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We strive to view issues pertinent to Hawai‘i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai‘i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai‘i me ke kuana‘ike laulā. Ho‘okomo mākou i nā ‘atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā ‘atikala waiwai e ho‘ololi ana i nā mea kū kānāwai ma Hawai‘i a ma nā ‘āina ‘ē, me ke kālele ‘ana i nā kumuhana like ‘ole e like me nā kānāwai pū‘ali koa, ka mālama ‘āina, nā kānāwai ona ‘āina, a nā pono o nā po‘e ‘ōiwi.

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Using Information Literacy to Prepare Practice-Ready Graduates

Ellie Margolis and Kristen Murray*

I. INTRODUCTION

Today's law graduates find themselves entering a world of law practice dominated by senior practitioners who grew up and entered law practice in a very different technological environment than the one that developed at the end of the twentieth century.[1] There is a gap in the way members of these generations use technology, particularly in the degree to which technology is integrated into the day-to-day practice of law.[2] This poses a great challenge to educators striving to prepare new graduates to enter the profession with the set of competencies necessary for the current practice of law.

Recent law graduates are mostly members of the millennial generation, who are generally technologically savvy and have grown up as "digital natives" who do not remember a time before the existence of interactive digital media.[3] They grew up writing email, sending texts, reading on screens, constantly connected, aware of the rapid changes in technology, and able to easily assimilate these changes into their lives.[4] Members of this generation are comfortable with the idea of using social media in both their personal and professional lives.[5] Like others of their generation,

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[1] *See* Margaret Thornton, *The Flexible Cyborg: Work-Life Balance in Legal Practice*, 38 SYDNEY L. REV. 1, 12 (2016); Brittany Stringfellow Otey, *Millennials, Technology, and Professional Responsibility: Training A New Generation in Technological Professionalism*, 37 J. LEGAL PROF. 199, 202–03 (2013) [hereinafter Otey, *Millennials*].

[2] *See* Brittany Stringfellow Otey, *Buffering Burnout: Preparing the Online Generation for the Occupational Hazards of the Legal Profession*, 24 S. CAL. INTERDISC. L.J. 147, 153–54 (2014) [hereinafter Otey, *Buffering Burnout*].

[3] Otey, *Millenials, supra* note 1, at 204.

[4] *Id.* at 202–03.

[5] Glen M. Vogel, *A Review of the International Bar Association, LexisNexis Technology Studies, and the American Bar Association's Commission on Ethics 20/20: The Legal Profession's Response to the Issues Associated with the Generational Gap in Using Technology & Internet Social Media*, 38 J. LEGAL PROF. 95, 96–97 (2013).

millennial lawyers assume that technology is and will continue to be an integral part of their careers.

Lawyers further along in their careers are from the Baby Boom generation and Generation X, and have a more tentative relationship with technology.[6] Most of those in control in law firms and other law-practice settings are digital immigrants, certainly familiar with electronic research and communication, but not conversant with it in the same way as digital natives.[7] Lawyers from these generations remember a time before technology was so ubiquitous, and are slower to embrace new technological developments. They are certainly aware of technology, and use it, but are often suspicious of newer technologies and what they have to offer.[8]

These more senior generations of lawyers, unlike millennials, do not always assume that using technology will lead to better, faster ways of doing things.[9] They learned legal research almost exclusively through books, and learned legal writing in a time before current technologies changed the potential for more flexible forms of legal analysis. As a result, they tend to think of non-digital methods as the better methods, with digital technologies being interlopers that cannot surpass the effectiveness of the older methods.[10] While they have adopted some new technologies, many lawyers, especially older ones, have been slow to understand and accept the dramatic changes technology has brought to law practice. Some believe technology does not facilitate the practice of law.[11] When they do use technology, they often use it by electronically replicating the way they have always done things, such as using online digests for legal research rather than relying on more complex search algorithms.[12] Most lawyers recognize that increasing use of technology is inevitable, but do not always know what that means for the future of law practice.

The legal education of the current generation of law students occurs in a very different environment than that of those who graduated ten or more

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[6] *See* Otey, *Millenials*, *supra* note 1, at 233.

[7] Thornton, *supra* note 1, at 12 (noting the gap in use of technology between Millennials and older generations of lawyers).

[8] *See* Otey, *Millenials*, *supra* note 1, at 233.

[9] *Id.*

[10] *See* Julie Spanbauer, *Mind the Gap: Teaching Research as a Fluid, Ever-Present Concept in the First-Year Legal Research and Writing Classroom*, 66 MERCER L. REV. 651, 658–59 (2015) (discussing resistance to legal research technologies).

[11] Timothy J. Toohey, *Beyond Technophobia: Lawyers' Ethical and Legal Obligations to Monitor Evolving Technology and Security Risks*, 21 RICH. J.L. & TECH. 9, 1 (2015).

[12] Ellie Margolis & Kristen Murray, *Say Goodbye to the Books: Information Literacy as the New Legal Research Paradigm*, 38 U. DAYTON L. REV. 117, 123–124 (2012) [hereinafter Margolis & Murray, *Say Goodbye to the Books*].

years ago. Today's students do not remember a time when research could only be done in books, when the only way to access cases was through a digest, when near-instantaneous access to information did not exist.[13] They are accustomed to the constant connectivity provided by mobile devices, working most often on laptops, tablets and smartphones but rarely on desktop computers.[14] For this generation, the practice of law will be largely digital—conducting research online, creating digital documents, conveying them electronically through e-filing, email and other methods, using office management software, and other new technology yet to be developed.

At the same time that technology has been changing law practice, the legal market has been changing, with an increasing expectation that new law school graduates will come to their first jobs with a skill set that allows them to hit the ground running. As law firm structures have changed and job prospects have declined, calls for "practice-ready" law graduates have steadily increased over the last two decades.[15] The pressure for law schools to prepare "practice-ready" graduates has grown with the adoption of new ABA accreditation standards providing that schools require experiential courses for graduation, and recommending that schools develop programs to "develop practice-ready lawyers."[16]

The challenge law schools face is how to prepare graduates to be "practice-ready" when the nature of practice is shifting and changing with such rapidity, and when more senior practitioners are at least somewhat resistant to these changes.[17] New graduates are likely to encounter a divide between their tech-heavy lives and the less technological world of those they are working for.[18] When new lawyers enter practice, expected to be

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[13] *See generally* Julie Spanbauer, *Mind the Gap: Teaching Research as a Fluid, Ever-Present Concept in the First-Year Legal Research and Writing Classroom*, 66 MERCER L. REV. 651, 657–59 (2015); Margolis & Murray, *Say Goodbye to the Books*, *supra* note 12, at 117–18.

[14] Otey, *Buffering Burnout*, *supra* note 2, at 154.

[15] *See* Steven C. Bennett, *When Will Law School Change?*, 89 Neb. L. Rev. 87, 108 (2010); Sarah Valentine, *Flourish or Founder: The New Regulatory Regime in Legal Education*, 44 J.L. & Educ. 473, 474 (2015) [hereinafter Valentine, *Flourish or Founder*]; Gary S. Gildin, *Practice-Ready Legal Education: The Four New Demands Law Schools Must Satisfy*, Pa. Law., May–Jun. 2015, at 33, https://dickinsonlaw.psu.edu/sites/default/files/Gildin-Practice-Ready-Legal-Education.pdf.

[16] *See* A.B.A., STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014–2015 15–25 (2014) [hereinafter ABA STANDARDS],; Robert J. Condlin, *"Practice Ready Graduates": A Millennialist Fantasy*, 31 TOURO L. REV. 75, 84 n.28 (2014) (noting the ABA House of Delegates Recommendation 10B, urging law schools to implement programs to develop practice ready lawyers).

[17] *See* Valentine, *Flourish or Founder*, *supra* note 15, at 488–89.

[18] *Id.*

"practice-ready" from day one, they will have to be able to use both old and new technologies to carry out the tasks of lawyering and be able to bridge the gap between them, conversant in both languages and able to adapt to the rapidly changing world of law practice.

Legal research and legal writing are two areas in which this gap can be seen most acutely. What constitutes "cutting edge" legal research and writing skills is almost ever-changing; these are also areas where senior practitioners are likely to feel wedded to the methods and technologies they learned and first encountered in practice. The first step in helping law students and new lawyers bridge the technology gap is to shift from thinking about research and writing as fixed skills, and to focus instead on self-learning and skill development, so that new lawyers can be flexible and adapt as the technological landscape continues to change. Thinking about these skills in terms of "information literacy" can help both professionals and educators take this first step.

This article serves as an attempt to find a new way to think about how to prepare law students to be "practice-ready" for the legal research and writing tasks they will face as they enter law practice, and how to equip them with the skills they need to communicate with older generations of lawyers while adapting to new and evolving technologies. In essence, recent law school graduates must be "bilingual" ambassadors of technology, simultaneously able to communicate with lawyers who may not be conversant in, or even understand, the new technologies taking over law practice and able to use those new technologies to be effective lawyers.[19] Part II discusses the current state of law practice, the idea of practice-readiness, and the role legal research and writing skills play in debates surrounding both of these. Part III proposes that the concept of information literacy can allow legal educators to reframe the way we think about what it means to possess practice-ready legal research and writing skills in a way that resolves some of the concerns about practice-readiness itself.

II. BACKGROUND

The United States legal market and the state of legal education have both shifted and changed in the early part of the twenty-first century. Technology has been a disruptive force in law practice, particularly in the areas of legal research and legal writing. At the same time as these changes are occurring, the call for experiential learning in law school and the

[19] *See* Otey, *Millennials*, *supra* note 1, at 234–235 (discussing the need for finding a common vocabulary for communicating about technology).

production of "practice-ready" law graduates has grown increasingly loud.[20] At the intersection of these two developments lies a challenge: how do we prepare "practice-ready" law students when the practice is changing so quickly?

Because law practice is so multi-faceted, specialized, and ever-changing, it is difficult to pin down a particular skill set that lives up to the "practice-ready" moniker. This complexity is exacerbated by the rapid changes brought by technology in the context of a profession slow to adopt change. New law graduates are walking into a minefield in which they may be expected to be in command of traditional legal skills, modern technology, or both. Any understanding of practice-ready research and writing skills must take into account the current state of flux in the way lawyers research and write legal documents.

The changes in legal education are the culmination of years of discussion of the need for law schools to focus more on practical skills, including the Carnegie Report and the MacCrate Report.[21] The current response to the call for practice-ready graduates has been to suggest that law schools should provide students with more experiential opportunities.[22] The new ABA Standard 303(a)(3) provides that law schools must require graduating students to complete "one or more experiential course(s) totaling at least six credit hours."[23] This standard grew out of the ABA House of Delegates Report 10B from the 2011 Annual Meeting of the ABA that law schools implement programs "intended to develop practice-ready lawyers including, but not limited to, enhanced capstone and clinical courses . . . ."[24] These requirements presume that there is a discrete set of skills which, if only clearly identified, can be taught so that new law school graduates can walk into their jobs prepared to handle the requirements of law practice. What these discussions are often missing, however, is a real understanding of

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[20] *See, e.g.*, Condlin, *supra* note 16, at 75–76.

[21] Andrea Boyack, *Get "PRACTICE READY." Get set. Go!*, PRAWFSBLAWG (Aug. 27, 2015, 11:29 AM), http://prawfsblawg.blogs.com/prawfsblawg/2015/08/get-practice-ready-get-set-go-.html; *see also* WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT]; ROBERT MACCRATE ET AL., A.B.A., REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

[22] *Id.*; ABA STANDARDS, *supra* note 16, at 16.

[23] ABA STANDARDS, *supra* note 16, at 16.

[24] A.B.A., DAILY JOURNAL: 2011 ANNUAL MEETING 18 (2011) [hereinafter ABA DAILY JOURNAL], http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_daily_journal_FINAL.authcheckdam.pdf.

what "practice-ready" means, particularly in a time where many aspects of legal work are in flux.

This section considers, in turn, how modern practice—in particular, legal research and writing—have changed and how the call for "practice ready" graduates has evolved.

A. The Realities of Modern Law Practice

That the legal profession is slow to adopt new technology is widely acknowledged.[25] Bar journals are full of articles discussing lawyers' responses to the rapid pace of change.[26] Indeed, the legal profession has the reputation of being conservative and slow to change in general.[27] Many lawyers reject change because they believe it is foreign to the concepts of precedent and stare decisis inherent in the law.[28] Others are willing, but struggle with new technologies.[29] As a result, the changes in legal research and writing have been slow.[30]

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[25] *See* Otey, *Millennials*, *supra* note 1, at 201; A.B.A., *Lawyers Slow To Adopt Cutting-Edge Technology*, A.B.A. J. (Aug. 29, 2008, 06:53 PM), http://www.abajournal.com/news/article/lawyers_slow_to_adopt_cutting_edge_technology/; Cliff Gilley, *Why Are Lawyers Slow to Adopt Technology?*, QUORA (Dec. 1, 2015), https://www.quora.com/Why-are-lawyers-slow-to-adopt-technology; Mary Juetten, *The Future of Legal Tech: It's Not As Scary As Lawyers Think*, FORBES (Feb 19, 2015, 10:00 AM), http://www.forbes.com/sites/maryjuetten/2015/02/19/legal-tech-or-tech-legal/#7a6b1179644d (noting that adoption of technology in the legal field is slow); Denise Magnell, *Legal Industry Slowly Lifts the Bar to Tech Adoption*, BOS. BUS. J. (Nov. 5, 2007, 12:00 AM), http://www.bizjournals.com/boston/stories/2007/11/05/focus3.html?b=1194238800%25255e1545436.

[26] *E.g.*, Jennie Bricker, *Where No One Has Gone Before Practicing Law in the Digital Age*, Or. St. B. Bull., Aug.–Sep. 2015, at 18; Miles J. LeBlanc, *Resistance Is Futile One Author's Take on the Death and Rebirth of the Legal Profession*, 78 Tex. B.J. 856, 856–57 (2015) (reviewing BENJAMIN H. BARTON, GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION (2015)).

[27] Melissa E. Darigan, *Facing Up to Change*, R.I. B.J., July–Aug. 2015, at 3, 4 ("Lawyers as a whole are notorious for being skeptics and slow to react.").

[28] Nelson P. Miller & Derek S. Witte, *Helping Law-Firm Luddites Cross the Digital Divide–Arguments for Mastering Law-Practice Technology,* 12 SMU L. REV. 113 (2009); Toohey, *supra* note 11 at 1.

[29] Joseph D. Lawson, *What About the Majority? Considering the Legal Research Practices of Solo and Small Firm Attorneys*, 106 LAW LIBR. J. 377, 389 (2014).

[30] *See* Nicole Black, *Legal Loop: Lawyers, Technology and a Light at the End of the Tunnel*, THE DAILY RECORD (Nov. 4, 2013), http://nydailyrecord.com/2013/11/04/legal-loop-lawyers-technology-and-a-light-at-the-end-of-the-tunnel/ (lamenting the slow adoption of technology and asserting that "many lawyers continue to practice law as if it were still 1999").

Nonetheless, change is occurring, and while some lawyers are resistant to technology and even take pride in rejecting it, others are early adapters of each new development.[31] Regardless of their preferences, lawyers will have to adapt to new technology as part of their ethical duty of competent representation.[32] In 2012, the ABA revised the comments to Rule 1.1 of the ABA Model Rules of Professional Conduct to explicitly recognize the effect of technological developments on law practice.[33] The new Comment 8 now suggests that staying current in the law and its practice includes staying abreast of "the benefits and risks associated with relevant technology . . . ."[34] This sends a strong signal that lawyers should, at a minimum, be aware of how changing technology is influencing the practice of law.

Technology is gradually, but inevitably, infiltrating every area of law practice.[35] The ABA has developed a Legal Technology Resource Center to address the multiple ways technology affects law practice.[36] The changes to legal research and writing have been profound. Legal information has been digitized and placed in searchable online databases.[37] The sophistication of word processing and electronic delivery of information facilitates legal communication in new and different ways.[38] Lawyers are starting to employ techniques such as hyperlinked citations and

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[31] Toohey, *supra* note 11, at 1; *see also* Katerina P. Lewinbuk, *There Is No App for That: The Need for Legal Educators and Practitioners to Comply with Ethical Standards in the Digital Era*, 24 U. FLA. J.L. & PUB. POL'Y 321, 354–55 (2013) (suggesting that lawyers will embrace technological advances through education).

[32] *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2015).

[33] *Id.*

[34] *Id.*

[35] *See* Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC: JALWD 1, 1 (2015) [hereinafter Margolis, *Medium*].

[36] Legal Technology Resource Center, *About Us*, A.B.A. (2016), http://www.americanbar.org/groups/departments_offices/legal_technology_resources/about_us.html.

[37] *See* Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 85 (2007); Margolis & Murray, *Say Goodbye to the Books*, *supra* note 12, at 117–18; Susan C. Wawrose, *What Do Legal Employers Want to See in New Graduates? Using Focus Groups to Find Out*, 39 OHIO N.U.L. REV. 505, 508 (2013).

[38] Kristen Tiscione, *The Rhetoric of E-Mail in Law Practice*, 92 OR. L. REV. 525, 526–28 (2013); Joe Dysart, *Catch up with tech or lose your career, judges warn lawyers*, A.B.A. J. (Apr. 1, 2014), http://www.abajournal.com/mobile/mag_article/catch_up_with_tech_or_lose_your_career_judges_warn_lawyers; Debora J. Merritt, *Why Has Law Practice Changed?*, LAW SCHOOL CAFE (Dec. 8, 2013), http://www.lawschoolcafe.org/thread/why-has-law-practice-changed/; Daniel Sockwell, *Writing A Brief for the iPad Judge*, COLUM. BUS. L. REV. (Jan. 14, 2014), http://cblr.columbia.edu/archives/12940.

embedded images in court documents, although these techniques have not been fully embraced.[39] The changes to both legal research and legal communication brought on by computer technology have been rapid and comprehensive.[40]

Lawyers operate in an increasingly, and almost exclusively, digital world as they adapt to these changes and incorporate them into law practice.[41] In the early phases of the digital revolution, technology was used to transfer the print legal world to an online environment.[42] Early electronic legal research platforms, which the legal profession greeted with distrust, mimicked the legal organization found in the print world.[43] As word processing technology began to take over from the typewriter, legal documents produced with word-processing programs looked identical to those produced by older technologies.[44] Technology was used primarily to create familiar documents more easily, rather than to re-envision the forms those documents could take.[45] As digital technologies improved and proliferated, lawyers have moved further away from those traditional forms, developing new approaches to research and writing. At the same time, older technologies have not gone away, and lawyers of different generations continue to use a blend of older and newer technologies. An understanding of just how research and writing has changed is an important first step in attempting to identify practice-ready skills.

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[39] *See* Margolis, *Medium*, *supra* note 35, at 28.

[40] Katrina June Lee et al., *A New Era: Integrating Today's "Next Gen" Research Tools Ravel and Casetext in the Law School Classroom*, 41 RUTGERS COMPUT. & TECH. L.J. 31, 38–39 (2015) (noting the rapid proliferation of new legal research technologies); Margolis, *Medium*, *supra* note 35, at 2 (noting the changes brought by new reading and writing technologies).

[41] *See* Margolis, *Medium*, *supra* note 35, at 2–3.

[42] *Id.* at 2.

[43] Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 312 (2000) [hereinafter Berring, *Legal Research*]; Margolis & Murray, *Say Goodbye to the Books*, *supra* note 12, at 123.

[44] Dennis Baron, *A Better Pencil: Readers, Writers, and the Digital Revolution* xiii (2009) (noting that computers achieved "the initial impact by allowing writers to produce familiar documents").

[45] Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1700 (2014) (indicating that technology has been used to reinforce text-centered legal discourse, rather than to revolutionize legal communication).

1. How Research Has Changed

The legal profession is in the midst of a major paradigm shift in legal research, with research platforms and search protocols evolving daily.[46] For many decades, the process of legal research remained largely unchanged, rooted in a bibliographic approach that reflected the print publication of legal materials.[47] However, as legal research software has evolved and legal content migrated online, it is now impossible to talk about legal research from a purely bibliographic perspective. The organization of legal materials in digital databases is getting further and further away from the world of books it once replicated.[48] Instead of digests, indexes and other finding tools, lawyers conduct most of their research electronically, typing requests into a search box.[49]

The changes in legal research have come as a result of the evolution of legal publishing, and new developments in the methods of accessing both legal and nonlegal information. For most of the last two centuries, the world of legal publishing was relatively static and, as a consequence, so was legal research.[50] Legal information was published in a stable, self-contained system, controlled largely by the West Publishing Company.[51] Statutes were published in code books. Cases were published in case reporters. Secondary sources were traditionally limited to legal encyclopedias, treatises, and scholarly journals. All of these sources were accessed by using some kind of an index, and the process of legal research was relatively straightforward.[52]

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[46] Ellie Margolis & Kristen Murray, *Mind the Gap*, 20 LEGAL WRITING: J. LEGAL WRITING INST. 25, 25 (2015).

[47] *Id.*

[48] *See* Kari Mercer Dalton, *Bridging the Digital Divide and Guiding the Millennial Generation's Research and Analysis*, 18 BARRY L. REV. 167, 180 (2012) (discussing the nonlinear, nonbibliographic nature of new legal research platforms).

[49] Margolis & Murray, *Say Goodbye to the Books*, *supra* note 12, at 119.

[50] *See* Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1675 (2000).

[51] *Cf. id.* at 1679–80.

[52] *See* Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 929–30 (2011) [hereinafter Margolis, *Authority Without Borders*] (describing process of researching using indexes). Legal research texts confirm this approach to conducting legal research. *See*, *e.g.*, Steven M. Barkan et al., *Fundamentals of Legal Research*, 78–80, 82–83, 232–33 (9th ed. 2009); Laurel Currie Oates & Anne Enquist, *Just Research*, 46–48 (3rd ed. 2011); Amy E. Sloan, *Basic Legal Research: Tools and Strategies*, 51, 74–76, 206–09 (5th ed. 2012).

Whether searching for secondary sources, statutes, or cases, the process of accessing the information was relatively similar.[53] To search in a secondary source, a legal researcher would look for key terms in either the index or table of contents, find a relevant article, and read it to gain general knowledge of the subject, as well as citation to primary legal authority.[54] To find a statute, a researcher would look in a key word index to find a statutory code citation, and look up that citation in the relevant code volume.[55] To find a case, a researcher would similarly look up key terms in the index of a digest, find a relevant key number, find the entry for that key number, and obtain citations to case reporters where the cases were located.[56]

In addition to the research process being similar across sources, the organization of print materials is neatly separated by jurisdiction and type of source (cases, statutes, etc.).[57] Looking for cases in the West's California Digest yields citations only to California cases. Looking up a key word in the index to the U.S. Code leads only to citations to a federal statute. To gain access to the source material in books, the legal researcher had to identify and search within a particular jurisdiction, and the organization of the books sent clear signals as to which jurisdiction the researcher was in. There was little possibility that a researcher looking for a Pennsylvania case would accidentally find and retrieve a case from North Dakota. The print based system of legal authority provided legal researchers with easily identifiable means of locating materials and understanding what they were.[58]

When legal information became "digitized" and migrated online, that landscape changed and destabilized.[59] While early forms of electronic research may have involved the transplanting of print research techniques into the electronic format, more recent technologies, combined with major changes in the provision of legal information, have wrought fundamental changes in the way researchers seek and evaluate relevant information.[60]

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[53] *See* Margolis & Murray, *Say Goodbye to the Books*, *supra* note 12, at 122.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Margolis, *Authority Without Borders*, *supra* note 52, at 925. Even a source like a regional reporter contains only cases, even though those cases may be from multiple jurisdictions.

[58] *Id.* at 911; *see also* F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 571 (2002).

[59] Berring, *Legal Research*, *supra* note 43, at 305–06.

[60] *See, e.g.*, *id.* at 312–14; Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift*, 93 LAW LIBR. J. 285, 286–289 (2001); Ian Gallacher,

Legal research is now a function of search algorithms, user interaction, and other technology-based search capabilities.[61]

The search engine is now the vehicle through which material in online databases is accessed.[62] While there are individual differences in search engines, the basic function is the same. The researcher enters search terms into a search box, which then uses an algorithm to retrieve results matching those search terms.[63] Unlike print research, the organization of legal information accessed via electronic research technology is not readily apparent, so whether using a fee-paid service, or free online website, the legal researcher is likely to conduct research without the filter provided by the traditional print legal indexing systems.[64]

While in some instances, the development of new technology pushes the old technology out, this is not the case with legal research technology. Even as Westlaw and Lexis continue to evolve, and new products such as Bloomberg Law, Ravel Law, and Casetext continue to proliferate, the books are still published, and previous generations of search products still exist. The degree to which new products have been adopted by law firms and other legal practice groups varies widely.[65] Almost all legal employers subscribe to electronic legal research services, while fewer and fewer keep their print subscriptions active (a switch from when electronic legal research debuted and only the largest organizations and firms subscribed).[66] Thus, some lawyers continue to research in books, though increasingly few. Many experienced practitioners are not versed in the newer research products and speak a research language based on older, sometimes obsolete, technology; some are highly skeptical of or outright reject newer methods. This is the practice environment into which new law graduates must enter.

Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation, 39 AKRON L. REV. 151, 163–67 (2006); Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 HARV. J.L. & TECH. 223, 226 (2008); Richard J. Ross, *Communications Revolutions and Legal Culture*, 27 LAW & SOC. INQUIRY 637, 640–46 (2002).

[61] *See* Lee, et al., *supra* note 40, at 35.

[62] Margolis & Murray, *Say Goodbye to the Books*, *supra* note 12, at 124.

[63] *See* Bast & Pyle, *supra* note 60, at 293–95.

[64] *See* William R. Mills, *The Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age*, 53 N.Y. L. SCH. L. REV. 917, 932 (2008) (noting the "growing resistance" to using subject indexes when conducting legal research).

[65] *See generally* SUSAN NEVELOW MART ET AL., ALL-SIS TASK FORCE ON IDENTIFYING SKILLS AND KNOWLEDGE FOR LEGAL PRAC., A STUDY OF ATTORNEYS' LEGAL RESEARCH PRACTICES AND OPINIONS OF NEW ASSOCIATES' RESEARCH SKILLS (2013), http://www.aallnet.org/sections/all/storage/committees/practicetf/final-report-07102013.pdf.

[66] *See* M.P. McQueen, *A New Look for Law Libraries: Fewer Books, More Tech*, THE AMERICAN LAWYER (June 29, 2015).

2. How Writing Has Changed

As with legal research, the digital revolution has brought rapid changes to writing after centuries of relative stability.[67] Legal writing has changed both in the means of producing it and in the forms of the writing itself.[68] Lawyers can produce and deliver documents more quickly and easily than ever before in history. No longer are briefs created by writing out analysis in longhand followed by painstaking transfer to print via a typewriter. The days of cumbersome word processing programs and slow printers have come and gone. Today's technology allows the writer to open a window, or an app, create a document on-screen, and instantly deliver it via email, e-filing, or other electronic transfer. Digital technology creates an entirely different writing experience than existed previously.[69]

Prior to the development of current digital technologies, the biggest impact on the process of writing was the typewriter.[70] Throughout the nineteenth century, legal documents were handwritten, drafted by lawyers and meticulously copied by scriveners.[71] The typewriter, which lawyers helped develop in the late nineteenth and early twentieth century, allowed for faster and more professional creation of legal documents.[72] Even with the typewriter, however, legal analysis was still handwritten, and then transferred to type by third parties, most often secretaries.[73] It was during this time that the formats for the office memo and legal brief were entrenched, and they did not change substantially over the ensuing hundred years.[74]

The transition to digital technology meant that legal writers were creating text and typing simultaneously. The process of constructing meaning

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[67] *See* STEVEN STARK, WRITING TO WIN: THE LEGAL WRITER xiv-xv (1999) (noting rapid changes to writing technology at end of twentieth century compared to previous centuries).

[68] *See* Margolis, *Medium*, *supra* note 35, at 1 (acknowledging that "[t]he dramatic changes that technology has brought to the world of legal research and writing are well documented" and that "[t]he changes to both writing and reading brought on by computer technology have been rapid and comprehensive").

[69] *See generally* M.H. Hoeflich, *From Scrivener to Typewriters: Document Production in the Nineteenth-Century Law Office*, 16 GREEN BAG 2D 395 (2013).

[70] Tiscione, *supra* note 38, at 527 (describing the difference between composing on a keyboard and by hand).

[71] Hoeflich, *supra* note 69, at 397.

[72] *Id.* at 402–03.

[73] *Id.* at 406.

[74] See Kirsten K. Davis, *"The Reports of My Death Are Greatly Exaggerated": Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 OR. L. REV. 471, 498–99 (2013).

through writing[75] is more immediate when there is no barrier between the writer and the text, which appears immediately on a screen as if it is a final product. This shorter "distance" from thought to text changes the writer's relationship with the subject, so the writing equipment itself changes the thinking process.[76] Digital natives, who have grown up composing text almost exclusively on screens, thus have a very different experience with the writing process than lawyers who began practicing law in the twentieth century.

Because digital technologies create a closer connection between writer and text, and make editing a much simpler prospect, the writer has more freedom to write longer texts and less fear of making mistakes that cannot be corrected, reducing writer's block.[77] The ability to write more quickly and easily allows the writer to quickly capture complex thoughts and write longer, more complex sentences.[78] Seeing the text "on screen" also helps the writer to distance herself and read with a more critical eye.[79] This, coupled with the ease of deleting and moving text, makes it more likely that the writer will make instantaneous changes.[80] With less at stake, it is at least possible that the writer will not think through the analysis as thoroughly as she might have when making corrections was more cumbersome. This could create friction between older attorneys who are more accustomed to thinking of writing as relatively fixed, and digital natives who are more comfortable with unpolished drafts.[81]

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[75] New Rhetoric theory posits that the process of research, reading, and writing construct knowledge. For a fuller explanation, see, for example, Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 156–57 (1999). *See also* Susan DeJarnatt, *Law Talk: Speaking, Writing and Entering the Discourse of Law*, 40 DUQ. L. REV. 489 (2002); Ellie Margolis & Susan DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 98–99 (2005) (discussing influence of rhetoric and composition theory on legal writing pedagogy focusing on the writing process).

[76] *See* Nicholas Carr, *Is Google Making Us Stupid?*, THE ATLANTIC (July–Aug. 2008), http://www.theatlantic.com/magazine/archive/2008/07/is-google-making-us-stupid/306868/2 (discussing the Internet and its effects on reading and peoples' thought processes).

[77] Tiscione, *supra* note 38, at 527.

[78] *Id.* (citing Luuk Van Waes & Peter Jan Schellens, *Writing Profiles: The Effect of the Writing Mode on Pausing and Revision Patterns of Experienced Writers*, 35 J. PRAGMATICS 829, 833 (2003)).

[79] *Id.* at 527–28.

[80] *Id.* at 528.

[81] *See, e.g.*, Ann Sinsheimer & David J. Herring, *Lawyers at Work: A Study of the Reading, Writing, and Communication Practices of Legal Professionals*, 21 LEGAL WRITING: J. LEGAL WRITING INST. 63, 104 (2016) (presenting results of study showing new associates write several drafts before presenting them to supervisors).

Outside of the legal context, electronic writing and communication has tended to be more informal than traditional legal writing. While older generations are also increasing their use of informal writing, digital natives are doing so at a much faster rate.[82] This generation has grown up writing digital text in a variety of media. They have spent their lives emailing, texting, tweeting—in other words, writing in short formats.[83] Research shows that teenagers "write more than any generation has since the days when telephone calls were rare and the mailman rounded more than once a day."[84] It is clear that the trends towards more informal and shorter writing will increasingly permeate the legal profession as this generation moves deeper into the legal field, and tension between formal and informal approaches will continue.[85]

Even as digital technology has made it easier to produce longer, more complex documents, the onset of mobile technologies has led to a growth of shorter, more informal writing.[86] Increasingly over the last twenty years, lawyers have shifted to communicating through email and other mobile platforms.[87] Lawyers are taking advantage of mobile technology applications for legal research, writing, and document review.[88] Writing on mobile devices, combined with the increased use of email, has led lawyers

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[82] *See* Lindsey P. Gustafson, *Texting and the Friction of Writing*, 19 LEGAL WRITING: J. LEGAL WRITING INST. 161, 165 (2014) (highlighting dominance of texting among younger generations correlating to an increase in informal writing).

[83] *See id.*

[84] *Id.* at 166 (quoting Rosalind. S. Helderman, *Click by Click, Teens Polish Writing: Instant Messaging Teaches More than TTYL and ROFL*, WASH. POST, May 20, 2003, at B1).

[85] *See*, Sinsheimer & Herring, *supra* note 81 at 78 (noting that study subject scrutinized email carefully to avoid disapproval of more senior partner).

[86] *See* Gustafson, *supra* note 82, at 165–67 (discussing students' growing preference for texting over all other forms of communication).

[87] *See* ROBERT B. DUBOSE, LEGAL WRITING FOR THE REWIRED BRAIN: HOW TO COMMUNICATE IN A PAPERLESS WORLD 2 (2010), http://www.texasbar.com/flashdrive/materials/managing_your_law_practice/Special_ManagingYourLawPracticeCLE_LegalWritingRewiredBrain_Dubose_FinalArticle.pdf; Kendra Huard Fershee, *The New Legal Writing: The Importance of Teaching Law Students How to Use E-Mail Professionally*, 71 MD. L. REV. ENDNOTES 1, 2 (2011) (citing Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32, 32–33 (2008)) (asserting that "the most common mode of written communication used in law offices today is e-mail").

[88] Davis, *supra* note 74, at 480–81; *see also* Ashley Hallene, *Top iPad Apps for Lawyers*, A.B.A. GP SOLO (2013), http://www.americanbar.org/publications/gp_solo/2013/march_april/top_ipad_apps_for_lawyers.html; Brennan Sharp & Steve Ravenscroft, *11 Must-Have Apps for Lawyers*, A.B.A. J., http://www.abajournal.com/gallery/mobilelawyerapps/790 (last visited Nov. 10, 2016).

to communicate in shorter formats.[89] Because there is no established convention for these shorter means of writing legal analysis, lawyers who wish to use them have largely had to find their own way.[90]

The move to digital law practice has led to a new form of legal writing—the email memo.[91] The key feature of the email memo is that the lawyer sends legal analysis directly in the body of the email, rather than attaching a separate legal document.[92] While some scholars have raised concerns about the rigor of analysis in the shorter, more informal email memo,[93] the inescapable fact is that email memos have become the predominant means of communicating analysis between lawyers.[94]

In addition to new short form writing like email research summaries and legal analysis, many things are changing about more traditional forms of legal writing such as memoranda and briefs. Lawyers have started to recognize the value of document design, varying fonts and typeface to alter the traditional appearance of legal documents and make them more readable in electronic formats.[95] The increased use of small-screen mobile devices including phones and tablets has led to new ways of communication organization to make it easier for readers who scroll rather than turn pages.[96] Likewise, lawyers are starting to use shorter paragraphs, bullet points and other visual ways of separating concepts. Driven largely by preferences expressed by judges, many lawyers are beginning to include

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[89] *See* Gustafson, *supra* note 82, at 165–67.

[90] *See, e.g.*, Katrina June Lee, *Process over Product: A Pedagogical Focus on Email as a Means of Refining Legal Analysis*, 44 CAP. U. L. REV. 655, 655 (2016) (describing lawyers who graduated at turn of the century as "self-taught experts" in email communication).

[91] *See generally* Charles Calleros, *Traditional Office Memoranda and E-mail Memos, In Practice and in the First Semester*, 21 PERSP.: TEACHING LEGAL RES. & WRITING 105, 105–06 (2013); Davis, *supra* note 74, at 482–84; Robbins-Tiscione, *supra* note 87, at 33–34; Tiscione, *supra* note 38, at 528–29.

[92] *See* Calleros, *supra* note 91, at 105.

[93] Davis, *supra* note 74, at 486–89.

[94] Robbins-Tiscione, *supra* note 87, at 36; *see also* Sinsheimer & Herring, *supra* note 81, at 99 (providing results of recent study showing that new associates summarize research findings in email rather than writing formal memoranda).

[95] Margolis, *Medium*, *supra* note 35, at 16; *see also* MATTHEW BUTTERICK, TYPOGRAPHY FOR LAWYERS 180 (2010); Jason P. Steed, *Font Matters*, FORMA LEGALIS (May 25, 2016), https://formalegalis.org/2016/05/25/font-matters/; Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 LEGAL COMM. & RHETORIC: JALWD 108, 131–34 (2004).

[96] Margolis, *Medium*, *supra* note 35, at 18; Jason P. Steed, *5 Tips For Writing Briefs For Tablets*, LAWYERIST (Sep. 22, 2014), https://lawyerist.com/76679/5-tips-writing-briefs-tablets/.

hyperlinks for all citations in briefs and other court documents.[97] Lastly, more and more lawyers are incorporating images into legal documents, both to present factual information and legal analysis.[98] All of these new ways of doing things are driven by the possibilities created by new writing technologies.

The combination of all of these factors—the ease of creating professional looking documents, the simultaneous ability to write more complex thoughts more quickly and rise of multiple forms of informal writing, the different sense of audience, and the facility with writing on the go—will only increase as digital natives move into higher ranks of law practice. At the same time, older approaches have not disappeared. While it is unlikely that currently practicing lawyers are writing on typewriters, many use older word-processing software, such as WordPerfect.[99] While on its way out, the Blackberry is still in high use in many law firm settings.[100] Many lawyers remain cautious and conservative about changing traditional forms of writing, especially in court documents.[101] New law school graduates, in order to be practice-ready, will have to be prepared to navigate these tensions.

B. The Idea of Practice-Readiness

The call to produce "practice-ready" graduates has become an increasingly prevalent part of the discussion on legal education. This comes in the wake of outspoken critiques of traditional pedagogy,[102] calls

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[97] *See, e.g.*, Richard G. Kopf, *Top Ten Legal Writing Hints When the Audience is a Cranky Federal Trial Judge*, HERCULES & THE UMPIRE (Jun. 20, 2013), https://wednesdaywiththedecentlyprofane.me/2013/06/20/top-ten-legal-writing-hints-when-the-audience-is-a-cranky-federal-trial-judge/.

[98] *See* Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 LEGAL WRITING: J. LEGAL WRITING INST. 57, 81-82 (2015); Porter, supra note 48, at 1723.

[99] Jeff Bennion, *The Rage-Inducing Word Versus WordPerfect Debate*, ABOVE THE LAW (Jun. 10, 2014, 4:02 PM), http://abovethelaw.com/2014/06/the-rage-inducing-word-versus-wordperfect-debate/.

[100] Jeff Richardson, *2015 ABA Tech Survey Shows 60% of Attorneys Use an iPhone, 40% Use an iPad*, IPHONE J.D. (Aug. 17, 2015), http://www.iphonejd.com/iphone_jd/2015/08/2015-aba-tech-survey.html.

[101] *Cf.* Calleros, *supra* note 91, at 105.

[102] *See, e.g.*, Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. SCH. L. REV. 203, 220–30 (2012); Peter S. Vogel, *The Future of Legal Education: Preparing Law Students to Be Great Lawyers*, 93 OR. L. REV. 893, 894 (2015); Cynthia L. Fountaine, *Dean Frank Wu on the Problems of Legal Education*, LAW DEANS ON LEGAL EDUCATION BLOG (Mar. 2, 2014), http://lawprofessors.typepad.com/law_deans/2014/03/

for change from legal employers,[103] and new standards issued by the ABA.[104] The traditional focus on doctrinal instruction and the Socratic method, with the goal of "thinking like a lawyer" has been supplemented, if not supplanted, by the idea that law schools ought to do more to prepare students to actually *be* lawyers.[105] Yet despite the increasing commitment to producing practice-ready graduates, legal educators and scholars have not engaged in much discussion of what "practice-ready" actually means in connection with the realities of law practice. In addition, although legal research and writing, fundamental skills for law practice, are a core part of every law school's curriculum, these subjects have been largely left out of the "practice-ready" discussion, despite the fact that they are two areas in which new lawyers' skills have drawn the sharpest critiques from members of the profession.[106] Legal research and writing are also areas where dramatic changes have already occurred and continue to be ripe with potential for innovative changes in practice.

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dean-frank-wu-on-the-problems-of-legal-education.html.

[103] *See, e.g.*, Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 90 (2010) ("Law schools primarily produce one thing: graduates who—for the most part—plan to practice law in one or more fields, in connection with one or more institutions, for some period of time. Increasingly, critics and commentators, inside and outside academia, have suggested that law schools can perform that central function better."); Sam Favate, *Law Schools Offering More Practical Skills Courses in Weak Job Market*, WALL ST. J. (Jul. 6, 2012 at 3:00 PM), http://blogs.wsj.com/law/2012/07/06/survey-law-schools-offering-more-practical-skills-courses-in-weak-job-markek/; Martha Neil, *NY State Bar Urges ABA to Encourage Law Schools to Focus on Educating 'Practice Ready' Attorneys*, A.B.A. J. (Aug. 5, 2011, 01:59 PM), http://www.abajournal.com/news/article/new_york_state_bar_urges_aba_to_strengthen_law_school_focus/.

[104] ABA STANDARDS, *supra* note 16, at 16.

[105] *See, e.g.*, Sherri Lee Keene, *One Small Step for Legal Writing, One Giant Leap for Legal Education: Making the Case for More Writing Opportunities in the "Practice-Ready" Law School Curriculum*, 65 MERCER L. REV. 467, 468 (2014); Alex Berrio Matamoros, *Answering the Call: Flipping the Classroom to Prepare Practice-Ready Attorneys*, 43 CAP. U. L. REV. 113, 114 (2015); Lynnise Pantin, *Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum*, 41 OHIO N. U. L. REV. 61, 61 (2014); Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 LEGAL COMM. & RHETORIC: JALWD 118, 118 (2008); Suzanne J. Schmitz & Alice M. Noble-Allgire, *Reinvigorating the 1L Curriculum: Sequenced "Writing Across the Curriculum" Assignments As the Foundation for Producing Practice-Ready Law Graduates*, 36 S. ILL. U.L.J. 287, 288 (2012); David V. Snyder, *Closing the Deal in Contracts: Introducing Transactional Skills in the First Year*, 34 U. TOL. L. REV. 689, 689 (2003).

[106] *See* ABA STANDARDS, *supra* note 16, at 16.

1. What does "Practice-Ready" Mean?

While much discussed, the term "practice-ready" is not well-defined.[107] Law schools use the term as part of their pitch to prospective students.[108] The general understanding is that the term suggests that students should learn more lawyering skills in law school and rely less on on-the-job training in the first few years of practice. Yet, reasonable minds can differ about how "ready" law graduates can and should be and what comprises the set of skills that are universal and transferable.[109]

The exact origin of the phrase "practice-ready" is unknown but the idea is not new.[110] As early as 1992, the MacCrate Report sought to advise law schools on how to narrow the gap between legal education and legal practice.[111] Specifically, the MacCrate Report challenged law schools to provide a program of study that would cultivate the "skills and values" required in the profession.[112] In the years that followed, law school faculties and administrations spent much time discussing and debating whether and how the report's recommendations should be implemented in law school curricula.[113]

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[107] *See* David Barnhizer, "Practice Ready" Law Graduates 2 (2013) (unpublished manuscript) (on file at https://works.bepress.com/david_barnhizer/83/). Professor Barnhizer comments:

> Although there has been an increase in demands that American legal education ought or must become more focused on producing "practice ready graduates" the idea of "practice ready" is poorly defined and elusive. I am certain that when some hear the words they immediately think about the most narrow and technical form of "skills" training that brings to mind something akin to a community college vocational school.

Id.

[108] *E.g.*, *Practice Ready*, CATHOLIC UNIV. OF AM., http://www.law.edu/PracticeReady.cfm (last visited Nov. 14, 2016); Gildin, *supra* note 15, at 33; *Educating the Complete Lawyer*, UNIV. OF DETROIT MERCY, http://www.law.udmercy.edu/index.php/career-services/prospective-students/learn-more-about-udm-laws-practice-ready-curriculum (last visited Nov. 14, 2016).

[109] *See, e.g.*, Lisa A. Kloppenberg, *Training the Heads, Hands and Hearts of Tomorrow's Lawyers: A Problem Solving Approach*, 2013 J. DISP. RESOL. 103, 104 (defining "practice-readiness" as providing students with "the initial skills needed to flourish in the modern workplace").

[110] *See* Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C.J.L. & SOC. JUST. 247, 250 (2012) (noting that the traditional doctrinal approach to teaching law has faced "almost a century of critique" that this approach does not provide enough preparation for the profession).

[111] MACCRATE REPORT, *supra* note 21, at 202.

[112] *Id.* at 236.

[113] *See, e.g.*, Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 110 (2001) ("The

In 2007, both "Best Practices for Legal Education"[114] and the Carnegie Report[115] were published. Best Practices challenged law schools to "significantly improve their students' preparation for their first professional jobs."[116] The Carnegie Report included practice competence and professionalism as two of the three major goals of legal education and noted an "increasingly urgent need [for law schools] to bridge the gap between analytical and practical knowledge."[117] The Carnegie Report noted that although legal analysis was the third major goal, legal education should place less emphasis there and more emphasis on practice competence and professionalism.[118]

During the economic downturn that began around 2008, the mainstream media also began to query whether law schools were doing enough to prepare students to enter the profession.[119] Legal employers began to call for more practical training in law schools because clients no longer wanted to underwrite on-the-job training for new law graduates.[120] The bench and bar encouraged the same.[121] Those who advanced these positions noted that

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MacCrate Report triggered a flurry of activity in the world of legal education. At various conferences, and in an array of law review articles, commentators analyzed and criticized the Report and its recommendations, but also discussed strategies for the Report's implementation.").

[114] ROY STUCKEY ET. AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 8 (2007) [hereinafter BEST PRACTICES] ("The conundrum that law schools face is that even the most well-designed program of instruction will not prepare students to provide a full range of legal services competently upon graduation after three years.").

[115] CARNEGIE REPORT, *supra* note 21.

[116] BEST PRACTICES, *supra* note 114, at 13.

[117] CARNEGIE REPORT, *supra* note 21, at 8.

[118] *Id.* at 8–10.

[119] *See* Lincoln Caplan, *Editorial, An Existential Crisis for Law Schools*, N.Y. Times, Jul. 15, 2012, at SR10; Ashby Jones & Joseph Palazzolo, *What's a First Year Lawyer Worth?*, Wall St. J., Oct. 17, 2011, at B1; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. Times, Nov. 19, 2011, at A1; Karen Sloan, *Reality's Knocking: The Ivory Tower Gives Way to the Real World's Demands*, Nat'l L.J. & LEGAL TIMES, Sep. 7, 2009, at 1, 15.

[120] *See, e.g.*, Erwin Chemerinsky, *The Ideal Law School for the 21st Century*, 1 U.C. IRVINE L. REV. 1, 14 (noting that law schools used to "adopt[] the mantra that they teach students to think like lawyers and leave practical training for after graduation"); *see also* Myra E. Berman, *Portals to Practice: A Multidimensional Approach to Integrating Experiential Education into the Traditional Law School Curriculum*, 1 J. EXPERIENTIAL LEARNING 157, 158 (mentioning "the reluctance and often the incapability of law firms to bear the cost of training new attorneys in basic lawyering skills"); Tierney Plumb, *A Law School-Run Law Firm*, NAT'L JURIST, Feb. 2012, at 23 ("Many law firms are no longer willing to finance the training of entry-level attorneys . . . .").

[121] Neil, *supra* note 103.

practice-readiness did not mean that law schools would produce fully-formed lawyers who did not need any further skills training or professional development, just that they were more prepared to start practice than they had been previously.[122]

Detractors, however, pushed back on the notion that there should be significant changes to legal education.[123] Critics pointed out that law is not a "unitary profession," and not only is it impossible to train students for all forms of law practice, it is also impractical to train them for a particular practice area that they may not wind up in upon graduation.[124] Even those who favored a practice-readiness standard recognized law schools cannot teach all students to do all things in only three years.[125] This is similar to some of the debates that followed the publications of the MacCrate Report, the Carnegie Report, and the Best Practices Report.[126]

Some have attempted to carve out a compromise position, one that acknowledges the need for change but cautioning against a singular focus on preparedness for practice.[127] Regardless, changes have mostly come in the form of additions, not subtractions, to the general curriculum. For example, some law schools have expanded their clinical offerings and skills-focused classes in both the first year and upper-level curricula.[128]

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[122] Stephanie M. Wildman, *In Honor of Angela Harris: Finding Breathing Space, Embracing the Contradictions, and "Education Work"*, 47 U.C. DAVIS L. REV. 1047, 1059 n.48 (2014) ("This emphasis on skills to begin work suggests a definition of practice readiness that recognizes 'practice' implies continuing professional development and not a final goal.").

[123] Barry, *supra* note 110, at 250 ("Yet, many in the law academy still hold onto the traditional approach, believing it will—or unconcerned that it will not—give students the grounding required to handle the pressing needs of their clients, whether an individual, corporation, government entity, or NGO.").

[124] Condlin, *supra* note 16, at 86.

[125] Keene, *supra* note 105, at 471–72 ("Given the breadth and diversity of legal jobs, we soon discover that legal educators can no more meet this goal than a goal to introduce law students to every area of law or legal concept that they will subsequently encounter.").

[126] *See, e.g.*, Boyack, *supra* note 21.

[127] Alfred S. Konefsky & Barry Sullivan, *There's More to the Law than 'Practice-Ready'*, CHRON. OF HIGHER EDUC. (Oct. 23, 2011), http://chronicle.com/article/Theres-More-to-the-Law-Than/129493/; Starla J. Williams & Iva J. Ferrell, *No at-Risk Law Student Left Behind: The Convergence of Academic Support Pedagogy and Experiential Education*, 38 S. ILL. U.L.J. 375, 378 (2014) ("The basic conflict between imparting legal knowledge and infusing practical skills forms the crux of this long-standing clash between academicians and practitioners of the bar, while reformers of legal education aptly recognize that both approaches are essential.").

[128] *See, e.g.*, Lynnise Pantin, *Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum*, 41 OHIO N. U. L. REV. 61, 72 (2014) (calling for a 1L course on transactional skills).

Like it or not, practice-readiness is going to remain part of the curricular conversation because of the new ABA standards.[129] Following the recommendation from the 2011 Annual Meeting of the ABA,[130] some law school standards were revised. For example, ABA Standard 301(a) requires that "[a] law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession."[131] Standard 302 requires that "[a] law school shall establish learning outcomes that shall, at a minimum, include competency in the following: . . . (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context . . . ."[132]

2. Legal Research and Writing as Practice-Ready Skills

Legal research is almost universally regarded as one of the skills that new graduates should possess.[133] It is one of the five essential skills for legal practice identified in the MacCrate Report.[134] In a 2007 survey of law firm librarians, 84.8% of them ranked cost-effective research as the most important research task.[135] According to the 2014 ABA Technology Report, attorneys spend approximately one-fifth of their billable hours engaged in legal research.[136]

Criticism of law graduates' legal research skills has been as much of a part of the conversation as its importance. In 1993, just after the issuance of the MacCrate Report, Professor Donald Dunn stated that "No one seems happy these days with either the quality of the legal research instruction provided by law schools or the quality of the legal research being conducted

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[129] ABA STANDARDS, *supra* note 16, at 15–25.

[130] ABA DAILY JOURNAL, *supra* note 24, at 18 ("[T]he American Bar Association urges legal education providers to implement curricular programs intended to develop practice-ready lawyers including, but not limited to, enhanced capstone and clinical courses that include client meetings and court appearances.").

[131] ABA STANDARDS, *supra* note 16, at 15. Standard 301(b) states that "A law school shall establish and publish learning outcomes designed to achieve these objectives." *Id.*

[132] *Id.*

[133] MACCRATE REPORT, *supra* note 21, at 135.

[134] *Id.* The other four were factual investigation, communication, counseling, and negotiation. *Id.* Note that the Carnegie Report did not mention legal research. *See* CARNEGIE REPORT, *supra* note 21, at 8–10.

[135] Patrick Meyer, *Law Firm Legal Research Requirements for New Attorneys*, 101 LAW LIB. J. 297, 311 (2009).

[136] Joshua Poje, *Legal Research*, A.B.A., http://www.americanbar.org/publications/techreport/2014/legal-research.html (last visited Nov. 14, 2016).

by law students and recent law school graduates."[137] Dunn attributed the decline in legal research skills to (1) an increased emphasis on writing and (2) the adoption of computer-assisted legal research.[138]

The legal writing abilities of new graduates have also garnered some negative attention. Following the publication of the MacCrate Report, Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit noted that, "Another matter of serious concern in legal education is the lack of good training in legal writing" because "[m]any lawyers appear not to understand even the most elementary matters pertaining to style of presentation in legal writing . . . ."[139] Similarly, a 2003 survey of attorneys, judges, and legal writing professors found "almost universal agreement, across the groups, that most legal writing is weak."[140]

These criticisms have persisted as the commentary about practice-readiness has expanded in recent years. Critics note that legal research and writing programs have been slow to change,[141] that new graduates are "unable to perform cost-effective research, are unable to think conceptually when researching, and are unable to use print and online sources interchangeably."[142] There have also been repeated calls for more writing opportunities in the law school curriculum, either through more than the ABA's minimum requirements[143] or more writing opportunities across the curriculum.[144]

But what does it mean to be a "practice-ready" legal researcher or legal writer? As discussed above, the legal technology landscape is ever-changing, and new research and case management tools become available

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[137] Donald J. Dunn, *Why Legal Research Skills Declined, or When Two Rights Make a Wrong*, 85 LAW LIBR. J. 49, 49 (1993).

[138] *Id.* at 52.

[139] *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 63-64 (1992).

[140] Susan Hanley Kosse & David T. Ritchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 85 (2003).

[141] *See, e.g.*, Amy Vorenberg & Margaret Sova McCabe, *Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs*, 2 PHOENIX L. REV. 1, 3 (2009).

[142] Aliza B. Kaplan & Kathleen Darvil, *Think (and Practice) Like A Lawyer: Legal Research for the New Millennials*, 8 LEGAL COMM. & RHETORIC: JALWD 153, 157 (2011); *see also* Patrick Meyer, *Law Firm Legal Research Requirements for New Attorneys*, 101 LAW LIB. J. 297, 321 (2009).

[143] *See* ABA STANDARDS, *supra* note 16, at 16 (requiring in Standard 303(a)(2) one first year and one additional faculty-supervised writing experience).

[144] *See, e.g.*, Keene, *supra* note 105, at 468.

on a regular basis.[145] It is impractical to think that new law graduates can enter practice with a skill-set that will remain intact throughout their years of legal practice; in fact, it might be impractical to think that the legal research and writing tools taught in the first year will be relevant at the time the law graduate enters practice two years later. We need a new way to think about these skills that encompasses both the realities of modern practice and the limitations of a narrow definition of practice-readiness. To date, "practice-readiness" in the world of legal research and writing has meant "can research and write based on the technologies that comprised the industry standard at the time of law school enrollment." Why not reframe these skills to include an ability to approach research questions differently, to present information and new and innovative ways, and to be mindful of the gap between the old and new approaches to doing so in practice? One way to think about these skills might be through the lens of information literacy.

III. THE INFORMATION LITERATE ASSOCIATE IS PRACTICE-READY

To be truly practice-ready, the new law school graduate must be able to be flexible and adaptable to change, with the simultaneous ability to be comfortable and conversant in older technologies and able to master new technologies and apply them to the practice of law. To prepare students for this, legal educators, and particularly those teaching legal research and writing, must move beyond an understanding of research and writing as fixed skills with clearly defined parameters. While the fundamentals of research and writing are still important, it is time to start broadening our understanding of skills to include the ability to self-learn, to ask the right questions, and to evaluate and incorporate new methods into existing skill-sets. The field of information literacy, initially developed as a pedagogical approach to teaching research, offers a new way of looking at skill development to produce practice-ready lawyers.

A. What is Information Literacy?

Over the past few years, discussions about legal research instruction and competencies have begun to include the idea of *information literacy*.[146]

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[145] *See* notes 35–43 and accompanying text.

[146] *See, e.g.*, Keene, *supra* note 105, at 468; Catherine A. Lemmer, *A View From the Flip Side: Using the "Inverted Classroom" to Enhance the Legal Information Literacy of the International LL.M. Student*, 105 LAW LIBR. J. 461, 462–63 (2013); Rebecca Lutkenhaus & Karen Wallace, *Assessing the Effectiveness of Single-Session Legal Research Skill*

The generally accepted definition of information literacy is the ability to "recognize when information is needed and have the ability to locate, evaluate and use effectively the needed information."[147] The American Association of Law Librarians adopted this definition in 2012.[148]

The concept of information literacy was first discussed in 1974: "People trained in the application of information resources to their work can be called information literates."[149] The concept was further developed in the 1980s as educators began to recognize that information was becoming more widely available and accessible electronically, rather than bibliographically.[150] Information literacy as a concept includes both instructional approaches and learning outcomes for gathering and using information.[151] Thus, information literacy can provide a framework for approaching the process of legal research and writing as well as a way to assess whether law graduates have achieved sufficient competency levels to be considered "practice ready."[152]

Instruction Through Pre- And Post-Testing: A Case Study, 107 LAW LIBR. J. 57, 58 (2015); Ellie Margolis & Kristen Murray, *Teaching Research Using an Information Literacy Paradigm*, 22 PERSP.: TEACHING LEGAL RES. & WRITING 101, 101–03 (2014); Margolis & Murray, *Say Goodbye to the Books*, *supra* note 12, at 120; Ben Beljaars, *Implementing Legal Information Literacy: A Challenge for the Curriculum*, 37 INT'L J. LEGAL INFO. 321, 321–22 (2009); Thomas Keefe, *Teaching Legal Research from the Inside Out*, 97 LAW LIBR. J. 117, 121–22 (2005); Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher to Do?*, 97 LAW LIBR. J. 661, 678–79 (2005); Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALT. L. REV. 173, 221–22 (2010) [hereinafter Valentine, *A Lifeboat for Students*].

[147] *Presidential Committee on Information Literacy: Final Report*, AM. LIBR. ASS'N (Jan. 10, 1989), http://www.ala.org/acrl/publications/whitepapers/presidential.

[148] *Principles and Standards for Legal Research Competency*, AM. ASS'N L. LIBR. (Jul. 11, 2013) [hereinafter *AALL Principles and Standards*], http://www.aallnet.org/Documents/Leadership-Governance/Policies/policy-legalrescompetency.pdf.

[149] *See* Shirley J. Behrens, *A Conceptual Analysis and Historical Overview of Information Literacy*, 55 C. & Res. Libr. 309, 310 (1994) (quoting PAUL G. ZURKOWSKI, NAT'L COMM'N ON LIBRARIES & INFO. SCI., THE INFORMATION SERVICE ENVIRONMENT: RELATIONSHIPS AND PRIORITIES 6 (1974)).

[150] *See* Richard A. Danner, *Contemporary and Future Directions in American Legal Research: Responding to the Threat of the Available*, 31 INT'L J. LEGAL INFO. 179, 193–94 (2003).

[151] *See, e.g.*, Dennis Kim-Prieto, *The Road Not Yet Taken: How Law Student Information Literacy Standards Address Identified Issues in Legal Research Education and Training*, 103 LAW LIBR. J. 605, 607–09 (2011).

[152] *Id.*; *see also Information Literacy Competency Standards for Higher Education*, ASS'N C. & RES. LIBR. [hereinafter *Information Literacy Competency Standards*], http://www.ala.org/acrl/standards/informationliteracycompetency (last visited Oct. 22, 2016)

1. Information Literacy Generally

The Association of College and Research Libraries (ACRL) first formally adopted a definition and set of competency standards for information literacy in 2000.[153] The ACRL defines information literacy as "[t]he set of skills needed to find, retrieve, analyze, and use information."[154] According to the ACRL, information literacy is increasingly important in today's world of "rapid technological change and proliferating information resources."[155] As the ACRL noted, "[t]he sheer abundance of information will not in itself create a more informed citizenry without a complementary cluster of abilities necessary to use information effectively."[156] An individual who is information literate has the skills to adapt to changes in the research environment and retain the ability of lifelong learning.[157]

The ACRL developed five primary competencies for assessing information literacy.[158] The ACRL assessment rubric is designed to apply to higher education at all levels, and to serve as both an assessment method and a tool for teachers to shape their pedagogy.[159] The competencies are as follows:

1. **Know**: "The information literate student determines the nature and extent of information needed."

2. **Access**: "The information literate student accesses needed information effectively and efficiently."

3. **Evaluate**: "The information literate student evaluates information and its sources critically and incorporates selected information into his or her knowledge base and value system."

4. **Use**: "The information literate student, individually or as a member of a group, uses information effectively to accomplish a specific purpose."

("Information literacy competency extends learning beyond formal classroom settings and provides practice with self-directed investigations as individuals move into internships, first professional positions, and increasing responsibilities in all arenas of life.").

[153] *See Information Literacy Competency Standards*, *supra* note 152.

[154] *Information Literacy Glossary*, ASS'N C. & RES. LIBR. http://www.ala.org/acrl/issues/infolit/overview/glossary (last visited Oct. 22, 2016).

[155] *Information Literacy Competency Standards*, *supra* note 151.

[156] *Id.*

[157] *See id.*

[158] *The Standards: Step-by-Step*, ASS'N C. & RES. LIBR. [hereinafter *The Standards*], http://www.ala.org/acrl/issues/infolit/standards/steps (last visited Oct. 22, 2016).

[159] *Information Literacy Competency Standards*, *supra* note 152; *see also* Kim-Prieto, *supra* note 151, at 608.

> 5. **Ethical/Legal**: "The information literate student understands many of the economic, social and legal issues surrounding the use of information and accesses and uses information ethically and legally."[160]

Each of these five standards is accompanied by performance indicators that provide a concrete description of the skills needed to achieve competence.[161] The performance indicators identify specifically what the student should learn.[162] For example, one of the performance indicators for Standard 2 is that the "information literate student selects the most appropriate investigative methods or information retrieval systems for accessing the needed information."[163] Each performance indicator contains a set of learning outcomes, which provide specific means of assessing whether the student has learned.[164]

While the competency standards are intended to apply to all forms of higher education, the ACRL recognizes that different disciplines could customize the different competencies to address each discipline's learning process.[165] Indeed, the standards have been modified for use in a number of different disciplines and subjects.[166] While the ACRL has not adopted information literacy standards for legal research and writing, they have obvious application in that context. However, because legal research and writing are specialized tasks, it is important to give careful consideration to how information literacy principles might be implemented in a law school context.

2. Information Literacy and Legal Research and Writing

While information literacy provides a useful framework for discussing practice-readiness in the context of new graduates' legal research and writing skills, it has not yet taken hold as a concept in law school research

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[160] *The Standards*, *supra* note 158.

[161] *Information Literacy Competency Standards*, *supra* note 152.

[162] *The Standards, supra* note 158.

[163] *Information Literacy Competency Standards*, *supra* note 152.

[164] *See The Standards*, *supra* note 158. For example, a learning outcome of the first performance indicator for Standard Two is that the student "[i]nvestigates benefits and applicability of various investigative methods." *Information Literacy Competency Standards*, *supra* note 152.

[165] *See Information Literacy Competency Standards* , *supra* note 152.

[166] *See Guidelines, Standards, & Frameworks*, ASS'N C. & RES. LIBR., http://www.ala.org/acrl/standards (last visited Oct. 22, 2016) (showing information literacy standards for journalism, anthropology and sociology, teaching education, and science and technology among others); Kim-Prieto, *supra* note 151, at 606–07.

and writing instruction. There have been increasing calls for considering information literacy in a legal research context,[167] but no legal research textbooks explicitly use an information literacy framework and legal research courses have been slow to make use of information literacy principles. And while writing-related principles of information literacy track some general ideas about writing instruction and learning outcomes, legal writing has largely been absent from conversations about bringing information literacy into law schools.

Law librarians have devoted some attention to information literacy, and in July 2013, the Executive Board of the American Association of Law Libraries (AALL) adopted a set of *Principles and Standards for Legal Research Competency*, which are modeled on the ACRL standards.[168] In so doing, the AALL

> invite[d] librarians, law schools, law firms, continuing legal education providers, and relevant organizations in the legal profession to engage in the implementation of these *Principles and Standards* in meaningful ways that will result in more competent, effective, and efficient legal research, thus impacting the bottom line and provision of legal services positively[.][169]

The AALL also challenged entities within the legal profession "to embrace legal research competency as a necessary skill and to incorporate these standards and competencies into its own performance measures."[170]

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[167] *See* Beljaars, *supra* note 146, at 321–22; Keefe, *supra* note 146, at 121–22; Peoples, *supra* note 146, at 678–79; Nancy B. Talley, *Are You Doing It Backward? Improving Information Literacy Instruction Using the AALL Principles and Standards for Legal Research Competency, Taxonomies, and Backward Design*, 106 LAW LIBR. J. 47, 51 (2014); Valentine, *A Lifeboat for Students*, *supra* note 146, at 221–22.

[168] *See AALL Principles and Standards*, *supra* note 148.

[169] *Legal Research Competency*, AM. ASS'N L. LIBR., http://www.aallnet.org/mm/Advocacy/legalresearchcompetency (last visited Oct. 22, 2016) [hereinafter *Legal Research Competency*].

[170] *Id.* The AALL has also taken concrete steps to encourage engagement with the Principles and Standards. *See, e.g.*, Dennis Kim-Prieto & Mustafa Kerem Kahvecioglu, *Three Faces of Information Literacy in Legal Studies: Research Instruction and Law Student Information Literacy Standards in the American Common Law, British Common Law, and Turkish Civilian Legal Traditions*, 42 INT'L J. LEGAL INFO. 293, 296 (2014). The authors noted that:

> [R]epresentatives from the Promoting the *AALL Principles and Standards for Legal Research Competency* Task Force presented a program entitled "Using the *AALL Principles and Standards for Legal Research Competencies* in Law Schools and Law Firms" at a recent meeting of the National Association for Law Placement/American Law Institute Professional Development Institute (NALP/ALI PDI)[.]

Id.

These Principles and Standards for Legal Research Competency are more explicitly tied to the process of legal problem solving and analysis.[171] The "Principles" are "broad statements of foundational, enduring values related to skilled legal research as endorsed by the American Association of Law Libraries."[172] The "Standards" then "provide a set of more specific applications of those norms or habits that demonstrate one's commitment to and attainment of the principles."[173] Finally, the "Competencies" are "activities that demonstrate knowledge and skill" and "provide concrete measures or indicators of successful achievement of the abilities required to meet the standards."[174] The AALL notes that these principles, standards, and competencies are "applicable and desirable across the legal profession and beyond the law school experience"[175] and they provide a good starting point for a discussion of how to incorporate information literacy as a framework for teaching and assessing legal research and writing.

Like the ACRL Standards, the Principles and Standards identify five primary principles, each further defined with particular standards and competencies.[176] The five principles are that students: 1) possess foundational knowledge of the legal system, 2) implement effective, efficient research strategies, 3) critically evaluate information, 4) apply information effectively to resolve a specific issue or need, and 5) distinguish between ethical and unethical uses of information and understand the legal issues arising from discovery and use of information.[177] The first three of the Principles are most closely related to the material generally covered in legal research courses, while the final two involve the application of information and its ethical and legal uses, and are thus related to the writing, rather than research, process.

The first principle is that "a successful legal researcher possesses foundational knowledge of the legal system and legal information sources."[178] This requires that students understand the legal system, the interrelationship between branches of government, and the structure and interrelationships between and among foreign and international legal systems. In addition, the researcher should be able to distinguish between primary and secondary sources of law and understand how to use each.

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171 *AALL Principles and Standards*, *supra* note 148.
172 *Id.*
173 *Id.*
174 *Id.*
175 *Legal Research Competency*, *supra* note 169.
176 *AALL Principles and Standards*, *supra* note 148.
177 *Id.*
178 *Id.*

The second principle focuses on "effective and efficient research strategies."[179] As further defined, this principle requires that the student select appropriate research tools based on the nature of the law governing the issue, and develop a detailed research plan that identifies cost-efficient sources.[180] In addition, students should confirm the validity of their search results by use of the available tools as well as their own prior work product and expertise. Finally, students should keep a careful record of their research for future reference.[181]

The third principle requires that the legal researcher "critically evaluate[] information."[182] This principle focuses on knowing that the reliability of all information (whether print or online or legal or nonlegal) is based on authority, credibility, currency, and authenticity.[183] Students should also be able to evaluate sources using a cost-benefit analysis.[184] The third principle also recognizes the recursive nature of the research process, asking that researchers review the information obtained and adjust their search parameters going forward.[185]

The fourth principle notes that "[a] successful legal researcher applies information effectively to resolve a specific issue or need."[186] This requires that students use rule synthesis and analogical reasoning to analyze legal problems. This principle also requires students to look back at their research as they apply this information: to modify and expand research queries; to determine when there is enough information to explain or support a conclusion; and to answer all issues or make analogies when the research cannot fully resolve the issue posed. Applying the information in written work product also involves considerations of audience, persuasion, and attribution.[187]

The fifth and final principle notes that a "successful legal researcher distinguishes between ethical and unethical uses of information, and understands the legal issues associated with discovery, use, or application of information."[188] Information ethics in this context includes determining a lawyer's ethical obligations (to the court, the bar, and society) and

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[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *See id.*
[184] *Id.*
[185] *See id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*

understanding an organization's rules on access, storage, and dissemination of information. This principle also requires that students understand the principles of intellectual property, copyright, fair use, and legal norms of citation and attribution.[189] Standard C of this fifth principle states that "[a]n information-literate legal professional understands that research skills are among the set of professional skills that are continuously learned and re-learned throughout one's professional life."[190]

In many ways, these principles reflect the way that most legal skills professors already think about legal research and writing. None of these principles are attached to any particular technology. Reframing skills education in terms of information literacy skills and competencies provides a way to get away from the source-based research instruction that is becoming increasingly outdated. Information literacy can be a useful way of rethinking legal research and writing pedagogy.[191] But it can also help define and assess whether a law graduate's research and writing skills are "practice ready."

B. Why Should Information Literacy be Considered Part of Practice-Readiness?

As we stand at this crossroads where research and writing has changed in a change-resistant profession, information literacy provides a useful conceptual framework for considering both the realities of how technology functions in modern law practice and the way we think about what it means to be "practice-ready." In discussing incorporating information literacy into law schools, law librarians and legal research professors have focused on information literacy as a teaching technique or a learning outcome.[192] With this article, we propose to expand the understanding of information literacy to think of it as an independent skill to cultivate in new law graduates, to prepare them for a practice that is ever-changing, and for their new role as ambassadors of that change.

Senior attorneys have high expectations for new attorneys as they enter the practice of law, but the list of skills those expectations encompass is not

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[189] *Id.*

[190] *Id.*

[191] *See, e.g.*, *Information Literacy Plan*, UNIV. N.H. L. LIBR. http://library.law.unh.edu/InformationLiteracyPlan (last visited Oct. 22, 2016); Paul D. Callister, *Time to Blossom: An Inquiry into Bloom's Taxonomy as A Hierarchy and Means for Teaching Legal Research Skills*, 102 L. LIBR. J. 191, 191–92 (2010).

[192] Margolis & Murray, *See Say Goodbye to the Books*, *supra* note 12, at 127; *see also* Talley, supra note 167, at 54–55, 63.

clear. New lawyers spend a significant amount of their time on legal research and writing tasks.[193] In contrast to many other fields, obsolete legal research and writing technologies do not necessarily sunset. Therefore, new lawyers must be prepared to conduct research using these older technologies as well as current and future technologies. Although legal research and writing instruction and methods now look quite different than the form they took when today's senior lawyers were first trained, the old methods have not been fully displaced—law libraries still feature full sets of books containing both primary and secondary sources, and typewriters still linger in secretarial bays—even though they are no longer the best and most efficient way to conduct legal research and writing.

Depending when they went to law school, senior lawyers often approach research and writing with a traditional mindset, even when using more modern technologies. This is true even though the organization of legal information has been reconceptualized. The bibliographic method was in place and undisturbed for more than a century.[194] Now, innovations occur on an almost yearly basis.[195] The state-of-the-art research and writing technology that exists for a class of 1Ls could be disfavored by the time those students graduate.

These rapid changes have led legal research and writing scholars to devote much attention to questions of pedagogy and training in a world of online legal research and writing. Legal research and writing professors have recognized and incorporated technological changes and advances in the first year and beyond.[196] The more specific the advice is, though, the more likely it is to be obsolete soon, possibly even while the students are still in school. And there is no way every student could be conversant in every new approach, because the list of potentially useful legal research and writing technologies grows ever longer.[197] Even knowing what is most popular in the marketplace does not necessarily mean that a particular service will be available in any given workplace.[198]

An information literacy approach will allow new attorneys to adjust and problem-solve, serving as translators for more senior attorneys who have not adapted to the changes. For example, while some senior attorneys have adjusted to new research methods, others still approach legal research using

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[193] *See, e.g.*, Sinsheimer & Herring, *supra* note 81.

[194] Margolis & Murray, *Say Goodbye to the Books*, *supra* note 12, at 121–22.

[195] *See* Toohey, *supra* note 11, at 1.

[196] *See supra* Parts II.A.1–2.

[197] Lee et al., *supra* note 40, at 32 (acknowledging that "[t]he landscape of legal research tools is changing . . . again" (alteration in original)).

[198] *See* MART ET AL., *supra* note 65.

electronic proxies for the print materials they learned with, or do not understand the differences between older versions of Westlaw and Lexis and the current, more sophisticated search algorithms. For now, relying on old methods of organization can work—you can hack your way into "old" Westlaw by using traditional Boolean search methods. But, as technology continues to develop, and vendors develop more advanced products and complex algorithms, there may come a point when this hack is no longer possible. Information literacy skills allow new lawyers to be "bilingual"—able to speak to more senior lawyers in a language they understand, and help show them that new technologies can achieve the same, or better, results.

Similarly, the profession has drifted from the formal legal memorandum as the primary mode of written communication between lawyers.[199] More experienced attorneys may be wedded to legal writing that looks the same as it did when they went to law school. Digital natives are far more likely to be familiar with and use shorter forms of communication including, like texts and tweets, and are more likely to adopt an informal writing style. They also may have thought about document design beyond typical word processing: use of graphics, font selection, or other visual choices.[200] They may be quicker to grasp the possibility of communicating complex analysis through visual media such as infographics, rather than pure, linear text. This again leads to a gap between what senior and newly-minted attorneys expect when they think about written communication. An information literacy approach can bridge that gap, allowing new lawyers to communicate with their supervisors to demonstrate that they have the skills needed to practice law.

We should think about information literacy as a stand-alone skill that encompasses both legal research and legal writing rather than only as a methodology for instruction for one or the other or both. Information literacy can be viewed as a type of metacognitive skill, giving students the ability to adapt existing learning to new situations and setting them up for success.[201] New lawyers who are trained with an awareness of the foundational principles of information literacy will be more successful in practice because these skills enable them to demonstrate competency,

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[199] *See, e.g.*, Robbins-Tiscione, *supra* note 87, at 32.

[200] *See* Margolis, *Medium*, *supra* note 35, at 16; *see also* Robbins, *supra* note 95, at 131–34, BUTTERICK, *supra* note 95, at 180.

[201] Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. Rev. 149, 155–56 (2012).

transferability, and a capacity for innovation. Thinking of information literacy as a hallmark of practice-readiness works for several reasons.

First, in a world of electronic research and writing, method does not matter, as long as the results are sound. An information literacy strategy focuses on those results, and should give the researcher enough confidence to talk about those results in a way that resonates with any audience, including an audience that is skeptical of new methodologies. At the end of the research process, a good legal researcher will have all the authority required to provide a competent answer to a legal question, no matter the method(s) used in her research. But new lawyers must also be able to communicate to more senior lawyers that the research has been complete and is reliable. The gap between the "old" and "new" or current way of doing legal research can be an obstacle to that communication. An information literate associate, however, can communicate the results of their research in terms that more senior lawyers can understand.

The information literate lawyer must first be able to recognize what is behind a question. In the research context, a lawyer rooted in traditional bibliographic research methods might ask a junior associate whether she used the digest to explore other possible cases on a particular issue. The information literate junior associate would understand that this is really a question about how thorough the research was, and be able to explain the process in a way that shows it was comprehensive. For example, the junior associate might explain that she identified all of the relevant cases in the jurisdiction by searching for a key term in the relevant database. This skill can extend to areas beyond pure research as well; for example, when an experienced lawyer asks, "Did you Bluebook this?" she is really asking whether proper citation form was followed, not whether a particular book was used.

Second, expectations for legal writing are perhaps more entrenched than those for legal research. How much has the memorandum or brief really changed from its original form? Yet, there are good reasons to consider making changes, especially changes made possible by technology. Documents can be more functional, more visually appealing, and more *persuasive* if we rethink the traditional approaches. For example, including a visual image in a brief or judicial opinion might more effectively convey the relationship between legal concepts than a linear written explanation.[202]

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[202] *See, e.g.*, Porter, *supra* note 45, at 1687; Lisa Eichhorn, *Old Habits: Sister Bernadette and the Potential Revival of Sentence Diagramming in Written Legal Advocacy*, 13 LEGAL COMM. & RHETORIC: JALWD (2016).

Principles of typography can lead to changes in font and spacing that make a document more convincing.[203]

New lawyers are perhaps best able to offer suggestions of how legal documents might be written differently, though the least likely to make the ultimate call on whether to try something innovative. Still, innovation requires that someone make the first move. An information literate lawyer can properly appraise and present options for innovation, even to more senior colleagues who are more comfortable with traditional approaches. For example, while writing an appellate brief, a new lawyer might show a supervisor what it would look like in a different font, assure that supervisor that the font change is within court rules, and be ready to provide the research that shows why some fonts are more effective than others.

Third, the elements of practice-readiness have traditionally been classified as either doctrinal work that helps students think like lawyers or experiential learning that provides hard lawyering skills. The challenge is striking the right balance between the two. Adding information literacy as one of the skills we cultivate in our students expands the definition to include the critical role that new lawyers must play: ambassadors of change. Today's graduates find themselves in the unique position of being the most junior employees and the most fluent in new and innovative practice-based technologies. Making legal information literacy part of the basket of skills we ascribe to the "practice-ready" law graduate reframes both our expectations of new lawyers and how they perceive their own skill sets. It allows them to appraise the value of newer innovations that emerge once they are in practice. Unlike their predecessors, this next generation of lawyers is less likely to be as wedded to the methods they learned because they have changed so fast already.

Fourth, no law graduate is going to enter practice with no need for additional training. Even the most prepared new lawyer will have to learn more about how her particular law office functions, what case management tools the organization uses, and other context-specific skills.[204] One of the fundamental advantages of an information literacy approach is that it encourages self-learning and promotes a mindset ready to look for and accept change. Thinking of a lawyer's skill set as one of information literacy (know, access, evaluate, use) provides necessary flexibility to adapt to the shifting nature of law practice.

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[203] *See* Robbins, *supra* note 95, at 110, 113.

[204] *See* Lee et al., *supra* note 40, at 54 (noting that disruptive technologies are making it harder for professors to know with certainty "what legal services technologies their students will confront after law school").

Finally, this idea of information literacy as a skill can be implemented across the curriculum.[205] Perhaps doctrinal teaching already includes this conceptually, though not overtly: the graduate who is competent in core subjects upon graduation cannot stand on that knowledge for the duration of her career. As the law changes, lawyers need to keep up. Information literacy captures this concept in a concrete way. Similarly, information literacy is not a skill that is (or should be) associated with one type of law practice or another. Thus, it transcends the debate over whether graduates should be practice-ready in litigation versus transaction work, or whether practice-readiness does not work as a concept, because law students may not be committed to a particular practice area upon graduation.

Eventually, perhaps information literacy can become a skill that is valued and recognized in the profession writ large, not just in newly-minted attorneys. It could be embedded in the culture of the profession in such a way that it becomes a necessary competency for bar passage or promotion within the profession. The profession as a whole would benefit from an expansive, information literacy-based view of what it means to be a successful practitioner.

Much of what we have discussed will continue to change, and change rapidly. Legal research and writing technologies will continue to evolve. Innovations will become the status quo in the face of new disruptive technologies. The proportion of digital natives involved in the practice of law will grow. If law practice changes, so too must the definition of what it means to be "practice ready." This is why we should think of information literacy as one of the skills we wish to cultivate in new graduates. Making information literacy an end goal and incorporating it across the curriculum acknowledges the important changes to legal research and writing and allows room for the next generation of lawyers to bring those changes into practice.

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[205] *See, e.g.*, Talley, *supra* note 167, at 51 ("The most practical means of incorporating information literacy instruction into legal education is to integrate it into doctrinal courses in which librarians collaborate closely with faculty members, as part of a library component to a legal research and writing class or in an advanced legal research course.").

Trauma-Informed Co-Parenting: How A Shift in Compulsory Divorce Education to Reflect New Brain Development Research Can Promote Both Parents' and Children's Best Interests

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I. INTRODUCTION

Concerned about the health and emotional wellbeing of children adversely affected by their parents' divorce, legislatures throughout the United States have enacted laws requiring divorcing parents to attend co-parenting classes.[1] The goal of this state intervention in the post-divorce family is to ensure that parents learn ways to minimize conflict between them and harm to their children.[2] While thousands of parents take these classes structured as "opportunity" for education and resources about building parental skills,[3] recent discoveries about brain development and function in medical research have demonstrated that individuals' history of trauma can have a profound impact on their emotional functioning, mental health, and physical welfare.[4] Called a *hidden epidemic*,[5] the negative long-

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[1] *See* Susan L. Pollet & Melissa Lombreglia, *A Nationwide Survey of Mandatory Parent Education*, 46 FAM. CT. REV. 375, 376 (2008).

[2] Andrew Schepard et al., *Preventing Trauma for the Children of Divorce Through Education and Professional Responsibility*, 16 NOVA L. REV. 767, 772 (1992).

[3] Pollet & Lombreglia, *supra* note 1, at 379 (stating that the mandatory nature of the classes was described in one study as "mandating an opportunity" for parents).

[4] Robert F. Anda et al, *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, 256 EUR. ARCH. OF PSYCHIATRY & CLINICAL NEUROSCIENCE 174, 180 (2005) ("Furthermore, the detrimental effects of traumatic stress on developing neural networks and on the neuroendocrine systems that regulate them have until recently remained hidden even to the eyes of most neuroscientists. However, the information and data that we present herein

term impact of childhood trauma reaches across generations.[6] Without ensuring that co-parent education is adequately *trauma-informed*, those states with compulsory education are missing an important opportunity to help parents understand why they may be struggling, learn the role of unresolved prior trauma in their lives, obtain resources, and protect themselves and their children from recurring trauma.

Part I of this Article provides an overview of the advent and proliferation of statutorily mandated divorce education classes in the United States as well as their goals. Part II explores Adverse Childhood Experiences (ACEs) research that reveals how childhood trauma is associated with serious adult physical and mental illnesses, chronic disease, and risk for violent victimization.[7] It also describes recent studies on the neurobiology of toxic stress and its impact on human development and wellbeing. Part III describes new data on parents' ACEs and co-parenting behaviors from a project entitled Successful Co-Parenting After Divorce, a university-sponsored online course that is part of a larger study on co-parenting issues.[8] The data reveal that most of the parents in the study experienced multiple traumas in their childhoods. Data also reflected statistically significant relationships indicating that higher amounts of early trauma were correlated with higher amounts of conflict in the co-parenting relationship.[9] Part IV proposes that current co-parenting training become trauma-informed, and describes the legislative and policy changes that can bring about a trauma-informed co-parenting education landscape. Recommendations include statutory changes in compulsory co-parenting, new family court rules, and evidentiary protections for documents that result from trauma-informed co-parenting education.

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suggest that this veiled cascade of events represents a common pathway to a variety of important long-term behavioral, health, and social problems.").

[5] Jane Ellen Stevens, ACEs TOO HIGH NEWS, *"Silent Evidence" Worth Hearing About,* (May 30, 2016), https://acestoohigh.com/2012/05/30/silent-evidence-worth-hearing/ (describing the insidious, widespread effects that childhood trauma may have upon adult health outcomes).

[6] Danya Glaser, *Child Abuse and Neglect and the Brain—A Review*, 41 J. OF CHILD PSYCHOL. & PSYCHIATRY 97, 99 (2000) (explaining that some parents with a prior history of child abuse may be at an increased risk of abusing their own child).

[7] *The ACEs Study*, CDC, http://www.cdc.gov/violenceprevention/acestudy/ace_brfss.html (last viewed May 5, 2016).

[8] Fla. St. U., *Successful Co-Parenting After Divorce*, http://coparenting.fsu.edu (last visited Nov. 3, 2016).

[9] See *infra* Part II.

II. DIVORCE AS A PUBLIC HEALTH ISSUE

Divorce has been described as a public health issue because of the large number of children and adults experiencing it;[10] between 40 and 50 percent all first marriages end in divorce,[11] and many of these families have children.[12] Decisions about the care and custody of children were historically gender-based,[13] with fathers having rights to their children as property through the eighteenth century[14] and mothers in the nineteenth century presumed to be uniquely suited to be their children's caregivers and to serve their children's developmental needs.[15] However, modern family law in both the United States and worldwide now emphasizes involvement by both parents in the lives of their children after divorce.[16] Custody disputes about children of divorcing parents shifted when the federal Uniform Marriage and Divorce Act (UMDA) of 1970[17] approved the "best interest standard," a case-by-case determination of what living arrangements would best meet the particular needs of the children involved.[18] Today the best interest of the child standard,[19] first implemented in California, is the law throughout the nation.[20]

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[10] Schepard et al., *supra* note 2, at 768; *see also* Pollet & Lombreglia, *supra* note 1, at 375.

[11] Am. Psych. Ass'n, *Marriage & Divorce*, http://www.apa.org/topics/divorce/ (last visited July 22, 2016).

[12] *See* Hal Arkowitz & Scott Lilienfeld, *Is Divorce Bad for Children?*, SCI. AM. MIND, March/April 2013, at 68 (2013), http://www.scientificamerican.com/article/is-divorce-bad-for-children/.

[13] Women had very few rights, and fathers had ultimate authority over their children. J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 214 (2014).

[14] *Id.*

[15] *Id.* By the mid-nineteenth century, maternal custody was presumed. Deborah Ahrens, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 751 (2000).

[16] DiFonzo, *supra* note 13, at 214–15.

[17] Unif. Marriage & Divorce Act § 308 (1973); CAL. CIV. CODE § 4801 (West 1976) (repealed 1993). The UMDA provided for an equal division of community property and made other substantive changes to improve the law, including increasing the emphasis on counseling and conciliation services. It also made a number of modifications designed to both make the divorce process less painful and to expedite the time necessary to secure a divorce. *See* Ovvie Miller, *California Divorce Reform After 25 Years*, 28 BEVERLY HILLS B. ASS'N J. 160 (1994).

[18] *See, e.g.*, Rosero v. Blake, 581 S.E.2d 41 (N.C. 2003), *cert. denied*, 540 U.S. 1177 (2004) (abolishing a rule that automatically placed children born out-of-wedlock with their mother and replacing it with a "best interests" test for such children).

[19] The "best interests of the child" standard requires consideration of "all relevant factors, including the child's health, safety, and welfare, any history of abuse by one parent

The UMDA also reflected the realization that divorce can be a painful process for all involved.[21] Concerns about the impact of divorce on children have included children's "crisis-engendered reactions."[22] Such emotional impacts can include deep sadness, anger, and distress over the child's future welfare; feelings of loss of the family structure; fear of losing a connection with both parents; desire for parents' reconciliation; and inability to concentrate at school.[23] Concerned about hostile custody battles between parents so contentious that legal decisions have used military terminology to describe them,[24] judges have supported a transformation of

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against any child or the other parent, and the nature and amount of the child's connection with the parents." Brown v. Yana, 127 P.3d 28, 31 (Cal. 2006). *See* Fox v. City of Tulare, No. 1:11-CV-0520 AWI SMS, 2014 WL 3687735, at *11 (E.D. Cal. July 24, 2014) ("[A] child who is the object of a custody battle between biological parents is entitled to proceedings that use the 'best interest of the child' legal standard.").

[20] Joan B. Kelly, *Future of Children: The Determination of Child Custody*, 4 CHILD. & DIVORCE 121, 128–37 (1994). Many states have laws that enumerate how the court is to determine what is in a child's best interest using factors such as the following:

> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs. (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. (e) The permanence, as a family unit, of the existing or proposed custodial home or homes. (f) The moral fitness of the parties involved. (g) The mental and physical health of the parties involved. (h) The home, school, and community record of the child. (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference. (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child[.]

MICH. COMP. LAWS § 722.23 (2015).

[21] Unif. Marriage & Divorce Act § 6 (1973) (eliminating the notion of fault in divorce in an "effort to reduce the adversary trapping of marital litigation," removing an "assignment of blame").

[22] Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J.L. REFORM 131, 140 (1993).

[23] *Id.*

[24] *See, e.g.*, Cristina Ortega, *The Custody Wars: Why Children Are Losing the Legal Battle and What We Can Do About It*, 4 J. L. & FAM. STUD. 217, 218 (2002) (stating that child custody disputes can be a battlefield); Schepard, *supra* note 22, at 140; *see also* Kirk v. Kirk, 770 N.E.2d 304, 305, 307 (Ind. 2002) ("The parties were regularly locked in a litigation struggle over the next five years . . . . [I]t is particularly difficult for a reviewing court to second-guess a situation that centers on the personalities of two parents battling for control of a child."); Black v. Black, 92 A.3d 688, 695 (N.J. Super. Ct. Ch. Div. 2013) ("For over thirty years after Newburgh, matrimonial litigants and attorneys have battled in court over college contribution issues, frequently and heavily focusing upon factor eleven, the

the divorce process.[25] This new philosophy emphasizes a less adversarial approach[26] to post-divorce parenting, with both parents co-parenting their children.[27]

In an effort to make divorce less emotionally difficult, the UMDA emphasized counseling and conciliation services for divorcing individuals.[28] Terminology used to describe post-divorce parenting has pivoted from the terms custody and visitation to more cooperation-based language.[29] The new legal term "parenting time" is now used by many jurisdictions to encourage a shared parenting approach reflected in a "parenting plan,"[30] a term used in the majority of the states[31] that describes

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'child's relationship with the paying parent.'"; Costley v. Benjamin, No. M2004-00375-COA-R3-CV, 2005 WL 1950114, at *7 (Tenn. Ct. App. 2005) ("Sending the police to the Benjamin house became a pattern during this custody struggle.").

[25] Eric S. Solotoff, *High Conflict Divorces: Parent Coordinators and Other Professions Enlisted to Help with Parenting Time Issues*, NY FAMILY LEGAL BLOG (Dec. 6, 2008), https://njfamilylaw.foxrothschild.com/2008/12/articles/visitationparenting-time/high-conflict-divorces-parent-coordinators-and-other-professionals-enlisted-to-help-with-parenting-time-issues/.

[26] *See, e.g.*, Catherine M. Lee & John Hunsley, *Empirically Informed Consultation to Parents Concerning the Effects of Separation and Divorce on Their Children*, 8 COGNITIVE & BEHAV. PRACT. 85, 86 (2001) (stating the benefits of medication and other alternatives to litigation); *see also* Claire Huntington, *Repairing Family Law*, 57 DUKE L. J. 1245, 1281 (2008) ("The process of family law fuels the hate by pitting one family member against another in a win/lose battle."); Brianna F. Issurdutt, *Child Custody Modification Law: The Never-Ending Battle for Peace of Mind*, 10 NEV. L. J. 763, 764 (2010) ("[C]hild custody law in Nevada has adjusted in an effort to provide more stability for families affected by divorce and custody battles.").

[27] Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 234 (2012) (explaining that when parents divorce during their child's minority, the marital relationship ends, but divorce does not end the co-parenting partnership, which endures until the child reaches majority).

[28] *Id.*; *see also* Miller, *supra* note 17, at 160.

[29] Weinberger Law Group, LLC, *Parenting Time vs. Visitation: What's the Difference?*, WEINBERGERLAWGROUP.COM (May 31, 2016), http://www.weinbergerlawgroup.com/blog/newjersey-child-parenting-issues/parenting-time-vs-visitation-whats-difference/ (stating that "[t]he more archaic and possibly more familiar term that was used in the past is 'visitation.' But, because a parent spending time with their own child is really time spent parenting the child and not just visiting with the child, the terms have evolved over time.").

[30] *See, e.g.*, Ariz. Supreme Ct., *Planning for Parenting Time: Arizona's Guide for Parents Living Apart*, ARIZONA.GOV (2009), http://www.azcourts.gov/portals/31/parentingtime/ppwguidelines.pdf; Mass. Supreme Ct., *Massachusetts Model Parenting Plans*, MASS.gov, http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/parentingplan.pdf (last viewed July 2, 2016); Minn. Supreme Ct., *Minnesota Parenting Agreement Worksheet*, MNCOURTS.GOV. (2004), http://www.mncourts.gov/documents/Parenting-Agreement-Worksheet.pdf; Ind. Supreme Ct., *Indiana Parenting Time Guidelines*, IN.GOV, http://www.in.gov/judiciary/rules/parenting/ (last viewed July 3, 2016).

[31] LINDA D. ELROD, CHILD CUSTODY PRACTICE & PROCEDURE § 4:7 (2015) ("By court

how time and responsibilities concerning the child are to be divided.[32] Divorcing parents are also often required in most states to attend mediation in an attempt to resolve their differences amicably.[33] The rise of parenting coordinators—individuals who help parents resolve disputes over parenting time and parenting plans[34]—is also an innovation created to help divorcing parents resolve their disputes.

These efforts are largely designed to protect children from the "perpetual turmoil" that can result from protracted litigation and conflict.[35] Because of the adversarial environment of the family court process and the powerfully "emotional nature of divorce, child custody battles can turn *vicious*[.]"[36] According to one researcher, divorce can be "the single most traumatic experience" of a child's life, with the potential to cause lasting psychological injury.[37] Studies show that children can be adversely affected by their parents' conflict;[38] children exposed to high levels of

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rule or statute, over half of the states now require the parties to submit a parenting plan in all or some types of custody cases.").

[32] *See, e.g.*, MINN. STAT. § 518.175 (2015) (emphasizing that it is in the best interest of the child to maintain a relationship with both parents and that parenting time is a shared approach); OHIO REV. CODE ANN. § 3109.04 (LexisNexis 2015) (requiring that parents in shared parenting make decisions together after divorce).

[33] *See* Resource Center on Domestic Violence, *Custody Mediation Where Domestic Violence is Present*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES (Jan. 24, 2014), http://www.ncjfcj.org/sites/default/files/chart-mediation-dv-present.pdf (last visited July 3, 2016) (displaying chart of states requiring mediation and listing whether there is an opt-out provision when domestic violence is present); *see also* Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 10–12 (2001) (citing mediation as a way to reduce prolonged conflict which may cause damage to children and is recommended as part of the Family Law and Dispute Resolution Sections of the American Bar Association). *But cf.* Dennis P. Saccuzzo et al., *Mandatory Custody Mediation: Empirical Evidence of Increased Risk for Domestic Violence Victims and Their Children*, https://www.ncjrs.gov/pdffiles1/nij/grants/195422.pdf (finding evidence that compelled mediation puts victims of domestic violence at risk).

[34] Christine A. Coates, *The Parenting Coordinator as Peacemaker and Peacebuilder*, 53 FAM. CT. REV. 398, 400 (2015) (explaining that it is the parent coordinator's responsibility to help parents create structures of co-parenting, such as parenting plans and calendars for parenting time).

[35] Lisa Haddad et al., *High-Conflict Divorce: A Review of the Literature*, 29 AM. J. FAM. L. 243, 243 (2016) (noting that for some, "the conflict continues, possibly never ending, trapping themselves and their children in a perpetual turmoil, causing deep and lasting scars").

[36] Allison M. Nichols, *Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes*, 112 MICH. L. REV. 663, 664 (2012) (emphasis added).

[37] *Id.* (quoting Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 429, 429 (2000)).

[38] Paul R. Amato, *Research on Divorce: Continuing Trends and New Developments*, 72

parental conflict are at greater risk for developing problems such as depression, anxiety, social and behavioral problems, and difficulties developing relationships in later life.[39] In the late 1970s,[40] courts[41] and legislatures[42] began to mandate that divorcing parents take classes to become educated about the effects of divorce and conflict on children.[43] The trend proliferated, with over a dozen states currently requiring all divorcing parents to take a divorce class,[44] other states recommending only the teaching of certain parenting skills to divorcing parents for the benefit of the child,[45] and still others leaving the decision of who is required to take the classes to the discretion of the family court judge hearing the case.[46] A few states have no requirement.[47]

J. MARRIAGE & FAM. 650, 653 (2010) (noting that research has consistently shown that children with divorced parents score lower on emotional, behavioral, social, health, and academic outcomes than children with continuously married parents).

[39] *See* Gregory M. Fosco & John H. Grych, *Emotional, Cognitive, and Family Systems Mediators of Children's Adjustment to Interparental Conflict*, 22 J. FAM. PSYCHOL. 843, 843–54 (2008).

[40] *See* Eighth Cir. Fam. L. Advisory Grp., *A Brief Review of the History*, EIGHTH JUD. CT. OF FLA., http://circuit8.org/web/family/flag/No%20Fault%20Divorce.pdf (last visited Oct. 28, 2016). The first documented parent education class began in 1978 in Kansas. *See id.*

[41] *See* Mass. Prob. & Fam. Ct. Order 4:08, MASS. CT. SYS. (Apr. 7, 2008), http://mgcmtraining.mass.gov/courts/case-legal-res/rules-of-court/probate/pfc-orders/4-08.html ("This court finds it in the best interests of the children to educate parents about emotional needs and effects of divorce and conflict on child behavior and development."); *see also* Ky. Ct. of Justice, *Divorce Education*, COURTS.KY.GOV (2016), http://courts.ky.gov/courtprograms/divorceeducation/Pages/default.aspx ("More than half of Kentucky's 56 judicial circuits have some form of Divorce Education that is mandated by the local courts.").

[42] *See, e.g.*, FLA. STAT. § 61.21(4) (2014) ("All parties to a dissolution of marriage proceeding with minor children or a paternity action that involves issues of parental responsibility shall be required to complete the Parent Education and Family Stabilization Course prior to the entry by the court of a final judgment.").

[43] *See, e.g.*, N.Y. State Parent Ed. & Awareness Program, *Parent's Handbook*, NYCOURTS.GOV, https://www.nycourts.gov/IP/parent-ed/pdf/ParentsHandbook.pdf (last visited July 3, 2016) (stating that the program was designed to help parents gain a better understanding of what children are experiencing and to help reduce the stress of the breakup on the children).

[44] *See, e.g.*, TENN. CODE ANN. § 36-6-408 (2015) (requiring parent educational seminar where a permanent parenting plan is or will be entered); UTAH CODE ANN. § 30-3-11.3 (LexisNexis 2015); WIS. STAT. § 767.401 (2015).

[45] *See, e.g.*, IOWA CODE §598.15 (2010) (recommending the teaching of parenting skills in conflict resolution for the benefit of the child).

[46] *E.g.*, 750 ILL. COMP. STAT. ANN. 5/404.1 (LexisNexis 2016); KAN. STAT. ANN. § 23-3214 (2016); MD. CODE. ANN., FAM. LAW §7-103.2 (LexisNexis 2016).

[47] South Dakota and North Dakota are two states that do not mandate or recommend

The structure and content of divorce education classes have some variation, but overall the emphasis has been on education with efforts to avoid therapy interventions.[48] Many states have developed a list of content that must be part of these classes,[49] which typically take between four and nine hours.[50] Instructors are generally tasked with informing parents about the impact that divorce can have on children and providing a means to create parenting plans that describe the parents' responsibilities and time-sharing arrangements for the children.[51] The statutory mandates generally refer to a more specific set of criteria that are established by rule.[52] Other states list the general topics in the state law, and name who will certify the classes. Delaware, for example, provides that the "Parenting Education Course" shall be certified by the Department of Services for Children, Youth and Their Families to meet the goal of "educating divorce litigants on the impact on children of the restructuring of families."[53] The course, required for divorcing parents unless the judge deems it unnecessary,[54] must be at least four hours long and include information on the developmental stages of children, children's adjustment to their parents' separation, conflict management and dispute resolution, stress reduction for children, cooperative parenting, and guidelines for visitation.[55]

Researchers who have collected and analyzed reports by parents who take the programs note that parents generally view those programs positively and believe that the classes are helpful to post-divorce

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parenting classes for divorcing parents. For a full list of states, *see* Pollet & Lombreglia, *supra* note 1, at 375.

[48] Tali Schaefer, *Saving Children or Blaming Parents? Lessons from Mandated Parenting Classes*, 19 COLUM. J. GENDER & L. 491, 497 (2010) (noting that parenting classes "provide education, not therapy").

[49] *See* Pollet & Lombreglia, *supra* note 1, at 375 (stating that as of 2008, forty-six states have mandatory divorce education classes).

[50] *See* Tamara A. Fackrell et. al., *How Effective Are Court-Affiliated Divorcing Parents Education Programs? A Meta-Analytic Study*, 49 FAM. CT. REV. 107, 111 (2011) (stating that most parent education programs reviewed in the study were about four to nine hours in length).

[51] Amanda Sigal et. al., *Do Parent Education Programs Promote Healthy Post-Divorce Parenting? Critical Distinctions and a Review of the Evidence*, 49 FAM. CT. REV. 120, 132 (2011) (explaining that most divorce education classes outlined goals pertaining to co-parenting, such as the division of time and responsibilities, and education of the impact of divorce-related events on children).

[52] For example, the Florida Family Stabilization Course is mandated by statute but further defined by Rule 65C-32 of the Florida Administrative Code. FLA. ADMIN. CODE ANN. r. 65C-32 (2016).

[53] DEL. CODE ANN. tit. 13, § 1507 (2015).

[54] *Id.*

[55] *Id.*

adjustment.[56] However, criticisms of the programs often include concern that many parenting programs have not been thoroughly evaluated to determine whether they are effective in changing parents' behaviors and attitudes.[57] Other criticisms of the programs involve the mandatory nature of the classes perceived to place a "negative judgment" and blame on divorcing parents.[58]

A specific concern is that without explicit safeguards for victims of domestic violence, victims compelled to take parenting classes are at greater risk because the courses emphasize that parents must cooperate with each other.[59] Perpetrators of domestic or intimate partner violence use their power and control over victims to coerce, threaten, and manipulate their victims, thereby severely reducing the amount of bargaining power that their partners have.[60] This produces an imbalance of power that, when added to the threats of harm and stalking behaviors common in domestic violence dynamics,[61] creates a more formidable batterer. Thus empowered, a batterer can force the victimized parent to capitulate to parenting demands solely to keep more violence from occurring, regardless of whether or not the decisions are in the child's best interest.[62] No real power to negotiate or compromise exists when domestic violence is present. What is commonly called "parallel parenting,"[63] rather than co-parenting, is often recommended in domestic violence cases.[64]

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[56] *See* Peter Salem et al., *Taking Stock of Parent Education in the Family Courts: Envisioning a Public Health Approach*, 51 FAM. CT. REV. 131, 131–48 (2013); *see also* Nancy Ver Steegh & Solveig Erickson, M*andatory Divorce Education Classes: What Do the Parents Say?* 28 WM. MITCHELL L. REV. 889, 905–07 (2001).

[57] Salem, *supra* note 56, at 131.

[58] Schaefer, *supra* note 48, at 492.

[59] *See*, Evelyn Frazee *Sensitizing Parent Education Programs to Domestic Violence Concerns: The Perspective of the New York State Parent Education Advisory Board*, 43 FAM. CT. REV. 124, 130 (2005) (stating that for victims, engaging in cooperative parenting in a domestic violence or high-conflict situation may very well jeopardize the safety of the abused parent and that of the children).

[60] N.Y. Office for the Prevention of Domestic Violence, *Understanding Domestic Abusers,* http://www.opdv.ny.gov/professionals/abusers/genderandipv.html (last visited July 14, 2016) (describing the "coercive controlling violence" that results in a fixed imbalance of power); *see also* Kerry Loomis, *Domestic Violence and Mediation: A Tragic Combination for Victims*, 35 CAL W. L. REV. 355, 363–68 (1999).

[61] CDC, *Intimate Partner Violence: Definitions*, CDC.GOV, http://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html (last updated July 20, 2016).

[62] *See* Evelyn Frazee & Susan Pollet, *Doing No Harm While Doing Good: Minimizing the Threat of Domestic Violence While Optimizing the Benefits of Parent Education,* 49 JUDGES' J. 23, 24 (2010).

[63] Edward Kruk, *Parallel Parenting After Divorce,* Psych. Today (Sept. 1, 2013), https://www.psychologytoday.com/blog/co-parenting-after-divorce/201309/parallel-parenting-after-divorce (describing "parallel parenting" as an "arrangement in which

In addition to these concerns, the content of these classes does not require consideration or accommodation of parents' individual needs or differences.[65] This may be a result of the limited amount of time required to complete many of the courses. Whatever the explanation, no state requires that instructors offer parents a way to gauge their own individual challenges or obstacles to co-parenting as a component of the training. Such a gap may result in ineffective service delivery, especially in light of recent neurobiological studies showing the devastating impact that histories of early trauma can have on individuals' functioning[66] and research offering evidence that a substantial percentage of the population has suffered such trauma.[67]

III. THE IMPACT OF CHILDHOOD TRAUMA ON PARENTING

Research known as "The Adverse Childhood Experiences" (ACE) studies[68] has provided confirmation that exposure to childhood trauma can have a profound impact on individual development, and lead to serious

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divorced parents are able to co-parent by means of disengaging from each other, and having limited direct contact, in situations where they have demonstrated that they are unable to communicate with each other in a respectful manner").

[64] *See* Eighth Jud. Cir. of Fla., *Parallel Parenting Plans*, CIRCUIT8.ORG, http://circuit8.org/parallel_parenting (last visited July 14, 2016) (asserting that parallel parenting plans are appropriate for parents who do not get along, are highly reactive to each other, feel extremely uncomfortable in each other's presence, have an order of protection, or cannot cooperate in one or more major areas of parenting).

[65] This absence is reflected by the general course requirements for several types of parenting courses. *See, e.g.*, Atrium Fam. Ctr., *Positive Parenting Through Divorce*, http://www.positiveparentingthroughdivorce.com/course_outline.htm (last visited July 14, 2016) (listing general types of information); Cobb Cnty., *Divorcing Parents Seminar, Cobb County*, https://cobbcounty.org/index.php?option=com_content&view=article&id=2193&Itemid=990 (last visited July 14, 2016) (noting that the purpose of the seminar is to "provide parents with information on topics including the divorce process and how it impacts children, developmental stages of children, communication skills, identifying when a child may need help, and realistic expectations about step families"); *see also* FLA. STAT. § 61.21(1)(c) (2015) (requiring an educational program with general information regarding the issues and legal procedures for resolving time-sharing and child support disputes, the emotional experiences and problems of divorcing adults, the family problems and the emotional concerns and needs of the children and the availability of community services and resources).

[66] *See infra* notes 68–108.

[67] *See infra* note 69 and accompanying text.

[68] Robert F. Anda et. al., *Building a Framework for Global Surveillance of the Public Health Implications of Adverse Childhood Experiences*, 39 AM. J. PREVENTATIVE MED. 93, 93–96 (2010) ("Sufficient amounts of data exist to show that ACEs are common and are associated with many public health problems.").

long-term physical, interpersonal, and mental health problems. The ACE studies also demonstrated that a significant proportion of the public—in most studies between 50% and 75%—have been exposed to traumatic events.[69] The groundbreaking ACE studies show that exposure to multiple traumas in childhood can create emotional and physical scars[70] so wounding that their insidious, widespread effects upon adult health outcomes are considered a major underreported source of adult health problems.[71]

Evidence of the impact of trauma is not new,[72] but attention to it has recently increased. The science of childhood trauma has its roots in an accidental discovery. In the 1980s Dr. Vincent Felitti was operating an obesity clinic that was struggling to keep its patients from dropping out of treatment before completion.[73] Felitti began by interviewing 286 of the patients from his clinic who had dropped out, and discovered a high rate of early-life sexual trauma among them.[74] These results prompted Felitti to investigate the prevalence of childhood adversity and its association with adult illness among the general population, eventually leading to a research collaboration between Felitti and Centers for Disease Control epidemiologist Dr. Robert Anda.[75] They partnered with the Health

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[69] Bonnie L. Green et al., *Trauma-Informed Medical Care: A CME Communication Training for Primary Care Providers*, 47 FAM. MED. 7 (2015) (citing Naomi Breslau, *Gender Differences in Trauma and Posttraumatic Stress Disorder*, 5 J. GENDER SPECIFIC MED. 34, 34–40 (2001)) (noting that the prevalence of exposure to traumatic events is 50–75% of the general population).

[70] *See generally* Robert Listenbee, Jr. et al., *Defending Childhood: Report of the Attorney General's National Task Force on Children Exposed to Violence*, TRAUMA-INFORMED CARE PROJECT (2012), http://www.traumainformedcareproject.org/resources/CEV-Full%20Report%2012-12-12%20us%20attorney%20gen%20report%20on%20trauma.pdf (noting that childhood trauma harms children's ability to mature cognitively and emotionally, scarring them physically and emotionally well into their adult lives).

[71] Stevens, *supra* note 5.

[72] Naomi Breslau, Epidemiologic Studies of Trauma, Posttraumatic Stress Disorder, and Other Psychiatric Disorders. 47 CAN. J. PSYCHIATRY 923, 923–24 (2002) (explaining that psychiatric interest in PTSD in the 1980's was focused primarily on veterans of the Vietnam War, with a more recent focus on the prevalence of trauma within the general population).

[73] *Id.* (stating that Dr. Felitti, then-chief of Kaiser Permanente's Department of Preventive Medicine in San Diego, couldn't understand why 55 percent of the 1,500 people who enrolled in his weight-loss clinic every year left before completing the program).

[74] Jane Ellen Stevens, *The Adverse Childhood Experiences Study—the Largest, Most Important Public Health Study You Never Heard of—Began in an Obesity Clinic*, ACES TOO HIGH NEWS, Oct. 3, 2012, https://acestoohigh.com/2012/10/03/the-adverse-childhood-experiences-study-the-largest-most-important-public-health-study-you-never-heard-of-began-in-an-obesity-clinic/ (stating that, in Dr. Felitti's initial study with 286 patients from his obesity clinic who were interviewed, most had been sexually abused as children).

[75] *Id.* (describing the sequence of events that led to Dr. Felitti being introduced to Dr.

Maintenance Organization (HMO) Kaiser Permanente[76] to conduct a large-scale, ongoing study evaluating how early negative experiences affected the adult physical and mental health outcomes and risk behaviors of over 17,000 participants.[77] The first wave of the original Kaiser Permanente study involved over 9,500 participants who were receiving medical services through the HMO and responded to a survey asking about adverse childhood experiences.[78] A 17-item surveys asked study participants about physical, emotional, and sexual abuse; physical and emotional neglect; parental divorce or death; parental incarceration; and mental illness and substance abuse in their childhood home.[79] In order to generalize the original results to more diverse populations,[80] the ACE study was replicated multiple times with different populations and settings, including with children in poor, urban areas[81] and with juvenile offenders.[82] Additionally,

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Anda, and the subsequent development of the ACE study).

[76] *Id.* The article described the study as follows:

> Kaiser Permanente in San Diego was a perfect place to do a mega-study. More than 50,000 members came through the department each year, for a comprehensive medical evaluation. Every person who came through the Department of Preventive Medicine filled out a detailed biopsychosocial (biomedical, psychological, social) medical questionnaire prior to undergoing a complete physical examination and extensive laboratory tests. It would be easy to add another set of questions. In two waves, Felitti and Anda asked 26,000 people who came through the department "if they would be interested in helping us understand how childhood events might affect adult health," says Felitti. Of those, 17,421 agreed.

Id.

[77] Anda et al., *supra* note 4, at 176 (describing the collaborating institutions involved with the study, as well as the purpose of the study and the participant response rate over two waves).

[78] *See also* Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 245, 246–49 (1998) (describing the survey methods and the response rate of participants in the first wave).

[79] *Id.* at 248 (describing the different categories used to measure adverse childhood experiences, and the number of question items used to measure each category).

[80] Anda et al., *supra* note 4, at 178 (noting that 73% of women and 76% of men were white).

[81] Nadine J. Burke et al., *The Impact of Adverse Childhood Experiences on an Urban Pediatric Population*, 35 CHILD ABUSE & NEGLECT 408, 409 (2011) ("We present data from youth who live in and around Bayview Hunters Point, a community that places them at high risk for exposure to ACEs.").

[82] Michael T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in The Lives of Juvenile Offenders*, 3 J. JUV. JUST. 1, 6–7 (2014) (explaining how a secondary data analysis of Positive Achievement Change Tool assessment results was used to extrapolate the ACE scores of 64,329 juvenile offenders in the state of Florida for research purposes).

the study was conducted internationally in developing countries.[83] Different versions of the original ACE survey have been created that examine additional types of adverse childhood experiences, including bullying, poverty, and living in an unsafe neighborhood.[84]

ACE scales are designed to measure cumulative childhood stress. Respondents are provided with a list of various traumatic experiences and one point is given to each affirmative response to each particular type of trauma experienced.[85] Researchers found that about two-thirds of adults surveyed in the initial study reported at least one ACE,[86] and that more than half of the study participants report one or more ACEs.[87] The correlation between increased numbers of ACEs and increased health problems is remarkably strong; as the number of ACEs rises, so does incidence of later health and behavioral problems.[88] The authors extracted these findings by analyzing the relationship[89] between ACE scores and subsequent health problems.[90] Having an ACE score of four or higher, for example, is linked with higher rates of adult alcoholism, sexually transmitted diseases, and intravenous drug use.[91] In addition, high ACE scores put people at a greater

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[83] Laurie S. Ramiro et. al., *Adverse Childhood Experiences (ACE) and Health-risk Behaviors Among Adults in a Developing Country Setting,* 34 CHILD ABUSE & NEGLECT 842, 844 (2010), ("This study aimed to determine the interrelationship among adverse childhood experiences, health-risk behaviors and health outcomes in a developing country setting.").

[84] David Finkelhor et al., *Improving the Adverse Childhood Experiences Study Scale*, 167 J. AM. MED. ASS'N PEDIATRICS 70, 72 (2013) (outlining the additional items used to assess adverse childhood experiences that were not included in the original ACE study).

[85] Felitti et al., *supra* note 77, at 248 (defining participants as exposed to a category if they responded "yes" to one or more of the questions in that category).

[86] Amy Anderson Mellies, *Impact of Adverse Childhood Experiences on Adult Health in Colorado,* 99 HEALTH WATCH 1 (2016) ("Results from the initial recruitment phase showed that ACEs are common, with nearly two-thirds of participants experiencing at least one type of ACE while growing up.").

[87] Felitti et al., *supra* note 77, at 249 (stating that "more than half of respondents (52%) experienced ≥1 category of adverse childhood exposure.").

[88] *Id.* at 250 ("finding a strong relationship between the number of childhood exposures and the number of health risk factors for leading causes of death in adults").

[89] Olav Axelson, Francesco Forastiere & Mats Frederickson, *Assessing Dose-Response Relationships by Cumulative Exposures in Epidemiological Studies*, 50 AM. J. INDUS. MED., 217, 217 (2007) (citing Austin Bradford Hill, *The Environment and Disease: Association or Causation?* (1965)) ("If the occurrence of a disease increases with the degree of exposure, an increasing dose—response (or exposure-response) relationship is indicated, which facilitates the interpretation that the exposure is of causal importance for the development of the disease, a consideration included in the so called Hill 'criteria' or 'viewpoints'").

[90] *Id.* at 249 (stating that "[t]o test for a dose-response relationship to health problems, we entered the number of childhood exposures as a single ordinal variable (0, 1, 2, 3, 4, 5, 6, 7) into a separate logistic regression model for each risk factor or disease condition.").

[91] Felitti, *supra* note 77, at 250 (describing the dose-response relationships between

risk of developing heart disease, chronic lung disease, liver disease, skeletal fractures, and cancer.[92] Having an ACE score of four or greater also leads to an increased risk of being diagnosed with symptoms of a mental health condition[93] such as hallucinations[94] and depression.[95] ACE scores of six or higher have been correlated with an average reduced life expectancy of twenty years.[96]

Neuroscience explains how ACEs can have such a devastating impact. When a child is exposed to a traumatic experience, this exposure causes the child's developing brain to be flooded with stress hormones.[97] These hormones are correlated with impaired neurological functioning in high amounts.[98] Because individuals' brains are not fully developed until the

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ACE scores of 4 or greater and corresponding health-risk behaviors).

[92] *Id.*

[93] Valerie J. Edwards et. al., *Relationship Between Multiple Forms of Childhood Maltreatment and Adult Mental Health in Community Respondents: Results from the Adverse Childhood Experiences Study*, 160 AM. J. PSYCHIATRY 1453, 1456 (2003) ("Decrements in the mental health score occurred in a dose-response manner as the number of abuse types increased.").

[94] Charles L. Whitfield et. al., *Adverse Childhood Experiences and Hallucinations*, 29 CHILD ABUSE & NEGLECT 797, 803 (2005). Researchers assessed the relationship between ACE score and hallucinations separately for persons with and without substance abuse histories. *Id.* After adjusting for age, sex, race, and educational attainment, the researchers found an increase in the prevalence of hallucinations for both groups. *Id.*

[95] Daniel P. Chapman et al., *Adverse Childhood Experiences and the Risk of Depressive Disorders in Adulthood*, 82 J. AFFECTIVE DISORDERS 217, 222 (2004) ("Cumulative exposure to ACEs generally assumed a stronger dose–response relationship with depressive disorders among women than men. However, the presence of ACEs was also associated with strong and significantly increased risks of both lifetime and current depressive disorders in men.").

[96] David W. Brown, *Adverse Childhood Experiences and the Risk of Premature Mortality*, 37 AM. J. PREVENTATIVE MED. 389, 393 (2009), ("People with six or more ACEs died nearly 20 years earlier on average than those without ACEs.").

[97] Anda, *supra* note 4, at 180 ("Extreme, traumatic or repetitive childhood stressors such as abuse, witnessing or being the victim of domestic violence, and related types of ACEs are common, tend to be kept secret, and go unrecognized by the outside world. Likewise, the fight-or- flight response among children exposed to these types of stressors, and the attendant release of endogenous catecholamines and adrenal corticosteroids are both uncontrollable and invisible.") (citation omitted).

[98] Glaser, *supra* note 6, at 104 (citing Amy F. T. Arnsten, *Development of the Cerebral Cortex: Stress Impairs Prefrontal Cortical Function*, 38 J. AM. ACAD. & ADOLESCENT PSYCHIATRY 220, 220–22 (1999); Dennis Charney et. al., *Psychobiological Mechanisms of Post-Traumatic Stress Disorder*, 50 ARCH. GEN. PSYCHIATRY 294, 294–305 (1993)). Charney and his co-authors noted:

> In preclinical studies, stress has been shown to enhance the release and metabolism of dopamine in the prefrontal cortex, one of whose functions is to produce coping responses to stress. Raised levels of noradrenaline and dopamine are positively associated with dysfunction of the prefrontal cortex, whose functions also include the

third decade of life,[99] exposure to ACEs can actually interfere with the normal developmental process of the brain.[100] A part of the brain called the prefrontal cortex, which helps with "executive functioning"—a person's ability to plan, organize, and filter out distracting stimuli[101]—can be damaged by excessive stress hormones.[102] The impact that ACEs have on a child's developing brain may impact the child's physical and mental health,[103] as well as behavioral and social functioning.[104] Prolonged exposure to ACEs may have permanent negative impacts upon the development of a child's brain[105] and may cause behavioral, social, and health problems.[106] Studies have demonstrated that exposure to ACEs may predispose a child towards developing mental health conditions such as depression and anxiety disorders.[107]

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planning and organizing of actions using working memory and the inhibiting of inappropriate responses and attention to distractions ("executive functions").

Id.

[99] Peter B. Jones, *Adult Mental Health Disorders and Their Age at Onset*, 202 BRIT. J. PSYCHIATRY s5, s8 (2013).

[100] Yolanda P. Graham et al., *The Effects of Neonatal Stress on Brain Development: Implications for Psychopathology*, 11 DEVELOPMENT & PSYCHOPATHOLOGY 545, 558 (1999) ("It is likely that early abuse or neglect, especially chronic exposure, activates the HPA axis of infants, perhaps leading to permanent changes in their developing neurobiological systems.").

[101] Glaser, *supra* note 6, at 104 (describing the functions of the prefrontal cortex, and explains the specific role of executive functioning).

[102] *Id.* (describing how elevated levels of neurotransmitters associated with reactions to stress may be correlated with dysfunction of the prefrontal cortex in ways that have negative impacts upon working memory and executive functioning).

[103] Amanda R. Tarullo & Megan R. Gunnar, *Child Maltreatment and the Developing HPA Axis*, 50 HORMONES & BEHAVIOR 632, 636 (2006) ("Child maltreatment clearly has complex, long-term effects on HPA function, which likely have deleterious implications for physical and mental health.").

[104] Anda et al., *supra* note 4, at 180 (stating that the accumulation of negative effects of traumatic stress upon developing brain may lead to long-term problems with behavioral health and social functioning).

[105] Graham et al., *supra* note 99, at 558 ("It is likely that early abuse or neglect, especially chronic exposure, activates the HPA axis of infants, perhaps leading to permanent changes in their developing neurobiological systems.").

[106] Anda et al., *supra* note 4, at 180. Anda stated that the detrimental effects of traumatic stress on developing neural networks and on the neuroendocrine systems that regulate them have until recently remained hidden even to the eyes of most neuroscientists. *Id.* However, the information and data that we present herein suggest that this veiled cascade of events represents a common pathway to a variety of important long-term behavioral, health, and social problems.

[107] Christine Heim & Charles B. Nemeroff, *The Impact of Early Adverse Experiences on Brain Systems Involved in the Pathophysiology of Anxiety and Affective Disorders*, 46 BIOLOGICAL PSYCHIATRY 1509, 1517–18 (1999) ("Together, these findings suggest that there

As victims of childhood trauma grow up and form their own relationships, another consequence of ACEs—especially abuse and neglect—may be dysfunctions and difficulties in intimate relationships.[108] Studies show that marital relationships may be undermined if one or both partners have a history of ACEs.[109] Individuals who have unresolved trauma may be unable to form and maintain healthy relationships.[110] Moreover, they may display impaired judgment in their choice of partners and spouses.[111] Exposure to various forms of childhood maltreatment also increases the likelihood that victims will get divorced.[112] Being exposed to various forms of maltreatment may also predispose a person towards experiences of intimate partner violence;[113] people who have been traumatized as children may be more likely to subconsciously reenact traumatic experiences in their adult intimate relationships.[114] For those who are later re-victimized, these reenactments of trauma are not a calculated

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may be an initial sensitization of the stress hormone system, representing a biological vulnerability for the development of depression and anxiety disorders.").

[108] *See* Rebecca A. Colman & Cathy Spatz Widom, *Childhood Abuse and Neglect and Adult Intimate Relationships: A Prospective Study*, 28 CHILD ABUSE & NEGLECT 1133, 1139 (2004) (finding that child abuse and neglect were associated with an increased risk of relationship dysfunction among study subjects who had ever married or cohabitated).

[109] *Id.* (finding that male and female victims of child abuse and neglect in study experienced more dysfunction in marital relationships than control subjects).

[110] *See* Green, *supra* note 69, at 7 ("Trauma survivors may be impaired in forming and maintaining trusting relationships . . . .").

[111] David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 AM. J. ORTHOPSYCHIATRY 530, 535 (1985) Finkelhor and Browne stated as follows:

> Sexual abuse victims suffer from grave disenchantment and disillusionment. In combination with this there may be an intense need to regain trust and security, manifested in the extreme dependency and clinging seen in especially young victims. This same need in adults may show in impaired judgment about the trustworthiness of other or in a desperate search for a redeeming relationship.

Id.

[112] Colman & Widom, *supra* note 108, at 1135 (finding that physical abuse, sexual abuse, and neglect each increased risk for divorce).

[113] Charles L. Whitfield et al., *Violent Childhood Experiences and the Risk of Intimate Partner Violence in Adults Assessment in a Large Health Maintenance Organization*, 18 J. INTERPERS. VIOLENCE 166, 176 (2003) ("Childhood physical abuse increased the risk of victimization among women and the risk of perpetration by men more than 2-fold; childhood sexual abuse increased these risks 1.8-fold for both men and women; and witnessing domestic violence increased these risks approximately 2-fold for women and men.").

[114] Jim Walker, *Unresolved Loss and Trauma in Parents and the Implications in Terms of Child Protection*, 21 J. SOC. WORK PRAC. 77, 80 (2007) ("Where psychoanalysis talks of the repetition compulsion, attachment therapists refer to narrative reenactment of the trauma. This is often most evident in the choice of a partner.").

choice; instead, they result from having been raised in an environment where being victimized was a common and ongoing experience.[115]

In adults who have children, research suggests that parents struggling with the effects of unresolved trauma are more likely to act in ways that are harmful to their own children, and are at a higher risk of maltreating their children in manners similar to their own victimization.[116] This phenomenon has been hypothesized as resulting from a parent's unconscious fear, anger, and memories of abandonment being triggered by a child's vulnerability and the demands of providing care to young children.[117] Unresolved trauma increases the likelihood of a repeated cycle of violence; some parents with high exposure to ACEs may be more likely to neglect or abuse their children if they are not given the opportunity to resolve their traumatic experiences.[118]

In addition, parents who have suffered from trauma as children are at a higher risk of having children who experience disorganized forms of attachment.[119] Dissociation—a state of numbed detachment from the present environment[120]—interferes with parents' capacity to create secure

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[115] Whitfield, *supra* note 113, at 179–80. The article found:

> Revictimization/retraumatization is usually experienced and learned inside the family and is nearly always associated with a low self-esteem and often with dissociation during the revictimization, both of which commonly come from the prior repeated trauma. Toward the end of her recovery work, one of our patients said, "If I believe that I am bad and unworthy, then I will more easily let others mistreat me."

Id.

[116] *See* Walker, *supra* note 114, at 80 (citing Robert J. Neborsky, *A Clinical Model for the Comprehensive Treatment of Trauma Using an Affect Experiencing Attachment Theory Approach*, *in* HEALING TRAUMA: ATTACHMENT, MIND, BODY, AND BRAIN (Marron F. Solomon & Daniel J. Siegel eds., 2003)) ("Unresolved trauma leads to an increased likelihood that as a parent the person will treat their own child the same way they themselves were treated.").

[117] *See id.* at 82 ("[I]t seems that whenever the abusive or neglectful parent finds himself in a relationship in which the child appears vulnerable or in a state of need, old unresolved childhood feelings of fear, anger, distress or abandonment are unconsciously activated.").

[118] Glaser, *supra* note 6, at 99 (explaining that mothers who did not abuse their children were able to lucidly reflect on their experiences of abuse in a cohesive manner, in contrast to abusive mothers who presented with elevated levels of dissociation and whose recollections of their childhoods that were inconsistent with a history of abuse).

[119] *See* Walker, *supra* note 114, at 80 (citing Mary Main & Erik Hesse, *Parents' Unresolved Traumatic Experiences Are Related to Infant Disorganised Status: Is Frightened and/or Frightening Behaviour the Linking Mechanism?*, *in* ATTACHMENT IN THE PRESCHOOL YEARS: THEORY, RESEARCH AND INTERVENTION 161-82 (Mark Greenberg, Dante Cicchetti, & E. Mark Cummings eds., 1990)) (asserting existence of "strong correlation" between unresolved loss and trauma and disorganised attachment in children).

[120] Allan N. Schore, *The Effects of Early Relational Trauma on Right Brain Development, Affect Regulation, and Infant Mental Health*, 22 INFANT MENTAL HEALTH J.

attachment bonds with their infants.[121] Some researchers believe that the heightened risk of dissociation among children of parents who suffered serious ACEs may reflect a link between a parent's dissociation—a symptom of, and common coping mechanism for trauma[122]—and the child's own.[123] Further, there is also a strong link between a parent's dissociation and his or her neglect of the child.[124]

Secure attachment bonds between an infant and caregiver are based upon a complex interplay of biological and environmental factors.[125] In order to learn to regulate their own emotions, infants depend on the attuned responses of a caregiver.[126] If the caregiver is unresponsive to the infant because of earlier trauma, this lack of an attuned infant-caregiver interaction leaves a baby unable to regulate his or her own emotions—potentially inducing prolonged states of hyperarousal in the baby.[127] States of dysregulated arousal can be passed from a caregiver to the child, thus contributing to intergenerational cycles of attachment

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201, 211 (2001) ("[Dissociation is a process] in which the child disengages from stimuli in the external world and an attends to an 'internal' world. The child's dissociation in the midst of terror involves numbing, avoidance, compliance, and restricted affect.").

[121] Nico Moleman et al., *The Partus Stress Reaction: A Neglected Etiological Factor In Postpartum Psychiatric Disorders*, 180 J. NERV. MENT. DIS. 271, 271 (1992) (describing how the dissociative experiences of a parent led to a failure to form attachments with their infants).

[122] *See* Bessel A. Van der Kolk et al., *Dissociation, Somatization, and Affect Dysregulation: The Complexity of Adaption of Trauma*, 153 AM. J. PSYCHIATRY 83, 84 (1996) (describing dissociation as a symptom that is associated with trauma-related psychiatric diagnoses).

[123] *See* Schore, *supra* note 120, at 217–18.

[124] *Id.* at 218 ("The caregiver's entrance into a dissociative state represents the real-time manifestation of neglect.").

[125] Glaser, *supra* note 6, at 101 (citing Allan Schore, *The Experience-Dependent Maturation of a Regulatory System in the Orbital Prefrontal Cortex and the Origin of Developmental Psychopathology*, 8 DEV. PSYCHOPATH. 59 (1996)) ("The early mother-infant interaction is thus a biobehavioural system. In the brain of the infant who sees the responsive mother's face, brain stem dopaminergic fibres are activated, which trigger high levels of endogenous opiates. These endorphins are biochemically responsible for the pleasurable aspects of social interaction and social affect and are related to attachment.").

[126] *Id.* (citing B.A. Kolk & R.E. Fisler, *Childhood Abuse and Neglect and Loss of Self-Regulation*, 58 BULL. MENNINGER CLINIC 145 (1994)) ("The sensitive caregiver's role is to modulate the infant's arousal, which could also follow intense displeasure, fear, or frustration, by calming the infant and restoring her or him to a tolerable emotional state, free of anxiety.").

[127] Allan Schore, *Relational Trauma and the Developing Right Brain*, 1159 ANNALS N.Y. ACAD. SCI. 189, 196 (2009) ("Instead of modulating, [abuse] induces extreme levels of stimulation and arousal . . . . and . . . [without] interactive repair, the infant's intense negative-affective states last for long periods of time.").

trauma.[128] Such a dysfunction may predispose the child to an increased risk of aggression or hypervigilance later in life[129] Research conducted on the mental health problems of children in the juvenile justice system demonstrates that children in this system have higher rates of childhood trauma compared to children in the general population,[130] and have a greater likelihood of having suffered multiple forms of childhood trauma.[131]

Recent studies in neuroscience have challenged common longstanding beliefs that neural imprints laid down in the brain during critical periods of development are irrevocable.[132] Instead, and despite the alarming fact that ACEs might cause significant damage to the developing brain, the brain has been viewed as somewhat plastic.[133] Thus, some of the damage may be reversible.[134] It is therefore important to develop prevention efforts aimed at breaking the cycles of intergenerational trauma. Many programs have been developed that focus on prevention and early intervention for

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[128] *Id.* at 197 (citing R. Davidson et al., *Approach-Withdrawal and Cerebral Asymmetry: Emotional Expression and Brain Physiology*, 58 J. PERS. SOC. PSYCHOL. 330 (1990)) ("During the intergenerational transmission of attachment trauma, the infant is matching the rhythmic structures of the mother's dysregulated arousal states. This synchronization is registered in the firing patterns of the stress-sensitive corticolimbic regions of the right brain, dominant for coping with negative affects.").

[129] Glaser, *supra* note 6, at 101 ("In the absence of experiences of external modulation of affect, the infant brain is unable to learn self-regulation of affect, part of the process of ontogenesis. Such deficits may only become apparent later, when the child is expected to have matured for that particular task and these deficits may then become manifest by aggression or hypervigilance.").

[130] Baglivio et al., *supra* note 82, at 2–3 (citing Carly B. Dierkhisings et al., *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. PSYCHOTRAUMATOLOGY 1483 (2013)) ("Prior research on adverse and traumatic experiences, as well as mental health problems of juvenile justice–involved youth, has revealed higher prevalence rates of adversity and trauma for these youth compared to youth in the general population.").

[131] *Id.* at 3 ("Furthermore, compared to youth in the general population, juvenile justice–involved youth have been found to have a greater likelihood of having experienced multiple forms of trauma, with one-third reporting exposure to multiple types of trauma each year." (citation omitted)).

[132] Richard J. Davidson & Bruce S. McEwen, *Social Influences on Neuroplasticity: Stress and Interventions to Promote Well-Being*, 15 NAT. NEUROSCI. 689, 691 (2012) ("One of the longest held notions of brain plasticity is that certain critical periods or windows exist in development, during which circuitry is laid down that lasts for the lifetime.").

[133] *Id.* ("However, a more recent set of findings suggests that developmentally induced plasticity, at least certain kinds, can be reversed by re-opening those windows.").

[134] Bruce S. McEwen & Linn Getz, *Lifetime Experiences, the Brain and Personalized Medicine: An Integrative Perspective*, 62 METABOLISM: CLINICAL & EXPERIMENTAL S20, S22 (2013) ("It is important to understand that the human brain possesses a life-long and clinically significant capacity for reversible, structural plasticity.").

children.[135] Still, adults who have experienced ACEs—including those who become parents—can benefit from interventions.[136] Targeted interventions for parents to enhance brain function can include basic but transformative changes such as healthy lifestyles with less stress, good sleep habits, exercise, and nutrient-rich healthy eating.[137] Studies suggest that neural changes and even changes in the structure of the brain (especially the amygdala[138]) may occur with these and other interventions, and result in positive changes in behavior.[139]

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[135] *See* NAT'L CHILD TRAUMATIC STRESS NETWORK, *Effective Treatments for Youth Trauma*, (2003), http://www.nctsnet.org/sites/default/files/assets/pdfs/effective_treatments_youth_trauma.pdf (describing treatments that have been found to be effective for youth who have experienced trauma).

[136] Julian D. Ford & Christine A. Courtois, *Educational Resources and Evidence-Based Treatment for Adults*, ACAD. ON VIOLENCE & ABUSE (2015), http://www.avahealth.org/aces_best_practices/educational-resources-evidence-based-treatment---adults.html. The authors described the progression of intervention as follows:

> There are a number of evidence-based approaches to psychotherapy for adults with ACEs histories, each of which guides the client through a progression of three phases: (1) safety and stabilization, (2) trauma processing, and (3) consolidation of therapeutic gains. The first and third phases are standard-of-care best-practice approaches for all psychotherapies, although they must be done with careful attention to the unique impact of ACEs.

Id.

[137] *See* McEwen & Getz, *supra* note 134, at S24. The authors identify several successful programs that are focused on preventing adverse childhood experiences and describing the return on investment of such programs in regards to individual and societal benefits, while giving the caveat that these programs are most successful when the family environment is already stable. *Id.* The authors then stress that interventions for those who have suffered from ACEs are beneficial as well, although they may require a greater investment in time and energy. *Id.* Social integration and social support, along with basic salubrious behaviors such as healthy eating, sleeping, and exercise habits are described as being not only beneficial, but even having potentially equal or superior positive effects as medications. *Id.*

[138] Christian Paret et al., *Down-Regulation of Amygdala Activation with Real-Time FMRI Neurofeedback in a Healthy Female Sample,* 8 FRONT. BEHAV. NEUROSCI. 1, 13 (2014) (citing Annete Beatrix Brühl, *Real-Time Neurofeedback Using Functional MRI Could Improve Down-Regulation of Amygdala Activity During Emotional Stimulation: A Proof-Of-Concept Study*, 27 BRAIN TOPOGRAPHY 138 (2014)) ("In particular, down-regulation of the amygdala as demonstrated in the current study and elsewhere may be helpful for disorders characterized by problems in emotion regulation and elevated amygdala activity such as borderline personality disorder. In these patients, training skills for emotion regulation is a decisive aspect of successful psychotherapies.").

[139] Davidson & McEwen, *supra* note 132, at 692 ("There is a growing literature documenting functional and structural changes in the brain with specific interventions and training regimes. The behavioral evidence in support of such interventions and training provides a reasonable foundation for the exploration of neural changes that support these behavioral outcomes.").

Such striking evidence of long-term detrimental impact of childhood trauma, the need for intervention, the potential cyclical recurrence of trauma on parents' children, and the potential for healing has been analyzed in many ways. Researchers have recognized that unresolved trauma has a high economic cost that has an effect upon various domains, including health care, workplace absenteeism and productivity, and mental health services.[140] Apart from the financial cost, trauma takes a high human toll as individuals and families suffer and cycle through the justice system repeatedly[141]—in family court cases, delinquency cases, dependency cases, and criminal cases.[142] Such a powerful dynamic creates a compelling case for the justice system to alert individuals, families, and communities to the devastating impact of trauma and to devise ways to break its cycle.

IV. TRAUMATIZED PARENTS AND CHILDREN IN THE COURT SYSTEM

Although research about ACEs has existed since the late 1990s,[143] it is only recently that researchers, clinicians, and community leaders have

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[140] Richard J. Gelles & Staci Perlman, *Estimated Annual Cost Of Child Abuse And Neglect*, PREVENT CHILD ABUSE AMERICA (2012), http://www.preventchildabuse.org/images/research/pcaa_cost_report_2012_gelles_perlman.pdf (finding that the total direct and indirect cost of child maltreatment is $78,405,740,013; adding two new categories of costs—indirect costs of early intervention ($247,804,537) and emergency/transitional housing ($1,606,866,538) thereby increasing the total costs to $80,260,411,087).

[141] *See* Baglivio et al., *supra* note 82, at 3 ("By extrapolating ACE scores from the e standardized assessment tool used within the Florida Department of Juvenile Justice (FDJJ), described below, we demonstrate that increased ACE scores correlate with increased risk to reoffend."); *see also* Rose Patterson, *Trauma: Why it Matters to Florida Courts*, LINKEDIN (Apr. 11, 2016), https://www.linkedin.com/pulse/trauma-why-matters-florida-courts-rose-patterson; Gene Griffin & Sarah Sallen, *Considering Child Trauma Issues in Juvenile Court Sentencing*, 34 CHILD. LEGAL RTS. J. 1, 11 (2013) (citing Elizabeth M. Tracy & Pamela J. Johnson, *The Intergenerational Transmission of Family Violence*, in WORKING WITH TRAUMATIZED YOUTH IN CHILD WELFARE 113, 113–34 (Nancy Boyd Webb ed., 2005) ("It is not unusual to see families cycle through the court system.").

[142] *See* Patterson, *supra* note 141.

[143] Anda et al, *supra* note 4, at 176. In describing the methods used in the ACE study, the author stated:

> The study population was drawn from the HAC (Health Appraisal Center), which provides preventive health evaluations to adult members of Kaiser Health Plan in San Diego County. All persons evaluated at the HAC complete a standardized questionnaire, which includes health histories and health-related behaviors, a medical review of systems, and psychosocial evaluations which are a part of the ACE Study database. Two weeks after their evaluation, each person evaluated at the HAC between August 1995 and March 1996 (survey wave 1; response rate 70%) and June and October 1997 (survey wave 2; response rate 65 %) received the ACE Study questionnaire by mail. The questionnaire collected detailed information about ACEs

realized that adults who navigate a range of community systems such as medical organizations, social services, and the court system have suffered from trauma.[144] This involvement makes it imperative for the leaders of these systems to take an active role in developing methods that are sensitive to the needs of the traumatized individuals with whom they will interact. The term "trauma-informed"[145] changes the dialogue around trauma and trauma effects. It seeks to ask not "What Is Wrong with You?" but rather "What Happened to You?"[146] A national organization called the Trauma Informed Care Project provides guidance, ideas, and explanations of concepts to judges in "The Essential Components of Judicial Practice":[147] "Many of the individuals who come into your courtroom have been severely injured as children, and their behaviors, although ineffective, are ways to maintain and cope with toxic stress."[148]

Thus, the goals of judicial practice should be to protect those who come before the court, recognize that many of them have experienced trauma that has made them vulnerable, treat those individuals with dignity and respect, and focus on their strengths.[149] Judges have been advised to educate

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including abuse, witnessing domestic violence, and serious household dysfunction as well as health-related behaviors from adolescence to adulthood.

Id.

[144] *See* Denise E. Elliott et al., *Trauma-Informed or Trauma-Denied: Principles and Implementation of Trauma-Informed Services for Women*, 33 J. COMMUNITY PSYCHOL. 461, 461–77.

[145] National Center for Trauma-Informed Care, *Trauma-Informed Approach and Trauma-Specific Interventions*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., http://www.samhsa.gov/nctic/trauma-interventions (last updated Aug. 8, 2015). The agency suggests:

> A program, organization, or system that is trauma-informed: 1. *Realizes* the widespread impact of trauma and understands potential paths for recovery; 2. *Recognizes* the signs and symptoms of trauma in clients, families, staff, and others involved with the system; 3. *Responds* by fully integrating knowledge about trauma into policies, procedures, and practices; and, 4. Seeks to actively resist *re-traumatization*.

Id.

[146] TRAUMA INFORMED CARE PROJECT, http://www.traumainformedcareproject.org (last viewed May 18, 2016).

[147] Susan Wells & Jennifer Urff, *Essential Components of Trauma Informed Judicial Practice* (2013), http://www.nasmhpd.org/sites/default/files/JudgesEssential_5%201%202013finaldraft.pdf (last viewed June 13, 2016).

[148] *Id.*

[149] *Id.* (Protect: "The goal is to guarantee physical and emotional safety for all individuals who appear in [one's] court." Respect: "Trauma-informed judicial interactions begin with . . . treating individuals who come before the court with dignity and respect." Teach and Reinforce: Encouraging skill-building and competence by acknowledging strengths and underlying positive intent of behavior.).

themselves on trauma, its effects, and methods to encourage and support healing. In Florida, for example, there is a Family Court Tool Kit on Family and Child Development.[150] It educates judges and magistrates about ACEs and their impact to improve judicial decision-making and outcomes for children.[151] However, it is also meant to be used widely by hearing officers who preside over family court cases as well as by court partners: mediators, attorneys, parenting coordinators, case managers, juvenile probation officers, and clerks who handle family court cases.[152]

While the Tool Kit educates those who work in the court system, no equivalent training for parents and individuals involved in the court system is offered to educate them about the impact of trauma and the importance of resolving it. This important gap should be corrected. As courts around the country order divorcing parents to participate in parent education classes, they have an opportunity to insist that such classes be trauma-informed, to recognize that most parents have experienced trauma, to give parents some insights into the effect of adverse childhood experiences, and to offer parents opportunities to think about and resolve their prior trauma so that the problem is not repeated in the next generation of children. New research associated with the public curriculum "Successful Co-Parenting After Divorce"[153] provides data revealing a correlation between childhood trauma and various dimensions of co-parenting conflict.

The online training Successful Co-Parenting After Divorce is divided into three modules.[154] The first module explains the effects of divorce on children and parents and discusses basic family law concepts such as parenting time, sharing decision making about the children, and the economic impact of divorce.[155] The second module offers parents directions for developing new skills and strategies for successfully sharing responsibilities for their children; prominent among these are communication skills, conflict reduction, and negotiation.[156] The third module provides information about remarriage, describes the importance of stress reduction for parents, and offers information concerning child abuse, domestic violence, and community and faith-based resources.[157] Videos in

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[150] *See Family Court Tool Kit: Trauma and Child Development*, FLORIDA COURTS, http://www.flcourts.org/resources-and-services/court-improvement/judicial-toolkits/family-court-toolkit/ (last viewed May 18, 2016).

[151] *Id.*

[152] *Id.*

[153] *Successful Co-Parenting After Divorce*, *supra* note 8.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

the training include advice to divorcing parents from adults whose own parents had divorced when they were young,[158] divorced individuals talking about their feelings and about the importance of co-parenting,[159] and actors portraying parents demonstrating hostile and then cooperative parenting communication.[160] For those who completed the full training (n = 156), most parents had positive attitudes about the training itself; 89% of participants reported that they had learned new skills from the training, and 91% reported that the training could help parents and families adjust post-divorce.[161]

At specific junctures throughout the training, participants are asked to complete voluntary, anonymous study surveys about their opinions, attitudes, beliefs, history, and behavior.[162] Through pilot testing of the training conducted by an online data collection and analysis company, participants provided information about their co-parenting relationships, their wellbeing, and their children's wellbeing.[163] Participants were also asked whether they had experienced certain childhood traumatic experiences when they were under the age of eighteen using the World Health Organization's Adverse Childhood Experiences International Questionnaire (ACE-IQ).[164] Parents were asked about the frequency with which they experienced a variety of traumas; if they answered any in the affirmative, regardless of the frequency, they were considered to have experienced the given ACE.[165] This is the manner in which ACE studies are typically conducted and presented.[166]

Table 1 below demonstrates that many parents who took the curriculum during the pilot testing phase reported experiencing trauma as children. More than half of the sample reported experiencing each of the following forms of childhood trauma: physical abuse, emotional abuse, household

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[158] Institute for Family Violence Studies, *Advice to Parents from Children of Divorce*, YOUTUBE (Aug. 28, 2015), https://www.youtube.com/watch?v=qZrAYif2cOw.

[159] Institute for Family Violence Studies, *The Truth about Divorce*, YOUTUBE (Aug. 31, 2015), https://www.youtube.com/watch?v=UD5epM2aiN0.

[160] Institute for Family Violence Studies, *Talking to Your Co-Parent: Two Examples to Consider*, YOUTUBE (Sept. 23, 2015), https://www.youtube.com/watch?v=eN4mwa8e-OE.

[161] *See generally* Karen Oehme, *Successful Co-Parenting Pilot Data,* FLA. STATE UNIV. INST. FOR FAMILY VIOLENCE STUDIES (June 1, 2016), http://familyvio.csw.fsu.edu/wp-content/uploads/2016/06/Co-Parenting-Study.pdf.

[162] *Successful Co-Parenting After Divorce*, *supra* note 8.

[163] *Id.*

[164] World Health Organization, *Adverse Childhood Experiences International Questionnaire (ACE-IQ)*, WHO.INT, http://www.who.int/violence_injury_prevention/violence/activities/adverse_childhood_experiences/en/ (describing the ACE questionnaire).

[165] *Id.*

[166] *See generally* Baglivio et al., *supra* note 82.

intimate partner violence, the death or divorce of at least one parent, bullying, and community violence. Additionally, over a third of the sample reported experiencing each of the following forms of childhood trauma: contact sexual abuse, mental illness of someone in their household, and physical neglect. Moreover, over a quarter of the sample experienced having a substance abuser in the household.

Table 1: ACEs of parenting taking online co-parenting curriculum[167]

Adverse Childhood Experiences (ACEs) of parents taking online co-parenting curriculum	**Yes (%)**	**No (%)**
Physical Abuse	62.7	37.3
Emotional Abuse	73.7	26.3
Contact Sexual Abuse	39.2	60.8
Alcohol or drug abuser in household	28.2	71.8
Incarcerated household member	14.1	85.9
Mental Illness household member	35.3	64.7
Household Intimate Partner Violence	72.9	27.1
Parental divorce or death of parent	65.5	34.5
Emotional neglect	15.7	84.3
Physical neglect	33.7	66.3
Bullying	73.3	26.7
Community violence	68.6	31.4
Collective violence	21.6	78.4

Table 2 displays parents who participated in the pilot training, separated into groups based upon the number of ACEs experienced. Although the number of women in this sample (215) outnumbered the men (40), a comparable proportion of men and women were in each group. Approximately three quarters of parents who took the course had experienced four or more ACEs. Further, over 43% of participants experienced seven or more ACEs. The pervasiveness of this trauma calls for intervention and education to help parents learn to resolve their trauma.

[167] Oehme, *supra* note 161, at 23.

Mandatory co-parenting classes provide a prime opportunity to undertake such efforts.

Table 2: ACEs of study participants by segment[168]

Number of ACEs	Total (n = 255)	Men (n = 40)	Women (n = 215)
0-3	65 (25.5%)	12 (30.0%)	53 (24.7%)
4-6	79 (31.0%)	12 (30.0%)	67 (31.1%)
7 or more	111 (43.5%)	16 (40.0%)	95 (44.2%)

The preliminary data from the Successful Co-parenting After Divorce study, presented here, investigates for the first time the association between these traumatic experiences and specific co-parenting behaviors. In order to advance the knowledge base on co-parenting and to protect families, a series of inferential analyses was conducted to expand understanding of the relationship between ACEs and co-parenting behaviors. Parents were therefore asked about their relationship with their former partners, using a newly developed measure—currently being validated—called the Multidimensional Co-parenting Measure for Dissolved Relationships (MCS-DR) to assess four dimensions of the post-divorce co-parenting relationship: *Support*, *Overt Conflict*, *Self-Regulated Covert Conflict*, and *Partner-Regulated Covert Conflict*.[169]

Support is a co-parenting dimension that involves cooperation and assistance between parents in the responsibilities of childrearing.[170] This instrument includes items that assess the degree to which parents ask each other for advice and help in childrearing decisions, and the extent to which the former spouse is a resource to the other parent in raising the child.[171] The remaining three sections of the instrument—*Overt Conflict*, *Self-Regulated Covert Conflict*, and *Partner-Regulated Covert Conflict*—represent three dimensions of conflict that have frequently been subsumed under a single global assessment of conflict in prior literature concerning co-parenting.[172] However, some researchers have suggested

[168] *Id.*
[169] *Id.*
[170] *Id.* at 18–21.
[171] *See id.*
[172] *See* Cheryl Buehler et al., *Interparental Conflict Styles and Youth Problem Behaviors: A Two-Sample Replication Study*, 60 J. MARRIAGE & FAM. 119, 120 (1998).

that a more nuanced conceptualization of conflict is needed, specifically distinguishing between co-parents' overt and covert conflict.[173] *Overt Conflict* involves direct or openly conflictual behaviors, such as conversations between parents that are "tense and/or sarcastic" and parents' criticizing or belittling their former partner.[174] Covert conflict involves indirect forms of conflict that either are communicated passively or through alternative sources including the child (e.g., "triangulation" or "triangling").[175] Two forms of covert conflict are measured with the MCS-DR,[176] differentiating between behaviors that parents themselves engage in and behaviors that they perceive their former partner engaging in. *Self-Regulated Covert Conflict* includes items that assess behaviors such as asking the child about the former partner's personal life, and a parent's trying to persuade the child that he or she is better than the other parent.[177] *Partner-Regulated Covert Conflict* includes items that assess if the former spouse is sending messages through the child, and if a parent asks the child about the other parent's personal life.[178]

The relative presence (or absence) of each of these co-parenting dynamics has implications for the adjustment of both parents and children to the divorce process, as well as for the overall wellbeing of parents and children after divorce.[179] For instructors who provide divorce education courses, the nature and quality of existing co-parenting relationships can be an important consideration in helping divorcing parents move forward after divorce. Conversely, parents receiving only generic co-parenting information (such as that required by statute) will find the course of limited utility. The new scale helps parents gain insights into the kinds of co-parenting behaviors they are experiencing. It can also be important for

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[173] *See id.*

[174] Karen Oehme, *The Multidimensional Co-Parenting Scale for Dissolved Relationships*, FLA. STATE UNIV. INST. FOR FAMILY VIOLENCE STUDIES (June 1, 2016), http://familyvio.csw.fsu.edu/wp-content/uploads/2016/06/MCSDR-Scale.pdf

[175] Oehme, supra note 174, at 1; Buehler, *supra* note 172, at 120. Triangulation occurs when parents have poor boundaries and engage others in their conflicts. Cheryl Buehler & Deborah P. Welsh, *A Process Model of Adolescents' Triangulation into Parents' Marital Conflict: The Role of Emotional Reactivity*, 23 J. FAM. PSYCHOL. 167, 167–68 (2009). The term is frequently used to describe an unhealthy parental bond with a child. *Id.* In a conflicted divorce, it can mean putting the child in the middle of a dispute. *Id.*

[176] *See* Oehme, *supra* note 161, at 18; Oehme, *supra* note 174, at 1.

[177] Oehme, *supra* note 174, at 1.

[178] *Id.*

[179] *See* Bonnie L. Barber & David H. Demo, *The Kids Are Alright (at Least, Most of Them): Links Between Divorce and Dissolution and Child Well-Being, in* HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION 289, 289–312 (Mark A. Fine & John H. Harvey eds., 2006); *see also* W. Kim Halford & Susie Sweeper, *Trajectories of Adjustment to Couple Relationship Separation*, 52 FAM. PROC. 228, 228–43 (2013).

instructors and parents alike to understand that parents' experiences may vary. After all, it is not uncommon for parents to engage in seemingly contradictory co-parenting behaviors: e.g., those who exhibit a *Mixed* co-parenting relationship containing high levels of both conflict and support.[180] Providing parents with brief instruments that give them information about how much support and conflict exist in their co-parenting relationship and suggestions for improving or strengthening their co-parenting may be an important next step in co-parenting program development.

Results of analyses examining co-parenting dimensions in light of parents' ACEs are displayed in Table 3 below.

Table 3: One Way ANOVA results comparing MCS-DR constructs by participant ACEs[181]

MCS-DR Factors	**0-3 ACEs M (*SD*)**	**4-6 ACEs M (*SD*)**	**7 or More ACEs M (*SD*)**
Support	3.72 (*1.42*)$_a$	3.63 (*1.32*)$_a$	3.80 (*1.41*)$_a$
Overt Conflict	2.72 (*1.29*)$_a$	3.35 (*1.34*)$_b$	3.40 (*1.40*)$_b$
Self-Regulated Covert Conflict	1.73 (*0.75*)$_a$	1.99 (*0.83*)$_{ab}$	2.10 (*1.01*)$_b$
Partner-Regulated Covert Conflict	2.23 (*1.09*)$_a$	2.51 (*1.13*)$_{ab}$	2.75 (*1.25*)$_b$

These pilot data suggest a connection between the number of ACEs experienced by parents and certain dimensions of co-parenting evaluated in the MCS-DR scale.[182] *Support* was the only co-parenting factor not to

[180] *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 234 (1992) (describing the typologies of co-parenting behaviors).

[181] Oehme, *supra* note 161, at 24. Subscripts that vary across columns denote significant differences at a 0.05 p-value or lower for One Way ANOVAs across groups using 5,000 bias-corrected bootstrapped samples and a Least-Squares Difference Post-Hoc Test.

[182] Table 3 displays results of a series of One Way Analyses of Variance (ANOVAs) to examine group differences for each of the four MCS-DR dimensions (support, and different types of conflict) across the segmented ACEs classifications described above. Specifically, ANOVAs allow researchers the capability to compare more than two conditions and is

significantly vary as a function of the number of ACEs experienced by participants. Those with three or fewer ACEs experienced lower *Self-Regulated Covert Conflict* and *Partner-Regulated Covert Conflict* than those with seven or more ACEs. Those with three or fewer ACEs experienced statistically significantly lower levels of *Overt Conflict* than both those experiencing between four and six ACEs and those with seven or more ACEs.

Table 4 highlights results from a series of linear regressions conducted to determine if the number of ACEs a parent had experienced was significantly related to any of the dimensions of the MCS-DR.[183] Linear regressions are used to examine how various independent variables—e.g., support, overt conflict—account for variation in a given dependent variable.[184] As was observed in Table 3, *Support* was did not correlate with the number of ACEs a parent experienced. However, *Overt Conflict*, *Self-Regulated Covert Conflict*, and *Partner-Regulated Covert Conflict* were all significantly correlated with the number of ACEs parents had experienced.[185] With many of the parents studied having experienced a high number of ACEs, there is some evidence that as the number of parents' ACEs' increases so do the levels of various forms of co-parenting conflict. Still, despite the statistically significant findings, additional factors need be explored to further our understanding of the relationship between ACEs and co-parenting behaviors. As a first glimpse into the association between ACEs and varying co-parenting behaviors, these new data offer additional hope for improving the quality of co-parenting relationships. Because reducing conflict is such an important part of co-parenting, it makes sense that parents be exposed to information about resolving their own trauma histories to help them fashion a healthier future.

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preferred over the use of multiple t-tests. ANDY FIELD, DISCOVERING STATISTICS USING SPSS 348 (3d ed. 2009). Such analyses, therefore, provide us insights regarding the equality of means across groups. *Id.* After such initial comparisons, post-hoc tests are used to identify which groups differ from one another using a series of contrasts providing further detailing how each factor (e.g., overt conflict) compares across groups (e.g., ACEs). *Id.* Using bias-corrected bootstrapped sampling methods are among the techniques used by researchers to test for significant group differences. *See generally* BRADLEY EFRON & ROBERT J. TIBSHIRANI, AN INTRODUCTION TO THE BOOTSTRAP (1993).

[183] Oehme, *supra* note 161, at 24.

[184] FIELD, *supra* note 182, at 198.

[185] Independently ACEs accounted for approximately 3% of the variance in each of the co-parenting dimensions for which it was significantly related. Significant coefficients are determined using 5,000 bias-correct bootstrapped samples and 95% confidence intervals. $*p < .05$.

Table 4: Regression analyses for co-parenting behaviors based upon number of ACEs[186]

Variables	Support	Overt Conflict	Self-Regulated Covert Conflict	Partner-Regulated Covert Conflict
Number of ACEs (β)	.02	.18	.18	.17
Adjusted R^2	.00	.03	.03	.03

V. TOWARD TRAUMA-INFORMED EDUCATION FOR CO-PARENTS

The most powerful people for reducing ACE scores in the next generation are parenting adults. Parents have the most opportunity and the most potential for changing the trajectory of the public's health for generations. But parents must actually know about ACEs and their effects in order to realize this potential.[187]

Many researchers believe that individuals can benefit from learning how childhood trauma might be contributing to current relationship[188] or health problems.[189] Nevertheless, our proposal to policymakers to ensure that compulsory co-parenting classes for divorcing parents are trauma-informed comes with an important caveat. Any legislative or judicial mandates to make co-parenting training trauma-informed should contain specific language intended to prepare parents for the sections that will be addressing trauma. We believe that this language, which could be written into a state's administrative code that provides detail to the statutory mandate, will serve several purposes. First, it will prepare parents to assess whether they are able to engage with material addressing trauma before questionnaires about ACEs are actually administered. Thus, parents will have a meaningful opportunity to opt out of the inquiry. Second, the language will provide parents with resources if they experience discomfort. Third, it will ensure

[186] Oehme, *supra* note 161, at 24.

[187] REGION X ACE PLANNING TEAM, THRIVE WASH., NEAR@HOME: ADDRESSING ACES IN HOME VISITING BY ASKING, LISTENING, AND ACCEPTING 9 (2d ed. 2016), https://thrivewa.org/wp-content/uploads/NEARatHome.pdf [hereinafter NEAR@HOME].

[188] *See* Colman & Widom, *supra* note 107 ("Among those individuals who had ever married or cohabitated, child abuse and neglect were also associated with an increased risk of relationship dysfunction.").

[189] *See* Felitti, *supra* note 77, at 250 ("We also found a significant (P less than .05) dose-response relationship between the number of childhood exposures and the following disease conditions: ischemic heart disease, cancer, chronic bronchitis or emphysema, history of hepatitis or jaundice, skeletal fractures, and poor self-rated health.").

uniform use of standardized instruments throughout the jurisdiction. Finally, it will provide parents with information about how to build resiliency so that trauma does not become intergenerational.

A. Crafting Sensitive Trauma-Informed Classes

Ensuring that the parenting education mandate is trauma-informed includes recognition that classes must be sensitive to the shame and guilt that individuals often feel when reflecting upon their trauma histories.[190] In turn, this shame may cause parents to avoid discussing or acknowledging past experiences of trauma—a course that could increase the risk of intergenerational transmission of trauma.[191] However, when parents learn that painful experiences are common to many people, the experience may be *normalized* and made less painful or embarrassing to consider.[192] In addition, when parents are given information about the prevalence of trauma,[193] symptoms of trauma,[194] and coping strategies to resolve

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[190] *See* Deborah A. Lee et al., *The Role of Shame and Guilt in Traumatic Events: A Clinical Model of Shame-Based and Guilt-Based PTSD*, 74 BRIT. J. MED. PSYCHOL. 451, 451–52 (2001) ("[W]hile fear is often a dominant affect in the formation and maintenance of PTSD, other affects such as anger, shame, guilt and sadness are frequently associated with the traumatic event . . . . Indeed[,] imaginal exposure conducted in a manner where no account is taken of the patient's shame, guilt or anger may serve to worsen the post-trauma reactions.").

[191] *See* NEAR@HOME, *supra* note 187, at 10. The team noted:

> When we avoid talking about ACEs, we may inadvertently be sending a message that people should be ashamed of their childhood experiences. Shame can increase risk of intergenerational transmission because it reinforces one of the pathways for transmission: avoidance. A parent may re-create the emotional conditions of past adversity without consciously choosing this path for her children. People need to have an opportunity to appropriately and voluntarily share information about their personal histories as a part of a healing process.

Id.

[192] *See* Rosanne McBride, NAT'L INST. ON DRUG ABUSE, TALKING TO PATIENTS ABOUT SENSITIVE TOPICS: TECHNIQUES FOR INCREASING THE RELIABILITY OF PATIENT SELF-REPORT—HANDOUT (2010), https://www.drugabuse.gov/sites/default/files/sensitive-topics-handout_0.pdf. Using the concept of universality, along with language that normalizes experiences of trauma, may be important factors in helping to prepare individuals to be able to discuss sensitive topics. *See id.*

[193] *See* Christopher Wildeman et al., *The Prevalence of Confirmed Maltreatment Among US Children: 2004 to 2011*, 168 J. AM. MED. ASS'N PEDIATRICS 706, 709 (2014). Between 2004 and 2011, approximately one in eight children in the United States were confirmed to be maltreated from birth to 18 years of age. *See id.*

[194] *See* U.S. Dep't of Health & Hum. Servs. Child Welfare Info. Gateway, *What Is Child Abuse and Neglect? Recognizing the Signs and Symptoms* (2013), https://www.childwelfare.gov/pubpdfs/whatiscan.pdf.

trauma,[195] such information may reduce the stigma of victimization and give parents hope that such trauma will be resolved and not replicated with a new generation of victims.[196]

Instructors must take care to offer ACE scales and other instruments as optional tools that parents can use. Parents should be told that the process of exploring ACEs and other sensitive issues is voluntary and that family courts will never compel parents to explore their trauma histories as part of such classes. Instead, parents should be informed that the classes offer an *opportunity* for them to learn about new research that links individuals' childhood traumatic experiences to adult problems.[197] Thus, parents should always be able to decline to review the information about childhood histories of trauma in the class.[198] It is virtually inevitable, of course, that some parents will not exercise this prerogative. However, for many who choose to learn about this information, the exposure may prove invaluable. Moreover, even some of those who initially elect not to review the information may, upon later reflection, decide to explore their histories. Monitoring patterns of response will form an important part of conducting and reforming trauma-informed co-parenting training.

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[195] *See* Substance Abuse & Mental Health Servs. Admin., *Coping with Traumatic Events*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Aug. 25, 2011), http://media.samhsa.gov/MentalHealth/TraumaticEvent.aspx?from=carousel&position=1&date=3112011 (providing resources, strategies, and advice for coping with trauma).

[196] *See* NEAR@HOME, *supra* note 187, at 9 ("Parents who know the impact of ACEs and have a chance to reconstruct personal narrative about their lives can make meaning from their experiences and intentionally choose a more protected developmental path for their children. They also report feeling more self-worth and fulfillment in their lives.").

[197] *See id.* ("Because ACEs can affect emotional state, behavior, and illness, adult history of ACEs can affect the climate inside a family or household."); *see also* Charles B. Nemeroff, *Paradise Lost: The Neurobiological and Clinical Consequences of Child Abuse and Neglect*, 89 NEURON 892, 892 (2016) ("In the last decade, a remarkable concatenation of research findings has accumulated supporting the hypothesis that exposure to early untoward life events (early life stress [ELS]) in the form of child abuse and/or neglect is associated with a marked increase in vulnerability to major psychiatric and other medical disorders including major depression, bipolar disorder, post-traumatic stress disorder (PTSD), alcohol and drug abuse, and perhaps even schizophrenia, as well as obesity, migraines, cardiovascular disease (CVD), diabetes, and others.")

[198] Research suggests that while some individuals do experience symptom relief after talking about trauma, others respond with an exacerbation of symptoms. Lindsay Bicknell-Hentges, & John J. Lynch, Everything Counselors and Supervisors Need to Know About Treating Trauma 2 (March 2009) (unpublished manuscript), https://www.counseling.org/docs/disaster-and-trauma_sexual-abuse/everything-counselors-and-supervisors-need-to-know-about-treating-trauma_bicknell-hentges-lynch.doc?sfvrsn=2 (citing Alexander C. McFarlane & Bessel A. Van Der Kolk, *Trauma and Its Challenge to Society, in* TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY & SOC'Y 24–26 (1996)).

Offering information about ACEs does not transform classes into therapy sessions; on the contrary, classes should be consciously designed to be educational rather than therapeutic. Class leaders can make it clear that they do not provide mental health services while still offering referrals to those individuals who may want to speak to a mental health counselor, clergy member, or community support group.[199] Offering parents the ability to stop answering questions at any time and reminding parents of community resources—their own physicians, community health clinics, or other local resources provide information on mental health and wellness issues—should be an integral part of co-parenting classes. One way of preparing parents to think about prior trauma is using trauma scenarios or vignettes[200] that explore an imagined person's childhood trauma, highlighting the strengths exhibited by the person's adapting to life after that experience.[201] It is important to tell parents what kinds of events might "trigger" a person's re-experiencing of trauma as an adult,[202] but at the

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[199] Janice Carello & Lisa D. Butler, *Potentially Perilous Pedagogies: Teaching Trauma is Not the Same as Trauma-Informed Teaching*, 15 J. TRAUMA & DISSOCIATION 153, 158 (2013) (discussing a study which stated that 14% of students who wrote about past traumatic experiences felt retraumatized, which included "feeling anxious, panicky, depressed, or suicidal—feelings serious enough to warrant clinical attention (citing JEFFREY BERMAN, RISKY WRITING: SELF-DISCLOSURE AND SELF-TRANSFORMATION IN THE CLASSROOM 236 (2001))).

[200] *See* Christopher M. Layne et al., *The Core Curriculum on Childhood Trauma: A Tool for Training a Trauma-Informed Workforce*, 3 PSYCHOL. TRAUMA: THEORY, RES., PRAC. & POL'Y 243, 245 (2011). In describing the benefits of using case vignettes in clinical practice, the author stated:

> The Core Curriculum uses detailed case vignettes of trauma-exposed youth and families, combined with problem-based learning methods, to promote two primary learning aims: (a) to enhance the development of foundational trauma-related conceptual knowledge, and (b) to accelerate the acquisition of trauma-informed clinical reasoning and clinical judgment. Vignettes are presented in segments to simulate gathering, organizing, drawing meaning from, and making decisions based on information in professional practice[.]

Id.

[201] SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES NO. 57, TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 8 (2014), https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf ("Although many individuals may not identify the need to connect with their histories, trauma-informed services offer clients a chance to explore the impact of trauma, their strengths and creative adaptations in managing traumatic histories, their resilience, and the relationships among trauma, substance use, and psychological symptoms.").

[202] *See* Elliott, *supra* note 144, at 472 (Parents "should be educated about the common vulnerabilities of trauma survivors, such as retraumatization being triggered by a child's age or behavior, and supported in finding ways to take care of their own feelings as well as those of their children.").

same time to provide them with reason to believe that these experiences need not defeat their goal of effective parenting.

B. The Necessity of Confidentiality

Those who choose to learn about childhood trauma and its links to adult problems must be protected from disclosure of sensitive information about themselves. Statutes should be amended to maintain the confidentiality of a parent who reveals traumatic exposure as part of participation in a class or pursuant to an automated (online) system. Legislatures have long adopted exceptions to public record laws[203] and carved out exceptions to the collection of evidence in court proceedings for a host of reasons.[204] The expectation of confidentiality for protected communication is essential to facilitating the free and honest flow of information. To encourage parents to reflect on their own histories of trauma, responses to questions about ACEs and any paperwork or statements relating to that trauma must be confidential and not subject to discovery.

While several statutes already recognize the need for confidentiality and privileges to protect parents who take parenting classes, these should be expanded where necessary to preserve the confidentiality of all records or forms filled out by parents to effectuate the purposes of the parenting classes. For example, Section 61.21 of the Florida Statutes, which authorizes the Department of Children and Families to approve a class for divorcing parents to educate, train, and assist them on the consequences of divorce for parents and children, states:

[I]nformation obtained or statements made by the parties at any educational session required under this statute shall not be considered in the adjudication of a pending or subsequent action, nor shall any report resulting from such educational session become part of the record of the case unless the parties have stipulated in writing to the contrary.[205]

Other states, such as Minnesota, make it clear that statements made by a party during a parent education program are inadmissible as evidence for

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[203] *See, e.g.*, CAL. GOV'T. CODE § 6254; FLA. STAT. §§ 119.071, 119.0711; GA. CODE ANN. § 50-18-72; TENN. CODE ANN. § 10-7-504.

[204] *See, e.g.*, FED. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."); 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction."); 409 ("Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.").

[205] FLA. STAT. § 61.21(8).

any purpose—including impeachment—and specify that parent education instructors may not be subpoenaed or called as witnesses.[206] Maryland adds a prohibition on releasing any "reports" obtained from a parenting seminar.[207] Similarly, West Virginia protects the confidentiality of parents who participate in divorce education sessions and restricts information that can be provided to the court to the number of sessions that the parent completes.[208] New York requires a larger amount of demographic data to be reported: evaluation forms, the number of participants in each class by gender, a list of referral sources, names of the presenters, and the location of the training.[209] These data are presumably sought for purposes of evaluating the trainings themselves rather than to focus on any individual participant.

In recognition of the importance of open and honest communication,[210] records of other proceedings involving former partners and their children are inadmissible. For example, Illinois protects statements made by parents in family court conferences, with exceptions for new allegations of abuse or neglect.[211] Many states extend the privilege to litigants' communication with mediators,[212] social workers, and counselors.[213] There are, however, exceptions to privileged communications, including known or suspected child maltreatment[214] Under our recommendation to provide parents with

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[206] *See* MINN. STAT. § 518.157(5); *see also* N.J. STAT. ANN. § 2A:34-12.7 ("All communications made by any program participant during the course of attending the 'Parents' Education Program,' . . . are confidential and shall not be admissible as evidence in any court proceeding.").

[207] MD. CODE ANN., FAM. LAW §7–103.2(e) (2015).

[208] *See* WV. R. PRAC. & PROC. FAM. CT. RULE 37a(f) ("[A] parent education presenter shall maintain the confidentiality of all parent education sessions and records . . . [and] shall not be subpoenaed or called to testify . . . .").

[209] *See* N.Y. STATE PARENT EDUC. ADVISORY BD., PROPOSED GUIDELINES, STANDARDS & REQUIREMENTS FOR PARENT EDUCATION PROGRAMS (2003).

[210] *See* ILL. S. CT. R. 942, Committee Comments (adopted Feb. 10, 2006) (stating that confidentiality was needed to ensure open and honest discourse).

[211] *See* ILL. S. CT. R. 942(e).

[212] *See, e.g.*, ILL. S. CT. R. 905(c).

[213] *See, e.g.*, OHIO REV. CODE ANN. § 2317.02(G)(1) (LexisNexis 2015); *see also* Ike Vanden Eyke & Emily Miskel, *The Mental Health Privilege in Divorce and Custody Cases*, 25 J. AM. ACAD. MATRIM. L. 453, 463 (2013) (citing Roth v. Roth, 793 S.W.2d 590, 592 (Mo. Ct. App. 1990)).

[214] Bruce G. Borkosky & Mark S. Thomas, *Florida's Psychotherapist-Patient Privilege in Family Court*, 87 FLA. B. J. 35, ¶ 8 n.20 (2013) (citing FLA. STAT § 39.204 (2012)). In Florida, exceptions to privileged communication include any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect. *See id.* at ¶ 8. Other exceptions to privileged communications under Florida Statutes include Baker Act proceedings; when the communication is subsequent to a court-ordered evaluation; or when the patient relies on his or her condition

information about ACEs, it is conceivable that individuals may seek out physical or mental health treatment because of a realization that their past trauma may be affecting their current wellbeing. State laws recognize the longstanding privilege between a patient and his or her physician/psychiatrist and will generally not allow medical records to be released even if a parent is seeking custody of a child.[215] However, in an abundance of caution, we recommend that states add language to their codes to the effect that records, statements, or other evidence created at or derived from parenting classes are not admissible in court proceedings.

VI. CONCLUSION

The very purpose of mandatory co-parenting classes for estranged partners has always been to help parents address the challenges of caring for children under strained and complicated circumstances. These classes, however, will not fully serve their function without acknowledging and incorporating recent research showing the destructive impact that parents' adverse childhood experiences can have on their ability to raise their children both individually and cooperatively. Instruction that is not sufficiently *trauma-informed* increases the likelihood that parents will fail to grasp and respond to the role of unresolved prior trauma in their lives. Without steps to mitigate the effects of early trauma, parents run a substantial risk of subjecting their children to their own traumatic experiences.

To prevent such cycles of intergenerational trauma, this Article proposes that states revise current co-parenting training to ensure that it is properly trauma-informed. The legislation itself should be crafted both to ensure

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as "an element of the patient's claim or defense" (known as the "shield and sword rule"). *Id.* at ¶ 14, n.41 (citing Davidge v. Davidge, 451 So. 2d 1051, 1052 (Fla. 4th Dist. Ct. App. 1984)).

[215] *See* Eyke & Miskel, *supra* note 213, at 464 (citing Roper v. Roper, 336 So.2d 654, 656 (Fla. Dist. Ct. App. 1976)) (discussing how under Florida law a party's mental condition does not automatically become an element of a child custody case); *see also* Courtney Waits, *The Use of Mental Health Records in Child Custody Proceedings*, 17 J. AM. ACAD. MATRIM. L. 159, 165 (2001) (citing Kinsella v. Kinsella, 696 A.2d 556 (N.J. Ct. App. 1954)) (describing New Jersey's three prong test for allowing access to a parent's medical records: "a 'legitimate need' must be present for the evidence to exist, the relevancy and materiality to the issue before the court, and the moving party must demonstrate that the information to which they are seeking access 'cannot be secured from any less intrusive source.'"); Clark v. Clark, 371 N.W.2d 749, 753 (Neb. 1985) ("[W]hen a litigant seeks custody of a child in a dissolution of marriage proceeding, that action does not result in making relevant the information contained in the file cabinets of every psychiatrist who has ever treated the litigant. The determination as to the admissibility of the evidence to which the waiver applies is to be initially entrusted to the sound discretion of the trial court.").

that all such training is sensitive to the trauma that many parents have suffered and to avoid exacerbating the rancor often found in family court litigation. Thus, parents should be offered the opportunity to reflect on their own histories of trauma, and be made aware of the existence and value of information on the persistent effects of early trauma. Likewise, statutes should prescribe sweeping confidentiality of documents arising out of parents' participation in training activities. Such features will aim to assure parents that trauma-informed education is designed to be neither coercive nor invasive. Rather, it seeks to help parents reduce the lingering force of trauma in their lives and avert its presence in their children's.

The "Director Preference" in Stockholder Litigation

Megan Wischmeier Shaner*

I. INTRODUCTION

A persistent concern with the public corporation is the concentration of decision-making in the hands of paid managers, thereby providing directors and officers with the opportunity to benefit themselves at the expense of the owners and residual claimants of the entity, the stockholders.[1] In economic terms, this is a classic agency cost problem—when a principal uses an agent to act on its behalf there is the risk that the agent will act in a self-interested or careless manner to the detriment of the principal.[2] To prevent or mitigate these costs, a principal typically incurs further costs related to monitoring the agent and undertaking measures to better align the principal's and agent's interests.[3] The agency costs specific to the separation of stockholder ownership from director and officer control in the corporate context—referred to as managerial agency costs—have been well-

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[1] See Marcel Kahan & Edward Rock, Embattled CEOs, 88 TEX. L. REV. 987, 1051 (2010); A.B.A., Report of the Task Force of the ABA Section of Business Law Corporate Governance Committee on Delineation of Governance Roles and Responsibilities, 65 BUS. LAW. 107, 111 (2009) (stating that historically a major concern with the corporate form is that it provides management with the opportunity to "act in a self-interested manner" at the expense of stockholders).

For purposes of the discussions herein, this article focuses on stockholder litigation and corporate governance in the context of the publicly-traded corporation.

[2] See generally Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J. OF L. & ECON. 327 (1983); see also Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[3] *See* Jensen & Meckling, *supra* note 2, at 305. For a discussion of the measures that can reduce agency costs, *see id.* at 308; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorneys Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12 (1991).

documented, most notably in the work of Berle and Means.[4] In their work, Berle and Means caution that as stockholders in the modern corporation became more widely-dispersed and owned only a small number of shares of stock in any one corporation, they would lack the incentive to monitor management.[5] The result being that those who are directly involved in the day-to-day business and affairs (the director and officers) would have the opportunity to manage the resources of the corporation to their benefit.[6] Accordingly, a key objective of corporate law is to minimize these managerial agency costs.[7]

To control managerial agency costs, stockholders may employ an array of strategies. The imposition of fiduciary duties under state law has long been a principal check on the misuse of corporate power by management, requiring directors and officers to exercise their broad authority with care and loyalty to the corporation and its stockholders. Stockholders' ability to sue when a director or officer breaches his/her fiduciary duties is a chief mechanism for enforcing these legal obligations.[8] Stockholder fiduciary

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[4] *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 6–7 (Transaction Publishers 1991) (1932) (discussing the agency costs due to the delegation of management powers to the board and officers). In addition to managerial agency costs, stockholders subject themselves to a variety of other agency costs when they invest in a corporation. *See, e.g.*, Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013) (discussing agency costs resulting from the reconcentration of stock ownership in the hands of institutional investors); Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L.J. 55, 62 (2014) (discussing the agency costs arising when a stockholder steps into the role of management by bringing litigation in the name of the corporation); Park Mcginty, *The Twilight of Fiduciary Duties: On the Need for Shareholder Self-Help in an Age of Formalistic Proceduralism*, 46 EMORY L.J. 163, 163 (1997) (discussing "surrogate agency costs" resulting from "self-appointed 'rescuers'" of stockholders such as stockholder plaintiffs, proxy fight dissidents, stockholder proposal proponents, and takeover bidders).

[5] *See* BERLE & MEANS, *supra* note 4, at 134–38.

[6] See id.

[7] See William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 993 (2003) ("One of the central problems of corporate law has always been how to create a system whereby diffuse stockholders feel comfortable entrusting their capital to centralized management."); Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183, 199 (2004) ("The main question regarding corporate governance . . . is whether powerful corporate managers are adequately accountable to shareholders' interests.").

[8] *See* Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1733 (1994) ("Shareholder suits are the primary mechanism for enforcing the fiduciary duties of corporate managers."); Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional*

duty litigation is thus a primary, and many scholars contend the most important, tool for policing managerial abuses and reducing managerial agency costs.[9]

The vast majority of stockholder fiduciary duty litigation is representative litigation—derivative and class action lawsuits.[10] Two important characteristics of this type of litigation are that (i) the plaintiffs are typically nominal stockholders with a limited role in litigation decision-making and attorney oversight, and (ii) attorneys are paid on a contingent fee basis.[11] Both of these features are a response to the structure of the corporation, in particular the public corporation. Because public corporations tend to have a large base of geographically dispersed stockholders, many of whom own a small number of shares, individual stockholders have little incentive to bring fiduciary duty litigation.[12] Moreover, in most cases an individual stockholder's recovery in such a lawsuit would pale in comparison to the expense of bringing the suit (and in the case of derivative actions, the recovery belongs to the corporation not

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Litigation, 106 NW. U.L. REV. 1753, 1763 (2012) [hereinafter Thomas & Thompson, *Shareholder Suits*]; Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 167 (2004) [hereinafter Thompson & Thomas, *Shareholder Litigation*] (describing fiduciary duty cases as "the heart of shareholder litigation under corporate law.").

[9] *See* James D. Cox & Randall S. Thomas, *Corporate Darwinism: Disciplining Managers in a World with Weak Shareholder Litigation*, European Corporate Governance Institute Law Working Paper No. 309/2016, at 2–3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2651863&download=yes (Jan. 27, 2016) [hereinafter Cox & Thomas, *Corporate Darwinism*]; James D. Cox & Randall S. Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the Enforcement of the U.S. Securities Law*, 6 EUR. COMPANY & FIN. L. REV. 164 (2009); Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 167; C.N.V. Krishnan, et al., *Shareholder Litigation in Mergers and Acquisitions*, 18 J. CORP. FIN. 1248, 1248 (2012). *But see* Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261, 263 (1986); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 84 (1991) ("The data support the conclusion that shareholder litigation is a weak, if not ineffective, instrument of corporate governance.").

[10] *See* Romano, *supra* note 9, at 57 (stating there are two categories of lawsuits where stockholders enforce management fiduciary duties: derivative actions and direct actions (usually brought as a class action)). For purposes of this paper "representative litigation" and "stockholder litigation" refer to derivative and class action lawsuits, collectively, that are brought by stockholder(s) against the corporation and/or corporate management for breach of their fiduciary duties.

[11] *See* discussion *infra* Part II.

[12] *See* Romano, *supra* note 9, at 55 (discussing collective action problems in stockholders bringing litigation).

the stockholder-plaintiff).[13] To mitigate these problems, the law incentivizes attorneys to file representative litigation on stockholders' behalf through the award of attorneys' fees.[14] The structure of and financial incentives surrounding stockholder litigation are thus necessary and mostly beneficial, enabling dispersed stockholders and/or stockholders with small individual injuries to hold management accountable while their attorneys bear much of the monetary risk.[15] The incentives in stockholder litigation are further beneficial in that they encourage attorneys to invest in search costs and seek out violations of the law, thereby serving an important monitoring function.[16] At the same time, this system is not without flaws. Most prominently, it can create the opportunity, and incentive, for attorneys to put their own economic interests before those of their stockholder clients'.[17] Due to the contingent fee structure, attorneys will seek to keep costs low and may settle a suit quickly. In addition, stockholder collective action problems in representative litigation, coupled with the significant discretion afforded legal counsel diminish the role of oversight as a mechanism to mitigate the risk that attorneys will make litigation

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[13] See id.

[14] *See id.*; *In re* Activision Blizzard, Inc. Stockholder Litig, 86 A.3d 531, 548 (Del. Ch. 2014).

[15] See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 679 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*].

[16] *See id.*; *Activision*, 86 A.3d at 548 (quoting Bird v. Lida, Inc., 681 A.2d 399, 403 (Del. Ch. 1996)) ("Incentivized by contingent fees, specialized law firms representing stockholder plaintiffs can 'pursue monitoring activities that are wealth increasing for the collectivity (the corporation or the body of its shareholders).'"); *see also* Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1786 (2004) [hereinafter Thompson & Thomas, *Public and Private Faces*] ("Theory tells us that in U.S. public corporations with dispersed ownership structures, where there are markets, independent directors and other checks on corporate misconduct, representative shareholder derivative suits have a monitoring role to play in corporate governance.").

[17] *See, e.g.*, Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 15, at 676 (applying agency theory to representative litigation and stating that "the attorney's interests typically control class and derivative actions."); Fischel & Bradley, *supra* note 9, at 271 (noting that plaintiffs' attorneys in derivative suits "have very poor incentives to maximize shareholders' wealth"); Macey & Miller, *supra* note 3, at 7–8 ("Because these attorneys are not subject to monitoring by their putative clients, they operate largely according to their own self-interest, subject only to whatever constraints might be imposed by bar discipline, judicial oversight, and their own sense of ethics and fiduciary responsibilities."); Romano, *supra* note 9, at 55–56 (noting the "principal-agent problem with such an arrangement [in stockholder litigation]: the attorney's incentives need not coincide with the shareholders' interest.").

decisions based on their economic interests, potentially to the detriment of their stockholder clients (i.e., an agency cost). [18] Ironically, the mechanism touted as a chief means of reducing managerial agency costs actually generates agency costs of its own – litigation agency costs.

Litigation agency costs can be seen in the decision-making surrounding the initiation of a lawsuit. Attorney self-interest can drive choices about what claims to file, where to file a lawsuit, and whom to name as defendants in the suit. Indeed, recent scholarship has concluded that the proliferation of corporate litigation filings in multiple jurisdictions can be attributed to attorneys' self-interested motivations in deciding where to file a lawsuit.[19] This paper adds to the litigation agency cost scholarship by examining whether the inclusion or exclusion of certain corporate managers as defendants in stockholder litigation is similarly a consequence of attorney self-interest. Specifically, there appears to be a longstanding preference in stockholder litigation alleging fiduciary duty breaches to to name as defendants a corporation's directors to the exclusion of the officers, a phenomenon which this paper identifies and labels the "director preference."[20] After exploring possible reasons for the director preference, this paper concludes that it is another area where attorneys seem to be making litigation decisions for their individual benefit and not necessarily the stockholders'.

This paper also explains why the director preference is a significant agency cost. First, in the corporate context plaintiffs' attorneys play a prominent role in the development of the law and good governance practices by their litigation choices, particularly in decisions surrounding the what, where and who of a complaint.[21] Certain areas of corporate law such as fiduciary duties are particularly sensitive to this decision-making by

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[18] The purpose of this paper is not to take a position on whether stockholder litigation should be a primary means of policing officers' behavior or the effectiveness of stockholder litigation in reducing managerial agency costs. Rather, this article takes as a given that stockholder litigation is a primary method for controlling officer-related agency costs. Starting from that premise, the focus of this paper is on the agency costs associated with stockholder litigation. For a summary of the debate surrounding whether stockholder litigation actually reduces managerial agency costs and, if so, whether the benefits of stockholder litigation outweigh its agency costs, see David H. Webber, *Private Policing of Mergers and Acquisitions: An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Class and Derivative Actions*, 38 DEL. J. CORP. L. 907, 922–23 (2014).

[19] *See infra* notes 46–50 and accompanying text.

[20] *See infra* Part III.A.

[21] *See* Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 432 (2012) (noting that the plaintiffs' bar plays an important role in shaping the regulation and governance of corporations because they largely determine which suits are brought and where those suits are brought).

legal counsel. Fiduciary doctrine is largely a creature of common law,[22] thus litigation decisions are uniquely important to the development and enforcement of these legal duties. The impact of the director preference in this regard is apparent in the area of officer fiduciary duties. Officer fiduciary duty doctrine is conspicuously underdeveloped which can be attributed, in large part, to a lack of officer-focused fiduciary duty litigation in state court.[23]

Second, due to regulatory reforms and changes in best corporate practices, very few officers (if any at all) also serve as a director at the same public corporation.[24] Historically, senior executive officers occupied a dual director-officer status and were included in stockholder litigation in their director capacity. Today, however, this is no longer the case. Unless specifically included in a lawsuit, officers are no longer subject to fiduciary duty accountability because of their simultaneous director status. The reduction in officers serving as directors has thus exacerbated the effects of the director preference, diminishing the impact of stockholder litigation in reducing the managerial agency costs associated with corporate officers.

This paper proceeds in three parts. Part II reviews the role of stockholder litigation in corporate governance, including a discussion of the agency relationship between legal counsel and their stockholder clients and the agency costs inherent in the representative litigation model. Part III explores the director preference phenomenon in stockholder fiduciary duty

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[22] *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 114 n.6 (Del. Ch. 2009).

[23] *See, e.g.*, Lyman Johnson & Robert V. Ricca, *Reality Check on Officer Liability*, 67 BUS. LAW. 75, 95–97 (2011); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1617 (2005); Megan W. Shaner, *Officer Accountability*, 32 GA. ST. U.L. REV. 357, 366–67 (2016) [hereinafter Shaner, *Officer Accountability*]; Megan W. Shaner, *The (Un)Enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271, 329 (2014) [hereinafter Shaner, *The (Un)Enforcement*]; *cf.* Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections Upon Federalism*, 56 VAND. L. REV. 859, 865 (2003). The Delaware courts also recognize the existence of several open issues surrounding officers' fiduciary obligations and point out that they are unable to resolve such issues due to the parties failing to raise them. *See, e.g.*, Chen v. Howard-Anderson, 87 A.3d 648, 666 n.2 (Del. Ch. 2014) ("A lively debate exists regarding the degree to which decisions by officers should be examined using the same standards of review developed for directors. Given how the parties have chosen to proceed, this decision need not weigh in on these issues and intimates no view upon them." (internal citations omitted)); Hampshire Group, Ltd. v. Knutter, C.A. No. 3607-VCS, 2010 WL 2739995, at *11 (Del. Ch. July 12, 2010) ("There are important and interesting questions about the extent to which officers and employees should be more or less exposed to liability for breach of fiduciary duty than corporate directors. The parties in this case have not delved into any of those issues, and I see no justifiable reason for me to do so myself.").

[24] *See infra* notes 81–87 and accompanying text.

litigation, including examples thereof. This part also explains (i) why the failure to include officers in stockholder litigation is particularly important in today's corporate climate, and (ii) the costs that accompany a preference to sue only directors. In Part IV this paper examines possible explanations for the director preference and concludes that attorney self-interest seems to be driving the focus on directors in stockholder litigation. Finally, this paper concludes with raising the concern that the director preference has effectively rendered stockholder litigation an under-utilized tool for controlling the significant managerial agency costs associated with officers. As a result, it places added pressure on other corporate governance mechanisms such as stockholder activism and board oversight to fill the gap left by the role stockholder litigation is intended to play in monitoring and enforcing officers' fiduciary duties.

II. STOCKHOLDER LITIGATION AND AGENCY COSTS

Stockholder litigation plays a critical role in maintaining the balance of power in the corporate form between the directors and officers, on the one hand, and the stockholders on the other. Fiduciary duties, which are considered to be a principal check on the broad power and authority given to directors and officers, are largely enforced through stockholder litigation.[25] Stockholder litigation supports the disciplinary effect of these duties, in particular where isolated breaches of fiduciary duty, as opposed to widespread gross mismanagement, are at issue.[26] Indeed, the ability to sue is arguably the most powerful tool available to stockholders to protect their interests in the corporation and hold management accountable for their actions.[27] In addition to sanctioning and compensating functions,

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[25] *See* Kraakman et al., *supra* note 8, at 1733; Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1763; Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 167.

[26] *See* Kenneth B. Davis, Jr., *The Forgotten Derivative Suit*, 61 VAND. L. REV. 387, 436–37 (2008) ("Derivative litigation performs the task of translating the abstract concepts of fiduciary obligations, good faith, and fairness into the specific limits on the insiders' ability to favor themselves."); *see also* Cox, *supra* note 29, at 752–53; Shaner, *The (Un)Enforcement*, *supra* note 23, at 329.

[27] *See* Thompson & Sale, *supra* note 23, at 865 ("The practical constraints on shareholder voting and selling modern public corporations left fiduciary duty litigation as the principal legal check on centralized corporate authority during the twentieth century."); Jeffries, *supra* note 4, at 56 ("Shareholder litigation has historically played an important role in policing the behavior of corporate managers."); Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1817–18 (describing stockholder litigation rights as "longstanding" and "core instruments" used to check management power); *see also* Donald E. Schwartz, *In Praise of Derivative Suits: A Commentary on the Paper of Professors Fischel and Bradley*, 71 CORNELL L. REV. 322, 324 (1986).

Scholarship and empirical studies have raised questions about the efficacy of

stockholder litigation serves a deterrent function, encouraging director and officer fidelity to corporate and stockholder interest in managing the corporation.[28] Stockholder litigation thus functions as a means of reducing managerial agency costs caused by the separation of ownership from control in a corporation.[29]

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stockholders' other rights—the right to vote and the right to sell their shares—on influencing management behavior. *See, e.g.*, Victor Brudney, *Corporate Governance, Agency Costs and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1420–29 (1985) (discussing why market constraints on management behavior are ineffective); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 SUM LAW & CONTEMP. PROBS. 5, 8 (1985) [hereinafter Coffee, *The Unfaithful Champion*]; Harry DeAngelo & Linda DeAngelo, *Proxy Contests and the Governance of Publicly Held Corporations*, 23 J. FIN. ECON. 29, 30 (1989) (finding dissident stockholders only succeed in winning a board seat one-third of the time when challenging officer-recommended directors); Ribstein, *supra* note 7, at 199–200 (stating that "shareholders' power to approve manager-initiated actions and to remove the directors may not be adequate to police agency costs"); *see generally* James J. Park, *The Limits of the Right to Sell and the Rise of Federal Corporate Law*, 68 OKLA. L. REV. (forthcoming 2017) (discussing stockholders' right to sell in public corporations); Randall S. Thomas & Patrick C. Tricker, *Shareholder Voting in Proxy Contests for Corporate Control, Uncontested Director Elections and Management Proposals: A Review of the Empirical Literature*, 68 OKLA. L. REV. (forthcoming 2017) (reviewing empirical studies of stockholder voting in the context of elections of directors and management proposals).

[28] *See* Anne Tucker Nees, *Who's the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 214 (2010) (stating that "the shareholder derivative suit [is] an important tool to encourage and enforce complying behavior"); Romano, *supra* note 9, at 61–62 (stating that from a deterrence perspective, "small recoveries [found] in derivative suits indicate that liability rules are deterring egregious misconduct."); Schwartz, *supra* note 27, at 327 (contending that derivate suits are primarily intended to deter while class actions are primarily intended to compensate).

[29] *See* Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1761 ("Shareholder representative litigation is different from other forms of representative litigation in large part because of its managerial agency-cost-reduction characteristics."); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS VII, 1, Intro. Note (AM. LAW. INST. 1994) ("[T]he most important claim that can . . . be made for the derivative action is that it can reduce average agency costs."); *see also* James D. Cox, *Compensation, Deterrence, and the Market as Boundaries for Derivative Suit Procedures*, 52 GEO. WASH. L. REV. 745, 746–48 (1984). As the Delaware Court of Chancery has explained:

> Due to rational passivity, "it is likely that in a public corporation there will be less shareholder monitoring expenditures than would be optimum from the point of the shareholders as a collectivity." Incentivized by contingent fees, specialized law firms representing stockholder plaintiffs can "pursue monitoring activities that are wealth increasing for the collectivity (the corporation or the body of its shareholders)." "In so doing, corporations are safeguarded from fiduciary breaches and shareholders thereby benefit." Understood from this perspective, well-founded stockholder litigation becomes "a cornerstone of sound corporate governance."

In re Activision Blizzard, Inc. Stockholder Litig., 86 A.3d 531, 548 (Del. Ch. 2014) (internal citations omitted). *But see* Romano, *supra* note 9, at 85 (concluding that there is "scant

Stockholder litigation also serves a broader role in shaping corporate governance and corporate law. With respect to directors' and officers' fiduciary duties, for example, stockholder litigation provides courts the opportunity to expound on and adapt the otherwise abstract concepts of the duties of care and loyalty in an ever-changing business environment. Moreover, it is widely-recognized that the decisions of the Delaware courts go beyond deciding relevant legal standards of conduct for management, influencing the development of social norms and best practices in corporate America.[30] As Professors Thompson and Thomas point out, "Representative suits including the classics—*Smith v. Van Gorkom*, *Weinberger v. UOP, Inc.*, and more recently, *In re Southern Peru Copper Corp. Shareholder Derivative Litigation* and *In re Del Monte Foods Co. Shareholders Litigation*—illustrate the incredible importance of corporate representative litigation in this capacity. Liability rules and legal norms have been shaped and formed in large part through the holdings in these and other similarly significant class actions and derivative lawsuits."[31]

Stockholder litigation is largely comprised of class actions and derivative lawsuits. Class actions are the typical litigation instrument used to enforce management's fiduciary duties in the merger and acquisition context.[32] Derivative litigation generally involves breach of the duty of loyalty claims against management for engaging in conflict of interest transactions or usurping a corporate opportunity.[33] In typical class actions and derivative

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evidence" that lawsuits function as an alternative governance mechanism).

[30] *See, e.g.*, Edward B. Rock, *Saints & Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1012–13, 1019–20 (1997) (describing Delaware fiduciary duty case law as normative stories on how directors should behave); Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 206 (2007); Thompson & Thomas, *The Public and Private Faces*, *supra* note 16, at 1749 (stating that derivative decisions "changed the rules for future legal practice by allowing well-motivated legal counselors to get their clients to accept better conduct and procedures"); *cf.* Lawrence A. Hamermesh & Jacob J. Fedechko, *The Role of Judicial Opinions in Shaping M&A Practice*, in RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS (Claire Hill & Steven Davidoff Solomon eds., 2016) (discussing the strong influence of Delaware court opinions on M&A practice).

[31] Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1761.

[32] *See id.* at 1781 (finding deal litigation to usually be class actions as opposed to derivative suits); Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 137; Thompson & Thomas, *The Public and Private Faces of Derivative Lawsuits*, *supra* note 16, at 1748 (stating that "fiduciary duty class actions under state law are the principal litigation vehicle to remedy management misconduct in merger and acquisition settings.").

[33] *See* Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1784 (citing options backdating as an example of derivative suits being used to attack directors or officers for breach of the duties of loyalty (including good faith) and care). Corporate governance changes are more likely to be effected though derivative litigation, as opposed to class

suits, one stockholder files a lawsuit on behalf of other plaintiffs—a class of stockholders or the corporation, respectively. Inherent in this representative relationship is the risk of agency costs.[34] A second agency relationship exists between the stockholder-clients and their legal counsel. Much of the scholarship analyzing and critiquing the utility of stockholder litigation focuses on the attorney-client relationship and the motivations of plaintiffs' attorneys in pursuing these lawsuits.[35] And it is this latter agency relationship that is also the focus of this paper.

In the model attorney-client relationship the interests of the agent-attorney and principal-client are envisioned to be aligned. The unique nature of class actions and derivative lawsuits, however, can disrupt this alignment.[36] Private plaintiffs' attorneys play the leading role in stockholder litigation—instituting and controlling the litigation with little input and oversight from their nominal clients.[37] This state of affairs is a product of "a fundamental condition of the corporate form . . . as typically occurs in the public corporation," and the incentives created by the legal structure of stockholder litigation.[38] First, rational passivity and collective action problems among stockholders in public corporations render it unlikely they will undertake the monitoring necessary to detect and discipline management misconduct.[39] Second, the potential monetary recovery for each stockholder-plaintiff in these suits is relatively small (or nonexistent, as in the case of derivative suits where recovery goes to the

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acitons. *See* Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 84–85 (2011); Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1776.

[34] *See In re* Riverbed Tech., Inc. Stockholders Litig., C.A. No. 10484-VCG, 2015 WL 5458041, at *1 (Del. Ch. Sept. 17, 2015) (describing the agency relationship in representative stockholder litigation); Mcginty, *supra* note 4, at 163–64, 190–97 (discussing agency costs resulting from stockholder plaintiffs).

[35] *See, e.g.*, Romano, *supra* note 9, at 55–56; Fischel & Bradley, *supra* note 9, at 271.

[36] See Riverbed Tech, 2015 WL 5458041, at *1; John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. CHI. L. REV. 877, 883 (1987) [hereinafter Coffee, The Regulation of Entrepreneurial Litigation] (explaining that "several factors exacerbate agency problems in the market for legal services"); Coffee, Understanding the Plaintiff's Attorney, supra note 15, at 679.

While there are measures which can reduce such costs—monitoring by the principal, bonding by the agent, and devices that align the incentives of the agent and principal—scholars have noted their limited effectiveness in the representative litigation context. *See, e.g.*, Macey & Miller, *supra* note 3, at 12–27.

[37] *See* Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 36, at 877 (stating that it is a "noble myth" that a client can and should control all litigation decisions in class actions).

[38] Bird v. Lida, Inc., 681 A.2d 399, 402–03 (Del. Ch. 1996).

[39] *See* Romano, *supra* note 9, at 55.

corporation) while the costs associated with litigation are increasingly burdensome.[40] Thus, there is little economic incentive to bring suit in these cases. But while such a lawsuit is rarely feasible for the individual stockholder, the law incentivizes law firms through the award of attorneys' fees to monitor the behavior of and pursue claims against corporate managers.[41] At its best, this system encourages the plaintiffs' bar to police conduct by management that otherwise would likely be overlooked or ignored.[42] The downside to this system, however, is the creation of "'entrepreneurial' plaintiffs' attorneys" who, because they (i) have a greater economic stake in the litigation than the stockholder-plaintiffs, and (ii) are not subject to monitoring by their clients, can operate largely according to their own economic self-interest.[43] Stated another way, the attorney-client relationship in stockholder litigation exposes the stockholder to another type of agency costs commonly referred to as litigation agency costs. As explained by Professor Coffee, "The classic agency cost problem in class actions involves the 'sweetheart' settlement, in which the plaintiff's attorney trades a high fee award for a low recovery. The principal-agent relationship also encourages subtler forms of opportunism such as 'shirking'—where the attorney fails to expend the effort she otherwise

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[40] *See id.*; Coffee, *The Unfaithful Champion*, *supra* note 27, at 8 ("The usual economics of these suits are that the individual shareholder will not gain enough from a successful resolution of the claim to make it worthwhile to incur the costs that a suit would entail.").

[41] *See In re* Activision Blizzard, Inc. Stockholder Litig., 86 A.3d 531, 548 (Del. Ch. 2014); Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 15, at 679; Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1765 ("The attorneys' fees that [plaintiffs' attorneys] are able to collect from the entire group [of stockholders] make it worthwhile for them to incur substantial costs in pursuing the litigation. . . .").

[42] *See In re* Riverbed Tech., Inc. Stockholders Litig., C.A. No. 10484-VCG, 2015 WL 5458041, at *3 (Del. Ch. Sept. 15, 2015).

[43] Macey & Miller, *supra* note 3, at 14 ("[T]he attorney inevitably retains a relatively large area of discretion in which shirking or abuse is possible."); *see* Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 148 ("The end result is under-investment by shareholders in monitoring class counsel's efforts."). The problematic nature of representative litigation being driven by plaintiffs' attorneys' self-interest is well-documented. S*ee, e.g.*, STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 402 (2002) ("In almost all cases, the legal fees of plaintiffs exceed the monetary payment to shareholders."); Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 15, at 681; Coffee, *The Unfaithful Champion*, *supra* note 27, at 12 (asserting that the plaintiff's attorney should be analyzed "from an ex ante perspective as a risk-taking entrepreneur who predictably will act to maximize his expected return and to minimize his risk"); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 660 (2002); Romano, *supra* note 9, at 65 (finding that the "principal beneficiaries of cash payouts in shareholder suits are attorneys"); Thomas & Thompson, *A Shareholder Suits*, *supra* note 8, at 1764-65; Thompson & Thomas, *The Public and Private Faces*, *supra* note 16, at 1758.

would have put forth had the client been capable of actively monitoring the litigation. Conversely, the attorney may seek to provide additional services that are not desired by the client."[44]

Litigation agency costs can arise in the decision-making surrounding filing a lawsuit—what claims to file, what jurisdiction (and court) to file those claims in, and against whom to bring those claims. With the proliferation of multi-jurisdictional litigation in corporate law, recent scholarship has focused on the forum choice aspect of initiating litigation.[45] The rise in multi-jurisdictional stockholder litigation involving Delaware corporations has led judges, practitioners, and academics to question whether the decision of where to file such a lawsuit is being made based on the attorneys', not the stockholders', best interests.[46] Supporting this

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[44] Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 36, at 883; *see In re Riverbed*, 2015 WL 5458041, at *3 (discussing the "well-known agency problem" of settlements in class actions). *But see* C.N.V. Krishnan et al., *Who are the Top Law Firms? Assessing the Value of Plaintiffs' Law Firms in Merger Litigation*, EUROPEAN CORP. GOVERNANCE INST. 4–33 (2015).

[45] For a discussion of the increase in multi-jurisdictional litigation and its causes, see, for example, John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345 (2012) [hereinafter Armour et al., *Delaware's Balancing Act*]; John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605 (2012) [hereinafter Armour et al., *Is Delaware Losing*]; Patrick M. Garry, et al., *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D.L. Rev. 275, 281 (2003–04) (discussing shareholder class actions generally); Jeffries, *supra* note 4, at 56; Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467 (2014) (presenting and discussing empirical evidence regarding intra-corporate disputes at public corporations that attract litigation in multiple fora); Brian J.M. Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 155 (2011); Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1787–1801.

A decrease in multi-jurisdictional merger and acquisition litigation has been observed over the past three years. *See* Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2015 (Preliminary Figures)* at 2–4, http://ssrn.com/abstract=2715890 (Jan. 14, 2016) (finding 23.5% of transactions with litigation in 2015 experiencing litigation in multiple states, where as 53.6% of transactions with litigation in 2012 involved multi-jurisdictional litigation). It has been posited that this trend is due, likely in large part, to the increase in forum selection bylaws. *Id.*; *see* Alison Frankel, *Forum Selection Clauses are Killing Multiforum M&A Litigation*, REUTERS, Jun. 24, 2014, http://blogs.reuters.com/alison-frankel/2014/06/24/forum-selection-clauses-are-killing-multiforum-ma-litigation/.

[46] *See* Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, Yale L. & Econ. Research Paper No. 524, at 1 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2624951&download=yes, at 1 (June 30, 2015) (stating that the trend of stockholder suits against Delaware corporations being filed in multiforum to be less puzzling in light of the agency relationships in such litigation); Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 180 (describing multi-jurisdictional corporate litigation as "fee distribution litigation" for attorneys).

conclusion are the facts that first, under the internal affairs doctrine, the substantive law governing the majority of stockholder litigation is the corporation's state of incorporation, regardless of the forum in which the litigation is brought.[47] Second, stockholders' interest in remedying alleged wrongdoing is satisfied once one suit is filed; additional litigation in other jurisdictions based on the same wrongdoing is likely to result only in additional costs borne by stockholders.[48] Thus, scholars have pointed out "the addition of multiple suits in different jurisdictions does not appear to serve the shareholders in any meaningful way."[49] Rather, scholars suggest that self-interest on the part of plaintiffs' counsel is behind the trend of multi-jurisdictional stockholder litigation.[50]

As with the choice of forum, the decisions of plaintiffs' counsel regarding which members of corporate management to name as defendants in a lawsuit may also be colored by self-interest. As discussed more fully in the next section, in stockholder litigation involving allegations of corporate misconduct there appears to be a preference to sue a corporation's directors to the exclusion of the officers. While there are many possible

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[47] *See* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113–14 (Del. 2005) (citing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89–93 (1987)) ("It is now well established that only the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs."). "[F]ew, if any, claims are more central to a corporation's internal affairs than those relating to alleged breaches of fiduciary duties by a corporation's directors and officers." *In re* Fedders N. Am., 405 B.R. 527, 538–39 (Bankr. D. Del. 2009).

[48] *See* Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 155 (stating that "filing more suits may simply raise the costs to shareholders of challenging the board's actions").

[49] Jeffries, *supra* note 4, at 75; *see* Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 155, 183 (observing that may of the complaints are "virtually identical" despite being filed by different counsel and plaintiffs).

[50] *See, e.g.*, Cox & Thomas, *Corporate Darwinism*, *supra* note 9, at 12 ("[A]mong the burdens of that multi-forum litigation is not just unevenness across the judiciary but more importantly unevenness across the suits' counsels. This may well reflect the reluctance of some counsel to invest heavily in investigating the facts of the case and devoting time to drafting a complaint if uncertain whether those efforts will be undercut by a swifter proceeding by a rival counsel."); Jeffries, *supra* note 4, at 74 ("[M]erger objection suits also tend to be filed in multiple forums, another potential indicator of opportunistic behavior on the part of the plaintiffs' attorneys"); Quinn, *supra* note 45, at 155 ("The out-of-Delaware litigation strategy appears to be an effort by plaintiffs' counsel to skirt attempts by the Delaware judiciary to more closely monitor agency costs associated with shareholder lawsuits."). Relatedly, several reasons have been posited for the "out-of-Delaware" trend in representative stockholder litigation, many of which relate to attorney interests and benefits that do not necessarily also benefit the stockholders. *See* Armour, et al., *Delaware's Balancing Act*, *supra* note 45, at 1364–80; *see generally* Armour, et al., *Is Delaware Losing*, *supra* note 45.

reasons for this director preference, a close analysis of those reasons suggest that it too is an agency cost of stockholder litigation.

III. THE DIRECTOR PREFERENCE

A. What Is It?

Despite the prominent role of officers in the corporate enterprise, there is comparatively little traditional state fiduciary duty litigation involving these individuals.[51] This paper posits that the lack of officer fiduciary duty litigation is a result of the "director preference" in stockholder litigation. The "director preference" is the phenomenon in fiduciary duty litigation where the stockholder plaintiffs and their legal counsel name corporate directors as defendants to the exclusion of corporate officers.[52] This preference arises in two separate scenarios. First, where there are allegations of misconduct by both directors and officers, only the directors are being sued for violating their fiduciary duty. Second, where an individual accused of misconduct serves as both an officer and a director of a corporation, he or she is sued only in a directorial capacity.

There are several features of Delaware's corporate law that point toward the director preference.[53] Perhaps the strongest indicator is the slow and

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[51] *See* Johnson & Ricca, *supra* note 23, at 95–97; Johnson & Millon, *supra* note 23, at 1617; Shaner, *Officer Accountability*, *supra* note 23, at 370; Shaner, *The (Un)Enforcement*, *supra* note 23, at 329; *cf.* Thompson & Sale, *supra* note 23, at 865 (discussing officer accountability occurring at the federal level as opposed to in state law fiduciary duty suits).

[52] At this point two caveats are important. First, the existence of a director preference discussed herein is based on a review of officer fiduciary duty case law and scholarship. To show the director preference with a higher level of confidence would necessitate an empirical analysis of stockholder litigation. This paper does not seek to undertake such an endeavor. Second, it is of course expected that, as compared with directors, officers of a corporation would be subject to less fiduciary duty litigation. This is because directors are statutorily charged with broad powers to manage the corporation generally and specific decisional tasks (e.g., approving a merger, dividends, and a sale of all or substantially all of the corporation's assets). *See* DEL. CODE ANN. tit. 8, §§ 141(a), 170, 251, 271 (Supp. 2008). Finally, the purpose of this paper is not to advocate for more stockholder litigation; rather to highlight and discuss the absence of officer inclusion when stockholders are suing management.

[53] Delaware has been widely-recognized as the preeminent source of corporate law. *See* William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) ("Corporate lawyers across the United States have praised the expertise of the Court of Chancery, noting that since the turn of the century, it has handed down thousands of opinions interpreting virtually every provision of Delaware's corporate law statute. No other state court can make such a claim."); William T. Allen, *The Pride and Hope for Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 71 (2000) (stating that the Delaware General Corporation Law "is

limited development of fiduciary duty doctrine as it applies to corporate officers. It was not until 2008 that Delaware courts provided any specific guidance on the fiduciary obligations of officers. Prior that that time, the nature and scope of an officer's fiduciary duties and liability for violations were unclear, their existence typically mentioned only in passing and in broad, indeterminate generalizations.[54] The absence of judicial guidance, however, is a product of the cases in front of the courts; none turned on the nature of the fiduciary duties of corporate officers qua officers. "Thus there [has been] no need—and in fact, no opportunity—for the court to provide . . . guidance on the topic."[55]

Even two members of the Delaware judiciary acknowledge that corporate fiduciary law has historically focused on directors or individuals in their directorial capacity: "As a practical matter, however, most of our case law has focused on the fiduciary duties of corporate directors because boards have tended to include those key executives in a position to extract private rents from the firm at the expense of the stockholders."[56] By way of example, in the protracted Disney litigation surrounding the hiring and firing of President Michael Ovitz, the stockholder-plaintiffs made essentially the same claims against certain defendants in their capacities as officers and directors of the corporation.[57] It was not until their final appeal

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certainly the nation's and indeed the world's leading organization law for large scale business enterprise"); Ribstein, *supra* note 7, at 230 (noting the continued dominance of Delaware corporation law); Thompson & Thomas, *Public and Private Faces*, *supra* note 16, at 1760 (describing why Delaware is the "country's most important corporate law jurisdiction"); DELAWARE DIVISION OF CORPORATIONS, 2015 ANNUAL REPORT 2 http://corp.delaware.gov/Corporations_2015%20Annual%20Report.pdf (providing data on incorporation rates each year in Delaware); *see also* Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1559–1610 (2002) (exploring reasons why firms incorporate in Delaware or their home states).

[54] *See, e.g.*, Copi of Del., Inc. v. Kelly, No. 14529, 1996 WL 633302, at *5 (Del. Ch. Oct. 25, 1996) ("Officers and directors of a corporation owe a fiduciary duty to shareholders."); Zirn v. VLI Corp., No. 9488, 1989 WL 79963, at *4 (Del. Ch. July 17, 1989) ("Delaware law is clear that a fiduciary duty is owed to the shareholders of a corporation by the officers and directors of the corporation[.]" (citations omitted)); *see also* Megan Wischmeier Shaner, *Restoring the Balance of Power in Corporate Management: Enforcing an Officer's Duty of Obedience*, 66 BUS. LAW. 27, 31-36 (2010) [hereinafter Shaner, *Restoring the Balance*] (describing the development of officer fiduciary duties in Delaware).

[55] Shaner, *Restoring the Balance*, *supra* note 54, at 32. The lack of opportunity to address officers' duties due to counsel's failure to raise officer-related issues continues even today. *See, e.g.*, Chen v. Howard-Anderson, 87 A.3d 648, 666 n.2 (Del. Ch. 2014).

[56] Chandler & Strine, *supra* note 7, at 1002; *see also* Shaner, *Restoring the Balance*, *supra* note 54, at 31–36 (explaining the lack of focus on officer fiduciary duties in Delaware case law).

[57] *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 777 n.588 (Del. Ch. 2005),

to the Delaware Supreme Court that the plaintiffs focused on certain defendants' officer actions as distinct from their director conduct, arguing for a stricter standard of fiduciary liability to apply. Such a late attempt to assert officer-specific claims was rejected by the court on procedural grounds.[58]

While prior to 2003, the director preference could be explained by the lack of personal jurisdiction over non-director officers, amendment of the state's long-arm statute to include certain senior officers does not appear to have led to an appreciable increase in officer-specific case law.[59] In its 2009 opinion in *Gantler v. Stephens*,[60] the Delaware Supreme Court indirectly acknowledged this fact:

> That issue—whether or not officers owe fiduciary duties identical to those of directors—has been characterized as a matter of first impression for this Court. In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold.[61]

Even following Delaware's highest court clarifying (at least in part) officers' fiduciary duties, there continues to be a striking absence of case law in this area.[62] Again, the absence seems attributable, at least in part, to a lack of specific attention to officers.[63]

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aff'd, 906 A.2d 27 (Del. 2006) ("The parties essentially treat both officers and directors as comparable fiduciaries, that is, subject to the same fiduciary duties and standards of substantive review. Thus, for purposes of this case, theories of liability against corporate directors apply equally to corporate officers, making further distinctions unnecessary.").

[58] *In re* Walt Disney Co. Derivative Litig., 906 A.2d at 46 n.38.

[59] *See supra* note 51 and accompanying text. Effective on January 1, 2004, Section 3114(b) of the Delaware Code was amended to provide for personal jurisdiction over individuals who serve as certain officers of a Delaware corporation. DEL. CODE ANN. tit. 10, § 3114(b) (Supp. 2008).

[60] 965 A.2d 695 (Del. 2009).

[61] *Id.* at 708–09.

[62] *See* Shaner, *Officer Accountability*, *supra* note 23, at 370–72. The absence of case law is evident when looking at the many important areas of officer fiduciary duty doctrine yet to be clarified by the courts. *See* Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1108 (2009) (discussing the outstanding issues following *Gantler* and stating that "[c]learly the area of officer duties remains murkier than that of director duties") One such area is the standard of review applicable to officers in determining whether they have met their fiduciary duties. *See* Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 781 n.24 (Del. Ch. 2016); Chen v. Howard-Anderson, 87 A.3d 648, 666 n.2 (Del. Ch. 2014).

[63] This is evidenced by language in the Delaware courts' opinions acknowledging the open issues surrounding officer duties, noting that officer fiduciary issues are not before it in the case at hand, and seeming to offer invitations to litigants to raise those issues in the

A review of deal litigation further supports the existence of the director preference. Today, lawsuits arising out of merger and acquisition (M&A) transactions are the dominant type of fiduciary duty litigation.[64] According to a recent study, in 2015, 87.7% of M&A transactions that targeted U.S. public corporations where the value of the transaction was more than $100 million and the offer price was at least $5 per share were subject to a stockholder lawsuit.[65] This should not be surprising as management and stockholders frequently have diverging interests in the M&A context.[66] M&A transactions also provide a number of opportunities for management to engage in self-dealing.[67] With respect to officers in particular it is well-established that chief executive officers (CEOs) and other senior executive officers are heavily involved in negotiating these transactions, and also many times negotiate in a self-interested manner seeking to extract

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future. *See, e.g.*, *Chen*, 87 A.3d at 666 n.2 ("A lively debate exists regarding the degree to which decisions by officers should be examined using the same standards of review developed for directors. Given how the parties have chosen to proceed, this decision need not weigh in on these issues and intimates no view upon them.") (internal citations omitted); Hampshire Grp., Ltd. v. Kuttner, No. CIV.A.3607-VCS, 2010 WL 2739995, at *11 (Del. Ch. July 12, 2010) ("There are important and interesting questions about the extent to which officers and employees should be more or less exposed to liability for breach of fiduciary duty than corporate directors. The parties in this case have not delved into any of those issues, and I see no justifiable reason for me to do so myself.").

[64] *See* Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 167–69 ("[T]he overwhelming majority of fiduciary litigation in Delaware is in the form of challenges to director actions taken in the context of the sale of a company").

[65] Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2015 (Preliminary Figures)*, http://ssrn.com/abstract=2715890 (Jan. 14, 2016). The litigation rate for 2014 was 94.9%. *Id.* at 2. The posited reason for the decrease over the past year is recent decisions by the Delaware Chancery Court scrutinizing and rejecting disclosure only settlements in M&A lawsuits. *Id.* at 3, 7–8.

[66] *See Chen*, 87 A.3d at 677–79 (discussing the potential conflicts of interest in a sale of the company); *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 439 (Del. Ch. 2012) ("[T]he potential sale of a corporation has enormous implications for corporate managers and advisors, and a range of human motivations, including but by no means limited to greed, can inspire fiduciaries and their advisors to be less than faithful[.]").

[67] *See* Jeffries, *supra* note 4, at 67 ("The potential for management self-dealing is not uncommon in the deal context."); Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1778 ("For example, management will regularly implement defensive tactics that block third-party offers at a price offering an attractive premium over the current market price. Alternatively, management may make a deal with a buyer that shareholders believe is too low, perhaps because the preferred bidder is the majority shareholder or a private equity group that is likely to retain current management."); Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 145 ("Delaware has recognized the risk of greater managerial agency costs in acquisitions, as opposed to 'ordinary' director decisions, and has imposed additional legal duties on corporate directors in this setting.").

individual benefits.[68] Fiduciary duties combined with litigation rights are intended to curb such behavior by providing stockholders with legal recourse against opportunistic managers. Nevertheless, few of these M&A lawsuits seem to include allegations related to self-interested officer conduct, instead focusing exclusively on the board of directors (and, in the case of officer/directors, focusing only on the director-specific actions).[69] For example, in *In re Novell, Inc. Shareholder Litigation*, a class action challenging the merger of Novell and Attachmate, the President and CEO of Novell, Ronald Hovsepian, was the only inside director on the board.[70] In the complaint, the plaintiffs note that "[b]y virtue of their positions as directors and/or officers of Novell . . . [e]ach Defendant owed and owes Novell's shareholders fiduciary obligations."[71] The complaint includes specific allegations that Hovsepian (i) had personal financial incentives to get the Attachmate deal done,[72] (ii) was impermissibly given "the

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[68] *See Chen*, 87 A.3d at 679 ("[T]he reality [is] that American business history is littered with examples of managers who exploited the opportunity to work both sides of a deal"); Jay C. Hartzell et al., *What's in it for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37, 51-56 (2004) (finding target management exchanges lower premiums for generous compensation packages); Julie Wulf, *Do CEOs in Mergers Trade Power for Premium? Evidence from Mergers of Equals*, 20 J.L. ECON. & ORG. 60, 94 (2004) (finding target management exchanges lower premiums for employment in the surviving entity); *see also* Tom C.W. Lin, *CEOs and Presidents*, 47 U.C. DAVIS L. REV. 1351, 1384–86 (2014) (describing studies that suggest that high-statured individuals like executive officers are more inclined to engage in unethical and risky behavior).

[69] *Cf.* Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2013*, Public Law & Legal Theory Working Paper Series No. 236, at 3, http://ssrn.com/abstract=2377001 (Jan. 9, 2014) (stating that in nearly all of the stockholder lawsuits involving public company deals the directors were named as defendants and breach of fiduciary duty claims were included); Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 167 (observing that the majority of fiduciary litigation in Delaware involves challenges to director actions in the deal context).

I acknowledge that deal litigation is an imperfect area to demonstrate the director preference. Directors play a central and statutorily-mandated role in M&A activity. *See* DEL. CODE ANN. tit. 8, §§ 251, 252 (Supp. 2008). This necessitates a focus on board action and inclusion of directors in litigating M&A transactions. In particular, almost all the relief sought in M&A lawsuits—injunctive relief, amendments to the deal terms, and supplementary and/or corrective disclosures to stockholders—require board involvement. Nevertheless, this does not mean that officers' misconduct in this area should be ignored, especially given the central (and too many times self-interested) role senior executive officers play in M&A activity.

[70] *See* Second Amended Verified Consol. Class Action Compl. at ¶ 26, *In re* Novell, Inc. S'holder Litig. No. 6032-VCN, 2011 WL 3799696 (Del. Ch. Aug. 23, 2011).

[71] Consol. Amended Verified Class Action Compl. at ¶ 32, *In re* Novell, Inc. S'holder Litig. No. 6032-VCN, 2013 WL 3109109 (Del. Ch. Jan. 6, 2011)

[72] *Id.* at ¶¶ 42, 132–135.

opportunity to control the sale process,"[73] and (iii) was more concerned about being ousted from Novell than getting the best deal possible.[74] Nevertheless, the plaintiffs only frame their breach of fiduciary duty claims against Hovsepian as a director, not an officer, using the allegations of his conflict of interest only to show that the board of directors was improperly influenced in entering into the transaction.[75] Similarly, in *In re BioClinica, Inc. Shareholder Litigation*, the only officer who also on the board of directors was the President and, Mark Weinstein.[76] In challenging the sale of BioClinica, Inc. to JLL BioPartners, Inc., the stockholders allege that Weinstein was conflicted as he stood to gain personally from the deal.[77] The complaint and briefing on a motion to dismiss, however, only loosely make allegations to Weinstein in his officer capacity, focusing on his director actions and the board's breach of its fiduciary duties.[78]

B. The Significance of the Director Preference

Until the start of the twenty-first century the director preference was, as a practical matter, of little consequence. Most officers in positions that allowed them to engage in damaging self-dealing at the expense of stockholders also served as directors. As a result, officers were held accountable for their wrongdoing, it was just in their director (not officer) role.[79] Today, however, changes in the corporate culture and legal

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[73] *Id.* at ¶ 132.

[74] *Id.* at ¶ 42.

[75] *See In re* Novell, Inc. S'holder Litig., No. 6032-VCN, 2013 WL 322560, at *12 (Del. Ch. Jan. 3, 2013) (finding on a 12(b)(6) motion to dismiss that "[t]here is therefore no reasonably conceivable set of facts to indicate that [the CEO's role] . . . led to a breach of the Board's fiduciary duties."); *see also In re* Novell, Inc. S'holder Litig., No. 6032-VCN, 2014 WL 6686785, at *1 (Del. Ch. Nov. 25, 2014); Plaintiffs' Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss the Second Amended Verified Consol. Class Action Compl. at 17, *In re* Novell, Inc. S'holder Litig., C.A. No. 6032-VCN (Del. Ch. Oct. 31, 2011).

[76] *See* Verified Consol. Second Amended Class Action Compl. at ¶ 18, *In re* BioClinica, Inc. S'holder Litig., No. 8272-VCG, 2013 WL 1757609 (Del. Ch. Apr. 22, 2013).

[77] *See id.* at ¶ 74; Plaintiffs' Omnibus Answering Brief in Response to Defendants' Motions to Dismiss at 19, *In re* BioClinica, Inc. S'holder Litig., No. 8272-VCG, 2013 WL 3212107 (Del. Ch. June 21, 2013)

[78] *See In re* BioClinica, Inc. S'holder Litig., No. 8272-VCG, 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013) (discussing Weinstein's interests in the context of the BioClinica board's breach of its duty of loyalty); Plaintiffs' Omnibus Answering Brief in Response to Defendants' Motions to Dismiss at 29, *In re* BioClinica, Inc. S'holder Litig., No. 8272-VCG, 2013 WL 3212107 (Del. Ch. June 21, 2013).

[79] *See* Chandler & Strine, *supra* note 7, at 1002.

landscape governing board composition at public corporations have increased the significance of the director preference.

The most notable change in corporate law and best practices governing public corporations that has implications for the director preference is the emphasis on director independence and shift in the composition of the board from inside to outside director dominance. Following the financial scandals at corporate giants such as Enron, WorldCom, and Tyco in the early 2000's, governance reforms aimed at more directorial independence from the corporation's officers were put in place.[80] Specifically, provisions of Sarbanes-Oxley and new governance rules adopted by the New York Stock Exchange (NYSE) and NASDAQ require boards of most public corporations to consist of a majority of independent directors.[81] Additionally, under the new rules and regulations certain committees of the board must be comprised entirely of independent directors.[82] With these changes, it is less likely that senior officers will also serve as directors at the same corporation. Professor Jeffrey Gordon, for instance, estimates that the percentage of inside directors at public corporations decreased from 50% in 1950 to approximately 15% in 2005, with independent directors having increased their board representation from 20% to 75% over the same time period.[83] Professor Gordon's research also reveals that the trend in more director independence began prior to the enactment of the NYSE, NASDAQ, and Sarbanes-Oxley requirements, indicating a shift in best practices and corporate culture towards greater independence irrespective of

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[80] See Usha Rodrigues, The Fetishization of Independence, 33 J. CORP. L. 447, 455–58 (2008); see generally Jeffrey N. Gordon, The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices, 59 STAN. L. REV. 1465 (2007).

[81] *See* NASDAQ, Inc., Rule 5605(b)(1); NYSE, Inc., Listed Company Manual §§ 303A.01–.02. "Independent" for purposes of these rules and regulations is defined as, among other things a person who is not also an officer of the corporation. *See* NASDAQ, Inc., Rule 5605(a)(2) (defining independent director as "a person other than an Executive Officer or employee of the Company or any other individual having a relationship which, in the opinion of the Company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director"); NYSE, Inc., Listed Company Manual § 303A.02 ("No director qualifies as 'independent' unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company).").

[82] *See* 15 U.S.C. §§ 78j-1(3)(A)–(B) (2006) (audit committee requirements); NASDAQ, Inc., Rules 5605(d)–(e) (compensation committee and director oversight or director nominations); *Id.* Rule 5605(c)(2)(A) (audit committee); NYSE, Inc., Listed Company Manual § 303A.04(a) (nominating/corporate governance committee); *Id.* § 303A.07(a) (audit committee).

[83] Gordon, *supra* note 80, at 1471, 1473–75.

the legal requirement.[84] Looking at a slightly different timeframe, Professors Rock and Kahan observe that the number of employee directors at S&P 500 corporations declined from about 2.1 in 2000, to 1.5 in 2007.[85] Other scholars have reached similar conclusions regarding the steady decrease in the number of officers who also serve as a director at the same public corporation.[86] Even the CEO, an officer who traditionally occupied dual roles within the corporation, has seen a decrease in his/her role and service on the board of directors.[87]

Today's greater board independence means that, unless specifically included in a lawsuit, corporate executives that were previously held accountable for their fiduciary duties through their dual officer-director role can potentially escape scrutiny. It is also important to note that the regulatory and corporate culture trends described above show no signs of reversal.[88] As a result, the impact of the director preference in this regard is unlikely to abate in the future.[89]

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[84] *Id.*; Kahan & Rock, *supra* note 1, at 1025 ("Moreover, according to IRRC data, even in 2000, 60% of directors in S&P 600 companies, 64% of directors in S&P 400 companies, and 69% of directors in S&P 500 companies were independent. Thus, it is likely that most companies fulfilled the requirements of the new 2004 listing standards for committee and board composition several years prior to their adoption.").

[85] *See* Kahan & Rock, *supra* note 1, at 1024.

[86] *See, e.g.*, Urska Velikonja, *The Political Economy of Board Independence*, 92 N.C.L. REV. 855, 857 (2014) (citing SPENCER STUART, 2013 SPENCER STUART BOARD INDEX 6 (2013) ("By 2013, 85% of directors were independents; 60% of boards had only one nonindependent director—the CEO—and 45% had a nonexecutive chairman.").

[87] *See* Kahan & Rock, *supra* note 1, at 1030 (citing Bus. Roundtable, Business Roundtable Corporate Governance Survey Key Findings (2007)) ("According to the Business Roundtable Survey, the percentage of companies that had split the CEO and Chairman positions increased from 4% in 2004 to 13% in 2007. And our own review of S&P 100 companies indicates that the percentage of companies with split positions increased from 18% in 2003 to 26% in 2006."); *Id.* at 1030 (citing Bus. Roundtable, Business Roundtable Corporate Governance Survey Key Findings (2007)) ("And according to an annual survey conducted by the Business Roundtable, 90% of companies had an independent chairman, lead director, or presiding director in 2007 (up from 83% in 2005 and 71% in 2004)."); Velikonja, *supra* note 86, at 857 n.4 (citing SPENCER STUART, 2010 SPENCER STUART BOARD INDEX 3 (2010) ("In 1986, only three boards (or only 3% of the 100 boards reviewed) had the chairman/CEO as the sole insider. Today, the CEO is the sole insider on more than half of the S&P 500 boards.")); Urska Velikonja, *Independent Directors as a Handy Political Tool*, THE CLS BLUE SKY BLOG (Dec. 5, 2013), http://clsbluesky.law.columbia.edu/2013/12/05/independent-directors-as-a-handy-political-tool/ ("Over the last 15 years, the percentage of S&P 500 firms with separated positions [of CEO and Chairman] has risen from 16% to 45%.").

[88] *See* Rodrigues, *supra* note 80, at 457 ("Today, scholars speak of the 'norm' of a supermajority independent board . . . .").

[89] Of course, it is important to note that greater board independence has value that may, in fact, outweigh the costs to stockholders that flow from the director preference discussed in

The decline in officer service on the board has not, however, coincided with a substantial decline in the power and authority of senior executive officers.[90] Officers continue to wield broad power and authority and are often afforded great deference in managing the business and affairs of the corporation.[91] Because of this power, and the commensurate potential for significant harm to the corporate enterprise if it is abused, the function of litigation as a check on management power is critical. Indeed, two members of the Delaware judiciary expressed this very concern—that a reduction in management directors resulting from the legal reforms emphasizing board impendence would, absent an amendment to Delaware's jurisdictional statute, decrease the deterrent and remedial value of fiduciary duty litigation with respect to key officers.[92] While their proposed statutory amendment providing for personal jurisdiction over officers who were not also directors of a Delaware corporation was subsequently adopted, the persistence of the director preference in litigation undercuts the corrective measure that those two jurists envisioned.

C. The Costs of the Director Preference

Proponents of stockholder litigation point out that it serves three broad functions: (i) compensation for harm, (ii) sanctioning of current misconduct and deterrence of future misbehavior, and (iii) shaping legal norms and best practices.[93] To the extent that officers are not being held accountable for

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this paper.

[90] *See* Chandler & Strine, *supra* note 7, at 962; Jens Dammann, *How Embattled Are U.S. CEOs?*, 88 TEX. L. REV. 201, 205 (2010) ("Accordingly, any finding that U.S. CEOs are now less powerful than they used to be has to be handled with care in legal policy discussions. For example, even if CEOs are now less powerful than they were some years ago, they may still have too much power vis-à-vis shareholders, and critics of regulatory competition may still worry that such competition has made Delaware law excessively management friendly."). *But see* Kahan & Rock, *supra* note 1, at 989 (asserting that CEOs of publicly held corporations are losing power).

[91] *See* Shaner, *The (Un)Enforcement*, *supra* note 23, at 286–88 (discussing the increase in officer power); Lin, *supra* note 68, at 1379–84 (describing the deference given to presidents and CEOs; Charles K. Whitehead, *Why Not a CEO Term Limit?*, 91 B.U.L. REV. 1263, 1265 (2011).

[92] *See* Chandler & Strine, *supra* note 7, at 962.

[93] *See* Jessica Erickson, *Corporate Misconduct and the Perfect Storm of Shareholder Litigation*, 84 NOTRE DAME L. REV. 75, 78 (2008) ("Scholars have long recognized that shareholder litigation is intended to deter future instances of corporate misconduct and punish the individuals involved in corporate scandals."); Rock, *supra* note 31, at 1016 (discussing stockholder litigation's role in shaping norms and best practices); Schwartz, *supra* note 27, at 327 (citing Fischel & Bradley, *supra* note 9, at 261) ("Although F&B suggest in their first sentence that the primary purpose of liability rules is to 'create

their fiduciary breaches in stockholder litigation at all, each of these functions would be compromised.[94]

At a granular level, in any specific lawsuit, the decision to sue directors while ignoring officer misconduct can result in losses in bargaining position and potential monetary recovery. For example, the exculpation protections for violations of the duty of care that are available to directors do not apply to officers.[95] Additionally, it is unclear whether officers are afforded the same deference under the business judgment rule as directors and whether the standard of lability for the duty of care is the same (gross negligence for directors versus simple negligence for officers under agency law).[96] These differences subject officers to potentially greater personal liability than directors for breaches of fiduciary duty, as well as making it less likely that fiduciary duty claims against officers will be dismissed.[97] When officers are included as defendants in stockholder litigation, these differences can then provide stockholder-plaintiffs with bargaining leverage in the litigation and in settlement discussions.

More broadly, oft-cited concerns that the business judgment rule and exculpation's shield from certain types of liability undermine the disciplinary effect of stockholder litigation are not applicable to the same extent for officers. Officers do not enjoy liability protections to the same degree as directors. Thus, stockholder litigation and legal liability can still

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incentives to engage in socially desirable conduct,' liability rules also compensate those who have been injured.").

[94] This of course assumes that the officer is not held accountable for misconduct through other means such as internal sanctioning, securities litigation, SEC actions, or market forces. However, each of these forms of accountability (as well as stockholder litigation) is not identical or interchangeable with respect to the compensatory, punishment, deterrence, and legal norms implications. *See supra* note 9 and accompanying text.

[95] *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2011) (providing that a certificate of incorporation may contain a "provision eliminating or limiting the personal liability of a *director* to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a *director*" (emphasis added)); *see also* Gantler v. Stephens, 965 A.2d 695, 709 n.37 (Del. 2009).

[96] *See* Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 780 n. 24 (Del. Ch. Feb. 2, 2016) (noting that an officers' standard of liability for the duty of care and the application of the business judgment rule are still open issues); Shaner, *The (Un)Enforcement*, *supra* note 23, at 298 n.109 (describing the uncertainty over the business judgment rule and duty of care with respect to officers).

[97] *See e.g.*, Malpiede v. Townson, 780 A.2d 1075 (Del. 2001) (dismissing duty of care claims against directors because of Section 102(b)(7) exculpation provision; dismissing duty of loyalty claims against directors because the plaintiffs failed to rebut the business judgment rule presumptions).

play a meaningful role in policing and compensating for officer misconduct even if, as some scholars assert, it no longer does for directors.[98]

The director preference also diminishes the deterrence value of stockholder litigation.[99] Even though the vast majority of stockholder litigation settles before there is any possibility of judicial finding of management misconduct and liability, studies have found that the institution of litigation in and of itself has an impact on those named as defendants.[100] This impact may also affect the behavior of similarly situated individuals who are not directly involved in, but learn of, the lawsuit.[101] The cost of a loss of deterrence is an increased likelihood of future wrongdoing and/or more egregious wrongdoing by officers.[102]

The value of stockholder litigation is not limited to the individual level; rather, these suits play an important role in shaping the regulation and governance of corporations more broadly. Indeed, the impact of stockholder litigation in this respect has been frequently recognized by corporate scholars, practitioners, and members of the judiciary.[103] The Delaware

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[98] *See* Cox & Thomas, *Corporate Darwinism*, *supra* note 9, at 16, 30; Lisa M. Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors' Fiduciary Duty Through Legal Liability*, 42 HOUS. L. REV. 393, 409–14 (2005); Fischel & Bradley, *supra* note 9, at 286; Ann M. Scarlett, *A Better Approach for Balancing Authority and Accountability in Shareholder Derivative Litigation*, 57 U. KAN. L. REV. 39, 40 (2008); *cf.* Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105, 116–17 (2006) (citing indemnification, exculpation and insurance as protections for directors from monetary liability from a stockholder lawsuit). *But see* Schwartz, *supra* note 27, at 334.

[99] *See* George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 268 (2014) ("Even better, the threat of private legal action could prevent bad behavior in the first place.").

[100] One area that has been studied is the reputational harm that flows from being named in a lawsuit. *See, e.g.*, Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market*, 74 U. CHI. L. REV. 487, 489 n.7 (2007) ("The emotional impact of shareholder litigation and its reputational consequences, of course, will affect directors and officers directly. . . ."); Saiying Deng, Richard Willis & Li Xu, *Shareholder Litigation, Reputational Loss, and Bank Loan Contracting*, J. FIN. & QUANTITATIVE ANALYSIS 1101, 1125 (2014) (examining and finding reputational losses for defendant firms following stockholder litigation); *see also* Peter H. Huang, *Emotional Adaptation and Lawsuit Settlements*, 108 COLUM. L. REV. SIDEBAR 50, 51 (2008) ("Litigation itself also generates usually negative affect."). The initial filing of a lawsuit, pursuit of claims in litigation, and ultimate sanctioning of misconduct, individually (and collectively) can have deterrent value.

[101] *See* Hamermesh & Fedechko, *supra* note 31 (discussing the strong influence of Delaware court opinions on M&A practice).

[102] *See, e.g.*, Romano, *supra* note 9, at 61–62 (stating that from a deterrence perspective, "small recoveries [found] in derivative suits indicate that liability rules are deterring egregious misconduct.").

[103] *See, e.g.*, Rock, *supra* note 31, at 1016 ("Delaware courts generate in the first instance

courts, in particular, are well-known for implicitly and explicitly shaping corporate governance and management behavior through rulings on legal standards of conduct, creation of incentives for certain "best practices," and discussions of "aspirational ideals of good corporate governance practices."[104] Explaining this importance of stockholder litigation from a different angle, Professor Roberta Romano writes, "One potential social benefit from a shareholder suit that is ancillary to its role as a governance device has not been discussed: legal rules are public goods. All firms benefit from a judicial decision clarifying the scope of permissible conduct. The benefit of clarification is not simply deterrence of future managerial misconduct, but rather, given the contractual setting of the corporation, identification of a rule around which the parties (managers and shareholders) can transact."[105] But due to the director preference, these benefits of stockholder litigation are lost, or at least diminished, in the context of corporate officers.

Lastly, a release of claims that is executed in connection with the settlement of stockholder litigation that does not include officers as defendants may nonetheless prevent future litigation against those individuals. As noted by Professors Thomas and Thompson in their study of stockholder litigation, "defendants generally insist on global settlements of all litigation related to a common fact pattern, whether it is filed in one

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the legal standards of conduct (which influence the development of the social norms of directors, officers, and lawyers) largely through what can best be thought of as 'corporate law sermons.'"); Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 206 (2007) ("The Delaware judges, from their vantage point at the center of the corporate governance arena, offer their insights to the community of those who regularly think about best practices, and in doing so can help to bring certain questions to the forefront of the collective mind on these issues."); E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1404 (2005) ("Delaware judges have had a substantial role in shaping best practices in corporate governance."); *see generally* Frank v. Elgamal, No. Civ.A.6120-VCN, 2014 WL 957550, at *20 n.217 (Del. Ch. Mar. 10, 2014) ("Extensive literature has developed on the ways in which this Court has encouraged, implicitly or explicitly, certain 'best practices' of corporate governance.").

[104] *See* Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000); Rock, *supra* note 31, at 1016; Chandler & Strine, *supra* note 7, at 967–68, 977–78 ("Within the framework of fiduciary duty review, the Delaware courts have provided strong incentives for corporate boards to use procedures that are designed to protect public stockholders.").

[105] Romano, *supra* note 9, at 85. Professor Romano does point out though that this "explanation of lawsuit efficacy turn on the need for a large number of lawsuits in order to obtain a ruling. There is no reason to believe that the current level of litigation is optimal in relation to any public good benefits, but I leave that cost-benefit calculation for another day." *Id.*

court or many, and whether it is deal-related or a derivative claim. In a global settlement, the defendant gets a release of all claims, actual or potential, that could be brought by the shareholders of the company in any forum."[106] By way of illustration, in most stockholder suits involving M&A transactions the fiduciary duties of the board of directors are challenged.[107] Overwhelmingly, these suits result in a settlement of the plaintiffs' claims.[108] If, in the negotiation and approval process of a merger, a dual director-officer violated his/her fiduciary duties, but, as was the case in the Novell and Bioclinica litigation, the plaintiffs only focus on the director actions, it is likely that through settlement and a broad release, claims related to the individual's officer actions will be released as well. Given that the vast majority of stockholder actions (M&A and non-M&A) are settled, the ramifications of the director preference coupled with a broad release of claims remains particularly worrisome.[109]

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[106] Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1799.

[107] *See* Cain & Davidoff, *supra* note 69, at 3; Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 167.

[108] *See* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 478-79 (2015) (finding approximately 71.6% of the merger litigation brought during their 2005–2011 sample time period settled); Coffee, *The Unfaithful Champion*, *supra* note 27, at 8; Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 15, at 727 n.9 ("[O]nly a very small percentage of derivative actions (apparently less than one percent) result in litigated plaintiff victories. There is also a pronounced tendency for such actions to end in collusive settlements. . . ." (citation omitted)); Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 559 (2015); Romano, *supra* note 9, at 70 ("While derivative suits do settle less frequently than class actions (66 percent compared to 79 percent), the difference is insignificant."). Recently, however, Cain and Davidoff Solomon have found a decrease in the percentage of M&A-related stockholder suits that are settling in Delaware. *See* Cain & Davidoff Solomon, *supra* note 45, at 6.

[109] It is important to note that recent decisions of the Delaware Court of Chancery have taken a closer look at the settlement of stockholder litigation (which has included releases given in connection with the settlement) in the M&A context. *See, e.g.*, Transcript of Hearing at 66, Raymond Acevedo v. Aeroflex Holding Corp., C.A. No. 9730-VCL (Del. Ch. July 8, 2015) (declining to approve stipulated settlement); Transcript of Hearing, *In re* TW Telecom, Inc. Stockholder Litig., C.A. No. 9845-CB (Del. Ch. Aug. 20, 2015) (expressing skepticism as to the value of the settlement terms which included supplemental disclosures and deal protection amendments, but approving the settlement); Transcript of Hearing, *In re* Aruba Networks, Inc., Stockholder Litig., C.A. No. 10765-VCL (Del. Ch. Oct. 9, 2015) (rejecting settlement); Transcript of Hearing, *In re* Riverbed Technology, Inc. Stockholders Litig., C.A. No. 10484-VCG (Del. Ch. Sept. 7, 2015) (questioning the value of the disclosure only settlement and reluctantly approving the settlement); Transcript of Hearing, *In re* InterMune, Inc. Stockholder Litig., C.A. No. 10086-VCN (Del. Ch. July 8, 2015) (judgment on stipulated disclosure-only settlement reserved).m In particular, the court in *In re* Trulia Inc. Stockholder Litigation announced that going forward the court would be

IV. THE DIRECTOR PREFERENCE AS A LITIGATION AGENCY COST

A. Possible Explanations for the Director Preference

As presented in Part II there is an apparent director preference in stockholder fiduciary duty litigation. Despite the significance of the director preference and the costs flowing therefrom, the preference persists today.[110] The next logical step is to explore what could be behind the preference. One possible explanation previously advanced by Professors Johnson and Millon is that officers and their role in the corporation are simply being overlooked.[111] In their view, officers are "forgotten fiduciaries" in the corporate form. This is due to (i) a lack of appreciation by plaintiffs' attorneys, boards of directors, and judges for the distinctive fiduciary obligations of officers, and (ii) lawyers not fully appreciating the fiduciary duties of officers as agents of the corporation because law schools devote less time and attention to agency law principles.[112] Johnson and Millon's theory could explain the last-minute effort by the plaintiffs in *In re Walt Disney*[113] to distinguish the director and officer actions of the defendants that was described above. More recently, the legal arguments advanced by plaintiff's counsel in *Chen v. Howard-Anderson*[114] illustrate an apparent lack of attention to the distinct legal principles that govern officer conduct. In *Chen*, the court pointed out that the plaintiffs failed to distinguish between the fiduciary duties and relevant standards of review of the director and officer defendants, suggesting that it would have been appropriate to do so.[115] But while attorney oversight may play a contributing role in the director preference it seems unlikely that oversight alone or in a significant way explains the preference.

The driving force behind the director preference is most likely the substantive and procedural laws governing officers and stockholder

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reviewing "disclosure settlements" with heightened scrutiny. 129 A.3d 884, 898 (Del. Ch. 2016). This new increased judicial scrutiny of stockholder litigation settlements will help alleviate some of the problems related to the release of claims against officer-directors. The recent decisions in Delaware thus far have arisen in the M&A context and been largely related to disclosure-only settlements, thus it remains to be seen what impact there will be in non-M&A litigation settlements.

[110] *See, e.g.*, Chen v. Howard-Anderson, 87 A.3d 648, 686-87 (Del. Ch. 2014); *cf.* Se. Pa. Trans. Authority v. Abbvie Inc., 2015 WL 1753033, at *13 n.108 (Del. Ch. Apr. 15, 2015) (noting that the officers were included in name only).

[111] *See* Johnson & Millon, *supra* note 23, at 1609–18.

[112] Id.

[113] 907 A.2d 693 (Del. Ch. 2005).

[114] 87 A.3d 648 (Del. Ch. 2014).

[115] *Id.* at 686-87.

litigation. First, there is more established case law outlining the contours of directorial fiduciary duties as opposed to the limited guidance for officers.[116] The uncertainty surrounding officers means that lawyers are left to speculate as to the exact nature and scope of their fiduciary duties as well as how much liability might accompany a breach of those duties. To a plaintiffs' attorney operating largely on a contingent fee basis, the stability and predictability of director fiduciary duties are far more attractive targets than the unknown of pursuing fiduciary claims against officers.[117]

Second, the statutorily prescribed roles of officers in contrast to directors may impact their likelihood of being sued. The board of directors is given broad power and authority in managing the business and affairs of the corporation, while officer authority is more limited and company-specific, arising from the bylaws and board delegation.[118] Corporate statutes also require board (but not officer) approval for certain extraordinary transactions, which, not coincidentally, are the events that tend to be the subject of stockholder litigation.[119] In addition, officers generally act individually while directors act and make decisions collectively as the

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[116] *See, e.g.*, 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.10[C], 4–38 (3d ed. 2014) ("Few authorities deal with the nature of the obligation owed by officers to the corporation and its stockholders."); Johnson & Millon, *supra* note 23, at 1601 ("Hardly a week goes by without yet another Delaware decision addressing the subject of director duties. Yet, surprisingly, no Delaware decision has ever clearly articulated the subject of officers duties and judicial standards for reviewing their discharge."); A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215, 215 (1992) ("The precise nature of the duties and liabilities of corporate officers who are not directors is a topic that has received little attention from courts and commentators."); Shaner, *Restoring the Balance*, *supra* note 54, at 29 ("[T]he exact nature and scope of an officer's fiduciary obligations were left virtually untouched by the Delaware courts and legislature for almost seventy years, despite Delaware's otherwise vast and well-developed body of corporate law.").

[117] *See* Jeffries, *supra* note 4, at 72; *In re* Revlon Shareholder Litig., 990 A.2d 940, 945 (Del. Ch. 2010) (noting that merger objection suits are attractive to plaintiffs' attorneys "because they bear little contingency risk" and are "cheap and easy").

[118] *See* DEL. CODE ANN. tit. 8, §§ 141(a), 142 (2014); Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 780–81 (Del. Ch. Feb. 2, 2016) (describing the differences between the legal duties of directors and officers).

[119] Studies of class and derivative suits have found that such litigation tends to follow on the heels of highly visible events (e.g., announcement of a merger or other large-scale acquisition, SEC investigations, and bankruptcy proceedings) where the search costs necessary to find potential legal violations are the lowest. *See* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 15, at 682; *cf.* John E. Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study*, 14 HOUS. L. REV. 769, 807, 824 (1977). Relatedly, ultimate responsibility for the business and affairs resides with the board, making them a prime target in litigation.

board. The practical result is significantly more formal decision-making and documentation surrounding board conduct (e.g., resolutions, written consents, and meeting minutes) than officer conduct.[120] Accordingly, from an evidentiary standpoint it can be easier to investigate and prove breaches of fiduciary duty by a director as opposed to an officer.[121] Moreover, the type of relief plaintiffs seek in their lawsuit can influence who is named as a defendant. While damages can be sought against directors and officers alike, injunctive relief to stop corporate action will usually be sought against the board of directors as they are the body with central management power.[122]

More so than the substantive law of officers, the procedural law governing stockholder litigation plays a central role in the director preference. The majority of breach of fiduciary duty claims against officers will be derivative in nature.[123] The procedural rules (and corresponding case law) governing derivative lawsuits create significant hurdles for stockholders.[124] To file derivative litigation without first making a demand on the board of directors a stockholder must allege particularized facts creating a reasonable doubt that: (i) a majority of the board is disinterested and independent; or (ii) the challenged decision was a valid exercise of

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[120] *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(f) (2014) (providing for director written consent); MODEL BUS. CORP. ACT. § 16.01 (2006) (providing for specific corporate records).

[121] Access to this documentation through books and records inspection rights also make proving director conduct easier than officer conduct. *See* DEL CODE ANN. tit. 8, § 220 (2014) (providing stockholders with books and records inspection rights); Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1792 (pointing out that "plaintiffs must pay the costs associated with researching and filing a case, spend the time, and overcome significant informational barriers to uncover proof of alleged wrongs committed by the defendants—information that is generally in the defendants' sole possession.").

[122] *See* DEL. CODE ANN. tit. 8, § 141(a) (2014). Similarly relief in the form of M&A agreement amendments and supplementary or corrective disclosures to stockholders are accomplished through board action.

[123] *See supra* note 33 and accompanying text.

[124] The problematic nature of the law governing stockholders' ability to bring derivative lawsuits has been widely-documented. *See, e.g.*, John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 326 (1981) (discussing "three distinct barriers" to the effectiveness of derivative actions); Fairfax, *supra* note 98, at 408–09 (describing procedural hurdles to stockholder actions); Fischel & Bradley, *supra* note 9, at 286 (listing rules that limit the shareholders' ability to bring derivative suits); Usha Rodrigues, *From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level*, 61 FLA. L. REV. 1, 34–35 (2009) (describing the difficulties faced in bringing a derivative suit); Scarlett, *supra* note 98, at 40 (explaining that "shareholder derivative litigation . . . rarely succeeds in holding directors liable for their actions"); Schwartz, *supra* note 27, at 339–40; Shaner, *The (Un)Enforcement*, *supra* note 23, at 315–16.

business judgment.[125] If a stockholder-plaintiff fails to meet this standard, the court will dismiss the complaint even if the underlying breach of fiduciary duty claim against an officer is otherwise meritorious.[126] Where officer but not also director conduct is being challenged, showing demand futility is even more daunting. In this scenario, the test for determining whether demand is excused is "whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."[127] To be successful under this test, a showing of deferential board behavior or even a role reversal in corporate management will not be sufficient; rather, the inability to exercise independent judgment by a majority of the board is required to survive a motion to dismiss.[128] And further confounding stockholders' efforts to satisfy their burden is a lack of discovery rights.[129] In sum, the combination of a lack of fiduciary duty case law and evidentiary challenges surrounding officer decision-making, when taken in the context of derivative litigation and its procedural hurdles, make it extremely difficult for a stockholder-plaintiff to survive a motion to dismiss for failure to make a demand when challenging the actions of officers.[130] In light of these tough doctrinal barriers, stockholders

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[125] *See* Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000); Aronson v. Lewis, 473 A.2d 805, 814–15 (Del. 1984), *overruled on other grounds by* 746 A.2d at 253. The particularity requirement to show demand futility under Delaware Chancery Court Rule 23.1 is a more stringent standard than the notice pleading standard that generally applies to complaints. *See* BALOTTI & FINKELSTEIN, *supra* note 116, at § 13.12; *see also* Grobow v. Perot, 539 A.2d 180, 187 (Del. 1988), *overruled on other grounds by Brehm*, 746 A.2d at 253 (stating that in considering a derivative complaint "upon a motion to dismiss, only well-pleaded allegations of fact must be accepted as true; conclusionary allegations of fact or law not supported by allegations of specific fact may not be taken as true"); *In re* Nat'l Auto Credit, Inc., C.A. No. 19028, 2003 WL 139768, at *12 n.69 (Del. Ch. Jan. 10, 2003) (stating that the standard under Rule 23.1 is more rigorous than under Rule 12(b)(6)).

[126] *See* Del. Ch. Crt. R. 23.1; *Brehm*, 746 A.2d at 253; *Aronson*, 473 A.2d at 814–15.

[127] Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993); *see* Shaner, *The (Un)Enforcement*, *supra* note 23, at 315–16 ("Where a stockholder complaint is alleging breaches of fiduciary duty based on officer, and not director, conduct, it will be particularly difficult to show futility.").

[128] *See Aronson*, 473 A.2d at 816 (stating that "[t]he shorthand shibboleth of 'dominated and controlled directors' is insufficient" to excuse demand); Orman v. Cullman, 794 A.2d 5, 27 (Del. Ch. 2002); BALOTTI & FINKELSTEIN, *supra* note 116, at § 13.14[B] ("[A]n unsupported allegation of domination and control of directors by one interested in the transaction is insufficient to demonstrate demand futility.").

[129] *See Rales*, 634 A.2d at 934 n.10 ("[D]erivative plaintiffs . . . are not entitled to discovery to assist their compliance with Rule 23.1. . . .").

[130] *See* Shaner, *The (Un)Enforcement*, *supra* note 23, at 314–16 & n.187 (describing the difficulties of showing demand excused under *Aronson* and *Rales* when the actions of

and their attorneys will be discouraged from seeking derivative claims against officers except in the most egregious circumstances.

In addition to these legal rules, the economic incentives in stockholder litigation are a likely explanation for some or all of the director preference. The fee structure in this type of litigation encourages plaintiffs' attorneys to keep the costs in bringing lawsuits low and many times to seek a quick settlement.[131] As described above, from an evidentiary standpoint, a procedural standpoint, and a substantive law standpoint, it will generally be easier, less costly, and less risky to make a case against directors as compared to officers. Accordingly, there is an incentive to go after the more traditional, and many times less expensive, members of management (i.e., directors) with stronger claims in hopes of settling with the corporation quickly and for a large amount, while ignoring an officer against whom it is more difficult to establish fiduciary claims, which can then also weaken the overall settlement value of a suit. Relatedly, director and officer (D&O) insurance may be playing a meaningful role in the preference to sue directors. The vast majority of the fees in stockholder litigation are paid by the corporation's D&O insurer.[132] It is thus plausible that plaintiffs' attorneys view D&O insurance as the source of their litigation payouts.[133] The reality of this practice is that plaintiffs' attorneys

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officers and not directors are being challenged).

[131] *See* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 15, at 682 (discussing how derivative suits tend to follow highly visible events where the search costs for potential wrongdoing are low). Macey and Miller note that:

> Attorneys compensated on a percentage method have an incentive to settle early for an amount lower than what might be obtained by further efforts. The attorney who puts in relatively few hours to obtain an early settlement is likely to earn a much greater compensation per hour of effort than an attorney who expends greater efforts and litigates a case to the point where the plaintiffs' recovery is maximized.

Macey & Miller, *supra* note 3, at 25.

[132] *See* Baker & Griffith, *supra* note 100, at 487 ("Directors' & Officers' (D&O) liability insurers are the financiers of shareholder litigation in the American legal system, paying on behalf of the corporation and its directors and officers when shareholders sue."); Romano, *supra* note 9, at 55 (stating that "the vast majority of settlements are paid by D&O insurance"). As Professors Baker and Griffith explain, "Liability insurers bankroll shareholder litigation in the United States. Directors' and officers' (D&O) liability insurance policies cover the risk of shareholder litigation. Nearly all public corporations purchase D&O policies. And nearly all shareholder litigation settles within the limits of these policies." Baker & Griffith, *supra* note 100, at 487–88.

[133] *See* Baker & Griffith, *supra* note 100, at 535 ("This, alone, is unsurprising since plaintiffs' lawyers typically prefer to be paid by an insurance company that is contractually obliged to pay them rather than to expend extra effort seeking recovery from individuals who will do everything they can do to protect their personal assets."); *cf.* James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 512 (1997) (stating that "the insurance proceeds often [are] the sole source of settlement funds" in securities

receive approximately the same amount of money from a D&O insurer regardless of how many members of management are named in the lawsuit, so there is no incentive to pursue more complicated claims against an officer.[134] Moreover, many times an officer's fiduciary liability will implicate the personal profit exclusions in D&O policies thereby increasing the risk to the attorney of nonpayment.[135] Lastly, there is no financial incentive via good will and long-term relationship building with a client on the plaintiffs' side of stockholder litigation to encourage diligent investigation, research, and pursuit of challenging claims or defendants such as officers. More often, plaintiffs' attorneys in stockholder litigation represent one-time, nominal plaintiffs, obviating any real threat of harm from losing a client for lack of diligence.[136]

Finally, other contributing factors to the director preference are rooted in the habits of plaintiffs' attorneys in drafting and filing fiduciary duty claims. Complaints in stockholder litigation have the reputation of being hurriedly filed, duplicative, and relatively generic.[137] Indeed, the haste of filing suit in stockholder litigation is well documented. Professors Thompson and Thomas found that almost 70% of the M&A class actions filed in Delaware between 1999 and 2000 were filed within three days of the announcement of the transaction.[138] Studies since then have reported

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class action settlements).

[134] D&O insurance policies typically include limits on coverage based on a claim basis, policy year, and/or aggregate basis. *See* JOSEPH M. SMICK DIRECTOR & OFFICERS LIABILITY INSURANCE DESKBOOK ch. 6 (2011) ("A single D&O policy may offer separate limits of liability for each claim or policy year, as well as an aggregate limit of liability that may be for an amount higher than the per year claim or policy year limits of lability."). Settlement awards in stockholder litigation are then "effectively capped at typical policy limits." Baker & Griffith, *supra* note 100, at 536; *see* Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 760-61 (2009) ("Virtually all U.S. public corporations buy D&O insurance, and the vast majority of securities claims settle within or just above the limits of the defendant corporation's D&O coverage."); *cf.* Cox, *supra* note 133, at 512 (stating that "approximately 96% of securities class action settlements are within the typical insurance coverage").

[135] *See* MARTIN J. O'LEARY, DIRECTOR & OFFICERS LIABILITY INSURANCE DESKBOOK, ch. 8 (2011) (stating that "almost all D&O policies exclude coverage for [claims of personal profits or improper gains]").

The fraud exclusion in D&O policies, which excludes coverage for claims relating to actual fraud or personal enrichment by a director or officer may also be triggered. *See* Baker & Griffith, *supra* note 100, at 500 (discussing the fraud exclusion).

[136] Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 15, at 712.

[137] *See In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 641 (Del. Ch. 2005) (noting the "dashed-off complaints" by plaintiffs' counsel).

[138] *See* Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 182–83; *see also* Elliott Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1827 (2004). Weiss and

that this practice continues today.[139] Interpreting these findings, scholars agree that this race to the courthouse indicates that plaintiffs' attorneys are reflexively instituting litigation without engaging in any detailed research or investigation of the facts surrounding the transaction.[140] As a practical matter then, when choosing who to name as defendants, attorneys will target the proverbial "low hanging fruit." In most circumstances this will be the board of directors. The board is statutorily tasked with managing the business and affairs of the corporation generally and approving certain transactions specifically.[141] Accordingly, public filings and press releases surrounding corporate action will describe the actions and decisions of the board. Officers, in contrast, are not charged by statute with management powers and approval requirements and their actions are not documented to the same extent as those of the board.[142] As a result, many times it will require more investigation to determine an officer's role and potential conflicts of interest in a transaction and, correspondingly, whether there was a breach of one's fiduciary duties. Where the goal is to be the first to

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White explain:

> An immediately striking fact is the speed with which these complaints were filed: Of the 104 challenged mergers, 77 (74.0 percent) attracted their initial lawsuit within one business day of the merger announcement. An additional 7 mergers (6.7 percent) attracted their initial lawsuit on the second business day after the merger announcement.

Id.

[139] *See* Brian Cheffins, John Armour & Bernard Black, *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 482 n.189 (2012). The group found:

> In our dataset of large M&A transactions, when a suit in a deal involving a Delaware target was filed in Delaware, half of the time the suit was filed within two days after the announcement; for Delaware targets in our LBO dataset, the median number of days from announcement to first lawsuit was four.

Id.; *see also* Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 FLA. L. REV. 1098, 1127-28 (2013) (reporting that "[i]n 2011 alone, shareholders challenged ninety-six percent of acquisitions involving U.S. public companies valued at over $500 million . . . strongly suggest[ing] that plaintiffs' attorneys are reflexively filing many shareholder suits.").

[140] *See, e.g.*, Erickson, *supra* note 139, at 1127–28; Weiss & White, *supra* note 138, at 1881 ("Such rapid filings indicate that plaintiffs' attorneys spent little or no time doing research or consulting with their "clients" before filing complaints."); *see also* Cox & Thomas, *Corporate Darwinism*, *supra* note 9, at 12 (noting the unevenness across attorneys' complaints in multi-forum litigation, positing that if may be a reflection of attorney's investing heavily in investigating and drafting complaints, and "[i]f this surmise is correct, it poses a larger concern: this is an arena in which diligence and reflection are ultimately not rewarded but nimbleness and timing.").

[141] *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 141(a), 170, 251, 271 and 275 (Supp. 2008).

[142] *See infra* notes 118–121 and accompanying text.

the courthouse door with a complaint in stockholder litigation, engaging in the research necessary to include officers is perhaps seen as a route that plaintiffs' counsel simply cannot afford.[143]

Complaints in stockholder litigation have also been observed as being duplicative and containing superficial, broadly drafted allegations. In the deal litigation context it has been reported that M&A transactions that were the subject of stockholder litigation attracted an average of 4.4 complaints per case in 2014.[144] While these complaints may be filed in different jurisdictions, by different counsel, and on behalf of different stockholders, they have been observed as being "virtually identical."[145] In addition, the Delaware courts have commented that many of these complaints appear quickly drafted with generalized, conclusory allegations of wrongdoing void of specifics.[146] These attributes suggest a herd behavior in drafting stockholder complaints[147] and reinforce the notion that plaintiffs' counsel invests little time and effort to research their complaints before they are filed. As a result, the actions of officers will go largely unaddressed.

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[143] It is possible that plaintiffs could later amend their complaint to add allegations against officer-directors or add officers as defendant. *See* Jeffries, *supra* note 4, at 70 n.110; *In re* Sauer-Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1125 (Del. Ch. 2011). Scholarship investigating fiduciary duty litigation involving officers, however, has found that the opinions of the Delaware courts do not reflect plaintiffs pursuing claims against officer defendants. *See* Shaner, *Officer Accountability*, *supra* note 23, at 13–17. This suggests it is rare that a complaint is being amended to add facts and allegations related to officers. In addition, given that the majority of stockholder litigation settles early in the litigation there may be little time for amendment of a complaint to address officers. *See supra* note 108 and accompanying text.

[144] Cain & Davidoff Solomon, *supra* note 108, at 476–77.

[145] Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 155, 183; *see* Jeffries, *supra* note 4, at 57–58, 75.

[146] *See, e.g.*, Rales v. Blasband, 634 A.2d 927, 934 n.10 (Del. 1993) (noting the "plethora of superficial complaints that could not be sustained"); Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961, 981–82 (Del. Ch. 2003) ("It is troubling to this Court that, notwithstanding repeated suggestions, encouragement, and downright admonitions over the years both by this Court and by the Delaware Supreme Court, litigants continue to bring derivative complaints pleading demand futility on the basis of precious little investigation beyond perusal of the morning newspapers." (citations omitted)); White v. Panic, 793 A.2d 356, 364 (Del. Ch. 2000) (chastising the plaintiff for his lackluster efforts in filing litigation, and stating that "[f]or all of its colorful language, what is missing from the complaint, in terms of the details of actions taken by the Director Defendants, is at least as important as what is alleged.").

[147] *See* Cain & Davidoff Solomon, *supra* note 108, at 477; Webber, *supra* note 18, at 957.

B. An Agency Cost

The possible explanations for the director preference described herein can be separated into three broad groups. The first, is simply a lack of diligence or experience on the part of plaintiffs' attorneys. This group includes reasons such as a failure to appreciate the distinct fiduciary obligations of officers and the herding behavior in drafting and filing complaints. The second group assumes that the director preference stems from conscious strategic choices by plaintiffs' attorneys to focus their time and energy on directors instead of officers. This group includes considerations such as the evidentiary, procedural and substantive legal difficulties involved in suing officers, especially when coupled with the financial incentives for attorneys to pursue claims against directors that incur minimal costs and often result in large, speedy settlements. Finally, the third group is a combination of the first two, as illustrated by plaintiffs' counsel's hasty filing habits in an effort to be lead counsel. A convenient, if oversimplified, shorthand for these categories could be (i) shirking and carelessness, (ii) self-interested behavior, or (iii) some combination thereof. Framed this way, the director preference looks to be another litigation agency cost.

To the extent that it is attorney interests and not stockholder interests that are driving the director preference, it can be explained as a consequence of litigation agency costs. Officers pose a greater challenge than directors in investigating their misconduct and pursuing litigation. As discussed above, it is more risky and expensive to pursue officers as defendants—two factors that run contrary to the financial incentives of plaintiff's counsel in stockholder litigation. In contrast, stockholders have a strong interest in (i) officers being held accountable for their misconduct, and (ii) the proper operation of litigation, or the threat of litigation, as a tool to reduce the managerial agency costs associated with these individuals. Officers play a prominent role in managing corporations, which leads to myriad opportunities for self-interested behavior.[148] The possible explanations for the director preference, however, indicate that the decision to target particular members of corporate management (i.e., the directors) and not others (i.e., the officers) is being largely motivated by plaintiffs' attorneys' interests which are not always the same as stockholders' interests. Indeed many of the possible explanations for the director preference are strikingly

[148] *See* Mcginty, *supra* note 4, at 189 ("Because they possess greater and more specialized expertise than ordinary workers, they can divert more wealth to themselves without the principal's being able to prevent (or even necessarily detect) such losses."); Whitehead, *supra* note 91, at 1265 (discussing the increase in agency costs as CEOs use their "control over the board" to their benefit).

similar to those cited in multi-jurisdictional litigation studies as having the indicia of attorney self-interest.[149]

It is important to note that in arriving at this conclusion this paper is not asserting that all plaintiffs' attorneys make litigation decisions with their own interest, not their clients' interests, in mind. Rather, recent research has found that in reality plaintiffs' attorneys' decision-making is more nuanced.[150] Additionally, there may be instances where it is in both attorney and stockholder interests not to pursue officers in litigation for their fiduciary breaches. In those instances, a director preference would not be an agency cost. Nevertheless, there is a striking absence of stockholder litigation involving officers. It is difficult to imagine that all of the instances where officers escape judicial scrutiny can be justified as being in the stockholders' interests. Where this is the case, the director preference is a litigation agency cost that, in light of the costs attendant to the preference discussed above, necessitates attention.

V. CONCLUSION

Agency costs in stockholder litigation is not a new idea.[151] Bearing the risk and expense of investigating and filing class and derivative lawsuits, legal counsel are incentivized to pursue these types of suits through the award of attorneys' fees.[152] This structure is beneficial, in particular in the public corporation setting, because it has led to private attorneys monitoring and policing managerial misconduct that stockholders would not otherwise undertake.[153] However, the financial incentives in stockholder litigation

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[149] *See* Thompson & Thomas, *Shareholder Litigation*, *supra* note 8, at 138, 152–156, 182 (citing (i) rapid filing of complaints, (ii) multiple lawsuits filed for the same alleged wrongdoing, (iii) quick settlements, (iv) substantial attorney fee awards, (v) small recovery for the plaintiffs, (vi) little activity in pursuing the litigation after it was filed, (vii) litigation targeting a particular type of corporation, and (viii) a small number of repeat law firms and nominal plaintiffs filing complaints as having the indicia of attorney self-interest driving litigation decision making); Weiss & White, *supra* note 138, at 1828.

[150] *See* Krishnan, et al., *supra* note 44, at 4–33 ("Our results provide a more textured view of the value of plaintiffs' lawyers in shareholder litigation: while some firms may specialize in filing many cases, then settling them cheaply, other plaintiffs' law firms are more aggressive litigators in their quest to obtain more favorable results for their clients.").

[151] *See, e.g.*, Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 15, at 680 ("[T]here are high 'agency costs' associated with class and derivative actions"); Macey & Miller, *supra* note 3, at 12 n.20 (crediting Professor Coffee as the first scholar to apply agency cost theory to class litigation and extending his analysis); *see also* Jeffries, *supra* note 4, at 62 ("One of the first types of corporate suits to draw attention to the agency costs associated with representative litigation was the shareholder derivative suit . . . .").

[152] Thomas & Thompson, *Shareholder Suits*, *supra* note 8, at 1764–65.

[153] *See In re* Activision Blizzard, Inc. Stockholder Litig., 86 A.3d 543, 548 (Del. Ch.

can also create a misalignment in the interests of the stockholder-clients and their attorneys.[154] When combined with the broad discretion afforded to legal counsel by their nominal clients in this context, the risk of opportunistic decision-making on the part of legal counsel is quite high. As a result, a chief mechanism for reducing the managerial agency costs inherent in the corporate form—stockholder litigation—generates its own separate agency costs for stockholders.

One recent area where legal decision-making has been explained in terms of being a litigation agency cost is forum selection and the proliferation of multi-jurisdictional stockholder suits.[155] This paper identifies another litigation choice that seems to be a function of self-interested attorney decision-making: who to name as the defendants in the lawsuit. Specifically, this paper describes the apparent director preference in stockholder litigation involving breaches of fiduciary duty—the decision to sue a corporation's directors to the exclusion of the officers.[156]

Possible reasons for why there is a director preference include (i) a lack of appreciation for the distinct legal rules applicable to officers, (ii) the uncertainty surrounding officer fiduciary duties, (iii) the evidentiary challenges in investigating and proving officer misconduct, (iv) the procedural hurdles in pursuing derivative lawsuits, (v) the attorney fee structure in stockholder litigation, and (vi) hasty drafting and filing habits by plaintiffs' attorneys in filing complaints.[157] In exploring these different explanations for the director preference, the preference seems to be driven by attorneys' economic interests. Corporate officers as compared to directors are more difficult and expensive individuals to hold accountable for breaches of their fiduciary duties.[158] Where, as is the case in stockholder litigation, the financial aspects of a lawsuit are the practical drivers of decisions such as inclusion or exclusion of certain defendants, there is a high risk that attorneys will make those decisions in their own

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2014); Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 15, at 679.

[154] *See* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 15, at 671 ("[T]he legal rules governing the private attorney general have created misincentives that unnecessarily frustrate the utility of private enforcement."); Romano, *supra* note 9, at 55 (stating that in providing a financial incentive to the plaintiff's attorneys to police corporate management through litigation there is "a principal-agent problem with such an arrangement: the attorney's incentives need not coincide with the shareholders' interest").

[155] *See supra* notes 46–49 and accompanying text (discussing the research surrounding the increase in multi-jurisdictional stockholder litigation).

[156] *See supra* Part III.A.

[157] *See supra* Part IV.A.

[158] *See supra* Part IV.A (discussing the difficulties surrounding suing officers for breach of fiduciary duty).

self-interest.[159] This means that except for instances of egregious misconduct legal counsel will pursue fiduciary duty claims against directors but not officers. Of course stockholders' interests in litigation also include similar economic considerations (e.g., compensation), however, they also include holding all members of management—directors and officers—accountable for their misconduct and deterring future misconduct. These latter interests are frustrated where attorney economic considerations are dominating the decision-making surrounding who to include as defendants in stockholder litigation.

While the director preference in stockholder litigation has been a long-standing practice, the consequences of the preference have taken on added significance in light of changes in the legal landscape. Stockholder litigation's traditional focus on holding directors and not officers accountable for their management of the business and affairs of the corporation was of little practical consequence since most senior officers were also directors.[160] Over the past twenty-five years, however, due to new regulatory requirements and changes in corporate norms, boards of directors are almost entirely comprised of independent directors.[161] Greater board and committee independence means that while historically senior executive officers were being held accountable for their misconduct albeit in their director (not officer) capacity, many of today's officers will not be unless they are specifically included in the litigation.

The decline in officer participation at the board level has not, however, led to an appreciable decline in officer power and the commensurate risk of opportunistic conduct by these individuals.[162] Indeed a strong argument can be made that officer-related agency costs are of greater concern than those of directors.[163] Stockholder litigation's role in enforcing fiduciary duties is thus an important check on these managerial agency costs. To the extent that attorney self-interest is resulting in officers avoiding accountability for their fiduciary breaches via stockholder litigation, the director preference seems to be preserving, if not potentially exacerbating, the managerial agency costs associated with officers. Stated another way, the director

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[159] *See supra* notes 15 and 43 and accompanying text.

[160] *See* Chandler & Strine, *supra* note 7, at 1002.

[161] *See supra* notes 81–87 and accompanying text (discussing changes to board composition and the declining role of officers as directors as well as regulatory requirements for greater board independence).

[162] *See supra* notes 90–91 and accompanying text (discussing how officer power has not seen an appreciable decline in recent years); *cf.* Baker & Griffith *supra* note 100, at 523–24, 539–40 ("D&O underwriters base a large amount of their risk assessment on . . . the culture of the firm . . . and the character of its management[,]" including specifically the character of the senior executive officers).

[163] *See* Mcginty, *supra* note 4, at 189; Whitehead, *supra* note 91, at 1265.

preference is undermining the utility of stockholder litigation in policing officer behavior and reducing agency costs.

If the director preference continues it puts pressure on other mechanisms to counteract the shortage in litigation accountability for officers. For instance, the greater independence on the board of directors can lead to more meaningful monitoring of officer conduct and enforcement of fiduciary duties, lessening the need for stockholder litigation as a check on officers. In addition, other alternative stockholder monitoring techniques such as hedge fund activism, Say on Pay Votes, and appraisal arbitrage have been cited as addressing, to some extent, the void left by the decline in stockholder litigation generally.[164] To differing degrees these other mechanisms can account for some (but not all) of the absence of stockholder litigation caused by the director preference. The important point being that alternative checks on officer conduct cannot wholly compensate for the role stockholder litigation plays in regulating officer conduct. Over-reliance on board oversight as a check on officers, for example, has been cautioned against because "management may well become more and more adept at finding directors who appear to meet the requirements for independence but are nonetheless sympathetic to management."[165] Moreover, a recent study found that boards of directors are ineffective at the monitoring of officers.[166] Further, with respect to

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[164] Cox & Thomas, *Corporate Darwinism*, *supra* note 9, at 30 (suggesting hedge fund activism, Say on Pay Votes, and appraisal arbitrage may fill the gap left by stockholder litigation's lessening role in addressing certain managerial agency costs).

[165] Dammann, *supra* note 90, at 207 (pointing out that officers may adapt to changes in the law to blunt their impact); *see* Lawrence E. Mitchell, *Structural Holes, CEOs, and Informational Monopolies: The Missing Link in Corporate Governance*, 70 BROOK. L. REV. 1313, 1350 (2005) ("[I]f the only officer on the board is the CEO, then [a]s the sole bridge between corporate management and the board, the CEO is put in an enormously powerful position. He has a monopoly over the information delivered to the body ultimately responsible for the integrity of corporate management and information."); Rodrigues, *supra* note 80, at 463 (discussing criticisms of reliance on board independence including that defining independence in "terms of non-management status alone, does not guarantee a good monitor"). In addition, there are questions surrounding the efficacy of more independent boards in serving as monitors and stewards of the corporation. *See* Rodrigues, *supra* note 80, at 458–463 (discussing the debate surrounding the value of board independence).

[166] *See* Steven Boivie et al., *Are Boards Designed to Fail? The Implausibility of Effective Board Monitoring*, ACAD. MGMT. ANNALS (2016). The group concluded that:

> it is unreasonable to expect boards to be able to do an effective job at ongoing monitoring. We show that for most boards there are significant barriers at the director, board and firm level that prevent them from being effective monitors . . . . In many cases even the most motivated directors will be unable to effectively monitor executives because of the many barriers that limit the acquisition, processing and sharing of adequate information.

Id.

alternative stockholder monitoring techniques, the suggested alternatives may only ameliorate the general lessening role of stockholder litigation with respect to directors but not officers. Thus, the role of stockholder litigation as an independent check on officer power is still important.

A Unified Framework to Adjudicate Corporate Constitutional Rights

Jonathan A. Marcantel*

I. INTRODUCTION

Since the early Nineteenth Century, the Supreme Court's conception of corporate constitutional rights has been subject to periodic movement. As a result of those movements, the Court's current jurisprudence incorporates principles from each of the dominant theoretical conceptions of the corporation.[1] Nevertheless, the incorporation of those various principles has led to significant analytical inconsistencies in the jurisprudential line. Thus, for instance, the Court has held that corporations are not protected by the Privileges and Immunities Clause based upon pure concessionary principles.[2] Nevertheless, the Court has extended a variety of constitutional protections to corporations premised upon the presumption that corporations are "persons" within the meaning of the Fourteenth Amendment.[3] On the basis of those inconsistencies, and others, scholars have argued the Court needs some mechanism to unify and explain its existing corporate constitutional jurisprudence.[4] This Article argues a unifying framework can be achieved by tempering the three dominant theoretical conceptions of corporate existence, combining the resulting composite with agency-based contract principles, and then subjecting the yield to both a textual limitation and a functional limitation.

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[1] *See, e.g.*, Darrell A.H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 91629 (2011) (describing three primary models of corporate personhood—artificial entity theory, real entity theory, and aggregate theory—and describing their use at different times in Supreme Court corporate constitutional jurisprudence).

[2] *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 586 (1839) (holding that the Privileges and Immunities Clause only protects natural people, and that corporations are artificial creations of the state).

[3] *See, e.g.*, Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (stating, summarily, that corporations are "person[s]" within the meaning of the Equal Protection Clause of the Fourteenth Amendment). For a discussion of cases extending constitutional rights to corporations using the *Santa Clara* line of reasoning, see *infra* Part II.B and notes 27–34, 36.

[4] *See, e.g.*, Miller, *supra* note 1, at 954.

To prove that thesis, this Article proceeds in four remaining parts. Part II of this Article traces the jurisprudential history of corporate constitutional rights and demonstrates the various inconsistencies that exist within the Court's extant corporate constitutional jurisprudence. Part III of this Article then shifts the discussion from the jurisprudential discussion of corporate constitutional rights to the scholarly discussion of those rights. Specifically, Part III canvasses scholarly contributions in the area and concludes that identification of a unified framework to explain extant corporate constitutional rights has gone largely unanalyzed. Furthermore, this Part explains why the existing theories, as currently configured, are insufficient to articulate and explain a unifying mechanism. Part IV of this Article then draws upon existing jurisprudential and scholarly literature to formulate, explain, apply, and defend the unified framework.

II. JURISDPRUDENTIAL CONCEPTIONS OF CORPORATE CONSTITUTIONAL RIGHTS

The Court's doctrinal vision of corporate constitutional rights has been the subject of periodic movement, with each of the dominant theories of corporate existence having some influence on the Court's decisions.[5] Although those movements can appear random, the Court's conception of corporate constitutional rights does demonstrate patterns with relatively distinct periods.[6] Specifically, the Court's movements, at least in the macro sense, can be divided into four distinct periods—the Early Period, the Interim Period, the Modern Period, and the Current Period. Notwithstanding the existence of those distinct periods, however, the Court's conception of corporate constitutional rights remains in theoretical unrest, as the Court's existing corporate constitutional jurisprudence currently relies on multiple theories of the corporation.

A. The Early Period and the Dominance of Concessionary Theory

From the moment the Court first spoke on its conception of the corporation, the Court expressed a concessionary vision of both the existence and capacities of incorporated entities. Over time, that vision bled into the Court's constitutional jurisprudence such that, at least for a period of time, the Court uniformly denied corporations constitutional status based, at least in part, on the concessionary nature of corporations. While,

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[5] *See, e.g.*, *id.* at 915.

[6] *See, e.g.*, *id.* (viewing historical development of corporate constitutional rights as functionally three temporal periods).

admittedly, the Court's position on both its theory of the corporation and the constitutional status of corporations would change by the beginning of the Interim Period, the concessionary seeds first laid in the Early Period still linger in the Court's jurisprudence today.

The Court's initial discussions of corporate existence and capacity did not originate in the constitutional realm. Rather, the Court's initial discussions began in the doctrinal realm of contracts. Nevertheless, those discussions, from the beginning, adopted a concessionary view of corporate existence and capacity. Thus, for instance, in *Head & Amory v. Providence Insurance Co.*,[7] the Court confronted the issue of whether certain acts by a corporate officer were sufficient to bind the corporation in contract, where the alleged acts were not completed with the requisite formality required by the corporation's charter.[8] In reaching its decision, the Court reasoned that corporations are "mere creature[s] of the act to which [they] owe[] [their] existence . . . ."[9] Accordingly, a corporation "derive[s] all its powers from [the] act,"[10] and is "capable of exerting its faculties only in the manner which that act authorizes."[11] As a result, in the instance where a corporate officer engages in conduct that is otherwise sufficient to constitute a contract, the conduct will be insufficient to bind the corporation, unless the conduct complies with the formalities required by the corporation's charter.[12] The concessionary markers are obvious.

Although the Court's doctrinal position in *Head & Amory* was, at the time, limited to the realm of private law, only five years later, the Court was applying the same concessionary principles within the constitutional context. Thus, for instance, in *Bank of United States v. Deveaux*,[13] the Court was confronted with the issue of whether a corporation, as an entity, was a citizen for purposes of the Court's constitutional subject matter jurisdiction.[14] The Court held that corporations are not citizens, as the constitutional term was intended to refer to natural persons, and corporations are "artificial being[s]" created by statutory law.[15]

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[7] 6 U.S. (2 Cranch) 127 (1804).

[8] *Id.* at 128.

[9] *Id.* at 167.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 167–68.

[13] 9 U.S. (5 Cranch) 61 (1809), *abrogated by* Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).

[14] *Id.* at 63–65.

[15] *Id.* at 86–91. The Court's decision in *Deveaux* does harbor some aggregate concepts. *Id.* at 91–92. Thus, for instance, the Court, after holding that corporations are not citizens and thus cannot invoke constitutional diversity jurisdiction in their own rights, stated that constitutional diversity jurisdiction could be maintained by a corporation, where the

While the Court's discussions of the corporation in *Head & Amory*, *Deveaux*, and indeed its other cases to date, relied heavily on concessionary principles, the Court did permit aggregate principles to adulterate its otherwise pure concessionary approach.[16] As a result, it was only a matter of time before the Court was confronted with whether corporations were truly concessionary in nature or were instead aggregate in nature. Although the Court in *Bank of Augusta v. Earle*[17] quickly eliminated that problem, the analytical basis it used foreshadowed the decline of concessionary theory.[18] Specifically, the Court in *Earle* faced the issue of whether corporations could claim and exercise the privileges and immunities protections of their shareholders.[19] In response to that question, the Court held that courts could not look through the corporate form and permit the corporation to achieve protection on behalf of its shareholders because corporations are "person[s] for certain purposes in contemplation of law" and thus, actions taken by a corporation are actions of the corporation alone.[20] Furthermore, the Court held the Privileges and Immunities Clause only applies to natural people.[21] Accordingly, logic dictated that corporations cannot seek protection pursuant to the Privileges and Immunities Clause.[22]

In the period immediately following *Earle*, the Court's seemingly benign statement regarding the personhood of corporations appeared largely irrelevant, as, during the period, the Court continued to both use strong concessionary markers and deny corporations the ability to exercise constitutional rights. In *Paul v. Virginia*,[23] for example, the Court held that corporations cannot invoke the Privileges and Immunities Clause, as the word "citizen" only applies to natural people, and corporations are "artificial[,]" "mere creations of law[,]" and "created by legislatures[.]"[24] Thus, at least until the close of the Early Period, whatever concern the Court's personhood-based statements from *Earle* may have generated seemed unfounded, as the Court continued a consistent, concessionary-based

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corporation's shareholders can establish diversity. *Id.*

[16] Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 642 (1819) (referring to corporations as "assignees" of the rights of its shareholders).

[17] 38 U.S. (13 Pet.) 519 (1839).

[18] *See id.* at 519–20.

[19] *Id.* at 586.

[20] *Id.* at 588.

[21] *Id.*

[22] *See id.* at 587–88 (limiting the rights a corporation can claim).

[23] 75 U.S. (8 Wall.) 168 (1868), *overruled on other grounds by* United States v. Se. Underwriters Ass'n, 322 U.S. 533, 553 (1944).

[24] *Id.* at 177–81; *see* Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 184–85 (1888) (citing *Paul* and using language consistent with *Paul* in that context).

theoretical path in its constitutional cases. Indeed, while the concessionary theory would ultimately decline in the Interim Period to come, the Court's decisions in *Earle* and *Paul* are still the governing law in the privileges and immunities context.[25]

B. The Interim Period and the Rise of Real Entity Theory

Although concessionary principles remained binding within the context of privileges and immunities cases, concessionary principles were largely eschewed in the Interim Period. Indeed, the Court's Interim Period ushered in a real entity theory of the corporation that, with the exception of the Self-Incrimination Clause cases, ensured the extension of constitutional rights to corporations in nearly every case that came before the Court. Thus, the Court's Interim Period is simultaneously marked by both a dominant real entity theory and the existence of theoretical tension in the Court's conception of corporate constitutional rights.

At the close of the Early Period, it seemed the Court had definitively resolved its vision of the corporate constitutional person. That is, the Court continuously and consistently expressed a concessionary approach to corporate constitutional rights that ensured the clear separation between natural people—those for whom constitutional rights exist—and artificial people—those for whom constitutional rights do not exist.[26] And, even in the circumstances under which the Court expressed some ambiguity in its conception, the Court's subsequent opinions seemed to alleviate the ambiguity. That clear, concessionary vision, however, fell both quickly and summarily within the Interim Period, as the Court moved away from its concessionary vision of the corporation and closer to its then seemingly benign vision of the corporation expressed in *Earle*.

The Interim Period began when the Court heard oral arguments in *Santa Clara County v. Southern Pacific Railroad Co.*[27] While the specifics of *Santa Clara* are not relevant here, the Court's statements immediately preceding oral arguments became a watershed event in corporate constitutional rights jurisprudence. Specifically, the Court stated that corporations were "person[s]" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.[28] The Court reached this position without any analysis or discussion. Rather, prior to oral arguments, the

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[25] *See, e.g.*, W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656 (1982) (citing Hemphill v. Orloff, 277 U.S. 537, 548–50 (1928)) (holding that the Privileges and Immunities Clause is inapplicable to corporations).

[26] *See, e.g.*, *Earle*, 38 U.S. at 520.

[27] 118 U.S. 394 (1886).

[28] *Id.* at 396.

Court instructed counsel that it believed corporations were "person[s]" and entitled to Fourteenth Amendment protection.[29] Thus, the issue was not further analyzed or discussed.[30]

Although the Court did not discuss its reasoning in *Santa Clara*, the decision quickly generated a life of its own, as the Court's theoretical discussion of corporate constitutional rights largely fell silent and was replaced by presumption.[31] Indeed, only ten years after *Santa Clara*, the fact that corporations were constitutional people was "settled" such that no further analysis was necessary.[32] And, only eleven years after *Santa Clara*, the issue was "well settled[.]"[32] More importantly, though, the period of presumption that followed *Santa Clara* coincided with the Court's movement toward incorporating the Bill of Rights under the Fourteenth Amendment.[33] Thus, because the Court presumed that corporations were constitutional people pursuant to the Fourteenth Amendment, the Court presumed corporations were eligible to exercise those incorporated rights as well. In fact, the presumption became so entrenched that, with only limited exceptions, the Court extended a variety of constitutional protections to corporations, without any serious discussion, from a period spanning from 1886 until the early 1970s.[34]

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[29] *Id.*

[30] *Id.*

[31] *See, e.g.*, Minneapolis & Saint Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889) ("It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of [the Fourteenth Amendment.]"). There are isolated situations when the Court deviated from this rule and did indeed use both aggregate and concessionary markers. But, those deviations are almost entirely centered on a short period between 1905 and 1911. *See, e.g.*, Wilson v. United States, 221 U.S. 361, 383–84 (1911) ("[T]he corporation is a creature of the State. . . . It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law."); Guthrie v. Harkness, 199 U.S. 148, 155 (1905) (citing Cincinnati Volksblatt Co. v. Hoffmeister, 56 N.E. 1033, 1035 (Ohio 1900) ("The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders who are the real owners of the property."). And, in situations where those markers were present outside that time frame, the markers are only used in cases involving either the Privileges and Immunities Clause or the Self-Incrimination Clause. *See, e.g.*, United States v. White, 322 U.S. 694, 699 (1944).

[32] *E.g.*, Gulf, Colo. & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 154 (1897) (citations omitted) ("It is well settled that corporations are persons within the provisions of the fourteenth amendment of the constitution of the United States.").

[33] During the same period, the Court incorporated a variety of rights pursuant to the Fourteenth Amendment. *See* McDonald v. City of Chicago, 561 U.S. 742, 758–63 (2010) (cataloging the various cases wherein the Court incorporated specific constitutional rights).

[34] *See, e.g.*, Ross v. Bernhard, 396 U.S. 531, 533–34 (1970) (holding that corporations have a right to a jury trial); Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936) (summarily providing First Amendment protections to corporation); Silverthorne Lumber Co. v. United

Notwithstanding the Court's clear adoption of real entity principles for its new vision of corporate constitutional rights, the Court's jurisprudence nonetheless bore two large inconsistencies in the Interim Period. First, the Court eschewed the real entity theory and continued to use concessionary principles in its privileges and immunities cases.[35] Second, the Court eschewed real entity principles and adopted a new test within the context of the Self-Incrimination Clause—the purely personal test.[36]

In the wake of *Santa Clara*, it initially appeared that the Court was postured to summarily extend any and all constitutional rights to corporations. Indeed, in the roughly twenty years following *Santa Clara*, the Court had already summarily extended the Due Process Clause[37] and the Takings Clause[38] to corporations. And, the Court had already summarily reaffirmed its position on the Equal Protection Clause as well.[39] Nevertheless, beginning in the early Twentieth Century, the Court culled out a specific instance wherein corporations could not exercise constitutional rights. And, more importantly, the Court created a new test to justify the non-extension—the purely personal test.

The purely personal test, at least as it is currently envisioned within the context of corporate constitutional rights, arose from the Court's holding in *Hale v. Henkel*.[40] In *Hale*, the Court was confronted with whether a corporate officer could claim Fifth Amendment protection on behalf of a corporation where his testimony would tend to incriminate the corporation.[41] In response, the Court held the Fifth Amendment privilege against self-incrimination is "purely a personal privilege[.]"[42] Thus, corporate officers are incapable of exercising the privilege on behalf of incorporated bodies.[43]

Although the Court's position in *Hale* was clear, albeit summary, *Hale* left the theoretical concept of the corporate constitutional person in disarray. That is, the Court in *Hale* denied corporations the Self-Incrimination

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States, 251 U.S. 385, 392 (1920) (providing rights to corporation pursuant to the Search and Seizure Clause).

[35] *See, e.g.*, W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656 (1982) (citations omitted).

[36] *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 69 (1906), *overruled on other grounds by* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 70–73 (1964).

[37] *E.g.*, Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896).

[38] Mo. Pac. Ry. Co. v. Nebraska *ex rel.* Bd. of Transp., 164 U.S. 403, 417 (1896).

[39] Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 188–89 (1888).

[40] 201 U.S. 43 (1906), *abrogated by* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 70–73 (1964)

[41] *Id.* at 69–70.

[42] *Id.* at 69.

[43] *Id.* at 74–75.

Privilege by applying the purely personal test.[44] Yet, within the same case, the Court stated that corporations had Fourth Amendment protections pursuant to the *Santa Clara* line of cases.[45] Thus, following *Hale*, it was unclear whether *Hale*'s precedent was isolated to the Self-Incrimination Clause or whether the new test had larger application.

As the Court continued to confront corporate constitutional cases, it became clear the purely personal test only applied within the context of the Self-Incrimination Clause, as, following *Hale*, the Court continued to extend constitutional rights to corporations pursuant to the *Santa Clara* line of cases without mention of the purely personal test.[46] Furthermore, it became clear that, in terms of the Self-Incrimination Privilege, the Court intended to maintain both its holding and analysis from *Hale*, as the Court consistently applied *Hale*'s precedent to self-incrimination cases.[47] Indeed, the opinions delivered between *Hale*, and the later case *United States v. White*,[48] simply cited to precedent and provided nothing further in terms of explaining the test.[49]

Following *Hale* and *White* and through the remainder of the Interim Period, the Court's patterns continued. Thus, the Court continued to apply its purely personal test to cases involving the Self-Incrimination Clause,[50] continued to deny corporations protections pursuant to the Privileges and Immunities Clause,[51] and continued to cite to the *Santa Clara* line of cases in other contexts.[52] Accordingly, at the close of the Interim Period, it appeared the Court had maintained its real entity presumption in all cases

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[44] *Id.* at 69–70, 74–75.

[45] *Id.* at 76 (citing Gulf, Colo. & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 154 (1897)).

[46] *See, e.g.*, G. M. Leasing Corp. v. United States, 429 U.S. 338, 352–53 (1977) (holding, without discussion, that G.M Leasing Corporation was protected by the Fourth Amendment); Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936) (summarily providing First Amendment protections to corporation).

[47] *E.g.*, Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 55 (1974) (citing *Hale*, 201 U.S. at 74–75; Wilson v. United States, 221 U.S. 361, 382–384 (1911); United States v. White, 322 U.S. 694, 699 (1944)).

[48] 322 U.S. 694 (1944). In *White*, the Court provided some guidance on both the historical purpose prong and the policy basis for denying protections to corporations. *Id.* at 698–701.

[49] *See, e.g.*, Essgee Co. of China v. United States, 262 U.S. 151, 155–56 (1923) (quoting *Wilson*, 221 U.S. at 382).

[50] *E.g.*, Bellis v. United States, 417 U.S. 85, 89–93 (1974).

[51] *E.g.*, W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656 (1982).

[52] *E.g.*, G. M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977) (citations omitted) (relying on precedent and summarily stating corporations have Fourth Amendment rights); NAACP v. Button, 371 U.S. 415, 428–29 (1963) (summarily stating that corporations may assert First Amendment rights on their own behalf).

other than cases involving either the Privileges and Immunities Clause or the Self-Incrimination Clause.

C. The Modern Period and the Growing Tension

The tension created in the Court's conception of corporate constitutional rights during the Interim Period was continued into the Modern Period in three respects. First, the Court continued to use concessionary principles in privileges and immunities cases. Second, the Court continued to use its purely personal test within the context of the Self-Incrimination Clause. And, finally, the Court continued to rely upon its *Santa Clara*-based reasoning, at least to some degree, in the vast majority of its remaining cases. Nevertheless, the Modern Period is marked by its own tension as well. That is, the Modern Period is marked by a movement away from *Santa Clara*'s real entity presumptions, at least in some respects. Thus, the Modern Period represents both a continuation of the tension established in the Early and Interim Periods as well as a growing tension peculiar to the Modern Period.

The Court's shift away from its Interim Period vision of corporate constitutional rights can be seen as early as 1970. For instance, the Court began to once again regularly use concessionary markers when discussing the rights of corporations, even in cases that did not involve the Privileges and Immunities Clause.[53] Furthermore, the Court began to once again catalogue distinctions between corporations and natural persons when reaching its holdings.[54] More convincingly, though, as the short overlap between the Interim Period and the Modern Period faded, the Court began to move away from the focus on corporate identity entirely—at least within the First Amendment context.

The most convincing evidence of the Court's movement away from *Santa Clara*'s presumption-based analysis exists by implication. That is, the Court's jurisprudence in the Modern Period, in contrast with the Court's cases in the Interim Period, does not *simply* rely on *Santa Clara*'s precedential line when assessing corporate constitutional rights. Instead, the Modern Period is marked by a movement toward an analysis consistent with the Court's purely personal test. Thus, for instance, in *First National Bank*

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[53] *E.g.*, Ross v. Bernhard, 396 U.S. 531, 533 (1970) (referring to corporations as "artificial").

[54] *E.g.*, Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 65–66 (1974) ("[Corporations] are endowed with public attributes. They have collective impact on society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege in engaging in interstate commerce.").

of Boston v. Bellotti,[55] the Court confronted the issue of whether a state legislature could criminalize corporate election expenditures that both attempted to influence a vote and were not premised upon issues that materially affected the property interests of the corporation.[56] In responding to that question, the Court eschewed the idea that corporate status bore any relevance to the question.[57] Rather, the Court invalidated the prohibition on the basis that, irrespective of the character of the speaker, speech is protected.[58]

The Court's opinion in *Bellotti* is notable for three reasons. First, although the Court cited to both *Santa Clara County v. Southern Pacific Railroad Company*[59] and *Grosjean v. American Press Company*,[60] the Court did not *simply* rely on the combined presumptions and precedents of *Santa Clara* and *Grosjean* to reach its decision—a much easier mode of analysis and one to which the Court was still adhering only fifteen years earlier.[61] Rather, the Court reframed the question as a purpose-based, policy-oriented approach to the First Amendment that completely eliminated the relevance of the speaker.[62] Second, the Court, for the first time, referenced the purely personal test—by name—outside the context of the Self-Incrimination Clause.[63] Admittedly, the Court does not purport to actually apply the purely personal test in *Bellotti*.[64] Nevertheless, the Court's discussion in *Bellotti* is at least consistent with addressing the factors contained within the test.[65] And, even assuming no consistency existed between the Court's analysis in *Bellotti* and the factors of the purely personal test, the Court's statements contemplate that the Court no longer viewed the purely personal test as being limited to self-incrimination cases.[66] Finally, *Bellotti* is not an isolated case. Rather, following *Bellotti*, the identity of the speaker—whether corporate or otherwise—became at best, "not decisive" on the question of whether the First Amendment applied in the first instance.[67]

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[55] 435 U.S. 765 (1978).

[56] *Id.* at 767–70.

[57] *Id.* at 775–76.

[58] *Id.* at 777.

[59] 118 U.S. 394 (1886).

[60] 297 U.S. 233 (1936).

[61] *See Bellotti*, 435 U.S. at 780, 780 n.15 (citing *Grosjean*, 297 U.S. at 244; *Santa Clara*, 118 U.S. 394 (1886)).

[62] *Id.* at 775–76.

[63] *Id.* at 778 n.14 (citing United States v. White, 322 U.S. 694, 698–701 (1944)).

[64] *See id.* at 780–84.

[65] *See id.*

[66] *See id.* at 778 n.14.

[67] *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986) ("The identity of the speaker is not decisive in determining whether speech is protected.").

Although *Bellotti*'s policy-based approach to corporate constitutional rights became dominant—at least in terms of First Amendment cases[68]—in the decades following *Bellotti*, the effect of that pattern, and more importantly its relationship with the Court's *Santa Clara*-based reasoning, remained unclear. That is, even in the *Bellotti*-based cases, the Court continued to cite to *Santa Clara*'s presumption-based jurisprudential line.[69] Thus, while the Court appeared to be limiting the use of *Santa Clara*'s presumptions—at least somewhat—the Court nonetheless retained portions of *Santa Clara*'s legacy. As a result, at the close of the Modern Period, it is and was unclear whether the Court was actually moving away from the real-entity-based reasoning of *Santa Clara* and its progeny or was rather simply providing a policy-based reason to support and bolster its First Amendment jurisprudence.

D. The Current Period and the Potential for Significant Change

While the Modern Period indicated a disturbance in the Court's *Santa Clara* line of reasoning, the Current Period harbors the potential for its end. The Court's *dicta* in *Burwell v. Hobby Lobby Stores, Inc.*[70] harbors evidence indicating the Court may indeed be moving away from *Santa Clara*'s real entity presumptions entirely and moving towards an aggregate-based theory of the corporation.

In *Hobby Lobby*, three for-profit corporations, along with their individual owners, sued the Department of Health and Human Services, as well as a host of other federal officials, arguing that provisions of the Affordable Care Act and its corresponding regulations violated both the Religious Freedom Restoration Act ("RFRA") and the Free Exercise Clause of the First Amendment.[71] Subsequently, the Court granted certiorari and held for-profit corporations are "persons" within the context of the RFRA.[72] Furthermore, the Court held that the Affordable Care Act's Contraceptive Mandate[73] violates RFRA.[74]

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[68] The vast majority of the Court's corporate constitutional cases in the Modern Period are First Amendment cases. *See id.* at 8–9 (cataloging cases).

[69] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 342 (2010) (citing NAACP v. Button, 371 U.S. 415, 428–29 (1963); Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936)).

[70] 134 S. Ct. 2751 (2014).

[71] *Id.* at 2765–66.

[72] *Id.* at 2768–69.

[73] "Contraceptive Mandate" refers to the provision of the Affordable Care Act that required corporations to provide health insurance coverage to employees for certain methods of contraception. *See id.* at 2762–63.

[74] *Id.* at 2785.

Although the vast majority of the Court's analysis is irrelevant within the context of this Article, the Court's prologue to its analysis does provide some insight into the Court's notion of the corporate constitutional person. That is, before discussing the meaning of the word "person" for purposes of the RFRA, the Court stated the following:

When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of . . . people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies.[75]

Admittedly, this quote is not central to the Court's holding regarding the statutory construction of the word "persons" for purposes of the RFRA. And, admittedly, the Court's holding in *Hobby Lobby* does not reach or address Hobby Lobby's Free Exercise Claims.[76] Thus, at best, the statement is *dicta*.[77] Nonetheless, the Court's statement is important for purposes of this Article for two reasons. First, the Court explicitly stated its perception of the conceptual basis for providing corporations constitutional rights. That is, when "constitutional" rights are provided to corporations, the purpose is to protect the constitutional rights of the individuals who comprise the corporation—the shareholders.[78] Second, the Court clearly indicated that the statement was not intended to be limited to the context of religion.[79] Rather, the Court provided a number of examples where the Court has extended constitutional rights to corporations—under *Santa Clara*'s presumptive reasoning—and then stated the extension of rights in those examples was intended to protect the "constitutional" rights of the individuals who comprise the corporation.[80] Thus, in several strokes of a keyboard, the Court both stated an aggregate conception of corporate constitutional rights and potentially upset the theoretical foundation for the entire *Santa Clara* line of cases.

Taken together, the Early Period, Interim Period, Modern Period, and Current Period indicate significant unrest in the Court's conception of

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[75] *Id.* at 2768.

[76] *See id.* at 2785 ("Our decision . . . makes it unnecessary to reach the First Amendment claims raised by [the plaintiffs.]").

[77] *See id.*

[78] *See id.* at 2768.

[79] *See id.*

[80] *Id.*

corporate constitutional rights, as each period has contributed to the Court's jurisprudence in a manner that survives today. Thus, and bluntly, the Court's current theoretical conception of corporate constitutional rights is undisciplined.

III. SCHOLARLY THEORIES AND THEIR ABILITY TO FORM A UNIFYING FRAMEWORK

Although some scholarly discussion of corporate constitutional rights existed in the latter part of the Twentieth Century, the Court's opinion in *Citizens United* opened a groundswell of interest in the topic.[81] Nevertheless, the vast majority of scholarly discussion in the area is unrelated to generating a unifying mechanism for corporate constitutional jurisprudence.[82] Rather, scholarly discussion can be synthesized into the following related areas: critiquing or criticizing the Court's opinion in *Citizens United*,[83] critiquing the possibility that corporations could possess free exercise rights,[84] arguing against aggregate-based theories of corporate

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[81] For examples of scholarship preceding *Citizens United*, see Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793 (1996); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990). For examples of scholarship following *Citizens United*, see *infra* notes 85–91.

[82] *See infra* notes 86–91. *But see, e.g.*, Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 54 (2014) (arguing in favor of a unified approach).

[83] *See, e.g.*, Teneille R. Brown, *In-Corp-O-Real: A Psychological Critique of Corporate Personhood and* Citizens United, 12 FLA. ST. U. BUS. REV. 1, 23–24 (2013) (arguing that *Citizens United* was a "dramatic departure" from legal history and jurisprudence and psychology and cognitive science places humans in different positions than humans with regard to political speech); Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 603–17 (2011) (arguing that Court's decision will likely lead to incoherence in the Court's campaign finance jurisprudence); Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 417 (2013) (arguing that Court should have decided *Citizens United* pursuant to the Press Clause of the First Amendment); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 499 (2010) (arguing that opinion in *Citizens United* is flawed when viewed through a corporate law lens); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After* Citizens United, 31 CARDOZO L. REV. 2365, 2369–75 (2010) (arguing that *Citizens United* disregards the dangers posed by unchecked corporate election spending by permitting corporate interests to purchase political influence).

[84] Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1, 5 (2014) (arguing, in part, that corporations cannot and do not act on behalf of their shareholders; thus, aggregate-based theories for extending First Amendment rights to

rights,[85] historical discussions that either support extension of constitutional rights or support their denial,[86] discussing or predicting the effects or aftermath of the *Citizens United* decision,[87] and focusing on the legitimacy of corporate rights within the context of a specific amendment.[88] That having been said, some scholars have posited a variety of theories with the purpose of either creating a unified concept of the corporation or normatively justifying the existence or non-existence of corporate constitutional rights. While those theories, as currently configured, are insufficient to generate a unifying mechanism, the theories nonetheless provide foundational structures for the unified framework.

A. Non-Aggregate Based Theories of Corporate Constitutional Rights

In the context of non-aggregate theories, scholars have, broadly speaking, posited three approaches to examining corporate constitutional rights. First, scholars have urged adoption of some test similar to the purely personal test for prospective adjudication of corporate constitutional rights. Second, scholars have argued that the Court should return to its concessionary roots. Finally, scholars have argued in favor of a real entity theory. While each of those perspectives has varying degrees of normative appeal, each is,

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corporations are mislaid).

[85] *See, e.g.*, *id.* at 39 (arguing that individuals may associate together in the form of a corporation to collectively exercise their free exercise rights but that for-profit ventures cannot); Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life Into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 538–40 (2012) (arguing corporate speech is not necessarily the speech of the shareholders); Tucker, *supra* note 83, at 530 (arguing that the voice of the corporation may not actually be the aggregate opinion of the shareholders).

[86] *See, e.g.*, Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 232–65 (2011) (using primary documents to argue that no originalist basis exists for according constitutional rights to corporations qua corporations); Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J. L. & PUB. POL'Y 115, 121 (2012) (arguing the original understanding of the Constitution was that it denied the government power to restrict corporate speech).

[87] *See, e.g.*, Susanna Kim Ripken, *Corporate First Amendment Rights After* Citizens United*: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 236–44 (2011) (arguing that Court's holding has only strengthened the Corporate Abolitionists grassroots movement to "defy the Court and strip corporations of their personhood (human rights) status").

[88] *See, e.g.*, Deborah Hellman, *Money Talks But it Isn't Speech*, 95 MINN. L. REV. 953, 967–83 (2011) (arguing that none of the relationships between money and speech justify treating restrictions on giving and spending money as restrictions on speech); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 146–63 (2010) (arguing freedom of speech as both political equality and political liberty and discussing possible ways to reform in the aftermath of *Citizens United*).

standing alone, incapable of providing a framework sufficient to unify the Court's existing jurisprudence. Nevertheless, as this Article will discuss in Part IV, each theory has some element or elements that form the foundation for the unified framework.

1. Assessing the purely personal test

Scholars arguing in favor of some variant of the purely personal test do not seek to create a mechanism by which the Court could unify its existing jurisprudence. Rather, these scholars argue that some variant of the purely personal test is normatively justifiable for prospective adjudication of corporate constitutional rights.[89] Nonetheless, the purely personal test and its variants have some appeal as mechanisms to unify the Court's jurisprudence, as the Court has already applied the purely personal test, at least implicitly, in three contexts. Specifically, the Court has applied the test within the context of the Self-Incrimination Clause,[90] has perhaps applied some early variant of the test in the context of the Privileges and Immunities Clause,[91] and has indicated within the context of the First Amendment that the test could have broader applicability.[92] Still, the purely personal test, at least as currently configured, is incapable of forming a legitimate unifying framework because the test views corporations qua corporations as constitutional people.[93] Thus, an underlying postulate of the test is

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[89] *See, e.g.*, Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 103–04 (2005) (arguing the Court should abandon its existing jurisprudence, as it is unprincipled, and adopt a variant of the purely personal test for all corporate constitutional adjudication).

[90] *See, e.g.*, United States v. White, 322 U.S. 694, 699–700 (1944).

[91] Although the Court has never explicitly mentioned the purely personal test within the context of the Privileges and Immunities Clause jurisprudential line, the Court nonetheless applies principles that are similar to the factors of the test when achieving its holdings. *See, e.g.*, Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 184 (1888) (discussing the purposes of the Privileges & Immunities Clause and holding that the Clause only applies to natural persons).

[92] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) ("Certain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." (internal citations omitted)).

[93] Some scholars use variants of the test within otherwise aggregate theories. *See, e.g.*, Pollman, *supra* note 82, at 32. In the context where a variant of the purely personal test is discussed outside the real entity theory of the corporation, those theories are discussed in Part III.B.

inconsistent with the constitutional text.[94] Furthermore, and perhaps more convincingly, application of the test's purpose component to extant corporate constitutional rights generates inconsistencies.

At its core, the purely personal test is designed to create a binary system of constitutional analysis, whereby constitutional rights either extend to corporations qua corporations or are instead only intended to be exercised by "natural people."[95] Perforce, the purely personal test, as currently configured, presumes corporations are capable of exercising constitutional rights qua corporations.[96] Or, stated differently, the purely personal test begins from the postulate that corporations can be real constitutional people.

The problem with viewing corporations as real constitutional people, under any circumstances, is that there is simply no basis within the constitutional text for doing so.[97] That is, the constitutional text does not explicitly mention corporations. Rather, the constitutional text only provides explicit protections to "people," "persons," and "citizens."[98] Thus, for the constitutional text to extend to corporations qua corporations there must be some basis for arguing the words "people," "persons," or "citizens" were used with the purpose of protecting corporations qua corporations. Nevertheless, no such purpose can be found within any of the primary, organic documents.[99] As a result, there is no textual basis for viewing corporations as constitutional people.

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[94] This section does not argue that corporations cannot exercise constitutional rights. Rather, this section argues that corporations cannot exercise constitutional rights qua corporations. Part IV of this Article will argue in favor of a mechanism that both permits corporations to exercise constitutional rights and is consistent with the constitutional text. Furthermore, Part IV will adopt a functional limitation that, in part, uses the purposes component of the purely personal test. But, when using that purposes component, the component will be shorn of any notion that corporations can exercise constitutional rights qua corporations.

[95] Miller, *supra* note 1, at 913 (arguing the purely personal test begins from a "startling baseline," as the test "creates a rebuttable presumption in favor of corporate constitutional rights. Corporations are constitutional persons, equal to human beings, unless for reasons of nature, history, or purpose, they are something less"). *See, e.g.*, *Bellotti*, 435 U.S. at 778 n.14 ("Certain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals."); *see also, e.g.*, Krannich, *supra* note 89, at 108 ("By examining the values and policies underlying each right, the Court would ensure that corporations are not granted constitutional rights meant only for natural persons in our system of government.").

[96] Krannich, *supra* note 89, at 106 ("[A] corporation would only be entitled to a constitutional right if the values and policies underlying the right are such that the reasons a natural person is entitled to the right apply equally to a corporation.").

[97] Marcantel, *supra* note 86, at 265.

[98] *Id.* at 232.

[99] *Id.* at 232–64.

In addition to an absence of a textual basis for extending constitutional rights to corporations qua corporations, the application of the purely personal test's own factors to various constitutional amendments generates inconsistent results. More specifically, application of the purpose component of the test leads to inconsistent results when applied to the Fourteenth Amendment.[100]

The purpose component is in many respects the "core" of the purely personal test, irrespective of whether one is analyzing the Court's configuration of the test or scholarly configurations of the test. Thus, and in terms of the former, Professor Krannich identifies the underlying purposes of a particular constitutional right as a necessary feature of her test.[101] Furthermore, and in reference to the Court, this particular feature is explicitly mentioned in *Bellotti*'s statement of the test[102] and is, perhaps more importantly, the consistent feature in each of the Court's applications of the test.[103] Thus, in many respects, the purely personal test, at least as currently configured, must rise or fall as a unifying framework based upon this factor.

When the purpose factor of the purely personal test is applied to the Fourteenth Amendment, an inconsistency emerges. For instance, the Court has repeatedly held that corporations are "persons" within the context of the Fourteenth Amendment.[104] Yet, it is unequivocal that the *purpose* of the Fourteenth Amendment was "to remedy the perceived constitutional deficiencies with the Freedman's Bureau Act of 1866 and the Civil Rights Act of 1866."[105] Or stated differently, the drafters and ratifiers of the Fourteenth Amendment intended to "secure civil rights for African-Americans"[106]—not to provide constitutional rights to corporations. Indeed, John Bingham, the "drafter of section one of the Amendment, affirmed that '[b]y persons, [the Amendment] did not mean corporations . . . . [N]o one, either in Congress or in a State ratifying legislature, has been found who

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[100] Other scholars have argued that application of the purpose component—in its current articulation—to other constitutional amendments generates inconsistent results. *See, e.g.*, Miller, *supra* note 1, at 912 (arguing that the purpose component leads to inconsistent results when applied to the Fourth and Fifth Amendments).

[101] Krannich, *supra* note 89, at 108.

[102] First Nat'l. Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

[103] *See* United States v. White, 322 U.S. 694, 700 (1944) (discussing the policies and purposes of the Self-Incrimination Clause).

[104] *See, e.g.*, Minneapolis & Saint. Louis. Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889) ("It is contended by counsel as the basis for his argument, and we admit the soundness of his position, that corporations are persons within the meaning of [the Fourteenth Amendment].").

[105] Marcantel, *supra* note 86, at 263 n.261 (cataloging the various instances where the purpose of the Amendment is discussed within the debates).

[106] *Id.* at 263–64.

stated that the word 'person' in the Equal Protection Clause was intended to include corporations.'"[107] Thus, when the purpose component is applied to the Fourteenth Amendment, the purpose component is incapable of describing why corporations can exercise constitutional rights.

Taken together, attempting to use the purely personal test—in its current articulation—as a means to unify the Court's precedents presents two interrelated problems. First, the test presumes that corporations are constitutional people. Nevertheless, that presumption is inconsistent with the constitutional text. Second, the purposes component of the test generates inconsistent results when applied to the Fourteenth Amendment. Accordingly, at least given its existing articulation, the purely personal test is an insufficient basis for creating a unified framework.

2. Assessing the concessionary theory

Similar to the scholars arguing in favor of some variant of the purely personal test, scholars arguing in favor of a concessionary approach do not attempt to argue that concessionary theory is a mechanism by which to explain extant corporate constitutional jurisprudence.[108] Rather, these scholars argue that concessionary theory, and the consequent denial of corporate constitutional rights, is logical and justifiable.[109] Thus, for instance, Professor Dibadj has argued that corporations are "piece[s] of paper" that are "given legal legitimacy by a state."[110] Accordingly, because corporations only exist at the leave of the state, the state is able to comprehensively regulate their conduct.[111] Or stated differently, corporations are "not [people] worthy of constitutional rights," and thus, the concept of corporate constitutional rights is nonsensical.[112] Admittedly, the concessionary vision of the corporate has some appeal as a *unified theory of the corporation*. That is, the concept is simple, historically grounded, and indeed consistent with the mechanism of corporate formation. That having been said, and accepting the intuitive appeal that these theories carry,

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[107] Katie J. Thoennes, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLINE L. REV. 203, 207 (2005) (quoting CHESTER JAMES ANTIEUA, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 340 (Wm. S. Hein & Co. 1997)).

[108] *See, e.g.*, Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 342–59 (2014) (arguing that concessionary theory has been unfairly marginalized and should still serve a roll in defining the proper place of corporations in society).

[109] *See, e.g.*, Reza Dibadj, *(Mis)conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731, 733 (2013).

[110] *Id.*

[111] *Id.*

[112] *Id.*

theories premised *solely* upon pure concessionary principles are insufficient to unify the Court's *actual jurisprudence* because application of the concessionary approach to any one of the constitutional rights accorded to corporations yields inconsistent results.

Historically, the concessionary approach has always been either a basis for describing corporate rights as inferior to those of natural people or a mechanism to justify the denial of corporate rights.[113] Thus, it is not surprising that applying the theory to the Court's extant jurisprudence yields inconsistent results, at least within every context other that the Privileges and Immunities and Self-Incrimination lines of cases. [114] Because the concessionary approach yields inconsistent results when applied to the vast majority of the Court's extant jurisprudence, concessionary theory, at least standing alone, is insufficient to unify the Court's corporate constitutional jurisprudence.

At least when concessionary theory is viewed in its traditional formulation, its principles are irreconcilable with the vast majority of the Court's extant corporate jurisprudence. For instance, concessionary principles posit that corporations are created by legislatures and are thus subject to the comprehensive regulatory authority of their creators.[115] Yet, the Court has extended the Free Speech Clause to corporations pursuant, at least initially, to its *Santa Clara*, real-entity jurisprudential line.[116] And, the rights that stem from that Clause exist in their pure form—corporations are

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[113] *See, e.g.*, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868) (holding that corporations are not protected by the Privileges and Immunities Clause based, in part, on the notion that corporations are "created by . . . legislature[s]", and "possess[] only the attributes which the legislature has prescribed"), *overruled on other grounds by* United States v. Se. Underwriters Ass'n, 322 U.S. 533, 578–79 (1944); Dibadj, *supra* note 109, at 733 (arguing corporations should not have constitutional rights because they are "piece[s] of paper" that exist at leave of the state).

[114] *See, e.g.*, W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 656–57 (1981) (holding that the Privileges and Immunities Clause does not prevent a state from imposing a tax of foreign corporations); *Hale v. Henkel*, 201 U.S. 43, 76–77 (1906) (holding that corporations cannot exercise the Self-Incrimination Clause).

[115] *See, e.g.*, Dibadj, *supra* note 109, at 733 (arguing that corporations are "pieces[s] of paper" and thus have no constitutional rights); *see also, e.g.*, Doyle v. Cont'l Ins. Co., 94 U.S. 535, 540 (1877), *overruled on other grounds by* Terral v. Burke Constr. Co., 257 U.S. 529, 532 (1922) ("The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect." (internal citations omitted)); *Terral*, 257 U.S. at 532 (holding that a state may not condition the grant of a license on the waiver of a constitutional right).

[116] *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936) (summarily providing First Amendment protections to corporations).

treated equally with natural people in terms of the Clause.[117] Furthermore, and as another example, the Court has extended the Fourth Amendment to corporations pursuant to its *Santa Clara*, real-entity line of reasoning.[118] Consequently, governments are prohibited from conducting unreasonable searches of corporate property.[119] As a final example, the Court has extended the Due Process Clause to corporations on the basis that they are constitutional "persons."[120] Therefore, legislatures are prohibited from depriving a corporation of its property without due process of law.[121] When applied to these examples, concessionary theory's basic principles do not explain or describe the Court's holdings. Rather, at least in many respects, concessionary theory's underlying principles are antithetical to these lines of cases, as each of these examples secures corporate rights against the power of the states—against the power of their creators. As a result, and at least to the extent that concessionary theory remains uncoupled with some other doctrinal premise, concessionary theory, as currently configured, is incapable of unifying the Court's extant jurisprudence.

3. Assessing the real entity theory

As Part II.B indicates, the real entity theory has been the most frequent mechanism used to extend constitutional rights to corporations. Nevertheless, the theory is incapable, at least standing alone, of unifying the entirety of the Court's jurisprudence, as it is incapable of explaining or describing the Court's decision to deny protection pursuant to the Self-Incrimination Clause. Stated differently, if corporations are constitutional people—in and of themselves capable of exercising constitutional rights—then the inability of corporations to exercise the rights inlaid in the Self-Incrimination Clause generates a logical inconsistency.

Since the Court's summary statement in *Santa Clara*, the real entity theory of corporate existence has been the Court's primary mechanism of adjudicating corporate constitutional rights. Thus, and as described in Part II.B., the Court has extended constitutional rights to corporations in a variety of contexts premised, at least implicitly, upon the theory.[122] And, although the theory has subsequently become the subject of skeptical scrutiny in

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[117] *E.g.* Citizens United v. FEC, 558 U.S. 310, 343 (2010).

[118] *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (providing rights to corporations pursuant to the Search and Seizure Clause).

[119] *See, e.g.*, *id.*

[120] *E.g.*, Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896).

[121] *E.g.*, *id.*

[122] *See supra* Part II.B. and notes 27–34, 36.

corporate and constitutional scholarship,[123] some corporate constitutional scholars still defend the theory. Thus, for instance, Professor Phillips has argued, albeit with some reservations, that the real entity theory is the most plausible theory of corporate existence and rights.[124] Furthermore, and in a unique construction of real entity principles, Professor Matambandzo has argued in favor of an embodiment theory of the corporation, which argues that the "boundaries of legal personhood should incorporate human embodiment as a guiding framework for thinking about who 'counts' in the community of persons."[125] Notwithstanding the historical and perhaps even normative appeal of real entity theory, though, the theory is incapable of explaining the absence of corporate rights within the realm of the Self-Incrimination Clause. Thus, the real entity, as currently configured, is incapable of unifying the Court's corporate jurisprudence.

Real entity theory stems from the notion that corporations are constitutional entities unto themselves and thus deserving of constitutional protection.[126] Stated differently, real entity theory posits that corporations are indeed "people" for purposes of the Constitution.[127] Accordingly, corporations are protected by the Constitution in a manner consistent with natural people.[128] Thus, for instance, in its most famous statement regarding corporate constitutional rights, the Court stated corporations were "person[s]" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.[129] And, as a result of that statement, the Court

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[123] *E.g.*, Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1062 (1994) ("The real entity theory fell out of favor among American legal commentators after the 1920s. Today it has few, if any, advocates within the scholarly legal community." (internal citations omitted)).

[124] *See id.* In an analysis critical of existing corporate rights, Professor O'Mellin has argued that corporations are best viewed as entities distinct from their shareholders and endowed with both existence and rights of their own because they possess distinct moral personalities. *See* Liam Seamus O'Melinn, *Neither Contract Nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 203 (2006). A similar argument has been made by Jason Iuliano. *See* Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47, 49 (2015) (arguing that corporations should be viewed as real entities because they possess the philosophical components of distinct intentional states).

[125] Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 460 (2013).

[126] *E.g.*, Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1642 (2011) ("[T]his view regard[s] the corporation as a real entity with a separate existence from its shareholders and from the state. Some proponents of this view describe[] the corporation as greater than the sum of its parts, and as existing before recognition of law. This view of corporations as 'real' and 'natural' suggest[s] inherent, inviolable rights.").

[127] *See, e.g.*, Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 455 (1874) ("A corporation has the same right to the protection of the laws as a natural citizen . . . .").

[128] *E.g.*, *id.*

[129] *See* Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394, 409 (1886).

thereafter provided protections pursuant to a number of constitutional protections. Indeed, the vast majority of constitutional rights have been extended to corporations on the basis of the real entity theory—at least implicitly—and they have been extended in a manner consistent with the rights of natural people.[130]

Notwithstanding that overwhelming grant of corporate rights premised upon the real entity theory, the Court has repeatedly declined to extend protections to corporations pursuant to the Self-Incrimination Clause. Thus, for instance, in *Hale*, the Court declined to extend the protections of the Self-Incrimination Clause to corporations on the basis that corporate officers are incapable of exercising the privilege on behalf of incorporated bodies because the Fifth Amendment, by its own terms, only protects a witness from being forced to incriminate "himself."[131] Consequently, a corporate officer cannot invoke the privilege on behalf of the corporation—an entity that is not inclusive of the corporate officer's "self."[132] That ruling, and the cases that followed it, presents an inconsistency within the context of the real entity theory of corporations.[133] Specifically, if corporations are constitutional people, then corporations should be able to invoke the privilege on behalf of "themselves."

When the ruling in *Hale* is juxtaposed with the Court's holding that corporations are "persons" for purposes of the Fourteenth Amendment, a logical inconsistency arises—corporations are constitutional people, and yet, they cannot protect themselves from compelled speech. Admittedly, the concept that a corporation could be forced to testify against itself is difficult to imagine. Nevertheless, it is unequivocal that corporations are legal entities whose activities are completely discharged by the actions of actual agents.[134] Stated differently, corporations cannot act, speak, or engage in any other conduct absent some activity by its employees.[135] Thus, when a corporate employee acts with actual authority, the employee is indeed acting

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[130] *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936) (summarily providing First Amendment protections to corporations); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (providing rights to corporations pursuant to the Search and Seizure Clause); *Santa Clara*, 118 U.S. at 409 (summarily stating corporations are "persons" within the context of the Fourteenth Amendment).

[131] *See* Hale v. Henkel, 201 U.S. 43, 69–70 (1906), *abrogated by* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 70–73 (1964).

[132] *See id.*

[133] The holding in *Hale* has been repetitively upheld by the Court. *See, e.g.*, United States v. White, 322 U.S. 694, 698 (1944) ("The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.").

[134] *See generally* 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 30 (Supp. 2012–13) ("A corporation is a distinct legal entity that can act only through its agents.").

[135] *See id.*

on behalf of the corporation.[136] More to the point, if a corporate employee is forced to testify against the corporation about activities within the scope of the employee's employment, the *effect* is to indeed force the corporation to testify against itself. Thus, under the real entity theory's anthropomorphized concept of the corporation, the Court's decision in *Hale* denies a "person" a basic right that is fundamental to due process.

Admittedly, there are ways to at least attempt to resolve this inconsistency. Specifically, one could retreat to the Court's purely personal test—a test the Court developed, at least in the first instance, specifically to deny corporations the Self-Incrimination Privilege. That is, one could attempt to align the *Santa Clara* line of cases and the *Hale* line of cases by simply distinguishing the historical purposes of the Self-Incrimination Clause from the historical purposes of the remaining constitutional rights that the Court has extended. Alternatively, one could argue the Court's policy objectives, as stated in *White*, resolve the inconsistency.[137] Thus, one could argue that corporations should be denied the Self-Incrimination Privilege because any other position would effectively prevent effective law enforcement.[138] Nevertheless, both of those alternatives are unsatisfying, as the first is functionally a purely personal analysis—instead of a pure real entity analysis—and the second is wholly removed from any test the Court uses in any other context to determine the existence of constitutional rights. Rather, the second is much more akin to an analysis the Court would conduct where the Court determines that a right exists but nonetheless permits it to be curtailed based upon a compelling governmental interest.[139] As a consequence, even those positions fail to resolve the inconsistency, and thus, the real entity theory is incapable of describing or explaining the Court's Self-Incrimination line of cases.

B. Aggregate-Based Theories of Corporate Constitutional Rights

The hallmark of aggregate theories, at least as that phrase is used within the context of this Article, is that aggregate theories view corporations as

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[136] *See, e.g.*, Hoffman v. John Hancock Mut. Life Ins. Co., 92 U.S. 161, 164 (1875) ("Within the sphere of the authority conferred, the act of the agent is as binding upon the principal as if it were done by the principal himself."); Butler v. Maples, 76 U.S. (9 Wall.) 766, 776 (1869) ("A principal is bound by all that a general agent does within the scope of the business in which he is employed as such general agent . . . .").

[137] *See White*, 322 U.S. at 694.

[138] *See id.* at 700.

[139] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that the Court's strict scrutiny test requires the government to demonstrate a narrowly tailored measure that furthers a compelling governmental interest).

collections of individuals and perceive extending constitutional rights to corporations as a means to protect the rights of those individuals who, at least to some extent, comprise the corporation.[140] Although that core commonality exists, each aggregate-based theory takes a slightly different perspective on the mechanism to determine whether a corporation can exercise constitutional rights. Nevertheless, those mechanisms can be broadly categorized in two ways. First, theorists have argued in favor of an associational view of corporate constitutional rights.[141] Second, theorists have argued in favor of a contractual view of corporate constitutional rights.[142] While both types of theories play a foundational role in the construction of a unified framework, neither type, as currently constructed, is sufficient to create a unified framework.

1. Assessing the associational theory

In contrast with the non-aggregate theorists, one associational theorist *does* attempt to state a unified framework for explaining corporate

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[140] *See, e.g.*, Matthew I. Hall & Benjamin Means, *The Prudential Third-Party Standing of Family-Owned Corporations*, 162 U. PA. L. REV. ONLINE 151, 153–54 (2014) (arguing that the Court should permit the corporate plaintiffs in *Hobby Lobby* to litigate religious objections to the Affordable Care Act using principles of third-party standing).

[141] *See, e.g.*, Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1696 (2015) (arguing that corporations exercise constitutional rights derivatively); Hall & Means, *supra* note 140, at 153–54; Lynda J. Oswald, *Shareholders v. Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause*, 24 J. CORP. L. 1, 2 (1998) (arguing that constituency statutes, as currently constructed, violate the Takings Clause of the Constitution, as they deprive shareholders of a property interest); Pollman, *Reconceiving Corporate Personhood*, *supra* note 126, at 1630 (arguing, in part, that corporate constitutional rights are rooted in protecting the property and contract rights of shareholders); Pollman, *A Corporate Right to Privacy*, *supra* note 82, at 32 (arguing that corporations can exercise constitutional rights as a means to protect the natural persons who comprise them).

[142] *See, e.g.*, HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION viii (1995) (arguing in favor of a contractual theory of corporations that protects corporate constitutional rights to the same extent as other contracts); Joseph F. Morrissey, *A Contractarian Critique of* Citizens United, 15 U. PA. J. CONST. L. 765, 806–22 (2013) (arguing that corporations are a nexus of contracts between various constituencies); *see also, e.g.*, Stephen Bainbridge, Citizens United, *Corporate Personhood, and Nexus of Contract Theory*, STEPHEN BAINBRIDGE'S J. OF L., REL., POLS., & CULTURE (Jan. 21, 2010, 3:30 PM), http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-corporate-personhood-and-nexus-of-contracts-theory.html ("Government regulation of corporations obviously impacts the people for whose relationships the corporate serves as a nexus . . . . It's useful to allow the corporation to provide those persons with a single voice when seeking constitutional protections. Indeed, doing so is not just useful, it is necessary to protect the rights of the parties to those various contracts.").

constitutional rights.[143] More specifically, Professor Pollman has argued that a unified framework can be generated by using a modified variant of the purely personal test.[144] Specifically, Professor Pollman has argued that a common thread in the Court's caselaw can be found by analyzing the purpose of the constitutional right, in combination with analyzing whether permitting a corporation to exercise the right would facilitate the right's objectives.[145] Several years later, Professor Pollman further refined the theory, slightly reframing the two-part inquiry such that the initial two prongs of the test were coupled and a new second prong was added. The reframed test provided that courts should determine:

> [W]hether the purpose of the right is served by according it to the corporation in question—that is, whether it is necessary to protect natural persons—and if the right is of a type that inheres only in an individual in his or her individual capacity. . . . This requires analyzing the purpose of the right and the natural persons involved in the corporation. Furthermore, the derivative nature of rights for corporations requires paying attention to distinctions between different corporations because not all can be fairly regarded as representing any particular natural person or group of natural persons from whom rights can be derived.[146]

While the associational theory is foundational to the understanding of a unified theory, the associational theory is, as currently stated, insufficient to describe and explain the Court's existing corporate constitutional jurisprudence for one reason: the associational test focuses its purpose-based inquiry on "the corporation in question," an analytical inquiry that inherently attaches significant weight to the type, size, and purpose of the incorporated entity.[147] Although that analytical structure may be

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[143] Although other theorists bear associational views, no other associational theorist attempts to state or defend a descriptive unified mechanism. *See, e.g.*, Hall & Means, *supra* note 142, at 153–54 (arguing that the Court should permit the corporate plaintiffs in *Hobby Lobby* to litigate religious objections to the Affordable Care Act using principles of third-party standing).

[144] *Compare* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) ("Certain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision."), *with* Pollman, *A Corporate Right to Privacy*, *supra* note 84, at 54 ("[I]n determining whether to accord a right to a corporation, we must look to whether the purpose of the right is served by according it to the corporation in question—that is, whether it is necessary to protect natural persons—and if the right is of a type that inheres only in an individual in his or her individual capacity.").

[145] Pollman, *supra* note 126, at 1671.

[146] Pollman, *supra* note 82, at 54.

[147] *Id.* at 62–84 (applying the two-part inquiry and arguing that whether corporations

normatively justifiable—and indeed Professor Pollman has argued that it is[148]—that position is inconsistent with the Court's existing jurisprudence, as the Court has not analytically distinguished those features of incorporated entities when reaching its decisions. Furthermore, the Court has extended constitutional rights to a variety of incorporated entities seemingly without attaching any relevance—implicit or otherwise—to the type, size, or purpose of the entity. As a result, this particular portion of the test is insufficient to describe the Court's extant jurisprudence.

Over the course of roughly two centuries, the Court has extended constitutional rights to corporations without individualized entity-based distinctions. That is, when extending constitutional rights to corporations, the Court has not premised its analysis on the type, size, and purpose of an incorporated entity. Indeed, those features are rarely mentioned, and when they are, they seem irrelevant to the Court's analysis.[149] For instance, in *G. M. Leasing Corp. v. United States*,[150] the Court held the Internal Revenue Service violated the Fourth Amendment rights of a for-profit corporation in the business of leasing luxury cars, when the Service entered the business premises of the corporation without consent and without a warrant for the purpose of inspecting and seizing business records.[151] Although irrelevant to the Court's analysis, the corporation in question was a small corporation; indeed, the corporation was small enough that the Service successfully argued the corporation was the alter ego of its singular shareholder.[152] Similarly, the Court has extended Fourth Amendment rights to large corporations as well—also without providing any relevance to the corporation's size or relationship with its shareholders. For instance, in *Dow Chemical Co. v. United States*,[153] the Court held that Dow Chemical had Fourth Amendment protections against unreasonable searches and

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should be able to exercise the right to privacy depends upon the nature of the corporation, the purpose of the corporation, the size of the corporation, and the relationships between the various constituencies of the corporation).

[148] Blair & Pollman, *supra* note 141, at 1737–38.

[149] The Court has generated constitutional distinctions based upon the *type of industry* and the relationship of that variable to constitutional protections. *See, e.g.*, United States v. Biswell, 406 U.S. 311, 315–17 (1972) (holding that the sale of firearms, as an industry, is subject to a modified Fourth Amendment protection). Those distinctions, however, have not been based on the *type of entity* or the *purpose of the entity*.

[150] 429 U.S. 338 (1977).

[151] *Id.* at 352–53.

[152] *See* G. M. Leasing Corp. v. United States, 514 F.2d 935, 939–40 (10th Cir. 1975) (holding that corporation was the alter ego of its shareholder), *affirmed in part and reversed in part on other grounds by* 429 U.S. at 338.

[153] 476 U.S. 227 (1986).

seizures in its large, industrial, manufacturing complex,[154] even though Dow Chemical was a publically traded corporation whose shareholders presumptively had, at best, slight regular interaction with the corporation and, at best, slight direct control over its operations.[155] Thus, at least within the context of the Fourth Amendment, the Court has not made entity-based distinctions when discerning whether—or to what extent—corporations can exercise constitutional rights.

Admittedly, this argument would appear facially weak if it were isolated to Fourth Amendment cases, as, in line with Professor Pollman's general statements of the theory, corporate access to constitutional rights is strongest in the context of property and contract cases.[156] More specifically, it would make sense that the size, type, and purpose of the corporation would be less important in the context of the Fourth Amendment because corporate invocation of the right would be the only mechanism available to protect the underlying property rights of the corporation's shareholders. While that argument is valid, the Court's failure to distinguish between corporations is not isolated to the Fourth Amendment context. Rather, at a minimum, it exists in the First Amendment context as well.

Assuming some strength-based scale exists, if corporate assertion of constitutional rights is strongest in the Fourth Amendment context due to its property-based protections, then corporate assertion of constitutional rights in the context of the First Amendment's Free Speech Clause should be weaker, as corporate speech does not inherently give rise to an economic interest for shareholders.[157] Nevertheless, the Court has not made relevant distinctions based upon type of entity, size, and purpose when applying the First Amendment's free speech rights to corporations.[158] In that vein, the

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[154] *Id.* at 236 (citing See v. City of Seattle, 387 U.S. 541, 543–44 (1967)) ("Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings . . . ."). Nevertheless, the Court held that Dow lacked a reasonable expectation of privacy in its open fields in the same way that a corporeal person would lack an expectation of privacy in open fields—at least with respect to aerial photography. *Id.* at 239.

[155] The Court did not mention this particular fact when analyzing the question presented or achieving its holding. Still, it remains true that Dow Chemical Company was publically traded at the time the Court issued the opinion.

[156] Pollman, *supra* note 128, at 1630.

[157] Pollman, *supra* note 84, at 54 (citing Blair & Pollman, *supra* note 141, at 1673) ("This requires analyzing the purpose of the right and the natural persons involved in the corporation. Furthermore, the derivative nature of rights for corporations requires paying attention to distinctions between different corporations because not all can be fairly regarded as representing any particular natural person or group of natural persons from whom rights can be derived.").

[158] The Court has made distinctions based upon the type of speech. For instance, the Court has distinguished commercial speech from non-commercial speech. *See, e.g.*, Sorrell

Court has applied the First Amendment's free speech rights to local advocacy groups,[159] a small monthly magazine,[160] for-profit corporations,[161] and non-profit corporations,[162] among many others. Furthermore, and more convincingly, the Court has repetitively stated that legislative "restrictions distinguishing among different speakers"[163] are constitutionally prohibited because, "[b]y taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[164] More importantly, the Court has repetitively implied that the type of entity is irrelevant to the analysis.[165] Thus, First Amendment speech protections apply equally to corporations, other legal entities, unions, and individuals.[166] In the aggregate, then, the Court's position on corporate speech can be reduced to a single rule: the identity of the speaker is irrelevant.[167]

In addition to not making individualized entity-based distinctions in the context of extending constitutional rights, the Court has also not made individualized entity-based distinctions when denying the extension of constitutional rights. Thus, for instance, in the context of the Fifth Amendment's Self-Incrimination Clause, the Court has refused to extend the Self-Incrimination privilege to a for-profit, single-shareholder corporation.[168] Similarly, the Court has refused to extend the privilege to the former sole shareholder of a dissolved corporation, at least where the information sought was generated by the previously existing corporate form.[169] Perhaps more convincingly, the Court has refused to extend the privilege to unincorporated entities.[170] In that vein, the Court has stated: "Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of *any* organization, such as a corporation."[171] Accordingly, even within the context of instances where the

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v. IMS Health Inc., 564 U.S. 552, 579 (2011). Nevertheless, those distinctions are entity-neutral.

159 Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

160 Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974).

161 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 497, 501–02 (1952).

162 Citizens United v. FEC, 558 U.S. 310, 319 (2010).

163 *Id.* at 340.

164 *Id.* at 340–41.

165 *See supra* notes 161–65 and accompanying text.

166 *Citizens United*, 558 U.S. at 349–50.

167 *See id.*

168 Braswell v. United States, 487 U.S. 99, 101–05 (1988).

169 Grant v. United States, 227 U.S. 74, 76–80 (1913).

170 *See, e.g.*, United States v. White, 322 U.S. 694, 696, 699 (1944).

171 *Id.* at 699 (emphasis added).

Court has refused to extend constitutional rights to corporations, entity-based distinctions have proven irrelevant.

When viewed in the aggregate, the Court's extant jurisprudence cannot be described as bearing any relationship with the type, size, or purpose of an incorporated entity. Rather, if anything, the Court's extant jurisprudence seems to indicate that corporate constitutional rights exist, if at all, *in spite of* the entity-based distinctions rather than *because of* entity-based distinctions. As a result, Professor Pollman's associational theory, as currently constructed, cannot serve as a unifying mechanism for the Court's existing jurisprudence.

2. Assessing the contractual theory

Like their non-aggregate-based counterparts, scholars arguing in favor of a contractual theory of corporate constitutional rights do not argue that contractual theory is a mechanism to unify and explain the Court's extant jurisprudence. Rather, these scholars argue that contractual theory accurately describes corporate existence, and thus, contractual theory should be applied to corporate constitutional rights.[172] Although these theorists play a seminal role in constructing the unified framework espoused by this Article, the contractual theory, as currently constructed, is insufficient to state a unified framework, as the theory's existing formulations are incapable of explaining or describing the Court's self-incrimination cases.

The hallmark of the contractual theory is that corporations are simply a nexus or series of contracts between the shareholders of the corporation and various other constituencies.[173] As a result, contractual theorists argue the law—both constitutional and otherwise—should accord the contracts that gave rise to the corporation—or the nexus—the same deference or "presumption of enforceability" that is provided to any other contract.[174] Within the constitutional context, then, theorists such as Professors Butler and Ribstein—by far the most outspoken proponents of the position in the constitutional context—argue that constitutional protections should extend

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[172] *See, e.g.*, BUTLER & RIBSTEIN, *supra* note 142, at viii, ix–x, 143.

[173] *See, e.g.*, *id.* at viii; *see also* Grant M. Hayden & Matthew T. Bodie, *Ribstein: The Uncorporation and the Unraveling of "Nexus of Contracts" Theory*, 109 MICH. L. REV. 1127, 1129 (2011) (stating that nexus of contracts theory generally "holds that the firm—and by extension the corporation—is merely a central hub for a series of contractual relationships" (citations omitted)).

[174] *E.g.*, BUTLER & RIBSTEIN, *supra* note 142, at 1, 29; Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 100 (1995) ("Under the contractual theory, the corporation is understood as a set of contractual arrangements, which ought to be no more regulated than other contracts are.").

to corporations at the same rate they extend to the individuals who comprise them, as the managers of a corporation are simply acting as the agents for the corporation's shareholders.[175] Although this Article agrees with those basic premises, the contractual theory of the corporation, as stated, is insufficient to unify the Court's precedents for at least one reason: the contractual theory completely rejects any notion that corporations are distinct legal entities. As a result, contractual theory has no mechanism to describe or explain the Court's self-incrimination cases.

In the general sense, contractual theory completely rejects all notions that corporations are distinct legal entities.[176] Rather, contractual theorists view corporations as simply a bundle of contracts among various participants. In that vein and more specifically, contractual theorists do not view corporations as existing "wholly apart from the contracts among [their] participants."[177] Thus, they argue, "there is no conceptual justification for reifying" corporate existence.[178] Although contractual theory's wholesale rejection of distinct legal status may be theoretically and normatively attractive, the position generates practical inconsistencies when applied to existing law. Most notably, contractual theory's wholesale rejection of a distinct corporate legal status yields inconsistencies when applied to the Court's Fifth Amendment jurisprudence.

When the Court's extant corporate jurisprudence within the context of the Self-Incrimination Privilege is juxtaposed with contractual theory's underlying postulates, an inconsistency results. Specifically, if corporations do not actually exist and constitutional rights should effectively pass through them unaltered, then no mechanism within contractual theory exists to explain why individuals would lose their Self-Incrimination Privilege simply because they organized.[179] Furthermore, contractual theory's underlying

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[175] *Id* at 10–18, 40–46; *see also, e.g.*, Miller, *supra* note 1, at 928–29 ("Modern aggregate theory views corporations as individual rights holders 'acting through fiduciaries.'").

[176] *See, e.g.*, BUTLER & RIBSTEIN, *supra* note 142, at 143–44 ("[T]he state-creation theory and personification of the corporation should not play any role in the determination of corporations' rights . . . ."); Hayden & Bodie, *supra* note 173, at 1129 (citing William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 415 (1989); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989)) ("[Jensen and Meckling's] approach seeks to disaggregate our notion of the corporation as an entity and break it down into its component parts. These parts are the contractual relationships between the various parties involved with the firm: executives, directors, creditors, suppliers, customers, and employees. The corporation itself doesn't really exist; it is merely the nexus (or connection or link) amongst these various corresponding relationships."); Miller, *supra* note 1, at 928–29 ("Modern aggregate theory views corporations as . . . neither fictions nor real entities . . . .").

[177] BUTLER & RIBSTEIN, *supra* note 142, at 145 n.1.

[178] *Id.*

[179] The Court's corporate Fifth Amendment jurisprudence is largely premised on the

rejection of distinct corporate legal status renders contractual theory unable to describe or explain why a corporation would be unable to exercise the constitutional rights of its shareholder, where the corporation itself was a single-shareholder corporation.[180] Or, stated differently, contractual theory remains unable to explain the Court's self-incrimination jurisprudence, even once group dynamics are removed from the equation. Finally, at least some contractual theorists admit that contractual theory is incapable of explaining the Court's self-incrimination line of cases. For instance, Professors Butler and Ribstein explicitly state that the Court's holding in *Braswell* is "clearly wrong" in light of contractual theory's underlying postulates.[181] Thus, Professors Butler and Ribstein functionally admit that at least their version of contractual theory is incapable of describing or explaining the Court's self-incrimination cases. As a result, and for all of these reasons, contractual theory's current formulation is insufficient to form a unifying framework.

IV. A FRAMEWORK TO UNIFY THE COURT'S JURISPRUDENCE

The crux of the unified theory is that the Court's existing corporate constitutional jurisprudence cannot be unified or explained with any one of the primary theoretical models of corporate existence. Rather, the unified theory represents a composite of all three primary models that, when coupled with agency concepts and then subjected to specific, categorical limitations, yields a descriptive framework capable of consistently explaining the Court's extant jurisprudence. In that vein, this Part proceeds in three sections. First, section A will describe and explain the interrelationship among the three primary theories as a unified composite. Second, section B will discuss the relationship between that composite and the agency concepts that form the backbone of the unified framework. Finally, section C will apply the unified framework to the Court's jurisprudential line and explain the application of the framework's limiting devices.

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postulate that corporations are distinct legal entities. *See, e.g.*, Bellis v. United States, 417 U.S. 85, 92 (1974) (holding that the Court's analysis in Self-Incrimination cases "presupposes the existence of an organization which is recognized as an independent entity apart from its individual members"); *see also* Braswell v. United States, 487 U.S. 99, 107 (1988) (holding that the sole shareholder of a corporation could not invoke the privilege to resist production of corporate documents).

[180] *Braswell*, 487 U.S. at 118.

[181] BUTLER & RIBSTEIN, *supra* note 142, at 144 (*citing Braswell*, 487 U.S. at 118).

A. Creating a Composite: Aggregating the Three Primary Models of Corporate Existence

The fundamental flaw with attempting to unify the Court's existing precedents has been the underlying, false postulate that the three primary models of corporate existence are inherently antithetical.[182] While perhaps that is true in their current, marginal forms, relaxed versions of each primary theory, once properly characterized, are not inherently antithetical. Rather, concessionary theory, real entity theory, and aggregate theory can be reformulated and tempered such that they harmoniously and comprehensively describe corporate existence.

As both Parts II and III discuss, juridical and scholarly visions of corporate constitutional rights tend toward a singular model to explain corporate existence. Thus, and as explained in Part II, the Court's adoption of each theoretical model of the corporation has tended to exist in temporal periods where the Court favored one theoretical model over another at any given time, and the Court's movement toward one theoretical model was nearly uniformly a movement away from the previous theoretical model.[183] Similarly, scholarly positions on corporate constitutional rights tend toward a singular model of corporate existence, with the adoption of one model seeming to require a rejection of all other models.[184] As a result, and in substance, the long-standing, albeit perhaps at times implicit, belief has been that the three primary models of corporate existence must exist as triangular poles, where each model is mutually exclusive of the others.

Although it is obviously possible to read the primary theoretical models as mutually exclusive, the models need not be read so aggressively. Rather, when those models are each tempered, it is possible to view them as both functional and consistent. Thus, if concessionary theory is read aggressively, it is inherently inconsistent with both real entity theory and aggregate theory.[185] But, if tempered, concessionary theory can be viewed as solely the impetus for corporate existence. Similarly, if real entity theory

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[182] *See, e.g.*, *id.* at 143–44 ("[T]he state-creation theory and personification of the corporation should not play any role in the determination of corporations' rights . . . ."); Dibadj, *supra* note 109, at 733 ("Common conceptions of the corporation are wrong. Contrary to contemporary jurisprudence, a corporation—a piece of paper that is given legal legitimacy by a state—is not a person worthy of constitutional rights."); Liam Seamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 203 (2013) (arguing corporations are neither a nexus of contracts nor a state concession but rather a distinct entity with a moral personality).

[183] *See supra* Parts II.A–II.D.

[184] *See supra* note 182.

[185] *See, e.g.*, Dibadj, *supra* note 109, at 733 (arguing that corporations are "piece[s] of paper" and thus cannot possess or exercise constitutional rights).

is viewed aggressively, it is inherently inconsistent with aggregate theory.[186] Nevertheless, if real entity theory is tempered, it can be viewed as the means by which individual, corporeal people aggregate to achieve a common end. Finally, if aggregate theory is viewed aggressively, it outright rejects both concessionary theory and real entity.[187] But, if stripped of those assumptions, aggregate theory can be viewed as the means by which incorporated entities derive the power to exercise constitutional rights.

1. Concessionary theory can be tempered and viewed as the impetus for real entity theory

In its traditional formulation, concessionary theory is fundamentally inconsistent with real entity theory, as concessionary theory ordinarily viewed corporations as objects of the state—and thereby incapable of being constitutional people—while real entity theory traditionally viewed corporations as constitutional people in their own right. Nevertheless, both of these theories are needed to comprehensively define and explain both corporate existence and corporate constitutional rights. As a result, this section argues both concessionary theory and real entity theory can be reformulated and tempered such that the two can exist harmoniously and thereby describe and explain different, necessary aspects of corporate existence.

As discussed in Part III.A.2, concessionary theory has traditionally been a mechanism to justify the denial of constitutional protections to corporations. That justification stemmed from the notion that concessionary theory, in its traditional form, viewed corporations as existing purely at the discretion of the states.[188] And, because corporations existed purely at the discretion of the states, the states were free to regulate them without constitutional constraint.[189] In contrast, and as discussed in Part III.A.3, real entity theory was traditionally viewed as extending constitutional rights to corporations as constitutional people. Thus, pursuant to real entity theory's traditional view,

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[186] *See, e.g.*, O'Melinn, *supra* note 182, at 203 (arguing that corporations are neither concessionary nor aggregates but real, distinct entities with their own moral personalities).

[187] *See, e.g.*, BUTLER & RIBSTEIN, *supra* note 142, at 144 (arguing that corporations are neither concessions nor real entities, and thus, those theories have no place in determining whether or to what extent a corporation can possess or exercise constitutional rights).

[188] *See, e.g.*, Dibadj, *supra* note 109, at 733 (arguing that corporations are concessions of the state and thus cannot possess or exercise constitutional rights); *see also, e.g.*, Hale v. Henkel, 201 U.S. 43, 76 (1906) ("[T]he corporation is a creature of the state. . . . Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation."), *abrogated by* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 70–73 (1964).

[189] *E.g.*, Dibadj, *supra* note 109, at 733.

the states' ability to regulate corporate activity was delimited by the constitutional rights of the corporation.[190] That is, the corporation was a constitutional person in its own right, and thus, the Constitution applied to the corporation qua corporation in a manner at least substantially similar to that of a corporeal individual.[191]

The problem with traditional attempts to define corporate existence is that both concessionary theory and real entity theory are needed to comprehensively describe the corporation. More specifically, it is analytically difficult to accurately describe the impetus for corporate existence without using some element of concessionary theory, as it is unequivocal that corporations exist by virtue of statutory laws that permit them.[192] Similarly, it is analytically difficult to describe the separate legal status of corporations without some element of real entity theory, as it is unequivocal that, once a corporation comes into existence, it is an actual legal entity separate and apart from its shareholders that is capable of exercising various legal actions and is concomitantly capable of experiencing various legal liabilities.[193] Thus, both theories describe different—but equally necessary—aspects of corporate existence. Nevertheless, in their traditional formulations, the theories are mutually exclusive.

The analytical exclusivity that exists between concessionary theory and real entity theory only exists if the two theories are read narrowly and in their most marginal formulations. That is, concessionary theory could be reformulated and viewed as nothing more than the impetus for corporate existence with limited further constitutional implications. Similarly, real entity theory could be viewed as a means to describe the separate legal status of corporations without bearing any constitutional implications.

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[190] *See, e.g.*, Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394, 409 (1886) (stating that corporations are "persons" for Fourteenth Amendment purposes).

[191] *See, e.g.*, Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 455 (1874) ("A corporation has the same right to the protection of laws as a natural citizen . . . .").

[192] *See* Hayden & Bodie, *supra* note 173, at 1130 (citations omitted) ("The individuals involved must apply to a state for permission to create such an entity. The fact that this permission is readily granted (as long as fees and taxes are paid) does not change the fact that permission is required.").

[193] *See, e.g.*, FLETCHER *supra* note 134, at § 5 ("[T]he distinguishing characteristics of a corporation are that it is an artificial person, a legal entity, capable of acting through its corporate officers and agents, of suing and being sued, of taking and holding property, of contracting in its own name, and of continuing to exist independently of the individuals who compose it.").

a. A tempered version of concessionary theory

A tempered version of concessionary theory would recognize that concessionary theory is useful in describing the mechanism giving rise to corporate existence, but the existence—and even necessity—of the mechanism does not inherently carry constitutional implications. As stated a moment ago, it is unequivocal that corporations owe their existence to state statutes that both permit incorporation and provide the concomitant state benefits of incorporation.[194] Thus, it is inescapable that corporations, at least at some primitive level, are concessionary in nature. That having been said, and in contrast with the traditional understanding of concessionary theory, the admission that corporations are concessionary does not abrogate or delimit the ability of corporations to exercise constitutional rights. Rather, the impetus for corporate existence and the resulting effects of that existence are easily separable through a simple doctrine that already exists in constitutional law and has already been discussed by other scholars within the context of corporate constitutional rights: the doctrine of unconstitutional conditions.

Although a thorough discussion of the doctrine of unconstitutional conditions is beyond the scope of this Article, the doctrine can be articulated, at least in the most simplistic sense, as providing that a state cannot condition a governmental benefit—the benefits endowed by the corporate form—upon the waiver of constitutional rights.[195] Thus, for instance, while a state is free to lack general incorporation legislation, if the state has that legislation, a state cannot condition the advantages of the corporate form on the forfeiture of First Amendment rights.[196] Similarly, a state cannot premise the continuance of a license on a corporation's agreement to waive a constitutional right.[197] Other examples exist.[198] Once

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[194] *See supra* note 192 and accompanying text.

[195] For a more in-depth discussion of unconstitutional conditions, see generally, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). Other scholars have argued that the doctrine should be applied within the context of corporate constitutional rights. *See generally, e.g.*, RICHARD EPSTEIN, BARGAINING WITH THE STATE (Princeton Univ. 1993)

[196] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 350–51 (2010) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–59, 680 (1990)) ("[T]he *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that '[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.' This does not suffice, however, to allow laws prohibiting speech. 'It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.'").

[197] *See, e.g.*, Terral v. Burke Constr. Co., 257 U.S. 529, 532–33 (1922).

[198] *See, e.g.*, W. Union Tel. Co. v. Kansas, 216 U.S. 1, 38 (1910) (holding that a state's

concessionary theory is combined with the doctrine of unconstitutional conditions, the resulting theoretical approach permits concessionary theory to explain the existence of corporations without inherently carrying the constitutional implications generally accepted by traditional concessionary theory. Thus, while it is certainly true that the impetus for corporate existence is due entirely to concession by the states, it nevertheless does not follow that a state's concession in any manner abrogates or delimits the ability of corporations to exercise constitutional rights. To the contrary, the mere fact that a state provides leave for the existence of corporations does not permit the state to comprehensively regulate their activities. As a result, a version of concessionary theory that is tempered by the doctrine of unconstitutional conditions generates a reformulated theory that describes the impetus for corporate existence without concomitantly making any inherent statement as to resulting constitutional implications. Furthermore, this reformulated version of concessionary theory makes it possible for concessionary theory to co-exist with real entity theory—at least once real entity theory is similarly reformulated.

b. A tempered version of real entity theory and its relationship with the tempered version of concessionary theory

A tempered version of real entity theory would recognize that corporations are separate, independent legal entities in their own right but nonetheless stop short of recognizing corporations as real constitutional entities. As referenced above, it is unequivocal that, at least in some respects, corporations are independent legal entities that are separate from their shareholders.[199] Thus, any positive, descriptive mechanism needs to recognize that corporations are indeed real legal entities. That having been said, and in contrast with the traditional notion of real entity theory, the mere fact that corporations are real legal entities need not say inherently anything about whether corporations are entities independently capable of possessing constitutional rights. Thus, the tempered version of concessionary theory and the traditional version of real entity theory can be made consistent by recognizing that corporations are real entities but not real constitutional entities.

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attempt to enjoin a corporation's business within the state upon its failure to pay taxes on property without the state is unconstitutional).

[199] *See, e.g.*, FLETCHER, *supra* note 134, at § 5 ("[T]he distinguishing characteristics of a corporation are that it is an artificial person, a legal entity, capable of acting through its corporate officers and agents, of suing and being sued, of taking and holding property, of contracting in its own name, and of continuing to exist independently of the individuals who compose it.").

Any accurate description of corporate existence would need to recognize that corporations are entities separate and apart from their shareholders. That is, corporate boards are not inherently mere proxies for the wishes and desires of their shareholders.[200] Rather, corporations can and sometimes do possess values and inclinations distinct and divergent from their shareholders.[201] And, even when the interests of a corporation and the interests of its shareholders are identical, the corporation and the shareholders could—and sometimes do—have differing positions about how best to achieve those goals. More importantly, when those differences arise, it is management who will ultimately make the decisions on behalf of the corporation.[202] Thus, at least in some general sense, corporations—once they exist—are both independent and distinct from their shareholders in terms of their motivations and volitions.

The independent and distinct status of corporations does not end with their motivations and volitions. Rather, corporations additionally enjoy separate legal status from their shareholders, and thus, corporations are more than merely distinct entities; they are also distinct legal entities. That fundamental postulate, of course, underlies the reality that corporations can sue and be sued as entities independent of their shareholders.[203] Furthermore, and as another example, that postulate underlies the reality that corporate conduct can give rise to independent criminal liability for the corporation.[204] Other obvious examples abound, but the point is that any attempt to describe corporate status—at least in the positive sense—needs to recognize that corporations are legal entities distinct from their shareholders. Nevertheless, that recognition does not perforce mean that corporations are distinct, independent constitutional entities. Rather, those two concepts are easily severable.

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[200] *See, e.g.*, Iuliano, *supra* note 125, at 48 (arguing corporations have their own emotions, goals, fears, and hopes which are distinct from their shareholders).

[201] *See, e.g.*, Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) (citations omitted) ("After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."); *see also, e.g.*, Iuliano, *supra* note 125, at 48.

[202] *See, e.g.*, Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 3–5 (2002) (arguing in favor of the director primary model of corporate governance).

[203] FLETCHER, *supra* note 136, at § 5 ("[T]he distinguishing characteristics of a corporation are that it is an artificial person, a legal entity, capable of acting through its corporate officers and agents, of suing and being sued, of taking and holding property, of contracting in its own name, and of continuing to exist independently of the individuals who compose it.").

[204] 1 TREATISE ON THE LAW OF CORPORATIONS § 8:21 (2015) ("[I]t is generally accepted that a corporation may be criminally liable for actions or omissions of its agents in its behalf.").

There is no basis for inferring that the text of either the Constitution or the Fourteenth Amendment intended to confer constitutional rights on corporations qua corporations.[205] Rather, both the text and surrounding circumstances of the Constitution and the Fourteenth Amendment seem to contemplate that those involved in both the drafting and ratification of those documents held a traditional concessionary vision of incorporated entities.[206] In that vein and by way of example, neither the constitutional text nor the Fourteenth Amendment mentions the words "corporation" or "corporate."[207] Rather, the Constitution speaks of protecting "people," "person[s]," and "citizens,"[208] and the Fourteenth Amendment speaks of protecting "person[s]" and "citizen[s]."[209] Furthermore, and more importantly, those words—"people," "person," and "citizen"—were not contemporaneously used in a manner consistent with implicit reference to incorporated entities.[210] Rather, they were uniformly used to reference corporeal, natural individuals.[211] Thus, there is no inherent need to provide constitutional status to corporations qua corporations. As a result, corporations can be viewed as non-constitutional entities without any damage to the constitutional text, the Fourteenth Amendment, or any identifiable intent on behalf of the drafters or ratifiers of those documents. Accordingly, a tempered version of real entity theory—a version where corporations are not constitutional entities—is possible.

If the legal status of corporations is uncoupled from the constitutional status of corporations, a tempered version of concessionary theory is consistent with real entity theory. That is, corporations can be viewed as arising from a corporeal person or people filing documents with the government with the subjective and objective intent to form a specific type of recognized legal entity. And, once formed, an incorporated entity exists separate and apart from its constituents both in the practical and the legal sense. Thus, stated more succinctly, a tempered version of concessionary theory is capable of explaining the existence of incorporated entities, while a tempered version of real entity theory is capable of explaining the separate legal status of corporations once they indeed exist.

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[205] *See generally* Marcantel, *supra* note 86, at 265.
[206] *Id.*
[207] *Id.* at 232, 261.
[208] *Id.* at 233.
[209] *Id.* at 261.
[210] *Id.*
[211] *Id.*

2. *A tempered version of aggregate theory and its relationship with the tempered versions of concessionary theory and real entity theory*

The immediately preceding sections generated tempered versions of both concessionary theory and real entity theory and demonstrated the manner in which those two traditionally diametrically opposed theories could be made consistent. The flaw in using those two tempered theories as a model for corporate constitutional rights, however, is that the two tempered theories, either individually or in the aggregate, do not provide a mechanism for permitting corporations to possess or exercise constitutional rights. For obvious reasons, that position is inconsistent with the Court's extant jurisprudence. Thus, if the composite is to adequately explain corporate existence, it needs some component to describe and explain an incorporated entity's ability to exercise constitutional rights. The antidote to that problem is a tempered version of aggregate theory.

In its marginalized form, aggregate theory is fundamentally inconsistent with both concessionary theory and real entity theory.[212] Indeed, theorists who hold marginalized views of aggregate theory—theorists such as Professor Butler and Ribstein—explicitly reject both of those theories.[213] Nevertheless, aggregate theory need not be incompatible with either concessionary theory or real entity theory—at least in their tempered states. Rather, aggregate theory could be formulated in such a way as to maintain the pass-through constitutional aspects of the theory, while still recognizing both the concessionary and real nature of corporations.[214]

Reformulating aggregate theory such that it can be consistent with the tempered versions of concessionary theory and real entity theory is straightforward. Indeed, the only modification that need truly be made is to strip the theory of its wholesale rejection of the other two dominant theories. More specifically, if aggregate theory were tempered to permit the existence of concessionary theory and real entity theory—in their modified states—

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[212] BUTLER & RIBSTEIN, *supra* note 142, at 144 (arguing neither concessionary theory nor real entity theory have any role in defining or explaining the constitutional rights of corporations).

[213] *Id.*

[214] In the general sense, this notion underlies the positions of other theorists. *See, e.g.*, Pollman, *supra* note 82, at 54 ("Incorporation creates a separate legal identity. Rights do not originate in corporations qua corporations. They are accorded to corporations only when necessary to protect the rights of natural persons involved in the corporation . . . ."); Pollman, *supra* note 126, at 1630 (citations omitted) (arguing that corporate personhood "should be understood as merely recognizing the corporation's ability to hold rights in order to protect the people involved"). Nevertheless, no previous scholar has discussed the general concept of tempering the various dominant theories and amalgamating them into one unified composite.

aggregate theory could still maintain both its basic philosophic view of the corporation as well as the basic pass-through aspects that permit corporations to exercise constitutional rights on behalf of their shareholders. More specifically, aggregate theory could still posit that corporations are merely aggregates of their constituents. Furthermore, aggregate theory could still posit that corporations are capable of exercising constitutional rights because individual, corporeal people do not lose their constitutional rights simply by aggregating and forming a corporation. With that simple modification, then, a comprehensive view of the corporation would emerge. That is, the tempered version of concessionary theory would explain the impetus for corporate existence, the tempered version of real entity theory would explain the legal status of corporations, and the tempered aggregate theory would explain the mechanism by which corporations can exercise constitutional rights.

B. Coupling the Composite with Agency Principles to Form the Unified Framework

Although the Composite articulated in the previous section dispatches a variety of limitations existing within each of the traditional models of corporate existence, one big limitation remains. Specifically, the Composite, standing alone, does not provide a tool for determining when corporations can exercise the rights of their shareholders and, in contrast, when corporations cannot. Or, stated differently, the aggregate concepts within the Composite provide a mechanism for explaining *how* corporations can exercise constitutional rights, when corporations in fact can, but the concepts provide no mechanism for determining or explaining which specific rights are eligible for their exercise. Thus, the remaining aspect of generating a unified framework is to provide some mechanism that, when used within the context of the Composite, accurately and consistently describes and explains which constitutional rights corporations are capable of exercising. The missing link resides in basic, contract-based agency concepts.

The agency-based component of the unified framework was not generated in a vacuum. Rather, all existing aggregate-based theories of corporate constitutional rights use some agency-based principles either implicitly or explicitly. Thus, the agency-based aspect of the unified framework is not an exercise in creating a new concept or even adopting an old concept in a new way; instead, it is an exercise in coupling existing concepts with the Composite.

The common aspect of aggregate theories, at least within the corporate constitutional context, is that they all implicitly or explicitly maintain some

element of agency theory. Thus, for instance, Professor Pollman's associational theory inherently carries basic assumptions about agency relationships between corporations and their constituents because the keystone to Professor Pollman's theory is that corporations do not have constitutional rights qua corporations.[215] Rather, corporate constitutional rights stem from the underlying constitutional rights of the corporation's shareholders.[216] Accordingly, corporations only exercise constitutional rights derivatively and presumptively as agents for their shareholders.[217] Similarly, Professors Butler and Ribstein explicitly refer to the agency-based concepts that underlie their contractual theory of corporate constitutional rights.[218] Indeed, they explicitly argue that corporate constitutional rights stem from a corporation's shareholders, and managers of the corporation act as agents for the corporation's shareholders.[219] Thus, when a corporation exercises constitutional rights, it is actually exercising the constitutional rights of its shareholders in an agency capacity.[220]

The unified framework adopts the basic agency-related positions of aggregate theorists and the groundwork that underlies them. Nevertheless, and in a manner inconsistent with aggregate theorists, the unified framework posits that every constitutional right held by a shareholder can pass through and be exercised by a corporation as an agent for the shareholder, unless some constitutionally textual or functional basis exists for preventing it.[221] What remains, then, is to both explain and apply the textual and functional limitations that prevent a corporation from exercising the rights of their shareholders in an agency capacity and to demonstrate how the unified framework generates consistent results when applied to rights the Court has permitted corporations to exercise.

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[215] Pollman, *supra* note 82, at 54.

[216] *Id.*

[217] *Id.*

[218] *See generally* BUTLER & RIBSTEIN, *supra* note 142.

[219] *Id.*

[220] *Id.*

[221] Aggregate theorists differ from this position in two respects. First, aggregate theorists do not ordinarily begin with the idea that corporations can always exercise the rights of their shareholders, absent some limitation. *See, e.g.*, Pollman, *supra* note 82, at 53–54. Second, aggregate theorists traditionally attempt to limit the application of their theories on some loosely confined version of the purely personal test. *See, e.g.*, *id.* While, admittedly, the functional limitation discussed in Part IV.C.2 bears a resemblance to aspects of the purely personal test, the functional limitation narrows the inquiry substantially.

C. Applying the Unified Framework

The sections that follow discuss three different aspects of the unified framework and its application to the Court's jurisprudence. In that vein, the first section describes the textual limitation to the unified framework and applies the textual limitation to the Court's self-incrimination line of cases. The second section then explains the functional limitation to the unified framework and applies the functional limitation to explain and describe why corporations cannot exercise the rights of their shareholders in the context of the Privileges and Immunities Clause. Finally, the last section discusses the general application of the unified framework and then explains how the general application of the framework is capable of explaining the Court's extension of constitutional rights to corporations. Taken together, these three sections demonstrate the manner in which the unified framework can be applied and the means by which it can unify the Court's corporate constitutional jurisprudence.

1. *Explaining the textual limitation and applying it to the self-incrimination line of cases*

As stated above, the unifying framework generally permits corporations to exercise the rights of their shareholders, absent some textual or functional basis for preventing it. The underlying concept behind the textual limitation is that corporations cannot exercise constitutional rights on behalf of their shareholders in instances where the constitutional text explicitly limits or prohibits such an exercise. Thus, the purpose of the textual limitation is to ensure the unifying framework's attempt to explain the Court's jurisprudence does not offend the text of a constitutional provision. In the context of the Self-Incrimination Clause, then, the textual limitation provides the basis under which the entire line of cases is decided. As a result, the unifying framework, once coupled with the textual limitation, is capable of consistently explaining the inability of corporations to exercise the Self-Incrimination Clause.[222]

In the general sense, the unified framework recognizes corporations as distinct legal entities but not real constitutional entities. Thus, although corporations are real entities, corporations cannot exercise constitutional rights qua corporations.[223] Rather, corporations are only eligible to exercise constitutional rights, if at all, through the rights of their shareholders.[224]

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[222] As discussed in Parts II.B & II.C, the Court has consistently held that corporations cannot exercise the Self-Incrimination Clause.

[223] *See supra* Part IV.A.1.b.

[224] *See supra* Parts IV.A.1.c & IV.A.2.

Within the context of the Self-Incrimination Clause, then, the unified framework provides that corporations cannot independently exercise the Self-Incrimination Clause, as corporations are not independent constitutional entities eligible for constitutional protection.[225] Instead, corporations can only exercise the Self-Incrimination Privilege, if at all, through the aggregated constitutional rights of their shareholders.[226]

Given that understanding of corporate constitutional rights, the reason corporations cannot exercise the Self-Incrimination Clause on behalf of their shareholders is that the Clause explicitly limits its target. That is, the Clause explicitly prohibits the government from compelling a person to testify against "himself."[227] The Clause does not, however, limit the government from forcing a person to testify against another.[228] Furthermore, and similarly, it does not limit an agent from being forced to testify or produce evidence adverse to the agent's principal.[229] Consequently, and translating that principle to the corporate context, a corporation cannot—as an agent—invoke the Self-Incrimination Clause on behalf of its shareholders because permitting it to do so would be tantamount to permitting the corporation to invoke the privilege on behalf of another—a result inconsistent with the constitutional text. Thus, because the unifying framework does not extend constitutional rights to corporations qua corporations and because the textual limitation prevents corporations from exercising the Self-Incrimination Clause, there is simply no remaining, legitimate basis upon which a corporation could allege its ability to exercise the right. As a result, the

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[225] This particular aspect of the Composite resolves the problem discussed in Part III.A.3. Specifically, because corporations are not real constitutional entities, no legitimate concern exists that a corporation could be forced to testify against itself.

[226] *See supra* Part IV.A.2.

[227] U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

[228] *E.g.*, Couch v. United States, 409 U.S. 322, 323–34 (1973) (citing United States v. White, 322 U.S. 694, 698 (1944) (holding that the Self-Incrimination Privilege only prevents the state from compelling inculpatory evidence "from one's own mouth" and not from the mouth of another); *see also* United States v. Patane, 542 U.S. 630, 637 (2004) (citations omitted) ("[I]t suffices to note that the core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial.").

[229] *See* Fisher v. United States, 425 U.S. 391, 393–95, 397–98 (1976) (holding that a lawyer cannot invoke the privilege on behalf of his client, where the lawyer is in physical possession of tax-related documents that were delivered by the client to the lawyer); *see also* Couch v. United States, 409 U.S. 322, 323–34 (1973) (holding that a client cannot invoke the Self-Incrimination Privilege to resist production of a subpoena for documents owned by the client, where the subpoena was sent to an agent of the client and the agent physically possessed the documents subject to the subpoena).

unifying framework, once coupled with the textual limitation, is capable of explaining and describing the self-incrimination line of cases.

2. *Explaining the functional limitation and applying it to the Privileges and Immunities line of cases*

The underlying concept behind the functional limitation is that corporations cannot exercise constitutional rights on behalf of their shareholders in instances where doing so would lead to absurd results. Thus, the purpose of the functional limitation is to ensure the unifying framework's attempt to explain the Court's jurisprudence does not impermissibly expand or contract a constitutional right. In the context of the privileges and immunities cases, then, the functional limitation provides a basis to explain the Court refusal to extend the privileges and immunities protections to corporations.[230]

The functional limitation is intended to provide a basis for preventing application of the framework's general principles when that application would generate absurd results. Thus, for example, while the Court has never ruled that corporations lack the right to vote,[231] it is almost certain the Court would hold that corporations cannot vote because permitting them to do so would lead to one of two absurd results: either the corporation would be able to cast a vote *in addition* to the votes already cast by each of its shareholders individually, or the corporation would be able to cast one singular vote on behalf of its shareholders but the assignment of that right by the shareholders to the corporation would thereafter prohibit the shareholders from casting individual votes of their own. In either circumstance, the result is absurd. That is, in the former circumstance,

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[230] At various points, this section will loosely discuss the historical purposes of a constitutional right. Thus, to some extent this section is exposed to criticisms similar to those discussed in Part III.A.1. Nevertheless, the use of the purposes component in this context is distinguishable for at least two interrelated reasons. First, the component, as it is used here, is shorn of any notion that corporations can exercise constitutional rights qua corporations. Thus, in this context, the component's use does not generate a conflict with the constitutional text. Furthermore, because the purposes component is shorn of the notion that corporations can be real constitutional people, the purposes component is no longer grounded in whether the *purpose* of a constitutional right was to extend protections to corporations qua corporations. Rather, the analysis in this section shifts to whether the purpose of the constitutional right is inconsistent with corporations exercising the right as an agent of their shareholders. For that reason, the inconsistencies that arose with applying the purely personal test in its traditional formulation are resolved.

[231] Although the Court has never ruled on this issue, members of the Court have discussed the issue. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 394 (2010) (Stevens, J., dissenting) (stating that corporation cannot vote).

corporeal people could effectively nullify the "one man one vote" rule by simply generating a series of artificial entities that could then thereby vote as well.[232] The result would be to impermissibly enhance this particular constitutional right by permitting an individual to multiply the number of times the individual could exercise the right. In the latter circumstance, the result would effectively condition the existence of the corporate form on the loss of the individual right to vote.[233] Thus, shareholders would not be able to vote themselves if they elected to operate in a corporate form. While perhaps that result could be theoretically acceptable in the context of a sole-shareholder corporation, it would be absurd within the context of Google. Accordingly, the functional limitation operates to temper the general rules of the unified framework, where the general framework is not already limited by the textual limitation and application of the framework to a particular constitutional right would impermissibly expand or contract the right.[234]

The functional limitation that prevents corporations from exercising the right to vote is the same limitation that prevents corporations from exercising the rights inlaid in the Privileges and Immunities Clause.[235] That is, permitting corporations to exercise the rights inlaid in the Privileges and Immunities Clause would inherently expand the constitutional right beyond its contours by converting incorporation—a state concession—to a fundamental right of citizenship.[236]

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[232] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 554–55 (1964) (citations omitted) (stating that the right to vote includes, among other things, the right to have one's vote counted and not diluted or diminished).

[233] Notably, and as discussed in Part IV.A.1.a, this would also likely constitute an unconstitutional condition.

[234] The right to vote would not be subject to the textual limitation, as the constitutional text does not explicitly prohibit a person from exercising the right through another. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 1; *id.* art. II, § 1, cl. 3; *id.* amends. XIV, §2, XV, § 1, XVII. That is, there is nothing within the constitutional text indicating whether or to what extent the right could be exercised through a corporate agent. Thus, the textual limitation discussed in the preceding section would not prevent a corporation from exercising the right to vote as an agent for its shareholders.

[235] U.S. CONST. art. IV, § 2, cl. 1.

[236] Unlike the Self-Incrimination Clause, the Privileges and Immunities Clause does not contain any explicit textual prohibition that explains the Court's refusal. That is, by its own terms, the Self-Incrimination Clause explicitly prevents its exercise by an agent; the Privileges and Immunities Clause contains no such limitation. *Compare* U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."), *with* U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). Admittedly, one could argue that the clause itself only grants protections to "citizens," and thus, that in itself is a textual limitation. Nevertheless, that would not be a textual limitation within the context discussed in this Article. That is, this Article uses the phrase "textual limitation" to refer to language within the Constitution that prohibits a person from exercising a constitutional right

The Privileges and Immunities Clause only protects the citizenship rights which have been "enjoyed by citizens of the several States which compose this Union[] from the time of their becoming free, independent, and sovereign."[237] Or, stated differently, the Privileges and Immunities Clause does not protect all rights; it only protects "fundamental rights" that are within the "class of rights which the State governments were created to establish and secure."[238] Thus, for instance, the Clause protects the right of citizens to petition the government, to seek the protection of the government, to transact business with the government, and "for all the great purposes for which the Federal government was established . . . ."[239]

Although the Privileges and Immunities Clause protects fundamental rights, the Clause is not a roving limitation on governmental power. That is, the Clause does not substantively generate rights or substantively protect rights that did not already exist.[240] Rather, the Clause operates as a non-discrimination provision that prohibits a state from providing disparate rights and privileges to non-residents, where those distinctions would "hinder the formation . . . or the development of a single Union of those States."[241] Thus, for instance, the Court has held that states may treat non-residents disparately in terms of access to recreational game hunting, as sport hunting is not a "fundamental" or "natural" right that is necessary to the "vitality of the Nation."[242] In contrast, the Court has held that states may not treat non-residents disparately if the effect would be to limit or hinder an individual's ability to pursue a "common calling," as the right and ability to

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through another. *See supra* Part IV.C.1. Furthermore, and even assuming the phrase could be broadened to encompass the argument that the word "citizen" simply does not refer to artificial entities, that broadening would still not resolve the underlying inquiry, as the mere fact that a corporation is not a "citizen" for purposes of this provision says nothing about whether a corporation can exercise the right on behalf of its corporeal shareholders. Finally, and in other contexts, the Court has held that corporations are "citizens" within the context of other constitutional provisions, as they are composed of, and act on behalf of, corporeal citizens. *See, e.g.*, Great S. Fireproof Hotel Co. v. Jones, 177 U.S. 449, 455–56 (1900) (citations omitted) (holding that corporations are citizens for purposes of diversity jurisdiction only because "a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation"). Thus, and in any event, use of the word "citizens" cannot constitute a textual limitation.

[237] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 76 (1872).

[238] *Id.*

[239] *Id.* at 79.

[240] *Id.* at 77.

[241] Baldwin v. Fish and Game Comm'n of Mont., 436 U.S. 371, 383 (1978).

[242] *Id.* at 383, 387.

work is fundamental and thus protected by the Privileges and Immunities Clause.[243]

Viewed through the lens of the Privileges and Immunities Clause, it is clear there is no fundamental right to associate in the corporate form, as association in the corporate form has never been a "right" which governments were "created to secure" at the time the states "bec[ame] free, independent, and sovereign."[244] Or, stated differently, the right to operate in the corporate form is not a "natural" right "which belong[s] of right to the citizens of all free governments . . . ."[245] Rather, incorporation is a privilege granted by concession of the states and was indeed a rare privilege until the Nineteenth Century.[246] Thus, and in the first instance, the Privileges and Immunities Clause does not protect a right to incorporate.

Notwithstanding the absence of a right to incorporate, the conclusion that corporeal people have no fundamental right to operate through the corporate form does not end the inquiry, as that conclusion does not explain why a corporeal person cannot exercise her personal rights through the corporate form once the corporate form exists. The answer here, of course, is that corporeal people are free to exercise their constitutional rights through the corporate form, but the Privileges and Immunities Clause does not bestow any actual rights.[247] Thus, in the strict sense of the Clause, there aren't any peculiar rights to exercise. Rather, "exercising" the Privileges and Immunities Clause through the corporate form is really an attempt to prevent a state from exposing foreign corporeal citizens to disparate treatment, where those foreign corporeal citizens have incorporated in a foreign jurisdiction.[248] Accordingly, "exercising" the right is a reframed way of arguing a state cannot treat similarly situated United States citizens disparately on the basis of state citizenship.

The problem with permitting corporations to exercise the Privileges and Immunities Clause on behalf of their shareholders under this reframed inquiry is that the Privileges and Immunities Clause does not prohibit all

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[243] *E.g.*, United Bldg. & Constr. Trades Council of Camden Cty. v. City of Camden, 465 U.S. 208, 219 (1984) (citing *Baldwin*, 436 U.S. at 387).

[244] *Slaughter-House Cases*, 83 U.S. at 76.

[245] *Id.*

[246] For information regarding the status of corporations at the time the Constitution was drafted and ratified, see Marcantel, *supra* note 86, at 226–28. Notably, states did not begin to enact general incorporation statutes until the Nineteenth Century. *Id.* at 228. Thus, until that point, corporations only existed by special legislation. *Id.*

[247] *Slaughter-House Cases*, 83 U.S. at 77.

[248] *See, e.g.*, *id.* ("Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.").

classifications based upon state citizenship. More specifically, states are permitted to discriminate against non-citizens, unless creation and maintenance of the distinction would "hinder the formation . . . or the development of a single Union of . . . States."[249] Or, stated differently, states are permitted to discriminate against non-citizens, unless the type of discrimination would endanger or inhibit the vitality of a Nation.[250]

The concept that discrimination against the corporate form—or that discrimination against corporeal citizens using the corporate form—would inhibit the "vitality of a Nation" or "hinder the formation . . . or . . . development of a single Union of . . . States" is absurd. As indicated a moment ago, general incorporation statutes did not become prevalent until the late Nineteenth Century.[251] Thus, for the roughly one hundred years that preceded the widespread use of general incorporation statutes, the existence of corporations was a relative rarity that required special action by a legislature.[252] Nevertheless, the Nation endured and thrived. If the Nation could maintain its vitality and indeed thrive during that period of time—a period of time when corporations were rare—the existence of state discrimination based upon the use of the corporate form could not possibly have the type of negative impact that the Privileges and Immunities Clause inherently seeks to prevent. As a result, the Privileges and Immunities Clause simply does not provide any "rights" that a corporation could exercise on behalf of its shareholders.

Because operating in the corporate form is a not a "fundamental right" within the context of the Privileges and Immunities Clause and because discrimination against shareholders operating in the corporate form does not threaten to impede or inhibit the formation of a Nation, permitting corporations to exercise the "rights" inlaid in the Privileges and Immunities Clause would impermissibly expand the confines of the right beyond its bounds. As a result, corporations cannot exercise the Privileges and Immunities Clause by operation of the functional limitation.

3. *Applying the unified framework to corporate constitutional rights*

As discussed in Part II.B, the Court has permitted corporations to exercise a variety of constitutional rights. Thus, for the unified framework to be viable, the unified framework must be able to describe and explain why corporations can exercise those rights. The unified framework meets this

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[249] Baldwin v. Fish and Game Comm'n of Mont., 436 U.S. 371, 387 (1978).

[250] *Id.* For this reason, the analysis applicable to the Equal Protection Clause of the Fourteenth Amendment is distinguishable—the Equal Protection Clause is not so limited.

[251] W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 659 (1981).

[252] *See id.* at 659–60.

challenge through application of its general rules. That is, pursuant to the general rules of the unified framework, corporations are capable of exercising all of the constitutional rights of their shareholders, absent some textual or functional limitation. Once these general rules are applied to the Court's jurisprudence, the unified framework is capable of yielding results consistent with the Court's jurisprudential line.

Since *Santa Clara*, the Court has extended a variety of constitutional rights to corporations.[253] Thus, for instance, the Court has extended the First Amendment's protections to corporations.[254] Furthermore, the Court has extended the Fourth Amendment's Search and Seizure protections to corporations.[255] As a final example, the Court has extended the Fourteenth Amendment's Due Process Clause to corporations.[256] Although the Court's reasoning for extension of these rights is admittedly distinct, the result is the same—corporations are capable of exercising these rights. Thus, if the unified framework is indeed viable, it must be capable of achieving the same results.

The unified framework is capable of explaining and describing the Court's extant jurisprudence through application of its general principles. The general principles of the unified framework provide that corporations are always eligible to exercise constitutional rights as agents for their shareholders, absent some textual or functional limitation. Thus, assuming some functional or textual limitation does not exist, the unified framework is capable of describing and explaining the vast array of constitutional rights the Court has permitted corporations to exercise.

a. The absence of textual limitations

The textual limitation prohibits the application of the unified framework's general principles, where application would yield a result inconsistent with the constitutional text. Thus, in the context of the Self-Incrimination Clause, the amendment's text limits its application to a specific target such that permitting a corporation to exercise the right as an agent of its shareholders is inconsistent with the text. In contrast, the rights the Court has permitted

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[253] *See supra* Part II.B.

[254] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 342 (2010) ("The Court has recognized that First Amendment protection extends to corporations.").

[255] *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (providing rights to corporations pursuant to the Search and Seizure Clause)

[256] *See, e.g.*, Covington & Lexington. Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons, within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as denial of the equal protection of the laws.").

corporations to exercise do not suffer from a textual limitation. That is, the constitutional text of those rights does not limit their application to a specific target and thus does not prohibit exercise of those rights through an agent. As a result, the textual limitation does not bar the application of the unified framework's general principles for any right other than the Self-Incrimination Privilege.[257]

As discussed in Part IV.C.1, the textual limitation prevents the application of the general principles to the Self-Incrimination Clause because the constitutional text of the Self-Incrimination Clause limits its application to a specific target—a person's "self". Or, stated differently, the text of the Clause impliedly prohibits a party from exercising the right through an agent. In contrast, the variety of rights the Court has permitted corporations to exercise do not contain such a limitation. For instance, there is no textual language within the First Amendment indicating the rights are only exercisable by one's "self."[258] Rather, the only limitations contained within the text of the amendment are limitations directed at "Congress."[259] Thus,

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[257] Admittedly, the Double Jeopardy Clause of the Fifth Amendment would also likely invoke the textual limitation, as the Clause—at least in the literal sense—only protects "life or limb". *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb"). *But see, e.g.*, Breed v. Jones, 421 U.S. 519, 528 (1975) (citing *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 170–73 (1874) ("Although the constitutional language, 'jeopardy of life or limb,' suggests proceedings in which only the most serious penalties can be imposed, the Clause has long been construed to mean something far broader than its literal language."). Nevertheless, the Court has never actually confronted or entertained the issue of whether corporations can exercise the Clause. Rather, the Court has, at most, *applied* the Clause to corporations in situations where the issue was never presented or argued to the Court. *See, e.g.*, United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962). That does not create an inconsistency with the application of the unified framework, as the Court does not create precedent, unless the Court confronts an issue and rules on it. *See, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821)) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

[258] *Compare* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."), *with* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

[259] U.S. CONST. amend. I. Admittedly, the Press Clause, the Assembly Clause, and the Petition Clause all implicitly or explicitly reference a specific group to be protected. And, in that respect, one could argue those rights are limited to the "press" or the "people." Nevertheless, that would not be a textual limitation within the context discussed in this Article. That is, this article uses the phrase "textual limitation" to refer to language within the Constitution that prohibits a person from exercising a constitutional right through another. *See supra* Part IV.C.1. Furthermore, and even assuming the phrase could be broadened to encompass the argument that the words "press" or "people" simply do not refer to artificial

there is nothing within the First Amendment that inherently prohibits a person from exercising the right(s) through an agent.[260] Similarly, the protections contained within the Fourth Amendment's Search and Seizure Clause do not limit the medium in which they are exercised. That is, nothing within the Fourth Amendment implicitly or explicitly prohibits its exercise through an agent.[261] Thus, there is no basis for application of the textual limitation. As a final example, neither the text of the Due Process Clause nor the text of the Equal Protection Clause invoke the textual limitation, as both of those clauses limit the actions of a specific actor—the states—but say nothing—either explicitly or implicitly—about the medium in which people can exercise the right.[262] As a result, neither the Due Process Clause nor the Equal Protection Clause is subject to the textual limitation.[263]

When viewed through the prism of the unified framework, permitting corporations to exercise the rights the Court has extended to corporations does not generate an inherent inconsistency with the constitutional text. As a result, the rights the Court has permitted corporations to exercise do not invoke the textual limitation.

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entities, that broadening would still not resolve the underlying inquiry, as the mere fact that a corporation is not a person for purposes of these provisions says nothing about whether a corporation can exercise the right on behalf of its corporeal shareholders. Thus, the analysis contained within this section is equally applicable to the Press Clause, the Assembly Clause, and the Petition Clause.

[260] In that vein, the Court has, on a number of occasions, explicitly stated that corporations are permitted to exercise First Amendment rights on behalf of their shareholders. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428 (1963) (citations omitted) ("[P]etitioner claims that the chapter infringes the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights. We . . . think petitioner has standing to assert the corresponding rights of its members."); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961) (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958)) ("It is clear from our decisions that NAACP has standing to assert the constitutional rights of its members.").

[261] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[262] *See, e.g.*, U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[263] Although I have not discussed every single right the Court has extended to corporations here, the same analysis would apply. Thus, for example, the Takings Clause of the Fifth Amendment has been extended to corporations. *E.g.*, Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896). Nothing within that clause indicates—either explicitly or implicitly—that it cannot be exercised by and through an agent. As a result, the textual limitation is inapplicable.

b. The absence of functional limitations

The functional limitation to the unified framework prohibits the application of the unified framework's general principles, where application would lead to absurd results. Thus, within the context of the Privileges and Immunities Clause, the functional limitation explains the reason why corporations cannot exercise those rights. In contrast, the rights the Court has extended to corporations do not generate absurd results when the unified framework's general principles are applied to them. As a result, the rights the Court has extended to corporations are not subject to the functional limitation.

As discussed in Part IV.C.2, the functional limitation prohibits application of the unified framework's general principles when application of those principles would lead to absurd results. Thus, the functional limitation prohibits a corporation from exercising the Privileges and Immunities Clause because the result would be to convert incorporation to a natural right. In contrast with the Privileges and Immunities cases, application of the general rules of the unified framework does not generate an absurdity when applied to the rights which have been extended to corporations. As a result, the functional limitation is inapplicable to those rights.

When the general principles of the unified framework are applied to the various rights the Court has extended to corporations, no absurdity results. Thus, for instance, no absurdity results from the notion that corporate agents could "speak" on behalf of their shareholders. Indeed, while scholars and jurists have certainly criticized the notion that corporations can "speak" in a representational capacity for their shareholders,[264] the fact remains that

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[264] A variety of scholars and jurists have criticized the notion that corporations can speak on behalf of their shareholders, arguing the likelihood that shareholders would hold a uniform position on various substantive matters is low. *See, e.g.*, Tucker, *supra* note 83, at 530. While it is certainly possible that shareholders would possess a non-uniform view, the result is not foregone. For instance, one would expect that the position taken by a corporate agent of a single-shareholder corporation would be both internally and externally consistent. *Cf.* Adam Winkler, *Beyond* Bellotti, 32 LOY. L.A. L. REV. 133, 193 (1998) (arguing that the shareholders of a close corporation might easily obtain unanimous consent for corporate speech). Similarly, and even in the context of much larger groups, large groups of people are capable of sharing a common view and attempting to use a corporate mouthpiece as an instrument to vocalize that view. *See, e.g.*, *Button*, 371 U.S. at 429. That having been said, the positions of shareholders in various-sized corporations may be divergent either internally between themselves or externally between themselves and the corporate agent at various times. But, even in those circumstances, corporate speech would always presumptively be consistent with the view of at least the majority of the shareholders or a majority of the outstanding shares; otherwise, the shareholders are likely to either take corrective action—assuming they have the requisite control to do so—or vote with their feet and sell their shares. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 361–62 (2010) ("There is, furthermore, little

corporate agents—just like any other agent—can act as expressive mouthpieces for the positions of their shareholders without expanding or contracting the right in such a way that it diminishes the rights of others external to the corporation or diminishes the rights of shareholders within the corporation. In terms of the former, permitting both an individual shareholder to speak while also permitting a corporate agent to speak on behalf of that individual shareholder does not in any way suppress or diminish the ability of those external to the corporation from fully exercising their right to speak. More specifically, if a shareholder, or a group of shareholders, all spoke both individually and collectively in conjunction with a corporate agent, an individual who is not a shareholder of the corporation would not lose any aspect of his or her right to speak. Admittedly, of course, the volume of a collective group might be greater due to the unison of voices, but the right itself does not guarantee the right to persuade; it only guarantees the opportunity to try. Furthermore, and in the context of the latter, permitting a corporate agent to speak on behalf of its shareholders also does not diminish the rights of the shareholders to the corporation. That is, assuming the corporation speaks on behalf of the shareholders as a group, each shareholder is still free to individually exercise the right as well. Additionally, each shareholder remains free to exercise the right to speak and express a position that is inconsistent with that of the collective group. Thus, the notion that a corporate agent can speak on behalf of a shareholder or group of shareholders does not create the inherent absurdity that exists when the general principles are applied to the Privileges and Immunities Clause. As a result, applying the unified framework to the freedom of speech does not invoke the functional limitation.[265]

Similar to the analysis within the context of the freedom of speech, applying the unified framework's general principles to the protection against unreasonable searches and seizures also does not generate an absurdity, as application of the general principles does not expand or diminish the contours of the right. That is, permitting corporations to exercise the rights

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evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy."). Of course, the same is true of minority shareholders—if the corporate message is inconsistent with their own, they can vote with their feet. *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 n.34 (1978). But, if they stay, they tacitly approve the message. While that, admittedly, only provides prospective protection from "unauthorized" corporate speech, shareholders do not lack mechanisms of prospectively protecting themselves, as they choose where to invest and under what contractual terms they are willing to invest.

[265] The analysis would be identical for the Association Clause, the Petition Clause, and the Assembly Clause of the First Amendment. *See* U.S. CONST. amend. I. Furthermore, this analysis would be substantively similar for the Due Process Clause and the Equal Protection Clause. *See* U.S. CONST. amend. XIV, § 1.

of their shareholders within the context of the Fourth Amendment neither expands nor contracts the right internally or externally. Specifically, permitting a corporation to exercise the Fourth Amendment rights of its shareholders would not prevent an individual shareholder of the corporation from exercising the right in her personal capacity against property solely owned by her at the same time the corporation was asserting the right for property held by the corporation but ultimately owned by her and the remaining shareholders.[266] Thus, corporate exercise of Fourth Amendment rights does not internally limit or functionally prohibit the constitutional rights of the shareholders.[267] Additionally, permitting corporations to exercise Fourth Amendment rights does not limit or diminish the rights of others external to the corporation. That is, no other corporeal person's rights are diminished by virtue of a corporation exercising the right. As a result, corporate exercise of the Fourth Amendment does not generate an absurdity. Accordingly, permitting corporations to exercise Fourth Amendment rights does not invoke the functional limitation.[268]

When viewed through the prism of the unified framework, the rights the Court has extended to corporations do not generate absurd results. That is, permitting corporations to exercise these rights of their shareholders do not contract or expand the shareholders' or any other person's innate

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[266] Although the view that shareholders own corporations has fallen out of favor with corporate law scholars, it remains a reality of the law. *See, e.g.*, Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 899–900 (2010) (recognizing that corporate law scholars dismiss the notion of shareholder ownership but the courts still recognize shareholders as the owners of corporations); *see also* Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 14 n.10 (1986) ("Management has no interest in corporate property except such interest as derives from the shareholders[.]"); S. Pac. Co. v. Bogart, 250 U.S. 483, 487–88 (1919) (holding that shareholders have an ownership interest in corporate property and the proceeds of corporate property).

[267] Admittedly, the separate legal status of corporations would prohibit an individual shareholder from asserting the exclusionary doctrine—in her personal capacity—for violations of the Fourth Amendment with respect to corporate property. Thus, in that way, a shareholder's rights are limited. But, that fact *bolsters* the argument that corporations should be able to assert Fourth Amendment rights. That is, if neither shareholders nor corporations can assert Fourth Amendment rights, then the property of the corporation—property that is indirectly but ultimately owned by the shareholders—could be unceremoniously seized at the will of the government. If anything, that would be the absurd result. *Cf.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014) (stating that the purpose of permitting corporations to exercise constitutional rights is, in part, to protect shareholders from governmental intrusion into property rights). Furthermore, it would potentially give rise to the problem of unconstitutional conditions discussed in Part IV.A.1.a.

[268] The discussion and analysis herein also supports corporate exercise of the Takings Clause. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

constitutional rights. As a result, the rights the Court has permitted corporations to exercise do not invoke the functional limitation.

V. CONCLUSION

For centuries, the Supreme Court has struggled with creating a consistent, unified image of corporate existence. As a result of that conflict, the Court has not identified a specific, unified framework to generally adjudicate whether a corporation can exercise constitutional rights. Rather, the Court's jurisprudence to date has attempted a variety of mechanisms that all appear to apply only within the context of specific constitutional rights. Thus, and stated simply, the Supreme Court's corporate constitutional jurisprudence currently lacks both a consistent image of corporate existence and a consistent mechanism to distinguish which constitutional rights corporations can exercise and which they cannot. Notwithstanding the confusion within the jurisprudential line, a unified framework is possible. In that vein, this Article proves a unifying framework can be achieved by tempering the three dominant theoretical conceptions of corporate existence, combining the resulting composite with agency-based contract principles, and then subjecting the resulting yield to both a textual limitation and a functional limitation.

Eminent Domain and Serrated Power

Steven Ferrey*

MODERATOR: "Mr. Trump, you have said, quote, 'I love eminent domain,' which is the seizure of private property for the sake of the greater good theoretically . . . the Northern pass would bring hydro-electric power from Canada into the Northeastern grid. Do you see eminent domain as an appropriate tool to get that done?"

DONALD TRUMP: "Eminent domain is an absolute necessity for a country, for our country."

JEB BUSH: "The difference between eminent domain for public purpose—as Donald said, roads and infrastructure, pipelines and all that—that's for public purpose. But what Donald Trump did was use eminent domain to try to take the property of an elderly woman on the strip in Atlantic City. That is not public purpose that is downright wrong."

DONALD TRUMP: "Jeb wants to be a tough guy tonight. I didn't take the property."

JEB BUSH: "How tough it is to take property from an elderly woman . . . . And you lost in the court."

DONALD TRUMP: "you—let me talk. Let me talk. Quiet. Do you consider the Keystone pipeline private? . . . Is it public or private?"

JEB BUSH: "It's a public use."

DONALD TRUMP: "It's a private job."

JEB BUSH: "Established by the courts—federal, state courts."

-- Republican New Hampshire debate, February 6, 2016[1]

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[1] Team Fix, *Transcript of the New Hampshire Presidential Debate, Annotated*, WASH. POST (Feb. 6, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/02/06/

I. POWER AND DOMAIN

There is no technology that matters more than electric power. Electric power was recently deemed, aside from the wheel, to be the second most important invention in history and the single most important invention during the last millennium.[2] Nothing is more indispensable than electricity in the operation of our modern economy.[3] Electricity is the hub of the developed U.S. economy.

Eminent domain not only has emerged as a major legal controversy in the U.S. Presidential election,[4] but is the regulatory lynchpin for how power is sited and provided to all of us. The regulatory system is in fast change; independent power generation, not subject to state utility regulation,[5] has emerged as the major force in the reshaping American power. Energy facility regulation is jurisdictionally vested partially in the fifty states, partially in the federal government, and using traditional police power in thousands of municipal governments.[6] Approximately half the states now attempt to preempt traditional local land-use and zoning authority.[7] This article examines legal issues arising on the serrated edge carved by countervailing and conflicting federal, state, and local assertion of jurisdiction over American power.

Eminent domain is a legal mechanism both ingrained in, and restricted by, American law.[8] Traditionally, to make the wire interconnections to deliver

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transcript-of-the-feb-6-gop-debate-annotated/) [hereinafter *New Hampshire Presidential Debate*] (modified from original).

[2] James Fallows, *The 50 Greatest Breakthroughs Since the Wheel*, THE ATLANTIC (Nov. 2013), http://www.theatlantic.com/magazine/archive/2013/11/innovations-list/309536/. Electricity finished behind only the movable type printing press. *Id.* Electricity is essential to operate seven other 'top 50' inventions of all time: The Internet, computers, air-conditioning, radio, television, the telephone, and semiconductors. *Id.*

[3] STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES & EXPLANATIONS 562–64 (6th ed. 2013) [hereinafter ENVIRONMENTAL LAW].

[4] *See, e.g.*, *New Hampshire Presidential Debate*, *supra* note 1.

[5] STEVEN FERREY, THE NEW RULES: A GUIDE TO ELECTRIC MARKET REGULATION 238–39 (2000) [hereinafter FERREY, THE NEW RULES]; *see also* THE ELECTRIC ENERGY MARKET COMPETITION TASK FORCE, REPORT TO CONGRESS ON WHOLESALE AND RETAIL COMPETITION MARKETS FOR ELECTRIC ENERGY 10 (2007), http://www.ferc.gov/legal/staff-reports/competition-rpt.pdf ("In the 1970s, vertically integrated utility companies (investor-owned, municipal, or cooperative utilities) controlled over 95 percent of the electric generation in the United States. . . . [B]y 2004 electric utilities owned less than 60 percent of electric generating capacity. Increasingly, decisions affecting retail customers and electricity rates are split among federal, state, and new private, regional entities.").

[6] *See infra* Section III.A.

[7] *See infra* Section IV.A.

[8] *See infra* Section V.

electric power, states granted their traditional state-regulated utilities the power to exercise eminent domain to take or use private property by easement and/or fees simple.[9] The ultimate limitation on government taking of property, is that a taking must be used for a "public" purpose, which has proved an evolving legal concept.[10] The eminent domain power of government historically could not be used to redistribute private property from one private party to another. The Supreme Court decision in *Kelo v. New London* tempered the contours of such a limitation and whether this constituted an unauthorized taking.[11]

New legal boundaries now surround state regulation of development of electric energy within state borders.[12] Now that private unregulated power suppliers have superseded public utilities' role as primary suppliers of new electric energy, can these new private stakeholders exercise "public" eminent domain? This article examines key Supreme Court precedent, relevant state and local law controlling this second most important invention in history, and the limits on exercise of eminent domain to reshaped the power sector of the American economy.[13]

Section II sets the stage of the fast-changing nature of power with the entrance of private, non-public entities in the power sector. Section II peals back the legal layers to examine what aspects of power are exclusively under federal authority pursuant to the Supremacy Clause of the Constitution, what are reserved exclusively to state authority, and how these integrate with traditional local police power. Section II tracks recent fundamental changes in the power sector facilitating the accelerating entrance of private projects not subject to traditional state regulatory authority.

On this foundation, Section III enters the power vortex formed at the intersection of state and local law. Each of the fifty states is examined as to whether and how it exercises preemptive state power siting authority or leaves siting decisions to each local government under the police power, as to technology, size, and applicable legal standards. This article focuses on the public/private regulatory distinction: Which states only regulate new facilities undertaken by conventionally regulated utilities, and which extend their authority to include power facilities built by new independent power producers.

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[9] STEVEN FERREY, LAW OF INDEPENDENT POWER § 6:541 (38th ed. 2015) [hereinafter FERREY, LAW OF INDEPENDENT POWER].

[10] *See Eminent Domain*, EMINENT DOMAIN AND CONDEMNATION, http://forensic-appraisal.com/eminent_domain.

[11] *See* Kelo v. City of New London, 545 U.S. 469, 489–90 (2005).

[12] *See, e.g.*, S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014); Ill. Commerce Comm'n v. FERC, 756 F.3d 556 (7th Cir. 2014).

[13] *See infra* Section V.

Section IV focuses the regulatory power over power, analyzing traditional police power, state sovereignty, and power over hardware and transmission corridors, placing in context President-elect Trump's comment that "When eminent domain is used on somebody's property, that person gets a fortune."[14] Section IV highlights rights of first refusal (ROFRs) to control who can compete in the state electric sector under what rules and recent federal litigation. Section IV concludes by examining constitutional Supremacy Clause violations found regarding states' traditional exercise of authority over new power generation siting decisions.

The regulatory distinction between traditional utilities and Independent Power Producers matters in the 21st Century of power. Section V analyses whether eminent domain to take private property can and has been legally extended along a legally serrated edge by states to private, non-utility stakeholders? The majority of new power sector providers are Independent Power Producers, which may have need to exercise the strong arm of eminent domain to site power production facilities.

Eminent domain is only allowed to take private property for a "public purpose." It is an open question whether private, unregulated companies serve a "public purpose" or the public interest. The law on impermissible 'takings' of property is examined through the prism of key Supreme Court decisions in the *Dolan* and *Kelo* cases.[15] Section V, for its detailed comparison on key issue of eminent domain, analyzes in detail key statutes and resultant recent holdings in the half dozen states within the original U.S. Independent System Operator (ISO).[16]

Section VI arranges the legal pieces and charts the future legal landscape of our second most important invention. We first set the stage.

II. SETTING THE STAGE

A. The Levels of Power

Everyone wants electric power, and it is the signature of a modern economy.[17] However, many persons and some communities do not appreciate hosting the hardware and plants of the power system. Traditional law starts with the local "police power" to regulate creation of the facilities to produce and supply electric distribution: The "[n]eed for new power

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[14] Catherine Rampell, *New York Should Seize Trump Tower*, WASH. POST (Dec. 12, 2016), https://www.washingtonpost.com/opinions/new-york-should-seize-trump-tower/2016/12/12/6dfdfc50-c0b2-11e6-897f-918837dae0ae_story.html.

[15] *See infra* Section III.

[16] *See* Figure 2.

[17] ENVIRONMENTAL LAW, *supra* note 3, at 562–64.

facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."[18] States authorize the actual construction of transmission facilities, but do not regulate their terms of operation, which is an area exclusively within federal authority at the wholesale and transmission levels, and exclusively within state authority at the retail and distribution levels.[19]

Electric generation siting and power distribution is a traditional land-use responsibility of local government.[20] Distribution of power is not the transmission of power:[21] The former is exclusively regulated by the states, while the latter is exclusively regulated by the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act and court interpretation. Municipalities are creatures of state government.[22] There is no federal authority over any siting of power generation,[23] except for hydroelectric facilities located on federally navigable waters.[24] Separate federal, state and local authorities overlap, sometimes preempt, and integrate.

This integration and overlap is legally complex because the Federal Power Act[25] alters the legal treatment of electricity, rendering it unique compared to everything else regulated. At the federal level, FERC has promoted competition in the operation of regulated energy markets for a quarter century.[26] Some states do not want competition with established in-state incumbent companies, even if limited to moving new renewable wind and

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[18] Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 205 (1983); *see* Frost v. Corp. Comm'n of Okla., 278 U.S. 515, 534 (1929) ("The federal constitution imposes no limits on the state's discretion" in giving a franchise to operate a public utility).

[19] *See infra* Section III A.

[20] ENVIRONMENTAL LAW, *supra* note 3, at 488.

[21] FERREY, Law of INDEPENDENT POWER, *supra* note 9, at § 5:10; ENVIRONMENTAL LAW, *supra* note 3, at 586; FERREY, THE NEW RULES, supra note 5, at 23–24, 46–47.

[22] ENVIRONMENTAL LAW, *supra* note 3, at 168.

[23] *See infra* note 209.

[24] FERREY, LAW OF INDEPENDENT POWER, *supra* note 10, at §§ 5:47–58.

[25] 16 U.S.C. §§ 791–828c.

[26] FERC has for 25 years attempted to mitigate monopoly transmission power by requiring certain elements of more competitive open access transmission service as a condition of merger approval. Utah Power & Light Co., 45 FERC ¶ 61,095 (1988). Investment in the transmission grid has lagged dangerously for decades. *See* David Raskin, *Transmission Policy in Flux*, FORTNIGHTLY MAG., May 2013, http://www.fortnightly.com/fortnightly/2013/05/transmission-policy-flux. In the Energy Policy Act of 2005, Congress gave additional tools to FERC, which provided price incentives and these merchant transmission entitlements to promote more investment. *See id.* FERC promulgated Order No. 679, providing transmission pricing incentives in accordance with new Section 219 of the Federal Power Act. *See id.*; *see also* 16 U.S.C. § 824s (2012) ("[T]he Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.").

solar energy to consumers.[27] Several states are insisting on enforcing state rights of first refusal (ROFRs) for existing in-state utility transmission monopolies to commandeer any competitive electric power transmission proposals.[28]

Most states chose to give their monopoly utilities the power of eminent domain to build power generation technologies and construct transmission and distribution lines. Even though the large investor-owned utilities are private companies, their exercise of eminent domain is deemed a public purpose: These wires are necessary to deliver electricity until "wireless" electricity is invented.[29]

However, recently, the structure of how and who accomplishes these essential functions has changed fundamentally. Several states have taken their regulated utilities out of the business of generating power, in favor of purchasing it wholesale in the states' new deregulated market.[30] This began to change with the enactment of the Public Utility Regulatory Policies Act of 1978.[31] Beginning in 1997 in Massachusetts, Rhode Island, and then spreading to thirteen states (see Figure 1), competition and partial deregulation of retail power was adopted at the state level.[32]

In a significant number of these thirteen states, this resulted in the regulated monopoly utilities divesting their generation units to independent power companies.[33] Now, each year for more than a decade, more new power generation is constructed each year by independent power companies than by the regulated utilities.[34] And this trend is expected to continue with more distributed generation, including solar rooftop facilities, continuing to proliferate.[35] Concentrating solar collectors require ten times as much land area, and wind turbines require up to seventy times as much land area, as

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[27] *See* Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 777 (7th Cir. 2013).

[28] *See* Steven Ferrey, *Pentagon Preemption: The 5-Sided Loss of State Energy and Power*, 2014 U. ILL. J. L. TECH. & POL'Y 393, 424–25.

[29] WiTricity, a company in Watertown, Massachusetts, claimed that it has invented wireless electricity. *See Technology*, WITRICITY.COM, http://witricity.com/technology (last visited Sept. 25, 2016). However, its application to date has been extremely limited and unsuited to the mass distribution of electricity. *See Applications*, WITRICITY.COM, http://witricity.com/applications (last visited Sept. 25, 2016).

[30] FERREY, THE NEW RULES, *supra* note 5, at 238–239.

[31] Pub. L. No. 95-617, 92 Stat. 3117; *see* FERREY, LAW OF INDEPENDENT POWER, *supra* note 10, at chapter 4.

[32] FERREY, THE NEW RULES, *supra* note 5, at 234–239.

[33] *Id.* at 238–39.

[34] *See Wind Energy Facts at a Glance*, AM. WIND ENERGY ASS'N, www.awea.org/Resources/Content.aspx?ItemNumber=5059; *Today In Energy*, U.S. ENERGY INFO. ADMIN. (March 10, 2015), www.eia.gov/todayinenergy/detail.cfm?id=20292.

[35] *U.S. Solar Market Insight*, SOLAR ENERGY INDUS. ASS'N, http://www.seia.org/research-resources/us-solar-market-insight (last visited Sept. 25, 2016).

does a typical fossil-fuel-fired power plant of similar output.[36] This is because solar technology is less efficient in generating electricity[37] than more concentrated fossil-fuel technologies.[38]

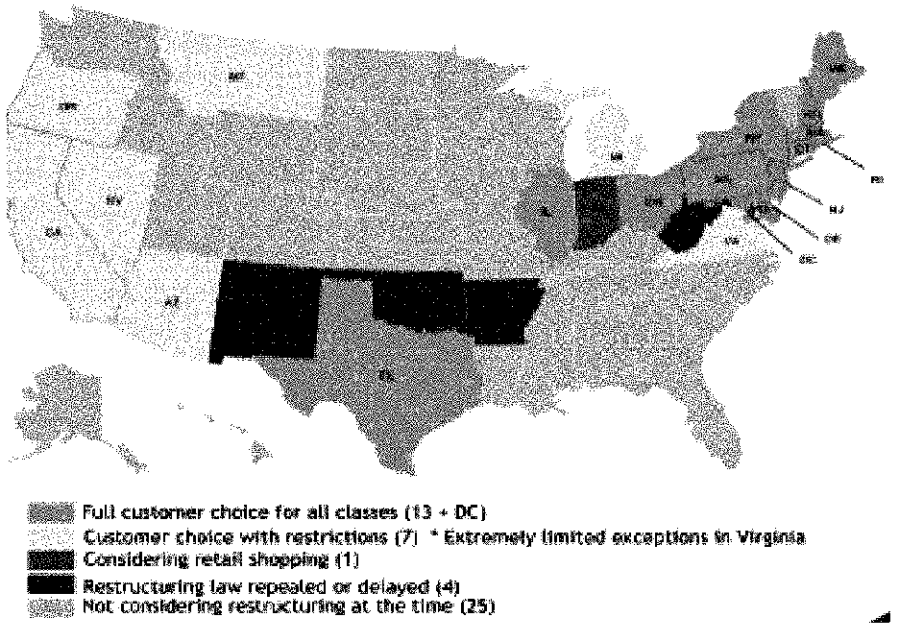

Figure 1: Retail Electricity Markets

And use of local land for power production is traditionally is subject to local 'police power' and land-use considerations.[39] There is no power that is more local than the police power, which includes land use. Local communities have always been the primary wielders of the police power to regulate what gets sited where.[40] The move to more renewable energy in America, *ceteris paribus,* will involve more land, traditionally regulated by local police power.

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[36] Robert Glennon & Andrew M. Reeves, *Solar Energy's Cloudy Future*, 1 ARIZ. J. ENVTL. L. & POL'Y 91, 105 (2010).

[37] *Id.* at 127, n.248 (quoting U.S. ENERGY INFO. ADMIN., ELECTRIC POWER ANNUAL 2008 Table ES1 (Jan. 2010), showing less than 20% efficiency of installed solar capacity).

[38] *Id.* at 101, n.64 (citing U.S. DEP'T OF ENERGY, CONCENTRATING SOLAR POWER COMMERCIAL APPLICATION STUDY: REDUCING WATER CONSUMPTION OF CONCENTRATING SOLAR POWER ELECTRICITY GENERATION 11–12 (2006)).

[39] *See infra* Section IV.A.

[40] ENVIRONMENTAL LAW, *supra* note 3, at 488.

B. Why Power is Different Than Everything

Electricity is a unique form of energy—with no substitutes or alternatives to its use in the twenty-first century for operation of computers, the Internet, medical imaging, national defense and security, modern communication, and building size and climate control.[41] Electric energy is the fundamental technology essential to power the developed American economy.[42] Power moves according to Kirchoff's Law[43] almost at the speed of light on one interconnected energized grid, to which people can connect.[44] The electric power grid must constantly balance supply and demand to keep the grid operational.[45]

Electricity and the legal stresses on the electric transmission system are distinctive. Unlike all other forms of energy, moving electrons cannot be efficiently stored as electricity for more than a second before the energy is lost as waste heat.[46] Therefore, the supply of electricity must match the demand for electricity over the centralized utility grid on an instantaneous, constant, real-time, and ongoing basis, or else the electric system shuts down.[47] Either too much or too little power causes system instability on a second-by-second basis.[48] A loss of power would disrupt communication and transportation, heating and water supply, and hospitals and emergency rooms, depending on their amount of back-up generation.[49] A constant simultaneous balancing of supply and demand on the utility grid system is essential.[50]

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[41] *See* FERREY, LAW OF INDEPENDENT POWER, *supra* note 10, at §§ 2:1–2 (outlining the use of energy and electricity as the force elevating industry and commerce).

[42] MICHAEL BRUCH ET AL., POWER BLACKOUT RISKS: RISK MANAGEMENT OPTIONS § 1 (2012), http://www.thecroforum.org/wp-content/uploads/2011/11/CRO-Position-Paper-Power-Blackout-Risks-.pdf [hereinafter POWER BLACKOUT RISKS].

[43] This law is also called Kirchhoff's first law, Kirchhoff's point rule, Kirchhoff's junction rule, and Kirchhoff's first rule. The principle of conservation of electric charge that at any point in an electrical circuit where charge density is not changing in time, the sum of currents flowing towards that point is equal to the sum of currents flowing away from that point. *See* E. J. Mastascusa, *Kirchoff's Voltage Law*, BUCKNELL UNIVERSITY (July 17, 2003), http://www.facstaff.bucknell.edu/mastascu/elessonshtml/basic/basic5kv.html.

[44] *See* Steven Ferrey, *Inverting Choice of Law in the Wired Universe: Thermodynamics, Mass and Energy*, 45 WM. & MARY L. REV. 1839 (2004) [hereinafter Ferrey, *Inverting Choice of Law*].

[45] ENVIRONMENTAL LAW, *supra* note 3, at 568.

[46] *Id.*

[47] *Id.*

[48] POWER BLACKOUT RISKS, *supra* note 42, § 3.1.2.

[49] *Id.* § 4.1.

[50] *See generally Demanding Times*, UTIL. WEEKLY, Sept. 19, 2008 (discussing challenges of balancing supply and demand within energy grid).

Since power is only usable when delivered to users over a wire network, this movement and transmission of power is the key component.[51] It is not the copper molecule electrons, but the movement of these electrons, which creates and delivers electric power.[52] The charge is never consumed nor created.[53]

The high-voltage transmission network was recognized by engineers as the most important engineering feat of the 20th century.[54] A study by the U.S. Department of Energy forecasts that 39,000 miles of additional high-voltage transmission circuits will be constructed within the current decade before 2020.[55] Annual utility investment in transmission was $6 billion in 1980, declined to $3 billion annually in the late 1990s, and rose to about $8 billion by 2007.[56] One study estimates that it may take as much as $1.5 trillion to update the grid by 2030.[57] By any measure, this is a large construction project at large cost.

New transmission to strengthen the grid and for renewable power deployment could cost $100 billion.[58] The Joint Coordinated System Plan, a study commissioned by several power pools and independent system operators of transmission capacity, predicted that a 5% wind generation component by 2024 could require the construction of roughly 10,000 miles of additional high-voltage transmission lines at an estimated cost $50 billion. A more aggressive 20% wind penetration target could require the

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[51] Self-generated distributed power does not require connection to the integrated network. *See* Steven Ferrey, *Exit Strategy: State Legal Discretion to Environmentally Sculpt the Deregulating Electric Environment*, 26 HARV. ENVTL. L. REV. 109 (2002) (discussing distributed generation options).

[52] Ferrey, *Inverting Choice of Law*, *supra* note 44, at 1911.

[53] NASA Glenn Research Center, *First Law of Thermodynamics*, NASA (Nancy Hall, ed., May 5, 2015), http://www.grc.nasa.gov/www/k-12/airplane/thermo1.html (explaining that the first law of thermodynamics is that energy is neither created nor destroyed).

[54] MASON WILLRICH, ELECTRICITY TRANSMISSION POLICY FOR AMERICA: ENABLING A SMART GRID, END TO END 5 (July 2009), http://www.cleanlineenergy.com/sites/cleanline/media/resources/Electricity%20Transmission%20Policy%20for%20America-%20Enabling%20a%20Smart%20Grid,%20End-to-End%20.pdf.

[55] N. AM. ELEC. RELIABILITY CORP., 2010 LONG-TERM RELIABILITY ASSESSMENT 23 (2010), http://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/2010_LTRA_v2-.pdf.

[56] *See generally* JJ DOOLEY, ENERGY R&D IN THE UNITED STATES (1999), www.pnl.gov/main/publications/external/technical_reports/PNNL-12188.pdf.

[57] U.S. DEP'T OF ENERGY, SMART GRID SYSTEM REPORT 49 (2009), http://energy.gov/sites/prod/files/2009%20Smart%20Grid%20System%20Report.pdf (citing MARC W. CHUPKA ET. AL., THE BRATTLE GRP., TRANSFORMING AMERICA'S POWER INDUSTRY: THE INVESTMENT CHALLENGE 2010–2030 (2008), http://www.edisonfoundation.net/iei/Documents/Transforming_Americas_Power_Industry.pdf).

[58] *See* Rebecca Smith, *New Grid for Renewable Energy Could Be Costly*, WALL ST. J. (Feb. 9, 2009), http://www.wsj.com/articles/SB123414242155761829.

construction of 15,000 miles of additional high-voltage transmission lines at a cost of approximately $80 billion.[59]

With a delivered value in the U.S. of approximately $390 billion annually,[60] exceeding the total amount of corporate income taxes collected in the U.S.,[61] electricity is critical. We next enter this electric legal synapse of the U.S. economy.

III. OVERLAPPING SYNAPSES OF GOVERNMENT

Energy facility siting is jurisdictionally vested in the states plus four territories, rather than the federal government, all operating under their own very divergent laws. And in some of these states,[62] states cede this authority to localities by asserting no separate state siting authority in addition to variant municipal land-use restrictions. Which states regulate power siting and how do they differ?

A. State Versus Local Government Regulation of Power-Related Siting of Facilities

Every state which has investor-owned public utilities which it regulates (all states except Nebraska), regulates them through its public utilities commission (PUC).[63] PUCs are designed to protect rate-payers by regulating monopoly investor-owned utilities, to control costs and ensure the reliability of electricity service.[64] PUCs exercise different authority under disparate state law in different states.[65]

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[59] Matthew L. Wald et al., *The Blackout: What Went Wrong; Experts Asking Why Problems Spread So Far*, N.Y. TIMES, Aug. 16, 2003, at A1 (examining cause of 2003 blackout across northeastern United States).

[60] *See* PUBLIC POLICY INSTITUTE OF NEW YORK STATE, INC., *Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State, Year-to-Date through February 2011 and 2010* (Apr. 30, 2015), http://ppinys.org/reports/jtf/2011/employ/average-retail-price-of-electricity2010-11.htm (last visited Oct. 28, 2016).

[61] Urban Institute & Brookings Institution, *Historical Amount of Revenue by Source*, TAX POLICY CENTER (Feb. 4, 2015), http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=203 (last visited Oct. 26, 2016).

[62] *See infra* Section II.A.1.

[63] Nebraska has no private utilities, and is the only state without a PUC. Different states have different names for this agency in their states. *See* NEB. POWER REV. BOARD, HISTORICAL PERSPECTIVE, *in* NEBRASKA POWER REVIEW BOARD ORIENTATION MANUAL, http://www.powerreviewboard.nebraska.gov/prbmanual/2.html (last visited Oct. 26, 2016).

[64] *See* Jonas J. Monast & Sarah K. Adair, *A Triple Bottom Line for Electric Utility Regulation: Aligning State-Level Energy, Environmental, and Consumer Protection Goals*, 38 COLUM. J. ENVTL. L. 1, 11 (2013) (tracing history of Public Utilities Commissions).

[65] *See id.* at 12–13.

A group of states has a common unique legal structure in which the state plays no role in the siting process for independent merchant, or investor-owned utility, projects. In these states, either no single state agency is primary responsible for siting or any exiting agencies have no siting jurisdiction. In twenty-two states, there is no state energy siting permit required, apart from separate state environmental regulation, required for new power generation facilities. In the other twenty-eight states, they do separately regulate power facility siting at the state level include: Arizona, California, Connecticut, District of Columbia, Florida, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Vermont, Virginia, Wisconsin, and Washington.

Fifteen of these twenty-eight states have a separate and single-purpose specific energy facility siting authority legally apart from the PUC that regulates retail energy transactions in the state: Arizona, California, Connecticut, Florida, Maine, Massachusetts, Nebraska, Kentucky, New Hampshire, New York, Ohio, Oregon, Rhode Island, Washington, and Wyoming.[66]

Those states which separately regulate energy facilities do not regulate all power facilities. Many impose facility size thresholds. Pursuant to the Energy Policy Act of 1992, there was created a new class of independent power generators not primarily owned by regulated utilities—Exempt Wholesale Generators.[67] When examined, there is an ascending staircase of size thresholds necessary to trigger state regulation of utility or Independent Power Producer power generation facilities:

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[66] NAT'L ASS'N OF REG. UTIL. COMM'RS, WIND ENERGY & WIND PARK SITING AND ZONING BEST PRACTICES AND GUIDANCE FOR STATES 13 (2012), http://www.occeweb.com/pu/NOI2014-232/NARUCWindEnergy%26WindParkSiting.pdf.

[67] FERREY, THE NEW RULES, *supra* note 5, at 64. The exempt wholesale power generator status was to promote the development of independent power by independent power producers that do not qualify as a qualified facility. *Id.* at 67. A qualifying facility (QF) is an independent power supplier established under Public Utility Regulatory Policies Act (PURPA) that sells electric output to the local utility at the utilities cost, but the QF must meet specific ownership, generation size and efficiency standards, and other criteria regulated by FERC. *Id.* at 417.

- Iowa,[68] New York, [69] Oregon,[70] and Washington[71] require commission approval and certification for electric generation plants with a generation capacity capable of producing 25 megawatts (MW) or more of power output.
- One step up, the New Hampshire Site Evaluation Committee (SEC) has jurisdiction over facilitates that could produce more than 30 MW.[72]
- Minnesota, [73] Montana, [74] North Dakota[75] and Ohio[76] require plants capable of producing an output capacity of 50 MW or more to obtain approval and certification.

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[68] *See* IOWA CODE § 476A.2 (2012). In Iowa a developer cannot begin construction of a project that will produce 25 MW or more of electricity within obtaining a Certificate of Public Convenience, Use, and Necessity from the Iowa Utility Board. *See id.*

[69] *See* N.Y. PUB. SERV. LAW § 162 (2011); PATRICIA E. SALKIN, 2 N.Y. ZONING LAW & PRAC. § 11:23.10 (4th ed. 2015). The New York Power Plant Act of 2011 created the Multi-Agency Siting Board (Siting Board). *Id.* The Siting Board established a streamlined permitting process for all electric generation facilities with the capability of producing 25 MW or more of power. *Id.*

[70] *See* OR. REV. STAT. § 469.300 (2015) (defining terms). If a thermal or combustion power electric power plant has a normal generation capacity of 25 MW or if geothermal, solar, or wind energy plant has a normal generation capacity of 35 MW then the developer of such a plant must apply for a site certificate. *See id.* Smaller plants may also require a certificate if its accumulated effects of development are similar to a single plant with an average electric generation capacity of 35 MW or more. *See id.*

[71] *See Comparison of Energy Facility Siting Requirements*, OREGON.GOV, http://www.oregon.gov/energy/Siting/Pages/compare.aspx (last visited Sept. 25, 2016) (comparing consolidated review process in Oregon, Washington, Montana, and California). Washington's Energy Facility Site Evaluation Council makes siting decisions, and has jurisdiction covers power plants 250 MW and greater, and facilities able to receive greater than 50,000 barrels or process greater than 25,000 barrels per day of crude or refined petroleum. *See id.*

[72] N.H. REV. STAT. ANN. §§ 162-H:2(VII)(a)–(g) (defining an "energy facility" subject to regulation by N.H. REV. STAT. ANN. §162-H:4).

[73] MINN. STAT. §§ 216B.2421(2)(1)–(9) (2015) (defining what size power plants and transmission lines with be subject to this process). No person in Minnesota seeking to build a plant producing over 50 MW or lines over 200 kV can begin construction without first filing an application with the Minnesota Public Utilities Commission to obtain a Certificate of Need and a siting permit. *See id.*

[74] *See Comparison of Energy Facility Siting Requirements*, OREGON.GOV, http://www.oregon.gov/energy/Siting/Pages/compare.aspx (last visited Sept. 25, 2016). Montana's Natural Resources Board has jurisdiction over power plants of 50 MW and up, any in-sit coal gas facility, energy conversion facility, uranium mines, gas pipelines, and any geothermal developments in excess of $750,000. *See id.*

[75] N.D. CENT. CODE § 49-22-03(5)(b) (2015) (defining an energy conversion facility as a facility that can produce 50 MW or more of power).

[76] OHIO REV. CODE ANN. § 4906.04 (2015) ("No person shall commence to construct a major utility facility in this state without first having obtained a certificate for the facility.");

- Maryland [77] and Nevada[78] draw the pre-construction permit line at 70 MW.
- Florida[79] requires pre-construction permits for new electric generation facilities capable of producing 75 MW or more, as does Rhode Island[80] and on alterations that will have a major impact on the environment, public health, or safety.[81]
- Arizona,[82] California,[83] Massachusetts,[84] South Dakota,[85] and Wisconsin[86] require a certification process for all plants over 100 MW.

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see id. § 4906.01 (defining a major plant as one that has the capacity to produce 50 MW or more.)

[77] MD. CODE ANN., PUB. UTIL. § 7-207.1 (LexisNexis 2016); MD. CODE REGS. 03 (2015) (exempting plants that do not meet definition listed in MD. CODE ANN., PUB. UTIL. § 7-207.1). Maryland plants capable of producing over 70 MW must obtain a Certificate of Public Convenience and Necessity from the Maryland Public Service Commission. *See id.* § 7-207.1(a)(1)(i)(1).

[78] NEV. REV. STAT. § 704.860(1) (2009) (exempting projects under 70 MW gross nameplate rating).

[79] *See* FLA. STAT. § 403.506(1) (2015). Only power plants that produce more than "75 megawatts in gross capacity are regulated." *See id.*

[80] 42 R.I. GEN. LAWS §42-98-3(d) (defining major energy facility as capable of operating at 40 MW or more).

[81] *Id.*

[82] ARIZ. REV. STAT. § 40-360(9) (2015) (defining a plant as a separate thermal electric, nuclear or hydroelectric generating unit with a nameplate rating of 100 MW or more). In Arizona, prior to construction plants must obtain a Certificate of Environmental Compatibility from the Arizona Corporation Commission. *Id.* § 40-360.03.

[83] *See* Eric Garofano, Note, *Losing Power: Siting Power Plants in New York State*, 4 ALB. GOV'T L. REV. 744 (2011); *see also* CAL. PUB. RES. CODE § 25541 (West 2016) ("The Commission may exempt from this chapter thermal power plants with a generating capacity of up to 100 MW and modifications to existing generating facilities that do not add capacity in excess of 100 MW, if the Commission finds that no substantial adverse impact on the environment or energy resources will result from the construction or operation of the proposed facility or from the modifications.")

[84] *See* MASS. GEN. LAWS ch. 164, § 69J (2016). The Massachusetts Energy Facilities Siting Board has jurisdiction over proposed power plants capable of operating at a gross capacity of 100 MW or more and new electric transmission lines having a design rating of 69 kilovolts and with one mile or more in length. *See id.*

[85] S.D. CODIFIED LAWS § 49-41B-2(6). South Dakota requires new conversion, AC/DC conversion, wind energy and electric transmission facilities to notify the Public Utilities Commission for a certificate that deals with location, construction and operation. *See id.* § 49-41B-2(7). A conversation facility is defined as a generation facility designed for or capable of generating 100 MW or more of electricity. *See id.* § 49-41B-2(6).

[86] *See* WIS. STAT. § 196.491(3) (2015) (requiring plants with the capacity of 100 MW or more to obtain a Certificate of Public Convenience and Necessity (CPCN) from the Public Service Commission of Wisconsin); *see also* PUB. SERV. COMM. OF WIS., APPLICATION FILING REQUIREMENTS ELECTRIC GENERATION PROJECTS IN WISCONSIN (2015),

- New Mexico[87] and North Carolina[88] have by far the highest threshold requiring 300 MW of facility power generation capacity and sale of the output to the public as prerequisites for state siting approval.

Each state which exercises authority considers different factors in approving power generation equipment siting: Arizona,[89] California,[90]

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https://psc.wi.gov/utilityinfo/electric/construction/documents/powerPlantAFR.pdf (informing those attempting to apply for a certificate of their obligations).

[87] *See* N.M. STAT. ANN. §§ 62-9-3(G), 62-9-3(A) ("The legislature finds that it is in the public interest to consider any adverse effect upon the environment and upon the quality of life of the people of the state that may occur due to plants.")

[88] N.C. GEN. STAT. § 62-110.1(a) (requiring certificate for any person generating utility sold to the general public); *see* 4 N.C. ADMIN. CODE 11.R8-61 (2015) (clarifying plants that produce over 300 MW or are included in the rate base are subject to greater scrutiny), 11.R8-63 (noting section only applies to merchant produces). Rule 11.R8-63 defines merchant producers as "electric generating facility, other than one that qualifies for and seeks the benefits of 16 U.S.C.A 824a-3 or G.S. 62-156, the output of which will be sold exclusively at wholesale and the construction cost of which does not qualify for inclusion in, and would not be considered in a future determination of, the rate base of a public utility pursuant to G.S. 62-133." *Id.* Rule 11.R8-63.

[89] *See* ARIZ. REV. STAT. § 40-360.06(A) (2015); *see also* Ariz. Power Plant and Transmission Line Siting Comm., *Frequently Asked Questions*, ARIZ. CORP. COMM., http://www.azcc.gov/divisions/utilities/electric/linesiting-faqs.asp (last visited Sept. 25, 2016).

[90] *See* CAL. ENERGY COMM'N, PUBLIC PARTICIPATION IN THE SITTING PROCESS: PRACTICE AND PROCEDURE GUIDE 121 (2006); CAL. CODE REGS. tit. 20, § 1745.5(b)(1) (2015) (dictating decision be based exclusively on evidentiary record from hearing). After an initial Application for Certification hearing, the Presiding Member of the two-person Committee prepares a proposed decision based upon the evidence presented at the hearings. CAL. CODE REGS. tit. 20, § 1745.5(a). The Members' proposed decision follows a rigid format in which each proposal includes an outline of the evidence relevant to that issue, considers the Energy Commission and public comments, states the factual findings and conclusion of the Committee, and lists the conditions of certification and verification. *Id.* § 1745.5(b).

Connecticut,[91] Florida,[92] Iowa,[93] Kentucky,[94] Maine,[95] Maryland,[96] Massachusetts,[97] Minnesota,[98] Montana,[99] Nebraska, [100] Nevada,[101] New

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[91] *See* CONN. GEN. STAT. ANN. §§ 16-50P(a)–(b).

[92] *See* FLA. STAT. § 403.509(3)(a)–(g) (2015). All hearings are held before an administrative law judge who creates recommendations which are approved or rejected by the FDEP. The final step in certification is approval by the Governor and those sitting on the siting board. *See id.* §§ 403.5065; 403.508(b)-(d).

[93] *See* IOWA CODE § 476A.6 (2015).

[94] *See* KY. REV. STAT. ANN. § 278.020(1) (LexisNexis 2016)

[95] Mark E. Bergeron, Director of Land and Resource Regulation, Me. Dep't of Envtl. Prot., Presentation to the Vermont Energy Generation Siting Policy Commission: An Introduction to Maine's Energy Siting Considerations (Dec. 19, 2012), http://sitingcommission.vermont.gov/sites/cep/files/Siting_Commission/Publications/Meeting121912/ME_Bergeron_121912.pdf; *see also* Maine Dep't of Envtl. Prot., *Site Location of Development Permit Application* (Sept. 9, 2013), https://www1.maine.gov/dep/land/sitelaw/application_text.pdf (describing permit application process, including sample application and certification forms).

[96] *See* MD. CODE ANN., PUB. UTIL. § 7-207.1(d) (LexisNexis 2016).

[97] *See* MASS GEN. LAWS ch. 164 § 69J¼. This finding does not require a determination of need. *See id.*

[98] *See* MINN. STAT. § 216E.03(7) (2015).

[99] *See* MONT. CODE. ANN. § 75-20-301 (2015).

[100] *See* NEB. REV. STAT. §§ 70-1014(1)–(2) (2015).

[101] *See* NEV. REV. STAT. § 704.890(1) (2009).

Hampshire,[102] New York,[103] Ohio,[104] Oregon,[105] Rhode Island,[106] South Dakota,[107] Vermont,[108] and Washington,[109] Wisconsin.[110]

B. Preemption of Power at The State Level

One way to facilitate the energy siting process is when some states consolidate the new facility siting process and provide a one-stop permit at the state level incorporating all state and local permits to flow through one integrated certification process. States typically may utilize eminent domain power to obtain property necessary for the production and distribution of electric power.[111] Most of these consolidated permit states require that the facility meet local land-use or zoning regulations, but within the state facility siting process there is an opportunity to preempt certain, but not other, of the local regulations. Those states with some state preemptive authority of local regulation include twenty of the twenty-eight states that

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[102] *See* N.H. REV. STAT. § 162-H:16 (2015). The committee, in connection with the Counsel for the Public, may request any information or studies it needs to make an informed decision; the applicant must pay all reasonable costs. *See id.* § 162-H:10(V). All proceedings and deliberations on these matters are open to the public. *See id.*§ 162-H:10(I).

[103] *See* N.Y. PUB. SERV. LAW §§ 168(2), (4) (2011).

[104] *See* OHIO REV. CODE ANN. §§ 4906.10(A)(1)–(8) (LexisNexis 2016).

[105] *See* OR. ADMIN. R. 345-022-0000 (2015) (offering general standard of review); *see also ODOE: Energy Facility Siting*, OREGON.GOV, http://www.oregon.gov/energy/siting/pages/standards.aspx (last visited Sept. 25, 2016) (listing fundamental questions needing to be answered).

[106] *See* 53-3 R.I. CODE R. § 1.13(c)(1) (2015). The Public Utilities Commission holds separate hearings to determine need. *See id.* Final decisions from the Siting Board are released at least 120 days after the application is filed. *See id.* §§ 1.13(a) (2015).

[107] *See* S.D. CODIFIED LAWS §§ 49-41B-7(1)-(10) (2015). Within one year after the application is submitted, the Commission must render a decision. S.D. CODIFIED LAWS § 49-41B-24.

[108] *See* VT. STAT. ANN. tit. 30, § 248 (2016); Vt. Pub. Serv. Bd., *Guide to Filing Section 248 Petitions*, STATE OF VERMONT, http://psb.vermont.gov/statutesrulesandguidelines/guidelines/GuidetoFiling248Petition (last visited Sept. 25, 2016). There is no specific timeframe for state Commission decisions.

[109] *See* Energy Facility Site Eval. Council, *Siting Review Process,* ACCESS WASHINGTON, http://www.efsec.wa.gov/cert.shtml#6 (last visited May 6, 2015).

[110] *See* WIS. STAT. § 196.491(3)(d) (noting that Commission shall hold public hearing).

[111] 26 AM. JUR. 2D *Eminent Domain* § 79 (2001). Eminent domain can be exercised to provide property for the generator of electric power or an intermediate company that distributes power. *Id.* Where the use is public, such a taking is allowed. *Id.*

exercise siting jurisdiction: Arizona,[112] California,[113] Connecticut,[114] Florida,[115] Iowa,[116] Kentucky,[117] Maine,[118] Maryland,[119] Massachusetts,[120] Minnesota,[121] Montana,[122] New Hampshire,[123] New Mexico,[124] New York,[125]

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[112] *See* ARIZ. REV. STAT. § 40-360.05 (allowing "[E]ach county and municipal government and state agency interested in the proposed site" to become a party to the certification proceedings at the state, rather than local, level.).

[113] *See* Garofano, *supra* n.83, at 744. See also CAL. PUB. RES. CODE § 25500 (2016), which provides:

In accordance with the provisions of this division, the commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law. After the effective date of this division, no construction of any facility or modification of any existing facility shall be commenced without first obtaining certification for any such site and related facility by the commission, as prescribed in this division.

[114] *See* CONN. GEN. STAT. §§ 16-50X, 16-243 (2015).

[115] *See* FLA. STAT. §§ 403.502, 403.506, and 403.508(f) (2015).

[116] IOWA CODE § 476A.5 (2015) ("City and county zoning authorities designated as parties to the proceeding may appear on record to contest whether the facility meets city, county and airport zoning requirements. The failure of a facility to meet zoning . . . shall not preclude the board from issuing the certificate and to that extent the provisions. . . .").

[117] *See* KY. REV. STAT. §§ 278.704(1), (3) (2015). The Siting Board has specific set-back regulations dictating how close a turbine or exhaust stack can be built to specific buildings or adjacent property. *See id.* § 278.704(2) . No exhaust stack or wind turbine must be built at least one thousand feet from the property boundary, and two thousand feet from any residential neighborhood, school, hospital, or nursing home. *See id.*

[118] *See* ME. STAT. tit. 12, § 685 (2015).

[119] *See* MD. CODE REGS. 20.79.01.04 (2013).

[120] *See* MASS. GEN. LAWS. ch. 164, §69K (2015).

[121] *See* MINN. STAT. §§ 216E.03(1), 216E.05(1), 216E.10 (2015).

[122] *See* MONT CODE ANN. §§ 75-20-103, 75-20-401 (2015).

[123] *See* N.H. REV. STAT. ANN. § 162-H:1 (2015).

[124] *See* N.M. STAT. ANN. §62-9-3(G) (2015).

[125] *See* N.Y. PUB. SERV. LAW § 168(e) (2011). The Board will offer the local government an opportunity to present evidence in support of the local law, but if the municipality fails to file a notice of interest at the appropriate time in the proceeding, it is barred from all enforcement authority. *Id.* Municipalities also nominate two *ad hoc* members of the siting board and have access to money provided by the applicant for public participation. *Id.*

Ohio,[126] Oregon,[127] Rhode Island,[128] South Dakota,[129] Vermont,[130] and Washington.[131]

Three other states require compliance with local regulations, however, even in these states, local laws can be preempted under limited special circumstances: New Jersey,[132] Nevada, [133] and Wisconsin.[134] Five of the twenty-eight states with state siting statutes retain the necessity of power facility applicants to obtain all local land-use and environmental authority in their siting processes. They do this either by requiring all local permits to be obtained as a prerequisite for state siting approval, or by not preempting any local permits. In the latter situation, this adds an additional state permit layer without preempting or superseding the required local permits which must be obtained.

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[126] *See* OHIO REV. CODE ANN. § 4906.13(B) (LexisNexis 2016); *see also* Garofano, *supra* note 83, at 745.

[127] *See* Or. Dep't of Energy, *The Siting Process for Energy Facilities* ¶ 2, OREGON.GOV, http://www.oregon.gov/energy/Siting/Pages/process.aspx (last visited Oct. 26, 2016) (describing state certification as a one-stop process). The Council's decision is binding on all state and local entities, but does not constitute a federal-delegated permit. *See id.* ¶ 4; *see also* OR. REV. STAT. §§ 469.320 (2015) (stating that "no facility shall be constructed or expanded unless a site certificate has been issued for the site thereof") and 469.401(3) (noting certificate binds all state entities, counties, and cities to the approval of the site).

[128] *See* 42 R.I. GEN. LAWS ANN. § 42-98-9(a) (2015).

[129] *See* S.D. CODIFIED LAWS § 49-41B-7 (2015).

[130] *See* S. Burlington v. Vermont Elec. Power Co., 344 A.2d 19, 24 (Vt. 1975). In *S. Burlington*, the court held that the Public Service Commission preempted the City's orders, because municipalities should play a secondary role where there is a clash between state control and local control. *Id.* at 24.

[131] *See* WASH. REV. CODE § 80.50.030 (2001) (determining persons to sit on committee). The Council asks potentially impacted cities, towns, and port districts to appoint representatives to the Council. *See id.* EFSEC is comprised of state agency representatives with a public chair. *See id.*

[132] *See* N.J. STAT. ANN. §40:55D-19 (West 2015). If the Board finds that the land "described in the petition is necessary for the service, convenience or welfare of the public[,] . . . the public utility or electric power generator may proceed in accordance with such decision of the Board of Public Utilities, any ordinance or regulation made under the authority of this act notwithstanding." *Id.*

[133] *See* NEV. REV. STAT. § 704.890 (2009).

[134] *See* WIS. DEP'T OF LAND AND NAT. RES., ELECTRIC UTILITY PRE-CPCN APPROVAL AND APPLICATION 2 (Apr. 12, 2004), http://dnr.wi.gov/files/PDF/pubs/wa/WA606.pdf. Sixty days before submitting an application, an applicant must submit a description of their proposed project to the Wisconsin Department of Natural Resources (WDNR). *Id.* WDNR will then provide a list of all set-specific permits required for construction and operation on that site. *Id.* Within twenty days, applicants must apply for these permits, and within 120 days WDNR must decide then whether to issue these environmental permits. *Id.* The Public Service Commission holds public hearings, and prepares an Environmental Impact Statement before it determine whether to approve, reject or modify the plant plants. *Id.*

C. Regulatory Power Extended over Non-Utility "Merchant" Facilities

The majority of new generation facilities is now constructed each year by "merchant" (unregulated) companies, rather than by regulated utilities.[135] In twelve of the twenty-eight states which exercise state level power facility siting, only public utilities are required to obtain a siting certificate before beginning construction on a generation facility.[136] Independent or 'merchant' power generation facilities, which for several successive years have dominated new facility construction in the U.S.,[137] are not covered in those twelve states. These twelve states which exempt from necessary permission independent non-utility facilities include: Alabama,[138] Arkansas,[139]

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[135] ELEC. ENERGY MARKET COMPETITION TASK FORCE, REPORT TO CONGRESS ON WHOLESALE AND RETAIL COMPETITION MARKETS FOR ELECTRIC ENERGY 10 (2007), http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EPAct_sec_1815_rpt_transmittal_letter_-_Epact_sec_1815_rpt_to_Congress.pdf. "In the 1970s, vertically integrated utility companies (investor-owned, municipal, or cooperative utilities) controlled over 95 percent of the electric generation in the United States . . . by 2004 electric utilities owned less than 60 percent of electric generating capacity. Increasingly, decisions affecting retail customers and electricity rates are split among federal, state, and new private, regional entities." AM. BAR ASS'N, THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES 217-18 (Michael B. Gerard, 2011).

[136] *Compare* IND. CODE § 8-1-8.5-7 (2013) (exempting "construction of facilities primarily for that person's own use"), *with* MO. REV. STAT. § 386.020(15) (2015) (noting exemptions including electricity generated for railroads, and private use private land).

[137] *See* ELEC. ENERGY MARKET COMPETITION TASK FORCE, *supra* note 135, at 10.

[138] *See* ALA. CODE § 37-4-2 (2013) (limiting Commission jurisdiction to exclude nonutility generators). The Alabama Public Service Commission has no siting jurisdiction over "wind generation or generation facilitates proposed by non-regulated utilities." NAT'L ASS'N OF REG. UTIL. COMM'RS, *supra* note 66, at A-3 (2012).

[139] *See* ARK. CODE ANN. § 23-3-201 (2014) (noting utilities must obtain certificate stating public convenience and necessity require construction). The Arkansas Commission will not regulate municipally owned utilities, public power agencies, or exempt wholesale generators (Independent Power Producers). *See Electric Section,* ARKANSAS PUBLIC SERVICE COMM'N, http://www.apscservices.info/electric.asp (last visited Oct. 28, 2016).

Colorado,[140] Delaware,[141] Indiana,[142] Idaho,[143] Kansas,[144] Michigan,[145] Mississippi,[146] Missouri,[147] Texas,[148] and Wyoming.[149]

In all of these states, the state commission's approval does not exempt the utility from compliance with local zoning regulations.[150] Some state siting statutes specifically requiring conformity with local regulations include: Arkansas,[151] Colorado,[152] Michigan,[153] Mississippi,[154] Missouri,[155] and

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[140] *See* COLO. REV. STAT. ANN. § 40-5-101 (2015) (certifying public utilities intending to construct a new facility).

[141] *See* DEL. CODE ANN. tit. 26, § 201(a); *see also* DEL CODE ANN. tit. 26, § 203A(a)(3) (allowing construction of facility within existing utility territory without the need of an additional certificate of public convenience and necessity).

[142] *See* IND. CODE ANN. § 8-1-8.5-2 (noting that public utility may not begin construction without certificate).

[143] *See* IDAHO CODE ANN. §§ 61-526, 61-528 (mandating that only regulated utilities seek certificate merchant plants need environmental and local approval).

[144] *See* Edison Electric Inst., Survey of Transmission Siting Practices in the Midwest 47 (2004) [hereinafter EEI].

[145] *See* MICH. COMP. LAWS § 460.502.

[146] *See* MISS. CODE ANN. § 77-3-14(6) (clarifying that electric generation facilities built for person's own use do not require certification).

[147] *See* MO. ANN. STAT. §§ 386.020(15), 393.170 (stating that all electric corporations must obtain a certificate, but defining electric corporations to exclude producers generating electricity for private use on private land).

[148] *See* TEX. UTIL. CODE ANN. § 37.051 (2015). The Texas PUC requires certificates for public utilities to serve areas outside there already allocated service area. Generally siting is a primarily local process. *See* EEI, *supra* note 144, at 117.

[149] *See* WYO. STAT. ANN. §37-2-205 (2016) (requiring Commission certificate for construction of most new lines or plants).

[150] *See, e.g.*, Stopaquila.Org v. Aquila, Inc., 180 S.W.3d 24, 30 (Mo. Ct. App. 2005) (upholding injunction on power plant that violated local zoning rules even though the plant obtained a certificate from the commission).

[151] *See* NAT'L ASS'N OF REG. UTIL. COMM'RS, *supra* note 66, at 33. The primary siting agency is in local municipalities. *See id.*

[152] *See* COLO. REV. STAT. ANN. § 29-20-108(4)(a). A utility must notify a local jurisdiction that they wish to site their plant in the jurisdiction, and the local jurisdiction is required to render a decision based on their local standards within 120 days. *See id.* § 29-20-108(2).

[153] *See* MICH. COMP. LAWS ANN. § 460.503 (requiring applicant to secure consent from municipality before issuance of certificate).

[154] *See* MISS. CODE ANN. § 77-3-19. While Mississippi does not appear to give municipalities the right to prevent construction, the Commission will not grant a certificate unless to a facility that plans to use public roads unless if can prove that it has entered into a franchise agreement with the applicable municipality. *See id.* Nevertheless, if the Commission finds that the franchise agreement was denied arbitrarily, then the Commission can grant a certificate despite the lack of such a franchise agreement. *Id.*

[155] *See Stopaquila.Org*, 180 S.W.3d at 30. In *Stopaquila.Org*, the Missouri Court of Appeals found that an electric utility could not begin construction in violation of local zoning regulations simply because it obtained a Certificate of Convenience from the Commission. *Id.*

Wyoming.[156] Most of these states also require utilities to notify the local jurisdiction before applying for a certificate.[157] Some commissions also require a utility to gain required local approvals before applying for a Certificate of Convenience.[158]

IV. NEW CONTOURS OF EMINENT DOMAIN AND "TAKINGS"

A second mechanism to abet the siting of electric power facilities is to grant power developers the power to exercise eminent domain over land. This allows them to take or use property for their projects and/or interconnection of the facility to the grid.

A. Sovereign Power

The issue of private property being taken by the sovereign dates back to medieval England, when owners of freehold estates sought to protect themselves from having their lands taken by the king. The Fifth Amendment to the Constitution states, "nor shall private property be taken for public use without just compensation."[159] For much of the nineteenth century, this "takings" clause received little attention from the courts and was strictly interpreted when it was invoked. A "taking" was generally found only when the government actually took title to private land via the power of eminent domain. As states expanded their regulation of private land use under the police power in the late 1800s, affected landowners began to invoke the takings clause to challenge these laws.

To contest a potential taking, the injured plaintiff must demonstrate standing, exhaustion of administrative remedies, and ripeness of the action.[160] The "takings clause" was initially interpreted quite narrowly[161] and later was

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at 41. The court stated, "In short, we emphasize we should take cognizance of—and respect—the present municipal zoning and not attempt, under the guise of public convenience and necessity, to ignore or change that zoning." (quoting *In re* Mo. Power & Light Co., 18 Mo. P.S.C. (N.S.) 116, 120 (1973)).

[156] *See* EEI, *supra* note 144, at 8, 139.

[157] *See, e.g.*, ARK. CODE ANN. § 23-18-513 (2014) (requiring publication of notice to jurisdiction prior to application); COLO. REV. STAT. ANN. § 29-20-108(4)(a) (2015) (requiring utilities to notify local jurisdiction in all events before submitting application).

[158] *See, e.g.*, COLO. REV. STAT. ANN. § 29-20-108(4)(a) (requiring applicant to secure consent from municipality before issuance of certificate); MICH. COMP. LAWS ANN. § 460.503 (same).

[159] U.S. CONST. amend. V.

[160] Palazzolo v. Rhode Island, 533 U.S. 606, 618–22 (2001); Williamson Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 192–95 (1985).

[161] *See generally* Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. 166, 177–78 (1871).

more refined in *Lucas v. South Carolina Coastal Council*.[162] The *per se* takings test of the majority receded over time in favor of the balancing test.[163] In *Dolan v. City of Tigard*,[164] the Court held that there must be an essential nexus between the legitimate interests and the permit conditions exacted by the City resulting in a "rough proportionality" between the exactions and the development.[165]

The Supreme Court created a two-part alternative inquiry into whether a zoning regulation creates a regulatory taking.[166] First, the exaction must serve a legitimate governmental interest.[167] There must be an "essential nexus" between the legitimate governmental interest and the exaction imposed on the developer.[168] Second, there must be a "rough proportionality" between the legitimate governmental interest and the exaction imposed on the developer.[169] These tests are in the alternative: If

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In *Pumpelly*, the defendant dammed a river pursuant to a charter from the government of Wisconsin, flooding the plaintiff's land with water. *Id.* at 177. The state tried to claim that no taking had taken place because the plaintiff still owned the flooded land; title had not been taken by the state. *Id.* The Supreme Court found that a physical invasion in the form of the rising river waters was sufficient to constitute a taking requiring payment of compensation. *Id.* at 181.

[162] 505 U.S. 1003 (1992). A "taking" will occur when the owner has been deprived of all economic use of the property or if there is a physical invasion of the property. *Id.* at 1015–16.

[163] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–25 (1978).

[164] 512 U.S. 374 (1994).

[165] *Id.* at 391. The Court found that the city's requirements for a floodplain greenway and bike path were not "roughly proportional" to, nor substantiated as to, Dolan's loss of space in relation to the proposed new larger building. *Id.* at 394–95. These tests are in the alternative: If the exaction fails either, then the exaction is considered an unconstitutional regulatory taking. *Id.* at 395.

[166] *See id.* at 386.

[167] *Id.* at 385 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). Courts usually defer to the municipality's judgment as to whether an objective is legitimate. *See, e.g.*, Folsom Invs., Inc. v. City of Scottsdale, 620 F. Supp. 1372, 1375 (D. Ariz. 1985) (citing Cardon Oil Co. v. City of Phoenix, 593 P.2d 656 (1979); City of Tucson v. Ariz. Mortuary, 272 P. 923 (Ariz. 1928) ("[C]ourts are to interfere only when the ordinance enacted pursuant to the [state's] grant [of authority] is arbitrary and unreasonable"); *cf. In re* Ball Mountain Dam Hydroelectric Project, 576 A.2d 124, 126 (Vt. 1990) (quoting Valcour v. Village of Morrisville, 158 A. 83, 86 (1932)) (construing municipal actions strictly and resolving any doubt concerning the municipality's ability to act against the development).

[168] *See Dolan*, 512 U.S. at 387–88 (1994) (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).

[169] *Id.* at 391; *see, e.g.*, Merelli v. City of St. Clair Shores, 96 N.W.2d 144, 150 (Mich. 1959) (finding that because the increase in building permit fees would generate more revenue than the cost of issuing the permit, the increased fees were invalid).

the exaction fails either, then the exaction is considered an unconstitutional regulatory taking.[170]

In *Kelo v. City of New London*,[171] the Court allowed a municipality to exercise eminent domain power to take private homes and other property in order to develop an office, retail and parking complex that was primarily intended to entice pharmaceutical company Pfizer to locate in the town.[172] The Plaintiffs claimed that because the proposed development was for a use by the private corporation, the city had no public right to take their properties; the city conceded that the property was not in poor condition and urban revitalization was not the purpose.[173] Prior to this decision, the Court had recognized the elimination and redevelopment of blighted neighborhoods as a proper public purpose for the taking of property by a municipality by eminent domain.[174]

In *Kelo* the public purpose, at best, was indirect. A principal motive was to increase tax revenues.[175] The Court rejected plaintiff's literal interpretation of the clause and instead held that "public use" meant "public purpose."[176] The majority found that New London's purpose to re-develop an economically distressed area was constitutionally permissible.[177] Thereafter, mere economic development, which is often influenced and controlled by political factors, is justified as a proper public purpose.[178]

1. *Hardware and law*

There are significant limits to the exercise of any federal jurisdiction over the actual transmission hardware and facilities, although the federal government, through FERC, has clear authority over financial wholesale and interstate transactions carried forward on this hardware.[179] Traditionally, monopoly utilities built electric power transmission and distribution facilities.[180] The Federal Power Act directs FERC to regulate all interstate electricity transmission and to ensure the national electricity grid's reliability.[181] Further, the "Federal Power Act Sections 205 and 206

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[170] *See Dolan*, 512 U.S. at 386.
[171] 545 U.S. 469 (2005).
[172] *Id.* at 484.
[173] *Id.* at 485–86.
[174] *Id.* at 481 (citing Berman v. Parker, 348 U.S. 26, 31, 33, 35 (1954)).
[175] *Id.* at 472.
[176] *Id.* at 480 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–64 (1896)).
[177] *Id.* at 485.
[178] *Id.*
[179] *See* 16 U.S.C. §§ 824(d)–(e).
[180] FERREY, THE NEW RULES, *supra* note 5 at 581.
[181] Federal Power Act § 202; 16 U.S.C. § 824a.

empower FERC exclusively to regulate rates for the interstate wholesale sale of power and transmission of electricity."[182] All transmission tariffs are exclusively within FERC jurisdiction rather than within state jurisdiction.[183]

FERC case law exerts exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and over "all facilities for such transmission or sale of electric energy." The U.S. Supreme Court held that Congress meant to draw a "bright line," easily ascertained and not requiring case-by-case analysis, between state and federal jurisdiction. When a transaction is subject to exclusive FERC jurisdiction and regulation, state regulation is preempted as a matter of federal law and the Constitution's Supremacy Clause, according to a long-standing and consistent line of rulings by the U.S. Supreme Court.[184]

However, FERC does not regulate the construction of transmission facilities themselves, only economic tariffs for transactions moving power over them.[185] This creates an important legal dichotomy.

2. Necessary transmission corridor regulation

There is a multi-year evolution of the federal regulatory history promoting greater competition in electric power transmission. In Order No. 888,[186] the Commission established the foundation for the development of competitive bulk power markets: non-discriminatory open access transmission service by

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[182] Steven Ferrey, *Torquing the Levers of International Power*, 15 WASH. U. GLOBAL STUD. L. REV. 255, 279–80 (2016) (citing 16 U.S.C. §§ 824d–824e; Pub. Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006), *aff'd in part, rev'd in part sub nom.*, Morgan Stanley Capital Grp., Inc. v. Pub. Util Dist. No. 1, 554 U.S. 527 (2008)).

[183] *See* Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842, 49,955 (Aug. 11, 2011) [hereinafter Final Rule], *modified by* 77 Fed. Reg. 64,890 (Oct. 24, 2012) [hereinafter Modified Rule].

[184] Ferrey, *supra* note 182, at 279–80 (footnotes omitted); Steven Ferrey, *Carbon Outlasts the Law: States Walk the Constitutional Line*, 41 B.C. ENVT'L AFF. L. REV. 309, 337–38 (2014) (footnotes omitted); *see also* Steven Ferrey, *Broken at Both Ends: The Need to Reconnect Energy and the Environment*, 65 SYRACUSE L. REV. 53, 78 (2014).

[185] *See* Final Rule, *supra* note 183, at 49,955 (requiring nondiscriminatory access by all parties to transmission infrastructure). This pertains only to Commission-jurisdictional tariffs or agreements and does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements. *See id.* at 49,885 n.231. FERC noted that Order 1000 does not address the prudence of investment decisions nor determine which particular entity should construct any particular transmission facility, but merely to allow more entities to be considered for potential construction responsibility. *Id.* at 49,891.

[186] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (Apr. 24, 1996) (codified at 18 C.F.R. pts 35, 385).

electric utilities.[187] In Order No. 2000,[188] the Commission encouraged the development of Regional Transmission Organizations to form "competitive wholesale electric markets"[189] that had to incorporate non-discriminatory transmission service.[190]

For example, ISO-New England (ISO-NE) is one of several geographic independent system operators operating under FERC jurisdiction to facilitate competition in wholesale trade of electricity.[191] See Figure 2. In 2005, ISO New England began operating as a regional transmission organization, to oversee the daily transmission system needs of existing transmission companies.[192] A regional transmission group is a "voluntary organization of transmission owners, users, and other entities interested in coordinating transmission planning, expansion, operation, and use on a regional or inter-regional basis."[193] In addition to daily oversight of transmission needs, ISO New England determines who pays for regulated transmission projects, and how to allocate the costs of those projects.[194] For a project to qualify for regional cost allocation, the project must "improve reliability throughout the region provide a benefit for all of New England, and their costs shared by the region," where "[a] region's share of the costs is proportionate to its electricity demand."[195]

In Order No. 890,[196] the Commission amended the Order No. 888 pro-forma tariff to require transmission providers to plan for the needs of their customers on a comparable basis to planning for their own needs.[197] Section 216 of the Energy Policy Act of 2005[198] directs the U.S. Department of Energy to study transmission congestion in consultation with the states and

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[187] *See id.* at 21,540.

[188] Regional Transmission Organizations, 65 Fed. Reg. 810 (Dec. 20, 1999) (codified at 18 C.F.R. pt. 35).

[189] Me. Pub. Utils. Comm'n v. FERC, 454 F.3d 278, 280-81 (D.C. Cir. 2006) (citing Regional Transmission Organizations, 65 Fed. Reg. at 825).

[190] *See* Regional Transmission Organizations, 18 C.F.R. § 35.34(k)(7) (2006).

[191] ISO New England, Inc., *Our History*, ISO NEW ENGLAND, http://www.iso-ne.com/about/what-we-do/history (last visited Sept. 25, 2016).

[192] *In Brief ISO New England*, 3705 PUR Util. Regulatory News 8 (2005).

[193] FERREY, THE NEW RULES, *supra* note 5, at 418.

[194] ISO New England, Inc., *Transmission Cost Allocation*, ISO NEW ENGLAND, http://www.iso-ne.com/system-planning/transmission-planning/transmission-cost-allocations (last visited Sept. 25, 2016).

[195] *Id.*

[196] Preventing Undue Discrimination and Preference in Transmission Service, 72 Fed. Reg. 12,266 (Mar. 15, 2007).

[197] N.Y. Reg'l Interconnect, Inc. v. FERC, 634 F.3d 581, 584 (D.C. Cir. 2011) (citing Preventing Undue Discrimination and Preference in Transmission Service, 72 Fed. Reg. at 12,435).

[198] Pub. L. No. 109-58, 119 Stat. 594 (2005).

designate certain transmission-constrained areas as national interest electric transmission corridors (NIETCs).[199] Section 216 grants FERC the authority to issue permits to construct transmission facilities in these NIETCs under certain circumstances.[200]

The federal push for NIETCs under the Energy Policy Act of 2005 confronted multiple states for failure to adequately assess GHG impacts involving National Environmental Policy Act (NEPA),[201] and Endangered Species Act[202] challenges regarding failure to assess greenhouse gas (GHG) impacts.[203] A federal appellate court blocked FERC from acting to

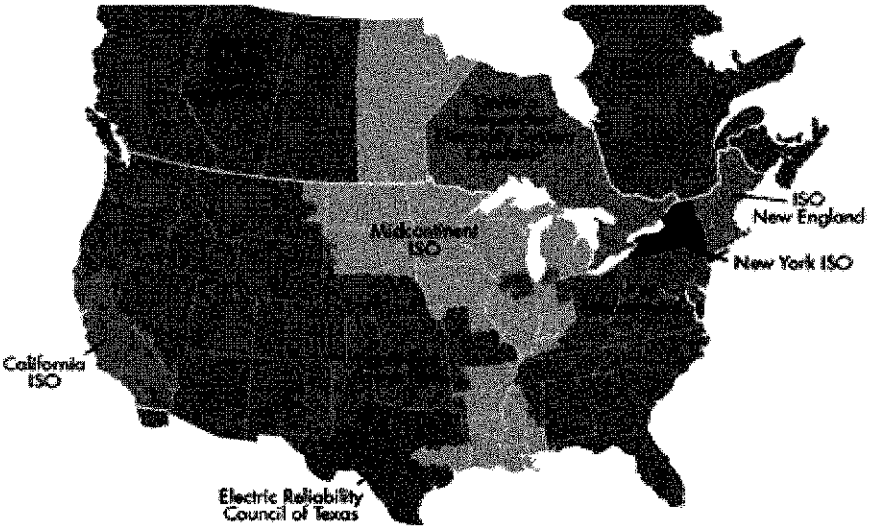

Figure 2: National Independent System Operators

"backstop" and grant a federal permit under Section 216 for a new transmission line, when the state had failed for twelve months to act on the

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[199] *Id.* § 216(a), 16 U.S.C. § 824p(a).

[200] *Id.* § 216(b), 16 U.S.C. § 824p(b). In 2006, FERC issued Order No. 689 that created a cumbersome, multi-year process for obtaining a federal permit to construct transmission within a NIETC. *See* Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440 (Dec. 1, 2006) (codified at 18 C.F.R. pts. 50, 380).

[201] 42 U.S.C. § 4321–4370m-12 (2012).

[202] 16 U.S.C. §§ 1531–1544 (2012).

[203] *See, e.g.*, Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172 (9th Cir. 2008); Mid States Coals. for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003); Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez, 606 F. Supp. 2d 1122 (E.D. Cal. 2008); NRDC v. Kempthorne, 506 F. Supp. 2d 322 (E.D. Cal. 2007); Border Power Working Grp. v. U.S. Dep't of Energy, 260 F. Supp. 2d 997 (S.D. Cal 2003).

permit.[204] As long as the state took some action, including a denial of the permit, FERC's Section 216 authority to intercede was not triggered.

In 2011, the Ninth Circuit ruled that the U.S. Department of Energy (DOE) failed to properly consult with affected states in preparing the Congestion Study required by Section 216, and further ruled that the DOE failed to consider the environmental effects of designating NIETCs under NEPA for corridors in mid-Atlantic and Southwestern states.[205] These opinions effectively eliminated any contingent FERC authority over traditional state decisions to site electric transmission lines.

B. State Rights-of-First-Refusal (ROFRs)

Moving beyond the hardware of transmission to its financial impacts discussed below: Can states require that additional transmission facilities proposed by a competitive entity must be turned over and built by incumbent in-state businesses? Incumbents are typically the traditional utilities.

In the Midwest, a federal circuit court struck a FERC order that would require all RTO members to equally share in the cost of building any large transmission lines, whether or not they benefited from the investment.[206] The court held that local utilities should not have to pay for transmission lines to transport power outside the region which would widely socialize costs to all ratepayers, not just to those that benefited.[207] A state Supreme Court held that no transmission lines could be certified nor any eminent domain for construction of any lines be exercised unless the primary beneficiaries of the line were in-state ratepayers.[208]

1. FERC Order 1000

FERC turned a corner and attempted to regulate *who* is permitted to build new transmission capacity on an equal plane with incumbent utility transmission providers, although FERC still does not regulate the transmission hardware itself. FERC approves all RTO and Independent System Operator (ISO) terms of service and their financial tariffs.[209] FERC

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[204] Piedmont Envtl. Council v. FERC, 558 F.3d 304, 309–10 (4th Cir. 2009).

[205] Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1107 (9th Cir. 2011).

[206] Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 478 (7th Cir. 2009).

[207] *Id.* at 473–74.

[208] Miss. Power & Light Co. v. Conerly, 460 So. 2d 107, 113 (Miss. 1984). Courts in the same state a few years earlier had held that PURPA amendments to the Federal Power Act were an unconstitutional exercise of the Commerce Clause and a violation of the Act. *See* FERC v. Mississippi, 456 U.S. 742 (1982).

[209] FERREY, THE NEW RULES, supra note 5, at 49–50.

Order 1000 introduced competitive bidding into the construction process for transmission facilities.[210] FERC found that Order 1000 reforms were required to reflect new industry developments and "to address remaining deficiencies in transmission planning and cost allocation processes so that the transmission grid can better support wholesale power markets . . . ."[211]

The North American Electric Reliability Corporation concluded that an additional 39,000 circuit miles of new transmission capacity would need to be constructed during the next ten years to maintain long-term reliability of the grid and to integrate intermittent additional renewable power generation.[212] FERC Order 1000 requires incumbent transmission providers, utilities, and the RTOs, which manage regional multi-state transmission access to the grid, to remove rights-of-first-refusal (ROFRs) from FERC-approved transmission tariffs:[213] "[W]e do not believe that [the] obligation [to build] is necessarily dependent on the incumbent transmission provider having a corresponding federal right of first refusal to prevent other entities from constructing and owning new transmission facilities located in that region."[214]

In its Notice of Proposed Rulemaking prior to issuance of its Order 1000, FERC directed public utility transmission providers to "eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation."[215] This was kept intact when the final FERC Order 1000 rule was promulgated,[216] and in the subsequent FERC Orders 1000-A[217] and 1000-B.[218] Failure of RTOs and ISOs to consider and evaluate independent non-incumbent transmission projects could violate the FERC Order 890 planning principle of "openness" in transmission planning.

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[210] *See* Modified Rule, *supra* note 183; Final Rule, *supra* note 183.

[211] Transmission Planning and Cost Allocation, 77 Fed. Reg. at 49,860.

[212] N. AM. ELEC. RELIABILITY CORP., *supra* note 55, at 23.

[213] Final Rule, *supra* note 183, at 49,846. For an excellent treatment of this, see RISHI GARG, WHAT'S BEST FOR THE STATES: A FEDERALLY IMPOSED COMPETITIVE SOLICITATION MODEL OR A PREFERENCE FOR THE INCUMBENT? (NRRI BRIEFING PAPER NO. 13-04) (Apr. 2013).

[214] Final Rule, *supra* note 183, at 49,887.

[215] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 75 Fed. Reg. 37,884, 37,896 (proposed June 30, 2010).

[216] Final Rule, *supra* note 183, at 49,846. Non-incumbent transmission developer rights must be consistent with state or local laws. *Id.* at 49,870 n.155.

[217] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 32,184 (May 17, 2012) [hereinafter Order 1000-A].

[218] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 64,890 (Oct. 18, 2012) [hereinafter Order 1000-B].

FERC Order 1000, as modified, provides that public utility transmission providers in a transmission planning region must adopt a "transparent and not unduly discriminatory evaluation process" and must use the "same process to evaluate a new transmission facility proposed by a nonincumbent transmission developer as it does for a transmission facility proposed by an incumbent transmission developer."[219] As long as they did not contain ROFRs, Order 1000 does not require removal from Commission-jurisdictional tariffs or agreements references to state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.[220] On the ground, despite many competitors making proposals, the state rather than FERC retains the ultimate decision to permit a specific application for transmission facility construction.

If there were a state ROFR provision, the deck would effectively be stacked against non-incumbents, even if the opportunity to compete were theoretically open to them through an RTO-administered competitive project selection process. Order 1000 addresses only the RTO and ISO process and tariff for transmission; the actual physical transmission construction decision is made by the states. States[221] and their localities[222] control a host of necessary land-use, eminent domain, and permit authorizations. Under such direct and indirect state control: "Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."[223]

2. The Federal Circuit Court of Appeals holding

The D.C. Circuit Court of Appeals unanimously rejected challenges to FERC's Order 1000, finding the allegations that Order 1000 would harm

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[219] Order 1000-A, *supra* note 217, at 32,255 (explaining requirements of Order 1000). This statement "does not preclude public utility transmission providers in regional transmission planning processes from taking into consideration the particular strengths of either an incumbent transmission provider or a non-incumbent transmission developer during its evaluation." *Id.* An incumbent transmission provider may have unique knowledge of its own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to funds needed to maintain reliability. *See id.* at 32,244.

[220] Final Rule, *supra* note 183, at 49,885 n.231; Order 1000-A, *supra* note 217, at 32,244.

[221] For discussion of state transmission siting powers, see FERREY, LAW OF INDEPENDENT POWER, *supra* note 10, §§ 6:135.20, 140.

[222] For discussion of local transmission siting powers, see *id.* §§ 6:124–131. For a discussion of eminent domain authority and takings law, see *id.* § 6:131.

[223] Final Rule, *supra* note 183, at 49,885 n.231.

system reliability were "unpersuasive."[224] The court declared that FERC properly addressed reliability concerns by maintaining ROFRs for projects that would be located entirely within a utility's service territory and thus would not be subject to regional cost allocation.[225] The court held that FERC had sufficient authority under the Federal Power Act to require removal of federal ROFR provisions from federally mandated transmission tariffs "upon determining they were unjust and unreasonable practices affecting rates."[226]

States still exercise critical decisions on new transmission infrastructure within their borders. Additionally, states still control, under state authority and municipal land-use law, whether non-utilities have right to eminent domain power for transmission facilities, which can be essential for siting. And, states control whether transmission facilities must be turned over to the incumbent utility for operation after construction. State supreme courts have held that no transmission lines could be certified nor any eminent domain for construction exercised unless the primary beneficiaries of the line were in-state ratepayers.[227]

C. Constitutinal Limits on State "Merchant" Power Siting Control

Both Dormant Commerce Clause and Supremacy Clause issues are in play if states attempt to control "merchant" power facility siting in their states. New Jersey enacted legislation to encourage utility companies to acquire the output of 2000 MW of new in-state power projects.[228] New Jersey imports a substantial amount of its electricity from other states, which requires paying more transmission charges to move the power to New Jersey consumers.[229] New Jersey enacted the Long-Term Capacity Pilot Project Act (LCAPP)—a subsidy program with "contracts for differences."[230] Since the program

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[224] S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 48 (D.C. Cir. 2014).

[225] *Id.*

[226] *Id.* at 48–49.

[227] Miss. Power & Light Co. v. Conerly, 460 So. 2d 107, 112 (Miss. 1984). Courts in the same state a few years earlier had held that PURPA amendments to the Federal Power Act were an unconstitutional exercise of the Commerce Clause and a violation of the Act. *See* FERC v. Mississippi, 456 U.S. 742, 742 (1982).

[228] Steven Ferrey, *The Fifth Dimension: Legal Infrastructure, Cracks, and Governance*, 15 Minn. J. L. Sci. & Tech. 469, 486 n.123 (2014) (citing PJM Interconnection, L.L.C., 135 FERC ¶ 61,022, 61,089, *clarified on reh'g by* 137 FERC ¶ 61,145 (2011)).

[229] *See* L.S. POWER ASSOCS. L.P., COMMENTS ON N.J. ELECTRIC POWER & CAPACITY NEEDS 11–12 (July 2, 2010) [hereinafter L.S. POWER], http://www.state.nj.us/bpu/pdf/energy/LSPower_comments.pdf.

[230] *See* New Jersey Long-Term Capacity Pilot Project Act, 2011 N.J. Laws 9 (codified at N.J. STAT. ANN. §§ 48:3-51, 48:3-98.2–.4). "After conducting a competitive bid process with public utilities, the BPU is directed to enter into standard offer capacity agreements (SOCAs), which are fifteen-year contracts that guarantee the state selected generating companies a fixed

began, 680 MW of additional generation was placed in service in New Jersey.[231]

Mid-Atlantic regional power generators filed a challenge to New Jersey's program, arguing that New Jersey's in-state energy facility location gives preference to new independent "merchant" power generation.[232] The plaintiffs argued that New Jersey's preference for new power generation would result in a change to FERC-approved regional independent system operator procedures of the PJM ISO, which controls all the wholesale power sales and transmission in the thirteen-state North Atlantic region.[233]

In a separate case, *PPL Energyplus, LLC v. Hanna*,[234] two plaintiffs asserted that, under the Supremacy Clause, the New Jersey statute is preempted through field preemption and conflict preemption; a third plaintiff asserted that the New Jersey statute violated the Constitution's (dormant) Commerce Clause.[235] In response, New Jersey responded that the statute is a mere planning measure, with only an incidental effect on FERC

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price for their capacity." Steven Ferrey, *The Double Helix of Supremacy and Commerce Clause Constitutional Restraints Encircling the New Energy Frontier*, 8 NW. INTERDISC. L. REV. 1, 25 n.167 (2014).

[231] L.S. POWER, *supra* note 229, at 8 (citation omitted). Of the 6000 MW retired within the PJM grid since 2002, one-third of these deactivations of power generation facilities have been in New Jersey. *See id.* at 6 (citation omitted).

[232] *See* Complaint and Request for Clarification at 57–64, PJM Power Providers Grp. v. PJM Interconnection, L.L.C., No. EL11-20 (F.E.R.C. Feb. 1, 2011), http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12552322; Ferrey, *supra* note 228, at 486 n.123.

[233] PJM Interconnection, L.L.C., 135 FERC ¶ 61,022 (2011) (accepting proposed tariff revisions). "Power generators in the North Atlantic region filed a complaint at FERC alleging discrimination against New Jersey's statute ordering utilities to sign long-term contracts only with in-state generation facilities that bid to receive regional multi-state PJM ISO capacity payments." Ferrey, *supra* note 230, at 25 n.172 (citing Mary Powers, *PJM Generators File Complaint with FERC Seeking Relief from NJ in-State Generation Law*, ELEC. UTIL. WKLY., Feb. 2, 2011, at 11, 13). In response, FERC in 2011 "amended the PJM ISO rules to prevent New Jersey state law from attempting to encourage construction of in-state power generation by, in part, causing them to bid power into the PJM system at suppressed prices in order to win capacity auctions." Ferrey, *supra* note 228, at 486 n.123 (citing Mary Powers, *Rebuffed by FERC Ruling, N.J. BPU Plans to Look Again at How to Attract New Generation*, ELEC. UTIL. WKLY., May 23, 2011, at 4, 6, http://www.electricdrive.org/sites/testing/index.php ?ht=a/GetDocumentAction/i/22845). Next, a pending lawsuit regarding New Jersey energy regulation by several existing independent power generators asserted that the New Jersey state law is in violation of the Dormant Commerce Clause because it is predicated on in-state "favoritism," and the New Jersey act is a "blatant and explicit effort to promote the construction of new generation facilities in New Jersey." *See id.* (quoting Hannah Northey, *Utilities Challenge N.J. Law While Preparing to Reap Its Benefits*, E&E NEWS (Mar. 2, 2011), http://www.eenews.net/public/Greenwire/2011/03/02/4).

[234] 977 F. Supp. 2d 372 (D.N.J 2013).

[235] *Id.* at 411.

authority.[236] The court agreed with the plaintiffs, holding that the New Jersey statute is preempted by field and conflict preemption.[237]

The Third Circuit has held that a state regulatory process was field preempted because of its effects.[238] For the New Jersey LCAPP, even if the state's authority to regulate power is not preempted, the result of such regulation—the out-of-market subsidy that distorts the base auction of wholesale power—might be preempted.[239] In *Hanna*, the trial court denied cross motions for summary judgment on field preemption, reserving those questions of fact to be decided at trial.[240]

Even in the absence of field preemption, conflict preemption can still supersede state law if the state law interferes with a federal goal.[241] In *Hanna*, the plaintiffs contended that the statute is conflict preempted because New Jersey's guaranteed fixed price for select New Jersey generators allows New Jersey's statute to obstruct the federal goal of a competitive auction without selective subsidies for capacity resources by guaranteeing a fixed price for certain New Jersey generators.[242]

The plaintiffs alleged that selected New Jersey generators, with the state subsidy in hand, will bid lower and win the regional PJM auction—thereby guaranteeing New Jersey generators a substantial capacity payment every month.[243] The ultimate cost for the New Jersey law would be passed not just to New Jersey ratepayers but to all PJM ratepayers who reside in many of the thirteen PJM states and Washington, D.C.[244] In addition, the plaintiffs argued

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[236] *Id.* at 402–04.

[237] *Id.* at 405–11.

[238] NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 348 (3d. Cir. 2001).

[239] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citing Hill v. Florida, 325 U.S. 538, 543 (1945)) (noting that state legislation may be preempted where result is inconsistent with objective of federal statute).

[240] *See* PPL Energyplus, LLC v. Solomon, Civ. No. 11-745, 2012 U.S. Dist. LEXIS 140335, at **32–33 (D.N.J. Sept. 28, 2012) (denying summary judgment on preemption issue on grounds that adjudication required determination of certain facts best accomplished at trial).

[241] Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (holding that state law will be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress").

[242] 977 F. Supp. 2d at 408–09. After the New Jersey BPU selects a generator program, they enter into a standard offer capacity agreements (SOCA) with the BPU, which obligates the generator to produce a fixed amount of electricity that is sold to New Jersey retail utilities in return for a fixed price for the power. *Id.* at 394 (citing N.J. Stat. Ann. § 49:3-98.3).

[243] *Id.* at 400–02.

[244] *See id.* at 378–79 (noting that PJM's service area covers all or part of thirteen states including New Jersey); *see also* PJM, *Territory Served*, PJM.COM, http://www.pjm.com/about-pjm/who-we-are/territory-served.aspx (last visited Sept. 25, 2016) (stating that PJM "coordinates the movement of electricity through all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee,

that the New Jersey law would have the effect of driving down the clearing price at the PJM annual auction, thereby resulting in lower clearing prices and capacity revenues to all participants than if such state-subsidized entrants had not been permitted to bid under these circumstances.[245] The issue for the court was whether New Jersey's regulatory implementation of a long-term capacity agreement contract that subsidizes only certain in-state generators distorts and impedes the federal goal of maintaining a competitive capacity auction.[246] If the New Jersey law impedes the federal goals, it is conflict preempted.[247] The federal district court and the Third Circuit both found that the Federal Power Act and the Supremacy Clause preempted the New Jersey statute.[248]

In a similar challenge to a statute in Maryland, the district court and the Fourth Circuit held that the Maryland statute was preempted by both field preemption and conflict preemption under the Supremacy Clause.[249] There are significant constitutional barriers to those approximately 60% of customers whose power supply passes through a FERC-approved ISO (See Figure 2) to reassert control to attract independent power generation facilities into their states.

The Supreme Court in 2016 unanimously upheld the Fourth Circuit's *Nazarian* decision, finding that the Maryland statute intrudes on exclusive FERC wholesale market authority: "Maryland's program sets an interstate wholesale rate, contravening the [Federal Power Act's] division of authority between state and federal regulators.[250] The Court acknowledges that the New Jersey statute makes a similar regulatory intrusion into exclusive federal jurisdiction as does the stricken Maryland statute—jurisdiction of federal versus state authority is separated by a legal "bright line" allocating exclusive control to either federal or state government depending on whether a transaction is laveled as "wholesale" or "retail." Justice Kagan, author of the

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Virginia, West Virginia and the District of Columbia").

[245] *Hanna*, 977 F. Supp. 2d at 388.

[246] *Id.* at 375.

[247] *Id.* at 407.

[248] *Id.* at 412, *aff'd sub nom*, PPL Energyplus, LLC, v. Solomon, 766 F.3d 241, 255 (3d Cir. 2014).

[249] PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d 790, 855 (D. Md. 2013), *aff'd.*, 753 F.3d 467, 480 (4th Cir. 2014). In the Maryland case, the federal trial court applied the *Pike* balancing test, and determined that because Maryland only provided incentives for physical location of facilities in the state but did not restrict whether the output of those facilities was sold in-state or out-of-state, it did not burden interstate commerce. *Id.* at 855. The statute was found to restrict the location of power facilities but not restrict either facially or in its practical effect their commercial activities or sales in commerce, and thus it is subject only to the balancing test of *Pike*, which the defendants could sustain. *Id.* at 851–54.

[250] Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016).

Supreme Court's 2016 opinion, stated to the state's counsel at oral argument, "I'm not sure why it is that when you say it was subject to FERC's jurisdiction that doesn't end the case right there against you—[it is FERC's authority] to set the rates and other terms of wholesale sales, and that's not for the states to do. So that means you're preempted."[251]

V. EMINENT DOMAIN, PRIVATE PARTIES, AND PUBLIC PURPOSE

A. The Federal and State Dimensions

The Fifth Amendment to United States Constitution provides that "nor shall private property be taken for public use, without just compensation." *Moving* power is a requirement which often involves eminent domain and the use of the property of another to extend power from the generating facility to the monopoly grid. Electric lines have to be provided, even if not always popular; electric generation facilities have to be sited. As the utility monopolies grew and extended their services to larger geographic areas, the states extended their eminent domain power to regulated utilities as a necessary government function within the ambit of public use.[252]

Pursuant to the Federal Power Act of 1920, the federal government maintains regulatory jurisdiction over electricity transactions in its wholesale form, under the commerce clause, as the energy may potentially cross state lines.[253] In 1992, Congress enacted the Energy Policy Act (EP Act), which began the process of deregulation of the energy sector in order to promote competition.[254] In 1996, FERC promulgated Order 888 mandating open-access transmission of electricity in interstate commerce.[255] In Order 888, FERC differentiated between the legal purposes of power transmission, whether it was the wholesale or retail sale of electricity determined state or federal jurisdiction,[256] but if the electricity was sold as retail, then the state regulations applied.[257]

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[251] Rebecca Kern, *Supreme Court to Assess if FERC Preempts Subsidy Program*, ENERGY & CLIMATE REP., Feb. 23, 2016.

[252] *See generally In re* Bangor Hydro-Electric Co., 314 A.2d 800 (Me. 1974).

[253] FERREY, THE NEW RULES, *supra* note 5 at 23.

[254] *Id.* at 38 (citing Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776).

[255] *Id.* at 41 (citing Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) [hereinafter Rule 888]).

[256] ENVIRONMENTAL LAW, *supra* note 3 at 587.

[257] *Id.*

FERC Order 888 required utilities to make their monopoly transmission lines available for use by all parties on a nondiscriminatory basis.[258] FERC Order 2003 extended this rule to the separate service of interconnection to the grid on a similar nondiscriminatory basis.[259] The federal courts determined that Rule 2003 forbids transmission owners from discriminating in their exercise of eminent domain power to the detriment of Independent Power Producers or to the advantage of their affiliates.[260] The authority to control and allocate the power of eminent domain to private companies was recognized by the D.C. Circuit Court of Appeals to be within exclusive state discretion.[261] However, once given to owners of transmission facilities, eminent domain cannot be applied to discriminate in restraint of competition or nondiscriminatory access, according to the court:[262]

> We recognize that a state's authority to exercise the eminent domain power, and to license public utilities to do so, is an important state power. But FERC has done nothing more than impose a non-discrimination provision on public utilities. The orders explicitly leave state law untouched, specifying that any exercise of eminent domain by a public utility pursuant to the orders' non-discrimination mandate be 'consistent with state law.' Thus the states remain free to continue licensing public utilities to exercise eminent domain, or to discontinue that practice. To be sure, if hitherto, a utility would not have exercised eminent domain to enable interconnection with an independent generator, the orders, conditionally, compel the utility to either broaden its use of the state-provided power for the benefit of independents, or drop its use for its own and its affiliates' power. But the modifier conditionally is critical. Nothing in the federal rule compels either continued state retention of the license, or public utilities' continued employment of eminent domain. [T]he orders here leave state law completely undisturbed and bind only utilities–not state officials.[263]

An independent power producer is a "private entity that operates a generation facility and sells power to electric utilities, wholesalers, or to retail customers."[264] However, as each state maintains regulation over the retail sale of electricity, and promulgates its own definitions of public service companies, regulations are increasingly more complicated and multifaceted.

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[258] Rule 888, 61 Fed. Reg. 21,632–33.

[259] *See* Standardization of Generator Interconnection Agreements and Procedures, 68 Fed. Reg. 49,845, 49,930 (Aug. 19, 2003), *aff'd and clarified*, 69 Fed. Reg. 15,932 (Mar. 26, 2004).

[260] *See* Nat'l Assoc. of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277, 1283 (D.C. Cir. 2007).

[261] *Id.*

[262] *Id.*

[263] *Id.* (citations omitted).

[264] FERREY, THE NEW RULES, *supra* note 5, at 409.

In *Kelo v. City of New London*,[265] the Supreme Court broadly interpreted required "public purpose" for eminent domain, holding that private development can constitute "public use."[266] Should new independent power producers, benefit from the same extension of eminent domain that traditional public utilities exercise?

Another article generically grouped states that most likely would or would not allow independent transmission entities to exercise eminent domain.[267] It only covers companies engaged in the transmission of electricity, rather than those engaged in the equally important generation of electricity.[268] The precise basis of these groupings were not set forth.[269]

One group was eight states with generic statutes that generally can confer eminent domain authority for transmission lines broadly to power companies that do not need to be "utilities," but so far typically lack precedent.[270] Four states specifically take a contrary position and do not allow merchant companies with transmission lines to utilize eminent domain and exclude public utility commissions from granting such authority.[271] Four states' public utility commissions have granted or denied use of eminent domain to merchant lines under a non-specific state statute.[272] New York discriminates against eminent domain applied to interstate transmission by a merchant transmission company, but may allow if for intrastate projects.[273]

Without a clear direction, the article categorizes eleven state statutes as potentially broad enough with imprecise case law under which eminent domain power might apply to merchant transmission lines.[274] Conversely,

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[265] 545 U.S. 469 (2005).

[266] *Id.* at 490.

[267] *See* Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV 1079, 1124–27 (2013).

[268] *See id.* at 1123.

[269] *See id.* at 1124–27.

[270] *Id.* at 1124 (identifying Florida, Kentucky, Michigan, Montana, New Mexico, Oregon, Rhode Island, Vermont, and Wisconsin as states with statutes potentially granting eminent domain authority to independent lines).

[271] *Id.* (Illinois, Maryland, New Hampshire, and Nebraska).

[272] *Id.* ("Kansas and Oklahoma lack specific statutory grants, but their public utility commissions have granted eminent domain powers to merchant lines."); *see id.* at 1126 ("Arkansas and Connecticut lack specific statutory prohibitions, but their public utility commissions or courts have denied eminent domain powers to merchant lines.").

[273] *Id.* at 1124.

[274] *Id.* at 1155–60 (citations omitted) (Arizona; Colorado ("any corporation formed for the purpose of constructing an electric line"); Idaho (anything in the interest of Idaho citizens); Indiana (eminent domain to transmission-only companies); Iowa (any company operating a transmission line); Massachusetts (for "transmission company" and "electric companies"); South Dakota (a cooperative can be construed as a "utility"); Tennessee (private company transmitting electricity for one generator); Texas; West Virginia (under case law, independent

five state statutes are categorized as unlikely to afford eminent domain power to a merchant transmission line.[275] A group of remaining states' statutes were categorized as indeterminate.[276]

States in New England provide a microcosm of this question; the first two states to deregulate power generation were Massachusetts and Rhode Island.[277] We focus in detail on the six New England states; all six participate within the same ISO, ISO-NE, for the sale of wholesale power and its transmission.[278] ISO-NE is the oldest RTO or ISO in the U.S., originating as a power pool after the East coast blackout of 1965, and now coordinating all movement of wholesale and interstate power and its transmission within and exterior to and from New England.[279] Some states do, and some do not, extend eminent domain to these new market participants in order to either site, or transmit, power generation facilities.

B. Extending Eminent Domain to Private Stakeholders

1. Massachusetts

The Massachusetts state zoning statute includes a provision which lists exemptions and subjects, including certain energy projects, that local zoning may not regulate.[280] Specifically, the provision prohibits municipalities from unreasonably regulating "the installation of solar energy systems . . . except where necessary to protect the public health, safety or welfare."[281] The statute defines solar energy systems as "a device or structural design feature, a substantial purpose of which is to provide for interior lighting or provide

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transmission companies have power of eminent domain); and Wyoming (wholesale IPP entitled to eminent domain)).

[275] *Id.* (citations omitted) (dictating by California Public Code Section 610 that eminent domain is only available to "public utilities"; however, the definition of a "public utility" is broad), Hawaii, Minnesota, Nevada, and Pennsylvania (eminent domain only for person or corporation owning transmission facilities for selling power to the public for compensation).

[276] *Id.* (citations omitted) (listing states with neutral statutory language regarding merchant transmission lines using eminent domain power).

[277] *See* 1997 Mass. Acts ch. 164.

[278] *See* FERC, *New England (ISO-NE) Electric Regions*, FERC.GOV, https://www.ferc.gov/market-oversight/mkt-electric/new-england.asp (last visited Nov. 1, 2016) (noting that "ISO-NE serves six New England states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont").

[279] *See* ISO New England, *Our History*, ISO-NE.COM, http://www.iso-ne.com/about/what-we-do/history (last visited Nov. 1, 2016).

[280] MASS. GEN. LAWS ch. 40A, § 3 (2010).

[281] *Id.*

for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating."[282]

The Massachusetts Department of Energy Resources published a model as-of-right zoning guide, which contemplates that solar energy photovoltaic systems are regulated by the state building code and need not be covered in local zoning bylaws.[283] The state Energy Facilities Siting Board exerts jurisdiction over facilities of 100 MW and larger, as well as "a new electric transmission line having a design rating of 69 kilovolts or more and which is one mile or more in length on a new transmission corridor, . . . [or] a new electric transmission line having a design rating of 115 kilovolts or more which is 10 miles or more in length on an existing transmission corridor[,] except reconductoring or rebuilding of transmission lines at the same voltage."[284]

a. Eminent domain

In Massachusetts, upon approval from the Department of Public Utilities, any electric company may exercise eminent domain for the benefit of the public in the transmission of electricity:

"Any electric company, distribution company, generation company, or transmission company or any other entity providing or seeking to provide transmission service may petition the department for authority to construct and use or to continue to use as constructed or with altered construction a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale, or to a railroad, street railway or electric railroad, for the purpose of operating it, and shall represent that such line will or does serve the public convenience and is consistent with the public interest . . . . *The department may by order authorize an electric company, distribution company, generation company, or transmission company or any other entity to take by eminent domain* under chapter 79 such lands, or such rights of way or widening thereof; or other easements therein necessary for the construction and use or continued use as constructed or with

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[282] *Id.* § 1A.

[283] *See* MODEL AS-OF-RIGHT ZONING BYLAW: ALLOWING USE OF LARGE-SCALE GROUND-MOUNTED SOLAR PHOTOVOLTAIC INSTALLATIONS, DEP'T OF ENERGY RES., MASS. EXECUTIVE OFFICE OF ENVTL. AFFAIRS 2 (Dec. 2014), http://www.mass.gov/eea/docs/doer/green-communities/grant-program/solar-model-bylaw.pdf.

[284] MASS GEN. LAWS ANN. ch. 40A, § 69G (2016) (defining "facility"); *see* MASS. GEN. LAWS ANN. ch. 164, § 69H (2016) (defining jurisdiction of Energy Facilities Siting Board).

altered construction of such line along the route prescribed in the order of the department."[285]

How an Independent Power Producer qualifies as an eligible facility, depends on state definitions. States have authority to define different categories into which projects and parties in the power sector qualify when operating within the state. The Massachusetts legislature, in relevant part, defined an electric company as a corporation that is organized in the commonwealth for the purpose of "selling, transmitting, distributing, transmitting, and selling or distributing and selling, electricity within the commonwealth," provided that the production of the energy is not for the primary benefit of a hospital or nonprofit schools, thus excluding an unaffiliated hospital or school "electric company" that only transmits or sells electricity to such hosts.[286] This definition would exempt, for example, the MATEP facility which cogenerates power and heat for a collection of closely situated major hospitals in Boston.[287]

This expansive definition of "electric company" would include an independent power company, as long as the company distributes, transmits, and sells their produced electricity rather than use it itself.[288] Even though a state, such as Massachusetts, cannot regulate wholesale electric power sales,[289] this definition appears to do so without distinguishing whether the sale is at wholesale or retail. This is completely a definition of an "electric company" within state discretion, as long as Massachusetts restricts its actual regulatory activities to those which fall within state authority. This allows granting an Independent Power Producer powers of eminent domain to construct its facility.

A "generation company" is an entity that produces, manufactures, or generates electricity or related services and products, including renewable energy generation for retail sale.[290] Companies that perform the other key power sector functions are also specifically defined in Massachusetts statute. For example, Massachusetts defines a "transmission company" as a company engaging in the transmission of electricity or owning or operating a transmitting facility used for the transmission of electricity to all generation companies, without discriminatory prices or terms.[291]

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[285] MASS. GEN. LAWS ch. 164, § 72 (2016) (emphasis added).

[286] *Id.* § 1.

[287] *See* Matep, LLC, *About Us*, MATEP.COM, http://www.matep.com/about-us-1/ (last visited Nov. 1, 2016) ("MATEP provides steam, electricity, and chilled water to five major hospitals, . . . as well as the Harvard Institutes of Medicine[.]").

[288] *See* MASS. GEN. LAWS ch. 164, § 1 (2016).

[289] *See* 16 U.S.C. §§ 824(d)–(e).

[290] MASS. GEN. LAWS ANN. ch. 164, § 1 (2016).

[291] *Id.*

Pursuant to the Massachusetts eminent domain statute, the Department of Public Utilities may petition the Supreme Judicial Court or the Superior Court in equity to enforce the Department's orders regarding any generation, transmission, or distribution companies.[292] It is only upon a petition by the commission that the Supreme Judicial Court or the Superior Court will hear the case in equity.[293]

b. Preemption of local authority

i. Dual agency jurisdiction

Both the state Department of Public Utilities (DPU), and the separate Energy Facilities Siting Board (EFSB), have separate statutory authority to preempt local land-use and zoning decisions. The DPU draws its authority from Chapter 40A, Sections 3 and 10, which grant the DPU an exemption from local zoning laws if it determines it is "necessary for the convenience or welfare of the public" after a public hearing about which all interested parties have been notified.[294] Public utilities can petition directly to the DPU for zoning exemptions without having to first apply through local municipalities.[295] When the DPU is deciding whether to grant an exemption, it is not required to determine if an alternative site would be best, but whether the chosen site is reasonably necessary for the convenience or welfare of the public.[296]

Traditionally, the general rule in Massachusetts was that the "State is immune from municipal zoning regulations, absent statutory provision to the contrary" when carrying out an essential government function.[297] The courts

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[292] *Id.* § 79; *see id.* § 69R (conferring right of electric company to petition for exercise of eminent domain power).

[293] *See id.* ch. 79 (outlining eminent domain procedures).

[294] *Id.* § 3 ("Land or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if . . . the department of public utilities shall, after notice . . . and public hearing . . . determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public."); *id.* § 10 ("The permit granting authority shall have the power after public hearing for which notice has been given by publication and posting as provided in section eleven and by mailing to all parties in interest to grant upon appeal or upon petition with respect to particular land or structures a variance from the terms of the applicable zoning ordinance or by-law.").

[295] Sager A. Williams, Jr., *Limiting Local Zoning Regulation of Electric Utilities: A Balanced Approach in the Public Interest*, 23 U. BALT. L. REV. 565, 600 (1995).

[296] Planning Bd. of Braintree v. Dep't of Pub. Util., 647 N.E.2d 1186, 1191 (Mass. 1995); Martorano v. Dep't of Pub. Util., 516 N.E.2d 131, 136 (Mass. 1987); Wenham v. Dep't of Pub. Util., 127 N.E.2d 791, 793 (Mass. 1955).

[297] Cty. Comm'rs of Bristol v. Conserv. Comm'n of Dartmouth, 405 N.E.2d 637, 639

will uphold the DPU's decision as long as the DPU meets the reasonable necessary standard.[298]

The EFSB can issue a preemptive permit,[299] which embodies all the "individual permits, approvals, or authorizations which would otherwise be necessary for the construction and operation of the facility."[300] The composite permit is binding over all other agencies when the applicant meets the standards pursuant to Sections 69K–69O.[301] The following actions allow a company to petition the EFSB for a Section 69K Certificate:

1. If a company is required to meet standards of constructing its facility with equipment that is above commercially available equipment[302]
2. A state or local agency unduly delays for any reason, including an environmental impact report[303]
3. If an agency's ruling is inconsistent with resource use permits issued by other state or local agencies for the project[304]
4. If the agency is deciding on matters not within its jurisdiction, such as a non-regulatory issue (i.e. aesthetics), preventing approval of a permit[305]
5. If a state or local agency disapproval, condition or denial prevents construction of the facility[306]

(Mass. 1980) (quoting Medford v. Marinucci Bros. & Co., 181 N.E.2d 584, 588 (Mass. 1962)).

[298] Gregory Tan, *Wading Through the Rhetoric of the Telecommunications Act of 1996: Uncertainty of Local Zoning Authority over Wireless Telecommunications Tower Siting*, 22 VT. L. REV. 461, 485 n.186 (1997).

[299] MASS. GEN. LAWS ANN. ch. 164, § 69K½ (2016).

[300] *Id.* § 69K.

[301] All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 932 N.E.2d 787, 799 (Mass. 2010).

[302] MASS. GEN. LAWS ANN. ch. 164, § 69K ("[T]he electric, gas or oil company is prevented from building a facility because it cannot meet standards imposed by a state or local agency with commercially available equipment or because the processing or granting by a state or local agency of any approval, consent, permit or certificate has been unduly delayed for any reason, including the preparation and publication of any environmental impact report required by section sixty-two of chapter thirty.").

[303] *Id.*

[304] *Id.* ("[T]he electric, gas or oil company believes there are inconsistencies among resource use permits issued by such state or local agencies").

[305] *Id.* ("[T]he electric, gas or oil company believes that a non-regulatory issue or condition has been raised or imposed by such state or local agencies such as but not limited to aesthetics and recreation.").

[306] *Id.* ("[T]he facility cannot be constructed due to any disapprovals, conditions or denials by a state or local agency or body, except with respect to any lands or interests therein,

6. A burdensome condition or limitation on a permit impacts the Siting Board's responsibilities to provide a reliable energy supply with minimum impact on the environment at the lowest possible cost[307]

A Section 69K certificate allows the petitioning company to gather all requisite state and local permits and authorizations necessary for its construction and operation from the EFSB in a consolidated permit.[308] The Massachusetts Supreme Judicial Court has interpreted this section of the statute as requiring the EFSB to assume all powers and obligations of the state or local authority that would otherwise issue a required permit.[309] Section 69K instructs the EFSB to preempt any state or local agency that is inconsistent with its decision to issue a Section 69K Certificate.[310] The Massachusetts Supreme Judicial Court recognized this preemption as consistent with the EFSB's original purpose of maintaining and providing reliable energy sources for state residents over competing local interests by ensuring local authorities do not exercise their jurisdictional powers over an approved facility.[311]

This preemptive authority is not available *ab initio*. A party petitioning for a Section 69K certificate must have made a good faith unsuccessful effort to obtain all state and local permits necessary for its construction prior to petitioning for a Section 69K certificate.[312] A showing of good faith requires

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excluding public ways, owned or managed by any state agency or local government.").

[307] *Id.* ("[A]ny state or local agency has imposed a burdensome condition or limitation on any license or permit which has a substantial impact on the board's responsibilities as set forth in [Section 69H].")

[308] *See id.* ("A certificate, if issued, shall be in the form of a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility and that portion of the certificate which relates to subject matters within the jurisdiction of a state or local agency shall be enforced by said agency under the other applicable laws of the commonwealth as if it had been directly granted by the said agency.").

[309] All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 932 N.E.2d 787, 799 (Mass. 2010) ("We read the quoted provision in [Section 69K] as an express legislative direction to the siting board to stand in the shoes of any and all State and local agencies with permitting authority over a proposed "facility"—that is, a directive to assume all the powers and obligations of such an agency with respect to the decision whether to grant the authorization that is within the agency's jurisdiction, with regulatory enforcement thereafter returned to that agency.").

[310] *See supra* notes 302–307 and accompanying text.

[311] City Council of Agawam v. Energy Facilities Siting Bd., 776 N.E.2d 1002, 1007 (Mass. 2002) (stating that the intent and purpose of the state, in part, is to "ensure that local boards do not use their power over licenses and permits to thwart the needs of the broader community for a reliable, affordable, and environmentally sound energy supply.").

[312] MASS. GEN. LAWS ch. 164, § 69L(A)(4) (2016) (requiring in an application for a certificate "a representation as to the good faith effort made by the applicant to obtain from

providing the EFSB with information relating to an applicant's inability to comply with a state or local law or the denial, delay, or burdensome condition imposed by a state or local authority.[313] This ensures the petitioning company has in fact attempted to obtain every required permit prior to invoking the EFSB's jurisdiction.

ii. Application to Cape Wind

A Section 69K certificate consists of any individual state and local permits, approvals, and authorizations necessary for the construction and operation of a facility that would otherwise need to be obtained separately.[314] The Cape Wind offshore wind project needed some local and regional permits for its transmission line to proceed.[315] The Cape Cod Commission rejected the Cape Wind permit under the regional development of regional impact process, the approval of which was a condition of the EFSB's earlier 2005 approval.[316]

The Cape Wind project owners petitioned the EFSB for a Section 69K Certificate, invoking four of the six statutory grounds listed above under Section 69K, because of the Cape Cod Commission's DRI denial.[317] The Siting Board granted Cape Wind a Section 69K certificate, which preempted the required development of regional impact approval, four state permits, and four local permits necessary for the construction and operation of the transmission lines.[318] The EFSB approved a Section 69K certificate that included all nine of these separate permits necessary for the construction and operation of the transmission lines for the Cape Wind project.[319]

Various parties appealed the EFSB decision to the superior court, and the superior court dismissed the appeal.[320] The Commission, The Town of

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state agencies and local governments the licenses, permits and other regulatory approvals required by law for construction or operation of the facility").

[313] *Id.* (requiring in an application for a certificate a showing of good faith through "either, a representation as to the inability, if any, of the applicant to comply with any law, ordinance, by-law, rule and regulation affecting the construction or operation of the facility; or a representation as to the applicant's inability to proceed with the construction or operation of the facility by reason of the denial, delay, or imposition of a burdensome condition in issuing specified licenses, permits or approvals.").

[314] All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 932 N.E.2d 787, 794 (Mass. 2010).

[315] *Id.* at 791.

[316] *Id.*

[317] *Id.* at 794.

[318] *See id.* at 795.

[319] *Id.* at 794–95.

[320] *Id.* at 791.

Barnstable, and the Alliance appealed to the Massachusetts Supreme Judicial Court (SJC), the state's highest court.[321] The SJC granted a direct appeal.[322] The Cape Cod Commission and the Town of Barnstable originally sought declaratory relief under Chapter 231A, claiming that there was a statutory conflict between the Cape Cod Act, and that the enabling statute of the EFSB's enabling legislation.[323] The appellants' unsuccessful challenge of the EFSB's preemptive power was several-fold:

- Whether the EFSB could overrule a self-contained regional approval required by the EFSB's earlier decision.[324]
- Whether the EFSB had jurisdiction over the local tidelands through which the required transmission line would pass.[325]

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[321] *See* MASS. GEN. LAWS ch.164 §69P. Section 69P provides:

> Any party in interest aggrieved by a decision of the board shall have a right to judicial review in the manner provided by section five of chapter twenty-five. The scope of such judicial review shall be limited to whether the decision of the board is in conformity with the constitution of the commonwealth and the constitution of the United States, was made in accordance with the procedures established under section sixty-nine H to section sixty-nine *O* and with the rules and regulations of the board with respect to such provisions, was supported by substantial evidence of record in the board's proceedings; and was arbitrary, capricious or an abuse of the board's discretion under the provisions of section sixty-nine H to section sixty-nine *O*.

Id.

[322] *See All. to Protect Nantucket Sound Inc.*, 932 N.E.2d at 795.

[323] *Id.* at 795 n.17.

[324] *Id.* The appellants questioned the Board's jurisdiction in view of the perceived conflict of the Cape Cod Act, and argued the Board could not override the Cape Cod Commission. *Id.* at 795 n.19, 796–97. The appellants questioned the validity of the Board's decision, and also the validity of a Department of Environmental Protection regulation that was at issue. *Id.* at 791. The appellants claimed that because the Cape Cod Act had an appeals provision, its decision was beyond the provisions of the Board's enabling legislation. *Id.* at 796–97. Through an analysis of statutory construction, the court declined this assertion, and instead chose to read the allegedly conflicting statutes as coexistent. *Id.* at 797. Accordingly, the court relied on the provisions of the subsequently passed enabling legislation of the Board's jurisdiction:

> And § 69K directs that when the siting board issues a certificate, '[n]otwithstanding the provisions of any other law to the contrary . . . *no* state agency or local government shall impose or enforce any law, ordinance, by-law, rule or regulation nor take any action . . . which would delay or prevent the construction, operation or maintenance of such facility'

Id. (emphasis added).

Consequently, the court found that the Board could preempt the finding of a local government commission, in this case, the Cape Cod Commission. *See id.* at 815.

[325] *Id.* at 798–803. The court rejected the assertion of the Cape Cod Commission that the tidelands that the transmission were to pass through, and the requisite permits to do so, were within the scope of the Board, despite the tidelands' status of being held in trust by the

- That there should not be deference to the EFSB's decision that there would be a minimum impact on the environment.[326]
- That Cape Wind did not make a good-faith effort to seek the requisite local permits as is required under Section 69L(A)(4).[327]

The SJC upheld the decision of the EFSB granting a preemptive state certificate which overrode the Cape Cod Commission's decision with a composite permit "that covered all the necessary approvals under state law."[328] The SJC held that the legislation which created the Cape Cod Commission and gave it authority to approve the development of a regional impact proposal which was needed for the transmission project did not supersede the EFSB's authority to override local permitting decisions.[329]

2. Vermont

Vermont is unique in that it extends the ability to exercise eminent domain to any company under the jurisdiction of its energy regulatory board.[330] Vermont legislation makes this distinction by employing in the statute the

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Commonwealth for the benefit its citizens. *Id.* at 802–03.

[326] *Id.* at 808. The court reviewed and analyzed two relevant statutes:

> Section 69O(2) requires a finding with respect to the compatibility of the facility with *considerations of environmental protection,* and § 69O(3) requires a finding that any exemption from conformance with State or local law be "consistent with the implementation of the energy policies contained in this chapter to provide *a necessary energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost.*

Id. at 809, 811 (emphasis added).

The court found that it would defer to the Board's balancing. *Id.* at 811–13. The appellants attacked the substance of the Board's decision. *Id.* In reviewing the Board's decision, the court noted that it was a well-established principle of administrative law to give great deference to the boards' expertise and decision, only to reverse it if an alternative conclusion from the board was a "necessary inference." *Id.* at 808 (quoting Goldberg v. Bd. of Health, 830 N.E.2d 207, 216 (2005)).

[327] *Id.* at 808. The court, upon reviewing the record of the petition before the Cape Cod Commission, rejected this argument. *Id.* at 809–10.

[328] *Id.* at 791 (citing MASS. GEN. LAWS § 69K); *see* Kenneth Kimmel & Dawn Stolfi Stalenhoef, *The Cape Wind Offshore Wind Energy Project: A Case Study of the Difficult Transition to Renewable Energy*, 5 GOLDEN GATE U. ENVTL. L.J. 197, 208 (2011).

[329] *All. to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 796–97. The SJC also held that the Board was correct in limiting its review to the transmission lines and not the wind farm itself since the Board only has jurisdiction to consider "in-State impacts." *Id.* at 801–07; *see* Kenneth Kimmel & Dawn Stolfi Stalenhoef, *The Cape Wind Offshore Wind Energy Project: A Case Study of the Difficult Transition to Renewable Energy*, 5 GOLDEN GATE U. ENVTL. L.J. 197, 222–24 (2011) (further discussing the Alliance suit).

[330] *See* VT. STAT. ANN. tit. 30, § 110 (2015).

term "public service company" (PSC), in which a company is acting to provide public service; this definition is in contrast to what other states may designate as a "Public Utility Company" (PUC) which has an obligation to indiscriminately serve the public.

Traditionally, an Independent Power Producer would not be subject to state regulation, as it may only engage in wholesale sale or transmission transactions which are subject exclusively to federal jurisdiction. Since Independent Power Producers typically do not engage in the provision of required utility services to state ratepayers, they would not be subject to state commission regulation. Nonetheless, under its statutory definitions, Vermont exercises broad discretion. An Independent Power Producer may petition to be subject to the Public Service Board's regulation, if it chooses. Vermont's statutory definition of "company" is broad and includes "any individual partnership, association, corporation, group, syndicate, operating division, joint stock company, trust, other entity, or municipality which would be defined as a company pursuant to this section if such approval were to be granted."[331]

Therefore, an Independent Power Producer may be able to obtain Public Service Board approval to exercise eminent domain. Vermont authorizes companies under its jurisdiction to use eminent domain, "[so] that it may render adequate service to the public in the conduct of its business."[332] This

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[331] *Id.* § 201. Section 201 provides:

> (a) As used in this chapter, the word 'company' or 'companies' means and includes individuals, partnerships, associations, corporations and municipalities, owning or conducting any public service business or property used in connection therewith and covered by the provisions of this chapter. The term 'company' or 'companies' also includes electric cooperatives organized and operating under chapter 81 of this title, the Vermont public power supply authority to the extent not inconsistent with chapter 84 of this title, and the Vermont Hydro-electric Power Authority to the extent not inconsistent with chapter 90 of this title. In the context of actions requiring prior approval under section 107 of this title, the term "company" shall also mean any individual, partnership, association, corporation, group, syndicate, operating division, joint stock company, trust, other entity, or municipality which would be defined as a company pursuant to this section if such approval were to be granted.

Id. § 201(a).

[332] *Id.* § 110. Section 110 provides:

> When it is necessary for a corporation formed under this chapter or a foreign corporation under the jurisdiction of the public service board to acquire property within this state, or some easement or other limited right in such property *in order that it may render adequate service to the public in the conduct of its business*, it may condemn such property or right, as provided in sections 111–124 of this title. All other companies, as defined in sections 201 and 501 of this title, which are within the scope of sections 203 and 501 of this title, shall have the same power of condemnation and be subject to the same procedure as hereinafter provided for condemnation by corporations subject to the jurisdiction of the public service board.

language as to what constitutes "service to the public," is relatively broad, and therefore would not in itself disqualify an Independent Power Producer from qualifying to exercise eminent domain.

The Supreme Court of Vermont, in *Grice v. Vermont Electric Power. Co. Inc.*,[333] shed light on the extent of the Public Service Board's jurisdiction and what constitutes a "public service" for the purposes of an eminent domain taking.[334] *Grice* was an eminent domain case, where the plaintiff landowner appealed the PSC's decision to allow Vermont Electric Power Company (Vermont Electric) to exercise eminent domain.[335] Vermont Electric, the integrated electric and fiber-optic network in Vermont, sought to condemn a piece of Grice's land to install a cable.[336]

The court differentiated between wholesale versus retail transmission.[337] Independent power companies and Exempt Wholesale Generators typically do not engage in retail supply of power, and their transactions are not subject to state regulation. However, the nature of power has changed *fundamentally*: The amount of power wholesaled before it is sold at retail has shifted from only 8% in the 1960s to a majority today.[338] As the U.S. Supreme Court noted, it is now "possible for a customer in Vermont [to] purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma."[339] Given these new flows and transactions, there is a new organization of power flow.[340] The court reasoned that even though Vermont Electric is subject to FERC regulation, the transmission lines and the physical structures are in Vermont and are subject to state control.[341] The Court held that since the physical structures and transmission lines were on Vermont soil, the Public Service Board had proper jurisdiction. [342]

Id. (emphasis added).

[333] 956 A.2d 561, 656 (Vt. 2008).

[334] *Id.* at 565.

[335] *Id.*

[336] *Id.* Vermont Electric was formed in 1956, joining together Vermont's local utilities to establish the nation's first statewide, "transmission only" company in order to create and maintain an interconnected electric transmission grid. *See About Vermont Electric Power Company*, VELCO.COM, http://www.velco.com/about (last visited Nov. 29, 2016).

[337] *Grice*, 956 A.2d at 568.

[338] *See* INDEPENDENT POWER, *supra* note 9, at 10–11; ENVIRONMENTAL LAW, *supra* note 3, at 587.

[339] New York v. FERC, 535 U.S. 1, 8 (2002) (quoting Transmission Access Policy Study Grp. v. FERC, 225 F.3d 667, 681 (D.C. Cir. 2000)).

[340] *See* Steven Ferrey, *The Poles of Power*, 8 GEO. WASH. J. ENERGY & ENVTL. L. (forthcoming 2016).

[341] *Grice*, 956 A.2d at 570.

[342] *Id.*

Additionally, the *Grice* court provided a broad interpretation of the "public use" element required for an eminent domain taking.[343] The court held that the right to condemnation is not invalidated if an incidental non-public purpose may result from the taking.[344] The court reasoned that Vermont Electric is a public-service company providing energy transmission and it is not necessary that a public use apply to the whole public or any considerable portion of it to render the taking's purpose "public," in a constitutional sense.[345] The court cautioned that condemnation of private property and the doctrine of incidental benefit is a matter of fact-specific circumstances and "the benefit is not incidental if the power of eminent domain is perverted to wrongful ends or diverted to wrongful uses."[346]

The court also denied Grice's claim that the Public Service Board violated the Vermont constitution, stating that the Vermont constitution permits taking of private lands when necessary for public uses, and it held that the right to condemnation is not invalidated if an incidental non-public purpose may result from the taking.[347] The *Grice* court concluded that eminent domain may extend to a private company even if its public use is not widespread or there is some incidental private benefit. However, the court reiterated that the extension of eminent domain is a fact-specific determination and should not be contorted for a purely private benefit. The court took the position that so long as there has been a finding of beneficial public use by the board, there is public benefit.

Vermont's legislation and precedent provide a broad view of eminent domain in relation to private companies' access. In Vermont, an Independent Power Producer would have the power to exercise public domain, through the Public Service Board's jurisdiction, if the Public Service Board found that there would an appropriate degree of public benefit from the taking. Thus, so long as an independent power producer obtains Public Utility Board approval, eminent domain could be extended to a private power provider.

3. Maine

The Maine Legislature extended the ability for the private sector to exercise eminent domain, subject to the Public Utility Commission's

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[343] *See id.* at 571.

[344] *Id.* at 571, 574. *See also* Kelo v. City of New London, 545 U.S. 469, 489–490 (2005) (broadening the definition of "public purpose" under federal common law).

[345] *Grice*, 956 A.2d at 571.

[346] *Id.* at 575.

[347] *Id.* at 571, 574. *See also Kelo*, 545 U.S. at 489–490 (broadening the definition of "public purpose" under federal common law).

approval.[348] Maine has codified the conditional right for an Independent Power Producer to exercise eminent domain, in a statute titled "Transmission and Distribution Utilities Have Eminent Domain," if the Independent Power Producer transacts beyond solely generating power to transmitting power for resale.[349]

In Maine, an Independent Power Producer which maintains its own transmission infrastructure would come within the definition of a "transmission and distribution utility," which although it is not the traditional public utility, qualifies as a "public utility" under Maine's legislative code.[350] According to Maine statute, a "transmission and distribution utility" is "a person, its lessees, trustees or receivers or trustees appointed by a court, owning, controlling, operating or managing a transmission and distribution plant for compensation within the State, except where the electricity is distributed by the entity that generates the electricity through private property alone solely for that entity's own use or the use of the entity's tenants and not for sale to others."[351] There also are community transmission and distribution companies, including municipal corporations and cooperatives.[352]

This exempts self-use of power, community solar networks, or provision of service within an office park or from a common cogeneration system.[353] So while there is no statutory grant of eminent domain power to Independent Power Producers that only generate power, there could be such extension if the Independent Power Producer also transmits the power for resale to the public.[354] Therefore, the extent of activity in the spectum of power supply dictates whether there is access to eminent domain.

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[348] *See* ME. REV. STAT. ANN. tit 35-A, §3136.

[349] *Id.*

[350] *Id.* §102.20-B.

[351] *Id.*

[352] *Id.* §§ 102, 3201.

[353] *See id.* § 102.20-B.

[354] *See id.* §§ 3136, 3201. Section 3136 confers eminent domain authority upon certain transmission and distribution utilities:

> 1. Land necessary for location of transmission lines carrying 5,000 volts. Subject to approval by the commission under subsection 4, a transmission and distribution utility may take and hold by right of eminent domain lands and easements necessary for the proper location of its transmission lines that are designed to carry voltages of 5,000 volts or more and of necessary appurtenances, located within the territory in which the utility is authorized to do public utility business, in the same manner and under the same conditions as set forth in chapter 65.
>
> 2. Right of eminent domain not applicable. The right of eminent domain granted in subsection 1 does not apply to:
>
> A. Lands or easements located within 300 feet of an inhabited dwelling;
>
> B. Lands or easements on or adjacent to any developed or undeveloped water power;
>
> C. Lands or easements so closely paralleling existing wire lines of other utilities that the

If an Independent Power Producer is able to qualify as "transmission and distribution utility," when it distributes its own power, it may petition the Public Utility Commission to approve any eminent domain taking.[355] The Maine statute definition of "transmission and distribution utility," is placed within the definition of a "public utility." A public utility is not an unregulated company. Correspondingly, a "public utility" has the ability upon Public Utility Commission approval to use eminent domain power.

In *In Re Bangor Hydro-Electric*,[356] the landowner petitioned the court to review the order of the Public Utilities Commission approving a taking to construct two transmission lines on the landowner's private property.[357] The court reasoned that upon the legislature's delegation to the Public Utility Commission, the determination of public need was a political decision and not subject to judicial review.[358] The court held that the agency's decision to approve a public use by a public utility may be granted to a private for-profit company, as long as the public benefitted.[359]

The court noted that electric power companies gained the right to exercise eminent domain in 1929, as a result of the electrification of the state and the public need for access to electricity in a reasonable and efficient manner.[360] Corporations could only exercise eminent domain upon the approval of the Public Utilities Commission.[361] Therefore, it is the Public Utility

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proposed transmission lines would substantially interfere with service rendered over the existing lines, except with the consent of the owners;

D. Lands or easements owned or used by railroad corporations, except as authorized pursuant to section 2311; and

E. Lands or easements owned by the State.

Id. §§ 3136(1)–(2).

Section 3201 defines "consumer-owned transmission and distribution utility" as follows:

Consumer-owned transmission and distribution utility" means any transmission and distribution utility wholly owned by its consumers, including, but not limited to:

A. The transmission and distribution portion of a rural electrification cooperative organized under chapter 37;

B. The transmission and distribution portion of an electrification cooperative organized on a cooperative plan under the laws of the State;

C. A municipal or quasi-municipal transmission and distribution utility;

D. The transmission and distribution portion of a municipal or quasi-municipal entity providing generation and other services; and

E. A transmission and distribution utility wholly owned by a municipality."

Id. §§ 3201(6)(A)–(E).

[355] *See id.* § 3136(4).

[356] 314 A.2d 800 (Me. 1974).

[357] *Id.* at 802.

[358] *Id.* (citations omitted).

[359] *Id.* at 803 (citations omitted).

[360] *Id.* at 804–05 (citing ME. REV. STAT. ANN. tit. 35, § 2306).

[361] *Id.* at 805.

Commission's responsibility to determine whether or not there is a good faith basis for the taking and that the construction proposal is in the proper location;[362] the Commission must do more than review the proposal for not being arbitrary.[363]

Even though the *Bangor* case is a decision from 1974, which was prior to deregulation, it is consistent and applicable with the legislative changes codified in Maine after deregulation. Now, there is a difference between transmission and distribution utilities and other entities, utilities such as energy infrastructure developers; these changes are based upon load capacity, and the underlying eminent domain principles still apply.[364] In order for a transmission and distribution utility to take private property, the Public Utility Commission must approve the proposal. No matter which type of energy producer is requesting an application for eminent domain approval, the proposal must comply with the requirements of public benefit and proper location before the commission will grant any eminent domain authority.

These Maine definitions do not include self-use of power, community solar networks, or provision of service within an office park or from a common cogeneration system. So while there is no statutory grant of eminent domain power to Independent Power Producers which only generate power, there could be such extension if the Independent Power Producer also itself transmits the power itself for resale to the public.[365] Therefore, in Maine there must be more than merely production of power and use of the utility grid to distribute it in order to access eminent domain.

D. No Extension of Eminent Domain to Independent Power Producers

1. Connecticut

a. Eminent domain

In Connecticut, the legislature has deemed that an exempt Independent Power Producer wholesale generator is not a public service company.[366] This is logical in that public service companies have an obligation to serve retail customers. However, according to the Connecticut Department of Public Utility Control's decision in *In re Transenergie U.S. Ltd.*,[367] whether or not

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[362] *Id.* at 809–11.

[363] *Id.*

[364] 65-407-886 ME. CODE R. § 5 (LexisNexis 2016).

[365] *See supra* note 354 and accompanying text.

[366] CONN. GEN. STAT. § 16-1 (2015).

[367] Docket No. 00-06-14, 2000 WL 33121599 (Conn. Dep't of Pub. Util. Control Oct. 18, 2000) (slip op.).

an entity qualifies under the distinct definition as an electric distribution company is a more in-depth inquiry.[368] TransEnergie U.S. Ltd. Company filed a petition requesting a declaration that it was not an electric distribution company in its construction of a fiber optic submarine cable system in the New Haven Harbor and Long Island Sound.[369] The company argued that it was not providing electric transmission or distribution services and would not require eminent domain to complete the project.[370] The Department concluded that the term "electric distribution company" was intended to refer to an electric company, which included transmission and distribution functions.[371] Further, the Department found that an "electric distribution company" applies to the now de-bundled electric companies, and must include the provision of distribution service at the retail level, which Transenergie as an Independent Power Producer power supplier lacked, and therefore, was not an "electric distribution company."[372]

The question remains, is an independent power company, which is an exempt wholesale generator and not an "electric distribution company," eligible to be granted eminent domain authority to further its interests? In *Wheelabrator Lisbon, Inc. v. Department of Public Utility Control*,[373] Wheelabrator petitioned the Department of Public Utility Control, arguing that the defendant, Connecticut Light and Power Company was not entitled to renewable energy credits from Wheelabrator's generation output and that the trial court erred in stating that the department's decision was a not an unconstitutional taking.[374] The Supreme Court of Connecticut upheld the trial court and held, in relevant part, that "an unconstitutional taking occurs when there is a substantial interference with private property which destroys or nullifies its value or by which the owner's right to its use or employment is in a substantial degree abridged or destroyed."[375]

The relevant statute stated:

> A person engaged in the transmission of electric power or fuel in the state may acquire real property, and exercise any right of eminent domain, granted by the general statutes or any special act therefor, for (1) relocation of a transmission facility or right-of-way required by a public highway project or other governmental action; (2) acquisition of additional rights or title to property already subject to an easement or other rights for electric transmission or

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[368] *Id.* at Part II, ¶ 1.
[369] *Id.* at Part I.A., ¶ 1.
[370] *Id.* at Part II, ¶ 2.
[371] *Id.* at Part II, ¶ 9.
[372] *Id.*
[373] 931 A.2d 159 (Conn. 2007).
[374] *Id.* at 163.
[375] *Id.* at 177.

> distribution lines; or (3) widening a portion, not exceeding one mile in length, of a transmission right-of-way for reasons of safety or convenience of the public.[376]

The statute defined a person as "an individual, business, firm, corporation, association, joint stock association, trust, partnership or limited liability company."[377]

The legislature made it clear that eminent domain for purposes of transmission was not to be extended except for the relocation of a facility, the purchase of additional rights to property already under easement, and to widen a portion of a right-of-way for the public benefit.[378] However, there is one caveat; the legislature also stated any no person shall exercise eminent domain in preparation for construction of a facility, unless the department of public service provides a certificate of environmental compatibility and public need.[379]

However, Independent Power Producers do not engage in transmission services, which is provided by monopoly owners of transmission facilities in most states. IPPs produce and distribute power, typically using that monopoly transmission grid, to which they are provided nondiscriminatory access by the Energy Policy Act of 1992 and FERC orders 888 and 1000. It remains unclear whether they can exercise or be entitled to any eminent domain power under to interconnect their facility output to the transmission and distribution grid.

b. Preemption of local authority

The Connecticut Siting Council is charged with the siting of energy sources exceeding one MW.[380] Pursuant to Section 16-243, the Siting Council does not have jurisdiction over the placement of transmission lines; that jurisdiction lies with the Public Utilities Regulatory Authority, a separate

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[376] CONN. GEN. STAT. § 16-50z(b).

[377] *Id.* § 16-1.

[378] *Id.* at § 16-50z(b).

[379] *Id.* § 16-50k(a).

[380] CONN. GEN. STAT. § 16-50x; *see* 4 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 37:9 (5th ed. 2016). Section 16-50x states: "[T]he council shall have exclusive jurisdiction over the location and type of facilities and over the location and type of modifications of facilities subject to the provisions of subsection (d) of this section." *Id.*§ 16-50x(a). The provisions of subsection (d) permit a municipality to regulate and restrict the location of a *private* power producer of one MW or less, or of electric substations of more than 69 kilowatts. However, subsection (d) also provides for an aggrieved party to appeal to the council, "which shall have jurisdiction, in the course of any proceeding on an application for a certificate or otherwise, to affirm, modify or revoke such order or make any order in substitution thereof by a vote of six members of the council." *Id.* § 16-50x(d).

state agency.[381] In *Town of Preston v. Connecticut Siting Council*,[382] the town argued that the council exceeded its authority by overruling the decision of the town's planning and zoning commission against a proposed power generation facility,[383] the council reversed the planning and zoning commissions' decision on impermissible grounds,[384] and the council exceeded its charge when considering the environmental benefits of the resource recovery facility and the council could only determine a need for the electricity provided pursuant to Section 16-50P(a).[385]

The appeals court upheld the trial court's dismissal of an appeal by the Town of Preston of a decision by the Connecticut Siting Council to approve the location of an electric generating regional resource recovery facility in Preston.[386] Consequently, the Siting Council could preempt a local zoning board.[387]

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[381] *Id.* § 16-243.

[382] 568 A.2d 799 (Conn. App. 1990).

[383] *Id.* at 804. The applicants had applied to the town's planning and zoning commission for a local zoning and coastal site location permit, and also to the council for a certificate pursuant to Section 16-50X for the location of the facility that the applicants withdrew and subsequently resubmitted in an identical application. *Id.* The appellants contended that this reapplied for state application was beyond the state council's jurisdiction because it was not submitted to the town planning and zoning commission first pursuant to Section 16-50X(d). *Id.* The court, upon a simple analysis of Section 16-50X found that "this argument is based upon the erroneous hypothesis that the commission had jurisdiction to review an application to the council for a certificate. It did not. With respect to the certification process under General Statutes § 16-50x (a), the council has "exclusive jurisdiction over the location and type of facilities . . . .

Id. (quoting CONN. GEN. STAT. § 16-50x(a)). With respect to the separate and distinct application process before the zoning commission, under Section 16-50x(d), the decision of the zoning commission may be appealed to the council, "which shall have jurisdiction, in the course of any proceeding on an application for a certificate or otherwise, to affirm, modify or revoke such order [of the local agency] or make any order in substitution thereof . . . ." *Id.* (quoting CONN. GEN. STAT. § 16-50x(d)).

[384] *Id.* The town suggested the court should have reviewed the commission's decision like that of an administrative board, offering it great deference. *Id.* at 804–05. The court, through an analysis of the relevant administrative, zoning, and Siting Council enabling statute disagreed: "It is clear that, under PUESA framework, the role of the council in its review of local zoning decisions was meant to be comprehensive and plenary." *Id.* at 805.

[385] *Id.* at 807. The court was not persuaded: "Protection of the environment and the ecology can be achieved not only by restricting the number and size of electric facilities to be built in this state, but also by employing resource recovery facilities to eliminate solid waste. The council was correct to take that environmental need into account, along with the need for electrical power." *Id.*

[386] *Id.* at 801.

[387] *See id.*

In *Town of Westport v. Connecticut Siting Council*,[388] the Supreme Court of Connecticut directly decided preemption of local land-use decisions by the state siting council.[389] This case involved the siting of cellular communication towers, under the council's authority pursuant to Section 16-50i that also governs energy production facilities.[390] The applicant for the cell tower was awarded a certificate by the state board, and attempted to begin construction by applying to the town zoning officer for a permit, which was rejected for noncompliance with the town's zoning ordinances.[391] The town's Board of Zoning Appeals rejected the cell tower applicant's appeal.[392]

The town appealed the council's previous ruling, and the project applicant appealed the Board of Zoning Appeals' denial of their appeal.[393] The cases were consolidated and the trial court, in ruling on the merits, upheld state preemptive authority: "The trial court determined, based upon its reading of §§ 16-50x(a) and 16-50i(a)(6), in conjunction with General Statutes § 16-50p(b)(1)(B) and (b)(2), that the legislature intended to give the council exclusive jurisdiction over telecommunication towers . . . ."[394] The Supreme Court of Connecticut upheld the trial court's finding and reasoning, and consequently, the council's preemption over local zoning laws.[395]

2. New Hampshire

The New Hampshire statutory provision extending eminent domain, specifies that the taking power only extends to a "public utility."[396] Additionally, in order for a public utility to exercise eminent domain, it must be "eligible for regional cost allocation, for either local or regional transmission tariffs, by ISO–New England or its successor regional operator."[397]

New Hampshire's definition for a "public utility," is "owning, operating or managing any plant or equipment or any part of the same for the conveyance . . . in the generation, transmission or sale of electricity

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[388] 796 A.2d 510 (Conn. 2002).

[389] *Id.* at 516 (citing Town of Westport v. Connecticut Siting Council, 797 A.2d 655 (2001)) (summarily affirming trial court's decision).

[390] *Id.* at 513.

[391] *Id.* at 514–15.

[392] *Id.* at 514.

[393] *Id.*

[394] *Id.* at 515.

[395] *Id.* at 516 (citing Town of Westport v. Connecticut Siting Council, 797 A.2d 655 (2001)) (summarily affirming trial court's decision).

[396] N.H. REV. STAT. ANN. § 371:1 (2015).

[397] *Id.*

ultimately sold to the public."[398] The legislative language in this section does not specify whether this creates an obligation for the public utility to serve the public indiscriminately.[399] However, the statutory provision, Section 362:4, explicitly excludes from the definition of a "public utility," an Exempt Wholesale Generator, or any entity that has received a certificate as an "energy facility."[400] The same provision provides an option that allows a Exempt Wholesale Generator or "energy facility" to avail itself to the commission for "public utility" status.[401]

In 2006, New Hampshire added an amendment to its state constitution which limited the ability for a private company to use eminent domain. Pursuant to the 2006 amendment, "[n]o part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property." [402]

In 2012, New Hampshire addressed the eminent domain issue in the context of the Northern Pass Project. The Northern Pass Project involved several regulated retail utilities associated with the Northern Pass transmission proposal, which proposed to construct a new transmission line to carry hydroelectric power from Québec, Canada, through New Hampshire to distribute throughout New England to the New England regional power grid.[403] The Northern Pass petition proposed the construction, maintenance, and transmission over high voltage lines on new towers that would span 187 miles on primarily existing public utility rights-of-ways.[404] The opponents of the proposal argued that the Northern Pass project allowed for a private company to use eminent domain, where there was little benefit for the citizens of New Hampshire, as most of the power would be exported out of state.[405] Furthermore, the opponents feared the effect of the project on New Hampshire's environment and landscape.[406]

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[398] *Id.* § 362:2.

[399] *See id.*

[400] *Id.* § 362:4-c.

[401] *Id.*

[402] N.H. CONST. art. 12-a.

[403] Northern Pass Transmission, LLC, *Frequently Asked Questions*, NORTHERNPASS.US, http://www.northernpass.us/faqs.htm# (last visited Sept. 9, 2016).

[404] Northern Pass Transmission, LLC, *Project Overview*, NORTHERNPASS.US, http://northernpass.us/project-overview.htm (last visited Sept. 9, 2016).

[405] Society for the Protection of New Hampshire Forests, *The Northern Pass Issue Brief*, FORESTSOCIETY.ORG, https://www.forestsociety.org/advocacy-issue/northern-pass (last visited Sept. 9, 2016) (arguing that "[t]here is no clear long-term public benefit to New Hampshire from the Northern Pass Project").

[406] *Id.* (arguing that the "route chosen for the Northern Pass will degrade [the forest] resource and compromise . . . quality of life. . . .").

Amidst the Northern Pass controversy, the New Hampshire legislature amended the statute, which specified that in order for eminent domain to be exercised, the public utility must be "eligible for regional cost allocation, for either local or regional transmission tariffs, by ISO–New England or its successor regional operator."[407] This statutory provision clarified New Hampshire's stance on eminent domain takings, as it New Hampshire views that "public use" taking must provide a regional benefit to New Hampshire.[408] This essentially severely limits, and precludes the ability of an Independent Power Producer from exercising eminent domain powers in the construction of its facility or transmission system in New Hampshire.

The New Hampshire legislature limited the definition of "public utility" to exclude any entity that is designated by FERC as an exempt wholesale generator or any entity that has received a certificate as an "energy facility."[409] Therefore, a public utility must meet two requirements.[410] First, the petitioning entity must not be excluded from the definition of a public utility, such as being an Independent Power Producer.[411] Second, the entity must receive approval from ISO New England that the costs will be regionally allocated through tariff.[412] If the project is not going to provide regional benefit, then New Hampshire will not extend eminent domain powers to such a project.

Public use is determined on a case-by-case basis as to whether the corporation's intent is to accommodate the public or if the public benefit is merely incidental:[413] "the use of land for collecting, storing, and distributing electricity for the purposes of supplying power and heat to all who may desire it is a public use . . . ."[414] The New Hampshire Supreme Court established that a corporation could obtain the power of eminent domain from the legislature, on a case-by-case determination, so long as the corporation's primary intent was to provide power for the public use.[415] Pubic use is determined on a case-by-case basis as to whether the corporation's intent is to accommodate the public or if the public benefit is merely incidental:[416] "the use of land for collecting, storing, and distributing electricity for the

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[407] *See* 2011 N.H. Laws 2 § 6 (codified at N.H. REV. STAT. ANN. § 371:1).
[408] *See id.*
[409] N.H. REV. STAT. ANN. §362:4-c.
[410] *Id.* §§ 371:1, 362:4-c.
[411] *See id.* § 371:1.
[412] *See id.*
[413] Rockingham Cty. Light & Power Co. v. Hobbs, 58 A. 46, 47 (N.H. 1904).
[414] *Id.* at 48.
[415] *See id.*
[416] *Id.* at 47.

purposes of supplying power and heat to all who may desire it is a public use . . . ."[417]

3. *Rhode Island*

In Rhode Island, an independent power producer may be granted the authority of eminent domain if it functions as a transmission company, which pursuant to FERC Order 1000, without a state ROFR, it potentially could. In Rhode Island, the legislature extended the use of eminent domain to electric companies.[418] Definitions matter in law; exactly what is an electric transmission company? The legislature defines an "electric company" as "a company engaging in the transmission of electricity or owning, operating or controlling transmission facilities."[419]

The Rhode Island legislature has provided that an Independent Power Producer may be able to seek approval for an eminent domain taking if it falls within the legislative definition of an "electric transmission company." If a private company qualifies as an "electric transmission company" which is exempt from state regulations as a public utility, although it remains subject to FERC regulation and must provide service to all non-regulated power producers.[420] The statute provides that an "electric transmission company" is able to petition the Public Utilities Commission for eminent domain.[421] Therefore, if a private company meets the statutory definition of an "electric transmission company," it has the ability to petition the Public Utilities Commission for a certificate allowing a taking.[422]

The statute further provides that "electric transmission companies shall have the power of eminent domain exercisable following a petition to the commission . . . ."[423] In order to obtain a certificate of authorization to exercise eminent domain, the company must petition the commission explaining why certain property must be obtained through eminent domain:[424]

> [E]xercising any power of condemnation a company shall present a petition to the commission describing the land, right of way, easement or other interest in property it proposes to acquire and setting forth why it is necessary to acquire

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[417] *Id.* at 48.

[418] 39 R.I. GEN. LAWS § 39-1-2(13) (2015).

[419] *Id.*

[420] *Id.* § 39-1-2.

[421] *Id.* § 39-1-2(13) ("Electric transmission companies shall have the power of eminent domain exercisable following a petition to the commission pursuant to § 39-1-31").

[422] *See id.*

[423] *Id.*

[424] *Id.* § 39-1-31.

> it by eminent domain. . . . If the commission shall determine that the taking is for the benefit of the people of the state, and that it is necessary in order that the petitioner may render adequate service to the public, and that the use to which the property taken will be put, will not unduly interfere with the orderly development of region and scenic development, it shall use a certificate authorizing the company to proceed with condemnation.[425]

The commission must determine that the condemnation of property through eminent domain is for the benefit of the people of Rhode Island, that the company will provide adequate service to the public, and that such condemnation will not unduly disrupt the development of the region, to extend the right of eminent domain to the applicant company.[426]

The case law does not address, either positively or negatively, whether there can be commission extension of eminent domain to independent power producers who are not providing public transmission services to the public. For generation project siting, an Independent Power Producer would need to obtain property itself without eminent domain. For the interconnection of this power generation output to the grid, this leaves two options if intermediary property between the generator and the transmission line is necessary to be acquired without a willing sale:

- Either have the electric transmission company bring the line to the generator in lieu of the generator having acquire property to reach the grid; or
- Request that the commission under its authority to declare that an Independent Power Producer is an electric service company for purposes of gaining eminent domain to acquire property for its requirements to reach the existing, off-site transmission line.

VI. PREEMPTIVE LEGAL METRICS

The landscape of American power is shifting significantly. Going-forward, the majority of new power generation facilities is being developed by independent private power stakeholders not subject to conventional state utility regulation. To encourage a level playing field for competition, a significant number of states have taken their regulated utilities out of the business of generating power, in favor of purchasing power from the competitive market.

Everyone wants the benefits of electric power, however, many persons and some communities do not want to site power hardware and facilities in their

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[425] *Id.*
[426] *Id.*

communities. Access to land uses for power facilities is a matter of traditional local law under the police power. Only states and municipalities can authorize the actual siting and construction of power facility land uses and transmission hardware. To facilitate siting of adequate power hardware, states traditionally afford their tightly regulated monopoly utilities the power of eminent domain to build power generation technologies and construct transmission and distribution lines.

Two legal doctrines—one public and the other largely private—can override local government police power. First, slightly more than half the states, as examined above,[427] as a matter of law can preempt local government decisions pertaining to electric power generation facility siting. Second, to make the wire interconnection and to deliver electric power over transmission and distribution wires, traditionally most states grant regulated electric companies, their traditional utilities, the power to exercise eminent domain and take or use private property by easement and/or fees simple.[428]

The ultimate limitations on government taking by eminent domain of private property, is that a taking must be used for a "public" purpose, a concept whose definition is now evolving legally with the entrance of private party power sector stakeholders.[429] This power of eminent domain historically could not be used to redistribute private property from one private party to another. Whether the power of eminent domain can be extended for use by unregulated private Independent Power Producers, and whether such private use satisfies the required "public" purpose, occupies a serrated legal edge that states are just now beginning to resolve.

Several states are insisting on enforcing state rights of first refusal to limit Independent Power Producers development of power transmission facilities, and any eminent domain powers associated with them, only for existing utilities.[430] Such state rights of first refusal were outlawed by FERC Order 1000, which was eventually upheld by the federal Court of Appeals.[431] With rights of first refusal legally prohibited and some states still resisting, state law is now sculpting the contours of state power facility regulation. If private electricity suppliers are extended access to exercise government powers of eminent domain in the power sector, does this constitute a 'taking' of private property in violation of the second amendment of the Constitution?

Nothing is more indispensable than electricity in the modern U.S. economy. Electric power was deemed to be the second most important

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[427] *See supra*, Part II.

[428] FERREY, LAW OF INDEPENDENT POWER, *supra* note 10, § 6-541.

[429] *See* Forensic Appraisal Grp., Ltd., *See Eminent Domain and Condemnation*, FORENSIC-APPRAISAL.COM, http://forensic-appraisal.com/eminent_domain (last visited Sept. 25, 2016).

[430] *See supra*, Part IV.B.

[431] *See supra*, Part IV.B.2.

invention in history.[432] The power sector has a delivered value in the U.S. of approximately $390 billion annually,[433] exceeding the total amount of corporate income taxes collected in the U.S.[434] And power is no longer a primary question of technology—everything about this technology deployment now turns on law. Access to eminent domain is the cutting edge issue, still unresolved. A ragged cutting edge between power exercised by different levels of government, now must mediate these issues.

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[432] Fallows, *supra* note 2.

[433] *See* PUBLIC POLICY INSTITUTE OF NEW YORK STATE, INC., *Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State, Year-to-Date through February 2011 and 2010* (Apr. 30, 2015), http://ppinys.org/reports/jtf/2011/employ/average-retail-price-of-electricity2010-11.htm.

[434] *See* Urban Institute & Brookings Institution, *Historical Amount of Revenue by Source*, TAX POLICY CENTER (Feb. 4, 2015), http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=203.

A New Narrative: *Native Hawaiian Law*

Paul Babie*

I. COMEBACK

John Ralston Saul's landmark book *The Comeback*[1] traces the resurgence over the last 100 years of the Aboriginal peoples of Canada.[2] Saul says this:

> The situation is simple. Aboriginals have and will continue to make a remarkable comeback. They cannot be stopped. Non-Aboriginals have a choice to make. We can continue to stand in the way so that the comeback is slowed and surrounded by bitterness. Or we can be supportive and part of a new narrative.[3]

Yet we need not limit what Saul says merely to Canada. The notion of a "comeback" not only aptly summarizes similar strides made by Aboriginal peoples[4] of former European colonies the world over,[5] but also, and more importantly, it points to the significant work that remains to be done in order to build upon what has already been accomplished. As Saul explicitly identifies, an important part of what remains to be done involves what non-Aboriginal peoples can and must do. At the very least, it means not standing in the way.[6] But at its most hopeful, non-Aboriginal peoples will join Saul in saying that:

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[1] JOHN RALSTON SAUL, THE COMEBACK (2014).

[2] *See id.* at 6.

[3] *Id.*

[4] In this review essay, I use "Aboriginal peoples" to refer to those peoples of the world who refer to themselves as Aboriginal, Indigenous and/or Native peoples.

[5] *See, e.g.*, BRUCE PASCOE, DARK EMU BLACK SEEDS: AGRICULTURE OR ACCIDENT (2014); ATHOLL ANDERSON ET AL., TANGATA WHENUA: AN ILLUSTRATED HISTORY (2014).

[6] "Standing in the way" can take many forms. Consider just these few examples, drawn from media and press during the writing of this essay: negative press in relation to Metis and Non-Status Indians in Canada, Jeffrey Simpson, *Confusion Reigns on Aboriginal Rights When Court Rulings Meet Reality*, GLOBE & MAIL, July 11, 2015, at F2 (referring to the Supreme Court of Canada decision in *Tsilhqot'in Nation v British Columbia* [2014] 2 S.C.R. 256); Editorial, *The Supreme Court Goes Back to 1763*, GLOBE & MAIL, Oct 13, 2015, at A12 (referring to the Supreme Court decision in Daniels v. Canada, [2016] S.C.R. 99 (Can.)), attempts of Indigenous and Aboriginal peoples worldwide to rescind the Doctrine of Christian Discovery and to obtain an apology from the Roman Catholic Church for its racist

> To free ourselves, two things must happen. We must reinstall a national narrative built upon the centrality of the Aboriginal peoples' past, present and future. And the policies of the country must reflect that centrality, both conceptually and financially.[7]

A new narrative forming part of a comeback must, then, involve all people, Aboriginal and non-Aboriginal, in a joint effort of creating a new national narrative, one that challenges the neo-liberal narrative that is today so common.[8] That task also involves the law and legal order of a nation, for law represents one of the ways in which a country or a jurisdiction can both reinstall such a narrative in former colonial systems, as well a means of adjusting its policies accordingly. One of the most obvious ways in which law can contribute to a new narrative and so adjust policies, to take but one example (and it is by no means the only way it can do this) involves the method by which a society allocates resources, especially the land resource. Today, some form of the concept of private property typically comprises the means by which resources are allocated. But that need not be the only prism through which a society looks at its resources. As recently as 200 years ago (a mere drop in the bucket of time in the course of human history) much of the world was allocated according to various alternatives to private property: common ownership in aboriginal societies (as found in most parts of the world, such as Australia, Canada, New Zealand, or the United States);[9] peasantry and serfdom in feudal land-holding societies (as found in much of Europe);[10] autocratic forms of landownership that combined serfdom with absolutism (as found in pre-Revolutionary

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implementation and for its pernicious and ruinous consequences, @chantlaca, *Mexico: Indigenous Peoples Demand That Pope Francis Rescind the "Doctrine of Discovery"*, RED: CONTINENTAL COMUNICACIONES—COMMUNICATIONS: MEDIOS—MEDIA ABYA YALA (Feb. 5, 2016, 12:20 PM), http://redabyayala.blogspot.com.au/2016/02/mexico-indigenous-peoples-demand-that.html; @yotlacuila, *El Papa, los Indígenas y la Doctrina del Descubrimiento*, ANIMAL POLITICO (Feb. 11, 2016 11:43 PM), http://www.animalpolitico.com/blogueros-codices-geek/2016/02/11/el-papa-los-indigenas-y-la-doctrina-del-descubrimiento/; ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (2010), and the ongoing disadvantage suffered by Indigenous Australians, Sara Hudson, *PM's Closing the Gap Statement on Repeat*, CENTRE FOR INDEP. STUD. (Feb. 5, 2016), https://www.cis.org.au/commentary/articles/pms-closing-the-gap-statement-on-repeat.

[7] SAUL, *supra* note 1, at 14.

[8] DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

[9] *See generally* ANDRO LINKLATER, OWNING THE EARTH: THE TRANSFORMING HISTORY OF LAND OWNERSHIP 5 (2014).

[10] *See generally id.* at 93–130.

Russia);[11] the distribution of land so as to achieve an equilibrium between promoting harmony within and control over a large population (as found in China).[12] Private property disrupted the patterns of these alternative forms of land ownership, constituting a great revolution running the span of the last 200 years.[13] The point is not to focus on the alternative forms of land distribution, but on the fact that there are other ways of looking at the world around us, and that we can draw upon our own past, in the sense of a common human history, for alternatives to the narrative that we find today.

At a higher level of generality, though, what might a new legal narrative of the sort described by Saul look like? What trends or phenomena might we look for and expect to see in a society's legal and political order suggesting the emergence of a new narrative? Looking at the global evidence available to us today, at the very least, we might expect to see three such trends or phenomena.

First, we would expect to see the dominant legal culture recognizing, and perhaps adopting, even if in small ways, the place of Aboriginal peoples and legal structures within the broader dominant structure. This we might call recognition by the legal order.[14] Second, the political order of a dominant society might recognize, again, even in small ways, the place of Aboriginal peoples and political-legal structures within the broader order of the dominant society. We might call this recognition by the political order.[15] Finally, and perhaps most importantly, we would expect to find the

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[11] *See generally id.* at 131–49.

[12] *See generally id.* at 150–66.

[13] *See generally id.* at 169–214.

[14] As found in various jurisdictions, such as, in Canada, Calder v. British Columbia, [1973] S.C.R. 313, New Zealand, *New Zealand Maori Council v. Attorney-General* (1987) 1 NZLR 641 (CA), and in Australia, *Mabo v Queensland [No. 2]* (1992) 175 CLR 1.

[15] There have been numerous attempts at Aboriginal self-government within existing nations. For example, in 1993, Canada passed the Nunavut Act the Nunavut Act, establishing the Nunavut Territory of Canada. *See* Nunavut Act, S.C. 1993, c. 28. There are provisions of national and intra-national constitutions. *See, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, ch. 11, § 25 (U.K.) (acknowledging aboriginal rights and freedoms pertaining to aboriginal peoples of Canada); Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c 11, § 35 (U.K.) (recognizing and affirming existing aboriginal and treaty rights of aboriginal peoples of Canada including Indian, Inuit, and Métis peoples); HAW. CONST. art XII, § 7 (reaffirming protection of traditional and customary rights of native Hawaiians who are descendants of those who inhabited the Hawaiian Islands prior to 1778). There are also public lands trusts, such as the Hawaiian Crown Lands Trust, Haw. Rev. Stat. § 171-18 (2013) (appropriating funds from the sale or lease of certain public lands). In addition, there are treaties, such as the Treaty of Waitangi Between the Government of England and Certain Aboriginal Peoples of New Zealand [1840], *reprinted in* Treaty of Waitangi Act 1975, sch. 1

scholarship of Aboriginal experts writing about the way in which dominant law can recognize Aboriginal peoples and legal and political structures as part of the broader political-legal order of a society. This growing body of literature provides structure and, above all, content to the emergent recognition in the legal and political orders. Indeed, today one finds such scholarship in many parts of the modern world.[16]

Why does it matter that we look for these three phenomena as pointing to an Aboriginal legal narrative? Because it comprises part of the plurality of legal forms that exists, imbricated and interacting at a global level. To fail to recognize and understand any part of this plural legal order is to misunderstand the nature of law itself. This point cannot be overstated; the global legal order today, if limited merely to the recognized positive law of a nation, excludes, as Twining writes:

> (i) . . . other levels of supranational, sub-national and trans-national levels of legal relations: public international law, European Community law, Islamic law, Maori law, and lex mercatoria for example. (ii) . . . some of the major legal traditions in which law is not conceptually or politically tied to the idea of the state. For example, it leaves out Islamic law or confines it to countries in which Islamic law is formally recognized as a source of municipal law. But it is obvious that this distorts the extent, scope, and nature of shari'a. (iii) However, if we decide to include major religious and customary normative orderings, and perhaps other examples of non-state law, we run into major conceptual problems. First, we have to adopt a conception of law that includes at least some examples of "non-state law". That re-opens the Pandora's box of the problem of the definition of law and all its attendant controversies. Second, there is the problem of individuating legal orders. What counts as one legal order or system or unit for the purposes of mapping? How does one deal with vaguely constituted agglomerations of norms, which may be more like waves or clouds than billiard balls? (iv) If one decouples the notion of law and state, one is confronted with another set of problems. If one moves away from the idea of one kind of institution having a legitimate claim to monopoly of authority and force, one has to accept the idea of legal

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(N.Z.), the modern British Columbia treaty process, managed by the British Columbia Treaty Commission and established pursuant to the Treaty Commission Act, R.S.B.C. 1996, c 461, and the efforts to recognize Aboriginal peoples in the Australian Constitution, *see generally* ANN TWOMEY, SYDNEY LAW SCH., CONSTITUTIONAL REFORM UNIT, CONSTITUTIONAL RECOGNITION OF INDIGENOUS AUSTRALIANS IN A PREAMBLE (2011), https://sydney.edu.au/law/cru/documents/2011/Report_2_2011.pdf.

[16] See, for example, in the United States, FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2d ed. 2012), Australia, RICHARD H. BARTLETT, NATIVE TITLE IN AUSTRALIA (3d ed. 2014), Canada, JOHN BORROWS, CANADA'S INDIGENOUS CONSTITUTION (2010), and New Zealand, PAUL G. MCHUGH, THE MĀORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI (1991).

> and normative pluralism—i.e. the co-existence of more than one legal order in the same time-space context—and all the difficulties that entails.[17]

It is important, then, that we understand the new legal narrative emerging globally around Aboriginal law—it is part of supranational, sub-national, and trans-national legal relations. To ignore it is to ignore the nature of law in our modern world. The true task, as Twining points out, is to see it in what is already there, before our very eyes.

And such a narrative is emerging in Hawai'i, among the kānaka 'ōiwi, kānaka maoli, and Hawai'i maoli, the Indigenous Polynesian people of the Hawaiian Islands and their descendants, who trace their ancestry back to the original Polynesian settlers of Hawai'i. It is not always easy to see. When they think about it, most people associate Hawai'i more with Waikīkī, Elvis and pineapple than with a Polynesian Indigenous culture rich in its abundance. Sadly, visitors to the Hawaiian Islands may at best spend an evening at a lū'au or an hour at a lei-making session; but that is usually the sum total of a visitor's cultural exposure, retreating all too quickly to the seeming "safety" of the endless luxury goods stores that line the main tourist streets, or the man-made white sand beaches of Waikīkī.[18] Yet the narrative, hard though it may be to see, is there. Three events of 2015 reveal its emergence, and its force, driven by the power of the ongoing political struggles of Native Hawaiians to emerge from the hegemony of colonialism and thereby gain greater recognition of customary and traditional rights though Native Hawaiian law.[19] These events, examined in

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[17] WILLIAM TWINING, LAW, JUSTICE AND RIGHTS: SOME IMPLICATIONS OF A GLOBAL PERSPECTIVE 5 (2007), https://www.researchgate.net/publication/242143434_Law_Justice_and_Rights_Some_Implications_of_a_Global_Perspective (citations omitted); *see generally* WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE (2009).

[18] *See* HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 17 (1993) (describing commodification of Hawaiian culture in Hawaii tourism industry); Haunani-Kay Trask, *Hawaiians, American Colonization, and the Quest for Independence*, 31 SOC. PROCESS IN HAW. 101, 118 (1984) (same); Haunani Kay Trask, *Tourism and the Prostitution of Hawaiian Culture*, CULTURAL SURVIVAL Q., Mar. 2000 (same); *see also* Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Co-modification of Culture*, 48 HOW. L.J. 737, 754–56 (discussing impact of cultural commodification on health, environment, and sustainability); Gregory K. Schlais, *The Patenting of Sacred Biological Resources, the Taro Patent Controversy in Hawai'i: A Soft Law Proposal*, 29 U. HAW. L. REV. 590–91 (2007) (noting the deleterious impact of cultural products, traditional knowledge, and cultural expressions on native peoples).

[19] On these struggles worldwide, see CLARE LAND, DECOLONIZING SOLIDARITY: DILEMMAS AND DIRECTIONS FOR SUPPORTERS OF INDIGENOUS STRUGGLES (2015).

Part II, brought squarely to public attention the choice faced by non-Aboriginals between either standing in the way or supporting the new narrative emerging in Hawai'i.

Two of the events—one involving the legal order and the other largely the political—dealt with disputes between Native Hawaiians and the descendants of European and American colonizers. The first involved an attempt to build a new telescope on Mauna Kea on the Island of Hawai'i, a place sacred to Native Hawaiians. The second event involved the proposed election ('Aha) of Native Hawaiian delegates to a proposed convention to discuss, and perhaps to organize, a "Native Hawaiian governing entity." While the former was largely a matter of legal interpretation of conflicting rights, and the latter largely a political issue, both ultimately became legal disputes finding their way into the courts, the former into the State system, the latter into the Federal. The third phenomena, scholarship, came with the publication of Melody Kapilialoha MacKenzie's second edition of *Native Hawaiian Law: A Treatise*.[20]

This essay considers each of these three events, the legal, political and scholarly recognition of Native Hawaiians and their law as part of the wider Hawaiian legal-political-scholarly order. Its primary focus is on the structure and content that *Native Hawaiian Law* provides for understanding the first two events. While neither of those two events directly involved the interpretation or application of Native Hawaiian law, the disputes behind those events allowed for a recognition, in law and in politics, of the place of Native Hawaiians in the broader legal and political order of Hawai'i. And the publication and public reception of *Native Hawaiian Law* in the midst of those disputes made clear that the cause of Native Hawaiians and Native Hawaiian law are a part of the new narrative, a narrative with which non-Native Hawaiians are free to engage and in doing so join the political and cultural struggles of Native Hawaiians, rather than stand in their way.

The magisterial work collected in *Native Hawaiian Law* joins the rich, diverse, and growing international body of law and literature leading a new narrative guiding the Aboriginal comeback taking place globally. With that in mind, Part III offers brief concluding reflections suggesting that the three events of 2015 are, indeed, signs of an emerging narrative in which non-Native Hawaiians can either stand in the way, surrounded by bitterness, or support, becoming part of that new narrative. The hope, which I hope this essay expresses, is that non-Native Hawaiians, indeed, all non-Aboriginal people the world over, will support a new narrative surrounding the

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[20] NATIVE HAWAIIAN LAW: A TREATISE (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter NATIVE HAWAIIAN LAW].

emerging world comeback of all Aboriginal peoples. And that support starts with law.

II. HAWAI'I 2015: THREE PHENOMENA CONVERGE

A. Legal Order: Mauna Kea Anaina Hou v. Board of Land and Natural Resources

Mauna Kea Anaina Hou v. Board of Land and Natural Resources[21] involved an application by the University of Hawai'i at Hilo (UHH) to the State Board of Land and Natural Resources (BLNR) for approval to construct a Thirty Meter Telescope (TMT) on Mauna Kea on the Island of Hawai'i.[22] The BLNR held two public hearings in respect of the application, at which proponents asserted that the TMT would facilitate cutting-edge scientific research that could not be conducted as effectively anywhere else.[23] Opponents included Native Hawaiian Appellants who stated that the construction of the TMT constituted a desecration of the summit area, considered sacred in Native Hawaiian culture.[24] The BLNR scheduled the application for action at a public board meeting in February 2011, at which various opponents spoke, requesting that the BLNR delay action on the permit until it could conduct a contested case hearing,[25] to which Native Hawaiians are entitled pursuant to Article XII, Section 7, of the Hawai'i Constitution:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[26]

In relation to the customary and traditional rights claimed in relation to Mauna Kea, the Hawai'i Supreme Court noted that:

> Appellants have argued throughout this case that the project will have significant negative effects on their Native Hawaiian cultural practices on Mauna Kea. For example, Appellant Neves testified that "development in my sacred temple of religious practice will seriously interfere with my ability to

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[21] 136 Hawai'i 376; 363 P.3d 224 (2015).

[22] *Id.* at 379, 363 P.3d at 227.

[23] *Id.* at 379–80, 363 P.3d at 227–28.

[24] *Id.* at 380, 363 P.3d at 228.

[25] *Id.*

[26] *Id.* at 390, 363 P.3d at 238 (quoting HAW CONST. art. XII, § 7).

> adore Mauna Kea." And in a jointly submitted letter, Appellant[s] . . . wrote, "Mauna Kea is considered the Temple of the Supreme Being[,] the home of N[ā] Akua (the Divine Deities), N[ā] 'Aum[ā]kua (the Divine Ancestors), and the meeting place of Papa (Earth Mother) and W[ā]kea ([S]ky Father)."[27]

Despite the objections of the Appellants, the BLNR voted to approve the permit at the meeting, subject to a number of conditions, before the contested case hearing occurred, which resulted in "put[ting] the cart before the horse."[28] The Court explained, "[o]nce the permit was granted, Appellants were denied the most basic element of procedural due process—an opportunity to be heard at a meaningful time and in a meaningful manner. Our Constitution demands more."[29]

The BLNR also directed that a contested case hearing be conducted and imposed a condition in the permit that no construction could be undertaken until the contested case hearing was resolved.[30] The Chair of the BLNR appointed a hearing officer to conduct the hearing, which took place in 2011.[31] In 2012, the hearing officer issued a recommendation that the BLNR approve the permit, subject to essentially the same conditions as originally imposed by the BLNR at the 2011 meeting.[32] In 2013, the BLNR adopted the hearing officer's recommendation, and the Third Circuit Court affirmed the BLNR's action.[33]

In the Supreme Court of Hawai'i, the Appellants argued that the approval of the permit before the contested case hearing violated the Hawai'i Constitution's guarantee of due process, which provides that "No person shall be deprived of life, liberty or property without due process of law. . . ."[34] Finding the arguments of the respondents unpersuasive, the Supreme Court of Hawai'i held that the due process provisions of the Hawai'i Constitution had been violated by the failure to provide the Appellants with a meaningful opportunity to be heard in both reality and appearance.[35] As such, as a matter of due process pursuant to the Hawai'i Constitution:

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[27] *Id.*

[28] *Id.* at 391, 363 P.3d at 239.

[29] *Id.*

[30] *Id.* at 380, 363 P.3d at 228.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* (quoting HAW CONST. art. I, § 5). Justice Pollack, in a concurring opinion in which Justice Wilson joined, and in which Justice McKenna joined as to Part IV, held that the actions of the Board also violated the public trust doctrine enshrined in the Article XI, Section 7 of the Hawai'i Constitution. *Id.* at 403–09, 413–15, 363 P.3d at 251–572, 261–63.

[35] *Id.* at 393, 363 P.3d at 241.

> Given the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, the risk of an erroneous deprivation absent the protections provided by a contested case hearing, and the lack of undue burden on the government in affording Appellants a contested case hearing, a contested case hearing was "required by law" regardless of whether BLNR had voted to approve one on its own motion at the February 25, 2011 meeting.[36]

Importantly, in a concurring opinion, Justice summarized the recognition and accommodation of Native Hawaiian cultural practices in Hawaiian law:

> [The Hawai'i Supreme Court]'s evolving jurisprudence concerning Native Hawaiian traditional and customary rights has conceived of a system in which the State and its agencies bear an affirmative constitutional obligation to engage in a meaningful and heightened inquiry into the interrelationship between the area involved, the Native Hawaiian practices exercised in that area, the effect of a proposed action on those practices, and feasible measures that can be implemented to safeguard the vitality of those practices. When an individual of Native Hawaiian descent asserts that a traditionally exercised cultural, religious, or gathering practice in an undeveloped or not fully developed area would be curtailed by the proposed project, the State or the applicable agency is "obligated to address" this adverse impact in its findings and conclusions pursuant to the [framework established in Ka Pa'akai o Ka 'ina v. Land Use Commission, 94 Hawai'i 31, 7 P.3d 1068 (2000)].
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> Consequently, if customary and traditional Native Hawaiian practices are to be meaningfully safeguarded, "findings on the extent of their exercise, their impairment, and the feasibility of their protection are paramount." To effectively render such findings, it is imperative for the agency to receive evidence and then make "[a] determination . . . supported by the evidence in the record."[37]

Thus, the agency must act as a factfinder—to evaluate the evidence presented by the parties—in order to determine whether the exercise of Native Hawaiian rights will be limited to some extent. "To fulfill this duty and to permit such findings to be made, the agency is obligated to conduct a contested case hearing before the legal rights of the parties are decided."[38]

Reading the majority and concurring opinions together, and based upon the evolving recognition of Native Hawaiian customary and traditional rights in Hawaiian law, the Hawai'i Supreme Court found that:

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[36] *Id.* at 390, 363 P.3d at 238 (citation omitted).

[37] *Id.* at 402, 363 P.3d at 250 (Pollack, J., concurring) (internal citations omitted).

[38] *Id.* (Pollack, J., concurring) (internal citations omitted).

> [the] constitutional right of Native Hawaiians to exercise their customs and traditions, [in which] the guarantees of Article XII, § 7 [of the Hawai'i Constitution], the public trust obligations of the State under Article XI, § 7, and the due process protections encompassed by Article I, § 5 [are] all triggered to constitutionally safeguard the continued practice of Native Hawaiian customs and traditions.[39]

The larger issue here is the extent to which *Mauna Kea Anaina Hou* contributes to the ongoing evolution of Native Hawaiian law, and thus to the new narrative surrounding Native Hawaiians within Hawai'i, and of Aboriginal peoples globally. The key to this is the sacredness of Mauna Kea to Native Hawaiians; therein one finds the heart of the narrative as embodied in Hawai'i's legal order. For it is in that dispute, the stand-off between the UHH's claim of scientific advances possible only through the construction of the TMT and the Native Hawaiian claim of the sacredness of Mauna Kea, as embodied in the law of the dominant legal order, that we see the potential for non-Aboriginal peoples either to stand in the way or to support that evolution.

The mere recounting of the facts and the outcome of the litigation, though, fails fully to capture the tension between standing in the way and support. Certainly, the outcome in *Mauna Kea Anaina Hou* represents a supportive stance taken to the evolving narrative, one which incorporates the Native Hawaiian worldview and its protection. But what happened at the base of Mauna Kea during the course of the dispute suggests the work still to be done, not only by Native Hawaiians, but also, and much more importantly, by non-Native Hawaiians. What happened at the base reveals the tension between these two potentialities: standing in the way or support. The front page headline of the Honolulu Star Advertiser of 25 June summarized it this way: *Mauna Kea Standoff: Blocked Again* followed by *Twelve Protesters are Arrested as Construction Vehicles Attempt to Make their way to the Summit* and *The Thirty Meter Telescope is on Hold Once More to Allow for the Removal of Boulders on the Road.*[40] In other words, standing between the $1.4 billion project were boulders placed along the road to the summit of Moana Kea by the Native Hawaiian protesters.[41] At that point, the standoff had already lasted 96 days.[42] While the Governor of Hawai'i claimed that the "[e]ffort to block the roadway [at Mauna Kea was]

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[39] *Id.* at 415, 363 P.3d at 263 (Pollack, J., concurring) (internal citation omitted).

[40] Timothy Hurley, HONOLULU STAR-ADVERTISER, June 25, 2015, at A1.

[41] *See Telescope Protesters Pile Rocks in Road*, HONOLULU STAR-ADVERTISER, June 24, 2015, at B1.

[42] *Id.*

not lawful or acceptable,"[43] the dispute emboldened other Native Hawaiians in their struggle against these legal and political vestiges of colonialism, including Kako'o Haleakala, to mount their own protest to new astronomy projects atop Haleakala on Maui.[44]

By October 2015, "an uneasy but needed truce ha[d] occurred where just months [earlier], there had been protests and late-night arrests, human blockades and rocks perilously toppled as summit roadblocks."[45] "Stewardship," in the form of decommissioning some of the existing telescopes on Mauna Kea in favor of newer ones, such as TMT, had become the catchword. Yet the opinion of one protester at Mauna Kea, Kaho'okahi Kanuha, summarized the ongoing attitude of political and cultural struggle amongst the Native Hawaiians: "[w]e're bracing ourselves mentally, spiritually for the battle ahead. I don't mean a physical battle. It's brain against brain."[46] In short, truce or not, the government's standing in the way was and is being met with Native Hawaiian resistance in order to protect the cultural and spiritual significance of a place, Mauna Kea. And it seems unlikely that the Supreme Court of Hawai'i's decision in *Mauna Kea Anaina Hou*, on the narrow technical grounds of State Constitutional due process involving the BLNR, is likely to resolve this standing in the way in the long term. That will require a much wider adoption of its holding as part of the broader socio-political order, with which the second event of 2015 dealt more directly.

B. Political Order: The Native Hawaiian 'Aha

Akina v. Hawaii[47] involved a dispute surrounding the proposed election (known as an 'Aha) of Native Hawaiian delegates to a proposed convention to discuss, and perhaps to organize, a 'Native Hawaiian governing entity'.[48] The election was to be conducted from 1 until 30 November 2015 by the

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[43] See Timothy Hurley, *Showdown Over Telescope Looms Anew*, HONOLULU STAR-ADVERTISER, June 22, 2015 at A7. Other negative commentary, prizing 'serious science' over the sacredness of the site to Native Hawaiians is found in Richard Borreca, *Turmoil atop Mauna Kea stymies Ige Administration*, HONOLULU STAR ADVERTISER, June 28, 2015.

[44] Timothy Hurley, *Protesters Target Maui Telescope*, HONOLULU STAR-ADVERTISER, June 27, 2015, at B1, B3.

[45] *Better Care of Mauna Kea is Necessary*, HONOLULU STAR-ADVERTISER, Oct. 21, 2015, at A8.

[46] See Hurley, *supra* note 40, at A1, A7.

[47] 141 F. Supp. 3d 1106 (D. Haw.), *aff'd,* 136 S. Ct. 581 (2015) (mem.); *see also* Akina v. Hawaii, 136 S. Ct. 922 (2016) (mem.) (denying motion of applicants Keli'i Akina, et al. for civil contempt).

[48] *Akina*, 141 F. Supp. 3d at 1111.

Defendant, Na'i Aupuni,[49] a Hawai'i non-profit corporation that supports efforts to achieve Native Hawaiian self-determination.[50] Voters and delegates were to be based on a roll of qualified Native Hawaiians as set forth in Hawaiian state legislation (the "Roll").[51]

Pursuant to Hawai'i state legislation, a "qualified Native Hawaiian" was defined as:

> an individual, age eighteen or older, who certifies that they (1) are "a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of Hawaii," and (2) have "maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity."[52]

The Native Hawaiian Roll Commission (the "Commission"), the entity responsible for registering participants, asked or required prospective registrants to the Roll to make the following three declarations:

- Declaration One. I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance;
- Declaration Two. I have a significant cultural, social or civic connection to the Native Hawaiian community; and
- Declaration Three. I am a Native Hawaiian: a lineal descendant of the people who lived and exercised sovereignty in the Hawaiian Islands prior to 1778, or a person who is eligible for the programs of the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that person.[53]

The Roll also included "as qualified Native Hawaiians 'all individuals already registered with the State as verified Hawaiians or Native Hawaiians through the office of Hawaiian affairs [("OHA")] as demonstrated by the production of relevant [OHA] records[.]'"[54] Native Hawaiians included in the Roll through an OHA registry were not required to affirm Declarations One or Two.[55]

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[49] *Id.*
[50] *Id.* at 1117.
[51] *Id.* at 1111–12.
[52] *Id.* at 1112 (quoting Haw. Rev. Stat. §§ 10H-3(a)(2)(A)–(B)).
[53] *Id.* at 1112.
[54] *Id.* (quoting Haw. Rev. Stat. § 10H-3(a)(4)).
[55] *Id.*

On 13 August 2015, the Plaintiffs filed a Motion for a Preliminary Injunction, seeking, among other relief, an "Order preventing the Defendants 'from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians,'" alleging that the "restrictions on registering for the Roll" found in the Declarations violated the Fifteenth Amendment, the Equal Protection and the Due Process clauses of the Fourteenth Amendment, and the First Amendment of the United States Constitution, the Voting Rights Act of 1965, that Na'i Aupuni was "acting 'under color of state law' for the purposes of 42 U.S.C. § 1983[,]" and "acting jointly with other state actors."[56] The Plaintiffs therefore sought to enjoin the Defendants "from requiring prospective applicants for any voter roll to affirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry" and to enjoin "the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll."[57] In short, the Plaintiffs sought to stop the election of delegates, and thereby halt the proposed convention.

District Judge J. Michael Seabright heard the Plaintiffs' Motion for Preliminary Injunction on 20 October 2015, and delivered an oral ruling denying the Motion on 23 October 2015,[58] followed by a written ruling on 29 October 2015.[59] Judge Seabright found that while the Plaintiffs had standing to seek an Order, at least at the preliminary injunction stage, they had not shown a likelihood of success in respect of any of their claims: (i) the Fifteenth Amendment and Voting Rights Act claims, because the election would not result in any new state officials or law or change in state government;[60] (ii) the Fourteenth Amendment claim, because the Plaintiffs failed to show that any deprivation of a constitutional right would occur "under color of any statute, ordinance, regulation, custom, or usage of any State," as required by Section 1983, Title 42, United States Code;[61] and (iii) the First Amendment claim, because any claim on that basis, in relation to the burdens imposed by the declarations to be placed on the Roll would only apply in the context of a public election, whereas Na'i Aupuni's election was private.[62]

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[56] *Id.* (internal citations omitted).
[57] *Id.*
[58] *Id.* at 1113.
[59] *See id.* at 1106.
[60] *Id.* at 1125.
[61] *Id.* at 1127.
[62] *Id.* at 1133.

In reaching this conclusion, however, Judge Seabright was clear that the Court was not addressing four significant issues: (i) an assessment of the election process itself; (ii) whether the election would result in an entity that reflects "the will of the native Hawaiian community" or whether it would be "fair and inclusive"; (iii) whether the relevant legislation reflected wise public policy; and (iv) whether the Hawaiian Department of the Interior even has the Congressional authorization to facilitate the "reestablishment" of a government-to-government relationship with the Native Hawaiian community.[63]

As one might expect, this decision was met with extensive public reaction.[64] The Plaintiffs appealed the ruling to the Ninth Circuit Court of Appeals, which ultimately upheld the District Court holding that the Plaintiffs had not established, as required by *Winter v. Natural Resources Defense Council, Inc.*,[65] (i) a likelihood of the success on the merits of the appeal; (ii) that they were likely to be irreparably harmed if the vote counting was not enjoined pending disposition of the appeal; (iii) that the balance of the equities tipped in their favor; and (iv) that it was in the public interest to issue an injunction pending disposition of the appeal.[66] However, on 2 December 2015, prior to the Ninth Circuit's decision, the United States Supreme Court granted an application for injunction pending appellate review and enjoined the Defendants from counting the ballots cast in, and certifying the winners of, the election, pending final disposition of the appeal by the Ninth Circuit Court of Appeals.[67]

The injunction had the desired effect, for on 15 December 2015, Na'i Aupuni announced the termination of the Native Hawaiian election process.[68] It simultaneously announced, however, that it would nonetheless go forward with a four-week 'Aha in February 2016, with all 196 Native Hawaiians who had run as candidates being offered a seat as a delegate in order "to learn about, discuss and hopefully reach a consensus on a process to achieve self-governance."[69] The confirmation deadline to participate in

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[63] *Id.* at 1136.

[64] *See, e.g.*, Richard Borreca, *For Hawaiians, Sovereignty Comes With a Few Deadlines*, HONOLULU STAR-ADVERTISER, Oct. 27, 2015, at A11; *Rejecting Call to Stop "'Aha" Was Right Call*, HONOLULU STAR-ADVERTISER, Oct. 25, 2015, at E2; .

[65] 555 U.S. 7, 20 (2008); *see also* Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011).

[66] Akina v. Hawaii, 835 F.3d 1003, 1010–11 (2016).

[67] Akina v. Hawaii, 136 S. Ct. 581 (2015) (mem.).

[68] Press Release, Na'i Aupuni, Na'i Aupuni Terminates Election Process (Dec. 15, 2015), http://www.naiaupuni.org/docs/NewsRelease-NaiAupuniTerminatesElectionProcess-121515.pdf.

[69] *Id.* at 1.

the 'Aha was 22 December;[70] on 23 December 2015 Na'i Aupuni posted the list of delegates on its website.[71] On 26 February 2016, having met, the 'Aha adopted a Constitution[72] which established a framework ultimately to provide for Native Hawaiian self-determination.[73] The Preamble of the Constitution of the Native Hawaiian Nation reads:

> We, the indigenous peoples of Hawai'i, descendants of our ancestral lands from time immemorial, share a common national identity, culture, language, traditions, history, and ancestry. We are a people who Aloha Akua, Aloha 'Āina, and Aloha each other. We mālama all generations, from keiki to kupuna, including those who have passed on and those yet to come. We mālama our 'Āina and affirm our ancestral rights and Kuleana to all lands, waters, and resources of our islands and surrounding seas. We are united in our desire to cultivate the full expression of our traditions, customs, innovations, and beliefs of our living culture, while fostering the revitalization of 'Ōlelo Hawai'i, for we are a Nation that seeks Pono.
>
> Honoring all those who have steadfastly upheld the self-determination of our people against adversity and injustice, we join together to affirm a government of, by, and for Native Hawaiian people to perpetuate a Pono government and promote the well-being of our people and the 'Āina that sustains us. We reaffirm the National Sovereignty of the Nation. We reserve all rights to Sovereignty and Self-determination, including the pursuit of independence. Our highest aspirations are set upon the promise of our unity and this Constitution.
>
> UA MAU KE EA O KA 'ĀINA I KA PONO.[74]

To come into force, the Constitution of the Native Hawaiian Nation requires ratification by a vote of all Native Hawaiians,[75] of which there are

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[70] *Id.* at 2.

[71] *See* Na'i Aupuni, *Na'i Aupuni List of 154 Participants for February 'Aha* (Jan. 6, 2016), http://www.naiaupuni.org/docs/NaiAupuniListOf154Participants-010616.pdf; *see also* Na'i Aupuni, *February 2016 'Aha Participant Guide* (2016), http://www.naiaupuni.org/docs/NA%20Participant%20Guide-p1A_v2.pdf.

[72] CONSTITUTION OF THE NATIVE HAWAIIAN NATION Feb. 26, 2016, http://www.aha2016.com/wp-content/uploads/2016/03/Aha2016.FinalConstitution.Approved-022616.pdf.

[73] *See* Mileka Lincoln, *Native Hawaiian 'Aha Adopts Constitution for Self-Determination,* HAWAII NEWS NOW, Feb. 27, 2016, http://www.hawaiinewsnow.com/story/31330094/native-hawaiian-aha-adopts-constitution-for-self-determination.

[74] CONST. OF THE NATIVE HAWAIIAN NATION pmbl. The phrase "Ua mau ke ea o ka 'āina i ka pono," translated as, "The life of the land is perpetuated in righteousness," is the official motto of the State of Hawai'i. Haw. Rev. Stat. § 5-9.

[75] CONST. OF THE NATIVE HAWAIIAN NATION art. 51.

about 298,000 living in the State and another 262,000 living in the continental United States.[76] While all enjoy the right to vote, currently no funding to hold an election of that scale exists which, it is estimated, could cost at least $2 million.[77]

Needless to say, as *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*,[78] the litigation in *Akina v. Hawaii*,[79] and the events surrounding the 'Aha and the adoption of the Constitution of the Native Hawaiian Nation demonstrate that in Hawai'i a new narrative is emerging, and that popular political protest remains a principle means of expressing its parameters. Indeed, those parameters, through the 'Aha, have been given voice in a document forged through the process of learning about, discussing and ultimately reaching consensus on a constitutional process to achieve self-governance; a clear sign of the desire for a narrative that emerges from the colonial past into a self-determining future. Together, these two events, and many more like them, represent an expression of Native Hawaiian's emancipatory political will. Peter Hallward writes this of such a will:

> The active willing of a general or generalizable will. . . . Such a will is at work in the mobilization of any emancipatory collective force—a national liberation struggle, a movement for social justice, an empowering political or economic association, and so on—which strives to formulate, assert and sustain a fully common (and thus fully inclusive and egalitarian) interest.[80]

These Hawaiian events clearly mark the common interest that Hallward identifies. But do they form a part of a new narrative that is enjoying the support of the broader non-Native Hawaiian community? The answer to that question must really come in the form of a choice for the Haole,[81] the

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[76] *See* Sara Kehaulani Goo, *Native Hawaiian Population Makes a Comeback After Sharp Decline: Estimates of the Native Hawaiian Population in Hawaii*, PEW RESEARCH CENTER (Apr. 6, 2015), http://www.pewresearch.org/fact-tank/2015/04/06/native-hawaiian-population; *see also* KAMEHAMEHA SCHOOLS, KA HUAKA'I: NATIVE HAWAIIAN EDUCATIONAL ASSESSMENT 10 (2014), http://www.ksbe.edu/_assets/spi/pdfs/kh/Ka_Huakai_2014.pdf.

[77] Casey Tolan, *Why Some Native Hawaiians Want to Declare Independence From the U.S.*, FUSION, Mar. 10, 2016, http://fusion.net/story/278126/native-hawaiian-constitution-independence/.

[78] *See supra* Part II.A. (discussing Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 363 P.3d 224 (2015)).

[79] *See supra* Part II.B. (discussing Akina v. Hawaii, 141 F. Supp. 3d 1106 (2015), *aff'd by* 835 F.3d 1003 (9th Cir. 2016)).

[80] Peter Hallward, *Communism of the Intellect, Communism of the Will*, *in* THE IDEA OF COMMUNISM 111–30, 121 (Costas Douzinas and Slavoj Žižek eds., 2010).

[81] Pukui and Elbert define "haole" as "White person, American, Englishman,

non-Native peoples of Hawai'i. It is the choice identified by Saul: one can either stand in the way of, or support a new narrative.[82] The narrative must take account of the sorts of issues raised in *Mauna Kea Anaina Hou* and *Akina*, and which give rise to the expression of political will contained in the Constitution of the Native Hawaiian Nation. It is only if Haole, too, can join the emancipatory activity of Native Hawaiians that the truly egalitarian and common interest of all Hawaiians can be achieved.

The choice emerging from the events surrounding the 'Aha, the new narrative it portends, and the political will of all Hawaiians directs us to the third remarkable event surrounding Native Hawaiian law in 2015, an event which provides us with the language and the content necessary fully to participate in and become a part of this new narrative.

C. Scholarship: Native Hawaiian Law: A Treatise

There is something much more important, at a much deeper level, in the *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*[83] and *Akina v. Hawaii*[84] litigation. We can see them in a different way, not so much in terms of the technical legal disputes, but in terms of what they tell us about the emerging place of Native Hawaiian law in the life of all Hawaiians, and of the need to understand the desire for the place of Native Hawaiian law as an expression of a new narrative surrounding Native Hawaiians and their place within the wider Hawaiian legal and political orders.

No doubt due to the unfolding of events surrounding sacred spaces and self-determination throughout 2015, the 23 October 2015 edition of the Honolulu Star-Advertiser contained a full page interview[85] with Melody Kapilialoha MacKenzie, the Editor-in-Chief of the just-published second edition of *Native Hawaiian Law: A Treatise*.[86] The interview, appearing in the popular media, opened the potential for Haole to participate, or at least to find the means to participate, in the narrative emerging in the legal and

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Caucasian," by note that the term formerly described "any foreigner." *Haole*, HAWAIIAN DICTIONARY 58 (Mary Kawena Pukui & Samuel H. Elberts eds., rev. ed. 1986).

[82] *See* SAUL, *supra* note 1, at 6.

[83] 136 Hawai'i 376, 363 P.3d 224 (2015).

[84] 141 F. Supp. 3d 1106 (2015), *aff'd by* 835 F.3d 1003 (9th Cir. 2016).

[85] Mark Coleman, *Melody MacKenzie: The Specialist in Native Hawaiian Law has Seen Much Growth and Progress in the Field Since Starting her Career Several Decades Ago*, HONOLULU STAR-ADVERTISER, Oct. 23, 2015, at A14.

[86] NATIVE HAWAIIAN LAW, *supra* note 20.

political orders.[87] The interview identified MacKenzie as an expert in Native Hawaiian law,[88] having already edited the highly successful first edition of the book, published as the *Native Hawaiian Rights Handbook*[89] in 1997, and serving as a contributing author of *Cohen's Handbook of Federal Indian Law*.[90] In the interview, MacKenzie addressed four major issues: the nature of Native Hawaiian law itself, the publication of the book, the most significant cases in Native Hawaiian law, and the recognition of Native Hawaiians as Native Americans and their quest for self-determination and land rights, including as part of the 'Aha in 2016.[91] MacKenzie supported the process of self-determination, saying that "what we're moving toward, and the ['A]ha is all about, is really the ability to have more self-determination, to control Native Hawaiian lands and resources."[92] And as part of that long process of struggle, MacKenzie expressed hope in the existing Anglo-American legal order:

> I think, as with probably other areas of law, there are good things that happen and negative things, and things that give you incredible hope. I mean, I have to say, for the most part our Hawai['i] Supreme Court comes out with some very good decisions on Native Hawaiian issues, particularly in relation to natural resources, that certainly gives me hope.[93]

Both disputes involved technical legal issues, and we cannot ignore the importance of those issues to the resolution of the disputes. And yet, as noted in the previous two sections, the importance of the events lies in their significance as part of a new narrative. In other words, it is the assertion of a collective political will of Native Hawaiians, available for acceptance by the wider legal and political order, that matter most. And the MacKenzie interview, opening a means of engagement with *Native Hawaiian Law*, provides the scholarly structure for an understanding of and support for that will and its recognition and accommodation in the Hawai'i state legal and political order.

At their core, both *Mauna Kea Anaina Hou* and *Akina* can be seen through the lenses of resources, about land, about territory, space, and place within it. If we see them this way, we need to see them through the lens of Native Hawaiian law, and that is where MacKenzie's book contributes to

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[87] *See* Coleman, *supra* note 85, at A14.

[88] *Id.*

[89] (Melody Kapilialoha MacKenzie ed., 1991).

[90] FELIX S. COHEN, *supra* note 17.

[91] Coleman, *supra* note 85, at A14.

[92] Coleman, *supra* note 85, at A14–15.

[93] *Id.* at A15.

the growing global scholarly literature surrounding the new narrative of comeback.[94] In this broader, richer, more sociological sense, then, the book takes on an added (we might even say much greater) significance than the mere recounting of Native Hawaiian law. The very fact of it tells us of that growing importance—a second, expanded, edition—but more than that, the book provides us with the legal content of a new narrative in Hawai'i.

The content of Native Hawaiian law encompasses the sum of the "events, cases, statutes, regulations, and actions that form and give substance to a body of law affecting Kānaka Maoli, the Native Hawaiian people."[95] Emerging over the course of a millennium, through complex historical and political factors,[96] the totality of this law allows the Native Hawaiian people to resist the pressures of assimilation and conformity to the goals and values of the majority society surrounding it, so as to allow Native Hawaiians:

> to exercise native rights; to pursue a traditional lifestyle; and, most importantly, to exert meaningful control over [their] 'āina, [their] natural and cultural resources, and [their] own destiny provides Native Hawaiians with a choice: to assimilate or to maintain [their] integrity and values as a distinct and independent native people.[97]

This summarizes the whole of what lies behind the dispute in *Mauna Kea Anaina Hou*, and what made and makes the 'Aha significant: Native Hawaiian law, above all, concerns self-identification and self-determination which, in turn, depend at the most fundamental level on concepts of place and territory or, put another way, on the nature of the relationship to land and resources. The principle means of self-determination expressed by

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[94] *See, e.g.*, LARISSA BEHRENDT, ABORIGINAL DISPUTE RESOLUTION: A STEP TOWARDS SELF-DETERMINATION AND COMMUNITY AUTONOMY (1995); LARISSA BEHRENDT, ACHIEVING SOCIAL JUSTICE: INDIGENOUS RIGHTS AND AUSTRALIA'S FUTURE (2003); JOHN BORROWS, FREEDOM AND INDIGENOUS CONSTITUTIONALISM (2016); JOHN BORROWS, DRAWING OUT LAW: A SPIRIT'S GUIDE (2010); PAUL G. MCHUGH, ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS (2011); PAUL G. MCHUGH, ABORIGINAL SOCIETIES AND THE COMMON LAW (2004); PAUL G. MCHUGH, THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI (1991); KENT MCNEIL, COMMON LAW ABORIGINAL TITLE (1989); ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (2010); BENJAMIN J. RICHARDSON AND SHIN IMAI, INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES (2009).

[95] Melody Kapilialoha MacKenzie, *Introduction* to NATIVE HAWAIIAN LAW, *supra* note 20, at xi [hereinafter MacKenzie, *Introduction*].

[96] *See id.*

[97] *Id.* at xiii.

Indigenous peoples the world over is through the recognition and protection of a relationship to land and water. This has emerged in various ways in former colonial states, including the judicial recognition of a form of Native or Aboriginal Title,[98] or through treaties.[99] Land, and the relationship to it, represents one of the fundamental means of Aboriginal self-identification and self-determination. This is perhaps captured best by a statement attributed to Chief Tecumseh, a Native American leader of the Shawnee of North-eastern North America and a large tribal confederacy which opposed the United States during Tecumseh's War and became an ally of Britain in the War of 1812: "When the blood in your veins returns to the sea, and the earth in your bones returns to the ground, perhaps then you will remember that this land does not belong to you, it is you who belongs to this land."[100]

At the heart of *Mauna Kea Anaina Hou* and *Akina*, then, stands Native Hawaiian law. And at the heart of that one finds the sense of place and space that the Native Hawaiian people seek to achieve and to defend. It is, simply, about the nature of relationship to place; the character and content of that relationship unifies the whole of *Native Hawaiian Law*. Divided into five Parts—lands and sovereignty (Part I), individual land titles (Part II), natural resource rights (Part III), traditional and customary rights (Part IV), and resources for Native Hawaiians (Part V)—containing 21 chapters written by the leading experts in the full range of issues arising in Native Hawaiian law, the book is a rich and detailed account of the Native Hawaiian relationship to place.

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[98] See, for example, in Australia, *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, and in Canada, St. Catherine's Milling and Lumber Co. v. The Queen, [1888] 14 AC 46 (PC); Calder v. British Columbia (Attorney General), [1973] S.C.R. 313; R. v. Guerin, [1984] 2 S.C.R. 335; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.

[99] See, for example, in New Zealand, Treaty of Waitangi Between the Government of England and Certain Aboriginal Peoples of New Zealand [1840], *reprinted in* Treaty of Waitangi Act 1975, sch. 1, and in Canada, Government of Canada, *Treaties with Aboriginal People in Canada*, INDIGENOUS AND NORTHERN AFFAIRS CANADA (Sept. 15, 2010), http://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292, describing various treaties between the Government of Canada and various Aboriginal peoples of Canada.

[100] This is a very difficult quotation for which to find an authoritative reference; in the late 1990's the author saw it attributed to Chief Tecumseh on a plaque placed at the southernmost tip of Point Pelee National Park, Essex County, Ontario, Canada. Several sources attribute the phrase simply as a "Native American quote." *See* GAIL JENNER, HISTORIC REDWOOD NATIONAL AND STATE PARKS 20 (2016), to the Suquamish Chief Seattle, *see*, OKLEVUEHA CENTRAL VALLEY NATIVE AMERICAN CHURCH, http://www.oklevuehacentralvalley.com/ (last visited Jan. 1, 2017), or to a Cherokee Indian, *see* California-Nevada United Methodist Church, *Minutes of the Annual Conference* 9 (2016), http://www.cnumc.org/files/pdf_documents/annual_conference-session/2016+acs/2016+acs+minutes.pdf.

My focus here touches only briefly on those parts of the book that help better understand *Mauna Kea Anaina Hou* and *Akina*: lands and sovereignty (Part I) and traditional and customary rights (Part IV). Together, these Parts provide the structure better to understand the issues raised in *Mauna Kea Anaina Hou* and *Akina* from the perspective of the political and legal order—traditional rights in relation to Mauna Kea and self-determination, the recognition of sovereignty, in respect of the place of Native Hawaiians within the Hawaiian political and legal order. And having provided that structure, *Native Hawaiian Law* also assists with a full understanding of both the content of the traditional and customary rights enjoyed and the self-determination and sovereignty claimed by Native Hawaiians. And for present purposes, focusing on Parts I and IV provides a representative sample of the whole, useful not only for scholars working in this area, but also, and more importantly, for scholars beyond Hawaiian shores engaged in work that relates to the new global narrative of the Aboriginal comeback.

Consider first the right to self-determination and the sovereignty claimed by Native Hawaiians. Part I of the book, Lands and Sovereignty, provides the historical background[101] to customary and traditional rights in respect of the public lands trust[102] and the island of Kaho'olawe,[103] and the nature and content of the rights created by the Hawaiian Homes Commission Act[104] and by United States[105] and international law.[106] In broad outline,

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[101] Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 2–74 [hereinafter MacKenzie, *Historical Background*].

[102] Melody Kapilialoha MacKenzie, *Public Land Trust*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 76–146 [hereinafter MacKenzie, *Public Land Trust*].

[103] Koalani Laura Kaulukukui, *Island of Kaho'olawe, in* NATIVE HAWAIIAN LAW, *supra* note 20, at 148–75 [hereinafter Kaulukukui, *Island of Kaho'olawe*].

[104] Paul Nāhoa Lucas, Alan T. Murakami, and Avis Kuuipoleialoha Poai, *Hawaiian Homes Commission Act*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 176–262 [hereinafter Lucas et al., *Hawaiian Homes Commission Act*]. The Hawaiian Home Commission Act set aside certain land for homesteading by Native Hawaiian beneficiaries. *Id.* at 179 (citing Hawaiian Home Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921) (codified as amended at 42 U.S.C. §§ 691–718 (1958)). The Act was omitted from codification in 1959, *id.* at 179 n.1, and became a state constitutional provision in 1978, *see* HAW. CONST. art XII, § 1. *See also* 81 Haw. Op. Att'y Gen. No. 4 (1981) (affirming that the Act is a state constitutional provision; Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63, 70 (discussing the Act).

[105] Melody Kapilialoha MacKenzie, *Native Hawaiians and U.S. Law*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 264–351 [hereinafter MacKenzie, *Native Hawaiians and U.S. Law*].

[106] Julian Aguon, *Native Hawaiians and International Law*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 352–424 [hereinafter Aguon, *Native Hawaiians and International Law*].

traditional Hawaiian life and culture was intimately connected to land[107] and the development of Native Hawaiian law therefore traces that relationship, from the very first origins of Kānaka Maoli and Polynesian settlement in the Hawaiian Islands[108] (the precise date of this arrival is the subject of ongoing debate) to the land tenure system prior to European contact in 1778,[109] through the colonial and statehood periods,[110] to the 1978 amendments to the Hawai'i Constitution aimed at providing Native Hawaiians with rights to resources and to self-determination,[111] to more recent attempts at federal[112] and state[113] recognition of self-determination. MacKenzie summarizes the meaning of sovereignty as:

> a matter of governments—formal recognized institutions that, theoretically, are expressions of a people's deepest value—sovereignty is expressed by native people through relationship to land, environment, family, genealogy, language, *and* political institutions. Former Comanche tribal chairperson Wallace Coffey and Professor Rebecca Tsosie describe this as cultural sovereignty, "the efforts of Native people and Native nations to exercise their own norms and values in structuring their collective future." They suggest that cultural sovereignty is "a process of reclaiming culture and of building nations" that first looks inward to a native people's own values, norms, and traditional systems and then seeks natural expression of those values, norms, and traditional systems in political sovereignty. This cultural sovereignty framework embraces the complexity of the Native Hawaiian experience, integrating culture values, history, socioeconomic power, and collective needs and aspirations.[114]

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[107] MacKenzie, *Historical Background*, *supra* note 101, at 6 ("Kānaka Maoli trace their ancestry to the 'āina (land). . . .").

[108] *Id.*

[109] *Id.* at 8–10.

[110] *Id.*at 10–33.

[111] *Id.* at 33; *see also* HAW. CONST. art. X, § 4 (providing for a Hawaiian language, culture, and history program in public schools), art. XII, §§ 4–7 (relating to Hawaiian Affairs), art. XV, § 4 (establishing English and Hawaiian ('Ōlelo Hawai'i) as official languages).

[112] MacKenzie, *Historical Background*, *supra* note 101, at 35–37 (describing the "Akaka Bill," federal legislation recognizing the right of Native Hawaiians to self-determination).

[113] *Id.* at 37–38 (describing Act of July 6, 2011, No. 195, 2011 Haw. Sess. Laws 646 (codified at HAW. REV. STAT. ch. 10H (2013)), state legislation recognizing Native Hawaiians as the "only indigenous, aboriginal, maoli population" of Hawai'i, HAW. REV. STAT. § 10H-1).

[114] *Id.* at 38 (citing Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 191, 196 (2001)) (emphasis in original).

Native Hawaiians, as do Aboriginal peoples globally,[115] express this cultural and political self-determination and sovereignty in relation to land, natural and cultural resources, and assets in various ways, but typically it means the ability of Native Hawaiians "to be able to make decisions that have real and lasting effects on their lives and environment,"[116] including "efforts to reclaim lands, to bring about reconciliation, and to reframe the relationships between them and the United States."[117] Thus, in 1993, the Island of Kaho'olawe, the smallest of the eight main Hawaiian Islands,[118] was designated as a reserve for Native Hawaiian cultural, spiritual, and subsistence purposes.[119] In 1993 an Apology Resolution was issued by the United States government, acknowledging the anniversary of the overthrow of the Hawaiian Kingdom, and apologizing for the United States' participation.[120] Finally, there has been a general use of international law as a means of expressing self-determination.[121]

The remainder of Part I adds breadth and depth to each of these expressions of self-determination.[122] The contributors to this Part explore the nature and content of public trust or "ceded" lands, which were set aside for the benefit of all Hawaiians;[123] the Hawaiian Homes Commission Act of 1920,[124] which withdrew approximately 203,500 acres of the public trust lands and brought them under the authority of a statutory trustee body for the purpose of holding them in trust to be leased to Native Hawaiian beneficiaries for a nominal fee of 99 years, the transfer of authority over

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[115] MacKenzie, *Historical Background*, *supra* note 101, at 45.

[116] MacKenzie, *Native Hawaiians and U.S. Law*, *supra* note 105, at 323.

[117] MacKenzie, *Historical Background*, *supra* note 101, at 38.

[118] Kaulukukui, *Island of Kaho'olawe*, *supra* note 103, at 151 (citing Peter MacDonald, *Fixed in Time: A Brief History of Kahoolawe*, 6 HAWAIIAN J. HIST. 69 (1972)).

[119] *Id.* at 163 (citing HAW. REV. STAT. § 6K-3 (2013)).

[120] MacKenzie, *Historical Background*, *supra* note 101, at 41 (citing Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on behalf of the United States for the Overthrow of the Kingdom of Hawaii, S.J. Res. 19, 103d Cong., Pub. L. No. 103-150, 107 Stat. 1510 (1993)).

[121] *Id.* at 42–45.

[122] *See* MacKenzie, *Historical Background*, *supra* note 101, at 1–74; MacKenzie, *Public Land Trust*, *supra* note 102, at 76–146; Kaulukukui, *Island of Kaho'olawe*, *supra* note 103, at 148–75; Lucas et al., *Hawaiian Homes Commission Act*, *supra* note 104, at 176–262; MacKenzie, *Native Hawaiians and U.S. Law*, *supra* note 105, at 264–351; Aguon, *Native Hawaiians and International Law*, *supra* note 106, at 352–424.

[123] *See* MacKenzie, *Public Land Trust*, *supra* note 102, at 79; *see generally* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008); Cheryl Miyahara, Comment, *Hawaii's Ceded Lands*, 3 U. HAW. L. REV. 101 (1981).

[124] *See supra* note 104.

both to the state of Hawai'i on its admission to the US federal union in 1959, and ongoing efforts to obtain a full inventory of all such lands so as to allow, ultimately, for self-governance.[125] And, importantly, in addition to the role played by international law in supporting and furthering the quest for Aboriginal self-determination both in Hawai'i and other parts of the world,[126] Part I adds detail to an understanding of the relationship between American native peoples, including Native Hawaiians, and the United States government, as well as the ongoing relationship with the Hawai'i state government. Of greatest interest here is the background to the 'Aha process, which began with the 2014 Office of Hawaiian Affairs announcement "committ[ing it] to facilitating the next steps in a governance or 'nation-building' process."[127]

In sum, modern Native Hawaiian self-determination and sovereignty means that

> Kānaka Maoli continue to chart their own destiny—reviving language and culture, protecting and caring for their lands and natural resources, and seeking ways to restructure their relationship with the United States. Whether on an international, national or state level, it is clear that . . . expressions of cultural sovereignty as well as the persistent assertion of the inherent right of self-determination are critical for Kānaka Maoli.[128]

Quite apart from, but intimately associated with, self-determination and sovereignty are the existing traditional and customary rights enjoyed by Native Hawaiians—these stood at the heart of the *Mauna Kea Anaina Hou* litigation, in which the Appellants asserted "that the project w[ould] have significant negative effects on their Native Hawaiian cultural practices on Mauna Kea[:]. . . . 'Mauna Kea is considered the Temple of the Supreme Being[,] the home of N[ā] Akua (the Divine Deities), N[ā] 'Aum[ā]kua (the Divine Ancestors), and the meeting place of Papa (Earth Mother) and W[ā]kea ([S]ky Father)."[129] As we saw, the Appellants argued that the construction of the TMT would interfere with the pursuit of their cultural practices on Mauna Kea.[130] What is the content of those practices? In

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[125] MacKenzie, *Public Land Trust*, *supra* note 102, at 79–82, 123.

[126] *See* MacKenzie, *Native Hawaiians and U.S. Law*, *supra* note 105, at 265–351.

[127] *Id.* at 322 (citing Office of Hawaiian Affairs, OHA Statement of Commitment on Governance, Mar. 6, 2014, http://www.oha.org/nationbuilding/downloads/Statement_of_Commitment_on_Governance.pdf).

[128] MacKenzie, *Historical Background*, *supra* note 101, at 46.

[129] Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 390, 363 P.3d, 224, 238 (2015) (footnote omitted).

[130] *Id.*

broad terms, they include access and gathering,[131] religious freedom,[132] iwi kūpuna (burial rights),[133] and protections for cultural property[134] and family relationships.[135] Part IV of *Native Hawaiian Law* details the content of each of these rights.[136]

Of ancient origin and well-established at the time of first European contact in 1778, the content of the traditional and customary access and gathering rights have been influenced by western practices, ultimately finding codification through successive iterations of colonial, federal and state control over the course of Hawai'i's history.[137] The key rights—the traditional trail system[138] and traditional gathering practices—[139]as currently found in the Hawai'i Constitution (especially Article XII, Section 7,[140]

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[131] *See generally* David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 776–854 [hereinafter Forman & Serrano, *Traditional and Customary Access and Gathering Rights*].

[132] *See generally* Melody Kapilialoha MacKenzie, *Religious Freedom*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 856–905.

[133] *See generally* Natasha L.N. Baldauf, *Iwi Kūpuna: Native Hawaiian Burial Rights*, *in* MacKenzie et al., *supra* note 13, at 906-1015 [hereinafter Baldauf, *Iwi Kūpuna*].

[134] *See generally* Le'a Malia Kanehe, *Indigenous Cultural Property*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 1016–1124 [hereinafter Kanehe, *Indigenous Cultural Property*].

[135] *See generally* N. Kanale Sadowski & K. Ka'ano'i Walk, *Pili 'Ohana: Family Relationships*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 1126–65 [hereinafter Sadowski & Walk, *Pili 'Ohana*].

[136] In addition to the traditional and customary rights, there are a broad range of natural resource rights—water, fishing and fishponds, access to shorelines and to the Northwestern Hawaiian Islands—enjoyed by, and human resource entitlements—charitable trusts, education, and health—available to Native Hawaiians. *See* D. Kapua'ala Sproat, *From Wai to Kānāwai: Water Law in Hawai'i*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 522–610; Alan T. Murakami & Wayne Chung Tanaka, *Konohiki Fishing Rights*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 612–63; D. Kapua'ala Sproat & Jodi A. Higuchi, *Loko I'a: Hawaiian Fishponds*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 664–94; Melody Kapilialoha MacKenzie & Wayne Chung Tanaka, *Papahānaumokuākea: The Northwestern Hawaiian Islands*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 696–734; D. Kapua'ala Sproat, *Kahakai: Shorelines*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 736–74; Avis Kuuipoleialoha Poai & Susan K. Serrano, *Ali'i Trusts: Native Hawaiian Charitable Trusts*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 1168–1255; Kamanaonāpalikūhonua Souza & K. Ka'ano'i Walk, *'Ōlelo Hawai'i and Native Hawaiian Education*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 1256–1307; Amanda Lokelani Donlin Furman & Scott K.D. Shishido, *Native Hawaiian Health*, *in* NATIVE HAWAIIAN LAW, *supra* note 20, at 1308–48.

[137] *See* Forman & Serrano, *Traditional and Customary Access and Gathering Rights*, *supra* note 131, at 779.

[138] *See id.* at 780–81.

[139] *Id.* at 781–83.

[140] "The State reaffirms and shall protect all rights, customarily and traditionally

which was expressly raised and relied upon in the opinions of the Hawai'i Supreme Court in *Mauna Kea Anaina Hou*[141]) and state law continue to apply and enjoy broad protection as background to modern private property law.[142] They comprise "a mixture of Hawaiian custom and usage, English common law, and statutory and constitutional provisions."[143] As in *Mauna Kea Anaina Hou*, the courts currently apply the traditional and customary rights through a balancing of the rights themselves against a landowner's private property rights in a unique and evolving blend of Western and Native Hawaiian property law.[144]

Customary religious rights infuse every aspect of Native Hawaiian life, and these, too, form part of the content of customary rights. Four major akua (gods) governed each aspect of Hawaiian Life[145]: Kū, the "male generating power and god of medicine and war,"[146] Kāne, the "procreator, the god of life, fresh water, sunlight, and all natural phenomena occurring in the sky,"[147] Kanaloa, the god of the "ocean and ocean winds,"[148] and Lono, the god of "peace, agriculture, fertility, rain, and medicine."[149] Together, the four akua "personified the natural forces and were generally referred to with an epithet signifying the particular force being invoked."[150] Other Native Hawaiian religious concepts were 'aumākua (family ancestral gods),[151] mana (spiritual power),[152] and the kapu system,[153] which

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exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778[.]" HAW. CONST. art. XII, § 7.

[141] Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 390, 363 P.3d, 224, 238 (2015).

[142] *See* Forman & Serrano, *Traditional and Customary Access and Gathering Rights*, *supra* note 131, at 810–19.

[143] *Id.* at 821.

[144] *Id.* at 779, 821.

[145] Mackenzie, *supra* note 132, at 861 (citing VALERIO VALERI, KINGSHIP AND SACRIFICE: RITUAL AND SOCIETY IN ANCIENT HAWAI'I 14–15, tbl. 1, (Paula Wissing trans., 1985)).

[146] *Id.* (citing DONALD D. KILOLANI MITCHELL, RESOURCE UNITS IN HAWAIIAN CULTURE 72 (1982)).

[147] *Id.* (citing MITCHELL, *supra* note 146, at 72).

[148] *Id.* at 862 (citing MARTHA WARREN BECKWITH, HAWAIIAN MYTHOLOGY 73–74 (1970)).

[149] *Id.* (citing MITCHELL, *supra* note 146, at 72).

[150] *Id.* at 861.

[151] *Id.* at 863 (citing SAMUEL MĀNAIAKALANI KAMAKAU, KA PO'E KAHIKO: THE PEOPLE OF OLD 28 (Dorothy B. Barrère ed., Mary Kawena Pukui trans., 1992)).

[152] *Id.* at 863–64.

[153] *Id.* at 864.

"protected the mana of individuals and places and prevented mana from harming others."[154]

An integral part of the spiritual dimension of customary Native Hawaiian life includes the importance placed upon ancestral remains, iwi kupūna or iwi, which "are a metaphor for the sacred bond of place and family, of mortal strength and sacred power"[155] thus making it a spiritual and cultural responsibility to care for iwi and to ensure that they are not disturbed in their resting places.[156] Closely related to the importance place upon iwi, then, is cultural property, which:

> embodies all aspects of indigenous peoples' cultural heritage—tangible and intangible, oral and written, ancient and contemporary. Indigenous peoples consider genetic material, traditional medicines, cultigens, seeds, and all associated traditional knowledge about the uses of flora and fauna as cultural property. Indigenous peoples' rights to genetic material are inseparable from rights to traditional territories, lands, and natural resources.[157]

So, too, Native Hawaiian culture places great importance on family relationships, as noted by the Hawai'i Supreme Court in *Mauna Kea Anaina Hou*, and eloquently explained by N. Kanale Sadowski and K. Ka'ano'i Walk:

> 'Ohā, the root or corm of kalo (taro), serves as the "staff of life" in the Hawaiian diet; "ohā" is the root word from which the Hawaiian word "'ohana" (family) is derived, and it is a powerful metaphor for the 'ohana itself. One section of Kumulipo, the Hawaiian creation chant, describes the union of Wākea (sky-father) and Ho'ohōkūkalani, producing their first child, Hāloanaka, who was stillborn and deformed. The buried him, and from his

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[154] *Id.* (citing JOHN F. MULHOLLAND, HAWAII'S RELIGIONS 16 (1970)).

[155] Baldauf, *Iwi Kūpuna*, *supra* note 133, at 911 (citing *Hearing Before the S. Comm. on Indian Affairs to Provide for the Protection of Indian Graves and Burial Grounds and to Provide for the Repatriation of Native American Group or Cultural Patrimony*, 101st Cong. 81, 82 (1990) (testimony of Clarence Ching, Trustee, Office of Hawaiian Affairs)).

[156] *Id.* at 977; *see generally* Craig W. Jerome, Comment, *Balancing Authority and Responsibility: The Forbes Cave Collection, NAGPRA, Hawai'i*, 29 U. HAW. L. REV. 163, 172–74 (discussing Hawaiian death and burial customs); Matthew Kekoa Keiley, Comment, *Ensuring our Future by Protecting our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection*, 33 U. HAW. L. REV. 321, 323–26 (2010) (same); Matthew J. Petrich, Comment, *Litigating NAGPRA in Hawai'i: Dignity or Debacle?*, 22 U. HAW. L. REV. 545, 545–46 (2000) (same).

[157] Kanehe, *Indigenous Cultural Property*, *supra* note 134, at 1019 (citing U.N. Comm'n on Human Rights, Sub-Comm'n. on Prevention of Discrimination and Prot. of Minorities, *Protection of the Heritage of Indigenous Peoples*, Annex, ¶ 12, U.N. Doc. E/CN.4/ Sub.2/1995/26 (June 21, 1995) (prepared by Erica-Irene Daes); Indigenous Research Protection Act § 5.1(k) (2000) (rev. 2006).

> body grew the shoots of the kalo. Their second child, Hāloa, named after his sibling, was the first man. Thus, in the Hawaiian worldview, kalo is an elder brother to be respected and cared for, and humans have the kuleana (responsibility) to maintain pono (spiritual balance) with each other, nature, and the akua (gods). Likewise, members of the 'ohana, having come forth from the same metaphorical root, have a duty to foster a harmonious relationship with each other.[158]

There is, in short, a powerful spiritual connection that links every Native Hawaiian not only to the spiritual realm, but also, and equally importantly, to land, to culture, and to one another. This link forms the very basis of Native Hawaiian culture and life and so, it comes as no surprise that the connection is given extensive protection in the Native Hawaiian worldview. And while commensurate protection is not always found in modern Hawaiian law, what Part IV makes clear is that there are nonetheless extensive federal and state constitutional and legislative provisions, complemented in some cases by international law.

Parts I and IV of *Native Hawaiian Law*, as we would expect Aboriginal scholarship to do, provide a framework, first, to consider the claims to spiritual significance raised in relation to Mauna Kea and the self-determination sought in the 'Aha, and second, to provide the content of what those claims might ultimately mean. The disputes in *Mauna Kea Anaina Hou* and *Akina* raise issues found in and dependent upon Native Hawaiian law; they point towards Native Hawaiian law; they provide, one might argue, a degree of hope that the Native Hawaiian worldview is being accepted by the broader legal and political orders. And if the law is beginning to offer that hope, as MacKenzie said it was in her *Star-Advertiser* interview, how can Haole, non-Native Hawaiians, participate in the new narrative?[159] By learning the necessary language and content of the relevant law, which is where *Native Hawaiian Law* plays a part, for, as MacKenzie notes, while "intended, obviously, for attorneys and law students, . . . we have tried to make it so that the language is accessible to the general public and to the Hawaii community generally."[160] *Native Hawaiian Law* provides an indispensable tool for understanding Native Hawaiian law, of course, but its greater contribution is to the new narrative. Only in first seeing the markers and then in using the tools available to us to understand them, can all people, Aboriginal and non-Aboriginal become a part of the new legal narrative, not only in Hawai'i, but also globally.

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[158] Sadowski & Walk, *Pili 'Ohana*, *supra* note 135, at 1129 (internal citations omitted).

[159] *See supra* text accompanying note 87.

[160] Coleman, *supra* note 85, at A14.

Native Hawaiian law is but one form of law operating at the supra-, sub-, and trans-national levels, and forming a part of the plurality of legal systems and structures which overlap and interact in the world around us today. Native Hawaiian law, then, as *Native Hawaiian Law* makes clear, forms an integral part of the global legal order.[161] For that reason, it is incumbent upon all people to understand Aboriginal law, and so it is incumbent upon all of us, Hawaiians or not, to understand Native Hawaiian law. MacKenzie's book, therefore, helps us with two important tasks. First, to understand more deeply the nature and operation of Native Hawaiian law and, second, and at least equally, if not more importantly, to understand the plurality of the legal structures operating in Hawai'i and globally. Both tasks allow us not only to support, but also to become a part of a new global legal narrative.

III. CONCLUDING REFLECTIONS

2015 offered all Hawaiians a choice: to stand in the way of the Native Hawaiian comeback, or to be supportive of the struggle and to become a part of a new narrative, one embracing all Hawaiians through the diversity of their legal structures, as well as the supporting global narrative. *Native Hawaiian Law* provides a source, not merely for judges and lawyers and academics in every discipline, but also for every Hawaiian to educate oneself, to become involved, and to begin a new narrative. In turn, the choice also offers an opportunity: for all Hawaiians to unite around a common political will, one that sees the importance of Native Hawaiian cultural, social, and political life as valuable.

Yet there is so much more that supporting this narrative could mean. Take, as but one example, the way in which we relate to the physical world around us. It is only as recently as 200 years ago that most of the world's land resource was held in non-private forms of property. *Native Hawaiian* law reveals new ways (that are in fact old ways) in which all people might conceive of their relationship to land, in a way not always involving only the private property relationship made possible by the liberal tradition. In a world in which concerns about the environment and global finance lead us to ask if there might not be other ways of relating to resources and to others, ways that place emphasis on duty and obligation to the community as opposed only to individual right, Native Hawaiian culture and law might suggest these alternatives to private property as the only way of dividing up the earth's resources. Native Hawaiian law reveals to us that there are, in

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[161] *See* MacKenzie, *Introduction*, *supra* note 95, at xi-xv.

fact, many ways, with their own people and history, providing lessons about successes and failures, and that those lessons are not so temporally distant to us. But more importantly, what we learn from Native Hawaiian law, and from the new narrative prophesied by Saul, is that these alternatives are not so culturally distant from us, either. Rather, there is a vast, inter-generational and inter-cultural dialogue contributing to a narrative about our place in and relationship to the world. And the distribution of land is but one way in which peoples of differing social, cultural, political, economic and legal orders can learn from one another.

Learning from one another is the goal that animates the whole of *Native Hawaiian Law*. Mahealani Wendt's poem entitled *Voyage* appears as the epigraph to the book:

> We are brothers
> In a vast blue heaven,
> Windswept kindred
> Souls at sea.
> We are the sons
> Of immense night,
> Planets, brilliant and obscure,
> Illimitable stars,
> Somnolent moon.
> We have loved
> Lash and sail,
> Shrill winds and calm,
> Heavy rains driven in squalls
> Over turbulent sea.
> We have lashed our hearts
> To souls of islands,
> Joined spirits with birds
> Rising to splendour
> In a gold acquiescence of sun.
> We are voyagers
> And sons of voyagers—
> Our hands work the cordage
> Of peace.[162]

MacKenzie opens her own preface with Mary Kawena Pukui's proverb:

> E kaupē aku no i ka hoe a kō mai.
> Put forward the paddle and draw it back
> Go on with the task that is started and finish it.[163]

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[162] *Id.* at vii.

And Mahealani Wendt summarizes the goal for the contributors to the book this way:

> This treatise . . . has as its ambition no less than world peace predicated on ancient wisdoms—wisdoms not only instructive but critical to our survival as a species. It is our modest contribution to a grand enterprise. With these good works . . . our intent is that our collective strivings and humankind will be fruitful, mau a mau, forever.[164]

These words aptly characterize the task that lies ahead for all people. In other words, as important as *Native Hawaiian Law* is for Native Hawaiians, it is equally important for non-Hawaiians, who can find much of use in engaging with and in and contributing to the narrative that has already begun. And so, the choice faced by Hawaiians in 2017 is not merely theirs, it is ours too: will you stand in the way, or will you support a new, temporally unlimited, supra-, sub-, and trans-national narrative? This monumental and magnificent book deserves a place not only in the home of every Hawaiian, but also, and just as much, it deserves to be known about and read by every person of good will, wherever and whenever they may be.

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[163] *Id.* at viii (citing MARY KAWENA PUKUI, ʻŌLELO NOʻEAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 39 (1983)) (emphasis in the original).

[164] Mahealani Wendt, *Foreword* to NATIVE HAWAIIAN LAW, *supra* note 20, at vi.

The "Grande Iced Nonfat Chai With a Shot of Espresso" Problem: Dealing With Designer Drugs in the Wake of *McFadden v. United States*

Sarah Nishioka*

I. INTRODUCTION

People like to get high—humans have experimented with recreational drugs for millennia, showing particular interest in them in the last two centuries.[1] Before federal regulation, opium and cocaine were favored for both recreational and medical uses in 19th century America.[2] After those substances were banned, marijuana and alcohol were next, although the Constitutional ban on alcohol was eventually repealed.[3] With the inception of the "war on drugs" and the prohibition of a dizzying number of substances through the Controlled Substances Act of 1970, Americans have sought new ways to have psychotropic experiences, resulting in the invention of "designer drugs."[4]

"Designer drug" is a catch-all term used to capture a wide variety of artificial psychoactive substances, made at home or abroad, which are intended to cause a legal "high."[5] Also known as "synthetic drugs," designer drugs are labeled as such for two reasons: they are currently in fashion, and they can be customized or "designed" to skirt the law.[6] These substances are legal by default—although regulatory agencies at state and federal levels have demonstrated clear intent to ban and prosecute their producers and purchasers, law enforcement mechanisms have largely failed to keep up with the rapid pace of designer drug development.

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[1] Bertha K. Madras, *Designer Drugs: An Escalating Public Health Challenge*, 6 J. GLOBAL DRUG POL'Y & PRAC. 1, 2 (2012).

[2] LISA N. SACCO, CONG. RESEARCH SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 2 (2014).

[3] *Id.* at 3.

[4] Hari K. Sathappan, *Slaying the Synthetic Hydra: Drafting a Controlled Substances Act that Effectively Captures Synthetic Drugs*, 11 OHIO ST. J. CRIM. L. 827, 827 (2014).

[5] MICHELLE MCCORMICK, DESIGNER-DRUG ABUSE 12–13 (1989).

[6] Kevin T. Brown, *A Problem of Design: Proposed Changes to Controlled Substances Analogue Statutes—Modifying Tennessee's Approach*, 45 U. MEM. L. REV. 395, 399 (2014) [hereinafter *A Problem of Design*].

Americans searching for a "legal" high may get much more than they bargained for, as evidenced by hundreds of emergency room mysteries every year—and many gruesome, high-profile news stories.[7] For example, two college students in Massachusetts were admitted to a hospital with self-inflicted stab wounds, claiming that they had consumed LSD or magic mushrooms—neither of which should have caused the students' violence and delirium.[8] Hospital staff eventually discovered that the students had taken a hallucinogen called 25I-NBOMe (pronounced "en-bomb"), a designer drug often sold to oblivious consumers as traditional LSD.[9] In California, a nineteen year old man murdered his grandmother with a shotgun while under the influence of "bath salts."[10] An Army medic in Washington state led police on a high-speed chase after consuming bath salts labeled "Lady Bubbles."[11] The chase ended when he took his own life—but police believe he had killed his wife and their son earlier that day.[12]

The effects of these extremely potent drugs can be alarming and long-lasting. A twenty-four year old woman smoked crystalline substances labeled "Meow Meow," "Bolivian MDPV," and "Miami Ice," which resulted in violent fits that caused her to scrape her face and body with her own nails, and then fantasize about tearing human flesh with her teeth.[13] Eventually, the woman's paranoid hallucinations became so severe that she called the police, believing there was a conspiracy against her.[14] She was later admitted to the hospital where she exhibited additional strange behavior: hospital staff say she was crawling on the floor and snarling like an animal.[15] A year and a half after that incident, the woman was still

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[7] *See, e.g.*, Alan Schwarz, *Potent 'Spice' Drug Fuels Rise in Visits to Emergency Room*, N.Y. TIMES (Apr. 24, 2015) http://nyti.ms/1Hvlyft (documenting spice-related emergency room visits in early 2015).

[8] Kate Baggaley, *Designer drugs hit dangerous lows to bring new highs*, SCIENCE NEWS (May 5, 2015), https://www.sciencenews.org/article/designer-drugs-hit-dangerous-lows-bring-new-highs.

[9] *Id.*

[10] Kathryn E. Brown, *Stranger Than Fiction: Modern Designer Drugs and the Federal Controlled Substances Analogue Act*, 47 Ariz. St. L.J. 449, 449 (2015) (citing Jonathan Gonzalez, *Police: Grandmother Killer Possibly High on Bath Salts*, BAKERSFIELDNOW.COM (Oct. 8, 2013, 5:53 PM), http://www.bakersfieldnow.com/news/local/Police-Grandmother-killer-possibly-high-on-bath-salts-226992661.html.) [hereinafter *Stranger Than Fiction*].

[11] Keegan Hamilton, *David Stewart, Fort Lewis Soldier, Snorted Bath Salts Before Deadly Rampage*, SEATTLE WEEKLY (Jun. 14, 2011), http://www.seattleweekly.com/home/934283-129/drugs.

[12] *Id.*

[13] Emily Underwood, *A New Drug War*, 347 SCIENCE 469, 469 (2015).

[14] *Id.*

[15] *Id.* at 473.

experiencing hallucinations, sudden bouts of rage, and occasional cravings for bath salts.[16]

In short, designer drugs are hurting people—they are by nature unregulated and not tested for human safety.[17] Indeed, many of the drugs are explicitly marked as "not for human consumption" when they are sold.[18] The Controlled Substances Analogue Enforcement Act of 1986 ("Analogue Act"),[19] a supplement to the Controlled Substances Act of 1970 ("CSA"),[20] was the federal government's legislative response to the rapid proliferation of designer drugs.[21] In essence, the Analogue Act provides that "controlled substance analogues" should be treated like the controlled substances, and be criminalized to the same extent.[22] A controlled substance analogue is a substance that is "substantially similar" in chemical structure to a schedule I or II controlled substance, has a physiological effect similar to one of those substances, or is intended to have such an effect.[23]

Under this statutory scheme, however, judges, prosecutors, defense attorneys, and probation and parole officers still face serious challenges in dealing with designer drugs. If a designer drug is not based on a substance already placed on a CSA schedule, its producers and consumers cannot be prosecuted under the Analogue Act. Prosecutions—and therefore defenses—are also complicated by the fact that "substantial similarity" of chemical structure and physiological effect on human beings must typically be proven by expert testimony, leading to long, expensive, and highly technical evidentiary hearings and trials.[24]

In June 2015 the United States Supreme Court further complicated enforcement under the CSA and the Analogue Act when it decided *McFadden v. United States*.[25] The Court held that the knowledge requirement of offences under the CSA also applied to those offences when prosecuted under the Analogue Act, explaining that:

> When the substance is [a controlled substance] analogue, th[e] knowledge requirement is met if the defendant knew that the substance was controlled

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[16] *Id.*

[17] Madras, *supra* note 1, at 5.

[18] *Id.* at 3.

[19] 21 U.S.C. § 802.

[20] 21 U.S.C. §§ 801–971.

[21] *Stranger Than Fiction*, *supra* note 10, at 450.

[22] LISA N. SACCO & KRISTIN FINKLEA, CONG. RESEARCH SERV., R42066, SYNTHETIC DRUGS: OVERVIEW AND ISSUES FOR CONGRESS, 2–3 (2014).

[23] *Id.*

[24] *See e.g.* United States v. Bays, No. 3:13-CR-0357-B, 2014 U.S. Dist. LEXIS 104476, at *7–45 (N.D. Tex. Jul. 31, 2014) (denying the defendant's motions to exclude expert testimony).

[25] 135 S. Ct. 2298 (June 18, 2015).

> under the CSA or the Analogue Act, even if he did not know its identity. The knowledge requirement is also met if the defendant knew the specific features of the substance that make it a "controlled substance analogue.[26]

Chief Justice Roberts' concurrence identified an important flaw in the Court's new standard: the majority's application of the word "knowingly" would suggest "that a defendant needs to know more than the identity of the substance; he needs to know that the substance is *controlled*."[27] Therefore, a person may know that their substance is called "K-12" or some other name, but may not know that it is chemically similar to a controlled substance—he or she may not know that their substance is "controlled," and instead only know that it is supposed to be a legal "high."[28] That person—and perhaps many others—could escape prosecution, offering a new legal loophole for consumers of designer drugs.

Shortly after the *McFadden* decision, the Ninth Circuit Court of Appeals vacated a revocation of supervised release in *United States v. Aquino*,[29] noting that the defendant's conduct—consuming a controlled substance analogue—may actually have been legal under the new *McFadden* scienter requirement.[30] The Ninth Circuit Court of Appeals also noted that one of the defendant's conditions of supervised release, which prohibited the consumption of anything that would "mimic the effect[s] of any controlled substance," was too vague.[31] "Red Bull, Diet Mountain Dew Code Red, Jolt Cola (popular in the 1980s), and countless other sodas," the Ninth Circuit explained, "could fall into this category."[32]

The *Aquino* court highlighted what this author is calling the "grande iced nonfat chai with a shot of espresso" problem.[33] Combating designer drugs through legislative bans is extremely difficult, as legislatures cannot keep up with the rapid pace of designer drug development.[34] A newly developed drug will escape narrow statutory definitions, and by the time it can be studied and regulated, a different drug will be ready to take its place; as a result, designer drugs have sometimes been compared to the mythological

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[26] *Id.* at 2302 (citing 21 U.S.C. § 802(32)(A)).

[27] *Id.* at 2307 (Roberts, C.J., concurring).

[28] *Id.*

[29] 794 F.3d 1033 (9th Cir. 2015).

[30] *Id.* at 1038 n.4.

[31] *Id.* at 1037 (alteration in original).

[32] *Id.*

[33] *Id.*

[34] *See, e.g.*, Joseph A. Cohen, Comment, *The Highs of Tomorrow: Why New Laws and Policies are Needed to Meet the Unique Challenges of Synthetic Drugs*, 27 J.L. & HEALTH 164, 165 (2014); Sathappan, *supra* note 4, at 843; Timothy P. Stackhouse, Comment, *Regulators in Wackyland: Capturing the Last of the Designer Drugs*, 54 ARIZ. L. REV. 1105, 1109–11 (2012).

hydra.[35] If regulating individual drugs is too slow, governments should look for ways to ban all the designer drugs at once—but what statute can be broad enough to capture the huge class of designer drugs without also banning innocuous substances, like the caffeine in an iced nonfat chai latte?

This paper argues that the *McFadden* knowledge requirement exacerbates the "iced chai" problem. Statutory schemes that rely on specific, clinical definitions of prohibited substances cannot be broad enough to capture them all, but also cannot be updated frequently enough to combat new drugs as they become problematic. The *McFadden* decision will make the prosecution of certain individuals more difficult, and will not alleviate any of the problems already faced by practitioners at the trial level. Furthermore, it highlights the basic inadequacy of the CSA and Analogue Act—indeed, all prohibitive legislation—as responses to the designer drug problem. Unless the federal drug prohibition paradigm shifts dramatically, the CSA and Analogue Act structures may never be able to competently regulate designer drugs.

In light of the inadequacy of current federal legislation, what advice can attorneys and probation officers give their clients with respect to these technically legal, but potentially deadly drugs? How can judges prevent defendants from abusing these drugs while on supervised release or probation if they are not actually illegal, but still harmful? What can a legislature do to combat the ever-changing threat presented by designer drugs? This paper will provide a brief overview of the designer drug problem in America, then describe and evaluate the federal and selected state responses to the problem. Then, this paper will explain some of the difficulties that the *McFadden* and *Aquino* cases highlight with respect to the criminalization and regulation of designer drugs. Finally, this paper will attempt to offer suggestions to practitioners for dealing with designer drugs in the absence of effective legislation, as well as alternative legal paradigms for legislatures hoping to curb the designer drug epidemic in their jurisdictions.

II. DESIGNER DRUGS AND DRUG CULTURE

Cocaine and opium were common recreational and medicinal substances in 19th century America.[36] Psychedelic, mind-altering experiences are exciting and therefore alluring, and humans have been interested in recreational drugs for a very long time.[37] Drugs have been received with

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[35] *See, e.g.*, Sathappan, *supra* note 4, at 843; Baggaley, *supra* note 8.

[36] SACCO, *supra* note 2, at 2.

[37] Madras, *supra* note 1, at 2.

varying levels of approval in popular culture: Cheech Marin and Tommy Chong became famous for their marijuana-addled comedy, and many outdoor music festivals like Woodstock and its spiritual successor, Coachella, are well-known for being venues for drug exchange and enjoyment.[38] The plot of the recent movie reboot of *21 Jump Street*, the police serial, was focused on a high school crime ring selling a designer drug with a comically obscene name.[39] The mainstream news media, however, have not received designer drugs so positively, and have instead emphasized the negative side effects of the drugs and the threat they pose to young people because of their "legal" status.[40] Indeed, designer drugs appear to be a global problem, attracting the concern and attention of the European Union and the United Nations' International Narcotics Control Board.[41]

Synthetic drugs, as their name suggests, are artificial substances produced in a laboratory through chemical processes.[42] Their chemical structure may be identical to naturally-occurring drugs, or may be different, and most prescription drugs are technically synthetic drugs.[43] Designer drugs are a subset of synthetic drugs, although the two terms are sometimes used interchangeably.[44] "[T]he term designer drugs refers to clandestinely produced substances which are chemically and pharmacologically similar to substances listed in the [CSA] but which are not themselves controlled."[45]

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[38] Andrea Torres, *Despite New Synthetic Drugs, Ultra Music Festival Follows Old Woodstock Tradition*, LOCAL 10 NEWS (Mar. 27, 2015) http://www.local10.com/news/despite-new-synthetic-drugs-ultra-music-festival-follows-old-woodstock-tradition-; *see generally* UP IN SMOKE (Paramount Pictures 1978) (telling the story of two stoners, played by Cheech and Chong, who smuggle a van made entirely of marijuana from Mexico to Los Angeles).

[39] Angel Tagudin, *21 Jump Street (2012)*, ART OF THE TITLE (Sept. 19, 2012), http://www.artofthetitle.com/title/21-jump-street/ (reviewing 21 JUMP STREET (Relativity Media 2012)).

[40] *See, e.g.*, Judith Retana, *Synthetic Drugs on the Rise Nationwide*, NBC MONTANA (Feb. 23, 2016) http://www.nbcmontana.com/news/Synthetic-drugs-on-the-rise-nationwide/38154974; Baggaley, *supra* note 8; Schwarz, *supra* note 7.

[41] *See, e.g.*, Cormac O'Keeffe, *'No Limit' to New Designer Drugs*, IRISH EXAMINER (Mar. 3, 2016) http://www.irishexaminer.com/ireland/no-limit-to-new-designer-drugs-385275.html; Simon Shuster, *The World's Deadliest Drug: Inside a Krokodil Cookhouse*, TIME (Dec. 5, 2013), http://time.com/3398086/the-worlds-deadliest-drug-inside-a-krokodil-cookhouse/; Paolo Deluca et al., *Identifying Emerging Trends in Recreational Drug Use: Outcomes from the Psychonaut Web Mapping Project*, 39 PROGRESS IN NEURO-PSYCHOPHARMACOLOGY & BIOLOGICAL PSYCHIATRY 221 (2012).

[42] SACCO & FINKLEA, *supra* note 22, at 1.

[43] *Id.*

[44] *Id.*

[45] *Controlled Substance Analogs Enforcement Act of 1985: Hearing on S. 1437 Before the S. Comm. on the Judiciary*, 99th Cong. 44–45 (1985) (statement of John C. Lawn,

Around the time the CSA was enacted, designer drugs were sold as counterfeit versions of more conventional drugs.[46] However, with the CSA and Analogue Act, drug producers have turned their focus to substances that can be easily modified to skirt the law—substances that can be "designed" not to fall within the statutory definition of any controlled substance, while hopefully retaining strong psychoactive effects.[47]

Today, two of the most common categories of designer drugs are synthetic cannabinoids and synthetic cathinones.[48] Synthetic cannabinoids are designed to mimic the effects of the main psychoactive compound in marijuana, THC (delta-9-tetrahydrocannabinol).[49] As with any designer drug, synthetic cannabinoids can be sold under many different brand names, but they are best known by their street names "Spice," "K2," or "herbal incense."[50] These products may be sold in the form of dried plant material, like a loose-leaf tea, but the plant material itself typically has mild psychoactive or hallucinogenic effects on its own—the product is usually sprayed with a liquid synthetic cannabinoid, which provides the actual active ingredient.[51] Some cannabinoids have already been officially scheduled by the Drug Enforcement Administration ("DEA"), meaning that they are controlled substances in their own right, but any derivatives of those specific cannabinoids would be "controlled substance analogues," as discussed in Part III.[52]

Synthetic cathinones are derived from cathinone, an analogue of amphetamine, which is naturally present in a plant called "khat" (pronounced "cot").[53] The many variations of cathinone are typically stimulants with effects similar to methamphetamine, ecstasy, or cocaine, and are often sold as "bath salts" or "plant food."[54] Some newer types of bath salts are actually non-cathinone compounds that are closer in chemical structure to actual amphetamine or cocaine than cathinone.[55]

Young adults seem to be the primary consumers of synthetic drugs.[56] According to a 2010 survey by the Substance Abuse and Mental Health

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Adm'r, DEA).

[46] MCCORMICK, *supra* note 5, at 15.

[47] *A Problem of Design, supra* note 6, at 411.

[48] Stackhouse, *supra* note 34, at 1112.

[49] Cohen, *supra* note 34, at 167.

[50] *Id.*

[51] Paul L. Cary, *Designer Drugs: What Drug Court Practitioners Need to Know*, IX No. 2 DRUG COURT PRACTITIONER FACT SHEET 1, 3 (2014).

[52] *Id.*

[53] Stackhouse, *supra* 34, at 1112; Cary, *supra* note 48, at 5.

[54] Cohen, *supra* note 34, at 169.

[55] Cary, *supra* note 51, at 5.

[56] Jake Schaller, Comment, *Not For Bathing: Bath Salts And The New Menace of*

Services Administration, an agency of the U.S. Department of Health and Human Services, "about a fifth of those aged eighteen to twenty-five had taken an illicit substance . . . a higher rate of use than any of use than any other age group."[57] This may be part of what is fueling rising rates of drug overdose deaths among young, non-Hispanic whites, which rose from six per 100,000 to 30 per 100,000 in the span of just five years.[58] The news media have picked up on this trend, frequently characterizing young adults and their oblivious parents as the victims of yet another preventable drug scourge.[59]

Designer drugs have become popular for a number of possible reasons. These drugs can be less expensive but far more potent than traditional controlled substances, enticing consumers with a bigger "bang" for their buck.[60] Designer drugs are also attractive because they may escape current drug-testing procedures, even though laboratories that specialize in drug testing now screen for an increased list of compounds in response to designer drug trends.[61] However, recent advances in drug screening techniques may soon aid laboratories (and therefore employers and probation officers) in catching designer drug use, at least with respect to synthetic cannabinoids.[62]

While some designer drugs function as advertised, providing a safe and pleasant experience, other designer drug variants may have horrific side

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Synthetic Drugs, 16 J. HEALTH CARE L. & POL'Y 245, 251 (2013) (citing SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FORM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 11 (2011)).

[57] *Id.*

[58] Gina Kolata & Sarah Cohen, *Drug Overdoes Propel Rise in Mortality Rates of Young Whites*, N.Y. TIMES (Jan. 16, 2016), http://nyti.ms/1OWwo0R. The years were 1999 to 2014; the New York Times apparently reviewed about 60 million death certificates from 1990 to 2014. *Id.*

[59] *See, e.g.*, Drew Griffin & Nelli Black, *Deadly High: How Synthetic Drugs are Killing Kids*, CNN (Dec. 2, 2014) http://www.cnn.com/2014/12/01/us/synthetic-drugs-investigation/.

[60] *See* Tonya Alanez, *Flakka: Rampant Designer Drug Dubbed "$5 Insanity"*, SUN SENTINEL (Apr. 5, 2015) http://www.sun-sentinel.com/local/broward/fl-flakka-on-the-rise-20150402-story.html. "Flakka," also known as "gravel," is a designer drug known to cause "hallucinations, psychosis, paranoia, anxiety, aggression and combativeness." *Id.* It has been dubbed "$5 Insanity" because users can experience those symptoms from anywhere from three hours to three days for just five dollars. *Id.*

[61] Cary, *supra* note 51, at 5, 9.

[62] AACC, Breaking Research in AACC's Clinical Chemistry Journal Could Help to Hold Back the Tide of Designer Drugs, PR NEWSWIRE (Jan. 4, 2016), http://www.prnewswire.com/news-releases/breaking-research-in-aaccs-clinical-chemistry-journal-could-help-to-hold-back-the-tide-of-designer-drugs-300198672.html.

effects. For example, a relatively new drug called "krokodil," which originated in Russia in 2002 and has spread through parts of Europe, can cause serious physical harm and eventually death.[63] Krokodil is injected like heroin and repeated use causes the user's skin to become "dark, scaly, and necrotic" and to eventually "wither away."[64] Despite its frightening side effects, researchers suspect that krokodil is popular because it is highly addictive and easy to produce:

> "Krokodil" is a mixture of several chemicals; the root agent is desomorphine, a synthetic derivative of morphine. It can be manufactured at home from codeine, along with easily available additives, and is significantly cheaper than heroin. Desomorphine has 8 to 10 times higher analgesic potency, faster onset of action, and shorter half-life compared with morphine, which accounts for its increased addictive potential.[65]

Many users are attracted to designer drugs because they are "legal," not realizing that they are legal in the sense that they are unregulated or not yet criminalized, not legal as in "safe"—as is commonly assumed of prescription drugs.[66] Designer drugs enjoy this status only because federal and state governments cannot identify and ban them as fast as they are being developed.[67] In fact, the rapidity of drug development is probably only matched by the expedience of drug distribution: aside from regular street deals and sale in "head shops," designer drugs are easily purchased on the Internet, thanks to their technically legal status.[68] According to urban legend, the first commercial transaction over the Internet was a sale of marijuana between students at Stanford and the Massachusetts Institute of Technology.[69] Marijuana and MDMA (3,4-methylenedioxy-methamphetamine, also known as "ecstasy" or "Molly")[70] are still popular on "dark net" websites that may sell not only illegal and prescription drugs, but also child pornography and weapons.[71]

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[63] Dany Thekkemuriyi et al., *"Krokodil"—A Designer Drug from Across the Atlantic, with Serious Consequences*, 127 AM. J. MED. e1 (2014).

[64] *Id.*

[65] *Id.*

[66] Kevin Loria, *One in 10 People Around the World Gets High Off Designer Drugs*, BUSINESS INSIDER (May 1, 2015), http://www.businessinsider.com/synthetic-designer-drugs-are-shockingly-common-2015-5.

[67] Madras, *supra* note 1, at 4.

[68] Cohen, *supra* note 34, at 165.

[69] *The Amazons of the Dark Net*, THE ECONOMIST, Nov. 1, 2014, http://www.economist.com/news/international/21629417-business-thriving-anonymous-internet-despite-efforts-law-enforcers.

[70] *Drug Facts: MDMA (Ecstasy or Molly)*, NAT'L INST. ON DRUG ABUSE (Sept. 2013), https://www.drugabuse.gov/publications/drugfacts/mdma-ecstasy-or-molly.

[71] *Id.*

Online markets are often more attractive to consumers than more traditional methods of drug distribution. Digital drug deals require no face-to-face interaction, reducing the presence of violence or intimidation in any given transaction.[72] Dealers may be less hostile to each other as they have no physical territory to fight over, and they may even provide better customer service and higher quality products: many online drug markets have product review systems that allow customers to leave detailed feedback.[73] Drug purchasers cannot rely on small-claims courts or arbitration to resolve conflicts with drug sellers, so they are cautious in selecting their products.[74] Sellers must therefore rely on high ratings and developing good reputations to secure business, just like producers in more traditional retail industries.[75]

Designer drugs can sometimes be purchased on mainstream websites—like Amazon.com[76]—but are more commonly sold on obscure sites and forums, making them difficult for government agencies to track.[77] Unregulated or under-regulated laboratories in Asia supply a large portion of the drugs available on the Internet.[78] One investigative reporter based in Britain, posing as a pharmaceutical researcher working on analgesics for dogs, wanted to see how easy it would be to buy drugs over the internet.[79] He consulted a chemist who then designed a new analogue of phenmetrazine—a drug with no known analgesic properties.[80] Using a false name, a fake company, a webmail address, and a few hundred dollars, the reporter convinced a Chinese chemical firm to send him a high-purity sample of the analogue drug.[81] Based on his research on online drug communities, the reporter ruminated on the hypothetical future of his new designer drug:

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[72] *Amazons of the Dark Net*, *supra* note 69.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] Drew Dee, *What is NSI-189?*, THE WORST THINGS FOR SALE (Feb. 21, 2016), http://theworstthingsforsale.com/2016/02/21/what-is-nsi-189/. A blog called "The Worst Things For Sale" purports to collect and publish "[t]he Internet's most horrible items." *Id.* One of these items was the "nootropic" drug "NSI-189," which was supposed to improve the user's memory or cognition. *Id.* The product picture on the Amazon listing showed an open hydrofoil bag filled with white powder or crystal. *Id.* By the time this author was able to read the article, the product had already been pulled from Amazon.com.

[77] Mike Power, *The Drug Revolution That No One Can Stop*, MEDIUM (Jan. 29, 2014) https://medium.com/matter/the-drug-revolution-that-no-one-can-stop-19f753fb15e0#.2kxr0ljut.

[78] Madras, *supra* note 1, at 4.

[79] Power, *supra* note 77.

[80] *Id.*

[81] *Id.*

> A legal highs vendor would now offer the drug privately to a select number of influential bulletin-board posters, and ask them to review the drug online. Building hype, creating a market, they would then start selling the compound, but the process of testing and legislating means the British government would be powerless to intervene for at least a few months—perhaps even up to a year.[82]

Drugs like these are not tested on human beings before they are sold; consequently, when they hit the market buyers and sellers can only guess their physiological effects, duration of effects, overdose levels, and toxicity.[83] This mystery drug, according to the two chemists working with the reporter, could still possess the psychoactive properties of phenmetrazine *or* it might act as both a stimulant and an anorexic—there was no way to be sure without a human test subject.[84]

Producers of designer drugs pay close attention to the law, and hope to escape prosecution by altering the chemical structure of their products to prevent them from falling within a CSA schedule.[85] Many products borrow language from the Analogue Act in an attempt to avoid criminal liability, labeling their products as "not for human consumption."[86] Some products may come with warnings that the product does not contain controlled substances.[87] Mislabeling products or providing "deliberately misleading instructions on how they should be used" decreases information provided to consumers and increases risks of consuming undisclosed ingredients that could potentially be hazardous.[88]

Medical researchers are caught between a rock and a hard place—they need to be able to acquire research materials easily, and they need to be able to publish their work about new medications and other drugs.[89] However, they are aware that drug producers not only pose as researchers to obtain raw materials and but also read medical literature to find new substances to modify.[90] Indeed, drugs like bath salts are often marketed as

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[82] *Id.*

[83] MCCORMICK, *supra* note 5, at 15–16.

[84] Power, *supra* note 77. The reporter had his drug analyzed by a medicinal chemist at Cardiff University, and then had the drug entered into "TICTAC, a database that is used by [British] law enforcement and healthcare professionals." *Id.*

[85] Sathappan, *supra* note 4, at 829.

[86] Madras, *supra* note 1, at 3.

[87] *See, e.g.*, McFadden v. United States, 135 S. Ct. 2298, 2302 (2015).

[88] Schaller, *supra* note 56, at 259 (citing Larry Oakes, *Users Play Chemical Roulette*, MINNEAPOLIS STAR TRIB. (Sept. 4, 2011)).

[89] Helen Shen, *Federal Red Tape Ties up Marijuana Research*, 507 NATURE 407, 408 (2014).

[90] Power, *supra* note 77; Sathappan, *supra* note 4, at 829.

"research chemicals."[91] For the peer review process to be meaningful, researchers must publish as much information as they can about the new compounds they create and the procedures for creating them.[92] As regulations close in on illegal sources of these drugs, it has become more difficult for legitimate researchers to do their work.[93]

Federal "red tape" makes it difficult to do any kind of research on, for example, marijuana.[94] The University of Mississippi has a contract with the National Institute on Drug Abuse ("NIDA") to run the only federally-sanctioned marijuana farm in the United States.[95] Obtaining material from this farm requires the approval of the Department of Health and Human Services or the National Institutes of Health and the Food and Drug Administration ("FDA").[96] On top of that, the research facilities must be approved by the DEA and local drug law enforcement officials for the secure storage and handling of marijuana—an approval process that can take years.[97] Similar procedures are required for other controlled substances, as detailed by the NIDA Drug Supply Program's extensive ordering guidelines, which are accompanied by catalog of all the drugs that can be ordered from the federal government.[98]

In sum, the current status of the designer drug problem can be described as a kind of sumo match between the government and drug producers: as the government closes in on a drug, attempting to push it into illegality, producers push back with something novel. Some observers describe the struggle as a game of "whack-a-mole."[99] With sudden and shocking deaths and injuries, some have called the designer drug trend a global epidemic.[100] Set against the backdrop of drug-addition-as-disease ideology, designer drug abuse may very well be an epidemic: to stem the spread of disease,

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[91] Madras, *supra* note 1, at 3. These drugs can be sold in bulk in powder form as "plant food," among other euphemisms. *Id.*

[92] *See, e.g.*, Nahoko Uchiyama et al., *URB-754: A New Class of Designer Drug and 12 Synthetic Cannabinoids Detected in Illegal Products*, 227 FORENSIC SCI. INT'L 21 (2013).

[93] Shen, *supra* note 89, at 407.

[94] *Id.*

[95] *Id.* at 408.

[96] *Id.*

[97] *Id.*

[98] *Ordering Guidelines for Research Chemicals and Controlled Substances*, NAT'L INST. ON DRUG ABUSE (Jan. 2016), https://www.drugabuse.gov/ordering-guidelines-research-chemicals-controlled-substances.

[99] Cohen, *supra* note 34, at 167 (citing Olga Khazan, *Synthetic Drugs Are Multiplying Too Fast for Regulators to Outlaw Them*, THE ATLANTIC (Jun. 27, 2013), http://www.theatlantic.com/international/archive/2013/06/synthetic-drugs-are-multiplying-too-fast-for-regulators-to-outlaw-them/277321/).

[100] Remi L. Roy, *Synthetic Drugs: Investigating a Global Epidemic*, THE FIX (Aug. 5, 2014), https://www.thefix.com/content/synthetic-drugs-investigating-global-epidemic.

drug abuse prevention and treatment must be employed to protect the drug addicts who are merely the "hosts" of the disease.[101] The next section addresses current governmental responses to the problem.

III. FEDERAL AND STATE RESPONSES TO DESIGNER DRUGS

Congress's first serious attempt to regulate drugs began with the Harrison Narcotics Act of 1914, which placed importation, manufacturing, and distribution restrictions on cocaine and opium.[102] Marijuana was next, as it became a popular recreational drug in during the Prohibition Era.[103] Attitudes toward drug use and drug laws changed gradually over the decades, and then shifted dramatically in the 1970s: President Nixon's "war on drugs" and the Comprehensive Drug Abuse Prevention and Control Act of 1970[104] altered the social and legal landscape in a few important ways.[105]

First, the newly-enacted CSA replaced earlier drug laws with a comprehensive set of drug crimes of varying severity, based on five categories, or "schedules," of substances.[106] Second, the DEA was founded with the sole purpose of enforcing the CSA, signaling a new seriousness about federal enforcement of drug laws.[107] Third, the creation of the CSA was the impetus for the resurgence of designer drugs—once the CSA was enacted, large swaths of recreational drugs were criminalized and made harder to obtain, and new designer drugs were developed to fill the void.[108]

A. Federal Drug Scheduling and Penalties

Designer drugs were created by "clandestine chemists" as an attempt to circumvent the CSA.[109] The Controlled Substances Analogue Enforcement Act of 1986[110] was an attempt to circumvent those clandestine chemists by providing a "gateway" for the prosecution of controlled substance

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[101] Alan I. Leshner, *Addiction Is A Brain Disease*, Issues in Sci. & Tech. (Spring 2001) http://www.issues.org/17-3/leshner.htm.

[102] SACCO, *supra* note 2, at 2.

[103] *Id.* at 3.

[104] Pub. L. No. 91-513, 84 Stat. 1236 (Oct. 27, 1970).

[105] *Id.* at 5.

[106] *Id.* at 6.

[107] *Id.*

[108] *See* Sathappan, *supra* note 4, at 829 (explaining that clandestine chemists responded to the CSA by creating designer drugs, prompting Congress to pass the Analogue Act).

[109] Todd J. Bruno, U.S. v. McFadden*: Fourth Circuit Reads Scienter Out of Analogue Enforcement Act*, 66 S. C. L. Rev. 909, 911–12 (2015).

[110] Pub. L. No. 99-570, 100 Stat. 3207 (Oct. 27, 1986).

analogues.[111] Section 813 provides that "[a] controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I," meaning that people dealing in analogues may be prosecuted under the CSA as though they were dealing in actual controlled substances.[112] As a result, drug producers began using labels declaring that their products were "not for human consumption" in an attempt to avoid prosecution under the Analogue Act.[113]

The Analogue Act added a definition of "controlled substance analogue," identifying an "analogue" as any substance:

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.[114]

Controlled substances, substances with an approved new drug application, substances with an exemption for investigational use, and substances not intended for human consumption, are not analogues.[115]

Consistent with Congressional concerns about drug addiction, the Attorney General must consider the following factors when adding or removing a substance from a schedule:

> (1) [The substance's] actual or relative potential for abuse.
> (2) Scientific evidence of its pharmacological effect, if known.
> (3) The state of current scientific knowledge regarding the drug or other substance.
> (4) Its history and current pattern of abuse.
> (5) The scope, duration, and significance of abuse.
> (6) What, if any, risk there is to the public health.
> (7) Its psychic or physiological dependence liability.
> (8) Whether the substance is an immediate precursor of a substance already controlled under this title.[116]

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[111] Bruno, *supra* note 109, at 912.
[112] 21 U.S.C. § 813 (2012); Bruno, *supra* note 109, at 912.
[113] SACCO & FINKLEA, *supra* note 22, at 3.
[114] 21 U.S.C. §§ 802(32)(A)(i)–(iii) (2012).
[115] *Id.* §§ 802(32)(C)(i)–(iv).
[116] *Id.* § 811(c) (2012).

An "immediate precursor" is, generally speaking, a substance that is primarily used in the production of a controlled substance, or needs to be controlled in order to prevent the manufacture of a controlled substance.[117]

Drugs are organized in the CSA schedules according to the eight factors stated above, resulting in the most addictive and least medically useful drugs being the most restricted. Thus, Schedule I drugs have a "high potential for abuse," no "currently accepted medical use in treatment in the United States," and no "accepted safety for use of the drug or other substance under medical supervision."[118] Schedule II drugs also have a high potential for abuse, but have an accepted medical use or accepted medical use with "severe restrictions," and abuse of the drug "may lead to severe psychological or physical dependence."[119] Schedule I drugs include marijuana, heroin, and LSD, while schedule II drugs are substances like cocaine, Adderall (amphetamine), and methadone.[120]

Schedule III drugs have less potential for abuse than schedule I and II drugs, some currently accepted medical use, and may cause "moderate or low physical dependence or high psychological dependence."[121] Examples include ketamine and testosterone.[122] Schedule IV drugs have an accepted medical use, "low potential for abuse relative to the drugs . . . in schedule III," and may cause "limited physical dependence or psychological dependence relative to the drugs . . . in schedule III."[123] Schedule V drugs have an accepted medical use and low potential for abuse or dependence relative to the drugs in schedule IV.[124] Common prescription drugs like Xanax, Ambien, and Valium are in schedule IV, while Lyrica and certain dosages of codeine (like Robitussin AC) are on schedule V.[125]

The schedules may be amended by Congress, or by notice-and-comment rulemaking.[126] The most recent example of Congressional scheduling is the Synthetic Drug Abuse Prevention Act of 2012 ("SDAPA"), which scheduled several synthetic cannabinoids and two synthetic cathinones.[127] Although the DEA was created specifically to enforce the CSA, it must

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[117] *See id.* § 802(23).

[118] *Id.* §§ 812(b)(1)(A)–(C) (2012).

[119] *Id.*

[120] U.S. DEPARTMENT OF JUSTICE, LISTS OF: SCHEDULING ACTIONS CONTROLLED SUBSTANCES REGULATED CHEMICALS at 4, 7, 9–10 (Feb. 2016) [hereinafter *Orange Book*].

[121] 21 U.S.C. § 812(b)(3)(A)–(C) (2012).

[122] *Orange Book*, *supra* note 120, at 8, 13.

[123] 21 U.S.C. § 812(b)(4)(A)–(C) (2012).

[124] *Id.*

[125] *Orange Book*, *supra* note 120, at 1, 6, 11–13.

[126] 21 U.S.C. § 811(h) (2012).

[127] *A Problem of Design*, *supra* note 6, at 410.

work with other agencies like the Federal Food and Drug Administration ("FDA") in order to add drugs to the schedules.[128]

The FDA is responsible for the regulation of, as its name suggests, food and pharmaceutical drugs in America.[129] The DEA's administrative scheduling process requires that the DEA investigate the substance it intends to regulate and then the Department of Health and Human Services ("HHS") must make an assessment of the drug, during which HHS must consult with the FDA and the National Institute of Drug Abuse ("NIDA").[130] This process includes a period of notice and comment, which gives attentive drug-producers an opportunity to change their formulas once they see which exact substances will be banned.[131] The DEA has emergency scheduling authority when doing so "is necessary to avoid an imminent hazard to the public safety."[132] Under this emergency authority, a process called "notice of intent," the DEA must give a thirty-day notice period before issuing an order banning a substance.[133]

The length of the administrative scheduling process can work to the advantage of drug producers in more than one way. In 1985 the DEA attempted to schedule ecstasy through the rulemaking process, but in 1987 the First Circuit Court of Appeals vacated that rule because the DEA had not followed its own procedures correctly.[134] Almost four years passed between the time the DEA announced its intent to schedule ecstasy and the time it was successfully scheduled.[135] In the meantime, ecstasy was completely legal.

Once a drug has been scheduled, conduct involving that substance may constitute a crime enumerated in Section 841, Title 21, United States Code.[136] Knowingly or intentionally dispensing a controlled substance over the Internet is one such crime.[137] The CSA helpfully provides some examples of conduct that constitutes an offense under that section, which include "delivering, distributing, or dispensing a controlled substance

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[128] *Stranger Than Fiction*, *supra* note 10, at 453.

[129] Christopher J. Frisina, *Let FDA Regulate Its Own Drugs!: An Argument for Narcotic Control and Enforcement Under the Risk Evaluation and Mitigation Strategies (REMS)*, 27 LOY. CONSUMER L. REV. 238, 248 (2015).

[130] *Stranger Than Fiction*, *supra* note 10, at 453; Cary, *supra* note 48, at 7.

[131] *Stranger Than Fiction*, *supra* note 10, at 458.

[132] Jeffrey C. Grass, McFadden v. United States*: Deconstructing Synthetic Drug Prosecutions*, 39 CHAMPION 34, 35 (2015) (citing 21 U.S.C. § 811(h)(1)).

[133] *Id.*

[134] Grinspoon v. DEA, 828 F.2d 881, 891–92 (1st Cir. 1987).

[135] Amanda Kay, *The Agony of Ecstasy: Reconsidering the Punitive Approach to United States Drug Policy*, 29 FORDHAM URB. L.J. 2133, 2163–66 (2002).

[136] *See* 21 U.S.C. § 841 (enumerating prohibited acts and penalties for those acts).

[137] *Id.* § 841(h).

by . . . an online pharmacy that is not validly registered with a modification authorizing such activity," or "serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance."[138] Only actual transactions involving controlled substances are illegal, and the CSA is clear that using the Internet to merely advocate the use of controlled substances or state how much they cost is not punishable conduct.[139]

Penalties for offenses involving controlled substances are found in Section 841(b), which establishes a fairly straightforward set of mandatory minimum sentences depending on enumerated circumstances.[140] Penalties for controlled substance analogue crimes, however, are less straightforward, as discussed *infra*.

B. Federal Drug Prosecution and Sentencing

Part of the problem with prosecution of designer drug manufacturers, dealers, and consumers stems from the first part of the "controlled substance analogue" definition—the "substantial similarity" of the chemical structure.[141] Identifying a designer drug as an analogue of a controlled substance almost always requires that the government call an expert witness—indeed, it appears that Congress intended to require expert testimony—who will most likely be challenged by the defendant's expert.[142] This "battle of the experts" can be a highly technical matter. Currently, there are two tests for identifying analogues, neither of which are universally accepted by the scientific community.[143] The first is the "structure and effect" test, which requires a finder of fact to compare the chemical composition and physiological effect of a controlled substance and its alleged analogue.[144] The second is the "core arrangement of atoms" test, which requires a finder of fact to compare only the chemical makeup of the substances using two-dimensional diagrams created by experts or chemical manufacturers.[145]

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[138] *Id.* §§ 841(h)(2)(A), (C).

[139] *Id.* § 841(h)(3)(A)(ii).

[140] *Id.* § 841(b).

[141] *See id.* § 802(32)(A)(i) (2012) (requiring controlled substance analogues to have a chemical structure that "is substantially similar to the chemical structure of a controlled substance in schedule I or II.").

[142] *Stranger Than Fiction*, *supra* note 10, at 459.

[143] *Id.* at 460; Grass, *supra* note 132, at 38.

[144] *Stranger Than Fiction*, *supra* note 10, at 461–62.

[145] *Id.* at 460–61, 470.

After the substance has been identified as the analogue of a particular controlled substance, the court has to convert quantities of the analogue into equivalent amounts of marijuana to arrive at a sentencing range within the United States Sentencing Guidelines ("USSG").[146] This is why the "substantial similarity" standard for chemical structure is so important: associating the designer drug with the wrong controlled substance will result in calculating the wrong sentencing range.

In *United States v. Moreno*, for example, the defendants pleaded guilty to conspiring to import and distribute Alpha–Pyrrolidinovalerophenone ("Alpha-PVP"), a designer drug that was added to Schedule I in 2014.[147] Alpha-PVP is the chemical base of "flakka," a relatively new designer drug that can cause "delirium, delusions and hallucinations . . . violent fits, nightmarish visions, belligerence and aggression [accompanied by] seemingly superhuman strength."[148] At sentencing, the defendants disputed the drug quantity calculation, arguing that Alpha-PVP was closer to a Schedule V drug like pyrovalerone (used to treat chronic fatigue), instead of a Schedule I drug like methcathinone (originally an anti-depressant, now just a recreational drug).[149] Under the USSG, pyrovalerone would have netted the defendants zero to twelve months in jail; in contrast, methcathinone would have resulted in a sentence of seventy to eighty-seven months.[150] The district court was presented with detailed testimony from battling experts—and ultimately decided that the proper equivalent was methcathinone, meaning that each gram of Alpha-PVP was equivalent to 380 grams of marijuana for the purposes of sentencing.[151]

C. State Responses to Designer Drugs

State responses to designer drug abuse have generally followed the criminalization model established by the federal government.[152] The various state analogue statutes have been characterized as falling into four groups, "based on their reach and applicability."[153]

The first type of statute utilizes a three-prong approach, generally following the elements of the Analogue Act's definition of "controlled

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[146] Grass, *supra* note 132, at 40.

[147] United States v. Moreno, No. 15-CR-15-JDP, 2015 WL 6071680, at *1 (W.D. Wis. Oct. 15, 2015).

[148] Alanez, *supra* note 60.

[149] *Moreno*, 2015 WL 6071680, at *1.

[150] *Id.* at *2.

[151] *Id.* at *5.

[152] *A Problem of Design*, *supra* note 6, at 416.

[153] *Id.* at 417.

substance analogue," but making clear which subsections are required: substantial chemical structure, *and* similar effect *or* intent to have a similar effect as a controlled substance.[154] The second type of statute uses a two-prong approach, requiring only substantial similarity in chemical structure and similar effect.[155] The third type of statute adopts the Analogue Act's definition, but inserts an "or" between each of the elements, meaning that the government need only prove one of the three to establish that a substance is a controlled substance analogue.[156] The fourth type of statute inserts an "or" between the two prongs of the second type of statute, meaning that the government need only prove substantial similarity in chemical structure *or* substantially similar pharmacological effect.[157]

Hawai'i chose to forego the analogue scheme of the federal government and many other states, and instead adopted only the Uniform Controlled Substances Act ("UCSA").[158] The UCSA provides a streamlined control scheme that utilizes the CSA's eight factors, listed above in Part II, Section A, to place a drug in one of five schedules.[159] Hawai'i's version of the UCSA deviates from the model in several ways, the most important being that the agency determining whether a substance should be scheduled must "assess the degree of danger or probable danger of the substance"—language that is absent from the CSA and UCSA.[160] The scheduling agency, the Department of Public Safety, is provided only five factors to consider in making its dangerousness determination: 1) "[t]he actual or probable abuse of the substance;" 2) "[t]he biomedical hazard of the substance;" 3) "[a] judgment of the probable physical and social impact of widespread abuse of the substance;" 4) "[w]hether the substance is an immediate precursor of a substance already controlled;" and 5) "[t]he current state of scientific knowledge regarding the substance."[161]

In 2012, Hawai'i amended its UCSA through Act 29, which criminalized the synthetic cannabinoid and substituted cathinone drug families by employing a "general chemical class approach" instead of the analogue or specific-substance scheduling employed by the CSA and Analogue Acts.[162]

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[154] *Id.* at 417–18.

[155] *Id.* at 418.

[156] *Id.* at 418.

[157] *Id.* at 418–19.

[158] HAW. REV. STAT. §§ 329-1 to -131 (2013).

[159] UNIF. CONTROLLED SUBSTANCES ACT § 101 (UNIF. LAW COMM'N 1995).

[160] *Compare* HAW. REV. STAT. § 329-11(a) (2013), *with* 21 U.S.C. § 812(b) (2012), *and* UNIF. CONTROLLED SUBSTANCES ACT § 201(a) (UNIF. LAW COMM'N 1995).

[161] HAW. REV. STAT. §§ 329-11(a)(1)–(5). Factors one and two have additional sub-factors that are helpful in assessing the dangerousness of a substance, but are not relevant here. *Id.*

[162] Act 29 Relating to Controlled Substances, State of Hawai'i Department of Public

Although there have been no confirmed spice-related deaths in Hawai'i, there have been and continue to be spice-related hospitalizations, which likely served as the impetus for the new law.[163] By banning a class of drugs, the Act is "intended to prevent manufacturers of these products from simply adjusting the chemical formula of these controlled drugs to make them uncontrolled compounds."[164] However, it appears that this solution was short-lived, as different families of synthetic drugs were introduced to circumvent the law almost immediately.[165]

IV. *MCFADDEN* AND THE "ICED CHAI" PROBLEM

In 2010, Jewel Aquino pleaded guilty to one count of sex trafficking of children by force, fraud, or coercion, pursuant to Section 1591, Title 18, United States Code.[166] After a number of other probation violations, Aquino was involved in a car accident and tested presumptively positive for "spice" when she submitted to a drug test at her probation officer's request.[167] At the revocation and resentencing hearing, the District Court judge imposed a condition of supervised release, Special Condition No. 9, that would have prevented Aquino from possessing any substance she believed was "intended to mimic the effect[s] of any controlled substance."[168] The Ninth Circuit Court of Appeals vacated the District Court's revocation on other grounds, but took time to address Special Condition No. 9, holding that it was impermissibly vague.[169]

Aquino's argument against Special Condition No. 9 was that, in the Ninth Circuit's words, "it could cover innocuous substances such as chocolate and coffee, both of which (a) can be highly addictive, (b) fuel a significant percentage of American adults daily, and (c) can serve as an 'upper.'"[170] Indeed, the Ninth Circuit mused, that condition was so vague it would force Aquino to "guess whether an overzealous probation officer will attempt to revoke her supervised release for drinking a grande iced nonfat

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Safety (Apr. 19, 2012) (on file with author).

[163] Brent Remadna, *Manufacturers find loophole to keep hallucinogenic drug on Hawaii's streets*, KHON2 (Aug. 7, 2015), http://khon2.com/2015/08/07/manufacturers-find-loophole-to-keep-hallucinogenic-drug-on-hawaiis-streets/.

[164] *Id.*

[165] Allison Schaefers, *Drug dealers swiftly skirt Hawaii's 'proactive' law*, HONOLULU STAR-ADVERTISER (Dec. 10, 2012), http://www.bendbulletin.com/news/1564146153/drugdealersswiftlyskirthawaiisproactivelaw.

[166] United States v. Aquino, 794 F.3d 1033, 1034 (9th Cir. July 20, 2015).

[167] *Id.* at 1035.

[168] *Id.* at 1037.

[169] *Id.*

[170] *Id.*

chai with a shot of espresso."[171] This statement captures the crux of the problem with designer drugs: simple definitions based on what the drugs *do* are too broad to be functional, but piecemeal scientific definitions based on chemical structure leave too many legal loopholes.

McFadden v. United States[172] aggravates the second part of the problem. Stephen McFadden had been selling "bath salts" to Lois McDaniel, the owner of a video store, under product names like "Alpha," "No Speed," "Speed," "Up," and "The New Up."[173] These drugs had labels stating that they were "not for human consumption" or that the products did "not contain any of the following compounds or analogues of the following compounds" followed by a list of controlled substances.[174] McFadden maintained at trial that he did not know the bath salts he was selling were controlled substances.[175] He was eventually convicted of eight counts of knowingly manufacturing, distributing, or possessing with the intent to distribute controlled substance analogues, and one count of conspiracy.[176]

On appeal, McFadden argued that:

> [T]he District Court "erred in refusing to instruct the jury that the government was required to prove that he knew, had a strong suspicion, or deliberately avoided knowledge that the [substances] possessed the characteristics of controlled substance analogues."[177]

The Fourth Circuit Court of Appeals affirmed, concluding that the intent element of the statute required the government to prove that McFadden "meant for the substance at issue to be consumed by humans," not that McFadden knew the substances were controlled substance analogues.[178]

The crime of distribution of a controlled substance, codified at Section 841(a)(1), Title 21, United States Code provides that:

> Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .[179]

"Under the most natural reading of this provision," Justice Thomas wrote for the unanimous court, "the word 'knowingly' applies not just to the

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171 *Id.*
172 135 S. Ct. 2298 (June 18, 2015).
173 *Id.* at 2302.
174 *Id.*
175 *Id.*
176 *Id.* at 2303.
177 *Id.*
178 *Id.*
179 21 U.S.C. § 841(a)(1) (2012).

statute's verbs but also to the object of those verbs—'a controlled substance.'"[180] The word "a," in this context, refers to "[s]ome undetermined or unspecified particular," meaning that Section 841(a)(1) "requires a defendant to know only that the substance he is distributing is some unspecified substance listed on the federal drug schedules."[181]

In the context of an Analogue Act prosecution, the government must still prove that the defendant knew he was dealing with "a controlled substance," because "controlled substance analogues" are treated as schedule I substances.[182] This knowledge requirement can be proven by showing 1) that the defendant knew he or she was dealing with a controlled substance (that is, a substance actually listed on a schedule, or is treated as a scheduled substance by the Analogue Act) "regardless of whether [the defendant] knew the particular identity of the substance," or 2) that the defendant "knew the specific analogue he [or she] was dealing with, even if he [or she] did not know its legal status as an analogue."[183]

A defendant does not need to know that the Analogue Act exists or know its definition of "controlled substance analogue."[184] Knowing the underlying *facts* about the substance that fit the definition of "controlled substance analogue" will be enough to make a defendant's conduct illegal.[185] According to the Analogue Act, the features of a controlled substance analogue are: 1) a "chemical structure [that] is substantially similar to the chemical structure of a controlled substance in schedule I or II;" 2) a "'stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than' the effect of a controlled substance in schedule I or II;" or 3) the fact that the substance is "represented or intended to have [the] effect [stated above] with respect to a particular person."[186] Note that the word "or" is placed between features 2 and 3, but there is no connector between features 1 and 2.[187]

Analogue Act prosecutions are already difficult without the two-option knowledge requirement of *McFadden* because of the battle of the experts described *supra,* in Part III, Section B. With *McFadden*, Justice Thomas solved the scienter problem through a "natural reading" analysis of the statute's text, but did not decide whether the three elements in

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[180] *McFadden*, 135 S.Ct. at 2304.
[181] *Id.*
[182] *Id.* at 2305.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* (citing 21 U.S.C. § 802(32)(A)).
[187] 21 U.S.C. § 802(32)(A) (2012).

Section 841(32)(A) should be read conjunctively or disjunctively.[188] This question was not before the Supreme Court—at the district level, McFadden and the government agreed to a conjunctive reading, which appears to be the majority view.[189] Most courts have chosen to apply the rule of lenity and resolve the question in favor of defendants by reading the statute conjunctively.[190] A conjunctive reading requires the government to prove feature 1 (substantially similar chemical structure) and then *either* feature 2 (effect on the nervous system) or feature 3 (representation or intent to have the effect).[191] If read disjunctively, the government need only prove one of the three.

The *McFadden* decision resolved a circuit split on the scienter issue—without explaining much about it.[192] Prior to *McFadden*, the minority approach (followed by the Fourth and Fifth Circuits) essentially found no scienter requirement with respect to the definition of "controlled substance analogue," requiring only that the government prove the "*intent* that the substance be consumed by humans."[193] The majority approach (followed by the Second, Seventh, and Eighth Circuits) required that the government "prove the defendant knew the substance in question to be a controlled substance analogue, 'and thus, by definition, a controlled substance.'"[194] The Supreme Court essentially agreed in *McFadden*, but went a little farther in providing two ways to satisfy the requirement.

No law can cover every possible factual situation, but the scienter requirement that *McFadden* imposes on Analogue Act through the CSA presents a prickly problem. If a person does not know what a controlled substance is, and therefore does not know if something is an analogue of a controlled substance, that person can still be caught on the Court's second knowledge option: the government need only produce evidence that the person knows the features of the substance that make it a "controlled substance analogue."[195] For example, the fact that the defendant researched chemicals to create in their lab may be enough to prove that they knew the product was "substantially similar" in "chemical structure" to a Schedule I or II drug. In *McFadden*, Stephen McFadden researched "bath salts" by

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[188] *McFadden*, 135 S. Ct. at 2304.

[189] United States v. McFadden, 15 F. Supp. 3d 668, 672 n.2 (W.D. Va. 2013) (citing United States v. Turcotte, 405 F.3d 515, 522 (7th Cir. 2005)).

[190] Grass, *supra* note 132, at 35.

[191] Bruno, *supra* note 109, at 913.

[192] *See* Hugh B. Kaplan, *Justices Wrangle With Scienter Element Of Statute That Outlaws Designer Drugs*, BLOOMBERG LAW, 97 CRL 94 (Apr. 22, 2015) (speculating that the forthcoming decision would resolve a circuit split).

[193] Bruno, *supra* note 109, at 915.

[194] *Id.* at 916.

[195] McFadden v. United States 135 S. Ct. 2298, 2304 n.1 (June 18, 2015).

consulting the DEA's controlled substances list and even disposed of some products after discovering that they contained ingredients on those lists.[196] But is that kind of evidence enough?

Justice Thomas provided some additional guidance in the first footnote of *McFadden*:

> Direct evidence [to prove the knowledge element] could include, for example, past arrests that put a defendant on notice of the controlled status of a substance . . . Circumstantial evidence could include, for example, a defendant's concealment of his activities, evasive behavior with respect to law enforcement, knowledge that a particular substance produces a "high" similar to that produced by controlled substances, and knowledge that a particular substance is subject to seizure at customs.[197]

Direct producers of the drugs would probably know—that is, the government could prove—that they knew they were mixing a particular set of chemicals, which would result in a drug they thought was legal, but should have known was an analogue. However, if the defendant is a just a consumer buying a drug called "2C-E" or "Ivory Wave," he or she may not have the requisite knowledge to satisfy the new knowledge requirement imputed to the Analogue Act.

The *McFadden* decision was unanimous, but Chief Justice Roberts concurred separately to take issue with the Court's first knowledge option.[198] The Court stated that the government may satisfy the knowledge requirement of Section 841(a)(1) "by showing that the defendant knew the identity of the substance he possessed."[199] Because the knowledge requirement of the statute applies "not just to the statute's verbs, but also to the object of those verbs—'a controlled substance,'" Chief Justice Roberts instead argues that "a defendant needs to know more than the identity of the substance; he needs to know that the substance is *controlled*."[200] Although "ignorance of the law is typically no excuse to criminal prosecution," and therefore "it is no defense that a defendant did not know it was illegal to possess a controlled substance," lack of knowledge *is* a legal defense when such knowledge is required by statute—under the Court's first knowledge option, "it is a defense that [a defendant] did not know the substance was controlled."[201]

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[196] Bruno, *supra* note 109, at 909–10.

[197] *McFadden*, 135 S. Ct. at 2304 n.1.

[198] *Id.* at 2307 (Roberts, C.J., concurring).

[199] *Id.*

[200] *Id.*

[201] *Id.* at 2308. This mistake of fact defense could potentially be applied to *every* crime involving a controlled substance, but such an inquiry is beyond the scope of this paper.

Jewel Aquino, for example, probably knew that she was consuming spice, but may not have known that it was treated as a controlled substance analogue because its chemical structure was similar to marijuana, a schedule I drug. That is assuming, of course, that the spice Aquino smoked was *in fact* an analogue of marijuana, and not some other substance listed or not listed on the CSA's schedules. Consumers and second-hand sellers (i.e., distributors who obtained the drugs from a producer) who do not have a lot of knowledge of the chemical makeup or production process of their drugs may not know that the substance they are dealing in is, in fact, a controlled substance analogue.

Although Justice Thomas's opinion was a scant five pages, it solved one problem and exacerbated others, and has already been making its way across America's federal circuits. The *McFadden* court read a scienter requirement into the Analogue Act, through the CSA. Now, the government must prove at least one of those two knowledge options in addition to at least one of the three features of a controlled substance analogue in order to secure an Analogue Act conviction. As the Ninth Circuit noted, there is conduct involving designer drugs that may not actually be illegal under that standard.[202] At least one new trial has been granted based on *McFadden*,[203] and several circuits have cited *McFadden* for the court's statutory interpretation analysis—specifically, its "natural language" reading of the statute.[204] Courts have also cited *McFadden* for the proposition that courts assume that individuals know the law.[205] In sum, *McFadden* resolves one narrow legal question about whether the Analogue Act has a scienter requirement, but leaves open many others. Where does *McFadden* leave courts, legislatures, and practitioners in their fight against designer drugs?

V. MOVING FORWARD IN THE ABSENCE OF EFFECTIVE LEGISLATION

Against this stunningly complex regulatory backdrop, what is a practitioner to do? How are lawyers to advise their clients? How will probation officers decide what conduct actually constitutes a violation of probation conditions? Can judges keep defendants from enjoying technically legal but potentially harmful vices? The bottom line is that people want to know what is legal and what is not—and while the lines

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[202] United States v. Aquino, 794 F.3d 1033, 1038 n.4 (9th Cir. 2015).

[203] United States v. McConnell, No. 2:14CR00001, 2015 WL 4633669, at *9 (W.D. Va. Aug. 3, 2015).

[204] *See, e.g.*, Long v. Insight Commc'ns of Cent. Ohio, L.L.C., 804 F.3d 791, 797 (6th Cir. 2015); United States v. Roy, 630 F. App'x 169, 171 (4th Cir. 2015).

[205] *See, e.g.*, Heller v. District of Columbia, 801 F.3d 264, 285 (D.C. Cir. 2015).

between the former and the latter are unclear, the federal government's intent to ban designer drugs certainly is not. The Federal Analogue Act and the DEA's administrative and emergency scheduling authority indicate that Congress wants to criminalize designer drugs—they are legal by omission, not by approval.

State legislatures seeking to curb the designer drug epidemic may seek to empower pre-existing law enforcement resources, but may lack the funding to do so. What can state legislatures—or Congress—do in such a position? Luckily for them, most of the scholarly discussion on the designer drug problem has focused on legislative reforms and responses.

A. Survey of Pre-McFadden Solutions

Most suggestions made before *McFadden* involve changes to the language of the CSA and the Analogue Act. The "substantially similar" language in the definition of "controlled substance analogue" has been criticized as vague and difficult to apply, but may now be possible to generate lists of analogues through "computer-aided drug design" ("CADD") techniques.[206] The "substantially similar" requirement, one author suggests, could be eliminated and replaced by a list of compounds generated through CADD, but subject to exceptions for legitimate research.[207]

One author has suggested that the FDA should take over the regulation of addictive drugs.[208] The Food and Drug Administration Amendments Act of 2007 ("FDAAA") gave the FDA the ability to regulate pharmaceuticals through "risk evaluation and management strategies" ("REMS") that permit the FDA to "restrict distribution and prescription methods under its own power rather than relying on the DEA."[209] REMS allow the FDA to determine how certain drugs are distributed, which may put the FDA in a better position than the DEA to control how designer drug producers acquire the materials needed to make their products.[210] Alternatively, the FDA and DEA could simply participate in joint rulemaking, sharing resources and findings to expedite the drug approval or drug scheduling processes which are ordinarily very slow.[211]

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[206] Stackhouse, *supra* note 34, at 1133.

[207] *Id.*

[208] Frisina, *supra* note 129.

[209] *Id.* at 241.

[210] *Id.* at 277.

[211] *Id.* at 279–80. One problem with this remedy is that FDA regulations are difficult for the average person (and even the above-average person) to understand. If the U.S. Supreme Court applied a *McFadden*-like knowledge requirement to those notoriously inscrutable

The pre-*McFadden* literature also expressed concern about the lack of an effective early warning system for new and dangerous drugs.[212] In 2008, the European Union launched the Psychonaut Web Mapping Project in order to monitor the internet for discussion on recreational drugs, a strategy that United States law enforcement could emulate.[213] In 2012, the United Nations Commission on Narcotic Drugs requested that the United Nations Office on Drugs and Crime ("UNODC") create a global warning system to "monitor synthetic drug activity worldwide and alert countries of new synthetic substances."[214] One author has suggested that the United States, through the State Department, "should incorporate its equivalent of a domestic early warning system, [the DEA's National Forensic Laboratory Information System], into the UNODC's system as soon as possible."[215]

B. Post-McFadden Suggestions for Practitioners

Attorneys and probation officers advising clients or probationers—the would-be consumers of legal highs—should continue to emphasize the danger and constantly shifting legality of designer drugs. Despite the fact that many designer drugs are technically legal, the use of these drugs should nonetheless be discouraged because of the serious health risks described above. In addition to the unpredictability of prosecution for designer drugs, Jewel Aquino's car accident illustrates the fact that consuming legal drugs may cause people to engage in risky or illegal behavior.

What can a trial court do to prohibit defendants from consuming designer drugs *before* the holes in the CSA, Analogue Act, and other legislation are closed? Even if designer drugs are never properly criminalized, courts may still have good reasons to forbid a person from consuming those substances – like keeping defendants out of trouble.[216] With the *McFadden* decision, the battle of the experts problem facing designer drug prosecutions has not changed, but jurists and litigants now have a clear answer about the scienter requirement imposed on the Analogue Act. Whether the government can muster sufficient proof of knowledge is a different question, and old convictions may be overturned as a result; a new trial was granted in the Fourth Circuit just two months after *McFadden* came down.[217] Judges will

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regulations then huge swaths of people would likely escape prosecution.

[212] Stackhouse, *supra* note 34, at 1135; Cohen, *supra* note 34, at 182.

[213] Stackhouse, *supra* note 34, at 1135.

[214] Cohen, *supra* note 34, at 183–84.

[215] *Id.* at 184.

[216] United States v. Aquino, 794 F.3d 1033, 1038 (9th Cir. July 20, 2015).

[217] United States v. McConnell, No. 2:14CR00001, 2015 WL 4633669 (W.D. Va. Aug. 3, 2015).

still face difficulties in trying to prohibit designer drug consumption through conditions of probation or supervised release as a result of the persistent vagueness of the "iced chai" problem.

In *Aquino*, the Ninth Circuit Court thought that other, overlapping laws would have covered the behavior that the District Court hoped to prohibit.[218] Specifically, the Court noted that Hawai'i's driving laws already forbid Aquino from driving "[w]hile under the influence of any drug that impairs the person's ability to operate [a] vehicle in a careful . . . manner" and that the federal Analogue Act already forbids her to consume controlled substance analogues.[219] The Ninth Circuit instead highlighted a Seventh Circuit case and, while being careful not to adopt that language, suggested that the District Court examine that language for guidance.[220] In *United States v. Kappes*, the Seventh Circuit Court of Appeals rejected a vague condition of supervised release that prohibited the defendant from using "mood altering substances."[221] The Court suggested that a better restriction might be the prohibition of "psychoactive substances that impair physical or mental functioning, including street, synthetic, or designer drugs."[222] This language, however, still may not solve the "iced chai" problem—for example, the term "impair" requires further definition, as it is not clear if stimulants (which arguably *enhance* functioning) would fall within the prohibition.

Specialty courts are designed to focus on early treatment and rehabilitation of particular social ills—drug abuse, domestic violence, or prostitution—by providing early treatment and enhanced surveillance of their participants.[223] The drug court model may provide some guidance to non-specialty criminal courts. The National Drug Court Institute ("NDCI") has released a Drug Court Practitioner Fact Sheet about designer drugs.[224]

The NDCI has made five recommendations for drug courts that non-specialty courts may also find helpful; first, courts should acknowledge the problem and take care to "understand the complexity and rapid evolution of designer drugs," including the ways in which the laws of their jurisdiction may be inadequate to keep up with designer drug evolution.[225] Second, courts should unequivocally ban the use and possession of even legal

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[218] *Aquino*, 794 F.3d at 1038.

[219] *Id.*

[220] *Id.* (citing United States v. Kappes, 782 F.3d 828, 853 (7th Cir. Apr. 8, 2015)).

[221] 782 F.3d 828, 853 (7th Cir. Apr. 8, 2015).

[222] *Id.*

[223] Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 83, 85 (2007).

[224] Cary, *supra* note 51.

[225] *Id.* at 9.

designer drugs.[226] Third, courts should put their expectations and policies in writing, as "[p]articipants are more likely to react favorably to an adverse judgment if they are given advance notice on how such judgments will be reached."[227] Fourth, to the extent that it is feasible, courts should screen participants for designer drug use using the drug testing methods available, and should "consider a limited amnesty initiative to encourage other participants to self-report designer drug use," which has therapeutic and deterrent benefits.[228] Fifth and finally, courts should take advantage of "community supervision by probation and law enforcement officers, court personnel, caseworkers, and marshals" to monitor participants for relapse.[229]

Specialty courts are not without their critics, however: most drug court models focus on cooperation between the offender, the government, and the community, resulting in the subordination of the adversarial system to the overall goals of treatment.[230] Criminal defense attorneys may not understand that this laudable purpose creates a tension between their ethical duty of loyalty to their clients, and their role in their clients' treatment.[231] The most obvious flaw in NDCI's suggestions, of course, is the fact that judges and the probation officers and social workers that support their efforts are in need of resources, and must rely on their legislatures to allocate funds to them. Congress and the states may be more willing to do that in the wake of *McFadden v. United States*.

C. Post-McFadden Suggestions for Legislatures

State legislatures have generally imitated the federal model of designer drug regulation, but as "laboratories of democracy" need not follow the federal lead in all things. A brave state could invert the drug regulation paradigm altogether and ban *all* psychoactive drugs, instead of engaging in the drug-by-drug scheduling struggle that plagues federal drug regulation. States could and should provide exceptions for scientific research and industrial manufacturing and production. With additional exceptions for prescriptions, over the counter drugs, caffeine, nicotine, and other chemicals deemed safe for human consumption by the FDA, this inverted

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[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *See generally* Meekins, *supra* note 223; Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006) [hereinafter Specialized Justice].

[231] *See generally* Specialized Justice, *supra* note 230.

regulation scheme could ban all designer drugs in one fell swoop as long as it provides an appropriate definition for "psychoactive drug."

The federal government and states that take the CSA and Analogue Act as models already rely heavily on scientific experts to craft highly technical definitions of the drugs they ban. Why not work with those experts to develop a scientifically-sound, medically-accurate definition of "designer drug" or "psychoactive drug" that is broad enough to cover high-inducing drugs *generally*, instead of through piecemeal definitions? Although this approach appears to be a sensible and achievable at first blush, the "iced chai" problem rears its ugly head again: a broad definition will face the vagueness problems encountered in *Aquino*. Furthermore, legislatures brave enough to try this scheme will still have the *McFadden* proof-of-knowledge problem if they decide to implement a scienter requirement—and as *McFadden* itself demonstrates, a scienter requirement may be read into a statue by the United States Supreme Court even if it is omitted by the legislature.[232]

This complete-ban stratagem would also fail to address religious or cultural uses of drugs (e.g. kava or peyote), and would almost certainly overburden law enforcement agencies upon its initial enactment. Further, would it even be Constitutional to institute such a wide ban? If overbreadth and vagueness are two sides of the same coin, the former is certainly as unconstitutional as the latter. This is a question for another time, but the idea presents an opportunity to discuss and evaluate the current drug control paradigm.

In the alternative, the federal government could observe and mimic state responses and pursue alternatives to the prohibitive paradigm of drug regulation. The legalization of "traditional" marijuana in some states presents an interesting juxtaposition to the designer drug war—what if governments just created a process by which "safe" designer drugs could be registered, regulated, and legally sold? A change in the supply and demand of other drugs may reduce the appeal of designer drugs. After all, one significant reason they are so popular is the fact that they offer a "legal high."

Despite the long-running debate on the morality and propriety of drug use, which has been competently discussed in other literature,[233] many states have been lifting restrictions on the use of marijuana. Twenty-six states—Alaska, Arizona, Arkansas, California, Colorado, Connecticut,

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[232] *See supra* Part IV.

[233] *See generally* DOUGLAS HUSAK & PETER DE MARNEFFE, THE LEGALIZATION OF DRUGS (R. G. Frey ed., 2005); DRUGS, MORALITY, AND THE LAW (Steven Luper-Foy et al. eds. 1994).

Delaware, Florida, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Rhode Island, Vermont, and Washington—have legalized the use of marijuana for medical purposes.[234] Alaska, California, Colorado, Massachusetts, Nevada, Oregon, and Washington have legalized marijuana for recreational use.[235] Marijuana has also been decriminalized in the District of Columbia, meaning that residents can possess and grow certain amounts of marijuana for personal use, but marijuana cannot be sold or purchased within the District.[236]

Decriminalization has substantial financial advantages, especially for cash-starved states. In the 2014 tax year, Colorado collected $70 million in marijuana-specific tax revenue.[237] Washington has raised $83 million in taxes since it legalized marijuana.[238] It is estimated that if all fifty states and the District of Columbia legalized marijuana, the retail market for that drug alone could generate more than $35 billion in revenue by 2020.[239] Such massive tax revenues could create funding for education or law enforcement initiatives to combat designer drugs like synthetic cannabinoids, which would be more dangerous than government-regulated weed. Indeed, Colorado has been spending some of its marijuana revenue on grants for public and charter schools.[240]

Presenting regular marijuana as a safe and legal alternative to spice, the technically legal but dubiously safe synthetic form of marijuana, would turn the fight against designer drugs on its head. If consumers could have the same psychoactive experience with the government's safety seal of approval, designer drugs would appear far less attractive. President Barack Obama, in an interview with Vice News, opined that "[a]t a certain point, if enough states end up decriminalizing, then Congress may . . . reschedule marijuana."[241]

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[234] Liz Rowley, *Where Is Marijuana Legal in the United States? List of Recreational and Medicinal States*, MIC.COM (Oct. 4, 2015), http://mic.com/articles/126303/where-is-marijuana-legal-in-the-united-states-list-of-recreational-and-medicinal-states#.Z9HNtyFZZ.

[235] Rowley, *supra* note 234; Christopher Ingraham, *Marijuana Wins Big on Election Night*, WASHINGTON POST (Nov. 8, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/11/08/medical-marijuana-sails-to-victory-in-florida/.

[236] Rowley, *supra* note 234.

[237] *Id.*

[238] Michelle Toh, *Colorado Raises $150 Million from Marijuana. Will More States Legalize?*, CHRISTIAN SCI. MONITOR (Sept. 6, 2015), http://www.csmonitor.com/USA/USA-Update/2015/0906/Colorado-raises-150-million-from-marijuana.-Will-more-states-legalize.

[239] Rowley, *supra* note 234.

[240] Toh, *supra* note 238.

[241] Interview with Barack Obama, President of the United States of America, by Vice

Eventually, the federal government could reschedule or decriminalize other substances—including, perhaps, substances that were once designer drugs. Certainly, research to determine which drugs would be good candidates for decriminalization would be expensive, but Colorado's marijuana sales of more than $996 million—resulting in tax revenue of $135 million for the 2015 period—suggests that legalizing some recreational drugs might be positive for the economy.[242] Some of this revenue could be earmarked for safety regulation enforcement and medical or other scientific research. Researchers may be able to utilize the findings of the self-styled "psychonauts"—people who try new designer drugs to see if they are safe for others, or just to "explor[e] the frontiers of the mind"—who might line up in droves for the opportunity to volunteer for government-regulated human drug trials.[243]

The jury is out, as it were, on the social impact of marijuana legalization—time and research are required to understand how legal marijuana is changing American society. However, legalizing some already well-known (well-understood and manageable) substances like marijuana may be a viable stopgap measure in reducing the popularity of designer drugs while more effective regulation and prosecution—or addiction treatment—methods are being developed.

VI. CONCLUSION

High rates of change and low testing standards result in high casualty rates among designer drug users. Federal and state regulatory agencies cannot identify, define, and regulate new drugs fast enough to put a dent in the popularity or profitability of designer drugs. As a result, legal loopholes allow drug dealers to invent new and technically lawful substances that may have serious detrimental effects on consumers. From the young woman deeply affected by one binge on bath salts to the Army medic who tragically ended his life and the lives of his wife and child, the consequences of designer drugs have made a grisly and lasting impression on American society—yet their appeal to consumers has not diminished.

Is the current approach to designer drugs the correct approach? Present legal paradigms do not recognize drug addiction as an illness, despite the

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News (Mar. 23, 2015), https://www.youtube.com/watch?v=pMQDQl0ZQv8.

[242] Ricardo Baca, *Colorado Marijuana Sales Skyrocket to More Than $996 Million in 2015*, THE CANNABIST (Feb. 9, 2016), http://www.thecannabist.co/2016/02/09/colorado-marijuana-sales-2015-reach-996-million/47886/.

[243] William Alexander, *Internet Psychonauts Try All The Drugs You Don't Want To*, VICE (Apr. 30, 2013), http://www.vice.com/read/internet-psychonauts-try-all-the-drugs-you-dont-want-to-try.

fact that advances in scientific understanding of the brain have caused some researchers to think that "drug addiction is a brain disease that develops over time as a result of the initially voluntary behavior of using drugs."[244] New research suggests that "[a]ddiction should be understood as a chronic recurring illness" that may take repeated treatments to achieve recovery.[245] Prison alone is not an effective treatment for drug addiction, and although increasing numbers of prisons offer drug treatment programs to their addicted inmates, people may start using drugs again once they leave custody and return to their old environments.[246] Instead of legislating the problem by criminalizing its symptom—drug abuse—states and the federal government should put more effort into drug addiction prevention. A shift in legislative mentality from punishment-oriented schemes to treatment-oriented schemes may produce better results than the retributivist methods of the "war on drugs." Designer drugs are everywhere; if piecemeal criminalization does not work and the drug supply seems endless, governments that want to have any hope of stemming the tide of designer drug abuse must find some other way to decrease the demand for designer drugs.

While there is no perfect solution to any problem and a decent solution is likely a long way away, law enforcement and medical professionals certainly feel a real sense of urgency about the designer drug craze: people are dying or being hurt, and something needs to be done. However, is this reaction to designer drugs just evidence of another "drug panic"? Like methamphetamine and ecstasy before them, designer drugs are being surrounded by "widespread press coverage of what is constructed as the most ominous drug scourge to face America."[247] If the designer drug craze follows the meth and ecstasy pattern, its negative press coverage will be "followed by a tempered policy response that focuses primarily on regulation, education, and alternatives to incarceration."[248]

Whatever comes to be—mere panic or monstrous pandemic—practitioners should be cautious in the meantime. Practitioners should understand (and are already well aware of) the fact that the federal government and all fifty states are interested in continuing to ban and regulate new designer drugs. What is legal one week may be a controlled substance or controlled substance analogue the next, and attorneys should

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[244] Leshner, *supra* note 101.

[245] *Id.*

[246] *Id.*

[247] *See* Deborah Ahrens, *Drug Panics in the Twenty-First Century: Ecstasy, Prescription Drugs, and the Reframing of the War on Drugs*, 6 ALB. GOV'T L. REV. 397, 399 (2013) (describing the pattern of responses to recent drug epidemics).

[248] *Id.*

advise their clients about this fact. Parole or probation officers should do the same; if individuals would like to avoid revocation of their conditionally-granted freedom, they should avoid designer drugs altogether. Although the drugs might be technically legal, their side effects may drive people to commit other revocable offenses: Jewel Aquino ended up in a car accident after smoking some variation of spice, endangering herself and her young child.[249] Ryan Roudebush, in a more violent example, consumed spice and attempted to throw his girlfriend off a Waikiki balcony.[250]

State legislators could institute dramatic changes in their regulation schemes—or take a wait and see approach. Colorado, Washington, Oregon, and Alaska have legalized marijuana for recreational use and many others have permitted medical or compassionate use.[251] Legalizing a handful of well-documented drugs—ones whose safe dosages and side effects are understood and treatable—may put a dent in the designer drug market for a while, giving governments a chance to assess the extent of the problem. If piecemeal legalization (for criminalizing or decriminalizing) is not feasible, then perhaps a shift in the drug law paradigm is in order—a bold state could ban everything other than what is proven safe, and let researchers expand the list later. At the very least, state legislatures could provide additional support to judges, who have to handle designer drug issues on a case-by-case basis using limited resources and limited legal options. Expanding drug courts and providing more addiction treatment resources for the whole community could be relatively low-cost supplemental strategies for governments waiting to see how other states or the federal government respond to designer drugs.

As the federal Analogue Act and various state statutes show, governments are certainly engaging in regulatory responses to designer drug use, but only time will tell if alternatives to regulation will follow. Whether they pursue the crackdown and criminalization approach of the "war on drugs" or the demand-reducing decriminalization strategies of a few brave states, the federal and state governments must change their approach to designer drugs to achieve their goals. Drugs seem to be a part of humanity's pursuit of new experiences, and they do not seem to be going away anytime soon.

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[249] United States v. Aquino, 794 F.3d 1033, 1036 (9th Cir. July 20, 2015).

[250] Jim Mendoza, *Synthetic Drugs Offer a Legal but Dangerous High*, HAWAII NEWS NOW (Feb. 19, 2012), http://www.hawaiinewsnow.com/story/16971793/synthetic-drugs-offer-a-legal-but-dangerous-high.

[251] *See* discussion *supra* Section V.C.

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We strive to view issues pertinent to Hawai‘i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai‘i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai‘i me ke kuana‘ike laulā. Ho‘okomo mākou i nā ‘atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā ‘atikala waiwai e ho‘ololi ana i nā mea kū kānāwai ma Hawai‘i a ma nā ‘āina ‘ē, me ke kālele ‘ana i nā kumuhana like ‘ole e like me nā kānāwai pū‘ali koa, ka mālama ‘āina, nā kānāwai ona ‘āina, a nā pono o nā po‘e ‘ōiwi.

Translation by Pauahi Ho‘okano

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