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Introduction

It is a truism of modern constitutional law scholarship that originalism, the judicial philosophy propounded by Justice Antonin Scalia, Justice Clarence Thomas, former Judge Robert H. Bork, and former Attorney General Edwin Meese III, cannot justify the Supreme Court's sex discrimination cases of the last forty years. Justice Scalia confidently announced in a speech at Hastings College of Law recently that the Fourteenth Amendment does not ban sex discrimination because "[n]obody thought it was directed against sex discrimination."[1] And, Justice Ruth Bader Ginsburg once wrote that "[b]oldly dynamic interpretation, departing radically from the original understanding, is required to tie to the fourteenth amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities."[2] The received wisdom is that the only kind of discrimination that the Fourteenth Amendment was meant to outlaw originally was racial discrimination and perhaps discrimination based on ethnic origin. Both Justice Ginsburg's majority opinion in *United States v. Virginia*[3] (*VMI*) and Justice Scalia's strongly worded dissent in that case assume that, as a matter of original meaning, the Fourteenth Amendment does not ban sex discrimination.[4]

This Article shows that both Justices Ginsburg and Scalia are wrong. They have failed to recognize two demonstrable things: first, that Section One of the Fourteenth Amendment was from its inception a ban on all systems of caste;[5] and second, that the adoption of the Nineteenth Amendment in 1920 affected how we should read the Fourteenth Amendment's equality guarantee. The Nineteenth Amendment struck out the Constitution's only explicit privileging of the male sex (which was found in Section Two of the Fourteenth Amendment) and constitutionalized what had become widely recognized by 1920: that gender is not a rational basis for denying a person even the most exalted type of autonomy, an equal vote in a democracy. The fact that the Framers of the Fourteenth Amendment did not understand that the Amendment would eventually require the Virginia Military Institute (VMI) to admit female cadets does not undermine our

1. Adam Cohen, *Justice Scalia Mouths Off on Sex Discrimination*, TIME (Sept. 22, 2010), http://www.time.com/time/nation/article/0,8599,2020667,00.html.

2. Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161.

3. 518 U.S. 515 (1996).

4. *See id.* at 531 (noting that the current equal protection jurisprudence "responds to volumes of history" of sex discrimination); *id.* at 566–67 (Scalia, J., dissenting) ("Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears . . . . Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable.").

5. *See* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2410–13 (1994) (positing that the Fourteenth Amendment "forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage").

claim that the application of originalist interpretive methods justifies the *VMI* decision.

We should note at the outset that all the major scholars who have written in the field agree with Justices Scalia and Ginsburg that originalism is incompatible with the majority's holding in *VMI*, so we are taking issue with those scholars as well as with Justices Scalia and Ginsburg. Professors Michael Dorf of Cornell University, Ward Farnsworth of Boston University, and Reva Siegel of Yale University have all written major articles that discuss aspects of sex discrimination and the Fourteenth Amendment, and they each conclude that, as an original matter, the Fourteenth Amendment was not meant to forbid sex discrimination.[6] Dorf, Farnsworth, and Siegel all assert that the Framers of the Fourteenth Amendment did not *expect* the provision to forbid sex discrimination.[7] But many originalists reject the use of legislative history altogether and are likely to be unmoved by the isolated statements on which Dorf, Farnsworth, and Siegel rely.[8] More importantly, even if one accepts that legislative history has some value—and we do—it does not follow that the original meaning of a clause or text is defined by the Framers' original expected applications.[9] We contend that it is not, because original expected applications are not enacted by the text, and legislators are often unaware of the implications of laws they enact. In so arguing, we agree with Yale law professor Jack Balkin.[10]

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6. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 975 (2002); Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1230 (2000); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 964 (2002).

7. *See* Dorf, *supra* note 6, at 974–75 (observing that the plain text of the Fourteenth Amendment allowed for the disenfranchisement of women, an issue not resolved until the passage of the Nineteenth Amendment); Farnsworth, *supra* note 6, at 1237–39 (quoting congressional leaders during the debates over the adoption of the Fourteenth Amendment saying that the Amendment's guarantees were not intended to extend to women); Siegel, *supra* note 6, at 983–84 (quoting the floor statement of Representative Broomall that "the fact that women do not vote is not in theory inconsistent with republicanism").

8. *See, e.g.*, Zedner v. United States, 547 U.S. 489, 509–11 (2006) (Scalia, J., concurring) (writing a concurrence for the sole purpose of criticizing the majority's use of legislative history); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 386–87 (1999) (noting the decline in the Supreme Court's use of legislative history since Justice Scalia joined the bench); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 809, 819–20 (1998) (positing that the modern era's legislative process, with its mammoth bills and spools of legislative debate, demands congressionally mandated interpretative guidelines for the use of legislative history to be meaningful); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1896 (1998) (arguing for a rule that bars courts from considering legislative history because "there are reasons to doubt judicial competence to discern legislative intent from legislative history").

9. *See* Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 669–70 (2009) (arguing that antimiscegenation laws were banned despite that ban not being an original expected application of the Fourteenth Amendment).

10. *Id.* at 668–69 (agreeing with Professor Jack Balkin that original expected applications are not binding).

Our thesis starts from the premise that originalists ought to begin and end all analysis with the original public meaning of constitutional texts.[11] We believe we are following Justice Scalia's methodology completely in this regard.[12] Original public meaning can be illuminated by legislative history and by contemporary speeches, articles, and dictionaries.[13] Additionally, understanding the original public meaning depends on knowing what interpretive methods legislators and informed members of the public used to arrive at the meaning of the provision, as professors John McGinnis and Michael Rappaport have argued persuasively.[14] Our analysis leads to the conclusion that the text of the Fourteenth Amendment was meant, as an original matter, to forbid class-based legislation and any law that creates a system of caste.[15] The Black Codes, enacted by the Southern States in 1865

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11. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) ("The search is not for a subjective intention. . . . [W]hat counts is what the public understood.").

12. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 37–38 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*] (arguing that the Constitution should be interpreted not according to the intent of the drafters, but by the original meaning of the text as understood by "intelligent and informed people of the time"); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (explaining that constitutional interpretation should be grounded in the political and intellectual atmosphere at the time of the framing).

13. *See* William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's* Bill of Rights, 106 MICH. L. REV. 487, 497–98 (2007) (highlighting Justice Scalia's use of constitutional debating history and contemporary political writings in attempting to divine original constitutional meaning).

14. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 763 (2009) ("Although the public meaning cannot be divorced from word meanings or grammar rules, Barnett never explains why interpretive rules should be treated differently. It is true that the content of these interpretive rules is disputable, but so is the content of word meanings and grammatical rules.").

15. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1413 (1992) (quoting Senator Jacob Howard in stating that the purpose of the Fourteenth Amendment was to "'abolish[] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another'" (alterations in original)); *see also* Philip A. Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 123 (2011) ("[The Civil Rights Act of 1866] had secured equality in various natural rights and the due process enjoyed under law. Echoing the statute, the Fourteenth Amendment guaranteed equal protection of the laws and due process, and in both ways it also established a foundation for enforcement legislation such as the Civil Rights Act."); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 399–400 (2011) (opining that Section One of the Fourteenth Amendment granted express protection to the natural right of equal protection of the law for all persons). Professor Melissa L. Saunders has published a major article that argues that the Framers of the Fourteenth Amendment in some ways did more than merely ban a caste system. Saunders claims that the Amendment nationalized a body of constitutional limitations formulated by state courts that forbade legislatures from enacting "'partial' or 'special' laws, which forbade the state to single out any person or group of persons for special benefits or burdens without an adequate 'public purpose' justification." Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247–48 (1997). Professor Saunders thinks the Fourteenth Amendment bans not merely systems of caste,

in an attempt to relegate the freed slaves to second-class citizenship, created the paradigmatic example of such a caste system or system of class legislation. Congress legislated to overturn the Black Codes when it adopted the Civil Rights Act of 1866. The Fourteenth Amendment wrote that Act into the Constitution, making it unalterable by future majorities of Congress. All scholars, including the original originalist Raoul Berger, concede that the Fourteenth Amendment made the Black Codes unconstitutional by constitutionalizing the Civil Rights Act of 1866.[16]

We contend, however, that the Fourteenth Amendment did more than that. The Civil Rights Act of 1866 guaranteed "citizens, of every race and color" the same common law civil rights "as [were] enjoyed by white citizens."[17] But Section One of the Fourteenth Amendment is not confined to race and provides that

> No State shall make or enforce *any* law which shall abridge the privileges or immunities of *citizens of the United States*; nor shall any State 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.[18]

The Black Codes violated this command because they gave some citizens or persons a shortened or abridged list of civil rights as compared to those

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which are usually hereditary and involve social stigmatization, but all forms of class legislation or special-interest lawmaking, which are not usually hereditary and which may not involve stigmatization. *Id.* For purposes of our argument here, all we need say is that if sex discrimination is a forbidden form of caste then it is also *a fortiori* a form of forbidden class-based, special-interest lawmaking. Saunders's article thus is entirely supportive of what we argue here.

16. RAOUL BERGER, SELECTED WRITINGS ON THE CONSTITUTION 185 (1987) ("[T]he uncontroverted evidence, confirmed in these pages, is that the framers [of the Fourteenth Amendment] repeatedly stated that the amendment and the Civil Rights Act of 1866 were '*identical*' . . . ."); *see also* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 75 (1992) ("It was the demonstrable consensus of the Thirty-ninth Congress that section 1 of the Fourteenth Amendment 'constitutionalized' the Civil Rights Act of 1866."); MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 72 (1999) ("Recall that, whatever else it did, the second sentence of section one constitutionalized the 1866 Civil Rights Act."); 2 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS 53 (8th ed. 2010) ("The Fourteenth Amendment was obviously designed to constitutionalize the Civil Rights Act of 1866.").

17. The Civil Rights Act of 1866 provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

18. U.S. CONST. amend. XIV, § 1 (emphasis added).

enjoyed "by white citizens." But the words of the Fourteenth Amendment are general and are not confined to discrimination or abridgements on the basis of race. In this respect the Fourteenth Amendment is sharply different from the Fifteenth Amendment, which forbids only race discrimination in determining eligibility to vote.[19] The Fourteenth Amendment's scope is much more similar to that of the Thirteenth Amendment, which forbids the enslavement of any person, not just people of African descent.[20]

The Constitution's text alone is evidence of the Fourteenth Amendment's broad scope, but the original public meaning of a text can rarely be gleaned by reading it in a vacuum. As we have said, legislative history, newspaper accounts, speeches, and contemporary dictionaries can help to illuminate a text's original public meaning.[21] The Framers of the Fourteenth Amendment and those who contemplated its ratification said repeatedly and publicly that it forbids the imposition of caste systems and class-based lawmaking.[22] Those who heard them concurred in that understanding.[23] If asked whether the imposition of a European feudal system or an Indian caste system was unconstitutional, the Framers of the Fourteenth Amendment would not have hesitated to condemn both as a blatant violation of the no-caste norm that animates the Fourteenth Amendment.[24] In fact, the Amendment's Framers and contemporary commentators frequently compared race discrimination to other forms of arbitrary, caste-creating discrimination to illustrate the evil caused by the Black Codes and to explain what the Amendment would prohibit. Reasoning by analogy was the original interpretive method the Framers of the Fourteenth Amendment employed. The original meaning of the amendment is thus that it bars all systems of caste and of class-based laws, not just the Black Codes. This does not mean that no law can be discriminatory or make classifications—all laws classify[25]—but it does mean that a law cannot discriminate on an improper basis. Any law that discriminates or abridges civil rights to set up a hereditary caste system violates the command of

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19. *See id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

20. *See id.* amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

21. *See supra* note 13 and accompanying text.

22. *See infra* sections I(C)(1)–(2).

23. *See infra* notes 162–64 and accompanying text.

24. *See infra* notes 153–64 and accompanying text.

25. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 154 (1980) ("[B]urglars are certainly a group toward which there is widespread societal hostility, and laws making burglary a crime certainly do comparatively disadvantage burglars."); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 138 (1988) ("A theory that the state should treat all people equally cannot mean that the state may never treat two people differently, for such a theory would mean the end of all law.").

Section One of the Fourteenth Amendment. According to Professor Melissa Saunders, the Amendment goes even further and bans not only systems of caste but all special or partial laws that single out certain persons or classes for special benefits or burdens.[26] Under this Jacksonian reading of the Fourteenth Amendment, the Black Codes would fall because they were examples of the slave power trying to perpetuate itself by giving its supporters monopoly power over the lives of the freed African-Americans. If there was one thing all Jacksonians hated, it was government-conferred monopolies or special privileges or class legislation.[27] This, in fact, is what President Jackson hated so much about the Bank of the United States, which was specially privileged above ordinary banks.[28]

Did the Framers and ratifiers of the Fourteenth Amendment understand sex discrimination to be a form of caste or of special-interest class legislation? Certainly not. But then they also did not understand when they enacted the Civil Rights Act of 1866 banning race discrimination in making contracts that they were also banning antimiscegenation laws, which made it a crime for a white person to contract to marry a black person.[29] The point is that sometimes legislators misapply or misunderstand their own rules. For this reason, although the Framers' original expected applications of the constitutional text are worth knowing, they are not the last word on the Fourteenth Amendment's reach. This was recognized at the time, which is precisely why some legislators worried that the Amendment would have unanticipated effects.[30]

It is important to note here at the start of our analysis that Congress often enacts texts into law without understanding what those texts mean. Members of Congress have little incentive to actually read and understand what they legislate, and they have great incentives to legislate ambiguously in order to please most of the people, most of the time.[31] It is the job of the courts to figure out what the texts that Congresses have legislated actually meant to the public at large when they were enacted into law and to apply

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26. Saunders, *supra* note 15, at 247–48.

27. *See* LAWRENCE FREDERICK KOHL, THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA 61–62 (1989) (exploring the Jacksonian fear of corporations, centralized banking, and monopolies).

28. *Id.* at 110.

29. *See* Loving v. Virginia, 388 U.S. 1, 9 (1966) (noting that the State presented legislative history tending to show that the Thirty-ninth Congress did not intend that the Civil Rights Act of 1866 ban state miscegenation laws).

30. *See infra* note 181 and accompanying text.

31. *See* ELY, *supra* note 25, at 132–33 (decrying the "undemocratic" congressional practice of passing tough decisions on to agencies via vaguely worded statutes); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 88 (1985) (noting situations in which legislators are incentivized to delegate broad policy-making authority to agencies).

those meanings to the facts of the cases before them.[32] This does not mean judges are free to read their own values into open-ended legislative texts. It does mean, however, that judges must construct an objective social meaning of an enacted text rather than give that text the subjective meaning that certain members of Congress said they thought it had when they voted for it.[33]

The idea that legal texts have an objective social meaning that differs from the subjective meaning given to the text by some who voted for it was well accepted in the post-*Marbury* world of the Thirty-ninth Congress, which ratified the Fourteenth Amendment.[34] And sometimes, as with interracial marriage, the result will be one that Congress did not "intend" but that it did "legislate." The ability of a law to have effects other than those intended by its drafters was recognized in the Reconstruction era, and it is generally recognized today, including by Justice Scalia.[35] Justice Scalia himself is the leading proponent of text over legislative history or original intent or the original application of members of Congress,[36] which makes his reliance on the original intentions and expected applications of the Framers of the Fourteenth Amendment with respect to sex discrimination especially puzzling. We understand today that if a tenant signs a lease with his landlord without reading all of it, he is nonetheless bound by the clauses he did not

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32. *See* U.S. CONST. art. III, § 2 (vesting power to hear all cases and controversies "arising under . . . the Laws of the United States").

33. *See* BORK, *supra* note 11, at 144 ("The search is not for a subjective intention. . . . [W]hat counts is what the public understood."). The need for courts to construct an objective original public meaning of enacted texts resembles the need for courts in tort cases to ask what a reasonable person might have done in a given situation. There is no need for originalist judges to sum up the intentions of all those who made the Fourteenth Amendment law, as Professor Robert W. Bennett claims. *See* Robert W. Bennett, *Originalism and the Living American Constitution*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 78, 87–88 (2011) (noting that even if the mental states of individual participants in the legislative process could be ascertained, the problem of determining the intent of the whole body from the intents of its members would remain). Such judges need instead to engage in a semantic interpretation of the text based on dictionaries and grammar books in use at the time the text was enacted, as Professor Lawrence B. Solum claims in his debate with Professor Bennett. *See* Lawrence B. Solum, *We Are All Originalists Now*, *in* BENNETT & SOLUM, *supra*, at 1, 10–11 (noting that the original-public-meaning originalist approach to word meaning involves examining writings of the period and that originalists' arguments should focus directly on linguistic meaning, grammar, and syntax). They can do this by constructing an objective original social meaning of the text at hand.

34. For example, Senator Jacob M. Howard of Michigan famously said,

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarant[e]ed and secured by the first eight amendments of the Constitution . . . .

CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

35. This is true when it comes to statutes. *See* Brogan v. United States, 522 U.S. 398, 403 (1998) ("[T]he reach of a statute often exceeds the precise evil to be eliminated.").

36. Scalia, *Common-Law Courts*, *supra* note 12, at 29–30 ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning.").

read. The same principle applies when members of Congress pass, and members of state legislatures ratify, constitutional amendments. The legal system and democracy itself cannot function unless the people writing in and commenting on proposed amendments or laws can have confidence that the content of the law is embodied in the objective social meaning of its text rather than in the unknowable intentions of those who voted for it.[37]

Just as the Framers failed to recognize that antimiscegenation laws infringed on the freedom of contract guaranteed by the Civil Rights Act, they also were mistaken in their belief that laws discriminating on the basis of sex are not relevantly similar to laws that discriminate on the basis of race. They made clear that they believed that (most) racially discriminatory laws violate Section One's anticaste rule, but sexually discriminatory laws do not because sex classifications are different from race classifications in specific, relevant ways.[38] They conceded that if women had been fitted by nature for the privileges and responsibilities afforded to men, then the fears of some and the hopes of others that the Fourteenth Amendment would threaten the sexual social order would be well founded. We now know more about women's capabilities than the Fourteenth Amendment's Framers knew. Fortunately, as Robert Bork has explained, we are governed by the constitutional law that the Framers of the Fourteenth Amendment wrote and not by the unenacted opinions that its members held.[39] It follows that we also are not bound by their unenacted factual beliefs about the capabilities of women. Laws are to be applied to known facts.[40]

The change in our understanding of women's abilities has been constitutionalized by a monumental Article V amendment—the Nineteenth Amendment, which in 1920 gave women the right to vote.[41] By 1920, two-thirds of Congress and three-quarters of the states had concluded that each woman should have the same voting rights as each man. Sex discrimination, although not generally understood to be a form of caste in 1868, had come to be recognized as a form of caste by 1920, when the Nineteenth Amendment

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37. *Cf. id.* at 25 ("Long live formalism. It is what makes a government a government of laws and not of men.").

38. *See* discussion *infra* subpart II(A).

39. Robert Bork wrote,

> I can think of no reason that rises to the level of constitutional argument why today's majority may not decide that it wants to depart from the tradition left by a majority now buried. Laws made by those people bind us, but it is preposterous to say that their unenacted opinions do.

BORK, *supra* note 11, at 235.

40. This should be uncontroversial. Surely most would agree that if, for instance, the legal definition of murder requires intent to kill, and if someone were to cause a deadly car accident while experiencing an entirely unexpected seizure, that person is not guilty of murder even if the framers of the law prohibiting murder happened to believe that seizures are a symptom of murderous intent.

41. *See* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

was ratified.[42] The definition of caste had not changed; rather, the capabilities of women and the truth of their status in society had come to be better understood and that new understanding was memorialized in the text of the Constitution.[43]

The Nineteenth Amendment's supporters believed they were making women equal to men in all rights by securing women the right to vote.[44] This makes sense: those who hold political rights have attained the highest level of autonomy that organized society has to offer. The idea that women would be able to vote but would still in some respects be second-class citizens is an implausible synthesis of the constitutional text of the Fourteenth Amendment with the constitutional text of the Nineteenth Amendment. It is not plausible to read the Constitution as guaranteeing women their right to vote for President, Congress, Governor, and state legislative positions but also as allowing the state to forbid women from making a simple contract without their husbands' consent. The words of the Constitution have to be read holistically and not by snipping off a clause and analyzing it in isolation.[45] The Nineteenth Amendment ought to inform our reading of the general proscription on caste systems that was put in place by the Fourteenth Amendment, just as the Fourteenth Amendment itself informs our reading of the Eleventh Amendment.[46]

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42. *Compare* 2 IDA HUSTED HARPER, THE LIFE AND WORK OF SUSAN B. ANTHONY app. at 971 (1898) ("In the oft-repeated experiments of class and caste . . . [,] [t]he right way . . . is so clear . . .—proclaim Equal Rights to All."), *with* U.S. CONST. amend. XIX (enacting, in 1920, the Constitutional requirement that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex"); *see also infra* notes 308–21, 463 and accompanying text.

43. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 212–18 (2000) (describing the rising political clout of women during the "endgame" preceding passage of the Nineteenth Amendment).

44. *See infra* subsection III(C)(1)(b); *see also* Siegel, *supra* note 6, at 968–76 (discussing deep historical ties between the Fourteenth and Nineteenth Amendments).

45. Professor Amar has written that, "Textual argument as typically practiced today is blinkered ('clause-bound' in [John Hart] Ely's terminology), focusing intently on the words of a given constitutional provision in splendid isolation. By contrast, intratextualism always focuses on at least two clauses and highlights the link between them." Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999) (alteration in original) (footnote omitted). He continued, "[I]ntratextualism draws inferences from the patterns of words that appear in the Constitution even in the absence of other evidence that these patterns were consciously intended." *Id.* at 790. Professor Amar was talking about understanding similar words and phrases in light of each other, but the same problems of clause-bound interpretation exist when two clauses address the same topic. The Fourteenth and Nineteenth Amendments both address the same topic—individual rights—and they must be read together to reach the fullest understanding of their meaning.

46. The proposition that the Fourteenth Amendment altered the Eleventh Amendment was accepted even in an opinion written by Chief Justice Rehnquist, one of the most conservative members of the Supreme Court:

> Thus our inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the

We conclude that the original public meaning of the Fourteenth Amendment is that it bans all systems of caste and of class-based lawmaking, much the way the Fourth Amendment bans unreasonable searches and seizures[47] and the Eighth Amendment bans cruel and unusual punishments.[48] The meaning is not static, and the adoption of the Nineteenth Amendment changed permanently the way courts ought to read the no-caste-discrimination rule of the Fourteenth Amendment. Once women were given equal political rights by the Nineteenth Amendment, a reading of the general ban on caste systems in the Fourteenth Amendment that did not encompass sex discrimination became implausible. This is true for three reasons. First, the Nineteenth Amendment nullified the word "male" in Section Two of the Fourteenth Amendment, which had introduced that word into the Constitution and had countenanced sex discrimination in the bestowal of the franchise. Section Two is the only textual evidence that women's legal status was to remain unchanged by the Fourteenth Amendment.[49] Second, there is abundant evidence that political rights have always been understood to hold a place at the apex of the hierarchy of rights.[50] The category of civil rights is broader and more inclusive than the category of political rights.[51] For

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> Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) (citations omitted).

47. *See* 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.").

48. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

49. Section Two of the Fourteenth Amendment provides,

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the *male inhabitants* of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2 (emphasis added).

50. *See infra* subpart III(B).

51. *See* Oregon v. Mitchell, 400 U.S. 112, 163 (1970) (illustrating a historical distinction between civil rights that are required by "full membership in a civil society" and "participation in the political process," which is not necessarily so).

example, children have civil rights, but they lack the political right to vote.[52] Thus, giving women the political right to vote suggests that it is no longer plausible to deny them equal civil rights with men. Finally, giving women the right to vote is a constitutional repudiation of the mistaken facts that the Framers of the Fourteenth Amendment relied upon when they formed their original expectation that Section One would not alter the legal condition of women.

Put another way, constitutionally protecting a group's political rights is an acknowledgment that a certain characteristic, such as sex, does not affect a person's competence to exercise the most carefully bestowed of all rights—the right to vote. A constitutional guarantee that *political* rights will not be denied based on gender therefore should be seen as creating a presumption that denials of *civil* rights on that basis violate the Fourteenth Amendment's rule against caste systems. Even the pre-New Deal Supreme Court recognized as much in its 1923 decision in *Adkins v. Children's Hospital*,[53] where Justice Sutherland led five Justices to the conclusion that the Nineteenth Amendment made women as well as men the beneficiaries of Lochnerian substantive due process.[54] The case led Justice Holmes to quip in dissent, "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account."[55] Justice Holmes never explained, however, why the Nineteenth Amendment ought not affect our reading of the Fourteenth, and his dissent was motivated by his opposition to *Lochner*-style substantive due process for men as well as for women.[56] Holmes dissented in *Lochner v. New York*[57] as well as in *Adkins*, so he in fact would have applied the same constitutional rule to men as he applied to women notwithstanding his *Adkins* quip.

The Supreme Court in recent years has inexplicably ignored the Nineteenth Amendment. As we argue in this Article, and as Professor Reva Siegel has argued,[58] this is a mistake. The Court should recognize the

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52. *Compare, e.g.*, *In re* Gault, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."), *with* U.S. CONST. amend. XXVI, § 1 (protecting the right to vote only for citizens eighteen years of age and older).

53. 261 U.S. 525 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1936).

54. *Id.* at 553. Justices Taft, Sanford, and Holmes dissented. *Id.* at 562, 567.

55. *Id.* at 569–70 (Holmes, J., dissenting). In his separate dissent, Chief Justice Taft explained that "[t]he Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller v. Oregon* rests. . . . I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the Amendment." *Id.* at 567. Justice Holmes did not address whether the Nineteenth Amendment would warrant construing the Fourteenth Amendment differently if a challenged law were based on supposed *intellectual* differences between men and women.

56. *See id.* at 570 (expressing disdain that the Court did not share his view that *Lochner* had been overruled by *Bunting v. Oregon*, 243 U.S. 426 (1917)).

57. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

58. Siegel, *supra* note 6, at 1022. Professor Mark Yudof has also opined that the *Adkins* reliance on the Nineteenth Amendment was "well placed." Mark G. Yudof, *Equal Protection,*

significance of the Nineteenth Amendment to Fourteenth Amendment interpretation. We and Professor Siegel agree on this, but on another important point we do not agree. She argues that the Court should ground its sex discrimination doctrine in the independent history of the women's movement, thereby obviating any need for the Court to analogize race and sex in order to find that sex discrimination is prohibited by the Fourteenth Amendment.[59] She gives a sociohistorical account, one that is less concerned with the legislative history, the nuances of text, and the original interpretive methods of the Framers.

We think our approach is more deeply grounded in law. The evidence leads us to conclude that the Court, by employing an analogy between race and sex, has acted consistently with the original interpretive methods of the Framers of the Fourteenth Amendment to find that sex discrimination is banned. The Fourteenth Amendment, as a matter of original public meaning, was drafted to prohibit systems of caste, which is why the text of the Amendment does not confine its reach only to race discrimination. The Framers, supporters, and early interpreters of the Amendment concluded that race discrimination created a system of caste and that the Amendment would reject race discrimination as a forbidden caste system.[60] They came to this conclusion by comparing institutionalized race discrimination to feudalism and the Indian caste system, finding that all were the same type of hereditary, class-based discrimination.[61] Although the Fourteenth Amendment's text is open-ended and cannot be understood using only semantic methods, these "paradigm cases," as Professor Jed Rubenfeld has called them,[62] let us know what sort of discrimination was to be made unconstitutional.

The Framers' use of analogy to understand the scope of the Amendment means that the modern Supreme Court, by comparing sex discrimination to race discrimination, has employed the appropriate interpretive method. The Court has only faltered by not following the analogy far enough. The ties between the Fifteenth and Nineteenth Amendments must be taken into account when analogizing race and sex. The Fifteenth Amendment completed the constitutional process of elevating nonwhite Americans to

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Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics, 88 MICH. L. REV. 1366, 1403 (1990) (book review).

59. *See* Siegel, *supra* note 6, at 1018, 1022 (observing that "in the immediate aftermath of ratification, both the Supreme Court and Congress understood the Nineteenth Amendment to redefine citizenship for women in ways that broke with the marital status traditions of the common law," a fact ignored by the current "ahistorical" sex discrimination doctrine grounded in an analogy to race discrimination).

60. *See infra* Part I.

61. *See infra* subparts I(B)–(C).

62. We agree with Professor Rubenfeld that "on the basis of the Fourteenth Amendment's paradigm cases, . . . state action is unconstitutional if it purposefully imposes an inferior caste status on any group." Jed Rubenfeld, *The Purpose of Purpose Analysis*, 107 YALE L.J. 2685, 2685 (1998). He has argued persuasively for the importance of paradigm cases in constitutional law. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 455–57 (1997).

equal citizenship with white Americans. The Nineteenth Amendment was understood to do the same thing for women. The Court should not, however, require a perfect analogy between race and sex. The analogy between the Indian caste system and American slavery is also imperfect, suggesting that the Framers were looking for less than absolute interchangeability.

Our Article proceeds in four parts. Part I explains why the Fourteenth Amendment ought to be read as enacting a general prohibition on all class-based discrimination or systems of caste and not merely on laws that discriminate on the basis of race. The part begins with the text of Section One of the Fourteenth Amendment and shows how that text both constitutionalized the Civil Rights Act of 1866 and went even further. We collect here a large number of statements by members of the Thirty-ninth Congress and others who considered the Amendment's ratification, as well as early postenactment interpretations. We show that the Amendment reflected a widespread rejection of classifications based on birth status or religious designation, such as those found in feudalism and the Indian caste system. Racially discriminatory laws, like the laws that provided for African-Americans to be held in slavery, were simply an especially damaging and insidious species of class legislation. The Framers believed that other types of class legislation would also be barred by the Amendment. This was expressed by Congress in a number of ways, including by the rejection of an earlier draft of the Amendment that only prohibited race discrimination. The proper understanding of the Fourteenth Amendment is that it enacted a general rule prohibiting all systems of caste or of class-based laws.

Part II considers the way that Congress and the public understood the relationship between the Fourteenth Amendment's no-caste rule and sex discrimination. We argue that sex discrimination is precisely the kind of discrimination prohibited by the Fourteenth Amendment, despite the fact that the Framers of the Fourteenth Amendment did not understand this to be the case. An analysis of the discussions in Congress on women and the Fourteenth Amendment reveals a bipartisan congressional belief that *if* sex discrimination *were* like race discrimination in particular ways—i.e., if women were a caste—then sex discrimination would be prohibited by the Fourteenth Amendment. The question of whether sex discrimination was (or was not) a form of caste was purely a question of fact. We will try to explain how the term *caste* was understood by the Framers of the Fourteenth Amendment and why they did not generally recognize sex discrimination to be a form of caste before or during Reconstruction. We will also present the nineteenth-century minority view that gender discrimination did indeed create a forbidden form of caste, a view that anticipated the vast changes in public opinion that would culminate in the adoption of the Nineteenth Amendment. The adoption of the Nineteenth Amendment reflected a broad consensus that an individual's sex could not make him or her unfit to exercise an equal portion of the popular sovereignty that defines democracy.

Part III explains how the adoption of the Nineteenth Amendment permanently changed the way in which the Fourteenth Amendment ought to be read. We will present evidence that the Framers of the Fourteenth Amendment, as well as the Framers of the Nineteenth Amendment, would have found incomprehensible the idea that women or anyone else could have equal political rights but not equal civil rights. Political rights are at the apex of the pyramid of rights for which civil rights are the base. Anyone who has equal political rights must by definition also have equal civil rights. We describe what distinguished political and civil rights and how the relationship between them was understood. Our conclusion is that if a trait is an improper basis for denying political rights, it presumptively cannot be the basis for a shortened or abridged set of civil rights. Part III concludes with a discussion of the evidence that the Nineteenth Amendment was understood to make women the equals of men under the law by finishing the work that began with the Reconstruction Amendments.

In Part IV we briefly consider the other conclusions that can be drawn from our proposal that the Fourteenth Amendment proscribes caste systems, such as whether age discrimination against those between the ages of eighteen and twenty-one is barred as a result of the Twenty-sixth Amendment, which lowered the voting age to eighteen. We also discuss the clause in the original Constitution protecting the political right to hold public office without having to pass any "religious Test."[63] We conclude that this clause, when read together with the Fourteenth Amendment, strongly implies that the no-caste rule of the Fourteenth Amendment bans laws and executive practices that discriminate as to civil rights on the basis of religion.

Our firmest conclusion remains that Justice Ginsburg and Justice Scalia are mistaken when they claim that part of the original meaning of the Fourteenth Amendment is that it does not apply to sex classifications. We think they have confused original meaning here with original intent. Both Justices have elevated the subjective opinions of enactors about the possible application of a legal text over the text itself and its objective original public meaning.

I. The Fourteenth Amendment as a Ban on Caste

> *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.*[64]

63. U.S. CONST. art. VI.

64. U.S. CONST. amend. XIV, § 1.

Any person reading these clauses for the first time would immediately conclude that they mandate, in some sense, "equality before the law." *All* citizens' privileges and immunities are protected from abridgment or lessening, and *no* person may be denied either due process or the equal protection of the laws. But "equality before the law" is an ambiguous concept—and no less ambiguous are the concepts behind such phrases as "privileges or immunities," "due process," and "equal protection of the laws"—making the conclusion that the Amendment is about equality only a first step in any analysis. The difficulties presented by the text are not a modern problem, and at least one member of the House complained during debates over Section One that the text is "open to ambiguity and admitting of conflicting constructions."[65] Some texts are inherently open-ended and cannot be understood using only semantic methods.

Commentators like Raoul Berger have sought to tackle Section One's undeniable ambiguity by interpreting it as a prohibition on race discrimination and discrimination based on ethnic origin only.[66] The argument is that the Framers of the Fourteenth Amendment were primarily concerned with the plight of the freed slaves and the longevity of the Civil Rights Act of 1866, and so their amendment did no more than address these problems. The majority in the *Slaughter-House Cases*[67] took this view of the Fourteenth Amendment, saying, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[68]

This conclusion is a simple one that could prevent overreaching by judges. But like many simple conclusions, it is mistaken. First, the text does not support a race-discrimination-only reading, and laws can reach further than the motive behind them necessitates—even further than the enactors' various intents—if the text's objective original public meaning countenances such extension. Moreover, the Framers' use of broad language in Section One of the Fourteenth Amendment was no accident. They did not seek to prohibit institutionalized race discrimination alone, though that was their primary concern. As John Harrison has argued, the Reconstruction conception of "equality"[69] suggests that Republicans "phrased their opposition to

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65. CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866) (statement of Rep. Boyer).

66. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 191 (1977); *see also* Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (arguing that "[e]xcept in the area of the law in which the Framers obviously meant [Section One] to apply—classifications based on race or on national origin, the first cousin of race," the Court's decisions may be described as "an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle").

67. 83 U.S. (16 Wall.) 36 (1873).

68. *Id.* at 81.

69. An exchange between Senator Cowan and Senator Wilson during debates over the Freedmen's Bureau Bill illuminates the Republican conception of equality:

race discrimination in terms of the more general principle that all citizens were entitled to the same basic rights of citizenship."[70] They enacted this principle into law with an amendment framed in sweeping terms.

Still, a number of difficult questions must be answered in order to get at the meaning and scope of Section One's equality guarantee. What type of laws must be "equal"? Only those conferring civil rights? What about those conferring political rights? And what sort of equality before the law does the Amendment require? Facial neutrality? Something else? Finally, and most importantly for purposes of this Article, what are the prohibited grounds for discrimination?

These questions become somewhat easier to answer when Section One is understood in the way that it was understood originally: as enacting a rule against class legislation and systems of caste. *Caste*, as Senator Charles Sumner—one of the Amendment's Framers—explained in 1869, was once confined to describing the famously stratified social system of India but had by "natural extension" come to mean "any separate and fixed order of society."[71] When one group "claim[s] hereditary rank and privilege" and another is "doomed to hereditary degradation and disability," you have a caste system.[72] From the time of the Jacksonians on, Americans had been

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> Mr. COWAN. . . . The honorable Senator from Massachusetts says that all men in this country must be equal. What does he mean by equal? Does he mean that all men in this country are to be six feet high, and that they shall all weigh two hundred pounds, and that they shall all have fair hair and red cheeks? Is that the meaning of equality? Is it that they shall all be equally rich and equally jovial, equally humorous and equally happy? What does it mean?
>
> . . . .
>
> Mr. WILSON. . . . Why are these questions put? Does he not know precisely and exactly what we do mean? Does he not know that we mean that the poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and the proudest man in the land?
>
> . . . .
>
> The Senator knows what we believe. He knows that we have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country.

CONG. GLOBE, 39th Cong., 1st Sess. 342–43 (1866).

70. Harrison, *supra* note 15, at 1388.

71. CHARLES SUMNER, THE QUESTION OF CASTE 7 (1869).

72. *Id.* at 10. *Class legislation* and *caste* were often used interchangeably by those who contemplated the Fourteenth Amendment, and this usage helps to define the terms. Contemporary dictionaries defined the terms as follows:

> Caste, *n.* In *Hindostan*, a tribe or class of the same profession, as the caste of Bramins; a distinct rank or order of society.
>
> Class, *n.* A rank; order of persons or things; scientific division or arrangement.

CHAUNCEY A. GOODRICH, A PRONOUNCING AND DEFINING DICTIONARY OF THE ENGLISH LANGUAGE 64, 75 (1856);

> Caste, *n.* 1. In *Hindostan*, a name (from *casta*, race) first given by the Portuguese to the several classes into which society is divided, having fixed occupations, which have come down from the earliest ages. There are four great and many smaller castes. 2. A distinct order in society.

NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 152 (1857); and:

opposed to monopolies, systems of class, and special hereditary privileges, immunities, and emoluments.[73] Section One of the Fourteenth Amendment

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> Caste, *n.* A distinct, hereditary order or class of people among the Hindoos, the members of which are of the same rank, profession, or occupation; an order or class.
>
> Class, *n.* A rank or order of persons or things; a division; a set of pupils or students of the same form, rank, or degree; a general or primary division.

JOSEPH E. WORCESTER, A UNIVERSAL AND CRITICAL DICTIONARY OF THE ENGLISH LANGUAGE 107–08, 128 (1849).

Caste, as used in nineteenth-century America, could refer exclusively to a class of people in the Indian caste system, or it could refer more generally to any order or class that was defined by entrenched legal or societal distinctions that created or maintained a hierarchy of classes. *Caste* in the social or economic rather than legal sense is expressed in this account from an official of the Freedmen's Bureau who had been stationed in South Carolina:

> During fifteen months of my life I had the honor of being known as the "Bureau-Major," and of ruling by virtue of that title over a region in western South Carolina not much less extensive than the State of Connecticut. Although, as an officer of the "Bureau of Refugees, Freedmen, and Abandoned Lands," I was chiefly concerned with the affairs of negroes and Unionists, I was occasionally obliged to deal with other classes of our Southern population, and especially with that wretched caste commonly spoken of as the "mean whites," or the "poor white folksy," but in my district as the "low-down people." I have strung together, on as brief a thread as the subject will admit, a few gems from the character of this variety of our much-boasted Anglo-Saxon race.

J.W. Deforest, *The Low-Down People*, 1 PUTNAM'S MAG. 704 (1868).

This poem in praise of Massachusetts denies that the state has a social or a legal caste system in place. The poem also ties the concept of caste not to slavery, but to racism:

> She [Massachusetts] knows no caste, but honors all things good;
> The Esquimaux may doff his Norland furs
> And sit beside her hearth-stone, and the man
> Masked by the sun may throw his fetters by
> And unrebuked take place among his fellows,
> And thus assert that mind is colorless.
> And when he goes within the council hall,
> There is no need that he should rise and say
> The first blood shed upon our nation's soil
> For Liberty was blood of Africa.
> The star is on thy forehead, noble State!
> There let it shine, the cynosure to all
> The mariners on Time's tumultuous sea,
> Who set their sails for Freedom and the Truth.

Thomas Buchanan Read, *To Massachusetts*, BOS. DAILY ADVERTISER, Nov. 16, 1866, at 1.

Class legislation is a term of art that does not appear in dictionaries, but it was widely used and understood. While *class* could be a neutral term, *class legislation*, like *caste*, was normally pejorative, but some in Congress felt strongly that class legislation was appropriate:

> [T]he negro race in this country constitute such a class which is easily and well defined; and the peace and welfare of a State, especially where they are found in great numbers, demand that the radical difference between them and the white race should be recognized by legislation.

CONG. GLOBE, 39th Cong., 1st Sess. 2081 (1866) (statement of Rep. Nicholson).

73. Professor Melissa Saunders argued in a painstakingly researched article that the term *class legislation* was understood to encompass laws that grant monopolies or otherwise benefit a favored few. Saunders, *supra* note 15, at 247–48. We do not think that our analysis of the Fourteenth Amendment is necessarily in conflict with that of Professor Saunders. Our argument that the Amendment bans caste does not preclude understanding the Amendment also to ban class legislation as described by Professor Saunders, although, her claim is in some respects a more

constitutionalized America's rejection of systems of class- or caste-based laws.

Our analysis of the Fourteenth Amendment begins with the language of the other two Reconstruction Amendments and with the other sections of the Fourteenth Amendment. These provisions suggest partial answers to some of the questions posed above. Reading these texts in conjunction renders the contention that Section One only prohibits race discrimination untenable. It also shows that Section One's equalizing power is not limitless, most strikingly because Section One cannot plausibly be read to guarantee equal political rights in light of Section Two, which discourages but does not prohibit race-based limitations on suffrage, and the Fifteenth Amendment, which finally does eliminate racial discrimination with respect to political rights like the right to vote.

The starting point for our analysis is the Civil Rights Act of 1866, a measure explicitly concerned with race discrimination. The widespread agreement among all interpreters of the Fourteenth Amendment, from Raoul Berger on, is that the Act was later constitutionalized by the Fourteenth Amendment,[74] but there is disagreement about whether it is significant that the Fourteenth Amendment used broader terms than the 1866 Act.[75] We argue that this difference in wording has considerable significance. There is a lot of support in the intellectual history of the times and even in the legislative history for the proposition that concerns over class legislation generally—both extant and potential—were well developed during Reconstruction. The American people clamored for a Constitution that would end class oppression, and Congress obliged.[76]

The Fourteenth Amendment's legislative history in Congress and the ratifying state legislatures confirms that the inclusion of language at a high level of generality was purposeful and was understood to be addressed to a broad problem. This history reveals that Section One was understood to ban *class legislation* and systems of *caste*, terms that were understood to be nearly identical. Contemporary public statements demonstrate that the congressional understanding that the Amendment banned all systems of caste was shared by the public. Importantly, these sources make clear that the Amendment's core anticaste meaning is distinct from and superior to the

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ambitious one. *See also* KOHL, *supra* note 27, at 58, 61–62 (noting the importance of equality and the fear of monopoly and privilege that crystallized within a subset of society during the Jacksonian era).

74. *See supra* note 16 and accompanying text.

75. *Compare* PERRY, *supra* note 16, at 215 n.49 (arguing that while Section One of the Fourteenth Amendment constitutionalizes the Act, the Privileges and Immunities Clause provides a broader mandate for equality), *with* ROSSUM & TARR, *supra* note 16, at 53 (suggesting that this broad sort of interpretation creates ambiguity as to what rights are protected by the Amendment).

76. *Cf.* RICHARD SCHNEIROV, LABOR AND URBAN POLITICS: CLASS CONFLICT AND THE ORIGINS OF MODERN LIBERALISM IN CHICAGO, 1864–97, at 32–33 (1998) (observing the maturation of class outlook in Chicago and the push to get the working class involved in American politics).

applications of that principle that the enactors predicted. Our findings support Professor John Harrison's conclusion that ad hoc castes were banned[77] and have important implications for applying the Fourteenth Amendment to sex discrimination, which we turn to in Part II.

A. The Text

1. Which Clause Guarantees Equality and Prohibits Caste?—At the outset, a question presents itself: which clause in Section One of the Fourteenth Amendment guarantees equality? The Framers themselves were, for the most part, vexingly silent on the independent operation of Section One's clauses. They tended to explain that Section One would guarantee equality and ban caste without getting more specific.[78] Though the Supreme Court has long relied on the Equal Protection Clause as the source of the Fourteenth Amendment's equality guarantee, Professor John Harrison made a strong argument in a law review article nineteen years ago that the Privileges or Immunities Clause is a much better candidate.[79] Professor Harrison's argument is that the noun in the Equal Protection Clause is *protection* while the word *equal* is only an adjective.[80] The Equal Protection Clause, he contends, is about giving everyone, including free African-Americans and Northerners in the South, the same right to be protected by laws against violence already on the books as was enjoyed by white Southern citizens.[81] The Clause is thus addressed primarily to state executive officials who enforce laws that have already been made. It says nothing about what laws the legislature can make[82] but rather was aimed at the very real problem that general laws against violence in the South were not being enforced equally to protect against lynchings and violence by the Ku Klux Klan.[83]

In contrast to the Equal Protection Clause, Professor Harrison argues, the Privileges or Immunities Clause is specifically addressed to the question of what laws the legislature and Executive can make or enforce.[84] The Privileges or Immunities Clause explicitly says, "No State shall *make or enforce* any law which shall abridge the privileges or immunities of citizens

77. Harrison, *supra* note 15, at 1459 ("[T]he Reconstruction notion of abridgment probably also included what we might call ad hoc castes . . . that are not commonly employed but that nevertheless represent a division of the citizenry into classes for reasons unrelated to the content of fundamental rights.").

78. *See infra* subpart I(B).

79. Harrison, *supra* note 15, at 1414–33.

80. *Id.* at 1434.

81. *Id.* at 1437 & n.213.

82. *See id.* at 1411 (describing the congressional vision of the Equal Protection Clause as one that would "preserve state control over the content of law while demanding that the laws apply to all citizens equally").

83. *See id.* at 1437 (discussing the Equal Protection Clause as the source of authority for the Ku Klux Act of 1871).

84. *Id.* at 1420–24, 1447–51.

of the United States . . . ."[85] Here is a clause addressed to the state legislatures about what laws they may "make," and according to Professor Harrison, the privileges or immunities of citizens of the United States include all privileges or immunities (e.g., civil rights) that a citizen enjoys under state law as well as the privileges or immunities of national citizenship.[86] This makes sense. The Civil Rights Act of 1866—which all agree was constitutionalized in the Fourteenth Amendment[87]—guaranteed equality in a number of common law rights that were conferred by state common law.[88] These rights included rights of contract, recovery in torts, rights to own property, and family law rights.[89] The Privileges or Immunities Clause forbids a state from "abridging" (i.e., shortening or lessening) these rights on the basis of race or some other system of caste. The privileges or immunities of state citizenship were common law rights, and perhaps rights under state constitutional law, and the Privileges or Immunities Clause forbade the making of any law that abridged those rights of state citizenship.[90]

The drafters of the Fourteenth Amendment explained the scope of state privileges or immunities by making reference to the common law rights listed in Justice Bushrod Washington's opinion in *Corfield v. Coryell*.[91] The list in *Corfield* was a description of the privileges and immunities protected by the Comity Clause of Article IV of the Constitution, which in turn had roots in a clause in the Articles of Confederation.[92] Justice Washington implied in *Corfield* that Article IV privileges or immunities included all state common law and state constitutional rights, but he also said that such rights could be overcome by "restraints as the government may justly prescribe for the general good of the whole."[93] Therefore, Justice Washington believed that even federal constitutional rights could be overcome where there is a

85. U.S. CONST. amend. XIV, § 1 (emphasis added).

86. *Id.* at 1422.

87. *See supra* note 16 and accompanying text.

88. Harrison, *supra* note 15, at 1416.

89. *See supra* note 17.

90. *See* Harrison, *supra* note 15, at 1419–20 (illuminating the congressional debate surrounding the meaning of the Privileges or Immunities Clause, proclaiming, "We are therefore justified in reading the Fourteenth Amendment as including positive law rights of state citizenship within the scope of the privileges and immunities of citizens."); *see also* David R. Upham, Note, Corfield v. Coryell *and the Privileges and Immunities of American Citizenship*, 83 TEXAS L. REV. 1483, 1529–30 (2005) (noting that freed slaves were often formally deprived, by positive state law, of the same common law rights as other citizens, which led to the passage of the Privileges or Immunities Clause). *But see* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873) (holding that the Privileges or Immunities Clause of the Fourteenth Amendment only protects the privileges or immunities of U.S. citizens and that the privileges or immunities of state citizens, "whatever they may be, are not intended to have any additional protection by this paragraph of the amendment"); McDonald v. City of Chicago, 130 S. Ct. 3020, 3030–31 (2010) (acknowledging the controversy surrounding the limited scope of the Privileges or Immunities Clause under the holding in the *Slaughter-House Cases* but declining to disturb that holding).

91. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230); Harrison, *supra* note 15, at 1409–10.

92. *Corfield*, 6 F. Cas. at 551–52.

93. *Id.*

governmental interest is "just" and that promotes "the general good of the whole" people. Government may trump constitutional rights but only if it does so "justly" and in a "nondiscriminatory" way. This statement anticipates the view of the judicial role that the Supreme Court has followed in the modern era. Professor Harrison argues that "the privileges or immunities of citizens of the United States" listed in Section One of the Fourteenth Amendment are the same body of rights as the "Privileges and Immunities of Citizens in the several States" which are protected by the Comity Clause in Article IV.[94] Critically, Professor Harrison explains that systems of caste or of class-based laws violate the Privileges or Immunities Clause because they offer a lesser or shortened or abridged set of rights to one class of citizens as compared to another[95] and they are not laws that have been "justly prescribe[d] for the general good of the whole" people.[96] The Privileges or Immunities Clause forbids making or enforcing "any" law that "abridges" a citizen's privileges or immunities.[97] This use of the word *abridge* in an antidiscrimination sense occurs again in the Fifteenth Amendment, which says that "[t]he right of citizens of the United States to vote shall not be denied or *abridged* by the United States or by any State on account of race, color, or previous condition of servitude."[98] The word *abridged* is again used in the same way in the Nineteenth Amendment when it extends the franchise to women.[99]

Professor Harrison argues that the word *abridge* can only mean discriminate and that as a result there is an antidiscrimination command in Section One of the Fourteenth Amendment but no command protecting individual rights.[100] He thus constitutionalizes the approach taken by John Hart Ely in *Democracy and Distrust*.[101] This seems to us to go way too far. Rights can be "abridged" or "shortened" one person at a time as well as one class at a time. The First Amendment ban on "abridgements" of freedom of speech or of the press obviously protects individual rights and also protects

94. Harrison, *supra* note 15, at 1452.

95. *See id.* at 1422 (noting that a state "abridges such rights when it withdraws them from certain citizens, but not when it alters their content equally for all").

96. *Corfield*, 6 F. Cas. at 552.

97. U.S. CONST. amend. XIV, § 1.

98. *Id.* amend. XV, § 1 (emphasis added).

99. *Id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

100. Harrison, *supra* note 15, at 1420–24.

101. *Compare* Harrison, *supra* note 15, at 1474 ("If we pay more attention to language, we realize that it is possible for a state to abridge a state law right and conclude that the clause secures equality with respect to such rights. If we pay enough attention to the Equal Protection Clause to get beyond the word equal, we discover that protection is narrower than privileges and immunities. We then can conclude that the Privileges or Immunities Clause does the main work of Section 1 by constitutionalizing the Civil Rights Act of 1866."), *with* ELY, *supra* note 25, at 24 ("[T]he slightest attention to language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements.").

against class or caste discrimination.[102] But Professor Harrison's core point that the word *abridge* in the Privileges or Immunities Clause is a synonym for *discriminate* is correct. A modern formulation of that Clause would read: "No State shall make or enforce any law that shortens or lessens the civil and common law rights of citizens of the United States in a way that is unjust and that is not for the general good of the whole people."

Professor Harrison's argument that the main equality guarantee of the Fourteenth Amendment must be the Privileges or Immunities Clause[103] is compelling, but not entirely convincing. For one thing, "citizens of the several States"—the language used for the rights-bearers in Article IV of the Constitution—may have a meaning different from the phrase "citizens of the United States," which is the language used for rights-bearers in the Fourteenth Amendment's Privileges or Immunities Clause. Additionally, the word *protection*, as understood during Reconstruction, was better able to bear the broad meaning it is given today than Harrison concedes. *Webster's Dictionary*, for instance, offered a number of synonyms for *protection* in 1856: *defense*, *guard*, *shelter*, *safety*, and *exemption*.[104] And a number of the Framers seemed to understand "equal protection of the laws" as a requirement of equal legislation rather than equal police protection.[105] As we see it, the clauses may have some overlap, or perhaps taken together they ban caste. One objectionable law or official practice could violate one clause, while another violates a different clause. Moreover, among the existing laws on the books as to which the Equal Protection Clause guarantees equality of protection are the rights citizens hold under the federal and state constitutions. Thus, a state legislative enactment discriminating as to federal or state constitutional free speech rights on the basis of race might be said to deprive someone of the equal protection of the federal or state constitution.

Fortunately, settling which clause or combination of clauses the Framers and contemporary readers of Section One understood to prohibit unequal legislation is not necessary to our argument. What matters is (1) that the Framers of the Fourteenth Amendment drafted an amendment to forbid legislation that prohibits all systems of caste and of class-based laws that were not "justly prescribe[d] for the general good of the whole"[106] people;

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102. *See* DANIEL A. FARBER, THE FIRST AMENDMENT 224 (3d ed. 2010) ("Thus, the First Amendment would lose much of its value if it protected only isolated individuals but left the government a free hand to prevent organized activity.").

103. *Id.* at 1420–24.

104. GOODRICH, *supra* note 72, at 356. The full text of the definitions are as follows:

> Protect, *v.t.* To secure from injury; to throw a shelter over; to keep in safety.—SYN. To shield; save; cover; vindicate; *defend*, which see.
>
> Protection, *n.* The act of preserving from evil, loss, injury, [etc.]; that which protects or preserves from injury; a writing that protects.—SYN. Defense; guard; shelter; safety; exemption.

Id.

105. *See infra* notes 154, 254 and accompanying text; *see also infra* note 290.

106. Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3,230).

(2) that they used language broad enough to carry out their intention; and (3) that contemporary readers generally understood the amendment to mandate equality under the law by forbidding caste. We turn now to proving each of these propositions.

2. The Text in Context.—The Thirteenth and Fifteenth Amendments, like the Fourteenth Amendment, were primarily motivated by the plight of people of African descent. Thus, the Thirteenth Amendment banned slavery,[107] and the Fifteenth Amendment prohibited race-based denials of suffrage.[108] The Thirteenth Amendment's silence on the issue of race and the Fifteenth Amendment's explicit mention of it are telling. The former gives *everyone* the right not to be enslaved, while the latter endows only *some* citizens with the right to vote, demonstrating that the Framers made narrow pronouncements when such was their intention and used broad language when they sought broad application. Based on the content of the other two amendments, the Fourteenth Amendment, which by its terms protects the rights of "any person," or any citizen in the case of the Privileges or Immunities Clause, can hardly have been read to protect only the victims of race discrimination.[109]

Justice Scalia agrees that the Thirteenth Amendment informs the meaning of the Fourteenth, but he draws a far more limited inference. In his dissenting opinion in *Rutan v. Republican Party of Illinois*,[110] he gave a glimpse into his view of the Equal Protection Clause: "[T]he Thirteenth Amendment's abolition of the institution of black slavery[] leaves no room for doubt that laws treating people differently because of their race are invalid."[111] Of course, as discussed above, the Thirteenth Amendment

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107. The Thirteenth Amendment reads as follows:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

108. The Fifteenth Amendment reads as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Id. amend. XV.

109. *See* ELY, *supra* note 25, at 33 ("[Congress] knew how to bind their successors when they wanted to: the Fifteenth Amendment provides that the right to vote shall not be denied or abridged 'by the United States or by any State' on account of race.").

110. 497 U.S. 62 (1990).

111. *Id.* at 95 n.1 (Scalia, J., dissenting).

banned more than "black slavery."[112] This supports our argument that the Equal Protection Clause was meant to apply broadly.

Other sections of the Fourteenth Amendment limit the reach of Section One's equality guarantee.[113] Under Sections Three and Four, certain former Confederates were explicitly given lesser rights than other Americans.[114] Most striking today, however, is the inclusion of the word *male* in Section Two, which provides that if a state denies any male twenty-one or older the right to vote, the state's basis of representation will be reduced proportionally, except in the case of criminals and traitors.[115] There is no penalty in the Fourteenth Amendment for disenfranchising women, but there is an explicit penalty for disenfranchising men.

Section Two bestowed political rights on men but not women, and it is of course absolutely true that Section Two's sanctioning of sex discrimina-

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112. *See supra* notes 107–09 and accompanying text.

113. The unamended text of the Fourteenth Amendment reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
>
> Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
>
> Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Id. amend. XIV.

114. *Id.* §§ 3–4.

115. *Id.* § 2.

tion in voting rights makes it more doubtful that the Amendment's original readers could have understood Section One to prohibit all laws that discriminate on the basis of sex. This is especially so considering that in the United States, today and in the past, groups that are denied the vote tend to have reduced civil rights.[116] Thus aliens who lack the right to vote can be deported,[117] felons who lack the right to vote can be monitored,[118] and children who lack the right to vote can be forced to comply with a curfew to which adults are not subject.[119] Why would women who lack the right to vote have been any different? This is perhaps the strongest argument against an originalist reading of Section One as banning sex discrimination. The Nineteenth Amendment, however, struck the word *male* out of Section Two of the Fourteenth Amendment and at the same time altered the reach of Section One. The Framers of the Fourteenth Amendment would have thought that if political rights were guaranteed to a group, civil rights could not rationally be denied on the basis of group membership. This argument is made in more depth in Part III.

Section Two also limits Section One's scope in an additional way by permitting denials of suffrage so long as the disenfranchised are not counted in the basis of representation.[120] By most accounts, this made the Fifteenth Amendment necessary if African-Americans were to have a right to vote. Thus, Section One of the Fourteenth Amendment is concerned only with the protection of equal civil rights and not with the protection of equal political rights. The nineteenth-century distinction between political and civil rights is explored in section III(B)(1). At this point, it is only necessary to understand

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116. *See, e.g.*, Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1334 (2011) (arguing that denial of suffrage results in an inferior form of citizenship).

117. *Compare* ARIZ. REV. STAT. ANN. § 16-101(A)(1) (2006) (establishing United States citizenship as a prerequisite to voting in Arizona), *with* ARIZ. REV. STAT. ANN. § 11-1051(B), (D) (2006 & Supp. 2010) (mandating immediate notification of federal immigration authorities when an alien is illegally present in Arizona and giving authority to transfer aliens unlawfully present into "federal custody that is outside the jurisdiction").

118. *Compare* TEX. ELEC. CODE ANN. § 13.001(a)(4) (West 2010) (prohibiting certain felons from voting in Texas), *with* Griffin v. Wisconsin, 483 U.S. 868, 875–77 (1987) (affirming a probation officer's warrantless search of a felon's home on the basis of a tip that the felon possessed a firearm).

119. *Compare* CAL. CONST. art. II, § 2 (establishing a voting age of eighteen in California), *with* L.A., CAL., MUN. CODE § 45.03(a) (2011) (making it unlawful for individuals in Los Angeles who are under the age of eighteen to be seen in public between 10:00 p.m. and sunrise on the following day).

120. Members of Congress made clear statements that Section Two permitted disenfranchisement. Senator Stewart asked, "[W]ould [Section Two] not be a recognition of the power of the State to [exclude persons from the right of suffrage]?" CONG. GLOBE, 39th Cong., 1st Sess. 1280 (1866) (statement of Sen. Stewart). Senator Fessenden replied,

> I confess that owing to my very great stupidity I do not understand what the Senator is driving at. If he means to ask me whether this proposition is not an admission that the States have the power under the Constitution, I say certainly it is, and I have been arguing that this last half hour or more.

Id. (statement of Sen. Fessenden).

that political rights were more narrowly conferred and were more highly valued than civil rights. As we have said, lots of people with civil rights, such as children, lacked political rights. But no one with political rights lacked civil rights.

It seems clear from the historical record that Section One of the Fourteenth Amendment bans abridgements of civil but not political rights. But the text is ambiguous as to what abridgements are banned. It seems clear that more than just abridgements on the basis of race are banned, because the Fourteenth Amendment is phrased at a higher level of generality than is the Fifteenth Amendment. In order to recapture the objective original public meaning of Section One, it is helpful to consult extratextual sources that document the events that led to the writing of the Amendment, the intellectual history of the times, contemporaneous dictionaries, the discussion of the Amendment, and newspaper accounts at the time of the Fourteenth Amendment's adoption. When these sources are consulted, they point strongly toward the view that Section One bans abridgments of civil rights by enacting a ban on all systems of caste or of class-based legislation.

B. Background: The Need for a Constitutional Amendment

Before the Fourteenth Amendment was introduced, the Civil Rights Act of 1866 was passed by Congress, vetoed by President Johnson on the grounds that it exceeded congressional authority to enforce the Thirteenth Amendment,[121] and then passed again over his veto.[122] President Johnson claimed the Civil Rights Act of 1866 was unconstitutional because it exceeded Congress's power to enforce the Thirteenth Amendment's ban on slavery, and proponents of the Civil Rights Act of 1866 were concerned that the courts might hold the Act unconstitutional.[123] The uncertain future of the Act was the most pressing reason for a constitutional amendment.[124] The idea was to give the Civil Rights Act of 1866 a more secure constitutional footing and to immunize it from the attacks of future majorities in Congress should the Democrats ever regain control of the national lawmaking apparatus. No scholar of the history of the Fourteenth Amendment has argued

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121. When he vetoed the Civil Rights Bill on March 27, 1866, President Johnson purported to be worried about discrimination: "The bill, in effect, proposes a discrimination against large numbers of intelligent, worthy, and patriotic foreigners, and in favor of the negro, to whom, after long years of bondage, the avenues to freedom and intelligence have just now been suddenly opened." EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 75 (3d ed. 1880). While this statement is offensive, it does raise questions about permissible discrimination and impermissible discrimination.

122. Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144.

123. *See* MCPHERSON, *supra* note 121, at 77 ("It cannot, however, be justly claimed that, with a view to the enforcement of this article of the Constitution, there is at present any necessity for the exercise of all the powers which this bill confers. Slavery has been abolished, and at present nowhere exists within the jurisdiction of the United States . . . .").

124. BERGER, *supra* note 66, at 23.

that the Amendment does not constitutionalize the Civil Rights Act of 1866.[125]

So what exactly did the Civil Rights Act of 1866 do? Tellingly, the Act was titled "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication."[126] The operative language provided as follows:

> [A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[127]

Democrats and a few Republicans joined President Johnson in doubting this Act could be constitutionally justified by Congress's power to enforce the Thirteenth Amendment's prohibition on slavery. The power to legislate against slavery, it was said, does not include the much more sweeping power to legislate to require equal civil rights.[128] As a result, supporters of the Civil Rights Act of 1866 feared that even if the Act initially survived judicial review, as a mere statute, it might be repealed by a future Democratic Congress or struck down by some future Democratic Supreme Court.[129] The relationship between the Civil Rights Act and the Fourteenth Amendment is recognized by nearly all modern commentators on the original meaning of the Fourteenth Amendment[130]—including those, such as Raoul Berger, who

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125. BERGER, *supra* note 16, at 185.

126. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

127. *Id.* § 1.

128. MCPHERSON, *supra* note 121, at 75.

129. As an example of some of these concerns, one Congressman stated:

> The gentleman who has just taken his seat [Mr. Finck] undertakes to show that because we propose to vote for this section we therefore acknowledge that the civil rights bill was unconstitutional. He was anticipated in that objection by the gentleman from Pennsylvania, [Mr. Stevens.] The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power.

CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (statement of Rep. Garfield) (alterations in original); *see also id.* at 2081 (statement of Rep. Nicholson) ("The very fact that this amendment would authorize such legislation as the 'civil rights bill' is an additional reason why it should not be adopted.").

130. *See supra* note 16 and accompanying text.

have given the Amendment an exceptionally narrow construction.[131] They agree that at a bare minimum the Fourteenth Amendment must be understood as constitutionalizing the Civil Rights Act of 1866.[132]

The problem of class legislation was a prominent consideration of the supporters of the Civil Rights Act of 1866, and at times the scope of the Act was exaggerated. A congressional commentator went so far as to claim that the Act "declares that in civil rights there shall be an equality among all classes of citizens,"[133] despite the fact that the Act on its face only protected citizens from being denied particular civil rights on the basis of race.[134] Nonetheless, this claim was echoed and exaggerated further in the press, with one editorial contending that the Civil Rights Act of 1866 was a "guarantee of the rights of *freedmen*, and of *all others* who are citizens of the republic, to hold property, transact business, and to be in all things equal before the law with all other classes."[135]

Although equality before the law for all "classes" could not be satisfied by any fair reading of the words of the Civil Rights Act of 1866—it was only concerned with race discrimination[136] as to certain common law rights—the Fourteenth Amendment could be read as guaranteeing equality before the law for all classes of citizens. Significantly, as the amendment that would become the Fourteenth was being considered in Congress, some members of the public were asking for a constitutional amendment that would do more than just constitutionalize the Civil Rights Act of 1866. They wanted an end to all forms of class legislation whatsoever for good. These commentators associated slavery and the Black Codes with feudalism and aristocratic class discrimination, and they knew that any distinguishing characteristic could potentially be used as the basis for arbitrary or predatory discrimination if a simple majority so chose.[137] One especially forceful appeal for a constitutional amendment was made by a *Chicago Tribune* editorial in January 1866,[138] just as Congress was gearing up to address the problem of race discrimination with a constitutional amendment that was to become the

131. BERGER, *supra* note 66, at 191.

132. *See supra* note 16 and accompanying text. Berger contended that while segregation was not prohibited by the Fourteenth Amendment, the "purpose of the [F]ourteenth [A]mendment" was to "incorporate" the Civil Rights Act. BERGER, *supra* note 16, at 268.

133. CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866) (statement of Sen. Trumbull).

134. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (guaranteeing certain rights to "citizens, of every race and color").

135. *Adjournment of Congress*, PHILA. N. AM. & U.S. GAZETTE, July 30, 1866, at 1 (emphasis added).

136. *Class* and *race* were often spoken of in tandem, but were never synonyms. *See* Saunders, *supra* note 15, at 289–90 n.198 (noting the historic distinction between "class" and "caste" legislation).

137. The Fourteenth Amendment may also ban class legislation based on nonhereditary characteristics, but discussion of that point would take us far afield from the topic of sex discrimination since sex is a hereditary characteristic.

138. Editorial, *Class Legislation*, CHI. TRIB., Jan. 12, 1866, at 2.

Fourteenth Amendment. The editorial conceptually ties the Black Codes to the English aristocracy, in this way revealing that American laws based on racial classifications were recognized as just one species of impermissible oppression by hereditary ruling classes:

> We have seen, through bitter experience, the evils of class legislation as practi[c]ed by the States, in the form of slave and black codes. We cannot but perceive the evils of the system in England, and all monarchical governments, where the laws are allowed to recognize distinctions between persons and classes. We cannot shut our eyes to the patent fact that such legislation, even when exercised for good purposes, is based upon a principle of pernicious tendencies, that ought not, if it can be avoided, to obtain a recognition in the Republic. The design and spirit of our Government is opposed to this system, and its evident intent is to render unnecessary any special enactments for the benefit or repression of any class, but to legislate for all alike. But, unhappily, there is, at present, no special clause whereby this intent can be accomplished, in cases like that under consideration. And, if the several States can practi[c]e class legislation, as between whites and blacks, except when forbidden by counter-legislation by Congress, they can also create class distinctions in the future between native and adopted citizens, between rich and poor, or between any other divisions of society.
>
> The most effectual way to reach the root of this matter, is to amend the Constitution so as to forbid class legislation entirely by prohibiting the enactment of laws creating or recognizing any political distinctions because of class, race or color between the inhabitants of any State or Territory, and providing that all classes shall possess the same civil rights and immunities, and be liable to the same penalties, and giving Congress the power to carry the clause into effect. . . . [W]e believe that we might as well level the evil of caste at one blow, as to fight it by driblets and sections, through another long course of years.[139]

The *Tribune*'s call for a constitutional amendment that would "level the evil of caste at one blow" was obviously not echoed by all. But the reality that such an amendment would be a congressional goal was acknowledged even by those who opposed it, such as one commentator, also writing in January 1866, who expressed fear that Congress would soon go beyond the abolition of slavery and "repeal God's law of caste."[140] More supportive of

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139. *Id.*

140. DAILY NAT'L INTELLIGENCER, Jan. 5, 1866 at col. 1. This is in harmony with Professor Harrison's insight that "ad hoc castes"—groups discriminated against based upon unjustified animus—are prohibited by the Fourteenth Amendment. Harrison, *supra* note 15, at 1457–58. Harrison gives the example of laws denying "individuals who drive foreign cars" the right to purchase gasoline because of widespread resentment against them and contends that the Fourteenth Amendment prohibits such legislation. *Id.* Notably, the *Tribune* editorial contemplates an amendment that would prohibit the creation of "class distinctions" in the future. Editorial, *supra* note 138.

equality, the *Philadelphia North American Gazette* informed its readers in February 1866 that a constitutional amendment was being discussed in Congress that would "secure for the citizens of any one State the same rights as are enjoyed by the citizens of other States, thus terminating the discriminations made against sections and classes and races."[141] The hope of some and the fear of others—that Congress would produce a constitutional amendment mandating equality, meaning there would be no subjugated classes—was in fact realized.

C. *The Drafting of the Fourteenth Amendment*

1. Congress Crafts the Text.—Fifteen members of Congress began crafting what would become the text of the Fourteenth Amendment in 1866.[142] The mission of the Committee of Fifteen on Reconstruction was to draft an amendment that would alter the relationship between the states and the federal government by allowing the federal government to nullify discriminatory state legislation.[143] This amendment would secure Congress's constitutional power to enact the Civil Rights Act of 1866.[144]

The Committee of Fifteen held hearings to determine the scale of inequity and persecution in the Confederate states.[145] The hearings show that the congressional motive to amend the Constitution was from the beginning broader than the desire to protect freed slaves. Members of the Committee expressed concern for white Unionists in the South who were being persecuted,[146] a concern that was also raised during the subsequent debates.[147]

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141. *Constitutional Amendments*, PHILA. N. AM. & U.S. GAZETTE, Feb. 15, 1866, at 1.

142. The subject of the framing and ratification of the Fourteenth Amendment has been well treated by a number of commentators. *E.g.*, BERGER, *supra* note 66; KULL, *supra* note 16; NELSON, *supra* note 25; Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 29–65 (1955); Charles Fairman, *Reconstruction and Reunion 1864–88*, *in* 6 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund ed., 1971); Harrison, *supra* note 15; Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984).

143. *See* BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 213 (1914) ("At this time laws discriminating against the negroes and denying to them civil rights . . . were being passed by the legislatures in the southern states. . . . [O]n the very day that the 39th Congress met, Charles Sumner introduced some resolutions, providing among several other things for equal civil rights." (footnote omitted)).

144. And most scholars today agree that it did. *See supra* note 16 and accompanying text.

145. KENDRICK, *supra* note 143, at 264.

146. Several witnesses testified before the Committee that hostility toward Union men in the South was prevalent. *Id.* at 286. One member warned that if former Confederates were re-enfranchised, it would be a "death-blow to the Union men and the men of color in the South. They will have no protection, their rights will not be recognized." *Id.* at 410.

147. John Martin Broomall of Pennsylvania was one member of Congress who discussed the plight of white Unionists in the South:

The Committee submitted an initial, inadequate version of what would become the Fourteenth Amendment in April 1866:

> Section 1. No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.
>
> Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.
>
> Sec. 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.[148]

This version obviously differed from the Fourteenth Amendment as we know it today in important ways. Most obviously, it was confined to prohibiting only race discrimination.

The narrow scope of this proposed race discrimination version of the Fourteenth Amendment caused the draft to be rejected both by members of Congress on the left who wanted to prohibit all forms of caste and by members on the right who wanted to protect the rights of white Unionists in the South and to refer to race obliquely. Senator Charles Sumner, who was in the first camp, argued that the voting-rights provision in the original Section Three (which, modified, would become Section Two) was in fact "the recog-

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> But are the evils complained of limited to the black man? While I would blush if I could admit that that fact, if acknowledged, would in any degree lessen the necessity for the passage of this law, I nevertheless maintain and hold myself ready to prove that white men, citizens of the United States, have been, and are now being punished under color of State laws for refusing to commit treason against the United States at the bidding of Democratic candidates for the Presidency . . . .

CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866). Sidney Perham of Maine was similarly concerned about the plight of white Unionists:

> Their policy is to render it so uncomfortable and hazardous for loyal men to live among them as to compel them to leave. Many hundreds of northern men who have made investments and attempted to make themselves homes in these States have been driven away. Others have been murdered in cold blood as a warning to all northern men who should attempt to settle in the South.

Id. at 2082. Representative Broomall said that he could not support a system of reconstruction that did not

> effectually guaranty the rights of the Union men of the South . . . . [T]he Government of the United States above all other duties owes it to itself and to humanity to guard the rights of those who, in the midst of rebellion, periled their lives and fortunes for its honor, of whatever caste or lineage they be.

Id. at 469–70. Similarly, Representative Bingham felt that an amendment was needed because "equal and exact justice" had been denied to "white men as well as black men." *Id.* at 157.

148. KENDRICK, *supra* note 143, at 83–84.

nition of a caste and the disenfranchisement of a race"[149] because it allowed for African-Americans to be denied the right to vote by a state so long as its representation in Congress was proportionally diminished. His concern was addressed by the revised version, our race-neutral version of the Fourteenth Amendment, which Senator Jacob Howard explained, "applies not to color or to race at all, but simply to the fact of the individual exclusion."[150] Senator Henderson also explained the more expansive meaning of the revised Section Two: "For all practical purposes, under the former proposition loss of representation followed the disenfranchisement of the negro only; under this it follows the disenfranchisement of white and black, unless excluded on account of 'rebellion or other crime.'"[151]

The importance of this change, and the reason Senator Sumner viewed the original version as creating a system of caste, is illuminated by a discussion between Senators Howard and Clark. Senator Howard explained that the application of Section Two to individual exclusion will combat feudal aristocracy, which, like caste, was opposed by the drafters.[152]

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149. CONG. GLOBE, 39th Cong., 1st Sess. 1281 (1866).

150. *Id.* at 2767.

151. *Id.* at 3033.

152. During the congressional debate, Senator Howard explained his position on Section Two of the Fourteenth Amendment:

> Mr. CLARK. . . . I wish to inquire whether the committee's attention was called to the fact that if any State excluded any person, say as Massachusetts does, for want of intelligence, this provision cuts down the representation of that State.
>
> Mr. HOWARD. Certainly it does, no matter what may be the occasion of the restriction. It follows out of the logical theory upon which the Government was founded, that numbers shall be the basis of representation in Congress, the only true, practical, and safe republican principle. If, then, Massachusetts should so far forget herself as to exclude from the right of suffrage all persons who do not believe with my honorable friend who sits near me [Mr. Sumner] on the subject of negro suffrage, she would lose her representation in proportion to that exclusion. If she should exclude all persons of what is known as the orthodox faith she loses representation in proportion to that exclusion. . . . And, sir, the true basis of representation is the whole population. It is not property, it is not education, for great abuses would arise from the adoption of the one or the other of these two tests. Experience has shown that numbers and numbers only is the only true and safe basis; while nothing is clearer than that property qualifications and educational qualifications have an inevitable aristocratic tendency—a thing to be avoided.
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> . . . .
>
> Mr. HOWARD. It is not an abridgement to a caste or class of persons, but the abridgement or the denial applies to the persons individually. If the honorable Senator will read the section carefully I think he will not doubt as to its true interpretation. It applies individually to each and every person who is denied or abridged, and not to the class to which he may belong. It makes no distinction between black and white, or between red and white, except that if an Indian is counted in he must be subject to taxation.

Id. at 2767.

The new version of Section One was introduced by Thaddeus Stevens on April 30, 1866, and it also dropped the words *race* and *color*.[153] Its meaning was explained in most detail by Senator Howard:

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.[154]

Senator Eliot explained the meaning of Section One in similar terms:

> I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit[ ]State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.[155]

This understanding of Section One as banning all class legislation was discussed at length,[156] but it was not contested.[157] Suggestions that Section One only protected black people were explicitly rejected.[158] Those who

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153. *Id.* at 2286.

154. *Id.* at 2766.

155. *Id.* at 2511.

156. Melissa Saunders quotes Representative Hotchkiss of New York as saying that the Fourteenth Amendment was "designed to forbid a state to 'discriminate between its citizens and give one class of citizens greater rights than it confers upon another.'" Saunders, *supra* note 15, at 284. She quotes Senator Jacob Howard as saying that the Amendment would "abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another." *Id.* at 286 (alterations in original). She quotes Senator Timothy Howe as saying the Amendment would give the federal government "the power to protect classes against class legislation." *Id.* at 287.

157. Senator Dixon, debating the content of Section One, stated,

> One word in reply to the Senator from Massachusetts, with the consent of the Senate. The Senator says that I have forgotten many things, and among others the guarantees required by the four million slaves who have been emancipated. I desire to ask the Senator what guarantee those persons have in the proposition reported by the committee. The Senator exhausted all the terms of opprobrium in the English language in denouncing a resolution which was before the Senate some time since, and which contained the only guarantee for the colored race that is contained in this report.

CONG. GLOBE, 39th Cong., 1st Sess. 2335.

158. Senator Bingham, during the congressional debate, clarified that Section One applied to whites as well as blacks:

> Mr. HALE. It is claimed that this constitutional amendment is aimed simply and purely toward the protection of "American citizens of African descent" in the States lately in rebellion. I understand that to be the whole intended practical effect of the amendment.
>
> Mr. BINGHAM. It is due to the committee that I should say that it is proposed as well to protect the thousands and tens of thousands and hundreds of thousands of loyal

opposed the Amendment did not dispute the idea that it prohibited class legislation; they simply were unabashedly in favor of class legislation.[159]

On June 16, 1866, the text of what was to become the Fourteenth Amendment was formally presented to the states.[160] In August of that year—two years before three-quarters of the states had ratified the Amendment—the National Republican Party published a laudatory account of the caste-abolishing accomplishments of the 39th Congress:

> The Republicans in Congress sought by legislation and by constitutional amendment to guarantee to every citizen of the republic the equality of civil rights before the law. How much did the Democrats do toward that object?
>
> The Republicans in Congress sought to break up the foundations of secession and rebellion by making citizenship national and not sectional. How much did the Democrats do toward that object?
>
> The Republicans in Congress tried to the extent of their powers *to abolish throughout the bounds of the republic the evils of caste*, as second only to those of slavery. How much did the Democrats do toward that object?[161]

Undeniably, the Framers of the Fourteenth Amendment gave state legislators ample notice that they understood the Amendment to prohibit caste or systems of special-interest and class-based lawmaking.

Newspapers regularly recounted Congress's debates on the proposed amendment, and many publications articulated the amendment's anticaste meaning. The *San Francisco Daily Evening Bulletin* described the amendment as an "opportunity . . . for the masses to break down the domination of caste and aristocracy."[162] The *Boston Daily Advertiser* reported that "[t]he great object of the first section, fortified by the fifth, was to compel the States to observe these guarantees, and to throw the same shield over the black man as over the white, over the humble as over the powerful."[163] The Republican

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> white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation, and protect them also against banishment.

Id. at 1065.

159. A statement made by Representative Nicholson during congressional debates exemplifies sentiment favorable to class legislation:

> Now, the negro race in this country constitute such a class which is easily and well defined; and the peace and welfare of a State, especially where they are found in great numbers, demand that the radical difference between them and the white race should be recognized by legislation; and every State should be allowed to remain free and independent in providing punishments for crime, and otherwise regulating their internal affairs, so that they might properly discriminate between them, as their peace and safety might require.

Id. at 2081.

160. HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 140 (1908).

161. *Who Did It?*, PHILA. N. AM. & U.S. GAZETTE, Aug. 18, 1866, at 1 (emphasis added).

162. *Southern Experiment*, S.F. DAILY EVENING BULL., Nov. 9, 1866, at 1.

163. Editorial, *Reconstruction*, BOS. DAILY ADVERTISER, May 24, 1866, at 1.

understanding that Section Two was a challenge to aristocracy and feudalism was also disseminated:

> "But," say some, "this section is designed to *coerce* the South into according Suffrage to her Blacks." Not so, we reply; but only to notify her ruling caste that we will no longer bribe them to keep their blacks in serfdom. An aristocracy rarely surrenders its privileges, no matter how oppressive, from abstract devotion to justice and right. It must have cogent, palpable reasons for so doing.[164]

By connecting the old-world problems of aristocracy and feudalism with race discrimination and caste in America, these commentators provide more evidence that the American public conceived of the word *caste* at a higher level of generality than the word *race*. The Framers and ratifiers of the Fourteenth Amendment would have understood it to ban European feudalism or the Indian caste system, as well as the special-interest monopolies that so outraged Jacksonian Americans.

2. State Legislatures Consider Ratification.—As John Hart Ely has noted, the legislative history of a constitutional amendment merely begins with Congress; it is the state legislators who ratify an amendment who actually make it binding law.[165] Accordingly, it is the public understanding of the ratifiers of the Fourteenth Amendment that establishes its original public meaning. State legislators in 1866–1868 presumably would have been familiar with newspaper accounts such as those described above. They must also have been aware that some of their constituents had been lobbying Congress to prohibit systems of caste or of class-based lawmaking for some time.[166] But, Indiana Governor Oliver Morton was mistaken when he declared that

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164. Nat'l Republican Union Comm., *Address to the American People*, BANGOR DAILY WHIG & COURIER, Sept. 22, 1866, at 1.

165. ELY, *supra* note 25, at 17.

166. *See* CITIZENS OF W. TEX., MEMORIAL ON BEHALF OF THE CITIZENS OF WESTERN TEXAS, H.R. MISC. DOC. NO. 40-35, at 2 (2d Sess. 1867) (complaining that the new state legislature "forever excluded a large portion of citizens from a participation in the common school fund, and only granted them partial privileges in courts of justice, for no other reason than because of their caste or color"). The Republican Party of Louisiana made a similar argument:

> [I]n the name of those who love their country and hate its enemies, in the name of those who love liberty and hate tyranny, we appeal to you, as the faithful representatives of the American people, as our brothers, to protect the lives, the liberty, and the property of the loyal people of Louisiana; to establish here a government loyal to the nation, a government founded on justice to all, under which all good citizens, regardless of caste or color, shall enjoy equal civil and political rights.
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> . . . .
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> . . . Willing as we are to forgive the past offen[s]es of those who, having sinned against the government, are now sincerely repentant, we are at the same time opposed to any compromise with its known enemies. We do not believe in submitting constitutional amendments to rebel legislators who glory in having served the defunct confederacy. We protest against the continuance of the present so called State government of Louisiana. We ask you to abolish it, and substitute one composed of

> [n]o public measure was ever more fully discussed before the people, better understood by them, or received a more distinct and intelligent approval. I will enter into no argument in its behalf before this General Assembly. Every member of it understands it, and is prepared, I doubt not, to give his vote for or against, on the question of ratification.[167]

In reality, America's unusual post-Civil War political situation complicated state legislatures' discussions of the Fourteenth Amendment's propriety, meaning, and scope, and undoubtedly confused the public. The struggle between North and South, Republicans and Democrats, and federal and state authorities frequently dominated discussion of the Amendment, and in Southern legislatures, insidious prejudice and wounded pride sometimes led them to refuse to discuss the merits of the Amendment at all.[168]

Many of the states that did consider the Amendment at length did not record the debates in detail.[169] For the most part, we are left with governors' addresses and committee reports, which sometimes and to some degree illustrate how the proposed amendment was understood. The bulk of objections to ratification rested on states-rights arguments, at least nominally. The indisputable fact that the Fourteenth Amendment increased the power of Congress at the expense of the states gave pause even to some in the North.[170] But the wildest pronouncements came from Southern anti-Amendment forces seeking to discourage ratification. They ranged from claims that the Amendment would give Congress plenary power over the

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> those who require no Executive pardons before they enter upon the duties of their offices. Do these things and the loyal people of Louisiana will ever hold in grateful remembrance the members of the thirty-ninth Congress.

THE CENT. EXEC. COMM. OF THE REPUBLICAN PARTY OF LA., MEMORIALS AND RESOLUTIONS, H.R. MISC. DOC. NO. 39-8, at 1–2 (2d Sess. 1866).

167. S. JOURNAL, 45th Gen. Assemb., Reg. Sess. 42 (Ind. 1867).

168. The views expressed in the Georgia state legislature provide one example:

> Your committee ha[s] serious doubts as to the propriety of discussing the proposed amendments to the Constitution of the United States. They are presented without the authority of the Constitution, and it occurred to us, that as the dignity and rights of Georgia might be compromised by a consideration of the merits of the proposed amendments, that the proper course would be to lay them on the table, or indefinitely postpone their consideration, without one word of debate. We shall depart from this course, only so far as to give the reasons which, to our minds, forbid discussion upon the merits of the proposed amendments.

J. COMM. ON THE STATE OF THE REPUBLIC, REPORT, JOURNAL OF THE H., Ann. Sess., at 61 (Ga. 1866).

169. *But cf.* NELSON, *supra* note 25, at 60 (explaining that "voluminous material" covers the "extensive debates" about the Fourteenth Amendment that took place in state legislatures).

170. *See* S. JOURNAL, 19th Leg., Ann. Sess. 96 (Wis. 1867) (claiming that the "framers of the federal constitution were very careful to guard the rights of the several states, and held in abhor[r]ence everything that looked like consolidation"); NELSON, *supra* note 25, at 104 (detailing Southerners' concerns about centralized power and its erosive effect on state autonomy and noting that "[s]imilar views were held by Northerners").

states[171] to warnings that Southern Democrats would be made permanently powerless. Governor Thomas Swann of Maryland explained that Section Five "may leave the Southern and Border States at the mercy of the majority in Congress, in all future time," which he found "subversive . . . of every principle of justice and equality among the States, and in times of high party excitement and sectional alienation, dangerous to the liberties of the people."[172] Others in the South took a more practical view, recognizing that ratification of the Amendment was the only path back to representation in Congress: they argued for it solely on that ground.[173]

Despite these different modes of evaluating the Amendment, available commentary shows widespread agreement that the Amendment was about more than just the rights of people of African descent (though a desire to secure those rights was known to be its catalyst). Governor Frederick Low of California recognized that white Unionists were being persecuted along with former slaves,[174] and Arkansas Governor J.H. Barton expressed the same concern, recounting that "[i]n Woodruff County a premium is offered for the murder of Union men. The Ku Klux riding about the county. D.P. Upham and F.A. McClure shot down while riding along the road. Several freedmen killed. Officers cannot execute the law."[175] Governor Swann of Maryland, in what may have been an attempt at cleverness, provided more evidence that the Amendment was not understood simply to protect African-Americans by claiming that a law on the books in his state discriminated against white people and should be repealed promptly in the name of racial equality:

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171. *See* S. JOURNAL, 16th Leg., Ann. Sess. 259–60 (Ark. 1866) ("The great and enormous power sought to be conferred on Congress, under the Amendment, which gives that body authority to enforce by appropriate legislation the provision of the first article of such amendment, in effect, takes from the States all control over all the people in their local and their domestic concerns, and virtually abolishes the States.").

172. MESSAGE OF GOVERNOR SWANN TO THE GENERAL ASSEMBLY OF MARYLAND 21–22 (1867), *available at* http://www.archive.org/details/messageofgoverno1867swan [hereinafter MESSAGE OF GOVERNOR SWANN].

173. H. JOURNAL, 17th Leg., Ann. Sess. 19 (Ark. 1868) ("As the reconstruction laws require the ratification of this 14th Article before the State will be received and recognized as a State in the Union, it will be unnecessary for me to say more to the present Legislature, composed of loyal citizens of the State, than merely call their attention to the importance of early attention to the ratification of the same.").

174. Governor Low explained that the proposed Amendment was needed because in some states,

> laws were passed by their Legislatures providing for the apprenticing of negroes, which, if carried into effect, would have rendered the condition of the freedmen worse than that from which they had been emancipated by the operations of the war; and all men, whether white or black, who had stood by the Government in the hour of its peril, were proscribed and persecuted. In a word, the spirit of rebellion seemed triumphant, and all loyalty appeared crushed under its iron heel.

S. JOURNAL, 17th Leg., Reg. Sess. 50 (Cal. 1868).

175. POWELL CLAYTON, THE AFTERMATH OF THE CIVIL WAR, IN ARKANSAS 70 (1915).

> In relation to that feature of your Code, relating to the colored population, adopted years ago, giving to the courts the power to commute criminal sentences, by selling the offender into slavery for the period of his sentence, in lieu of imprisonment at hard labor in the penitentiary, I would commend it to your notice, not in the interest of the colored race, to whom it is a benefit, but as making an unfair discrimination under the new order of things, against the white man, from whom the same privilege is withheld. I trust that its repeal will be promptly ordered.[176]

The Amendment's detractors understood it to do more than abolish the Black Codes.[177] So did its supporters, but in public they stuck to vague talk of equality. This was the tactic that was also employed (unsuccessfully[178]) by the outgoing Governor, Frederick F. Low. He explained that Section One "declares 'equality before the law' for all *citizens*, in the solemn and binding form of a constitutional enactment, to which no reasonable objection can be urged."[179] Governor William Ganaway Brownlow of Tennessee also dealt with the arguably ambiguous meaning of the Amendment by simplifying it. He paraphrased the entirety of Section One as "[e]qual protection of all citizens in the enjoyment of life, liberty, and property."[180] Such pronouncements, while they confirm the Amendment's broad scope, fail to tell us much else. Uncertainty about the Amendment's meaning caused concern in some quarters specifically because it was recognized that courts can interpret ambiguous language in unanticipated ways. The minority

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176. MESSAGE OF GOVERNOR SWANN, *supra* note 172, at 19.

177. *See, e.g.*, John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 856 (1966) (noting that the Fourteenth Amendment was intended to outlaw the Black Codes of 1865–1866, but that "its intended scope and impact are less clearly illuminated by the legislative debate preceding adoption").

178. California did not ratify the Fourteenth Amendment until 1959! 1959 Cal. Stat. 5695–96.

179. S. JOURNAL, 17th Leg., Reg. Sess. (Cal. 1868) (emphasis added). Interestingly—and supportive of John Harrison's Privileges or Immunities theory—the Governor paraphrased the Privileges or Immunities Clause and the Due Process Clause but did not mention the Equal Protection Clause at all. *See id.* ("By the first section it is provided that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the State wherein they reside, and States are prohibited from abridging the privileges and immunities of citizens, or depriving them of life, liberty, or property, without due process of law."). On the other hand, he considered the Amendments, "so necessary for the protection of individual rights," a purpose Harrison might dispute. *Id.*; *see* Harrison, *supra* note 15, at 1458 n.277 ("The teaching of the Civil Rights Act of 1866 on this subject is equivocal because § 2 of the Act, which provided criminal enforcement, penalized state actors who deprived inhabitants of rights protected under § 1, or who imposed greater punishments on an inhabitant than were prescribed for white persons. This suggests a focus on the rights of individuals, not the abstract rule of equality. On the other hand, the 1866 Act elsewhere spoke in terms of simple race-blindness." (internal citations omitted)).

180. JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 20–21 n.51 (1997) (explaining that the Governor's message was distributed throughout the state, including through papers like the *Nashville Daily Press-Times* on June 22, 1866).

report from the Joint Committee of the Indiana General Assembly is an example:

> We have seen so many instances of stretching the powers of government in the last few years, by resorting to new and startling constructions of what seemed to be plain provisions, plainly written, that we feel the time has come when proposed amendments should be freed from all ambiguity; and therefore we are unwilling to sanction any new proposal to confer power upon the Federal Government, by amending the Constitution, until we know its precise scope and meaning.[181]

Discussions of the Amendment in state legislative journals sometimes raise more questions than they answer. For example, Missouri's Governor, Thomas C. Fletcher, who was a ratification proponent, claimed in a message to the General Assembly that the Amendment gives Congress the ability to create new rights for citizens that the states must honor: "[Section One] prevent[s] a State 'from depriving any citizen of the United States of any rights conferred on him by the laws of Congress, and secures to all persons equality of protection in life, liberty and property under the laws of the State.'"[182]

This is not the meaning ascribed to the Amendment today, though it is certainly not an unreasonable construction. Governor Fletcher's explanation also contains an interesting merger of the language of the Due Process and Equal Protection clauses, further highlighting the confusion the Amendment engendered.

While it is impossible to know how often the Amendment's anticaste rule was discussed in state legislatures or how many legislators were consciously aware of its existence, there is little doubt that most understood the Amendment to guarantee equal rights.[183] Other commentary reveals that state legislators understood that one goal of Reconstruction was the elimination of caste. For example, on the issue of Section Two and enfranchisement, Governor Morton decried "political vassalage" and described "our Republican theory, which asserts that 'governments exist only by the consent of the governed,' and that 'taxation and representation' should go together."[184] He explained that this theory "does not admit that suffrage

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181. H.R. JOURNAL, 45th Gen. Assemb., Reg. Sess. 104 (Ind. 1867).

182. JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 166 (1984). Large majorities in both houses ratified the Amendment after listening to Governor Fletcher. *Id.* at 165.

183. *See supra* notes 69–106 and accompanying text. We also include in this category those, such as the Governor of Vermont, who were concerned about a small, helpless minority of whites in the South who, along with black people, were being persecuted. *See* H.R. JOURNAL, Ann. Sess. 33 (Vt. 1867) (worrying that the Executive's restoration policy might "leav[e] to [Southerners'] unappeased and unrelenting hate a minority of whites so small as to be helpless").

184. S. JOURNAL, 45th Gen. Assemb., Reg. Sess. 44–45 (Ind. 1867).

shall be limited by race, caste, or color."[185] Similarly, the Governor of Arkansas, Isaac Murphy, explained that under the new state constitution, the adoption of which was a prerequisite for re-admittance to the Union,

> the interest of a few will no more crush out the energies and liberty of the people, but every human being in the State will feel confidence that his life, liberty, character, and property, are fully and equally protected. Class rule, class monopoly, and class oppression, will no more be known. All the citizens of the State are free, and entitled to seek their own happiness in their own way, so long as they obey the laws and respect the rights of others.[186]

State elected officials seem to have understood the proposed Amendment to be more than simply a ban on racially discriminatory legislation.

D. Post-enactment Practice and Early Jurisprudence

Almost as soon as the Fourteenth Amendment became law, controversy over its meaning erupted. Some claimed that it only protected the rights of black people,[187] but more commonly, it was acknowledged that the Constitution had been amended to prohibit caste and class legislation.[188]

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185. *Id.*

186. H.R. JOURNAL, 17th Sess. (Ark. 1868). Steven Calabresi and Sarah Agudo argue that state constitutions current in 1868 provide much insight into what rights were considered "fundamental" at the time. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEXAS L. REV. 7, 95 (2008) ("Nineteen states out of thirty-seven in 1868—a bare majority—specifically guaranteed 'equality' of some kind or equal protection . . . ."). A study of how those nineteen state constitutional provisions were discussed and applied could shed more light on how the federal Equal Protection Clause was understood by its readers.

187. One Congressman argued,

> The only purpose of this provision was to abolish discriminations, and to give, "without regard to race, color, or previous condition," citizenship; and to invest those who previously had been withheld from any rights, privileges, or immunities all that had been common to persons then citizens of the United States, and thus to put the colored citizens upon the same level with white citizens. This provision applies to all citizens, without regard to color, age, or sex; and yet it gives to no woman or minor the right to vote, and its only effect is to abolish all discriminations against the black or colored race. To the extent that the laws of any State may make such discriminations Congress may intervene to abolish them, but no further.

CONG. GLOBE, 42d Cong., 1st Sess. 648 (1871) (statement of Sen. Davis).

188. Senator Thayer of Nebraska explained that "[f]or the first time in our history [the Fourteenth Amendment] struck down that prop of despotism, the doctrine of caste." CONG. GLOBE APP., 41st Cong., 2d Sess. 322 (1870). Similarly, Senator George Edmunds of Vermont opined,

> The Constitution of the United States . . . is a bill of rights for the people of all the States, and no State has a right to say you invade her rights when under this Constitution and according to it you have protected a right of her citizens against class prejudice, against caste prejudice, against sectarian prejudice, against the ten thousand things which in special communities may from time to time arise to disturb the peace and good order of the community.

Importantly, it was recognized early on that the Framers' original expected applications were not determinative of the Amendment's meaning, demonstrating that the interpretive methods of the time were not unlike our own. Thus, Justice Bradley, riding circuit, explained,

> It is possible that those who framed the article were not themselves aware of the far reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment, as framed and expressed, does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional enactment. It is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has in fact been decreed.[189]

Additionally, arbitrary classifications such as those based on height or hair color were presumptively invalid, as one petitioner assumed when asking Congress,

> Could a State disenfranchise and deprive of the right to a vote all citizens who have red hair; or all citizens under six feet in height? All will consent that the States could not make such arbitrary distinctions the ground for denial of political privileges; that it would be a violation of the first article of the fourteenth amendment; that it would be abridging the privileges of citizens.[190]

And a similar understanding was adopted in *Strauder v. West Virginia*[191]:

> Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[192]

One especially powerful exposition of the Amendment's prohibition of class legislation was made by Charles Sumner, one of the Framers of the

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3 CONG. REC. 1870 (1875). Speaking of his opponents, Congressman Lewis of Virginia critiqued the Democratic Party for being "the party of privilege, of monopoly, of caste, of proscription, and of hate." *Id.* at 998.

189. Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 8,408).

190. H.R. REP. NO. 41-22, pt. 2, at 9–10 (1871). Although this report was concerned with political rights, this fact does not undermine its relevance.

191. 100 U.S. 303 (1880).

192. *Id.* at 308.

Fourteenth Amendment, as he decried the system of segregation that had sprung up all over the South:

> [It is] vain to argue that there is no denial of Equal Rights when this separation is enforced. The substitute is invariably an inferior article. . . . Separation implies one thing for a white person and another thing for a colored person; but equality is where all have the same alike.
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> . . . .
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> . . . Religion and reason condemn Caste as impious and unchristian, making republican institutions and equal laws impossible; but here is Caste not unlike that which separates the Sudra from the Brahmin. Pray, sir, who constitutes the white man a Brahmin? Whence his lordly title? Down to a recent period in Europe the Jews were driven to herd by themselves separate from Christians; but this discarded barbarism is revived among us in the ban of color. There are millions of fellow citizens guilty of no offense except the dusky livery of the sun appointed by the heavenly Father, whom you treat as others have treated the Jews, as the Brahmin treats the Sudra. But pray, sir, do not pretend that this is the great Equality promised by our fathers.[193]

Sumner's 1872 remarks demonstrate once again that those who objected to race discrimination did so because such discrimination violates a broader equality principle. The idea was not new—Sumner himself had made a similar case against the exclusion of witnesses on the basis of race in an 1864 Senate report.[194] It is striking that Sumner equates the racial caste system of the South to the traditional Indian caste system and to the oppression of the Jews in Europe. This supports our thesis that the animating principle behind Section One of the Fourteenth Amendment is a general rule of no caste and not merely a ban on race discrimination.

The same year, Senator Allen G. Thurman of Ohio employed the race–sex analogy in *support* of segregation and provided more evidence that from the beginning of the Fourteenth Amendment's existence, analogy has been the primary interpretive method employed:

> [L]et the Senator hear me and he will see. Let me turn the argument of [Senator Edmunds]. Is not a female child a citizen? Is she not

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193. CONG. GLOBE, 42d Cong., 2d Sess. 382–83 (1872).

194. CHARLES SUMNER, *Exclusion of Witnesses on Account of Color: Report, in the Senate, of the Committee on Slavery and Freedmen, February 29, 1864*, *in* 8 THE WORKS OF CHARLES SUMNER 176, 203 (1873). Sumner argued that

> it is in the irreligious system of Caste, as established in India, that we find the most perfect parallel. Indeed, the late Alexander von Humboldt, in speaking of colored persons, has designated them as a Caste; and a political and juridical writer of France has used the same term to denote not only the distinctions in India, but those in our own country, which he characterizes as "humiliating and brutal."

Id. (footnote omitted).

> entitled to equal rights? Why, then, do you allow your school directors to provide a school for her separate from a school for the male? Why do you not force them into the same school?. . . . Will the Senator say that all the laws of the States providing for a division of the schools by sexes are unconstitutional and infringe the fourteenth amendment? He cannot say that; and if he cannot say that, his argument falls to the ground.[195]

Senator Thurman does not pose the precise question at issue in *VMI*—the Court in *VMI* would seemingly have allowed separate-but-equal facilities for women (if truly equal, and the Virginia Military Institute, the Court concluded, is one of a kind)[196]—but he came close. Analogy as an original interpretive method is explored more fully in Part II.

In 1873, the Supreme Court weighed in on the scope of the Fourteenth Amendment. In the *Slaughter-House Cases*, famous for cutting the Privileges or Immunities Clause off at the knees, Justice Miller wrote, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[197] But he went on, "It is so clearly a provision for that race and that emergency, that *a strong case would be necessary for its application to any other*[,]"[198] conceding earlier that "if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent."[199] He did not say what sort of situation would present a "strong case," but his concession that one could exist is notable. Justice Bradley was more in touch with the original meaning when he wrote in dissent that the Constitution prohibits states from passing a "law of caste."[200]

Several years after the *Slaughter-House Cases*, the Supreme Court issued another landmark opinion. In the *Civil Rights Cases*,[201] a majority of the Justices paid lip service to "[w]hat is called class legislation," which it said was banned.[202] But it was Justice Harlan's dissent that first gave a thorough explanation of the Fourteenth Amendment's equality guarantee:

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195. CONG. GLOBE APP., 42d Cong., 2d Sess. 26 (1872).

196. *See* United States v. Virginia, 518 U.S. 515, 553–54 (1996) (holding that Virginia had failed to create a comparable women's institute due to its inability to replicate VMI's "funding, prestige, alumni support and influence").

197. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

198. *Id.* (emphasis added).

199. *Id.* at 72.

200. *Id.* at 113 (Bradley, J., dissenting).

201. 109 U.S. 3 (1883).

202. *Id.* at 24. The Court found the Civil Rights Act of 1875 unconstitutional because it regulated private parties rather than lawmakers. *Id.* at 11 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.").

> At every step, in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, "for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot." To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.[203]

Twelve years after the *Civil Rights Cases*, in *Plessy v. Ferguson*,[204] Justice Harlan once more dissented and invoked the anticaste command of the Fourteenth Amendment:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. *There is no caste here.* Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.[205]

Between the *Slaughter-House Cases* and *Plessy*, Justice Miller also commented on the Fourteenth Amendment once more, this time during oral argument following an adjuration from legislator-turned-advocate Roscoe Conkling—one of the members of the Joint Committee of Fifteen on Reconstruction. Conkling, arguing for the defendant in *San Mateo v. Southern Pacific Railroad*,[206] gave two reasons why the Amendment should not be understood merely to protect the interests of people of African descent: first, because "complaints of oppression, in various forms, of white men in the South,—of 'Union men,' were heard on every side," as Conkling knew first hand;[207] and second, because "the Congress which proposed, and the people who through their legislatures ratified the Fourteenth Amendment, must have known the meaning and force of the term 'persons.'"[208] He continued with feeling:

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203. *Id.* at 62 (Harlan, J., dissenting).

204. 163 U.S. 537 (1896).

205. *Id.* at 559 (Harlan, J., dissenting) (emphasis added).

206. 116 U.S. 138 (1885). Conkling—a member of the committee responsible for the Fourteenth Amendment—entered the case hoping to convince the Court that "the opinion of Justice Miller in the Slaughter-House cases was based upon a misconception of the intent of the framers of section 1 of the fourteenth amendment." KENDRICK, *supra* note 143, at 28–29.

207. KENDRICK, *supra* note 143, at 32–33.

208. *Id.* at 34.

> Those who devised the fourteenth amendment wrought in grave sincerity. They may have builded better than they knew.
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> They vitalized and energized a principle as old and as everlasting as human rights. To some of them, the sunset of life may have given mystical lore.
>
> They builded, not for a day, but for all time; not for a few, or for a race, but for man. They planted in the Constitution a monumental truth, to stand foursquare whatever wind might blow. That truth is but the golden rule, so entrenched as to curb the many who would do to the few as they would not have the few do to them.[209]

In response to these arguments and those of Conkling's co-counsel, Justice Miller declared that he had "never heard it said in this Court or by any judge of it that these articles [i.e., the Fourteenth Amendment] were supposed to be limited to the negro race."[210] Though the decision in *San Mateo* did not reach these questions, it has been claimed that this case marked the beginning of the Court's willingness to apply the Amendment more broadly than just on behalf of African-Americans.[211]

II. Sex Discrimination as Caste

Aside from black Southerners, female citizens were the group whose status under the proposed Fourteenth Amendment was discussed most frequently by Congress. The general view is that the discussions in Congress of women and the Fourteenth Amendment's no-caste rule are the greatest barrier between originalists and the conclusion that sex discrimination is unconstitutional. We disagree with this view and think that the debates actually support our thesis that fidelity to the original public meaning of the Fourteenth Amendment has, since 1920, led inexorably to the conclusion that the Fourteenth Amendment prohibits sex discrimination. These debates show that using the interpretive methods current in the 1860s to interpret Section One—i.e., analogizing oppressed groups and applying Section One's anticaste rule to known facts—will lead any committed originalist to reach outcomes much like the modern Supreme Court has reached in cases beginning with *Reed v. Reed*.[212] And as we have said, we agree with Professors John McGinnis and Michael Rappaport (among others) that understanding the interpretive methods of the drafters and enactors is

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209. *Id.*

210. *Id.* at 34–35 (alteration in original). He went on to explain that "[t]he purport of the general discussion in the Slaughter-House cases on this subject was nothing more than the common declaration that when you come to construe any act of Congress, you must consider the evil which was to be remedied in order to understand fairly what the purpose of the remedial act was." *Id.* at 35.

211. *Id.* at 34.

212. 404 U.S. 71 (1971). The Court struck down an Idaho statute giving mandatory preference to males in the appointment of administrators for estates as a violation of the Equal Protection Clause. *Id.* at 76–77.

essential to any accurate assessment of the original public meaning of a constitutional provision.[213]

One problem with the general view of the congressional debates is that it is derived exclusively from statements of supporters of the Amendment who assured their listeners that adoption would not change women's legal status. (Women, they explained, needed to have their freedom limited much the way children's freedom needed to be limited.)[214] This narrow focus ignores that the Framers and enactors intended the Amendment to be applied to actual facts[215] and that they knew that courts would be tasked, at least in part, with this job. These legislators naturally assumed that judges would find the same "facts" they had found themselves during the debates—that sex discrimination is natural and necessary rather than unjust and arbitrary[216]—but they did not think that these factual assumptions were part of the rule they had enacted.[217] Their expected applications illuminate their interpretive methods but do not define the text they drafted and sent out into the world.

On this point we diverge from Professors McGinnis and Rappaport, who argue that expected applications are fairly conclusive of original public meaning.[218] Professors McGinnis and Rappaport make this claim notwithstanding *Loving v. Virginia*,[219] a case many originalists, including John Harrison and both of us, believe correctly held that antimiscegenation laws violate the Fourteenth Amendment.[220] We think that liberty of contract was protected by the Civil Rights Act of 1866 and was also a privilege or immunity of state citizenship.[221] Marriage contracts are contracts just as much as any other kind of contract.[222] Under an antimiscegenation law, a

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213. McGinnis & Rappaport, *supra* note 14, at 761.

214. *See infra* notes 245–48 and accompanying text.

215. *See supra* notes 71–77 and accompanying text.

216. There may, of course, have been quiet Republicans who hoped that the Amendment would equalize women's legal status.

217. *See infra* notes 247–48, 251, 254 and accompanying text.

218. *See* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 379 (2007) ("Using expected applications is particularly important for modern interpreters, because usage may have changed in dramatic or subtle ways since the Framers' day. Expected applications are especially useful because they caution modern interpreters against substituting their own preferred glosses on meaning for those that would have been widely held at the Framing.").

219. 388 U.S. 1 (1967).

220. *See* Calabresi & Fine, *supra* note 9, at 669–70 ("Does this clear expected application mean that under originalism *Loving v. Virginia* is wrong? No. It does not. All originalists, from Raoul Berger to the present, have always conceded that the Fourteenth Amendment was meant at a minimum to codify the antidiscrimination command of the Civil Rights Act of 1866." (footnote omitted)); Harrison, *supra* note 15, at 1460 ("If marriage is a contract then the Civil Rights Act banned antimiscegenation laws.").

221. *See* Calabresi & Fine, *supra* note 9, at 669–70, 693 (arguing that the Civil Rights Act of 1866 and the Privileges and Immunities Clause protect a common law right to make contracts).

222. *Id.* at 670 (arguing that the common law of contracts included a right of marriage); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *433 ("Our law considers marriage in no other

white woman may enter into a contract to marry only a white man and not an African-American man.[223] Such a law "abridges" the liberty of contract of both parties; it makes race relevant to whether the contract a person enters into is valid; and it thus violates both the Civil Rights Act of 1866 and the Fourteenth Amendment. Antimiscegenation laws are as unconstitutional as would be a law prohibiting a black person from hiring a white plumber and a white person from hiring a black plumber. Under the Fourteenth Amendment, the race of a person who enters into a contract simply does not affect whether the contract is valid. Age and mental capacity matter, but race does not. The fact that most people did not understand this in the 1860s or in 1896 is quite simply irrelevant. People often misunderstand the formal requirements of legal texts, but their misunderstandings do not therefore alter the objective social meaning of those texts. The originalist case against antimiscegenation laws is absolutely airtight.

Professors McGinnis and Rappaport disagree with us on this, and they reason that the enactors of the Fourteenth Amendment expected others to use the same facts and reach the same conclusions that they had reached themselves, making the enactors' expectations part of their interpretive method.[224] At least in the Fourteenth Amendment context (and likely in many others), this conclusion is inconsistent with the interpretive methods of the enactors of that particular constitutional amendment. For one thing, by the 1860s the U.S. Supreme Court's decision in *Marbury v. Madison*[225] was firmly entrenched.[226] The Fourteenth Amendment's creators knew well that their Amendment, once adopted, could be applied in ways contrary to their expectations just as in *McCulloch v. Maryland*,[227] where the Supreme Court had found a federal power to charter corporations even though the Philadelphia Convention had voted *against* giving such a power to the national government.[228] Moreover, the Framers of the Fourteenth

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light than as a civil contract. . . . And, taking it in this civil light, the law treats it as it does all other contracts . . . .").

223. *E.g.*, N.C. GEN. STAT. ANN. § 14-181 (Michie 1953) (repealed 1973); MD. CODE ANN., art. 27, § 398 (Michie 1967) (repealed 1967); VA. CODE ANN. §§ 20-54, 20-59 (Michie 1960) (repealed 1968).

224. McGinnis & Rappaport, *supra* note 218, at 372 ("[P]eople at the time of the enactment of the Constitution would have been unlikely to eschew expected applications because such applications can be extremely helpful in discerning the meaning of words.").

225. 5 U.S. (1 Cranch) 137 (1803).

226. *See* James H. Landman, Marbury v. Madison: *Bicentennial of a Landmark Decision*, 66 SOC. EDUC. 400, 405 (2002) (emphasizing the significance of the 1857 *Dred Scott* case, in which the Supreme Court had clearly exercised its power of judicial review).

227. 17 U.S. (4 Wheat.) 316 (1819).

228. *Compare id.* at 424 ("After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land."), *with* JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 725–26 (E.H. Scott ed., 1893) (1840) (stating that the members of the Constitutional Convention rejected a provision that would have granted the federal government the power to grant charters of incorporation).

Amendment had little reason, if any, to expect that judges would look to the legislative history to glean their expected applications. Original expected applications had not been looked to by the Supreme Court in the eras of John Marshall or Roger B. Taney.[229] There is, in addition, the problem that original expected applications, like intentions, could not have been uniform throughout Congress and throughout state legislatures. Some members of Congress may have expected the Amendment to allow antimiscegenation laws, segregation, and discrimination against women while others might have disagreed.[230] The Framers of the Fourteenth Amendment were free to use language that was either broad or narrow. They could have explicitly excluded women from Section One's protections, but they did not do so. As Professor Siegel has pointed out, women's rights groups made no objections to Section One because they believed it to protect women's civil rights.[231] (The use of the word *male* in Section Two of the Fourteenth Amendment is what they struggled against.)[232] In our opinion, this was a reasonable conclusion for women's rights groups to draw from reading the language of Section One.

The discussions of sex discrimination that peppered congressional debates over the Amendment bolster these claims. There was substantial disagreement over whether sex discrimination was enough like race discrimination (or the Indian caste system or European feudalism) for the Amendment to prohibit it.[233] Alongside these disagreements, a consensus emerged that ought to inform our understanding of the original meaning of the Amendment and how it should affect laws that discriminate on the basis of sex. Lawmakers, in effect, agreed to a conditional statement. If sex discrimination *were* similar to race discrimination, then sex discrimination would be prohibited by the Amendment.[234] The question was whether sex discrimination in 1868 was considered to be relevantly similar to race discrimination, feudalism, and the Indian caste system.

To answer this question, we must look at the now-debunked popular justifications for sex discrimination and the powerful rejoinders that were

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229. *See* Vermeule, *supra* note 8, at 1887 ("For nineteenth-century statutory interpreters, ascertaining the intention of the legislature was the fundamental goal of interpretation. . . . However, nineteenth-century interpreters also adhered to a strict rule, traceable to English law, that forbade recourse to internal legislative history."); *see also* Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1844) (Taney, C.J.) ("In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered.").

230. This is the summing-of-intentions problem that concerns Professor Bennett. *See* Bennett, *supra* note 33, at 87–91 (discussing the "summing problem" of inferring the state of mind of a body from the states of mind of its individual members).

231. Siegel, *supra* note 6, at 970–72.

232. *Id.* at 975–76.

233. *See infra* notes 247, 254 and accompanying text.

234. *See infra* subpart II(A).

made even during Reconstruction and ask whether the legal status of women in the 1860s and later made them a subordinate caste. The available evidence of original meaning makes it abundantly clear, we think, that legislation that discriminates on the basis of sex violates the anticaste rule of the Fourteenth Amendment as that rule was originally understood.

This evidence also shows that the belief of many scholars and judges today that women were shut out of Fourteenth Amendment protection from the Amendment's inception is mistaken. In fact, the Supreme Court did not hold that women lacked equal civil rights under the Fourteenth Amendment until 1908—a full forty years after the Amendment was finally ratified and following several previous opportunities in which the Court could have so ruled but declined to do so.[235] The offensive decision came in *Muller v. Oregon*[236] at the urging of Louis Brandeis and the anti-*Lochner* Progressives, of all people.[237] Notably, the Supreme Court's opinion in *Muller* relied heavily on sociological evidence to withhold Lochnerian liberty of contract from women.[238] The Brandeis Brief in *Muller* provided studies and statistics on the "Dangers of Long Hours,"[239] including the "specific evil effects on childbirth and female functions"[240] and the "bad effect of long hours on morals."[241] This means that the Supreme Court was swayed by contemporary sociological evidence to apply the Fourteenth Amendment differently to women from the way in which it was applied to men. It was not original public meaning that animated *Muller v. Oregon* but judicial reliance on Louis Brandeis's contemporary sociology from 1908. The use of this type of sociological evidence in place of arguments from original meaning has long been one of the main criticisms made by originalists of Chief Justice Warren's much-discussed sociological opinion in *Brown v. Board of Education*.[242]

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235. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) were decided on other grounds. *See infra* notes 278, 290 and accompanying text.

236. 208 U.S. 412 (1908).

237. *Id.* at 420–21.

238. As Josephine Goldmark stated,

> Today the Brandeis Brief is so widely copied—the presentation of economic, scientific, and social facts is so generally made part of the legal defense of a labor law—that the boldness of the initial experiment is hard to realize. . . . To present such a brief evidenced a supreme confidence in the power of truth. . . .
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> . . . .
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> Gone was the deadening weight of legal precedent.

JOSEPHINE GOLDMARK, IMPATIENT CRUSADER 157–59 (1953).

239. Brief for Defendant in Error at 18–55, Muller v. Oregon, 208 U.S. 412 (1908).

240. *Id.* at 36.

241. *Id.* at 44.

242. 347 U.S. 483 (1954). The Court stated that it could not "turn the clock back" when addressing segregation and used academic research to conclude that "[s]eparate educational facilities are inherently unequal." *Id.* at 492–96; *see also* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949 (1995) (asserting that *Brown v. Board of Education* was "arguably the first explicit, self-conscious departure from the traditional view that the Court may override democratic decisions only on the basis of the Constitution's text, history, and interpretive tradition—not on consideration of modern social policy").

Originalists who object to the shaky sociology in the Supreme Court's opinion in *Brown v. Board of Education* should stop and consider carefully whether the sociology of the Court's opinion in *Muller v. Oregon* can be squared with their interpretive theories.

A. Congressional Debates

Most supporters of the Fourteenth Amendment in the Thirty-ninth Congress claimed that legislation discriminating on the basis of sex would not violate Section One. Democratic opponents of the Fourteenth Amendment, on the other hand, argued that Section One was just as applicable to women as to black men. Yet the vocal members of both sides generally agreed on some critically important points. They agreed that women were a class,[243] and, as we develop below, they agreed that *were* sex discrimination relevantly similar to race discrimination, Section One would prohibit both. They simply did not agree on whether women were a class that was suffering from arbitrary, caste-like discrimination. Indeed, they may well have thought that sex discrimination was a restraint that the government could "justly prescribe for the general good of the whole" people.[244]

The widespread congressional belief that legislation discriminating on the basis of sex was appropriate had two main justifications: (1) nature had not suited women for making certain kinds of decisions, and (2) family unity, and ultimately national unity, required that women remain in a subservient role to men.[245] A look at how members of Congress supported these factual

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243. For example, one Congressman argued,

> Formerly under the Constitution, while the free States were represented only according to their respective numbers of men, women, and children, all of course endowed with civil rights, the slave States had the advantage of being represented according to their number of the same free classes, increased by three fifths of the slaves whom they treated not as men but property.

CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

244. *See* Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (listing Article IV privileges and immunities). Note that race discrimination could not have been so justified as to common law rights because the Fourteenth Amendment constitutionalized the Civil Rights Act of 1866 and that Act explicitly required that African-Americans should have common law rights "as [were] enjoyed by white citizens." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. There can thus be no difference at all in the common law rights accorded to African-Americans and white Americans. Obviously, laws that create a forbidden caste system are by definition unjust laws that are not enacted "for the general good of the whole" people. *Id.* at 552.

245. The same ideas were the basis for denying women suffrage as well as civil rights. They were reflected outside Congress, one notable example coming from Orestes Brownson in 1885:

> The conclusive objection to the political enfranchisement of women is, that it would weaken and finally break up and destroy the Christian family. The social unit is the family, not the individual . . . . We are daily losing the faith, the virtues, the habits, and the manners without which the family cannot be sustained; and when the family goes, the nation goes too . . . .
>
> Extend now to women the suffrage and eligibility; give them the political right to vote and to be voted for; render it feasible for them to enter the arena of political strife, to become canvassers in elections and candidates for office, and what remains of family union will soon be dissolved. The wife may espouse one political party, and the

claims exposes the absurdity of a legislature or court concluding today, especially in light of the Nineteenth Amendment, that the Fourteenth Amendment does not prohibit sex discrimination. Such a conclusion would fly in the face of the original understanding of the Fourteenth Amendment's meaning because the Amendment was designed to be applied to the facts as we can best determine them today, not as people understood the facts 113 years ago. Surely the original public meaning of the Amendment does not call on subsequent generations to apply it based on misinformation prevalent in 1868, particularly after the Nineteenth Amendment knocked down all the factual foundations that caused the Supreme Court to allow sex discrimination in *Muller v. Oregon*.[246]

Many members of Congress put forward arguments that the Fourteenth Amendment would not interfere with the legal disabilities of women because women were inherently unequal to men. These are arguments that few, if any, would accept today. Senator Howard, the most thorough explicator of the Fourteenth Amendment, relied on "natural law" to exclude women from the Amendment's operation. In answer to the question of whether James Madison meant to include women in his statements on the importance of equality, Senator Howard explained,

> I believe Mr. Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature which has a certain influence even in political affairs, and that by that law women and children were not regarded as the equals of men. . . . [E]verywhere mature manhood is the representative type of the human race.[247]

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husband another, and it may well happen that the husband and wife may be rival candidates for the same office, and one or the other doomed to the mortification of defeat. . . .

Woman was created to be a wife and a mother; that is her destiny. To that destiny all her instincts point, and for it nature has specially qualified her. . . .

We do not believe women, unless we acknowledge individual exceptions, are fit to have their own head. The most degraded of the savage tribes are those in which women rule, and descent is reckoned from the mother instead of the father. Revelation asserts, and universal experience proves that the man is the head of the woman, and that the woman is for the man, not the man for the woman; and his greatest error, as well as the primal curse of society is that he abdicates his headship, and allows himself to be governed, we might almost say, deprived of his reason, by woman. It was through the seductions of the woman . . . that man fell . . . . She has all the qualities that fit her to be a help-meet of man, to be the mother of his children . . . ; but as an independent existence, free to follow . . . her own ambition and natural love of power, without masculine direction or control, she is out of her element, and a social anomaly, sometimes a hideous monster, which men seldom are, excepting through a woman's influence. This is no excuse for men, but it proves that women need a head, and the restraint of father, husband, or the priest of God.

Orestes A. Brownson, *The Woman Question* (1885), *reprinted in* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS 632–33 (6th ed. 2006).

246. *See infra* text accompanying notes 294–306.

247. CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866).

Other congressional claims that sex and race discrimination were not the same reveal their proponents' utter ignorance of women's plight:

> Women have not been enslaved. Intelligence has not been denied to them; they have not been degraded; there is no prejudice against them on account of their sex; but, on the contrary, if they deserve to be, they are respected, honored, and loved. Wide as the poles apart are the conditions of these two classes of persons.[248]

It should be immediately apparent that the claim that women who deserve to be are always respected, honored, and loved is absurd in hindsight, if not as it was being made. Equally absurd are the claims that there was no prejudice against women on account of their sex and that women were not denied "intelligence," presumably meaning education.[249] It would be an exaggeration to suggest that the position of white women and slaves were nearly identical, but "wide as the poles apart" is also a gross exaggeration of the disparity. It is true that some women were treated kindly in 1868, but in theory slaves could also have been treated kindly in the 1860s and a very small number were.[250] The point is that both groups had their options in life curtailed by law, making their abilities, merits, and desires irrelevant, and leaving them to some degree at the mercy of the men who benefited from their unpaid labor.

Some members of Congress supported their mistaken claim that sex and race were relevantly different by relying on questionable interpretations of legal authorities. Thus, for example, Representative William Lawrence explained

> [James] Kent says that if citizens
>
> "[r]emove from one State to another they are entitled to the privileges that persons of the same description are entitled to in the State to which the removal is made."
>
> That is, distinctions created by nature of sex, age, insanity, [etc.], are recognized as modifying conditions and privileges, but mere race or color, as among citizens, never can.[251]

It is odd and rather shocking that Lawrence would class sex with age and insanity, rather than with race.[252] An editorial in the *Macon Daily*

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248. CONG. GLOBE, 39th Cong., 2d Sess. 56 (1866) (statement of Sen. Williams).

249. *See* Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 660 (1996) (observing that the "limited opportunities for higher education" were a chief concern of the early women's rights movement).

250. *See* ROBERT B. EDGERTON, HIDDEN HEROISM: BLACK SOLDIERS IN AMERICA'S WARS 14 (2001) (explaining that some house slaves were treated as if they were "part of the family" and many "developed great affection for their masters").

251. CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866). Lawrence made his comments during debate on the Civil Rights Act. *Id.* at 1832.

252. The need for special care was Lawrence's likely rationale. Similarly, a North Carolina Supreme Court judge would write in 1899, "I certainly did not intend the slightest reflection upon married women, by continuing to give them the same protection afforded to 'infants, idiots, lunatics

Telegraph from September 21, 1866, challenged such baseless distinctions, from bad motives unfortunately, when it asked, "[O]n what principle shall we exclude the women of the country and children above the age of fifteen" if black men should be given the vote?[253] Others also failed to see the significance of the distinctions between sex and race, concluding that laws limiting people's rights based on their sex were no different than laws that discriminated on the basis of race. A back-and-forth between Senators Hale and Stevens demonstrates that these members of Congress had the better argument:

> Mr. HALE. . . . Take the case of the rights of married women; did any one ever assume that Congress was to be invested with the power to legislate on that subject, and to say that married women, in regard to their rights of property, should stand on the same footing with men and unmarried women? There is not a State in the Union where disability of married women in relation to the rights of property does not to a greater or less extent still exist. Many of the States have taken steps for the partial abolition of that distinction in years past, some to a greater extent and others to a less. But I apprehend there is not to-day a State in the Union where there is not a distinction between the rights of married women, as to property, and the rights of *femmes sole* and men.
>
> Mr. STEVENS. If I do not interrupt the gentleman I will say a word. When a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality.
>
> Mr. HALE. The gentleman will pardon me; his argument seems to me to be more specious than sound. The language of the section under consideration gives to *all persons* equal protection. Now, if that means you shall extend to one married woman the same protection you extend to another, and not the same you extend to unmarried women or men, then by parity of reasoning it will be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man. I think, if the gentleman from Pennsylvania claims that the resolution only intends that all of a certain class shall have equal protection, such class legislation may certainly as easily satisfy the requirements of this resolution in the case of the negro as in the case of the married woman. The line of

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and convicts'; nor have I heard any complaint from those married women whose opinions would naturally influence my conduct." Weathers v. Borders, 32 S.E. 881, 882 (N.C. 1899) (Douglas, J., concurring).

253. Editorial, *Democracy Run Mad—What Are We Coming To*, MACON DAILY TELEGRAPH, Sept. 21, 1866, at 2.

> distinction is, I take it, quite as broadly marked between negroes and white men as between married and unmarried women.[254]

Ward Farnsworth presents the above passage as strong evidence for his position that sex discrimination is permissible under the Fourteenth Amendment's objective original public meaning.[255] Though Professor Farnsworth acknowledges Judith Baer's claim that Hale's point was simply unanswerable,[256] he does not give her observation proper weight, instead answering weakly, "[B]ut it seems likely that Stevens would have had more to say."[257] Baer was quite right: Stevens did not have logic on his side, even given the misinformation about women's abilities that was widely accepted in his time. Rather than interpreting this passage as evidence that women fell outside of the "equal protection" guarantee, we contend that it should be viewed as evidence that supporters of the Amendment were not always willing to apply their own anticaste rule in an honest and consistent manner—a failure that did not go undetected at the time—which is one more reason why it would be inappropriate to give their expected applications significant weight.

Encouragingly for women's rights activists, there were glimmers of progressive thought on sex discrimination in the Thirty-ninth Congress. The radical Senator Benjamin Wade of Ohio did not see the justification for denying women the vote, although he thought the issue was less pressing than suffrage for black men. Commenting on the possibility of women's suffrage in Washington, D.C., he made a statement that straddles the line between progress and ignorance:

> I do not know that I would have agitated it now, although it is as clear to me as the sun at noonday that the time is approaching when females will be admitted to this franchise as much as males, because I can see no reason for the distinction. I agree, however, that there is not the

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254. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866). Although Hale is talking about distinctions between married and unmarried women rather than between men and women, it is impossible to ignore the subtext: married men did not have the same legal disabilities as married women.

255. Farnsworth, *supra* note 6, at 1240–41.

256. *Id.* at 1241 & n.26 (citing JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 90 (1983)).

257. *Id.* at 1241. Hale's argument brings to mind John Adams, though Adams was making a somewhat different point:

> The Same Reasoning, which will induce you to admit all Men, who have no Property, to vote, with those who have, for those Laws, which affect the Person will prove that you ought to admit Women and Children: for generally Speaking, Women and Children, have as good Judgment, and as independent Minds as those Men who are wholly destitute of Property: these last being to all Intents and Purposes as much dependent upon others, who will please to feed, cloath, and employ them, as Women are upon their Husbands, or Children on their Parents.

Letter from John Adams to James Sullivan (May 26, 1776), *in* 1 THE FOUNDERS' CONSTITUTION 394, 395 (Philip B. Kurland & Ralph Lerner eds., 1987), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch13s10.html.

> same pressing necessity for allowing females as there is for allowing the colored people to vote; because the ladies of the land are not under the ban of a hostile race grinding them to powder. They are in high fellowship with those that do govern, who, to a great extent, act as their agents, their friends, promoting their interests in every vote they give, and therefore communities get along very well without conferring this right upon the female.[258]

Although *communities* may have gotten along very well, women who longed for expanded opportunities probably did not feel that they were getting along well.[259] And surely some women were being ground to powder.[260] But despite his failure to see the plight of women with complete clarity, Senator Wade was an unequivocal supporter of women's equality. The *New York Times* reported on a speech that Senator Wade delivered in Lawrence, Kansas, in 1867:

> Mr. Wade then said that as he had kept in advance of the people in the great strife between Freedom and Slavery, he *meant to do the same thing in the contest which had just commenced for extending the right of suffrage to women.* He was unqualifiedly in favor of equal rights for all, not only without regard to nationality and color, but without regard to sex. . . . If he had not believed that his own wife had sense enough to vote, he never would have married her, [laughter and applause,] and if any of his hearers had wives who were unequal to the discharge of the right of suffrage, he would advise them to go home and get divorced at once. [Renewed laughter.][261]

Is it possible that Senator Wade held these views but did not agree with Democratic opponents of the Fourteenth Amendment who argued that its guarantee of equal civil rights applied to women? It would seem to be very unlikely.

Another Framer, former Representative John M. Broomall, assumed (soon after ratification if not earlier) that equality in civil rights was guaranteed to women by the Amendment. At the Pennsylvania Constitutional Convention of 1872–1873, he declared,

> Four hundred years ago women, according to the popular notion of that day, had no souls . . . . Still later than that, the women were beasts of burden . . . . Still the world moves, and in our time they have

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258. CONG. GLOBE, 39th Cong., 2d Sess. 63 (1866).

259. *See* O'Connor, *supra* note 249, at 659–61 (describing women's rights in the nineteenth century and identifying the right to vote as an important tool to remedy legal discrimination against women).

260. *Cf. id.* at 659 (discussing Elizabeth Cady Stanton's childhood experience of observing her father give legal advice to "[m]any . . . women who complained that their husbands and fathers had disposed of their property, spent their earnings on liquor, or had the sole right to guardianship of their children in the event of a separation").

261. *Senator Wade's Speech at Lawrence, Kansas*, N.Y. TIMES, June 20, 1867, at 8 (alterations in original).

> been granted equal civil rights with men. The next step is coming, and there are those living who will see it . . . . That step is equality of all human beings both before the law and in the making of the law.
>
> Thus it is that the world moves, and the man who is not prepared to keep pace with its motion had better get out of the way.[262]

These Reconstruction Senators, it appears, believed that equal political rights would make women the complete equals of men under the law. Equal political rights would necessarily mean equal civil rights.

While political rights continued to elude women, Justice Bradley's concurring opinion in *Bradwell v. Illinois*,[263] the case that held that the practice of law was not a privilege or immunity of citizenship, did not hesitate to proclaim that

> [t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[264]

This was not the majority's basis of decision (the majority sidestepped the sex discrimination question as we discuss below), but if it had been, could the decision be good constitutional law after women were guaranteed the vote by the Nineteenth Amendment?[265] If women can vote for President and Congress and Governor, surely they can make contracts without their husbands' consent.

B. Why Sex Discrimination Creates Castes

In light of the conclusion that Section One prohibited all systems of caste, and not only racial-caste systems, a fundamental question must be answered: was discrimination on account of sex a form of caste- or class-based lawmaking? Put another way, under the definition of *caste* in the 1860s, was it conceptually legitimate to call sex discrimination a caste system? It turns out that people did use *caste* to describe the position of women, although the Fourteenth Amendment's use of the word *male* in Section Two might have made it difficult for them to make their case in court.

Looking first to the original caste system, that of India, we find that in its earliest sense, the term *caste* was an apt description of the status of women. The *shastras*, which are the third-century-BC treatises that form the

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262. 1 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 553 (1873), *available at* http://www.duq.edu/law/pa-constitution/_pdf/conventions/1873/debates/debates-a-vol1.pdf.

263. 83 U.S. (16 Wall.) 130 (1873).

264. *Id.* at 141 (Bradley, J., concurring).

265. We answer this question in the negative in Part III, *infra*.

basis of the Indian caste system, expose the deep connection between women and the lower castes in India:

> In these treatises women have been equated to the lower castes and definite restrictions have been placed on both. Both have been defined as impure, of sinful birth and as having a polluting presence. Both the lower castes and women had to observe practices of verbal difference, temporal distance and dress codes as a[n] index of their subordinate status.[266]

Sex and caste were not identical, however, and Mary Cameron warns that "[i]n attempting to understand how gender and caste hierarchy are intertwined, we need to be aware that these are not always direct correspondences. Far less gender hierarchy exists at the lower levels of caste hierarchy than at the top, and not strictly for reasons of impurity."[267] But it is still quite significant that the "same pollution–purity ideology that divides the castes divides the sexes as well," and although different, "[g]ender and caste are seen as different manifestations of the same principles."[268]

Similarly, the connection between sex and the American version of caste, black slavery, was drawn many years before the Fourteenth Amendment was adopted. As early as 1837, Sarah Grimké opined that the slave laws of Louisiana were "not very unlike" those governing married women.[269] She made it clear that she was not claiming white women suffered to the same degree as slaves, but, she said,

> The various laws which I have transcribed, leave women very little more liberty, or power, in some respects, than the slave. "A slave," says the civil code of Louisiana, "is one who is in the power of a master, to whom he belongs. He can possess nothing, nor acquire anything, but what must belong to his master."[270]

In the latter half of the nineteenth century, the legal status of women was repeatedly decried as a species of caste. In 1869, Elizabeth Cady Stanton made a powerful speech that drew connections between race discrimination, sex discrimination, caste, feudalism, and aristocracy:

> A government, based on the principle of caste and class, can not stand. The aristocratic idea, in any form, is opposed to the genius of our free institutions, to our own declaration of rights, and to the civilization of the age. All artificial distinctions, whether of family, blood, wealth,

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266. Sharmila Rege, *Caste and Gender: The Violence Against Women in India*, *in* DALIT WOMEN IN INDIA: ISSUES AND PERSPECTIVES 18, 33 (P.G. Jogdand ed., 1995).

267. MARY M. CAMERON, ON THE EDGE OF THE AUSPICIOUS: GENDER AND CASTE IN NEPAL 43 (1998).

268. Sherry B. Ortner & Harriet Whitehead, *Introduction: Accounting for Sexual Meanings*, *in* SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY 1, 18 (Sherry B. Ortner & Harriet Whitehead eds., 1981).

269. Sarah Grimké, *Legal Disabilities of Women* (1837), *reprinted in* PRESSER & ZAINALDIN, *supra* note 245, at 580.

270. *Id.* at 581.

> color, or sex, are equally oppressive to the subject classes, and equally destructive to national life and prosperity. Governments based on every form of aristocracy, on every degree and variety of inequality, have been tried in despotisms, monarchies, and republics, and all alike have perished. . . . Thus far, all nations have been built on caste and failed. Why, in this hour of reconstruction, with the experience of generations before us, make another experiment in the same direction? If serfdom, peasantry, and slavery have shattered kingdoms, deluged continents with blood, scattered republics like dust before the wind, and rent our own Union asunder, what kind of a government, think you, American statesmen, you can build, with the mothers of the race crouching at your feet . . . . Of all kinds of aristocracy, that of sex is the most odious and unnatural; invading, as it does, our homes, desecrating our family altars, dividing those whom God has joined together, exalting the son above the mother who bore him, and subjugating, everywhere, moral power to brute force.[271]

Similarly, at the Woman's Rights Convention of 1866, Susan B. Anthony and Elizabeth Cady Stanton, after proclaiming that they proposed "no new theories," but simply desired the government to "secure the practical application of the immutable principles of our government to all, without distinction of race, color, or sex," asked

> In the oft-repeated experiments of class and caste, who can number the nations that have risen but to fall? Do not imagine you come one line nearer the demand of justice by enfranchising but another shade of manhood; for, in denying representation to woman, you still cling to the same false principle on which all the governments of the past have been wrecked. The right way, the safe way, is so clear, the path of duty is so straight and simple, that we who are equally interested with yourselves in the result, conjure you to act not for the passing hour, not with reference to transient benefits, but to do now the one grand deed which shall mark the zenith of the century—proclaim Equal Rights to All.[272]

Matilda Joslyn Gage's comparison of sex discrimination to caste harkened back to the earliest days of the Indian caste system:

> [T]he caste of sex everywhere exists, creating diverse codes of morals for men and women, diverse penalties for crime, diverse industries, diverse religions and educational rights, and diverse relations to the

271. Elizabeth Cady Stanton, Address to the National Woman Suffrage Convention (Jan. 19, 1869), *in* THE CONCISE HISTORY OF WOMAN SUFFRAGE 249, 251–52 (Mari Jo Buhle & Paul Buhle eds., 2005).

272. Elizabeth Cady Stanton & Susan B. Anthony, Address to Congress (May 10, 1866), *in* HARPER, *supra* note 42, app. at 968, 969, 971.

> Government. Men are the Brahmins, women the Pariahs, under our existing civilization.[273]

These statements, although they do not reflect how most people at the time conceived of women's legal status, are evidence that the word *caste* as understood during Reconstruction was applicable to women. Indeed, intelligent and discerning people sometimes said as much.

C. *The Supreme Court Weighs In*

Women would not see their rights expanded by the Fourteenth Amendment for a century. The first failed test came in *Bradwell v. Illinois*, when Myra Bradwell challenged an Illinois law that prohibited women from practicing law.[274] Bradwell presented the question, "Can a female citizen, duly qualified in respect of age, character, and learning, claim, under the fourteenth amendment, the privilege of earning a livelihood by practicing at the bar of a judicial court?"[275] Counsel for Bradwell had argued

> The legislature may say at what age candidates shall be admitted; may elevate or depress the standard of learning required. But a qualification, to which a whole class of citizens never can attain, is not a regulation of admission to the bar, but is, as to such citizens, a prohibition. For instance, a State legislature could not, in enumerating the qualifications, require the candidate to be a white citizen. This would be the exclusion of all colored citizens, without regard to age, character, or learning. Yet no sound mind can draw a distinction between such an act and a custom, usage, or law of a State, which denies this privilege to all female citizens, without regard to age, character, or learning. If the legislature may, under preten[s]e of fixing qualifications, declare that no female citizen shall be permitted to practice law, it may as well declare that no colored citizen shall practice law; for the only provision in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that "no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen."[276]

Bradwell, a good textualist, insisted that "the argument *ab inconvenienti*, which might have been urged with whatever force belongs to it, against *adopting* the fourteenth amendment in the full scope of its language, is futile to resist its full and proper operation, now that it has been adopted."[277] The Court nonetheless managed to resist the Amendment's full scope, not by

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273. Matilda Joslyn Gage, *Preceding Causes* (1881), *reprinted in* THE CONCISE HISTORY OF WOMAN SUFFRAGE, *supra* note 271, at 51, 52.

274. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 130 (1873).

275. *Id.* at 133.

276. *Id.* at 135–36.

277. *Id.* at 136.

reasoning that women were not protected by the Fourteenth Amendment, but by concluding that the practice of law was not one of the privileges or immunities of citizens of the United States.[278] With only the Chief Justice dissenting, the Court decided against Bradwell.[279]

The majority in *Bradwell* could easily have said that sex classifications were not forbidden by the Fourteenth Amendment, but the majority did not take what could be called the Ward Farnsworth route.[280] Even Justice Bradley's concurrence, although it would have upheld the legislation in question on the basis that women are different from men in their capacity to practice law, did not go so far as to say that women fall entirely outside the Fourteenth Amendment's scope and protection.[281] Because the entire Court—minus Chief Justice Chase—was in favor of upholding the Illinois law barring women from practicing law, the failure of the eight Justices in the majority to say the Fourteenth Amendment left women out entirely is interesting.[282]

Five years after *Bradwell*, another court, the Supreme Court of West Virginia, explicitly said that women were protected by the Fourteenth Amendment's equality guarantee to the same degree as black men. In *State v. Strauder*,[283] the Supreme Court of West Virginia concluded that black men could be excluded from juries because women could be excluded, and the

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278. *Id.* at 139. The Court stated,

> We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them.

Id. The concurring opinion talks about the "respective spheres" of men and women. *Id.* at 141 (Bradley, J., concurring). But the majority opinion avoids deciding the case on that basis. *Id.* at 139.

279. Chief Justice Chase, who had a very liberated and capable daughter, dissented, but he did not write a dissenting opinion. Richard L. Aynes, Bradwell v. Illinois*: Chief Justice Chase's Dissent and the "Sphere of Women's Work,"* 59 LA. L. REV. 521, 526, 530–35 (1999). He died soon thereafter without ever explaining his position. *Id.* at 526–27. For a discussion of what Chase's views may have been, see *id.* at 526–29.

280. Farnsworth, *supra* note 6, at 1230 ("But the view that emerges from the record nevertheless is clear enough. The [Fourteenth] Amendment was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women, particularly married women.").

281. *See Bradwell*, 83 U.S. (16 Wall.) at 139–42 (Bradley, J., concurring) (standing by the traditional view that "a woman had no legal existence separate from her husband" but acknowledging the "humane movements of modern society").

282. The Supreme Court in *Bradwell* could have thought that the right to practice law was a political right like the right to vote or serve on a jury and that it therefore was not a "privilege or immunity" of state citizenship. Lawyers are officers of the courts, and practicing law has some of the same elements as does jury duty. Finding the right to practice law as being a political rather than a civil right would explain why the Court would have ruled against Bradwell.

283. *Strauder I*, 11 W. Va. 745 (1877), *rev'd sub nom.* Strauder v. West Virginia, 100 U.S. 303 (1880).

Fourteenth Amendment protected both groups in the same way.[284] The opinion explains,

> It is true that the occasion for this provision and all the other provisions of the thirteenth and fourteenth amendments was the supposed necessity of protecting the negro; but special care was taken to extend these provisions to all persons whatsoever. The language is as broad as it possibly can be: "No person shall be denied the equal protection of the laws."
>
> . . . .
>
> The negro has no more right to insist upon the equal protection of the laws, than a Chinaman or a woman. And surely it will not be pretended that a State, which by its laws, prohibits a Chinaman or a woman from sitting on a jury, does thereby deny to a Chinaman or woman, who is being tried for a felony the equal protection of the laws. Has not a woman as much right to insist that a State, by its laws, must permit her to be defended by a woman as her counsel, as she has to insist that women should be allowed to sit on a jury which tries her.[285]

The U.S. Supreme Court overturned the West Virginia Supreme Court's decision by concluding that the Fourteenth Amendment prohibits laws that exclude African-American men from juries, but the opinion entirely avoided mentioning women.[286] This may have been because the argument that women have as much right to have women on their juries as black men have to have black men on their juries was unassailable,[287] but the U.S. Supreme Court was unwilling to make this acknowledgement until 1975.[288]

Two years after the U.S. Supreme Court's decision in *Bradwell*, the Court considered the question of whether women have the right to vote under the Fourteenth Amendment. The case was *Minor v. Happersett*.[289] Strikingly, the Court in *Minor v. Happersett* did not deny that women's civil rights were equally protected by the Fourteenth Amendment, but it instead

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284. *Id.* at 814, 817.

285. *Id.*

286. *See* Strauder v. West Virginia (*Strauder II*), 100 U.S. 303, 308–12 (1880) (overturning the West Virginia Supreme Court's decision to exclude African-American men from juries but not mentioning women anywhere in the decision).

287. *Strauder I*, 11 W. Va. at 814, 817 (insisting that the Fourteenth Amendment affords women the same degree of equal protection as African-Americans). If it is not immediately apparent that female defendants benefit from having women on their juries, consider cases where women raise the affirmative defense that they defended themselves against an abusive husband. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 182 n.111, 183 n.113 (1989) (noting that prosecutors and defense attorneys often exercise peremptory challenges on the basis of gender in battered-wife-syndrome cases).

288. *See* Taylor v. Louisiana, 419 U.S. 522, 531–33 (1975) (guaranteeing men as well as women a jury that is a "fair-cross-section" of the community, which must include women).

289. 88 U.S. (21 Wall.) 162 (1875).

concluded that the Fourteenth Amendment guaranteed *no one* the right to vote because the Amendment protected only civil and not political rights.[290] As we discuss, Section Two of the Fourteenth Amendment makes it implausible to read Section One as guaranteeing citizens the right to vote.[291] Moreover, the passage of the Fifteenth Amendment to give African-American men the right to vote made it clear that the Reconstruction Framers did not think the Fourteenth Amendment guaranteed equal political rights and thought instead it guaranteed only equal civil rights.

The Court's continued silence on the question of whether the Fourteenth Amendment protected against sex discrimination allowed other courts to say that the Fourteenth Amendment did prohibit sex discrimination as to civil rights. In 1895, the Illinois Supreme Court said that a woman's contract rights could not be restricted any more than a man's could be, first noting that the Supreme Court had held in *Minor v. Happersett* that "a woman is both a 'citizen' and a 'person' within the meaning of [Section One]."[292] The opinion continued,

> As a "citizen," [a] woman has the right to acquire and possess property of every kind. As a "person," she has the right to claim the benefit of the constitutional provision that she shall not be deprived of life, liberty, or property without due process of law. Involved in these rights thus guarant[e]ed to her is the right to make and enforce contracts. The law accords to her, as to every other citizen, the right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions, or other vocations. Before the law, her right to a choice of vocations cannot be said to be denied or abridged on account of sex.[293]

The U.S. Supreme Court did eventually come to the opposite conclusion—that women were not entitled to the same protections as men under the Fourteenth Amendment—but not until 1907 and even then only at the urging of future Justice Louis D. Brandeis.

In *Muller v. Oregon*, the Supreme Court held that laws setting maximum work hours for women were valid even though such laws were invalid for men under the rule of *Lochner v. New York*, a case where the Supreme Court had struck down a law that forbade bakers from working more than sixty hours a week.[294] Future Supreme Court Justice Louis Brandeis's infamous

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290. *See id.* at 171 ("The [Fourteenth] [A]mendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had.").

291. *See supra* notes 120, 164 and accompanying text; *infra* notes 354–59 and accompanying text.

292. Ritchie v. People, 40 N.E. 454, 458 (Ill. 1895) (citing *Minor*, 88 U.S. (21 Wall.) at 162).

293. *Id.*

294. Muller v. Oregon, 208 U.S. 412, 416–19, 423 (1907). *Lochner* involved the common law right of liberty of contract, which was a privilege or immunity of state citizenship; but there was a disagreement among the Justices over whether the sixty-hour-a-week work limit was a just law

brief—the original Brandeis brief—on the important differences between men and women convinced the Court that women could be given restricted contract rights compared to men without falling afoul of the Fourteenth Amendment's no-caste-rule guarantee.[295] Perhaps surprisingly, the brief was conceived of and largely written by a very progressive woman, Florence Kelley.[296] Kelley, daughter of Congressman William Darrah Kelley, was the first female factory inspector in Chicago, a resident of Hull House, and an early member of the NAACP.[297] She was also a fierce fighter for women's rights, whom Jane Addams's nephew described as "the toughest customer in the reform riot, the finest rough-and-tumble fighter for the good life for others, that Hull House ever knew."[298] It may seem strange that such a woman would work so hard to push women out of the Fourteenth Amendment's scope. But the Court had foreclosed the possibility of universally protective labor laws in *Lochner*,[299] and so Kelley, despite believing women *and* men were being woefully mistreated by their employers, was willing to push for labor laws that applied to women only. If she could not protect all workers thanks to *Lochner*, she would protect some in *Muller*. Kelley also reasoned that protective labor laws were more necessary for women because they could not vote to improve their conditions and did not have the power of trade unions behind them.[300]

When Kelley first heard that *Muller* would be heard by the Supreme Court, she reportedly exclaimed, "There is just one man whom I wanted for the defense of the next labor case . . . . Such a chance may not come soon

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enacted for the good of the whole people. The majority appears to have thought that the sixty-hour-a-week limit was special-interest, rent-seeking legislation that insulated established bakers from competition. *See Lochner*, 198 U.S. at 64 (stating that the Court would look beyond the letter of the statute to determine its true meaning). Justice Harlan's dissent, however, argued that the law was a valid exercise of the police power. *Id.* at 73–74 (Harlan, J., dissenting). Justice Holmes thought the Supreme Court ought only to strike down violations of the Fourteenth Amendment when there was nothing in history or tradition to support the laws being challenged. *Id.* at 76 (Holmes, J., dissenting). Since the New Deal, there has been a consensus on the Court that state laws should only be found to be unjust and not for the good of the whole people when they: (1) discriminate; (2) violate the rights protected in the federal Bill of Rights; or (3) violate personal liberties in contraception, abortion, or gay rights cases. *See generally* Lawrence v. Texas, 539 U.S. 558, 564–79 (2003); Roe v. Wade, 410 U.S. 113, 147–66 (1973); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). For a critique of the current doctrine, see generally Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517 (2008).

295. *See Muller*, 208 U.S. at 419 (citing approvingly to Brandeis's brief); Brief for Defendant in Error at 18–27, Muller v. Oregon, 208 U.S. 412 (1907) (citing to numerous professional reports discussing the dangers of long workdays for women).

296. *The Life and Times of Florence Kelley in Chicago 1891–1899*, NW. UNIV. SCH. OF LAW, http://florencekelley.northwestern.edu/florence.

297. *Id.*; Louis L. Athey, *Florence Kelley and the Quest for Negro Equality*, 56 J. NEGRO HIST., 249, 250 (1971).

298. JAMES WEBER LINN, JANE ADDAMS: A BIOGRAPHY 138–39 (1935).

299. *See Lochner*, 198 U.S. at 57 (striking down a maximum-hour law for bakers as a violation of the right to freedom of contract).

300. GOLDMARK, *supra* note 238, at 148.

again. The man I wanted is Louis Brandeis."[301] On November 14, 1907, she approached Brandeis—accompanied by his sister-in-law, Josephine Goldmark, who would later be Kelley's biographer—to enlist his support for the "Oregon ten-hour law for women."[302] He agreed. According to Goldmark, "[h]e then outlined what he would need for a brief: namely, *facts*, published by anyone with expert knowledge of industry in its relation to women's hours of labor, such as factory inspectors, physicians, trades unions, economists, [or] social workers."[303] Kelley collected the facts, and Brandeis successfully defended the law. Thrilled with the Court's decision, Kelley described it as "epoch-making."[304] To her great satisfaction, the Court had relied heavily on the "facts" she had supplied.[305]

Interestingly, the opinion in *Muller*—despite undermining women's claim to equal protection of the laws under the Fourteenth Amendment—provides much support for our argument that the equality principle of the Fourteenth Amendment is to be applied to the facts as currently understood (especially in light of the adoption of the Nineteenth Amendment) rather than by trying to reconstruct discarded beliefs of yesteryear. The Court explained:

> Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.[306]

So, the very Supreme Court case that first held that men and women could receive differential Fourteenth Amendment protection also established that the degree of difference must be justified by well-established facts.

It is worth considering how *Muller v. Oregon* might have come out if the Nineteenth Amendment had already been adopted when *Muller* was decided in 1907. The Supreme Court might very well have concluded, two years after *Lochner v. New York*, that women would protect their own contract rights through the political process if they needed protection. This would have been a mistaken conclusion for reasons we will discuss at length

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301. *Id.* at 152.

302. *Id.* at 143.

303. *Id.* at 155.

304. *Id.* at 159.

305. *See* Muller v. Oregon, 208 U.S. 412, 419–21 (1908) (citing approvingly to Brandeis's brief and generally incorporating facts from the brief into the Court's reasoning); Brief for Defendant in Error at 18–27, Muller v. Oregon, 208 U.S. 412 (1907) (citing to numerous professional reports discussing the dangers of long work days for women).

306. *Muller*, 208 U.S. at 420–21.

below.[307] On the other hand, the Court might have concluded that a constitutional amendment declaring sex an impermissible basis for disenfranchisement—in effect, a constitutional assertion that sex is irrelevant to decision making—outweighed Brandeis and Kelley's collection of sociological evidence. In that event, the law would be struck down either for failure to protect women's contract rights or for failure to protect men's labor rights.

III. The Difference the Nineteenth Amendment Made

"If that word 'male' be inserted as now proposed, it will take us a century at least to get it out."

—Elizabeth Cady Stanton[308]

It is tempting to conclude that if Section One of the Fourteenth Amendment prohibits systems of caste, and if legislation that discriminated on the basis of sex made women a caste, then the argument that sex discrimination is prohibited is complete. This is not certain in part due to the Amendment's second section, which privileged men. We argued above that the Framers were free to write their factual assumptions into law and exclude women from the protection of the Fourteenth Amendment if they so chose, but that they failed to do so.[309] Yet in some sense they did inject their assumptions about women's competence and proper sphere into the text of the Fourteenth Amendment. In Section Two, the Reconstruction Framers inserted the word *male* into the Constitution for the first time, explicitly privileging males over females with respect to voting rights. The section mandated a reduction in a state's basis of representation if the vote were "denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States."[310] This makes it very difficult to read the original 1868 version of the Fourteenth Amendment as a bar to sex discrimination. The Nineteenth Amendment changed all this, however, when it reinstated the Constitution's sexual neutrality by nullifying the use of the word *male* in Section Two.

The Nineteenth Amendment also implicitly changed how the Fourteenth Amendment treats sex classifications. By guaranteeing that political rights would not be denied on the basis of sex, the Nineteenth Amendment made it

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307. In short, political power is an important, but not always sufficient, means of carrying out the equality guarantee of the Fourteenth Amendment. This is true even in the case of groups, such as women, who exist in very large numbers. Individuals should not be dependent on all class members being motivated to secure the rights of the class.

308. ELLEN CAROL DUBOIS, WOMAN SUFFRAGE AND WOMEN'S RIGHTS 94 (1998) (quoting ALMA LUTZ, CREATED EQUAL: A BIOGRAPHY OF ELIZABETH CADY STANTON 134 (1940)).

309. *See supra* notes 207–11 and accompanying text.

310. U.S. CONST. amend. XIV, § 2 (amended 1920).

implausible to read the Fourteenth Amendment's equality guarantee as inapplicable to women, because a guarantee of political rights implicitly guarantees full civil rights. Political rights are at the apex of the rights hierarchy with civil rights at the base.[311] Lots of people, such as children and resident aliens, have equal civil rights, but only the most privileged citizens have the political right to vote.[312] We think that once the Constitution was amended to give women the right to vote it became implausible to read the no-caste rule of the Fourteenth Amendment as allowing discrimination on the basis of sex with respect to civil rights. Our conclusion rests on the way the relationship between the two types of rights—political rights and civil rights—have been understood in America historically, as well as on the stark fact that if two-thirds of Congress and majorities in at least three-quarters of the state legislatures believe that a class of people is fit to exercise the vote—the most carefully bestowed of all rights—then there is good reason to believe that limiting that class's civil rights would be arbitrary and improperly discriminatory under the Fourteenth Amendment.

Additionally, the Nineteenth Amendment's legislative history shows that those who debated it understood it to make women equal to men under the law. Outdated assumptions about gender were rejected by the Nineteenth Amendment's supporters, and its detractors objected to the Amendment precisely because it emancipated women.[313] Debaters on both sides of the issue made explicit statements that full equality—not merely equal voting rights but full equality—was the purport of the Amendment.[314]

Reva Siegel has also argued that the connection between the Fourteenth and the Nineteenth Amendments calls for a synthetic reading of the two Amendments. She has amassed significant evidence that women's struggle for the vote, which began in earnest in 1866 and was finally realized in 1920, was a struggle against subordination within the family.[315] In this way, Siegel has provided a sociohistorical grounding for the sex discrimination doctrine that she hopes will influence courts to look at the ways in which women are oppressed within the family—something that she feels cannot happen so long as sex discrimination is prohibited not for its own sake but as a form of

311. *See infra* subpart III(B).

312. *See infra* subpart III(B).

313. *See infra* notes 449–60 and accompanying text.

314. *See infra* notes 437–43 and accompanying text. Of course the push for the Equal Rights Amendment, which came hot on the heels of the Nineteenth Amendment's adoption, cannot be ignored. *See* CHRISTINE LUNARDINI, FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN'S PARTY, 1910–1928 (1986). It suggests that the very people responsible for guaranteeing women the vote did not think that the Constitution prohibited sex discrimination as to civil rights. But consider that in the 1920s, Section One of the Fourteenth Amendment was not given full force even in the race discrimination context: segregation and antimiscegenation laws were decades away from being held unconstitutional. It would have required real imagination for anyone to have anticipated *Loving v. Virginia*, let alone *Reed v. Reed*. Proponents of the ERA could reasonably have viewed Section One as a dead letter.

315. Siegel, *supra* note 6, at 1030–31.

discrimination similar to race discrimination.[316] But while Siegel argues that history provides sex discrimination doctrine with an independent grounding, freeing it from the race analogy, we argue that history (legislative and otherwise) shows something else: that the two forms of discrimination have a common rationale, a shared struggle, and a common remedy, making the analogy quite appropriate. We reach this conclusion by taking what may be a more legalistic approach than the sociohistorical treatment offered by Siegel, who gives little consideration to the legislative history of either the Nineteenth Amendment or the Fourteenth.

The legislative history of the Nineteenth Amendment shows that sex discrimination was intertwined with race discrimination in surprising ways. Some members of Congress feared that the Nineteenth Amendment, by enfranchising black women, who, according to some, would be more politically active than their male counterparts, would spark a "second Reconstruction."[317] Suffragists, deriving hope rather than fear from this possibility, argued that white men would be more hesitant to use violence against black *women* to deny them access to the polls.[318] Other supporters in Congress proclaimed that the Nineteenth Amendment was fifty years late, the implication being that women should have been full beneficiaries of the Fourteenth and Fifteenth Amendments.[319]

The Fourteenth Amendment's explicators had in effect said that if sex discrimination was like race discrimination in relevant ways, then it would be prohibited by Section One of the Fourteenth Amendment. The Nineteenth Amendment's explicators finally concluded that sex discrimination and race discrimination were like cases that ought to be treated alike.[320] From 1920 on,[321] the U.S. Constitution ought to have been read as conferring equal civil

316. *Id.* at 952.

317. *See infra* notes 452–54 and accompanying text.

318. *See, e.g.*, W.E.B. DuBois, *Votes for Women*, THE CRISIS, Nov. 1917, at 8 (highlighting the deterrent effect of publicity on the use of violence to disenfranchise black women).

319. *See infra* note 444 and accompanying text.

320. *See infra* note 445 and accompanying text.

321. Professor Calabresi's view is that it was only in 1920, when the Nineteenth Amendment struck out the word *male* in Section Two of the Fourteenth Amendment, that sex discrimination became unconstitutional as to all civil rights. Ms. Rickert thinks that Section One always could have been legitimately read to prohibit laws discriminating on the basis of sex, but she admits that it would have been challenging to argue that all sex-discriminatory laws were arbitrary and unconstitutional while the Constitution still explicitly privileged males. But the authors completely agree that the Nineteenth Amendment, as an analogue to the Fifteenth Amendment, made sex-discriminatory laws as unconstitutional as race-discriminatory laws. Professor Calabresi, however, believes that an Article V consensus is the only sure way to identify a caste, while Ms. Rickert thinks other types of evidence (including sociological) can establish that a group is being discriminated against in violation of the no-caste and no-class-legislation rules of the Fourteenth Amendment. The authors agree, of course, that sex discrimination as to civil rights prior to 1920 was immoral. *See also* Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988) (arguing that sexual-orientation discrimination is in fact just a form of forbidden sex discrimination).

rights as well as equal political rights on women as well as men. This did not happen in part thanks to *Muller v. Oregon*.

A. The Problem of Section Two

When word spread that the word *male* would be included in Section Two of the Fourteenth Amendment, feminists were rightfully indignant.[322] They pushed back hard,[323] but they did not have the clout to stop the Constitution from becoming gendered nor to stop the very Amendment that was designed to stamp out class legislation from setting women apart in its second section. The "Call for the Eleventh National Women's Rights Convention" of 1866 made this critique:

> Those who tell us the republican idea is a failure, do not see the deep gulf between our broad theory and partial legislation; do not see that our government for the last century has been but a repetition of the old experiments of class and caste. Hence the failure is not in the principle, but in the lack of virtue on our part to apply it. The question now is, have we the wisdom and conscience, from the present upheavings of our political system to reconstruct a government on the one enduring basis which never yet has been tried—Equal Rights to All?
>
> From the proposed class legislation in Congress, it is evident we have not yet learned wisdom from the experience of the past; for, while our representatives at Washington are discussing the right to suffrage for the black man as the only protection to life, liberty and happiness, they deny that "necessity of citizenship" to woman, by proposing to introduce the word "male" into the Federal Constitution. . . . Can a ballot in the hand of woman and dignity on her brow, more unsex her than do a scepter and a crown? Shall an American Congress pay less honor to the daughter of a President than a British Parliament to the daughter of a King?[324]

Women's rights advocates' fears were realized. The inclusion of the word *male* would directly or indirectly justify many denials of women's rights. The Court in *Minor v. Happersett* relied on Section Two to find that voting is not a privilege or immunity of citizenship, asking,

> Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, "persons."[325]

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322. Siegel, *supra* note 6, at 968–69.

323. *Id.*

324. Elizabeth Cady Stanton & Susan B. Anthony, Nat'l Woman's Rights Convention, *in* HARPER, *supra* note 42, at 256–57.

325. Minor v. Happersett, 88 U.S. 162, 174 (1875).

The Nineteenth Amendment remedied the sex inequality found in the Fourteenth Amendment's text. In doing so, it excised Section Two's implication that women could justifiably—and constitutionally—be denied equal rights. The text of the Constitution was made sex-neutral once more.

B. A Grant of Political Rights Implies Equal Civil Rights

Before, during, and after the adoption of the Fourteenth Amendment and the Nineteenth Amendment, Americans conceived of political rights (i.e., rights concerned with governance) as encompassing full civil rights (i.e., personal rights such as contract and property). Historically, groups lacking political rights could permissibly have a shortened or abridged set of civil rights—e.g., felons, aliens, children, and women[326]—but if a class had political rights, it would be guaranteed full civil rights (at least in theory). This makes a good deal of sense. If membership in a particular group is an impermissible basis for disenfranchisement, it is very difficult under the Fourteenth Amendment to justify denial of less momentous decision-making power—like the power at issue in *Reed v. Reed*[327]—on that basis. Along these lines, Akhil Amar has argued that after the Nineteenth Amendment was adopted, legislatures were estopped from basing legislation on the idea that women were not the political equals of men.[328] The historical evidence provided below supports Professor Amar's argument.

1. Background: The Distinction Between Political Rights and Civil Rights.—If you were to look for the distinction between political and civil rights in *Black's Law Dictionary* today, you would discover that there is none:

> *civil right.* (*usu. pl.*) 1. The individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act. Civil rights include esp. the right to vote, the right of due process, and the right of equal protection under the law.
>
> 2. *civil liberty.* "At common law a person convicted of a felony became an outlaw. He lost all of his civil rights and all of his property became forfeited. This harsh rule no longer prevails. Under modern jurisprudence the civil rights of a person convicted of a crime, be it a

326. *See supra* notes 117–19 and accompanying text.

327. 404 U.S. 71 (1971). The Court held that a law favoring men over women in the administration of deceased relatives' estates was unconstitutional. *Id.* at 73, 77.

328. Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 471–72 (1995).

> felony or misdemeanor, are in nowise affected or diminished except insofar as express statutory provisions so prescribe."[329]

Professor Tushnet has argued that, in fact, there never was any principled distinction between these types of rights and that the categories have always been in flux.[330] Nonetheless, in the nineteenth century, it was widely accepted that there was a difference between political and civil rights, including by members of Congress.[331] Senator Stephen Douglas drew the classic distinction back in 1850, explaining that free blacks in Illinois were "protected in the enjoyment of all their civil rights," yet they were "not permitted to serve on juries, or in the militia, or to vote at elections; or to exercise any other political rights."[332]

Traditionally, political rights were thought to be those concerned with governance: voting, jury service, and holding office.[333] On occasion, the practice of law was added to this list,[334] which may explain the *Bradwell* case's holding that the right to practice law was not a privilege or immunity.[335] Political rights were bestowed on select citizens with especially good judgment; civil rights, on the other hand, were the natural rights to which every person, or at least every citizen including even children, was entitled.[336] The Civil Rights Act of 1866 included among these civil rights the right

> to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to

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329. BLACK'S LAW DICTIONARY 281 (9th ed. 2009) (quoting Alexander Holtzoff, *Civil Rights of Criminals*, *in* ENCYCLOPEDIA OF CRIMINOLOGY 55 (Vernon C. Branham & Samuel B. Kutash eds., 1949)).

330. *See* Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1209 (1992) ("Even during Reconstruction, difficulties arose in sustaining the idea that these types of rights were categorically different.").

331. Even those who did not think the distinction should exist recognized that it existed nonetheless: "A distinction is taken, I know very well, in modern times, between civil and political rights." CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham).

332. CONG. GLOBE APP., 31st Cong., 1st Sess. 1664 (1850).

333. Harrison, *supra* note 15, at 1417; *see also* Amar, *supra* note 328, at 467 (listing "the rights to vote, hold office, serve on a jury, and serve in a militia" as the "quintessential[]" political rights).

334. *See A Woman Cannot Practice Law or Hold Any Office in Illinois*, CHI. LEGAL NEWS, Feb. 5, 1870, at 147 (discussing *In re Bradwell* and analogizing that "the Dred Scott case was to the rights of negroes as citizens of the United States, [as] this decision [denying Bradwell's admission to the Illinois bar] is to the political rights of women in Illinois—annihilation").

335. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873) ("We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them.").

336. *See* Tushnet, *supra* note 330, at 1208 (contrasting civil rights, as rights "attached to people simply because they were people," with "[p]olitical rights, [which] in contrast, arose from a person's location in an organized political system").

> none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[337]

Professor Harrison explains that these common law rights were foreshadowed in the explanation of privileges and immunities found in *Corfield v. Coryell*, which concerned a New Jersey act that forbade residents of other states from gathering oysters in New Jersey.[338] The case was explicitly relied upon by the drafters of the Civil Rights Act of 1866.[339] *Corfield* expounded on the meaning of the Comity Clause—Article IV's "Privileges *and* Immunities" Clause.[340] *Corfield* is important because its discussion of the words "privileges and immunities" in Article IV was said by the Framers of the Fourteenth Amendment to shed light on the meaning of that Amendment's Privileges or Immunities Clause.[341] But interestingly, *Corfield*'s list of fundamental rights ends by saying that the political right to vote was a privilege and immunity[342]—a conclusion that most scholars reject today.[343] Justice Washington described a list of fundamental rights: "[T]o which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised,"[344] a fact

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337. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

338. Harrison, *supra* note 15, at 1416 ("[*Corfield*'s] privileges and immunities closely foreshadow[ed] the common law rights protected by the 1866 Act."); Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

339. *See* Harrison, *supra* note 15, at 1416–18 (relating portions of the debates over the Civil Rights Act and noting that "Senator Trumbull relied on [*Corfield*] and the positive law notion of privileges and immunities that accompanie[d] it in explaining the Civil Rights Bill") (citing CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866)).

340. *Corfield*, 6 F. Cas. at 551–52.

341. Ahkil Amar's "intratextualism" supports reading the Privileges or Immunities Clause in light of the meaning of the older Comity (Privileges and Immunities) Clause. Amar, *supra* note 45, at 792 ("The words 'privileges,' [and] 'immunities,' . . . in the Fourteenth Amendment provide another example [of intratextualism]. . . . [W]hen we . . . turn to the clustered use of these . . . words in Article IV, . . . we see the linguistic light (and link).").

342. *Corfield*, 6 F. Cas. at 551–52 (listing the political right to vote among the fundamental rights that comprise a citizen's privileges and immunities).

343. *See, e.g.*, Raoul Berger, *The "Original Intent"—As Perceived by Michael McConnell*, 91 NW. U. L. REV. 242, 256 (1996) (criticizing *Corfield* as a "rambling opinion . . . in which [Justice Washington] read the *right to vote* as a privilege and immunity of Article IV, an assertion for which the history of Article IV leaves no room"); Brainerd Curie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1335–38 (1960) (criticizing *Corfield*'s exposition of the clause as dicta and arguing that "[j]udicial interpretation of the clause got off to a bad start when Mr. Justice Bushrod Washington, riding circuit in 1825, felt called upon to expound his reasons for believing that it did not prevent New Jersey from denying to nonresidents the privilege of taking oysters from the waters of the state"); *see also* Upham, *supra* note 90, at 1485–86 (collecting sources criticizing *Corfield*).

344. *Corfield*, 6 F. Cas. at 551–52. The full list of fundamental rights from *Corfield* is as follows:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free,

dubiously ignored by the opinion in the *Slaughter-House Cases*, which quoted *Corfield*.[345] This tends to support Professor Tushnet's claim that categories of rights have never been well-defined,[346] but it does not change that most people living in 1868 thought there was a difference between political rights and civil rights,[347] nor does it change that the drafters of the Civil Rights Act of 1866 conspicuously did not include in it the rights that were traditionally viewed as political rights.[348] And *Corfield* must have been wrong that under Article IV the elective franchise was one of the privileges and immunities of citizens under the Comity Clause, because out-of-state citizens cannot vote in state elections, nor do they have other political rights such as the right to serve on a jury.[349] Furthermore, the statements in *Corfield* were merely dicta: no civil right to harvest oysters was found.[350] The right to harvest oysters was neither a civil nor a political right but was instead a right of in-state citizens to make use of state property. Harvesting

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> independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."

Id.

345. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75–76 (1873) (citing *Corfield*, 6 F. Cas. 546).

346. *See* Tushnet, *supra* note 330, at 1209–10 ("[D]uring Reconstruction, difficulties arose in sustaining the idea that . . . rights were categorically different. . . . Thus even at the outset, the distinctions among civil, political and social rights were unstable.").

347. *See id.* at 1208 ("Reconstruction legal thinkers [saw] civil, political and social rights . . . as three distinct categories.").

348. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (securing the right to contract, to sue, to own property, etc., but not the right to vote).

349. *See* Harrison, *supra* note 15, at 1417 ("[N]ineteenth-century usage concerning political participation confirms the close connection between privileges and immunities and civil rights: neither was thought to extend to political rights, such as voting or serving on juries."). *But see id.* (noting that, "in opposition to the Fourteenth Amendment, Democratic Representative Andrew Jackson Rogers of New Jersey complained that 'all the rights we have under the laws of the country are embraced under the definition of privileges and immunities,'" but rejecting Rogers's statements as "hyperbole").

350. *Corfield*, 6 F. Cas. at 552.

oysters was thus like Alaskans getting money from the state as a result of its oil resources. Itinerant out-of-staters in Alaska have no right to share in the proceeds of state natural resources.[351] This is why Justice Washington concluded in *Corfield v. Coryell* that the right to harvest oysters was not fundamental.[352] The correct understanding of the words *privileges* and *immunities* in Article IV, Section Two, and the Fourteenth Amendment is that only civil rights are privileges or immunities. This is confirmed, as we said earlier, by Section Two of the Fourteenth Amendment, which plainly contemplates the constitutionality of state deprivations of the political right to vote.[353]

It should be mentioned that some individuals, mostly opponents of the Fourteenth Amendment, claimed in 1868 that they understood the Amendment to guarantee African-Americans the right to vote.[354] There was enough disagreement, however, to convince the Reconstruction Framers that another constitutional amendment beyond the Fourteenth was needed to secure the right of African-American men to vote.[355] As a result, the Fifteenth Amendment, which prohibited disenfranchisement on the basis of race, was approved by Congress and ratified by three-quarters of the states in 1870.[356] The prevailing understanding in 1868 was that Section One of the

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351. *See* State Dep't of Revenue v. Cosio, 858 P.2d 621, 627 (Alaska 1993) (reasoning that dividends from the Alaska Permanent Fund are a governmental "grace" and not a fundamental right, such as education).

352. *Corfield*, 6 F. Cas. at 552.

353. *See supra* notes 113–15 and accompanying text.

354. This was one of the objections opponents of the Amendment made in the Indiana legislature:

> Fourth. The first section places all persons, without regard to race or color, who are born in this country, and subject to its jurisdiction, upon the same political level, by constituting them "citizens of the United States, and of the State wherein they reside," thus conferring upon the negro race born in this country the same rights, civil and political, that are now enjoyed by the white race, and subject to no other conditions than such as may be imposed upon white citizens, including, as we believe, the right of suffrage.
>
> Fifth. But lest there might still be power in a State to prescribe color and race as qualifications for voting, the second section reduces the congressional representation in any such State, "in the proportion which the number of male negroes over the age of twenty-one years so excluded, shall bear to the whole number of male citizens twenty-one years of age, in such State."

H.R. JOURNAL, 45th Gen. Assemb., Reg. Sess. 102–03 (Ind. 1867). Incidentally, these objections misstate what the Amendment actually says by claiming that race is explicitly mentioned.

355. *See* NELSON, *supra* note 25, at 123–33 (highlighting the various facets of the debate over whether the Fourteenth Amendment granted the right to vote).

356. The Fifteenth Amendment reads:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

Fourteenth Amendment guaranteed equal civil rights, but it did not touch the subject of political rights, which remained the province of the states. Congressmen and senators expressed this view repeatedly.[357] In the debate on the Civil Rights Act of 1866, which did not protect African-American voting rights, Congressman James F. Wilson observed practically that "the fall elections lie between us and posterity, and some fear the result of the former more than they consider the welfare of the latter. . . . We will stop short of what most of us know we ought to do [which is to guarantee African-American men the right to vote]."[358] Professor William Nelson concludes in his history of the Fourteenth Amendment that a large majority rejected the notion that the Amendment protected a right of African-American men to vote.[359] The political climate changed dramatically in 1868 when Ulysses S. Grant was elected President, and when the former Confederate States were allowed to once again send delegations to Congress. Suddenly, the advocates of voting rights for African-American men had a politically popular war hero in the White House on their side.[360] Moreover, Republicans in Congress had political reasons for wanting African-American men to be able to vote in the South.[361] As a result there was a sudden and dramatic shift between 1866 and 1870 such that voting rights for African-American men went from being unpopular to enjoying national support. During the debate over whether to adopt the Fifteenth Amendment, Senator Cragin announced, "I remember that it was announced upon this floor by more than one gentleman, and contradicted and denied by no one so far as I recollect, that [the Fourteenth] amendment did not confer the right of voting upon anybody . . . ."[362] Hence, the need for the Fifteenth Amendment. The Reconstruction generation's belief that the Fifteenth Amendment was necessary to secure political equality is proof enough that the Fourteenth Amendment had only secured equality of civil rights.

Even without the legislative history that supports our understanding of Section One of the Fourteenth Amendment (that it only guaranteed equality as to civil rights), the textual argument that it did not extend to equality of political rights is very strong. Section Two of the Fourteenth Amendment clearly permits states to disenfranchise voters so long as the basis of repre-

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357. *See* NELSON, *supra* note 25, at 125–26 (providing examples from the debate over the Amendment expressing the view that the Amendment did not confer the right to vote).

358. CONG. GLOBE, 39th Cong., 1st Sess. 2948 (1866). The same view was expressed about the Civil Rights Act of 1866 by Representative Thayer: "[N]obody can successfully contend that a bill guarantying simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right." *Id.* at 1151.

359. NELSON, *supra* note 25, at 125.

360. *See* Ulysses S. Grant, President of the U.S., First Inaugural Address (Mar. 4, 1869) (supporting the ratification of the Fifteenth Amendment), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 145, 148 (1989).

361. *See* NELSON, *supra* note 25, at 46–47 (explaining that one way for Republicans to retain political power was to enfranchise Southern African-Americans).

362. CONG. GLOBE, 40th Cong., 3d Sess. 1004 (1869).

sentation is reduced proportionally.[363] The inexorable conclusion one is left with from reading Section Two of the Fourteenth Amendment is that Section One of that Amendment did not grant anyone the political right to vote even though it mandated equality in civil rights. This textual evidence is, we think, the best evidence that Section One of the Fourteenth Amendment is about civil rights only and not a grant of any political rights.[364]

2. Political Rights Have Long Been Understood to Imply Full Civil Rights.—On their face, the Fifteenth and Nineteenth Amendments only forbid disenfranchisement, but originally they were understood to have implications beyond that. First, they were understood to guarantee *full political rights*, not simply the right to vote in elections. Second, they were understood to establish that race and sex are common but inappropriate subjects of discriminatory legislation, including legislation that only denies the most exclusive and rarely bestowed group of rights—political rights. If political rights may not be denied on a particular basis, then civil rights, which are by definition less exclusive, must not be denied on that basis either. In other words, political rights exist at the apex of a rights hierarchy, and a guarantee that they will not be denied on a particular basis creates a presumption that denying civil rights on that basis violates the Fourteenth Amendment.[365]

This second conclusion is our ultimate argument, but to get there, the preliminary argument that the Fifteenth and Nineteenth Amendments should be read to guarantee full political rights must be made. We agree with Professor Vikram Amar's argument that voting is the essence of all political activity—legislators and jurors vote—and so the voting-rights amendments pertain to these activities.[366] There is significant support that suggests these amendments were understood to have applied to all these forms of voting both in 1870 when the Fifteenth Amendment was adopted and in 1920 when the Nineteenth Amendment was adopted.[367] Although Professor Amar's

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363. *See supra* note 115 and accompanying text.

364. The other prominent argument that political rights are excluded from Section One is that because the privileges and immunities of Article IV were only about civil rights, the privileges and immunities of Section One must be about civil rights only also. But it may be that the "privileges and immunities of citizens of the several states" are different than the "privileges or immunities of citizens of the United States," so we find this argument somewhat less compelling.

365. Melissa Saunders says that at the time of the framing of the Fourteenth Amendment everyone "agreed that it should guarantee Blacks the same 'civil' rights as everyone else, [but] few believed it should guarantee them the same 'political' rights, and fewer still that it should guarantee them full 'social' equality." Saunders, *supra* note 15, at 270.

366. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 206 (1995) (arguing that a juror's vote is just as important to healthy representative democracy as an electoral vote).

367. *See id.* at 239 ("This *in haec verba* formulation is itself strong evidence of the linkage between voting and jury service as part of a political rights package in the Fifteenth Amendment."); Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1165 (1993) (noting that the passage of the Nineteenth Amendment helped to create the

argument that all political rights involve voting[368] is in tension with the understanding of that Amendment espoused by those members of the Fortieth Congress who denied that the Fifteenth Amendment would guarantee the right to hold office,[369] other members took the opposite position.[370] And while it cannot be ignored that Congress failed to pass a proposed draft of the Fifteenth Amendment that explicitly included the right to hold office,[371] we believe that the inclusion would have been superfluous.

During the period between the adoption of the Fourteenth and Nineteenth Amendments, the understanding that the right to vote carried along with it other political rights held sway. It was central to an especially vicious attack on the women's suffrage movement made in 1885 by Orestes Brownson, a former abolitionist and women's-suffrage supporter who in his later years denounced equality and democracy with all the vigor he had once used to support them.[372] Brownson claimed that if women were given the vote, they would soon compete with their husbands for office, leaving "one or the other doomed to the mortification of defeat," and in either case, rendering the women "hideous monster[s]."[373] More specifically, the political right to serve on a jury was also presumed by many to be included in the right to vote. Thus, Assemblyman James Shea of Essex, New York, warned in 1910 that "[i]f we give women the vote our wives will soon be absorbed in caucuses instead of in housekeeping. They will be drafted on juries too."[374] Assemblyman Shea's conclusion is not a nonsequitur. One popular objection to enfranchising women was that women were unable to fulfill the duties that are connected to political rights: jury duty and military service.[375] Both require time away from the home and care of children. The opponents of the Nineteenth Amendment thus argued that it was fair and appropriate to deny women the right to vote.

The U.S. Supreme Court has never drawn a connection between the right to vote and the right to serve on a jury. Professor Tushnet has argued that the decision in *Strauder v. West Virginia*, although it "rested on the

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"indicia of full citizenship both in the minds of woman suffragists and in the attitudes of American society").

368. Amar, *supra* note 366, at 250.

369. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 888 (observing that a provision guaranteeing the right to hold office was removed in the process of drafting the Fifteenth Amendment).

370. *Id.* at 888 n.111.

371. *Id.* at 888.

372. PATRICK W. CAREY, ORESTES A. BROWNSON: AMERICAN RELIGIOUS WEATHERVANE 277–81 (2004).

373. Brownson, *supra* note 245, at 632–33.

374. KEYSSAR, *supra* note 43, at 196.

375. *See* Rogers M. Smith, *"One United People": Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229, 238 (1989) (tracing the roots of this argument to classical republican theorists).

Fourteenth Amendment," must surely have been based conceptually on the Fifteenth.[376] He says,

> [B]ecause the Constitution guaranteed the most important political right there [which is the right to vote in the Fifteenth Amendment], it would have been senseless to insist that a less important political right [like the right to serve on a jury] was unprotected, even though the framers of the Fourteenth Amendment may have thought it protected no political rights at all.[377]

Professor Akhil Amar has made a similar claim.[378]

The Fifteenth Amendment guarantee of equal political rights for men clarified that race is an impermissible basis for discrimination in voting just as the Nineteenth Amendment would later do for sex.[379] The Fifteenth Amendment did so first by enshrining a reminder that race discrimination is insidious and inappropriate as to political rights.[380] Additionally, and more significantly, by prohibiting denials of political rights on the basis of race, the Fifteenth Amendment completed the process of making black men equal to white men under the law (although courts did not always honor the new social order). This effect was fully understood by at least some of the Framers of the Fifteenth Amendment. Senator John Sherman (younger brother of General William T. Sherman),[381] speaking in favor of the Fifteenth Amendment, expressed an understanding very close to our claim that political rights are at the apex of a rights hierarchy:

> I hope yet before this session closes to have the satisfaction of bringing here the vote of the Legislature of Ohio to make the cap-sheaf upon the pyramid of liberty which will secure to every man in this country equal rights before the law, at the ballot-box, to hold public office . . . .[382]

Senator Allen G. Thurman challenged this view—sort of:

> My colleague says that he hopes to have the privilege before this session adjourns of presenting from his State a ratification of the fifteenth amendment, the cap-sheaf of this great something or other—

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376. Tushnet, *supra* note 330, at 1209.

377. *Id.*

378. *See* Amar, *supra* note 328, at 470 ("[T]he famous case of *Strauder v. West Virginia* is best understood, not as a pure Fourteenth Amendment case, but also as anticipating blacks' Fifteenth Amendment right to equal political participation." (footnote omitted)).

379. It must be remembered that the Fourteenth Amendment is thought by no one to prohibit all discrimination. Every law is discriminatory. The Amendment forbids a particular sort of discrimination. What sort is the topic of this Article.

380. Justice Scalia gives that distinction to the combined effects of the Thirteenth Amendment. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 95–96 n.1 (1990) (Scalia, J., dissenting) (stressing the role of the Thirteenth Amendment in leaving "no room for doubt" that laws that discriminate on the basis of race are invalid). But the Fifteenth Amendment is a better textual hook for his assumption.

381. WINFIELD S. KERR, JOHN SHERMAN: HIS LIFE AND PUBLIC SERVICES 164 (1907).

382. CONG. GLOBE, 41st Cong., 2d Sess. 211 (1869).

> pyramid, I believe he called it, of civil and human liberty—this thing which disregards color, which will reject no man because of the color of his skin, which utterly detests and abhors caste, and is to make this country the exemplar of that divine impartiality which prevails in the kingdom to come. Ah! when the question comes whether John Chinaman shall vote, I hope my friend will be able then to explain how it is that this fifteenth amendment excludes him.[383]

Senator James Nye responded to Thurman, saying, "My friend from Ohio inquired what we were going to do with the Chinese. Take care of them as men; give them all the rights to which they are entitled."[384] Later in the same speech, employing Senator Sherman's cap-sheaf metaphor, Senator Nye said, "Is not the fifteenth amendment worthy of this labor? To my mind it is the cap-sheaf and the crowning stone and glory of the party of which it was born."[385]

Reconstruction commentators in the states also understood that if black men were guaranteed the right to vote, they would be the full legal equals of white men. Governor Thomas Swann of Maryland, in his January 1867 message to the General Assembly, referring to Section Two of the Fourteenth Amendment said,

> [T]he proposed change in the basis of representation, points to negro suffrage, and the equalization of the races. . . .
>
> My opposition to any farther tampering with the Constitution, proceeds upon the honest belief, that Congress controls all the power needed to protect the country against disloyalty, whatever form it may assume, if any such exists, and that Constitutional Amendments, to force equality between the races, can only result in the ultimate annihilation of the weaker race. Some time ago, the absorbing topic among political agitators, was amalgamation: now it is "manhood suffrage," which means amalgamation, and the power to hold office, without regard to race or color, and every other attribute of perfect equality between the races.[386]

The same sentiment was expressed years later by R.L. Gordon at the 1901–1902 Constitutional Convention of Virginia, where he stated:

> I cannot do justice to my own feelings without . . . commenting upon . . . that great fifteenth amendment . . . the hearts of the Virginia people have never approved it, and true Virginians can never approve it. We do not believe that the colored man is the equal of the white man, and that is what the fifteenth amendment means.[387]

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383. *Id.* at 212.
384. *Id.* at 221.
385. *Id.*
386. MESSAGE OF GOVERNOR SWANN, *supra* note 172, at 25.
387. KEYSSAR, *supra* note 43, at 105 (alterations in original).

A post-ratification statement from an opponent of the Amendment is unlikely to have exaggerated the rights it guaranteed.

3. The Conundrum of Alien Suffrage.—One peculiarity of American history might initially seem to undermine our claim that political rights always and everywhere necessarily imply that the rights bearer also has civil rights. This peculiarity is the now-forgotten practice of alien suffrage or voting rights.[388] Though allowing aliens to vote fell out of fashion and came to a final end in 1930, it was allowed in some jurisdictions for decades, beginning in the earliest days of the republic. This was the case despite the fact that prior to the Civil War aliens were not generally thought to be protected by the Constitution and did not have equal civil rights.[389] Alien suffrage had lost popularity after the founding and had largely disappeared by the Jacksonian period, but within twenty years it began to experience resurgence.[390] Support for alien suffrage had very little to do with ideology, and in any given area, it was the party that felt it had the most alien votes to gain that supported alien suffrage.[391] As of 1868, aliens could vote in at least some elections in ten out of thirty-seven states.[392] Nearly one quarter of the states in 1868 gave aliens the political right to vote.[393] Yet at common law, aliens did not have equal civil rights.[394] Property rights in particular were limited:

> An alien cannot acquire a title to real property by descent, or created by other mere operation of law. . . . If an alien purchase land, or if land be devised to him, the general rule is, that in these cases he may take and hold, . . . but upon his death the land would instantly and of

388. One of the rationales of *Minor v. Happersett* was that citizenship and voting were not coextensive because children were citizens but could not vote, while aliens were not citizens yet some could vote. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 172–74 (1875) (exemplifying that voting rights are not given to all citizens in many states and explaining why the Framers did not intend for citizenship to necessarily include suffrage).

389. Gerald Neuman explains in *Strangers to the Constitution* that—although the issue was hotly debated during the Alien and Sedition Acts controversy (with Madison firmly of the opinion that aliens indeed had constitutional rights)—the Supreme Court steered clear of finding alien constitutional rights prior to the Civil War, but did so decisively afterward in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 61–62 (1996).

390. KEYSSAR, *supra* note 43, at 32–33.

391. *Id.* at 40.

392. Alabama (terminated 1901), Arkansas (terminated 1926), Florida (terminated 1895), Georgia (terminated 1877), Indiana (terminated 1921), Kansas (terminated 1917), Michigan (terminated 1894), Nebraska (terminated 1918), Oregon (terminated 1914), and Wisconsin (terminated 1908). *Id.* app. at 371–73 tbl.A.12.

393. *See id.* (showing that by 1868, ten states had enacted constitutional provisions that recognized the rights of declarant aliens to vote).

394. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *64 (John M. Gould ed., 14th ed. 1896) (noting that aliens had an incentive to become citizens "since they are unable, as aliens, to have a stable freehold interest in land, or to hold any civil office, or vote at elections, or take any active share in the administration of the government").

> necessity (as the freehold cannot be kept in abeyance), without any inquest of office, escheat and vest in the state, because he is incompetent to transmit by hereditary descent.[395]

New York and other states were reportedly in the practice of granting particular aliens, by name, the special privilege of being able to legally hold real property.[396]

The Taney Court stayed out of such matters and only scrutinized state laws for conflicts with the commerce power, treaties, or foreign relations.[397] In no case before the Civil War did the Court hold that aliens possessed civil rights.[398] The Framers of the Fourteenth Amendment discussed the question of alien rights, and they made a deliberate decision to give aliens some but not all of the civil rights enjoyed by citizens.[399] The Framers conferred equal civil rights only on all citizens who were the class of persons who enjoyed the privileges or immunities of citizenship. Citizens were defined as all persons born in the United States and subject to the jurisdiction thereof.[400] The Framers of the Fourteenth Amendment did extend some civil rights to resident aliens because they protected the due process and equal protection rights of all "person[s]."[401] The decision to give citizens greater civil rights than were given to aliens was made deliberately and knowingly.[402]

It was not until 1886 that the U.S. Supreme Court held that aliens are persons under Section One of the Fourteenth Amendment who are entitled to due process and equal protection rights. In its landmark 1886 decision in *Yick Wo v. Hopkins*,[403] a case that concerned the issuance of licenses for Chinese owners of laundries in San Francisco, the U.S. Supreme Court, relying on "the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States," held that aliens "still . . . subject[s] of

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395. *Id.* at *54.

396. *Id.* at *69–70.

397. NEUMAN, *supra* note 389, at 61.

398. *Id.*

399. As Professor Harrison has explained,

> It was clear in the nineteenth century that citizens had rights that aliens, who were persons but not citizens, did not. Most importantly, aliens generally were not permitted to own real property except as specifically provided by state law.... This commonplace about the rights of citizens and aliens arose during the debates on the Civil Rights Act. The word "inhabitants," which had appeared in the original draft of Section 1, was changed to "citizens" in order to avoid any implication that it would enable aliens to own real property.

Harrison, *supra* note 15, at 1442 (footnotes omitted).

400. U.S. CONST. amend. XIV, § 1.

401. *Id.*

402. *See* NELSON, *supra* note 25, at 52 ("[W]hat ultimately became section one [of the Fourteenth Amendment] was designed to give constitutional stature to a basic distinction in mid-nineteenth-century American law between the rights of aliens and the rights of citizens."); Harrison, *supra* note 15, at 1442 ("A striking feature of the second sentence of Section 1 is that the first clause refers to citizens while the latter two refer to persons.").

403. 118 U.S. 356 (1886).

the Emperor" were nonetheless entitled to equal protection of the laws.[404] Such aliens would not have been citizens with full civil rights but for the Court holding that a law that was racially neutral on its face could not be applied by executive officials in a racially discriminatory way.[405] Executive officials who applied facially neutral laws in a racially discriminatory way denied an alien his rights as a person who was entitled to the equal *protection* of the laws. This was the case as well in states where laws against murder and assault were not as equally enforced for the protection of African-Americans as for whites.[406]

Seven years after its landmark decision in *Yick Wo v. Hopkins*, the U.S. Supreme Court held in *Fong Yue Ting v. United States*[407] that the government could expel even resident aliens who had been in the country for twenty years without judicial review of the expulsion.[408] The three dissenters in *Fong Yue Ting* protested passionately, saying it was a violation of the due process rights of aliens to allow executive officials to deport them without the concurrence of an Article III federal court.[409] The Court in *Fong Yue Ting* did affirm that aliens within the U.S. were entitled to some of the same

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404. *Id.* at 358, 373–74. The case additionally held that even though the law in question was facially neutral, it was effectively class legislation and violated Yick Wo's Fourteenth Amendment rights:

> [T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373–74. The Court has more recently held that the Equal Protection Clause guarantees alien children in the United States illegally the same public education as citizens. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (explaining that the state must show some substantial state interest is furthered in order to deny free public education to children in the United States illegally).

405. *Yick Wo*, 118 U.S. at 373–74.

406. Harrison, *supra* note 15, at 1448 ("If a state refuses to enforce its criminal battery laws when ex-slaves are attacked, it has violated the Equal Protection Clause.").

407. 149 U.S. 698 (1893).

408. *See id.* at 731 (explaining that whether and under what conditions aliens should be allowed to remain within the United States is a question for Congress to decide).

409. *Id.* at 733 (Brewer, J., dissenting) ("[T]hey are within the protection of the Constitution, and secured by its guarantees against oppression and wrong . . . ."); *id.* at 750 (Field, J., dissenting) ("And it will surprise most people to learn that any such dangerous and despotic power lies in our government . . . a power which can be brought into exercise whenever it may suit the pleasure of Congress, and be enforced without regard to the guarantees of the Constitution . . . ."); *id.* at 763 (Fuller, C.J., dissenting) ("No euphuism can disguise the character of the act in this regard. It directs the performance of a judicial function in a particular way, and inflicts punishment without a judicial trial.").

civil rights as citizens, but apparently they were not entitled to be accorded due process of law.[410] Professor Gerald Neuman describes the U.S. government's summary power to deport even longtime resident aliens without an Article III court's permission as being "an anomalous qualification to the general recognition of aliens' constitutional rights within [the confines of the] United States."[411] In light of the original history of Section One of the Fourteenth Amendment,[412] this conclusion seems overly optimistic even though it is clearly morally desirable.

U.S. immigration law for many years did perpetuate distinctions that can only be described as distinctions of caste. Federal law limited naturalization rights to "free white person[s],"[413] although the law was later amended to include "aliens of African nativity and to persons of African descent."[414] Those aliens who fell outside those racial classifications were excluded from eligibility to become U.S. citizens. Shockingly, the determination of whether an Asian-Indian alien was white could depend in part on his caste! The case of *In re Mohan Singh*[415] is a notable example. It concerned Mohan Singh, "a high caste Hindu, competent in all moral and intellectual respects," who had applied for citizenship.[416] After explaining that Singh was a member of the Aryan branch of the Caucasian race, and therefore arguably white,[417] the district court concluded:

> In the absence of an authoritative declaration or requirement to that effect, it would seem a travesty on justice that a refined and enlightened high caste Hindu should be denied admission on the ground that his skin is dark, and therefore he is not a "white person," and at the same time a Hottentot should be admitted merely because he is "of African nativity."[418]

If aliens were allowed to vote but their civil rights were not protected, our argument that when political rights are accorded to a group, civil rights are also conferred would be somewhat undermined. But the jurisdictions that gave aliens the right to vote also protected the aliens' civil rights. Generally, these jurisdictions gave voting rights and full civil rights to aliens who had declared their intent to become citizens, "declarant aliens."[419] The Alabama

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410. *See id.* at 723–24 (explaining that although Chinese aliens are entitled to the safeguards of the Constitution, Congress may still order them to be removed and deported).

411. NEUMAN, *supra* note 389, at 62.

412. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (stating that revised Section One of the Fourteenth Amendment prevents a state from denying equal protection and due process to any person, not just a citizen).

413. 2 KENT, *supra* note 394, at 64.

414. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

415. 257 F. 209 (S.D. Cal. 1919).

416. *Id.* at 209.

417. *Id.* at 212.

418. *Id.*

419. The Michigan Constitution of 1850 provided that "every white male inhabitant residing in this State on the first day of January, one thousand eight hundred and fifty, who has declared his

Constitution, for example, provided that "all persons resident in this State, born in the United States, or naturalized, or who shall have *legally declared their intention to become citizens* of the United States, are hereby declared citizens of the State of Alabama, possessing *equal civil and political rights and public privileges*."[420] As the Alabama example shows, it was at one time thought possible to be a state citizen even if you were not a United States citizen,[421] and naturally these "citizens" were able to vote and were given full civil rights under state law. Alien suffrage was particularly widespread in the territories, where frequently alien electors would become citizens automatically when the territory gained statehood.[422] The State of Vermont took a slightly different approach by allowing alien voting rights until 1828 without requiring aliens to declare their intention to become citizens.[423] Instead, upon completing a one-year residency requirement and taking an oath of allegiance, aliens were given all the political and civil rights of citizens.[424]

Illinois had a unique experience with alien voting rights, one that illustrates how constitutional language can bind a court even when the legislature may have "intended" no such thing. (And it came long before the Framers of the Fourteenth Amendment's drafters chose the word *person* in the Equal Protection and Due Process Clauses—so the Framers of the Fourteenth Amendment were effectively forewarned.) The Illinois Constitution of 1818 read, "In all elections, all white male *inhabitants* above the age of twenty-one years, having resided in the state six months next preceding the election, shall enjoy the right of an elector . . . ."[425] So, in 1840, the Illinois Supreme Court held that lack of U.S. citizenship was *not* grounds for denying voting rights in Illinois.[426] Then, in 1848, the

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intention to become a citizen of the United States . . . shall be an elector and entitled to vote . . . ." MICH. CONST. of 1850, art. VII, § 1. The Michigan constitution also protected the property rights of alien residents: "Aliens who are, or who may hereafter become, *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property, as native born citizens." *Id.* art. XVIII, § 13.

420. ALA. CONST. of 1867, art. I, § 2 (emphasis added).

421. NEUMAN, *supra* note 389, at 64–65. A number of Supreme Court cases dealt with this issue. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (concluding that state citizenship exists for internal purposes); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817) (deciding that the federal government has exclusive right to confer citizenship); Collet v. Collet, 2 U.S. (2 Dall.) 294, 296 (1792) (finding that state and federal governments have concurrent right to bestow citizenship). In 1867, Alabama still believed it had the right to declare state citizenship. *See supra* note 420.

422. KEYSSAR, *supra* note 43, at 38.

423. VT. CONST. of 1777, ch. II, § XXXVIII; *see also* WILLIAM C. HILL, THE VERMONT STATE CONSTITUTION: A REFERENCE GUIDE 13–14 (1992) (describing the change to citizenship-voting requirements made in the 1828 Vermont Constitution).

424. NEUMAN, *supra* note 389, at 64.

425. ILL. CONST. of 1818, art. II, § 27 (emphasis added).

426. Spragins v. Houghton, 3 Ill. (2 Scam.) 377, 415 (1840).

Constitution was amended to limit suffrage to "every white male citizen above the age of twenty-one years, having resided in the state one year."[427]

The point is that when a class of people has been granted political rights, equal civil rights are traditionally guaranteed as well. And this makes a good deal of sense given the presumptions about a group's capabilities that underlie the decision to confer the right to vote. Simply put, it is irrational to deny civil rights to a person on a basis that may not be used to deny political rights to that same person. What kind of a government would allow someone to vote for President, Congress, and Governor without allowing that person the right to own property or enter into contracts? Consider that the exercise of civil rights generally has a less direct impact on the fate of other members of society than does the exercise of political rights. To grant political rights, especially to a large group that could easily become a perpetual majority (women, for example) is to say, "We trust you to make important decisions." To say otherwise by permitting sex inequality in civil rights is certainly unreasonable. This is precisely what the Court decided in *Adkins v. Children's Hospital*,[428] the 1923 post-Nineteenth Amendment case that found that women had the same civil right as men to enter into employment contracts. Justice Sutherland, writing for the majority following the adoption of the Nineteenth Amendment, proclaimed that "we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract, which could not lawfully be imposed in the case of men under similar circumstances."[429] This case severely undermined *Muller v. Oregon*, and it extended Lochnerian liberty of contract equally to women as well as to men. Strikingly, Justice Sutherland's opinion for the Court followed the change wrought in the legal status of women as to their civil rights as a result of the adoption of the Nineteenth Amendment.

C. *Calls for an End to Sex Discrimination: More on the History of the Nineteenth Amendment*

Most people living between 1868 and 1920, including majorities of the Supreme Court during this period of time, did not believe women fell totally outside of the protection of Section One of the Fourteenth Amendment. Rather, they believed that it was not arbitrary or irrational to limit women's civil rights any more than it was arbitrary or irrational to limit children's civil rights. This conclusion was based on the facts as people living in 1868 knew and understood them, and these views were enshrined to some degree in Section Two. Considering that the Constitution did not yet protect women's right to vote, it must have seemed reasonable and proper to give women less control over their own lives, including lesser civil rights. Many people living

427. ILL. CONST. of 1848, art. VI, § 1.
428. 261 U.S. 525 (1923).
429. *Id.* at 553.

then simply did not think that sex discrimination created a system of caste.[430] Today, we know better.

The Nineteenth Amendment was the culmination of fifty years of people fighting for equal rights for women. As Professor Siegel explains in her article *She the People*, the ongoing struggle for women's rights that began with the Fourteenth Amendment and continued unceasingly for decades resulted in the adoption of the Nineteenth Amendment in 1920.[431] Professor Siegel shows that the supporters of the Nineteenth Amendment viewed it as a repudiation of married women's legal subordination to their husbands.[432] The legislative history shows that the Nineteenth Amendment was the final step in enabling the Constitution to protect women as well as racial minorities from discriminatory legislation that created a system of caste.[433] The first Supreme Court case to address the issue of sex discrimination following adoption of the Nineteenth Amendment, *Adkins v. Children's Hospital*, embraced the congressional understanding that the Amendment would end sex discrimination,[434] but the enlightenment was to be short-lived.

1. The Congressional Debates.—The legislative history of the Nineteenth Amendment reveals important things about its original public meaning in 1920: supporters of the Nineteenth Amendment believed and said that it would make women equal to men under the law. The Nineteenth Amendment was seen by both those who supported it and by those who opposed it as being nothing less than the final step in a process begun by the Reconstruction Amendments. The opponents' objection to giving women the right to vote was that they were unfit for work outside of the home and that they were unable to serve in the military or on juries because of the damage this would cause to family life.[435] This objection was soundly rejected.

a. The goal was full equality.—Senator William H. Thompson of Kansas praised Susan B. Anthony during the debates over the Amendment (which was named for her),[436] and he proclaimed that "[s]lowly all thinking and justly disposed peoples are moving up to her advanced position. Her dream has all but become a grand reality."[437] Of course, Susan B. Anthony's

430. *See supra* notes 247–52 and accompanying text.

431. Siegel, *supra* note 6, at 968–69.

432. *See id.* at 951 (stating that ratifying the Nineteenth Amendment broke with "understandings of the family that had organized public and private law" and that "equal citizenship for women includes freedom from subordination in or through the family").

433. *See infra* subsection III(C)(1)(b).

434. *Adkins*, 261 U.S. at 553.

435. *See infra* note 461 and accompanying text.

436. *See* Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 6 (2000) (referring to the Nineteenth Amendment as the "Susan B. Anthony Amendment").

437. 56 CONG. REC. 8345 (1918).

dream of equality for women was not confined to giving them voting rights,[438] nor did members of Congress think that the constitutional change they were proposing meant only that women would henceforth be able to vote. Instead, they thought the Nineteenth Amendment would make women equal to men under the law. By returning the Constitution to sex-neutrality and guaranteeing women the right to vote, the proponents of the Nineteenth Amendment achieved their goal. In support of the Amendment, Congressman Edward C. Little of Kansas declared that "[i]f common sense is more potent than the sword . . . woman should now be accorded the same opportunity to take part in life that men have always had."[439] He firmly rejected the idea that physical differences between men and women should limit a woman's legal rights: "God Almighty placed upon her certain duties from which you escape, and you are wonderfully fortunate that you do, and every time you think of it you should blush for shame that you would deny any rights you have because of the responsibility that God has placed upon her."[440]

Even women's unequal status in the family was condemned during the debates, and the measure under consideration, the Nineteenth Amendment, was seen as a remedy. Congressman Little rather sentimentally called for a change in the status of wives and mothers:

> I hope, as my dear wife holds my hand for the last time as I pass out into the starlight, and as my dear mother extends her sainted hand to me as the trumpets sound the reveille on the other side, both will know that the sons for whom they went down into the valley of the shadow have granted to the mothers of this most august and stateliest Republic of all time *the same power, authority, and opportunity to fashion and preserve the lives of their sons that is possessed by their fathers*."[441]

Senator Miles Poindexter of Washington made an appeal for full equality by pointing out that the Western states had "long since overcome the prejudices which heretofore have discriminated against women in the suffrage" with the result that women were recognized "as equal partners in the State as well as in business and in the home."[442] "With us," Poindexter explained, "it has ceased to be an experiment, and most of the antisuffrage arguments, based upon theory and dire prophecy, have no effect in the face of realities."[443]

b. The Nineteenth Amendment was tied to the Reconstruction Amendments by supporters and opponents.—The Nineteenth Amendment

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438. *See, e.g.*, KATHLEEN BARRY, SUSAN B. ANTHONY: A BIOGRAPHY OF A SINGULAR FEMINIST 127–29 (1988) (discussing Anthony's campaign for coeducation).

439. 58 CONG. REC. 80 (1919).

440. *Id.*

441. *Id.* (emphasis added).

442. 56 CONG. REC. 8343 (1918).

443. *Id.*

was understood to be a continuation of the constitutional reform that began with the Reconstruction Amendments, a fact that strongly supports our argument that the same principles were at stake. Senator Thompson spoke of the Amendment as a measure coming fifty years later than it should have:

> Woman suffrage is coming as certainly as the sun is sure to rise to-morrow. The struggle is almost over. The victory is about won. A story is told of one of our soldier boys returning to camp from an afternoon off and who was stopped by a sudden call of "Halt!" from a sentry. "Halt? . . . Don't halt me; I am a half hour late as it is." So when Senators cry "Halt!" to the Federal amendment I reply, "Great heavens, our Nation is a half century late with this reform now!"[444]

Senator Robert L. Owen of Oklahoma, responding to Connecticut Senator Frank B. Brandegee's opposition to the Nineteenth Amendment on federalism grounds, argued that the Nineteenth Amendment was justified and appropriate for the same reasons that the Fourteenth and Fifteenth Amendments were needed:

> I merely call the attention of the Senator from Connecticut to the fourteenth and fifteenth amendments, which were advocated by the particular party to which he belongs, and which were the fruit of the Civil War, and the adoption of which was brought about by the fact that a moral question arose concerning human slavery, and the Constitution was amended by a vote of the States. The Senator, if he recognizes that principle in the case of enfranchising the negro race, can not, I think, consistently argue against the application of the same principle in amending the Constitution with regard to the white women of this country.[445]

Congressman Frank Clark of Florida also acknowledged the relationship between the Nineteenth Amendment and the Reconstruction Amendments, but to his thinking, this was part of the problem: "The fourteenth and fifteenth amendments were the offspring of the bitterest sectional hate and most unreasoning party passion that ever blighted any land," he explained, concluding, "God grant that our beloved country may never be cursed with its like again."[446]

There were of course still those who argued that sex and race were not relevantly similar. The old fears of family disruption were put forward again. But the enlightened Congressman Little responded to such arguments with a dose of reality, reiterating that the struggle for women's rights was entwined with the struggle against race discrimination:

> Men have argued here for 50 years that woman suffrage would break up the home. But in the Western States, where we have had woman

444. *Id.* at 8345.
445. *Id.* at 8349.
446. 58 CONG. REC. 91 (1919).

> suffrage in one form and another for years, we know of no family that has ever been disrupted by quarrel over politics.[447]

Continuing, he vividly espoused the race–sex analogy, making very clear that the same principles were at stake:

> The long and short of the whole matter is that for centuries you have treated woman as a slave, dragged her over the pages of history by the hair, and then you pretend to think she is an angel, too good to interfere in the affairs of men. Give her now a fixed, reasonable status, as becomes a rational human being like yourself.[448]

Senator Brandegee dismissed the idea that women were in any sense slaves, but his argument was trite:

> All this lingo about the women of America being enslaved is pure trumpery and foolishness. You can not get on a trolley car without having to take off your hat and give up your seat to every woman who gets aboard the car, and they are petted and flattered, and are the queen bees in this country, and there is no nation in the world where a woman's lot is so happy as it is in the United States of America.[449]

In the same vein, Senator Brandegee also said that "all this talk about striking the manacles and the shackles off the limbs of the enslaved women of this country is perfect tommy-rot. . . . That is all there is to it."[450] Brandegee apparently agreed with Congressman Clark, who declared that "no woman in Florida has ever yet needed protection that she did not get it [sic] and the day will never come when the men of my State will decline to come to the rescue of a woman in distress."[451]

Brandegee and Clark's specious claim that women did not face discrimination akin to race discrimination is further eroded by other portions of the debates, which reveal that those men opposed the Nineteenth Amendment largely because of their belief that it would finish the job the Reconstruction Amendments had begun. The Nineteenth Amendment, they said, would precipitate a "second Reconstruction" in the South by reigniting the fight for equal rights.[452] According to Congressman Clark:

> While the great masses of the negroes in the South are contented with existing conditions, some of the alleged leaders of the race are agitators and disturbers and are constantly seeking to embroil their people in trouble with the white people by making demands for social recognition which will never be accorded them; and the real leaders in

447. *Id.* at 80.

448. *Id.*

449. 56 CONG. REC. 8350 (1918).

450. *Id.*

451. 58 CONG. REC. 89 (1919).

452. *See id.* at 90 (statement of Rep. Clark) ("I warn my colleagues from the South who are supporting this measure that they are 'playing with fire,' which is likely to produce another 'reconstruction' conflagration in our Southland.").

> these matters are the negro women, who are much more insistent and vicious along these lines than are the men of their race.
>
> Make this amendment a part of the Federal Constitution and the negro women of the Southern States, under the tutelage of the fast-growing socialistic element of our common country, will become fanatical on the subject of voting and will reawaken in the negro men an intense and not easily quenched desire to again become a political factor.[453]

Senator Brandegee expressed the same sentiment when he quoted approvingly from a letter written to him by Charles S. Fairchild, president of the American Constitutional League: "[U]pon ratification, [the Nineteenth Amendment] would immediately renew the 'reconstruction' and racial problems in the South, as well as double the Socialist and Bolshevist menace in the North."[454] Along the same lines, Senator John S. Williams of Mississippi asked in horror, "Are you going to arm all the Chinese and Japanese and negro women who come to the United States with the suffrage?"[455]

Senator Thomas W. Hardwick of Georgia, also in fear of a second Reconstruction inspired by Bolshevists, female voters, and African-Americans, called the attention of his fellow Senators to a February 27, 1918 article from the *New York Journal* that described the visit of a white female activist, Mrs. Howard Gould, to a campaign meeting in support of Reverdy C. Ransom, a black candidate for Congress.[456] Mrs. Gould, with inspiring boldness, arrived to the meeting "[u]naccompanied by a white escort" and "[w]ith the exception of three reporters, [she] was the only white person in the hall."[457] "[S]tunningly dressed[,] [she] did not seem at all embarrassed by her environment."[458] Mrs. Gould called for black people to vote for Mr. Ransom, and she delivered this message: "Now that the black women of the North have political power, they must band together for the black women of the South. You black people must strangle the solid South."[459] Senator Hardwick, shaking in his boots, thought this story sufficiently demonstrated

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453. *Id.*

454. 56 CONG. REC. 8347 (1918).

455. *Id.* at 8346.

456. *Id.* at 10,894.

457. *Id.*

458. *Id.* Perhaps unknown to Senator Hardwick, Mrs. Gould was a divorced New York socialite, born Katherine Clemmons. Ralph W. Tyler, *Mrs. Howard Gould and Her Mission*, CLEV. ADVOC., Mar. 30, 1918, at 8. She had acted on the stage and was rumored to have had a relationship with William F. "Buffalo Bill" Cody before her marriage to Howard Gould. *Sordid Troubles of the Married Rich*, SUN (Fort Covington, N.Y.), Apr. 16, 1908, at 1. The *Cleveland Advocate* explained at the time of the Ransom campaign that "Mrs. Gould has taken up the fight to secure justice for a race that has suffered, and is still suffering, more injustices than are Russian serfs" and that "[o]ccasionally, so occasional as to impel unusual admiration on the one hand, and bitter criticism on the other, a white woman emerges from the drawing room of luxury to espouse the cause of the weak." *Id.* Mrs. Gould's sister Ella, a "San Francisco slum worker," was notorious for having married a "Chinaman." *S.P. Clemmons Insane*, N.Y. TIMES, Mar. 10, 1908, at 1.

459. 56 CONG. REC. 10,894 (1918).

the dangers of women voting. But Senator James K. Vardaman of Mississippi responded to Hardwick's condemnation of Mrs. Gould with the observation that "every idea of justice and sense of right is outraged by a condemnation of women for doing things in politics or anywhere else that men are applauded for doing," explaining, "I am in favor of treating women fairly."[460]

c. Political rights, military duties, and women's abilities.—A long-standing objection to women voting was that they could not fulfill all the duties that political rights entail. It was most vociferously alleged that they could not serve in the military, and this argument was again put forward during the Nineteenth Amendment debates. Congressman Clark, the man who claimed that no woman in Florida had ever been victimized, declared that women were unfit for combat and thus must not have the vote:

> No class of persons ought to have the right to vote, I think everyone will agree, unless that class can perform all of the duties of citizenship. They ought not to have the privileges of citizenship unless they can perform the duties. I think that is a proposition which no one will dispute. Women can not do that. We have heard a great deal here about what they can do. We can not create our armies out of women. We can not depend upon them.[461]

This argument, like others put forward by those opposed to the Amendment, was soundly defeated by the Amendment's supporters, because the First World War had provided a new response to the military service argument. In a turnaround, President Wilson told the Senate:

> This war could not have been fought, either by the other nations engaged or by America, if it had not been for the services of the women—services rendered in every sphere—not merely in the fields of efforts in which we have been accustomed to see them work, but wherever men have worked and upon the very skirts and edges of the battle itself.
>
> . . . .
>
> I propose it as I would propose to admit soldiers to the suffrage, the men fighting in the field for our liberties and the liberties of the world, were they excluded.[462]

Senator Thompson and others echoed this argument in terms strongly implying that the Nineteenth Amendment was understood to be the path to full equality:

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460. *Id.* Vardaman should really have stopped there. He instead concluded, "It is my purpose to continue the fight for the repeal of the fifteenth amendment, and finally the completed elimination of the negroes, both male and female, from the politics of America. And I expect the white women of America to help me in that great undertaking." *Id.*

461. 58 CONG. REC. 90 (1919).

462. 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8601–02 (1927).

> While women stand ready to forge cannon, make guns, and even to use them on the field of battle, and to do man's work wherever necessary for the good of the Nation, it is a gross injustice amounting to nothing less than outrage to deny them the right of suffrage, *or any other right that man may be entitled to or permitted to enjoy.* If the people of this country had never before looked upon woman suffrage with favor they should do so now in recognition of woman's sacrifice in defense of our citizenship and the natural and inalienable rights of life, liberty, and the pursuit of happiness.[463]

Congressman Little added that World War I was a struggle between brutality and reason, in which it was decided that "right, not might, shall rule the world."[464] The world, he went on, "is about ready to substitute the rule of reason for the rule of force in the government of reasoning creatures."[465] He continued,

> The time is opportune for marking an era's close. Civilization has reached a stage, a period, a moment, when we can ring the liberty bell again and announce that this great step forward has been taken.
>
> They tell us that woman should not vote merely because she is a female. No other reason has been advanced except that form which says that she can not bear arms. Every mother who bears a son to fight for the Republic takes the same chance of death that the son takes when he goes to arms.[466]

Congressman Little also described how the war had revealed that women were capable of all types of "men's work" and explained that women's presence in the workplace made denying them the vote much worse:

> [I]n my great country, women throng the shops, the offices, the factories, in their strife with men to earn a living. In uncivilized nations they still treat her as a slave and as an angel. Your great civilization gives woman the glorious privilege that man has to battle for a livelihood if she will do so for smaller wages, but denies her the use of the ballot in her struggle. What are you afraid of?[467]

What *were* those who opposed women voting afraid of? If the legislative history is any indication, most of them feared racial minorities and

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463. 56 CONG. REC. 8345 (1918) (emphasis added).

464. 58 CONG. REC. 79 (1919).

465. *Id.*

466. *Id.* at 80. Interestingly, Mrs. Howard Gould, the white woman who attended the campaign meeting of black congressional candidate Reverdy Johnson, in 1918 became the first woman admitted to "active membership in the Army and Navy Union, U.S.A." *Mrs. Gould To Be Veteran*, WASH. POST, Oct. 1, 1918, at 16. She was given the honorary military title "colonelette" and was "accorded the full honors of comradeship" when she was "received with ceremony into the President's Own Garrison." *Id.* No lightweight, she delivered an address on the occasion entitled "The American Advance from Bunker Hill to Gettysburg; from Santiago to Chateau Thierry." *Id.*

467. 58 CONG. REC. 80 (1919).

emancipated women. For example, the unenlightened Senator Brandegee had the audacity to claim that passing the Amendment would "prostitute the Constitution of the United States,"[468] and in a desperate attempt to convince his colleagues to reject the Amendment, Brandegee warned that "[t]he minute the ladies get the privilege of voting, if they do get it, they will forget all about the gentlemen who gave it to them, and they will vote just as they please."[469] Senator Owen made the best possible rejoinder: "I hope so."[470] Clearly many who contemplated the Nineteenth Amendment understood it to put women on equal constitutional footing with men.

2. Adkins v. Children's Hospital.—The Supreme Court acknowledged the implications of the Nineteenth Amendment in *Adkins v. Children's Hospital*, the first sex discrimination case to be decided by the Supreme Court following the adoption of the Amendment in 1920. *Adkins* considered the constitutionality of a law that set a minimum wage for women and children.[471] Under *Lochner v. New York*, it would have been unconstitutional to set a minimum wage for men.[472] The Supreme Court ruled 5–3 in *Adkins* that a minimum-wage law for women only could not be squared with the Fourteenth Amendment *in light of the Nineteenth Amendment.*[473] Justice Sutherland, writing for the majority, reasoned much like the supporters of women's voting rights in Congress:

> [T]he ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case* has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to

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468. 56 CONG. REC. 8350 (1918). When Senator Brandegee's arguments do not avoid substance entirely, they show a failure to know his opponent:

> Mr. SHAFROTH: "Does not the Senator believe that the just powers of government are derived from the consent of the governed?"
>
> Mr. BRANDEGEE: "What does the Senator believe about the Philippine Islands?"
>
> Mr. SHAFROTH: "I must say that I have always been in favor of giving independence to the Philippine Islands, and I fought upon the floor of the Senate for that very principle."

Id.

469. *Id.*

470. *Id.*

471. Adkins v. Children's Hospital, 261 U.S. 525, 539 (1923).

472. Lochner v. New York, 198 U.S. 45, 64 (1905).

473. *Adkins*, 261 U.S. at 553. Justice Brandeis took no part in the case, while Chief Justice Taft and Justices Sanford and Holmes dissented. *Id.* at 562, 567.

> restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.[474]

Less persuasively, the Court attempted to salvage *Muller* by maintaining that the maximum-hours law at issue in that case was merely an acknowledgement of the actual physical differences between men and women, while a minimum-wage law implicated women's minds.[475] This is a false distinction: if women have the same capacity as men to enter into contracts for wages, then they have the same capacity as men to contract for limited hours. The constitutionally sound response to this problem is the modern one: reasonable minimum-wage and maximum-hours laws that protect both men and women. But when *Adkins* was decided, *Lochner* stood in the way of such a conclusion for most of the Court, although Justice Holmes, in his *Adkins* dissent, said he thought *Bunting v. Oregon*[476] left *Lochner* in "deserved repose."[477]

The *Adkins* dissenters had two main objections to Justice Sutherland's opinion for the Court. First, they claimed with good reason that the decision was inconsistent with *Muller*. Justice Oliver Wendell Holmes wrote: "I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. . . . *Muller v. Oregon*, I take it, is as good law today as it was in 1908."[478] Chief Justice William Howard Taft said he was "not sure from a reading of the opinion whether the court thinks the authority of *Muller v. Oregon* is shaken by the adoption of the Nineteenth Amendment."[479] Second, Justice Holmes and Chief Justice Taft both denied that the Nineteenth Amendment should have any effect on the constitutional analysis. Holmes said bluntly, "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account."[480] But presumably he would not have thought it proper to take false differences into account.

Chief Justice Taft dissented at greater length and with less clarity:

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474. *Id.* at 553 (internal citation omitted).
475. *Id.* at 552–53.
476. 243 U.S. 426 (1917).
477. *Adkins*, 261 U.S. at 569–70 (Holmes, J., dissenting).
478. *Id.* at 569.
479. *Id.* at 567 (Taft, C.J., dissenting).
480. *Id.* at 569–70 (Holmes, J., dissenting).

> The Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller v. Oregon* rests. The amendment did give women political power and makes more certain that legislative provisions for their protection will be in accord with their interests as they see them. But I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the Amendment.[481]

Chief Justice Taft did not explain what physical difference makes women more in need of a minimum wage than men. The majority's assessment of the Nineteenth Amendment's effect was much more cogent, and something like the *Adkins* majority's approach to sex discrimination doctrine should be revived by the modern, present-day Supreme Court. The fact that the majority opinion in *Adkins* considered and rejected the Holmes and Taft dissents bolsters the argument that the Nineteenth Amendment changed the meaning of the no-caste rule of the Fourteenth Amendment. The majority in *Adkins* is premised on the idea that after 1920, sex discrimination was, as a constitutional matter, a form of caste.

The Supreme Court revisited the issue of sex discrimination after the overruling[482] of *Adkins* in a bad landmark opinion by Justice Felix Frankfurter—*Goesaert v. Cleary*.[483] *Goesaert v. Cleary* involved the constitutionality of a Michigan law that forbade any woman from serving as a bartender unless she was the wife or daughter of the man owning the bar.[484] Justice Frankfurter disposed of the case dismissively using extreme New Deal judicial restraint as his rationale. He applied the rational basis test and had no trouble concluding that the States could have banned women from serving as barmaids under all circumstances as well as when they were not related to bar owners.[485] Justice Frankfurter's opinion did not cite any of the Reconstruction history of the Fourteenth Amendment that we have discussed in this Article or the dispute about the Nineteenth Amendment in *Adkins*. He instead reasoned,

> The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of liquor traffic. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards,

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481. *Id.* at 567 (Taft, C.J., dissenting). Louis Brandeis—by this time Justice Brandeis—took no part in the *Adkins* decision; he would not have cast the deciding vote anyway. *Id.* at 562.

482. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 386–87 400 (1937) (upholding a minimum-wage law for women and overruling precedent in which a similar labor law had been invalidated on substantive due process grounds).

483. 335 U.S. 464 (1948).

484. *Id.* at 465.

485. *Id.* at 465–67.

> any more than it requires them to keep abreast of the latest scientific standards.[486]

Justice Wiley Rutledge wrote a solid two paragraph dissent joined by Justices Douglas and Murphy but also did not mention the origins of the Fourteenth Amendment's no-caste rule or the discussion of the Nineteenth Amendment in both the *Adkins* majority and dissenting opinions.[487] The dissent did, however, correctly say that the "statute arbitrarily discriminates between male and female owners of liquor establishments" and that it was therefore "invalid as a denial of equal protection."[488] The majority's failure to agree with this statement likely reinforced the view of some activists that only adoption of the Equal Rights Amendment could protect women's rights.[489] They were mistaken, but this would not be proven until the Court decided *Reed v. Reed* over twenty years after *Goesaert*.

The question of the original meaning of the Fourteenth and Nineteenth Amendments as to sex discrimination is in some respects still open for the Court to address. The Supreme Court can address the sex discrimination issue today under the no-caste rule of the Fourteenth Amendment, as modified by any implications to be drawn from the Nineteenth Amendment, without any prior case law interfering. In our view, the Fourteenth Amendment no-caste rule, as modified by the implications that should be drawn from the Nineteenth Amendment, lead to the conclusion and doctrinal test that Justice Ginsburg argued for in *VMI*. We think we have offered originalist reasons that Justices Scalia and Thomas should find compelling as to why Justice Ginsburg is right. We also hope our research will be helpful to the new Justices on the Supreme Court who have yet to participate in a major sex discrimination case. These four new Justices include Chief Justice Roberts, Justice Alito, Justice Sotomayor, and Justice Kagan. We hope they not only follow the *VMI* precedent as doctrinalists but that they also root any future holding in the text and history of the Constitution and not merely in doctrine. It is time for the Supreme Court to acknowledge the central importance of the Nineteenth Amendment in Fourteenth Amendment sex discrimination cases. Susan B. Anthony, Elizabeth Cady Stanton, and even Justice Sutherland thought the Nineteenth Amendment would do a lot more for women's rights than the Court has ever acknowledged. We think they were absolutely right and that the Court has missed the boat.

IV. Conclusion

An infinite number of questions could be asked about if and how the anticaste rule of the Fourteenth Amendment should be applied to classifica-

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486. *Id.* at 466 (citations omitted).

487. *Id.* at 467–68 (Rutledge, J., dissenting).

488. *Id.* at 468.

489. *See supra* note 314.

tion beyond race and sex. While no group aside from women and African-Americans were discussed at length by the Framers of the Fourteenth Amendment, there is nothing in the text to prevent application of the no-caste rule to other groups if the group classification is relevantly similar to race or sex and the legal disabilities the group suffers are as arbitrary as those that once accompanied being female or being black. Yet a definitive showing that a law relegates a group to caste status—and is therefore a violation of Section One—is not easy to make and, in Professor Calabresi's view, ought only to be made where there is an Article V consensus of three-quarters of the states. The courts must look for—but not dictate—the content of the objective social meaning today of the anticaste command of the Fourteenth Amendment. This present-day objective social meaning is to be found in the evolving standards of equality of *the whole* of American society and not merely in the evolving social standards among the judicial and legal elite. Ms. Rickert disagrees and believes it is appropriate for the Supreme Court to unilaterally recognize new forbidden castes whenever it has before it unequivocal evidence that a group is being arbitrarily denied equal protection of the laws. In her view, an Article V amendment that protects a particular group's voting rights is the strongest evidence that a law discriminating on the basis of membership in that group is arbitrary, but she disagrees with Professor Calabresi's argument that the existence of an Article V amendment protecting a group is almost a prerequisite for that group to be protected from discriminatory legislation by the Fourteenth Amendment. As explained throughout this Article, race and sex are given a special status in our Constitution—discrimination in political rights cannot be made on those bases—and so, in both authors' view, full civil rights must be accorded also. An Article V consensus of three-quarters of the states forbade discrimination as to voting rights both on the basis of race and on the basis of sex.[490] There is no other alleged caste that can make this claim. Professor Andrew Koppelman, however, has argued that sexual-orientation discrimination is actually a forbidden form of sex discrimination, but assessing his argument is outside the scope of this Article.[491]

We also will not go deeply into other possible applications of the no-caste rule in this Article, but we will briefly address an issue that must be acknowledged before concluding: what do our conclusions mean for legislation that discriminates on the basis of age, given the Twenty-sixth Amendment, which prohibits denying the vote to citizens eighteen years or older on the basis of age?[492] Are laws forbidding eighteen-to-twenty-year-olds from buying or consuming alcohol unconstitutional?

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490. And, crucially, the Nineteenth Amendment returned the Constitution to sex neutrality.

491. Koppelman, *supra* note 321, at 147.

492. The language of the Amendment is as follows:

Perhaps, but such laws are not certainly unconstitutional. The Twenty-sixth Amendment—although it was inspired by the military service of class members much like the Fifteenth Amendment and the Nineteenth Amendment were—surely does not invalidate all age-based legislation. For one thing, the Twenty-sixth Amendment itself arbitrarily discriminates on the basis of age by excluding those under the age of eighteen from voting. And age is undeniably different from race and sex: all people who live a normal lifespan go through the same stages of development and ages, and competence does in fact tend to correlate to age, particularly during the earlier periods of the human life span. Infants, obviously, cannot be left to make very many of their own life choices if we want the human race to continue. Infants also cannot exercise the right to vote, because they are utterly unaware of what exercising that right means. This helplessness and ignorance of youth decreases over time, very slowly. We continue to learn and grow throughout our lives. Age does not become irrelevant to lawmaking all at once. The Constitution was drafted with this in mind, and so the Constitution itself discriminates on the basis of age by setting age requirements for federal office holding. Eligibility to be a representative requires that one have attained the age of twenty-five.[493] Eligibility to be a senator requires that one have attained the age of thirty.[494] And, eligibility to serve as President requires that one have attained the age of thirty-five.[495] Age discrimination is an important issue, but preventing it in all its forms is a job for the political process under the U.S. Constitution.

The second possible application of the no-caste rule of the Fourteenth Amendment that is suggested by clauses in the U.S. Constitution occurs with respect to discrimination on the basis of religion. Article VI of the Constitution requires that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[496] The Constitution thus recognizes a political right to hold office, which absolutely forbids discrimination on the basis of religion. Does this mean that civil rights discrimination on the basis of religion is also a forbidden form of caste under the Fourteenth Amendment?

The Framers of the Fourteenth Amendment, who we quoted above,[497] said that a paradigmatic example of a system of caste is the low status

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> Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XXVI.

493. *Id.* art. I, § 2.

494. *Id.* art. I, § 3.

495. *Id.* art. II, § 1.

496. *Id.* art. VI.

497. *See supra* note 193 and accompanying text.

accorded to Jewish people in Western Europe prior to the 1800s. We agree with this statement. We also think the Religious Test Clause protects a political right from discrimination on the basis of religion (or lack of religion). Under the reasoning of this Article, that does suggest that civil rights discrimination on the basis of religion is a forbidden system of caste. For these reasons, Professor Calabresi endorses Justice Scalia's dissenting opinion in *Locke v. Davey*,[498] which suggests that state-constitutional Blaine Amendments unconstitutionally discriminate on the basis of caste in violation of the antidiscrimination command of the Fourteenth Amendment.[499]

As we have tried to show, the Fourteenth Amendment's original public meaning bans all systems of caste once three-quarters of the states—an Article V consensus—find that a classification is in fact caste-like. We have also shown that since 1920 sex discrimination is forbidden as to civil rights just as it is as to political rights. The Nineteenth Amendment, read together with the Fourteenth Amendment, provides a legitimate basis for striking down almost all sex-discriminatory laws. By bestowing on women the most exclusive of all rights—the right to vote—our Constitution finally guaranteed that a person's sex will not determine his or her rights.

We should emphasize that in agreeing with the U.S. Supreme Court's opinions as to sex discrimination in *Adkins v. Children's Hospital* and in *VMI*, we mean to express no shared opinion on the constitutionality of laws against abortion. Professor Calabresi has publicly and repeatedly expressed the view that such laws are generally constitutional.[500] There are countries like Germany whose constitutions ban sex discrimination but which also constitutionally protect fetal life.[501] There are other countries that take a different approach, such as Canada, whose Charter of Rights and Freedoms bans sex discrimination but does not protect fetal life.[502] We leave it to our readers to make whatever judgment they choose to make on this matter. A facial rule of no sex discrimination does not answer the question of when human life begins nor does it definitively answer the question of whether a

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498. 540 U.S. 712 (2004).

499. *See id.* at 726 (Scalia, J., dissenting) (characterizing the majority's holding as "sustain[ing] a public benefits program that facially discriminates against religion").

500. *See, e.g.*, Calabresi & Fine, *supra* note 9, at 695–98 (arguing that laws against abortion are constitutional). Ms. Rickert's view on the degree to which the Constitution protects the right to abortion is nuanced and will be explained in some future article.

501. *Compare* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 3, cl. 2 (Ger.) ("Men and women shall have equal rights."), *with* PARENTHOOD AND MENTAL HEALTH 92 (Sam Tyano et al. eds., 2010) (explaining that "the Federal Constitutional Court of Germany held that the constitution guaranteed the right to life from conception").

502. *Compare* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c. 15(1) (U.K.) ("Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law . . . without discrimination based on . . . sex . . . ."), *with* PARENTHOOD AND MENTAL HEALTH, *supra* note 501, at 92 (noting that "in Canada, the fetus is a human being only when it has completely proceeded, in a living state, from the body of its mother").

legislature or a court ought to be empowered to say when life begins. The question addressed in this Article is solely the question of whether sex discrimination is unconstitutional under the U.S. Constitution as amended. We conclude that it is.

Our experience as a nation since the adoption of the Fourteenth Amendment in 1868 has shown that the Framers of the Fourteenth Amendment's "factual" assumptions about women's capabilities, as well as their belief that enfranchised women would pose a serious threat to the family, were unfounded. We now know that women are as capable as men of exercising their rights responsibly. For that reason, women have had a constitutional right to vote in all federal and state elections since 1920.

Women have had a big impact on American politics since they won the right to vote. Women played a decisive role in electing the first African-American president,[503] and two women have been nominated to be Vice President.[504] Four women have now been appointed to the Supreme Court, and three of those four are currently serving on the Court and constitute one-third of its membership. The progress that American women have made since 1920 is mind-boggling and has affected the status of women and men all over the world. Research conducted in rural India, the original home of the caste system, found that six to seven months after getting cable television, "men and women alike had become more open to the idea of women's autonomy, and more accepting of female participation in household decision making."[505] This is encouraging, and it may be evidence that, if the Framers of the Fourteenth Amendment knew what we know now, they would not have included the word *male* in Section Two of the Amendment.

In conclusion, we ask our readers to think back to the Court's most recent big step toward a sex discrimination doctrine that comports with the original meaning of the Fourteenth and Nineteenth Amendments—*VMI*. We think that case shows the wisdom of the Framers of the Fourteenth and Nineteenth Amendments. Recall that in *VMI* it was said that there were facts in dispute. The State of Virginia said that the Virginia Military Institute's unique educational experience could not survive the admission of women; the United States claimed that women would not destroy the unique experience of VMI for men and that women were in fact entitled to a share of it.

As it turns out, Justice Ginsburg and the majority's assessment of the facts has been vindicated. Ms. Rickert recently spoke with Colonel Michael Strickler, who was in charge of public relations for VMI during the six-year-

503. Fifty-six percent of women went for Obama, compared to forty-nine percent of men. *Election Results 2008*, N.Y. TIMES (Nov. 5, 2008), http://elections.nytimes.com/2008/results/president/exit-polls.html.

504. *See* Gail Collins, Op-Ed., *McCain's Baked Alaska*, N.Y. TIMES, Aug. 30, 2008, at A19 (taking note of the increasing role of women in presidential politics).

505. Rana Foroohar, *The Real Emerging Market*, NEWSWEEK (Sept. 11, 2009), http://www.thedailybeast.com/newsweek/2009/09/11/the-real-emerging-market.html.

long court case and who is now Assistant to the Superintendent. He reports that the addition of female cadets to VMI has been an unquestionable success.[506] Very few changes had to be made to the facilities of VMI and none to the curriculum.[507] Women come to VMI, he says, for the same reasons that men are attracted to the school: military discipline, competitive athletics, and rigorous academics.[508] And importantly, VMI's famed "adversative method"—a mentally and physically challenging process that involves lower-classmen having to do push-ups at the behest of upper-classmen—has survived fully intact.[509] There are now 115 women enrolled at VMI, and Colonel Strickler and the rest of the administration hope to see that number rise.[510]

VMI's recent experience, combined with the original meaning of the Fourteenth Amendment and Nineteenth Amendment, means that the time has come for the U.S. Supreme Court to overrule *Rostker v. Goldberg*.[511] Women should be required to register along with men at the age of eighteen for the draft. May the pockets of faux originalists still opposed to applying the Fourteenth Amendment in full force shrink steadily. The original public meaning of the Fourteenth Amendment, when read in light of the Nineteenth Amendment, renders sex discrimination as to civil rights unconstitutional.

506. Interview with Col. Michael Strickler, Assistant to the Superintendent, Virginia Military Institute (Jan. 8, 2010) (notes on file with author).

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. 453 U.S. 57 (1981).

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The Pretend Solution: An Empirical Study of Bankruptcy Outcomes

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I. Introduction

Bankruptcy is an integrated legal solution to the problem of overwhelming debt. Evidence suggests that the architects of the modern Bankruptcy Code, in 1978, were genuinely concerned about offering ample relief to American families to cope with the burgeoning, emerging consumer-credit economy.[1] A few years before, the Brookings Institution had released a landmark study documenting gaping holes in the existing structure, consisting of bankruptcy law and a patchwork of state laws.[2] The study noted that many types of debts could not be discharged in bankruptcy and that the bankruptcy process provided almost no effective treatment for problems in paying debts secured by collateral, such as home mortgages or car loans.[3] Aggressive garnishment laws and strong rights for secured creditors led many people to file bankruptcy under creditor duress, often without sufficient contemplation of their options.[4] The 1973 Bankruptcy Review Commission Report recommended major changes to the bankruptcy laws to give consumers more help with their debt problems.[5] These recommendations focused on encouraging consumers to consider repayment as an alternative to straight liquidation bankruptcy.[6] The Commission warned that dramatic reforms were needed to provide more relief to individuals in financial trouble because the existing bankruptcy system was inadequate.[7]

In reaction to these criticisms and empirical findings, the drafters of the 1978 Bankruptcy Code—and the legal advocates who advised them—designed a complex system to help consumers. Even in 1978, household finance was complicated. Consumers in financial trouble were delinquent on both secured and unsecured debts; these debts were owed to a mix of government-guaranteed and private lenders, had different maturities, and

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1. *See* William T. Vukowich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 GEO. L.J. 1129, 1132 (1983) (noting that Congress "modernized" the bankruptcy laws in 1978 in response to a noticeable increase in consumer credit during the mid-twentieth century). The Bankruptcy Code resulted from more complex political considerations than just a two-sided conflict between debtor interests and creditor interests. *See generally* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47 (1997) (arguing that a "satisfactory explanation of the Bankruptcy Code must take into account the interests of all relevant parties and the extent of their political power").

2. DAVID T. STANLEY & MARJORIE GIRTH, BROOKINGS INST., BANKRUPTCY: PROBLEM, PROCESS, REFORM (1971).

3. *Id.* at 57–58 ("If much of his debt is secured, a bankrupt will gain little from his discharge, because it does not affect valid liens. After bankruptcy he will either have to pay his secured creditors or possibly have the property repossessed.").

4. *Id.* at 47–53 (reporting that the main immediate cause of bankruptcy was a threat of legal action such as garnishment, repossession, or a lawsuit).

5. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 11–14 (1973) [hereinafter 1973 COMMISSION REPORT].

6. *Id.* at 157–60.

7. *See id.* at 2–5 (describing several problems with the bankruptcy system that led to the establishment of the Commission).

bore different interest rates and fees.[8] With disparities in state laws, creditors had varying enforcement tools available to them to exert leverage on struggling debtors. The 1978 Bankruptcy Code offered consumers complex, sophisticated tools to address their debt problems. Consumers were given their choice of two chapters of bankruptcy relief: Chapter 7 (liquidation) and Chapter 13 (debt repayment over three to five years). This new, improved system, which bifurcated options, offered families in financial trouble a rich array of tools to eliminate, reduce, or restructure debts.[9]

The creation of Chapter 13 was seen as a cornerstone of the improved system of legal relief for consumers.[10] The 1973 Commission Report had enthusiastically recommended the expansion of the repayment bankruptcy system, concluding that "[n]o feature of the present Bankruptcy Act has received as much general acclaim as Chapter XIII."[11] On the Commission's advice,[12] the drafters of the Bankruptcy Code added numerous additional features to the prior Chapter XIII, including christening it with a new Arabic numeral in its name. These additional features were intended to improve the relief that bankruptcy provided to financially distressed individuals.[13] The new Chapter 13 clarified that no minimum amount of repayment was required, loosened eligibility requirements for debtors, and added significant tools to permit debtors to catch up on missed payments for secured debts.[14]

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8. *See* Carl J. Palash, *Household Debt Burden: How Heavy Is It?*, FRBNY Q. REV., Summer 1979, at 9, 10–12 (charting the distribution of household debt and discussing consumer delinquency); David F. Seiders, Fed. Reserve, Div. of Research & Statistics, *Recent Developments in Mortgage and Housing Markets*, 65 FED. RES. BULL. 173, 178–79, 184 (1979) (surveying changes to the lending market and noting the increase in private lenders).

9. *See infra* Part II.

10. This sentiment was reflected in the Senate Report for the enacting statute:

> In theory, the basic purpose of Chapter XIII has been to permit an individual to pay his debts and avoid bankruptcy by making periodic payments to a trustee under bankruptcy court protection, with the trustee fairly distributing the funds deposited to creditors until all debts have been paid. The hearings record and the bankruptcy literature show uniform support for this principle. In practice however, the results have been less than satisfactory, even though chapter XIII has been available since 1938.
>
> . . . .
>
> The new chapter 13 undertakes to solve these problems insofar as bankruptcy law can provide a simple yet precise and effective system for individuals to pay debts under bankruptcy court protection and supervision.

S. REP. NO. 95-989, at 12–13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5798–99.

11. 1973 COMMISSION REPORT, *supra* note 5, at 157.

12. *See id.* at 162–67 (recommending improvements to Chapter XIII).

13. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 232–33 (1989) [hereinafter AS WE FORGIVE].

14. *See* Melvin Kaplan, *Chapter 13 of the Bankruptcy Reform Act of 1978: An Attractive Alternative*, 28 DEPAUL L. REV. 1045, 1047–51 & nn.23, 34 (1979) (describing the new debtor-eligibility requirements, noting that the new Chapter 13 only mandated specific payments to a small subset of creditors, and explaining the debtor's ability to cure or waive defaults on secured debts in a Chapter 13 plan, even over creditor objections).

Additionally, debtors no longer needed the consent of their creditors to reduce their debt obligations.[15]

Advocates, academics, judges, and legislators heralded the 1978 Bankruptcy Code as a consumer protection victory.[16] At the center of the celebration was Chapter 13. Law review articles announced that the "underlying premise" of the reform was to relegate Chapter 7 to a last-resort option and that some practitioners would realize that Chapter 13 was "an inexpensive, effective means" of helping debtors.[17] Congress had given consumers substantially more relief, essentially promising all that the prior Chapter VII and Chapter XIII options had provided, and then some. One commentator has described the "myth" of the enactment of Chapter 13 as follows:

> Once upon a time, a benevolent government passed a law to help poor but honest debtors protect their homes from foreclosure and their encumbered personal property from repossession. . . . [T]he idea was for [Chapter 13] debtors to be able to complete their plans successfully, then all could live happily ever after . . . .[18]

The exaltation of Chapter 13 in part reflected the success of bankruptcy experts in getting their recommended changes enacted into law. The 1973 Commission Report devoted most of its recommendations to a legal redesign that would encourage debtors to file repayment bankruptcies.[19] The Commission Report also fully embraced the concept of consumers making informed, uncoerced choices about how best to rehabilitate their households—a vision of legal relief reflected in offering debtors two options

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15. *See id.* at 1050–51 & nn.52–54 (outlining the new "cram down" provision of Chapter 13).

16. *See, e.g.*, *Consumer Debt: Hearing Before the H. Comm. on Banking & Fin. Servs.*, 104th Cong. 385 (1996) (statement of Ford Elsaesser, Vice President, American Bankruptcy Institute) ("When Congress created the modern bankruptcy code in 1978, it made bankruptcy a much more debtor-friendly law."); Tamar Lewin, *Business and the Law: Lively Debate on Bankruptcy*, N.Y. TIMES, Aug. 9, 1983, at D2 (reporting that consumer advocates declared the Bankruptcy Reform Act of 1978 a victory).

17. *E.g.*, Kaplan, *supra* note 14, at 1058.

18. Gordon Bermant, *What Is "Success" in Chapter 13? Why Should We Care?*, AM. BANKR. INST. J., Sept. 2004, at 20, 20. Before the 1978 Bankruptcy Code, the federal government had apparently preferred Chapter XIII, but it remained frequently used only in some areas. *See* Max Siporin, *Bankrupt Debtors and Their Families*, SOC. WORK, July 1967, at 51, 53 ("Although the Administrative Office of the United States Courts strongly favors the use of Chapter XIII proceedings when feasible, only a handful of the district courts are partial to this plan . . . .").

19. The Commission Report contained an entire chapter on "Plans for Debtors with Regular Income" despite only a tiny fraction of cases being filed under the then-existing Chapter XIII. *See* 1973 COMMISSION REPORT, *supra* note 5, at 157–67 (discussing various recommendations in light of the Commission's conviction that usage of Chapter XIII "should be fostered," and noting the Commission's goals were "to discover reasons why Chapter XIII has not been more popular" and to "enhanc[e] the effectiveness of [Chapter XIII] without making it compulsory"). Even a contemporary critique of the 1978 Bankruptcy Code offered suggestions for further reforms that would continue to "result in greater use of and larger repayment plans in chapter 13." Vukowich, *supra* note 1, at 1132.

for bankruptcy.[20] In the aftermath of the enactment of the 1978 Bankruptcy Code, a "national campaign to sell judges, attorneys, and ultimately debtors on the benefits of Chapter 13" was launched.[21] As one law journal opined, "Chapter 13 often offers a far more effective solution to a debtor's problems than a straight liquidation under Chapter 7."[22] And indeed, Chapter 13 filings skyrocketed during the first years under the 1978 Bankruptcy Code, increasing from about 15% of all consumer filings in 1978 to nearly 30% by 1982.[23] For the last two decades, approximately one-third of all consumer filings have been in Chapter 13.[24]

The first major study of consumer bankruptcy relief under the 1978 Bankruptcy Code halted the victory celebration. Teresa Sullivan, Elizabeth Warren, and Jay Westbrook's book *As We Forgive Our Debtors*, published in 1989, documented that many of the improvements in the law were not translating into on-the-ground relief for families. Their most controversial finding was that only one in three cases filed under Chapter 13 ended in a completed payment plan.[25] Two out of three families did not receive a Chapter 13 discharge. This modal outcome was contrary to the careful statutory scheme of court-approved debt reduction, development of a budget, repayment over a period of years, and discharge of any remaining obligations.[26] Mincing no words, *As We Forgive Our Debtors* concluded, "In short, there are a lot of people in bankruptcy who bought a bill of goods when they filed Chapter 13. These Chapter 13 failures were cheated by a system that made unjustified promises of successful repayments and reestablished creditworthiness, and then left them to founder alone."[27] This critique of the discharge rate for Chapter 13 was driven in large part by comparison to the alternative of Chapter 7, which has consistently had a discharge rate exceeding 95%. The one-in-three success rate of Chapter 13 paled against Chapter 7 outcomes.

The sting of the Chapter 13 critique was compounded by a cost comparison. Not only did Chapter 13 deliver little protection to most of those who turned to it for help, but the complexity of Chapter 13 meant that the attorney's fees were significantly higher than for Chapter 7.[28] The

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20. 1973 COMMISSION REPORT, *supra* note 5, at 79–81.

21. AS WE FORGIVE, *supra* note 13, at 339.

22. C. William Schlosser, Jr., *Chapter 13 Bankruptcy as an Alternative to Chapter 7*, 18 COLO. LAW. 2089, 2089 (1989).

23. AS WE FORGIVE, *supra* note 13, at 266 n.13 (citing JUDICIAL CONFERENCE OF THE U.S., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 402 tbl.F3B (1982)).

24. For spreadsheets containing annual statistics on the number of total filings and filings under each chapter of the Bankruptcy Code, see *Bankruptcy Statistics*, ADMIN. OFF. U.S. COURTS, http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx.

25. *Id.* at 217.

26. *See* AS WE FORGIVE, *supra* note 13, at 37–39 (describing the detailed procedure for plan confirmation and discharge).

27. *Id.* at 339.

28. *Id.* at 250.

difference has persisted over time. In 2007, the median cost of a Chapter 13 bankruptcy was $2,500, 250% higher than the cost of a Chapter 7 case.[29] Chapter 13 also requires significantly more debtor involvement, typically including a court appearance for plan confirmation and the submission of regular payments for a period of years.[30] By contrast, debtors usually get a discharge in Chapter 7 within four months of filing.[31]

Defenders of Chapter 13 were furious.[32] Their friends in Congress pushed for an official government study of the issue, presumably to disprove Sullivan, Warren, and Westbrook. A few years later, however, the resulting report confirmed that only one in three debtors obtained a discharge.[33] In the face of repeated studies that confirmed the original Sullivan, Warren, and Westbrook finding,[34] an alternate theory of bankruptcy emerged. Advocates for Chapter 13 began to opine that the discharge rate was a poor measure of

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29. The median Chapter 13 filer in 2007 paid $2,500; the median Chapter 7 filer in 2007 paid $1,000. Katherine Porter, *Driven by Debt: Bankruptcy and Financial Failure in American Families*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS (Katherine Porter ed., forthcoming 2012) [hereinafter BROKE] (manuscript at 1, 20) (on file with author). Using standard "no-look" fees in each district, a government study found that the median fee for Chapter 13 one year later in 2008 was $3,000. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-697, BANKRUPTCY REFORM: DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 24–26 (2008).

30. AS WE FORGIVE, *supra* note 13, at 37–38.

31. *See* ADMIN. OFFICE OF THE U.S. COURTS, STATISTICS DIV., OFFICE OF JUDGES PROGRAMS, 2010 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 13 (2010) [hereinafter 2010 BAPCPA REPORT], *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2010/2010BAPCPA.pdf (reporting that for Chapter 7 consumer cases filed on or after October 17, 2006, and closed in 2010, the mean interval from filing to disposition was 178 days and the median interval was 120 days); AS WE FORGIVE, *supra* note 13, at 33, 44 n.26 (reporting that the median time from filing under Chapter 7 to discharge was four months in the study sample); *Discharge in Bankruptcy*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/DischargeInBankruptcy.aspx ("Typically, [a Chapter 7 discharge is granted] about four months after the date the debtor files the petition with the clerk of the bankruptcy court.").

32. Strong proponents included the Chapter 13 trustees—whose trade group devoted an annual meeting to criticizing the Sullivan, Warren, and Westbrook finding—and several prominent bankruptcy judges and law professors.

33. Michael Bork & Susan D. Tuck, *Bankruptcy Statistical Trends: Chapter 13 Dispositions* 4 graph 1 (Admin. Office of the U.S. Courts, Working Paper No. 2, 1994) (studying termination data for Chapter 13 cases filed between 1980 and 1988 and reporting that 36% of Chapter 13 cases received a discharge).

34. *See, e.g.*, Gordon Bermant & Ed Flynn, *Measuring Projected Performance in Chapter 13: Comparisons Across the States*, AM. BANKR. INST. J., July–Aug. 2000, at 22, 22 ("Completion rates [for Chapter 13 filings] hover nationally at about one-third of confirmed plans . . . ."); Henry E. Hildebrand III, *Administering Chapter 13—At What Price?*, AM. BANKR. INST. J., July–Aug. 1994, at 16, 16 ("The trustees estimated that the completion rate of chapter 13 cases averaged 32.89 percent. This is consistent with conventional wisdom that approximately two-thirds of chapter 13 cases fail to reach discharge."); Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 505 (2006) ("The overall discharge rate for the debtors in the seven districts covered by the Project was exactly the oft-repeated statistic of one-third.").

Chapter 13's usefulness.[35] Aside from the potential for greater creditor recovery in Chapter 13,[36] Chapter 13 devotees noted that debtors received an array of benefits from Chapter 13 other than discharge. They pointed out that Chapter 13, unlike Chapter 7, permitted a debtor to cure a default on a secured debt, such as a home at risk of foreclosure, even if state law did not permit reinstatement and deceleration of the debt.[37] They emphasized that this benefit did not require the completion of the repayment plan.[38] Defenders of Chapter 13 also argued that the temporary stay of foreclosure or repossession during the pendency of Chapter 13 helped debtors make plans for the future even if cases ended without a discharge and debtors lost their property.[39] Finally, some argued that debtors benefitted from the Chapter 13-imposed discipline of living on a trustee-supervised repayment plan with a strict budget.[40] This rehabilitation aspect, it was asserted, might improve debtors' financial prospects even if they dropped out of Chapter 13 because they had now learned self-restraint and financial-management strategies from trying to hold themselves to a repayment program.[41]

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35. *See, e.g.*, Bermant, *supra* note 18, at 65 ("Arguments are made that completion is neither necessary nor sufficient for success.").

36. In part because of the high rate of dismissals and conversions, recovery by nonpriority unsecured creditors in Chapter 13 appears to be quite low. The 2007 Consumer Bankruptcy Project data (on file with author) show that only one in three Chapter 13 plans even proposed to make any payment to unsecured creditors. Data from the U.S. Trustee Program for fiscal year 2008 show that there was zero payout to unsecured creditors in 32% of all Chapter 13 filings. U.S. DEP'T OF JUSTICE, U.S. TR. PROGRAM, FY-2008 CHAPTER 13 TRUSTEE AUDITED ANNUAL REPORTS (June 28, 2010), http://www.justice.gov/ust/eo/private_trustee/library/chapter13/docs/ch13ar08-AARpt.xls.

37. *See, e.g.*, CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 1202 (2d ed. 2009) ("Chapter 13 gives a debtor a chance to retain her house, car, and other property, even if the debtor currently is in default and facing foreclosure.").

38. *See* Teresa Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 AM. BANKR. L.J. 121, 143 (1994) ("Some judges and lawyers reacted to our 1981 findings by asserting, among other things, that success in chapter 13 is not properly measured merely by completion of a plan because many debtors get benefits from incomplete cases, including an opportunity to negotiate with mortgage holders and other creditors.").

39. *See, e.g.*, Bermant, *supra* note 18, at 67 (noting that an alternate measure of success in Chapter 13 could include debtors retaining their collateralized property); *see also* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *What We Really Said About Chapter Thirteen*, NACTT Q., Apr. 1992, at 18, 19 [hereinafter *What We Really Said*] ("The two-thirds statistic does not mean that these Chapter 13 [bankruptcies] were total failures—for example, foreclosure of a home may have been forestalled, or the petitioners might have learned more about household budgeting by developing a plan.").

40. Colloquium, *Panel Discussion: Consumer Bankruptcy*, 67 FORDHAM L. REV. 1315, 1356, 1358 (1999) (relating comments by a private practitioner that "there is nothing like having [a bankruptcy trustee] spend three-to-five years helping the debtor understand how . . . to budget," an education that one "cannot find . . . in a Chapter 7 case," and by a law professor that "one of the remarkable things . . . is that Chapter 13, even in those areas of the country without a formal education program, does by its nature provide some education").

41. *See What We Really Said*, *supra* note 39, at 19 ("The two-thirds statistic does not mean that these chapter 13 [sic] were total failures—for example, . . . the petitioners might have learned more about household budgeting by developing a plan."); *cf.* Siporin, *supra* note 18, at 53 ("There has

Adding punch to this alternate theory was the fact that Chapter 13 cases most commonly ended because the debtors stopped making their payments.[42] In other words, the debtors themselves were the "cause" of the failed cases.[43] In this view, the early exits from Chapter 13 were the outgrowth of providing consumers with more tools for relief. The alternate theory posited that the dropout rate for Chapter 13 was evidence that giving consumers choices allowed them to tailor their uses of the legal system to their individual needs and desires. The argument was plausible, at least in theory. Even Sullivan, Warren, and Westbrook backed down a bit, admitting in a later work that it was a "difficult issue . . . whether Chapter 13 'works' for those petitioners who choose it."[44]

The furious debate over Chapter 13 cooled to an intellectual stalemate. Chapter 13 critics did not give up, but neither did supporters. Eventually, the fervor died down for a lack of new arguments. In successive reforms, Congress added amendments to encourage—and then to force—a greater number of troubled debtors into Chapter 13.[45] Today, Chapter 13 is

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been little recognition that [Chapter XIII] actually constitutes a federal social service program. It provides individualized assistance to meet social needs and is so understood by a number of the debtors."). Siporin offered as an illustration of the potential "disciplining" effect of repayment bankruptcy a situation in which being on a debt plan would help a debtor's alcoholic husband assume his family responsibilities. *Id.*

42. *Cf.* 2010 BAPCPA REPORT, *supra* note 31, at 16–17, 63 tbl.6 (reporting that 49% of Chapter 13 cases nationwide, and up to 85% in some districts, were dismissed for failure to make plan payments).

43. For example, perhaps debtors simply could not respond to obvious economic incentives and were steering themselves into the wrong chapter. *Cf.* Michelle J. White, *Economic Versus Sociological Approaches to Legal Research: The Case of Bankruptcy*, 25 LAW & SOC'Y REV. 685, 691 (1991) ("Another implication of the economic theory of bankruptcy is that debtors will only choose chapter 13 when the terms of the repayment plan make them no worse off than they would be if they filed under chapter 7.").

44. *What We Really Said*, *supra* note 39, at 19.

45. To be sure, the support of Chapter 13 in the decades after the Bankruptcy Code's enactment in 1978 may have come from those who either clearly or latently supported pro-creditor positions, rather than those concerned with improving outcomes for debtors. The political-economy story of recent amendments to consumer bankruptcy law is that the consumer credit industry exerted more influence than debtor interests, resulting in the expansion and entrenchment of Chapter 13. *See* Stephen Nunez & Howard Rosenthal, *Bankruptcy "Reform" in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J.L. ECON. & ORG. 527, 527–29, 553 (2004) (concluding that both ideology and money played a significant role in support for the legislation). Experts in consumer bankruptcy, including trustees, judges, and academics, do still play a role in law reform, and some experts profess strong support for Chapter 13 because they believe it provides better solutions for debtors in certain situations. *See, e.g.*, *In re* Wilks, 123 B.R. 555, 562 (Bankr. W.D. Tex. 1991) ("Congress intended Chapter 13 to be the primary tool of wage earners to save their home."); Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 186 (1997) (noting that Chapter 13 is "often touted as a means to save a home" and commenting that when saving a home is not possible under Chapter 7, Chapter 13 may be more likely to succeed in that goal).

considered a bedrock of consumer bankruptcy, esteemed by many for its nuanced approach to debt relief.[46]

But the basic question of whether Chapter 13 dismissals constitute successful outcomes for the millions of debtors who have taken that path has never been tested empirically.[47] Decades after the enactment of the Bankruptcy Code, knowledge of outcomes of Chapter 13 can largely be reduced to one enduring fact: only one in three cases ends in a Chapter 13 discharge. There is simply no evidence of whether the remaining cases in which debtors do not complete repayment plans are successful in providing relief to debtors. The result is a gaping hole in the knowledge necessary to assess the efficacy of the bankruptcy system. This lack of data is particularly remarkable because dropping out is more common than completion and because that ratio of outcomes has persisted for more than thirty years.[48]

This Article exposes the real outcomes of Chapter 13 bankruptcy for the first time. It provides evidence of what problems families *tried* to solve in bankruptcy and what problems they *did* solve in bankruptcy. These data come from hour-long telephone interviews conducted as part of my original empirical study of 303 debtors from across the nation. Study participants failed to receive a Chapter 13 discharge, and a strong majority exited the bankruptcy system entirely (rather than converting to Chapter 7). My findings lay bare, against theories and conjecture, what really happens to families that file Chapter 13 bankruptcy.

The data show that participating families had two major goals in filing Chapter 13: to keep their homes,[49] and to reduce personal and family stress

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46. *See, e.g.*, BARRY E. ADLER ET AL., CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 25, 39, 517–20, 621 (4th ed. 2007) (arguing that while most individuals now choose Chapter 7, Chapter 13 is valuable because it allows a debtor to discharge claims not dischargeable under Chapter 7 and to circumvent recalcitrant creditors, and explaining that Chapter 13 empowers debtors to assume ownership in restructuring their obligations through the proposal of individualized repayment plans, which may allow them to retain otherwise nonexempt assets); DOUGLAS J. WHALEY & JEFFREY W. MORRIS, PROBLEMS AND MATERIALS ON DEBTOR AND CREDITOR LAW 253 (3d ed. 2006) (observing that many attorneys and judges extol the "wonders" of Chapter 13 relief and noting that Chapter 13 offers a number of benefits not available under Chapter 7, including the ability to retain possession of all property, avoid the need to pay off claims by way of full redemption in a Chapter 7 case, and obtain a stay in favor of co-debtors).

47. Even the most comprehensive study, the Chapter 13 Project, relies solely on the discharge rate as its measure of debtor success. *See* Norberg & Velkey, *supra* note 34, at 504 (explaining that the study relied solely on discharge and refiling rates because they are the only reliable measure of debtor success); *see also* Bork & Tuck, *supra* note 33, at 4 ("Data are not collected on why a chapter 13 case has been dismissed or at what stage of the life cycle the case is dismissed."). To the extent research has gone beyond counting legal outcomes, it has focused primarily on attempting to predict what determines plan completion rather than examining real outcomes in noncompleted cases. *See* David A. Evans & Jean M. Lown, *Chapter 13 Bankruptcy: Successful Versus Unsuccessful Debtors*, 18 PAPERS W. FAM. ECON. ASS'N 33, 33 (2003) ("With the dismal track record of chapter 13, it is important to understand why plans fail (cases are dismissed) or how debtors who succeed in chapter 13 differ from debtors who fail to complete their plans.").

48. *See supra* note 34 and accompanying text.

49. Among all debtors, saving a home was the most commonly identified "most important" goal of bankruptcy. About three-fourths (74%) of the debtors in the study were homeowners, and

by gaining control over their financial circumstances.[50] The data show that families temporarily accomplished these goals during the time they were in Chapter 13. Most kept their homes during bankruptcy. And with collection calls halted and repossessions held at bay, these families reported significantly reduced stress and less marital strain. For many, Chapter 13 may have seemed like divine relief.

But these families received only half answers to their prayers. Once their cases were dismissed, the relief quickly evaporated. Within a few weeks, 14% of homeowners had already lost their homes, and another 59% were in default and on the path to foreclosure. Similarly, the respite from collection calls and repossessions was temporary. In this study's sample, one-fourth (26.6%) of Chapter 13 cases converted to Chapter 7, which would discharge the debtors' unsecured debts. The remaining (74.4%) cases ended in dismissals. This meant families still owed the full amount of their debts plus interest that accrued during the time they were in Chapter 13.[51] As creditors and debt collection agencies learned that the bankruptcies were dismissed, collection efforts began again.[52] For the majority of families dismissed from Chapter 13, relief was only temporary. They spent money that they could ill afford in order to file bankruptcy, only to find themselves unable to accomplish even their most basic goals and without a better solution for their problems.[53]

We might expect these families to be angry and disappointed. For them, Chapter 13 was the law's most potent remedy—a huge step that signaled that they were taking action to protect themselves. Filing gave them a welcome respite from debt pressures, and it fostered the sense that they could recapture the lives they had known before financial problems overtook them. Their phones stopped ringing with creditor calls, and they could enjoy living in their homes without risk of foreclosure. When they could no longer sustain payments in Chapter 13, they held on to their illusions as they quietly exited the system. Fully 83% of families reported that filing bankruptcy was a "very good" or "somewhat good" decision, despite its failure to produce any lasting solution. Some clung to the belief that "something would work out,"

70% of these homeowners said that keeping their homes was their single most important goal in bankruptcy.

50. Nearly all families (99%) interviewed said it was a very important or somewhat important goal for bankruptcy to help them organize and get control of their financial situation; 86% said it was very important or somewhat important to stop harassment from creditors by filing bankruptcy.

51. *See* 11 U.S.C. § 1328 (2006) (providing that discharge is only available upon completion of the plan, with limited exceptions).

52. In the first weeks after their cases were dismissed, 40% of families had already received one or more collection calls.

53. A minority of households, approximately 20%, reported positive outcomes despite having dismissed or converted their cases. Subpart IV(C) of this Article, and particularly Figure 7 therein, describes these data. Fewer than one in five households (19%) agreed that their bankruptcies ended because they had found better solutions. Just over one in four (27%) agreed that their bankruptcies ended because they had accomplished their bankruptcy goals.

while others acknowledged that they had run out of options. Some blamed themselves, saying they had failed the system, and others blamed individual actors such as their attorneys or the trustees in their cases. But very few questioned whether the Chapter 13 system was itself fatally designed and only infrequently capable of solving their financial problems.

Policy makers follow a similar path. We might expect the benevolent policy makers who designed the bankruptcy system to be protesting loudly and pressing hard for changes in the bankruptcy laws to improve alternatives for families mired in debt. Instead, both debtors and policy makers continue to embrace Chapter 13.[54] Despite the evidence of high dismissal rates, the policy debate largely accepts the alternate theory—that incomplete Chapter 13 cases produce solutions on par with completed cases.[55] Others blame any problems with Chapter 13 on bad lawyers, inattentive trustees, or ill-informed judges.[56]

Chapter 13 is a pretend solution. I use this term to mean a social program that does not work as intended but is not critiqued or reformed because its flaws are hidden. The consumer bankruptcy system fits this description, as the data show. While this study's findings are new, the systemic failure of Chapter 13 has existed for decades. The data in this Article are a clarion call to redesign bankruptcy relief to be simpler and blunter, even if the resulting system of rough justice leaves a few sophisticated or lucky people with fewer legal options. The tyranny of choice in consumer law is that the complexity is so expensive and difficult to navigate that most people do not receive any relief, and policy makers never have to confront those poor outcomes.

Chapter 13 also is a cautionary tale about what happens when policy makers—with the best of intentions—offer up a program to help consumers

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54. *See* Ed Flynn & Phil Crewson, *Data Show Trends in Post-BAPCPA Filings*, AM. BANKR. INST. J., July–Aug. 2008, at 14, 14 (noting that during the first twelve months after passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Chapter 13 cases rose from 29% of all bankruptcy filings to 42%); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1953 (2011) (identifying ways in which BAPCPA was designed to push debtors toward Chapter 13 by raising procedural barriers to Chapter 7 and structuring incentives for bankruptcy attorneys to advise their clients to choose Chapter 13).

55. *Cf.* Bermant, *supra* note 18, at 65 (noting that, for some judges, trustees, attorneys, debtors, and secured creditors, completion is not necessary for success); Norberg & Velkey, *supra* note 34, at 504 (observing that some bankruptcy trustees do not consider noncompletion to be equivalent to failure and that in some cases the debtor merely needs the brief protection of Chapter 13 to regain financial footing).

56. *See* Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 440, 450 (1999) (suggesting that judges, trustees, creditors, and debtors' attorneys could reduce dismissed cases if they had data on factors that correlate with case dismissal, but ultimately finding no data that are useful predictors of case outcome); Bork & Tuck, *supra* note 33, at 6–8 (noting that the likelihood of a discharge or dismissal depends on the expertise and attentiveness of judges, trustees, and lawyers, which varies by district).

but fail to adequately monitor outcomes. The program's mere existence immunizes policy makers from the need to assess whether the program is an effective solution. In bankruptcy, Congress can push more debtors into Chapter 13, confident that its supporters will defend the move as a benevolent act rather than a callous way to leave debtors at the mercy of their creditors. New efforts to point out continued suffering from overwhelming debts may be met with a wagging finger and a reminder that a good solution already exists, and if problems persist, perhaps it is the moral fiber of these troubled families that is the real problem. Because experts can show that the legal tools work in hypothetical cases, any failures in real cases are the fault of the debtors themselves, not the design of the system.

The result is an unholy contract between the helpers (policy makers) and the helped (bankruptcy debtors). Neither side has succeeded, yet both are lulled into inaction. The pretend solution is powerful because it does meaningful work for both parties. Pretend solutions entrench the status quo and discourage efforts to argue that laws need to be improved. Families content themselves with false hope, and policy makers content themselves with false promises.

Pretend solutions are not unique to bankruptcy. A number of problems may be declared solved, while in fact, the social policies are failing. The data reported in this Article suggest ways to frame a theory of pretend solutions. Complexity, for example, facilitates the repeated redefining of the purpose of a law, so that every twist and turn in the law creates the opportunity for the adoption of a new theory of success. Similarly, expert participation in crafting a solution creates a powerful assumption from the outset that the program cannot be improved—and therefore does not need monitoring and assessment. Not every program with some of the features of a pretend solution is a failure. But these features, often viewed as markers of a generous and effective social program, can signal that the legal solution to a problem may be a mirage.

This Article also illustrates the cure for pretend solutions. Empirical research can expose pretend solutions or, if conducted early enough, prevent recently established programs from becoming pretend solutions. For example, the federal government's Home Affordable Modification Program (HAMP) was rolled out with an identified goal of helping three to four million homeowners stay in their homes.[57] While there were no plans to report on whether that goal had been accomplished, the program was part of the

57. *See* President Barack Obama, Address at Dobson High School, Mesa, Arizona: Remarks by the President on the Home Mortgage Crisis (Feb. 18, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-mortgage-crisis (proclaiming that the housing plan "will enable as many as 3 to 4 million homeowners to modify the terms of their mortgages to avoid foreclosure"); Press Release, U.S. Dep't of the Treasury, Homeowner Affordability and Stability Plan Fact Sheet (Feb. 18, 2009), *available at* http://www.treasury.gov/press-center/press-releases/Pages/20092181117388144.aspx (reiterating that the plan would "offer reduced monthly payments for up to 3 to 4 million at-risk homeowners").

Troubled Asset Relief Program (TARP) and therefore fell under the jurisdiction of the Congressional Oversight Panel.[58] The Panel, led by Elizabeth Warren, insisted on regular data reporting—and it cross-examined those data and reported them in accessible language.[59] The conclusion was inescapable: HAMP was a dismal failure.[60] Despite the Obama Administration's efforts to redefine the goal of HAMP to claim success, the data and public reporting made clear that HAMP "failed to provide meaningful relief to distressed homeowners and, disappointingly, [that] the Administration inadvertently created a sense of false expectations among millions of homeowners who reasonably anticipated that they would have the opportunity to modify or refinance their troubled mortgage loans under HAMP."[61] This empirical analysis of outcomes revealed HAMP as a masquerade and prevented it from becoming a pretend solution.[62] Because the failure of the existing program was obvious, policy makers must again confront the problem of unaffordable mortgages.

The differences between HAMP (which was recognized as a nonsolution) and Chapter 13 bankruptcy (which has existed for decades as a pretend solution) suggest factors to consider in designing a legal solution to a social problem. Clever, or even generous, front-end statutory solutions do not guarantee the desired outcomes. Successful solutions require the establishment of objectives for the law and the simultaneous design of back-end program evaluations. Without these checks, the law can continue to systemically underperform its objectives.

The way to avoid pretend solutions is to focus sharply on outcomes, not intentions. At the outset, policy makers should identify simple outcomes and

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58. *See* 12 U.S.C. § 5233(b)(1)(A)(iv) (Supp. III 2009) (assigning to the Congressional Oversight Panel the duty of issuing regular reports on "the effectiveness of foreclosure mitigation efforts"); CONG. OVERSIGHT PANEL, OCTOBER OVERSIGHT REPORT: AN ASSESSMENT OF FORECLOSURE MITIGATION EFFORTS AFTER SIX MONTHS 43 (2009) [hereinafter OCTOBER OVERSIGHT REPORT] (stating that HAMP is funded by a government commitment comprised of funds from both TARP and the Housing and Economic Recovery Act).

59. *See* OCTOBER OVERSIGHT REPORT, *supra* note 58, at 34–35 (detailing the Treasury Department's data collection and reporting efforts and encouraging the Treasury to improve them).

60. *See* CONG. OVERSIGHT PANEL, APRIL OVERSIGHT REPORT: EVALUATING PROGRESS ON TARP FORECLOSURE MITIGATION PROGRAMS 5 (2010) ("The redefaults signal the worst form of failure of the HAMP program: billions of taxpayer dollars will have been spent to delay rather than prevent foreclosures."); *see also* CONG. OVERSIGHT PANEL, DECEMBER OVERSIGHT REPORT: A REVIEW OF TREASURY'S FORECLOSURE PREVENTION PROGRAMS 46 (2010) [hereinafter DECEMBER OVERSIGHT REPORT] (reporting that HAMP had achieved only 483,342 active permanent modifications and calculating that since HAMP began, there have been just over nine foreclosure starts for every one HAMP modification).

61. DECEMBER OVERSIGHT REPORT, *supra* note 60, at 124.

62. *See* OCTOBER OVERSIGHT REPORT, *supra* note 58, at 136–40 (presenting the dissent of Congressman Jeb Hensarling, who nonetheless acknowledged that "[a] fair reading of the Panel's majority report and my dissent leads to one conclusion—HAMP and the Administration's other foreclosure mitigation efforts to date have been a failure"); *see also* 157 CONG. REC. H1994 (daily ed. Mar. 29, 2011) (introducing the HAMP Termination Act of 2011, which sought to "put an end to the poster child for failed Federal foreclosure programs").

design ways to measure whether those ends are being achieved. The resulting data will break the satisfying illusion of success and drive better social programs.

II. A Primer on Chapter 13 Bankruptcy Law

Today, nearly all consumers who file bankruptcy still have the option of choosing between Chapter 7 and Chapter 13.[63] Chapter 7 is more popular, accounting for about two-thirds of consumer filings in recent years.[64] In Chapter 7, a debtor receives an immediate discharge of his unsecured debts in exchange for turning over all nonexempt assets for distribution to his creditors. Because of relatively generous exemption levels, about 96% of consumer Chapter 7 cases are "no-asset" distributions,[65] and debtors receive a discharge of their unsecured debts about four months after filing bankruptcy.[66]

Chapter 13 attracts about one in three bankrupt households.[67] Only individuals or families (not entities or businesses) with debts below statutory thresholds may file Chapter 13.[68] Eligibility also depends on the debtor

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63. The "means test" incorporated into the Bankruptcy Code in 2005 does screen Chapter 7 cases for presumed "abuse," and if the debtor cannot rebut the presumption of abuse, the case is dismissed or the debtor must convert to Chapter 13. 11 U.S.C. § 707(b) (2006). It appears that only a small number of people who have chosen to file bankruptcy since the 2005 law was implemented have been truly "forced" into Chapter 13. About one-half of one percent of all Chapter 7 debtors are forced to convert to Chapter 13 after failing the means test and then losing litigation to rebut the means-test presumption that their Chapter 7 case is an abuse of the system. *See* Katie Porter, *Means Test Changes Won't Mean Much*, CREDIT SLIPS (Oct. 26, 2009, 5:34 AM), http://www.creditslips.org/creditslips/2009/10/means-test-changes-wont-mean-much.html (citing U.S. DEP'T OF JUSTICE, U.S. TR. PROGRAM, ANNUAL REPORT: FISCAL YEAR 2008, *available at* http://www.justice.gov/ust/eo/public_affairs/annualreport/docs/ar2008.pdf) (concluding that trustees filed motions to dismiss for abuse in only 0.4% of Chapter 7 cases in 2008). The means test may operate primarily as a sorting mechanism to screen people into Chapter 7 or Chapter 13 before filing or to discourage any bankruptcy filing. The initial empirical evidence, however, suggests that the inflation-adjusted median income of Chapter 7 and Chapter 13 filers did not change between 2001 and 2007, which is consistent with the idea that the means test did not dramatically influence either the bankrupt population or the selection between Chapter 7 and Chapter 13. Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A.E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 361–63 & fig.3 (2008).

64. Katie Porter, *Today's Consumers Prefer Chapter 7 Bankruptcy 3 to 1*, CREDIT SLIPS (Mar. 22, 2010, 6:08 PM), http://www.creditslips.org/creditslips/2010/03/todays-consumers-prefer-chapter-7-bankruptcy-3-to-1.html (noting that the rate of Chapter 13 filings was 38% in 2006–2007, 31% in 2008, and 26.5% in 2009).

65. Ed Flynn et al., *Chapter 7 Asset Cases*, AM. BANKR. INST. J., Dec.–Jan. 2003, at 22, 22.

66. *See supra* note 31 and accompanying text.

67. *See supra* note 64 and accompanying text.

68. 11 U.S.C. § 109(e) (2006). As of the date of the bankruptcy petition, a Chapter 13 debtor must have noncontingent, liquidated, unsecured debts of less than $360,475 and noncontingent, liquidated, secured debts of less than $1,081,400. *Chapter 13: Individual Debt Adjustment*, ADMIN. OFF. U.S. COURTS, http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/Chapter13.aspx.

having "regular" income,[69] although that income could be from nonwage sources such as government benefits or family support.[70]

Chapter 13 permits debtors to retain all assets, regardless of whether the assets are exempt under law.[71] In return, debtors pay their "disposable income" to their unsecured creditors and make payments on their secured obligations.[72] The repayment period is between three and five years.[73] The bankruptcy court must confirm the repayment plan for it to take effect.[74] The terms of repayment are complex, reflecting an interaction of legal requirements and negotiations with creditors.[75] Generally, Chapter 13 debtors are required to live on modest budgets, which are reviewed by courts and bankruptcy trustees at the time of plan confirmation.[76]

Chapter 13 debtors can retain assets secured by collateral (homes, cars, boats, etc.) only if they can continue to make the ongoing payments on those debts during the repayment plans.[77] For most collateral other than the debtor's principal residence, Chapter 13 permits a debtor to restructure the terms of secured debts, typically by writing down the obligation to the value of the collateral.[78] Home-mortgage debt may not be modified;[79] this is the "cramdown" prohibition.[80] However, Chapter 13 is widely used by

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69. 11 U.S.C. § 109(e).

70. *See, e.g.*, *In re* Antoine, 208 B.R. 17, 20 (Bankr. E.D.N.Y. 1997) (finding that spousal support can be a source of regular income for purposes of 11 U.S.C. § 109(e)); *In re* Dawson, 13 B.R. 107, 109 (Bankr. M.D. Ala. 1981) (noting that "persons who receive . . . various government-provided benefits qualify as individuals with regular income").

71. 11 U.S.C. § 1327(b)–(c).

72. *Id.* § 1325(b)(1)(B); *see also id.* § 1307(c)(6) (allowing dismissal or conversion of the case if the debtor fails to make payments).

73. *See id.* § 1322(d) (stating that plans may be three to five years, depending on circumstances, but prohibiting courts from approving periods longer than five years in any case). It appears that the majority of Chapter 13 debtors propose plans of five years in length. *See* Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 AM. BANKR. L.J. 431, 453–55 & tbls.13 & 14 (2007) (reporting that median and modal plan length was 60 months for a sample of Chapter 13 cases filed in 1994 in seven judicial districts).

74. 11 U.S.C. § 1327(a).

75. *See id.* § 1322(a)–(b) (listing both the minimum mandatory requirements a repayment plan must contain and the terms a debtor may include in his repayment plan).

76. *See id.* § 1325(b)(1) (prohibiting confirmation of a plan unless it either pays objecting creditors in full or distributes all of the debtor's "projected disposable income" as determined by the court).

77. *See id.* § 1307(c)(6) (allowing a creditor to force the liquidation of a debtor's property if the debtor stops making payments as required under the repayment plan).

78. *See id.* § 1322(b)(2) (allowing modification of a secured creditor's rights); *id.* § 1325(a)(5)(B)(ii) (allowing confirmation of a plan that pays out only the allowed amount of a secured claim); *id.* § 506(a)(1) (restricting the allowed amount of a secured claim to the value of the collateral).

79. *Id.* § 1322(b)(2).

80. *See supra* note 15 and accompanying text; *see also* William Safire, *Cramdown*, N.Y. TIMES, Jan. 22, 2009, *available at* http://www.nytimes.com/2009/01/25/magazine/25wwln-safire-t.html (describing *cramdown* as a "vivid noun [that] has long enlivened the language of bankruptcy law").

homeowners facing foreclosure and has an explicit home-saving purpose.[81] Debtors are permitted to cure missed mortgage payments in their repayment plans, with foreclosure stayed as long as a debtor makes all ongoing payments as required by his mortgage loan while also catching up on all missed payments as set forth in his repayment plan.[82]

A Chapter 13 trustee administers the case.[83] The trustee collects payments from the debtor and makes distributions to creditors.[84] At the end of the repayment plan, the debtor receives a discharge of any remaining amount of unsecured debt.[85] The discharge does not affect liens on property, so if a debtor fails to make payments after bankruptcy on secured obligations such as home and car loans, he can lose that property.[86] However, the discharge prevents the creditor from suing the debtor for any deficiency outstanding after the collateral is sold and the proceeds applied to the debt.[87] The discharge basically functions as an injunction that protects the debtor from personal liability for any discharged obligations. The primary exceptions to discharge are domestic support and educational obligations, which are not dischargeable in either Chapter 7 or Chapter 13.[88]

Chapter 13 is expensive. Attorneys charge two to three times more to file a Chapter 13 case than to file a Chapter 7 case. In 2007, the median attorney's fees for Chapter 13 were $2,500, in comparison with $1,000 for Chapter 7.[89] To put these costs in context, consider Chapter 13 debtors' incomes at the time of bankruptcy. In 2007, the median Chapter 13 debtor had monthly income at the time of filing of $3,058.[90] To pay attorney's fees in a lump-sum payment at the time of filing, as is required to file Chapter 7 bankruptcy, families may have to save up for many months.[91] Chapter 13 permits debtors to pay their attorney's fees as part of their repayment plans.[92] Most attorneys require a modest down payment of a few hundred dollars at

81. *See infra* section IV(A)(1).

82. 11 U.S.C. § 1322(b)(3), (b)(5), (c).

83. *Id.* § 1302(a)–(b).

84. *Id.* §§ 704(a)(1), 1302(b).

85. *Id.* § 1328.

86. *See id.* § 1328(a)(1) (exempting from discharge secured or unsecured debts when the last payment is after the end of the plan); *id.* § 1322(b)(5) (permitting the trustee to arrange plans for payment of secured and unsecured debt).

87. *See id.* § 1328(a) (discharging debts except for those enumerated); *id.* § 506(a) (bifurcating the secured debt into an allowed secured claim that is still secured by the lien and an allowed unsecured claim subject to the discharge).

88. *Id.* §§ 101(14A), 523(a)(5), 523(a)(8), 1328(a)(2).

89. *See supra* note 29.

90. Author's calculations from the 2007 Consumer Bankruptcy Project (on file with author).

91. Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 292, 319, 323 (2010).

92. HENRY J. SOMMER ET AL., NAT'L CONSUMER LAW CTR., 1 CONSUMER BANKRUPTCY LAW AND PRACTICE § 16.4 (9th ed. 2009); *see also* 11 U.S.C. § 1322(a)(2) (requiring Chapter 13 plans to provide full payment of priority claims); *id.* §§ 503(b)(4), 507(a)(2) (granting priority to "administrative expenses" such as attorney's fees).

the time that the petition is filed and receive the remaining fees in the first few payments under the repayment plan.[93] There are no estimates of how many people are driven to Chapter 13 by the ability to finance attorney's fees.

When enacted in 1978, Chapter 13 offered "carrots" to incentivize the choice of repayment.[94] Reforms have reduced many of those benefits, including a broader discharge for debts in Chapter 13 than in Chapter 7.[95] Today, the "stick" of a means test labeling debtors as abusers of the Chapter 7 system[96] will push a small fraction of debtors to file Chapter 13. But the vast majority of families choose Chapter 13 voluntarily.[97] There is little systematic research on why families file Chapter 13 instead of Chapter 7. In the study reported in this Article, only about half (47%) of all debtors even considered Chapter 7. Those debtors were asked why they chose Chapter 13. The most popular answers were wanting to keep assets such as homes or cars, attorney advice that Chapter 13 was better for their situation, and wanting to try to repay their debts.

Despite successive reforms that have made Chapter 13 less generous to debtors, the percentage of Chapter 13 filings has barely budged from its one-third share of bankruptcies filed.[98] In 2010, over 400,000 households filed Chapter 13 cases.[99] Chapter 13 is a centerpiece of the American bankruptcy system, emblematic of the focus on consumer choice and sophisticated legal tools that carefully balance the rights of debtors and creditors.

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93. *See* SOMMER, *supra* note 92, at § 16.4.1 (positing that an attorney's assurance that his or her fee will be paid through the plan makes him or her more comfortable about taking the client's case with only a modest down payment rather than a large advance payment of all or most of the fee).

94. *See* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 346 (6th ed. 2009) ("Congress attempted to influence debtors to choose Chapter 13 by offering carrots, such as a broader discharge and the ability to deal with secured creditors over time.").

95. *See* Thomas Evans & Paul B. Lewis, *An Empirical Economic Analysis of the 2005 Bankruptcy Reforms*, 24 EMORY BANKR. DEV. J. 327, 338–39 (2008) (describing the reduced number of items included in Chapter 13's "super-discharge" after the amendment of the Bankruptcy Code).

96. *See supra* note 63.

97. *See* WARREN & WESTBROOK, *supra* note 94, at 347 (observing that "almost 90 percent of those who now file in Chapter 13 are below-median debtors who could have filed in Chapter 7 despite the means test").

98. *See supra* note 24 and accompanying text.

99. ADMIN. OFFICE OF THE U.S. COURTS, U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2010, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/1210_f2.pdf.

III. Methodology of the Chapter 13 Dropout Study

A. Study Design

The purpose of this study is to provide a systematic examination of what actually happens to the households whose Chapter 13 cases do not end in plan completion and a Chapter 13 discharge. Such data are not available from public court records. As a matter of practice, almost all dismissed cases are officially terminated by a trustee's motion to dismiss the case, most commonly because the debtor quit making payments.[100] This is because debtors' attorneys generally do not go to the expense and hassle of filing motions to dismiss cases. Instead, the attorneys instruct the debtors to simply stop paying and let the trustee dismiss the case. For this reason, the procedural outcome of trustee dismissal reveals almost nothing about the reasons for the outcome of a case. To see why, imagine two situations that could result in a dismissed Chapter 13 case. In the first situation, the debtor confirmed a repayment plan but lost her job. She stops paying the trustee because she cannot afford to complete her repayment plan. She will exit bankruptcy still delinquent on all her debts. In the second situation, the debtor confirmed a repayment plan. She then made eighteen consecutive plan payments, paying off all the arrearages on her mortgage and becoming current on the loan. This debtor received a raise recently and thinks she can manage to pay off her modest unsecured debts on ordinary nonbankruptcy terms. She stops paying the trustee because her attorney told her this would end her bankruptcy, which she no longer sees herself as needing. Both debtors will exit the Chapter 13 system with a case disposition of "dismissed for failure to make plan payments." However, these debtors have very different outcomes from bankruptcy if measured in terms of their future economic prospects and relief from prior debts. The publicly available court-record data mask these differences and do not permit a researcher to disprove the alternate theory of Chapter 13.

To see the real outcomes from bankruptcy, I conducted a study of 303 debtors who did not receive a discharge. In the remainder of this Article, I refer to the study as the "Chapter 13 Dropout Study." The cases included in the study ended in either dismissal or conversion; they share the fact that the debtors "dropped out" of Chapter 13. Shortly after their cases ended, debtors were interviewed about their goals for bankruptcy and whether they achieved these goals. The resulting data reveal why Chapter 13 bankruptcy cases end—not merely in legal terms (i.e., the debtor stopped paying the trustee), but also in terms of life events. In the subparts below, I provide more details on the survey's techniques and sample. Before turning to those issues, I briefly describe the key research questions of the survey interview.

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100. *See supra* note 42 and accompanying text.

The main goal of the interview was to measure whether dismissed or converted Chapter 13 cases are successes or failures from debtors' perspectives.[101] The first part of the interview asked debtors what goals they wanted to accomplish in bankruptcy. Debtors were asked how important it was to them to accomplish each specific named goal. This was repeated for more than a dozen goals that were likely reasons the debtors chose to file bankruptcy generally and Chapter 13 in particular. Debtors were also asked if they had any other goals and to identify their single most important goal from a list of all self-identified "very important" goals. Additional questions were asked about saving property, particularly preventing a home foreclosure, because prior research has established that 75% of Chapter 13 debtors are homeowners and that nearly all of these homeowner debtors are delinquent on their home mortgages at the time of filing.[102] The questions regarding bankruptcy goals permit me to move beyond the mere legal end result of a nondischarge case disposition and instead consider a more nuanced set of outcomes from bankruptcy.[103]

The second part of the interview then asked debtors about whether they achieved their bankruptcy goals. Various measures were used to probe overall outcomes and goal-specific outcomes from the Chapter 13 bankruptcies. Some questions sought debtors' subjective responses on the degree to which they felt they had accomplished their overall goals or their single most important goal in bankruptcy. Other questions were objective. For example, debtors were asked if they still owned their homes, and if not, why they no longer had their homes. They were also asked if they were current on their home mortgages or facing foreclosure. Other measures of outcome included questions about debtors' financial situations at the time of the interview (which usually occurred about two months after case termination) and questions about whether they thought filing bankruptcy was a good decision. In addition to financial characteristics, the interview queried debtors about aspects of psychological and social well-being—such as self-perceptions of stress and spousal relations—before, during, and after bankruptcy. These are crucial nonfinancial benefits of bankruptcy; prior

101. These nondischarge-terminated bankruptcy cases could have resulted in greater payouts to creditors than if the debtor either had filed Chapter 7 or had not filed bankruptcy at all. Creditor recovery is uncontrovertibly an aspect of the design of the American bankruptcy system. But the fresh start for debtors—embodied by the discharge—is the heart of the Bankruptcy Code, and this is a debtor-centric goal. *See generally* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67 (2006) (describing the primacy of the fresh start in the consumer bankruptcy system).

102. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEXAS L. REV. 121, 141 nn.125 & 127 (2008).

103. *Cf.* Daphna Lewinsohn-Zamir, Beyond the Bottom Line: The Complexity of Outcome Assessment 6–11 (Sept. 27, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1479051 (describing differences between end results and outcomes). In the bankruptcy context, the end result is a dismissed case. But as Lewinsohn-Zamir notes, "Individuals regard various factors, in addition to end-results, as part of the ensuing outcome itself." *Id.* at 4.

research suggests that collection calls and "dunning letters" are a primary reason that consumers decide that they should seek bankruptcy relief.[104] Collectively, the interview questions were designed to permit an evaluation of whether a debtor can be fairly characterized as having achieved a meaningful fresh start despite not receiving a discharge.

The interview did not assume that bankruptcy was the only or best solution to these families' financial problems. The interview asked debtors why they had stopped paying their trustees and whether this was due to financial hardship such as a decline in income. Debtors were also asked whether their cases had ended because they found alternative solutions that they preferred to bankruptcy (such as negotiating outside of bankruptcy with a creditor, committing to a debt-management plan, etc.). Because these processes do not require the participation of a lawyer or court and occur outside the insular judicial process of bankruptcy, they are much harder to observe.

B. Sampling Frame

This project documents the outcomes of debtors who exit the system. It is not an effort to predict completion of Chapter 13. The relevant sample, therefore, selected debtors whose Chapter 13 cases had ended, instead of all debtors who had filed Chapter 13 cases.[105] In limiting the sample to noncompleted cases, I make the assumption that the one-third of all Chapter 13 cases that end in discharge are "successes."[106]

To obtain a sample of debtors whose Chapter 13 cases were terminated without discharge, I worked with a data service, AACER, which gathers data from all bankruptcy court files in the nation.[107] AACER provided me with a complete list of all Chapter 13 cases in the United States that ended without a discharge for a given time period.[108] Eligible cases included those that were dismissed (regardless of whether by debtor's motion, trustee's motion, etc.) or converted to Chapter 7.[109] For any given time period, AACER's list was the universe of Chapter 13 cases that ended without a Chapter 13 discharge.

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104. *See* Mann & Porter, *supra* note 91, at 327–28 (suggesting that "in practice it is the 'dunning' stage of collection that is important in the etiology of bankruptcy filings").

105. The 2007 Consumer Bankruptcy Project sample is appropriate for a study attempting to predict plan completion because it contains approximately 600 Chapter 13 cases filed in 2007. The final result of those cases can be determined by checking the court records in 2012, five years after the cases were filed.

106. For additional discussion of how data from the Chapter 13 Dropout Study can be combined with the one-third discharge rate for an overall assessment of the Chapter 13 system, see *infra* Part V, and subpart V(A) in particular.

107. AACER is an acronym for Automated Access to Court Electronic Records and is part of Epiq Systems, a company that provides data from bankruptcy court records. AACER also provided the lists for the 2007 Consumer Bankruptcy Project and is affiliated with the Harvard Bankruptcy Data Project, with which I am a fellow. I thank Mike Bickford, Anna Biggs, and other AACER staff for their assistance.

108. Cases from Puerto Rico were excluded from the sample.

109. Cases that converted to Chapter 11 or 12 were excluded from the sample.

Because AACER conducts daily monitoring of all bankruptcy cases in the nation, it can generate lists of "fresh" cases that were just terminated. However, the terminated cases themselves may have been filed anytime during the preceding five-year period. This is because cases have different longevities. Some cases terminate shortly after being filed, and others may not convert or dismiss until near the end of their repayment plan. Prior research found that the typical case that does not end in discharge terminates within two years of being filed.[110] The majority of cases were filed in the latter half of 2008 or during 2009. However, the sampling procedure gave all cases that terminated before plan completion an equal chance of being in the sample, regardless of the duration of time between filing and termination.

This sampling strategy is a new and innovative approach to studying outcomes in Chapter 13. Prior studies have interviewed an entire sample at the same moment in time (e.g., one year after the bankruptcy cases were filed).[111] The result of such an approach is that debtors are all at different points in their cases—some still trying to confirm a repayment plan, some having dropped out of bankruptcy without a discharge, some making payments under a plan, etc.—when the data are gathered. Unless such a study is conducted five years after all cases have been filed, the sample will not be representative of the full panoply of case outcomes. Sampling from recently terminated cases allowed me to interview debtors within a few weeks of their cases ending. This reduced problems in memory distortion from interviewing people about events that occurred in the past. It also likely boosted the response rate and reduced the number of people whose contact information in the bankruptcy court records was not valid. Virtually all debtors who participated in this study were interviewed within two months of the termination of their cases.

There remained some variation, however, among cases in how much time elapsed between when a debtor quit paying the bankruptcy trustee and when the case was terminated. Figure 1 is a histogram of how many months elapsed between when debtors last paid the bankruptcy trustee and the time of the interview. Over half of debtors were interviewed within three months of stopping payments, and 86% were interviewed within six months of stopping payments. The modest observed variation is largely a result of "local legal culture," a longstanding feature of the consumer bankruptcy system.[112] Some trustees are more aggressive in dismissing a case after a

110. *See* Norberg & Velkey, *supra* note 34, at 529 (reporting that cases that were dismissed or converted after plan confirmation lasted, on average, less than two years, whereas cases that were dismissed or converted before plan confirmation lasted, on average, less than six months).

111. The 2001 Consumer Bankruptcy Project used this strategy. *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP 182 app. (2003) (detailing the sample and data collection procedures of the 2001 Consumer Bankruptcy Project).

112. *See* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 556–61 (1993) (describing how lawyers' desire to fit in to the legal culture in different cities drives differences in bankruptcy practice); Teresa A. Sullivan, Elizabeth Warren &

missed payment, while others give debtors a grace period of three or so months in which they may catch up on their missed payments. Additionally, some debtors responded more quickly to the invitation to participate in the study than other debtors.

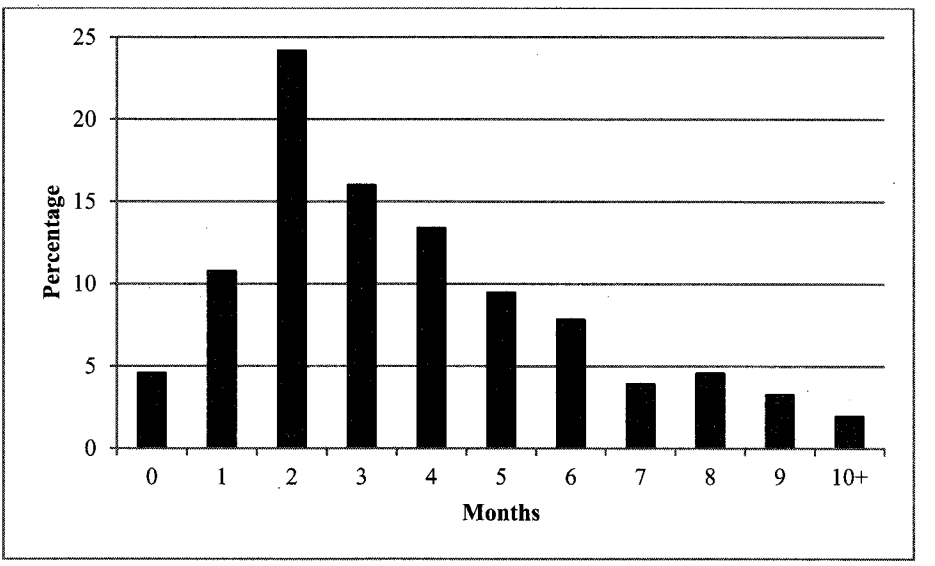
I obtained six lists of terminated Chapter 13 cases from AACER. The first list was treated as a pretest of survey procedures and consisted of a random sample of one hundred cases, from which seventeen interviews were completed. The remaining five lists make up the study sample. The lists each contained a single week of terminated cases from across the nation. While I could not identify any literature on seasonal variation in case termination,[113] I spread the draws of samples over several months. The lists were drawn for a given week from February, March, April, June, and August in 2010. This choice also permitted me to manage the scale of data collection with only a single research team member conducting the vast majority of interviews, eliminating the problem of intercoder reliability.[114]

Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 806–07 (1994) (describing the "pervasive, systematic influence" of local legal culture on the bankruptcy system).

113. There is some research that seeks to identify seasonal effects in bankruptcy filings. *Compare* AS WE FORGIVE, *supra* note 13, at 344–45 (finding some seasonality in bankruptcy filings, including an increase at the end of the summer, but "no post-Christmas rush in the early spring"), *with* Mann & Porter, *supra* note 91, at 319–22 (finding some evidence of a seasonal filing effect in early spring because the tax refund seems to be used to fund attorney's fees).

114. Of course, even with one person, there is the question of whether that coder was reliable. While an estimate of reliability was measured for the court records data, *see infra* subpart III(C), there is no feasible way to construct such a measure for interviews, where replication is not possible.

Figure 1. Months Elapsed Between Study Interview and When Debtor Stopped Paying Trustee



Source: Chapter 13 Dropout Study

Note: $N = 303$

From each list of terminated cases, I drew a random sample. The lists varied in size from one hundred cases to five hundred cases.[115] The total random sample from the five lists was 1,200 cases. This number was ultimately reduced by eleven debtors, for reasons I explain in subparts III(C) and (D), *infra*.

Like most empirical studies, the Chapter 13 Dropout Study reflects data from particular moments in time. The cases in this sample ended in 2010 but began in varying years, primarily 2008, 2009, and 2010. The U.S. economy during this period has been weak, and some cases were filed during a recession; families have struggled in particular with mortgage debts and with the effect of declining home prices. Because many people file Chapter 13 to save their homes, the mortgage problems of this recession may have skewed the sample and the data. It is certainly possible that a study replicating this one in later years (or hypothetically occurring in prior years) would produce different results. There are reasons, however, to doubt the degree of distortion from the recession. First, the one-in-three discharge rate for Chapter 13 has been relatively steady for the last thirty years, including during other

115. The variation in size of the random samples was a result of differing capacities for handling the data collection process.

recessions.[116] More recently, the 2007 Consumer Bankruptcy Project has updated the status of the approximately seven hundred Chapter 13 cases in its random national sample. In the first four years after being filed in 2007, 59% of Chapter 13 cases in that sample ended in dismissal or conversion.[117] While this is below the typical 66% figure, a few more cases will likely end without discharge in the final year of repayment. This statistic, plus its projected trend, suggests that any distortion from nontraditional mortgages, high unemployment, or the recession is not wholly altering outcomes in Chapter 13. If anything, the finding from the 2007 Consumer Bankruptcy Project suggests that slightly fewer debtors are dropping out of Chapter 13 during the recession. This would mean that the Chapter 13 system may be performing slightly better than usual during the period of the Chapter 13 Dropout Study. At this point, one cannot untangle whether any variation from the 66% nondischarge rate stems from the recession, the 2005 amendments to the Bankruptcy Code, or the timing of sampling.

To the extent that there are changes in Chapter 13 outcomes from various economic factors, it remains important to observe how Chapter 13 debtors fare at this moment in time. While financial distress from overindebtedness occurs in boom economies as well, it may be most socially important to have a well-functioning bankruptcy system in dire economic conditions such as those the United States has experienced in the last few years. I also cannot eliminate the possibility that Chapter 13 outcomes are skewed in a positive direction by the unusual economic conditions. For example, people may be less likely to seek Chapter 13 relief when their homes are declining in value; with fewer homeowners coming into Chapter 13, the statistics on home-saving may be dampened. On balance, given the steady rate of dismissal in this time period, I believe that this study's sample is useful for making generalizations about the Chapter 13 system.

C. Data Collection Process

The primary research instrument in this study was a computer-assisted telephone interview. The software prompted the interviewer with the applicable questions for each debtor (including adjustments based on prior answers), displayed them on screen for the interviewer to read aloud to the debtor, and simultaneously permitted the interviewer to record the debtor's answers.

The questions, as described above in subpart III(A), focused on documenting debtors' outcomes at the time they exited Chapter 13. The design of the interview involved several stages. First, I spoke with

116. For data on Chapter 13 plan completion since 1978, see *supra* notes 23–26 and accompanying text.

117. Data from the 2007 Consumer Bankruptcy Project (on file with author). The remaining 41% of cases in the sample are either pending or a Chapter 13 discharge has been entered.

professionals who work in the Chapter 13 system, including trustees, judges, and attorneys, to help identify appropriate options for closed-ended responses. After drafting the interview questions, I repeatedly revised and tested them. This included having the interview questions reviewed by a sociologist with expertise in surveying bankruptcy debtors and by the UC Berkeley Center for Survey Research. After revisions, the questions were tested for ease of reading aloud and to gauge the length of the interview. I paid considerable attention in writing the questions and responses to ensuring that the interview was logically organized and that people with high-school educations who had no legal training could understand the questions. When the interview was finalized, a custom computer-assisted interview platform was written. Practice interviews were completed before the data collection began to familiarize the interviewer with the database and the questions.

To invite debtors to participate in the interview, I mailed a letter to the debtor in each case in the random sample. Approximately 10% of these letters were returned as undeliverable; these cases were replaced with randomly drawn cases from the universe of cases for the corresponding week. After data collection ended, a few mailings were returned as undeliverable and were not replaced. These instances reduced the final sample of debtors contacted by letter to participate from 1,200 to 1,189.

The debtors' names and addresses were provided by AACER as part of the case information it gathers when it obtains court record data. If a case was filed jointly, the letter was addressed to both spouses. When debtors were contacted, we interviewed any adult person in the household, even if he or she had not technically been a debtor because a single petition was filed. We inquired, however, if the nondebtor spouse was very familiar with the debtor's bankruptcy case. Herein, the respondents will be called "debtors," although technically a few were not debtors but rather adults living with a debtor.

The letter of invitation for the study contained the required elements of consent for academic research on human subjects and explained the purpose of the study. The letter told debtors that if they participated in the study they would be provided a $50 gift card to their choice of Target or Walmart. A Spanish-language version was printed on the reverse side of the letter. Enclosed with the letter were a participation form and an addressed, stamped envelope for the return of the participation form. The letter also provided a toll-free number that debtors could call to be interviewed. Upon receipt of a request to participate, an interview was scheduled and completed at the debtor's convenience.

About two weeks after the initial mailing, debtors who had not yet responded to the initial letter were contacted by telephone if possible. Telephone numbers are not provided on bankruptcy court records except for pro se debtors. Public search engines and a for-fee service were used to

attempt to locate telephone numbers, but ultimately, valid phone numbers were only found for about half of the debtors.[118] About four to six weeks after the initial mailing, a follow-up reminder letter was sent to debtors who had not completed interviews. People who declined to participate were never contacted subsequent to their refusal.

The telephone interview database permitted all data to be coded simultaneously with the interviews. The questions were primarily closed-ended, such that a specific response was selected to match a respondent's answer. Interviewers coded all responses to open-ended questions, as well as any additional spontaneous comments, into overflow. The data set is nearly complete for all items for all interview participants. There are few missing data, and refusals to individual interview items (captured by "don't know" and "no answer" responses) were rare. The interviews averaged forty-five minutes in length, although some were over an hour.

The study gathered a second type of data to supplement the interview data. For each completed interview, data were coded from the debtors' bankruptcy court records. The records were downloaded from PACER, the government's online access system for the courts. These data provide a more complete profile of each debtor's situation at the time of bankruptcy. Variables include the existence, chapter, and date of any prior bankruptcy; assets, debts, income, and expenses; and demographic information such as home-ownership status and occupation. Details about the length and structure of the Chapter 13 repayment plans were also coded. For each case, approximately 140 variables were coded. A random sample of 10% of the cases (30 cases) were coded a second time. This recoding was blind—that is, it was done without the coder knowing that it was a recoded case and without access to the initial coding. I compared every variable for every case and noted differences. Discrepancies were noted in less than 0.5% of the data.

The data from these court records and the telephone interviews were matched for each participant and merged together for analysis. I primarily use telephone interview data for the analysis in this Article.

D. Sample Characteristics

The study completed interviews with 303 debtors.[119] Two interviews were conducted in Spanish; the remaining 301 were conducted in English. Demographically, the participants in this study appear to be similar to participants in other studies, including the 2007 Consumer Bankruptcy

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118. For half of the debtors, no phone number at all could be located, any numbers that could be located were disconnected, or it was confirmed by in-person conversation or answering-machine messages that the number was not for the debtor household.

119. Appropriate sample size depends on the population studied, the incidence of the characteristics estimated, and other factors. *See* FLOYD J. FOWLER, JR., SURVEY RESEARCH METHODS 40–43 (rev. ed. 1988) (discussing inadequate approaches to determining sample size but noting the absence of a single right answer).

Project.[120] Generally, the debtors in this study meet many of the traditional definitions for membership in the middle class.[121] For these analyses, data are presented on those interviewed because there was no statistically significant difference in the demographic variables between the people interviewed and their spouses/partners.[122] The typical (median) interview respondent had "some college but not a four-year degree." About three-fourths (74%) of households owned a home at the time of bankruptcy. This is consistent with the idea that families choosing Chapter 13 have some assets that they might want to preserve in bankruptcy. The average age of interview respondents was forty-nine years. A male completed the interview in 38% of the sample.

The race data are important in light of very recent work showing that African-Americans are overrepresented in Chapter 13 as compared to Chapter 7.[123] Because debtors could select multiple racial identifications, and the full presentation of such results would be cumbersome, I used a protocol to categorize each interview respondent as a single race or ethnicity,[124] which essentially treated people as members of a minority group even if they also self-identified as white.[125] Under this protocol, 53% of interview respondents were white and 36% percent were black. Hispanics represented only 7% of the sample, and the remaining 4% of "other" included Asians and other racial self-identifications. Based on the race data from the 2007 Consumer Bankruptcy Project, these figures seem to approximately reflect all Chapter 13 filers.[126] The largest disparity may be a lower number of

120. *See, e.g.*, DEBORAH THORNE ET AL., AARP PUB. POL'Y INST., GENERATIONS OF STRUGGLE 3 (2008) (reporting a median age of 43 for bankruptcy filers in 2007); Dov Cohen & Robert M. Lawless, *Less Forgiven: Race and Chapter 13 Bankruptcy*, *in* BROKE, *supra* note 29 (manuscript at 175, 177) (reporting that African-Americans are over-represented in Chapter 13 bankruptcy filings).

121. *Cf.* Elizabeth Warren & Deborah Thorne, *A Vulnerable Middle Class: Bankruptcy and Class Status*, *in* BROKE, *supra* note 29 (manuscript at 25, 25) ("Studies conducted by the Consumer Bankruptcy Project . . . in 1991, 2001, and 2007 consistently demonstrate that bankruptcy is a largely middle-class phenomenon.").

122. I conducted t-tests for interview respondents and their spouses/partners for the age, education, and race variables; *p*-values were less than .05 for each variable.

123. Cohen & Lawless, *supra* note 120.

124. Although the U.S. Census considers race and Hispanic origin to be distinct, the interview gave Hispanic/Latino as an option, along with white, African-American, Asian-American, or other.

125. The exact protocol was as follows: Respondents who indicated a racial identification of African-American (even if they indicated other races as well) were categorized as African-American. Respondents who indicated a racial identification of Hispanic but did not also identify as African-American were categorized as Hispanic. Respondents who indicated white and no other race were categorized as white. The category of "other" included the remaining respondents: (i) those who indicated white and a race other than African-American or Hispanic, or (ii) those who only indicated racial categories other than white, African-American, or Hispanic—for example, someone who indicated Asian-American as their only racial identification.

126. For example, using the same protocol for racial identification as in this Article, there are 36% African-Americans in the 2007 Consumer Bankruptcy Project sample of Chapter 13 cases. Author's calculations from the 2007 Consumer Bankruptcy Project (on file with author).

Hispanic participants, although the only available comparison is to Chapter 13 filings—not terminated Chapter 13 cases.[127]

The households exiting Chapter 13 were rarely one-person units. At the time they filed bankruptcy, about half of respondents (49%) were married. Twenty-nine percent were either divorced or separated, and the remainder were either widowed or single. Just over half (53%) of respondents had no children under eighteen years old at the time they filed bankruptcy. Among the half with school-age or younger children, the median number of children was two.

The response rate is always a concern in survey research, and rates are relatively low in telephone surveys compared to in-person studies.[128] Following the widely adopted protocols of the American Association for Public Opinion Research, I collected information to calculate several metrics for response rate. Nonrespondents were divided into three groups: those never reached (noncontacts), those unwilling to cooperate (refusals), and all others (those for whom it would have been difficult or impossible to participate (hearing barrier, hospitalized, etc.)). Using the most conservative metric, the response rate was 25%.

The total sample was 1,189 debtors. This number reflects the eleven instances out of the total sample of 1,200 in which the letter was undeliverable and replacement was not attempted.[129] However, the study could not obtain a valid telephone number for 643 debtors, over half the random list sample. Because this was a telephone survey, and because the mailed letter is a requirement of the University of Iowa Institutional Review Board rather than a part of the study design itself, I calculate the response rates using two different denominators: the 1,189 debtors who were mailed letters, and the 546 debtors for whom the study had valid (or possibly valid) telephone numbers. This latter group includes each debtor with whom the study made no telephone contact (live person or answering machine) but for which we located a connected, possibly valid phone number. The group of 546 debtors also includes people whom agreed to participate in the study but whom ultimately were not interviewed.[130] There were thirty-three debtors in this group; these could be considered passive refusals or noncontacts.

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127. Using the same protocol as in this Article, only 3% of Chapter 13 debtors are Hispanic in the 2007 Consumer Bankruptcy Project sample. Author's calculations from the 2007 Consumer Bankruptcy Project (on file with author).

128. Charlotte Steeh et al., *Are They Really as Bad as They Seem? Nonresponse Rates at the End of the Twentieth Century*, 17 J. OFFICIAL STAT. 227, 227–28 (2001) (reporting that the Council for Marketing and Opinion Research reports a 25% average response rate for all samples and a 12% response rate for random-digit-dialing samples for commercial telephone surveys).

129. One hundred fourteen cases from the sample of 1,189 were replaced with randomly drawn alternates from the initial lists because the letter was returned as undeliverable.

130. Of the 546 debtors, thirty-three returned surveys, called the 1-800 number, or were contacted and scheduled interviews, but they either were no-shows when called for the interviews or could not be contacted for the interviews after their initial agreement to participate.

As Table 1 shows, the final participation rate was 25% for the mailed sample and 55% for those with valid or possibly valid phone numbers. The refusal rates were 7% and 16%, respectively. Refusals were people who either returned participant forms indicating that they did not wish to participate or verbally confirmed by phone that they did not want to participate. This refusal rate would adjust upward somewhat using the passive refusal assumption for the debtors who initially agreed to an interview but ultimately did not participate.

Table 1. Response Rate for Chapter 13 Dropout Study

	Mailed Sample (N = 1,189)	Valid or Possible Valid Phone Sample (N = 546)
Participation Rate	25%	55%
Active Refusal Rate	7%	16%
Possible Passive Refusal Rate (agreed to participate but did not complete interview)	3%	6%
Noncontact Rate	64%	22%
Other Noninterviews	0.3%	0.7%

The major source of nonresponse was noncontacts, as Table 1 shows. Debtors whose phone numbers were impossible to obtain may differ from those with obtainable phone numbers. Younger debtors may be more likely to have only cell phones, which are generally unlisted. In the general population, it is estimated that 20% of households rely exclusively on cell phones.[131] Another source of nonresponse bias may be that debtors who were particularly angry or disappointed about the bankruptcy process were less likely to participate. Finally, debtors who faced the most intense collection pressure or the most severe hardships may have cut off their phones to avoid dunning calls or to save money.

To provide some measure of the nature and extent of nonresponse bias in the telephone survey, I coded bankruptcy court record data for a random sample of debtors who were eligible for the study but who did not complete the interviews.[132] I then compared the respondents and nonrespondents on variables such as income, household size, total assets, total unsecured debts, total debts, and case disposition. For most variables, there was no statisti-

131. John M. Boyle et al., *Cell Phone Mainly Households: Coverage and Reach for Telephone Surveys Using RDD Landline Samples*, SURVEY PRACTICE (Dec. 9, 2009), http://surveypractice.org/2009/12/09/cell-phone-and-landlines.

132. Court records were coded for 150 nonrespondents, approximately half the number of respondents (303). In the analysis comparing the two groups, the nonrespondents were weighted double to create groups of approximately equal size for comparison.

cally significant difference in the two groups. There were two exceptions: Among respondents (those who completed the interview), 27% of cases converted to Chapter 7; the remaining 73% were dismissed from bankruptcy entirely. Among the nonrespondent sample, 19% of cases converted. Because cases that convert to Chapter 7 nearly always result in the debtors getting discharges of their unsecured debts, people with converted cases may have different assessments of Chapter 13 bankruptcy. I explore the data with regard to this point later in the Article.[133] Also, those who responded to the study had, on average, lower actual monthly incomes at the time of bankruptcy than those who did not respond.[134] This result may be unsurprising given the $50 incentive for completing the interview. It may be that respondents with lower incomes at the time of filing also had lower incomes when they were interviewed, compared to nonrespondents. This could have made the respondents more pessimistic about Chapter 13. It is also possible that people who converted their bankruptcies to Chapter 7 were more likely to have lower incomes, so that the two differences reflect an overlapping group of people. While the court records provide an unusually large amount of data on nonrespondents to permit checks for nonresponse bias, there may still be unmeasured nonresponse bias, such as by race or educational attainment.[135]

IV. Findings: The Real Outcomes of Chapter 13

A. Goals of Chapter 13 Debtors

Chapter 13 offers debtors many legal tools for many kinds of debt problems. Some kinds of secured debts may be written down to the value of the collateral;[136] for other types of secured debt, most notably home mortgages, the remedy is a right to cure a default over a reasonable time.[137] Loans that are shorter than the plan can be re-amortized over the life of the plan.[138] Similarly, unsecured debt obligations may be substantially reduced; if the debtor pays all of his or her disposable income for the life of the repayment plan, any remaining amount of debt is forgiven.[139] Tax creditors may be paid as priority claims,[140] effectively permitting a debtor to devote his or her income to these nondischargeable debts ahead of regular creditors. The point here is not to belabor the details of Chapter 13 but merely to show

133. See *infra* subpart V(A) for a discussion of how case outcome affected question response.

134. The average respondent had a monthly income of $3,675; the average nonrespondent had a monthly income of $4,305, with $p < .05$ for this difference.

135. The United States does not collect this type of demographic information, although most other countries do so as part of their bankruptcy forms.

136. *See supra* note 78 and accompanying text.

137. *See supra* note 82 and accompanying text.

138. *See* 11 U.S.C. § 1322(b)(2) (2006) (allowing modification of secured creditors' rights).

139. *See supra* note 72 and accompanying text.

140. 11 U.S.C. § 507(a)(8).

that its intricacies mean that debtors could reasonably have broad and ambitious goals for Chapter 13. Indeed, the very premise of the system is that debtors can do it all: receive a discharge of their unsecured debts (just as in Chapter 7) but, in addition, retain their assets regardless of exempt status, write down or cure their secured debts, and enjoy the automatic stay for the life of the plan.

Each interview with an individual who dropped out of Chapter 13 began with a series of questions on what that debtor hoped to accomplish with bankruptcy. Debtors were asked to respond on a four-point Likert scale[141] whether a particular goal was "very important," "somewhat important," "somewhat unimportant," or "very unimportant." Eleven closed-ended goals were queried. Then debtors also were asked whether there were any "other things" they wanted to accomplish in bankruptcy and if they responded affirmatively, to describe those other things.

The data are remarkable for the universal strength of debtors' responses. A majority of debtors responded "very important" to nine of the eleven goals (all except "saving property other than a car or a home"[142] and "dealing with tax debt"[143]). The goals can be broadly grouped into categories: saving property, relieving creditor pressure, and improving a debtor's financial situation. Figure 2 shows the percentage of respondents that indicated a goal was "very important," clustered into these three categories (and showing tax debt separately). At least a majority of debtors chose "very important" for every goal. Crucially, these data do not include debtors who indicated "somewhat important." If that response option were included—effectively transforming the four-point scale into a binary one of "important" or "unimportant"—over 90% of debtors would have indicated that it was important ("very important" or "somewhat important") to accomplish these goals: saving their home, getting control of their financial situation, getting a fresh start, and repaying as much as they could on their debt.

The data show that debtors do not have a single purpose in filing Chapter 13. When they enter bankruptcy, people have multiple goals. While some might suggest that the large number of goals shows that debtors are unrealistic about bankruptcy, the counterargument is powerful: Chapter 13 actually does provide tools for debtors to achieve each of these goals. These debtors did not report ultra vires goals for bankruptcy such as "raising my income" or "never having to worry about money." Chapter 13 may have attracted these families precisely because it did not require them to make hard

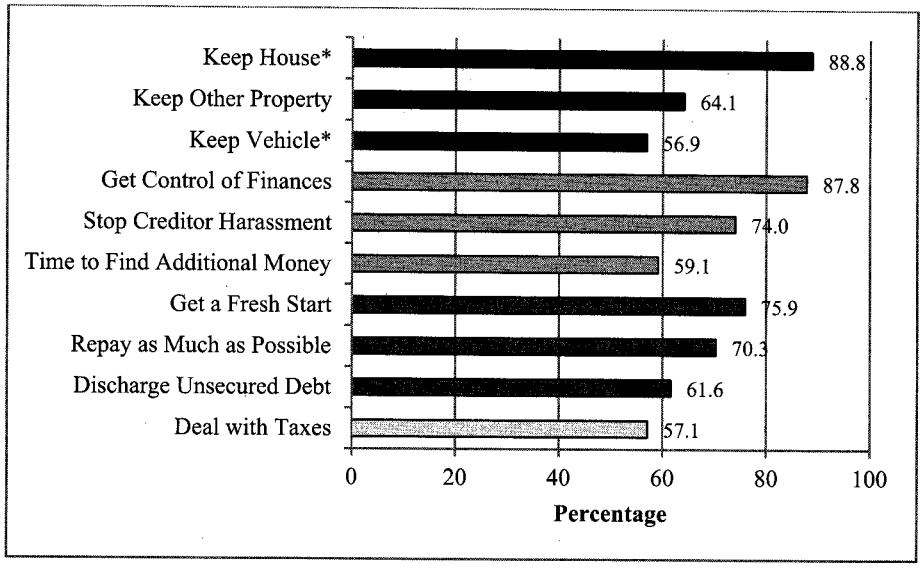
141. A Likert scale presents a statement then asks a respondent to choose one response from a range of options representing graduated increments of agreement, frequency, or evaluation regarding the statement. COLLEEN KONICKI DI IORIO, MEASUREMENT IN HEALTH BEHAVIOR: METHODS FOR RESEARCH AND EDUCATION 128–29 (2005).

142. This is true only because just 16% of debtors said they had some other property. Among those who did have such property, 67% indicated that saving that property was "very important."

143. This is true only because fewer than half of debtors owed tax debts. Among those who did owe tax debts, 57% indicated that dealing with their tax debts was "very important."

choices—for example, between trying to hang onto a house subject to a large mortgage and getting a fresh start in their financial lives. The findings on goals mimic the complexities and contradictions inherent in the structure of Chapter 13.

Figure 2. Percent of Debtors Indicating Particular Goal Was Very Important to Accomplish in Bankruptcy



Source: Chapter 13 Dropout Study

Note: $N = 303$

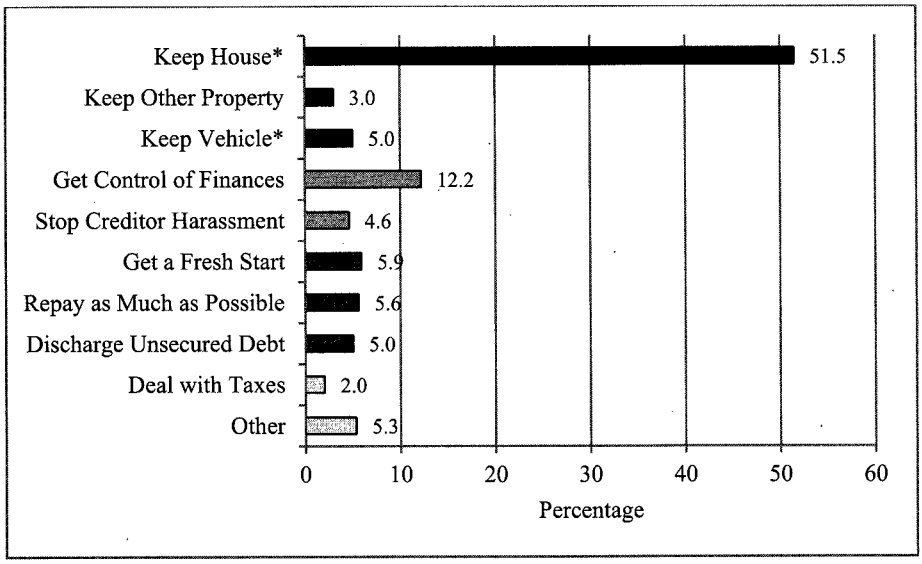
*Keep House is as percent of homeowners. Keep Vehicle is as percent of vehicle owners.

To have debtors prioritize among their multiple and competing goals, I asked each debtor to select the "single most important goal" from the list of all goals that he or she had identified in the prior interview question as "very important."[144] Figure 3 shows the results of this question about the single most important goal of each debtor's Chapter 13 bankruptcy case. Over half (51.5%) of debtors said saving a home was their primary purpose in bankruptcy; this fraction jumps when considering only the responses of homeowners. Even when considering the entire sample, including debtors who rent or live with families or friends, saving one's home still overwhelms all other goals among Chapter 13 filers. In the this subpart, I explore the home-saving goal in more detail and present additional data on the second most popular goal: getting control of and organizing one's financial situation.

144. The vast majority of debtors only selected one response; if a debtor insisted upon giving two answers, both were recorded. These responses were recoded to select the first named goal as the most important response.

The data show that these two objectives are the key goals for debtors who exit the bankruptcy system and establish a definite benchmark against which bankruptcy outcomes can be measured.

Figure 3. Most Important Bankruptcy Goal for Chapter 13 Debtors



Source: Chapter 13 Dropout Study

Note: $N = 303$

*Keep House is as percent of homeowners. Keep Vehicle is as percent of vehicle owners.

1. Save the House.—When enacted in 1978, Chapter 13 provided debtors with significantly improved tools to address defaults on secured debts. The law's special treatment of home mortgages reveals the government's support of home ownership.[145] By the early 1990s, Chapter 13 was recognized as a way to effectuate the government's home ownership policy;[146] this understanding of Chapter 13 as a federal foreclosure-prevention device continues today.[147] Consumers have heard this message

145. *See* Adam J. Levitin & Joshua Goodman, *The Effect of Bankruptcy Strip-Down on Mortgage Markets* 4 (Georgetown Univ. Law Ctr. Pub. Law & Legal Theory Working Paper Series, Research Paper No. 1087816, 2008), *available at* http://ssrn.com/abstract=1087816 ("The policy presumption behind bankruptcy's special protection for home mortgage lenders is that it enables them to offer lower interest rates and thus encourages home ownership.").

146. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 238 (1997), *available at* http://govinfo.library.unt.edu/nbrc/reportcont.html ("Notwithstanding these 'exceptions to the exception,' the special protection for mortgage lenders in the Bankruptcy Code is relatively consistent with pervasive federal policies promoting home ownership.").

147. Marianne B. Culhane, *No Forwarding Address: Losing Homes in Bankruptcy*, *in* BROKE, *supra* note 29 (manuscript at 119, 123) ("Chapter 13 . . . was designed to help debtors keep their

too. Despite a new push of government loan-modification programs and foreclosure-counseling programs, Chapter 13 is still probably the most widespread home-saving device in American law.[148] A strong majority of Chapter 13 filers are homeowners, and most of these homeowners have at least one mortgage.[149]

The households that drop out of Chapter 13 bankruptcy are predominantly homeowners. About three in four households filing for bankruptcy owned their homes when they sought bankruptcy relief. Saving a home was the main goal of an overwhelming portion of these homeowners' bankruptcies. Two measures reveal this. First, 70% of homeowners participating in the study said that saving a home was their single most important goal. Second, 94% of homeowners said that saving a home was either a very important or somewhat important goal of their bankruptcy. This is very close to the fraction of homeowners who said that saving a home was "very important" in a telephone interview conducted as part of the 2007 Consumer Bankruptcy Project, which used a mixed sample of Chapter 7 and Chapter 13 cases (including Chapter 13 cases that could have ended in a discharge).[150]

American families are very attached to their homes, a reality that is easy to lose sight of in the face of news stories about strategic defaults on mortgage loans. Several researchers have documented the strong desire of families to save their homes. Eric Nguyen has identified the presence of school-age children as a strong predictor of whether a bankruptcy debtor gives saving her home as a reason for bankruptcy.[151] Marianne Culhane has documented the social and emotional stakes of losing a home to financial distress:

> Bankrupt debtors who lose their homes suffer immediate hard consequences: they must find somewhere else to live, perhaps persuading someone to take them in despite their recent or ongoing bankruptcy; they must pack up belongings and transport what they can afford to take or sell or abandon items too expensive to move or too large for their new residences; and they must leave friends and neighbors behind and move children away from familiar schools. At each of these turns, they face out-of-pocket expenses and the embarrassment of failure in the eyes of their neighbors, children,

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homes . . . ."); Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2274 (2008) (identifying Chapter 13 as one of the tools homeowners can use to manage a mortgage delinquency).

148. *See* Jacoby, *supra* note 147, at 2283 (asserting that bankruptcy has become "an important de facto formal law component of mortgage delinquency management").

149. Porter, *supra* note 102, at 141 n.125; *see also* Raisa Bahchieva et al., *Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership*, *in* CREDIT MARKETS FOR THE POOR 73, 104 (Patrick Bolton & Howard Rosenthal eds., 2005) (noting that most homeowners filing bankruptcy "face substantial mortgage debts").

150. Culhane, *supra* note 147, at 121–22.

151. Eric S. Nguyen, *Parents in Financial Crisis: Fighting to Keep the Family Home*, 82 AM. BANKR. L.J. 229, 247 (2008).

families, and others. Losing a home is nearly always a step down the social and economic ladder . . . .[152]

The families who exit the Chapter 13 system express similar fears about the consequences of home loss.[153] In describing saving their homes as their most important goal, interview respondents focused on providing stable homes for their children.[154] Other respondents made clear that paying their mortgages to keep their homes came before paying other debts, including those that were more unmanageable or expensive.[155]

Chapter 13 provides tools for addressing defaults on secured loans other than home mortgages; indeed, the law is more generous for many other kinds of secured debt, permitting the debtor to reduce (i.e., cramdown) the loan to the value of the collateral.[156] This legal right can be particularly powerful for cars, which tend to depreciate quickly after purchase. Nine out of ten debtors owned a car at the time they filed bankruptcy, and 71% of these car owners said bankruptcy was very or somewhat important as a way to keep their cars. This is sharply lower than the 94% of homeowners who said saving their homes was either very or somewhat important. Cars may be crucial for some debtors, particularly those facing an immediate repossession, but homes are the main story for families who exit Chapter 13. Debtors wanted to use bankruptcy to avoid losing their homes because of their financial distress.

2. Get Control of the Financial Situation.—The other primary goal of families was to use bankruptcy as a way to organize and get control of their financial situations. Figure 3 shows that 12% of debtors said this was their single most important goal. Organizing and getting control, however, was a secondary goal of virtually every family. Over 98% of debtors said that getting control of their financial situation was a very or somewhat important goal for their bankruptcy. That this goal was nearly universally identified suggests that by the time they file bankruptcy, many families are in need of additional structure or tools to manage their financial situations; going it alone has left them feeling that their financial lives are out of control and chaotic.

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152. Culhane, *supra* note 147, at 129.

153. Interview with Respondent W6-089R ("I don't have anyone to move in with, so I needed to keep it."). All interviews cited in this Article are part of the Chapter 13 Dropout Study database on file with the author.

154. Interview with Respondent W1-045S ("Keeping the home was the most important thing of all, for my children."); *id.* ("I had just built this home for our family. It was the first new home—home that no one else had lived in before—that my children had ever had. . . . I wanted to have it for my family.").

155. Interview with Respondent W5-126R ("It would be between keeping our house and dealing with the student loans, but if I had to choose one, it would be our house."); Interview with Respondent W4-169D ("All of these were important, but if I had to pick one, keeping the house would be it.").

156. *See supra* notes 78–80 and accompanying text.

Although the response shows that debtors want order, the survey choice was broadly worded. The high response rate may indicate that many debtors felt like they needed to change their financial lives and set themselves on a different path. Debtors' responses to other closed-ended goals help illuminate the more specific ways in which debtors sought to create breathing room to improve their family finances.

A bankruptcy filing triggers the imposition of an automatic stay against any actions against a debtor or his property.[157] The purpose of the stay is to help debtors get control.[158] But the stay also works simply to delay the perhaps inevitable day of reckoning about one's debts. This is because creditors who wish to take action against debtors must seek relief from the stay by motion to the court,[159] a process that often takes a month or more and involves some expense. This may deter some creditors from taking immediate action even if bankruptcy law gives them that right. Thus, a bankruptcy filing means that most debtors will get an additional two or three months to postpone collection, even if the debtor makes no effort to move his Chapter 13 case forward. If a repayment plan is confirmed, the debtor has even more time, because the automatic stay remains in place until the case is dismissed or a creditor receives relief from the court.

Most debtors reported that obtaining additional time was something they hoped to accomplish with their bankruptcies. Two survey questions probed this issue. When asked how important bankruptcy was as a way to have more time to deal with their property, 75% of debtors said this was a very or somewhat important objective for their filings. When asked how important bankruptcy was as a way to have more time to find additional money to deal with their debts, 78% of debtors said this was very or somewhat important. In total, more than 85% of debtors identified one of these two additional-time goals as important. Only a handful of debtors offered any specific information on how they hoped to obtain more money or the strategies they needed more time to deploy with regard to their property. It may be that debtors had never clearly identified the actual ways in which more time would let them find more money or deal with their defaults on secured debts.

The final question that touched on getting control of one's finances asked about stopping harassment from creditors. Eighty-six percent of debtors said this was very or somewhat important. This is consistent with research suggesting that dunning calls, rather than formal legal action, are the most powerful trigger for pushing a financially distressed consumer into

157. 11 U.S.C. § 362(a) (2006).

158. *See In re* Siciliano, 13 F.3d 748, 750 (3d Cir. 1994) ("The purpose of the automatic stay provision is to afford the debtor a 'breathing spell' by halting the collection process. It enables the debtor to attempt a repayment or reorganization plan with an aim toward satisfying existing debt.").

159. 11 U.S.C. § 362(d).

bankruptcy.[160] Respondents described the pressure before bankruptcy by noting that "[c]alls were all day long and every day,"[161] and speculating that "Wells Fargo had [them] on a speed dial."[162]

The overall importance to Chapter 13 filers of achieving breathing room from their creditors is highlighted by examining the cumulative responses to the four questions regarding bankruptcy goals discussed above: obtaining more time to deal with property, obtaining more time to find additional money, organizing and getting control of one's financial situation, and stopping creditor harassment. More than four out of five debtors (83%) said that *all four* of these goals were either very or somewhat important to accomplish with their bankruptcies. The automatic stay in bankruptcy halts all direct creditor pressure from the very first day of the filing. A bankruptcy filing is a uniquely powerful tool for a family that wants to reduce stress from debt collection efforts and gain time to develop a plan for its debt problems.

B. Immediate Outcomes: "Good While It Lasted"

The interview asked the debtors to evaluate whether their most important goal in bankruptcy was accomplished. The debtors' responses to this inquiry seem to suggest that Chapter 13 filers—even this sample of filers who dropped out of Chapter 13—were successful. When read back what they had said earlier in the interview was their most important goal and asked how much they agreed that this goal was accomplished by their bankruptcies, debtors generally were positive about bankruptcy's efficacy. Over two-thirds (68.5%) of debtors said they either very much agreed (42.7%) or somewhat agreed (25.8%) that the debtor's single most important goal was accomplished in bankruptcy. Only about three in ten debtors (31.5%) were pessimistic about whether bankruptcy accomplished the debtor's most important goal, saying they somewhat or very much disagreed with that statement about the outcomes of their bankruptcies. These findings seem to support the alternate theory of Chapter 13—that consumers are exiting Chapter 13 voluntarily because they no longer need additional relief—and to indicate that the lack of bankruptcy discharges does not mean these cases did not provide help to debtors.

Debtors also were positive about their decisions to file bankruptcy, even after their cases ended without completion. Figure 4 illustrates responses to the following questions: "Looking back on the bankruptcy, how good of a decision do you think filing bankruptcy was? Was it a very good decision, a somewhat good decision, a somewhat bad decision, or a very bad decision?" Very few debtors said that they thought their decision to file Chapter 13

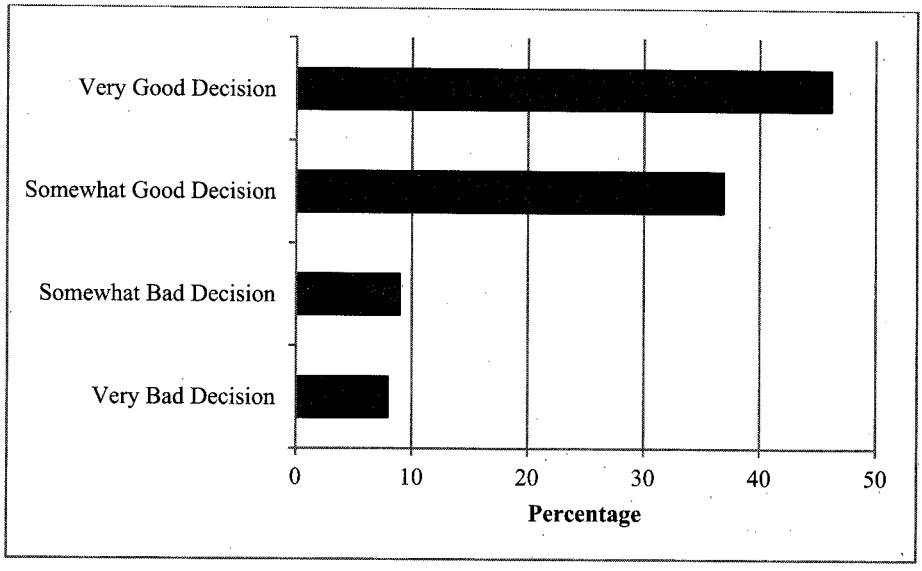
160. Mann & Porter, *supra* note 91, at 330.

161. Interview with Respondent W4-457T.

162. Interview with Respondent W4-218M.

bankruptcy was somewhat or very bad; only 17% of respondents selected either of those two negative categories. It is possible that people were unwilling to admit that they had made bad decisions; however, the 46% of debtors who indicated that filing bankruptcy was a very good decision is such a strong positive response that at least some portion of it likely reflects unbiased answers.

Figure 4. Debtors' Responses to Whether It Was a Good Decision to File Bankruptcy



Source: Chapter 13 Dropout Study

Note: $N = 301$

The qualitative data suggest that debtors may instead be putting the blame for their bankruptcy outcomes on what they view as their own individual situations. As one debtor explained, "I'm not sure the decision was bad, but it just didn't work out for me."[163] Debtors sometimes pointed to specific events in their lives that hindered Chapter 13 working out as they had hoped. For example, one debtor who filed hoping to address his debts in order to retain a security clearance seemed to see the unrealized potential in bankruptcy, rather than the actual outcome, as the main criterion for evaluating his decision to file bankruptcy. As he said, "The decision was good, but I just didn't get the clearance in time and lost my job. If I hadn't lost my job, I think that my Chapter 13 could have worked."[164]

163. Interview with Respondent W5-007R; *see also* Interview with Respondent W5-181G ("It was a good decision, but it didn't work out.").

164. Interview with Respondent W4-365C.

The debtors' positive opinions about filing bankruptcy counters the idea that many people are duped into filing bankruptcy or into choosing Chapter 13. The large majority (83%) of people reporting that bankruptcy was either a very good or somewhat good decision suggests that people do not regret filing bankruptcy. This does not mean that people accomplished their goals in bankruptcy or that their cases left them better off than they were before bankruptcy. However, as compared to doing nothing, debtors believe bankruptcy was a good choice.

On the question of whether filing bankruptcy was a good decision, debtors' assessments depended on whether their cases were converted or dismissed. Debtors with converted cases were more likely to say that filing bankruptcy was a very good decision (55%), compared to debtors with dismissed cases (43%).[165] Because a conversion more closely approximates the outcome in a Chapter 7 case, this difference undermines the alternate theory that Chapter 13 without a discharge often is equally valuable to debtors than a discharge of their debts. However, it is notable that even those whose cases are dismissed find some benefit in the process.

Taken together, the data on accomplishment of the most important goal and assessment of the bankruptcy filing decision provide support for the alternate theory of Chapter 13. Most debtors who drop out of Chapter 13 are not hostile to the Chapter 13 bankruptcy system, even though it did not work out as intended. To unpack the meaning of these data, I explore in detail in the next two sections the explanations that debtors gave for their answers to whether they accomplished their most important goal in bankruptcy. Consistent with the two main goals identified above, debtors primarily talked about saving their homes and relieving the pressure of financial problems. These qualitative data show more precisely what positive benefits accrue even to those who drop out of Chapter 13.

1. Hanging onto Homes.—The homeowners who filed Chapter 13 had a simple, measurable objective: staying in their homes. To evaluate debtors' success in this regard, the interview asked a simple objective question: "Do you still own the same home you did when you filed bankruptcy?" The response shows that bankruptcy is absolutely effective at stymieing foreclosure during, and in the immediate aftermath of, bankruptcy. Only 19% of homeowners lost their houses during bankruptcy or by the time of the interview for the Chapter 13 Dropout Study. Nearly all of these home losses were due to foreclosure. The 19% figure is still notable, however, because when these families filed bankruptcy, foreclosure was often imminent—a matter of mere days or weeks. The typical Chapter 13 debtor owes arrearages equal to six months of mortgage payments by the time he seeks

165. The difference in mean responses between the groups along the four-point Likert response scale (very good to very bad) is statistically significant ($p < .05$).

bankruptcy relief.[166] Yet 81% of homeowners said that they still owned and were living in their home, a result that they attributed to Chapter 13 bankruptcy.

As described above, among debtors who owned a home when filing Chapter 13, 70% identified hanging onto the home as the single most important goal for filing. Bankruptcy clearly met this objective in many debtors' minds. Homeowners described the immediate help they got from Chapter 13: "It stopped the sheriff sale and foreclosure on our house."[167] "I wouldn't still have my home if I hadn't filed. It stopped foreclosure."[168] Another debtor strongly agreed that bankruptcy was effective in dealing with falling behind on his mortgage after a workplace accident: "It kept us from losing our house to foreclosure. At that time, my disability hadn't been approved and I was not able to work as much."[169] This is the traditional story about saving a home in Chapter 13: a debtor has an adverse life event that causes an income shock; this leads to the debtor missing a few payments on his mortgage. Chapter 13 gives the debtor time to catch up on those missed payments as his income stabilizes back to its prior level. But regardless of the reason for the missed payments, most people who enter bankruptcy as homeowners exit bankruptcy as homeowners. Chapter 13 clearly works to derail foreclosures and to arrest imminent home loss.

2. *A Rest for the Financially Weary.*—By the time they file bankruptcy, debtors have often endured months of dunning and threats of legal action.[170] Eighty-four percent of debtors said they were very stressed about their finances right before they filed bankruptcy. This stress partially resulted from contact with debt collectors. Not quite three-fourths of debtors very much agreed with the statement, "Before I filed bankruptcy, pressure from debt collection bothered me or others in my household." This stress manifested itself in arguments about money and strain on marital relationships. Among married debtors, 41% said they argued with their spouses "always" or "often" in the year before bankruptcy.

Debtors described the way that bankruptcy addressed these problems. As one debtor bluntly put it, "I got the creditors off my back."[171] Some debtors praised how bankruptcy halted creditors immediately, seemingly finding that power over the collection dynamic to be a welcome reversal

166. Katherine Porter, *Arrears and Default Costs of Homeowners*, NACTT Q., Jan.–Feb.–Mar. 2010, at 15, 15.

167. Interview with Respondent W4-370P.

168. Interview with Respondent W4-383H; *see also* Interview with Respondent W4-143D ("I still have my house. It gave me some time and stopped foreclosure."); Interview with Respondent W6-201H ("Filing bankruptcy stopped foreclosure on our house and made it possible for us to keep it.").

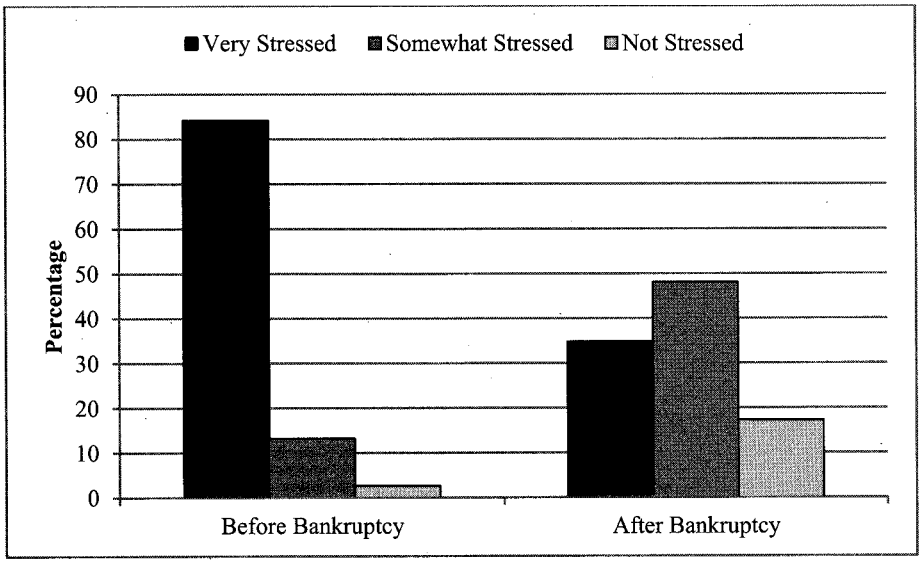
169. Interview with Respondent W4-452R.

170. Mann & Porter, *supra* note 91, at 306–07.

171. Interview with Respondent W4-565K.

from the months before bankruptcy. One debtor described her strategy: "The calls and harassment [have] stopped. Filing bankruptcy is about the only way to stop them. As soon as they hear the 'B' word and you give them your case number, they don't call anymore."[172] Another debtor spoke as if describing the benefits of Chapter 13 to a prospective filer: "It stops everything in its track[s] and allows you to regroup. It allows you to reorganize your future. It allowed me to emotionally set myself up for success."[173] Filing bankruptcy gave debtors a welcome respite from constant reminders about their financial difficulties. This break seemed to improved debtors' sense of well-being in measurable ways.

Figure 5. Self-stress Evaluation of Chapter 13 Debtors Before and After Bankruptcy



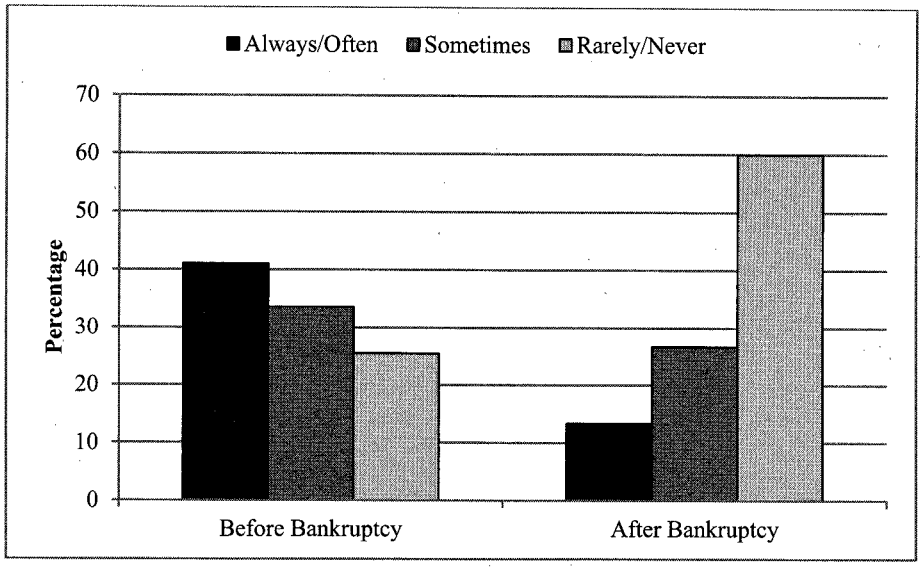
Source: Chapter 13 Dropout Study

Note: $N = 303$ (Before Bankruptcy); 302 (After Bankruptcy)

172. Interview with Respondent W2-029I; *see also* Interview with Respondent W4-479E ("After we filed, we only had one other person call and we referred them to our attorney. It really helped stop the harassment."); Interview with Respondent W5-129S ("As soon as I filed, they stopped calling. If I did get a call, then I just gave them my case number and they stopped.").

173. Interview with Respondent W2-053M.

Figure 6. Frequency of Debtors Arguing with Spouse About Money Before and After Bankruptcy



Source: Chapter 13 Dropout Study

Note: $N = 161$ (Before Bankruptcy); 150 (After Bankruptcy)

As Figures 5 and 6 show, both self-reported stress and marital disagreements over money declined after bankruptcy compared with the period before bankruptcy. Many fewer debtors reported being very stressed about their finances after bankruptcy than before bankruptcy; the percentage dropped from 84% to 35%. Indeed, about one in six debtors reported being not stressed at all at the time of the interview (just after the termination of the bankruptcy). This represents nearly six times more debtors with no stress about their financial situations than the number that existed at the time of bankruptcy. Families that filed Chapter 13 bankruptcy had legitimate reasons to be positive about their decision to file. During bankruptcy, most families not only stayed in their homes but also did so while enjoying a better quality of life. Free from dunning calls and anxiety about repossession or foreclosure, these debtors could spend time with their children and spouses and go to work without daily reminders of their financial straits.

C. Final Outcomes: "Nowhere to Turn"

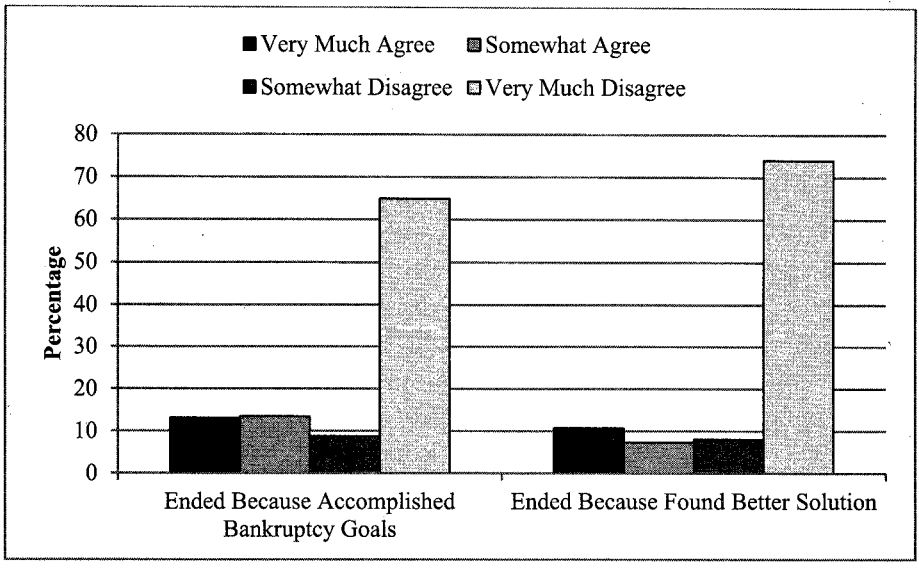
The data are clear that most people who end their Chapter 13 cases without completing their repayment plans still see important benefits from bankruptcy. Foreclosures and collection calls are halted, and families remain in their homes with less emotional strain from their financial problems. These are real outcomes, but they may be only temporary. In fact, the home saving and the stress relief will not endure for the majority of those who exit

Chapter 13. Those were benefits of *being in* bankruptcy, not of having gone through bankruptcy and coming out on the other side. The relief from foreclosure and creditor calls will evaporate for most debtors without the protection of an active bankruptcy case.

As the data show in the next two sections, most debtors will not ultimately achieve their goals of saving their homes or getting relief from debt collection. Even just a few weeks after their bankruptcies had ended, more than half of homeowners were already behind on their payments and facing foreclosure, and more than half of debtors had already begun to get collection calls. Most importantly, with the exception of the 27% of debtors in the sample who converted their Chapter 13 cases to Chapter 7, these dropout debtors still owed all of their outstanding debts. These data are particularly depressing when put in context of the debtors' case terminations. The interview data reflect the outcomes when debtors were interviewed. In the following weeks and months, many debtors' situations likely changed for the worse. As creditors noticed the case terminations and ramped up their collection processes, more creditors would start to dun the debtor, and more debtors would again face the imminent loss of their homes to foreclosure.

Debtors had some sense of this impending reality, especially when pressed to explain why their bankruptcy cases ended. The vast majority of debtors disagreed that their bankruptcy cases ended because they had accomplished what they wanted to with their bankruptcies. As shown on the left-hand side of Figure 7, only 13% of debtors very much agreed with that statement, and another 13% somewhat agreed with that statement. More strikingly, 65% of debtors very much disagreed that their bankruptcy fit the alternate theory of Chapter 13—a truly voluntary dismissal because the debtor had succeeded in the case. The remaining 9% somewhat disagreed that their bankruptcy ended because they accomplished their goals. While an incomplete Chapter 13 bankruptcy may have helped with the most important goal of getting more time in their homes or giving them some breathing room, such a case did not bring full relief. The stay may have put off the dreaded home loss or collection suit, but these results did not last beyond the bankruptcy case.

Figure 7. Debtors' Agreement with Statements on Their Bankruptcies Having Ended



Source: Chapter 13 Dropout Study

Note: $N = 299$ (Accomplished Goals); 300 (Better Solution)

The parallel data on the right-hand side of Figure 7 show that about three-fourths (74%) of debtors that ended Chapter 13 bankruptcy did not have a better solution than bankruptcy.[174] Having exited the legal system, few were confident that they had other ideas to address their remaining financial problems—including the delinquencies on their mortgage loans and the collection pressures from their unsecured debt burdens described below.

The minority of debtors (18%) who very much agreed or somewhat agreed with the statement that they ended their bankruptcies because of a better solution were asked to identify the better solution. The answers are troubling. Most debtors did not seem to be pinning their financial futures on reliable strategies. Over one-third of those who said they found a better solution were hoping to obtain loan modifications on their mortgages, often by negotiating with their lenders.[175] Yet the rate of approved loan modifications outside of bankruptcy is very low.[176] Many months after its rollout, the

174. Limiting this question only to those whose cases were dismissed (for whom the question makes more sense than for those with converted cases), outcomes are only modestly more positive, with 71% of those debtors saying they very much disagree that they found a better solution.

175. Seventy-two people did *not* "very much disagree" with the statement that their bankruptcies ended because they found a better solution. Of these people, twenty-eight people specifically mentioned a loan modification or a negotiation with their mortgage creditor.

176. *Cf. Progress of the Making Home Affordable Program: What Are the Outcomes for Homeowners and What Are the Obstacles to Success: Hearing Before the Subcomm. on Hous. &*

federal government's HAMP program had achieved only 421,804 permanent modifications from among the 1,051,555 trial modifications that struggling homeowners undertook.[177] Given that many people who contacted HAMP were never even offered a trial modification, loan modification has an even lower success rate than Chapter 13. Considering that the debtors participating in this study already found Chapter 13 too difficult to complete, their odds for a successful loan modification appear low.[178]

1. Home Today, Gone Tomorrow.—While most people (81%) who went into bankruptcy as homeowners technically exited as homeowners, that status was precarious. At the time of the interviews for this study, six out of ten debtors who were still homeowners said they were not current on their mortgage payments. The mortgage companies, freed from the waiting game of bankruptcy, had taken notice of dismissal of their borrowers' Chapter 13 bankruptcy. Among those who were delinquent, half already faced a pending foreclosure action at the time of the interviews. This means that a total of 28% of all debtors who owned their homes at the time of the interview were at imminent risk of losing those homes to foreclosure.

The interview also asked if debtors were having trouble paying their mortgage debts since their bankruptcies had ended. Just over one-third of homeowners said "yes" in response to this question. When the numbers are put together (lost home already for financial reasons, not current on payments/pending foreclosure, and struggling to pay the mortgage), the rate of home loss or threatened home loss exceeded 70% among all those who were homeowners when they filed bankruptcy.

These are grim numbers, and debtors in this situation tended to be somewhat bleak about the benefits of bankruptcy. As one debtor explained, "I'm still living in my home, but I'm going to lose it. [Bankruptcy] bought me some time here, but that's about it."[179] Another debtor noted that neither bankruptcy nor the federal government's HAMP program could help him save his home.

Cmty. Opportunity of the H. Comm. on Fin. Servs., 111th Cong. 90 (2009) (statement of Alys Cohen, Staff Attorney, National Consumer Law Center) (testifying that the number of mortgage modifications made with the assistance of HAMP through the fall of 2009 was "paltry compared to the volume of foreclosures").

177. *See* CONG. OVERSIGHT PANEL, SEPTEMBER OVERSIGHT REPORT: ASSESSING THE TARP ON THE EVE OF ITS EXPIRATION 49–50 (2010) (stating that there were 412,804 homeowners in permanent modifications, 12,912 homeowners who had left their permanent modification program, and 616,839 failed trial modifications).

178. Some respondents had already tried and failed at loan modifications before bankruptcy. "I was actually trying to work out a loan modification and ran out of time. My mortgage company suggested that I file for bankruptcy." Interview with Respondent W2-064S. Others described their frustrations with the loan modification process, even though they were just a few months into it. Describing his mortgage servicer, one debtor remarked, "They can't get it together. No one knows anything. They all need to be fired. We've sent in four different loan modifications and it's still not right." Interview with Respondent W1-008D.

179. Interview with Respondent W4-528L.

> [I] was able to stay in my home for a while. But [after] filing bankruptcy, I didn't qualify for the Obama program. I was unable to renegotiate my loan. So it wasn't accomplished really because the home was foreclosed on. My wife left me and left me with a mortgage payment to pay on my own. So there you go.[180]

Another debtor sounded a cautionary tale about the loan modification process: "I still have my home, but I'm worried about losing it. They called me at 10:00 p.m. the other night and the lady was asking me when I was going to pay $7,000. I got a loan modification, but they're still calling me."[181] A few debtors admitted that bankruptcy had been futile from the outset.

Much has been made out of the special rules in bankruptcy for home mortgages, which are generally not subject to being written down to the value of the home or to having their payment terms modified.[182] At least some cars, however, are subject to cramdown even after the 2005 Bankruptcy Amendments.[183] Thus, we might expect that homes are a particularly acute example of the difficulties debtors face in using Chapter 13 to retain their assets. To the contrary, however, the data show that debtors are even less successful at saving cars in bankruptcy than they are at saving homes.[184] Nearly three in ten (29.5%) debtors who were delinquent on a vehicle when they filed bankruptcy lost it to repossession or surrendered it to the lender. Among those who still had the same car as when they filed bankruptcy, 37% were delinquent on their payments at the time of the interview. Cumulatively, it appears that as few as 40% of Chapter 13 dropout debtors with delinquencies on car loans at the time of filing may have saved their cars as of the dates of their interviews. The worse performance for cars compared to homes may be because the repossession process is faster than the foreclosure process, thus making lenders more aggressive. Additionally, some debtors may have been willing to part with their cars to make a last sacrifice to try to save their homes.

The crown jewels of Chapter 13 are supposed to be its tools to permit debtors to retain ownership of their assets. On paper, and from a distance, those statutory twists and turns may sparkle, but up close—seen right through the eye of their beholders, the failed Chapter 13 debtors—the gems are fakes. Two recent single-location studies report that home loss is very common among Chapter 13 filers. A study of debtors who filed Chapter 13

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180. Interview with Respondent W2-007A.

181. Interview with Respondent W1-008D.

182. *See supra* note 80 and accompanying text.

183. *See* 11 U.S.C. § 1325(a) (2006) (exempting many claims secured by vehicles from being stripped down to the value of the vehicle under § 506(a), but still permitting cramdown of such loans under § 1325(a)(5)).

184. Seventy-three percent of debtors no longer owned the vehicles they owned when they filed for bankruptcy. Of those who lost cars, 73% of debtors either had had their cars repossessed or had surrendered them back to the lender because they were in default on their loans.

in Broward County, Florida, in 2007 found that only three years after their filings, 43% of homeowners had already lost their homes to foreclosure and another 22% of homeowners were in the foreclosure process.[185] A study of Chapter 13 debtors in Delaware in 2001–2002 found that 28% of homeowners lost their houses despite filing bankruptcy and that the rate of loss rose to 41% for those who had been delinquent on their mortgages for at least one year before filing bankruptcy.[186] While such rates of home loss might be significantly lower than a similarly situated control group (those in financial trouble that do not seek bankruptcy relief), it is certainly far more than the grand hopes the drafters and advocates of Chapter 13 harbored.

2. The Next Round of Debt Difficulties.—In Chapter 13, a discharge of debt is normally not given until all payments to be made under the plan are complete.[187] This is a crucial difference between Chapter 13 and all other chapters in the Bankruptcy Code—one that harshens the consequences of failing to complete a Chapter 13 plan. Examining this study's sample of cases that ended without a discharge shows that people who drop out of Chapter 13 will face significant difficulties in managing the stress and pressures of their unsecured debts without having received a discharge.

On top of their past debts, these families continue to have the problems with income instability and uneven or high expenses that often led to their financial distress in the first place. While these income shortfalls also plague Chapter 7 filers,[188] Chapter 13 filers face a double whammy. Ongoing bills continue to challenge debtors' financial resources after bankruptcy. In this study, 59% of respondents said they had struggled in just the few months since the end of their bankruptcy cases to pay bills such as medical bills, utilities, rent or mortgage, or child support. Simultaneously, prebankruptcy unsecured debts remain problematic because they continue to exist and to be fully collectable. Already, by the time of the interview, four in ten Chapter 13 dropouts had received postbankruptcy collection calls. As creditors update their files to mark the case disposition to dismissal, debtors will have to deal with more dunning. Because they did not discharge a single dollar of unpaid debt in their partial Chapter 13 cases, these families' overall debt-to-income ratios remained, after bankruptcy, at the same unsustainable

185. Joshua L. Boehm, No Shelter: Chapter 13 Debtors' Home Loss in the Foreclosure Crisis 18–19 & tbl.1 (Apr. 22, 2011) (unpublished manuscript) (on file with author).

186. Sarah W. Carroll & Wenli Li, *The Homeownership Experience of Households in Bankruptcy*, 13 CITYSCAPE: J. POL'Y DEV. & RES., no. 1, 2011, at 113, 123.

187. 11 U.S.C. § 1328(a). There is a provision in the Bankruptcy Code to permit a hardship discharge, but it is used relatively infrequently. *Id.* § 1328(b). Possibly, this is because many debtors eligible for a hardship discharge convert their cases to Chapter 7 instead.

188. *See* Porter & Thorne, *supra* note 101, at 70 (noting that Chapter 7 bankruptcy "may offer a temporary refuge, but it does not generate sufficient or steady enough income to shelter families with chronic income problems from further economic distress").

levels where they were. As one debtor said, with a deep sigh, "I have the same income and same debts, and now I have to refile."[189]

Consistent with a lack of a bankruptcy discharge, many families reported that their financial situations had not improved since filing Chapter 13. Figure 8 shows debtors' self-assessments of whether their overall financial situations at the time of the interview had improved, stayed about the same, or worsened, compared to when they filed their bankruptcies. Forty-two percent of debtors said their financial situations had improved. However, many of those who were not struggling explained that their financial situations improved because they surrendered their homes or cars to lenders and no longer had to make payments. While this change in financial burdens may well be appropriate and produce lasting benefits to families, it is difficult to square with the objectives of Chapter 13 or the alternate theory of success.

Well over half (57.5%) of households said that their financial situations at the time of the interview were either the same as or worse than the time when they filed bankruptcy. Despite its costs and burdens, bankruptcy did not propel these families forward into better circumstances. It is particularly disheartening that more than one in four families said their financial situations had worsened. Follow-up research on these families would offer insights into bankruptcy as a mobility path. For these families, a very poor outcome from Chapter 13 could be the beginning of a downward spiral that could lead to sustained poverty. Alternatively, if these families' situations improved as additional months elapsed after bankruptcy, it would be useful to identify any social institutions that helped contribute to a reversal of their declining situation.

The largest percentage (42.5%) of debtors reported an improved financial situation. This finding suggests beneficial effects of Chapter 13 bankruptcy (or at least the absence of deleterious effects that cancel out other positive developments in debtors' lives). The reference point for the question is important, however, in deciding on the inference to draw from this statistic. Families were making a comparison between the time of the interview and the time that they filed bankruptcy—circumstances that were so dire that the families were prompted to seek legal intervention. While improvement is certainly good news, it does not necessarily indicate that Chapter 13 is delivering a lasting fresh start. Because the relief from creditor pressure was temporary, and ended when the bankruptcy was dismissed, longitudinal research at six months and one year after the end of the bankruptcy cases would help assess whether the improved financial circumstances reported in this study dissipate as collection pressures return.

189. Interview with Respondent W4-123T.

Figure 8. Debtor Assessment of Change in Overall Financial Situation Between Time of Filing Bankruptcy and Time of Interview

Source: Chapter 13 Dropout Study

Note: $N = 303$

The debt collectors had already begun to pursue these households only a month or two after their bankruptcies terminated. Forty percent of households said they had already received phone calls from debt collectors. The qualitative data also reflect the degree to which the prebankruptcy harassment is becoming the postbankruptcy outcome. "They started calling as soon as it was over," explained one debtor.[190] Many debtors missed the respite of bankruptcy, as this debtor did: "Temporarily, [bankruptcy] got creditors and the IRS off my back. But now that my case has ended, they're all back."[191] Many debtors made clear that a lack of improvement in their financial situations as a result of Chapter 13 meant that they were in serious financial trouble. "I'm still facing foreclosure on my house, and I'm probably going to lose it. I'm still struggling to pay for things, and my case has been dismissed. I have the same job and pay. They just turned my water off today. Things are still pretty much the same."[192] This debtor had no water in a house from which she was about to be evicted.

Other debtors echoed that Chapter 13 had simply allowed them to keep falling behind each month because of a gap between their income and expenses. These families struggled even during Chapter 13, experiencing

190. Interview with Respondent W4-235M.
191. Interview with Respondent W4-468R.
192. Interview with Respondent W5-131F.

serious privations. These problems only worsened after bankruptcy. At the time of interview—normally only a month or two after their cases ended—59% of families said they were already struggling with bills. One-third of all those who exited bankruptcy were struggling to pay for food; similar percentages struggled to pay for medicine, doctor bills, and basic utilities. These outcomes are far from debtors' beliefs about what Chapter 13 does to help people. One debtor explained, "When I filed, I thought that I would be able to get a fresh start. This didn't happen. Everything's still the same."[193] Far from a fresh start, a majority of Chapter 13 debtors exit bankruptcy in the same, or even worse, financial circumstances.

The data show that most debtors did not actually succeed in rescuing their homes from foreclosure or in reducing their unsecured debts. Indeed, the data suggest that increased collection pressure and new foreclosure filings were imminent for many families. When bankruptcy sheltered them with its automatic stay, families got to enjoy the pretend solution of Chapter 13. Not able to make their payments, these debtors were on the cusp of realizing the real outcomes of an incomplete Chapter 13 case: loss of their homes and renewed debt collection pressure.

V. Implications

A. Assessing Bankruptcy Outcomes

Upon first examination, the data shown in Figures 4 and 7 may seem to be a paradox. How could debtors say bankruptcy was a good decision, as reported above, and still report that they did not accomplish their bankruptcy goals, that the problems and pressures that led to their bankruptcies were still problems, and that they had no better alternative to bankruptcy? The answer is that bankruptcy is a pretend solution. After the bankruptcy stay let them reclaim the lives they led before financial distress (existences without foreclosure threats and debt collection), debtors were pacified into thinking bankruptcy worked. But the concrete measures of financial health give the opposite indication: bankruptcy failed.

The apparent paradox between debtors saying bankruptcy was a good decision but being in dire financial trouble is resolved when one realizes that debtors are evaluating bankruptcy against a benchmark of having done nothing. In nearly all cases, the only alternative to bankruptcy was simply giving in and allowing creditors to take property, file lawsuits, and dun them for years. While it may be understandable for people to evaluate Chapter 13 against their prior situation of nonbankruptcy, "better than nothing" is too weak of a standard for policy evaluation. When enacted, Chapter 13 was intended to be a generous system that aids struggling families, not a least-bad alternative to inaction. And today, addressing debt remains a pressing policy

193. Interview with Respondent W4-250J.

concern. Economists are concerned that future economic growth will be constrained because consumers will struggle to service debt with their incomes rather than engage in current consumption.[194] Bankruptcy relief remains an important part of the economic system, particularly as other protections in the social safety net weaken.[195]

From a policy perspective, Chapter 13 should be evaluated against Chapter 7, the other primary bankruptcy option. The data on Chapter 7 show a discharge rate exceeding 95%.[196] One in three Chapter 13 filings ends in discharge. Among the remaining fraction, those examined in this study, only approximately 20% to 25% achieve relief without a discharge. This works out to about 16% of all Chapter 13 filings ending in relief without discharge. Summing the 33% of discharged cases with the 16% of self-reported positive outcomes in nondischarge cases, I estimate the success rate of Chapter 13 to be less than 50%.

Defenders of Chapter 13 may interpret the data differently. They could suggest yet another possible avenue for debtor success that was not examined in the study. They also could suggest that the study is flawed because it did not sample families that completed their Chapter 13 plans. The latter is a weak critique. In concluding that Chapter 13 works in less than half of cases, I make the assumption (unproven with data) that debtors who receive a Chapter 13 discharge either achieved their goals or that discharge itself is sufficient to call a case a success. This assumption is surely too generous,[197] suggesting that Chapter 13 may fare worse than my findings suggest.

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194. *E.g.*, Reuven Glick & Kevin J. Lansing, *U.S. Household Deleveraging and Future Consumption Growth*, FRBSF ECON. LETTER, May 15, 2009, at 1, 3, *available at* http://www.frbsf.org/publications/economics/letter/2009/el2009-16.pdf.

195. *Cf.* JACOB S. HACKER, THE GREAT RISK SHIFT 182 (2006) (arguing that components of the existing social "safety net" were not designed to carry the burdens that they now carry and should be replaced with stronger alternatives).

196. *See* David J. Adler, *Chapter 7 and Its Role in the Current Economy*, *in* CHAPTER 7 COMMERCIAL BANKRUPTCY STRATEGIES 7, 29 (2009) ("[A]s a rule, individual debtors receive a discharge in more than 99 percent of Chapter 7 bankruptcy cases . . . ."); *see also Chapter 7: Liquidation Under the Bankruptcy Code*, ADMIN. OFF. U.S. COURTS, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx ("Generally, excluding cases that are dismissed or converted, individual debtors receive a discharge in more than 99 percent of chapter 7 cases."). Because a few Chapter 7 cases are converted or dismissed, I discount this rate to 95%.

197. My own research on how debtors fare after receiving a Chapter 7 discharge suggests that the bankruptcy system does not ensure families will have stable and healthy financial situations, even in the first year after discharge. *See* Porter & Thorne, *supra* note 101, at 117 (highlighting that nearly a third of families remain financially troubled in the year after filing for bankruptcy). In addition, there are undoubtedly some families who received a Chapter 13 discharge but did not need any other Chapter 13 tools (that is, they had no secured debts). These families may have filed Chapter 13 to take advantage of financing their attorney's fees over the repayment plan. Such families would have achieved equivalent debt relief in a much shorter period if they had filed Chapter 7.

Admittedly, there is no established threshold for success in a social program.[198] Undoubtedly, for some legal regimes, a success rate of less than 50% (probably closer to 45%) would be seen as a high success rate (for example, the recidivism rate among convicted felons). In the bankruptcy realm, however, especially given the efforts of the last three decades to encourage or force people into Chapter 13 rather than Chapter 7, the 95% discharge rate in Chapter 7 makes the 50% success rate in Chapter 13 look paltry. It is also difficult to defend 50–50 odds as sufficient to satisfy America's longstanding normative commitment to a robust fresh start for poor but honest debtors.[199]

With American families carrying debt loads that would have been unthinkable even a generation ago,[200] the time for pretending about the 1978 Bankruptcy Code has expired. Chapter 13 does not work as intended. America needs to design and deploy a radical new approach to addressing the problem of overwhelming consumer debt. Tinkering at the margins of the 1978 Code is only adding curlicues onto flourishes. The system is already too expensive, with filing and attorney's fees often being equal to about 7% of debtors' annual incomes at filing.[201] Revisions aimed at "fixing" Chapter 13 seem likely only to add further complications to the system, driving up attorney's fees and limiting access.[202]

The new consumer bankruptcy system should be much simpler. It is not possible to solve every problem in a high-volume legal system. Undoubtedly, a simpler system would eliminate some of the "debtor friendly" tools of the Bankruptcy Code.[203] In its place would be a system of

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198. *See* Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1943–44, 2022 (2011) (comparing bankruptcy to disability and welfare and concluding that bankruptcy is significantly more successful).

199. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (declaring that "one of the primary purposes" of the Bankruptcy Act was to permit the debtor to "start afresh"). As the Supreme Court has stated,

> This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre[e]xisting debt.

Id. (emphasis omitted).

200. Porter, *supra* note 29, at 2, 4.

201. *See supra* notes 89–90 and accompanying text.

202. NAT'L BANKR. REV. COMM'N, *supra* note 146, at 275 ("The complexity of the system prevents the people most in need of relief from receiving it.").

203. One possible solution to the problems of complexity and choice is a single chapter of bankruptcy for individuals. This is not a new idea. *See* William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 415 (1994) ("[T]he easiest solution to the problems that I have identified is to simplify the Bankruptcy Code so that consumers are not presented with so many choices. . . . [T]he basic choice between chapter 7 and 13 might be eliminated."). Such a system would give consumers some of the key tools of Chapter 13, such as the ability to write down

rough justice, but one in which the rough justice is nearly universally delivered. Policy makers need to move beyond the traditional model of sophisticated lawyers providing tailored legal advice and accept that cost concerns mean that consumers will have only very limited access to legal counsel. To make that counseling worthwhile, lawyers need to spend their time gathering factual information from clients. In the current system, counseling by a lawyer who is guided by conventional norms of professionalism likely entails mapping out the twists and turns of the Bankruptcy Code to help the client consider options.[204]

The new consumer bankruptcy system should reject the idea of broad consumer choice. The idea of free and informed selection between Chapter 7 and Chapter 13 was never realistic,[205] given the hours of education and counseling required to help consumers understand the benefits and burdens of the two chapters. William Whitford has observed that this framework creates a new consumer protection problem within the consumer bankruptcy system because of inadequate processes to guide the choice of chapter.[206] Most importantly, adding choices and options does not mean that people actually achieve additional relief.

While this study's data and its methodological approach are new, the critique of Chapter 13 is old. The hard fact is that every single study of the consumer bankruptcy system has concluded that repayment bankruptcies fail to deliver on their promises.[207] The prior critiques of Chapter 13 have been impassioned. In a symposium on the book *As We Forgive Our Debtors*, William Whitford argued for the repeal of Chapter 13.[208] Gordon Bermant has sharply criticized the gap between intent and achievement in Chapter 13. In his words, "The legislature, however benevolent it may have been, first created then repeatedly amended a law of debt adjustment that is ambiguous and convoluted . . . . The result is a cycle of complaint, with each component

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secured debts, but would abandon the idea of a repayment plan and long-term court supervision. The metric for success would be sharply defined: a permanent reduction in consumers' debts, something akin to the current discharge. The National Bankruptcy Conference, a private organization that has focused on improving the bankruptcy system since the 1930s, is working on a proposed single-chapter consumer system. I am a member of the National Bankruptcy Conference and am actively involved in the development of its proposal.

204. *See* Braucher, *supra* note 45, at 167, 178–79 (noting that consumer bankruptcy attorneys cannot devote much time or energy to litigating points of law and that they do not do consumer workouts, but that they must advise clients on the choice between Chapters 7 and 13).

205. *See* Whitford, *supra* note 37, at 88–90 (describing why consumers do not and cannot make an informed and self-interested choice between Chapter 7 and Chapter 13 and opining that informed consumer choice about bankruptcy procedure is not a viable option in most instances).

206. Whitford, *supra* note 203, at 403, 406.

207. *See, e.g.*, AS WE FORGIVE, *supra* note 13, at 339 (condemning Chapter 13 as misleading and discouraging to debtors); STANLEY & GIRTH, *supra* note 2, at 105–06 (decrying the deficiencies of Chapter XIII in rehabilitating debtors); Norberg & Velkey, *supra* note 34, at 476–77 (highlighting the high incidence of repeat Chapter 13 filers).

208. Whitford, *supra* note 37, at 88–90.

[judge, trustee, creditors, etc.] laying responsibility off on the others."[209] These arguments against Chapter 13 were made by eminent scholars. Yet, they failed to defeat the alternative theory of Chapter 13 as a "choose your own bankruptcy adventure" that permitted families to craft custom relief for their financial problems.

In addition to poor outcomes, pretend solutions ensnare consumers and their elected representatives in a web of inaction. In the bankruptcy context, the result has been decades of mistaken belief that Chapter 13—a complex legal system that gives temporary and illusory relief—delivers permanent and real relief to families. The contribution of this Article is not to develop a specific reform proposal,[210] but to argue that reform efforts should resolutely abandon Chapter 13. This Article's findings may invigorate policy making in the area of overindebtedness. A simpler, redesigned system can articulate a crisp objective and build ways to test progress into the system itself. While the new solution may fall short of its objective,[211] the move away from a pretend solution can clear the way for new ideas and stimulate innovation.

B. Features of Pretend Solutions

The story of Chapter 13 that I tell in this Article can help identify generalizable elements of a pretend solution. In the paragraphs below, I develop a skeletal framework of a pretend solution. This framework will not always fit. Many government programs are not pretend solutions. Some programs have high rates of success; they are widely considered to be solutions (even if not 100% effective), and data support that perception of success. The opposite are nonsolutions, which are widely identified as failures. Such programs may help a few families, but the data show that the

209. Bermant, *supra* note 18, at 20.

210. I am working on a proposal for a redesigned consumer bankruptcy system. The core features of the system are to alter dramatically the pace of decision making and the timing of lawyer interventions in the process. Building on prior work suggesting a 1-800-DONOTDUN system to shield families from the wear of debt-collection pressure, Mann & Porter, *supra* note 91, at 333, 336, I suggest that the proposed law eases the ability of people to initiate a bankruptcy without lawyer representation. In this new system, consumers would only be asked to make decisions about property retention and repayment after a period of breathing room from dunning. The system would also feature automatic adjustments to repayment obligations if debtors' income changes. In my view, one of the most significant problems with the existing Chapter 13 is that it presupposes a level of income stability that is unrealistic in today's economy. *See* Jacob S. Hacker, *The Middle Class at Risk*, *in* BROKE, *supra* note 29 (manuscript at 218, 223–25) (reporting that the proportion of working-age families experiencing a year-to-year 25% or greater drop in income increased from 12% in 1985 to 17% in the early 2000s and was projected to have increased to 20% in 2009).

211. In critiquing the Chapter 13 system, I am not suggesting that Chapter 7 is perfect or that addressing overindebtedness is an easy task. My empirical research documents the limitation of Chapter 7 for putting people on a path to financial wellbeing. Porter & Thorne, *supra* note 101, at 124. Overindebtedness brings with it many consequences, some of which are nonfinancial and some of which are macroeconomic in scope. I have written an essay about the difficulty in measuring the harms of overindebtedness, an important prerequisite to designing solutions for the problem. Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. (forthcoming Apr. 2012).

programs have serious and widespread shortcomings in delivering on their promises.

And of course, Chapter 13 is only one legal system. The pretend-solution architecture may need to be modified to describe a broader range of social programs. The new concept of a pretend solution, however, can sharpen the assessment of social programs. The term itself is a caution against assuming that a social program works in the absence of any data. Using the consumer bankruptcy system as an example, I identify five elements that contribute to a pretend solution.

The first element of a pretend solution is that the law must have been genuinely intended to help a given constituency or to ameliorate a particular problem. It must provide generous relief that people expect will work. A law that is a farce from its enactment is not a pretend solution. People recognize it as a nonsolution and agitate for alternatives. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is a powerful contrast to the 1978 Bankruptcy Code. The 2005 Act was widely criticized for its lack of consumer protection (despite its moniker),[212] whereas in 1978, Congress offered up Chapter 13 in a sincere effort to improve debtors' prospects in bankruptcy.[213] To qualify as a pretend solution, the legislative history and political negotiations of the law should evidence a desire to address a social problem and not merely make an ineffectual statement for political purposes. Perceived generosity sets that stage for a pretend solution because the assumption is that such largesse from the legislature will materialize in the law on the ground.

A second, and related, aspect of a pretend solution is buy-in from experts. Experts have technical knowledge, often more about law than about the underlying social problem to be solved. That is, they know the statutory twists and turns in the solution—such as all the subsections of the Bankruptcy Code—but they may have little to no data or knowledge about the people who file bankruptcy and the situations that lead them to file. When experts craft a legal solution, it is usually reasoned and balances competing concerns. This process, combined with a genuine desire to improve the existing system, results in a detailed set of complex recommendations. In the pretend-solution framework, experts lend legitimacy to the law. Experts are not easily attacked for partisan positions and help reassure lawmakers

212. *See, e.g.*, Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1296 (2006) (stating that the Act "commits two counts of intentional fraud in its name alone" in that it "does not do a good job of preventing abuse and also does not protect consumers but rather puts new burdens on all filers, even the worst-off who are clearly not abusers"); Charles J. Tabb, *Consumer Bankruptcy After the Fall: United States Law Under S. 256*, 43 CAN. BUS. L.J. 28, 39 (2006) (asserting that under the Act, "consumer lenders have been given the green light to proceed merrily along the careless path they have chosen"); James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 866 (2006) ("The principal target of the Act was the debtor.").

213. *See supra* Part I.

that the solution is a good idea. In the bankruptcy realm, this role was played by both the 1973 and 1997 Bankruptcy Review Commission Reports, the National Bankruptcy Conference, and the bankruptcy trustees (who are neither debtors nor creditors). As outsiders concerned with objectivity and achieving a principled result, these experts often remain dogmatically committed to the theoretical ideas that justified the pretend solution. Even in light of subsequent empirical evidence to the contrary, experts are invested in promoting and defending a system that reflects their expert advice. Acknowledging the contribution of experts to pretend solutions does not suggest that lawmakers should ignore experts or that experts cannot design effective solutions. The key points are more limited. First, expert blessing of legislation makes it harder to later disrupt the assumption that the law is achieving its stated purpose. Second, experts tend toward complexity in design, which inhibits assessment of the program's efficacy.

Third, complexity often accompanies a pretend solution. While not all complex social programs are pretend solutions, the converse will nearly always be true. This is because complexity obscures empirical assessment of outcomes and shields poor results from scrutiny. In complexity's wake, a nonsolution can masquerade as a solution, often for decades. As the history of Chapter 13 illustrates, well-intentioned defenders of a solution can posit multiple theories of a complex law's objectives and divert attention from serious warning signs of system failure. The more outcomes that are possible, the harder it is to discern the real outcomes of the law. Complexity operates to protect the pretend solution. This effect of pretend solutions is insidious, in part because generosity and expert input (both seen as desirable qualities) often lead to complexity.

The fourth feature of a pretend solution is that those to be helped must get at least some initial benefit or believe that they do so. By definition, the relief from a pretend solution is not sufficient to be a real solution. The system must deliver more than a bare promise, however, or those to be helped would avoid the system, and their advocates would protest. The social problem would return to the policy agenda for new ideas. Those actions would expose the solution as pretend, eliminating its harm and leading to alternate approaches. The pretend solution endures over time because it is generous enough to attract people to the program and because it delivers at least an illusion of help. This Article shows that in the Chapter 13 bankruptcy context, the help is partial and temporary, rather than totally illusory. The pretend solution pacifies the people whose problems led to the enactment of a social program and lifts the burden to do more from policy makers, experts, and advocates.

The final quality of a pretend solution is that it does not contain regular, transparent assessment of the program's efficacy. Lack of data can be a function of government bureaucracy, which may resist data collection as either threatening or unrewarding. Government mandates to collect data also may be largely uninformative. The studies and data collection provisions in

the 2005 bankruptcy amendments yielded few insights and little data;[214] more data does not necessarily add knowledge.[215] A related problem is reluctance, caused by either the costs or the hassles, of researchers to move beyond easily obtained data on case termination to obtain more nuanced data on outcomes.[216] Assessment of a program is also difficult when a sharp and fixed consensus on the program's goal is lacking. Complexity and generosity can hinder assessment because when a program tries to do too much, its outcomes become harder to assess. People may differ on which outcomes are worth measuring, as well as on the best way to assess them. Instead of the debtor-survey technique used here, researchers instead might rely on objective measures, such as examining property records to verify homeownership in dismissed or converted Chapter 13 cases. This study offers only one model of how additional data collection beyond legal end results can reveal effects of laws that were previously obscured.

These five elements of a pretend solution help explain why some social programs continue, despite niggling concerns or sporadic naysaying that suggest program failure. The framework of a pretend solution developed here may help guide further research on policy design and assessment. Testing the framework against other social programs may deepen and refine knowledge about how to expose or avoid pretend solutions.

C. *Identifying and Preventing Pretend Solutions*

In this final subpart of the Article, I expand the idea of the pretend solution beyond bankruptcy. I use the federal foreclosure-prevention program (HAMP) as an example of a social program that avoided being a pretend solution. I show how certain features of HAMP that permitted robust assessment of efficacy were critical to exposing the program's weaknesses

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214. *See* Katherine Porter, *The Potential and Peril of BAPCPA for Empirical Research*, 71 MO. L. REV. 963, 972–74 (2006) (bemoaning the difficulties in compiling longitudinal data on Chapter 13 debtors and reporting the difficulties and delays plaguing the Government Accountability Office's initial efforts at data gathering).

215. In his paper on court data, Lynn LoPucki seems to assert that increased access to raw data would almost certainly increase knowledge. *See generally* Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481 (2009). Yet not all data nor all studies are useful. In the bankruptcy context, the government has begun posting some additional data under the Open Government Initiative, and yet I am not aware of a single study making use of this information. *See* Chris Haverstock & Phil Crewson, *U.S. Trustee Program Posts Bankruptcy Data on Data.gov Web Site*, EXEC. OFF. FOR U.S. TRUSTEES, http://www.justice.gov/ust/eo/public_affairs/articles/docs/2010/ abi_201006.pdf (detailing new bankruptcy case data sets and statistical summaries released by the United States Trustee Program).

216. Such data were even more difficult to gather when Professors Sullivan, Warren, and Westbrook conducted their study of bankruptcies filed in 1981. They tell stories of purchasing an airline seat to transport a portable photocopy machine around the country to obtain court records for bankruptcy debtors. Leon Neyfakh, *Elizabeth Warren's Unorthodox Career*, BOS. GLOBE, Oct. 22, 2011, *available at* http://www.bostonglobe.com/ideas/2011/10/22/elizabeth-warren-unorthodox-career/3AFEDVW9B40rgbF1bhBXoM/story.html.

and the need for policy improvements. This illustrates why nonsolutions may be preferable to pretend ones.

Pretend solutions may exist in a number of policy areas. Low-income housing programs, special education, medical care for veterans, social security disability, and foreclosure prevention are possible examples of pretend solutions. Many of these programs are longstanding and reflect impulses to improve recipients' welfare. However, the programs pose delivery challenges and are mired in complexities that may leave them dramatically short of delivering on their promises. The development of these examples is beyond the scope of this Article, and not just for reasons of brevity. Rather, a key point of this Article is that both data collection and deep system knowledge are needed to untangle whether a program is working well or failing badly, and that the challenge in assessment is particularly difficult when a pretend solution exists. The very features of a pretend solution—generosity, complexity, expert participation, modest benefits, and data limitations—are what permit assumptions of success or facile assertions of efficacy to escape challenge. Testing the pretend-solution concept outside of bankruptcy will help refine our knowledge of how pretend solutions develop and why they are able to mask serious deficiencies in programs.

In contrast to a pretend solution, a nonsolution can be readily discerned. A nonsolution is a program that does not work (either at all, or much less frequently than expected); it is widely acknowledged as a failure. There is dissatisfaction or frustration among those who were to be helped, their advocates, and policy makers about the lack of outcomes. That situation gives rise to momentum to design a better system. The federal government's foreclosure-prevention program, HAMP,[217] is an example of a nonsolution. The program lacks most features of a pretend solution. Rather than being too generous, the program was criticized at the outset for being too onerous to consumers.[218] The program was set up hastily, with little time to facilitate and incorporate the advice of experts, including consumer and homeowner

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217. *See Home Affordable Modification Program (HAMP)*, MAKING HOME AFFORDABLE, http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx (last updated Feb. 10, 2011) (providing news and information about the HAMP program to consumers).

218. *See, e.g.*, *Foreclosure Prevention Part II: Are Loan Servicers Honoring Their Commitments to Help Preserve Homeownership? Hearing Before the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 638 (2010) (statement of Elise Brown, Supervising Attorney, Foreclosure Prevention Project, MFY Legal Services, Inc.) ("A process that is intended to be 'bold and swift' in order to 'arrest this downward spiral' of foreclosures . . . is the complete opposite and reflects a failed system in which servicers take advantage of the homeowners' vulnerabilities." (footnote omitted)); *Hearing Before the Cong. Oversight Panel*, 111th Cong. 19 (2009) (statement of Herbert M. Allison, Jr., Assistant Secretary for Financial Stability, U.S. Department of the Treasury) (explaining six months after the program's inception that reforms were planned for HAMP in response to criticism because "[w]e do not want eligible borrowers to fail the trial period because the document requirements are unnecessarily burdensome"); Karyn Datko, HAMP Is a Failure: Here's Why, SMART SPENDING (Feb. 3, 2011, 8:25 PM), http://money.msn.com/saving-money-tips/post.aspx?post=c124f733-e80a-4582-b236-0128df523ab4 ("Many [banks] complain that [the HAMP] requirements are too strict.").

advocates.[219] The result was that the program lacked a presumption of success at its outset. Equally important, HAMP had a testable outcome: to save houses from foreclosure. The outcome was simple and binary. There was little temporary relief to pacify homeowners because foreclosures were often completed even as people repeatedly called or wrote to plead for a loan modification.[220] The declining housing market also ensured that policy makers stayed attuned to the program's effectiveness. Most importantly, perhaps, the President established a clear, measurable objective at HAMP's inception,[221] and funded HAMP through TARP. All TARP programs were immediately subject to Congressional Oversight Panel reporting and monitoring.[222] Report after report on HAMP, written in clear language and disseminated to the public through a media blitz, stated plainly that the vast majority of troubled homeowners simply did not get any help.[223] As millions of Americans lost their homes to foreclosure, we know that the government's loan modification program simply did not achieve its goal.[224]

The HAMP experience, as well as the approach of this study to assessing Chapter 13, holds important lessons for policy design. While there are myriad challenges to designing a program that delivers real relief, there is one relatively simple way to avoid a pretend solution: a requirement for regular, transparent outcome data must be built into the program at its inception. This requirement forces policy makers to define more sharply

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219. *See, e.g.*, Alan White, *HAMP: Is It Helping?*, CONSUMER L. & POL'Y BLOG (Aug. 4, 2009, 11:36 AM), http://pubcit.typepad.com/clpblog/2009/08/hamp-is-it-helping.html (arguing that "HAMP does nothing to address the necessary reduction in principal mortgage debt that is a precondition to long-term recovery of the housing market, and the economy," and that "the Administration and the mortgage industry have vigorously resisted addressing" alternative solutions).

220. *See* Andrew Martin & Michael Powell, *Two States Sue Bank of America Over Mortgages*, N.Y. TIMES, Dec. 17, 2010, *available at* http://www.nytimes.com/2010/12/18/business/18mortgage.html (reporting that the attorneys general of Nevada and Arizona filed a suit against Bank of America for "assuring customers that they would not be foreclosed upon while they were seeking loan modifications, only to proceed with foreclosures anyway").

221. In his speech announcing the creation of HAMP, President Obama said that it would "enable as many as 3 to 4 million homeowners to modify the terms of their mortgages to avoid foreclosure." *See supra* note 57.

222. *See supra* note 58 and accompanying text.

223. *See supra* notes 57–61 and accompanying text; *see also* Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 727 (2010) ("After a year of operations, . . . only about 230,000 [of the expected three to four million] borrowers had entered into permanent HAMP modifications, and even these were not necessarily truly permanent.").

224. *See* Editorial, *The Foreclosure Crises*, N.Y. TIMES, Oct. 14, 2010, *available at* http://www.nytimes.com/2010/10/15/opinion/15fri1.html ("According to the latest figures, 4.2 million loans are now in or near foreclosure. An estimated 3.5 million homes will be lost by the end of 2012, on top of 6.2 million already lost. Yet the administration's main antiforeclosure effort has modified fewer than 500,000 loans in about 18 months."); Sheryl Gay Stolberg & Edmund L. Andrews, *$275 Billion Plan Seeks to Address Crisis in Housing*, N.Y. TIMES, Feb. 19, 2009, at A1 (reporting on the Obama Administration's claim that the mortgage-relief program would save about four million people from losing their homes).

what they hope to accomplish. It may also require refraining from making public promises that solutions will deliver, to be colloquial, "all that and a bag of chips." Rough justice that is actually doled out may ultimately produce better outcomes for the population to be helped. Exposing the pretend-solution problem sets up the challenge for additional thinking about outcome assessment and data collection in program design.

VI. Conclusion

The data from this study reveal the serious failures of Chapter 13 bankruptcy. There is no longer a vacuum of knowledge that permits alternative theories to excuse away the realities of Chapter 13 outcomes. Nearly all of the two in three families that file Chapter 13 and later drop out of their repayment plans do so in precarious financial straits. The majority of homeowners seem poised to lose their homes, and families are already experiencing an uptick in collection pressure. These families still owe their unsecured debts, and they are out of ideas and options. Some families may file another bankruptcy, some may simply avoid collectors for years, and some will simply tumble down the socioeconomic ladder, losing homes, cars, and their aspirations for middle-class prosperity. Admitting that Chapter 13's success rate truly is less than half is a crucial first step to generating a new bankruptcy system that is simpler, cheaper, and more effective. If the pretend solution stays in place, another entire generation will need to heed the advice of the Chapter 13 debtor who warned,

> Be prepared for a rocky road. It's not an easy thing to go through. It's a longer process than what we thought it would be and there [are] unbelievable amounts of paperwork. We had creditors telling us that bankruptcy wouldn't solve our problems. We wanted to believe it would help us, but maybe they were telling us the truth.[225]

225. Interview with Respondent W2-075N.

Book Reviews

On Citation and Dialogue: Thoughts on Inga Markovits, *Justice in Lüritz*

JUSTICE IN LÜRITZ: EXPERIENCING SOCIALIST LAW IN EAST GERMANY. By Inga Markovits. Princeton, New Jersey: Princeton University Press, 2010. 244 pages. $26.95.

Reviewed by Leora Auslander*

Inga Markovits set out, in *Justice in Lüritz: Experiencing Socialist Law in East Germany*, to write an account of the workings of the law under socialism in the German Democratic Republic (DDR). More specifically, she sought, as the subtitle indicates, first to grasp and then to convey how people experienced that legal system. This is not, then, a text that lays out the principles of socialist law as expressed in legal treatises but rather one that describes and analyzes how it was practiced and used in local and regional courts. The result is an engaging, profoundly moving, beautifully written book that leaves the reader with a nuanced understanding of how all who came into contact with the courts of the DDR thought about the law and justice. *Justice in Lüritz* is also courageous, breaking many of the conventions of scholarly prose. That rupture is not driven by a self-conscious quest for originality but rather by the demands of the story told. This brief Review follows that model, engaging Markovits's text in dialogue rather than obeying the norms of the review essay. My standpoint in this conversation is threefold: as a historian, as a scholar of the everyday, and as a feminist.

The experience of socialist law in the DDR in *Justice in Lüritz* is derived, narrowly in a certain sense, from one location—the town given the pseudonym "Lüritz" in the text. The narrowness of place contrasts with the temporal breadth of the book; thinking in visual terms, this is a moving picture or, better, a slideshow, rather than a snapshot. The book opens at the beginning of the socialist regime and ends with the fall of the Berlin Wall. Despite those chronological bookends, however, the book is not a narrative but rather is organized thematically by the life activities of those whose trajectories took them into the courts of Lüritz. Correspondingly, the chapter titles are lapidary single words, sometimes specified with the definite article. Although Markovits did not choose to divide the book into parts, the chapters

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in fact fall into three clusters, followed by "The End," which, of course, both sketches the collapse of the DDR and provides a conclusion to the book. Thus, we have three parts: Part I ("The Files," "The Beginning," "People"), Part II ("Property," "Work," "Families"), and Part III ("Punishments," "The Party," "Hopes and Lies," and finally, "The End"). The titles feel like the breadcrumbs dropped by Hansel and Gretel as they moved through the forest—allusive and indicative rather than providing a clear path, although they are, in fact, more substantial and durable than those crumbs.

The book opens with "The Files" because they are, indeed, the beginning and determine what the book can, and cannot, do. *Justice in Lüritz* rests above all on the court files that Markovits was able to locate and to which she was granted access. Thus, the book begins not with what was the beginning for the historical actors but rather for the scholar. Markovits chooses to underscore, in the very structure of the book, that it is a construct; this is not a narrative that obediently follows a story as it unfolded in real time and space nor one from which the author will efface herself. Both the physicality of the documents and of the courthouse itself, and the emotion generated by the author's encounters with witnesses, are very much part of the story.

After introducing the files, the text then moves to the temporal beginning point of the story. The brief chapter, "The Beginning," which is not the opening of the book but the onset of the historical period of relevance here, provides a synopsis of the birth of the DDR. "People" sketches the staffing of the courts in these years, particularly the origins and training of the judges. Thus, by the end of what I think of as Part I, the reader has been provided with the essential information concerning the courts of Lüritz, the people who worked there, the paper they generated, and the possibilities and constraints under which they worked. Part II ("Property," "Work," and "Families") fills the courthouse with plaintiffs and defendants as well as judges and clerks. We learn of the conflicts that came before the courts of East Germany and, to some extent, how they resembled and differed from those before the courts of the capitalist West.

It is in what I have called Part III—which includes "Punishments" (a long chapter dealing heavily with criminal law), "The Party," and "Hopes and Lies"—that intersections between the judicial system and broader transformations of East German politics, including relations with both the Soviet Union and the Federal Republic, become clearest. "Hopes and Lies" reveals the gap between an idealized vision of what justice should be and what justice was (as well as the regime's incessant efforts to mask that gap). The chapter on "The Party" shows that, despite the conviction in both the West and the East that the Socialist Party controlled all, it left little trace in the archives but rather emerges as a force in the interstices of these papers. The book ends with the process of dissolution of the DDR as it played out in the courts. *Justice in Lüritz* provides, in other words, in a remarkably economical format, a highly detailed and lively account of how all East

German citizens whose lives brought them into contact with the courts—in whatever role—lived that experience. It describes changes in those experiences over the lifespan of the regime and in relation to the event that brought each person to court. Markovits accomplishes all of this through her extraordinary use of the files with which the book opens and the paths they compelled her to tread. It is a remarkable and brilliant history of the socialist legal system and, along the way, of social life in the DDR.

And yet Inga Markovits's book, because it breaks just about every rule on how historians ought to write, poses real challenges to a reader who comes to the book with a historian's expectations: the data in *Justice in Lüritz* are unverifiable; it does not locate itself in the scholarly literature; it makes extensive use of the first person, admitting to subjective reactions; and, although this is minor in relation to the other issues, it is not chronologically organized. As noted above, this rule breaking is not a stylistic artifice; it is, rather, a side effect of the author's sources, goals, and intellectual style.

Justice in Lüritz is a case study based upon the records of the town's court, supplemented by the press, the Stasi archives, the city archives, some other judicial records, and interviews. Since the object was to chronicle the uses made of the law, it was the accident, first, of the survival, and then of Markovits's discovery, of the extant court records that determined the author's choice of a town to study.[1] The town itself is of no particular interest to her; she hopes, in fact, that it is interchangeable with any other town—or more to the point, any other set of courts—in the DDR.[2] The irrelevance of the details of the locale is reinforced by the anonymity of the place and people in the book. A corollary is that the records used cannot be directly cited; the records are not archived and may no longer exist.[3] Even if the files had been deposited somewhere, Markovits would not have provided references because that would have rendered the historical actors identifiable. There are, therefore, very few footnotes in this book and none that refer to the primary source base. Unlike some other texts in which citation is avoided, the purpose is not to avoid making truth claims; as she puts it, "Apart from the names of persons and of places, nothing in this book has been made up."[4] This is not an antipositivist text. It does, however,

1. In this, it is like a number of classic microhistories. *See, e.g.*, CARLO GINZBURG, THE CHEESE AND THE WORMS: THE COSMOS OF A SIXTEENTH-CENTURY MILLER (John Tedeschi & Anne Tedeschi trans., 1980); EMMANUEL LE ROY LADURIE, MONTAILLOU: THE PROMISED LAND OF ERROR (Barbara Bray trans., Vintage Books 1979) (1978); GIOVANNI LEVI, INHERITING POWER: THE STORY OF AN EXORCIST (Lydia G. Cochrane trans., 1988).

2. In this, she departs from the microhistory tradition, where the cases are, like Lüritz, to stand in for the whole, but where they retain their individuality. *See* David A. Funk, *Legal History as Empirical Social Science in Theory and Practice*, 21 HOUS. L. REV. 311, 317 n.14 (1984) (explaining that microhistory exists on a continuum of varying degrees of generality, with macrohistory at the opposite end).

3. INGA MARKOVITS, JUSTICE IN LÜRITZ: EXPERIENCING SOCIALIST LAW IN EAST GERMANY 4 (2010).

4. *Id.* at 7.

completely refuse the scholarly apparatus that a historian (and many other social scientists) would use to justify such truth claims. There is an interesting paradox here; an accounting of the very personal and the very local is achieved, is only made possible, through a transformation of the particular into the general. The anonymity of the place and the people, and the accompanying absence of scholarly apparatus, in tandem with the book's truth claims, are unnerving to a reader disciplined by history.

Historians, it may be argued, fetishize citation practice. One conception of historians' work is to uncover untouched archival materials, that is, most often, not to literally find new documents but rather to wake documents that had been quietly sleeping in their box and extract their story. Traditionally, history dissertations depended, in fact, on the student discovering a "virgin" cache of material rather than reinterpreting an existing text. This is no longer the case, but it is still expected that all interpretations rest upon a paper trail, signposted by means of footnotes that others can follow. Even oral history methodology attempts to emulate the discipline's norms.[5] Audio and video tapes and transcripts are ideally to be archived and referenced in ways analogous to traditional textual evidence.[6] Historians are assumed to work on the past, so even if the witnesses are alive, they are providing information about historical acts now at a safe distance. United States-based historians have pleaded, in fact, for automatic dispensation from Internal Review Board authorization for the protection of human subjects on the grounds that their "use" of such subjects is fundamentally unlike that of other social scientists.[7]

One could argue that all of this, however interesting, is irrelevant to *Justice in Lüritz* because the model Markovits is following, or at least the appropriate analogy, is not to history but rather to sociology and anthropology—the citation practices and conceptions of narrative in those disciplines are different and much closer to those used by Markovits. For example, in the Middletown studies by Robert and Helen Lynd, the original transcripts of interviews and questionnaires were destroyed after the study was written up and before the authors' papers were given to the Library of

5. *See* NANCY MACKAY, CURATING ORAL HISTORIES: FROM INTERVIEW TO ARCHIVE 19–21 (2007) (discussing the importance of meticulously recording, preserving, and cataloging oral-history archives).

6. *Cf.* PATRICIA LEAVY, ORAL HISTORY: UNDERSTANDING QUALITATIVE RESEARCH 44–45 (2011) (stating that most researchers tape-record interviews and some videotape them, and providing various recommendations on how to catalog corresponding interview notes); MACKAY, *supra* note 5, at 29–31 (explaining how to process and record an oral history); Stephen Ellis, *Writing Histories of Contemporary Africa*, 43 J. AFR. HIST. 1, 20–21 (2002) (arguing that "any historian" studying recent African history must consider the unofficial, spoken news as "a prime source").

7. *See, e.g.*, Jonathan T. Church, Chair, Arcadia Univ. Dep't of Sociology & Anthropology, Should All Disciplines Be Subject to the Common Rule?, Panelist Remarks Before the U.S. Department of Health and Human Services' National Human Research Protections Advisory Committee (Jan. 2002), *in* ACADEME, May–June 2002, at 62, 64 ("[C]ertain kinds of research—for example, oral history interviews or work by professors of journalism—should be excluded altogether from IRB review.").

Congress.[8] Likewise, one of the basic principles of fieldwork, as articulated by the Society for Applied Anthropology, is that scholars will "provide a means through our research activities and in subsequent publications to maintain the confidentiality of those we study."[9] In both cases, the assumption is that the privacy of living informants and ethnographic subjects is an essential ethical foundation for the work. So perhaps even thinking about *Justice in Lüritz* in the context of the discipline of history is inappropriate. Perhaps it is rather at home with ethnographies and sociological studies.[10] I am not, however, satisfied with that solution because *Justice in Lüritz* is extremely persuasive *as a historical narrative*, as an account of the experience of law under socialism. It provides us with a more profound, nuanced, and *truer* understanding of an issue of fundamental importance than many books written with "proper" sources and conventional forms of argumentation. These are surely appropriate goals for professional historians.

I am also not sure that thinking of the book as ethnography would, in fact, resolve the question. There is now a considerable body of reflection among ethnographers on the ethics of confidentiality and pseudonyms. The issues raised there are many. Two of the most interesting are, first of all, the possibility that informants may lie when they know that they will not be held accountable (either to their neighbors or the researcher) for their words and, secondly, the fact that some informants have said that they possess a sense of pride and authorship in their stories and want their names attached. Others have gone so far as to report having felt robbed of their intellectual property

8. Howard M. Bahr et al., *Middletown III: Problems of Replication, Longitudinal Measurement, and Triangulation*, 9 ANN. REV. SOC. 243, 246 (1983).

9. *Statement on Ethical and Professional Responsibilities*, SOC'Y FOR APPLIED ANTHROPOLOGY, http://www.sfaa.net/sfaaethic.html.

10. It could also be argued that I am overstating the difference here and that some studies combine elements of historical studies with elements of ethnographies and sociological studies. *See* ORAL HISTORY: AN INTERDISCIPLINARY ANTHOLOGY xix–xx (David K. Dunaway & Willa K. Baum eds., 1984) (compiling works on oral history, including many that combine historical and anthropological elements); Ronald J. Grele, *Useful Discoveries: Oral History, Public History, and the Dialectic of Narrative*, PUB. HISTORIAN, Spring 1991, at 61, 63 (exploring the impact that oral history and public history have had on the "narrative and analysis" of historians' work); Fern Ingersoll & Jasper Ingersoll, *Both a Borrower and a Lender Be: Ethnography, Oral History, and Grounded Theory*, ORAL HIST. REV., Spring 1987, at 81, 82 (combining ethnography and oral history in the study of a village in central Thailand); Caren Kaplan, *Resisting Autobiography: Outlaw Genres and Transnational Feminist Subjects*, *in* DE/COLONIZING THE SUBJECT: THE POLITICS OF GENDER IN WOMEN'S AUTOBIOGRAPHY 115, 126–27 (Sidonie Smith & Julia Watson eds., 1992) (considering the relationship between the legacies of colonialism in ethnography and autobiography); Personal Narratives Group, *Origins*, *in* INTERPRETING WOMEN'S LIVES: FEMINIST THEORY AND PERSONAL NARRATIVES 3, 10–11 (Personal Narratives Group ed., 1989) (explaining that contemporary examinations of feminist theory must take a cross-disciplinary approach and describing the compilation of articles that focus both on personal narratives themselves and on the interpretation and use of these stories in particular societies).

or exploited.[11] There is, in addition, the preservation question. Is part of a scholar's task to assure, or to attempt to assure, the survival of the documentary record? Norms have changed on this question in all of the disciplines using qualitative evidence; the interviews from the Middletown III (1976–1978) study, for example, were preserved and publicly archived.[12] Thus, although historians are perhaps particularly fetishistic about documentation, these issues are not limited to that discipline. And it is because of, as well as in spite of, the troubling questions raised by *Justice in Lüritz* that I suggested to colleagues who teach a historiography and historical methods course to incoming Ph.D. students that they should assign this book. They often hesitate, saying that it is indeed a great book but not an appropriate model for apprentice historians.

The two issues most often raised are the absence of "followable" references to primary sources and the nonengagement with the existing scholarly literature. One possible answer concerning the anonymity of the sources and the nonreproducibility of the research is the not very interesting, but nonetheless essential, point that had Markovits limited herself to the sources that could have been "properly documented," our understanding of East German law would have been greatly impoverished. That is, the only way to pragmatically, ethically, and legally use these sources is as has been done in this text. The preservation issue was no doubt moot; the quantities of paper (and their "triviality") were such that there was almost certainly no possibility of persuading an archive to accept them nor a funding agency to pay for their digitization. And, while some of her informants might have preferred to be identified, and some might have been more restrained in a useful sense had they known they would be, others would not have felt able to speak had they thought they would be named. Most fundamentally, Markovits would almost certainly not have been allowed to see the court records had she said she would identify the town and its people. So, in this case, the reality is that the other choice would be to leave the documents moldering in the basement of the courthouse, unread, unattended to, and unused. And as they moldered, the stories they bear would, of course, molder with them. Implicit in the argument that the text should not be taught to apprentice historians is the contention that, were they to find a cache of similar documents or to imagine a research project that would require such documents, they should turn their back on them. There is a crucial issue here then: should historians limit themselves to the stories they can tell with the

11. *See, e.g.*, Sjaak van der Geest, *Confidentiality and Pseudonyms: A Fieldwork Dilemma from Ghana*, 51 ANTHROPOLOGY TODAY, Feb. 2003, at 14, 17 (recounting that informants "lied profusely" before being promised confidentiality and chronicling the malaise of informants whose names were substituted with pseudonyms in the author's work); *cf.* John L. Jackson Jr., *On Ethnographic Sincerity*, CURRENT ANTHROPOLOGY S279, S285 (2010) (contending that anthropologists should value the sincerity of their informants over authenticity in order to prevent closing off critiques of identity politics).

12. Bahr et al., *supra* note 8, at 250.

materials left to them in "proper" archives? What would be at stake, exactly, in demarcating the boundaries of the discipline and saying that a book like *Justice in Lüritz* is a fascinating piece of ethnography, historical sociology, or even historical fiction but should not be included in the historiographical canon?

One of the justifications for historians' insistence that arguments be based upon primary sources to which other scholars may have access is verifiability, the basic idea that other scholars who follow behind can be sure of the empirical claims.[13] More interesting, however, is the argument that such access is important because it allows for others to assess the writer's interpretation of the sources.[14] Here the facts are not at issue but rather the narrative, the story, told on the basis of those facts. Finally, a third logic for using only documents that can be cited properly (and therefore found and read by others) is that it allows for collective labor.[15] According to this model, in an ideal world, an interpretation would be offered and other historians would read it along with the primary sources upon which it rests and offer alternative, improved interpretations on the basis of their reading. This would happen multiple times, ultimately producing a collective, dialogic interpretation of a past event or problem. It is, perhaps (and perhaps ironically in an essay in a law review) a vision that closely duplicates the adversarial dynamics of a court of law, at least as it appears to a lay person. Evidence is presented in a courtroom; it is then assessed and interpreted by the lawyers for the defense and the prosecution; the jury then determines, on the basis of the evidence and the argument, where the truth lies. While the writing of history is not necessarily adversarial (in contrast to the common law courtroom), the process is parallel. There are, then, both positivist and antipositivist assumptions underlying the scholarly apparatus conventional to the profession. The question remaining is whether the costs to historians of including evidence to which no other scholar will have access—thereby eliminating the possibility of interpretative debate—are worth the benefits of the knowledge generated by the use of this material. I would make the response that yes, they are, but that such inclusion does not throw the basic mode of operation of the discipline into question. Such texts will always provoke anxiety alongside admiration, as perhaps they should.

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13. *See* Edmund Russell & Jennifer Kane, *The Missing Link: Assessing the Reliability of Internet Citations in History Journals*, 49 TECH. & CULTURE 420, 422 (2008) ("The footnote flowered in the nineteenth century as a way to prove historical arguments. . . . If the purpose of a footnote was to prove assertions, other historians needed to be able to examine the same material.").

14. Robert K. Merton, *Foreword* to EUGENE GARFIELD, CITATION INDEXING—ITS THEORY AND APPLICATION IN SCIENCE, TECHNOLOGY, AND HUMANITIES, at v, vi (1979) (explaining that citations are "designed to provide the historical lineage of knowledge and to guide readers of new work to sources they may want to check or draw upon for themselves").

15. *See* Donald O. Case & Georgeann M. Higgins, *How Can We Investigate Citation Behavior? A Study of Reasons for Citing Literature in Communication*, 51 J. AM. SOC'Y FOR INFO. SCI. 635, 636–37 (2000) (explaining that an author's reasons for providing citations may include criticism, corroboration, development of ideas, illustration, substantiation, and current concerns).

The second very unusual feature of *Justice in Lüritz* is its nonengagement with the existing relevant scholarly literatures. Ethnographers, qualitative sociologists, and historians share the assumption that one is, as a scholar, participating in a conversation with other scholars, past and present, dead and alive, who have worked on the same or similar topics. It is assumed that one may be, in the case of anthropology and sociology, basing one's analyses and interpretations on a common body of social theory to which it is crucial to refer or, more rarely, that one is looking at the same "case" but from another point of view. Historians less often make overt theoretical claims and infrequently return to archives already studied by their colleagues, but they do engage in intense interpretive debate. Classic questions like the causes of the French Revolution, the impact of industrialization on gender structure, or the timing or reality of Europe's secularization thesis are hotly disputed, in print and in person, either on the basis of conflicting data or conflicting interpretations of data. Likewise, the question of the nature of justice under socialist regimes has been the subject of considerable discussion. Inga Markovits chose, in *Justice in Lüritz*, not to address directly any of the existing literatures with bearing on this story.

The point of *Justice in Lüritz* is emphatically not to prove any other scholar wrong or even, quite, to contribute to scholarly debate. The book emerges very powerfully as the product of individual curiosity and determination; the author has spent a lifetime seeking to understand how the legal system worked in the DDR. This publication is the most recent in an ongoing project. This is, perhaps, also at least part of the explanation for why she does not suffer from the curse of much academic writing, which is to invent disagreement when there really is not one or to make very bold claims for originality that involve ignoring the contributions of others. Markovits makes no bold claims for her book; she simply offers it. Worrying about the reception of her book, or its audience, was, I think, not high on her agenda. The paradox of that choice is, of course, that the book can speak to more audiences since it privileges none. That said, I do regret some of the costs of this strategy.

This text intersects in very interesting ways with the conceptual literature on everydayness—with the literature that engages in reflection on the place of reflexivity and first-person narratives in nonfiction writing—and with the historiography on the DDR and that on law under socialism, but the reader is left to imagine the discussions Markovits might have had with scholars working in these fields.

I found myself, furthermore, as a nonspecialist academic reader, wondering about how much this image of law under the DDR differs from those drawn by other historians (legal and otherwise).[16] She provides hints

16. For examples of other histories of law in East Germany, see DIE DDR: RECHT UND JUSTIZ ALS POLITISCHES INSTRUMENT [EAST GERMANY: LAW AND JUSTICE AS POLITICAL TOOLS] (Heiner Timmermann ed., 2000); GERALD MICHAEL KRAUT, RECHSTSBEUGUNG? DIE JUSTIZ DER DDR

of such a discussion at various points but nothing approaching a full-blown analysis. I also found myself wishing that I knew more of her understanding of "the everyday" and feeling a little deprived of the kind of eavesdropping that being told the conversations in which the author understands herself to be participating can provide. What does she, for example, think of Michel de Certeau's, Henri Lefebvre's, Dorothy Smith's, or Alf Lüdtke's take on "the Everyday"?[17] Or, what does she think of Sheila Fitzpatrick's work on everyday life elsewhere in the Soviet Bloc?[18]

There is also, by now, a rather massive literature on the status of the first-person experience—and more to the point, the author's experience—in academic writing.[19] Literary critics and anthropologists were in the avant-garde of those discussions, as challenges from the authors of the texts they analyzed on the one hand, and the intensified critique in the 1970s of their discipline's linkage to colonialism on the other, made them wonder about what they were doing, exactly, in the field. That wondering took many forms. Some analyzed how their very presence shaped the data they were collecting.[20] Others attempted to grasp how their own emotional states

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AUF DEM PRÜFSTAND DES RECHTSSTAATES [LAWBREAKING? TESTING THE JUSTICE OF EAST GERMAN LAW] (1997); RUTH-KRISTIN RÖSSLER, JUSTIZPOLITIK IN DER SBZ/DDR: 1945–1956 [JUDICIAL POLITICS IN THE SBZ/DDR: 1945–1956] (2000); PETER W. SPERLICH, THE EAST GERMAN SOCIAL COURTS: LAW AND POPULAR JUSTICE IN A MARXIST–LENINIST SOCIETY (2007); STEUERUNG DER JUSTIZ IN DER DDR [CONTROL OF JUSTICE IN THE DDR] (Hubert Rottleuthner ed., 1994); and NANCY TRAVIS WOLFE, POLICING A SOCIALIST SOCIETY: THE GERMAN DEMOCRATIC REPUBLIC (1992).

17. MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE (Steven F. Rendall trans., 1984); HENRI LEFEBVRE, CRITIQUE DE LA VIE QUOTIDIENNE [A CRITIQUE OF EVERYDAY LIFE] (1947); DOROTHY E. SMITH, THE EVERYDAY WORLD AS PROBLEMATIC: A FEMINIST SOCIOLOGY (1987); Alf Lüdtke, *What Happened to the "Fiery Red Glow"? Workers' Experiences and German Fascism*, *in* THE HISTORY OF EVERYDAY LIFE: RECONSTRUCTING HISTORICAL EXPERIENCES AND WAYS OF LIFE 198 (Alf Lüdtke ed., William Templer trans., 1995).

18. SHEILA FITZPATRICK, EVERYDAY STALINISM: ORDINARY LIFE IN EXTRAORDINARY TIMES: SOVIET RUSSIA IN THE 1930S (1999).

19. *See generally* GENDER AND THEORY: DIALOGUES ON FEMINIST CRITICISM (Linda Kauffman ed., 1989) (exemplifying the use of the academic "I" through dialogic essays on feminist literary theory); LAURA MARCUS, AUTO/BIOGRAPHICAL DISCOURSES: THEORY, CRITICISM, PRACTICE (1994) (discussing the history of autobiography and exploring contemporary autobiographical writing, criticism, and theory); Suzanne Fleischman, *Gender, the Personal, and the Voice of Scholarship: A Viewpoint*, 23 SIGNS: J. WOMEN CULTURE & SOC'Y 975 (1998) (exploring the trend toward personalization of scholarly writing and considering how that trend is gendered); Forum, *The Inevitability of the Personal*, 111 PMLA 1146, 1146 (1996) (asserting that the self inevitably "permeates criticism, theory, and scholarship"); Lorna Martens, *Saying "I"*, 2 STAN. LITERATURE REV. 27 (1985) (challenging the idea that literary autobiographical narrative is inherently unreliable); Camilla Stivers, *Reflections on the Role of Personal Narrative in Social Science*, 18 SIGNS: J. WOMEN CULTURE & SOC'Y 408, 410, 411–14 (1993) (arguing that because individuals experience the world subjectively, it is impossible to "remov[e] the observer from the knowledge acquisition process"); Elisabeth Young-Bruehl, *Pride and Prejudice: Feminist Scholars Reclaim the First Person*, LINGUA FRANCA, Feb. 1991, at 15 (remarking on the emergence of the first-person-singular voice in academic prose).

20. *See, e.g.*, Helen Callaway, *Ethnography and Experience: Gender Implications in Fieldwork and Texts*, *in* ANTHROPOLOGY AND AUTOBIOGRAPHY 29, 29 (Judith Okely & Helen Callaway eds., 1992) (analyzing the role of the anthropologist's gender in shaping data gathering and

influenced what they perceived and did not perceive.[21] Still others became acutely aware of how their own age, gender, and race were influencing what they were allowed to witness.[22] Feminist sociologists, philosophers, and historians a decade later became concerned with a related but distinctive set of preoccupations. They developed and then took seriously the argument, used in the context of the struggle over affirmative action in universities, that it was important to have a diverse faculty and student body, because experience matters.[23] That is, at least in societies in which gender and race are fundamental organizing categories, restricting knowledge production to those of one race or one gender will result in partial knowledge. The argument for the importance of standpoint was, of course, part of a broader critique of positivism and of certain kinds of truth claims. One might think, reading *Justice in Lüritz*, that Inga Markovits was coming out of that intellectual tradition. Both internal and external evidence, however, suggest that this is not the case. Markovits herself appears frequently in the text, but never, I think, to suggest that the author *as author* matters to what she has learned or how she is telling her tale. The first person is not there, in other words, to suggest that if another person—a man, someone who had not been born in Germany and emigrated to the United States, someone who had not had children, someone who was not a law professor—were to have written the

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interpretation); Forum, *supra* note 19, at 1152 ("[S]cholars who don't reveal their participation in interactions risk the appearance of hiding it."); Stivers, *supra* note 19, at 410 (discussing "the kind of particular, contextual knowledge [that] personal narrative imparts").

21. *See, e.g.*, R.J. Dolan, *Emotion, Cognition, and Behavior*, 298 SCIENCE 1191, 1192–93 (2002) (describing the neuroscientific effects that emotions have on perception); Janet Liebman Jacobs, *Women, Genocide, and Memory: The Ethics of Feminist Ethnography in Holocaust Research*, 18 GENDER & SOC'Y 223, 227–29 (2004) (explaining the decision to use photography to create a "portable database that could be transferred from the emotion-laden research setting (the Holocaust site) to the comparatively safe haven of [her] office in the United States" to help account for emotionally influenced perception).

22. *See, e.g.*, RUTH BEHAR, THE VULNERABLE OBSERVER: ANTHROPOLOGY THAT BREAKS YOUR HEART 162–63 (1996) (contending that Chicano and Chicana anthropologists were better able to see and understand Latino cultures than were Anglo researchers); GEORGE E. MARCUS, ETHNOGRAPHY THROUGH THICK & THIN 196–98 (1998) (describing the important role that personal traits play in the interaction between the anthropologist observer and his or her subject); Fran Markowitz & Michael Ashkenazi, *Introduction* to SEX, SEXUALITY, AND THE ANTHROPOLOGIST 5–10 (Fran Markowitz & Michael Ashkenazi eds., 1999) (explicating the evolution of anthropologists in revealing the effect of their sexual behavior in the field on their research); Liz Stanley & Sue Wise, *Method, Methodology, and Epistemology in Feminist Research Processes*, *in* FEMINIST PRAXIS: RESEARCH, THEORY AND EPISTEMOLOGY IN FEMINIST SOCIOLOGY 20, 39 (Liz Stanley ed., 1990) (arguing that gender can influence perspective due to social experiences).

23. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 120–21 (1991); Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1230 (1995); Marnia Lazreg, *Women's Experience and Feminist Epistemology: A Critical Neo-rationalist Approach*, *in* KNOWING THE DIFFERENCE: FEMINIST PERSPECTIVES IN EPISTEMOLOGY 45, 46 (Kathleen Lennon & Margaret Whitford eds., 1994). *See generally* Carolyn Leste Law, *Introduction* to THIS FINE PLACE SO FAR FROM HOME 1 (C.L. Barney Dews & Carolyn Leste Law eds., 1995) (arguing that faculty members from working-class backgrounds bring unique perspectives to academia).

book, it would have been substantially different. The first person is there to provide information the author views as crucial for the reader in assessing the argument. The most striking case is, no doubt, when Markovits notes, in her discussion of a case in which a mother's children were permanently taken away from her by the court because she was unable to care for them while recovering from having been badly beaten by her husband, that she herself would have gone to jail rather than lose any of her children.[24] The comment is there to inform the reader of her point of view but not really to suggest that a reader who had not had children would read the case differently. Reading this passage, and others in which Inga Markovits appears, brought to my mind the work of feminist philosopher Iris Marion Young, who in the essays collected in *On Female Body Experience*, as well as elsewhere, inserts evidence from her own life to reinforce an argument.[25] Rather than arguing for the necessary partiality of all knowledge resulting from the impossibility for any author to escape from his or her standpoint and achieve objectivity, Young implicitly makes a claim for privileged knowledge; she is in a particularly good location to grasp how norms of domesticity worked in mid-twentieth century America because she was taken away from her mother when her mother was judged to be an incompetent parent.[26] I would have found it helpful while reading *Justice in Lüritz* to know what conversation Markovits might have had, be having, or imagine having, with Iris Marion Young or others, on the situated knowledge and place of the "I" in academic prose. As in the case of Inga Markovits's silence on the historiography of the DDR and its legal history, the silence does not make the text less interesting or less persuasive, but it does leave one, as the French say, "on one's hunger" to know more of what she thinks.

Finally, I would like to suggest that, despite the title, *Justice in Lüritz* is not primarily a book about justice. It is a book, as the subtitle (*Experiencing Socialist Law in East Germany*) suggests, about the workings of the legal system in East Germany. While this may appear to be a semantic quibble, I think it is not the case. The gap between justice in the more profound sense and the legal system is marked in any society. I found myself wondering, as I finished the book, about other ways of thinking about justice. It would seem that the principles of justice—in the abstract—in socialist and capitalist societies were fundamentally different. *Justice in Lüritz* makes clear that the socialist regime did not succeed in changing many people's conception of justice—they continued, for example, to defend their rights as property owners. But many do seem, for a while at least, to have accepted that the

24. MARKOVITS, *supra* note 3, at 83.

25. *See, e.g.*, IRIS MARION YOUNG, *Breasted Experience: The Look and the Feeling*, *in* ON FEMALE BODY EXPERIENCE, at 75, 83 (2005) (giving an example of shedding her bra to illustrate that although "[w]omen never gathered in a ritual of bra burning, . . . the image stuck" in the minds of women).

26. IRIS MARION YOUNG, *House and Home: Feminist Variations on a Theme*, *in* ON FEMALE BODY EXPERIENCE, *supra* note 25, at 123, 136.

common good had to take precedence over individual desire and that contract was a concept of limited validity. It would be fascinating to know more about the *mechanisms* by which people's fundamental understanding of justice changes. When and how, for example, do people come to believe that the color of skin should not affect wages or employment opportunities? Why is it so hard to convince people that it is unjust for women to be paid less than men? *Justice in Lüritz* gives us a series of snapshots of what issues people living in the DDR thought that they could bring to court, the arguments they used, and the responses of the judges. It cannot give us a clear sense of how "justice" worked—that is, how and why conceptions of the just and unjust changed (or did not). This is a result, I think, of both the source base and the organization of the book.

Any method of organization carries the faults of its virtues, and that governing *Justice in Lüritz* is no exception. The choice to organize the book topically or thematically both produces a certain amount of repetition but, more seriously, makes it much harder to grasp, in a systematic way, how the experience of the courts changed over the lifespan of the DDR and how those changes were imbricated with other transformations in polity, economy, and society. This was a frustration to me, but she might well reply that this was not her goal. Her goal was to understand how people *experienced* the law, and most people experience the law episodically and in particular parts of their lives—family, work, or property—during which they are obliged to come in contact with the courts. A narrative that started at the beginning and oscillated through changes in the judicial and other aspects of East German governance would have risked losing the book's central subject in what might appear to be a grander narrative and larger explanation. The issue of comparing socialist with nonsocialist experiences of the law lies in parallel with that of tracing change over time.

There is inevitably in this text, as in all that take one aspect or another of a socialist regime as their agenda, an implicit or latent comparison with the equivalent institution or structure in capitalist regimes. While asking for a full-blown comparison of the experience of law under capitalism and socialism is obviously unreasonable, I was occasionally troubled by sentences, or sentence fragments, that implied that a given phenomenon would not have happened in a court of law in a capitalist system. I found that, for example, to be true in the case referred to above of the woman who committed suicide after her children were removed from her.[27] It is clear that socialist justice in the DDR often did privilege what the judges understood to be the collective good over individual interest, but that seems to often be true in capitalist justice in the United States as well. So, I found myself longing, sometimes, for the implicit comparisons to be made more explicit, even if only to open the question.

27. MARKOVITS, *supra* note 3, at 86.

I would like to conclude on what may seem to be another trivial issue, but one that I find intriguing. My strong impression as I was reading *Justice in Lüritz* was that Markovits had translated the book herself. I thought that not because there was anything particularly Germanic about the prose but because of certain formulations that were both very appealing and deeply idiosyncratic. I realized, after a point, for example, that the verb the author virtually always uses to describe someone leaving the East for the West was *abscond*[28]—a very particular choice. I focus here on that particular example because I think it sums up very beautifully both the location and power of this book. *Abscond*, whose dictionary meaning is "to depart secretly and hide oneself"[29] is, of course, perfectly apt for those who fled the East. But, connotatively, *absconding* is not entirely honorable; it does not imply the pathos of *fleeing* or of *escaping*. Inga Markovits's choice of this verb emblematizes the work she has done in *Justice in Lüritz*: the book provides an extraordinarily vivid and equally extraordinarily complex, moving picture of how people experienced socialist law in East Germany. She neither rehabilitates nor condemns the DDR any more than she romanticizes or judges those individuals who remained within its borders or absconded to the other side of the border. She set about attempting, using all the tools available to her, to do justice to the system of justice of the DDR. And she has succeeded admirably.

28. *Id.* at 9, 16, 29, 49, 99, 189.

29. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 4 (11th ed. 2006).

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The Magic Mailbox of Inga Markovits

JUSTICE IN LÜRITZ: EXPERIENCING SOCIALIST LAW IN EAST GERMANY. By Inga Markovits. Princeton, New Jersey: Princeton University Press, 2010. 244 pages. $26.95.

Reviewed by Lawrence M. Friedman*

Inga Markovits began her scholarly career as a specialist in the law of the German Democratic Republic, the DDR. The DDR was, of course, part of the bloc of states in Eastern Europe dominated by the Soviet Union. Its capital was East Berlin, and the local Communist party controlled its government along the usual strictly autocratic lines. Professor Markovits's first book, published in 1969, was on legal thought in the DDR.[1]

A bit more than twenty years later, Professor Markovits underwent what is an exceedingly rare experience for a scholar: her chosen subject matter simply disappeared. Many scholars, I suppose, lose bits of their field when this or that law is repealed or when parts of it become obsolete. But to have the whole subject disappear—to suppose that libertarians got rid of the whole Internal Revenue Code or that the Supreme Court declared the patent system unconstitutional—that is much rarer. Or to be a specialist, say, in the law of some small island country that disappears under the waves due to global warming or some catastrophic volcanic explosion. I cannot really think of another example. It might be, perhaps, a little bit like a biologist who, let's suppose, was the world's leading expert on the Chinese river dolphin, which has now become irretrievably extinct. The legal system of East Germany, which included the small town of Lüritz, is also like that dolphin—completely extinct. And extinction is forever.

Yet Professor Markovits has turned what might have been an academic calamity into a magnificent academic opportunity. For judges and lawyers of the DDR (with rare exceptions), the death of the system meant the end of their careers. But professors have options that these judges and lawyers did not have. Professor Markovits, to begin with, seized the chance to chronicle the death of the East German legal system. She wrote an account of the last days of the system in a wonderful book written in the form of a diary. The English title is *Imperfect Justice: An East–West German Diary*.[2] In many ways, this book foreshadowed the Lüritz book in its insightful (and very

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1. INGA MARKOVITS, SOZIALISTISCHES UND BÜRGERLICHES ZIVILRECHTSDENKEN IN DER DDR [SOCIALIST AND BOURGEOIS LEGAL THOUGHT IN THE DDR] (1969).

2. INGA MARKOVITS, IMPERFECT JUSTICE: AN EAST–WEST GERMAN DIARY (1995).

human) treatment of the legal system of the DDR and very definitely in the gracious and very personal style of its prose.

After that, Professor Markovits became, despite herself, a historian. For scholars, the demise of East Germany opened a number of doors that had been firmly closed before. The DDR was, after all, a communist dictatorship. So much information about the way its system worked was secret, unavailable, or off-limits to outsiders. But all that was over now. And then, providentially, Professor Markovits discovered, in the town she calls Lüritz,[3] a treasure trove of data: records of the work of a lower court, the district court, dating back almost to the beginning of the DDR—records, in other words, of the ordinary, day-by-day processes of law in East Germany.

In the beginning of the book, Professor Markovits makes a revealing and striking comment. As a child, she says, she toyed with "the idea of stealing the contents of a mailbox . . . and, by reading every letter in it, discovering what life was all about."[4] And now, she continues, at long last, her childhood dream has come true: she found her mailbox.[5] And what a rich and satisfying mailbox this is—how full of life, how fascinating; how much it tells us about the legal world of the DDR. The book, in short, is an exploration of this magic mailbox. Whether it would have revealed so much to a less gifted author is another question. Almost certainly it would not.

The first point I want to make about this book is how beautifully written it is. The prose is supple, lapidary, precise, and yet also esthetically balanced. The book is a sheer delight to read. And this, I believe, is more than a matter of style. It is organic. And it is, I am sure, deliberate. Professor Markovits was born in Germany and is a product of German legal education. But it would be hard to imagine a greater affront to the whole notion of *Rechtswissenschaft*, or legal science, a greater contrast to the reams and reams of legal writing in her native country, than this book, as indeed with regard to her earlier book about the dying days of East German law. Most of what passes for *Rechtswissenschaft* is dull, labored, and formalistic. Very little of it deals, as this book does, with the actual life of the law.

Style is, of course, a personal matter, but in this case, style tells us two important things. First, that the life of the law is simply part of the general fabric of life in society; the life of the law is not theory, it is not philosophy,

3. This is not the real name of the town. Because some of the players in the drama are still alive, and because Professor Markovits conducted interviews and made promises of confidentiality, the names of people in the book, and the name of the town itself, are disguised under pseudonyms. INGA MARKOVITS, JUSTICE IN LÜRITZ: EXPERIENCING SOCIALIST LAW IN EAST GERMANY 1 (2010). This is a common practice, particularly in sociological studies ("Middletown" is a classic example). To be sure, the identity of Lüritz is fairly obvious to anybody who makes an effort to find out.

4. *Id.* at 2.

5. *Id.*

it is (to echo Holmes) the workaday experience of legal actors.[6] Above all, law is about people. Especially is this so for courts at the very base of the legal order, the lowest level of courts. And especially so when the courts operate inside what is supposed to be a socialist system, that is, in a state that feels entitled to control and to monitor everything in a person's life and work.

The style tells us something else as well. It tears away the mask of science and admits that authors like Professor Markovits are also human beings with likes, dislikes, ideas, and prejudices. It admits, too, that absolute neutrality or objectivity in a book of this sort is impossible. Objectivity is a goal or an ideal; it can be approached but never completely attained. This is, in many ways, a work of ethnography, historical ethnography as it were, and the ethnographer necessarily has to see, feel, and interpret. Interpretation, however, is an art, not a science. And it requires inevitably processing raw data in the machine of one's own personality and experience.

The text makes this crystal clear. Professor Markovits is nothing if not candid. Discussing family law, she states: "I [have] lived and worked for more than half my life in the United States . . . . I have children myself."[7] Her reaction to some of what the court was doing in this area, she says, "demonstrates how difficult it is for even a well-intentioned observer to keep herself out of the story that she is investigating."[8] Even more striking, when discussing the judges, she says: "Like the reader of a novel, I discover likes and dislikes for the protagonists of my files."[9] She expresses respect for Frau Christiansen, one of the judges, but she considers another, Herr Kellner, "self-righteous and authoritarian"[10]—she "cannot stand him."[11]

These personal touches do not reduce the value of the book as social science; indeed, they enhance it by making clear the limits and the assumptions under which Professor Markovits worked. There are limits and assumptions in any work of history or social science, but they are rarely so close to the surface, rarely expressed so frankly, rarely so enlightening. The message is this: the story in these pages is about human beings, with all their frailties; and the author, too, is a human being who has likes and dislikes, prejudices and opinions; and you must be careful never to forget these facts; and if it leads you, the reader, to be skeptical, to balance what is said with what is not said, to wonder how much these pages reflect the prismatic influence of the author's own point of view, so much the better. Truth, in ethnography, and in historical sociology in general, is shifting and elusive.

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6. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Little, Brown & Co. reprint) (Mark D. Howe ed., Harv. Univ. Press 1963) (1st ed. 1881).

7. MARKOVITS, *supra* note 3, at 83.

8. *Id.*

9. *Id.* at 17.

10. *Id.*

11. *Id.*

Another striking feature is the author's amazing sensitivity to small details—meaningful details that most researchers might have overlooked. Professor Markovits is a remarkably keen and insightful observer; even the kind of paper used in the court is treated as data and mined for its meaning.[12] She says, for example, about bundles of model cases sent by the regional court: "Their pages, like old carpets, are shot through with bare spots in places where the copy machine's ink ran low, and their immaculate smoothness after forty years tells me that they cannot have been handled by many readers."[13]

These personal touches, then, do not (as I said) imply any loss of rigor. Where rigor is possible, rigor is what we get. Indeed, although what the reader most notices are the telling incidents and the rich human quality of the narrative, where numbers are available and useful, Professor Markovits provides them. To take one example out of many, in 1976, we are told, 86% of all defendants sentenced for "asocial behavior" were imprisoned before trial.[14] By contrast, only 29% of all other offenders were imprisoned before trial.[15] East German law treated slackers with great disdain.[16] In divorce proceedings, what percentage of lawsuits were suspended in hopes that the parties could get together? A small and declining percentage, as it turns out: in 1985, only 6% of cases were suspended for reconciliation.[17] Simple statistics can be, at times, extremely telling. Before the Wall went up, it was mostly members of the middle class who fled to West Germany; most were older than twenty-five, and a third of them were women.[18] Once the Wall was up, it was dangerous—even life threatening—to try to cross over; only the "young and daring" made the attempt.[19] The average age was just over twenty-one.[20] Prudent elders and women stayed put.

This mix of the quantitative and the qualitative is one of the strengths of the book. After all, numbers alone are blind and meaningless; narratives and incidents alone, on the other hand, fall short of anything one considers proof. The mixture is powerful and persuasive. The smooth, easy style also conceals a tremendous amount of work. Professor Markovits looked in every corner, every nook and cranny, for evidence. She checked data where she could—with personal interviews, archives, anything she could lay her hands on, anybody she could talk to or see.

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12. *Id.* at 5–6.
13. *Id.* at 161.
14. *Id.* at 177.
15. *Id.*
16. *See infra* notes 41–48 and accompanying text.
17. MARKOVITS, *supra* note 3, at 78. Twenty years earlier, the figure was 13.8%. *Id.*
18. *Id.* at 109.
19. *Id.*
20. *Id.*

What do we learn from this book? We learn of course a great deal about law in East Germany, its culture, its essential nature. Communist law is, on the whole, "parental."[21] This is a metaphor that appears again and again. The East German state is compared to a parent, the citizens to children. No metaphor is more frequent. At its worst, like a strict parent, the state could be, and was, dictatorial and autocratic. The system would not "let its children step out of line nor . . . drop by the wayside."[22] Perhaps, at times, the metaphor seems a bit inappropriate; this was, after all, a regime with political prisoners, a regime that killed people who tried to scramble over the Wall, and that, in many ways, made a mockery of human rights and due process. But the book is primarily about a lower court in a small town; the high political decisions and manipulations in East Berlin find only rather dim echoes in this book.

West Germans were and are apt to dismiss East Germany as an *Unrechtstaat*.[23] This word defies exact translation, but it means, roughly, an unjust state, a state that lacks human rights and ignores the rule of law. In her work, Professor Markovits clearly suggests that this label is a bit unfair, at least at the level of the court in Lüritz.[24] There were most definitely elements of the *Unrechtstaat*. But in some regards, at times, the parental state did show some feeling for its children.[25] True, it was a strict parent, and a parent not very skilled at understanding the hopes and dreams of its children.[26] But the judges in Lüritz were not particularly malevolent, or perhaps not malevolent at all.[27] They were also not particularly powerful. They had no lawmaking authority, and of course no army and no corps of spies or informers.

In the early days, the judges, and possibly many ordinary citizens, had faith, perhaps naive faith, in socialist society and its ideals. They thought a new and better world might be coming, a world of equality and proletarian dignity.[28] This dream at least gave people some hope. The times were tough.[29] To be sure, the Nazi nightmare had ended. But Germany was in ruins. Millions were dead. Foreign armies occupied the land. The Soviets had committed atrocities. The economy was prostrate. People had lost almost everything. The docket of the court in its early years mirrored the hard

21. Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1344 (2008). This metaphor for socialist law, according to Markovits, was originally used by Professor Harold Berman. *Id.*

22. MARKOVITS, *supra* note 3, at 125.

23. *Id.* at 240.

24. *E.g.*, *id.* at 175–76.

25. *Id.* at 207–09.

26. *Id.* at 182.

27. *Id.* at 20–21.

28. *Id.* at 18.

29. *Id.* at 22–23.

times, the poverty, the misery, the devastation, the sense of loss.[30] But to many people, there was at least a chance of renewal, a chance of some sort of future[31]—a socialist future, at that.

As time went on, however, faith in the new socialist society dwindled.[32] It became ragged and attenuated. Promises were not kept. Freedom was in short supply. The regime was at times tyrannical. West Germany got richer and richer; East Germany, by comparison, stagnated. After 1961, the Wall sealed the country off from the West.[33] The regime's legitimacy slowly but surely drained away.[34]

Curiously, the court's work became more legalistic as time went on.[35] As socialist faith declined, legal faith increased.[36] Originally, the court had administered what amounted almost to a kind of rough folk justice.[37] Over time, its behavior conformed much more to the usual idea of a court.[38] This corresponded, very likely, to a change in public opinion—in what people outside of court felt about law, the state, and the socialist ideal. In the court itself, the curve on an "imaginary graph," showing faith in socialism, "drops to the very bottom" at the end of the regime's course of life; faith in law, on the other hand, which starts out at the "bottom of the graph," rises over time; and "by November 1989 has reached the level of a legal system that increasingly puts its trust in legal formality and professional routine."[39]

This is, as I said, a rich and definitive study of the work of a particular court. Of course, we cannot be sure Lüritz is representative. It is, after all, a small town. Perhaps the district court in Berlin acted differently. Even other small town courts, in other parts of East Germany, might have followed other paths. All ethnographic studies are case studies. They have to be. But unless and until we get more studies of this sort (not very likely), we have to presume that what we have is an accurate and typical snapshot of a lower court at work in East Germany. The detailing is so precise, the observations so shrewd, that the book has the ring of truth.

All national legal systems are unique. For the most part, each begins and ends inside its own territory. East German law was no exception. But legal systems can be grouped into systems that have family resemblances. It makes sense to talk about a Soviet bloc, yet East Germany was not the same as the other socialist countries. Unlike Hungary or Poland, East Germany was a piece of what was once a unified country. The other part, West

30. *Id.* at 10–11.
31. *Id.* at 20.
32. *Id.* at 219, 229.
33. *Id.* at 37–38, 109.
34. *Id.* at 182, 189.
35. *Id.* at 229–30.
36. *Id.* at 236–37.
37. *Id.* at 229–30.
38. *Id.*
39. *Id.* at 236.

Germany, got richer and richer. Even after the Wall went up, the two pieces were never entirely separate. Tourists—and West Germans—could cross over into East Berlin at Checkpoint Charlie. East Germans could, so to speak, always peek over the Wall. The Wall never kept the outside world from trickling in through letters, visits, radio broadcasts (legal or illegal), and even television. The seductive sounds and sights of West Germany wafting in over the Wall had a tremendous impact on East Germany. East Germany was "obsessed" with comparisons: "It stared West with the intensity of a rabbit staring at a snake."[40]

East German law was harsh toward people who defected or tried to defect.[41] This was an autocratic society with dangerous borders—so dangerous they had to be sealed tightly shut. The system was also harsh on the inner defectors, the *Asoziale*—the largest group of lawbreakers, slackers, good-for-nothings, drop-outs, deviants.[42] The system despised those who did not conform: "Socialism could not accept an individual's detachment from the fold."[43] The system wanted to be "loved."[44] In 1973, out of 297 defendants sentenced in court, no fewer than 124 were *Asoziale*.[45] Another 17 were cases of "flight from the Republic."[46] Citizens had a duty to stay, to work hard, and to develop good socialist personalities.[47] The *Asoziale* could not or would not do this. And their "mere existence" was threatening; they "gave the lie to the pedagogic pretensions of the system."[48]

Justice in Lüritz gives us insights into two distinct and important types of legal order. In the beginning, in particular, in the age of socialist faith, the district court dispensed what Max Weber has called *kadi justice*.[49] This is the justice of people's courts in many societies; it is more or less how tribal courts work in preliterate societies. These courts dispense common sense justice. They are not legalistic. They show little or no interest in finding what we would consider the right legal answer to the cases before them. What they aim at, above all, is social harmony. They want to keep the peace, avoid trouble, and make sure the wheels of society run smoothly. The problems and disputes that boil over into court threaten harmony and order, and the job of the court is to restore what had been disturbed.

Anthropologists find a lot to admire in legal systems of this sort. They might even be guilty of a bit of romanticizing. Perhaps kadi justice works out well in close-knit legal systems, or in a closed community such as the

40. *Id.* at 164.
41. *Id.* at 122.
42. *Id.* at 122–23.
43. *Id.* at 116.
44. *Id.* at 108.
45. *Id.* at 121.
46. *Id.*
47. *Id.* at 123.
48. *Id.*
49. *Id.* at 13–14; RICHARD SWEDBERG, THE MAX WEBER DICTIONARY 136–37 (2005).

Israeli *kibbutz* in its classic days, or in some small-claims courts. But it simply did not function well in the DDR. Indeed, this is one lesson of East Germany (and of the socialist countries in general): enforcing "community" cannot work, and cannot last, in a modern complex society, a society with millions of people, all with hopes and dreams of their own. Socialist man and woman never supplanted the other sort of men and women. The law "had the task of keeping its citizens' possessive greed in check,"[50] but this never really happened.[51] People never learned to love collective ownership.[52] Indeed, as time passed, "little acts of stealing from the state" had become "second nature" for many citizens.[53] Bourgeois consciousness could not be rooted out. The court had to bend to the realities of life.

At the end of the socialist period, the work of the court had much less of its original socialist flavor and the comfortable, easy ways of kadi justice.[54] By the time the Wall collapsed, East German law had morphed into quite a different type of system. This was one to which it had always belonged, in an important sense: systems in dictatorships, or failed states, or corrupt states—states that had for one reason or another lost the respect of the public. A system without legitimacy has two choices and two choices only. It can maintain itself through the use of savage repression. This was the choice made by the Third Reich and by Stalin's Soviet Union. It is the choice that various kings and sheiks in the Middle East are making at the moment. It is the choice made by North Korea and by Myanmar.

But this is not the only possible response, and, indeed, pure repression is difficult to sustain. Often, what develops in states with weak legitimacy is a kind of dual system. People generally despise and distrust the official system, which somehow limps along, partly through threats and force, partly as a kind of historical reflex. There is also another, informal, system that exists in the shadows. The official system tolerates it, for the most part, because it really has no alternative. A kind of legal black market develops. This market flourished in the DDR in its later years, and Professor Markovits describes it in detail.[55] Particularly striking is her account of the black market in used cars. New cars were a rare commodity, and buyers waited as many as ten years to get one.[56] The official fixed price was ridiculous and widely ignored.[57] Thus, once a month, in a field outside Lüritz, there was a thriving used car market.[58] A person who bought a used car would agree on a price with the seller, and then they would execute a contract to buy at the

50. MARKOVITS, *supra* note 3, at 26.
51. *Id.* at 227–28.
52. *Id.* at 35.
53. *Id.*
54. *Id.* at 229–30.
55. *Id.* at 224–26.
56. *Id.* at 225.
57. *Id.*
58. *Id.*

official rate. But the real contract was oral, and it fixed a black market price.[59] As one can imagine, this system had complex, inconsistent, and revealing legal consequences.[60]

In the world of socio-legal studies, legitimacy is an important concept, and it has produced a sizeable literature. How much extra bite does a system get from the fact that people accept the system as legitimate? It is hard to measure this impact, though some studies have tried.[61] On the other hand, the literature does not, in general, deal systematically with situations where legitimacy is weak or nonexistent. There are some honorable examples—Xin He's study of illegal garment workers in Beijing, for example.[62] There, the system was corrupt and the rules were almost impossible to follow, but everybody in the industry learned to cope.[63] They connived with local officials and constructed detours around the formal rules. In Communist Poland and the Soviet Union, as Maria Łoś has shown, "the over-regulation of all aspects of life" more or less forced "virtually all citizens" to be lawbreakers.[64] Communist economies presented "almost unlimited criminal opportunities."[65] Under such conditions, legitimacy loses whatever bite it once had. Autocratic societies quite generally have this malady. But there are bits and pieces of most legal systems that share this problem—even in the best societies, the most democratic ones, there are small areas, like holes in a carpet, where the formal system, or some aspects of the law in action, or both, lack legitimacy, and a kind of dual system springs up in the shadows. Shadow economies develop shadow legal arrangements, and these can generate their own brand of codes, their own norms, their own legitimacy.[66]

In the DDR, as Professor Markovits tells us, there was indeed a "shadow economy," and, no surprise, it came to be "ruled by a private moral code."[67] In general, this study of Lüritz gives us insights into all of those failed and illegitimate systems and subsystems where the public learns to cope and society somehow learns to muddle through—though often at great cost in money, human lives, and efficiency. To be sure, the regime in East Germany did not fail all at once. As we said, there was a long and gradual slide into illegitimacy and loss of faith.

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59. *Id.*

60. *Id.* at 226–27.

61. *E.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 57–68 (1990).

62. Xin He, *Why Do They Not Comply with the Law? Illegality and Semi-legality Among Rural–Urban Migrant Entrepreneurs in Beijing*, 39 LAW & SOC'Y REV. 527 (2005).

63. *Id.* at 528–29.

64. MARIA ŁOŚ, COMMUNIST IDEOLOGY, LAW AND CRIME 301 (1988). Łoś points out that the "hypocrisy" of the system—the fact that official dogma was "entirely contradicted" by reality—led to "feelings of bitterness, cynicism, and disrespect for the state property." *Id.* at 211. As a result, "moral norms" were no longer seen as "binding in the workplace." *Id.*

65. *Id.* at 301. Similarly, Markovits discusses "daily little acts of stealing." MARKOVITS, *supra* note 3, at 35.

66. MARKOVITS, *supra* note 3, at 223–24.

67. *Id.* at 224.

The DDR, in the last years, "drift[ed] toward its downfall."[68] Its structure of "public lies" simply collapsed.[69] And when the end came, it came swiftly and decisively. The Wall came down. The government of the DDR disintegrated. East German law became totally extinct. But like many extinct creatures, it left behind fossilized traces, preserved in the basement of the Lüritz district court.

And from there, the system was brilliantly exhumed and analyzed by Professor Markovits in rich detail and intense human scale. In its range, its cascade of insights, and its sheer beauty, this book has no real equal in the literature on socialist law—and few equals, indeed, in the vast literature on law and society.

68. *Id.* at 230.
69. *Id.*

On the Value of Jurisprudence

LEGALITY. By Scott J. Shapiro. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2011. 472 pages. $39.95.

Reviewed by Ian P. Farrell*

Introduction

It is a truth universally acknowledged that a legal philosopher in possession of a theory of law must be in want of a point. At least, such is the conventional wisdom on the opinion of mainstream legal academics—the core audience, as it happens, of law reviews like this one. According to this conventional wisdom, analytical jurisprudence is an abstract and abstruse enterprise of little interest to the typical law professor or student. The fundamental question that analytical jurisprudence seeks to answer—What is law?—has no *practical* significance, and in any event, legal philosophers' attempts to answer it are incomprehensible. In short, there are better ways for a legal scholar to spend her time than to read a book on analytical jurisprudence.

This Austenian framing of the conventional view is, of course, hyperbole. But like most caricatures, it contains a kernel of truth. As Scott Shapiro wryly observes in his excellent recent book, *Legality*, "one doesn't need especially acute powers of social observation to be aware that analytical jurisprudence is not everyone's cup of tea."[1] Shapiro's book challenges this common sentiment. Shapiro develops an original and ambitious theory of law,[2] and does so with a clarity of expression that makes it engaging and accessible to readers not fluent in jurisprudential jargon. Along the way, Shapiro directly addresses the skeptical view of the value of analytical jurisprudence by arguing that the nature of law in general is of crucial importance to determining the content of law in particular cases.[3]

The central claim of *Legality* is that law is best understood as an intricate system of plans that allows us to resolve the serious moral problems

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1. SCOTT J. SHAPIRO, LEGALITY 22 (2011). Shapiro uses the term *analytical jurisprudence* to describe the area of legal philosophy concerned with determining the fundamental nature of law, in contrast to normative jurisprudence, which is concerned with interpreting and critiquing the content of law from a moral perspective. *Id.* at 2–3.

2. *Id.* at 169–73.

3. *Id.* at 25.

that arise from communal life in large, complex societies. In the course of presenting and defending this claim, Shapiro positions his theory within the tradition of legal positivism and responds to several prominent critiques from natural law. The result is therefore a guided tour of much of the terrain of Anglophone jurisprudence, with lucid descriptions of theorists including H.L.A. Hart, John Austin, Lon Fuller, and Ronald Dworkin. As such, Shapiro's book provides the jurisprudential rookie with an introduction to both the historical debates and the contemporary disputes in analytical jurisprudence, disputes that have already begun to include the "Planning Theory of Law."

Legality has much to offer jurisprudential veterans as well. For it is not merely an introductory treatise, in either intent or execution. It involves, first and foremost, the development of a sophisticated and comprehensive theory of the nature of law—one that, Shapiro argues, resolves questions that, up until now, legal positivism has found impossible to answer. While, as I argue below, Shapiro's arguments are not always successful, he nonetheless presents a stimulating, evocative, and ambitious theory of law that adds a fresh dimension to the modern jurisprudential discourse.

This Review has several goals. The first goal is to provide readers of the Review with a strong sense of Shapiro's book. This requires not just an exposition of Shapiro's Planning Theory of Law, but also sketching the way Shapiro characterizes the enterprise of analytical jurisprudence, and placing his thesis in the context of other jurisprudential theories and current controversies. One of the strengths of *Legality* is that it presents an accessible overview of analytical jurisprudence structured around a statement of the central questions of jurisprudence, with the interplay between various theories presented by their differing approaches to answering these questions. My aim is to reflect that attribute of the book in this Review, albeit in significantly truncated form. This Review, in other words, is intended to provide juris-curious scholars with a useful point of entry into legal philosophy.

The Review also engages Shapiro's analysis from a critical perspective, posing several questions raised by the Planning Theory, including whether it remedies the weaknesses Shapiro identifies in earlier positivist theories and whether it provides convincing responses to critiques of legal positivism. I also address whether Shapiro succeeds in achieving one of his self-described goals, namely, demonstrating that "analytical jurisprudence has profound practical implications for the practice of law."[4]

The structure of the Review mirrors these goals. Part I sets out Shapiro's formulation of the core endeavor of analytical jurisprudence by reference to its central questions and puzzles. Part II involves a brief description of previous influential positivist theories, how they attempted to resolve the questions described in Part I, and why Shapiro considers them to

4. *Id.* at 25.

have been unsuccessful. Part III of the Review recounts Shapiro's Planning Theory of Law, addressing both what plans are in general and how they provide insight into the nature of law. In order to do justice to Shapiro's theory, and to achieve my goal of giving the reader a useful orientation to the world of jurisprudence, the first three parts include more exposition than is often the case in book reviews. In Part IV, I raise some questions for the Planning Theory: I suggest, *inter alia*, that Shapiro's theory may not remedy the flaws of earlier positivistic theories—especially in relation to law's normativity—and I put pressure on the meaning of Shapiro's claim that it is part of the essential nature of law to have a moral aim. Part V describes Shapiro's detailed rebuttal of Ronald Dworkin's argument that legal positivism cannot explain theoretical disagreements in law. Put briefly, Shapiro argues that his Planning Theory generates an approach to the question of interpretive methodology in law that explains not only the possibility of disagreement about which methodology to employ in, for instance, constitutional interpretation, but also the obduracy of such disputes.

Shapiro's response to Dworkin provides a segue into his claim regarding the value of analytical jurisprudence. I argue in Part VI that Shapiro partly succeeds on this front, as his analysis shows the value of legal theory, but not by demonstrating that it determines the answers to particular legal disputes. Analytical jurisprudence has significant value regarding the practice of law by telling us the *kinds* of arguments we ought to make, how those arguments ought to be oriented, and by adding to our understanding of *why* the arguments we already make are sensible and coherent. Moreover, to assess the value of jurisprudence in purely practical terms is to cast too narrow a net. The value of analytical jurisprudence extends beyond pragmatic concerns. As with other branches of philosophy (and theoretical endeavors in general), analytical jurisprudence also has the intrinsic value of sharpening and systematizing what is an otherwise inchoate or nebulous understanding of a concept or practice such as law.

I. The Central Questions of Analytical Jurisprudence

A. What Is the Fundamental Nature of Law?

Shapiro presents the central project of jurisprudence as addressing "the overarching question of 'What is law?'"[5] To ask this question, according to Shapiro, is to "inquire into the fundamental nature of law."[6] And asking about the fundamental nature of a thing, including law, can take the form of two separate yet related questions, which Shapiro dubs the "Identity Question"[7] and the "Implication Question."[8] The Identity Question requires

5. *Id.* at 3.
6. *Id.* at 8.
7. *Id.*
8. *Id.* at 9.

one to discover the identity, the essence, of the thing being studied. That is, it requires one to ascertain the set of essential properties of the thing that distinguish it from other, different things.[9] With respect to law, then, the Identity Question is concerned with determining "what makes all and only instances of law instances of *law* and not something else."[10] It asks what makes law *law* and not, for example, morality, or etiquette, or large-scale brute force.

In contrast to the Identity Question, the Implication Question addresses not "what *makes* the object the thing that it is but rather . . . what *necessarily follows from* the fact that it is what it is and not something else."[11] The Implication Question directs us to discover those properties that follow by necessary implication from the nature of the entity in question. In jurisprudence, the Implication Question involves identifying the necessary properties of law, namely "those properties that law could not fail to have."[12] It also involves distinguishing the necessary properties of law from its contingent properties.[13] The contingent properties of law are those that are shared by some (or many, or most) legal systems, but not *all* legal systems. Since it is possible for an entity to be law without such properties, they cannot be said to be part of the law's identity.

Moreover, in addressing the Implication Question, according to Shapiro, the discerning legal philosopher will not care about *all* the necessary properties of law. She will only seek to discover the *interesting* necessary properties.[14] To Shapiro, a property is interesting only if it is "*distinctive*."[15] The interesting properties of law are therefore those properties that law has but other social practices do not have. Legal philosophers want to know, for example, "which properties law necessarily possesses in virtue of being an instance of law and not a game, social etiquette, religion, or some other thing."[16] In sum, then, on this view, legal philosophers are engaged in the search for the set of properties shared by all law, but only law.

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9. As Shapiro puts it, "to ask about the identity of X is to ask what it is about X that makes it X and not Y or Z or any other such thing." *Id.* at 8. If this all seems a little abstruse, Shapiro illustrates what he means by giving the example of water. The identity of water is H_2O. Why? "[B]ecause water is just H_2O. Being H_2O is what makes water *water*." *Id.* at 9.

10. *Id.*

11. *Id.* (first emphasis added). Shapiro gives the example of the number *three* and the property of its being prime to demonstrate the difference between the Identity Question and the Implication Question: "While being a prime number is not part of the number 3's identity (being the successor of 2 is), we might still say that it is part of the nature of 3 because being 3 necessarily entails being prime." *Id.*

12. *Id.*

13. *Id.* at 10.

14. *Id.* at 9.

15. *Id.*

16. *Id.* at 9–10.

Whereas some legal philosophers have focused on the Identity Question and others on the Implication Question,[17] Shapiro explicitly states that he is attempting to address both questions.[18] Despite the distinction that Shapiro is careful to draw between these two endeavors,[19] they have in common the fact that they are both ways of searching for the fundamental or essential nature of law.[20] I wish to emphasize this point for several reasons. First, a clear understanding of Shapiro's target, and his methodology for approaching that target, enables us to make better sense of the point and context of Shapiro's analysis. Second, understanding what Shapiro is trying to achieve provides us with a framework from which to evaluate the success of Shapiro's theoretical arguments. Specifically, given that Shapiro is trying to discover a set of properties common to all law, but only law, he fails on his own terms if his theory designates as part of the essence of law properties that are not necessary to law or are common to nonlaw practices. I argue below, for instance, that we can imagine legal systems that do not have the aim of addressing the moral problems arising from what Shapiro calls the "circumstances of legality"[21] and therefore that this aim cannot be part of the fundamental nature of law.

Finally, the fact that Shapiro frames analytical jurisprudence as an exercise in determining the essential nature of law is one of the main points on which *Legality* has drawn criticism.[22] Because this methodological

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17. *Id.* at 12.

18. *See id.* ("I want here to try to address both problems. That is to say, I will be concerned in what follows not only with the question of what makes law *law* but also with the related question of what necessarily follows from the fact that something is law.").

19. Shapiro asserts the importance of not muddling questions of identity and implication, pointing out that conflating the two has resulted in, for example, disagreement as to whether the "separability thesis"—that there is no necessary connection between law and morality—need be a point of contention between natural lawyers and positivists. *Id.* at 404–05 n.8; *see also, e.g.*, JOSEPH RAZ, *Authority, Law, and Morality*, *in* ETHICS IN THE PUBLIC DOMAIN 194, 210–11 (1994) (asserting that the idea of a "necessary connection" between law and morality is compatible with positivism where the connection relates to a legal system's service of moral ends); Jules L. Coleman, *Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence*, 27 OXFORD J. LEGAL STUD. 581, 583 (2007) (arguing that positivists and natural lawyers can agree upon many of the most important claims about the relationship between law and morality and suggesting that disagreement between the two schools of thought is primarily methodological); Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1037–41 (2008) (highlighting competing views about the meaning of the severability theory and its relationship to different schools of positivist thought).

20. SHAPIRO, *supra* note 1, at 8.

21. *Id.* at 170.

22. *See* Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, 32 OXFORD J. LEGAL STUD. (forthcoming 2012) (manuscript at 4–6), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599620 (arguing that essentialist accounts such as Shapiro's are doomed to fail because the concept of law is an artifact and as such does not have essential properties); Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 590 (2010) (reviewing SHAPIRO, *supra* note 1) (arguing that Shapiro's *Legality* exemplifies the misguided modern tradition in jurisprudence of "seeking to explain the nature of law in terms of essential properties, and accordingly without reference to force"). To be sure, Shapiro is not alone in taking

dispute[23] is likely to be a significant aspect of contemporary jurisprudence, with Shapiro as one of the main players, a review of *Legality* would be incomplete without notifying the reader of the book's role in this likely ongoing dispute.

B. How Is Law Possible?

Having identified the target of inquiry, Shapiro frames his discussion of the jurisprudential tradition around a fundamental puzzle, namely: How is it possible for law to arise? Shapiro introduces the divide between natural lawyers and legal positivists by reference to their divergent answers to this puzzle, each of which generates a distinct challenge for its proponents. He describes each of these new challenges and sets out the positivistic attempts to meet them, and then he argues that his Planning Theory of Law succeeds where the earlier theories fail.

Shapiro describes the puzzle of how the law could have been invented[24] as a "classic 'chicken-egg' problem."[25] Acquiring legal authority "seems to involve a catch-22: in order to *get* legal power, one must already *have* legal power."[26] Two statements both seem to be true about legal authority (or legal power): First, in order for somebody to have *legal* power—as opposed to naked force, for instance—there must already be an existing legal norm that confers this power. Second, in order for there to be a legal norm that bestows this legal power, it must have been created by some already-existing body with the legal power to do so.[27]

Shapiro neatly introduces the natural-law–legal-positivism schism by reference to their divergent approaches to explaining this paradox,—which Shapiro labels the "Possibility Puzzle"[28]—"without resorting to vicious circles or infinite regresses."[29] The modern natural lawyer points to the rules of morality, which exist without anyone having created them, as the ultimate

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this essentialist approach and consequently, criticism for this approach does not fall on him alone. Indeed, Brian Leiter identifies the search for the essential properties of law as having been central to jurisprudence for the last century. Leiter states that the "Demarcation Problem"—how to distinguish law and morality—has been "*the* dominant problem in jurisprudence" in "the last hundred years." Leiter, *supra* (manuscript at 1). To be precise, the Demarcation Problem, as Leiter frames it, refers specifically to the demarcation between law and morality, but his challenge applies generally to attempts to demarcate the border between law and other normative systems by isolating law's essential attributes. Leiter focuses on the boundary between law and morality because morality is the normative system from which legal positivists have been most at pains to demarcate the law.

23. *See* Schauer, *supra* note 22, at 590 (describing the search for the essential features of law as a "prevailing methodological commitment[] of contemporary jurisprudential inquiry").

24. SHAPIRO, *supra* note 1, at 37.

25. *Id.* at 39.

26. *Id.* at 37.

27. *Id.* at 40.

28. *Id.* at 20.

29. *Id.* at 40.

source of legal authority. The legal positivist, by contrast, claims that *social facts* can ground legal authority (and thereby short-circuit the vicious circle).[30]

C. *Hume's Challenge and the Problem of Evil*

Both the natural-law and positivistic routes to resolving the Possibility Puzzle present their proponents with a separate challenge. Because natural law grounds legal authority in moral authority, it appears to "rule[] out the possibility of evil legal systems."[31] But the existence of evil, or even morally illegitimate legal systems, is an obvious truth.[32] The "Problem of Evil"[33] faced by the natural lawyer is therefore how to reconcile the claim that legal authority is grounded in morality with the existence of morally illegitimate legal systems.

The existence of evil legal systems presents no problem, of course, for the positivist, as social facts rather than moral norms ground legal authority. But this raises a different problem, namely, how to explain the notion of legal obligation. To claim that someone has a legal obligation—that they legally *ought* to do something—is to make a normative claim. But according to the positivist, "the content of the law is ultimately determined by social facts alone,"[34] and the existence of social facts is a descriptive matter. It is a matter of what is, rather than what ought to be. According to David Hume's widely accepted law, one can never derive an *ought* from an *is*;[35] one cannot derive normative conclusions from descriptive premises. Thus, "Hume's Challenge"[36] to the legal positivists is how to reconcile the claim that legal authority is grounded in social facts with the fact that one can sensibly make claims about the existence of legal obligations.

At first blush, both Hume's Challenge and the Problem of Evil seem insurmountable; choosing the natural-law or positivistic route to explaining

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30. *Id.* at 42–44.

31. *Id.* at 49.

32. *Id.* at 16, 49. On Shapiro's intuitions at least, morally illegitimate legal systems, such as that of the Soviet Union, are indeed legal systems. *See id.* at 16–22 (discussing the role of intuitions in conceptual analysis and the role of conceptual analysis in analytical jurisprudence); *see also* Ian P. Farrell, *H.L.A. Hart and the Methodology of Jurisprudence*, 84 TEXAS L. REV. 983, 996–1003 (2006) (reviewing NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004)) (clarifying what is meant by *conceptual analysis* and distinguishing between different forms of conceptual analysis).

33. SHAPIRO, *supra* note 1, at 49.

34. *Id.* at 47. This is referred to in the jurisprudential literature as the "social fact thesis." *See, e.g.*, Jare Oladosu, *Choosing a Legal Theory on Cultural Grounds: An African Case for Legal Positivism*, *in* LAW, MORALITY, AND LEGAL POSITIVISM 47, 53 (Kenneth Einar Himma ed., 2004) ("The import of the social fact thesis is the claim that the existence of the law is purely a matter of social fact.").

35. SHAPIRO, *supra* note 1, at 47 (citing DAVID HUME, A TREATISE OF HUMAN NATURE 302 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2005) (1739)).

36. *Id.* at 45–47.

the nature of law is therefore "very much an exercise in picking our poison."[37] The strength of each of these challenges, according to Shapiro, explains the intractability of the jurisprudence's continental divide:

> Indeed, the debate between legal positivists and natural lawyers is so interesting, and has lasted for so long, precisely because it seems as though neither side can be right. On the one hand, if we follow the natural lawyer and try to solve the Possibility Puzzle by ultimately grounding the law in moral facts, then we preclude the possibility of morally illegitimate legal systems. Yet if we eschew the appeal to moral facts completely and follow the positivist in founding the law on social facts alone, we solve the Possibility Puzzle only on pain of violating Hume's Law. Legal philosophers, therefore, face a terrible dilemma: they are damned if they do ground the law in moral facts and damned if they don't.[38]

II. A Brief History of Legal Positivism

While Shapiro displays a sympathetic understanding for natural law in *Legality*, an appreciation for which he credits Mark Greenberg,[39] he is a card-carrying member of legal positivism. As such, he positions his Planning Theory primarily in response to earlier positivistic theories. He argues that the Planning Theory is superior to these earlier theories in terms of accurately capturing the essential nature of law and addressing the Possibility Puzzle and Hume's Challenge. Shapiro therefore devotes much of the first third of his book to outlining and critiquing the theories postulated by his positivistic predecessors, primarily John Austin and H.L.A. Hart, before setting out his Planning Theory and arguing that it provides better answers to these questions. The structure of my argument will mirror that of Shapiro's. In this part, I will briefly outline the theories of Austin and Hart and describe the challenges Shapiro thinks most compelling. In Part III, I will describe Shapiro's Planning Theory and argue that it also does not adequately address the key questions of jurisprudence.

A. Austin's Sovereign-Command Theory of Law

Shapiro's guided tour of legal positivism begins with John Austin's *The Province of Jurisprudence Determined*.[40] According to Austin, a law is

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37. *Id.* at 49.

38. *Id.*

39. *Id.* at 451.

40. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) [hereinafter AUSTIN, PROVINCE OF JURISPRUDENCE]. Austin's account of law was heavily influenced by Jeremy Bentham's positivistic understanding of law. SHAPIRO, *supra* note 1, at 52 (explaining that in the lectures comprising Austin's book, "Austin tried to simplify and develop the ideas of his friend and mentor Jeremy Bentham"). But Austin's account had the twin virtues of being exponentially simpler and published during his lifetime. Bentham's theory of jurisprudence was not published at all until 1945, and even then,

simply "(1) a rule (2) issued by the sovereign,"[41] where a rule is a command backed by threat of harm for noncompliance, and the sovereign is a person or entity who is habitually obeyed by most members of a community and who does not, in turn, habitually obey any other person or entity.[42]

Austin therefore gives us a simple answer to the Identity Question: "what makes the law *the law* is its being the general commands issued by someone who is habitually obeyed by the bulk of the population and habitually obeys no one else."[43] The theory also proposes "a clean resolution to the Possibility Puzzle"[44] (legal rules derive from legal authorities, not the other way around) and a direct response to Hume's Challenge. Hume's prohibition on deriving normative conclusions from descriptive premises is not violated because while on the Austinian account the grounds of legal authority are merely descriptive, so too are statements of legal obligation. To say that a person has a legal obligation is simply to say that there is a threat that they will be sanctioned for failure to comply; it says nothing of what a person *ought* to do.[45]

As Shapiro explains, however, Austin's responses to both the Possibility Puzzle and Hume's Challenge are unsatisfactory. The sovereign-command theory fails to explain the puzzle of law's creation because the notion of the habitual obedience "cannot account for basic properties of legal authority, namely, its continuity, persistence, and limitability."[46] Nor does it have the resources to explain other features of legal systems, such as the way many people think of, and talk about, the sovereign as having a "*legal right* to rule."[47]

Austin's theory avoids violating Hume's Law by decoupling the concept of what one is legally obliged to do from the concept of what one should or ought to do.[48] As Shapiro points out, this has "disastrous

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inaccurately. H.L.A. Hart, *Bentham's* Of Laws in General, 2 CAMBRIAN L. REV. 24, 25–26 (1971) (discussing the 1945 publication date and the publication's inaccuracy). The definitive version had to wait until 1970. JEREMY BENTHAM, OF LAWS IN GENERAL (H.L.A. Hart ed., 1970). By that time, Austin had become deeply entrenched as the father of English jurisprudence. *See generally* JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (Robert Campbell ed., 3d ed. 1869); AUSTIN, PROVINCE OF JURISPRUDENCE, *supra*. Whether Bentham's more complex theory of law better withstands Hartian criticism than does Austin's is an interesting question that has yet to be fully explored.

41. SHAPIRO, *supra* note 1, at 53.

42. *Id.*

43. *Id.* at 54.

44. *Id.* at 57.

45. *Id.* at 58.

46. *Id.* at 77. Lawmaking power continues uninterrupted when a new sovereign begins to rule, before a habit of obedience has been established. *Id.* at 74. Legal prohibitions persist even after the sovereign who created them no longer exists. *Id.* And many sovereigns, such as constitutional regimes, are *legally limited*, which is impossible if the sovereign is the source of all legal rules. *Id.* at 75.

47. *Id.* at 76 (emphasis added).

48. *Id.* at 58, 77.

consequences"[49] for Austin's theory of law. It reduces the authority of the law to the brute force of a gunman demanding your money and fails to make sense of the justificatory and evaluative functions of concepts such as *obligation*.[50] To treat the concepts of *obligation*, *duty*, and *right* as descriptive rather than as normative is to repudiate them; such concepts are inherently normative. As Shapiro explains,

> When we tell people that they are obligated to perform some action, we are trying to state a *reason* for them to do it. Similarly, when we criticize people for violating their obligations, we are presupposing that they *ought* to have acted differently. We say that they have acted "wrongly" and are "guilty" of an "offense." If any concepts are normative, these are; to borrow a phrase from Wilfrid Sellars, they are "fraught with ought."[51]

For these reasons, Shapiro concludes that Austin's theory fails to provide solutions to the central questions of jurisprudence.[52]

B. Hart's Theory of Law as Social Rules

Shapiro is by no means the first to point out these flaws in Austin's understanding of law. These weaknesses were part of the definitive critique of Austin performed by H.L.A. Hart in his seminal work, *The Concept of Law*.[53] Hart proposed an alternative (but also positivist) theory with greater resources to explain the features of law. Whereas Austin built his account around the notion of the command of a habitually obeyed sovereign, Hart proceeds from the concept of a *social rule*.[54]

Hart pointed out that a rule involves more than "[m]ere convergence in behaviour between members of a social group."[55] For a rule to exist, this convergence must be accompanied by a critical attitude among its participants: their reasons for behaving in accordance with the rule must include the fact that they *accept* it as a rule. The rule must not be incidental to their reasons for acting. They must treat the existence of a rule as giving them a reason to act in compliance with it and to criticize failure to comply. For a rule to exist, most members of the community to which it applies must

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49. *Id.* at 77.

50. *Id.* at 77–78.

51. *Id.* (quoting Wilfrid Sellars, *Truth and "Correspondence,"* 59 J. PHIL. 29, 44 (1962)).

52. *Id.* at 78.

53. *See generally* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

54. SHAPIRO, *supra* note 1, at 80. I shall use the terms *rule* and *social rule* interchangeably. Hart considered all legal rules to be social rules, in that their existence and content is determined by social facts. *See id.* at 84 (explaining that the rule of recognition, which lies at the heart of a legal system and determines the validity and content of all other rules in that system, is a social rule that exists only because of certain social facts).

55. HART, *supra* note 53, at 9.

take this attitude toward it.[56] Hart names this attitude the "internal point of view."[57]

Many of the rules that compose a legal system impose duties and as such resemble Austinian commands. Criminal prohibitions, for example, fit this model: they involve orders to refrain from certain behavior accompanied by threats of punishment for noncompliance.[58] But Hart's notion of social rules is not exhausted by orders and threats.[59] Unlike Austin's sovereign-command theory, Hart's theory of social rules is expansive enough to include rules that confer power, such as the power to alter legal rights by creating a will or getting married.[60]

Hart's theory also provides for rules about rules, such as rules of adjudication (how to settle disputes about rules) and rules of change (how to change the rules). Hart calls these *secondary rules*, as they "are in a sense parasitic upon or secondary to" the basic or *primary rules* that obligate individuals "to do or abstain from certain actions."[61]

The most important of the secondary rules is the *rule of recognition*, which is a rule about which rules are valid in the legal system.[62] Shapiro states Hart's doctrine of the rule of recognition in the following manner:

> According to Hart, every legal system necessarily contains one, and only one, rule that sets out the test of validity for that system. The systemic test of validity specifies those properties the possession of which by a rule renders it binding in that system. Any norm that bears one of the marks of authority set out in the rule of recognition *is a law of that system*, and officials are required to recognize it when carrying out their official duties.[63]

Hart claimed that the "[t]he union of primary and secondary rules"[64] "may be justly regarded as the 'essence' of law."[65] Shapiro renders this

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56. SHAPIRO, *supra* note 1, at 81–82.

57. HART, *supra* note 53, at 90.

58. SHAPIRO, *supra* note 1, at 59–60.

59. HART, *supra* note 53, at 79–91 (recognizing the failures of a model of law based on the sovereign's coercive orders and suggesting that rules originate from social pressure rather than sovereign orders); SHAPIRO, *supra* note 1, at 89–90.

60. HART, *supra* note 53, at 96 (explaining how rules that confer power allow individuals to vary their initial positions under the primary rules). For a discussion of why power-conferring rules cannot be accommodated within Austin's command model, see SHAPIRO, *supra* note 1, at 59–69.

61. HART, *supra* note 53, at 81.

62. *Id.* at 94.

63. SHAPIRO, *supra* note 1, at 84. By way of example, Hart described the British legal system's rule of recognition as: "What the Queen in Parliament enacts is law." *Id.* at 85. It is a little more difficult to state the U.S. rule of recognition. *See id.* at 85–86 (noting that no single provision of the U.S. Constitution explicitly sets out a complete U.S. rule of recognition as it would pertain to federal judges, legislators, and executive branch officials).

64. HART, *supra* note 53, at 99. It is worth noting, in light of criticisms about the essentialist character of modern jurisprudence, that Hart does not claim that the union of primary and secondary rules is a set of necessary and sufficient conditions for law, or at least for the word *law*. *Id.* at 155. He claimed that "[t]he union of primary and secondary rules is at the centre of a legal system; but it

union in terms of criteria for the existence of a legal system: "According to Hart, then, we can say that a legal system exists for a group *G* just in case (1) the bulk of *G* obeys the primary rules *and* (2) officials of *G* accept the secondary rules from the internal point of view and follow them in most cases."[66]

Hart's theory of law has many advantages over Austin's simpler theory. Shapiro states that "Hart's theory is able to account for many of the commonplace features of modern legal systems that were mysterious or inconceivable in Austin's account. It also renders legal thought and discourse intelligible by showing how legal concepts and terminology are ultimately rule based in nature."[67]

Chief among the advantages of Hart's theory is the role of the rule of recognition, which Shapiro describes as "a great advance in legal theory."[68] The rule of recognition "at the foundation of every legal system" is a *social rule*, the existence and content of which are determined by social facts: the practices, behaviors, and attitudes of legal officials.[69] Social rules are simply social practices, according to Hart, and therefore "the rule of recognition is generated through the convergent and critical behavior of official identification of certain rules because the rule of recognition is *nothing but* this practice among officials."[70]

Hart has therefore provided an answer to the Possibility Puzzle: the rule of recognition, and through it the legal system, can be created without prior legal authority simply by engaging in the relevant social practice. The rule of recognition exists purely because of its acceptance and practice among officials, and primary rules exist by virtue of being validated by the rule of recognition.[71]

Crucially, therefore, legal systems are not grounded in moral facts; Hart's theory is "a scrupulously positivistic one."[72] But because it grounds law in social facts, Hart's account faces Hume's Challenge: "How can normative judgments about legal rights and obligations be derived from purely

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is not the whole." *Id.* at 99. This union occupies the central place in legal theory because of its great explanatory power. *Id.* If we understand the law as a system of primary and secondary rules, then "*most* of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear." *Id.* at 81 (emphasis added). Schauer's criticism of jurisprudence in general, and Shapiro specifically, can be thus understood as a claim that modern legal theory ignores a central feature of most legal systems with great explanatory power, namely, that law employs coercion. Schauer, *supra* note 22, at 593–94.

65. HART, *supra* note 53, at 155.

66. SHAPIRO, *supra* note 1, at 93.

67. *Id.* at 80.

68. *Id.*

69. *Id.*

70. *Id.* (emphasis added).

71. *Id.* at 80, 84–85.

72. *Id.* at 97.

descriptive judgments about social practices?"[73] This is a question that Hart never explicitly addresses, and so Shapiro takes on the task of constructing a Hartian response, drawing on Hart's various writings and more recent developments in the field of metaethics.[74]

Shapiro ascribes to Hart the view that law's normative terminology expresses the speaker's state of mind—specifically, her attitude toward the relevant rule—but does not assert the existence of a moral obligation or authority. In other words,

> [C]laims of obligation and right express the internal point of view, that is, the normative attitude of commitment to a social rule. When one claims, say, that one is obligated to keep one's promises, one is expressing one's commitment to the social promise-keeping rule, not asserting the existence of a normative fact requiring one to keep one's promises.[75]

On this "expressivist"[76] account, claims of legal obligation and legal authority do not violate Hume's Law, for two reasons. First, they do not involve deriving normative conclusions from purely descriptive premises because the premises (of statements of legal obligations, for instance) are themselves normative. Declarations of legal obligation are grounded in the speaker's normative commitment to the relevant social rule. Since the legal *ought* is derived from this normative premise, Hume's prohibition on deriving *ought* from *is*, is not violated. Second, claims of legal obligation—for instance, when a judge declares that a defendant has an obligation to pay damages—should be understood not as a statement about the defendant's moral obligations but instead as a statement of what the *judge* is entitled to do. The judge is not declaring what the defendant ought morally to do; rather, the judge "is claiming that *she* may demand compliance from the defendant and extract performance if necessary."[77] Because the relevant legal rules provide the judge with reasons to act in a certain way (the judge accepts the rules from the internal point of view), the claim of legal obligation is normative with respect to the judge. However, the claimed obligation does not necessarily provide the defendant with reasons for acting, and therefore those reasons are not *moral* with respect to the defendant.[78]

If the expressivist understanding of normativity is convincing, then, Hart's theory wins the trifecta. First, it survives Hume's Challenge by "regard[ing] legal concepts such as *authority* and *obligation* as normative, but not moral."[79] Second, it explains law's normative discourse and so

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73. *Id.*
74. *Id.* at 98–99.
75. *Id.* at 99 (internal citation omitted).
76. *Id.*
77. *Id.* at 102.
78. *Id.* at 101–02.
79. *Id.* at 113.

captures an undeniable feature of a legal system that Austin's theory could not account for, and it distinguishes being *obligated* to obey the law from merely being *obliged* to obey a gunman. Third, the expressivist account explains these features while still having the resources to deny that legal authority necessarily entails moral authority—thereby avoiding the Problem of Evil.

However, Shapiro ultimately rejects the expressivist account of law's normativity as an unsustainable compromise.[80] Once we admit that legal concepts are normative, he argues, "it becomes hard to resist the conclusion that these concepts must be moral as well."[81] These legal concepts are used to "ground coercive and punitive responses"[82] and to "make demands that materially constrain freedom."[83] According to Shapiro, "[o]nly moral concepts have the heft to make such serious claims."[84] Normative claims therefore collapse into moral claims. The expressivist view also "misconstrues the intended audience of the law"[85] by treating duty-imposing legal rules as primarily directed at legal officials rather than subjects.

Crucially, Hart's theory of law cannot account for the fact that "legal judgments can be coherently formed and expressed even when the judger does not take the internal point of view toward the system's rule of recognition."[86] A person who rejects the law's moral authority, who follows the law only for self-interested reasons like avoiding punishment—the infamous "bad man" of Oliver Wendell Holmes[87]—is able to describe the law "using the language of obligation."[88] The bad man can say, for instance, "not only that the law obliges him to pay his taxes, but also that he is *legally obligated* to do so."[89] This is a problem for Hart. Since the bad man does not take the internal point of view, he has no normative commitment to the legal rules, and so his statement that he has a legal obligation is not an expression of such a commitment. In addition, the bad man is deriving a normative conclusion—the judgment that he is under a legal obligation—

80. *Id.*

81. *Id.* at 114.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 115.

86. *Id.* at 112.

87. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."); *see also* HART, *supra* note 53, at 90 ("The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation.").

88. SHAPIRO, *supra* note 1, at 112.

89. *Id.*

from purely descriptive premises (observing legal rules from the external point of view) in violation of Hume's Law.[90]

For these reasons, among others,[91] Shapiro concludes that Hart's theory of law is unsatisfactory, despite Hart's "core insights"[92] regarding the relationship between legality and the commitments and evaluations of legal officials. According to Shapiro, the fundamental nature of law is not to be found by describing the commitments and evaluations of officials as creating social *rules*. Rather, the essence of law is that the attitudes of legal officials take the form of creating, adopting, and applying social plans.[93]

III. The Planning Theory of Law

A. Understanding Plans

As we have seen, both Austin and Hart analyze the concept of law by reference to other, simpler concepts. Austin's theory centers law around the concept of *sovereign commands*, while Hart understands the law to consist of *social rules*. Shapiro's theory of law follows a similar pattern, but for him the building blocks of a legal system are *plans*.[94]

Like rules, plans are norms: they guide conduct.[95] Plans are also like Hartian rules in that they are man-made entities, "created via adoption and sustained through acceptance."[96] They are created specifically for the purpose of guiding conduct. To borrow Shapiro's example, "I adopted a plan to cook dinner tonight precisely so that it would guide my conduct in the direction of cooking dinner."[97] Accepting a plan disposes one to follow it and settles some of the questions about what is to be done. Again, if I plan to cook dinner tonight, I am disposed to do so, and it is settled that I will not make a restaurant reservation.[98] But plans do not typically settle every question about what to do. Plans are usually incomplete at first, and are fleshed out incrementally over time by other subplans. At first, I simply plan to cook

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90. *Id.*

91. Shapiro critiques Hart's theory of law on other grounds as well. *See, e.g.*, *id.* at 102–04 (arguing that the identification of legal rules in the practices of legal officials involves a "category mistake" because rules are "*abstract objects*" and practices are "*concrete events*"); *id.* at 104–10 (pointing out that not all social practices create rules and that "Hart cannot, therefore, simply assume that social rules will be generated just because officials regularly engage in a practice of rule recognition in every legal system").

92. *Id.* at 116.

93. *Id.* at 116–17.

94. Shapiro's theory of law as a system of plans builds on the insights of Michael Bratman, to whom Shapiro is quick to give credit, on the nature and psychology of planning. *Id.* at 120–21.

95. *Id.* at 128.

96. *Id.* They are thus distinguished from moral norms and logical norms, which are not man-made creations: they "exist simply by virtue of their ultimate validity." *Id.*

97. *Id.*

98. Plans are, however, contingent. They are not set in stone, but rather can be revised if good reasons to do so arise. *Id.* at 126.

dinner; then I plan what I am going to cook, the ingredients I will use, and where I will buy them. In this way, a nested system of plans is created.

Even for individuals acting alone, planning for the future is a valuable means of achieving our goals. By settling a course of conduct in advance, plans allow us to avoid spending our entire time deciding what is to be done and second-guessing those decisions.[99] The nested structure of planning also prevents us from having to decide everything at once: we can leave our initial plans sketchy at first and later create subplans to fill in the details.[100]

Planning has additional benefits in the context of group activity. Shared plans are a way of coordinating behavior so that we each can know our own roles, predict what other members of a group will do, and allocate tasks to those most suited to implementing them.[101] The need for a plan will be especially important in relation to activities that are complex, contentious, or involve arbitrary decisions.[102] By providing a framework for coordination and specialization, planning allows us to achieve goals that would be beyond the reach of individuals or groups that act by improvisation.

Plans can divide labor not only horizontally, but also vertically.[103] Some group members may allocate the activity of planning (or parts of it) to other members, creating a hierarchical structure. The subordinates surrender their exclusive power to plan and in exchange receive the benefit of outsourcing the cost and effort of planning. In Shapiro's lingo, the plan is shared by the group when the superiors adopt a plan for the entire group, provided that most group members accept the hierarchical relationship and their role in the adopted plan.[104] This vertical division of labor is itself a plan: subordinates "accept a plan to defer to someone else's planning."[105] The efficiency of these plans for planning makes hierarchy "a major technological advance in behavioral organization."[106]

Crucially, hierarchical plans allow groups to achieve goals to which not all members of a group are committed, or even intending, to achieve.[107] I may agree to go shopping for you, not because I am committed to your goal of cooking dinner, but because you offer to pay me for the service. Provided I perform my role in the plan (such as following the shopping list you give me) and allow others to do their part (I do not cook the ingredients if that role has been allocated to someone else), I have *accepted* the plan, even if I do not desire that your dinner-cooking goal be achieved. Hierarchies, therefore,

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99. *Id.* at 122–23.
100. *Id.* at 123.
101. *Id.* at 131–33.
102. *Id.* at 133–34.
103. *Id.* at 141–42.
104. *Id.* at 141, 150.
105. *Id.* at 141.
106. *Id.* at 142.
107. *Id.* at 136.

allow members of a group to achieve their goals by recruiting the effort and expertise of other members via incentivizing useful conduct, even if they "care [not] a whit" about the success of the enterprise.[108]

According to Shapiro, "That individuals can be made to work together in pursuit of ends that they do not value is critically important in understanding how the modern world is possible."[109] The value of planning increases with the size of the group.[110] In a larger group, there is likely to be more diversity of skills, knowledge, and values; the goals that the group aims to accomplish are likely to be more complex; and it is less likely that everyone will be committed to the same goals. But as the value of planning increases, so too does the cost.[111] As Shapiro points out, "If shared plans are needed to regulate behavior in complex and contentious environments, it is likely that they will be expensive to create ahead of time through deliberation, negotiation, or bargaining."[112] As group size increases, there comes a point where planning mechanisms such as hierarchy "become[] not only desirable but absolutely indispensable."[113] Shapiro describes the role of plans in these circumstances in terms of regulating trust and distrust:

> Developing a dense network of plans and empowering trustworthy individuals to be decentralized plan adopters, affecters, and appliers are essential to supplying distrusted participants with correct instructions for how to proceed as well as standards for holding them accountable. In the end, massively shared activity is possible only because shared plans are capable of capitalizing on trust as well as compensating for distrust.[114]

B. The Law as a System of Plans

1. How to Build a Legal System.—Shapiro provides a concrete illustration of planning and the manner in which a legal system can be understood as a solution to the problems of social life in a complex society by ingeniously extrapolating his example of planning to cook dinner. Shapiro's development of this narrative to communicate sophisticated ideas is one of the chief delights of his book.

The concept of a plan is introduced via the example of a single person planning to cook dinner, then expanded to include two friends planning to cook dinner together, which requires them to coordinate their activities and

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108. *Id.* at 149.

109. *Id.*

110. *Id.* at 151.

111. *See id.* at 138 (noting that the group dynamics that make shared plans necessary "also make them costly to produce").

112. *Id.* at 138.

113. *Id.* at 151.

114. *Id.*

play separate roles.[115] The example is further extended to a group of friends who form an ongoing cooking club, which adopts general policies and delegates both plan adoption and plan application to various members.[116] When the cooking club decides to form a catering company, hierarchical plans are invaluable in order to direct the activities of employees who do not share the original club members' commitment to the enterprise.[117]

Shapiro then has us imagine that the catering company is so sensationally successful that the cooking-club members take the catering company public. They soon sell their shares for a fortune, "move to an uninhabited island in the South Pacific, and start a new community."[118] This provides Shapiro with the opportunity to discuss the role of planning in the organization of an entire community.

The island, now called "Cooks Island,"[119] initially has sufficient resources to support a comfortable hunter–gatherer existence. This simple existence involves shared activity among small groups; therefore "small-scale group planning is crucial to our ability to live peacefully and productively together."[120] However, community-wide "*social* planning"[121] is not necessary—at least not until the arrival of winter. The resultant food shortage demonstrates that community-wide action is required for long-term sustainability.[122] The community pools its resources, begins ranching and farming, and creates a system of private property to prevent free riding and the consequent waste of island resources. For this plan to succeed, "it is imperative that the policies govern the activities of the whole community."[123]

The new property regime works well. With a dramatic increase in the production of goods, trading markets emerge. However, these changes render transactions more numerous and complex and increase the level of conflict—even if "[e]ach of us is willing to do what we morally ought to do . . . none of us knows or can agree about what that is."[124] Regularized planning is needed, but prosperity has led to population growth. Planning by community consensus on an ongoing basis is no longer possible, so a "master plan"[125] is created. The master plan delegates to some people the power to adopt plans in the future, and other people are authorized to apply those

115. *Id.* at 129.

116. *Id.* at 139.

117. *Id.* at 144–45.

118. *Id.* at 157.

119. This is perhaps a clever allusion to the Cook Islands, a group of fifteen islands located in the South Pacific Ocean between French Polynesia and Fiji. *The Cook Islands*, COOK ISLANDS GOV'T ONLINE, http://www.cook-islands.gov.ck/cook-islands.php.

120. SHAPIRO, *supra* note 1, at 157.

121. *Id.* at 158.

122. *Id.*

123. *Id.* at 160.

124. *Id.* at 163.

125. *Id.* at 166.

plans. To ensure stability, these roles are institutionalized. Some officials create written proclamations of general application, other officials put plans into effect, and still others resolve disputes that arise under them.[126]

Shapiro concludes, "At this point, it seems safe to say that Cooks Island has developed a legal system,"[127] with the master plan as its constitution.[128] The Cooks Island system exhibits all the main characteristics we associate with legal systems.

2. The Planning Theory of Law.—Shapiro argues that this depiction of the birth of a legal system gives us several insights into the nature of law and provides us with—among other things—convincing solutions to the conundrums of the Identity Question, the Possibility Puzzle, and Hume's Challenge. First, it provides an example of a completely plausible legal system that contains no penalties for disobedience[129] and thereby demonstrates that sanctions are not a *necessary* or *essential* feature of law.[130] In other words, sanctions are not a property of the fundamental nature of law.

Second, Shapiro has shown us that it is possible to build a legal system using nonlegal parts. The Cooks Island scenario began in a nonlegal state, and a legal system was constructed without introducing any purely legal concepts.[131] Another way of putting this is that legal norms were created without preexisting legal authority, hence solving the Possibility Puzzle. Law is possible because plans are possible (and plans are possible because human beings are rational creatures with the ability to commit to, and carry out, plans).[132]

Shapiro's solution to the Possibility Puzzle is positivist in nature. The Cooks Island example shows that the existence of a legal system is determined exclusively by social facts.[133] It does not depend on whether any moral facts obtain. As Shapiro points out,

> The shared plan can be morally obnoxious. It may cede total control of social planning to a malevolent dictator or privilege the rights of certain subgroups of the community over others. The shared plan may

126. *Id.* at 169.

127. *Id.*

128. *Id.*

129. *Id.* On Cooks Island, "[t]he islanders all accept the legitimacy of the group plans and, as a result, abide by them. . . . Sanctions would simply be otiose in such a setting." *Id.*

130. *Id.*

131. Shapiro self-consciously parallels Hart's "Constructivist Strategy" in Part IV of *The Concept of Law*. *Id.* at 20–21; HART, *supra* note 53, at 52–78. As Shapiro explains, "The Constructivist Strategy enables the development of noncircular analyses of law. By building legal systems from exclusively nonlegal building blocks, legal philosophers can ensure that they do not appeal to the law in order to explain the law." SHAPIRO, *supra* note 1, at 21.

132. *Id.* at 179–81.

133. *Id.* at 177.

> have no support from the population at large; those governed by it may absolutely hate it.[134]

A legal system may nonetheless exist provided the following social facts obtain: (1) the master plan sets out a public, impersonal, hierarchical activity of social planning; (2) most of the officials designated by the master plan accept it; and (3) the community normally abides by the plans created pursuant to the master plan.[135]

Shapiro claims that the existence and content of a legal system "*must* be determined exclusively by social facts *if* [*shared plans*] *are to fulfill their function*."[136] The function of all shared plans, including legal systems, is "to guide and coordinate behavior by resolving doubts and disagreements about how to act."[137] If people have to resolve moral questions to determine what plan to apply, this would "resurrect the very questions that plans are designed to settle."[138]

Third, the Cooks Island story demonstrates not only that law *has* a moral goal, but what that moral goal is. The Cooks Island community reached a point at which it was faced with "numerous and serious moral problems whose solutions [were] complex, contentious, or arbitrary."[139] In

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134. *Id.*

135. *Id.* at 177, 179–80. It is worth noting the parallel between Shapiro's requirements for the existence for law and the requirements under Hart's theory. According to Hart, a legal system exists if officials accept the rule of recognition from the internal point of view, and the community normally obeys the primary rules validated by the rule of recognition. HART, *supra* note 53, at 116–17.

136. SHAPIRO, *supra* note 1, at 177 (first emphasis added).

137. *Id.*

138. *Id.* Because he believes it would be self-defeating for the law to require adjudicators to resolve moral questions, Shapiro is an "exclusive" legal positivist—as opposed to an "inclusive" legal positivist. While legal positivists all agree that law is *ultimately* a matter of social fact, they disagree as to whether law is *exclusively* a matter of social fact. *Id.* at 268–69. Inclusive legal positivists (also called "soft" positivists) allow for moral tests of legality, provided those tests are in fact accepted by officials from the internal point of view. For example, the moral standard of "cruel and unusual punishment" is a legal norm in the United States because the Eighth Amendment has the requisite social pedigree. *Id.* at 270. Exclusive legal positivists, by contrast, claim that "a norm counts as law only when it has a social pedigree and is ascertainable *without resort to moral reasoning*." *Id.* at 271 (emphasis added). On this view, the Cruel and Unusual Punishment Clause does not create a legal norm; instead, it imposes a *legal* obligation to look "*outside* the law to morality in order to resolve the case at hand." *Id.* at 273 (emphasis added). Shapiro sides with the exclusivists because it would violate the logic of planning to have the existence and content of law "determined by facts whose existence the law aims to settle." *Id.* at 275. Jeremy Waldron makes a counter argument that inclusive legal positivism does not violate the logic of planning. *See* Jeremy Waldron, *Planning for Legality*, 109 MICH. L. REV. 883, 895–96 (2011) (reviewing SHAPIRO, *supra* note 1) ("[E]ven when moral predicates are used, their use does not always beg the question that the law is supposed to settle."). Waldron makes a similar argument with respect to Shapiro's claim that the law's planning function requires the *ultimate* ground of law must be determined by social facts alone. *Id.* at 891–96. For a more detailed discussion of inclusive and exclusive positivism, see, for example, RAZ, *supra* note 19, at 194 and Kenneth Einar Himma, *Inclusive Legal Positivism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 125, 125–65 (Jules Coleman & Scott Shapiro eds., 2002).

139. SHAPIRO, *supra* note 1, at 170.

these conditions, which Shapiro calls the "circumstances of legality," resolution of the serious problems of community life demanded "the sophisticated technologies of social planning that only legal institutions provide."[140] That this function is an essential feature of the nature of law is the "central claim" of Shapiro's Planning Theory of Law: "[*T*]*he law is first and foremost a social planning mechanism whose aim is to rectify the moral deficiencies of the circumstances of legality.*"[141]

C. The Planning Theory and Hume's Challenge

Shapiro proposes an adamant version of legal positivism to explain the fundamental nature of law. Like earlier positivistic theories, the Planning Theory faces the challenge posed by Hume's Law. That is, the theory appears to derive normative conclusions from descriptive premises by grounding legal obligations in social facts.

Shapiro responds to this challenge by denying that claims of legal obligation are normative claims. According to Shapiro, claims of legal obligation are descriptive; grounding legal obligations in social facts therefore does not violate Hume's Law.[142]

The difficulty with this approach, as we saw with Austin's theory, is that the concepts of authority, right, and obligation are moral concepts. A theory of law that treats such statements as descriptive, it seems, fails to explain this feature of law. Shapiro's response is to distinguish between adjectival and perspectival interpretations of a statement that someone has a legal obligation.[143] The adjectival interpretation treats the *legal* in *legal obligation* as an adjective. That is, legal obligation is a *kind* of obligation, just as a yellow car is a kind of car. Because obligation is inherently moral, any kind of obligation is also a *moral* obligation.[144] The adjectival interpretation of *legal obligation* therefore leads to a violation of Hume's Law.

Shapiro argues that the perspectival interpretation of *legal obligation* does not violate Hume's Law. On this interpretation, the term *legal* plays a qualifying,[145] or distancing,[146] rather than modifying role. To say that

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140. *Id.*

141. *Id.* at 172 (emphasis added).

142. *Id.* at 188. In this passage, Shapiro states,

> [S]tatements of legal authority, legal rights, and legal obligations are *descriptive*, not normative. . . .
>
> Because legal statements purport to describe the legal point of view, the conclusion of legal reasoning will be a descriptive judgment. . . . From descriptive judgments about the existence of shared plans or the content of the legal point of view, other descriptive judgments about the legal point of view can be derived. The Planning Theory, in other words, conforms to Hume's Law because legal reasoning does not involve the derivation of an ought from an is, but rather an is from an is.

Id.

143. *Id.* at 185.

144. If a car is inherently a form of transport, a yellow car is also a form of transport.

145. SHAPIRO, *supra* note 1, at 185.

someone has a legal obligation is simply to say that, "from the legal point of view,"[147] the person has an obligation. One can think of this in the following way: to say that a person has a legal obligation is merely to say that the law *claims* the person has a (moral) obligation; it does not involve a claim that the person in fact has a (moral) obligation.

According to the perspectival interpretation, therefore, statements of legal obligation—and legal authority, legal right, and so on—are descriptive, not normative.[148] They simply report what the law's normative judgments are without endorsing those judgments.[149] By employing the perspectival interpretation, in other words, the Planning Theory of law is able to meet Hume's Challenge. As Shapiro puts it, "The Planning Theory . . . conforms to Hume's Law because legal reasoning does not involve the derivation of an ought from an is, but rather an is from an is."[150]

As the Planning Theory provides persuasive answers to such puzzles as Hume's Challenge, Shapiro concludes, it represents a significant improvement on previous theories of legal positivism. In the part below, I shall examine whether Shapiro's understanding of law as a system of plans does in fact resolve the problems of previous positivistic legal theories. I shall also raise several questions of clarification and critique, most notably with respect to Shapiro's claim regarding the moral aim of law.

IV. Some Questions Raised by the Planning Theory

A. Obligation, Rules, and Plans

As I outlined in subpart II(B) above, one of the main criticisms Shapiro levels at Hart is that his theory of law as social rules cannot explain legal concepts such as obligation. Hart's expressivist theory cannot explain, for instance, how the bad man may make normative judgments like "I have a legal obligation to pay my taxes," despite not accepting law from the internal point of view. Shapiro asserts that, in contrast, the normative discourse of law is explicable under his theory.[151] Statements of legal obligation and legal authority should not be interpreted as expressing the speaker's commitments to the rule or as adjectival statements. Rather, a claim of legal obligation should be understood as perspectival—as a descriptive claim that, *from the law's perspective*, there is a (moral) obligation. Understood in this way, judgments of legal obligation make sense even when made by the bad man and also conform to Hume's demand that *ought* cannot be derived from *is*.

146. *Id.* at 186.
147. *Id.* at 185 (emphasis omitted).
148. *Id.* at 188.
149. *Id.* at 186.
150. *Id.* at 188.
151. *See supra* subpart III(C).

There are two points worth noting with respect to Shapiro's position. The first point is that the distinction between rules and plans plays no role in the perspectival understanding of statements of legal obligation. We can understand statements of legal obligation as perspectival regardless of whether we treat rules or plans as the fundamental building blocks of law. To put it another way, a Hartian legal philosopher could accept the perspectival understanding of statements of legal obligation without rejecting the view that law consists of social rules. The perspectival account of legal obligation does not entail the position that law is a system of plans. That the perspectival account better explains law's normative discourse than the expressivist account, therefore, cannot count as a reason why we should prefer the Planning Theory over a social-rules theory of law. It merely provides a reason for rejecting the expressivist account of normative discourse.

Second, it is unclear how to understand, on the perspectival account of claims of obligation, the distinction between "being obliged" and "having a legal obligation." Shapiro seems to accept (as did Hart)[152] that the law is not simply the gunman writ large, but rather involves obligations in a way that a gunman's demands do not. But what is to stop us from describing the gunman's demands as involving "gunman-obligations"? That is, could we not say that a victim is under a gunman-obligation to hand over her money, by which we would mean that from the perspective of the gunman, the victim is under a moral obligation to hand over her money?

Shapiro could respond to this question by reminding us that under his theory, having a moral aim is part of law's essential nature—unlike gunmen's essential nature. It therefore makes more sense to think of having a moral obligation to obey from the law's perspective rather than having a moral obligation to obey from the gunman's perspective. Whether this response is sufficient requires us to consider more closely what exactly Shapiro means when he declares that "it is part of the nature of law to have a moral aim."[153]

B. The Moral Aim of Law

1. Law Outside the Circumstances of Legality.—As we saw in section III(B)(2) above, the Planning Theory posits that the fundamental aim of law is to address the serious moral problems that arise out of the circumstances of legality. Given Shapiro's discussion of the fundamental nature or essence of law,[154] it seems reasonable to understand this fundamental aim as a prerequisite for the existence of a legal system. That is, a system is only a legal system if it has the aim of rectifying the moral problems that arise out of the

152. HART, *supra* note 53, at 82.

153. SHAPIRO, *supra* note 1, at 392.

154. *See supra* Part I.

circumstances of legality. This, in turn, seems to entail that the circumstances of legality themselves are necessary for the existence of a legal system.

This is a counterintuitive result. Imagine that there is another island—call it New Island—located near Cooks Island in the South Pacific. The resources of New Island are plenty and easily suffice to support its small population. New Island has a simple social structure based around kinship ties, which ensures homogenous values and community accord. In short, the circumstances of legality do not apply to New Island. The community does not need complex mechanisms for harnessing trust and corralling distrust. But suppose a charismatic traveler from Cooks Island visits New Island and dazzles them with tales of his community's complex legal system—its courts, legislatures, and executive officials. We can imagine the citizens of New Island, impressed by this newcomer, deciding to adopt a similar system of their own. They choose a leader and other officials to whom they delegate legislative and executive authority (in Shapiro's lingo, the authority to plan on their behalf); they adopt a system of individual property ownership and agree to have disputes settled by appointed arbitrators.

All of this newfangled planning technology is, of course, unnecessary. The New Islanders were content with their simple but well-functioning society before the arrival of the Cooks Island visitor. These sophisticated, hierarchical institutions are inefficient overkill. But just because they are not necessary for, or even valuable to, the well-being of the community does not make them impossible.

We therefore seem to have the possibility of a legal system that does not fit Shapiro's criteria for the existence of a legal system. Shapiro asserts that "the Planning Theory's answer to the Identity Question for law" includes the criterion that *the law* is a "planning organization whose aim is to solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering."[155] Shapiro reiterates this point: "If we want to explain what makes the law *the law*, we must see it as necessarily having a moral aim . . . ."[156] But not just any moral aim. According to the Moral Aim Thesis, "The fundamental aim of legal activity is to remedy the moral deficiencies *of the circumstances of legality*."[157] If we take Shapiro's claims of the necessity and essentialness of this aim seriously (and Shapiro appears to intend that we do), it would seem that on this view legal activity is

155. SHAPIRO, *supra* note 1, at 225.

156. *Id.* at 215; *see also id.* at 216 ("It is simply an essential truth about the law that it is supposed to solve moral problems.").

157. *Id.* at 213 (emphasis added). It is not the existence of any old moral aim that distinguishes a legal system from other normative systems, but specifically "the rectification of the moral defects associated with the circumstances of legality." *Id.* at 214. Moral aims of some kind will be common to many, if not all, normative systems, "[b]ut only a legal system is supposed to address those problems that less sophisticated methods of coordinating social activity and guiding action are unable to resolve." *Id.*

impossible absent the circumstances of legality. For when these circumstances do not apply, it cannot be the *aim* of the law to remedy their deficiencies.[158]

Through his Cooks Island narrative, Shapiro makes a compelling case that a society in the circumstances of legality will inevitably develop a legal system. But this argument does not establish that a society not faced with the moral predicament of the circumstances of legality *cannot* adopt a legal system. The Planning Thesis, Shapiro claims, "explains why we think that law is invaluable in the modern world but not, say, among simple hunter-gatherers."[159] But explaining why law is not invaluable to hunter–gatherers is insufficient to justify a claim that it is not possible for hunter–gatherers to have a legal system. That legal systems are only invaluable to large, complex societies might justify an empirical claim regarding the relative prevalence of law among complex and simple societies. But it is inadequate to justify Shapiro's *metaphysical* claim that "[a] legal system cannot help but have a moral aim if it is to be a legal system."[160]

More generally, what Shapiro has demonstrated is that a complex, pluralistic society cannot resolve the moral problems arising from the circumstances of legality without a legal system. This does not support his Moral Aim Thesis that a law is not possible without the aim of resolving these moral problems. Shapiro's argument is that when a society *does in fact have the aim* of remedying the moral deficiencies of the circumstances of legality, then they will create a legal system. It does not tell us whether legal systems exist when a normative system does *not* have this aim (either because the circumstances of legality are not present, or because they are present but the normative system does not aim to remedy the deficiencies of those circumstances). It leaves open the possibility that a legal system can exist without this moral aim.[161]

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158. To be precise, it could be the aim of legal activity—or at least the *purported* aim—to remedy the defects of the circumstances of legality in circumstances where officials *claimed* to be faced with, or *believed* they were faced with, these circumstances, even when they do not in truth apply. The purported aim need not be sincere, for on Shapiro's account the law has a moral aim if "high-ranking officials *represent* the practice as having a moral aim." *Id.* at 216–17 (emphasis added). I address this point in greater detail below. For present purposes, it suffices to point out that in the New Island example, the high-ranking officials do not even represent that the legal system has the aim of resolving the deficiencies that arise out of the circumstances of legality.

159. *Id.* at 214.

160. *Id.* at 215. That we can provide counterexamples to Shapiro's description of the essential nature of law is also, of course, relevant to whether law actually *has* an essential nature. As I discussed in subpart I(A), *supra*, commentators have recently criticized the claim that law has an essential nature.

161. A possible avenue of response for Shapiro is to deny that the social organization of New Island qualifies as a *legal* system. That is, while the New Islanders have a sophisticated system for guiding behavior, it is not law. I am not persuaded by this rejoinder. On my understanding of linguistic usage, it is appropriate to say that New Island has a legal system. Indeed, it seems that we do in fact ascribe legality to systems that arise in societies where it is at least arguable that they are not faced with the circumstances of legality. For example, modern Australian law recognizes that

Shapiro might argue that I am misinterpreting his statements that the law's aim is to solve those moral problems that arise out of the circumstances of legality. After all, he also asserts that "the fundamental problem to which law is a solution is not any *particular* moral quandary" but is rather "the problem of how to solve moral quandaries *in general*."[162] However, this move dilutes the connection between law and social plans. What made the Cooks Island example so compelling was that the problems that the law resolved for the Cooks Islanders were the types of problems to which *plans* are uniquely suitable—problems of coordination, choosing between contentious or equally appropriate options, and so on. Once we understand the moral aim of the law as being the resolution of *some* moral problem, the conceptual connection between law and plans is less apparent.

2. Representing a Moral Aim.—The Moral Aim Thesis was also recently criticized by Fred Schauer as leading to counterintuitive results with respect to the legal status of unjust regimes whose leaders are not morally motivated. He argues that

> although Shapiro's use of moral motivation to distinguish legal from nonlegal institutions allows the law of erroneously morally motivated states—Nazi Germany, apartheid South Africa, and Stalinist Russia, for example—to count as law, it also leads to the counterintuitive conclusion that kleptocratic states whose dictators are interested only in their own gain—the Philippines under Marcos, for example, or Zaire under Mobutu—do not have law at all.[163]

To be precise, Shapiro is not committed to denying that Marcos's Philippines or Mobutu's Zaire did not have law at all, because these dictators were interested only in their own gain. If a dictator *represents* that his regime has a moral purpose, then the Moral Aim Thesis is satisfied even if the purported moral purpose is not genuine. Whether the Moral Aim Thesis leads to counterintuitive conclusions in the cases Schauer mentions depends on whether Marcos and Mobutu *represented* their regimes "as having a moral mission."[164]

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customary *law* existed among indigenous societies prior to the arrival of European colonists. *See Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 57 (Austl.) (recognizing that customary law existed in indigenous societies prior to the acquisition of sovereignty by the British Crown, and holding that the British acquisition of sovereignty did not automatically extinguish customary property rights). While not all indigenous societies were hunter-gatherers, it is doubtful that they satisfied Shapiro's definition of the circumstances of legality, which envisions populations of a massive size, without close ties of kinship, and so on. In any event, my intuitions suggest that the notion of law does apply to New Island and other similar normative systems. The intuitions of my colleagues with whom I have discussed this accord with my own. Just as "it is easy for [Shapiro] to imagine legal systems that are evil," it is easy for me to imagine legal systems that do not have the aim of remedying the moral deficiencies of the circumstances of legality. SHAPIRO, *supra* note 1, at 16.

162. SHAPIRO, *supra* note 1, at 173.

163. Schauer, *supra* note 22, at 599 n.49.

164. SHAPIRO, *supra* note 1, at 217.

Shapiro might respond that the officials of these regimes *did* represent the practice as having a moral aim, at least implicitly. As long as the regime presents the appropriate moral posture, the requirement that it have a moral aim is satisfied. As Shapiro describes it,

> These representations may take many forms, either explicitly in speeches, ceremonial steles, preambles to constitutions, prologues to legal codes, and judicial dicta, or implicitly through the atmospherics of ritual dress and speech, the construction of monumental buildings housing legal activity, and the use of religious or moral iconography in legal settings. *Perhaps most importantly, the moral aims of the law are represented through legal discourse.* By describing legal demands as "obligating," not merely "obliging," and power as based on "right," not merely "might," elites present their practice as something other than a criminal enterprise or self-interested pursuit of pleasure, profit, or glory. They depict it, in other words, as an activity that is supposed to solve moral problems and should be obeyed for that reason.[165]

This broad understanding of what is required in order for a regime to be depicted as having a moral aim is an effective response to Schauer's claim that the Moral Aim Thesis denies the possibility of kleptocratic legal systems. For even self-interested dictators invoke the apparatuses and discourse of law. In fact, it is difficult to imagine a regime, even when completely uninterested in the welfare of its citizens, that did not use the language of "obligation" and the "right" to rule. As is so often the case, however, the answer to one question raises several others. First, according to Shapiro's expression of the Moral Aim Thesis, not any moral mission will do. Only a regime that purports to be committed to resolving the particular moral questions of cooperation and coordination that arise from the circumstances of legality have the status of law. But nothing in the language of moral discourse specifically depicts this particular goal. The same concepts and terminology could be invoked for any putatively moral purpose.

Second, Shapiro's explanation of when a regime represents to have a moral aim locates this representation—which is an essential feature of law—in the discourse of rights and obligations. This claim seems to be in tension with Shapiro's later claim that laws "do not claim moral force."[166] Shapiro expands upon this notion that law does not claim moral force in relation to how we should understand legal directives:

> Strictly speaking, the directive to pay income tax is best rendered as: "Everyone, pay x percent of your income in taxes!" (rather than:

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165. *Id.* (emphasis added).

166. *Id.* at 231. It is also difficult to reconcile the assertion that law does not claim moral force with Shapiro's statement that, "[t]he law claims the right to demand compliance from everyone, even those who reject its demands." *Id.* at 112. For further discussion of Shapiro's analysis of how law's normative discourse forms punitive and coercive regimes, see *supra* subpart II(B).

> "Everyone is obligated to pay x percent of their income in taxes") and the authorization to Congress to regulate interstate commerce is similarly rendered as: "Everyone, *Congress* regulates interstate commerce!" (as opposed to: "Congress has the right to regulate interstate commerce").[167]

The best rendering of a legal directive, then, excludes any reference to moral concepts. However, it is just this "morally inflected"[168] language that characterizes legal discourse and that Shapiro identifies as representing law as having a moral aim—a representation essential to law being *law*. How might we reconcile the claims that (1) law necessarily claims to have a moral aim, and (2) law does not claim moral force? A possible move is to suggest that claiming to have a moral aim is different from claiming to have moral force. This move is not a fruitful one, however. Shapiro argues that officials depict law as having a moral aim precisely by describing legal demands as creating "obligations," and power as based on a "right" to rule.[169] Surely such assertions involve a claim of moral *force*—that seems at least as clear as Shapiro's assertion that they involve a claim that law has a moral *point*. And if legal demands are rendered without this moral terminology, then they no longer represent that they have a moral point. It does not seem possible for legal demands to assert claims of moral purpose—by using the language of "right" and "obligation"—and not simultaneously assert claims of moral force. If anything, Shapiro seems to derive law's representation of a moral aim primarily from law's representation of (or demand regarding) moral force.

Shapiro's generous analysis of what is required for the law to have a moral aim, and his comments regarding the best analysis of legal directives, also make it more difficult to maintain the normative distinction between law and the "gunman writ large." For not only could a gunman conceivably couch his demands in moral terms—stating a right to issue his demand, however insincerely, and his victim's obligation to obey—but Shapiro's "best rendering" of legal directive puts them on the same footing as mere demands for compliance.[170] "Everyone, pay your taxes!" is a general version of, "Hand over your money!"

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167. SHAPIRO, *supra* note 1, at 231.

168. *Id.* at 232.

169. *Id.* at 231–32.

170. Shapiro expressly addresses criminal syndicates such as the Sicilian Mafia and Japanese Yakuza, which are essentially versions of the gunman on a larger scale. *Id.* at 215–17. He concludes that criminal syndicates are not legal systems because they "do not portray their threats as creating legal obligations and right[s] for their victims. They drop the conceit that they are trying to solve the problems associated with the circumstances of legality . . . ." *Id.* at 217. While it may be true that, empirically, most criminal syndicates do not represent themselves in this way, it is by no means inconceivable that they could. Members of the Mafia could insist that shopkeepers have an obligation to pay protection money, and that individuals have a right to petition the Don on the day of his daughter's wedding. The top officials could even insist (disingenuously) that the Mafia has a moral aim: providing stability, say, in a multiracial, religiously diverse urban setting. Shapiro

3. Finnis and Focal Examples of Law.—That Shapiro treats law as having a moral aim whenever elite officials purport that it has such an aim has ramifications for his response to John Finnis's prominent theory of natural law. Finnis claims, in Shapiro's words, that "one truly understands the nature of law only when one understands its moral point or purpose."[171] Because law has a moral purpose, Finnis argues, just legal regimes are "central" or "focal" examples of law—whereas unjust or evil regimes are "peripheral," "watered-down," or "borderline" instances of law.[172] In other words, legal positivists fail to recognize that unjust legal systems are "not *really* law."[173]

Shapiro agrees with Finnis that most positivists are mistaken in asserting that law does not have a moral aim.[174] As we have already discussed, Shapiro believes law has a moral aim, that "it is part of the nature of law that law must conform to morality."[175] He disagrees with Finnis, however, as to the status of regimes that fail to satisfy this fundamental aim. Such regimes are not borderline examples of law but are simply unsuccessful legal systems. They are real (albeit defective) legal systems. Shapiro illustrates his disagreement with Finnis with the "well-worn analogy"[176] of a broken clock. An unjust legal system is a real legal system just like a broken clock is a real clock. A decorative clock, on the other hand, is a borderline example of a clock. Unlike a broken clock, a decorative clock is not a real clock. Finnis's error, according to Shapiro, is to treat broken legal systems as decorative legal systems.

However, as applied to legal systems, the distinction between broken and decorative is more difficult to maintain on Shapiro's understanding of when law "has" a moral aim. As we have discussed, a legal system has a moral aim when its top officials *represent* that it has a moral aim. In other words, it is the fundamental nature of law to *purport* to have a moral aim, not to actually have such an aim. But this makes self-consciously unjust legal systems analogous to decorative clocks: they are not actually even trying to solve moral problems—they are just pretending to solve moral problems. The clock–law analogy does not hold because, unlike Shapiro's conception of law, our concept of a clock applies to devices that depict the time, not objects that merely purport to depict the time. For the broken–decorative

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concedes "that if a criminal organization presents itself as dedicated to solving serious moral problems (think of Robin Hood and his Merry Men), it too might be eligible to be a legal system." *Id.* at 424 n.20. Presumably the same applies to criminal organizations such as the Mafia or Yakuza if they present themselves in a similar fashion, even if their representation is less plausible than that of Robin Hood.

171. *Id.* at 390 (citing JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 16–17 (1980)).

172. *Id.*

173. *Id.*

174. *Id.* at 390–91.

175. *Id.* at 391.

176. *Id.*

distinction to apply to law, on Shapiro's understanding of the aim of law, he would have to draw a distinction between "real" legal systems that genuinely attempt to resolve moral problems but fail and "borderline" legal systems that insincerely represent to resolve moral problems—an unlikely concession for a legal positivist to make.

V. Dworkin, Interpretation, and Theoretical Disagreements

As I have discussed above, in *Legality*, Shapiro addresses how the Planning Theory of Law improves upon earlier theories of legal positivism. I have also discussed, relatively briefly, Shapiro's response to one natural-law critique, that of John Finnis. Shapiro further argues that the Planning Theory provides a compelling response to Lon Fuller's influential criticism of positivism.[177] Shapiro devotes the most energy, however, to perhaps the most high profile and persistent critic of legal positivism of the last few decades—Ronald Dworkin. Dworkin rejects legal positivism for a number of reasons, several of which Shapiro outlines and responds to in *Legality*.[178] In this Review, I will address the one Dworkinian critique that Shapiro considers "extremely powerful and not so easily dismissed,"[179] namely the problem of "'theoretical' disagreement[s]."[180]

According to Dworkin's theory, the fact that theoretical disagreements such as debates about the proper method for interpreting law are not only possible, but also endemic, poses a serious difficulty for legal positivism:

> As Ronald Dworkin has argued, the mere fact that such disputes take place indicates that law cannot rest on the kind of facts that positivists believe form the foundation of legal systems. For positivists have maintained that the criteria of legal validity are determined by convention and consensus. But debates over interpretive methodology demonstrate that no such convention or consensus exists. In other words, disagreements about interpretive method are impossible on the

177. According to Shapiro, Fuller claims that "positivists fail to see that a regime would not be law if it consistently flouted the moral principles that constitute the Rule of Law." *Id.* at 392 (citing LON L. FULLER, THE MORALITY OF LAW 33–38 (1964)). These eight principles or values include requirements such as that legal rules are publicly available, clearly drafted, capable of being satisfied, do not contradict each other, and are not applied retroactively. *Id.* at 393. Shapiro accepts that a regime lacking these characteristics would not be a legal system but claims that the Planning Theory neatly explains this, while maintaining that law's existence is not grounded in morality. According to Shapiro, "[R]egimes that flout these principles are simply not engaged in the basic activity of law: they are not engaged in social planning." *Id.* at 394. The Planning Theory, Shapiro concludes, allows positivists to "agree with Fuller that observance of his eight principles is necessary for the existence of a legal system and yet deny that the existence of law depends on moral facts." *Id.* at 395.

178. *See id.* at 259–388 (considering three of Dworkin's critiques and possible responses by legal positivists).

179. *Id.* at 284. That Shapiro considers this critique to be of immense importance is reflected by the fact that he devotes almost one-third of *Legality* to engaging it.

180. RONALD DWORKIN, LAW'S EMPIRE 4–5 (1986).

> legal positivist position. Nevertheless, they seem not only possible, but pervasive.[181]

It can hardly be denied that disputes about proper interpretive methodology are pervasive features of law. In fact, whether or not the U.S. Constitution should be interpreted according to its original meaning is surely a leading candidate for the most often and hotly debated question in American law. This debate, though, is about "what the grounds of law *are*,"[182] which is precisely the question that the rule of recognition is supposed to settle.[183] But a legal system only exists when there is a consensus among officials (including judges) about the rule of recognition. If there is a consensus about the grounds of law, perennial disagreements such as the debate about constitutional interpretation are impossible.

Dworkin concludes that legal positivism is at odds with truisms about the practice of law and ought to be rejected. He presents an alternative theory of law known as constructive interpretation[184] that, he claims, accounts for the existence of theoretical disagreements. Constructive interpretation of the law requires legal interpreters to engage in moral reasoning, and because moral disagreements are endemic and intractable, so too are legal theoretical disagreements.[185]

A. Law as Constructive Interpretation

A complete exposition of Dworkin's theory is well beyond the scope of this Review. I will therefore restrict myself to a very brief—but hopefully fair—description of Shapiro's presentation of Dworkin's relevant claims. I will focus on Shapiro's argument that the Planning Theory of Law explains the persistent disagreements about interpretive methodology in law. Put briefly, Dworkin argues that law involves the practice of constructive interpretation. In general, constructive interpretation is the process of "imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[186]

To take literary interpretation as an example, because a novel is a form of art, "the interpreter seeks to impose on the text an *aesthetic* purpose that

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181. SHAPIRO, *supra* note 1, at 283.

182. *Id.* at 285.

183. *See id.* (arguing that Dworkin's distinctions between theoretical and empirical disagreements "have analogues in Hart's theory of law" (i.e., the rule of recognition) and equating theoretical disagreements—or disagreements over "what the grounds of law *are*"—to "disputes about the content of the rule of recognition").

184. *See* DWORKIN, *supra* note 180, at 90 (arguing that all general theories of law are really constructive interpretations).

185. *See* SHAPIRO, *supra* note 1, at 293 ("Dworkin argues that the process of legal interpretation should be viewed . . . as a form of constructive interpretation. . . . Disagreements about the grounds of law would be predicated upon disagreements about the moral purpose of law . . . [because] the content of the law is dependent on which principles portray legal practice in its morally best light, genuine *moral* disagreements will induce genuine *legal* disagreements.").

186. *See id.* at 292–93 (quoting DWORKIN, *supra* note 180, at 52).

will make it the best possible novel it can be."[187] Because people "disagree about the aesthetic merits of literature[,] . . . the pervasiveness of theoretical *literary* disagreements can be neatly explained."[188]

Similarly, because law is a form of social control, "the legal interpreter imposes a purpose on legal practice in order to make it the *morally best* social practice it can be."[189] But people disagree about the *moral merits* of law as a social practice, a fact that accounts for theoretical *legal* disagreement.[190]

B. Interpretation and Distrust

Shapiro's response to the Dworkinian critique has two parts. First, he claims that the Planning Theory illustrates why Dworkin's explanation of theoretical disagreements is fatally flawed. Second, he argues that the Planning Theory *can* account for theoretical disagreements, or, as Shapiro calls them, "meta-interpretive" disagreements.[191] If successful, this argument would constitute a major advance in analytical jurisprudence, for as Shapiro points out, "no positivist theory . . . has yet shown that theoretical disagreements are possible."[192]

Shapiro deals with the first part of this response in a manner the reader will find familiar. On Dworkin's account, "the only way to discover the content of the law is to engage in moral and political philosophy, which is the very sort of inquiry that the law aims to obviate."[193] By putting back on the table the contentious issues that the law is supposed to settle, "Dworkin's theory recommends a meta-interpretive practice that defeats the very purpose of law."[194]

Moreover, Dworkin's meta-interpretive theory demands an incredible degree of philosophical skill and moral judgment on the part of interpreters, and quintessentially, judges. Shapiro argues that as a result, Dworkin's

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187. *Id.* at 293 (emphasis added).

188. *Id.* (emphasis added).

189. *Id.* (emphasis added).

190. I should note that this explanation of pervasive theoretical disagreement does not indicate that there is no right answer to legal questions—quite the contrary. According to Dworkin, there is a correct method of legal interpretation, but it is a Herculean task that requires, among other things, substantial moral reasoning. DWORKIN, *supra* note 180, at 96–101. It is the fact that people have genuine moral disagreements that explains theoretical disagreements in law. But this fact does not require more than one moral view to be *correct*.

191. SHAPIRO, *supra* note 1, at 304–05. Meta-interpretive disagreements are disagreements about which interpretive method one ought to apply. A meta-interpretive theory "does not set out a specific methodology for interpreting legal texts, but rather a methodology for determining which specific methodology is proper. It provides participants of particular systems, in other words, with the resources they need to figure out whether to endorse textualism, living constitutionalism, originalism, pragmatism, law as integrity, and so on." *Id.*

192. *Id.* at 308.

193. *Id.* at 307; *see also id.* at 310 ("Having to answer a series of moral questions is precisely the *disease* that the law aims to cure.").

194. *Id.* at 307.

account not only violates the logic of plans in general, but also violates the specific plan embodied in the U.S. Constitution. The design of the Constitution, Shapiro claims, evinces a "pervasive sense of mistrust"[195] of both individuals and organs of government.[196] The Constitution's institutional arrangements were designed to distribute authority so as to "economize on the small degree of virtue present in the system"[197] and "leverage . . . distrust in order to prevent power from growing beyond its proper sphere."[198]

Shapiro bases his own meta-interpretive theory on the notion that all planning systems can be understood as exercises in "trust management."[199] For example, an investment plan developed by a financial advisor (and accepted by her client) that takes all investment decisions out of the client's hands reflects an attitude, on both their parts, of trust in the advisor's financial decisions and distrust in the client's.[200] For plans—including legal plans—to achieve their goals, they must be interpreted in a manner consistent with their "economy of trust."[201] In other words, the function of law[202] demands that interpreters "*defer to its economy of trust*, namely, the attitudes of trust and distrust that motivated its creation."[203] This is Shapiro's meta-interpretive theory.

It is crucial to understand that this meta-interpretive theory does not mandate a particular method of interpretation for all legal systems. Rather, the best interpretive methodology for a specific legal system will be contingent on the particular attitudes of trust represented in that system's master plan. We can say, roughly, that "[a] distrustful system requires a constraining methodology, such as textualism, whereas a more trusting system demands one according greater interpretive discretion."[204]

Shapiro now has the resources to explain, contra Dworkin, how meta-interpretive (that is, theoretical) disagreements are possible under legal positivism. Legal officials can *agree* on the social facts by which the existence and content of the (legal) master plan is determined, but they can *disagree* about the attitudes of trust and distrust the plan embodies and about which interpretive methodology will best give effect to those attitudes. As

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195. *Id.* at 325.

196. *See generally id.* at 312–27 (chronicling the development of the Framers' mistrust in both powerful political actors and the people through the events leading up to the Constitutional Convention of 1787 and how those attitudes affected the eventual structure of the federal government).

197. *Id.* at 324.

198. *Id.* at 325.

199. *Id.* at 335.

200. *Id.* at 332–33.

201. *Id.* at 335.

202. Shapiro argues that "the problems of the circumstances of legality are largely (although not exclusively) problems of trust." *Id.* at 337.

203. *Id.* at 336 (emphasis added).

204. *Id.*

the agreement is about one thing and the (theoretical) disagreement is about another, acknowledging that officials disagree about interpretive methodology is consistent with claiming that the law requires official consensus about the social foundations of law.[205]

Shapiro's theory also accounts for why theoretical disagreements are so prevalent: "[I]t is highly likely that meta-interpreters will disagree with one another about the content of the planners' shared understandings and which methodologies are best supported by them."[206] Without these shared understandings, theoretical disagreements will be "irresolvable."[207]

C. *Interpreting the Eighth Amendment*

The debate about the Eighth Amendment and its application to the death penalty is a case in point. The debate revolves around whether the prohibition on "cruel and unusual punishments"[208] should be interpreted in accordance with the Framers' intent. If this is the proper interpretive methodology, then the death penalty is constitutional (as "the framers plainly did not regard the death penalty as cruel and unusual").[209] On the other hand, if the prohibition is interpreted "literally" (to use Shapiro's term) then the death penalty is unconstitutional ("since 'cruel' means cruel, and the death penalty is cruel and unusual").[210]

Which of these two methodologies is appropriate will turn on social facts that are in dispute. The originalist could argue that the constitutional designers were distrustful of judges, for example.[211] This distrust is respected by an interpretive method of fidelity to original intent, which will "minimize the potential for judicial mischief."[212] The anti-originalist could argue, among other things, that constitutional features such as life tenure for federal judges, judicial review, and the broad language of the clause in question indicate a high degree of trust in judges, at least compared to

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205. *Id.* at 383.

206. *Id.* Shapiro's meta-interpretive theory, like Dworkin's, is quite taxing on the abilities of meta-interpreters. But while Dworkin's theory requires meta-interpreters to address difficult questions of moral and political philosophy, Shapiro's theory requires meta-interpreters to determine questions of *social fact*, such as the planner's attitudes of trust. *Compare* DWORKIN, *supra* note 180, at 87–113 (explaining that differing conceptions of the law diverge according to how they account for the relationship between a community's laws and its popular morality), *with* SHAPIRO, *supra* note 1, at 382–83 (asserting that the ideology of a legal system is a fact about the behavior and attitudes of social groups, which may be established by empirical reasoning). While these questions may be difficult or even irresolvable, they do not raise the very questions that law is supposed to resolve and therefore do not violate the logic of planning. SHAPIRO, *supra* note 1, at 382.

207. SHAPIRO, *supra* note 1, at 383.

208. U.S. CONST. amend. VIII.

209. SHAPIRO, *supra* note 1, at 384.

210. *Id.*

211. *Id.*

212. *Id.*

legislators.[213] There is further room for reasonable disagreement along another dimension. According to Shapiro's theory, what matters is the planners' allocation of trust, and whether the "planners" are the Framers or current participants depends on *why* the current participants accept the system.[214] If we currently accept the Constitution because we believe it was "designed by those having superior authority or judgment,"[215] then we should adhere to the original allocation of distrust. If, however, we currently accept the Constitution because we believe that it provides appropriate solutions to moral problems (but we believe so for different reasons than the framers did), then we should follow our current attitudes of trust and distrust.[216] Which of these scenarios applies to the U.S. Constitution is, of course, a matter on which originalists and non-originalists may have differing opinions.[217]

The Planning Theory is therefore able to explain the intractable legal controversy surrounding interpretation of the Eighth Amendment, and American constitutional interpretation generally. The correct interpretation depends on social—often historical—facts that shed light on the attitudes of trust and distrust among the U.S. Constitution's planners, and as Shapiro points out, "In a legal system as complex and old as the U.S. regime, there really is something for everyone."[218]

VI. The (Practical?) Value of Jurisprudence

The Planning Theory's agnosticism about the correct constitutional interpretive methodology may leave nonphilosophers with a hollow feeling; those readers hoping for guidance (or supportive theoretical arguments) are likely disappointed. Not only does Shapiro's theory fail to identify the correct method of constitutional interpretation, it provides the possibility that there is no definite answer to the question.

From the theoretical perspective, this is an altogether-appropriate conclusion for a positivistic theory. Since law is dependent on social facts and is partially indeterminate, it makes sense that the legally proper interpretive methodology will be contingent on the social facts that apply and may not be determined. Nor does the theory's failure to answer the meta-interpretive question undermine Shapiro's response to Dworkin. Indeed, this *is* Shapiro's response. Shapiro summarizes these considerations as follows:

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213. *Id.* at 384–85.

214. *Id.* at 350.

215. *Id.*

216. *Id.*; *see also id.* at 385 ("[T]he U.S. system is a constitutional democracy that grants life tenure and the power of judicial review to federal courts, an allocation of authority that bespeaks a fairly high degree of trust in judges as compared to the legislature.").

217. I do not address here whether we *should* treat the Framers of the U.S. Constitution as having superior authority or judgment, nor do I address the interesting question of in what circumstances (if any) a society should defer to the moral judgment of an earlier generation.

218. SHAPIRO, *supra* note 1, at 385.

> [A] theory of law should account for the *intelligibility* of theoretical disagreements, not necessarily provide a resolution to them. An adequate theory, in other words, ought to show that it makes sense for participants to disagree with each other about the grounds of law. Whether a unique solution to these disputes actually exists is an entirely different, and contingent, matter, and a jurisprudential theory should not, indeed must not, demand one just because participants think that there is one.[219]

Shapiro makes a strong case that the Planning Theory of Law makes a valuable contribution to analytical jurisprudence. It improves upon the weaknesses of prior positivist theories and rebuts a powerful and heretofore unanswered critique. The question remains, however, whether Shapiro has made his case for the *practical* value of analytical jurisprudence. The strength of Shapiro's theoretical argument (that disagreement is both possible and intractable) may undercut his argument for practical value (that the general nature of law is crucial to determining the content of specific laws).

The reader will recall that Shapiro argues that "many of the most pressing practical matters that concern lawyers"[220] depend on the answers to abstract questions of legal philosophy. In the opening chapter of *Legality*, Shapiro declared,

> One of the main goals of this book will thus be to show that analytical jurisprudence has profound practical implications for the practice of law—or, in other words, that the answer to what the law is *in any particular case* depends crucially on the answer to what law is *in general*.[221]

And Shapiro referred specifically to the debate about the correct way to interpret the Constitution as an example of the profound practical difference that analytical jurisprudence can make.[222] The jurisprudential skeptic is likely to argue that Shapiro's discussion of constitutional interpretation demonstrates precisely the opposite: that legal theory does *not* have significance with respect to the outcome of concrete cases. To quote Judge Richard Posner, "Nothing does turn on it."[223]

There are two responses to this complaint. First, it is a mistake to equate "It does not determine the answer" with "It is of no significance." The Planning Theory does not tell us whether we should interpret the Constitution according to originalism or non-originalism, but it does tell us

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219. *Id.* at 384.

220. *Id.* at 25.

221. *Id.* Perhaps ironically, this description of the relationship between general theories of law and practical legal questions echoes Dworkin's sentiments on the issue. Dworkin asserts that, "Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers . . . . Jurisprudence is the general part of adjudication, silent prologue to any decision at law." DWORKIN, *supra* note 180, at 90.

222. SHAPIRO, *supra* note 1, at 28–29.

223. RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 3 (1996).

the kinds of arguments that are legally appropriate. It rules out arguments for a particular interpretive theory—either originalism or non-originalism—that appeal to moral philosophy. It demands that such arguments require sociological inquiry into whether certain facts obtain. Surely guidance on the right forms of argument in constitutional disputes is of practical importance to even the most pragmatic legal scholars.

The determined skeptic might respond by pointing out that the Planning Theory provides little assistance to lawyers because they already make the kinds of arguments that the Planning Theory recommends. Indeed, Shapiro concedes that "many of the meta-interpretive arguments that lawyers have actually made conform, albeit in an inchoate and unreflective manner, to the process of meta-interpretation that the Planning Theory recommends."[224] This is not to concede, however, that *all* meta-interpretive arguments that lawyers make already conform to the Planning Theory. That they do not all conform is clear in the constitutional context: arguments for both originalism and non-originalism are rife with the kind of appeals to moral and political philosophy that the Planning Theory would preclude.

In addition, the Planning Theory is of practical value to the lawyers who already use arguments that conform to its recommendations, because it allows them to improve their arguments from "inchoate and unreflective" to, well, choate and reflective.

This last observation indicates the second response available to the defender of analytical jurisprudence as a valuable enterprise: the value of an enterprise, especially a scholarly one, should not be judged solely on its "practical" value—in the case of legal philosophy, on its capacity to conclusively resolve particular legal disputes. Legal philosophy increases our understanding of the social practice of law; it helps us make sense of the practices and institutions that legal scholars and practicing lawyers—indeed, all individuals to varying degrees—contribute to and engage with on a regular basis. That understanding of law is, I suggest, of value in addition to its instrumental value in resolving legal disputes or providing guidance on the applicable legal arguments. We could say that analytical jurisprudence has hermeneutical value: it improves our ability to "make ourselves and our practices intelligible."[225] It makes the practice of law more intelligible by providing a *theory*, that is, by providing an explanation that gives the practice internal consistency and coherency by unearthing the sometimes obscure relationships between different aspects of the practice and providing a framework within which to resolve questions about the practice, its rules, and its institutions.

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224. SHAPIRO, *supra* note 1, at 355.

225. Farrell, *supra* note 32, at 1002.

Conclusion

Shapiro argues that law is best understood as a sophisticated system of plans, the function of which is to resolve the serious moral issues that arise in the circumstances of legality. This understanding of law, Shapiro argues, allows us to determine the existence and content of law purely by reference to social facts, while also providing us with the resources to capture features of law previously inexplicable to the legal positivist—most notably, the existence of persistent and pervasive theoretical agreements about the grounds of law. While the Planning Theory does not achieve all of these (ambitious) goals, it is nonetheless a substantial contribution to analytical jurisprudence and provides the field with a fresh focal point around which future debates will coalesce. Moreover, *Legality*'s combination of breadth and accessibility makes it a worthy introduction to analytical jurisprudence, while not sacrificing sophisticated philosophical analysis. As for the jurisprudential skeptic, Shapiro partially succeeds in his argument regarding the value or relevance of analytical jurisprudence. While Shapiro may not have convincingly demonstrated that knowledge of law's fundamental nature is invaluable in resolving particular cases, *Legality* does represent an example of the value of analytical jurisprudence in sharpening, systematizing, and clarifying our amorphous understanding of law.

Notes

Improving Forensic Science Through State Oversight*

In December 2002, operations at the Houston Police Department Crime Laboratory—one of the nation's busiest forensic science laboratories—came to a screeching halt. What started a month earlier as a series of investigative reports by a local television station became the most significant laboratory scandal in the nation's history. Amid news reports of analytical errors, misrepresented findings, and the wrongful conviction of Josiah Sutton for aggravated kidnapping and sexual assault—based on flawed conclusions about DNA evidence[1]—the laboratory quickly suspended all DNA and toxicology analysis.[2] Shortly thereafter, the City of Houston hired a team of lawyers and forensic scientists to conduct an independent review of the laboratory.[3] The investigation found the laboratory in shambles, with countless problems spanning across twenty-five years of operations. These problems included the fabrication of scientific results,[4] a DNA section supervised by a leader without any experience performing DNA analysis,[5] and a roof that allowed water to leak into the laboratory and the evidence storage facility for over six years, at one point contaminating evidence.[6] Over the course of the investigation, the team reviewed forensic analyses performed in over 3,500 criminal cases.[7] The investigation found that numerous sections of the laboratory had failed to meet generally accepted forensic science principles, "pos[ing] major risks of contributing to miscarriages of justice in extremely significant cases, including death penalty cases."[8]

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1. MICHAEL R. BROMWICH, FINAL REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM 54–57 (2007), *available at* http://www.hpdlabinvestigation.org/reports/070613report.pdf.

2. *Id.* at 54.

3. *Id.* at 1 (Executive Summary) (stating that the Houston Police Department commissioned an investigation into the crime lab's activities). The investigative team included lawyers, forensic scientists, and statisticians. *Id.*

4. *Id.* at 153 n.212.

5. *Id.* at 186.

6. *Id.* at 32–33.

7. *Id.* at 3 (Executive Summary).

8. *Id.* at 4 (Executive Summary).

While the number of problems identified at the Houston crime lab represents an extreme, the reality is that similar problems have occurred throughout the country. Often, these problems have gone unrecognized due to a general lack of regulation of crime laboratories. This Note explores the role of state oversight in forensic science regulation and argues that stronger state-level oversight would help prevent situations like the Houston crime lab scandal. Part I describes the maladies that plague forensic science. Part II taps the power of the states within the framework of federalism and explains why state-level oversight is necessary to solve the problems. Part III describes the oversight mechanisms that states currently employ. While some states have established oversight institutions, most have not, and those that have can strengthen their oversight. Part IV then proposes a fortified model of state oversight, highlighting areas where current state efforts often fail. Finally, Part V concludes by arguing that state oversight is necessary even if pending federal legislation increases the role that the federal government plays in the regulation of forensic science.

I. The Current Forensic Science Framework

Given the popularity of television programs like *CSI: Crime Scene Investigation* and its spin-offs, most Americans have heard the term *forensic science*.[9] But despite what its singular name implies, forensic science actually refers to a range of disciplines, each with its own practices and culture. These disciplines include toxicology, firearms, toolmarks, trace evidence, arson analysis, impression evidence, blood-pattern analysis, and medical death investigation, among numerous others.[10] While professionals often perform analyses inside laboratories, police officers also perform forensic services, such as crime scene investigation and latent-fingerprint analysis, outside of the laboratory.[11] Of course, forensic science includes DNA analysis, a practice that has become a "model" forensic science discipline.[12] The strength of DNA analysis did not happen by chance; rather, "Congress allocated funding, [the National Academy of Sciences] issued reports, [the National Institute of Justice] distributed grants, attorneys filed motions, judges held hearings and legal and forensic scholars engaged in (often contentious) debates."[13] Unlike DNA analysis, which emerged from these so-called DNA wars of the 1990s as a strong, credible scientific practice, the

9. *See generally* N.J. Schweitzer & Michael J. Saks, *The* CSI *Effect: Popular Fiction About Forensic Science Affects the Public's Expectations About Real Forensic Science*, 47 JURIMETRICS J. 357 (2007) (reporting that the public's knowledge of forensic science from television shows like *CSI* may affect trials).

10. NAT'L INST. OF JUSTICE, STATUS AND NEEDS OF FORENSIC SCIENCE SERVICE PROVIDERS: A REPORT TO CONGRESS 2 (2006), *available at* https://www.ncjrs.gov/pdffiles1/nij/213420.pdf.

11. *Id.*

12. Erin Murphy, *What "Strengthening Forensic Science" Today Means for Tomorrow: DNA Exceptionalism and the 2009 NAS Report*, 9 L. PROBABILITY & RISK 7, 24 (2010).

13. *Id.*

other forensic science disciplines have historically avoided the spotlight,[14] even though they comprise the overwhelming majority of crime-laboratory work.[15] This Note focuses on how increasing state oversight of *all* forensic science disciplines—not just DNA analysis—can make them stronger.

Two core problems plague forensic science. First, questions of validity—whether forensic science truly measures real-world phenomena—threaten the foundation upon which disciplines are built. A landmark National Academy of Sciences report (NAS Report) on the state of non-DNA forensic science questioned whether underlying research supports many of the claims forensic scientists make in court.[16] In other words, to what extent is there *science* in any given forensic science discipline?[17] Because the criminal justice system routinely uses forensic science evidence and forensic experts,[18] this question is significant. To address validity concerns, the NAS Report recommended the creation of a new federal agency that would "promote the development of forensic science into a mature field of multidisciplinary research and practice."[19] Among its activities, the agency would encourage "scholarly, competitive peer-reviewed research,"[20] including studies demonstrating the scientific validity of practices,[21] and would oversee forensic science programs in higher education.[22]

Second, questions of reliability—whether forensic results are accurate, assuming that the methods are valid—have already eroded the credibility of forensic science. Analyst errors, whether willful or negligent, have led to the dismissal of criminal convictions in many jurisdictions. While some of the instances of error have been attributed to "rogue" analysts,[23] systemic

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14. *See id.* at 9 (explaining that, unlike DNA, the legitimacy of "traditional forensic disciplines that had long served as the backbone of scientific evidence in the courtroom . . . went largely ignored").

15. *See* Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 210 (2007) ("DNA cases, however, make up only a small portion of crime lab work . . . .").

16. *See generally* NAT'L RESEARCH COUNCIL, NAT'L ACAD. OF SCIS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter NAS REPORT]. The report dedicates an entire chapter to analyzing validity concerns discipline-by-discipline. *See id.* at 127–82.

17. *See id.* at 87 ("The law's greatest dilemma in its heavy reliance on forensic evidence, however, concerns the question of whether—and to what extent—there is *science* in any given 'forensic science' discipline.").

18. *See, e.g.*, CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 58 (Gerald Uelmen ed., 2008) ("The presentation of forensic science evidence is often the turning point in a criminal trial.").

19. NAS REPORT, *supra* note 16, at 81.

20. *Id.*

21. *Id.* at 190.

22. *Id.* at 82.

23. *See, e.g.*, Giannelli, *supra* note 15, at 174–82 (describing the repeated misconduct by Joyce Gilchrist, a forensic chemist in the Oklahoma City Police Department crime laboratory).

problems have caused many others.[24] These systemic problems are difficult to diagnose and to remedy. A particular analyst may be the culprit, but the cause may be a systemic issue such as lack of effective laboratory management or biases caused by the relationship between the laboratory and law enforcement.[25] The NAS Report recommended various measures to address reliability concerns. These recommendations included encouraging research on quantifiable measures of the reliability of analyses[26] and on human-observer bias and sources of human error;[27] developing best practices for professionals and laboratories;[28] mandating laboratory accreditation and certification of forensic science professionals;[29] and establishing a national code of ethics.[30] Controversially, the NAS Report also recommended removing laboratories from law enforcement control.[31]

Viewpoints differ on the merits of these concerns. The NAS Report elicited widespread reaction from scholars in the fields of forensic science and evidence, as well as from professional organizations.[32] While academic commentators have endorsed most of the NAS Report's recommendations, many have questioned whether the recommendations are realistic.[33] Professional organizations representing differing interests agreed that forensic science is severely under-resourced but disagreed as to whether the NAS Report endorsed or criticized forensic science methods.[34] They also

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24. *See* Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 725, 728 n.5 (2011) (listing "serious concerns" that arose at major laboratories across the country, including labs in Boston, Chicago, Houston, Los Angeles, New York, and San Francisco); Giannelli, *supra* note 15, at 172–208 (surveying failures by forensic science laboratories across the nation). Rogue analysts and systemic problems often merge. *See, e.g.*, *id.* at 172–74 (describing prosecutors' reliance on rogue analyst Fred Zain, the chief serologist in the West Virginia State Police Crime Laboratory, because other "West Virginia serologists were incapable, in their view, of reaching the 'right' results").

25. *See generally* Paul C. Giannelli, *Independent Crime Laboratories: The Problem of Motivational and Cognitive Bias*, 2010 UTAH L. REV. 247, 250–57 (describing motivational bias and multiple forms of cognitive bias in forensic science laboratories).

26. NAS REPORT, *supra* note 16, at 190.

27. *Id.* at 191.

28. *Id.* at 81.

29. *Id.* at 215.

30. *Id.*

31. *Id.* at 183–84, 190–91.

32. *See* Kenneth E. Melson, *Embracing the Path Forward: The Journey to Justice Continues*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 197, 213–20 (2010) (surveying responses from stakeholders in the forensic science community).

33. *See, e.g.*, D. Michael Risinger, *The NAS/NRC Report on Forensic Science: A Path Forward Fraught with Pitfalls*, 2010 UTAH L. REV. 225, 236–39 (doubting that political realities will permit the establishment of a new federal agency that oversees forensic science).

34. Murphy, *supra* note 12, at 23. For an example of an organization arguing that the NAS Report endorsed (rather than criticized) forensic science methods, see Nat'l Dist. Attorneys Ass'n, *NDAA Message to Prosecutors Regarding the National Academy of Sciences Forensic Science Report*, WIN INTERACTIVE, http://www.wininteractive.com/NDAA/NAS.html. The message stresses that "contrary to what some people are arguing, this report does not show that there are

disagreed about the practicality and necessity of the NAS Report's recommendations.[35] Some even accused the NAS of bias against law enforcement.[36] And while documented cases of analyst error or misconduct make it difficult to argue that the reliability concern is completely unwarranted, views differ on the extent of the problem and whether current protections such as accreditation can remedy it.[37]

Unlike the NAS Report, courts have accepted most forensic science disciplines as valid and reliable. The well-documented legacy of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[38] and its progeny is the relaxed judicial scrutiny of forensic science experts in criminal cases, as compared to heightened scrutiny of scientific experts in civil cases.[39] Unlike in civil cases, where courts routinely exclude scientific expert evidence under the *Daubert* factors,[40] they often admit forensic science evidence in criminal cases without question under the same *Daubert* standard.[41] And according to the NAS Report, even a change in "[j]udicial review, by itself, will not cure the infirmities of the forensic science community," no matter the gatekeeping standard.[42] In a recent Confrontation Clause decision, the Supreme Court

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problems with forensic science. . . . The science is valid, the science is good, and the science can be proven and replicated." *Id.*

35. *Compare* NAT'L DIST. ATT'YS ASS'N, RESOLUTION IN SUPPORT OF EFFORTS TO STRENGTHEN FORENSIC SCIENCE IN THE UNITED STATES 3 (2010), *available at* http://www.ndaa.org/pdf/NDAA_strengthen_forensic_science_resolution_4_10.pdf (opposing the creation of a new federal agency and questioning the effectiveness of removing crime laboratories from law enforcement or prosecutorial control), *with* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, PRINCIPLES AND RECOMMENDATIONS TO STRENGTHEN FORENSIC EVIDENCE AND ITS PRESENTATION IN THE COURTROOM 2 (2010), *available at* http://www.nacdl.org/sl_docs.nsf/issues/crimelab_resources/$FILE/NACDLStrengtheningForensicAustin.pdf (endorsing all of the NAS Report's recommendations).

36. Murphy, *supra* note 12, at 23.

37. *See infra* subpart III(B).

38. 509 U.S. 579 (1993).

39. *See generally* D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99 (2000) (finding that while civil defendants often win when challenging the reliability of plaintiffs' proffered expert evidence under *Daubert*, criminal defendants almost always lose when challenging the reliability of the prosecution's proffered expert evidence).

40. Though not an exhaustive list, courts generally look at whether a theory or technique has been tested, whether it has been subject to peer review and publication, the known or potential error rate, the existence and maintenance of standards controlling its operation, and whether it has been generally accepted by the relevant scientific community. *Daubert*, 509 U.S. at 593–94.

41. *See* Jane Campbell Moriarty, *Will History Be Servitude?: The NAS Report on Forensic Science and the Role of the Judiciary*, 2010 UTAH L. REV. 299, 315 ("In civil cases, courts seem quite up to the task of evaluating microbiology, teratology, and toxicology evidence . . . . Yet when it comes to evaluating the shortcomings of lip prints and handwriting, courts are unable to muster the most minimal grasp of why a standardless form of comparison might lack evidentiary reliability or trustworthiness.").

42. NAS REPORT, *supra* note 16, at 12; *see also* Peter J. Neufeld, *The (Near) Irrelevance of* Daubert *to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107, S110–11 (2005) (arguing that poorly funded defense counsel, unskilled defense counsel, inadequate

mentioned the possibility that forensic science evidence is unreliable due to analyst error or bias;[43] however, it does not appear that the nation's highest court will administer any top-down changes in the way trial courts handle admissibility questions. The Court's decision to cite the NAS Report may encourage defense counsel to try to use it in criminal cases to disqualify forensic scientists as unreliable expert witnesses under *Daubert*.[44] However, the success of such a strategy is unlikely.[45]

Fragmentation by jurisdiction, laboratory, and discipline exacerbates the validity and reliability problems. First, forensic science has historically operated under the formal supervision of law enforcement within each jurisdiction but without any significant external regulation.[46] Funding often comes from different levels of government, and laboratories often perform analyses for law enforcement from neighboring or overlapping jurisdictions.[47] The large number of small laboratories[48] and laboratories that only perform limited types of analysis[49] further disaggregate forensic science. The rise of private laboratories adds to the fragmentation as well,[50] and any

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funding for defense experts, and lack of effective discovery require reforms "upstream of the courthouse" rather than changes in judicial gatekeeping).

43. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2536 (2009); *see also* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2709–10 (2011) (relying on *Melendez-Diaz* and holding that the accused has the right to confront the analyst who either certified that a forensic analysis adhered to certain procedures or actually performed the forensic analysis in question).

44. Paul C. Giannelli, *The NRC Report and Its Implications for Criminal Litigation*, 50 JURIMETRICS J. 53, 55 (2009).

45. *See id.* ("It remains to be seen . . . how much impact the [NAS Report] will have and how soon that influence will be felt."); *see also* Moriarty, *supra* note 41, at 321–24 (surveying state and federal admissibility decisions since the publication of the NAS Report and concluding that no challenge "seeking to exclude forensic science evidence on reliability grounds has succeeded"). Since the *Daubert* decision in 1993, there have been several notable cases of exclusion of forensic science evidence. *See* Paul C. Giannelli, Daubert *and Forensic Science: The Pitfalls of Law Enforcement Control of Scientific Research*, 2011 U. ILL. L. REV. 53, 60–64 (surveying cases excluding handwriting analysis, fingerprint analysis, and firearms identification). In perhaps the most famous case, Judge Pollack first ruled that fingerprint experts could not testify that two samples actually matched, only to reverse himself on reconsideration. United States v. Llera Plaza, 179 F. Supp. 2d 492 (E.D. Pa. 2002), *vacated, motion granted on reconsideration*, 188 F. Supp. 2d 549, 551–52, 576 (E.D. Pa. 2002).

46. *See generally* Paul C. Giannelli, *Regulating Crime Laboratories: The Impact of DNA Evidence*, 15 J.L. & POL'Y 59 (2007) (surveying the regulation of crime laboratories since the establishment of the first laboratory in the 1920s).

47. *See, e.g.*, CAL. CRIME LAB. REVIEW TASK FORCE, AN EXAMINATION OF FORENSIC SCIENCE IN CALIFORNIA 47 (2009) (discussing numerous funding structures used by California laboratories, including fee-for-service and annual-contract programs in which one jurisdiction provides forensic services for another).

48. In 2005, the median staff size at the 389 publicly funded laboratories was only sixteen. MATTHEW R. DUROSE, DEP'T OF JUSTICE, CENSUS OF PUBLICLY FUNDED FORENSIC CRIME LABORATORIES, 2005, at 2 & tbl.1 (2008).

49. The median number of services performed by publicly funded laboratories is only six. *Id.* at 3.

50. Roughly half of publicly funded laboratories outsource some forensic services to private laboratories. *Id.* at 7. However, few data exist on the number of for-profit forensic science laboratories. NAS REPORT, *supra* note 16, at 58.

reform proposals must include increased oversight of these laboratories. In short, the term *forensic science* encompasses a complex world of overlapping jurisdictions and laboratories. The result is an environment where it is difficult to determine which entity should be responsible for oversight.

Second, forensic science has historically subdivided itself by discipline, "marked by multiple types of practitioners with different levels of education and training and different professional cultures and standards for performance."[51] Disciplines have developed at different times and in different contexts. Some, such as fingerprint and firearm comparisons, developed as pragmatic solutions to help solve law enforcement needs, while others, such as DNA and blood-typing, developed in medicine or other scientific fields and later became useful to law enforcement.[52] While professional associations organized by discipline have provided some leadership, they generally do not share standards or policies between organizations,[53] and this breakdown by discipline often contributes to "apprentice-type training and a guild-like structure of disciplines, which work against the goal of a single forensic science profession."[54] Key federal agencies, such as the Federal Bureau of Investigation (FBI) and the National Institute of Justice (NIJ), have provided "modest leadership," but neither has led calls for uniformity or scrutiny.[55] In fact, some discipline organizations, including Scientific Working Groups,[56] have refuted portions of the NAS Report addressing individualization, error-rate data, and the need for oversight.[57] The dichotomy between forensic science providers working in laboratories and providers working at crime scenes has also contributed to the fragmentation.[58] Depending on the jurisdiction and the type of evidence, forensic science may be performed by laboratory technicians, sworn law enforcement officers, or crime scene investigators.[59] Finally, even within disciplines, there are no formal entry mechanisms to the profession, such as

51. NAS REPORT, *supra* note 16, at 78.

52. DONALD E. SHELTON, FORENSIC SCIENCE IN COURT: CHALLENGES IN THE TWENTY-FIRST CENTURY 11 (2011).

53. NAS REPORT, *supra* note 16, at 78.

54. *Id.* at 15.

55. *Id.* at 78–79.

56. Scientific Working Groups (SWGs) and Technical Working Groups (TWGs) are organized by discipline and supported by the FBI and other federal agencies. *Scientific Working Groups*, FED. BUREAU INVESTIGATION, http://www2.fbi.gov/hq/lab/html/swg.htm.

57. *See* Jonathan J. Koehler, *Forensic Science Reform in the 21st Century: A Major Conference, a Blockbuster Report and Reasons To Be Pessimistic*, 9 L. PROBABILITY & RISK 1, 4–5 (2010) (describing organizations' opposition to the NAS Report).

58. *Cf.* NAS REPORT, *supra* note 16, at 218 (contrasting crime scene investigators, who often lack college degrees above the associate level, with laboratory practitioners, who often have bachelor's degrees).

59. *See supra* note 11 and accompanying text.

exams or licensure,[60] which leads to variations between providers within a single discipline.[61]

These core problems—questionable validity and questionable reliability, both augmented by a fragmented profession—have contributed to the ever-growing list of jurisdictions suffering from laboratory scandals.[62] Exonerations due in part to postconviction discovery of improper forensic science are well documented.[63] And the mainstream media has repeatedly reported on significant laboratory scandals.[64] But all is not lost. In many jurisdictions, state-level oversight is minimal.[65] Government action can address many of the problems and usher forensic science into a new era of valid, reliable science.

II. State Oversight: An Ignored Resource

With attention concentrated on the NAS Report and possible federal legislation, commentators have ignored the role of state forensic science oversight.[66] This lack of focus on state oversight is striking. In the American system of federalism, criminal law is traditionally reserved to the states under the police or welfare power.[67] Since any unresolved problems affect state criminal justice systems at their core, state oversight should play a critical role in forensic science oversight. A postconviction exoneration or the

60. NAS REPORT, *supra* note 16, at 59–60.

61. *Cf. id.* at 201 ("Adherence to standards . . . improves consistency . . . ."). While some disciplines have developed standards, others have not, "which contributes to questions about the validity of conclusions" and the reliability of results. *Id.*

62. *See supra* note 24.

63. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 14 (2009) (investigating the forensic science testimony in 137 cases where the convicted individual was later exonerated by DNA testing). It should be noted, however, that forensic science has also contributed to many exonerations through postconviction DNA testing. *See Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (reporting that there have been 273 postconviction DNA exonerations in the United States).

64. *See, e.g.*, Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Testing in Houston Police Crime Lab*, N.Y. TIMES, Aug. 5, 2004, at A19 (describing the Houston crime lab scandal); Editorial, *DAs On Board*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 31, 2010, *available at* http://www.newsobserver.com/2010/08/31/655855/das-on-board.html (commenting on the ongoing investigation into the State Bureau of Investigation's crime laboratory in North Carolina). *See generally* Joseph L. Peterson & Anna S. Leggett, *The Evolution of Forensic Science: Progress Amid the Pitfalls*, 36 STETSON L. REV. 621, 649–52 (2007) (surveying investigative journalism's increasing role in exposing misconduct in laboratories).

65. *See infra* subpart III(A).

66. In this Note, I use the term *oversight* in the broadest sense possible. I do not mean mere supervision of a laboratory's budget and hiring practices. Oversight includes policy making on issues that affect reliability, validity, laboratory structure, and accreditation, as well as investigations into allegations of negligence or misconduct. Furthermore, oversight is not limited to supervision by a regulatory body; it includes any state institution that has the potential to affect crime laboratory behavior. *See infra* Part III.

67. *See* U.S. CONST. amend. X (reserving to the states those powers not granted to the federal government).

discovery of a negligent technician puts the credibility of the state criminal justice system in question. The decisions of state legislatures and state executives—and not those of the United States Congress—determine a state's forensic science policies, the structure of its laboratories, and changes to its regulatory scheme.[68]

Although the body of federal criminal laws has ballooned in recent decades,[69] state and local law enforcement and prosecutors still "process the lion's share of U.S. criminal offenders."[70] While the federal government provides grants for laboratory operations,[71] helps fund research,[72] and influences state laboratories through its own laboratories and procedures,[73] the operation of state and local laboratories remains under the control of the state in which they are located. At the same time, formal federal regulation of non-DNA forensic science has lacked.[74] The spending power triggers the only current federal regulations.[75] The National Science Foundation and the National Institute of Standards and Technology have little experience with forensic science.[76] And only in response to the NAS Report did the White House form an advisory committee on forensic science.[77]

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68. *See, e.g.*, MD. CODE ANN., HEALTH–GEN. § 17-2A-02 (LexisNexis 2009) (establishing oversight of forensic science laboratories in Maryland); R.I. GEN. LAWS §§ 12-1.2-1 to -7 (2002 & Supp. 2010) (creating the Rhode Island State Crime Laboratory).

69. *See* JAMES A. STRAZZELLA, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7–12 (1998) (surveying the recent increase in federal criminal laws).

70. Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 263 (2005).

71. Distributed through the Paul Coverdell Forensic Science Improvement Grants Program, these grants are a significant form of support but are only a small part of state and local laboratories' total budgets. *Compare* OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, FY2010 PAUL COVERDELL NATIONAL FORENSIC SCIENCE IMPROVEMENT ACT REPORT TO CONGRESS: FUNDING TABLE (2010), *available at* http://www.nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2010-funding-table.xls (showing roughly $33 million of federal funds awarded in fiscal year 2010), *with* DUROSE, *supra* note 48, at 2 tbl.3 (estimating a total budget of $895 million for all state, county, and municipal laboratories in 2005). Still, laboratories in all fifty states received funding under the Coverdell program in fiscal year 2010. OFFICE OF JUSTICE PROGRAMS, *supra*.

72. NAS REPORT, *supra* note 16, at 71–75 (describing sources of research funding and providing examples of awards).

73. *See generally, e.g.*, FBI, FBI LABORATORY 2007: SUPPORTING FBI OPERATIONS FOR 75 YEARS (2007), *available at* http://www.fbi.gov/about-us/lab/ lab-annual-report-2007/fbi-lab-report-2007-pdf (describing FBI–state interaction by discipline, including how the FBI provides support and forensic analyses to state laboratories and teaches courses to state forensic scientists).

74. *See* Jennifer L. Mnookin, *The Courts, the NAS, and the Future of Forensic Science*, 75 BROOK. L. REV. 1209, 1237 (2010) (decrying the lack of any "significant federal initiative vis-à-vis forensic science" despite the "significant critique" presented in the NAS Report).

75. *See infra* notes 141–50 and accompanying text.

76. *See* NAS REPORT, *supra* note 16, at 79–80 (finding that the NSF and the NIST lack the experience and institutional capacity to establish an effective governance structure for forensic science).

77. NAT'L SCI. & TECH. COUNCIL, CHARTER OF THE SUBCOMMITTEE ON FORENSIC SCIENCE 1 (2009), *available at* http://www.forensicscience.gov/assets/pdfs/subcommittee_charter.pdf. Among other duties, the subcommittee will develop strategies to "enhanc[e] the validity and reliability of

The NAS Report charged the federal government with implementing its recommendations.[78] But, as mentioned above, this ignores the direct control that states have over their laboratories and criminal justice systems. Furthermore, federal reform requires uniformity and ignores the benefits of state experimentation.[79] It ignores geographic differences in values and the differences in the ways that states administer their systems of criminal justice and criminal investigation.[80] Finally, with the current political climate in Washington, federal reform may be difficult to pass. And even if it were to pass, it may reflect a compromise between differing interests rather than the most robust oversight possible.[81]

States, on the other hand, are well positioned to implement reforms, especially reforms that target reliability. States understand the structure of their own criminal justice systems and can experiment with new or nontraditional forms of oversight.[82] They operate on a smaller scale and are more likely to act quickly, especially those states that have experienced embarrassing scandals.[83] When reforms are implemented, a local presence allows for better enforcement and ground-level monitoring. When reforms prove unsuccessful or require tweaking, states can make the necessary changes without undue delay.

Most importantly, state officials bear responsibility for the failures of the state's forensic science laboratories. State officials are accessible to those directly affected by reform, such as forensic scientists and state police, and to state citizens who support the criminal justice system by paying taxes and serving on juries. Local forensic scientists are likely to view reforms implemented from the state capital as more credible than those implemented by anonymous regulators in Washington, since the forensic science community within a state is more familiar with that state's government. Finally, professional regulation has been successful at the state level in other

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the federal government's undertakings in forensic science" and to "help ensure that regional, state and local entities adopt best practices." *Id.* at 1.

78. This is understandable, since the federal government commissioned the study. But the NAS Report still failed to indicate ways in which state oversight could address the problems that the report identified.

79. Justice Brandeis articulated this concept in a celebrated quote: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

80. *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 86–87 (1995) (discussing regional variations in subculture and positing that particular types of reform may take root more easily in different areas).

81. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 104 (2006) ("Legislators may compromise on a statute that does not fully address a perceived mischief, accepting half a loaf to facilitate a law's enactment.").

82. *See* SHAPIRO, *supra* note 80, at 87–88 (surveying successful instances of state experimentation in various regulatory contexts).

83. *See, e.g.*, Giannelli, *supra* note 15, at 170 (explaining that scandals have prompted states to enact reforms).

contexts.[84] Here, as in other areas of professional regulation, each state could determine its own qualification standards and disciplinary rules.

III. A Range of Activities: Current State Oversight Mechanisms

Some states have established state-level oversight, but none have established it to the extent proposed by this Note. Determining the success of these oversight mechanisms is difficult, since controversies or errors can occur even with oversight in place.[85] And for the most part, these states have avoided questions concerning the validity of non-DNA forensic science. Efforts range from the establishment of boards overseeing forensic science laboratories[86] to the establishment of panels that investigate analyst negligence or misconduct alleged by members of the public.[87] While a few states have removed oversight from law enforcement control[88]—thereby reducing the risk of unintended bias and conflicts of interest—the others have not. Similarly, some states have performed effective independent investigations into laboratory practices and have identified causes of error or negligence, rather than allowing law enforcement to conduct internal investigations.[89] But often, investigations have not been sufficiently independent to detect problems, recommend changes, or monitor implementation of recommendations.[90] Finally, in the few states that have implemented investigations of public complaints, questions remain as to whether these institutions, with their focus on the past, can provide effective oversight.

Before turning to a proposed model of state oversight, a description of the patchwork of current state oversight mechanisms is necessary. This Note's proposed model of state oversight captures the benefits of these actual institutions and attempts to eliminate their shortcomings.

A. Do Nothing

Many states lack any institutional oversight. In these states, tensions between stakeholders and a lack of political will have prevented the establishment of oversight mechanisms. The intention of this subpart is not to survey the states without oversight. Instead, an examination of a recent

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84. *See, e.g.*, Fred C. Zacharias, *Reform or Professional Responsibility as Usual: Whither the Institutions of Regulation and Discipline?*, 2003 U. ILL. L. REV. 1505, 1509 (observing that professional regulation of attorneys has historically been a state function).

85. *See, e.g.*, JOSEPH FISCH, N.Y. OFFICE OF THE INSPECTOR GEN., REPORT OF INVESTIGATION OF THE TRACE EVIDENCE SECTION OF THE NEW YORK STATE POLICE FORENSIC INVESTIGATION CENTER 10–11 (2009) (investigating misconduct in the trace evidence section of a state laboratory that was accredited and subject to board oversight by the state).

86. *See infra* subpart III(C).

87. *See infra* subpart III(E).

88. *See, e.g.*, MD. CODE ANN., HEALTH–GEN. § 17-2A-02 (LexisNexis 2009) (moving oversight to the Department of Health and Mental Hygiene).

89. *See infra* subpart III(D).

90. *See infra* note 150 and accompanying text.

effort to build oversight in California illustrates the barriers to implementation of state-level oversight.

The lack of oversight in California does not imply a lack of reflection on the matter. California has a history of task forces charged with studying crime laboratories within the state.[91] The state legislature established the most recent one, the California Crime Laboratory Review Task Force (CA Task Force), to "make recommendations as to how best to configure, fund, and improve the delivery of state and local crime laboratory services in the future."[92]

In November 2009, the CA Task Force issued its final report, recommending that California "establish a statewide body to consider issues related to forensic science" and resolving to publish a supplemental report on the specifics of that recommendation within one year.[93] According to the CA Task Force, statewide oversight could improve the allocation of resources, increase efficiency, standardize terminology and the method of communicating findings, coordinate education and training, and investigate allegations of serious negligence and misconduct.[94] All members of the CA Task Force, however, did not agree on such a proposal. Some had "strong reservations," arguing that a statewide body would micromanage local laboratory operations and issue arbitrary, inefficient rules.[95]

The voices of these dissenting members ultimately prevailed in the summer of 2010, when the CA Task Force disbanded without publishing the supplemental report.[96] The members advanced various reasons for disbanding: they had fulfilled their legislative mandate, federal action would preempt state reform, state oversight would duplicate existing accreditation programs, outside regulation would consume the time of laboratory managers and result in decreased productivity, and other states' approaches experienced only mild success.[97] The termination vote was controversial, especially because five of the six members voting to disband were laboratory managers.[98] Proponents of the task force remaining active argued that many of the reasons cited for termination conflicted with recommendations in the CA Task Force's own report.[99]

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91. *See* CAL. CRIME LAB. REVIEW TASK FORCE, *supra* note 47, at 11–14 (describing three government-sponsored studies conducted in California between 1998 and 2004).

92. *Id.* at 1 (quoting CAL. PENAL CODE § 11062 (West 2011)).

93. *Id.* at 91.

94. *Id.* at 85–88.

95. *Id.* at 85.

96. Minutes, Cal. Crime Lab. Review Task Force 4 (June 3, 2010), *available at* http://ag.ca.gov/meetings/tf/pdf/TF_Minutes_060310.pdf.

97. *Id.* at 1–4.

98. Letter from William Thompson et al., Members, Cal. Crime Lab. Review Task Force (June 25, 2010), *available at* http://ag.ca.gov/meetings/tf/pdf/legislature_submit.pdf.

99. *See id.* (recalling that the CA Task Force concluded that accreditation alone was insufficient and arguing that federal initiatives would not address state needs).

California's failure to implement state-level oversight illustrates the role that competing voices play in forensic science oversight and the tension caused by the forced relationship of science and law. In this case, the failure to establish oversight may be due to the dominant voices of science and forensic science organizations.[100] Lawyers, analysts, laboratory managers, the police, and citizens likely agree that validity and reliability are crucial. But when voices diverge on how to achieve these goals, reform becomes difficult, especially if forensic science providers resist working with outsiders.[101] Funding, too, likely contributes to the failures to establish oversight, particularly at a time when most crime laboratories are underresourced.[102] Many states, however, have established and funded oversight institutions, and this consistent oversight at least eliminates the financial inefficiencies that result from a patchwork of localized laboratory control, repeated statewide task-force studies, and ad hoc investigations.

B. Mandatory Accreditation

Most forensic science laboratories are accredited.[103] A few states require that an external organization accredit all public laboratories within the state,[104] but most do not. The American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) performs accreditation in almost all cases.[105] ASCLD/LAB is an independent, not-for-profit corporation; however, the American Society of Crime Laboratory Directors (ASCLD) created it, and the two bodies still work closely together.[106] There

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100. *See id.* ("It is unfortunate that the membership of the Task Force was dominated by laboratory managers and representatives of organizations that operate crime laboratories.").

101. *See, e.g.*, Larry A. Hammond, *The Failure of Forensic Science Reform in Arizona*, 93 JUDICATURE 227, 228 (2010) (describing state crime laboratories in Arizona as "not enthusiastic" about outside involvement in oversight); Jennifer L. Mnookin, *supra* note 74, at 1210 (explaining that when academics have attempted to study questions of validity or reliability, "they have sometimes faced limited cooperation, or even downright resistance, from the forensic science community").

102. *See* CAL. CRIME LAB. REVIEW TASK FORCE, *supra* note 47, at 48 (noting that all California crime laboratories surveyed expressed a need for more predictable, stable funding); Hammond, *supra* note 101, at 229 (hypothesizing that Arizona's financial crisis and general lack of funding could be the reason for state inaction). *See generally* DUROSE, *supra* note 48, at 2–7 (describing laboratory funding and the high frequency of backlogged requests for service).

103. DUROSE, *supra* note 48, at 3 (reporting that 91% of state laboratories are accredited). While accreditation of state-level laboratories is the norm, accreditation of laboratories serving counties and cities occurs less frequently. *Id.* (reporting that 67% of county laboratories and 62% of municipal laboratories are accredited). This 2005 report provides the most recent data; rates may have increased in recent years.

104. *See, e.g.*, OKLA. STAT. ANN. tit. 74, § 150.37 (West Supp. 2011) ("[A]ll forensic laboratories . . . shall be ASCLD/LAB accredited.").

105. DUROSE, *supra* note 48, at 3 (reporting that 78% of all crime laboratories were accredited by ASCLD/LAB and another 3% were accredited by other bodies).

106. *History of the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB)*, AM. SOC'Y CRIME LABORATORY DIRECTORS: LABORATORY ACCREDITATION BOARD, http://www.ascld-lab.org/about_us/history.html. That the organizations

are 387 crime laboratories accredited by ASCLD/LAB, including 193 state laboratories and 130 local laboratories.[107] Only three states lack ASCLD/LAB accredited laboratories.[108] Thus, the vast majority of public laboratories (especially statewide laboratories) are accredited, and given that only a minority of states requires accreditation, most accreditations occur voluntarily.

ASCLD/LAB has grown quickly since its establishment in 1981,[109] and the increase in the number of accredited laboratories is noteworthy.[110] Accreditation ensures—at least nominally—that a laboratory "adheres to an established set of standards of quality and relies on acceptable practices within these requirements."[111] But with the majority of large, public forensic science laboratories already accredited on a voluntary basis, state statutes requiring accreditation do little more than encourage a baseline level of quality assurance. As the NAS Report concludes, "Accreditation is just one aspect of an organization's quality assurance program . . . ."[112] Whether ASCLD/LAB will continue to enjoy its monopoly on accreditation remains unknown, especially amidst reports of corruption and bias.[113] In other words, ASCLD/LAB might not be as independent as it claims, as it is the only real accreditation option available to laboratories and it has close ties with laboratory directors.[114] But more importantly, no matter what entity accredits

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work "closely" may be an understatement. They occupy the same address in North Carolina, along with related consulting and lobbying groups. Joseph Neff & Mandy Locke, *Forensic Groups' Ties Raise Concerns*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 13, 2010, *available at* http://www.newsobserver.com/2010/09/26/703376/forensic-groups-ties-raiseconcerns.html. *But see* Giannelli, *supra* note 46, at 75 (arguing that criticism of the close ties between ASCLD, ASCLD/LAB, and crime laboratory directors is "overblown").

107. *ASCLD/LAB Accredited Laboratories*, AM. SOC'Y CRIME LABORATORY DIRECTORS: LABORATORY ACCREDITATION BOARD, http://www.ascld-lab.org/labstatus/accreditedlabs.html (noting the total numbers as of September 12, 2011). The remaining accredited laboratories are federal, international, and private. *Id.*

108. *Id.* (Delaware, Rhode Island, and South Dakota).

109. *See History of the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB)*, *supra* note 106 (describing the establishment of ASCLD/LAB and its growth as an accrediting board in the following years).

110. *See, e.g.*, NAT'L INST. OF JUSTICE, *supra* note 10, at 24 (reporting in 2006 only 260 accredited laboratories and 9 states without any accredited laboratories). There are now 387 accredited laboratories. *See supra* note 107 and accompanying text.

111. NAS REPORT, *supra* note 16, at 195.

112. *Id.*

113. *See* Neff & Locke, *supra* note 106 (noting questions about ASCLD/LAB's independence and that the legislature encouraged the State Bureau of Investigation to "shop for another accreditation group"). The current federal reform proposal requires that the federal government determine the standards and procedures for accreditation in consultation with "qualified professional organizations." Criminal Justice and Forensic Science Reform Act of 2011, S. 132, 112th Cong. § 202(a)(1) (2011) (as referred to S. Comm. on the Judiciary, Jan. 25, 2011). It also permits the federal government to designate an outside organization to perform the actual accreditation of laboratories under government oversight and review. *Id.* § 203(a)(2)(A). ASCLD/LAB could qualify for this proposed role.

114. *See infra* notes 235, 237 and accompanying text.

laboratories, accreditation only addresses issues of compliance with existing scientific practices. It does not address the validity of the underlying science, identify cases of technician negligence or fraud, remedy past injustices, or necessarily advocate for the best possible laboratory practices. Nor does it reach activities that occur outside of the laboratory, such as field-testing.[115] While ASCLD/LAB posits that "its continuously evolving accreditation program has been the single most important factor in improving the quality of forensic services provided to the criminal justice system nationwide,"[116] the fact remains that accreditation failed to shield many laboratories from substantial misconduct, error, and ensuing scandals.[117] Accreditation may help decrease the likelihood that violations will occur,[118] but its failure to engage continuously with laboratories and to provide sufficient external monitoring disqualifies it as the sole source of oversight.[119]

C. Oversight Boards

A common form of state oversight is a board or committee comprised of various actors from within the criminal justice system and forensic science community. Many states utilize such boards; New York and Virginia, described in part below, provide illustrative examples.

The location of a board within state government varies by state. Often, the board is located within whichever state agency or department handles

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115. According to some estimates, over half of forensic scientists do not work inside traditional laboratories and are outside the scope of accreditation. Risinger, *supra* note 33, at 241; *see also* NAS REPORT, *supra* note 16, at 200 (recognizing a "substantial gap" in accreditation since some disciplines are largely practiced outside of the laboratory).

116. Position Statement, Am. Soc'y of Crime Lab. Dirs.: Lab. Accreditation Bd., Position on Reporting of Blood Screening Tests in the 1980's and 1990's 2 (Feb. 18, 2011), *available at* http://ascld-lab.org/statements/Position_Statement_Blood_Testing.pdf.

117. *See id.* at 1 (reporting that a laboratory accused of issuing "inaccurate" and "misleading" reports complied with ASCLD/LAB accreditation standards on every inspection during the time period in question).

118. *See* NAS REPORT, *supra* note 16, at 195 ("[A]ccreditation does not mean that accredited laboratories do not make mistakes . . . but rather, it means that the laboratory adheres to an established set of standards of quality and relies on acceptable practices within these requirements.").

119. *See* Craig M. Cooley & Gabriel S. Oberfield, *Increasing Forensic Evidence's Reliability and Minimizing Wrongful Convictions: Applying* Daubert *Isn't the Only Problem*, 43 TULSA L. REV. 285, 376–78 (2007) ("[A] grant of accreditation is insufficient to provide external and independent oversight."). *But see, e.g.*, JEFF RODZEN ET AL., CAL. ASS'N OF CRIMINALISTS & CAL. ASS'N OF CRIME LAB. DIRS., AB-1079 AND THE CALIFORNIA CRIME LABORATORY SYSTEM: STATEWIDE FORENSIC SCIENCE OVERSIGHT 4–5 (2010), *available at* http://www.cacnews.org/policies/CACLD-CAC%20Oversight%20paper%20final%20072810.pdf (arguing that accreditation and the nature of the criminal justice system provide sufficient oversight in California). Those in favor of an accreditation-only approach to oversight often exaggerate the oversight provided by the structure of the criminal justice system. *Compare id.* at 5 ("[T]he very nature of the criminal justice system provides its own informal, yet powerful, oversight of crime laboratories' performance through the discovery process, review of crime laboratory work by defense experts, and court 'gatekeeper' decisions."), *with* Neufeld, *supra* note 42, at S108–11 (questioning the role the criminal justice system and judicial gatekeeping can play in improving forensic science).

criminal investigations. In New York, for example, the Commission on Forensic Science and its DNA Subcommittee are located within the Office of Forensic Services, which in turn is located within the Division of Criminal Justice Services.[120] In Virginia, the Forensic Science Board is located within the Department of Forensic Science, a department within the Virginia state government.[121] Maryland employs a novel approach, locating its oversight within the Department of Health and Mental Hygiene, the same state department charged with oversight of medical laboratories.[122]

Enabling statutes often describe a board's duties. For example, the Forensic Science Board oversees all forensic science in Virginia and is charged with adopting regulations and reviewing budgetary decisions.[123] The board reviews, amends, and approves recommendations made by the Scientific Advisory Committee.[124] That committee, in turn, reviews laboratory operations and makes recommendations to the board concerning new scientific programs, improvements to existing programs, protocols for testing, and qualification standards for scientists within the Department of Forensic Science.[125] The committee also recommends to the board "a review process for the Department to use . . . where there has been an allegation of misidentification or other testing error made by the Department during its examination of evidence."[126]

Some combination of forensic scientists, laboratory directors, law enforcement officials, prosecutors, and defense attorneys typically comprises the membership of a state oversight board. Appointment differs by state. In New York, for instance, the Governor appoints twelve of the fourteen members of the Commission on Forensic Science based upon the recommendation of various groups with an interest in forensic science oversight.[127] For example, one member of the commission must be a representative of a law enforcement agency, appointed upon the recommendation of the commissioner of Criminal Justice Services.[128] Among the representatives, two must

120. *About the Office of Forensic Services*, N.Y. DIVISION OF CRIM. JUST. SERVICES, http://criminaljustice.state.ny.us/forensic/aboutofs.htm.

121. *About DFS*, VA. DEPARTMENT OF FORENSIC SCI., http://www.dfs.virginia.gov/about/index.cfm. The Virginia General Assembly removed the Department of Forensic Science from law enforcement in response to several instances of misconduct and subsequent exonerations. Giannelli, *supra* note 15, at 194–95.

122. MD. CODE ANN., HEALTH–GEN. § 17-2A-12 (LexisNexis 2009) (establishing the Forensic Laboratory Advisory Committee, an advisor to the Secretary of the Department of Health and Mental Hygiene); *Forensic Laboratory Advisory Committee*, MD. ST. ARCHIVES (Mar. 21, 2011), http://www.msa.md.gov/msa/mdmanual/26excom/html/15forensiclab.html.

123. VA. CODE ANN. § 9.1-1110(A)(1), (4) (2006).

124. *Id.* § 9.1-1110(A)(7).

125. *Id.* § 9.1-1113(B).

126. *Id.* § 9.1-1113(C).

127. N.Y. EXEC. LAW § 995-a(1)(b), (2) (McKinney 1996).

128. *Id.* § 995-a(2)(e).

be scientists with experience in the areas of laboratory standards and quality assurance.[129]

The number of states with boards has grown since New York became the first state to establish one in 1994.[130] Other states include Arizona,[131] Minnesota,[132] Missouri,[133] Montana,[134] New Mexico (DNA oversight only),[135] Rhode Island,[136] and Washington.[137]

D. Independent Investigations

While accreditation and oversight boards seek to ensure the present and future quality of forensic science through policy making and enforcement of rules, state investigative entities examine allegations of negligence and misconduct in order to regulate laboratories. States take various approaches to investigation. Some authorize oversight boards to perform investigations themselves.[138] Other states delegate the role to an outside agency such as the Office of Inspector General, either via a state oversight board[139] or without that intermediate step.[140]

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129. *Id.* § 995-a(2)(d).

130. Giannelli, *supra* note 46, at 78.

131. Press Release, Office of Att'y Gen. Terry Goddard, Terry Goddard Appointing New Panel to Assist State Crime Labs (Nov. 20, 2007), *available at* http://www.azag.gov/press_releases/nov/2007/TGAppointsNewPanelToAssistStateCrimeLabs.pdf (discussing the creation of the Forensic Services Advisory Committee, located within the Attorney General's office).

132. MINN. STAT. ANN. § 299C.156 (West 2007) (establishing the Forensic Laboratory Advisory Board, located within the Bureau of Criminal Apprehension, and in turn within the Department of Public Safety).

133. MO. ANN. STAT. § 650.059.1 (West Supp. 2011) (creating the Crime Laboratory Review Commission, located within the Department of Public Safety). The enabling statute envisions "independent review of any state or local Missouri crime laboratory receiving state-administered funding." *Id.* However, the commission is located within a law enforcement agency, so its independence is questionable.

134. *Forensic Science Laboratory Advisory Board*, MONT. DEPARTMENT OF JUST., http://www.doj.mt.gov/enforcement/crimelab/#advisoryboard (discussing the Forensic Science Laboratory Advisory Board, located within the Department of Justice).

135. N.M. STAT. ANN. § 29-16-5 (Supp. 2004) (establishing the DNA Oversight Committee).

136. R.I. GEN. LAWS § 12-1-1-3 (2002) (creating the State Crime Laboratory Commission).

137. WASH. REV. CODE ANN. § 43.103.030 (West 2007) (establishing the Washington State Forensic Investigations Council).

138. *See, e.g.*, *id.* (charging the Washington State Forensic Investigations Council with oversight of the state's forensic pathology program). For an example of an investigation by an oversight board, see FORENSIC INVESTIGATIONS COUNCIL, REPORT ON THE WASHINGTON STATE TOXICOLOGY LABORATORY AND THE WASHINGTON STATE CRIME LABORATORY (2008), *available at* http://www.corpus-delicti.com/ficinvestigativeteport04-17-08.pdf.

139. *See, e.g.*, FISCH, *supra* note 85, at 1 (explaining that the New York State Commission on Forensic Science designated the State Inspector General to conduct an independent investigation).

140. *See, e.g.*, GREGORY W. SULLIVAN, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE DNA TESTING OPERATIONS AND THE ASSOCIATED MANAGEMENT STRUCTURE OF THE EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY'S FORENSIC SERVICES GROUP 1 (2009), *available at* http://www.mass.gov/ig/publ/forensic_lab_rpt.pdf (explaining that the office investigated pursuant to the Massachusetts State Police Crime Laboratory's designation under the Coverdell program).

The designation of investigative entities occurs in large part due to a requirement under the federal Paul Coverdell Forensic Sciences Improvement Grants program.[141] In order to receive funds under the Coverdell program, a state must submit a certification to the U.S. Attorney General that it has a process in place "to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results."[142] In theory, the requirement of external investigations forces states to create a new state entity or delegate the function to an existing one. But in practice, the NIJ, which administers the Coverdell funds from within the Office of Justice Programs, has largely failed to enforce the requirement.[143] For example, of 223 grant applications received in fiscal year 2005, 80 provided the certification and the name of the government entity assigned the investigatory role, 87 did not provide the certification or provided incomplete certification, and 56 merely quoted the general terms of the Coverdell grant statute without providing the name of the governmental entity assigned the investigatory role.[144] Three years later, a subsequent investigation found that while the NIJ technically complied with the statute by gathering external investigation certifications from applicants, it still failed to ensure that the entities designated by applicants had the authority, capability, and independence required for effective external investigations.[145]

The NIJ has responded to the reports by clarifying the certification requirements and providing examples in its 2010 grant application of how states could meet the requirement.[146] The application warns that an official who misrepresents the existence of a government agency to conduct independent investigations may be subject to criminal prosecution for false statements.[147] While the NIJ may withhold funding if a recipient fails to disclose the number of allegations of negligence or misconduct and the outcome of each investigation,[148] it remains unclear how tenaciously the NIJ enforces the requirement. As Congress considers forensic science reform, it is likely

141. 42 U.S.C. § 3797k(4) (2006).

142. *Id.*

143. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE OFFICE OF JUSTICE PROGRAMS' FORENSIC SCIENCE IMPROVEMENT GRANT PROGRAM 7–11 (2005), *available at* http://www.justice.gov/oig/reports/OJP/e0602/final.pdf (finding that the NIJ failed to provide enough guidance to applicants or to ensure compliance with the requirement that applicants designate an external investigator).

144. *Id.* at 10–11.

145. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE OFFICE OF JUSTICE PROGRAMS' PAUL COVERDELL FORENSIC SCIENCE IMPROVEMENT GRANTS PROGRAM 7 (2008), *available at* http://www.justice.gov/oig/reports/OJP/e0801/final.pdf.

146. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, SOLICITATION: PAUL COVERDELL FORENSIC SCIENCE IMPROVEMENT GRANTS PROGRAM 5–8 (2010), *available at* http://www.ncjrs.gov/pdffiles1/nij/sl000921.pdf.

147. *Id.* at 5.

148. *Id.*

that enforcement will improve.[149] For now, the result of the requirement in many states is either continued ignorance of the requirement, reactive delegation of investigatory authority once allegations of misconduct arise, or delegation of investigatory authority to entities that are not sufficiently independent to execute proper oversight of investigations.[150]

This is not to say that oversight via external investigations is a lost cause. Independent investigations do occur and often find significant evidence of misconduct.[151] The subject matter of an investigation is often broad in scope, examining everything from the complete work product of an allegedly negligent technician to ineffective laboratory management. Investigations—when conducted by credible, external entities—are critical to forensic science oversight. They force the forensic science community to face allegations of misconduct,[152] especially in cases where informal, internal investigations fail to identify and remedy problems.[153] When criminal convictions are involved, investigations assign accountability for miscarriages of justice and anticipate ways to prevent future problems. And the publication of reports brings attention to allegations of misconduct that

149. *See, e.g.*, Letter from Gabriel S. Oberfield, Research Analyst, Innocence Project, to Members of the Task Force to Conduct a Review of California's Crime Laboratory System 2–3 (Apr. 2, 2008), *available at* http://www.ag.ca.gov/meetings/tf/pdf/innocence_project_letter.pdf ("Enforcement of [the external investigation] requirement undoubtedly will be more robust in coming years, and the failure of California labs to comply with the provision could put Coverdell funding in jeopardy.").

150. *See, e.g.*, CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 18, at 62 (surveying California grant recipients and concluding that in "nearly every instance, the independent auditing entity described was the Internal Affairs Division of the County Sheriff's Office or Police Department involved"). The commission recommended that district attorneys in each county evaluate allegations of negligence or misconduct and conduct an independent investigation when necessary. *Id.* at 63. However, delegating "independent" authority to the state's district attorneys does not necessarily ensure independence. *See* Letter from Gabriel S. Oberfield to Members of the Task Force to Conduct a Review of California's Crime Laboratory System, *supra* note 149, at 5 (describing internal investigations as ineffective due to conflicts of interest and questioning whether a district attorney's office could ever provide independent, external oversight).

151. *See, e.g.*, BROMWICH, *supra* note 1, at 114–15, 150–51 (reporting significant and pervasive problems with the analysis and reporting of results in a large portion of serology and DNA cases in Houston's crime laboratory); FISCH, *supra* note 85, at 52–53 (reporting misconduct in the trace evidence section of the Forensic Investigation Center operated by the New York State Police); FORENSIC INVESTIGATIONS COUNCIL, *supra* note 138, at 10–11 (reporting that the Washington State Crime Laboratory's toxicology manager filed false certifications on tests that were conducted by another analyst).

152. *See, e.g.*, BROMWICH, *supra* note 1, at 186 ("The purpose of outside scrutiny is to shed light on a laboratory's practices, to focus attention on existing deficiencies and potential problems, and to broaden the perspective of laboratory analysts . . . .").

153. *See, e.g.*, FISCH, *supra* note 85, at 1 (recounting the flawed internal inquiry conducted by laboratory management that ignored valid complaints about the training and supervision of the guilty laboratory technician); *see also* Letter from Gabriel S. Oberfield to Members of the Task Force to Conduct a Review of California's Crime Laboratory System, *supra* note 149, at 4 ("We have yet to observe a local police department or crime laboratory internal affairs division conduct a crime lab investigation completely free from influence, if not supervision, by its upper laboratory management."). Internal investigations in Montana, Virginia, and New York all suffered from conflicts of interest. *Id.*

may have otherwise gone unnoticed. Although they can be time-consuming and costly, investigations provide an effective form of oversight, at least when employed in conjunction with oversight boards that can help implement and monitor the investigator's recommendations. To better perform their role, investigation entities must receive immediate notification when problems arise.[154] In addition to making findings about allegations of past misconduct, they must also communicate future-oriented recommendations. Many large-scale investigations in recent years have done so.[155] When independent investigations occur at the appropriate time, they are an important part of any framework of forensic science oversight.

E. Forensic Science Investigative Panels

The State of Texas has developed a unique version of the investigation framework in which a dedicated government entity receives public complaints and performs case-by-case investigations. Established in 2005, the Texas Forensic Science Commission (TFSC) investigates allegations of professional negligence or misconduct that would substantially impact the integrity of the results of a forensic analysis conducted by any accredited laboratory.[156] The results of an investigation must be made available to the public in a written report.[157] Investigation panels comprised of three of the nine commissioners conduct investigations.[158] These panels investigate public complaints that make it past the commission's vetting process.[159] They may also "contact . . . any governmental agency, individual, or entity" for assistance in the investigation.[160] Like oversight boards, membership on the TFSC is distributed amongst stakeholders. The Governor, Lieutenant Governor, and attorney general appoint the members of the commission.[161] Seven members come from various scientific perspectives within the umbrella of forensic science.[162] One member must be a prosecuting attorney

154. *See* FISCH, *supra* note 85, at 111–12 (recommending that the independent investigator should be "immediately notified" when allegations of misconduct arise).

155. *See, e.g.*, *id.* (recommending technical review, independent investigations, and additional training in order to improve quality control in a forensic laboratory).

156. TEX. CODE CRIM. PROC. ANN. art. 38.01, §§ 1, 4(a)(3) (West Supp. 2010); *About Us*, TEX. FORENSIC SCI. COMMISSION, http://www.fsc.state.tx.us/about.html. In Texas, a forensic analysis or expert testimony relating to forensic evidence is only admissible in court if the crime laboratory conducting the analysis was accredited. TEX. CODE CRIM. PROC. ANN. art. 38.35(d)(1) (West Supp. 2010).

157. TEX. CODE CRIM. PROC. ANN. art. 38.01, § 4(b)(1) (West Supp. 2010). The TFSC recently published its first final report. *See generally* TEX. FORENSIC SCI. COMM'N, REPORT OF THE TEXAS FORENSIC SCIENCE COMMISSION: WILLINGHAM/WILLIS INVESTIGATION (2011), *available at* http://www.fsc.state.tx.us/documents/FINAL.pdf.

158. TEX. FORENSIC SCI. COMM'N, POLICIES AND PROCEDURES 8 (2011), *available at* http://www.fsc.state.tx.us/documents/D_PoliciesandProcedures042811.pdf.

159. *Id.* at 6–8 (describing the complaint-screening process).

160. *Id.* at 8.

161. TEX. CODE CRIM. PROC. ANN. art. 38.01, § 3(a) (West Supp. 2010).

162. *See id.* (listing the qualifications of individual members).

and another a defense attorney.[163] The Governor designates a member to serve as the presiding officer.[164]

The TFSC has experienced major growing pains, including a controversy over the inquiry into the science used to convict Cameron Todd Willingham of arson.[165] Texas Attorney General Greg Abbott's narrow interpretation of the TFSC's enabling statute is cause for serious concern,[166] as is political interference that may threaten the integrity of the commission's procedures.[167] Critics argue that the Governor's appointment of an aggressive prosecutor as presiding officer created an imbalance in the commission's operation and stymied its role as a scientific investigator.[168] The TFSC also adds to the size of the government bureaucracy; other states have questioned whether the creation of such an entity is worth the cost, especially if the state believes that county district attorneys or the attorney general can provide proper investigations into individual allegations of misconduct.[169]

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163. *Id.* § 3(a)(1)(B)–(C).

164. *Id.* § 3(c).

165. *See, e.g.*, James C. McKinley, Jr., *Texas Governor Fires Chairman of Forensic Science Committee*, N.Y. TIMES, Oct. 1, 2009, at A24 (describing Governor Rick Perry's decision to replace the presiding officer of the commission two days before the commission was to hear evidence that Willingham, who had been executed by the state five years earlier, was innocent).

166. *See* Tex. Att'y Gen. Op. No. GA-0866 (2011), *available at* https://www.oag.state.tx.us/opinions/opinions/50abbott/op/2011/htm/ga-0866.htm (prohibiting the TFSC from considering evidence that was tested or offered into evidence prior to September 1, 2005, and from considering fields of forensic analysis expressly excluded from the statutory definition of *forensic analysis*, including latent print examination, digital evidence, and alcohol breath testing). The opinion effectively ended the pending part of the Willingham investigation—whether there was negligence or misconduct committed by forensic scientists—and greatly limits the TFSC's ability to review older cases. *See* TEX. FORENSIC SCI. COMM'N, *supra* note 158, at 6 (explaining that a pending attorney general opinion precluded any findings on negligence in the Willingham case); Brandi Grissom, *New Head of Forensic Science Panel Takes on Arson Case*, TEX. TRIB. (July 22, 2011), http://www.texastribune.org/texas-dept-criminal-justice/texas-forensic-science-commission/new-head-of-forensic-science-panel-takes-on-arson/ (explaining that the potential opinion would deny TFSC access to an "unknown number of inmates convicted based on so-called junk science").

167. *See* McKinley, *supra* note 165 (quoting the co-director of the Innocence Project, who likened Governor Perry's actions to "Nixon firing Archibald Cox to avoid turning over the Watergate tapes").

168. Rick Casey, Op-Ed., *Willingham: Scientists vs. Lawyers*, HOUS. CHRON., Jan. 9, 2011, at B1, *available at* http://www.chron.com/disp/story.mpl/metropolitan/casey/7373600.html (questioning whether a member serving simultaneously as presiding officer and prosecutor could effectively lead the "scientific" commission while also vigorously defending criminal convictions). The Texas State Senate was unwilling to reconfirm the prosecutor's appointment. Mike Ward, *Williamson Prosecutor Lacks Votes to Lead Panel*, AUSTIN AM.-STATESMAN, Mar. 10, 2011, at A1. Governor Perry subsequently appointed a medical examiner to chair the TFSC. *Forensic Panel Gets New Leader After Willingham Case*, HOUS. CHRON. (July 1, 2011), http://www.chron.com/news/houston-texas/article/Forensic-panel-gets-new-leader-after-Willingham-2081564.php. There is optimism that the commission can move past the political wrangling of its early years. *See* Grissom, *supra* note 166 (describing legislators' optimism that the new chairman "will move the commission past the political pressures that have beleaguered its work").

169. *See, e.g.*, CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 18, at 63 (determining that creating a new forensic science commission in California based on the TFSC model would be an unnecessary "new level of bureaucracy"). *But see* Letter from Gabriel S.

But it is too early to dismiss the TFSC as a failed experiment. First, TFSC investigations allow regulators to get a better picture of the maladies that plague forensic science. Second, the investigations represent a potential path to new evidence for those individuals who have been wrongfully convicted.[170] Third, unlike independent investigators and boards who usually conduct broad-brush investigations, the TFSC is at the public's disposal and solicits public complaints based on individual cases.[171] Fourth, unlike outside investigators conducting ad hoc investigations, the TFSC represents a permanent institution dedicated to the oversight of forensic science. In other words, forensic science cannot get lost in the shuffle, and other agency duties cannot delay investigations. Finally, unlike outside investigators such as an inspector general, the majority of TFSC commissioners represent the forensic science community that they investigate. They have the experience, expertise, and credibility that may be required to perform accurate investigations and to make meaningful recommendations.[172] In the coming years, the TFSC (and the legislators who draft future enabling acts) must expand the scope of its investigatory authority and implement procedures to use should the TFSC find negligence or misconduct in a forensic analysis. Does such a finding require further inquiry into all related cases? How should the courts handle findings of negligence or misconduct? These questions illustrate how the commission's seemingly narrow subject-matter jurisdiction still has broad implications.

F. Innocence Commissions

Unlike the TFSC, which investigates laboratory misconduct and negligence but does not engage directly with the courts, innocence commissions (ICs) investigate past forensic analyses in order to ensure a just criminal system.[173] Of course, an actual innocence claim may be based on a

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Oberfield to Members of the Task Force to Conduct a Review of California's Crime Laboratory System, *supra* note 149, at 3 (suggesting that local investigations into misconduct or negligence would create more inefficiency as opposed to establishing new, statewide oversight).

170. It is important to note that when used in subsequent criminal proceedings, TFSC reports are not prima facie evidence of the information they contain. TEX. CODE CRIM. PROC. ANN. art. 38.01, § 4(e) (West Supp. 2010). Thus, the TFSC does not offer a direct remedy to the wrongfully convicted. Nothing, however, precludes a party in a subsequent proceeding from at least offering a report as evidence.

171. *Id.* § 4(a)(3) (authorizing the TFSC to investigate *any* allegation of professional negligence or misconduct); *see also Texas Forensic Science Commission Complaint Form: Individual*, TEX. FORENSIC SCI. COMMISSION, 1, 3 (2009), http://www.fsc.state.tx.us/documents/D_ComplaintForm.pdf (soliciting complaints from individuals and asking for the complainant's relationship to the defendant).

172. The TFSC also has discretionary authority to perform follow-up evaluations to review the implementation of its recommendations. TEX. CODE CRIM. PROC. ANN. art. 38.01, § 4(b)(2)(B)(i) (West Supp. 2010).

173. *See, e.g.*, N.C. GEN. STAT. § 15A-1461 (Supp. 2010) (establishing an innocence commission as "an extraordinary procedure to investigate and determine credible claims of factual innocence").

number of causes, such as an improper eyewitness identification, an unreliable informant, or a false confession.[174] While the role that faulty forensic science plays in wrongful convictions is hard to quantify, a recent empirical study illustrates that it is significant.[175] The failure of the courts to exclude unreliable evidence under *Daubert* certainly augments the effect.[176]

North Carolina is the only state to create an IC—it established the North Carolina Innocence Inquiry Commission (NCIIC) in 2006.[177] While other states have formed formal task forces to investigate the causes of wrongful conviction and recommend reforms to reduce the frequency of wrongful conviction,[178] these states have not granted any authority to review individual claims of actual innocence.[179] Like the TFSC, the NCIIC exemplifies state experimentation;[180] its success may have a large impact on other states' decisions to establish similar entities.[181]

The NCIIC has authority to hear claims of "factual innocence" brought by persons convicted of felony crimes in North Carolina state court.[182] Eight commissioners serve on the NCIIC, including a superior court judge, a

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174. *See The Causes of Wrongful Conviction*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/ (listing eyewitness misidentification, improper forensic science, false confessions, and mistaken informants as among the most common causes of wrongful conviction).

175. *See generally* Garrett & Neufeld, *supra* note 63 (cataloging the forensic science testimony used in the convictions of 137 people who were later exonerated by postconviction DNA testing).

176. *See id.* at 97 ("[T]he adversary system cannot be depended upon as an adequate safeguard. . . . [J]udges did not remedy most errors brought to their attention."); *see also supra* notes 38–45 and accompanying text.

177. *About Us*, N.C. INNOCENCE INQUIRY COMMISSION, http://www.innocencecommission-nc.gov/about.html; *see also* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1049–53 (2010) (describing the NCIIC in detail).

178. *See, e.g.*, INNOCENCE COMM'N, MISSION STATEMENT, OBJECTIVES, AND OPERATING PROCEDURE 1 (2010), *available at* http://www.flcourts.org/gen_public/bin/Commission-Mission.rtf (describing the Florida Innocence Commission as "a collegial body" that "identif[ies] the common causes of wrongful convictions, and . . . recommend[s] procedures to decrease the possibility of these convictions in the future").

179. *See* Wolitz, *supra* note 177, at 1046–47 (noting that several states have established commissions to "study the problem of post-conviction review" but that "none of them had the mandate to investigate individual cases").

180. *See id.* at 1053 ("The NCIIC is the first commission of its kind in the United States, and almost every aspect—from its inception to its composition to its procedures—can be fairly debated.").

181. *See id.* at 1033 (arguing that the NCIIC could reframe the discussion about wrongful convictions and recommending that the NCIIC serve as a model for other states).

182. N.C. GEN. STAT. §§ 15A-1460, 1466 (Supp. 2010). A claim of factual innocence is defined as

> a claim on behalf of a living person convicted of a felony in the General Court of Justice of the State of North Carolina, asserting the complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief.

Id. § 15A-1460(1).

prosecutor, a criminal defense attorney, and a member of the public.[183] Like the TFSC, the NCIIC may investigate claims raised by any person.[184] Formal rules govern the inquiry,[185] and the commission may utilize any measure available in the Code of Civil Procedure including compelling the attendance of witnesses.[186] If a claim passes the vetting process, an inquiry begins.[187] If the NCIIC concludes that there is sufficient evidence to support a possible finding of factual innocence,[188] a three-judge panel hears the case in a contested hearing between the State and the convicted individual.[189] If all three judges find by clear and convincing evidence that the convicted individual is innocent, they must dismiss the charges.[190] A convicted individual may not appeal the NCIIC's vote or the panel's finding, but all other rights to postconviction relief remain available.[191]

In 2010, Gregory Taylor became the first person exonerated by the NCIIC after serving over sixteen years in prison for murder.[192] The forensic analysis of a substance thought to be the victim's blood was a key issue in Taylor's exoneration.[193] After Taylor's car was found near the scene of the murder, the State Bureau of Investigation (SBI) analyzed a substance found on the fender.[194] Initial crime scene results identified the substance as blood, but subsequent tests at the laboratory returned negative results.[195] The SBI only reported the positive test to the prosecutors, and neither Taylor nor the jury learned of the subsequent negative results.[196] The negative tests remained undisclosed for almost two decades until the NCIIC inquiry revealed laboratory notes indicating that there were additional tests and

183. *Id.* § 15A-1463(a)(1)–(2), (4)–(5).

184. *Id.* § 15A-1467(a).

185. *See generally* N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES (2010), *available at* http://www.innocencecommission-nc.gov/rules.html (setting out rules and procedures "to serve as a guideline for all functions of the Commission").

186. N.C. GEN. STAT. § 15A-1467(d) (Supp. 2010).

187. N.C. INNOCENCE INQUIRY COMM'N, *supra* note 185, at 8.

188. N.C. GEN. STAT. § 15A-1468(c) (Supp. 2010).

189. *Id.* § 15A-1469(d).

190. *Id.* § 15A-1469(h); *see also Case Progression Flowchart*, N.C. INNOCENCE INQUIRY COMMISSION, http://www.innocencecommission-nc.gov/chart.html (diagramming the steps in an innocence inquiry).

191. N.C. GEN. STAT. § 15A-1470 (Supp. 2010).

192. Wolitz, *supra* note 177, at 1053 & n.196.

193. Mandy Locke, *In Taylor Case, Blood is the Issue*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 11, 2010, *available at* http://www.newsobserver.com/2010/02/11/332181/in-taylor-case-blood-is-the-issue.html.

194. *Id.*

195. *Id.*

196. *Id.*

results.[197] Subsequent FBI investigations of the SBI laboratory revealed that improper forensic analysis was used in 230 cases.[198]

The Taylor case illustrates the oversight potential of ICs. The three-judge panel exonerated Taylor and dismissed the conviction. But the events also catalyzed reviews of other convictions and an investigation into more than a decade's worth of questionable forensic science.[199] These events persuaded the North Carolina General Assembly to implement reforms at the SBI laboratory.[200] Thus, the past-oriented approach of an IC has the potential to change present and future conditions in laboratories. And unlike oversight boards, which attempt to improve forensic science through policy making, ICs can simultaneously remedy cases of misconduct or negligence and free the innocent.

Many states will likely question how ICs fit within the framework of their existing judicial systems. ICs certainly do little to further policies promoting finality of decisions,[201] and they add another level of complexity to an already-complicated criminal appeals process.[202] While the Taylor case illustrates the oversight potential of ICs, the resulting reforms at the SBI laboratory may be the exception rather than the rule. Also, ICs target more than improper forensic science. Whether they have enough focus and expertise to provide meaningful forensic science oversight remains unknown.

With their focus on criminal convictions, ICs cannot be the sole form of forensic science oversight. But ICs bring public attention to the issues confronting forensic science and provide a direct way for convicted individuals and the public to engage in oversight. Like the TFSC, ICs regulate at a level that neither boards nor large-scale investigations reach. And in contrast to the TFSC and the numerous obstacles it encountered during its early years, the NCIIC's relative success may encourage other states to establish their own ICs.

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197. *Id.*

198. Mandy Locke et al., *Scathing SBI Audit Says 230 Cases Tainted by Shoddy Investigations*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 19, 2010, *available at* http://www.newsobserver.com/2010/08/19/635632/scathing-sbi-audit-says-230-cases.html.

199. *Id.*

200. Joseph Neff, *Perdue Signs Crime Lab Law*, NEWS & OBSERVER (Raleigh, N.C.) (Apr. 1, 2011), http://www.newsobserver.com/2011/04/01/1096213/perdue-signs-crime-lab-law.html (listing reforms that include mandating that the crime laboratory disclose all notes, data, and test results; creating an independent scientific advisory board; removing ASCLD/LAB as the sole accrediting authority for the laboratory; and changing the name of the laboratory from SBI Crime Laboratory to North Carolina Crime Laboratory). The North Carolina General Assembly is also considering additional reforms, such as removing the state forensic science laboratory from law enforcement control. *Id.*

201. *But see* Wolitz, *supra* note 177, at 1082 (arguing that the judicial system affords too much value to finality "at the price of too many miscarriages of justice").

202. *Id.* at 1081–82 (viewing ICs as a new remedy rather than a "fix" for habeas corpus and other postconviction procedures).

IV. What Is a State To Do? A Proposed Model

States should enact reforms that regulate at both the laboratory and individual-analyst levels. Oversight should be independent, transparent, and active. The entities charged with oversight should continually recommend reforms—rather than act as ad hoc task forces or infrequent investigators—and should monitor the implementation of reforms. No state currently employs such a strong system of oversight.

While the NAS Report's call for the removal of laboratories from law enforcement is infeasible and unlikely to receive political support,[203] partial removal of law enforcement oversight could achieve many of the proposed benefits of complete removal, such as freeing forensic science from police management, separating funding streams, increasing the focus on scientific investigation, and fostering a scientific culture.[204] At the same time, continuing to locate physical laboratories within police departments addresses the concerns of law enforcement and prosecutors[205] and maintains the tradition of the "police laboratory." *Where* the laboratory technician arrives to perform her job likely plays less of a role in reliability than *who* determines how she conducts her analyses and *who* investigates allegations of misconduct or error.

A board comprised of diverse stakeholders—forensic scientists, laboratory directors, law enforcement personnel, prosecutors, defense attorneys, and judges—should monitor laboratory practices and implement strong policies to combat reliability issues.[206] The majority of members should come from the scientific, rather than the legal, community. But this is not self-regulation; actors from outside of the laboratories and law enforcement organizations should also be involved.[207] Unlike the majority of current state boards, the board must not be located within a law enforcement

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203. *See* D. Michael Risinger et al., *The* Daubert/Kumho *Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 43 (2002) ("The establishment of freestanding government forensic laboratories . . . would require such a revolution in thinking and organization, and diminish so many established bureaucratic empires, that it would take a generation of patient lobbying to have a chance of success.").

204. *See* Letter from Gabriel S. Oberfield to Members of the Task Force to Conduct a Review of California's Crime Laboratory System, *supra* note 149, at 3 ("Uniting [examples of effective oversight] is a recognition that significant errors are more likely to be revealed by bodies that are distinctly separate from the employees or management of the labs they supervise."). *But see* Michael J. Saks et al., *Model Prevention and Remedy of Erroneous Convictions Act*, 33 ARIZ. ST. L.J. 665, 698–700 (2001) (proposing that the removal of both laboratories and oversight from law enforcement is necessary to emphasize the science in forensic science and free forensic science of police culture and police personnel).

205. *See, e.g.*, NAT'L DIST. ATT'YS ASS'N, *supra* note 35, at 3 (arguing that organizational and geographical proximity lead to more effective criminal investigations).

206. *See supra* subpart III(C) (providing examples of the composition of similar existing boards).

207. *See* Giannelli, *supra* note 15, at 229 (arguing that it is "critical" that any oversight board include research scientists and the defense bar among its members).

agency.[208] It may be located in its own independent department or within an existing entity such as the Department of Health.

The statute establishing the board should define terms such as *forensic science*, *forensic analysis*, and *forensic science provider* broadly in order to avoid gaps in oversight. For example, *forensic analysis* should mean any biological, medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purposes of determining the connection of the evidence to a criminal action.[209] A limited definition of *forensic science* currently constrains oversight in many jurisdictions, including for institutions such as the New York State Commission on Forensic Science[210] and for institutions in states requiring accreditation.[211] State statutes also typically exclude private laboratories from oversight.[212] Extending oversight to these laboratories and to forensic science in all contexts—including in disciplines performed outside of the traditional laboratory or by crime scene investigators—may be controversial[213] but is necessary in order to provide effective oversight.

The board should at least perform the following duties. It should familiarize itself with the literature on reliability and bias and mandate the most stringent quality-assurance and quality-control procedures possible, such as blind testing of evidence,[214] evidence lineups,[215] blind proficiency

208. *See supra* subpart III(C) (discussing independent oversight boards).

209. This definition is based on the one provided by the Texas Code of Criminal Procedure but eliminates all of the exceptions provided by the Code's definition. *See* TEX. CODE CRIM. PROC. ANN. art. 38.35(a)(4) (West Supp. 2010) (excluding tests such as latent-fingerprint examination and digital evidence from the definition of forensic analysis).

210. *See* N.Y. EXEC. LAW § 995(1) (McKinney Supp. 2011) (excluding latent-fingerprint analysis by a police agency from the definition of "forensic laboratory"). Disciplines such as fingerprint analysis, which are largely performed outside of the laboratory, are often outside of the scope of accreditation and other quality control mechanisms. *See* CAL. CRIME LAB. REVIEW TASK FORCE, *supra* note 47, at 82 (reporting that forensic units outside of crime laboratories do not participate in accreditation and that most fingerprinting takes place outside of crime laboratories).

211. *See, e.g.*, OKLA. STAT. ANN. tit. 74, § 150.37(d) (West Supp. 2011) (requiring accreditation of public laboratories but creating exceptions for breath testing for alcohol, latent-fingerprint analysis, examination of digital evidence, and crime scene processing).

212. *Id.* § 150.37(A)(3), (D) (requiring accreditation only for public laboratories).

213. Opponents may argue that such broad oversight would interfere with the ability of police to investigate crimes. Such a debate is beyond the scope of this Note. However, the legal and scientific communities should examine the extent to which forensic science plays a role in investigations—even before the evidence arrives at a traditional laboratory.

214. Risinger et al., *supra* note 203, at 45–47. Blind testing involves limiting the amount of information that flows to the analyst from law enforcement, laboratory management, coworkers, and other sources. *Id.* at 45. It includes strategies such as formulating questions in the least suggestive way and limiting analyst access to only necessary information about the alleged crime. *Id.* at 45–46.

215. *Id.* at 47–50. Evidence lineups would combat the tendency to make "false positive errors" (since most evidence that enters the laboratory is inculpatory) by presenting "foils" for testing along with the actual specimen. *Id.*

testing,[216] certification of technicians,[217] and a code of ethics.[218] To ensure compliance with this requirement, the enabling statute should require that at least one member of the board has expertise in laboratory standards and quality assurance.[219] The board should require accreditation for all laboratories (including county and municipal laboratories)[220] and periodically review whether the state's laboratories meet the most stringent accreditation standards available. The board should facilitate communication between stakeholders. It should also educate forensic science professionals, prosecutors, defense attorneys, and judges on the current capabilities and limitations of forensic science, as well as on future changes in technology, policies, or practices.[221] A lack of information should no longer play a role in a criminal trial or admissibility hearing. When possible, the board should limit the effects of fragmentation on forensic science by holding each discipline to the same standards and rules. Finally, the board should manage laboratory budgets and should communicate the needs of forensic science laboratories to the state legislature. For example, if the consolidation of smaller municipal and county laboratories would decrease transaction costs and the risk of error, the board and the legislature should pursue this option.[222]

Although its operations are independent from law enforcement, the board may be too tangled or familiar with the state's forensic science laboratories to conduct an independent, large-scale investigation. Thus, a separate entity, such as an inspector general, should conduct investigations

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216. NAS REPORT, *supra* note 16, at 206–08. Proficiency testing involves verifying the results of an analyst or an entire laboratory. *Id.* at 206–07. In blind proficiency testing, the analyst does not know that the sample he is analyzing is a test rather than evidence from an actual criminal investigation. *Id.* at 207. While the majority of laboratories engage in proficiency testing, blind proficiency testing is not required and is only used by 26% of laboratories. *Id.* at 208.

217. *Id.* at 208–10. Unlike accreditation, which addresses the competence of an entire laboratory, certification focuses on the individual analyst. *Id.* at 208. The forensic science community generally supports certification but does not require it. *Id.* at 209; *see also* CAL. CRIME LAB. REVIEW TASK FORCE, *supra* note 47, at 45 (recommending that the state require certification of all analysts).

218. NAS REPORT, *supra* note 16, at 212, 214.

219. *See supra* note 129 and accompanying text.

220. *See supra* note 103 and accompanying text (noting that county and municipal laboratories are accredited less frequently than state laboratories).

221. The general lack of training and education appears to be widespread. For example, almost half of the criminal law judges in Texas responding to a survey receive no yearly forensic science training, and many judges have requested more training on reliability standards for the admission of scientific evidence. TEX. CRIMINAL JUSTICE INTEGRITY UNIT, 2009 ANNUAL REPORT OF ACTIVITIES 6 (2009), *available at* http://www.cca.courts.state.tx.us/tcjiu/reports/TCJIU-2009-report.pdf.

222. The Illinois State Police, for example, perform forensic science services for 1,200 local and county police agencies in all 102 Illinois counties, comprising 98% of the services it provides. NAS REPORT, *supra* note 16, at 57–58; *see also* CAL. CRIME LAB. REVIEW TASK FORCE, *supra* note 47, at 54–55 (recommending the regional consolidation of rarely used disciplines but noting that consolidation could increase inefficiencies when one piece of evidence requires multiple types of tests or when the distance to the regional laboratory is too great).

into any broad allegations of negligence or misconduct. While designating an independent investigator is required for recipients of Coverdell grants,[223] not all laboratories receive funding on a consistent basis.[224] Thus, a state-level requirement is necessary. The investigation entity should remember that issues may arise due to the actions of individual analysts or may be more systemic, such as when a laboratory policy allows for biases to infiltrate results.[225] Of course, what begins as an investigation into a single analyst or single laboratory unit may grow into a larger investigation.

The board may request an investigation at any time, but the investigation entity should also be authorized to investigate sua sponte. This will further ensure that investigations are independent and proactive. Similarly, the district attorney's office or the attorney general's office should have authority to request an independent investigation if it discovers an allegation of error or misconduct within its jurisdiction, but it should not conduct the investigation internally,[226] even if independent from the laboratory in question. The risk of bias is simply too high.

Finally, states should establish mechanisms to investigate specific claims of misconduct or error raised by the public, whether through an IC or a forensic science investigative panel similar to the TFSC. Since these investigations will require the same external perspective necessary for large-scale investigations, the investigation unit should not be housed within the oversight board. Each state must determine whether the unit should exist as a separate office (such as the TFSC and NCIIC) or as a department under the supervision of an inspector general. States must also determine whether the unit should provide a judicial remedy, as the NCIIC does.[227] In this broad model, states could actually remedy injustices caused by faulty forensic science, but the focus on forensic science would be lost.[228] In the narrower model, exemplified by the TFSC, the unit would remain a forensic science authority and would still hold laboratories accountable for mistakes, but would not engage directly with courts.[229] These units would also provide a way to measure the success of oversight by examining the number of challenges and their success rates. If boards engage appropriately and on a consistent basis, challenges to evidence collected from the present onward

223. For a discussion of the overall grant program, see *supra* notes 141–50 and accompanying text.

224. *See, e.g.*, CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 18, at 62 (noting that not all laboratories receive Coverdell funds and therefore will not necessarily have investigatory oversight in place).

225. *See supra* notes 23–25 and accompanying text.

226. *See supra* note 150 and accompanying text (discussing the importance of independent investigations).

227. *See supra* subpart III(F).

228. *See supra* note 174 and accompanying text (noting that forensic science errors are not the only cause of wrongful convictions).

229. *See supra* note 170 and accompanying text (noting that the TFSC's narrower model does not provide a judicial remedy for the wrongfully convicted).

should decrease. By receiving public complaints, these units would be accessible to the public in a more visible way than boards or investigatory bodies.[230] As discussed previously, these units would also have the potential to unearth systemic issues and catalyze reform.

Of course, these changes will not come without challenges. First, funding is an obvious concern at the state government level given the current economic climate. But an investment in oversight prevents the future cost of investigating questionable criminal convictions. And it is likely that some of the state budget currently funneled to law enforcement to administer forensic science laboratories can be redistributed to the proposed board. For states with existing but inactive boards, it will take a jump-start in funding to make the board independent of law enforcement and to have it operate at the appropriate level. An inactive board that exists only in name hurts forensic science in the long run, as it lulls citizens and legislators into a false sense of security about the quality of forensic science in the state. States must understand that the independent board, the broad-brush investigator, and the public-complaint unit regulate in different manners. To fund one without funding the others leaves a regulatory gap that could lead to a failure to prevent or remedy systemic issues.[231] For some states, the more pressing question is how to provide sufficient operational funding to the laboratories. With laboratories already lacking the resources to hire enough staff and purchase enough equipment to avoid backlogs,[232] it may be difficult to specifically appropriate funds for quality assurance and quality control without first addressing the need for additional staff and equipment.

Second, many legislators (and their constituents) are unaware of the reliability and validity concerns threatening forensic science.[233] The popularity of television shows like *CSI* does not help.[234] Someone must communicate to legislators the current threat to state criminal justice systems. Unfortunately, the forensic science community has so far failed to provide

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230. Many states require state bodies like oversight boards to hold public meetings and publish meeting agendas and minutes. *See, e.g.*, CAL. GOV'T CODE § 11123 (West 2005); N.Y. PUB. OFF. LAW §§ 103–07 (McKinney 2008); TEX. GOV'T CODE ANN. § 551.002 (West 2004) (all creating open-meetings requirements for state boards). However, a body that investigates specific public complaints, such as the TFSC or the NCIIC, engages in a different way than one that merely allows the public to participate in open meetings.

231. *Cf.* FORENSIC LAB. ADVISORY BD., STATE OF MINN., LEGISLATIVE REPORT 1 (2011), *available at* http://archive.leg.state.mn.us/docs/2011/mandated/110100.pdf (advising the Minnesota State Legislature that the board "continues to lack the financial resources necessary to carry out its principal missions").

232. *See supra* note 102 and accompanying text.

233. *See, e.g.*, *Strengthening Forensic Science in the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 4 (2009) (statement of Sen. Jeff Sessions) ("But I don't think we should suggest that those proven scientific principles that we've been using for decades are somehow uncertain . . . .").

234. *See, e.g.*, Mnookin, *supra* note 74, at 1209 (discussing the public's misperception of forensic science's accuracy, which stems largely from inaccurate depictions on television shows like *CSI*).

the necessary information.[235] The increasing likelihood of federal reform may push state legislators that have thus far ignored these issues to consider them. But the rise of a strong voice from within the forensic science community would certainly help. Legislators are more likely to make changes if forensic science laboratories welcome them, or at the very least do not resist them.[236] In many jurisdictions, forensic science organizations enjoy a power advantage, as many forensic scientists simultaneously wear two hats—directing professional organizations and managing state and local laboratories.[237] Organization constituents should realize that their field will be stronger because of these changes and demand that their leadership pursue and support them. Perhaps more importantly, lobbying groups representing law enforcement and prosecutors should realize that blocking the establishment of oversight prevents forensic science from growing into a valid, reliable practice that will ultimately help capture criminals.[238] These groups should view this proposed oversight model as an effective compromise; laboratories remain housed within law enforcement, but independent oversight ensures that practices are valid and reliable.

Third, the political will to support newly established oversight institutions must exist at the state government level. On the one hand, political actors must continue to nurture oversight institutions once they are established. As with an institution that lacks funding, a new entity without

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235. In fact, the forensic science community has arguably misinformed legislators. *See, e.g.*, Letter from Dean Gialamas, President, Am. Soc'y of Crime Lab. Dirs., to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary 3 (Mar. 17, 2009), *available at* http://www.ascld.org/files/releases/090317%20ASCLD%20Letter%20to%20Congress%20FINAL.pdf ("[A]lthough the validation documentation may not be readily available in or published in literature by some laboratories, the lack of that data does not mean the science is unreliable."). While ASCLD officially recognized the NAS Report as "in-depth," it did not endorse its call for a new federal agency or removal from crime laboratories from "parent" law enforcement agencies. *Id.* at 2–3. Instead, ASCLD viewed the core problem as a general need for "standardization in education, training and forensic science delivery" and for adequate, consistent funding. *Id.* at 1. ASCLD proposes mandatory accreditation as the key to oversight, since accreditation "provides confidence and assurance to a parent organization, its employees, the criminal justice community, and the public that the operation can meet the most comprehensive forensic quality management system requirements." *Id.* at 2. Given the close ties between ASCLD and ASCLD/LAB, it is unsurprising that ASCLD proposes a prominent oversight role for ASCLD/LAB. *See supra* notes 106–19 and accompanying text.

236. *See* Neufeld, *supra* note 42, at S112 ("Most of the crime laboratories are resistant to any oversight.").

237. It is difficult to quantify the link between crime laboratory directors and organizations that resist change. Anecdotally, it appears strong. *See, e.g.*, Minutes, Cal. Crime Lab. Review Task Force, *supra* note 96, at 3 (reporting that CA Task Force member Bob Jarzen, on behalf of the California Association of Crime Laboratory Directors, "opined" that any new, state-level oversight would be duplicative of ASCLD/LAB programs). Not surprisingly, Mr. Jarzen served on the Board of Directors of ASCLD. Robert Adolph Jarzen, Curriculum Vitae 5 (Dec. 27, 2007), *available at* http://ag.ca.gov/meetings/tf/pdf/TF_JARZEN.pdf. The fact that ASCLD recommends accreditation by their sister organization, ASCLD/LAB, as the solution to forensic science's problems illustrates a similar conflict of interest. *See supra* note 235.

238. *See* Risinger, *supra* note 33, at 239 (describing the power of the law enforcement lobby on the national level).

political support is doomed to fail when it encounters obstacles. The TFSC experience is a cautionary tale of the difficulties of commencing operations.[239] On the other hand, political support must not interfere with independent board oversight, large-scale investigations, ICs, or forensic science investigative panels. Again, the TFSC illustrates what happens when political "support" interferes with independent oversight.[240]

Finally, states must determine how the oversight units should interact and work together to provide effective oversight. The oversight board may need to help manage logistics and limit transaction costs. This is acceptable, but the investigatory units must still remain independent from the board's sphere of influence. Because the board is likely to assume that it is providing effective oversight, it may be prone to blame individual analysts when problems arise, rather than investigate the systemic dangers lurking in the background.[241] In situations like this, it is imperative that independent investigation determines the scope of any problems. Deliberate, clear rules must define the jurisdiction of each institution so that "turf wars" do not occur. At the same time, the rules must be broad enough to avoid gaps—areas where no institution can claim jurisdiction. States that currently lack any of these oversight mechanisms may be unable to implement them all at once. Such states should prioritize the establishment of an independent oversight board and authorize an existing agency outside of law enforcement to conduct any necessary investigations.

V. Conclusion: State Oversight Is Needed Even If Federal Reforms Pass

To complicate matters, the extent of federal regulation of forensic science is fluid. Depending on one's perspective, the proposed Criminal Justice and Forensic Science Reform Act (CJFSRA) could either drastically change the structure of forensic science practice or simply extend the status quo—prolonging the general gap in ground-level state oversight. While viewpoints differ on the potential of the proposed federal changes to remedy forensic science's core problems, the fact remains that the portions of the legislation applicable to state laboratories—requiring accreditation, certification, the adoption of a code of ethics, etc.—are triggered only through the federal spending power.[242] While federal financial support of state forensic science is common through Coverdell grants, many

239. *See supra* note 166 and accompanying text.

240. *See supra* notes 165, 167 and accompanying text.

241. *See* William C. Thompson, *Beyond Bad Apples: Analyzing the Role of Forensic Science in Wrongful Convictions*, 37 SW. U. L. REV. 1027, 1028 (2008) ("We tend to think that replacing the bad apples solves the underlying problem without considering why we have so many bad apples in the first place, why we find more bad apples in some environments than others, and why the apples repeatedly seem to go bad in the same familiar ways.").

242. *See* Criminal Justice and Forensic Science Reform Act of 2011, S. 132, 112th Cong. § 201(a) (as referred to S. Comm. on the Judiciary, Jan. 25, 2011) (requiring accreditation only for laboratories receiving federal funding).

laboratories do not receive any federal funding, and states spend significantly more on forensic science operations than the federal government offers.[243] Furthermore, states could always avoid any federal requirements by rejecting all federal funding. On the other hand, the establishment of a new federal office could strengthen the enforcement of any spending requirements. It could also encourage states to establish local oversight via top-down influence and induce state standards via the establishment of best practices in federal laboratories. Additionally, many of the federal reforms are directed at validity concerns, such as inducing basic research.[244] In this regard, the federal legislation may address areas that state oversight cannot effectively target, such as coordination of nationwide research.

But more fundamentally, the entire framework of proposed federal regulation continues to ignore states' control of their own criminal justice systems—a cornerstone of America's system of federalism.[245] Even if federal reforms impose additional obligations on laboratories that receive federal funds, states must still engage in local oversight beyond the requirements of the CJFSRA. While there are sections of the legislation dedicated to quality assurance and quality control, a requirement that states designate an independent investigator is noticeably lacking. Similarly, the CJFSRA imposes no obligation on states to establish state-level oversight boards. The legislation does not "nationalize" oversight of state forensic science laboratories—nor should it. Instead, decisions about the structure and location of laboratories within state government, the structure and location of oversight boards, budgetary priorities, and how to investigate allegations of systemic misconduct or individual errors would remain under state control. In short, to conclude that federal action eliminates the need for state oversight[246] would ignore the fact that laboratories remain a part of state government and service state criminal justice systems. Additionally, proposed federal reforms will not solve the reliability problems that plague forensic science.

States must play a more active role in the oversight of forensic science. When news broke of the Houston crime lab scandal, a key question swirled: How could the police department have let the situation deteriorate to such a shocking level? While the independent investigation provided answers to this question in its report, this Note poses broader questions: Where was state-level oversight? How could it have prevented such a scandal? By establishing oversight boards outside of law enforcement, designating entities

243. *See supra* note 71 and accompanying text.

244. *See* S. 132, § 401 ("[T]he Board shall recommend to the Director a comprehensive strategy for fostering and improving peer-reviewed scientific research relating to the forensic science disciplines, including research addressing issues of accuracy, reliability, and validity in the forensic science disciplines.").

245. *See supra* Part II.

246. *See, e.g.*, Minutes, Cal. Crime Lab. Review Task Force, *supra* note 96, at 1 ("A key question is whether California can be more productive than the federal government on oversight issues.").

to conduct independent investigations, and implementing review of public complaints through entities like the TFSC or NCIIC, states can prevent the repetition of the scandals that have plagued so many jurisdictions.

—Ryan M. Goldstein

The Multiplication of Indivisible Injury*

> *rule,* n. *1. Generally, an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.*[1]
>
> *exception,* n. *2. Something that is excluded from a rule's operation.*[2]

A motorist is suddenly rear-ended while stopped at an intersection. Before he even has time to complete the thought, "How could this get any worse?" the motorist's car is struck again by another vehicle. The motorist is injured in this series of events and now seeks recourse in the legal system.

What initially appears to be a relatively straightforward negligence suit is actually a somewhat complex problem for the law to resolve. Negligence law requires the plaintiff to tie the specific injuries alleged in the suit to the specific events created by the negligent actor. That task will be very difficult in this case, however, because it will be nearly impossible for the plaintiff to attribute some specific injuries to the first wreck and attribute other specific injuries to the second wreck. Is the motorist simply out of luck?

The law has answered this question in the negative and has created an exception to the rule for these situations.[3] But as is the risk with exceptions in general, this particular exception has grown to encompass more and more cases, expanding well beyond its original purpose. Perhaps ironically, this doctrine is known as the "single indivisible injury *rule*," even though it operates solely as an exception to the rule requiring the plaintiff to tie his specific injuries to the event created by the negligent defendant.

In addition to the doctrinal inconsistency created by this expanding exception, there are other drawbacks to its use. Two tort law concepts—"bar-to-recovery provisions" and the existence of "nonparties"—can also intersect with the indivisible injury exception. Bar-to-recovery provisions are rules that are created (legislatively or judicially) that prevent a plaintiff from recovering if the jury finds that the plaintiff was too greatly at fault for

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1. BLACK'S LAW DICTIONARY 1446 (9th ed. 2009).

2. *Id.* at 644.

3. The rule is that the plaintiff must tie his specific injuries to the event negligently created by the defendant. The exception—and focus of this Note—occurs when the plaintiff is able to prove that he suffered "indivisible injuries."

the incident.[4] "Too greatly" is certainly a relative term, and states have taken various approaches to defining the appropriate percentage.[5]

Nonparties, as the name indicates, are people who are not parties to the lawsuit. They are significant, however, because occasionally a defendant will allege that a nonparty is at fault for a portion of the tort. In these situations, the court (and sometimes the jury) must decide how to deal with assigning fault to an individual that is not involved in the proceedings.

When the indivisible injury doctrine intersects with bar-to-recovery provisions, or if the case involves nonparties, the operation of the doctrine can lead to questionable results. This Note describes the progression and consequences of this doctrine in four parts. Part I provides necessary background and traces the development of the indivisible injury doctrine. Part II defines in detail the jury procedure followed in indivisible injury cases, and it then discusses two significant paradoxes created by the use of this jury procedure. Part III advocates taking a narrower view of the indivisible injury doctrine to limit the instances in which its application is problematic. Jurisdictions should adopt more stringent requirements for using the indivisible injury doctrine, and they should also give judges, as well as juries, the opportunity to decide cases on other grounds before resorting to indivisible injury. Part IV concludes.

I. The Roots and Growth of the Indivisible Injury Doctrine

In the typical negligence case, a plaintiff is required to prove five elements in his prima facie case: "duty, breach, cause in fact, legal cause, and damages."[6] As part of the analysis for the damages element, the plaintiff must tie the particular injuries he suffered to the event created by the culpable conduct of the defendant—a concept usually kept distinct from cause in fact.[7]

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4. *See generally* DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 343–44 (4th ed. 2011) (discussing the traditional rule that any legally relevant negligence by a plaintiff bars the plaintiff's recovery completely).

5. *See infra* subpart II(A).

6. David W. Robertson, *The Vocabulary of Negligence Law: Continuing Causation Confusion*, 58 LA. L. REV. 1, 4 (1997).

7. *See* E. Tex. Theatres, Inc. v. Rutledge, 453 S.W.2d 466, 467–68 (Tex. 1970) (identifying two distinct matters on appeal: (1) whether the evidence could support a finding of proximate cause (defined in the context of the case to mean cause in fact), and (2) whether there was a causal connection between the incident created by the negligent conduct and the injury alleged by the plaintiff); *see also* Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1353–55 (1981) (identifying the distinct roles of causation and damages regarding preexisting conditions, and noting that the damages phase is where courts identify and determine the extent of the specific injuries caused by the defendant's negligent act). The reporters of the *Restatement (Third) of Torts: Apportionment of Liability* grappled with the same issue when trying to decide what portion of an injury is appropriate to attribute to a tortfeasor. This issue is especially important in cases of multiple sufficient causes—where there are multiple negligent acts that were all sufficient, on their own, to cause the plaintiff's injuries. *See* Michael D. Green, *The Intersection of Factual Causation*

A lawsuit for injuries suffered in a car wreck serves as a good example of how this requirement works in an actual negligence case. In the cause-in-fact inquiry, a plaintiff would be attempting to prove that the defendant's negligent conduct (e.g., speeding, following too closely) resulted in the wreck. Then, as part of the damages inquiry, the plaintiff must prove that his injuries were a result of the wreck.

This requirement creates a difficult problem when a plaintiff suffers injuries from multiple events (each of which involved negligent acts) and it is impossible to sort out which injuries resulted from each event. If the plaintiff were to sue any of the individual negligent actors, he would not be able to prove that the specific event caused by that defendant resulted in any of the specific injuries. Any of the events could have caused all, some, or none of the plaintiff's specific injuries—and under the normal rule requiring the plaintiff to tie his specific injuries to the negligently created event, he would lose the case. To remedy the harsh nature of this rule in this unique set of cases, an exception to the requirement to tie specific injuries to specific events was created—the indivisible injury doctrine.[8]

In these cases, the exception (i.e., the indivisible injury doctrine, operating as an exception to the causation component of damages) rescues the plaintiff from the position of not being able to recover simply because he happened to encounter two negligent actors instead of one. Additionally, it prevents the tortfeasors from escaping liability for their negligent acts simply because the hapless plaintiff was injured a second time.

The case of *Maddux v. Donaldson*[9] illustrates the indivisible injury doctrine in its purest form. Fred Maddux was driving with his wife and daughter in their pickup when they saw a swerving vehicle, driven by William Donaldson, headed toward them.[10] Maddux attempted to avoid

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and Damages, 55 DEPAUL L. REV. 671, 672–73 (2006) (recounting the debate Professor Green had with fellow *Restatement* reporter Professor Bill Powers about whether or not to address injury attribution in relation to causation or damages). Professor Powers felt that these issues should be addressed in relation to causation, but Professor Green's position—waiting to deal with these issues in relation to damages—eventually won the day. *Id.* at 673.

8. *See* Maddux v. Donaldson, 108 N.W.2d 33, 37–38 (Mich. 1961) (describing the theory of causation of damages when indivisible injuries are present). Professor David Robertson has suggested that the more appropriate term for this doctrine is "inextricable tangle." *See* David W. Robertson, *Causation in the* Restatement (Third) of Torts*: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1014 (2009) (referring to this body of law as "The Inextricable-Tangle Cases"). While Professor Robertson's term is more precise, and probably gives a more accurate description of the situations where this doctrine should be applied, the term "indivisible injury" is so pervasive in the literature and in the jurisprudence that this Note will use the standard terminology. Professor Robertson's terminology serves to distinguish a true indivisible injury (e.g., plaintiff passenger is killed when a car is struck by a train as a result of the negligence of the driver of the car and the negligence of the train conductor) from the situations we are dealing with in this Note—successive independent accidents that combine to cause a single indivisible injury.

9. 108 N.W.2d 33 (Mich. 1961).

10. *Id.* at 34.

Donaldson but was unable to do so, and the cars collided.[11] Approximately thirty seconds after that collision, a vehicle negligently driven by Paul Bryie struck the Maddux truck.[12] Mrs. Maddux sued both Donaldson and Bryie, subsequently discontinued the suit against Donaldson, and was proceeding only against Bryie when this case reached the Michigan Supreme Court.[13] There, the court noted the impossibility of determining which injuries came from the first accident and which injuries came from the second.[14] The court held that when this division is impossible, plaintiffs should not be forced to lose.[15] Additionally, the court stated that in the indivisible injury context, the burden of dividing the injuries should fall on the defendants, and the court thereby applied the standard rule of joint and several liability.[16]

Maddux serves as the foundation on which the indivisible injury doctrine is built.[17] There are two specific components of this doctrine that have experienced significant change since that time. First, the situations where the indivisible injury doctrine applies have expanded greatly. Second, many jurisdictions have moved away from applying joint and several liability to indivisible injury cases.

A. The Doctrine Spreads

The indivisible injury doctrine began in response to a particular set of circumstances in which successive car wrecks occurred so closely in time that it was impossible to sort out which injuries came from which wreck.[18] When the doctrine was first adopted, courts had a grasp on its limited nature. For example, the Supreme Court of Iowa adopted the doctrine in a case of two wrecks occurring "from one to three seconds" apart.[19] The court succinctly announced the doctrine:

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 35–36.

15. *Id.*

16. *Id.* at 36–37. Joint and several liability was the only approach used in multiple-defendant cases at the time *Maddux* was decided; therefore, the court's use of this rule is not at all surprising. *See infra* subpart I(B).

17. *See* 57A AM. JUR. 2D *Negligence* § 550 (2004) (citing *Maddux* as one of the cases establishing the single indivisible injury doctrine); *see also, e.g.*, Stonecipher v. Charon, 435 F.2d 779, 780 (10th Cir. 1971) (citing *Maddux* as a source of the single indivisible injury doctrine); Acushnet Co. v. Coaters, Inc., 972 F. Supp. 41, 62 (D. Mass. 1997) (same); *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 823 (E.D.N.Y. 1984) (same); D'Ambra v. United States, 396 F. Supp. 1180, 1185 (D.R.I. 1973) (same); Holtz v. Holder, 418 P.2d 584, 588 (Ariz. 1966) (same); Ruud v. Grimm, 110 N.W.2d 321, 324 (Iowa 1961) (same); Azure v. City of Billings, 596 P.2d 460, 470 (Mont. 1979) (same); Taylor v. Celotex Corp., 574 A.2d 1084, 1096 (Pa. 1990) (same); Cox v. Spangler, 5 P.3d 1265, 1272 & n.4 (Wash. 2000) (same).

18. *See Maddux*, 108 N.W.2d at 35–36 (explaining why the indivisible injury doctrine makes sense in the context of "'chain collisions' on today's highways").

19. *Ruud*, 110 N.W.2d at 323.

> [W]here two or more persons acting independently are guilty of consecutive acts of negligence closely related in point of time, and cause damage to another under circumstances where the damage is indivisible, i.e., it is not reasonably possible to make a division of the damage caused by the separate acts of negligence, the negligent actors are jointly and severally liable.[20]

At that stage in the doctrine's development, courts were also illustrating that they recognized the doctrine's limited scope. The Supreme Court of Washington refused to apply the doctrine in a case of two wrecks that occurred almost eight months apart.[21] The court noted that it was looking at "two independent torts and two separate harms," and that "[t]he collisions were widely separated by both time and distance."[22]

Similarly, the Supreme Court of Wisconsin declined an invitation to adopt the doctrine in a case involving two wrecks separated by four and one-half months.[23] The court stated, "The operative facts, not the consequences, are determinative of a cause of action. 'It is the wrongful act, and not the injury, that creates liability.'"[24] The court held that this case simply did not give rise to a relationship between the defendants: "The acts are not substantially concurrent, the events are unrelated, and the accidents took place in different counties."[25] In discussing the indivisible injury doctrine in other jurisdictions, the Wisconsin court noted that these other courts adopted the doctrine in cases of "successive torts involv[ing] only an insignificant time lapse between them, not almost five months as in the case before us."[26] These cases illustrate how this doctrine was designed to operate—as a narrow exception to the damages-causation requirement.

This attractive new doctrine for plaintiffs, however, did not remain constrained to closely successive car accidents for long. In many jurisdictions, its application has expanded to encompass accidents separated by significant time spans. The two accidents in *Maddux* occurred thirty seconds apart.[27] In one of the leading indivisible injury cases, the Supreme Court of Arizona explored two car accidents that occurred on the same day—one in the early morning and one around lunchtime.[28] The Supreme Court of Florida applied the doctrine in a case where the accidents occurred three months apart.[29] The Supreme Court of Ohio applied the doctrine in a series

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20. *Id.* at 324.
21. Smith v. Rodene, 418 P.2d 741, 742–43 (Wash. 1966).
22. *Id.*
23. Caygill v. Ipsen, 135 N.W.2d 284, 285, 289 (Wis. 1965).
24. *Id.* at 286 (quoting N. Fin. Corp. v. Midwest Commercial Credit Co., 239 N.W. 242, 243 (S.D. 1931)).
25. *Id.* at 289.
26. *Id.*
27. Maddux v. Donaldson, 108 N.W.2d 33, 38 (Mich. 1961).
28. Piner v. Superior Court, 962 P.2d 909, 910 (Ariz. 1998).
29. Gross v. Lyons, 763 So.2d 276, 277 (Fla. 2000).

of three accidents over four and one-half months.[30] In all of these cases, the courts found that indivisible injuries existed and that the plaintiff could rely on that theory to satisfy the requirement to relate specific damages to the negligently caused event.[31]

Two questions arise out of this expansion. First, should a line be drawn to determine when two incidents are too far apart to justify the use of the indivisible injury doctrine? Second, where might that line be drawn? The *Apportionment Restatement*[32] proposes no line; it simply requires "independent tortious conduct of two or more persons [to be] a legal cause of an indivisible injury."[33] The reporters specifically note that "there is no temporal requirement for the actions of the tortfeasors."[34] But for policy, efficiency, or consistency reasons, some jurisdictions have been significantly more limiting in their approach to the indivisible injury doctrine.

For example, an Arizona intermediate court of appeals confronted this question in a case involving two wrecks that occurred thirteen days apart.[35] The court reversed the trial court's decision to submit the claim to the jury with an indivisible injury instruction, holding that the time span between the wrecks was simply too long.[36] The court noted that while it may have been *difficult* to apportion the injuries, it was not *impossible*.[37]

The state of Missouri provides a more widespread example of efforts to constrain the indivisible injury doctrine. *Barlow v. Thornhill*[38] is the leading indivisible injury case from the Supreme Court of Missouri. The plaintiff, Billy Barlow, was a passenger in a car involved in a three-car accident on a highway outside of St. Louis.[39] The three drivers exited their vehicles to exchange information in the median.[40] During this exchange—ten to fifteen minutes after the initial accident—a fourth car struck the vehicle in which

30. Pang v. Minch, 559 N.E.2d 1313, 1315–17 (Ohio 1990).

31. *Piner*, 962 P.2d at 916–17; *Gross*, 763 So.2d at 280; *Maddux*, 108 N.W.2d at 35–36; *Pang*, 559 N.E.2d at 1325.

32. When this Note refers to "*Apportionment Restatement*," it is referring to the *Restatement (Third) of Torts: Apportionment of Liability*. The ALI separated the *Restatement (Third) of Torts* project into separate volumes, three of which have been published thus far. *See generally* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (2000); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

33. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § A18 cmt. b (2000).

34. *Id.*

35. Potts v. Litt, 828 P.2d 1239, 1240 (Ariz. Ct. App. 1991).

36. *Id.* at 1241–42.

37. *Id.* at 1241. As the court noted, "The accidents occurred thirteen days apart, and the record shows that Potts was treated by a chiropractor five times between the first accident and the second. Thus, even though it might have been difficult to apportion Potts's damages, it was not impossible." *Id.*

38. 537 S.W.2d 412 (Mo. 1976).

39. *Id.* at 414.

40. *Id.*

Barlow was waiting.[41] As a result of the accidents, Barlow suffered a number of injuries including severe swelling and pain in his neck and back.[42] The court held that Barlow was entitled to proceed to the jury on an indivisible injury theory because it was impossible to determine through medical testimony which injuries were attributable to each accident.[43]

Missouri courts then started confronting the potentially expansive nature of this doctrine, but they did so in a more constraining fashion. In 1982, the Missouri Court of Appeals held that three accidents—occurring in May 1977, June 1977, and October 1978—could not satisfy the requirements for indivisible injury because the accidents occurred too far apart in time.[44] Because this decision came from an intermediate appellate court, it remained unclear whether the state would impose a temporal restraint on the doctrine. The first hint toward an answer to that question came from the Supreme Court of Missouri in *State ex rel. Jinkerson v. Koehr*[45] in 1992.

The *Jinkerson* plaintiffs were involved in two car accidents—one in March 1986 and one in February 1987.[46] The plaintiffs argued that the injuries sustained were "inseparable and indistinguishable[,] thereby creating common liability among all of the named defendants."[47] The court held that two wrecks eleven months apart were separate incidents—not part of the "*same transaction or occurrence*"—for venue purposes.[48] The court did not mention the indivisible injury problem specifically, but it did indicate in the course of the venue discussion that each motorist's responsibility was limited to "the injuries caused in the accident in which he or she was involved."[49] While this decision came in the context of a venue dispute, the language used by the court is undoubtedly having a ripple effect into traditional indivisible injury cases.

Recently, the Missouri Court of Appeals refused to apply the doctrine in a case of two car wrecks that occurred three years apart.[50] The court held that these incidents were too far apart to be considered the "same transaction of facts."[51] Additionally, the court described the *Barlow* decision, noting that

41. *Id.* at 414–15.

42. *Id.* at 415.

43. *Id.* at 419.

44. State *ex rel.* Retherford v. Corcoran, 643 S.W.2d 844, 845, 847 (Mo. Ct. App. 1982).

45. 826 S.W.2d 346 (Mo. 1992).

46. *Id.* at 346.

47. *Id.* at 348.

48. *Id.* (emphasis added). One of the defendants challenged the venue, the Circuit Court of the City of St. Louis, as improper because: (1) the accident occurred in St. Louis County, not the City of St. Louis; and (2) although the defendant resided in St. Louis County at the time of the accident, he had moved to Kansas City, Missouri, before the lawsuit was filed. *Id.*

49. *Id.*

50. Stevenson v. Aquila Foreign Qualifications Corp., 326 S.W.3d 920, 923, 926 (Mo. Ct. App. 2010).

51. *Id.* at 926. The court further supported its conclusion by citing the Missouri Supreme Court's decision in *Jinkerson*. *Id.* at 927.

Barlow "simply recognizes that in the rare case, two technically independent events are essentially a single transaction of facts causing an indivisible injury because there is insufficient intervening time between the occurrences to permit any other conclusion."[52] Further, the court emphasized that the wrecks in *Barlow* "occurred at the same location *within ten to fifteen minutes* of each other," creating "essentially the same transaction of facts," which was not a feasible conclusion for wrecks occurring three years apart.[53]

This effort to constrain the indivisible injury doctrine frequently seems to be discussed in terms of timeframe; however, timeframe is not the precise reason for narrowing the focus of the doctrine. As the Supreme Court of Missouri noted, "The gist of the rule with respect to injuries is not so much the time separating the collisions as it is the impossibility of definitely attributing a specific injury to each collision."[54] In other words, there comes a point where it is not appropriate for a court to excuse the fact that an injury cannot be divided. For example, if a car accident victim simply neglects to visit a doctor for a long period of time and then is involved in a second wreck, that failure to visit the doctor very well could be the reason that the injuries became indivisible.[55] Furthermore, when accidents are separated by long periods of time, the accidents are almost always geographically separated as well. This forces juries to evaluate two entirely distinct factual situations, adding in new variables like changes in road conditions or weather. The only link between the two situations is the plaintiff.

The Missouri Supreme Court seemed correct in saying that "[t]here is no arbitrary time limit the court could promulgate as being the 'cutoff point' for application of the rule," and that "[e]ach case must be judged in the circumstances of the case."[56] What the decisions of the Missouri courts illustrate, however, is that there are legitimate interests in limiting this doctrine that may get lost if a jurisdiction applies only the broad language of the *Apportionment Restatement*.[57]

B. Joint and Several Liability in Indivisible Injury Cases

The other area where jurisdictions have diverged is in relation to what type of liability is imposed on the defendants when the determination is made that a case will be handled according to the indivisible injury doctrine. *Maddux* applied the rule of joint and several liability,[58] which made sense

52. *Id.* at 926.

53. *Id.* at 925–26 (citing Barlow v. Thornhill, 537 S.W.2d 412, 414–15 (Mo. 1976)).

54. *Barlow*, 537 S.W.2d at 419. This is an example of a court using imprecise terminology—referring to indivisible injury doctrine as "the rule" even though it is actually operating as an exception.

55. The inverse situation is also true. If a plaintiff does visit a specialist, it then becomes more likely that it is possible to separate the injuries. *See supra* note 37.

56. *Barlow*, 537 S.W.2d at 419.

57. *See supra* notes 32–34 and accompanying text.

58. Maddux v. Donaldson, 108 N.W.2d 33, 36–37 (Mich. 1961).

because the decision occurred in the era of the contributory negligence regime, during which there was no method available to apportion fault between the defendants after the court made the determination that both defendants were liable for the plaintiff's injuries. However, following the adoption of comparative negligence,[59] this logic became less clear. Jurisdictions were then required to determine whether indivisible injury was a special exception to comparative fault warranting joint and several liability or if the adoption of comparative negligence required fault to be apportioned in indivisible injury cases.

The *Apportionment Restatement* takes no position on joint and several liability for indivisible injury cases, shifting from the advocacy of joint and several liability in the *Restatement (Second)*—a shift corresponding with the widespread adoption of comparative fault during the 1980s.[60] There are still some jurisdictions that employ joint and several liability, but "the number is dwindling."[61] Currently, only nine jurisdictions that have adopted a comparative fault regime retain joint and several liability for indivisible injury cases.[62] This Note will focus primarily on the remaining jurisdictions,

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59. *See* ROBERTSON ET AL., *supra* note 4, at 344–45 (describing the transition from contributory negligence to comparative negligence in England and later in the United States).

60. *Compare* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 cmt. a (2000), *with* RESTATEMENT (SECOND) OF TORTS § 879 (1979).

61. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § A18 cmt. a (2000).

62. *See* ARK. CODE ANN. § 16-55-201 (2005) (comparative negligence in Arkansas); Bill C. Harris Constr. Co. v. Powers, 554 S.W.2d 332, 337 (Ark. 1977) (joint and several liability for indivisible injury cases in Arkansas); DEL. CODE ANN. tit. 10, § 8132 (1999) (comparative negligence in Delaware); Campbell v. Robinson, No. 06C-05-176-PLA, 2007 WL 1765558, at *2 (Del. Super. Ct. June 19, 2007) (citing Sears, Roebuck & Co. v. Huang, 652 A.2d 568, 573 (Del. 1995)) (joint and several liability for indivisible injury cases in Delaware); ME. REV. STAT. ANN. tit. 14, § 156 (1964) (comparative negligence in Maine); Lovely v. Allstate Ins. Co., 658 A.2d 1091, 1092 (Me. 1995) (joint and several liability for indivisible injury cases in Maine); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2000) (comparative negligence in Massachusetts); Shantigar Found. v. Bear Mountain Builders, 804 N.E.2d 324, 332 (Mass. 2004) (joint and several liability for indivisible injury cases in Massachusetts); MINN. STAT. ANN. § 604.01 (West 2010) (comparative negligence in Minnesota); Canada *ex rel.* Landy v. McCarthy, 567 N.W.2d 496, 507 (Minn. 1997) (joint and several liability for indivisible injury cases in Minnesota); 42 PA. CONS. STAT. ANN. § 7102 (West Supp. 2011) (comparative negligence in Pennsylvania); Carrozza v. Greenbaum, 916 A.2d 553, 565 (Pa. 2007) (joint and several liability for indivisible injury cases in Pennsylvania); R.I. GEN. LAWS § 9-20-4 (1997) (comparative negligence in Rhode Island); Roberts-Robertson v. Lombardi, 598 A.2d 1380, 1381 (R.I. 1991) (joint and several liability for indivisible injury cases in Rhode Island); Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991) (comparative negligence in South Carolina); Rourk v. Selvey, 164 S.E.2d 909, 910 (S.C. 1968) (joint and several liability for indivisible injury cases in South Carolina); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (W. Va. 1979) (comparative negligence in West Virginia); Kodym v. Frazier, 412 S.E.2d 219, 222–23 (W. Va. 1991) (joint and several liability for indivisible injury cases in West Virginia).

Additionally, joint and several liability is the rule in five jurisdictions that retain contributory negligence, as well as in one jurisdiction that uses comparative negligence if the plaintiff's negligence is "slight" but otherwise applies contributory negligence. *See* Williams v. Delta Int'l Mach. Corp., 619 So.2d 1330, 1333 (Ala. 1993) (contributory negligence in Alabama); Matkin v. Smith, 643 So.2d 949, 951 (Ala. 1994) (joint and several liability for indivisible injury cases in Alabama); Nat'l Health Labs., Inc. v. Ahmadi, 596 A.2d 555, 557, 561 (D.C. 1991) (contributory

which employ several liability or some type of hybrid approach to indivisible injury cases.[63] These approaches account for thirty-seven jurisdictions.[64]

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negligence for the District of Columbia and joint and several liability for indivisible injury cases); Bd. of Cnty. Comm'rs v. Bell Atl.-Md., Inc., 695 A.2d 171, 181 (Md. 1997) (contributory negligence in Maryland); Consumer Prot. Div. v. Morgan, 874 A.2d 919, 950–53 (Md. 2005) (joint and several liability for indivisible injury cases in Maryland); Yancey v. Lea, 532 S.E.2d 560, 563 (N.C. Ct. App. 2000) (contributory negligence in North Carolina); Simpson v. Plyler, 128 S.E.2d 843, 847 (N.C. 1963) (joint and several liability for indivisible injury cases in North Carolina); S.D. CODIFIED LAWS § 20-9-2 (2004) (codifying South Dakota's use of pure comparative negligence for "slight" negligence by the plaintiff and contributory negligence in other situations); Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992) (joint and several liability for indivisible injury cases in South Dakota); Litchford v. Hancock, 352 S.E.2d 335, 337 (Va. 1987) (contributory negligence in Virginia); Sullivan v. Robertson Drug Co., 639 S.E.2d 250, 255 (Va. 2007) (joint and several liability for indivisible injury cases in Virginia).

63. All of the approaches other than joint and several liability require the jury to apportion fault among the actors, which is why these approaches will be the focus of this Note. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B18 (2000) (describing several liability in indivisible injury cases); *id.* §§ C18, C21 (describing the "reallocation" hybrid model whereby joint and several liability applies unless a defendant is able to establish that a judgment for contribution cannot be collected from another defendant, in which case the judgment is crafted severally according to the factfinder's fault apportionment); *id.* § D18 (describing the "threshold" hybrid model whereby the judgment is based upon the fault percentage unless a defendant's fault rises to a certain threshold level where the liability then changes to joint and several); *id.* § E18 (describing the "damages" hybrid model whereby negligent defendants are jointly and severally liable for economic damages and are severally liable for noneconomic damages according to their fault allocation).

64. Some jurisdictions employ more than one method, which is why the following inventory appears to include more than thirty-seven jurisdictions.

Nineteen jurisdictions have adopted a several liability model. ALASKA STAT. § 09.17.080 (2010); ARIZ. REV. STAT. ANN. § 12-2506 (1956); COLO. REV. STAT. ANN. § 13-21-111.5 (West Supp. 2010); FLA. STAT. ANN. § 768.81 (West 2011); GA. CODE ANN. § 51-12-33 (Supp. 2011); IDAHO CODE ANN. § 6-802 (2010); IND. CODE ANN. § 34-51-2-8 (West 2011); KAN. STAT. ANN. § 60-258a (Supp. 2010); KY. REV. STAT. ANN. § 411.182 (LexisNexis 2005); LA. CIV. CODE ANN. art. 2324 (2010); MISS. CODE ANN. § 85-5-7 (1972); NEV. REV. STAT. § 41.141 (2009); N.M. STAT. ANN. § 41-3A-1 (1978); N.D. CENT. CODE § 32-03.2-02 (2010); S.B. 862, 53d Leg., 1st Reg. Sess., 2011 Okla. Sess. Law Serv. 94 (West) (amending OKLA. STAT. tit. 23, § 15); McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992); UTAH CODE ANN. § 78B-5-818 (LexisNexis 2008); VT. STAT. ANN. tit. 12, § 1036 (2002); WYO. STAT. ANN. § 1-1-109 (2011).

Six jurisdictions have adopted some form of reallocation system. CONN. GEN. STAT. ANN. § 52-572h (West 1958); MICH. COMP. LAWS ANN. § 600.6304 (West 2000); MINN. STAT. ANN. § 604.02 (West 2010); MONT. CODE ANN. § 27-1-703 (2011); N.H. REV. STAT. ANN. § 507:7-e (2010); OR. REV. STAT. § 31.610 (2009). Note, however, that the Montana Supreme Court invalidated the portion of the statute that allows allocation of fault to nonparties. Newville v. Dep't of Family Servs., 883 P.2d 793, 803 (Mont. 1994). For further discussion regarding nonparties, see *infra* subpart II(B).

Eleven jurisdictions have adopted some form of threshold for imposing joint and several liability. HAW. REV. STAT. ANN. § 663-10.9 (LexisNexis 2007); 735 ILL. COMP. STAT. ANN. 5/2-1117 (West Supp. 2011); IOWA CODE ANN. § 668.4 (West Supp. 2011); MO. ANN. STAT. § 537.067 (West Supp. 2011); MONT. CODE ANN. § 27-1-703 (2011); N.H. REV. STAT. ANN. § 507:7-e (2010); N.J. STAT. ANN. § 2A:15-5.3 (West 2000); N.Y. C.P.L.R. § 1601 (McKinney 1997); OHIO REV. CODE ANN. § 2307.22 (West 2004); TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (West 2008); WIS. STAT. ANN. § 895.045 (West 2006). Several amendments to the Illinois comparative negligence scheme were held unconstitutional in *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997), but the threshold doctrine remains.

II. Problematic Application of the Doctrine

The case of *Piner v. Superior Court*[65] provides a detailed procedure for fault allocation in indivisible injury situations. Early one morning, William Piner was rear-ended while he was stopped, causing injuries to his neck, upper back, left arm, and head.[66] Around lunchtime on that same day, Piner was again rear-ended in a separate accident, resulting in similar injuries.[67] Piner's doctors were unable to attribute Piner's injuries to one wreck or the other, and on that basis Piner sued both of the drivers, alleging that when two separate incidents combine to cause an indivisible injury, the negligent actors are jointly and severally liable.[68]

The Arizona Supreme Court agreed with Piner that the burden of apportioning liability in an indivisible injury case should fall on the defendants.[69] However, Arizona had recently enacted a new fault apportionment statute eliminating joint liability but not preventing courts from imposing several liability.[70] Therefore, the court found that Piner could recover from both of the negligent drivers, but only in proportion to their negligence.[71]

The court made the determination that the indivisible injury doctrine applied, relieving the plaintiff of the burden to tie specific injuries to specific wrecks. Then, the court tasked the jury with apportioning liability between the parties on the basis of fault in the separate wrecks.[72] The court

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Seven jurisdictions impose joint and several liability for economic damages and several liability for noneconomic damages on independent tortfeasors. CAL. CIV. CODE §§ 1431, 1431.2 (West 2007); FLA. STAT. ANN. § 768.81 (West 2011); HAW. REV. STAT. ANN. § 663-10.9 (LexisNexis 2007); IOWA CODE ANN. § 668.4 (West Supp. 2011); NEB. REV. STAT. § 25-21,185.10 (2008); N.Y. C.P.L.R. § 1601 (McKinney 1997); OHIO REV. CODE ANN. § 2307.22 (West 2004). Despite the Nebraska statute, the Nebraska Supreme Court upheld the application of joint and several liability for noneconomic damages in an indivisible injury case. Shipler v. Gen. Motors Corp., 710 N.W.2d 807, 843 (Neb. 2006). However, the court did not decide whether this holding would apply in all contexts or would be confined to products liability cases.

Lastly, there is one jurisdiction that applies joint and several liability if there is no negligence on behalf of the plaintiff. *See* WASH. REV. CODE ANN. § 4.22.070 (West 2005).

65. 962 P.2d 909 (Ariz. 1998).

66. *Id.* at 910.

67. *Id.*

68. *Id.* at 910–11. Piner's argument for applying joint and several liability to his indivisible injury case was well-founded in Arizona law at that time. *See* Holtz v. Holder, 418 P.2d 584, 588 (Ariz. 1966) ("[J]oint and several liability may also be imposed upon two or more negligent actors, notwithstanding that their tort is not a joint one in a multiple collision case, where their acts occur closely in time and place and the result is such that the injured party suffers damages or injuries which the trier of the facts determines to be unapportionable between or among the several tortfeasors.").

69. *Piner*, 962 P.2d at 916.

70. *Id.* at 914–16 (citing ARIZ. REV. STAT. § 12-2506).

71. *Id.* at 916.

72. *Id.* at 916–17.

recognized that this could be a difficult task for a jury,[73] so it provided guidance on how courts and juries should proceed when faced with this scenario. Once the determination is made that the indivisible injury doctrine is going to apply, juries are instructed to follow a four-step process to apportion fault between the parties. First, the jury is to apportion fault between the parties in each of the separate incidents.[74] For example, in *Piner*, the jury would allocate fault between Piner and the negligent driver in the first wreck, and would then perform a separate allocation between Piner and the negligent driver in the second wreck. Second, the judge sums the percentages of all actors.[75] Third, the judge divides the total percentages by the number of incidents.[76] Fourth and finally, the judge multiplies that adjusted fault percentage by the total damages suffered by the plaintiff to determine the judgment against each defendant.[77]

Applying the methodology provided by *Piner* to a hypothetical situation illustrates the allocation process in a concrete manner. For this example, envision a situation where Plaintiff (*P*) is involved in two separate wrecks, minutes apart, which result in indivisible injuries. The first wreck was between *P* and Defendant *X* (*X*). The second wreck was between *P* and Defendant *Y* (*Y*). For the sake of argument, assume the judge has determined that the case can proceed to the jury as an indivisible injury case and that *P*'s total damages amount to $100,000.

When the case gets to the jury, the jury's first task is to determine whether the plaintiff has made out a prima facie case[78] against each defendant. In our hypothetical, the jury would find that each defendant acted negligently and that each defendant's negligent conduct was a cause in fact and a legal cause of an wreck. Once it is determined that an indivisible injury exists, and the indivisible injury doctrine is applied, the damages requirement of tying the specific injury to the specific event[79] is satisfied. Furthermore, the jury would find that *P* was guilty of some negligence in each of the wrecks. At this point, the jury is prepared to follow the steps outlined in *Piner*. The first step is fault allocation for the individual wrecks. In the first wreck, assume that the jury assigns 30% of the fault to *P* and 70% of the fault to *X*. In the second wreck, assume that the jury assigns 20% of the fault to *P* and 80% of the fault to *Y*.

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73. *See id.* at 917 ("We are aware that the factfinder in an indivisible injury case will be required to allocate a percentage of fault to each of several defendants and possible non-parties involved in more than one accident. This will perhaps be more difficult than the already difficult task of allocating percentages of fault in cases in which there has been a chain of cause and effect that produces injury in a single accident.").

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See supra* note 6 and accompanying text.

79. *See supra* note 7 and accompanying text.

In the second step, the judge would add together the percentages: 50% for *P*, 70% for *X*, and 80% for *Y*. Using the third step to divide by the number of wrecks, the final percentage for each party is 25% for *P*, 35% for *X*, and 40% for *Y*. Crafting the judgment in the fourth step by multiplying the final percentage by the total damages, *P* would be able to collect $35,000 from *X* and $40,000 from *Y*. The allocation process is illustrated in Table 1.

Table 1. Fault Allocation and Resulting Judgment 1

	Plaintiff (*P*)	Defendant *X* (*X*)	Defendant *Y* (*Y*)
Wreck 1	30%	70%	-
Wreck 2	20%	-	80%
Total Fault	50%	70%	80%
Final Percentage	25%	35%	40%
Judgment	-	**$35,000**	**$40,000**

In this scenario, the result is fairly straightforward. The trouble arises when some of the facts are changed—either the parties, the percentages, or both. The following permutations of the hypothetical illustrate those problems.

A. Bar-to-Recovery Provisions

During the comparative negligence revolution, states were required to confront the issue of whether plaintiffs would be able to recover in all scenarios—especially when plaintiffs were predominantly at fault for the incident. States took four different approaches to this problem, some through legislation and others through judicial decisions. The four approaches are: contributory negligence, pure comparative negligence, "modified (51%)" comparative negligence, and "modified (50%)" comparative negligence.

Only five jurisdictions retain the doctrine of contributory negligence, whereby there is no recovery if the jury finds that negligent conduct of the plaintiff was a cause in fact and a legal cause of the injuries.[80] The remaining jurisdictions adopted some form of comparative fault, whereby the fault of the negligent plaintiff is compared to the fault of the negligent defendant.

Fourteen jurisdictions have adopted a doctrine of pure comparative negligence.[81] Under this approach, a plaintiff is able to recover no matter

80. Williams v. Delta Int'l Mach. Corp., 619 So.2d 1330, 1333 (Ala. 1993); Nat'l Health Labs., Inc. v. Ahmadi, 596 A.2d 555, 557, 561 (D.C. 1991); Bd. of Cnty. Comm'rs. v. Bell Atl.-Md., Inc., 695 A.2d 171, 181 (Md. 1997); Yancey v. Lea, 532 S.E.2d 560, 563 (N.C. Ct. App. 2000); Litchford v. Hancock, 352 S.E.2d 335, 337 (Va. 1987). One jurisdiction imposes contributory negligence unless the plaintiff's negligence was "slight," in which case pure comparative negligence applies. S.D. CODIFIED LAWS § 20-9-2 (2004).

81. ALASKA STAT. § 09.17.060 (2010); ARIZ. REV. STAT. ANN. § 12-2506 (1956); Li v. Yellow Cab Co., 532 P.2d 1226, 1243–44 (Cal. 1975); FLA. STAT. ANN. § 768.81 (West 2011); KY. REV. STAT. ANN. § 411.182 (LexisNexis 2005); LA. CIV. CODE ANN. art. 2323 (2010); MICH. COMP.

what the allocation of fault percentage turns out to be.[82] If the fault was allocated 99% to the plaintiff and 1% to the defendant, the plaintiff would be entitled to recover 1% of his total damages.

The vast majority of states (thirty-two in total) adopted one of the two remaining forms of modified comparative fault. In modified (51%) systems, the plaintiff is barred from recovering any damages if the plaintiff is allocated more fault than the defendant(s).[83] Twenty-one states are currently modified (51%) systems.[84] In modified (50%) systems, the plaintiff is barred from recovery if the plaintiff is allocated 50% or more of the fault.[85] Eleven states are currently modified (50%) systems.[86]

The most common approaches to fault apportionment, modified systems, create difficulties in indivisible injury cases.[87] To illustrate this problem, we return to the hypothetical wreck, changing only the fault apportionment determinations by the jury. Assume that in wreck one, the jury finds that *P* was 5% at fault, and that *X* was 95% at fault. In the second wreck, assume that the jury finds that *P* was 80% at fault and that *Y* was 20% at fault.[88] The results of this fault allocation are illustrated in Table 2.

LAWS ANN. §§ 600.2959 (West 2000), 600.6306 (West 2010); MISS. CODE ANN. § 11-7-15 (1972); Gustafson v. Benda, 661 S.W.2d 11, 16 (Mo. 1983); Scott v. Rizzo, 634 P.2d 1234, 1239 (N.M. 1981); N.Y. C.P.L.R. § 1411 (McKinney 1997); R.I. GEN. LAWS § 9-20-4 (1997); S.D. CODIFIED LAWS § 20-9-2 (2004) (imposing comparative negligence if the plaintiff's negligence was "slight"); WASH. REV. CODE ANN. § 4.22.005 (West 2005). With respect to noneconomic damages, Michigan adjusts to a modified (51%) jurisdiction. *See infra* notes 83–84 and accompanying text.

82. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 cmt. a (2000).

83. *Id.*

84. CONN. GEN. STAT. ANN. § 52-572h (West 1958); DEL. CODE ANN. tit. 10, § 8132 (1999); HAW. REV. STAT. ANN. § 663-31 (LexisNexis 2007); 735 ILL. COMP. STAT. ANN. 5/2-1116 (West 1993); IND. CODE ANN. § 34-51-2-6 (West 2011); IOWA CODE ANN. § 668.3 (West 1998); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2000); MINN. STAT. ANN. § 604.01 (West 2010); MONT. CODE ANN. § 27-1-702 (2011); NEV. REV. STAT. § 41.141 (2009); N.H. REV. STAT. ANN. § 507:7-d (2010); N.J. STAT. ANN. § 2A:15-5.1 (West 2000); OHIO REV. CODE ANN. § 2315.33 (West Supp. 2011); OKLA. STAT. tit. 23, § 13 (2001); OR. REV. STAT. § 31.600 (2009); 42 PA. CONS. STAT. ANN. § 7102 (West Supp. 2011); Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West 2008); VT. STAT. ANN. tit. 12, § 1036 (2002); WIS. STAT. ANN. § 895.045 (West 2006); WYO. STAT. ANN. § 1-1-109 (2011). An amendment to the Illinois statute was deemed unconstitutional in *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1081–89 (Ill. 1997), so Illinois remains a modified (51%) jurisdiction.

85. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 cmt. a (2000).

86. ARK. CODE ANN. § 16-55-216 (2005); COLO. REV. STAT. ANN. § 13-21-111 (West 2005); GA. CODE ANN. § 51-12-33 (Supp. 2011); IDAHO CODE ANN. § 6-801 (2010); KAN. STAT. ANN. § 60-258a (Supp. 2010); ME. REV. STAT. ANN. tit. 14, § 156 (1964); NEB. REV. STAT. § 25-21,185.09 (2008); N.D. CENT. CODE § 32-03.2-02 (2010); McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992); UTAH CODE ANN. § 78B-5-818 (LexisNexis 2008); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (W. Va. 1979).

87. Undoubtedly, modified systems create difficult situations for any multiple-defendant case. The *Apportionment Restatement* cautions against barring recovery unless the plaintiff's fault rises to 50% in aggregate, not when the plaintiff's fault merely rises to 50% when compared with any single defendant. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 cmt. n (2000).

88. While this example may seem artificial at first glance, this situation is not too difficult to imagine. For instance, after the first wreck, *P* refuses medical treatment and returns to the road in a

Table 2. Fault Allocation and Resulting Judgment 2

	Plaintiff (*P*)	Defendant *X* (*X*)	Defendant *Y* (*Y*)
Wreck 1	5%	95%	-
Wreck 2	80%	-	20%
Total Fault	85%	95%	20%
Final Percentage	42.5%	47.5%	10%
Judgment	-	**$47,500**	**$10,000**

Assuming this judgment is rendered in a modified comparative fault jurisdiction, we are confronted with an interesting quandary when looking at the "Final Percentage" numbers. Using the *Apportionment Restatement* approach to multiple-defendant cases in modified comparative fault jurisdictions, the plaintiff would be permitted to collect from both defendants because the plaintiff's fault percentage did not rise to the requisite (50% or 51%) level to bar recovery. But can this possibly be correct? Should *P* really be permitted to collect $10,000 from *Y* when *Y*'s only involvement in the incident was 20% fault for one of the two wrecks? In a single-defendant suit between *P* and *Y*, there would be no question that *P* would be barred from recovering any damages from *Y*. Furthermore, if we allow *P* to recover from *Y* in this scenario, it would only be due to *P*'s hapless misfortune of being involved in two wrecks. From *Y*'s perspective, this result seems completely unjust. Under any normal situation, *Y* would be able to walk away not paying anything, but because *P* was in an earlier wreck (completely unrelated to *Y*), *Y* is now stuck paying part of the judgment.[89]

The seemingly logical solution to this problem would be to look at the fault percentages in each of the individual wrecks and make the bar-to-recovery decisions based on those comparisons. This solution, however, brings with it its own set of problems. The indivisible injury doctrine is sustained by the damages element in the case against each defendant being satisfied by the legal fiction that the two wrecks converged to create one injury.[90] If recovery is barred in one of those wrecks because the plaintiff was too much at fault, then should we still allow the plaintiff to use this wreck to satisfy the damages-causation requirement? If the theory behind the application of bar provisions is that we do not want plaintiffs to recover when they are "too negligent," it may not make sense to still allow the use of

questionable state in his severely damaged car, leading to the second wreck; or, *P* stops in the middle of an intersection for no reason, causing the second wreck.

89. This particular quandary could be solved by specific statutory language dictating exactly how the bar provision should work in multiple-defendant cases. But regardless of how the bar provision works, we will still be faced with a result that is far from ideal in the context of indivisible injury cases, because at least one of the difficulties expressed in this subpart would come to fruition.

90. *See supra* note 8 and accompanying text. A legal fiction exists because injuries suffered in two separate wrecks are, in a literal sense, divisible, even if they are deemed indivisible because we do not have the technological or medical expertise to divide them.

indivisible injury as a lynchpin of the case against the first defendant. This is largely a policy question for legislatures to resolve, but the dilemma further illustrates the difficult situation created when indivisible injury intersects with the bar-to-recovery provisions of comparative fault regimes.

This problem is not limited to the role defendants will play in the judgment; modified comparative negligence doctrines can have similar impacts on plaintiffs as well. Assume, for example, that we adjust the numbers slightly once again. In the first wreck, the jury apportions 20% of the fault to *P* and 80% of the fault to *X*. In the second wreck, the jury apportions 90% of the fault to *P* and 10% of the fault to *Y*. Table 3 illustrates the outcome of this fault apportionment.

Table 3. Fault Allocation and Resulting Judgment 3

	Plaintiff (*P*)	Defendant *X* (*X*)	Defendant *Y* (*Y*)
Wreck 1	20%	80%	-
Wreck 2	90%	-	10%
Total Fault	110%	80%	10%
Final Percentage	55%	40%	5%
Judgment	-	**$40,000**	**$5,000**

In a modified comparative fault jurisdiction, if the judge looks only at the final percentage, *P* is going to be barred from all recovery. This is the corollary to the example expressed in Table 2—here, the plaintiff is prohibited from recovering anything from *X*, even though *X* was 80% at fault for the first wreck. Contrarily, if the judge looks at the individual wrecks, the plaintiff is still going to be able to recover $40,000, even though the plaintiff was responsible for 55% of the overall situation.

The reason why these examples are unsettling lies in the legal fiction created by allowing an indivisible injury to satisfy the damages-causation requirement. The example illustrated in Table 2 highlighted the situation of possibly allowing a plaintiff to recover from a defendant that was only 20% responsible for a wreck that *may* have caused 0% of the plaintiff's specific injuries. Table 3 demonstrates the troublesome scenario where a plaintiff is possibly prohibited from recovering damages from a defendant who was 80% at fault for a wreck that *may* have caused 100% of the plaintiff's injuries.

How states choose to resolve this tension will be a policy question for the legislatures. Any path these states choose, however, leads to at least one of the two precarious situations described in Tables 2 and 3.[91] In a situation

91. Early on, the Wisconsin Supreme Court explained the paradox as it related to the indivisible injury doctrine as a whole—the statement is even more applicable when bar-to-recovery provisions are involved:

where the best choice that can be made is a choice between the lesser of two evils, the more prudent course may be to try to limit the situations in which the choice has to be made.

B. Nonparties

Another difficult situation arises in relation to nonparties. A number of comparative fault states permit the assignment of fault percentages to nonparties. While the procedure for this varies widely from jurisdiction to jurisdiction,[92] the basic premise is that fault is assigned to all persons who are at fault for a portion of the event, regardless of whether or not they are parties to the lawsuit.[93] The policy justification for this allocation is that the fault of a nonparty should not be imputed to either the plaintiff or the defendant when we have the ability to assign fault to the nonparty directly.[94]

The addition of nonparties into the fault allocation equation almost always results in harm to the plaintiff. If the jury "takes" fault points from the defendant to give to the nonparty, that will decrease the plaintiff's recovery. If the jury "takes" fault points from the plaintiff to give to the nonparty, it provides no help to the plaintiff because those fault points are going to a nonparty from whom the plaintiff cannot recover.[95] While the

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> Stated from a plaintiff's viewpoint, the problem is said to be whether the injured plaintiff shall recover nothing because he is unable to carry the impossible burden of proving the respective shares of harm caused by each tortfeasor, or whether a tortfeasor may be required to pay more than his theoretical share of the damages accruing out of a confused situation which his wrong has helped to create.
>
> Stated from a defendant's viewpoint, the question is whether the defendant will be forced to pay damages for injuries not shown to have been caused by his own wrongful act or by the act of another under such circumstances as to be attributable to him.

Caygill v. Ipsen, 135 N.W.2d 284, 290 (Wis. 1965) (quoting D.E. Buckner, Annotation, *Apportionment of Damages Involving Successive Impacts by Different Motor Vehicles*, 100 A.L.R.2d 16, 32 (1965)) (internal quotation marks omitted).

92. The intricate detail of the approaches to allocating fault to nonparties is outside the scope of this Note, but suffice it to say there is a wide variety of positions that jurisdictions have taken. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2506 (1956) (allowing fault allocation to nonparties "regardless of whether the person was, or could have been, named as a party to the suit"); Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 141 (Ark. 2009) (holding Arkansas's nonparty fault allocation statute unconstitutional); FLA. STAT. ANN. § 768.81 (West 2011) (allowing fault allocation to nonparties and requiring that their identity, if known, be revealed in the defendant's pleading); IND. CODE ANN. § 34-51-2-8 (West 2011) (permitting assignment of fault to nonparties but forbidding disclosure of a nonparty's immunity defense to the jury); KAN. STAT. ANN. § 60-258a (Supp. 2010) (requiring that a nonparty be "joined" in the action if fault is alleged); UTAH CODE ANN. § 78B-5-818 (LexisNexis 2008) (permitting fault allocation to a nonparty and imposing specific evidentiary rules for establishing an unidentified motorist in a traffic accident).

93. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 cmt. c (2000).

94. *See* Leonard E. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 903 (1984) (arguing that for a comparative fault system to be fair, it must allow for allocation of fault to all culpable actors).

95. However, in the few jurisdictions that retain joint and several liability for indivisible injury (or all) cases, the plaintiff is helped by the assignment of fault to nonparties because it potentially alerts him to new sources from which to collect (either through an additional suit or by adding the nonparties to the current suit).

introduction of these nonparties harms the plaintiff, there is little concern needed in most circumstances, because the plaintiff had the ability to sue these nonparties in the same lawsuit and made the decision not to do so.[96]

Assigning fault to nonparties also has significant implications for indivisible injury cases because the nonparty could be the only person other than the plaintiff involved in one of the incidents. For example, imagine that in our scenario, *Y* is a nonparty. If *P* pled the case as an indivisible injury case (i.e., planning to satisfy the damages-causation requirement with the indivisible injury rule), then presumably *P* would have the burden of establishing the negligence of *Y* in order to demonstrate that these two events both caused the indivisible injury.

The plaintiff, in order to satisfy the damages-causation requirement for the overall case, will be required to prove a full case of negligence against the nonparty. That nonparty is not there to defend himself, and yet a determination is still being made as to his fault. While the plaintiff will not be able to recover anything from this nonparty, there is still potential harm from having fault allocated without the party being there to defend himself. This concern is not as clear in the context of a car accident, but what if the incident in question was medical malpractice and the nonparty was a doctor?[97] Medical reputation is something that is very important to a doctor, and if the doctor is a nonparty, the jury may be asked to assign fault to the doctor even though the doctor was not there to defend himself.[98]

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96. There are occasionally procedural mechanisms that the plaintiff can use to join a nonparty to the lawsuit. *See, e.g.*, FED. R. CIV. P. 20(a)(2) (explaining the procedure to join a person as a defendant to a lawsuit). There is a multitude of reasons that a plaintiff could have made the choice to not sue or join a party, some of which could be outside the control of the plaintiff (e.g., immune from suit, judgment proof, jurisdictional issues), but ultimately the decision of whom to sue remains in the hands of the plaintiff.

97. Indivisible injury cases can, and do, include medical malpractice actions. *See In re* Liu, 290 S.W.3d 515, 523–24 (Tex. App.—Texarkana 2009, no pet.) (indicating that a medical malpractice action could proceed as an indivisible injury case); Santos v. Holzman, No. 13-02-662-CV, 2005 WL 167309, at *2 (Tex. App.—Corpus Christi Jan. 27, 2005, pet. denied) (mem. op.) (treating successive incidents of potential medical malpractice as indivisible injuries).

98. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 Reporters' Note cmt. c (2000) (noting that being assigned fault is a substantial concern, "especially for the nonparty who is a doctor and who may suffer significant reputational harm from a jury determination of professional negligence"). At least one court has held that these concerns rise to the level of a substantive due process violation. *See, e.g.*, Plumb v. Fourth Judicial Dist. Court, 927 P.2d 1011, 1021 (Mont. 1996) (holding that the portion of Montana's comparative fault statute allowing "apportionment of liability to parties who are not named in the lawsuit and who do not have an opportunity to appear and defend themselves" violated the Fourteenth Amendment's protection of substantive due process rights). *But see* Wall v. Cherrydale Farms, Inc., 9 F. Supp. 2d 784, 788–89 (E.D. Mich. 1998) (holding that fault apportionment to nonparties did not violate the due process or equal protection rights of the plaintiff). The *Wall* decision is distinguishable, however, because it was focused on the due process and equal protection rights of the *plaintiff*. *Wall*, 9 F. Supp. 2d. at 785–86. *Plumb* was concerned with the due process rights of both the plaintiff *and the nonparty*. *Plumb*, 927 P.2d at 1020. The *Apportionment Restatement* cites both of these cases in its discussion of allocation of fault to nonparties. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 Reporters' Note cmt. c (2000).

The *Apportionment Restatement* dismisses this concern; in the reporters' view, the interests of the third party are always adequately argued and represented by the diametrically opposed plaintiff and defendant.[99] The reporters' theory is that it will always be in the best interest of the defendant to have as much fault as possible allocated to the nonparty, thereby removing fault that could otherwise be allocated to that defendant; and it will always be in the best interest of the plaintiff to have as little fault as possible allocated to the nonparty because the plaintiff is unable to recover from a nonparty. This setup creates opposing interests, which, in the view of the reporters, results in the nonparty's interests being adequately protected.

While that scenario may be true in most circumstances, it is not true in the context of indivisible injury cases that occur in some comparative fault jurisdictions.[100] Once a nonparty *that is involved in a separate wreck* enters the picture in an indivisible injury case, the percentage of fault that is allocated to the nonparty may not matter, in any way, to either party. The presence of this second wreck will result in the total fault of the parties being divided by two, but how that fault is apportioned in the second wreck is irrelevant, as Table 4 illustrates. Here, Defendant *Y* from our example is now "Nonparty *Y*."

Table 4. Fault Allocation and Resulting Judgment—Nonparty Involved

Scenario A	**Plaintiff (*P*)**	**Defendant *X* (*X*)**	**Nonparty *Y* (*Y*)**
Wreck 1	10%	90%	-
Wreck 2	**80%**	-	**20%**
Total Fault	90%	90%	20%
Final Percentage	45%	45%	10%
Judgment	-	**$45,000**	-
Scenario B	**Plaintiff (*P*)**	**Defendant *X* (*X*)**	**Nonparty *Y* (*Y*)**
Wreck 1	10%	90%	-
Wreck 2	**20%**	-	**80%**
Total Fault	30%	90%	80%
Final Percentage	15%	45%	40%
Judgment	-	**$45,000**	-

99. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 Reporters' Note cmt. c (2000) (stating that the concern about a disproportionate share of responsibility being assigned to a nonparty "is obviated by the fact that the plaintiff and defendant have symmetrical and opposing incentives to present evidence regarding the appropriate share of comparative responsibility to be assigned to a nonparty").

100. At this juncture, it is important to note that the answer to the question in subpart II(A) (when to apply bar-to-recovery provisions) dictates in which jurisdictions the nonparty concern will be implicated. If the bar occurs by looking at only the "final percentage" number, then the nonparty concern will only be applicable in pure comparative fault regimes. This is true because all defendants would then always have an interest in seeing more fault points allocated to the plaintiff. However, if the bar analysis takes place at the individual-wreck level, then the nonparty concern is raised in all modified comparative fault jurisdictions as well.

As Table 4 illustrates, the amount of fault that is allocated to *Y* has no impact on the judgment. The indivisible injury doctrine, when used with a nonparty, risks assessing fault to that nonparty without adequate protection in the litigation.

The *Apportionment Restatement* further indicates that the reputations of nonparties can also be protected by the nonparties' ability to intervene.[101] In the indivisible injury context (or in any context, for that matter) the right to intervene does not provide sufficient protection because it forces nonparties to make an impossible choice. In an action where this individual was not even sued, he now must choose between remaining a nonparty and having his fault assessed without any opportunity to defend himself, or intervening in the action and subjecting himself to judgment. It is difficult to see how intervention does much to remedy the situation in which nonparties will find themselves.

Even less satisfying is the *Apportionment Restatement*'s position that "frequently a judgment, although not binding on a nonparty, may cause collateral harm to that nonparty."[102] The fact that there are other contexts where nonparties are collaterally harmed by litigation is not a particularly strong argument for apportioning fault to those parties. Furthermore, "collateral harm" is very different than an actual finding of fault and an assignment of how "bad" the nonparty acted in the context of the situation in suit. One would be hard-pressed to find another litigation context where the level of detail and extent of the judgment (and thereby, the level and extent of potential reputational harm) rises to the level of assigning a fault percentage to a nonparty—especially in the context of indivisible injury, where, as we have seen, the nonparty is not necessarily protected by the interests of the parties.

None of the *Apportionment Restatement* "protections" for nonparties are very satisfying when viewed through the lens of indivisible injury. But similar to the bar-to-recovery problem, there is not a wonderful solution that rectifies this concern. The only two alternatives available are: (a) allowing assignment of fault to nonparties and potentially risking all of the concerns discussed in this subpart; or (b) prohibiting the assignment of fault to nonparties, which may undermine the effectiveness of a comparative fault regime.[103] Because the problems created by the intersection of these two doctrines are largely structural, an effective solution is to limit the circumstances where the indivisible injury doctrine applies, therefore limiting the cases in which these scenarios arise.

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101. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 Reporters' Note cmt. c (2000); *see also* FED. R. CIV. P. 24 (explaining the procedure for intervention).

102. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 Reporters' Note cmt. c (2000).

103. *See supra* note 94 and accompanying text.

III. The Return to an Exception

As the problems highlighted in Part II illustrate, the best approach may be to take a narrow view of the situations in which the indivisible injury doctrine is applicable. This certainly does not mandate setting a hard rule as to when injuries take place too far apart. However, taking a narrow reading of the cases where the doctrine is applicable will help to stem the expansion of this doctrine. Additionally, the procedure that we use to determine when cases qualify for use of the indivisible injury doctrine can be tweaked to ensure that courts are actually in a position to restrict the doctrine to appropriate cases.

First, it is important for courts to read the indivisible injury doctrine narrowly, realizing that it is an *exception* to the rule that the plaintiff must connect specific injuries with a specific negligently caused event. The key aspect of the doctrine is "the impossibility of definitely attributing a specific injury to each collision."[104] There is an inverse relationship between the passage of time and the likelihood that this attribution is going to be possible—as more time passes, it becomes less likely that it is impossible to separate the injuries. Additionally, if a plaintiff actually has visited a specialist between the accidents, it also becomes more unlikely that the division is impossible.[105] It certainly is necessary, as the Supreme Court of Missouri aptly noted, to make the determination as to whether the doctrine applies according to the facts of each case.[106] But the principles discussed here at least give courts some guiding factors to consider. Furthermore, the adoption of language giving some teeth to the courts' ability to restrict claims employing indivisible injury will help to narrow the exception. Missouri has accomplished this with its reliance on the "same transaction of facts" language.[107] While the wisdom of this exact rule has been questioned,[108] having some sort of limiting language is crucial to restricting the use of this doctrine to cases where indivisible injury is serving as an exception and not merely as an alternative.

Second, it would be wise to look at the procedure for determining when the indivisible injury doctrine is appropriate. Admirably, the court in *Piner* indicated that a judge has the first opportunity to determine whether or not an

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104. Barlow v. Thornhill, 537 S.W.2d 412, 419 (Mo. 1976).

105. *See supra* note 55 and accompanying text; *see also* Smith v. Rodene, 418 P.2d 741, 742–43 (Wash. 1966) (stating that one of the plaintiffs received "immediate hospital treatment" following the first wreck and ultimately holding that there were "two independent torts and two separate harms").

106. *Barlow*, 537 S.W.2d at 419.

107. *See supra* notes 50–53 and accompanying text.

108. *See generally* Michael J. Kleffner, Note, *Successive Torts Resulting in a Single, Indivisible Injury: Plaintiffs, Prepare to Prove the Impossible*, 64 MO. L. REV. 1003 (1999) (arguing that requiring plaintiffs to prove that multiple injuries arose from the same "transaction" imposes an impossible burden on plaintiffs with indivisible injuries and invites arbitrary and problematic allocation of fault by triers of fact).

indivisible injury is present.[109] The burden of proof that the *Piner* court utilized, however, is extremely low. The judge can only forbid the doctrine from being used on a finding that there is "no evidence" to support the theory of indivisible injury.[110]

The judge should ideally have more leeway than is envisioned by the *Piner* court. Initially, the parties should try to decide the indivisible injury question through pre-trial practice (possibly through motions in limine), which advances a couple of important benefits. From a strategic perspective, it allows the entire case presented by each side to be consistent and coherent, because the parties will not be required to argue in the alternative on the issue of indivisible injury.[111] Additionally, resolving the indivisible injury question before the trial begins prevents any unnecessary jury confusion resulting from the plaintiff's theory changing during the course of the trial.

If the question does not get resolved in pre-trial practice, the next possible place for it to arise would be at directed verdict. At the conclusion of the plaintiff's case in chief, the defendant would move for directed verdict, claiming that the plaintiff had not proven a prima facie case of negligence. The defect in the case, the defendant would argue, is that the plaintiff has not satisfied the requirement of tying the particular injury suffered to the negligently caused event. The plaintiff would then counter by invoking the indivisible injury doctrine. At this point, the judge would be in the position to apply the law of that particular jurisdiction. This is where the two suggested reforms intersect—the judge will now apply whatever law is on the books. For example, if a jurisdiction uses language similar to "the impossibility of definitely attributing a specific injury to each collision,"[112] or "same transaction of facts,"[113] it is going to be easier for the trial judge to limit the applications of indivisible injury more than if a jurisdiction employs no restrictive language beyond "independent tortious conduct of two or more persons [being] a legal cause of an indivisible injury."[114] When applying the law, the judge will grant the motion for directed verdict if no reasonable juror could find that the injuries are indivisible under that jurisdiction's applicable law.[115] While this procedural posture is still deferential to the case

109. Piner v. Superior Court, 962 P.2d 909, 916 (Ariz. 1998).

110. *Id.*

111. If the indivisible injury question becomes a jury issue, the plaintiff will have to present evidence that the injuries are indivisible, and in the alternative that if the jury finds the injuries to be divisible, there is enough specific evidence to tie the injury to the event. Correspondingly, the defendant will have to negate both arguments.

112. Barlow v. Thornhill, 537 S.W.2d 412, 419 (Mo. 1976). For a discussion of the implications of this standard, see *supra* notes 54–55 and accompanying text.

113. Stevenson v. Aquila Foreign Qualifications Corp., 326 S.W.3d 920, 926 (Mo. Ct. App. 2010).

114. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § A18 (2000). For a discussion of the implications of this definition, see *supra* notes 31–32 and accompanying text.

115. *See* FED. R. CIV. P. 50(a)(1) (providing the standard for granting a judgment as a matter of law). It is possible that a plaintiff could proceed on two theories in its case in chief: alleging that

proceeding to the jury on an indivisible injury theory, it is more workable than what the court in *Piner* applied in stating that the jury must be instructed to apportion unless "there is *no evidence* on which to base a jury finding of inability to apportion."[116]

Following the judge's ruling, the case will be dismissed, proceed on the theory of separate injuries, or proceed to the jury with the possibility of an indivisible injury finding. The *Piner* court correctly identified the method in which the jury should be instructed if the case proceeds with the possibility of applying the indivisible injury doctrine. If the jury finds that all of the elements of the plaintiff's case have been proven, the jury is to attempt to separate the specific injuries stemming from each incident.[117] If the jury is unable to complete that separation, the indivisible injury doctrine will apply.[118] Then, the jury—if sitting in a comparative fault jurisdiction—will be required to apportion fault between the parties in each of the wrecks, and a judgment will be entered on that basis.[119]

This proposed approach to implementing the indivisible injury doctrine is ideal because it places the power to limit the doctrine in the hands of both the judge and the jury. The judge has the ability to either dismiss a case or force the injuries to be separated; the jury has the ability to separate the injuries on their own accord. Coupled with more detailed and restrictive language from the courts of last resort, this procedure can assist in restricting the indivisible injury doctrine to the cases in which it truly needs to be applied.

IV. Conclusion

The indivisible injury doctrine certainly has a place as an exception to the normal rule that plaintiffs must tie specific injuries to specific events. This Note has presented the justification for limiting the doctrine to the exceptional situations where deviation from that rule is needed. Bar-to-recovery provisions and nonparties provide two reasons to take a restrictive view of indivisible injury. The far-reaching impact of these issues was demonstrated by inventorying the states' various approaches to employing comparative negligence, barring plaintiffs from recovering, and allocating fault to nonparties.

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the injuries were indivisible, and therefore this rule should apply, but in the alternative that there still remains enough evidence to tie the specific injuries to the specific events caused by the defendants. In that situation, if the court determined that the indivisible injury "claim" could not survive directed verdict, it would force the plaintiff to proceed on the alternative theory, and would force the jury to apportion damages. This situation would most likely arise in the jurisdictions that retain joint and several liability for indivisible injury cases—the plaintiff would attempt to argue for the indivisible injury definition to try to get the benefit of a joint and several judgment.

116. Piner v. Superior Court, 962 P.2d 909, 916 (Ariz. 1998) (emphasis added).

117. *Id.*

118. *Id.*

119. *Id.*

While the evolution of this doctrine will vary greatly by jurisdiction, this Note has also presented a framework that can be used to allow both judges and juries to use the rule, rather than the exception, in cases in which it is available. Hopefully, the concerns associated with a broad view of the indivisible injury doctrine have been illuminated and judges will be cognizant of those concerns when making determinations about the applicability of the exception.

—Michael T. Raupp

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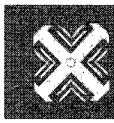

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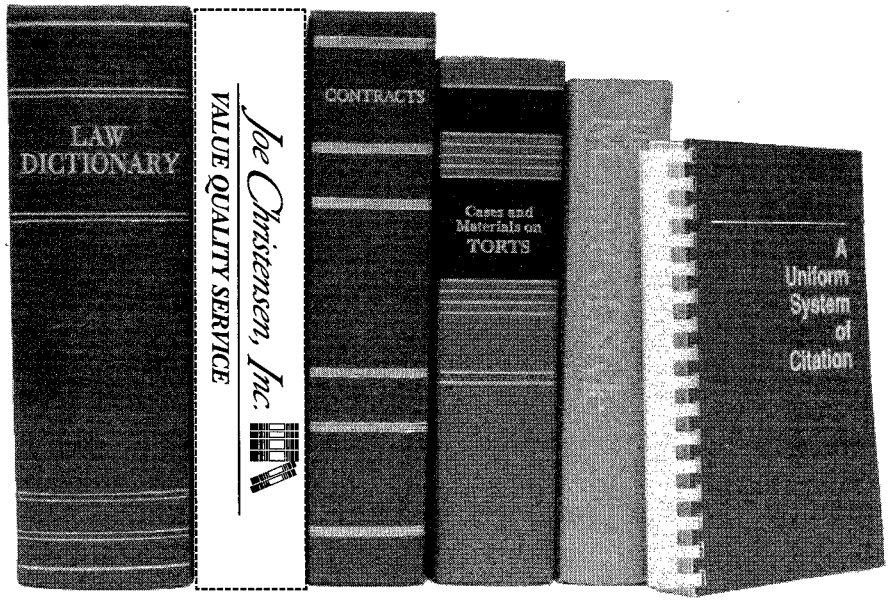

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