of Calabresi's work soon after its 1982 publication. He explained, perhaps a bit tongue-in-cheek,

> Professor Calabresi has done us a service by bringing out into the open what are after all the secret thoughts not only of many modern legal academics but of some modern judges . . . . [H]e has also helped us understand why there is today a revival of "strict constructionism," [which] contrary to a widespread impression, . . . is not a formula for ensuring fidelity to legislative intent. It is almost the opposite. It is the lineal descendant of the canon that statutes in derogation of common law are to be strictly construed and, like that canon, was used in nineteenth-century England to emasculate social welfare legislation.
>
> To construe a statute strictly is to limit its scope and lifespan—to make Congress work twice as hard to produce the same effect . . . . I know of no principled, nonpolitical basis for a court to adopt the view that Congress is legislating too much and ought therefore to be reined in by having its statutes construed strictly. [S]uch a view would be a form of judicial activism because it would cut down the power of the legislative branch; and at this moment in history, we do not need more judicial activism.

Id.; *see also* Schacter, *supra* note 91, at 214 (distinguishing critiques against judicial supremacy, which focus "principally on finality (i.e., that judges wrongly claim final authority to bind other actors, especially other branches of government)," from critiques against judicial activism, which focus "on how courts interpret the law (i.e., that judges inject their substantive preferences and decide questions that ought to be left to political determination)").

undertaking a deliberative codification process is that the body of law is "scientifically examined . . . . Obsolete law is removed, efficient rules substituted for inefficient."[314] One primary goal of codification is to make the law more understandable, not only to lawyers and judges, but to anyone who may be affected by it.[315] As one scholar noted in 1984, most jurisdictions have codified their laws in response to problems associated with "a plethora of unmasterable, idiosyncratic, sometimes irreconcilable cases."[316] Yet instead, Calabresi's proposed solution would have vastly expanded judicial power to effectively legislate by repealing and "updating" statutes in a manner directly contra-

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314. Gahan, *supra* note 96, at 111–12; *see also* Stone, *supra* note 20, at 304. Stone explained:

> Perhaps the most frequent statements of the problem for the solution of which codification has been proposed consist in pointing out that laws are not all of a single period of time or even of a single age; that old laws no longer used are still unrepealed; that laws have been amended so frequently as to be difficult either to find or understand; that rules have become so encrusted by exceptions as to be misleading; that sometimes laws are not all of a single language or manner of speech; that laws of diverse subject matter are often mixed together without guide or proper reference; that laws on the same subject often reflect the diverse economic and social philosophies of the different decades in which they were enacted. This all adds up to the single statement that the law has become confused and, in some cases, unintelligible, not only to the ordinary man who is held accountable for following it, but also to the legislator, judge and lawyer. It is at this point that the reformers begin to propose codification.

Id. Yet Calabresi never considered codification; nor did he give serious consideration to any other kind of legislatively driven law reform as a possible remedy for outdated statutes. Nor did he acknowledge the English Law Commissions, established in 1965 to do for English law what he complained was needed for American law. Of course, codification or consolidation of American statutes would have threatened the concept of judicial supremacy, which was perhaps the unstated motivating force behind his proposed judicial remedies for what he derisively called the "statutorification" of American law. *See* CALABRESI, *supra* note 19, at 1, 79.

315. Stone, *supra* note 20, at 304. "[T]he task [of codification] is always the same [regardless of what motivates it], namely, to state the law clearly and concisely so that man may know the rules and principles which are to govern his actions." *Id.* The litany of problems Stone enumerated in 1955 for which codification is often the proposed solution reads like a concise version of Calabresi's many complaints a full generation later about "statutorification." *See id.* (listing, among others, "that old laws no longer used are still unrepealed; that laws have been amended so frequently as to be difficult either to find or understand; that rules have become so encrusted by exceptions as to be misleading; . . . that the law has become confused and, in some cases, unintelligible").

316. Miller, *supra* note 102, at 94.

ry to the Constitution's prescribed method for lawmaking—bicameral deliberation and agreement, subject to Presidential veto and congressional override.[317]

By now, in the early twenty-first century, the "common law tradition" has come to an end—or at the very least, the end of American common law is most certainly near at hand.[318] Watson was correct that reform in statutory lawmaking in the United States has not been "drastic," but it certainly has been both continuous and significant. The fact that the legal academy has largely ignored the significance of these developments reflects the entrenched nature of legal education in the United States and its reluctance to hire law faculty with significant or even minimal experience in statutory lawmaking.[319]

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317. U.S. CONST. art. I; *see* I.N.S. v. Chadha, 462 U.S. 919 (1983).

> [A]n exercise of legislative power [is] subject to the standards prescribed in Article I. The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.

Id. at 957–58. Of course, "judicial legislation" in general, and Calabresi's proposal in particular, are entirely inconsistent with these clear procedural constitutional requirements.

318. *See* Scalia, *supra* note 107, at 13 ("We live in an age of legislation, and most new law is statutory law."). A few narrow exceptions arguably remain, such as the "federal common law" of foreign relations. However, even in that arena, the domain of common law has continued to shrink. Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO. L.J. 1825, 1826 (2018).

> Foreign relations is often described as one of the best established and most legitimate enclaves of federal common law, but its overall scope and effect have been declining for decades. Issues that were once characterized as federal common law are increasingly resolved based on statutes, the Constitution, or actions by the President. The shrinking of common law in the area of foreign affairs forms part of some broader trends in foreign relations and constitutional law . . . .

Id.; *see also id.* at 1854–55 ("[I]n its current and very limited form, [the federal common law of foreign relations] is best understood and best legitimated as fundamentally interstitial, limited largely by federal statutes but also by international law and stare decisis, all of which minimize potential constitutional objections.").

319. *See* Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. U. L. REV. 699, 702 (2010) (reporting that fewer than five percent of the most prestigious law school faculties have any experience working for a legislative institution); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 809 (2014) (referring to the "legal academy's relative inexperience in the area of congressional lawmaking"); *id.* at 811 ("Be-

III. GENERAL ATTRIBUTES OF MAJOR WESTERN LEGAL SYSTEMS

The developing field of comparative law[320] traditionally focused on classifying nation-states into a limited number of legal systems or families.[321] The field has been criticized as methodologically underdeveloped[322] and Western-centric,[323] and for failing to acknowledge the increasingly "transnational" nature of law and legal systems.[324] Nevertheless, the primary classifi-

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cause legal scholars do not fully understand the realities and complexities of the legislative process, they have underdeveloped or incorrect theories about legislatures."); *see also infra* Part IV, addressing the need for reforms in legal education; *cf.* Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 679 (1999) (noting the minimal attention the legal academy devotes to scholarship on legislative institutions); *id.* at 687 (suggesting a research agenda "for legal scholars who want to break away from the court-centrism of our discipline by working to increase the attention paid to the state and federal legislative processes").

320. The practice of comparing and contrasting legal traditions is rooted in ancient history. *See* Walther Hug, *The History of Comparative Law*, 45 HARV. L. REV. 1027, 1029–70 (1932). Comparativists generally agree, however, that comparative law as a modern field of scholarly legal study originated in 1900 with the Paris International Congress of Comparative Law. *See* David S. Clark, *Nothing New in 2000? Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871, 872 (2001) (referring to the 1900 Paris Congress as "defining"); Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. 1043, 1049 (2012) ("It was not until the 1900 International Congress on Comparative Law (Congrès international de droit comparé) in Paris that taxonomies of legal systems would be elevated to a central feature of comparative law as the science that it aspired to become.").

321. *See* Garoupa & Morriss, *supra* note 26, at 1493–94 ("In fact, the original understanding of common- and civil-law legal families referred to the rules regulating private law (contract, torts, and property)."); David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153, 232 (2016) (noting that the traditionally accepted comparative law taxonomies apply to private law, and calling for development of a suitable taxonomy that encompasses constitutional and other public law).

322. *See* Chodosh, *supra* note 90, at 1128.

323. *See, e.g.*, Mattei, *supra* note 90, at 19.

324. *See, e.g.*, Arthur T. von Mehren, *The Rise of Transnational Legal Practice and the Task of Comparative Law*, 75 TUL. L. REV. 1215, 1216 (2001) (observing that "the once predominant belief in uniqueness as a characteristic of legal systems has lost ground to the belief in convergence").

> In the course of the last half century, the context in which comparative work is undertaken has changed in significant respects. The enormous growth in cross-border and intersystem activity, the far greater economic and political importance of emerging societies, and the greatly increased efforts to facilitate and structure international economic and commercial activity have reshaped old problems and raised new ones for comparatists.

Id. at 1218–19; *see also* Ronald J. Krotoszynski, Jr., *Linnaean Taxonomy and Globalized Law*, 115 MICH. L. REV. 865, 866 (2017) ("[T]o understand the globalization of law, both in the United States and abroad, one must first make a serious effort to iden-

cation of legal systems has become well-entrenched in comparative law as well as legal thinking generally.

Notably, the comparativists' classifications of the world's legal systems are not immutable. Indeed, the two twentieth-century German scholars credited with developing a well-accepted taxonomy for global legal systems cautioned that the classifications they had devised were likely to change over time.[325] They explicitly acknowledged that "the division of the world's legal systems into families, especially the attribution of a system to a particular family, is susceptible to alteration as a result of legislation or other events, and can therefore be only temporary."[326] A central thesis of this Article is that the United States legal system has evolved and matured over the last two centuries to the point that its continued classification as a "common law" legal system is simply a mischaracterization.

A. Legal System Taxonomy

Over the past century, comparative law scholars have developed various nomenclatures for classifying legal systems.[327] Worldwide, the most commonly accepted taxonomy classifies the major legal systems as civil law, common law, or socialist law, perhaps with a "residual" category for legal systems that

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tify and classify different types of interactions among and between domestic and international legal systems—including, but not limited to, the transplantation of legal rules and ideas among and between local legal systems."); Reimann, *supra* note 286, at 1106, 1112 (describing "the traditional concept of twentieth-century comparative law" as "the study of national legal systems, their laws, and virtually nothing else," and calling for comparativists to acknowledge the "transnational sphere").

325. Pargendler, *supra* note 320, at 1056 (referring to German scholars Konrad Zweigert and Hein Kötz).

326. *Id.* (quoting KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 64 (Tony Weir trans., 2d ed. 1987)).

327. *See* Mattei, *supra* note 90, at 7–8 (explaining comparative lawyers' efforts in "classifying families of legal systems" based on the conviction that "some deep-rooted characteristics shared by a number of legal orders transcend the differences between systems belonging to a particular family," but cautioning that "taxonomy is not an end in itself"); Pargendler, *supra* note 320, at 1047–60 (offering a comprehensive historical overview of the evolution of legal system taxonomies and acknowledging critiques of the traditional civil law–common law distinction). Professor Pargendler posited that the "principal driving force" for the recent scholarly critique of the classic dichotomy between civil and common law systems "is the widespread perception that the rise of the European Union and pressure for legal convergence in a globalized world have rendered legal family distinctions increasingly outmoded." *Id.* at 1044.

do not easily fit one of the other groupings.[328] The major "Western legal traditions" are common law, often denominated Anglo-American law; and civil law, otherwise known as the "Continental" or Romano-Germanic tradition.[329] For that reason, this Article focuses on the attributes of these two legal traditions as a framework for assessing the place of the contemporary American legal system within it.

B. Attributes of the Common Law Tradition

Scholars have variously identified the essential features of common law legal systems as compared to civil law systems characteristic of the European Continent and much of Latin America. Although no scholarly consensus exists, most would probably agree with the following enumeration of elements that generally differentiate common law from civil law legal systems.[330]

First, in common law systems, judicial decisions are the primary source of controlling law,[331] while statutes and codes are

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328. Mattei, *supra* note 90, at 8 (citing RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LES GRANDS SYSTEMES DE DROIT CONTEMPORAINS (10th ed. 1992)); Pargendler, *supra* note 320, at 1053 (citing David's "celebrated book" published in 1962 that divided the world into three families: Romano-Germanic, Common Law, and Socialist Law). Two German comparativists developed a more detailed taxonomy of "styles" that took into account a nation's history, legal sources, ideology, mode of thought, and distinctive institutions. Pargendler, *supra*, at 1055–60 & tbl. 1 (summarizing the historical development of legal system taxonomies and citing KONRAD ZWEIGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS (1969)).

329. Charles C. Jalloh, *Does Living by the Sword Mean Dying by the Sword?*, 117 PENN ST. L. REV. 707, 721 (2013); Weiss, *supra* note 38, at 438 ("In a process called macro-comparison, comparativists traditionally distinguish common-law from civil-law systems[, referring] to the legal systems on the European continent derived from Roman law on one hand (civil law) and those derived from Anglo-American law on the other (common law)."). Weiss, however, noted that "[t]his distinction, based on the differences in historical development, has become less convincing over the course of time. Various studies have shown that the European *ius commune* and the English common law were not as radically distinct as has been historically suggested." *Id.*

330. *But see supra* notes 327–29 and accompanying text (identifying deficiencies and oversimplification of the classic common law–civil law taxonomy); *see also* Weiss, *supra* note 38, at 438.

331. Beatson, *supra* note 30, at 295 ("The hallmark of a common law system is the importance accorded to the decisions of judges, and in particular appellate judges, as sources of law."); Ernest Bruncken, *Common Law and Statutes*, 29 YALE L.J. 516, 516 (1919) ("In the common-law countries, the customary law, defined and developed by the courts, is the foundation on which the legal edifice is

secondary.[332] Because *stare decisis* and statutory precedent constrain judicial decision making,[333] innovations are rare and law changes incrementally.[334] In contrast, most judicial decisions in civil law nations do not bind any other court,[335] although they do serve as highly persuasive legal authority.[336] Common law

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reared. All statutes, large and small, whether called codes or not, are but modifications of the customary law and must be interpreted with a constant regard to this underlying foundation.").

332. Weiss, *supra* note 38, at 491 ("Unlike on the Continent, precedent was the primary source [in England], and the statutes were supplementary."); *cf.* Neil Duxbury, *Custom as Law in English Law,* 76 CAMBRIDGE L.J. 337, 341 (2017) ("Precedent and statute are the main sources of English law.").

333. An English scholar has recently observed, however, that the notion of binding precedent "emerge[d] late in the history of common law." Duxbury, *supra* note 332, at 341. Until relatively recently, a line of judicial decisions was treated as merely *evidence* of the law, not the law itself. *Id.* at 341–42 n.23. Thus, caselaw was persuasive but not binding authority; not until the nineteenth century were English courts "properly equipped" to develop the law based on "the principle that like cases should be treated alike." *Id.* at 341.

334. Bruncken, *supra* note 331, at 517 (referring to *stare decisis* as the "binding nature of precedent," which is inherently "incompatib[le] . . . with making a statute the statement of jural principles independently of preëxisting law"). While *stare decisis* lends certainty and predictability to the law, its downside is the grinding inertia that renders common law impotent to address rapid sociological and technological change. *See, e.g.*, Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1312–13 (2000) (questioning whether the slow pace of common law tort litigation is realistically capable of protecting data privacy). "Common law lawmaking is ordinarily both gradual and slow. Although the rare judicial opinion can inspire widespread and rapid endorsement, the litigation process is protracted and resource intensive, and typically yields only incremental change." *Id.* at 1313; *see also* Beatson, *supra* note 30, at 295 ("The [common law] system is built on precedent, and centres on individual decisions and building up its principles by a gradual accretion from case to case."); *cf.* David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 914 (2015) (advocating scrapping the "widespread legislative and executive incursions into the tort system . . . in favor of . . . the common law method [of making] incremental adjustments to the procedural, substantive, and remedial law of our civil justice system").

335. Duxbury, *supra* note 332, at 341.

336. *See* Lawson, *supra* note 144, at 4 (referring to European continental law).

> No decision of a court is binding on any other court; it is even possible for an inferior court to overrule a decision of a higher court. But in fact, as decisions have come to be efficiently reported, they have come to enjoy very high persuasive authority. Those of the [French] Cour de Cassation are in practice almost as binding as those of any court in a common law country. Thus, to differentiate between code countries and case law countries [with respect to judicial precedent] is in practice quite false.

Id.

reasoning relies primarily on analogizing from caselaw,[337] while judges are generally reluctant to analogize from statutory text.[338] And in the United States (but not in England), courts at all levels review statutes for constitutionality.[339] Since 1920, civil law systems have increasingly recognized judicial power to review statutory enactments for constitutionality, but those

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337. *See* Shael Herman, *Minor Risks and Major Rewards: Civilian Codification in North America on the Eve of the Twenty-First Century*, 8 TUL. EUR. & CIV. L.F. 63, 67 (1993) ("[T]he common lawyer regards precedent as a soil from which predictability is mined, and *stare decisis* as its visible sign. Hence, a common lawyer will develop intellectual vertigo when the precedents, his traditional source of stability, yield no helpful guidelines . . . .").

338. Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 473 (1962) ("[Common law] courts are more reluctant, almost to a point of abstention, about reasoning by analogy from a statute or extending its principle to situations not dealt with explicitly or by clear implication in the statutory formulation."); *see also* Beatson, *supra* note 30, at 303, 312 (proposing development of common law in an age of statutes by use of judicial analogy from statutory principles). *But see supra* note 126 and accompanying text (discussing *Rosen v. United States*, 245 U.S. 467, 471–72 (1918), as an example of legal reasoning by analogy from related statutes). *See generally* Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554 (1982).

339. Justice Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 OHIO ST. L.J. 559, 583 (1993).

> The American, or "diffuse," system of judicial review relies upon the constituent pieces of the ordinary judicial system to engage in judicial review. In the United States, any lower court may make a decision regarding the constitutionality of both legislation and administrative action, or the conformity of a lower law to a statutory mandate.

Id. Yet Great Britain has never recognized any form of constitutional review of statutes. *See id.* at 577. In 2005, Parliament enacted the Constitutional Reform Act, which established the Supreme Court of the United Kingdom effective October 1, 2009. *See generally* Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543 (2014) (describing the history leading up to the Constitutional Reform Act 2005 and its ramifications). However, the court is not the sort of constitutional court that other continental nations have established, and it lacks the power to consider challenges to Parliament's authority to enact legislation. Michael Skold, Note, *The Reform Act's Supreme Court: A Missed Opportunity for Judicial Review in the United Kingdom?*, 39 CONN. L. REV. 2149, 2156 (2007); Lady Hale, Deputy President of the Supreme Court, *The UK Supreme Court in the United Kingdom Constitution: Inaugural Lecture at the Institute for Legal and Constitutional Research*, U.K. SUP. CT. (Oct. 8, 2015), https://www.supremecourt.uk/docs/speech-151008.pdf [https://perma.cc/38CW-M9XP]. Lady Brenda Hale was appointed President of the UK Supreme Court effective September 2017. *Biographies of the Justices: Lady Hale*, U.K. SUP. CT., https://www.supremecourt.uk/about/biographies-of-the-justices.html [https://perma.cc/Q8MZ-9BBT] (last visited Mar. 29, 2019).

that do typically limit that authority to specialized constitutional courts.[340]

Additionally, court proceedings in common law systems are typically adversarial in nature, rather than inquisitorial proceedings generally characteristic of civil law systems.[341] And common law judges are appointed or elected to the bench after years of law practice experience, while in civil law systems, relatively inexperienced law graduates are typically selected for training as career judges.[342]

Furthermore, statutes in common law systems tend to be detailed, specific, and concrete relative to the broad, general, and abstract principles embodied in civil law codes.[343] Moreover, courts in common law jurisdictions often interpret statutes with respect to common law, and statutory enactments were historically presumed to supplement common law rather than

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340. *See, e.g.*, Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT'L J. CONST. L. 44, 44–46 (2007) (describing the development of specialized constitutional courts in civil law jurisdictions).

341. *E.g.*, Koch, *supra* note 30, at 37 ("Civil law judicial decision-making is supported by the 'inquisitorial' procedures. The basic strategy of this procedural model is judicial control, in contrast to the 'adversary' system, which bestows control upon the lawyers.").

342. *E.g.*, del Duca & Levasseur, *supra* note 175, at 15 ("Most civil law countries assign fact finding to professional career judges."); Koch, *supra* note 30, at 37.

> Civil law judges are part of the civil service. Judges enter a career of judging and advance through the judicial hierarchy. They are educated and trained to be judges. In particular, their education and training equips them to work with language and to engage in the rational and scientific finding of the law. They then gain experience as judges . . . . Their training and experience creates an elite, if anonymous, corps of adjudicators.

Id. (footnotes and citations omitted); Utter & Lundsgaard, *supra* note 339, at 569 (noting that "[m]any civil-law judges are career judges who entered the judiciary immediately following their legal education" and therefore often lack "legal and practical experience").

343. *See, e.g.*, Herman, *supra* note 337, at 72.

> To the civilian, the legal rule is designed to operate at an optimum level of abstraction. This level may be seen as a point of equilibrium between the broad generality of the ordering legal principle and the extreme particularity of the concrete resolution of an individual dispute. A rule too general is over inclusive and cannot provide practical guidance of sufficient predictability; a rule too particular is too exclusive, and leads to rigidity, and obsolescence.

Id.; Neumann, *supra* note 91, at 442 (referring to "fussy" legislation characteristic of common law legal systems); *see also supra* notes 313–22 and accompanying text (describing features of codification in detail).

alter or supplant it.[344] Common law reasoning is typically inductive based on case-by-case synthesis and evolution of legal rules, as compared to deductive reasoning based on syllogistic application of codified laws to facts.[345]

C. Attributes of the Civil Law Tradition

Codification is the most commonly cited feature characteristic of the civil law tradition.[346] Speaking generally, codification is nothing more than "a method for the formulation of written law as opposed to unwritten [judge-made] law."[347] Further, codification is not unique to the civil law tradition; common law nations and states have increasingly made use of the method as well.[348]

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344. *See* Bruncken, *supra* note 331, at 519 (citing Arthur v. Bokenham, 11 MOD. 148, 150 (1708, Eng. C.P.); SUTHERLAND, STATUTORY CONSTRUCTION § 290 (1891)). As Bruncken interprets the rule, "whether the application is rigid or liberal, the very existence of the maxim implies that the courts will look upon the statute, not as upon an isolated piece of lawmaking, but as becoming an integral part of the whole body of the law, as soon as it is enacted." *Id.* at 520; *see also* Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1091 (1987) (explaining that statutes are interpreted in light of common law principles); Traynor, *supra* note 92, at 402 ("A statute may be a fat code or a thin paragraph or a starveling sentence. It may cast a heavy shadow on the common law or a light one, or it may idly plane until some incident sends it careening into action. The hydraheaded problem is how to synchronize the unguided missiles launched by legislatures with a going system of common law.").

345. *E.g.*, Bergel, *supra* note 344, at 1089 ("[C]ommon law systems do not resort to a deductive reasoning imposed by the civil law systems on the basis of legislative principles . . . .").

346. Beatson, *supra* note 30, at 295 ("[C]ivilian systems are essentially codified legislative systems and owe their inspiration to the principles of the Napoleonic codes. In such systems judicial decisions are not primary sources of law but only a gloss on the law in the legislative code."); *see* Weiss, *supra* note 38, at 448 (observing that "[e]ver since comparativists have tried to distinguish the world's two main legal systems, common law and civil law, codification has been one of the distinguishing features"). The term was introduced into the English language by Jeremy Bentham, an English philosopher who was perhaps history's greatest proponent of codification. *See* Scarman, *supra* note 98, at 357; Weiss, *supra*, at 474 (identifying Jeremy Bentham as "the strongest advocate of codification"); *see also supra* notes 147–58 and accompanying text (discussing Bentham's influence as a proponent of codification).

347. Stone, *supra* note 20, at 303; *see* Bergel, *supra* note 344, at 1097 ("[C]odification constitutes one of the essential methods of nomology, or legislative drafting. Its principal methods are thus closely linked to the development of legal systems and civilizations.").

348. *E.g.*, Stone, *supra* note 20, at 310 ("All too frequently, codification is linked in thought with the civil law[,] and we forget the great and increasing use that the common law jurisdictions have made and are making of this method."). As Stone

The United States and many of the fifty states within it generally refer to statutory compilations as "codes," and the products of the Uniform Law Commission carry the same designation. Although similar in appearance, most American codes are not cut of the same cloth as "true codes" in the form known to civil law systems.[349] Nevertheless, "[i]n its broadest sense, a code is a compendium of laws, a body or corpus of legal provisions relating to a particular matter."[350]

All codes are statutes, but not all statutes are codes. One English proponent of codification explained the difference this way:

> A code is an end and a beginning. Unlike a statute, which is superimposed upon the common law like a ship floating on the water, a code supersedes the common law, excluding all reference (except on very special grounds) to any source of law other than itself. It is because it writes *finis* to the old

observed, both the Uniform Law Commission and the American Law Institute to some extent reflect codification efforts. *Id.* Indeed, "there is no one, single, inescapably right approach to codification, and [if] it is believed that the method used does not produce the desired result then constructive advice should be given rather than a show of righteous indignation that the method has been profaned." *Id.* Others have noted that "[t]here are a great number of codes in the United States but they are mostly devised as mere compilations." Bergel, *supra* note 344, at 1091.

> Their main goal is to list written rules, put them in order and make them easy to find. American codes bring together the rules of law in force in a specific field, but generally do not have the goals of establishing a basis for the development of the law or regulating an entire subject matter, since the common law remains in existence and all statutes must be interpreted in light of its principles.

Id.

349. Bergel, *supra* note 344, at 1073–74 (distinguishing "true codes" from "compendiums derived from previous cases destined to supplement custom"). The 1804 French Civil Code, consisting of "thirty-six separate statutes and gathered together in one single code," was "an essential legislative monument which was to have a great influence in the world." *Id.* at 1074. Bergel defined a "true code" as comprising "systematic and innovative constructions of a body of written rules relating to one or several defined matters, founded on a logical coherence and constituting a basis for the growth of law in a given domain." *Id.* at 1075–76. The key features of a true code are deliberate structuring, including "internal partitioning [that] rests upon divisions and sub-divisions which follow a certain hierarchy," and clarity of expression, including "precise legal terminology." *Id.* at 1084–88 (elaborating on both features); *see also* Maxeiner, *supra* note 46, at 364–65 (making the case that "true codes" are "rare or nonexistent" in the United States).

350. Bergel, *supra* note 344, at 1073.

> and permits a new start . . . that a code is the given solution when extensive changes in a legal system are required.[351]

Compared to codes, statutes are less abstract with a "relatively restricted scope."[352] In a common law system, the "codification" process often has the purpose of restating or reformulating rules derived from caselaw, without disregarding principles of either the common law or equity. The products of codification continue to be interpreted within the frame of reference of pre-existing law rather than the legislative purpose or policy that motivated the enactment. "Thus, they have as their main objective the identification and classification of preexisting rules, not the construction of a new and coherent system."[353]

Codification as a method has several characteristics that distinguish it from other lawmaking methods.[354] First, it is by definition written law.[355] Second, codification is characterized by some kind of systematic organization, which may take various forms.[356] Third, the concept of codification implies that the en-

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351. Hahlo, *supra* note 106, at 243. "There is much the legislature can do by interstitial legislation. But if the whole conceptual framework of a legal system is to be reshaped there may be no choice but to resort to codification." *Id.* at 245.

> A code is not just a large statute[;] it is a different species of law, demanding different techniques, and these techniques have to be learnt by the legal profession. Even where a rule of the common law is merely restated, the fact that it is now laid down in writing and forms part of a system of interrelated rules[] affects its meaning and scope.

Id. at 253.

352. *Id.* at 252.

353. Bergel, *supra* note 344, at 1076, 1089–90. Bergel refers to the common law meaning of codification as *formal codification* as distinguished from the continental European style of *traditional substantive codification*. *Id.*

354. Professor Stone emphasized that codification is simply a method that reflects nothing about either the merit or deficiency of the outcome. Stone, *supra* note 20, at 303. "Not all codified law is good law, and, conversely, not all codified law is bad. Being a method, the value to be attached to [codification] depends on the usefulness which it is found to have in the accomplishment of a given task." *Id.; see also* H.R. Hahlo, *Codifying the Common Law: Protracted Gestation,* 38 MOD. L. REV. 23, 30 (1975) ("There is nothing to show that a non-codified system of law has some mystic qualities which render it inherently superior to a codified one. But neither is there anything to show that a codified system of law is inherently superior to a non-codified one.").

355. Stone, *supra* note 20, at 305.

356. *Id.*; Bergel, *supra* note 344, at 1081 ("[A] code is characterized by a specific content and a particular systematization."). "Thus, a good code must lay down dispositions broad enough to be able to regulate various real situations, without thereby wandering away from the realities that it must govern and venturing into

tire body of law is considered altogether "as a single fabric" or unitary "corpus," rather than piecemeal,[357] although the relevant "corpus" may be subject-matter specific. Fourth, successful codification requires participation by experts such as practicing lawyers, jurists, and academics.[358] Finally, the product of codification is necessarily binding on the courts.[359]

The term "codification," like the term "common law," carries numerous meanings.[360] In the continental or civil law sense of the term, the product of codification, once enacted, replaces not only "existing legislation, but also the common law and equity governing the topic," although not always with the same level of detail.[361] In the United States, the term is often used more loosely to refer to the process of consolidation, which "merely re-enacts in one statute the contents of many pre-existing statutes with only such alterations as are absolutely necessary in order to produce a coherent whole," with no conscious intent to alter the substance of the law.[362] For example, the process long underway by Congress to enact individual titles of the

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purely theoretical statements. A good code is thus characterized mainly by its systematization." *Id.* at 1083.

357. Stone, *supra* note 20, at 305–06. Stone observed that systematic codifications often include definitions and rules of construction and interpretation to enhance uniformity in application. "Some of the more ardent devotees of codification compare a well drafted code to a symphony with its motifs and its careful development of basic themes." *Id.* at 306; *cf.* Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation,* 47 COLUM. L. REV. 1259, 1277 (1947) (analogizing statutory interpretation to a musical performer's interpretation of a musical score).

358. Stone, *supra* note 20, at 306.

359. *Id.* Justice Scarman identified what he considered three essential characteristics of a code: First, a code is enacted into law. Second, a code comprehensively covers the subject matter within its scope. Third, a code is the exclusive source of law pertaining to the subject matter. Scarman, *supra* note 98, at 358. These three features appear comparable to Stone's first, third, and fifth essential elements of codification. *See* Stone, *supra* note 20, at 305–06.

360. Lawson, *supra* note 144, at 1 ("Codification . . . has been used in many senses."); Weiss, *supra* note 38, at 449 (noting the existence of "dozens of definitions and explications of codification in the legal literature").

361. Lawson, *supra* note 144, at 1.

362. *Id.* "No conscious change of law is intended and all that happens is a partial clearing up of the statute book." *Id.*

United States Code as "positive law"[363] amounts not to codification in the civil law sense but rather consolidation.

History reveals two primary motives for a nation to embark on codification. First is a general perception that the mass of legal materials has become disorganized and in need of general "tidying up." Second is a desire to unify the law of a nation formerly subdivided, either geographically or politically, into separate legal systems. Both motivations share a common theme of uniting a body of "disunited law."[364]

Both the processes and products of codification can vary.[365] Some are relatively detailed, such as the German Code; others are more general and abstract, like the French Civil Code.[366]

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363. Office of the Law Revision Counsel, *Positive Law Codification*, *supra* note 262; *see also* Office of the Law Revision Counsel, *Positive Law Codification in the United States Code*, supra note 262; *supra* notes 262–64 and accompanying text.

364. Lawson, *supra* note 144, at 1. In 1960, Lawson, then an Oxford University Professor of Comparative Law, observed,

> [T]he United States [was then] in a position not very unlike that of France before the Revolution of 1789. There is great variety in the laws of the various states and in some respects the variety causes great difficulties of a practical kind, especially in parts of commercial law and in the law of marriage and divorce. [T]he need for unification . . . lies at the back of the movement to unify commercial law in the Uniform Commercial Code.

Id. at 1–2. The problem, of course, is that unlike France, the United States is a federation of sovereign states, each with reserved constitutional powers. *See* U.S. CONST. amend. X. State-by-state variations in both statutory and common law are inherent in a federation; thus, complete codification and unification of American law in the nature of the French Civil Code could not be reconciled with the Constitution.

365. *See* Head, *supra* note 138, at 5–6 & nn.6–7 (defining "codification" and "code" and citing numerous sources for the terms' various accepted meanings); Lawson, *supra* note 144, at 2 (comparing the approaches and styles of the German, French, and Swiss codes); Stewart, *supra* note 166, at 47 ("[E]ven the name 'code' itself is only loosely attached to any particular legislative form . . . ."); Stone, *supra* note 20, at 310 ("[T]here is no one, single, inescapably right approach to codification . . . .").

366. The French Civil Code reflects three fundamental legal principles: (1) a code should be "complete in its field"; (2) it should be drafted in "relatively general principles rather than in detailed rules"; and (3) its principles should "fit together logically as a coherent whole . . . based on experience." Tunc, *supra* note 144, at 459–61. The French Civil Code is generally viewed as the prototype of the civil law codes. *See, e.g.*, Aldisert, *supra* note 136, at 936 ("France presents the model of the civil law tradition. It set the pattern with the Napoleonic Code, a format now followed by all civil law jurisdictions."); Cachard, *supra* note 136, at 42 ("[T]he French Civil Code was the matrix of many other codes, both in Europe and around the world."); Wagner, *supra* note 46, at 340 ("France [took] the lead in the codification movement which conquered all continental Europe and swept the world in the course of the nineteenth century.").

Some are more comprehensive than others.[367] Some codes are longer than others in terms of the number of articles or paragraphs.[368] And the process of codifying one area of the law, such as contracts, need not cover every possible subtopic if the existing law is considered adequate.[369]

American scholars often assume that civil law relies solely on the code and no other source of law. But that is not an accurate assessment. Continental law has traditionally relied heavily on academic commentaries and preparatory materials as interpretive aids. And over the last several decades, published judicial decisions have become highly persuasive authorities as well.[370]

The perception that codes are inflexible and unchangeable is also a myth.[371] For example, the French and German Codes have each been amended numerous times.[372] In fact, one scholar has observed that

> the code systems have one great advantage [in facilitating amendments]. Under them the judge can always go back to the words of the code for an authentic statement of fundamental principle, whereas a common law judge must often feel that if he does not hang on to prevailing case law he is at sea. Conversely, it may be more difficult to modify first principles under a code than under a common law system, but on the whole this does not seem to have occurred.[373]

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367. For example, the French Civil Code left the general body of administrative law uncodified. Lawson, *supra* note 144, at 3; *see also* Stewart, *supra* note 166, at 24 ("The [French] Code civil codified only one area of the law, albeit a huge area. A few other major areas were covered by other codes (all of which have now been replaced): criminal law, commercial law, criminal procedure and civil procedure.").

368. Lawson, *supra* note 144, at 3.

369. *Id.*

370. *See id.* at 4; *supra* note 336 and accompanying text.

371. Lawson, *supra* note 144, at 4–5. "[T]he code is only a statute like any other statute and can be altered just as easily." *Id.* at 5.

372. *Id.*; *see* Garoupa & Morriss, *supra* note 26, at 1489 (noting that the French Civil Code's survival for over 300 years through multiple French constitutions testifies to its adaptability, as does the survival of the 1896 German Civil Code).

373. Lawson, *supra* note 144, at 5. The perception that "first principles" are somehow entrenched in common law (as opposed to written federal and state constitutions) may help explain American judges' historical viewpoint that legislation must expressly and clearly convey an intent to override common law, which in turn explains the characteristic detail and complexity of statutory enactments in the United States. *See supra* note 91.

Thus, contrary to the perception of some Anglo-American legal scholars,[374] codes are by no means "unbending."[375] Traditional civil codes are often updated, expanded, reformed, and even replaced to accommodate new ideas, norms, and techniques.[376]

Table 1 summarizes the primary features that distinguish common law from civil law legal systems.

Table 1: Distinguishing Attributes of Common Law and Civil Law Systems

Attribute	Common Law	Civil Law
Primary Source of Law	"Unwritten"; judicial decisions, particularly appellate caselaw	"Written"; enacted Codes
Constraints on Judicial Discretion	*Stare decisis*; binding judicial precedent (in the same jurisdiction); case or controversy (federal courts)	Enacted codes; judicial decisions (persuasive but never binding) merely "gloss" codified law
Legal Development	Incremental; case-by-case; statutes considered interstitial	Code adoption and amendment; gap-filling by judicial application of codes
Dispute Resolution	Jury or bench trial; reasoned opinion and judgment	Court judgment with concise explanation citing relevant codes

374. *See, e.g.*, Garoupa & Morriss, *supra* note 26, at 1484–88 (evaluating the relative adaptability of civil codes and common law and concluding that any apparent advantages of common law flexibility are likely offset by judicial reluctance to abandon precedent; "adaptability . . . represents a tradeoff with uncertainty").

375. Bergel, *supra* note 344, at 1080; *see* Garoupa & Morriss, *supra* note 26, at 1489 (citing French and German Civil Codes as examples).

376. Bergel, *supra* note 344, at 1080 (explaining that traditional civil codes are frequently amended, although the range of modifications has varied among code jurisdictions).

Fact-finding	Adversarial	Inquisitorial
Judicial Officers	Neutral; independent; law practice experience	Civil servants; career appointees
Appellate review	Diffuse review; all courts empowered to review statutes for constitutionality	Centralized constitutional review; limited to special constitutional courts (traditionally not permitted by ordinary courts)
Legal Reasoning	Inductive; judges analogize from case to case, comparing facts to reach consistent decisions; less likely to analogize from related statutes	Deductive; judges reason syllogistically by applying codes to facts, analogizing from code text to fill gaps
Structure and scope of statutory enactments	Generally unsystematized, often ad hoc; many statutes and codes include "savings clauses" by which they supplement and coexist with common law	Systematic, comprehensive codification of entire subject, superseding prior statutes and judicial interpretations
Form of Statutes and Codes	Concrete, specific, detailed; less accessible but easier to apply on a case-by-case basis	Abstract, expressed as broad principles; more accessible but more difficult to apply to specific cases

D. Mixed Legal Systems

The two major Western legal system classifications—common law and civil law—are not mutually exclusive. Contemporary scholars of comparative law have recognized the notion of "mixed" legal systems.[377] For example, comparativists consider Louisiana, the single United States jurisdiction that

377. *See* Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 16–18 (2003) (observing the resurgence of the theory of mixed legal systems among international and comparative law scholars beginning in the 1990s, and positing reasons, including the "growing internationalization of law" and "the expansion and growing integration of the European Union," with its potential to "draw together and integrate the rules of common law and civil law").

has retained its civil law heritage, to be a "mixed jurisdiction."[378] In addition, the mixed legal system classification has been applied to nations around the world, including Scotland, the Philippines, Malta, Sri Lanka, and South Africa, among others.[379]

Comparative law scholars have not agreed on the essential attributes of a mixed legal system, or even an accepted definition.[380] Generally, however, comparative law scholars tend to assign the classification to jurisdictions that have a long legal tradition but, for one reason or another, a different legal system has "inva[ded]" in a way that has "endangered" or otherwise modified that tradition.[381] The classification suggests that change occurs as a result of some externality, rather than internal forces by which a legal system naturally evolves over time.

E. Convergence

Some comparative law scholars believe that legal systems inevitably converge and become more alike as a direct result of globalization and other cross-fertilizing influences.[382] Certainly the increasing influence of supranational institutions such as the European Union, the United Nations, and the Council of Europe has caused Western nations to adapt their legal systems accordingly. The twenty-first century has witnessed dramatic

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378. "[D]espite the national drive for uniformity of law, Louisiana stubbornly remains the classic example of a mixed legal system up to the present day." Weiss, *supra* note 38, at 500–01. For a comprehensive historical overview of Louisiana's "eclectic" tradition, see Parise, *supra* note 171, at 164 & n.331 (noting that many consider Louisiana a "traditional mixed jurisdiction" because the civil law system, while predominant, is no longer "pure, and the influence of the common law is sensed" (citing Vernon Valentine Palmer, *Introduction* to LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 3, 4 (Vernon Valentine Palmer ed., 1999))). In fact, the first Louisiana Constitution in 1812 specifically prohibited the legislature from adopting any "system or code of laws" by general reference. LA. CONST. art. IV, § 11 (1812); *see* Hall, *supra* note 36, at 804–05 (citing LA. CONST. of 1812, art IX, § 11, *renumbered*, LA. CONST. art. III, § 18). In 1937, one scholar declared that Louisiana had become a common-law state, which promptly drew the protests of several other academics. Hall, *supra*, at 805, 805 nn.73–74.

379. Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, *in* MIXED JURISDICTIONS WORLDWIDE 3, 27–28, 628 (Vernon Valentine Palmer ed., 2d ed. 2012). *See generally* SUE FARRAN ET AL., A STUDY OF MIXED LEGAL SYSTEMS, ENDANGERED, ENTRENCHED OR BLENDED (2017).

380. *See* FARRAN ET AL., *supra* note 379, at 241–43; Palmer, *supra* note 378, at 7.

381. FARRAN ET AL., *supra* note 379, at 4–5.

382. *See* von Mehren, *supra* note 324, at 1215 & n.2 (citing examples).

technological developments yielding almost instantaneous global telecommunications. All of these influences are likely to lead to ever-greater convergence among disparate legal systems and traditions.[383]

In 1934, Professor Samuel Williston predicted that the time would come when the United States, like France and Germany, would adopt a code. At that time, the American Law Institute was embarking on an effort to "frame the rules" that had developed over time in the United States in a manner that would allow for their continued development. At the same time, it sought to offer a set of rules that state courts might adopt and thus incrementally help to unify the great variety of state common law.[384] But Williston recognized that the earlier codification efforts of the Uniform Law Commission and the American Law Institute's *Restatement* projects were simply developmental steps in the evolution of the still relatively youthful American legal system toward further unification of the law.

Williston readily acknowledged the disadvantages of codification, but he embraced the natural evolution in that direction primarily because of the massive increase in published judicial opinions. He observed that the continued proliferation of judge-made law created uncertainty at a time when commercial and industrial development demanded just the opposite. And judge-made law had the significant disadvantage of inaccessibility to laymen.[385]

> It has been the history of law in every other civilized country that after customary or common law has developed to a certain degree, or for a long period of years, and become unwieldly, a Code has followed. Most of the world today is living under Codes . . . ; and when a Code has once been adopted, they never go back.
>
> Whether it be in fifty or one hundred or two hundred years, my own belief is that we shall repeat the history of

383. *See* Jeffrey L. Friesen, *When Common Law Courts Interpret Civil Codes*, 15 WIS. INT'L L.J. 1, 3 (1996) (explaining reasons why "the common law and civil law worlds appear to be getting closer together rather than farther apart").

384. Williston, *supra* note 307, at 41; *see supra* notes 247–52 and accompanying text (discussing influence of American Law Institute).

385. Williston, *supra* note 307, at 39–40. Williston dryly observed that Field and Carter's debate in New York over whether written laws were preferable to judge-made law was beside the point. "[T]he question is not one of perfection against imperfection. It is rather a choice between two evils." *Id.* at 40.

> other countries; and if we are going to do so, it is highly desirable that we should have something that will be a good Code.[386]

Decades later, in 1960, an English law professor also observed the tendency of civil law and common law systems to converge.[387] A quarter-century ago, an article co-authored by a jurist and a legal scholar recognized the continuing influence of the two major Western legal traditions on one another.[388] In the European Union, for example, member nations had been gradually establishing specialized constitutional courts with the authority to review legislative enactments.

> At the same time the civil-law systems have been moving toward forms of constitutional control of legislation, the common-law nations have been moving toward more extensively codified legal systems. In these ways, the two legal systems are beginning to converge. The traditional authority and independence of the common-law judge has been reduced in recent years by the introduction of broad and comprehensive legislation in those nations that adhere to the common-law system. The common-law judge is now called upon to exercise his or her authority more and more often in cases of statutory construction and less frequently in cases of explicit judicial lawmaking. This shift in focus is likely to be accompanied by an increasing judicial deference to the legislature and diminution of the ability of the common-law judge to interpose his or her authority against the will of the majority.[389]

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386. *Id.* at 41.

387. *See* Lawson, *supra* note 144, at 6 ("[T]here is much to be said for the view that the methods of French and English law are not very wide apart."). More generally, "[i]f a code becomes old, . . . , even if it is amended from time to time, it may ultimately produce a type of law which is not very different from a common law system." *Id.* Many civil law nations have embarked on recodification efforts of various kinds, recognizing "the obsolescence in various degrees of the early 19th-century codification," and these efforts have often reflected "more eclecticism" by incorporating comparative law perspectives and the influence of supranational jurisdictions such as the European Union. Maria Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 J. TRANSNAT'L L. & POL'Y 163, 175–77 (2001); *see also* Bergel, *supra* note 344, at 1087 ("In almost every civilian jurisdiction, important reforms of the codes have been successfully undertaken.").

388. Utter & Lundsgaard, *supra* note 339, at 581.

389. *Id.*

Over the last century, other scholars have similarly recognized the trend of convergence, underscoring the increasingly indistinct boundaries between common law and civil law legal systems.[390]

F. The Diminishing Sphere of American Common Law

American law is increasingly expressed in statutes, codes, administrative rules, court rules, and other positive law.[391] In the twenty-first century, the primacy of enacted law as the controlling source of legal authority in the United States stands in stark contrast to the nineteenth century, when judicial decisions took center stage as the primary source of law.[392] Two important developments are primarily responsible for the shift from "unwritten" caselaw to "written" statutes, codes, and regulations as the primary sources of American law. The first is the professionalization of legislatures, in particular the addition of nonpartisan legislative staff. The second is the rise of the so-called "administrative state" since the New Deal era.

1. Legislative Reforms

In the nineteenth century, the members of both Congress and state legislatures were largely "citizen legislators" whose public service was ancillary to their primary occupations. Legisla-

390. *See* Eleanor Healy-Birt, *The Laws of Codes and Cases: A Comparative Analysis between Civil Law and Common Law*, 2013 BRISTOL L. REV. 109, 109–12 ("The distinction between civil and common law legal sources is not as clear-cut as is classically portrayed." (citing numerous examples illustrating convergence of the two legal traditions)); Judson, *supra* note 149, at 54 ("It is obvious that in recent years these two great systems of law have been brought into closer relations."); M.N. Marchenko, *Convergence of Romano-Germanic and Anglo-Saxon Law: Methods and Typologies*, 5 J. COMP. L. 211, 211–12 (2010) (noting prevailing view by Western scholars in recent years that the differences between common law and civil law systems are more a matter of form than substance). *But see* Healy-Birt, *supra*, at 114 ("The importance of traditional sources of law in each system is still fundamental, and informs practitioners' attitudes to the creation and application of law to such an extent that convergence between the two traditions is no more likely today than it was one hundred years ago.").

391. Wistrich, *supra* note 299, at 752 ("[T]he roles of statutes, treaties, and administrative regulations have expanded, while the roles of constitutional text and the common law have shrunk.").

392. *Id.* ("The overall trend is clear: in lawmaking of every sort, and in the relative proportions in which the methods of lawmaking are employed, the role of the past is waning, and the role of the future is waxing. The common law has been dethroned, and statutes, treaties, and regulations have been enthroned in its place.").

tive staff were essentially nonexistent,[393] and legislatures convened for short sessions, often every other year. Beginning in 1919, Congress established a legislative drafting service and authorized two professional draftsmen, one to be appointed by each chamber's leadership, to provide drafting services.[394] By the mid-1930s, several state legislatures had established nonpartisan staff agencies, sometimes known as "legislative reference bureaus."[395] In addition, the judicial council movement was well underway, which facilitated dialogue between the legislative and judicial branches regarding necessary improvements in the law, and national organizations had emerged to strengthen the legislative process.[396]

Today, Congress and many state legislatures are supported year-round by professional nonpartisan staff, including lawyers, sometimes known as "Revisors of Statutes," who prepare bills at the request of legislators or legislative committees and

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393. *See* Pound, *supra* note 310, at 8 (attributing English common law's endurance in America in part to the "premature and crude codification during the legislative reform movement which came to an end about 1875").

394. *Final Report of the Special Committee on Legislative Drafting*, 46 A.B.A. REP. 410, 410 ¶ 4 (1921) (describing the process of establishing the first congressional legislative drafting service and reporting on its influence in "raising legislative drafting to a recognized branch of legal science"); *see infra* note 493 (describing 1918 appointment of two Columbia law professors to provide drafting assistance to Congress, who would become the forerunners of the Office of Legislative Counsel); *see also* Revenue Act of 1918, Pub. L. No. 65-254, § 1303, 40 Stat. 1141 (codified as amended at 2 U.S.C. §§ 271, 281 (2012)) (establishing first congressional Legislative Drafting Service to "aid in drafting public bills and resolutions or amendments thereto on the request of any committee of either House of Congress"). The Special Committee's report referred to the service as "corresponding to the office of the Parliamentary Counsel to the Treasury of England." *Final Report of the Special Committee on Legislative Drafting*, *supra,* at 410, ¶ 4. Appendix C to the Committee's Report compiled extensive resource materials for the development of a legislative drafting manual. *Id.* at 417–60.

395. John H. Wigmore, *Recent Phases of Contemporary Legislative Proposals*, 15 ILL. L. REV. 141, 148 (1920) (acknowledging "gradual establishment of legislative reference bureaus in the States").

396. *E.g.*, Horack, *supra* note 19, at 44 & nn.15–16. The National Conference of State Legislatures was established in 1975, the successor to three predecessor organizations. *About Us*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/aboutus.aspx [https://perma.cc/X8JT-VFEH] (last visited Mar. 29, 2019). The Council of State Governments was established in 1933 to serve all three branches of state government. *About*, COUNCIL ST. GOV'TS, https://www.csg.org/about/default.aspx [https://perma.cc/46E3-BKMC] (last visited Mar. 29, 2019).

who codify and annotate statutes once enacted.[397] Moreover, virtually every state legislature's professional drafters have adopted manuals or conventions that have significantly improved the nature and quality of legislation in the United States.[398] And unlike the "citizen legislatures" that were common in the seventeenth and eighteenth centuries, Congress and many state legislatures meet much more regularly in modern times, in some cases almost continuously in legislative sessions lasting several months.[399] For these and other reasons, the legislative branch of government at both the federal and state levels has undergone major reforms since the early days of the American republic.[400]

2. Rise of the Administrative State

Beginning with the industrial revolution in the late nineteenth century, the United States government entered a new era by establishing administrative agencies with broad regula-

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397. In 1952, Professor Harry W. Jones evaluated developments in state and federal legislative drafting services and their influence on the quality of legislative products. Harry W. Jones, *Bill-Drafting Services in Congress and the State Legislatures*, 65 HARV. L. REV. 441 (1952). He urged state legislatures to establish bill-drafting staff divisions composed of lawyers: "No other step could do as much to improve the clarity, consistency and predictability of American law as would the creation of a really excellent drafting office in every state." *Id.* at 451.

398. *See Bill Drafting Manuals*, NAT'L CONF. ST. LEGISLATURES (Apr. 3, 2018), http://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/bill-drafting-manuals.aspx [https://perma.cc/WPP6-6FPP]. For an evaluation of legislative drafting manuals from an international perspective, see Helen Xanthaki, *Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?*, 4 LEGISPRUDENCE 111 (2010).

399. *See, e.g.*, Kellen Zale, *Compensating City Councils*, 70 STAN. L. REV. 839, 855–56 (2018) ("In the state legislative context, researchers have focused on four factors as indicators of professionalism: 'the amount of staff and other forms of support, length of session, turnover, and level of compensation.'" (quoting David L. Sollars, *Institutional Roles and State Legislator Compensation: Success for the Reform Movement?*, 19 LEGIS. STUD. Q. 507, 508 (1994))); *see also Full and Part-Time Legislatures*, NAT'L CONF. ST. LEGISLATURES (June 14, 2017), http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx [https://perma.cc/776A-B752] ("To measure the capacity of legislatures, it's important to consider the amount of time legislators spend on the job, the amount they are compensated and the size of the legislature's staff.").

400. Shobe, *supra* note 319, at 810 (examining how the legislative drafting process has evolved and improved since the mid-1970s to "arrive at the practice of modern drafting" and explaining how those advances should influence statutory interpretation).

tory powers.[401] The New Deal era of the 1930s further entrenched what some observers have derisively called the "headless fourth branch of government."[402] Given the complexities of the modern era, administrative agencies at both federal and state levels issue regulations that have the form, force, and effect of positive law.[403]

In civil law systems, regulations issued by administrative agencies are often classified as "secondary" or "subordinate" legislation, as distinguished from primary legislation enacted by the legislative or parliamentary body.[404] But regardless of nomenclature, administrative rules and regulations in the United States represent a massive body of positive law generated largely since the late nineteenth century.

3. Legislative Overlays on "Private" Common Law

Over the last century and a half, the proliferation of statutes, court rules, and administrative regulations in the United States has effectively superseded the common law canvas. As one scholar observed, "the core of pure common law doctrine continues to shrink[,] and as it does the need to understand how the common law process works in a world where it is surrounded by statutes increases."[405] Another acknowledged that

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401. *See* Kim, *supra* note 108, at 80–81.

402. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (quoting PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 30 (1937)); *see also* Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190 (2011) ("Whether we like it or not, government administration is everywhere. The Constitution vests the 'executive Power' of the United States in the president. The executive branch exercises that power by administering the laws that Congress enacts, and those laws are numerous.").

403. *See, e.g.*, Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANAL. 121, 121 (2016) (noting that "administrative law is . . . positive law, with highly developed procedures, precedents, doctrines, and institutions for crafting and enforcing its commands").

404. *See, e.g.*, Eduardo Jordão & Susan Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 ADMIN. L. REV. 1, 6 n.5, 72 (2014) (equating the American term "rulemaking" to "secondary legislation issued by agencies (both cabinet departments and independent agencies) under authority delegated to them by statute, or, as in France, by the French Constitution itself").

405. Beatson, *supra* note 30, at 301. "Nevertheless psychologically, if not statistically, statutes can still appear to many lawyers as exceptions rather than the rule." *Id.* Some might call this psychological phenomenon "denial." *See* Pierre

"[p]rivate law subjects like tort, contract, and property are traditionally understood to be at the core of the common law tradition, yet statutes increasingly intersect with these bodies of doctrine."[406] This section offers examples of statutory frameworks that have supplanted significant components of American private law[407] that were traditionally governed by judge-made law.

a. Torts

Torts might be considered the last bastion of American common law, although torts are not immune from either legislative innovation or override.[408] Early state legislatures enacted "reception statutes" by which English common law was "received" as of a specified date as part of state law. Many reception statutes then delegated the power to state courts to continue to develop the "received" law consistent with the state's public policy. "These long-forgotten statutes were the basic vehicle through which legislative power was vested in state judiciaries."[409] Thus, even tort law in the United States is arguably a creature of statute.

Schlag, *Politics and Denial*, 22 CARDOZO L. REV. 1135, 1143–44 & n.18 (2001) ("[L]aw is, in part, a discourse of denial."; discussing good and bad aspects of the "ethically unflattering realm labeled 'denial' . . . depend[ing] on the identity of its object, context, or source").

406. Pojanowski, *supra* note 23, at 1691 (giving examples); *see also* Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1123 (arguing that over the last three decades of the twentieth century, "a large-scale—though piecemeal—codification of the common law has occurred"; of the traditional common law subjects, "only the law of torts remains uncodified"); Robert F. Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 MERCER L. REV. 803, 804 (1984) ("Areas of the law such as torts, property, and contracts have been influenced increasingly by legislation.").

407. *See* Randy E. Barnett, *Four Senses of the Public Law-Private Law Distinction, Foreword to the "Symposium on the Limits of Public Law,"* 9 HARV. J.L. & PUB. POL'Y 267, 271 (1986). "Private law subjects . . . include contract, torts, property, corporations, agency and partnership, trusts and estates, and remedies—subjects defining the enforceable duties that all individuals owe to one another." *Id.*

408. John C. P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1271 (2008) ("[S]tatutes figure in tort law in all sorts of ways. Indeed, it is difficult to think of an aspect of tort law that has not been touched by statutory law."). Goldberg lists as one "half-truth" that tort law is common law. *Id.* at 1276.

409. Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L.J. 745, 746–47 (1997).

At the turn of the twentieth century, workers' compensation acts displaced a large segment of tort law pertaining to injuries in the workplace.[410] Congress and many state legislatures enacted tort claims acts, which abrogated common law sovereign immunity.[411] The comparative negligence doctrine is largely a legislative innovation.[412] Recreational use statutes enacted in many states modified common law premises liability, in part to encourage private landowners to make their property available for public use.[413] Wrongful death actions were not recognized at common law; they are strictly creatures of statute.[414] Statutes

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410. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 69–72 (1967) (describing reasons for enactment and rapid proliferation of state workers' compensation statutes between 1910 and 1920, which fundamentally altered traditional methods for remediating on-the-job injuries by precluding common law adjudication of civil liability for workplace accidents).

411. Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 767 (2008) ("Sovereign immunity is a judge-made doctrine in its very origins, and its reinvention in recent years has been almost exclusively driven by the judiciary."); *id.* at 771–72 (explaining that one aspect of sovereign immunity applicable to suits in the sovereign's own courts derived from English common law); Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 529 (2008) ("Under the doctrine of federal sovereign immunity as it has evolved in Supreme Court jurisprudence over the past 200 years, the amenability of the federal government to legal action in court turns upon consent by the government, expressed through legislation enacted by a democratically elected congress.").

412. *E.g.*, David C. Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413, 414 (1985) (noting that most states have adopted comparative negligence by statute).

413. *E.g.*, Paul A. Svoboda, *Protecting Visitors to National Recreation Areas Under the Federal Tort Claims Act*, 84 COLUM. L. REV. 1792, 1798–800 (1984) ("The enactment of recreational use statutes by the vast majority of states has significantly altered standards of [common law] landowner liability [by] substantially limit[ing] the liability of those [private] landowners who make their premises available to the public for recreational purposes[,] primarily to encourage [them] to open their lands to the public . . . ."); *see also* Michael S. Carroll, Dan Connaughton & J.O. Spengler, *Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation*, 17 J. LEGAL ASPECTS SPORT 163, 164 (2007) (explaining history of recreational use statutes, some form of which have been enacted in all fifty states beginning with Virginia in 1950; other states followed after 1965 when the Council of State Governments proposed model legislation to limit landowner liability to recreational users).

414. Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1052 (1965) ("[T]he denial of a cause of action to one person for the wrongful death of another is a common-law limitation . . . ."). Malone speculated that the origin of the common law rule was the merger doctrine, "since discarded, that where a cause of action disclosed the commission of a felony the civil action was merged

of limitation, and more recently statutes of repose, have long cabined the right to recover damages in tort.[415] No-fault automobile liability insurance statutes enacted in the mid-twentieth century largely obviated the need to litigate negligence claims for automobile accidents.[416] And the enactment of statutes conferring property rights to married women, which significantly altered English common law, also drove changes in a number of common law tort principles, including a husband's liability for torts committed by his wife.[417] All of these legislative developments in tort law show that even this last domain of the common law is increasingly governed by statute.

Legislatures have developed and shaped the common law of torts in many other ways. For example, beginning in the early twentieth century, state legislatures enacted statutes to provide a civil remedy for invasion of privacy.[418] In part to deter acts of

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into the criminal wrong." *Id.* at 1055. At common law, homicide was considered both a criminal and a civil wrong. *Id.*

415. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 454–55 (1997).

> Statutes of limitation are an important feature of the legal landscape. Virtually every country has them. Their direct antecedents can be traced back for centuries, and some sorts of time limits have been enforced for thousands of years . . . . The limitation system is the product of the interplay between two competing sets of policies: those supporting the extinguishment of untimely claims and those encouraging the resolution of all claims, whether timely or untimely, on their substantive merits.

Id. Statutes of repose were enacted largely in response to creative judicial interpretations of statutes of limitation such as the "discovery rule," which delayed accrual of an action until the plaintiff knew or should have known that the injury was traceable to the commission of a tort. *See, e.g.*, Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. BALT. L. REV. 119, 128 (2014) ("Recognizing [the impact of discovery rules], state legislatures began to enact 'statutes of repose' to provide a finite time limit on defendants' potential liability.").

416. *See, e.g.*, Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 310–14 (2018) (outlining the development of no-fault automobile insurance, its early successes, and the possible reasons it has fallen out of favor).

417. Landis, *supra* note 17, at 16–17. "There has been general recognition that the married women's acts embodied principles which were of wider import than the statutes in terms expressed and thus necessitated remoulding common-law doctrines to fit the statutory aims." *Id.* at 17; *see* Traynor, *supra* note 92, at 403 (noting that "for many centuries judges have been accommodating statutes to the common law openly or indirectly, expansively or warily").

418. *E.g.*, N.Y. CIV. RIGHTS LAW §§ 50, 51 (originally enacted 1903); *see also* Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902), in which the New York Court of Appeals rejected a claim for invasion of privacy by misappropria-

race discrimination, Congress created a federal statutory tort action for violation of a person's constitutionally protected civil rights by a perpetrator acting under color of state law.[419] Legislatures have enacted a multitude of statutory duties that, if violated, support a claim for damages.[420] Nearly two decades ago, one scholar observed, "In a world of pervasive legislative activity, it may be a rare case where one of the parties cannot assert some legislative enactment in support of their [tort] claim or defense."[421] Not surprisingly, some of the legislative activity during the twentieth century to alternatively develop and constrain tort law was met with judicial resistance.[422]

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tion of a young woman's likeness for advertising purposes without her consent; the New York General Assembly promptly responded to the public outcry by prospectively legislating a tort remedy. *See generally* Victoria Prussen Spears, *The Case That Started It All:* Roberson v. The Rochester Folding Box Company, 3 PRIVACY & DATA SECURITY L.J. 1043 (2008). For a comprehensive analysis and critique of the many federal and state statutes enacted to protect privacy, see Elizabeth D. De Armond, *A Dearth of Remedies*, 113 PENN ST. L. REV. 1 (2008).

419. *See* 42 U.S.C. §§ 1983–1988 (2012).

420. Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 IND. L. REV. 781, 782 (1990) ("Statutory duty cases are hybrids involving both the legislative and judicial branches."); Keeton, *supra* note 338, at 473 (explaining that "tort law has depended heavily on applications of statutes beyond their letter" such as by grounding civil liability on violations of criminal statutes "in the context of negligence per se and related doctrines," suggesting that "the legal system is not confronted with an either-or choice between decisional and statutory creativity for solution of emerging problems").

421. Harvey S. Perlman, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813, 814 (2000). Indeed, Professor Perlman, then Chancellor of the University of Nebraska, concluded that "courts in formulating applicable legal rules of tort liability should assimilate policies reflected in legislation." *Id.* at 864. As noted above, judicial reasoning by analogy from statutes, recognized by the United States Supreme Court as early as 1918, is one feature of civil law systems. *Supra* notes 55, 77 and accompanying text.

422. *See, e.g.*, Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 SETON HALL L. REV. 688, 692 (2001) ("[F]undamental disrespect for the separation of powers doctrine . . . occurs when majorities of some state supreme courts nullify [tort reform] legislative action that has a clear, coherent and rational basis."); *see also* Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1503 (2009) (addressing "the increasingly complicated and dynamic relationship between state legislatures, Congress, and state and federal courts in the area of tort law"); Scalia, *supra* note 107, at 112 (criticizing judicial resort to constitutional doctrine to set aside statutes as representing "the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures"); John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1160 (2005) ("Under the guise of judicial review, state courts have all too often

b. Contracts

As with tort law, statutes have significantly intervened in the common law of contracts, particularly over the last century.[423] The most obvious example of statutory constraints on the enforcement of contracts was the English Statute of Frauds, the last of a series of parliamentary enactments designed to address matters formerly thought beyond the scope of legislative innovation.[424] "There had never been such sweeping legislative intrusion upon common law of contract—nor would there be anything to equal or exceed it until the twentieth century."[425]

The Industrial Age of the late nineteenth century instigated additional statutory constraints on freedom of contract. The labor movement ushered in an era of statutory protections for workers.[426] The rapid development of commercial law demanded uniformity across state lines, which led to the formation of the Uniform Law Commission and its effort to propose model legislation for state enactment to facilitate interstate commerce.[427] In particular, the Uniform Commercial

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used state constitutional provisions to interfere with experiments in public policy that over time have come to be widely respected.").

423. *See* Kevin M. Teeven, *A History of Legislation Reform of the Common Law of Contract*, 26 U. TOL. L. REV. 35, 79–80 (1994) ("[D]ue recognition should be given to the significant role played by legislatures in shaping the law of contract [over the past eight centuries].").

424. *Id.* at 54–55.

425. *Id.*

426. William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1132 (1989) ("The labor movement of the 1880's and early 1890's embraced what was, by contemporary standards, a bold program for government regulation of the wage contract and working conditions. Its central goal was to legislate a shorter work day."). Professor Forbath comprehensively discussed judicial resistance to the labor movement, which courts expressed by striking down numerous statutes. *Id.* at 1133.

> Judicial review was the most visible and dramatic fashion in which courts curtailed labor's ability to use [statutory] laws to redress asymmetries of power in the employment relationship. By the turn of the century state and federal courts had invalidated roughly sixty labor laws. During the 1880's and 1890's courts were far more likely than not to strike down the very laws that labor sought most avidly. For workers, judicial review—the invalidation of labor laws under the language of "liberty of contract" and "property rights"—became both evidence and symbol of the intractability of the American state from the perspective of labor reform.

Id. (footnotes and citations omitted).

427. John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN. ST. L. REV. 119, 141 (2009) ("The American commercial law codification movement began in earnest in 1892 with the creation by the American Bar Associ-

Code, the Commission's flagship codification project, has been adopted in some form in all fifty states and has substantially supplanted the influence of common law in domestic commercial transactions.[428] The United Nations Convention on Contracts for the International Sale of Goods (CISG), the international counterpart of the U.C.C., has had a similarly unifying effect for international commercial law.[429]

Beyond the labor movement of the late 1800s, substantial statutory constraints have also been imposed on employment contracts.[430] The Fair Labor Standards Act of 1938, the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990 each altered the common law doctrine of employment at will.[431]

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ation . . . of the National Conference of Commissioners on Uniform State Laws . . . . Of course, the need for codification in the United States was obvious.").

428. *See, e.g.*, Gilmore, *supra* note 97, at 466 ("Thus in most of the country by 1920, and in many states as early as the 1900's, we had a codified law of sales, negotiable instruments, documents of title and security transfer . . . . These statutes were, truly, codifying statutes of a type we had not theretofore known."); Murillo, *supra* note 387, at 170 ("[T]he United States, despite its common law tradition, has a substantial segment of its law of contracts that is currently regulated under the provisions of the Uniform Commercial Code . . . . American contract law has been greatly influenced by the provisions of the U.C.C."). As Gilmore noted, however, the American codification broke with the civil law tradition in an important respect "by making it expressly clear that our codifying statutes were not designed to be, and were not to be taken as, exclusive statements of all the law, past, present and future." Gilmore, *supra*, at 466.

429. One scholar has referred to the CISG in the following glowing terms:

> This stunningly successful treaty sought to "contribute to the removal of legal barriers in . . . and promote the development of international trade" and has been described as "arguably the greatest legislative achievement aimed at harmonizing the international law of sales," enjoying "widespread acceptance as the governing law of contracts for international trade."

Amir Shachmurove, *Here Lions Roam: CISG As the Measure of a Claim's Value and Validity and a Debtor's Dischargeability*, 34 EMORY BANKR. DEV. J. 461, 486 (2018) (footnotes and citations omitted).

430. Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 655 (2000) ("Numerous statutes protect employees from discharge at the whim of their employers.").

431. *See, e.g.*, Timothy J. Coley, *Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence*, 24 BYU J. PUB. L. 193, 208 (2010) ("Over . . . the past 100 years, particularly during the second half of the century, a wide raft of federally-enacted legislative wrongful discharge schemes have been put in place, which are fundamentally at odds with the common law conception of employment-at-will and serve to limit a firm's ability to otherwise freely terminate employees.").

Numerous states have enacted comparable statutes, as well as others regulating the terms of noncompetition agreements between employer and employee.[432]

Although freedom of contract is an important legal principle of American law, it is not absolute. The courts have upheld many different kinds of statutory constraints on contracts.[433]

c. Property

The third major category of "private" common law is property, historically the most deeply entrenched of all in English common law. Yet even here, statutes have superseded common law in significant ways.

Perhaps the most significant was the widespread departure from common law rules prohibiting married women from owning property in their own names, beginning in the mid-nineteenth century. At common law, the property rights of married woman were severely limited.[434] Under the common law principle of coverture,[435] any real property owned by a woman at the time of her marriage became subject to her husband's absolute management and control; similarly, her personal property was exclusively within his dominion as soon as he took possession of it.[436] New York was the first state to enact

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432. Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 120–22 (2008) (citing state restraint of trade statutes in California and North Dakota, as well as specific statutes restricting or barring enforcement of noncompete agreements in California and Colorado).

433. *See, e.g.*, David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 103 (2013) (noting that states' authority to regulate the subject matter of contracts has long been recognized as a matter of public policy); *id.* at 57–58 (acknowledging the "tension . . . between the right of an individual to possess the faculty to contract versus the right of a government to restrict the scope of or even the parties to certain, specified contracts").

434. *E.g.*, 5 WILLISTON ON CONTRACTS § 11:5 (4th ed. 2018) ("[T]he property rights of married women at common law were very limited until the enactment of liberalizing statutes, commonly referred to as married women's property acts, passed by the states beginning in the middle of the 19th century.").

435. *E.g.*, Hon. Richard A. Dollinger, *Judicial Intervention: The Judges Who Paved the Road to Seneca Falls in 1848*, 12 JUD. NOTICE 4, 5 (2017) (defining coverture as "the centuries-old English common law rule that dictated that when a woman married, her husband acquired the right to all her property. The husband could pledge the property to creditors, sell it or otherwise dispose of it . . . . [U]nder coverture, a married woman was 'civilly dead.'" (citation omitted)).

436. Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1361 (1983).

a married women's property statute in 1848, but it applied only to women who married after its effective date.[437] It would be 1860 before New York enacted a statute giving married women the right to control their own earnings and operate businesses on their own behalf.[438] Nearly every other state followed New York's lead.[439] By 1895, the legislatures of forty-four states and territories had enacted some form of married women's statutes.[440]

Other illustrations of statutory property regulation abound. Virtually every state has enacted statutes regulating the financing of real estate transactions, specifically mortgage and redemption.[441] They have also enacted recording statutes to provide real estate grantees assurance and a reliable method for giving public notice of their property rights.[442] Congress and

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437. After years of debate, the New York Legislature in 1848 finally enacted a married women's property rights statute. *See* Dollinger, *supra* note 435, at 10–11; Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 WM. & MARY J. WOMEN & L. 493, 509–10 (2000) (quoting the 1848 New York statute: "The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.").

438. Ranney, *supra* note 437, at 510. In 1860, New York enacted a statute guaranteeing all married women the right to contract and the right to control their earnings. *Id.* (citing 1860 N.Y. Laws 90). In addition, the statute allowed married women to operate their own businesses, including the right to contract to the extent necessary to that end, and to sue and be sued with respect to their separate property. *Id.*

439. *See* B. Zorina Khan, *Married Women's Property Laws and Female Commercial Activity: Evidence from United States Patent Records, 1790–1895*, 56 J. ECON. HIST. 356, 362 n.19 (1996).

440. *Id.* at 363–64 & tbl.1 (listing statutory enactments by state, by type, and by year spanning 1790–1895). The statutes reflected great variations from state to state, but most granted women the right to own and control property in their own names, to control their own earnings without their husbands' interference, and to execute contracts and engage in business transactions without their husbands' consent. *Id.* at 364 tbl. 1 notes.

441. "Unencumbered by centuries of mortgage practice in which lenders took [actual] possession of the mortgaged land, American mortgage law evolved more quickly than English law to focus on the debt aspect of the mortgage relationship." Ann M. Burkhart, *Lenders and Land*, 64 MO. L. REV. 249, 266–67 (1999). *See generally* Ann M. Burkhart, *Freeing Mortgages of Merger*, 40 VAND. L. REV. 283 (1987) (tracing the development of mortgage law from ancient common law to the present).

442. Charles Szypszak, *Real Estate Records, the Captive Public, and Opportunities for the Public Good*, 43 GONZ. L. REV. 5, 24 (2008).

most states have enacted detailed statutes regulating the landlord-tenant relationship that protect the rights of tenants to decent housing.[443]

Finally, nearly every state has enacted comprehensive statutes on the administration of wills and estates, including the distribution of assets of intestate decedents.[444] The Uniform Probate Code and the Uniform Trust Code have both supplanted much of the relevant common law.[445]

4. Criminal Procedure

Although codification has increasingly supplanted common law in the traditional fields of "private law"[446] and in many areas of public law, some might argue that federal criminal pro-

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443. Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 485–86 (1985) (describing inadequacies of the common law of landlord-tenant).

> Under traditional common law, the landlord had two basic obligations: the duty to provide the tenant with possession of the land and the duty, based upon an implied covenant of quiet enjoyment, to refrain from disturbing the tenant in his possession of the land for the duration of the tenancy. A landlord had no obligation to provide premises with structures in a particular state of repair or to make repairs once the tenancy had begun. Because courts viewed the lease primarily as a conveyance of land, the tenant, as the purchaser of a possessory interest in the land, was responsible for ordinary repairs. Although the tenant could obtain from the landlord an express covenant to repair any buildings located on the property, the value of such a promise was limited by the doctrine of independent covenants. According to that doctrine, the tenant's duty to pay rent continued unabated, despite the landlord's breach of an express covenant to repair.

Id. (footnotes omitted); *see also id.* at 489–90 (identifying the "almost complete reversal of the common law no-repair rule . . . complemented by changes in tenant remedies and landlord tort liability," among other reforms).

444. *See* Mary Louise Fellows & Gregory S. Alexander, *Forty Years of Codification of Estates and Trusts Law: Lessons for the Next Generation*, 40 GA. L. REV. 1049, 1050–51 (2006) (describing the impact of uniform laws on the law of wills, estates, and trusts, including those that reverse common law and those that predominantly codify common law).

445. *See, e.g.*, Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 718–19 (2006) (noting that scholars, jurists, legislators, and practicing attorneys have issued a call for uniformity in probate and trust law, particularly with respect to will substitutes).

446. *See* Barnett, *supra* note 407 (discussing the traditional distinction between private law (torts, contracts, property, and similar subject matter that governs private relationships) and public law (constitutional law, criminal law, tax law, immigration, and other subject matter areas dealing with individual citizens vis à vis government institutions)).

cedure is one exception.[447] It is certainly true that over the last half century, the United States Supreme Court has devised a number of rules designed to ensure fairness and due process to those accused of criminal offenses, and to deter questionable law enforcement conduct.[448] Moreover, the Supreme Court has interpreted the Fourteenth Amendment's Due Process Clause to extend these prophylactic rules to require states to comply when prosecuting individuals charged with state criminal offenses.[449]

However, the Court's "judge-made" rules in the domain of criminal procedure do not represent lawmaking in the traditional common law sense of that term. Rather, the Court's reasoning in those cases has been grounded in concerns that existing federal legislation and federal rules of criminal procedure are insufficient to deter violations of the Fourth, Fifth, and Sixth Amendments.[450] In fact, in *Miranda v. Arizona*,[451] the Court called on Congress to enact legislation to protect arrestees from overzealous attempts to coerce confessions in violation of the

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447. *See, e.g.*, Stephen F. Smith, *Activism As Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1057–58 (2002) ("Now it is only slightly exaggerated to say that all of the rules that really count concerning the process of investigating and prosecuting crimes come from the pages of the *United States Reports*, not state and federal rules of criminal procedure.").

448. For example, the exclusionary rule is a judge-made rule of evidence devised to deter law enforcement officials from engaging in searches and seizures that violate the Fourth Amendment. *See* Weeks v. United States, 232 U.S. 383, 393 (1914) ("If letters and private documents can . . . be [unlawfully] seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961), *and* Elkins v. United States, 364 U.S. 206 (1960); *see also Mapp*, 367 U.S. at 655 (extending exclusionary rule to state prosecutions).

449. *E.g.*, *Mapp*, 367 U.S. at 655.

450. Indeed, the Fourteenth Amendment, on the basis of which the Court has reasoned that government restrictions in the Bill of Rights also extend to the states, expressly authorizes *Congress* to enact legislation to enforce its provisions "by appropriate legislation." U.S. CONST. amend. XIV, § 5; *see* Dickerson, *supra* note 289, at 785 & n.27. Identical enabling clauses appear in U.S. CONST. amend. XIII, § 2 and U.S. CONST. amend. XV, § 2, and of course Congress has enacted major statutory frameworks to enforce the three post-Civil War constitutional amendments.

451. 384 U.S. 436 (1966).

Fifth Amendment.[452] But rather than waiting for Congress to enact legislation (or the Judicial Conference to propose rules of criminal procedure), the Court devised its own remedy reflecting its best judgment on how federal courts might serve that purpose.

For these reasons, the Court's criminal procedure decisions do not represent lawmaking in the common law sense. Instead, they simply reflect the Court's exercise of its jurisdiction under Article III to resolve cases raising federal constitutional issues.[453] Those precedents involve interpretation and application of constitutional language—the foundation of American positive law—not common law lawmaking in the sense defined in Part I of this Article.[454]

In the decades and centuries to come, statutory enactments will continue to overlay what little remains of the American common law canvas. One scholar predicted this development well more than a century ago:

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452. United States v. Dickerson, 530 U.S. 428, 440 (2000) (referring to the "*Miranda* Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination" (citing *Miranda*, 384 U.S. at 467)).

453. U.S. CONST. art. III, § 2. Indeed, the Supreme Court has declared that *Miranda* is a "fully constitutional rule." Ronald J. Rychlak, *Baseball, Hot Dogs, Apple Pie, and Miranda Warnings*, 50 TEX. TECH L. REV. 15, 16 (2017); *see also* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1074–75 (2017) (referring to prophylactic rules such as *Miranda* and the exclusionary rule as "[s]ubconstitutional checks . . . not derived explicitly from constitutional language but from an interest in protecting explicit constitutional structure and to give substance to specifically enumerated constitutional rights."); *cf.* 42 U.S.C. §§ 1981–1988 (2012) (granting federal courts jurisdiction to consider claims against state officials for depriving any person of federal rights, privileges, or immunities guaranteed by federal statutes or federal Constitution).

454. *See supra* notes 25–32 and accompanying text (defining "common law" for purposes of this Article); *see also* Dickerson, *supra* note 289, at 774–81 (comparing features that statutes and constitutional provisions have in common and those that distinguish them for purposes of extracting meaning). Professor Dickerson observed "a widely professed judicial reverence for constitutional provisions so generously interpreted that they provide little or no appropriately disciplined guidance for meeting current social needs." *Id.* at 777. He wondered, "[H]ow can so much democratic wisdom be safely left to a democratically unresponsive and only modestly equipped judicial elite?" *Id.* Dickerson concluded by noting the "need for a healthier allocation of functions among the three main branches of government and [the] need, by this means, to reshape some judicial attitudes." *Id.* at 795. In particular, "the system needs a clearer concept of what the Constitution consists of [including supplementary constitutional law and subconstitutional enforcement of its purpose] and how much of either remains the exclusive province of the courts and how much . . . is shared with the legislature and subject to its supremacy." *Id.* at 795–96.

> The codes that have been attempted have not proved entirely satisfactory, and yet the demand for codification will go on until the common-law methods and common-law ideas are entirely eliminated from our jurisprudence. To participate in the work will be both the duty and the privilege of the coming generation of lawyers.[455]

In summary, common law's sphere has diminished to such an extent that it is no longer accurate to characterize the United States as a "common law" legal system. More than a century ago, Roscoe Pound declared it was, even then, "an age of legislation."[456] He predicted that "the course of legal development" already underway would ultimately lead American law to accept legislative innovation "not only as a rule to be applied but a principle from which to reason, and hold it . . . of superior authority to judge-made rules on the same general subject."[457]

More than six decades ago, Professor Ferdinand Fairfax Stone observed that "in this day and age the amount of unwritten law is infinitesimal as compared to written law . . . ."[458] It was true in 1955; it is even more true now. Calabresi's radical attempt in 1982 to breathe new life into the common law by elevating the judiciary as a check on legislative innovation fell on deaf ears. The train had already long since left the station.

American law has continued to chug along into the future, developing in fits and starts by legislative enactment and partial codification throughout the twentieth century. By now, in the first quarter of the twenty-first century, the train has indeed arrived in the Age of Legislation that Pound long ago anticipated.[459] Yet the common law is dragged along like a caboose, serving only to fill gaps—and perhaps to reassure those who choose to believe that contemporary lawyers still practice in a common law age. But it will not be long before even the caboose is cut loose and we are finally back to the future.[460]

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455. Morris, *supra* note 226, at 67.
456. Pound, *supra* note 19, at 385.
457. *Id.* at 385–86.
458. Stone, *supra* note 20, at 305.
459. Pound, *supra* note 19, at 385.
460. *See* BACK TO THE FUTURE (Universal Pictures 1985).

IV. REFORMING AMERICAN LEGAL EDUCATION

> Although legislation is the primary instrument of social change in our society, it receives considerably less attention in law schools than judge made law, and there is a need for a better understanding by lawyers of the legislative process.
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> Joseph Dolan, *Law School Teaching of Legislation: A Report to the Ford Foundation*, 22 J. LEGAL EDUC. 63, 63 (1969).
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> The present attitude responsible for our cavalier treatment of legislation is certain to be a passing phenomenon . . . . [T]he profession and the [law] schools are at fault for not affording the bench better technical aids. These United States present a most extraordinary laboratory for comparative legislative study. But while the [court] precedents . . . are carefully catalogued, analyzed, and weighed, no scientific concern is manifested over our constantly accumulating legislation. Texts and source-books thread their way through the welter of our decisions, throwing off statutes as excrescences upon the body of the law. Under the impulse of great law-teaching a national attitude toward the common law has arisen to counterbalance the centrifugal forces of our many states. But even the idea that the same spirit can control legislative law is wanting. The task of its development promises to be a chief concern of to-morrow.
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> James McCauley Landis, *Statutes and the Sources of Law*, 2 HARV. J. ON LEGIS. 7, 26 (1965).

Law and legal systems are constantly evolving.[461] In the twenty-first century, the traditional notion of "American common law" has become an anachronism.[462] Scholars have been

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461. *See, e.g.*, Corbin, *supra* note 127, at 672 ("The change and growth of the law by . . . judicial action can never be avoided."); Walter F. Dodd, *Statute Law and the Law School*, 1 N.C. L. REV. 1, 1 (1922) ("The law is a constantly changing and developing body of rules."); The Right Hon. Lord Goff, *Judge, Jurist and Legislature*, 2 DENNING L.J. 79, 81 (1987) ("The only truly constant feature of the law is that it is in a constant state of change."); Liaquat Ali Khan, *The Paradoxical Evolution of Law*, 16 LEWIS & CLARK L. REV. 337, 338 (2012) ("Law, rooted in the nation's history and past traditions, continuously renews itself."). In the age of statutes, change is ongoing, both by legislative enactment and amendment, and by judicial interpretation of enacted laws. *See* Hahlo, *supra* note 106, at 252 ("It is . . . of the nature of law that it stands perpetually in need of revision if it is to remain in keeping with changing conditions.").

462. *See, e.g.*, James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 520 (2006) ("American legal

foretelling it for decades.[463] We are indeed now living in an Age of Statutes and many other forms of enacted law, as long recognized by American jurists, legal practitioners, and even observant scholars.[464] Yet the common law myth that gives judicial decisions primacy as the source of American law lives on in the legal academy, and its perpetuation produces law graduates who falsely assume that the answer to most legal problems may be found in judicial precedent.[465] But lawyers confronting

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methods and structures have not mastered the transition from the world of the eighteenth century to that of the twenty-first.").

463. *E.g.*, Dodd, *supra* note 461.

> [T]o what extent can we adopt a broad view as to the place of statutes in the development of the law, when each succeeding generation of students is taught to get its law from cases and to ignore the statutes[?] . . .
>
> From the standpoint of the needs of its students, the American law school must give more attention to statutes. Much may be accomplished by an independent course on the subject; but all courses in the law school should at the same time devote some attention to the statutory basis of the law.

Id. at 2, 6.

464. *See, e.g.*, Horack, *supra* note 19, at 44–45 ("[T]he history of social control through law usually follows a pattern which eventually shifts from the unwritten to the written law—and thus, statutes become the significant legal materials." (citing Williston, *supra* note 307)); Traynor, *supra* note 92, at 402 ("The endless cases that proceed before [a judge] increasingly involve the meaning or applicability of a statute, or on occasion, its constitutionality); *cf.* Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1740 (2016) ("The challenge ahead would seem to be to reenvision the role of courts in an age in which administrative regulations preponderate."). Professor Sharkey argues that "[t]he United States is indeed still a common law country—not its nineteenth-century version, but a distinctly twenty-first century version that is just coming into view." *Id.*

Professor Pojanowski has convincingly demonstrated that statutes, rather than being anathema to English and early American lawyers, in fact played an important role in the development of Anglo-American common law. Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1376–85 (2012). Indeed, in the early fourteenth century, the English government recognized no divisions among executive, legislative, and judicial power; the king's courts both wrote statutes and applied them to resolve disputes. William Herbert Page, *Statutes as Common Law Principles*, 1944 WIS. L. REV. 175, 183–84 & n.11 (citing English cases decided in the early fourteenth century). It stands to reason that both statutes and customary law played an important role in the development of English common law by the time of the American Revolution.

465. Roger Traynor, then Chief Justice of the California Supreme Court, long ago observed the lack of an effective way to research statutes comparable to the system we have for researching caselaw. Traynor, *supra* note 92, at 426 ("There is great need not only for a systematic cataloguing and research of statutes but also for systematic criticism."). Even earlier, Professor Horack observed the need for

the great majority of contemporary legal issues will not find the answers in caselaw.[466]

A. Colonial and Post-Revolutionary Legal Education

Before the Revolution and throughout most of the first century of the new republic, prospective lawyers "read the law"—and in most cases that meant reading Coke's *Institutes* and Blackstone's *Commentaries*.[467] After the Revolution, several law

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improved access by courts "to the legislative precedents of their own jurisdictions" as well as recognition that the statutes of other states are helpful "guides to the development of their own policy." Horack, *supra* note 19, at 55–56. Both Justice Traynor and Professor Horack called for improvements in the legal academy to facilitate the judiciary's effective use of the burgeoning body of statutory law.

> With all too little critical comment to serve as a warning or guide, how can judges immersed in mounting litigation ferret out potentially good statutes for use in their own lawmaking from among the host of inferior ones? . . .
>
> We are still far from betterment measured by the goal of rational processes of lawmaking in all the lanes of law. We might well concentrate on a preliminary goal, better use in the judicial process of the good laws that often emerge amid the variegated products of the legislative process. There must be teamwork to that end. If the librarians and researchers will systematize the study of statutes, if the watchbirds will sharpen their watch on legislatures in action, if commentators will set forth salient qualities or defects of legislative products, the judges will surely make better use than they have of the statutes revolving in common-law orbits. Then benefits will flow in every direction . . . .

Traynor, *supra* note 92, at 427; *see* Horack, *supra* note 19, at 56 ("Law schools provide the most effective agency for the advancement of a jurisprudence which combines in an effective way the inter-related development of case and statute law. Unfortunately, even at this late date [1937], there is little appreciation or sympathy for such a movement."). Still, a half-century after Justice Traynor issued his call to arms, the legal academy has largely failed to heed his call for helping the judiciary constructively navigate in what has largely become a statutory universe.

466. Under the auspices of the American Bar Foundation, two authors proposed what may be the earliest scholarly research agenda for curriculum reform in legal education. Barry B. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 223 (1974) (explaining that the Foundation had commissioned the study as "the initial step" of its "program of research on legal education"). The authors' charge was "to survey the existing empirical knowledge of law schools, law students, and law teachers, to suggest areas in which further research is needed to lift 'the shadow of very considerable ignorance' that affects decision-making in legal education." *Id.* (quoting ABA Special Comm'n To Consider the Feasibility of Undertaking a Comprehensive Survey of the Legal Profession, *Report* 3 (Aug. 1972)).

467. *See* Bryson, *supra* note 37, at 13–19, 27; Pound, *supra* note 310, at 7–8. Pound observed that English common law was taught "almost from the very beginning," and that

schools were established, the first at William and Mary in Williamsburg, Virginia.[468] Others were established in the New England and Middle Atlantic states.[469] In 1826, Thomas Jefferson founded the University of Virginia and its law school.[470] Both William and Mary and the University of Virginia law school curricula incorporated politics and government, reflecting what Jefferson thought was an essential aspect of legal training for gentlemen who would be instrumental in developing government institutions.[471] Several proprietary law schools soon followed and would come and go over the next century.[472]

But law schools were expensive, and many prospective lawyers could afford to attend only for one year, or two at the most.[473] Many others opted for apprenticeships with practicing

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> what gave it life and enabled it to prevail in the critical period of legal development in early America, in the fore part of the nineteenth century, in the time of apprentice training of lawyers, was that English Common Law was the only system that was or could be taught to young men studying for the bar with the books at hand in law office or law office-type of law-school.

Id. Pound explained why, in his view, American proponents of the French Civil Code in the first half of the nineteenth century did not succeed: Americans were "averse to authorities in a foreign tongue," *id.* at 8, and English translations of the French Civil Code came too late. By that time, American jurists Kent and Story had published texts that presented English common law in a "systematic, ordered, reasoned fashion which appealed to the bar and to the courts." *Id.* at 8, 9; *see also infra* note 483 (discussing Kent's *Commentaries*).

Professor Pound went so far as to credit the commentators with preserving the common law on American soil: "More than anything else the books of our great nineteenth-century text writers saved the common law." Pound, *supra*, at 9. Pound also attributed English common law's endurance in America to the "premature and crude codification during the legislative reform movement which came to an end about 1875." *Id.* at 8; *see infra* notes 473 & 485 (noting Dean Story's reasoning for disregarding legislation and related topics by focusing the Harvard curriculum on common law).

468. Bryson, *supra* note 37, at 9. A chronological listing of degree-awarding law schools by date of establishment appears in REED, *supra* note 17, at 424–30.

469. REED, *supra* note 17, at 424.

470. Bryson, *supra* note 37, at 9, 18. The scope of the law school course at Virginia was to include instruction in both "common and statute law." REED, *supra* note 17, at 118 n.3.

471. *See* REED, *supra* note 17, at 118–19 & nn.2–3, 149. But by the mid-1850s, Government and Political Economy were "crowded out of the law course" at the University of Virginia and relocated to other departments, and law students were encouraged to take courses in other parts of the university. *Id.* at 119.

472. Bryson, *supra* note 37, at 9–10, 16–18.

473. Early law schools were not able to cover everything even in a regular two-year curriculum. Harvard, for example, elected to narrow course coverage for the

lawyers,[474] which was the only way to obtain an eighteenth-century legal education in either the Colonies[475] or in England[476] before the Revolutionary War.

Legal treatises, and Blackstone's *Commentaries* in particular, were the basic fodder for legal education in Virginia and the rest of early America until 1875.[477] Both Coke[478] and Blackstone were Englishmen, and both touted common law as vastly superior to legislation.[479] But neither was among the Framers, and neither one had anything to do with drafting United States constitutions or statutes. Coke and Blackstone were never empowered to alter the constitutional system of positive law in the United States. And yet the dead hands of Coke and Black-

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"regular" two-year course of study, while offering additional subjects for students who elected to study for an additional year. REED, *supra* note 17, at 146. Reed observed that Harvard Law School deliberately dropped both state government law and statutory law from the basic curriculum, retaining only federal constitutional law as a supplement to the "original narrow field" of course coverage. *Id.* at 146–47.

474. *See id.* at 126 (noting that apprenticeship law training was still "firmly entrenched" in the early nineteenth century).

475. Bryson, *supra* note 37, at 9–10, 16–18. In the eighteenth and nineteenth centuries, a legal education was not undertaken exclusively for the purpose of representing clients. Many believed "reading the law" was the most suitable preparation for the "country gentleman" to conduct his own personal affairs and take a place in political life. *See id.* at 21–24; *supra* note 471 and accompanying text.

476. By 1700, England's Inns of Court no longer provided legal training to prospective lawyers. *Id.* at 11 (citing, *e.g.*, Needham, *supra* note 89, at 201–02).

477. Bryson, *supra* note 37, at 32–33; Charles E. Consalus, *Legal Education during the Colonial Period, 1663–1776*, 29 J. LEGAL EDUC. 295, 310 (1977). Bryson explained why:

> It was Blackstone's succinct and well-written survey of the entire law of England that made it so attractive as a textbook for law students. It was at the same time an outline and an encyclopedia. It was clearly written and could be read by a beginning law student with relative ease of comprehension in a fairly short period of time . . . . While it was not perfect, it was far better than anything that had gone before. It most certainly aided in the learning of the law and resulted in a better trained bar.

Bryson, *supra* note 37, at 32.

478. *See generally* DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS AND JURISPRUDENCE, 1578–1616 (2014).

479. "Coke and Blackstone saw statutes as evil devices marring the symmetry of the common law." Beatson, *supra* note 30, at 299. "[T]he dominant ideology in common law systems since Coke and Blackstone is that statutes and common law flow next to but separately from each other in their separate streams." *Id.* at 300.

stone, like the dead hand of the common law itself, have long continued their hold on American legal education.[480]

B. Early American Law Schools

The earliest American law schools were extensions of the apprenticeship model, and they provided little more than the rudimentary training necessary to pass the bar and practice law.[481] Many were short-lived proprietary schools.[482]

Legal education gradually shifted to the universities beginning early in the nineteenth century. Columbia University appointed James Kent professor of law, who began delivering lectures there in 1794.[483] The University of Maryland hired six law faculty in the second decade of the 1800s. One of them, David Hoffman, developed a comprehensive law school "course of legal study," first published in 1817.[484] Harvard took steps to

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480. *See, e.g.*, Weiss, *supra* note 38, at 475 (crediting Blackstone's *Commentaries* as an "enormous improvement of English law 'in form,'" but concluding that the work "could not completely solve the problems of the diffuse and muddled state of the sources of law"; further, because "the *Commentaries* were written strictly on the basis of the existing common law, reformers soon found them to be too conservative").

481. Harlan F. Stone, *Some Phases of Legal Education in America*, 58 AM. L. REV. 747, 750–51 (1924).

482. *See* Bryson, *supra* note 37, at 9–11, 16–18.

483. REED, *supra* note 17, at 121. Kent went on to publish the first American legal treatise in four volumes between 1826 and 1830. *Id.* Even Kent's *Commentaries*, however, were "conceived in the general spirit of Blackstone's *Commentaries*," *id.*, which would further entrench English common law as the focus of American legal education. *See* Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440, 440 (1993) ("Kent managed to reconcile . . . what appear to be contradictory positions: to justify the common law on a basis other than the English customary tradition and, at the same time, to borrow extensively from the substance of that tradition as authority for legal rules."); *id.* at 446 ("Kent, like Story, was forced to overcome the resentment directed at the importation of English law, and to reconcile reception with the widespread nativism that balked at the prospect.").

484. DAVID HOFFMAN, A COURSE OF LEGAL STUDY (Philadelphia, Thomas, Cowperthwait & Co. 2d ed. 1846). Hoffman expressly incorporated legislation as well as jurisprudence in his course of study. *See id.* at ix–x, 31 (referring to study of Political Economy, "a study essential in a nation where the lawyer and politician are so frequently combined"). Hoffman revised and republished his *Course of Legal Study* several times before the 1846 edition was published, in part reflecting American law as it had developed in the 1830s and early 1840s. REED, *supra* note 17, at 454–55; *see* HOFFMAN, *supra*.

> So great has been the change in the legal science, even of England (and altogether for the better), that [even Lord Coke] would find himself compelled to become a close and methodical student of the law, before he

add a law school as early as 1817, but not until 1830 was the first Harvard Law professorship established, held by Joseph Story.[485] Yale College established a law department in 1824 when it took over a proprietary law school then operating in New Haven.[486] But most early law schools continued to rely on treatises as primary teaching materials, and the treatises then available were steeped in the common law of Coke and Blackstone.

In 1870, Harvard Law School hired a new dean, Christopher Columbus Langdell, who would perpetuate the common law myth[487] while otherwise revolutionizing law school teaching

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> could venture to take a stand among his professional brethren. [T]he improvements [in the law] to which we principally allude, are the growth of, perhaps, the last fifteen years."

HOFFMAN, *supra*, at x–xi; *see also* REED, *supra* note 17, at 454–55 (discussing revisions to Hoffman's *Course of Legal Study*, including one published in 1836).

Hoffman's law school curriculum and his "diffusive tendencies" influenced both Harvard and the University of Virginia. REED, *supra*, at 454–55. But Hoffman had undertaken what ultimately proved "a hopeless task—that of reforming legal education single-handedly." *Id.* at 126.

485. Stone, *supra* note 481, at 750. In his 1830 inaugural address at Harvard,

> [Story] stretched historical accuracy in his sweeping declaration that our ancestors brought [the common] law over, as a fully developed body of legal doctrines it would appear, which they deliberately put into operation. He persuaded himself, accordingly, that all that was necessary in order to secure good statutes was to have them drafted by masters of the common law—such as the Harvard law school intended to train. He underestimated how much efficient legislation involves beyond mere knowledge of the common law that it is designed to supplement or replace . . . .
>
> Whatever judgment may be passed upon Story's and Harvard's slighting of everything except the general principles of the common law, and American decisions developing this and the Federal Constitution, one thing at least is certain. Under the lead of this most successful of American law schools the orthodox province of law school teaching was now defined. Politics and law were no longer to be joined as in Jefferson's two Virginia institutions. Politics, as a subject of university study, was eventually to be developed by the college in its departments of government or political science; the particular function of the law school, from now on, was to cope with the increasing flood of judicial decisions.

REED, *supra* note 17, at 148–49.

486. Stone, *supra* note 481, at 750; *see also* REED, *supra* note 17, at 423.

487. In the early 1870s, a debate was already well underway in England about the relative merits of codification over common law. *See* W. Markby, *Codification and Legal Education*, 3 L. MAG. & REV. QUART. REV. JURIS. & QUART. DIG. ALL REP. CASES 5th ser. 259, 259–60, 262 (1878) (observing that calls for codifying English common law had increased "in the last five and twenty years" and noting the objections of the English bench and bar). Markby, in fact, addressed some of the

methods.[488] At the time, reading primary sources of law—rather than the tomes of Coke, Blackstone, and others—was considered revolutionary in legal education.[489] But Langdell's casebooks were filled with case reports. By the last quarter of the nineteenth century, there was no shortage of state and federal statutes that could have been studied side by side with judicial opinions as primary sources of law. Yet Langdell selected appellate court opinions as the primary source of law that students would study to learn how to "think like lawyers."

Thereafter, the Socratic method took hold as the primary teaching approach in the American legal academy. The casebook and the Socratic method enabled single law professors to teach huge classes, which in turn generated tuition revenue

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same arguments in his 1878 article that Gilmore and Calabresi would debate a century later in the United States. *See, e.g.*, *id.* at 268–69 ("[O]ne of the most frequent objections brought against codification [is] that it will not provide for new wants and new contingencies . . . . Experience shows that these gaps will continue to be filled by the common law[,which] will not die out in England because of the Code . . . .").

In his Storrs Lectures, Professor Grant Gilmore was perhaps going a bit far when he described the English codification movement as having been "abandoned" in the last quarter of the nineteenth century. Gilmore (1975), *supra* note 294, at 1029 (asserting that England had "quietly abandoned" codification after enacting the Bills of Exchange Act (1882) and the Sale of Goods Act (1893)); *cf.* Wagner, *supra* note 46, at 345 (referring in 1953 to the Bills of Exchange Act and the Sale of Goods Act as "[a]mong the *first and most important* of [the English codification] achievements" (emphasis added)). *But see* Jonathan Teasdale, *Codification: A Civil Law Solution to a Common Law Conundrum?*, 19 EURO. J. L. REFORM 247, 249–50 & n.5 (2017) (citing England's Partnership Act (1890), Arbitration Act (1889), and Marine Insurance Act (1906), after which "there was a hiatus" during World Wars I and II until the Law Commissions Act 1965, which expressly charged the Law Commission with "codification of [the] law").

488. *See generally* WILLIAM C. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT 28–31 (1982) (describing Langdell's method and law-as-science philosophy); HARNO, *infra* note 497, at 53–60 (describing Langdell's lasting influence as the progenitor of "the most significant event in the evolution of American legal education").

489. Bryson, *supra* note 37, at 33 (noting that Langdell's case method was a "pedagogical innovation" that substituted the analysis of judicial opinions as primary sources of law for classroom lectures based on secondary legal authorities). As Bryson explained, however, the "true foundation of the fame of the faculty of Harvard Law School rest[ed] upon their succession to Blackstone as writers of the basic legal treatises." *Id.* The challenges Harvard Law School slowly overcame following Langdell's 1870 appointment are chronicled in WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994).

that has incentivized law schools to largely continue those practices ever since.[490]

C. Adding Legislation to the Traditional Curriculum

Early in the twentieth century, the first scholarly call for American legal education reform to include statutes and legislative lawmaking was a 1911 *Illinois Law Review* article authored by a member of the New York Bar.[491] Perhaps the Illinois legal academy was responding to that call when Northwestern University School of Law soon after began offering Legislation, which was apparently the first time any modern American law school had offered such a free-standing course.[492] Columbia began offering a Legislation course a few years later during the 1919–1920 academic year.[493] The course

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490. *See, e.g.*, Leib, *supra* note 18, at 170.

> For a long time, the standard first-year curriculum has been badly out of synch with what lawyers actually do. [In] particular . . . the first-year slate of courses tends to be dominated by a judge-centered perspective on the law, in which all legal questions are answered by people in black robes—and generally black-robed people at the appellate level. That neither reflects reality, nor approximates how lawyers need to perceive the workings of the law.

Id.; *see also* Boyer &. Cramton, *supra* note 466, at 224 (observing that "[t]he large-class, case method of instruction, usually in a 'Socratic' question-and-answer format, has dominated law teaching since it was pioneered by Langdell . . . . The reasons for the longevity and popularity of the case method [include] its adaptability to large classes, and thus its low cost . . . ."); *id.* at 289 & n.234 (explaining that the Langdellian approach to legal education, "notable for its low cost[,] . . . has survived on faculty-student ratios that would shock teachers at undergraduate colleges, much less at graduate schools"). LaPiana speculated that Langdell's teaching method became entrenched in the legal academy in part because "law schools came to link case method training with the prestige of the bar." LAPIANA, *supra* note 489, at 169.

491. Horace A. Davis, *Instruction in Statute Law*, 6 ILL. L. REV. 126, 126 & n.1 (1911) (noting, even then, that "one of the first experiences of a clerk in a busy [law] office is to be obliged to pass on questions of statute law; and the more responsible his work the more he is thrown upon legislative enactment").

492. Wigmore, *supra* note 395, at 141 (referring in 1920 to "a unique course entitled 'Practical Problems in Contemporary Legislation,' conducted now for some ten years past, each year, at Northwestern University Law School").

493. Thomas I. Parkinson, who taught the course that year at Columbia Law School, had been appointed to a newly created professorship at Columbia in 1917, and in 1918 he began serving as the United States Senate's first legislative counsel. Grad, *supra* note 14, at 2 n.7. At the same time, Middleton Beaman was appointed the House of Representatives' first legislative counsel. These two appointments were the forerunners of the Office of Legislative Counsel. *See* Frederic P. Lee, *The Office of the Legislative Counsel*, 29 COLUM. L. REV. 381, 385–87 (1929); *see also* Reve-

met with such favor during its first decade that Columbia required all first-year students to take the course beginning in 1929.[494]

The Carnegie Foundation for the Advancement of Teaching published a comprehensive, detailed report in 1921 on the history and development of legal education.[495] But little is known about law school course offerings in the 1930s and 1940s. The economic depression, followed by World War II, most likely led to a period of retrenchment rather than innovation in legal education. But Roosevelt's New Deal programs and the rise of the administrative state would underscore the need to revamp American legal education for the modern era. James M. Landis, then a member of the Securities and Exchange Commission,

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nue Act of 1918, Pub. L. No. 65-254, § 1303, 40 Stat. 1057, 1141 (codified as amended at 2 U.S.C. §§ 271, 281 (2012)).

494. Grad, *supra* note 14, at 2. Yet Professor Samuel McCune Lindsay, Columbia's Professor of Social Legislation in 1929, continued to reflect the legal academy's traditional common law bias when he explained that "courts of last resort" were "often the more important part of the legislative process." Samuel McCune Lindsay, *Social Legislation*, 34 AM. J. SOC. 1053, 1053 (1929) (reviewing state legislative output in 1928).

> In any review of American legislation it is well to remember that decisions of courts of last resort, which determine constitutionality and practically define the scope and application of statutes, constitute often the more important part of the legislative process, especially in dealing with social problems through the legislative method.

Id. The required course at Columbia was expanded to three credits in 1936 and was moved to the first semester of the first-year required curriculum. Grad, *supra*, at 2 n.8. Beginning in 1944, the required Legislation course evolved into Legal Methods, which was apparently designed at first to give "equal attention to legislation and case law." *Id.* at 3–4, 4 n.8. A two-course sequence remains a part of Columbia Law School's first-year curriculum, but the course description no longer mentions legislation. *See Academics & Courses, First-Year Curriculum*, COLUM. L. SCH. https://www.law.columbia.edu/admissions/jd/learn/curriculum/1l [https://perma.cc/3T4G-ERMB] (last visited Mar. 29, 2019) (describing Legal Methods I and II as "an intensive introduction to the legal system and case analysis . . . , exposing students to important legal methods and jurisprudential, ethical, social, or cultural perspectives relevant to different areas of the law"). Columbia now offers Legislation and Regulation as one of fourteen elective courses from which first-year students may select during the second semester. *See id.* Across the country, Legal Methods courses became a typical part of many law schools' required first-year curricula during the latter half of the twentieth century. *See generally infra* notes 511–14 (citing ABA curriculum surveys in 2002 and 2010).

495. REED, *supra* note 17.

was an early proponent of including legislation as a component of the law school curriculum.[496]

Nevertheless, by the 1950s "[l]egislation, long neglected, [had become] an integral field of study . . . firmly installed in the programs of a substantial number of [law] schools."[497] Professor Reed Dickerson was without doubt the twentieth century's greatest champion of adding courses in legislation and legislative drafting to the American law school curriculum.[498] For decades he advocated for the legal academy and practicing

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496. *See* James M. Landis, *The Implications of Modern Legislation to Law Teaching*, 8 AM. L. SCH. REV. 157, 159 (1935) (observing that legal education had ignored legislative materials to an even greater extent than it had administrative law materials); *supra* notes 129–32 and accompanying text. In 1937, Landis was appointed Dean of Harvard Law School at the age of thirty-seven, replacing Dean Roscoe Pound, who had resigned a few months earlier. *Appointment of James M. Landis as Dean of Law School is Confirmed by Overseers*, HARV. CRIMSON (Jan. 12, 1937), https://www.thecrimson.com/article/1937/1/12/appointment-of-james-m-landis-as/ [https://perma.cc/T3M8-6M83].

497. ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 182 (1953). Among other criticisms of legal education, Harno noted its overemphasis on case analysis to the exclusion of other aspects of a lawyer's professional work. In particular, legislation was "[o]ne of the neglected fields in legal education," including the legislative process as well as planning and drafting legislation. *Id.* at 141–42.

> It is passing strange that law teachers could at any time, at least in the modern era, have ignored a phase so real, so essential to the education of lawyers as the legislative process. It is an enigma that can be explained only in the light of the facts of history. Even so, any explanation must leave much to conjecture. Our English heritage with its strong emphasis on judge-made law no doubt was a contributing factor. With the introduction of the case method and the acceptance of Langdell's premise that printed books, consisting solely of reported cases, were the ultimate sources of a legal education, the mold that shaped the materials of legal education was fixed. Statutory law and related operations in the broader context of the legislative process . . . were not in the mold, and it was not until the last twenty-five or thirty years [the second quarter of the twentieth century] that law teachers began to seriously question this arrangement.

Id. at 142; *see also, e.g.*, Dolan, *supra* note 116, at 63, 71 (calling on law schools to offer legislative process courses).

498. Miers & Page, *supra* note 21, at 23 n.2 ("Professor R. Dickerson has been one of the most significant advocates of the need for legal education to include explicit and direct teaching of legislation."); Dickerson, *supra* note 115; *see also* F. REED DICKERSON, LEGISLATIVE DRAFTING (1955) (published in 17 editions between 1954 and 1977); CHARLES B. NUTTING, SHELDON D. ELLIOTT & REED DICKERSON, LEGISLATION, CASES AND MATERIALS (4th ed. 1969) (among the earliest of the published Legislation textbooks); J. Lyn Entrikin & Richard K. Neumann Jr., *Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More*, 55 DUQ. L. REV. 9, 12–15 (2017) (summarizing the significant contributions of Professor Dickerson to the field of Legislation and Legislative Drafting).

lawyers to focus more attention on both legislation and improving legislative drafting.[499] By 1967, one scholar estimated that just over half of the ABA-accredited law schools at that time offered courses in legislation.[500] But during the two decades between 1960 and 1980, the consensus among scholars is that law schools essentially disregarded legislation as a stand-alone law school course.[501]

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499. *See, e.g.*, Entrikin & Neumann Jr., *supra* note 498, at 12–15 (citing many of Professor Dickerson's scholarly publications as well as his longtime service as a member of the ABA Standing Committee on Legislative Drafting). *See generally, e.g.*, Reed Dickerson, *Professionalizing Legislative Drafting: A Realistic Goal?*, 60 A.B.A. J. 562 (1974).

500. Dolan, *supra* note 116, at 74 (reporting that in January 1967, of the 115 ABA-approved law schools, sixty-six (somewhat more than half) offered legislation courses); *see id.* at 71 ("The primary instrument of ordered social change is legislation. But our law schools have, in general, maintained an orientation that the primary body of the law is the common law, and the primary instrument of change is the evolution of common law decisions.").

In 1966, an English scholar pointed out the "grave dangers" of using judicial decisions as the primary source of teaching material in the legal academy:

> [L]itigation is a pathological phenomenon in the body politic. The reported cases are the cases of the most serious diseases, and the leading cases are often the worst, and least typical of all . . . . [P]art of the case against [the dichotomy of the English legal profession] is . . . that the barristers from whom the judges are recruited get through their professional lives a picture of society in a distorting mirror . . . . Is legal education based on case law not like a medical education which would plunge the student into morbid anatomy and pathology without having taught him the anatomy and physiology of the healthy body? More than that, is the concentration on decided, and especially on reported, cases not like a clinical education which would enable the doctor to diagnose and to treat some complicated brain tumor without ever telling him how to help a patient suffering from a simple stomach upset?

O. Kahn-Freund, *Reflections on Legal Education*, 29 MOD. L. REV. 121, 127 (1966); *see also id.* at 136 (noting that by then, even in England, statute law was "increasingly supplanting case law," and courts were spending much more time interpreting statutes than developing common law; "Yet in the legal literature our students use, . . . statute law developments are not always given their proper place especially in the treatment of the sources of law.").

501. Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 3 n.8 (1993) (citing Robert J. Araujo, *Suggestions for a Foundation Course in Legislation*, 15 SETON HALL LEGIS. J. 17, 18 n.5 (1991)).

In 1975, the Council on Legal Education for Professional Responsibility sponsored a comprehensive study of elective courses offered in legal education. That study confirmed the relatively low number of credit hours generated by law schools in course electives in legislation and legislative process. *See* DONALD W. JACKSON & E. GORDON GEE, BREAD AND BUTTER?: ELECTIVES IN AMERICAN LEGAL EDUCATION 43–44 (1975) (providing data concerning "courses which examine the

In the mid-1970s, the ABA Special Committee for the Study of Legal Education commissioned a study by the American Bar Foundation to determine the scope of curricular offerings related to statutory drafting.[502] At about the same time, the first comprehensive study of law school curricula was published in 1975 by the Council on Legal Education for Professional Responsibility, Inc.[503] A follow-up study of law school curricula was issued by the American Bar Association in 1987.[504] The latter two reports both confirm that Legislation, Administrative Law, and similar courses were underrepresented in law school curricula during the last quarter of the twenty-first century.[505]

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materials and skills necessary to the proper understanding and use of legislation as well as courses with review the current problems within the Legislative Branch and its relationship with Executive and Judiciary," including "Law of Legislative Government, Legislation and the Legislative Process, and Statutory Interpretation"). The 1975 study reflected a sizeable difference between the number of credit hours offered in elective legislative courses compared to the number of credit hours actually generated by student enrollments in those elective courses. *See id.* at 44 (noting that with one exception, neither law schools nor law students devoted more than five percent of their elective "resources" to legislative courses); *see also id.* at app. 29 (listing elective course offerings in legislation and legislative process).

502. BERNARD LAMMERS, LEGISLATIVE PROCESS AND DRAFTING IN U.S. LAW SCHOOLS (1977). *See generally* Reed Dickerson, *Legislative Process and Drafting in U.S. Law Schools: A Close Look at the Lammers Report*, 31 J. LEG. EDUC. 30, 36 (1981) (critiquing the 1977 American Bar Foundation Report).

503. E. GORDON GEE & DONALD W. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA (1975); *see also* JACKSON & GEE, *supra* note 501 (supplementing the first-cited report by focusing on law school elective courses).

504. WILLIAM B. POWERS, A STUDY OF CONTEMPORARY LAW SCHOOL CURRICULA (1987). The survey covered 175 ABA-accredited law schools. *Id.* at 75–76. The Powers study listed a wide variety of course titles classified under "Legislation and Legislative Process," many of which were specialized courses in drafting or subject-matter specific topics such as "Employment Legislation," "Mental Health Law," or "Drafting of Legal Instruments." *Id.* at 142. Of the law schools that did offer such courses, most offered just one. *See id.* at 30 (noting that the average number of courses offered under the Legislation and Legislative Process classification was 1.03 in 1984–1985 and .80 in 1974–1975). Among all courses offered, those classified as Legislation and Legislative Process courses ranked twenty-nine out of thirty-three classifications with respect to the total number offered in 1984–1985, and twenty-eight out of thirty-three in 1974–1975. Of the total law schools responding, 9.7 percent listed Administrative Law and Process as a required course, while only 2.3 percent listed Legislative and Administrative Process as a required course. *Id.* at 14 (listing courses required by fewer than 25 percent of responding law schools). None listed Legislation alone as a free-standing requirement. *See id.*

505. In 1974, Professors Boyer and Cramton acknowledged the efforts some legal educators had undertaken to develop skills beyond the "ability to critically

D. Late Twentieth Century Curriculum Developments

By the mid-1980s, Professor Dickerson's advocacy efforts were beginning to make a difference by nudging the legal academy to make changes to the traditional law school curriculum.[506] But with respect to the proportion of law schools offering courses in Legislation, not much had changed since 1967.[507] In 1981, somewhat more than half of the 174 "approved" law schools reportedly offered some kind of elective course in Legislation.[508] Typically courses covered the legislative process, statutory interpretation, and legislative drafting.[509]

Other than the American Bar Foundation study pertaining to legislative drafting and similar courses, no comprehensive study has been undertaken of legislative course offerings by ABA-accredited law schools. As discussed further below, several law schools have recently revamped their required curricula to include a first-year course in Legislation and Regulation.[510]

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analyze . . . cases." Boyer & Cramton, *supra* note 466, at 227. Specifically, they observed that "[c]oncern for an understanding of legislative and administrative processes in earlier years has expanded to a broader interest in the totality of skills required for the many professional roles to be assumed by law graduates." *Id.*

506. *See* Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1068 (1986) (noting that because of statutes' increasingly central role in American law, more law school courses dealing with Legislation and Administrative Law were offered in 1986 than fifty years earlier).

507. *See supra* note 500 and accompanying text.

508. Bruce Comly French, *Teaching about Legislation and the Legislative Process*, 31 J. LEG. EDUC. 604, 607–08 (1981) (reporting results of an unscientific survey of about 100 law schools; finding that "a large number of law schools offered no [legislation] courses"); Grad, *supra* note 14, at 3 (estimating that of the 174 law schools approved by either AALS or the ABA, roughly forty percent did not offer any sort of legislation course); *see* POWERS, *supra* note 504, at 44 (1987) (reporting that the average number of credit hours offered by law schools in elective courses in legislation and legislative process averaged 2.48 in 1984–1986, up from an average of 2.14 in 1974–1975); POWERS, *supra*, at 142 (listing elective courses in legislation and legislative process).

A number of scholars had published articles during the early 1980s encouraging law schools to devote more curricular focus on legislation as a separate topic of study. *E.g.*, Dickerson, *supra* note 502, at 36 (reviewing the 1977 American Bar Foundation report and decrying its results showing "the serious imbalance that persists between case law and statute law" in American law schools); Posner (1983), *supra* note 313, at 802–05 (calling for upper-level legislative courses that address legislative process, empirical and political science research on the legislative process, legislative history research, and statutory interpretation).

509. Grad, *supra* note 14, at 6–8; Williams, *supra* note 406, at 820–28 (summarizing and explaining the value of typical course content).

510. *See infra* note 514 and accompanying text.

But little is known about how many law schools now require such a course in the first year. Even less is known about the scope and depth of upper-level required or elective course offerings in Legislation and related areas such as legislative drafting.

The American Bar Association Section of Legal Education and Admissions to the Bar published comprehensive reports based on surveys of law school curricula conducted in 2002[511] and again in 2010.[512] But those reports revealed little about curriculum changes related to Legislation courses. For example, the most recent report's executive summary highlighted the significant increase in the number of professional skills courses offered, including transactional drafting, as compared to the 2002 survey results.[513] But the report made only passing mention of the substantial curriculum innovations that Harvard Law School and several others had undertaken during the previous decade to add required courses in Legislation and Regulation for first-year students.[514]

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511. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 1992–2002 (2004) [hereinafter ABA 2002 CURRICULUM SURVEY], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/1992_2002_survey_of_law_school_curricula.pdf [https://perma.cc/2Y58-7H8W]. The 2002 report included survey data provided by law schools about curriculum changes undertaken since 1992. *See generally id.*

512. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010 (Catherine L. Carpenter ed., 2012) [hereinafter ABA 2010 CURRICULUM SURVEY], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_survey_of_law_school_curricula_2002_2010_executive_summary.authcheckdam.pdf [https://perma.cc/5JUD-YZW6].

513. *Id.* at 16.

514. *Id.* at 15 (summarizing changes to first-year curricula, noting that "the first-year lineup of core courses has remained constant since 1975," although some law schools "reconfigured unit allocation and timing of core courses" and offered additional courses and electives for first-year law students); *id.* at 102 ("Doctrinal courses most likely added [in restructuring first-year courses] were Legislation or Statutory Regulation."). Of 162 responding law schools, twenty-eight reported significant increases in upper-division course offerings in "Administrative Law/Legislation/Government Law" in 2010 as compared to course offerings in 2002. *See id.* at 71, 74. This figure reflects a notable upswing compared to the number of law schools reporting significant increases in course offerings in the same subject-matter areas over the previous decade. *See* ABA 2002 CURRICULUM SURVEY, *supra* note 511, at 33. Of 152 responding law schools in 2002, eleven reported significant increases in upper-division course offerings in "Administrative Law/Legislation/Government Law" as compared to course offerings in 1992. *Id.*

Thus, the limited published data reflects that most of today's American law students continue to study judicial opinions in casebooks as if they were still the supreme law of the land.[515] The reasons have nothing to do with reality and everything to do with perpetuating the common law myth that still primarily relies on an outdated teaching method.[516] In the meantime, most law schools do not require even a single foundational course on legislation and statutory analysis, let alone legislative process or administrative law. Yet the legal issues of today's clients are largely based on statutes and administrative regulations. Those problems cannot be effectively resolved by lawyers formally trained almost exclusively to read and analyze judge-made law in casebooks edited and published by the legal academy.

Our American system of legal education remains deeply rooted in the doctrine of English treatise-writers who treated English common law as gospel and denigrated legislation as a source of law.[517] Formal postgraduate legal education in the

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515. *See* Boyer & Cramton, *supra* note 466, at 222 ("The teaching method and first-year curriculum used by most law schools today antedate the [twentieth] century.").

516. *See* Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 610 (2007) ("[W]e legal educators are still doing the same basic thing we were doing [130] years ago. Many law professors are conscientious and devoted teachers, . . . but their efforts are constrained and hobbled by an educational model that treats the entire twentieth century as little more than a passing annoyance.").

517. Professor Frank Grad placed the blame squarely on the shoulders of Harvard's Dean Langdell and the Socratic method. Grad, *supra* note 14, at 2.

> There was no training in any aspect of legislation for many years following Christopher Columbus Langdell's major contribution to legal education. The whole Langdellian apparatus of case law study, with its insistence on case-by-case development and synthesis of the common law, its reliance on the Socratic Method, and its abhorrence of principles of law that could not be drawn from reported cases, began as a monumental advance in legal education, but also served as a massive obstacle to the teaching of legislation well into the 20th century. Langdell's contribution to legal education choked the development of legislation as a subject for serious academic concern.

Id. (footnotes omitted). Grad posited that Langdell's method reflected the general perception of the time that statutes were merely "intrusions into the perfect and seamless web of the common law." *Id.* In fact, Langdell and others "actively sought to prevent legislation from being taught in American law schools," an effort that in part reflected the lack of esteem the public then held for elected representatives, especially state legislators. *Id.*; *see also* CHASE, *supra* note 488, at 28 ("Langdell did consciously exclude the study of legislation by means of [the case]

United States has never properly balanced its focus on primary sources of American law—which consist almost entirely of written state and federal constitutions; state and federal statutes; court rules of procedure; administrative rules and regulations; and increasingly, international treaties, conventions, and agreements. The truth is that the United States of America is a nation governed by enacted law—the product of the People as sovereign in a democratic republic.[518] Judicial opinions are an important component of legal training only because they demonstrate how enacted law is *interpreted, construed, and applied* in litigation—not because judicial opinions are any longer the primary source of American law.[519]

E. Legal Education for the Twenty-First Century

Encouragingly, a few law schools over the last two decades[520] have added required first-year courses on Legislation and Administrative Law (often known as "LegReg").[521] Professor Peter

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method, and it is clear from his later thought that he would not have considered administrative law a worthy subject for 'law' study.").

518. *See supra* note 161 (referring to the People as sovereign under the Constitution).

519. *See* Maxeiner, *supra* note 462, at 527 ("In the course of the nineteenth and twentieth centuries, statutes displaced common law as the principal source of American law."). The proliferation of statutes was acknowledged by scholars beginning as early as a century ago. *E.g.*, Bruncken, *supra* note 331, at 518. "At the present day, statutory rules have outgrown those of the common law, if not in fundamental importance, yet in the frequency with which the courts are called upon to apply them." *Id.*

520. In the early 1940s, Wisconsin School of Law was perhaps the first to offer an "orientation" course to first-semester law students dealing with Legislation and Administrative Law. *See* Hurst, *supra* note 19, at 291–94 (describing the content and coverage of a first-semester course called "Law in Society," which used excerpts from secondary materials as well as appellate cases, statutes, legislative history, and administrative source materials relevant to a single industrial accident problem); *id.* at 294 (calling on law schools to place "more explicit stress on . . . aspects of the lawman's relation to the shaping and application of legislative policy").

521. *See, e.g.*, Brudney, *supra* note 103, at 26 ("A growing number of law schools—public and private, elite and non-elite—have added Leg-Reg or Leg as a first-year requirement."); John F. Manning & Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. LEGAL EDUC. 45, 47–51 (2015) (describing the process leading to curricular reforms that Harvard Law School's faculty adopted in 2006).

According to Brudney's informal 2014 survey, at least twenty-seven law schools then required such a course, and a handful more required a first- or second-year course focused on legislation. *See* Brudney, *supra* note 103, at 4–5 & nn.7–8 (listing

Strauss, a highly respected legislative scholar, has lauded this development:

> The past quarter-century . . . has seen a steady movement toward courses on legislation and regulation—today's predominant sources of law—as required elements of first-year curricula. The phenomenon is a long-overdue reaction to the continued dominance of common-law, judicially oriented doctrinal analysis courses in the first year, conveying to entering students a strikingly inaccurate sense of the current world of law.[522]

But real innovation in the curriculum of American law schools may have to wait until key institutions that control access to the legal profession acknowledge that lawyers who lack a working understanding of both legislative and administrative law are simply not competent to practice law in the modern age.[523] State supreme courts, the National Conference of State Bar Examiners, and the American Bar Association's Council of Legal Education and Admissions to the Bar must all recognize the need for change.[524] Significant change in law school curricu-

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law schools); *see also* Abbe R. Gluck, *The Ripple Effect of "Leg-Reg" on the Study of Legislation & Administrative Law in the Law School Curriculum*, 65 J. LEG. EDUC. 121, 122 & n.1, 144–45 (2015) (surveying ninety-nine "highly ranked" law schools; of the fifty-nine respondents, only fifteen required a first-year course in legislation or administrative law and two others required an upper-level course); Leib, *supra* note 18, at 189 & n.9 (acknowledging several law schools' newly required courses in Legislative and Administrative Law, even predating Harvard's curriculum innovations in 2006 to add a required first-year LegReg course); Jonathan D. Glater, *Harvard Law Decides to Steep Students in 21st-Century Issues*, N.Y. TIMES (Oct. 7, 2006) (referring to the change in Harvard's required curriculum as "the broadest overhaul in more than 100 years"), https://www.nytimes.com/2006/10/07/education/07harvard.html [https://nyti.ms/2VqvYXD].

522. Peter L. Strauss, *Christopher Columbus Langdell and the Public Law Curriculum*, 66 J. LEGAL EDUC. 157, 168 (2016).

523. Ultimately, law schools' continued existence heavily depends on ABA accreditation standards, which largely dictate the contents of law school curricula. *See* ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–2019 ch. 3 (2018) (Program of Legal Education), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf [https://perma.cc/74EA-DKXV]. In turn, law schools' curricular decisions are largely influenced by the subject matter tested on state bar examinations and the Multi-State Bar Examination, the latter annually updated by the National Conference of State Bar Examiners.

524. *See* GEE & JACKSON, *supra* note 503, at 33–34 (noting that the subject matter tested on state bar examinations "may exert a good deal of influence both on the courses offered by a law school and the courses which students will select during

la will not happen until the regulatory institutions recognize that traditional legal education fails to reflect the realities of modern law practice.[525] But regrettably, inertia is as omnipresent in the domain of legal education as it is in the evolution of common law.[526]

V. CONCLUSION

> From the standpoint of the needs of its students, the American law schools must give more attention to statutes . . . . Statute law is subject to criticism and should be criticized, but it should not be ignored by the law school. Competent criticism of and emphasis on statutes by law school teachers would aid materially in improving the body of statute law. At the same time, it would send forth more effectively trained lawyers; and set in motion forces for statutory improvement in future generations.
>
> Walter F. Dodd, *Statute Law and the Law School*, 1 N.C.L. REV. 1, 6–7 (1922).

One foresighted scholar once had this to say about needed developments in legal education to accommodate the modern age of statutes:

> The demands of tomorrow will place on lawyers the burden of directing the orderly development of legislation, the correlation of administration with that policy, and the sympathetic review of that policy by the courts. If the lawyer of

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their three years of law school study"); Boyer & Cramton, *supra* note 466, at 288 ("[T]he law curriculum and the bar examination are based at least in part on implicit assumptions about the kind of work that many young lawyers will be doing in practice—assumptions which may or may not correspond to the facts.").

525. *But cf.* Edwards, *supra* note 22, at 78.

> I wholly reject the argument that [legal] institutions are gripped by larger social forces[] that preclude their free action . . . . A single law school can decide to reemphasize legal texts, even if other law schools do not . . . . I am not arguing against some kind of coordinated action by the profession. But individuals and institutions should not wait for such action. They have no excuse for waiting, and the profession cannot afford their lack of leadership.

Id.

526. *See, e.g.*, Miers & Page, *supra* note 21, at 25 (surmising that "a degree of inertia in legal education" is in part responsible for the failure to teach using legislative materials); *see also* LAPIANA, *supra* note 489, at 170 ("Whatever the shortcomings of the legal education Langdell and his colleagues created, present-day legal education is still shaped by the actions and beliefs of those teachers and scholars of the preceding century . . . .").

> tomorrow adequately fulfills this responsibility, he must be trained in a system of jurisprudence that excludes none of its potential materials. He must be able to synthesize statutes, administrative rulings, and judicial decisions into a consistent jurisprudence.[527]

This scholarly call to the American legal academy was published more than eight decades ago.[528] In 1949, the call for curricular reform was repeated, referring to the lack of Legislation courses in the law school curriculum as a "neglected opportunity."[529] Nearly fifty years ago, the call was repeated again.[530]

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527. Horack, *supra* note 19, at 56.

528. Two decades earlier, Professor Eugene Gilmore wrote that the time had already come for reforming legal education, in part by refocusing the curriculum on statutes and legislative lawmaking:

> [T]here should be a close connection with and a participation in the activities of those agencies concerned with legislative law making. The imperative element in the law has been too long ignored by lawyers, judges, and law teachers, or, if not ignored, it has been treated with indifference. The time has come when in our law teaching and in the law curriculum serious consideration must be given to the great and constantly increasing body of statutory law. That our common law principles and traditions are to a rapidly increasing extent undergoing changes by direct legislation is undeniable. However much we may deplore the great mass of ill-digested statute law which comes annually from our legislative bodies, the process will continue. We can either stand by and watch it, criticize or ignore the results after they are reached, or we can join actively with those agencies seeking to improve such legislation and thus make a helpful constructive contribution.

Eugene A. Gilmore, *Some Criticisms of Legal Education*, 7 A.B.A. J. 227, 230 (1921).

529. Harry W. Jones, *A Case Study in Neglected Opportunity: Law Schools and the Legislative Development of the Law*, 2 J. LEGAL EDUC. 137, 139 (1949).

> However sympathetically viewed, the record of American legal education—its teaching methods and its faculty scholarship—in the area of legislation is a record of neglected opportunity. The characteristic university law school case method is a realistic and effective procedure in so far as case-law knowledge and skills are concerned, but the very success of the case method as a means of communicating to students the realities of the judicial process has caused us to forget or underplay legislative processes and methods of at least equal importance. The best case lawyer is incompletely equipped for professional service in a dominantly legislative era. What should we be doing to give our students a better balanced picture?

Id.; *see also* Julius Cohen, *On the Teaching of "Legislation,"* 41 COLUM. L. REV. 1301, 1301–02 (1947) ("The revolt against the traditional in the field of law school training has assumed impressive proportions . . . . One of the many examples of the lag between training and skill . . . merits singling out for special mention—the training lag with respect to the skills needed by the lawyer functioning in the legislative arena.").

And again in 1981[531] and 1984, when one scholar referred to the situation as "a professional disgrace."[532] And yet again in 2008,[533] 2015,[534] and 2016.[535] But even today, relatively few American law schools require students to take courses in Legis-

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530. Dolan, *supra* note 116, at 63.

> A course in the legislative process should be, and can easily be, an integral part of the law student's education . . . .
>
> It would be helpful for law schools to have a required course in Legislative Process in the first year, and an elective course, devoted exclusively to problem solving, in the second or third year.

Id. Dolan went on to explain the need for change in legal education:

> Legislation is the primary instrument of ordered social change under the United States constitutional system, at the federal, state and local level. Present day law school teaching generally places much greater emphasis on judge made law than on law made by legislative bodies . . . . Barely 10% of our law schools have required courses in legislation. Often, law school legislation courses give insufficient knowledge or insight into the legislative process, but rather confine themselves to structure, judicial review of the legislative process, rules of statutory construction and drafting of statutes.

Id. The rest of Dolan's article quoted scholars who had been calling for similar changes in American law schools as early as 1908, when Roscoe Pound openly acknowledged "the indifference, if not contempt, with which [legislative] output is regarded by courts and lawyers." *Id.* at 64–65 (quoting Pound, *supra* note 19, at 383).

531. Dickerson, *supra* note 502, at 36 ("Instead of looking at statutes and administrative regulations mostly through the eyes of the courts, we need a heavy exposure to problem materials that can be handled only by explicating the applicable instruments.").

532. Grad, *supra* note 14, at 1–2 (characterizing American law schools' failure to train students in legislation as "a professional disgrace"). Professor Grad's 1984 article reviewed the "miscellany" of legislation-related courses then offered at American law schools. *Id.* at 4–13; *see also* Posner (1983), *supra* note 313, at 800, 802–05 (calling for "better instruction in legislation in the law schools" and outlining the topics he would include in an upper-level legislation course); Williams, *supra* note 406, at 804 ("During the era of ever-increasing reliance on statutes, often under circumstances in which the common law proved inadequate, . . . legal education [has] failed to reflect the evolving realities of the modem legal system. This remains true today [1984].").

533. Leib, *supra* note 18, at 167–69 (reporting on Harvard Law School's addition of a first-year required Legislation and Regulation course as potentially having "dramatic ramifications for legal education more broadly" and calling on other law schools to follow the lead).

534. *See* Gluck, *supra* note 521, at 162–63 (affirming the "centrality of leg-reg topics in the work of modern lawyers" espoused by advocates of requiring a first-year course, but cautioning that doing so might detract from more specialized upper-level Legislation and Administrative law course offerings in law school curricula).

535. Strauss, *supra* note 522.

lation or Administrative Law. And those that do typically use traditional teaching materials—casebooks that focus on judicial opinions rather than statutes or regulations as primary legal authority.[536]

The "lawyer of tomorrow" in 1937 was the lawyer of yesterday, today, and the future.[537] It was true then just as it is true now: The common law myth perpetuated by many in the American judiciary and legal academy fails to serve the legal profession, the judiciary, or the clients and citizens that repre-

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536. *Id.* at 157, 158, 185 (noting the "recent growth of required courses on legislation and regulation" but critiquing teaching materials that rely primarily on judicial decisions consistent with the Langdellian model); *see* WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA R. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES v (2014) (noting that "published materials [for LegReg and Legislation courses] are still dominated by the agenda and pedagogy of the 1950s"; offering a "departure from tradition" by offering statutes and regulations as well as judicial decisions as primary source materials); *see also, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY (5th ed. 2014) (using cases as primary materials, but prefacing some opinions with key statutory text); JOHN F. MANNING, LEGISLATION AND REGULATION: CASES AND MATERIALS (3d ed. 2017) (using appellate decisions as primary source materials).

537. Dolan, *supra* note 116, at 72 ("The government . . . of tomorrow will be determined by the students of today; whether that government will be democratic or tyrannical, representative or not will be determined . . . by the readiness, the willingness and the ability of the lawmakers of tomorrow to cope with the problems of tomorrow."); *see also* Michael J. Graetz & Charles H. Whitebread II, *Monrad Paulsen and the Idea of a University Law School*, 67 VA. L. REV. 445, 454 (1981) ("A university law school is among the few institutions for anticipating future social needs and for relating the role of law to furthering those needs. It must produce lawyers for tomorrow."). Professors Graetz and Whitebread also encouraged law schools to expand the scholarly community beyond the traditional insularity of legal theory:

> The mission of creating and nurturing a community of scholars has met with varied success . . . , but all law schools have failed in one crucial respect. The promotion of a community of scholars among the faculty has to date everywhere excluded students, alumni, members of the practicing bar, judges and legislators. History shows only too well that scholarship simply cannot flourish in an atmosphere that does not support the endeavor. The failure of the modern law faculty to enter into a dialogue with these other constituencies as a means of convincing them of the worthiness of the enterprise is fast producing a crisis of misunderstanding—a misunderstanding of both the utility of scholarship to society as a whole and the value of scholarship in producing first-rate law practitioners in a rapidly changing legal environment.

Id. at 449–50; *see supra* note 22 and accompanying text.

sentatives of both institutions are presumably trained and compensated to serve.[538]

> [I]t seems likely that the transition from customary to statutory law has made tremendous strides and is still actively going forward. Taken by itself, statutory law, that is law consciously and purposely adopted to meet social needs as they arrive, is certainly a higher stage of legal development than customary law, even in the highly refined form represented by our system of binding precedent. Not a few of us may look forward to a time when with us, as with most other Western nations, practically all law shall be statutory.[539]

The train has long since left the station, and there is no turning back. American legal education, long entrenched in the great common law myth, needs to get on board.[540] The time is

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538. Dolan, *supra* note 116, at 71.

> Present day and foreseeable future needs of society could be more adequately met if our law schools improved the nature and quality of their training. One of the ways in which improvement could be made would be to give more and better training in the nature of the legislative process, and its operation. Lawyers play an important voluntary and involuntary role in change in our society, as counsellors to clients, as legislators, as judges, as lobbyists and as draftsmen.
>
> Too often the lawyer is ill-prepared for this role, because of the nature and the quality of the education he has had. The primacy of the case method of teaching in our law schools, granted its advantages, has had deleterious side effects. Too seldom is a law student trained to analyze a problem in terms of the relative efficacy of various solutions—negotiation, litigation or resort to the legislative process. And more and more often, the correct remedy is resort to the legislative process.

Id.

539. Bruncken, *supra* note 331, at 522. In 1997, Beatson analogized common law reasoning in disregard of statutes to viewing the world through a flawed kaleidoscope: "To ignore the contribution of the statute book in the search for principle is to use a kaleidoscope with three-quarters of the pieces of glass blacked out." Beatson, *supra* note 30, at 314.

540. *See, e.g.*, Gerald P. López, *Transform—Don't Just Tinker with—Legal Education*, 23 CLINICAL L. REV. 471, 558 (2017).

> For those of us who aspire to topple traditional legal education, to challenge and replace its assumptions and methods and aspirations, we must mobilize around a fierce unwillingness to accept familiar status-quo-plus changes as transformative and an equally ferocious effort to move beyond the limits of the deep stock story to articulate and insist upon the legal education our students (and so many others) deserve and require . . . . The transformation that should have happened this past decade—and in earlier periods still—must happen now.

Id.

long overdue[541] for the legal academy to wake up from the deep slumber of Rip Van Winkle,[542] who languished for decades in a fictitious state of suspended animation.[543] The legal fiction is over. The time is now.[544]

As for American common law, may it forever rest in peace.[545]

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541. *See* Brudney, *supra* note 103, at 5 ("From a pragmatic standpoint, lawyers since the New Deal have devoted ever-increasing time and energy to understanding, applying, interpreting, litigating, and counseling about statutes and the regulations or agency judgments that flow from those statutes. Legal education must catch up."); Cardozo, *supra* note 128, at 126 ("The time is ripe for betterment . . . . The law has 'its epochs of ebb and flow.' One of the flood seasons is upon us. Men are insisting, as perhaps never before, that law shall be made true to its ideal of justice. Let us gather up the driftwood, and leave the waters pure."); *see also* Miers & Page, *supra* note 21, at 25 (attributing English law schools' failure to teach using legislative materials in part to "a degree of inertia in legal education").

542. WASHINGTON IRVING, RIP VAN WINKLE AND THE LEGEND OF SLEEPY HOLLOW 63 (1920) ("[A]t length his senses were overpowered, his eyes swam in his head, his head gradually declined, and he fell into a deep sleep.").

> It was some time before [Van Winkle] could be made to comprehend the strange events that had taken place during his torpor. How that there had been a revolutionary war—that the country had thrown off the yoke of old England—and that, instead of being a subject of his Majesty George the Third, he was now a free citizen of the United States. Rip, in fact, was no politician; the changes of states and empires made but little impression on him . . . .

Id. at 90. The irony of this storybook passage is telling and needs no further comment. *See* FARRAN ET AL., *supra* note 379, at 2 ("All modern legal traditions are both mixed and mixing. [E]ach is a hybrid; each continues to evolve over time.").

543. *See* Robert Mitchell, *Suspended Animation, Slow Time, and the Poetics of Trance*, 126 PMLA 107, 108–09 (2011) (describing the origin of the term and its metaphorical use in early nineteenth-century literature); *id.* at 111 (describing one lay author's premise that "only 'a new language' could communicate how suspended animation might make it possible to overcome death entirely" (citing WALTER WHITER, A DISSERTATION ON THE DISORDER OF DEATH; OR, THAT STATE OF THE FRAME UNDER THE SIGNS OF DEATH CALLED SUSPENDED ANIMATION (London 1819)).

544. *See* Edwards, *supra* note 22, at 78.

545. *See* H.R. Hahlo, *Here Lies the Common Law: Rest in Peace*, 30 MOD. L. REV. 241, 258 (1967) ("Once the common law is codified, it will, of necessity, cease to be the common law, not only (rather obviously) in form, but also in substance.").

A COASEAN APPROACH TO COST-BENEFIT ANALYSIS

D. BRUCE JOHNSEN*

Many federal regulators are required to perform cost-benefit analysis of rules proposed to correct the failure of private markets to efficiently allocate society's resources owing to so-called "externalities." Yet, as Ronald Coase showed decades ago, social inefficiencies cannot persist if the "costs of market transactions" are zero, putting the entire notion of market failure on shaky ground. Transacting is of course costly, but these are real costs that must be factored into the social welfare calculus. What kind of failure is it when the parties affected by an apparent externality could resolve the inefficiency but in practice decline to do so because the costs of transacting outweigh the net benefits? This article proposes a relatively simple Coasean approach to cost-benefit analysis. Where the parties deal face-to-face in competitive markets, a rule is justified only if the regulator can show it is likely to reduce the relevant transaction costs. If so, the parties can be relied on to adjust their private arrangements to maximize the net gains from trade out of self-interest. There is no need for the regulator to quantify costs and benefits. This is information the parties—the men and women "on the spot"—are best able to identify on their own.

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"[W]hatever we may have in mind as our ideal world, it is clear that we have not yet discovered how to get to it from where we are."[1]

"What I think will be considered in future to have been the important contribution of [*The Nature of the Firm*] is the explicit introduction of transaction costs into economic analysis."[2]

— R.H. Coase

INTRODUCTION

Economists have struggled for decades over how to do reliable cost-benefit analysis (CBA).[3] During this time, Reagan-, Clinton-, and Obama-era executive orders and federal case law have increasingly required executive agencies to address "material failures of private markets" by integrating CBA into the

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1. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960). This is arguably the most influential article ever published in economics. *See* William M. Landes & Sonia Lahr-Pastor, *Measuring Coase's Influence*, 54 J.L. & ECON. 383, 383 (2011).

2. R. H. Coase, *The Institutional Structure of Production*, 28 OCCASIONAL PAPERS L. SCH. U. CHI. 1, 7 (1992).

3. *See* Wendy L. Gramm, *Regulatory Review Issues, October 1985–February 1988*, 63 ADMIN. L. REV. 27, 33 (2011).

rule-making process, with the stated objective being to "maximize net benefits" to society.[4] Federal statutes and case law have recently extended the CBA mandate to include independent agency rulemaking, primarily by financial regulators. Yet substantial controversy continues to swirl over the feasibility of CBA in a variety of settings and for a host of reasons, the most important among them being uncertainty in quantifying costs and benefits.[5]

The neoclassical model of market exchange provides the theoretical foundation for traditional CBA. It illustrates the welfare effects of trade embedded in market demand and supply assuming, among other things, that people behave "as if" they are rational maximizers,[6] that the affected parties face zero transaction costs, and that there are no externalities. In equilibrium, the model hypothesizes that market prices reflect *marginal* benefits and costs, and that the parties will capture all possible gains from trade in the form of consumer and producer surplus, which together constitute net social benefits or "social welfare."

The neoclassical model's main scientific function is to predict the direction of affected parties' response to parametric shocks, a method known as comparative statics. If the tax on cigarettes

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4. Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88 (2012) ("Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.").

5. *See generally* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 167 (1999); John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015); Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. 351 (2014); Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935 (2018) [hereinafter Masur & Posner, *Cost-Benefit Analysis*]; Jonathan S. Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation under Uncertainty*, 102 CORNELL L. REV. 87 (2016) [hereinafter Masur & Posner, *Unquantified Benefits*]; Eric A. Posner & E. Glen Weyl, *Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms*, 124 YALE L.J.F. 246 (2015); Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 YALE L.J.F. 263, 264–65 (2015); Abby McCloskey & Hester Peirce, *Holding Financial Regulators Accountable: A Case for Economic Analysis*, AM. ENTERPRISE INST. (May 20, 2014), http://www.aei.org/publication/holding-financial-regulators-accountable-a-case-for-economic-analysis/[https://perma.cc/VTR8-38XQ].

6. MILTON FRIEDMAN, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 3, 40–41 (1953).

increases, for example, will the price, quantity traded, and quality of tobacco increase or decrease? The model makes no predictions about the magnitude of these changes, only their direction.[7] According to the theory, all that is necessary to make predictions in the basic model is that demand curves slope down and supply curves slope up, that some observable parameter has changed, and that the effects of the change can be measured ordinally.[8] The neoclassical model has tremendous predictive power in this regard. It is testable, has been tested, and has gone largely unrefuted.[9] Federal courts have found it sufficiently reliable to be admissible into evidence as the basis for expert opinion testimony under the *Daubert* standard, which establishes testability, or falsifiability, of the underlying theory as one important factor.[10]

In contrast to comparative statics, CBA attempts to cardinally measure, or to quantify, the magnitude of changes in total consumer and producer surplus from the imposition of a proposed regulatory rule. This requires an estimate of consumers' subjective willingness to pay for a good and producers' subjective willingness to provide the good along the relevant range of demand and supply. These values are exceedingly difficult to measure reliably. Various workarounds can be used, but ultimately in many settings CBA would have difficulty passing

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7. In the language of mathematics, predictions focus on the sign of a partial derivative rather than its magnitude.

8. Ordinal measurement reflects a simple rank ordering of outcomes, whereas cardinal measurement reflects the relative magnitude of differences between outcomes. For an explanation of the distinction between ordinal and cardinal measurement in the CBA context, see Adler & Posner, *supra* note 5, at 191–92 (1999).

9. Ellig and Peirce argue that two important criteria for assessing the quality of an agency's economic analysis are whether it clearly identifies a market failure and whether it outlines a testable theory capable of being refuted by observed facts. Jerry Ellig & Hester Peirce, *SEC Regulatory Analysis: "A Long Way to Go and a Short Time to Get There"* 8 BROOK. J. CORP., FIN. & COM. L. 361, 379 (2014).

10. *See, e.g.*, *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 245 F. Supp. 3d 1343, 1359 (N.D. Ga. 2017) (collecting cases where expert testimony based on predictive economic models was admitted under *Daubert* to prove conspiracies to fix prices). The factors that determine admissibility are: (1) whether the body of knowledge on which the testimony is based is testable and has been tested; (2) whether it has been subjected to peer review and publication; (3) whether it has a known or knowable error rate; (4) whether there are established standards controlling its operation; and (5) whether it is generally accepted as reliable within a relevant scientific community. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 580, 593 (1993).

muster under the *Daubert* standard for the admissibility of expert opinion testimony. How, for example, could someone who wants to challenge the accuracy of a CBA test it and refute it other than to criticize its methods and offer a contradictory CBA, which may be more convincing but will be equally untestable?

A critical question largely ignored in the recent CBA debate but embraced here is why regulation is justified to begin with and how the answer to this question affects the policy analysis. At least as far back as the writings of A.C. Pigou almost a century ago, mainstream welfare economists have asserted that regulation by an omniscient social planner is justified when markets fail to efficiently allocate resources owing to so-called "externalities"—situations in which one party takes an action that imposes costs or bestows benefits on another party but fails to account for them in choosing his activity level.[11] As a result, in pursuing his self-interest he does too much or too little of the activity, leading to socially inefficient resource allocation—failure to maximize net benefits to society. The accepted policy implication is that government regulation correcting the market failure is necessary to improve resource allocation and increase net benefits.

In his path-breaking work *The Problem of Social Cost*, Nobel laureate Coase turned this belief on its head.[12] He showed that any prospect of inefficient resource allocation creates an opportunity for market participants to benefit by internalizing the externality through private transactions. Put more simply, people can profit by resolving inefficiencies. If transaction costs were zero, the parties would negotiate to maximize net benefits out of self-interest. A change in the regulatory rule would have no effect on resource allocation or the parties' joint welfare and government regulation would be unnecessary.[13]

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11. *See, e.g.*, ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE 293–99 (1920). The activity level might be the amount of trading a broker does for a client's account over which he has trading discretion or the amount of research he does as a basis for recommending trades to a client who directs his own account.

12. *See* Coase, *supra* note 1, at 43*; see also* R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 403 (1937) (using the phrase "the costs of using the price mechanism" rather than "the costs of market transactions").

13. Although the parties' joint wealth would be at a maximum, the distribution of wealth between them is indeterminate.

Transaction costs are never zero, and they inevitably increase with the number, size, and complexity of transactions, eventually overwhelming the benefits from negotiating further adjustments. Some inefficiency will persist in the form of hypothetical resource misallocation, by definition a state of affairs in which marginal social benefits fall short of marginal social costs or vice versa. Potential net benefits are lost, but only because the transaction costs the parties must incur to capture them are even greater. Transactions costs are real costs to society and should be factored into the social calculus. In a given regulatory framework, the parties will negotiate what they privately perceive as efficient resource allocation with due consideration for the costs of transacting. The outcome is an equilibrium in the sense that neither party has any incentive to negotiate further adjustments given the transaction costs they face, and the conclusion must be that net-net social benefits are maximized. In a dynamic world, the parties have ongoing incentives to identify and adopt practices that reduce the cost of transacting and move their equilibrium toward first-best resource allocation.

Coase's main point, often misunderstood, is that transaction costs explain why the rule of liability—here, the regulatory rule—affects resource allocation. Rather than asking whether the overall benefits of a proposed rule will exceed the overall costs, in a Coasean framework the proper question is simply whether, at the margin, a proposed regulation will reduce the parties' costs of transacting. If not, the regulation should be scrapped absent convincing evidence that its benefits exceed its costs.[14] If so, regulators should move forward confident that people can be counted on to perform their own CBA "on the spot," or not, and make all efficient adjustments to the new rule based on their "knowledge of the particular circumstances of time and place."[15] This knowledge is fleeting, circumstantial, and inherently unavailable to outside observers because it re-

14. A reduction in transaction costs is a necessary but not a sufficient condition for regulation. A sufficient condition is that the discounted present value of reduced transaction costs exceeds the up-front cost of changing the regulation, perhaps including the cost to the regulator of performing the CBA. See Masur & Posner, *Unquantified Benefits*, *supra* note 5, at 116 for a related discussion.

15. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521–22 (1945).

quires them to identify a counterfactual, yet another reason quantified CBA of proposed regulation is so difficult.[16]

This analysis is not to say private markets solve all problems or that government regulation is incapable of improving resource allocation. As a policy matter, it simply says that in low-transaction-cost settings, such as where the parties deal face-to-face in competitive markets, regulation is justified if it reduces the parties' costs of transacting. It is insufficient to identify so-called "problems" that need correcting without having credibly made this showing. Only then can it be properly characterized as a market failure calling for a corrective rule. Regulators should bear this fundamental point in mind when performing CBA of corrective rules in keeping with their executive order charge to base new rules on "the best reasonably obtainable scientific, technical, economic, and other information."[17]

The Coasean approach, characterized here as transaction cost-benefit analysis (TCBA), avoids much of the measurement problem that plagues regulators when performing traditional CBA because it requires them to assess only the direction of the marginal effect of a proposed rule on the costs of transacting—comparative statics. There is plenty of excellent theoretical and empirical scholarship on the cost of transacting available to serve as a guidepost.

Transaction cost-benefit analysis stands to dramatically reduce the information burden regulators face in certain situations to assess a rule's likely effects on net social benefits. It can serve as both a substitute for and as a complement to traditional CBA. It is likely to prove most helpful where the parties face sufficiently low transaction costs that they can bargain face-to-face and competitive markets can be relied on to move them toward optimal resource allocation. Traditional vertical relationships (those between manufacturers, retailers, and consumers or between principals and agents), which inherently pose conflicts of interest, are a broad category on point. Even where transaction costs so high that market transactions between the affected parties are precluded, TCBA provides an

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16. *Id.* at 521–24; JAMES M. BUCHANAN, COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY 25–26 (Midway Reprint 1978) (1969).

17. Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88 (2012).

insightful framework to guide traditional CBA. This Article puts that issue aside for the time being.

Coase's fundamental insight about the nature of market failure and the relevance of transaction costs to understanding it has been largely absent from the recent scholarship on CBA of federal financial market regulation. This article seeks to fill the void. Part I briefly recounts the history of CBA in federal regulation and identifies the sources of federal agencies' requirement to perform CBA of proposed rules. It also reviews a selection of the recent scholarly literature addressing whether quantified CBA of proposed financial regulation is feasible. The consensus on this question appears to be that complete quantification is impossible but that regulators should nevertheless attempt to quantify costs and benefits of a proposed rule "as best [they] can" and describe potentially unquantifiable costs and benefits in qualitative terms.[18] Though errors are inevitable, this puts the regulator on record and provides both a long-run basis for assessing success and a reference point for adaptive learning.[19]

Part II briefly discusses the neoclassical model as the foundation for traditional CBA and illustrates the widely accepted economic rationale for regulation by an omniscient social planner based on market failure.[20] Part III takes a closer look at market failure. Early on, Knight showed that Pigou and his followers mistook the absence of property rights for market failure. Where property rights are well defined and enforced, markets routinely resolve many Pigouvian externalities long before they appear on the regulatory radar screen.

Part IV examines what is meant by "transaction costs," concluding that they consist of the costs of defining and enforcing economic property rights to valuable asset flows.[21] It reviews some of the foundational scholarly literature on the economics of property rights. The underlying theory is testable and has been successfully and repeatedly tested. Where appropriate,

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18. Chamber of Commerce v. SEC, 412 F.3d 133, 143 (D.C. Cir. 2005).

19. *See infra* Part V.

20. PIGOU, *supra* note 11, at 329–35.

21. *See* Douglas W. Allen, *What are Transaction Costs?*, 14 RES. L. & ECON. 1, 12–13 (1991).

this literature can serve as helpful guide for regulators when performing TCBA of proposed rules.

Part V provides a summary and concluding remarks. It discusses the circumstances in which TCBA is likely to provide simpler and more reliable answers than traditional CBA and where it can serve as a helpful complement CBA.

I. OVERVIEW OF COST-BENEFIT ANALYSIS OF FEDERAL REGULATION

A. Brief History

It is difficult to pinpoint the origin of CBA in the U.S. According to one source, the Army Corps of Engineers began using it as early as 1902,[22] but it gained considerable traction with the rise of the administrative state starting with the New Deal.[23] There is also evidence the Army Corps of Engineers used it informally to evaluate various dam projects on the Snake and Columbia Rivers during the early 1930s.[24] More formal use of CBA apparently began during the Johnson administration, with modestly increasing importance and sophistication during the Nixon, Ford, and Carter administrations.[25] In 1980, President Carter signed the Paperwork Reduction Act into law.[26] This statute created the Office of Information and Regulatory Affairs (OIRA) as part of the Office of Management and Budget (OMB) to "review and approve agency collections of information, including those related to regulations."[27]

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22. THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 153 (1995).

23. Henry G. Manne, *Economics and Financial Regulation*, 35 REGULATION, Summer 2012, at 20.

24. Richard O. Zerbe, Jr. & Linda J. Graham, *The Role of Rights in Benefit Cost Methodology: The Example of Salmon and Hydroelectric Dams*, 74 WASH. L. REV. 763, 766 (1999).

25. *See* Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 41–43 (2011).

26. Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended at 44 U.S.C. §§ 3501–3521 (2012)).

27. Susan E. Dudley, *Observations on OIRA's Thirtieth Anniversary*, 63 ADMIN. L. REV. 113, 114 (2011); *see also* Gramm, *supra* note 3, at 28; Tozzi, *supra* note 25, at 55.

B. Executive Agency CBA

Shortly after taking office, President Reagan put teeth into regulatory oversight with his Executive Order 12,291, mandating that executive agencies perform cost-benefit analysis of proposed "major" rules.[28] Section 2 of the Order stated, in relevant part:

> (a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
>
> (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation *outweigh* the potential costs to society;
>
> . . .
>
> (e) Agencies shall set regulatory priorities with the aim of *maximizing the aggregate net benefits to society*, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.[29]

The Order made OIRA responsible for assessing proposed regulations to ensure they plausibly maximize aggregate net benefits to society. It requires executive agencies to perform and publish regulatory impact analysis of major rules, and it also requires the Director of the OMB to "[m]onitor agency compliance with the requirements of this Order and advise the President with respect to such compliance."[30] Although OIRA's early years were rocky,[31] it eventually became a powerful, though surprisingly inconspicuous force, on the federal regulatory landscape.[32]

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28. Exec. Order No. 12,291, § 3(a), 3 C.F.R. 127, 128 (1981) (revoked 1993). Section 1(d) reads as follows: "'Agency' means any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10)." *Id.* The latter section of the U.S. Code refers to "independent regulatory agencies" and specifically lists the SEC among them. 44 U.S.C. § 3502(10) (Supp. IV 1980).

29. Exec. Order No. 12,291, § 2, 3 C.F.R. at 128 (emphasis added).

30. *Id.* § 6(a)(8), at 131.

31. Gramm, *supra* note 3, at 29–30.

32. Donald R. Arbuckle, *Obscure but Powerful: Who are those Guys?*, 63 ADMIN. L. REV. 131, 132 (2011).

In 1993, President Clinton's Executive Order 12,866 replaced Executive Order 12,291.[33] Section 1(a) softens the substantive cost-benefit provisions, stating that "agencies should select those approaches that maximize net benefits . . . unless a statute requires another regulatory approach."[34] It also adds assessment of "distributive impacts" and "equity" into the calculus.[35] Section 1(b)(6) weakens the threshold for approval by requiring that benefits merely "justify"[36] costs rather than "outweigh" them.[37]

Notably, the Order states that costs and benefits can include both quantitative and qualitative measures, and it frames the call for regulation in the language of market failure. Its preamble provides the following seemingly sensible foundation for federal regulation: "the private sector and private markets are the best engine for economic growth . . . . Federal agencies should promulgate only such regulations as . . . are made necessary by compelling public need, such as *material failures of private markets* to protect . . . the well-being of the American people."[38] It lists various principles to guide agency CBA, among them: to "identify the problem it intends to address" and its significance; to "identify and assess available . . . economic incentives to encourage the desired behavior"; to base decisions on "the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation"; to "the extent feasible, [to] specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt"; and to "minimiz[e] the potential for uncertainty."[39] Section 2(b) of the Order requires OMB to issue guidance on the proper conduct of CBA to affected agencies.[40] Among them, OMB's 2003 guidance advises that

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33. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88 (2012).

34. *Id.* § 1(a), at 639.

35. *Id.*

36. *Id.* § 1(b)(6).

37. Exec. Order No. 12,291, §2(b), 3 C.F.R. 127, 128 (1981) (revoked 1993).

38. Exec. Order No. 12,866, pmbl., § 1(a), 3 C.F.R. at 638–39 (emphasis added).

39. *Id.* § 1(b), at 639–40.

40. *Id.* § 2(b), at 640.

"'[o]pportunity cost' is the appropriate concept for valuing . . . costs."[41]

Order 12,866 remains in effect today, but in January 2011, President Obama reinforced it with Executive Order 13,563, among other things requiring executive agencies to allow Internet submission of public comments, to provide for greater coordination with other agencies, to ensure scientific integrity, and to further provide for retrospective analysis of existing rules.[42] Although independent agencies are exempt from executive orders, Executive Order 13,579 urges them to comply with Executive Order 13,563 to the extent permitted by law.[43] Arguably, these orders collectively outline best practices for all federal agency rulemaking, including both executive and independent agencies.

Largely owing to OIRA review, executive agency CBA is widely considered to be of variable but sometimes acceptable quality, with much of the CBA done by the Environmental Protection Agency (EPA) being the best model.[44] Independent agency CBA lags behind but appears to be improving.[45]

C. Independent Agency CBA

An early statutory mandate for independent agency CBA appears in the 1974 amendments to the Commodity Exchange Act of 1936 (CEA) authorizing creation of the Commodity Futures Trading Commission (CFTC). Section 19(a) of the CEA states in relevant part:

> (1) In general
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> Before promulgating a regulation under this chapter or issuing an order . . . the Commission shall consider the costs and benefits of the action of the Commission.

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41. Circular A-4, Regulatory Analysis, 68 Fed. Reg. 58,366 (Oct. 9, 2003).

42. *See* Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 101–02 (2012).

43. Exec. Order No. 13,579, 3 C.F.R. 256 (2012), *reprinted in* 5 U.S.C. § 601 app. at 102.

44. *See* Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE J. ON REG. 545, 550–52 (2017).

45. *See* Ellig & Peirce, *supra* note 9, at 383; *see also* Jerry Ellig, *Evaluating the Quality and Use of Regulatory Impact Analysis: The Mercatus Center's Regulatory Report Card, 2008–2013*, at 4–5 (Mercatus Ctr., Working Paper, 2016).

> (2) Considerations
>
> The costs and benefits of the proposed Commission action shall be evaluated in light of—
>
> (A) considerations of protection of market participants and the public;
>
> (B) considerations of the efficiency, competitiveness, and financial integrity of futures markets;
>
> (C) considerations of price discovery;
>
> (D) considerations of sound risk management practices; and
>
> (E) other public interest considerations.[46]

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) also specifically requires an independent agency to perform CBA. Title X of Dodd-Frank creates the Bureau of Consumer Financial Protection, and Section 1022(b)(2)(A) gives it rulemaking authority provided that in so doing it considers "the potential benefits and costs to consumers and covered persons, including the *potential reduction of access* by consumers to consumer financial products or services resulting from such rule."[47]

In 1996, Congress passed the National Securities Market Improvement Act (NSMIA) adding the following language to the Securities Act of 1933 (SA),[48] Securities Exchange Act of 1934 (SEA),[49] and the Investment Company Act of 1940 (ICA)[50]:

> CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is *necessary or appropriate* in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will *promote efficiency, competition, and capital formation*.[51]

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46. 7 U.S.C. § 19(a).

47. 12 U.S.C. § 5512(b)(2)(A)(i) (emphasis added).

48. 15 U.S.C. § 77b(b).

49. *Id.* § 78c(f).

50. *Id.* § 80a-2(c).

51. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110 Stat. 3424–25 (emphasis added). In addition, the SEA requires that

Beginning in 2005, three cases from the U.S. Court of Appeals for the D.C. Circuit found that this language requires the Securities and Exchange Commission (SEC) to perform CBA of its proposed regulations, and in each case it found the SEC's CBA deficient and therefore "arbitrary and capricious" in violation of the Administrative Procedure Act (APA).[52]

In *U.S. Chamber of Commerce v. SEC*, the Chamber sought review of the SEC's Investment Company Governance Rule (Governance Rule),[53] which would have conditioned various exemptions most mutual funds enjoy from provisions of the ICA on having boards with at least seventy-five percent outside directors and an independent chairman.[54] The D.C. Circuit Court found that the SEC had failed to adequately consider the costs of the conditions it proposed and hence their likely effect on efficiency, competition, and capital formation.[55] Although an empirical study is unnecessary, a regulator must nevertheless do its best to assess costs.[56] Uncertainty may limit what the Commission can do but does not excuse its statutory obligation to do what it can to apprise itself, and hence the public and the Congress, of the economic consequences of a proposed regulation before it chooses to adopt it.[57]

In *American Equity v. SEC* the petitioner, American Equity Investment Life Insurance Company, sought the D.C. Circuit

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"The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition." 15 U.S.C. § 78w(a)(2).

52. Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011); Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 177 (D.C. Cir. 2010); Chamber of Commerce v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005).

53. 412 F.3d at 137. The SEA, the ICA, and the Investment Advisors Act (IAA) all allow persons aggrieved by a final order of the Commission to obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or in the District of Columbia Circuit. SEA § 25(a), 15 U.S.C. § 78y(a); ICA § 43(a), 15 U.S.C. § 78y(a); IAA § 213(a), 15 U.S.C. § 80b-13(a).

54. The ICA mandates that mutual funds have at least forty percent outside directors. By ICA Rule 12(b)-1, the SEC had already conditioned various exemptions on a mutual fund having a majority of outside directors. 17 C.F.R. pts. 239, 240, 270, 274.

55. *Chamber of Commerce*, 412 F.3d at 144.

56. *Id.* at 142–43.

57. *Id.* at 144.

Court's review of SEC Rule 151A under the SEA,[58] finding that fixed index annuities are securities rather than an insurance contract.[59] As an issuer of securities, American Equity therefore would be subject to the Act's registration and reporting requirements. The thrust of the SEC's rationale for the rule was that the absence of a clear basis for identifying the regulatory status of fixed index annuities injected sufficient uncertainty into the market that efficiency, competition, and capital formation were undermined. In the Court's opinion, however, it was not enough for the SEC simply to declare that *some* rule is necessary.[60] It must first establish a pre-rule benchmark and then identify the relative merits of the proposed rule in comparison to the baseline.[61] It had not done so, and so the Court vacated the rule.[62]

Most recently, in *Business Roundtable v. SEC*, the D.C. Circuit Court vacated SEA Rule 14a-11,[63] known as the Proxy Access Rule.[64] With modest limitations, the Rule would have required firms subject to the SEA, including investment companies, to add to their proxy materials the name of any person or persons nominated for a directors seat by a shareholder who has held at least three percent of the firm's voting stock for a least three years.[65] The effect of the rule would have been to allow qualified dissident shareholders partial control over the ballot to elect the company's board of directors. The SEC reasoned that the rule could create "benefits (including the possible benefit of improved board accountability and company performance) [that] justify the costs" and that any adverse effects on the board would derive generally from long established state law proxy rules and not from the rule's enhanced proxy access requirements.[66]

The court disagreed, vacating the rule. In its words:

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58. 15 U.S.C. § 78mm.

59. 613 F.3d 166, 167 (D.C. Cir. 2010).

60. *Id.* at 177.

61. *Id.* at 178.

62. *Id.*

63. Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668 (Sept. 16, 2010).

64. 647 F.3d 1144, 1148 (D.C. Cir. 2011).

65. *See* 75 Fed. Reg. at 56,674–75.

66. *Id.* at 56,761.

> [The SEC] inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters. For these and other reasons, its decision to apply the rule to investment companies was also arbitrary.[67]

The court faulted the SEC for declaring the costs of board distraction from enhanced proxy access to be merely an incident of traditional state law proxy rules. Citing to *Chamber of Commerce*, the court reiterated: "As we have said before, this type of reasoning, which fails to view a cost *at the margin*, is illogical and, in an economic analysis, unacceptable."[68]

These D.C. Circuit Court decisions prompted a decided response. In 2012 the SEC published an internal guidance memorandum recognizing that it has a general "statutory obligation to determine as best it can the economic implications of [a proposed] rule," although not CBA per se.[69] As a matter of good regulatory practice, however, it instructs SEC economists to "quantify anticipated costs and benefits even where the available data is imperfect."[70] It also advises that staff economists be given a more prominent role in the rule-writing process, from inception through adoption.[71] Soon afterwards the SEC dramatically increased the number of economists on its staff.[72]

Recall the statement in Executive Order 12,866 that "agencies should select those approaches that maximize net bene-

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67. *Bus. Roundtable*, 647 F.3d at 1148–49.

68. *Id.* at 1151 (emphasis added) (citing Chamber of Commerce v. SEC, 647 F.3d 133, 143 (D.C. Cir. 2005)).

69. Memorandum from the Div. of Risk, Strategy and Fin. Innovation and the Office of the Gen. Counsel, U.S. Sec. & Exch. Comm'n, to the Staff of the Rulemaking Div. and Offices, U.S. Sec. & Exch. Comm'n, on Current Guidance on Economic Analysis in SEC Rulemakings 1 (March 16, 2012), https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf [https://perma.cc/9WWY-AZ8C].

70. *Id.* at 13.

71. *See* Ellig & Peirce, *supra* note 9, at 365–66; Bruce R. Kraus, *Economists in the Room at the SEC*, 124 YALE L.J.F. 280, 281 (2015).

72. *See* Joshua T. White, *The Evolving Role of Economic Analysis in SEC Rulemaking*, 50 GA. L. REV. 293, 308–09 (2015).

fits . . . *unless a statute requires another regulatory approach*."[73] In *National Association of Manufacturers v. SEC*, the D.C. Circuit Court addressed the adequacy of the SEC's CBA of its Conflict Minerals rule.[74] Section 1502 of Dodd-Frank charged the SEC with issuing regulations requiring firms using "conflict minerals" in the Republic of the Congo to investigate and disclose the origin of those minerals.[75] In passing the statute, Congress had specifically determined that "'[the rule's] costs were necessary and appropriate in furthering the goals' of peace and security in the Congo."[76] In response to the National Association's challenge, the court found that the SEC had "exhaustively analyzed the final rule's costs."[77] Because Congress "intended the rule to achieve 'compelling social benefits' . . . [the SEC] is not required 'to measure the immeasurable' and need not conduct a 'rigorous, quantitative economic analysis' unless the statute explicitly directs it to do so."[78]

Two federal cases recently found that general language in the EPA's enabling legislation requires it to assess the costs and benefits of a proposed rule. Most important, in *Michigan v. EPA*, the U.S. Supreme Court found that the EPA must consider both costs and benefits in regulating under the Clean Air Act's "appropriate and necessary" standard,[79] and that its refusal to consider costs in coming to the decision to regulate power plants was an unreasonable interpretation of the Clean Air Act.[80]

As the Court put it:

> [T]he phrase "appropriate and necessary" requires at least some attention to cost. One would not say that it is even rational, never mind "appropriate," to impose billions of dol-

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73. Exec. Order No. 12,866, § 1(a), 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88 (2012) (emphasis added).

74. 748 F.3d 359, 363 (D.C. Cir. 2014), *adhered to on reh'g*, 800 F.3d 518 (D.C. Cir. 2015).

75. *See* 15 U.S.C. § 78m(p)(1)(A) (2012).

76. *Nat'l Ass'n of Mfrs.*, 748 F.3d at 369 (D.C. Cir. 2014) (quoting Conflict Minerals, 77 Fed. Reg. 56,274, 56,350 (Sept. 12, 2012)).

77. *Id.*

78. *Id.* (citations omitted) (quoting Conflict Minerals, 77 Fed. Reg. at 56,350, and Inv. Co. Inst. v. CFTC, 720 F.3d 370, 379 (D.C. Cir. 2013)).

79. 42 U.S.C. § 7412(n)(1)(A).

80. 135 S. Ct. 2699, 2707 (2015).

> lars in economic costs in return for a few dollars in health or environmental benefits . . . . No regulation is "appropriate" if it does significantly more harm than good.[81]

A full-blown CBA is unwarranted at the preliminary stage, however. In the Court's words: "We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value."[82]

More recently, the District Court for the District of Columbia relied on *Michigan v. EPA* to invalidate the MetLife corporation's designation by the Financial Stability Oversight Council (FSOC) as a systemically important financial institution (SIFI) in *MetLife, Inc. v. FSOC*.[83] Under Dodd-Frank, the FSOC may designate a "nonbank financial company" for enhanced supervision by the Federal Reserve System's Board of Governors if it determines that "material financial distress" at the company "could pose a threat to the financial stability of the United States."[84] The court rejected the FSOC's determination that it is not required to consider the costs to the company in its risk calculus, finding that it must identify a causal connection between the risk of financial distress and the prospect of significant damage to the U.S. economy.[85] Costs to the company are part of this determination.[86] Otherwise the FSOC has no way of knowing whether the designation does significantly more harm than good, and it is therefore "arbitrary and capricious" under the APA.[87]

D. The Scholarly Literature

Federal statutes and case law requiring independent agencies to perform CBA of proposed rules focus largely on financial regulators such as the SEC and CFTC, and much of the recent scholarship assailing or defending judicially reviewable

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81. *Id*.
82. *Id*. at 2711.
83. 177 F. Supp. 3d 219, 240 (D.D.C. 2016).
84. 12 U.S.C. § 5323(a)(1).
85. *See Metlife*, 177 F. Supp. 3d at 242.
86. *See id*. at 239.
87. *Id*. at 241.

CBA therefore focuses on financial regulation. Largely absent from this literature, however, is any critical discussion of the need to identify the nature of the specific market failure driving the regulation or how a careful assessment of these fundamentals might feed into the underlying economic analysis.[88]

Coates provides an exhaustive review of the feasibility of quantified CBA in financial regulation.[89] This includes his attempt to perform reliable CBA in six subject areas, which he reports to have proven impossible.[90] He identifies any number of insurmountable difficulties and rejects claims by those who argue that quantified CBA, as done in the environmental setting, can provide a workable model for use in financial regulation. He asserts that economic analysis of environmental regulation involves an assessment of relatively simple physical interaction.[91] Economic analysis of financial markets is different because the market lies at the heart of the entire economy, involves various human elements that cannot be quantified, and is subject to various "non-stationary relationships" that exhibit "long-term structural changes."[92] As he puts it, unless "evidence is developed to illuminate when [CBA of financial regu-

88. Ellig & Peirce, *supra* note 9, are a notable exception. One study argues that transaction costs should be included as one component of costs in traditional CBA. Frank A.G. den Butter, Marc de Graaf & André Nijsen, *The Transaction Costs Perspective on Costs And Benefits of Government Regulation: Extending The Standard Cost Model* (Tinbergen Inst., Discussion Paper No. 2009-13/3, 2009). Another argues for the importance of considering institutional transaction costs when conducting cost benefit analysis on environmental regulations. Dale B. Thompson, *Beyond Benefit-Cost Analysis: Institutional Transaction Costs and Regulation of Water Quality*, 39 NAT. RESOURCES J. 517 (1999). Neither of them takes the approach offered here.

89. *See, e.g.*, Coates, *supra* note 5.

90. The six subject areas are (1) Section 404 of the Sarbanes-Oxley Act requiring the SEC's rules creating the Public Company Accounting Oversight Board (PCAOB) and to impose on public companies new mandatory disclosures under Section 404 of the Sarbanes-Oxley Act of 2002; (2) the SEC's proposed 2004 Investment Company Governance Rule, addressed by the Court in *Chamber of Commerce I*; (3) heightened bank capital requirements mandated by the Basel Committee on Banking Supervision following the 2008 mortgage crisis; (4) the Volcker Rule under the Dodd-Frank Act prohibiting U.S. banks from engaging in "proprietary trading" for their own accounts; (5) the SEC's proposed 2013 rule on cross-border swaps; and (6) the U.K.'s Financial Services Authority's 2011 mortgage market reforms. *See id.* at 996–97.

91. *See id.* at 1001.

92. *Id*. at 888. *See generally* Gordon, *supra* note 5.

lation] passes its own test, courts and secondary agencies (that is, agencies other than those charged with rulemaking responsibility) should have no role in second-guessing the choice of when to conduct [it], or the details . . . when it is used."[93] Until CBA of financial regulation develops further, any attempt at quantification is merely "guesstimation."[94] In the meantime, he argues it should be used strictly as a conceptual framework to guide informed decisions ultimately based on unreviewable "expert judgment."[95]

Writing in response, Posner and Weyl argue that financial markets are ideally suited to quantified CBA because they "generate a vast amount of data [that is] monetary in nature."[96] Accordingly, quantified CBA is much more suited to assessing financial market regulation than environmental health and safety regulation. They argue that most of Coates's criticisms of quantified CBA of financial regulation are really criticisms of any and all CBA.[97] In their view, any uncertainty with quantified CBA is an argument in favor of further academic research rather than rejection of CBA altogether.[98]

More recently, Masur and Posner recognize that in any given setting the regulator may be unable to quantify costs and benefits with precision owing to uncertainty, in which case it should use its most informed judgment.[99] To move forward with a rule based on judgment regarding difficult-to-quantify costs and benefits, the regulator should publish its best estimate of costs and benefits and report its methodology as a basis for retrospective evaluation. This process essentially provides for iterative learning over time.[100]

Sunstein recognizes that financial regulators are plagued by the Hayekian knowledge problem; the information necessary to formulate rational regulations is dispersed across many members of society. In some cases "Knightian uncertainty" will

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93. Coates, *supra* note 5, at 888.
94. *Id*. at 887.
95. *Id*. at 903.
96. Posner & Weyl, *supra* note 5, at 247.
97. *See id*. at 251.
98. *See id*. at 246.
99. *See* Masur & Posner, *Cost-Benefit Analysis*, *supra* note 5, at 941.
100. *Id*. at 945.

make it impossible for them to perform reliable CBA.[101] He nonetheless concludes that "[t]here is no reason to think that it is always or usually impossible for financial regulators to conduct cost benefit analysis," pointing out that "Executive Order 13,563 . . . directs executive agencies 'to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'"[102]

Revesz takes a somewhat different approach. Rather than focusing on whether, or to what extent, quantified CBA of financial regulation is feasible, he emphasizes the need for institutional reforms necessary to ensure financial regulators are able to perform CBA of sufficient quality to survive judicial scrutiny.[103] These reforms are all the more pressing, he argues, owing to the Supreme Court's decision in *Michigan v. EPA*, which relied on the "appropriate and necessary" language of the Clean Air Act to find the EPA's failure to consider costs in regulating power plant emissions unreasonable.[104] Similar language appears in the SEC's enabling legislation—in its case "necessary or appropriate in the public interest"—and Dodd-Frank uses it eighty times, in many cases for provisions directed to the SEC or CFTC.[105] Revesz points out that the quality of CBA done by executive agencies is relatively high owing to OIRA review. The EPA, which has built significant economic expertise in this area, is apparently the acknowledged forerunner.[106] He recommends institutional reforms that will help bring the quality of financial regulators' CBA up to EPA standards, either by subjecting them to review by the FSOC or, preferably, to OIRA. But his formulation would not preclude judicial review.[107] Rather, it would subject CBA of financial regulation to two levels of review, one administrative and one judicial. With first-stage administrative review, he believes federal courts would be in-

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101. Sunstein, *supra* note 5, at 265.

102. *Id*. at 264–65 (quoting Exec. Order No. 13,563, § 1(c), 3 C.F.R. 215, 216 (2012), *reprinted in* 5 U.S.C. § 601 app. at 101–02 (2012)).

103. *See* Revesz, *supra* note 44, at 548.

104. *See id*.

105. *Id*. at 548.

106. *Id*. at 545, 592.

107. *Id*. at 549–50.

clined to defer to the agency but that judicial review is nonetheless appropriate.[108]

Although insightful as far as it goes, none of this scholarship discusses or even cites Coase, mentions market failure as the ostensible justification for regulation, or examines how the market failure framework might inform CBA. Mannix provides a notable exception. He argues that regulators suffer from an agency problem. They are charged with identifying and correcting market failure, but they may have a tendency to overregulate because they neither bear the full costs of their actions nor capture the full benefits.[109] That is, their behavior is subject to distorting externalities. The CBA requirement serves as an effective check on the agency problem, ensuring regulators act as "faithful agents of the public's interest."[110]

Of relevance here, Mannix notes that the Obama administration opened the door to incorporating behavioral economics into regulatory CBA. As he describes it, since then "regulatory agencies have increasingly used consumer irrationality to justify regulatory interventions—even where there is no apparent market failure. They attribute economic benefits amounting to many billions of dollars to regulatory actions that give consumers nothing new and simply deprive them of their preferred choices."[111] If regulators are to be trusted as stewards of the public interest, they must be willing to accept those being regulated as sovereign in their preferences. He quotes Gayer and Viscusi on this point, whose statement also supports the Coasean approach:

> How can it be that consumers are leaving billions of potential economic gains on the table? . . . Moreover, how can it also be the case that firms seeking to earn profits are likewise ignoring highly attractive opportunities to save money? . . . Rather than accept the implications that consumers and firms are acting so starkly against their economic interest, a more plausible explanation is that there is something

108. *Id.* at 593–94.

109. *See* Brian F. Mannix, *Benefit-Cost Analysis as a Check on Administrative Discretion*, 24 SUP. CT. ECON. REV. 155, 164–65 (2017).

110. *Id.* at 165.

111. *Id.*

> incorrect in the assumptions being made in the regulatory [CBA].[112]

In the following statement, Mannix recognizes the fundamental premise of TCBA: "improvements [in efficiency] would be accomplished by the market instead of the government if the market were better able to overcome transaction costs."[113] It takes only one more step in reasoning to recognize that requiring regulators to demonstrate a reduction in transaction costs before imposing a new rule provides an economically correct constraint on regulatory overreach. Equally important, by leaving the regulated free to respond as they choose to a properly justified rule, TCBA accords them sovereignty over their preferences. Although seemingly normative, this point accentuates the informational advantage of TCBA, which recognizes the positive proposition that the parties being regulated are better equipped to assess the costs and benefits of various possible responses than are regulators.

Another point worth mentioning is that the debate over the feasibility of quantified CBA focuses attention largely on macro-level regulation, such as banking reserve requirements, measures to control systemic risk, and cross-border swaps market regulation. Yet much of what the SEC regulates occurs on the micro level, often involving garden-variety vertical arrangements familiar in the antitrust arena.[114] The transaction costs the parties would face to privately address putative market failures in economy-wide settings might make private ordering solutions completely ineffectual (although market participants' ingenuity in this regard is often surprising). But transaction costs in the issuer-brokerage-investor, issuer-investment-bank-investor, securities-exchange-investment-company-investor, and other vertical relationships in financial services are presumably fairly low. Indeed, in each case it is apparent that reducing transaction costs is an important reason these relationships are structured as they are. In financial services, transaction costs may hinder the parties from maximiz-

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112. *Id.* at 164–65 (quoting Ted Gayer & W. Kip Viscusi, *Overriding consumer preferences with energy regulations*, 43 J. REG. ECON. 248, 263 (2013)).

113. *Id.* at 160.

114. *See* D. Bruce Johnsen, *A Transaction Cost Assessment of SEC Regulation Best Interest*, 2018 COLUM. BUS. L. REV. 695.

ing net benefits, but they are surely low enough that any regulation reducing the relevant costs of transacting could lead the parties to adjust their relations to increase net benefits.

II. OVERVIEW OF TRADITIONAL COST-BENEFIT ANALYSIS

A. Assessing Welfare in the Basic Neoclassical Model

In 1896, Pareto proposed *Pareto optimality* as the ideal basis for welfare trade-offs in social policy.[115] A given allocation of resources is Pareto optimal if there is no reallocation that would improve one person's welfare without reducing another's. In a world of zero transaction costs, voluntary market exchange would lead to Pareto optimality and regulation would be unnecessary. Despite the contractarian appeal of relying exclusively on voluntary exchange to allocate resources, Pareto optimality is an unworkable standard for justifying regulation. There can be no doubt regulation is warranted in some settings in which relying purely on voluntary exchange is impossible, and there will always be winners and losers. The cost of finding the losers, divining their losses, and compensating them to assure that they would be no worse off is simply unworkable.

The Kaldor-Hicks rule emerged in roughly 1939 as an alternative to Pareto optimality and has since become the default rule for assessing net benefits to society in the context of CBA.[116] A given reallocation of resources is Kaldor-Hicks efficient if the winners could, in principle, fully compensate the losers and still improve their own welfare. It has come to be known as the "potential compensation test."[117] Obviously, Kaldor-Hicks efficiency removes many conceptual roadblocks to social policy, but it has suffered crippling critiques as well. In 1951 Arrow theoretically demonstrated the impossibility of constructing a unique social welfare function based on ordinal preferences that avoids the necessity of making thorny moral judgments. If confined to ordinal preferences, most economists

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115. RICHARD O. ZERBE, JR. & ALLEN S. BELLA, A PRIMER FOR BENEFIT-COST ANALYSIS 12 (2006).

116. *See* J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939).

117. ZERBE & BELLA, *supra* note 115, at 80.

are steadfastly agnostic about how to weight the benefits and costs of social policy choices to affected parties because interpersonal welfare comparisons cannot be made.[118] Adler and Posner sidestep these problems by arguing that CBA need not require moral pronouncements but can instead be usefully treated as an imperfect but practical and informative regulatory "decision rule," presumably one that both enables and constrains the administrative state.[119]

The neoclassical model provides the theoretical foundation for traditional CBA. It illustrates the welfare effects of trade embedded in market demand and supply assuming, among other things, that individuals and firms are rational maximizers, that no buyer or seller has market power, that all decision makers bear the full costs of their decisions and capture the full benefits, that all parties have full information, and that the interacting parties face zero transaction costs. In equilibrium, the model hypothesizes that market prices will reflect *marginal* benefits and costs, and that the parties will capture all potential gains from trade in the form of consumer and producer surplus, or social welfare. With costless transacting, the allocation of resources is said to be socially optimal, or "first best."

These assumptions provide a foundation for explaining how individuals and firms make decisions and are not an attempt to accurately characterize reality. The main concern is that the assumptions lead to testable predictions consistent with real-world observations. Whether or not people make cognitively rational decisions is irrelevant. The important question is whether they behave "as if" they are cognitively rational and fully informed.[120] Transaction cost economics has shown many times that behavior seemingly inconsistent with the neoclassical model can be easily explained by relaxing its assumptions to accommodate the costs of transacting, as Coase predicted.

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118. Adler & Posner, *supra* note 5, at 192–94 (1999).

119. *Id.*

120. FRIEDMAN, *supra* note 6, at 40–41. In a competitive market, firms that happen to zig when they should zag will be eliminated from the system. Those remaining will appear to have chosen correctly even if their managers lacked the wherewithal to make an intelligent choice. Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 213 (1950).

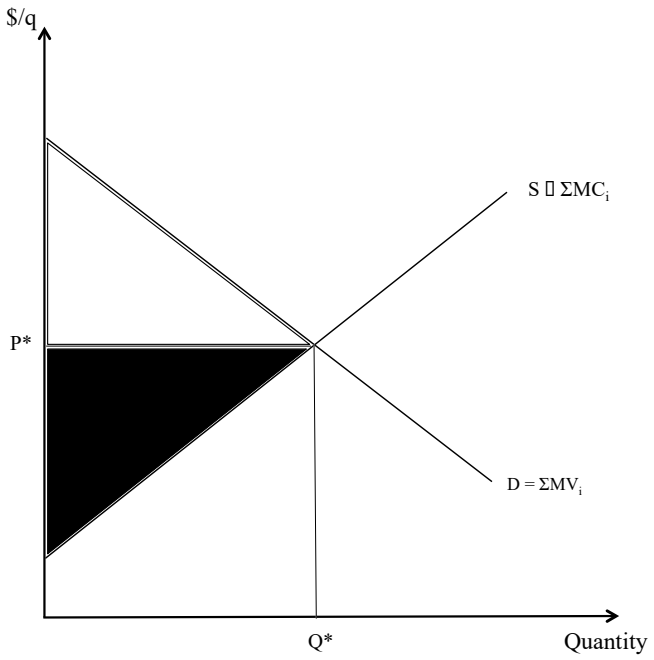

Figure 1
Social Welfare

Figure 1 shows the unit rate of output for a traded good, Q, on the horizontal axis and the price in dollars per unit, P, on the vertical axis. Line D shows consumer demand for the good, which is synonymous with aggregate marginal valuation ($\sum MV_i$) across i consumers for each possible rate of output. The demand curve slopes downward to the right to reflect diminishing marginal valuation. Line S shows aggregate supply of the good across j producers, roughly reflecting their aggregate marginal cost ($\sum MC_j$) for each possible quantity, with these costs equal to the value of productive inputs if deployed elsewhere. The supply curve slopes up to the right, reflecting increasing marginal cost.

In a well-functioning, competitive market with no transaction costs, the equilibrium price is P* and output is Q*. Consumers make total expenditures equal to rectangle $P^* \times Q^*$. For the marginal unit of the good, consumer valuation is exactly

equal to price, and consumers are indifferent to whether they buy this unit or not, so it generates no surplus, or "net benefits," at the margin. Moving backward along the demand curve, consumers' valuation of the good increasingly exceeds the price they pay. For Q* units per period rather than zero, their total valuation is represented by the large trapezoid under the demand curve between zero units and Q* units. Subtracting their total expenditures, P* × Q*, the remaining upper dotted triangle is known as consumer surplus, one component of net social benefits.

A similar story can be told for producers. For Q* units, they are indifferent to whether or not they supply the marginal unit because P* = MC for that unit. As a result of supplying Q* units rather than zero, they earn total revenues of P* × Q*, exactly what consumers spend. Their cost of supplying Q* units is the trapezoid beneath MC from zero to Q*. The difference, represented by the lower cross-hatched triangle, is known as producer surplus, the other component of net social benefits.

Together, consumer and producer surplus constitute the gains from trade, total social welfare, or, what Executive Order 12,291 refers to as the "net benefits to society"[121] from Q* units of the good rather than zero. The resulting allocation of resources is said to be Pareto optimal because no reallocation can improve social welfare. Hypothetically, if output is forced below Q*, consumers sacrifice more value than producers save. If output is forced above Q*, producers lose more value than consumers gain.

The neoclassical model is a remarkably powerful tool for predicting the direction of the marginal effects from outside shocks. Obvious examples include the imposition of a new tax or a restriction on trade that shifts either the demand or supply curve and causes predictable changes in prices, rates of output, and other indicia of the parties' behavior. More generally, the model can be used to explain how and why observed patterns of behavior vary across time or cross-sections when the constraints market participants face change at the margin. The

121. Exec. Order No. 12,291, § 2(c), 3 C.F.R. 127, 128 (1981) (revoked 1993).

model is testable, has been repeatedly tested, and has survived testing largely intact.

The neoclassical model's reliability falls off as we move beyond marginal analysis. Quantifying net social benefits, or even just the marginal effect on net social benefits from a given shock, is far less reliable. Economists hypothesize that the area under a demand curve up to any arbitrary rate of output reflects total consumer valuation, but getting enough data to reliably estimate a real-world demand curve is problematic. Not only is the real world a noisy place, but most of the variation we observe is in a narrow neighborhood around the equilibrium price and quantity. Among other things, accurate quantification requires the researcher to estimate how much people would pay for the first few units of a good whose normal consumption might be in the millions. Although the CBA methodology is based on theory that is reliable for predicting marginal effects, the thorny scientific question is what evidence could possibly refute any specific measure of social welfare or, by implication, any CBA?

The same can be said on the producer side. The supply curve roughly reflects marginal costs aggregated across all producers, but (as Executive Order 12,866 recognizes) the economic definition of cost is opportunity cost, the value of the next best opportunity forgone. Opportunity cost is seldom observable in an objective way even though marginal changes in opportunity cost can be identified. They have only a loose relationship to out-of-pocket expenses, do not appear as such on balance sheets or income statements, and in any event reflect the value of actions not taken and are therefore unobservable. Indeed, economists generally do not assert that market participants themselves know the opportunity cost of their decisions, only that they behave as if they know. Assessing opportunity cost at the margin is also troublesome because it represents the increase in total cost owing to a one-unit increase in output holding all else equal, a normally unobservable counter-factual. What most laymen have in mind when they think of cost is average cost, or total cost divided by total output, which is much easier to observe and measure but in many settings is an inappropriate basis for predicting the choices people make or the relevant costs for CBA.

This analysis is not to say quantification is hopeless. Over the years, econometricians have made tremendous progress developing empirical methods to help see through noise in the data and to disentangle the various factors that influence market outcomes. Far more complete data is now available.[122] With the advent of scanners that record millions of retail transactions evidencing huge variations in prices and quantities, economists have begun to make headway estimating demand and consumer surplus, possibly bringing quantified CBA within reach in specific settings. One early study estimates the demand for a new breakfast cereal, putting the annual addition to consumer surplus from a single new product in the range of $66 to $78 million.[123] Another estimates the demand for Uber rides, with total benefits to U.S. consumers in the billions of dollars.[124] In some settings, an appropriate CBA requires a valuation of life. Empirical estimates of the value of a statistical human life are widely used in environmental and other CBA and, being based in part on market prices and revealed preferences, are generally considered reliable. In all of these situations, the researcher picks the subject matter based on knowledge that sufficient data is available for analysis, rather than because of the pressing need to do CBA of proposed regulation in a specific setting. In most financial settings calling for CBA of corrective rules, the necessary data is unlikely to exist and collecting it may be too costly or time consuming to be feasible.

B. Market Failure as a Basis for Corrective Rules

The notion that government regulation is warranted to correct market failure goes back at least to A.C. Pigou's influential treatise, *The Economics of Welfare*. In the original edition, Pigou used the example of two roads linking two cities. One road he

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122. *See* Manne, *supra* note 23, at 22.

123. Jerry A. Hausman, *Valuation of New Goods under Perfect and Imperfect Competition*, *in* THE ECONOMICS OF NEW GOODS 209, 228, 234–35 (Timothy F. Bresnahan & Robert J. Gordon eds., 1996) ("The correct economic approach to the evaluation of new goods has been known for over fifty years, since Hicks's pioneering contribution. However, it has not been implemented by government statistical agencies, perhaps because of its complications and data requirements. Data are now available.").

124. Peter Cohen, et al., *Using Big Data to Estimate Consumer Surplus: The Case of Uber* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 22,627, 2016).

assumed to be slow but with sufficient capacity that it is never congested. The other he assumed to be faster but subject to congestion. If all travelers have access to both roads, and with sufficient demand, they will join the fast road until it becomes so congested that the marginal traveler is indifferent between which road he chooses, and travel time on the fast road is the same as on the slow road. Self-interested travelers overuse the fast road because they neglect the congestion costs they impose on their fellow travelers, a standard negative externality calling for some form of corrective regulation by an omniscient social planner.[125]

The neoclassical model states that people acting in their own self-interest will allocate resources efficiently as long as they bear the full costs or capture the full benefits of their actions. When some costs or benefits fall on third parties—so-called externalities—the decision maker's resource allocation decisions could exceed or fall short of optimality, and if so the market is said to fail. Every undergraduate economics major learns that regulation by an omniscient social planner is justified when the market fails owing to externalities. For lack of a better alternative, the government serves as a stand-in.

125. PIGOU, *supra* note 11, at 194.

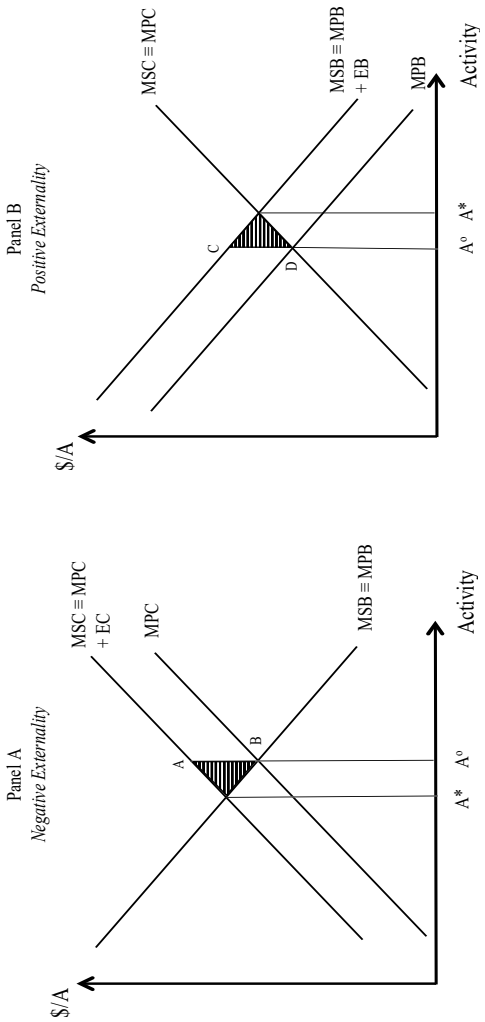

Figure 2
Externalities

Figure 2 illustrates how externalities are thought to lead to market failure. Panel A shows a negative externality and Panel B shows a positive externality. In either case the activity in question may involve a nontraded good such as driving on public roads. Line MPB in Panel A reflects the marginal private benefits to a decision maker from engaging in a socially productive activity, such as driving to work. Because he captures all benefits, there are no external benefits that spill over onto

others; thus, marginal private benefit is identical to marginal social benefit (MPB ≡ MSB). On the other side of the equation, his private costs are given by MPC. Being self-interested, he will engage in A^o units of the activity, where MPB = MPC. According to standard welfare analysis, at A^o he does too much of the activity, neglecting to consider the marginal external costs, EC, that spill over onto others in the form of traffic congestion. From society's standpoint optimality occurs at A*, where marginal social benefits exactly equal marginal social costs; MSB = MSC ≡ MPC + EC. Social welfare falls short of the optimum by the dotted triangle, a deadweight loss reflecting resource use whose social value falls short of their social cost, more generally referred to as forgone gains from trade.

The mechanics of positive externalities, shown in Panel B, follow much the same reasoning. Here, the decision maker equates his marginal private benefit with his marginal private cost and ignores any external benefits that spill onto others because he is unable to charge a price for them. He ends up doing too little of the activity; that is, A^o falls short of A*. The shaded triangle shows the associated loss in social welfare. A relevant example comes from the principal-agent setting. The agent is charged with taking action to generate benefits for the principal, but although the agent bears the full costs of such actions he normally receives only a small fraction of the associated benefits. He therefore stops short of the activity level that maximizes benefits to the principal net of his own (and society's) costs. For example, a retail securities broker might exert too little effort identifying profitable trades for his client's benefit or under-search for price improvement on trades the client orders.

A simple solution to too much or too little activity is government mandates, such as limiting to A* the number of travelers allowed to enter the roadway in Panel A. A common example is HOV restrictions requiring a minimum number of vehicle occupants on specific roads at peak travel times. Speed limits, in essence, are another. Examples of mandates to solve positive externalities include required vaccinations and minimum schooling requirements. Mandates can be cumbersome because they require the regulator to gather information to identify A* and leave little discretion to market participants about how to make efficient adjustments in response.

Corrective taxes are an alternative to quantity mandates. By forcing travelers to bear the full social cost of their travel decisions, for example, a road tax equal to the marginal external cost at A^o (distance AB) is said to correct the market failure and restore socially optimal resource allocation and also leave people free to choose how much and when to travel. They naturally choose activity level A* rather than A^o. Gasoline and cigarette taxes are arguable examples of corrective taxation. Where feasible, corrective taxes impose a smaller information burden on the regulator than government mandates because they allow market participants to make economizing adjustments so long as they are willing to pay the tax.

Two additional responses are available to address market failure. One is for the government to do nothing and the other is for it to require one party to compensate the other by establishing or changing the rule of liability. These possibilities are discussed below.

III. A CLOSER LOOK AT MARKET FAILURE

A. From Pigou to Knight to Coase

Writing just a few years after Pigou published his two roads example, Knight rejected the claim that market failure necessarily justifies government regulation.[126] In response to Pigou's example, Knight showed that the optimal tax Pigou endorsed to correct the market failure would be exactly the same as the profit-maximizing toll a private road owner would charge.[127] From this he concluded it was not market failure that caused overuse of the fast road but Pigou's unstated assumption that the road was unowned—in the public domain—and therefore subject to open access and the attendant resource misallocation.[128] Knight's insight was devastating. The only reason Pigou

126. F.H. Knight, *Some Fallacies in the Interpretation of Social Cost*, 38 Q.J. ECON. 582 (1924).

127. *Id.* at 587. For a brief history of roadway ownership and administration, see DOUGLAS W. ALLEN, THE INSTITUTIONAL REVOLUTION: MEASUREMENT AND THE ECONOMIC EMERGENCE OF THE MODERN WORLD 179–84 (2012).

128. Knight, *supra* note 126, at 586–87. This is not to say that open access is always inefficient. *See* Michel A. Habib & D. Bruce Johnsen, *The Quality-Assuring Role of Mutual Fund Advisory Fees*, 46 INT'L REV. L. & ECON. 1 (2016); D. Bruce Johnsen, *Myths About Mutual Fund Fees: Economic Insights on* Jones v. Harris, 35 J.

found an externality is because he assumed away private property rights to a scarce resource, the road.

Knight also made the important point that the social function of private property consists of the incentive it provides owners to use their property efficiently, by setting prices (and other terms of trade) that maximize net benefit to society, in this case by gathering the information necessary to identify the profit-maximizing toll.[129] The owner loses profits if he sets a toll leading to inefficient resource allocation. It is entirely plausible in many cases that government regulators lack the wherewithal or incentive to identify the optimal tax or toll even if they know congestion when they see it. They are neither omniscient, nor do they bear the full costs or receive the full benefits of their actions.

Nearly thirty-five years later, Coase famously introduced the "costs of market transactions" into the market failure debate.[130] This helped operationalize Knight's insight about property rights because transaction costs are capable of leading to testable theory. Coase used the example of a rancher's cattle straying and trampling the neighboring farmer's crops, a garden-variety negative externality that the common law regularly addressed under the law of nuisance.[131] Assuming zero transaction costs, he showed that the rule of liability would have no effect on the number of cattle (resource allocation) the rancher raises or the resulting crop damage.[132] Whether ranchers have to pay for damage to farmers' crops or farmers have to pay ranchers to reduce their herd size, efficient resource allocation will prevail.

This irrelevance result has since come to be known as the Coase Theorem, although Coase never touted his analysis as "the Coase Theorem" and did not endorse the relevance of zero

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CORP. L. 561, 590–94 (2010); Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 405 (1995).

129. Knight, *supra* note 126, at 591. Although Knight's analysis focused on Pigou's call for corrective taxation, it applies equally to quantity mandates.

130. *The Problem of Social Cost* was the culmination of several of Coase's earlier works. Coase, *supra* note 12; R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

131. Coase, *supra* note 1, at 2–3.

132. *Id.* at 8.

transaction costs to the real world.[133] Nonetheless, countless scholarly articles have attempted to refute the Coase Theorem. Some claim to have done so theoretically by showing that if bargaining is costly the rule of liability can affect resource allocation even where the costs of market exchange are zero.[134] This result follows only by excluding bargaining costs from the costs of market transactions. As Douglas Allen observes, those who labored to refute the Coase Theorem "won the argument, but . . . missed the point and helped to side line transaction cost economics as far as the mainstream profession was concerned."[135]

A core group of economists began integrating the cost of transacting into the neoclassical model to explain the workings of the economic system, especially the contours of economic organization, as Coase had predicted.[136] In recognition of this point, Allen offers the Coase Theorem Part II: "When transaction costs are positive, property rights are allocated to maximize the gains from trade net of the transaction costs."[137]

In a Coasean framework, it begs the question to label one party the victim and the other the wrongdoer, or to say that one party injures or imposes costs on another. Two parties simply want to use a scarce resource in mutually incompatible ways, an inevitable condition in a world of scarcity. The traveler who enters the fast road no more imposes costs on other travelers than they impose costs on him and on each other. The rancher whose cattle stray is no more economically responsible for injury to the farmer from increasing his herd size than the farmer is responsible for planting crops where the cattle are likely to stray. In Coase's words, "it is true that there would be no crop damage without the cattle. It is equally true that there

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133. The Coase Theorem is virtually identical to the Modigliani and Miller Irrelevance Theorem (under given assumptions, a firm's capital structure will have no effect on firm value). Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV. 261, 268 (1958). For such theorems, the explanatory power comes from relaxing the underlying assumptions.

134. *See, e.g.*, Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982).

135. Douglas W. Allen, *Theoretical Difficulties with Transaction Cost Measurement*, 2 DIVISION LAB. & TRANSACTION COSTS 1, 6 (2006).

136. Allen, *supra* note 21, at 12–13.

137. Allen, *supra* note 135, at 5.

would be no crop damage without the crops."[138] Injury, or damage, is a reciprocal problem and, operationally, the costs of transacting determines who ends up with what rights.

More generally, transaction costs guide understanding of the structure of property rights, whether the focus is the rule of liability, the choice of contract terms or business form, the prevailing business customs, the pattern of social norms, or any other evolved mechanism to determine who holds rights to which value flows. Inefficient resource allocation leaves money on the table and creates an opportunity for market participants to cooperate to capture gains from trade. It can persist only where the costs of transacting exceed the value of forgone gains from trade. Transaction costs are real costs and, as always, it pays people to spend a dollar only if doing so generates more than a dollar in gains.

Transaction cost economics identifies costs that the frictionless neoclassical model assumes away, and when properly accounted for they provide considerable insight into how people respond to changes in all sorts of rules. As a result, it can better predict the likely effects of government regulation on transacting parties' behavior. Regulation constrains transacting their choices, driving them to a new equilibrium determined in part by the costs of transacting. The relevant policy question is whether the new equilibrium is an improvement over the old, which depends at least in part on how the regulation affects the costs of transacting. In the real world, it makes little sense to claim government can correct a market failure unless it has a clear comparative advantage in reducing transaction costs. As Coase lamented:

> A better approach would seem to be to start our analysis with a situation approximating that which actually exists, to examine the effects of a proposed policy change and to attempt to decide whether the new situation would be, in total, better or worse than the original one. In this way, conclusions for policy would have some relevance to the actual situation.[139]

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138. Coase, *supra* note 1, at 13.
139. *Id.* at 43.

What is more, trying to divine what the world would look like if transaction costs were zero is little help for setting policy. The operational goal of transaction cost economics is to understand how differences in, or shocks to, the costs of transacting influence interacting parties' equilibrium behavior, including prices, outputs, various other terms of exchange, and the evolved structure of property rights and other institutions.

B. Externalities Everywhere and Nowhere

Quite literally, externalities are everywhere, but private ordering internalizes most of them before they are ever recognized. Imagine Mr. A enjoys eating eggs, which he produces and consumes up to the point where his MPB is equal to his MPC. Now imagine Ms. B also likes eggs but has none, and that there is no trade between them. Strictly speaking, according to Pigou's definition, Ms. B's unmet valuation qualifies as a positive externality resulting from Mr. A's decision about how many eggs to produce. Ms. B's valuation must be included in the MSB, and Mr. A does not account for this in his production and consumption decisions. The conclusion must be that Mr. A produces too few eggs and keeps too many for himself because the net benefit he gets from the marginal egg is zero, and that Ms. B values a single egg far more than zero. Should the government correct the market failure by compelling Mr. A to increase output and share his eggs with Ms. B? Tax Mr. A? Possibly, but, with clear economic property rights, the problem is routinely solved through market transactions, which can be expected to continue until social net benefits are maximized inclusive of transaction costs.

It is difficult to see an externality in these situations because transaction costs are low enough to allow the parties to negotiate a better outcome, which they routinely do. If the goal is to understand or explain the terms of trade observed in the real world as a function of the costs of transacting, it is literally accurate in the Pigouvian sense to say that trade internalizes externalities resulting from the absence of trade. Any claim of real-world externalities should be met with a healthy skepticism and a willingness to drill down to identify the relevant costs of transacting and equilibrium conditions before concluding there is a problem that needs fixing. It may be that corrective government regulation is appropriate, but, at least where the par-

ties deal directly, the case should first be made that the government has a comparative advantage over the parties in reducing the relevant transaction costs, and that the regulation will, in fact, reduce these costs.

There are countless examples of externalities being internalized in private markets, and this internalization occurs even where the transacting parties are anonymous to one another.[140] Cars now come equipped with sensors, cameras, and warning mechanisms that help spatially challenged drivers park, which reduces the delay other drivers experience. Grocery stores supply shoppers with carts having seats to keep young children from wandering and unloading shelves for entertainment, allowing other shoppers to save valuable time and the store owner to increase prices incrementally without losing sales. Coffee shops now have smart-phone apps to make preordering and payment simple and quick, thereby reducing customer waiting times. The list of externalities routinely internalized to the advantage of interacting parties is endless but goes largely unnoticed.

Cheung may have been the first to develop "a theory of contractual choice"[141] to show how private parties in the real world successfully avoid market failure of the kind Pigou hypothesized.[142] Prior to Cheung's insightful work, development economists considered share contracting in agriculture inefficient because tenants receive only a fraction of the crop but bear the entire cost of variable inputs including their own labor, a classic positive externality.[143] The inference was that they would undersupply effort. Development economists generally considered fixed rent contracts more efficient because the tenant who makes on-site decisions about working the land bears one hundred percent of the consequences of any inefficiency. Cheung pointed out that private landowners can choose between fixed rent and cropshare contracts, and that in equilibri-

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140. *See generally* STEVEN N.S. CHEUNG, THE MYTH OF SOCIAL COST (3d ed. 1992).

141. *See* John McManus, *The Theory of Share Tenancy by Steven N. S. Cheung*, 3 CAN. J. ECON. 349, 350 (1970).

142. *See generally* STEVEN N.S. CHEUNG, THE THEORY OF SHARE TENANCY (1969).

143. *See, e.g.*, Charles Issawi, *Farm Output Under Fixed Rents and Share Tenancy*, 33 LAND ECON. 74, 74–76 (1957).

um they often chose cropshare.[144] Development economists characterized landlords who did so as irrational. Yet Cheung convincingly shows that non-price terms of the cropshare contract mitigate the undersupply problem by more carefully clarifying who has what rights and responsibilities.[145] He systematically explains the choice between fixed rent and share contracts based on variations in transaction costs and crop risk across different crops. Depending on circumstances, cropshare contracts can be either more or less efficient than fixed rent contracts.[146] He empirically tests his transaction-cost-versus-risk-aversion hypothesis and fails to reject it.[147]

A large amount of early scholarly work on transaction costs shows that the alleged externalities used to support calls for government regulation were sometimes imaginary. In 1973, Cheung responded to Meade's 1952 description of insoluble market failure between beekeepers and apple orchardists.[148] According to Meade, because of the parties' inability to transact and price the pollination services beekeepers provide orchardists or the nectar the orchardists provide beekeepers, the parties will devote too few resources to growing apples and raising bees.[149] As did Pigou, Meade concluded that the problem of "unpaid factors" could be addressed only by government imposed taxes or subsidies.[150]

Cheung's analysis of the beekeeping industry buried these claims. While thumbing through the yellow pages of the local telephone directory one day, he came across advertisements offering beekeeping services.[151] In talking with beekeepers and orchardists, he soon found that they routinely negotiate over pollination services and nectar collection. What is more, the

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144. *See* CHEUNG, *supra* note 140, at 68.

145. *See id.* at 66–72.

146. *See id.* at 72–79.

147. *See id.* at 158–59.

148. *See* Steven N. S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 J.L. & ECON. 11 (1973). Cheung notes that "[Pigou deleted] the example of two roads . . . from later editions of The Economics of Welfare, presumably in an attempt to avoid the criticism by F. H. Knight." *Id.* at 11 n.2.

149. *Id.* at 12 (citing J. E. Meade, *External Economies and Diseconomies in a Competitive Situation*, 51 Econ. J. 54, 56–57, 58 (1952)).

150. *Id.*

151. *Id.* at 19.

terms of their agreements systematically vary across different crops consistent with the hypothesis of joint wealth maximization constrained by the cost of transacting.[152]

Apple trees, it turns out, require beekeeper services for pollination in the early spring but yield very little nectar for honey. Alfalfa grown for hay requires no pollination services but yields ample nectar for honey. Although his hand-assembled database is limited, Cheung finds strong empirical evidence that apple orchardists pay beekeepers to place their hives nearby in the spring and beekeepers pay alfalfa growers for the right to place their hives near alfalfa fields later in late summer.[153] The other agreed terms and customary practices are remarkably consistent with constrained wealth maximization.[154]

Economists working in the Pigouvian tradition have also used lighthouses as evidence of market failure and the need for corrective government regulation. Lighthouse keepers, the story goes, are unable to charge ship captains for their warning services on dark and stormy nights. Because of the unpaid factor, there will be too few lighthouses, and a system of government subsidies is in order. Notable economists including John Stuart Mill, Pigou, Henry Sidgwick, and even Nobel laureate Paul Samuelson all subscribed to this story of market failure.[155]

On investigating, Coase found that the British lighthouse system had largely relied for centuries on private parties to finance, build, and operate lighthouses.[156] Rather than government taxes and subsidies, private lighthouse owners routinely levied fees on ships large and small.[157] Fees varied according to economic circumstances. Collecting them was often a simple matter of visiting ship captains in nearby ports to request payment. Concurrently, Trinity House, an ancient quasi-public or-

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152. *Id.* at 26.

153. *Id.* at 23, tbl. 2.

154. Cheung reports that the parties rarely resort to written contracts, but when they do it is primarily to serve as evidence for beekeepers to secure bank financing. Apparently, it pays the parties to incur the transaction costs of formalizing their agreements to reduce the transaction costs beekeepers face in negotiating bank financing. *Id.* at 29.

155. *See* R.H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357, 357–60 (1974).

156. *Id.* at 363–64; *see also* ALLEN, *supra* note 127, at 172–79.

157. *See* Coase, *supra* note 155, at 364–65.

ganization descended from a medieval seaman's guild, also financed and owned lighthouses and administered fee collection for centuries based on Crown patents.[158] Trinity House eventually came under government oversight by the Ministry of Trade and consolidated its control over privately owned-lighthouse, but the system of self-funding continued at least up to the time of Coase's work.

Worth noting is the entrepreneurial role private lighthouse firms played. Clearly these firms succeeded in building lighthouses in the most precarious circumstances of the sea's destructive forces. Trinity House often contracted for their construction services in one way or another.[159] In many cases, it appears the private firm that built a lighthouse in a precarious location retained ownership and collected fees until such time that the lighthouse's survival became reasonably certain, at which time ownership often devolved one way or another to Trinity House. The private builder therefore bore the residual from the lighthouse's structural integrity over its early years. Once that was proven, Trinity House assumed ownership bore the residual from efficient administration and fee collection.

The cooperative adjustments market participants make for mutual gain are relentless and often subtle, even where the parties are anonymous to one another. Consider taxes. The standard neoclassical analysis of tax incidence makes several interesting points regarding the likely effect on price, output, the distribution of tax burden, lost gains from trade owing to resource misallocation, and the like, but the point of interest here is that producers and consumers have a common interest in cooperating to reduce the tax burden in terms of both total tax payments and lost gains from trade.

Barzel extends the neoclassical model of taxation and demonstrates the ingenuity transacting parties often summon when it comes to cooperative wealth capture.[160] In the U.S., the late 1950s and 1960s witnessed a substantial increase in state cigarette taxes, which were often levied at a fixed dollar amount (say 11¢) per pack, with the pack price in the neigh-

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158. *See id.* at 363.

159. *See id.* at 363–65.

160. Yoram Barzel, *An Alternative Approach to the Analysis of Taxation*, 84 J. POL. ECON. 1177 (1976).

borhood of 30¢ pack.[161] The tax rate varied substantially across states.[162] Yet packs of cigarettes are not fundamentally what consumers value. Instead they want something more akin to "smoking pleasure." Not all packs are alike when it comes to smoking pleasure, either at a given moment in time or through time. In response to higher taxes, producers and consumers adjusted by moving from eighty-five millimeter to one-hundred millimeter cigarettes, regular- to king-sized, lower- to higher-quality tobacco, and in-store to vending machine purchases (which include valuable convenience with every pack).[163] This allowed them to transact more smoking pleasure in every pack and per dollar of tax paid. The tax per pack was fixed, but not the size of packs or the tax per unit of smoking pleasure.

Unit sales of larger packs were no doubt more than what otherwise would have occurred, and per pack prices adjusted upward, surprisingly in many states by more than the amount of the tax.[164] This is theoretically impossible under standard neoclassical analysis, which assumes the characteristics of the good remain fixed. The reduction in the number of packs traded reduced total tax payments by more than enough to compensate for the added costs producers incurred providing consumers with larger packs of higher quality tobacco. Prior to the tax, the new larger packs would have been sub-optimal. Rather than direct bargaining, competition drove these adjustments.

The tax laws, although superficially clear, were incomplete and subject to joint wealth-increasing adjustments by self-interested market participants. By failing to carefully define what constituted a "pack" of cigarettes, state tax laws failed to clearly define the government's legal rights to collect taxes. This left value in the public domain and subjected it to capture by producers and consumers, who reclaimed economic property rights to some portion of their lost gains from trade through

161. *See id.* at 1193.
162. *See id*.
163. *See id*.
164. *See id.* at 1194.

cooperative adjustments in the characteristics of the taxed good.[165]

Umbeck's examination of the famous California gold rush of 1848 extends Cheung's theory of contract choice.[166] He shows that when gold was first discovered miners' initial reaction was to form into groups to work gold-bearing land under sharing contracts.[167] He specifies the trade-offs between transaction costs and risk across sharing and land allotment contracts and shows that as population in the gold fields rose the optimal group size also rose. The miners then systematically abandoned high transaction cost sharing contracts in favor of low transaction cost land allotment contracts.[168]

Scholars have conducted a large amount of empirical testing of transaction cost economics. A major theoretical development came with Allen and Lueck. They reject a trade-off between risk aversion and transaction costs as a basis for contract choice in favor of a trade-off between alternative transaction costs.[169] As they explain it, "[the] difficulty with [risk-based] models is that they have been short on testable hypotheses because they rely on measurement of risk preferences or proxies for them."[170]

Their analysis of over 1600 cropshare contracts in the American Midwest includes the traditional moral hazard and incomplete-contracts problems, but adds the transaction costs of allocating both the responsibility for inputs and the divisions of

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165. Similar adjustments have occurred in other goods subject to a per unit tax. The 1960s witnessed large increases in the per gallon gasoline tax, following Pigou, to correct the negative pollution externality motorists "imposed" on those who wanted to breath fresh air. The market adjusted by moving to higher-lead gasoline to boost octane content and per gallon mileage, thereby reducing the number of gallons transacted and total tax payments. Although fewer gallons of gasoline were traded, each gallon contained more lead, gasoline's primary pollutant. The net effect may have been an increase in lead emissions. *See id.* at 1195. Unlike a per unit tax, with a percentage, or *ad velorem*, tax on the purchase price consumers and producers have a common interest in unbundling valuable attributes of the ex ante economic good and to transact them separately free of the tax. *See id*.

166. *See* John Umbeck, *A Theory of Contract Choice and the California Gold Rush*, 20 J.L. & ECON. 421, 421–22 (1977).

167. *See id*. at 422–23.

168. *See id*. at 435–37.

169. Douglas W. Allen & Dean Lueck, *Transaction Costs and the Design of Cropshare Contracts*, 24 RAND J. ECON. 78, 79 (1993).

170. *Id*.

outputs—economic property rights—between the farmer and the landowner. Uncertainty resulting from weather, pests, and other exogenous factors remains important in the analysis. Rather than entering the model through risk aversion,[171] however, it enters on the transaction cost side by raising prospects that the farmer might attempt to capture value by undersupplying effort, overusing non-contractible soil attributes such as moisture content, underreporting crop output, and overreporting costly shared inputs such as seed, fertilizer, herbicides and pesticides, power for irrigation, crop drying costs, and so on.[172] Even risk neutral parties will be averse to ex post variation in these behaviors because of the potential for moral hazard and the costliness of measuring one another's true contribution.

The authors hypothesize that cropshare contracts have the benefit of reducing the farmer's incentive to deplete the capital value of the soil.[173] They predict that the parties will choose cropshare contracts over cash rent contracts when the potential for soil exploitation is high and the measurement costs of dividing the crop are small.[174] Their empirical results fail to reject their transaction cost theory and otherwise overwhelmingly support it.[175]

IV. WHAT ARE TRANSACTION COSTS?

For the concept of transaction costs to be useful in social science, they must be defined specifically enough that any theory relying on them is capable of being refuted. As Cheung notes: "A theory potentially consistent with everything explains nothing."[176] And regardless of the merit of transaction costs as an analytical tool for the social sciences, for the purposes of this

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171. For other work that relies purely on transaction costs rather than risk aversion, see Sanford J. Grossman & Oliver D Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 7 J. LAW, ECON. & ORG. 24 (1991); Keith B. Leffler & Randal R. Rucker, *Transaction Costs and the Efficient Organization of Production: A Study of Timber-Harvesting Contracts*, 99 J. POL. ECON. 1060 (1991).

172. *See* Allen & Lueck, *supra* note 169, at 79, 81.

173. *See id.* at 80.

174. *See id.*

175. *See id.* at 89–92.

176. Steven N.S. Cheung, *A Theory of Price Control*, 17 J.L. & ECON. 53, 54 (1974).

Article the concept must be specific enough to assist regulators called on to perform TCBA of proposed rules.

An intuitive definition of transaction costs is that they consist of all costs absent from a one-man ("Robinson Crusoe") economy.[177] That is, they encompass the costs of all human interaction of any economic substance. For most purposes this definition is overly broad, among other reasons because it would subsume transportation costs, which better qualify as garden-variety production costs common to frictionless models.

A second possible definition of transaction costs is that they consist of the costs of transferring legal ownership or, as Coase stated by way of example in *The Problem of Social Costs*, the "costs of market transactions."[178] Though adequate for some purposes, this definition is too narrow for many others, in part because it excludes the costs of transactions in which no transfer of legal ownership occurs, such as those occurring within firms and other organizations, or even in a market setting involving bargaining and strategic behavior.

A third definition is that transaction costs consist of the costs of establishing and maintaining *economic* property rights.[179] This definition accommodates a world in which ownership is never complete, always leaving some value in the public domain and subject to competitive capture. Because Pigou's road lies in the public domain, its travelers establish de facto ownership over their place on the road by occupying it first. A competitive race to first possession results in crowding and congestion and overuse, which dissipates some of the road's potential value.[180]

Even where a private road owner holds legal title and restricts access to those who pay a toll, however, for practical purposes some of its value inevitably remains in the public

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177. *See* Douglas W. Allen, *Transaction Costs*, *in* 1 ENCYCLOPEDIA OF LAW & ECONOMICS 893, 906 (1999).

178. Coase, *supra* note 1, at 37; *see also* Allen, *supra* note 135, at 6.

179. Allen, *supra* note 135, at 5.

180. Absent an owner, it is conceivable those who want to use the road can get together and negotiate efficient restrictions on use, but the cost of such collective action—a transaction cost—is likely to be prohibitive in many settings. Private ownership can be seen as a transaction-cost-reducing stand-in for collective action because a private owner not only profits from good outcomes but loses from bad outcomes.

domain because the costs of perfect exclusion are too high. Toll-paying travelers have the ability to capture this value, at a cost, and face a competitive race to do so against other travelers, and ultimately the road owner. They might agree to constrain their behavior, but unless the road owner installs a perfect and very costly system of cameras, helicopters, radar detectors, and so on, to measure travelers' actual behavior, any given traveler can extract more value from using the road than is jointly efficient.

The parties would probably agree that travelers have the right to stop on the roadside to fix a flat tire, but what about to take a nap or watch wildlife, both of which are likely to slow other travelers and reduce the toll they are willing to pay. What about speeding, which may benefit the speeder but increases the prospect of injury to others and also reduces the amount of toll they are willing to pay? What about vehicle weight limits to save wear-and-tear on the road? If the toll is assessed based on weight, any trucker knows to fill his fuel tanks after getting a weight certificate rather than before. This type of maximizing behavior is reciprocal. Despite advertising safe passage, the road owner might neglect to erect warning signs and other markers, to ward off highwaymen, or to keep cattle and large wildlife from straying onto the road. All of these possibilities and more feed into the equilibrium toll and other terms of travel, which the owner can vary by time of day, weather conditions, size or weight of vehicle, traveler loyalty, and so on, so as to mitigate dissipation, but subject to the costs of transacting.

Who ends up with what rights in practice depends on the parties' opportunities to capture value lying in the public domain, which depends predictably on the costs of transacting. Equilibrium occurs where the marginal cost of transacting equals the marginal "external cost" or "external benefit," depending on the situation. For any level of activity beyond A^o in Panel A of Figure 2, the gains from reducing the level of activity exceed the transaction costs, consistent with market equilibrium. The lengths of line segments AB and CD in Figure 2 illustrate this point. If the costs of transacting at A^o in Panel A are less than the value reflected in line segment AB, the parties would find it in their interest to move to a lower and more socially efficient level of activity. At A^o, the marginal private cost (MPC) of the activity is equal to the marginal social cost (MSC)

inclusive of transaction costs. The parties are in equilibrium in the sense that neither is interested in adjusting given the transaction costs they would incur to do so. This outcome is socially optimal since the transaction costs of avoiding the externality exceed the social benefits.

This framework provides a theoretical basis for understanding the structure of economic property rights, as well as the effect any external intrusion such as government regulation is likely to have on the parties' decisions. It also makes clear that any regulation that reduces transaction costs will move the interacting parties toward A*. A parallel story can be told for Panel B and positive externalities. A reduction in transaction costs is therefore the theoretically ideal goal of regulation aimed at correcting market failure, and of course this need not preclude alternatives. A showing by regulators that a proposed rule will reduce transactions costs (for parties that deal face-to-face in competitive markets) is a sufficient condition for the rule to increase social welfare. It is possible a rule that increases transaction costs reduces other costs, such as standard production costs, by an amount sufficient to increase social welfare, and this is where traditional CBA may be helpful. Nevertheless, to understand the nature of the problem it will normally pay to examine the transaction costs that bring it about.

Doug Allen correctly defines economic property rights as the ability, whether legally protected or not, to exercise a choice over an economic good.[181] Economic property rights are de facto in nature rather than de jure. [182] This definition raises three questions. First, what maximand is appropriate for hypothesizing about the right-holder's motivation in exercising his choice? Second, what is meant by an economic "good"? Third, what is meant by a "right"?

Scholars who focus on the economics of property rights have had success hypothesizing that people maximize expected wealth net of transaction costs. As a maximand, wealth has two

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181. Allen, *supra* note 177, at 898; Allen, *supra* note 135, at 3. Being concerned about transaction costs as the basis for explaining individual choice, transaction cost analysis often assumes transacting parties are risk neutral. This is clearly an unrealistic assumption, but one that has shown surprising explanatory power.

182. Donald J. Boudreaux and Roger Meiners, Externality: The Biggest Straw Man of Our Time (unpublished working paper).

favorable attributes helpful for understanding the structure of economic property rights. Wealth is a stock concept representing future expected value flows discounted to the present at the appropriate interest rate. It concentrates attention on decisions having intertemporal consequences. Wealth maximization implies that people will invest to enhance their wealth to the extent, and only to the extent, that their expectations about capturing the investment returns are likely to be met, that is, to the extent economic property rights are secure. Wealth maximization recognizes that any theory of property rights must account for multiple periods. In addition, value, and hence wealth, is potentially measurable in the real world through revealed preference.[183] Revealed preference is defined as the actor's willingness to give up some valued good to get another good or vice versa.[184] It is often observable at the margin in the competitive struggle to establish or maintain economic property rights.[185]

Following Demsetz, a "right" is forward-looking and reflects the ability of the holder to form accurate expectations about capturing the value of an economic good.[186] The more definite the right the more a wealth maximizing right-holder will invest to increase its net present value. Any number of mechanisms effectively increases the certainty of rights. Law with its sanctions is one of them. Others include reputation, custom or social norms, and the threat of violence and other forms of self-help. Each of these, in relevant situations, carries its own transaction costs, which has implications for the structure of economic property rights.

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183. *See* D. Bruce Johnsen, *Wealth* is *Value*, 15 J. LEGAL STUD. 263, 264–65 (1986).

184. The CBA literature characterized the values as "willingness to pay" (WTP) to get a good one does not have and "willingness to accept" (WTA) other goods to give up a good one does have. *See* Richard O. Zerbe, *The Legal Foundation of Cost Benefit Analysis*, 2 CHARLESTON L. REV. 93, 108–10 (2007). Note that the text emphasizes willingness to *forgo* rather than willingness to *pay*. Forgone value may be either paid to another party or dissipated, and this distinction is extremely important where legal property rights are imperfectly defined and the relevant parties are attempting to capture value lying in the public domain.

185. *See* DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 19, 22 (2000); Johnsen, *supra* note 183, at 274.

186. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967).

The standard definition of an economic "good" is that it consists of anything for which more is preferred to less. But what is the "thing"? It is not necessarily a tangible object. Any tangible object, Blackacre for example, will generate value on multiple dimensions, each of which might be treated as a separate intangible "thing" owned, in law or in fact, by separate parties and with their boundaries imperfectly defined and enforced.[187] Partition of the surface and mineral estates in land, various servitudes on the surface estate, leases, and usufructs are obvious examples.

Economic property rights consist of the ability to exercise choice through time over one or more intangible sources of value that can be regarded as a capital asset,[188] often but not invariably embodied in an identifiable thing in the following sense. "Rights" of any kind do not simply give the holder the ability to capture value; they also give the holder the ability to expect to capture value, potentially as a stream that flows out over time on some dimension of a legally ownable good. Rights to the yearly harvest of apples from an orchard, rights to the orchard's yearly flow of nectar for honey, and rights to collect branches periodically pruned from the trees for use as firewood are obvious examples. Rights over these value flows can be unbundled and packaged into separate intangible assets, with their capitalized value, or wealth, equaling the expected value of the net flows discounted to present value.[189]

To the extent the structure of rights is clear and reliable, the parties often find it worthwhile to cooperate to increase their joint wealth by making specialized investments in their respective assets. Specialized investment to protect an asset from capture by others is one source of value creation. Another, conditional on the first, is specialized investment to increase the productivity of the asset.

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187. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691–92 (2012).

188. Even in law, intellectual property rights are intangible and generally have no association with any tangible thing.

189. *See* Smith, *supra* note 187, at 1693 ("Property organizes this world into lumpy packages of legal relations—legal things—by setting boundaries around useful attributes that tend to be strong complements. The law of property in effect encapsulates these lumpy packages, or modules, semitransparently from other modules and the outside world generally." (footnote omitted)).

Economic property rights motivate specialists to make informed investments in the assets over which they exercise choice, especially where future states of the world are uncertain. In many settings, an asset owner cannot simply hire a valuation specialist as a consultant to provide the necessary expertise because the cost of assessing the specialist's valuation in a noisy world are too high.

As the world unfolds, asset values often depart from what was expected at the moment of investment. This can occur because of random noise, which the specialist cannot control, or because he exercised poor judgment or simply shirked—call it "entrepreneurial moral hazard." Knowing little about the specialist's expertise, a non-specialist owner lacks the wherewithal to effectively assess whether random noise or moral hazard caused a bad outcome. Where the costs of transacting allow, requiring the specialist to make the investment and to own the results by bearing the asset's residual value averts moral hazard and increases the gains from trade.[190] Assigning responsibility in this way is an important function of economic (and legal) property rights. [191]

Secured lending provides insight into one among many possible examples of how intangible assets can be unbundled and owned separately from a tangible thing. Imagine construction of a commercial building to be used as an office tower by a specialist in office-tower (OT) management. Unknown to the OT specialist, should the bad state come to pass, the best alternative use of the office tower is converted into a hotel. Public reports confirm that office-tower-to-hotel conversions have occurred in significant numbers at times during the past.[192] Office

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190. YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 56 (1989); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 782 (1972).

191. If someone claims to have special expertise at creating value on Dimension X of an identified thing, it is efficient for him to own the associated residual subject to the constraint of costly transacting. Alternatively, if economic ownership of Dimension X is given to someone with restrictions on resale, as with restricted stock, he has an incentive to invest in specialized expertise to enhance its value.

192. *See, e.g.*, Drew Ward, *Old offices get new lease on life as hotels*, WALL ST. J., Aug. 21, 1996, at B1; Laura Kusisto, *Desks Swapped for Bed: As Demand for Rooms Increases, Office Building Are Converted to Hotels*, WALL ST. J. (Mar. 25, 2012), https://www.wsj.com/articles/SB10001424052702303404704577304041654456890 [https://perma.cc/Q2GL-AW4G]; Kosaku Narioka, *Land-Squeezed Developers Con-*

towers with rectangular floor plans make better conversions than those with square floor plans because they ensure each room has a window without leaving dead space in the center of the building. For given square footage, however, the construction costs of rectangular floors plans are higher because of their greater wall perimeter per square foot of floor space.

In contemplating the investment, an OT specialist is likely to wonder what he can do with buildings of various configurations if the bad state occurs. If he finances a portion of construction cost with secured debt, he is likely to find he can borrow more to finance a tower with a rectangular floor plan than one with a square floor plan, because the secured lender is a specialist at knowing what can be done with the building in the bad state and how much it will fetch when redeployed should the OT specialist default. The lender bonds his valuation of the building's redeployment value as a hotel by lending this amount minus anticipated transaction costs and taking a security interest in the tower. If he is correct, he profits, and if he is incorrect, he suffers losses. Embodied in the tangible thing, the building, are two intangible assets, an office tower and a hotel, each owned by the appropriate specialist.[193] And this is true even in the absence of secured lending, although it may remain unknown to the OT specialist, making it difficult for him to know when redeployment is called for and raising the cost of discovering the best alternative use of the OT.

The OT specialist need not know any of this if he borrows with a secured nonrecourse loan. He makes his decision about the best configuration of the building for use as an office tower after trading off alternative construction costs and loan terms from different lenders. Ex post, he then defaults if the revenue the building generates in the future falls short of his mortgage payments, which is the jointly efficient thing to do. The OT

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vert Office Buildings Into Hotels, WALL ST. J. (May 2, 2017), https://www.wsj.com/articles/land-squeezed-developers-convert-office-buildings-into-hotels-1493736404) [https://perma.cc/Q5F6-AEKA].

193. A skeptic might point out that secured lenders such as banks have no apparent specialized expertise. The response is that they serve as intermediaries between different specialists. It is clear from some industries, however, that lenders do have specialized expertise, as in the case of aircraft leasing-lending. *See generally* Michel A. Habib & D. Bruce Johnsen, *The Financing and Redeployment of Specific Assets*, 54 J. FIN. 693 (1999).

specialist bears the residual from his accuracy in predicting the payoff to the building as an office tower, the lender bears the residual from his accuracy in predicting the building's redeployment value, and the arrangement avoids ex post bargaining on revelation of the state. Default is a feature, not a bug.

Hiring a consultant to provide the information embedded in the lender's valuation and actually carrying out the conversion would require the OT specialist to incur inordinate transaction costs, for example by spending resources bargaining ex post in the event redeployment becomes necessary. Secured debt reduces the transaction costs of discovering this information and arranging for redeployment by efficiently allocating ownership across states of the world in a way that is nearly self-executing.[194]

V. SUMMARY AND CONCLUDING REMARKS

The theoretical foundation Coase laid by highlighting the cost of transacting as a basis for understanding economic organization has dramatically changed the way we should regard regulation. One need only refer to the history of antitrust case law to see the dramatic influence of Coase's work. Where once courts condemned vertical business arrangements as illegal per se, vertical arrangements now command a full factual inquiry under the rule of reason, in large part because courts have recognized they reduce the costs of transacting.[195] In practical effect, they have taken on reasonable per se status. Recent judicial review of both executive and independent agency rulemaking requires regulators to assess the costs and benefits of proposed rules and to justify them on some kind of proportionality basis. This requirement stands to impose an equally dramatic constraint on the growth of the administrative state if it is properly conceived and implemented.

Cost-benefit analysis is one approach to proportionality review, but it is plagued by serious informational problems that

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194. *See generally id.*; Michel A. Habib & D. Bruce Johnsen, *The Private Placement of Debt and Outside Equity as an Information Revelation Mechanism*, 13 REV. FIN. STUD. 1017 (2000); D. Bruce Johnsen, *The Quasi-Rent Structure of Corporate Enterprise: A Transaction Cost Theory*, 44 EMORY L.J. 1277 (1995) .

195. *See generally* Johnsen, *supra* note 114.

the neoclassical model was never designed to address, such as measuring infra-marginal welfare or valuating non-traded goods. Instead, the model is designed to generate comparative statics predictions capable of being tested by real world facts, a task it has performed admirably well with increasing success, including by integrating transaction costs into the analysis.

This Article proposes an alternative approach to assessing proportionality, TCBA. Transaction cost-benefit analysis captures Coase's fundamental point that the parties to market transactions routinely cooperate to maximize the joint gains from trade but that transaction costs keep them from achieving first best resource allocation. In a Coasean framework, any regulation that reduces the parties' costs of transacting can be presumed to increase their joint gains from trade net of transaction costs.

Unlike traditional CBA, which requires a cardinal accounting of the total costs and benefits of a rule change, TCBA has the benefit of requiring the regulator to identify only the direction of the marginal effect the rule is likely to have on the parties' costs of transacting, leaving them to conduct the associated proportionality review. Allowing regulators to establish a presumption of proportionality by showing a proposed rule reduces the relevant costs of transacting should substantially reduce the informational burden they face. It is both consistent with the neoclassical model's comparative statics focus and with the notion that correcting market failure should be the driving force behind regulation.

Showing that a proposed rule reduces transaction costs is not the only way to establish proportionality, and it may be inappropriate or impractical in some settings. Transaction cost-benefit analysis is most workable where the regulated parties transact face-to-face in competitive markets. In these settings, regulators should be able to identify the relevant parties, the economic good and market in which they transact, the nature of the market failure they suffer, and the relevant transaction costs that prevent them from achieving first-best resource allocation. With this information at hand, a determined regulator can plausibly predict how a proposed rule is likely to affect the relevant transaction costs. Reliably doing so requires the regulator to wholly embrace the neoclassical model's fundamental insight that market participants, though remorselessly self-

interested, will normally try to cooperate for their mutual gain. And this true no matter how grasping, or ill-informed, or irrational they actually appear to be. Unless observed departures from *homo economicus* can be properly integrated into the model's analysis they should be treated as pure noise.

Transaction cost-benefit analysis is likely to prove most helpful where transaction costs are fairly low. Examples include the many vertical relationships currently subject to regulation, including but not limited to the following: (1) the issuers of corporate stock, the broker-dealers who place and trade their securities, and the institutional and retail clients who hold them; (2) the securities exchanges, their members, and the holders of corporate securities; (3) commodities brokers and their clients; (4) merchants, credit card-issuing banks, and cardholders; (5) defined benefit pension plans and their members; (6) employers and employees in the context of workplace safety; (7) product-market manufacturers, retailers, and consumers in the antitrust context; (8) pharmaceuticals and medical devices, doctors, and patients; etc. Even in these low transaction cost settings, however, traditional CBA should also be performed, if only as a robustness check.

At the other extreme, TCBA may provide few clear answers where transaction costs are high, as with the provision of vaccines to protect against infectious diseases; the management of migratory birds, whales, or other fauna that do not respect sovereign boundaries; and the control of emissions from polluting factories whose smoke comes to ground many miles from the source, for example. Determining the direction of the effect of proposed regulations on the costs of transacting in these settings may be extremely difficult, but it is certainly no more difficult than the cardinal accounting for costs and benefits that traditional CBA would require.

At the very least, TCBA explicitly recognizes an overall framework essential for the proper conduct of CBA, and both should be conducted in parallel. Masur and Posner correctly argue that requiring regulators to perform CBA according to established protocol would be beneficial even where costs and benefits are impossible to reliably quantify because it puts the regulator on record and provides a basis for ex post iterative

learning.[196] Similarly, even where transaction costs are high, TCBA should be used to inform the long-run process of knowledge accumulation.

Transaction costs may appear extremely high, potentially even seemingly prohibitive, in some settings, such as with intergenerational exchange. How do future generations make their willingness to pay felt in the present? In certain settings the solution is deceptively simple. Simply create some form of legal property rights. Allowing private parties to own wildlife stocks has proven to be a powerful mechanism for preservation in many cases. The shift from prohibiting trade in alligator hides to allowing trade in certified farm-raised alligator hides probably helped saved the species.[197] With trade in and profit from alligator hides impossible, habitat destruction due to development led to an alarming decline in numbers during the 1960s. The shift to allowing trade in certified farm-raised alligators' hides put profit into preservation. Alligator populations rebounded.[198] All that was needed was a reliable certification process for legitimate private ownership of hides.

Ted Turner is known for owning and stewarding an expanding population of bison on his large, heavily fenced landholdings in the Rocky Mountain West.[199] With private ownership, future generations' willingness to pay for bison meat or hides, or just for the opportunity to view bison, in their natural setting is transmitted through the price mechanism to the current generation by private ownership. No one has ever expressed fear, for example, that chickens will go extinct and leave future generations wanting. Their owners have too much to gain by transferring chicken populations to the next generation for profit.

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196. Masur & Posner, *Cost-Benefit Analysis*, *supra* note 5, at 945.

197. *See* Robert A. Thomas, *Hunting Alligators,* PERC REPORTS, Sept. 1999, at 12, 12; LA. DEP'T WILDLIFE & FISHERIES, *General Alligator Information*, http://www.wlf.louisiana.gov/general-alligator-information (last visited Jan. 21, 2019) [https://perma.cc/7AWU-JU7Z].

198. *See* Thomas, *supra* note 197, at 12; LA. DEP'T WILDLIFE & FISHERIES, *supra* note 197.

199. *See Turner Ranches FAQ*, TURNER ENTERPRISES, INC., https://www.tedturner.com/turner-ranches/turner-ranches-faq/ [https://perma.cc/YG3X-A6R5] (last visited Jan. 15, 2019); Deena Shanker, *Bison Returned From the Brink Just in Time for Climate Change*, BLOOMBERG (July 31, 2017), https://www.bloomberg.com/news/features/2017-07-31/bison-returned-from-the-brink-just-in-time-for-climate-change [https://perma.cc/R8S2-NLTP].

Reports have surfaced recently that honeybee colonies are threatened owing to disease, and that they are dying out at an alarming rate.[200] The results, we are told, could be disastrous because honeybees are an "apex" species essential for pollination and possibly even for mankind's very existence.[201] More sober reports reveal that private owners—beekeepers—are introducing new colonies at the replacement rate.[202] At least for the time being, honeybees are safe because they are privately owned.

In each of these examples, private property reduces the transactions costs the affected parties must bear to make their valuations felt. Where private ownership is too costly to be feasible, intermediate solutions have proven viable so that legal property rights properly channel the competitive race for economic property rights and thereby reduce the costs of transacting. Throughout the world, various marine fisheries were once in shambles, with dangerously low and declining stocks owing to open access resource rights.[203] Under open access, ownership of individual fish occurs only when they are reduced to the fisher's possession under the law of capture. No fisher has the incentive to reduce fishing effort to maintain or enhance the stocks necessary for regeneration. The race for economic prop-

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200. Sean Rossman, *A Third of the Nation's Honeybee Colonies Died Last Year. Why you should care.*, USA TODAY (May 26 2017), https://www.usatoday.com/story/news/nation-now/2017/05/26/third-nations-honeybee-colonies-died-last-year-why-you-should-care/348418001/ [https://perma.cc/SQ4T-ELVP]; *see also* Alan Bjerga, *Honeybees May Be Dying in Larger Numbers Due to Climate Change*, BLOOMBERG (May 24, 2018), https://www.bloomberg.com/news/articles/2018-05-23/bee-death-increase-may-be-tied-to-climate-change-survey-says [https://perma.cc/4H6V-XBQ6].

201. One third of food eaten by humans is directly or indirectly pollinated by honeybees who "pollinate about $15 billion worth of U.S. crops each year" including the entirety of the U.S. almond industry. Rossman, *supra* note 200.

202. Shawn Regan, *How Capitalism Saved the Bees*, PERC REPORTS (July 20, 2017), https://www.perc.org/2017/07/20/how-capitalism-saved-the-bees/ [https://perma.cc/V36U-3ET7].

203. See, for example, the North Sea herring stock's collapse in the 20th century due to overfishing or the Campeche shrimp fishery's decline due to open access conditions and overfishing. *See* Edward B. Barbier & Ivar Strand, *Valuing Mangrove-Fishery Linkages: A Case Study of Campeche, Mexico*, 12 ENV'T & RESOURCE ECON. 151 (1998); Mark Dickey-Collas, et al., *Lessons learned from the stock collapse and recovery of North Sea herring: a review*, 67 ICES J. MARINE SCI. 1875 (2010).

erty rights dissipated the value of many marine resources and put a large number of species on the endangered list.

Traditional gear and entry restrictions have proven incapable of stemming the decline. The advent of individual transferable quotas (ITQs) has changed all that, in part by reducing transaction costs. With an ITQ system, the regulator sets the total allowable catch for the season and each ITQ holder has a right to harvest his allotted share. With the total allowable catch fixed at presumably sustainable levels, each fisher's share becomes a specific number of fish and there is no need to race to catch fish before others do. With IQTs being transferable, inefficient or high cost fishers are free to sell their rights to those who are more efficient and, therefore, willing to pay an attractive price. The seller receives compensation for relinquishing his rights, harvesting costs fall, and both parties capture gains from trade. What is more, under an ITQ system quota, holders have an incentive to invest to enhance the underlying stocks.[204] The evidence is clear that fish populations across the globe have prospered where ITQs have been implemented.[205] Compared to gear and entry regulations under open access rights, ITQs reduce the transaction costs affected parties face to make their valuations felt and to capture the value flows over which they hold fairly clear legal and economic rights.

Executive Order 12,866 requires executive agencies to base decisions on "the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."[206] This Article argues that TCBA qualifies, and is a plausible alternative to traditional CBA that can serve as both a complement and a substitute. Following Executive Order 12,866, the presumption should be that "the private sector and private markets are the best engine for economic growth" and should be regulated only when the case can be made that they suffer from a "material

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204. *See* TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 107–21 (2001).

205. Christopher Costello & Robert Deacon, *The Efficiency Gains from* Fully *Delineating Rights in an ITQ Fishery*, 22 MARINE RESOURCE ECON. 347 (2007).

206. Exec. Order No. 12,866, § 1(b)(7), 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88 (2012).

failure[]."[207] Observed patterns of interaction that persist in the market presumptively reflect the best efforts of the parties to capture gains from trade, constrained as they inevitably are by the costs of transacting. Sensible regulation must be premised on understanding why, and under what current circumstances, observed market practices reflect an equilibrium determined in part by the costs of transacting and how government regulation might improve the equilibrium by reducing transaction costs. Transaction cost-benefit analysis promises to provide an effective and economically correct tool in the emergent trend to constrain the administrative state.

207. *Id.* pmbl., § 1(a), at 638.

THE CURE FOR AMERICA'S OPIOID CRISIS? END THE WAR ON DRUGS*

CHRISTINE MINHEE** & STEVE CALANDRILLO***

The War on Drugs. What began as a battle waged on morals has created multiple public health crises, and no recent phenomenon illustrates this in more macabre detail than America's opioid disaster. 2017 alone amassed a higher death toll than the totality of American military casualties in the Vietnam, Iraq, and Afghanistan wars combined. With this wave of mortalities came a crash of parens patriae lawsuits filed by states, counties, and cities on the theory that jurisdictions are entitled to recompense for the costs of addiction ostensibly created by Big Pharma. To those attuned to the failures of the Iron Law of Prohibition, this litigious blame game functions merely as a Band-Aid over a deeply infected wound. This Article synthesizes empirical economic impact data to paint a clearer picture of the role that drug prohibition has played in the devastation of American communities, exposes parens patriae litigation as a misguided attempt at retribution rather than deterrence, and calls for the legal and political decriminalization of opiates. We reveal that America's fear of decriminalization has at its root the "chemical hook" fallacy—a holdover from Reagan-era drug policy that has been debunked by far less wealthy countries like Switzerland and Portugal, whose economies have already benefited from discarding the War on Drugs as an irrational and expensive approach to public health. We argue that the le-

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* This Article is dedicated to Bruno Leopold Caterpillar Steenstrup. The authors thank Chryssa Deliganis, Karen Boxx, Tres Gallant, Lauren Sancken, Jonathan Moskow, Anna Deliganis, George Webb, and Irwin Yoon for their helpful thoughts and comments on this Article. We are particularly grateful to Jason Oh, Mary Whisner, and the Marian Gould Gallagher reference librarians for their excellent research assistance, and to the Washington Law School Foundation and the Jeffrey & Susan Brotman Professorship for their generous financial support of this project.

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gal and political acceptance of addiction as a public health issue—not the view that addiction is a moral failure to scourge—is the only rational, fiscally responsible option left to a country that badly needs both a prophylactic against future waves of heavy opioid casualties and restored faith in its own criminal justice system.

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I. INTRODUCTION: DRUG ASSUMPTION RESISTANCE EDUCATION (D.A.R.E.)[1]

"Despair may have made certain American communities more vulnerable to the epidemic. Economic and social factors may have contributed to the kindling—but the explosion in the supply of opioids was a flamethrower."[2]

A. Prohibition Kills

America's opioid crisis is the latest battle in the War on Drugs, with war-like casualties. Like war, our opioid crisis is an entirely manmade, sweeping epidemic of death.[3] Major news outlets report that opioid overdoses have claimed more American casualties in one year alone than did the Vietnam, Iraq, and Afghanistan wars combined.[4] The World Health Organization estimates that 69,000 people die of opioid overdoses

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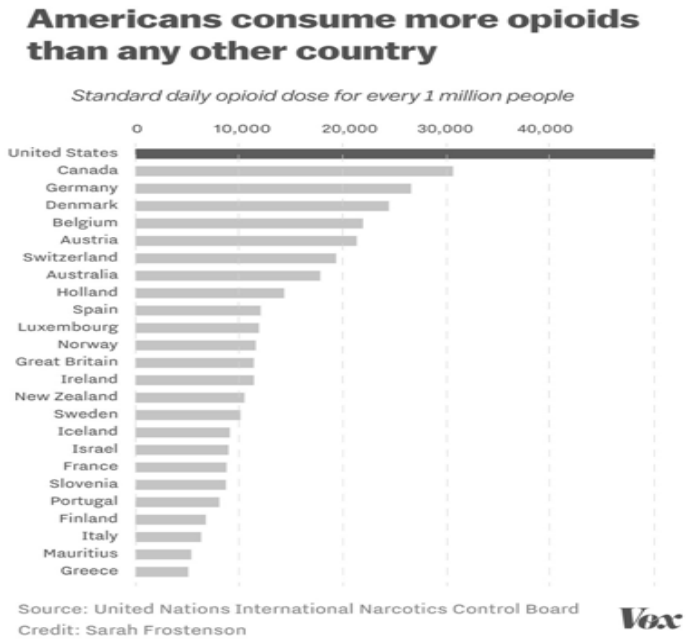
1. Initially founded in 1983 as a partnership between the Los Angeles police department and its public schools, *The History of D.A.R.E.*, D.A.R.E., https://dare.org/history/ (last visited Oct. 29, 2018), Drug Abuse Resistance Education (D.A.R.E.) is a "police officer-led series of classroom lessons" that attempts to teach kindergarteners through high schoolers "how to resist peer pressure and live productive drug and violence-free lives," *About D.A.R.E.*, D.A.R.E., https://dare.org/about [https://perma.cc/S9EF-NWHA] (last visited Oct. 29, 2018). Its ineffectiveness is well documented. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-172R, YOUTH ILLICIT DRUG USE PREVENTION: DARE LONG-TERM EVALUATIONS AND FEDERAL EFFORTS TO IDENTIFY EFFECTIVE PROGRAMS 2 (2003) ("All of the evaluations suggested that DARE had no statistically significant long-term effect on preventing youth illicit drug use"). And yet, Attorney General Jeff Sessions has touted the effectiveness of the program. *See Attorney General Jeff Sessions Delivers Remarks at the 30th DARE Training Conference*, U.S. DEP'T OF JUSTICE OFFICE OF PUB. AFFAIRS (Jul. 11, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-30th-dare-training-conference [https://perma.cc/R7L4-Q3CY] ("We must have Drug Abuse Resistance Education. DARE is the best remembered anti-drug program. I am proud of your work. It has played a key role in saving thousands of lives and futures.").

2. Eric Levitz, *Did Americans Turn to Opioids Out of Despair—or Just Because They Were There?*, N.Y. MAG.: INTELLIGENCER (Jan. 16, 2018), http://nymag.com/daily/intelligencer/2018/01/is-the-opioid-crisis-driven-by-supply-or-demand.html [https://perma.cc/5WVA-J4EY].

3. *See* Julie Garner, *The Opioid Boom*, U. WASH. ALUMNI MAG., https://magazine.washington.edu/feature/the-opioid-boom [https://perma.cc/S9JA-5E56] (last visited Feb. 19, 2019) (quoting UW School of Public Health research professor Gary Franklin, who describes our current opioid crisis as "the worst man-made epidemic in modern medical history").

4. Anthony Zurcher, *Opioid Addiction and Death Mail-Ordered to your Door*, BBC NEWS (Feb. 22, 2018), http://www.bbc.com/news/world-us-canada-43146286 [https://perma.cc/H47F-F9C9].

globally each year[5]—a sum barely greater than the 63,600 Americans who died from opioid overdoses in 2016 alone.[6] And since 2000, over 300,000 people[7]—roughly half the population of the state of Vermont[8]—have died from fatal opioid poisoning. Given that "[m]ore Americans die annually from [opioids] than are killed in car accidents or firearm incidents,"[9] few can deny that the supersized scope of this national tragedy is uniquely American.



5. *Information Sheet on Opioid Overdose*, WORLD HEALTH ORG. (Nov. 2014), http://www.who.int/substance_abuse/information-sheet/en [https://perma.cc/6X78-YS8C].

6. *Opioid Crisis: Overdose Rates Jump 30% in One Year*, BBC NEWS (Mar. 6, 2018), http://www.bbc.com/news/world-us-canada-43305340 [https://perma.cc/M8YY-MRU7].

7. *The Opioid Crisis*, WHITE HOUSE, https://www.whitehouse.gov/opioids/ [https://perma.cc/SK6R-F8JK] (last visited Aug. 6, 2018).

8. According to the U.S. Census Bureau, Vermont's population in 2017 was 623,657. *Population Estimates, July 1, 2017*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/geo/chart/US/PST045217 [https://perma.cc/XX8K-L5YF] (last visited Aug. 6, 2018).

9. Zurcher, *supra* note 4.

Our epidemic is not solely fueled by prescription oversupply, for our country's opioid-related deaths came not in one wave, but three. When listed as a toxicological cause of death, "opioids" include both illegal and legal FDA-approved formulations of the drug. For a diminishing portion of America, the former class is better known. Healthcare providers in one year wrote enough prescriptions to provide each American adult his own bottle of opioids like OxyContin and Vicodin,[10] and incidents of "medicine cabinet" overdoses were reported to have increased for at least a decade after increased prescribing habits began in the mid-1990s.[11]

Ten years after the peak of prescription opioid popularity came a tidal crash of heroin-related overdoses in 2010,[12] with another wave of deaths linked to synthetic opioids like fentanyl following soon after.[13] The U.S. Centers for Disease Control and Prevention (CDC) maintains that the strongest risk factor for heroin use is the "[p]ast misuse of prescription opioids," and describes the transition from off-label use of prescription opioids to heroin abuse as mere "part of the progression to addiction."[14] But according to the U.S. Department of Health & Human Services, increases in opioid-related fatalities are now driven by the use of illicitly manufactured fentanyl hybridized with heroin, counterfeit pills, and cocaine.[15]

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10. *Prescription Opioid Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/prescribing.html [https://perma.cc/KA8E-MDRK] (last updated Aug. 30, 2017).

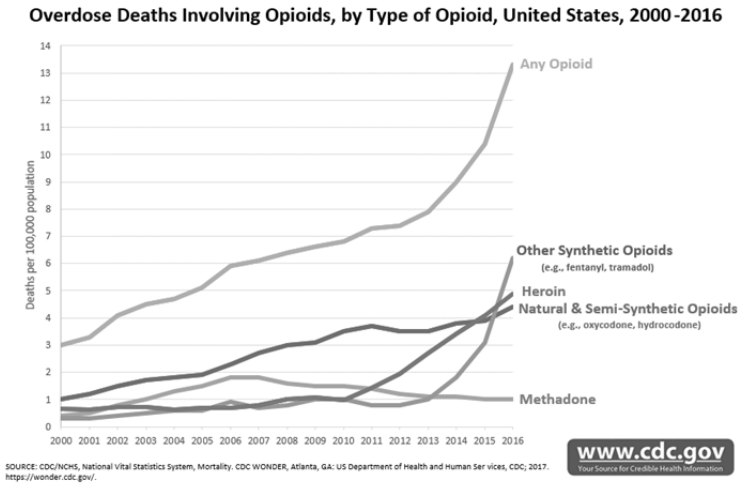
11. *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/epidemic/index.html [https://perma.cc/SKT3-T6F7] (last updated Dec. 19, 2018).

12. *See id.*

13. *See id.*

14. *Heroin Overdose Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/heroin.html [https://perma.cc/66E9-J3KH] (last updated Jan. 26, 2017).

15. *See* William M. Compton et al., *Relationship between Nonmedical Prescription-Opioid Use and Heroin Use*, 374 NEW ENG. J. MED. 154, 155 (2016).



No one type of opiate is exclusively to blame for our crisis.[16]

What is worrisome about this trajectory from prescription opioids to fentanyl is the fact that their respective strengths are not linearly related. With their extremely variable potencies,[17] semi-synthetic heroin and synthetic fentanyl pose an exponentially more powerful threat.[18] And as we will illustrate later, the black-market economy virtually ensures their ample supply. The market for synthetic drugs has "never been so complex and widely spread."[19] This is a terrifying state of popularity for a category of drugs "up to 10,000 times" more potent than morphine,[20] for illicit opioids require neither Big Pharma, multi-million-dollar marketing budgets, nor free market availability, to supply their ever-increasing demand.

As Americans rapidly progressed from FDA-approved opioid use to illicit heroin and fentanyl, they also died in larger numbers, but the trajectory of overdose deaths today is de-

16. *Heroin Overdose Data*, *supra* note 14.

17. *See* U.N. Office on Drugs & Crime, *World Drug Report 2017: Pre-briefing to the Member States* (June 16, 2017), https://www.unodc.org/wdr2017/field/WDR_2017_presentation_lauch_version.pdf [https://perma.cc/W5CA-W8ZF].

18. *See id.*

19. *Id.*

20. *Id.*

tached from increases in new users of prescription drugs.[21] "[C]landestinely-manufactured synthetics" like fentanyl now constitute the "primary drivers" of opioid-related overdoses.[22] Our executive branch believes that our crisis can be solved by preventing children from stepping onto the slippery slope of opioid use.[23] How does that approach square with the trend of "dramatically" increasing "overdose deaths, addiction treatment admissions, and other adverse public health outcomes associated with [opioid] use . . . since 2002," despite a simultaneous decline in new, nonmedical opioid users?[24] America has experienced such a sudden reversal in health from this crisis that its death toll has nearly surpassed that of the AIDS epidemic, which took the lives of 650,000 Americans between 1981 and 2015.[25] "A combination of behavioral change and drug therapy brought the US AIDS epidemic under control."[26] But "public awareness of the enormity of the AIDS crisis was far greater" than that of our opioid crisis today,[27] and our epidemic will likely cause millions to "age into Medicare in worse health than the currently elderly," positioning the middle aged to become a "lost generation" of health with "future[s] . . . less bright than those who preceded them."[28] This cross-

21. *U.S. Drug Overdose Deaths Continue to Rise; Increase Fueled by Synthetic Opioids*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/media/releases/2018/p0329-drug-overdose-deaths.html [https://perma.cc/WZY4-7HGR] (last visited Mar. 29, 2018); *see also* Andrew Kolodny et al., *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction*, 36 ANN. REV. PUB. HEALTH 559, 563 (2015).

22. Leo Beletsky & Corey S. Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 INT'L J. DRUG POL'Y 156, 157 (2017).

23. Adam K. Raymond, *Trump's Solution to Opioid Crisis: Tell Kids Drugs Are 'No Good'*, N.Y. MAG. (Aug. 9, 2017), http://nymag.com/daily/intelligencer/2017/08/trumps-solution-to-opioid-crisis-tell-kids-drugs-are-bad.html [https://perma.cc/UBN4-G92V]; *see also Remarks by President Trump on Combatting the Opioid Crisis*, THE WHITE HOUSE (Mar. 19, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-combatting-opioid-crisis/ [https://perma.cc/8BW7-V74T].

24. Kolodny et al., *supra* note 21, at 563.

25. Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, 112 PROC. NAT'L ACAD. SCI. U.S. 15,078, 15,081 (2015); *see also Understanding the Epidemic*, *supra* note 11 (noting that more than 630,000 people died from drug overdoses, and more than 350,000 from opioid overdoses, in the United States between 1999 and 2016).

26. Case & Deaton, *supra* note 25, at 15,081.

27. *Id.*

28. *Id.*

generational destruction by opioid addiction is just one reason why our various legal, administrative, and policy approaches should aim to do more than merely prevent new opioid users. In order to do what works, we ought to glean insight from our past battles with these drugs.

B. A Brief History of American Opiophilia

Our current epidemic is not America's first bout with fatal opioid overdose poisoning en masse. Large-scale opioid abuse began almost immediately after the Civil War.[29] Deaths during this era were epidemiologically traced to the "popularization of hypodermically injected morphine,"[30] which triggered thousands of overdoses between the 1870s and the 1920s.[31] State and federal legislation like the Pure Food and Drug Act of 1906, the Harrison Anti-Narcotic Act of 1914, and the Heroin Act of 1924 were enacted in response.[32] And countless newspapers articles published during that era—replete with yellow journalism-tinged titles like *A Beautiful Opium Eater*[33]—describe stories that, "aside from some Victorian-era moralizing,"[34] feel strikingly familiar to those told on President Trump's CrisisNextDoor.gov.[35] The prototypical American anti-heroine heroin tale, then and now, goes something like this: a young American develops an addiction to opiates "at a vulnerable point in her life," finds enabling doctors, and then, inevitably, self-destructs.[36]

That tale, however, is a normatively prescribed archetype of abuse that inaccurately reflects our history with drug addiction. Often forgotten is America's battle with heroin addiction during the Vietnam War, when 20% of enlisted troops were

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29. Clinton Lawson, *America's 150-Year Opioid Epidemic*, N.Y. TIMES (May 19, 2018), https://www.nytimes.com/2018/05/19/opinion/sunday/opioid-epidemic-history.html [https://nyti.ms/2IzHXMe].

30. *Id.*

31. *Id.*

32. *Id.*

33. *A Beautiful Opium Eater*, CLARENCE & RICHMOND EXAMINER, Mar. 23, 1878, at 4, https://trove.nla.gov.au/newspaper/article/62080789/5047385 [https://perma.cc/EJ27-4FY5].

34. Lawson, *supra* note 29.

35. *See Opioids: The Crisis Next Door*, CRISIS NEXT DOOR, https://www.crisisnextdoor.gov/ [https://perma.cc/S2H9-8WNR].

36. Lawson, *supra* note 28.

addicted to heroin while stationed abroad.[37] A ready supply of cheap, illicit heroin—the apparent result of heavy "profiteering" by South Vietnamese government officials[38]—enabled high rates of use. But demand for analgesic escape was arguably extraordinary for this group as well. The hindsight of modern psychology lends a sense of obviousness to discussions about why heroin addiction flourished amongst U.S. servicemen during this era: "growing disenchantment with the war" and "progressive deterioration in unit morale" are posited to explain the instinct to self-medicate and hedonistically indulge while coping with the existential terror of life-threatening combat.[39] But heroin at the time was also considered the "*bete noire* of American drugs"—"the most addictive substance ever produced"—and "a narcotic so powerful" that it was "nearly impossible to escape."[40] A "horrified" American public awaited the war's end, fearing the apocalyptic return of hundreds of thousands of servicemen-turned-junkies.[41] Instead, the Archives of General Psychiatry found that 95% of those 20% of servicemen addicted to heroin did not resume their addictions upon return to American soil.[42]

Sudden cessation, though seemingly odd, is supported by science. When opioid use is monitored and tapered to avoid side effects of withdrawal, the risk of readdiction can be happily, anticlimactically low.[43] Human and animal laboratory studies demonstrate that compulsive self-administration of drugs becomes less likely when subjects are presented with a choice between substance abuse and access to an alternative or

37. M. Duncan Stanton, *Drugs, Vietnam, and the Vietnam Veteran: An Overview*, 3 AM. J. DRUG & ALCOHOL ABUSE 557, 557 (1976).

38. *Id.*

39. *Id.*

40. Alix Spiegel, *What Vietnam Taught Us About Breaking Bad Habits*, NPR (Jan. 2, 2012), https://www.npr.org/sections/health-shots/2012/01/02/144431794/what-vietnam-taught-us-about-breaking-bad-habits [https://perma.cc/6B2J-VVZH].

41. *Johann Hari: Does Stigmatizing Addiction Perpetuate It?*, NPR: TED RADIO HOUR (Feb. 23, 2018) [hereinafter Hari], https://www.npr.org/templates/transcript/transcript.php?storyId=587908364 [https://perma.cc/V7RG-S28F].

42. Stanton, *supra* note 37, at 557.

43. *See* Kate Nicholson, *What We Lose When We Undertreat Pain*, YOUTUBE (Oct. 17, 2017), https://www.youtube.com/watch?v=u4vHSLeTe-s [https://perma.cc/26PQ-67SJ].

competing reinforcer like food, money, or entertainment.[44] When the Vietnam War public then was met with a result not nearly "as severe as originally supposed," "[m]yths as to the persistence and intractability of physiological narcotic addiction were dispelled."[45] For veterans living today, quitting an opioid habit, statistically speaking, beckons suicide and not mere accidental overdose.[46] How did Vietnam veterans fare any better upon return from war?

The myth of addiction's intractability does not derive from the medical community, which maintains that opioids are helpful for acute pain and addictive only for a minority of longtime users.[47] The CDC does not assert a causal relationship between mere prescription opioid use, stating only that "serious risks are *associated* with [opioid] use."[48] And yet, addiction is considered a communicable disease—one that defies rational market behaviors.[49]

To be fair, the overarching fear of opioids' addictive propensity is not entirely misplaced. Many find opioids highly addictive due to their ability to "induce euphoria (positive reinforcement)" and relieve the "dysphoria (negative reinforce-reinforcement)" triggered by cessation of chronic use.[50] Chronic use does tempt death, as a person's first opioid overdose makes a second far more likely.[51] Further justifying opiophobia are recent findings that suggest that continued opioid use may in-

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44. *See generally* Stephen T. Higgins, *The Influence of Alternative Reinforcers on Cocaine Use and Abuse: A Brief Review*, 57 PHARMACOLOGY BIOCHEMISTRY & BEHAV. 419 (1997).

45. Stanton, *supra* note 37, at 557.

46. Nate Morabito, *VA Reps to Discuss Impact of Opioid Reduction on Suicides During Summit*, WJHL, http://www.wjhl.com/news/va-reps-to-discuss-impact-of-opioid-reduction-on-suicides-during-summit_20180123093420242/934066782 [https://perma.cc/HHT3-UYMM] ("[O]pioid discontinuation was not associated with overdose mortality but was associated with increased suicide mortality.")

47. Beletsky & Davis, *supra* note 22, at 157 (citing Deborah Dowell, Tamara M. Haegerich & Roger Chou, *CDC Guideline for Prescribing Opioids for Chronic Pain—United States, 2016*, 315 JAMA 1624, 1624–45 (2016)).

48. *Prescription Opioid Data*, *supra* note 10.

49. *See, e.g.*, Ernest Drucker & Victor W. Sidel, *The Communicable Disease Model of Heroin Addiction: A Critique*, 1 AM. J. DRUG ALCOHOL AB. 3 (1974); Patrick H. Hughes, *A Contagious Disease Model for Researching and Intervening in Heroin Epidemics*, 27 ARCH. GEN. PSHYIAT. 149 (1972).

50. Kolodny et al., *supra* note 21, at 560.

51. *Opioid Crisis: Overdose Rates Jump 30% in One Year*, *supra* note 6.

crease sensitivity to pain.[52] While "[drug] tolerance is characterized by desensitization of neural pain pathways, . . . opioid-induced hyperalgesia is the result of hypersensitization of those pathways," a state where "some patients may find themselves taking dangerously high doses while their pain continues to intensify."[53] Rats are found to display an increased sensitivity to pain after being exposed to morphine,[54] and a Stanford University study involving humans using oral morphine for chronic back aches led researchers to conclude that "opioid tolerance and opioid-induced hyperalgesia might limit the clinical utility of opioids in controlling chronic pain."[55] According to one scientist at the New York State Psychiatric Institute, though the rates of opioid-induced hyperalgesia are unknown, this blind spot in the way modern analgesic science understands opioids to work could be a "major factor" in our present-day opioid crisis.[56]

The problem with this fear of addiction's intractability is that it ultimately stems from the outmoded chemical hook theory—the idea that drugs contain all-consuming, psychologically hijacking "chemical hooks" that capture the unwary, invariably transforming them into raging drug addicts who spiral towards demise.[57] This theory anthropomorphizes the results of experiments on rats that found that when provided a supply of cocaine or heroin, rats will choose to overdose rather than abstain.[58] Much like *Reefer Madness* for cannabis,[59] a 1980s Partnership for a Drug-Free America TV commercial propagandized

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52. *See* Clayton Dalton, *When Opioids Make Pain Worse*, NPR (Mar. 3, 2018, 6:00 AM), https://www.npr.org/sections/health-shots/2018/03/03/586621236/when-opioids-make-pain-worse [https://perma.cc/7CSR-6QWT].

53. *Id.*

54. Sabih Kayan, L.A. Woods & C.L. Mitchell, *Morphine-Induced Hyperalgesia in Rats Tested on the Hot Plate*, 177 J. PHARMACOL. EXP. THER. 509, 512 (1971).

55. Larry F. Chu, David J. Clark & Martin S. Angst, *Opioid Tolerance and Hyperalgesia in Chronic Pain Patients After One Month of Oral Morphine Therapy: A Preliminary Prospective Study*, 7 J. PAIN 43, 43 (2006).

56. Dalton, *supra* note 52.

57. *See, e.g.*, Hari, *supra* note 41.

58. *See, e.g.*, Adam N. Perry, Christel Westenbroek & Jill B. Becker, *The development of a preference for cocaine over food identifies individual rats with addiction-like behaviors*, PLOS ONE (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3832528/ [https://perma.cc/P4NB-EG38].

59. *Reefer Madness*, IMDB, https://www.imdb.com/title/tt0028346/ [https://perma.cc/6UNR-6VL6] (last visited Aug. 8, 2018).

these experiments to reinforce the fear that humans, when faced with the choice between the banality of mere sustenance and drugs, will also opt for the drugs and invariably die.

From the perspective of behavioral psychology, myths of addiction's intractability ultimately derive from "antique notions of demonic possession, divine command, and other supernatural volition," and find expression in modern life when "social factors, societal oppression, emotional distress, external provocation, mental illness, [and] drugs" are used to rebut liability for the negative externalities produced by addictive behaviors.[60] There are indeed a multitude of biological, genetic, and social factors that contribute to the likelihood of addiction, and many of these factors—subject to intense debates about legal volition and philosophical free will—are within the user's control.[61] The chemical hook theory may very well be our way of garnering support for the public health approach to drugs when we might otherwise fall prey to our normative judgment that public funds ought not be spent on those who need it as a result of what is perceived to be, at least in part, a moral failing. But policies that abide by the belief that addiction can strong-arm the entire superset of factors tending to yield drug addiction are not only "tantamount to a disbelief in free will,"[62] but also utterly counterintuitive to the goal of addiction recovery. Around 1900, the medical community began using the word "addiction" to refer to the "[u]nconscious processes, genetic determinism, brain mechanisms, [and] chemical forces (e.g., the 'twinkie defense')" associated with the inability to abstain from drug use.[63] This medical lexicon facilitated the eventual treatment of addiction as biological destiny,[64] which, when married with the post-modern insistence "that all human actions are caused by prior events," renders free will in the drug context "entirely an illusion."[65]

From the prohibition propagandist's perspective, the beauty of bloating addiction's power is that it flattens the nuanced,

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60. Kathleen D. Vohs & Roy F. Baumeister, *Addiction and Free Will*, 17 ADDICTION RES. & THEORY 231, 231 (2009).

61. *See id.* at 233–34.

62. *Id.* at 231.

63. *Id.*; *see also id.* at 233–34.

64. *Id.* at 233.

65. *Id.* at 231 (citations omitted).

complicated, often heartbreaking factors tending humans towards fatal drug addiction, reducing its complexity to logical if-then statements such as: "If you overexpose a society or culture to cheap, plentiful food, you'll have an obesity epidemic," and "[i]f you overexpose a culture to opioids, you're going to have an opioid epidemic."[66] Statements like these are co-opted as propaganda to bolster supply-side interdictions. But they also reflect outdated scientific norms, as suggested by a rebuttal study led by Professor Bruce Alexander of Vancouver's Simon Fraser University.[67] Alexander, an occupational and environmental epidemiologist, thought that the results of the original rat experiment made perfect sense: When trapped in wire cages with zero healthy reinforcers, rats, like humans in existential despair, will opt to get high and anesthetize in isolation.[68] To underscore the point, Professor Alexander produced a sequel. In his updated experimental environment, dubbed "Rat Park," rats were provided a supply of drug-laced water and ample opportunity to eat to their hearts' content, mate with other rats, and play.[69] The results? Zero rats died from compulsive opioid or narcotic overdose, while all or most of the lonely rats in bare, non–Rat Park, control cages did.[70] Alexander's Rat Park experiment is criticized for "merely replac[ing]" the misconception that drug chemistry dispositively produces addiction with another: "that environment is the most important factor."[71] But if that is true, and if the chemical

66. Zurcher, *supra* note 4.

67. *See generally* Bruce K. Alexander et al., *The Effect of Housing and Gender on Morphine Self-Administration in Rats*, 58 PSYCHOPHARMACOLOGY 175 (1978); *see also* German Lopez, *It's Not Just Opioid Addiction. Alcoholism May Be on the Rise Too.*, VOX (Aug. 10, 2017, 1:50 PM), https://www.vox.com/policy-and-politics/2017/8/10/16124938/study-alcoholism-addiction-epidemic [https://perma.cc/7SAV-C92W] (describing Alexander's Rat Park study as a "classic experiment").

68. Bruce K. Alexander, *Addiction: The View from Rat Park*, BRUCE K. ALEXANDER (2010), http://www.brucekalexander.com/articles-speeches/rat-park/148-addiction-the-view-from-rat-park [https://perma.cc/YQ6N-9FPX].

69. *Id.*

70. Bruce K. Alexander, *Rat Park Versus the New York Times*, BRUCE K. ALEXANDER, http://www.brucekalexander.com/articles-speeches/rat-park/282-rat-park-versus-the-new-york-times-2 [https://perma.cc/8EZ4-PKQ6] (last visited Nov. 14, 2018).

71. Katie MacBride, *This 38-Year-Old Study is Still Spreading Bad Ideas About Addiction*, OUTLINE (Sept. 5, 2017, 2:55 PM), https://theoutline.com/post/2205/this-38-year-old-study-is-still-spreading-bad-ideas-about-addiction?zd=1&zi=fszfqmqt [https://perma.cc/5QGC-4GPM].

hook theory is also defunct, how are drugs like OxyContin resulting in more addiction and overdoses than ever before? What makes things so climactic today?

C. The Iron Law of Prohibition

One part of the answer rests on the ingenuity of legal supply. Ours is not America's first bout with large-scale opioid addiction, but it is the first in the era of Big Pharma. OxyContin is the brand name of Purdue Pharma's extended-release, FDA-approved formulation of oxycodone, the generic name for the opioid analgesic manufactured in America beginning in the 1930s.[72] As an extended release formulation, OxyContin provided great hope to the many who suffer from chronic bodily pain.[73] However, before OxyContin obtained FDA approval in 1995,[74] "many physicians were reluctant to prescribe [opioid pain relievers] on a long-term basis for common chronic conditions" due to "concerns about addiction, tolerance, and physiological dependence."[75] To topple physicians' opiophobia, Purdue developed an idea called "pseudoaddiction," commissioning its "physician-spokespersons" to sell the term to medical communities in order to artificially differentiate and render "clinically unimportant" the "physical dependence" on opioids from drug addiction.[76] In support of its efforts to "big-pharmasplain" addiction to doctors,[77] Purdue relied on a single, paragraph-long letter in a medical journal titled *Addiction Rare in Patients Treated with Narcotics*.[78] This letter anecdotally

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72. *Common Myths About OxyContin® (Oxycodone HCI Controlled-Released) Tablets CII*, PURDUE, http://www.purduepharma.com/news-media/2011/12/common-errors-in-the-media-about-oxycontin-oxycodone-hcl-controlled-release-tablets/ [https://perma.cc/A6UA-FSJU] (last visited Nov. 14, 2018).

73. *See* OXYCONTIN, https://www.oxycontin.com/ [https://perma.cc/K2S9-H9ZD] (last visited Nov. 14, 2018).

74. *Common Myths About OxyContin® (Oxycodone HCI Controlled-Released) Tablets CII*, *supra* note 72.

75. Kolodny et al., *supra* note 21, at 562.

76. *Id.*

77. *Cf., e.g.*, *Mansplain*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/mansplain [https://perma.cc/SWB5-RAWJ] (last visited Jan. 31, 2019).

78. Jane Porter & Hershel Jick, *Addiction Rare in Patients Treated with Narcotics*, 302 NEW. ENG. J. MED. 123, 123 (1980); *see also Opioid Crisis: The Letter that Started it All*, BBC NEWS (June 3, 2017), http://www.bbc.com/news/world-us-canada-40136881 [https://perma.cc/VP8E-RX3G].

describes one instance where out of 11,882 hospitalized patients treated with narcotics, "only four patients with no history of addiction became addicted."[79] A 0.03% addiction rate—if accurate—is tantalizing evidence against the chemical hook theory. But the paragraph-long study merely describes the addictive effects of weaker narcotics on hospitalized patients, not the effect of extended-life opioids on those who would take them regularly to combat chronic pain.[80] Citations of the letter spiked into the hundreds in the lead-up to and after Purdue's introduction of OxyContin.[81] Other letters published at the same time were cited an average of eleven times.[82] And despite the clinical inapplicability of the study and the dearth of peer review, Purdue offered the letter as conclusive medical proof of pseudoaddiction.[83] The study enabled Purdue to market a gateway opioid as chemically unhookable, then push it on an America that has, as we will examine later, been the most un–Rat Park it has been in decades.

The other part of our answer rests in the fundamental economic logic of drug prohibition. The transition from relatively mild, legal opioids to stronger formulations, while shocking to the public, is an entirely foreseeable eventuality under what is called the "Iron Law of Prohibition."[84] As a regulatory measure, prohibition imposes "substantial barriers and costs to the illicit drug supply chain"—heightening risk for illicit suppliers, which applies "direct pressure to minimise volume while maximising profit."[85] The Iron Law of Prohibition refers to this pressure cooker of supply-demand interplay, which ensures that "[m]ore bulky products become more expensive relative to less bulky ones," thereby incentivizing dangerous increases in

79. *Id.*

80. *See id.*

81. *See* Matthew Herper, *Did This 100-Word Letter Help Spark the Opioid Epidemic?*, FORBES (May 31, 2017, 5:00 PM), https://www.forbes.com/sites/matthewherper/2017/05/31/did-this-100-word-letter-help-spark-the-opioid-epidemic/#6b98d7691057 [https://perma.cc/2M6N-E4LM].

82. *Id.*

83. Marion S. Greene & R. Andrew Chambers, *Pseudoaddiction: Fact or Fiction? An Investigation of the Medical Literature*, 2 CURRENT ADDICT. REP. 310, 310–317 (2015).

84. *See* Zurcher, *supra* note 4.

85. Beletsky & Davis, *supra* note 22, at 157.

potency.[86] Take a look at the Iron Law of Prohibition's role during alcohol prohibition between 1920 and 1933, when the production and sale of alcoholic beverages was criminalized, save for industrial or "limited" medical use.[87] Prior to Prohibition, beer was America's drink of choice.[88] Faced with the risk of "more voluminous contraband being seized and destroyed,"[89] black-market constraints caused the cost of products with lower alcohol to increase by over 700%, while the price of spirits rose much more slowly ("Prohibition-era cost increase: 270%").[90] As a result, Prohibition-era bootleggers transported "less beer and wine,"[91] and transported more "highly-distilled spirits like gin and moonshine."[92] Put another way, the Iron Law of Prohibition drove illicit suppliers to produce more potent substances over time, which forced consumers to purchase higher doses of illicit alcohol—not because their tastes had changed, but primarily because they ended up being cheaper.

Make no mistake: the Iron Law of Prohibition is not mere black market, price-gouging chicanery. Black-market economics, as applied to the illicit opioid market, routinely produces doses strong enough to kill people. Purchased legally, OxyContin costs $1.25 for a 10-milligram tablet, and $6 for an 80-milligram tablet. In the black market, the former's street price ranges from $5 to $10, while the latter commands up to $80.50 a pill.[93] By comparison to legal supply, black market heroin is cheap:[94] at our apex death toll in 2016, heroin's street price was

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86. *Id.*

87. *Id.*

88. *Everything You Ever Wanted to Know About Prohibition*, OXFORD U. PRESS: OUPBLOG (Oct. 21, 2011), https://blog.oup.com/2011/10/prohibition/ [https://perma.cc/4S53-CCZL].

89. Beletsky & Davis, *supra* note 22, at 157.

90. *Id.* (citing Jeffrey A. Miron & Jeffrey Zwiebel, Alcohol Consumption During Prohibition 1–13 (Nat'l Bureau of Econ. Research, Working Paper No. 3675, 1991)).

91. Zurcher, *supra* note 4.

92. Beletsky & Davis, *supra* note 22, at 157.

93. *Oxycontin / Oxycodone*, CONNECTICUT CLEARINGHOUSE, https://www.ctclearinghouse.org/topics/oxycontin-oxycodone [https://perma.cc/GJ75-EWX2] (last visited Mar. 3, 2019); *see also Sky-High Prices for Prescription Opioids Sold on Street*, PARTNERSHIP FOR DRUG-FREE KIDS (June 1, 2011), https://drugfree.org/learn/drug-and-alcohol-news/sky-high-prices-for-prescription-opioids-sold-on-street [https://perma.cc/HP7U-AJ4P].

94. *See* Kolodny et al., *supra* note 21, at 560–61.

$152 per gram.[95] In one study, 94% of opioid-addicted participants reported switching from prescription opioid pills to heroin because the former were "far more expensive and harder to obtain."[96] This is how black-market economics whirlpools supply and demand, and creates a vicious feedback loop that exacerbates itself. As the desire for cheaper drugs increases linearly, the potency of the drugs increases exponentially, and the fear of prohibition-legal doses is then sold for more fear. A lethal dose of fentanyl, for example, is approximately the size of four grains of salt.[97] So when local law enforcement seizes twenty-four pounds of it—an amount sufficient to "administer lethal doses to [Ohio's] entire population of 11.6 million"[98]—hyperbolic alarm is conjured merely by framing the danger in simple mathematical proportion.[99]

When black market-generated costs drive much of the demand for lethally potent drugs, "accidental suicide" becomes a predictable negative externality of black-market economics. Perhaps the only satisfying form of justice in this crisis is the poetic full-circling of Dr. Hershel Jick, the physician who wrote the letter Purdue co-opted to scientifically decriminalize opioid use for chronic pain.[100] He "never intended for the article to justify widespread opioid use," and went so far as to testify at the Senate to say so.[101] "I'm essentially mortified that that letter to the editor was used as an excuse to do what these drug companies did," he states.[102] And we should be mortified, too. For without reexamining our crisis "through the lens of [its] social

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95. *Heroin and cocaine prices in Europe and USA*, U.N. OFFICE ON DRUGS & CRIME, https://dataunodc.un.org/drugs/heroin_and_cocaine_prices_in_eu_and_usa [https://perma.cc/FG4J-G9CT] (last visited Nov. 21, 2018).

96. Kolodny et al., *supra* note 21, at 560–561 (quoting Theodore J. Cicero et al., *The Changing Face of Heroin Use in the United States: A Retrospective Analysis of the Past 50 Years*, 71 JAMA PSYCHIATRY 821, 821–26 (2014)).

97. *Record US Fentanyl Bust 'Enough to Kill 26 Million People'*, BBC NEWS (May 25, 2018), https://www.bbc.com/news/world-us-canada-44244688 [https://perma.cc/GXB5-2QSZ].

98. Zurcher, *supra* note 4.

99. *See* Michelle Chavez, *Fentanyl Bust Nets Enough Drugs to Wipe Out Population of Ohio*, FOX NEWS (Dec. 6, 2017), http://www.foxnews.com/us/2017/12/06/fentanyl-bust-nets-enough-drugs-to-wipe-out-population-ohio.html [https://perma.cc/DN8Y-FWSJ].

100. Porter & Jick, *supra* note 78, at 123.

101. *Opioid crisis: The letter that started it all*, *supra* note 78.

102. *Id.*

determinants . . . [such as] unemployment, concentrated disadvantage, isolation, and inadequate access to physical and mental health care," we will continue to dodge the "multifaceted, structural solutions" designed to "significantly move the needle on the most formidable drug-related public health crisis of our time."[103] And as we continue to circumvent holistic analyses of demand, our crisis is free to "mutate[] into something far more deadly."[104]

D. Macroeconomic Depression as Unreported Demand

Our crisis is as much a story of underestimated demand as it is one of overexuberant legal and illegal oversupply. Beneath nefarious corporate product marketing and the Iron Law of Prohibition rests an iceberg of undetected demand—one which initially reared its head in doctors' offices as a "chronic, nonmalignant pain."[105] To monetize the "widespread prevalence and under-treatment" of this pain[106]—one found to be "strongly associated with . . . frequent use of ambulatory health care, unfavorable self-appraisal of health status, and psychological impairment"[107]—Big Pharma urged physicians to make greater use of opioids.[108] It is this capitalization of demand that births our desire to blame suppliers. But what we lose in our rush to blame supply is a meaningful discussion of the macrosociological tidal changes constituting the demand for analgesic relief, which as we will explain, yields greater dispositive effect on the scope and scale of our epidemic. In other words, opioid oversupply simply "added fuel to the flames, making the epidemic much worse than it otherwise would have been."[109]

According to the supply-side story, the social blight of our national addiction to opioids sprouted like fungus from an ex-

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103. Beletsky & Davis, *supra* note 22, at 158 (citations omitted).

104. *Id.*

105. Ameet Sarpatwari, Michael S. Sinha & Aaron S. Kesselheim, *The Opioid Epidemic: Fixing a Broken Pharmaceutical Market*, 11 HARV. L. & POL'Y REV. 463, 465 (2017).

106. *Id.*

107. *Id.* (omission in original) (quoting Michael Von Korff et al., *Graded Chronic Pain Status: An Epidemiologic Evaluation*, 40 PAIN 279, 289 (1990)).

108. Sarpatwari, Sinha & Kesselheim, *supra* note 105, at 467.

109. Anne Case & Angus Deaton, *Mortality and Morbidity in the 21st Century*, 2017 BROOKINGS PAPERS ON ECON. ACTIVITY 397, 399.

cess of pharmaceutical drug supply. This supply-side tale is tidy.[110] Framing our opioid crisis as one of oversupply provides the "simplest and most compelling explanations for our exceptional rates of opioid use."[111] But opioid addiction is not tidy, and is arguably the ugliest threat to public health in modern-day America. As addictive behaviors become destructive and harmful both to addicts and society at large, we struggle with its ugliness, indulging our libertarian impulse to hold addicts accountable for "shirking their duties" and producing social welfare-deteriorating harms.[112] It is this multifaceted, messy causality problem of mass addiction that strengthens the appeal of treating it neatly as an intractable hook. We operationalize as policy the parasitic belief that addicts cannot absolutely control their actions to release ourselves from the politically incorrect task of rationalizing drug addicts' behaviors.[113] For doing so is what gives us the freedom we need to express our normatively correct desire to treat addicts compassionately, while criminalizing behaviors we subconsciously deem as deserving of moral condemnation.

The danger in circumventing a good-faith analysis of the factors that contribute to opioid demand today, though, is that it also forecloses a valid survey of the market interventions available to reduce it. The chemical hook theory is designed to forever tempt us into circumventing the study of addiction as an expression of demand, and to instead assume that oversupply alone is capable of its production. However, given the scale of our crisis, can we afford to merely hope that the market for illegal heroin and fentanyl will diffuse itself, without looking under the rug and attempting to understand why it might exist in the first place? Given their interplay, heroin and fentanyl's

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110. *Cf.* Lenny Bernstein & Joel Achenbach, *A Group of Middle-Aged Whites in the U.S. is Dying at a Startling Rate*, WASH. POST (Nov. 2, 2015), https://www.washingtonpost.com/national/health-science/a-group-of-middle-aged-american-whites-is-dying-at-a-startling-rate/2015/11/02/47a63098-8172-11e5-8ba6-cec48b74b2a7_story.html?noredirect=on&utm_term=.4df001bbf3a2 [https://perma.cc/L54-UCUE]. The story is perhaps too tidy, as the overemphasis on supply obfuscates even economists' analysis of the way our nation got addicted in droves. As one economics professor at Dartmouth expressed his confusion: "I don't know what's going on, but the plane has definitely crashed." *Id.*

111. Levitz, *supra* note 2.

112. Vohs & Baumeister, *supra* note 60, at 232.

113. *See id.* at 231–32.

pharmacological and social differences are worthy of better understanding.

Heroin is a black, sticky, semi-synthetic, opioid-based drug that can be injected, smoked, and snorted.[114] It became a controlled substance in the early 1970s,[115] making its manufacture, distribution, and dispensation illegal.[116] But heroin does possess medical value. In other countries, it is sometimes prescribed to the terminally ill as an alternative to morphine, a drug with about half of heroin's potency.[117] Rates of non-medical, illegal abuse of heroin remained stable for decades.[118] But between 1999 and 2016, heroin-related overdoses increased by a factor of five.[119] The CDC attributes this spike to the ubiquity of heroin's use "among men and women, most age groups, and all income levels."[120] The demographic egalitarianism of this surge is notable, for groups historically unlikely to use the drug—"women, the privately insured, and people with higher incomes"—experienced "[s]ome of the greatest [usage] increases" in recent years.[121] Heroin's newfound ability to capture a historically quotidian, non-criminal demographic of users is likely best illustrated by the cottage industry of so-called opioid cessation products that cater to them. These products tempt addicts into "[i]magin[ing] a life without the irritability, cravings, restlessness, excitability, exhaustion[,] and discomfort associated with the nightmare of addiction and withdrawal symptoms."[122] For their efforts to snake-oil illusory off-ramps

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114. *See Today's Heroin Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/opioids/heroin.html [https://perma.cc/4V9Q-G4JC] (last updated Aug. 29, 2017).

115. Controlled Substances Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1236, 1249 (codified as amended at 21 U.S.C. § 812 (2012)).

116. *Id.*

117. *See* Michael Gossop et al., *The Unique Role of Diamorphine in British Medical Practice: A Survey of General Practitioners and Hospital Doctors*, 11 EUROPEAN ADDICTION RES. 76, 76 (2005); Donald R. Jasinski & Kenzie L. Preston, *Comparison of Intravenously Administered Methadone, Morphine and Heroin*, 17 DRUG & ALCOHOL DEPENDENCE 301, 304 (1986).

118. *See* Beletsky & Davis, *supra* note 22, at 156 (citations omitted).

119. *Opioid Data Analysis and Resources*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/analysis.html [https://perma.cc/B3Z5-VRWQ] (last updated Feb. 9. 2017).

120. *Today's Heroin Epidemic*, *supra* note 114.

121. *Id.*

122. *FTC, FDA Warn Companies about Marketing and Selling Opioid Cessation Products*, FED. TRADE COMM'N (Jan. 24, 2018), https://www.ftc.gov/news-events/press-

from the complicated condition of drug addiction, several of these products have also ensnared the U.S. Food and Drug Administration's (FDA) and Federal Trade Commission's (FTC) attention.[123]

Fentanyl, unlike heroin, is a fully synthetic opioid.[124] It is not only 100 times more potent than natural morphine, but 50 times stronger than heroin,[125] which makes it medically appropriate only for individuals otherwise facing imminent death. When legally prescribed as a transdermal patch or lozenge,[126] fentanyl provides end-of-life palliative care,[127] manages advanced cancer pain,[128] and addresses "breakthrough pain" unresponsive to the usual suite of prescription opioid pills.[129] It should come as no surprise that when the opioid black market became "increasingly adulterated with illicitly-manufactured synthetic opioids,"[130] "deaths attributed to fentanyl analogues spiked by over 72%" in a single year.[131] By 2016, "deaths involving synthetic opioids, mostly fentanyls, had risen 540 percent in just three years."[132] The artist Prince's death was just one of the 2016 fatalities resulting from fentanyl overdose.[133] And these fentanyl-related deaths are expected to increase:

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releases/2018/01/ftc-fda-warn-companies-about-marketing-selling-opioid-cessation [https://perma.cc/5PSB-WKPN].

123. *See id.*

124. *Fentanyl*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/opioids/fentanyl.html [https://perma.cc/6KDV-RETH] (last updated Aug. 29, 2017).

125. *Synthetic Opioid Overdose Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/fentanyl.html [https://perma.cc/FT2Y-52G7] (last updated Dec. 16, 2016).

126. *Fentanyl*, *supra* note 124.

127. *Synthetic Opioid Overdose Data*, *supra* note 125.

128. *See Fentanyl*, *supra* note 124.

129. *Nine Die in Vancouver in 24 hours from Fentanyl Opioid Overdose*, BBC NEWS (Dec. 17, 2016), http://www.bbc.com/news/world-us-canada-38351958 [https://perma.cc/W698-N8BU].

130. Beletsky & Davis, *supra* note 22, at 157.

131. *Id.* (citing Rudd et al., *Increases in drug and opioid-involved overdose deaths—United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. RPT. 1445, 1445–52 (2016)).

132. Maya Salam, *The Opioid Epidemic: A Crisis Years in the Making*, N.Y. TIMES (Oct. 26, 2017), https://www.nytimes.com/2017/10/26/us/opioid-crisis-public-health-emergency.html [https://nyti.ms/2iATbrJ].

133. *Prince Death: Powerful Drugs Found in Singer's Home "Were Mislabelled,"* BBC NEWS (Aug. 21, 2016), http://www.bbc.com/news/world-us-canada-37151146 [https://perma.cc/CEX9-EPUV].

though fentanyl is more easily mixed into the powder heroin sold in Eastern states, distributors are discovering ways to mix synthetic opioids into the black tar heroin sold west of the Mississippi.[134]

The public is accustomed to thinking about prescription opioid, heroin, and fentanyl misuse as a "rural white problem"—an aggrandized craving for hedonistic escape triggered by the economic recession, death of coal mining industries, and ensuing "Appalachian despair."[135] Princeton economists Anne Case and Agnus Deaton describe it similarly.[136] They report that American "whites in midlife" are increasingly experiencing greater bodily pain and "greater difficulties with daily living,"[137] and are also subject to "deaths of despair,"[138] described to include suicides, fatal drug overdoses, and alcohol-related liver deaths.[139] To Case and Deaton, increase in suicides and fatal opioid poisoning were "maladaptive attempts to escape physical or psychological pain" caused by worsening macronational conditions[140] produced by the "collapse of the white working class after its heyday in the early 1970s," and the "pathologies" produced by "globalization and automation, changes in social customs that have allowed dysfunctional changes in patterns of marriage and childrearing, [and] the decline of unions."[141]

134. Josh Katz, *The First Count of Fentanyl Deaths in 2016: Up 540% in Three Years*, N.Y. TIMES (Sept. 2, 2017), https://www.nytimes.com/interactive/2017/09/02/upshot/fentanyl-drug-overdose-deaths.html [https://nyti.ms/2xEFpHB].

135. *Id.*

136. *See generally* Case & Deaton, *supra* note 109.

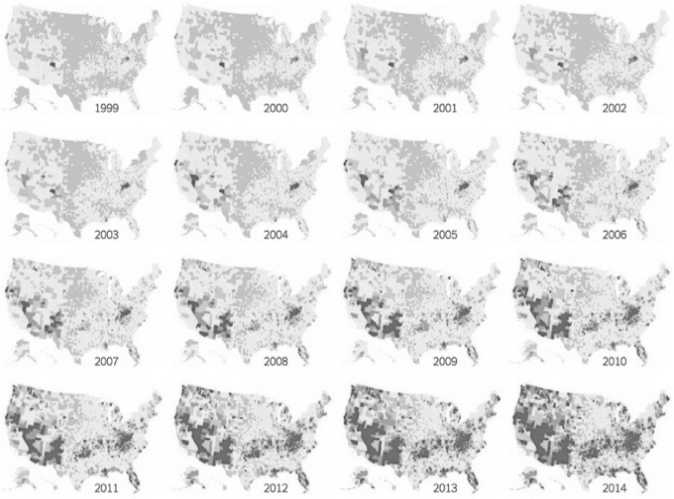
137. Case & Deaton, *supra* note 25, at 15,078.

138. Salam, *supra* note 132.

139. *Id.*

140. Eric Levitz, *The Death Rate for White Middle-Aged Americans is Rising*, CUT (Nov. 15, 2015), https://www.thecut.com/2015/11/white-americas-mortality-crisis.html [https://perma.cc/DC27-8MYA] (referencing Case & Deaton, *supra* note 25).

141. Case & Deaton, *supra* note 109, at 438–49.



Fatal opioid overdoses "rippled across the United States."[142]

Indeed, many states with the highest rates of opioid overdose-related deaths are home to the manufacturing and coal mining towns of the American heartland. The Midwest "witnessed opioid overdoses increase 70% from July 2016 through September 2017."[143] Fentanyl-related deaths spiked over 55% in Maryland, 77% in Florida, and 109% in Ohio.[144] In 2016, West Virginia experienced 52 fatal overdoses per 100,000 people, with the rates of Ohio (39.1), New Hampshire (39.0), Pennsylvania (37.9), and Kentucky (33.5) following closely behind.[145] The demographics of heroin users entering treatment have also shifted dramatically in the last half century.[146] The mostly white interviewees on President Trump's CrisisNextDoor.gov are visually representative of this "decidedly rural" crisis,[147] for

142. *Id.*

143. *Opioid Overdoses Treated in Emergency Departments*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/vitalsigns/opioid-overdoses/ [https://perma.cc/4R39-VQ2W].

144. U.S. DRUG ENF'T ADMIN., DEA-DCT-DIR-031-16, (U) NATIONAL HEROIN THREAT ASSESSMENT SUMMARY—UPDATED (2016).

145. *Drug Overdose Death Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/statedeaths.html [https://perma.cc/B45R-NUMJ].

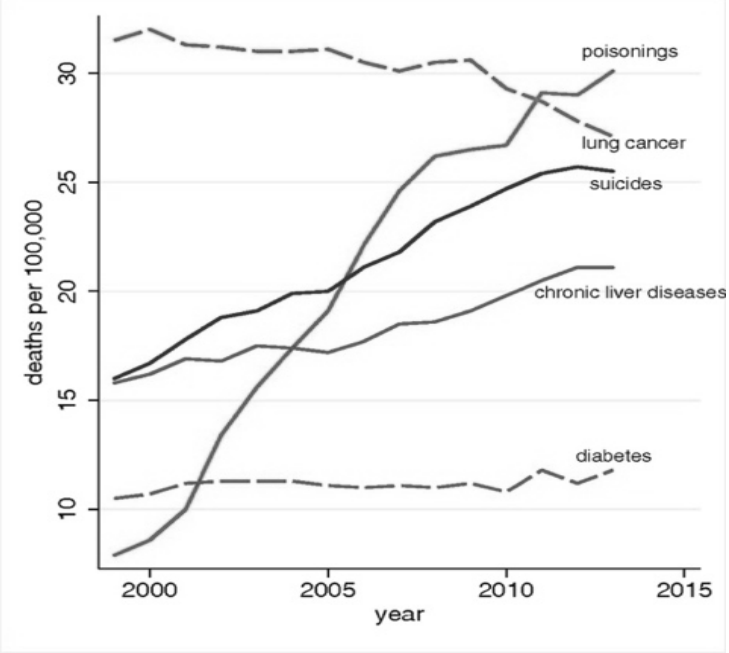
146. T.J. Cicero, H.L. Surratt & S.P. Kurtz, *The Changing Face of Heroin Use in the United States: A Retrospective Analysis of the Past 50 Years*, 71 JAMA PSYCHIATRY 821, 821–826 (2014).

147. Lawson, *supra* note 29.

what was once considered "an inner-city, minority-centered problem" has rapidly transformed into one with greater geographical distribution, with outsized, fatal impact on white Americans residing far outside of "large urban areas."[148] After 1998, as other rich countries' mortality rates continued to decline by 2% a year, US white non-Hispanic mortality rose by half a percent a year.[149] This is notable not only because "[n]o other rich country saw a similar turnaround" during this period,[150] but also because the loss of health produced by mass opioid addiction negated "[m]ortality declines from the two biggest killers in middle age—cancer and heart disease."[151] Even tobacco failed to impact U.S. mortality in this way, as "historical patterns of smoking" merely hit "pause" on midlife mortality decreases.[152]

148. Cicero, Surratt & Kurtz, *supra* note 146, at 821, 823.
149. Case & Deaton, *supra* note 25, at 15,078.
150. *Id.*
151. Case & Deaton, *supra* note 109, at 398.
152. Case & Deaton, *supra* note 25, at 15,079.

The change in all-cause mortality for white non-Hispanics 45–54 is largely explained by an increasing death rate from external causes, mostly increases in drug and alcohol poisonings and in suicide.[153]



This turnaround in mortality is "historically and geographically unique."[154] Before our bout with fatal opioid poisoning, and before OxyContin received FDA approval in 1995,[155] the U.S. benefited from a "remarkable long-term decline in mortality rates."[156] And while "midlife mortality continued to fall in other wealthy countries, and in other racial and ethnic groups in the United States," deaths of white, non-Hispanics in middle age "increased from 1998 through 2013."[157] Indeed, from the mid-90s onward, Case and Deaton found "marked differences in mortality by race and education, with mortality among

153. *Id.*

154. *Id.*

155. *Common Myths About OxyContin® (Oxycodone HCI Controlled-Released) Tablets CII*, *supra* note 72.

156. Case & Deaton, *supra* note 25, at 15,078.

157. Case & Deaton, *supra* note 109, at 398.

white non-Hispanics (males and females) *rising* for those without a college degree, and *falling* for those with a college degree."[158] "In contrast, mortality rates among blacks and Hispanics continued to fall, irrespective of educational attainment."[159] So, as deaths from cancer and heart disease continued to decline, and as mortality rates in other wealthy countries "continued their premillennial fall at the rates that used to characterize the United States,"[160] America witnessed a "profound uptick in self-reports of chronic pain and mental distress among white middle-aged Americans—particularly those without a college degree."[161] The CDC tells us that our "regional variation in use of prescription opioids" cannot simply be explained by a population's "underlying health status."[162] But curious is the fact that worsening individual, *micro*economic factors—"particularly slowly growing, stagnant, and even declining incomes"—fail to explain why rates of mortality rose specifically for non-college-educated whites.[163] "Growth in real median earnings has been slow for this group, especially those with only a high school education."[164] But Case and Deaton find individual, income-based explanations for these reversals in mortality "hard to sustain,"[165] for factors like "lower education, lower incomes[,] and race" typically work against the welfare of American people of color.[166] American people of color saw increases in their lifespans: mortality declines for Hispanic Americans were "indistinguishable from the British" during this period, and rates of "midlife all-cause mortality" for Black Americans dropped as well.[167] When considered against their

158. *Id.* at 397.

159. *Id.*

160. *Id.*

161. Levitz, *supra* note 140.

162. *Prescription Opioids*, CTRS. FOR DISEASE CONTROL & PREVENTION (citing Anne G. Wheaton et al., *Vital Signs: Variation Among States in Prescribing of Opioid Pain Relievers and Benzodiazepines—United States, 2012*, 63 MORBIDITY & MORTALITY WKLY. REP. 557, 563–568 (2014)), https://www.cdc.gov/drugoverdose/opioids/prescribed.html [https://perma.cc/EJU8-FS5U] (last visited Feb. 19, 2019).

163. Case & Deaton, *supra* note 109, at 397.

164. Case & Deaton, *supra* note 25, at 15,081.

165. Case & Deaton, *supra* note 109, at 424.

166. Bernstein & Achenbach, *supra* note 110 (internal quotation marks omitted).

167. Case & Deaton, *supra* note 25, at 15,079.

comparative advantages, the seemingly exclusive effect of our opioid crisis on American whites is, frankly, "shocking."[168]

"An increase in the mortality rate for any large demographic group in an advanced nation has been virtually unheard of in recent decades, with the exception of Russian men after the collapse of the Soviet Union."[169] Could the death of America's global economic hegemony constitute the macrosocial tidal change drastic enough to produce such radical effect? America's industrial productivity was slow in the 1970s, causing income inequality to widen in spectacular fashion among whites. This made many baby-boomers the "first to find, in midlife, that they [would] not be better off than . . . their parents."[170] The "[d]eclining value of the USD and large outflows of capital" also "threatened the very grounds of U.S. global domination" since the 1970s,[171] which could in part explain why increases in suicides and self-reported pain commenced prior to our twenty-first century recession.[172] It is straightforward enough to hypothesize that "wages, marriage rates, job quality, social cohesion, cultural capital, and, perhaps, racial privilege ostensibly dr[ove] an ever-larger number of non-college-educated whites into suicidal" or addictive behaviors.[173] Far less obvious is the discovery that macrosociological tidal changes in an individual's environment are more determinative of addiction than individual characteristics:[174]

> Of course, this historical perspective does not deny that differences in vulnerability are built into each individual's genes, individual experience, and personal character, but it removes individual differences from the foreground of attention, because societal determinants are so much more powerful. Addiction is much more a social problem than an individual disorder.[175]

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168. Bernstein & Achenbach, *supra* note 110.

169. *Id.*

170. Case & Deaton, *supra* note 25, at 15,081.

171. Tayyab Mahmud, *Is it Greek or déjà vu all over again? Neoliberalism and Winners and Losers of International Debt Crises*, 42 LOY. U. CHI L.J. 629, 659–60 (2013).

172. Case & Deaton, *supra* note 25, at 15,081.

173. Levitz, *supra* note 140.

174. BRUCE K. ALEXANDER, http://www.brucekalexander.com/ [https://perma.cc/A25G-KEYJ] (last visited Aug. 7, 2018).

175. *Id.*

Global history informs us that "addiction can be rare in a society for many centuries, but can become nearly universal when circumstances change," like "when a cohesive tribal culture is crushed or an advanced civilisation collapses."[176]

Opioid epidemics may very well be one way in which modern societies grieve the death of majority norms. Russia experienced a similar reversal in mortality after the dissolution of the Soviet Union, where opioid addiction produced massive fatality rates amongst Russian men.[177] Following the collapse of the Soviet Union, "heroin spread very rapidly, attracting most of those users previously injecting homemade solutions drawn from poppy straw, opium, anesthetics and medical drugs."[178] The "rapid diffusion" of heroin during this era is striking because "the substance was virtually unknown in the former Soviet Union" prior to the collapse.[179]

We must also recall our own exceptional bout with mass, fatal opioid poisoning post–Civil War.[180] If mass, mortality-rate-reducing opioid epidemics are historically precipitated by deaths in majority power ideals—such as centralized, federalist states or the institution of human chattel enslavement based on racial class—could it be that our epidemic similarly results from a dip in white dominance in an increasingly diversifying America? As the historian Carol Anderson puts it, "If you've always been privileged, equality begins to look like oppression"—a mindset in stark contrast with the "sense of hopefulness, that sense of what America could be, that has been driving black folk for centuries."[181] Terror management theory refers to the practice of "embrac[ing] culturally constructed beliefs," like American manifest destiny,[182] to "fend off what

176. *Id.*

177. *See, e.g.*, Letizia Paoli, *The Development of an Illegal Market: Drug Consumption and Trade in Post-Soviet Russia*, 42 BRIT. J. CRIMINOLOGY, 21, 21–39 (2002).

178. *Id.* at 25.

179. Letizia Paoli, *The Price of Freedom: Illegal Drug Markets and Policies in Post-Soviet Russia*, 582 ANNALS 167, 167 (2002).

180. Bernstein & Achenbach, *supra* note 110.

181. Susan B. Glasser & Glenn Thrush, *What's Going on With America's White People?*, POLITICO (Sept./Oct. 2016), https://www.politico.com/magazine/story/2016/09/problems-white-people-america-society-class-race-214227 [https://perma.cc/ZJ8D-KMP3].

182. Natsu Taylor Saito, *Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism*, 1 GEO. J.L. & MOD. CRIT. RACE PERSP., 67, 92 (2009) ("According to historian Frederick Merk, its 'postulates were that Anglo-Saxons are

would otherwise be paralysing existential terror."[183] It may explain our present-day macrosocial problem with addiction. For if American exceptionalism was the way that "whites with low levels of education" suppressed the very human terror of witnessing their employment opportunities "progressively worsen[],"[184] it is no wonder that so many of them suffer from severe psychological distress, report limitations in daily activities, and are "twice as likely to have limitations in their ability to work."[185] And if the sheer scale of our crisis is in any way the result of suppressed disappointment at the loss of majority power, Trump's presidential win would make perfect sense. Trump's campaign, after all, "put overwhelming emphasis on economic explanations for the demographic's plight," both describing the "American carnage" hitting "many white, rural areas" as a "symptom of economic dispossession,"[186] and Trump himself as a solver of "big and intricate problems."[187] In his remarks accepting the Republican nomination, then-candidate Trump stated that he "joined the political arena so that the powerful can no longer beat up on people who cannot defend themselves."[188] As he famously proclaimed: "Nobody

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endowed as a race with innate superiority, that Protestant Christianity holds the keys to Heaven, that only republican forms of political organization are free, that the future—even the predestined future—can be hurried along by human hands, and that the means of hurrying it, if the end be good, need not be inquired into too closely.'" (quoting FREDERICK MERK, MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY: A REINTERPRETATION 265 (Greenwood Press 1987) (1963))).

183. Rachel Nuwer, *What if we knew when and how we'd die?*, BBC NEWS (June 18, 2018) (citing Sheldon Solomon, Jeff Greenberg, & Tom Pyszczynski, *A Terror Management Theory of Social Behavior: The Psychological Functions of Self-Esteem and Cultural Worldviews*, 24 ADVANCES IN EXPERIENTIAL SOCIAL PSYCHOLOGY 93 (1991)), http://www.bbc.com/future/story/20180618-what-if-we-knew-when-we-were-going-to-die [https://perma.cc/2H9B-5S2T].

184. Case & Deaton, *supra* note 25, at 397.

185. Judith Weissman et al., *Disparities in Health Care Utilization and Functional Limitations Among Adults With Serious Psychological Distress*, 68 PSYCHIATRIC SERVS. 653, 656 (2017).

186. Levitz, *supra* note 140.

187. Donald Trump, President of the United States, Remarks on the Strategy in Afghanistan and South Asia (Aug. 21, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-strategy-afghanistan-south-asia/ [https://perma.cc/5TXJ-4CUL].

188. Donald Trump, Republican Nomination Acceptance Speech (Jul. 21, 2016), https://assets.donaldjtrump.com/DJT_Acceptance_Speech.pdf [https://perma.cc/LL4Z-P55B].

knows the system better than me, which is why I alone can fix it."[189]

For the "woke,"[190] macroeconomic depression as the foundational cause-in-fact of our crisis makes intuitive sense. The psychosocial, pre-market determinants of demand—primarily, distress over America's loss of international hegemony for those whose egos have intrinsically, perhaps tribal-narcissistically[191] borrowed from their own country's grandeur[192]—provide lucid reasons to despair. Research suggests that "promoting disbelief in free will produces destructive, antisocial behaviors,"[193] which suggests that Big Pharma could not have independently produced the entirety of the underlying demand for opioids by oversupplying it, and merely exacerbated our crisis by rampantly overcapitalizing upon it. The problem with this holistic conceptualization of our crisis is that it is not politically fashionable. Habitually inuring Americans to view this crisis as one caused by aggrandized supply, rather than macroeconomically triggered demand for analgesic relief, however, is.

II. JUST SAY NO

"History repeats itself, Marx wrote, 'first as tragedy and then as farce.' The continued emphasis on supply-side interventions to suppress non-medical opioid use is both."[194]

A. Under the War on Drugs' Influence

Experienced policymakers have long heralded the necessity of addressing drug abuse epidemics as public health crises, rather than as failures of criminal enforcement. According to President Obama, "for too long, we have viewed the problem of drug abuse generally in our society through the lens of the

189. *Id.*

190. *Woke*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/woke [https://perma.cc/73CT-LBGG] (last visited Jan. 31, 2019).

191. *See, e.g.*, Jeffrey Kluger, *The Narcissist In All Of Us*, PSYCHOL. TODAY, https://www.psychologytoday.com/us/articles/201409/the-narcissist-in-all-us [https://perma.cc/CT3G-G6XP] (last updated June 9, 2015).

192. *See, e.g.*, Saito, *supra* note 182, at 92.

193. Vohs & Baumeister, *supra* note 60, at 4.

194. Leo Beletsky & Corey S. Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 INT'L J. DRUG POL'Y 156, 157 (2017).

criminal justice system," when "the only way that we reduce demand is if we're . . . thinking about this as a public health problem."[195] The public health approach is especially appropriate for an overdose crisis that is not solely provoked by the legal, above-ground market for drugs. Opioid prescriptions have declined each year since 2012, and the "force accelerating today's epidemic is a booming market for potent heroin and fentanyl and its analogs."[196] But we continue to anchor liability for illegal overdoses to free market, regulated issues like prescription drug diversion—an approach that is at best confusing, and more likely, counterproductive.[197]

Inequitable War on Drugs policies, like the well-known disparity between powder and crack cocaine, are also often criticized for operationalizing law enforcement against urban people of color.[198] The opioid epidemic differs for mostly taking the lives of the rural and white.[199] Assuming racial bias, will the races of those dying from fatal overdoses today make the public health approach easier to take? Non-Hispanic whites are far more likely to use prescription opioids than Hispanics.[200] And "[w]hile African Americans remain over-represented among those arrested and incarcerated for a drug offense," white Americans in one year accounted for 83% of the drug overdoses in our country, and represent an even greater percentage of opioid-related deaths overall.[201] For President Obama at least,

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195. Barack Obama, President of the United States, Remarks by the President in Panel Discussion at the National Prescription Drug Abuse and Heroin Summit (Mar. 29, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/03/29/remarks-president-panel-discussion-national-prescription-drug-abuse-and [https://perma.cc/J2QZ-5QQW].

196. Stefan G. Kertesz, *Turning the tide or riptide? The changing opioid epidemic*, 38 SUBSTANCE ABUSE 1, 3–8 (2017).

197. *See* Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375, 414 (2017).

198. *See, e.g.*, Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531 (2010).

199. *Why Is The Opioid Epidemic Overwhelmingly White?*, NPR (Nov. 4, 2017), https://www.npr.org/2017/11/04/562137082/why-is-the-opioid-epidemic-overwhelmingly-white [https://perma.cc/232E-ZM2Y].

200. STEVEN M. FRENK, KATHRYN S. PORTER & LEONARD J. PAULOZZI, PRESCRIPTION OPIOID ANALGESIC USE AMONG ADULTS: UNITED STATES, 1999–2012, at 3 (Nat'l Ctr. for Health Statistics, Data Brief No. 189, 2015).

201. Rose A. Rudd, et al., *Increases in Drug and Opioid Overdose Deaths – United States, 2000–2014*, 64 MORBIDITY & MORTALITY WKLY. REP. 1378, 1380 (2016) (Fig-

"one of the things that's changed in this opioid debate is a recognition that this reaches everybody."[202] At the National Prescription Drug Abuse and Heroin Summit in 2016, he stated that "[p]art of what has made it previously difficult to emphasize treatment over the criminal justice system has to do with the fact that the populations affected in the past were . . . stereotypically identified as poor, minority."[203] The widespread availability of naloxone, for instance—"a non-addictive, life-saving" opioid antagonist capable of reversing an opioid overdose when administered in timely fashion[204]—is understood to "reflect[] the relatively humane response to the opioid epidemic, which is based largely in the nation's white, middle-class suburbs and rural areas—a markedly different response from that of previous, urban-based drug epidemics, which prompted a 'war on drugs' that led to mass incarceration, particularly of blacks and Hispanics."[205]

Regardless of the races involved, the massive scope and shape of our crisis independently beg for the public health approach, for our opioid epidemic is conclusively deadlier than our battle with AIDS. The CDC points out that our overdose deaths in 2016 alone outpaced the HIV/AIDS epidemic's at its 1995 peak by 50%.[206] The responsibility of curbing this epidemic therefore ought not to be triaged to both the criminal justice and public health systems, for doing so would produce con-

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ures in Table 1 report a total of 47,055 drug overdose deaths in 2014 and 37,945 drug overdose deaths involving White individuals in 2014; thus, White individuals account for 80.6% of total drug overdose deaths); Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010-2015*, 65 MORBIDITY AND MORTALITY WKLY. REP 1445, 1448–51 (2016) (Figures in Tables 1 and 2 report total and race-specific numbers of opioid overdose deaths in 2014).

202. Obama, *supra* note 195.

203. *Id.*

204. *Reverse Overdose to Prevent Death*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/prevention/reverse-od.html [https://perma.cc/H7R3-TQA7] (last visited Aug. 9, 2018).

205. Katherine Q. Seelye, *Naloxone Saves Lives, but Is No Cure in Heroin Epidemic*, N.Y. TIMES (July 27, 2016), https://www.nytimes.com/2016/07/28/us/naloxone-eases-pain-of-heroin-epidemic-but-not-without-consequences.html [https://nyti.ms/2aguNCw].

206. Dan Clark, *The Scourge of Heroin and Opioid Deaths Still Doesn't Match AIDS at its Worst*, POLITIFACT (July 8, 2016), https://www.politifact.com/new-york/statements/2016/jul/08/andrew-cuomo/fewer-people-are-dying-heroin-and-opioid-overdoses/.

flicts between "legitimate approaches for treating pain [and] the punishment for engaging in the illegal use of drugs."[207]

The sensibility of taking a public health approach, however, does not on its own secure its execution. The War on Drugs' lasting institutional effect is likely best illustrated by the unavailability of evidence-based addiction treatment. As the U.S. Surgeon General pointedly observes, "[w]e would never tolerate a situation where only one in [ten] people with cancer or diabetes gets treatment, and yet we do that with substance-abuse disorders."[208]

B. Drumming Power from Fear

"[C]hronic use of prescription opioid drugs was correlated with support for the Republican candidate in the 2016 US presidential election,"[209] so our craving for near-term, War on Drugs strongman solutions to this crisis should not puzzle us in the least. "People who reach for an opioid might also reach for . . . near-term fixes," says Dr. Nancy Morden from the Dartmouth Institute for Health Policy and Clinical Practice.[210] "I think that Donald Trump's campaign was a promise for near-term relief."[211] Many of us do, after all, participate in a culture that enjoys simple solutions. "Americans are seduced by the idea that drugs can solve most problems and are fast-

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207. Stemen, *supra* note 197, at 414.

208. Lenny Bernstein, *Landmark report by Surgeon General calls drug crisis 'a moral test for America'*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/national/health-science/landmark-report-by-surgeon-general-calls-drug-crisis-a-moral-test-for-america/2016/11/16/4214bf2a-ac49-11e6-977a-1030f822fc35_story.html?utm_term=.62885bf9e77c [https://perma.cc/NE7Z-LRFR] (discussing U.S. DEP'T HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH (2016), https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf [https://perma.cc/V9CB-SCWX]).

209. *See* James S. Goodwin, Young-Fang Kuo, David Brown, et al., *Association of Chronic Opioid Use With Presidential Voting Patterns in US Counties in 2016*, JAMA NETWORK OPEN (June 22, 2018), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2685627 [https://perma.cc/RUZ8-DS2J].

210. Paul Chisholm, *Analysis Finds Geographic Overlap In Opioid Use And Trump Support In 2016*, NPR (June 23, 2018), https://www.npr.org/sections/health-shots/2018/06/23/622692550/analysis-finds-geographic-overlap-in-opioid-use-and-trump-support-in-2016 [https://perma.cc/VER3-H7LR].

211. *Id.*

acting, safe and simple solutions to whatever ails them,"[212] and this is especially the case when faced with chronic pain with perceivably little individual, immediate causal origin. To address the rising tide of millions who report suffering from chronic pain, Big Pharma marketed painkillers as chemically unhookable, creating a veritable "gateway to heroin by overselling their benefits and underplaying their harms."[213] The Iron Law of Prohibition then funneled moderate users towards more and more lethal drugs, incentivizing a shift in their tastes for the lethal by supplying only drugs with high potency per gram. But in the business of selling simple solutions to big, giant problems, no profit is made unless that problem is not also then rendered as the specific keyhole for which key federal approaches to the War on Drugs can fit. This is how opiophobia is alchemized into expansions of executive control.

The War on Drugs approach fracks considerable political power from fear. "Some argue that by the end of the twentieth century, crime and crime control were central to the exercise of authority in the United States at all levels of government and the control of drugs was central to that authority."[214] Take a look at the history of prohibition, with its ability to increase federal power and allocate funds. Resources devoted to alcohol interdiction and law enforcement "reached unprecedented levels" during alcohol prohibition, where the Bureau of Prohibition saw a four-fold budget increase through the 1920s.[215] In our present-day prohibition against recreational opioid use, the DEA has benefited from "major scale-up in the staffing and funding of federal agents along the US-Mexico Border."[216] Even if "[p]rohibition clearly does not work for the vast majority of the world's citizens," it does "meet[] the needs of the world's superpowers, who can resource and engage their military, po-

212. Heather Tick & Jane Ballantyne, Opinion, *Health-care system needs reboot to solve pain and opioid crisis*, SEATTLE TIMES (June 17, 2018), https://www.seattletimes.com/opinion/health-care-system-needs-reboot-to-solve-pain-and-opioid-crises/ [https://perma.cc/UZ3R-FN3L].

213. *Id.*

214. Stemen, *supra* note 197, at 385 (internal citations and quotations omitted) (citing JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 71–72, 262–63 (2009)).

215. Beletsky & Davis, *supra* note 22, at 157 (citation omitted).

216. *Id.* (citation omitted).

lice[,] and criminal justice systems, all justified in the war against the global 'drug menace.'"[217]

And President Trump, who considers formidable law enforcement to be "absolutely vital to ensuring a drug-free society,"[218] will likely be the last to discard punitive War on Drugs strategies. The militarized law enforcement approach works particularly well for his administration, given Obama's strategic passivity within the area of drug enforcement during his presidency. "At the end of 2016, there were 23 percent fewer [federal drug prosecutions] than in 2011," Trump states, a fact he takes to mean that Obama's administration simply "looked at this scourge and . . . let it go by."[219] Unlike Obama, Trump declares: "we're not letting it go by."[220] While some countries pursue the "full decriminalization of narcotics" as a solution, the United States chooses instead to respond with "enhanced law enforcement" to "clamp[] down" on its possession and trade.[221] The international community has borne witness to this approach, most recently by our efforts to convince the UN to further criminalize fentanyl.[222] Fentanyl is so potent that dosage mistakes pose Russian-roulette odds of death. But it is its international origins that lubricate American War on Drugs efforts abroad. As President Trump puts it: "In China, you have some pretty big companies sending that garbage and killing our people"—a type of foreign interference he would liken to "a form of warfare."[223] Most of the fentanyl shipped to the U.S. does arrive from China, traveling through the U.S. postal sys-

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217. Brian Wheeler, *Why not . . . legalise drugs?*, BBC NEWS (Sept. 5, 2013), https://www.bbc.com /news/uk-politics-23374228 [https://perma.cc/3BVJ-XM3D].

218. Donald Trump, President of the United States, Remarks Before a Briefing on the Opioid Crisis (Aug. 8, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-briefing-opioid-crisis/ [https://perma.cc/PF57-YLJ6].

219. *Id.*

220. *Id.*

221. *Topic One: Combatting Drug Addiction and Overdoses*, WORLD HEALTH ORGANIZATION 1, 2 (2018), https://static1.squarespace.com/static/533e6b7de4b0d84a3bd7c4be/t/5a387c1bc83025d4900d14f4/1513651232055/WHO_Background_Guide.pdf. [https://perma.cc/ZNZ9-FAKU].

222. *See* Matthew Hall, *US turns to Trump targets — UN, China and Mexico — for help in Opioid Crisis*, GUARDIAN (Jan. 7, 2018), https://www.theguardian.com/us-news/2018/jan/07/us- [https://perma.cc/8JK3 -CVBW].

223. Julie Hirschfield Davis, *Once Dry Discussions, Cabinet Meetings Are Now Part of the Trump Show*, N.Y. TIMES (Aug. 6, 2018), https://www.nytimes.com/2018/08/16/us/politics/trump-cabinet-meetings.html [https://nyti.ms/2My12n6].

tem in small packages,[224] sometimes mislabeled or with chemical modifications,[225] then "distributed by Internet cryptomarkets and Mexican drug trafficking organizations."[226] The cryptomarket route of sale poses unique regulatory challenges, as dark web transactions allow purchasers to shop anonymously, then pay for their illicit goods using virtual currencies like Bitcoin.[227] These covert, dark trade routes inspired James A. Walsh, Deputy Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, to warn at the Sixty-First United Nations Commission on Narcotic Drugs (CND) that "[a]nyone with an internet connection and access to international mail can be next. So the world must be vigilant and respond to this new threat."[228]

When our federal officials urge border vigilance as a solution to drug crises, is it mere political rhetoric, or welfare-maximizing policy? As we detail in our next section, Just Say Yes, our major legislative and political efforts cumulatively cut off legal supply of a substance for which there is rabid demand. Could we reasonably have expected anything other than an explosion in illegal supply? "Simply removing access to [opioid analgesics] without replacing this therapy with other pain management modalities and delivering evidence-based opiate substitution treatment could lead to only two outcomes: increases in untreated pain, unmanaged withdrawal or substitution with other, likely more potent, opioids."[229] Implementing demand-reduction measures, on the other hand—thought to

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224. Zurcher, *supra* note 4.

225. *See Tackling Fentanyl: The China Connection: Hearing Before the Subcomm. on Africa, Global Health, Global Human Rights, & Int'l Orgs. Of the H. Comm. on Foreign Affairs*, 115th Cong. 60 (2018) [hereinafter *Tackling Fentanyl*] (statement of Bryce Pardo, Associate Policy Researcher, RAND Corporation) ("It has been reported that Chinese traffickers and chemical exporters will mislabel shipments, modify chemicals, or ship preprecursors that fall outside international controls.").

226. Beletsky & Davis, *supra* note 22, at 157 (citation omitted).

227. *See* Nathaniel Popper, *Opioid Dealers Embrace the Dark Web to Send Deadly Drugs by Mail*, N.Y. TIMES (June 10, 2017), https://www.nytimes.com/2017/06/10/business/dealbook/opioid-dark-web-drug-overdose.html?mtrref=www.nytimes.com [https://nyti.ms/2s8fNCE].

228. *See U.S. Leading International Progress on Combating the Opioid Crisis at 61st UN Commission on Narcotic Drugs*, DIPNOTE (Mar. 14, 2018), https://blogs.state.gov/stories/2018/03/14/en/us-leading-international-progress-combating-opioid-crisis-61st-un-commission [https://perma.cc/38D8-9FZK].

229. Beletsky & Davis, *supra* note 22, at 157.

include a Rat Park-like combination of "improv[ed] access to . . . methadone and buprenorphine," expanded insurance coverage of treatment, and subsidized treatment costs for those unable to pay—would both reduce "economic incentives for drug dealers" and save lives.[230]

The "advent of illicitly manufactured synthetic opioids coming from China" certainly produces uncertainty.[231] But what of the significantly "less uncertainty surrounding the impact of medication therapies when it comes to saving lives"?[232] The chemical hook theory foreclosed rational examination of the underlying demand, and the Iron Law of Prohibition worked to ensure that the only accessible doses are those that risk killing people. And yet, at the height of our scourge, what we get is not a commitment to an honest analysis of demand, but a litigious, finger-pointing blame game.

C. The Litigious Blame Game

Purdue Pharma and McKesson are frequently in the news.[233] "Cities as large as Philadelphia and Chicago, as well as hundreds of small towns and cities," have sued these "Big Pharma" manufacturers and distributors in *parens patriae* lawsuits,[234] which rest on the doctrine that the state, as a sovereign, may prosecute on behalf of its residents.[235] These jurisdictions argue that by knowingly manufacturing inordinate amounts of supply and pumping it into a macroeconomically depressed American heartland, Big Pharma "triggered a public health crisis,"[236] raising insurance rates and imposing an estimated total eco-

230. *Tackling Fentanyl*, *supra* note 225, at 66.

231. *Id.*

232. *Id.*

233. *See, e.g.*, Jared Brown & Kitsap Sun, *Kitsap County files lawsuit against opioid manufacturers and distributors*, KING 5 NEWS (July 25, 2018, 4:32 PM), https://www.king5.com/article/news/local/kitsap-county-files-lawsuit-against-opioid-manufacturers-and-distributors/281-577475519 [https://perma.cc/CEW7-RFTY].

234. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1146 (2014); *see also, e.g.*, *In re* Nat'l Prescription Opiate Litig., 209 F. Supp. 3d 1375 (J.P.M.L. 2017).

235. *Parens patriae*, BLACK'S LAW DICTIONARY (7th ed. 1999).

236. Andrew M. Harris & Patricia Hurtado, *Opioid Makers Sued for Premium Hikes in First-of-Kind Cases*, BLOOMBERG (May 2, 2018), https://www.bloomberg.com/news/articles/2018-05-02/opioid-makers-sued-over-rising-premiums-in-first-of-kind-cases [https://perma.cc/GR6H-YCVH].

nomic burden of $78.5 billion in 2013 alone.[237] Federal health agencies are forced to respond to this dilemma by scrambling like the little Dutch boy, plugging leaks in the increasingly deteriorating dike of drug crime enforcement with efforts to stem the tide of death.[238]

The scope of liabilities is broad, and the instinct to blame *somebody* for our opioid dilemma—whether dealers, doctors, manufacturers, or distributors—is a potent one. The many philosophical bases justifying punishment for social welfare-minimizing offenders tend to go in two directions.[239] The utilitarian view punishes in order to deter future bad acts, while retributive theories seek to punish bad actors "because they deserve to be punished."[240] Corrective justice theory—with its reliance on individual moral rights—falls into the former.[241] It focuses on achieving justice between parties and holding negligent parties responsible for making injured patients whole,[242] which would appear to make it ideal for our crisis of oversupply. But because it prioritizes moral justifications for blame over pragmatic policy goals of compensation,[243] capitalistic America hardly takes to it.

The same cannot be said for retributive justice theory, which ostensibly relies on biblical reasons for blaming Big Pharma for our crisis:

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237. Curtis Florence et al., *The Economic Burden of Prescription Opioid Overdose, Abuse, and Dependence in the United States*, 2013, 54 MED. CARE 901 (2016).

238. *Enhanced State Opioid Overdose Surveillance*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/foa/state-opioid-mm.html [https://perma.cc/586M-LRBH] (last visited Aug. 9, 2018) (The CDC, for instance, has invested considerable effort to increasing the "timeliness and comprehensiveness of reporting fatal opioid overdose through the State Unintentional Drug Overdose Reporting System (SUDORS), which captures detailed information on toxicology, death scene investigations, route of administration, and other risk factors that may be associated with a fatal overdose.") .

239. *Punishment—Theories of Punishment*, JRANK, https://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html [https://perma.cc/EAR4-PBUG] (last visited Feb. 5, 2019).

240. *Id.*

241. *See* James R. Blaufuss, Note, *A Painful Catch-22: Why Tort Liability for Inadequate Pain Management Will Make for Bad Medicine*, 31 WM. MITCHELL L. REV. 1093, 1114 (2005).

242. *Id.*

243. Hugo A. Bedau & E. Kelly, *Punishment*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2017), https://plato.stanford.edu/entries/punishment [https://perma.cc/67XW-8LL9].

> This eye-for-an-eye theory rests upon the premise that crime upsets the peaceful balance of society, and punishment helps to rectify the balance. The major difference between the retributive and utilitarian theories is one of perspective: retributive justice looks backward at the crime itself as the reason for punishment, whereas the utilitarian theory "looks forward by basing punishment on societal benefits."[244]

The "acceptability, if not supremacy, of the retributive justification for punishment is reflected in American popular culture," which glorifies retribution both in entertainment and in political rhetoric.[245] And the myriad *parens patriae* suits today certainly do portray addicts and cities ravaged by opioids as the Davids to Big Pharma's Goliath.

Many argue that doctors ought to have been the protective intermediary between addicts and companies like Purdue. To them, physicians deserve punishment under either theory for acting as "pill-mills," prescribing opioids for profit rather than to uphold the Hippocratic Oath.[246] Physician liability in this crisis appeals to the paternalistic values society ascribes to doctors, and neatly places the burden at the prescriber's feet to control what use should occur. The entire purpose of the prescription regulation system, after all, rests on the public policy judgment that doctors ought to be vested with the legal responsibility of understanding the benefits and risks of a specific drug to their specific patient.[247]

Negligent over-prescription by doctors was one of many initial causes-in-fact of this crisis. According to one expert in pharmacology, the success of OxyContin stems "partly [from] the fact that so many doctors wanted to believe in the therapeutic benefits of opioids."[248] While most opioid prescriptions

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244. Anna Armistead, Comment, *Epidemics Collide: The Opioid Crisis in Prisons*, 7 WAKE FOREST J.L. & POL'Y SUA SPONTE 49, 69–70 (2017) (internal citations omitted) (quoting *Punishment—Theories of Punishment*, *supra* note 239).

245. Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 19 (2005).

246. *See* Zurcher, *supra* note 4.

247. Judith Edersheim & Theodore Stern, *Liability Associated with Prescribing Medications*, 11 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 115, 115–19 (2009).

248. Patrick Radden Keefe, *The Family that Built an Empire of Pain*, NEW YORKER (Oct. 30, 2017), https://www.newyorker.com/magazine/2017/10/30/the-family-that-built-an-empire-of-pain.

were written in good faith, "some providers prescribed (and sometimes dispensed) large amounts of opioids without regard for the patients' medical need."[249] "Medication was offered a month's supply at a time for one-time injuries and chronic pain, often to treat years of working in physically arduous jobs—like those in manufacturing and the coal mines."[250] And as these jobs dried up and more people lost work, companies like Purdue continued to woo physicians with all-expenses-paid trips at resort hotels,[251] urging them to prescribe twelve-hour, or "Q12h" dosage regimens that were later found to *increase* tolerance, thereby *increasing* demand for drugs stronger than legal OxyContin.[252]

This is where the sins of physicians bleed into the sins of Big Pharma. "[T]hough many fatal overdoses have resulted from opioids other than OxyContin, the crisis was initially precipitated by a shift in the culture of prescribing—a shift carefully engineered by Purdue."[253] Prior to OxyContin's release, physicians typically reserved long-term narcotic prescriptions for the terminally ill.[254] Purdue thought this market was too small. "A 1995 memo sent to the [Oxycontin] launch team emphasized that the company did 'not want to niche' OxyContin just for cancer pain."[255] So, when doctors deviated from Purdue-prescribed OxyContin consumption recommendations, Purdue executives mobilized its sales reps—described in internal budget documents as the company's "most valuable resource"[256]—to "refocus" physicians on 12-hour dosing.[257] One memorandum, entitled "$$$$$$$$$$$$ It's Bonus Time in the

249. Beletsky & Davis, *supra* note 22, at 156.

250. Zurcher, *supra* note 4.

251. Harriet Ryan, Lisa Girion & Scott Glover, *You Want a Description of Hell? Oxycontin's 12-Hour Problem*, L.A. TIMES (May 5, 2018), http://www.latimes.com/projects/oxycontin-part1/ [https://perma.cc/7F97-8USY].

252. *See id.*

253. Keefe, *supra* note 248.

254. *Id.*

255. *Id.*

256. *Id.*

257. Ryan, Girion, & Glover, *supra* note 251 (As one Purdue sales manager wrote to her staff, prescriptions for shorter intervals of OxyContin "needs to be nipped at the bud. NOW!!").

Neighborhood!", "reminded Tennessee reps that raising dosage strength was the key to a big payday."[258]

As a result, "doctors wrote 5.4 million [OxyContin] prescriptions in 2014"[259]—almost all of which were for 12-hour doses.[260] Both clinical data and patients report that OxyContin would wear off in less than twelve hours,[261] creating a veritable sine wave of higher highs and lower lows.[262] As a "chemical cousin" of heroin, OxyContin, in between these highs of analgesic coverage, triggered "body aches, nausea, anxiety," and other symptoms of heroin withdrawal in its users.[263] It was entirely foreseeable then that abuse of semi-synthetic opioids would later be identified as the "primary cause of a decade-long increase in overdose deaths in the USA."[264] As two doctors would put it, 12-hour dosing intervals of OxyContin creates "the perfect recipe for addiction," which makes Purdue's insistence upon it an "addiction producing machine."[265]

Purdue likely could not have toppled physician opiophobia without the "many doctors [who] wanted to believe in the therapeutic benefits of opioids."[266] It knows this, and victim-blames accordingly.[267] In a statement responding to a lawsuit accusing Purdue and other companies producing our opioid epidemic, Purdue "vigorously" denied the allegations, noting that: (1) OxyContin is FDA-approved, (2) its "products account for less than 2 percent total opioid prescriptions," and (3), like the rest of America, it is "troubled by the crisis" and "wants to be part of the solution."[268] Purdue is eager to share that it "dis-

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258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. S. Cunningham & K. Finlay, *Identifying Demand Responses to Illegal Drug Supply Interdictions*, 25 HEALTH ECON. 1268, 1287 (2016) (citation omitted).

265. Ryan, Girion & Glover, *supra* note 251.

266. *See* Keefe, *supra* note 248.

267. Ryan, Girion, & Glover, *supra* note 251. (In the words of Purdue's senior medical director in 2001, "A lot of [OxyContin users] say, 'Well, I was taking the medicine like my doctor told me to,' and then they start taking them more and more and more . . . . I don't see where that's my problem.").

268. Adam Lidgett, *Tribes Hit Pharma Cos. With Suit Over Opioid Crisis*, LAW360 (Mar. 6, 2018), https://www.law360.com/articles/1018863 [https://perma.cc/2P6P-RYLV].

tributed the CDC Guideline for Prescribing Opioids for Chronic Pain, developed three of the first four FDA-approved opioid medications with abuse-deterrent properties,"[269] and partners with law enforcement to ensure access to naloxone."[270] However, addiction does not "simply dissipate with . . . the introduction of 'abuse deterrent' formulations," nor is it addressed by post-hoc, life-saving remedies.[271] And in the court of public opinion, the naivete of doctors has done little to detract from the detestability of Purdue designing OxyContin for profit, rather than for patient well-being,[272] and it holding fast to its "Q12h" dosing campaign to protect its hegemony in the painkiller market.[273]

OxyContin's FDA approval, however, does operate as an affirmative defense against complete responsibility.[274] In the words of one former DEA chief of staff, OxyContin's FDA approval is a "fundamental weakness" in the cases brought against the manufacturer.[275] Retributive justice theories do entitle bad actors like Purdue to a number of defenses when they are pilloried to deter future bad acts, in order to "counterbalance the state's lack of incentive, or conceivably disincentive, to

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269. *Id.*; *Press Release, Setting the Record Straight on Our Anti-Diversion Programs*, PURDUE PHARMA (July 11, 2016), https://www.purduepharma.com/news-media/2016/07/setting-the-record-straight-on-our-anti-diversion-programs/ [https://perma.cc/S949-TGKR].

270. Press Release, Purdue Pharma, National Sheriffs' Association and Purdue Pharma Announce Additional Funding for Life-Saving Opioid Overdose Initiative (Jun. 26, 2017), https://www.purduepharma.com/news-media/2017/06/national-sheriffs-association-and-purdue-pharma-announce-additional-funding-for-life-saving-opioid-overdose-initiative/ [https://perma.cc/MW3J-69JN].

271. Beletsky & Davis, *supra* note 22, at 156.

272. Ryan, Girion & Glover, *supra* note 251 ("The company charged wholesalers on average about $97 for a bottle of the 10-milligram pills, the smallest dosage, while the maximum strength, 80 milligrams, ran more than $630, according to 2001 sales data the company disclosed in litigation with the state of West Virginia.").

273. *Id.*

274. *OxyContin Maker Stops Promoting Opioids, Cuts Sales Staff*, REUTERS (Feb. 10, 2018), https://www.reuters.com/article/usa-opioids-purduepharma/oxycontin-maker-stops-promoting-opioids-cuts-sales-staff-idUSL2N1Q00EU [https://perma.cc/EB92-VT4X] ("As a company grounded in science," Purdue writes, "we must balance patient access to FDA-approved medicines, while working collaboratively to solve this public health challenge.").

275. Nate Raymond, *U.S. state, local government lawsuits over opioids face uphill battle*, REUTERS (June 2, 2017), https://www.reuters.com/article/us-ohio-opioids-lawsuit-analysis-idUSKBN18T1H4 [https:// perma.cc/X9JW-EC89].

verify definitively the actual guilt of the charged party."[276] But allowing federal agency approval to protect opioid makers runs the danger of negating the benefit of deterrence: analysts predict that the FDA's approval of prescription opioids will cause liabilities to fall short of the "200 billion plus tobacco [master settlement agreement]."[277]

The desire for retribution, then, is a legally imperfect mode of punishing Big Pharma. It strives not for symmetrical, corrective justice, but mass blame-signaling effect, which means that the inexactness with which litigation seeks to hold Big Pharma stakeholders accountable is a desired feature, rather than a bug. Indeed, the uneven patchwork of litigation is comprised of states that sue using their own attorneys, others using private firms; some capping their attorneys' compensation fee structures, while others compensate on a sliding scale; and some states choosing to sue only Purdue Pharma, while others add Endo Pharmaceuticals, Johnson & Johnson, Amerisource Bergen, Cardinal Health, and McKesson into the mix.[278] Disparate lawsuits do not appeal to the obsessive-compulsive, for the "sprawling nature of the opioid litigation, with hundreds of plaintiffs and a still-expanding roster of defendants, has made it particularly challenging to contain within traditional legal procedures."[279] The breadth of litigants, "from manufacturers and distributors like Purdue Pharma and Cardinal Health and big retail pharmacy chains like Walgreens down to small-town pharmacies and prescribing physicians,"[280] also reflects a disharmonious choir of industries who each sing their defenses at

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276. Fellmeth, *supra* note 245, at 31.

277. *Fitch Ratings: US Pharma Tobacco—Style MSA Possible, Similar Size Unlikely*, FITCH (Aug. 24, 2018), https://www.fitchratings.com/site/pr/10042562 [https://perma.cc/7NWE-GYZ6].

278. Daniel Fisher, *Latest Wave of State Opioid Lawsuits Shows Diverging Strategies and Lawyer Pay Scales*, FORBES (May 29, 2018), https://www.forbes.com/sites/legalnewsline/2018/05/29/latest-wave-of-state-opioid-lawsuits-shows-diverging-strategies-and-lawyer-pay-scales/#66c79e776d1d [https://perma.cc/ H9H4-WU98].

279. Daniel Fisher, *Judge Sees Litigation As Only An "Aid In Settlement Discussion" For Opioid Lawsuits*, FORBES (May 10, 2018), https://www.forbes.com/sites/legalnewsline/2018/05/10/judge-sees-litigation-as-only-an-aid-in-settlement-discussions-for-opioid-lawsuits/#3578a9af4b99 [https://perma.cc/C5FZ-YFAW].

280. Daniel Fisher, *Judge Orders Trials in Opioid Suits, DEA Records As "Step Toward Defeating the Disease,"* FORBES (Apr. 12, 2018), https://www.forbes.com/sites/legalnewsline/2018/04/12/opioid-judge-orders-trials-dea-records-as-step-toward-defeating-the-disease/#2105c7667fe5 [https://perma.cc/PG4S-S33U].

different keys.[281] After all, each industry included in suit—drug makers, distributors, and retailers—contributed to our opioid epidemic differently, which inspires defendants to blame each other, and "makes the apportionment of liability even more contentious."[282]

Various still are the flora and fauna of liability claims and defenses that sprout from retributive desire. Both manufacturers and distributors argue against total responsibility for opioid oversupply by ducking behind the medical licensure of the physicians that prescribed them.[283] This view, though morally bankrupt, is a robust defense against public nuisance claims, which require plaintiffs to prove "the defendants had control over the products when it caused the nuisance."[284] The gist of the arguments against opioid manufacturers is that they "knew—or should have known—that their products weren't safe or effective, yet they advertised their products as safe and effective anyway."[285] The case against opioid distributors, however, requires more nuance to grasp:

> Under federal and some state laws, opioid distributors have a legal obligation to stop controlled substances from going to illicit purposes and misuse. The diversion theory argues that these distributors clearly did not do that: As the opioid epidemic spiraled out of control, and as some counties and states had more prescriptions than people, it should have become perfectly clear that something was going wrong—yet, the claim goes, distributors continued to let the drugs proliferate.[286]

Given that "most . . . overdose deaths are caused by illegal drugs like fentanyl," plaintiffs seeking distributor liability face the additional burden of proving that "victims were launched on the path to addiction by legally prescribed opioids . . . that

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281. *See* Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html [https://nyti.ms/2Fhx7sK].

282. *Id.*

283. Fisher, *supra* note 280.

284. *Id.*

285. German Lopez, *The Growing Number of Lawsuits Against Opioid Companies, Explained*, VOX (updated May 15, 2018), https://www.vox.com/policy-and-politics/2017/6/7/15724054/opioid-epidemic-lawsuits-purdue-oxycontin [https://perma.cc/5PFP-DWPB].

286. *Id.*

were illegally diverted with the drug companies' knowledge."[287] The desire to blame distributors for enabling diversion is thus criticized for fundamentally misunderstanding how pharmaceutical supply chains are regulated.[288] According to John Parker, senior vice president of the Healthcare Distribution Alliance, "[t]hose bringing lawsuits will be better served addressing the root causes, rather than trying to redirect blame through litigation."[289]

Whether claiming public nuisance, fraud, racketeering, corruption, or violations of state and federal controlled substances laws,[290] holding legal suppliers to account can only really recompense costs of legal supply. Both unreported demand and illegal supply, however—not merely legal, pharmaceutical overproduction—work to distinguish our addicts' morbidity from those who got clean when they returned to Vietnam. How much ability do we have, then, to remedy a drug market bifurcated into legal and illegal sources of harm? When the executive and legislative branches are slow to respond to crises, Judge Dan Polster of the Northern District of Ohio is one federal judge who believes that courts must step up to the plate.[291]

Judge Polster has captained a multi-district litigation (MDL) effort to collect the over 1,500 opioid harm-based, *parens patriae* lawsuits clamoring in the federal court system today.[292] They are filed by cities, counties, hospitals, and Native American tribes seeking to recover against "central figures in the national opioid tragedy"[293]—a motley crew of opioid manufacturers, distributors, and retailers—for the costs associated with what Judge Polster describes as "a man-made plague."[294]

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287. Fisher, *supra* note 280.

288. *See, e.g.*, Lidgett, *supra* note 268.

289. *Id.*

290. Hoffman, *supra* note 281.

291. Abbe R. Gluck, *Can a Judge Solve the Opioid Crisis?*, WALL ST. J. (May 7, 2018, 6:24 PM), https://www.wsj.com/articles/can-a-judge-solve-the-opioid-crisis-1525731873 [https://perma.cc/68ML-93P2].

292. Jan Hoffman, *Opioid Lawsuits Are Headed to Trial. Here's Why the Stakes Are Getting Uglier*, N.Y. TIMES (Jan. 30, 2019), https://www.nytimes.com/2019/01/30/health/opioid-lawsuits-settlement-trial.html [https://nyti.ms/2HE1zTe].

293. Hoffman, *supra* note 281.

294. Amanda Bronstad, *Opioid Judge Refuses to Dismiss Claims That Drug Companies Caused "Man-Made Plague,"* LAW.COM (Dec. 20, 2018), https://www.law.com/2018/12/20/opioid-judge-refuses-to-dismiss-claims-that-

The procedural streamlining of MDLs is an attractive feature when the "theories under which parties are suing make for a legal cacophony."[295] Unlike class actions, MDLs allow plaintiffs from different jurisdictions to file their lawsuits separately, group similar cases together before a court, resolve pretrial issues in concert, then remand cases to their home jurisdictions for final adjudication at trial.[296] But the "vast majority" of MDLs do settle prior to remand.[297] According to Judge Polster, America is not "interested in depositions, and discovery, and trials," nor "figuring out the answer to interesting legal questions like preemption and learned intermediary, or unravelling complicated conspiracy theories."[298] The goal of this MDL, as stated by him, is rather simple: to "dramatically reduce the number of the pills that are out there."[299]

Whether too big to fail or too big to succeed, Judge Polster's MDL arguably presents "the most daunting legal challenge in the country"[300]—one even he admits has become "far more" "complex and challenging" than envisioned by his original goal.[301] And "[c]omplexity" in the litigatory context "favors the defense."[302] As do delays—like those that have already pushed back start dates for the first set of bellwether trials—which are typically better weathered by corporate entities capable of affording "the long game" in litigation, and can also "afford to drag . . . out" settlement negotiations (which typically "drive[s] down" its "final tab").[303] Indeed: what becomes of economic deterrence when the pharmaceutical industry is able to budgetarily plan for the billions in product liability defense costs,[304]

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drug-companies-caused-man-made-plague/?slreturn=20190105214952 [https://perma.cc/ 4LMM-RBF2].

295. Hoffman, *supra* note 281.

296. Gluck, *supra* note 291.

297. Fisher, *supra* note 280.

298. Eric Heisig, *Here's why a federal judge presiding over opioid lawsuits thinks settling them is important*, CLEVELAND (Mar. 7, 2018, 5:07 PM), https://www.cleveland.com/courtjustice/index.ssf/2018/01/heres_why_a_federal_judge_pres.html [https://perma.cc/SP7B-V3BX].

299. *Id.*

300. *Id.*

301. Hoffman, *supra* note 292.

302. *Id.*

303. *Id.*

304. Sarpatwari, Sinha & Kesselheim, *supra* note 105, at 480 ("Over the past twenty-five years, the industry has paid $35.7 billion to settle claims of illegal

yet remain "extremely profitable"?[305] In 2007, Purdue incurred over $630 million in fines.[306] But it also generated over $31 *billion* in OxyContin revenue since the mid-1990s,[307] which makes its 2007 penalty just 2% of its gains. Monetary penalties remain a "quite small percentage" of the industry's global revenue,[308] and OxyContin to this day continues to generate billions of dollars per annum,[309] which says nothing of pharmaceutical companies' and distributors' contention that increased costs of business ultimately fall on patients' and taxpayers' shoulders.[310]

There are also few mechanisms to ensure that the money which jurisdictions generate from litigation will reach their intended destinations. This ought to be compelling, given that the results of mass, Big Tobacco litigation by states suggest that grand litigatory compacts achieve very little in terms of victim services.[311] To many, Judge Polster's MDL mimics Big Tobacco's 1999 Master Settlement Agreement (MSA), an accord "between the state Attorneys General of 46 states, five U.S. territories, the District of Columbia and the five largest cigarette manufacturers in America concerning the advertising, marketing and promotion of cigarettes."[312] The MSA required the Big

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marketing, including making false or misleading claims or failing to disclose known risks.").

305. *See* Richard Anderson, *Pharmaceutical Industry Gets High on Fat Profits*, BBC NEWS (Nov. 6, 2014), http://www.bbc.com/news/business-28212223 [https://perma.cc/BWH9-M5ST].

306. Ryan, Girion & Glover, *supra* note 251.

307. *Id.*

308. Kevin Outterson, *Punishing Health Care Fraud — Is the GSK Settlement Sufficient?*, 367 NEW ENG. J. MED. 1082, 1083 (2012).

309. Jeff Feeley, *Purdue's Oxycontin Targeted at Judge's Opioid Summit*, BLOOMBERG (Feb. 2, 2018, 1:00 AM), https://www.bloomberg.com/news/articles/2018-02-02/purdue-s-oxycontin-said-to-be-targeted-at-judge-s-opioid-summit [https://perma.cc/68ML-93P2].

310. Geoff Mulvihill & Kyle Potter, *As States Consider Taxing Opioids, Drugmakers Push Back*, U.S. NEWS (Apr. 28, 2018), https://www.usnews.com/news/us/articles/2018-04-28/as-states-consider-taxing-opioids-drugmakers-push-back [https://perma.cc/N69B-ZMC9].

311. *See, e.g.*, Kip Viscusi, *A Postmortem on the Cigarette Settlement*, 29 CUMB. L. REV. 53 (1999).

312. *Master Settlement Agreement*, PUB. HEALTH LAW CTR., http://www.publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/master-settlement-agreement [https://perma.cc/T3M8-P2TD] (last visited Aug. 10, 2018).

Tobacco industry to pay states billions of dollars annually.[313] The problem with compensating states for their citizens' harms, however, is that it requires states to "keep[] their promise to use a significant portion of their settlement funds—estimated at $246 billion over the first 25 years—to attack the enormous public health problems caused by tobacco use in the United States":[314]

> Despite receiving huge sums from the settlement and collecting billions more in tobacco taxes, the states continue to shortchange tobacco prevention and cessation programs that we know save lives and money. In . . . Fiscal Year 2018, the states will collect $27.5 billion from the settlement and taxes. But they will spend less than 3 percent of it—$721.6 million—on programs to prevent kids from smoking and help smokers quit. Meanwhile, tobacco companies spend $8.9 billion a year—$1 million dollars every hour—to market their deadly and addictive products. This means tobacco companies spend $12 to market their products for every $1 the states spend to reduce tobacco use.[315]

Because retributive consequences are tautologically validated by the desire to punish—and therefore "need be only loosely related to any tangible or even articulable damage actually caused by the defendant"[316]—perhaps they also perfectly justify imperfect means of recompense and economic deterrence like the MSA.

Perhaps the most persuasive evidence against the wisdom of retribution via MDL derives from the fact that drug warrior–led executive agencies take to it. The Department of Justice, formerly under Jeff Sessions, joined the MDL as a "friend of the court."[317] It did so to argue "that the federal government" has also "borne substantial costs from the opioid epidemic"[318]—an

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313. *Id.*

314. *A State-By-State Look at the 1998 Tobacco Settlement 19 Years Later*, TOBACCO FREE KIDS, https://www.tobaccofreekids.org/what-we-do/us/statereport [https://perma.cc/C3QL-4BVB] (last updated Dec. 13, 2017).

315. *Id.*

316. Fellmeth, *supra* note 245, at 19–20.

317. *Department of Justice Files Motion in Multi-District Opioid Case*, U.S. DEP'T OF JUSTICE OFFICE OF PUB. AFFAIRS (Apr. 2, 2018), https://www.justice.gov/opa/pr/department-justice-files-motion-multi-district-opioid-case [https://perma.cc/8TB5-2WS7].

318. *Id.*

argument that ought to be barred as rationally offensive, given the FDA's prior approval of OxyContin, and equitably barred as unfair to the plaintiff-jurisdictions, given that "federal involvement could also undermine a claim made by drugmakers that state and local jurisdictions are not entitled to sue over a federal law at the center of their litigation."[319] One Yale Law School professor regards the inclusion as President Trump's "desire to show that the federal government is in front in the litigation," or, terrifyingly, to "give the Trump administration more influence over any large award granted in the case."[320]

In Judge Polster's view, our crisis cannot be alleviated with "a whole lot of finger-pointing."[321] But suing repeatedly does not make America great again either. We Americans will prefer retribution even when it does not economically deter, for litigatory retribution *feels* justified when a single pharmacy in Kermit, West Virginia—with its population of 392—received 9 million hydrocodone pills in just over two years.[322] And it *feels* jusjustified when 845 million milligrams of opioids were shipped to the Cherokee Nation's fourteen counties, effectively supplying "360 pills for each prescription opioid user."[323] How can we shift our retributive gaze from "supply reduction," and refocus it instead on reducing harm and demand?[324]

D. Return on Investment from Acceptance

The U.S. today is experiencing a brief resurgence of 1980s, "Just Say No"-inspired, blanket prohibition approaches to drug interdiction. Channeling the spirit of President Nixon, President Trump describes our opioid overdose crisis as a "national shame," where "[f]ailure is not an option."[325] The executive de-

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319. John Fritze, *President Trump threatents to sue opioid makers, says crisis is "warfare,"* USA TODAY (Aug. 16, 2016), https://www.usatoday.com/story/news/politics/2018/08/16/donald-trump-opioid-makers-could-face-federal-lawsuit/1008957002/ [https://perma.cc/9CDS-BLVC].

320. *Id.*

321. Heisig, *supra* note 298.

322. Eric Eyre, *Drugs firms poured 780M painkillers into WV amid rise of overdose*, GAZETTE-MAIL (Dec. 17, 2016), https://www.wvgazettemail.com/news/health/drug-firms-poured-m-painkillers-into-wv-amid-rise-of/article_78963590-b050-11e7-8186-f7e8c8a1b804.html [https://perma.cc/DJ95-T2LY].

323. Lopez, *supra* note 285.

324. Beletsky & Davis, *supra* note 22, at 158.

325. *The Opioid Crisis*, *supra* note 7.

sire to eradicate drug addiction entirely, after all, has historically produced catchy political soundbites:[326] Richard Nixon declared drug abuse "America's public enemy number one";[327] Ronald Reagan deemed illegal drug use "an especially vicious virus of crime";[328] and Trump has also concluded that addiction is, categorically, "not our future."[329]

But when it comes to policy, Trump's take is more akin to Nancy Reagan's.[330] In 2017, his proposed solution to combat the opioid crisis was the creation of "really tough, really big, really great advertising" designed to convince young Americans to avoid opioids entirely.[331] Two years later, he continues to overemphasize "preventing initiates" through "education" as his primary strategy for "reduc[ing] the size of the drug-using population."[332] Abstinence-based arguments can sound responsive to an America that is so inundated with opioids that even the mussels in Seattle contain them.[333] But as support for his approach, he ostensibly relies not on peer-reviewed analyses of evidence-based treatment, but on personal epiphany. "This was an idea that I had," the President states, "where if we can teach young people not to take drugs, it's really, really easy not to take them."[334]

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326. Rosalind K. Kelley, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing — Are They Constitutional?*, 93 DICK. L. REV. 759, 765 (1989).

327. Richard Nixon, President of the United States, Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971), http://www.presidency.ucsb.edu/ws/?pid=3047 [https://perma.cc/B8DB-9TYU].

328. Ronald Reagan, President of the United States, Radio Address to the Nation on Federal Drug Policy (Oct. 2, 1982), http://www.presidency.ucsb.edu/ws/?pid=43085 [https://perma.cc/F4KT-29PU].

329. *The Opioid Crisis*, supra note 7.

330. *Just Say No*, HISTORY, https://www.history.com/topics/just-say-no [https://perma.cc/9LEW-52GE] (last visited Aug. 10, 2018).

331. Julie Hirschfeld Davis, *Trump Declares Opioid Crisis a "Health Emergency" But Requests No Funds*, N.Y. TIMES (Oct. 26, 2017), https://www.nytimes.com/2017/10/26/us/politics/trump-opioid-crisis.html?_r=0 [https://nyti.ms/2iBk6Uc].

332. OFFICE OF NAT'L DRUG CTRL. POLICY, EXEC. OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY, at iii (2019), https://www.whitehouse.gov/wp-content/uploads/2019/01/NDCS-Final.pdf [https:// perma.cc/2UNZ-PCWK].

333. Vanessa Romo, *Traces of Opioids Found in Seattle-Area Mussels*, NPR (May 25, 2018), https://www.npr.org/sections/thetwo-way/2018/05/25/614593382/traces-of-opioids-found-in-seattle-area-mussels [https://perma.cc/JX3F-CCVR].

334. Donald Trump, President of the United States, Remarks on Combatting Drug Demand and the Opioid Crisis (Oct. 26, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-combatting-drug-demand-opioid-crisis/ [https://perma.cc/ER3H-E4RR].

When American drug policy implicitly permits the capitalistic oversupply of the legal market for opioids, then stringently criminalizes illicit, non-pharmaceutical uses, blanket prohibition becomes far less reasonable policy, and far more political rhetoric. Total suppression—that is, the "modal programmatic and policy response" with the "singular focus" of eliminating opioid access[335]—is a singularly interesting response to our opioid crisis that has multiple, overlapping sources of both legal and illegal supply.[336] In the U.S., "the sale and use of cocaine and heroin is illegal and punishable by prison and sentencing," while the sale and use of morphine and drugs like OxyContin are legal only when prescribed by a physician.[337] This bifurcated view of addiction ultimately weakens faith in criminalization as an effective policy response: it encourages the criminal justice system to deprioritize rehabilitative approaches to drug interdiction, and to instead view its goals as incapacitation, punishment, and deterrence.[338]

Our War on Drugs enforcement efforts also incur "sunk costs in law enforcement, courts, jails, and prisons to apprehend, process, and house large numbers of drug offenders."[339] These "[e]nforcement and prohibition strategies continue under the assumption that those efforts will increase prices sufficiently to reduce demand,"[340] even while the impact of drug criminalization on overall social welfare remains "hotly debated."[341] Many believe that drug criminalization creates more negative externalities than it solves,[342] and "[p]olicy efforts to increase drug prices through supply-side interventions have had ambiguous results."[343] Treatment for cocaine dependency, for instance, is significantly more cost-effective as a measure of control than

335. Beletsky & Davis, *supra* note 22, at 156.

336. *See id.* (citation omitted).

337. Methadone is also available at licensed clinics, while its black market sale remains illegal. *See* Donald S. Kenkel & Jody Sindelar, *Economics of Health Behaviors and Addictions: Contemporary Issues and Policy Implications*, OXFORD HANDBOOK OF HEALTH ECONOMICS 1, 9 (Sherry Glied & Peter C. Smith eds., 2011).

338. Kelley, *supra* note 326, at 765.

339. Stemen, *supra* note 197, at 418.

340. Cunningham & Finlay, *supra* note 264, at 1286.

341. Kenkel & Sindelar, *supra* note 337, at 10–11.

342. *Id.*

343. Cunningham & Finlay, *supra* note 264, at 1270.

"domestic enforcement and source country interdictions."[344] And while state governments arrest more people each year for drug crimes than does the federal government,[345] the 46.1% of the inmates within the Federal Bureau of Prison incarcerated for drug offenses[346] exist as a tantalizing market for the cottage industry of privatized, for-profit prisons,[347] which arguably produce entire classes of negative externalities on their own.[348]

Restricting the supply of drugs as a means of reducing demand has been an "utter failure" in every other macroeconomic sense as well.[349] In the case of alcohol prohibition, America ultimately deemed that the "aggregate negative economic, social, and public security consequences of Prohibition could not be justified by dwindling returns in terms of reduced consumption."[350] This was not because Prohibition failed to initially produce "sharp reductions in the volume of alcohol consumed."[351] Rather, the myopic focus on reducing consumption ignored the costs of replacing the legal market for lesser-potent dosages of beer with the black market of moonshine. "While the overall volume of alcohol consumption initially decrease[d]," alcohol's potency during Prohibition rose over 150% relative to pre- and post-Prohibition periods.[352] This means that even for a comparatively innocuous substance like alcohol, prohibition had the effect of producing Russian roulette-like circumstances for its consumers. On Christmas Eve 1926, sixty people were hospitalized for alcohol poisoning, and

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344. *Id.* (citation omitted).

345. *2014: Crime in the United States*, FED. BUREAU OF INVESTIGATION (Fall 2015), https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/main [https://perma.cc /UB4M-9MGQ].

346. *Offenses*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [https://perma.cc/548V-X7GP] (last updated July 28, 2018).

347. Ari Melber, *Presumed Guilty: How Prisons Profit Off the "War on Drugs,"* MSNBC (July 29, 2014, 5:58 PM), http://www.msnbc.com/msnbc/presumed-guilty-how-prisons-profit-the [https://perma.cc/2CAZ-ZJ2T].

348. Farah Mohammed, *The Problem With Privatizing Prisons*, JSTOR: THE DAILEY (May 15, 2017), https://daily.jstor.org/the-problem-with-privatizing-prisons/ [https://perma.cc/6GCK-RQ29].

349. Bernd Debusmann, *Obama and the Failed War on Drugs*, REUTERS (Apr. 16, 2012), http://www.reuters.com/article/us-column-debusmann-drugs-idUSBRE83F0ZR2012 0416 [https://perma.cc/VM7H-PEL8].

350. Beletsky & Davis, *supra* note 22, at 156.

351. *Id.* (citation omitted).

352. *Id.* (citation omitted).

sixteen died from it in New York City *alone*.[353] "Within the next two days, yet another 23 people died in the city from celebrating the season."[354] Because the costs of total alcohol suppression outweighed its benefits, Prohibition was repealed "barely more than a decade after it was enacted."[355]

Similarly, the War on Drugs has failed to prove that opioid prohibition—the suppression of both legal and illegal supply—has any lasting effect on eliminating the demand that undergirds it. Purdue Pharma did in fact "successfully contribute[] to and capitalize[] on the medical establishment's changing view of pain management."[356] But we blame them for their efforts to capitalize upon it, in spite of the fact that the "incentive to sell potent drugs to addicts will always exist" when "our nation's health care remains a privatized, for-profit industry."[357] As a basic economic principle, "if one supplier of a commodity is prevented from operating, another will quickly emerge to take its place as long as there is a strong incentive to do so."[358] And as we were busy blaming Big Pharma for hyper-commercializing the supply of moderate opioid dosages, demand for an opioid black market grew. After half a century of global drug prohibition, "drugs are cheaper, more available and widely used than ever before."[359] What's more: this $300 billion business in drug trade is effectively "gifted" to criminal drug enterprises, who create "vast costs for those least able to bear them," "undermin[e] public health," and energize "corruption and conflict," "destabilising entire regions."[360] Indeed, the illicit drug industry constitutes "between a fifth and a third of the income of transnational organized crime."[361] It also enriches "global financial markets who launder the billions in il-

353. *Id.* (citation omitted).

354. Deborah Blum, *The Chemist's War*, SLATE (Feb. 19, 2010), http://www.slate.com/articles/health_and_science/medical_examiner/2010/02/the_chemists_war.html [https://perma.cc/G649-EWXH].

355. Beletsky & Davis, *supra* note 22, at 156.

356. Sarpatwari, Sinha & Kesselheim, *supra* note 105, at 466.

357. Lawson, *supra* note 29.

358. Frank J. Chaloupka, *Curbing the Epidemic: Governments and the Economics of Tobacco Control*, 1 WORLD BANK 1, 45 (1999).

359. Wheeler, *supra* note 217.

360. *Id.*

361. U.N. Office on Drugs & Crime, *supra* note 17.

licit profits."[362] HSBC, for one, was recently fined $1.9 billion for laundering $881 million for drug cartels.[363] Given that a third of drug profits "result in illicit financial flows," drug money also damages economies.[364]

III. JUST SAY YES

"At its heart, legalization is . . . a drama reduction program."[365]

A. Ideologically Pure Solutions from Abroad

The scale and severity of our opioid dilemma has exhausted even "historic Republican resistance to [the] public health [approach]."[366] First Lady Melania Trump's "Be Best" initiative—which prioritizes opioid abuse as one of its three pillar focuses—is one example of the way stringent biases against the recognition of drug abuse as a dual-party policy concern have dissolved over time.[367] "[W]ide-ranging bipartisan support" for evidence-based solutions is also demonstrated by passage of the SUPPORT for Patients and Communities Act,[368] which seeks to "address[] the opioid crisis by reducing access to and the supply of opioids and by expanding access to prevention, treatment, and recovery services."[369] Spearheaded by the Senate health committee's top Democrat and Republican, Senator Patty Murray (D-WA) and Senator Lamar Alexander (R-TN), H.B. 6 was overwhelmingly approved by Congress in a "rare" show of bipartisan harmony, passing the House 396 votes to 14, and the Senate 98 votes to 1.[370] The law contains provisions that re-

362. Wheeler, *supra* note 217.

363. *Id.*

364. *Heroin and cocaine prices in Europe and USA*, *supra* note 95.

365. Hari, *supra* note 41 (internal quotations omitted).

366. Tim Dickinson, *Why America Can't Quit the Drug War*, ROLLING STONE (Feb. 18, 2017), http://www.rollingstone.com/politics/news/why-americacant-quit-the-drug-war-20160505 [https://perma.cc/8N4V-6WWV].

367. *Be Best*, WHITE HOUSE, https://www.whitehouse.gov/bebest/ [https://perma.cc/G3VK-57AH] (last visited Nov. 30, 2018).

368. SUPPORT for Patients and Communities Act, Pub. L. No. 115-271 (2018).

369. *President Donald J. Trump Signed H.R. 6 into Law*, WHITE HOUSE (Oct. 24, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signed-h-r-6-law/ [https://perma.cc/33SY-KPNF].

370. Katie Zezima & Seung Min Kim, *Trump signs sweeping opioid bill. Expect to hear about it on the campaign trail*, WASH. POST (Oct. 24, 2018), https://www.washingtonpost.com/politics/trump-signs-sweeping-opioid-bill-

lax requirements for substance-use disorder telehealth services from specified requirements under Medicare;[371] requires the National Institutes of Health's research initiatives to include "cutting-edge research . . . urgently required to respond to a public health threat";[372] and "requires coverage of medication-assisted treatment under Medicaid," albeit only temporarily.[373] There is even robust support among conservative policymakers to create needle exchange programs and supply police with opioid antagonist drugs like naloxone.[374] Hell hath yet to freeze over, but it appears that the end of blanket prohibition—if not nigh—is certainly nearer than it once was.

But are we really ready for what works? States are able to apply for considerable opioid-specific project grants from entities like the Substance Abuse and Mental Health Services Administration (SAMHSA) and the CDC.[375] Even with "a lot of money going into the system," though, it "takes time" for changing political tides to "translate into new infrastructure,"[376] which is to say nothing of the varying political willingness across the states to adopt the most progressive, most effective drug reform policies—most of which hail from abroad, where the international community does treat drug addiction in notably different ways.

Portugal, for one, "had one of the worst drug problems in Europe."[377] When the prototypal War on Drugs approach failed to curb the numbers of fatal addiction poisoning, Portugal decided instead to redistribute the funds formerly used to disconnect addicts from society—either via legal criminalization

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expect-to-hear-about-it-on-the-campaign-trail/2018/10/24/1328598c-d7a9-11e8-aeb7-ddcad4a0a54e_story.html [https://perma.cc/UB8V-GKBZ].

371. SUPPORT for Patients and Communities Act § 1009.

372. Cong. Research Serv., *Summary: H.R. 6— 115th Congress*, CONGRESS.GOV (June 22, 2018), https://www.congress.gov/bill/115th-congress/house-bill/6/summary/36 [https://perma.cc/W8ZY-F7PX]; *see also* SUPPORT for Patients and Communities Act § 7042.

373. Cong Research Serv., *supra* note 372; *see also* SUPPORT for Patients and Communities Act § 1006(b).

374. Stemen, *supra* note 197, at 415 (internal citations omitted).

375. Press Release, U.S. Dep't of Health & Human Servs., HHS Awards Over $1 Billion to Combat the Opioid Crisis (Sept. 19, 2018), https://www.hhs.gov/about/news/2018/09/19/hhs-awards-over-1-billion-combat-opioid-crisis.html [https://perma.cc/HQY2-K34S].

376. Katz, *supra* note 134 (citation omitted).

377. Hari, *supra* note 41.

or stigmatization via restriction in social services—towards efforts to reconnect them, through residential rehabilitation centers, therapy, and loans for small businesses.[378] In 2000, 1% of Portugal's population was addicted to heroin.[379] Since these reforms were adopted in 2001, the prevalence of problematic drug use, "particularly intravenous drug use," experienced a dramatic decline.[380]

While Portugal's approach was premised upon an eminently logical proposition—one that asked, "instead of creating harsher conditions for drug users, why not give them a way out?"[381]—Switzerland, as another example, tried a slightly different approach to address its own disastrous rates of heroin addiction.[382] According to former Swiss president Ruth Dreifuss, her administration "had to change perspective and introduce the notion of public health [to the problem of drug addiction]. We extended a friendly hand to drug addicts and brought them out of the shadows."[383] To bring addicts into the light, Swiss authorities implemented large-scale methadone programs, needle exchange sites, and safe or supervised injection facilities (SIFs), "in some cases building on services that had been started quasi-legally in response to open drug use in Swiss cities."[384] Since the inception of Swiss SIFs over fifteen years ago, zero people have died from heroin overdose[385]—a result often described as "extraordinary."[386]

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378. *Id.*

379. *Id.*

380. Caitlin Elizabeth Hughes & Alex Stevens, *What Can We Learn From the Portuguese Decriminalization of Illicit Drugs?*, 6 BRITISH J. CRIMINOLOGY 999, 1006 (2010).

381. Chris Branch, *What the U.S. Can Learn from Portugal about Decriminalizing Drugs*, HUFFINGTON POST (Feb. 3, 2015) https://www.huffingtonpost.com/2015/02/03/portugal-drug-decriminalization_n_6606056.html [https://perma.cc/5VT8-WR9X].

382. *See* Hari, *supra* note 41.

383. Stephanie Nebehay, *Swiss Drug Policy Should Serve as Model: Experts*, REUTERS (Oct. 25, 2010), https://www.reuters.com/article/us-swiss-drugs/swiss-drug-policy-should-serve-as-model-experts-idUSTRE69O3VI20101025 [https://perma.cc/BP7P-3JDV].

384. JOANNE CSETE, OPEN SOC'Y FOUNDS., FROM THE MOUNTAINTOPS. WHAT THE WORLD CAN LEARN FROM DRUG POLICY CHANGE IN SWITZERLAND 9 (reissued 2013), https://www.opensocietyfoundations.org/sites/default/files/from-the-mountaintops-en-20160212.pdf [https://perma.cc/DBF9-UHKC].

385. *Id.*

386. Hari, *supra* note 41.

What these approaches have in common is the *genuine* belief that addiction is a public health problem—one that can be curbed only by acknowledging legal supply, illegal supply, *and* demand. While America's top executive dubs his country's struggle with addiction a "national shame," the United Nation's top drug and corruption agency would rather describe the opioid crisis as a "growing public health problem," relapse as "part of the natural history" of "opioid dependence," and overdose not as something to shame, but an opportunity that "allows people to continue their progress towards recovery," and "enable[s] them to seek out other life-saving services."[387] SIFs are one such service, with well documented life-saving potential. They operate safely abroad,[388] providing intravenous drug users the safety of injecting drugs under the supervision of personnel trained to prevent overdoses.[389] Despite the fact that SIFs "significantly reduce the transmission of infectious disease and overdose deaths without increasing drug use or crime rates," and rid communities of needles and other public drug consumption . . . hazards,"[390] SIFs in America remain illegal.[391] "Employees and users of such a site would be exposed to federal criminal charges regardless of any state law or study,"[392] for our federal drug policy embraces the view that SIFs both "normalize intravenous use of heroin and fentanyl," and would rather "undermine[] all of the hard work of treat-

387. U.N. OFFICE ON DRUGS & CRIME & WORLD HEALTH ORG., OPIOID OVERDOSE: PREVENTING AND REDUCING OPIOID OVERDOSE MORTALITY, at 7, U.N. Sales No. V.13-83194 (2013).

388. *See* Amanda Holpuch, *Secret Supervised Drug Injection Facility Has Been Operating at U.S. Site for Years*, GUARDIAN (Aug. 8, 2017), https://www.theguardian.com/society/2017/aug/08/secret-supervised-drug-injection-facility-us-opioids-overdoses [https://perma.cc/U4BD-TM9R].

389. Lenny Bernstein, *White House Opioid Commission Calls for Wide-Ranging Changes to Anti-Drug Policies*, WASH. POST (Nov. 1, 2017), https://www.washingtonpost.com/news/to-your-health/wp/2017/11/01/white-house-opioid-commission-calls-for-wide-ranging-changes-to-anti-drug-policies/?noredirect=on&utm_term=.71313874da20 [https://perma.cc/BAU8-DC5B].

390. Megan McLemore, *How the Justice Department Can Help Solve the Opioid Crisis*, NATION (Dec. 18, 2017), https://www.thenation.com/article/how-the-justice-department-can-help-solve-the-opioid-crisis/ [https://perma.cc/3QSJ-JXQP].

391. Press Release, U.S. Dep't of Justice, Statement from U.S. Attorney Andrew Lelling Regarding Proposed Injection Sites (July 19, 2018), https://www.justice.gov/usao-ma/pr/statement-us-attorney-andrew-lelling-regarding-proposed-injection-sites [https://perma.cc/49AA-S6X9].

392. *Id.*

ment providers and law enforcement across the Commonwealth."[393]

Wide-ranging legislative support for norm-challenging health interventions may reflect a culturally decriminalized mindset unavailable to a capitalistic America that chooses to privatize healthcare. The unmonetizable good of social cohesion, for instance, was one way post–Soviet Union Russia weathered the storm of macro-socioeconomic despair.[394] The start of mass privatization programs in Russia was heavily correlated with a steep uptick in suicides and instances of fatal poisoning for all groups, save one: those connected to their local community in some way.[395] In fact, each "1% increase in the percentage of population who were members of at least one social organization" had the effect of decreasing the statistical association between privatisation and mortality by 0–27%.[396] And when more than 45% of a population was a member of at least one social organisation, "privatisation was no longer significantly associated with increased mortality rates."[397] These social organizations had the effect of mitigating the effect of the macro-social changes Russia was undergoing at the time, as "the effect of privatisation was reduced if social capital was high."[398] Case and Deaton assert that a lack of the same social capital—weakening social cohesion, and declining institutional support for "marriage, childrearing, and religion"—trigger "deaths of despair" in middle-aged white Americans.[399] Together, these findings suggests that human Rat Park, if ever constructed, ought to include programs that foster the feelings of social cohesion and connectedness, in order to allow individuals to weather cognitively dissonant, meta social changes in their environment.[400] For if the real determining factor of addiction rests not in a particular substance, but in the uncon-

393. *Id.*

394. David Stuckler, Lawrence King, and Martin McKee, *Mass Privatisation and the Post-Communist Mortality Crisis: A Cross-National Analysis*, LANCET (Jan. 15, 2009), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(09)60005-2/fulltext [https://perma.cc/H7AQ-ZK6S].

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. Case & Deaton, *supra* note 109, at 398–99.

400. *See, e.g.*, Hari, *supra* note 41.

scious suspicion we harbor about the insubstantiality of our own lives, the uncivil,[401] un–Rat Park state of America today may be the most powerful factor determining the scale and scope of our crisis.

B. The Limitations of Politically Feasible Initiatives

Despite the fact that our political climate is ripe for some type of change, we cannot create Rat Park–like conditions for everybody. So in lieu of total, cultural decriminalization of drug use, perhaps our next-best, politically feasible, American Rat Park alternative ought to provide drug users with "comprehensive and integrated treatment, counselling, and clean needles and syringes."[402] Here in America, there is urgent need for "[b]road scale-up in access to high-quality, low cost drug treatment and other physical and mental health services."[403] We have made good progress in recognizing that a focus on "overdose fatality prevention and education, including expanding access to naloxone is critical, especially following periods of forced abstinence or other times of special vulnerability."[404] And we have also made headway in pushing medication-assisted treatment (MAT), "a combination of psychosocial therapy and U.S. Food and Drug Administration-approved medication"[405] considered the "most effective remedy for opioid addiction, bar none."[406]

Under MAT, addicts are provided with methadone and buprenorphine—less powerful opioids that satiate most addicts'

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401. German Lopez, *Police Shootings and Brutality in the U.S.: 9 Things You Should Know*, VOX (May 6, 2017), https://www.vox.com/cards/police-brutality-shootings-us/us-police-racism [https://perma.cc/ EP58-U7MM].

402. Gunilla Backman et al., *Health Systems and the Right to Health: An Assessment of 194 Countries*, 372 LANCET 2047, 2049 (2008); *see also* Richard Horton, *What does a National Health Service mean in the 21st Century?*, 371 LANCET 2213, 2213–18 (2008).

403. Beletsky & Davis, *supra* note 22, at 158.

404. *Id.*

405. *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, PEW CHARITABLE TRUSTS (Nov. 22, 2016) [hereinafter *MAT Improves Outcomes*, http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/11/medication-assisted-treatment-improves-outcomes-for-patients-with-opioid-use-disorder [https://perma.cc/U79J-YNKK].

406. Eric Levitz, *Why the Opioid Crisis Could Shatter Trump's Coalition*, DAILY INTELLIGENCER (Oct. 26, 2017), http://nymag.com/daily/intelligencer/2017/10/the-opioid-crisis-is-an-emergency-for-american-conservatism.html [https://perma.cc/7MFJ-XETN].

cravings, and arrest their withdrawal symptoms, without inducing opioids' debilitating, euphoric high. Decades of research, the World Health Organization, CDC, and National Institute on Drug Abuse have all demonstrated MAT's efficacy. Some studies suggest that the treatment reduces mortality among drug addicts by more than 50%.[407]

MAT is also extremely effective for helping addicted inmates successfully reenter society.[408] A 2001 Rikers Island study found that inmates who received MAT during their sentences were less likely to commit new crimes and more likely to pursue treatment upon release,[409] results that were echoed by a companion 2014 study involving Australian prison inmates.[410] But even though President Trump's own commission on opioid addiction advocates for inmates' increased access to addiction medication,[411] barriers to MAT availability in jails stems from typical factors, like "inadequate funding for treatment programs and a lack of qualified providers who can deliver these therapies."[412] Our criminal justice system indubitably maintains a "punitive approach to addiction," which takes MAT out of the list of treatment options for most jails.[413] Indeed, "[m]any who work in corrections believe, incorrectly, that treatments like methadone, itself an opioid, allow inmates to get high and simply replace one addiction with another. And many officials say they have neither the money nor the mandate to provide the medications."[414]

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407. *Id.*

408. Salam, *supra* note 132.

409. Vincent Tomasino et al., *The Key Extended Entry Program (KEEP): A Methadone Treatment Program for Opiate-Dependent Inmates*, 68 MOUNT SINAI J. MED. 14, 20 (2001).

410. Louisa Degenhardt et al., *The Impact of Opioid Substitution Therapy on Mortality Post-Release from Prison: Retrospective Data Linkage Study*, 109 ADDICTION 1306, 1311 (2014).

411. PRESIDENT'S COMM'N ON COMBATING DRUG ADDICTION & THE OPIOID CRISIS, FINAL REPORT 119 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-15-2017.pdf [https://perma.cc/7P8N-DD3E].

412. *MAT Improves Outcomes*, *supra* note 405.

413. Timothy Williams, *Opioid Users Are Filling Jails. Why Don't Jails Treat Them?*, N.Y. TIMES (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/us/heroin-addiction-jails-methadone-suboxone-treatment.html?mtrref=www.nytimes.com [https://nyti.ms/2uqbyQd].

414. *Id.*

Treatment of inmates aside, when the non-incarcerated American addict seeks professional help, the chances of her encountering an empirically validated program are slim.[415] The slowness with which empirically validated, efficacious treatment programs are disseminated into American community treatment centers is well known.[416] MAT, despite the fact that it significantly reduces overdose fatalities and is "more effective than either behavioral interventions or medication alone,"[417] is only available in 10% of American drug-treatment facilities.[418] And even naloxone, which is "extremely effective at preventing opioid overdoses from turning fatal," is often least accessible to those who need it.[419] The U.S. Surgeon General recommends "[e]xpanding the awareness and availability of this medication" to "health care practitioners, family and friends of people who have an opioid use disorder, and community members who come into contact with people at risk for opioid overdose" as the most effective way to reduce overdose deaths.[420] And yet, the Affordable Care Act (ACA) and Comprehensive Addiction and Recovery Act (CARA) did "little to assure that naloxone distribution is well-targeted."[421] Cities like Baltimore would have to spend $46.5 million dollars to equip each of its residents with a two-dose kit—a sum of money greater than the Baltimore health department's annual budget.[422] In spite of the fact that government-use authorities are routinely employed to circumvent patent restrictions in the military

415. Kenneth M. Carpenter, *Psychosocial Treatments for Substance Use Disorders: Guiding Principles for Promoting Behavioral Change*, PRIMARY PSYCHIATRY (Feb. 1, 2006), http://primarypsychiatry.com/psychosocial-treatments-for-substance-use-disorders-guiding-principles-for-promoting-behavioral-change/ [https://perma.cc/J6PZ-RXA6].

416. *Id.*

417. *MAT Improves Outcomes*, *supra* note 405.

418. Levitz, *supra* note 406.

419. Beletsky & Davis, *supra* note 22, at 158 (citation omitted).

420. *Surgeon General's Advisory on Naloxone and Opioid Overdose*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2018), https://www.surgeongeneral.gov/priorities/opioid-overdose-prevention/naloxone-advisory.html [https://perma.cc/T9FB-MKQ2].

421. Beletsky & Davis, *supra* note 22, at 159.

422. Robert Weissman & Leana Wen, Opinion, *One Easy, Cost-Free Thing Trump can do to Ease the Opioid Crisis*, WASH. POST (June 11, 2018), https://www.washingtonpost.com/opinions/one-easy-cost-free-thing-trump-can-do-to-ease-the-opioid-crisis/2018/06/11/16165efa-69a9-11e8-9e38-24e693b38637_story.html. [https://perma.cc/69ZF-MQ6U].

realm,[423] the municipal public health officials who petition Trump's "opioid czar" Kellyanne Conway to use existing federal patent law to circumvent Big Pharma markups and secure cheaper stockpiles of naloxone are met with silence.[424]

By stymying affordable access, America's capitalistic reality relegates the widespread adoption of evidence-based solutions to pie-in-the-sky fantasies. When it comes to drug addiction interventions, we historically do not spend money on evidence-based solutions,[425] despite the fact that every $1 invested in evidence-based treatment yields up to $6 in saved "costs for health, security and welfare."[426] The problem of access is highlighted in states with the political will to reach high-water marks in progressive programming, yet struggle to spread baseline services across the board. Take Washington, where the University of Washington School of Medicine Harborview Medical Center's "innovative" addiction program "treat[s] patients with heroin addiction the same way it would treat those suffering from a chronic disease, such as diabetes," while "myriad" barriers ensure that "[l]ess than half of those who would benefit from methadone or buprenorphine are able to access them" in the state.[427] "Efforts to undermine or repeal the ACA and short-sighted budgetary austerity measures" also threaten to "further undermine access to evidence-based treatment and prevention"[428]—an embarrassing state of public health affairs for a world leader, when the global human rights community broadly considers affordable access to be a "critical" component of public health—one "critical for functioning health systems."[429] Without "serious, sustained efforts to ad-

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423. *See* Robert S. Pasley & John TeSelle, *Patent Rights and Technical Information in the Military Assistance Program*, 29 LAW AND CONTEMPORARY PROBLEMS 566 (1964). For a proposal to use these powers in the context of hepatitis C, see Amy Kapczynski and Aaron S. Kesselheim, *"Government Patent Use": A Legal Approach to Reducing Drug Spending*, 35 HEALTH AFF. 791 (2016).

424. Weissman & Wen, *supra* note 422.

425. Beletsky & Davis, *supra* note 22, at 159 (citation omitted).

426. UNITED NATIONS OFFICE ON DRUGS & CRIME, UNODC-WHO JOINT PROGRAMME ON DRUG DEPENDENCE TREATMENT AND CARE, U.N. Sales No. V.09-80987 (2009).

427. Garner, *supra* note 3 (citation omitted).

428. Beletsky & Davis, *supra* note 22, at 159.

429. *Innovation Access and Use*, WORLD HEALTH ORG., https://www.who.int/medicines/access/en/ [https://perma.cc/6H7M-5956] (last visited Mar. 3, 2019).

dress the direct and root causes non-medical opioid use, intensive supply suppression efforts that brought us fentanyl will continue to push the market towards deadlier alternatives."[430]

C. Skip the Eggs—Kill the Black-Market Golden Goose

This is because the subterranean, extrajudicial black market for drugs is the ultimate negative externality of drug prohibition—one that prohibition, as a particularly "stringent" breed of regulation, has failed to control.[431] The regulatory issues that plague the pharmaceutical market generally—"[w]eak patenting standards and ineffectual policing of both anticompetitive actions and fraudulent marketing"[432]—played an important role in launching and prolonging the opioid epidemic,[433] which would make prohibition seem like the best way to reduce the negative externalities of legal addiction. What is particularly crazy about this crisis, however, is that the growth of the black market for illicit opioids was preemptively accepted as a cost of stringently regulating legal supply:

> [The] iatrogenic risk to the health of people who use [opioids] was not just foreseeable, but in some cases directly foreseen by policymakers. One of the most shocking articulations of this came from Pennsylvania's former Physician General, who recently remarked, "We knew that [drug user transition to the black market] was going to be an issue, that we were going to push addicts in a direction that was going to be more deadly. But . . . you have to start somewhere."[434]

Statements like these reflect the erroneous view that the ultimate negative externality of prohibition-as-regulation is an increase in illicit use—social blight—when it is in fact the black market's tendency to skyrocket the risks of opioid use disorder into lethal stratospheres.

Regulation also fails to control supply when the regulated market captures only the iceberg tip of demand. Take regulation in the methamphetamine ("meth") context. Regulatory supply interdictions of its precursor drugs used in manufacture were at best only temporarily effective at reducing its black-

430. Beletsky & Davis, *supra* note 22, at 158.
431. Kenkel & Sindelar, *supra* note 337, at 214–15.
432. Sarpatwari, Sinha, & Kesselheim, *supra* note 105, at 484.
433. *Id.* at 464.
434. Beletsky & Davis, *supra* note 22, at 157 (alterations in original).

market consumption, as producers eventually optimized their processes to rely on unregulated materials.[435] Unlike meth, opioids require "sophisticated production facilities," and do possess legitimate medical use.[436] Regulatory shortcomings in the legal opioid context not only hinder access to lower-cost, medically appropriate generics,[437] but also has the ironic effect of simultaneously "spur[ring] overutilization" of brand-name OxyContin while reducing access to life-saving naloxone.[438] And the dearth of regulatory efforts controlling the "contents, quality, and dosage in black market opioid products" is what inevitably trailblazed the path from casual Percocet user to black market heroin overdoser.[439] Thus, in the opioid context, it at best "remains to be seen if interdictions are cost effective in the long-run," or if regulation may be implemented in a way that protects social welfare from reduced access to "legitimate medicines."[440]

Although regulation is unable to reduce drug demand, it caters to our desire for decisive action over holistic solutions that reduce overall societal harm. Criminalizing addiction is "inimical to both public health scientific and ethical norms,"[441] and has the tendency to both crowd out evidence-based treatments and encourage prohibition as a sole intervention.[442] It is problematic not only for its counterproductivity, but also because "[e]very dollar spent on enforcement is a dollar not spent on treatment, harm reduction, or prevention."[443] And like the chemical hook theory, which allows us to flatten the complexity of drug addiction into a two-dimensional failure of Victorian restraint, opioid prohibition allows us to circumvent the task of analyzing drug addiction as an expression of rational demand, and opioid addicts as rational consumers.

Unlike the way we consider addictions to recreationally legal substances, we assume that addiction to heroin could not be

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435. *See* Cunningham & Finlay, *supra* note 264, at 1269.
436. *Id.* at 1287.
437. *See* Sarpatwari, Sinha, & Kesselheim, *supra* note 105, at 484.
438. *Id.* at 477.
439. Beletsky & Davis, *supra* note 22 (citation omitted).
440. Cunningham & Finlay, *supra* note 264, at 1287.
441. Beletsky & Davis, *supra* note 22, at 156.
442. *Id.*
443. *Id.*

the product of rational choice. "Modern economic theory holds that consumers are usually the best judges of how to spend their money on goods and services," and this "principle of consumer sovereignty" rests on two assumptions: "first, that the consumer makes rational and informed choices after weighing the costs and benefits of purchases, and, second, that the consumer incurs all costs of the choice."[444] We accept that cigarette smokers smoke because the benefits of doing so outweigh the costs.[445] The former is understood to include "pleasure and satisfaction, enhanced self-image, stress control and, for the addicted smoker, the avoidance of nicotine withdrawal," while the latter based on "money spent on tobacco products, damage to health, and nicotine addiction."[446] And indeed, though tobacco's addictive qualities would seem to except it from basic laws of economics—such as the principle that when the "price of a commodity rises, the quantity demanded of that product will fall"[447]—a "growing volume of research now shows that . . . smokers' demand for tobacco, while inelastic, is nevertheless strongly affected by its price."[448]

In contrast, when we observe people beginning their addictive trajectories with OxyContin and ending with fatal dosages of fentanyl, we assume that the "simple answer"—that people "derive enough utility from the consumption of the substances that they willingly accept the health consequences"—is very unlikely to apply.[449] But we assume so while neglecting the reality that "reduced consumer ability to exercise preferences" catalyzes "ability of black market traffickers to get the 'biggest bang for their buck,'"[450] incentivizing the mass availability of fatality-inducing moonshine and fentanyl over the comparatively moderate beer and poppy tea. By stymying the availability of moderate, pharmaceutical opioids and criminalizing non-FDA approved supply, all opioid suppliers—legal and not—

444. Chaloupka, *supra* note 358, at 3.
445. *Id.*
446. *Id.*
447. *Id.* at 38–39.
448. *Id.* at 39.
449. Kenkel & Sindelar, *supra* note 341, at 3.
450. Beletsky & Davis, *supra* note 22, at 156.

operate under higher "legal risk," and drug users are "less able to act on informed choices."[451]

Opioid addiction "challenge[s] the standard neoclassic assumption that consumers make rational, utility-maximizing choices."[452] But it does so because regulation, in the form of prohibition, obfuscates the rational cost-benefit analyses of drug addiction by utterly foreclosing rational choice in the market.

D. Taxation Trumps Prohibition

Regardless of which market interventions America ought to use in lieu of its blanket, War on Drugs approach, we cannot assume that opioid addicts will not respond to free market interventions when the costs of their addiction are necessarily muffled by black market pricing. After all, "[m]ost economic studies suggest that addictive substances are consumed on the inelastic portion of demand,"[453] and products for which there is inelastic demand, like cigarettes, are prime candidates for "sin" taxing.[454] Sin taxing—a regulatory measure once used to express moral judgment—now receives wide support as a public health intervention.[455] And sin taxes on products for which there is inelastic demand are a consistently "effective source of revenue generation."[456] "Even though an increase in the tobacco tax may cause some smokers to stop smoking, the overall result of the tax increase" produces net profits.[457]

Unlike prohibition and criminalization, sin taxes have proven themselves to be highly effective in reducing demand.[458] In the tobacco context, "[e]vidence from countries of all income levels shows that price increases on cigarettes are highly effective in . . . induc[ing] some smokers to quit and prevent[ing] other individuals from starting."[459] Like tobacco, demand for

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451. *Id.*

452. Kenkel & Sindelar, *supra* note 337, at 3

453. Cunningham & Finlay, *supra* note 264, at 1275.

454. *See* Andrew J. Haile, *Sin Taxes: When the State Becomes the Sinner*, 82 TEMP. L. REV. 1041, 1045–46 (2009).

455. See Kenkel & Sindelar, *supra* note 337, at 207.

456. *See* Haile, *supra* note 454, at 1045.

457. *Id.* at 1046.

458. *See* Chaloupka, *supra* note 358, at 6.

459. *Id.*

heroin is inelastic, which makes it a prime candidate for "sin" taxation.[460]

The fear of a free, taxed market for even the most innocuous doses of opioids, however, is strong. Many imagine that it would entail a "heroin aisle" at one's local CVS,[461] and critics opine that a free market for opioids would have the effect of "increasing addiction, normalising use among kids, and relegating its sale to profit-hungry corporations or governments with every incentive to increase addiction to advance their bottom line."[462] But because sin taxing tobacco did reduce consumption and increase revenue in places like Canada, the United Kingdom, and South Africa,[463] the U.S. would be remiss if it did not explore the ways a free market opioid tax might lance the boil that is our epic national demand for immediate analgesic relief.

Taxes on opioids will inevitably be difficult to calculate, even with the "standard neoclassical economic criteria for determining the optimal tax on a substance" dictating that "taxes should be levied to reflect the marginal negative externalities."[464] And empirically estimating those negative externalities would be a challenge, given the difficulty in determining the "full and appropriate range of factors" to include as costs.[465] A "1% increase in white meth use," for example, is correlated with a "1.5% increase in white foster care admissions"[466]—a result that is predictable in hindsight, yet arguably unforeseeable in the *Palsgraf* sense.[467] However, the Master Settlement Agreement that

460. *See* Cunningham & Finlay, *supra* note 264, at 1275 (citation omitted).

461. *See* Hari, *supra* note 41.

462. Wheeler, *supra* note 217.

463. *See* Chaloupka, *supra* note 358, at 39.

464. Kenkel & Sindelar, *supra* note 337, at 213.

465. *Id.*

466. Cunningham & Finlay, *supra* note 264, at 765.

467. *See* Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928). Palsgraf is the seminal 1L year tort law staple, a case in which an employee at a railway station helped push a passenger onto a train car as it was beginning to depart the station. In doing so, the employee dislodged the passenger's package, which unbeknownst to the employee, contained fireworks. When the package hit the ground, the fireworks inside exploded. The reverberations from the explosions then knocked down some scales across the railway station platform. Mrs. Palsgraf happened to be standing next to those scales and was seriously injured. *Id.* at 99. Upon suing to recompense her suffering, the court laid down the general principle of "proximate causation"—the notion that unless it was reasonably foreseea-

"ended" the era of Big Tobacco resulted in a "tax-like hike" in cigarette prices, in addition to "new restrictions on cigarette advertising and other tobacco industry practices."[468] Could similar provisions be included in agreements resulting from Judge Polster's MDL, provided that the parties settle?

A heavily taxed, free market for opioids ought to attract President Trump, who is prone to moral absolutism in his criticism of foreign importers of crime,[469] and believes that the "best way to prevent drug addiction and overdose" is to tell young people that drugs are "[n]o good, really bad for you in every way."[470] For one, even when drugs are smuggled at a high rate, taxes still manage to reduce consumption for them while yielding high revenues.[471] And sin taxes are known to have the "greatest [impact] on young people, who are more responsive to price rises than older people."[472] Since any drug fatality-reduction strategy designed to deter children will yield delayed results, policymakers "concerned with health gains in the medium term" must also adopt "broader measures" that help existing addicts reduce their consumption.[473]

Taxation fits the bill here, too. Even under conservative assumptions, sin taxes on tobacco had the effect of reducing "the number of ex-smokers who return to cigarettes" and "consumption among continuing smokers," in addition to "deter[ring] others from taking up smoking in the first place."[474] And evidence suggests that sin taxes on drugs are a particularly effective deterrent for long-time users, as "a real and permanent price increase will have approximately twice as great an impact on demand in the long run as in the short run."[475]

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ble to the employee that his actions would result in harm, no action in tort could lie. *Id.* at 101.

468. Kenkel & Sindelar, *supra* note 337, at 207; *see also* Viscusi, *supra* note 311, at 53.

469. Donald Trump, President of the United States, Remarks at a California Sanctuary State Roundtable (May 16, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-california-sanctuary-state-roundtable [https://perma.cc/E5DF-PTY5].

470. Raymond, *supra* note 23.

471. *See* Chaloupka, *supra* note 358, at 14.

472. *Id.* at 38.

473. *Id.* at 10.

474. *Id.* at 6.

475. *Id.* at 41.

Taxation generally, unlike prohibition, does lack a bold moral condemnation signaling feature—a serious deficiency in user experience given America's particular affinity for retributive punishment.[476] But there are legislative bills proposed in almost half of our states that suggest taxing prescription painkillers, and they garner bipartisan support under the promise that such fees will "funnel millions of dollars toward treatment and prevention programs."[477] Could the taxation of illicit opioids also yield the similar effect of bringing black market economics out into the sunlight, and disinfecting the Iron Law of Prohibition's tendency to funnel the unwary towards overdose and death?

E. Home Brew Decriminalization

Thanks to state sovereignty, the end to ineffective, blanket drug prohibition may be near. The Achilles heel of federal War on Drugs initiatives may be that they require state allegiance to enforce. And local governments are those that feel the financial pinch of blanket prohibition most, given that states are responsible for the majority of drug arrests in America.[478]

How many times can state and municipal codes reclassify drug offenses and mandate probation in lieu of jail for simple possession charges before the exceptions to blanket criminalization become the rule?

Safe injection sites may not be endorsed by President Trump's Opioid and Drug Abuse Commission,[479] and the Department of Justice has yet to support pilot programs that would enable "local officials to help remove legal barriers" or "increase[e] awareness of the evidence-based public-safety arguments in their favor."[480] But powerful medical entities like the U.S. Surgeon General and American Medical Association support safe injection programs.[481] And underground safe injection facilities for Americans who would otherwise "inject[]

476. *See* Fellmeth, *supra* note 245, at 19.

477. Mulvihill & Potter, *supra* note 310.

478. In one year, the DEA arrested 30,035 people drug offenses, while state and local law enforcement arrested over 1.5 million. *Crime in the United States*, *supra* note 344.

479. *See* Bernstein, *supra* note 389.

480. McLemore, *supra* note 390.

481. Holpuch, *supra* note 388.

in a public restroom, street, park or parking lot" have already saved lives.[482] Hope springs from the fact that "defiant" cities like Seattle, San Francisco, New York City, Philadelphia, and Baltimore have publicly announced plans to open SIFs, despite the federal government threatening "criminal prosecution" and "confrontation" akin to those that occurred over sanctuary cities.[483]

The complete decriminalization of certain drugs may not be far behind as well. Some have proposed that California serve as a testbed for Portugal's two-pronged decriminalization approach, which pairs "drug dissuasion panels" with harm-reducing public health initiatives.[484] Portugal, exhausted by the costs of drug criminalization, pursued a strategy grounded in "principles of harm reduction, prevention, and reintegration of the drug user into society."[485] California, "with its history of trailblazing marijuana laws," is considered "well poised" to serve as the American petri dish for this model:[486]

> By following Portugal's lead by decriminalizing possession for all illicit substances, [California] may reap significant rewards. To name a few, the state may see 40% fewer drug arrests, a drop in prevalence rates for drug use, and over $2 million in Medicaid savings. Overall, . . . California's budget may see rewards of over $480 million in the first few years after decriminalization. [487]

If California were to decriminalize drugs entirely, its statutes would brazenly challenge the War on Drugs.[488] And states'

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482. *Id.*

483. Lenny Bernstein & Katie Zezima, *Cities defiant after Justice Department's threat on "supervised injection sites,"* WASH. POST (Sept. 4, 2018), https://www.washingtonpost.com/national/health-science/cities-defiant-after-justice-departments-threat-on-supervised-injection-sites/2018/09/04/fcf798d6-b056-11e8-a20b-5f4f84429666_story.html?utm_term=.20832b411772 [https://perma.cc/TFA3-RYRX].

484. Mallory Whitelaw, *A Path to Peace in the U.S. Drug War: Why California Should Implement the Portuguese Model for Drug Decriminalization*, 40 LOY. L.A. INT'L & COMP. L. REV. 81 (2017).

485. Kellen Russoniello, Note, *The Devil (and Drugs) in the Details: Portugal's Focus on Public Health as a Model for Decriminalization of Drugs in Mexico*, 12 YALE J. HEALTH POL'Y L. & ETHICS 371, 384 (2012).

486. *Id.*

487. *Id.*

488. *Id.*

rights–driven collisions into federal initiatives can be a good, galvanizing thing for the creation of sound drug policy.

The state-level shifts in drug policies that are occurring today do indicate "clear public and . . . policymaker support to move beyond the War on Drugs,"[489] as is best evidenced by the sheer quantum of senators, governors, mayors, and Democratic presidential candidates in support of the federal legalization of marijuana, including Senators Cory Booker, Kirsten Gillibrand, Kamala Harris, and Bernie Sanders.[490] For many, decriminalization and legalization efforts have always smacked of good policy. Novel in our current epidemic is that supporting the federal legalization of a Schedule I drug also constitutes "good politics."[491] To imagine why, one only needs to imagine what the televised debates of Democratic presidential candidates in 2020 might look like. According to one Colorado cannabis advocate, "If a moderator just asks, 'Do you support descheduling marijuana[?]' and a candidate says 'no,' that's a viral ad right there."[492] As political costs of supporting War on Drugs policies continue to rise, one questions the motives of politicians whose "thinking . . . on the issue has evolved" only very recently.[493] However, when candidates for the highest political office in our nation are able to publicly assert that broad legalization proposals, like the Marijuana Justice Act, "must be about restorative justice,"[494] the task of splitting ideological hairs begins to feel like an ungrateful exercise.

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489. Stemen, *supra* note 197, at 417.

490. Dan Merica, *Potential Democratic 2020 contenders are rushing to back marijuana legalization*, CNN (Apr. 20, 2018), https://www.cnn.com/2018/04/20/politics/democrats-marijuana-legalization/index.html [https://perma.cc/23H3-C8RY].

491. Daniella Diaz, *Harris says she'll back Booker's legislation to legalize marijuana*, CNN (May 10, 2018 4:59 PM), https://www.cnn.com/2018/05/10/politics/kamala-harris-cory-booker-legalizing-marijuana/index.html [https://perma.cc/Z9PJ-7UU6] (citation omitted).

492. *Id.*

493. Press Release, Senator Chuck Shumer, Senator Chuck Schumer Announces Support for Decriminalizing Marijuana at Federal Level, Plans to Introduce New Legislation in U.S. Senate (Apr. 20, 2018), https://www.schumer.senate.gov/newsroom/press-releases/schumer-announces-support-for-decriminalizing-marijuana-at-federal-level-plans-to-introduce-new-legislation-in-us-senate [https://perma.cc/965G-X6S4].

494. *Cory Booker Reintroduces Weed Legislation Called the Marijuana Justice Act*, NOW THIS NEWS (Mar. 1, 2019), https://nowthisnews.com/videos/weed/cory-booker-reintroduces-the-marijuana-justice-act [https://perma.cc/B2H9-3QMY].

Eradicating prohibition as America's default approach to drug addiction will require incredible legislative effort, though. Already in place are laws denying those convicted of felony drug charges federal aid,[495] access to public housing,[496] and food stamps,[497] and the right to vote in most states,[498] which is to say nothing of the War on Drugs sentencing practices that are thirty years in the making—precedent that requires extreme political will to change.[499] As rates of state incarceration continue to rise, policymakers and corrections administrators, faced with "growing fiscal constraints and social scrutiny," will continue "evaluat[ing] the cost-effectiveness and efficacy of incarceration as a response to drugs."[500] Deferred prosecution and local drug courts are the results of cost-benefit analyses like these.[501] California, Colorado, Delaware, Idaho, Iowa, Maine, Massachusetts, Mississippi, New York, Oregon, Pennsylvania, and South Carolina have all decided to charge many of their simple drug possession crimes as misdemeanors.[502] An Oregon bill reclassifies—from felony to misdemeanor—the

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495. Higher Education Amendments of 1998, 20 U.S.C. § 1091(r) (2012) (stating that a conviction of any offense under any federal or state law involving the possession or sale of a controlled substance makes an individual ineligible for any federal grant, loan, or work assistance).

496. The Quality Housing and Work Responsibility Act of 1998, 42 U.S.C. § 13662 (2012) (supporting a public housing authority's right to exclude applicants with a history of controlled substance use and to exercise their discretion to determine which applicants were possible risks to the safety of the community); Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, § 501, 104 Stat. 4079, 4180–81 (imposing a mandatory three-year ban on the readmission of tenants evicted for drug-related criminal activity); Housing Opportunity Program Extension Act of 1996, 42 U.S.C. § 1437d(l), (q) (2012 & Supp. I 2013) (strengthening eviction rules and allowing housing authorities access to housing applicants' criminal records).

497. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 814(3), 110 Stat. 2105, 2313–14 (since repealed) (establishing that a state or federal felony drug conviction makes an individual ineligible for federal welfare benefits).

498. *See Felon Voting Rights*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 30, 2017), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx. [https://perma.cc/ JVB8-YP75].

499. Stemen, *supra* note 197, at 418.

500. *Id.* at 403.

501. *Id.* at 411–12.

502. Review of Those States' Laws Which Provide Misdemeanor Penalties for Simple Possession of Drugs Other Than Marijuana (Unpublished draft, Alaska Judicial Council), http://www.ajc.state.ak.us/acjc/drugs/misdechrt.pdf [https://perma.cc/XCW4-U729] (last visited Aug. 10, 2018).

possession of heroin, cocaine, and other drugs.[503] Oregon, as one lawmaker put it, "can't continue on the path of building more prisons when often the underlying root cause of the crime is substance use."[504]

Two Washington counties' approaches to the crime of simple drug possession illustrate the power of piecemeal exceptions from federal War on Drugs policies. As of February 2018, King County and Snohomish County—two out of Washington States' three largest counties[505]—no longer charge possession crimes involving less than two grams of drugs.[506] The reasons? Expense, and futility.[507] Snohomish County Prosecutor Mark Roe believes that the "prosecutorial response to minor possession" has failed to curb drug use, and merely distracted city attorneys from prosecuting crimes that cause greater harm to communities.[508] The county now prosecutes possession crimes involving small amounts of drugs only if a defendant's underlying addiction serves as a nexus to criminal behaviors of "higher importance," such as DUIs, assaults, and burglaries.[509]

These counties realize what the federal government does not: that "dutifully charging" minor drug possession crimes is, in practice, indistinguishable from the unconstitutional practice of criminalizing drug abusers "essentially for being addicts in the first place."[510] Prosecutorial discretion is just one way local jurisdictions operationalize their individual distaste for the costs of blanket prohibition without waiting for the repeal of federal

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503. Nicole Lewis, *Oregon Bill Decriminalizes Possession of Heroin, Cocaine and Other Drugs*, WASH. POST (July 11, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/11/oregon-legislature-passes-bill-decriminalizing-heroin-cocaine-meth-possession-hoping-to-curb-mass-incarceration/?noredirect=on&utm_term=.1887c402b266 [https://perma.cc/8EFT-MLF5].

504. *Id.*

505. *Washington Counties by Population*, CUBIT, https://www.washington-demographics.com/counties_by_population [https://perma.cc/R85J-NHUS] (last visited Aug. 10, 2018).

506. *See Snohomish Co. to Stop Prosecuting Small-Time Drug Users*, KING 5 NEWS (Feb. 27, 2018, 4:43 PM)., https://www.king5.com/article/news/local/snohomish-co-to-stop-prosecuting-small-time-drug-users/281-523887181 [https://perma.cc/VV52-WT9X].

507. *See id.*

508. *Id.*

509. *Id.*

510. *Id.*; *see also* Robinson v. California, 370 U.S. 660 (1962) (holding that statutes criminalizing addiction to the use of narcotics violate the Fourteenth Amendment's bar against cruel and unusual punishment).

drug initiatives. And this is a powerful idea, for encouraging "experimental drug law reform" at the state level will yield the dual benefit of helping less progressive states, and the federal government, observe how "smarter, more effective" approaches to drug addiction may alleviate the costs they incur upon jurisdictions nationwide.[511] It is one thing for the public to disbelieve in War on Drugs programming and quite another for municipalities to employ cost efficiency principles to effectively engender their own species of drug decriminalization.

This is how executive War on Drugs priorities find their greatest threat from nonbelieving local jurisdictions. The type of political will sufficiently potent to upturn federally programmed norms has typically brewed first at the local level, then has gradually made its way into national policy either via the legislature, the judiciary, or by civilly disobedient local government policies.[512] We have witnessed this occur with cannabis, where Colorado's and Washington's decriminalization efforts have challenged federal War on Drugs objectives since 2012.[513] Lay the heat map of states that have suffered the most fatal opioid poisonings[514] over the map of states that have decriminalized cannabis,[515] and one observes that they are nearly mutually exclusive. This is not mere coincidence. According to one JAMA Internal Medicine study, "states with medical marijuana laws between 1999 and 2010 saw, on average, about 25 percent fewer opiate overdose deaths" than did states without them.[516] And for their flagrant acts of civil diso-

511. Whitelaw, *supra* note 484, at 113.

512. *See* Lawson, *supra* note 29.

513. *See* Scott Johnston, *Five Years In: The Effects of Legalization in Colorado and Washington State*, LIFT NEWS (Nov. 13, 2017), https://news.lift.co/five-years-effects-legalization-colorado-washington-state/ [https://perma.cc/VX9W-83E7].

514. *See* FRANK, PORTER & PAULOZZI, *supra* note 200.

515. *See State Marijuana Laws in 2018 Map*, GOVERNING, http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html [https://perma.cc/9YBR-LUAN] (last visited Aug. 10, 2018).

516. Christopher Ingraham, *Attorney General Sessions Wants to Know the Science on Marijuana and Opioids. Here It Is*, WASH. POST (Feb. 28, 2017), https://www.washingtonpost.com/news/ wonk/wp/2017/02/28/attorney-general-sessions-wants-to-know-the-science-on-marijuana-and-opioids-here-it-is/?noredirect=on&utm_term=.76cfd9f61998 [https://perma.cc/P66C-X2EL] (referencing Marcus A. Bachhuber, Brendan Saloner, Chinazo O. Cunningham, et al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States*, 1999-2010, 174 JAMA INTERN MED. 1668 (2014)).

bedience, Washington and Colorado were not visited upon by the Department of Justice,[517] but handsomely rewarded. Washington has generated $220 million in cannabis taxes, Colorado $129 million, and neither state noted any worrisome increases in crime and substance abuse.[518] The legal marijuana market is expected to reach $23 billion in annual revenue by 2020[519]—an unsurprising figure when the federal legalization of marijuana may not be far behind.[520] The Marijuana Justice Act, if enacted, would limit funding for states if the Bureau of Justice Assistance determines that the state "has a disproportionate arrest rate or a disproportionate incarceration rate for marijuana offenses,"[521] direct federal courts to "expunge conviction[s] for a marijuana use or possession offense,"[522] and "establish a grant program to reinvest in communities most affected by the war on drugs."[523]

The United States of Drug Criminalization has produced an economy where states are able to, quite literally, legalize one drug to compensate for the economic, health, and social costs of criminalizing another.[524] When states' cost-benefit analyses have already begun to carve out exceptions to the War on Drugs—and as restorative justice principles continue to seep into our national drug policies, via federal legislation, no less—for how long will our federal government insist on its survival?

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517. Press Release, U.S. Dep't of Justice, Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement [https://perma.cc/W7MK-K38D].

518. Christopher Ingraham, *Here's How Legal Pot Changed Colorado and Washington*, WASH. POST (Oct. 13, 2006), https://www.washingtonpost.com/news/wonk/wp/2016/10/13/heres-how-legal-pot-changed-colorado-and-washington/?utm_term=.e053611ba487 [https://perma.cc/5DSX-HNYG].

519. Trevor Hughes, *Legal Marijuana Sales Forecast to Hit $ 23 Billion in Four Years*, USA TODAY (Mar. 20, 2016), http://www.usatoday.com/story/money/business/2016/03/ 20/legal-marijuana-sales-forecast-hit-23b-4-years/82046018/ [https://perma.cc/W34E-RC7S].

520. *See* Marijuana Justice Act of 2019, S. 597, 116th Cong. (2019).

521. *Id.* § 3(b).

522. *Id.* § 3(c).

523. *Id.* § 4.

524. David DiSalvo, *How Cash from Marijuana Legalization Can Help Kill the Opioid Epidemic*, FORBES (May 31, 2017), https://www.forbes.com/sites/daviddisalvo/2017/05/31/how-cash-from-legal-pot-sales-can-help-kill-the-opioid-epidemic/#2e290c1b5135 [https://perma.cc/5BKD-UR9H].

IV. CONCLUSION

Legal and illegal opioids have killed off more Americans than war. And as Americans rapidly progressed from FDA-approved opioid use to illicit heroin and fentanyl, the trajectory of overdose deaths far exceeded increases in new prescription drug users.

But as we search for solutions to our crisis, we forget to refer to our own history with addiction and assume that the chemical hook theory applies in every case. We prefer promises of immediate relief over the task of remembering that the myth of addiction's intractability is what allows the Iron Law of Prohibition to generate lethally potent doses, then deliver them to a depressed America that has been the most "un–Rat Park" it has been in decades. We do so to give ourselves the space to both judge and express compassion towards the drug-addicted. But our ambivalence elects leaders who help us further ignore what global addiction history has to say about our own: that our America is the worst it has been in a while, and that our epidemic is one undergirded by rational demand.

Experienced policymakers herald the necessity of treating drug abuse with evidence-based solutions, but we ignore their pleas for evidenced-based treatment and access, even when the mostly rural and white fatalities of our crisis would suggest greater political amenability to the public health approach. We reject holistic conceptualizations of our crisis because it better serves those in power to drum power from the fear of addiction. We reject them also because our capitalistic reality and cultural appreciation for retribution persuades us to believe that blame-gaming Big Pharma is what will help America feel great again, even when supply-side interdictions have done little to decrease demand, and have failed to economically deter those who oversupply. And by bifurcating the issues of legal versus illegal supply, we implicitly permitted Big Pharma's overcapitalization on demand while exhausting our criminal justice system, dealing fatal blows to our faith in the effectiveness of drug criminalization as sound public policy.

We watch countries like Portugal and Switzerland benefit from discarding ineffective War on Drugs policies, and hope that our patchwork of politically facile initiatives will yield the same effect. And we invest hope in futile directions because we

misunderstand the greatest negative externality of our epidemic to be the golden eggs of death, when it is actually the golden goose of the black-market drugs economy. We abide in the power of prohibition, even as it flattens the complexity of drug addiction into a two-dimensional failure of Victorian restraint, because it allows us to circumvent analysis of drug addiction as an expression of rational demand. But if we were to understand our demand for analgesic relief better, and had faith that addicts, like us, are rational consumers, we could sin tax their behaviors, which would also deter children from stepping onto the slippery slope of addiction and disincentivize long-term users.

In the end, it may be the cash-strapped states that homebrew the strongest challenges to the War on Drugs, for the Achilles heel of federal prohibition initiatives is that they require local jurisdictions to enforce. So, we should mimic the counties that have effectively engendered their own species of decriminalization as a way of financing the costs incurred by the drug criminalization generally. We should support states like California, who are best situated to attempt heroin decriminalization and to profit from it, much like recreational cannabis has yielded hundreds of millions of dollars in profits for other civilly disobedient jurisdictions. And we should take the advice of our U.S. Surgeon General and American Medical Association to erect safe injection sites, increase access to naloxone and medication-assisted treatment, and continue passing bipartisan proposals like the SUPPORT for Patients and Communities Act. For without reexamining our battle with opioids as a story of demand *and* supply, we will continue to fail ourselves, and the War on Drugs will win again.

THE WORLD AFTER *SEMINOLE ROCK* AND *AUER*

PAUL J. LARKIN, JR. & ELIZABETH H. SLATTERY*

For more than seventy years, the Supreme Court of the United States has consistently held that the federal courts must defer to an agency's interpretation of its own vague or ambiguous rule. The Court first adopted that principle in 1945 in *Bowles v. Seminole Rock & Sand Co*.[1] and reaffirmed *Seminole Rock* two decades ago in *Auer v. Robbins*.[2] Moreover, from 1945 to today, the Court has consistently treated *Seminole Rock* as if it were a statute rather than an opinion by applying its ruling in a wide range of contexts with little regard to whether their facts resemble the ones that gave rise to the Court's original decision.[3] The upshot is that *Seminole Rock* produced what has become a well-settled administrative law rule, one that the Supreme

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1. 325 U.S. 410, 414 (1945).

2. 519 U.S. 452, 461 (1997).

3. *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 613–14 (2013); PLIVA, Inc. v. Mensing, 564 U.S. 604, 613 (2011); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 59–63 (2011); Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 208–11 (2011); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 284 (2009); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007); Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 94–95 (1995); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512–18 (1994); Stinson v. United States, 508 U.S. 36, 44–45 (1993); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989); United States v. Larionoff, 431 U.S. 864, 872–73 (1977); INS v. Stansic, 395 U.S. 62, 72 (1969); Udall v. Tallman, 380 U.S. 1, 16–17 (1965).

Court and lower courts have cited on more than one thousand occasions.[4]

Despite all that, the Supreme Court should "retire" the *Seminole Rock* rule.[5]

Wrong when decided in 1945, *Seminole Rock* should have passed into history when Congress enacted the Administrative Procedure Act (APA) the following year. The APA directs courts to review and set aside agency actions that rest on an erroneous view of the law.[6] This command forbids the courts from granting agencies final law-interpreting authority, as *Seminole Rock* directs. The strongest argument for retaining *Seminole Rock* rests on the need to trust the expert judgment of agency officials on how to implement complex regulatory regimes. Yet, we can retain the value of that expert judgment without divesting the courts of their historic responsibility to define the law. Giving an agency's opinion the same heft that a court would afford a treatise by Phil Areeda or Charles Allen Wright or a *Restatement of the Law* by the American Law Institute would preserve both the courts' historic role and the benefits of agency expertise. In *Kisor v. Wilkie*, the Supreme Court has an op-

4. A January 25, 2019, Westlaw search revealed that 1,280 cases have cited *Seminole Rock*.

5. The problem with *Seminole Rock* is not the holding in the case—*viz.*, that the government's March 1942 price cap applies to executory contracts—but is with the Court's articulation of the standard that was appropriate to review the agency's action. Accordingly, the appropriate remedy is not to "overrule" *Seminole Rock*, but to "retire" the standard that the Court used. The Court used that approach in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), when it decided to dispense with the standard adopted in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), to measure the sufficiency of a pleading under FED. R. CIV. P. 12. *See Twombly*, 550 U.S. at 562–63 ("We could go on, but there is no need to pile up further citations to show that *Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."). The Court's approach in *Twombly* is also appropriate with respect to *Seminole Rock*.

6. Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (2012).

portunity this Term to correct its mistake in *Seminole Rock*.[7] It should.

I. OF ARTICLE III COURTS, ARTICLE II AGENCIES, AND LAW-INTERPRETING POWER

The ruling in *Seminole Rock* stands in tension with two far more deeply settled principles of Anglo-American law. One is the proposition set forth by Chief Justice John Marshall in 1803 in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is."[8] That was no novel pronouncement. English courts crafted a common law of torts, contracts, and crimes for centuries before England populated North America.[9] American colonial and state courts exercised the same common law decision-making authority as English courts from the nation's earliest days.[10] The Judicial Power Clause of Article III of the Constitution vested the authority to decide questions of law in federal courts.[11]

The second doctrine can be seen in the maxims "*Nemo judex in cause sua*"—"No one may be a judge in his own cause"—and

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7. Petition for Writ of Certiorari at i, Kisor v. O'Rourke, No. 18-15 (U.S. June 29, 2018), 2018 WL 3239696 ("The questions presented are: 1. Whether the Court should overrule *Auer* and *Seminole Rock*."); Kisor v. Wilkie, 139 S. Ct. 657, 657 (2018) ("Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit granted limited to Question 1 presented by the petition.").

8. 5 U.S. (1 Cranch) 137, 177 (1803).

9. *See, e.g.*, THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 56, 238, 455–56 (Liberty Fund 2010) (1929).

10. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 7, 14 (3d ed. 2005); O. W. HOLMES, JR., THE COMMON LAW 27–28, 325 (Lawbook Exch., Ltd. 2009) (1881).

11. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); THE FEDERALIST NO. 37, at 183 (James Madison) (Liberty Fund ed., 2001) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 536–74 (2008). The Seventh Amendment also implicitly recognized that principle. *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law*." (emphasis added)).

"*Audi alteram partem*"—"A judge must hear both sides of a case before deciding it." The former principle traces its lineage to Judge Edward Coke's 1610 decision in *Dr. Bonham's Case*.[12] Coke does not stand alone. William Blackstone,[13] James Madison,[14] a host of Supreme Court justices,[15] and others have endorsed that principle without hesitation or qualification since Coke first applied it. The second maxim reaches back even further—to Demosthenes, Euripides, and Cicero[16]—and reaches forward to both old and contemporary English and American law.[17] The English courts developed an adversarial system of adjudication, rather than the inquisitorial system used on the European continent. Together those maxims presume that judges will be independent from the parties to a dispute. The

12. Thomas Bonham v. College of Physicians, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610).

13. 1 WILLIAM BLACKSTONE, COMMENTARIES *91 ("[I]t is unreasonable that any man should determine his own quarrel.").

14. THE FEDERALIST NO. 10, at 44 (James Madison) (Liberty Fund ed., 2001) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties, at the same time . . . .").

15. *See, e.g.*, Williams v. Pennsylvania, 136 S. Ct. 1899, 1905–06 (2016); Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 876–77 (2009); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 428–29 (1995); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986); *In re* Murchison, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (ruling that the Due Process Clause incorporates the common law rule that a judge must recuse himself if he has "a direct, personal, substantial, pecuniary interest" in a case); Spencer v. Lapsley, 61 U.S. (20 How.) 264, 266 (1858); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("[A] law that makes a man a Judge in his own cause . . . is against all reason and justice.").

16. *See* John M. Kelly, Note, *Audi Alteram Partem*, 9 NAT. L.F. 103, 104, 106–07 (1964).

17. *See, e.g.*, *In re* Oliver, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . . ."); Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864) ("Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence."); Rex v. Chancellor of the University of Cambridge, 1 Str. 557, 567, 93 Eng. Rep. 698, 704 (K.B. 1723) ("The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.").

Seminole Rock decision, however, effectively empowers one party to a lawsuit—a federal agency—to decide a legal issue in any case where the federal government is a party.[18] By so doing, the *Seminole Rock* decision trespasses on the principles underlying those maxims. If, as the Supreme Court has often held, notice of the issues to be resolved in a dispute is essential to the proper functioning of the adversarial process,[19] so too is a party's ability to persuade the judge that he is correct on the law. Empowering an adversary to decide a case renders notice useless. All that notice does is tell a party how it will lose.

To date, the Supreme Court has never recognized the existence of the conflict between *Seminole Rock* and Anglo-American legal tradition, let alone attempted to resolve it. The result is that *Seminole Rock*, on the one hand, and *Marbury v. Madison* and *Dr. Bonham's Case*, on the other, resemble a pair of overhead steam pipes running in infinitely parallel contrariety, oblivious to each other.[20]

Recently, however, there has been considerable pushback against the growth of the administrative state.[21] All three

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18. Of course, the *Seminole Rock* decision applies even where the federal government is not a party. *See* Auer v. Robbins, 519 U.S. 452, 461–63 (1997).

19. *See, e.g.*, Lankford v. Idaho, 500 U.S. 110, 126–28, 126 n.22 (1991) (collecting cases).

20. The authors are indebted to Professor Anthony Amsterdam for thinking of the image. *See* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67 (1960).

21. Historians would say that we have seen this movie before. Consider how one scholar described the state of administrative law in 1940:

> Americans' reaction to their new government included both apprehension about administrative power and new interest in its rules and limits. On the eve of World War II, criticism of the agencies was at a fever pitch. Individual agencies, administrative practices, and the administrative state as a whole were the subject of questions, concerns, and hostility—from conservative members of Congress disturbed by the political activity of bureaucrats, from executive and legislative reformers troubled by the broader shift in policy-making authority, from regulated parties and their lawyers worried about their own economic interests, from Democrats and Republicans concerned about the administration of substantive laws, from law professors and political scientists wondering what this change meant for democracy and for the logic of the constitutional system, and from agency officials and their defenders who repeatedly stressed the legitimacy of administrative action.

JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 4 (2012) (footnote omitted). The more things change, the more they remain the same.

branches of the federal government, as well as the academy, the bar, and the public, have vigorously debated the issue of whether the Supreme Court has excessively delegated law-interpreting power to unelected and unknown officials at administrative agencies.[22] The legitimacy of the *Seminole Rock-Auer* rule, along with its companion *Chevron* rule affording deference to an agency's interpretation of an ambiguous statute,[23] has been a central aspect of that debate.[24] Most importantly, a number of current Supreme Court justices have expressed concerns about the problems with an interpretive rule permitting agencies to combine legislative, executive, and judicial functions.[25] Some of them have expressed interest in reconsidering

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22. *See, e.g.*, ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 86 (2016); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475 (2016); Cory R. Liu, Chevron*'s Domain and the Rule of Law*, 20 TEX. REV. L. & POL. 391 (2016); Aaron L. Nielson, *Confessions of an "Anti-Administrativist,"* 131 HARV. L. REV. F. 1 (2017); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012). Even members of the federal judiciary have chimed in on that subject, before or after assuming the bench. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Laurence H. Silberman, Chevron*—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990).

23. The principal difference between *Chevron* and *Seminole Rock* or *Auer* is in the form that a law takes. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) ("In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes."). Yet an agency can receive deference under *Auer* in circumstances where it cannot under *Chevron*. *Compare Auer*, 519 U.S. at 461–63 (affording deference to an agency's interpretation in an amicus brief), *with* United States v. Mead Corp., 533 U.S. 218, 229–31 (2001), *and* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (denying deference under *Chevron* to an agency position that was not the product of notice-and-comment rulemaking).

24. *See, e.g.*, Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, 8 J. LEGAL ANALYSIS 47, 48–50 (2016); Aaron L. Nielson, Cf. Auer v. Robbins, 21 TEX. REV. L. & POL. 303, 305 (2016); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1451–52 (2011). *See generally* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103 (2018).

25. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215–22 (2015) (Thomas, J., concurring in the judgment); *id.* at 1210–11 (Alito, J., concurring in part and in the judgment); *Decker*, 568 U.S. at 615–16 (2013) (Roberts, C.J., concurring); *id.* at 621 (Scalia, J., concurring in part and dissenting in part); Talk America,

the *Seminole Rock-Auer* rule, but have said that the Court should wait for a case that squarely poses the issue whether to reconsider those decisions.[26]

That case has arrived.

II. *KISOR V. WILKIE*

In 1982, James Kisor filed a claim with the Veterans Administration (now the Department of Veterans Affairs (DVA)) seeking disability benefits for post-traumatic stress disorder resulting from a combat operation that took the lives of thirteen other Marines.[27] The DVA denied his claim the following year.[28] In 2006, Kisor asked the DVA to reopen his claim,[29] arguing that it failed to consider relevant records discussing his combat history during its initial review.[30] The DVA concluded that the identified records were not "relevant" under the pertinent agency regulations[31] because they were not "outcome determinative."[32] On appeal to the U.S. Court of Appeals for the Federal Circuit, Kisor argued that the DVA misread its rule because records are "relevant" if they have any tendency to prove or disprove a relevant fact, even if they are not "dispositive."[33] Finding the term "relevant" to be ambiguous,[34] the Circuit

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Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); *cf.* Kavanaugh, *supra* note 22, at 2150–51 (reviewing ROBERT KATZMANN, JUDGING STATUTES (2014)).

26. *See, e.g.*, *Mortg. Bankers Ass'n*, 135 S. Ct. at 1210–11 (Alito, J., concurring in part and in the judgment); *Decker*, 568 U.S. at 615–16 (Roberts, C.J., concurring). Ironically, Justice Antonin Scalia, the author of *Auer*, later came to regret his decision. *See Decker*, 568 U.S. at 616–21 (Scalia, J., concurring in part and dissenting in part); Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1600, 1603 (2017) ("[A] few Terms ago, as we came off the bench after hearing arguments in a case involving judicial deference to agencies, Nino announced that *Auer v. Robbins* was one of the Court's 'worst decisions ever.' Although I gently reminded him that he had written *Auer*, that fact hardly lessened his criticism of the decision or diluted his resolve to see it overruled.").

27. Kisor v. Shulkin, 869 F.3d 1360, 1361 (Fed. Cir. 2017).

28. *Id.* at 1362.

29. *Id.*

30. *Id.*

31. 38 C.F.R. § 3.156(c)(1) (2018).

32. Petition for Writ of Certiorari at 7, Kisor v. O'Rourke, No. 18-15 (U.S. June 29, 2018), 2018 WL 3239696.

33. *Id.*

34. *Kisor*, 869 F.3d at 1367.

Court deferred to the DVA's reading because it was not clearly mistaken or inconsistent with the rule's text.[35] Kisor sought review in the Supreme Court, which granted certiorari limited to the question whether to overrule *Seminole Rock* and *Auer*.[36]

Kisor v. Wilkie squarely poses the question whether to jettison *Seminole Rock*.[37] It therefore makes sense to examine *Seminole Rock* carefully.

III. *BOWLES V. SEMINOLE ROCK & SAND CO.*

Seminole Rock involved a dispute over the interpretation of a rule issued by a World War II–era agency, the Office of Price Administration (OPA).[38] Created shortly after the attack on Pearl Harbor to avoid wartime inflation, the OPA Administrator imposed price controls on virtually all goods, capping their price to whatever a company had charged during March 1942.[39] The specific issue in *Seminole Rock* involved determining, for purposes of the cap, what price Seminole Rock & Sand Co. had charged for crushed stone during that month: the price agreed in the crushed stone contract, which predated March 1942 (Seminole Rock's position) or the capped price when the product was later delivered (the Administrator's position).[40] When framing the relevant legal analysis, the Court wrote that, because "an interpretation of an administrative regulation" was at issue, "a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."[41] When so doing, the Court wrote, "[t]he intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions" of an agency rule.[42]

Had the Court stopped there, the *Seminole Rock* case might have disposed of numerous similar contractual disputes, but it

35. *Id.* at 1368.

36. *See supra* note 7.

37. *See supra* note 7.

38. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 411 (1945).

39. *Id.* at 413.

40. Before March 1942, the parties had agreed upon a price of $1.50 per ton, but the crushed rock had not yet been delivered when the Administrator capped the price at 60 cents per ton. *Id.* at 412–13.

41. *Id.* at 413–14.

42. *Id.* at 414.

would not have produced a severe change in the law. The decision would have come to stand only for the limited and obvious proposition that a court should consider one party's construction of a relevant legal rule. Nevertheless, in the next sentence, the Court went on to make clear that an agency's interpretation of a rule is far more than merely "relevant." "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[43] To make clear that the agency effectively possessed law-interpreting authority, the Court went on to specify precisely what was relevant to the disposition of the case. "Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator."[44] Using only those guides, the Court went on to accept the OPA's position.[45]

Consider what the Court wrote. A factor that "may be relevant" suddenly transformed into the "ultimate criterion" and took on "controlling weight" in less than thirty-five words, all without a shred of logical or legal support.[46] The Court cited no provision of the Constitution, no statute, and no precedent justifying the proposition that a court must defer to one party's interpretation of the critical issue in a lawsuit.[47] To be sure, if an agency's interpretation of a rule conflicted with the rule's text, a court could reject the agency's position.[48] But, according to the Court those were the "*only* tools" that a court may use when deciding what a regulation means.[49]

Really? When did literacy become the deciding factor in legal interpretation? Suppose the agency's interpretation was literally correct but led to an irrational result. Terms in a rule might be simple and straightforward, but so too is the phrase "Sleeping in the railway station is prohibited." Just as a court might

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43. *Id.*

44. *Id.*

45. *Id.* at 414–18.

46. *Id.* at 414.

47. *See* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 617–18 (2013) (Scalia, J., concurring in part and dissenting in part) (*Seminole Rock* "offered no justification whatever—just the *ipse dixit*" quoted above); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 619 (1996).

48. *See Seminole Rock*, 325 U.S. at 414.

49. *Id.* (emphasis added).

legitimately inquire whether a commuter who nods off while waiting for a train has violated that ordinance,[50] a court should also be free to inquire whether the agency's interpretation is irrational or unreasonable, creates unforeseen and unforeseeable harmful results, undermines other valuable goals, conflicts with settled legal doctrines, or is quite mistaken on other grounds. It was for reasons such as those that Judge Learned Hand wrote that we should not "make a fortress out of the dictionary."[51]

Seminole Rock took a common sense admonition that an executive official's application of an agency rule might bear on the proper legal interpretation it should receive and made the agency's understanding the dispositive factor in determining, as *Marbury* put it, "what the law is."[52] If read literally, the effect of the *Seminole Rock* ruling, whether or not intended, was to grant executive branch officials the final say in the interpretation of a vague or ambiguous agency rule when the issue arose in litigation in a federal court, or even if the government was not a party to the lawsuit. Given the off-hand manner in which the Court adopted the rule in *Seminole Rock* and the Spartan justification that it gave, it seems that the Supreme Court could not possibly have meant what it said.

Indeed, it is possible that the Court did not intend its *Seminole Rock* decision to have such precedent shattering importance for the law. From all appearances, the case involved a simple, run-of-the-mill application of a wartime regulation to an executory contract for a rather pedestrian item (crushed rock) produced, not for overseas military use, but for a domestic railroad roadbed.[53] The Court did not explain why the exigencies of the war or the intricacies of government contracts and price caps demanded that executive officials displace judges from their historic role as adjudicators. The Court also did not discuss the oddity that would follow from a rule demanding that courts abstain from acting as neutral decision makers by turning over to one of the parties (the federal government)

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50. The hypothetical is taken from Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 (1958).

51. Cabell v. Markhan, 148 F.2d 737, 739 (2d Cir. 1945).

52. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

53. Bowles v. Seminole Rock & Sand Co., 145 F.2d 482, 483 (5th Cir. 1944), *rev'd*, 325 U.S. 410 (1945).

the responsibility for deciding the only legal issue in the case. Nor did the Court cite, let alone distinguish, what Chief Justice Marshall wrote in *Marbury* about the courts' law-interpreting function. In fact, the Court did not cite *any* of its (or anyone else's) decisions in the relevant portion of its opinion.[54] Although one justice dissented, he wrote nothing about the majority's analysis, saying only that the Court of Appeals was correct.[55] As such, there was reason to hope that the Court would not read literally its rather novel and unsettling statement in *Seminole Rock* about the executive's new law-interpreting power.[56]

Unfortunately, the law went in a different direction. The Court has read and applied the *Seminole Rock* opinion on numerous occasions in widely assorted contexts with the same military discipline required if the decision were a statute.[57] Moreover, the Court has made clear that the agency's interpretation need not be the best reading of a rule; a "plausible" interpretation will do.[58] The Court not only reaffirmed *Seminole Rock* in 1997 in *Auer v. Robbins*,[59] but also applied the deference rule well beyond the original limited context of *Seminole Rock*.[60] Rather than become, as Justice Felix Frankfurter once wrote, "a

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54. At the tail end of its decision, the Court cited two precedents—*Lockerty v. Phillips*, 319 U.S. 182 (1943), and *Yakus v. United States*, 321 U.S. 414 (1944)—in the context of expressly declining to decide "the constitutionality or statutory validity" of the rule. *Seminole Rock*, 325 U.S. at 418–19.

55. *Id.* at 419 (Roberts, J., dissenting) ("MR. JUSTICE ROBERTS thinks the judgment should be affirmed for the reasons given in the opinion of the Circuit Court of Appeals, 145 F.2d 482.").

56. *See* Jonathan H. Adler, Auer *Evasions*, 16 GEO. J.L. & PUB. POL'Y 1, 7 (2018) ("commentators largely ignored" *Seminole Rock* and the Court did not rely on it to justify deferring to an agency's regulatory interpretation "for another two decades"); Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 597 (1950) (describing *Seminole Rock*'s discussion of the standard of review as "hardly more than dictum").

57. *Supra* note 3.

58. *See* Ehlert v. United States, 402 U.S. 99, 105 (1971) (noting that the agency's interpretation need only be a "plausible construction of the language of the actual regulation").

59. 519 U.S. 452, 461.

60. *See* Adler, *supra* note 56, at 8–9 (noting that *Auer* gave deference to an agency position advanced decades after the rule had been promulgated, not contemporaneously with its issuance, and in an amicus brief filed at the Supreme Court's urging, not in a public document sent to the regulated community).

derelict on the waters of the law,"[61] *Seminole Rock* stands as a fixture of contemporary administrative law.

Or so it seemed.

IV. "THINGS FALL APART; THE CENTRE CAN NOT HOLD"[62]

The Supreme Court decided *Seminole Rock* during a tumultuous period in regulatory policy history. The principle that courts should independently scrutinize the legality of executive actions followed logically from the tripartite system of government that the Framers created at the Convention of 1787. By separately allocating the legislative, executive, and judicial powers to only one of the three discrete branches, the Vesting Clauses in Articles I, II, and III implement a government in which Congress enacts the laws, the President enforces them, and the courts interpret and apply them.[63]

Beginning with the New Deal, Congress modified that design. Relying on Progressive philosophy, which posited that educated, trained, expert administrators could fashion scientific solutions to any public policy problem, Congress created a bevy of new regulatory agencies.[64] Some combined legislative, executive, and adjudicative powers.[65] With few exceptions,[66] the Court rejected constitutional challenges to laws transferring legislative power to newly created agencies and laws restraining the President's ability to remove their officials.[67]

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61. Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

62. William Butler Yeats, *The Second Coming*, 69 THE DIAL 466, 466 (1920).

63. *See* Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337, 355–56 (2015).

64. *See, e.g.*, JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 124–25 (2d ed. 1954); RALPH HENRY GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT: AN INTELLECTUAL HISTORY SINCE 1815, at 337 (1940); ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM 36 (1983); PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 60–61, 65–66 (2018).

65. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994).

66. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) (both holding unconstitutional statutes delegating broad power to an agency).

67. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 425–26 (1944) (rejecting a Delegation Doctrine challenge to a statute authorizing the head of the World War II-era Office of Price Administration to set "fair and equitable" prices); Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (rejecting a constitutional chal-

Seminole Rock came along at a time when the Supreme Court appeared willing to abandon the assignment of particular, specific, and discrete powers to separate branches. Like some of the Court's other decisions in this period,[68] *Seminole Rock* granted Congress flexibility to reshape the Framers' chosen structural constraints on federal power by treating the Constitution's text as if it were guidance rather than an immutable restraint on old-fashioned common law judicial decision making. With that in mind, *Seminole Rock*'s willingness to grant executive officials the law-interpreting authority normally enjoyed only by judges comes less as a surprise. Such willingness to do so and failure to acknowledge or justify the novelty of its approach are natural consequences of the Court's decision to treat the separation of powers more as a presumptive ordering than a fixed architecture.

The Supreme Court, however, has left that mindset behind. Just as the Constitution "does not enact Mr. Herbert Spencer's Social Statics,"[69] it also does not incorporate Woodrow Wilson's Progressivism.[70] Today, the Court begins its analysis not with the policy that the Constitution or a statute might, or might not, advance, but with the text.[71] This starting point is critical here. Congress enacted the Administrative Procedure Act (APA)[72] a year after the Court decided *Seminole Rock*, and the text of that act speaks directly to this issue. The APA makes clear that "*the reviewing court* shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[73]

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lenge to a for-cause restriction on the President's power to remove a Federal Trade Commissioner).

68. *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947).

69. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

70. Woodrow Wilson was the leading Progressive advocate even before he became President. *See, e.g.*, WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (Transaction Publishers 2002) (1908); WOODROW WILSON, THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS (Boston, D.C. Heath 1889); WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (15th ed. 1901); Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887).

71. *See, e.g.*, Culbertson v. Berryhill, 139 S. Ct. 517, 521–22 (2019); Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938, 1946 (2016); Nixon v. United States, 506 U.S. 224, 228 (1993); INS v. Chadha, 462 U.S. 919, 945–46 (1983).

72. 5 U.S.C. §§ 701–706 (2012).

73. *Id*. § 706 (emphasis added).

The APA also specifies precisely what "*the reviewing court*" should do when carrying out those responsibilities, including the directive to "hold unlawful and set aside agency action, findings, and conclusions" that it finds "contrary to constitutional right, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations" or "short of statutory right."[74] It would be difficult for Congress to be more clear who is to make those decisions than to say "the reviewing court." It is as if Congress wrote the APA to expressly overrule *Seminole Rock*.[75]

Perhaps for that reason, *Seminole Rock* defenders do not rely on (what passes for) the majority's reasoning in that decision to defend its delegation of law-interpreting responsibility. Those advocates maintain that *Seminole Rock* adopted a sensible rule given Congress's decision to entrust lawmaking, law-implementing, and policy-balancing responsibility to regulatory agencies.[76] To some extent, they are right. Expert agency personnel are far better equipped than generalist Article III judges to know how best to implement a complex, technical regulatory scheme. Senior agency officials are also politically

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74. *Id*. (emphasis added) ("The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.").

75. For this reason, stare decisis considerations should count for little in the *Kisor* case. The Court has cited *Seminole Rock* as if the APA did not exist. *Kisor* will require the Court to reconcile *Seminole Rock* with the APA. Because statutes trump judicial decisions in cases that do not involve interpreting the Constitution, the Court cannot invoke stare decisis to reject the plain meaning of the APA.

76. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297 (2017).

accountable for their actions in ways that life-tenured judges are not and cannot be. Agency civil servants also provide a stability, consistency, and uniformity in their understanding of a statutory scheme that can serve the public better than reliance on the judgments of various different federal judges spread across thirteen circuit courts of appeals. Whatever the weaknesses of the *Seminole Rock* decision might be, the demands of the modern administrative state justify relying on the guidance that expert career personnel can offer the public.

Finally, the argument goes, consider the alternative. Do we want to transfer the authority to decide what drugs are safe and effective, what pesticides can damage human and animal health, and a range of other highly scientific decisions from agencies like the Food and Drug Administration and the Environmental Protection Agency, respectively, to judges trained, not in medicine or biochemistry, but in the law? There is much to be said, the argument goes, for the proposition that Congress has acquiesced in, maybe even quietly approved of, the current allocation of responsibility. In sum, the subtext of the argument defending *Seminole Rock* is this: Leave well enough alone. The current system is not perfect—none could be—but it is a better one than any possible substitute.[77]

That argument is appealing, principally as a practical matter, but, ultimately, it is unpersuasive as a legal matter. In addition, the correct legal answer still preserves the practical benefits of agency expertise.[78]

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77. The difference between applying and not applying the *Seminole Rock-Auer* rule matters. Some estimates are that the government has between a 76 and 91 percent affirmance rate of cases in which a court applies those decisions. Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of* Seminole Rock, 22 GEO. MASON L. REV. 647, 652 n.58, 659 (2015) (citing Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 62 ADMIN. L. REV. 77, 83–85 (2011) and Richard J. Pierce & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 519–20 (2011)).

78. Scholars have argued that *Seminole Rock* and *Auer* are flawed because they allow an agency to draft a vague or ambiguous rule governing a politically controversial subject and then adopt its preferred interpretation of the rule in, for example, a later enforcement proceeding. *See, e.g.*, Adler, *supra* note 56, at 14–15 ("[B]y enabling agencies to provide legally binding interpretations of their own regulations and allowing agencies to do so in letters, guidance documents, and even legal briefs, *Auer* facilitates the evasion of multiple administrative law norms: accountability, responsibility, notice, and finality."); Knudsen & Wildermuth, *supra* note 77, at 654–55. The Supreme Court appears troubled by that prospect. *See* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 158–59 (2012).

One problem with that theory of deference to agency expertise is that it is neither always right nor always wrong. Some agency officials—physicians, veterinarians, biochemists, epidemiologists, hydrologists, nuclear engineers, astrophysicists, and so forth—will know far more about a particular subject matter than Supreme Court Justices think they know and also will have a better grasp of the on-the-ground tasks necessary to make a regulatory program work. Other agency officials will be no smarter or better equipped to manage a complicated regulatory program than are the people behind the counter at your local DMV. Uttering that conclusion certainly is not politically correct, and it is highly unlikely that the Supreme Court would ever endorse it in a written opinion published for posterity in the United States Reports. Nonetheless, Supreme Court justices are people—actually, very savvy people—and, like everyone else, they will hold different views regarding the competencies of different agencies and different administrative officials. It therefore makes little sense to pretend that every regulatory official is entitled to the same deference as a former president of Cal Tech (former Secretary of Defense Harold Brown) or a Nobel Prize laureate (former Secretary of Energy Steven Chu).

Another flaw in *Seminole Rock* and *Auer* is that they ignore the well-settled common law doctrines noted above demanding that a judge must be impartial and willing to listen to the

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Other scholars argue that this fear is groundless. *See, e.g.*, Sunstein & Vermeule, *supra* note 76, at 309–10 ("There is a palpable lack of realism, and a lack of empirical grounding, to the widespread concern that *Auer* is a significant part of the constellation of considerations that lead agencies to speak specifically or not. We do not believe that agencies often preserve ambiguity on purpose—in fact we think that that is highly unusual—but when they do, *Auer* is hardly ever, and possibly never, part of the picture. The critics speak abstractly of possible abuses, but present no empirical evidence to substantiate their fears."). There is support for the fear of agency manipulation in an analogous context. One of the authors of this article formerly worked in the U.S. Justice Department Office of the Solicitor General, whose permission is necessary for the federal government to take an appeal to a circuit court of appeals, to file a suggestion for rehearing en banc, or to petition the Supreme Court to review a case. 28 C.F.R. § 0.20 (2018). In his experience, parties seeking to turn defeat into victory will try to spin the facts, the law, or both to achieve that goal. There is no reason to believe that the people who work in agencies would not take advantage of the option of using vague or ambiguous draft rules to achieve a similar end by not tipping off the Office of Management and Budget how the agency intends to act. In any event, even if only half of agency rule drafters are aware of *Auer* and just shy of 40 percent use it when drafting rules, *see* Walker, *supra* note 24, at 106–07 n.14, that is hardly a trivial number of game players.

competing positions of the parties to a dispute. Whether the parties disagree over the facts, the law, or both, Anglo-American law has always rested on the principle that each side to a lawsuit is entitled to have the judge decide what facts and law are relevant, how much weight each side's arguments should receive, and how ultimately to resolve the case. *Seminole Rock* and *Auer*, however, give the government a benefit that no court would ever afford a private party: the ability to decide what a vague or ambiguous legal rule means. By so doing, "deference" becomes a "systematic judicial bias" in favor of the federal government, "the most powerful of parties," and against everyone else.[79] There is no evidence that Congress intended to upset the balance that the common law had developed over hundreds of years to ensure a fair outcome of a lawsuit.[80] Rather than "keep the balance true,"[81] the Court took it upon itself in *Seminole Rock* and *Auer* to make up a new rule of decision without explaining why it had the power to do so. To be sure, the federal courts have devised rules of statutory analysis ever since Congress passed the Judiciary Act of 1789,[82] and those rules apply to the interpretation of agency rules.[83] But those are rules for *courts* to apply when they call balls and strikes. They are not a justification for a court to hand over that decision-making responsibility to one of the competitors.

The biggest problem with the defense of the *Seminole Rock-Auer* rule is that it conflicts with the text and background of the APA. After years of debate, Congress enacted the APA to govern the administrative state.[84] Congress wanted the courts to

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79. Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1189, 1190 n.5, 1195 (2016).

80. *See* Adler, *supra* note 56, at 12–13 (finding no proof that Congress delegated the federal courts authority to adopt the *Seminole Rock-Auer* rule). The argument that the courts should adopt the legal "fiction" that Congress implicitly delegated agencies the authority to adopt the *Seminole Rock-Auer* rule turns a fictive legislative intent into a lie. The honest approach would require courts to admit that they are engaged in common law decision making, which would be impermissible under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

81. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

82. Ch. 20, 1 Stat. 73 (1789).

83. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 51, 246 (2012).

84. For discussions of the background to the APA, see, for example, DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014); GRISINGER, *supra* note 21; KIMBERLY JOHNSON, GOV-

constrain the actions of administrative agencies. Section 706 of Title 5 clearly serves that role.[85] The *Seminole Rock-Auer* rule, which hands law-interpreting power back to an agency, hardly respects the judgment that Congress made. The APA's text and the background against which the statute became law—the longstanding common law principles that no party can judge his own case—combine to demonstrate that a court must independently decide the legal issues in a dispute. *Seminole Rock* and *Auer* assume without proof or evidence that Congress del-

ERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877–1929 (2007).

85. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985–95 (2016) (arguing that *Chevron* is inconsistent with Section 706 of Title 5).

egated law-interpreting power to an agency.[86] That is the fatal flaw in those decisions.[87]

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86. In *Kisor*, the government concedes that the *Seminole Rock-Auer* deference standard is flawed and that the APA does not adopt it. *See* Brief for the Respondent 15–27, Kisor v. Wilkie, No. 18-15 (U.S. Feb. 25, 2019), 2019 WL 929000. The government nonetheless urges the Court to retain that standard in limited circumstances: namely, where a court, after using the traditional tools of legal interpretation, finds that a rule is ambiguous and that the agency's reading satisfies three requirements: the agency's reading has been consistent, it rests on the agency's technical or policy expertise (rather than its legal analysis), and it represents the views of the agency's politically accountable senior officials. *Id*. at 27–34. An agency interpretation failing that test cannot receive deference under *Seminole Rock*, the government admits, but it argues that the rule might still receive whatever deference *Skidmore* offers. *Id*. at 28. The government's new-fangled theory is multiply flawed. First, if the APA endorses the settled common law standard that courts must independently resolve issues of law, the case is over, because the APA is controlling. The Supreme Court must leave it to Congress to decide whether to amend the APA to adopt the *Seminole Rock* standard. Second, the government tries to salvage *Seminole Rock* by conflating it with *Skidmore*. The factors that the government invokes to trigger *Seminole Rock* deference are sensible ones under *Skidmore* because they help a court decide whether an agency's interpretation is persuasive. *Seminole Rock*, by contrast, said that the only relevant factor is the text of the rule. It makes less sense to reshape *Seminole Rock* as *Skidmore* than simply to apply *Skidmore* itself. Third, in many instances an agency interpretation of its own rules will not be entitled to any deference whatsoever. The Congressional Review Act (CRA), 5 U.S.C. §§ 801–808 (2012), requires agencies to publish in the Federal Register and to submit to Congress all post-CRA "rules"—a term that would include every agency interpretation of its own regulations. Any rule not so published and submitted *cannot* receive *deference* of *any* type, because the CRA renders those rules of no force and effect. *See* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 40 HARV. J.L. & PUB. POL'Y 187 (2018). The government's effort to preserve *Seminole Rock* therefore cannot work in most cases where the government would have its new standard applied. In sum, the Supreme Court should "retire" the *Seminole Rock-Auer* deference standard. *Supra* note 5.

87. It has been argued that, just as a writer knows best what his book says, so too the agency that authored a rule knows best what it means. *See* 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.11, at 532 (5th ed. 2010). That argument is at odds with the fairness and separation of powers principles that no one party should both promulgate and apply the law. *See* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 619–21 (2013) (Scalia, J. concurring in part and dissenting in part). Atop that, a court's role is to interpret the written law, not psychoanalyze the author's state of mind. *See id.* at 618 ("The implied premise of this argument—that what we are looking for is the agency's *intent* in adopting the rule—is false. There is true of regulations what is true of statutes. As Justice Holmes put it: 'We do not inquire what the legislature meant; we ask only what the statute means.' Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). Whether governing rules are made by the national legislature or an administrative agency, we are bound *by what they say*, not by the unexpressed intention of those who made them."); Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 GEO. J.L. & PUB. POL'Y 87, 89 (2018).

As the Supreme Court made clear in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the APA "was not only a new, basic and comprehensive regulation of procedures in many agencies, but was also a legislative enactment which settled long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[88] Just as the federal courts cannot "engraft[] their own notions of proper procedures upon [federal] agencies,"[89] so too the courts cannot punt their law-interpreting responsibility over to administrative officials. The APA reflects Congress's considered judgment regarding the respective roles that agencies and courts must play in the administrative state. While the Court did not have the benefit of the APA when it decided *Seminole Rock* in 1946, the APA came along a year later, and the judicial review provisions in that act are in effect today. It is time to correct the Court's error in *Seminole Rock*.[90]

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88. 435 U.S. 519, 523 (1978) (citations and internal quotations omitted).

89. *Id*. at 525.

90. One final point: Then-Harvard Law School Professor (now Dean) John Manning has argued that *Seminole Rock* and *Chevron* trench on separation of powers principles. *See* Manning, *supra* note 47, at 618. In response, fellow Harvard Law School Professors Sunstein and Vermeule have claimed that Dean Manning's argument is "overheated" and that his reliance on "the heavy constitutional artillery" of separation of powers "appears to be a stalking horse for much larger game—namely, a wholesale critique of the administrative state." Sunstein & Vermeule, *supra* note 76, at 297, 299. That debate raises the question whether Congress could revise the APA by adopting the *Seminole Rock-Auer* standard. By greatly affecting how an Article III court can adjudicate a lawsuit, the debate potentially raises the question whether such a statute would exceed the restrictions that Article III imposes on Congress to create courts without granting their judges the life tenure and salary protections that Article III demands.

That is a difficult issue. Congress can require federal courts to give some degree of weight to an agency's factual findings, *see, e.g.*, Thomas v. Union Carbide Agric. Prods., 473 U.S. 568, 583 (1985); Crowell v. Benson, 285 U.S. 22, 51 (1932), but there is a limit to how far Congress can go with regard to deciding questions of law, *see, e.g.*, Bank Markazi v. Peterson, 136 S. Ct. 1310, 1325 (2016) (noting that Congress can change the substantive law underlying a dispute and require the courts to apply it retroactively); *Union Carbide*, 473 U.S. at 592–93 (noting that the relevant arbitration scheme allowed for review for constitutional errors and an arbitrator's abuse of his authority); United States v. Klein, 80 U.S. 128, 146–48 (1871) (ruling that Congress cannot direct a federal court how to resolve a case). For example, it is doubtful that Congress could order a court to issue judgment in favor of a party whose actions, the court believes, were legally wrong. Also relevant is the question of whether Congress may entrust the determination of legal and factual issues to what have been described as "Article I" courts, *viz*., courts lacking the tenure and salary protections required by Article III, § 1. *See* Den v. Hoboken

V. QUO VADIS?

There is a way to respect the expertise of agency officials without handing them the power to decide a legal issue. The Supreme Court identified the appropriate standard in its unanimous opinion by Justice Robert Jackson in *Skidmore v. Swift & Co.*,[91] which predates *Seminole Rock* by only six months but went unmentioned in that decision. The issue in *Skidmore* was whether employees were entitled to overtime pay for the hours they spent at or nearby their job in a state of readiness in case of a fire.[92] The relevant statute, the Fair Labor Standards Act of 1938, did not answer this question, but the Administrator of Wages and Hours issued an agency bulletin concluding that a

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Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855). ("[W]e do not consider [whether] congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."); *see also, e.g.*, Stern v. Marshall, 564 U.S. 462, 473–88 (2011) (collecting cases reaffirming *Den*). When an issue arises under the Constitution, federal trial and appellate courts must independently decide questions of law, as well as so-called mixed questions of law and fact. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 693, 696–97 (1996) (Fourth Amendment probable cause determinations); Miller v. Fenton, 474 U.S. 104, 110, 113, 115 (1985) (Fifth Amendment Self-Incrimination Clause confession-voluntariness determinations); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503–11 (1984) (First Amendment "actual malice" determinations in defamation cases); Jackson v. Virginia, 443 U.S. 307, 309, 326 (1979) (sufficiency of the evidence to support a conviction). At the same time, Congress can create non–Article III courts in the District of Columbia, *see* Palmore v. United States, 411 U.S. 389, 390 (1973), and the territories, *see* Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828), and also can empower non–Article III courts to adjudicate issues arising entirely under acts of Congress, *viz.*, the so-called "public rights doctrine," *see Stern*, 564 U.S. at 488–95 (collecting cases). Accordingly, the question of what weight Congress can demand that an Article III court give to an agency's decision does not have an obvious answer. *See generally* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27 (2018).

The Court need not reach that issue in *Kisor*, for two reasons. One is that the APA's text does not adopt the *Seminole Rock-Auer* standard, and Congress has not done so elsewhere. Adler, *supra* note 56, at 12–13. The other reason is that the background common law adjudicatory principles noted above—*viz.*, "No one may be a judge in his own cause" and "A judge must hear both sides of a case before deciding it"—should inform the proper reading of the APA's judicial review provisions, and they advance much the same concerns that underlie a constitutional challenge to *Seminole Rock* and *Auer*. Accordingly, there should be no need to fire off any "heavy constitutional artillery" to retire the standard adopted in *Seminole Rock* and *Auer*.

91. 323 U.S. 134, 140 (1944).

92. *Id.* at 135–36.

flexible approach was the best way to decide whether such "waiting" time should be deemed overtime.[93] The Court found that the Administrator's ruling was sensible and persuasive, despite its being neither conclusive nor binding on the courts, and therefore decided that the Administrator should prevail.[94] As the Court explained:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[95]

Skidmore articulates a standard that accommodates both an agency's expert judgment how to make a statute work and a court's responsibility to keep the agency within legal bounds.

The Court's decision in *Skidmore* is still good law. In 2001, the Court reaffirmed *Skidmore* in *United States v. Mead Corp.*, which involved a tariff classification judgment made by the U.S. Customs Service.[96] The Court declined to afford the Customs Service deference under the Court's *Chevron* decision, which created a doctrine parallel to *Seminole Rock* and *Auer*, one granting deference to an agency's interpretation of a vague or ambiguous statute, instead of a regulation. Congress, the Court decided, had not intended that the Customs Service have dispositive law-interpreting power. At the same time, the Court said that the Customs Service's decisions were entitled to respect insofar as they were well reasoned and persuasive. In the absence of *Seminole Rock* and *Auer*, judges would not ignore an agency's reading of a regulation, but the courts also would not be hamstrung by the agency's construction.

The upshot is that even if the Court were to abandon the *Seminole Rock-Auer* rule, agencies would still be in a position to invoke their expertise as a justification for their judgment about

93. *Id.* at 136, 138.
94. *Id.* at 139–40.
95. *Id.* at 140.
96. 533 U.S. 218, 221 (2001).

how a regulatory program should operate. Courts would be likely to decide whether the agency's position is a persuasive one by asking the same type of questions they have long pondered when reviewing a regulatory decision: When did the agency first adopt its interpretation (e.g., when the statute became law or when the agency filed suit)? How long has the agency maintained that position (e.g., for fifty years or fifty days)? Has the agency's interpretation remained consistent over time or gone from pillar to post? Is the field a highly technical one? And so forth. A contemporaneous, consistent, longstanding interpretation of a technical rule is likely to receive deference. A construction that is in "the same class as a restricted railroad ticket, good for this day and train only," should not.[97]

A court would want to know what John Henry Wigmore said about an issue of evidence law, what Arthur Corbin thought about a matter of contract law, what William Prosser wrote about tort law, what Philip Areeda or Herbert Hovenkamp concluded about antitrust law, and what Herbert Wechsler, David Shapiro, and Charles Allen Wright believed about criminal law, federal jurisdiction, and federal civil procedure, respectively. Each one is or was a highly learned and respected scholar. The legal community, including members of the bench, eagerly seeks their views on an issue in a lawsuit. The same would be true when an agency has earned respect for its consistently well-reasoned opinions.

Of course, experts can be wrong; even Homer nodded.[98] When that is the case, courts should reject their opinions. Just as it would be irrational for a court to disregard a persuasive agency position because the agency's views are not dispositive, so too would it be irrational to reject an otherwise persuasive argument just because an agency offered it, not a law professor. Under *Skidmore*, a federal court would likely give an agency's opinion whatever persuasive force its reasoning deserved. The difference between *Skidmore* and *Seminole Rock* is that *Skidmore* lets a court decide what is persuasive. A persuasive agency ar-

97. Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

98. *Even Homer Nods*, OXFORD DICTIONARIES ("Even the best person makes a mistake due to a momentary lack of alertness or inattention."), http://www.oxforddictionaries.com/us/definition/american_english/even-homer-nods [https://perma.cc/SS4G-HCDJ].

gument is no less persuasive just because the court has the final say. Moreover, if an agency cannot persuade the courts that its position is a sound one, why would we want the agency to prevail?

Freed from the shackles of *Seminole Rock* and *Auer* deference, judges would independently interpret the language of regulations before them.[99] This would not lead to judges making policy determinations but instead would allow judges to fulfill their constitutional duty to say what the law is. As then-Judge (now Justice) Neil Gorsuch pointed out, "We managed to live with the administrative state before *Chevron*. We could do it again."[100] Likewise, there was a time before *Seminole Rock* and *Auer*. We can live without them too.

VI. CONCLUSION

The world as we know it would not end if the Supreme Court reconsidered *Seminole Rock* and *Auer*. While courts would no longer be constrained by an agency's unpersuasive or unreasonable construction of a regulation, agencies would still operate much the same, issuing regulations that touch on nearly every aspect of Americans' daily lives, from highways to healthcare. The Supreme Court did not justify the *Seminole Rock* standard when it decided that case, and there is no persuasive reason to keep repeating that mistake. It is time for courts to follow the command of *Marbury v. Madison* and the APA that judges—not agency officials—must decide questions of law. The Supreme Court should seize the opportunity presented in *Kisor v. Wilkie* and retire the *Seminole Rock-Auer* standard.

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99. Then-Judge Brett Kavanaugh provided a simple roadmap for finding the best reading of a statute, an approach that applies equally well to regulations: look to "(1) the words themselves, (2) the context of the whole statute, and (3) any other applicable semantic canons, which at the end of the day are simply a fancy way of referring to the general rules by which we understand the English language." Kavanaugh, *supra* note 22, at 2145.

100. Gutierrez-Brizuela v. Lynch, 834 F.3d. 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

CONSTITUTIONAL AVOIDANCE, SEVERABILITY, AND A NEW *ERIE* MOMENT

Suppose that you are a textualist federal judge. In front of you is a federal statute containing a provision that is best read as unconstitutional. You have two options. You can discard the best interpretation and adopt an alternative interpretation that avoids the constitutional problem. Or you can adopt the best interpretation and declare the provision unconstitutional. Then, in order to determine whether you should invalidate the statute in whole or in part, you have to speculate about whether Congress would have enacted the statute without the unconstitutional provision. Which option do you choose?

Federal judges face this choice routinely in our current regime of constitutional adjudication. Those who choose the first option—constitutional avoidance—will sometimes confront charges of having impermissibly "rewritten" the statute through interpretation, which is to say, outside Article I, Section 7's procedures. And those who choose the second option—severability—will have to gaze into a crystal ball in an attempt to determine whether Congress would have passed a version of the statute that, in all likelihood, Congress never considered. They too risk charges of having rewritten the statute.

National Federation of Independent Business v. Sebelius[1] illustrates this dilemma, in which judges must choose between two kinds of rewriting, when judges should not be rewriting at all. There the Supreme Court considered the constitutionality of the Affordable Care Act's (ACA) Individual Mandate and Medicaid Expansion.[2] Chief Justice Roberts conceded that the best reading of the Mandate was that it commanded individuals to purchase insurance.[3] But because that reading would result in a finding of unconstitutionality, he chose to read the Mandate as a tax.[4] In a joint dissent, four Justices accused Chief Justice Roberts of having rewritten the Mandate.[5]

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1. 567 U.S. 519 (2012).
2. *See id.* at 530–31.
3. *See id.* at 562.
4. *See id.* at 561–63.
5. *See id.* at 668 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

Yet the dissenters' choice to give the ACA its best reading came at a cost. Because the dissenters concluded that the Mandate and Expansion were both unconstitutional,[6] severability doctrine required them to speculate about whether Congress would have enacted the rest of the ACA without those provisions. Severing the Mandate and Expansion, though, risked rewriting the statute, they said. It was a legislative power that the Court could not exercise.[7] The dissenters thus concluded that the most restrained course of action would be to invalidate the ACA entirely.[8]

This Note argues that the Court should repudiate the avoidance and severability doctrines. Both doctrines assume the existence of an unexpressed legislative intent that judges can discover. But the rise and influence of modern textualism have challenged that assumption to such an extent that a significant portion of judges and lawyers are now skeptical of legislative intent. As a result of that skepticism, the doctrines have begun to look different. Namely, they appear to engage courts in the exercise of legislative rather than judicial power, and a judge's quest for legislative intent can appear to mask the expression of policy preferences. *The ACA Cases—NFIB* and *King v. Burwell*[9]—suggest that the prevailing judicial approach to addressing the unconstitutionality of statutes creates tension with the common textualist-inspired skepticism among judges and lawyers about legislative intent. That expanding skepticism has the effect of making avoidance and severability appear illegitimate because they seem to be forms of judicial legislation.

Changing theories of law have prompted sweeping doctrinal reform in the past. In *Swift v. Tyson*,[10] in 1842, the Court held that the Rules of Decision Act did not require federal courts sitting in diversity to apply state court decisions in matters of general common law.[11] Because Justice Story, writing for the Court, conceived of the common law as a transcendental body of law that all judges could discover, he reasoned that the Act

6. *See id.* at 647–48.
7. *See id.* at 692.
8. *See id.* at 691.
9. 135 S.Ct. 2480 (2015).
10. 41 U.S. (16 Pet.) 1 (1842).
11. *See id.* at 18–19.

authorized federal courts to provide the rule of decision themselves.[12]

But by the eve of the Court's decision in *Erie Railroad Co. v. Tompkins*,[13] in 1938, the conception of the common law reflected in *Swift* had changed. Legal positivism had challenged the notion that the common law was "discovered" as opposed to "made."[14] This shift in legal thought brought constitutional concerns into view: if the common law was made, then federal courts should not be making law in the place of state legislatures.[15] The Court declared that "[t]here is no federal general common law" and gave the power to provide the rule of decision to the states.[16]

Erie charts a two-part pattern that Professor Lawrence Lessig calls the "*Erie*-effect."[17] First, contestation of a certain practice that courts engage in makes that practice seem "illegitimate." Second, the Court reallocates the practice to another legal institution in order to avoid incurring an illegitimacy cost to courts. Thus, *Erie* reflects a development wherein legal positivism's contestation of the notion of a transcendental body of law that all judges could discover rendered illegitimate the federal courts' practice of "discovering" common law under *Swift*. The Court then reallocated the power to provide the rule of decision, from federal courts to the states.

The first part of the *Erie*-effect has already happened to the doctrines of avoidance and severability: changes in legal thought surrounding statutory interpretation have altered the appearance of these judicial doctrines so that they now seem legislative and therefore illegitimate.[18] This Note argues that

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12. *See id*.

13. 304 U.S. 64 (1938).

14. *See id.* at 79.

15. *See id.* at 80.

16. *Id.* at 78.

17. *See generally* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1400–12 (1997) [hereinafter Lessig, *Fidelity and Constraint*]; Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1787–95 (1997) [hereinafter Lessig, Erie-*Effects*]; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426–38 (1995).

18. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 24–29 (2006) (explaining that "the rise of modern textualism . . . has much in common with the shift from *Swift* to *Erie*").

the Court should complete the *Erie*-effect pattern by repudiating avoidance and severability and replacing them with a regime in which courts give statutes their best readings. If a statute is unconstitutional, the Court should invalidate the unconstitutional part. By ceding to Congress some of the power to address unconstitutional statutes, this proposal aims to reduce the illegitimacy cost that the Court incurs under our current regime.

The argument proceeds in five parts. Part I briefly introduces the doctrines of avoidance and severability. Part II argues that the rise and influence of modern textualism has challenged the doctrines' intentionalist assumptions to such an extent that the assumptions are no longer a judicial default. Part III discusses *The ACA Cases* in order to argue that because the use of avoidance and severability appears to engage the Court in judicial legislation, the doctrines impose an illegitimacy cost on the Court. Part IV argues by analogy to *Erie* that the Court should cede to Congress some of its current power to address unconstitutional statutes and proposes that the Court repudiate avoidance and severability. Part V concludes.

I. BACKGROUND

A. Constitutional avoidance

Constitutional avoidance is the principle that courts should decide cases on nonconstitutional grounds whenever possible. Three types of avoidance should be distinguished[19] for the sake of clarity:

- Procedural avoidance: "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."[20]
- Classical avoidance: "[A]s between two possible interpretations of a statute, by one of which it *would be* unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act."[21]
- Modern avoidance: "[W]here a statute is susceptible of two constructions, by one of which grave and

19. *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948–49 (1997).
20. Escambia Cty. v. McMillan, 466 U.S. 48, 51 (1984).
21. Blodgett v. Holden, 275 U.S. 142, 148 (1927) (emphasis added).

> doubtful constitutional *questions arise* and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter."[22]

Procedural avoidance requires a court to order the issues for adjudication so as to obviate the need for a constitutional ruling. Classical and modern avoidance each allow a court to adopt an alternative interpretation of an ambiguous statute, provided that the interpretation is plausible. They differ in the kind of doubt they require: whereas modern avoidance requires potential unconstitutionality, classical avoidance requires actual unconstitutionality. As its name connotes, modern avoidance is more prevalent today than classical avoidance.[23]

By "avoidance," this Note refers to both classical and modern avoidance, unless otherwise noted.[24]

B. Severability

Severability is the inquiry that governs how much of a partially unconstitutional statute a court should invalidate. It results in a determination either that the statute is "severable"—in which case the court invalidates only the statute's unconstitutional provisions or applications—or "inseverable"—in which case at least some of the rest of the statute is invalidated. Severance of provisions differs from severance of applications.[25] The former refers to invalidation of statutory language, whereas the latter refers to cases in which a court declares a statute unconstitutional as applied.

The current test provides that a statute is severable if (1) Congress would have enacted the remaining provisions of the statute without the unconstitutional provision, and (2) the remaining provisions of the statute can operate independently of

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22. United States v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) (emphasis added).

23. *See* Vermeule, *supra* note 19, at 1949 n.24; *see also* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015) (arguing that academic commentators should more readily differentiate between classical and modern avoidance).

24. For a prominent scholarly discussion of procedural avoidance, see Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

25. *See, e.g.*, United States v. Booker, 543 U.S. 220, 320 (2005) (Thomas, J., dissenting in part) ("The severability issue may arise when a court strikes either a provision of a statute or an application of a provision.").

the unconstitutional provision.[26] The second prong focuses on whether the remaining provisions can operate in "a manner consistent with the intent of Congress."[27] Thus, the prongs are related: whether remaining provisions can operate independently is evidence of whether Congress would have enacted them alone.[28]

Courts often apply one or more presumptions in conducting severability analysis. Historically, courts have vacillated between presumptions of severability and inseverability, but the current practice is a general presumption of severability.[29] A presumption of severability also applies where Congress includes a severability clause in a statute. Such clauses typically state that if any provision or application of the statute is held unconstitutional, the remainder of the statute shall remain in effect.[30] However, courts generally do not accord dispositive weight to these clauses.[31]

II. MODERN TEXTUALISM'S CHALLENGE TO INTENTIONALIST ASSUMPTIONS

This Part argues that modern textualism has challenged avoidance and severability doctrines' intentionalist assumptions. Both doctrines originated in a legal discourse that assumed the existence of an unexpressed legislative intent that judges could discover. Within that discourse, a judge who invoked the doctrines could defend her actions as an interpretation of an external legislative command, and the doctrines were justified as means to further judicial restraint and legislative supremacy.

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26. *See* Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932).

27. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (emphasis removed).

28. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 693–94 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

29. *See* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 218–25 (1993) (tracing the history of these presumptions).

30. *See id.*

31. *See, e.g.*, Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (stating that a severability clause "provides a rule of construction which may sometimes aid in determining [legislative] intent. But it is an aid merely; not an inexorable command"); *see also* Nagle, *supra* note 29, at 235 (proposing and rejecting justifications for nonenforcement of severability clauses).

Times have changed. Starting in the late twentieth century, textualism challenged the intentionalist approach to statutory interpretation. Other approaches also eschewed reliance on unexpressed legislative intent. In our contemporary discourse, the notion that a judge who invokes the doctrines interprets an external command is contested. As a result, the doctrines have begun to appear legislative. Ironically, judicial restraint and legislative supremacy, far from justifying the doctrines, are now reasons to doubt their legitimacy.

This Part proceeds as follows: first, I explain that avoidance and severability originated in an intentionalist legal discourse, and second, I show that textualism has challenged that discourse.

A. Avoidance and severability originated in an intentionalist legal discourse.

For much of our country's history, federal courts proclaimed that the goal of statutory interpretation is to effectuate legislative intent.[32] The hallmark of this intentionalist approach was its tendency to anthropomorphize the legislature.[33] It was commonly thought that, just as one cannot understand the meaning of human speech without considering a speaker's unexpressed intent, a judge could not interpret the meaning of a statute without considering Congress' unexpressed intent.[34]

The doctrines of avoidance and severability originated in this context. There seems to be no scholarly consensus about when a federal court first adopted what might properly be called an avoidance interpretation. Avoidance surfaced in early form even before the establishment of substantive judicial review in *Marbury v. Madison*,[35] although it probably had not attained canonical status by then. Some have pointed to Justice Brandeis'

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32. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–21, 427–30 (2005).

33. *See id.* at 423.

34. *See id.* at 419–21, 427–30; *see also* John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2404 n.28 (2017) (citing Pennington v. Coxe, 6 U.S. (2 Cranch) 33, 52 (1804) (Marshall, C.J.) (asserting that the object of interpretation is to "discover[] the mind of the legislature")).

35. 5 U.S. (1 Cranch) 137 (1803); *see* Vermeule, *supra* note 19, at 1948.

concurrence in *Ashwander v. Tennessee Valley Authority*[36] as the moment that the practice of avoidance crystallized into canon.[37]

Federal courts have long rationalized avoidance as a means of effectuating legislative intent. For example, in the 1838 case of *United States v. Coombs*,[38] Justice Story urged that a "presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous."[39] Although the federal courts have sometimes relied on other rationales for avoidance,[40] they have continued to rely on this intentionalist rationale until today.[41]

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36. 297 U.S. 288 (1936).

37. *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 73.

38. 37 U.S. (12 Pet.) 72 (1838).

39. *Id.* at 76; *see also, e.g.*, Bd. of Sup'rs v. Brown, 112 U.S. 261, 268–69 (1884) ("[I]f there were room for two constructions . . . the court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the constitution . . . ."); Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433, 448–49 (1830) (Story, J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."); Case of Fries, 9 F. Cas. 924, 933 (C.C.D. Pa. 1800) (Chase, J.) ("It cannot be credited by dispassionate men . . . that congress will intentionally make laws in violation of the constitution, contrary to their sacred trust, and solemn obligation to support it.").

40. One such rationale sees avoidance as a tool of judicial restraint. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (1962) (discussing the counter-majoritarian difficulty of judicial review). The Court has sometimes expressed support for this rationale. *See, e.g.*, *Ashwander*, 297 U.S. at 345–46 (Brandeis, J., concurring); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 249 (2012) ("[T]he canon rests . . . upon a judicial policy of not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2145 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("The canon is based on a theory of judicial restraint.").

41. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 381 (2005) (Scalia, J.) ("[Modern avoidance] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."); Rust v. Sullivan, 500 U.S. 173, 191 (1991) ("[Modern avoidance] is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[Avoidance] not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

Avoidance was part of a more general approach to statutory interpretation that sought to effectuate legislative intent. Two years after the Court decided *Coombs*, it captured the spirit of the era when, in *Brewer's Lessee v. Blougher*,[42] it declared that it had the duty "to ascertain the meaning of the legislature" and "to restrain [a statute's] operation within narrower limits than its words import, if [it was] satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."[43]

Severability doctrine lacks avoidance's historical pedigree. At the founding, the ability to invalidate entire statutes because of partial unconstitutionality was not thought to inhere in the judicial power. When a court declared a statute unconstitutional, it determined that the Constitution displaced the statute only insofar as the statute was unconstitutional.[44] Severability's unique contribution to judicial review, then, was to empower courts to invalidate entire statutes on the basis of only partial unconstitutionality.[45]

Although the founding-era practice had the same effect as severance, it is anachronistic to think of the practice in these terms.[46] The reason is that early American courts did not see judicial review as a process of excision so much as one of displacement.[47] In other words, courts saw judicial review not as creating a new law consisting of a statute "minus" its unconstitutional provisions, but instead as enforcing the partially unconstitutional statute "plus" the Constitution.[48]

Severability doctrine rose to prominence in 1854, when, in *Warren v. Mayor & Aldermen of Charlestown*,[49] Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts reasoned by analogy to contract that an unconstitutional statutory provision could render an entire statute invalid.[50] His

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42. 39 U.S. (14 Pet.) 178 (1840).

43. *Id.* at 198.

44. *See* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 768–69 (2010) (discussing the original approach to partial unconstitutionality).

45. *See id.* at 776–77.

46. *See id.*

47. *See id.* at 778.

48. *See id.*

49. 68 Mass. (2 Gray) 84 (1854).

50. *See id.* at 99–100; *see also* Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995) (critiquing the analogy to contract).

analysis centered on a counterfactual inquiry into legislative intent and on the operability of the statute's remaining provisions.[51] Severability quickly gained acceptance among the state courts and persists until today.[52]

The Court adopted severability doctrine in the 1880 case of *Allen v. Louisiana*,[53] and it rationalized the doctrine as a means of effectuating legislative intent. It said, "The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature." [54] Like avoidance, severability was part of a more general interpretive approach that sought to effectuate legislative intent.[55]

In the intentionalist discourse in which they originated, the doctrines of avoidance and severability were justifiable as means of furthering judicial restraint and legislative supremacy. If one assumes that Congress intends to legislate within constitutional bounds and that courts are capable of determining what Congress would have done had it known of a constitutional problem, then the doctrines seem not only to reduce the frequency and severity of judicial review, but also to effectuate Congress' intent.

Thus, the doctrines of avoidance and severability originated in a legal discourse that assumed the existence of an unexpressed legislative intent that judges could discover. Within that discourse, the doctrines were understood as effectuating Congress' intent and were justified as means to further judicial restraint and legislative supremacy.

B. Modern textualism challenged the intentionalist approach to statutory interpretation.

In the late twentieth century, modern textualism challenged the intentionalist approach to statutory interpretation. Its chal-

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51. *See Warren,* 68 Mass. (2 Gray) at 99–100.

52. *See* Nagle, *supra* note 29, at 213 n.54 (collecting cases).

53. 103 U.S. 80 (1880).

54. *Id.* at 84.

55. *See* Murphy v. Nat'l Collegiate Athletic Ass'n., 138 S.Ct. 1461, 1487 n. * (2018) (Thomas, J., concurring) ("This Court adopted the *Warren* formulation in the late 19th century, an era when statutory interpretation privileged Congress' unexpressed 'intent' over the enacted text." (internal citations omitted)).

lenges were pragmatic and formal.[56] Pragmatically, textualists denied the existence of an unexpressed legislative intent that judges could discover. The legislative process, they argued, was so complex and path-dependent that the notion of unexpressed legislative intent was nonsensical.[57] At least "with respect to 99.99 percent of the issues of construction reaching the courts," Justice Scalia declared, "there *is* no legislative intent."[58] Formally, textualists questioned whether reliance on unexpressed legislative intent is consistent with Article I, Section 7's requirements of bicameralism and presentment. Legal texts overcome the rigors of the legislative process, textualists emphasized; unexpressed intentions do not. Again, Justice Scalia put the point well when he declared, "It is the *law* that governs, not the intent of the lawgiver . . . Men may intend what they will; but it is only the laws that they enact which bind us."[59]

Textualism is associated with a realist concern about judicial lawmaking.[60] That is, if there is no unexpressed legislative intent for judges to discover, or if such intent is not a proper source of authority for judicial decision making, then "the invocation of 'legislative intent' merely masks a process of judicial choice that rests on *something other* than decoding Congress's instructions."[61] The realist concern is that this "something other" could be a judge's personal policy preferences.[62]

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56. In what follows, I am glossing over the gradual evolution that textualism has undergone. For an excellent account of that evolution, see John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010).

57. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable.").

58. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 32 (Amy Gutmann ed., 1997).

59. *Id.* at 17.

60. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930) ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition.").

61. Manning, *supra* note 56, at 1296 (emphasis added).

62. *See* Scalia, *supra* note 58, at 17–18 ("The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

The doctrines are inconsistent with textualism for other reasons. Except in those rare instances when a judge is in equipoise between two interpretations, avoid-

The foregoing aspects of textualism have been broadly influential. As Professor Molot has explained in his postmortem of the "textualist revolution,"[63] the extent of textualism's influence is difficult to quantify in objective terms,[64] but empirical studies and anecdotal evidence suggest that textualism's "core observations" about the notion of unexpressed legislative intent and the propriety of relying upon it have appealed to textualists and nontextualists alike.[65]

Textualism challenged the doctrines of avoidance and severability in particular. Justice Scalia wrote that "*today*," legislative intent is a dubious rationale for avoidance because federal statutes "often all but acknowledge their questionable constitutionality with provisions for accelerated judicial review, for standing on the part of members of Congress, and even for fallback dispositions should the primary disposition be held un-

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ance causes a judge to swerve from a statute's best reading. *See* Almendarez-Torres v. United States, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting) ("The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one—the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function."). Because textualists emphasize Article I, Section 7's requirements of bicameralism and presentment, any move away from a statute's best reading is a significant concession. *See* Scalia, *supra* note 58, at 28–29 ("But whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it.").

Similarly, severability allows judges to disregard the plain text of severability clauses and, because it focuses on legislative intent alone, the President's role in lawmaking. *See* Movsesian, *supra* note 50, at 71. Severability's failure to account for the President is likely to become practically important. In *NFIB*, for example, the Obama administration took the position that the Mandate was not severable from the rest of the ACA. *See* Abbe R. Gluck & Michael J. Graetz, *The Severability Doctrine*, N.Y. TIMES, Mar. 23, 2012, at A29. But what if the administration had asserted that President Obama would have vetoed the ACA without the Mandate? Severability provides no occasion for the Court to consider such direct evidence of presidential intent, even though failing to consider it would seem to implicate the Court in the sort of end-run around presentment that textualists sometimes criticize.

63. Molot, *supra* note 18, at 1.

64. *See id.* at 33–34.

65. *See id.* at 32; *see also* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1912–13 (2015) ("[M]any diverse approaches—legal realism, modern pragmatism, Dworkinian constructivism, and even Legal Process purposivism—all build on the common theme that a complex, multimember body such as Congress lacks any subjective intention about the kind of difficult issues that typically find their way into court.").

constitutional."[66] Justice Scalia also opposed the kind of counterfactual inquiry into legislative intent that severability requires. While he acknowledged that a "what-would-the-legislature-have-wanted strain existed" in Anglo-American law at one time, "*today*," he wrote, "it is anomalous and philosophically indefensible as violating the separation of powers, and it produces considerable judicial mischief."[67]

As textualism challenged the doctrines of avoidance and severability, each doctrine underwent a similar transformation. Academic commentators questioned the doctrines' reliance on unexpressed legislative intent and began to characterize them as impermissibly legislative. While some commentators argued that the doctrines could be rationalized on other grounds, others called for the them to be reformed or repudiated. A general consensus emerged that judicial restraint and legislative supremacy, far from justifying the doctrines, are reasons to doubt their legitimacy.

Commentators largely rejected intentionalist rationales for the avoidance doctrine.[68] Some commentators proposed that

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66. SCALIA & GARNER, *supra* note 40 at 248–49 (emphasis added).

67. *Id.* at 349–50 (emphasis added).

68. *See, e.g.*, HENRY J. FRIENDLY, BENCHMARKS 210 (1967) ("It does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them."); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 448 (2005) ("Presumably, Congress might prefer to know the limits of its power and have at least some of its controversial statutes survive intact without judicial reworking."); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2127 (2015) (noting that avoidance's intentionalist rationale has been "roundly and persuasively criticized"); Kavanaugh, *supra* note 40, at 2146 ("Of course, one initial problem with this doctrine is that Congress may have wanted to legislate right up to the constitutional line but didn't know where it was and trusted the courts to make sure Congress did not unintentionally cross the line."); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 846 (2001) ("[G]iven the complexities of the legislative process, it might well be that Congress would want a statute to be construed in a manner that makes the constitutional question unavoidable."); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 22–23 (1996) ("[T]hese assumptions are questionable in light of the multiple factors animating legislation and the complexity of the legislative process."); Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481, 488 (1990) ("Unless there is actual evidence that Congress was concerned with some specific constitutional issue, it is unrealis-

the doctrine could be defended as a means for the Court to enforce constitutional norms[69] or to conserve its institutional capital.[70] Others were not so charitable. Judge Easterbrook, for instance, criticized modern avoidance as a "roving commission to rewrite statutes to taste."[71] Whatever view one subscribes to,

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tic to assume that Congress gave much consideration to the constitutional ramifications of a statute it enacted."); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1209–10 (2006) (agreeing with Judge Friendly's criticisms of modern avoidance); Schauer, *supra* note 37, at 92 ("[T]here is no evidence whatsoever that members of Congress are risk-averse about the possibility that legislation they believe to be wise policy will be invalidated by the courts."); Vermeule, *supra* note 19, at 1962 (same); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1581 (2000) (stating that Judge Friendly's criticisms "surely undermine fidelity to congressional intent as an argument for the [modern] avoidance canon"). *But see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 948 (2013) ("To the extent that the avoidance canon rests on the presumption that Congress tries to legislate within constitutional bounds, our respondents' answers were consistent with it."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989) (stating that avoidance "responds to Congress' probable preference for validation over invalidation").

69. *See* Young, *supra* note 68, at 1585; *see also* Morrison, *supra* note 68, at 1212–17 (2006) ("The avoidance canon . . . guards the [constitutional] boundaries by making it more difficult for Congress even to approach them.").

70. *See* Frickey, *supra* note 68. *But see* Neal Devins, *Constitutional Avoidance and the Roberts Court*, 32 U. DAYTON L. REV. 339 (2007) (arguing that the Roberts Court need not employ constitutional avoidance techniques for this reason).

71. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405 (2002). Although commentators disagree about the desirability of rewriting through avoidance, they generally characterize it as such. *See, e.g.*, Frickey, *supra* note 68, at 402 (stating that the avoidance canon "involves judicial lawmaking, not judicial restraint"); Katyal & Schmidt, *supra* note 68, at 2121 ("In fact, avoidance often results in a rewritten law that cannot be revisited."); Kavanaugh, *supra* note 40, at 2146 (stating that Judge Easterbrook makes a "strong case[]"); Kelley, *supra* note 68, at 846 ("[I]t is no service to Congress, no great act of deference, to construe a statute in a manner contrary to its text and history in order to avoid even confronting a constitutional doubt."); Kloppenberg, *supra* note 68, at 11 ("The Supreme Court has used a wide range of formulations of [modern and classical avoidance], some limiting potential uses of the canon and others giving judges substantial latitude to rewrite statutes."); Marshall, *supra* note 68, at 487 ("[A] judge who invokes the avoidance doctrine actually rewrites the statute, thereby engaging in a relatively creative, arguably legislative, exercise of authority."); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 840 (1991) ("[S]ustaining and applying a statute that Congress never intended to enact is hardly a lesser usurpation of the legislative power than is overturning a statute on constitutional grounds."); Morrison, *supra* note 68, at 1250 (noting that, under certain circumstances, the President's invocation of the avoidance canon "is tan-

today "there seems to be consensus that the [avoidance] canon's use signals a Court that is actively engaged in shaping law and policy, not acting modestly."[72]

Commentators also sharply criticized severability doctrine's counterfactual inquiry into legislative intent.[73] When Professor Nagle published his study of severability in 1993,[74] the leading

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tamount to rewriting the legislation itself"); Schauer, *supra* note 37, at 93 ("[T]he assumption of congressional desire not to pass unconstitutional laws is in fact an imposition *on* Congress of the view that it should be the job of the courts to interpret statutes so as to *make* them constitutional."); Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299, 303 (2000) ("In the interest of preserving legislation, the court is legislating."); Sunstein, *supra* note 68, at 469 ("The mild statutory 'bending' that sometimes occurs is legitimate, for courts are not mere agents of the enacting legislature but have an obligation to the citizenry and the legal system as a whole."); Young, *supra* note 68, at 1587 ("Judges applying [avoidance] are not attempting to serve as Congress's 'agent'; instead, they are using the enterprise of statutory construction as a means of furthering values external to the legislative process itself.").

72. Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 189.

73. *See, e.g.*, Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1505–06 (2011) ("While a court may lay decent claim to being able to evaluate whether a statute is capable of functioning with or without a particular provision, the court can have no real knowledge of which bargains were essential to arrive at a final legislative product."); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 291 (1994) ("Speculating whether Congress, faced with different circumstances, *would have* passed a statute it did not in fact pass is a considerably more uncertain enterprise than searching legislative history for the meaning of a statute Congress *did* pass."); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 647 (2008) (calling the inquiry "permissive"); Kavanaugh, *supra* note 40, at 2148 (calling the inquiry "an inherently suspect exercise"); Movsesian, *supra* note 50, at 71 ("Discovering the intent of the legislators who enact a statute is likely to be a far more difficult enterprise than discovering the intent of the parties who make a contract."); Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735, 748 (2017) ("[T]he current severability rubric poses a high risk of error because it is difficult to accurately determine what a legislature would have intended . . . ."); Nagle, *supra* note 29 at 230 ("[T]he question posed by *Champlin* is purely speculative, as many frustrated courts have acknowledged."); Sherwin, *supra* note 71, at 305 ("[H]ypothetical intent is quite speculative. It can perhaps be given some content by reference to legislative purpose, or to the 'enterprise' to which the statute belongs. But it can easily deteriorate into a question of what ought to happen, in which case 'legislative intent' adds nothing."); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 78 (1937) (citing "bad guesses by the judges as to the intent of the law makers"); Walsh, *supra* note 44, at 753 ("The hypothetical legislative intent test gets around [the] absence of any actual legislative intent to discern but does so by posing a question whose answer often calls for rank speculation.").

74. *See* Nagle, *supra* note 29.

academic article on the topic dated from 1937.[75] After Nagle's study, scholars debated severability in the law reviews, and a consensus about severability's legislative character emerged.[76] By 2010, Professor Walsh lamented that "[f]or too long" the legal community had accepted "judicial rewriting through severability doctrine."[77]

It is possible that the rise of textualism and the increased criticism of avoidance and severability doctrines are coincidental. To prove that textualism caused the doctrines to be rethought would require eliminating all of the alternate causes for the doctrines' declining favor among legal commentators. The increasing complexity of federal statutes could be one such cause. But because textualism challenged the very existence of an unexpressed legislative intent, and because the doctrines so plain-

75. *See* Stern, *supra* note 73.

76. Scholars consider severability doctrine to be legislative in two respects. The first is that the severability *inquiry* is legislative because, by requiring the Court to determine what Congress would have done had it known of a constitutional problem, it requires the Court to make an essentially legislative judgment. *See, e.g.*, Gans, *supra* note 73, at 663 ("The doctrine gives courts a wide-ranging power to rewrite statutes, and this regularly enmeshes the judiciary in making policy choices that are better left to the legislature. The focus on legislative intent obscures this."); Lea, *supra* note 73, at 748 ("[T]he speculative nature of legislative intent-based severability determinations leaves courts room to implement their own policy preferences under the cover of severability analysis."); Walsh, *supra* note 44, at 752 ("By reaching determinations about counterfactual legislative intent . . . a court reviewing a partially unconstitutional statute can expand the scope of its invalidation as widely or as narrowly as it discerns to be consistent with hypothesized legislative intent. This authority to 'excise' and 'rewrite' is effectively discretionary because the legislative intent test is almost always indeterminate."). The second is that *severing* an unconstitutional provision is legislative because it effectively creates a new law that Congress did not enact. *See, e.g.*, Campbell, *supra* note 73, at 1495 ("Courts legislate when they engage in 'severability analysis,' allowing part of a law to continue in force after having struck down other parts as unconstitutional."); Dorf, *supra* note 73, at 292 ("Shrill accusations of 'legislation from the bench' ring hollow when only the *interpretation* of the Constitution or an act of Congress is at stake, but the cries may ring true when the Court severs an invalid statutory provision."); Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 CALIF. L. REV. 915, 958 (2011) ("[T]he severing of a statute must not require such a creative or unconstrained rewriting as to constitute what the Justices apprehend as 'quintessentially legislative' rather than judicial work."); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1333–34 (2000) ("Judicial lawmaking would occur . . . if the particular subrules that a court would need to specify to 'save' part of a statute would not sufficiently reflect the structure and history of the statute to be attributed to Congress, rather than the court."); Sherwin, *supra* note 71, at 303 ("In the interest of preserving legislation, the court is legislating.").

77. Walsh, *supra* note 44, at 743.

ly assume the same, it is reasonable to think that a causal relationship is at work.

Thus, the rise and influence of modern textualism has challenged the intentionalist assumptions on which the avoidance and severability doctrines rest, and, as a result, the doctrines have begun to appear legislative. Ironically, judicial restraint and legislative supremacy, far from justifying the doctrines, are now reasons to doubt their legitimacy. In the intentionalist discourse in which they originated, the doctrines seemed to reduce the frequency and severity of judicial review while also effectuating Congress' unexpressed intent. In our contemporary discourse, by contrast, doctrines that assume an unexpressed intent for the Court to discover seem outdated and anachronistic.

III. THE ILLEGITIMACY COSTS OF USING AVOIDANCE AND SEVERABILITY

This Part discusses *The ACA Cases* in order to argue that the existing allocation of power for addressing unconstitutional statutes has become improper. The Constitution vests Congress with all legislative powers therein granted.[78] Thus, as avoidance and severability have begun to appear legislative, the legitimacy of the Court invoking either doctrine has been drawn into doubt. Today, Congress has a stronger political pedigree to address unconstitutionality than the Court does when it invokes either avoidance or severability.

The result is that the Court incurs an illegitimacy cost when it invokes the doctrines. A court incurs an illegitimacy cost when it acts in ways that appear inappropriate for a court.[79] In *NFIB*, the Court applied avoidance and severability faithfully. But because the Court could not credibly claim to be interpreting an external legislative command, it appeared that the Court had impermissibly legislated. Later, in *King*, it appeared that the Court had used the doctrines to enact its own policy preferences.

This Part examines these cases in turn.

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78. U.S. CONST. art. I, § 1.

79. *See* Lessig, *Fidelity and Constraint*, *supra* note 17, at 1387.

A. The doctrines of avoidance and severability risk charges that the Court has impermissibly legislated . . .

In *NFIB*, the Court considered the constitutionality of the ACA's Individual Mandate and Medicaid Expansion. The plaintiffs alleged that the Mandate exceeded Congress' powers under the Commerce Clause because it required individuals to purchase health insurance or else pay a penalty.[80] They also claimed that the Expansion was unconstitutionally coercive because it conditioned states' pre-existing Medicaid funding on their acceptance of additional funding in exchange for expanding their Medicaid coverage.[81]

The avoidance doctrine's assumption that Congress intends to legislate within constitutional bounds was not credible on the facts of the case. Curiously, the dissenters appealed to legislative history in order to assert that "Congress knew precisely what it was doing when it rejected an earlier version of [the ACA] that imposed a tax."[82] Even while invoking classical avoidance, Chief Justice Roberts conceded that "Congress thought it could enact . . . a command under the Commerce Clause, and the Government primarily defended the law on that basis."[83] Thus, Chief Justice Roberts' avoidance interpretation was difficult to justify as an effectuation of legislative intent,[84] and it appeared that the Court had impermissibly legislated. Though Chief Justice Roberts' interpretation was not particularly aggressive,[85] especially in light of the Court's other avoidance cases,[86] the dissenters claimed that there was "simp-

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80. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 539–43 (2012).

81. *See id.*

82. *Id.* at 668–69 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

83. *See id.* at 562 (opinion of Roberts, C.J.).

84. *See id.* at 561–63. The Chief Justice's use of avoidance's classical form raised eyebrows. *See id.* at 623 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Ultimately, the Court upholds the individual mandate as a proper exercise of Congress' power to tax and spend . . . I concur in that determination, which makes the Chief Justice's Commerce Clause essay all the more puzzling.").

85. *See, e.g.*, Kevin C. Walsh, *The Limits of Reading Law in the Affordable Care Act Cases*, 92 NOTRE DAME L. REV. 1997, 1998 (2017) ("Under the Court's precedent . . . the Court was required to choose the constitutionally salvific interpretation—even over the textually superior one—as long as it was "reasonable" and "fairly possible" to read [the statute] that way. And it was.").

86. Recently, the Court has adopted avoidance interpretations so aggressive that one commentator has recommended classifying avoidance as both a canon of

ly no way, without doing violence to the fair meaning of the words used, to escape what Congress enacted: a mandate . . . enforced by a penalty."[87]

Severability doctrine's intentionalist assumption that the Court can determine what Congress would have done had it known of a constitutional problem also was not credible. The ACA is an omnibus enactment, consisting of several highly interdependent major provisions, including notably the Mandate and the Expansion, but also many minor provisions that are unrelated to expanding healthcare coverage. It was therefore difficult, if not impossible, for the Court to determine whether Congress would have enacted the ACA without its major provisions.[88] Severability doctrine thus seemed to engage the Court in an exercise of legislative power. At oral argument, for example, Justice Sotomayor responded to an argument that severing the Mandate would increase insurance premiums by noting that the Court was "not in the habit of doing legislative findings," and she suggested that the argument instead be addressed to "the people who should be fixing this, not us."[89] A similar exchange took place between Justice Kennedy and H. Bartow Farr, the advocate in favor of severing the Mandate:

> JUSTICE KENNEDY: So do you want us to write an opinion saying we have concluded that there is an insignificant risk of a substantial adverse effect on the insurance companies, that's our economic conclusion, and therefore not severable [sic]? That's what you want me to say?
>
> MR. FARR: It doesn't sound right the way you say it, Justice Kennedy.[90]

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interpretation and a remedy. *See* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275 (2016).

87. *See NFIB*, 567 U.S. at 662 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (internal citations omitted).

88. At oral argument, Justice Sotomayor expressed interest in eliminating severability's counterfactual inquiry into legislative intent altogether. *See* Transcript of Oral Argument at 19–20, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (No. 11-393). Her alternative was a clear statement rule in favor of severability, which she said would let Congress "fix their problems." Also, Justice Scalia invited the advocates to oppose severability's focus on legislative intent by asking if it was "right." *Id.* at 10.

89. *Id.* at 5.

90. *Id.* at 68. Justice Kennedy's acknowledgment that severability was legislative also led him to acknowledge that severing the ACA might undermine rather than further the principles of judicial restraint and legislative supremacy. "When you

The dissenters ultimately accused the majority of rewriting the Expansion through severability doctrine. Because seven Justices agreed that the Expansion was unconstitutional, the Court confronted the question whether and how to sever it. The Court determined that the federal government could withhold the extra funding that the government had offered states to help them finance the Expansion, but could not reduce what states had received prior to the ACA's enactment. In support, Chief Justice Roberts cited a severability clause in the same title as the Expansion.[91] The dissenters claimed that the Court had "revised" the Expansion.[92] They read the severability clause to mean that if the Court found the Expansion unconstitutional, then the Court should invalidate the Expansion but let provisions *besides* the Expansion stand.[93] Again, the dissenters did not credit the assumption that Congress intends to legislate within constitutional bounds. They relied heavily on what they perceived to be Congress' textual intent to coerce the states, even though, on that reading, Congress had acted unconstitutionally.[94]

A concern about rewriting supported the dissenters' own conclusion that the Mandate and Expansion could not be severed from the rest of the ACA. "[A]n automatic or too cursory severance of statutory provisions risks rewriting a statute," they warned. It is an exercise of "the legislative function; for it imposes on the Nation, by the Court's decree, its own new statutory regime . . . This Court must not impose risks unintended by Congress or produce legislation Congress may have lacked the support to enact."[95] This concern compelled the dissenters to question severability doctrine itself. According to them, while the Court had "no reliable basis for knowing

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say judicial restraint," he said to an advocate, "you are echoing the earlier premise that it increases the judicial power if the judiciary strikes down other provisions of the Act. I suggest to you it might be quite the opposite . . . I just don't accept the premise." *Id.* at 36.

91. *See NFIB*, 567 U.S. at 585–86.

92. *Id.* at 690–91 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

93. *See id.*

94. *See id.* at 642 n.25 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The joint dissenters also rely heavily on Congress' perceived intent to coerce the States. We should not lightly ascribe to Congress an intent to violate the Constitution (at least as my colleagues read it).").

95. *See id.* at 692, 705 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

which pieces of the Act would have passed on their own," it was "certain that many of them would not have, and it [was] not a proper function of [the] Court to guess which."[96] But of course, severability doctrine assumes that the Court *can* guess which pieces of the Act would have passed on their own. Here, the dissenters implicitly rejected severability doctrine.

B. . . . in accordance with its own policy preferences.

The Court's next encounter with the ACA came in *King*. There the Court considered the availability of tax credits to citizens in states where the federal government set up healthcare exchanges.[97] The ACA provided that credits would be available in states where the exchange was "established by the State."[98] Chief Justice Roberts, writing for six Justices, read the term "State" to include the federal government, reasoning that the term was ambiguous and that this reading best accorded with the ACA's structure.[99]

Joined by two Justices, Justice Scalia dissented.[100] As in *NFIB*, he criticized the Court's interpretation along textualist lines, asking, for example, what made the majority "so sure that Congress 'meant' tax credits to be available everywhere."[101] Justice Scalia also stressed constitutional limitations on the Court's power to address what he called "flaw[s] in the statutory machinery" through interpretation.[102] Because Congress is vested with "all legislative powers" enumerated in the Constitution, Justice Scalia wrote, it is responsible for "both making laws *and mending them*."[103]

King did not involve avoidance or severability doctrine, but the case is still noteworthy because the dissenters' textualism gave way to realism more thoroughly than it had in *NFIB*. Justice Scalia began the dissent by accusing the majority of adherence to the overarching principle that "[t]he Affordable Care

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96. *Id*. at 705.
97. *See* King v. Burwell, 135 S.Ct. 2480, 2485 (2015).
98. *Id.* at 2487.
99. *See id.* at 2491–93.
100. *See id.* at 2496 (Scalia, J., dissenting).
101. *Id.* at 2505.
102. *Id.*
103. *Id* (emphasis added).

Act must be saved."[104] And he concluded the dissent by summarizing *NFIB* in realist terms:

> In [*NFIB*], this Court revised major components of the statute in order to save them from unconstitutionality. The Act that Congress passed provides that every individual "shall" maintain insurance or else pay a "penalty." This Court, however, saw that the Commerce Clause does not authorize a federal mandate to buy health insurance. So it rewrote the mandate-cum-penalty as a tax. The Act that Congress passed also requires every State to accept an expansion of its Medicaid program, or else risk losing *all* Medicaid funding. This Court, however, saw that the Spending Clause does not authorize this coercive condition. So it rewrote the law to withhold only the *incremental* funds associated with the Medicaid expansion . . . . *We should start calling this law SCOTUScare . . . . The cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.*[105]

The previous Part noted that textualism is associated with a realist concern about judicial lawmaking. Justice Scalia's dissent in *King* marks the extension of that concern to avoidance and severability.

Together, the dissents in *NFIB* and *King* contain the suggestion that it is illegitimate for courts to respond to the unconstitutionality of a statute by resort to avoidance and severability doctrines. In *NFIB*, the Court applied the doctrines faithfully. But because the Court could not credibly claim to be effectuating legislative intent when it invoked the doctrines, it was vulnerable to the dissenters' charges that it had impermissibly legislated in accordance with its own policy preferences, and it incurred an illegitimacy cost as a result.[106]

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104. *Id.* at 2497.

105. *Id.* at 2506–07 (third emphasis added).

106. This cost does not depend on the Court misapplying avoidance or severability doctrine. However, the Court has drawn criticism for misapplying the doctrines in recent cases. *See supra* note 86. Such misapplications only increase the cost that the Court's continued adherence to the doctrines imposes. The problem is not only that the doctrines engage the Court in an exercise of legislative power, but also that the doctrines fail to provide a principle that guides and limits the Court's discretion. *Cf.* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2443–44 (2005) ("To the extent that the intelligible principle test is used to distinguish between law-implementation and a raw transfer of 'legislative' power,

Unless the Court revisits its avoidance and severability precedents, these illegitimacy costs will recur. One need not look beyond the ACA line of cases to see how. A third challenge to the ACA is currently in the lower courts. In 2017, Congress eliminated the tax for not having health insurance, but it left the other provisions of the ACA intact. The plaintiffs in *Texas v. United States*[107] argue that because the Mandate no longer generates any revenue, it can no longer be sustained as a tax.[108]

The plaintiffs go on to argue that if the Mandate is ruled unconstitutional, the rest of the ACA should be invalidated in keeping with the intent of the 2010 Congress that enacted it.[109] To this argument, amici sensibly responded that because the 2017 Congress made the Mandate unenforceable but left the rest of the ACA's provisions intact, it clearly intended the rest of the ACA to remain in effect.[110] After a judge ruled for the plaintiffs in December, one commentator denounced the decision as "raw judicial activism."[111]

IV. REALLOCATING TO CONGRESS THE POWER TO ADDRESS UNCONSTITUTIONAL STATUTES

This Note's Introduction described a model of jurisprudential change that Professor Lessig calls the "*Erie*-effect." First, contestation makes a practice within law seem illegitimate. Second, the Court reallocates the practice to another legal institution in order to avoid incurring an illegitimacy cost to courts. In *Erie*, legal positivism contested the existence of a transcendental body of law that all judges could discover, which made

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it is odd to declare that the test can be satisfied by a sweeping doctrine that grants the judiciary all-purpose authority to step into Congress's shoes and correct its apparent mistakes in any statute."); Aaron Nielson, Erie *as Nondelegation*, 72 OHIO ST. L.J. 239 (2011) (arguing that the nondelegation doctrine formed the basis for the *Erie* Court's constitutional holding).

107. 352 F. Supp. 3d 665 (N.D. Tex. 2018).

108. *See id.* at 668–69.

109. *See id.* at 669.

110. *See* Brief of Amici Curiae Jonathan H. Adler et al. in support of Intervenors-Defendants' Opposition to Plaintiffs' Application for Preliminary Injunction at 4, Texas v. United States, 352 F. Supp. 3d 665 (N.D. Tex. 2018) (No. 4:18-cv-00167-O).

111. *See* Nicholas Bagley, Opinion, *The latest ACA ruling is raw judicial activism and impossible to defend*, WASH. POST (DEC. 15, 2018), https://www.washingtonpost.com/opinions/2018/12/15/latest-aca-ruling-is-raw-judicial-activism-impossible-defend/?noredirect=on&utm_term=.1aabcc489e45 [https://perma.cc/56DX-6W7U].

the practice of federal courts "discovering" common law under *Swift* seem illegitimate. The Court then reallocated to the states the power to provide the rule of decision.

The first part of the *Erie*-effect has already happened to the doctrines of avoidance and severability, and the Court should complete the pattern by ceding to Congress some of its current power to address unconstitutionality. The best means for the Court to do so is by repudiating avoidance and severability and replacing them with a regime in which courts give statutes their best readings. If a statute is unconstitutional, the Court should invalidate the unconstitutional part. This proposal aims to reduce the illegitimacy cost that the Court incurs under the current regime.

This Part proceeds as follows: first, I analogize textualism's challenge to the doctrines of avoidance and severability on the one hand to positivism's challenge to *Swift* on the other, and second, I argue that the Court should cede to Congress some of its current power for addressing unconstitutional statutes.

A. Much like legal positivism exposed judicial lawmaking under Swift*, textualism has exposed judicial lawmaking through the doctrines of avoidance and severability.*

Professor Lessig argues that changing theories of law explain the *Erie* Court's decision to overturn *Swift*.[112] Justice Story's rhetoric in *Swift* suggested that the common law was "discovered."[113] But, in the years following *Swift*, that rhetoric invited two sorts of skepticism.[114] First, positivists asked, discovered *where*? They insisted that "the source of the law" be named.[115] Second, realists asked, really *discovered?* They demanded proof that a judge "didn't just pretend to find it."[116]

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112. The basis for the *Erie* Court's constitutional holding is famously unclear. Professor Lessig's attempt to explain the decision is one of many, and for those who believe that legal positivism was irrelevant to the holding, my analogy to *Erie* is inapt. *See generally* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

113. *See supra* note 12 and accompanying text.

114. *See* Lessig, *Fidelity and Constraint*, *supra* note 17, at 1401.

115. *Id.*

116. *Id.*

These skepticisms first surfaced in the academy and then in the pre-*Erie* dissents of Justice Holmes.[117] In *Southern Pacific Co. v. Jensen*,[118] for example, Justice Holmes quipped that the common law is not "a brooding omnipresence in the sky."[119] And in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[120] he famously claimed that the Court's decision in *Swift* rested upon a "subtle fallacy":

> If there were . . . a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But *there is no such body of law.* The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but *law in the sense in which courts speak of it today does not exist without some authority behind it.*[121]

These dissents made the *Swift* regime contestable,[122] meaning not just that there was disagreement about it, but also that the disagreement was salient in the legal community.[123] The illegitimacy cost associated with *Swift* eventually became substantial: on the eve of the Court's decision in *Erie*, "[i]t was neither plausible that judges were really being guided by anything; nor if they were being guided, that what was guiding them was a proper source of authority."[124] The *Erie* Court overturned *Swift* as a result.

Positivism's challenge to *Swift* parallels textualism's challenge to the doctrines of avoidance and severability. Much like positivism produced skepticism about the common law's source, textualism has produced skepticism about the source of the Court's authority to invoke avoidance or severability. In his academic writings, Justice Scalia spoke the language of Holmes. Avoidance and severability each assume that there is an unexpressed legislative intent outside of any particular stat-

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117. *See id.* at 1405 (citing TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 92–99 (1981)).

118. 244 U.S. 205 (1917).

119. *See id.* at 222 (Holmes, J., dissenting).

120. 276 U.S. 518 (1928).

121. *Id.* at 533–35 (Holmes, J., dissenting) (emphasis added).

122. *See* Lessig, Erie-*Effects*, *supra* note 17, at 1807.

123. *See id.* at 1802.

124. Lessig, *Fidelity and Constraint*, *supra* note 17, at 1401.

ute that the Court can discover. But, Justice Scalia wrote, "with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent."[125] Legislative intent in the sense in which courts speak of it "today,"[126] Justice Scalia seemed to say, does not exist without some text behind it.

Further, because they contested the source of the Court's authority to engage in particular interpretive practices, positivism and textualism both invited realist questions about whether judges were simply legislating in accordance with their policy preferences.[127] Justice Holmes thought that *Swift* had masked the reality that the common law "flowed not from *facts* found but from *choices* made."[128] Justice Scalia thought that reliance on unexpressed legislative intent could mask that same reality.[129] The result in each case was a rethinking of what the Court does when it acts—from "discoverer" of the common law to "maker," and from "interpreter" of a statute to "rewriter."

This is not to say that textualism has prevailed over rival approaches to interpretation or even that it is normatively superior to them. My claim is, more modestly, that textualism has been influential enough to challenge the notion that a judge who invokes avoidance or severability is effectuating legislative intent. As Professor Lessig has explained in the context of *Erie*, "Formalists and anti-realists abounded [then], but none of that matters. Instead, the relevant change is a change from a background contested discourse, to a foreground contested discourse."[130]

Further, I am not arguing that our nineteenth century forebears were blind to the possibility that avoidance and severability doctrines could engage the Court in an exercise of legislative power; in fact, courts warned against that possibility early on.[131] In order to accept this Part's claim, one need only think

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125. *Supra* note 58.

126. *Supra* notes 66–67 and accompanying text.

127. *See generally* Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001).

128. Lessig, *Fidelity and Constraint*, *supra* note 17, at 1406.

129. *See supra* note 62.

130. Lessig, *Fidelity and Constraint*, *supra* note 17, at 1409.

131. *See, e.g.*, United States v. Reese, 92 U.S. 214, 221 (1875) ("To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."); Bd. of Sup'rs v. Brown, 112 U.S. 261, 269 (1884) ("Our duty, therefore, is to adopt that construction which, without doing violence

that textualism has foregrounded such concerns about judicial legislation. This too, is consistent with Professor Lessig's explanation: scholars were arguing that judges "make" the law rather than "discover" it, a full century before the Court decided *Erie*.[132]

Thus, much like legal positivism exposed judicial lawmaking under *Swift*, textualism has exposed judicial lawmaking through the doctrines of avoidance and severability.

B. The Court should cede to Congress some of its current power for addressing unconstitutional statutes.

As judges' use of the doctrines of avoidance and severability has begun to appear legislative, our regime for addressing the unconstitutionality of statutes has increasingly become a dilemma in which judges are forced to choose between two kinds of judicial rewriting. Yet scholars have not attempted to explain the doctrines' change in appearance and, because scholars only rarely study the doctrines side-by-side,[133] they have often overlooked the dilemma that this change created.

First, if, as some scholars have suggested,[134] the Court should reform our current regime in order to avoid judicial legislation, it is important that we determine what causes the use of our judicial doctrines to appear legislative. This Note has argued that the answer lies in changes in legal thought surrounding statutory interpretation: whereas it was once assumed that avoidance and severability effectuated the legislature's unexpressed intent, modern textualism has challenged that notion, with the result that judicial reliance on the doctrines seems legislative.

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to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution.").

132. *See* Lessig, *Fidelity and Constraint*, *supra* note 17, at 1401 (quoting William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 934 (1998)) ("By the 1830s critics were railing against the legal profession and the common law as undemocratic institutions.").

133. Scholars' tendency to study one doctrine to the exclusion of the other is strange given that courts sometimes claim that "each doctrine entails the other." Vermeule, *supra* note 19. For a recent example, see Ass'n of Am. R.Rs. v. United States Dep't of Transp., 869 F.3d 539, 550 (D.C. Cir. 2018) ("[S]everability is a doctrine borne out of constitutional-avoidance principles, respect for the separation of powers, and judicial circumspection when confronting legislation duly enacted by the co-equal branches of government.").

134. *See supra* notes 68–77 and accompanying text.

If this analysis is correct, then some existing reform proposals may be counterproductive. For example, Professor Manheim's article on severability doctrine argues that because severability allows a court only two options—to invalidate in whole or in part—it inhibits the Court from effectuating legislative intent.[135] She proposes foregoing the severability framework in favor of "a fundamentally broader inquiry into legislative intent."[136] While this proposal may satisfy intentionalists, textualists may find that increasing the role of legislative intent mistakes the disease for the cure.[137]

Second, reform proposals should account for the impact that changes in one doctrine would likely have on the other.[138] For example, Neal Katyal and Thomas Schmidt's recent article argues that the Court, in order to avoid rewriting statutes, should adhere more faithfully to the avoidance doctrine's requirements that a statute be ambiguous and that alternative interpretations be plausible.[139] But by forcing the Court to declare statutes unconstitutional more frequently, their proposal would likely substitute rewriting through severability for rewriting through avoidance.

The same can be said for certain proposals to reform severability doctrine. Professor Campbell argues by analogy to the legislative and line-item veto cases that because severing a statute effectively creates a new law that Congress did not enact, severability violates Article I, Section 7's requirements of bicameralism and presentment.[140] He proposes a regime in which courts declare all partially unconstitutional statutes entirely invalid.[141] While he suggests means to temper the harsh-

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135. *See* Lisa Marshall Manheim, *Beyond Severability*, 101 IOWA L. REV. 1833 (2016).

136. *Id.* at 1892.

137. The extent of this Note's disagreement with Professor Manheim's proposal depends partly on whether she would retain severability's counterfactual inquiry into legislative intent. She does not, however, take a stance on this issue in her article. *See id.* at 1840 n.38.

138. *Cf.* Richard H. Fallon, Jr., *Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006) (arguing that justiciability, substantive, and remedial doctrines are mutually interconnected).

139. *See* Katyal & Schmidt, *supra* note 68, at 2163.

140. *See* Campbell, *supra* note 73, at 1495.

141. *See id.* at 1525.

ness of this proposal,[142] he does not discuss the incentives it could create for the Court to rewrite statutes through avoidance.

Appearances matter.[143] As the Court itself has recognized, it "must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures . . . ."[144] Because the doctrines of avoidance and severability fail this test today, the Court should repudiate both and replace them with a regime in which courts give statutes their best readings. If a statute is unconstitutional, a court should invalidate the unconstitutional part.

This proposal has theoretical and practical advantages. Theoretically, it cedes to Congress some of the Court's power for addressing unconstitutional statutes. Our current regime relies heavily on judicial intervention to conform statutes to constitutional requirements in a way that effectuates Congress' unexpressed intent. Repudiating avoidance and severability would give Congress greater responsibility for legislating within constitutional bounds or drafting fallback law *ex ante* and for addressing unconstitutional statutes *ex post*. Practically, the proposal replaces flexible, open-ended standards with more easily administrable rules. As Justice Kavanaugh has persuasively argued, avoidance doctrine's threshold ambiguity finding is difficult to make in a principled way.[145] The same can be said for its requirement that interpretations be "plausible" and for severability's counterfactual inquiry into legislative intent. The result has been that the Court has not developed uniform and predictable practices for applying avoidance and severability despite many years of experience.

Repudiating the doctrines of avoidance and severability would better equip the Court to defend its decisions in controversial statutory cases as grounded truly in principle. In part

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142. *See id.* at 1516–19 ("Judicial stays, expedited action by Congress, and equitable use of the doctrine of retroactivity can all mediate any perceived hardships to the effective functioning of government.").

143. *See* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995) (arguing that the Court can and should consider appearances as part of its decision-making process).

144. *See* Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion).

145. *See* Kavanaugh, *supra* note 40, at 2118.

because avoidance and severability rely on an outdated and anachronistic conception of legislative intent, the Court's authority to invoke either doctrine is contested. By contrast, the Court's authority to give statutes their best readings and to enforce the Constitution in individual cases is "beyond dispute."[146]

The Court's claim to be enforcing the Constitution would, in particular, be more credible. In *NFIB*, Chief Justice Roberts responded to the dissenters' charge that he had rewritten the Expansion in part by claiming that he was "merely enforcing the Constitution."[147] That claim was less persuasive than it might have been under the proposal, however, because severability doctrine requires the Court to do more than merely enforce the Constitution; the Court must also effectuate legislative intent.

The proposal also has drawbacks. There are cases in which partial invalidation itself seems legislative. The paradigmatic case is *I.N.S. v. Chadha*.[148] There Congress delegated certain legislative powers to executive agencies on the condition that a single house of Congress could veto the agencies' exercise of those powers.[149] By declaring the legislative veto provision unconstitutional and severing it from the delegation,[150] the Court arguably sheared the delegation's quid from its quo.

But one can believe that partial invalidation sometimes disrupts legislative bargains while also believing that Congress should be the legal institution to address that disruption. Further, even where partial invalidation does shear a statute's quid from its quo, if the Court repudiates severability doctrine, the law in effect after invalidation will at least be traceable to "a combination of constitutional command and legislative provision, rather than judicial supposition about what the legislature would have wanted."[151]

Next, although the proposed regime could be more administrable than the doctrines of avoidance and severability, it would not always be so. Where multiple provisions conspire to

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146. *See Casey*, 505 U.S. at 865.

147. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 586 (2012) (opinion of Roberts, C.J.).

148. 462 U.S. 919 (1983).

149. *See id.* at 923.

150. *See id.* at 931–35.

151. *See* Walsh, *supra* note 44, at 743.

create a constitutional problem, it would remain unclear which provision or provisions the Court should invalidate. In *Free Enterprise Fund v. PCAOB*,[152] for example, several provisions of the Sarbanes-Oxley Act created an unconstitutional administrative structure.[153]

But the Court can address this drawback by focusing on judicial restraint as opposed to legislative intent. The Court adopted this approach in *Free Enterprise* itself. There the Court did not attempt to determine which of the possible dispositions Congress would have preferred, as severability doctrine requires. Instead, it simply chose the disposition that, in its estimation, required it to exercise the least "editorial freedom."[154] The Court then left it to Congress to pursue other, more extensive alternatives going forward.[155]

Finally, if the Court cannot invoke avoidance doctrine, judicial review would become more frequent. But without the prospect of total invalidation, review would probably be less severe than under severability, and, the frequency with which the Court addresses high-profile statutes like the ACA might actually decrease. It is difficult to imagine that cases like *Texas v. United States*, for example, would be brought as frequently if the Court lacked the power to invalidate entire statutes.

Thus, the Court should cede to Congress some of its current power to address unconstitutionality.

V. CONCLUSION

Constitutional avoidance and severability are venerable doctrines, but they are also vestigial. Both doctrines originated in a legal discourse that assumed the existence of an unexpressed legislative intent that judges could discover. But as the kind of intent skepticism commonly associated with modern textualism has challenged that assumption, judicial reliance on the doctrines has begun to appear legislative. *The ACA Cases* show that when the Court addresses unconstitutional statutes by resort to avoidance and severability, the Court incurs an illegitimacy cost.

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152. 561 U.S. 477 (2010).
153. *See id.* at 509–10.
154. *Id.*
155. *See id.*

In the interest of its legitimacy, the Court should cede to Congress some of its current power to address unconstitutional statutes. This Note has suggested one means by which the Court could do this: it can give a statute its best reading and, if the statute is unconstitutional, invalidate the unconstitutional part. Such a regime would protect the Court's legitimacy from the threat that continued adherence to avoidance and severability poses, while preserving the Court's essential role in upholding and enforcing the Constitution.

Ryan M. Folio

THE TAXATION OF RELIGIOUS ORGANIZATIONS IN AMERICA

INTRODUCTION

Christ taught his disciples to "[r]ender to Caesar the things that are Caesar's, and to God the things that are God's."[1] The Supreme Court has, to an extent, rendered to God what is God's by repeatedly acknowledging that it will not involve itself in the internal affairs of religious organizations.[2] Nevertheless, the extent to which religious organizations remain vulnerable to involvement from other branches of government remains a pertinent question, especially with regards to the government's power to tax.[3]

This Note investigates the extent to which religious organizations are vulnerable to such involvement. A prime example of such involvement is Congress' ability to use the Internal Revenue Code to the detriment of religious organizations. As it ensures that what is Caesar's (i.e., taxes) is rendered to Caesar (i.e., the federal government), any policy of Congress and the Internal Revenue Service (I.R.S.) that thwarts the faithful from rendering to God what is God's has the potential to impose a prohibitive burden on the operation of religious organizations. The potential to hinder the work of religious organizations

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1. *Mark* 12:17 (KJV).

2. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184 (2012) ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 120–21 (1952) ("Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.").

3. Article I of the U.S. Constitution grants Congress the "Power To lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. However, it was not until the passage of the Sixteenth Amendment that Congress received the power to directly tax income "without apportionment among the several states." *Id.* amend. XVI.

through taxation is great. Indeed, "the power to tax involves the power to destroy."[4] Insofar as Congress retains the power to tax religious organizations, it likewise maintains the power to destroy.

In short, religious organizations benefit tremendously from their tax-exempt status.[5] However, this tax-exempt status is not a given; the tax-exempt status for religious organizations is neither a right that was found to be in existence prior to the formation of the United States and therefore enshrined in the Constitution, nor is it a right created by the Constitution.[6] Rather it is a status that is based on the consent of Congress and listed deep in the bowels of the United States Code. Therefore, religious organizations and their allies must remain vigilant in ensuring that their representatives in Congress and officials in the executive branch uphold those portions of the Tax Code that exempt religious organizations from tax obligations.

I. THE BASIS ON WHICH RELIGIOUS ORGANIZATIONS ARE GRANTED TAX-EXEMPT STATUS

In order to understand the threat to religious organizations from adverse changes to tax law, it is important to first understand the provisions in the Internal Revenue Code on which

4. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

5. *See, e.g.*, Dylan Matthews, *You Give Religions More Than $82.5 Billion a Year*, WASH. POST (August 22, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/08/22/you-give-religions-more-than-82-5-billion-a-year/?utm_term=.a7f0f667a612 [https://perma.cc/Z5BB-FPP8] (approximating the annual benefits of the tax-exempt status to religious organizations at $82.5 billion dollars). Indeed, those who benefit the most from the tax-exempt status of religious organizations—and who would likely be negatively affected the most by a repeal of the tax-exempt status—are perhaps the poor and the needy whom many religious organizations work so hard to serve temporally. Each dollar that a religious organization pays to the government in taxes is one less dollar that the religious organization has to spend on serving the "least of these." *Matthew* 25:40 (KJV) ("Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.").

6. *See* United States v. Cruikshank, 92 U.S. 542, 551 (1875) (discussing rights that are commonly found wherever civilization exists, and those that were created by the United States Constitution).

religious organizations are granted tax-exempt status,[7] as well as the legislative history behind these sections of the Tax Code.

A. Tax-Exempt Status for Religious Organizations Codified

At the federal level, all income to a person, be it to a corporation or to a non-corporation individual, is taxable by default.[8] On this principle hang all the law and the profits of the Tax Code.[9] Thereafter, deriving a person's tax burden involves accounting for various deductions and exemptions provided for in the Tax Code,[10] and multiplying this calculated amount by the appropriate tax rate.[11] But for the exemptions allowed for in § 501(a) and § 501(c), religious organizations would be considered ordinary corporations for tax purposes,[12] and thus would be subject to taxation on all received tithes, offerings, and donations at the corporate tax rate.[13] In other words, assuming simi-

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7. This Note does not explicitly address state taxation of religious organizations, although all fifty states provide for the tax exemption of places of worship. *See* Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970).

8. *See* 26 U.S.C. § 61(a) (2012) ("Gross income means all income from whatever source derived.").

9. *Cf. Matthew* 22:40 (KJV) ("On these two commandments hang all the law and the prophets.").

10. Popular deductions include the standard deduction for individuals, *see* 26 U.S.C. § 63(c), the mortgage interest deduction for individuals, *see id.* § 163(h), and wage and salary deductions for corporations, *see id.* § 162(a)(1). It will be useful here to briefly distinguish between the standard deduction and itemized deductions for individuals. Individuals have the option of listing each deduction for which they qualify, adding these up, and deducting this sum from their taxable income. This process is known as itemization. The alternative is to take the standard deduction, which is a default sum that any individual taxpayer can deduct from his or her taxable income. *See id.* § 63(c). If an individual's itemized deductions surpass the standard deduction, and assuming that this individual desires to minimize his or her tax burden, then it is in the taxpayer's interest to forego the standard deduction and take the aggregate itemized deductions. Typically speaking, wealthier taxpayers will elect to itemize deductions, while other taxpayers will elect to take the standard deduction. For a discussion on the effect that raising the standard deduction might have on the amount people donate to religious organizations, see *infra* Part III.

11. Corporations, among which religious organizations are normally included, *see* 26 U.S.C. § 7701(a)(3), are taxed according to the rates found in 26 U.S.C. § 11(b), while all other taxpayers are taxed according to the rates found in 26 U.S.C. § 1.

12. *See id.* § 7701(a)(3) ("The term 'corporation' includes associations, joint-stock companies, and insurance companies.").

13. *See id.* § 11(a) ("A tax is hereby imposed for each taxable year on the taxable income of every corporation.").

lar levels of income, the local church, mosque, or synagogue, which exists to connect believers to the divine in a non-profit manner, would be taxed in the same way as the local grocer or hardware store, which exists to maximize shareholder value.

Congress, however, elected to exempt from taxation certain types of organizations.[14] Among these are corporations "organized and operated exclusively for religious, charitable, [and] scientific . . . purposes."[15] This exemption releases a religious organization from the burden of paying taxes on any donations received, and thereby enables such an organization to devote more funds to its operations and efforts to fulfill its mission as a religious organization. Persons making charitable contributions to such an organization are also thus reassured that more of their contribution will go to the religious organization, as opposed to the government's coffers.

However, a religious organization must conform to certain provisions contained in 26 U.S.C. § 501(c)(3) in order to qualify for tax-exempt status: (1) None of the religious organization's earnings may "inure[] to the benefit of any private shareholder or individual"; (2) the religious organization may not have a "substantial part of [its] activities" dedicated to influencing legislation; and (3) the religious organization may not participate in any political campaign in support of or in opposition to a candidate for public office.[16] Violation of any of these provisions can result in the religious organization losing its tax-exempt status.[17]

B. The History and Justification for the Tax-Exempt Status of Religious Organizations

Religious organizations were first exempt from taxation under the Wilson-Gorman Tariff Act of 1894, which Congress

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14. *See id.* § 501(a).

15. *Id.* § 501(c)(3).

16. *See id.* § 501(c)(3). The third provision of 26 U.S.C. § 501(c)(3) is known as the Johnson Amendment after then-Senator Lyndon B. Johnson, who proposed this amendment in 1954 as part of the Internal Revenue Code of 1954. For a critique of the Johnson Amendment and a discussion of its constitutionality, see generally, Erik W. Stanley, *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT U. L. REV. 237 (2012).

17. For an explanation of the codified process by which religious organizations may have their tax-exempt status revoked, see *infra* Part IV.A.

billed as an act to reduce taxation and which President Grover Cleveland refused to sign but nevertheless allowed to become law by not vetoing the bill.[18] The act explicitly indicated that none of the enacted taxes "shall apply . . . to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes."[19] In 1954 Congress adopted the first iteration of the modern Tax Code, in which it maintained a similar wording to grant tax-exempt status to religious and charitable organizations.[20]

Congress has offered several justifications for granting tax-exempt status to religious organizations and charities:

> (1) Charitable and religious organizations serve the public and therefore should be supported through provision of tax benefits;
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> (2) Charitable and religious organizations provide goods and services that otherwise would have to be provided by the Government and therefore should be supported by the Government;
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> (3) It is difficult to measure the net income of charitable and religious organizations, and therefore they should be exempt from tax;
>
> (4) Charitable and religious organizations promote pluralism;
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> (5) Charitable and religious organizations are efficient providers of services but have inherent limits on their ability to raise capital compared to for-profit entities and therefore need government support in the form of tax exemption (and charitable contributions); and,

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18. For a more comprehensive history of the tax-exempt sector, see generally, Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. INCOME BULL., Winter 2008, at 105; *see also* Intervenor-Defendants' Reply Brief in Support of Their Motion for Summary Judgement at 9–16, Gaylor v. Mnuchin, 278 F. Supp. 3d 1081 (W.D. Wis. 2017) (No. 16-CV-215), 2017 WL 3251871, *rev'd*, Nos. 18-1277, 18-1280, 2019 WL 1217647 (7th Cir. Mar. 15, 2019).

19. Wilson-Gorman Tariff Act, ch. 349, § 32, 28 Stat. 509, 556 (1894).

20. *See* I.R.C. § 501(c)(3) (1954) ("Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.").

> (6) Exemption is afforded to those organizations that can prove their worth through sustained donations.[21]

It is clear from Congress' wording of the Tax Code that it distinguishes religious organizations from charitable organizations. This does not mean that religious organizations are not charitable; while religious organizations might have charitable functions, they nevertheless differ from charitable organizations sufficiently in order to justify their separate enumeration in the Tax Code. Indeed, if religious organizations were merely a subset of charitable organizations, then they would not be explicitly mentioned separately from charitable organizations in 26 U.S.C. § 501(c)(3).

Religious organizations provide a public good apart from what charitable organizations provide.[22] It has been suggested that religion itself is a factor that disproportionately motivates persons to make donations when compared to non-religious charitable organizations, which would justify separate mentioning in the Tax Code.[23] Additionally, religious organizations play a key role in integrating persons from a variety of backgrounds into a single community, thereby strengthening the fabric of society.[24] Furthermore, at a constitutional level, a tax exemption for religious organizations is beneficial in that it "re-

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21. JOINT COMM. ON TAX'N, HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 8 (2005); *see also* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) ("We find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others—family counselling, aid to the elderly and the infirm, and to children.").

22. *See* Ross Douthat, Editorial, *Do Churches Fail the Poor?*, N.Y. TIMES (May 16, 2015), https://www.nytimes.com/2015/05/17/opinion/sunday/ross-douthat-do-churches-fail-the-poor.html [https://nyti.ms/2qnIs5F] ("A church that pays out to help the poor, but doesn't pray with them, looks less like a church than what Pope Francis has described, unfavorably, as merely another N.G.O.").

23. *See, e.g.*, Editorial, *Charitable Giving to Churches Provides a Great Benefit to Society*, DESERET NEWS (Nov. 8, 2013), https://www.deseretnews.com/article/865590058/Charitable-giving-to-churches-provides-a-great-benefit-to-society.html [https://perma.cc/W8WW-M4HN] ("[R]egions of the United States in which a high percentage of people are devoutly religious tend to give far more than people in other areas.").

24. *See, e.g.*, Hamil R. Harris, *Churches Become Area's Melting Pot*, WASH. POST, (Oct. 22, 1998), https://www.washingtonpost.com/archive/local/1998/10/22/churches-become-areas-melting-pot/982bed07-7733-4639-a7e9-782759a1dba4/?utm_term=.9e7fd6c71ed3 [https://perma.cc/3K77-EJB8] (describing how churches in the Washington, D.C. area have integrated religious individuals from different backgrounds).

stricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other."[25]

II. NEGATIVE EXTERNALITIES OF NON-HOSTILE CHANGES TO THE TAX CODE

Before discussing potential threats to the tax-exempt status of religious organizations, it is worth noting the effects that recent changes to the Tax Code could have on the financial health of religious organizations. There is no indication that Congress undertook these changes in order to hinder the operations of religious organizations. Rather, the negative effects are merely the consequences of independent changes to other provisions of the Tax Code.

A. Increase to the Standard Deduction

Religious organizations are vulnerable not just to hostile changes to the Tax Code, but also to the unforeseen and unintended consequences of non-hostile changes to Tax Code, such as an increase in the standard deduction. The Tax Cuts and Jobs Act, which was signed into law on December 22, 2017, increased the standard deduction from $12,700 to $24,000 for married couples filing jointly and from $6,350 to $12,000 for single filers for the years 2018 to 2025.[26] This is expected to have a negative impact on the financial health of religious organizations by weakening the incentive to make donations and therefore decreasing the amount of donations made to religious organizations by individual taxpayers.[27] As mentioned above, the Tax Code allows individuals to deduct from taxable income any donations made to religious organizations.[28] Allowing individuals to deduct donations to religious organizations from their taxable income incentivizes them to make donations to religious organizations by reducing the economic cost of mak-

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25. *Walz*, 397 U.S. at 676.

26. *Compare* Rev. Proc. 2016-55 § 3.14, 2016-2 C.B. 707 (listing the standard deduction amounts for fiscal year 2017), *with* 26 U.S.C. § 63(c)(7) (Supp. V 2018) (listing the standard deduction amounts for fiscal years 2018 through 2025).

27. *See Mass Deduction: Recent tax reforms in America will hurt some non-profits more than others*, ECONOMIST, Feb. 15, 2018, at 72.

28. *See* 26 U.S.C. § 170(c)(2)(B) (2012).

ing a donation. The logic is as follows: if an individual is required to part with a certain amount of his income in any event, and if an individual would rather that his money goes to a local religious organization than to the distant government in Washington, D.C., then such an individual is likely to pay as much of the required amount as possible directly to his local religious organization, rather than simply to pay the full required amount to the federal government. Thus, given the opportunity to do so, the taxpayer will make donations to his local religious organization and deduct these donations from taxable income, thereby decreasing his tax bill. This system is effectively a redirect of funds, as money that would have gone to government coffers instead goes to the individual's religious organization or charity of choice.[29]

B. The greater the standard deduction, the smaller the incentive to make donations to religious organizations

The incentive, however, exists only for individuals that elect to take the itemized deduction.[30] Such individuals are incentivized to increase donations to charities in order to increase their itemized deductions and thus decrease their tax bill. The incentive does not exist for individuals taking the standard deduction because no donation is actually required to take the standard deduction.[31] If an individual can claim the standard deduction in any event, then there is no fiscal benefit to making a donation to any organization. Hence, people taking the standard deduction are less incentivized by the Tax Code to make charitable donations to religious organizations. If more people take the standard deduction, then fewer people are incentivized to make donations to religious organizations and, as a result, religious organizations will receive fewer donations.

Increasing the standard deduction for federal personal income tax does just that: it invites more individuals to elect to

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29. *See Mass Deduction*, *supra* note 27, at 72–73.

30. Individuals who take the standard deduction are not eligible to itemize any deductions. *See* 26 U.S.C. § 63(c)(6) (2012) (declaring that if an individual itemizes any deductions then the standard deduction for this individual shall be zero).

31. *Compare* 26 U.S.C. § 63(b) (2012) (enumerating that taxable income for individuals not itemizing deductions is equal to adjusted gross income minus the standard deduction), *with* 26 U.S.C. § 63(d), (e) (2012 & Supp. V 2018) (outlining the process of itemizing deductions).

take the standard deduction, and thereby completely removes the incentive for these individuals to itemize deductions, which in turn reduces the incentive to make donations to religious organizations.[32] Therefore, by increasing the standard deduction, which the Tax Cuts and Jobs Act did, Congress has encouraged more individuals to elect to take the standard deduction and removed the incentive for these individuals to itemize deductions and make donations to religious organizations. Wealthier individuals who have traditionally itemized deductions are anticipated to continue to make donations to religious organizations as they did before, and poorer individuals who have traditionally elected to take the standard deduction will also continue to make donations to religious organizations in the same amounts as they did before the change to the standard deduction amount. The decrease in donations is likely to come from individuals who previously itemized their deductions, but who in light of the increase in the standard deduction will now elect to take the standard deduction. Indeed, the greatest temptation to decrease donations to religious organizations will be presented to those individuals for whom the newly increased standard deduction surpasses their itemized deductions. These individuals tend to be in middle-class families, who traditionally give the most to religious organizations.[33]

To be sure, devoutly religious individuals of all economic classes will likely continue to make donations to religious organizations as they would in any economic situation. But in the aggregate, donations are expected to drop as the marginal economic tax benefit of donating to religious organizations also drops. The lesson to be learned here is that religious organizations are vulnerable not just to hostile changes to those Tax Code provisions that directly implicate them, but also to the unforeseen and unintended consequences of non-hostile changes to Tax Code provisions that are seemingly peripheral to religious organizations.

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32. *See Mass Deduction*, *supra* note 27, at 72.

33. *See id*. The rich tend to donate more to universities. *See id.* at 73.

III. HOW A RELIGIOUS ORGANIZATION CAN LOSE ITS TAX-EXEMPT STATUS

There are many ways in which a religious organization can lose its tax-exempt status. The threats range from case-by-case revocations of individual religious organizations, which only require the initiative of the Secretary of the Treasury, to outright removal from the Tax Code of the exemption for religious organizations, which would require an act of Congress, presentment to the President,[34] and, in the likely event that the act is challenged in the courts, support from a majority of justices of the Supreme Court. Thus, each level of threat must overcome a corresponding level of constitutional hurdles in order to come into force.

A. Case-By-Case Revocation

Religious organizations that meet the requirements of 26 U.S.C. § 501(c)(3) are by default assumed to be operating as religious organizations in good faith and are normally exempt from I.R.S. audits meant to determine the sincerity of their religious activity and thus whether they should be considered tax-exempt under 26 U.S.C. § 501(c)(3).[35] The Secretary of the Treasury may initiate a church tax inquiry only if the Secretary has (1) met the requirement of reasonable belief that an inquiry is justified and (2) provided appropriate notice to the religious organization that is the subject of the inquiry.[36] In turn, the reasonable belief requirement is met if the Secretary "reasonably believes," based on written facts and circumstances, that (1) a religious organization is not actually a religious organization or (2) the religious organization is carrying on an unrelated business or other activity that is subject to taxation.[37] Inquiries

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34. *See* U.S. CONST. art. I, § 7, cls. 2–3.

35. *See* I.R.S., PUB. NO. 1828 (REV. 8-2015), TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 2 (2015) ("Churches that meet the requirements of [26 U.S.C.] § 501(c)(3) are automatically considered tax exempt and are not required to apply for and obtain recognition of tax-exempt status from the I.R.S.").

36. *See* 26 U.S.C. § 7611(a)(1) (2012).

37. *See id.* § 7611(a)(2) (2018). An "unrelated trade or business" refers to any trade or business that is not substantially related to an organization's fulfilling of its charitable or educational purpose, or other purpose that grants it tax-exempt status under 26 U.S.C. § 501(c)(3), which would include religious purposes. *See id.* § 513(a). For organizations receiving tax-exempt status under 26 U.S.C. § 501(c)(3),

opened by the Secretary ultimately turn on either or both of these two issues, and a religious organization can have its tax-exempt status revoked on the grounds of failing to comply with either of these issues. As part of an inquiry, the Secretary may request corporate documents, financial statements, lists of members and contributors,[38] and may observe the activities of the religious organization.[39] If the religious organization believes that the Secretary is noncompliant with the requirements of 26 U.S.C. § 7611, then the religious organization may file suit in court to have the church tax inquiry stayed until all issues of noncompliance have been corrected.[40] Based on the results of the inquiry, the Secretary may decide to revoke a religious organization's tax-exempt status.[41] Such a revocation must be approved by the regional counsel of the I.R.S., who will determine that the Secretary has substantially complied with the requirements of reasonable belief and appropriate notice.[42] Thereafter, a religious organization is left to appeal to the court to reinstate its tax-exempt status.[43]

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including religious organizations, an unrelated trade or business does not include any trade or business that is carried on by the organization for the convenience of the organization's members, such as businesses that sell particular types of clothing and equipment to members or that sell food through vending machines or snack bars located on the organization's functional premises. *See id.* § 513(a)(2). Additionally, the term "unrelated trade or business," thankfully for some faiths, does not include conducting regular bingo games. *See id.* § 513(f)(1).

38. *See id.* § 7611(h)(4)(A).

39. *See id.* § 7611(h)(3).

40. *See id.* § 7611(e)(1). For a contemporary example of a taxpayer filing suit to have a church tax inquiry stayed, see Rowe v. United States, No. 18-75, 2018 WL 2234810 (E.D. La. May 16, 2018) (dismissing church minister's petition to quash church tax inquiry).

41. *See* 26 U.S.C. § 7611(d)(1)(A). The revocation can be retroactive to all prior years that an organization is found to not be a religious organization under 26 U.S.C. § 501(c)(3) up to six years, meaning that an organization would be liable for unpaid taxes for at most the past six years. *See id.* § 7611(d)(2)(A) (2018). If an organization is found to be a religious organization in previous years, then it is not considered to have its tax-exempt status revoked for that year and thus is not liable for any taxes in that year. *See id.*

42. *See id.* § 7611(d)(1).

43. In theory, a religious organization could lose its tax-exempt status under 26 U.S.C. § 501(c)(3), while its members could continue to deduct donations from taxable income. This is due to the fact that 26 U.S.C. § 170(c) does not require that a recipient organization qualify under 26 U.S.C. § 501(c)(3). Indeed, 26 U.S.C. § 170(c)(2)(D) merely requires that an organization not be disqualified for attempting to influence legislation or for participating in political campaigns of candidates for public office. Thus, assuming that a religious organization does not

The Secretary thus has immense power to add a level of misery to the lives of religious organizations. While there is an assumption that an organization presenting itself as a religious organization is in fact a religious organization, the requirements for initiating an audit have low hurdles that can be easily overcome by a motivated Secretary. Even if a religious organization does not ultimately have its tax-exempt status revoked, a church tax inquiry can be burdensome and intrusive. The religious organization will have had its legal and financial documents searched and its member lists perused. Sacred activities will likely have been observed in an effort to determine whether a third-party observer would consider them to be sufficiently religious. If the case goes to court, then the religious organization will have to cover the costs of litigation. As such, the office of the Secretary of the Treasury can be used as a means to hinder the activities of religious organizations. For supporters of tax-exempt religious organizations who are preparing to vote in general elections, it is valuable to know (1) whom a presidential candidate would likely nominate as Secretary of the Treasury, and (2) what that individual's attitude is towards religious organizations in general, and on the tax-exempt status of religious organizations in particular.[44] Insofar as the Senate must approve of a President's nominee for Secretary of the Treasury, voters would also do well to question candidates for Senate regarding their willingness to reject nominees for the Secretary of the Treasury that are not fully supportive of the tax-exempt status for religious organizations.

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lose its tax-exempt status for its political activity, donations to the organization should still be deductible from the taxable income of the donor. However, inasmuch as a religious organization is most likely to lose its tax-exempt status for failing to be a bona fide religious organization, it is difficult to see in practice how a religious organization's members would be able to continue to deduct donations to the organization from their taxable income even after the organization has lost its tax-exempt status; if the organization is no longer tax-exempt because it is deemed to no longer have a religious purpose, then donations to the organization would likewise not be deductible from taxable income.

44. *See* U.S. CONST. art. II, § 2, cl. 2 (establishing that the President of the United States has the power to nominate and, with the advice and consent of the Senate, appoint officials).

1. The Secretary has discretion to determine what is and what is not a religious organization for tax purposes.

Having opened a church tax inquiry, the Secretary has the discretion to rule on that most sensitive of topics, namely what is and what is not a religious organization. The I.R.S. has issued guidelines according to which the Secretary will assess the extent to which a religious organization is indeed a religious organization that is acting in good faith.[45] These include, but are not limited to, the following:

(1) Distinct legal existence;

(2) Recognized creed and form of worship;

(3) Definite and distinct ecclesiastical government;

(4) Formal code of doctrine and discipline;

(5) Distinct religious history;

(6) Membership not associated with any other church or denomination;

(7) Organization of ordained ministers;

(8) Ordained ministers selected after completing prescribed courses of study;

(9) Literature of its own;

(10) Established places of worship;

(11) Regular congregations;

(12) Regular religious services;

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45. It is unlikely that these guidelines will receive *Chevron* deference in court to the extent that these guidelines were published without procedures for notice and comment. In *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011), the Supreme Court ruled that *Chevron* provided the appropriate standard for evaluating a Treasury Regulation because, *inter alia*, the Treasury issued the rule only after notice-and-comment procedures. *Chevron* does not apply unless a regulation has gone through notice and comment. *See* CARTER BISHOP & DANIEL KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW ¶ 1.11[3] (Thompson Reuters 1994 & Supp. 2018). As such, lesser regulatory interpretations that do not go through notice and comment, such as revenue rulings, revenue procedures, and announcements, will likely not receive *Chevron* deference, but will instead receive a more exacting standard, such as *Skidmore*. *See id.* For a history of how courts apply *Chevron* in tax cases, see Steve R. Johnson, *The Rise and Fall of* Chevron *in Tax: From the Early Days to* King *and Beyond*, 2015 PEPP. L. REV. 14 (2015). For insight into how courts use *Auer* and *Seminole Rock* deference in tax cases, see Steve R. Johnson, Auer/Seminole Rock *Deference in the Tax Court*, 11 PITT. TAX REV. 1 (2013).

> (13) Sunday schools for the religious instruction of the young; and,
>
> (14) Schools for the preparation of its ministers.[46]

The I.R.S. posits that these fourteen attributes have been developed by both the I.R.S. and the courts.[47] But it also posits that other facts and circumstances could be used to determine whether a religious organization is indeed a religious organization for tax purposes.[48] Furthermore, while the I.R.S. "makes no attempt to evaluate the content of whatever doctrine a particular organization claims is religious," it does require that the organization's beliefs be sincerely held and that the practices and rites associated with the organization's beliefs be neither illegal nor contrary to "clearly defined public policy."[49]

It is the requirement that beliefs, practices, and rites of an organization not be contrary to "clearly defined public policy" that should give rise to concern. It is possible that the Secretary could use this phrase to require religious organizations to adhere to public accommodations standards in order to be considered a religious organization for tax purposes. In this way, the Tax Code could become a tool for the Secretary of the Treasury to use in order to nudge society in a specific and desired direction. Such was the case in *Bob Jones University v. United States*,[50] in which the Supreme Court upheld the Treasury Secretary's decision to revoke the tax-exempt status of a religious university due to the fact that the university's policies ran contrary to desired public policy.[51] The Court held that, because the university refused to admit particular individuals due to specific immutable conditions of those individuals, the university could not be viewed as "conferring a public benefit within the 'charitable' concept . . . or within the congressional intent underlying [26 U.S.C.] § 170 and § 501(c)(3),"[52] and thus

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46. I.R.S., *supra* note 35, at 33.

47. *See id.*

48. *See id.*

49. *Id.*

50. 461 U.S. 574 (1983). For additional analysis of *Bob Jones University*, see Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of* Bob Jones University v. United States, 36 VAND. L. REV. 1353 (1983).

51. *See Bob Jones*, 461 U.S. at 595.

52. *Id.* at 595–96. In his oral argument in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Solicitor General Donald Verrilli suggested that the same logic from *Bob*

is not worthy of tax-exempt status. Although religious organizations are granted constitutional protections that religious universities are not,[53] similar logic to that seen in *Bob Jones* could be applied to a religious organization that, for example, does not permit individuals of particular sexual orientation to fully participate in the religious organization's worship.[54] If a religious organization denies such individuals the opportunity to participate in a sacrament based on the belief that such individuals are not worthy of participating in that sacrament, and if the Secretary deems this denial based on sexual orientation to be against public policy, then the Secretary can move to revoke the tax-exempt status of the religious organization, whatever the rationale for denying the sacrament and however sincere that rationale may be.[55] Inasmuch as the Secretary of the Treasury is endowed with the power to determine what is and what is not a religious organization, and inasmuch as such a judgment may be based on whether a religious organization's prac-

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Jones that applied to interracial marriage and dating would also apply to same-sex marriage. Justice Alito asked General Verrilli, "Well, in the *Bob Jones* case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?" General Verrilli responded, "You know, . . . I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue . . . I don't deny that, Justice Alito. It is . . . going to be an issue." Transcript of Oral Argument at 38, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

53. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (establishing a three-prong test to determine the constitutionality of legislation directed at religion). For further discussion of the *Lemon* Test, see *infra* Part IV.B.ii.

54. *See* Michael A. Lehmann & Daniel Dunn, Obergefell *and Tax-Exempt Status for Religious Institutions*, 7 COLUM. J. TAX L. TAX MATTERS 7 (2016) (arguing that an organization that refuses to acknowledge the constitutional right of same-sex marriage could be considered to not be promoting the "public good" and thus could lose its tax-exempt status). *But see* Ray Wiacek, Noel Francisco & Vivek Suri, *Tax Exemptions and Same-Sex Marriage*, 7 COLUM. J. TAX L. TAX MATTERS 14 (2016) (arguing that public policy can justly deny a tax exemption only if Congress enacts a statute establishing such a public policy and that, because Congress has yet to enact such a statute, the I.R.S. is obliged to conclude that private institutions otherwise satisfying the requirements of 26 U.S.C. § 501(c)(3) shall remain eligible for tax exemptions despite practices that reflect opposition to same-sex marriage).

55. *See Bob Jones*, 461 U.S. at 595 ("Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy."); *see also* United States v. Lee, 455 U.S. 252, 257 (1982) ("Not all burdens on religion are unconstitutional . . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."), *quoted in Bob Jones*, 461 U.S. at 603.

tices are sufficiently in harmony with current public policy,[56] religious organizations are to an extent at the mercy of the Secretary and could be forced to sacrifice either their timeless beliefs in order to follow the current trend in public policy or to sacrifice their tax-exempt status.[57] This provides all the more reason for religiously minded voters to ensure a proper vetting of candidates for President and the Senate regarding questions of exempting religious organizations from paying taxes.

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56. In the aftermath of the Supreme Court's decision to legalize same-sex marriage in *Obergefell*, the then-commissioner of the I.R.S., John Koskinen, promised members of the Senate Judiciary Oversight Subcommittee that his agency would not challenge the tax-exempt status of religious colleges and universities that oppose same-sex marriage. *See* Sarah Pulliam Bailey, *IRS commissioner promises not to revoke tax-exempt status of colleges that oppose gay marriage*, WASH. POST (Aug. 3 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/03/irs-commissioner-promises-not-to-revoke-tax-exempt-status-of-colleges-that-oppose-gay-marriage/?utm_term=.9ea5117a857d [https://perma.cc/8W9T-NMMJ]. That the Senate extracted such promise from the Commissioner of the I.R.S. suggests (1) the extent to which appointed officials have power to challenge the tax-exempt status of religious organizations and (2) the role that elected officials, in this case U.S. senators, have in checking the power of appointed officials.

57. Such was the case in 2016 in the Commonwealth of Massachusetts, when the Massachusetts Commission Against Discrimination and the Commonwealth's Attorney General interpreted the commonwealth's public accommodations laws as requiring religious organizations to allow individuals to use the restroom, changing room, and other private areas of an organization's worship premises in accordance with the gender of their choice rather than their biological gender, even if such an allowance violated a teaching or belief of the religious organization. *See* News Release, Alliance Defending Freedom Massachusetts Churches Free to Serve Their Communities Without Being Forced to Abandon Beliefs (Dec. 12, 2016), https://adflegal.org/detailspages/press-release-details/massachusetts-churches-free-to-serve-their-communities-without-being-forced-to-abandon-beliefs [https://perma.cc/JH7B-YMMD]. Although religious organizations were able to convince the Commission and the Attorney General to allow religious organizations an exception from this interpretation of the commonwealth's public accommodations laws, *see id.*, this case demonstrates the extent to which religious organizations are vulnerable to the policy interpretations of public officials. For arguments on why the tax-exempt status of religious schools will not likely be affected by recent trends in public accommodations laws following the Supreme Court's decision in *Obergefell*, see generally, Johnny Rex Buckles, *The Sexual Integrity of Religious Schools and Tax Exemption*, 40 HARV. J.L. & PUB. POL'Y. 255 (2017). For arguments on why religious organizations should not be allowed to abstain from public accommodation laws, see generally, Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177 (2015).

2. The courts have disallowed donors a deduction from taxable income of donations made to religious organizations.

The Supreme Court has sided with the Commissioner for Internal Revenue in disallowing donors from taking a deduction from taxable income of donations made to religious organizations on a case-by-case basis. In *Hernandez v. Commissioner*,[58] the Court considered whether payments to the Church of Scientology for auditing sessions could be deducted from the taxpayer's taxable income under 26 U.S.C. § 170(c).[59] The Court reasoned that, because "Congress has specified that a payment to an organization operated exclusively for religious purposes is deductible *only* if such a payment is a contribution or gift," and because the payments made by the petitioner for auditing services were made with the intent to receive a religious benefit in return, the payments did not count as donations to a religious organization and thus were not deductible from the petitioner's taxable income under 26 U.S.C. § 170(c).[60] In essence, the Court found that the *quid pro quo* nature of the transaction between the petitioner and the Church of Scientology ran contrary to 26 U.S.C. § 170(c).[61]

However, the Court's decision that *quid pro quo* payments for auditing services do not qualify under 26 U.S.C. § 170(c) is concerning, because the Court's decision to disallow the deductibility of payments to the Church of Scientology seems arbitrary.[62] The I.R.S. has in the past allowed—and, indeed, continues to allow—*quid pro quo* payments to religious organizations to be deductible under 26 U.S.C. § 170(c)(2)(B). For example, some Christians pay pew rents in order to receive a par-

58. 490 U.S. 680 (1989).

59. As discussed *supra* in Part II.A, 26 U.S.C. § 170(a) (2012) allows for donations to religious and charitable organizations to be deducted from the taxable income of donors.

60. *Hernandez*, 490 U.S. at 692–93 ("The Code makes no special preference for payments made in the expectation of gaining religious benefits or access to a religious service.").

61. *See id.* at 701–02 ("The relevant inquiry in determining whether a payment is a contribution or gift under [26 U.S.C.] § 170 is . . . whether the transaction in which the payment is involved is structured as a *quid pro quo* exchange.").

62. The court distinguished the practices of the Church of Scientology from those of other religious organizations by noting the Church's usage of price schedules for auditing sessions and its policies for granting discounts for advance payments for auditing sessions for granting refunds for unused auditing sessions. *See id.* at 685–86.

ticular seat during worship services, some synagogues require general admissions tickets for attending High Holy Days, and some churches require payment of tithing as a necessary condition for entering particular houses of worship—and all these payments are deductible under 26 U.S.C. § 170(a).[63] As Justice O'Connor, writing in dissent in *Hernandez*, explains, "According to some Catholic theologians, the nature of the pact between a priest and a donor who pays a Mass stipend is a bilateral contract known as *do ut facias* . . . A finer example of a *quid pro quo* exchange would be hard to formulate."[64] Yet, Mass stipends are deductible under 26 U.S.C. § 170(c).[65] That the I.R.S. and the Court singled out the Church of Scientology for unfavorable tax treatment points to the arbitrary nature in which the I.R.S. and the Court can treat religious organizations. Justice O'Connor continues, stating, "[the Government's regulation] involves the differential application of a standard based on constitutionally impermissible differences drawn by the Government among religions."[66] Inasmuch as the First Amendment imposes equality of treatment among religions, the Government should have either allowed all *quid pro quo* transactions or disallowed all such transactions, and the Court should have required that the Government do so.[67] However, this is not what the Government did, and this is not what the Court required the Government to do. That the Commissioner may apparently treat certain religions differently for the purposes of 26 U.S.C. § 170(c) highlights the extent to which religious organizations are vulnerable to the hostile and arbitrary application of the Tax Code.[68] Indeed, based on *Hernandez*, it would seem that motivated tax officials could use the Tax Code to single out and actively hinder a religious organization. It is

63. *See id.* at 708–09 (O'Connor, J., dissenting).

64. *Id.*

65. *See id.*

66. *Id.* at 712 ("[The Government's regulation] is best characterized as a case of the Government putting an imprimatur on all but one religion. That the Government may not do.").

67. *See id.* at 707.

68. For speculation on whether the current administration will seek to revoke the tax-exempt status of the Church of Scientology, see, e.g., Yashar Ali, *Trump Thinks Scientology Should Have Tax Exemption Revoked, Longtime Aide Says*, HUFFINGTON POST (Nov. 10, 2017) https://www.huffingtonpost.com/entry/trump-scientology-tax-exemption_us_5a04dd35e4b05673aa584cab [https://perma.cc/R2D3-M9H7].

therefore in the interest of religious organizations and their members to ensure that elected officials appoint and confirm tax officials that will protect the evenhanded application of tax-exempt status for religious organizations.

B. Blanket Revocation of Tax-Exempt Status

If on one end of the spectrum of threats to the tax-exempt status of religious organizations sits case-by-case revocation, then on the other end of the spectrum sits a blanket revocation of tax-exempt status for religious organizations, which would require either an act of Congress and presentment to the President, or a court striking down provisions of the Tax Code benefiting religious organizations. Specifically, Congress could alter or altogether remove from the Tax Code 26 U.S.C. § 107,[69] § 170(c)(2)(B), or § 501(c)(3) in order to increase the tax burden on religious organizations, or the courts could hold any of these sections of the Tax Code to be unconstitutional. The most significant increase to the tax burden of religious organizations would come from alterations to 26 U.S.C. § 501(c)(3), while alterations to 26 U.S.C. § 107 and § 170(c)(2)(B) would have a direct impact on the taxes of individual members of religious organizations and thus an indirect impact on the revenues of the religious organizations themselves.[70]

1. Revocation by Congress through alterations to the Tax Code

Congress has the ability to alter the Tax Code to remove the tax-exempt status for religious organizations and individuals making donations to religious organizations. This can be accomplished by simply removing the word "religious" from 26 U.S.C. § 501(c)(3) and § 170(c)(2)(B), thereby removing organizations operated for religious purposes from the list of organizations receiving tax-exempt status.[71] Thus, altering the Tax

69. 26 U.S.C. § 107 (2012) allows ministers of the gospel to deduct from gross income the rental value of housing provided as part of compensation for their ministerial work for a religious organization.

70. For a discussion of the impact of 26 U.S.C. 170(c) on individual taxpayers and religious organizations, see *supra* Part II.A.

71. A similar dilemma as described *supra* in note 43 could arise here. If Congress alters 26 U.S.C. § 501(c)(3) to exclude religious organizations from the list of organizations receiving tax-exempt status but fails to make a similar alteration to 26 U.S.C. § 170(c)(2)(B), then individuals would still be able to deduct donations made to religious organizations from taxable income. The religious organizations

Code to the detriment of religious organizations is to a large extent a political issue that would require the support of both houses of Congress and the President. But such a revocation of tax-exempt status would need to clear the hurdles established by the Religious Freedom Restoration Act.[72] In 1993, Congress passed the Religious Freedom Restoration Act, which bars the federal government from burdening an individual's free exercise of religion, unless the burden (1) furthers a "compelling governmental interest," and (2) "is the least restrictive means for furthering that compelling governmental interest,"[73] and which provides standing to sue the government for redress to those individuals whose ability to freely exercise their religion has been unduly burdened by the government in violation of the Act.[74]

Inasmuch as changes to the federal Tax Code would require action from the federal government—namely from Congress acting as legislator and the I.R.S. acting as executor—such a change would need to overcome the hurdles imposed by the Religious Freedom Restoration Act. Essentially, the government would need to show that revoking the tax-exempt status from religious organizations is (1) in furtherance of a compelling government interest, and (2) is the least restrictive way to

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would not cease to be religious because they were removed from the list of tax-exempt organizations found in 26 U.S.C. § 501(c)(3), they would just no longer be exempt from paying taxes. Therefore, because 26 U.S.C. § 170(c)(2)(B) only requires that an organization be religious in nature and does not require that it qualify under 26 U.S.C. § 501(c)(3), the deduction of donations to religious organizations granted under 26 U.S.C. § 170(a) would still be in force. However, it is likely that any Congress that is willing to remove religious organizations from 26 U.S.C. § 501(c)(3) would also be willing to remove religious organizations from 26 U.S.C. § 170(c)(2)(B).

72. An act to revoke the tax-exempt status of religious organizations would likely need to contain language showing congressional intent to revoke the Religious Freedom Restoration Act in order to satisfy the canon against implied repeals. Absent such plain and unambiguous intent, the courts will likely require that the revocation of tax-exempt status overcome the hurdles of the Religious Freedom Restoration Act. *See* Carcieri v. Salazar, 555 U.S. 379, 395 (2009) ("We have repeatedly stated . . . that absent a clearly expressed congressional intention, . . . an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.").

73. 42 U.S.C. § 2000bb-1(b).

74. *See id.* § 2000bb-1(c).

further this compelling interest.[75] On the one hand, the government could claim that such a revocation would further the compelling government interest of increasing government revenues, but on the other hand there are other ways that the government could increase revenues without placing such a burden on religious organizations. A revocation of tax-exempt status with such a stated intent should fail to clear the hurdles imposed by the Religious Freedom Restoration Act and therefore be struck down by the courts. Thus, the Religious Freedom Restoration Act should serve as a line of defense against new laws and regulations that would impose a tax burden on religious organizations.[76]

Such a revocation of tax-exempt status would also be subject to scrutiny under the Free Exercise Clause. In *Church of Lukumi Babalu Aye v. City of Hialeah*,[77] the Court explained that if a law places a burden on religion in a way that is (1) not neutral and (2) not of general application, then it must undergo "the most rigorous of scrutiny," meaning that it must advance a govern-

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75. The Religious Freedom Restoration Act originally applied to both federal and state governments. However, the Supreme Court ruled in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that applying the Act to states was beyond Congress' authority under the Fourteenth Amendment. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Supreme Court affirmed the constitutionality of the Act as it pertains to the federal government.

76. Of some concern is *United States v. Lee*, 455 U.S. 252 (1982), in which the Court held that a member of the Amish faith was not exempt from paying social security taxes, despite his assertion that doing so violated his belief, because the state had an interest in providing a social security system and mandating all citizens to participate was part of this interest. The Court stated, "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* at 257. However, *Lee* is distinguishable from a situation in which Congress revokes the tax-exempt status of religious organizations. In *Lee*, the Court used the taxpayer's choice to enter into commerce as justification for imposition of the social security tax. *See id.* at 261 ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."). But in the situation in which Congress revokes the tax-exempt status of religious organizations, religious organizations (1) have not entered into commercial activity in the way that the taxpayer in *Lee* did, and (2) because it is only religious organizations involved in the "activity" in which religious organizations are involved, they are not superimposing anything on any statutory schemes that binds others in that activity—indeed all who are involved in that "activity" of religiosity are already treated equally under the statutory scheme that is 26 U.S.C. § 501(c)(3).

77. 508 U.S. 520 (1993).

ment interest that is of the highest order and it must be narrowly tailored in pursuit of that interest.[78] The Court reasoned that because the laws in question prohibited certain actions when they occurred in religious settings, but did not prohibit the same actions when they occurred in secular settings,[79] the laws were not neutral and not of general application, and therefore did not satisfy the demands of the Free Exercise Clause.[80] The Court also cited a pattern of animosity in the manner in which the laws were enacted by the City of Hialeah as evidence that the laws were not neutral.[81] Applying this logic to the revocation of tax-exempt status, it is likely that a change in the Tax Code that imposes an increased burden on religious organizations without imposing the same burden on analogously situated tax-exempt secular organizations will not pass scrutiny under the Free Exercise Clause.[82]

2. Revocation by the courts

The federal courts have the ability to revoke the tax-exempt status of religious organizations on grounds that laws allowing for such a status are unconstitutional—most likely on the grounds that they violate the Establishment Clause of the First Amendment. If the Free Exercise Clause and the Religious Freedom Restoration Act impose hurdles that new laws and regulations affecting religious organizations must clear, then the Establishment Clause imposes hurdles that currently existing laws and regulations—such as 26 U.S.C. § 501(c)(3)—must clear in order to be deemed constitutional.[83] If a court finds

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78. *See id.* at 546.

79. *See id.* at 542 (" . . . [T]he texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense."); *see also id.* at 545 ("The ordinances 'have every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.'" (quoting Fla. Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring))).

80. *See id.* at 545.

81. *See id.* at 542; *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018).

82. *See Masterpiece Cakeshop*, 138 S. Ct. at 1737 ("[T]he one thing [the Colorado Civil Rights Commission] can't do is apply a more generous legal test to secular objections than religious ones.").

83. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970) (holding that a New York state law "sparing the exercise of religion from the burden of property taxa-

that, for example, 26 U.S.C. § 501(c)(3) violates the Establishment Clause, then it can strike down this provision of the Tax Code and thereby remove the tax-exempt status granted to religious organizations by this provision.

An example of the Establishment Clause being invoked to attempt to render a provision of the Tax Code unconstitutional can be seen in the recent case of *Gaylor v. Mnuchin*,[84] which deals with the constitutionality of the parsonage exemption for ministers of the gospel.[85] In *Gaylor*, the Co-Presidents of the

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tion" does not establish a religion because the exemption extends to all houses of worship and therefore does not violate the Establishment Clause).

84. Gaylor v. Mnuchin, 278 F.Supp.3d 1081 (W.D. Wis. 2017) (Crabb, J.), *rev'd*, Gaylor v. Mnuchin, Nos. 18-1277, 18-1280, 2019 WL 1217647 (7th Cir. Mar. 15, 2019). The Freedom from Religion Foundation, Inc., filed suit in 2013 against then-Secretary of the Treasury Jacob Lew asking to enjoin enforcement of 26 U.S.C. § 107(2) on the grounds that it was unconstitutional. However, although the district court ruled in favor of the Foundation, *see* Freedom from Religion Found., Inc., v. Lew, 983 F. Supp.2d 1051 (W.D. Wis. 2013), the district court's decision was vacated by the Seventh Circuit Court of Appeals on the grounds that the Foundation lacked standing to sue, *see* Freedom from Religion Found., Inc. v. Lew, 773 F.3d 815, 825 (7th Cir. 2014). The Seventh Circuit explained that, in order to have standing to sue, an individual would need to first apply for the parsonage tax exemption under 26 U.S.C. § 107(2) and have it denied by the I.R.S. *See id.* at 824–25 ("Standing is absent here because the plaintiffs have not been personally denied the parsonage exemption."). This is not the first time that the Seventh Circuit vacated a district court decision from Judge Crabb in favor of the Freedom from Religion Foundation on the grounds that the Foundation lacked standing. *See* Freedom from Religion Found., Inc. v. Obama, 641 F.3d 803 (7th Cir. 2011) (vacating the district court's decision that the National Day of Prayer is unconstitutional on the grounds that the Freedom from Religion Foundation lacked standing). After the Seventh Circuit issued its ruling, the following series of events ensued: (1) the Co-Presidents of the Foundation applied for the parsonage exemption; (2) they were initially granted the exemption by the I.R.S.; (3) seemingly unsatisfied with this result (or perhaps disgruntled that the I.R.S. actually considered them to be ministers of the gospel, per their application), they notified the I.R.S. that they were not ministers of the gospel and did not work for a church; (4) the I.R.S. then denied the parsonage exemption on account of the Co-Presidents not being ministers of the gospel within the context of 26 U.S.C. § 107 (which perhaps alleviated the disgruntled mood of the Co-Presidents); and (5) the Co-Presidents filed suit against the Secretary of the Treasury, having been sufficiently harmed by the I.R.S.'s application of 26 U.S.C. § 107 so as to have standing to sue. *See Gaylor*, 278 F. Supp. 3d at 1085–86. The district court agreed with the Foundation that 26 U.S.C. § 107 violated the First Amendment. *See id.* However, on March 15, 2019, the Seventh Circuit unanimously reversed the decision of the district court. *See* Gaylor v. Mnuchin, Nos. 18-1277, 18-1280, 2019 WL 1217647, at *12 (7th Cir. Mar. 15, 2019).

85. The parsonage exemption permits ministers of the gospel to deduct from their personal gross income (1) the rental value of a home that is furnished to

Freedom from Religion Foundation, Inc., sued Steve Mnuchin, the current United States Secretary of the Treasury, to enjoin enforcement of 26 U.S.C. § 107(2) on the grounds that the parsonage exemption for ministers of the gospel violates the Establishment Clause of the First Amendment and is therefore unconstitutional. The district court judge, Judge Crabb, issued summary judgement in favor of the Co-Presidents, deciding that 26 U.S.C. § 107(2) "violates the Establishment Clause because it does not have a secular purpose or effect and because a reasonable observer would view the statute as an endorsement of religion."[86] The district court judge applied *Lemon v. Kurtzman*[87] and *Texas Monthly, Inc. v. Bullock*[88] to conclude that the parsonage exemption was unconstitutional.[89] In *Lemon*, the Supreme Court established a three-prong test to determine whether a law or regulation violates the Establishment Clause. According to the *Lemon* Test, a law must be invalidated if (1) it lacks a secular legislative purpose, (2) its principal purpose or primary effect either advances or inhibits religion, or (3) it fosters an excessive entanglement with religion.[90] The district court judge held that, because it provides a tax benefit to ministers of the gospel and to no one else,[91] 26 U.S.C. § 107(2) ad-

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them as part of their compensation, or (2) the rental allowance paid to them as part of their compensation. *See* 26 U.S.C. § 107.

86. *Gaylor*, 278 F.Supp.3d at 1085.

87. 403 U.S. 602 (1971).

88. 489 U.S. 1 (1989).

89. *Gaylor*, 278 F.Supp.3d at 1089–90.

90. *See Lemon*, 403 U.S. at 612–13. For analysis on how repealing 26 U.S.C. § 107 would potentially increase government entanglement with religion, see *Amici Curiae* Brief of Tax Law Professors in Support of Appellants at 13–25, Gaylor v. Mnuchin, Nos. 18-1277, 18-1280, 2019 WL 1217647 (7th Cir. Mar. 15, 2019), 2018 WL 2121089.

91. The I.R.S. interprets "ministers of the gospel" to incorporate ministers of all religions. *See* 26 C.F.R. § 1.107-1(b) (2017) (identifying ministers of a church "or other qualified organization" as qualifying for the parsonage exemption). Narrowly interpreting "ministers of the gospel" either to identify a specific religion or to exclude particular religions would likely run afoul of the Establishment Clause. However, there is reason to believe that, even under the broadest definition of "minister of the gospel," the court would still consider 26 U.S.C. § 107(2) to be unconstitutional because the statute would nevertheless be promoting religion in general. *See* Freedom from Religion Found., Inc. v. Lew, 983 F.Supp.2d 1051, 1071 (W.D. Wis. 2013) ("[Even] if atheism were included under the umbrella of 'religion,' § 107(2) still would advance religion over secular interests, even if the provision applied to atheists, because secular taxpayers still would be excluded from the benefit.").

vances religion without a secular purpose and thus violates the Establishment Clause under *Lemon*.[92]

The district court judge further honed her criticism of 26 U.S.C. § 107(2) by turning to *Texas Monthly*, in which the Supreme Court looked to *Lemon* to consider whether a state sales tax exemption for religious periodicals that are published and distributed by religious organizations violated the Establishment Clause.[93] While a majority of the Court found the sales tax exemption to be unconstitutional, no single opinion garnered sufficient support to be considered the majority opinion.[94] The plurality opinion in *Texas Monthly* held that (1) the state sales tax exemption for religious periodicals lacked a secular purpose or effect and communicated a message of religious endorsement because it provided a benefit to religious publications only, without any showing that the sales tax exemption was necessary to alleviate a burden to the free exercise of religion,[95] and (2) that the sales tax exemption fostered an entanglement because it forced the government to evaluate the "relative merits of differing religious claims."[96] The concurring opinion in *Texas Monthly* held that a sales tax exemption limited to religious literature sold by religious organizations violated the Establishment Clause because it leads to "preferential support for the communication of religious messages."[97] Applying the plurality and concurring opinions from *Texas Monthly* to 26 U.S.C. § 107(2), the district court judge in *Gaylor* held that the parsonage exemption violated the Establishment Clause because it (1) "gives an exemption to religious persons without a corresponding benefit to similarly situated secular persons," and (2) inasmuch as the purpose of a minister of the gospel is to share a religious message, a tax benefit to ministers

92. *See Gaylor*, 278 F. Supp. 3d at 1091. Inasmuch as the same district court judge, Judge Crabb, heard both the first round of this suit in *Freedom from Religion Foundation* in 2013 and the second round in *Gaylor* in 2017, much of Judge Crabb's opinion in *Gaylor* repeats her opinion in *Freedom from Religion Foundation*.

93. *See Tex. Monthly*, 489 U.S. at 5 (plurality opinion).

94. *See Gaylor*, 278 F. Supp. 3d at 1090.

95. *See Tex. Monthly*, 489 U.S. at 15 (plurality opinion); *see also Gaylor*, 278 F. Supp. 3d at 1090.

96. *Tex. Monthly*, 489 U.S. at 20 (plurality opinion).

97. *Id.* at 28 (Blackmun, J., concurring in the judgment).

of the gospel has the effect of preferring religious messages over secular messages.[98]

The Seventh Circuit reversed the district court's decision in a unanimous decision.[99] Applying the *Lemon* Test, the Seventh Circuit concluded that the parsonage exemption for ministers (1) had a secular purpose, (2) had a principal effect of neither endorsing nor inhibiting religion, and (3) did not cause excessive government entanglement with religion.[100] Firstly, regarding the secular purpose of 26 U.S.C. § 107(2), the Seventh Circuit noted that a statue is unconstitutional only when there is no question that the statute was motivated "wholly by religious considerations."[101] Because the Treasury Department pointed to three secular legislative purposes for 26 U.S.C. § 107(2),[102] the Seventh Circuit concluded that the statute passed the first prong of the *Lemon* Test.[103]

Secondly, on the question of whether the parsonage exemption either advanced nor inhibited religion, the Seventh Circuit rejected the district court's claim that *Texas Monthly* superseded *Walz* and *Amos*. Applying *Walz*, the Seventh Circuit declared that the parsonage exemption satisfies the second prong of the *Lemon* Test because providing a tax exemption to ministers does not "connote[] sponsorship, financial support, and active involvement of the [government] in religious activity."[104] Therefore, the "primary effect of § 107(2) is not to advance religion on behalf of the government, but to '*allow*[] churches to advance religion, which is their very purpose.'"[105]

Thirdly, regarding whether the parsonage exemption fostered excessive government entanglement with religion, the Seventh Circuit noted that, because some entanglement is inev-

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98. *Gaylor*, 278 F. Supp. 3d at 1090.

99. Gaylor v. Mnuchin, Nos. 18-1277, 18-1280, 2019 WL 1217647 (7th Cir. Mar. 15, 2019).

100. *Id.* at *11.

101. *Id.* at *4 (quoting Lynch v. Donnelly, 465 U.S. 668, 680 (1984)).

102. The Treasury Department argued that 26 U.S.C. § 107(2) had the secular purposes of eliminating discrimination against ministers, eliminating discrimination between ministers, and avoiding excessive entanglement with religion. *Id.*

103. *Id.* at *9.

104. *Id.* at *10 (alterations in original) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

105. *Id.* (alteration in original) (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987)).

itable, the question of entanglement is one of "kind and degree."[106] While 26 U.S.C. § 107(2) does involve some entanglement with government, this entanglement is of a nature that is approved by the Supreme Court in *Hosanna-Tabor*[107] and the alternative to 26 U.S.C. § 107(2), which is found in 26 U.S.C. § 119(a)(2),[108] would involve even more entanglement with the government.[109] Because Congress decided that U.S.C. § 107(2) is the less entangling option, and because legislative determinations about the Establishment Clause[110] and tax classifications are entitled to deference,[111] the Seventh Circuit elected to not disturb this decision of Congress.[112] Thus, the Seventh Circuit determined that 26 U.S.C. § 107(2) satisfied all three prongs of the *Lemon* Test.[113]

The Seventh Circuit then applied the historical significance test under *Town of Greece v. Galloway*.[114] Because the Freedom from Religion Foundation offered no evidence that 26 U.S.C. § 107(2) was historically viewed as an establishment of religion, and because the government provided "substantial evidence of a lengthy tradition of tax exemptions for religion, particularly for church-owned properties,"[115] the Seventh Circuit concluded that the parsonage exemption did not violate the Establishment Clause under the historical significance test.[116] Having found that 26 U.S.C. § 107(2) passed both the *Lemon* Test and the historical significance test, the Seventh Circuit held that it did not

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106. *Id.* (quoting *Lynch*, 465 U.S. at 684).

107. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190–95 (2012).

108. 26 U.S.C. § 119(a)(2) allows an exemption for employee lodging only if the employee is required to accept such lodging on the business premises of the employer as a condition of employment.

109. *See Gaylor*, 2019 WL 1217647 at *10.

110. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 28 (1989) (Blackmun, J., concurring) ("We in the Judiciary must be wary of interpreting [the Religion] Clauses in a manner that negates the legislative role altogether.").

111. Regan v. Taxation with Representation, 461 U.S. 540, 547 (1997) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.").

112. *Gaylor*, 2019 WL 1217647, at *10.

113. *Id.* at *11.

114. 572 U.S. 565, 577 (2014) ("Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.").

115. *Gaylor*, 2019 WL 1217647, at *11

116. *Id.* at *12.

violate the First Amendment, thereby adding clarity to the constitutionality of the parsonage exemption that some sought.[117]

Although this attempt to repeal the tax benefit for ministers of the gospel is disconcerting,[118] there is good reason to believe that a repeal of 26 U.S.C. § 107(2) will not establish precedent for any further repeal of 26 U.S.C. § 501(c)(3) or § 170(c). The main criticism of 26 U.S.C. 107(2) is that it provides a benefit to religious purposes without providing any symmetrical benefit to secular purposes and thus promotes religion in violation of the Establishment Clause.[119] However, this apparent constitutional weakness of 26 U.S.C. § 107(2) is absent in 26 U.S.C. § 501(c)(3) and § 170(c): while 26 U.S.C. § 107(2) provides a tax benefit exclusively for persons working in a religious capacity without providing a similar benefit to persons working in a secular capacity, 26 U.S.C. § 501(c)(3) and § 170(c) provide a tax benefit both to religious organizations as well as to secular organizations. In this way, 26 U.S.C. § 501(c)(3) and § 170(c) cannot be seen to promote religious purposes over secular purposes in the same way that 26 U.S.C. § 107(2) does.[120] For this

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117. *See generally* Adam Chodorow, Gaylor v. Mnuchin—*A Step Toward Greater Clarity on Clergy Tax Exemptions?*, ABA TAX TIMES, Nov. 2017, at 7. Chodorow also filed an *Amicus Curiae* brief in support of the Freedom from Religion Foundation. *See Amicus Curiae* Brief of Tax Law Professors in Support of Appellees, Gaylor v. Mnuchin, Nos. 18-1277, 18-1280, 2019 WL 1217647 (7th Cir. Mar. 15, 2019), 2018 WL 3311509.

118. For further arguments on why 26 U.S.C. § 107(2) should be declared unconstitutional, see generally, Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 WHITTIER L. REV. 707 (2003); Adam Chodorow, *The Parsonage Exemption*, 51 U.C. DAVIS L. REV. 849 (2018).

119. *But see* Intervenor-Defendants' Reply Brief in Support of Their Motion for Summary Judgement at 21–30, Gaylor v. Mnuchin, 278 F. Supp. 3d 1081 (W.D. Wis. 2017) (No. 16-CV-215), 2017 WL 3251871, *rev'd*, Nos. 18-1277, 18-1280, 2019 WL 1217647 (7th Cir. Mar. 15, 2019) (explaining that 26 U.S.C. § 107(2) is only one part of a broader package of tax exemptions that equally benefits secular purposes).

120. Indeed, 26 U.S.C. § 501(c)(3) provides the same tax benefit to both the Parish of St. Paul in Harvard Square and the Freedom from Religion Foundation, Inc. However, it is certainly ironic that the I.R.S. initially applied the parsonage exemption of 26 U.S.C. § 107(2) to the Co-Presidents of the Freedom from Religion Foundation, Inc., in the same way that it applies the parsonage exemption to ministers of the gospel, and only refused the exemption when the Co-Presidents themselves notified the I.R.S. that (1) they were not clergy, (2) that their employer was not a church, and (3) that they believed that it was "unfair that ministers can exclude housing while [they] cannot." *Gaylor*, 278 F. Supp. 3d at 1085. This suggests that the purpose of the Co-Presidents of the Freedom from Religion Founda-

reason, the tax benefits to religious organizations granted in 26 U.S.C. § 501(c)(3) and § 170(c) are less vulnerable to being considered in violation of the Establishment Clause. The key lesson from *Gaylor* will be that citizens can establish standing to sue the Secretary of the Treasury in federal court to prevent the Secretary from executing those parts of the Tax Code that grant religious organizations tax benefits. Likewise, federal courts can invalidate parts of the Tax Code, the result of which would be to increase the tax burden of religious organizations. It is therefore provident that members of religious organizations properly vet Presidential candidates and candidates for the Senate to establish whether these candidates will nominate and confirm (1) Treasury Secretaries that will defend the tax-exempt status of religious organizations in court and (2) judges that will uphold the tax-exempt status of religious organizations.

C. Possible Ways for Religious Organizations to Mitigate the Damaging Effects of Losing Their Tax-Exempt Status

In the event that a religious organization loses its tax-exempt status in any way, it could mitigate the financial effect of this event by spinning off its charitable activities into a separate corporation that would qualify as having a charitable purpose under 26 U.S.C. § 501(c)(3). Bifurcating a religious organization into a services corporation and a charitable works organization could mitigate the damaging effects of losing tax-exempt status by allowing at least some received donations and activities to remain tax-exempt on account of their having a charitable purpose: while the religious organization would pay taxes on donations received to finance non-charitable religious activities, the religious organization's sister charitable organization would be able to avoid paying taxes on donations received to finance non-religious charitable activities. A donor to the religious organization would then need to likewise bifurcate her donations into (1) donations to the religious organization that would likely not be deductible from the donor's taxable income, and (2) donations to the charitable organization that would likely be deductible from the donor's taxable income.

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tion is not to obtain the parsonage tax benefit for themselves and others in their same situation, but rather to have the parsonage benefit abolished entirely.

This system would at least allow for a religious organization's charitable activities to escape the grips of taxation and thereby mitigate the financial damage it can expect from losing its tax-exempt status.

IV. CONCLUSION

As mentioned previously, religious organizations benefit greatly from being exempt from taxes. But this benefit is not a given. On the contrary, this benefit can be revoked by Congress working in tandem with the President and the Secretary of the Treasury and receiving the blessing of the courts. Indeed, as *Gaylor* suggests, the enemy of tax-exempt religious organizations stands at the gates. While defenses do exist, these defenses are only as strong as the willingness of the Secretary of the Treasury and the courts to uphold these defenses. As such, much depends on the Secretary of the Treasury and federal judges. Religious organizations must therefore be vigilant with regard to who holds those positions. In particular, proponents of the tax-exempt status for religious organizations[121] must properly vet candidates for President and for Senate to ensure that they will require nominees for Secretary of the Treasury and federal judgeships to support the tax-exempt status of religious organizations. Only by ensuring that the Secretary of Treasury and federal judges are firmly on the side of tax-exempt religious organizations can proponents of such religious organizations be assured that the tax exemption will be protected.

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121. As mentioned *supra* in note 16, religious organizations themselves must take caution to not endorse candidates for public office, as doing so can lead to a violation of the Johnson Amendment and revocation of tax-exempt status. *See* 26 U.S.C. § 501(c)(3) (2012).