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Article

The Fragmentation of Standing

Richard H. Fallon, Jr.*

Introduction

Recent years have witnessed the accelerated fragmentation of standing into a multitude of varied, complexly related subdoctrines. Scarcely a Term goes by without the Supreme Court deciding one or more high-profile standing cases.[1] Yet the Court's decisions have done little to enhance

* Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School. I am grateful for comments by Tara Grove, Vicki Jackson, Dan Meltzer, and Adrian Vermeule, and by participants in a session of the Federal Courts Section of the American Association of Law Schools. Niko Bowie, Caitlin Halpern, and Max Rosen provided extraordinary research assistance.

1. *See, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2338, 2343 (2014) (finding that petitioners had standing to challenge an Ohio law criminalizing false statements made in connection with political campaigns based on a "credible threat" of enforcement); United States v. Windsor, 133 S. Ct. 2675, 2685–86 (2013) (upholding standing of the United States to seek review of a lower court decision mandating federal recognition of same-sex marriages licensed by states even though the United States agreed with the ruling on the merits); Hollingsworth v. Perry, 133 S. Ct. 2652, 2662–63 (2013) (denying standing to private litigants who argued they were authorized by California law to defend a state ballot initiative barring gay marriage that state officials declined to defend); Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147–50 (2013) (finding that various plaintiff organizations lacked standing to sue to enjoin national security wiretaps because their claims of injury rested on speculative fears and assumptions); Camreta v. Greene, 131 S. Ct. 2020, 2029–30 (2011) (upholding standing of government officials who had prevailed in the lower court on grounds of official immunity to challenge the lower court's ruling that their alleged conduct was nevertheless constitutionally prohibited); Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1440 (2011) (denying taxpayer standing to challenge allegedly unconstitutional tax credits to support religious institutions); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 144, 156 (2010) (upholding standing in a dispute regarding whether a plant entity should be subject to government regulation); Salazar v. Buono, 559 U.S. 700, 705–06, 712 (2010) (finding that, "[h]aving obtained a final judgment granting relief on his claims," petitioner had standing to challenge a transfer of land by the government in a case involving a religious symbol); Summers v. Earth Island Inst., 555 U.S. 488, 493–95 (2009) (denying standing to an organization that failed to demonstrate governmental regulations threatened imminent and concrete harm to identifiable members' interests); Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 285–86 (2008) (holding that assignees had Article III standing to pursue the assignor's claim for money owed); Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 592–93 (2007) (distinguishing an earlier case and denying taxpayer standing to challenge expenditures that benefited religious institutions because the expenditures were made by the federal executive branch out of general rather than special appropriations); Massachusetts v. EPA, 549 U.S. 497, 518 (2007) (finding that the state had a "special position and interest" sufficient to justify Article III standing that private challengers apparently would not possess); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 346 (2006) (holding that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers"). Although perhaps failing to achieve high profile status, the Court's 2014 decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377

clarity in this contentious corner of constitutional law. To be sure, the problem of standing's fragmentation did not begin with the Roberts Court. Since the Court began in the 1970s to characterize standing as turning almost entirely on a single, transsubstantive, tripartite test—requiring showings of injury in fact, causation, and redressability[2]—commentators have complained about inconsistencies and anomalies in application.[3] Over time, however, the grounds for objection and occasional befuddlement have grown, not diminished, as more controversial cases upholding standing have taken their places alongside more controversial decisions denying it.

The fragmentation of standing—as I shall presently seek to describe it—has regrettable current consequences, involving complexity and confusion, but it also contains a latent potential for positive development. However opaque or inadequate the Supreme Court's opinions, over time its cases have formed patterns. As I shall explain in considerable detail, those patterns are complex, and the Court has often failed to describe—much less

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(2014), may have important implications for the future of prudential standing doctrine. *See infra* notes 267and accompanying text.

2. *See infra* notes 19–22 and accompanying text.

3. *See, e.g.*, Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1154 (1977) ("[G]eneralized articulations of injury isolated from the claim invite charges of inconsistency, selectivity, and ad hoc decisionmaking; judicial expressions of skepticism about the merits, predictably commonplace in such standing decisions, provide further support for such charges."); Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 59 (1982) ("[U]nder the current formula the decision whether to grant standing necessarily implicates the merits of the case to some degree."); William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 286–87 (2013) (arguing that recent environmental standing decisions "respond to the Court's perception of political reality" and find standing for individuals and groups with "increasing political influence"); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380 (1973) ("[T]he criteria [for standing] have become confused and trivialized."); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 68–69 (1984) ("Observers, with just cause, regularly accuse the Supreme Court of applying standing principles in a fashion that is not only erratic, but also eminently frustrating in view of the supposed threshold nature of the standing inquiry." (footnote omitted)); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1743 (1999) ("The doctrinal elements of standing are nearly worthless as a basis for predicting whether a judge will grant individuals with differing interests access to the courts."); Robert J. Pushaw, Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's* The Structure of Standing, 65 ALA. L. REV. 289, 290 (2013) (complaining that during the era of the Burger and Rehnquist Courts, "[s]cholars were far better at deconstructing standing doctrine than proposing workable solutions" and "[m]ost often, they accused" the Justices of "manipulating standing rules to achieve the conservative goal" of denying relief to certain types of plaintiffs); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) ("[T]he law of standing lacks a rational conceptual framework. . . . Decisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim."); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1988) ("It is almost de rigueur for articles on standing to quote Professor Freund's testimony to Congress that the concept of standing is 'among the most amorphous in the entire domain of public law.'" (quoting *Judicial Review: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 498 (1966) (statement of Paul A. Freund, Professor, Harvard Law School))).

justify—them as such. But there are patterns nonetheless. Once identified, those patterns frequently exhibit an implicit normative logic that not only enables predictions, at least by legal experts, but also gives definition to the law that lower courts are obliged to apply. Although it is increasingly bootless to seek general rules governing standing to sue in federal court—at least beyond the frequently empty standards of injury, causation, and redressability—we can often achieve a good deal of clarity if we ask which rules apply to particular plaintiffs seeking particular forms of relief under particular constitutional or statutory provisions.[4]

Among my central ambitions in this Article is to describe both the negative or confusion-generating and the positive or pattern-reflecting aspects of the fragmentation of standing. But my aims go beyond description. Through its several parts, this Article also pursues analytical, diagnostic, and prescriptive goals. It aims to enhance understanding of standing doctrine and the dynamics that have given it its present shape. The Article also aspires to promote realistic doctrinal reform, tailored in recognition of the sometimes unyielding factors that have occasioned standing's fragmentation.

Part I provides relevant background. It offers a brief sketch of the modern history of standing doctrine, emphasizing the conceptual unity that the Supreme Court promised in the 1970s when it promulgated the apparently simple, tripartite, transsubstantive formula that makes standing invariably depend on injury in fact, causation, and redressability.

Part II—which develops the Article's central descriptive theses—traces the accelerating trend toward doctrinal fragmentation, especially in decisions of the Roberts Court. On the one hand, Part II demonstrates the failure of the Court's three-part formula to explain the results that it often reaches. On the other hand, it identifies complex patterns in the Court's decisions, albeit ones that the Court has not always identified as such. In effect, Part II furnishes a re-mapping of the present law of standing.

Part III advances the argument, which I expect to be uncontroversial, that the mixture of complexity and lack of articulate explanation that characterizes much of current standing doctrine is regrettable from all perspectives. But Part III marks a step along the path of inquiry, not an ultimate pronouncement. It lays the foundation for further diagnostic and prescriptive analysis.

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4. *Cf.* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 174, 213 (2012) (arguing that the Supreme Court tends to relax standing requirements in cases in which Congress has conferred procedural rights and maintaining more generally that "the most plausible way to reconcile the Court's inconsistent approaches to standing is to admit that . . . there are two tiers of the Case or Controversy Clause—one for procedural rights cases and one for traditional common law review").

Part IV draws heavily on insights from the social sciences in identifying multiple and overlapping causes for standing's increasing fragmentation. Some of these causes, it suggests, need to be accepted as fixed points that practical reform proposals must acknowledge and accommodate if they aim to be effective in the short term. Part V buttresses the findings of Part IV's diagnostic project by framing and answering the question of what makes standing, in comparison with other doctrines in constitutional law, distinctively prone to unacknowledged and therefore inadequately justified complexity.

Part VI articulates the modest agenda for reform to which prior Parts have pointed. Its suggestions operate along two tracks. Both the Supreme Court and legal scholars, Part VI argues, should embrace the fragmentation of standing law as a fact of life and, having done so, should attempt to identify how generally stated rules or principles apply differently in coherently distinguishable contexts. Building on the analytical model implicit in Part II's mapping of doctrinal categories, Part VI also emphasizes the value of critical perspectives and normative prescription within doctrinally Realist scholarship.

I. A Brief Sketch of History

To take the measure of standing's recently increasing fragmentation requires only a cursory account of the doctrine's contested emergence and evolution. Through most of American legal history, standing doctrine as we know it today—as a doctrine regulating who is a proper party to invoke the jurisdiction of a federal court to assert a legal claim or defense, either at trial or on appeal—did not exist.[5] Nevertheless, standing is not entirely a twentieth-century invention. In earlier periods, other doctrines—apparently reflecting widely shared understandings of the separation of powers and the limited reach of judicial authority—governed rights to sue in federal court.[6]

5. *See, e.g.*, RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 113–14, 146–48 (6th ed. 2009) [hereinafter HART & WECHSLER] (discussing the origins of modern standing doctrine); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168–97 (1992) (providing a detailed overview of the development of modern standing doctrine); Winter, *supra* note 3, at 1418–25 (tracing the history of the concept of "standing").

6. *See, e.g.*, Anne Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (noting that although "early American courts did not use the term 'standing' much," they "were well aware of the need for proper parties," they "regularly designated some areas of litigation as being under public control and others as being under private control," and "[w]ithin the area of private control . . . paid close attention to whether the correct private parties were before them").

In crude outline, one set of nineteenth-century doctrines structured actions by public officials to enforce the rights of the public.[7] Another set applied to actions by private litigants, including cases in which private plaintiffs sought protection against unlawful official action.[8] The latter doctrines reflected what commentators have called a "private rights" or "dispute resolution" model,[9] generally limiting judicial intervention to the kinds of disputes that the founding generation likely would have regarded as cases "of a Judiciary nature."[10] Within this model, the plaintiff typically alleged that the defendant had harmed an interest protected at common law.[11] Then, when the defendant answered by claiming that the challenged action had occurred pursuant to legal authority, the plaintiff would reply that any purported authorization violated the Constitution.[12] If so, the official would be liable on the same terms as any other tortfeasor.[13]

During the twentieth century, the private rights model came under strain from several directions. Contributing factors included the vast increase in governmental regulation, which created novel rights that many or even all members of the public shared; an expansion of constitutional rights to embrace liberty interests that had no analogues at common law, including those associated with voting and freedom from discrimination; and an emerging conception of rights as swords with which to make demands on the government, and not merely use as shields against coercive mistreatment.[14] In response, the Supreme Court began to develop doctrines that it expressly denominated as involving standing to govern the eligibility of parties to seek judicial enforcement of constitutional or statutory guarantees.

For current purposes, the signal developments in the law of standing occurred during the 1960s and 1970s. First, the Court purported to distinguish the question of standing from the question of whether a plaintiff

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7. *See id.* at 712 (indicating the central concern addressed by standing rules that "control of public rights should remain in the hands of public officials and that individuals should be free from arbitrary enforcement at the hands of private actors").

8. *See id.* ("Contrary to the critics' claims, however, the Supreme Court did see some standing issues as constitutional, expressing particular concerns about unwarranted judicial interference with the federal and state political branches.").

9. *See* HART & WECHSLER, *supra* note 5, at 72–73 (describing the dispute resolution model); Monaghan, *supra* note 3, at 1365–68 (introducing the private rights model as one of two models of judicial competence).

10. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911)) (internal quotation marks omitted).

11. HART & WECHSLER, *supra* note 5, at 113–14; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1717, 1723–24 (1975).

12. HART & WECHSLER, *supra* note 5, at 114.

13. *Id.*

14. *See id.* (describing various sources of strain on the concept of standing in the twentieth century).

had a legal right to relief on the merits. It did so most explicitly in *Association of Data Processing Service Organizations, Inc. v. Camp*,[15] in which it denied that standing required a legal authorization to sue.[16] Standing, the Court said, depended entirely on whether the plaintiff had suffered an injury to an interest "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[17] In doing so, the Court formulated the dependence of standing on injury as a demand for injury in fact.[18]

Before the end of the 1970s, however, the Court's development of standing doctrine took a more restrictive turn.[19] Emphasizing the function of standing in limiting the judicial role within the separation of powers, the Court increasingly insisted that, in order to support standing, an injury must be concrete and particularized.[20] It also began to recite a standing formula that linked the need for injury in fact to a demand that plaintiffs trace a line of causation between an alleged constitutional violation and the injury that they suffered.[21] The Court's three-part formula also separately required plaintiffs to demonstrate that a favorable judicial ruling would redress their injuries.[22]

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15. 397 U.S. 150 (1970).

16. *See id.* at 153 (rejecting a "legal interest" test for standing on the ground that it "goes to the merits" and asserting that "[t]he question of standing is different").

17. *Id.* at 153. *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014), subsequently characterized the zone of interests question as "an issue that requires [a court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."

18. *See Data Processing*, 397 U.S. at 152 ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.").

19. *See, e.g.*, Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976) (explaining that a federal court that ignores the requirement that a plaintiff must have "some personal interest" in the suit "overstep[s] its assigned role in our system of adjudicating only actual cases and controversies"); Warth v. Seldin, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."); United States v. Richardson, 418 U.S. 166, 179–80 (1974) (holding that "[t]he acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant" must satisfy the "fundamental tests" of standing).

20. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–23 (1974) (emphasizing concrete injury as an "indispensable element of a dispute" that requires the plaintiff to have suffered a particular harm); *Richardson*, 418 U.S. at 179–80 (demanding more than a generalized grievance to satisfy the standing requirement).

21. *See, e.g.*, *Simon*, 426 U.S. at 41–42 ("Art[icle] III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."); Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973) (requiring a nexus between the alleged injury and the claim to be adjudicated).

22. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984) (positing that relief must be likely to follow from a favorable decision); Los Angeles v. Lyons, 461 U.S. 95, 128 (1983) (determining that standing turns in part upon whether the plaintiff's injuries are likely to be redressed from a favorable ruling); *Simon*, 426 U.S. at 38 (asserting that to establish a personal stake in the outcome

Since the 1970s, the Court has recited its tripartite demand for injury in fact, causation, and redressability with mind-numbing regularity, as if all, or nearly all, of standing doctrine could be divided into just three parts.[23] The injury-in-fact prong of the test, devised to capture a prelegal conception of injury that did not vary with the merits of a plaintiff's claim,[24] bespeaks an especially strong aspiration to conceptual unity.[25] In point of fact, conceptual unity never existed. In framing the now familiar three-part test, the Burger Court sought not merely to describe then-existing law but also to rein in expansions of judicial power to oversee the operations of other branches of government that a majority of the Justices found disturbing.[26] According to Justice Lewis Powell, who was a leader in the drive to establish limits on standing, an important function of standing doctrine was to remove the judiciary from "amorphous general supervision of the operations of government."[27] In Justice Powell's formulation, the courts properly protect "the constitutional rights and liberties of individual citizens and minority groups" who suffer concrete harms from government action but should otherwise avoid "essentially head-on confrontations" with "the representative branches of government" about the wisdom and even the constitutionality of government policies.[28]

Given their aims, the Justices who initially propounded the three-part standing formula must have known that a number of cases that they apparently did not intend to overrule did not fit comfortably within the conceptual bounds that they laid out. For example, they made little effort to explain why the complaints of voters in one-person, one-vote cases did not constitute "generalized grievance[s]" that were too widely shared to support standing,[29] why municipal taxpayers suffered sufficient injury to have

of a case, a plaintiff must be able to show an injury that is "likely to be redressed by a favorable [judicial] decision").

23. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1442 (2011) (explaining that establishing standing requires an injury in fact, a causal link between the injury and the action complained of, and a likelihood that the injury will be redressed by a favorable decision); Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (same); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (same).

24. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1448 (1988) (noting that "the injury-in-fact test . . . suggested that there was a prelegal category of injuries").

25. For an argument that the aspiration to unity is especially problematic insofar as the Court has demanded injury in fact in cases alleging violations of private rights, see generally F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008).

26. *Id.* at 296–97.

27. United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring). On the role of Justice Powell in restricting standing doctrine, see generally Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1151 (2009).

28. *Richardson*, 418 U.S. at 188, 192.

29. *Compare* Reynolds v. Sims, 377 U.S. 533, 537 (1964) (implicitly conferring standing to similar voters in Alabama), *and* Baker v. Carr, 369 U.S. 186, 204–06 (1962) (upholding standing of plaintiff voters on behalf of all similarly situated qualified voters in Tennessee), *with*

standing to sue[30] but federal taxpayers did not[31] (except in a subset of Establishment Clause cases),[32] or why and when various governmental officials could sue in their official capacities even when they had suffered no personal hardship.[33] But if a conceptually unified standing doctrine always represented more of an aspiration than a reality, the Court of the 1970s plainly regarded that aspiration as one that it both could and should realize more fully.

II. Standing Under the Roberts Court

In reflecting on the implicit promise of the Supreme Court to subsume all standing analysis under a single, tripartite, transsubstantive formula, one might well begin with Robert Burns's much quoted observation that "[t]he best laid schemes o' *Mice* an' *Men* /Gang aft agley"[34] and, from there, trace the development of standing doctrine from the 1970s through the present day as an illustration of that theme. For reasons that will shortly become apparent, the project of creating a unitary and principled doctrinal structure built around the concepts of injury in fact, causation, and redressability was doomed from the beginning. Here, however, I shall focus nearly exclusively on the handiwork of the Roberts Court. For those who expected the Chief Justice's concern with issues of judicial role and his commitment to high standards of judicial craftsmanship to lead to a more principled integration of standing doctrine, the record of the Roberts Court has occasioned considerable disappointment.

Far from becoming more elegant and unified, standing doctrine has grown more complex and variegated with nearly every recent Supreme Court Term. Part of the complexity arises from the failure of the Court's continuing project of divorcing determinations of injury in fact from substantive judgments concerning the protections that particular provisions

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Richardson, 418 U.S. at 176, 179–80 (withholding standing from an individual taxpayer with a generalized grievance about CIA expenditures).

30. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947) (permitting appellant to bring suit in state court "in his capacity as a district taxpayer").

31. *See, e.g.*, *Richardson*, 418 U.S. at 175 (denying respondent standing to bring complaint in federal court when standing was based on his status as a taxpayer); Massachusetts v. Mellon, 262 U.S. 447, 487 (1923) (characterizing a single taxpayer's "interest in the moneys of the Treasury" as "minute and indeterminable" and therefore not a basis for standing).

32. *E.g.*, Flast v. Cohen, 392 U.S. 83, 105–06 (1968). For discussion of *Flast*, see *infra* notes 45–61 and accompanying text.

33. *See, e.g.*, Coleman v. Miller, 307 U.S. 433, 437 (1939) (determining members of a state legislature had standing to bring suit to determine whether a Lieutenant Governor had authority to cast the deciding vote on a resolution); Georgia v. Tenn. Copper Co., 206 U.S. 230, 236–37 (1907) (permitting the State to bring suit in its capacity as "*quasi*-sovereign" to protect the State's forests and air).

34. ROBERT BURNS, *To a Mouse*, *in* POEMS CHIEFLY IN THE SCOTTISH DIALECT 138, 140 (Woodstock Books 1991) (1786).

of law confer.[35] Additional sources include the myriad of issues that emerge when governments and their officials, as distinguished from private plaintiffs, bring suits or otherwise seek legal redress.[36] Nor is this the end. The Roberts Court has also struggled with issues involving congressional authority to confer standing and, separately, with the conundrums presented by relative probability and uncertainty concerning future action and the harms that it might cause.[37] The Court has failed to develop a unitary formula for determining how likely it must be that a threat will ripen into a more palpable injury, or that a judicial ruling would redress an injury or threat thereof, in order for a plaintiff to have standing.[38]

In saying that standing doctrine has grown progressively more fragmented, I should be clear about the nature of my claim. My thesis is not the familiar, reductionist one that the secret to understanding the Supreme Court's standing cases lies more in politics or ideology than in law and that the Justices recurrently manipulate standing doctrine to promote an ideological or political agenda through illicit means.[39] To the contrary, while acknowledging that judicial ideology influences standing determinations in some cases in sometimes unavoidable ways, I shall assume throughout that standing doctrine is worth taking seriously. In taking doctrine seriously, however, I shall train my attention as much on what the Court does as on what it says. When I believe that the Court's proffered explanations for particular outcomes are misleading or uninformative, I shall sometimes advance better, more persuasive, and more accurately descriptive grounds for distinctions that the Court recurrently draws. My guiding assumption is that it is the obligation of lower courts and an important function of scholars to develop interpretations of Supreme Court precedents that furnish coherent guidance for deciding future cases as a matter of law. Consistent with this assumption, my thesis holds that the Court's standing decisions form discernible patterns and are often capable

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

36. *See infra* subpart II(B).

37. *See infra* subpart II(C).

38. *See infra* subpart II(D).

39. *See, e.g.*, Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 326 (2002) ("[M]uch of the rationale for access to the courthouse likely lies in ideology."); Pierce, *supra* note 3, at 1743 (proclaiming that the votes of Supreme Court Justices on cases involving standing have been predictable and clearly split along ideological lines); Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1015–16 (2011) ("[I]nconsistency [in standing doctrine] leads to suspicion that decisions on standing in close cases may be guided more by the courts' instincts toward the merits than by an independent determination of the parties' eligibility to invoke jurisdiction."); Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 121 (2011) ("[T]he inherent indeterminacy of standing law can be understood as reflecting an unstated desire to protect racial and class privilege, which is accomplished through the dogma of individualism, equal opportunity (liberty), and 'white innocence.'").

of determining doctrinally correct answers to future standing cases—but that the lines that need to be drawn to portray standing doctrine as ordered rather than disordered have grown increasingly numerous and complex over time. By "fragmentation," I mean the division of standing law into multiple compartments, most of which may be intelligible in themselves, but that reflect more conceptual and normative diversity than unity.

In proceeding as I do, I draw inspiration from a strand of Realist legal scholarship that I shall describe as "doctrinal Realism."[40] This variety of Realism emphasizes a "distinction between the forms of words that judges use in laying down and describing legal doctrine and the kinds of facts that actually drive judicial decisions" in practice.[41] Realists in this tradition maintain that the law, if rightly understood, typically makes sense in its own terms, but they insist that one should not be mesmerized by the bare words of judicial opinions, abstracted from the facts that evoked them.[42]

A. *Standing and the Merits*

In a brilliant article published in 1988, then-Professor William Fletcher argued that the question of whether a plaintiff has standing is conceptually inseparable from the question of whether a plaintiff has a right to sue to enforce the duties that a particular statutory or constitutional provision imposes.[43] Since then, experience has taught that the concept of injury is

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40. For elaboration of this notion, see generally Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105 (2014).

41. *Id.* at 106.

42. *See, e.g.*, Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 447 (1930) (arguing that there are "real 'rules' and rights" distinct from "paper rules and rights"); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223 (1931) [hereinafter Llewellyn, *Some Realism About Realism*] (discussing Realists who seek to discern the "tangibles which can be got at beneath the words"); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 (1928) ("Not the judges' opinions, but which way they decide cases will be the dominant subject matter of any truly scientific study of law."); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (noting distinctions "between the rules that purport to govern the relations of man and man and those that in fact govern them").

43. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988). Fletcher wrote:

> If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it. If a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it. Congress should have some, but not unlimited, power to grant standing to enforce constitutional rights. The nature and extent of that power should vary depending on the duty and constitutional clause in question.

Id. at 223–24. For an earlier development of similar insights, see generally Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

too vague and malleable for the idea of injury in fact to have much analytical bite in many cases. Try as the Supreme Court might to conceptualize standing injury as injury in fact, its decisions reveal that whether a plaintiff has suffered a judicially cognizable injury—and, if so, whether the relief sought is sufficiently likely to redress it to support standing—frequently turns on the provision of law under which a plaintiff seeks relief. As a result, a body of doctrine that aspires to trans-substantivity instead fractures along substantive lines in important, identifiable categories of cases.

1. The Establishment Clause.—The fragmentation of standing doctrine nowhere manifests itself more visibly than in suits to enforce the Establishment Clause. For practical purposes, one rule upholds the standing of taxpayers seeking to enjoin direct congressional expenditures in support of religion; a second denies standing to taxpayers who object to the use of general appropriations and the provision of tax credits to support religion; and a third governs challenges to public displays of religious objects.

To understand the current state of the law, one must recognize that the Roberts Court inherited a seemingly anomalous doctrine of taxpayer standing to enforce the Establishment Clause. Ordinarily, the Court has held, any purported injury that state or federal taxpayers suffer when the government spends tax dollars illegally or even unconstitutionally is too small, uncertain, or generalized to support standing.[44] But in 1968, in *Flast v. Cohen*,[45] the Warren Court made an exception for Establishment Clause cases.[46] Apparently conscious of the novelty of its ruling, and perhaps intending its recognition of taxpayer standing as an experiment, the *Flast* Court predicated taxpayer standing on the satisfaction of a "double nexus" test:

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.[47]

On the facts before it, the *Flast* Court found the first requirement to be met by the link between taxpayer status and exercises by Congress of the taxing and spending power.[48] The second nexus existed between taxpayer

44. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347–49 (2006) (acknowledging the existence of a "general prohibition on taxpayer standing").

45. 392 U.S. 83 (1968).

46. *Id.* at 105–06.

47. *Id.* at 102.

48. *Id.* at 103.

status and the Establishment Clause.[49] According to the Court, that provision addressed a concern among the founding generation that "the taxing and spending power would be used to favor one religion over another or to support religion in general."[50]

By a series of divided votes, the Roberts Court has maintained the *Flast* exception to the general rule that pocketbook injuries to federal taxpayers are too small, generalized, and uncertain to support standing, but it has narrowed that exception nearly to its facts. In *Hein v. Freedom from Religion Foundation, Inc.*,[51] which arose from efforts by the Executive Branch to ensure that faith-based community groups were not excluded from federal expenditure programs,[52] Justice Alito sought to distinguish *Flast* on the tenuous ground that the money involved in the case before the Court came from a general appropriation for the Executive Branch, not a special enactment to support an establishment of religion.[53] Concurring in the judgment, two Justices would have overruled *Flast*.[54] According to Justice Scalia, a principled application of the injury-in-fact requirement required what he characterized as a "Wallet Injury."[55] In his view, the plaintiff had alleged only a "Psychic Injury," which he thought could not suffice.[56] Four other Justices called for what they regarded as a fair application of *Flast*: if the expenditure in *Flast* injured objecting taxpayers, then so did the outlay of federal money in *Hein*.[57] The doctrinal line that emerges from *Hein* is serviceably clear. Taxpayers have standing to challenge special appropriations to support religious institutions but not payments to support religion that the government makes out of generally available revenues. Yet six Justices agree that this distinction makes no principled sense—a position with which I agree.

Again purporting to distinguish *Flast*, the Court still further limited its precedential reach in *Arizona Christian School Tuition Organization v. Winn*.[58] In that case, a 5–4 majority, in an opinion by Justice Kennedy, held that support for religious education effected through tax credits, as distinguished from direct expenditures, did not injure the challengers in their capacity as taxpayers.[59] In my view, the Court's distinction between tax levies, which inflict injury, and tax credits, which do not, borders on the

49. *Id.*
50. *Id.*
51. 551 U.S. 587 (2007).
52. *Id.* at 593–94 (plurality opinion).
53. *Id.* at 605.
54. *Id.* at 618, 635–37 (Scalia, J., concurring).
55. *Id.* at 619–20.
56. *Id.* at 619, 633.
57. *Id.* at 637, 639 (Souter, J., dissenting).
58. 131 S. Ct. 1436 (2011).
59. *Id.* at 1439, 1447–49.

logically unsupportable. As Justice Kagan pointed out in dissent, it is nearly impossible to think that the mechanism by which the government provides financial support to religious education should matter to whether an aggrieved taxpayer can assert an Establishment Clause violation:

> Suppose a State desires to reward Jews—by, say, $500 per year—for their religious devotion. Should the nature of taxpayers' concern vary if the State allows Jews to claim the aid on their tax returns, in lieu of receiving an annual stipend?[60]

Although Justice Kagan's question seems to me to permit only a negative answer,[61] what matters most for present purposes is the fragmentation within standing doctrine that the Roberts Court's attempts at line drawing have produced. We have one rule for taxpayer standing to enforce the Establishment Clause in *Flast* and cases that are nearly factually identical to it; another applies to cases in which challengers rely on their status as taxpayers to sue to stop government support of religious institutions effected through general appropriations and tax credits.

Even more puzzling, we apparently also have another set of rules to govern standing in Establishment Clause cases in which aggrieved parties forgo reliance on taxpayer status when challenging government support for religion through, for example, displays of crèches and the Ten Commandments and officially sponsored prayers during sessions of governmental bodies. In the latter category of cases, the Court has historically treated standing as largely unproblematic. More specifically, it proceeded directly to the merits, without pausing to conduct a standing inquiry, in *Lynch v. Donnelly*[62] and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,[63] both of which involved crèches on public property;[64] in the Ten Commandments cases of *Van Orden v. Perry*[65] and *McCreary County v. ACLU of Kentucky*;[66] in *Capitol Square Review & Advisory*

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60. *Id.* at 1457 (Kagan, J., dissenting).

61. For the majority, Justice Kennedy reasoned:

> [T]ax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are "extracted and spent" knows that he has in some small measure been made to contribute to an establishment in violation of conscience.... When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment.... And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.

Id. at 1447 (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)). For an unsparing critique of *Winn*, see generally William P. Marshall & Gene R. Nichol, *Not a* Winn-*Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215.

62. 465 U.S. 668, 672–73 (1984).

63. 492 U.S. 573, 589–94 (1989).

64. *Cnty. of Allegheny*, 492 U.S. at 578; *Lynch*, 465 U.S. at 670–71.

65. 545 U.S. 677, 681 (2005) (plurality opinion).

66. 545 U.S. 844, 850 (2005).

Board v. Pinette,[67] in which the Ku Klux Klan was permitted to maintain a Latin cross on the Ohio Statehouse grounds;[68] and, most recently, in *Town of Greece v. Galloway*,[69] in which aggrieved citizens challenged the Town's practice of commencing meetings of its governing board with religious invocations by invited clergy.[70]

To my mind, it is not obvious how to conceptualize the injury that an aggrieved citizen suffers in cases such as these.[71] Nor is it obvious why the injury that a complainant experiences in that kind of case, however conceptualized, does not also exist when a plaintiff sues to stop governmental expenditures of money or provision of tax credits to support religious education.

Questions such as these received extensive briefing in *Salazar v. Buono*,[72] which originated as a challenge to the maintenance on federal land of a Latin cross erected by the Veterans of Foreign Wars as a tribute to fallen soldiers.[73] But the case came before the Roberts Court in a complicated procedural posture. In earlier stages of the litigation, Buono had obtained a lower court injunction requiring removal of the cross, and the lower court's judgment, which included a determination that Buono had standing to sue, became final when the government failed to appeal.[74] By the time the dispute reached the Supreme Court, the government, pursuant to an Act of Congress, had transferred the property on which the cross stood to private ownership in exchange for another parcel of land.[75] When Buono challenged that transfer, which left the cross in place, the government argued that he lacked standing because he had suffered no injury personal to him.[76]

Despite the importance of the question whether Buono or anyone else would have standing to challenge an initial display of a cross on public

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67. 515 U.S. 753 (1995).

68. *Id.* at 758, 770. For a review of the standing analysis, or lack thereof, in these cases, see generally Ashley C. Robson, *Measuring a "Spiritual Stake": How to Determine Injury-in-Fact in Challenges to Public Displays of Religion*, 81 FORDHAM L. REV. 2901, 2925–28 (2013).

69. 134 S. Ct. 1811, 1818 (2014).

70. *Id.* at 1816–17.

71. The lower courts are divided about the standards that plaintiffs must satisfy to have standing to challenge such displays. *See* Robson, *supra* note 67, at 2932–36 (contrasting a "direct and unwelcome contact" standard employed by the Eight Circuit with an "altered behavior" standard used by the Seventh Circuit). Some have held that direct and unwelcome contact with a religious display constitutes an actionable injury. *E.g.*, Red River Freethinkers v. City of Fargo, 679 F.3d 1015, 1024 (8th Cir. 2012); ACLU of Ohio Found. v. DeWeese, 633 F.3d 424, 429–30 (6th Cir. 2011). The Seventh Circuit demands a showing of altered behavior. Freedom from Religion Found., Inc. v. Zielke, 845 F.2d 1463, 1468 (7th Cir. 1988).

72. 559 U.S. 700 (2010).

73. *Id.* at 706–07 (plurality opinion).

74. *Id.* at 708–09.

75. *Id.* at 709–10.

76. *Id.* at 711.

property—or, presumably, the initial display of crèches or reproductions of the Ten Commandments—a splintered Court avoided it. Instead, the plurality and principal dissenting opinions agreed that after the judgment granting Buono an injunction became final, he had standing to enforce it.[77] Justices Scalia and Thomas would have denied standing, but they, too, avoided the largest question.[78] "[E]ven assuming that being 'deeply offended' by a religious display (and taking steps to avoid seeing it) constitutes a cognizable injury," Justice Scalia wrote with evident skepticism, "Buono has made clear that *he* will not be offended."[79]

With a divided Roberts Court having avoided the most fundamental questions about standing to challenge public religious displays in *Salazar*, there can be no doubt that the doctrine governing standing to sue under the Establishment Clause is fragmented. Nor can there be reasonable doubt that the doctrine currently draws distinctions, whether stable or unstable, that are very difficult to rationalize.

2. The Equal Protection Clause.—Whatever Justice Scalia may believe to be the correct rule under the Establishment Clause, the Supreme Court does not always demand a redressable "Wallet Injury"[80] to ground standing—nor does Justice Scalia think that it ought to do so—under the Equal Protection Clause. The most instructive case predates the Roberts Court, but it establishes a precedent to which the Roberts Court would surely adhere. In *Heckler v. Mathews*,[81] Congress had provided higher social security benefits for some retired women than for men who had similar patterns of earnings.[82] A statutory severability clause mandated that if a court found that the differential violated equal protection principles, affected women would receive the amount paid to men.[83] Accordingly, the men who sued to challenge the disparity could not achieve a financial benefit.[84] In Justice Scalia's terms, they suffered no wallet injury. Nevertheless, the Court upheld standing.[85] The plaintiffs' injury, it reasoned, consisted not in the simple deprivation of benefits but in the deprivation of a right to have benefits "distributed according to classifications which do not without sufficient justification differentiate

77. *Id.* at 711–12; *id.* 738 n.2 (Stevens, J., dissenting).
78. *Id.* at 729–30 (Scalia, J., concurring).
79. *Id.* at 733.
80. *See supra* note 55 and accompanying text.
81. 465 U.S. 728 (1984).
82. *Id.* at 731.
83. *Id.* at 734.
84. *Id.*
85. *Id.* at 738.

. . . solely on the basis of sex."[86] The Court continued: "[D]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' . . . can cause serious noneconomic injuries" that are cognizable and provide a basis for standing under the Equal Protection Clause.[87]

The Court has upheld standing under reasoning that similarly ties judicially cognizable injury to the substantive guarantees of the Equal Protection Clause in cases challenging affirmative action programs. Indeed, the Roberts Court did so by implication in *Fisher v. University of Texas at Austin*,[88] in which it recited that the plaintiff was a Caucasian who had applied to an institution with a race-based affirmative action policy but made no express mention of standing issues at all.[89] A standing question had arisen in the earlier case of *Regents of the University of California v. Bakke*.[90] Emphasizing the requirements of standing doctrine that a plaintiff show both an injury and a high probability that a favorable decision would redress that injury, amici argued that even if the Court held a challenged affirmative action program unconstitutional, the plaintiff Alan Bakke still might not gain admission to the University of California at Davis Medical School.[91] But the Court held that Bakke suffered redressable injury from the university's denial to him of the opportunity to compete for every slot in its entering class.[92] A subsequent case made the Court's rationale even more explicit: "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of [a barrier that makes it more difficult for the members of a group to obtain a benefit], not the ultimate inability to obtain the benefit."[93]

Although this reasoning seems correct to me, it clearly depends on the substantive guarantees of the Equal Protection Clause and, accordingly, requires distinctions within standing doctrine between cases in which the imposition of a barrier to receiving a benefit will, and those in which it will not, support standing. To cite just one recent example, in *Summers v. Earth Island Institute, Inc.*,[94] the Roberts Court held that members of an environmental organization lacked standing to challenge Forest Service regulations that imposed an obstacle to their achieving environmental

86. *Id.* at 737 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 647 (1975)) (internal quotation marks omitted).

87. *Id.* at 739 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

88. 133 S. Ct. 2411 (2013).

89. *Id.* at 2415, 2417.

90. 438 U.S. 265 (1978).

91. *Id.* at 280 n.14 (opinion of Powell, J.).

92. *Id.* at 281 n.14.

93. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).

94. 555 U.S. 488 (2009).

outcomes that they sought.[95] According to the Court, the Forest Service's challenged policies at most imposed a generalized injury that was insufficiently concrete and personalized to support standing.[96]

3. *National Security Policies.*—The Roberts Court's recent decision in *Clapper v. Amnesty International USA*[97] suggests that the requirements of standing may vary, not just with the provision of the Constitution under which a plaintiff brings suit, but also with the nature of the governmental action or policy that a plaintiff seeks to challenge. The plaintiffs in *Clapper* were U.S. citizens residing in the United States who sought judicial invalidation of an amendment to the Foreign Intelligence Surveillance Act.[98] The amendment permitted the Attorney General and Director of National Intelligence, with the authorization of the Foreign Intelligence Surveillance Court, to direct the interception of communications involving non-Americans "reasonably believed to be located outside the United States [in order] to acquire foreign intelligence information."[99] The plaintiffs alleged that their personal and professional relationships with parties abroad made it likely that their communications would be intercepted under the revised statute.[100] Writing for the Court, Justice Alito denied standing based on the plaintiffs' failure to establish that an injury in fact was "certainly impending" in light, among other things, of the opacity of the Government's criteria for seeking foreign-security wiretaps.[101] He concluded, in addition, that the plaintiffs had not adequately established that any injury they might suffer was or would be causally traceable to the challenged amendment since "[t]he Government has numerous other methods of conducting surveillance, none of which is challenged here."[102]

As four dissenting Justices pointed out, although some of the Court's past decisions had referred to a need for "certainly impending" injury, future injury is seldom "absolutely certain," and the "federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely . . . to take place."[103] Because the plaintiffs had averred that their

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95. *Id.* at 493–97.

96. *Id.* at 496–97.

97. 133 S. Ct. 1138 (2013).

98. *Id.* at 1142.

99. *Id.* at 1144 (quoting 50 U.S.C. § 1881a (2006 & Supp. V 2011)) (internal quotation marks omitted). The amendment required minimization procedures to restrict the collection of information about persons within the United States. *Id.* at 1145.

100. *Id.* at 1145, 1147.

101. *Id.* at 1143 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)) (internal quotation marks omitted).

102. *Id.* at 1149.

103. *Id.* at 1155, 1160 (Breyer, J., dissenting) (emphasis omitted).

work as lawyers, scholars, and journalists required them to communicate with people abroad whom the government believed to be affiliated with terrorist groups, the dissenters thought the likelihood of injury large enough to permit standing.[104]

With the majority and dissenting opinions citing different cases to support their judgments about the appropriate standard—and with even the majority acknowledging in a footnote (which I shall further discuss below) that "[o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about"[105]—an additional distinction that Justice Alito cited in his majority opinion takes on enhanced significance: "[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs."[106]

In light of the supporting authority that the Court cited,[107] among other cases, that assertion seems to me to be unquestionably true. If I am right that it is also material to the Court's holding, *Clapper* illustrates another line of fragmentation within the Roberts Court's standing doctrine[108] by making national security concerns relevant to standing inquiries.[109] Corroborating evidence for this hypothesis comes from the Court's 2014 decision in *Susan B. Anthony List v. Driehaus*,[110] which upheld the standing of two advocacy groups to seek an injunction against enforcement of a statute alleged to violate the First Amendment by forbidding knowingly false statements about political candidates.[111] Anticipating the possibility of enforcement actions in future campaigns, the Court unanimously ruled that

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104. *Id.* at 1157–60.

105. *Id.* at 1150 n.5. The majority went on to say that it had sometimes "found standing based on a 'substantial risk' that the harm will occur." *Id.* (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 153 (2010)). The footnote then continued: "[T]o the extent that the 'substantial risk' standard is relevant and is distinct from the 'clearly impending' requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here." *Id.*

106. *Id.* at 1147.

107. *Id.* (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209–11 (1974); United States v. Richardson, 418 U.S. 166, 167–70 (1974); Laird v. Tatum, 408 U.S. 1, 11–16 (1972)).

108. For a pre-*Clapper* argument that lower court decisions have created confusion and incoherence by imposing a more restrictive standing standard for plaintiffs in surveillance cases than for other plaintiffs asserting probabilistic injuries, see generally Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. REV. 71 (2009).

109. *See also* Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1297–98 (2013) (suggesting that, based on language in the Court's opinion, "were a case with similar probabilities to arise outside the context of intelligence gathering and foreign affairs, and where the behavior of an independent decisionmaker were not implicated, there might in fact be standing").

110. 134 S. Ct. 2334 (2014).

111. *Id.* at 2338–40, 2243.

"a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in . . . conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'"[112] When *Susan B. Anthony List* is juxtaposed with *Clapper*, little room for doubt exists that a credible threat of prosecution for violating a federal statute (on which the plaintiff relied for standing in the former) is easier to establish than a credible threat of being subjected to allegedly unconstitutional surveillance related to national security (which the plaintiffs unavailingly claimed to face in the latter). The *Susan B. Anthony List* opinion blandly described *Clapper* as having recognized that "[a]n allegation of future injury may suffice [for standing] if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur."[113]

4. Standing to Assert Procedural Challenges.—In many cases, the redressability prong of the standing inquiry requires plaintiffs to demonstrate that the relief they seek would almost certainly alleviate their injuries. As the Roberts Court has acknowledged, however, it makes an exception for cases involving "procedural rights."[114]

Allen v. Wright[115] exemplifies the Supreme Court's usual, stringent stance with regard to redressability. In *Allen*, the Court acknowledged that plaintiffs seeking to challenge Internal Revenue Service policies involving the award of tax-exempt status to racially discriminatory private schools had asserted a cognizable injury in their children's "diminished ability to receive an education in a racially integrated school."[116] Nevertheless, the majority denied standing on the ground that it was "entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies."[117]

If applied across the board, this exacting interpretation of standing's redressability requirement would preclude standing in virtually all cases in which a plaintiff complains that the government violated procedural rights when making a decision adverse to the plaintiff's concrete interests. Consider, for example, cases in which a plaintiff alleges that an

112. *Id.* at 2342 (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

113. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5 (2013).

114. Massachusets v. EPA, 549 U.S. 497, 517–18 (2007) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992)). For extended discussion of the Court's differential treatment of procedural rights and an argument that the disparate treatment can best be rationalized by acknowledging that Article III means different things in different contexts, see generally Lee & Ellis, *supra* note 4, at 215–28.

115. 468 U.S. 737 (1984).

116. *Id.* at 739, 756.

117. *Id.* at 758 (citation omitted).

administrative agency failed to provide the fair hearing required by applicable statutes, agency regulations, or the Due Process Clause when deciding to impose a burdensome regulation. If a court concludes that a procedural violation occurred, it will typically remand the case to the agency for further action consistent with its opinion. Because the agency, on the remand, will remain free to reinstate its previous substantive decision as long as it follows proper procedures, one might think it "speculative" whether the only remedy that the plaintiff seeks and that the court could award would satisfy the redressability requirement of standing doctrine.

The Court has responded by relaxing the redressability demand in cases involving procedural rights. The Roberts Court's most direct affirmation came in *Massachusetts v. EPA*,[118] in which it upheld a state's standing to challenge a refusal by the Environmental Protection Agency (EPA) to issue regulations governing greenhouse gas emissions, despite uncertainty about what material effects such regulations might have.[119] Writing for the Court, Justice Stevens quoted a prior decision's recognition that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' . . . 'can assert that right without meeting all the normal standards for redressability and immediacy.'"[120] He continued: "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."[121]

I have no quarrel with the Roberts Court's classification of procedural rights as distinctive for purposes of applying standing doctrine's redressability requirement. Plainly, however, it furnishes a further example of standing's progressive fragmentation.

B. *Standing of the State and Federal Governments and Their Officials*

The Supreme Court apparently never intended that the injury in fact, causation, and redressability requirements would apply to the federal and state governments in the same way as to private litigants. In perhaps the most obvious illustration, the government need not make a showing of personal injury to itself or anyone else in order to initiate a criminal prosecution.[122] But this intuitive, historically rooted conclusion has only

118. 549 U.S. 497 (2007).

119. *Id.* at 521, 525.

120. *Id.* at 517–18 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992)) (citations omitted).

121. *Id.* at 518.

122. *See* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2251 (1999) (noting that the United States can prosecute crimes "based on nothing more

limited application. The doctrines that apply to government claims of standing are as complexly variegated as those that regulate the standing of private parties.

1. State Standing.—An old, tangled doctrine (that the Roberts Court has left untouched) holds that states sometimes may bring *parens patriae* actions on behalf of their citizens.[123] Although *parens patriae* standing normally requires a state to show some distinctive harm to itself in addition to those suffered by its citizens, the Court has sometimes accepted claims of injuries to states that seem "attenuated" by the standards applied to private litigants.[124] Moreover, the demand for independent injury developed in suits filed in the Supreme Court's original jurisdiction, and the Court suggested in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*[125] that the limitations developed in that context may not apply to suits filed in federal district court.[126] *Parens patriae* standing has no precise analogue in private litigation, nor are the rules the same as those that govern the standing of private organizations to bring suit to protect their members' interests.

Even apart from *parens patriae* actions, the Roberts Court has held that special standing rules apply to states when they allege injury to their own real property and to their quasi-sovereign interests "in all the earth and air within [their] domain."[127] It did so in *Massachusetts v. EPA*, which arose from a determination by the Environmental Protection Agency that it lacked authority to regulate greenhouse gas emissions that the state alleged were causally responsible for injuries to the state and its coastal lands.[128] Writing in dissent, Chief Justice Roberts argued that the state had failed to satisfy standing's ordinary requirements.[129] Because the global warming caused by greenhouse gases threatens all property owners alike, the Chief Justice thought that Massachusetts had not alleged particularized injury,[130] and if Massachusetts's injury lay in the loss of coastal property, the state failed to satisfy the demand that any threatened injury must be imminent, he

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than the 'harm to the common concern for obedience to law,' and the 'abstract . . . injury to the interest in seeing that the law is obeyed.'" (quoting FEC v. Aikins, 524 U.S. 11, 23–24 (1998))).

123. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 475 (1995).

124. *Id.* at 511–12; *see also* HART & WECHSLER, *supra* note 5, at 261–66 (reviewing cases involving a state's standing to assert a claim on behalf of its citizens).

125. 458 U.S. 592 (1982).

126. *Id.* at 603 n.12.

127. Massachusetts v. EPA, 549 U.S. 497, 519–20 (2007) (quoting Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)) (internal quotation marks omitted).

128. *Id.* at 511.

129. *Id.* at 536–37 (Roberts, C.J., dissenting).

130. *Id.* at 541.

argued.[131] It was also far from clear that the distinctive failure of the EPA to regulate greenhouse gases—rather than other contributors to the problem—caused any particular injuries that global warming might inflict on the state, Chief Justice Roberts continued.[132] Nor, in his view, had Massachusetts established that EPA action would redress any harms that it might suffer, as the responses of other actors on the global stage remained wholly unpredictable.[133] In response, Justice Stevens reasoned that "Massachusetts' stake in protecting its quasi-sovereign interests" set it apart from other litigants and entitled it to "special solicitude in our standing analysis."[134] Dissenting, Chief Justice Roberts countered:

> The good news is that the Court's "special solicitude" for Massachusetts limits the future applicability of the diluted standing requirements applied in this case. The bad news is that the Court's self-professed relaxation of those Article III requirements has caused us to transgress "the proper—and properly limited—role of the courts in a democratic society."[135]

However much the majority and dissenting opinions disagreed about, they thus concurred with respect to one important point: The Court had either recognized or introduced special standing rules for states suing to protect their property and other quasi-sovereign interests.[136]

2. Assignments of Governmental Interests.—When the government or a government official would have standing to represent the government's interests, the question has occasionally arisen whether the government can assign its interest to, and thereby confer standing on, a third party. In the context of purely private litigation, the Roberts Court has established that when one party assigns its financial interests to another, a suit by the assignee to protect the assigned interests satisfies Article III.[137] The Rehnquist Court had previously held, moreover, that a federal statute

131. *Id.*

132. *Id.* at 543–45.

133. *Id.* at 545–46.

134. *Id.* at 520 (majority opinion).

135. *Id.* at 548–49 (Roberts, C.J., dissenting) (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)).

136. According to Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008), the *Massachusetts* Court "fail[ed] to define to what extent and under what circumstances federal courts should apply more relaxed standing requirements for states." *Id.* at 1786. *See generally* Kathryn A. Watts & Amy J. Wildermuth, Essay, Massachusetts v. EPA*: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029, 1046 (2008) (arguing that *Massachusetts v. EPA* leaves states "in a relatively powerful position vis-à-vis federal agencies in terms of their ability both to file suits against agencies and to seek fairly exacting judicial review of the agency's reasons for declining to regulate").

137. Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 271 (2008).

authorizing private citizens to bring qui tam actions on behalf of the United States against those who have procured payment on false claims against the government passed muster under Article III.[138]

It is a separate question, however, whether a party to whom the government has purported to assign its interest in enforcing or defending laws in which the assignee had no prior financial stake can thereby acquire Article III standing. In *Hollingsworth v. Perry*,[139] the Court confronted a version of that question and, by a 5–4 vote, gave a negative answer.[140] California law authorizes the proponents of ballot initiatives that are approved by California voters to defend the constitutionality of those initiatives in court when state officials decline to do so.[141] *Hollingsworth* arose after California voters enacted Proposition 8, which limited marriage to opposite-sex couples. After the district court ruled Proposition 8 unconstitutional under the Equal Protection Clause, state officials declined to defend it any further.[142] When proponents of the initiative then intervened, the Ninth Circuit upheld their standing to appeal.[143]

The Supreme Court reversed on the standing issue. According to Chief Justice Roberts's majority opinion, the "petitioners had no 'direct stake' in the outcome of their appeal."[144] "Their only interest" was a generalized one, shared by myriad other California citizens, in "vindicat[ing] the constitutional validity of a generally applicable California law."[145] Having so concluded, the Chief Justice acknowledged that the state could have protected its undoubted interest in defending Proposition 8 by entrusting litigation responsibility to state officials or by "designat[ing] agents to represent it in federal court."[146] But the interveners were not California officials, nor, according to Chief Justice Roberts, did they qualify as state agents.[147] Among other difficulties, the state retained no authority to control or remove them.[148]

In a forceful dissenting opinion, Justice Kennedy mocked the majority for holding that a state's authority to secure the constitutional defense of state ballot initiatives that the state executive declined to defend should

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138. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 777–78 (2000).

139. 133 S. Ct. 2652 (2013).

140. *Id.* at 2658–61, 2668.

141. *Id.* at 2660.

142. *Id.*

143. *Id.*

144. *Id.* at 2662.

145. *Id.*

146. *Id.* at 2664.

147. *Id.* at 2666.

148. *Id.* at 2666–67.

depend on compliance with the *Restatement of the Law of Agency*.[149] By any fair appraisal, moreover, the narrow Court opinion needed to distinguish more cases than it found to rely on, including cases in which states had authorized officials outside the executive branch to represent state interests when executive officers refused.[150]

For present purposes, however, there is no need to judge the merits of the contending positions. Whether *Hollingsworth* was right or wrong, and whether it is read narrowly or broadly, it introduced an element of complexity into standing doctrine—involving permissible assignees of states' interests in defending their laws against constitutional challenge—that had not existed previously. Moreover, whatever may be the case with state officials and state agents, *Hollingsworth* strongly suggests that there are general limits to governments' capacity to assign their interests in litigation to private parties, at least absent financial damages.

3. Federal Governmental Standing to Appeal: The Windsor *Case.*—Just as there is ordinarily no question about the standing of the executive branch to initiate criminal and civil actions on behalf of the federal government, no issue typically arises concerning the standing of the executive branch to appeal adverse judgments, including those that hold federal statutes unconstitutional. But an issue of standing to appeal emerged in *United States v. Windsor*,[151] after the President and Attorney General concluded that the provision of the Defense of Marriage Act (DOMA) that denied federal recognition to same-sex marriages that are valid under state law violated the federal Constitution.[152] Based on this determination, the executive branch could have ceased to enforce the provision at issue. Instead, with the aim of framing the constitutional question for judicial resolution, the Administration, though not defending DOMA, continued to enforce it by denying Windsor an estate tax exemption that she would have received if federal law recognized her deceased partner—to whom she was lawfully married as a matter of New York law—as her spouse.[153] The Attorney General also notified both houses of Congress of the Administration's position.[154] The House of

149. *Id.* at 2671–72 (Kennedy, J., dissenting).

150. *See id.* at 2664–68 (holding that the Court had "never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to" after distinguishing Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765 (2000); Arizonans for Official English v. Arizona, 520 U.S. 43 (1997); Gollust v. Mendell, 501 U.S. 115 (1991); Whitmore v. Arkansas, 495 U.S. 149 (1990); United States v. Providence Journal Co., 485 U.S. 693 (1988); Karcher v. May, 484 U.S. 72 (1987); and Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787 (1987)).

151. 133 S. Ct. 2675 (2013).

152. *Id.* at 2683.

153. *Id.* at 2683–84.

154. *Id.* at 2683.

Representatives responded by authorizing its Bipartisan Legal Advisory Group (BLAG) to intervene to defend DOMA.[155] When the district court and the court of appeals both held DOMA unconstitutional in pertinent part, the United States sought certiorari, as did BLAG.[156] The Court granted the petition but also appointed Harvard Law Professor Vicki Jackson as an amica curiae to argue that the United States lacked standing to appeal because the government agreed with Windsor that the relevant part of DOMA violated the Constitution.[157]

If a private party who supported the judgment of the court of appeals had nevertheless sought certiorari, the Supreme Court would undoubtedly have held that that party lacked standing to appeal or otherwise failed to present a justiciable controversy. In *Windsor*, the Roberts Court upheld standing.[158] In reaching its decision, the Court, in an opinion by Justice Kennedy, began with common ground: all agreed that the district court had jurisdiction over Windsor's suit to recover money she had lost due to the government's refusal to classify her as the "spouse" of her deceased partner.[159] Nor did the government's material interest in the outcome end with the district court's ruling in favor of Windsor, Justice Kennedy reasoned: "[T]he United States retain[ed] a stake sufficient to support Article III jurisdiction on appeal . . . [because the judgment] order[ed] the United States to pay Windsor [a tax] refund . . . ."[160] "It would be a different case if the Executive had taken the further step of paying Windsor the refund," Justice Kennedy wrote.[161]

Having concluded that the United States satisfied the Article III requisites for standing, Justice Kennedy noted that the Court's jurisdiction also depended on "prudential considerations."[162] He determined, however, that the presence of BLAG as an intervenor, and its "sharp adversarial presentation of the issues[,] satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."[163] So concluding, Justice Kennedy found it

155. *Id.* at 2684.

156. Petition for Writ of Certiorari Before Judgment, *Windsor*, 133 S.Ct. 2675 (12-307); Supplemental Brief for the United States, *Windsor*, 133 S. Ct. 2675 (12-307); Petition for Writ of Certiorari, *Windsor*, 133 S. Ct. 2675 (12-785).

157. *Id.*

158. *Id.* at 2686.

159. *Id.* at 2684–85.

160. *Id.* at 2686.

161. *Id.*

162. *Id.* at 2687.

163. *Id.* at 2688.

unnecessary to decide whether BLAG might have had standing to appeal in its own right.[164]

Writing in dissent, Justice Scalia argued that the question in *Windsor* was not one of standing at all but rather involved the requirement of sufficiently adverse parties to support federal appellate jurisdiction:

> Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint. . . . The question here is not whether, as the majority puts it, "the United States retains a stake sufficient to support Article III jurisdiction," the question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor. There is not.[165]

However one judges that contention, *Windsor* will enter the United States Reports as a decision about the standing of the United States, in contrast with most if not all other litigants, to appeal from judgments with which it agrees on the merits.[166]

4. The Standing of Government Officials.—*Windsor* and *Hollingsworth* both presuppose that duly authorized officials of the executive branch have standing to sue on behalf of the government whenever the government itself could claim standing. *Hollingsworth* goes further in affirming by implication the holding of the Rehnquist Court in *Karcher v. May*[167] that a state may designate its speaker of the house or president of the senate to defend a state statute that state executive officials will not defend.[168] A host of further standing issues can come up, however, when government officials claim injuries to interests either of their own or of the particular institutions of government in which they serve.

In *Windsor*, as I have noted, Justice Kennedy's majority opinion chose not to resolve the standing issue BLAG presented.[169] Four other Justices

164. *Id.* For a thoughtful pre-*Windsor* examination of the standing of intervenor defendants, see generally Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539 (2012).

165. *Windsor*, 133 S. Ct. at 2701 (Scalia, J., dissenting) (citation omitted).

166. In upholding standing, the Court relied on its earlier decisions in *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007); *INS v. Chadha*, 462 U.S. 919 (1983); and *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980). *Windsor*, 133 S. Ct. at 2686–87. For the argument that *Windsor* is not a case about the standing of the United States, but about the standing of the Executive Branch, and that claims of the standing Congress and the President should depend on considerations emanating from Articles I and II, as well as from Article III, see generally Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311 (2014).

167. 484 U.S. 72 (1987).

168. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2664–65 (2013) (emphasizing that *Karcher* created a precedent of standing for government officials in their official capacity, but concluding that *Karcher* offered no support for a finding of standing for private individuals acting in an unofficial capacity).

169. 133 S. Ct. at 2688.

did reach that issue. In reasoning based on a mixture of precedent and constitutional first principles, Justice Scalia's dissent—which was joined by Justice Thomas and in pertinent part by Chief Justice Roberts—concluded that BLAG lacked standing.[170] By contrast, Justice Alito thought that the threatened, de facto nullification of House votes in favor of DOMA constituted an institutional injury in fact.[171]

In some ways analogous to *Windsor*, *Camreta v. Greene*[172] presented a question involving standing to appeal by defendants who had prevailed in the lower courts.[173] In the lower courts, child welfare officials defeated a claim for damages against them for allegedly violating a child's Fourth Amendment rights when they interviewed her at her elementary school, without either a warrant or parental consent, in response to third-party allegations of parental abuse.[174] But the court of appeals rested its decision on official immunity doctrine, not the Fourth Amendment. It found that the petitioners had in fact violated the Constitution but dismissed the damages claim on the ground that the right in question was not "clearly established" at the time of the violation, as it must be for plaintiffs to recover damages in constitutional tort actions against most officials.[175]

Alleging that the court of appeals's constitutional ruling would diminish their capacity to respond effectively in future cases of suspected child abuse, the prevailing defendants sought Supreme Court review, and the Court upheld their standing.[176] Justice Kagan's majority opinion credited the petitioners' allegations that the effective discharge of their official responsibilities required them to conduct unconsented interrogations of minors.[177] In light of the court of appeals's ruling, she reasoned, an affected official had to "change the way he performs his duties or risk a meritorious damages action."[178] In either case, she held, he had suffered "injury caused by the adverse constitutional ruling."[179]

By creating an exception to the rule that prevailing parties lack standing to appeal judgments in their favor,[180] the Roberts Court quite transparently sought to accommodate a small corner of standing doctrine to

170. *Windsor*, 133 S. Ct. at 2697, 2700 (Scalia, J., dissenting).
171. *Id.* at 2712–14 (Alito, J., dissenting).
172. 131 S. Ct. 2020 (2011).
173. *Id.* at 2027–28.
174. *Id.* at 2027.
175. *Id.*
176. *Id.* at 2028–29, 2032.
177. *Id.* at 2027.
178. *Id.* at 2029.
179. *Id.*
180. The Court pointed to two other cases in which it had recognized exceptions. *Id.*

the comparably complex doctrine of qualified immunity.[181] With officials normally liable in damages for constitutional violations only if they violate "clearly established" rights,[182] the Court has erected a framework that encourages courts of appeals to issue constitutional rulings that clarify the law even when they could bypass the merits altogether—as the doctrine of "constitutional avoidance" would normally counsel[183]—by upholding qualified immunity defenses.[184] *Camreta* facilitates the Court's law-clarifying aim by creating a rule of appellate standing distinctively available to governmental officials who want to claim that judicial opinions purporting to create clearly established law have instead committed constitutional error.

Reasonable minds differ about the wisdom of this accommodation. Reasonable minds do not dispute that *Camreta* introduces new complexity into standing doctrine in order to hasten the creation of clearly established law.

C. Congressionally Authorized Standing

The Supreme Court has unmistakably affirmed that standing doctrine's demands for injury in fact, causation, and redressability apply equally to cases in which Congress has specifically purported to authorize standing and to cases in which it has not.[185] But the Court has never suggested that congressional authorization makes no difference to standing analysis, even if it has never made wholly plain exactly what difference congressional authorization can make. *Massachusetts v. EPA* maintained, and possibly deepened, the uncertainty. In that case, as noted already, Justice Stevens emphasized the "special solicitude" due to state claims of standing, but he also placed weight on Congress's authorization of the state's suit.[186] *Massachusetts* thus appears to ratify an otherwise largely opaque doctrinal state of affairs in which the demands for injury in fact, causation, and

181. Writing in dissent, Justice Kennedy argued that the Court's ruling breached the Article III precept that the jurisdiction of an appellate court lies only "to correct wrong judgments, not to revise opinions." *Id.* at 2037 (Kennedy, J., dissenting) (quoting Herb v. Pitcairn, 324 U.S. 117, 126 (1945)) (internal quotation marks omitted).

182. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

183. *See, e.g.*, Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 343 (1999) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944))).

184. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (explaining the benefit of clarifying the law applicable to constitutional issues that are rarely litigated except in suits also presenting qualified immunity claims).

185. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (holding that "there is absolutely no basis for making the Article III inquiry turn on the source of [an] asserted right").

186. Massachusetts v. EPA, 549 U.S. 497, 516, 519–20 (2007).

redressability mean one thing when Congress purported to confer standing and something different when Congress has not.

D. *Probabilistic Standing*

In my effort to describe the continuing fragmentation of standing doctrine under the Roberts Court, I have necessarily grouped cases into categories, but I have not meant to suggest that alternative categorizations would not prove equally illuminating. One such scheme would differentiate cases involving injuries that have already occurred from cases in which a plaintiff claims standing to sue based on a threat of future injury. Many of the cases that I have discussed, although in other connections, would occupy the latter category.[187] So located, they raise the question: exactly how certain must it be that a threat of injury will ripen into a more tangible harm in order for a plaintiff to possess standing?[188]

That question has no unitary answer under Roberts Court standing doctrine. The fragmentation emerged most unmistakably in *Clapper*, in which the plaintiffs sought to challenge national security surveillance policies, and the majority denied standing because the plaintiffs had not shown that injury was "certainly impending."[189] In response to the majority's demand, Justice Breyer's dissenting opinion identified a compendium of cases—some very recent—in which the Court had employed a variety of less demanding formulations.[190]

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187. *See, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2343 (2014) (finding that the threat of future enforcement may constitute an injury in fact); Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013) (denying standing based on a claim that communications may be illegally intercepted in the future); *Massachusetts*, 549 U.S. at 526 (finding that a state has standing based, in part, on the possibility of future harm from increasing amounts of greenhouse gasses in the atmosphere).

188. For valuable academic discussions of probabilistic standing, see generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 503–06, 510–11 (2008); F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55 (2012); Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665 (2009); and Nash, *supra* note 109.

189. 133 S. Ct. at 1150.

190. Justice Breyer wrote:

> [R]ecognizing that "'imminence' is concededly a somewhat elastic concept," *Lujan* [*v. Defenders of Wildlife*, 504 U.S. 555, 565, n.2 (1992)], the Court has referred to, or used (sometimes along with "certainly impending") other phrases such as "reasonable probability" that suggest less than absolute, or literal certainty [that injury will soon occur]. See *Babbitt* [*v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)] (plaintiff "must demonstrate a *realistic danger* of sustaining a direct injury" (emphasis added)); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 . . . (2000) ("[I]t is the plaintiff's burden to establish standing by demonstrating that . . . the defendant's allegedly wrongful behavior will likely occur or continue"). See also *Monsanto Co. v. Geertson Seed Farms*, [561 U.S. 139, 153] . . . (2010) ("'"reasonable probability"'" and "substantial risk"); *Davis* [*v.* FEC], 554 U.S. [724], 734 [(2008)] . . . ; *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 . . . (2007) ("genuine threat of enforcement");

In response, the majority acknowledged, in a footnote, that the Court's cases do not "uniformly require" satisfaction of the "certainly impending" standard that it had identified as applicable.[191] "In some instances," Justice Alito continued, "we have found standing based on a 'substantial risk' that harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm."[192] On the facts, the majority then argued, "to the extent that the 'substantial risk' standard is relevant," the plaintiffs failed to meet it.[193]

The varying stringency of the Court's standard in cases involving probable future injuries became clearer when the Court followed *Clapper* with its unanimous decision upholding standing in *Susan B. Anthony List*, discussed above, in which the plaintiffs challenged the constitutionality of a statute that made it a crime to make knowingly false statements about the voting record of a political candidate.[194] Analogizing the case to past decisions in which plaintiffs had sought injunctions against the enforcement of allegedly unconstitutional statutes, the Court recited a formula that it had applied in one such case and upheld standing based on "a credible threat of prosecution."[195]

Although I would not pretend to be able to rationalize all of the cases, significant patterns stand out. For example, juxtaposing *Clapper* with *Susan B. Anthony List*, I would reaffirm my earlier appraisal that the Court has demanded elevated showings of likely injury by parties seeking injunctive relief from policies that relate closely to national security.[196] Then, generalizing from *Susan B. Anthony List* and the previous cases on which it relied, I would conclude that the Court tends to accept a significantly lesser showing when plaintiffs sue to enjoin the enforcement of a statute that forbids or penalizes conduct in which they have reason to want to engage; in cases of that kind, a reasonable probability that

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> *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 333, . . . (1999) ("substantially likely" (internal quotation marks omitted)); *Clinton v. City of New York*, 524 U.S. 417, 432 . . . (1998) ("sufficient likelihood of economic injury"); *Pennell v. San Jose*, 485 U.S. 1, 8 . . . (1988) ("realistic danger" (internal quotation marks omitted)); *Blum v. Yaretsky*, 457 U.S. 991, 1001 . . . (1982) ("quite realistic" threat); *Bryant v. Yellen*, 447 U.S. 352, 367–368 . . . (1980) ("[]likely"); *Buckley v. Valeo*, 424 U.S. 1, 74 . . . (1976) (per curiam) ("reasonable probability").

Id. at 1160–61 (Breyer, J., dissenting).

191. *Id.* at 1150 & n.5 (majority opinion).

192. *Id.* In support, the Court cited four cases: *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Blum v. Yaretsky*, 457 U.S. 991 (1982); and *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). The majority did not discuss the other cases on which the dissenting opinion relied. *Id.*

193. *Clapper*, 133 S. Ct. at 1150 n.5.

194. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2338 (2014).

195. *Id.* at 2342 (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

196. *See supra* section II(A)(3).

government officials will bring an enforcement action normally suffices to confer standing.[197] Identifying yet another category, I would further venture to say that the Court quite routinely imposes a heavy burden on plaintiffs who seek to enjoin government officials from engaging in allegedly unlawful actions, other than initiating civil or criminal enforcement proceedings, that no statute or formally promulgated policy requires them to take.[198] To pick out just one more set of cases, I would credit the descriptive accuracy of the observation of the Court's 5–4 majority in *Summers v. Earth Institute* that "[w]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish."[199]

These efforts at explanation are, I want to emphasize, tentative and somewhat off-the-cuff. Undoubtedly, the cases would permit multiple categorizations. Again, I do not mean to imply that all could be fitted into an identifiable, defensible pattern. But the cases are not wholly random either. Prediction is not impossible.[200]

One could expose similar disparities by pressing the question: what standard of probability does the Court employ in determining whether an injury is redressable through the relief that a plaintiff seeks? The Roberts Court requires less certainty in cases in which the plaintiff asserts the violation of a procedural right than it does in ordinary cases[201] and also less in cases in which Congress has authorized suits by states.[202] But we do not

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197. *See, e.g.*, MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128–29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit . . . . The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.").

198. For example, in *City of Los Angeles v. Lyons*, the Court held:

> That Lyons may have been illegally choked by the police on October 6, 1976 . . . does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.

461 U.S. 95, 105 (1983).

199. 555 U.S. 488, 489, 493 (2009) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)) (internal quotation marks omitted).

200. If a simple pattern were wanted for normative reasons, there would be force to Professor Jonathan Nash's proposal that standing doctrine should allow plaintiffs to sue whenever they have suffered a loss of expected value: "A 1-in-10,000 chance of losing $100,000 is the equivalent of a $10 loss . . . and a $10 loss is an injury." Nash, *supra* note 109, at 1285; *see also* Hessick, *supra* note 188, at 69 ("[A]ny risk of harm, even a tiny one, should suffice for Article III standing.").

201. *See supra* section II(A)(4).

202. *See supra* section II(B)(1).

know whether there is a single standard for ordinary cases or whether different kinds of cases—as defined by the provision of law under which they are brought, the invasiveness of the relief that they seek,[203] or other variables—call for the application of different criteria.

In asserting that standing doctrine has grown more fragmented with nearly every Term of the Roberts Court, I do not wish to overstate my case. However prone the Justices may be to fracture in some important cases, the Roberts Court has preserved, rather than upset, what might be thought of as a relatively broad pseudo-equilibrium, predicated on an unvaried formula under which standing requires injury in fact, causation, and redressability.[204] And that formula dictates determinate, predictable outcomes in most standing cases. For example, there are many contexts in which virtually all would concur that I could not plausibly claim injury arising from what I believe to be a violation of someone else's rights. Discord persists and fragmentation occurs mostly at the margins—but at margins that are demonstrably expanding and that frequently involve matters of high constitutional and practical importance.

III. A Provisional and Partial Normative Assessment

So far I have argued that standing doctrine is complex and fragmented but not that a more unitary approach—with fewer subcategories and exceptions—would be better. Nor do I propose now to advance a strong normative thesis about the optimal design of standing law, including a specification of its optimal complexity. I shall offer prescriptive suggestions, although less ambitious ones, in Part VI. But a prior question is now ripe: Does the current law contain signals that something is amiss?

The analysis in Part II strongly supports an affirmative answer to that question. In principle, doctrinal complexity such as that described in Part II could promote valid purposes, even if it made knowledge of the law harder to attain. Nearly all rules are over or underinclusive when measured against their background justifications.[205] Without wholly eliminating over and underinclusivity, a more complex system of rules might, under some circumstances, produce better outcomes than a simpler, more elegant doctrinal structure. But current standing doctrine seems poorly designed to

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203. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635–36 (2006) (emphasizing the connection between justiciability rulings and concerns about unacceptably intrusive remedies).

204. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1442 (2011) (asserting and citing authority establishing that standing requires injury in fact, causation, and redressability); Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (same); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (same).

205. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 31–34 (1991) ("A rule's factual predicate is a generalization [that is] . . . not necessarily true for *all* cases.").

achieve the benefits that a complex but coherently integrated rule structure might afford. The Roberts Court has not only failed to bring elegance to standing doctrine, it has also done a poor job of explicating how some elements relate to others. The Court frequently fails to give fully rationalized accounts of the lines of division that its cases actually reflect.[206] Perhaps most notably, the Court recurrently but misleadingly suggests that injury in fact is indeed a question of fact,[207] even though—as Part II demonstrated—what counts as a cognizable injury sometimes varies with the provision under which a plaintiff brings suit or with the nature of the relief that a plaintiff seeks.

As a result, whatever the benefits that complexity might produce in principle, costs bulk needlessly large in practice, as it becomes increasingly difficult for anyone but a specialist to identify all of the potentially relevant doctrinal categories and the different modes of analysis for which they call. Moreover, given the confusing and misleading rationales for decision that the Court frequently offers, even specialists often and understandably disagree about which rules apply to new cases.[208] Competing analogies,

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206. Among these lines of division, as I shall explain more fully below, see *infra* subpart VI(A), is the line between cases presenting issues about the standing of governments and their officers and those involving the standing of private parties.

207. *See, e.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) (holding that petitioners who sought to vindicate the constitutional validity of a state ballot initiative that they had sponsored had suffered no injury "that affects [them] in a 'personal and individual way,'" had no "'direct stake in the outcome' of the case," and thus had not suffered an injury in fact (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992), and Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997))); Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011) (asserting that standing to enforce the Establishment Clause depends on "real injury to particular individuals").

208. For example, the *Clapper*, *Hollingsworth*, and *Windsor* cases all provoked divergent predictions. *Compare* Steve Vladeck, *Clapper v. Amnesty Int'l: Secret Surveillance, Standing, and the Supreme Court*, LAWFARE (Feb. 20, 2012, 1:23 AM), http://www.lawfareblog.com/2012/02/clapper-v-amnesty/, *archived at* http://perma.cc/URD7-KJ4L (hypothesizing that the Court might uphold standing in light of "a specific (and public) statutory authorization for surveillance that necessarily gives some fairly strong clues (to both private parties and the courts) as to how those whom the statute bars the government from targeting could nevertheless end up having their communications intercepted"), *with* Lyle Denniston, *Argument Preview: Can Global Wiretaps Be Challenged?*, SCOTUSBLOG (Oct. 26, 2012, 12:11 AM), http://www.scotusblog.com/2012/10/argument-preview-can-global-wiretaps-be-challenged/, *archived at* http://perma.cc/R826-WT74 ("It is difficult to argue that the Court granted review in this case for any reason other than to reverse the Circuit Court's finding of 'standing' for the challengers. . . . [T]his is a Court with a majority that does not have an expansive view of Article III 'standing' . . . ."); *compare* Vikram Amar, *Revisiting Standing: Proposition 8 in the Ninth Circuit*, JURIST (Feb. 16, 2012, 8:00 AM), http://jurist.org/forum/2012/02/vikram-amar-marriage-standing.php, *archived at* http://perma.cc/KS3L-ZED9 ("I will not be surprised if the Supreme Court concludes that the requirements of federal standing are not necessarily met by the proponents in the Proposition 8 setting itself."), *and* Laurence Tribe & Richard Parker, *Tribe Offers Predictions on Gay Marriage Rulings*, HARVARD L. TODAY (May 8, 2013), http://today.law.harvard.edu/tribe-offers-predictions-on-gay-marriage-rulings, *archived at* http://perma.cc/H5TQ-QCGK ("As to *Hollingsworth* . . . I doubt that the Court will conclude that Chuck Cooper and the other private proponents of Prop 8, all

which support different results, often exist. Uncertainty spreads, as does frustration and suspicion of naked, result-oriented manipulation.

In sum, even if complexity is not per se objectionable, modern standing doctrine has sunk into a combined state of complexity and confusion that no one could applaud. What is more, its condition seems to be worsening, not improving, under the Roberts Court.

IV. Possible Explanations

If standing doctrine has descended into under-theorized and poorly explained fragmentation, it is worth asking why. Among other things, identifying the factors that have produced fragmentation will serve a diagnostic function. Those factors help to define the challenge that proponents of doctrinal reform confront. A sophisticated understanding of causal factors will thus help to ground judgments concerning viable reform strategies.

In seeking insight into why standing doctrine has fallen into its currently untidy, fragmented state, I shall highlight four partial explanations. Although all build upon the insights of social scientists, none, I want to emphasize, denies the fundamental proposition that judges and Justices have an obligation, which they normally attempt to satisfy, to decide cases in accordance with applicable law.

Two examples should suffice as reminders of the role of purely legal considerations in standing determinations. First, stare decisis plainly influences the Justices to greater or lesser degrees. In one visible, though not necessarily representative example, Chief Justice Roberts and Justices Kennedy and Alito seem deeply reluctant to overrule *Flast v. Cohen*, even though their tenuous efforts to distinguish it strongly suggest that they do not agree with its core reasoning.[209] More generally, a commitment to stare

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lacking a fiduciary duty to California, have Art. III standing to defend it on the merits in the Supreme Court . . . ."), *with* John Bursch, *Reading Tea Leaves: Why the Court Will Uphold Proposition 8*, SCOTUSBLOG (Mar. 28, 2013, 11:59 AM), http://www.scotusblog.com/2013/03/reading-tea-leaves-why-the-court-will-uphold-proposition-8/, *archived at* http://perma.cc/K6Z7-SY94 ("California undisputedly has standing to defend the constitutionality of its own constitution, and it also has the authority to delegate the authority to mount that defense."); *compare* Tribe & Parker, *supra* ("[M]y hunch . . . is that the Court will narrowly conclude that the DOMA . . . issue is properly before SCOTUS on the merits notwithstanding the solid reasons to doubt that BLAG . . . is a proper representative of Congress . . . ."), *with* Vikram David Amar, *Does BLAG Have Standing in the Defense of Marriage Act (DOMA) Case in Front of the Supreme Court?*, VERDICT (Feb. 14, 2013), https://verdict.justia.com/2013/02/14/does-blag-have-standing-in-the-defense-of-marriage-act-doma-case-in-front-of-the-supreme-court *archived at* http://perma.cc/49AQ-CYDT ("I won't be surprised if the Court (or a large enough number of individual Justices on the Court) effectively defers these cases and avoids issuing dispositive rulings on the merits using the flexible justiciability doctrine.").

209. *See* Gene R. Nichol, Professor, Univ. of N.C., The Roberts Court and Access to Justice, Keynote address at the Case Western Reserve Law Review Symposium: Access to the Courts in the Roberts Era (Jan. 30, 2009), *in* 59 CASE W. RES. L. REV. 821, 827–28 (2009) (characterizing

decisis may explain some of the Justices' unwillingness to reconsider the assumption—which has underlain virtually all of the Court's opinions since the 1970s—that standing depends on prelegal injury in fact. To confess a doctrinally global conceptual error might seem to some Justices to go too far in undermining the interests in legal stability and continuity that the doctrine of stare decisis exists to protect. I shall return to this consideration below when I offer proposals for reform.

Second, Justice Scalia's commitment to an originalist methodology likely influenced his decision upholding standing based on the government's assignment of a financial interest in litigation to a private party in *Vermont Agency of Natural Resources v. United States ex rel. Stevens.*[210] As he emphasized, precedents for qui tam litigation extend to the colonial era and formed part of the backdrop against which Article III was written and ratified.[211]

Nonetheless, acknowledgment of the significance of legal or even legalistic considerations does not preclude the possibility of further illumination from the insights and methodologies of social scientists. Those insights are partly overlapping. The first two of the possible explanations that I shall offer for the fragmentation of standing may embody the complementary perspectives of political science and psychology on phenomena that approach extensional equivalence. Nor, in citing possible social–scientific explanations for the fragmentation of standing, do I mean to suggest that any one of the four explanatory themes that I shall advance here could explain all elements of the Roberts Court's standing jurisprudence without help from others. Making sense of the fragmentation of standing doctrine is a multifaceted undertaking.

A. *Insofar as Standing Is Interconnected with the Merits, Ideology Matters*

Because the notion of injury in fact is too plastic to do the analytical work that standing doctrine demands of it, and some determinations of injury therefore require substantive judgments about the protections that various constitutional provisions confer,[212] the Justices' substantive constitutional views inevitably drive standing decisions in a number of

Justice Alito's majority opinion in *Hein* as adopting the position that "we've been idiotic on this front for forty years and idiotic we'll remain"); *supra* notes 44–61 and accompanying text.

210. 529 U.S. 765 (2000).

211. *Id.* at 774, 776–78.

212. *See* Fletcher, *supra* note 43, at 234 (arguing that standing analysis requires "paying careful attention to the nature of the substantive right at issue in the particular case"); Sunstein, *supra* note 5, at 186–92 (criticizing the failure of *Data Processing* to explain the legal source of its "unprecedented approach to standing" and the assumption that injury in fact can be a purely factual matter).

important areas.[213] Abundant examples confirm this thesis. With the Roberts Court, as with predecessor Courts, it is possible to distinguish judicial conservatives from liberals and to characterize some standing rulings as having either a liberal or a conservative valence. Although these labels carry undoubted risks of imprecision, it will suffice for current purposes to characterize judicial rulings as either conservative or liberal when they produce outcomes that political conservatives or liberals, as those terms are used in common parlance, would respectively applaud.[214] When the terms are used in this way, nearly everyone agrees that the Roberts Court consists of five conservatives (Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Kennedy) and four liberals (Justices Ginsburg, Breyer, Sotomayor, and Kagan), with Justice Kennedy most often the Justice most nearly in the middle.

To take a plain example of substantively conservative views driving conservative rulings, the Roberts Court's decisions cutting back on taxpayer standing to challenge Establishment Clause violations under *Flast* align almost precisely with political conservatives' views about the Establishment Clause's protective scope.[215] In conservative eyes, the Establishment Clause does not ordinarily prohibit the government from offering symbolic support for religion nor does it bar the provision of financial benefits to religious and non-religious institutions on a neutral basis.[216] Liberals tend to hold more "separationist" views with respect to the proper substantive interpretation of the Establishment Clause and

213. Among political scientists, insistence on the pertinence of the Justices' ideologies in predicting their voting patterns comes most stridently from proponents of the so-called "attitudinal model." *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 312–26 (2002) (applying the attitudinal model to Supreme Court voting patterns).

214. *See* RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE 32 (2d ed. 2013) (noting political scientists' use of common parlance as a measure of whether judicial action is liberal or conservative).

215. For example, in a *New York Times* article published after the Supreme Court's rulings in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), James C. Dobson of the conservative Focus on the Family Action in Colorado Springs cast the cases in the following terms: "The court has failed to decide whether it will stand up for religious freedom of expression, or if it will allow liberal special interests to banish God from the public square." Ralph Blumenthal, *Split Rulings on Displays Draw Praise and Dismay*, N.Y. TIMES, June 28, 2005, http://www.nytimes.com/2005/06/28/politics/28display.html?_r=1&, *archived at* http://perma.cc/7JXF-Z9GD.

216. The Supreme Court's most conservative Justices regularly take this view in decisions on the merits in Establishment Clause cases. *See, e.g.*, *Van Orden*, 545 U.S. at 681 (upholding Texas's display of the Ten Commandments on the State Capitol grounds); *McCreary Cnty.*, 545 U.S. at 885–89 (Scalia, J., dissenting) (advocating a less rigid separation of church and state); Mitchell v. Helms, 530 U.S. 793, 829 (2000) (plurality opinion) (holding that an aid program benefiting religious as well as secular schools did not violate the Establishment Clause "because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content").

correspondingly broader assessments of what constitutes actionable injury.[217]

The standing ruling in *Clapper* invites a similarly ideological explanation. The Court's most conservative Justices favor greater deference to the executive branch in national security matters than do its more liberal members.[218] That division manifested itself in a 5–4 split in *Clapper* about whether the plaintiffs satisfied standing doctrine's injury-in-fact requirement and, even if so, about whether their injury was "fairly traceable" to the statute that they sought to challenge.[219]

Based on *Clapper* and the Establishment Clause cases, one might be tempted to conclude that the Roberts Court's conservative Justices simply have more restrictive understandings of the kind of injury necessary to support Article III standing, and similarly of the requisite assurance of redressability, than do the Court's relative liberals.[220] Even if this were typically so—and I am not sure that it is—there are ideologically driven exceptions. Conservatives who regard affirmative action as deeply suspect if not per se unconstitutional have not demanded wallet injury or even proof that a disappointed white applicant would have received a sought-after benefit in the absence of racial preferences in order to establish standing: the mere interposition of a race-based criterion suffices to create an actionable injury.[221] Where procedural rights protect liberty and property interests of a kind protected at common law, conservatives have similarly

217. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1460–63 (2011) (Kagan, J., dissenting) (arguing for strong separation between religion and the state while advocating taxpayer standing to uphold the separation); Hein v. Freedom from Religion Found. Inc., 551 U.S. 587, 642–43 (2007) (Souter, J., dissenting) (arguing for taxpayer standing broad enough to permit judicial enforcement of constitutional norms calling for separation between church and state).

218. In *Boumediene v. Bush*, 553 U.S. 723 (2008), for example, the Court's four liberal Justices joined Justice Kennedy in emphasizing the function of the judicial branch in enforcing constitutional norms in an opinion holding that habeas corpus protections extend to noncitizen prisoners held at Guantanamo Bay, despite the Executive's classification of the prisoners as enemy combatants. *Id.* at 730, 732, 765–66. By contrast, Justice Scalia's dissent in *Boumediene* exemplified the more characteristically conservative position of according great deference to the Executive in wartime. *See id.* at 827–28 (Scalia, J., dissenting).

219. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1142–43 (2013).

220. *Cf.* Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 946–47 (2008) (characterizing standing disputes as an ideological struggle in which conservatives favor greater restrictions than liberals).

221. In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), Justice Thomas wrote:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

Id. at 666.

supported a relaxation of standing's redressability requirement.[222] With commercial farmers' economic interests at stake, the Roberts Court's most conservative Justices also joined Justice Alito's opinion upholding standing based on a "reasonable probability" or "substantial risk" of injury arising from a decision by the Animal and Plant Health Inspection Service in *Monsanto Co. v. Geertson Seed Farms*[223]—a stark contrast with their insistence in *Clapper* that injury must be "certainly impending."[224]

In my view, ideologically rooted divisions of this kind are probably inevitable. Determinations of who is entitled to sue ultimately depend on disputable judgments about the scope of the rights that particular statutory and constitutional provisions confer. It would enhance conceptual clarity and legal transparency, however, if the Court would say so openly. I shall return to this theme in Part VI.

B. The Importance of "Motivated Reasoning"

In a marvelous foreword to the *Harvard Law Review*'s 2011 Supreme Court edition, Professor Dan Kahan called attention to modern psychological research that establishes the propensity of human beings to embrace factual claims, as well as arguments, that cohere well with their preexisting normative commitments.[225] Symmetrically, most of us tend to look skeptically on factual assertions as well as arguments that contradict our prior, ideologically suffused set of beliefs. Psychologists refer to this phenomenon as "motivated reasoning."[226] They emphasize, moreover, that the motivation to accept some claims and reject others is frequently unconscious, not conscious.[227] Pushing Professor Kahan's argument slightly further than he expressly takes it, I would suggest that Supreme Court Justices do not differ greatly from the rest of us in their proclivities to appraise the persuasiveness of arguments and factual assertions in light of their ideological congeniality as measured by the Justices' own normative lights.

If one acknowledges the existence of motivated reasoning as a psychological phenomenon, it immediately emerges as a candidate to shape the application of legal concepts as amorphous as those of injury in fact and

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222. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 557, 572 n.7 (1992) ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

223. 561 U.S. 139, 142, 153 (2010).

224. *Clapper*, 133 S. Ct. at 1150.

225. Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19–20 (2011).

226. *Id.* at 7.

227. *Id.* at 19.

redressability—and, indeed, possibly to explain one of the mechanisms through which Justices' political ideologies manifest themselves in standing cases. Quasi-realist accounts of the Supreme Court's standing rulings sometimes suggest that the Justices calculatingly manipulate malleable concepts to advance a nakedly ideological agenda.[228] Thus, when a conservative Justice writes in one case that Article III requires "Wallet Injury" to ground standing,[229] but conservatives hold in another that race-based classifications are inherently injurious even if they occasion no economic cost to the white plaintiffs who challenge them,[230] critics have sometimes responded with attributions of bad faith.[231] Motivated reasoning offers an alternative explanation for a similar and possibly extensionally equivalent set of phenomena.

Recognition that the Justices are roughly as prone to motivated reasoning as the rest of us would have at least a modest practical payoff. We might achieve more psychological insight, and thus a better understanding of how judges and Justices are likely to respond to other claims of injury in future cases, if we credited the possibility that a Justice's ideological predispositions may shape her good-faith views of which distinctions are well justified and which are legally untenable.

In my view, for example, Justice Kagan's dissenting opinion in *Arizona Christian School Tuition Organization v. Winn* exposed the Court's denial of standing as flatly insupportable absent an overruling of prior cases.[232] If a plaintiff would have standing to challenge a state's funding of religious education through financial appropriations, it makes no economic sense to hold that a taxpayer does not suffer the same harm, and thus possess an equal claim to standing, when the state gives an equivalent subsidy in the form of a tax deduction. Nevertheless, Professor Kahan's

228. Chayes, *supra* note 3, at 56 ("[P]osing the question whether public law litigation[] [is] seemingly an expression of a liberal and reformist ideology in the legal system."); Pierce, *supra* note 3, at 1743 ("The applicable [standing] doctrines are so malleable, however, that it is impossible to avoid the inference that the Justices manipulated the doctrines to rationalize their politically preferred results.").

229. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 619–20 (2007) (Scalia, J., concurring).

230. *See, e.g.*, Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 658, 666 (1993) (holding that challengers to a race-based affirmative action program need not establish that they would have received material benefits in order to have standing to challenge the imposition of a barrier to their receipt of those benefits).

231. *See, e.g.*, Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1496 (1995) (maintaining that the racial disparities in standing cases brought by whites and those brought by minority plaintiffs "seem to violate the Supreme Court's own interpretation of the Equal Protection Clause because other evidence of Supreme Court racial attitudes indicates that the Court is engaged in intentional racial discrimination").

232. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1463, 1450 (2011) (Kagan, J., dissenting) (asserting that the Court's denial of standing contradicted the Court's precedents).

thesis shakes my confidence that all of the Justices in the majority must surely so recognize.

C. The Sometime Relevance of "Strategic Actor" Models

In my judgment, it is impossible to give a persuasive account of the behavior of American judges and Justices that does not posit their commitment to governance through law and the even-handed enforcement of legal rules.[233] But one can coherently deny that the Justices routinely cast strategic votes in standing cases while affirming that they cast strategic votes—by which I mean votes that do not reflect principles that they would be prepared to live with in future cases that would be difficult to distinguish on principled grounds from time to time. Although I cannot prove it, I would speculate that the outcomes in some of the Roberts Court's most controverted standing cases may have involved strategic voting by one or more Justices whose positions controlled the outcome.

An example may come from *Hollingsworth v. Perry*, in which the Court held 5–4 that the sponsors of the California ballot proposition that abolished gay marriage in the state lacked standing to defend it after California officials ceased to do so.[234] For constitutional purposes, the state of California indisputably had an interest in defending Proposition 8. And if California can permissibly make law through an initiative process designed to circumvent the possibly obstructive efforts of elected officials, then one might expect that California should also be able to make special provisions for the defense of ballot initiatives, again to avoid the possibly obstructive stances of state officials. No precedent dictated otherwise. To the contrary, in holding that the defenders of Proposition 8 lacked the injury requisite for standing, Chief Justice Roberts's majority opinion struggled to distinguish a number of cases in which states had authorized officials or agents to litigate on behalf of the state.[235]

In the end, one cannot know for sure, but at least some of the Justices who made up the majority in *Hollingsworth* would appear to have had strategic reasons—albeit different ones—to want to avoid a ruling on the merits of that case.[236] In *United States v. Windsor*, which held 5–4 that a

233. *See* Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 992 (2009) (asserting that judges and Justices are "deeply socialized . . . to believe that there are legal norms independent of personal preference" and that they rarely think of deviating from those norms).

234. 133 S. Ct. 2652, 2658–61, 2668 (2013).

235. *Id.* at 2664–65.

236. *See, e.g.*, Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 146 (2013) (asserting that the Court in *Hollingsworth* likely avoided the constitutional issue because some of the justices "were not yet prepared to impose gay marriage on the states").

provision of DOMA violated equal protection norms,[237] Justice Scalia's dissenting opinion flatly asserted that although the majority reserved the question whether state prohibitions against same-sex marriage were also unconstitutional, the rationale of the Court's opinion revealed that a majority of "*this* Court" would so hold.[238] If so, then Chief Justice Roberts, who dissented in *Windsor*, would have had an obvious strategic reason to want to avoid a ruling on the equal protection issue that *Hollingsworth* otherwise would have presented. So, although for quite different reasons, might Justice Ginsburg, who voted with the majority in *Windsor* but found no standing in *Hollingsworth*. Justice Ginsburg has famously and repeatedly argued that the Court went too far, too fast in its decision in *Roe v. Wade*.[239] In comparison, the conjunction of *Windsor*'s invalidation of an important provision of DOMA with *Hollingsworth*'s avoidance of issues concerning the constitutionality of state prohibitions of same-sex marriage may have reflected a step-at-a-time approach more to Justice Ginsburg's liking. Justices Breyer, Sotomayor, and Kagan also might have preferred to advance slowly.

A comparison of the standing issues in *Windsor* with those in *Hollingsworth* supports this speculation. In the view of many observers, *Windsor*—in which the United States trumpeted its agreement with the judgment that it sought to appeal—presented more formidable obstacles to standing than did *Hollingsworth*.[240] But five Justices clearly wanted to reach the merits in *Windsor*, with Justice Kennedy's majority opinion frankly acknowledging that there were powerful "prudential" reasons—involving the desirability of clarifying the law to be applied by district courts in ninety-four judicial districts across the United States—for the

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237. 133 S. Ct. 2675, 2681, 2696.

238. *Id.* at 2709.

239. *See, e.g.*, Allen Pusey, *Ginsburg: Court Should Have Avoided Broad-Based Decision in* Roe v. Wade, A.B.A. J. (May 13, 2013, 2:20 PM), http://www.abajournal.com/news/article/ginsburg_expands_on_her_disenchantment_with_roe_v._wade_legacy/, *archived at* http://perma.cc/76JD-KQZV (reporting Justice Ginsburg's recent criticism of *Roe*). Justice Ginsburg has long maintained that, in contrast with the Supreme Court's methodical line of "gender classification" cases such as *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), "*Roe v. Wade* sparked public opposition and academic criticism . . . because the Court ventured too far in the change it ordered and presented an incomplete justification for its action." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376 (1985) (footnote omitted); *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) ("Measured motions seem to me right, in the main, for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable.").

240. *See, e.g.*, Neal Devins & Tara Grove, *Commentary on Marriage Grants: Article III & Same-Sex Marriage*, SCOTUSBLOG (Dec. 8, 2012, 3:44 PM), http://www.scotusblog.com/2012/12/commentary-on-marriage-grants-article-iii-same-sex-marriage/, *archived at* http://perma.cc/9G2J-JXSM (considering standing issues in DOMA and Proposition 8 cases and predicting the Proposition 8 proponents in *Hollingsworth* would be able to establish standing).

Court to resolve the equal protection issue.[241] If the decision to deny standing in *Hollingsworth* required one or more strategic votes, the same may be true of the decision to uphold standing in *Windsor*.[242]

Having offered these speculations, I hasten to add qualifications and caveats. First, the phenomenon of motivated reasoning, as discussed above, numbers among my reasons for caution in asserting that particular Justices may have engaged in strategic voting in particular cases. Even absent a self-conscious decision to act strategically, some Justices may find the standing arguments that pull them where they would like to go more powerful than those that would push them in an ideologically or strategically inconvenient direction. Accordingly, to say, for example, that Chief Justice Roberts would have had strategic reasons to want to deny standing in *Hollingsworth v. Perry* is not to say that he made a self-conscious decision to act on those reasons.[243] Motivated reasoning would often propel Justices in the same direction as strategic calculation (that the Justices might truthfully insist that they had never performed).

Second, because standing determinations sometimes necessarily reflect judgments about the substantive guarantees of particular constitutional provisions, I would not categorize decisions that restrict standing to enforce the Establishment Clause, for example, as strategic in the relevant sense. I would reserve that label for a Justice's decisions to deviate from whatever would be her best, conscientious interpretation of standing doctrine in order to achieve an ideologically attractive outcome in a particular case.

Finally, in suggesting that the strategic actor hypothesis has explanatory power with respect to the votes of some Justices in some cases, I mean to affirm my belief that most of the Justices' voting behavior is not strategic in the relevant sense. Rather, my suggestion has affinities with the jurisprudential position that Professor Fred Schauer has labeled "presumptive positivism."[244] The defining premise of presumptive positivism holds that although legal rules are "presumptively controlling," a "rule will be set aside when the result it indicates is egregiously at odds with the result that is indicated by [a] larger and more morally acceptable set of values."[245] Analogously, I would suggest that some of the Justices of the Roberts Court

241. *Windsor*, 113 S. Ct. at 2676, 2688.

242. Justice Kennedy's dissenting opinion in *Hollingsworth* may have obliquely so hinted. *See id.* at 2674 (Kennedy, J., dissenting) ("Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject. But it is shortsighted to misconstrue principles of justiciability to avoid that subject.").

243. *But cf.* Klarman, *supra* note 236, at 145–46 (observing that "[i]t is especially difficult to fathom how [an] ordinarily staunch defender[] of the states' constitutional prerogatives such as Chief Justice Roberts . . . could deny states the authority to determine who gets to defend the constitutionality of their laws in federal court" (footnotes omitted)).

244. SCHAUER, *supra* note 205, at 203.

245. *Id.* at 204–05.

may make strategic decisions with respect to standing when, but only when, the stakes seem to them to be extraordinarily large.

D. *The Supreme Court as a "They," Not an "It"*

Although there is a natural tendency to refer to the Supreme Court as a unitary body, political scientists emphasize the obvious reality that the Court is "a 'they,' not an 'it.'"[246] The nine Justices disagree with one another about numerous matters. What is more, many of the Roberts Court's most important and controversial standing rulings, like those of prior Courts, have come by 5–4 votes. On an ideologically divided Court, it may frequently be the case that a majority of the Justices would like to clarify the law by pushing it decisively in one direction or the other but that they disagree about the direction in which to move. If so, a swing Justice may cast the decisive vote. And a succession of relatively eccentric swing votes can sow confusion.

With respect to standing as with respect to so much else, Justice Kennedy has most often been the Roberts Court's swing Justice in important cases.[247] With Chief Justice Roberts and Justice Alito, Justice Kennedy has voted to pare taxpayer standing in Establishment Clause cases, but he has resisted overruling *Flast v. Cohen*.[248] Above I opined that the most recent decision cutting back on *Flast*, in *Arizona Christian Schools Tuition Organization v. Winn*, is legally and logically indefensible: the Court should either follow *Flast* (as I understand its holding) or overrule it.[249] For all I know—for it is impossible to be certain of the Justices' actual thoughts and motivations—six or even seven Justices may agree that the controlling opinions in recent decisions rest on dubious distinctions. But the swing Justices do not. In any event, their views control.

Massachusetts v. EPA, which holds that states are entitled to "special solicitude" in standing analysis,[250] furnishes another example of a case in which the idiosyncratic views of a single Justice may have determined the stated basis for the Court's decision. In addition to believing that states were not entitled to any special solicitude with respect to standing, four dissenting Justices thought that Massachusetts had no standing under

246. This idea received its most powerful introduction into the legal literature in Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

247. Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1070 (2009).

248. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 616 (2007) (Kennedy, J., concurring); *see* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1439, 1446–47 (2011) (relying on *Flast* to reject respondents' reliance on the exception to the rule against taxpayer standing).

249. *See supra* notes 58–61 and accompanying text.

250. 549 U.S. 497, 520 (2007).

ordinarily applicable principles.[251] At the other end of the spectrum, the Court's four liberals might well have stood ready to hold that the state satisfied more ordinary principles—though I cannot pretend to be sure. Justice Kennedy, who has recurrently affirmed that the Constitution reserves to the states a number of sovereign and quasi-sovereign prerogatives,[252] held the fifth vote that the liberals needed in order to prevail. Unsurprisingly under the circumstances, Justice Stevens's majority opinion not only quoted extensively from prior opinions by Justice Kennedy[253] but also advanced a "special solicitude" rationale that no Justice besides Justice Kennedy may have found either adequate or necessary to support the judgment.[254]

As others have noted, recognition that the Supreme Court is "a 'they,' not an 'it'" complicates ready dispositions to criticize "the Court" for producing confused or confusing doctrine.[255] Norms of individual behavior do not always apply sensibly or even coherently to multimember institutions.[256]

V. Contrasting Standing with Other Doctrines

In describing standing doctrine as having become increasingly fragmented under the Roberts Court, I have depended at least implicitly on a contrast with other doctrines. If all constitutional doctrines grew more fragmented with each passing Supreme Court Term, then standing doctrine's fragmentation would hardly bear comment. In some areas of the law, however, the Court more comprehensively settles matters, at least for a time.[257] A good, multifactored account of the enforcement, reformation, and fracturing of standing doctrine should therefore identify the specific

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251. *Id.* at 535, 540.

252. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2691–92 (2013) (declaring the regulation of marriage to be a state function); Alden v. Maine, 527 U.S. 706, 715 (1999) ("[The states] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.").

253. *See Massachusetts*, 549 U.S. at 516–17 (quoting Justice Kennedy's concurring opinion in *Lujan*); *id.* at 519 (quoting Justice Kennedy's majority opinion in *Alden*).

254. *Id.* at 520.

255. *See, e.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 814–17 (1982) (noting that voting paradoxes make it difficult or impossible for multimember institutions to render consistent decisions in cases requiring sequential voting on multiple issues); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 102–15 (1986) (discussing the logic and some paradoxes of group decision making in the judiciary).

256. *See* ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 9, 14–37 (2011) (discussing fallacies in attempts to extrapolate from claims about individual behavior to claims about group behavior, including fallacies "of composition" and "of division").

257. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 111–26 (1997) (discussing ordinary adjudication pursuant to established doctrines).

conditions that have prevented more stable equilibria from emerging with respect to standing, in contrast with what has happened in other areas.

Any effort to develop a general theory about conditions for the emergence of relatively stable doctrinal equilibria would swiftly draw me far beyond my competence. Nevertheless, I shall hazard a few observations about what makes standing law at least partly distinctive.

A first, obvious consideration involves the Roberts Court's composition. The Justices who have sat on the Roberts Court have divided about standing issues in ways that they have not divided about all other issues and, equally crucially, in ways that another set of Justices need not have divided. For example, with a change of just one or two Justices at the Court's center, the resulting majority could decisively resolve currently tangled and controverted issues of standing to enforce the Establishment Clause one way or the other.

Second, as I have emphasized, standing doctrine includes a peculiar mixture of transsubstantive and substantive elements. Despite the Court's pretensions to the contrary, standing inquiries cannot be wholly trans-substantive because, as I have argued, courts cannot give content to the concept of injury, in particular, without reference to the guarantees of particular constitutional provisions.[258] This being so, it seems almost inevitable that increasingly varied characterizations of injuries and non-injuries should emerge over time and should spawn increasing doctrinal complexity, as the Justices have appraised more claims of injury under multifarious constitutional provisions.

Third, standing cases are diverse not only in the constitutional and statutory provisions under which they arise but also in the parties who litigate them. The formative cases in the Supreme Court's development of its tripartite standing formula mostly involved private suits against the government and its officials.[259] With the Justices' thinking likely focused on such cases, it is understandable that concepts advanced with private challenges to governmental action in mind would apply awkwardly to later cases in which governments and their officials claimed standing as plaintiffs or appellants.[260] Further, largely unforeseen challenges that call for complex solutions have also, perhaps predictably, developed from congressional efforts to confer standing and, in particular, from probabilistic injuries, which can take a dizzying variety of forms.

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258. *See supra* subpart II(A).

259. *See, e.g.*, Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 28 (1976); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 210–11 (1974); United States v. Richardson, 418 U.S. 166, 167 & n.1 (1974).

260. For praise of *Windsor*'s result (though not all of its reasoning), on the ground that it permits "the Executive to facilitate judicial review by enforcing but refusing to defend a challenged law," see generally Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67 (2014).

Fourth, standing is a gateway doctrine, and the Justices may feel special, relatively ad hoc pressures either to let particular cases into or to keep them out of court.[261] Consistent with this hypothesis, the Supreme Court has long claimed that standing has a prudential element.[262] Within relatively recent times, the Court invoked prudential considerations as grounds for denying standing in its 2004 decision in *Elk Grove Unified School District v. Newdow*.[263] The Court's majority cited a desire not to interfere with family relations structured by state law as a reason to bar a father from bringing an action, which the mother of his child opposed, to challenge the constitutionality of a school district's policy of daily recitations of the pledge of allegiance.[264] Quite likely, the Justices who joined the Court's opinion preferred to avoid deciding the divisive Establishment Clause issue that the case presented on the merits. More recently, Justice Kennedy asserted prudential reasons for the Court to exercise jurisdiction in *United States v. Windsor*, in which he thought it important for the Court to give clear guidance to the lower courts about the constitutionality of Section 3 of the Defense of Marriage Act.[265] But the Court rests very few holdings on avowedly prudential grounds, possibly—I would speculate—because the Justices find it psychologically and rhetorically easier to present themselves as disinterested expositors of the law than as personally responsible agents making discretionary decisions. Considerations of doctrinal consistency push in the same direction. As the Court recognized in its recent, unanimous decision in *Lexmark International, Inc. v. Static Control Components, Inc.*,[266] the invocation of prudential grounds for declining to adjudicate "a case or controversy that is properly within federal courts' Article III jurisdiction . . . is in some tension with . . . the principle," which the Court has frequently avowed in other contexts, "that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."[267] The important point, however, is that formal invocation of explicitly prudential doctrines is one thing, while

261. For a classic argument that the Supreme Court appropriately relies on standing and other justiciability doctrines to forestall the need to issue merits rulings, especially in order to reconcile the Court's role as the ultimate guarantor of constitutional "principle" with the sometimes competing imperatives of prudence and expediency, see generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 115–27 (1962).

262. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750–52 (1984) ("Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction . . . ."); Warth v. Seldin, 422 U.S. 490, 500–01 (1975) ("[T]he source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes.").

263. 542 U.S. 1 (2004).

264. *Id.* at 17.

265. 133 S. Ct. 2675, 2687–89 (2013).

266. 134 S. Ct. 1377 (2014).

267. *Id.* at 1386 (quoting Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013)) (internal quotation marks omitted).

prudentially driven decision making that eschews such formal reliance may be another. Notwithstanding the Court's evident unease in *Lexmark* with formal recognition of a prudential element in standing doctrine, grounds for suspicion remain that ad hoc pressures to authorize or withhold adjudication on the merits may encourage some of the Justices to draw finer distinctions than they would draw otherwise—including finer distinctions than they might think appropriate in applying other doctrines—in determining whether the injury-in-fact, causation, and redressability requirements are met.

VI. Prescriptions

If I am correct that the fragmentation of standing is likely irreversible, both the Supreme Court and legal scholars ought to acknowledge this reality. Having done so, they should begin to address the frustration and confusion to which unacknowledged or untheorized divisions within the doctrine have given rise. But the Justices, with the aid of scholars whose interests include identifying practicable proposals for reform, should proceed with awareness of what is likely to be achievable in light of the phenomena and jurisprudential commitments—some of which should probably be accepted as fixed, at least for the short run—that I discussed in Part IV and that have produced fragmentation in the first place.

A. Judicial Correctives

Beyond acknowledging that standing doctrine is multifaceted and complexly differentiated, the Supreme Court—even if it remains divided about many standing matters—should agree on three significant but far from revolutionary revisions of its current approach. None would occasion distinctive repudiations of prior positions by any identifiable coterie of Justices. None has an ideological charge.

First, even if the Court will not go so far as to acknowledge that standing issues ultimately involve legal rights and legally valid authorizations to sue,[268] and even if it continues to insist on the centrality of injury in fact, it ought to recognize that what counts as an injury depends on the provision under which a plaintiff brings suit. This modest, clarifying recognition would bring increased transparency to divisions about standing.

268. In *Lexmark*, the Court recharacterized the question whether a plaintiff falls within the zone of interests that a statute protects, which it had previously termed one of "prudential standing," as an issue of statutory construction involving whether the plaintiff has a valid cause of action. 134 S. Ct. at 1387. As part of its analysis, the Court noted that it had occasionally referred to the zone-of-interests inquiry as one of "statutory standing" but dismissed that label as "misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case.'" *Id.* at 1387 & n.4 (quoting Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 642–43 (2002)).

Moreover, it should provoke no embarrassment, either to the Court institutionally or to any of the Justices individually. The Court has already acknowledged that injury under the Equal Protection Clause depends partly on the meaning of the equal protection guarantee.[269] It has also recognized that some injuries are real, but nevertheless not judicially cognizable, in the absence of a statute conferring authority to sue. For example, in *Lujan v. Defenders of Wildlife*,[270] Justice Scalia pointed to two prior cases as having established that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law . . . ."[271] From acknowledgment that injuries vary in nature and degree, it would be a small step to recognize that, although injury of some sort is invariantly required, different constitutional and statutory provisions guard against different kinds of injuries, which therefore require contextual characterization and appraisal.

Indeed, in the statutory context, a recognition of this kind arguably inheres in the conjunction of *Lujan* and last Term's decision in the *Lexmark* case, in which the Justices unanimously characterized the question of whether an injured plaintiff came within the zone of interests that a statute protected as involving the existence of a legislatively conferred cause of action.[272] *Lujan* signals that what counts as a judicially cognizable injury can depend on the contents of a statute. *Lexmark* confirms that whether injuries that would be cognizable in some contexts are actionable in others can also turn on the protections and authorizations to sue that particular statutes confer.

Just as the Court should be able to agree that the requirements of injury vary with the provisions under which a plaintiff brings suit, it should acknowledge that the necessary likelihood of redressability of injury is a variable, not a constant. In response to the examples catalogued in Justice Breyer's dissenting opinion in *Clapper*, the Court recognized that it has articulated different standards in different cases.[273] The Court has also, separately, pointed out that it applies different rules in cases involving procedural injuries than in other kinds of cases.[274] With disparities in the requisite likelihood of redressability now flushed into the open, one path to clarifying reform would of course involve the embrace of a uniform, quantitatively formulated standard, specifying a precise likelihood that a judicial remedy would redress an injury that otherwise would have

269. *See, e.g.*, Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) (discussing the different meanings of injury in fact in different applications of the equal protection clause).

270. 504 U.S. 555 (1992).

271. *Id.* at 578.

272. 134 S. Ct. at 1383, 1387.

273. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5 (2013).

274. *E.g.*, *Lujan*, 504 U.S. at 572 n.7.

occurred. An alternative, and I believe more salutary approach, would be for the Court to begin to articulate qualitative rather than quantitative standards, deeming judicial intervention more important and judicial remedies more appropriate in some kinds of cases than in others. I shall return to this issue below. For now, my principal point is simply that the Court, especially after *Clapper*, should be able to agree that it has advanced apparently inconsistent measures of the necessary likelihood that an injury would be redressable in order for standing to exist. Having done so, it should take on the agenda of sorting cases into categories and of identifying the varying criteria to be applied within them. I took a provisional stab at categorical mapping above.[275]

Second, the Court should make explicit that in some contexts, the standing requirements that apply to private parties do not extend to the government and its officials, and that in other cases the same formally articulated demands require adjustments in light of the government's special status and role. The example that should render this acknowledgment relatively uncontroversial and easy for all to swallow is governmental standing to enforce the criminal law: no one believes that the government must demonstrate a concrete injury to itself in order to prosecute a criminal case.[276] The government has a variety of kinds of interests, some shared with private citizens—such as those in its property and in having its contracts enforced—but some not, including those in vindicating its sovereign authority over people, places, and subject matters. There is no reason to think that rules governing the standing of private parties to protect their private interests should apply to all forms of government litigation.

275. *See supra* notes 196–203 and accompanying text.

276. *See* Hartnett, *supra* note 122, at 2246–47 (explaining that the government does not need to satisfy ordinary standing requirements in criminal law cases). According to Professors Ann Woolhandler and Caleb Nelson, in the early history of the United States, "criminal prosecutions were conducted in the name and under the authority of the people in their collective capacity, and the legal rights that they vindicated were understood to be those of the public rather than of any private individual." Woolhandler & Nelson, *supra* note 6, at 697 (footnote omitted). Traditionally, however, a state could not invoke the Supreme Court's original jurisdiction based on an injury to one of its citizens in the absence of a distinctive injury to itself of a kind that would have grounded standing by a private party. *Id.* at 716–17. This distinction may reflect a further set of distinctions among the kinds of interests that a state may seek to assert in litigation, including (1) interests in enforcing state civil and criminal law; (2) interests "similar to those of private parties," such as interests in property under contracts; (3) "*parens patriae*" or "quasi sovereign" interests deriving from those of its citizens; and (4) "sovereignty interests" in vindicating authority over a subject matter. Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 213–14 (2014). In an apparent analogue of the last of these kinds of interests, but this time involving the federal government, the Supreme Court recently adjudicated an action by the United States to have certain Arizona laws pertaining to immigration declared preempted by federal law in *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).

Other requirements may also apply differentially to cases involving the government. The requirement of concrete adversity that Justice Scalia thought central in the *Windsor* case may furnish a case in point. In a variety of cases, the Supreme Court has upheld standing and found the requirement of concrete adversity to be satisfied when one official or agency of the federal government has sued another official[277] or agency.[278] Any analogue in litigation involving private parties would be unthinkable.

In asserting that the rules governing standing by private litigants may not apply to the government, or that the same verbal formula may produce different results, I will not venture further into specifics. Particular rules or proposed modifications might understandably provoke controversy. In *Massachusetts v. EPA*, for example, the question of whether particular rules should apply differently to a state government in a particular kind of suit divided the Supreme Court by 5–4.[279] Without seeking to resolve understandable disputes, I suggest only that the nature of the remaining debates would be clearer if the Court dropped the pretense that Article III invariably applies to government litigants in the same way as to private parties.

Third, and relatedly, though admittedly more controversially, the Justices should recognize that disputed standing questions are frequently enmeshed with concerns about the propriety of particular kinds of remedies.[280] Standing issues rarely emerge in suits for damages.[281] By contrast, justiciability disputes occur with considerable frequency in suits for injunctive or declaratory relief. In actions for equitable remedies, the Court has occasionally said that the concerns bearing on standing merge along a spectrum with concerns about whether the relief sought would overreach the bounds of judicial competence or enmesh the issuing court in

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277. *E.g.*, United States v. Nixon, 418 U.S. 683, 697 (1974).

278. *See* United States v. Interstate Commerce Comm'n, 337 U.S. 426, 431–32 (1949) (finding standing in a suit by the United States as shipper to set aside a reparations order entered by the Interstate Commerce Commission). *See generally* Michael Herz, United States v. United States: *When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991) (discussing how the Supreme Court has allowed federal government officials or agencies to sue another official or agency and has never dismissed a case by characterizing it as the government suing itself).

279. 549 U.S. 497, 501, 518–20 (2007).

280. For an earlier and fuller development of this theme, see generally Fallon, *supra* note 201.

281. *Id.* at 650. Exceptions involve the antitrust laws and class action cases. In antitrust cases, the Supreme Court has attempted to restrict plaintiffs from seeking treble damages under the Sherman Antitrust Act for literal violations of the Act that cause injuries unrelated to anticompetitive behavior. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 484–89 (1977); *see also* RUDOLPH CALLMAN, 1 CALLMAN ON UNFAIR COMPETITION, TRADEMARK & MONOPOLY § 4:49 (4th ed. 2013) (observing that "[a]ntitrust standing is distinct from constitutional standing, in which a mere showing of harm in fact will establish the necessary injury," and depends on further considerations involving proper parties to enforce the antitrust laws). In class action cases, lower courts have split over the question of whether all prospective members of a class must be injured, or if an injury to the named class members is sufficient for standing purposes. *In re* Deepwater Horizon, 739 F.3d 790, 800–02 (5th Cir. 2014).

functions more properly reserved to democratically accountable institutions.[282]

The connection that the Supreme Court has noted in these cases deserves more general recognition. Whether self-consciously or not, and whether wisely and consistently or not, cases that state and apply different standards for the likelihood of redressability that is needed for standing almost certainly reflect sensitivity to the propriety of the award of particular remedies under particular circumstances. *Clapper* signaled as much when it cited authority purporting to establish that standing should be particularly difficult to establish when plaintiffs seek to challenge national security policies.[283]

A telling analogy in this respect emerges from a comparison between two cases from the 1970s in which plaintiffs sought relief based on alleged misconduct by the Ohio National Guard. In one, the Court allowed a suit for damages to go forward.[284] In the other, *Gilligan v. Morgan*,[285] it dismissed a suit for injunctive relief on the ground that it presented a nonjusticiable political question.[286] With both cases growing out of the same set of events, the principal difference that led the Court to pronounce one justiciable and the other not involved the nature of the relief that the respective plaintiffs requested. In my judgment, there should be little doubt that the anxieties about judicial competence that motivated *Gilligan*—involving a demand for a judicially mandated restructuring of the Ohio National Guard[287]—closely parallel the concerns that frequently underlie rulings that plaintiffs who seek injunctive remedies against sensitive governmental operations have no standing.

As I have stated before, it would be better if the demands for standing were relaxed and disputes about the propriety of equitable relief were openly debated and resolved within the law of remedies.[288] Traditional standards for the award of equitable remedies call for a balancing of public and private interests.[289] Looking at variations in the Court's articulation

282. *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–47 (2013) (stating that the law of standing is "built on separation-of-powers principles" and prevents the judicial branch from "usurp[ing] the power of the political branches"); O'Shea v. Littleton, 414 U.S. 488, 499 (1974) (considerations bearing on standing "obviously shade into those determining whether the complaint states a sound basis for equitable relief" and emphasize the importance of judicial restraint when "state officers [are] engaged in the administration of the State's criminal laws").

283. 133 S. Ct. at 1147.

284. Scheuer v. Rhodes, 416 U.S. 232, 233–35 (1974).

285. 413 U.S. 1 (1973).

286. *Id.* at 3, 11–12.

287. *Id.* at 3–4.

288. *See* Fallon, *supra* note 203, at 704–05.

289. *See, e.g.*, eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (reciting a four-factor test for the award of permanent injunctions that includes considering the public interest); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312–13 (1982) (emphasizing that "courts of equity

and application of redressability standards that make standing distinctively easier to obtain in some kinds of actions than in others,[290] I find it difficult to believe that such a balancing is not being conducted, even though the Court refuses to acknowledge as much. And if what once was called a balancing of public and private interests occurs anyway, it would dispel confusion and enhance clarity of analysis for the Court to frame debates about the propriety of remedies in terms that bring all pertinent considerations clearly into view.

Others may of course disagree, perhaps based on a concern that for courts to rest their decisions in suits for injunctive relief on judgments about competing public and private interests would cast the judiciary in a policy-making role and undermine public respect for the courts as nonpartisan oracles of a determinate body of previously established law. In my judgment, aspirations to conceal the nature of and grounds for official decisions fit uneasily with the premises of liberal democracy.[291] And among the institutions of liberal democracy, courts have special obligations of candor.[292] Nonetheless, I do not mean to be dogmatic in suggesting that standing rules applicable to probabilistic injuries and their redressability should be relaxed and analysis of the propriety of equitable relief correspondingly revitalized. Even if the Court resisted that relatively bold suggestion, it would enhance clarity within the domain of standing law for the Court to acknowledge more consistently that the standing question is one about the justiciability of disputes and that justiciability depends partly on the nature of the remedy that a plaintiff seeks. If progress is ever to be made in making sense of the varied standards that the Court has invoked in gauging the likelihood of future injury and the probability of successful redress that are necessary to support standing, that progress will depend on a recognition that the Court's pattern of decisions reflects a sensitivity to the nature of the relief for which a plaintiff asks. Having acknowledged that pattern, the Court should address the questions to which it gives rise.

B. *A Role for Legal Scholarship*

In my view, there are many forms of valuable scholarship. It implies no disparagement of any to say that, given the current confusion about standing, both the bench and the bar, as well as law students, would profit from more work by law professors that examined standing doctrine from

should pay particular regard . . . [to] public consequences" when considering the remedy of an injunction); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947) (weighing both private and public interests in deciding whether forum non conveniens is appropriate).

290. *See supra* subpart II(A).

291. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 133 (1971) (discussing the "publicity condition" of liberal society).

292. *See generally* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) (defending the view that judges have an obligation of candor and explicating its content).

what I characterized above as a doctrinal Realist perspective. In the most general terms, doctrinal Realism assumes that although judicial articulations of applicable rules frequently furnish reliable indicators of future judicial decisions, context matters crucially to determinations of whether and how abstract legal concepts apply.[293] To make either good predictions or sound judicial decisions requires "situation sense,"[294] which in turn can depend on discriminating insights concerning what is, and what others will perceive as being, reasonable and appropriate under varied circumstances.[295]

Through much of this Article, and especially in Part II, I have pursued a doctrinal Realist approach, with the goal not only of generating specific insights into the current structure of standing doctrine, but also of illustrating a style of analysis that others might usefully practice. In characterizing myself as having deployed doctrinal Realist assumptions, I make no claim of innovation. I am not even the first to deploy a doctrinal Realist methodology to standing doctrine. Among those who have most notably done so is Judge William Fletcher in his article *The Structure of Standing*,[296] which has both shaped my general thinking about standing and inspired some of the specific analysis in this Article. Judge Fletcher made it patently clear that the Supreme Court's standing determinations vary with the constitutional or statutory provision under which plaintiffs bring suit. I have previously emphasized the pertinence of concerns about appropriate remedies to standing analysis.[297] But there is plainly opportunity for much more doctrinal Realist work, perhaps most urgently with regard to the currently vexed topic of probabilistic standing.[298] More imaginative

293. *See* Fletcher, *supra* note 3, at 282 (discussing the need to consider context to understand certain controversial standing opinions); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1215 (2006) (noting that Realists argued for "greater sensitivity to commercial, political, and social context").

294. *Cf.* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60 (1960) ("*Situation-sense* will serve well enough to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with whatever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with, and to judge with.").

295. *See, e.g.*, Fletcher, *supra* note 3, at 281–84 (dividing standing cases into statutory and constitutional categories and arguing, among other things, that taxpayer standing cases should be understood based on the constitutional provision at issue rather than the status of the petitioner); Llewellyn, *Some Realism About Realism*, *supra* note 42, at 1240 ("A further line of attack on the apparent conflict and uncertainty among the decisions in appellate courts has been to seek a more understandable statement of them by grouping the facts in new—and typically but not always narrower—categories."); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 646–47 (1973) (arguing the importance of "distinguish[ing] the different contexts in which an issue of standing is said to arise" in order to "give coherence to the much-criticized doctrine").

296. Fletcher, *supra* note 43.

297. *See supra* notes 284–90 and accompanying text.

298. *See supra* subpart II(D).

analysis will generate new hypotheses.[299] Modern research tools will abet better empirical examination of larger data sets.

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299. Professor Richard Re argues interestingly that the Supreme Court's standing cases are best understood as displaying an immanent pattern of upholding standing by "those claimants with the greatest stake in obtaining legal relief in any particular case" and of denying standing to those with lesser stakes based on an implicit recognition that resolving their claims is not "necessary to remedy a violation of law." Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1197 (2014). Although I am much in sympathy with the spirit of Professor Re's inquiry, and admire the imagination with which he pursues it, in my view he offers no adequate explanation of what it means for a litigant to have or not to have "the greatest stake in obtaining relief in any particular case." In some cases, the question appears to turn on a relatively straightforward inquiry involving the rights that a particular constitutional or statutory provision confers. Affirmative action cases furnish a good example. Whether an excluded white applicant with a better academic record has a greater stake in obtaining relief in the form of a judicial invalidation of a challenged admissions policy than an excluded applicant with a weaker academic record apparently depends on the proper definition of the relevant right (if any) that the Equal Protection Clause confers: if there is a right not to have race considered in the review of one's application, then the two candidates have an equal stake. If the purported right is a right not to be denied a place on the basis of race-based considerations, then the candidate with the stronger claim to be admitted under race-neutral criteria would apparently have a greater stake in obtaining legal relief. What I find most telling, however, is that postulation that only the "claimants with the greatest stake in obtaining legal relief" should have standing affords no help in resolving the question on which standing ultimately turns, which involves the scope of the rights that the Equal Protection Clause protects. On the surface, relational issues may look more pertinent in cases in which a central question involves uncertain or possible future action that might violate one or another party's rights. The *Clapper* case, which I discussed earlier, *supra* notes 97–109, 187–93 and accompanying text, and which Professor Re also discusses to illustrate his theory, Re, *supra*, at 1244–47, exemplifies this kind of case. In *Clapper*, he emphasizes, the Court appeared to think it relevant that there might be another party who would have suffered a more indisputable injury than the actual plaintiffs and who would thus be a more appropriate claimant of standing. *Id.* at 1246. But I am unpersuaded that relational considerations—involving whether other plaintiffs would have more palpable or likely injuries—door ought to do the work that Professor Re thinks they do. Suppose that, although the Court could not be certain at the outset, the *Clapper* plaintiffs were in fact being subjected to unconstitutional searches or seizures. On this supposition, it seems mysterious to me why they would have a lesser stake in having the violation of their rights enjoined than would other possible plaintiffs. Professor Re's implicit assumption may be that when one party can establish only a probabilistic injury, and another party has suffered a demonstrably realized injury, the former always has a lesser stake than the latter. But from the perspective of one party, another party's rights and injuries will often be virtual irrelevancies. Suppose that the parties held out as potentially better plaintiffs in *Clapper* later choose not to sue for an injunction, accept a plea bargain without litigating their constitutional claim in the context of a criminal prosecution, or bring and settle a suit for damages. As a normative matter, I see no reason why the latter's conduct should bear on whether the former's stake in procuring relief should suffice to confer standing. Noting considerations such as these, Professor Re says that the problem in *Clapper* was more "nuanced" than the Court acknowledged, *see id.* at 1246, and he concludes that "[a] more defensible relativistic analysis would have erred on the side of affording standing." *Id.* at 1247. The deeper problem, in my view, is that a "relativistic analysis" would, more often than not, require "err[ing]" one way or the other without furnishing adequate criteria for defining error. As a descriptive and doctrinal matter, moreover, the Court has explicitly rejected Professor Re's position in cases in which plaintiffs seek injunctive relief by holding that realized injuries that will indisputably ground standing to sue for damages can fail to establish the likelihood of future injury necessary to standing to sue for injunctive relief. *See* Los Angeles v. Lyons, 461 U.S. 95, 101–02, 109, 111–13 (1983) (denying respondent's standing for injunctive relief but acknowledging that he "still has a claim for damages against the City that appears to

In suggesting that doctrinal Realist scholarship could help bring order to a body of law that many experience as subsisting in confusion—largely by identifying categories of cases in which the Supreme Court's general statements of doctrinal requirements have differing applications—I have called attention to the value of pattern making in predicting the outcome of future cases. But scholarship that begins with doctrinal Realist assumptions can also very usefully extend into the normative realm.

Although persuasively identified patterns of judicial decisions can command recognition as part of the fabric of the law, pattern identification is by no means necessarily a value-free exercise. As Ronald Dworkin persuasively argued, legal theories defining what the law is and prescribing how judges should decide future hard cases are appropriately tested against the sometimes competing criteria of fit and normative attractiveness.[300] When both are taken into account, imaginative groupings of cases, and equally imaginative imputations to them of immanent moral and policy-based rationales, can sometimes be justified.

Doctrinal Realist theorizing of this kind can frequently involve law professors in seeking to improve existing law, albeit typically incrementally, by depicting the patterns of cases that they have identified as already reflecting attractive values that judges should strive to realize more fully in the future.[301] In my view, some patterns of standing cases plainly lend themselves to explanation as embodying attractive principles. For example, I applaud standing cases under the Equal Protection Clause that hold, in effect, that being subjected to unequal treatment in the distribution of benefits or opportunities constitutes an adequate inquiry to support standing, even absent a further showing of material harm. In my judgment, this conclusion flows from the substantive purposes best ascribed to the Equal Protection Clause. If I am correct that the Court frequently upholds standing to sue to enjoin the enforcement of criminal statutes without stringent demands of proof that prosecutors would actually enforce a challenged statute against a particular plaintiff—as I hypothesized

meet all Art. III requirements"). Professor Re thinks *Lyons* was ultimately wrongly decided because no alternative plaintiff had a greater stake, Re, *supra*, at 1241–42, but this stance requires an implicit judgment of the stake that is minimally adequate to support standing, contrary to Professor Re's stated position that noncomparative inquiries into the adequacy of a stake to ground standing are unworkable. *Id.* at 1204, 1209–12.

300. *See* RONALD DWORKIN, LAW'S EMPIRE 255–58 (1986) (describing the process by which judges resolve hard cases in light of interlocking and sometimes competing considerations of fit and political morality).

301. Dworkin would himself falsify any rigid claim that a practitioner of the Dworkinian method can be only modestly innovative; I offer the claim in text as a generalization, not a categorical rule.

above[302]—that pattern also strikes me as a normatively desirable one that good interpretive theorizing could usefully identify and rationalize. Citizens who believe that they have a constitutional right to engage in a course of conduct that they otherwise would engage in should not need to risk a criminal prosecution with an uncertain outcome in order to do so. But these are only examples. My point, once again, is that there is valuable work to be done—not that patterns are obvious or that self-evident legal principles explain why patterns that appear attractive on the surface ought to be continued.

I should emphasize, moreover, that doctrinal Realism should not disable criticism. For example, imaginatively identified patterns of cases might reveal disturbing biases or insensitivities among Justices and judges, possibly embedded in culturally influenced factual judgments. To repeat an example that I offered earlier, some writers have argued that the Supreme Court has recurrently disfavored claims of injury by racial minority groups.[303] If so, good doctrinal Realist scholarship might help to trigger reform by exposing concealed biases. That said, I would expect the most telling insights to be discriminating ones, not global generalizations about—for example—the irreducibly political character of determinations of standing across the entire gamut of cases.

Conclusion

Recent years have witnessed a continuing and possibly accelerated fragmentation of standing doctrine. For reasons that I have canvassed, one need not like this trend in order to predict that the future will hold more of the same. Absent dramatic changes in the doctrine's structure, the Supreme Court's composition, or both, standing's fragmentation seems overdetermined.

If so, it is time for judges and Justices, law professors and law students to come to terms with standing's fragmentation by acknowledging and, within limits, embracing it. In the domain of standing law, we should recognize simplicity and elegance as illusions. We should distrust the large generalizations that have often occupied center stage in judicial opinions.

302. *See supra* note 197 and accompanying text.

303. *See, e.g.*, Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 9 (2013) ("Today, courts reviewing equal protection challenges to facially neutral laws brought by members of minority groups proceed under law that directs judges to defer to representative government, while courts reviewing equal protection claims brought by members of majority groups strictly scrutinize challenges to affirmative action."); Spann, *supra* note 231, at 1422–25 ("The observation that I wish to offer is that the Supreme Court's decision in *Northeastern Florida* . . . is one of a series of racially suspicious decisions that the Supreme Court has issued concerning the issue of standing."); *supra* notes 228–31 and accompanying text.

But we should not throw up our hands or succumb to legal nihilism. Patterns exist, even if the lines that demarcate them are sometimes difficult to identify, as well as more numerous and complex than we might wish. The doctrinal Realist credo affords a note of hope, not despair: We need to discern the "tangibles which can be got at beneath the words."[304]

304. Llewellyn, *Some Realism About Realism*, *supra* note 42, at 1223.

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Essay

Does "Public Use" Mean the Same Thing It Did Last Year?

Mark A. Lemley*

I. Introduction

In 2011, Congress enacted the America Invents Act (AIA), the most substantial overhaul of the patent system in the past sixty years. The most significant change in the AIA was the move from a "first to invent" regime to a "first inventor to file" regime. Before 2011, U.S. patent law chose among competing claimants to a patent by favoring the first to invent. Under the AIA, we (largely) follow the rest of the world in awarding the patent to the first inventor to file a patent application.

The goal of the move to (mostly) first to file, besides harmonization, is to encourage inventors to move with alacrity to share their invention with the world. Under the new law, an inventor can't rest on merely having invented; they have to race to the Patent and Trademark Office (PTO) in hopes of beating competitors. Under the AIA, unlike many other countries, inventors can also satisfy the obligation to share the invention with the world by making a "public disclosure" such as a publication or a public sale; doing so gives the inventor a year to get her invention on file. But whether it is by filing a (later-published) patent application or by publishing the invention, one of the touted advantages of the AIA is that it will encourage inventors to promptly disclose their ideas to the public.[1]

There is an ambiguity in the AIA, however, that threatens that disclosure objective. Some commentators have argued that Congress intended to fundamentally change the rules of prior art in a way that would encourage

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1. *See, e.g.*, Press Release, The White House Office of the Press Sec'y, President Obama Signs America Invents Act, Overhauling the Patent System to Stimulate Economic Growth, and Announces New Steps to Help Entrepreneurs Create Jobs (Sept. 16, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/16/president-obama-signs-america-invents-act-overhauling-patent-system-stim, *archived at* http://perma.cc/V9WE-VQ4C (noting that the purpose of the bill was to help inventors bring their ideas to market more quickly).

secrecy rather than disclosure.[2] Under this interpretation of the new law, an inventor can use its process in secret for commercial purposes, potentially forever, and still file a patent on that invention at some point in the future. Far from encouraging disclosure, on this interpretation the effect of the AIA is to encourage secrecy and delay in patenting. Curiously, the argument is that Congress signaled its intent to make this fairly radical change by reenacting language that had been in the Patent Act for the last 140 years: the words "public use."

Because two of these commentators, Bob Armitage and Joe Matal, were involved in the drafting of the AIA,[3] this argument has carried substantial weight, and the PTO in 2013 adopted regulations that read the term "public use" in the AIA as meaning something completely different than it had for the century before 2011.[4]

In this Essay, I make two points. First, as a matter of statutory interpretation it is unlikely that Congress intended to make such a change, not only because they readopted existing statutory language but because other parts of the statute make no sense under such an interpretation. Second, reading the AIA as making such a change would be unwise as a policy matter, not only because it would encourage secrecy but because it would undermine confidence that other terms reenacted in the AIA have the same meaning they have accrued in decades of common law.

In Part II, I explain the rules that existed before 2011. In Part III, I explain the changes made by the AIA and how they have been interpreted to date. In Part IV, I consider whether those changes result in "public use" meaning something different under the AIA than it did before 2011.

II. Prior Art and Public Use Before the AIA

An inventor can obtain a patent only if the invention is "novel"—that is, that no one has done the same thing before.[5] Rather than adopting an absolute novelty rule, however, patent law has traditionally required that most

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2. *See* Robert A. Armitage, *Understanding the America Invents Act and Its Implications for Patenting*, 40 AIPLA Q.J. 1, 53–57 (2012) (dismissing the idea that the new prior art language could be "read to allow secret uses . . . to impact patentability"); Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part I of II*, 21 FED. CIR. B.J. 435, 466–74 (2012) (arguing that the AIA excluded secret commercial uses based largely on statements by Senators Orrin Hatch, Jon Kyl, and Patrick Leahy).

3. Matal was a staffer for Senator Kyl. Matal, *supra* note 2, at 435 n.*. Armitage wrote early drafts of the language that was ultimately adopted by Congress in changed form. *See* Tony Dutra, *America Invents Act Post-Grant Oppositions After Two Years: Benefit or 'Death Squad'?*, 88 PAT. TRADEMARK & COPYRIGHT J. 1268, 1268–69 (2014) (calling Armitage "one of the leading forces behind the drafting of the legislation that became the AIA").

4. Examination Guidelines for Implementing the First Inventor to File Provisions of the Leahy-Smith America Invents Act, 78 Fed. Reg. 11,059, 11,062, 11,075 (Feb. 14, 2013).

5. 35 U.S.C. § 102 (2012).

categories of prior art be "accessible to the public."[6] Thus, while 35 U.S.C. § 102(a) bars a patent if the invention was "known or used by others" before the applicant invented it,[7] courts have interpreted that term to mean "publicly known or used."[8] At the same time, the public accessibility requirement does not require that the public have a realistic chance of accessing the information; "public" seems to mean merely "not secret."[9] An invention performed underground on private property in a rural area,[10] an invention found only inside the walls of a safe,[11] and a single copy of a graduate thesis in the basement of a library in Germany have all been held sufficiently "public" to constitute prior art.[12]

In addition to novelty, the Patent Act of 1952, like its predecessors, created a series of "statutory bars" designed to prevent inventors from making commercial use of their invention while keeping it secret. Section 102(b) provides that even a true first inventor is not entitled to a patent if the invention has been "on sale" or "in public use" more than a year before the inventor files her patent application.[13] As with § 102(a), the courts have interpreted the word "public" quite loosely, so that even uses that are extremely unlikely to be viewed by the public are nonetheless classed as "public uses" so long as they are not affirmatively secret. In the most extreme example, the Supreme Court held that a woman engaged in a public use of a corset invented by her fiancé when she wore it under her clothing.[14]

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6. *See, e.g.*, *In re* Cronyn, 890 F.2d 1158, 1161 (Fed. Cir. 1989) (holding that writings must be "reasonably accessible to the public" to constitute printed publications).

7. 35 U.S.C. § 102(a) (2006).

8. *E.g.*, Vulcan Eng'g Co. v. Fata Aluminium, Inc., 278 F.3d 1366, 1372 (Fed. Cir. 2002) ("The [lower] court found that the [manufacturing process] was 'secret' and that it was not on sale or *publicly known or used*, and correctly held that it was not prior art." (emphasis added)); *see also* Rosaire v. Baroid Sales Div., Nat'l Lead Co., 218 F.2d 72, 74 (5th Cir. 1955) (holding that a patent on a prospecting method was invalid if previously performed on private property because no action was taken to conceal or exclude public viewing of the past performance).

9. W.L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1549 (Fed. Cir. 1983).

10. New Railhead Mfg. v. Vermeer Mfg. Co., 298 F.3d 1290, 1299 (Fed. Cir. 2002); *Rosaire*, 218 F.2d at 74–75. Judge Dyk, dissenting in *New Railhead*, noted that in *Rosaire* the use was completely hidden from view. *New Railhead*, 298 F.3d at 1300 (Dyk, J., dissenting in part). As Judge Dyk observed:

> The use actually took place *under* public land, hidden from view, and there has been no showing whatsoever that the use was anything but confidential. In order to understand the method of using the drill bit a person at the job site would have to view the drill bit or see it in operation, and this was impossible to do while the drill bit was underground.

Id. Nonetheless, the use was held public. *Id.* at 1299 (majority opinion).

11. Hall v. Macneale, 107 U.S. 90, 96–97 (1882).

12. *In re* Hall, 781 F.2d 897, 899–900 (Fed. Cir. 1986).

13. 35 U.S.C. § 102(b) (2006).

14. Egbert v. Lippmann, 104 U.S. 333, 337–38 (1881).

But even a very broad definition of "public" left a significant loophole—an inventor could avoid the one-year statutory bar by commercializing his invention but treating it as a trade secret. Because a secret use is by definition not a public use, a company could make commercial use of an invention indefinitely without triggering the one-year period for filing. To solve this problem, courts for more than seventy years have created a special rule for secret commercial uses: a secret commercial use is not prior art that bars a third party from later obtaining a patent, but it does start the one-year clock running for the user.[15] This rule originated in a 1940 opinion by Judge Learned Hand in *Metallizing Engineering v. Kenyon Bearing & Auto Parts*.[16] The court acknowledged that interpreting the same term ("public use") to have different meanings was hard to reconcile with the statute.[17] But Judge Hand reasoned that it was not the intent of the statute to encourage secrecy but instead to encourage disclosure.[18] *Metallizing*'s split interpretation of public use served that goal in two ways. First, it encouraged inventors to file a patent quickly rather than relying in trade secrecy because they would lose the right to patent if they waited longer than a year.[19] Second, the fact that a secret commercial use wouldn't prevent a later patent from issuing to a third party adds to the disclosure incentive because an inventor who opts for trade secrecy may find that a later inventor has patented their own idea and there is nothing they can do to stop it.[20]

Metallizing has been the law for more than seventy years. It has repeatedly been endorsed by the Federal Circuit.[21] And while it doesn't fit

15. Metallizing Eng'g Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516, 520 (2d Cir. 1946).

16. *Id.* at 517. For a detailed discussion of the facts of *Metallizing*, see Dmitry Karshtedt, *Did Learned Hand Get It Wrong?: The Questionable Patent Forfeiture Rule of* Metallizing Engineering, 57 VILL. L. REV. 261, 272–77 (2012).

17. *Metallizing*, 153 F.2d at 519–20.

18. *Id.* at 520.

19. *See supra* note 13.

20. *See, e.g.*, Dunlop Holdings Ltd. v. Ram Golf Corp., 524 F.2d 33, 35–36 (7th Cir. 1975) (noting that one who commercially exploits an invention in secret loses a claim to patent it and also cannot bar a later inventor from patenting the same idea); Gillman v. Stern, 114 F.2d 28, 31–32 (2d Cir. 1940) (explaining that a secret inventor is not a first inventor).

21. Kinzebaw v. Deere & Co., 741 F.2d 383, 390 (Fed. Cir. 1984); W.L. Gore & Assocs. v. Garlock, Inc., 721 F.2d 1540, 1550 (Fed. Cir. 1983); D.L. Auld Co. v. Chroma Graphics Corp., 714 F.2d 1144, 1147 (Fed. Cir. 1983); *see also* Moore v. United States, 194 U.S.P.Q. 423, 428, 1977 WL 22793194, at *5–6 (Ct. Cl. 1977) (endorsing *Metallizing*); 2 DONALD S. CHISUM, CHISUM ON PATENTS § 6.02[5][b], at 6–61 (2014) ("[I]t is now well established that commercial exploitation by the inventor of a machine or process constitutes a public use even though the machine or process is held secret."). *Compare* Dey, L.P. v. Sunovion Pharm., Inc., 715 F.3d 1351, 1355 (Fed. Cir. 2013) (stating that third party use, if confidential, was not a public use), *with* Pronova Biopharma Norge AS v. Teva Pharm. USA, Inc., 549 F. App'x 934, 939 (Fed. Cir. 2013) (noting that confidentiality will not bar a finding of public use if the patentee has engaged in commercial exploitation).

well with the literal language of the statute (since a secret commercial use isn't "public"), the development of the prior art rules under the 1952 Act (and even before that time) has always been in significant part a common law process. Courts have sought to balance absolute and relative novelty, requiring some form of public access even in statutory sections like § 102(a) that do not require them.[22] They have grafted an experimental use exception onto the public use and on sale bars in § 102(b), allowing patentees to engage in even truly public uses for more than a year if they do so for purposes of testing their invention.[23] Preventing applicants from engaging in secret commercial uses or sales for an indefinite period is designed to achieve the goals of encouraging early disclosure of inventions and avoiding delay in patenting, while ensuring that applicants have enough time to test their inventions before deciding whether to patent them.

III. The AIA and the First Inventor to File

The AIA made a number of significant changes to patent law and practice. At a high level of abstraction, the most significant change in the law was the decision to favor the first to file, not the first to invent, when choosing among competing inventors.[24] In fact, however, new § 102 is rather more complex than that. Like the 1952 Act, the AIA includes a one-year grace period allowing inventors to engage in some conduct before filing a patent suit. The AIA gives a patent applicant a one-year grace period for any "disclosures" made through the patentee's own conduct.[25] It also protects

22. *See supra* notes 6–8 and accompanying text.

23. City of Elizabeth v. Pavement Co., 97 U.S. 126, 135 (1877).

24. Simultaneous invention is quite common. Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 712 (2012).

25. 35 U.S.C. § 102(b)(1) (2012). The relevant text of § 102 reads:

> (a) NOVELTY; PRIOR ART.—A person shall be entitled to a patent unless—
>
> (1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention; or
>
> (2) the claimed invention was described in a patent issued under section 151, or in an application for patent published or deemed published under section 122(b), in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention.
>
> (b) EXCEPTIONS.—
>
> (1) DISCLOSURES MADE 1 YEAR OR LESS BEFORE THE EFFECTIVE FILING DATE OF THE CLAIMED INVENTION.—A disclosure made 1 year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention under subsection (a)(1) if—
>
> (A) the disclosure was made by the inventor or joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or
>
> (B) the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.

patentees who make a "public disclosure" of the invention from intervening filings by third parties during the next year.[26] As leading patent scholar Rob Merges has explained, a "public disclosure" is presumably a subset of "disclosures," suggesting that "disclosures" in turn includes some information that is not in fact public.[27]

What then does "disclosure" encompass? Rob Merges suggests that it encompasses any category of prior art in § 102(a)(1)—specifically, things that were "patented, described in a printed publication, or in public use, on sale, or otherwise available to the public."[28] Merges relies on the structure of § 102, but further support for his position comes from the fact that the term "disclosures" was a term of art under the 1952 Patent Act that was used synonymously with "prior art." Thus, in *OddzOn Products v. Just Toys*,[29] the court addressed whether a § 102(f) confidential disclosure could also be used as prior art under § 103.[30] OddzOn Products argued that "because these disclosures are not known to the public, they do not possess the usual hallmark of prior art, which is that they provide actual or constructive public knowledge."[31] The Federal Circuit rejected that argument, concluding that derivation under old § 102(f) was prior art that could be used for an obviousness inquiry.[32] Notably, both the court and the party arguing against prior art status for secret information used the term "disclosures" to refer to that secret prior art.[33] That usage by both courts and litigants is consistent with the idea that "disclosures" in patent law has traditionally meant

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(2) DISCLOSURES APPEARING IN APPLICATIONS AND PATENTS.—A disclosure shall not be prior art to a claimed invention under subsection (a)(2) if—

(A) the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor;

(B) the subject matter disclosed had, before such subject matter was effectively filed under subsection (a)(2), been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or

(C) the subject matter disclosed and the claimed invention, not later than the effective filing date of the claimed invention, were owned by the same person or subject to an obligation of assignment to the same person.

Id. § 102(a)–(b).

26. *Id.* § 102(b)(1)(B).

27. Robert P. Merges, *Priority and Novelty Under the AIA*, 27 BERKELEY TECH. L.J. 1023, 1038 (2012).

28. *Id.* at 1026 (quoting § 102(a)(1)) (internal quotation marks omitted).

29. 122 F.3d 1396 (Fed. Cir. 1997).

30. *Id.* at 1400.

31. *Id.* at 1401.

32. *Id.* at 1401–02.

33. *Id.*

"anything that qualifies as a prior art reference," not a particular level of publicness.[34]

The definition of prior art, in turn, is set out in § 102(a)(1).[35] Fortunately, the terms used in § 102(a)(1) are all familiar from prior law. The terms "patented," "described in a printed publication," "public use," and "on sale" are taken directly from § 102(b) of the 1952 Act.[36] And, as noted previously, the term "available to the public" was used to describe what fit into the categories of patents and publications but not public uses or sales.[37] The only new piece of § 102(a)(1), then, is the word "otherwise" before "available to the public," which seems to create a catchall new category of prior art.[38]

Notwithstanding the continuation of the same terms from the 1952 Act, the PTO has taken the position in its Examination Guidelines that the terms "public use" and "on sale" have different and significantly more restrictive meanings under the AIA than they did under the 1952 Act and its predecessors.[39] The PTO guidelines concluded that a secret commercial use by the patent applicant more than a year before filing will no longer bar that applicant from a patent. In so concluding, the proposed Guidelines take the position that the AIA has reversed an unbroken line of precedent of both the Federal Circuit and the regional circuits tracing back to Judge Learned Hand's decision in the [*Metallizing*] case.[40] The guidelines go further, concluding that

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34. Other cases use the term consistently. Thus, in *Conmar Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150 (2d Cir. 1949), Judge Hand referred to a putative piece of prior art as "Poux's disclosure" even though it was not in fact public as of the priority date. *Id.* at 152–53. Similarly, *White Cap Co. v. Owens-Ill. Glass Co.*, 203 F.2d 694 (6th Cir. 1953), speaks of a rejected patent application that never became public, and therefore did not qualify as prior art, as the "Armstrong disclosure." *Id.* at 696; *see also* Hazeltine Research, Inc. v. Brenner, 382 U.S. 252, 253, 256 (1965) (finding a filed patent application to be prior art for § 103 purposes even though "its disclosures were secret and not known to the public").

35. 35 U.S.C. § 102(a) (2012).

36. *Compare id.* § 102(a)(1), *with* 35 U.S.C. § 102(b) (2006).

37. *See supra* notes 6–8 and accompanying text.

38. For a discussion of this new catchall category, why it is unnecessary, and the problems it might create, see generally Paul Morgan, *The Ambiguity in Section 102(a)(1) of the Leahy-Smith America Invents Act*, 2011 PATENTLY-O PAT. L.J. 29, http://patentlyo.com/media/docs/2011/12/morgan.2011.aiaambiguities.pdf, *archived at* http://perma.cc/59S3-CC9L; Joshua D. Sarnoff, *Derivation and Prior Art Problems with the New Patent Act*, 2011 PATENTLY-O PAT. L.J. 12, 25–28, http://patentlyo.com/media/docs/2011/10/sarnoff.2011.derivation.pdf, *archived at* http://perma.cc/Q5RZ-WFT8.

39. Examination Guidelines for Implementing the First Inventor to File Provisions of the Leahy-Smith America Invents Act, 78 Fed. Reg. 11,059, 11,062, 11,075 (Feb. 14, 2013).

40. Portions of this paragraph are adapted from Mark Lemley, *Comments on PTO 1st to File Guidelines*, U.S. PAT. & TRADEMARK OFF. (Oct. 5, 2012), http://www.uspto.gov/sites/default/files/patents/law/comments/m-lemley_20121005.pdf, *archived at* http://perma.cc/6DBQ-FXF6; *see also* Examination Guidelines for Implementing the First Inventor to File Provisions of the Leahy-Smith America Invents Act, 78 Fed. Reg. at 11,059, 11,062, 11,075.

a sale as well as a public use must be available to the public.[41] Sell your invention subject to a confidentiality agreement and the PTO believes you can commercialize to your heart's content without triggering the one-year grace period. The result is that under the PTO's interpretation, a potentially large category of prior art has been eliminated from the statute.

IV. Does Public Use Have a Different Meaning Today Than It Did in 2011?

While the PTO has no substantive rulemaking authority,[42] so their guidelines have no legal force, there is a substantial risk that courts will follow the PTO in changing the meaning of the terms "public use" and "on sale" in the AIA. I think that would be a mistake. The PTO's decision to eliminate secret sales and commercial uses from the scope of prior art is troubling both as a matter of statutory interpretation and for its implications for the new statute.

A. *Statutory Interpretation*

I should begin by acknowledging that, if we were writing on a clean slate, a secret commercial use does not seem to fit comfortably within the plain meaning of the term "public use." As noted above, "public" in the 1952 Act, and the related term "accessible to the public" in the case law, was generally interpreted to mean merely "not secret," regardless of whether the public was actually likely to encounter the prior art.[43] A use inside the inventor's factory that is protected as a trade secret is not public in that sense.

Nonetheless, because the term "public use" has been in the patent statute since 1870[44] and has consistently been interpreted during that time to extend to secret commercial uses,[45] the relevant question is not simply "what does the term public use mean?" but "did Congress intend to change the settled meaning of that term?" It is a well-established principle of statutory interpretation that when Congress reenacts existing statutory language, it is presumed to acquiesce in the way the courts have interpreted that language.[46]

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41. Examination Guidelines for Implementing the First Inventor to File Provisions of the Leahy-Smith America Invents Act, 78 Fed. Reg. at 11,059, 11,062, 11,075.

42. Tafas v. Doll, 559 F.3d 1345, 1352 (Fed. Cir. 2009). For debates on the wisdom of this rule, see generally Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269 (2007); Sapna Kumar, *Expert Court, Expert Agency*, 44 U.C. DAVIS L. REV. 1547 (2011); Sarah Tran, *Patent Powers*, 25 HARV. J.L. & TECH. 609 (2012).

43. *See supra* note 8 and accompanying text.

44. Act of July 8, 1870, ch. 230, §§ 24–25, 16 Stat. 198, 201 (repealed 1952).

45. *See supra* note 17 and accompanying text.

46. *See, e.g.*, Neder v. United States, 527 U.S. 1, 21 (1999) ("'[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, [we] must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'"

Indeed, the Supreme Court applied that principle to the Patent Act as recently as 2011 when it concluded that the phrase "a patent shall be presumed valid" in the 1952 Act required the application of a clear and convincing evidence standard because courts before 1952 had interpreted the presumption to be rebutted only with clear and convincing evidence.[47] So it is reasonable to start with a strong presumption that both "public use" and "on sale" mean the same thing in the AIA as they meant in the 1952 Act (or the Patent Act of 1870, for that matter).[48] "Public use" has become a term of art in patent law.[49] When a term has become such a term of art, it is the traditional use, *not* the plain meaning, that governs.[50]

The argument against changed meanings is even stronger with respect to secret sales. While the plain meaning of "public use" seems to exclude secret uses, there is no similar limitation in the term "on sale." A sale is a sale whether it is done publicly or privately. But the interpretation adopted by the PTO,[51] while perhaps consistent with the plain meaning of the term "public use" unenlightened by decades of judicial interpretation, is flatly contrary to the plain meaning of "on sale" because it requires courts to distinguish between secret and public sales and ignore the former, despite the fact that the statute draws no such distinction.

The sole statutory hook for the idea that "public use" and "on sale" have changed meanings in the new statute is the addition of a new, catchall category of prior art—information that was "otherwise available to the

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(quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992))); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense . . . ."); GPX Int'l Tire Corp. v. United States, 666 F.3d 732, 739 (Fed. Cir. 2011) (identifying Supreme Court cases that support this principle).

47. Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2242, 2246 (2011).

48. *See* Morgan, *supra* note 38, at 33. As Paul Morgan argues:

> The fact that the drafters did not [change the preexisting "public use" language] suggests that the drafters did *not* intend to overrule the long-established case law precluding delayed patenting after secret commercial use of inventions and making secret "on-sale" activities a statutory bar, especially since the AIA deliberately retained, unqualified, the exact same previously judicially interpreted words "in public use" and "on sale."

Id.

49. *See* Metallizing Eng'g Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516, 519–20 (2d Cir. 1946) (demonstrating the legal significance that courts have placed on the term in the context of patents).

50. "'[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken.'" Air Wis. Airlines Corp. v. Hoeper, 134 S. Ct. 852, 861–62 (2014) (quoting FAA v. Cooper, 132 S. Ct. 1441, 1449 (2012) (internal quotation marks omitted)).

51. *See supra* notes 39–41 and accompanying text.

public."[52] Those who argue that the AIA overruled *Metallizing* point to the word "otherwise" as implicitly indicating that all the other categories of prior art—patents, publications, public uses, and sales—must also be "available to the public."[53] But, as noted previously, "available to the public" was a phrase in common use in cases interpreting the 1952 Act, and it applied to a number of things that were not in fact available to the public.[54] Far from indicating an intent to change the definition of prior art under the 1952 Act, the adoption of this language suggests an intent to continue the same definition of prior art that existed before 2011. At a minimum, it would be odd to interpret the addition of a new category of prior art to *sub silentio* eliminate other categories.

The idea that public uses and sales must include some nonpublic information notwithstanding the "otherwise available to the public" language is further bolstered by the structure of the grace period created in the AIA. While the normal rule is that an inventor cannot have a patent if the prior art was available before their filing date, § 102(b) creates an exception for "disclosures" occurring within one year before the inventor files. A "disclosure" made by the inventor herself will not bar her from patenting the invention within a year after that disclosure.[55] In addition, if the inventor has made a "public disclosure," that public disclosure will create a one-year grace period in which the later application is immune to *all* prior art, not just prior art disclosed by the inventor.[56] But as Rob Merges has pointed out, the use of the two different terms, "disclosures" and "public disclosures," in the same statutory subsection strongly suggests that the two have different meanings and that "disclosures" encompasses some things that are not in fact public.[57] If "public use" and "on sale" have the same meaning they have always had, the distinction between disclosures and public disclosures makes sense—"disclosures" means all types of "prior art" in § 102(a)(1) and that includes some that are not public. By contrast, there is no good explanation for the use of these two different terms if all disclosures are necessarily "available to the public," as the Armitage interpretation suggests.[58]

52. 35 U.S.C. § 102(a)(1) (2012).

53. Armitage, *supra* note 2, at 54; Matal, *supra* note 2, at 471–75.

54. *See* Sharon K. Sandeen, Be Careful What You Wish for: Trade Secrets and the America Invents Act 8 (Sept. 17, 2013) (unpublished manuscript), *available at* http://ssrn.com/abstract=2327263, *archived at* http://perma.cc/B2HW-8E3Z ("[U]nder long-standing patent law principles, not all forms of prior art had to actually be shown to the public, they simply needed to be available to the public in a 'minimum sense.'"); *supra* notes 8–12 and accompanying text.

55. 35 U.S.C. § 102(b)(1)(A).

56. *Id.* § 102(b)(1)(B).

57. Merges, *supra* note 27, at 1038.

58. Armitage, *supra* note 2, at 54.

Finally, the history of the drafting of the AIA suggests that it did not repeal *Metallizing*. The original bill introduced in Congress in 2005 would have eliminated the categories of public use and on sale altogether, defining "prior art" as only things "patented, described in a printed publication, or otherwise publicly known."[59] Senator Kyl expressly noted that the purpose of dropping public use and on sale was to "eliminat[e] confidential sales and other secret activities as grounds for invalidity."[60]

But that language was not the language Congress adopted. During the course of six years of Congressional debate, Congress added the terms "public use" and "on sale" back into the definition of prior art.[61] Indeed, Senator Kyl and two others objected to adding that language because they said it would add secret uses back to the definition of prior art.[62] To limit those terms only to uses and sales that were publicly known would render that decision a nullity—the statute would have precisely the same effect as if the terms "public use" and "on sale" were excluded altogether. An interpretation of a statute that renders a portion of it a nullity is strongly disfavored.[63] That is particularly true when the terms were specifically added to the bill during the legislative process.

Against the considerable weight of this statutory interpretation, those who claim the AIA overruled *Metallizing* offer only a relatively weak form of legislative history—the statements of individual senators. The basis of the argument is a "colloquy" on the floor of the Senate the day *after* the Senate had passed the AIA, in which Senator Leahy expressed his view to Senator Hatch that "subsection 102(a) was drafted in part to do away with precedent under current law that private offers for sale or private uses or secret processes practiced in the United States . . . may be deemed patent-defeating prior art."[64] Senator Kyl made similar statements about his interpretation of the statute the day before.[65] This prepackaged "conversation" enabled certain representatives to express their view that *Metallizing* should be overruled.

59. H.R. 2795, 109th Cong. § 3 (2005).

60. 154 CONG. REC. 22,631 (2008) (statement of Sen. Jon Kyl). That statement was in reference to a 2008 Senate bill that went back to the original 2005 House language but which was ultimately not adopted. For a full and thoughtful discussion of the legislative history on this point, see generally Daniel Taskalos, Note, Metallizing Engineering*'s Forfeiture Doctrine After the America Invents Act*, 16 STAN. TECH. L. REV. 657, 685–93 (2013).

61. *Compare* H.R. 2795, *with* 35 U.S.C. § 102(a)(1).

62. *See* S. REP. NO. 111-18, at 60 (2009) (supporting removing language from the bill relating to patent-forfeiture provisions "that apply only to non-public prior art").

63. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).

64. 157 CONG. REC. 3415 (2011) (statement of Sen. Patrick Leahy). Senator Hatch did not respond to this point, instead turning to different issues. *Id.* at 3415–16. Hal Wegner has called this "*faux* legislative history" because it was created after the fact to explain a bill that had already passed. HAROLD C. WEGNER, THE 2011 PATENT LAW: LAW AND PRACTICE 138 (4th ed. 2011).

65. 157 CONG. REC. 3423–24 (2011) (statement of Sen. Jon Kyl).

But the floor statement of two members of Congress articulating their personal intent, unexpressed in the statute, to overrule *Metallizing* should not change settled law.[66] While the use of any legislative history is suspect to some, the statements of individual members of Congress on the floor are particularly weak legislative history because there is no reason to think that they speak for anyone but themselves.[67] That is particularly true here because other members of Congress, notably Representative Zoe Lofgren, publicly took a different view.[68]

A stronger form of legislative history lies in the official reports written by the Committee that advanced the legislation to the floor.[69] Those reports, unlike a colloquy, at least purport to speak for the Committee as a whole. Notably, the House Report accompanying the 2007 bill—the one that reintroduced the "public use" and "on sale" language—expresses an intent to adopt the "public use" and "on sale" language "primarily because of how the terms 'in public use' and 'on sale' have been interpreted by the courts."[70] That—coupled with the fact that the bill changed to add those terms over the objections of the Senators who wanted to overrule *Metallizing*[71]—suggests that the legislative history is at most ambiguous. Indeed, if anything, the best reading of that history is that Congress voted to maintain the definitions of "public use" and "on sale" as they have existed for decades, even if a few senators wished it were otherwise.

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66. Lemley, *supra* note 40; *see also* Taskalos, *supra* note 60, at 706 ("Statements by three legislators should not dictate the fate of such a well-established doctrine.").

67. Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 752 (2012) (noting that an individual senator's comments in support of legislation "are not controlling"); Patriotic Veterans, Inc. v. Indiana, 736 F.3d 1041, 1053 (7th Cir. 2013) ("[T]he comments of individual senators do not necessarily reflect Congress's intent in enacting any particular piece of legislation."); *see also* Wis. Educ. Ass'n Council v. Walker, 705 F.3d 640, 652 (7th Cir. 2013) (stating that a single comment "reveals little of the intent of the legislature as a whole").

68. 157 CONG. REC. H4424 (daily ed. June 22, 2011) (statement of Rep. Zoe Lofgren). Representative Lofgren sought to submit an amendment to H.R. 1249 on the floor of the House to clarify that all existing categories of prior art were subsumed in the term "disclosure," but the Rules Committee would not allow the amendment to be presented, so there was no opportunity for Congress to discuss or vote on the question. *H.R. 1249—America Invents Act*, HOUSE OF REPRESENTATIVES COMMITTEE ON RULES, http://rules.house.gov/bill/112/hr-1249, *archived at* http://perma.cc/W5S-FTRW. For a discussion of the problems with relying on the statement of a few members of Congress, particularly when lobbyists may be involved in drafting statements, see Taskalos, *supra* note 60, at 703–05.

69. Courts are generally hesitant about looking at the legislative history of a bill from a prior Congress. But here there is a more compelling case for looking at it because the only report for the enacted AIA states "the bill is a 6-year work in progress" and cites hearings from 2005 to 2010. H.R. REP. NO. 112-98, at 57 (2011). That is particularly true where, as here, the final statutory language was settled on in the 2007 term and did not change thereafter. *Compare* H.R. 1908, 110th Cong. (as introduced in House of Representatives, Apr. 18, 2007), *with* 35 U.S.C. § 102(a)(1) (2012).

70. H.R. REP. NO. 110-314, at 57 (2007).

71. *See supra* notes 64–66 and accompanying text.

B. *Policy*

It seems unlikely, then, that Congress acted to overrule *Metallizing* and the cases that have followed it. That is a good thing for two reasons. First, *Metallizing* is good public policy. Second, a conclusion that the re-adoption of the language of the 1952 Act in the AIA changes the meaning of that language would create enormous uncertainly about the scope of patent law for decades to come.

1. Avoiding Delay in Patenting.—Requiring inventors who put their inventions to commercial use to promptly file a patent application or lose their right to do so at all serves two goals. First, it discloses the invention to the world. *Metallizing* forces the inventor who wants to make commercial use of her invention to choose early between patent and trade secret protection, and it biases that choice in favor of patenting. An inventor who commercializes a process but does not file a patent within one year will forever lose the right to patent, but her prior work will not be prior art against a later third party inventor.[72] Thus, under *Metallizing*, anyone who opts for trade secrecy risks having someone else patent their invention.[73] One might reasonably question how valuable the disclosure function of patent law is in the modern world,[74] but the AIA is based on the premise that encouraging inventors into the patent system serves a valuable social purpose.[75]

Second, the *Metallizing* rule prevents the commercializing inventor from delaying the filing of her patent application in order to extend the life of her patent and her control over the invention. This has long been an important policy that underlies the statutory bars in patent law. Since the days of *Egbert v. Lippmann*,[76] courts have worried that applicants could delay

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

73. The risk is lessened under the AIA because the first inventor will be able to assert prior use as a personal defense. 35 U.S.C. § 273(a). But the prior user right is limited in various ways. *Id.* § 273(e). Owning a patent is preferable to having an imperfect defense to infringement of someone else's patent.

74. *Compare* Alan Devlin, *The Misunderstood Function of Disclosure in Patent Law*, 23 HARV. J.L. & TECH. 401, 403 (2010) (arguing that disclosure "is both ineffective and potentially poisonous to larger social goals"), Lemley, *supra* note 24, at 745–49 (questioning the value of the disclosure in the patents), *and* Note, *The Disclosure Function of the Patent System (or Lack Thereof)*, 118 HARV. L. REV. 2007, 2025–26 (2005) (criticizing the opaqueness of patent disclosures and how patent applicants are incentivized away from clear and concise disclosures), *with* Jeanne C. Fromer, *Patent Disclosure*, 94 IOWA L. REV. 539, 542–43 (2009) (asserting that patent disclosure is central to the patent system and suggesting "improvements to strengthen patent disclosure"), *and* Lisa Larrimore Ouellette, *Do Patents Disclose Useful Information?*, 25 HARV. J.L. & TECH. 545, 547 (2012) (arguing that patents in some industries provide valuable disclosures).

75. *See* Nathan Hurst, *How the America Invents Act Will Change Patenting Forever*, WIRED, Mar. 15, 2013, http://www.wired.com/2013/03/america-invents-act/all/, *archived at* http://perma.cc/MF6N-4QHU (describing the goals and intended impact of the AIA).

76. 104 U.S. 333 (1881).

the issuance of their patent application in order to artificially delay the expiration of their patents.[77] And indeed so-called "submarine" patents were a very real problem in the 1990s.[78] But after 1995 when the patent term began to be measured from the date the application was filed rather than the date the patent issued, the loophole that allowed submarine patenting was largely closed.[79]

Eliminating *Metallizing* would invite the return of submarine patents. Inventors of easily concealable inventions like manufacturing processes could keep their process inventions secret for years or even decades and then surface and file a patent application.[80] Because that application was filed later, the patent would expire later. It could take an existing industry by surprise because others who developed but did not patent the technology would not be able to use their own secret use as prior art to defeat the patent. And while some inventors will not want to take the risk that someone else patents the idea before them, the AIA actually lessens that risk by giving the first inventor a prior user right.[81] Eliminating *Metallizing* would encourage delay in patenting in the hopes of extending the life of a patent.[82] That is directly contrary to the goals of first inventor to file in the AIA, which encourages early filing of patent applications.[83]

Some have argued that pushing inventors towards early filing of patent applications is unwise as a policy matter.[84] That may well be true; in some circumstances trade secrecy may be a better social policy, and late patenting

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77. *See id.* at 337 (stating that the "inventor slept on his rights for eleven years" while allowing his invention to be part of the public use).

78. For discussion of submarine patents, see Mark A. Lemley & Kimberly A. Moore, *Ending Abuse of Patent Continuations*, 84 B.U. L. REV. 63, 79–80 (2004).

79. *Id.* at 80. The existence of patent term extensions for long patent prosecutions, 35 U.S.C. § 154(b) (2012), does present an opportunity for some submarine behavior even today.

80. Lemley, *supra* note 40.

81. *See* 35 U.S.C. § 273 (providing that the first inventor will be able to assert prior use as a limited, personal defense).

82. *See* Taskalos, *supra* note 60, at 707 (speculating that companies with valuable technologies, especially in pharmaceuticals, would take the risk of secret commercialization in order to obtain longer patent lives).

83. Lemley, *supra* note 40. One commentator has even gone so far as to argue that it is unconstitutional because it permits unlimited delay in the filing (and hence the expiration) of patents. *See generally* Ron D. Katznelson, *The America Invents Act May Be Constitutionally Infirm If It Repeals the Bar Against Patenting After Secret Commercial Use*, ENGAGE, Oct. 2012, at 86, *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1067&context=rkatznelson, *archived at* http://perma.cc/G58S-3AT8.

84. *See, e.g.*, Christopher A. Cotropia, *The Folly of Early Filing in Patent Law*, 61 HASTINGS L.J. 65, 104–05 (2009) (asserting that early filing encourages additional applications and additional patents); Dmitry Karshtedt, *The Riddle of Secret Public Use*, 93 TEXAS L. REV. SEE ALSO (forthcoming 2015) (manuscript at 5–6) (asserting that the current approach creates too many applications, undermines patent quality, and leads to underdeveloped inventions). I have taken a similar position myself. *See* Mark A. Lemley, *Ready for Patenting* (Feb. 18, 2015) (unpublished manuscript) (on file with author).

may also allow some inventions to fall into the public domain because the inventor turns out not to pursue them. But it is hard to come up with a plausible policy justification for allowing an inventor to choose *both* trade secret and then, later, patent protection, as overruling *Metallizing* would do.[85] And I expect it would be a surprise to most in Congress to learn that a bill that was supposed to encourage early filing and public disclosure was being interpreted to encourage greater secrecy instead.

The broader question of whether a secret use is commercial exploitation of the invention or an experiment designed to perfect the invention is a more difficult one, and I do not address it here. Pharmaceutical companies in particular may be put between a rock and a hard place if they are forced to patent before engaging in clinical testing for fear of a statutory bar but denied an early patent on the grounds that they cannot yet show utility for their product.[86]

2. Avoiding Uncertainty in Statutory Interpretation.—Concluding that *Metallizing* and the cases that follow it were abrogated will have another, even more pernicious effect.[87] *Metallizing*, *Gore v. Garlock*,[88] and other cases interpret the term "public use" in the old statute.[89] One might reasonably conclude that those cases stretch the plain meaning of that term,

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85. *See, e.g.*, Sandeen, *supra* note 54 (manuscript at 5) (arguing that the AIA is "fully consistent with the well-established principle that inventors should not be able to have it both ways; they cannot use or profit from their inventions in secret for a period of more than a year and then seek to patent their inventions").Dmitry Karshtedt agrees that this should be the rule with respect to secret sales but would treat secret uses differently, in part because of the difficulty of determining when an internal use is "commercial" rather than "experimental." Karshtedt, *supra* note 84 (manuscript at 8). He is certainly correct that discerning the boundaries of commercial versus experimental use can be difficult. *See, e.g.*, Invitrogen Corp. v. Biocrest Mfg., L.P., 424 F.3d 1374, 1380 (Fed. Cir. 2005) (discussing how experimental use may play a role in a public use analysis). Indeed, *Invitrogen* arguably got the result wrong by focusing on whether the inventor was paid for the internal use rather than benefiting from it in a manufacturing or other business process. *Id.* at 1383. But the fact that secret public use, like most patent law issues, presents line-drawing problems is not a reason to jettison the doctrine altogether. And indeed Karshtedt himself would seek to reimplement essentially the same result by declaring late-obtained patents unenforceable as a matter of policy. *See* Karshtedt, *supra* note 84, at 10 (proposing "to render unenforceable certain patents due to strategic or abusive behavior by inventors"). Similarly, we could reimplement *Metallizing* outside the text of § 102 by concluding that it was a judicially created limit on patenting rather than a prior art case. But it's hard to see why we should take that circuitous route to the same destination we have already reached.

86. *See, e.g.*, Shashank Upadhye, *To Use or Not to Use: Reforming Patent Infringement, the Public Use Bar, and the Experimental Use Doctrine as Applied to Clinical Testing of Pharmaceutical and Medical Device Inventions*, 4 MINN. INTELL. PROP. REV. 1, 5 (2002) (proposing a "first clear chance" rule under which pharmaceutical patent owners must file a patent application when they first have a completed invention that meets the utility requirement).

87. Lemley, *supra* note 40.

88. W.L. Gore & Assocs. v. Garlock, Inc., 721 F.2d 1540 (Fed. Cir. 1983).

89. *Id.* at 1549; Metallizing Eng'g Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516, 518, 520 (2d Cir. 1946).

but what the courts said they were doing was interpreting the words "public use."[90] The term "public use" appears unchanged in new § 102 under the AIA.[91] For the courts to conclude that the new law would open the door to reinterpretation of the settled meaning of terms present in both the old and new statutes opens a dangerous door. Parties and courts might be expected to try to revisit the meaning of "on sale," "patented," "printed publication," and many other settled statutory provisions, creating enormous uncertainty.[92] Indeed, the interpretation advanced by the PTO requires changing the meaning not only of "public use" but also of "on sale."[93] And the meaning advanced for "on sale" is one that is at odds with the plain language of that term.[94] If we are to revisit the public aspect of "on sale," who is to say we should not also revisit the detailed case law on what constitutes an offer for sale[95] or the rule that the on sale bar is triggered when the invention is ready for patenting, even if it hasn't yet been built.[96] None of those rules flow inexorably from the meaning of the words "on sale," and if the "on sale" of the AIA is different than the "on sale" of the 1952 Act, all those interpretations are open to question.

Patent law is full of terms that have taken on a judicial gloss that departs from their plain meaning. A "printed publication" does not by its terms include a website or a PowerPoint presentation, but courts have interpreted both to fit within the meaning of the term.[97] "Available to the public" has a meaning defined in a variety of cases that is at odds with how most law people would understand the phrase.[98] If reenacting old statutory language is an invitation to revisit the meaning of that language, we will lose all the benefit of more than a century of case law interpreting those terms. We will have to start over, with no guarantee that the settled meaning of these old terms will carry over into the new statute. And because it will be years before patents

90. *Gore*, 721 F.2d at 1549; *Metallizing*, 153 F.2d at 518, 520.

91. 35 U.S.C. § 102 (2012).

92. Lemley, *supra* note 40.

93. *See supra* note 39 and accompanying text.

94. *See supra* note 41 and accompanying text.

95. *See, e.g.*, Gemmy Indus. Corp. v. Chrisha Creations Ltd., 452 F.3d 1353, 1359–60 (Fed. Cir. 2006) (holding that a statement by the patentee's president did not establish the date of first sale for purposes of an on sale bar); *In re* Kollar, 286 F.3d 1326, 1333 (Fed. Cir. 2002) (holding that license agreement was not a "sale"); Group One, Ltd. v. Hallmark Cards, Inc., 254 F.3d 1041, 1048 (Fed. Cir. 2001) (holding that "[o]nly an offer which rises to the level of a commercial offer for sale . . . constitutes an offer for sale under" the on sale bar).

96. Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 67–68 (1998).

97. *E.g.*, Suffolk Techs., LLC v. AOL Inc., 752 F.3d 1358, 1364–65 (Fed. Cir. 2014) (holding that an unindexed Usenet newsgroup posting is a printed publication); Voter Verified, Inc. v. Premier Election Solutions, Inc., 698 F.3d 1374, 1379–80 (Fed. Cir. 2012) (holding that an unindexed web page is a printed publication); *In re* Klopfenstein, 380 F.3d 1345, 1352 (Fed. Cir. 2004) (holding that a PowerPoint presentation at a conference is a printed publication).

98. *See supra* note 9 and accompanying text.

issue and begin to be litigated under the AIA, it will be a very long time before we can know for sure whether the scope of prior art is the same as it was before the AIA.

The problems don't end there. The definition of prior art includes not only terms like "public use" and "printed publication" but also a large number of judicially created doctrines that refine the scope of prior art. The inherency doctrine,[99] for example, like the *Metallizing* rule, is not articulated expressly in either the old or new statute. If the reenactment of the term "public use" opens the door to revisiting *Metallizing*, it also opens the door to revisiting inherency, which by definition isn't "available to the public." The same is true of the experimental use exception to the on sale and public use bars. That exception doesn't exist in the statute; it was created by the Supreme Court in the nineteenth century.[100] But if the touchstone for the new meanings of public use and on sale is public availability, there is no reason to think those new terms should include an unarticulated exception for uses and sales that are public but nonetheless experimental.[101] Similarly, the rule that prior art must be enabling exists nowhere in the statute;[102] courts would be free to revisit that requirement and conclude that a public description of the invention was prior art whether or not it was enabling, so long as the publication was available to the public. And we might question the doctrine of double patenting,[103] which is similarly not articulated anywhere in § 102.

The PTO, patent applicants, and litigants would be much better served by leaving existing precedent interpreting unchanged statutory terms in place.[104] The AIA creates enough uncertainty with a variety of new language. Concluding, as the PTO has done, that we must revisit all our old decisions even where Congress chose to reenact old language would doom us all to decades of uncertainty as to the scope of prior art.

V. Conclusion

Despite the efforts of some of the drafters of the AIA, including Bob Armitage, Congress did not change the basic language establishing the core categories of prior art. The PTO was wrong to conclude that reenacting the same statutory language nonetheless worked a major change in the definition

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99. The inherency doctrine provides that things already in use in the prior art cannot be patented, even if the people using them didn't understand what they were using. For greater discussion of the inherency doctrine, see generally Dan L. Burk & Mark A. Lemley, *Inherency*, 47 WM. & MARY L. REV. 371 (2005).

100. Elizabeth v. Pavement Co., 97 U.S. 126, 137 (1877).

101. For a discussion of whether and under what circumstances experimental use survives the AIA, see generally Lemley, *supra* note 86.

102. *In re* Hafner, 410 F.2d 1403, 1405 (C.C.P.A. 1969).

103. *In re* Kaplan, 789 F.2d 1574, 1578–79 (Fed. Cir. 1986); *In re* Vogel, 422 F.2d 438, 441–42 (C.C.P.A. 1970).

104. Lemley, *supra* note 40.

of prior art. While the issue is not entirely free from ambiguity, the canons of statutory interpretation counsel strongly against such a reading. Were courts to follow the PTO, the result would be not only the loss of a valuable doctrine that encourages early filing of patent applications but to put at risk many of the most fundamental doctrines of patent law.

Book Reviews

How the Workplace Constitution Ties Liberals and Conservatives in Knots

Cynthia Estlund*

THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT. By Sophia Z. Lee. New York, New York: Cambridge University Press, 2014. 328 pages. $29.99.

Introduction

On the last day of the Supreme Court's last term, in *Harris v. Quinn*,[1] a majority of the Court lined up with the "right-to-work movement" in the latest phase of the latter's long-running battle with organized labor over mandatory union fees. The Court held that for Illinois to require home-care workers to pay an "agency fee" to a union that represented them in collective bargaining, pursuant to a majority vote of their coworkers, would violate the First Amendment rights of workers who opposed the union.[2] The holding in *Harris* was narrower than the unions had feared, and hinged on the home-care workers' unusual joint-employment relationships.[3] Yet *Harris* revealed the deep judicial skepticism that unions face in attempting to defend the agency fee arrangements that help underwrite their financial viability and their ability to represent workers. *Harris* is also a testament to the right-to-work movement's success in building a constitutional case for the "right to refrain" from supporting unions.

Harris was thus a victory for the anti-union right and a serious blow for the labor unions that have been stalwarts of the post-New Deal Democratic coalition. Ironically, however, if the right-to-work movement has its way and the right to refrain from paying for union representation is eventually extended to all public employees, and even to private employees, it will do so partly on the basis of constitutional precepts for which liberals fought during their own long-running battle to expand the rights of employees, especially against discrimination.

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1. 134 S. Ct. 2618 (2014).
2. *Id.* at 2644.
3. *Id.* at 2638.

That is among the provocative lessons of this outstanding book of twentieth-century legal history. Professor Sophia Lee explores the evolution of two visions of what she calls the "workplace Constitution"—two conceptions of the federal constitutional rights of employees—that have been contending for judicial approval since the New Deal. The liberal workplace constitutionalists fought chiefly to deploy constitutional arguments to combat discrimination in private-sector employment, especially in the decades before the Civil Rights Act of 1964. The conservative workplace constitutionalists proclaimed the rights of individual workers as against collectivist trade unions and especially against mandatory union fees. Lee explores the intertwined jurisprudential underpinnings of the liberal and conservative variants of the workplace Constitution, which have swirled beneath and around some of the most elemental constitutional controversies of the mid-twentieth century and beyond. The famously confounding "state action" problem is at the heart of the story, and Lee brings that problem and others to life through vivid histories of lawmaking and litigation that feature sophisticated legal analysis—both that of the participants and Lee's own.

The opening sentences of the book make a bold claim: "Today, most Americans lack constitutional rights on the job. Instead of enjoying free speech or privacy, they can be fired for almost any reason, or for no reason at all. This history explains why."[4] But that opening claim might both overstate and understate what the book delivers. The lack of constitutional constraints on arbitrary employer power in the private-sector workplace has its roots in the state action requirement: nearly all of Americans' federal constitutional rights run only against state action, not against purely private infringement.[5] That limitation on employees' constitutional rights originated long before the post-New Deal period that Lee describes. But what Lee's book does deliver is a gripping and richly illuminating history of the passionate and partly successful post-New Deal litigation battles to expand workers' constitutional rights and the scope of state action in the workplace. She tells the story of how private-sector employers emerged from those battles with their immunity from employees' constitutional claims intact, while unions became—and continue to be—more vulnerable to constitutional litigation.

It is a central irony of the workplace Constitution that it constrained the powers of unions far more than that of employers. It did so largely because of the threshold requirement of state action. But it is ironic because, for many liberals before and since the New Deal, workers' right to

4. SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT, at i (2014).

5. See the *Civil Rights Cases*, 109 U.S. 3, 11–13 (1883), for the original articulation of the "state action requirement" for alleged constitutional violations.

form independent unions and engage in collective bargaining represented the advent of democracy and freedom into industrial life and the liberation of workers from autocratic employer rule. The National Labor Relations Act (NLRA),[6] and union representation itself, sought to combat arbitrary employer power and to transform workers from subjects into citizens of the workplace, by arming the latter with a rudimentary "bill of rights" as against employers and enabling them to participate in workplace governance.[7] In effect, the NLRA created a metaphorical workplace constitution to extend the reach and the values of the actual Constitution beyond the state action threshold.

For others, however, the growing role of trade unions in industrial life was a singular threat to individual workers' autonomy and opportunity (not to mention the threat to employer freedom of action). Other critics of unions—including some friendly critics within the labor movement—focused more narrowly on racially exclusionary, segregationist, and discriminatory practices.[8] Crucially, union critics of all stripes were better able than union proponents to harness the Constitution and constitutional litigation in support of their views of workers' rights. That is because, in the wake of the New Deal, the powers of unions were intertwined with government action in ways that employer powers were not. As a consequence, unions, and ultimately unions' ability to counter employer power over employees, were far more vulnerable to constitutional challenges than were employers themselves. The metaphorical workplace constitution embodied in the New Deal labor laws thus came into conflict with the actual post-New Deal workplace Constitution—especially with its conservative variant, but to some extent with its liberal variant as well.

Lee's rich account of how those conflicts played out from the 1930s through the 1980s brings the modern reader face-to-face with paradoxes and contradictions in the law of work that have periodically burst into public consciousness over the decades and that percolate underneath some of today's most contentious debates about workers' rights and the future of unions. In particular, strange bedfellows like those that appear throughout Lee's history of the workplace Constitution are likely to reappear in future chapters of the roiling agency fee controversy.

6. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

7. *Id.*

8. *See* HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW 140–51 (1977) (detailing a history of NLRB litigation regarding racial discrimination by unions and employers).

I. How the "Liberal Workplace Constitution" Divided the New Deal Coalition

Lee begins her story after the New Deal "switch in time" sounded the death knell for the old Constitution of the workplace—the *Lochner* era doctrine of "liberty of contract" that had long been the conservative bulwark against much progressive legislation and against the trade unions that both pressed for and benefited from some of that legislation.[9] The death knell was sounded most decisively when the Supreme Court upheld the NLRA against multiple constitutional challenges in 1937,[10] to the surprise of nearly everyone at the time. But the New Deal was hardly the end of constitutional challenges to the law and institutions of the workplace. Some of the new challenges were not really new; they echoed the old Constitution of substantive due process and liberty of contract. But the chosen vessels for the post-New Deal round of constitutional claims, both the new and the not so new, were the First Amendment and the Equal Protection Clause, declared fit for service in *Carolene Products*[11] and its famous footnote.[12]

The NLRA, like the Railway Labor Act (RLA)[13] before it, had not only legitimized labor unions but made them central actors in a new industrial-relations regime. Before the NLRA, unions had gained considerable legal latitude to organize employees and pressure employers to bargain with unions on employees' behalf (through strikes, picketing, and such). In particular, the 1932 Norris-LaGuardia Act had sharply restricted the use of labor injunctions and union liabilities in the federal courts[14] and thus ushered in a brief era of "collective *laissez-faire*" under federal law.[15] But employers' refusal to recognize and deal with unions, even when they had overwhelming majority support, continued to fuel growing industrial conflict. So the NLRA went a big step further: once a union had the support of a majority within an appropriate bargaining unit of employees, that union became the *exclusive* representative of all employees in the

9. LEE, *supra* note 4, at 24, 63–65.

10. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 25, 29–30 (1937). As the dissent observed, the Court's recent decisions in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), had placed "purely local" industry, as opposed to the instrumentalities of commerce, beyond the reach of Congress. *Jones*, 301 U.S. at 76–77, 84 (McReynolds, J., dissenting).

11. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

12. *Id.* at 152 n.4.

13. Pub. L. No. 69-257, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151–188 (2012)).

14. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (2012)).

15. *See* Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 HARV. L. REV. 354, 356 (1958) (noting the Act's *laissez-faire* premise "that the settlement of labor disputes is best accomplished privately").

bargaining unit.[16] The employer was *compelled* to bargain in good faith with the majority-backed union and was prohibited from recognizing another union and from bargaining separately with individual employees.[17] The latter stood in particularly sharp contrast with the recently vanquished liberty of contract.

Under the exclusivity doctrine at the heart of both the NLRA and the RLA, employees were bound by the terms collectively bargained between the union and their employer, whether they supported or belonged to the union or not.[18] Under the original NLRA (though not the RLA), that could include a "closed shop" agreement, which required the employer to hire only union members.[19] Closed shop agreements were later prohibited by the Taft-Hartley amendments in 1947,[20] but the first part of Professor Lee's book takes us back into the world as it existed under the original NLRA and some of the constitutional controversies it wrought.

Consider how this regime affected many black workers in the deeply segregated society of the late 1930s and early 1940s. Both employers and unions practiced blatant forms of discrimination and segregation, especially in the South. While some labor unions were among the most racially progressive institutions in this era—the Congress of Industrial Unions (CIO) was pioneering a new integrationist course in its push for plant-wide, integrated industrial unions[21]—others were among the bulwarks of a racist society. In particular, many skilled trades were organized by all-white unions, and those unions often sought a closed shop agreement requiring the employer to hire only union members.[22] The National Labor Relations Board (NLRB) cast doubt in 1943 as to whether all-white closed unions could be permitted to negotiate a closed shop on behalf of a partly black bargaining unit, but it did little to follow through on that doubt.[23] Many CIO unions, for their part, sought a "union shop," which left hiring to the employer but required employees to join the union and pay union dues and fees once hired.[24] The closed shop or union shop exacerbated the problems faced by black workers who could be saddled with exclusive representation

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16. J.I. Case Co. v. NLRB, 321 U.S. 332, 333 (1944).

17. Employers were also prohibited by § 8(2) of the NLRA from forming a more compliant company union, not only when the employees chose independent union representation but even if they did not. NRLA § 8(2), 29 U.S.C. § 158(a)(2) (2012).

18. NLRA, Pub. L. No. 74-198, § 9(a), 49 Stat. 449, 453 (1935); RLA § 2.

19. NLRA § 8(3).

20. Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 8(a)(3), 61 Stat. 136, 140–41 (1947) (codified as amended at 29 U.S.C. § 158(a)(3) (2012)).

21. LEE, *supra* note 4, at 15–16.

22. *See id.* at 14.

23. *Id.* at 42.

24. *Id.* at 58.

by a union that excluded them from membership or that sought to relegate them to the worst jobs or to drive them out of their jobs altogether.

Until the 1930s, many leading black lawyers "saw the labor movement primarily as a threat to African American workers. . . . To defend against Jim Crow, they embraced the liberty-of-contract doctrine."[25] In particular, one of its "key components, the right to work, was a revered tenet of the black bar, wielded against discriminatory unions seeking to close African Americans out of jobs and restrictive licensing laws that excluded them from particular trades."[26] But the integrationist program of the CIO and the comparatively progressive politics of the New Deal led many black labor leaders to conclude that black workers' "best hope lay in joining and advancing the labor movement."[27] In Charles Hamilton Houston's words, African Americans "are not antagonistic to collective bargaining but we d[o] insist on being part of the collection as well as part of the bargain."[28]

Black trade unionists are among the compelling figures in Lee's narrative. Even in the face of violent white supremacism from some quarters of organized labor, some black trade unionists put their trust in the power of labor solidarity and politics to eventually prevail over racist exclusion.[29] While some black trade unionists cast their lot with the CIO activists who were preaching integration, others fought to preserve separate black unions.[30] And while some black unionists sought to fight their battles within the labor movement and the political sphere, others turned to the courts for relief.[31] But the latter found little law on the books to help them. No statute then barred racial discrimination by either employers or unions. The constitutional commitment to equal protection of the laws applied only to state action, not the private actions of employers and unions,[32] and it did not yet bar racial segregation, for "separate but equal" still ruled the day in this era before *Brown v. Board of Education*.[33]

Those political cross currents and legal challenges form part of the backdrop behind a cornerstone of the workplace Constitution, *Steele v.*

25. *Id.* at 21. *See generally* DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001) (arguing that many labor laws harmed the economic prospects of African Americans, including the NLRA, the RLA, the Davis-Bacon Act, and the Fair Labor Standards Act).

26. LEE, *supra* note 4, at 21.

27. *Id.* at 22.

28. *Id.* at 21.

29. *See id.* at 13–15.

30. *Id.* at 13–16.

31. *See id.* at 11–12, 18–20.

32. *Id.* at 19–20.

33. 347 U.S. 483, 495 (1954).

Louisville & Nashville Railroad Co.,[34] the story of which Lee tells in Chapter 1. The union that was designated under the RLA as the plaintiff's exclusive representative, based on support by a majority of the larger bargaining unit, barred him and his fellow black workers from membership.[35] The union had set about bargaining with the employer on behalf of its white members to marginalize the black workers and to establish a white monopoly over jobs under their jurisdiction.[36] For black workers in the era of Jim Crow, that was what exclusive union representation could mean.[37]

The Supreme Court rose to the challenge posed by this obvious injustice in *Steele* and held that the RLA imposed on labor unions an unwritten statutory duty to represent fairly and without discrimination all of the workers in the bargaining unit they represented.[38] It did so, said the Court, to avoid serious constitutional questions: for Congress to foist upon black workers "exclusive representation" by a union that excluded them from membership, and that had no duty to fairly represent them, would arguably deny to black workers the equal protection of the law.[39] *Steele* is a founding document of the liberal workplace Constitution in Lee's account. As she recognizes, however, it was an ambiguous starting point, given that it did not resolve or even clearly state the constitutional question that the Court sought to avoid.[40] *Steele* set a template of "constitutional avoidance" in labor law that has endured. The implied statutory "duty of fair representation" eventually spread beyond the RLA into the NLRA, beyond collective bargaining into contract administration and grievance handling, and beyond race discrimination into other grounds for unfair treatment—all without the Court ever seriously engaging with the constitutional arguments, and especially the nature of the state action, that had impelled the statutory result in *Steele*.[41]

Steele explicitly declined to require unions to admit black workers as members.[42] But that was among the issues that were to occupy the NLRB and the courts for decades to come. *Steele* did embolden the NLRB in 1946

34. 323 U.S. 192 (1944). The story is also told in Deborah C. Malamud, *The Story of* Steele v. Louisville & Nashville Railroad*: White Unions, Black Unions, and the Struggle for Racial Justice on the Rails*, *in* LABOR LAW STORIES (Laura J. Cooper & Catherine L. Fisk eds., 2005).

35. *Steele*, 323 U.S. at 194–95.

36. *Id.* at 195.

37. In industries covered by the NLRA, the closed shop was lawful, and those agreements often kept black workers from even gaining entry to jobs by making all-white unions the gatekeepers to the trade. *See supra* notes 19–20, 22 and accompanying text.

38. *Steele*, 323 U.S. at 202–03.

39. *Id.* at 202.

40. *See* LEE, *supra* note 4, at 33.

41. *See* Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 153–56 (1957) (surveying cases post-*Steele*).

42. *Steele*, 323 U.S. at 204.

to announce a "firm policy against allowing closed unions to organize closed shops"; the board cited "the NLRA's term 'representative' in light of that act's purposes, as well as 'the national policy against discrimination,'" expressed in both the Constitution and executive orders.[43] But other constitutional questions loomed: were unions themselves state actors by virtue of their legal powers? If so, the Constitution would presumably require them to admit black workers as members (as Charles Hamilton Houston had argued unsuccessfully in the *Steele* litigation), and it might require them to ban segregated locals (though that argument faced the additional hurdle of separate but equal before *Brown v. Board of Education*). Of course, if unions were state actors, they would become vulnerable not only to equal protection claims but to an expanding array of individual rights claims under the constitutional jurisprudence that had begun to unfold in the Supreme Court after the mid-1930s.

Whether or not unions were state actors, what were the constitutional obligations of federal agencies administering the labor laws? A fascinating and mostly forgotten strain of the liberal workplace Constitution that Lee explores lies in litigation claiming that federal administrative agencies might violate the Constitution simply by ignoring the discriminatory practices of the private actors that appeared before them in statutory and regulatory disputes.[44] This line of argumentation surmounted the state action hurdle by targeting actual branches of the state, but it posed difficult questions about the substantive scope of state actors' constitutional obligations and how far they reached beyond those actors' own intentional discrimination. For example, was the NLRB obligated to deny certification to unions that excluded black workers? Or to unions that maintained segregated local chapters—both an all-white local and an auxiliary black local? Or that discriminated in less overt ways? These questions were deeply troubling not only on jurisprudential grounds but on pragmatic political grounds. The NLRB and some civil rights advocates believed that union representation was an essential part of the battle for equal opportunity and fairness at work, and they worried that opening the door to an inquiry into union discrimination would give employers—often themselves discriminators—a new pretext to resist union certification.[45] As a legal matter, attempts to construe the statute to bar union discrimination were complicated by the fact that, until 1947, there was nothing in the NLRA that directly regulated union practices at all—no text that might be construed to reach discriminatory practices.

43. LEE, *supra* note 4, at 54 (quoting 10 NLRB ANN. REP. 17 (1945)).

44. *Id.* at 45–47.

45. *See id.* at 101, 188–89.

The Taft-Hartley Act, passed over President Truman's veto in 1947,[46] was a monumental victory for the opponents of unions. The NAACP had opposed the law because of its harsh anti-union cast, but its lawyers nonetheless recognized new opportunities for civil rights advocacy in the revised NLRA.[47] Taft-Hartley sharply cut back on unions' control over employment opportunities through the closed shop and union shop;[48] that was a gain for black workers given their exclusion from many unions. It also dramatically recast the statutory context for challenges to union practices. Even though nothing in the statute directly addressed race discrimination or union membership policies, the creation of new "unfair labor practices" targeting some union practices opened the door to new *Steele*-like arguments by black workers and civil rights advocates before the NLRB.[49] Under the shadow of possible unconstitutionality, some civil rights advocates argued that the board should construe the statute to prohibit racial discrimination and segregation by unions in both membership and representation.[50]

For these constitutional avoidance arguments to have any bite, the board and the courts would have to embrace a broad conception of "state action." An expanding state action doctrine was the linchpin for broader rights against union and employer discrimination and broader duties of agencies and unions themselves to purge discriminatory practices. But was state action present only when the state itself discriminated (as in *Brown*) or when it compelled discrimination by private actors (as in many of the follow-on public accommodation cases in the Jim Crow South)? Or when courts enforced discriminatory agreements by private actors (as in *Shelley v. Kramer*[51])? Or when the state empowered private actors to carry out discrimination (as the RLA arguably did in *Steele*)? Was state action present when the state granted licenses or other privileges to private actors in regulated industries that engaged in discriminatory employment practices (as in a series of cases under the Federal Communications Commission)?[52] Or when it merely tolerated, or failed to combat, private discrimination (as in many of the cases before the NLRB and other federal agencies involving discriminatory union or employer practices)? The broadest theories of state action reached the actions of private employers, though primarily when they were exercising or seeking legal privileges beyond the baseline rights of property and contract and the law of incorporation.

46. *Id.* at 52.
47. *Id.* at 52–53.
48. *Id.* at 52.
49. *See id.* at 53.
50. *Id.*
51. 334 U.S. 1 (1948).
52. *See* LEE, *supra* note 4, at 156–72.

The fate of the liberal workplace Constitution was of course intertwined with a broader set of civil rights challenges to discrimination and segregation by powerful private actors, all of which turned on the scope of state action. The legal battle over state action reached a fever pitch in 1964 in *Bell v. Maryland*,[53] in which the Court reviewed the trespass convictions of civil rights sit-in protesters at a segregated restaurant.[54] The Court had already invalidated Jim Crow laws *requiring* segregation. Congress was then debating the Civil Rights Act, which would prohibit discrimination in public accommodations—but its fate was in doubt given Southern senators' record-breaking filibuster.[55] The question in *Bell*, and perhaps the most divisive legal controversy of the day, was whether the Constitution itself prohibited states from enforcing private property-owners' right to exclude others on discriminatory grounds.

In *Bell*, Justice Brennan managed to cobble together a majority for reversal of the convictions, based on a rather arcane state law ground that avoided the constitutional question,[56] and the passage of the Civil Rights Act a few weeks later spared the Court from *ever* deciding it.[57] But most of the Justices in *Bell* felt compelled to address the question. As Justice Douglas put it: "The whole Nation has to face the issue . . . , North as well as South; the question is at the root of demonstrations, unrest, riots, and violence in various areas. The issue . . . consumes the public attention. Yet we stand mute, avoiding decision of the basic issue by an obvious pretense."[58] For some Justices, equal access to places of public accommodation was a fundamental aspect of equal citizenship ensured by the Fourteenth Amendment.[59] But for others, property owners' right to exclude others, backed by trespass law, and the freedom of association in private settings, were themselves fundamental tenets of a decent and well-ordered society.[60] Lee recounts the high drama behind the scenes of the Court's decision in *Bell* and shows how these passionate debates swirled around the intense and contemporaneous controversy over the civil rights movement's effort to force the desegregation of union locals.[61]

53. 378 U.S. 226 (1964).

54. *Id.* at 227.

55. *Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm, *archived at* http://perma.cc/EFD3-J2GL.

56. *Bell*, 378 U.S. at 228.

57. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28, 42, and 52 U.S.C.).

58. *Bell*, 378 U.S. at 243 (Douglas, J., concurring).

59. *Id.* at 247–52; *id.* at 288 (Goldberg, J., concurring).

60. *Id.* at 343, 346 (Black, J., dissenting).

61. LEE, *supra* note 4, at 150–54.

The civil rights advocates were propounding a broad theory of state action that would compel the NLRB to strike down discriminatory and segregationist practices of many unions, rather than "sanctioning" such practices by ignoring them.[62] That put them at odds with the leaders of organized labor, who were seeking to reform discriminatory union practices and were supporting civil rights legislation, but who resisted constitutionalizing the battle against union discrimination.[63] For its part, the Supreme Court did expand the meaning of state action in order to strike down some entrenched Jim Crow practices.[64] But much as the Court balked in *Bell*, it never went far enough in its state action jurisprudence to impose constitutional constraints on ordinary private employers' hiring, firing, and disciplinary practices. The power of private-sector employers over workers reflected baseline legal entitlements embodied in property and contract law, as the Legal Realists had emphasized, but those baseline entitlements apparently did not count as state action for constitutional purposes. By contrast, trade unions since the New Deal had gained power in part from federal statutory provisions that departed from the common law baseline.[65] In short, after decades of intense contestation and expanding constitutional rights, the impact of the federal Constitution in the workplace was sharply skewed by the state action doctrine toward scrutiny of unions, not employers.

These questions roiled the labor movement and the civil rights movement, the NLRB, and the courts even after Title VII of the Civil Rights Act of 1964 finally prohibited discrimination by both employers and unions,[66] for civil rights advocates pressed for additional fora and regulatory resources to speed enforcement. Unlikely as it may seem for the modern reader, many advocates saw the NLRB as a better forum—cheaper for complainants and more powerful—for discrimination claims than both the Equal Employment Opportunity Commission (EEOC) and the courts.[67] But the labor movement and some of its liberal allies were skeptical of engaging the NLRB more heavily in the fight against race discrimination; they worried that discrimination claims would become another weapon in

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62. *See id.* at 44–47, 76–77.

63. *Id.* at 139–41.

64. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 199–216 (2004) (documenting the Supreme Court's shift to a more liberal conception of state action to reach private discriminatory behavior prior to federal civil rights legislation).

65. *See* James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 BUFF. L. REV. 653, 670 (2009).

66. Pub. L. No. 88-352, § 703(a), (c), 78 Stat. 241, 255–56 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a), (c) (2012)).

67. *See, e.g.*, WILLIAM GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 42–44 (1977) (comparing the NLRB and EEOC as a forum for discrimination claims); HILL, *supra* note 8, at 147–49 (same).

employers' anti-union arsenal.[68] That worry grew as employers ramped up their resistance to unions.

Lee shows that, "[a]lthough historians generally date business conservatives' coordinated attacks on labor to the mid-1970s, they were under way, if largely hidden from view, in the 1960s"; that was when "resisting unionization became a more mainstream business position."[69] Against that background, union lawyers worried that the right-to-work movement would see the NLRB's new antidiscrimination rules as "'an opportunity to destroy collective bargaining in this country.'"[70] Liberal scholars, too, argued that it was best to leave the problem of discrimination to the EEOC and private litigants under Title VII, and to keep such issues out of the process of union-certification and unfair-labor-practice proceedings before the NLRB.[71] These issues were debated within the labor–civil rights coalition on the grounds of both pragmatic politics and legal theory, and Lee's account infuses these debates with both the urgency of the times and the jurisprudential sophistication of leading advocates. One of the great strengths of Lee's book lies in her serious engagement throughout with legal arguments, legal doctrine, and legal theory.

The nature of the legal issues changed as the law and institutions changed, but Lee highlights the tectonic plates moving below the surface, not only throughout the period she studies—the New Deal through the 1980s—but even today. That is seen in her discussion of early controversies over affirmative action policies that favored under-represented minorities in hiring and promotions. By the 1970s, the civil rights movement's battle to open unions and workplaces to black workers had been largely won at the level of principle and shifted toward issues of implementation and enforcement. Some employers, under pressure from within and from without, had begun to embrace affirmative action, and to actively pursue a more racially diverse workforce, out of a mix of motives—social justice, litigation avoidance, public relations.[72] But at that point white workers and their conservative allies sought to seize the banner of equal opportunity for themselves, again putting constitutional principles into play. The conservative workplace constitutionalists initially took aim at affirmative action admissions programs and government preferences for minority contractors where state action was not in question.[73] But how far would the constitutional arguments against affirmative action reach in the

68. LEE, *supra* note 4, at 188–89.
69. *Id.* at 187.
70. *Id.* at 188.
71. *Id.* at 188–89.
72. *See id.* at 164–72.
73. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477–81 (1989); LEE, *supra* note 4, at 243–45.

private sector? The question was intertwined with the legality of minority preferences under Title VII, but the constitutional questions lurked in the background.

As the Supreme Court's equal protection jurisprudence veered toward the "color-blind" Constitution,[74] the political valence of the state action arguments for the civil rights community was reversed: if private employers' conduct involved state action, all of the constitutional arguments crafted by civil rights advocates to combat discrimination could be turned against the proponents of affirmative action. As Lee explains:

> Supporters of the liberal workplace Constitution had stretched the state action doctrine to reach traditionally private workplaces in part to impose affirmative action duties on employers and unions. With the Court tipping toward a color-blind Constitution, broad theories of state action could now threaten these workplaces' affirmative action programs.[75]

The same dilemma plagued conservative legal thinkers as well. Conservative "strict constructionists" like Justice Rehnquist were pushing back against the most ambitious constitutional theories for combatting private discrimination.[76] But in doing so, the strict constructionists were also undercutting the arguments that other conservative legal thinkers sought to deploy against private affirmative action. The controversy was emblematic of the battle within the conservative establishment between proponents of judicial restraint and those who advocated a more muscular use of judicial review to promote conservative values. That battle was also taking place in the parallel litigation campaign by the right-to-work movement.

II. How the "Conservative Workplace Constitution" Divided the New Right

Lee's history of the converging and diverging interests and constitutional arguments of civil rights activists and trade unionists during the fifty years after the New Deal, and particularly the nuanced legal analysis that Lee brings to the project, is a major scholarly contribution. Although others have labored in these vineyards,[77] Lee finds much that is

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74. LEE, *supra* note 4, at 244–45.

75. *Id.* at 245.

76. For example, see Justice Rehnquist's opinion in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171–72 (1972).

77. Some leading examples are BERNSTEIN, *supra* note 25; PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2008); GLENDA GILMORE, DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919–1950 (2008); HUGH GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972 (1990); ROBERT ROGERS KORSTAD, CIVIL RIGHTS UNIONISM:

new and unexpected there. What has the reader's head spinning, however, is the parallel story Lee tells about the evolution of the right-to-work movement—the "conservative workplace Constitution"—and its philosophical, jurisprudential, and even organizational intersections with the civil rights movement and the liberal workplace Constitution. Lee finds these disparate forces not only drawing on overlapping constitutional arguments but enjoying overlapping constituencies. Some black workers who were fighting all-white unions were drawn into the nascent right-to-work movement, and some right-to-work activists embraced the cause of excluded black workers.[78] (The latter was more a reflection of political expediency than of conviction—the right-to-work movement was predominantly white and Southern and at least as infected with the prevailing racism of the day as the worst white unionists.)

The story of the conservative workplace Constitution features Cecil B. DeMille—yes, *that* Cecil B. DeMille—in a leading role. DeMille was part of a conservative anti-New Deal elite, with industrialists in the lead, which had been fighting since 1937 to roll back New Deal legislation and in the state legislatures to ban the closed shop.[79] By 1941, the anti-union forces had already claimed for themselves the historically resonant phrase "right to work."[80] DeMille was thus outraged when his union, the American Federation of Radio Artists (AFRA), sought in 1944 to charge him a one-dollar assessment to fund AFRA's opposition to a California ballot measure that would ban the closed shop.[81] And that one-dollar assessment enabled DeMille to launch a new phase of the anti-union crusade. Lee portrays DeMille as having made two crucial contributions to the right-to-work movement: The first was to take his fight against AFRA's assessment to the courts and to begin to craft a constitutional argument against mandatory union fees.[82] The second was to weave those arguments into a populist campaign and to recast the fight against unions as a fight for the rights of ordinary working people.[83]

DeMille's lawyers, like the *Steele* plaintiffs, relied partly on pre-New Deal substantive due process cases; they sought to salvage an individual right to work, free from collective compulsion, from the broad repudiation of the old doctrine of liberty of contract.[84] They also relied on *Steele* itself and sought to take advantage of newly emerging case law in support of

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TOBACCO WORKERS AND THE STRUGGLE FOR DEMOCRACY IN THE MID-TWENTIETH-CENTURY SOUTH (2003).

78. LEE, *supra* note 4, at 73–74, 229–30.

79. *Id.* at 58–61.

80. *Id.* at 59.

81. *Id.* at 56.

82. *Id.* at 62–66.

83. *See id.* at 66–69.

84. *Id.* at 63–64.

"minority rights" and individual religious and political liberties versus collectivism and majority rule.[85] These arguments implicitly relied on an expanding conception of "state action" of the sort that *Steele* suggested, though DeMille (like much of the public then and now) remained largely oblivious to the state action hurdles to invoking the Constitution and nearly all its fundamental rights.

There was a cynical dimension to these arguments: As Lee observes, "[l]ike other conservatives, DeMille used the analogy between right to work and African Americans' civil rights to bolster his own movement, not to support theirs."[86] His own movement was backed and funded largely (though quietly, at DeMille's insistence) by rich conservatives and industrialists who sought to undercut the CIO's ability to use mandatory assessments to raise political funds.[87] "By attacking the left's supply route and building 'an organization with a voting power surpassing that of the unions,' [DeMille's] foundation would transform the constitutional spirit of the times."[88] DeMille's movement also sought to mobilize white Southerners who opposed both civil rights for African Americans and the CIO's leftist and integrationist agenda.[89]

Still, it was easier to turn the civil rights and civil libertarian Constitution to the anti-union right-to-work cause in the early 1940s than it might appear today, given the practices already discussed. Unions, many of them all white, had enormous power over individuals' ability to get or keep a job in many trades, especially in the closed shop and the original union shop.[90] Both made union membership a condition of employment, and unions then had complete control of their membership. It was not hard to find individuals who had been put out of a job by high-handed or discriminatory unions, and it was not hard to generate public sympathy for these individuals even in the relatively pro-union climate of the 1940s.

The campaign to limit union power gained traction after World War II with the rise of anti-Communist fervor and anti-collectivist sentiments. The Taft-Hartley Act in 1947 curbed union power in many ways. Some provisions (like the secondary boycott ban) directly regulated unions' ability to exert collective economic power in their contests with employers.[91] Other provisions targeted unions' power over individuals' livelihoods (which indirectly undercut their power vis-à-vis employers).[92]

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85. *Id.* at 122.
86. *Id.* at 74.
87. *Id.* at 67–69.
88. *Id.* at 68.
89. *Id.* at 74, 83.
90. *See supra* note 22 and accompanying text.
91. Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 8(b)(4)(A), 61 Stat. 136, 141 (1947) (codified as amended at 29 U.S.C. § 158(b)(4) (2012)).
92. *Id.* § 8(b)(2) (codified at 29 U.S.C. § 158(b)(2)).

The abolition of the closed shop and the transformation of the union shop from a requirement of membership—controlled by the union—to a requirement of dues payment—controlled by the individual—were welcomed both by anti-union employers and ideologues and by some individual dissenters and racial minorities whose cause could be embraced by many good liberals today.

The Taft-Hartley Act did not mandate the "open shop," which foreclosed any contractual requirement of union membership or fees as a condition of employment, but it expressly permitted states to do so.[93] So after 1947, the right-to-work movement shifted its political focus to the states and to passing open shop or right-to-work laws.[94] But the constitutional battles in the courts continued. DeMille lost his lawsuit in the California courts, not on state action grounds (state action was not a prerequisite to state constitutional claims in California), but on the merits[95]: The majority was entitled to seek agreements imposing mandatory dues and fees, said the court, and the union assessment in no way compelled DeMille's personal expression.[96] In the meantime, as the right-to-work litigation shifted into the federal courts, the state action issue moved to the fore.

By the late 1940s, as we have seen, the Supreme Court had begun to expand the meaning of state action—in inconclusive dicta in *Steele* but more decisively in *Shelley v. Kraemer*, in which the Court struck down a state court's enforcement of a private restrictive covenant that barred non-whites from buying a home in a white neighborhood.[97] But the right-to-work lawyers made even broader arguments of the sort that some liberal civil rights and civil liberties lawyers were also making at the time: There is state action, they argued, whenever the courts *permit* a private entity (like a union, or presumably an employer) to invade the rights of individuals. "'No distinction can properly be made as to whether the judicial action challenged on constitutional grounds is affirmative or negative.'"[98]

Let us pause to ponder the implications of the theory of state action that was being propounded by the right-to-work advocates in the late 1940s: That theory would seem to render private employers subject to constitutional claims whenever they discriminated against employees, retaliated against them for their off-duty or on-duty speech and associations, or disciplined or discharged them without due process; for the court's failure

93. *Id.* § 14(b)(2), 61 Stat. at 151 (codified at 29 U.S.C. § 164(b)).

94. *See* LEE, *supra* note 4, at 75.

95. *Id.* at 75.

96. *Id.*

97. Shelley v. Kraemer, 334 U.S. 1, 4, 23 (1948).

98. LEE, *supra* note 4, at 77 (quoting Petition for Writ of Certiorari at 15, DeMille v. Am. Fed'n of Radio Artists, 333 U.S. 876 (1948) (No. 679)).

to enforce the constitutional rights of individuals could constitute the requisite state action. Acceptance of that argument would create in one stroke a broad set of fundamental rights at work, and essentially reverse the longstanding presumption of employment at will.[99]

It may be surprising to find right-wing right-to-work advocates supporting such an expansive theory of state action. Their employer allies in particular must have blanched. Certainly their union adversaries did. Broad state action theories threatened to expose unions not only to the constitutional claims of the right-to-work crowd but also to the constitutional claims of black workers who were excluded from membership and subject to forms of discrimination and segregation in which the unions were deeply implicated.

Alliances shifted again in the early 1950s as the leadership of organized labor both purged from their ranks the left-wing unions and union activists who had been the strongest proponents of racial equality and signed onto the civil rights agenda (up to a point).[100] The labor movement's leadership was now officially committed to opposing union discrimination, though continuing discrimination on the ground by many unions gave some resonance to the argument of the right-to-work advocates that "it was the open shop, not union rights, that best protected black workers from discrimination."[101] The right-to-work movement's white-supremacist ties obviously undercut those claims and put it at odds with a labor–civil rights alliance.[102] But the right-to-work movement's constitutional litigation strategy and some of its legal foundations—broad conceptions of both individual constitutional rights and the state action that made them actionable—continued to scramble its alliances at the level of jurisprudence.

In the wake of liberals' constitutional victories in expanding the scope of state action, and in expanding individual rights to freedom of speech and association *and* freedom from compelled speech and association, the right-to-work movement continued to pursue its legal campaign against mandatory union fees.[103] Along the way, the movement sought to cast off some of its most reactionary associations and to embrace some of the constituencies whose lawyers had been propounding similarly broad constitutional theories. The movement sought to "all[y] itself with African Americans' struggle for civil rights," with working women, and "with New

99. It would bring the rights of American workers close to those of German workers, for example, under their post-war Fundamental Law, which constrains employers in their conduct toward workers. See generally JENS KIRCHNER ET AL., KEY ASPECTS OF GERMAN EMPLOYMENT AND LABOUR LAW 4–11 (2010), for an overview of the employment rights of German workers.

100. LEE, *supra* note 4, at 83.

101. *Id.* at 132.

102. *Id.* at 83.

103. *See id.* at 231–33.

Left critiques of ossified union bureaucracy."[104] These moves helped to draw more public support, and perhaps more judicial support, for the right-to-work cause.

For labor lawyers, the headlines in the litigation campaign against union security and mandatory union fees are familiar, but the inside story that Lee tells is not only a gripping historical drama but one that is rich with implications for the present and future. Many of the cases that the labor movement counts as losses were also seen as losses by the right-to-work movement, which continued to press the maximalist argument that any requirement that individuals pay union fees as a condition of employment—whether imposed by statute or by contract—was unconstitutional. The right-to-work advocates lost that argument in 1956 in *Railway Employees' Department v. Hanson*,[105] which upheld a union shop agreement under the RLA against the claim that it was a violation of dissenters' free speech rights to compel them to pay any dues to a union that they opposed: "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."[106] The lawyers in *Hanson* had failed to press or present evidence for the narrower theory "that compulsory membership will be used to impair freedom of expression."[107] That narrower issue was presented five years later in *International Association of Machinists v. Street*,[108] in which the Court held, by way of constitutional avoidance, that the RLA "denies the authority to a union, over the employee's objection, to spend his money for political causes which he opposes."[109]

Street established a basic principle and a rationale that held for decades, that was eventually extended to the public sector (where state action was clear) in 1977 in *Abood v. Detroit Board of Education*[110] and to the rest of the private sector under the NLRA (again by way of constitutional avoidance) in 1988 in *Communication Workers of America v. Beck*.[111] It was impermissible—either unconstitutional or a statutory violation that reflected constitutional concerns—for unions to charge dissenters for political and ideological expenditures, but it was permissible to charge them an agency fee for the costs germane to collective bargaining and contract administration.[112] State and federal labor laws in public and

104. *Id.* at 229–30.
105. 351 U.S. 225 (1956).
106. *Id.* at 238.
107. *Id.*
108. 367 U.S. 740 (1961).
109. *Id.* at 750.
110. 431 U.S. 209, 235–36 (1977).
111. 487 U.S. 735, 745–46 (1988).
112. *Street*, 367 U.S. at 767–69.

private employment alike all provided for exclusive representation of employees by a union chosen by a majority within the bargaining unit, and *Steele* and its progeny required unions to fairly represent all the employees, members and non-members alike.[113] The minor infringement that agency fees imposed on the First Amendment interests of dissenters was necessary in order to vindicate the government's legitimate interest in preventing "free riders" from undermining the union's ability to represent the whole bargaining unit.[114]

As of *Beck*, the right-to-work advocates had succeeded in depriving unions of the ability to compel contributions to their political activities and in confining union security provisions to the partial agency fee-for-services, in all states and all sectors of the economy. They continued to litigate many details of the agency fee, mainly over which expenses were "chargeable" to dissenters and which were not and over the procedures for opting out of the non-chargeable portion of dues; the Supreme Court saw many of these cases.[115] But the ultimate goal of the right-to-work advocates—embraced by Justice Black's dissent in *Street*[116]—was uncompromising and unchanged. In their view, the Constitution compels an open shop, or a right-to-work regime across the board, and is contravened by any contractual or statutory provision requiring individuals to pay a fee of any kind to a union they oppose.[117] That claim recently prevailed for the first time for one unusual subset of public employees in *Harris*,[118] and is now being litigated in cases across the country.[119]

Lee's account of these litigation battles, which ends with *Beck*, is bristling with insights into the future course of constitutional litigation against unions. She shows, for example, how the agency fee issue exposed deep fault lines within the conservative legal establishment between the

113. *See supra* notes 16–19, 38–41 and accompanying text.

114. *E.g.*, *Beck*, 487 U.S. at 762; *Abood*, 431 U.S. at 221–22; *Street* 367 U.S. at 760–61.

115. *See, e.g.*, Locke v. Karass, 555 U.S. 207, 210 (2009) (permitting unions to charge dissenters for some national litigation that is germane to collective bargaining); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 191 (2007) (upholding state requirement that public sector unions receive affirmative authorization prior to spending nonmember fees for political purposes); Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 869 (1998) (striking down mandatory arbitration of agency fee disputes); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991) (holding that cost of lobbying activity that does not concern the collective-bargaining agreement is not chargeable to dissenters); Chi. Teachers Union v. Hudson, 475 U.S. 292, 310 (1986) (requiring unions to explain and afford an opportunity to challenge fees and hold disputed money in escrow); Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 448–53 (1984) (allowing the union to charge dissenters for conventions, social events, and publications but not organizing or all litigation).

116. *Street*, 367 U.S. at 789–91 (Black, J., dissenting).

117. *Id.* at 790–91.

118. *See supra* notes 1–2 and accompanying text.

119. *E.g.*, Sweeney v. Pence, 767 F.3d 654, 669 (2014); Centeno v. Quigley, No. C14–200, 2015 WL 432537, at *1 (W.D. Wash. Feb. 2, 2015); Bierman v. Dayton, No. 14–3021, 2014 WL 5438505, at *3 (D. Minn. Oct. 22, 2014).

advocates of right-to-work and the advocates of judicial restraint. Justice Rehnquist, who personified the latter, joined the *Abood* majority's rejection of the right-to-work movement's claim that any mandatory fee violated the First Amendment rights of dissenters.[120] That claim rested on robust First Amendment rights of public employees that liberal majorities had recently embraced but that Justice Rehnquist (and other conservative justices) had rejected.[121] So while most of the conservatives joined a concurrence by Justice Powell that sought to expand upon constitutional claims that they had recently opposed, Rehnquist instead joined most of the Warren Court liberals in rejecting the extension of public employees' First Amendment rights to the agency fee context.[122]

That battle within the conservative legal establishment continued in the *Beck* litigation, which culminated during the Reagan Administration, and which again pitted the anti-union, right-to-work branch of the right wing against the partisans of judicial restraint. In particular, when *Beck* brought the state action problem back to the fore, the right-to-work lawyers found that the "greatest doctrinal challenges were placed before them by the Court's *conservative* justices,"[123] who had been pulling back the frontiers of state action since the late 1970s. Moreover, the emerging gospel of strict constructionism embraced by Attorney General Edward Meese and Solicitor General Charles Fried was deeply at odds with the right-to-work movement's expansive constitutional claims.[124] Strict constructionism prevailed when Solicitor General Fried filed an amicus brief against the right-to-work plaintiffs in *Beck*, and uproar ensued within the Republican Party.[125] For its part, as we have seen, the Supreme Court in *Beck* extended the basic *Street* compromise into the NLRA, again by way of constitutional avoidance, rejecting both the maximalist position of the right-to-work movement that no mandatory fees were permissible and the labor movement's position that mandatory union fees involved no state action and raised no constitutional concerns worth avoiding.[126]

Lee demonstrates vividly that the Reagan administration's constitutional agenda "created winners and losers among the New Right coalition"; "the workplace Constitution divided the New Right just as it had split the New Deal coalition in its heyday."[127] Lee's book chronicles these splits,

120. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 243 (1977) (Rehnquist, J., concurring).
121. LEE, *supra* note 4, at 237.
122. *Id.* at 235–37.
123. *Id.* at 246.
124. *Id.* at 250–52.
125. *Id.* at 252–53.
126. *See supra* note 111, and accompanying text.
127. LEE, *supra* note 4, at 255.

and the surprising cross currents of constitutional thought underlying them, with enormous intelligence, fair-mindedness, and flair.

III. Tangled up in Dues: The Agency Fee Controversy Scrambles the Politics of the Workplace Constitution Again

Lee's whiplash-inducing account of the workplace Constitution, its evolution, and its implications for the future stirred up and helped to crystalize some concerns that have been percolating in my mind since the *Harris* case landed on the Supreme Court docket. Why does the agency fee issue find some advocates and scholars on both sides of the debate talking out of both sides of their mouths? Why do we find the issue so perplexing? I hope the reader will indulge this lapse into a more personal vein, for the convergence of the *Harris* decision and Lee's book have compelled me to revisit my own views on the workplace Constitution.

The freedom of speech at and about work has long been a preoccupation of mine. My student note in 1982 argued for stronger First Amendment protection of unions' peaceful consumer picketing.[128] It invoked the Supreme Court's ringing declaration in *Thornhill v. Alabama*[129] that the facts of ordinary labor disputes were matters of public concern whose communication through peaceful picketing deserved constitutional protection.[130] Labor picketing was inherently political expression, I argued, and not merely an exercise of economic power, as the courts had mostly treated it since the 1950s.[131] Along similar lines, my first article as an academic in 1990 criticized the holding of *Connick v. Myers*[132] that public employees' ordinary workplace grievances were rarely "matters of public concern" and enjoyed no constitutional protection within the government workplace.[133] I argued for the political import and constitutional significance of shared workplace grievances.[134]

It is with some chagrin that I find similar strains in the anti-union arguments in *Harris*. For it was the right-to-work, anti-union plaintiff, and the conservative majority in *Harris* that proclaimed the inherently political nature of the issues at stake in collective bargaining, at least in the public sector.[135] The union expression involved in ordinary collective bargaining (in the public sector) is more ideologically charged, held the majority, than

128. Cynthia Estlund, Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 938–39 (1982).

129. 310 U.S. 88 (1940).

130. *Id.* at 102.

131. Estlund, *supra* note 128, at 959–60.

132. 461 U.S. 138 (1983).

133. Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 2–4 (1990).

134. *Id.* at 37–39.

135. Harris v. Quinn, 134 S. Ct. 2618, 2632–33 (2014).

commercial speech; therefore, compelled support of that expression triggered a higher level of constitutional scrutiny.[136] The union, in the meantime, persuaded four liberal Justices that *Connick* and its narrower notion of "matters of public concern" supported the line that existing precedent had drawn, and that *Harris* rejected, between chargeable collective bargaining expenses and non-chargeable political and ideological expenses.[137] (Indeed, there was speculation before *Harris* that Justice Scalia might supply a fifth vote for the union based partly on his narrow view of the constitutional rights of public employees.)[138]

The ironies will mount as the right-to-work advocates seek to extend *Harris* to the private sector: the *Harris* majority offered a narrowing construction of its holding by suggesting that "core issues such as wages, pensions, and benefits," while political in the public sector, are not generally important political issues in the private sector.[139] Unions will likely rely in part on that suggestion in resisting the extension of *Harris* to the private sector. Yet union advocates, as well as scholars, have long argued the opposite, as I have, in support of broader free speech rights for unions and employees. To be sure, the latter arguments were unsuccessful; so the conservative justices had to, and will again have to, not only switch positions but ignore or overrule precedent in order to hold for the right-to-work plaintiffs. (The dilemmas are similar to those faced by their predecessors in the Rehnquist era, whose commitments to judicial restraint and strict constructionism were sometimes at odds with their ideological preferences in both affirmative action and the agency fee cases.)[140]

Other ironies await in the state action controversy that will rise to the fore in the coming private-sector phase of the agency fee litigation. Like other employment law scholars in the 1990s and beyond, much of my writing has sought to import some semblance of constitutional rights into private-sector employment—to civilize the harsh employment-at-will regime and to narrow the rights gap left by the state action bar to constitutional claims against private employers.[141] I have seconded the argument of others that judicial enforcement of private arbitration agreements constituted state action and should trigger constitutional due

136. *Id.* at 2639.

137. *Id.* at 2654–55 (Kagan, J., dissenting).

138. *See* Michael Hiltzik, *How Justice Scalia Could Become the Savior of Public Employee Unions*, L.A. TIMES, May 29, 2014, http://www.latimes.com/business/hiltzik/la-fi-mh-justice-scalia-20140529-column.html, *archived at* http://perma.cc/4EGD-WN8K (noting that "the precedents in Scalia's own jurisprudence [make] clear" that public employee union activity is not "an infringement of the free speech of workers").

139. *Harris*, 134 S. Ct. at 2632.

140. *See supra* note 76, 120–22 and accompanying text.

141. *E.g.*, Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 129–39 (1995); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1528, 1581 (2002).

process scrutiny.[142] And like many employment law teachers, I have admired the audacity of the *Novosel v. Nationwide Insurance Co.*[143] decision, which brushed aside state action objections in holding that the First Amendment—in particular, its protection against compelled speech—supplied a public policy basis for a state wrongful discharge tort action against a private employer.[144] As the litigation over agency fees moves to the private sector, as it is destined to do, right-to-work advocates will be making similarly broad state action arguments, and unions and their allies will be resisting those arguments.

The point is not that it is impossible to reconcile arguments for the constitutionality of agency fees with any of the pro-employee and pro-union arguments that many labor scholars have been making over the years. But some of the arguments both for and against agency fees may trigger some Houdini-like contortions like those that Lee finds strewn throughout the history of the post-New Deal workplace Constitution. With the agency fee issue now on the front burner, some union-friendly labor and employment law scholars will be feeling the heat.

Some of the unions' conservative adversaries should be feeling the heat as well. For carrying the right-to-work movement's constitutional crusade against agency fees into the private sector—especially under the NLRA—would require not only overturning the Court's agency fee precedents but also reopening the state action controversy and reversing course on decades of conservative resistance to broad interpretations of state action. In the private sector, the requirement that individual workers pay an agency fee to a union that they oppose arises not out of any provision of law but out of agreements between private employers and private unions that are merely permitted by federal labor law. Even at its high-water mark, state action doctrine would not readily expose such agreements to constitutional scrutiny. So the upcoming agency fee battles will test both liberals' and conservatives' jurisprudential commitments, much as they did in the 1980s in the agency fee and affirmative action cases.

Many of the cross currents in these debates stem from some unique features of unions in our society and our legal system. The union bar took

142. Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 409–11 & n.95 (2006). Other scholars have developed and more squarely endorsed the argument. *E.g.*, Richard C. Reuban, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 615–19 (1997); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 44 (1997).

143. 721 F.2d 894 (3d Cir. 1983).

144. *Id.* at 898–99. Full disclosure: The law clerk who worked on *Novosel*, Samuel Issacharoff, is now my spouse.

note with alarm when Justice Alito, writing for a majority in the 2012 *Knox v. SEIU, Local 1000*[145] decision, said that "[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering 'labor peace.' But it is an anomaly nevertheless."[146] The Court found that "anomaly" unacceptable for the home health-care workers in *Harris*,[147] and it is sure to give it a close look in the next case involving ordinary public employees and in subsequent cases involving private-sector unions. In the meantime it behooves labor and employment law scholars, including me, to develop a deeper understanding of the agency fee controversy and the nature of unions within constitutional jurisprudence, lest they find themselves on the opposite side of arguments that they have made on behalf of employees in other contexts.[148] Professor Lee's exceptionally thoughtful and thought-provoking book is a perfect place to begin that effort.

Conclusion

Lee closes her book with reflections on the contemporary relevance of the vigorous, not-so-long-ago debates over the meaning of the workplace Constitution. Lee sees implications for the future of workers' own impulses toward collective action—impulses that might be inhibited partly by workers' highly optimistic beliefs about their rights at work.[149] The history of litigation over the workplace Constitution, says Lee, contains some harsh as well as hopeful lessons:

> Collective action is hard, messy, and imperfect. Sometimes it involves forms of oppression. Conflicts have abounded over how and why to join together, yet the bare desire to do so has been profound and persistent. The idea of a workplace Constitution, or at least the knowledge of its current paltry protections, could strengthen this impulse. Whether people today organize around the Constitution or another idea better suited to the time, they may yet bring what A. Philip Randolph called "the breath of democracy" into the twenty-first-century workplace.[150]

This is a hopeful conclusion. Its optimism with regard to worker organizing is especially striking in light of the right-to-work movement's campaign to

145. 132 S. Ct. 2277 (2012).

146. *Id.* at 2290 (citation omitted).

147. *See supra* notes 1–2 and accompanying text.

148. My own effort along these lines has been given more than a nudge by Lee's book, but it extends beyond the confines of a book review. *See* Cynthia Estlund, *Are Unions a Constitutional "Anomaly"?*, 144 MICH. L. REV. (forthcoming Nov. 2015).

149. *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997).

150. LEE, *supra* note 4, at 260.

abolish agency fees and its recent victory in *Harris*. But Lee finds an encouraging lesson for the proponents of collective action even in the right-to-work movement's successes: Constitutional ideas that seem laughable when first articulated—that seem to be swimming against powerful historical currents—may gain traction in society and in the courts through a combination of intellectual creativity and political activism.

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The Many American Constitutions

AMERICA'S FORGOTTEN CONSTITUTIONS. By Robert L. Tsai. Cambridge, Massachusetts: Harvard University Press, 2014. 368 pages. $35.00.

Aziz Rana*

I. Introduction: Recovering the History of Constitutional Skepticism

For all the disagreement and polarization that mark modern American politics, one commitment that enjoys wide-ranging support—able to unite even hardened foes on the right and on the left—is faith in the essential goodness of the federal Constitution. Members of both major political parties often clamor to display their constitutional loyalty, from establishing Constitution Day as a national holiday[1] to reading from the text to begin new sessions of Congress[2] to habitually invoking its wisdom during speeches and addresses.[3] But in recent years, the halo around the Constitution appears to have fractured ever so slightly. Today, it has become almost a fad among legal scholars to attack the Constitution as outmoded and ill equipped to meet current political needs. The pages of *The New Yorker* discuss worries about whether the Constitution is "broken."[4] Various books declare the United States to be a "frozen republic"[5] or a "republic[] lost"[6] and call for "constitutional disobedience"[7]

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1. 36 U.S.C. § 106 (2012).

2. This practice was started in 2011 by Republican members of the House of Representatives, with notable Democrats, such as Nancy Pelosi, participating. Two years later, according to Bob Goodlatte, the Republican House Judiciary Chair, the desire to participate in the reading was so strong that they "ran out of Constitution before they ran out of readers." *66 Minutes to Read the U.S. Constitution*, NOTE, ABC NEWS (Jan. 15, 2013, 1:17 PM), http://abcnews.go.com/blogs/politics/2013/01/66-minutes-to-read-the-constitution/, *archived at* http://perma.cc/D65T-NHNP.

3. As just one illustration, the very first words of President Barack Obama's second inaugural address, maintained that the inauguration itself should be viewed as a collective moment in which the country "bear[s] witness to the enduring strength of our Constitution." President Barack Obama, Second Inaugural Address (Jan. 21, 2013) (transcript available at http://articles.washingtonpost.com/2013-01-21/politics/36473487_1_president-obama-vice-president-biden-free-market, *archived at* http://perma.cc/AQ89-5BH4).

4. Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER, Dec. 9, 2013, http://www.newyorker.com/magazine/2013/12/09/our-broken-constitution, *archived at* http://perma.cc/WHP2-EEWB.

5. DANIEL LAZARE, THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY 9 (1996).

6. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 1 (2011).

7. LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 10 (2012).

and even a second constitutional convention.[8] Indeed, in republishing his seminal book *Constitutional Faith* in 2011, Sanford Levinson pointedly concludes that although he once chose to sign the Constitution as part of an exhibit celebrating the text's 200th anniversary, he would not do so again.[9] He no longer believes in the document's basic utility "unless one reduce[d] 'constitutional faith' to a willingness to embrace the Preamble while being harshly critical of much of what follows it."[10]

But if constitutional skepticism has seen a marked revival in legal scholarship, far less attention has been paid to exploring the history of such skepticism and the extent to which current concerns resonate with early generations of Americans.[11] Some academics like Lawrence Lessig no doubt write that "[w]e were here at least once before"[12] and see a parallelism between the early twenty-first century and the early twentieth. For him, just as a hundred years ago the country struggled through a Gilded Age of corporate power, corruption, and striking economic inequality, he now worries that—against the backdrop of financial crisis and pervasive government gridlock—we are living through a second Gilded Age marked by dysfunctional political institutions and deepening class divides.[13] In his view (not to mention Levinson's[14]), the Constitution's structure (its combination of countermajoritarianism and divided institutional power) has only made any confrontation of these problems all the more difficult.[15] Still, even critics like Lessig and Levinson tend to assume both the contemporary and historical idiosyncrasy of their own positions and thus implicitly presuppose that the document is and virtually always has been a site of basic national reverence. In this way, many of the text's present-day opponents too seem to accept a basic narrative of American constitutional culture that highlights the depth and pervasiveness of constitutional veneration.

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8. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 24 (2006).

9. SANFORD LEVINSON, CONSTITUTIONAL FAITH 249–50 (2011).

10. *Id.* at 245.

11. One noteworthy exception is Louis Michael Seidman's recent article, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1 (2014).

12. LESSIG, *supra* note 6, at 3.

13. *See id.* at 7–9 (detailing the similarities between the Gilded Age and the present while also contending that contemporary corruption, unlike a century ago, is the product not of specific bad actors but of an entire political infrastructure that systematically generates poor governance and low levels of popular trust).

14. LEVINSON, *supra* note 9, at 247–50.

15. *Cf.* LESSIG, *supra* note 6, at 305 (arguing in favor of various governmental reform efforts, because of the failure of existing constitutional arrangements to counter corruption and to create "structures for controlling what happens").

As a consequence, despite the rise of scholarly skepticism, the dominant academic accounts of the Constitution continue to take for granted essential constitutional commitment among citizens and to downplay—if not ignore altogether—actual practices of opposition. Most histories describe how, following the American Revolution and the struggle for constitutional ratification, no anticonstitutional party took root in the newly independent colonies. Historians largely conclude from this fact that all relevant political voices almost immediately accepted the Constitution as the established basis for future debate. According to Lance Banning, "intellectually, the Antifederalists had no heirs"[16] because "[w]hile interest in fundamental amendments persisted for years, determined opposition to the new plan of government disappeared almost as quickly as it arose."[17] Michael Kammen offers perhaps the most succinct and compelling expression of this view in his classic book on the Constitution in public life, *A Machine That Would Go of Itself*. Taking as uncontroversial the fact of agreement from the founding to the present, he writes:

> Observers remind us how swiftly the Federalists and Anti-Federalists reached common ground. Although their disagreements about particular policy issues grew, within five years of ratification so many of those who had vigorously opposed the Constitution in 1788 warmly affirmed it. Similarly, in the crisis of 1860–61, southerners proclaimed their loyalty to the Constitution and imitated it closely (with a few key exceptions) in preparing the Confederate Constitution. Throughout the Civil War, Democrats and Republicans in the North disagreed about many matters but vied with one another in expressing reverence for the Constitution.[18]

Thus, in much of the literature, dissident practices of constitutional opposition are simply excised from the narrative. They are viewed as irrelevant for making sense of the development and transformations in American constitutional culture.[19] And to the extent that they are recognized at all—like the example of the Confederate Constitution—they are reimagined instead as further proof of a general sentiment of veneration. Indeed, as Banning remarks, the very irrelevance of opposition is central to what makes "America unique"[20]: namely, singular and unbending faith in

16. Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. 167, 169 (1974).

17. *Id.* at 168.

18. MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 29–30 (1986).

19. *See, e.g.*, CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS CONSTITUTION 131 (2005) ("[A]fter ratification the Anti-Federalists shrank into a tiny minority too small to affect policy. Anti-Federalism . . . ceased to exist as a policy to which electable politicians could attach themselves . . . [because] [t]he country liked the Constitution . . . [and it] was considered common sense at the time . . . .").

20. Banning, *supra* note 16, at 168.

the Constitution since the founding, with the "quick apotheosis of the American Constitution" nothing less than "a phenomenon without parallel in the western world."[21]

No doubt scholars have acknowledged that American political life has faced extensive dissensus and division. But such dissensus is by and large presented as taking place against the backdrop of shared and near-unanimous constitutional support, in which "the basic pattern of American constitutionalism [has been] one of *conflict within consensus*."[22] Americans have fought vigorously about virtually every issue of social significance, from slavery and capitalism to matters of equality, inclusion, warfare, and government responsibility. Much of this conflict has even been about the Constitution itself—how to interpret the text and what its basic terms require. These struggles have often generated profoundly contradictory political visions of the Constitution, so contradictory that at times it can seem that activists are describing wholly different documents. Yet all these debates, according to the dominant narrative, have embraced one key element. They have assumed that the political process established by the Constitution is basically just and thus that the constitutional system is the appropriate framework within which political resolutions should be forged. Even when operating outside the existing laws or engaging in civil disobedience, Americans have claimed to be acting on behalf of and in the spirit of the Constitution; they have maintained their constitutional fidelity.

The new book by Robert Tsai, *America's Forgotten Constitutions: Defiant Visions of Power and Community*, frontally challenges this pervasive historical account.[23] In it, Tsai describes in detail the efforts of various Americans from the founding until the present to generate and institute competing constitutional projects, from settler pioneers to utopian socialists, abolitionists, Confederate secessionists, indigenous communities, internationalists, black nationalists, and white-power activists. In the process, Tsai recovers extensive and diverse traditions of alternative constitution writing from across the political spectrum. He thus highlights the deep plurality of American constitutional culture as well as the centrality of dissident chords in shaping our legal and political institutions. The book is a remarkable feat of excavation, one that offers a much-needed corrective to the conventional histories of American constitutionalism—histories that deemphasize the vitality and importance of popular suspicion toward the federal Constitution. It thus enriches—quite dramatically—the current literature on contemporary constitutional opposition by implicitly placing today's critics within a long-standing American struggle over the

21. *Id.*

22. KAMMEN, *supra* note 18, at 29.

23. ROBERT L. TSAI, AMERICA'S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY (2014).

compatibility between existing institutional arrangements and classic principles of popular sovereignty, self-government, and self-authorization.

Over the following pages, I plan to explore the significance of Tsai's book as well as to raise questions for future research. Part II will discuss in greater detail the basic argument of *America's Forgotten Constitutions* as well as how it exposes the problematic staying power of what is often called the "Consensus School" of historiography in American constitutional scholarship. Part III then turns to a basic concern with whether Tsai's narrative nonetheless still reads into the mainstream constitutional project an inherent liberal *telos* that ultimately cuts against the very plurality he seeks to recover. In other words, at the end of the day, the issue remains of whether Tsai goes far enough in challenging governing historical narratives around the permanence and inevitability of the modern and liberal American constitutional project. Finally, by way of conclusion, I explore future avenues for research opened up by Tsai's account. For instance, what does the book suggest about how precisely mainstream and dissident traditions have been stitched together in American constitutional life? And what has been the relationship between radical projects of alternative constitutionalism and more mainstream reform trends?

II. Bringing the Margins to the Center of American Constitutionalism

According to Tsai, the discursive tradition of American constitutionalism has been marked by many simultaneous projects of constitution writing. The Framers may have "unleashed" notions of popular sovereignty and written constitutionalism,[24] but they could hardly control its direction in the hands of ordinary citizens. This not only meant that citizens contested how best to interpret the federal Constitution, they also—from the very founding—engaged in their own efforts of re-founding and fundamental constitutional rupture. As Tsai writes, alongside practices of veneration, each generation of Americans embraced the "imaginative, lawbreaking strain of the political tradition,"[25] challenging root and branch the established legal order but in the language of constitutionalism and through the process of constitution writing. Thus, "[i]nstead of a single legal text standing intact for all time, citizens subsequently found themselves awash in competing constitutions."[26]

For Tsai, there are two key reasons why the plurality and dissonance of American constitutionalism has been obscured. To begin with, opponents of the established order "lost crucial battles in their own time," with these struggles and defeats shaping our memory of the political and legal past.[27]

24. *Id.* at 2.
25. *Id.* at 3.
26. *Id.* at 2.
27. *Id.* at 4–5.

But more importantly, although the survival of the 1787 Constitution may have been quite perilous at various moments in American history, the capacity of mainstream constitutionalism to steadily defeat and absorb its competitors has created a sense in the present of inevitability.[28] The document's very longevity has not only diminished the perceived utility today of alternative constitution writing but, in Tsai's words, it "has induced forgetfulness of much that has passed: failed democratic experiments, the ingenuity of alternative designs, certain tactics of direct action—even the inner workings of the ideological aspects of constitutionalism itself."[29]

Above all, such forgetfulness has generated a contemporary scholarly and public sensibility that ignores the deep, internal ideological tensions and multiplicities within the constitutional tradition—a tradition for Tsai that for most of American experience has fundamentally been "at war with itself."[30] The 1787 text and mainstream constitutionalism may have promoted conventional theories of law and politics, grounded in the preservation of order and the enforcement of ordinary law.[31] But at the same time, dissident and alternative constitutionalisms underscore the very ubiquity and breadth of divergent accounts of law and politics, based at times in *pioneer* logics of settlement, *tribal* notions of indigenous self-determination, *ethical* projects of equal liberty, *cultural* ideas of racially circumscribed membership, or even *global* accounts of world federation.

Tsai proceeds to illustrate the historical vitality of these competing theories through chapters that focus on specific constitution-writing efforts and that map the transformations in American life from the early nineteenth century until the present day. It is in these chapters, each a close case study of a particular episode, where the book truly shines. He describes the efforts of settlers in the 1830s in the contested territory at the border of British Canada and New Hampshire to establish their own independent political community, the Republic of Indian Stream.[32] Tsai highlights how such settlers sought to legitimate their own acts of land expropriation by embracing a radicalized version of republican theories of productive use and land ownership as the condition for self-government.[33] He next explores the move by French utopian socialists to create an ideal ethical community on American soil, one that could avoid the problems of individualism and capitalism increasingly marking mid-nineteenth-century

28. *Id.* at 5.

29. *Id.*

30. *Id.*

31. *See id.* at 293 (describing how the "theory of conventional sovereignty" from the 1787 Constitution adapted to subsequent political movements).

32. *Id.* at 19–21.

33. *See id.* at 20 ("Their view of popular sovereignty was inextricably linked to territory: control of a parcel of land and productive work of it . . . generated true authority to govern.").

society.[34] Tsai then turns to John Brown's experiment in radical abolitionist constitution writing and engages in a close textual reading of Brown's 1858 Provisional Constitution and Ordinances for the People of the United States.[35] Through the document, Tsai examines the vision shared by Brown and his supporters (many of them African American) for transforming, by legal example and guerrilla war, the country from a corrupted slave society into a truly emancipatory and multiracial republic.[36]

Tsai continues in following chapters by assessing the persistence in American history of racialized notions of sovereignty, particularly in constitution-writing projects by Southern Confederates and more recently white supremacists. He describes the Confederate Constitution as an effort to reaffirm the centrality of white rule to the American revolutionary and legal tradition.[37] By later juxtaposing the real strength of the white-sovereigntist position in the Antebellum and Civil War periods with its marginality in twenty-first century white-power efforts among Aryan groups,[38] Tsai speaks to the fundamental shifts in mainstream constitutional discourse. Tsai further complicates questions of race and sovereignty by also detailing the effort of black nationalists in the 1960s and 1970s to establish a separatist state on American soil (the Republic of New Afrika), based on arguments about the irredeemability of white society and the impossibility—even with the decline of explicit white-supremacist discourse—of ever creating a national community not tainted by white power.[39] In addition, Tsai also describes attempts by indigenous peoples, most notably through the 1905 Constitution for the State of Sequoyah, to create an Indian-run state—in place of what eventually became Oklahoma—that would enjoy self-rule within the system of American federalism.[40] In the process, Tsai assesses the adaptive and creative efforts of indigenous peoples to use American constitutionalism to sustain meaningful tribal self-determination under incredibly hostile circumstances.[41] And finally, he includes an account of post-World War II efforts among academics and policy makers to imagine a world constitution that

34. *Id.* at 49–50.

35. *Id.* at 91–98.

36. *Id.* at 111–17.

37. *Id.* at 135–36.

38. *Compare id.* at 120–27 (describing cultural sovereignty arguments advanced in Confederate states, predicated on "regional distinctiveness and the superiority of the white civilization," as flourishing), *with id.* at 254–56, 259 (describing modern Aryan communities as "toiling at the margins of political relevance" and as a "dissident movement").

39. *Id.* at 219–20.

40. *Id.* at 168–69.

41. *See id.* at 154–64 (describing how an indigenous movement "resorted to state constitutionalism" as a way of sustaining political autonomy in the face of coercive federal authority).

would extend far beyond the U.N. Charter and more directly challenge the global legitimacy of the nation-state system.[42]

Taken as a whole, the chapters drive home the continuity and persistence of radical political experiments in American history—experiments that, rather than taking mainstream institutions as given, self-consciously employed and redirected constitutional discourses and practices. The result is not only a fascinating account that brings to the center what has traditionally been treated as marginal but a work of extensive archival and primary research that will be essential for future scholars. The chapter on John Brown is a particularly standout contribution,[43] and one that deepens immeasurably questions about the legal and political thought of radical abolitionism.

But perhaps the book's most significant contribution is how it contests the pervasive narrative of the role of constitutionalism as such in American public life. The familiar story is that the discursive traditions and practices of constitutional interpretation and writing in the United States have generated a very particular type of citizen–subject. Although Americans may disagree strenuously about substantive ends, the importance of constitutionalism as both a value and a mechanism for framing disputes has provided citizens with a common public language of self-critique. The overall constitutional tradition, in the words of Laurence Tribe, allows Americans to participate in a continuous practice of "collective interpretation and reinterpretation," which promotes civic ideals of reason giving, critical engagement, and self-reflection.[44] Whatever their momentary passions, the fact that citizens privilege constitutionalism as the basic means for debate has had the effect of rationalizing disagreement, limiting the power of violent appeals, and above all making individuals more tolerant, pluralistic, and open-minded.

In some ways, the persistence of this narrative speaks to the remarkable staying power in academic and political life of the Consensus School of American historiography. Consensus history, most powerfully captured by Richard Hofstadter's seminal work, *The American Political Tradition*, maintained that regardless of real political division in the United States, "there has been a common ground, a unity of cultural and political tradition, upon which American civilization has stood."[45] For Hofstadter and other mid-twentieth-century historians, writing in the context of Cold War orthodoxy, such essential agreement—especially around values of toleration, pluralism, and self-reflection—was a given in American life, a

42. *Id.* at 187.

43. *Id.* at 83–117.

44. Laurence H. Tribe, *America's Constitutional Narrative*, 141 DÆDALUS 18, 19 (2012).

45. RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT, at xxxii (25th anniversary ed. 1973).

common cultural feature from the founding itself that spoke to the essentially liberal and egalitarian nature of the American project. In the years since the mid-1960s, the credibility of consensus history has more or less collapsed. As political scientist Rogers Smith wrote in the 1990s: if anything, collective life has been permeated by a multiplicity of inclusive and exclusive traditions—each equally American—with public figures blending "liberal, democratic republican, and inegalitarian ascriptive elements in various combinations designed to be politically popular."[46]

But one place where such historiography seems to maintain a toehold of academic authority is in scholarship on constitutional law.[47] The conventional narratives about both unanimous constitutional support from 1791 as well as regarding the role of constitutionalism in liberalizing American life often devolve into variants of the Consensus School. To date, these arguments have escaped recognition as such, let alone been subjected to systematic critique. Thus, more than anything else, what Tsai's exploration of alternative constitution writing highlights is precisely how constitutional practices have been as open to illiberalism and intolerance as they have to liberal democratic values. Nothing about this shared discourse of constitutionalism—linking the mainstream to the margins—has necessarily facilitated rights protection, egalitarianism, or peaceful resolution. Both mainstream and dissident traditions have sought to impose their will through force and coercion and have developed sophisticated theories, depending on the political movements and constituencies in conflict, of both exclusionary and inclusionary sovereignty. In this way, Tsai helpfully grounds Smith's "multiple tradition thesis" not only in American political culture generally but in constitutionalism more specifically. In the process, he therefore explodes whatever remains of the myth that American constitutional culture—due to the role of constitutionalism as a practice of critique, revision, and reinterpretation—has carried with it an inherent liberal direction.

III. Tsai's Hidden *Telos*

If I have any significant concerns with the book's analysis, it is that Tsai does not extend arguments about constitutional multiplicity far enough. At times, Tsai's critique of the idea that American life has been marked by a single, unified constitutional tradition unwittingly tends to represent the mainstream 1787 document and tradition in Consensus History

46. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 6 (1997).

47. *See, e.g.*, Justin Driver, *The Consensus Constitution*, 89 TEXAS L. REV. 755, 757 (2011) (critiquing modern legal scholars' use of the "consensus constitutionalism" approach, which "claim[s] that the Supreme Court interprets the Constitution in a manner that reflects the 'consensus' views of the American public").

terms. In particular, the book associates mainstream constitutionalism with what he calls conventional sovereignty or theories of law and politics. For the most part, he defines "conventional" without giving any necessary content; it is simply whatever may have been dominant at a specific moment in American history. However, at places Tsai appears to slip between this content-free account of conventional and a presumption that conventional is equivalent to or somehow interlinked with liberal egalitarianism.

For example, he presents the defeat of the Confederate Constitution as a victory of "conventional sovereignty" over racially grounded and "cultural theories of power."[48] Following the Civil War, he describes conventional sovereignty—embodied by the mainstream constitutional project—as increasingly "[i]nfluenced by ideas of liberal egalitarianism" and as "envision[ing] citizenship in 'neutral' political terms."[49] Thus, the collapse of the Confederacy is marked as a key "turning point in the development of conventional sovereignty, which successfully defended the idea of one people and laid down new principles promoting national citizenship and civic equality."[50] In effect, these arguments juxtapose an egalitarian mainstream constitutionalism with racialist alternative strands, at times appearing to embed within the 1787 constitutional tradition an inherent liberal *telos*. Tsai comes closest to making this claim in the book's conclusion, where he combines liberal egalitarianism and conventional sovereignty, stating: "A theory of conventional sovereignty, descended from the 1787 Constitution and initially carried out through pioneer experiments, blossomed into a vision of law based on pluralism, individualism, and incrementalism."[51] At moments like these, Tsai seems to describe mainstream constitutionalism almost as an unfolding liberal endeavor that over time both defeated its illiberal challenges and steadily fulfilled its own initial promise.

This implicit, perhaps unintentional, image of the 1787 project deemphasizes the persistent and deeply exclusionary practices that remained dominant *within* mainstream constitutionalism far past the Civil War. Indeed, from the perspective of the post-Civil War period, it would be hard to describe mainstream constitutionalism in the late nineteenth and early twentieth centuries as opposed in any meaningful way to racial sovereignty. Similarly, one would have great difficulty in distinguishing conventional from Confederate constitutionalism on grounds that the latter was "cultural" and inegalitarian while the former increasingly plural and open. If anything, as Reconstruction receded, racially egalitarian readings

48. TSAI, *supra* note 23, at 12–13.
49. *Id.* at 12.
50. *Id.* at 13.
51. *Id.* at 293.

of the federal Constitution faded fairly rapidly from mainstream politics. By the turn of the century, different constituencies seriously debated whether the Constitution was outmoded, especially due to concerns about whether the divided and countermajoritarian nature of American government could successfully address growing industrial and labor problems.[52] However, white views about racial supremacy had become so commonplace that there was far greater agreement that the country should remain a white republic than about whether or not essential changes were needed for the 1787 constitutional structure.

To underscore the point, one need only look at the dominant accounts of Reconstruction during the era in political and academic life. William Dunning, the president of both the American Historical Association and the American Political Science Association, described the end of Reconstruction and the reassertion of white oligarchy in the South in heroic terms as "the struggle through which the Southern whites, subjugated by adversaries of their own race, thwarted the scheme which threatened permanent subjugation to another race."[53] Charles Francis Adams, scion of one of the nation's founding families, great-grandson of John Adams, grandson of anti-slavery advocate John Quincy Adams, and another president of the American Historical Association,[54] similarly concluded that black limitations required treating the community generally as "a ward and dependent" rather than as a "political equal."[55] And in his magisterial *The American Commonwealth*, perhaps the most academically well-respected account of the U.S. constitutional system during the era,[56] English jurist, politician, and diplomat James Bryce took for granted the impossibility of black civic inclusion, writing of former slaves in Louisiana: "Emancipation found them utterly ignorant; and the grant of suffrage found them as unfit

52. Aziz Rana, *Progressivism and the Disenchanted Constitution*, *in* THE PROGRESSIVES' CENTURY: DEMOCRATIC REFORM AND CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (Bruce Ackerman et al. eds., forthcoming 2015) (manuscript at 4–5) (on file with author).

53. HUGH TULLOCH, THE DEBATE ON THE AMERICAN CIVIL WAR ERA 214 (1999) (quoting 22 WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC, 1865–1877, at xv (1907)) (internal quotation marks omitted).

54. Earl N. Harbert, *Charles Francis Adams (1807–1886): A Forgotten Family Man of Letters*, 6 J. AM. STUD. 249, 249 (1972); *Charles Francis Adams*, AM. HIST. ASS'N, http://www.historians.org/about-aha-and-membership/aha-history-and-archives/presidential-addresses/charles-francis-adams, *archived at* http://perma.cc/7JJQ-5QZG.

55. MARILYN LAKE & HENRY REYNOLDS, DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY 69–70 (2008) (quoting Charles Francis Adams, *Reflex Light from Africa*, CENTURY MAG., May–Oct. 1906, at 101, 107).

56. Progressive politician and author Frederick Howe recalled in his memoir that in American universities at the turn of the century, "Mr. Bryce's *American Commonwealth* was at the time a work of Biblical authority." HUGH TULLOCH, JAMES BRYCE'S *AMERICAN COMMONWEALTH*: THE ANGLO-AMERICAN BACKGROUND 10 (1988) (quoting FREDERIC C. HOWE, THE CONFESSIONS OF A REFORMER 3 (1925)).

for political rights as any population could be."[57] Indeed, such views were so widely held that even many socialists on the radical left defended the racially circumscribed nature of American membership, with Victor Berger declaring "there can be no doubt that Negroes and mulattoes constitute a lower race."[58]

In fact, by the eve of World War I, with President Woodrow Wilson and Supreme Court Chief Justice Edward White hosting private screenings at the White House and elsewhere for D.W. Griffith's pro-Klan *Birth of a Nation*,[59] racially egalitarian arguments had retreated even as an account of the meaning of Gettysburg, where Lincoln had famously depicted the Civil War as a struggle over whether a nation "conceived in liberty" and "dedicated to the proposition" of equality "can long endure."[60] For the fiftieth anniversary of the battle in 1913, white veterans from both armies returned to the site, with speakers and organizers emphasizing the importance of national healing but pointedly refraining from mentioning any of the claims about an egalitarian ethos invoked by President Lincoln.[61] In the words of historian David Blight, the Gettysburg remembrances constituted "a Jim Crow reunion, and white supremacy might be said to have been the silent, invisible master of ceremonies."[62] For the progressive journal *Outlook*, Gettysburg—rather than highlighting a fundamental divide over racial sovereignty between conventional and Confederate constitutionalism—spoke instead to how North and South had really fought for a common ideal: "But in what other great war has it been true that both sides were loyal to the *same* ideal—the ideal of civil liberty."[63]

This far more complicated political history raises the worry that Tsai, by depicting American constitutionalism as marked by competing and distinct constitution-writing projects, inadvertently tends to compartmentalize the overall tradition. The result is that while he no doubt underlines the multiplicity of constitutionalisms, they at times appear insular and discrete, with the mainstream project in conflict with the theories of sovereignty expressed by alternative constitution-writing endeavors. The implicit consequence is to keep mainstream constitutionalism isolated from and uncontaminated by practices of illiberalism, in the

57. 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 335 (The Commonwealth Publ'g Co. 2d ed. rev. 1908) (1888).

58. MARK PITTENGER, AMERICAN SOCIALISTS AND EVOLUTIONARY THOUGHT, 1870–1920, at 181 (1993) (internal quotation marks omitted).

59. *See* TULLOCH, *supra* note 53, at 218–19.

60. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 22, 23 (Roy P. Basler et al. eds., 1953).

61. DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 386–87 (2001).

62. *Id.* at 9.

63. *Gettysburg: A Common Ideal*, OUTLOOK, July 12, 1913, at 554, 555.

form of racial ascription or other brands of political extremism. In fact, at a deeper level, this juxtaposition of conventional and alternative cultural or racial theories of sovereignty can make it appear that liberal egalitarianism does not itself carry embedded ascriptive visions of power and law. But given the mutations of racial politics in recent years, one may well wonder whether rather than separate currents flowing into the well of American values, liberal ideals have themselves operated through and sustained their own particular frameworks of exclusion and hierarchy. For a work that so powerfully captures the extent to which American ideas overflow classic assumptions of liberal consensus, this effect is occassionally jarring. At moments, Tsai appears close to embracing elements of the Consensus narrative that he otherwise works so thoughtfully to dislodge.

In a sense, this difficulty in the argument derives from the fact that Tsai never addresses in a direct and sustained manner the precise relationship between liberal egalitarianism and mainstream constitutionalism. In truth, given that the book is focused on recovering marginal and dissident projects of alternative constitutionalism it is hardly fair to ask that he also give a fuller account of mainstream constitutionalism and the process over time by which it became enjoined with a liberal egalitarian creed. But without interweaving this latter narrative, the book at times has the effect of flattening the dominant tradition. Whereas the dissident projects he details come across as richly textured and internally complex, the presentation of the mainstream constitutionalism—despite its changes and developments over the centuries—can have a static quality, serving as the rights-based liberalism in the background against which these contesting groups fight from the early nineteenth century until the present.

Still, one should not overemphasize this concern. If anything, the issue simply highlights the many fruitful paths for future research opened up by this compelling book. In particular, Tsai's work of constitutional recovery raises a set of key questions for future scholarship. If American constitutional history has not been marked by a single practice of near-unanimous support and veneration for the 1787 document, what exactly has been the relationship between the dominant constitutional project and competing alternatives? Which of the various dissident frameworks have ultimately been the most central for transformations in the overall constitutional tradition? More specifically, in what way have challenges to mainstream constitutionalism directly reshaped the 1787 text and its related practices? And finally, besides the Confederate challenge have there been any moments in which actual rupture or fundamental revision were politically viable? If so, what were the causes, as well as consequences, for long-term constitutional development? In the following conclusion, I would like to pursue some of these strands by raising a connected issue. Tsai's work on marginal constitutionalisms brings to the center the role of alternative projects in pressing the mainstream framework to institute

internal changes. What does this role suggest about the history of reformism in American law and politics?

IV. Conclusion: Reform and Revolution in Constitutional Thinking

One can read *America's Forgotten Constitutions* and be convinced that the United States has indeed had a far more multiple and plural constitutional tradition than is often appreciated. But at the same time, a reader may well conclude that in the present it is ultimately for the better—both in terms of political stability and ethical values—that alternative projects have disappeared or only exist at the extreme edges. In a sense, such a conclusion fits neatly into the conventional wisdom that stands behind the dominant scholarly view of the 1787 Constitution both as a site of near-unanimous support since the founding and as an historic instrument for liberalizing and rationalizing American politics. For instance, under this view, black nationalist efforts to create a separate Republic of New Afrika highlight precisely the problems of a revolutionary politics predicated on rupture and a repudiation of mainstream liberal constitutionalism. The rise of such voices to prominence in the late 1960s—especially given their militant posturing and fixation on armed self-defense[64]—embodied the moment when the civil rights and student movements lost contact with most Americans and instead descended into violence and irrelevancy. By contrast with such extremist voices, so the claim goes, the mainstream constitutional tradition offered—and continues to offer today—a reformist mechanism for redeeming the nation from the sins of slavery and racism.

Although there is real power to this perspective, one of the key benefits of recovering alternative constitutional projects is that they hint at the deeply interconnected relationship in American history between reformist achievements and the threat of more revolutionary politics, embodied either by radical abolitionists such as John Brown or black nationalists in the late 1960s. Although Tsai does not explicitly develop this thought, I believe it is an important extension of his arguments and provides a key corrective to contemporary scholarly and political debates about how social change occurs. If anything, today's pervasive suspicion of any project that adopts the language of radicalism and rupture has generated a very specific vision of politics. This vision—one that undergirds the legitimacy of mainstream constitutionalism—suggests that all reform projects must operate in line with realizable, if narrow, agendas, in the process showing respect for the great symbols of American life, chief among them the Constitution. Moreover, reform action should be as suspicious of those radical impulses reminiscent of abolitionist, or more

64. TSAI, *supra* note 23, at 225–26.

recent black militancy, as they are of racially ascriptive politics on the far right—as both variants embody dangerous extremes.

Yet, a potential implication of Tsai's work is that those reforms to the mainstream project—reforms that American citizens are most proud today—may well have been bound to the threat of fundamental institutional and ideological challenges. Indeed, a tacit feature of Tsai's historical narrative is that every high tide of meaningful social change *within* mainstream constitutionalism appears to have occurred during a period with a viable and oftentimes revolutionary radical base. As Tsai repeatedly reminds us, the very success of the constitutional order—both its longevity and its capacity for adaptation and change—were sustained in part by the real dangers that it faced. To make the point more explicitly, during Reconstruction, the Progressive period, the New Deal, and the Civil Rights Era, reformers were able to build broad-based support for their policies precisely because these policies appeared moderate against the backdrop of politically relevant and more transformative alternatives. Although political actors—both mainstream and dissident—in these moments may not have always appreciated this dynamic, at key historical junctures the existence of a vibrant revolutionary discourse gave strength to reformist aspirations.

This fact speaks to what may well be the real significance of constitutional skepticism—and related efforts at alternative constitutionalism—in American life. Regardless of whether one believes that skeptics were right or wrong about the legitimacy and justness of the 1787 system, dissident constituencies nonetheless expanded the range of acceptable debate. In effect, by presenting the political possibility of another governing order, constitutional skeptics often helped to empower interpretations of the federal Constitution that facilitated much needed change. Indeed, a key concern for the present—so long as constitutional skepticism remains only in the academy—is that the disappearance of alternative constitutionalism as a real political force has removed, perhaps counterintuitively, a critical pillar of support for reformist agendas within the mainstream project.

In a sense, Tsai's book calls on scholars to explore in greater detail the history of those alliances, both witting and unwitting, between reformers and revolutionaries that have been read out of the constitutional experience. It suggests that whereas the mainstream project has taken credit for key social changes, engaging more fully with the actual process by which reform has occurred may require revising both our conventional histories as well as our assumptions about the relevant political players and even the past's actual heroes. Such a thought again underscores the sheer number of questions and avenues opened up by *America's Forgotten Constitutions*. It speaks to the book's many contributions and the manner in which Tsai has forged an important path for the retelling of the American constitutional tradition in all its plurality.

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Executing Justice

THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION. By James S. Liebman & the Columbia DeLuna Project. New York, New York: Columbia University Press, 2014. 448 pages. $27.95.

Robert Weisberg*

I. Introduction

In recent years there have been many exoneration stories in American criminal justice and one big dispute about a possible exoneration story of a person already executed. The most publicized are people who have served long prison sentences[1] or have sat on death row[2] and who, with or without the acknowledgment of the prosecuting state, have turned out to be "actually innocent."[3] The public and the media tend to associate these exonerations with the magic of DNA[4]—the so-called CSI effect[5]—although in many cases, and indeed in many of the DNA cases, the major or contributing factors have been the more mundane problems of false testimony, illegally withheld evidence, and so on.

I referred above to a "possible" wrongful execution because much recent public debate has focused on a very unusual case—an instance of homicidal arson—where some see overwhelming proof of the actual innocence of

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1. See, for example, the famous rape exoneration of Ronald Cotton, documented in the well-known Frontline episode, *What Jennifer Saw* (PBS television broadcast Feb. 25, 1997).

2. See, for example, the case of Kirk Bloodsworth, *Kirk Bloodsworth*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Kirk_Bloodsworth.php, *archived at* http://perma.cc/V6VH-SSJY.

3. I emphasize the latter phrase because injustice occurs as well in cases of "legal innocence." These are of course cases where, because of errors or malfeasance, a person not wholly innocent of involvement in a criminal event turns out not to have been legally convicted; in these cases the defendant merits reversal, and sometimes because of the procedural posture reversal bars retrial. Where that error involves a capital trial, there has been a risk that a person is "wrongly sentenced" (and eventually is wrongly executed). And indeed on that latter score, the lead author of *The Wrong Carlos*, James Liebman, is also coauthor of the recent vast survey of the great number of wrongly sentenced capital defendants. Andrew Gelman, James S. Liebman, Valerie West & Alexander Kiss, *A Broken System: The Persistent Pattern of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 210–13 (2004).

4. *See generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000) (describing cases of wrongfully convicted persons exonerated based on DNA evidence).

5. *See generally The "CSI Effect,"* ECONOMIST, Apr. 22, 2010, http://www.economist.com/node/15949089, *archived at* http://perma.cc/2LN9-VAJV (describing the CSI effect and its impact on jury trials).

someone who was indeed executed but about which controversy continues.[6] More broadly the debate has been about whether, at least since the restoration of capital punishment in the 1970s and the advent of the modern due process heavy rules of the penalty trial, there has actually been a single actually innocent person executed. Notable figures, including Justice Antonin Scalia, deny or doubt this.[7] The claim of *The Wrong Carlos* is that the execution of Carlos DeLuna in Texas in 1989 disproves the reassurance side of the debate. The case of Carlos DeLuna did not exactly involve DNA, although had there been a proper forensic investigation of the case there might have been some DNA material subject to testing by the technology that might have become available in time had Carlos DeLuna lived longer. It does involve other forensic flaws, including the state's bizarre failure to preserve evidence in the more mundane, but statistically far more common, form of fingerprints.

For many, proof of a categorically undeniable wrongful execution should settle the big debate about whether to retain capital punishment. That may seem a powerfully logical deduction, but it is not philosophically flawless. Those who think capital punishment serves legitimate purposes need not establish that errors never occur because it is naive to think that any government policy that involves the likelihood or virtual (statistical) certainty of death must meet this standard of proof. And if Carlos DeLuna was wrongly sentenced and even actually innocent, his case is still likely to be an extremely rare one, and a robust debate about its relevance still leaves the possibility that the risk, however psychologically unbearable in a particular case, is not necessarily morally intolerable in the aggregate. Deontological values will always clash with utilitarian values.[8]

The Wrong Carlos will contribute to that big debate. But even if the outcome of the Carlos DeLuna case is a cosmic injustice, the inputs into that outcome do not represent deliberate government evil on any cosmic scale. Rather, the injustice occurred because of the perfect storm (a cliché hard to avoid here) of the inputs, the almost incredible confluence of the whole possible range of intentional, reckless, careless, and foolish actions and

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6. This is the Texas case of Cameron Willingham, executed for killing his children, where forensic evidence and post-execution discoveries of potential prosecutorial misconduct have raised great doubt about his guilt. Maurice Possley, *Fresh Doubts over a Texas Execution: New Evidence Revives Concerns that a Man Was Wrongly Put to Death in 2004*, WASH. POST, Aug. 3, 2014, http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/, *archived at* http://perma.cc/PDZ5-EA3U.

7. JAMES S. LIEBMAN ET AL., THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION, at ix (2014).

8. *Compare* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705 (2005) (suggesting, based on a rejection of the act–omission distinction, that capital punishment may be morally required), *with* Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 752–56 (2005) (critiquing Sunstein and Vermeule's argument and arguing that capital punishment is not morally required).

omissions by individual police, judges, prosecutors, and defense lawyers, which in smaller pieces occur in a wide range of cases, most of which are noncapital. So the takeaway of *The Wrong Carlos* may be that the established standards of conventional trial practice and appellate and postconviction review for error are both woefully insufficient but realistically capable of great improvement.

While lead author James Liebman is one of the most erudite criminal law academics in the nation—and earlier was one of the most elite death penalty lawyers in the nation—this is quite avowedly not a scholarly book or even a very legalistic book. It is a factual narrative, in effect a book-length work of feature journalism, abetted by a prize-winning team of investigative reporters and aimed at a general audience.[9] As a result, I must offer a somewhat telescoped review of the plot because no short review can cover all the key details. And because the target audience of an academic book reviewer is more legally trained than the general audience of the book, I will focus on those facts that enable me to break out the legal issues with some doctrinal and institutional detail to convey what, I suggest, are the real lessons.

The authors draw out some of the admonitory lessons of the story at the end of the book. These include the venerable problems of eyewitness identifications, the only recent advent of DNA testing and its still erratic use, and the local cultures of certain jurisdictions in the United States that combine inflated fear of violent crime by outsiders and minority groups with a mistrust of government that precludes the funding needed for professionally skilled prosecutors and defense lawyers.[10] These are all necessary lessons, but the nature of the book and the intended audience make them incomplete.

The egregious specifics of this story are (fortunately) very unusual and not likely to recur very often, but I suggest that to help prevent the punishment of the wholly innocent in a much wider range of cases one very concrete institutional conclusion follows. This is a conclusion that sounds dully bureaucratic in comparison to the ones the authors emphasize (although it is one they would surely concur in): the need for better funding and regulation of state postconviction review. Of course we must worry about the often pathetic skills of and funding for defense lawyers at trial, as well as malfeasance and incompetence among police officers. Nevertheless, the factual record that uncovers potentially tragic errors by those parties often requires the development of posttrial investigation and presentation of facts outside the official trial record, through the practice variously called collateral, postconviction, or habeas review. And given the barriers to state defendants seeking that review in *federal* court, the real hope lies in the *state*

9. The book cross-references a vast archive of the background research, located at http://the wrongcarlos.net. LIEBMAN ET AL., *supra* note 7, at ix–xi.

10. *Id.* at 327–41.

version of that practice. Therefore, to return to *The Wrong Carlos*, while there are many faulty parties in this tale, the one I will ultimately point to—the one who had at least the last clear chance to save an innocent man—is a figure who appears only briefly and at the very end: a lawyer named Richard Anderson.

II. The Fatal Confluence and a Remarkably Analogous Case

A first cut summary of the story: the title is self-defining. In February 1983 in Corpus Christi, Texas, Wanda Lopez, a clerk in a gas station convenience shop, was stabbed to death.[11] Relying on eyewitness reports, within forty minutes the police arrested Carlos DeLuna, who was hunkered under a pickup truck a short distance away.[12] Within six months Carlos DeLuna was convicted of murder and sentenced to death.[13] Five years later (a speck of time by the norms of modern death-penalty cases), he was executed.[14] But the book tells us that they got the wrong Carlos because Carlos Hernandez, who was also unquestionably nearby, fit the best eyewitness descriptions much better in terms of clothes and facial appearance. Carlos Hernandez was definitely seen running in the direction that the best eyewitness, one Kevan Baker, saw the killer run (opposite the direction in which Carlos DeLuna was found); had committed atrocious crimes, including stabbing other women, that closely resembled the modus operandi of the Lopez killing; and, most important, had undeniably spoken of and indeed bragged about the Lopez killing to a number of acquaintances and even family.[15]

What degree of convergence of what kinds of factors and events made this error possible? Here is a summary: Not only was Carlos DeLuna found in very stealthy circumstances close by to the crime scene, but he was not an improbable suspect anyway, at least in the eyes of the police and prosecutors (and perhaps indirectly the jury). He was a morally compromised lowlife who had committed many crimes (arguably some of them violent) and had been in and out of juvenile hall, jail, and prison most of his 25 years.[16] So convinced were the police that they had the right man that they overlooked tens and tens of potential sources of physical and forensic evidence before prematurely shutting down the crime scene.[17] The plausible and alleged motive for Carlos DeLuna to have killed Lopez was robbery, but the forensic evidence belied this motive, instead suggesting it was a purely sadistic

11. *Id.* at 7, 9.
12. *Id.* at 30–32.
13. *Id.* at 232, 239.
14. *Id.* at 284.
15. *Id.* at 3–4, 22–32, 127–34.
16. *Id.* at 70–77.
17. *See id.* at 57 (describing how detectives were at the crime scene for approximately an hour before leaving and letting employees clean the store).

slaughter.[18] And no such robbery motive was needed to accuse Carlos Hernandez because his record showed a proclivity towards sadistic beatings and stabbings of women.[19]

Compounding these factors was some local sociology: in the demimonde of their dusty poor Texas neighborhood, in the mix of often tortured and overlapping relations of people who knew and were related to both Carlos DeLuna and Carlos Hernandez, no one seems to have had an incentive to report to the prosecutors or detectives that Carlos Hernandez had essentially confessed to the crime,[20] and those officials who heard rumors of these confessions just ignored them.[21] Finally, of course Carlos DeLuna was indigent, and the lawyer appointed for his trial was a novice local shingle hanger with essentially no criminal experience, somewhat aided by a lawyer who knew something about criminal law but who operated as a high-volume, quick-turnover case processor.[22] But as discussed below, while questions of the quality of appellate lawyering make for less interesting drama than the botches of the investigation and trial, the incompetence of the new lawyer who handled appeals and habeas review contains some of the key lessons of *The Wrong Carlos*.

Those are the most elemental key facts, the bulk of which emerged long after Carlos DeLuna's execution through the diligence of documentary journalists and ultimately the team that wrote this book. I will mention other important facts below but, to set the predicate for the legal implications of this story, I first turn to a very famous Supreme Court case, which will prove useful in drawing those implications. This is *Kyles v. Whitley*.[23] The remarkable facts of *Kyles* were roughly these. In 1984 a woman named Dolores Dye left a Schwegmann Brothers' market in New Orleans.[24] "As she put her grocery bags into the trunk of her red Ford LTD," a man assaulted her, shot her to death, and drove away in her car.[25] Six eyewitnesses gave the police varied and contradictory statements in regard to height, weight, build, and hair length.[26] Having assumed that the killer left his own car in the lot, the police "recorded the license numbers of cars remaining in the parking lots," but this information proved a dead end.[27]

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18. *Id.* at 54–57.

19. *Id.* at 83–89, 115. Indeed, in a fascinating twist in the case, the informal cash accounting system of this store indicated that little to no money was taken at all. *See id.* at 56–57 (describing that the store clerk estimated that no more than "a couple of $10 bills" were missing).

20. *Id.* at 129–31.

21. *Id.* at 134.

22. *Id.* at 172, 177.

23. 514 U.S. 419 (1995).

24. *Id.* at 423.

25. *Id.*

26. *Id.*

27. *Id.* at 423–24.

Two days after the murder,

> a man identifying himself as James Joseph called the police and reported that on the day of the murder he had bought a red Thunderbird from a friend named Curtis, whom he later identified as . . . Curtis Kyles. He said that he had subsequently read about Dye's murder in the newspapers and feared that the car he purchased was the victim's.[28]

He met with the police, now telling them his real name was Joseph Banks and that he was called Beanie, although it turned out his real name was Joseph Wallace.[29] He told a new story—that he had bought the car a day later, and he then led the police to a car that indeed turned out to be the victim's.[30] In his narrative, he averred "that he lived with Kyles's brother-in-law," and he gave the police a description that partly matched and partly contradicted the eyewitnesses' reports.[31] More bizarrely, Beanie told police that because he was worried that he had been seen driving Dye's car, he had changed its plates, but the police reassured him he had done nothing wrong and indicated to him that he might be rewarded for his information.[32] So Beanie went on to urge the police that Kyles was the killer, telling them about Kyles's past acts of violence against him (Beanie) and others and leading them to Kyles's house.[33] He added that after he bought the car, he drove Kyles to the market parking lot to pick up Kyles's own car, which he described as an orange Ford, and he added that at the scene Kyles went into some bushes to retrieve a purse, which Kyles later hid in his (Kyles's) house, and that purchases from that same market would be found there.[34]

A series of recorded conversations between the police and Beanie revealed a number of startling contradictions, but "[t]he police neither noted the inconsistencies nor questioned Beanie about them."[35] Ultimately Kyles was arrested and inculpatory evidence was found in his house, although some of the things Beanie had said would be here were not, and the fingerprints on the key items were not Kyles's.[36]

All this background led to a controversial Supreme Court decision holding that the prosecution's failure to disclose just this background violated the rule of *Brady v. Maryland*.[37] *Brady* is the classic case holding that due process requires the state to turn over material exculpatory evidence.[38] In

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28. *Id.* at 424.
29. *Id.*
30. *Id.*
31. *Id.* at 424–25.
32. *Id.* at 425.
33. *Id.*
34. *Id.* at 425–26.
35. *Id.* at 426–27.
36. *Id.* at 427–28.
37. 373 U.S. 83 (1963).
38. *Id.* at 87.

Kyles, that evidence included some of the contradictory eyewitness reports and all the interactions with Beanie, plus the records of the police scan of the parking lot, which did not come up with Kyles's actual license plate, and evidence of Beanie's own involvement in violent crimes, including some at the very same supermarket.[39] Kyles was tried three more times after the Supreme Court ruling,[40] "but each [trial] ended in mistrial."[41] "The State finally dropped the charges against . . . Kyles after the fifth trial in 1998."[42]

Kyles hauntingly resonates with *The Wrong Carlos*—not least in literary ways. In New Orleans, as in Corpus Christi, while a capital murder defendant denies any involvement in the crime, a shadowy secondary figure inserts himself into the story and virtually dares the authorities to turn suspicions on him; during the investigation and trial of the defendant, a shadow narrative unfolds in which various figures, official and unofficial, are exposed to the secondary story; where some officials partly test out and partly avoid the possibility of the alternate suspect; where the defendant's trial jury learns virtually nothing about the alternative possibility; where defense lawyers lack access to what the police know about the secondary story; and where enough of the story is known to the police, prosecutors, and defense lawyers that the defendant's constitutional rights are implicated.

But then there are the differences, and in laying them out, I want to note a nuance about constitutional doctrine that might be helpful. The decisive factor in *Kyles* was that the prosecution withheld evidence that, under *Brady*, was exculpatory because, in retrospect, there was a "reasonable probability" that had the jurors known it, they would have acquitted.[43] But imagine the case from a different angle. Surely the defense lawyers at trial had some reason to focus on Beanie as the true killer, and indeed they put on witnesses who implicated Beanie by testifying, among other things, that shortly after the killing he was seen driving a car just like the victim's.[44] Had Kyles focused on the failure of his lawyers to take the initiative in finding and developing the facts withheld by the prosecutor, a lawyer for Kyles on direct appeal or postconviction review could have argued that the trial lawyers were unconstitutionally ineffective. Under the doctrine of *Strickland v. Washington*,[45] the argument would turn on two necessary points of proof: that a reasonably competent lawyer would have found the information on her own, and that, had she found and used it, there is a reasonable probability that

39. Kyles v. Whitley, 514 U.S. 419, 441–54 (1995).

40. In fact, the conviction under review came in his second trial because the first had ended in a deadlock. *Id.* at 429.

41. *Curtis Kyles*, INNOCENCE PROJECT NEW ORLEANS, http://www.ip-no.org/exonoree-profile/curtis-kyles, *archived at* http://perma.cc/5634-P9ZL.

42. *Id.*

43. *Kyles*, 514 U.S. at 421–22.

44. *Id.* at 430.

45. 466 U.S. 668 (1984).

Kyles would have been acquitted.[46] Yes, the latter part, the so-called "prejudice prong" of the *Strickland* test, is the same thing as the very definition of exculpatory evidence under *Brady*. And depending on the relative access of the defense and the prosecution to information that meets this overlapping standard, a misbegotten adjudication can be blamed on either a prosecution failure or a defense failure.[47]

In any event, Curtis Kyles won on a *Brady*, not a *Strickland*, claim and for some good reasons. While the published history of the *Kyles* case is silent on any possible challenge to the trial lawyer's competence, we at least know that the trial lawyer did something that Carlos DeLuna's lawyer did not. From the very start of the first of the several trials, Kyles's lawyer not only argued to the jury that someone else did the killing but also named that person.[48] Moreover, when the appeals got framed on *Brady*, not on *Strickland*, grounds two advantages followed. One was a simple matter of law: holding constant the nature of the information (the whole Beanie backstory), Kyles only had to show that this information was had by the police and would have affected the verdict, whereas under *Strickland* he would have had to reconstruct why a competent defense lawyer would have gotten the information. But the second difference between the Kyles story and the Carlos DeLuna story is the crucial one. Armed with the predicate that Beanie had been at least known of and that defense witnesses offered some credible evidence implicating him at the trial, Kyles's postconviction lawyers were able to undertake a thorough investigation of the Beanie story that enabled them to get supporting facts and to get them on the record before a state habeas court.[49] While Kyles of course lost in that state habeas court, the lawyers were then well armed to make the *Brady* claim in federal district court on federal habeas, and that is why Curtis Kyles, in the long run, was never successfully convicted of murder. Notably, in the *Kyles* opinion in the Supreme Court the state habeas phase is just mentioned in a cursory way to explain why there was no jurisdictional barrier to federal habeas review.[50] While the statutory complexities and judicial history of federal habeas under 28 U.S.C. § 2254 are the subject of a whole industry of commentary,[51] state

46. *See id.* at 687, 694 (explaining that "[f]irst, the defendant must show that counsel's performance was deficient" and second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

47. It would be an interesting hypothetical if the degree of failure was virtually the same for both and whether a reviewing court would find both violations or favor one claim over the other; presumably a cancelling-out tie game, while equitable as between the two sets of lawyers, would be unfair to the defendant.

48. *Kyles*, 514 U.S. at 429.

49. *Id.* at 430–31.

50. *See id.* at 431 (mentioning that Kyles exhausted his state remedies).

51. *E.g.*, RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (6th ed. 2014).

postconviction review remains an under-the-radar matter of obscure local practices. But when it involves good lawyers who have mastered the obscure exotica of this obscure practice, it is the lifesaver for innocent defendants.

III. The Pretrial Story

So now back to the more detailed story of *The Wrong Carlos* to develop these legal lessons. Although they were not as obviously intertwined as Beanie and Kyles, Carlos DeLuna and Carlos Hernandez shared acquaintances.[52] But most important, Carlos DeLuna probably saw Carlos Hernandez at a bar not far from the crime scene in the hours before the killing,[53] and some of the eyewitnesses implicitly showed that Carlos Hernandez just happened to be near the killing scene at the fatal time.[54] Thus, we can believe Carlos DeLuna's suggestion that Carlos Hernandez was afraid of being fingered by him for the crime and then got lucky when the wrong man was arrested. Moreover, the two men may have crossed paths later in a jail, where Carlos Hernandez may have warned Carlos DeLuna to keep silent if he wanted to avoid retaliation.[55]

As noted above, Carlos DeLuna, born in 1962, had quite a string of priors, mostly for things like disorderly conduct, theft, and burglary.[56] There was, however, one 1980 incident that was initially alleged as an attempted rape but charged as an assault,[57] a crime that proved important in the penalty phase of his trial.[58] Carlos DeLuna was also somewhat developmentally disabled.[59] He was eight years younger than Carlos Hernandez and was somewhat different in facial look (he was usually clean shaven, Carlos Hernandez scruffily bearded) and in clothing habits (he was known to favor dress shirts, whereas Carlos Hernandez was usually in worn-out flannels and sweatshirts).[60] But from a distance or, conversely, in certain photos, he could be confused with Carlos Hernandez; indeed, years after the crime Carlos

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52. LIEBMAN ET AL., *supra* note 7, at 220.

53. *Id.*

54. *Id.* at 209–10. One witness originally described the man as wearing jeans and a white t-shirt or thermal shirt but later testified at trial to dark-blue or black pants and a white button down. *Id.* at 209. Another witness originally described the attacker as wearing a red flannel jacket and having a mustache, which matched the description given on the manhunt tape not provided at trial. *Id.* at 210. Furthermore, two witnesses claimed to see the man they identified as the attacker in two different places at the same time: "[I]t is very likely that the Arsuagas' sighting of DeLuna two blocks from the Sigmor Shamrock station provided him with an alibi—not corroboration of his guilt—given that it occurred at the same moment as Baker saw the killer fleeing the gas station in the opposite direction." *Id.* at 321.

55. *Id.* at 317.

56. *Id.* at 59, 70–74.

57. *Id.* at 75–76.

58. *See infra* notes 126–29 and accompanying text.

59. LIEBMAN ET AL., *supra* note 7, at 66, 69–70.

60. *Id.* at 3, 59, 67–69, 90–92.

Hernandez's brother-in-law Freddy Schilling saw a photo of Carlos DeLuna and said it was Carlos Hernandez.[61]

Carlos Hernandez was born in 1954 and spent most of his teen-to-adult years in and out of jail and prison.[62] He was arrested at least two dozen times between the ages of 24 and 42.[63] His crimes including the egregiously reckless vehicular homicide of his sister's fiancé (and almost the death of his sister)[64] and a 1972 armed robbery for which he received a twenty-year sentence, of which he served only a brief part.[65] He was well known to engage in gratuitous misogynist violence, once thrusting an axe handle into his wife's chest.[66] Most important, the vast research that underlies *The Wrong Carlos* convincingly establishes that in 1979, Carlos Hernandez murdered a woman named Dahlia Sauceda (indeed did so in front of her two-year old child and stabbed a sign of *X* on her body)[67] because she had had an affair with his sister's husband Freddy.[68] And in one of the more bizarre turns in this bizarre set of intertwined stories, another man, Jesse Garza, was charged with the killing of Sauceda.[69]

Jesse Garza was lucky to have an excellent lawyer, Albert Peña, who had heard rumors about Carlos Hernandez's confessions about Sauceda and hired a first-class investigation team to develop the side case against him.[70] In fact, Carlos Hernandez was initially arrested for the Sauceda killing while the Jesse Garza trial was in process.[71] Peña persuaded the jury to acquit Jesse Garza, and six years later Carlos Hernandez was again arrested for the killing,[72] in part because witnesses reported that he had confessed to it[73] and also thanks to investigation by a local investigator named Eddie Cruz who had infiltrated Carlos Hernandez's gang.[74] But Carlos Hernandez won dismissal because the case had become too stale.[75] Finally, in 1989, in a fit of sexual frustration, Carlos Hernandez beat and stabbed a woman named Dina Ybanez.[76] For that assault he received a ten-year sentence, for which

61. *Id.* at 3.
62. *Id.* at 3–4.
63. *Id.* at 96.
64. *Id.* at 92.
65. *Id.* at 94–95.
66. *Id.* at 83–89.
67. *Id.* at 116–17.
68. *Id.* at 117.
69. *Id.* at 102.
70. *Id.* at 103–04.
71. *Id.* at 104.
72. *Id.* at 115.
73. *Id.* at 115–18.
74. *Id.* at 103.
75. *Id.* at 120.
76. *Id.* at 308.

he served only nineteen months.[77] But when he then encountered a tough parole officer after an arrest for a 1996 assault, he was sent to prison for what turned out to be the last three years of his life—he died of cirrhosis in prison.[78]

Among the things that went wrong in the Carlos DeLuna case, perhaps the most conventional was the problem of the eyewitnesses. We have become so used to the problem of eyewitnesses that the "notorious unreliability" of this evidence has become a tired cliché. But the case of Carlos DeLuna exhibits the whole panoply of eyewitness problems. Kevan Baker was the only witness who arguably saw the killer in the store and saw and heard the fatal incident itself.[79] Baker was a sympathetically tortured man who, seeing the assailant approach Lopez, at first turned away but then felt compelled to try to help.[80] Baker reported to the police on the man he saw in the store and then running away.[81] The man wore an old flannel shirt and gray sweatshirt and departed in an eastward or northward direction—in any event, opposite to the direction of the place where Carlos DeLuna was found.[82] When the police arranged a hasty show-up identification of Carlos DeLuna at the crime scene, Baker uttered ambivalent and even contradictory statements,[83] and he reprised this ambivalent and contradictory performance at trial.[84]

Meanwhile, three other witnesses saw a man in a white dress shirt running (by one report, casually jogging) in the opposite direction from where Baker saw his man going—again, clearly in the opposite direction to where Carlos DeLuna was found.[85] A series of officers immediately began scurrying around the neighborhood in reaction to these initial reports. In retrospect, the chaotic interactions of the police in response to the confused reports of the witnesses set in motion the flawed investigation that led to the arrest of Carlos DeLuna, far from where the best witness saw the killer going.[86] The chaos was captured by the 911 operator who also heard an anguished cry for help from Wanda Lopez[87] but, and here it takes heroic effort to resist the phrase "in another bizarre twist," the retrospect was two decades long. It was a fortuity that the 911 operator recorded 42 minutes of

77. *Id.* at 313–14.

78. *Id.* at 4, 314.

79. *Id.* at 12–13.

80. *Id.* at 12.

81. *Id.* at 13–14.

82. *Id.* at 13, 20.

83. *See id.* at 38–39, 42 (describing Baker's statements at the crime scene and the potentially leading statements made by police officers).

84. *Id.* at 210.

85. *Id.* at 15–17.

86. The tape included one distinct report from an officer named Bruno Mejia that the witness and police descriptions and movement observations were not squaring and that the police might be chasing the wrong man. *Id.* at 20–21, 188.

87. *Id.* at 18.

the calls among the police; a fortuity that the operator retained a copy of the tape; either a fortuity or a scandal that the police lost or destroyed the original tape;[88] and an ultimate fortuity that the authors of *The Wrong Carlos* received the copy from the 911 operator in researching this book. If Carlos DeLuna's lawyers had received this tape, they might have been able to destroy the eyewitness trial testimony that was virtually all of the prosecutor's case. And they surely would have been able to rely on the then-established constitutional law on how hastily arranged show-up procedures might render some trial testimony inadmissible.[89]

A key to the truth was available from a man named Robert Stange, the owner of the gas station franchise, but that truth only emerged years after Carlos DeLuna's execution. For one thing, when Stange saw that a few tens of dollars had been left at the store,[90] and knowing that the strict rules of the business limited the amount of cash the clerk could keep on hand, he found it inconceivable that robbery was the motive.[91] In addition, Stange himself meticulously examined the crime scene and the pattern of blood, and he surmised that the killer had gone over the counter and towards the victim in a way absolutely inconsistent with any desire to steal.[92] From the day of the murder, Stange had always worried over these things, but he was unable to influence the police.[93] In effect, Stange had conducted a parallel investigation and analysis, filling the gaps left by the police. And that parallel investigation had its own and much more comprehensive parallel in the work of Eddie Garza, an accomplished local detective who had been shunted away from the case in favor of Olivia Escobedo, an officer of much less experience.[94] Both during the Jesse Garza (no relation) trial and after, Eddie Garza investigated Carlos Hernandez, suspecting that he was benefiting from his status as a paid police informant.[95] Ultimately, Eddie Garza discovered

88. *Id.*

89. *Id.* at 37–40; *see also, e.g.*, Neil v. Biggers, 409 U.S. 188, 198–200 (1972) (acknowledging that a manipulative show-up procedure that leads to an unreliable identification may make references to the show-up identification or later in-court identification inadmissible).

90. LIEBMAN ET AL., *supra* note 7, at 56.

91. *Id.* at 46–47, 56–57.

92. *Id.* at 49.

93. *Id.* at 56–57.

94. *Id.* at 149. Years later Escobedo spoke with investigators who had reviewed her files on the case. *Id.* at 142–43. Although she denied knowledge of it, in the Wanda Lopez case file there were actually the rap sheets of seven other men named Carlos—only one of whom, Carlos Hernandez—came even close to fitting the witness descriptions, yet no further look at Carlos Hernandez occurred, although Carlos Hernandez's rap sheet included an arrest on suspicion for killing a woman with a knife. *Id.* Also, shortly after the killing of Lopez, Carlos Hernandez had been arrested on a traffic warrant and routinely fingerprinted, but the prints were useless in regard to Lopez because the ones taken from the scene were so inadequate. *Id.* at 140–41.

95. *Id.* at 138–39.

damning information about Carlos Hernandez[96] and performed a withering critique of the police investigation of Carlos DeLuna and the crime scene. Eddie Garza was concerned that the police had barely made any effort to check for prints on a huge number of surfaces at the crime scene.[97] He criticized the indifference of the police to the absence of any blood on Carlos DeLuna when he was arrested, given the extensive smearing of blood all over the murder scene.[98] And he was professionally offended at the incompetence of the police officers at the eyewitness show-up, where they managed to both miss and cause inconsistencies with and among the reports and made no effort at any objective cross-checking of the initial reports.[99]

Eddie Garza's research and analysis would have been invaluable to the trial defense lawyers if they had connected with him. It would have been invaluable to Carlos DeLuna's postconviction lawyers pursuing either *Brady* or *Strickland* claims. And none of that would have mattered anyway had the police and prosecutors themselves realized that Eddie Garza's analysis was an invaluable framework for analyzing the evidence, because it might have led them to the right person. But despite his effort to get his research to the investigating officers and the prosecutors, he was rebuffed,[100] and his research remained, like so much else in this case, just a parallel shadow.

IV. The Trial

As for the trial of Carlos DeLuna itself, it was a short and desultory affair. The trial judge, borrowed from another county, made nice extra money for this assignment and saw no reason to jeopardize future income by doing anything interventionist or dramatic in this case.[101] The prosecution relied almost exclusively on the compromised (but unchallenged) eyewitnesses.[102] In fact, beyond that evidence itself, the prosecution *defensively* put on witnesses to explain why the forensic and identification evidence was not more ample.[103] The two prosecutors who handled the case were strong figures who, when challenged later, either minimized the alternate-killer theory or seemed to blame each other for any hint that there were angles about Carlos Hernandez left unexplored.[104] One of them received permission after the trial to remove the physical evidence, and it was

96. *See, e.g.*, *id.* at 139 (stating that Garza relayed to Escobedo boasts by Carlos Hernandez relating to the Lopez murder).

97. *Id.* at 165–66.

98. *Id.* at 153–54.

99. *Id.* at 168–69.

100. *Id.* at 139.

101. *See id.* at 181 (relating one defense attorney's concerns regarding visiting judges).

102. *See id.* at 209–10 (describing the prosecution's examinations of eyewitnesses).

103. *Id.* at 207–08.

104. *Id.* at 200–01.

never found again.[105] The other insisted that he could discount any claim that Carlos Hernandez had threatened and then framed Carlos DeLuna when they encountered each other at the jail because he had ensured that Hernandez and DeLuna had never been in the same jail at once—despite clear documentation that they had.[106]

And then there were the defense lawyers. The lead lawyer, the wholly inexperienced Hector De Peña, did little work and seemed inclined to ingratiate himself with the prosecutors.[107] The co-counsel, James Lawrence, was widely viewed as largely indifferent to his client.[108] With only $500 allocated to them for investigation (it is unclear if they could have gotten more),[109] they did nothing to attack the eyewitnesses. As for defense witnesses, one was an acquaintance of Carlos DeLuna who testified that the defendant had recently earned enough cash to explain the amount found on him when he was arrested.[110] The other was Carlos DeLuna himself, whose testimony mainly amounted to a simple denial of guilt; he did finally utter Carlos Hernandez's name in public, but he could offer no evidence.[111] Worse yet, the lawyers allowed him to make a catastrophic mistake in claiming that he had an alibi witness for the time of the killing. Carlos DeLuna may have been honest and sincere in saying he remembered the supposed witness at a skating rink at the relevant time, but when the alibi was easily disproved at trial, the prosecutor was able to denounce him as a liar to the jury.[112]

So for much of the guilt phase of the trial, the instances of ineffectiveness were clear. Most of the ineffectiveness, of course, lay in the absence of the investigation before the trial ever happened. A sympathetic evaluator would note that the defense lawyers labored under one great disadvantage: while Carlos DeLuna steadfastly denied his guilt, he took a very long time before finally agreeing to give his lawyers Carlos Hernandez's

105. *Id.* at 194, 243.

106. *See id.* at 200 (stating that "records show that Carlos DeLuna and Carlos Hernandez evidently *were* in police custody at the same time on at least three occasions").

107. *See id.* at 172–73 (describing De Peña as a general practitioner who had never represented a defendant on a serious criminal charge and how De Peña would get coffee with one of the prosecutors during trial breaks).

108. *See id.* at 179 (enumerating how others recounted Lawrence's minimal contacts with his clients and his inability to remember the specifics of DeLuna's case).

109. *Id.* at 181.

110. *Id.* at 217. The judge assigned a psychologist who might have offered some mitigating evidence at the penalty phase, but the witness turned out to be a pedophile and therefore useless. *Id.* at 176.

111. *Id.* at 219–20.

112. *Id.* at 185–86. Carlos DeLuna's error was in recalling that he had seen Linda and Mary Perales at the time of the killing. *Id.* at 185–86, 219. DeLuna compounded the error at trial by succumbing to a manipulative move by the prosecutor and therefore confusing the date on a photo he was shown of Mary Perales, making this error seem even more obvious and dishonest. *Id.* at 224–26.

name;[113] presumably he delayed out of fear. But still the defense lawyers might well have found some way to identify Carlos Hernandez, most obviously by making demands of the prosecutor who had plenty of information that linked to Carlos Hernandez.[114] Moreover, the defense lawyers' indifference to uncovering more details and the chance to attack the police investigation were in no way affected by the delay in hearing Carlos Hernandez's name from Carlos DeLuna. After all, Eddie Garza, in his parallel research, had not needed that advantage to critique the forensic blunders by the police and the confusion of the eyewitnesses.[115] The lawyers made only the most feckless effort to get the tapes of the police calls[116] and got none of the photos of the scene, which ironically were obtained by a very good lawyer in yet another parallel case—a civil negligence suit brought by Wanda Lopez's family against the ownership of the gas station.[117]

These were all mundane but devastating failures by the defense, and the key thing about them is that had the lawyers not so failed, they might have won an acquittal. Whether documentation of these failures could have helped Carlos DeLuna later to make an ineffectiveness claim is a problematic matter I will discuss below. But even these trial lawyers probably had enough information to prompt a forceful discovery request of the prosecutor; that effort would have either gotten them information that could prove exculpatory or would have laid the basis for a later *Brady* claim.

The penalty phase requires a different evaluation—and here we must note the coincidental timing of this trial and the emergence of the constitutional ineffectiveness doctrine. It was only in 1984, a year after Carlos DeLuna's trial, that the Supreme Court, in *Strickland v. Washington*, enunciated the two-prong ineffectiveness principle.[118] That case, like most of the later Supreme Court decisions on the subject, involved a capital trial and specifically claims of lawyer ineffectiveness at the penalty phase.[119] And *Strickland*, again like later ones, focused on ineffectiveness in the form of failure to develop and present mitigating evidence that could have led to a life verdict.[120] The defendant in *Strickland* ultimately lost because the Court

113. *Id.* at 195.

114. *Id.* at 187–89, 194–95.

115. *See supra* notes 94–99 and accompanying text. Since two of the witnesses, a couple named Arsuaga, gave reports opposite to Kevan Baker's, in terms of both the appearance of the man they saw running and the direction he was running in, the defense lawyers not only had a chance to weaken the prosecution case, they even had a chance to use this couple's testimony as positively exculpatory evidence. They did neither. LIEBMAN ET AL., *supra* note 7, at 189.

116. *See id.* at 187 (detailing the attempts by the defense to acquire the tapes).

117. *Id.* at 189–90.

118. Strickland v. Washington, 466 U.S. 668, 668 (1984).

119. *Id.* at 675.

120. *Id.* at 698–700 (applying the doctrine to determine whether counsel was ineffective at presenting mitigating evidence); *see also, e.g.*, Rompilla v. Beard, 545 U.S. 374, 377 (2005) (examining a lawyer's duty to review evidence that may be used to aggravate a defendant's sentence

thought that the lawyer's deficiencies in pursuing mitigating leads were understandable in terms of a reasonable balance of strategic and resource priorities and, in any event, the Court deemed these leads of little weight in comparison to the power of the aggravation in the case.[121]

It may not be a coincidence that the penalty phase was the context for the earliest round of *Strickland*-era claims: the modern two-part death-penalty trial was very new at the time,[122] and many defense lawyers were probably not used to the unusual form of investigation and proof that penalty mitigation required. That historical point may explain both why there were so many ineffectiveness claims in that form and why, given the highly deferential standard of the performance prong of the new doctrine, so many of those claims failed. In any event, whether one uses *Strickland* as a benchmark for evaluating the performance of Carlos DeLuna's lawyers at the penalty phase or for reconstructing whether his habeas lawyer could have had a better shot at winning a *Strickland* claim, it is not even clear what standard actually applied in this case given the uncertainty of retroactive application.[123] Teasing out whether pre-*Strickland* rules (either more or less generous than *Strickland* depending on the jurisdiction) applied depends on what stage of Carlos DeLuna's case we are looking at and on just what legal authorities the state and defense lawyers were invoking and the appellate and habeas lawyers might have invoked.

How can we assess the Carlos DeLuna trial then? On the one hand, given that the trial lawyers put on virtually no mitigation at all, they might have been ineffective under any standard. On the other hand, given that the habeas lawyer offered almost no facts derived from any fresh investigation into mitigating factors missed by the trial lawyers, his ineffectiveness claim on habeas would probably have lost under any standard.[124] But the habeas lawyer might have *succeeded* under any standard had he done the work to generate the facts to persuade the habeas court of how egregiously faulty the

even in the claimed absence of mitigating evidence); Wiggins v. Smith, 539 U.S. 510, 514 (2003) (discussing appellant's claim that his lawyers' failure to present mitigating evidence of his life history violated his Sixth Amendment right to counsel).

121. *Strickland*, 466 U.S. at 699–700.

122. This new statutory form was approved in *Gregg v. Georgia*, 428 U.S. 153, 195 (1976), to remedy the constitutional problems that led to the invalidation of all the earlier laws in *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

123. Before the law was clarified in *Teague v. Lane*, 489 U.S. 288, 308–10 (1989), there were inconsistent rules of retroactivity for Supreme Court decisions about criminal procedure. But the principle that was emerging and was ultimately adopted in *Teague* came from Justice Harlan. *Id.* at 309–10 (citing Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part)). By that standard, a new Supreme Court decision applied to any criminal case still in trial and up to the point that direct appeal was finished. *Id.* at 310. It would not apply to cases that had advanced to the postconviction stage. *Id.*

124. *See* LIEBMAN ET AL, *supra* note 7, at 258 (noting that DeLuna's habeas lawyer had "reported only a couple of tidbits of new information" in the initial petition).

trial lawyers had been and how likely it was that minimally competent lawyers would have won an acquittal.

Beyond one colossal gaffe in closing argument,[125] one other important moment of defense counsel incompetence stands out. At the penalty phase the prosecutors introduced prior crimes as aggravators.[126] The most dramatic was a sexual assault, and the victim of that assault testified and described the crime in disturbing detail.[127] The defense lawyers had access to the file of that old case, which would have shown them that the charge got reduced to assault[128] and which probably had some investigatory information that explained why the prosecutor declined to charge it as an attempted rape. But the lawyers never examined the file.[129] Years later, in *Rompilla v. Beard*,[130] the Supreme Court actually granted *Strickland* relief in a case where at the penalty phase a juvenile prior was introduced as an aggravator, and the defense lawyer never even looked at the file to see if any mitigators might at least indirectly emerge from it.[131] A heated dissent in *Rompilla* complained that the majority had virtually ignored the prejudice prong in this case—that there was nothing to suggest that this potentially foregone evidence would have made a material difference in the penalty decision.[132] The dissent's correct inference was that under the majority holding, some performance violations may be so categorically egregious professional affronts to any judge or lawyer that they automatically warrant reversal. Thus, while the Court has repeatedly said that there is no per se prejudice for a *Strickland* performance violation,[133] failure to look at a potentially relevant case file may be an implied exception. For Carlos DeLuna, the lawyers' failure on the assault charge here obviously resonates with *Rompilla*, and in notable contrast to the Carlos DeLuna case, the lawyers for Rompilla had performed the crucial predicate step for winning on federal habeas: they had thoroughly litigated and made a solid record of the claim in a Pennsylvania state postconviction court.[134]

V. The Legal Aftermath

If the trial of Carlos DeLuna was desultory, the proceedings after the trial were anticlimactic but, I will argue, they are the locus source of the real

125. De Peña's co-counsel essentially insulted the jury by saying in handing down a death sentence they would be putting themselves "above God" as "destroyers of life." *Id.* at 238.

126. *Id.* at 233–34.

127. *Id.* at 234.

128. *Id.* at 235.

129. *Id.*

130. 545 U.S. 374 (2005).

131. *Id.* at 390, 393.

132. *Id.* at 406–08 (Kennedy, J., dissenting).

133. *E.g.*, Bell v. Cone, 535 U.S. 685, 695–97 (2002).

134. Commonwealth v. Rompilla, 721 A.2d 786, 789–90 (Pa. 1998).

lessons here. On direct appeal to the Texas Court of Criminal Appeals, Lawrence fashioned a claim—groundless in Texas law—that when the jurors briefly deadlocked on the penalty the trial judge should have just decided that life was the morally right verdict.[135] Lawrence also argued that one juror should have been excused for bias because of experience as a victim, but the appellate court easily concluded that the voir dire had dissipated any serious risk of bias.[136] Ironically, a day after the appeal was denied, the shadow story of Carlos Hernandez manifested itself again in a newspaper story that revealed that a man named Carlos Hernandez had been arrested for the murder of Dahlia Sauceda in Corpus Christi.[137]

After the direct appeal, Carlos DeLuna's family found a Dallas lawyer, Richard Anderson, who had some experience in capital appeals, although there was a warning sign when he acknowledged feeling fairly hopeless about the case from the start.[138] But neither Anderson nor anyone else thought the news of Hernandez's arrest might provide a reason for reexamining Carlos DeLuna's case.

Then Anderson went through the exercise of a state habeas corpus petition. Finally recognizing the trial lawyers' failure to pursue the alternative killer, he chided them for this failure.[139] But Anderson provided no facts—because he had done no investigation that could have uncovered any facts—that the trial lawyers might have discovered Carlos Hernandez and the evidence of his guilt.[140] Otherwise, Anderson was left to argue a hopeless point about their failure to pursue a psychiatric examination that would have turned up information about Carlos DeLuna's problems with drug abuse as potential mitigation.[141] Stretching for a claim of some greater constitutional valence, he argued that the case was rife with racial prejudice against a Latino defendant charged with killing a white woman.[142] Alas, no statistical analysis about sample size or correlation and causation was necessary to reject this claim once the court realized that the *victim*, named Lopez, was *herself* Mexican-American.[143]

Anderson's appeal of the denial of state habeas corpus was more of the same, and so was mostly a clumsy series of federal habeas corpus petitions. Although Anderson made some effort to show that the lawyers could have

135. LIEBMAN ET AL., *supra* note 7, at 250.

136. *Id.* at 249–50.

137. *Id.* at 250.

138. *See id.* at 250 (stating that Anderson did not believe that Carlos was innocent and saw no reason to take the case).

139. *Id.* at 253.

140. *Id.* at 253–54.

141. *See id.* at 253 (stating that Anderson argued that DeLunas's trial lawyers "improperly advised him not to cooperate with the court-appointed psychiatric experts").

142. *Id.* at 252–53.

143. *Id.* at 256, 262.

found Carlos Hernandez, the effort was still all assertion and no evidence.[144] Indeed, he was confused on some key facts and was caught helpless between saying the trial lawyers had the information and thus were ineffective and saying that the key information came in later and could constitute newly discovered evidence.[145] The federal court decided the ambiguities against Anderson on both scores.[146] He made one more try in federal court, but all this was far too late to overcome the deficiencies of his original federal habeas petition, which in turn derived from his failures at the state habeas stage.[147] Appealing the district court's denial of the habeas petition, Anderson then filed a twenty-five-page brief in the Fifth Circuit, which readily affirmed the district court.[148]

In one more ironic anticlimax, a very skilled lawyer named Kristen Weaver appeared at the last moment to try a sequence of successive state and federal habeas petitions.[149] But Weaver could not be the deus ex machina Carlos DeLuna needed. Weaver had a very interesting argument under the principle of a new case called *Penry v. Lynaugh*,[150] handed down a few months before Carlos DeLuna's execution. The idea was that the required instruction under the unusual Texas death-penalty law did not explicitly tell the jury to identify and balance aggravating and mitigating factors.[151] Instead, it asked whether the defendant was likely to commit dangerous acts of violence in the future if not executed.[152] Unless otherwise instructed, the jury might thereby refuse to consider legitimate mitigating evidence of mental deficiency[153]—a plausible factor for Carlos DeLuna. But of course no predicate for that claim had ever been laid by any of Weaver's predecessors in the DeLuna case, and this last effort was hopeless.[154]

The Carlos DeLuna story has a few noble figures (e.g., Eddie Garza) who would have been heroes had the truth about two men named Carlos come out while Carlos DeLuna was still alive. It has many arguable villains, or at least people on a continuum of culpability encompassing deception, manipulation, reckless indifference, and neglect with respect to the truth—and of course one person who was a villain because he killed Wanda Lopez. Richard Anderson is not very villainous, and he was dealt a very difficult hand when he inherited a case with virtually no records to support the claims

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144. *Id.* at 258–59.
145. *Id.* at 259.
146. *Id.* at 262.
147. *Id.* at 265–66.
148. *Id.* at 266–67.
149. *Id.* at 270.
150. 492 U.S. 302 (1989).
151. *Id.* at 310–11.
152. *Id.* at 310.
153. LIEBMAN ET AL., *supra* note 7, at 270–71.
154. *Id.* at 273.

he could make—and presumably at a time when, at least in Texas, he had little available financial or personnel help from the state or any nonprofit organization. Let us then hypothetically apply the modern standards of effective counsel to Anderson. If we do so we must conclude that he did not attempt, much less accomplish, the minimal amount of investigation that would have enabled him to produce the minimally competent pleadings that might have persuaded a state court to at least make a record of, if not decide favorably on the merits, the legal claim that might have unraveled the entire improbable (and mostly dishonest) case that the prosecution made. Or perhaps the villain is the state of Texas or the legal system that placed Anderson in that position with insufficient incentive to do what could have been done.

VI. Conclusion: The Last Clear Chance of State Habeas

It would be far better if defense lawyers had the skills and resources to fulfill the vision of *Gideon v. Wainright*,[155] or at least to avoid the disastrous blunders that Carlos DeLuna's lawyers committed. How far we have failed in fulfilling that vision, and what steps it would take to ensure minimally competent trial representation—these are vast questions.[156] But there will always be bad defense lawyers, and state habeas review can provide a firewall, especially in capital cases. Moreover, there are far fewer potentially meritorious habeas cases than there are trials, and allocating resources to ensure decent state habeas review is financially a more realistic challenge to take on.

Some states now have specialist offices doing this work with consummate skill.[157] But the level of state habeas lawyering is dismal in many places, and there is virtually no relief for a defendant who must rely on inadequate state habeas representation. A defendant only has a right to effective assistance of counsel where she has a constitutional right of counsel in the first place,[158] and that right ends on the first appeal as of right.[159] Under the troubling case of *Coleman v. Thompson*,[160] a slight delay in a filing by a state habeas lawyer can preclude any hope of review on federal habeas.[161]

155. 372 U.S. 335 (1963).

156. *See generally* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006) (discussing problems impacting the right to counsel and proposing remedies to address those problems).

157. California has an official state entity called the Habeas Corpus Resource Center. HABEAS CORPUS RESOURCE CENTER, http://www.hcrc.ca.gov/, *archived at* http://perma.cc/TLB8-LENH.

158. Murray v. Giarratano, 492 U.S. 1, 7 (1989) (explaining that a defendant only has a right to counsel at the trial court level).

159. Ross v. Moffitt, 417 U.S. 600, 610–12 (1974) (declining to hold a right to counsel for the discretionary review process).

160. 501 U.S. 722 (1991).

161. *Id.* at 729–32.

Just recently the Supreme Court has implicitly recognized the consequences of its own *Coleman* decision by offering a few small exceptions: where an ineffectiveness at trial claim—the dominant category of claim raised on postconviction review—is officially[162] or virtually[163] required to be raised on state habeas review and not direct appeal, then while there remains no constitutional right to a lawyer at this stage, the lawyer's ineffectiveness might be excused as a statutory matter and might not bar federal review.

These cases recognize that state habeas is a minimally necessary mechanism for giving the defendant a shot at federal review. But even where there are no jurisdictional barriers to getting into federal court, the chances of winning the constitutional claim on the merits are so restricted under the new federal habeas statute that we have to look at state habeas a different way. Yes, it is a predicate for federal review, but far more important, it is a place where a defendant might actually win, at least because the state courts obviously cannot invoke any federalism concerns as barriers.[164]

Perhaps this reviewer should apologize for emphasizing a general lesson learned from *The Wrong Carlos* that seems too dry and technical to be adequate to the grave moral and social questions raised by the book. For some readers, the key question about the book may be specific to this story but still of enormous significance: have the authors indeed confirmed that a man was executed for a killing he had nothing to do with? And for some, the answer to that last question may clearly be yes, and then the larger questions emerge: does proof of such a case (which of course increases the likelihood of other such cases) require a categorical moral denunciation of the death penalty, or should we view the case in the broader context of utilitarian decisions by government, examining costs and benefits in more nuanced ways? I hardly denigrate the relevance and importance of those questions.

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162. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1318–20 (2012) (holding that an initial review collateral proceeding on a claim of ineffective assistance at trial can provide cause for a procedural default in a federal habeas proceeding).

163. *See* Trevino v. Thaler, 133 S. Ct. 1911, 1915, 1921 (2013) (holding that the *Martinez* exception applies when the state permits, rather than requires, an ineffective assistance claim to be raised on direct appeal but the state's system makes it "virtually impossible" to present the claim on direct review (quoting Robinson v. State, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)) (internal quotation marks omitted)).

164. A declaration of the importance of state habeas review, and a clarion call for better funding for it, comes from Professors Joseph L. Hoffmann and Nancy J. King, Essay, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 835–37, 843–44 (2009). Notably, they express these views in the course of an essay calling for a redirection of resources away from federal habeas review, which they criticize as wasteful investment of federal and state resources in a mechanism that rarely leads to any relief for defendants anyway. *Id.* at 796–97.

But, I suggest, the special value of this book for a legal audience lies in what we learn about the ground level of bureaucratic operations of legal institutions where the daily work of often invisible lawyers and those who help them, if done right, can obviate the need to address these larger questions.

Note

Avoiding the Anchor: An Analysis of the Minimum-Payment and 36-Month Disclosures Mandated by the CARD Act and How to Improve Cardholder Repayment Patterns*

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I. Introduction

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) sought to ameliorate many of the debilitating problems associated with credit card use. Before the passage of the CARD Act, credit card issuers took advantage of behavioral biases and lack of consumer understanding to engage in practices that exacerbated consumer credit card debt, contributing to a national consumer debt crisis. Scholars have described credit cards as a dangerous product in need of more regulation.[1] The CARD Act addressed the problem by prohibiting some "abusive" issuer practices and requiring more transparency in credit card agreements and monthly bills.

One of the more noticeable changes to credit card bills involved the minimum payment. The CARD Act amended the Truth in Lending Act of 1968 (TILA) to provide for enhanced disclosures in addition to displaying the minimum payment for any given month.[2] Along with the minimum payment, monthly credit card statements must now alert customers to the downsides of paying only the minimum payment each month.[3] Specifically, issuers must compare the total cost of paying off a bill by only paying the minimum monthly payment with the total cost of paying a higher amount which, if paid monthly, would pay the balance in 36 months.[4] In addition, the issuer must provide a toll-free number the consumer may call to receive debt-counseling services.[5]

1. *See generally* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008) (arguing that credit cards are similar to dangerous physical products and should be regulated for safety in the same way those products are).

2. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 201(a), 123 Stat. 1734, 1743–44 (codified as amended at 15 U.S.C. § 1637(b)(11) (2012)).

3. 15 U.S.C. § 1637(b)(11) (2012).

4. *Id.*

5. *Id.*

Pulling from the behavioral economic and empirical literature, this Note addresses the merits and shortcomings of the minimum-payment disclosure and the 36-month disclosure, arguing that the provisions could be improved to better help consumers climb out of debt or help consumers avoid debt in the first place. Quite simply, the two disclosures do not do enough to help credit card users escape from crippling debt. One study found that by "reframing" the consumer on the 36-month target rather than the minimum payment, the disclosures led to higher monthly payments.[6] Unfortunately that 36-month payment serves as an "anchor"; many consumers chose to pay the amount that pays off the debt faster, but actually paid less than a matched cohort—meaning they might have otherwise paid more each month.[7] In other words, the nudge to pay a higher or "better" amount than the minimum payment works, but the target amount paid is not optimal. Other studies find the 36-month disclosure does little to mitigate the anchor effect of disclosing a minimum payment.[8]

This Note suggests that studies be done to find a more optimal target. The 36-month target that Congress proposed and enacted helps some consumers pay more than the minimum monthly payment but not enough to avoid accumulating, in some cases, overwhelming amounts of debt. Additionally, the disclosure should be reformulated to be less confusing to consumers. I also suggest the possibility of raising the minimum payment. Finally, in order to better effectuate Congress's purpose, I suggest that policy makers should require issuers to implement commitment devices that would assist consumers in paying down their debt in a more efficient manner. Studies show consumers like commitment devices and are likely to use them if offered.[9] It follows that consumers would be likely to opt into a payment-plan system that would allow consumers to control the way they pay off their debt along with the debt itself.

Part II of this Note addresses the major problems that exist with credit cards and the behavioral biases that allow consumers to acquire massive amounts of credit card debt despite their best intentions. Part II also describes the CARD Act's response to these problems, including the requirement of the minimum-payment disclosure and the 36-month disclosure. Part III discusses the results of empirical analysis of how the CARD Act impacts consumers' repayment behavior and what those results mean with regard to the success or failure of the 36-month and minimum-payment disclosures. Part IV proposes several alternatives to the disclosures as required by the CARD Act, which would better effectuate Congress's purpose in impacting the way consumers repay their credit cards. Part V concludes.

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6. *See infra* section III(B)(1).
7. *See infra* Part III.
8. *See infra* sections III(B)(2)–(3).
9. *See infra* section II(C)(2).

II. Behavioral Biases Exacerbate Credit Card Debt and Affect Payment Choices

Generally, certain inefficiencies or costs justify regulation in a given market. Economic inefficiencies in the market can warrant regulation to correct those inefficiencies, while welfare costs on the general public in a particular market may also support regulation to correct for those costs.[10] In the case of credit cards, the staggering levels of consumer debt exacerbated by credit card use have imposed welfare costs on the nation at large. Specifically, multiple empirical studies have demonstrated that the increased level of credit card debt in the United States has increased consumer bankruptcy filings.[11]

Credit cards have contributed so significantly to the consumer debt problem in the United States in part because of a combination of behavioral biases that cardholders experience and the business model issuers use to exploit those biases. Empirical research suggests that cardholders behave irrationally when making borrowing decisions, and the ease of credit card use only worsens the problems that result when cardholders cannot anticipate how their future selves will make decisions.[12] In particular, cardholders tend to fall victim to underestimation biases as well as a phenomenon called "hyperbolic discounting."[13] In concert, these behavioral biases contribute to cardholders taking on more debt than they predicted when opening the credit card and making lower payments than they originally anticipated being able to make.[14] Further worsening the problem is the ability for cardholders to take on minor amounts of debt at a time.[15]

A. *Overview of Behavioral Biases*

Cardholders overestimate their self-control. Many cardholders apply for credit cards with one of two intentions: to never borrow on the card and

10. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 4–8 (7th ed. 2011) (discussing accepted justifications for administrative regulation to protect against market failures).

11. *See* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 63 & n.22 (2012) (listing the various statistical studies "suggest[ing] a causal relationship between credit card debt and consumer bankruptcy filings"); RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 66 (2006) (indicating that "an increase in credit card debt . . . is associated with an increase in bankruptcy filings").

12. *See, e.g.*, Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1395–1401 (2004) (describing the behaviors that cause consumers to underestimate future borrowing); Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 251–54 (2006) (examining the mechanisms that contribute to excessive borrowing).

13. Bar-Gill, *supra* note 12, at 1396.

14. *Id.* at 1396–97, 1408.

15. *Id.* at 1399.

pay it off each month or to borrow only a certain amount.[16] On top of those original intentions, if they do take on debt, cardholders tend to anticipate paying down the debt responsibly and quickly.[17] Imperfect self-control leaves open the possibility that neither happens.[18] Credit cards are open-ended loans that have no commitment mechanism to ensure that a cardholder will act the way she originally intended to act.[19] Potentially inevitable lack of self-control might put the cardholder in a position where she will either take on more debt than she can handle or be unable, or unwilling, to pay off the debt as quickly as originally planned.

Empirical research in part attributes the high level of credit card debt caused by underestimation of future borrowing to a phenomenon called hyperbolic discounting.[20] In essence, cardholders tend to inaccurately predict their preferences at some point in the future.[21] Hyperbolic discounters make more patient and rational decisions when making decisions for their future selves than they are when making shorter term decisions.[22] When making a choice that affects her future self, a hyperbolic discounter would wait a little longer for a better benefit.[23] For instance, given the option of getting $100 a year from now or $150 thirteen months from now, a hyperbolic discounter would typically choose to receive the $150 in thirteen months. But in the short term preferences change, and hyperbolic discounters would rather take the less preferable benefit sooner rather than waiting for the better benefit.[24] Using the same example, given the choice of receiving $100 today or $150 a month from now, a hyperbolic discounter may choose to receive the more immediate benefit of $100 today.

Hyperbolic discounters discount costs as well as benefits.[25] So, when making the decision to get a credit card, a consumer may decide that the future costs of borrowing outweigh any future benefit of borrowing.[26] When time comes to make the decision whether to borrow, however, the consumer may change her mind and perceive the current benefits of borrowing as

16. *Id.* at 1395.

17. *See id.* at 1408 (describing the hyperbolic discounter's tendency to anticipate quick repayments).

18. *Id.* at 1395.

19. *Id.* at 1395–96.

20. *See, e.g.*, George-Marios Angeletos et al., *The Hyperbolic Consumption Model: Calibration, Simulation, and Empirical Evaluation*, J. ECON. PERSP., Summer 2001, at 47, 49 (predicting that hyperbolic discounting households "are likely to have high levels of [credit card] debt").

21. Bar-Gill, *supra* note 12, at 1396.

22. Angeletos et al., *supra* note 20, at 48.

23. *Id.*

24. *Id.*

25. Bar-Gill, *supra* note 12, at 1397.

26. *Id.*

outweighing the future costs in that moment.[27] Scholars call the inability to predict that change in preference hyperbolic discounting,[28] and economists have shown that hyperbolic discounters are more likely to carry more credit card debt.[29]

Other forms of "bounded rationality" may contribute to the consumer's excessive borrowing in spite of the best intentions to borrow responsibly, including savoring the luxury of the life borrowing affords now at its expense later[30] and underestimation of the probability of future adverse events, like a car accident or sudden illness.[31] The combination of these behavioral biases contributes to a general pattern of cardholders taking on more credit card debt in the short term than is consistent with their own long-term preferences and paying that debt back slowly through low minimum payments.[32] The situations cardholders find themselves in—despite their best intentions—lead to consumer bankruptcy and financial distress.[33]

B. *Issuer Capitalization of Behavioral Biases in Credit Card Pricing*

Credit card issuers capitalize on cardholders' behavioral biases, profiting off of cardholders' inability to accurately predict their future behavior. Cardholders are most profitable to issuers when they are paying high interest on large balances, occasionally triggering additional fees.[34] However, cardholders generally choose among credit cards not by comparing the potential cost to borrow but by weighing promotional rates, low or nonexistent annual fees, and rewards programs.[35] Future cardholders focus on these features of credit cards because of their inability to accurately assess their future borrowing behavior.[36] As a result, issuers tend to compete on front-end, immediately salient costs and charge higher interest rates than might otherwise be justified.[37]

27. *Id.*

28. *Id.*

29. Angeletos et al., *supra* note 20, at 49; David Laibson et al., *A Debt Puzzle*, in KNOWLEDGE, INFORMATION, AND EXPECTATIONS IN MODERN MACROECONOMICS: IN HONOR OF EDMUND S. PHELPS 228, 229–30 (Philippe Aghion et al. eds., 2003).

30. Sunstein, *supra* note 12, at 252.

31. Bar-Gill, *supra* note 12, at 1400.

32. *Id.* at 1396–97, 1408.

33. *See* Bar-Gill & Warren, *supra* note 1, at 3, 33–37 (describing the various behavioral mistakes cardholders make that may "lead to financial distress, bankruptcy, and foreclosure").

34. *See* Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 977 (2012) (explaining that issuers price credit cards so that long-term prices, like interest rates, are emphasized in order to better profit off of consumer behavior).

35. *See* Bar-Gill, *supra* note 12, at 1401 (suggesting that consumers tend to underestimate the cost of borrowing, focusing more on "short-term, non-contingent price elements").

36. *See supra* subpart II(A).

37. Bar-Gill, *supra* note 12, at 1401.

Combining the behavioral biases cardholders experience with credit card issuers' design of products that take advantage of those biases results in a market sector designed to encourage consumers to take on debt they cannot handle. Ronald Mann has dubbed this phenomenon the "sweat box" of credit card debt.[38] Issuers profit from distressed cardholders who have large balances and are on the verge of default.[39] Obviously, large-scale consumer default on loans would be bad for the issuer. But cardholders with large, unmanageable balances who are unable to pay those balances off remotely quickly generate a significant amount of profit for the issuer.[40] Issuers are therefore incentivized to push cardholders to such a point of financial distress.

Another pricing feature that issuers embrace is a low minimum monthly payment.[41] Cardholders who decide to only pay the minimum monthly payment set by the issuers accumulate a balance and do not pay enough of that balance to get out of debt for the foreseeable future. Since issuers profit from maintaining outstanding balances, they would prefer that cardholders pay as little as possible, "as long as cardholders do not default," in order to maximize revenues.[42] Issuers used to set minimum monthly payments so low that they would negatively amortize the balance, which means that the payment would not even cover the interest on the principal so the balance would actually grow each month in spite of the cardholder not making any additional purchases.[43] Due to regulatory intervention, minimum payments may no longer be set so low as to negatively amortize the balance,[44] but issuers still cling to low minimum monthly payments to keep cardholders in the sweat box.[45]

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38. *See generally* Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375.

39. *Id.* at 386.

40. *Id.*

41. Bar-Gill, *supra* note 12, at 1408.

42. BAR-GILL, *supra* note 11, at 72.

43. DIV. OF SUPERVISION & CONSUMER PROT., FED. DEPOSIT INS. CORP., RISK MANAGEMENT EXAMINATION MANUAL FOR CREDIT CARD ACTIVITIES 69 (2007), *available at* https://www.fdic.gov/regulations/examinations/credit_card/pdf_version/ch9.pdf, *archived at* https://perma.cc/X3AQ-XJKU.

44. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY ET AL., ACCOUNT MANAGEMENT AND LOSS ALLOWANCE GUIDANCE FOR CREDIT CARD LENDING 3 (2003) ("Prolonged negative amortization . . . raise[s] safety and soundness concerns and [is] subject to examiner criticism."), *available at* http://www.occ.gov/news-issuances/bulletins/2003/bulletin-2003-1a.pdf, *archived at* http://perma.cc/N635-89KJ; Mann, *supra* note 38, at 387 (reporting that an interagency regulatory entity "issued a 'guidance' suggesting that lenders should not permit negative amortization and should require payment in a 'reasonable' time").

45. *See* Mann, *supra* note 38, at 391 (explaining the issuer's benefit from encouraging customers to carry balances, make minimum payments, or even miss payments—the sweat box zone).

C. Consumer Attitudes Towards Credit Cards

1. Cardholders Appreciate Flexibility, but Flexibility Encourages Behavioral Biases.—The major advantage of credit cards to consumers is their unparalleled convenience. Rather than drive to the bank and take out a loan for a fixed amount, consumers can apply for credit cards without leaving their homes.[46] Approval for a credit card is often instantaneous,[47] and customers often receive cards with substantial credit limits that often do not reflect a cardholder's true ability to pay.[48] Cardholders can borrow in large amounts up to, and sometimes beyond, their credit limits, but many cardholders gradually accumulate debt with small purchases.[49] This practice is problematic but also convenient; cardholders can make purchases for their family by borrowing money without first having to go to the bank to be approved for a loan. Low minimum monthly payments also allow cardholders to experience the luxury of borrowed wealth now, at the expense of a long payoff period later.[50] The combination of these factors makes credit cards an incomparably easy way to borrow and spend money.[51]

2. Consumers Desire Commitment Devices.—However, the incredible ease with which consumers can borrow on credit cards encourages the very behaviors that result in consumers acquiring unmanageable credit card debt. One problem presented by the flexibility and ease of use of credit cards is the purposeful elimination of any precommitment element that might be found in other lending devices.[52] As a result, cardholders go back on promises they made to themselves to pay down balances responsibly, with no assistance from the issuer to meet their goals. In at least one study, cardholders

46. MANN, *supra* note 11, at 40.

47. A quick Google search of "credit card approval" demonstrates this point: the first result promises "instant" approval in as little as 60 seconds. *Instant Approval Credit Cards*, CREDITCARDS.COM, http://www.creditcards.com/instant-approval.php, *archived at* http://perma.cc/MHT7-SEZ5.

48. *See, e.g.*, Angela Littwin, *Testing the Substitution Hypothesis: Would Credit Card Regulations Force Low-Income Borrowers into Less Desirable Lending Alternatives?*, 2009 U. ILL. L. REV. 403, 426 (indicating that the mean and median balances on study participants' credit cards were significantly larger than the participants' mean and median monthly income levels, respectively). Congress tried to address the lack of correlation between credit availability and cardholders' ability to pay in the CARD Act, but the Act only requires that issuers consider whether a prospective cardholder can make the *minimum* payments. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 109(a), 123 Stat. 1734, 1743 (codified at 15 U.S.C. § 1665e (2012)).

49. Bar-Gill, *supra* note 12, at 1399.

50. *See* Sunstein, *supra* note 12, at 252 (stating that "myopic borrowing" is characterized by "a taste for current well-being over future well-being").

51. MANN, *supra* note 11, at 45; *see also* Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEXAS L. REV. 451, 457–58 (2008) (explaining that low-income borrowers valued credit cards for their ease of use in emergencies).

52. Littwin, *supra* note 51, at 472.

expressed a desire for precommitment devices that would allow them to counteract the poor decisions their future selves make.[53] In fact, 52% of the study participants attempted to create commitment devices of their own to prevent excess borrowing on their credit cards.[54]

The desire for a commitment device to counteract negative behaviors in the credit card context is relatively unsurprising given the wide-ranging preference of people to precommit to certain behaviors. Ulysses provides a classic example from literature: knowing his ship was about to sail past the sirens, he instructed the members of his crew to fill their ears with wax and tie him to the mast of his ship so he was physically prevented from succumbing to the temptation he knew was coming.[55]

The desire to precommit has also been tested and confirmed empirically. One study examined student choice when students were presented with flexibility for turning in three assignments.[56] Students could choose to make all three papers due on the same due date at the end of the semester or choose their own deadlines for each individual paper (with the final available due date being the one those choosing the first option would have at the end of the semester), which became binding upon turning in a schedule.[57] The students who created their own deadlines subjected themselves to a grade penalty for potential procrastination without an added benefit.[58] Seventy-three percent of the participants in the study chose the option to set deadlines before the last day of the semester.[59]

Another experiment studied whether the availability of a smaller portion size encouraged diners to commit themselves to smaller meals. Diners at a Chinese fast food restaurant were asked whether they would prefer to downsize a starchy side option.[60] Up to 33% of diners chose to downsize their meals, and the result was unaffected by whether the cashier offered a nominal $0.25 discount in connection with the downsizing.[61] Participants almost never requested to downsize spontaneously, meaning the availability of the option needed to be made known to the diners in order for them to take advantage.[62] But the diners who took advantage of the downsize offer tended not to add more calories to their plates to compensate for downsizing their

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53. *Id.* at 472–73.

54. *Id.* at 473.

55. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 41–42 (2008).

56. Dan Ariely & Klaus Wertenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 PSYCHOL. SCI. 219, 220–22 (2002).

57. *Id.* at 220.

58. *Id.*

59. *Id.* at 220–21.

60. Janet Schwartz et al., *Inviting Consumers to Downsize Fast-Food Portions Significantly Reduces Calorie Consumption*, 31 HEALTH AFF. 399, 401 (2012).

61. *Id.* at 404.

62. *Id.*

side dishes, thereby succeeding in precommitting to eating less unhealthy food by having less of it available at the dinner table.[63]

These scenarios reinforce the potential popularity of commitment devices as a debiasing mechanism. However, there are great benefits to the flexibility of credit cards, especially in times of emergency.[64] A successful policy proscription to the problems created by overborrowing and underpaying should address the problems caused by ease of borrowing, while being careful not to make borrowing too difficult.

D. *Theories Dominating the Proposed Regulatory Response to the Problems with Credit Cards*

Three schools dominate the debate over the proper function of regulation.[65] The neoclassical school argues that almost all regulation, save disclosure, should be avoided because a competitive market creates better products and services.[66] The school assumes either that consumers make rational choices[67] or, at the very least, that consumers learn from their irrational mistakes.[68] From the neoclassical perspective, most government regulation serves to disadvantage consumers by impeding consumer liberty due to the restriction or limitation of choice.[69]

The more liberal school believes that paternalism need not be considered a negative term and that regulation—even regulation that restricts citizen choice—can effectively solve societal problems.[70] Proponents of this view believe that choice-preserving regulatory mechanisms do not go far enough to achieve the social goals they are meant to achieve.[71] These proponents would abandon softer regulatory techniques, such as default rules and increased disclosure, in favor of more paternalistic techniques, such as direct mandates.[72] These theorists view weak paternalistic techniques as ineffective

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63. *Id.*

64. Littwin, *supra* note 51, at 457–58.

65. *See generally* THALER & SUNSTEIN, *supra* note 55, at 4–6 (discussing the libertarian paternalism ideal that defines the behavioral law and economics approach to regulation and how that approach incorporates "nudges"); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1597–98 (2014) (describing issues with the behavioral law and economics approach to regulation and outlining how traditional restrictive regulation would be more effective); Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 804–05 (2008) (outlining the neoclassical school of thought on the proper function of regulation).

66. Epstein, *supra* note 65, at 804.

67. Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1050 (2012).

68. Epstein, *supra* note 65, at 811.

69. Wright & Ginsburg, *supra* note 67, at 1067.

70. Bubb & Pildes, *supra* note 65, at 1600.

71. *Id.* at 1597–99.

72. *Id.* at 1597–98.

in achieving their goals; often, the consumer behaves as expected or desired, but the result is not socially optimal.[73]

The school of behavioral law and economics, which advocates for a "weak" or "libertarian" paternalistic approach to regulation, aims to represent a middle ground.[74] A behavioral economics approach to regulation introduces "nudges" that influence consumer behavior but preserve consumer choice, such as use disclosures or commitment devices.[75] These regulatory "nudges" theoretically "alter people's behavior in a predictable way without forbidding any options . . . ."[76]

E. *The CARD Act Response*

Congress responded to the consumer debt crisis by passing the CARD Act of 2009.[77] The CARD Act sought to ameliorate the financial distress brought about by irresponsible credit card use and issuer pricing policies.[78] The CARD Act limited or banned some issuer practices deemed abusive, such as over-limit fees[79] and a practice called double-cycle billing.[80] The CARD Act's other focus was mandating a number of behaviorally informed disclosures that issuers would be required to include in their credit card agreements and monthly statements, justified for consumer-protection reasons.[81]

In an effort to assist cardholders in understanding the ramifications of paying only the intentionally low minimum monthly payment that issuers set, Congress mandated a collection of disclosures that together, it hoped, would give consumers pause before they chose to submit the minimum payment.[82] The minimum-payment disclosure, located on the monthly statement, informs the cardholder of the total cost of paying off her balance by only paying the minimum monthly payment and of the total amount of time it

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73. *Id.*

74. THALER & SUNSTEIN, *supra* note 55, at 4–6.

75. *See id.* at 145–46 (suggesting that credit card users should be provided an annual statement listing all the fees incurred within the past year and credit card companies should allow customers to opt in to automatic payment of the full bill).

76. *Id.* at 6.

77. Credit Card Accountability Responsibility and Disclosure Act, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.).

78. CONSUMER FIN. PROT. BUREAU, CARD ACT REPORT 10 (2013) [hereinafter CARD ACT REPORT].

79. § 102(a), 123 Stat. at 1738–39 (codified at 15 U.S.C. § 1637(k) (2012)).

80. *Id.* at 1739–40 (codified at 15 U.S.C. 1637(j) (2012)).

81. *See* CARD ACT REPORT, *supra* note 78, at 10–13 (providing an overview of the CARD Act's purpose and major provisions).

82. *See, e.g.*, § 201(a), 123 Stat. at 1743–45 (codified as amended at 15 U.S.C. § 1637(b)(11) (2012)) (mandating a number of creditor disclosures for the customer's benefit); CARD ACT REPORT, *supra* note 78, at 12 (summarizing various disclosure provisions that must be included in monthly statements).

would take her to pay off the balance in full.[83] For comparison, issuers must also indicate the total cost of paying an amount that, if paid from that month forward and without adding to the balance, would pay off the balance in 36 months.[84] Issuers must also disclose a toll-free phone number a cardholder could call to receive debt-counseling services.[85] An example of these minimum-payment and 36-month disclosures follows[86]:

> **Minimum Payment Warning**: Making only the minimum payment will increase the amount of interest you pay and the time it takes to repay your balance.

If you make no additional charges and each month you pay . . .	You will pay off the balance on this statement in . . .	And you will ultimately pay an estimated total of . . .
The minimum payment	X months	$XXXX
$X	36 months	$XXXX (Savings: $XXXX)

> For information about credit counseling services, call 1-800-XXX-XXXX.

The CARD Act took into account the various behavioral biases that impact consumer credit card use. Some of the law involves more paternalistic regulation of credit cards that bans certain abusive practices by credit card issuers.[87] However, a number of the changes involve requiring disclosures to consumers. This approach is a classic application of the behavioral economics theory, which advocates for regulatory action that preserves consumer choice.[88] In the case of the disclosures mandated by the CARD Act, consumer autonomy is preserved because consumers are not being forced to make any changes to their behavior but rather are being nudged in a particular direction to make a particular choice.

In requiring the minimum-payment disclosure, the 36-month disclosure, and the inclusion of the toll-free number for debt-counseling services, Congress embraced a hybrid that included various weak paternalistic ideas;

83. 15 U.S.C. § 1637(b)(11) (2012).

84. *Id.* § 1637(b)(11)(B)(iii).

85. *Id.* § 1637(b)(11)(B)(iv).

86. *See* Connie Prater & Tyler Metzger, *How to Read, Understand Your Credit Card Statement*, CREDITCARDS.COM (May 29, 2013) http://www.creditcards.com/credit-card-news/new-look-credit-card-statement-1273.php, *archived at* http://perma.cc/3Z33-XWH6 (providing examples of statements from various issuers, all of which include variations on this disclosure).

87. *See supra* notes 79–80 and accompanying text.

88. Jonathan Slowik, Comment, *Credit CARD Act II: Expanding Credit Card Reform by Targeting Behavioral Biases*, 59 UCLA L. REV. 1292, 1316 (2012).

in other words, the legislation served to help consumers make better decisions without mandating any particular action. The mandatory disclosures seek to both inform consumers of their minimum payments and warn cardholders of the dangers that accompany paying only a small proportion of the total balance. The warning serves a weak debiasing purpose, since the disclosure alerts consumers that paying the minimum each month will keep them in debt for a long time, counteracting the behavioral bias that makes consumers overoptimistic that they can pay off their bills on time.[89] The minimum-payment disclosure is concededly less illustrative than Cass Sunstein's suggestion of using "vivid narratives of possible harm" to debias consumers,[90] but since the disclosures are "use disclosures" that provide information about the cardholder's own use of her credit card, they work towards the same debiasing purpose. Additionally, the 36-month disclosure in conjunction with the minimum-payment disclosure serves as a nudge to reframe the consumer away from the minimum payment anchor to a different, higher, "better" payment. The whole disclosure preserves consumer choice, with the caveat that a cardholder must pay at least the minimum payment. The disclosure constitutes a compromise between heavy paternalism and hands-off disclosure, since it debiases by attempting to show each consumer how her own decisions will affect her future finances.

III. Empirical Studies of the Minimum-Payment and 36-Month Disclosures Demonstrate that Framing Probably Works but the 36-Month Target Is Wrong

An empirical analysis of the CARD Act's mandate of the minimum-payment and 36-month disclosures reveals that the policy proscription positively affects behavior, yet exhibits some shortcomings. A collection of studies, construed together, essentially reveals that the disclosure of any minimum payment anchors cardholders to that amount, lowering repayment levels.[91] One study found that the 36-month disclosure successfully improves cardholder repayment patterns.[92] In spite of that improvement, the target of the 36-month disclosure not only moves but is also suboptimal.[93] Some cardholders made better payment decisions, but others made worse decisions

89. *See supra* note 17 and accompanying text.

90. Sunstein, *supra* note 12, at 258.

91. *See* Neil Stewart, *The Cost of Anchoring on Credit-Card Minimum Repayments*, 20 PSYCHOL. SCI. 39, 39 (2009) (reporting and summarizing the findings of a credit card repayment survey that "showed a strong correlation between minimum repayment size and actual repayment size").

92. *See* Dennis Campbell et al., *Reframing Behavior: The Impact of the CARD Act on Cardholder Repayment Plans*, CONSUMER FIN. PROTECTION BUREAU 8 & fig. (2001), http://files.consumerfinance.gov/f/2011/03/Gartenberg-Presentation-Revised-Final.pdf, *archived at* http://perma.cc/JS36-JV7B (documenting an increase "in the fraction of cardholders paying at the 36 month level").

93. *Id.* at 19.

than they had made before the introduction of the 36-month disclosure.[94] Other studies have indicated that disclosures such as the minimum-payment and 36-month disclosures do little to change cardholder repayment patterns.[95] Overall, the takeaway from these various empirical analyses of the CARD Act disclosures and their predecessors is that the CARD Act's solutions do not adequately address the minimum-payment problem Congress was attempting to solve.

A. Disclosing a Minimum Payment Anchors Payments to That Level

Before the CARD Act mandated the minimum-payment and 36-month disclosures, scholar Neil Stewart studied the effects of disclosing minimum payments on cardholder repayment patterns.[96] This study revealed that disclosing a minimum payment served as an "anchor."[97] A number that anchors biases decision making in a way that is arbitrary.[98] In the context of credit card minimum payments, the disclosure of a minimum monthly payment makes the suggestion that the number given is the proper or suggested amount to pay.[99] The study compared repayment patterns of participants who received bills that disclosed a minimum payment with those of participants who received bills that did not.[100] Stewart discovered that while removing the disclosure of a minimum payment did not substantially affect those paying the bill in full, it did affect those making partial repayments.[101] In particular, mean repayments rose 70% when the minimum-payment disclosure was removed.[102] These findings suggest that cardholders who pay in full will not be significantly affected by a minimum-payment disclosure, but those who make partial payments will essentially interpret a minimum-payment disclosure as a suggested amount to pay, thereby reducing monthly payments.

94. *Id.* at 20.

95. *See* Daniel Navarro-Martinez et al., *Minimum Required Payment and Supplemental Information Disclosure Effects on Consumer Debt Repayment Decisions*, 48 J. MARKETING RES. (SPECIAL ISSUE) S60, S61 (2011) (concluding that neither minimum-payment disclosure nor additional disclosures, such as loan-cost information or length of time required to pay off the loan, had a substantive impact on payment patterns); Linda Salisbury, *Minimum Payment Warnings and Information Disclosure Effects on Consumer Debt Repayment Decisions*, 33 J. PUB. POL'Y & MARKETING 49, 56 (2014) (concluding that statements disclosing negative effects of minimum payments have little effect on consumer repayment choices but that inclusion of a three-year repayment amount does have an influence on behavior).

96. Stewart, *supra* note 91, at 39–40.

97. *Id.* at 39.

98. *Id.*

99. *Id.*

100. *Id.* at 40.

101. *Id.*

102. *Id.*

A follow-up study revealed that raising minimum payments led to cardholders paying larger proportionate amounts of their bills each month.[103] Higher minimum payments were correlated with a larger percentage of the cardholders paying in full, higher partial repayments by those not paying in full, and fewer cardholders paying only the minimum payment.[104] This finding seems to suggest that the higher the anchor, the lower the anchor's effect has in the context of minimum payments. Together, the results of these studies may indicate that allowing issuers to keep minimum payments as low as they currently do works against Congress's goal of improving repayment patterns among cardholders.

B. *Adding Supplemental Disclosure Possibly Improves Repayment Patterns, but Results Are Mixed*

1. The 36-Month Disclosure Has Been Shown to Improve Repayment Patterns, but Frames to the Wrong Target.—The results from at least one study indicate that the CARD Act's disclosures altered repayment patterns. In a study of a small credit union's cardholder repayment activity, researchers found that fewer cardholders paid the minimum-payment amount after the CARD Act's disclosure mandates went into effect, instead paying an amount higher than the minimum.[105] The researchers expected the 36-month disclosure to counter the anchoring effect of revealing a minimum-payment amount on the bill, and they found that a number of cardholders did reframe to the 36-month disclosure amount.[106] In fact, the most credit constrained of the cardholder base began paying the 36-month amount in much higher numbers after the CARD Act's implementation.[107]

While many of the most credit-constrained cardholders paid more than the minimum after reframing to the 36-month amount, those that paid the 36-month amount paid much less than a matched cohort.[108] Those who paid the 36-month amount also maintained higher credit balances than the matched cohort.[109] The sharp increase in people paying the 36-month amount may also be an indication that some cardholders who previously paid their balances off faster are now anchored by the 36-month disclosure.

In addition to these indicia of the target of a three-year payoff being suboptimal, the target moves. The disclosure makes it reasonably clear that

103. Navarro-Martinez et al., *supra* note 95, at S74.

104. *Id.*

105. Campbell et al., *supra* note 92, at 2.

106. *Id.* at 8 & fig.

107. *See id.* at 10–14 (indicating that customers who, prior to the CARD Act's enactment, had slower payoff rates—those with lower credit scores, high balance-per-limit ratios, and higher balances—adopted the 36-month amount more readily than other cardholder segments).

108. *Id.* at 17 & fig.

109. *Id.* at 18 & fig.

in order to pay off the balance in either the 36-month time frame or the minimum-payment time frame (i.e., the amount of time the bill says it will take to pay off the balance by only paying the minimum payment), cardholders must not make any additional purchases on the card.[110] However, unwary consumers may not realize that in order to pay off the debt in three years, the consumer needs to pick a month to begin a 36-month payoff, pay the disclosed payment amount, and must stick to that amount for all three years.[111] In a quick glance, the cardholder might assume that if she pays the amount in the 36-month time-frame box, she is not only paying a higher and therefore "better" amount than the minimum payment but is also going to pay off the bill in 36 months. While the first assumption is certainly true, the second assumption—that paying the amount in the box next to the 36-month payoff timeline will pay off the debt in 36 months—is false. The 36-month disclosure is therefore a moving target because each successive month a cardholder pays the 36-month amount disclosed on her statement, she is 36 months away from paying off her balance.[112] Indeed, evidence shows that consumers either do not take the time to understand what the 36-month disclosure is telling them or simply do not understand the disclosure at all.[113] While customers who focus on this "better" number are paying more than the minimum, the disclosure might cause some—those who simply glance at the two options and pay the higher number—to miss the point: that to pay the balance off in three years, the consumer must affirmatively pick a time to start a three-year payment plan and stick to that payment each month.

Another major problem the study found with the 36-month disclosure is it anchored certain cardholders who otherwise would have made better repayment decisions to the 36-month payoff amount.[114] That amount is only better for those who were paying the minimum payment before the implementation of the disclosure. The study found that some cardholders

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110. *See* 15 U.S.C. § 1637(b)(11)(B)(i), (iii) (2012) (stating that the disclosure must list the number of months, if paying the minimum monthly payment, or the monthly payment amount, if following the 36-month plan, required to pay off the entire remaining balance "*if no further advances are made*" (emphasis added)).

111. *See* Karen Haywood Queen & Marissa Fajt, *Survey: Minimum Card Payments Rising*, CREDITCARDS.COM (June 26, 2014), http://www.creditcards.com/credit-card-news/minimum-credit_card-payments-survey-1276.php, *archived at* http://perma.cc/2PJJ-ZQRW ("[T]hose looking to that 36-month number . . . should realize that the minimum payment changes every month . . . . Consumers who want to pay the card off in the 36-month time frame should maintain the same payment and make no additional charges.").

112. Campbell et al., *supra* note 92, at 19.

113. *See* Ann Carrns, *Disclosures Are Found to Change Financial Behavior*, BUCKS, N.Y. TIMES (Feb. 22, 2012, 12:05 AM), http://bucks.blogs.nytimes.com/2012/02/22/disclosures-are-found-to-change-financial-behavior/?_php=true&_type=blogs&_r=0, *archived at* http://perma.cc/9NWR-5KVW (explaining that customers who adopt the 36-month payment may carry higher credit balances because the 36-month payment plan is a moving target).

114. *See* Campbell et al., *supra* note 92, at 17 & fig. (finding that customers using the 36-month payment amount "made *smaller payments* than a matched cohort").

began paying the 36-month payoff amount even though that amount was not in fact better than their previous repayment patterns.[115] In other words, while the 36-month payoff amount counteracted the anchoring effect of the minimum payment, it served as a new anchor for certain cardholders.

The thrust of these findings is that the CARD Act's minimum-payment and 36-month disclosures successfully reframe a cardholder away from the minimum-payment amount to a higher, "better" payment amount and tends to change some cardholders' payment strategy to pay the higher amount. However, that "better" payment amount is not an optimal target.

2. Supplemental Information Disclosure May Have an Insignificant Effect on Repayment Patterns.—When paired with a minimum payment, one study found that "supplemental information" disclosures did little to ameliorate partial-repayment strategies. This study examined the propensity for subjects to pay the minimum when additional information was disclosed along with the minimum payment as compared to subjects who only received a bill listing the minimum payment.[116] The types of additional information included the future interest cost of paying only the minimum; the time to pay off the amount if the subject paid only the minimum; a combination of those two information disclosures; and a combination of the time-to-pay-off disclosure with three-year payoff information, indicating an amount the subject could pay in order to pay the balance off in three years.[117] The CARD Act's mandatory disclosures inspired these variable choices.[118]

The subjects who received bills disclosing the minimum payment along with the future interest cost were more likely to pay just the minimum payment than they would have been had they received a bill only indicating a minimum-payment amount.[119] This effect was negated by adding the time-to-pay-off information, but including both categories of information did very little to affect the propensity to pay the minimum as compared to those who received a bill only listing the minimum-payment amount.[120] The variable that most resembled the CARD Act's requirements—the one including the three-year payoff amount and the time to pay off the balance paying only the minimum payment—was most successful in lowering the number of subjects

115. *See id.* at 10 & fig. (showing that some cardholders who paid off their bills in under 36 months reframed to the 36-month payment amount upon being exposed to the 36-month disclosure).

116. Navarro-Martinez et al., *supra* note 95, at S64.

117. *Id.*

118. *See id.* at S62, S75 (noting the similarities between the CARD Act disclosures and the potential supplemental information studied).

119. *Id.* at S67–S68.

120. *Id.* at S68.

choosing to only pay the minimum.[121] However, the change was not statistically significant.[122]

3. The Disclosures May Have Been Ineffective in Ameliorating the Behavior of the Intended Targets.—Yet another study examined results from a research center's Consumer Finance Monthly survey, in which a representative sample answers financial questions having to do with credit card use in the past month.[123] The study found that repayment behavior improved, but primarily among users who were very close to becoming transactors before the passage of the CARD Act.[124] Transactors are cardholders who use credit cards' purchasing function but not their borrowing function.[125] In other words, they pay their balances off in full each month. The study found that after the implementation of the CARD Act disclosures, users who had been paying most, but not all, of their bills each month became transactors.[126] In fact, the researchers found that the payment-to-debt ratio among revolvers actually decreased, although not statistically significantly.[127] Essentially, those who felt the benefits of the CARD Act were those who did not need the help in the first place.[128]

C. While the Disclosures Might Change Some Behavior, They Do Not Reach All Cardholders

Another problem with the CARD Act's solution to the minimum-payment problem is that many card users may never see the 36-month disclosure or the minimum-payment disclosure. Issuers invariably offer an online payment screen as an alternative to mailing in a check after receiving a paper bill or paying over the phone.[129] This screen does not post the disclosure since issuers are only required to provide the disclosure on the monthly bill itself, and issuers do not require credit card users to view their

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121. *Id.* at S67.

122. *Id.*

123. Lauren Jones et al., The Effects of CARD Act Disclosures on Consumers' Use of Credit Cards 12–13 (June 15, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=2034419, *archived at* http://perma.cc/M758-TCJ4.

124. *Id.* at 35.

125. BAR-GILL, *supra* note 11, at 57 & n.5.

126. *See* Jones et al., *supra* note 123, at 12–13 (finding an increased likelihood of "fully paying off credit card debt each month").

127. *Id.* Revolvers are those "who carry credit card debt for more than one month." *Id.* at 24.

128. The study notes that this result could possibly be explained by the disclosures' lack of effectiveness but might also be explained by the lasting effects of the financial crisis that began in 2008. *Id.* at 35. More specifically, revolvers might have maintained low repayment patterns because they simply could not afford to pay more in light of their personal financial situations brought about by the recession occurring during the study period. *Id.*

129. CARD ACT REPORT, *supra* note 78, at 68.

bills before making a payment.[130] As a result, a potentially large number of credit card users may never see the disclosures and therefore will not change their behavior accordingly.[131]

IV. The Minimum-Payment and 36-Month Disclosures May Be Improved by Incorporating Behavioral Economic Principles More Effectively

Given the shortcomings of the CARD Act's minimum-payment and 36-month disclosures in practice, I propose some alternative options that would better address the problem and improve consumer behavior. Each alternative seeks to increase monthly cardholder payments. Congress could seek to fix the existing disclosures by clarifying them, by fixing the moving target problem, and perhaps by optimizing the target as well. Going a step further, Congress could raise minimum-payment levels to a more optimal target. Congress could also require issuers to offer commitment devices to help consumers stick to a payment plan. These commitment devices would either subscribe cardholders to a payment plan or offer enrollment in a payment plan. Either option would require a default set to an optimal target payment rate.

As a preliminary matter, I propose changing the 36-month disclosure to make the frame more effective. As was shown in Part III, the 36-month target is suboptimal; thus the target should be set higher. While an empirical study of the "correct" target is beyond the scope of this Note, for the sake of argument I will hereinafter assume that a 12-month target strikes the proper balance between a manageable payoff goal and a responsibly high monthly payment level. Accordingly, all recommendations will assume the 12-month target to be optimal and therefore stand up to hypothetical critique for potentially being suboptimal. Additionally, any reference to the current 36-month disclosure will now be referred to as the "comparison disclosure," and the new recommendations will assume that the comparison disclosure should reflect a 12-month, rather than a 36-month, payoff rate.

A. Proposal 1: Restructure and Rephrase the Comparison Disclosure for Clarity.—As it stands, the payment amount in the comparison disclosure changes each month since the time-to-payoff starting point restarts each month. Part III explained the specific moving target problem that cardholders experienced when making a payment decision using these boxes.[132] A minimally burdensome solution to this problem would be to add a new box indicating how long it would take to pay off the balance should the cardholder pay the amount that she paid in the previous month. If in the previous month the cardholder picked the higher, now 12-month disclosure payment amount

130. *Id.*

131. *Id.*

132. *See supra* section III(B)(1).

in order to pay off the balance in 12 months, she would be able to see exactly how many more months it would take to pay off the loan (which would be 11 months the following month). As a result, she would more easily understand that, in order to continue to pay off the balance in the new one-year time frame, she must pay the same amount as she did last month and not the amount that was recalculated for the existing comparison disclosure. To make it clear to cardholders that the 12-month amount is merely a suggested amount, it would be labeled as such under this policy suggestion. This solution would make the comparison and minimum-payment disclosure more salient to the cardholder. This disclosure would be printed alongside the comparison disclosure and the minimum-payment disclosure. The suggestion would place little burden on issuers, who would simply have to re-report a number elsewhere on the bill along with a simple calculation indicating the length of time it would take to pay off the balance if she continued to make that payment.

The added disclosure further counteracts the anchoring problem of disclosing a minimum payment by providing an additional higher option. The proposed additional disclosure would fall in line with weak paternalistic principles, since consumer choice is preserved while encouraging welfare-increasing options.[133] This new target would likely produce higher monthly payments if chosen than would the moving target of the comparison disclosure. The comparison disclosure remains—along with its moving target—in order to provide a higher suggested amount (as compared to the minimum payment) in order to nudge the cardholder away from that anchor. Providing information about the cardholder's own use of the card might help to counteract biases. Ideally, the cardholder would choose to pay the 12-month amount, note the better progress she made the next month, and continue to pay that amount. Regardless of what path the cardholder chooses, the new box would alert her to the consequences of her choices.

Such a disclosure might be criticized as an overdisclosure, overwhelming consumers with too much information.[134] Undeniably, many of the disclosures on credit card statements are already too complex for consumers to adequately understand.[135] Adding yet another box might further discourage a consumer from even attempting to understand her credit card statement. However, the new disclosure is a use disclosure, or one that gives information to the consumer about her own use of the product. Oren Bar-Gill has promoted use disclosures as effective in preventing or correcting

133. *See* THALER & SUNSTEIN, *supra* note 55, at 5 (defining the libertarian paternalism approach as giving people the freedom to choose, while influencing them to choose the option that is better for them).

134. *See* Slowik, *supra* note 88, at 1306 (noting that consumer decision making only improves when consumers have the opportunity to read and understand the provided disclosures).

135. *Id.*

consumer mistakes.[136] In fact, he also suggested a disclosure that would alert a cardholder to the rate at which she would personally take to pay off her bill given her current repayment rates.[137] Use disclosures therefore do a better job than product-feature disclosures in alerting consumers to their own behaviors so that they may correct them.

An additional problem with the minimum-payment and 36-month disclosures as currently used is that they are only required to be placed on the physical or electronic credit card bill and not on the online payment screen, thus possibly hiding the disclosure from many users who either pay straight from the online payment screen without checking the bill or those who set up an automatic monthly payment.[138] A simple solution to this secondary problem would be to require issuers to post the disclosure on the bill as well as on any online payment screen, automatic payment set-up screen, or other alternative methods of paying that don't involve looking at the monthly statement. This more widespread disclosure would serve to ensure that most, if not all, cardholders would see the disclosure before making a payment decision.

B. Proposal 2: Raise the Minimum Payment to Match a 12-Month Payment Schedule.—An alternative change to the CARD Act's approach to the minimum payment and the surrounding disclosures is to raise the minimum payment. I suggest either setting the minimum payment to an intermediate level—to be determined empirically, but at a level higher than the 36-month repayment level—or to the 12-month repayment level. If the payment were raised to an intermediate level, the comparison disclosure would remain, as would the suggested third box disclosing the last month's payment level and the time to pay off. If the payment were raised to the 12-month repayment level, the comparison disclosure would be eliminated, as it would be duplicative.

There is plenty of empirical support for raising the minimum payment from the low levels issuers currently set. Stewart's study indicated that the disclosure of any minimum payment anchors payments to that level, in spite of what a cardholder might have otherwise paid.[139] Moreover, further empirical findings indicate that raising the minimum payment leads to better repayment practices.[140] As the follow-up study examining whether higher minimum payments affected repayment behavior indicated, even though disclosing minimum payments anchored payments generally, raising

136. Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 800 (2008).

137. *Id.* at 800–01.

138. CARD ACT REPORT, *supra* note 78, at 68.

139. *See supra* subpart III(A).

140. Navarro-Martinez et al., *supra* note 95, at S74.

minimum payments tended to improve repayment behavior, increasing the proportion of credit card balances cardholders paid each month.[141]

Importantly, raising the minimum payment would counteract many of the behavioral biases previously discussed that allow consumers to take on too much debt and pay it off too slowly. First, raising the minimum to a mandatory level would take away issuers' discretion in setting minimum payments, thereby mandating a more optimal payoff level. Under such a calculation of minimum payments, cardholders could better "assess the affordability of their debts."[142] Additionally, cardholders would pay less total interest than if they paid a lower minimum payment.[143] Credit card loans would also bear a more direct relationship "to the useful life of their purchases."[144] Restructuring monthly minimum payments in this way might also make the costs of borrowing on credit cards "more salient to the cardholder."[145] A disclosure of a high minimum payment has a greater likelihood of changing behavior because the immediate impact of the higher minimum payment will force the consumer to "take notice."[146] Indeed, others have suggested that better associating the pain of credit card use (i.e., the excessive spending leading to debt) with the actual use of credit cards will help break the cycle of overspending.[147]

A higher minimum payment, tied to the 36-month disclosure or not, is subject to criticism for infringing on consumer choice.[148] Specifically, any higher minimum payment will force the cardholder to pay a certain minimum amount, but there is a large range above the current minimum-payment levels from which to choose a monthly payment. The larger the range, the more flexibility a cardholder retains in choosing a monthly payment. Even the most responsible cardholders value flexibility to pay less than they usually do in a particularly expensive month; indeed, a cardholder might pick a particular card because of its low minimum monthly payment.[149] Mandating a high minimum monthly payment might help relatively irresponsible cardholders pay back their debts in a more sensible time frame, but the regulation might hurt consumers who otherwise appreciate and only

141. *Id.* at S74–S75. This change would need to be implemented gradually, or only on future balances, to prevent harming consumers who cannot pay more than the minimum on preexisting balances. *See* Littwin, *supra* note 51, at 491 (indicating that low-income women who recommended an increase in the minimum payment made clear that it would be harmful to apply a higher minimum payment to existing balances).

142. Slowik, *supra* note 88, at 1333–34.

143. *Id.* at 1334.

144. *Id.*

145. *Id.*

146. *Id.* at 1334–35.

147. *See* MANN, *supra* note 11, at 194 (highlighting that an increased minimum payment may address the problem of the "lack of pain tied" to credit card spending decisions).

148. Slowik, *supra* note 88, at 1335.

149. *Id.*

occasionally take advantage of the flexibility that a low minimum affords them. It may also push some highly distressed customers into default.

Jonathan Slowik has also suggested that Congress mandate a higher minimum payment,[150] but his suggestion is flawed. Slowik suggests a 36-month target, reasoning that Congress chose the 36-month time period for the 36-month disclosure because Congress wanted cardholders to pay down their debts in that amount of time.[151] Alternatively, he suggests a 5-year target.[152] One clear drawback of Slowik's policy proposal is that while Congress might have thought 36 months was a good amount of time to pay off debt, the study examining the effects of the CARD Act on the credit union indicated that the 36-month target is not an optimal time frame.[153] While true that, under that time frame, cardholders would pay more than their existing minimum payments, the empirical evidence highlights the possibility of a better solution. My proposal avoids this suboptimal repayment and instead suggests either a higher intermediate number or the 12-month repayment amount.

Many consumers use credit cards because of their incredible convenience, and requiring a recalculation of the minimum payment could affect that convenience in multiple ways. Some consumers already struggling with debt might no longer be able to afford their credit card, having relied on the lower minimum payment for budgeting purposes.[154] Other consumers might be taking advantage of a teaser rate or other promotional rate and be forced to pay more than was previously required.[155] Raising the minimum payment would help many consumers pay down their debt faster, but it would do so while decreasing others' flexibility. Such a regulation aims to help those most in need at the expense of others who use credit cards responsibly and probably also hurts those who are already drowning in debt. Raising the monthly minimum payment to such a high level might therefore be overly paternalistic. As a strong paternalistic policy, raising the minimum payment might therefore hurt those who borrow rationally in order to help those who do not.[156]

Raising minimums would threaten issuers' pricing model; therefore, they would be expected to fight such a regulatory change. Even if Congress

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150. *Id.* at 1334–35.

151. *Id.* at 1333.

152. *Id.* at 1333 n.314.

153. *See supra* section (III)(B)(1).

154. *See* Allie Johnson, *4 Ways to Fight Minimum Payment Increases*, CREDITCARDS.COM (July 31, 2009), http://www.creditcards.com/credit-card-news/four-ways-fight-minimum-payment-increases-1267.php, *archived at* http://perma.cc/S46M-B8FH (detailing how some consumers use the lower rate offered for a balance transfer to reduce their monthly minimum payment).

155. A teaser rate is a low- or no-interest rate that a consumer enjoys for a set period of time upon signing up for a credit card before the card's standard interest rates kick in. BAR-GILL, *supra* note 11, at 69.

156. Sunstein, *supra* note 12, at 254.

could manage to pass a law requiring higher minimum payments in the face of likely lobbying on behalf of issuers, issuers would change their pricing in order to compensate for lower profits due to fewer people with large balances accumulating large amounts of interest. At the prospect of losing back-end costs, issuers would likely raise front-end costs, such as annual fees, to compensate for the loss in profits.[157] Therefore, even if raising the minimum payment initially helps cardholders, issuers would likely shift their increased cost to cardholders.

Even though raising the minimum payment seems compelling, such a paternalistic approach may raise too many problems.

C. Proposal 3: Mandate the Availability and Advertisement of an Opt-In Payment Plan with a Default Monthly Payment.—Another potential solution is to mandate that issuers make available a payment plan that incorporates a default monthly payment higher than the minimum payment. Congress could mandate that issuers offer cardholders a payment plan that would pay off their debt in a certain amount of time, setting the default to the assumed-optimal 12-month target monthly payment. Such an opt-in plan would serve as a commitment device that consumers could use to sign themselves up for more responsible borrowing.

The proposed opt-in system would set the default amount at the 12-month repayment level. This default amount would set an encouraged payoff level for those interested in paying credit card debt down faster than at the minimum-payment level. Cardholders would then have the choice of signing up for alternative payment plans, paying more or less each month than the 12-month amount, but keeping the cardholder on track to pay off the debt in a certain amount of time. An opt-in system would preserve choice and would simply serve to give cardholders an alternative means of paying their bills. Additionally, an opt-in system would not threaten to drag transactors down to a lower minimum payment. In fact, it may provide an easier means to opt in to a payment plan that pays the bill off each month.

Evidence shows that people want to find ways to be more responsible and counteract their behavioral biases with commitment devices, particularly in the context of credit card debt.[158] Requiring issuers to offer payment plans would minimally invade on consumer autonomy, while providing a mechanism that would encourage cardholders to borrow more responsibly. Of course, to have an effect on many consumers' behavior, the availability of these plans would have to be advertised or made clear to cardholders. To accomplish such required notice to cardholders, Congress could mandate that issuers conspicuously disclose the availability of the payment plan on the credit card statement and on any online payment screens.

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157. Bar-Gill & Bubb, *supra* note 34, at 978.

158. *See supra* section II(C)(2).

Those in favor of stronger paternalistic policies would argue that an opt-in payment system would not go far enough in getting more consumers to pay off their credit card debt, leaving too much room for behavioral biases to prevent consumers from making the more optimal choice.[159] For instance, cardholders could choose to opt in to a payment plan but choose a payoff timeline below the optimal level. Additionally, the default could be set at a suboptimal level and may be too "sticky," meaning that employees tend not to deviate from the savings rate they are automatically enrolled in, bringing partial balance payments down from where they might otherwise be.[160] However, the 12-month level has been assumed optimal for purposes of this Note, and the real level would be derived from empirical study.

In spite of these shortcomings, an opt-in payment plan has many benefits. The opt-in system would essentially serve as a commitment device that issuers would be required to offer. Evidence across disciplines shows that cardholders, especially those who have learned from their former bad practices, want to be more responsible in paying off their credit card debt.[161] Issuers would likely be more amenable to a solution that does not change their minimum-payment practices, either absolutely, by raising the minimum monthly payment by statute, or functionally, by mandating an opt-out payment plan. Importantly, especially in terms of a product that is used primarily for its flexibility and convenience, an opt-in system would preserve consumer choice while both making available and encouraging a means by which cardholders can more responsibly manage their debt.

D. Proposal 4: Mandate an Automatic-Enrollment Payment Plan with a Default Monthly Payment.—An alternative to an opt-in system might be an opt-out system that would require issuers to enroll all cardholders into a payment plan with a default set to the 12-month target monthly payment amount. Logistically, an issuer would require cardholders to repay the 12-month target monthly payment each month. That amount would be the only allowed amount due each month, no matter the payment method, absent an affirmative opting out by the cardholder to pay any amount from the issuer-set minimum to the balance in full. Additionally, instead of fully opting out, the cardholder could remain in a payment plan but choose to pay a different level than the target amount. Thus, a cardholder could continue to take

159. *See supra* notes 70–73 and accompanying text.

160. *See* Bubb & Pildes, *supra* note 65, at 1618 (describing how a low default retirement contribution rate may reduce the savings rate of many employees).

161. *See supra* section II(C)(2).

advantage of the commitment device offered while paying an amount she deems more appropriate.

Such a plan could be modeled loosely after successful retirement savings plans.[162] Multiple studies have confirmed that automatic-enrollment retirement savings plans raised savings rates significantly, as compared to an opt-in approach.[163] The criticisms of these plans involve the default set for the automatic enrollment—the default is too "sticky."[164] As a result, employees collectively save less than they would in an alternative opt-in plan.[165] However, with the right default, an automatic enrollment in a payment plan could be an effective means of getting cardholders to pay down their debt more responsibly.

Opt-out plans tend to be significantly more effective than opt-in plans at getting targeted users to do whatever the regulator wants those users to do.[166] The automatic-enrollment retirement plans constitute one example; another is the organ donor rate when the default rule is a presumption of consent to donate coupled with an affirmative opt-out system.[167] The success demonstrated in those cases is reasonably likely to be replicated in the suggested-payment-plan context.

Obviously, the proposed system has its drawbacks in the context of the findings regarding automatic-enrollment plans for retirement savings. Presumably, the plan would not affect transactors or those who pay their bill in full each month.[168] It seems likely that cardholders intending to pay off their balance each month would actively opt out of the payment plan or set up their plan to pay in full each month; deciding to be a transactor is a choice that seems to survive regulations seeking to affect revolvers' behavior, and that presumption is unlikely to fail in this case.[169] Nevertheless, revolvers that would otherwise pay a higher amount than the default might anchor to the target level out of convenience. However, even though a default might be sticky, effectively "mandating" a certain amount, we can be sure that those

162. *See* Sunstein, *supra* note 12, at 256–57 (explaining the advantages of private default rules).

163. *See* Bubb & Pildes, *supra* note 65, at 1616–17 (discussing study results indicating that automatic enrollment as the default leads to higher participation rates).

164. *Id.* at 1618.

165. *See id.* (emphasizing that automatic enrollment plans reduce the savings rate of some employees).

166. *See* Bubb & Pildes, *supra* note 65, at 1618–19 (explaining how, in the area of retirement saving, "the default rules function much like mandates for many individuals"); Sunstein, *supra* note 12, at 264–65 (noting that imposing an additional-action requirement to change a default rule favors the default rule).

167. *See* Sunstein, *supra* note 12, at 264–65 (discussing that countries that assume consent to donate organs and require an affirmative declaration disallowing harvesting at death have an incredibly high organ donation rate).

168. *See supra* note 125 and accompanying text.

169. *See, e.g.*, Navarro-Martinez et al., *supra* note 95, at S67 (finding that changing minimum payment amounts insignificantly alters the behavior of those with a propensity to pay only the minimum).

who remain in the payment plan are paying more than the minimum payment; for those that would otherwise only pay the minimum, that is a positive result.

Issuer pushback limits the feasibility of a mandatory opt-out payment plan. As with the minimum-payment disclosure, any policy that would require issuers to raise minimum payment levels would hurt issuer profitability, as cardholders would be less likely to enter the sweat box.[170] And, if enacted, issuers would have to find a different source of profits to make up for the loss, likely increasing front-end costs for cardholders.[171] Issuers may also push back by sabotaging the effectiveness of the default through endless marketing.[172]

Despite potential criticism, an opt-out payment plan may be most effective at keeping cardholders from paying off their balances slowly and inefficiently.

V. Conclusion

Thanks to their incredible ease of use, credit cards often trap consumers in unwieldy debt that becomes impossible to pay off. The CARD Act sought to ameliorate this problem by alerting cardholders to the dangers of paying only the minimum payment, a practice that results in cardholders taking on unmanageable debt. However, the disclosures mandated by the CARD Act fall short; they probably improve repayment patterns, but the results are either insignificant or reveal a suboptimal payoff target. Improving the disclosures to provide more information about the cardholder's own use patterns, requiring issuers to raise the minimum payment, or mandating the subscription to or availability of a payment plan commitment device would better ameliorate cardholders' repayment patterns.

—Angela K. Daniel

170. *See supra* note 38–40 and accompanying text.

171. Bar-Gill & Bubb, *supra* note 34, at 978.

172. *See* Bubb & Pildes, *supra* note 65, at 1655 (discussing that when the Federal Reserve required banks to implement a default system opting account holders out of automatic overdraft protection, banks fought back by subjecting its customers to an onslaught of marketing encouraging them to re-enroll and opt into automatic overdraft protection).

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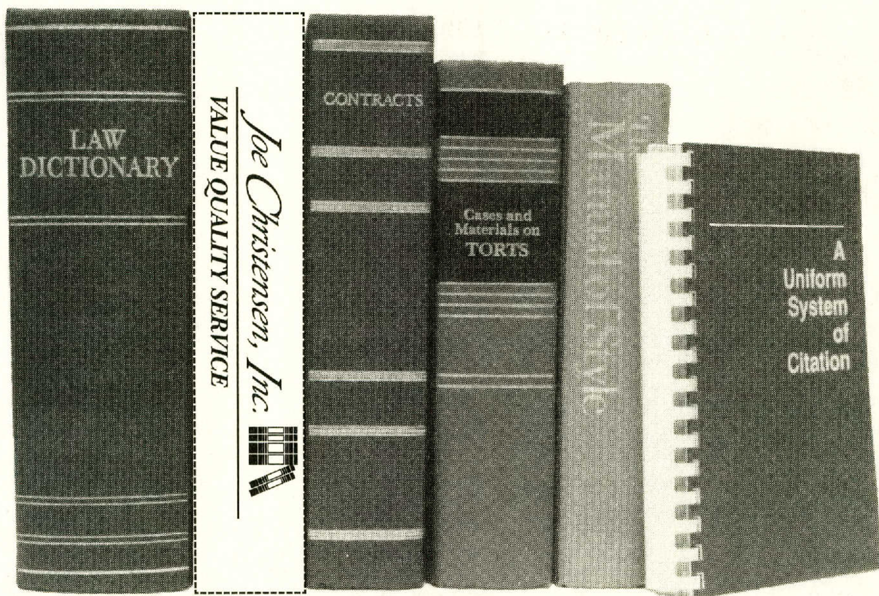

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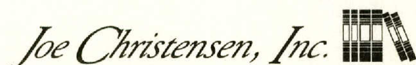

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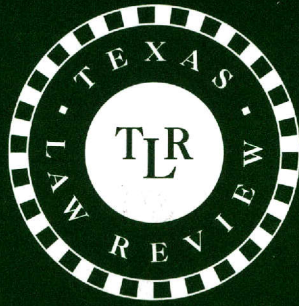
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