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TRIBUTES

WHAT WOULD JIM DO?: ADDRESSING THE CURRENT CHALLENGES TO LAW AND LEGAL EDUCATION

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Thank you to the extraordinary Dean Karen Bravo for her generous invitation as well as her effective leadership for IU McKinney and nationally. I am honored to recognize Jim White, whom I was really looking forward to seeing when I accepted the kind invitation to participate in his lecture series; now, after his recent passing, I am honored to help recognize his substantial influence in legal education. To do so, I have titled my remarks to enable us to discuss the current challenging environment in legal education and to muse upon what Jim might make of it were he here to help guide us.

To begin, I want to share a little bit about my first memory of Jim because it captures, in a way, a lot of what is at stake right now in terms of some of the crossroads that we find ourselves facing. I began my academic career at what is now called Seattle University. I started teaching just one year out of law school at what was then known as the University of Puget Sound. I joined this law school that I had never heard of in a city that I had never been to and started teaching a class I had never taken in law school. That school no longer exists because it was purchased by Seattle University, in a completely shocking transaction where the faculty had no idea it was coming. We got a little slip in our mailboxes one day about a press conference at one o'clock, telling us to cancel class to be there.

One of the things that was shocking at the time is there had not yet been many law school combinations and transactions like that. The faculty had no idea what that would mean for our ABA accreditation or our students' ability to take the bar.

Then, Jim White arrived on the scene. He told us what it meant. He said we could not keep our ABA accreditation, we had to go into provisional accreditation, and we had to re-earn the accreditation under a new institutional

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parent. We were not happy. We wailed, we stomped, we ranted, we went on and on, and Jim just smiled and did not budge. To be honest, we did not like him very much. There was a lot of frustration and fear at that time. Fear does that. It makes you mad. He made us jump through a lot of hoops.

What we did not know then, but we later learned, and I certainly know now, is Jim was right. He was saving us from ourselves. When we had to re-earn accreditation, it made us and our university do the right thing. It made us care about excellence. It made us put the structures in place that would assure our students continued to have an equivalent, excellent education, and that we had the same commitments to excellence that had made us successful in the past. That was what made that transition actually work—and it did work. That school thrives now as Seattle University in ways it never could have under its prior university sponsor. We did figure it out, and we gave Jim an honorary degree to show we held no grudge. But, that function of accreditation that propels excellence for law schools is too often lost.

Right now, it is about to drown. There is too little appreciation for the role of accreditation in promoting consumer protection and institutional excellence. Rather, the accreditation rules are collectively seen as impediments to innovation or “too political.” There is extraordinary pressure on the Council of the ABA’s Section on Legal Education and Admissions to the Bar (the “Council”) right now as an accreditor. Unfortunately, this pressure has weakened the Council at a time when law and higher education are both under attack and most need effective leadership for the rule of law. I am sure Jim would not quite like what he would see were he in the middle of it all. But I know he is going to continue to help us with that in every way he can. On we go.

Let me explain a little bit of what I think Jim might make of it and how we can go forward. Before I do, let me make sure we are on a similar playing field, because I know that everyone does not follow news of the Council and legal education with quite the fervor I do. First, there is a serious threat to the Council’s status as an accreditor recognized by the Department of Education. This started because of Standard 206, which asked law schools to work toward having diverse student bodies, faculties, and staffs. And, as you know, there is a lot of pushback against diversity and equity in our country right now. That has encouraged the federal government to push against the Council because of that standard.

The Council has since withdrawn that standard. It is in abeyance right now. But nonetheless, the Council is often conflated with the larger ABA and its policies despite its independence as a formal matter from the ABA, and the question of the Council’s renewal as the recognized accreditor for legal education by the Department of Education is ongoing. This threat of nonrenewal is most acute for the nation’s fifteen independent law schools, because they depend on the Department of Education authorization of the Council to have federal financial aid capabilities, unless they are also accredited by another

accreditor with Department recognition. For most schools that are part of universities, it really would not matter very much whether the Council had Department of Education authority, because they would be able to continue to issue financial aid under their university's regional accreditation. In some ways, whether that Department of Education authority is withdrawn or not, might not feel that different for most of us in legal education. But, it certainly sends a strong signal and feels like a weakening of the Council.

That is not the end of the threats to the Council, however. Some states have quickly followed the federal government, pushing back on the Council and asking, "Should this state now not recognize the Council as the accreditor for graduates in our state to be able to take the bar?" Texas, Florida, and a couple others have most vigorously begun that process of questioning the Council's authority. One of the things that is uncertain is whether states would recognize other accreditors of law schools but not the Council or just in addition to the Council. Right now, if someone graduates from an ABA accredited law school, they know they can sit for the bar. That tends to help with the portability of degrees, allowing a graduate to go to school, and then work wherever they wish. This is something that those in legal education are all concerned about because it may cause our schools to incur a lot of expenses to comply with more than one set of accreditation rules.

It also might make it more confusing for students in terms of where they go to school, where they can practice, and so on. Because state Supreme Courts hold the power to recognize the Council as the authority, they are the ultimate accreditor of law schools. These courts in each state now are going to be under pressure to look at this question and decide what the state wants to do about licensing lawyers and permitting graduates to sit for the bar. That is something to keep an eye on.

The Council is certainly feeling the pressure both from the federal government and state governments, but also from state courts. To be fair, the Council has not always made the best case for itself lately. There has been a lot of controversy with standards that it has proposed. Some of those standards are about experiential learning, such as how many credits for clinics and other forms of experiential learning should be required. Some of the controversy has been around whether or not to require admission tests. Other controversy has surrounded a standard called 405C, and whether more faculty than just tenured faculty should have what is called security of position, which would enhance their employment opportunities and sense of freedom to participate in faculty governance. Thus, there have been a lot of controversial standards pushed forward in a short amount of time that have made many criticize the Council as over-regulating law schools and stifling institutional pluralism.

One possible reason that the Council has been under more criticism from law schools is that over the past decade it has taken away a lot the processes Jim had put in place. Let me give you one example. Jim was great in understanding how much work it takes to accredit law schools, and that the process had to be

professional and well done. So, he set up committees and processes where the volunteers that were doing that work actually had time to really think about it and do it well. Likewise, he set up committees and processes for the Council to really think about the standards, what they should say or not say, and get input on them in a transparent way. Some of those processes and structures were dismantled about a decade ago in a consolidation of some volunteer structures. As a result, well-meaning people are trying to do their best, but they are not getting the input, data, and time to do their best work. We would profit from rethinking how that process is structured to have more open dialogue, more transparency, and more input. Process is important not only for its own sake, because it makes people feel heard and included, but when you have a good process, you often end up with a better result substantively. Jim knew this and we need to relearn it.

Related to this is another factor that is affecting the Council and law more generally. And this is one, as lawyers, we ought to all be very worried about. There is an anti-law sentiment that is prevalent, amazingly, even among lawyers. In many ways, it sometimes comes down to seeing law as a cost, just an impediment that gets in the way of doing whatever we want to do, instead of being a process that helps assure fair and transparent results for more people. This is something that we are hearing a lot about right now, that the standards are just regulatory burdens in the way of innovation. Jim would find it worrisome that not only are businesspeople or government officials making that argument, but so are legal educators and lawyers. That is not to say that either Jim or I are “anti-innovation.” You can have innovation within bounds of fair play. We need a balance. We do not need just innovation. We need innovation that is just. We need innovation to make things better, not a free-for-all. Right now, there is a lot of sentiment against the Council as a monopolistic barrier. While both Jim and I would be all for reforming standards to find the right balance that will help schools follow their own missions, it is a trope to criticize a national standard for being a monopoly – we don’t need a fragmented patchwork of multiple standards that law schools must comply with. The very nature of a clear legal rule is that there is one, not many.

Finally, I want to share one other thing that I think is a serious concern for legal education overall. This issue is also pushing quite legitimately against the Council right now. That is the incredible access-to-justice gap in our world. If you look at most state courts, there are so many unrepresented litigants. There is such a wide gap in the number of people who need legal representation but do not have it. That undermines the credibility of the entire project of law and legal education when those kinds of gaps persist and widen. There is a lot of pressure on the Council and all legal educators to meet that somehow. So, some say, “Council, get out of the way and let schools just admit more students and graduate more lawyers so that the justice gap can be met!” This is a difficult position because I want that justice gap to be met just as much as everyone else. However, I am not sure a solution that merely allows more law programs to

graduate more lawyers is necessarily going to get us there. Right now, there is surging demand for legal education, but there is also a really nice fit between the number of graduates and the number of jobs. It is one of the healthier ratios now than it has been for a long time. So, it is not clear that there would necessarily be employment when those gateways opened up even more. This requires a much closer look.

One possible solution to explore is creating additional professionals who can supplement the work of licensed lawyers in providing legal services. Perhaps every legal service does not have to be completed by someone with a JD licensed to practice. Perhaps, the legal profession should disaggregate law like medicine does, so that we are not asking clients to go to the JD lawyer for everything, but instead some legal professional that can supplement the practice. Just like I would be worried if my actual doctor was going to take my blood, I would rather have someone trained in phlebotomy. Some states are permitting some legal services to be performed by licensed professionals that can help meet that justice gap.

In short, the ABA Council has a lot coming at it from many directions. As a result, when you have all that pressure coming at you, you do not tend to be out there trying to take aggressive positions to help others too much. You are trying to play good defense and lay low. Unfortunately, that stance is coming right at a time when law schools and legal education really needs leadership, and particularly from an entity that is in the position of authority that the Council has historically held.

Law schools, too, are under many pressures. One of them is not because there are not enough students. That was certainly a problem after the Great Recession, where law schools saw enrollments really decline. Conversely, applicants to law schools were up last year by around twenty-five percent and are up again this year. This past year was the highest number of applications in fourteen years. There is a definite positive trend line in terms of people applying to law school. There are multiple reasons for that demand, including the high visibility of law in the news, the rational flight to graduate and professional education when the employment market is tight, and the downturn in other fields such as technology.

The high demand for the JD does not mean that schools are on easy street. Budgets are tight due to losses of university grants in science and medicine as well as the loss of international student enrollment due to migration and other government restrictions. Further, the “discount rate” for most law schools has grown exponentially in recent years, meaning that the school must give back in financial aid a large portion of its tuition price. That helps reduce costs for students but also constrains school budgets for hiring faculty and staff and other vital needs.

In addition to the cost pressure law schools experience, other pressures include technological advances such as AI. Schools have moved to embrace AI to help students learn how to use it in education and as new lawyers. The

“practice readiness” of new lawyers goes beyond AI, as law schools are pressured to bridge the gap in early career mentoring of lawyers by helping them hit the ground running. There are probably six or seven things that any dean hears in any given six month period that their law school is supposed to be doing more of—but quicker and for less cost—including more ethics, more experiential learning, more marketing and client relations training, more technical literacy for the students, more writing skills, more communication skills, more business literacy for the students, on and on. Cram that all into three years or less and make sure everyone passes the bar on the first try too!

Finally, I want to note that one of the big pressures on law schools right now is just that there is a lot of pressure on law. I mean, open the papers, and you will see challenges to judicial independence and very little tolerance for legislative compromise. We live in a polarized world. Law schools are facing more and more unrest in terms of trying to foster civil discourse and respect for working across differences and finding ways to mend viewpoints and get to a result that all of us can live with. That brings a lot of friction in the day-to-day in classrooms and in almost everything that law schools do. Higher education in so many states, Indiana included, is facing more government and board desire to control what have traditionally been dean and faculty decisions about governance and curriculum. This pressure, too, is very deep right now in our nation.

In sum, there is no lack of examples of areas in which law schools are feeling heat right at the same time that the Council is itself feeling a lot of pressure. What would Jim White say about all this if he were here? What would he do about it? I think Jim would do what he often did do. He would simply put his shoulder to the wheel and keep pushing. There is a lot to be said for understanding that a lot of the pressures that is felt and experienced by the profession are cyclical. It is very easy to think that when you are in a difficult time that there has never been a time like this, right? We hear the phrase “now more than ever” now more than ever. A lot of things are “unprecedented,” but are they?

The Association of American Law Schools just celebrated its 125th anniversary. As I look back at the history, there has been a lot of pressure. On us, on law schools, on the Council, on the ABA, and on our states and nation. I am not discounting that some of our current reality is deeply concerning and that we should be in any sense complacent. But I do think that law is worth defending. Jim would stand up bravely and defend it. He would do what he often did, maybe with a smile, but not budging, just like he did when he came into my law school to tell us we were no longer accredited.

Focusing on the quality of legal education in this nation is something that legal educators must continue to do. I work with all the deans across the nation, and I often say, “stay in your seat and keep pushing.” Like Jim would, we must put our hands on the boulder anywhere we can and try and do the right thing. It is a revolutionary act right now to just keep educating lawyers committed to

justice, committed to the rule of law, committed to values that have kept us strong through the many different political times that we have been in. I am hopeful that we might be able to build some unity across a shared commitment to the rule of law, which should not be a partisan issue. Jim White was good at building alliances, at talking across differences, at talking to people outside of academia. He worked with judges, lawyers across the country, people in other disciplines and fields, and presidents and provosts. That is something that we really need to do to build that kind of leadership for cross-sector collaboration. It is very hard when feeling a lot of pressure to lift your head up to do that work. But that is something else that Jim would say is an incredibly important point for us to do.

The other thing that he would remind us of is that American legal education continues to be the envy of the world. That is often not well appreciated. Yes, law schools are going through a lot right now, but they have never been collectively better. There is so much good happening in our law schools. Anytime you start to feel a little down about what is going on out there, go out and talk to those students and see what is happening in the schools. Innovation is alive and well. So much is moving forward in wonderful ways. There are 175 member schools of AALS. There are about 200 accredited law schools. There is a ton of strength in that list. If you go to many other countries, you may have two or four or five very strong law schools, and a lot of law schools that are not strong. Accreditation has helped us build that excellence in the United States, and it is deep. That is so critical if considering higher education as a means of social mobility and an opportunity for people from all walks of life to get an excellent legal education and thereby contribute to their communities. We need to keep that excellence a broad one. Jim would very much support that.

Finally, more than anything, I think what Jim would do is say, “Let's keep this torch for equal justice and excellence burning.” Law needs to continue being a cornerstone of justice, democracy, and progress. Is it perfect? No. Do we make mistakes as lawyers? Are there ways we could balance things differently? Of course. That is part of what law is there to do—to mediate when there are differences. I believe, and I think Jim believed and would continue to, that it is still our best pathway to a just world that promises human flourishing, not just for some, but for all.

LEGAL EDUCATION OWES SO MUCH TO DEAN JAMES P. WHITE

RANDALL T. SHEPARD*

The James P. White Lecture series has always had a broad purpose, which is to keep Indiana lawyers, professors, and judges, thinking about what legal education is and ought to be. That is why having this endowed lecture in the place where his portrait hangs is so important.

I know that if Jim had asked Justice Ginsburg who to invite, Dean Testy would have been on her list as well, so, hallelujah. When we celebrated Jim's twentieth anniversary as what was then called consultant, Dean Nina Appel wrote this in the collection of wonderful letters from across the country and beyond commemorating the occasion:

Dear Jim, you are a Brahe, a special angel, an illuminating star, and you are valued greatly. You sweep the legal education universe and skies, and countless gazers and beneficiaries are grateful for your indefatigable first-class achievements. You have epitomized fairness, intellect, culture, grace, and wit, along with the relentless search for truth and justice and your search for exquisite cuisine, fine lodging, and sartorial splendor.

Now, I certainly did not know then what it meant that you are a Brahe. It turns out that Tycho Brahe was a Danish astronomer in the 1500s, who died in 1601, and he was considered the greatest astronomer before telescopes. What that meant in our context is that Jim was terrific at visualizing things and possibilities.

Now, Jim's approach to the American Bar Association was admired, and it was something all of us were thankful for. Roy Stuckey from South Carolina, a dean, said, "I enjoy our relationship as allies or opponents, and you play to win, fairly."

Jerry Bepko used to talk about the places where he would run into Jim White, like airports. Jim was the only person I ever knew who in one year had elite status in three airlines at the same time because he went so many places to help people work on legal education.

And Bill Hines, a dean from Iowa, wrote in his letter in the book that the deans gave to Jim:

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Remember the time you and I were at the lingerie shop in I. Magnin in Los Angeles both on the same mission: to purchase gifts to take home to our wives. Imagine what those store clerks said in trading stories about those country bumpkins from Iowa who'd been in their store.

Well, that is sort of where it was, and he did so much to advance the law when they published a whole book in 1993 during the 100th anniversary of the Section of Legal Education and Admissions to the Bar, which was the ABA's very first section. One of the chapters is, in that whole book, covering 100 years, was "Jim White Arrives at the ABA," showing how important that was and how much it made a difference ultimately.

Jim's efforts reached far and wide. He helped schools with new dean training. He helped with outreach. Erica Mosher once said he was specifically good in that time, helping women and minorities find their way into law school and law school education. And that's part of the reason, along with many other reasons, he was called *Consultatus Maximus Magnus*. That was his title, we called it, and a lot of people agree with that.

Guido Calabresi, probably the most famous dean of the Yale Law School in the twentieth century, wrote to Jim, "Your extraordinary tenure has changed the face of legal education."

This lecture and this gathering recognize the monumental contribution that Jim made to so many lives. He was our friend and a leader in so many ways. On law, Jim would be quick to acknowledge that American legal education is a vast enterprise influenced by a host of leaders and institutions. His friends would say with some confidence that he ranked with the likes of Christopher Columbus Langdell and Roscoe Pound as a maker, and re-maker, of legal education. Hundreds of thousands have had more useful careers by virtue of his work, and we have been grateful for the chance to be his friend.

HOLDING FAST TO FAIRNESS: REMEMBERING JAMES PATRICK WHITE

KATHLEEN S. GROVE*

First, I want to express my deep gratitude to Dean Karen Bravo and Assistant Dean Elizabeth Allington for this invitation to share a few words about my former boss, mentor, and good friend, James Patrick White, on this occasion reviving the James White Lecture. I only regret that he is no longer with us to share in this event today.

I am not going to recap his many achievements in life. There is a wonderful obituary in the Indianapolis Star and an article on the law school's website that enumerates these as well as his contributions to Indianapolis and his family. I am going to tell you how I knew him.

I am Kathy Grove, and I was the Assistant Consultant on Legal Education for about half of Jim's tenure as Consultant on Legal Education. In a 1993 publication by Susan Boyd, titled *The ABA's First Section: Assuring a Qualified Bar*, I am described this way: "Kathleen S. Grove, a young Indianapolis lawyer, became the first assistant consultant on legal education to the ABA in 1981. Between that time and 1992, when she left that post to return to graduate school, Grove's duties expanded in a number of areas."¹

Yes—some of these areas included supervising the data gathering from the Annual Questionnaire, training site evaluation teams, staffing Council and Accreditation Committee meetings, supervising the foreign summer program evaluation process, and representing the office at meetings of national organizations such as the National Association for Law Placement and the Law School Admissions Council.

When I started the position, I think I was the fourth person hired, and our offices were a line of faculty offices on the second floor of the previous law school building, now the Herron School of Art and Design. We were tabulating the data from the questionnaire by hand with the assistance of law students and there was no such thing as cell phones or iPhones to communicate with our volunteers—most correspondence was by snail mail. There was no such thing as a digital or electronic copy of our documents—everything was xeroxed and we mailed each Accreditation Committee member forty-four pounds of paper in preparation for every meeting!

By the time I left a decade later, we had a staff of ten, were in a lovely suite of offices in the headquarters building of Sigma Theta Nu, the National Honorary Nursing Society over on North Street, and were doing sophisticated data analysis on computers and communicating with rudimentary email.

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1. SUSAN K. BOYD, A.B.A., *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR* 92 (1993).

When hired, little did I know what awaited me. But I was excited to learn about the accreditation process and the intersection of legal and higher education. I did not foresee that I would spend a night on the floor of the Atlanta airport during an ice storm en route to a Council meeting, or that one month after the 1985 TWA hijacking in the Middle East, I would fly to Israel for a summer program evaluation, or that I would be deposed in an anti-trust law suit. These were just small bumps on the road of a job that was truly life-altering, life-expanding, and wonderful. And that is because of the vision, commitment, support, kindness, and wisdom of Jim White.

Jim was probably the best supervisor I ever had. He gave me great opportunities to learn and expand my skill set without micromanaging, and he expressed trust in my abilities and opinions. He was open to new ideas and advocated for the enhancement and modernization of the office. He went to bat for his staff to make their lives easier, advocating for the latest equipment, adequate offices, and more support as the work expanded. It is easy to understand why his staff remained so loyal and stayed with him for decades. And he was a great role model and teacher because of his integrity, his informed knowledge of the world, his equanimity, and his humanity.

Working for Jim, I met some of the finest people I have ever known. As you know, much of the responsibility for decisions rested with volunteers: law professors, deans, lawyers, bar examiners, judges, and public members who Jim recruited to fill the committees and site evaluation teams. These folks were dedicated, smart, well-intentioned, and serious about the responsibility of improving the legal profession. But they also believed in and trusted Jim to hold fast to fairness, understanding, competence, and integrity in the work we accomplished. And so, they volunteered thousands of hours of their lives, usually giving up countless weekends for meetings and carrying around forty-four pounds of paper!

And it is true—Jim knew everyone. If he mentioned someone in a conversation, it was because he had a sincere relationship with that person and that person was most likely a friend—from Supreme Court Justices to state court judges, bar examiners, deans, professors, and students. Jim understood the value of face-to-face dialogue with a person, especially when trying to reach agreement or understanding. His travel schedule was grueling. I marveled at his stamina. But before we had Zoom or Teams for online meetings, Jim understood that presence and dialogue were key to solving conflict or creating community. So, when asked, he said “yes” to in-person meetings whether in a neighboring state, across the country, or in a foreign country. I am sure he was a million-mile frequent flyer several times over.

Jim’s efforts and vision for this work professionalized the process and elevated the quality of its outcome. Robert A. Stein, former executive director of the ABA commented, “Jim White is more responsible and deserves more credit than any other person for the high quality of legal education in the United

States.”² I could not agree more. Jim’s vision, effort, and network of dedicated staff and volunteers transformed the accreditation process into a reliable, validated, responsive, and standardized mechanism for evaluating legal education and improving it.

Here we are, years later. The Section and Accreditation process well-established and effective, but with the same tensions, and new detractors, and a political environment threatening our academic freedoms and the foundations of our rule of law. This is the perfect time to ask, “What would Jim White do?”

2. *IU McKinney Law Mourns Professor Emeritus James P. White*, Ind. Univ. Robert H. McKinney Sch. of L. (May 2, 2025), <https://mckinneylaw.iu.edu/news/releases/2025/05/iu-mckinney-law-mourns-professor-emeritus-james-p-white.html> [<https://perma.cc/3MRH-2B2S>].

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ARTICLES

THE GHOST IN THE MACHINE: THE THREAT SCREENING CENTER AND THE MOOTNESS TOOL

JEFFREY D. KAHN*

“... an elusive insubstantial man, a ghost who is everywhere yet nowhere.”
—Gilbert Ryle¹

TABLE OF CONTENTS

INTRODUCTION

I. CATCH-AND-RELEASE WATCHLISTING

A. Yonas Fikre’s Case

B. The Fikre Effect from A to Z

C. The Threat Screening Center

II. *FIKRE* AND THE MOOTNESS DOCTRINE

III. THE GHOST IN THE MACHINE

CONCLUSION

INTRODUCTION

In *FBI v. Fikre*, the Supreme Court resolved a circuit split about the voluntary cessation exception to the mootness doctrine in what initially appears

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1. GILBERT RYLE, *THE CONCEPT OF MIND* 18 (1949).

to be a plaintiff-friendly way.² The Court unanimously held that the government's "sparse declaration" was insufficient to moot lawsuits challenging the No Fly List (a list of people banned from aircraft).³ The declaration—five paragraphs in all, of which three were boilerplate—failed to show that the government "cannot reasonably be expected to do again in the future what it is alleged to have done in the past."⁴ It stated only that Fikre "will not be placed on the No Fly List in the future based on the currently available information."⁵

Justice Gorsuch's opinion focused exclusively on this not-good-enough declaration. Fikre's case was not moot, Gorsuch explained, because nothing in that "terse" recital "speaks to whether the government might relist him if he does the same or similar things in the future," whatever those things might be (the government never disclosed them).⁶ Yonas Fikre, who alleges that two FBI agents used the No Fly List to coerce him to be a government informant, and then enabled his detention and torture by agents of a friendly foreign power, fights on.⁷

Fikre is fighting long odds. Litigation against the federal government's Byzantine watchlisting apparatus rarely gets very far, although going nowhere takes a long time. Twenty years after the system's post-9/11 development, only one lawsuit (out of more than forty) has ever reached trial.⁸ That took eight years, a rare exception to the government's use of mootness as a tool to protect its watchlisting system from exposure through discovery or judicially imposed

2. *Fikre v. Fikre*, 601 U.S. 234 (2024); *compare* *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022), *with* *Long v. Pekoske*, 38 F.4th 417 (4th Cir. 2022), *and* *Mokdad v. Sessions*, 876 F.3d 167 (6th Cir. 2017).

3. *Fikre*, 601 U.S. at 242.

4. *Id.*

5. *Id.* at 240.

6. *Id.* at 242, 244.

7. Following the Supreme Court's judgment, Fikre filed an Eighth Amended Complaint. *See* Eighth Amended Complaint, *Fikre v. Wray*, No. 3:13-cv-00899 (D. Or. Jan. 27, 2025), Dkt. No. 198. The Government filed a Motion to Dismiss, simultaneously submitting classified and privileged materials for *ex parte*, *in camera* review. *See* Defendants' Public-Redacted Motion to Dismiss Plaintiff's Eighth Amended Complaint, *Fikre v. Driscoll*, No. 3:13-cv-00899 (D. Or. Feb. 20, 2025), Dkt. No. 202; Notice of Lodging Classified and Privileged Materials for Ex Parte, *In Camera* Review, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. Feb. 20, 2025), Dkt. No. 204. The publicly available but redacted declaration of the Deputy Director of the TSC asserted that "The TSC never removes an individual [from its watchlists] as a matter of litigation strategy or convenience." *See* Public/Redacted Declaration of Steven L. McQueen ¶ 19, *Fikre v. Driscoll*, No. 3:13-cv-00899 (D. Or. Feb. 20, 2025), Dkt. No. 202-1. The District Court granted the motion only in part. *See* Opinion and Order, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. June 9, 2025), Dkt. No. 222. On July 21, 2025, the Government filed an Answer, its first since the case was filed more than twelve years earlier. *See* Answer, *Fikre v. Patel*, No. 3:13-cv-00899 (D. Or. July 21, 2025), Dkt. No. 231.

8. *See* *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909 (N.D. Cal. 2014). Full disclosure: the author testified as an expert witness for the successful plaintiff.

reforms.⁹ If a complaint remains standing after a salvo of motions to dismiss, then mooted the case by asserting that the plaintiff is off the relevant watchlist has routinely been the government's practice.

What has *not* been routine government practice is any willingness to divulge information about its watchlists, even to acknowledge to those caught in its nets *that* they are on a list or the basis for the decision to put them there. The government's position since the beginning has been that secrecy is important to protect its sources and methods lest the watchlisting system, and the national security interests the government asserts that it protects, be undermined by too much openness. Litigants, however, have alleged a host of constitutional violations cloaked by this secrecy. When those plaintiffs' suits start moving forward, those suits are mooted out. The Solicitor General's petition for a writ of certiorari in Fikre's case sought to protect this useful mootness tool, thus protecting the watchlisting system that it helps shield from scrutiny.¹⁰

Fikre's victory is illusory (and the government's loss not so bad) because the Supreme Court's approach will generate whack-a-mole responses. The government will try out declarations that are incrementally less "sparse" and "terse."¹¹ It may remove him and future plaintiffs from one list while quietly retaining them on others.¹² And, additionally or alternatively, it may simply adjust the timing of its watchlisting revelations as it plays more litigation games. Just as *Fikre* was coming on the horizon, the judge presiding over another watchlisting case bemoaned "what almost seems to be a sick sense of delight the government has taken in withholding from the [plaintiffs] information that is key to the resolution of a jurisdictional question in their case."¹³ Such gamesmanship is the unifying thread that ties all watchlisting cases together. It

9. Ibrahim's complaint was filed in January 2006. *Id.* at 911. Following a bench trial, the district court issued its ruling on the merits in January 2014. *Id.* at 909. It took another five years for the Ninth Circuit, sitting en banc, to order the government to pay Ibrahim's *pro bono* lawyers the fees due under the Equal Access to Justice Act. *Ibrahim v. Dep't of Homeland Sec.*, 912 F.3d 1147 (9th Cir. 2019) (en banc).

10. Petition for a Writ of Certiorari at *17, *FBI v. Fikre*, 601 U.S. 234 (2024) (No. 22-1178) ("Especially in this national-security context, absent some strong showing of bad faith (which respondent has not attempted to make), the court should have presumed that the government removed respondent from the No Fly List for genuine reasons and in good faith, and that it will not place respondent back on the list absent new information that justifies that course of action.").

11. Fikre had already received four versions of such responses. These were interspersed among five government motions to dismiss. *See* Appendix A.

12. This was the problem faced by Rahinah Ibrahim. The trial judge noted that once a person is caught on the main watchlist, "it can propagate extensively through the government's interlocking complex of databases, like a bad credit report that will never go away." *See Ibrahim*, 62 F. Supp. 3d at 928.

13. *Jibril v. Mayorkas*, No. 1:19-cv-2457-RCL, 2023 WL 2240271, at *5 (D.D.C. Feb. 27, 2023).

is also just what an important part of the mootness doctrine is supposed to prevent. Rather than strengthen that doctrine, the Court defanged it.¹⁴

This article argues that the Supreme Court's preoccupation with assessing agency declarations in a vacuum ignores an important element in deciding whether the government's voluntary cessation should moot a claim. It isn't just the declaration that should matter, but also the nature of the agency that proffers the declarant. Yet in Justice Gorsuch's retelling of Fikre's story, the relevant agencies are ghosts in this watchlisting machine. Just how two FBI agents from Portland, Oregon, could use the No Fly List as perniciously as Fikre alleges is never explored. The Transportation Security Administration (TSA) also gets no mention in the Court's opinion, although, by strategic design, that agency is charged with enforcing the No Fly List but neither creates nor manages it. The entity that *does* compile and curate the No Fly List (and many other watchlists) was then known as the Terrorist Screening Center (TSC). But its single mention by the Court is only to give the title of the mid-rank official who signed the declaration.¹⁵ The Court doesn't even bother to say what the TSC *is* (an entity with complex relationships to both the FBI and the TSA, among other agencies also unmentioned), let alone that its name has now changed to keep pace with its efforts to expand its authority as the "Threat Screening Center."¹⁶

It is as if the institutional source of the alleged injury does not matter to the Court, *whichever* part of the federal government did this to Fikre (who, understandably uncertain himself, sued the top officials of seven government entities in his initial complaint).¹⁷ The Court's only question was the sufficiency of the declarant's assertion that the complained-of injury had stopped and would not happen again.¹⁸ But the complexity of this watchlisting system is a feature, not a bug. The multi-agency watchlisting apparatus is designed to obscure responsibility for government action and insulate administrative records from judicial review. The Ninth Circuit sitting en banc described it as "the Many-Faced Bureaucratic God."¹⁹ But none of this deliberately complex design figures into the Supreme Court's opinion about whether that god is done playing with Fikre.

It is counterproductive at best to note the injury but ignore the injurer. This is especially so when the whole point of policing the voluntary cessation

14. There is little reason to think the Court will change course on its own. In addition to its unanimity in Fikre's case, the Court cited *Fikre* twice the following term. See *A.A.R.P. v. Trump*, 605 U.S. 91, 98 (2025) (per curiam); *Lackey v. Stinnie*, 604 U.S. 192, 204 (2025).

15. *FBI v. Fikre*, 601 U.S. 234, 239–40 (2024).

16. U.S. DEP'T OF JUST. & FBI, NATIONAL CRIME INFORMATION CENTER (NCIC) TECHNICAL AND OPERATIONAL UPDATE (TOU) 21-3, at 2-1 (June 11, 2021); see also Declaration of Jason V. Herring Regarding Law Enforcement Sensitive Information at 1 n.1; *Jardaneh v. Barr*, No. 18-cv-02415 (D. Md. Apr. 30, 2021), Dkt. No. 128-4.

17. Complaint, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. May 30, 2013), Dkt. No. 1.

18. Such incuriousness is particularly striking given that Justice Gorsuch published a book six months after *Fikre* that criticizes the over-expansion of the administrative state. NEIL GORSUCH & JANIE NITZE, *OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW* (2024).

19. *Ibrahim v. Dep't of Homeland Sec.*, 912 F.3d 1147, 1177 (9th Cir. 2019) (en banc).

exception is to prevent gamesmanship by bad actors. This lack of attention renders other exceptions to mootness (such as the existence of collateral consequences) harder to perceive as well. This article argues that an additional factor should be added to a court's evaluation of attempts to moot a case: the agency's institutional design. The history of watchlist litigation presents a revealing pattern that explains why such an inquiry both strengthens Justice Gorsuch's approach in *Fikre* and better accomplishes a core purpose of the mootness doctrine: preventing litigants (especially, but not exclusively, government agencies) from gaming the judicial system.

Gaming the system is more difficult in organizations (1) with structures and rules that are hard to avoid or evade; (2) that follow decision-making procedures that make *ad hoc* deviations more difficult; and (3) that adhere to requirements of public accountability. Conversely, these indicia generate reasons why courts should trust entities that possess them and suspect invocations of mootness by entities lacking such characteristics. An agency with structures so malleable or secretive that their evasion or exception is as easy on the inside as they are undetectable from the outside, is just the sort of place where assertions of mootness are most subject to abuse.

This focus on institutional structures is not a new concept, although the mootness doctrine is a new application. Structural argument as a liberty protecting device is fundamental to our understanding of the Constitution. This is also consistent with the recent shift in the Court's perceptions of the administrative state. The return to prominence of *Skidmore* deference emphasizes that when courts assess agency action, what matters is "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."²⁰

A court presented with evidence of idiosyncratic, litigation-driven, or malleable decision-making acquires valuable evidence about the integrity of an agency's claim to have voluntarily ceased the action causing harm. For what constitutes an agency is the structure that contains and constrains the choices of the officials that populate it and act within its rules, norms, and precedents. With that consideration in mind, the Threat Screening Center defies characterization. It was not created by statute. It promulgates no regulations. It has no accessible public affairs office. Its very location is unpublicized. And yet it is the linchpin to the federal government's interlocking and powerful system of watchlists. As far as Justice Gorsuch's *Fikre* opinion goes, however, it is the ghost in this machine, a haunting presence never mentioned but in complete control.

The article proceeds in three parts. First, I summarize the claims of Yonas Fikre and show how many features of his complaint are replicated in similar lawsuits that the government sought to moot when they, too, approached discovery or a merits determination. Exploring the complex and secretive world

20. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 370 (2024) (quoting with approval *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

of terrorist watchlists, especially the No Fly List, this part reveals how the scope of the problem is obscured by a focus on the declaration alone. Second, I explore the theories and precedents from which the mootness doctrine and its relevant exceptions have emerged and critique Justice Gorsuch's resolution of this circuit split regarding the voluntary cessation exception. Third, I demonstrate how an assessment of TSC's institutional design improves the mootness analysis by exposing the ghost inside the watchlisting machine.

I. CATCH-AND-RELEASE WATCHLISTING

Yonas Fikre's allegations describe a nightmare similar to that of many other watchlisted plaintiffs.²¹ The commonalities that their alleged injuries share are striking, as are the common trajectories of their litigation efforts. They describe a world of "catch-and-release" watchlisting in which the No Fly List is not used as originally designed—to shield aircraft from attacks from known or suspected terrorists—but as an investigative tool.²² The plaintiff is "caught" in a watchlisting web and promised release in exchange for information or service as a government informant. Recourse to administrative remedies invariably proves futile. Only if a lawsuit threatens to advance to the discovery stage is the tool discarded—the plaintiff is "released"—in order to moot the case. Part A describes how Yonas Fikre was ensnared and his long experience litigating against it. After this focus on Yonas Fikre's paradigmatic case, Part B then provides some context by introducing a cohort of similarly situated plaintiffs whose cases reveal a disturbing pattern in the responses of both the government and the courts that hear these cases.

Just who is in charge of these watchlists and how did they come to be used this way? That is the focus of Part C, which briefly describes the consolidation of the government's terrorist watchlist system and its steady expansion. The history of its institutional design reveals the accretion of legal powers and defenses that were not developed with their current uses in mind. This part reveals a system purposely designed to make responsibility hard to locate, authority impossible to access, and decision-making as free from statute, regulation, and judicial interference as possible. In short, a system in which catch-and-release watchlisting could flourish.

21. In all but one No Fly List case, noted below, the government filed motions to dismiss in lieu of answers to the complaints. Thus, like the courts resolving these motions, this article accepts the unproven allegations in these complaints for the limited purpose of describing their grievances and the government's response to them. This is enough, for the point is to show the similarities in these repetitive complaints and the playbook responses of the repeat actors defending government action, almost always a cadre of lawyers in the Federal Programs Branch of the Civil Division of the Department of Justice.

22. Since this watchlisting system was not created by statute, there is no statutory basis to confine its use to any original purpose. Its expansion, however, coincides with allegations of abuse and constitutional injuries. The suspicions raised by these lawsuits are not alleviated by seeking their dismissal as moot.

A. Yonas Fikre's Case

Yonas Fikre, a U.S. citizen, initially sued the FBI, the State Department, four high-ranking government officials and two FBI agents.²³ He alleges that, while trying to set up a small business in Sudan, he was invited to the U.S. Embassy in Khartoum in April 2010 under false pretenses.²⁴ Shortly after he arrived, two FBI agents told him that he was on the No Fly List, but he could be removed from the list if he would become a government informant at his mosque back home in Portland, Oregon.²⁵ The agents interrogated Fikre for several hours, despite his request to contact his attorney, with questions about his attendance at a prominent mosque in Portland, his financial activities, and other topics.²⁶

Fikre refused to become an informant, which made him the unhappy member of a small but growing club.²⁷ Unnerved by the agents' deceptive conduct, their long interrogation, and feeling himself unsafe in Sudan (Fikre believed he was under surveillance), he moved his business to the United Arab Emirates.²⁸ He alleges that, roughly eight months later, he was seized and tortured by secret police whose questions frequently turned to the FBI's topics of interest and demand that he become an informant.²⁹ After more than three months, and a single, spiritless visit by a U.S. consular official, Fikre was released from UAE detention in mid-September 2011, but he was blocked by the No Fly List from return to his home in the United States.³⁰ Instead, he flew to a relative in Sweden.³¹

23. Complaint, *supra* note 17, ¶ 4. By the end of 2019, Fikre's Seventh Amended Complaint had altered the lineup to eight officials respectively heading the FBI, Departments of Justice, State, and Homeland Security, and the TSC, TSA, NSA, and the Director of National Intelligence. *See* Seventh Amended Complaint, Fikre v. FBI, No. 13-cv-00899 (D. Or. Dec. 18, 2019), Dkt. No. 145.

24. Seventh Amended Complaint, *supra* note 23, ¶¶ 52–63. Fikre alleges that David Noordeloos, an FBI agent from the Portland Field Office, falsely implied that he was an embassy official (e-mailing that "I work at the embassy") and invited him to attend a luncheon discussion at the embassy for Americans in Sudan.

25. When Fikre arrived, he was escorted to a small meeting room where Noordeloos and another agent from the FBI's Portland Field Office blocked the door, presented their credentials, and questioned him for hours despite his request to speak with his attorney, announcing that Fikre "had been placed on the No Fly List and thus could not return to the United States to confer with his attorney." *Id.* ¶ 57.

26. *Id.* ¶ 58.

27. This element of Fikre's complaint in particular is one shared with other plaintiffs. *See, e.g.,* Latif v. Holder, 28 F. Supp. 3d 1134, 1145–46 (D. Or. May 29, 2014) (detailing similar allegations by four plaintiffs); Tanvir v. Tanzin, 894 F.3d 449, 452 (2d Cir. 2018) (summarizing similar allegations by three plaintiffs); Kovac v. Wray, 363 F. Supp. 3d 721, 735 (N.D. Tex. 2019) (same for one plaintiff); El Ali v. Barr, 473 F. Supp. 3d 479, 527 (D. Md. 2020) (same for two plaintiffs); Ghedi v. Mayorkas, 16 F.4th 456, 459 (5th Cir. 2021) (one plaintiff-appellant).

28. Seventh Amended Complaint, *supra* note 23, ¶¶ 67–68.

29. *Id.* ¶¶ 69–72, 75, 82–86, 88–90. Fikre alleges that toward the end of his detention he was told the FBI had been working in coordination with UAE authorities.

30. *Id.* ¶ 89.

31. *Id.* ¶¶ 90, 97.

At this point, a variety of legal processes further complicate this serpentine story. Fikre sought political asylum in Sweden, describing his ordeal at a press conference in April 2012.³² Roughly two weeks later, Fikre, his brother, and the manager of a money transmitting business were indicted in the Southern District of California.³³ Fikre was accused of structuring financial transactions to evade reporting requirements and a related conspiracy charge.³⁴ Arrest warrants were issued, but an assistant U.S. attorney told the court only that Fikre “has not been arrested” without noting his status on the No Fly List or his quite public residence in Stockholm.³⁵ From Fikre’s vantage point, unable to return to the U.S., this looked like retaliation.³⁶ Fikre alleged that the indictment was “based at least in part upon information the United States obtained” from FBI questioning in Khartoum, his interrogation and torture in the United Arab Emirates, and electronic surveillance.³⁷ Without explanation, the government moved to dismiss its case against Fikre eighteen months later.³⁸

Fikre filed his civil action in Portland in May 2013 and frequently amended it to keep up with the government’s varied responses (none of which included filing an answer and many of which were conducted off the court’s docket). A summary timeline of key moments is provided at Appendix A. Like most No Fly List complaints, he alleged violations of his rights to substantive and procedural due process among other statutory and common law claims. According to an amended complaint, an unnamed U.S. government lawyer contacted Fikre’s lawyer in autumn 2013 to suggest that if Fikre “wished to return to the United States he should visit the United States embassy in Stockholm to make necessary arrangements.”³⁹ Why this outreach should occur, and why then, is unclear; the government failed to serve Fikre with its motion

32. *Id.* ¶ 98. See also Associated Press, *US Muslim: I was tortured at FBI’s behest in UAE*, DESERET NEWS (Apr. 18, 2012, at 11:15 MT), <https://www.deseret.com/2012/4/18/20407690/us-muslim-i-was-tortured-at-fbi-s-behest-in-uae/> [<https://perma.cc/B8GK-NJGD>].

33. Indictment, *United States v. Fikre*, No. 12-cr-001689 (S.D. Cal. May 1, 2012), Dkt. No. 1.

34. *Id.*

35. Response in Opposition to Defendants’ Motions For: (1) Discovery (2) Leave to File Further at 2 n.1, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. Feb. 11, 2013), Dkt. No. 51.

36. Seventh Amended Complaint, *supra* note 23, ¶ 98.

37. *Id.* The United States responded in the criminal proceedings only as to the latter accusation. See Notice of Intent to Use Foreign Intelligence Surveillance Act Information, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. May 4, 2012), Dkt. No. 10; Supplemental Notice of Intent to Use Foreign Intelligence Surveillance Act Information, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. June 3, 2013), Dkt. No. 65.

38. Judgment of Dismissal, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. Oct. 7, 2013), Dkt. No. 88. The court failed to include the conspiracy charge in the dismissal. *Id.* Charges against one of Fikre’s co-defendants were also dismissed, while the other received time served and an order of restitution for slightly more than \$2,300. See Judgment, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. Feb. 4, 2014), Dkt. No. 105; Judgment of Dismissal, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. Aug. 19, 2014), Dkt. No. 110.

39. Seventh Amended Complaint, *supra* note 23, ¶ 99.

dismissing the criminal indictment at roughly the same time.⁴⁰ Also unexplained is how Fikre could fly if he were on the No Fly List, though it did suggest the fluidity with which Fikre's watchlisting status could change (along with, perhaps, fluid government perceptions of the degree of threat he might pose to an aircraft or national security). Discussions between the lawyers collapsed when "adequate assurances" could not be negotiated that Fikre would be safe from "extra-judicial actions" and that he "could leave the United States once he returned."⁴¹

The government's outreach seems to have sparked some hope in Fikre that his watchlisting status might have changed. In November 2013, he submitted a request through the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP), the only administrative process available to individuals seeking to complain about perceived government interference with their travel. Two months later, he received the following status update (the letter is reproduced in full at Appendix B):

In response to your request, we have conducted a review of any applicable records in consultation with other Federal agencies, as appropriate. It has been determined that no changes or corrections are warranted at this time.⁴²

Reader, please try to decipher this carefully crafted response, Fikre's first written notice from the government. What records were "applicable records"? Was a review ever conducted? Why might one be deemed not "appropriate"? Which "other Federal agencies" were consulted, if any? And which "other Federal agencies" were directly involved? What status was determined to need "no changes or corrections"? Who made this determination (the second sentence having been written in the passive voice)? If no changes were needed "at this time," when would the next evaluation occur?

Fikre did get one lucky break, at least initially. Other such non-response responses had pushed No Fly List litigation, after nearly ten futile years, to an inflection point in a case called *Latif v. DHS*. Fikre's letter arrived just as the government was about to be compelled by the federal judge presiding in the *Latif* case to reform a redress process that had never before provided *any* concrete notice of watchlisting status.⁴³ The new procedures, fashioned by the

40. The government did not certify that it had served Fikre with its motion to dismiss the indictment, certifying only as to his co-defendants. Proof of Service, Attachment 1 to Motion to Dismiss Indictment, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. Sep. 26, 2013), Dkt. No. 85-1.

41. Seventh Amended Complaint, *supra* note 23, ¶ 99.

42. DHS Initial Decision, Exhibit 1 to Notice of Supplemental Authority, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. Mar. 4, 2014), Dkt. No. 33-1.

43. *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161–62 (D. Or. 2014).

government under pressure from the court, established broader notice through the DHS TRIP system.⁴⁴

As luck would also have it, both Fikre's case and *Latif* were assigned to the same judge, Anna Brown, who ordered that "substantive reconsideration" of Fikre's inquiry be conducted and Fikre notified of the result.⁴⁵ Fikre was duly notified that as of March 16, 2015, "he is (and, after completion of the renewed DHS TRIP process, remains) on the No Fly List."⁴⁶ This second notice was shorter, and only marginally less empty, than the first one.

As Fikre's lawsuit approached its third anniversary, and after four separate government motions had failed to dismiss it, the government changed its approach. In May 2016, the government filed an unsworn, four-sentence document notifying Judge Brown "that undersigned counsel recently was advised by the Terrorist Screening Center that Plaintiff has been removed from the No Fly List."⁴⁷ The notice (the third now in Fikre's collection) did not say when undersigned counsel learned this fact, what role he might have played in its development, nor any other explanation. But, after noting that plaintiff's counsel had been informed three days earlier, the notice stated that the defendants "are prepared to submit further briefing on the impact of this development" on those parts of plaintiff's lawsuit that stubbornly remained undismissed.⁴⁸

This was enough for Judge Brown to dismiss Fikre's case as moot. She focused on the government's statements, without analysis of the institutional design of the multi-agency watchlisting apparatus that operated behind them. Judge Brown asserted without citation that "the government action is inherently individualized and is not a matter of legislative or executive discretion. If an individual does not meet the substantive criteria to be placed or maintained on the No-Fly List, the government cannot place or keep that individual on the

44. *Traveler Redress Inquiry Program (DHS TRIP)*, DEP'T OF HOMELAND SEC., (June 5, 2025), <https://www.dhs.gov/dhs-trip> [<https://perma.cc/K68Q-RTQD>]. Under the new program, if the applicant made three *seriatim* requests over time, DHS TRIP would (1) reveal the traveler's status on the No Fly List; (2) provide the criteria used to put him or her there with a summary of reasons; and (3) allow the person to request further review. For a summary of this new system and the litigation that led to it, see Jeffrey Kahn, *Terrorist Watchlists*, in *THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW* 71, 93–96 (Gray & Henderson, eds., 2017).

45. Order, *Fikre*, No. 3:13-cv-00899 (D. Or. Jan. 14, 2015), Dkt. No. 57.

46. Joint Status Report at 2, *Fikre*, No. 3:13-cv-00899 (D. Or. Mar. 16, 2015), Dkt. No. 58. Inexplicably, however, Fikre was permitted to return to Portland on a private plane on February 14, 2015, although the No Fly List does not distinguish between commercial and private aviation. Seventh Amended Complaint, *supra* note 23, ¶ 105. Judge Brown wrote, without citation to any document in the record: "On February 12, 2015, . . . DHS informed Plaintiff that he remained on the No-Fly List because he had been 'identified as an individual who may be a threat to civil aviation or national security.'" *Fikre v. FBI*, No. 3:13-cv-00899, 2016 WL 5539591, at *4 (D. Or. Sep. 28, 2016).

47. Notice Regarding Plaintiff's Status at 1, *Fikre*, No. 3:13-cv-00899 (D. Or. May 9, 2016), Dkt. No. 98.

48. *Id.* at 1–2.

List.”⁴⁹ “Cannot” was a strong word; as Part C notes, watchlisting is a wholly self-regulating enterprise within the executive branch.

Judge Brown similarly dismissed as “far-fetched” the notion that the government would put national security at risk to game the litigation process and protect its system from judicial oversight.⁵⁰ Judge Brown observed that she herself was handling other No Fly cases, and there were “several other cases around the country.”⁵¹ Thus, she concluded: “To the extent that the government may be concerned about the potential legal and policy implications of those issues, mootng this case would do little to allay those concerns.”⁵²

The Ninth Circuit Court of Appeals disagreed with these *ipse dixit* conclusions, reversing Judge Brown’s judgment and remanding the case.⁵³ The panel expressly acknowledged a presumption of good faith when the government acts and noted that they “did not impute to it a strategic motive to moot Fikre’s suit.”⁵⁴ Nevertheless, just such an imputation is hard not to read into the court’s opinion. A few sentences earlier, the court noted:

The DHS re-evaluated Fikre’s presence on the No Fly List in 2013 and 2015 pursuant to its TRIP procedure and determined that no adjustments to his status were necessary. Indeed, the DHS affirmed as late as March 2015—*after* it had amended TRIP to conform to the decision in *Latif*—that Fikre posed “a threat to civil aviation or national security” and it refused to remove him from the No Fly List. Yet it did just that fourteen months later, without explanation or any announced change in policy. Fikre was taken off the list two months after briefing was completed on the government’s motion to dismiss Fikre’s lawsuit.⁵⁵

At least three times the Ninth Circuit emphasized that no explanation accompanied the government’s decision.⁵⁶ Rather, the record “suggests that Fikre’s removal from the No Fly List was more likely an exercise of discretion than a decision arising from a broad change in agency policy or procedure.”⁵⁷

Back the case went to Judge Brown, who allowed a sixth amended complaint that prompted a fifth motion to dismiss from the government. Judge Brown transferred the case to Judge Michael Mosman, apparently to

49. *Fikre*, 2016 WL 5539591, at *8.

50. *Id.* at *9.

51. *Id.* at *9 n.4.

52. *Id.*

53. *Fikre v. FBI*, 904 F.3d 1033, 1041 (9th Cir. 2018).

54. *Id.* at 1040.

55. *Id.*

56. *Id.* (describing a “determination untethered to any explanation or change in policy,” “without explanation or any announced change in policy,” and “no explanation of the reasons for dropping Fikre from the No Fly List”).

57. *Id.*

accommodate her change to senior status.⁵⁸ Judge Mosman then received from the government exactly what the Ninth Circuit's declaration-focused opinion invited: an incrementally more detailed declaration.⁵⁹ (This declaration, the focus of the Supreme Court's opinion to come, is reproduced in full at Appendix C.) The first two paragraphs of this five-paragraph declaration described the *bona fides* and source of knowledge of the declarant, Christopher Courtright, Associate Deputy Director for Operations at the Terrorist Screening Center.⁶⁰ The third, one-sentence paragraph referred the reader to a two-page summary of TSC policies and procedures released in 2018, without stating that they had been applied in Fikre's case.⁶¹ The fourth, two-sentence paragraph noted the date in 2016 when Fikre had been removed from the No Fly List.⁶² Finally, the fifth paragraph gave the payoff:

Plaintiff was placed on the No Fly List in accordance with applicable policies and procedures. Plaintiff was removed from the No Fly List upon the determination that he no longer satisfied the criteria for placement on the No Fly List. He will not be placed on the No Fly List in the future based on the currently available information.⁶³

Notice there is no link between the "applicable policies and procedures" referenced in this paragraph and those referenced in the third one. Everything is in the passive voice: no actor is identified as responsible for removing Fikre from the No Fly List. Was it the TSC, TSA, FBI, DHS? No specific criteria are identified, nor is it clear how Fikre "no longer satisfied" them.

Regardless, the Courtright declaration was enough for Judge Mosman to dismiss Fikre's due process claims.⁶⁴ Back the case went to the Ninth Circuit, now faced with the declaration it had solicited. But a largely different panel hearing this round remained unhappy: "the government has failed to follow the instructions given by this Court the last time Fikre's case was before us."⁶⁵ The

58. See Notice of Case Reassignment, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. July 15, 2019), Dkt. No. 134; see also Order, *Tarhuni v. Barr*, No. 3:13-cv-00001 (D. Or. June 13, 2019), Dkt. No. 174 (noting similar transfer "to accommodate the change to senior status of the undersigned").

59. Declaration of Christopher R. Courtright, Exhibit B to Defendants' Motion to Dismiss Sixth Amended Complaint, *Fikre*, No. 3:13-cv-00899 (D. Or. Aug. 12, 2020), Dkt. No. 130-2.

60. *Id.* ¶¶ 1–2.

61. *Id.* ¶ 3.

62. *Id.* ¶ 4.

63. *Id.* ¶ 5.

64. *Fikre v. Wray*, No. 3:13-cv-00899, 2020 WL 4677516, at *3 n.6 (D. Or. Aug. 12, 2020) ("At oral argument I framed that decision using standing terminology, but key to my holding was that Defendants had met their burden under the voluntary cessation doctrine as laid out by the Ninth Circuit's decision in this case. See Tr. [143] at 40–41 ("I take into account that [Mr. Fikre] has been taken off the [No Fly] List and that a serious barrier has been put in place to putting him back on the list—that is, the declaration that he won't be put back on the list based on anything currently known.")).

65. *Fikre v. FBI*, 35 F.4th 762, 764 (9th Cir. 2022).

Courtright declaration was deemed not good enough because it still provided no explanation either for Fikre's inclusion or removal from the No Fly List.⁶⁶ Its recitation of the existence of policies, procedures, and criteria "neither explains what those criteria are nor identifies any change to the policies, procedures, and criteria under which Fikre was placed on the No Fly List in the first place."⁶⁷ Likewise, the court emphasized that the declaration offered no sign of "procedural safeguards" or evidence that the government had repudiated its earlier decision.⁶⁸

Up the case went, on the Solicitor General's petition, to the Supreme Court.⁶⁹ Justice Gorsuch's opinion for a unanimous Court is discussed at Part II. Judge Brown's confidence that other ongoing cases would discourage use of the mootness tool in Fikre's case turned out to be misplaced. Evidence against that conclusion, and the circuit split that manifested, is the subject of Part B.

B. The Fikre Effect from A to Z

Was the notion that the "government would remove an individual from the No-Fly List whom it believes is a threat to civil aviation or national security, for the mere purpose of concluding this litigation" really as "far-fetched" as Judge Brown thought?⁷⁰ A lot of assumptions are built into the premises on which that conclusion rests. For example, just how low is the bar to label someone a watchlisted threat? Set the criteria low enough and No Fly List status may not always be a flashing signal of danger. Likewise, one might ask how the government balances litigation threats to its watchlisting system with the need to keep a watchlisted individual-turned-plaintiff off a plane and in the dark. Fikre's own return flight home, permitted while he was still on the No Fly List, suggests that whatever concerns might lead to watchlisting a person may be countered in different ways.⁷¹ The frequency with which people on the No Fly List are granted "one-time waivers" to fly home suggests alternative security measures exist. Part C considers these questions.

But first, this section provides short vignettes of other cases. Fikre is not alone. These cases highlight the similarity both in their factual allegations and in the *modus operandi* (especially the timing) of the watchlist removals that led courts to dismiss them all. This A to Z of U.S. citizens—from Ahmad Chebli to Zijad Bosnic—sketches similar struggles against the "Many-Faced Bureaucratic God," providing at least anecdotal support for the claim that catch-and-release watchlisting is not the far-fetched practice Judge Brown painted it to be.⁷² This section concludes with the case of Saadiq Long, which generated a circuit split

66. *Id.* at 771.

67. *Id.*

68. *Id.* at 771–72.

69. Petition for a Writ of Certiorari, *supra* note 10.

70. *Fikre v. FBI*, No. 3:13-cv-00899, 2016 WL 5539591, at *9 (D. Or. Sep. 28, 2016).

71. *See* Seventh Amended Complaint, *supra* note 23, ¶ 105.

72. *Ibrahim v. Dep't of Homeland Sec.*, 912 F.3d 1147, 1177 (9th Cir. 2019) (en banc).

between the Fourth Circuit and the Ninth Circuit (which decided *Fikre*). Only considerations of space inhibit the description of more cases.⁷³

Ahmad Chebli's lawsuit provoked a similarly quick delisting response that contrasted with the indifference with which the government had previously responded (precipitating his lawsuit). Chebli, a U.S. citizen, alleged that the FBI used the No Fly List to coerce him to be a government informant.⁷⁴ Chebli refused and found himself repeatedly subject to enhanced airport screening or simply denied boarding passes. Worried about his wife and children, Chebli and his family moved to Lebanon. When he attempted to return to the United States, he was barred until his attorney negotiated a one-time waiver to fly back home.⁷⁵

Chebli's work, relations with family and friends, and religious life were all harmed.⁷⁶ Resort to the DHS TRIP system failed to result in any information about his watchlisting status.⁷⁷ But ten days after his six-count complaint was filed by the ACLU and publicized by an article in the *New York Times*, there was suddenly a change.⁷⁸ According to his counsel's notice of voluntary dismissal, "the government finally responded to his years-old petition for redress" by informing him that he "no longer satisf[ied] the criteria for placement on the No Fly List [, was] removed from the No Fly List, and will not be placed back on the No Fly List based on currently available information."⁷⁹

Erich Scherfen and *Rubina Tareen*, U.S. citizens, found their case dismissed as moot just two months before *Fikre*'s own troubles began. Scherfen was a commercial pilot with an honorable record of service in the U.S. military; his wife sold books about Islam.⁸⁰ Both complained of enhanced screening at airports and prolonged stops at the border.⁸¹ Scherfen found himself on a

73. See, e.g., *Nur v. Unknown CBP Officers*, No. 1:22-cv-169, 2022 WL 16747284 (E.D. Va. Nov. 7, 2022); *Jibril v. Mayorkas*, 101 F.4th 857 (D.C. Cir. 2024). In a study of forty U.S. persons who sued to remedy watchlisting, the ACLU found that 70% (twenty-eight persons) "received confirmation that they were removed from the [No Fly] List during litigation." Brief for the American Civil Liberties Union and the ACLU Foundation of Oregon as *Amici Curiae* Supporting Respondent at 13–15, *FBI v. Fikre*, 601 U.S. 234 (2024) (No. 22-1178). And three-quarters of that number received this notice "early on in the process, i.e., before the individual received even a terse summary of reasons for their placement on the List." See *id.*

74. Complaint ¶¶ 7, 24–34, *Chebli v. Kable*, No. 1:21-cv-00937 (D.D.C. Apr. 6, 2021), Dkt. No. 1.

75. *Id.* ¶¶ 35–37, 49–58, 63–69.

76. *Id.* at ¶¶ 23, 35–37, 48, 59, 118–21.

77. *Id.* ¶¶ 72–75.

78. Charlie Savage, *Testing an Opaque Security Power, Michigan Man Challenges 'No-Fly List'*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/us/politics/no-fly-list-lawsuit.html> [<https://perma.cc/57F5-BNVD>].

79. Notice of Voluntary Dismissal at 3, *Chebli*, No. 1:21-cv-00937 (D.D.C. May 12, 2021), Dkt. No. 4.

80. *Scherfen v. Dep't of Homeland Sec.*, No. 3:08-cv-01554, 2010 WL 456784, at *1 (M.D. Pa. Feb. 2, 2010).

81. *Id.*

terrorist watchlist⁸²—not a good look for a commercial pilot. As it turned out, Scherfen was on the Selectee List, which can lead to hours of extended scrutiny at TSA security checkpoints.⁸³ As a result, Scherfen’s employer took away his pilot identification card, suspended him without pay, and threatened him with termination if he could not get himself off the list, and quickly.⁸⁴ The couple, frustrated by what they alleged was four months spent seeking relief from the government’s non-responsive DHS TRIP system, filed their complaint along with a motion for emergency injunctive relief.⁸⁵

Five days after a federal judge ordered a briefing on the emergency motion, the defendants (eight government entities and their respective top officials) submitted a letter from Scherfen’s own employer that confirmed his return to flight status.⁸⁶ According to Scherfen’s attorney, the government’s lawyer “would not disclose what had changed with regard to Mr. Scherfen’s underlying situation, who instructed [Scherfen’s employer] to issue the letter ‘confirming’ Mr. Scherfen’s return to flight status, or why the letter was addressed to an attorney with Defendant TSA.”⁸⁷ But the letter was enough to moot the need for the motion, for which the plaintiff’s attorney now sensibly sought a voluntary dismissal.⁸⁸

This turned out to be a clever trap. Although Scherfen’s lawsuit finally prompted action that saved his job, this came at the cost of continuing his case against the government. The court proceeded to use this opening melee to hold that the plaintiffs now lacked standing.⁸⁹ This was a nice example of the power of the adage that mootness is just “the doctrine of standing set in a time frame.”⁹⁰

Another husband and wife, *Ashraf Maniar* and *Umaina Shaikh*, experienced the familiar litany of injuries from the No Fly List, on which these U.S. citizens found themselves for approximately three years and two years, respectively.⁹¹ Using the reformed process for seeking administrative remedies, they received notices explaining that they had been put on the No Fly List because of Maniar’s “association and extensive communication with a known

82. *Id.* at *2.

83. *Id.*

84. *Id.* at 1–2.

85. *Id.* at 3.

86. *Id.*

87. Plaintiff’s Motion for Voluntary Withdrawal of Motion for Expedited Preliminary Injunction ¶ 5, *Scherfen*, No. 3:08-cv-1554 (M.D. Pa. Sep. 2, 2008), Dkt. No. 17.

88. *Scherfen v. Dep’t of Homeland Sec.*, No. 3:08-cv-01554, 2010 WL 456784, at *3 (M.D. Pa. Feb. 2, 2010).

89. *Id.* at 8 (“[Plaintiffs] argue that removal from the TSDB would merely amount to the voluntary cessation of actionable conduct that does not render a claim moot. The issue here, however, is not whether a claim has become moot, but whether plaintiffs can satisfy the preconditions for asserting an injunctive claim in a federal forum.”) (internal quotations and citation omitted).

90. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

91. Memorandum Opinion at 18, *Maniar v. Wolf*, No. 1:19-cv-03826 (D.D.C. Mar. 30, 2023), Dkt. No. 33.

extremist located in the United Kingdom who has supported terrorist organizations” and Shaikh’s “support to an individual, made with the knowing purpose of furthering the individual’s desire to join a foreign-based terrorist organization, as well as your association and communication with multiple known extremists.”⁹²

Their redress claims went nowhere until they filed a lawsuit. Contrary to the “far-fetched” assertion that people deemed too dangerous to fly would be delisted to avoid litigation, the government issued letters to each of them a few weeks before the deadline for the government’s motion to dismiss stating they “no longer satisfy the criteria for placement” on the No Fly List and that they would “not be placed back on the No Fly List based on currently available information.”⁹³ Their letters were identical to Fikre’s letter. On the basis of those letters, the government argued that the court should dismiss for lack of standing, since the operative complaint had been amended (to allege, *inter alia*, persistent or related injuries) only after these letters were issued.⁹⁴ However, the brief added, “even if the Court were to view this as a question of mootness, the analysis would remain largely the same.”⁹⁵

It’s a neat trick: timing the letters just right opened up the choice of jurisdictional defenses. Either the claims were moot because no further relief could be ordered by the court, or the plaintiffs never had standing to ask for relief in the first place. The standing option was preferred by the government largely because it avoided the pitfalls of the voluntary cessation exception.

Jamal Tarhuni, U.S. citizen, volunteered with an Oregon-based medical charity in Libya in 2011 and 2012.⁹⁶ After three prior successful trips, he was denied boarding in Tunis onto a flight home to Portland and directed to contact the U.S. Embassy.⁹⁷ An FBI agent at the embassy interviewed him for hours, conditioning his return home on a polygraph test and signed waiver of rights.⁹⁸

92. *Id.* at 14, 17–18.

93. Exhibit Nos. D & G, Second Motion to Dismiss for Lack of Jurisdiction, *Maniar*, No. 1:19-cv-03826 (D.D.C. Sep. 9, 2020), Dkt. Nos. 23-5, 23-8.

94. Second Motion to Dismiss for Lack of Jurisdiction, *Maniar*, No. 1:19-cv-03826 (D.D.C. Sep. 9, 2020), Dkt. No. 23.

95. Memorandum of Points and Authorities in Support of Defendant’s Motion to Dismiss Plaintiff’s Second Amended Complaint at 14 n.5, *Maniar*, No. 1:19-cv-03826 (D.D.C. Sep. 9, 2020), Dkt. No. 23. Maniar and Shaikh separately filed lawsuits preceding this joint one in which they sought writs of mandamus to compel answers from DHS. Upon receipt of these letters, Maniar voluntarily dismissed his action. Notice of Voluntary Dismissal, *Maniar v. Nielsen*, No. 1:18-cv-01362 (Aug. 19, 2020), Dkt. No. 35. However, the letter was issued four months after Judge Moss had rejected defendants’ first attempt to dismiss the case, inviting the defendants to provide “a more complete showing regarding the regulatory backdrop.” Memorandum Opinion and Order at 10, *Maniar*, No. 1:18-cv-01362 (D.D.C. Apr. 10, 2020), Dkt. No. 29. Shaikh’s action was dismissed by Judge Walton as moot. *See* Order, *Shaikh v. McAleenan*, No. 1:19-cv-01398 (D.D.C. Mar. 31, 2020), Dkt. No. 16.

96. *Tarhuni v. Lynch*, 129 F. Supp. 3d 1052, 1055 (D. Or. Sep. 8, 2015).

97. *Id.* at 1055–56.

98. *Id.* at 1056.

After Tarhuni refused, he was forced to wait until the following month to return on what appears to have been a one-time waiver.⁹⁹

Almost eighteen months later, his DHS TRIP inquiry resulted in a letter: “It has been determined that no changes or conditions are warranted at this time.”¹⁰⁰ More than a year later, under the *Latif* court-ordered reforms, DHS confirmed that Tarhuni remained on the No Fly List because he was “an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.”¹⁰¹ The letter added that “[t]he Government has concerns about the nature and purpose of Jamal Tarhuni’s travel to Libya in 2011 and 2012.”¹⁰² A final letter came in February 2015, stating that he had been removed from the No Fly List “based on the totality of available information, including your submissions to DHS TRIP.”¹⁰³

That might sound like a system of administrative relief that, albeit slow, ultimately worked. But the context of those letters was litigation that was gradually going south for the government.¹⁰⁴ Unexpectedly, the government answered the plaintiff’s amended complaint rather than move to dismiss it.¹⁰⁵ Such a filing is highly unusual in No Fly List cases, for a predictable reason: plaintiff’s counsel proceeded to serve a production request and interrogatories and the court set a tight discovery schedule.¹⁰⁶ As discovery heated up, and defendants sought to stay discovery, invoke the state secrets privilege, and

99. *Id.*

100. *Id.* “Conditions” may be a mistake in the court’s opinion. “Corrections” is the word that usually appears on such letters. The opinion does not cite to a record in the docket that could confirm this word choice.

101. *Id.* at 1057.

102. *Id.*

103. *Id.*

104. Tarhuni’s attorneys filed a preemptive “Motion to Establish Procedural Protocols Re Defendants’ Anticipated Lodging of Ex Parte, In Camera Materials” that led to an order from Judge Brown setting tough ground rules for such filings before the government could even respond. Plaintiff’s Motion to Establish Procedural Protocols Re Defendants’ Anticipated Lodging of Ex Parte, In Camera Materials, Tarhuni v. Barr, No. 3:13-cv-00001 (D. Or. May 7, 2013), Dkt. No. 15; Order, *Tarhuni*, No. 3:13-cv-00001 (D. Or. May 7, 2013), Dkt. No. 19. This initial volley seemed to put the government on its back foot, prompting a joint motion to hold further consideration of plaintiff’s motion in abeyance. See Joint Motion to Hold Consideration of Plaintiff’s Motion for Protocols in Abeyance, *Tarhuni*, No. 3:13-cv-00001 (D. Or. May 23, 2013), Dkt. No. 22. Government counsel represented that they “will not be filing *ex parte* or otherwise nonpublic materials” with their motion to dismiss. *Id.* This was a reversal from a prior representation to plaintiff’s counsel that “we are not able to stipulate to a requirement that the government provide advance notice of an *ex parte* submission.” See Plaintiff’s Motion to Establish Procedural Protocols, *supra*, at 2. A year later, defendants’ motion to dismiss produced a court order granting Tarhuni “leave to amend all claims dismissed without prejudice on the condition that Plaintiff can in good faith plead facts sufficient to satisfy the deficiencies discussed and state a plausible claim on the merits.” Opinion & Order at 53, *Tarhuni*, No. 3:13-cv-00001 (D. Or. May 23, 2013), Dkt. No. 49.

105. See Third Amended Complaint, *Tarhuni*, No. 3:13-cv-00001 (D. Or. Apr. 24, 2014), Dkt. No. 53; Answer to Third Amended Complaint, *Tarhuni*, No. 3:13-cv-00001 (D. Or. May 27, 2014), Dkt. No. 56.

106. See Minutes of Proceedings, *Tarhuni*, No. 3:13-cv-00001 (D. Or. May 28, 2014), Dkt. No. 57.

remand the case back to the agency for further administrative review, Judge Brown denied the motion to remand and stayed discovery herself, but with her own detailed schedule of notices the government would be required to give to plaintiff regarding his status on the No Fly List and review of his redress inquiries.¹⁰⁷

Tarhuni's last letter, notifying him that he had been removed from the watchlist in four short lines, shared a date with Judge Brown's deadline for the government to complete its substantive review of Tarhuni's status.¹⁰⁸ Judge Brown concluded that this result rendered Tarhuni's case moot and the voluntary cessation exception could not save it. "To the contrary," Judge Brown wrote in language she would duplicate in the *Fikre* case: "the notion that the government would remove from the No-Fly List an individual whom Defendants believe is, in fact, 'an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so' for the mere purpose of concluding this litigation is, to say the least, far-fetched."¹⁰⁹

The Ninth Circuit reversed and remanded the case back to Judge Brown, holding she had erred in dismissing the case with prejudice rather than considering leave to amend.¹¹⁰ Four years later, the government settled the case.¹¹¹

Zijad Bosnic, U.S. citizen, was denied boarding when he sought to fly home to Florida from a family visit to Bosnia in March 2017 and found himself instead interrogated by two FBI agents at the U.S. Embassy in Sarajevo.¹¹² Like Fikre, he responded to a call from "two men who identified themselves as being employed by the United States Embassy" who requested he meet, and then deceitfully suggested they could help him.¹¹³ He filed with DHS TRIP and received formal notice a few months later that he was on the No Fly List.¹¹⁴ A month later, his Transportation Worker Identification Credential (TWIC), essential for his work as a truck driver, was suspended because TSA "has determined that you may pose a security threat" based on a search of terrorist watchlists.¹¹⁵ Nevertheless, he was given a one-time waiver to return to the United States.¹¹⁶ Too dangerous to drive a truck, but not to fly (once).

107. See Minutes of Proceedings, *Tarhuni*, No. 3:13-cv-00001 (D. Or. Oct. 3, 2014), Dkt. No. 79.

108. *Tarhuni v. Lynch*, 129 F. Supp. 3d 1052, 1057 (D. Or. 2015); Order, *Tarhuni v. Barr*, No. 3:13-cv-00001 (D. Or. Jan. 15, 2015), Dkt. No. 88.

109. *Tarhuni*, 129 F. Supp. at 1062.

110. See *Tarhuni v. Sessions*, 692 F. App'x 477 (9th Cir. 2017) (mem.).

111. See Joint Stipulation of Dismissal, *Tarhuni*, No. 3:13-cv-00001 (D. Or. Apr. 29, 2021), Dkt. No. 233.

112. Complaint ¶¶ 110–11, 126, *Bosnic v. McCabe*, No. 3:17-cv-00826 (M.D. Fla. July 20, 2017), Dkt. No. 1.

113. *Id.* ¶¶ 121, 124–27.

114. *Id.* ¶ 133.

115. *Id.* ¶¶ 134–36.

116. *Id.* ¶ 141.

Bosnic filed a lawsuit.¹¹⁷ Six months later he received a letter from DHS: “After further review of your inquiry, we have determined that you are no longer on the No Fly List.”¹¹⁸ No further explanation was given, but a month later, the defendants moved to dismiss his complaint as moot.¹¹⁹ A magistrate judge cited approvingly Judge Brown’s conclusion that strategic mooting of these sorts of cases seemed “far-fetched.”¹²⁰ The defendants’ reply brief in support of their motion approvingly quoted the same passage.¹²¹ The magistrate then asserted without citation that “the decision to remove Plaintiff from the No Fly List appears to be the result of substantial deliberation, and not merely an attempt to manipulate jurisdiction.”¹²² And, although the burden falls on the party asserting mootness, he seemed to justify this conclusion by reversing the burden: “There is no evidence to suggest that Plaintiff’s removal from the No Fly List was not a result of a genuine assessment of Plaintiff’s DHS TRIP complaint.”¹²³ The district court judge, adopting the magistrate’s report and recommendation, ordered the case dismissed.¹²⁴

Saadiq Long, U.S. citizen, was an airman in the U.S. Air Force when he unsuccessfully sought conscientious-objector status after his religious conversion.¹²⁵ He was given an Other than Honorable Discharge, after which he eventually settled his family in Qatar.¹²⁶ When he attempted to renew his passport to visit his critically ill mother in Oklahoma, he found himself on the No Fly List, subject to FBI interrogation, and under arrest by Qatari police immediately upon leaving his FBI meeting at the U.S. Embassy.¹²⁷ Six months later, having retained legal counsel and publicized his plight, he was given a one-time waiver to the U.S. to see his mother (whom he alleges was also visited by the FBI).¹²⁸ En route and during his visit, he alleges that he was plagued with

117. See Complaint for Injunctive and Declaratory Relief against Andrew McCabe, Charles H. Cable, IV, Huban A. Gowadia, Kevin K. McAleenan, and Nicholas J. Rasmussen with Jury Demand, *Bosnic*, No. 3:17-cv-00826 (M.D. Fla. July 20, 2017), Dkt. No. 1.

118. Letter from DHS to Zijad Bosnic at 1, *Bosnic*, No. 3:17-cv-00826 (M.D. Fla. Feb. 15, 2018), Dkt. No. 23-1.

119. Defendants’ Motion to Dismiss for Lack of Jurisdiction, Motion to Dismiss for Failure to State a Claim and Memorandum in Support Thereof, *Bosnic v. Wray*, No. 3:17-cv-00826 (M.D. Fla. Feb. 15, 2018), Dkt. No. 23.

120. *Bosnic v. Wray*, No. 3:17-cv-00826, 2018 WL 3651382, at *4 (M.D. Fla. July 10, 2018).

121. Reply to Response to Motion to Dismiss for Lack of Jurisdiction; Motion to Dismiss for Failure to State a Claim and Memorandum in Support Thereof at 6, *Bosnic*, No. 3:17-cv-00826 (M.D. Fla. Apr. 10, 2018), Dkt. No. 27.

122. *Bosnic*, 2018 WL 3651382, at *4.

123. *Id.*

124. Order, *Bosnic*, No. 3:17-cv-00826 (M.D. Fla. Aug. 17, 2018), Dkt. No. 34.

125. *Long v. Barr*, 451 F. Supp. 3d 507, 519 (E.D. Va. Apr. 2, 2020).

126. *Id.*

127. *Id.*

128. *Id.*; see also Amended Complaint ¶ 225, *Long v. Lynch*, No. 1:15-cv-001642 (E.D. Va. Aug. 13, 2019), Dkt. No. 35; Glenn Greenwald, *US Muslim placed on no-fly list is unable to see his ailing mother*, THE GUARDIAN (UK), (Nov. 5, 2012, at 3:19 ET), <https://www.theguardian.com/commentisfree/2012/nov/05/muslim-no-fly-qatar> [<https://perma.cc/SVJ8-T4EU>].

delays, searches, and questioning by DHS and FBI officials.¹²⁹ After his attempt to return to Qatar after this visit failed, despite lengthy questioning by FBI agents, he drove to Mexico and then flew to Qatar.¹³⁰

Long appealed a district court order that substantially limited his claims. Two months after the court of appeals issued its briefing order, the government notified the court that Long had been removed from the No Fly List.¹³¹ The DHS letter, submitted with a declaration from a TSC official, initially confused the appellate court, which asked at oral argument just who was responsible for Long's status determination.¹³² The substantive paragraph of the unsigned DHS letter provided no answer:

Previously, you were informed of the TSA Administrator's determination to uphold your placement on the No Fly List based on the totality of available information. The Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) has recently been advised that, based on an assessment of the currently available information, you have been removed from the No Fly List and that you will not be placed back on the No Fly List based on the currently available information. This letter supersedes the letter sent to you on April 23, 2019.¹³³

Who advised *whom* at DHS TRIP? *How* was the matter assessed? *Who* removed him and *what* rules prevented reversal of that choice? The letter answered none of these questions. The declaration, from the Deputy Director for Operations of the Terrorist Screening Center, was also entirely in the passive voice: "Mr. Long will not be placed back on the No Fly List in the future based on the currently available information."¹³⁴ But, again, by *whom*, *how*, and with *what* recourse?

Nevertheless, the Fourth Circuit held that Long's No Fly List challenge was moot and that the voluntary cessation exception didn't apply, creating a circuit split with the Ninth Circuit's just-issued *Fikre* opinion.¹³⁵ The TSC declaration was enough to convince the Fourth Circuit that "the conduct Long challenges

129. Amended Complaint, *supra* note 128, ¶¶ 228–33.

130. *Long*, 451 F. Supp. 3d at 520; *see also* Amended Complaint, *supra* note 128, ¶¶ 234–38. The amended complaint details many other allegations regarding continuing difficulties with air travel, his employment as a truck driver in Oklahoma, and efforts to purchase a firearm that Long attributes to his status on different watchlists.

131. Letter, *Long v. Pekoske*, No. 20-1406 (4th Cir. Sep. 23, 2020), Dkt. No. 27.

132. *Long v. Pekoske*, 38 F.4th 417, 422 n.3 (4th Cir. 2022) ("At first, it was unclear who ordered Long removed from the No Fly List. But at oral argument, the government clarified it was the Screening Center.").

133. Letter, *Long*, No. 20-1406 (4th Cir. Sep. 23, 2020), Dkt. No. 27-1.

134. Declaration of Jason V. Herring, *Long*, No. 20-1406 (4th Cir. Sep. 23, 2020), Dkt. No. 27-3.

135. *Long*, 38 F.4th 417.

won't recur" because the TSC "has removed Long from the No Fly List and has assured us that won't change based on the information it has now."¹³⁶

The Fourth Circuit thought the Ninth Circuit in *Fikre* "demands too much of the government."¹³⁷ Whereas the Ninth Circuit was concerned that no explanation for Fikre's change of status was provided by the government, the Fourth Circuit was quite comfortable with that omission in Long's case: "we assume [the TSC] removed Long from the list because, as he contends, he doesn't belong on it. To say otherwise, would be to suggest the government risked national security simply to moot a lawsuit. This we decline to do."¹³⁸ Not only did the Fourth Circuit decline to do this, but "we think it appropriate—in this unique national-security context where the relevant decision-making is highly sensitive and confidential—to allow the government more leeway on its evidentiary burden than we otherwise might."¹³⁹

* * * * *

What conclusions emerge from this alphabet of watchlist cases? The FBI is involved in nearly every case. Its agents are alleged to use the No Fly List to pressure these travelers but succeed only in turning them into plaintiffs. At the administrative remedies stage, the FBI seems to disappear, replaced by the Department of Homeland Security and its TRIP system. But when courts examine this process more deeply, the FBI reemerges at the center of the action. It never left: although the TSA operates the No Fly List, and the Department of Homeland Security (in which TSA is a component) operates the TRIP system facing the public, the TSC (which the FBI administers) does all the work in the background.

The TSC makes the actual decisions about who is on or off any particular list. It is invariably a declaration from a TSC official that backs the DHS public-facing action. As Part C describes, TSC provides the compositional criteria, the content, and the decisionmakers. But the TSC does this work behind the scenes, without oversight by the public, the courts, or the legislature. The closer one inspects any public aspect of this process—the letters, the declarations, the *bases* for decisions made by these hidden TSC officials—the less substantial, and the more conclusory, the TSA-DHS edifice appears. Like a ghost in the machine,

136. *Id.* at 423–24.

137. *Id.* at 424.

138. *Id.* at 425.

139. *Id.* at 426. As previously noted, the Sixth Circuit Court of Appeals also dismissed a case as moot, holding that the voluntary cessation exception did not apply. *Mokdad v. Sessions*, 876 F.3d 167 (6th Cir. 2017). That case is not discussed because its brief analysis does not engage with the reasoning of its sister circuits. The *Mokdad* court concluded that the exception did not apply because the TSC issued a letter to plaintiff regarding his No Fly List status by order of the court and then agreed to the court's request that it supplement that letter with a declaration. Therefore, the court reasoned, these actions "were not voluntary." *Id.* at 171.

the proffered answers are elusive and insubstantial, and the real decision-maker “everywhere yet nowhere.”¹⁴⁰

How watchlisting is actually done, and its decisions protected from review, is the subject of Part C.

C. The Threat Screening Center

The creation of the Threat Screening Center (TSC), formerly the Terrorist Screening Center, was catalyzed by the terrorist attacks on September 11, 2001.¹⁴¹ But the origins of the No Fly List that fell under its control arose much earlier. This sequence is important because the TSC’s institutional design helps insulate this and other watchlists from scrutiny. Behind various screens, the TSC has grown in size and power along with the increasing number of watchlists it controls.

The origins of the No Fly List start in the 1960s with federal responses to an alarming rise in aircraft hijackings. Congress gave commercial airlines an exception to the usual requirement that common carriers serve all ticketed passengers if “in the opinion of the air carrier, such transportation would or might be inimical to safety of flight.”¹⁴² Within a few decades, and after more air tragedies (most notably the bombing of Pan Am Flight 103 in 1988), Congress gave the Federal Aviation Administration (FAA) statutory authority to issue obligatory “security directives” by which the FAA could forbid boarding to someone the FAA identified as a “specific and credible threat” to civil aviation, viz. discovery of an actual threat to a particular aircraft or carrier or route.¹⁴³

These security directives were slow (delivered via fax machine to airline security directors), few (averaging fewer than twenty or thirty per year), and far between (thanks to the decreasing frequency of hijackings due in part to other reforms).¹⁴⁴ On September 10, 2001, only twelve individuals were identified on them, none U.S. citizens and none the terrorists who attacked the next day.¹⁴⁵ But on 9/11, this was the only legal authority the federal government had to deny any particular person a boarding pass.

In the immediate aftermath of the 9/11 attacks, the Bush administration seized on the FAA’s security directive (SD) authority but put the FBI in charge of it. Early on September 12, 2001, according to one official’s memo documenting that initial activity:

140. RYLE, *supra* note 1.

141. A more detailed history of these origins and early operations is provided in JEFFREY KAHN, *MRS. SHIPLEY’S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS* (2013).

142. *Id.* at 128 (citing Pub. L. No. 87-197, § 4, 75 Stat. 466 (Sep. 5, 1961)).

143. *Id.* at 133–34.

144. *Id.*

145. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 83 (2004).

At the request of the FBI, the FAA issued SD-108-01-06/EA 129-01-05, which included a list of individuals developed by the FBI as part of the *Pentbom* [sic] investigation [PENTTBOM was the codename for the FBI's investigation of the 9/11 attacks] The FBI "controlled," both administratively and operationally, the contents of the list and added or removed names in accordance with the *Pentbom* [sic] investigation. The FAA received the list from the FBI and disseminated it to air carriers, without any format or content changes. FAA, in essence, acted as a conduit for the dissemination of their "watchlist."¹⁴⁶

Longer-term responses also built on this authority. The Aviation and Transportation Security Act, passed in November 2001, created the Transportation Security Administration (TSA). The Act transferred FAA authority to issue security directives to the TSA, which "in consultation with other appropriate Federal agencies and air carriers," could now require airlines:

to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security; 8and . . . if such an individual is identified, notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual.¹⁴⁷

Notice that this was not merely a transfer of the original legal authority, but a broadening of it. With a well-placed disjunctive—"a threat to civil aviation *or* national security"—the government could now bar someone from flying who was *not* a threat to civil aviation but deemed threatening to national security in some undefined way.

Who constitutes such a threat? It was clear that whichever government entity controlled that definition would have the power to shrink or expand this authority. Congress had conspicuously left that phrase undefined. The FBI quickly took that leading role, though (again) Congress had not granted it any such authority by statute.

The first clues as to who would really be in charge came early, with the FBI's dominance over the TSA's efforts to protect its new No Fly List. E-mails acquired in FOIA litigation not only show how quickly FBI special agents grew accustomed to using this new tool ("We've got a guy we want to no-fly. Do you have a copy of the last one we gave you?") but also how little quality control TSA could exercise over FBI demands; one TSA e-mail in reply to an FBI agent

146. Kahn, *supra* note 44, at 77 (quoting Internal TSA Memorandum "TSA Watchlists" from Claudio Manno, Acting Associate Under Secretary for Transportation Security Intelligence (Oct. 16, 2002)).

147. Pub. L. No. 107-71, § 101(a), 115 Stat. 597 (2001) (codified at 49 U.S.C. § 114(h)(3)(A)-(B)); *see also* *Gilmore v. Gonzales*, 435 F.3d 1125, 1131 n.4 (9th Cir. 2006) (observing that the TSA was authorized "to issue Security Directives without providing notice or an opportunity for comment in order to protect transportation security").

practically begged that “you state in the EC [electronic communication] that the FBI believes that the listed individual is a threat to Civil Aviation Security.”¹⁴⁸ With only a limited number of redacted documents released, one is left to speculate why this basic requirement should be absent.

As the new TSA struggled for control with a powerful and well-established FBI, watchlists were growing in size and number. The No Fly List, for example, soon split off a new list: the “Selectee List,” which allowed boarding only after substantially more intrusive security screening. Similarly, new executive branch entities began to consolidate the country’s intelligence on terrorism. A new Terrorist Threat Integration Center, later transformed by statute into the National Counterterrorism Center, created a massive database to help consolidate the country’s intelligence.¹⁴⁹ That database—called TIDE (Terrorist Identities Datamart Environment)—contained international terrorism intelligence from multiple agencies and departments. Information on purely domestic terrorism remained the province of the FBI. By April 2003, the GAO had identified twelve terrorist-related watchlists across six agencies.¹⁵⁰

With so many different agencies, watchlists, and policy interests involved, the need for coordination and systemization grew in importance. For those twin purposes, the Terrorist Screening Center (TSC) became operational by December 2003.¹⁵¹ Homeland Security Presidential Directive Six (HSPD-6) authorized the Attorney General to create an organization “to consolidate the Government’s approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes.”¹⁵² This short, one-page document provided little else in terms of details.

The details were in an eight-page memorandum of understanding (MOU) signed the same day by the heads of the Departments of Justice, Homeland Security, and State, and the Director of Central Intelligence.¹⁵³ The MOU

148. Kahn, *supra* note 44, at 78 (quoting redacted e-mails released in *Gordon v. FBI*, 390 F. Supp. 2d 897 (N.D. Cal. 2004)).

149. *See* Intelligence Reform and Terrorism Prevention Act, Pub. L. 108-458, § 1021, 118 Stat. 3638 (2004).

150. U.S. DEP’T OF JUST. OFF. OF THE INSPECTOR GEN., REVIEW OF THE TERRORIST SCREENING CENTER (AUDIT REPORT 05-27) iii (2005).

151. *Fact Sheet: The Terrorist Screening Center*, DEP’T OF JUST., https://www.justice.gov/archive/opa/pr/2003/September/03_ag_505factsheet.htm [<https://perma.cc/U87K-RZYT>] (last visited Nov. 4, 2025).

152. Homeland Security Presidential Directive/HSPD-6-Directive on Integration and Use of Screening Information to Protect Against Terrorism, 2 PUB. PAPERS 1174–75, ¶ 1 (Sep. 16, 2003) [hereinafter *Homeland Security Presidential Directive*], available at <https://www.govinfo.gov/content/pkg/PPP-2003-book2/pdf/PPP-2003-book2-doc-pg1174.pdf> [<https://perma.cc/KN2J-JQ75>].

153. Memorandum of Understanding on the Integration and Use of Screening Information to Protect Against Terrorism (MOU) (Sep. 16, 2003) [hereinafter *MOU*]. The MOU has not been publicly released. It was leaked as part of the March 2013 Watchlisting Guidance and published by The Intercept and the ACLU, among others. The MOU is at Appendix 3 of the March 2013 Watchlisting Guidance. *See March 2013 Watchlisting Guidance*, THE INTERCEPT (July 23, 2014),

implemented the presidential directive by establishing the TSC, the “organization” that HSPD-6 authorized the Attorney General to create. According to an audit by the Justice Department’s Office of the Inspector General, this MOU “governs the structure and operations of the TSC.”¹⁵⁴ It is worth noting that, unlike the TSA or even the National Counterterrorism Center, the TSC was not a creature of statute.

And here came the FBI’s next move to exert control. The MOU made clear that the TSC would be closely connected to the FBI. The Director of the FBI would be in charge of establishing it.¹⁵⁵ Once operational, the FBI would administer it.¹⁵⁶ Its director’s line of report goes through the FBI’s leadership.¹⁵⁷ Although staffing would involve many departments of the executive branch, as the multi-agency MOU suggested, the key positions would remain, almost invariably, with the FBI. Since there is no organizational chart or list of the TSC’s leadership published anywhere, evidence for this proposition must be extracted from the declarations its officials occasionally submit in litigation. Consider the position of deputy director for operations, which is routinely described in these court filings as “responsible for the overall operations of the TSC.”¹⁵⁸ Figure 1 is gleaned from successive declarations by three recent holders of this position:

Fig. 1. TSC Deputy Directors for Operations, 2013-2022

Name	Service as Deputy Dir.	Start of FBI Service	TSC Units Supervised	Individuals Supervised
Clayton Grigg ¹⁵⁹	Sep. 2013-Apr. 2016	1997	unstated	unstated
Timothy Groh ¹⁶⁰	May 2016-Feb. 2020	1996	9	≈ 300
Jason Herring ¹⁶¹	April 2020-Feb. 2022	1999	14	≈ 700

<https://theintercept.com/document/march-2013-watchlisting-guidance/> [https://perma.cc/X5HB-GAWE].

154. U.S. DEP’T OF JUST. OFF. OF THE INSPECTOR GEN., AUDIT OF THE FBI’S MANAGEMENT OF TERRORIST WATCHLIST NOMINATIONS (AUDIT REPORT 14-16) 1 (2014).

155. MOU, *supra* note 153, ¶ 3.

156. U.S. DEP’T OF JUST. OFF. OF THE INSPECTOR GEN., FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (AUDIT REPORT 07-41) 1 (2007).

157. MOU, *supra* note 153, ¶ 5.

158. Declaration of Timothy P. Groh at 1, *Elhady v. Kable*, No. 1:16-cv-00375 (E.D. Va. Mar. 11, 2019), Dkt. No. 299-4; Declaration of Jason V. Herring, *Jardaneh v. Garland*, No. 8:18-cv-02415 (D. Md. Apr. 30, 2021), Dkt. No. 128-4.

159. Declaration in Support of Defendants’ Motion to Dismiss, *Tarhuni v. Holder*, No. 3:13-cv-00001 (D. Or. July 6, 2015), Dkt. No. 99; *see also* Gurvais Grigg, LINKEDIN, <https://www.linkedin.com/in/gurvais-grigg-b1027a153/details/experience/>.

160. Declaration of Timothy P. Groh at 1, *Elhady*, No. 1:16-cv-00375 (E.D. Va. Mar. 11, 2019), Dkt. No. 299-4; *see also* Timothy Groh, LINKEDIN, <https://www.linkedin.com/in/timothy-groh/>.

161. Declaration of Jason V. Herring at 1, *Jardaneh v. Garland*, No. 8:18-cv-02415 (D. Md. Apr. 30, 2021), Dkt. No. 128-4; *see also* Jason V. Herring, LINKEDIN, <https://www.linkedin.com/in/jason-v-herring-998b79215/>.

Given the origins of the TSC and the close working relationship with the FBI, it is no surprise that the least amount of prior FBI experience for this important position supervising a growing number of units and individuals is over two decades in length. The declaration at the center of Fikre's case was signed by Christopher R. Courtright, the TSC's Acting Deputy Director for Operations. He has been with the FBI since 2001.¹⁶²

But what, exactly, does the TSC do? It is tasked to "maintain a consolidated terrorist screening database" that combines information on international threats from the National Counterterrorism Center's database (TIDE) with the FBI's purely domestic terrorism information.¹⁶³ The TSC also determines which screening processes may access each entry in that database.¹⁶⁴ And the TSC will "provide continual operational support" not only to help identify watchlisted persons, but "facilitate" the action taken by other agencies once that identification occurred and further action may be necessary.¹⁶⁵

The best analogy to translate all of this bureaucratese is to think of an old-fashioned library. Like a master librarian, the TSC was in charge of a massive card catalog (the "consolidated terrorist screening database," or TSDB) that linked to every substantive record about a known or suspected terrorist in the government's possession.¹⁶⁶ Just like a card catalog, the TSDB did not contain every little detail, but rather an unclassified snapshot of the essentials, with which the TSC could locate (and to some extent access) the full record.

In this librarian role, the TSC had an even greater power than managing this TSDB "card catalog." The TSC used the TSDB to create specialized catalogs, subsets of the main one, that became the different watchlists, most notably, the No Fly List.¹⁶⁷ That creative power meant that the TSC was the primary authority that established the criteria by which each watchlist would be compiled and also assessed whether those criteria were met.¹⁶⁸ As the master librarian, only the TSC could add or remove a name to one of these lists. Every agency that sought to use one of those watchlists became a patron in the TSC's library.

This relationship is depicted in Figure 2, which is an unclassified PowerPoint slide given to the author by the then-director of the TSC, Timothy Healy (a long-time FBI official), in 2010. It shows the inputs of intelligence information from the NCTC and FBI on the left, the curation of the TSDB by the TSC in the center, and the TSC's outputs (drawing on the TSDB) on the right in the form of various sublists to patron agencies.

162. See Appendix C ¶ 1.

163. MOU, *supra* note 153, ¶¶ 4(a), 13.

164. *Id.* ¶¶ 4(b), 18.

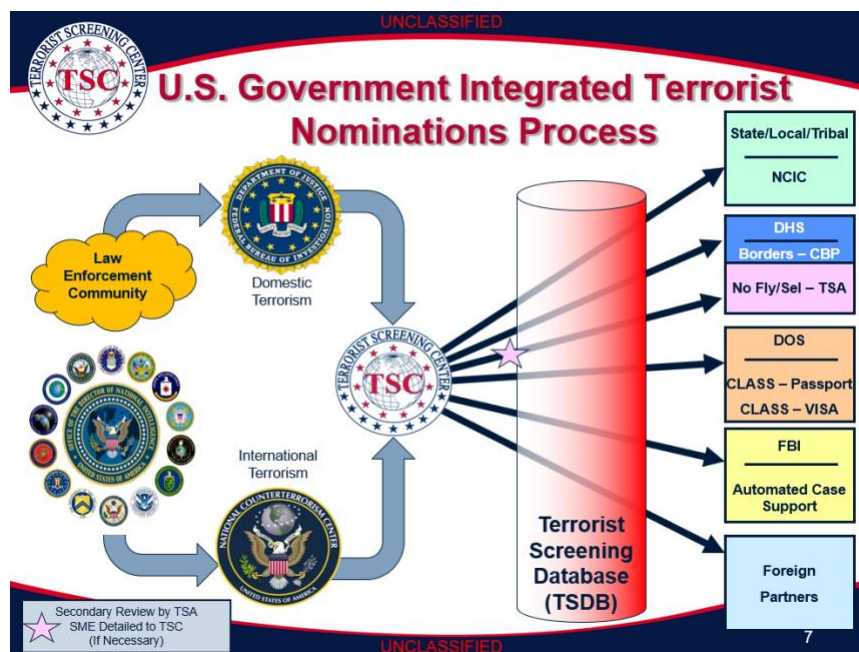
165. *Id.* ¶ 4(e).

166. *Id.* at ¶ 4(a). A nomenclature change has renamed the TSDB to the TSDS (Terrorist Screening Dataset). The original term is used in this article for consistency and ease of understanding.

167. MOU, *supra* note 153, ¶ 29(c).

168. *Id.* ¶¶ 8(a)–(c), 15(a)–(g).

Fig. 2. Flow Chart of the Work of the Terrorist Screening Center¹⁶⁹



Over the past twenty years, the Terrorist Screening Database has grown in size from approximately 150,000 records to 1.8 million records.¹⁷⁰ The database is no longer limited to known or suspected terrorists. For example, under a 2015 order of the Attorney General, “transnational organized crime” actors now fall within the TSC’s watchlisting bailiwick.¹⁷¹ According to the FBI, “in 2018, the Attorney General also granted the TSC authority to maintain additional datasets.”¹⁷² In addition, certain categories known as “exception records” include those of interest to the watchlisting community (such as “relatives, associates, . . . endorsers and inciters of terrorism”) but for whom “precise terrorist support activity is unknown.”¹⁷³ Not only is the absence of such

169. This PowerPoint presentation was provided to the author on April 20, 2010, following an interview with then TSC Director Timothy Healy. This slide has been reproduced in the March 2013 Watchlisting Guidance that was leaked by The Intercept. See *March 2013 Watchlisting Guidance*, *supra* note 153, § 1.32.

170. S. COMM. ON HOMELAND SEC. & GOV’T AFFS., 118TH CONG., MISLABELED AS A THREAT: HOW THE TERRORIST WATCHLIST & GOVERNMENT SCREENING PRACTICES IMPACT AMERICANS 14 (2023) [hereinafter HSGAC MAJORITY STAFF REPORT].

171. FBI, FY 2017 AUTHORIZATION AND BUDGET REQUEST TO CONGRESS 5–8 (2016), available at <https://www.justice.gov/jmd/file/821341/dl> [https://perma.cc/8EZW-NV3U] (“On August 6, 2015, the Attorney General signed Order No. 3548-2015, which granted the TSC the authority to manage, disseminate, perform identity verification, and encounter management functions regarding TOC Actors.”).

172. HSGAC MAJORITY STAFF REPORT, *supra* note 170, at 15.

173. *Id.* at 14.

information no impediment to watchlisting, these records “do not meet the same minimum standard for inclusion required for other records in the terrorist watchlist.”¹⁷⁴

The “standard for inclusion” is found in TSC internal documents and whatever excerpts are provided in litigation.¹⁷⁵ These documents are neither limited by statute nor promulgated as regulations. But it is here that the TSC describes the rules, standards, and criteria by which its personnel engage in their work. These procedures occupy over a hundred pages in the leaked “March 2013 Watchlisting Guidance” that is the only such manual to be publicly disclosed.¹⁷⁶ The U.S. Government, however, declines to acknowledge “the alleged leak of this guidance.”¹⁷⁷

So, what is the standard? The TSDB contains information about “known or suspected terrorists.” The breadth of this term’s definition is stunning:

A known or suspected terrorist is a person who is known or reasonably suspected to be engaged in, has been engaged, or intends to engage in conduct constituting, in preparation for, or in aid or in furtherance of terrorism and/or terrorist activities.¹⁷⁸

How does one determine whether a person is “engaged” (let alone intending to be engaged) in conduct, or what is “preparation,” “aid” or “furtherance” of these activities? In other words, if this is the definition, what is the test to evaluate whether it has been satisfied? That test is the “reasonable suspicion” standard, which is also defined:

174. *Id.*

175. In litigation, the FBI has frequently submitted a document titled “Watchlisting Overview.” An updated version of this document appears to have been published on the FBI’s website. *See Overview of the U.S. Government’s Terrorist Watchlisting Process and Procedures as of April 2024*, FBI (May 2, 2024), <https://www.fbi.gov/file-repository/terrorist-watchlisting-transparency-document-april-2024-050224.pdf/view> [<https://perma.cc/V3PK-CEUH>] [hereinafter USG Overview]. The document is not on letterhead, not signed by any official, and provides no indication of its provenance or legal status. Although the document is useful to corroborate more detailed documents that have been leaked, it is of limited legal value, as Judge Moss noted of one of its earlier versions in the *Maniar* case:

Here, the document is not on DHS letterhead, and it lacks any official insignia or markings.

The Department does not indicate who (or which agency) authored the document or who approved it. Nor does the Department even offer a declaration confirming the vague description of the document that appears in the footnote. The Court, accordingly, is left to puzzle over who “authorized” the process, what makes the process “official,” and whether the overview document has binding legal force.

Maniar v. Wolf, No. 1:18-cv-01362, 2020 WL 1821113, at *4 (D.D.C. Apr. 10, 2020) (internal citation omitted). In a footnote, Judge Moss continued, citing 49 C.F.R. § 15601.201, that “The TSA regulations add little clarity and merely declare.” *Id.* at *4 n.3.

176. *See March 2013 Watchlisting Guidance*, *supra* note 153.

177. HSGAC MAJORITY STAFF REPORT, *supra* note 170, at 31.

178. USG Overview, *supra* note 175, at 2 n.7. This sentence conforms to the definitions of known or suspected terrorists in the March 2013 Watchlisting Guidance. *See* Homeland Security Presidential Directive, *supra* note 152, §§ 3.10.1, 3.12.1.

The reasonable suspicion standard has been met when, based on the totality of the circumstances, there is reasonable suspicion that the person is engaged, has been engaged, or intends to engage in conduct constituting, in preparation for, or in aid or in furtherance of terrorism and/or terrorist activities.¹⁷⁹

As one federal judge observed, the effect of this double use of “reasonably suspected” in the definition, and “reasonable suspicion” in the standard is that “an American citizen can find himself labeled a suspected terrorist because of a ‘reasonable suspicion’ based on a ‘reasonable suspicion.’”¹⁸⁰

In a preview of the structural argument that is at the heart of this article, it is worth pausing here to consider the origin of this standard. The “reasonable suspicion” standard was derived by TSC lawyers from the test created in *Terry v. Ohio*, which upheld brief detention and questioning by police officers (who lacked probable cause to do so) if this standard was met in what would become known as “Terry stops.”¹⁸¹ But in the watchlisting context, the test was stripped of the inevitable judicial oversight that was the context for these stops. Conducted on public streets by police, such stops could be assessed by a neutral third-party magistrate in a subsequent criminal proceeding.¹⁸² That structural protection has no place in the world of watchlists. Use of the mootness tool is all about preventing such judicial scrutiny.

The low bar established by such a broad definition assessed under such a modest standard predictably engorged the TSDB with successful nominations. In one of the few watchlisting cases to reach discovery, the government revealed that nominations to the TSDB more than doubled between 2008 and 2013, while the rejection rate changed from 0.2% in 2009 to slightly more than 1% in 2013.¹⁸³ But this standard is not even always utilized, as even the public summary acknowledges.¹⁸⁴

179. USG Overview, *supra* note 175, at 3. This sentence conforms to the definition in the March 2013 Watchlisting Guidance. See Homeland Security Presidential Directive, *supra* note 152, § 3.4.

180. *Mohamed v. Holder*, 995 F. Supp. 2d 520, 531–32 (E.D. Va. 2014).

181. See KAHN, MRS. SHIPLEY’S GHOST, *supra* note 141, at 170 (citing the author’s interview with the TSC General Counsel); see also Jeffrey Kahn, *The Unreasonable Rise of Reasonable Suspicion: Terrorist Watchlists and Terry v. Ohio*, 26 WM. & MARY BILL RTS. J. 383, 386–87, 395–97 (2017).

182. See KAHN, MRS. SHIPLEY’S GHOST, *supra* note 141, at 169–70; see also Kahn, *supra* note 44, at 85–86.

183. See Kahn, *supra* note 44, at 85 (referencing statistics provided in Defendants’ Objections and Responses to Plaintiff’s First Set of Interrogatories, *Mohamed v. Holder*, No. 1:11-cv-00050 (E.D. Va. 2014), Dkt. No. 91-3).

184. USG Overview, *supra* note 175, at 2 n.7 (“The TSDB also includes identifying information of some individuals who are connected to or associated with known or suspected terrorists but who may not themselves meet the reasonable suspicion standard. These records are exported to State and DHS for the limited purpose of supporting screening functions, and may only be provided for other purposes, or to other departments and agencies, as approved through established interagency processes.”).

The No Fly List is populated from the TSDB if one or more additional criteria are satisfied.¹⁸⁵ Three such criteria are linked to statutory definitions of terrorism crimes.¹⁸⁶ A sweeping fourth criteria permits placement on the No Fly List of someone who is deemed “a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.”¹⁸⁷ The 2013 Watchlisting Guidance explains that this fourth criteria was “intended to enable flexibility for nominations to the No Fly List [for individuals who] do not pose a threat to civil aviation, a threat to the homeland, or a threat to U.S. facilities and their associated or supporting personnel.”¹⁸⁸

The same reasonable suspicion test is used to determine whether someone presents such a “threat” and is “operationally capable.”¹⁸⁹ But, again, there is a broad collection of exceptions that allow watchlisting without use of either of these self-imposed limits and definition of “operationally capable” is unsurprisingly broad.¹⁹⁰ And oversight on the process is impoverished. In the *Ibrahim* case, for example, an FBI special agent nominated the plaintiff to a variety of watchlists (prior to interviewing her), including the No Fly List. But he “fill[ed] out the form exactly the opposite way from the instructions on the form.”¹⁹¹ This blunder was only detected three months before trial, after eight years of litigation, when the plaintiff finally succeeded in compelling the FBI agent’s deposition.¹⁹² Despite this revelation—what the judge later called the “bureaucratic analogy to a surgeon amputating the wrong digit”—the case continued to trial, where government counsel conceded that the plaintiff “is not a threat to our national security,” that she “does not pose (and has not posed) a threat of committing an act of international or domestic terrorism with respect to an aircraft, a threat to airline passenger or civil aviation security, or a threat of domestic terrorism.”¹⁹³

Concluding this part, it is necessary to discuss the redress process. Although the TSC nominates individuals to the TSDB and selects such watchlisted persons onto the No Fly List, the Traveler Redress Inquiry Program (TRIP) is run by the Department of Homeland Security. This system was established in

185. USG Overview, *supra* note 175, at 4. This conforms to the 2013 Watchlisting Guidance. *March 2013 Watchlisting Guidance*, *supra* note 153, § 4.5.

186. USG Overview, *supra* note 175, at 4.

187. *Id.*

188. *March 2013 Watchlisting Guidance*, *supra* note 153, § 4.8.1. The document further explains that this now allows inclusion of those who are deemed to present a threat of terrorism “against U.S. nationals abroad (outside of the ‘homeland’) or against a target with no nexus to the United States or its nationals.” *Id.*

189. USG Overview, *supra* note 175, at 4 (referring to the TSDS and its subsets).

190. *March 2013 Watchlisting Guidance*, *supra* note 153, §§ 1.59 (Expedited Nomination Procedures for Temporary, Threat-Based Categories), 4.8.3 (Possible Indicators of Being Operationally Capable), and 4.9 (Operationally Capable Scenarios).

191. *Ibrahim v. Dep’t. of Homeland Sec.*, 62 F. Supp. 3d 909, 916 (N.D. Cal. 2014).

192. *Id.* (“Agent Kelley did not learn of this error until his deposition in September 2013.”). The complaint was filed in January 2006. *Id.* at 911. The trial occurred in December 2013. *Id.* at 914.

193. *Id.* at 915–16, 928.

response to a statutory directive from Congress in 2004 that was limited to the TSA and its authority over aircraft and, in 2007, shifted to more broadly encompass the Department of Homeland Security.¹⁹⁴ Until compelled to do so by order of the *Latif* court in 2015, “the U.S. government did not confirm or deny for DHS TRIP complainants whether they were on the No Fly List” and it continues to maintain a policy of secrecy about the criteria for the Selectee List and whether individuals are on that list or the TSDB.¹⁹⁵

This design creates a useful double screen. The first screen denies direct access to the TSC; all communication is processed through DHS TRIP. The second screen creates a useful legal shield to protect the TSC against intrusion into its administrative action. As even the government’s summary overview describes the process:

After reviewing the available information, the TSC determines whether the traveler’s record should remain in the TSDS, be modified, or be removed, unless the legal authority to make such a determination resides, in whole or in part, with another government agency. In such cases, the TSC prepares a recommendation for the decision-making agency and implements the decision-maker’s determination.¹⁹⁶

The key is in the first sentence, a footnote to which notes that “the TSA Administrator makes final determinations concerning placement on the No Fly List pursuant to 49 U.S.C. § 46110.”¹⁹⁷ That provision, a holdover from the FAA’s original administrative authority over security directives and other administrative action (like licensing and other traditional administrative decisions), directs that TSA orders are subject to exclusive review in the courts of appeals. In other words, the operative decision-making process occurs in and by the TSC but is wrapped in a package labelled with an order by the TSA. As the Fourth Circuit concluded, the TSA is only involved if the wrapping paper is

194. See Pub. L. 108-458, § 4012(a), 118 Stat. 3638 (2004) (codified at 49 U.S.C. § 44903(j)(2)(C)(iii)(I) (requiring TSA Assistant Secretary to “establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system”); and § 44903(j)(2)(G)(i) (“The Administrator shall establish a timely and fair process for individuals identified as a threat . . . to appeal to the Transportation Security Administration the determination and correct any erroneous information.”); see also Pub. L. 110-53, § 1606(a), 121 Stat. 266 (2007) (codified at 49 U.S.C. § 44926(a)) (“The Secretary of Homeland Security shall establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by the Transportation Security Administration, United States Customs and Border Protection, or any other office or component of the Department of Homeland Security.”).

195. Memorandum Opinion at 7, *Maniar v. Wolf*, No. 1:19-cv-03826 (D.D.C. Mar. 30, 2023), Dkt. No. 33.

196. USG Overview, *supra* note 175, at 7–8 (internal footnote omitted).

197. *Id.* at 8.

needed: “If the Screening Center decides someone doesn’t belong on the No Fly List, it will remove them. But if it determines the complainant should stay on the list, it will submit that recommendation to the TSA Administrator, who has the final say.”¹⁹⁸ The result is to shield action actually taken by the TSC from review in district courts. And if the matter is taken to a court of appeal, the shield further prevents discovery or other fact-finding and limits the available evidentiary record to a one-sided presentation by the government.

The TSC is a resource the government strives to protect from legislative or judicial interference. Historically, Congress has not been very interested in constraining an entity about which, almost by definition, only those labelled known or suspected terrorists tend to complain. As the record presented in Part B shows, the judiciary has also not been particularly inclined to interfere. It is to the mootness doctrine at the heart of the *Fikre* case that the next section now turns.

II. *FIKRE* AND THE MOOTNESS DOCTRINE

Practical application of the doctrine of mootness is easier to describe than its theoretical foundations.¹⁹⁹ If the facts that led to filing a lawsuit change—e.g., the plaintiff’s circumstances alter, the relevant law is repealed, the defendant’s action truly abates—there may be nothing further for a court to do. United States courts are averse to offering post-dispute commentary that would render only a constitutionally forbidden advisory opinion.²⁰⁰

Focusing on the existence of live controversies makes mootness seem akin to standing. Indeed, Professor Henry Monaghan famously described mootness as the “doctrine of standing set in a time frame.”²⁰¹ The hazy boundary between the two doctrines clears a bit when the focus shifts to the nature of the remedy sought. Damages claims may remain viable for wrongs long since passed. But if equitable relief is the only remedy, intervening circumstances may render the lawsuit moot when the option of other remedies might have kept it alive.²⁰²

198. *Long v. Pecoske*, 38 F.4th 417, 421 (4th Cir. 2022).

199. See Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 572–74 (2009) (noting the relative recency of current doctrine, the lack of support for its transformation into a constitutional requirement, and the incompatibility of judicially created exceptions to such a requirement).

200. *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

201. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)); see also *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021) (“The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings.”).

202. Declaratory relief presents a middle case, since it may sometimes be important to establish certain legal facts (e.g., property disputes) even if the injury that precipitated the lawsuit is no more. See *Uzuegbunam*, 592 U.S. at 286 (“For example, a trespass to land or water rights might raise a prospective threat to a property right by creating the foundation for a future claim of adverse

Many judges tend to describe mootness in constitutional terms, resulting from their limited jurisdiction under Article III. All the judges hearing Fikre's case did so, as did the Fourth and Sixth Circuit panels with which the Ninth Circuit split.²⁰³

The Supreme Court has been a little more cagey than the lower courts, referring to the “flexible character of the Art. III mootness doctrine.”²⁰⁴ This flexibility takes the form of exceptions to a finding of mootness. Sometimes, the defendant's claim of mootness will be rejected and the case allowed to proceed. This does not always fit well with the Court's rigid view of its limited jurisdiction only to hear live cases and controversies. But for perfectly reasonable policy reasons, justices have repeatedly recognized that unbending application of mootness would strip from lower court dockets cases they believe ought to remain there. For example, some issues by their very nature arise and then pass with a speed impossible for courts to match—hence they present genuine issues that are “capable of repetition, yet evading review.”²⁰⁵ Likewise, adverse collateral consequences that may linger long after the primary injury has passed (e.g., incarceration) might prevent a case “from ending ignominiously in the limbo of mootness.”²⁰⁶ Or, most relevant for this article, courts should not allow savvy defendants to stop behaving badly just to game the judicial system, ready to start again after the litigation danger has passed.²⁰⁷

This mootness doctrine is applicable to all litigants, public or private. But when the defendant is the federal government, as in *Fikre*, the issue is more acute because the availability of remedies is more limited. Against a private party, a claim for money damages can stave off mootness: defendants cannot unring the bell of their past actions to avoid paying up for a past injury.²⁰⁸ But

possession or prescriptive easement. By obtaining a declaration of trespass, a property owner could ‘vindicate his right by action’ and protect against those future threats.” (internal citations omitted).

203. *Fikre v. FBI*, No. 3:13-cv-00899, 2016 WL 5539591, at *6 (D. Or. Sep. 28, 2016); *Fikre v. Wray*, No. 3:13-cv-00899, 2020 WL 4677516, at *3 (D. Or. Aug. 12, 2020); *Fikre v. FBI*, 35 F.4th 762, 770 (9th Cir. 2022); *Long*, 38 F.4th at 422–23; *Mokdad v. Sessions*, 876 F.3d 167, 169 (6th Cir. 2017).

204. *Geraghty*, 445 U.S. at 400.

205. *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Obvious circumstances in this category are cases concerning elections, reproductive rights, and issues concerning government benefits (e.g., durational educational programs) or pretrial bail or confinement.

206. *See, e.g., Sibron v. New York*, 392 U.S. 40, 55 (1968) (internal quotation marks and citation omitted).

207. All of these exceptions (and others exist) lead some to conclude that mootness has a prudential basis, not a constitutional one. *See, e.g., Hall, supra* note 199; Scott T. MacGuidwin, *Note: Mooting Unilateral Mootness*, 121 MICH. L. REV. 641, 646 n.35 (2023) (“If mootness were truly a constitutional issue, then courts would have no authority to hear moot cases, even if prudential factors weigh in favor of hearing the case.”). This article need not resolve this issue to criticize the use of the voluntary cessation exception in the watchlisting context.

208. *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021) (holding suit for injunctive relief and nominal damages remained justiciable even after defendant changed policies after suit to render injunctive relief moot). *But see Campbell-Weald Co. v. Gomez*, 577 U.S. 153, 166 (2016) (reserving

in many cases in which the government is the defendant, an official may not be subject to a claim for money damages.²⁰⁹ That is the position in which Fikre found himself.²¹⁰ All that is available to the plaintiff is declaratory and injunctive relief. When the government defendant renders that judicial action unnecessary by changing its policies, reversing its decision, or otherwise alters its complained-of actions, the case may be moot.

The government repeatedly opposed application of the voluntary cessation exception in Fikre's case. There is an irony in that argument, because it is the reverse of the government's position advanced when it was the plaintiff in an early, foundational case for the voluntary cessation exception, *United States v. W.T. Grant Co.* In that case, the exception was meant to *promote* law enforcement, not foreclose remedies for the law's alleged violation. That is, the original concern was with *private* defendants engaging in gamesmanship against *public* efforts to enforce the law.

The case concerned a civil action by the United States to enjoin violation of antitrust legislation.²¹¹ Shortly after the United States filed its complaint, the defendants stopped their challenged conduct, filed affidavits that they had done so, and moved to dismiss the complaint as moot.²¹² After all, what was left to enjoin? The Court presented a public policy rationale for rejecting the claim of

question whether suit remains justiciable "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount").

209. *See, e.g.*, Jacksonbey v. U.S. Dep't of Just., No. 2:22-cv-00469, 2024 WL 4216023 (S.D. Ind. Sep. 17, 2024) (barring *Bivens* damages claim and holding claim for injunctive relief moot following government correction of records). Even when money damages are permitted, other doctrines may bar that remedy. *See, e.g.*, Tanvir v. Tanzin, 120 F.4th 1049, 1053 (2d Cir. 2024) (affirming lower court judgment that barred on qualified immunity grounds, and therefore dismissed, suit under RFRA for damages remedy against FBI agents alleged to have asked plaintiffs "to serve as government informants within Muslim communities, and that when they refused, the agents pretextually placed or retained them on the federal government's 'No Fly List,' even though none of them posed a threat to aviation safety").

210. Fikre's previous claims for money damages were dismissed with prejudice on sovereign immunity grounds, *see* Fikre v. FBI, 142 F. Supp. 3d 1152, 1168–69 (D. Or. 2015), and for failure to state a claim, No. 3:13-cv-00899, 2016 WL 5539591, at *13–16 (D. Or. Sep. 28, 2016). His proposed eighth amended complaint added a claim for damages under RFRA, presumably based on *Tanzin v. Tanvir*, 592 U.S. 43 (2020), and the notice foreclosing a qualified immunity defense in the future that was provided by *Tanzin v. Tanzin*, 120 F.4th 1049 (2d Cir. 2024). *See* Proposed Eighth Amended Complaint, Fikre v. FBI, No. 3:13-cv-00899 (D. Or. July 29, 2024), Dkt. No. 184-1. However, Judge Mosman denied Fikre's Motion for Leave to File an Eighth Amended Complaint with respect to his proposed RFRA claim. Fikre v. FBI, No. 3:13-cv-00899, 2025 WL 88705 (D. Or. Jan. 14, 2025). Judge Mosman held that the proposed claim was both "futile because it is inadequately pleaded under Rule 8 and, therefore, would not survive a Rule 12(b)(6) motion to dismiss," *id.* at *1 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) and substantively deficient because "even if his proposed claim was adequately pleaded, Mr. Fikre cannot sustain a valid RFRA claim" under his theory. *Id.* at *2. Because the motion was granted with respect to certain proposed factual allegations, the case continues. *Id.* at *1; *see also supra* note 8.

211. *United States v. W.T. Grant Co.*, 345 U.S. 629, 630 (1953).

212. *Id.*

mootness and keeping the case alive despite the apparent end of any further injury:

This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.²¹³

Viewed in this way, Fikre's case against mootness is clear. The opportunity to settle the "legality of the practices" that (as he alleges) barred his travel home, sought to coerce his compliance as an informant, and led to his torture is of great importance to him. The government's willingness to drop the case doesn't remove the value to him of a court determining that those actions were unlawful and prohibiting the government from engaging in them again. Not knowing why he was targeted, he considers himself still at risk. Fikre's remaining requests for equitable relief all focus on that remedy.

Justice Gorsuch's short, unanimous opinion does not flow from this perspective, although the end result allows Fikre to fight a little longer. Rather, the operative part of the opinion (which follows a summary of Fikre's allegations and the proceedings below) opens with a general statement of the mootness doctrine rooted in Article III. Justice Gorsuch notes the "limited authority vested in federal courts to decide cases and controversies," with a pinpoint citation that imbeds that rule firmly in Article III.²¹⁴ There is no middle ground apparent in his statement that "a federal court *must* dismiss the case as moot" if litigation would secure no further relief after "events in the world overtake those in the courtroom."²¹⁵

The pinpoint citation to support this seemingly absolute "must-dismiss" rule is to *Already, LLC v. Nike, Inc.* This 2013 case applied the voluntary cessation exception to mootness that is at issue in *Fikre*. But the citation provides a policy basis for voluntary exception that conflicts with, and certainly is not based in, strict adherence to Article III limits:

We have recognized, however, that a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. Given this concern, our cases have explained that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of

213. *Id.* at 632 (internal citations and footnotes omitted).

214. *FBI v. Fikre*, 601 U.S. 234, 241 (2024) (citing *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)).

215. *Id.* at 240 (emphasis added).

showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.²¹⁶

When Justice Gorsuch moves on to explain voluntary cessation in the next paragraph, again citing to this passage from *Already*, he fares no better.²¹⁷ *Already* relies on another case, *Aladdin's Castle*, to present another assertion hard to square with Article III: that the lower court “was under no duty” to declare moot a lawsuit despite a change in the middle of litigation to the language in an ordinance that was the central issue in the case.²¹⁸ And the next pinpoint cite, from *Friends of the Earth*, said the quiet part out loud: “if mootness were simply ‘standing set in a time frame,’ the exception to mootness that arises when the defendant’s allegedly unlawful activity is “capable of repetition, yet evading review,” could not exist.”²¹⁹

After these broad explanations of mootness in general and voluntary cessation in particular, which occupy the first third of this operative part of the opinion, Justice Gorsuch applies what he terms these “traditional mootness principles” to Fikre’s case.²²⁰ The same inconsistency occurs again. On the one hand, Justice Gorsuch notes that “a federal court’s duty to ensure itself of Article III jurisdiction may begin at the inception of a lawsuit, but it persists throughout the life of the proceedings.”²²¹ Of course, that’s a solid Article III requirement.

But in explaining that neither the contents of the government’s “sparse declaration” nor the passage of time since Fikre’s removal from the watchlist satisfies the “formidable burden” that voluntary cessation principles place on the government, Justice Gorsuch concludes that “[i]t is on that consideration alone—the potential for a defendant’s future conduct—that we rest our judgment.”²²² Potential future conduct sounds an awful lot like conjectural or hypothetical conduct, quintessentially insufficient to support a case or

216. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal citations omitted).

217. *Fikre*, 601 U.S. at 241.

218. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288 (1982). In fact, applying the voluntary cessation exception “is a matter relating to the exercise rather than the existence of judicial power.” *Id.* at 289.

219. *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 190 (2000). The *Friends of the Earth* Court explained the very practical basis for its view in a way that resonates with the delays and frustrations of lengthy No Fly List suits: “Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years.” *Id.* at 191.

220. It is interesting to note that Justice Gorsuch never uses the word “exception” in his opinion, although it is how “voluntary cessation” and other exceptions to mootness are regularly described. Reference is instead made to “traditional mootness principles” and “precedents” to introduce them. *FBI v. Fikre*, 601 U.S. 234, 241, 244 (2024). This would seem to be a way to elide the fact that these principles, found in those precedents, are grounded in policy concerns, and thus hard to reconcile with the logic of Article III.

221. *Id.* at 244.

222. *Id.*

controversy under Article III.²²³ And the long-standing test—that the defendant bears a “formidable burden” to show that it is “absolutely clear” that the subject of the complaint “could not reasonably be expected to recur”—is not a formula that is supportable by considerations other than policy.²²⁴

All this dancing around takes up a lot of space in this short opinion. What is more, it obscures an essential point. The issue in the voluntary cessation analysis is not whether Fikre has maintained the Article III standing that brought him to this point after a decade of litigation. There was no doubt now that Yonas Fikre is not on the No Fly List. He sought no damages and, as the Solicitor General emphasized in her petition for certiorari, Fikre and the Justice Department agreed that “there is no longer a live controversy with respect to Plaintiff’s request for an injunction requiring the Government to remove him from the No Fly List.”²²⁵ All that remained in Fikre’s complaint was a request for declaratory relief about the illegality of what was done to him and various requests for injunctive relief based on his suspicion that he may be subjected to similar watchlisting in the future.²²⁶ Of course, that’s potential (one might say conjectural, speculative, or even hypothetical) future conduct, too.

This emphasis on Article III is a *non sequitur*. Fikre’s injury was there at the start. Had it not been, the proper motion to dismiss would be for want of standing, not mootness. Justice Gorsuch alludes to (if he doesn’t invite) just such a future motion on remand, when “the complaint’s allegations will be tested rather than taken as true, and different facts may emerge . . . for a federal court’s duty to ensure itself of Article III jurisdiction may begin at the inception of a lawsuit, but it persists throughout the life of the proceedings.”²²⁷

The real issue before the court is whether the defendant’s assertion that the controversy is now moot should be believed. Only then would Fikre have managed “to secure outside of litigation all the relief he might have won in it.”²²⁸ Testing whether the defendant’s voluntary cessation renders the case moot shifts to the defendant the “formidable burden” of proving that the injurious action has

223. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”) (internal quotations and citations omitted).

224. Hall, *supra* note 199, at 582.

225. See Joint Stipulation, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. May 27, 2016), Dkt. No. 102; see also Petition for a Writ of Certiorari at 6, *Fikre*, 601 U.S. 234 (No. 22-1178).

226. As Fikre summarized his complaint in his brief to the Supreme Court, “Fikre continues to seek declaratory and injunctive relief, including a declaratory judgment that his due process rights were violated by his addition to the No Fly List; an order restricting the government from subjecting him to anything other than standard security precautions at airports; an order to remove and expunge his watchlist and No Fly List records; an order requiring the government to provide him with written notice if his name is again added to the No Fly List; and an order requiring the government to disclose the specific reasons he was listed and to repudiate that decision.” Brief for Respondent at 12, *FBI v. Fikre*, 601 U.S. 234 (2024) (No. 22-1178).

227. *Id.* at 244.

228. *Id.* at 240.

ceased and cannot reasonably be expected to recur. Perhaps the best formulation of this understanding was by Justice Scalia: “The ‘voluntary cessation’ doctrine is nothing more than an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist.”²²⁹

Justice Gorsuch’s approach can be seen to respond to this “evidentiary presumption” with a singular focus on only one piece of evidence: the Courtright declaration. Nothing in the government’s representation, he writes, “speaks to whether the government might relist him if he does the same or similar things in the future—say, attend a particular mosque or refuse renewed overtures to serve as an informant.”²³⁰ This focus allows the opinion to conclude on a high note for the government, emphasizing the national security context in which the case occurs. “Careful attention must be paid to the handling of classified or privileged information.”²³¹ A future declaration, it would be reasonable to infer, need not say too much more even if “so far” the government has not satisfied its burden.²³²

“So far” was an invitation to try again. Justice Alito, joined by Justice Kavanaugh, concurred solely to drive this point home. “I join the Court’s opinion, but write to clarify my understanding that our decision does not suggest that the Government must disclose classified information to Mr. Fikre, his attorney, or a court to show that this case is moot.”²³³ In fact, Justice Alito emphasizes the possibility that “non-classified information or information obtained in discovery from the plaintiff in this and other cases may be sufficient

229. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 213 (2000) (Scalia, J., dissenting) Justice Scalia presented this view in *support* of the idea that mootness, as well as its exceptions, are grounded in the federal courts’ limited jurisdiction under Article III. *Id.* at 212 (Scalia, J., dissenting) (“We have repeatedly recognized that what is required for litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III.”). By Justice Scalia’s lights: “Where the conduct has ceased for the time being but there is a demonstrated probability that it will recur, a real-life controversy between parties with a personal stake in the outcome continues to exist.” *Id.* at 213–14 (Scalia, J., dissenting) (quoting *Honig v. Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting)). This “probability” is hard to square with his seminal statements about standing doctrine in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992) (“Although ‘imminence’ is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is ‘*certainly* impending.’”) (citation omitted), let alone subsequent precedents heightening that hurdle. *See, e.g.*, *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (“Thus, we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.”) (internal quotation marks omitted).

230. *Fikre*, 601 U.S. at 242. The government also sought support from the duration of time that had passed since Fikre’s removal from the watchlist. But this was quickly dismissed as an attempt at burden shifting. *Id.* at 243 (“In all cases, it is the defendant’s ‘burden to establish’ that it cannot reasonably be expected to resume *its* challenged conduct—whether the suit happens to be new or long lingering, and whether the challenged conduct might recur immediately or later at some more propitious moment.”).

231. *Id.* at 244.

232. *Id.* at 245.

233. *Id.* (Alito, J., concurring).

to show that the allegedly unlawful listing is unlikely to recur, thereby proving mootness,” without a word about the possibility of useful discovery coming from the government defendants.²³⁴

In a national security environment in which so much information is, or can be, kept from the public and plaintiffs alike, this is not an approach that promises much more than slightly less “sparse” or “terse” declarations from officials and entities that already do their best to say as little as possible while shielding their involvement in watchlisting decisions. The D.C. Circuit expressed disgust for this sort of logic:

At oral argument, Government counsel suggested that if the Jibrils would like to determine whether they remain on a terrorist watchlist, some or all members of the family can book another trip to see whether they endure the same problems that they faced in 2018. Whether this suggestion was meant to be a tongue-in-cheek quip or simply a heartless argument, it makes no sense.²³⁵

Part III presents an alternative approach to assessing Justice Scalia’s “evidentiary presumption” that makes more sense.

III. THE GHOST IN THE MACHINE

What would application of the voluntary cessation rule look like if the *Fikre* Court had focused on the nature of the agency that proffers the declarant and not just the declaration alone? This concluding section of the article asks how an examination of the structure of the TSC, largely hidden but nevertheless at the heart of this case, could inform the “evidentiary presumption” at the base of the voluntary cessation exception. What structural or institutional details might lead a court to conclude that “the controversy reflected by the violation of alleged rights continues to exist”?²³⁶ What could reassure, or alarm, a court trying to discern whether *Fikre* was removed from the No Fly List because he had begun to see success in litigating against it (leaving the government “free to return to [its] old ways”), or was removed for reasons and in ways that make “absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur”?²³⁷

The Threat Screening Center is the ghost in the government’s watchlisting machine. The autonomy and secrecy that the TSC prizes for the free range of action it provides becomes a liability when the credibility of its assurances about mootness are assessed. Although courts routinely afford government agencies

234. *Id.*

235. *Jibril v. Mayorkas*, 20 F.4th 804, 817 (D.C. Cir. 2021).

236. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 213 (2000) (Scalia, J., dissenting).

237. *Fikre v. FBI*, 904 F.3d 1033, 1039 (9th Cir. 2018).

the presumption that they act in good faith, the “formidable burden” to demonstrate mootness is one carried by the defendant, whether public or private. One need not question the integrity of hard-working government officials to recognize that they operate within a secret and unaccountable system.²³⁸

In asking what prevents a recurrence of such action by the TSC, a natural first stop is to consider any restrictions the legislature placed on it. But there are none. Nothing in the United States Code authorized its establishment.²³⁹ The Aviation and Transportation Security Act does not provide it with any authority to compile watchlists, let alone establish criteria for their composition or requirements for how compliance with those criteria should be controlled. That statute authorizes a *different* agency, the TSA, to consult with other agencies before taking action to protect “civil aviation or national security” but says nothing about what *those* agencies may do in support of that mission.

Similarly, reassurance might be given that agency action could not reasonably be expected to recur if it were bound by publicly promulgated regulations, rules that create a check on mere exercises of executive discretion. But nothing of the kind is to be found in regulations promulgated by the FBI, Department of Justice, or *any* agency stakeholder in this system. In fact, both the FBI and DHS have exempted the TSC from various provisions of the Privacy Act.²⁴⁰ That law requires, *inter alia*, that each agency that maintains a system of records shall “maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.”²⁴¹

Rather than follow this regulatory regime, the FBI opted the TSC out of it, with only unenforceable assurances of self-regulation:

[M]any of the records in this system are derived from other domestic and foreign agency record systems and therefore it is not possible for the FBI and the TSC to vouch for their compliance with this provision;

238. KAHN, MRS. SHIPLEY’S GHOST, *supra* note 141, at 15.

239. At times, the government has argued that the Intelligence Reform and Terrorism Prevention Act is a source of authority. See Privacy Act of 1974; System of Records, 76 Fed. Reg. 77846, 77848 (Dec. 14, 2011) (citing, *inter alia*, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, as a source of authority for maintenance of its Terrorist Screening Records System); see also Declaration of Timothy P. Groh ¶ 4 n.1, *Elhady v. Kable*, No. 1:16-cv-00375 (E.D. Va. Mar. 11, 2019), Dkt. No. 299-4 (asserting that Congress “mandated greater sharing of terrorist information among federal departments and agencies,” citing IRTPA § 1016). IRTPA neither references the TSDB or TSC, nor does it impose any limits on them. As I noted in an *amicus* brief filed in the Fourth Circuit in the *Elhady* case, other than a 2005 requirement of some reports and guidelines that lack any indication of obligation, this law provides only hortatory instructions to the Director of National Intelligence to protect privacy and civil liberties. See Brief of Professor Jeffrey D. Kahn as Amicus Curiae in Support of Plaintiffs-Appellees at 5 n.8, *Elhady v. Kable*, Nos. 20-1119 & 20-1311 (4th Cir. June 2, 2020), Dkt. No. 43-1.

240. See, e.g., 28 C.F.R. § 16.96(s)(4), (6)–(8) (FBI); see also 6 C.F.R. Pt. 5, App. C (DHS).

241. 5 U.S.C. § 552a(e)(5).

however, *the TSC has implemented internal quality assurance procedures to ensure that TSC terrorist screening data is as thorough, accurate, and current as possible . . .* In the collection of information for law enforcement, counterterrorism, and intelligence purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light. The restrictions imposed by (e)(5) would limit the ability of those agencies' trained investigators and intelligence analysts to exercise their judgment in conducting investigations and impede the development of intelligence necessary for effective law enforcement and counterterrorism efforts. *The TSC has, however, implemented internal quality assurance procedures to ensure that TSC terrorist screening data is as thorough, accurate, and current as possible.*²⁴²

Notice that this exemption limits its assurances only to internal quality controls over the thoroughness, accuracy, and currency of TSC's information. No assurances are given about any procedures regulating the decisions made by its officials in reliance upon that data.

Any standards, rules, or criteria that do exist (and numerous exceptions to them) are all based solely on internal guidance manuals that are self-imposed and largely inaccessible. When leaked, the government declines to confirm their existence.²⁴³ And, historically, when courts have inquired about these criteria, or even acknowledgment that someone has been placed on the No Fly List, the TSC has claimed that national security would be compromised by such revelations. In the end, after ten years of litigation, the *Latif* case extracted reforms that make that information more accessible.²⁴⁴ However, the TSC continues to refuse acknowledgment of TSDB or Selectee List status.²⁴⁵

Neither HSPD-6 nor its MOU was published in the Federal Register nor refers to any regulatory authority. Indeed, HSPD-6 makes clear that it was only intended to improve "the internal management of the executive branch" and expressly did "not alter existing authorities or responsibilities of department and agency heads to carry out operational activities or provide or receive information."²⁴⁶ The MOU is hardly better, since its authority is even further removed from law and itself represents nothing more than the "consensus view"

242. 28 C.F.R. § 16.96(s)(7) (emphasis added).

243. See HSGAC MAJORITY STAFF REPORT, *supra* note 170, at 31.

244. See *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014).

245. HSGAC MAJORITY STAFF REPORT, *supra* note 170, at 34–35. The report expresses concern that "[t]he lack of acknowledgement of a change of status and repeated additional screenings for different reasons creates the possibility of a breakdown in trust and communication between the government and those who experience this cycle." *Id.*

246. Homeland Security Presidential Directive, *supra* note 152, after ¶ 5.

of four members of the Cabinet.²⁴⁷ In any event, it has never been publicly released.

Further, the precise content of what this presidential authorization requires is contested. The GAO reported that “[c]onsistent with Homeland Security Presidential Directive 6, to ensure that watchlist information is current, accurate, and complete, nominating agencies generally are to provide information to remove an individual from the watchlist when it is determined that no nexus to terrorism exists.”²⁴⁸ But the FBI told Senate staff that “this requirement does not appear in HSPD-6.”²⁴⁹

This isolation from established statutory and regulatory review and control is not by accident, but by design, to accomplish the TSC’s mission through what the FBI called “a unique, interagency business model.”²⁵⁰ By comparison, other contemporaneously created entities involved with national security watchlists within the Executive Branch have been established by statute. For example, the National Counterterrorism Center (the successor to the Terrorist Threat Integration Center that curated the first massive terrorism database, the Terrorist Identities Datamart Environment (TIDE)), was established by the Intelligence Reform and Terrorism Prevention Act of 2004.²⁵¹ So was its director, that office’s lines of direct report, their duties and responsibilities, and their limitations.²⁵²

Searching for limits on otherwise unbridled discretion is a search for structural reassurances that the agency declarant’s assurances are not easily discarded after the litigation threat has passed. Indeed, after *Fikre* was handed down, one federal judge sought to reconcile that case with an earlier Ninth Circuit opinion that seemed to diverge from Justice Gorsuch’s admonition that the formidable burden to successfully asserting mootness “holds for governmental defendants no less than for private ones.”²⁵³ Sitting en banc, the Ninth Circuit had previously held that “legislative actions should not be treated the same as voluntary cessation of challenged acts by a private party.”²⁵⁴ The legislature was given an easier time, with the burden shifted by a presumption that “repeal, amendment, or expiration of legislation will render an action

247. MOU, *supra* note 153, ¶ 1.

248. GOV’T ACCOUNTABILITY OFF., GOA-12-476, TERRORIST WATCHLIST: ROUTINELY ASSESSING IMPACTS OF AGENCY ACTIONS SINCE THE DECEMBER 25, 2009, ATTEMPTED ATTACK COULD HELP INFORM FUTURE EFFORTS 39 (2012).

249. HSGAC MAJORITY STAFF REPORT, *supra* note 170, at 13 (noting FBI response to Senate Homeland Security and Governmental Affairs Committee majority staff, October 13, 2023).

250. FBI, *supra* note 171, at 4-4.

251. See Intelligence Reform and Terrorism Prevention Act, Pub. L. 108-458, § 1021, 118 Stat. 3638 (2004).

252. *Id.*

253. *FBI v. Fikre*, 601 U.S. 234, 241 (2024).

254. *Ger Chong Ze Chang v. Cnty. of Siskiyou*, 746 F. Supp. 3d 808, 821 (E.D. Cal. Aug. 21, 2024) (quoting *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc)).

challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it.”²⁵⁵

The district court concluded that the Ninth Circuit’s burden-shifting scheme survived *Fikre*. The court’s reasoning is grounded in the structural differences between legislative action and executive action. In support, the district court actually referenced the Ninth Circuit’s logic in their first *Fikre* opinion prior to the one that Justice Gorsuch had affirmed:

[T]he form the governmental action takes is critical and, sometimes, dispositive. A statutory change is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed. The rigors of the legislative process bespeak finality and not for-the-moment, opportunistic tentativeness. On the other hand, an executive action that is not governed by any clear or codified procedures cannot moot a claim.²⁵⁶

What are those rigors? Procedural regularity, public accountability, codified rules, and accessible work product. Not all of those characteristics may be easily transferred to an entity in the intelligence community acting to protect national security. But neither are they inherently always in conflict with that role. That is especially true when the work of the government entity directly translates into concrete action that can affect the rights of U.S. persons. Intelligence gathering is different than taking action based on that intelligence.

The Second Circuit has similarly distinguished *Fikre* in a case that makes this last point even clearer. After the New York Police Department denied Joseph Srour a gun permit, he sued for injunctive, declaratory, and monetary relief, challenging the city’s permitting rules.²⁵⁷ The court partially ruled for the plaintiff, but before it could fully rule on the merits, the city-defendant defined a previously undefined term (a vague “good moral character” requirement) that was central to its permitting process and, when the plaintiff reapplied, granted the gun permit²⁵⁸. The city filed an interlocutory appeal and moved to dismiss the case as moot and vacate the lower court’s initial judgment after its definitional reform.²⁵⁹

The Second Circuit distinguished *Fikre*, focusing on a description of the watchlisting system (“it appears no statute or publicly promulgated regulation describes the standards” for adding or removing individuals from the watchlist) that—the main criticism of this article—subsequently played no role in the

255. *Id.*

256. *Fikre v. FBI*, 904 F.3d 1033, 1038 (9th Cir. 2018) (internal quotation marks, ellipses, and citations omitted).

257. *Srour v. New York City*, 117 F.4th 72, 76 (2d Cir. 2024).

258. *Id.* at 76–77.

259. *Id.* at 76.

reasoning behind Justice Gorsuch's opinion.²⁶⁰ But to the Second Circuit, this was the central, *structural*, point:

The fact that the defendant ceased and declared it would not restart its challenged behavior are where the similarities between *Fikre* and this case begin and end. In *Fikre*, the government unilaterally took Fikre off the No Fly List. Here, Srour actively applied for a rifle and shotgun permit again. Once Srour re-applied for a permit, the City had legal obligations to him beyond his role as a litigant in this suit. It was required to process his application. And it was required to do so under the new regulations defining "good moral character" promulgated by the NYPD.²⁶¹

None of these requirements exist to constrain the TSC, which decides its rules in secret as well as when they will not apply. Nothing in the TSC's organization, structure, or supervision provides anything similar to the public, transparent regulations that govern New York's permit system. Indeed, to the extent that any such system exists, the DHS TRIP system's design shields the TSC (the actual decision-maker) from the public it affects.

The Second Circuit also noted a sequencing detail that distinguished *Srour* from *Fikre* in a key factual way: "Srour, not the City, initiated review of his new application, which was eventually granted in March of 2024."²⁶² In a footnote, the Court observed, "If the City, after being faced with this lawsuit and decision from the district court, unilaterally reversed its denial of Srour's original 2018 application and issued him a rifle and shotgun permit, his case might more closely resemble *Fikre*."²⁶³

This, too, connects with structural considerations. Fikre's efforts to reach TSC decision-makers through the screen of the DHS TRIP system met with failure for six years. Twice, opaque statements through the TRIP system revealed no change in his status, and no explanation for the conclusion that he was a "threat."²⁶⁴ As the Ninth Circuit noted, the government "refused to remove him from the No Fly List [in 2015]. Yet it did just that fourteen months later, without explanation or any announced change in policy. Fikre was taken off the list two months after briefing was completed on the government's motion to dismiss Fikre's lawsuit."²⁶⁵

The Second Circuit then turned to directly distinguish *Fikre*'s logic from its own conclusion that Srour's case was moot:

260. *Id.* at 84.

261. *Id.* (internal citations omitted).

262. *Id.*

263. *Id.* at 84 n.7.

264. *Fikre v. FBI*, 904 F.3d 1033, 1036 (9th Cir. 2018).

265. *Id.* at 1040.

Additionally, in *Fikre*, when faced with a policy governed by no public rules or regulations, the Supreme Court could not rely on the government's "sparse declaration" that Fikre would not be subject to impermissible placement on the No Fly List in the future. Here, we have a robust set of rules and regulations governing the granting and renewal of licenses. We know quite a bit, including the exact standards that changed between the denial of Srour's first application and the granting of his second, the fact that his renewal will generally be automatic, and the criteria under which his renewal would not be automatic. Moreover, unlike in *Fikre*, if Srour's renewal were to be denied in the future, he would be provided with the exact reasons as to the denial.²⁶⁶

The Second Circuit is a little too generous to the Supreme Court. Critique of the sparse declaration was not made contingent on the absence of public rules or regulations. The Court made no such connection. That it should have done so is the essential argument of this article.

The TSC's isolation from oversight is not limited to the lawbooks. There is no public relations office at the TSC, which "does not receive or respond to individual complaints directly."²⁶⁷ In fact, even its physical location is undisclosed by the government. The only reason it is known to operate in Vienna, Virginia, is because the constant droning of HVAC systems needed to cool its computers led to a spat with angry neighbors for violating local zoning ordinances.²⁶⁸

Although the building lacks any visible signs, newspaper accounts can now be confirmed using Google Maps because the Center's former director dramatically revealed during an interview on CNN that its employee entrance is ornamented with a three-story tall sculpture taken from the rubble of the World Trade Center's North Tower.²⁶⁹ The sculpture is placed so that employees must file past it each morning on their way from the secure parking lot to the building entrance. This sobering opportunity for reflection at the start of the workday is hardly accidental. In his interview, TSC Director Christopher Piehota explained the purpose of this sculpture to his CNN interviewer: "It reminds us daily of the importance of what we do."²⁷⁰

266. *Srour v. New York City*, 117 F.4th 72, 84 (2d Cir. 2024) (internal citations omitted).

267. Privacy Act of 1974; System of Records, 76 Fed. Reg. 77846, 77850 (Dec. 14, 2011).

268. Tom Jackman, *Vienna Tormented by FBI Building's Non-Stop Buzz*, WASH. POST, June 21, 2012.

269. *An exclusive look inside the Terrorist Screening Center*, CNN POL. (Apr. 6, 2016), <https://www.cnn.com/videos/politics/2016/04/06/exclusive-interview-with-terrorist-screening-center-director-christopher-piehota-origwx-allee.cnn> [<https://perma.cc/459K-X82L>]. This paragraph and the following one, with minor changes, is taken from the author's Brief in Support of Plaintiffs-Appellees, at 23–27, *Elhady v. Kable*, Nos. 20-1119 & 20-1311 (4th Cir. June 2, 2020), Dkt. No. 43-1.

270. CNN POL., *supra* note 269, at 00:10.

Nor is the sculpture the only reminder. Once inside the building, these reminders continue. Director Piehota escorted his interviewer inside the building and showed CNN's audience the images his staff see each morning: a macabre museum of artifacts from past terrorist attacks. Again, his message was very clear. As he somberly observed standing in front of another piece of the wreckage from the World Trade Center, "The remnants were put here to remind our staff of our mission, which is to prevent acts of terrorism. Keeps us mindful of the threat that is still out there. Each remnant or each artifact shows you the evolution of terrorism."²⁷¹ Since this building is not accessible to the public, this museum's purpose is not to educate anyone who does not work at the TSC. The message to the employees passing these artifacts of intelligence failures seems clear: Do not err on the side of caution; do not interrogate too rigorously the judgments of those who send you names of people to be watchlisted. There will be no reward (and there is too much at risk) to question the reasons for adding someone who has been placed on the watchlist. The reasonable suspicion standard is meant to accord deference to the reasonable suspicion of FBI agents, not to provide an independent, neutral adjudication of their claims.

CONCLUSION

Courts whose role in the separation of powers is to decide cases and controversies declare themselves unable to proceed in watchlisting cases because unseen actors, ghosts in the government's watchlisting machine, assert that the claim that is the subject of judicial scrutiny has been rendered moot. This assertion is provided by yet another occult action: the TSC's secret conclusion, but neither its grounds nor anything else, is reported in a brief declaration that tends to be filed when the government has been unsuccessful in getting the case dismissed with other arguments. This can happen weeks after the complaint is filed, or months or years after the plaintiff has been stonewalled by government silence or conclusory responses.

This gamesmanship is just what the voluntary cessation exception to the mootness doctrine is supposed to prevent. Rendered by the Supreme Court in *FBI v. Fikre* as a referendum on the wording of the declaration alone, that exception is substantially weakened. A better approach is one that does not view the declaration in isolation, but considers its assurances alongside its silences about the nature of the decision-making process, the structure of the institution in which the real decision is made, and the impact—or absence—of statutory and regulatory regimes that can hold the decision-maker to its promises.

The TSC, from its creation to today, is an entity that is fundamentally premised on playing the central, decision-making role behind the screen of government agencies that shield it from scrutiny. It is the ghost in the government's watchlisting machine. Fortunately, such institutions are very rare in the federal government. But they are not unicorns.

271. *Id.* at 00:22.

Failure to establish a more substantial evaluation of the TSC's assurances, with a full understanding of the institutional context in which those assurances are being made, is dangerous. As its name change from Terrorist Screening Center to Threat Screening Center implies, watchlisting is a growth industry and the No Fly List merely an initial example of its power. According to a congressional inquiry to the agency heads that the TSC's watchlists support, portions of its work product are "distributed to other federal agencies, over 18,000 law enforcement agencies, over 500 private entities, and around 60 foreign governments."²⁷² Depending on the particular watchlist in question, the TSC may have a hand in restricting individuals' "air, land, and sea travel, as well as access to immigration benefits, financial services, employment, licenses, security clearances, and more."²⁷³

Even as far back as 2010, when the TSC PowerPoint slide that appears below (Figure 3) was created, that entity was dreaming big. The TSC leadership realized even before it changed its name that there was no logical reason why screening and watchlisting should stop at terrorism directed at civil aviation, or even limited to terrorism as a national security threat. The limits were, and are, only one's imagination.

Fig. 3. The Future According to the Terrorist Screening Center



272. Letter from Senator Elizabeth Warren, Senator Bernie Sanders, Congressman André Carson and Congresswoman Katie Porter to Att'y Gen. Merrick Garland, Dir. [sic] Alejandro Mayorkas, Dir. Christopher Wray, Under Sec'y Ken Wainstein, Comm'r Troy Miller, Adm'r David Pekoske, Dir. Avril Haines, and Dir. Christine Abizaid 2 (Dec. 20, 2023), <https://www.warren.senate.gov/imo/media/doc/2023.12.20%20Terrorism%20Watchlist%20Letter.pdf> [https://perma.cc/KLW9-78KQ].

273. *Id.* at 2–3.

Following after *FBI v. Fikre*, but not following its approach, both the Second Circuit Court of Appeals and the District Court for the Eastern District of California have shown that inquiry into the structural details of the relevant government actor is both possible and useful in assessing claims of mootness. In examining the declaration that seeks to assure the court that the challenged action cannot “reasonably be expected to recur,” it is entirely reasonable to examine the institutional context from which the declarant comes.

For plaintiffs like Yonas Fikre and the A to Z of litigants who have made similar allegations only to be denied the opportunity to prove them in court, such scrutiny makes all the difference. For agencies like the FBI, rendering the mootness tool harder to wield will, if Fikre and others are to be believed, bring greater accountability. And for entities like the TSC, such a change need not spell the end of their watchlisting world. The core of its mission—consolidating, systematizing, and sharing intelligence about national security threats across the federal government—will not be affected by a requirement that when its lists turn into action against U.S. persons who then challenge that decision, the ghost comes out of its machine.

Appendix A. Abbreviated Timeline of Fikre District Court Litigation

May 30, 2013	Initial Complaint FBI agents in Sudan notify Fikre he is on the No Fly List in 2010	
Nov. 4, 2013		Motion to Dismiss
Jan. 23, 2014	DHS TRIP Letter “No changes or corrections are warranted”	
June 27, 2014		2d Amended Complaint ²⁷⁴
Aug. 8, 2014		Motion to Dismiss
Jan. 14, 2015		Order re New DHS TRIP Procedures ²⁷⁵
Mar. 16, 2015	Joint Status Report “He is (and, after completion of the renewed DHS TRIP process, remains) on the No Fly List.”	
Apr. 6, 2015		4th Amended Complaint
May 22, 2015		Motion to Dismiss
Nov. 29, 2015		5th Amended Complaint ²⁷⁶
Jan. 21, 2016		Motion to Dismiss
May 9, 2016	Gov’t Notice Regarding Pl.’s Status “Plaintiff has been removed from the No Fly List.”	
Oct. 24, 2016		Dist. Ct. dismisses case
Jan. 10, 2019		Ninth Circuit remands

274. This amended complaint resulted from Judge Brown’s opinion and order dismissing one claim with prejudice for failing to meet pleading requirements and dismissed several others without prejudice and with leave to amend. Opinion and Order, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. May 29, 2014), Dkt. No. 36.

275. Judge Brown, noting “this case is now over 18 months old and has not yet proceeded beyond the pleading stage,” extended time to allow for substantive reconsideration of Fikre’s DHS TRIP inquiry consistent with new procedures emerging from her oversight in *Latif v. Holder*. She ordered a joint status report on the results due March 16, 2015. Order, *Fikre*, No. 3:13-cv-00899 (D. Or. Jan. 14, 2015), Dkt. No. 57.

276. This amended complaint resulted from Judge Brown’s opinion and order dismissing some, but not all, of Fikre’s claims and granting leave to amend others. Opinion and Order, *Fikre*, No. 3:13-cv-00899 (D. Or. Nov. 4, 2015), Dkt. No. 81.

June 19, 2019	Courtright Declaration “He will not be placed on the No Fly List in the future based on the currently available information.”	Motion to Dismiss
Jan. 22, 2020		Sealed Motion to Dismiss
Aug. 12, 2020		Dist. Ct. dismisses case
May 31, 2022		Ninth Circuit remands

Appendix B. Letter to Yonas Fikre from DHS TRIP, January 23, 2014

Case 3:13-cv-00899-MO Document 33-1 Filed 03/04/14 Page 1 of 2

U.S. Department of Homeland Security
Traveler Redress Inquiry Program (TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901



**Homeland
Security**

January 23, 2014

Mr. Yonas Fikre
Co Advokat Hans Bredberg
Norlandsgaten 12, Third Floor
Stockholm
Sweden

Redress Control Number: 2184463

Dear Mr. Yonas Fikre:

Thank you for submitting your Traveler Inquiry Form and identity documentation to the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (TRIP). DHS's mission is to lead the unified national effort to secure the country, including U.S. border and transportation security. We take requests for redress seriously, and we understand the inconveniences that additional inspections may cause. DHS strives to process travelers in the most efficient and professional manner possible without compromising our mission to safeguard the United States, its people, and its visitors.

In response to your request, we have conducted a review of any applicable records in consultation with other Federal agencies, as appropriate. It has been determined that no changes or corrections are warranted at this time.

If you feel that this decision is in error, you may file a request for administrative appeal with the Transportation Security Administration (TSA) by following the instructions in the enclosure, "How to Request an Appeal of an Initial Agency Decision." The information you submit should be as complete as possible and include accurate dates, complete addresses, names, and telephone numbers where appropriate.

This determination will become final 30 calendar days after you receive this letter unless you file a timely administrative appeal. Final determinations are reviewable by the United States Court of Appeals pursuant to 49 U.S.C. § 46110.

If you have any further questions, please contact DHS TRIP via e-mail at TRIP@dhs.gov, or write to the address found in the letterhead.

Sincerely,

Deborah O. Moore
Director
DHS Traveler Redress Inquiry Program
cc w/encl: Atty. Thomas Howard Nelson

Appendix C. Declaration of Christopher R. Courtright, June 19, 2019UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

YONAS FIKRE,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION, *et al.*

Defendants.

Case No. 3:13-cv-00899-BR

DECLARATION OF CHRISTOPHER R. COURTRIGHT

I, Christopher R. Courtright, hereby declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am a Supervisory Special Agent with the Federal Bureau of Investigation (FBI) and the Associate Deputy Director for Operations of the Terrorist Screening Center (TSC). I became Associate Deputy Director for Operations at TSC in December 2015. I have been Acting Deputy Director for Operations of the TSC since June 10, 2019. I have been with the FBI since 2001 and have served in a variety of criminal investigative, counterterrorism, and management positions.

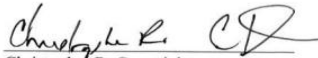
2. The matters stated herein are based on my personal knowledge and review and consideration of information available to me in my official capacity, including information furnished by TSC personnel, FBI Special Agents, and other Government agency employees or contract employees acting in the course of their official duties.

3. The current policies and procedures regarding inclusion on the No Fly List are described in the Watchlisting Overview document, released by the U.S. Government in January 2018.

4. On May 6, 2016, TSC advised counsel for Defendants that Plaintiff had been removed from the No Fly List. Counsel for Defendants notified counsel for Plaintiff of this change on Friday, May 6, 2016.

5. Plaintiff was placed on the No Fly List in accordance with applicable policies and procedures. Plaintiff was removed from the No Fly List upon the determination that he no longer satisfied the criteria for placement on the No Fly List. He will not be placed on the No Fly List in the future based on the currently available information.

Executed this 19th day of June 2019.


Christopher R. Courtright
Deputy Director for Operations, Acting
Terrorist Screening Center

THE REAL THREE-BODY PROBLEM: THE SEPARATION OF POWERS TODAY

R. GEORGE WRIGHT*

INTRODUCTION: QUESTIONS FROM THE CASE OF *BOWSHER V. SYNAR*

There are many possible entry points into the subject of today's constitutional separation of powers. One such entry point is through the well-known Supreme Court case of *Bowsher v. Synar*.¹ *Bowsher*, in this case, was the Comptroller General of the United States, a position the Court determined to be legislative and thus forbidden the exercise of executive branch powers.²

The *Bowsher* Court declared at the outset that “the Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.”³ The purpose of this “separating and dividing the powers of government”⁴ was said to be, “of course,”⁵ to “diffuse power the better to secure liberty.”⁶ A bit more elaborately, the Court declared that “there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.”⁷ And according to the *Bowsher* Court, the three branches were “wholly independent”⁸ of one another.

In further justifying the idea of the separation of powers, the *Bowsher* Court cited the historic desire “to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of government power.”⁹ Taken literally, this suggests that the separation of powers and checks and balances are not coordinate, complementary, or mutually limiting principles, but that the separation of powers is a means toward the end of having a checking mechanism on government power.

* Professor of Law, Indiana University Robert H. McKinney School of Law.

1. 478 U.S. 714 (1986). For a recent summary, see *Collins v. Yellin*, 594 U.S. 220, 245 (2021). There are many academic responses to *Bowsher*. See, e.g., Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 350–51 (1989); Suzanna Sherry, *Separation of Powers: Asking a Different Question*, 30 WM. & MARY L. REV. 287, 292–93 (1989); Peter Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

2. *Bowsher*, 478 U.S. at 721–32.

3. *Id.* at 721 (quoting the legislative veto case of *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

4. *Id.*

5. *Id.*

6. *Id.* (quoting the classic separation of powers case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)) (Jackson, J., concurring).

7. *Id.* at 722 (quoting THE FEDERALIST NO. 47, at 325 (James Madison) (Jacob E. Cooke ed., 1961) (quoting Montesquieu)).

8. *Id.*

9. *Id.*

Consider, then, the desire for “full, vigorous, and open debate on the great issues affecting the people.”¹⁰ As of the time of the adoption of the constitutional separation of powers, there was, for nearly all persons, no guarantee of speech rights as against any government actor.¹¹ Perhaps the structural separation and checking provisions themselves afford some protection for full, vigorous, and open public issues debate. Or perhaps these separation and checking mechanisms actually do a fully satisfactory job, all by themselves, of protecting public issue speech. Or perhaps, finally, the structural separation and checking only minimally protects public issue speech.

But with each of these possibilities, the relation between the presumed political speech protective purpose of the separation of powers and today’s First Amendment becomes deeply problematic. Today’s First Amendment provides, by any measure, a remarkable degree of protection for speech by ordinary persons on public issues.¹² So to the extent that the goal of the separation of powers is to protect free political speech, today’s First Amendment is a much more direct, explicit, and tailored way to achieve that goal. The free speech clause may well have additional purposes, some non-political in nature.¹³ But the free speech clause is indeed often thought to focus crucially on promoting full, vigorous, and open public issue discussion.¹⁴

To the extent that we think of the separation of powers as intended to promote free political speech, we might well wonder what value the separation of powers doctrine still has. If we took the separation of powers more seriously, would we then have significantly freer political speech than we now have? And would that be desirable? Why shouldn’t the enforced free speech clause suffice?

However useful the separation of powers may once have been in optimizing the flow of political speech, it may well now seem redundant in light of the strong and extensive protection of such speech under the free speech clause. The best argument for some independent value of the separation of powers in

10. *Id.*

11. See U.S. CONST. amend. I, added after, e.g., the Speech and Debate Clause, U.S. CONST. art. I, § 6, cl. 1.

12. The reader is invited to search for European or Canadian equivalents of, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (subversive advocacy); *Rankin v. McPherson*, 483 U.S. 278 (1987) (protecting controversial political expression outside of the government employee’s job responsibilities); *Snyder v. Phelps*, 562 U.S. 443 (2011) (group-abusive political and cultural speech unwelcomed by funeral participants); *Watts v. United States*, 394 U.S. 705 (1969) (on the scope and limits of political true threat law).

13. For accounts of such possible purposes, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

14. See, e.g., ZACHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 115–24 (1960); Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1054 (2016); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097 (2016); Vincent Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES. J. 521 (1977); Greenawalt, *supra* note 13, at 140–47; Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011). Note, in particular, the focus on the ‘checking’ function as emphasized in Blasi, *supra*.

protecting political speech focuses on judicial independence. Perhaps the courts would not have protected political speech under the First Amendment as well if the courts had not been largely independent from the president and Congress. Perhaps, at a specific level, the Court could not have fully protected political speech without the established power of judicial review established in *Marbury v. Madison*.¹⁵

On this understanding, political speech jurisprudence must still depend, at least indirectly, on the structural separation of powers. But even on this understanding, there is no obvious need for any general, three-branch separation of powers. We may assume that the Court must be independent, to whatever degree, of Congress, or of the Senate, and perhaps also of the president. But it is far from clear that the Supreme Court's robust protection of political speech also depends on the separation of Congress from the president, or on the president from Congress. The goal of a robust protection of political speech thus does not seem to get a full three-branch separation of powers theory off the ground.

Ultimately, the majority in *Bowsher* struck down the underlying deficit-reducing statutory arrangement at issue.¹⁶ Specifically, the majority declared that

Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws by an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.¹⁷

The *Bowsher* majority's reference here to 'practical terms' might seem to imply a functional, pragmatic approach to the separation of powers. The main alternative to a practical approach is that of a formalist, categorically focused, definitionally-oriented, line-drawing approach.¹⁸ The contest between varieties of formalism and functionalism in approaching separation of powers cases is perpetual.¹⁹

15. 5 U.S. 137 (1803).

16. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

17. *Id.*

18. For discussion of the functionalist versus formalist distinction in separation of powers cases, see, e.g., Thomas W. Merrill, *The Constitutional Principle of the Separation of Powers*, 1991 SUP. CT. REV. 225, 225–27 (“[T]he Court has alternated between the formal and functional constructions[.]”); M. Elizabeth Magill, *The Real Separation in the Separation of Powers*, 86 VA. L. REV. 1127, 1129 (2000) (referring to “two competing schools of thought, formalism and functionalism, and the predictable bickering back and forth between adherents to each school”); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (classifying thereunder the relevant Justices).

19. See, e.g., authorities cited *supra* note 18.

Justice White's dissenting opinion in *Bowsher*, however, takes the majority's approach not to be practical or functional, but to be "distressingly formalistic."²⁰ At the level of statutory text,²¹ the Comptroller General was well-insulated from congressional removal on political grounds.²² Removal of the Comptroller General would require a joint resolution of Congress,²³ with a possible presidential veto,²⁴ on only statutorily specified for-cause grounds,²⁵ and with subsequent judicial review.²⁶

Realistically, Congress's empowerment of the Comptroller General to make legislatively guided budget cuts, along with the Office of Management and Budget,²⁷ was, under the circumstances, more an admission of a congressional lack of self-control than an act of congressional aggrandizement, ambition, or power-seeking.²⁸ One could easily argue that Congress was recognizing its collective inability to generate responsible budgets consistently and was providing, through the Comptroller General, a statutory mechanism to reduce the resulting public harm.²⁹

Whether the majority in *Bowsher* was justified, on the merits, in rejecting this practical or realistic legislative arrangement is not crucial for our purposes. Instead, the point is that *Bowsher* illustrates the irrelevance of the familiar distinction between formalist and functionalist approaches to the separation of powers. In this respect, consider how a critic might characterize the Court majority's conclusion that the statute in *Bowsher* amounted to an illicit, ambitious power grab by Congress.

In Justice White's dissenting view, the majority's approach amounted to a "distressingly formalistic view of [the] separation of powers."³⁰ The supposed formalism of the majority lay in its attempt to discern and delineate formal boundary lines of constitutional authority between Congress and the executive, rather than to recognize real interbranch power relations.³¹ But Justice White's dissenting critique could also be expressed, just as naturally, by saying that the

20. *Bowsher*, 478 U.S. at 758 (White, J., dissenting).

21. See the Comptroller General's stringent removal protection provision at 31 U.S.C. § 703(e)(1)(b).

22. *See id.*

23. *See Bowsher v. Synar*, 478 U.S. 714, 727–28 (1986).

24. *See id.*

25. *See id.* at 728.

26. *See id.* at 729.

27. *See id.* at 732.

28. The logic of congressional pre-commitment regarding harmful legislative temptations has been explored by John Elster. *See* JOHN ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (rev. ed. 1984). For elaboration, see R. George Wright, *The Modern Separation of Powers: Would James Madison Have Untied Ulysses?*, 18 CUMB. L. REV. 69 (1987). *See also* Gewirtz, *supra* note 1, at 351 (on congressional power renunciation in *Bowsher*).

29. *See* authorities cited *supra* note 28.

30. *Bowsher v. Synar*, 478 U.S. 714, 759 (1986) (White, J., dissenting).

31. *See id.* at 761–64.

majority's approach was actually practical, functional, and pragmatic,³² but inaccurate, misguided, or otherwise unsuccessful on its own functionalist terms. On this line of analysis, the majority undertook a defective practical approach. The majority failed to perceive important pragmatic elements of the underlying circumstances.³³

The classic distinction between formalist and practical or functionalist approaches to separation of powers questions is, therefore, of minimal value. Functionalists must inevitably address the formal constitutional and statutory texts. And formalists must recognize that the separation of powers doctrine serves one or more practical purposes, which may be fulfilled to varying degrees. Otherwise, why adopt the doctrine in the first place? To depart from the underlying purposes or functions of the separation of powers would presumably tend to undermine the meaningfulness and authority of the Constitution. Moreover, formalism is ultimately based in some form of practical reason that involves functionally connecting constitutional textual means to one or more underlying constitutional purposes or goals. We might just as well say that 'excessive' formalism is impractical, or simply a form of bad functionalism.

Overall, then, the *Bowsher* case reflects multiple long-standing indeterminacies, fallacies, and unresolved problems that arise at the most basic levels of constitutional analysis and proliferate thereafter. We address further chronic difficulties below.

I. THE CONSTITUTIONAL SEPARATION OF POWERS AND ITS PURPOSES

The idea of constitutional separation of powers is the stuff of elementary school instruction. The principle may indeed seem clear, familiar, and uncontroversial. Consider the declaration by James Madison:

Power being found by universal experience liable to abuses, a distribution of it into separate departments, has become a first principle of free governments Hence the merited praise of governments modelled on a partition of their powers into legislative, executive, and judiciary, and repartition of the legislative into different houses.³⁴

The influential British observer A.V. Dicey later declared that "[t]he principle which . . . shapes every part of the American polity, is that distribution of

32. *See id.* at 726 (majority opinion) ("in practical terms" as being Justice White's focus). Note, certainly, that a concern for practicality, function, and purpose may include a concern for symbolic effects.

33. *See* authorities cited *supra* note 28.

34. JAMES MADISON, *Government of the United States*, NAT'L GAZETTE (Feb. 6, 1792), reprinted in JAMES MADISON: WRITINGS 508 (Jack N. Rakove ed., 1999); *see also* DAVID HUME, *Of the Balance of Power* (1752), reprinted in DAVID HUME'S POLITICAL ESSAYS 142 (Charles W. Hendel ed., 1953) ("[P]reserving the balance of power is founded . . . on common sense and obvious reasoning.").

executive, legislative, and judicial authority among bodies each coordinate with and independent of the other.”³⁵

The basic idea of the separation of powers may seem largely unproblematic, yet only a generation after the constitutional framers, Jeremy Bentham, in particular, was persuaded neither of the merits³⁶ nor the intelligibility³⁷ of the doctrine. Bentham concluded, specifically, that “[i]n general, those by whom this phrase [i.e., the balance of power] has been used have not known what they mean by it. It has no determinate meaning in their minds.”³⁸

Bentham’s view may seem extreme, but it is easy to argue that he was, in this respect, merely ahead of his time. Consider that the constitutional scholar Aziz Huq has observed that “[c]ontemporary academic writing on the Constitution’s separation of powers is thick on the ground, but prolixity has not precipitated much by way of consensus.”³⁹ Professor Rebecca Brown has similarly concluded that the separation of powers doctrine has become an “incoherent muddle.”⁴⁰ And the noted separation of powers specialist M.J.C. Vile has argued that the separation of powers “represents an area of political thought in which there has been an extraordinarily confusion in the definition and use of terms.”⁴¹

It is implausible that much of this doctrinal confusion could have been avoided simply by adopting an explicit textual separation of powers clause.⁴² Explicit constitutional provisions such as the terse Free Speech or Equal Protection Clauses are, in themselves, more the sources than the arbiters of contentious issues. Consider the language of California’s state constitutional

35. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 135–36 (8th ed. 1915) (reprint ed. 2024).

36. See JEREMY BENTHAM, HANDBOOK OF POLITICAL FALLACIES 163 (Harold A. Larrabee ed., 1971) (1824). In the prior generation, Condorcet had referred to what he saw as France’s “futile balance of powers.” See MARQUIS DE CONDORCET, SKETCH FOR A HISTORICAL PICTURE OF THE PROGRESS OF THE HUMAN MIND (1793), reprinted in CONDORCET: SELECTED WRITINGS 209, 237 (Keith M. Baker ed., 1976). See also BENJAMIN CONSTANT, PRINCIPLES OF POLITICS APPLICABLE TO ALL GOVERNMENTS (1815), reprinted in CONSTANT: POLITICAL WRITINGS 175, 180 (Biancamaria Fontana ed. & trans., 1988).

37. See BENTHAM, *supra* note 36, at 163.

38. *Id.* Bentham implicitly raises the question of the nature of the relationship between checks and balances on the one hand and the separation of powers on the other. Doubts about the separation of powers in this sense were then raised in G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 299, at 338 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (1821) (“It is implicit in the organic unity of the powers of the state itself that *one* and the same spirit decrees the universal and brings it to determinate actuality in implementing it.”).

39. Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517, 1518 (2018) (reviewing JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017)).

40. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991), quoted in Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 349, 350 (2016).

41. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 2 (2d ed. 1998) (1967).

42. For a reference to the non-adoption of any such clause, see *Trump v. United States*, 603 U.S. 593, 637 (2024).

separation of powers clause: “The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the other except as permitted by this Constitution.”⁴³ As one would expect, the separation of powers in California is actually far from complete separation, and a matter of one degree or another, according to context.⁴⁴

An important complication is that the most crucial separation of powers—or, in this case, checks and balances—may not concern distinguishing legislative, executive, and judicial powers, and then separating them in one way or another, to whatever degree. One might instead focus on the importance of socioeconomic classes and their divergent perceived interests. One might then seek stability or progress through a constitutional balancing of the contending socio-economic classes’ power.⁴⁵ Balancing one class against another could be as important as balancing one lawmaking and enforcement phase against another.

The balancing of socioeconomic class powers was crucial to the Baron de Montesquieu’s classic scheme.⁴⁶ As an American commentator rightly observed, Montesquieu “thought and wrote in terms of separation and balance as between orders and estates—king, nobles, commons,”⁴⁷ as distinct from more or less separable governmental phases, processes, or functions.⁴⁸ And it is hardly clear that judicially chasing elusive distinctions among legislative, executive, and judicial actions is today more important than the power relationships between and among our social and economic classes.⁴⁹

The American constitutional focus has instead been on issues arising from separation of governmental functions. The focus on three governmental functions, or else on three more or less distinct governmental branches, logically yields a total of six possible vectors of concern, where either of any two branches may seek to affect the others.⁵⁰ A case in which all three federal

43. *Simon v. City of San Francisco*, 135 F. 4th 784, 797 (9th Cir. 2025) (quoting CAL. CONST. art. III, § 3).

44. *See id.* at 804 (quoting *Carmel Valley Fire Prot. Dist. v. State*, 20 P.3d 554, 539 (Cal. 2001)) (“Nothing in California’s separation of powers doctrine prevents informal coordination between the branches, but instead prevents ‘one branch of government from exercising the *complete* power constitutionally vested in another.’”).

45. *See, e.g.*, Malcolm P. Sharp, *The Classical American Doctrine of “The Separation of Powers”*, 2 U. CHI. L. REV. 385, 385 (1935) (“[T]he familiar idea that it is . . . the balance of different classes’ power, that is the essential feature of democracy.”).

46. *See* 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. XI, ch. 6, at 151–52 (Thomas Nugent trans., 1949) (reprint ed. 1962) (1748).

47. Benjamin F. Wright, *The Origins of the Separation of Powers in America*, 40 *ECONOMICA* 169, 170 (1933).

48. *See id.*

49. For brief discussion, see 2 JÜRGEN HABERMAS, *ALSO A PHILOSOPHY OF HISTORY* 292 (Ciaran Cronin trans., 2024) (2019).

50. Setting aside cases where all three branches are arguably involved. *See* Cass R. Sunstein, *The Separation of Powers Is a They, Not an It*, 48 *HARV. J.L. & PUB. POL’Y* 149 (2025).

branches were involved would further multiply the logically inescapable complications.

Regardless of these permutations, there is no hope of a meaningful, function-oriented separation of powers if we cannot sufficiently clarify what the purposes or goals of our separation of powers ought to be. We have already seen that the Supreme Court in *Bowsher* focused on securing “liberty.”⁵¹ Case law before⁵² and after⁵³ *Bowsher* supports *Bowsher*’s emphasis on the value of liberty. The thought, as classically expressed by Justice Robert Jackson, is that “the Constitution diffuses power the better to secure liberty.”⁵⁴

The goal of securing liberty, presumably beyond merely the freedom of political speech, is related in some fashion to that of avoiding governmental arbitrariness. Here, the classic judicial formulation is that of Justice Brandeis. In his *Myers* dissent, Justice Brandeis argued that “the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power.”⁵⁵ And there is inevitably some relation between individual liberty and the possible separation of powers goal of promoting government accountability.⁵⁶

But let us simply ignore any possible conflicts among goals such as securing liberty, avoiding arbitrary rule, and promoting accountability in government. Let us also ignore any possible differences between protecting the liberties we have and expanding both the types of liberties and the number of persons whose liberty is protected. And finally, let us ignore any possible disputes, of whatever severity, over even the basic meaning of individual liberty as of the founding in 1789.

What we cannot ignore, though, is that the basic meaning of liberty, including in constitutional contexts, is today deeply and indeed essentially contested.⁵⁷ Even if the framers and ratifiers were of one mind on the basic relevant meaning of ‘liberty’, our own culture, today, is not. This creates a problem in constitutional theory.

51. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)) (Jackson, J., concurring).

52. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

53. *See, e.g., Collins v. Yellin*, 594 U.S. 220, 245 (2021) (“[T]he separation of powers is designed to preserve the liberty of all the people.”).

54. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). The liberty referred to here is presumably broader than freedom of political speech. For discussion of the framers’ concern especially with a tyranny of the majority impairing individual rights, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516 (1991).

55. *Myers v. United States*, 272 U.S. 52, 293 (Brandeis, J., dissenting). For discussion, see, e.g., David Fellman, *The Separation of Powers and the Judiciary*, 37 REV. POLITICS 357–58 (1975); Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–04 (1989).

56. *See, e.g., Huq & Michaels, supra* note 40, at 346.

57. *See* W.B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOC’Y 167, 167 (1955).

To borrow the dichotomy of Sir Isaiah Berlin, we care about both negative liberty and positive liberty.⁵⁸ Negative liberty is roughly a matter of the absence of social restraints on thinking, choice, and action.⁵⁹ Those social restraints can certainly take the form of binding law. This is Berlin's own basic negative liberty formulation:

I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree[.]⁶⁰

Liberty understood in roughly this fashion was plainly a concern of those who fashioned and then later expounded American constitutional principles.⁶¹

But liberty has also long been understood and valued in a plainly different sense.⁶² Berlin classically referred to this sense as one of positive liberty.⁶³ On this view, the above-described negative liberty sometimes amounts merely to a lack of interference with one's personally damaging choice to engage in addictive or otherwise gravely self-destructive acts, for no social payoff.⁶⁴ Negative liberty could thus take the form of a predictably wasted, pointless life.

Positive liberty, in contrast, has historically involved a focus on something like the realization of one's potential, personal development, self-fulfillment, genuine autonomy, and authentic flourishing.⁶⁵ Even an age of relativism, skepticism, and subjectivism cannot entirely eradicate all differences between a life's pointlessness and its meaningfulness.⁶⁶ There is thus normally thought to

58. See ISAIAH BERLIN, *Two Concepts of Liberty* (1969), reprinted in LIBERTY 166, 178–94 (Henry Hardy ed., 2002).

59. For background, see the essays in FREEDOM: A PHILOSOPHICAL ANTHOLOGY (Ian Carter, Matthew H. Kramer & Hillel Steiner eds., 2007); Ian Carter, *Positive and Negative Liberty*, STANFORD ENCYC. OF PHIL., (Nov. 19, 2021), <https://plato.stanford.edu/entries/liberty-positive-negative> [<https://perma.cc/F6RV-RAFM>].

60. BERLIN, *supra* note 58, at 169. One's negative liberty can be impaired not only by prevention of one's action, but by various sorts of after-the-fact punishments.

61. For a defense of negative liberty in exceptionally stark terms, see Henry David Thoreau, *On the Duty of Civil Disobedience*, in R. GEORGE WRIGHT, LEGAL AND POLITICAL OBLIGATION 25 (2d ed. 1992). More recently, see, e.g., F. A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

62. As expounded in the authorities cited *supra* note 59.

63. See BERLIN, *supra* note 58, at 178.

64. See *id.* at 169.

65. For Berlin's own account, see *id.* at 178–80, 187–194.

66. For contemporary discussion, see, e.g., MARTHA NUSSBAUM, CREATING CAPABILITIES (2011); CHARLES TAYLOR, *What's Wrong with Negative Liberty?*, in 2 PHILOSOPHICAL PAPERS 211 (1985). This is certainly not to deny that persons must have some negative liberty to realize their potential in accordance with positive liberty. For a schematic account, see Gerald C. McCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967). Nor is this to deny the potential for political abuse of positive liberty. See, e.g., John Plamenatz, *On le Forcera d'être Libre* (1965),

be a difference between, say, learning how to become a person who cures a dread disease, and becoming the kind of person who obsesses over counting blades of grass.

None of this is to take sides between those who emphasize some form of negative liberty, and those who instead emphasize a sensible form of positive liberty. The point is instead to recognize one of the crucial limitations of the doctrine of the separation of powers, insofar as it is intended to secure, or promote, liberty.⁶⁷ The idea of securing or promoting liberty through the separation of powers tells us nothing about the innumerable basic choices we face among forms of negative and positive liberty. Are negative and positive liberty in general equally worthwhile? Which forms of either negative or positive liberty merit greater sacrifice? Is the separation of powers equally effective in all these contexts? Equally costly in terms of other values that must be sacrificed?

This is not to suggest that the constitutional framers should have clarified what they meant, even roughly, in the context of the separation of powers. Even if they had, we would then still have to determine whether to feel constitutionally bound by the framers' text or their otherwise conveyed meaning. The point is rather that thinking of somehow promoting liberty as a purpose of the separation of powers settles little of consequence and leaves all the interesting questions unresolved.

Complicating matters is that other, often conflicting, purposes beyond those noted above are ascribed to the separation of powers. For some writers, for example, the separation of powers is not crucially a sacrifice of efficient government for the sake of liberty. Rather, the primary goal of the separation of powers is actually a certain kind of efficiency.⁶⁸ Thus N.W. Barber has argued that "[t]he essence, though not the whole, of separation of powers lies in the meeting of form and function."⁶⁹ The goal of the separation of powers is thus "the matching of tasks to those bodies best suited to execute them."⁷⁰

On such interpretations, the separation of powers principle is primarily a matter of an optimal division of the labor of governing.⁷¹ In a phrase, "[t]he core

reprinted in HOBBS AND ROUSSEAU: A COLLECTION OF CRITICAL ESSAYS 318 (Maurice Cranston ed., 1972).

67. See *supra* notes 51–54 and accompanying text.

68. See, e.g., N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 59 (2001).

69. *Id.* at 59.

70. *Id.*

71. See *id.* This logic might be extended to cover principles of federalism as well, if we choose to think of federalism as a vertical, rather than horizontal, form of the separation of powers. For broader perspectives on federalism, though, see Andreas Follesdal, *Federalism*, STANFORD ENCYC. OF PHIL. (Nov. 2, 2022), <https://plato.stanford.edu/entries/federalism> [<https://perma.cc/CE6Z-3RC2>]. For the classic "laboratory of the states" approach, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

of the doctrine is not liberty, as many writers have assumed, but efficiency.”⁷² The problem for all those concerned about separation of powers is that on many understandings, liberty and efficiency, and liberty and utility more broadly, come into frequent and basic conflict.⁷³

On some accounts, though, there is a basic compatibility between liberty on the one hand and certain forms of ‘inefficiency’ on the other. The slowly grinding and thus inefficient wheels of the separation of powers may prevent illiberal projects from being legally imposed on the public. Or relatedly, delays in law-making may amount to “a positive feature of the rule of law”⁷⁴ insofar as such inefficiencies promote legal stability,⁷⁵ predictability,⁷⁶ and broad consensus-building,⁷⁷ all for the sake of human flourishing.⁷⁸ The difficult task is then to distinguish benign delays from the pathologies of governmental rent-seeking mechanisms, gridlock,⁷⁹ and the chronic inability to address serious long-term threats to the public well-being.⁸⁰

A natural temptation, at this point, is to declare that there are, or should be, several distinct basic functions of the separation of powers. The great separation of powers scholar William B. Gwyn referred to possible functions such as achieving liberty,⁸¹ avoiding tyranny,⁸² promoting the rule of law,⁸³ reducing the group bias effects of government officials,⁸⁴ and promoting governmental efficiency.⁸⁵

72. Barber, *supra* note 68, at 59. See also John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1993–96 (2011). For further discussion, see Aileen Kavanagh, *The Constitutional Separation of Powers*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 221, 221–23 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

73. Consider, for example, the classic conflict between the intense wishes of a large majority and the religious or speech liberties of a small, unpopular group of dissenters, as in, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011) (Westboro Baptist funeral picketing case).

74. MELISSA MOSCHELLA, *ETHICS, POLITICS, AND NATURAL LAW: PRINCIPLES FOR HUMAN FLOURISHING* 153 (2025).

75. *See id.*

76. *See id.* at 153–54.

77. *See id.* at 154.

78. *See id.*

79. See, e.g., Jeffery Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 1, 2013), www.newyorker.com/magazine/2013/12/09/our-broken-constitution [https://perma.cc/QK5D-B6FW]. Classically, see MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* (1982) (on pathologically increasing institutional rigidities).

80. To the extent that members of Congress in particular cannot point to their own contributions to important broad public successes, the pathologies of rent-seeking behavior and irresponsible spending and regulation become correspondingly more attractive. See generally GORDON TULLOCK, *THE RENT-SEEKING SOCIETY* (Charles K. Rowley ed., 2005).

81. See William B. Gwyn, *The Indeterminacy of the Separation of Powers*, 30 WM. & MARY L. REV. 263, 264–65 (1989) (drawing upon W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* (1965)).

82. *See id.* at 264.

83. *See id.*

84. *See id.*

85. *See id.* at 264–65. See also Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 343 (1989).

The problem here, though, is one of the now multiplied basic conflicts and indeterminacies. There is no obvious hierarchy among such functions. There is no consensus on their actual or desirable tradeoff rates. The most obvious tradeoffs may be between promoting government by hard-won consensus, and prompt efficiency in responding to substantial problems. Efficiency in the sense of allocating powers to the most appropriate branch may have little connection to efficiency in responding to a crisis, or in translating legitimate democratic preferences into law. And there may well be harsh conflicts between minimizing the risks of tyranny, on the one hand, and substantially promoting liberty on the other.⁸⁶ Minimizing the risk of tyranny may require that we reject policies that give us a likely higher and stable level of liberty, with only a slightly higher, and still quite low, risk of tyranny. And perhaps even tyranny in some sense comes in morally important degrees.⁸⁷ Not all despotisms are equal in their benevolence, enlightenment, or overall impact of liberties.⁸⁸

At this point, it is fair to conclude that the separation of powers doctrine amounts largely to a series of conceptual conflicts and basic uncertainties, compounded and piled atop one another. But in light of the doctrine's centrality to contemporary discussion, we should, for pragmatic reasons, assume that there is sufficient meaning to the doctrine and proceed accordingly to a more substantive evaluation and critique. We undertake such an evaluation and critique below.

II. SOME SUBSTANTIVE PROBLEMS OF THE CONSTITUTIONAL SEPARATION OF POWERS

Let us then simply assume that there is some sufficiently coherent doctrine of the separation of powers to allow for meaningful substantive discussion and critique. For such purposes, there need not be a commonly shared core, or essence, of the separation of powers doctrine.⁸⁹ This means, though, that many separation of powers advocates can deny in good faith that any given critique, however substantial, touches their own favored version of the doctrine.

There is also the problem of the tendency of some leading proponents of the separation of powers to grossly overstate their case. Overstated claims have been common and conspicuous in this context. There may, conceivably, be

86. Consider the disadvantages of maxi-min strategies, as well as of the so-called, and often self-defeating, precautionary principle. See, e.g., Adam Hayes, *Ultimate Guide to Game Theory: Principles and Applications*, INVESTOPEDIA (July 18, 2025), www.investopedia.com/terms/g/gametheory.asp [<https://perma.cc/UZQ7-2U9G>]; CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

87. Consider the differences between a tyrant who rules arbitrarily, without check or consultation, but for generally benign, if not beneficial purposes, and the tyranny of any of the most important mid-twentieth century dictators.

88. For a very brief overview, see Jeremy Black, *Enlightened Despotism*, 60 TEACHING HIST. 32 (1990). At greater length, see DAVID FRASER, *FREDERICK THE GREAT: KING OF PRUSSIA* (2001).

89. For background, see, e.g., Halmar Wennerberg, *The Concept of Family Resemblance in Wittgenstein's Later Philosophy*, 33 THEORIA 79 (1967).

some minimal legitimate role for overstating the case for the separation of powers, but obvious exaggerations carry credibility risks. Consider, merely for example, the official French Declaration of the Rights of Man.⁹⁰ This celebrated document declares that “[a] society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.”⁹¹ Sir William Blackstone had earlier declared, with regard to the legislative and executive, that “wherever these two powers are united together, there can be no public liberty.”⁹²

In the American constitutional context, Alexander Hamilton approved of a related exaggeration originally propounded by Montesquieu. Hamilton wrote that “I agree that ‘there is no liberty if the power of judging be not separated from the executive and legislative powers.’”⁹³ This sentiment may be of the sort that could have loosely inspired the recent overruling of the *Chevron* doctrine⁹⁴ by the *Loper Bright* case.⁹⁵ We need not herein compare *Chevron* and *Loper Bright* on their respective treatments of the separation of powers. Our point is instead a matter of the chronic overstatement and exaggeration by advocates of the separation of powers. One might hold that *Loper Bright* treated the separation of powers with greater devotion than did *Chevron*. But it would not be easy to establish that the Court, in reclaiming authority from the executive branch in *Loper Bright*, has say, meaningfully increased public liberty. Federal judges are no more democratically responsible than executive agency heads. It is hardly as though liberty was moribund under *Chevron* but is now vigorous because *Loper Bright* overruled *Chevron* deference.⁹⁶ The practice of exaggerating separation of powers claims by the doctrine’s leading proponents ultimately tends to backfire.

A further underlying problem for those who assert the virtues of the separation of powers is one of the doctrine’s as yet unrecognized complexity. There are more moving parts in constitutional separation of powers problems than, by loose comparison, in the physical interactions of two or three ordinary size physical objects. Constitutional separation of powers problems are

90. See *Declaration of the Rights of Man – 1789, Approved by the National Assembly of France, August 26, 1789*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/rightsof.asp [https://perma.cc/8EYC-GHS9] (last visited June 14, 2025).

91. *Id.* at article 16.

92. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND bk. 1, ch. 2 (1765), https://avalon.law.yale.edu/18th_century/blackstone_bk1ch2.asp [https://perma.cc/77A6-VX5C] (last visited June 14, 2025).

93. THE FEDERALIST NO. 78 (Alexander Hamilton), reprinted in ALEXANDER HAMILTON: WRITINGS 420, 421 (Joanne B. Freeman ed., 2001) (quoting MONTESQUIEU, *supra* note 46, at bk. XI, ch. VI). See also DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 127–28 (1984) (discussing James Madison, in The Federalist no. 47, on Montesquieu).

94. See *Chevron, USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

95. See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412–13 (2024). The *Loper Bright* majority quotes Hamilton, but only more generally on the subject of judicial review. See *id.* at 385.

96. For a brief overview, see R. George Wright, *The Loper Bright Regulatory Landscape*, 15 IND. INT’L & COMP. L. REV. 245 (2025).

generally more difficult than are the latter sort of physical problems. It is revealing that physics has a much more difficult time understanding the interactive effects of three bodies, as, by loose analogy, in our three-branch separation of powers contexts,⁹⁷ than it does in the two-body case. And most separation of powers cases involve all three governmental bodies, to at least some degree, rather than just two.

Comparing the three federal government branches to three more-or-less separate interacting mechanical bodies is admittedly a matter of loose analogy. But it is an analogy that the constitutional framers themselves explicitly embraced. The framers were influenced by the idea of a Newtonian clockwork mechanism.⁹⁸ For the constitutional framers, the “delicate balances of the government”⁹⁹ reflected the Newtonian account of the delicate balances among, say, the Earth, Moon, and Sun.¹⁰⁰ Similarly, Jeremy Bentham thought in the mechanical terms of governmental “composition and resolution of forces.”¹⁰¹

Separation of powers theorists acknowledge that there are new and more difficult coalition building and obstruction problems in moving from a two-body model of the separation of powers to a three-body model of the separation of powers.¹⁰² Any two governmental branches, or bodies, may be capable of thwarting the ambitions of the third.¹⁰³ Ultimately, though, the Newtonian mechanical analogy as applied to the separation of powers raises more constitutional difficulties than potential solutions.

As it turns out, Newton was indeed capable of explaining much of the interactive effects of two ordinary-size bodies moving at non-relativistic speeds.¹⁰⁴ Unfortunately, though, predicting the interactive effects of three such physical bodies is not anything even remotely like merely fifty percent more difficult. In fact, the three-body interaction problem is remarkably more difficult.¹⁰⁵ Perhaps even the familiar transitive relation may not always hold for

97. As in, merely for example, the three constitutional body cases of *Chevron* and *Loper Bright*, *supra* notes 94–95 and accompanying text.

98. See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* (1986); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2016) (quoting KAMMEN, *supra*, at 18–19) (“In the Framers’ Newtonian vision, the separation of powers was to be ‘a machine that would go of itself.’”).

99. Harold H. Bruff, *The Federalist Papers: The Framers Construct an Orrery*, 16 HARV. J.L. & PUB. POL’Y 7, 7 (1993) (with an orrery being a display model of the solar system).

100. See *id.*

101. JEREMY BENTHAM, *HANDBOOK OF POLITICAL FALLACIES* 165 (Harold A. Larrabee ed., 1971) (1824). Bentham himself tended to think of the separation of powers in practice as obstructionist, preventative, and often based largely on “sinister” interests. *Id.* at 163.

102. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 16 (2d ed. 1998) (1967).

103. See *id.*

104. See, e.g., Richard Montgomery, *The Three-Body Problem*, SCI. AM. (Aug. 1, 2019), [www.scientificamerican.com/article/the-three-body-problem](https://perma.cc/CK9C-YAGY) [https://perma.cc/CK9C-YAGY].

105. See *id.* See also Alain Chenciner, *Three body problem*, SCHOLARPEDIA (2007), [http://www.scholarpedia.org/article/Three_body_problem#:~:text=Alain%20Chenciner%20\(2007\)%2C%20Sc](http://www.scholarpedia.org/article/Three_body_problem#:~:text=Alain%20Chenciner%20(2007)%2C%20Sc)

the relations among three physical bodies, or in our legal context, the three government branches.¹⁰⁶ And then if we see a given separation of powers problem as involving, say, the Senate, the House of Representatives, the Supreme Court, other federal courts, the president, and at least one federal agency that is unsympathetic with the president's agenda, we are up to at least a six-body problem,¹⁰⁷ for which even our most advanced artificial intelligence sites have no valid answer.¹⁰⁸

Suppose, then, that we limit the separation of problem to involve simultaneous negotiations among only three parties. Such negotiations, as we might expect, often resist any prediction of their outcome, let alone of the main later effects of any such outcome.¹⁰⁹ The sheer number of relevant variables may generate additional complexity.¹¹⁰ There is "a lack of theory that can adequately explain the multiplicity of interactions that typically characterize such negotiations."¹¹¹ And again, none of the three branches of government is monolithic in its interests, priorities, or beliefs.¹¹²

Predicting the significant effects of the operation of the separation of powers in any given instance may thus be virtually impossible. There may be detectable tendencies when the operations of the separation of powers are observed over a run of many cases. But again, consider the physical analogy. Knowing the tendency of a fair coin toss, in the long run, is of limited help in predicting the outcome of the next coin toss or set of coin tosses.

Overall, then, the three-body problem of our three governmental branches compares, at a minimum, to that with which the physical scientists are confronted. But even setting all such problems aside, a number of basic substantive problems and indeterminacies in the separation of powers doctrine then remain. We may here merely list but a few. These substantive indeterminacies are not fatal to the separation of powers doctrine. But as long as basic indeterminacies remain, the status of the doctrine remains fundamentally unclear.

First, the practical problem of classifying exercises of government power as either legislative, executive, or judicial, or along any other scheme, has never

holarpedia,%2C%20(10)%3A2111.&text=The%20problem%20is%20to%20determine,Newton's%20law%20of%20inverse%20squares. [https://perma.cc/FBJ9-BEGX].

106. For background, see *Transitive Relations*, GEEKS FOR GEEKS (July 23, 2025), www.geeksforgeeks.org/transitive-relations [https://perma.cc/FE6D-Y3GG].

107. See Chenciner, *supra* note 105. We are assuming that all six bodies sometimes exert simultaneous mutually interactive effects, which may well be realistic.

108. See *id.*

109. See, e.g., Larry Crump & A. Ian Glendon, *Towards a Paradigm of Multiparty Negotiation*, 8 INT'L NEGOT. 197 (2003).

110. See *id.* at 197.

111. *Id.* Imagine trying to predict the timing of breaking off, resuming, and abandoning three-body or three-party negotiations.

112. See *id.* at 199. Again, imagine a divided Congress, or a rift between a given president and the federal administrative body in question.

been solved.¹¹³ In part, this is a matter of inevitable mixture and overlap. Professor Philip Kurland noted that “sometimes the judiciary has to create rules, . . . sometimes the legislative and sometimes the judiciary has to enforce rules, and sometimes the legislative and sometimes the executive has to resolve controversies over the rules.”¹¹⁴

Bringing clarity to any of these various “sometimes” categories is as yet an unfulfilled substantive task. Classically, Montesquieu granted a well-designed legislature a supervisory power over the agencies that execute the law.¹¹⁵ But when this supervisory power extends beyond some point, *Bowsher*-type legislative overextension questions arise.¹¹⁶ Nor can classification problems be solved by re-classifying judicial operations as a form of executing the laws, nominally reducing the classes of government power down to two.¹¹⁷

Nor have we arrived at closure, or even made much progress, on the questions of the most basic relative power relationships among the branches. The traditional view may have been that “the judiciary is beyond comparison the weakest of the three departments of power.”¹¹⁸ But there have, no less, been periods of a perceived imperial judiciary,¹¹⁹ with such views then in turn being contested.¹²⁰

Similarly contested has been the basic relative power relationships between Congress and the president. John Adams wrote that “[t]he Legislative Power in our Constitution, is greater than the Executive The Legislative Power will increase. The Executive will diminish.”¹²¹ But then, there has been congressional

113. See Barber, *supra* note 68, at 60; Philip B. Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 MICH. L. REV. 592, 603 (1986).

114. Kurland, *supra* note 113, at 603.

115. See 2 JOHN PLAMENATZ, *MAN AND SOCIETY* 38 (M.E. Plamenatz & Robert Wokler, eds., 1992).

116. See *supra* notes 2–10 and accompanying text.

117. Classically, see THOMAS PAINE, *The Rights of Man*, reprinted in KEY WRITINGS 54, 211–12 (Hayden Harry Clark ed., 1961) (1792); JAMES HARRINGTON, *The Commonwealth of Oceana*, reprinted in POLITICAL WRITINGS 35, 61 (Charles Blitzer ed., 1955) (1656) (classifying “the people” as a legislative power, along with the Oceana senate, giving rise to the need for an executive-magistracy).

118. THE FEDERALIST NO. 78 (Alexander Hamilton), reprinted in ALEXANDER HAMILTON: WRITINGS 420, 421 (Joanne B. Freeman ed., 2001) (citing Montesquieu on this point). See also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1986).

119. See, e.g., MATTHEW J. FRANCK, *AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE* (1996). But see MARK KOZLOWSKI, *THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS* (2006) (rejecting the basic such view). Classically, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977). One obvious methodological problem is filtering out the effects of the critic’s own political biases in analyzing such matters.

120. See, e.g., KOZLOWSKI, *supra* note 119.

121. JOHN ADAMS, *Letter to Roger Sherman*, in WRITINGS FROM THE NEW NATION 1784–1826, at 228, 230 (Gordon S. Wood ed., 2016). See also THE FEDERALIST NO. 71 (Alexander Hamilton); GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 559–60 (3d ed. 1961) (discussing Montesquieu on “the greater power of the legislature”).

gridlock,¹²² the rise of the administrative state,¹²³ and an intermittently imperial presidency.¹²⁴ Further complications, such as an imperial presidency conjoined with an imperial Supreme Court, as checked to whatever degree by lower courts and the career administrative branch, are certainly possible. The permutations are multiple, and interminable in their unfolding.

And then, there are largely unrecognized problems regarding what we might call governmental division of labor or task-aptness questions. We might assume that each governmental branch should attend, at least primarily, to its proper work. But what should count as a branch's proper work may be a surprisingly difficult question. And this may be true even if we set entirely aside the problems of unavoidable overlap of governmental functions.¹²⁵

Professor N.W. Barber raises an initial concern in the context of which body should do what. He declares that “[t]o show that one body is not well equipped to perform a task is not a reason to switch that task to another body.”¹²⁶ More concretely, Professor Barber sensibly argues that “[e]ven if . . . the courts are badly placed to undertake a task[,] it does not follow that the legislature . . . will do any better.”¹²⁷

The natural assumption is that if the courts, and the Supreme Court in particular, are better than Congress and the president at some particular task of government, then the courts, and the Supreme Court ultimately, should be the branch that undertakes that task.¹²⁸ This may seem obvious, but it is not even correct. Consider that the three governmental branches all produce law, or at least constituent elements of law. Each branch's lawmaking, or elements thereof, may partly compete with, but partly complement, the law-making authority of the other branches. The three branches are not always competitive suppliers of law, in a marketplace for “buyers” or consumers of law. But sometimes, they are in a position to compete, and it is possible to adopt broad

122. See, e.g., Michael Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107 (2013).

123. See, e.g., PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (2017); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

124. Classically, see ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). More contemporarily, see Steven Greenhut, *Under Trump, the imperial presidency reaches its apogee*, R STREET (Feb. 16, 2025), www.rstreet.org/commentary/under-trump-the-imperial-presidency [https://perma.cc/3GRV-6WGE]. But see Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 372 (1976) (“Often, and for considerable periods of time, the concern in the United States has been with the weakness of the executive, not with its strength.”). Medieval European theorists often assumed a dominant monarchy. See, e.g., DANTE, *MONARCHY* 11 (Prue Shaw trans., 1996) (1315) (on the rise of an eventual world emperor); FRANCISCO DE VITORIA, *POLITICAL WRITINGS* 14 (Anthony Pagden & Jeremy Lawrance eds., 1991) (1528) (casually inferring, from the inability of a commonwealth as a whole to engage in diverse government functions, that “it must necessarily entrust all this business to a single man”). But see MARSILIUS OF PADUA, *THE DEFENDER OF THE PEACE* 124 (Annabel Brett ed. & trans., 2005) (1324) (on the need to regulate the Prince's conduct according to law, for the sake of avoiding tyranny).

125. See *supra* notes 113–117 and accompanying text.

126. Barber, *supra* note 113, at 74.

127. *Id.*

128. See *id.*

policies that encourage the lower-cost production of a higher quality law, overall.

Each law-making branch has some finite amount of resources, and some strengths and weaknesses, in generating law. Some law-making tasks involve greater costs than others, including opportunity costs for the governmental body in question. The public has an interest in the making of law without unnecessary waste of resources. And law may be created in alternative ways, at different costs, by the different branches.

So, our natural tendency may be to allocate all law-related tasks, at the federal level, to the branch that can perform them best. If the courts are better at producing law, then, we assume, the courts should generally make the law. The idea would be to respect the ‘absolute’ advantage that the courts have, in this context, over the other branches.¹²⁹

The logic here seems clear enough. Suppose it is September in Minnesota, and a healthy Minnesota Vikings all-pro tackle has a choice between chopping wood, on his own property, for the impending winter, or else paying a local college student, of merely ordinary physical ability, to do the work. The Viking would, we assume, do the work far better and far faster than the college student possibly could.

Logic, to this point, would suggest that the Viking should, rationally, do the work. But complications aside, this is not really the expected outcome. The Viking would indeed outperform the college student at the task in question. But in reality, this sort of advantage is largely irrelevant. The opportunity cost—to the Viking, to his team, to the Viking fans, and even to the broader public, of the Vikings player’s missed meetings, missed workouts, missed film study, etc., because of the wood-chopping would outweigh the obvious deficiencies in the college student’s doing the work instead and any opportunity costs the college student would incur.¹³⁰

The crucial point is that the typical local college student may, all else equal, hold a clear comparative advantage over the Viking in chopping the Viking’s firewood. The idea of comparative advantage, and the overall benefits to all parties where it is respected, is attributed to the classical economist David Ricardo.¹³¹

129. For a discussion of Adam Smith’s principle of absolute advantage, see, e.g., Monica Das, *Absolute and Comparative Advantage*, INT’L ENCYC. OF THE SOC. SCI. (William A. Darity, Jr. ed., 2d ed. 2008), <https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/absolute-and-comparative-advantage#:~:text=During%20the%20seventeenth%20and%20eighteenth,the%20inflow%20of%20precious%20metals.> [<https://perma.cc/YP6R-WE3H>].

130. For a definition and examples of opportunity costs, see, e.g., *Opportunity Cost*, ECONLIB, www.econlib.org/library/topics/college/opportunitycost.html [<https://perma.cc/L7Y7-YXZP>] (last visited June 14, 2025) (linking to additional resources).

131. See DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 119–43 (Dover ed. 2004) (1817). More broadly, see John Aldrich, *Discovery of Comparative Advantage*, 26 J. HIST. ECON. THOUGHT 379, 380–84 (2004). In the law school context, see Gregory W. Bowman,

The problems, and the potential value, of attending to comparative advantage or its logical analogue in separation of powers contexts are complex. But the complications, and the prospect of benefits for all those who pay for and consume the production of law, are significant. The key is that the houses of Congress, the president, the independent and less-independent administrative agencies, and the trial and appellate courts all do many things, the doing of some of which could be allocated elsewhere. Suppose that the Supreme Court really is slightly better at ascertaining matters of ordinary fact than any other branch of government, including the most relevant administrative agency. Respecting the principle of comparative advantage or its analogue, though, might require some shifting of this fact-finding responsibility to some other branch, allowing the Court to focus on those tasks where it holds a comparative advantage.

In any event, the possible role of comparative advantage in separation of powers analysis is an important unsolved, and largely unrecognized, source of indeterminacy in the doctrine of the separation of powers. The comparative advantage problem thus joins the list of major substantive problems in the separation of powers that have lingered unresolved for centuries.

III. WHAT CAN BE DONE IF THE BASIC PROBLEMS OF THE SEPARATION OF POWERS REMAIN UNSOLVED?

It seems likely that the basic conceptual and substantive problems of the separation of powers are largely here to stay. We may certainly wish success to all present and future attempts to address such problems on the merits. But other, complementary avenues are worth pursuing as well. Most importantly, we can seek to make progress by probing into what separation of powers theorists tend to take for granted.

Let us then begin by noting what is famously assumed by major separation of powers theorists. Classically, James Madison's 51st Federalist Paper assumes that electoral control of government officials and, as well, a separation of powers are necessary to reduce the effects of government officials' ambition and their desire for aggrandizement.¹³²

Madison's Newtonian goal was, famously, that "[a]mbition . . . be made to counteract ambition,"¹³³ with the intensity and pervasiveness of ambition itself

The Comparative and Absolute Advantages of Junior Law Faculty: Implications For Teaching and the Future of American Law Schools, 2008 BYU EDUC. & L.J. 171 (2008). For a more elaborate but also more narrowly focused discussion, see R. George Wright, *At What is the Supreme Court Comparatively Advantaged?*, 116 W. VA. L. REV. 535 (2013).

132. See THE FEDERALIST NO. 51 (James Madison), reprinted in ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST WITH LETTERS OF "BRUTUS" 251–53 (Terence Ball ed., 2003).

133. The logic here owed something to Adam Smith's 'invisible hand' and to Mandeville's Fable of the Bees. See, e.g., Peter Foster, *Adam Smith's Invisible Hand*, ADAM SMITH WORKS (Nov. 30, 2018), www.adamsmithworks.org/documents/adam-smith-peter-foster-invisible-hand [https://

being assumed to be largely constant. The vice of ambition was thus assumed to be more or less constant, but subject to beneficial redirection. Thus, the need, and the possibility, of “supplying by opposite and rival interests, the defect of better motives.”¹³⁴

The connection between the defects or vices of human nature and the separation of powers had been articulated earlier by John Locke. Locke had concluded that “it may be too great temptation to human frailty apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them . . . to their own private advantage.”¹³⁵ On such views, the separation of powers is largely, if not entirely, an ingenious structural mechanism for limiting the harms of what are assumed to be more or less constant and unaltered tendencies to vices of character.

This perspective was much later summarized by Professor Sheldon Wolin in these terms:

The Federalists had accepted as axiomatic that the shape of constitutional government was dictated by the selfish nature of man and his restless pursuit of interest The aim of a political organization was not . . . to alter their moral character, but to arrange institutions in such a manner that human drives would cancel each other or, without conscious intent, be deflected towards the common good.¹³⁶

As grateful as we might be for the institution of the separation of powers, and for the substantive rights protections of the First Amendment, all such institutions may nevertheless leave us still a bit uneasy. Famously, Judge Learned Hand reported that he often wondered “whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts.”¹³⁷ He concluded that “[t]hese are false hopes.”¹³⁸

Most importantly, Judge Hand then declared that “[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it While it lies there it needs no constitution, no law, no court to save it.”¹³⁹ For our current purposes, we may certainly include the separation of powers within the compass of the constitution and laws.

perma.cc/ZQ8G-UGFC]; BERNARD MANDEVILLE, *THE FABLE OF THE BEES* (Philip Harth ed., 1989) (1714) (on the possible transmutation of selfish private vices, through structural mechanisms, into public benefits).

134. MADISON, *supra* note 132, at 252.

135. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ch. 11, § 143, at 76 (C.B. MacPherson ed., 1980) (1690).

136. SHELDON S. WOLIN, *POLITICS AND VISION* 349 (Princeton Univ. Press 2016) (1960).

137. LEARNED HAND, *The Spirit of Liberty* (1944), *reprinted in* *THE SPIRIT OF LIBERTY* 189, 189–90 (Irving Dilliard ed., 1952).

138. *Id.* at 190.

139. *Id.*

We need not herein go as far as Judge Hand does on this occasion. The basic idea for our purposes is instead that the separation of powers, along with electoral responsibility and other constitutional provisions, cannot suffice to protect liberty and other jurisprudential goals. Montesquieu had himself earlier appreciated the limits of focusing on institutional or structural mechanisms.¹⁴⁰ The separation of governmental powers is, ultimately, fully compatible with a loss of public liberty.¹⁴¹ Montesquieu believed that to ensure liberty, a public spirit of virtuous self-reliance was necessary as well.¹⁴²

On such understandings, an effective separation of powers depends on “the character of the populace.”¹⁴³ This dependence seems inevitable, regardless of the precise form that the separation of powers takes in any given case. This recognition of the need for relevant public virtues is a special case of the broader insight that excellence in constitutions, like other laws, may require a degree of the “excellence of the people”¹⁴⁴ as a complement.

The constitutional indispensability of basic virtues was famously recognized by Justice Brandeis in his concurring opinion in the *Whitney* case.¹⁴⁵ Justice Brandeis declared courage, rather than a well-calibrated institutional separation of powers, to be “the secret of liberty.”¹⁴⁶ To the virtue of courage we may add other basic, cross-cultural epistemic and moral virtues, including that of attention to the pursuit of meaningful truth;¹⁴⁷ genuinely deserved trustworthiness that is based on competence, transparency, and fidelity;¹⁴⁸ and

140. See ALAN RYAN, ON POLITICS, BOOK TWO: HOBBS TO THE PRESENT, 529–30 (2012).

141. See *id.* See also CONDORCET, *supra* note 36; CONSTANT, *supra* note 36.

142. See RYAN, *supra* note 140, at 530.

143. Sharon Krause, *The Spirit of Separate Powers in Montesquieu*, 62 REV. POL. 231, 233 (2000).

144. WALTER BAGEHOT, THE ENGLISH CONSTITUTION 155 (Paul Smith ed., 2004) (1867) (ebook).

145. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on* assuredly quite separate grounds, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

146. *Id.*

147. See, e.g., Philip E. Dow, *Developing Truth Seekers*, in INTEGRITY, HONESTY, AND TRUTH SEEKING 274, 274–303 (Christian B. Miller & Ryan West eds., 2020); *id.* at 274 (“The pursuit of truth has always . . . provided a foundation for human flourishing.”). More broadly, see *id.* at 303 (John Adams as holding that “‘virtue is the only foundation of republics’”). The fuller quotation is that “Public Virtue cannot exist in a Nation without private, and public virtue is the only Foundation of Republics.” *Letter from John Adams to Mercy Otis Warren on April 16, 1776*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/06-04-02-0044#:~:text=The%20Form%20of%20Government%2C%20which,pure%20Religion%2C%20or%20Austere%20Morals.> [https://perma.cc/FPQ8-U59K] (last visited Oct. 14, 2025). This is not to suggest that Adams’s own list of relevant public and private virtues would match those of a given observer today.

148. See, e.g., Mara Olekalns, Feyona Lau & Philip L. Smith, *Resolving the Empty Core: Trust as a Determinant of Outcomes in Three-Party Negotiations*, 16 GRP. DECISION & NEGOT. 527, 527 (2007). Consider the value of genuine trustworthiness in circumstances of interminable inter-branch governmental gridlock and polarization on, e.g., governmental indebtedness. See also KEVIN VALLIER, TRUST IN A POLARIZED AGE (2020); TRUST AND GOVERNANCE (Valerie Braithwaite & Margaret Levi eds., 2003).

practical wisdom in decision making, especially under prisoner's dilemma-type separation of powers problems.¹⁴⁹

Promoting the relevant virtues, such as courage and fortitude, genuine trustworthiness, and practical wisdom certainly need not involve legal coercion, or even any governmental involvement in attempts to inculcate any basic virtues, or any governmental soul-craft.¹⁵⁰ The relevant virtues need not be inculcated from the top down. Nor should encouraging the basic, cross-cultural virtues be considered a threat to liberalism or to the proper role of public reason.¹⁵¹

This is not to suggest that the basic virtues complementary to the separation of powers are readily manipulable. There are no dials to conveniently and effectively turn. But it is implausible that societies have no choice as to the virtues, either epistemic or moral, that they effectively teach, model, validate, emphasize, and reward.

At our most optimistic, we might sympathize with Thomas Jefferson's virtue-focused response to the problems of the separation of powers. In 1819, Jefferson wrote to Judge Spencer Roan that "I . . . resign everything cheerfully to the generation now in place. They are wiser than we were, and their successors will be wiser than they, from the progressive advance of science."¹⁵² Cultures can, within limits, gain or lose in their practical wisdom.

But we need make no claim here for the inevitability of progress in the virtues linked to the separation of powers. The needed progress, instead, would

149. See, e.g., PRACTICAL WISDOM: PHILOSOPHICAL AND PSYCHOLOGICAL PERSPECTIVES (Mario De Caro & Maria Silvia Vaccarezza eds., 2021); WHAT IS WISDOM AND CAN IT BE TAUGHT? PHILOSOPHICAL, PSYCHOLOGICAL & PEDAGOGICAL PERSPECTIVES (Eeva K. Kallio & Päivi Tynjälä eds., 2025); Valerie Tiberius, *Wisdom and Perspective*, 102 J. PHIL. 163, 174–75 (2005). See also Katherine J. Bangen, Thomas W. Meeks, Dilip V. Jeste, *Defining and Assessing Wisdom: A Review of the Literature*, 21 AM J. GERIATRIC PSYCHIATRY 1254, 1263 (2013); Jeffrey A. Greene & Scott C. Brown, *The Wisdom Development Scale: Further Validity Investigations*, 68 INT'L J. AGING & HUM. DEV. 289 (2009).

150. The utopian writer Samuel Butler envisioned a class of persons "trained in soul-craft," akin to physicians. See SAMUEL BUTLER, EREWHON ch. X, at 59 (Warbler Classics 2023) (1872). For brief discussion, see WOLIN, *supra* note 136, at 34.

151. For the crucial exposition, see JOHN RAWLS, POLITICAL LIBERALISM (1993). See also the sources cited in Jonathan Quong, *Public Reason*, STAN. ENCYC. OF PHIL. (Apr. 20, 2022), <https://plato.stanford.edu/entries/public-reason/> [<https://perma.cc/H563-X8FD>]. Rawls himself relies on thin versions of basic virtues such as civility, tolerance, and an active sense of fairness for his own version of justice as fairness. For discussion, see Christie Kartley & Lori Watson, *Virtue in Political Thought: On Civic Virtue in Political Liberalism*, in VIRTUES AND THEIR VICES 415, 422, 431 (Kevin Timpe & Craig A. Boyd eds., 2014).

152. THOMAS JEFFERSON, *Limits to Judicial Review: Letter to Judge Spencer Roane* (1819), reprinted in THOMAS JEFFERSON: WRITINGS 1425, 1428 (Merrill D. Peterson ed., 1984). For a sense of Enlightenment confidence in moral progress, see R. George Wright, *Cruel and Unusual Punishments and the Constitutional Status of the Idea of Progress*, 20 FIU L. Rev. (forthcoming 2025).

arise from our better understanding how best to promote¹⁵³ the virtues that support the operation of the separation of powers.¹⁵⁴ There certainly appears to be room, at present, for a fully legitimate increase in our collective attention to promoting the relevant basic virtues.

153. We need not claim that the relevant epistemic and moral virtues can be directly or explicitly taught. It has been said that “many wisdom scientists view wisdom as malleable and educable, while . . . others say that it cannot be directly taught; according to them, it develops through life experience and informal unintentional learning or can be nurtured indirectly by arranging conditions contributing to its development.” Kallio & Tynjälä, *supra* note 149, at 37. Nor need we claim that the virtues as displayed in separation of powers contexts will also be displayed in other contexts, such as on the field of battle, or in choosing a life-partner. *See, e.g.*, JOHN M. DORIS, *LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR* (2005) (emphasizing the role of situation and circumstance).

154. Finally, we make no claim that the virtues noted above are exhaustive. They are instead illustrative. One might well make a case for the value, in separation of powers contexts, of the virtue of epistemic humility. Epistemic humility here involves not an under-rating of one’s own abilities, but a genuinely realistic recognition of both one’s capacities and one’s limitations, here in terms of political and policy disputes. *See, for background*, CHRISTOPHER M. BELLITTO, *HUMILITY: THE SECRET HISTORY OF A LOST VIRTUE* (2023); ROBERT C. ROBERTS & W. JAY WOOD, *INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY* ch. 9, at 236–56 (2007); Dennis Whitcomb et al., *Intellectual Humility: Owning Our Limitations*, 94 *PHIL. & PHENOMENOLOGICAL RES.* 509 (2017). Consider, for example, the role of a reasonable epistemic humility in judicially assessing the boundaries of administrative agency judgments involving individual rights claims during a pandemic. In that context, note the epistemic humility, and the practical wisdom, of Judge David Hamilton’s opinion regarding COVID-19 regulatory response. *Cassell v. Snyders*, 990 F.3d 539, 549 (7th Cir. 2021).

THE ROBERTS COURT'S LIBERTARIAN CONSTITUTIONALISM

CARLOS A. BALL*

This Article examines how important components of the Roberts Court's constitutional jurisprudence as it relates to individual rights reflect two constitutive elements of libertarian theory. The first element is the libertarian belief that laws aimed at attaining public policy objectives frequently engender injustices for regulated parties. The second element is the libertarian call for robust judicial interventions to correct those injustices.

The Article explores how the Court's Second Amendment ruling in New York State Rifle & Pistol Ass'n v. Bruen and its First Amendment decision in 303 Creative LLC v. Elenis reflect libertarianism's deep skepticism of the ability of legislatures to pursue social and economic objectives without creating injustices for regulated parties. The Article also examines how Bruen and two of the Court's Free Exercise Clause rulings assessing the constitutionality of COVID regulations rely on the type of expansive judicial power called for by libertarian theory to correct those injustices.

The Article's objective is neither to defend nor criticize the current Court's libertarian constitutionalism. The Article instead seeks to delineate its contours to better understand how significant components of the Roberts Court's constitutional jurisprudence reflect libertarian theory's values and priorities. In doing so, the Article shows how libertarian constitutionalism can manifest itself in ways other than by reviving the ghost of judicial protection for economic rights under substantive due process doctrine.

TABLE OF CONTENTS

INTRODUCTION

I. LEGISLATURES AND THE JUDICIARY IN LIBERTARIAN THEORY

A. Legislative Policy Choices as Sources of Injustices for Regulated Parties

B. Expansive Judicial Power and the Protection of Regulated Parties

II. THE GOVERNMENT IS UP TO NO GOOD: *BRUEN* AND 303 *CREATIVE*

A. The Government's Injustices in Bruen

B. The Government's Injustices in 303 Creative

III. EXPANSIVE JUDICIAL POWER TO CORRECT REGULATORY INJUSTICES

A. Bruen and Expansive Judicial Power Under the Second Amendment

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*B. COVID Rulings and Expansive Judicial Power Under
the Free Exercise Clause*

CONCLUSION

INTRODUCTION

There is no more long-standing and unresolved question in American constitutional law than how best to limit governmental power through the exercise of judicial review.¹ The Supreme Court, in its famous footnote four in *United States v. Carolene Products*, provided an analytical framework for approaching that question.² As is well known, the footnote calls for judicial deference to legislative enactments except when they may abridge fundamental rights, interfere with democratic or political processes, or work to the detriment of “discrete and insular minorities.”³ Although *Carolene Products* can be interpreted in different ways, it is generally understood to call on courts to uphold most laws and regulations implementing social and economic policies.⁴

Libertarian constitutional theory offers an alternative to the *Carolene Products* framework. Rather than presume the constitutionality of most laws, libertarian theory calls for a presumption of unconstitutionality when regulated entities and individuals contend that the measures impermissibly restrict their liberty rights.⁵ This presumption is grounded in the libertarian view that there is unavoidable tension between the constitutional rights of individuals and the government’s efforts to use its regulatory authority to achieve social and economic objectives.⁶

Commentators have paid considerable attention to how the Roberts Court’s constitutional jurisprudence repeatedly limits the government’s regulatory authority. There is an extensive literature, for example, contending that some of the Court’s recent First Amendment rulings promote deregulatory policy objectives in ways that are reminiscent of the *Lochner* era of the early twentieth

1. See, e.g., Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 921 (2001) (noting that “reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today”).

2. 304 U.S. 144, 152 n.4 (1938).

3. *Id.*

4. See, e.g., Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 111 (noting that among *Carolene Products*’ “key prescriptions” was that the Court “should *not* strike down ordinary social and economic legislation: the sorts of laws the Court had routinely nullified in the preceding *Lochner* era”).

5. See *infra* notes 92–93 and accompanying text.

6. For comprehensive explorations and defenses of libertarian constitutional theory, see generally RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014).

century.⁷ Much has also been written on the efforts by conservatives and libertarians to challenge foundational elements of the administrative state, many of which have found a receptive audience among a majority of the Roberts Court's members.⁸

Commentators have paid less attention to the overlap between important components of the current Court's constitutional jurisprudence and libertarian political theory. This Article is the first to link that jurisprudence to two constitutive elements of libertarian theory. The first element is the view that laws aimed at attaining public policy objectives frequently engender injustices for regulated parties.⁹ The second element is the belief that robust judicial interventions are essential to correct those injustices.¹⁰

The Article begins by describing the role that these two elements play in libertarian theory. It then proceeds to examine how they are both reflected in the methodology and reasoning of several of the Roberts Court's recent important decisions implicating the constitutional rights of individuals. The Article's objective is neither to defend nor criticize the current Court's libertarian constitutionalism. The Article instead seeks to delineate its contours to better understand how significant components of the Roberts Court's constitutional jurisprudence reflect libertarian theory's values and priorities.

Part I canvasses the writings of prominent libertarian thinkers, including the economist Friedrich Hayek and the constitutional theorist Randy Barnett, to explain how and why libertarian theory views the exercise of legislative authority aimed at attaining social and economic objectives as fonts of injustices for regulated parties. It also explains how and why libertarian theory calls for robust exercises of judicial power to remedy those injustices.

Part II explores how the Roberts Court's Second Amendment ruling in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*¹¹ and its First Amendment decision

7. See, e.g., Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179 (2018); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2014); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133.

8. See e.g., Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371 (2022); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1; Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

9. See *infra* Part I.A.

10. See *infra* Part I.B. I have elsewhere examined the ways in which the constitutional jurisprudence of Justice Anthony Kennedy, who served on the Roberts Court until 2018, generally abided by libertarian principles and priorities by promoting an atomistic conception of the self, a deep skepticism of government regulations, and a negative conception of individual rights. See Carlos A. Ball, *Progressive Constitutionalism and Its Libertarian Discontents: The Case of LGBTQ Rights*, 68 ST. LOUIS U. L.J. 671, 701–36 (2024).

11. 597 U.S. 1 (2022).

in *303 Creative LLC v. Elenis*¹² reflect libertarianism's deep skepticism that it is possible for legislatures to pursue social and economic objectives without engendering injustices for regulated parties. The Court, faced with individual rights claims in both cases, refused to give constitutional weight to legislative policy preferences related to gun safety and antidiscrimination objectives, respectively. Instead, the Court viewed the laws under challenge exclusively as fonts of injustices for regulated individuals.¹³

Part III examines how *Bruen* and two of the Court's free exercise rulings assessing the constitutionality of COVID regulations rely on the types of robust judicial interventions called for by libertarian theory. While other commentators have noted how the Roberts Court has expanded the judiciary's power in general,¹⁴ and its own authority in particular,¹⁵ my contribution in this Article is to examine how that expansion reflects constitutive principles of libertarian theory.

Before proceeding, it is important to make three points. First, there are additional examples of the Court's willingness to interpret the Constitution in ways that are consistent with libertarian theory beyond the ones I examine in this Article. These examples include rulings striking down campaign finance laws,¹⁶ voiding statutes protecting unions,¹⁷ prohibiting affirmative action programs,¹⁸ and rejecting regulations of arbitration agreements.¹⁹ The same is

12. 600 U.S. 570 (2023).

13. See *infra* Part II.

14. See, e.g., Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 636 (2022); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 2.

15. See, e.g., STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023) (explaining how the Court in recent years has used the emergency docket to expand its power); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) (arguing that the Roberts Court is "implement[ing] the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity except the Supreme Court itself").

16. See, e.g., *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014) (striking down a federal law limiting how much money a donor could contribute to political candidates for federal office in the aggregate); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (striking down a federal law restricting the ways in which corporations and unions used their general treasury funds to try to influence federal elections in the weeks leading up to those elections).

17. See, e.g., *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (holding that a California regulation allowing labor groups to access agricultural property to solicit support from farm workers violates the Takings Clause); *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018) (using the Free Speech Clause to strike down a statute allowing public-sector unions to collect agency fees from non-members).

18. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (holding that admissions policies that included an affirmative action component implemented by a public university violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 and that one implemented by a private university violated Title VI).

19. See, e.g., *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (holding that the Federal Arbitration Act preempted a West Virginia law prohibiting arbitration clauses for

true of rulings striking down health and safety regulations outside of the COVID context²⁰ and limiting the scope of antidiscrimination laws in cases other than *303 Creative*.²¹

Second, my argument is not that *all* of the Roberts Court's constitutional jurisprudence reflects a pervasive mistrust of the government's policy choices and a corresponding trust in the exercise of judicial authority. The Roberts Court sometimes defers to the government's policy preferences while calling for judicial restraint rather than intervention. This seems to be particularly true when the government is pursuing conservative rather than progressive regulatory objectives in matters related, for example, to abortion and LGBTQ rights.²²

Although these cases suggest that the Court embraces libertarian constitutionalism in a selective manner that helps attain conservative policy objectives while undermining progressive policy goals, that is not an issue I examine here. Instead, I focus on how significant (but not all) components of the Court's individual rights jurisprudence reflect the values and priorities of libertarian theory.

Finally, I do not in this Article address the question of judicial *motivations*. I do not, therefore, argue that a majority of the Roberts Court's members are

personal-injury and wrongful-death claims); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that the Federal Arbitration Act preempted California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts).

20. *See, e.g.*, *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755 (2018) (striking down a state law requiring licensed facilities providing certain medical services to inform users of abortion options); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (striking down a state law prohibiting pharmacies from selling doctors' prescription-writing histories when that information was to be used for marketing purposes).

21. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020) (holding that the Religion Clauses prevented two elementary school teachers at Catholic schools from suing their employers for age and disability discrimination); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (holding that the Religion Clauses prevented a fourth-grade teacher at a Lutheran school from suing her employer for disability discrimination).

22. *See, e.g.*, *United States v. Skrmetti*, 605 U.S. 495 (2025) (upholding a ban on gender-affirming health care for transgender minors); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade* and upholding a 15-week abortion ban). Some commentators have argued that some libertarian thinkers, particularly Friedrich Hayek, embrace traditional understandings of morality in ways that might support the outcome of cases like *Dobbs*. *See* WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST* 13 (2019) ("Hayekian neoliberalism is a moral-political project that aims to protect traditional hierarchies by negating the very idea of the social and radically restricting the reach of democratic political power in nation-states."); MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* 312 (2017) ("Hayek is . . . clear that the neoliberal will to adapt exists side by side with an unwavering deference to historical selection—the social conventions of religion, family, and inherited wealth that are thrown up as if by chance but subsequently validated by the weight of social norms.") (endnote omitted). *See also id.* at 8–9 ("[I]t would be a mistake to think that neoliberalism is any less invested in the value of the family than are social conservatives . . . [given that] neoliberal economists and legal theorists wish to reestablish the private family as the primary source of economic security and a comprehensive alternative to the welfare state.").

politically or ideologically committed to libertarian theory. Although that might be the case, I do not explore the question here. Instead, I limit myself to examining the extent to which important aspects of the Court's recent constitutional jurisprudence reflect the two constitutive elements of libertarian theory already noted. I believe this is the case regardless of the particular political, ideological, or other views that a majority of the justices may hold.

For many decades, libertarian constitutionalism has been associated with the *Lochner* era and its (in)famous protection of the right to contract as a fundamental right under the Due Process Clause.²³ The Supreme Court has expressed no interest in returning to that understanding of libertarian constitutionalism since 1937.²⁴ But, as this Article shows, libertarian constitutionalism can manifest itself in ways other than by reviving the ghost of judicial protection for economic rights under substantive due process doctrine. The Roberts Court's libertarian constitutionalism, for better or for worse, is not restricted to your great-grandfather's *Lochnerian* constitutionalism of a century ago.

I. LEGISLATURES AND THE JUDICIARY IN LIBERTARIAN THEORY

Section A provides an overview of how and why libertarian theory holds that most laws aimed at attaining social and economic policy objectives engender injustices for regulated parties. Section B explains how and why libertarian theory calls for robust judicial interventions to correct those injustices.

A. Legislative Policy Choices as Sources of Injustices for Regulated Parties

Libertarian political morality promotes a conception of human liberty that normatively prioritizes the ability of individuals to pursue their interests with minimal governmental restraint.²⁵ According to libertarian theory, the state's authority must be significantly limited to provide individuals with as much freedom as possible in economic, social, and personal spheres. This allows them to interact and bargain with each other as they deem best, free of governmental coercion.²⁶

Libertarian theory acknowledges that state mechanisms are needed to prevent violence and theft, as well as to enforce contracts and protect private

23. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a statute prescribing maximum working hours for bakers under the Due Process Clause).

24. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (rejecting challenge to a minimum wage law under the Due Process Clause).

25. See, e.g., BRIAN DOHERTY, *RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT* 4–5 (2007).

26. See, e.g., Randy E. Barnett & Douglas B. Rasmussen, *The Right to Liberty in a Good Society*, 69 *FORDHAM L. REV.* 1603, 1610 (2001); DOHERTY, *supra* note 25, at 3.

property.²⁷ But the theory holds that when the government goes beyond these limited goals by regulating individuals without their consent to attain social and economic objectives, it inevitably violates their liberty rights.²⁸

For libertarians, fundamental liberty rights are not derived from the government and its laws; instead, they are antecedent to the state's formation.²⁹ While libertarian theory holds that it is reasonable to assume individuals consent to the exercise of state authority to deter crime, enforce contracts, and protect private property, additional uses of governmental authority are illegitimate because they lack either the explicit or implicit consent of regulated individuals.³⁰

The fact that the government exercising regulatory authority might be democratic is generally irrelevant to libertarians.³¹ What matters instead is whether the state impermissibly tramples on pre-existing liberty rights.³² For libertarians, there is an ever-present danger that democracies will devolve into totalitarian systems due to the propensity of elected officials to use their authority to benefit particular segments of the population at the expense of others' basic liberty rights.³³

All of these principles are reflected in the writings of Friedrich Hayek, arguably the most influential libertarian economist of the twentieth century. According to Hayek, the freedom of individuals to make spontaneous decisions in unregulated economic marketplaces promotes innovation and progress.³⁴ Democratic government's exercise of regulatory authority in the pursuit of social and economic objectives inexorably replaces innumerable decisions made by private actors interacting in free markets with coercive governmental

27. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, at ix (1974).

28. See *infra* Part I.A.

29. See, e.g., BARNETT, *supra* note 6, at 23; F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 394 (Jeremy Shearmur ed., Univ. Chicago Press 2021) (originally published in three different volumes in 1973, 1976, and 1979, respectively).

30. The types of government action that libertarians approve emanate from agreed upon general principles of justice centered around individual liberty. From this perspective, "[o]nly if the society can form a real and durable consensus on principles of justice, principles that they can agree will control the actions of the state, can free and equal individuals confidently relinquish their right to consent or refuse to consent to laws governing their actions." Andrew C. Spiropoulos, *Rights Done Right: A Critique of Libertarian Originalism*, 78 UMKC L. REV. 661, 668 (2010).

31. See *infra* notes 45–46, 51–54 and accompanying text.

32. See *infra* notes 78–89 and accompanying text.

33. As Thomas Biebricher notes in describing what he calls neoliberal political theory, [s]imply put, the common denominator of all neoliberal views on democracy is the conviction that it poses a more or less serious problem [because it] has the potential to plunge societies into chaos and/or transform them into machineries of massive exploitation and repression that ultimately come to resemble the collectivisms that the neoliberals so vehemently oppose.

THOMAS BIEBRICHER, *THE POLITICAL THEORY OF NEO-LIBERALISM* 80 (2018). See also RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 302 (1998) (arguing that the intervention of state power to ameliorate insecurity and inequality is "far more troublesome and dangerous than the disease").

34. F.A. HAYEK, *THE ROAD TO SERFDOM* 86–88 (Bruce Caldwell ed., 2007) (1944).

mandates intended to attain public policy preferences.³⁵

When democratic governments, in seeking to attain distributive, egalitarian, and other general welfare objectives, enact and implement policies restricting the freedom of private actors, the inevitable result is a downward slide toward totalitarianism.³⁶ Hayek explained that

the more dependent the position of the individuals or groups is seen to become on the actions of government, the more they will insist that the governments aim at some recognizable scheme of distributive justice; and the more governments try to realize some preconceived pattern of desirable distribution, the more they must subject the position of the different individuals and groups to their control. So long as the belief in “social justice” governs political action, this process must progressively approach nearer and nearer to a totalitarian system.³⁷

Hayek believed that “it is the acceptance of . . . common principles that makes a collection of people a community This means that the power of the majority is limited by those commonly held principles and that there is no legitimate power beyond them.”³⁸ He also insisted that the only legitimate laws are rules of general and equal applicability that help “creat[e] conditions under which the knowledge and initiative of individuals are given the best scope so that *they* can plan most successfully.”³⁹ General rules of just conduct are legitimate because they arise from the consent of the governed.⁴⁰

In contrast, laws promoting what government officials believe is a more “rational utilization of our resources” are illegitimate.⁴¹ When elected

35. *See id.* at 71.

36. *Id.* at 67.

37. HAYEK, *supra* note 29, at 266.

38. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 171 (Ronald Hamowy ed., 2011) (1960). Hayek added that “it is not from a mere act of will of the momentary majority but from a wider agreement on common principles that a majority opinion derives its authority.” *Id.* Wendy Brown notes that for Hayek, “[p]olitical power . . . negates . . . freedom with coercion and disturbs, suppresses, or replaces . . . evolved and tested principles of community with artifice and rationalism Thus, the political in general and democracy in particular meet their limits in the commonly held principles that make and bind communities.” BROWN, *supra* note 22, at 75.

39. *See* HAYEK, *supra* note 34, at 85.

40. HAYEK, *supra* note 29, at 363 (“[If] the consent of the people . . . approves only of the laying down and enforcement of general rules of just conduct [then] even the highest constituted power may be limited.”). According to Hayek,

[o]nly a demagogue can represent as “antidemocratic” the limitations which long-term decisions and the general principles held by the people impose upon the power of temporary majorities. These limitations were conceived to protect the people against those to whom they must give power, and they are the only means by which the people can determine the general character of the order under which they will live.

HAYEK, *supra* note 38, at 269.

41. HAYEK, *supra* note 34, at 85. *See also* HAYEK, *supra* note 38, at 221–24 (explaining why rules, in order to be true laws, must be generally applicable, a characteristic that prevents them from being arbitrary).

legislatures enact laws that go beyond rules of general conduct, the result is a “bargaining democracy” in which officials legislate to satisfy the preferences of special interests.⁴²

Hayek viewed the notion that such legislation is somehow legitimate because it reflects majoritarian will as a dangerous illusion that occludes how elected legislatures are routinely captured by narrow and self-serving interests.⁴³ This capture results in laws that no majority actually wants or desires. As he explained,

[i]t appears that we have unwittingly created a[n institutional and democratic] machinery which makes it possible to claim the sanction of an alleged majority for measures which are in fact not desired by a majority, and which may even be disapproved by a majority of the people; and that this machinery produces an aggregate of measures that is not only not wanted by anybody, but that could not as a whole be approved by any rational mind because it is inherently contradictory.⁴⁴

For Hayek, “[d]emocracy is essentially a means, a utilitarian device for safeguarding internal peace and individual freedom.”⁴⁵ What ultimately matters is not whether government officials are elected; what matters is whether they respect individual liberty. As he put it, valuing democracy over liberty

is largely responsible for the misleading and unfounded belief that, so long as the ultimate source of power is the will of the majority, the power cannot be arbitrary . . . [I]t is not the source but the limitation of power which prevents it from being arbitrary. Democratic control *may* prevent power from becoming arbitrary, but it does not do so by its mere existence. If democracy resolves on a task which necessarily involves the use of power which cannot be guided by fixed rules, it must become arbitrary power.⁴⁶

Hayek urged that as many social and economic policy issues as possible be taken away from legislators and left in the hands of private actors participating

42. HAYEK, *supra* note 29, at 456. For Hayek, “all government, especially if democratic, should be limited. The reason is that democratic government, if nominally omnipotent, becomes as a result of unlimited government powers exceedingly weak, the playball of all the separate interests it has to satisfy to secure majority support.” *Id.* at 456–57. *See also id.* at 450 (“So long as the present form of democracy persists, decent government cannot exist”). Thomas Biebricher argues that the “core contention of the neoliberal critique of democracy” is that it allows for “the undue influence of actors pursuing particularistic interests in the political process and the distortions that result from this influence.” BIEBRICHER, *supra* note 33, at 86.

43. HAYEK, *supra* note 29, at 362–64.

44. *Id.* at 333.

45. HAYEK, *supra* note 34, at 110.

46. *Id.* at 110–11.

in free markets. Circumscribing governmental authority in this way both promotes general well-being and protects individual liberty.⁴⁷

Hayek, unlike contemporary libertarian constitutional theorists such as Randy Barnett and Richard Epstein,⁴⁸ did not demand that the power to limit legislative authority be placed squarely in the hands of judges.⁴⁹ Instead, Hayek prioritized institutional mechanisms that separated, and therefore diluted, governmental power. With this in mind, he proposed dividing legislatures into two chambers with different responsibilities and elected by different segments of the population.⁵⁰

For our purposes, the details of Hayek's proposed institutional model of government are less important than how it reflects his belief that most laws

47. As Hayek explained, [t]he democratic and the [classical] liberal traditions . . . differ . . . on the scope of the state action that is to be guided by democratic decision. While the dogmatic democrat regards it as desirable that as many issues as possible be decided by majority vote, the [classical] liberal believes that there are definite limits to the range of questions which should be thus decided.

HAYEK, *supra* note 38, at 170. Hayek titled one of the chapters of *Law, Liberty, and Legislation* as "The Containment of Power and the Dethronement of Politics." HAYEK, *supra* note 29, at ch. 18. The political theorist Wendy Brown notes that Hayek believed that the notion of popular sovereignty "threatens individual freedom, licenses unbounded government, and confers supremacy on precisely the domain that needs to be leashed, the political." BROWN, *supra* note 22, at 69.

48. See *infra* Part I.B.

49. See *infra* notes 72–73 and accompanying text.

50. Under Hayek's proffered institutional model, one chamber, the Legislative Assembly, would be tasked with enacting laws, which for him, as already noted, see *supra* notes 39–40 and accompanying text, should be limited to rules of general conduct that apply to everyone. HAYEK, *supra* note 29, at 466. But in order to make it less likely that legislators would engage in the type of democratic bargaining that Hayek believed represented a grave threat to individual liberty and the rule of law, see *supra* notes 42–44 and accompanying text, he proposed that assembly members be restricted to 45-year olds elected only by 45-year olds to 15-year terms and that legislators, when they retired at the age of 60, be guaranteed a state job. HAYEK, *supra* note 29, at 470. The age requirement was meant "[t]o assure [that] only people who have already proved themselves in the ordinary business of life" be chosen by their age contemporaries whom Hayek believed would be the "fairest judges" of their competency. *Id.* The long, 15-year terms were intended to insulate lawmakers from the reelection pressures imposed by special interests. *Id.* Finally, the guaranteed post-retirement state job was intended to reduce the chances that legislators would be corrupted by special interests' offers of jobs and remuneration. *Id.*

Hayek proposed the creation of a second body, the Governmental Assembly, which would have the power to determine how the government operates. *Id.* at 475. The second chamber's regulatory authority would be limited significantly because it would be "bound by the rules of just conduct laid down by the Legislative Assembly, and . . . it could not issue any orders to private citizens which did not follow directly and necessarily from the rules laid down by the latter." *Id.*

As part of his proposal, Hayek suggested significant restrictions on the right to vote as a means of limiting the government's regulatory authority. *Id.* at 470, 476. For example, as already noted, Hayek proposed that only 45-year-olds be allowed to vote for the assembly tasked with writing laws. *Id.* at 470. Hayek would also deny the right to vote for a second assembly, tasked with determining how the government operates, to large segments of the population, such as "civil servants, old age pensioners, the unemployed, etc.[.]" who might use the franchise to push for greater government spending. *Id.* at 476.

enacted by contemporary democratic legislatures are sources of injustices because they impinge on the liberty rights of regulated parties.

The economist Milton Friedman, another leading and highly influential twentieth-century libertarian thinker, was similarly distrustful of laws aimed at attaining distributive and egalitarian objectives. Like Hayek, Friedman viewed such efforts as intrinsic threats to economic liberty, which is “an essential requisite for political freedom.”⁵¹ Friedman’s writings do not distinguish between laws enacted through democratic processes and those adopted in other ways. Instead, he decried the fact that in democracies like those of the United Kingdom and the United States, “[t]he view that government’s role is to serve as an umpire to prevent individuals from coercing one another was replaced [in the twentieth century] by the view that government’s role is to serve as a parent charged with the duty of coercing some to aid others.”⁵² For Friedman, as for Hayek, most government regulations are sources of injustices because they trample on individual liberty. The key to preserving economic freedom, and therefore political freedom, is to demand strict limits on the government’s authority, whether democratic or otherwise.⁵³

Like Hayek, Friedman believed that the government represents a constant threat to freedom because of its power to coerce, and this is no less true of democratic and representative government than of monarchical, dictatorial, or oligarchical government.⁵⁴ To limit the government’s coercive powers, therefore, it is essential to remove “economic activity from the control of political authority.”⁵⁵ In this way, economic freedom serves as a check on political authority.⁵⁶

Friedman believed that protecting individuals’ economic decisions keeps government power in check. However, he rejected the converse, that is the notion that such power should be exercised to limit economic freedom. Although Friedman conceded that “[m]ajority rule is a necessary and desirable expedient,” he believed that economic marketplaces more accurately reflect individuals’ preferences than do voting booths.⁵⁷ If the objective is to distribute society’s resources in ways that reflect the preferences of its members, then we should encourage unrestricted economic exchanges and limit the scope of legislation and other exercises of governmental authority.⁵⁸

Like Hayek, Friedman called for denying government the authority to regulate in as many spheres as possible to leave distributive and other objectives

51. MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 2 (1980).

52. *Id.* at 5.

53. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 4 (4th ed. 2020) (arguing that to preserve freedom, “the scope of government must be limited”).

54. *Id.* at 19.

55. *Id.* at 20.

56. *Id.*

57. FRIEDMAN & FRIEDMAN, *supra* note 51, at 65.

58. *Id.* at 65–66.

to the market.⁵⁹ Friedman explained that “the market . . . reduce[s] greatly the range of issues that must be decided through political means, and thereby . . . minimize[s] the extent to which government need participate directly in the game.”⁶⁰

According to Friedman, relying on the market, rather than on politics and majoritarian democratic rule, reduces social strains while dispensing with the need for agreement or consensus on the acceptability of any given outcome.⁶¹ As he explained, “[t]he wider the range of activities covered by the market, the fewer are the issues on which explicitly political decisions are required and hence on which it is necessary to achieve agreement.”⁶²

In the end, Friedman’s normative political vision was simple: promote individual freedom by relying on markets as much as possible and prevent coercion by relying on government, whether democratically chosen or not, as little as possible.

In similar ways, the libertarian economist James Buchanan, a leading proponent of public choice theory, urged citizens not to be fooled by the “romance” of majoritarian government.⁶³ According to Buchanan, legislators rationally seek to maximize their chances for reelection by promoting the interests of the pressure groups that have the greatest power and influence.⁶⁴ From his perspective, the political sphere is not different from the economic one,

59. Most of Friedman’s book *Capitalism and Freedom* consists of arguments regarding why large spheres of human conduct and interactions must be taken away from political and democratic domains and handed over to the self-regulation of private parties exchanging goods and services in unrestrained economic marketplaces. In the book, Friedman advocates, for example, for the elimination of antidiscrimination laws, FRIEDMAN, *supra* note 53, at 134–38, social security programs, *id.* at 218–26, minimum wage laws, *id.* at 216–17, public housing programs, *id.* at 213–16, the governmental administration (if not necessarily the funding) of public education, *id.* at 103–17, and the state licensing of occupations including medical professions, *id.* at 165–90. His book *Free to Choose*, co-written with his wife Rose Friedman, additionally calls for *inter alia* eliminating the government’s role in consumer protection and workplace safety, FRIEDMAN & FRIEDMAN, *supra* note 51, at 189–213 and 222–47, while advocating for significant reductions in the regulation of industry to protect the environment. *Id.* at 213–18. Friedman, in both books, failed to give *any* weight to the fact that the laws and policies that he urged be replaced with the full unleashing of market forces were developed and implemented by democratic governments.

60. FRIEDMAN, *supra* note 53, at 19.

61. *Id.* at 30.

62. *Id.*

63. As Buchanan put it,

[p]ublic choice theory has been the avenue through which a romantic and illusory set of notions about the workings of governments and the behavior of persons who govern has been replaced by a set of notions that embody more skepticism about what governments can do and what governors will do, notions that are surely more consistent with the political reality that we may all observe about us.

James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in 1 THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES M. BUCHANAN 46 (1999).

64. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 283–95 (paperback ed. 1965).

as legislators and interests groups work not to advance the general welfare, but instead to promote their private interests.⁶⁵ Public choice theorists such as Buchanan “regard the state not as something ‘organic,’ something that just grows, with a life and purposes of its own. Rather, they see government as simply a means by which rational, self-interested individuals combine to promote their personal interests through collective action.”⁶⁶ Although progressives blame many of society’s ills on market failures, public choice theorists like Buchanan argue that those ills are instead caused by the failures of democratic governments.⁶⁷

According to Buchanan, majority rule inevitably results in the unequal treatment of minorities whose interests and preferences are not reflected in laws enacted by legislators.⁶⁸ As he explained, “[t]he elementary logic of majority rule . . . dictates that members of majority coalitions are differentially advantaged relative to members of the polity outside these coalitions; majoritarian democracy is necessarily discriminatory in its operation, until and unless this feature is explicitly constrained.”⁶⁹

It is possible, of course, to take issue with and critique the libertarian theory summarized here. To provide just one line of argument as an example, the political theorist Thomas Biebricher criticizes the ways in which the theory views democracy only “as a source of potential dangers, rarely as a context of cooperation, fostering mutual understanding and learning about ourselves and others by having our minds changed in the course of the democratic process.”⁷⁰ He adds that “[i]t may thus turn out that realizing our initial preferences is not the only issue of importance in a democracy; democracy could also turn out to be just as important as a context of discovery and reinterpretation of these preferences in exchange with others.”⁷¹

I do not here explore this and other critiques of libertarian political theory because this Section’s purpose has not been to normatively assess it. Instead, the objective has been to explain why libertarian theory is so mistrustful of legislatures’ policy choices. In Part II, I provide examples of how important components of the Roberts Court’s constitutional jurisprudence reflect libertarianism’s deep skepticism of legislative policy preferences, frequently viewing them exclusively as fonts of injustices for regulated individuals. But

65. Georg Vanberg, *A Square Peg in a Round Hold: Democracy, Constitutionalism, and Citizen Sovereignty*, 18 GEO. J.L. & PUB. POL’Y 655, 658 (2020) (“The aim of Buchanan’s political theory is to . . . view the political process as a means by which individuals seek to advance their separate individual interests and values by engaging in ‘political exchange’ with others.”).

66. EAMONN BUTLER, *PUBLIC CHOICE: A PRIMER* 41 (2012).

67. *Id.* at 34.

68. JAMES M. BUCHANAN & ROGER D. CONGLETON, *POLITICS BY PRINCIPLE, NOT INTEREST: TOWARD NONDISCRIMINATORY DEMOCRACY* 15–26 (1998).

69. James M. Buchanan, *Generality as a Constitutional Constraint*, in 1 *THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES M. BUCHANAN* 423 (1999).

70. BIEBRICHER, *supra* note 33, at 102.

71. *Id.* (citation omitted).

before I do, I next describe how and why libertarian theory assigns to judges expansive powers to correct those injustices.

B. Robust Judicial Power and the Protection of Regulated Parties

Hayek was skeptical that the robust exercise of judicial authority could legitimately constrain the government's regulatory powers. In his book *The Constitution of Liberty*, Hayek criticized the Supreme Court's use of the Due Process Clause during the *Lochner* era to strike down economic regulations.⁷² Hayek opined that, in granting itself the authority to assess the reasonableness of legislation given its purported ends, "[t]he Court was clearly overstepping its proper judicial functions and arrogating what amounted to legislative powers."⁷³

In contrast, contemporary libertarian constitutional theory brooks no patience for judicial restraint.⁷⁴ Indeed, the libertarian constitutionalism of today, like that of the *Lochner* era, calls for repeated and vigorous judicial policing of how and why legislatures exercise their authority on social and economic issues.⁷⁵ For libertarian constitutionalism, there is no such thing as judicial review's counter-majoritarian difficulty because it is never appropriate for judges to defer to majoritarian policy preferences when regulated parties challenge laws on liberty grounds.⁷⁶ While libertarian theory is highly skeptical of legislatures' use of their powers to pursue social and economic objectives, it is highly trustful of judicial efforts to protect individuals' liberty rights.⁷⁷

It is for this reason that the libertarian constitutional theorist Randy Barnett, for example, places judges at the center of his vision of a republican (read: libertarian) Constitution. Barnett views the sovereignty of "We the People" as residing not in a majoritarian and democratic *collective* but "in the people as *individuals*."⁷⁸ From his perspective, the reason why the Constitution delegates powers to the federal government "is not to reflect the people's will or desire—which in practice means the will or desires of the majority—but to secure the

72. HAYEK, *supra* note 38, at 282–83.

73. *Id.* at 283. *See also id.* at 284 (describing the Supreme Court's jurisprudence during the *Lochner* era as "extreme").

74. *See, e.g.*, BARNETT, *supra* note 6, at 224 (arguing that judicial "reticence . . . has undermined the rights of the sovereign people"); CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY 28 (2007) ("Given the explosive expansion of government power, what is remarkable and lamentable is not how many abuses of executive and congressional power have been struck down but how few.").

75. *See infra* notes 77–108 and accompanying text.

76. *See infra* notes 77–108 and accompanying text.

77. *See, e.g.*, Ilya Somin, *Libertarianism and Judicial Deference*, 16 CHAP. L. REV. 293, 294 (2013) ("[S]kepticism about judicial deference is a distinctively libertarian contribution to constitutional theory. It is a logical extension of libertarian skepticism about government power and the political process.").

78. BARNETT, *supra* note 6, at 22. As we have seen, Hayek also criticized the notion of popular sovereignty. *See supra* note 45–47 and accompanying text.

pre-existing rights of We the People, each and every one of us.”⁷⁹

Barnett rejects the descriptive accuracy and normative appeal of the concept of popular sovereignty.⁸⁰ According to Barnett, a democratic and majoritarian understanding of the Constitution is deeply flawed because it suggests that “first comes government and then come rights.”⁸¹ Under this constitutional understanding, “[w]e have moved . . . from securing the *rights* of the people, each and every one, to honoring the *will* of the people, as expressed by a majority of a handful of ‘legislators’—the will of the people to which the individual must yield or be forced to comply.”⁸²

For Barnett, pre-government rights, like Hayek’s common principles,⁸³ play a crucial role in limiting the authority of democratic government. The Constitution’s purpose is not to aid majoritarian will, but is instead to limit the power of democratic government to narrowly circumscribed spheres aimed solely at protecting the pre-existing liberty rights of individuals.⁸⁴ For Barnett, the “proper purpose of [government] regulation must be limited to the equal protection of the rights of every person. Any law that does not have this as its purpose is beyond the just powers of a republican legislature to impose on the citizenry.”⁸⁵

Barnett rejects judicial restraint and calls instead for vigorous “judicial engagement.”⁸⁶ He emphasizes that judges’ “primary duty is to adhere to the law of the Constitution above any statute enacted by Congress or the states.”⁸⁷ For Barnett, it is vitally important “to empower some group of servants [i.e., judges] to identify and directly protect the rights retained by the people.”⁸⁸

According to Barnett’s libertarian constitutionalism, the fact that sovereignty lies with “we the people” as individuals requires that judges vigorously enforce the Constitution’s liberty rights. He argues that “[a] skeptical judiciary” is essential to protect “[we] the people” as individuals from “[we] the people” as a collective.⁸⁹

For this reason, Barnett rejects *in toto* the notion that judges should presume

79. BARNETT, *supra* note 6, at 23.

80. Barnett criticizes what he calls a democratic understanding of the U.S. Constitution, one that understands its opening phrase of “We the People” as representing the American people as a collective body. *Id.* at 20–21. As he puts it, “what I am calling the Democratic Constitution is one way to address the problem of how the sovereign people can be said to rule. If sovereignty is conceived as residing in the people collectively, then popular sovereignty means rule by the people as a *body*. And rule by the people as a body then means rule according to the ‘will of the people.’” *Id.* at 20.

81. *Id.* at 21 (emphasis omitted).

82. *Id.* at 126–27.

83. *See supra* note 38 and accompanying text.

84. BARNETT, *supra* note 6, at 23–24.

85. *Id.* at 25.

86. *See, e.g., id.* at 225–33.

87. *Id.* at 24.

88. *Id.* at 169 (emphasis omitted).

89. *Id.* at 245.

that laws enacted by democratically elected legislatures are constitutional.⁹⁰ To so presume is to abdicate judicial functions and duties.⁹¹ Instead of a presumption of constitutionality, Barnett urges judges to apply a presumption of liberty, and a corresponding presumption of unconstitutionality, whenever a regulated party challenges a law on liberty grounds.⁹² As he explains, “being able to challenge any restriction on the liberties of the people as irrational or arbitrary before an independent and impartial judge is a vital structural means to secure the sovereignty of the people, each and every one.”⁹³

To the criticism that libertarian constitutionalism grants judges too much discretion, Barnett responds by arguing that such discretion can only be effectively cabined by *expanding* judicial power.⁹⁴ The reasoning here is that if judges vigorously apply a presumption of liberty in *all* cases challenging the constitutionality of laws, they will be less free to strike down laws based on their preferred policy outcomes.⁹⁵ A presumption of unconstitutionality also dispenses with the risk that judges will “selectively identify” preferred groups for heightened constitutional protection.⁹⁶

James Buchanan also urged the vigorous use of judicial power to keep legislatures from infringing on individuals’ liberty rights. In doing so, he called on judges to strictly enforce what he called the “generality constraint” principle.⁹⁷ Under this principle, the government can regulate individuals only through laws that apply equally to everyone in society.⁹⁸ As a result, any law that has the purpose or effect of burdening or benefiting a particular group is illegitimate and unconstitutional.⁹⁹

The strict judicial enforcement of the generality constraint principle serves to strictly limit the government’s size and authority, rendering unconstitutional “any particularized regulation or restriction on this or that market”¹⁰⁰

90. *Id.* at 222–45.

91. *Id.*

92. *Id.*

93. *Id.* at 245. See also Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 37 (“Liberty is and always has been the properly defined exercise of freedom [T]he existence of a right to liberty places a burden on the government to justify any regulations of liberty as necessary and proper.”) (emphasis omitted).

94. BARNETT, *supra* note 6, at 244.

95. *Id.* (arguing that any lower court judge should be able to “find any restriction of liberty to be unconstitutional if it is irrational or arbitrary without the need for the Supreme Court to bless a right as fundamental or decide that an identifiable group merits heightened protection”).

96. *Id.* See also Barnett, *supra* note 93, at 41 (“The more liberties the Court protects, the less ideological it will be and the more widespread political support it will enjoy When the Court plays favorites with liberty, as it has since the New Deal, it loses rather than gains credibility with the public, and undermines its vital role as the guardian of the Constitution.”).

97. Buchanan, *supra* note 69, at 428. For a detailed explanation of why the workings of democratic governments should be limited by a generality constraint principle, see generally BUCHANAN & CONGLETON, *supra* note 68.

98. Buchanan, *supra* note 69, at 428.

99. *Id.*

100. *Id.* at 426.

Buchanan added that “[i]f government is to regulate or to protect one industry, profession, or product category, [the generality] constraint would require that all comparable groups be treated similarly.”¹⁰¹ In this way, the “constraint would, almost immediately, remove all pressures toward market restrictions, since those who seek to secure differential benefits do so in the expectation that their group will be treated advantageously relative to other groups.”¹⁰²

Buchanan believed that “[a]ny legislatively orchestrated change that upsets the legitimately held expectations of citizens should be interpreted as a change in the constitutional structure, and, as such, should be prevented by the courts.”¹⁰³ It was his hope that “an activist judiciary . . . might rediscover in the American constitutional documents a more robust generality constraint than modern courts are likely to enforce[,]” similar to the one that prevailed in the nineteenth century.¹⁰⁴

The principle that courts should never defer to elected branches of government in their pursuit of social and economic objectives runs throughout the libertarian legal literature. This is what Professor Richard Epstein, for example, calls for in his book *The Classical Liberal Constitution* when he contends that “there are virtually no cases, except perhaps on some narrow national security questions, where rational basis sets the right standard of review.”¹⁰⁵ Similarly, Clint Bolick, the former director of the Goldwater Institute Center for Constitutional Litigation and current justice on the Arizona Supreme Court, in his book *David’s Hammer: The Case for an Activist Judiciary*, argues that “[e]xcessive deference to government power equals judicial abdication of constitutional duties and results in tyranny meant not to be tolerated in our constitutional system.”¹⁰⁶ Bolick adds that “[g]iven the explosive growth of government at every level and the resulting erosion of freedom, the problem with judicial activism” is not that there is “too much of it but too little.”¹⁰⁷ Like Barnett, Bolick insists that the raising of constitutional liberty claims “require[es] judges to indulge not a presumption in favor of government power to which individual rights are the exception, a concept alien to the Framers, but the presumption in favor of liberty reflected in the words of the Constitution.”¹⁰⁸

For his part, Clark Neily of the libertarian Cato Institute and former litigator

101. *Id.*

102. *Id.*

103. James M. Buchanan, *Contractarian Political Economy and Constitutional Interpretation*, 78 AM. ECON. REV. 135, 139 (1988).

104. Buchanan, *supra* note 69, at 428.

105. EPSTEIN, *supra* note 6, at 311.

106. BOLICK, *supra* note 74, at 154.

107. *Id.* at 5.

108. *Id.* at 154. As part of their promotion of “judicial engagement,” libertarians have sought to defend and rehabilitate the so-called *Lochner* approach to substantive due process. See, e.g., Randy Barnett, *What’s So Wicked About Lochner?*, 1 N.Y.U. J.L. & LIBERTY 325 (2005); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011); DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* (2011).

at the similarly libertarian Institute for Justice, complains that contemporary “[c]ourts simply refuse to enforce [constitutional limits on government power] in any meaningful way, deferring instead to public officials at the expense of individual liberty. The term for that practice is ‘judicial abdication,’ and it is why we have far more government at every level today than the Constitution permits.”¹⁰⁹

As with libertarian theory’s understanding of democracy, it is possible to critique its abiding trust in robust forms of judicial review.¹¹⁰ However, my objective has not been to normatively assess libertarianism’s call for expansive judicial power when adjudicating liberty claims brought by regulated parties. Instead, my objective has been to explain how and why libertarian constitutional theory demands vigorous forms of judicial review. To put it succinctly, libertarian theory holds that judges have the constitutional authority and obligation to repeatedly void legislative measures aimed at pursuing social and economic policy preferences to remedy unjust deprivations of the liberty rights of regulated parties.

II. THE GOVERNMENT IS UP TO NO GOOD: *BRUEN* AND 303 CREATIVE

Libertarian theory places a great deal of trust in the operation of economic markets while being deeply mistrustful of government regulation.¹¹¹ The libertarian constitutionalism of the early twentieth century, as implemented by the Court during the *Lochner* era, used substantive due process doctrine to protect economic rights as fundamental rights.¹¹² The Court dispensed with such use of the doctrine almost a century ago and has expressed no interest in returning to it.¹¹³

However, outside of the context of economic rights claims, the Court in recent years has frequently embraced a constitutionalism that reflects libertarian theory’s deep mistrust of legislative policy preferences.¹¹⁴ In some of these rulings, the Court has viewed the legislative measures under challenge

109. CLARK M. NEILLY III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT* 3 (2013) (endnote omitted).

110. For a conservative critique of libertarianism’s call for expansive forms of judicial engagement, see, e.g., Mark Pulliam, *Unleashing The “Least Dangerous” Branch: Quis Custodiet Ipsos Custodes?*, 22 TEX. REV. L. & POL. 423 (2018). For a progressive critique of judicial activism more generally, see, e.g., MARK TUSHNET, *TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW* (2020).

111. See *supra* Part I.A.

112. See sources cited *supra* note 108.

113. Ball, *supra* note 10, at 735–36.

114. In addition to the cases explored in this Section, see also cases cited in *supra* notes 16–21. In previous work, I have noted the ways in which Justice Anthony Kennedy, whose constitutional jurisprudence largely tracked libertarian ideology, see Ball, *supra* note 10, at 701–36, paid relatively little attention to the need to account for legislatures’ policy preferences. Carlos A. Ball, *The Judicial Activism of Justice Anthony Kennedy*, 72 AM. U. L. REV. 1501, 1543–70 (2023).

exclusively as fonts of injustices for regulated parties in ways that reflect the normative priorities of libertarian theory.

This Part examines two such rulings. Section A explores how the Court in its Second Amendment opinion in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*¹¹⁵ gave no constitutional weight to the government's interests in promoting gun safety. At the same time, the Court focused extensively on how the challenged law regulated gun owners in what it deemed to be unjust ways.

Section B examines how the Court in its First Amendment ruling in *303 Creative LLC v. Elenis*¹¹⁶ did not give any constitutional weight to the government's objective of prohibiting discrimination. Instead, the Court focused exclusively on how the antidiscrimination statute at issue regulated religious business owners in what it viewed as unfair ways.

The claimants in *Bruen* and *303 Creative* did not raise economic liberty arguments. If they had asked the Court to rediscover the constitutional validity of *Lochner*, they would have lost their claims in all likelihood. But *Bruen* and *303 Creative* show how the Court can decide constitutional cases implicating individual rights in ways that reflect important elements of libertarian theory without having to recognize a fundamental right to freely participate in market transactions and, therefore, without directly resuscitating *Lochner*'s ghost.

A. The Government's Injustices in Bruen

At issue in *Bruen* was a New York statute, in place for more than a century, requiring gun owners to get licenses before they could carry concealed handguns in public.¹¹⁷ The statute set forth eligibility criteria (such as age and a lack of felony convictions) that, if satisfied, automatically entitled persons with certain jobs, such as judges and law enforcement officers, to licenses.¹¹⁸ But most individuals also had to show "proper cause" before the license would issue.¹¹⁹ The plaintiffs in *Bruen* argued that this additional requirement violated their Second Amendment rights.¹²⁰ The Court struck down the legislation after concluding that there was no historical tradition of analogous regulations before, during, and after the adoption of the Second and Fourteenth Amendments.¹²¹

115. 597 U.S. 1 (2022).

116. 600 U.S. 570 (2023).

117. *Bruen*, 597 U.S. at 11.

118. *Id.*

119. *Id.* at 12.

120. *Id.* at 16.

121. *Id.* at 38 ("[T]he historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.").

Bruen has engendered a vast literature.¹²² My focus here is on how the ruling reflects a deep judicial skepticism of legislative efforts to attain public policy objectives. This skepticism led the Court to view the statute exclusively as a font of injustices for regulated individuals.

The State argued in *Bruen* that, as the U.S. Court of Appeals for the Second Circuit had explained in an earlier case, “widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces.”¹²³ But the Court, reflecting the little weight that libertarian theory gives to legislative objectives in the face of liberty challenges, reasoned that whether there was an important public interest behind the statute under challenge was constitutionally irrelevant.¹²⁴ As Justice Clarence Thomas explained in his majority opinion, the Court would no longer permit the government to rely on the claim that a challenged gun safety law “promotes an important interest” in applying the Second Amendment.¹²⁵ Instead, *Bruen* now required the government to prove that its measure “is consistent with this Nation’s historical tradition of firearm regulation.”¹²⁶

Justice Thomas made clear that, going forward, lower courts in Second Amendment cases were prohibited from giving any constitutional weight to the public’s interest in protecting itself from the harms of gun violence.¹²⁷ In doing so, he explicitly rejected the applicability of means-end tests, commonly used

122. See, e.g., Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023); Brannon P. Denning and Glen H. Reynolds, *Trouble’s Bruen: The Lower Courts Respond*, 108 MINN. L. REV. 3187 (2024); Nelson Lund, *Bruen’s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC’Y REV. 279 (2022); Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797 (2023); Eugene Volokh, *Implementing the Right to Keep and Bear Arms After Bruen*, 98 N.Y.U. L. REV. 1950 (2023); Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. 65 (2023).

123. Brief for Respondents at 43–44, *N.Y. State Rifle & Pistol Ass’n, Inc.*, 597 U.S. 1 (2022) (No. 20-843), 2021 WL 4245013, at *43–44 (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012)).

124. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). See also *id.* at 83–84 (Breyer, J., dissenting) (“[The majority] refuses to consider the government interests that justify a challenged gun regulation, regardless of how compelling those interests may be.”); Smith, *supra* note 122, at 798–99 (“The *Bruen* Court’s historical tradition approach abandons all considerations of government interests and whether a law or regulation accomplishes government interests. By adopting a historical tradition approach, the Court ruled that considerations with the aim of harm reduction are irrelevant to the constitutional inquiry.”); (footnote omitted); Zick, *supra* note 122, at 103 (“By rejecting interest balancing and intermediate scrutiny, *Bruen* appears to prohibit any consideration of the current public safety effects of public carry.”).

125. *Bruen*, 597 U.S. at 17.

126. *Id.*

127. *Id.* (“To justify its regulation, the government may not simply posit that the regulation promotes an important interest. . . . Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s unqualified command.”) (internal citation omitted).

in constitutional law,¹²⁸ to Second Amendment disputes.¹²⁹

In assessing the constitutionality of gun safety laws following the Court's holding in *District of Columbia v. Heller*¹³⁰ that individuals have a constitutionally protected right to possess firearms for self-defense, the federal appellate courts had applied either strict or intermediate scrutiny.¹³¹ These means-end tests required the government to show either that the gun safety measure was "narrowly tailored to achieve a compelling governmental interest" or that it was "substantially related to the achievement of an important governmental interest."¹³² But for the *Bruen* majority, both of these tests rendered relevant that which it deemed to be constitutionally irrelevant: the public's interest in having legislators enact laws aimed at protecting its safety in public places. *Bruen*'s constitutional bracketing of the public's interests in promoting gun safety reflects libertarian theory's deep mistrust of the validity of using legislative measures to promote the public good in the face of liberty challenges by regulated parties.¹³³

Justice Thomas's majority opinion provided a lengthy review of the history of concealed handgun regulations—from the Middle Ages through the nineteenth century—extending to almost forty pages of text.¹³⁴ That review paid a great deal of attention to the *scope* of regulations adopted in earlier centuries, while saying little about their *objectives*. Although Justice Thomas asserted that what mattered in the now mandated historical analysis was "how and why the regulations burden a law-abiding citizen's right to armed self-defense,"¹³⁵ his historical review was largely limited to the "how" with little discussion of the "why."¹³⁶

128. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988) (applying strict scrutiny in First Amendment case); *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (applying intermediate scrutiny in First Amendment case); *Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (applying rational basis review in Equal Protection Clause case).

129. *Bruen*, 597 U.S. at 19.

130. 554 U.S. 570, 635 (2008).

131. *Bruen*, 597 U.S. at 17–19.

132. *Id.* at 19–20 (internal citations omitted).

133. See *supra* Part I.A.

134. *Bruen*, 597 U.S. at 31–70.

135. *Id.* at 29.

136. See, e.g., *id.* at 48 ("The [colonial era] law restricted only concealed carry, not all public carry, and its restrictions *applied only* to certain 'unusual or unlawful weapons,' including 'pocket pistol[s].' It also *did not apply* to all pistols, let alone all firearms.") (emphases added) (internal citations omitted); *id.* at 50 ("Only after the ratification of the Second Amendment in 1791 did public-carry restrictions proliferate. Respondents rely heavily on these restrictions, which generally fell into three categories: common-law offenses, statutory prohibitions, and 'surety' statutes. None of these restrictions *imposed a substantial burden on public carry* analogous to the burden created by New York's restrictive licensing regime.") (emphasis added); *id.* at 56 ("While New York presumes that individuals have no public carry right without a showing of heightened need, the surety statutes presumed that individuals had a right to public carry that could be *burdened* only if another could make out a specific showing of 'reasonable cause to fear an injury,

But even if Justice Thomas had given more weight to the “why” of gun safety regulations, that consideration would not have included how the law helped prevent deaths and injuries. Instead, the “why” would have mattered only in the narrow sense of whether it overlapped with the “why” of laws enacted in earlier centuries.¹³⁷

Bruen has significant deregulatory implications. The government in the twenty-first century regulates vastly greater areas of human conduct than it did in the eighteenth and nineteenth centuries. If the scope of regulations from centuries ago, as understood by judges,¹³⁸ marks the outer limit of contemporary government’s regulatory authority then that limit, by definition, serves to constrain state power in ways that are consistent with libertarian values and priorities.¹³⁹

Bruen’s rejection of the constitutional relevance of the government’s public safety objectives is also reflected in how it referred to the harms associated with gun violence in the United States. The ruling describes “firearm violence in densely populated communities” as an “*alleged* societal problem” or a

or breach of the peace.”) (emphases omitted and emphasis added) (citation omitted); *id.* at 57 (“[U]nlike New York’s regime, a showing of special need was required only after an individual was reasonably accused of intending to injure another or breach the peace. And, even then, proving special need simply avoided a fee rather than a ban.”); *id.* (“[T]he burden these surety statutes may have had on the right to public carry was likely too insignificant to shed light on New York’s proper-cause standard.”) (emphasis added); *id.* (“[R]espondents offer little evidence that authorities *ever enforced* surety laws.”) (emphasis added); *id.* at 59 (“[T]he overlapping *scope* of surety statutes and criminal statutes suggests that the former were not viewed as substantial restrictions on public carry.”) (emphasis added).

137. See *supra* notes 134–36 and accompanying text.

138. I return to the judge-empowering components of *Bruen* in *infra* Part III.A.

139. Critics of *Bruen* have argued that it makes no sense to constrain contemporary governmental authority by using the priorities of legislators who lived centuries ago as the constitutional ceiling for permissible regulation. Professor Jacob Charles, for example, complains that under *Bruen*, “the dead hands of the past bind not just through their actions but through their omissions. If the nation’s Founding generations declined to act, without regard to the grounds or reasons for their inaction, then contemporary lawmakers are shackled.” Charles, *supra* note 122, at 71 (footnotes omitted). Professor Charles adds that making the existence of historical laws necessary for contemporary analogs to be constitutional “assume[s] that historical legislatures always legislated to the maximum extent of their constitutional authority, at least with respect to guns. Without that assumption, the absence of past regulation tells us nothing about what our ancestors thought their elected representatives *could* do.” *Id.* at 111 (footnotes omitted). See also Lund, *supra* note 122, at 293–94 (“There were very few restrictions on weapons in the founding period, but that might have been because legislatures saw no need for them. The absence of a regulation does not necessarily imply the absence of a power to adopt that regulation.”). Professor Michael Smith notes the dichotomy between the Court’s reasoning in *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022), and its reasoning in *Bruen*. As he explains, “[i]n [the] two cases, issued a day apart, the Supreme Court took diametrically opposed approaches over what inferences to draw from the lack of historical restrictions on a particular behavior. In *Dobbs*, the Court inferred that the absence of regulation was not evidence that the government could not restrict a particular behavior. But in *Bruen*, the Court inferred the opposite, concluding that the absence of regulation, or the partial restriction of the concealed carrying of firearms, inferred the existence of a right to carry firearms.” Smith, *supra* note 122, at 817 (footnotes omitted).

“perceived societal problem.”¹⁴⁰

For the recognition that legislatures have a legitimate role to play in crafting policies that account for both the proper and improper uses of firearms, one has to turn to Justice Stephen Breyer’s dissent.¹⁴¹ One also has to turn to the dissent to read about the human and social harms caused by gun violence in the United States.¹⁴² Since *Bruen* deemed the government’s interests to be constitutionally irrelevant, the majority found no reason to mention, much less grapple with, the deaths, injuries, and other harms engendered by the (mis)use of guns.

By refusing to incorporate the extent of harms inflicted by the (mis)use of guns in public places into its constitutional analysis, the majority implicitly deemed them irrelevant. In contrast, Justice Alito’s concurrence did so explicitly by criticizing Justice Breyer’s dissent for raising facts, data, and reports related to gun violence.¹⁴³ As Justice Alito noted, “[t]he dissent cites statistics on children and adolescents killed by guns, but what does this have to do with the question whether an adult who is licensed to possess a handgun may be prohibited from carrying it outside the home?”¹⁴⁴ Justice Alito’s view was that “mass shootings that have occurred in recent years” and “statistics about the use of guns to commit suicide” were constitutionally irrelevant to deciding the

140. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 27 (2022) (emphases added).

141. As Justice Breyer explained,

[b]alancing . . . lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures. It requires consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances, which together make decisions about how, when, and where to regulate guns more appropriately legislative work. That consideration counsels modesty and restraint on the part of judges when they interpret and apply the Second Amendment.

Id. at 89 (Breyer, J., dissenting).

142. Justice Breyer noted that:

In 2017, there were an estimated 393.3 million civilian-held firearms in the United States, or about 120 firearms per 100 people. That is more guns per capita than in any other country in the world Unsurprisingly, the United States also suffers a disproportionately high rate of firearm-related deaths and injuries. In 2015, approximately 36,000 people were killed by firearms nationwide. Of those deaths, 22,018 (or about 61%) were suicides, 13,463 (37%) were homicides, and 489 (1%) were unintentional injuries. On top of that, firearms caused an average of 85,694 emergency room visits for nonfatal injuries each year between 2009 and 2017. Worse yet, gun violence appears to be on the rise. By 2020, the number of firearm-related deaths had risen to 45,222 or by about 25% since 2015. That means that, in 2020, an average of about 124 people died from gun violence every day [G]un violence has now become the leading cause of death in children and adolescents, surpassing car crashes, which had previously been the leading cause of death in that age group for over 60 years. And the consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular.

Id. at 84–86 (internal citations omitted).

143. *Id.* at 71–72 (Alito, J., concurring) (“[I]t is hard to see what legitimate purpose can possibly be served by most of the dissent’s lengthy introductory section” discussing gun violence in the United States) (internal citation omitted).

144. *Id.* at 72–73 (internal citations omitted).

Second Amendment case.¹⁴⁵

Rather than give any constitutional weight to the claimed public safety considerations behind the law under challenge, the justices in the majority insisted on viewing the statute exclusively as a font of injustices for regulated individuals. According to Justice Thomas, the statute was a misguided effort by an overreaching legislature to impose what the majority deemed to be highly subjective licensing obstacles on regulated parties without adequate judicial review.¹⁴⁶ This meant that the challenged law unjustly and unnecessarily regulated individuals who wanted to use firearms for self-defense in public places.¹⁴⁷

In his concurrence, Justice Alito emphasized another way in which the statute was unjust to regulated individuals: it prevented them from protecting themselves from physical harms threatened by others. To make this point, Justice Alito described two reported instances in which individuals had used guns to protect themselves from attackers.¹⁴⁸ For Justice Alito, those two incidents were more constitutionally relevant than all the data and studies marshalled by Justice Breyer regarding the injuries and deaths caused by gun violence because the pair of incidents reflected the injustices perpetrated by New York's statute on regulated individuals.¹⁴⁹ As he put it, "while the dissent seemingly thinks that the ubiquity of guns and our country's high level of gun violence provide reasons for sustaining the New York law, the dissent appears not to understand that it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense."¹⁵⁰

It bears noting that the Court decided *Bruen* based on the pleadings without the benefit of discovery and evidentiary hearings. It is reasonable to believe that allowing the litigation to proceed before reaching the merits of the Second Amendment claim would have provided the justices with more information about why the law was enacted, the ways in which it might have promoted public safety, and how state officials were applying it.¹⁵¹ But the Court was

145. *Id.* at 72.

146. *Id.* at 12–13 (majority opinion) (noting that no New York law defined "proper cause"; that the regulatory regime provided "officials [with the] discretion to deny licenses based on a perceived lack of need or suitability"; and that judicial review of a license denial is "limited").

147. *See id.* at 13 ("The rule leaves applicants little recourse if their local licensing officer denies a permit."); *id.* at 12 (categorizing the licensing standard as "demanding").

148. *Id.* at 75 (Alito, J., concurring).

149. The law under challenge, Justice Alito reasoned, placed constitutionally impermissible burdens on individuals who live "in high-crime neighborhoods" and "must traverse dark and dangerous streets in order to reach their homes after work or other evening activities." *Id.* at 74. These individuals "reasonably believe that unless they can brandish or, if necessary, use a handgun in the case of attack, they may be murdered, raped, or suffer some other serious injury." *Id.*

150. *Id.* at 73–74.

151. Justice Breyer complained in dissent that "there is no record to support the Court's negative characterizations [of the statute under challenge], as we know very little about how the

clearly not interested in any of that additional evidence.¹⁵² This was the case because, as already noted, the Court deemed the challenged law's public benefits to be constitutionally irrelevant.¹⁵³ The Court was also of the view that the "proper cause" requirement, regardless of its policy purposes, unjustly burdened regulated parties.¹⁵⁴ It does not appear that any evidence of either the importance of the legislature's public safety objectives or of how state officials were enforcing the statute would have persuaded a majority of justices of the law's constitutionality.

In short, *Bruen* bracketed the relevance of the public's interests in enacting the challenged statute, while emphasizing the unjust burdens it imposed on gun owners. In this way, the Court's constitutional approach reflects the libertarian view that legislative provisions be measured according to the injustices they engender for regulated individuals without accounting for the importance of their public welfare objectives.

Bruen constitutionally operationalizes libertarian theory's deep mistrust of legislative measures seeking to advance public policy objectives. At the end of the day, what mattered constitutionally in *Bruen* were not what the Court deemed to be the "alleged societal problems" associated with gun violence,¹⁵⁵ but were instead the ways in which the statute unjustly burdened regulated individuals.

B. The Government's Injustices in 303 Creative

Although the legal issues raised in the First Amendment case of *303 Creative LLC v. Elenis*¹⁵⁶ were different from those in *Bruen*, the Court's constitutional *modus operandi* was the same in both cases. Like *Bruen*, *303 Creative* gave no constitutional weight to the government's policy objectives behind the statute under challenge.¹⁵⁷ In addition, as in *Bruen*, *303 Creative* viewed the law at issue exclusively as a source of injustices for regulated

law has actually been applied on the ground." *Id.* at 95 (Breyer, J., dissenting). He added that "[w]ithout an evidentiary record, there is no reason to assume that New York courts applying [the statute's] standard fail to provide license applicants with meaningful review." *Id.* at 96. Furthermore, "[b]ased on the pleadings alone, we cannot know how often New York courts find the denial of a concealed-carry license to be arbitrary and capricious or on what basis. We do not even know how a court would have reviewed the licensing officer's decisions in [the plaintiff's] cases because they do not appear to have sought judicial review at all." *Id.*

152. *See id.* at 76 (Alito, J., concurring) (noting that while the dissent "chastises the Court for deciding this case without a trial and factual findings about just how hard it is for a law-abiding New Yorker to get a carry permit[,] [t]he record before us . . . tells us everything we need on this score").

153. *See supra* notes 124–40 and accompanying text.

154. *See supra* notes 146–50 and accompanying text.

155. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 27 (2022).

156. 600 U.S. 570 (2023).

157. *See infra* notes 164–74 and accompanying text.

individuals.¹⁵⁸ Both of these interpretative choices reflect the principles and priorities of libertarian theory.¹⁵⁹

In *303 Creative*, the owner of a website design company in Colorado wished to expand her business by offering wedding-related design and marketing services to the general public.¹⁶⁰ But the owner only wanted to provide the services to heterosexual couples because doing so for same-sex couples was inconsistent with her religious views.¹⁶¹ She claimed that the First Amendment barred the state from enforcing its law prohibiting sexual orientation discrimination against her for turning same-sex couples away.¹⁶² The Court agreed, holding that applying the statute would compel the business owner to speak in ways she did not want to speak in violation of the Free Speech Clause.¹⁶³

Even though *303 Creative* acknowledged “the vital role public accommodations laws play in realizing the civil rights of all Americans,”¹⁶⁴ it gave no constitutional weight to that role. As in *Bruen*,¹⁶⁵ the Court in *303 Creative* found it unnecessary to account for the government’s interests in deciding the constitutional dispute. Doing so would have required the Court to balance the state’s antidiscrimination objectives against the challengers’ constitutional rights to be free of the governmental regulation at issue. As Justice Thomas’s majority opinion had done in *Bruen*,¹⁶⁶ Justice Neil Gorsuch’s ruling on behalf of the Court in *303 Creative* refused to apply a balancing or means-end test. Even strict scrutiny, which strongly presumes the unconstitutionality of the challenged law, would have apparently afforded too much weight to the government’s interest. As a group of commentators notes, “*303 Creative* . . . refused to consider whether the state interest in preventing harm to third parties was strong enough to withstand strict scrutiny. Instead, the Court deemed a public-accommodations law unenforceable against a covered business without seriously discussing the state’s interest in nondiscrimination mandates.”¹⁶⁷

There are other similarities between *Bruen* and *303 Creative*. In the same way that *Bruen*’s analysis made no room for the harms engendered by gun violence,¹⁶⁸ there is no mention in *303 Creative* of the history, existence, or

158. See *infra* notes 175–88 and accompanying text.

159. See *supra* Part I.A.

160. *303 Creative*, 600 U.S. at 579.

161. *Id.*

162. Petition for Writ of Certiorari, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (No. 21-476).

163. *303 Creative*, 600 U.S. at 602.

164. *Id.* at 590.

165. See *supra* notes 124–45 and accompanying text.

166. See *supra* notes 127–33 and accompanying text.

167. Rebecca Aviel et al., *From Gods to Google*, 134 YALE L.J. 1269, 1340 (2025). I have argued elsewhere that the Court has generally ignored the government’s interests in addressing discrimination in its sexual orientation exemption cases. Carlos A. Ball, *Supreme Court LGBTQ Orthodoxy*, 90 MO. L. REV. 751, 763–75 (2025).

168. See *supra* notes 124–45 and accompanying text.

relevance of discrimination against LGBTQ individuals. There is also no discussion of the economic, dignitary, and psychological injuries that discrimination imposes on such individuals. Indeed, Justice Gorsuch criticized the dissent for insisting on accounting for the reasons why the Colorado legislature had chosen to enact the law under challenge, reasons that the majority deemed to be irrelevant to the constitutional analysis.¹⁶⁹ To account for the reasons why the legislature had enacted the antidiscrimination law would have granted constitutional credit to the challenged provision, a credit that the Court was unwilling to award in the face of a regulated party's compelled speech claim.

It may seem surprising—perhaps even shocking—that *303 Creative* decided a dispute about the scope of antidiscrimination laws without discussing or examining, much less giving constitutional weight to, their objective of addressing and minimizing the harms caused by discrimination. As Professor Kenji Yoshino notes, “[o]ne wonders how it could possibly strike a reader as irrelevant to discuss the infinite everyday dignitary harms experienced by a community in public accommodations in a case that could dramatically increase such harms.”¹⁷⁰

I have elsewhere explained and criticized the ways in which *303 Creative* departs from Supreme Court cases, decided in the 1970s and 1980s,¹⁷¹ which gave considerable weight to the state's interest in addressing race or sex discrimination when assessing the scope of First Amendment exemptions.¹⁷² But my point here is simply that, as a descriptive matter, *303 Creative*'s refusal to give any constitutional weight to the statute's antidiscrimination objectives is consistent with the lack of importance that libertarian theory gives to the legislative pursuit of public policy objectives in the face of liberty claims raised by regulated individuals.¹⁷³

303 Creative, like *Bruen*, deemed it necessary to entirely ignore the government's interests in addressing social harms while focusing only on what it deemed to be the harms imposed by that law on regulated parties.¹⁷⁴ This approach reflects the libertarian view that much of contemporary governmental regulations engender injustices for those subject to them.¹⁷⁵

According to the Court, the government in *303 Creative* engendered

169. See *303 Creative LLC v. Elenis*, 600 U.S. 570, 597 (2023) (complaining that “[i]t is difficult to read the dissent and conclude we are looking at the same case” and that the dissent “reimagines the facts of this case from top to bottom”). In contrast to the majority opinion, Justice Sonia Sotomayor's dissent examined the history of discrimination against LGBTQ people. *Id.* at 615–18 (Sotomayor, J., dissenting). It also accounted for the state's interests in ensuring equal access to goods and services and equal dignity in the common market. *Id.* at 607–09.

170. Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 286 (2023).

171. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

172. Ball, *supra* note 167, at 757–60.

173. See *supra* Part I.A.

174. See *supra* notes 176–90 and accompanying text.

175. See *supra* Part I.B.

injustices by using the sexual orientation antidiscrimination law to compel the regulated party to adopt “its preferred message” on marriage equality.¹⁷⁶ In making this point, the Court repeatedly analogized between the application of the Colorado antidiscrimination law to business owners like the challenger and the application of World War II-era laws, struck down by the Court in *West Virginia Board of Education v. Barnette*,¹⁷⁷ threatening schoolchildren with expulsion from school, or their parents with jail time, if they refused to salute the U.S. flag or recite the Pledge of Allegiance.¹⁷⁸ For the Court, *303 Creative* was not about a law aimed at providing LGBTQ individuals equal access to economic marketplaces;¹⁷⁹ instead, the case, like *Barnette*, was about government officials seeking to “test [free speech] foundational principles.”¹⁸⁰

According to Justice Gorsuch, Colorado was not seeking to enforce the antidiscrimination law to advance equality objectives, but was rather aiming to “test[]” the “boundaries” of constitutional free speech protections.¹⁸¹ More specifically, he claimed that “Colorado seeks to compel this speech *in order* to ‘excis[e] certain ideas or viewpoints from the public dialogue.’”¹⁸² For the majority, “the coercive ‘[e]liminat[ion]’ of dissenting ideas about marriage constitutes Colorado’s ‘very purpose’ in seeking to apply its law to Ms. Smith.”¹⁸³

Justice Gorsuch added that if the Court failed to intervene by ordering the constitutional exemption, it would allow “a government to coerce an individual to speak contrary to her beliefs on a significant issue of personal conviction, all in order to eliminate ideas that differ from its own.”¹⁸⁴ For the majority, it was a “fact [that] Colorado seeks to use its [antidiscrimination law] to compel speech in order to ensure conformity to its own views on a topic of major significance,” a “fact” that rendered “the First Amendment implications . . . obvious.”¹⁸⁵ For the Court, therefore, the question before it was a simple one: “Can a State force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?”¹⁸⁶

176. *303 Creative LLC v. Elenis*, 600 U.S. 570, 598 (2023) (emphasis omitted).

177. 319 U.S. 624 (1943).

178. *Id.* at 629.

179. I elaborate on this point in Ball, *supra* note 167, at 774–76.

180. *303 Creative*, 600 U.S. at 585 (emphasis added). Justice Gorsuch’s majority opinion cited *Barnette* seven times. *Id.* at 584–85, 585, 589, 596, 600, 601, and 601–02. For an exploration of the role that *Barnette* played in *303 Creative*, see generally Linda C. McClain, *Do Public Accommodations Law Compel “What Shall Be Orthodox”? The Role of Barnette in 303 Creative LLC v. Elenis*, 68 ST. LOUIS U. L.J. 755 (2024).

181. *303 Creative*, 600 U.S. at 603.

182. *Id.* at 588 (emphasis added) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994)).

183. *Id.* (alteration in original) (citation omitted).

184. *Id.* at 598.

185. *Id.* at 598 n.5. I criticize *303 Creative*’s deployment of this “fact” in Ball, *supra* note 167, at 77.

186. *Id.* at 597.

In deeming the antidiscrimination law to be a font of injustices for regulated individuals, the Court did not focus only on how it purportedly compelled her to speak against her will. As it had done in *Bruen*,¹⁸⁷ the Court in *303 Creative* also emphasized the statute's administrative burdens on regulated parties.¹⁸⁸ Justice Gorsuch noted, for example, that the antidiscrimination law made it possible for the state or private parties to sue owners of public accommodations and subject them to fines and cease-and-desist orders.¹⁸⁹ The challenged law, he added, allowed the government to require violators to “participat[e] in mandatory educational programs and . . . submi[t] . . . ongoing compliance reports to state officials.”¹⁹⁰

From *303 Creative*'s perspective, then, the law was not a source of justice for LGBTQ individuals; instead, it was a source of injustices for regulated parties. The Court's approach reflects libertarian values by focusing exclusively on what the majority believed are the unjust burdens that the law under challenge imposes on regulated individuals. The Court's ruling also reflects libertarian priorities by refusing to give any constitutional weight to the government's interests in pursuing its policy objectives.

In the end, the Court's constitutional analysis in both *Bruen* and *303 Creative* gave precisely zero weight to the interests of individuals whom the legislatures intended to benefit or protect through the challenged statutes—members of the general public who are vulnerable to gun violence in public places and who do not wish to carry weapons for self-defense in *Bruen* and LGBTQ individuals subjected to discrimination in economic marketplaces in *303 Creative*. In neither case did the Court give any constitutional weight to the respective legislative efforts to address or mitigate those harms. Instead, the Court concluded, in paradigmatic libertarian fashion, that the only constitutionally relevant harms were those associated with the injustices perpetrated by the government, through the application of its statutes, on regulated parties.

III. EXPANSIVE JUDICIAL POWER TO CORRECT REGULATORY INJUSTICES

This Part explains how some of the Roberts Court's recent rulings reflect libertarian demands for robust judicial interventions to correct claimed regulatory injustices. Section A returns to *Bruen* to delineate the expansive understanding of judicial power called for by that ruling. Section B examines two free exercise cases assessing the constitutionality of COVID regulations

187. *See supra* notes 146–47 and accompanying text.

188. *303 Creative LLC v. Elenis*, 600 U.S. 570, 581 (2023).

189. *Id.*

190. *Id.* (citation omitted). *See also id.* at 589 (claiming that Colorado was seeking to compel the plaintiff to speak “or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in ‘remedial . . . training,’ filing periodic compliance reports as officials deem necessary, and paying monetary fines”).

that reveal a similarly capacious understanding of judicial authority.

A. Bruen and Expansive Judicial Power Under the Second Amendment

We have already seen how *Bruen* viewed the statute under challenge exclusively as a font of injustices for regulated parties in ways that are consistent with the values and priorities of libertarian theory.¹⁹¹ The ruling also reflects that theory's call for granting judges expansive powers to correct those claimed injustices.

Bruen contended that lower courts, in Second Amendment cases, had applied means-end tests in ways that were too deferential to the government.¹⁹² For the Court, the application of balancing tests in this context is problematic because they are “judge-empowering.”¹⁹³ As Justice Alito explained in his concurrence, the tests “place[] no firm limits on the ability of judges to sustain any law restricting the possession or use of a gun.”¹⁹⁴ The Court, therefore, rejected balancing tests in Second Amendment cases in favor of a historical test inquiring whether the statute under challenge “is consistent with this Nation’s historical tradition of firearm regulation.”¹⁹⁵

The Roberts Court’s application of originalist methodology to determine the meaning and scope of constitutional provisions has been the subject of immense attention by commentators.¹⁹⁶ But regardless of whether the Court’s originalist

191. *See supra* Part II.A.

192. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 26 (2022) (“If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of ‘intermediate scrutiny’ often defer to the determinations of legislatures.”).

193. *Id.* at 22 (citation omitted).

194. *Id.* at 77 (Alito, J., concurring). Justice Alito provided two examples of judicial opinions in Second Amendment cases that he argued showed inappropriate deference to the government. *Id.* The first was the ruling by the U.S. Court of Appeals in *Bruen*. *Id.* (citing *N.Y. State Rifle & Pistol Ass’n, Inc. v. New York*, 883 F.3d 45 (2d Cir. 2018)). The second was Justice Breyer’s dissent in *Heller*. *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 574–76 (2008) (Breyer, J., dissenting)). Professors Darrell Miller and Joseph Blocher have criticized Justice Alito’s tiny sample of evidence of undue deference to the government by the lower courts: “Considering that more than 1,000 Second Amendment challenges were resolved in the eight years after *Heller*—and probably more than 1,500 by the time *Bruen* was decided—one might expect more than two examples to sustain such a broad generalization, much less justify the doctrinal chaos *Bruen* threatens to unleash.” Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 76.

195. *Bruen*, 597 U.S. at 17.

196. For defenses of originalism, *see, e.g.*, JOHN O. MCGINNIS AND MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013); Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215. For critical views, *see, e.g.*, ERWIN CHERMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2022); JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* (2024).

methodology in *Bruen* should be praised or criticized,¹⁹⁷ it can hardly be categorized as a judicially restrained one.

Bruen's historical test is not any less "judge-empowering" than the means-end tests that it replaces.¹⁹⁸ *Bruen* grants judges the power to strike down laws that, in their sole discretion, are insufficiently analogous to centuries-old gun regulations.¹⁹⁹ More specifically, *Bruen* empowers judges to void laws on the ground that their scope, purposes, or effects go beyond those of regulations enacted in earlier centuries.²⁰⁰

Bruen, in other words, calls on judges to determine when contemporary gun safety laws are historical outliers. According to the Court, the New York statute was a regulatory outlier because, for example, only six states and the District of Columbia had "may issue" concealed gun licensing laws, while forty-three states had "shall issue" laws.²⁰¹ But, as Professors Darrell Miller and Joseph Blocher note, *Bruen* failed to explain why the number of states, rather than the size and density of the regulated population, was the proper baseline for determining what is a regulatory outlier.²⁰² They add that "[i]f the Court had used population as the relevant denominator, then New York's law is not an outlier—good cause permitting covers fully a quarter of the American population, including some of the highest population densities in the country."²⁰³

The point, for our purposes, is not that the Court necessarily got its regulatory outlier analysis wrong regarding gun licensing laws. Instead, the point is that *Bruen* granted judges unfettered discretion to determine what constitute regulatory outliers. *Bruen*'s originalist methodology may be wise or misguided, but it is nothing if not judge-empowering.²⁰⁴

Critics of *Bruen* have complained that its "history and tradition" standard is indeterminate and vague, and thus fails to give sufficient guidance to lower courts on how to apply it.²⁰⁵ Professor Jacob Charles notes, for example, that

197. For praise of *Bruen*'s originalism, see, e.g., Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023). For criticism of that originalism, see, e.g., Joseph Blocher & Eric Ruben, *Originalism-By-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023).

198. *Id.* at 22. See *Vidal v. Elster*, 602 U.S. 286, 324 (2024) (Barrett, J., concurring) ("Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is *itself* a judge-made test.").

199. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 19 (2022).

200. *Id.*

201. *Id.* at 13–14.

202. Miller & Blocher, *supra* note 194, at 65.

203. *Id.*

204. An empirical analysis of reported gun-rights decisions by lower federal courts issued between 2000 and 2023 concluded that the application of *Bruen*'s "history-and-tradition" test granted judges significantly more discretion than the means-end tests it replaced. Rebecca L. Brown, Lee Epstein, & Matt Gulati, *The Constraining Effect of "History and Tradition": A Test*, 713 ANNALS AM. ACAD. POL. & SOC. SCI. 200 (2024).

205. See, e.g., Charles, *supra* note 122, at 76; Miller & Blocher, *supra* note 194, at 62. See also Adam Liptak, *Supreme Court's Gun Rulings Leave Baffled Judges Asking for Help*, N.Y.

“*Bruen* did not define the concept [of tradition] or provide guidance to lower courts tasked with finding traditions.”²⁰⁶ Relatedly, there is no discussion in *Bruen* of how long laws must be in place in order for them to count as a “tradition.”²⁰⁷ Professor Charles adds that *Bruen* does not address, much less answer, questions related to when laws have been enforced with sufficient frequency that they can be said to have gained broad acceptance to be admitted to the constitutionally privileged pantheon of “this Nation’s historical tradition” of firearm regulation.²⁰⁸ As Professors Allen Sumrall and Beau Baumann note, “creating vague judicialized standards that ensure courts are future arbiters” is one of the common features of judicial aggrandizement.²⁰⁹

Bruen also empowers judges by asking them to take positions on contemporary policy disputes. There are ongoing debates, for example, on the extent to which firearm restrictions advance public safety objectives.²¹⁰ There are also disagreements about the extent and effectiveness of individuals’ use of firearms for purposes of self-defense.²¹¹ The New York legislature had made a

TIMES (Sep. 23, 2024), <https://www.nytimes.com/2024/09/23/us/supreme-court-guns-second-amendment.html> (canvassing confusion by lower court judges in applying *Bruen*).

206. Charles, *supra* note 122, at 101.

207. *Id.* at 106.

208. *Id.* at 87, 107. Justice Breyer noted the vagueness and imprecision that inhered in the majority’s methodological approach when he noted that:

In each instance, the Court finds a reason to discount the historical evidence’s persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here. But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York’s law, what could? Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either.

N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 597 U.S. 1, 130 (2022) (Breyer, J., dissenting). See also United States v. Rahimi, 602 U.S. 680, 743 (2024) (Jackson, J., concurring) (noting that, following *Bruen*, lower courts “have come to conflicting conclusions on virtually every consequential Second Amendment issue to come before them”) (citation omitted).

209. Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 39 (2023).

210. See, e.g., *What Science Tells Us About the Effects of Gun Policies*, RAND (July 16, 2024), <https://www.rand.org/research/gun-policy/key-findings/what-science-tells-us-about-the-effects-of-gun-policies.html> [<https://perma.cc/8MPH-UU7F>] (reviewing the scientific literature on the effectiveness of gun safety regulations); April M. Zeoli, Alexander D. McCourt, & Jennifer K. Paruk, *Effectiveness of Firearm Restriction, Background Checks, and Licensing Laws in Reducing Gun Violence*, 704 ANNALS AM. ACAD. POL. & SOC. SCI. 118, 120 (2022) (“Research has shown that well-implemented firearm policy that is based on evidence-based risk factors can be effective in reducing all types of firearm injury.”).

211. See, e.g., *The Challenges of Defining and Measuring Defensive Gun Use*, RAND (Mar. 2, 2018), <https://www.rand.org/research/gun-policy/analysis/Articles/defensive-gun-use.html> [<https://perma.cc/NGH7-JDVS>] (reviewing empirical studies on defensive gun use); Michael D.

judgment that its licensing regime appropriately balanced public safety considerations against individuals' interests in possessing weapons in public places for self-defense.²¹² *Bruen* replaced that legislative judgment with a judicial one by concluding that individuals are entirely justified in carrying weaponry in public for self-defense because "[m]any Americans hazard greater [crime-related] danger outside the home than in it."²¹³

Similarly, Justice Alito in his concurrence deemed it appropriate to judicially determine the dangers to which individuals expose themselves by being in public without firearms for self-defense.²¹⁴ Justice Alito also took it upon himself to assess the effectiveness of the New York law under challenge, which he found lacking.²¹⁵

Again, my objective here is not to question the particular empirical conclusions reached by the justices in the *Bruen* majority regarding whether the greater availability of and easier access to firearms in public places advances or hinders public safety goals. I am also not here taking issue with their empirical conclusion that the New York law was ineffective in achieving its public safety objectives. My point instead is that a majority of the justices believed it both appropriate and necessary for *judges* to make these assessments.

By granting judges expansive authority to veto legislative judgments on how best to achieve public policy objectives while correcting claimed injustices for regulated parties, *Bruen* closely tracks libertarian values and priorities. In

Anestis et al., *Lifetime and Past-Year Defensive Gun Use*, JAMA NETW. OPEN, Mar. 14, 2025, at 4 (finding that most survey respondents who had access to guns reported lifetime gun violence exposure but not defensive gun use).

212. In his dissent, Justice Breyer noted that "[a] State like New York, which must account for the roughly 8.5 million people living in the 303 square miles of New York City, might choose to adopt different (and stricter) firearms regulations than States like Montana or Wyoming, which do not contain any city remotely comparable in terms of population or density." *Bruen*, 597 U.S. at 91 (Breyer, J., dissenting) (citation omitted). He added that "[f]or a variety of reasons, States may also be willing to tolerate different degrees of risk and therefore choose to balance the competing benefits and dangers of firearms differently." *Id.*

213. *Id.* at 33 (majority opinion). To support this claim, Justice Thomas cited to a ruling by the U.S. Court of Appeals for the Seventh Circuit in which it stated that a "Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower." *Id.* (quoting *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012)).

214. As he put it, "[t]oday, unfortunately, many Americans have good reason to fear that they will be victimized if they are unable to protect themselves." *Id.* at 79 (Alito, J., concurring). For Justice Alito, the large number of illegally held guns in New York City, in particular, meant that "some [of its residents] must traverse dark and dangerous streets in order to reach their homes after work or other evening activities." *Id.* at 74.

215. According to Justice Alito, the law under challenge was ineffective because, although "[n]o one apparently knows how many of the 400 million privately held guns [in the United States] are in the hands of criminals, . . . there can be little doubt that many muggers and rapists are armed and are undeterred by" the New York gun licensing statute. *Id.* To Justice Alito, it was also clear that the New York law under challenge was ineffective because one of the mass murders noted by Justice Breyer in his dissent had taken place in Buffalo. "The New York law at issue in this case," Justice Alito reasoned, "obviously did not stop that perpetrator." *Id.* at 72.

doing so, *Bruen* does precisely what libertarian theory calls for: it prioritizes judicial assessments over legislative preferences. *Bruen* grants judges wide-ranging power to void legislative policy choices and thus reflects the expansive understanding of the judicial function called for by libertarian constitutionalism.²¹⁶

*B. COVID Rulings and Expansive Judicial Power Under
the Free Exercise Clause*

The Roberts Court's extensive understanding of judicial power, which is consistent with libertarian theory's values and priorities, was also evident in its emergency docket ruling in *Roman Catholic Diocese of Brooklyn v. Cuomo* (*RCD*).²¹⁷ That dispute arose after New York Governor Andrew Cuomo issued an executive order in the early days of the COVID pandemic intended to curb the transmission of the virus in areas where contagion was spiking.²¹⁸ The order imposed restrictions on a variety of activities in public places, including a 10- or 25-person cap (depending on the contagion rate in the area) on the number of individuals who could congregate in houses of worship.²¹⁹ The question in *RCD* was whether it was sufficiently likely that the executive order violated the Free Exercise Clause to justify the issuing of an emergency injunction pending appeal.²²⁰ By the time the case reached the Court, the order no longer applied to the plaintiffs' houses of worship because of reduced COVID-transmission rates in their areas.²²¹ Nonetheless, the Court, in a per curiam decision and without the benefit of full briefing and argument, enjoined the executive order's enforcement.²²²

RCD determined that the crucial question was whether the religious facilities that were potentially subject to the reimposition of the executive order were comparable, from a COVID-transmission perspective, to secular facilities exempted from that order.²²³ In his dissent, Justice Breyer contended that government officials were in a better position than judges to assess different degrees of risk presented by the different uses of different public places in the middle of a deadly virus epidemic.²²⁴ But a majority of the Court rejected any deference to public health risk assessments made by government officials in the

216. *See supra* Part I.B.

217. 592 U.S. 14 (2020).

218. *Id.* at 15–16.

219. *Id.* at 17.

220. *Id.* at 16–18.

221. *Id.* at 20.

222. *Id.* at 21.

223. *Id.* at 16–18.

224. *Id.* at 37–38 (Breyer, J., dissenting). *See also id.* at 40 (Sotomayor, J., dissenting) (“Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.”).

face of a free exercise challenge.²²⁵ The Court issued an injunction after concluding that risks of virus transmission in houses of worship were similar to those in secular facilities exempted from the executive order.²²⁶

RCD did not explain “how the Court should determine which favored classes of businesses [not subject to the challenged regulation] were comparable to worship.”²²⁷ The majority also did not cite to any studies or evidence to support its conclusion that the risks of virus transmission in houses of worship were comparable to those in facilities, such as factories and retail stores, that were not similarly restricted.²²⁸ As a result, it is impossible to assess the factual accuracy of *RCD*'s risk assessments.

What is clear is that the Court, rightly or wrongly, granted itself the authority to reach independent conclusions regarding the different degrees of risk presented by different activities in different public facilities. In the same way that *Bruen* replaced government assessments regarding how best to protect public safety with judicial ones,²²⁹ *RCD* replaced government assessments of how best to protect public health with judicial ones.²³⁰ In concluding that the

225. *Id.* at 16–18 (majority opinion).

226. *Id.*

227. Wendy Parmet, *From the Shadows: The Public Health Implications of the Supreme Court's COVID-Free Exercise Cases*, 49 J.L. MED. & ETHICS 564, 570 (2021) (internal quotation omitted).

228. Wendy Parmet notes that the Court decided *RCD* without “consider[ing] any scientific evidence in determining which secular activities were comparable to religious services.” WENDY E. PARMET, CONSTITUTIONAL CONTAGION: COVID, THE COURTS, AND PUBLIC HEALTH 84 (2023) (footnote omitted). It did not matter to the Court's analysis that, under the challenged executive order, “some secular businesses such as movie theaters [had to] remain closed and were thus treated less favorably than houses of worship.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 29 (2020) (Kavanaugh, J., concurring).

229. *See supra* notes 200–16 and accompanying text.

230. Less than three months after *RCD*, the Court in *S. Bay United Pentecostal Church v. Newsom* (*South Bay II*), 141 S. Ct. 716 (2021) (mem.), issued another per curiam emergency order that, without any explanation, prohibited California from enforcing an indoor gathering ban as applied to houses of worship even “when Covid rates are highest.” *Id.* at 721 (Kagan, J., dissenting). The regulation in question applied not just to “attending a worship service,” but also to attending “[a] political meeting; going to a lecture, movie, play, or concert; and frequenting a restaurant, winery, or bar.” *Id.* In criticizing the majority's unexplained action, Justice Elena Kagan highlighted both the extensive public health justifications for the regulation offered by the state, as well as the majority's refusal to justify its granting of the emergency petition. *Id.* at 722. As she noted:

The Court has decided that the State must exempt worship services from the strictest aspect of its regulation of public gatherings. No one can know, from the Court's 19-line order, exactly why: Is it that the Court does not believe the science, or does it think even the best science must give way?

Id. A clearly troubled Justice Kagan added that

[t]he Court's decision leaves state policymakers adrift, in California and elsewhere. It is difficult enough in a predictable legal environment to craft COVID policies that keep communities safe. That task becomes harder still when officials must guess which

determination of what constitutes comparable risks of virus transmission is one for judges to make without accounting for the views of government officials, *RCD* implemented the type of robust understanding of judicial power called for by libertarian theory in the face of a constitutional challenge brought by a regulated party.²³¹

Several months after *RCD*, the Court issued another per curiam order from its emergency docket in *Tandon v. Newsom* enjoining the enforcement of another COVID-related order issued by a governor.²³² The dispute arose after California Governor Gavin Newsom, aiming to reduce virus transmission rates, limited gatherings in private homes to individuals who belonged to no more than three different households.²³³ The plaintiffs wished to worship in their homes with people from more than three households.²³⁴ The challengers argued that the enforcement of the order against them violated their rights under the Free Exercise Clause because California law allowed more people from more households to congregate in certain public settings such as retail stores and restaurants.²³⁵

Tandon concluded that visiting stores and restaurants presented similar risks of virus transmission as did congregating in homes for religious exercise.²³⁶ As in *RCD*,²³⁷ the *Tandon* Court granted itself the authority to make independent judicial assessments regarding comparable risks of virus transmission arising in different settings.²³⁸ Furthermore, as in *RCD*,²³⁹ the Court in *Tandon* did not articulate a standard to determine which activities and settings present comparable risks of transmission, nor did it cite to any studies or evidence related to transmission rates in different places.

What *Tandon* did do is hold that strict scrutiny is required whenever government regulations “treat *any* comparable secular activity more favorably

restrictions this Court will choose to strike down. The Court injects uncertainty into an area where uncertainty has human costs.

Id. at 723.

231. *See supra* Part I.B.

232. 593 U.S. 61 (2021) (per curiam). For similar rulings in free exercise cases challenging COVID-19 restrictions issued from the emergency docket, *see* *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (mem.); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (mem.).

233. *Tandon*, 593 U.S. at 63.

234. *Id.* at 63–64.

235. *Id.*

236. *Id.* at 63.

237. *See supra* notes 224–32 and accompanying text.

238. *Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (“California treats some *comparable* secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time.”) (emphasis added) (citation omitted).

239. *See supra* notes 228–29 and accompanying text.

than religious exercise.”²⁴⁰ Since some commercial activities in public places were not restricted in the same way as religious practices in private homes, and since the majority concluded that such practices were comparable to commercial activities in terms of virus transmission risks, the Court deemed it necessary to apply strict scrutiny.²⁴¹

Under the Court’s reasoning, the fact that secular and religious activities in homes were restricted in precisely the same ways was irrelevant. This was because the comparability analysis was determined by the “risks various activities pose, not the reasons why people gather.”²⁴² It was for the Court to determine the extent of those risks without any deference to government public health experts.²⁴³ The judicial assessment of the degrees of risk trumped that of government officials, including the politically accountable governor.²⁴⁴

As in my earlier discussion of *Bruen*,²⁴⁵ my objective here is not to establish that the Court was mistaken in its judicial assessments of risks of harm arising from the regulated conduct. Instead, my goal is to bring attention to the extent to which the Court’s methodology and reasoning in *RCD* and *Tandon* placed an immense deal of trust in judges’ abilities to make correct assessments regarding the different COVID contagion risk profiles of different activities in different settings. Once religious plaintiffs in the two disputes claimed that the public health measures substantially burdened their religious exercise (claims that were

240. *Tandon*, 593 U.S. at 62 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020)).

241. *Id.* at 63, 65. Justice Kagan’s dissent, in reasoning that the appropriate comparator for assessing restrictions on religious gatherings in private homes were secular activities in such homes rather than secular activities in commercial spaces, pointed to the district court’s factual findings “based on the uncontested testimony of California’s public-health experts.” *Id.* at 66 (Kagan, J., dissenting) (citation omitted). She added that, “[n]o doubt this evidence is inconvenient for the *per curiam*’s preferred result. But the Court has no warrant to ignore the record in a case that (on its own view) turns on risk assessments.” *Id.* (citation omitted).

242. *Id.* at 62 (majority opinion) (citation omitted). In criticizing the Court’s COVID cases, Professor Wendy Parmet argues that if the reasons why people congregate are constitutionally irrelevant in free exercise challenges to public health measures, then “as long as hospitals pose as . . . great a risk of transmission as in-person worship (a likely assumption early in a pandemic), a court might treat the two activities as comparable, requiring the state to defend, subject to strict scrutiny, its decision to allow the former but not the latter.” Parmet, *supra* note 227, at 573. See also Leah L. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 5 (2022) (“[I]f a law cannot regulate religious activity if it fails to regulate not-all-that comparable secular activity, then many laws will be vulnerable to constitutional challenges.”).

243. The Court chose to compare virus transmission risks without the assistance of full briefing and argument by the parties. For a critique of the use of the emergency docket in COVID litigation to address free exercise issues, see generally Stephen I. Vladeck, *The Most-Favored Right: COVID, The Supreme Court and the (New) Free Exercise Right*, 15 N.Y.U. J.L. & LIBERTY 699 (2022).

244. Professor Parmet argues that “individuals who object to public health laws on free exercise grounds now hold a trump card. If they can convince the Court that a health order . . . burdens their free exercise of religion, the Court is unlikely to grant deference to either the relevant experts or the factual findings of a lower court. Instead, as in *Lochner*, the Court will rely on its own intuitions to safeguard one type of liberty . . .” PARMET, *supra* note 228, at 90.

245. See *supra* Part III.A.

uncontested by state officials), what controlled were judicial determinations of harms and risks.

This robust understanding of the judicial function reflects the values and priorities of libertarian theory. It assigns to judges the power to repeatedly and vigorously police the government's pursuit of public policy objectives in order to protect the liberty interests of regulated parties. In doing so, it makes it significantly more difficult for government to regulate in order to advance its understandings of public welfare and the common good. As such, it does what libertarian constitutionalism demands.

CONCLUSION

Whether one is pleased or troubled by the ways in which several recent constitutional rulings issued by the Roberts Court reflect constitutive elements of libertarian theory will undoubtedly depend on one's views about the merits of that theory. I believe that however one comes out on normative debates over the appeal of libertarian values and priorities, it is helpful for everyone who participates in those debates to have a clear understanding of the extent to which libertarian ideas are reflected in some of the Roberts Court's most important individual rights rulings of recent years.

It is for this reason that I have sought in this Article to show the degree to which those rulings reflect libertarian theory's deep mistrust of government officials' ability to pursue social and economic objectives without engendering injustices for regulated parties. It is also for this reason that I detailed the ways in which the recent rulings reflect libertarianism's strong and abiding trust in expansive understandings of judicial power as necessary and appropriate means to correct those injustices.

It is a mistake to confine our understandings of libertarian constitutionalism to a *Lochner*-inspired framework that focuses only on constitutional claims for the deregulation of economic marketplaces. As this Article has shown, significant components of the Roberts Court's constitutional jurisprudence reflect libertarian theory's values and priorities without needing to resuscitate *Lochner*'s recognition of substantive due process rights to economic liberty.

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NOTES

DON'T TREAT ME LIKE THAT: WHY TAXPAYERS WITH CANADIAN TAX LIABILITIES BEING COLLECTED BY THE IRS SHOULD BE ENTITLED TO CDP HEARINGS

BRYCE HULL*

INTRODUCTION

The Internal Revenue Service (IRS) is not immune from making mistakes during the collection process. For instance, the Treasury Inspector General for Tax Administration (TIGTA) identified over 11,000 collection due process (CDP) violations in issuing levies for the period July 1, 2021, through June 30, 2022, including over 10,000 violations where a levy was erroneously issued while a CDP hearing was pending.¹ As a result of these violations, the IRS received over \$4 million in erroneous levy payments.² Similarly, TIGTA found 200 potential taxpayers in federally declared disaster zones who received erroneous notices or demands for payment, including seven taxpayers who had a notice of federal tax lien (NFTL) filed against them while they were in the

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1. TREASURY INSPECTOR GEN. FOR TAX ADMIN., FISCAL YEAR 2023 STATUTORY REVIEW OF COMPLIANCE WITH LEGAL GUIDELINES WHEN ISSUING LEVIES 4 (2023), <https://www.tigta.gov/sites/default/files/reports/2023-09/202330066fr.pdf> [<https://perma.cc/PP9R-D3US>] [hereinafter 2023 REPORT ON COMPLIANCE WITH LEVIES]. *See also* TREASURY INSPECTOR GEN. FOR TAX ADMIN., FISCAL YEAR 2024 STATUTORY REVIEW OF COMPLIANCE WITH LEGAL GUIDELINES WHEN ISSUING LEVIES 5 (2024), <https://www.tigta.gov/sites/default/files/reports/2024-09/2024300056fr.pdf> [<https://perma.cc/7WKF-AG9Z>] [hereinafter 2024 REPORT ON COMPLIANCE WITH LEVIES] (finding 213 CDP violations in issuing levies during the period July 1, 2022, through June 30, 2023).

2. 2023 REPORT ON COMPLIANCE WITH LEVIES, *supra* note 1, at 6, 10–12. *See also* 2024 REPORT ON COMPLIANCE WITH LEVIES, *supra* note 1, at 7, 8, 11 (finding almost \$500,000 in erroneous levy payments received by the IRS during the period July 1, 2022, through June 30, 2023).

Hurricane Ian disaster area.³ As the TIGTA noted, an NFTL “places undue burden and stress on a taxpayer that has recently been affected by a hurricane.”⁴

Even though the CDP process itself is not immune from mistakes, CDP hearings still serve as an important bulwark against improper IRS collection actions.⁵ The CDP statutes were created to increase fairness to taxpayers and provide statutory due process rights to taxpayers facing collection actions by the IRS.⁶ Under the statutes, taxpayers ordinarily have the right to a hearing where they can raise issues, such as the appropriateness of the IRS collection action or collection alternatives.⁷

However, in August 2024, in a seven-to-six decision, the United States Tax Court held that taxpayers with Canadian tax liabilities do not have the right to a CDP hearing.⁸ Under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital (the Treaty), revenue agencies of both nations are authorized to collect revenue claims on the other’s behalf.⁹ Thus, the Canadian Revenue Agency (CRA) may send a mutual collection assistance request (MCAR) to the Internal Revenue Service (IRS).¹⁰ After the IRS collects the Canadian revenue claim, it will remit the amount collected to the CRA.¹¹ The IRS is to collect the Canadian revenue claim as though it were its own revenue claim “finally determined in accordance with the laws applicable to the collection of the requested State’s own taxes.”¹²

3. TREASURY INSPECTOR GEN. FOR TAX ADMIN., FISCAL YEAR 2024 STATUTORY REVIEW OF COMPLIANCE WITH NOTICE OF FEDERAL TAX LIEN FILING COLLECTION DUE PROCESS PROCEDURES 14 (2024), <https://www.tigta.gov/sites/default/files/reports/2024-08/2024300037fr.pdf> [<https://perma.cc/UY28-GBM6>].

4. *Id.*

5. NAT’L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 505 (2018), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MLI_05_AppealsCDP.pdf [<https://perma.cc/5GE3-WPVF>] [hereinafter 2018 REPORT TO CONGRESS]. See also Leslie Book, *Collection Due Process at Twenty-Five: A Still Important and Needed Check on IRS Collection Power*, 20 PITT. TAX REV. 145, 147 (2022) (noting that “CDP provides a needed systemic check on the IRS’s still broad collection powers”); Pippa Browde, *A Reflection on Tax Collecting: Opening a Can of Worms to Clean Up a Collection Due Process Jurisdictional Mess*, 65 DRAKE L. REV. 51, 64 (2016) (explaining how some scholars and policymakers argue that CDP provides “increased taxpayer protections against intrusive government collection actions”).

6. S. REP. NO. 105-174, at 67 (1998).

7. 26 U.S.C. §§ 6330(c)(2)(A), 6320(c).

8. *Ryckman v. Comm’r*, 163 T.C. 46, 59 (2024). The taxpayer, Ryckman, appealed the Tax Court’s decision to the Ninth Circuit. Notice of Appeal, *Ryckman v. Comm’r*, No. 24-7351 (9th Cir. Dec. 4, 2024). However, Ryckman later filed a motion to voluntarily dismiss the appeal, which the Ninth Circuit granted. Motion to Voluntarily Dismiss Appeal, *Ryckman*, No. 24-7351 (9th Cir. Feb. 10, 2025); Order, *Ryckman*, No. 24-7351 (9th Cir. Feb. 24, 2025).

9. Convention With Respect to Taxes on Income and Capital, Can.-U.S., art. XXVI A, Sep. 26, 1980, T.I.A.S. No. 11,087, as amended by the Protocols signed on June 14, 1983, T.I.A.S. No. 11,087 (Protocol 1), Mar. 28, 1984, T.I.A.S. No. 11,087 (Protocol 2), Mar. 17, 1995, T.I.A.S. No. 97-1216 (Protocol 3), July 29, 1997, T.I.A.S. No. 97-1216 (Protocol 4), and Sep. 21, 2007, T.I.A.S. No. 08-1215.2 (Protocol 5) [hereinafter Canada-U.S. Income Tax Convention].

10. *Id.* art. XXVI A(6).

11. *Id.*

12. *Id.* art. XXVI A(3).

The Tax Court concluded that the Treaty forecloses any right to a CDP hearing that is provided by statute.¹³ Specifically, the Tax Court held that “when the United States accepts a Canadian revenue claim, it must collect the revenue claim as it would a U.S. tax assessment for which the taxpayer’s administrative and judicial rights to restrain collection, *including* rights to a CDP hearing, have lapsed or been exhausted.”¹⁴ Thus, when the IRS filed an NFTL against the taxpayer, the Treaty precluded her from having a CDP hearing.¹⁵ The dissenting opinion, on the other hand, concluded that the taxpayer was entitled to a CDP hearing.¹⁶ The dissent reasoned that the Treaty may be harmonized with the CDP provisions, drawing “a distinction between the substance of the revenue claim underlying the request for assistance and the procedures by which the claim is to be collected.”¹⁷

This Note argues that the IRS violates taxpayers’ statutory due process rights when it collects Canadian tax liabilities without providing taxpayers with the opportunity for a CDP hearing. Part I provides an overview of the relevant Treaty and CDP statute provisions. Part II considers how the courts examine due process as it relates to the Treaty. Part III examines the legislative history of the CDP statutes. Part IV discusses case law on the CDP statutes. Part V argues that the Treaty may be read harmoniously with the CDP provisions, resulting in taxpayers with Canadian tax liabilities being entitled to CDP hearings. Finally, Part VI argues that the CDP provisions should control if they cannot be harmonized with the Treaty.

I. OVERVIEW OF THE RELEVANT AUTHORITIES

The issue of whether taxpayers with Canadian tax liabilities are entitled to CDP hearings is governed by two main authorities: the Treaty and the CDP statutes. This section will discuss the relevant portions of both.

A. *The United States-Canada Income Tax Treaty*

The Treaty was created in 1980 to address the interaction between the United States and Canada as it pertains to tax law.¹⁸ It replaced the existing income tax convention with Canada, first signed in 1942, which was the second oldest tax convention with the United States in force.¹⁹

In 1995, the Treaty was amended to enable the United States and Canada to collect revenue claims on each other’s behalf.²⁰ At the time, the only other U.S.

13. *Ryckman*, 163 T.C. at 59.

14. *Id.* at 58.

15. *Id.* at 59.

16. *Id.* at 76 (Urda, J., dissenting).

17. *Id.* at 72.

18. Canada-U.S. Income Tax Convention, *supra* note 9, at Letter of Submittal, at 2.

19. *Id.* at Letter to the President, at 3, para. 2.

20. *Id.* art. XXVI A.

treaties containing mutual collection assistance provisions were the treaties with the Netherlands, France, and Sweden.²¹ The addition of the mutual collection assistance provisions was a departure from existing U.S. treaty policy, as both the prior version of the Treaty and the U.S. model treaty lacked the collection assistance provision.²²

In considering whether to provide collection assistance to other nations, the Senate Committee of Foreign Relations found it important to evaluate “the substantive and procedural elements of the other government’s taxes, as well as an analysis of broader policy issues, such as the relative compatibility of the other government’s legal systems and individual protection with those of the United States.”²³ The Committee ultimately justified the added provisions “because of the special and unusually compatible relationship between the United States and Canada.”²⁴

The Treaty’s collection assistance provisions refer to the “applicant State,” which is the state requesting assistance in the collection of its revenue claim.²⁵ These provisions also refer to the “requested State,” which is the state that collects the revenue claim pursuant to the Treaty.²⁶ To request assistance in collecting a revenue claim, the applicant must certify that its revenue claim is “finally determined.”²⁷ In this context, the Treaty defines “finally determined” as “when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.”²⁸

When the requested state accepts an MCAR, it is then to collect the revenue claim “as though such revenue claim were the requested State’s own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State’s own taxes.”²⁹ For example, when the United States accepts a revenue claim from Canada, “the revenue claim shall be treated by the United States as an assessment under United States laws against the taxpayer as of the time the application is received.”³⁰ However, this provision is subject to the condition that “[a] revenue claim of an applicant State accepted for

21. S. EXEC. DOC. NO. 104-9, at 8 (1995); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Neth.-U.S., art. XXX, Dec. 18, 1992, 2291 U.N.T.S. 3; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Fr.-U.S., art. 28, Aug. 31, 1994, 1963 U.N.T.S. 67 [hereinafter France-U.S. Income Tax Convention]; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Swed.-U.S., art. 27, Sep. 1, 1994, T.I.A.S. 06-831 [hereinafter Sweden-U.S. Income Tax Convention].

22. S. EXEC. DOC. NO. 104-9, at 8.

23. *Id.* at 45.

24. *Id.*

25. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A.

26. *Id.*

27. *Id.* art. XXVI A(2).

28. *Id.*

29. *Id.* art. XXVI A(3).

30. *Id.* art. XXVI A(4).

collection shall not have in the requested State any priority accorded to the revenue claims of the requested State.”³¹

The Treaty does not create or provide “any rights of administrative or judicial review of the applicant State’s finally determined revenue claim by the requested State, based on any such rights that may be available under the laws of either Contracting State.”³² Additionally, neither state is required “to carry out administrative measures of a different nature from those used in the collection of its own taxes or that would be contrary to its public policy (*ordre public*).”³³ Having given an overview of the United States-Canada Income Tax Treaty, the following subsection provides an overview of the relevant portions of the collection due process statutes.

B. Collection Due Process Statutes

The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) created the right to a CDP hearing.³⁴ Through the CDP statutes, Congress intended to provide taxpayers with protections similar to those that they would have in dealing with other types of creditors.³⁵ Generally, Congress intended for the CDP statutes to increase fairness for taxpayers.³⁶

The CDP hearing itself is an informal process that may be conducted in-person, by telephone, or by correspondence.³⁷ As an informal hearing, “[t]axpayers do not have the right to examine witnesses and cannot compel the production of documents or third parties, nor do they have an absolute right to demand a record of the proceedings.”³⁸ After the hearing, the taxpayer will be issued a written notice of determination.³⁹

Under IRC §§ 6320 and 6330, the CDP statutes, taxpayers are entitled to a fair hearing after the IRS issues either an NFTL or proposes a levy to collect a tax liability.⁴⁰ The hearing is held by the Independent Office of Appeals (Appeals) within the IRS.⁴¹ The taxpayer is entitled to only one CDP hearing per taxable period,⁴² and usually taxable periods last one year.⁴³

31. *Id.* art. XXVI A(7).

32. *Id.* art. XXVI A(5).

33. *Id.* art. XXVI A(10)(b).

34. Danshera Cords, *How Much Process is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51, 53 (2004).

35. S. REP. NO. 105-174, at 67 (1998).

36. *Id.*

37. Book, *supra* note 5, at 158.

38. *Id.*

39. *Id.*

40. 26 U.S.C. §§ 6320(b), 6330(b).

41. 26 U.S.C. §§ 6320(b)(1), 6330(b)(1).

42. 26 U.S.C. §§ 6320(b)(2), 6330(b)(2).

43. Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 59 (2009).

The Appeals officer is to obtain verification that “the requirements of any applicable law or administrative procedure have been met.”⁴⁴ At the CDP hearing, taxpayers may raise various issues including: “(i) appropriate spousal defenses; (ii) challenges to the appropriateness of collection actions; and (iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.”⁴⁵ Taxpayers may also challenge “the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.”⁴⁶

Before the Appeals officers make a determination, they are to consider whether the requirements of any applicable law or administrative procedure have been met, the issues the taxpayer raised at the hearing, and “whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be *no more intrusive than necessary*.”⁴⁷ After the IRS issues its decision, the taxpayer, within thirty days, may “petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).”⁴⁸

Taxpayers are fully or partially sustained in sixty-eight percent of CDP appeals.⁴⁹ Taxpayers were successful in negotiating collection alternatives with the IRS in sixteen percent of CDP hearings.⁵⁰ Thus, CDP hearings serve an important role in allowing taxpayers to voice their concerns over IRS collection actions before collection transpires.⁵¹ When the United States collects a Canadian tax liability, it is to collect the liability under U.S. laws.⁵² Thus, taxpayers with Canadian tax liabilities and taxpayers with U.S. tax liabilities are both subject to the exact same collection procedures provided for by IRC §§ 6201 and 6301.⁵³ Without CDP hearings, taxpayers with Canadian tax liabilities are deprived of an important process that is useful in identifying and mitigating improper collection actions.⁵⁴

44. 26 U.S.C. §§ 6330(c)(1), 6320(c).

45. 26 U.S.C. §§ 6330(c)(2)(A), 6320(c).

46. 26 U.S.C. §§ 6330(c)(2)(B), 6320(c).

47. 26 U.S.C. §§ 6330(c)(3), 6320(c) (emphasis added).

48. 26 U.S.C. §§ 6330(d)(1), 6320(c).

49. NAT'L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 91 (2015), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_Most-Serious-Problems.pdf [<https://perma.cc/B5CA-DB8R>] [hereinafter 2015 ANNUAL REPORT TO CONGRESS].

50. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-112, LITTLE EVIDENCE OF PROCEDURAL ERRORS IN COLLECTION DUE PROCESS APPEAL CASES, BUT OPPORTUNITIES EXIST TO IMPROVE THE PROGRAM 3 (2006), <https://www.gao.gov/assets/gao-07-112.pdf> [<https://perma.cc/ULS9-8KLK>].

51. 2018 REPORT TO CONGRESS, *supra* note 5, at 505.

52. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(4).

53. *See generally* Ryckman v. Comm'r, 163 T.C. 46, 55 (2024).

54. 2018 REPORT TO CONGRESS, *supra* note 5, at 505; Book, *supra* note 5, at 177 (explaining that “CDP exposed an erroneous policy that would likely have continued unabated”); Steve R.

II. CASES INVOLVING THE TREATY AND DUE PROCESS

Although other cases involving the Treaty have found due process claims inapplicable,⁵⁵ those cases are distinguishable from *Ryckman v. Commissioner*. The United States Constitution sets forth a right to due process that applies in many circumstances, including as it pertains to taxes.⁵⁶ The Due Process Clause of the Fifth Amendment creates constitutional due process rights, and the CDP statutes provide their own statutory due process rights.⁵⁷ Specifically, the CDP statutes require notice after an NFTL is filed or before a levy is made and provide for the right to a fair hearing.⁵⁸ Because the CDP statutes provide their own independent basis for due process protections, it is possible to violate the CDP statutes without violating the Due Process Clause. By prohibiting CDP hearings for taxpayers with Canadian tax liabilities, the IRS is violating their statutory due process rights rather than their constitutional due process rights.

A. Cases Involving the Due Process Clause

The Fifth Amendment's Due Process Clause provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."⁵⁹ From the Due Process Clause, courts have required procedural due process, which generally requires notice and the opportunity for a hearing, prior to the deprivation of a protected interest in certain circumstances.⁶⁰ However, the Supreme Court has long held that the United States has a right to "collect its internal revenue by summary administrative proceedings."⁶¹ Likewise, the Supreme Court has held that due process is not denied where only property rights are involved "if the opportunity given for the ultimate judicial determination of the liability is adequate."⁶² Money paid as taxes, as a property right, is subject to this condition.⁶³ The Supreme Court determined that the collection of revenue is an essential government need, justifying the delay of a

Johnson, *Reforming Federal Tax Litigation: An Agenda*, 41 FLA. ST. U. L. REV. 205, 267 (2013) (explaining that CDP hearings "act as a tripwire alerting the IRS to, and prodding it to correct, its breaches of tax collection rules"). *But see* Browde, *supra* note 5, at 64 (noting that "critics have claimed that CDP wastes government resources, is used by tax protestors as a tool to delay or impede tax administration, and is generally unwieldy and unworkable").

55. *Deweese v. United States*, 272 F. Supp. 3d 96, 102 (D.D.C. 2017); *Retfalvi v. United States*, 335 F. Supp. 3d 791, 801 (E.D.N.C. 2018), *aff'd*, 930 F.3d 600 (4th Cir. 2019).

56. *Phillips v. Comm'r*, 283 U.S. 589, 596–97 (1931).

57. 26 U.S.C. §§ 6320, 6330.

58. *Id.*

59. U.S. CONST. amend. V.

60. Leslie Book, *The Collection Due Process Rights: A Misstep or A Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1175 (2004).

61. *Phillips*, 283 U.S. at 595.

62. *Id.* at 596–97.

63. *Id.* at 597–98.

hearing.⁶⁴ Similarly, the Ninth Circuit has held that “[t]he prompt collection of taxes is necessary for the nation’s continued existence and is an important governmental interest that justifies postponing notice and an opportunity for a hearing.”⁶⁵

In *Deweese v. United States*, the IRS assessed a \$120,000 penalty against Dewees.⁶⁶ The CRA later notified Dewees that it was withholding his Canadian tax refund because of his tax liability owed to the IRS.⁶⁷ Dewees sent a check to the CRA in satisfaction of this tax liability and accrued interest.⁶⁸ He then filed a claim for refund in the United States, and his refund was then rejected.⁶⁹

Deweese subsequently filed suit in a United States District Court, arguing in part that the Treaty was unconstitutional for violating the Due Process Clause of the Fifth Amendment.⁷⁰ Dewees argued that “he was denied adequate due process because he had no opportunity to appeal his penalty ‘through administrative means or the U.S. Tax Court’ before it was collected.”⁷¹

The district court noted that “[m]ere postponement of an opportunity to challenge the imposition of a tax penalty ‘is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.’”⁷² The court concluded that “[t]he ability to challenge tax penalties in *district courts* under § 1346(a)(1) fulfills the Fifth Amendment’s requirements.”⁷³ Thus, the Treaty did not violate the Fifth Amendment’s Due Process Clause.⁷⁴

In *Retfalvi v. United States*, Retfalvi was given notice of a tax assessment by the CRA.⁷⁵ He filed a timely administrative appeal with the CRA, which was denied.⁷⁶ In its denial, the CRA informed Retfalvi that he had ninety days to file an appeal with the Canadian Tax Court.⁷⁷ Retfalvi failed to do so, resulting in a final tax liability.⁷⁸ The CRA later sent a request to the IRS to collect the tax liability pursuant to the Treaty.⁷⁹ The IRS subsequently notified Retfalvi of its proposed levy.⁸⁰ Retfalvi requested a CDP hearing, which was denied by the IRS.⁸¹ Instead, the IRS informed Retfalvi that “he was entitled to a limited

64. *Id.* at 597.

65. *Stonecipher v. Bray*, 653 F.2d 398, 403 (9th Cir. 1981).

66. 272 F. Supp. 3d 96, 99 (D.D.C. 2017).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 99–100.

71. *Id.* at 102.

72. *Id.* at 101 (quoting *Phillips v. Comm’r*, 283 U.S. 589, 596–97 (1931)).

73. *Id.* at 102.

74. *Id.*

75. 930 F.3d 600, 604 (4th Cir. 2019).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 604–05.

hearing under the Collection Appeals Program.”⁸² However, the IRS denied the request for an appeal under the Collection Appeals Program (CAP) because the “Appeals Office does not have the authority to adjust a foreign tax liability.”⁸³

Retfalvi paid the tax liability, filed a claim for refund with the IRS, and filed suit in a United States District Court after the request for refund was denied.⁸⁴ He argued that the Treaty was unconstitutional because it violated his due process rights under the Fifth Amendment.⁸⁵ The district court noted that “[a] foreign judgment ‘cannot be enforced in a U.S. court unless it was obtained under a system with procedures compatible with the requirements of due process of law.’”⁸⁶ However, there is no requirement that “the foreign country’s procedures exactly conform with the procedures available in the United States.”⁸⁷

The court concluded that the Treaty did not deprive Retfalvi of his constitutional due process rights simply because Canada does not afford the exact same rights to administrative and judicial review as the CDP statute provides.⁸⁸ Retfalvi was entitled to appeal to the Canadian Tax Court.⁸⁹ The Due Process Clause does not mandate that taxpayers be provided with specific procedures or that the procedures of the foreign country mirror the procedures provided under U.S. law.⁹⁰ Therefore, the court held that the Treaty did not violate the Due Process Clause.⁹¹ Even though taxpayers with Canadian tax liabilities are not entitled to CDP hearings under the Due Process Clause, that does not necessarily mean that they are not entitled to CDP hearings altogether.

B. The Ryckman Case

In *Ryckman v. Commissioner*, the taxpayer did not argue that taxpayers with Canadian tax liabilities are entitled to CDP hearings based on the Due Process Clause.⁹² Instead, she argued that she was entitled to a CDP hearing based on the CDP statutes,⁹³ which independently require notice and provide the right to a fair hearing.⁹⁴

82. *Id.* at 605.

83. *Id.*

84. *Id.*

85. *Retfalvi v. United States*, 335 F. Supp. 3d 791, 795–96 (E.D.N.C. 2018), *aff’d*, 930 F.3d 600 (4th Cir. 2019).

86. *Id.* at 801 (quoting *Int’l Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 594 (5th Cir. 2003)).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. 163 T.C. 46 (2024).

93. *Id.* at 55.

94. 26 U.S.C. §§ 6330, 6320.

The CRA assessed approximately \$200,000 of tax liability to Ryckman.⁹⁵ In 2017, the CRA sent the IRS an MCAR pursuant to the Treaty.⁹⁶ The IRS accepted the MCAR and sent Ryckman a letter notifying her that an NFTL was filed against her.⁹⁷ In the letter, Ryckman was informed that she had “the right to a hearing to discuss collection options.”⁹⁸ The letter also stated that Ryckman did not have the right to a CDP hearing provided for by IRC § 6320(b).⁹⁹ Nonetheless, Ryckman requested a CDP hearing; she indicated that she was unable to pay the full balance of the NFTL and would like to pay the balance by installment agreement.¹⁰⁰ The IRS denied her request for the CDP hearing “[b]ecause the foreign tax liability is treated as a finally determined U.S. tax liability.”¹⁰¹

Ryckman then petitioned to the United States Tax Court, arguing that she was entitled to a CDP hearing.¹⁰² The majority focused on the Treaty provision which provides “that an accepted revenue claim ‘shall be collected by the requested State as though such revenue claim were the requested State’s own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State’s own taxes.’”¹⁰³ Using this provision, the majority concluded “that when the United States accepts a Canadian revenue claim, the claim must be treated as a U.S. tax assessment for which all rights to restrain collection have lapsed or been exhausted.”¹⁰⁴ The majority also determined that, because CDP hearings restrain collection, the Canadian revenue claim must be collected by the IRS “as though the taxpayer has exhausted all CDP rights.”¹⁰⁵ CDP hearings can restrain a collection action if, for instance, the taxpayer challenges the appropriateness of the collection action or offers collection alternatives.¹⁰⁶ The majority held that the Treaty “does not conflict with either CDP statute.”¹⁰⁷ The court considered the fact that a taxpayer’s right to a CDP hearing may be limited in certain circumstances.¹⁰⁸ Moreover, the majority considered the fact that neither CDP statute contains a provision stating that it applies notwithstanding any other law.¹⁰⁹ Thus, the court concluded that Ryckman was not entitled to the CDP hearing because she “had

95. *Ryckman*, 163 T.C. at 47.

96. *Id.*

97. *Id.* at 48.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 49.

103. *Id.* at 58.

104. *Id.*

105. *Id.* at 59.

106. 26 U.S.C. §§ 6330(c)(2)(A), 6320(c).

107. *Ryckman*, 163 T.C. at 61.

108. *Id.* at 61–62.

109. *Id.* at 62.

no additional administrative or judicial rights in the United States under the CDP statutes with respect to the NFTL.”¹¹⁰

The concurring opinion joined the majority opinion in full, writing separately to argue that the majority opinion faithfully interpreted the text of the Treaty.¹¹¹ Because the Treaty explicitly states that it does not create or provide any rights of administrative or judicial review, the concurring opinion reasoned that the majority opinion properly followed the plain text of the Treaty in prohibiting taxpayers with Canadian tax liabilities from CDP hearings.¹¹² The concurrence criticized the dissent’s interpretation of the Treaty as one that “would impermissibly expand the scope of the Treaty and create benefits unsupported by its plain text.”¹¹³

Like the majority, the dissent concluded that the CDP statutes could be read harmoniously with the Treaty.¹¹⁴ The dissent, however, reasoned that the substance of the revenue claim is determined by the law of the applicant country while the procedures by which the claim is collected are determined by the law of the requested country.¹¹⁵ Accordingly, the dissent determined that “the normal collection procedures of the requested state apply.”¹¹⁶ In the dissent’s view, taxpayers with Canadian tax liabilities are “entitled to the protections outlined in [the CDP statutes] before the IRS moves to collect by lien or levy.”¹¹⁷

The taxpayer’s argument in *Ryckman* was not based on the Due Process Clause, but on a statutory right created by the CDP statutes.¹¹⁸ In this way, the argument made in *Ryckman* is markedly different from those made in both *Deweese* and *Retfalvi*. Case law under the Due Process Clause holds that the government is justified in delaying notice and a hearing until after the deprivation of property for purposes of collecting tax.¹¹⁹ Congress, however, was unsatisfied with this case law and ultimately protected individual rights in the collection process.¹²⁰ The case law “overstate[d] the government’s interest in prompt payment of taxes.”¹²¹ The CDP statutes were created to provide protections in the collection process where the Due Process Clause did not.¹²² Therefore, the CDP statutes provide their own independent basis for their due process protections, completely separate from the Due Process Clause.

110. *Id.* at 64.

111. *Id.* at 64–65 (Jones, J., concurring).

112. *Id.* at 66–67.

113. *Id.* at 67.

114. *Id.* at 76 (Urda, J., dissenting).

115. *Id.* at 72.

116. *Id.* at 74.

117. *Id.* at 76.

118. *Id.* at 55 (majority opinion).

119. *Phillips v. Comm’r*, 283 U.S. 589, 597 (1931).

120. Book, *supra* note 60, at 1181.

121. *Id.*

122. *Id.*

III. THE LEGISLATIVE HISTORY OF THE CDP STATUTES SUPPORTS AFFORDING CDP HEARINGS TO TAXPAYERS WITH CANADIAN TAX LIABILITIES

When Congress was creating the CDP statutes, it set forth reasons for their enactment that are also relevant to taxpayers with Canadian tax liabilities. Therefore, the CDP statutes' legislative history supports affording CDP hearings to taxpayers with Canadian tax liabilities.

A. Legislative History of the CDP Statutes

The right to CDP hearings was first created by the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98).¹²³ The Senate Finance Committee hearings preceding the enactment showcased great displeasure with how the IRS was operating.¹²⁴ Statutory reform, including the creation of the CDP hearings, resulted from these meetings.¹²⁵ Specifically, the reform was triggered by inflammatory testimony given during the hearings, which alleged abuse by the IRS in its collection activities.¹²⁶

For instance, the Chairman of the Senate Finance Committee, Senator William Roth, stated at one of the hearings that:

In some instances, the first time a taxpayer is aware of any enforcement action by the IRS is when his or her bank calls to notify that funds have been frozen. The IRS can take these actions in many cases without giving the taxpayer notice or opportunity to be heard.¹²⁷

A witness also provided the following testimony:

The collection appeals process we think ought to be beefed up and allowed to be a true appellate review of the judgment and conduct of the revenue officers involved. Right now, it is strictly a procedural review and it does not have much of an impact. I think the lack of use by practitioners and taxpayers alike indicate that they view that as really not a legitimate forum.¹²⁸

123. Cords, *supra* note 34, at 53.

124. *Id.* at 51.

125. *Id.* at 52.

126. *Id.*

127. *Practices and Procedures of the Internal Revenue Service: Hearings Before the S. Comm. on Fin.*, 105th Cong. 105–190, at 2 (1997) (statement of Sen. William V. Roth, Jr., Chairman, S. Comm. on Fin.).

128. *Id.* at 26 (statement of Joseph F. Lane, Enrolled Agent, Chairman, Nat'l Govt. Relations Comm., The Nat'l Ass'n of Enrolled Agents).

Investigations of the IRS revealed that it had followed all applicable rules and regulations in 337 of 467 cases alleging seizure abuses against taxpayers.¹²⁹ The remaining 130 cases involved violations “such as not investigating all alternatives to seizure, seizing an asset that could result in a significant hardship to the taxpayer who owed the tax, and not making enough attempts to contact the taxpayer personally before making the seizure.”¹³⁰ Chairman Roth responded to these results by stating they were “a stunning confession of the sins of the IRS.”¹³¹ Some have criticized the basis for RRA 98.¹³² However, RRA 98 established foundational taxpayer rights, such as the right “to challenge the IRS’s position and be heard,” and the importance of those rights “exists even if there was or is little evidence that IRS Collection employees were reckless or intentional in disregarding taxpayer interests and rights in tax collection.”¹³³

The Senate Report on RRA 98 provided the following explanation for the creation of the CDP provisions:

The Committee believes that taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor. Accordingly, the Committee believes that the IRS should afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property. When collection of tax is in jeopardy, the Committee believes it is appropriate to provide notice and a hearing promptly after the deprivation of property. The Committee believes that following procedures designed to afford taxpayers due process in collections will increase fairness to taxpayers.¹³⁴

The Senate Report states that the IRS is to verify “that all statutory, regulatory, and administrative requirements for the proposed collection action have been met.”¹³⁵ This verification is to include the following:

- (1) the revenue officer recommending the collection action has verified the taxpayer’s liability;
- (2) the estimated expenses of levy and sale will not exceed the value of the property to be seized;

129. Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 90 (2004).

130. *Id.*

131. *Id.* at 90–91.

132. *Id.* at 91 (stating that “the actual factual case for reform was lukewarm at best”); Cords, *supra* note 34, at 52 (noting that “[m]uch of the testimony presented at the hearings has since been either disputed or entirely discredited”).

133. Book, *supra* note 5, at 194.

134. S. REP. NO. 105-174, at 67 (1998).

135. *Id.* at 68.

- (3) the revenue officer has determined that there is sufficient equity in the property to be seized to yield net proceeds from sale to apply to the unpaid tax liabilities; and
- (4) with respect to the seizure of the assets of a going business, the revenue officer recommending the collection action has thoroughly considered the facts of the case, including the availability of alternative collection methods, before recommending the collection action.¹³⁶

Similarly, the Senate Report also states that taxpayers are allowed to raise any relevant issue at CDP hearings, including:

- (1) challenges to the underlying liability as to existence or amount;
- (2) appropriate spousal defenses;
- (3) challenges to the appropriateness of collection actions; and
- (4) collection alternatives, which could include the posting of a bond, substitution of other assets, an installment agreement or an offer-in-compromise.¹³⁷

B. Application to Taxpayers with Canadian Tax Liabilities

The same abuses that Congress sought to reduce through the CDP statutes could affect taxpayers with Canadian tax liabilities. For instance, the IRS could fail to investigate all alternatives to seizure, or its seizure of an asset could result in significant hardship to the taxpayer.¹³⁸ Under the Treaty, the United States is to collect Canadian tax liabilities in accordance with its own laws.¹³⁹ Thus, there is no reason why these same concerns would not be applicable to taxpayers with Canadian tax liabilities when these taxpayers are subject to the exact same collection procedures by the IRS.

The verification to be conducted during a CDP hearing is relevant to taxpayers with Canadian tax liabilities. For example, it is possible for the estimated expenses of levy and sale to exceed the value of the property seized from a taxpayer with a Canadian tax liability.¹⁴⁰ Taxpayers with Canadian tax liabilities, like other taxpayers, may have properties with insufficient equity to yield net proceeds from the sale. Likewise, a taxpayer with a Canadian tax liability may have assets of a going business subject to seizure. Issues that taxpayers can raise at CDP hearings, including spousal defenses, challenges to the appropriateness of collection actions, and collection alternatives,¹⁴¹ are also

136. *Id.*

137. *Id.*

138. Camp, *supra* note 129, at 90.

139. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(4).

140. See generally Creighton R. Meland, Jr., *Omnibus Taxpayers' Bill of Rights Act: Taxpayers' Remedy or Political Placebo?*, 86 MICH. L. REV. 1787, 1808-09 (1988) (describing how the IRS can make uneconomical levies when collecting tax liabilities).

141. 26 U.S.C. § 6330(c)(2)(A), 6320(c).

relevant to taxpayers with Canadian tax liabilities. Even though taxpayers with Canadian tax liabilities are unable to challenge the substantive validity of the liability,¹⁴² there are other verifications conducted through CDP hearings and issues that may be raised during the hearings that would be useful. In fact, only thirty-seven percent of taxpayers question the existence of the liability at CDP hearings.¹⁴³ Almost one-third of taxpayers request collection alternatives and more than one-fourth of taxpayers question the appropriateness of the collection action at CDP hearings.¹⁴⁴ An example of this is set forth in *Ryckman*: the taxpayer did not challenge the underlying liability, but instead wanted a CDP hearing to propose an installment agreement.¹⁴⁵ In short, CDP hearings serve purposes other than to question the substantive liability, and those other purposes would be equally useful to taxpayers with Canadian tax liabilities.

By creating the CDP regime, Congress sought to give taxpayers “protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor.”¹⁴⁶ Congress also wanted the CDP statutes to increase fairness for taxpayers.¹⁴⁷ Taxpayers have successfully negotiated collection alternatives in sixteen percent of CDP hearings.¹⁴⁸ CDP hearings, therefore, “provide instrumental protections for taxpayers to meaningfully address the appropriateness of IRS collection actions.”¹⁴⁹ Just as CDP hearings have been used to increase fairness and to provide protections for taxpayers with U.S. tax liabilities, they too can increase fairness and protections for taxpayers with Canadian tax liabilities being collected by the IRS.

C. Collection Appeals Program

At the time Congress created the CDP statutes, the IRS had already instituted the collection appeals program (CAP) to review collection actions.¹⁵⁰ Even with CAP, Congress still thought it necessary to create the CDP statutes to provide additional protections to taxpayers in dealing with the IRS.¹⁵¹ CAP is available where CDP is not available.¹⁵² For example, a review under CAP is available to taxpayers where the IRS is collecting a tax liability pursuant to an MCAR.¹⁵³ However, the mere fact that taxpayers with Canadian tax liabilities

142. *Ryckman v. Comm’r*, 163 T.C. 46, 73 (2024) (Urda, J., dissenting).

143. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 50, at 4–5.

144. *Id.*

145. *Ryckman*, 163 T.C. at 48.

146. S. REP. NO. 105-174, at 67 (1998).

147. *Id.*

148. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 50, at 3.

149. 2018 REPORT TO CONGRESS, *supra* note 5, at 505.

150. S. REP. NO. 105-174, at 92.

151. *Id.* at 67.

152. IRM 8.24.1.2(2) (Sep. 28, 2021).

153. IRM 5.21.7.4.1(10)(b) (June 3, 2020).

are entitled to a review under CAP¹⁵⁴ should not mean that those taxpayers are not entitled to the additional protections provided by CDP hearings.

Like CDP hearings, CAP allows taxpayers to appeal certain collection actions.¹⁵⁵ CAP was first implemented by the IRS in 1996 and was initially limited to liens, levies, and seizures.¹⁵⁶ CAP is not mandated by statute, though the legislative history of RRA 98 indicates congressional intent that CAP be continued.¹⁵⁷

Under CAP, taxpayers may appeal a levy that has or will be taken, an NFTL that has or will be filed, and rejected, proposed, or terminated installment agreements.¹⁵⁸ An Appeals officer with the IRS Independent Office of Appeals will review the “appropriateness of the action proposed or taken based on law, regulations, policy and procedures after considering all of the relevant facts and circumstances.”¹⁵⁹ The Appeals officer does not consider collection alternatives.¹⁶⁰ A review under CAP is limited, involving swift resolutions.¹⁶¹ In fact, it is Appeals’ goal to complete CAP cases within five business days after the case is assigned to an Appeals officer.¹⁶² For more complicated cases, it is Appeals’ goal to have those completed within fifteen business days.¹⁶³

Even though both CDP and CAP allow an appeal of IRS collection actions, there are a number of differences between CDP and CAP.¹⁶⁴ Under the CDP statutes, a taxpayer may petition the Appeals officer’s determination to the Tax Court.¹⁶⁵ On the other hand, Appeals’ administrative decision under CAP is final, and the taxpayer does not have the right to seek judicial review of the administrative decision.¹⁶⁶ This is significant because the IRS is enjoined from its collection actions while the petition to the Tax Court is pending.¹⁶⁷ Hence, CDP hearings provide an additional safeguard as the taxpayer is not subject to a collection action until after judicial review. Additionally, CDP allows the taxpayer to raise collection alternatives.¹⁶⁸ Taxpayers appealing under CAP may not raise collection alternatives, as the review is limited to the “appropriateness of the issue under appeal.”¹⁶⁹ So although taxpayers appealing under CDP can

154. *Id.*

155. IRM 8.24.1.3(2) (Sep. 28, 2021).

156. IRM 8.24.1.1.1(1) (Sep. 3, 2019).

157. IRM 8.24.1.1.1(2) (Sep. 3, 2019); S. REP. NO. 105-174, at 92 (1998).

158. IRM 8.24.1.3(2) (Sep. 28, 2021).

159. IRM 8.24.1.2(5)(c) (Sep. 28, 2021).

160. IRM 8.24.1.2(5)(d) (Sep. 28, 2021).

161. IRM 8.24.1.3(7) (Sep. 28, 2021).

162. IRM 8.24.1.3(6) (Sep. 28, 2021).

163. IRM 8.24.1.3(8) (Sep. 28, 2021).

164. IRM 8.24.1.2 (Sep. 28, 2021).

165. 26 U.S.C. §§ 6330(d)(1), 6320(c).

166. IRM 8.24.1.2(4) (September 28, 2021).

167. 26 U.S.C. §§ 6330(e)(1), 6320(c).

168. 26 U.S.C. §§ 6330(c)(2)(iii), 6320(c).

169. IRM 8.24.1.2(5)(d) (Sep. 28, 2021).

propose an offer-in-compromise (OIC),¹⁷⁰ appeals under CAP cannot consider rejections of OICs.¹⁷¹

The differences between CAP and CDP have caused markedly different results for taxpayers who appeal through the two regimes.¹⁷² Notably, taxpayers are either fully or partially successful in sixty-eight percent of CDP appeals compared to only twenty-two percent of CAP appeals.¹⁷³ It comes as no surprise that CAP utilization is only about ten percent of CDP utilization.¹⁷⁴

Because of its limited review, CAP has been criticized as being “so circumscribed by the procedural limitations imposed that it really does not constitute a true appellate process.”¹⁷⁵ Furthermore, CAP has been criticized for jeopardizing “the fundamental rights of taxpayers *to appeal an IRS decision in an independent forum, to challenge the IRS’s position and be heard, to a fair and just tax system, and to privacy.*”¹⁷⁶

When Congress was creating the CDP statutes, it was aware that the IRS had already instituted CAP.¹⁷⁷ Nonetheless, Congress still thought it necessary to create the CDP statutes to provide taxpayers with additional protections.¹⁷⁸ Congress specifically intended to expand taxpayer rights by creating CDP appeals.¹⁷⁹ Despite the fact that taxpayers with Canadian tax liabilities are entitled to appeal collection actions through CAP,¹⁸⁰ they should still be entitled to CDP hearings given the limited review under CAP and the fact that Congress wanted to provide additional protections beyond CAP in creating the CDP appeals process. By being limited to CAP, taxpayers with Canadian tax liabilities are without an adequate, independent forum to challenge improper IRS collection actions.¹⁸¹

IV. CASE LAW CONCERNING THE CDP STATUTES SUPPORTS AFFORDING CDP HEARINGS TO TAXPAYERS WITH CANADIAN TAX LIABILITIES

Case law on the CDP statutes illustrates the importance of CDP hearings in providing a venue for taxpayers to challenge IRS collection actions. The IRS is not infallible. Just as taxpayers with U.S. tax liabilities are subject to improper collection actions, taxpayers with Canadian tax liabilities being collected by the

170. 26 U.S.C. §§ 6330(c)(2)(iii), 6320(c).

171. IRM 5.1.9.4.1(1) (Aug. 27, 2021).

172. 2015 ANNUAL REPORT TO CONGRESS, *supra* note 49, at 91.

173. *Id.*

174. *Id.* at 98.

175. *Id.* at 93.

176. *Id.*

177. S. REP. NO. 105-174, at 92 (1998).

178. *Id.* at 67.

179. 2015 ANNUAL REPORT TO CONGRESS, *supra* note 49, at 93; Book, *supra* note 5, at 155–56.

180. IRM 5.21.7.4.1(10)(b) (June 3, 2020).

181. 2015 ANNUAL REPORT TO CONGRESS, *supra* note 49, at 93.

IRS are also subject to improper collection actions.¹⁸² For this reason, those taxpayers should also be entitled to CDP hearings.

A. Case Law on the Purpose of CDP Hearings

Providing CDP hearings to taxpayers with Canadian tax liabilities aligns with the purpose of CDP hearings, as taxpayers would be able to raise legitimate concerns over collection actions at CDP hearings.

In *Zuch v. Commissioner*, the Third Circuit noted that Congress, in creating the CDP statutes, granted “all taxpayers in a CDP hearing the ability to raise issues relating to the unpaid tax or proposed levy.”¹⁸³ Only qualifying taxpayers are also entitled to raise a challenge to the underlying liability at a CDP hearing.¹⁸⁴ The CDP statutes were intended to provide “taxpayers a forum to *challenge* a lien or levy and account[] for different circumstances in which that need may arise.”¹⁸⁵

The majority opinion in *Ryckman* acknowledges that Ryckman is a taxpayer, despite having a Canadian tax liability, since the word “tax” as it is used in the CDP statutes also applies to foreign taxes being collected by the IRS.¹⁸⁶ And while the Third Circuit was not considering taxpayers with Canadian tax liabilities in *Zuch*, the decision reveals Congress’s intent that CDP hearings be used to raise issues regarding collection activities; the only qualification was for raising issues on the underlying liability.¹⁸⁷ Just as issues regarding collection actions would apply to taxpayers with U.S. tax liabilities, they would also apply to taxpayers with Canadian tax liabilities. Accordingly, taxpayers with Canadian tax liabilities should be given a forum to challenge an NFTL or a levy, since they are subject to the same conditions that would be considered by a taxpayer with a U.S. tax liability at a CDP hearing.¹⁸⁸

Additionally, *Zuch* noted that Congress intended for the IRS to observe all applicable laws and administrative procedures in collecting tax liabilities.¹⁸⁹ This could be accomplished at a CDP hearing for a taxpayer with a Canadian tax liability by confirming that the MCAR was pursuant to the Treaty.¹⁹⁰ All in all, affording CDP hearings to taxpayers with Canadian tax liabilities would grant those taxpayers the opportunity to raise legitimate concerns about IRS

182. See generally Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(4)(a) (providing that the United States is to collect the revenue claim as it would an assessment under its own laws).

183. 97 F.4th 81, 88 (3d Cir. 2024), *rev’d and remanded*, 605 U.S. 422 (2025).

184. *Id.*

185. *Id.* at 98.

186. *Ryckman v. Comm’r*, 163 T.C. 46, 55 (2024).

187. *Zuch*, 97 F.4th at 88.

188. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(4).

189. *Zuch*, 97 F.4th at 98.

190. *Ryckman*, 163 T.C. at 76 (Urda, J., dissenting).

collection actions and help ensure that the IRS is only collecting the liabilities pursuant to the Treaty.

B. The Balancing Test Requirement

CDP hearings provide a safeguard against unnecessarily intrusive collection actions.¹⁹¹ The CDP statutes require that the Appeals officer balance the efficient collection of taxes with the taxpayer's concerns over the intrusiveness of the collection action.¹⁹² By depriving taxpayers with Canadian tax liabilities of CDP hearings, those taxpayers are less protected against intrusive collection actions undertaken by the IRS.

In *Budish v. Commissioner*, Budish owned a sculpting company that was reliant on a foundry to provide materials and provide castings for sculptures.¹⁹³ Budish incurred a tax liability, and the IRS subsequently notified Budish of its intent to collect the liability by levy.¹⁹⁴ Budish requested a CDP hearing and did not dispute the underlying liability.¹⁹⁵ He offered an installment agreement of \$5,500 per month, but he stipulated that the IRS could not file an NFTL.¹⁹⁶ Instead, the Appeals officer offered to grant the installment agreement with an NFTL.¹⁹⁷ Budish was concerned that an NFTL would disrupt his relationship with the foundry, from which he received thirty to fifty percent discounts.¹⁹⁸ Moreover, he was concerned that he would then be required to make up-front payments to the foundry.¹⁹⁹ Consequently, Budish rejected the offer and the Appeals officer subsequently recommended that the proposed levy be sustained.²⁰⁰

Under the CDP statutes, the Appeals officer, prior to making a determination, is to consider “whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.”²⁰¹ In *Budish*, the Appeals officer did not provide any analysis for her conclusion that the levy action balances the need for the efficient collection of taxes with Budish's concern that it would be unnecessarily intrusive.²⁰² The court determined that the “Appeals officer gave little, if any, consideration to petitioner's arguments and, instead, decided a notice of lien should be filed

191. 2018 REPORT TO CONGRESS, *supra* note 5, at 505.

192. 26 U.S.C. §§ 6330(c)(3)(C), 6320(c).

193. T.C. Memo. 2014-239, 2014 WL 6645470, at *4 (2014).

194. *Id.* at *4–5.

195. *Id.* at *5.

196. *Id.* at *6.

197. *Id.* at *8.

198. *Id.* at *7.

199. *Id.*

200. *Id.* at *8.

201. 26 U.S.C. §§ 6330(c)(3)(C), 6320(c).

202. *Budish*, 2014 WL 6645470, at *22.

because of her mistaken belief that she lacked discretion to do otherwise under the IRM.”²⁰³ As a result, the Appeals officer was found to have abused her discretion in sustaining the levy against Budish, and the case was remanded for further consideration.²⁰⁴

Budish illustrates the importance of the balancing requirement of IRC § 6330(c)(3)(C). Without such a requirement, taxpayers would be subject to unnecessarily intrusive collections. Taxpayers with Canadian tax liabilities, however, would not be able to raise these concerns at a CDP hearing under the majority’s holding in *Ryckman*.²⁰⁵ The IRS is not infallible, as evidenced by the Appeals officer in *Budish* failing to meet the requirements of IRC § 6330(c)(3)(C) and her mistaken belief that she lacked discretion under the Internal Revenue Manual (IRM).²⁰⁶ And while the IRS may still make mistakes in conducting CDP hearings, they serve as an important safeguard against improper collection actions.²⁰⁷ Taxpayers with Canadian tax liabilities should therefore be entitled to CDP hearings.

The next section of this Note will consider the text of the Treaty, first looking at how, as written, individuals with Canadian tax liabilities are already entitled to CDP hearings, second considering how the IRS’s own actions support entitlement to CDP hearings, and finally how looking at the interpretation of other treaties creates this entitlement.

V. THE TREATY MAY BE READ HARMONIOUSLY WITH THE CDP PROVISIONS

A. The Provisions Within the Assistance in Collection Article of the Treaty Support Providing CDP Hearings

Taken as a whole, the provisions within the Assistance in Collection article of the Treaty support providing CDP hearings to taxpayers with Canadian tax liabilities. Treaty interpretation begins “with the text of the treaty and the context in which the written words are used.”²⁰⁸ Courts attempt to construe treaties and statutes to give effect to both if they relate to the same subject.²⁰⁹ When deciding non-tax cases, the Supreme Court “has sought to read statutes in harmony with treaties and rejected constructions of terms that would unnecessarily create conflict between the two.”²¹⁰

203. *Id.* at *24.

204. *Id.* at *24–25.

205. *Ryckman v. Comm’r*, 163 T.C. 46, 59 (2024).

206. *Budish*, 2014 WL 6645470, at *24. *See also* *Wadleigh v. Comm’r*, 134 T.C. 280 (2010); *Seminole Nursing Home, Inc. v. Comm’r*, T.C. Memo. 2017-102, 2017 WL 2438683 (2017); *Cox v. United States*, 345 F. Supp. 2d 1218 (W.D. Okla. 2004); *Lofgren Trucking Serv., Inc. v. United States*, 508 F. Supp. 2d 734 (D. Minn. 2007).

207. 2018 REPORT TO CONGRESS, *supra* note 5, at 505.

208. *Air France v. Saks*, 470 U.S. 392, 397 (1985) (citing *Maximov v. United States*, 373 U.S. 49, 53–54 (1963)).

209. *Toulouse v. Comm’r*, 157 T.C. 49, 58 (2021).

210. *Adams Challenge (UK), Ltd. v. Comm’r*, 154 T.C. 37, 62 n.18 (2020).

The Treaty provides that “a revenue claim is finally determined when the *applicant* State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.”²¹¹ It then goes on to provide that the requested state shall collect the revenue claim “as though such revenue claim were the requested State’s own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State’s own taxes.”²¹² The Treaty’s definition of “finally determined” only applies to the *applicant* state;²¹³ it does not necessarily mean that a revenue claim is finally determined in the requested state only when all administrative and judicial rights have lapsed or been exhausted.²¹⁴ It is possible to differentiate between the substance of the revenue claim and the procedures used to collect upon it.²¹⁵

While the substance of the revenue claim is to be governed by the applicant state’s laws, the procedures by which it is collected are governed by the laws of the requested state.²¹⁶ The Treaty provides that the requested state is to collect the revenue claim in accordance with its own collection laws.²¹⁷ Thus, it is possible to interpret “finally determined” as it pertains to the requested state to refer to the substantive liability of the revenue claim, meaning that its validity cannot be challenged in the requested state.²¹⁸ Separating the procedure from the substance allows the requested state to collect the revenue claim in accordance with its own laws, as the requested state would simply treat the liability as valid. Such an interpretation would properly give effect to both the Treaty and the CDP statutes.

Furthermore, the Treaty provides that it does not “impos[e] on either Contracting State the obligation to carry out administrative measures of a different nature from those used in the collection of its own taxes or that would be contrary to its public policy (ordre public).”²¹⁹ This provision indicates the Treaty’s intention to treat the procedural collection policies as separate from the substance of the liability. As the IRS provides CDP hearings when collecting its own taxes,²²⁰ it would be carrying out administrative measures differently by not providing CDP hearings when collecting on a Canadian tax liability. By providing CDP hearings to taxpayers with Canadian tax liabilities, there would be no variance between the administrative measures used to collect U.S. and Canadian tax liabilities.

211. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(2) (emphasis added).

212. *Id.* art. XXVI A(3).

213. *Id.* art. XXVI A(2).

214. *Ryckman v. Comm’r*, 163 T.C. 46, 73–74 (2024) (Urda, J., dissenting).

215. *Id.* at 72.

216. *Id.*; *see generally* Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(3).

217. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(2).

218. *Ryckman*, 163 T.C. at 73–74 (Urda, J., dissenting).

219. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(10)(b).

220. 26 U.S.C. §§ 6320(b), 6330(b).

In another provision, the Treaty states that when the IRS accepts an MCAR, “the revenue claim shall be treated by the United States as an assessment under United States laws against the taxpayer as of the time the application is received.”²²¹ This provision reflects the intent that the collection procedure will be governed by U.S. laws. Under U.S. laws, taxpayers are entitled to CDP hearings.²²² Taken as a whole, other provisions of the Treaty buttress the notion that the United States is to collect Canadian tax liabilities just like it would its own tax liabilities.²²³ The United States can collect a finally determined Canadian revenue claim, of which its substantive validity cannot be challenged, and still grant the taxpayer a CDP hearing.

Another provision of the Treaty is that “[a] revenue claim of an applicant State accepted for collection shall not have in the requested State any priority accorded to the revenue claims of the requested State.”²²⁴ On average, it takes fifty-nine days for the taxpayer’s request for a CDP hearing to be transferred to the Independent Office of Appeals.²²⁵ Most CDP hearings occur within six months after the taxpayer has requested a hearing.²²⁶ However, the amount of time it takes for a CDP hearing to be conducted varies because “all CDP cases are different and the time required to properly handle a CDP hearing request depends on the complexity of the issues raised by that case.”²²⁷ In total, the average time it takes for a CDP case to be resolved, from the taxpayer’s request until the determination, is 252 days.²²⁸ For CDP hearings where the taxpayer ultimately petitions the case to the Tax Court, the average is 339 days from request to determination.²²⁹ As taxpayers are allowed to enjoin the collection action while awaiting the CDP determination,²³⁰ taxpayers with Canadian tax liabilities would be subject to collection actions far sooner than taxpayers with U.S. tax liabilities. Hence, Canadian tax liabilities would effectively be given priority over U.S. tax liabilities, contrary to the provision in the Treaty. Entitling taxpayers with Canadian tax liabilities to CDP hearings is consistent with other provisions of the Treaty. Foreclosing the right to CDP hearings to taxpayers with Canadian tax liabilities needlessly creates a conflict not only with the CDP statutes, but also with other provisions of the Treaty.

Moreover, the Treaty provides that it does not create or provide “any rights of administrative or judicial review of the applicant State’s finally determined revenue claim by the requested State, based on any such rights that may be

221. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(4)(a).

222. 26 U.S.C. §§ 6320(b), 6330(b).

223. *Ryckman*, 163 T.C. at 72–74 (Urda, J., dissenting).

224. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(7).

225. U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-659, OPPORTUNITIES EXIST TO IMPROVE MONITORING AND TRANSPARENCY OF APPEAL RESOLUTION TIMELINESS 28 (2018), <https://www.gao.gov/assets/gao-18-659.pdf> [<https://perma.cc/PX6D-VSRU>].

226. Cords, *supra* note 34, at 62.

227. *Id.*

228. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 225, at 28.

229. Camp, *supra* note 43, at 87 n.149.

230. 26 U.S.C. §§ 6330(e)(1), 6320(c); Book, *supra* note 60, at 1156.

available under the laws of either Contracting State.”²³¹ The majority reasoned that entitling taxpayers to CDP hearings would conflict with this provision.²³² However, it is the CDP statutes, not the Treaty, that create the right to the CDP hearings.²³³ Hence, there is no conflict with this provision. The majority held that the United States is to collect the revenue claim “as it would a U.S. tax assessment for which the taxpayer’s administrative and judicial rights to restrain collection . . . have lapsed or been exhausted.”²³⁴ However, this interpretation renders Article XXVI A(5) superfluous. If taxpayers have no administrative and judicial rights in the requested state, then the Treaty could not possibly create or provide such rights. Instead, this provision indicates that taxpayers are entitled to administrative and judicial review in the requested state; the provision simply states that the Treaty itself does not create those rights.

Additionally, the majority concluded that it would be unreasonable to interpret the Treaty “as providing an additional administrative or judicial forum in the United States when the opportunity for such appeals in Canada has been exhausted.”²³⁵ When the CRA issues a tax assessment, taxpayers may file an administrative appeal and then appeal to the Canadian Tax Court.²³⁶ Under the Treaty, a person is also able to write to either the Secretary of the Treasury or the Minister of National Revenue, depending on the residency and nationality of the person, when the person believes “that the actions of one or both of the Contracting States result or will result for him in *taxation* not in accordance with the provisions of this Convention.”²³⁷ However, both of these options provide an opportunity to challenge the substantive liability of the revenue claim, not the IRS’s collection action.²³⁸ Therefore, it is not unreasonable to afford an additional administrative or judicial forum in the United States limited to the appropriateness of the IRS’s collection action, which the taxpayer had no prior opportunity to challenge in Canada.²³⁹

B. The Non-Discrimination Article Supports Providing CDP Hearings

In addition to the provisions within the Assistance in Collection article of the Treaty, the Non-Discrimination article further supports providing CDP hearings to taxpayers with Canadian tax liabilities. Treaty interpretation begins

231. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(5).

232. *Ryckman v. Comm’r*, 163 T.C. 46, 59–60 (2024).

233. 26 U.S.C. §§ 6320(b), 6330(b).

234. *Ryckman*, 163 T.C. at 58.

235. *Id.*

236. *See, e.g., Retfalvi v. United States*, 930 F.3d 600, 604 (4th Cir. 2019).

237. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI(1), art. III(1)(g) (emphasis added).

238. *See Retfalvi*, 930 F.3d at 604; Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI(1).

239. *See Retfalvi*, 930 F.3d at 604–05. *See also Ryckman*, 163 T.C. at 76 (Urda, J., dissenting) (noting that Congress “has not seen fit to strip away American procedural safeguards where a close Treaty partner has conducted its own proceedings”).

“with the text of the treaty and the context in which the written words are used.”²⁴⁰ Non-discrimination provisions exist in income tax treaties to treat the nationals of both countries on a level playing field.²⁴¹ Specifically, the Treaty provides:

Citizens of a Contracting State, who are residents of the other Contracting State, shall not be subjected in that other State to any taxation or any requirement connected therewith which is *other or more burdensome* than the taxation and connected requirements to which citizens of that other State in the same circumstances are or may be subjected.²⁴²

Under the non-discrimination provisions within U.S. income tax treaties, the United States “cannot impose more burdensome taxes or related requirements on the other country’s taxpayers than it imposes on its own persons.”²⁴³ Differences in procedural rules may constitute a violation of the non-discrimination provision.²⁴⁴ However, differences in enforcement and collection mechanisms may be justified because “foreign taxpayers are subject to limited tax jurisdiction in the source country, and frequently have few (if any) assets located there.”²⁴⁵ To constitute a violation on the non-discrimination provision, the difference in treatment must put “the person or entity at a substantively significant disadvantage in relation to domestic or domestically owned taxpayers.”²⁴⁶

Although CDP hearings are not a requirement, they do provide a mechanism by which taxpayers may raise spousal defenses, challenge the appropriateness of collection actions, and offer collection alternatives.²⁴⁷ And even though taxpayers with Canadian tax liabilities are permitted to a review under CAP,²⁴⁸ they are not allowed to raise collection alternatives under CAP.²⁴⁹ Moreover, taxpayers appealing under the CDP statutes are entitled to enjoin

240. *Air France v. Saks*, 470 U.S. 392, 397 (1985) (citing *Maximov v. United States*, 373 U.S. 49, 53–54 (1963)).

241. Sanford H. Goldberg & Peter A. Glicklich, *Treaty-Based Nondiscrimination: Now You See It Now You Don’t*, 1 FLA. TAX REV. 51, 53 (1992).

242. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXV(1) (emphasis added).

243. Ernest R. Larkins, *U.S. Income Tax Treaties in Research and Planning: A Primer*, 18 VA. TAX REV. 133, 187 (1998).

244. Goldberg & Glicklich, *supra* note 241, at 63. *But see* Mary C. Bennett, *The David R. Tillinghast Lecture Nondiscrimination in International Tax Law: A Concept in Search of a Principle*, 59 TAX L. REV. 439, 439 (2006) (noting that non-discrimination claims have had “very little success” in U.S. courts); Goldberg & Glicklich, *supra* note 241, at 108 (noting that while non-discrimination provisions “include rather sweeping terms, they appear to be read narrowly”).

245. Goldberg & Glicklich, *supra* note 241, at 63.

246. *Id.*

247. 26 U.S.C. §§ 6330(c)(2)(A), 6320(c).

248. IRM 5.21.7.4.1(10)(b) (June 3, 2020).

249. IRM 8.24.1.2(5)(d) (Sep. 28, 2021).

collection actions until the CDP hearing has concluded and while their petition to the Tax Court is pending.²⁵⁰ Under CAP, however, the administrative decision is final and the taxpayer cannot seek judicial review of the administrative decision.²⁵¹ It takes on average 252 days for a CDP case to be resolved within IRS Appeals.²⁵² Hence, taxpayers with Canadian tax liabilities are subjected to more burdensome treatment because they are not permitted to raise issues that taxpayers with U.S. tax liabilities are permitted to raise, and they face collection actions far sooner than taxpayers with U.S. tax liabilities who request a CDP hearing.

Additionally, taxpayers with Canadian tax liabilities are in similar circumstances as taxpayers with U.S. tax liabilities. There is little guidance defining the meaning of the phrase “in the same circumstances.”²⁵³ There are, however, commentaries for the 1977 draft of the Organization for Economic Cooperation and Development Model Double Taxation Convention on Income and on Capital (1977 OECD Model), which contains a typical U.S. non-discrimination provision.²⁵⁴ In the commentaries to the 1977 OECD Model, “in the same circumstances” refers to taxpayers in “*substantially similar circumstances both in law and in fact.*”²⁵⁵

The United States is to collect a Canadian revenue claim as it would its own revenue claim.²⁵⁶ Because taxpayers with Canadian tax liabilities are subject these same collection mechanisms, they are in substantially similar circumstances. Accordingly, they should not be subject to more burdensome treatment under the non-discrimination provision of the Treaty.²⁵⁷

C. Actions Taken by the IRS Support Providing CDP Hearings

Courts construe treaties more liberally than private agreements.²⁵⁸ When interpreting a treaty, courts “may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.”²⁵⁹ The Supreme Court has “considered as ‘aids to its interpretation’ the negotiation and drafting history of the treaty as well as ‘the postratification understanding’ of signatory nations.”²⁶⁰ Additionally, courts also consider the conduct of countries “since their conduct generally evinces their understanding

250. 26 U.S.C. §§ 6330(e)(1), 6320(c).

251. IRM 8.24.1.2(4)–(5) (Sep. 28, 2021).

252. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 225, at 28.

253. Goldberg & Glicklich, *supra* note 241, at 86–87.

254. *Id.*

255. *Id.*

256. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(3).

257. *Id.* art. XXV(1).

258. *Air France v. Saks*, 470 U.S. 392, 396 (1985).

259. *Id.* (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943)).

260. *Medellin v. Texas*, 552 U.S. 491, 507 (2008) (quoting *Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 226 (1996)).

of the agreement they signed.”²⁶¹ Although it is not conclusive, “the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”²⁶² IRS guidance memoranda have been used “to show the IRS’ position.”²⁶³

After the CDP hearings were created, the IRS considered whether the hearings applied to taxpayers with foreign tax liabilities, including Canadian tax liabilities.²⁶⁴ Specifically, the IRS considered “whether the treaty requirement that a liability be ‘finally determined’ may be reconciled to the pre-levy notice and hearing rights of taxpayers under sec. 6330.”²⁶⁵ The IRS concluded that “sec. 6330 applies to treaty levies but that only issues concerning the Service’s administrative collection procedures (e.g., challenges as to whether the procedural requirements have been met for the Service’s use of summonses, liens, and/or levies) and not issues concerning the liability itself, may be raised at a hearing.”²⁶⁶ Thus, the IRS’s poststratification understanding supports the interpretation that the Treaty can be harmonized with the CDP statutes. Under this interpretation, taxpayers with Canadian tax liabilities are entitled to CDP hearings, but they may not challenge the validity of the liability at the hearing.

However, the current IRS position is that a taxpayer with a foreign tax liability being collected by the IRS is not entitled to a CDP hearing “because the tax liability at issue is a foreign tax liability.”²⁶⁷ The IRS does allow for such a taxpayer to “request review under the Collection Appeals Program (CAP).”²⁶⁸ The majority opinion in *Ryckman* notes that this has been the IRS’s position since 2005.²⁶⁹

The *Ryckman* majority held that the IRS must collect Canadian revenue claims “as it would a U.S. tax assessment for which the taxpayer’s administrative and judicial rights to restrain collection . . . have lapsed or been exhausted.”²⁷⁰ Despite this, CAP is an administrative review program.²⁷¹ CAP allows an Appeals officer to review the appropriateness of a collection action and reverse the collection action if it is inappropriate.²⁷² Thus, the IRS’s current position still affords administrative rights to taxpayers with foreign tax liabilities,²⁷³ contrary to the majority’s holding.²⁷⁴ Even though the IRS’s current position does not entitle taxpayers with Canadian tax liabilities to CDP

261. *United States v. Stuart*, 489 U.S. 353, 369 (1989).

262. *Id.* (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

263. *Adams Challenge (UK), Ltd. v. Comm’r*, 156 T.C. 16, 43 n.14 (2021).

264. I.R.S. Chief Couns. Mem. 199939034, 1999 WL 779472 (Oct. 1, 1999).

265. *Id.*

266. *Id.*

267. IRM 5.21.7.4.1(10)(b) (June 3, 2020).

268. *Id.*

269. *Ryckman v. Comm’r*, 163 T.C. 46, 57 n.7 (2024).

270. *Id.* at 58.

271. *Offiler v. Comm’r*, 114 T.C. 492, 494 (2000).

272. IRM 8.24.1.2(5)(c) (Sep. 28, 2021).

273. IRM 5.21.7.4.1(10)(b) (June 3, 2020).

274. *Ryckman*, 163 T.C. at 58.

hearings, it is still at odds with the majority's holding. Therefore, under the IRS's current postratification understanding, taxpayers are entitled to administrative review, meaning that a Canadian revenue claim can be finally determined in the United States when taxpayers still have the right to administrative and judicial review.²⁷⁵

The IRS allows only CAP for taxpayers with other foreign liabilities being collected by the IRS pursuant to an MCAR.²⁷⁶ However, some of the treaties with other countries use different language than the Treaty.²⁷⁷ For instance, the treaty with France states that the requested state is to collect the revenue claim "in accordance with the laws applicable to the enforcement and collection of its own taxes."²⁷⁸ By the same token, the treaty with Sweden provides that the requested state is to collect the revenue claim "in accordance with the laws applicable to the enforcement and collection of its own taxes."²⁷⁹ Thus, the treaties with these countries lack the "finally determined" language as it pertains to the requested state's collection of a revenue claim. The majority opinion in *Ryckman* specifically determined that the Treaty foreclosed on CDP rights because the requested state is to treat the revenue claim as finally determined under its own laws.²⁸⁰ Since these other treaties do not contain the same "finally determined" language for the requested state, the *Ryckman* majority would likely determine that these other treaties would not foreclose on CDP rights. However, the IRS treats all taxpayers with liabilities being collected pursuant to an MCAR the same: they are all entitled only to CAP, not CDP.²⁸¹ Therefore, the IRS's current position is erroneous, even according to the majority's reasoning. For this reason, it is more appropriate to consider the IRS's initial stance, which supports providing CDP hearings to taxpayers with Canadian tax liabilities.²⁸²

D. Other Treaties Support Providing CDP Hearings

Given that courts interpret treaties more liberally than private agreements,²⁸³ it is appropriate to look to other sources in treaty interpretation. The United States Tax Court has "found the Treasury Department's technical explanations of income tax treaties helpful in interpreting treaty provisions."²⁸⁴ Courts have

275. *Id.* at 75 (Urda, J., dissenting).

276. IRM 5.21.7.4.1(10)(b) (June 3, 2020).

277. France-U.S. Income Tax Convention, *supra* note 21, art. 28(2); Sweden-U.S. Income Tax Convention, *supra* note 21, art. 27(2).

278. France-U.S. Income Tax Convention, *supra* note 21, art. 28(2).

279. Sweden-U.S. Income Tax Convention, *supra* note 21, art. 27(2).

280. *Ryckman*, 163 T.C. at 58.

281. IRM 5.21.7.4.1(10)(b) (June 3, 2020).

282. I.R.S. Chief Couns. Mem. 199939034, *supra* note 264.

283. *Air France v. Saks*, 470 U.S. 392, 396 (1985).

284. *Smith v. Comm'r*, 159 T.C. 33, 39 n.11 (2022).

also considered Senate Reports in interpreting treaties.²⁸⁵ The following paragraphs discuss each of these in turn.

First, the Treasury Department's technical explanation of the Treaty with Japan is relevant. The Convention Between the Government of the United States of America and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (United States-Japan Treaty) similarly defines a finally determined revenue claim as "when the applicant State has the right under its domestic law to collect the revenue claim and all applicable administrative and judicial rights of the taxpayer to dispute or appeal the revenue claim have lapsed or been exhausted."²⁸⁶ However, the Technical Explanation for the United States-Japan Treaty further provides that:

the existence of administrative or judicial rights available to the taxpayer in connection with the finally determined revenue claim that arise after collection actions have begun, such as collection due process rights (CDP) and collection appeals rights (CAP), shall not be interpreted by Japan to mean that such revenue claim is not finally determined under U.S. principles.²⁸⁷

Thus, the United States-Japan Treaty does not preclude taxpayers with a U.S. tax liability being collected by Japan from exercising their CDP or CAP rights.²⁸⁸ Accordingly, the United States-Japan Treaty suggests that a revenue claim can be finally determined even though the taxpayer still has the right to a CDP hearing. As the majority notes, the provision in the United States-Japan Treaty is not exactly the same as the one in the Treaty.²⁸⁹ According to the majority, "[i]t is telling that the words 'finally determined' were removed from the collection procedures in the Japan-U.S. Convention."²⁹⁰ While the two treaties are different, the United States-Japan Treaty nevertheless reveals that taxpayers with a U.S. tax liability can have a finally determined tax liability and still have the right to a CDP hearing.²⁹¹

Additionally, the Senate Report of the Treaty is also illuminative. When adopting the Treaty, the Senate Committee on Foreign Relations stated that the Treaty was similar to the Convention on Mutual Administrative Assistance in

285. *United States v. Stuart*, 489 U.S. 353, 366–67 (1989).

286. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Japan-U.S., art. 27(5), Nov. 6, 2003, T.I.A.S. No. 04-330, as Amended by the Protocols signed on November 6, 2003, T.I.A.S. No. 04-330, and January 24, 2013, S. Treaty Doc. No. 114-1.

287. Treasury Department Technical Explanation of the 2013 Protocol Amending the U.S.-Japan Income Tax Treaty, at 23–24, <https://home.treasury.gov/system/files/131/Treaty-Japan-Pr2-TE-10-29-2015.pdf> [<https://perma.cc/YDS7-SW3Z>].

288. *Id.* at 24.

289. *Ryckman v. Comm'r*, 163 T.C. 46, 63 n.12 (2024).

290. *Id.*

291. *Id.* at 75 (Urda, J., dissenting).

Tax Matters (the Mutual Assistance Treaty).²⁹² The Mutual Assistance Treaty provides for assistance in collection by providing that “[a]t the request of the applicant State, the requested State shall . . . take the necessary steps to recover tax claims of the first-mentioned State as if they were its own tax claims.”²⁹³ The Senate Committee on Foreign Relations distinguished the Mutual Assistance Treaty from the Treaty only in that the Mutual Assistance Treaty involved multiple parties and the negotiating considerations may have differed.²⁹⁴ Hence, there is no mention of the fact that the Treaty contains “finally determined” language and the Mutual Assistance Treaty does not. The fact that the Senate Committee on Foreign Relations compared the two treaties without noting this distinction indicates that the effect of “finally determined” on the procedures used to collect tax liabilities is minimal.

Overall, the text of the Treaty, initial actions undertaken by the IRS, the United States-Japan Treaty, and the Mutual Assistance Treaty all support entitling taxpayers with Canadian tax liabilities to CDP hearings. There is no conflict between the Treaty and the CDP statutes, as both can be implemented harmoniously.

VI. THE CDP PROVISIONS CONTROL IF THEY CANNOT BE HARMONIZED WITH THE TREATY

Even if the Treaty and the CDP statutes are in conflict, the CDP statutes must govern, and taxpayers with Canadian tax liabilities should be entitled to CDP hearings.

A. The Majority Opinion in Ryckman Creates a Conflict

The majority opinion concludes that the Treaty forecloses the default right to a CDP hearing “in the context of Canadian revenue claims accepted by the IRS.”²⁹⁵ However, the CDP statutes provide for a right to a hearing without any limitation for the IRS collecting foreign tax liabilities.²⁹⁶ Thus, the majority opinion creates a conflict between the Treaty and the CDP statutes by denying rights provided for in the CDP statutes based upon the provisions in the Treaty.²⁹⁷

The majority opinion seeks to reconcile this conflict based upon the fact that “[n]either CDP statute provides that its provisions apply notwithstanding any other law.”²⁹⁸ However, as the dissent notes, “where Congress has wished to

292. S. EXEC. DOC. NO. 104-9, at 44–45 (1995).

293. Convention on Mutual Administrative Assistance in Tax Matters, art. 11(1), June 28, 1989, T.I.A.S. No. 95-401.

294. S. EXEC. DOC. NO. 104-9, at 45.

295. *Ryckman*, 163 T.C. at 62.

296. 26 U.S.C. §§ 6320(b), 6330(b).

297. *Ryckman*, 163 T.C. at 59; 26 U.S.C. §§ 6320(b), 6330(b).

298. *Ryckman*, 163 T.C. at 62.

preserve earlier agreements with other nations in the face of conflicting subsequent legislation, it has added text to that effect, which it did not do here.”²⁹⁹ For instance, 28 U.S.C. § 1604 provides immunity to foreign states from the jurisdiction of U.S. courts, but it also notes that this immunity is “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act.”³⁰⁰ Therefore, the fact that the CDP statutes omit any language stating that they apply notwithstanding any other law is not a legitimate reason for concluding that there is no conflict; Congress could have also included language stating that the CDP statutes were subject to the Treaty.

B. The CDP Statutes Should Control

If a statute and treaty “pertain to the same subject matter but manifest an irreconcilable conflict, ‘the last expression of the sovereign will . . . control.’”³⁰¹ A statute and treaty conflict with one another if “there is ‘a clear repugnancy’ between the statute and the treaty.”³⁰² The Supreme Court has also “held ‘that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.’”³⁰³ Regardless of the existence of a treaty, the “United States is *always* ‘at liberty to make . . . such laws as [it] think[s] proper.’”³⁰⁴

The Treaty was amended to provide for assistance in collection in 1995.³⁰⁵ The right to a CDP hearing was initially created in 1998 as part of RRA 98.³⁰⁶ Hence, the CDP statutes are the later enacted authority. As such, the CDP statutes should control in the case of conflict.³⁰⁷ Because the majority’s holding declines to extend the right to a CDP hearing to taxpayers with Canadian tax liabilities,³⁰⁸ it conflicts with the CDP statutes. The Treaty, as the later enacted authority, should not be used to foreclose on the rights provided by the CDP statutes, including the right to a hearing.

299. *Id.* at 69 (Urda, J., dissenting).

300. 28 U.S.C. § 1604.

301. *Adams Challenge (UK), Ltd. v. Comm’r*, 156 T.C. 16, 44 (2021) (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889)).

302. *Id.* at 45 (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 457 (1945)).

303. *Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)).

304. *Medellin v. Texas*, 552 U.S. 491, 509 n.5 (2008) (quoting *Todok v. Union State Bank of Harvard, Neb.*, 281 U.S. 449, 453 (1930)).

305. Canada-U.S. Income Tax Convention, *supra* note 9, art. XXVI A(5).

306. *Cords*, *supra* note 34, at 53.

307. *Adams Challenge (UK), Ltd. v. Comm’r*, 156 T.C. 16, 44 (2021) (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889)).

308. *Ryckman v. Comm’r*, 163 T.C. 46, 64 (2024).

CONCLUSION

In *Ryckman v. Commissioner*, the United States Tax Court held that taxpayers with Canadian tax liabilities are not entitled to collection due process (CDP) hearings.³⁰⁹ The court ruled that the Treaty foreclosed any right to CDP hearings for those taxpayers.³¹⁰ However, the majority opinion's interpretation of the Treaty needlessly created a conflict between the CDP statutes and the Treaty.

This Note argued that taxpayers with Canadian tax liabilities being collected by the IRS should be entitled to CDP hearings. By prohibiting taxpayers with Canadian tax liabilities from challenging IRS collection actions at CDP hearings, their statutory due process rights are violated. This Note first provided the relevant provisions of the Treaty and the CDP statutes. It then looked at how courts have decided cases involving the Treaty and due process arguments made by taxpayers, drawing a distinction between the Due Process Clause and the statutory due process rights provided by the CDP statutes. Using the legislative history behind the enactment of the CDP statutes, this Note examined how taxpayers with Canadian tax liabilities could benefit from the same protections Congress meant to confer to taxpayers. Further, case law in cases involving CDP statutes illustrates the importance of CDP hearings in protecting taxpayers from improper IRS collection actions. This Note argued that the Treaty may be read harmoniously with the CDP statutes such that taxpayers with Canadian tax liabilities would be entitled to CDP hearings. In the alternative, this Note argued that taxpayers with Canadian tax liabilities should still be entitled to CDP hearings if the Treaty and the CDP statutes cannot be harmonized.

As this Note discussed, due process rights are important for taxpayers facing deprivation of property. CDP hearings serve an important role in staving off improper IRS collection actions.³¹¹ Without CDP hearings, taxpayers with Canadian tax liabilities are limited to the collection appeals program (CAP),³¹² which has been criticized for failing to provide meaningful review of IRS collection actions.³¹³ The IRS, though it has many dedicated workers, is not infallible. Without CDP hearings and their important function in protecting against improper collection actions, taxpayers with Canadian tax liabilities face a greater likelihood of the IRS taking improper collection actions against them. For this reason, it is important that all taxpayers who are subject to collection actions by the IRS, including those taxpayers with Canadian tax liabilities, receive an opportunity to be heard.

309. *Id.*

310. *Id.* at 59.

311. Book, *supra* note 5, at 147.

312. IRM 5.21.7.4.1(10)(b) (June 3, 2020).

313. 2015 ANNUAL REPORT TO CONGRESS, *supra* note 49, at 93.

FISHING FOR ANSWERS: RETHINKING DEFERENCE FOR STATE AGRICULTURAL AND ENVIRONMENTAL AGENCIES FOLLOWING *LOPER BRIGHT*

AINSLEY PETERSON*

INTRODUCTION

The legal battleground for environmental and agricultural policy has fundamentally changed in the wake of a major shift in federal administrative law. This change has the potential to either provide relief or to introduce unpredictability in agricultural and environmental rulings across the country. The change resulted in a federal legal landscape where agencies no longer have the final say in interpreting ambiguous laws. *Alt v. EPA* highlights the important role that deference can play in the outcome of litigation, which is why the states are now at a crossroads when it comes to their own agency deference standards.¹

Lois Alt was a poultry farmer in West Virginia.² Her chicken farm ran several thousand birds in eight poultry confinement houses.³ Because of the number of animals on her farm, Alt's operation was considered a concentrated animal feeding operation (CAFO).⁴ On her CAFO, Alt implemented manure management procedures to reduce exposure to precipitation on her farm.⁵ However, despite these efforts, particles of manure and litter were tracked and spilled.⁶ Further, dust—composed of manure, litter, and dander—and some feathers were blown by ventilation fans and settled on the farmyard ground.⁷ Precipitation eventually came into contact with these particles, causing these materials to runoff across a neighboring pasture and into Mudlick Run—a water of the United States.⁸

In 2011, the Environmental Protection Agency (EPA) accused Alt of violating the Clean Water Act (CWA).⁹ The EPA claimed that Alt violated the CWA by failing to obtain a National Pollutant Discharge Elimination System (NPDES) permit.¹⁰ Supposedly, Alt needed an NPDES permit for the rainwater

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1. *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D. W. Va. 2013).

2. *Id.* at 704.

3. *Id.*

4. *Id.* The EPA defines a large poultry CAFO as an animal operation exceeding 30,000 or more laying hens or broilers with a liquid manure system, 125,000 or more other chickens or 82,000 or more laying hens with a dry manure system. *See Regulatory Definitions of Large CAFOs, Medium CAFO, and Small CAFOs*, EPA (Aug. 2015), https://www.epa.gov/sites/default/files/2015-08/documents/sector_table.pdf [<https://perma.cc/JK3E-EXX5>].

5. *Alt*, 979 F. Supp. 2d at 704.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 705.

10. *Id.*

runoff that allegedly carried dust, feathers, and manure from her farm into nearby Mudlick Run.¹¹ The Findings of Violation and Order of Compliance issued by the EPA threatened civil penalties of up to \$37,500 per day of violation, mentioned criminal action could be initiated against Alt, and ordered her to apply for an NPDES permit.¹² In response, Alt filed suit.¹³

At the heart of this case was the question of “whether the litter found on Ms. Alt’s farmyard that could be picked up by rainwater, washed two hundred yards across a grassy cow pasture and discharged into a creek . . . is exempted from liability under the agricultural stormwater exception to the definition of a point source.”¹⁴

The language of the CWA was “ambiguous as to whether CAFO discharges could ever constitute agricultural stormwater.”¹⁵ This ambiguity triggered the EPA to file a plea for *Chevron* deference.¹⁶ *Chevron* deference gives deference to an agency’s interpretation of a statute if the intent of Congress was ambiguous on the specific issue and if the agency’s interpretation was reasonable or permissible.¹⁷ Ultimately, after conducting a *Chevron* deference analysis, the federal district court found that the EPA’s interpretation of the “agricultural stormwater exemption” was not afforded *Chevron* deference because Congress had not defined the term and the EPA had not yet promulgated specific regulations to interpret it.¹⁸ Therefore, *Chevron* deference did not apply, and Alt did not have to obtain an NPDES permit.¹⁹

On the other hand, if the district court had determined the EPA’s interpretation to be reasonable, the Agency would have won. But now, under new law handed down by the United States Supreme Court, would a reasonable interpretation in this case have been enough to result in the Agency’s victory? The answer remains unknown, but the question certainly shines a spotlight on the impact that removing deference will have on future litigation following *Loper Bright Enterprises v. Raimondo*.²⁰

On June 28, 2024, in *Loper Bright*,²¹ the United States Supreme Court handed down a historic decision that overturned *Chevron*,²² a forty-year-old

11. *Id.*

12. *Id.*

13. *Id.* at 703.

14. *Id.* at 706.

15. *Id.* at 709 (quoting *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 507 (2d Cir. 2005)) (internal quotations omitted).

16. *Id.* at 713.

17. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

18. *Alt*, 979 F. Supp. 2d at 712.

19. *Id.* at 712, 715.

20. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

21. *Id.*

22. *Chevron*, 467 U.S. at 837.

precedent-setting case.²³ *Chevron* has been used as a legal test for judges when evaluating a federal agency's statutory authority.²⁴ However, in *Loper Bright*, the Court held that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous."²⁵

So, now that the United States Supreme Court has done away with *Chevron* deference on a federal level, how should the states proceed from here?

Although the holding from *Loper Bright* only applies to federal agencies, states have already begun reevaluating their own deference doctrines.²⁶ Some states even made changes to their deference doctrines before the *Loper Bright* decision was handed down by the Supreme Court.²⁷ Although agency deference is still the standard in a majority of the states, there is a strong trend of states disfavoring *Chevron*-type frameworks.²⁸ Disfavoring doctrines of deference has been illustrated not only by state supreme courts, but also by state legislatures who have adopted bills that substantially change the administrative review process.²⁹

For example, Indiana's House Enrolled Act (HEA) 1003, which went into effect on July 1, 2024, exemplifies the growing movement against *Chevron*-type frameworks.³⁰ HEA 1003 is an action by the Indiana Legislature regarding agency deference.³¹ Essentially, HEA 1003 accomplishes the same outcome as *Loper Bright*, but on the state level.³²

HEA 1003 amended Indiana Code Section 4-21.5-5-11³³ to state, "[t]he court shall decide all questions of law, including any interpretation of a federal or state constitutional provision, state statute, or agency rule, *without deference* to any previous interpretation made by the agency."³⁴ This statutory amendment gives environmental appeals a "new look" in the state of Indiana.³⁵ Courts will now have more leeway on judicial review, which is advantageous for parties

23. Brigit Rollins, *Supreme Court Overturns Long-Standing "Chevron" Doctrine*, NAT'L AGRIC. L. CTR. (July 2, 2024), <https://nationalaglawcenter.org/supreme-court-overturns-long-standing-chevron-doctrine/> [<https://perma.cc/ZRM3-K63U>].

24. *Id.*

25. *Loper Bright*, 603 U.S. at 413.

26. Martha Kinsella & Benjamin Lerude, *Judicial Deference to Agency Expertise in the States*, STATE CT. REP. (June 28, 2024), <https://statecourtreport.org/our-work/analysis-opinion/judicial-deference-agency-expertise-states> [<https://perma.cc/H9VQ-Y6Z5>].

27. *Id.*

28. *See id.*

29. *Id.*

30. H.E.A. 1003, 123d Gen. Assemb., 2d Sess. (Ind. 2024).

31. *Id.*

32. *Id.*

33. IND. CODE § 4-21.5-5-11(b) (2024).

34. *Id.* (emphasis added).

35. Brianna J. Schroeder, *No Deference to the Agency? Environmental Appeals in Indiana have Changed*, JANZEN SCHROEDER AGRIC. L.: SCHROEDER AGRIC. L. BLOG (Mar. 20, 2024), <https://www.aglaw.us/schroeder-ag-law-blog/2024/3/19/environmental-appeals-just-changed> [<https://perma.cc/3VZQ-PNWX>].

who were not favored by an agency in a previous interpretation but disadvantageous for those who prevailed under an agency's decision.³⁶

For instance, a farmer who was granted a permit for a CAFO by the Indiana Department of Environmental Management (IDEM) may be less likely to prevail in an action brought by a third party to challenge the permit.³⁷ Depending on the argument behind the challenge, the Office of Administrative Law Proceedings (OALP) or a court may not agree with IDEM's interpretation of an ambiguous statute governing CAFOs.³⁸ In such a case, no deference would be afforded to IDEM, and the court may revoke the permit granted to the farmer.³⁹ This type of decision potentially poses a great risk to agricultural and environmental industries because it leaves the door wide open for judges to make rulings on highly technical decisions that may not be within their wheelhouse. However, by removing agency deference, Indiana may work to restore the balance of power between the branches and ensure its agencies aren't engaging in abusive lawmaking by using ambiguous language in a statute.

While Indiana no longer affords deference to state agencies on questions of law,⁴⁰ in other states many of the judicial or legislative changes to the administrative review process have not resulted in the death of agency deference entirely.⁴¹ Rather states adopted standards that equate to something in between *Chevron*⁴² and *Loper Bright*⁴³ doctrines. Among these standards are "Appreciable Deference for Agency Expertise" and "Due Weight for Agency Interpretations."⁴⁴

These standards mean that courts will not apply robust deference to an agency determination.⁴⁵ However, they will also not entirely disregard an agency's position on a statute or regulation.⁴⁶ Under the due weight for agency interpretation standard, courts consider and assign appropriate weight to an agency's interpretation of the law based on the agency's specialized knowledge and experience in that area.⁴⁷ However, courts are not required to fully defer to an agency's interpretation solely because it is reasonable under a given statute.⁴⁸

In practice, this balanced approach may be the most effective framework for handling agency deference, particularly when handling highly technical issues like those that arise in agricultural and environmental law. By applying the due

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. See IND. CODE § 4-21.5-5-11(b) (2024).

41. Kinsella & Lerude, *supra* note 26.

42. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

43. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

44. Kinsella & Lerude, *supra* note 26.

45. *Id.*

46. *Id.*

47. *Id.*; see also *Loper Bright*, 603 U.S. at 374 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

48. Kinsella & Lerude, *supra* note 26.

weight for agency interpretation standard, courts can draw on agency expertise to inform their decisions while still retaining the ultimate power of interpretation.⁴⁹

This Note argues that state courts in all fifty states should adopt a due weight for agency interpretation standard when dealing with challenges to agency decisions involving agricultural and environmental law. Part I focuses on what exactly deference is: first, it explains *Chevron* deference; second, it explains other deference standards that remain in effect and influence state standards. Part II addresses the Court's reasoning behind overturning *Chevron* in the *Loper Bright* case. Part III examines the deference standards implemented by each state: substantial deference, appreciable deference for agency expertise, due weight for agency interpretations, and no deference. Part IV discusses the outcomes arising from the demise of *Chevron* and what states may encounter if they follow suit: first, it outlines the positive results; second, it analyzes the negative by-products consequentially associated with a no deference standard. Finally, Part V argues that due weight for agency interpretation is the best deference standard available to strike the balance between upholding the constitutional powers of the branches and minimizing the consequences that emerge because of a no deference standard.

Although changes to administrative law appear procedural on their face because it governs the policies and processes that agencies follow, such changes may impact substantive law in a multitude of ways. Overturning *Chevron* poses major questions regarding deference. Thus, states have an important duty to carefully consider these questions. The states should evaluate the impact that replicating a *Loper Bright* decision may have on their agencies and citizens. Finally, states should consider adopting a due weight for agency interpretation standard to balance the pros and cons of a *Loper Bright* doctrine—particularly in the highly complex areas of agricultural and environmental law.

I. WHAT IS *CHEVRON* DEFERENCE?

Chevron deference guided federal courts in administrative review for decades.⁵⁰ This standard was adopted by a majority of the states to guide their own courts when making determinations involving agency interpretations of a statute.⁵¹ Furthermore, most states still have this standard in place today.⁵² Although *Chevron* is old law in federal courts, its principles are still very much alive in state courts. Therefore, it is important to understand how this standard works in action to adequately address whether states should change their agency deference standards.

49. *Id.*

50. Rollins, *supra* note 23.

51. Kinsella & Lerude, *supra* note 26.

52. *Id.*

A. Chevron 101

Prior to *Loper Bright*, *Chevron* deference was the two-part test articulated by the Supreme Court and applied by federal judges when determining whether to give latitude to agencies interpreting statutes that they administer.⁵³ In *Chevron*, the EPA promulgated a rule interpreting the term “stationary source” from the 1977 Amendment to the Clean Air Act (CAA).⁵⁴ This rule allowed states to adopt a plantwide definition of the term which could then include a “bubble” policy.⁵⁵ The “bubble” policy allowed plants that contained several pollution-emitting devices to install or modify equipment without a permit if the change did not increase total emissions for the plant.⁵⁶ All pollution-emitting devices within the same industrial grouping were contained within the same “bubble.”⁵⁷

Upon considering the EPA’s interpretation, the Court held, “the EPA’s definition of the term [stationary] ‘source’ is a permissible construction of the statute[.]”⁵⁸ With this opinion, the Court developed a two-step process to apply *Chevron* deference.⁵⁹ When reviewing an agency’s interpretation of a statute that it administers, the court must address two questions:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.⁶⁰

Thus, in the case of ambiguity, under *Chevron*, courts had to defer to an agency’s interpretation of a statute so long as the interpretation was reasonable.⁶¹ If the agency’s interpretation was deemed unreasonable, then a court could overturn an agency’s decision by substituting its own judgment to

53. Jeff Turrentine, *The Supreme Court Ends Chevron Deference—What Now?*, NAT. RES. DEF. COUNCIL (June 28, 2024), <https://www.nrdc.org/stories/what-happens-if-supreme-court-ends-chevron-deference> [<https://perma.cc/Q2CL-3PGU>].

54. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 866.

59. *Id.* at 842–43.

60. *Id.*

61. *Id.* at 844 (“In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

determine the best interpretation of the statute.⁶² However, under *Loper Bright*, *Chevron* deference is no longer afforded to federal agencies.⁶³ Courts will no longer adopt an agency's interpretation of a statutory provision just because it is reasonable.⁶⁴ Rather, courts will now use their own construction of a statutory provision when interpreting ambiguous language.⁶⁵ Nevertheless, *Chevron*-type doctrines are still alive in many states.⁶⁶ But what about other types of deference? Where do they stand after *Loper Bright*?

B. Other Types of Deference

Chevron is not the only type of deference that has made an impact on administrative law over the years; there are other types of deference commonly referred to when dealing with agency actions. Federal courts have “often deferred to agencies’ reasonable readings of genuinely ambiguous regulations.”⁶⁷ This deference is called *Auer* deference, or sometimes *Seminole Rock* deference.⁶⁸ *Auer* deference was reconsidered by the Court in *Kisor v. Wilkie* in 2019.⁶⁹

In *Kisor*, a veteran of the United States Marine Corps was denied benefits for posttraumatic stress disorder by the Department of Veterans Affairs (VA).⁷⁰ The veteran sought VA review of his previously denied claim and reopened the denial by submitting new materials that were not originally associated with his file.⁷¹ However, the VA did not retroactively grant the veteran relief under the regulation because it found that the new materials did not qualify as “relevant” for the purposes of the section under which he could obtain retroactive relief.⁷² According to the VA, to be “relevant,” the records must “go to the reason for the denial” of the first application.⁷³ Ultimately, the question became whether courts should continue to give deference to an agency’s reasonable reading of its own genuinely ambiguous regulations.⁷⁴

The Court upheld *Auer* deference but reinforced its limits.⁷⁵ There is “a presumption that Congress would generally want the agency to play the primary

62. *Id.*

63. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

64. *Id.*

65. *Id.* at 413 (“But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.”).

66. Kinsella & Lerude, *supra* note 26.

67. *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019).

68. *Id.*; *see Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

69. 588 U.S. at 563.

70. *Id.* at 564.

71. *Id.*

72. *Id.* at 565.

73. *Id.*

74. *Id.*

75. *Id.* at 563.

role in resolving regulatory ambiguities” because an agency that drafted the regulation would be equipped to interpret the technical matters at issue.⁷⁶ Nevertheless, *Auer* deference does not apply in all cases and is unwarranted “when a court concludes that an interpretation does not reflect an agency’s authoritative, expertise-based, ‘fair [, or] considered judgment.’”⁷⁷ Therefore, *Auer* deference is “cabined in its scope” because an interpretation of an ambiguous regulation must “implicate [the agency’s] substantive expertise” and be reasonable to invoke the presumption.⁷⁸ If the reasons for the presumption do not apply, then no deference should be afforded, but the agency’s reading may still be considered for its “power to persuade” under *Skidmore* deference.⁷⁹

Skidmore deference is the recognition that “the well-reasoned views of the agencies implementing a statute ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance[.]’”⁸⁰ The Court found: “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁸¹ This standard “provides that an agency’s rulings, interpretations, and opinions are not controlling on courts,” but they can sway a court’s decision when interpreting the language of a statute.⁸² *Skidmore*, more so than *Auer*, appears to be on more stable grounds with the courts as it was positively discussed by the Court in *Loper Bright*.⁸³ Due weight for agency interpretation, as discussed in the Introduction of this Note,⁸⁴ is a standard similar to *Skidmore* deference and has been adopted by several states in recent years as *Chevron*-type standards have begun to fall.⁸⁵

Skidmore and *Auer* deference are still good law, but following *Loper Bright*, their future remains uncertain.⁸⁶ While *Chevron*, *Auer*, and *Skidmore* deference standards are only applicable to federal law, these standards have molded the

76. *Id.* at 569–71.

77. *Id.* at 573.

78. *Id.* at 563–64, 577.

79. *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

80. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

81. *Skidmore*, 323 U.S. at 140.

82. *Skidmore Deference: Agency Actions Without the Force of Law*, BLOOMBERG L.: PRAC. GUIDANCE, <https://www.bloomberglaw.com/document/X7RFJ404000000> [https://perma.cc/57VB-8N7C].

83. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 476 (2024) (Kagan, J., dissenting).

84. See *supra* text accompanying notes 47–48.

85. Kinsella & Lerude, *supra* note 26.

86. Robert Iafolla, *Courts Show Little Interest in Skidmore as a Chevron Alternative*, BLOOMBERG L. (July 29, 2024, at 5:05 EDT), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X9B5CMSO000000?bna_news_filter=daily-labor-report#cite [https://perma.cc/E242-MTC9]; see also Sean Lyness, *Chevron Deference’s Demise Suggests Auer Won’t Last Much Longer*, BLOOMBERG L. (July 10, 2024, at 4:30 EDT), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/daily-labor-report/XFM41148000000> [https://perma.cc/E4QC-8XJE].

approaches of the states to their individual deference afforded to their state agencies.⁸⁷ These standards have been mimicked and amended by the states to create a diverse landscape of administrative law across the country.⁸⁸ Therefore, it can only be expected that a monumental decision like *Loper Bright* will call for change in the states.

II. OVERVIEW OF *LOPER BRIGHT* AND THE OVERTURNING OF *CHEVRON*

A. *Loper Bright* Decision by the United States Supreme Court

In *Loper Bright*, a group of commercial fishermen sued the National Marine Fisheries Service (NMFS) when NMFS implemented a rule that required the fishermen to pay for at-sea monitoring programs.⁸⁹ The program would cost the fishermen \$710 per day.⁹⁰ The Magnuson-Stevens Fishery Conservation and Management Act of 1976 (MSA) provided a provision that required “‘one or more observers be carried on board’ domestic vessels ‘for the purpose of collecting data necessary for the conservation and management of the fishery.’”⁹¹ The fishermen argued that the MSA did not permit NMFS to create an industry-funded monitoring requirement.⁹²

The District Court and Court of Appeals granted summary judgment for NMFS based on its reasonable interpretation of the authority granted by the MSA.⁹³ The lower courts relied on *Chevron* deference as the authority to support their decision.⁹⁴ The District Court “concluded that the MSA authorized the Rule, but noted that even if these petitioners’ ‘arguments were enough to raise an ambiguity in the statutory text,’ deference to the agency’s interpretation would be warranted under *Chevron*.”⁹⁵ The Court of Appeals affirmed, but unlike the District Court, it proceeded to the second step of *Chevron* because there was “some question” regarding Congress’s intent.⁹⁶

Despite the lower courts’ decisions, the Supreme Court held that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the [Administrative Procedure Act (APA)] requires.”⁹⁷ The decision was a 6-3 ruling with the plurality opinion delivered by Chief Justice Roberts.⁹⁸ The opinion hinged on constitutional

87. Kinsella & Lerude, *supra* note 26.

88. *Id.*

89. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 381 (2024).

90. *Id.* at 382.

91. *Id.* at 381.

92. *Id.* at 382.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (citation omitted).

97. *Id.* at 412.

98. *Id.*; Rollins, *supra* note 23.

arguments and the Framers' intent. It was the vision of the Framers "that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'"⁹⁹

Further, the Court cited to *Marbury v. Madison*, a foundational case that established judicial review, to reiterate that it is the duty of the judiciary "to say what the law is."¹⁰⁰ So, a court may not defer to an agency interpretation just because a statute is ambiguous; the court must make its own determination.¹⁰¹ Thus, the Court overruled *Chevron*, and the forty-year-old standard is no longer good law.¹⁰² This major decision has the potential to impact many areas of the law, but particularly the highly technical areas of agricultural and environmental law.

*B. Impact of the Decision on Federal Agricultural and
Environmental Agencies*

Agency deference has a rich history in cases involving agriculture and the environment. In fact, *Chevron* was ultimately a case about environmental regulations.¹⁰³ So, it will not come as a surprise when these stark changes to administrative review have a rippling impact on the future of agricultural and environmental laws across the country.

Agriculture and the environment in the United States are greatly "affected by regulatory decisions, actions, and interpretations issued by federal agencies."¹⁰⁴ The United States Department of Agriculture (USDA) Natural Resources Conservation Service makes determinations in regard to wetlands.¹⁰⁵ The EPA issues notices of violations of the CWA.¹⁰⁶ The Food and Drug Administration and the USDA Food Safety Inspection Service issue food safety rules.¹⁰⁷ The Department of Labor issues trucking regulations that impact the agricultural industry.¹⁰⁸ And the USDA Risk Management Agency makes determinations governing federal crop insurance.¹⁰⁹ These examples are just a few places in which agency interpretation can and has come into play; thus, a

99. THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961).

100. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

101. Rollins, *supra* note 23.

102. *Loper Bright*, 603 U.S. at 369.

103. Brad Lubben, *What Does Supreme Court Chevron Doctrine Ruling Mean for Ag?*, U. OF NEB.—LINCOLN CTR. FOR AGRIC. PROFITABILITY (July 26, 2024), <https://cap.unl.edu/policy-legal/what-does-supreme-court-chevron-doctrine-ruling-mean-ag> [https://perma.cc/M5VV-A84A].

104. Andrew Varcoe, *U.S. Agriculture & Deference to Federal Agency Decision-making: Recent & Emerging Issues*, NAT'L AGRIC. L. CTR., at 1:57 (Apr. 26, 2019), <https://nationalaglawcenter.org/webinars/deferencedefense/> [https://perma.cc/SY2S-LQCX].

105. *See* 16 U.S.C. § 3822.

106. *See* 33 U.S.C. § 1251.

107. *See* 21 U.S.C. § 601.

108. *See* 49 U.S.C. § 5333.

109. *See* 7 U.S.C. § 1503.

removal of agency deference could result in some major changes by shifting interpretative authority back to the judiciary.¹¹⁰

Chevron deference precedent is responsible for creating regulations in the areas of agriculture, water, climate, air, and other environmental matters.¹¹¹ These regulations were created under statutes drafted by Congress that did not elaborate on the fine details because Congress intended to punt those decisions to the agencies.¹¹² As a result, *Chevron* deference became a “favorite tool” of the agencies.¹¹³ Now, with *Chevron* gone, agricultural and environmental policy drafting and implementation will likely experience a great change.

Before *Loper Bright*, individuals who challenged agency action typically had to face the reality that agency action was commonly given considerable deference by courts.¹¹⁴ Under *Chevron* deference, agencies prevailed in approximately 70 percent of legal challenges.¹¹⁵ The elimination of *Chevron* in *Loper Bright* is expected to decrease this success rate, as the removal of deference may make challenges to agency actions more likely to succeed.¹¹⁶ While the Supreme Court has rendered its decision on deference and the impacts of its decision have begun to play out on the federal level, deference standards amongst the states are not so final.

III. DEFERENCE STANDARDS AMONGST THE STATES

A. Substantial Deference

The battles over deference standards in administrative law have already begun and will continue to unfold in “state capitols, state courts, and state ballot boxes.”¹¹⁷ *Chevron* deference is officially dead at the federal level following *Loper Bright*.¹¹⁸ However, the doctrine of deference at the state level has certainly not seen its end.¹¹⁹ Currently, there are four deference standards that are followed by the states.¹²⁰ Substantial deference is, in most cases, the state

110. Varcoe, *supra* note 104, at 27:58.

111. Jesse Klein, *What the Supreme Court’s Chevron decision means for agriculture*, AGRIC. DIVE (July 3, 2024), <https://www.agriculturedive.com/news/chevron-doctrine-explainer-agriculture/720533/> [<https://perma.cc/9E6Z-G2GY>].

112. *Id.*

113. *Id.*

114. Varcoe, *supra* note 104, at 2:10.

115. Turrentine, *supra* note 53.

116. *Id.*

117. GianCarlo Canaparo & Caleb Sampson, *Chevron in the States: Where Is Deference Still in Effect, and How Can States Eliminate It?*, FEDERALIST SOC’Y (Oct. 3, 2024), <https://fedsoc.org/commentary/fedsoc-blog/chevron-in-the-states-where-is-deference-still-in-effect-and-how-can-states-eliminate-it> [<https://perma.cc/4PGJ-8M42>].

118. *Id.*

119. *Id.*

120. Kinsella & Lerude, *supra* note 26.

equivalent to *Chevron* deference.¹²¹ Most states still follow a substantial deference standard.¹²²

However, the tests that dictate when substantial deference should be applied vary amongst the states. Many states defer to agency interpretation in the face of statutory ambiguity, like the two-step approach in *Chevron*.¹²³ But some states adopted deferential standards before *Chevron* had even been decided.¹²⁴

B. Appreciable Deference for Agency Expertise

In appreciable deference jurisdictions, “courts defer to agency expertise when interpreting technical language, while applying a less deferential standard to evaluate agency interpretations of general statutory terms.”¹²⁵ For example, when a decision involves evaluating scientific and technical data, courts in Missouri defer to agency expertise.¹²⁶ In Arizona, although courts no longer afford deference to their state agencies, the state has codified an exception that follows the appreciable deference standard.¹²⁷ This exception allows for courts to give deference to agencies for appeals that relate to healthcare and utility regulation.¹²⁸ Further, some states give more deference to longstanding agency interpretation and less to newer interpretations.¹²⁹ Other states afford more deference when an agency has been expressly granted the discretion to interpret the law through legislation.¹³⁰

C. Due Weight for Agency Interpretations

In jurisdictions that follow the standard of due weight for agency interpretations, courts “acknowledge that agency interpretations of a statute may be helpful in judicial review and tend to give them ‘due weight,’ recognizing their persuasive power.”¹³¹ This standard reflects *Skidmore* deference, which gives weight to agency action based on the agency’s thoroughness of consideration of the legal question.¹³² And for the states who are considering adopting this due weight for agency interpretation standard, *Skidmore* deference appears to be in good graces with the Supreme Court.¹³³

121. Canaparo & Sampson, *supra* note 117.

122. Kinsella & Lerude, *supra* note 26.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024).

Chief Justice Roberts states in his majority opinion in *Loper Bright*, “courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes.”¹³⁴ He goes on to discuss the value that such interpretations can offer to the courts and litigants when it comes to determining the statute’s meaning.¹³⁵ Yet he emphasizes the traditional understanding of the judicial function; a function in which courts must exercise independent judgment in determining the meaning of the statutory provisions.¹³⁶ Essentially, in *Loper Bright*, the Court reinforces *Skidmore* deference as a judicial review principle.

Due weight for agency interpretation is a standard that can allow state courts to comply with their traditional judicial function while leaning on agency experts for help (just like federal courts may use *Skidmore* deference for that same purpose). The due weight for agency interpretation standard gives state agencies “the power to persuade.”¹³⁷ The more “technical complexity, procedural rigor, and adherence to legislative intent” an interpretation has, the more persuasive that interpretation will be to the court.¹³⁸ Therefore, an agency’s interpretation of a law is more likely to be upheld when the agency has carefully considered the legal question at hand.¹³⁹

D. No Deference

States that follow a no deference standard have “abolished judicial deference to agency expertise.”¹⁴⁰ Some of these states never had substantial deference to begin with, but other states used to have substantial deference standards in place.¹⁴¹ The death to deference in these states has arose through judicial opinion, statute, and constitutional amendment.¹⁴² Due to the *Loper Bright* decision, it is conceivable that the number of states who rid themselves of agency deference entirely will only continue to increase.¹⁴³ However, states should question whether getting rid of agency deference entirely is an appropriate step or whether due weight for agency interpretation is a more compliant standard for highly technical issues presented in agricultural and environmental law.

134. *Id.* at 394.

135. *Id.*

136. *Id.*

137. Kinsella & Lerude, *supra* note 26.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.*

IV. THE PROS AND CONS OF OVERTURNING *CHEVRON* AND STATES REMOVING DEFERENCE

A. Pros

Overturing *Chevron* and states following suit by adopting a no deference or lesser deference standard will result in a few significant benefits. First, removing deference brings back into balance the power allotted to the branches.¹⁴⁴ Article III is interpreted to vest in the courts the power to interpret the law.¹⁴⁵ The primary reasoning used by the Court in *Loper Bright* is that the power “to say what the law is” lies with the courts.¹⁴⁶ Agency interpretation violates the separation of powers by shifting the power of statutory interpretation to executive agencies and away from the judiciary.¹⁴⁷ If the states choose to abolish substantial deference to their state agencies, then they will prioritize checks and balances.

Second, state supreme court rulings, statutes, and amendments that do away with agency deference will likely result in an easier action for challengers.¹⁴⁸ Under a substantial deference standard, when a law is ambiguous courts must defer to agency interpretation.¹⁴⁹ So, unless a challenger is able to prove that the law unambiguously supports their argument or that the agency’s interpretation is unreasonable, the court will be required to side with the agency. This creates an unequal consideration of arguments from the parties by the courts. By getting rid of substantial deference, the court is able to listen to the parties’ arguments and make its own interpretation of the law without interference from the agency.

Third, there will be a greater push towards clear and unambiguous statutory drafting. The ruling in *Loper Bright* highlights the need for “more precise legislative drafting and reduces broad grants of interpretive power to agencies.”¹⁵⁰ Overturning deference should lead to statutes that provide explicit grants of authority to agencies by Congress and the state legislatures.¹⁵¹ These decisions should encourage a greater amount of communication between the executive and legislative branches to produce statutes that clearly provide direction to state agencies. Clarity as a cornerstone of statutory drafting should

144. See, e.g., Michael Blumenthal et al., *The End of Chevron Deference: What Does It Mean, and What Comes Next?*, A.B.A. BUS. L. TODAY (Aug. 16, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-august/end-chevron-deference-what-does-it-mean-what-comes-next/ [<https://perma.cc/7DC3-FYL6>].

145. *Id.*

146. Rollins, *supra* note 23.

147. Canaparo & Sampson, *supra* note 117.

148. Schroeder, *supra* note 35.

149. Kinsella & Lerude, *supra* note 26.

150. Sterling Miller, *What in-house lawyers should know about the overturned Chevron doctrine*, THOMPSON REUTERS (July 17, 2024), <https://legal.thomsonreuters.com/blog/what-in-house-lawyers-should-know-about-the-overturned-chevron-doctrine/> [<https://perma.cc/E8HU-CQCL>].

151. *Id.*

eventually decrease the number of challenges brought against state agencies as well.

B. Cons

Such a monumental decision cannot go without some consequences, however. First, without deference there will be an inconsistent application of regulations throughout the country. Federal district courts and circuit courts across the United States do not always come to the same conclusions.¹⁵² These varying conclusions on statutory interpretation will result in an inconsistent application of the law.¹⁵³

If the states follow the Supreme Court's lead and abolish agency deference entirely, then the same issue applies to the state courts. The various levels of the judiciary within a state may not agree on the interpretation of the law. Therefore, trial courts across a state may implement varying interpretations of a state law, which undermines equal treatment under the law and will create problems with consistent enforcement.

Second, there will likely be a greater influx of cases into the court system. The inconsistent application of the law across the country and within the states will result in more issues needing to be decided by the courts of last resort.¹⁵⁴ Further, as actions have become more challenger friendly, it may be more likely for challengers to bring an action against an agency when such challenge may not have been brought under a substantial deference standard. Specifically, for agriculture, farmers will have less bureaucracy from agencies to contend with but will likely have to face more in-court litigation when appealing agency action.¹⁵⁵

Third, the end of *Chevron* and the absence of agency deference standards in states will likely result in forum shopping.¹⁵⁶ "Plaintiffs hostile to an agency's particular statutory interpretation or final rule will most likely seek out sympathetic courts, whereas those seeking to uphold an agency's decision will look for courts traditionally more deferential to the Executive Branch."¹⁵⁷ This undermines the standard of fairness and judicial efficiency that the court system is designed to uphold.

Fourth, the judicial branch will be required to interpret and decide hyper-technical questions. In Justice Kagan's dissenting opinion in *Loper Bright* she stated, "[s]ome interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not."¹⁵⁸ Moreover, "[a]gencies know those programs inside-out; again,

152. See, e.g., Blumenthal et al., *supra* note 144.

153. *Id.*

154. *Id.*

155. Klein, *supra* note 111.

156. Blumenthal et al., *supra* note 144.

157. *Id.*

158. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 449 (2024) (Kagan, J., dissenting).

courts do not.”¹⁵⁹ Simply put, Courts do not know nearly as much about a statute’s subject matter as the agency that enforces it.¹⁶⁰ This lack of expertise in the courts will pose major problems for industries whose statutory and regulatory laws involve increasingly complex terms and ideas.

V. ANALYSIS ARGUING FOR DUE WEIGHT FOR AGENCY INTERPRETATION IN AGRICULTURAL AND ENVIRONMENTAL LAW

States should adopt the standard of due weight for agency interpretation in administrative challenges involving agricultural and environmental agencies. The due weight for agency interpretation standard will strike the balance between a no deference standard and a substantial deference standard.¹⁶¹ Further, this standard will bridge the gap between the concerns with substantial deference voiced in Chief Justice Roberts’s opinion, and the concerns with no deference illustrated in Justice Kagan’s opinion in *Loper Bright*.¹⁶²

The due weight for agency interpretation standard still brings back into balance the powers of the branches by giving interpretation back to the courts.¹⁶³ This standard gives the courts the full power to interpret laws, which upholds the principle of judicial review given to the courts by the Constitution.¹⁶⁴ The due weight standard complies with the majority’s key point that:

[E]ven when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. “[M]any statutory cases” call upon “courts [to] interpret the mass of technical detail that is the ordinary diet of the law,” . . . and courts did so without issue in agency cases before *Chevron*.¹⁶⁵

The due weight for agency interpretation standard respects that Congress expects courts to handle technical statutory questions, while still allowing courts to utilize state agencies to help answer these questions. The due weight for agency interpretation standard recognizes that “[a]gencies are staffed with

159. *Id.*

160. *Id.* at 456.

161. *See generally* Tetra Tech EC, Inc. v. Wis Dep’t of Revenue, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.

162. *Loper Bright*, 603 U.S. at 449–50 (Kagan, J., dissenting).

163. Kinsella & Lerude, *supra* note 26.

164. *Loper Bright*, 603 U.S. at 369–70.

165. *Id.* at 402 (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting)).

‘experts in the field’ who can bring their training and knowledge to bear on open statutory questions.”¹⁶⁶

Chief Justice Roberts further discusses the importance of compliance with the APA.¹⁶⁷ The APA was enacted by Congress in 1946 to strengthen the balance of powers.¹⁶⁸ The Act was intended as a “check upon” agencies engaged in lawmaking within their offices.¹⁶⁹ Section 706 of the APA directs that the courts, not agencies, shall be the ones to decide all questions of law, engage in statutory interpretation, and determine the meaning of an agency action.¹⁷⁰ Thus, it is the responsibility of the courts “to decide whether the law means what the agency says.”¹⁷¹

This concept presents an even greater reason for many states to consider adopting a standard other than substantial deference to their agencies. All states have a statute that governs their administrative processes.¹⁷² Many of the states have modeled their own Administrative Procedure Act on the federal APA.¹⁷³ Therefore, considering the Supreme Court’s reasoning behind overturning *Chevron* to comply with the APA, a state whose own APA mirrors the federal one may be drawn to overturn agency deference and adopt another standard.

For example, it is likely that agency deference will be a vehemently contested issue in the Texas judiciary following *Loper Bright*.¹⁷⁴ Although Texas has never adopted or rejected a deference doctrine like *Chevron*,¹⁷⁵ its Supreme Court has held that an agency’s interpretation of a statute it is charged with enforcing is to be given deference if the language of the statute is ambiguous, and if the agency’s interpretation is reasonable.¹⁷⁶ The Texas Administrative Procedures Act (Texas APA) requires *de novo* review or review under the substantial evidence rule when reviewing state agency action.¹⁷⁷ But the Texas APA does not call for deference to an agency’s interpretation when

166. *Id.* at 456 (Kagan, J., dissenting) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)).

167. *Id.* at 393–94 (majority opinion).

168. *Id.* at 391.

169. *Id.* (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)).

170. *Id.* (quoting 5 U.S.C. § 706).

171. *Id.* at 392 (quoting *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in judgment)).

172. See, e.g., Von Wooding, *State Administrative Procedures Acts: Scope, Procedures, and Impact*, COUNS. STACK (June 22, 2024), <https://blog.counselstack.com/state-administrative-procedures-acts-scope-procedures-and-impact/> [<https://perma.cc/C2ML-5MPH>].

173. *Id.*

174. Lauren Morgan Fincher & Cole Hutchinson, *Locke Lord QuickStudy: Ramifications for Texas State Agencies After Overturning of Chevron Deference*, LOCKE LORD LLP (July 8, 2024), <https://www.troutman.com/insights/locke-lord-quickstudy-ramifications-for-texas-state-agencies-after-overturning-of-chevron-deference.html> [<https://perma.cc/5JCU-V875>].

175. *Id.*

176. *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clear Water*, 336 S.W.3d 619, 629 (Tex. 2011).

177. *Kidd v. Tex. Pub. Util. Comm’n*, 481 S.W.3d 388, 392 (Tex. App. 2015); see also Fincher & Hutchinson, *supra* note 174.

actions are called into question.¹⁷⁸ Therefore, Texas's highest court potentially faces the same conflict as the United States Supreme Court did in the fishermen's case. In the aftermath of *Loper Bright*, Texas courts will need to reconcile this position on agency deference with the recent Supreme Court ruling.¹⁷⁹ One way the state could do so would be to adopt the due weight for agency interpretations standard.

This standard, by mirroring *Skidmore*, will allow state courts to "go about its task with the agency's 'body of experience and informed judgment,' among other information, at its disposal."¹⁸⁰ However, the court itself will be the one to make the final ruling on the interpretation of the statute's meaning.¹⁸¹ Therefore, a court, by affording due weight for agency interpretation, may make informed decisions utilizing agency expertise without being bound by an agency's prior interpretation.¹⁸²

The State of Wisconsin has held that administrative agencies' conclusions of law are afforded no deference,¹⁸³ but the agencies are entitled to due weight.¹⁸⁴ This ruling came in 2018¹⁸⁵—long before *Loper Bright*—perhaps foreshadowing a movement of change in administrative law in the years to come. In *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, the case that set the state's precedent on agency deference, the Wisconsin Department of Revenue imposed a tax on Tetra Tech and Lower Fox River Remediation, contractors for environmental remediation.¹⁸⁶ The tax was imposed because of the contractors' "processing" of river sediments into waste sludge, reusable sand, and water."¹⁸⁷ The contractors petitioned the Department of Revenue for a redetermination of the assessed taxes on their services.¹⁸⁸ The Department subsequently denied the petition.¹⁸⁹ After exhausting their administrative remedies, the contractors filed a petition for judicial review, requesting the circuit court to set aside a ruling and order that subjected them to sales and use taxes.¹⁹⁰

Tetra Tech turns on the statutory interpretation of the term "processing" under the applicable Wisconsin statute.¹⁹¹ The statute applies a tax to a number

178. Fincher & Hutchinson, *supra* note 174.

179. *Id.*

180. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 374 (2024) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

181. *Id.*

182. *Id.*

183. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 510, 914 N.W.2d 21, 28.

184. *Id.* ¶ 78.

185. *Id.* ¶ 1.

186. *Id.*

187. *Id.*

188. *Id.* ¶ 6.

189. *Id.*

190. *Id.* ¶ 7.

191. *Id.*

of services, including “processing . . . of tangible personal property or items, property, or goods . . . for a consideration for consumers who furnish directly or indirectly the materials used in the . . . processing”¹⁹² However, “processing” is not a term defined by the statute.¹⁹³ The key question was whether “processing,” under the meaning of the statute, included the dewatering and desanding of the dredged sediment.¹⁹⁴ The Department of Revenue argued that the service was included under “processing,” while the contractors argued that the service was not encompassed by the term and was not taxable under the statute.¹⁹⁵

Ultimately, the Wisconsin Tax Appeals Commission, the Wisconsin Court of Appeals, and the Wisconsin Supreme Court all came to the same conclusion: the activity constituted processing.¹⁹⁶ Yet, the Supreme Court, in affirming the lower court’s decision, used its opinion as an opportunity to end the state’s practice of deferring to administrative agencies’ interpretations of statutes that they enforce.¹⁹⁷

The court found that an agency should not expect statutory directive alone to strengthen its argument when addressed by the court.¹⁹⁸ Rather, “[t]he agency should be prepared to explain how its experience, technical competence, and specialized knowledge give its view of the law a significance or perspective unique amongst the parties, and why that background should make the agency’s view of the law more persuasive than others.”¹⁹⁹ Thus, in considering the persuasive value of the state agencies’ interpretations, the court opted for a due weight agency interpretation standard.²⁰⁰ Giving “due weight” to an agency gives respectful consideration to its views while ensuring that courts may still exercise independent judgement with regard to questions of law.²⁰¹

As previously discussed by this Note in relation to *Alt v. EPA*,²⁰² *Tetra Tech* highlights the impact agency deference can have on a decision. The Wisconsin Supreme Court recognized that administrative agencies can offer insight into the matters that they are responsible for.²⁰³ However, the court emphasized that questions of law lie within the judgement of the courts.²⁰⁴ Therefore, the due weight standard for agency interpretation presents a lesser threat to the balance of powers while still giving appropriate consideration to the agencies’ reasoned

192. Wis. Stat. § 77.52(2)(a)(11) (2024).

193. Wis. Stat. § 77.52 (2024).

194. *Tetra Tech*, 2018 WI 75, ¶ 6.

195. *Id.* ¶¶ 1, 6.

196. *Id.* ¶¶ 6–7.

197. *Id.* ¶ 3.

198. *Id.* ¶ 79.

199. *Id.* ¶ 77.

200. *Id.* ¶ 78.

201. *Id.*

202. See *supra* text accompanying notes 14–20.

203. *Tetra Tech*, 2018 WI 75, ¶ 3.

204. *Id.* ¶ 12.

and knowledgeable views.²⁰⁵ “‘Due weight’ is a matter of persuasion, not deference,” and such persuasion stems from the agencies’ “special competence” when it comes to matters of which they enforce.²⁰⁶

Moreover, the majority opinion in *Loper Bright* states, “*Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”²⁰⁷ Although it is true that agencies may not have a “special competence” when it comes to interpreting legal terms of art and that such interpretation lies firmly in the courts purview, it is not true that agencies do not have “special competence” in interpreting technical language.²⁰⁸ For example, a judge certainly does not know more than a state agency when it comes to interpreting the intricate language of permit requirements for a CAFO or enforcing appropriate pesticide application based off the weather.²⁰⁹ Thus, the due weight for agency interpretation standard allows courts to refer to agencies when it comes to areas in which the courts may not have “special competence.”

One example that impacts agriculture and the environment is the interpretation of ambiguous, technical terms from the Endangered Species Act, by either an agency or a court.²¹⁰ “Deciding when one squirrel population is ‘distinct’ from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary.”²¹¹ Although a court could make this determination, it may take much more time and resources for a judge to make the determination versus an agency expert.²¹² In giving due weight for agency interpretation in this case, a court should be able to make informed decisions about the meaning of the term “distinct” with less time and resources expended than if due weight was not given.

Another example involves the dispute in *Chevron* itself. As Justice Kagan discusses in her dissent, the CAA required states to mandate permits for the modification or construction of “stationary sources.”²¹³ Understanding what a stationary source is does not necessarily fall within a typical judge’s knowledge base. Although a judge could make such a determination, the due weight for agency interpretation standard will increase judicial efficiency and ensures more consistent outcomes if a singular definition is referenced.²¹⁴

The ESA and the CAA are two examples of how deference standards can impact agriculture and the environment on the federal level. These statutory interpretation challenges only continue on the state level, which is why it is so

205. *Id.* ¶ 78.

206. *Id.*

207. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400–01 (2024).

208. *Id.* at 460 (Kagan, J., dissenting).

209. *Id.*

210. *Id.* at 452–53.

211. *Id.*

212. *Id.*

213. *Id.* at 441 (Gorsuch, J., concurring).

214. *Id.* at 456 (Kagan, J., dissenting).

important for states to consider adopting a due weight for agency interpretation standard—especially for agricultural and environmental agencies.

Additionally, a potential benefit that could arise from overturning *Chevron* and abolishing substantial deference within the states is the push toward clear and unambiguous statutory drafting.²¹⁵ However, “Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes.”²¹⁶ Inevitably there will be ambiguities within the law.²¹⁷ These ambiguities will have to be resolved by another entity, and there will be gaps that must be filled in order to create a law that can work within an agency.²¹⁸

In applying the due weight for agency interpretation standard, courts will be able to tap into agency knowledge when making decisions arising in the regulatory context that involve scientific or technical subject matter.²¹⁹ In contrast, if states were to adopt a no deference standard instead of the due weight standard, states courts could not so easily rely on agency expertise as they would be required to make their own “independent judgment.”²²⁰

Therefore, due weight for agency interpretation, a lower standard of deference to agencies,²²¹ for agricultural and environmental agencies will still allow for courts to make their own interpretations while still being able to rely on agencies to provide expert advice²²² on technical and complex subject matter that dictate farming operations, environmental protection programs, food safety, and many other facets of the law that impact agriculture and the environment.

CONCLUSION

The landscape of administrative law has undergone major changes within the past few years. This is a trend that can certainly be expected to continue as it is likely that the Supreme Court’s decision in *Loper Bright* will have a rippling effect throughout the states. And while most states still have a substantial deference standard, this could likely change.

As states begin to consider or reconsider their standards of agency deference in the wake of the Supreme Court’s decision in *Loper Bright*, it is important that each state recognize the potential impact that overturning agency deference may have on their state laws that deal with highly technical language. Particularly, statutes that deal with complex pieces of legislation in the agricultural and environmental space will be affected by a change in how courts may consider agency deference.

215. Miller, *supra* note 150.

216. *Loper Bright*, 603 U.S. at 449 (Kagan, J., dissenting).

217. *Id.*

218. *Id.*

219. *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 2018 WI 75, ¶ 11, 382 Wis. 2d 496, 516, 914 N.W.2d 21, 31.

220. *Id.* ¶ 59.

221. See, e.g., Kinsella & Lerude, *supra* note 26.

222. *Tetra Tech*, 2018 WI 75, ¶ 11.

While overturning agency deference can certainly result in positive outcomes, such as fewer overall regulations for farmers, this decision could also create major challenges for agriculture and the environment. If a court misinterprets a highly technical term, or if they interpret that term to mean something that the industry does not take it to mean, then there could be substantial ramifications in agricultural and environmental law. Therefore, as state legislatures propose amendments and statutes and state supreme courts consider questions of whether agency deference should be allowed, it would be wise to consider adopting the due weight for agency interpretation standard rather than fully upholding substantial deference or ending agency deference altogether.

Due weight for agency interpretation is a standard that results in a happy medium for both the executive and the judicial branches while protecting those individuals who are ultimately impacted by the laws that are being interpreted. Due weight for agency interpretation will allow for a better system of checks and balances than the substantial deference standard on one hand. And, on the other hand, this standard will help to avoid the cons of the no deference standard, such as inconsistent application of the law, an influx of cases into the judicial system, forum shopping, and other consequences of the judiciary deciding hyper-technical questions.

THE CURRENT FRAGILITY OF *MIRANDA*: WHY *MIRANDA* COULD FOLLOW *DOBBS* BACK TO CONGRESS

BAVLEEN KAUR SEERHA*

INTRODUCTION

The constitutional right to remain silent may soon itself be silenced. In police stations across the United States, officers continue their ritual recitation—“You have the right to remain silent”¹—derived from the Fifth Amendment’s right against self-incrimination.² These words, mandated by *Miranda v. Arizona*, have transcended their legal origins to become akin to constitutional gospel, as deeply embedded in American culture as police sirens and courthouse steps.³ As one scholar noted, “*Miranda* has so permeated the popular culture that not even my word processor’s spell-checker picks it up.”⁴ “*Miranda* may be the only criminal case to have morphed into a verb—to ‘Mirandize.’”⁵ Yet, beneath this veneer of permanence, *Miranda*’s foundation now shows signs of strain. In 2000, the Supreme Court in *Dickerson v. United States* appeared to secure *Miranda*’s future, reaffirming its constitutional status and striking down Congress’s attempt to override it.⁶ However, that victory, built on the shifting sands of stare decisis and a careful characterization of *Miranda* as a “constitutional rule,” is now fragile.⁷

In the summer of 2022, the Supreme Court revealed just how precarious that foundation is by laying the groundwork for what could be the most significant transformation of criminal procedure. On June 23, 2022, in *Vega v. Tekoh*, the Court revealed its deep skepticism of *Miranda*’s constitutional status, referring to its famous warnings as just “prophylactic” rules once again.⁸ Then, a mere twenty-four hours later in *Dobbs v. Jackson Women’s Health Organization*, the Court demonstrated its willingness to overturn even the most entrenched precedents when they represent “abuse of judicial authority.”⁹ This remarkable convergence suggests that *Miranda*, long considered the guardian of custodial rights, needs a guardian of its own.

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1. *Stopped by Police*, ACLU (Sep. 3, 2025), <https://www.aclu.org/know-your-rights/stopped-by-police> [https://perma.cc/46YM-6JV8].

2. U.S. CONST. amend. V.

3. 384 U.S. 436, 469 (1966).

4. Michael Edmund O’Neill, *Undoing Miranda*, 2000 B.Y.U. L. REV. 185, 185 (2000) (italics added).

5. Eugene R. Milhizer, *Miranda’s Near Death Experience: Reflections on the Occasion of Miranda’s Fiftieth Anniversary*, 66 CATH. U. L. REV. 577, 578 (2017).

6. 530 U.S. 428, 444 (2000).

7. *Id.*

8. 597 U.S. 134, 150 (2022); *see also, e.g.*, *Howes v. Fields*, 565 U.S. 499, 507 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011); *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010).

9. 597 U.S. 215, 231 (2022).

The vulnerability of *Miranda* becomes particularly apparent when viewed through the lens of *Dobbs*, where the Court did more than just overturn a precedent—it rewrote the rules of precedent itself.¹⁰ Like a carefully constructed legal fortress, *Miranda* seems secure behind the walls of stare decisis.¹¹ But in overturning *Roe v. Wade*,¹² the *Dobbs* Court revealed that even these walls could crumble, emphasizing that stare decisis is not an “inexorable command,” particularly when the Court determines that a previous decision improperly removed an issue from the democratic process.¹³ This reasoning casts doubt on *Miranda* and its reaffirmation in *Dickerson*, where the Court similarly overrode democratic will by striking down a congressional statute attempting to modify *Miranda*’s requirements.¹⁴ Just as *Dobbs* returned abortion regulation to the legislative branch, *Miranda*’s prophylactic rules may be destined for the same fate.¹⁵

The story of *Miranda*’s erosion, however, began long before *Vega* and *Dobbs* entered the scene. Through a series of exceptions and limitations, courts have steadily chipped away at *Miranda*’s once-categorical protections.¹⁶ From the public safety exception carved out in *New York v. Quarles* to the labyrinthine analysis of two-step interrogations in *Missouri v. Seibert*, judges have found increasingly creative ways to admit statements that *Miranda*’s original framework would have excluded without hesitation.¹⁷ This pattern of erosion bears an unsettling resemblance to the gradual weakening of abortion rights through exceptions and limitations before *Dobbs* delivered the final blow to *Roe*.¹⁸

The parallel becomes even more striking in the wake of *Vega v. Tekoh*, where the Court quietly dismantled another pillar of *Miranda*’s strength by holding that its violations do not constitute grounds for civil rights lawsuits under § 1983.¹⁹ Like a prelude to a larger constitutional drama, the Court’s characterization of *Miranda* as merely “prophylactic” rather than constitutional echoes the same skepticism that preceded *Dobbs*.²⁰ Most telling was the majority’s description of *Dickerson*’s conclusion—that prophylactic rules could override congressional statute—as a “bold and controversial” claim of judicial

10. *Id.* at 268.

11. *Dickerson*, 530 U.S. at 444.

12. 410 U.S. 113 (1973).

13. *Dobbs*, 597 U.S. at 262, 269.

14. *Dickerson*, 530 U.S. at 444.

15. Ayesha I. Ahsan, “My Mirandas Don’t Stand a Chance, With Cops”: The United States Supreme Court’s Impending Destruction of *Miranda* Rights Under the Pretense of Prophylaxis in *Vega v. Tekoh*, 65 B.C. L. REV. 1445, 1469 (2024).

16. See *New York v. Quarles*, 467 U.S. 649, 659 (1984); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985); *Missouri v. Seibert*, 542 U.S. 600, 617 (2004).

17. *Quarles*, 467 U.S. at 657; *Seibert*, 542 U.S. at 617.

18. *Dobbs*, 597 U.S. at 229–30.

19. 597 U.S. 134, 152 (2022).

20. *Id.* at 150.

authority.²¹ These words, carefully chosen, mirror the very criticisms of judicial overreach that would later topple *Roe*.²²

This Note argues that *Miranda* is constitutionally weak through the lens of recent Supreme Court decisions and proposes for legislative solutions to preserve its protections. Part I explores the historical foundation of *Miranda*, revealing constant debates as to whether it is judicial policymaking or textual interpretation. Part II analyzes the Supreme Court's gradual narrowing of *Miranda* protections through exceptions and recent decisions, demonstrating the doctrine's inherent instability. Part III examines how the *Dobbs* framework for overturning precedent applies directly to *Miranda*, highlighting its particular vulnerability to the Court's new approach to stare decisis. Finally, Part IV argues that congressional codification of *Miranda* warnings represents the only viable path forward, exploring how federal and state legislative action can secure these essential protections.

I. THE HISTORICAL FOUNDATION OF *MIRANDA*: A HOUSE BUILT ON SAND

A. *The Original Miranda Decision and Its Constitutional Roots*

Sometimes the most profound changes in law emerge not from legislative halls but from a simple signature on a confession.²³ The landmark case *Miranda v. Arizona* fundamentally transformed criminal procedure in the United States through a consolidated decision addressing four separate cases where suspects had made incriminating statements during police interrogations.²⁴ The protagonist, Ernesto Miranda, likely never imagined his name would become synonymous with criminal procedure and individual liberties when Phoenix police arrested him in March 1963 for the kidnapping and rape of an eighteen-year-old woman.²⁵ He is regarded as “the central dramatis personae in the Supreme Court’s most famous criminal law decision, rather than as a dangerous criminal who robbed and raped a number of women.”²⁶ His story might have ended as just another entry in the annals of criminal justice, had it not been for what happened next: after two hours of police interrogation, Miranda signed a confession without ever being informed of his constitutional rights or having access to an attorney.²⁷ This confession, obtained in the shadows of constitutional protection, would become not just evidence of his guilt but the catalyst for a seismic shift in American law.²⁸ In *Miranda*’s case, the Court

21. *Id.* at 149.

22. *Dobbs*, 597 U.S. at 237.

23. *Miranda v. Arizona*, 384 U.S. 436, 492 (1966).

24. *Id.* at 445.

25. *Id.* at 491–92; O’Neill, *supra* note 4, at 201.

26. Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 181–82 (1999) (footnote omitted).

27. *Miranda*, 384 U.S. at 491–92.

28. *Id.*

found that the lack of these safeguards violated his Fifth Amendment rights.²⁹ This decision was not an isolated instance of judicial innovation but rather the culmination of growing concern over the fairness and constitutionality of prevailing police interrogation practices.³⁰

Before *Miranda*, courts wandered through the fog of a “voluntariness” test under the Due Process Clause to evaluate confession admissibility.³¹ This test required judges to examine the totality of circumstances to determine if a confession was freely given.³² This standard proved as inconsistent in application as it was difficult to define.³³ The *Miranda* Court, under Chief Justice Earl Warren’s leadership, recognized that this patchwork approach was about as effective as using an umbrella in a hurricane when it came to protecting suspects in police custody.³⁴ The Court’s decision was grounded in the Fifth Amendment’s protection against compelled self-incrimination.³⁵ Writing for the 5-4 majority, Chief Justice Warren emphasized the inherent coercive nature of custodial interrogation.³⁶ The Court noted that modern psychological interrogation techniques could be just as coercive as the physical methods previously used by police.³⁷ The Court was particularly concerned with the practice of incommunicado interrogation where isolation and psychological pressure worked together in the shadowy corners of police stations.³⁸

From this decision emerged *Miranda*’s famous warnings, which established concrete constitutional guardrails that would become as familiar to television viewers as to criminal suspects. These rights include the right to remain silent, along with the warning that anything said can and will be used against them in court.³⁹ Additionally, suspects must be informed of their right to consult with an attorney before questioning and to have an attorney present during questioning.⁴⁰ Finally, they must be told that if they cannot afford an attorney, one will be appointed for them.⁴¹ These requirements were deemed necessary measures for every person, regardless of any personal traits.⁴² A scholar noted that earlier Supreme Court decisions had always “envisioned—rightly or wrongly—an intelligent citizen-suspect, perfectly able to resist standard police questioning and unwilling, absent threats or fabricated promises of leniency, to falsely

29. *Id.* at 492.

30. *Id.* at 441–42.

31. Richard H.W. Maloy, *Can a Rule Be Prophylactic and Yet Constitutional?*, 27 WM. MITCHELL L. REV. 2465, 2465 (2001).

32. Ahsan, *supra* note 15, at 1454.

33. *Miranda*, 384 U.S. at 461–62.

34. *Id.*

35. *Id.* at 439.

36. *Id.* at 467.

37. *Id.* at 446–48.

38. *Id.* at 457–58.

39. *Id.* at 479.

40. *Id.*

41. *Id.*

42. *Id.* at 472.

confess to the commission of a crime. The Court rejected this idealized conception”⁴³ Instead, the Court emphasized that the privilege against self-incrimination was fundamental to the American system of justice, tracing its origins back to English common law and noting its essential role in maintaining an accusatorial, rather than inquisitorial, system of criminal justice.⁴⁴ The Court stated, “[t]he privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent.”⁴⁵

The decision marked a significant shift from the previous voluntary confession rule. Where once courts merely asked whether a confession was voluntary, they now presume coercion unless the proper warnings are given.⁴⁶ Yet, even as the Court established these new protections, the Court left a door ajar, suggesting that Congress and the states could develop alternative safeguards—provided they matched *Miranda*’s protective power.⁴⁷ The Court stated, “[o]ur decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect.”⁴⁸ The Court also encouraged the legislative branch to draft laws, but stated the process must be “at least as effective” as the *Miranda* warnings.⁴⁹ This doctrinal framework aimed at creating a careful balancing of law enforcement needs with constitutional protections sparked immediate controversy.⁵⁰ As it turned out, *Miranda*’s greatest test would come not from the police stations the *Miranda* warnings sought to regulate, but from the halls of Congress itself.⁵¹

B. *The Rebellion Against Miranda*

If revolutions invite rebellion, then *Miranda*’s aftermath was textbook. Despite the Court’s intention, the response was not positive.⁵² The ink had barely dried on Chief Justice Warren’s opinion when resistance began mounting from an unlikely alliance of dissenting Supreme Court Justices and Congress.⁵³ Their arguments against *Miranda* eerily foreshadow modern challenges to the decision’s constitutional foundations.⁵⁴

The dissenting voices within the Supreme Court itself proved the most prescient, reading less like typical judicial disagreements and more like

43. O’Neill, *supra* note 4, at 204.

44. *Miranda*, 384 U.S. at 442.

45. *Id.* at 472.

46. *Id.* at 471–72.

47. *Id.* at 467.

48. *Id.*

49. *Id.*

50. O’Neill, *supra* note 4, at 210–11.

51. *Dickerson v. United States*, 530 U.S. 428, 431–32 (2000).

52. *Milhizer*, *supra* note 5, at 588.

53. O’Neill, *supra* note 4, at 207–11.

54. *Id.*; *Miranda*, 384 U.S. at 510 (Harlan, J., dissenting).

constitutional prophecies of doom.⁵⁵ Justice Harlan's dissent was not just a legal argument, but also a warning flare about judicial overreach that would illuminate debates for decades to come.⁵⁶ His characterization of the majority's reliance on the Fifth Amendment's self-incrimination clause as a "trompe l'oeil" anticipated the skepticism about *Miranda*'s constitutional status.⁵⁷ When Justice Harlan declared that the Court's decision "represents poor constitutional law and entails harmful consequences for the country at large[.]"⁵⁸ he effectively previewed *Dobbs*'s framework for overturning precedents that exceeds constitutional bounds.⁵⁹ His insistence that the Court should "restore the initiative in criminal law reform to those forums where it truly belongs"⁶⁰ particularly resonates with the current Court's emphasis on returning contested issues to democratic processes.⁶¹ Moreover, he stated the goal of the majority "is toward 'voluntariness' in a utopian sense, or to view it from a different angle, voluntariness with a vengeance."⁶² He criticized what he saw as the Court's lack of judicial restraint.⁶³

Justice White's dissent struck an even darker chord, one that would resonate ominously through future debates about judicial authority.⁶⁴ His constitutional critique could have been lifted directly from a modern opinion: "That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent"⁶⁵ This emphasis on constitutional text and historical understanding mirrors the exact methodology that *Dobbs* would use to dismantle *Roe*.⁶⁶ White's specific criticism that "[d]ecisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice"⁶⁷ particularly echoes the current Court's skepticism of rights not explicitly grounded in constitutional text.⁶⁸

In police stations across the United States, *Miranda* faced an equally formidable resistance. A 1966 Yale study observing 127 interrogations revealed not just occasional lapses, but widespread, systematic non-compliance with the new requirements.⁶⁹ Police officers were not just bending *Miranda*'s rules—

55. O'Neill, *supra* note 4, at 207–08.

56. *Miranda*, 384 U.S. at 510 (Harlan, J., dissenting).

57. *Id.*

58. *Id.* at 504.

59. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

60. *Miranda*, 384 U.S. at 524 (Harlan, J., dissenting).

61. *See, e.g.*, *Dobbs*, 597 U.S. at 269.

62. *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting).

63. *Id.*

64. *Id.* at 526 (White, J., dissenting).

65. *Id.* at 531.

66. *Dobbs*, 597 U.S. at 270.

67. *Miranda*, 384 U.S. at 531–32 (White, J., dissenting).

68. *Dobbs*, 597 U.S. at 237, 260–61.

69. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 632–33 (1996).

they were actively circumventing them, either ignoring the warnings entirely or providing watered-down versions that stripped them of their protective power.⁷⁰ This was not mere procedural disagreement; it reflected a fundamental rejection of the Court's attempt to rebalance power between law enforcement and suspects.⁷¹

As crime rates soared and the 1968 presidential election approached, *Miranda* transformed from a legal doctrine into a political lightning rod.⁷² Politicians quickly learned that “fear of crime could elect candidates with tough-on-crime agendas,” and *Miranda* became a convenient scapegoat for law enforcement's challenges.⁷³ The rhetoric was stark: “[W]e will not have effective law enforcement so long as the courts allow self-confessed killers to go unpunished. The confusion and disarray injected into law enforcement by such decisions as . . . Escobedo . . . and *Miranda* . . . are deplorable and demoralizing.”⁷⁴

Congress responded to these concerns with what amounted to a constitutional counterattack, enacting 18 U.S.C. § 3501 just two years after the decision.⁷⁵ This statute was no mere procedural adjustment but instead a bold legislative attempt to turn back the constitutional clock, aiming to restore the pre-*Miranda* “voluntariness” standard for admitting confessions in federal court and implement an arguably more “balanced and reasonable” way.⁷⁶ The statute eliminated the requirement for the three specific warnings established in *Miranda*, stating that if such warnings were given, they would merely serve as factors for the courts to consider in determining whether a confession was voluntarily made.⁷⁷ The accompanying committee report stated, “[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities.”⁷⁸ It also stated that “the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement.”⁷⁹

For three decades, § 3501 occupied a peculiar constitutional limbo, a legislative zombie that was neither fully alive nor completely dead.⁸⁰ The Department of Justice, under both Democratic and Republican administrations, treated the statute like an embarrassing family secret, consistently declining to invoke it in federal prosecutions.⁸¹ It became, as one scholar wryly noted, “the

70. *Id.* at 633–34.

71. *Id.*

72. Milhizer, *supra* note 5, at 589.

73. O'Neill, *supra* note 4, at 210.

74. *Id.* at 212 (footnote omitted).

75. Milhizer, *supra* note 5, at 596–97.

76. O'Neill, *supra* note 4, at 230–31.

77. Maloy, *supra* note 31, at 2466.

78. S. REP. NO. 90-1097, at 37, 46 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2123.

79. *Id.* at 2132.

80. O'Neill, *supra* note 4, at 234.

81. Maloy, *supra* note 31, at 2467.

statute that even prosecutors could not quite bring themselves to love.”⁸² This constitutional cold war might have continued indefinitely had the Fourth Circuit not finally fired a kill shot in *United States v. Dickerson*, holding that § 3501 had effectively overruled *Miranda* for federal prosecutions.⁸³ The defendant and the Department of Justice both sided against the statute, and “[t]he Department’s peculiar posture of supporting a criminal defendant . . . continued in the Supreme Court.”⁸⁴ The rebellion that began in police stations and congressional chambers would ultimately have to be resolved in the Supreme Court itself.⁸⁵ As the case that would become *Dickerson v. United States* made its way to the Court, few could have predicted that *Miranda*’s most unlikely defender would emerge from the ranks of its harshest critics.⁸⁶

C. Dickerson: *Miranda*’s *Unlikely Guardian Angel*

Enter the Supreme Court, forced to finally confront the constitutional elephant in the room: whether Congress could simply legislate away *Miranda*’s protections. In a twist of remarkable irony, it would be Chief Justice Rehnquist, long considered *Miranda*’s most formidable critic, who would emerge as its unexpected guardian angel.⁸⁷ His early career revealed deep skepticism of the Warren Court’s criminal procedure revolution.⁸⁸ In a revealing nineteen-page memorandum to John Dean in 1969, when Rehnquist served as Assistant Attorney General, he had launched a direct attack on *Miranda* and its progeny.⁸⁹ The memorandum proclaimed that “the Supreme Court has failed to hold true the balance between the right of society to convict the guilty and the obligation of society to safeguard the accused.”⁹⁰ His critique of *Miranda* was particularly caustic, lambasting the Court’s “dramatic change” in criminal defendants’ rights.⁹¹ He lamented, like Justice White before him, that the decision would render “relevant, competent, uncoerced statements” inadmissible unless an “elaborate set of warnings” were given—warnings so byzantine that they would likely “prevent[] a defendant from making any statement at all.”⁹² More provocatively, he had even recommended that the President appoint a

82. O’Neill, *supra* note 4, at 186.

83. Maloy, *supra* note 31, at 2467.

84. Cassell, *supra* note 26, at 179.

85. Maloy, *supra* note 31, at 2467.

86. Yale Kamisar, *Dickerson v. United States: The Case That Disappointed Miranda’s Critics—and Then Its Supporters*, in *THE REHNQUIST LEGACY* 106 (C. Bradley ed., Cambridge Univ. Press 2006).

87. *Id.* at 106–07.

88. *Id.* at 107.

89. *Id.* at 109.

90. *Id.*

91. *Id.* at 110.

92. *Id.*

commission to consider whether a constitutional amendment might be necessary to overcome such judicial innovations.⁹³

Despite his passionate expression of disagreement with *Miranda*, Rehnquist's *Dickerson* opinion became a masterclass in judicial compromise, at once affirming and subtly undermining *Miranda*'s constitutional foundation.⁹⁴ Writing for a 7-2 majority in *Dickerson*, Chief Justice Rehnquist's opinion can be characterized as a constitutional high-wire act.⁹⁵ While crowning *Miranda* with constitutional status, the Court simultaneously acknowledged its prophylactic nature, creating a curious hybrid that has weaknesses.⁹⁶ Rather than anchoring *Miranda* in firm constitutional bedrock, the Court seemed content to rest it on the shifting sands of cultural entrenchment and stare decisis, stating that "[f]ollowing the rule of *stare decisis*, we decline to overrule *Miranda* ourselves."⁹⁷ Chief Justice Rehnquist's reluctance in deciding this way was palpable in his carefully parsed admission where he stated that "[w]hether or not we would agree with *Miranda*'s reasoning and its resulting, were we addressing the issue in the first instance, the principles of *stare decisis* weighs heavily against overruling it now."⁹⁸

This tepid defense revealed *Dickerson* as less a vindication of *Miranda*'s constitutional status and more a temporary stay of execution.⁹⁹ Rehnquist even acknowledged that although the Court disagrees with the lower court's conclusion in *Miranda*, "we concede that there is language in some of our opinions that supports the view taken by that court."¹⁰⁰ An accurate description is that "his opinion reads more like a compromise report of a divided committee than the principled expression of a scholarly jurist."¹⁰¹ The attorney who had won in the lower court's opinion later remarked that "Dickerson's assertion that *Miranda* created a 'constitutional' rule contradicts numerous clear statements in earlier opinions. Surprisingly, these statements can be traced to Chief Justice Rehnquist, the author of the *Dickerson* opinion."¹⁰²

Justice Scalia, joined by Justice Thomas, penned a dissent that proves to be more prophecy than protest.¹⁰³ With surgical precision, he identified the majority's sleight of hand: to justify its result, the Court had invented what he called "an immense and frightening antidemocratic power," which was the ability to disregard congressional statutes not because they violated the

93. *Id.* at 109.

94. *Id.* at 106–07.

95. *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

96. *Id.*

97. *Id.* (footnote omitted).

98. *Id.* at 443 (citing *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980)).

99. *Id.* at 429.

100. *Id.* at 438.

101. Milhizer, *supra* note 5, at 603.

102. Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in Dickerson*, 99 MICH. L. REV. 898, 900 (2001).

103. *Dickerson*, 530 U.S. at 444 (Scalia, J., dissenting).

Constitution but because they contradicted the Court's self-proclaimed constitutional rules.¹⁰⁴ As one scholar questioned, "How can *Miranda* be classified as both a 'constitutional rule' and a 'prophylactic' with no cause of action attached to it?"¹⁰⁵ In Scalia's view, the inconsistency and the majority's careful phrases about *Miranda* being "constitutionally based" or having "constitutional underpinnings" were a linguistic dance around a simple truth: the Court could not explicitly say that un-Mirandized interrogation violates the Constitution because a majority of justices did not actually believe it did.¹⁰⁶ Like a geological survey identifying future fault lines, Scalia's critique mapped out the very vulnerabilities that now could threaten *Miranda*'s foundation.¹⁰⁷ He believed that the decision in *Dickerson* stood for "the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States."¹⁰⁸ The Court, he argued, was claiming the power not merely to interpret the Constitution but to expand it using a power he insisted simply did not exist.¹⁰⁹

This early history of resistance, from Congress to law enforcement, illustrated a doctrine facing persistent challenges from its inception. The controversy surrounding *Miranda*'s initial implementation and Congress's attempted override through § 3501 not only revealed the decision's contested nature but also highlighted its potential vulnerability. *Dickerson* thus represents not *Miranda*'s salvation but rather a temporary reprieve that inadvertently highlighted its constitutional weakness. By grounding *Miranda*'s survival in stare decisis rather than constitutional text, *Dickerson* created the very vulnerability that now threatens to bring *Miranda* down in the post-*Dobbs* era where stare decisis carries diminishing weight. *Miranda*'s journey reveals how even seemingly permanent constitutional landmarks can falter when their foundations blur the line between constitutional command and judicial creation.

II. THE GRADUAL EROSION OF *MIRANDA* THROUGH EXCEPTIONS

A. Safety First, Rights Second: Quarles and the Public Safety Exception

The Supreme Court's major retreat from *Miranda*'s protections came not with a bang but with a gun—specifically, Benjamin Quarles's missing gun in a supermarket.¹¹⁰ In *New York v. Quarles*, the Court carved out what would become known as the "public safety" exception to the *Miranda* requirement.¹¹¹

104. *Id.* at 446.

105. Mosche Schwartz, *Privacy and Prophylactics*, 46 HARV. J.L. & PUB. POL'Y 1353, 1361 (2023).

106. *Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting).

107. *Id.*

108. *Id.* at 461.

109. *Id.*

110. *New York v. Quarles*, 467 U.S. 649, 651–52 (1984).

111. *Id.* at 655.

The case arose when police officers apprehended Quarles, a rape suspect reportedly carrying a firearm.¹¹² After chasing him into a supermarket, one officer noticed Quarles's suspicious behavior and immediately asked him where the gun was, without first providing the *Miranda* warning.¹¹³ Quarles, perhaps not versed in constitutional law, obligingly told the officer about the weapon.¹¹⁴ Only then did they arrest him and read him his *Miranda* rights, after which he made additional incriminating statements.¹¹⁵ Quarles's defense argued that the statements made before the *Miranda* warning were inadmissible because the police failed to first advise him of his rights.¹¹⁶

The Supreme Court, faced with deciding whether to suppress Quarles's pre-warning statements, chose pragmatism, reasoning that the officer's immediate question about the location of the gun was justified by concerns for public safety because the weapon posed a significant danger to others.¹¹⁷ Under these circumstances, the Court concluded that the need to protect the public from potential harm outweighed the need to give the *Miranda* warning before questioning.¹¹⁸

This pragmatic approach, however, created a substantial crack in *Miranda*'s protective shield. The public safety exception allows statements made under potentially coercive circumstances to be admissible if officers can articulate an imminent threat.¹¹⁹ "The Fifth Amendment admits of no such public safety exception[.]"¹²⁰ The line between legitimate public safety concerns and pretextual police tactics can blur faster than a suspect's memory in a stressful interrogation.¹²¹ Moreover, the exception rests on a troubling assumption that *Miranda* is merely a prophylactic rule, not a constitutional command; in other words, violating *Miranda* is not necessarily violating the Fifth Amendment itself.¹²² "The rationale Quarles gave, however, was that the *Miranda* rules were nonconstitutional rules subject to modification by the Court. Dickerson hazard[ed] no attempt at explaining Quarles."¹²³ The *Quarles* decision marked more than just another exception to *Miranda*. It represented a fundamental shift in how the Court viewed these protections. *Miranda*, once the gold standard of police procedure, now had an Achilles' heel. This weakness would be exploited time and time again as the Court continued to chip away at *Miranda*'s

112. *Id.* at 651–52.

113. *Id.* at 652.

114. *Id.*

115. *Id.*

116. *See id.* at 654.

117. *Id.* at 657.

118. *Id.*

119. *Id.*

120. Cassell, *supra* note 102, at 902.

121. *Miranda v. Arizona*, 384 U.S. 436, 461–62 (1966).

122. Cassell, *supra* note 102, at 902 (footnote omitted).

123. *Id.*

foundations. The public safety exception was just the beginning of *Miranda*'s long, slow erosion.

B. Question First, Warn Later: The Two-Step Interrogation Strategy

Enter the two-step interrogation strategy where cops question first and *Mirandize* later. This strategy embodies the saying that confession is good for the soul but even better for the prosecution. The Supreme Court's treatment of two-step interrogations, in which police question suspects both before and after giving *Miranda* warnings, further illustrates the gradual erosion of *Miranda*'s protections. Two key cases, *Oregon v. Elstad* and *Missouri v. Seibert*, demonstrate the Court's increasingly flexible interpretation of *Miranda*'s requirements.¹²⁴

In *Elstad*, the Court confronted what appeared to be an innocent mistake.¹²⁵ Police arrested Elstad for burglary but initially failed to provide *Miranda* warnings, obtaining an incriminating statement.¹²⁶ After being informed of his rights, Elstad was questioned again, this time receiving a *Miranda* warning, and he made a second, more detailed confession.¹²⁷ The Court ruled that the second confession, made after receiving the *Miranda* warning, was admissible.¹²⁸ It held that the failure to administer *Miranda* warnings at the outset did not automatically taint the subsequent confession, so long as the confession made after the warning was voluntary.¹²⁹ The Court emphasized that the police's failure to give the warning initially did not necessarily undermine the suspect's later decision to waive his rights.¹³⁰ The Court stated that "a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment."¹³¹ The Court reasoned that the second confession was valid because the suspect was adequately informed of his rights before making it.¹³²

But what happens when that mistake becomes a strategy? The Court faced this darker scenario in *Missouri v. Seibert*, where police deliberately employed a two-step interrogation technique.¹³³ The police officers' familiar technique was coerce, warn, re-confess.¹³⁴ The case involved Celia Seibert, who was dragged to the police station in early morning hours and interrogated about her son's death.¹³⁵ Initially, the police questioned her for hours without giving her a

124. See *Oregon v. Elstad*, 470 U.S. 298, 318 (1985); *Missouri v. Seibert*, 542 U.S. 600, 617 (2004).

125. See *Elstad*, 470 U.S. at 301–02.

126. *Id.* at 302.

127. *Id.*

128. *Id.* at 318.

129. *Id.*

130. *Id.*

131. *Id.* at 306 n.1.

132. *Id.* at 318.

133. 542 U.S. 600, 605–06 (2004).

134. *Id.*

135. *Id.* at 604–05.

Miranda warning, and she made an incriminating statement.¹³⁶ Afterward, the police administered a *Miranda* warning and had Seibert repeat her confession, which was then used as evidence against her in court.¹³⁷

The Court ruled that the second confession, made after the *Miranda* warning, was inadmissible.¹³⁸ It held that the two-step interrogation process in which the warning was deliberately withheld at the outset to extract an initial confession was coercive and undermined the protections guaranteed by *Miranda*.¹³⁹ The Court described that the lower court stated the warning must be given before any custodial interrogation begins to ensure that the suspect's waiver of rights is voluntary, knowing, and intelligent.¹⁴⁰

However, the *Seibert* decision proved less protective than it initially appeared. While the Court found this practice inadmissible, it stopped short of categorically rejecting all midstream *Miranda* warnings. Instead, it created a complex framework focusing on the deliberateness of the two-step strategy and whether the warnings could function effectively.¹⁴¹ The key factor in determining the admissibility of midstream warnings is whether the initial confession was obtained through coercion or exploitation of the earlier failure to provide a *Miranda* warning.¹⁴² The Court emphasized that the admissibility of such warnings depends on the specific circumstances of each case, which is essentially the standard Congress had in the statute.¹⁴³ Furthermore, Justice Kennedy's concurring opinion in *Seibert* suggested that even deliberately employed two-step strategies could potentially be cured by additional warnings or procedures.¹⁴⁴ It is a weakening of *Miranda* when the admissibility of a confession turns not on the rights of the suspect but on the intentions of the interrogator.¹⁴⁵

The lesson of *Elstad* and *Seibert* is clear: *Miranda*'s once-robust protections are now subject to the whims and tactics of police questioning. The two-step interrogation strategy has become a standard move in the interrogation playbook, a way to circumvent *Miranda*'s strictures without technically violating its letter. As long as the police can navigate the legal labyrinth created by these decisions, they can have their confession and admit it too. However, the real casualty here is not just the exclusionary rule but also the very idea of *Miranda* as a guardian against coercive interrogations. These cases represent a slow but steady erosion of *Miranda*'s foundation, an impending death by a thousand cuts.

136. *Id.*

137. *Id.* at 605–06.

138. *Id.* at 604.

139. *Id.* at 617.

140. *Id.* at 606.

141. *Id.* at 611.

142. *Id.* at 615–16.

143. *Id.* at 621.

144. *Id.* at 622 (Kennedy, J., concurring).

145. *Id.* at 625 (O'Connor, J., dissenting).

C. Rights Without Remedies: Vega and Miranda's Constitutional Downgrade

If *Elstad* and *Seibert* represented *Miranda*'s impending death by a thousand cuts, *Vega v. Tekoh* might be setting the stage for the coup de grâce.¹⁴⁶ The case posed a seemingly straightforward question of whether individuals may sue police officers under 42 U.S.C. § 1983 for violations of their *Miranda* rights.¹⁴⁷ The Court's answer, a resounding no, revealed just how far *Miranda* had fallen from its constitutional pedestal.¹⁴⁸

The case involved Tekoh, who was interrogated without *Miranda* warnings, leading to a confession used against him at trial.¹⁴⁹ When Tekoh attempted to sue the officers under § 1983, the Court's 6-3 decision slammed the courthouse door in his face.¹⁵⁰ Justice Alito's majority opinion characterized *Miranda* warnings as mere prophylactic measures rather than constitutional requirements themselves.¹⁵¹ Justice Alito also emphasized that nowhere in the original *Miranda* decision did the Court state that a failure to provide warnings would constitute a violation of the Fifth Amendment itself.¹⁵² Instead, the majority viewed *Miranda* warnings as simply one possible means of protecting against self-incrimination during custodial interrogations.¹⁵³ This decision did not just limit civil remedies but also fundamentally downgraded *Miranda*'s constitutional status.¹⁵⁴

Most telling was the majority's treatment of *Dickerson*.¹⁵⁵ Where the Court in *Dickerson* had declared *Miranda* a "constitutionally based" right that could be applied against the states, Justice Alito in *Vega* described this conclusion as "bold and controversial."¹⁵⁶ He also referred to it as a "'judicially crafted' prophylactic rule."¹⁵⁷ The majority's description of *Dickerson*'s conclusion that a prophylactic rule can override a statute as "a bold and controversial claim of authority" is language that notably fails to show adamant support for *Dickerson*'s reasoning.¹⁵⁸ This skepticism is further reinforced by the Court's pointed footnote about *Dickerson* acknowledging that "[w]hether this Court has the authority to create constitutionally based prophylactic rules that bind both federal and state courts has been the subject of debate among jurists and commentators."¹⁵⁹ Justice Alito ended the footnote by stating, "for the purpose

146. Ahsan, *supra* note 15, at 1480.

147. *Vega v. Tekoh*, 597 U.S. 134, 138 (2022).

148. Ahsan, *supra* note 15, at 1480.

149. *Vega*, 597 U.S. at 139.

150. *Id.* at 138.

151. *Id.* at 150.

152. *Id.* at 152.

153. *Id.* at 151.

154. Ahsan, *supra* note 15, at 1480.

155. *Vega*, 597 U.S. at 150.

156. *Id.* at 149 (quoting *Dickerson v. United States*, 530 U.S. 428, 440 (2000)).

157. *Id.* at 151 (quoting *Maryland v. Shatzer*, 559 U.S. 98, 106 (2010)).

158. *Id.* at 149.

159. *Id.* at 149 n.5.

of deciding this case, we follow its rationale.”¹⁶⁰ This explicit recognition of the ongoing debate about the Court’s authority to impose prophylactic requirements on states and the reluctant acceptance of *Dickerson* plants seeds for overturning *Miranda* entirely.¹⁶¹

The implications of *Vega* are profound. It removes a critical avenue of accountability for law enforcement officials who fail to properly advise suspects of their rights.¹⁶² Without the ability to bring civil rights claims under § 1983, individuals who suffer harm due to *Miranda* violations have effectively lost access to meaningful remedies, particularly in cases where their statements are not suppressed at trial.¹⁶³ As Justice Kagan noted in her dissenting opinion, this leaves a significant enforcement gap that could embolden police misconduct.¹⁶⁴ Moreover, *Vega* represents a more fundamental weakening to *Miranda* than previous decisions.¹⁶⁵ While cases like *Quarles* and *Seibert* created specific carved-out exceptions, *Vega* strikes at *Miranda*’s constitutional core by rejecting its status as a constitutional rule.¹⁶⁶ This fundamental downgrading of *Miranda*’s authority, combined with removal of § 1983 liability, creates both practical and doctrinal vulnerability that weaken *Miranda* in such a way that relying on the Court to save its protections is no longer reasonable.¹⁶⁷

III. THE *DOBBS* FRAMEWORK AND *MIRANDA*’S FUTURE

A. *The New Approach to Stare Decisis*

In the world of constitutional law, stare decisis¹⁶⁸ has long served as the mortar holding together the edifice of American jurisprudence.¹⁶⁹ The cornerstone purpose of stare decisis is to foster a legal system characterized by stability and predictability, ensuring that judicial decisions remain consistent and foreseeable for all participants.¹⁷⁰ However, in *Dobbs v. Jackson Women’s*

160. *Id.*

161. *Id.*

162. *Id.* at 138.

163. *Id.* at 157–58 (Kagan, J., dissenting).

164. *Id.*

165. Ahsan, *supra* note 15, at 1467.

166. *Vega*, 597 U.S. at 156 (Kagan, J., dissenting).

167. Ahsan, *supra* note 15, at 1467.

168. The Latin phrase “stare decisis” derives from the maxim *stare decisis et non quieta movere*, which translates to “stand by the thing decided and do not disturb the calm,” reflecting the judicial principle of honoring established precedent. See James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. Rev. 345, 347 (1986).

169. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 263 (2022).

170. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) (“The doctrine [of stare decisis] exists for the purpose of introducing certainty and stability into the law . . .”); *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980)

Health Organization, the Supreme Court did not just remove a brick from this wall; it offered a new blueprint for dismantling entire sections of constitutional architecture.¹⁷¹ The decision represents more than the end of federal abortion rights; it signals a seismic shift in how the Court approaches its own precedents, creating tremors that shake *Miranda* to its foundations.¹⁷²

The case arose from a challenge to Mississippi's 15-week abortion ban, which directly contested the precedents established in *Roe v. Wade* and *Planned Parenthood v. Casey*.¹⁷³ In a contentious 6-3 ruling, the Court held that the Constitution does not confer a right to abortion, effectively overturning *Roe* and *Casey* and returning the authority to regulate abortion to individual states.¹⁷⁴ The Court stated, "*Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people."¹⁷⁵

Yet the significance of *Dobbs* extends far beyond abortion rights. The *Dobbs* majority established a more flexible framework for overturning precedent.¹⁷⁶ The Court stated that stare decisis "is at its weakest when [the Court] interpret[s] the Constitution[.]"¹⁷⁷ While maintaining that stare decisis is "not an inexorable command[.]" a phrase that has appeared in opinions for decades, *Dobbs* gives this familiar disclaimer sharp new teeth.¹⁷⁸ The majority outlined specific factors that could justify overturning precedent: the nature of the Court's error, the quality of its reasoning, the workability of the resulting rule, effects on other areas of law, and the weight of reliance interests.¹⁷⁹ Perhaps most significantly, *Dobbs* introduced a new emphasis on constitutional text and historical understanding that could prove fatal to decisions like *Miranda* that rest heavily on judicial interpretation rather than explicit constitutional commands.¹⁸⁰ The Court also stated, "when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake."¹⁸¹

This recalibrated approach to stare decisis casts a long shadow over *Miranda*'s future. *Miranda*'s vulnerabilities mirror those the Court identified in *Roe*. Like *Roe*, *Miranda* created a set of rights that, while designed to protect constitutional interests, are not themselves explicitly required by constitutional

(plurality opinion) ("[Stare decisis] serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules."); Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1849 (2023).

171. *Dobbs*, 597 U.S. at 268.

172. *Id.*

173. *Id.* at 232–34.

174. *Id.* at 302.

175. *Id.* at 268.

176. *Id.*

177. *Id.* at 264 (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)).

178. *Id.* at 292.

179. *Id.* at 268.

180. *See id.* at 231.

181. *Id.* at 264.

text.¹⁸² “Consistent with the Court’s prophylactic understanding of the ‘*Miranda* Rights,’ abortion falls to the same logic: a prophylactic with no constitutional claim attached.”¹⁸³ Like *Roe*, *Miranda* imposed specific requirements on states that some view as judicial legislation rather than constitutional interpretation.¹⁸⁴ And, like *Roe*, *Miranda*’s continued validity in *Dickerson* rested heavily on stare decisis and cultural entrenchment.¹⁸⁵ Chief Justice Rehnquist, writing for the majority in *Dickerson*, emphasized that *Miranda* had “become embedded in routine police practice” and “become part of our national culture.”¹⁸⁶ However, in the cold light of the post-*Dobbs* world, such sentimental appeals to tradition and societal integration may no longer be enough to sustain a precedent untethered from constitutional text.

The majority opinion in *Dobbs* stated, “in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.”¹⁸⁷ *Miranda* and its progeny are the perfect storm of appropriate circumstances.

B. *Miranda*’s Constitutional Vulnerability Under *Dobbs*

Sometimes the most prescient words come from defeat. As Justice Ruth Bader Ginsburg stated, “[d]issents speak to a future age . . . the greatest dissents do become court opinions and gradually over time their views become the dominant view . . . that’s the dissenter’s hope: that they are writing not for today, but for tomorrow.”¹⁸⁸ Justice Scalia was writing with vigorous hope for that tomorrow in his dissent in *Dickerson*. His concern was not just about *Miranda*; it was about judicial power itself. “By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people.”¹⁸⁹ These words could easily be compared to the majority opinion in *Dobbs*. The theoretical framework established in *Dobbs* now presents a direct threat to *Miranda*’s continued validity, with Scalia’s dissent serving as an unwitting blueprint for its potential undoing.¹⁹⁰ His core argument—that the Court’s insistence on categorizing *Miranda* as a constitutional rule does not make it a constitutional

182. *Vega v. Tekoh*, 597 U.S. 134, 157 (2022) (quoting *Maryland v. Shatzer*, 559 U.S. 98, 106 (2010)).

183. Schwartz, *supra* note 105, at 1371 (italics added).

184. *Dickerson v. United States*, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting).

185. *Id.* at 443.

186. *Id.*

187. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 264 (2022).

188. NPR Morning Edition, *Ruth Bader Ginsburg and Malvina Harlan*, NPR, at 03:41–04:03 (May 2, 2002), <https://www.npr.org/2002/05/02/1142685/ruth-bader-ginsburg-and-malvina-harlan> [<https://perma.cc/D2TY-TC73>].

189. *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting).

190. *See id.*

requirement—finds new life in the current Court’s emphasis on textual interpretation and historical understanding.¹⁹¹

When viewed through *Dobbs*’s analytical framework, *Miranda*’s vulnerabilities become painfully apparent across the five critical dimensions. First, like a house built on sand, *Miranda*’s foundational flaw lies in its nature as a prophylactic rule not explicitly derived from constitutional text.¹⁹² Unlike fundamental constitutional rights, *Miranda* represents a judicially created mechanism for protecting Fifth Amendment rights, a constitutional security system designed by judges rather than the Framers.¹⁹³ As one scholar noted, *Miranda* “‘reads more like a legislative committee report with an accompanying statute’ than a judicial decision.”¹⁹⁴ This tension is further exacerbated by the Court in *Dickerson* overruling the statute.¹⁹⁵ Senator Sam Ervin of North Carolina spoke out against *Miranda* and stated, “[i]f you believe that the people of the United States should be ruled by a judicial oligarchy composed of five Supreme Court Justices rather than by the Constitution of the United States, you ought to vote against the bill.”¹⁹⁶

The *Dobbs* approach explicitly creates a pathway for returning such interpretive decisions to the legislative branch, suggesting that warnings about self-incrimination, like regulations about abortion, might better emerge from democratic deliberation than judicial mandate.¹⁹⁷ Justice Scalia stated, “we cannot allow to remain on the books even a celebrated decision—*especially* a celebrated decision—that has come to stand for the proposition that the Supreme Court has power to impose extraconstitutional constraints upon Congress and the States.”¹⁹⁸ As a scholar discussing *Miranda* noted, “prophylactics are judicially fashioned rules that go further than necessary to protect what the Court sees as a fundamental constitutional right.”¹⁹⁹ The current Court, focused on facilitating democratic processes rather than proactively shaping social norms, could see *Miranda* as exactly the type of judicial policymaking it seeks to curtail.²⁰⁰

The Court’s original error mirrors the very reasoning *Dobbs* used to dismantle *Roe*—creating rights that, while perhaps wise, are not textually mandated and represent judicial overreach.²⁰¹ The current Court’s emphasis on

191. *Id.*; *Dobbs*, 597 U.S. at 231.

192. *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting).

193. *See Dickerson*, 530 U.S. at 465 (Scalia, J., dissenting).

194. O’Neill, *supra* note 4, at 205 (quoting David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988)).

195. *Dickerson*, 530 U.S. at 432.

196. Milhizer, *supra* note 5, at 598 (alteration omitted) (quoting 114 Cong. Rec. 14,155 (1968) (statement of Sen. Ervin)).

197. *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 219 (2022).

198. *Dickerson*, 530 U.S. at 465 (Scalia, J., dissenting).

199. Schwartz, *supra* note 105, at 1356.

200. *See Dobbs*, 597 U.S. at 231.

201. *Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting).

originalist interpretation might find this approach as dated.²⁰² Third, *Miranda*'s workability has become increasingly questionable. Like a simple recipe that has acquired too many modifications, the clarity of the original rule has been clouded by decades of exceptions and qualifications.²⁰³ The complexity of *Miranda* warnings and their implementation often creates more legal confusion than clarity as predicted by Justice White's dissent in *Miranda* and as evidenced by the labyrinthine jurisprudence surrounding two-step interrogations.²⁰⁴ Fourth, the decision's far-reaching effects on law enforcement practices and criminal procedure, while testament to its importance, also highlight the kind of broad social policy-making that the current Court views with skepticism.²⁰⁵ Finally, while *Miranda* has become deeply embedded in American legal culture, *Dobbs* demonstrates that cultural entrenchment provides surprisingly little protection for precedents lacking explicit constitutional foundations.²⁰⁶ The Court seems increasingly willing to tell Americans that their understanding of constitutional rights, no matter how longstanding, was built on judicial quicksand.

Dickerson's preservation of *Miranda* might have inadvertently hastened its eventual demise. The majority opinion's careful stating, "[w]hether or not we would agree with *Miranda*'s reasoning and its resulting rule . . . in the first instance, the principles of *stare decisis* weigh heavily against overruling it now" looks increasingly like a stay of execution rather than a full pardon.²⁰⁷ Those words, meant to shield *Miranda* through institutional respect for precedent, now reads like an invitation to reconsider its foundation entirely. The *Dobbs* Court demonstrated that when it believes a precedent was "egregiously wrong," neither decades of reliance nor cultural entrenchment can save it.²⁰⁸ In this new era, *Miranda*'s famous warnings face a profound silence, not from the bark of a gun, as in *Quarles*, nor from the tactical maneuvering of two-step interrogations, but from judicial pens prepared to write that the Warren Court simply demanded too much.²⁰⁹ Perhaps most fitting for a doctrine born from the constitutional right to remain silent, *Miranda*'s own silence is approaching, as it joins *Roe* in the gathering dust of rejected constitutional landmarks that reached beyond their textual foundations to grasp at rights that, however vital, found no explicit home in the Constitution's text.

202. *Id.* at 454; *Dobbs*, 597 U.S. at 231.

203. *Miranda v. Arizona*, 384 U.S. 463, 545 (1966); see *New York v. Quarles*, 467 U.S. 649, 657 (1984); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985); *Missouri v. Seibert*, 542 U.S. 600, 617 (2004); *Vega v. Tekoh*, 597 U.S. 134, 138 (2022).

204. *Miranda*, 384 U.S. at 531–32 (White, J., dissenting); *Elstad*, 470 U.S. at 318; *Seibert*, 542 U.S. at 617.

205. *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting); *Dobbs*, 597 U.S. at 231.

206. *Dobbs*, 597 U.S. at 231.

207. See *Dickerson*, 530 U.S. at 443 (citing *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980)).

208. See *Dobbs*, 597 U.S. at 231.

209. *Miranda*, 384 U.S. at 545; See *New York v. Quarles*, 467 U.S. 649, 657 (1984); *Elstad*, 470 U.S. at 318; *Seibert*, 542 U.S. at 617; *Vega v. Tekoh*, 597 U.S. 134, 138 (2022).

IV. FROM JUDICIAL MANDATE TO DEMOCRATIC CHOICE:
SAVING *MIRANDA*'S PROTECTIONS

Miranda's constitutional weakness demands a legislative solution. Unlike the post-*Dobbs* landscape for abortion rights, where state-by-state variation was inevitable, *Miranda*'s protections can and should be preserved through uniform federal legislation. Congress must act to codify *Miranda*'s warnings before the Court completes its dismantling of this essential safeguard.

Miranda's departure could finally return these crucial policy decisions to their proper forum: the legislative branch. As Justice Harlan presciently noted in his *Miranda* dissent, legislatures possess the aforementioned "advantage of empirical data and comprehensive study" that courts inherently lack.²¹⁰ Congress's earlier attempt to modify *Miranda* through § 3501, while ultimately struck down, demonstrated both the legislature's interest in shaping interrogation practices and its capacity to craft detailed regulatory frameworks. Freed from *Miranda*'s constitutional constraints, Congress should develop comprehensive legislation that better balances individual rights with law enforcement needs.

Congressional codification would offer several distinct advantages over the current judicially-created framework. First, it would place *Miranda*'s protections on firm legal ground, immune from judicial reconsideration of constitutional doctrine. Second, it would provide an opportunity to refine and improve *Miranda*'s protections based on decades of practical experience. Congress could conduct thorough hearings, gathering evidence about modern interrogation practices and their effects on both law enforcement and individual rights. It could craft nuanced requirements that account for technological advances, varying suspect vulnerabilities, and specific investigative challenges. Third, it would restore the proper constitutional balance by returning policymaking authority to the legislative branch while preserving the judiciary's role in interpreting and applying these protections.

The content of such legislation should include, at minimum, the core *Miranda* warnings: the right to remain silent, the warning that statements can be used against the suspect, the right to an attorney, and the provision of counsel for those who cannot afford it.²¹¹ Additionally, Congress should consider codifying exceptions like the public safety exception while providing clear guidelines for their application to prevent abuse.

While federal legislation represents the optimal solution, state-level protections provide an essential backstop against *Miranda*'s demise. Several states have already incorporated *Miranda*-like protections into their constitutions or statutes, creating a layer of protection that would survive even if the Supreme Court overturns *Miranda* entirely.²¹² States without such

210. *Miranda*, 384 U.S. at 524 (Harlan, J., dissenting).

211. Ahsan, *supra* note 15, at 1479.

212. *Id.*

protections should act quickly to adopt them, either through constitutional amendments or comprehensive legislation. These state-level protections could potentially offer even stronger safeguards than *Miranda* itself, tailored to local needs and concerns. This legislative diversity could generate valuable empirical evidence about the effectiveness of different approaches, leading to more informed policy choices at both state and federal levels, just as Justice Harlan's dissent in *Miranda* envisioned.²¹³ For example, states might require video recording of all custodial interrogations, provide enhanced protections for vulnerable populations, or create stronger remedies for violations than those currently available under federal law. The development of state protections would create a laboratory of democracy in criminal procedure, allowing different approaches to be tested and refined. This diversity of approaches could ultimately lead to more effective protections than *Miranda*'s one-size-fits-all federal standard.

The codification of *Miranda* protections would provide much-needed stability in criminal practice. Defense attorneys, prosecutors, and law enforcement would benefit from clear, consistent rules that are not subject to judicial reinterpretation with each new Supreme Court term. This stability would improve efficiency in the criminal justice system and reduce litigation over the admissibility of confessions. Moreover, legislative codification could address many of the practical problems that have emerged in *Miranda*'s implementation. The complex web of exceptions and qualifications that has developed through case law could be replaced with clearer statutory guidelines. The focus could shift from technical compliance with judicially-created rules to ensuring meaningful protection of suspects' rights. The end result would be a system that better serves both law enforcement and individual rights. Police officers would have clearer guidance about permissible interrogation practices, reducing the risk of inadvertently violating suspects' rights. Suspects would have more consistent protection against coercive interrogation techniques, particularly those who are most vulnerable to pressure.

In essence, the end of *Miranda*'s constitutional status need not signal a retreat from protecting against self-incrimination. Instead, as Justice Scalia consistently argued, it could mark a return to the proper constitutional order where the will of the people, expressed through their elected representatives, shapes the specific contours of criminal procedure protections.²¹⁴ His criticism of *Miranda*'s "antidemocratic" power to override legislative judgment finds particular resonance in today's debate over judicial authority.²¹⁵ This rebalancing of institutional roles, returning power to the people's representatives while preserving courts' role in protecting fundamental rights, might ultimately produce more effective and democratically legitimate protections than *Miranda*'s judicially created framework ever achieved. This

213. *Miranda*, 384 U.S. at 524.

214. *Dickerson v. United States*, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting).

215. *Id.*

approach would not only secure these rights against future Court reversals but would also enhance their legitimacy by anchoring them in democratic processes rather than judicial decree.

CONCLUSION

The convergence of *Vega* and *Dobbs* represents a watershed moment in American criminal procedure, creating an unprecedented vulnerability in *Miranda*'s constitutional foundation. While *Miranda* warnings have become deeply woven into the fabric of American legal culture over the past half-century, recent Supreme Court decisions suggest that such cultural entrenchment provides increasingly tenuous protection. The Court's decisive action in *Dobbs* to overturn long-standing precedent, coupled with its explicit questioning of *Miranda*'s constitutional status in *Vega*, creates a clear pathway for reconsidering one of criminal procedure's most fundamental protections.

The theoretical weakness at the heart of *Dickerson*'s preservation of *Miranda* now appears particularly vulnerable to the Roberts Court's more exacting approach to precedent. *Dickerson*'s attempt to secure *Miranda*'s future, while well-intentioned, may have inadvertently created the very vulnerability that now threatens its existence. This tension between judicial protection and constitutional foundation illustrates a broader challenge in preserving fundamental rights through judicial doctrine alone.

The implications of *Miranda*'s potential dismantling extend far beyond technical shifts in criminal procedure. Such a change would fundamentally alter the balance of power between individuals and law enforcement during custodial interrogations, potentially leaving vulnerable populations—including the young, mentally ill, and non-English speakers—particularly exposed without standardized warnings to protect their interests. The vital protections that *Miranda* provides deserve a more secure foundation than the shifting sands of judicial interpretation.

Congress must act decisively to codify *Miranda*'s protections before the Court completes its dismantling of this essential safeguard. As this Note has demonstrated, legislative action represents the most promising path forward for preserving these crucial rights. Congressional codification would offer several distinct advantages: placing *Miranda*'s protections on firm legal ground, providing an opportunity to refine and improve these protections based on decades of practical experience, and restoring the proper constitutional balance by returning policymaking authority to the legislative branch while preserving the judiciary's role in interpreting these protections. State constitutional and statutory frameworks offer an important backstop, but federal legislation can ensure uniform protection nationwide. The challenge lies not in whether these protections can survive *Miranda*'s potential demise but in how they can be secured through democratic processes to better serve both individual rights and law enforcement needs in contemporary society.

The future of constitutional criminal procedure thus stands at a critical juncture where the very foundations of long-accepted protections face unprecedented scrutiny. Justice Scalia's daunting dissent in *Dickerson* may prove prophetic, where he declared that the decision "converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."²¹⁶ Like the ancient Sphinx, *Miranda* stands as a guardian of constitutional rights, its warnings etched into American law as deeply as hieroglyphs in stone. Yet even the Sphinx eventually succumbed to the relentless erosion of time and sand. The same fate may await *Miranda* if its constitutional foundations prove to be built on nothing more than the judicial hubris Justice Scalia recognized. As Justice Harlan warned in his *Miranda* dissent, "the Court's new regime proves so dubious that there can be no due compensation for its weakness in constitutional law."²¹⁷ To preserve the protections pulled from the Fifth Amendment's right against self-incrimination, the legislative branch should build *Miranda* a new foundation. Otherwise, this constitutional Sphinx may find itself joining *Roe* in the graveyard of overturned precedents, ultimately forgotten like § 3501—the very statute that once dared to challenge its authority.

216. *Id.* at 465.

217. *Miranda*, 384 U.S. at 514–15 (Harlan, J., dissenting).

FINISHING SARBANES-OXLEY: HOLDING AUDIT COMMITTEES ACCOUNTABLE

CAITLIN TUDOR*

INTRODUCTION

In the fight to protect American investors from marketplace fraud, the foundation for safeguarding public interest starts within the four walls of a corporation.¹ Ethical business practices, effective safeguards, and strict compliance with law are essential.² After clear failures by companies to uphold these principles snowballed into the Enron, WorldCom, and Tyco scandals, The Sarbanes-Oxley Act (“SOX”)³ was passed with one goal in mind: to protect investors and restore confidence in financial reporting by fixing auditing of U.S. public companies.⁴ To accomplish this, SOX requires public companies to have an audit committee within their board of directors: a committee of independent directors⁵ charged with, among other things, oversight of independent auditors⁶

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1. Luis A. Aguilar, Comm’r, U.S. Sec. & Exch. Comm’n, Speech at Emory University School of Law: Looking at Corporate Governance from the Investor’s Perspective (Apr. 21, 2014), <https://www.sec.gov/newsroom/speeches-statements/2014-spch042114laa> [https://perma.cc/WY6F-JBYP] (emphasizing that good corporate governance is essential to the stability of our capital markets and our economy, as well as the protection of investors).

2. Tom Krantz, *What is SOX (Sarbanes-Oxley Act) Compliance?*, IBM (June 27, 2025), <https://www.ibm.com/topics/sox-compliance#:~:text=To%20be%20SOX%20compliant%2C%20public,the%20accuracy%20of%20financial%20disclosures> [https://perma.cc/T5Z5-GVYK].

3. The Sarbanes-Oxley Act of 2002 (“SOX”) was enacted as Public Law 107-204, and most of its provisions in Titles I through V and Title VII are codified at 15 U.S.C. § 7201 *et seq.*

However, Section 301, Section 501, Title VI, and Article XI (other than Sections 1102, 1104, and 1107) amend or are codified in the Securities and Exchange Act of 1934, as amended (“Exchange Act”), which is codified at 15 U.S.C. § 78a *et seq.*

Title VIII (other than Sections 803 and 804), Title IX (other than Section 904), and Section 1107 amend or are codified in Title 18 of the U.S.C. § 1501.

Section 803 amends 11 U.S.C. § 523(a).

Sections 804, 905, and 1104 amend or are codified in Title 28 of the U.S.C.

Section 904 amends 29 U.S.C. § 1131.

Cross-references between and citations to the provisions of SOX, the Exchange Act, and the U.S.C. are made interchangeably throughout this Note.

4. John C. Coates IV, *The Goals and Promises of the Sarbanes-Oxley Act*, 21 J. ECON. PERSPS. 91, 91 (2007).

5. An “independent director” under audit committee standards is a director who complies with all SEC and exchange requirements for independent of audit committees. Generally, these independence requirements are heightened as compared to traditional directors and prohibit accepting any compensatory fee or being an affiliated person of the issuer. *See* 15 U.S.C. § 78j-1(m)(3)(B).

6. As used in this Note, “independent auditor” refers to the external audit company that is employed to assist with audits of the company at hand.

and the financial reporting process.⁷

However, under the current framework of federal securities law, audit committees face no meaningful consequences for failing to fulfill their federally mandated duties—even when such failures expose millions of investors to risk.⁸ This gap not only weakens the very protections investors depend on but also undermines the integrity of the markets, as millions are vulnerable to preventable risk.⁹

BF Borgers (“BFB”), a recent Securities and Exchange Commission (“Commission”) settlement case, depicts just how dangerous audit committee failures can be and how quickly they can affect millions of investors.¹⁰ In fact, the Commission’s former director of the Division of Enforcement, Gurbir S. Grewal, has credited this scheme as contributing to “one of the largest wholesale failures by gatekeepers in our financial markets.”¹¹ BF Borgers and its owner, Benjamin F. Borgers, were collectively charged with deliberate and systemic failures to comply with Public Company Accounting Oversight Board (PCAOB) standards in its audits and reviews incorporated in more than 1,500 Commission filings from January 2021 through June 2023.¹² According to the Commission’s order, among three-hundred-and-sixty-nine (369) clients whose public filings in the above period incorporated BFB audits and reviews, at least 75% incorporated audits and reviews that failed to comply with PCAOB standards.¹³ None of these hundreds of audit committees reported issues with their financial statements.¹⁴

This failure to fulfill their role as gatekeepers of the financial markets underscores the need for reforms in federal securities law to hold audit committees accountable for their oversight duties.¹⁵ Currently, when a committee fails to detect egregious fraud by independent auditors within their respective Commission filings, there is no applicable consequence within SOX

7. Michael W. Peregrine & Charles W. Elson, *The Important Legacy of the Sarbanes-Oxley Act*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 30, 2022), <https://corpgov.law.harvard.edu/2022/08/30/the-important-legacy-of-the-sarbanes-oxley-act/> [<https://perma.cc/R5DA-R2QA>].

8. See discussion *infra* Part II (analyzing the current applicable federal securities laws).

9. Aguilar, *supra* note 1 (“[M]illions of households invest in stock, bonds, and mutual funds in order to save for retirement These hard-working Main Street Americans are the investors that need to be kept in mind as we think about corporate governance.”).

10. See *In re BF Borgers CPA PC*, Securities Act Release No. 11,283, Exchange Act Release No. 100,053, Accounting & Auditing Enforcement Release No. 4,500 (May 3, 2024), <https://www.sec.gov/files/litigation/admin/2024/33-11283.pdf> [<https://perma.cc/8B6D-TD44>].

11. Press Release, *SEC Charges Audit Firm BF Borgers and Its Owner with Massive Fraud Affecting More Than 1,500 SEC Filings*, SEC (May 3, 2024), <https://www.sec.gov/newsroom/press-releases/2024-51> [<https://perma.cc/EC77-6QAC>].

12. *In re BF Borgers CPA PC*, *supra* note 10, at 3.

13. *Id.* at 7.

14. SEC, *supra* note 11.

15. See generally Coates, *supra* note 4, at 96–97 (“Auditors have traditionally been employed as gatekeepers to prevent, detect, and punish lying corporate agents.”) When considering the goals of Sarbanes Oxley upon its creation, it is clear that gatekeeping financial markets was the critical inquiry in the legislation and should remain a top priority in continued rulemaking.

or the Securities Exchange Act of 1934;¹⁶ all existing antifraud provisions require elements beyond those applicable to oversight roles.¹⁷ While holding an individual audit committee member liable for the entire committee's failure may be unreasonable, reforms are necessary to ensure audit committees, as a whole, are held accountable for failing to perform their oversight responsibilities.

Additionally, while investors have a private right of action against company directors under Section 11(a) of the Securities Act of 1933,¹⁸ a safe harbor in Item 407 of Regulation S-K shields audit committee members from liability for oversight failures.¹⁹ To ensure investors can hold committee members accountable, this safe harbor should be removed, thereby creating external incentives for audit committee members to exercise proper due diligence as required by law.

This Note will begin with a brief history of audit committees, their development, and their importance in the financial reporting process. It will then examine the current state of securities regulation applicable to audit committee members, highlighting its failure to accomplish the original objectives behind the Sarbanes-Oxley Act. After analyzing the shortcomings of current law, this Note will argue that the Commission must promulgate a new rule amending Sarbanes-Oxley to grant the Commission a clear enforcement mechanism against audit committees who fail in their oversight duties. Then, the Note will shift into discussing the private right of action shortcoming, advocating for modification of the abovementioned safe harbor in Item 407. The Note will conclude with a review of key policy considerations, emphasizing the importance of audit committee due diligence.

I. HOW AUDIT COMMITTEES DEVELOPED: AN OVERVIEW

An audit committee is an independent group of an organization's board of directors responsible for oversight of internal controls and key components of the company's financial reporting and disclosure processes.²⁰ Section 301 of SOX required that, no later than 270 days after enactment, "the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer²¹ that is not in compliance with the requirements of any portion of paragraphs (2) through (6)."²² These paragraphs outline several anti-fraud strengthening measures.

16. See discussion *infra* Part II.

17. See discussion *infra* Part II.

18. See 15 U.S.C. § 77k(a).

19. See 17 C.F.R. § 229.407(d)(5)(iv) (2025).

20. *Audit Committee*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/accounting/audit-committee/> [<https://perma.cc/2Q6X-6HES>] (last visited Oct. 14, 2024).

21. "Issuer" is defined as any natural person, company, government, or political subdivision, agency or instrumentality of a government who proposes to issue any securities. See 15 U.S.C. § 78c(a)(8).

22. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775–76 (footnote added).

Paragraph (2) states:

The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.²³

Thus, Section 10A(m)(1) of the Securities Exchange Act of 1934, as amended (“Exchange Act”), became effective April 25, 2003, requiring the rules of each national securities exchange and association to “prohibit the initial or continued listing of any security of an issuer that is not in compliance with the requirements of any portion” of the regulation.²⁴ Additionally, the regulations require audit committees to disclose their responsibilities in Commission filings and certify the quality of independent auditors’ work.²⁵

Audit Committees play a vital role in the financial reporting system of public companies by overseeing financial reporting, internal controls, and the external, independent audit process.²⁶ As the previous Chief Accountant of the Commission, Paul Munter, stated, “Effective oversight by strong, active, knowledgeable, and independent audit committees significantly furthers the collective goal of providing high quality, reliable financial information to investors.”²⁷ Therefore, an audit committee that *actively* fulfills its oversight responsibilities is essential in setting a tone that emphasizes the importance of providing investors with accurate and reliable information.²⁸ Additionally, studies support the Commission’s stance that *active* audit committees make a difference in preventing financial misstatements and fraud, reinforcing the importance of holding audit committees liable for these critical responsibilities.²⁹

Audit committees play a key role in ensuring a company has a high “audit quality,” meaning the business creates an environment which maximizes the

23. *Id.*

24. 17 C.F.R. § 240.10A-3(a)(1) (2025).

25. See SEC, OMB 7100-0091, FORM 10-K GENERAL INSTRUCTIONS, ITEM 14.

26. *Audit committee oversight responsibilities*, DELOITTE, <https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/audit-committee-responsibilities.html> [https://perma.cc/ZZ26-H9VH] (last visited Oct. 14, 2024).

27. Paul Munter, Chief Acct., SEC, *The Importance of High Quality Independent Audits and Effective Audit Committee Oversight to High Quality Financial Reporting to Investors* (Oct. 26, 2021), <https://www.sec.gov/newsroom/speeches-statements/munter-audit-2021-10-26> [https://perma.cc/T5CT-Q39T].

28. *Id.*

29. *Id.*

likelihood that quality and compliant audits are performed consistently.³⁰ One study even quantified audit quality using the following mathematical equation:

$$\text{Audit Quality during period } t = \text{company auditor value} + \text{audit committee size} + \text{meetings during period } t + \text{audit committee financial expertise for firm at period } t + \text{audit committee effectiveness for firm at period } t.^{31}$$

By examining audit committees in Nigeria and benchmarking their attributes to the requirements of the 2011 Commission code, the study's authors concluded that all the variables examined indeed contribute to audit quality.³² This finding demonstrates that audit committees that actively meet and effectively fulfill their federally mandated oversight duties directly correlate with improved audit quality.³³

A Canadian empirical study further supports these findings, reinforcing the critical role audit committees play in ensuring investor protection within capital markets.³⁴ The study reviewed literature on corporate oversight and its relationship with proxy governance measures linked to financial reporting quality, testing the idea that audit committees are “the ultimate monitor” of the financial accounting reporting system.³⁵ By synthesizing the results of multiple studies, the authors show that large and *active* audit committees have a clear, positive correlation with the quality of a company's audit.³⁶

Federal regulators emphasize the crucial role of audit committees in financial reporting, and empirical studies consistently link their effectiveness to higher audit quality. This underscores the critical function audit committees serve in safeguarding investors. However, for this role to be meaningfully upheld, clear enforcement mechanisms must exist to react when committees fail. As the following part demonstrates, the current federal securities framework lacks such a mechanism within Commission enforcement.

II. CURRENT COMMISSION REGULATIONS AND INAPPLICABILITY TO AUDIT COMMITTEES

Although SOX includes several liability provisions designed to prevent

30. Osariemen Asiriwa et al., *Audit Committee Attributes and Audit Quality: A Benchmark Analysis*, 19 BUS.: THEORY & PRAC. 37 (2018) (noting that audit quality is a key measure of consumer trust and confidence in a company's financial reporting process).

31. *Id.* at 43 (summarizing variation of equation from examining audit committees in Nigeria by benchmarking their attributes against U.S. regulator systems).

32. *Id.* at 47.

33. *Id.*

34. See Luo He et al., *Board Monitoring, Audit Committee Effectiveness, and Financial Reporting Quality: Review and Synthesis of Empirical Evidence*, J. FORENSIC & INVESTIGATIVE ACCT., July–Dec. 2009, at 18.

35. *Id.*

36. *Id.* at 28.

fraud, misstatements, and unethical conduct, these provisions are largely ineffective against audit committees and their members.³⁷ This is due to various protections from liability that are extended to audit committee members.³⁸ First, lack of scienter is a defense available to audit committee members accused of misconduct.³⁹ Second, the very duty of audit committees—to oversee—does not lend itself to liability.⁴⁰ Third, the extremely forgiving expert standards applicable to those serving on an audit committee aid in avoiding liability under federal securities laws requiring “professional” or “expert” involvement.⁴¹ As these and other relevant regulations and safe harbors within are explored below, it becomes evident that these liability provisions are inapplicable to audit committees.

A. Rule 10b-5 of the Securities Exchange Act of 1934

The best-known rule in securities law, which in fact pre-dates SOX by many decades, Rule 10b-5, states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.⁴²

As discussed below, when attempting to apply the various subsections of this

37. As two examples of fraud prevention regulations failing to reach audit committees, see 17 C.F.R. § 240.10b-5 (2025) (prohibiting securities fraud) and 17 C.F.R. § 230.17(a) (2025) (addressing fraud under the Securities Act). These regulations are discussed further *infra* Part II.A and II.B.

38. See *infra* Part II.A and II.B.

39. To establish scienter, a plaintiff must show that an individual defendant acted with “intent to deceive, manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

40. As is the case in *BFB*, it is important to remember that the fraud scheme was carried out by an independent auditor, and that the audit committee did not play a *direct* role in the scheme. See *In re BF Borgers CPA PC*, *supra* note 10, at 2–7.

41. Under Item 407 of Regulation S-K, a company may have a financial expert serving on the committee. See 17 C.F.R. § 229.407(d)(5)(i)(A)(1) (2025). However, a safe harbor prevents the financial expert from liability as an “expert” under Section 11 of the Securities Act of 1933. See 17 C.F.R. § 229.407(d)(5)(iv).

42. 17 C.F.R. § 240.10b-5.

rule to an audit committee that fails to oversee the work of the independent auditor, issues arise that limit each respective section's applicability.

1. *Making Untrue Statements Under Subsection (b) of 10b-5.*—Subsection (b) explicitly prohibits any person, directly or indirectly, to *make* any untrue statement of a material fact or to omit to state a material fact to make the statement not misleading.⁴³ A leading case in determining what (or who) constitutes the “maker” of a statement is *Janus Capital Group, Inc. v. First Derivative Traders*.⁴⁴ Here, the Supreme Court considered whether Janus Capital Management LLC (“JCM”), a mutual fund investment adviser, could be held liable under Rule 10b-5 for false statements included in its client’s (Janus Investment Funds) prospectus.⁴⁵ Janus Capital Group, Inc. (“JCG”) created a family of mutual funds, which was a separate legal entity from JCM.⁴⁶ JCM, a subsidiary of JCG, was hired as the fund’s investment advisor.⁴⁷ The prospectuses of several investment funds falsely stated that JCM was taking steps to prevent “market timing,” even though JCG and JCM were secretly allowing it.⁴⁸

The Supreme Court ruled that JCM was not liable under Rule 10b-5 because it did not “make” the false statements in the prospectus.⁴⁹ In a 5-4 decision, the Court narrowly held that, for purposes of 10b-5, “the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.”⁵⁰ Without such control, a person who prepares or publishes a statement on behalf of another is not its maker; they can only suggest what to say, not “make” the statement.⁵¹

However, four dissenting justices opposed this narrow interpretation, advocating for a broader definition of ‘making a statement.’⁵² They argued that “both language and case law indicate that, dependent upon the circumstances, a management company, a board of trustees, individual company officers, or others, separately, or together, might ‘make’ statements . . . even if a board of directors has ultimate content-related responsibility.”⁵³ They further stated that, under the majority’s rule, it seems unlikely that the Commission itself “could exercise the authority Congress has granted it to pursue primary violators who ‘make’ false statements or the authority that Congress has specifically provided to prosecute aiders and abettors to securities violations.”⁵⁴

When applying the majority rule, audit committees are plainly beyond

43. *Id.* (emphasis added).

44. 564 U.S. 135 (2011).

45. *Id.* at 140.

46. *Id.* at 138.

47. *Id.*

48. *Id.* at 138–39.

49. *Id.* at 138.

50. *Id.* at 142.

51. *Id.*

52. *Id.* at 150–51 (Breyer, J., dissenting).

53. *Id.* at 150.

54. *Id.* at 157.

liability under 10b-5 as they are not the ‘maker’ of any statement. The Commission filings are under the ultimate authority of the company itself, while the audit committee is simply overseeing and recommending the inclusion of independent auditor work.⁵⁵ Thus, they are beyond liability under the *Janus* test for ‘making’ a false or misleading statement under Rule 10b-5.

2. *Employing Any Device to Defraud or Engaging in Any Act which Operates as Fraud under (a) & (c).*—As for 10b-5(a), a person who employs “any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security” may be held liable for a violation of 10b-5.⁵⁶ *Lorenzo v. SEC*, a recent Supreme Court decision, analyzes whether those who do not “make” false statements but merely “disseminate false or misleading statements to potential investors *with the intent to defraud*” can be found in violation of subsection (a) or (c).⁵⁷ In *Lorenzo*, the defendant’s firm was hired to sell fifteen million dollars’ worth of debentures.⁵⁸ However, the company had publicly disclosed, and explicitly told the defendant, that its intellectual property was worthless and its total assets were below \$400,000.⁵⁹ Shortly after, the defendant sent emails to prospective investors describing the offering and falsely stating that the company had “3 layers of protection” which included “\$10 million in ‘confirmed assets.’”⁶⁰ The Commission instituted proceedings against the defendant and ultimately found him in violation of Rule 10b-5, leading to this appeal.⁶¹

Sections 10b-5(a) and (c) both require scienter, but in *Lorenzo*, the appeals court’s scienter finding was not challenged by the defendant.⁶² “After examining the relevant language, precedent, and purpose,” the Supreme Court held that “dissemination of false or misleading statements *with intent to defraud* can fall within the scope of subsections (a) and (c) of Rule 10b-5 . . . even if the disseminator did not ‘make’ the statements and consequently falls outside subsection (b) of the Rule.”⁶³ “By sending emails he understood to contain material untruths, [the defendant] ‘employ[ed]’ a ‘device,’ ‘scheme,’ and ‘artifice to defraud’” under subsection (a).⁶⁴ The same behavior also constituted engaging in an act that operated as fraud or deceit under subsection (c).⁶⁵ The Court stated a bright-line rule: “Those who disseminate false statements with

55. See 17 C.F.R. § 229.407(d)(3) (2025) for the extent of audit committee review of financial statements.

56. 17 C.F.R. § 240.10b-5(a) (2025).

57. 587 U.S. 71, 74 (2019) (emphasis added).

58. *Id.* at 75.

59. *Id.*

60. *Id.*

61. *Id.* at 76.

62. *Id.* However, it should be noted that a showing of scienter is required under this rule. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (discussing scienter requirements).

63. *Lorenzo*, 587 U.S. at 78 (emphasis added).

64. *Id.*

65. *Id.*

intent to defraud are primarily liable under Rules 10b-5(a) and (c).”⁶⁶

Although *Lorenzo* does expand 10b-5 liability beyond that recognized in *Janus*, it is unlikely to apply to audit committees that fail to detect the fraud of independent auditors before financial statements are published.⁶⁷ This is because, in such circumstances, the Commission would likely struggle to prove scienter, or any intent on behalf of the audit committee to defraud investors. Without this critical element (which was not at issue in *Lorenzo*), the audit committee cannot be said to have violated 10b-5.⁶⁸ Additionally, as under subsection (b), because an audit committee is not the party making such statement, it is further removed from the likelihood of liability under this section.⁶⁹

B. Rule 17(a) of the Securities Act of 1933

To this point, this Note has focused on the Exchange Act, which primarily regulates the securities market. In addition, Congress has enacted the Securities Act of 1933, as amended (“Securities Act”), which primarily regulates the offer and sale of securities themselves. Rule 17(a) of the Securities Act of 1933 states that:

It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

- (1) To employ any device, scheme, or artifice to defraud, or
- (2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.⁷⁰

When comparing the language of Rule 17(a) with Rule 10b-5, clear similarities in structure are evident as both rules prohibit fraud in the offer and sale of securities.⁷¹ However, Rule 17(a) diverges from 10b-5 in two critical components. First, unlike Rule 10b-5, which requires scienter, Rule 17(a) allows

66. *Id.* at 83.

67. *See, e.g., id.*

68. *Id.* The bright line rule explicitly requires a showing of intent to defraud investors (scienter).

69. *Id.* If the committee can establish that they are not responsible for disseminating the statement, then they are not liable under the bright line test.

70. 15 U.S.C. § 77q(a).

71. *Compare id., with* 17 C.F.R. § 240.10b-5 (2025) (the rules read similar and have the same structure).

for claims based on negligence, and it does not contain the ‘maker of the statement’ requirement so often contended in Rule 10b-5.⁷² Second, “subsections (1) and (3) of Section 17(a) apply to scheme liability,” while “subsection (2) applies to misstatement liability.”⁷³

1. *Scheme Liability under 17(a)(1) and (3).*—In cases like the audit committees in *BFB*, which failed to correct financial report misstatements committed by external audit companies, scheme liability under 17(a) is unlikely to be established.⁷⁴ Under 17(a), “a ‘device’ . . . is simply that which is devised, or formed by design; a ‘scheme’ is a project, plan, or program of something to be done; and an ‘artifice’ is an artful stratagem or trick.”⁷⁵ For the same reasons that Rule 10b-5 liability is unlikely to attach to audit committees, the Commission would likely be unable to prove that audit committees actively participated in a scheme to defraud simply by failing to exercise diligent oversight.

As stated in *SEC v. Kelly*, “where the primary purpose and effect of a purported scheme is to make a public misrepresentation or omission, courts have routinely rejected the SEC’s attempt to bypass the elements necessary to impose ‘misstatement’ liability . . . by labeling the alleged misconduct a ‘scheme’ rather than a ‘misstatement.’”⁷⁶ Because the misstatement liability under 17(a) has a high burden of proof, courts have rejected any attempt by federal regulators to circumvent the difficulties under subsection (2) by recharacterizing a misstatement as a scheme. The U.S. District Court for the Southern District of New York has held that “allow[ing] primary liability to attach to individuals who did no more than facilitate preparation of material misrepresentations or omissions actually communicated by others . . . would swallow [the] bright-line test altogether.”⁷⁷ Thus, unless the Commission could show the audit committee colluding with an external auditor in a deliberate plan to misstate financial reports, an audit committee is unable to be held liable under scheme liability of 17(a) and must instead be found to have violated 17(a)(2).⁷⁸

2. *Misstatement Liability under 17(a)(2).*—Liability under Rule 17(a)(2) requires that a defendant both communicate an untrue statement or omission and receive money or property as a result of such misstatement.⁷⁹ Additionally, liability thereunder only requires proof of acting with negligence.⁸⁰ In *SEC v.*

72. See 15 U.S.C. § 77q(a).

73. *SEC v. Kelly*, 817 F. Supp. 2d 340, 345 (S.D.N.Y. 2011).

74. See *id.* at 345–46.

75. *Malouf v. SEC*, 933 F.3d 1248, 1260 (10th Cir. 2019) (quoting *Lorenzo v. SEC*, 587 U.S. 71, 78 (2019)) (internal quotations omitted).

76. *Kelly*, 817 F. Supp. 2d at 343.

77. *SEC v. PIMCO Advisors Fund Mgmt. LLC*, 341 F. Supp. 2d 454, 467 (S.D.N.Y. 2004).

78. It is important to again note that the core of this Note goes to audit committees who are *not* participating in a scheme to defraud, or any separate cause of action for such acts. This Note covers instead failure to oversee, a critical first step in maintaining integrity in the financial reporting system.

79. See 15 U.S.C. § 77q(a)(2).

80. See *id.*

Shanahan, the district court dismissed the claims against the defendant because of failure of proof.⁸¹ The Commission presented no evidence “with respect to the degree of care that an ordinary careful person would use under the same or similar circumstances, whether Mr. Shanahan, Jr., exercised reasonable care . . . [and] absolutely no evidence regarding Mr. Shanahan, Jr.’s duties as a member of [board].”⁸² This left the jury to speculate as to whether the duty truly existed and whether the defendant failed to perform such duty.⁸³

The Eighth Circuit agreed with the district court, highlighting just how high the burden under 17(a)(2) is for the SEC to hold a member of a board responsible.⁸⁴ It discussed the complexity in determining whether a defendant was negligent or engaged in the fraudulent practices and how evidentiary navigation of “complex issues” is required to determine if fraudulent practices occurred.⁸⁵ These complexities listed by the Court include “opinions accounting, [p]lan administration, the intricacies of securities filings,” the allocation of responsibilities between a company’s “professionals, outside auditors, inside and outside counsel, board of directors, and . . . [c]ommittees,” reliance on other professionals, and several other considerations.⁸⁶ This decision underscores the significant evidentiary burden under Rule 17(a)(2) and demonstrates why pinning liability for communicating a financial statement on a single committee—such as an audit committee—is likely unreasonable when multiple entities are involved in the process.

Additionally, 17(a)(2) requires receiving money or property in exchange for the communication of such false statement, an element not clearly defined by the courts. For example, in *SEC v. Wolfson*, a defendant ‘clearly’ received money or property by receiving a consulting fee for preparing a document in which he violated 17(a)(2).⁸⁷ However, in *SEC v. Forman*, the court held that when a defendant received a set, predetermined bonus not tied to a company’s performance, receiving money in exchange for the misstatement was not proven.⁸⁸ In *Forman*, the Commission also argued that the misstatement artificially increased the company’s stock price, thereby benefiting the defendant as a stakeholder.⁸⁹ However, the court rejected this claim due to the lack of evidence linking the misstatement to the stock price increase.⁹⁰ Given this precedent, it is unlikely that an audit committee member’s salary alone will be evidence of receiving money in exchange for a misstatement, absent proof that the salary is directly tied to performance of the company based on such

81. 646 F.3d 536 (8th Cir. 2011).

82. *Id.* at 545–46.

83. *Id.* at 546.

84. *Id.*

85. *Id.*

86. *Id.*

87. 539 F.3d 1249, 1264 (10th Cir. 2008).

88. *SEC v. Forman*, No. 07-11151-RWZ, 2010 WL 2367372, at *8 (D. Mass. June 9, 2010).

89. *Id.*

90. *Id.*

statement.⁹¹ Furthermore, the Commission's independence requirements limit the monetary fee that committee members may receive from an issuer.⁹² While this technical inquiry will depend on case-specific factors, it further raises the evidentiary burden for the Commission when considering the role of an audit committee.

Because 17(a) aims to target those who are primary violators of fraud provisions (much like 10b-5), an audit committee is not likely to be held liable under these statutes for failure of their oversight responsibilities.⁹³ This, however, does not diminish the importance of proper oversight by the committees.⁹⁴ It instead shows again that a statute explicitly enforcing proper oversight is a necessary next step for SOX.

C. Officer and Director Bars

Officer and director bars are among the most effective enforcement mechanisms available to the Commission, used to prevent an individual from serving as an officer or director of a public company following misconduct.⁹⁵ When Congress passed the Securities Enforcement Remedies and Penny Stock Reform Act of 1990,⁹⁶ it did so in response to the "wide range of securities law violations in the large and increasingly complex securities markets."⁹⁷ This regulation remains central to the Commission's regulation of conduct within United States markets. In fact, in 2024, the Commission obtained orders barring 124 individuals from service as officers or directors of public companies—the second-highest number of such bars in a decade.⁹⁸

In defining the elements required for an officer and director bar, *SEC v. Patel* is a landmark case, serving to define substantial unfitness through the creation of a six-factor test.⁹⁹ The court identified the following factors as relevant in resolving issues of substantial unfitness: "(1) the 'egregiousness' of the underlying securities law violation; (2) the defendant's 'repeat offender' status; (3) the defendant's 'role' or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the

91. *See id.*

92. *See* 15 U.S.C. § 78j-1(m)(3)(B).

93. *See* SEC v. Wolfson, 539 F.3d 1249, 1264 (10th Cir. 2008).

94. Violations of both statutes are frequently alleged by the SEC. *See Forman*, 2010 WL 2367372; *Wolfson*, 539 F.3d at 1249.

95. Jon Carlson, *Securities Fraud, Officer and Director Bars, and the "Unfitness" Inquiry after Sarbanes-Oxley*, 14 FORDHAM J. CORP. & FIN. L. 679, 685 (2009).

96. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931. This is the Act which gave the Commission the power to enforce and use officer and director bars.

97. Carlson, *supra* note 95, at 684.

98. Press Release, SEC, *SEC Announces Enforcement Results for Fiscal Year 2024* (Dec. 17, 2024), <https://www.sec.gov/newsroom/press-releases/2024-186#:~:text=In%20addition%2C%20in%20fiscal%20year,bars%20obtained%20in%20a%20decade> [https://perma.cc/W5ZC-K2KJ].

99. *See* 61 F.3d 137 (2d Cir. 1995).

violation; and (6) the likelihood that misconduct will recur.”¹⁰⁰ Officer and director bars are important remedies within securities regulation as company executives are generally less motivated to reform behavior when only punished with fines.¹⁰¹ However, as discussed below, their applicability to audit committees is likely limited.

1. Audit Committees’ “Role” in Fraud Is Minimal.—Due to the pure oversight nature of an audit committee with respect to any fraud committed by an independent auditor, the audit committee’s “role” in the fraud is minimal under Barnard’s definition. As stated in her article:

[T]he first post-threshold question federal courts should consider when presented with a substantial-unfitness inquiry is whether the defendant’s unlawful conduct occurred while he was acting as an officer or director of a public company or whether he was acting in some nonexecutive capacity. The answer to this question should prove significant ¹⁰²

Audit Committee members are often also company executives but are performing as an independent committee separate of their executive function.¹⁰³ Additionally, as illustrated in *BFB*, the audit committee’s misconduct involved a failure to properly oversee an independent auditor—not the direct act of making the misstatements at issue.¹⁰⁴ Thus, their role in the fraud scheme itself is limited.

2. Lack of Scienter.—Under the Remedies Act, a court cannot enter a suspension or bar order absent a finding of scienter.¹⁰⁵ When outlining the elements considered by the court in *SEC v. Patel*, Barnard defined scienter by relying on *Sundstrand Corp. v. Sun Chemical Corp.*:

A defendant’s conduct may be intentional but, at a minimum, it must be “highly unreasonable, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have

100. *Id.* at 141 (listing factors suggested in a law review article by Jayne W. Barnard entitled *When Is a Corporate Executive “Substantially Unfit to Serve”?*, 70 N.C. L. REV. 1489, 1492–93 (1992)).

101. Carlson, *supra* note 95, at 685.

102. Jayne W. Barnard, *When Is a Corporate Executive “Substantially Unfit To Serve”?*, 70 N.C. L. REV. 1489, 1513 (1992).

103. See 17 C.F.R. § 240.10A-3(b)(1)(i) (2025) (“Each member of the audit committee must be a member of the board of directors of the listed issuer and, must otherwise be independent.”).

104. *In re BF Borgers CPA PC*, *supra* note 10.

105. Barnard, *supra* note 102, at 1515 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976) (holding that § 10(b) requires scienter), and *Aaron v. SEC*, 446 U.S. 680, 697 (1980) (holding that 17(a)(1) requires scienter)).

been aware of it.”¹⁰⁶

A finding of scienter in cases involving a failure of oversight duties is highly unlikely, as establishing scienter requires showing an individual defendant acted with intent to deceive, manipulate, or defraud.¹⁰⁷ Because audit committees failing in their oversight role likely only amounts to negligence, not intentional misconduct, this falls short of the necessary threshold for a showing of scienter and prevents effective application of officer and director bars to such committees.

3. *Economic Stake*.—According to Barnard, “[l]ack of an economic stake need not insulate defendants from entry of a Remedies Act order, but the presence of an economic stake in a scheme to defraud investors should serve as an aggravating factor tending to favor such an order.”¹⁰⁸ This element serves as a prime example of why the officer and director bar does not work for audit committees. Unless the committee actively participated in the fraud scheme (a separate crime from failing to fulfill oversight duties), there would be no financial gain in merely failing to fulfill their duty to properly oversee the independent auditor.¹⁰⁹ While this does not dispose of the possibility of a bar, this consideration in conjunction with the rest of the above analysis, demonstrates why this remedy is unlikely to be enforceable against audit committees for failure in oversight capacity.

D. Rule 102(e)

Promulgated pursuant to authority granted by Section 602 of SOX, Rule 102(e) gives the Commission the power to suspend or bar a professional from appearing before the Commission, or revoke a firm’s registration.¹¹⁰ Specifically, the rule states:

The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter: . . .

- (ii) To be lacking in character or integrity or to have engaged in unethical or improper professional conduct; or
- (iii) To have willfully violated . . . Federal securities laws ¹¹¹

106. *Id.* at 1515–16 (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)).

107. *Hochfelder*, 425 U.S. at 197. As discussed *supra* note 39, scienter can be shown through an actual intent to defraud or recklessness.

108. Barnard, *supra* note 102, at 1517.

109. See *supra* Part II.B.2 for a further discussion on the considerations of salary and financial gain in conjunction with the actions of the audit committee.

110. 17 C.F.R. § 201.102(e) (2025).

111. *Id.*

With respect to licensed accountants, improper professional conduct includes intentional conduct, reckless conduct, and two types of negligent conduct: a single instance of highly unreasonable conduct that violates applicable professional standards or repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards.¹¹²

Checkosky v. SEC, a 1998 case from the D.C. Circuit, sparked a critical amendment to Rule 102(e) that shaped the current reading.¹¹³ In *Checkosky*, the court found the Commission had not clearly articulated what constitutes “improper professional conduct” under 102(e).¹¹⁴ In response, the Commission amended the rule, with the final version published in October 1998.¹¹⁵ The Commission described the amendment as clarifying “the Commission’s standard for determining when accountants engage in ‘improper professional conduct’ under Rule 102(e)(1)(ii).”¹¹⁶ The amendment was intended to cover violations of professional standards that demonstrate *an accountant’s* lack of competence to practice before the commission.¹¹⁷

Further, this amendment came to fruition as the Commission aimed to underscore the importance of the role and the need for “*auditors* [to] exercise due care in their audit of a company’s financial statements.”¹¹⁸ In its final notice, the Commission explained:

Investors have come to rely on the accuracy of the financial statements of public companies when making investing decisions. Because the Commission has limited resources, it cannot closely scrutinize every financial statement. Consequently, the Commission must rely on the competence and independence of the auditors who certify, and the accountants who prepare, financial statements. In short, both the Commission and the investing public rely heavily on accountants to assure corporate compliance with federal securities law requirements and disclosure of accurate and reliable financial information.¹¹⁹

This amendment makes clear the intent of the Commission when promulgating and amending Rule 102(e)—it applies specifically to professional standards governing *accountants*.¹²⁰

Notably, audit committee members are not required to be *accountants* under SOX. While SOX itself does not define “accountant,” under PCAOB Rule 1001,

112. 17 C.F.R. § 201.102(e)(iv).

113. 139 F.3d 221 (D.C. Cir. 1998).

114. *Id.* at 223.

115. Amendment to Rule 102(e) of the Commission’s Rules of Practice, 63 Fed. Reg. 57164 (Oct. 26, 1998) (codified at 17 C.F.R. pt. 201).

116. *Id.*

117. *Id.*

118. *Id.* at 57164–65 (emphasis added).

119. *Id.* at 57165.

120. *Id.* (emphasis added).

as approved by the Commission, the term “accountant” means a natural person who either (1) is a certified public accountant, (2) holds a degree in accounting or a license or certification authorizing them to engage in the business of accounting, or (3) holds a degree in a field other than accounting and participates in audits—excluding individuals engaged solely in clerical or ministerial tasks.¹²¹

To serve on an audit committee, one must simply be an independent director of the publicly traded corporation.¹²² Because audit committees are neither comprised of “accountants” nor acting as accountants, they are likely beyond the scope of liability for violations of Rule 102(e).¹²³ This reading is further supported by the fact that no publicly available case law demonstrates the Commission bringing a successful 102(e) claim against an audit committee or audit committee member.¹²⁴ Thus, even if an argument could be made that audit committees are exposed to liability under Rule 102(e), such an application of the rule is far from established and has never been successfully pursued by the Commission.

After analyzing Rule 10b-5, 17(a), 102(e), and officer and director bars in relation to audit committees, a violation of a committee’s federally mandated oversight duty likely does not rise to the level of liability under these existing rules. That does not mean, however, that audit committee diligence is not important to the integrity of financial markets. As previously discussed, multiple empirical studies demonstrate a direct correlation between an audit committee actively fulfilling their oversight duties and higher audit quality. Moreover, in recent years, the Commission has emphasized its commitment to holding companies accountable for fulfilling mandated duties in publicly reported documents.¹²⁵ In fact, the Division of Enforcement stated, “it is foundational to the proper operation of the securities markets that public companies provide materially accurate information to investors Charging individuals for securities law violations, where appropriate, is essential for accountability and deterrence and for enhancing public trust in the markets.”¹²⁶ Therefore, to allow the Commission to continue its goal of enhancing public trust and preventing the disclosure of materially inaccurate information, audit committees must be diligent in executing their oversight responsibility. Holding audit committees liable will incentivize diligent oversight, improve audit quality, and boost public

121. Pub. Co. Acct. Oversight Bd., Bylaws and Rules, Rule 1001(a)(ii).

122. 17 C.F.R. § 240.10A-3 (2025). Only one person on the committee needs to have enough relevant experience to be deemed the boards “financial expert,” but they too are not required to be an accountant. *See* 17 C.F.R. § 229.407(d)(5)(i)(A)(1) (2025).

123. *See* 17 C.F.R. § 240.10A-3; 17 C.F.R. § 229.407(d)(5)(i)(A)(1) (under the federal regulations, audit committees have no requirement to have even one accountant as a member).

124. This point was determined by independent research on legal research platforms including Lexis and Westlaw with no results indicating that the Commission has used 102(e) as a cause of action as against the audit committee for failure to oversee the work of independent auditors.

125. SEC, *supra* note 98.

126. *Id.*

confidence in the market—a critical focus of the Commission in recent years.¹²⁷

III. A REGULATION ALLOWING THE COMMISSION ENFORCEMENT OVER AUDIT COMMITTEE MISCONDUCT

In creating a regulation allowing the Commission to enforce audit committee oversight roles, it is important to strike a balance between the public interest in effective oversight of financial reporting and the committee's limited role in the creation of such financial documents. Additionally, company executives are generally less motivated to reform their behavior when punished only with fines.¹²⁸ For this reason, a regulation in which the committee may be punished by a bar from future service as a committee member or director of any public company may represent the most appropriate balance between effectiveness and punitive response. Additionally, because a bar would not constitute a claim modeled on common law, it would likely avoid the constitutional concerns raised in the recent *Jarkesy* decision, allowing the Commission to impose such penalties without implicating the jury trial requirement addressed in that case.¹²⁹

A. The Jarkesy Issue

On June 27, 2024, the Supreme Court in *SEC v. Jarkesy* ruled that the Seventh Amendment's right to trial by jury applies to certain enforcement actions brought by the Commission, severely limiting what actions can be requested in administrative proceedings.¹³⁰ The court held that any claim modeled on a common law cause of action and seeking a remedy available only in courts of law is entitled to a jury trial in an Article III court.¹³¹ Thus, defendants facing monetary penalties are entitled to trial by jury.¹³² However, non-common law remedies, such as a bar from the privilege of appearing before the Commission, may still proceed through administrative hearings.¹³³

127. *Id.*

128. Barnard, *supra* note 102, at 1517.

129. *See SEC v. Jarkesy*, 603 U.S. 109 (2024).

130. *Id.* at 139–40.

131. *Id.* at 133 (“To determine whether the claim implicated the Seventh Amendment . . . We examine[] whether the matter was from [its] nature ‘subject to a suit at common law.’”) (some internal quotation marks omitted).

132. *Id.* at 151 (Gorsuch, J., concurring) (discussing how the “in-house civil-penalty scheme” violated Article III).

133. *Id.* (“Because the action the SEC seeks to peruse is not the stuff of equity or admiralty jurisdiction but the sort of suit historically adjudicated before common-law courts, the Seventh Amendment [applied].”) However, since a bar from the privilege of appearing before the Commission is *not* a suit historically adjudicated before common law courts, it may peruse in administrative hearings.

*B. Example Regulation-Bar from Serving on Any Public
Company Board of Directors*

In creating this regulation, the Commission could simply amend the Rules of Practice, codified under 17 C.F.R. § 201.100.¹³⁴ The Commission Rules of Practice serve as a comprehensive procedural framework for how the SEC conducts investigations, hearings, and behaviors that constitute enforcement actions.¹³⁵ A regulation prohibiting a director from serving on an audit committee would be a natural fit within this framework.¹³⁶ Borrowing structure and form from Rule 102(e), a model regulation could read:

(e) *Suspension of ability to serve on audit committee—*

(1) **Generally.** The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it as a member of any audit committee or public company board of directors to any person who is found by the Commission after notice and opportunity for hearing in the matter:

- (i) To be lacking in character or integrity or to have engaged in unethical or improper professional conduct; or
- (ii) To have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder; or
- (iii) To have engaged in intentional or knowing conduct, including reckless conduct, that results in a violation of the applicable mandated duties of audit committees; or
- (iv) The following negligent conduct:
 - (A) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an audit committee (or member thereof) knows, or should know, that heightened scrutiny is warranted.
 - (B) Repeated instances of unreasonable conduct, each resulting in a violation of applicable audit

134. See 17 C.F.R. pt. 201 (2025).

135. *Id.* This regulation covers everything from penalties against accountants to business hours, hearing officers, filing with the commission, and definitions, among other things.

136. *Id.* Because this regulation covers such a broad scope of administrative action, adding another cause for administrative action seems a natural fit.

committee standards, that indicates a lack of competence to serve on such audit committee.¹³⁷

By adopting the form of Rule 102(e), this proposed regulation would give the Commission broad authority to investigate and address a wide range of audit committee misconduct.¹³⁸

With a regulation like this in place, audit committees would face a direct consequence for failing to fulfill their federally mandated duties. When audit committees fail to perform adequate oversight, as was the case in *BFB*, the Commission would have multiple avenues under this model regulation to hold them accountable because of the broad scope of the regulation. This framework would enable the Commission to develop its case and pursue liability against audit committees, provided it can meet its burden of proof.¹³⁹ By establishing a clear procedure for addressing audit committee shortcomings, this regulation would create a powerful incentive for committees to diligently fulfill their responsibilities and enhance oversight quality.

C. Implementing the Regulation Via Commission Rulemaking Under the Administrative Procedure Act

Because the Commission is tasked with overseeing the securities market and possesses the most comprehensive knowledge of current regulations, its staff is best positioned to develop a regulation that appropriately balances the interests of audit committee members with the need to address potential negligence in oversight.¹⁴⁰ When proposing new regulations, the Commission has a specific rulemaking process that ensures their compliance with the Administrative Procedure Act (APA), the federal law governing agency rulemaking.¹⁴¹ The APA first requires notice of proposed rulemaking to be

137. This model regulation was based in structure and form on 102(e), with language changes that allow for the regulation's applicability to audit committee members. See 17 C.F.R. § 201.102(e) (2025). As discussed previously, 102(e) is an incredibly well-written regulation from the Commission's perspective. However, with its scope limited to only accountants, it is unable to be used against audit committee members. Thus, an "easy" solution is to simply follow 102(e) in form and language, with slight adjustments as done above.

138. See *id.* The Commission may pursue for violation of securities law, or a demonstration of a lack of integrity or competence, making the scope very broad. This would translate to the new regulation if the language of 102(e) is used.

139. Traditionally, the Commission uses the "preponderance of the evidence" standard. See *In Re M.V. Gray Investments, Inc.*, Release No. 9180, 1971 WL 120492 (May 20, 1971).

140. See *Mission*, SEC (Aug. 9, 2023), <https://www.sec.gov/about/mission> [<https://perma.cc/G5UE-S86Z>]. As the government entity focused on securities law, they are the "subject matter experts" and best situated to amend the Commission rules.

141. *Suggestions for How Individual Investors Can Comment on SEC Rulemaking: Updated Investor Bulletin*, SEC (May 14, 2024), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-39> [<https://perma.cc/6QJ3-WRS4>]. This gives a detailed overview of the Commission's rule-making process.

published in the Federal Register, which includes a statement of time, place, and nature of the public rulemaking proceedings, reference to the authority under which the rule is proposed, and the terms or substance of the rule or a description of the issues involved.¹⁴² Following this notice, the agency must afford interested parties the opportunity to participate in rulemaking through submission of views and arguments during a period that must be, at a minimum, thirty days in length.¹⁴³ All persons must also have the right to petition for “the issuance, amendment, or repeal of a rule.”¹⁴⁴ The Commission’s “standard” rulemaking process is more than sufficient for both complying with the APA and giving the Commission power to propose this rule via agency rulemaking.¹⁴⁵ Through the Commission’s process, the rule would go through a concept release, proposing release, and adopting release process with public input twice throughout the process.¹⁴⁶

IV. AMENDING INVESTORS’ PRIVATE RIGHT OF ACTION AGAINST AUDIT COMMITTEES

When a company sells its securities to the public, Section 11 of the Securities Act allows investors to sue for damages if any part of a registration statement¹⁴⁷ contains false or misleading information of a material nature, or omits material information that makes the registration statement misleading.¹⁴⁸ Such claims may be brought against the company issuing the securities (the “issuer”), the directors of the issuer, and every accountant and other expert (“experts”) who have prepared or certified any report used in the registration statement.¹⁴⁹ Because audit committee members are by definition directors, they are included as potential defendants, along with the issuer’s independent auditors.¹⁵⁰ Generally, a private action for damages under Section 11(a) may be brought by any person acquiring such security, unless it can be shown that said purchaser knew of the misstatement or omission.¹⁵¹ The action must be brought within one year after the discovery of the misstatement or omission, or after such discovery should have been made through the exercise of reasonable

142. Administrative Procedure Act, 5 U.S.C. § 553.

143. 5 U.S.C. § 553(d).

144. 5 U.S.C. § 553(e).

145. SEC, *supra* note 141.

146. *Id.*

147. Securities Act of 1933, Pub. L. No 73-22, § 11 (codified at 15 U.S.C. § 77k(a)). The Registration statement is a document filed with the Commission that includes, among other things, the prospectus that offers the securities for sale and the company’s audited financial statements. *See What is a Registration Statement?*, SEC (Nov. 12, 2024), <https://www.sec.gov/resources-small-businesses/going-public/what-registration-statement> [<https://perma.cc/8EMW-NFE3>].

148. *See* 15 U.S.C. § 77k.

149. *Id.*

150. *Id.*; Audit Committee Disclosure, 64 Fed. Reg. 73389 (Dec. 30, 1999) (codified at 17 C.F.R. pts. 210, 228, 229, 240).

151. 15 U.S.C. § 77k. No reliance on the misstatement or omission must be shown.

diligence, but no more than three years after the security was initially offered to the public.¹⁵²

A claim under Section 11(a) does not require a showing of either a “scheme” or of “scienter,” which, as we have seen, has limited to ability to hold members of audit committees accountable under other theories of recovery.¹⁵³ As such, Section 11(a) would appear to be a very promising avenue for doing so. However, Section 11(b)(3) provides several due diligence defenses for persons other than the issuer—including directors and independent auditors—facing liability under Section 11(a).¹⁵⁴ Any person considered to be an “expert” must demonstrate that, after a reasonable investigation, the defendant had reasonable grounds to believe—and did in fact believe—that such statements made by the expert were accurate.¹⁵⁵ For a non-expert, the burden is much lower. The reasonable investigation requirement falls away, and non-experts must only prove they had no reasonable ground to believe, and did not believe, that the expert-provided information was materially false or misleading.¹⁵⁶

The classic “experts” for these purposes are the issuer’s independent auditors.¹⁵⁷ Because audit committee members do not prepare or certify any reports included in registration statements, they are not “experts” under Rule 11(a)(3) and are not subject to the more rigorous due diligence standard applicable to experts. SOX encourages, though does not require, at least one member of a company’s audit committee to be a “financial expert.”¹⁵⁸

One would think the financial *expert* on an audit committee would be held to the expert standard under 11(b)(3). However, a safe harbor protects the financial expert from exposure to expert liability under Section 11(a) of the Securities Act.¹⁵⁹ Indeed, under Item 407(d)(5) of Regulation S-K, “a person who is determined to be an audit committee financial expert will not be deemed an *expert* for any purpose, including without limitation for the purposes of section 11.”¹⁶⁰ As such, even though a member of the audit committee is designated a “financial expert,” the member has no more liability for material

152. 15 U.S.C. § 77m.

153. See 15 U.S.C. § 77k(c) (discussing the standard for a reasonable investigation to ensure the statement was true is simply “that required of a prudent man in the management of his own property”).

154. See 15 U.S.C. § 77k(b)(3).

155. *Id.*

156. *Id.*

157. This status is imposed by 15 U.S.C. § 77k(a)(4) (stating that accounts are included because their “profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any report or valuation which is used in connection with the registration statement”). For more information, see *SEC 2300 - Experts Language*, PWC (Sep. 17, 2024), https://viewpoint.pwc.com/dt/us/en/pwc/pwc_sec_volume/pwc_sec_volume_US/2000_registration_un_US/sec_2300_expertizati_US.html#pwc-topic.dita_031c2887-99da-4419-99c0-3d092e84748 [https://perma.cc/35JW-YZAL].

158. See 17 C.F.R. § 229.407(d)(5)(i) (2025).

159. 17 C.F.R. § 229.407(d)(5)(iv).

160. *Id.* Regulation S-K is a Commission regulation that prescribes what and how issuers must disclose on registration statements, periodic reports, and any other filings.

misstatements or omissions in the issuer's audited financial statements than any other director.¹⁶¹

The committee that is statutorily mandated to investigate and recommend auditor work for accuracy is currently held to a due diligence standard that requires less than that of the auditors they oversee.¹⁶² Those with greater authority should have greater responsibility under the law, not less. Cases like *BFB* demonstrate that without holding audit committees to a higher standard, financial reporting is not adequately supervised.¹⁶³ For this reason, the language contained in Item 407(d)(5)(iv) should be amended, and audit committee members should be held to the expert standard under private actions arising out of 11(a). By upping the due diligence standard of audit committee members, the committee will operate at a higher standard of due diligence, one that exactly aligns with the intentions behind creating their oversight role in SOX.¹⁶⁴

As with 102(e), modifying the safe harbor contained in 407 does not change the obligation of the committee.¹⁶⁵ Under SOX, an audit Committee must submit a report stating that, based on review of the audit and discussion with the auditors, they recommend to the Board of Directors that the audited financial statements be included in Annual Reports or Form 10-K.¹⁶⁶ The expert standard under Section 11(a)(3) requires proof of a reasonable investigation into the accuracy of statements made and of reasonable grounds to believe and actual belief that the information in the registration statement contained no material false statements or omissions.¹⁶⁷ These are highly analogous if not substantially the same requirement. Therefore, modifying 407 would not increase audit committee liability, but instead would directly fulfill the objectives of SOX.

The Commission acknowledged in its amendment of Rule 102(e) that it lacks the resources and time to verify every detail of financial statements for accuracy.¹⁶⁸ Because of these limitations, audit committees play a critical role in ensuring accuracy and compliance. Since the Commission cannot review each financial statement, they must provide investors with enforcement mechanisms to ensure this legally required duty is properly fulfilled. The modification of Item 407 provides such a mechanism. By aligning Item 407 with the objective of SOX, this modification ensures that audit committees remain diligent in their oversight and enhances the reliability of financial disclosures.

161. *Id.*

162. *See id.* Compare this to 15 U.S.C. § 77k(a)(4) to see the discrepancy in liability.

163. SEC, *supra* note 11.

164. *See* 17 C.F.R. § 229.407(d) (requiring proof of reasonable investigation into the audit directly aligns with the requirements of Item 407, which requires reviewing and discussing the audited financial statements and independent status of the auditors before recommending to the board of directors that the audited financial statements be included in the company's annual reports).

165. *Id.*

166. *Id.*

167. 15 U.S.C. § 77k(b).

168. Amendment to Rule 102(e) of the Commission's Rules of Practice, 63 Fed. Reg. 57164 (Oct. 26, 1998) (codified at 17 C.F.R. pt. 201).

V. POLICY CONSIDERATIONS

SOX was implemented to address widespread corporate fraud and restore trust in financial markets.¹⁶⁹ However, despite its successes, gaps in enforcement oversight remain, particularly regarding audit committees. This part examines two key policy considerations related to the implementation of SOX, focusing on the critical role audit committees play in accomplishing the law's objectives. Strengthening protections against audit committee oversight failures is essential to preventing financial fraud and improving audit quality, demonstrating the need for new regulations to better align the federal securities framework with these policy considerations.

A. Protect the Public from Financial Fraud & Misconduct

SOX came at a time where desperate change was needed to restore confidence in the American marketplace. It instituted several laws designed to protect stockholders from fraud, deceit, and deception within the market. As Securities and Exchange Commissioner Paul Atkins said in February 2003, seven months after the implementation of SOX,

Sarbanes-Oxley strengthens the role of directors as representatives of stockholders and reinforces the role of management as stewards of the stockholders' interest The role of directors is to monitor and oversee that situation on behalf of stockholders Since some of the recent problems concerned corporate managers using the corporation as a personal "piggy bank" or other theft by management of corporate assets, the Act's emphasis on a board's oversight function is certainly a step in the right direction.¹⁷⁰

While the act was a step in the right direction, cases like *BFB* illustrate the work that needs to be done to finish the goal of SOX. The audit committee serves as the initial gatekeeper for stockholders, providing a layer of oversight to the work of independent auditors. When the committee fails in that role, fraud can occur and investors face losses. Thus, to truly realize what SOX set out to accomplish over twenty years ago, a clear path for enforcement of those in oversight roles is long overdue.

B. Increase Audit Quality

A primary goal of SOX was to improve audit quality and reduce fraud—

169. Coates, *supra* note 4, at 91.

170. Paul S. Atkins, Comm'r, SEC, The Sarbanes-Oxley Act of 2002: Goals, Content, and Status of Implementation (Feb. 5, 2003), <https://www.sec.gov/news/speech/spch020503psa.htm> [<https://perma.cc/MD9C-Y9FC>].

and the legislation has been relatively successful at doing so.¹⁷¹ It created new incentives for firms to invest in internal controls, policies, and oversight of the financial reporting process beyond any previous measures.¹⁷² However, the audit committee does play a critical role in mitigating fraud risk. The committee works with management and independent auditors to oversee antifraud controls and is tasked with taking appropriate actions when fraud is detected.¹⁷³ By establishing a clear consequence for failure to take these steps, committees will be more motivated to truly fulfill their responsibilities, therefore increasing audit qualities for their respective companies.

CONCLUSION

When Congress enacted SOX, investor protection was the main objective. The legislation created a complex statutory framework to protect stockholders. However, as illustrated by *BFB*, a significant gap currently exists in the regulations, threatening the safety of investors from fraud within public company financial reports with no way to hold the guilty party liable for their oversight failures.

This Note examined the current state of federal securities law and illustrated how the current antifraud provisions and Commission penalties fail to properly apply to audit committee members who egregiously fail in their oversight duties. In response, this Note argued that a new regulation is necessary to fill this gap. This Note contained two proposed changes to federal securities law. First, the Commission must implement a regulation which allows for a clear path of enforcement against audit committee members who fail to uphold their statutorily mandated oversight duties. With Rule 102(e) serving as a guide, a regulation similar in scope, but applicable to audit committees, allows for the most efficient and effective enforcement scheme. By avoiding civil penalties and instead relying on a bar sanction, the Commission avoids the *Jarkesy* federal court requirement and may bring these cases before an administrative law judge. Second, this Note urged for the modification of Item 407's safe harbor, specifying that audit committee members be held to the "expert" standard in Section 11(b)(3) in the case of material misrepresentations or omissions in securities' offerings. By treating audit committee members as experts, we are, in fact, not adding to the job of audit committees. Investors expect audit committees to partake in statutorily mandated due diligence. These new regulations will result in increased investor protection, more confidence in the marketplace, and an increase in audit quality for publicly traded companies. By enacting these changes, the original goals and promises of Sarbanes-Oxley will finally be accomplished, over twenty years after its inception.

171. Coates, *supra* note 4, at 97.

172. *Id.* at 92.

173. *See generally* DELOITTE, *supra* note 26.

FLUSHING OUT GAPS IN CRITICAL INFRASTRUCTURE: CYBERSECURITY IN WATER UTILITIES

LINDSEY WEBB*

INTRODUCTION

On October 3, 2024, American Water, the largest water utility in the United States, was hit by a cyberattack.¹ American Water provides services in fourteen states, to eighteen military installations, and to over fourteen million people.² As a result of the cyberattack, American Water had to disconnect certain systems that stopped its billing and customer portal for over a week, causing consumer concern as to the reliability of their water.³ Attacks such as this one raise concerns as to what utilities are doing to protect their operational technology (OT) and information technology (IT) systems as cyberattacks are increasing in frequency and severity across the United States.⁴ This incident also captures another issue: the cyber-safety standards set by federal and state regulators for utilities.

The Presidential Policy Directive on Critical Infrastructure Security and Resilience, published by President Barack H. Obama in 2013, advanced a national unity of effort to “strengthen and maintain secure, functioning, and resilient critical infrastructure.”⁵ This Directive identified both energy and water as critical infrastructure sectors.⁶ Critical infrastructure sectors are systems “considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.”⁷ Therefore, President Obama’s 2013 Executive Order 13636 for Improving Critical Infrastructure Cybersecurity declares it is United States policy “to enhance the security and resilience of the Nation’s critical infrastructure and to maintain a

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1. Ray Fernandez, *What We Learned from the American Water Cyber Attack: Expert Analysis*, TECHOPEDIA (Oct. 13, 2024), <https://www.techopedia.com/news/what-we-learned-from-the-american-water-cyber-attack-expert-analysis> [https://perma.cc/3UUM-J3VK].

2. David Jones, *American Water Works reconnecting systems a week after cyberattack*, CYBERSECURITY DIVE (Oct. 11, 2024), <https://www.cybersecuritydive.com/news/american-water-reconnecting-cyberattack> [https://perma.cc/T2PG-6KGM].

3. Kate Gibson, *American Water restarting systems shut down a week ago by hackers*, CBS NEWS (Oct. 11, 2024, at 10:39 ET), <https://www.cbsnews.com/news/american-water-hack-systems-restored/> [https://perma.cc/2A24-N7CV].

4. *Enforcement Alert: Drinking Water Systems to Address Cybersecurity Vulnerabilities*, EPA (June 6, 2024), <https://www.epa.gov/enforcement/enforcement-alert-drinking-water-systems-address-cybersecurity-vulnerabilities> [https://perma.cc/F7J8-ED5T].

5. Presidential Policy Directive on Critical Infrastructure Security and Resilience, 1 PUB. PAPERS 106 (Feb. 12, 2013) [hereinafter PPD 21].

6. *Id.* at 114–15.

7. *Critical Infrastructure Sectors*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/topics/critical-infrastructure-security-and-resilience/critical-infrastructure-sectors> [https://perma.cc/RE5N-C2F9] (last visited Sep. 8, 2025).

cyber environment that encourages efficiency.”⁸ Through the Executive Order, President Obama directed the National Institute of Standards and Technology (NIST) to develop a “Cybersecurity Framework.”⁹ Specifically, Section 7(a) of Executive Order 13636 provides that “[t]he Cybersecurity Framework shall include a set of standards, methodologies, procedures, and processes that align policy, business, and technological approaches to address cyber risks. The Cybersecurity Framework shall incorporate voluntary consensus standards and industry best practices to the fullest extent possible.”¹⁰ Upon development, federal agencies are required to apply the Cybersecurity Framework to manage cybersecurity risks.¹¹ The NIST Cybersecurity Framework’s broad applicability across critical infrastructure sectors, coupled with its voluntary nature, generates security and resilience gaps for general industry issues.¹²

To address the cybersecurity and resilience of the electric grid specifically, the North American Electric Reliability Corporation (NERC) created the Critical Infrastructure Protection (CIP) Reliability Standards, which are enforced by the Federal Energy Regulatory Commission (FERC) through penalties and fines under the authority of the Department of Energy.¹³ Although derived from the NIST Framework, the NERC CIP Reliability Standards cut more tailored requirements and mandate more specific compliance deliverables.¹⁴ For example, the NIST Framework says that electric utilities should have an asset inventory to help managers understand which assets are deployed to avoid service interruptions; however, the NERC CIP Reliability Standards say that electric utilities should identify critical assets (control centers, transmission stations, generators, etc.) and then identify cyber assets at those locations that could impact the ability of those critical assets to operate.¹⁵ By identifying and enforcing express cyber-hygiene baselines for the bulk electric systems in North America, FERC better addresses foreseeable and significant cyber vulnerabilities than the Cybersecurity Framework alone.

As the 2024 cyberattack on American Water makes clear, security concerns are especially relevant to the infrastructure of water utilities in the United States. Indeed, Congress, through the Safe Drinking Water Act (SDWA), has identified the presence of cyber vulnerabilities and encouraged cyber-hygiene of

8. Exec. Order No. 13,636, 78 Fed. Reg. 11739 (Feb. 19, 2013).

9. *Id.* at 11741.

10. *Id.*

11. *Id.*

12. See Interview with Kurt Aikman, Senior Sec. Advisor, Midcontinent Independent System Operator (Nov. 8, 2024).

13. Rahul Awati, *North American Electric Reliability Corporation Critical Infrastructure Protection (NERC CIP)*, TECHTARGET (Mar. 2, 2022), <https://www.techtarget.com/searchsecurity/definition/North-American-Electric-Reliability-Corporation-Critical-Infrastructure-Protection-NERC-CIP> [<https://perma.cc/BJU9-FGQK>]; *Enforcement Reliability*, FERC, <https://www.ferc.gov/enforcement-reliability> [<https://perma.cc/8ZGQ-3K8U>] (last visited Sep. 8, 2025).

14. Interview with Danielle T. Bennett, Deputy Gen. Couns., Duke Energy (Oct. 10, 2024).

15. *Id.*

community water systems.¹⁶ To do so, the SDWA requires each community water system to prepare and certify a Risk and Resilience Assessment and an Emergency Response Plan that includes “strategies and resources to improve the resilience of the system, including the physical security and cybersecurity of the system.”¹⁷ If a water utility does not qualify as a community water system, the Environmental Protection Agency (EPA) will provide voluntary guidance for them to follow.¹⁸ Although community water systems are required to perform a Risk and Resilience Assessment and prepare an Emergency Response Plan, these processes are analogous to those of the NIST Framework and the voluntary guidance provided by the Cybersecurity and Infrastructure Security Agency (CISA) in both scope and detail.¹⁹ Additionally, it is a crucial time to be considering the scope of cyber-hygiene in the water-utility space, as the Office of Inspector General for the EPA has recognized: “[i]f malicious actors exploited the [identified] cybersecurity vulnerabilities, . . . they could disrupt service or cause irreparable physical damage to drinking water infrastructure.”²⁰

This Note argues that, because the current state of cybersecurity requirements for water utilities does not adequately address foreseeable and significant cyber vulnerabilities, Congress should enact the legislation proposed as H.R. 7922. The proposed legislation establishes an organization to develop risk and resilience requirements for the water sector. This Note further argues that defining cybersecurity baselines for water utilities in a risk-based approach, like the NERC-CIP Reliability Standards for the electric grid, would better enhance the security and resilience of the Nation’s critical infrastructure. Part I of this Note explains the various types of water utilities, threats to OT and IT systems, and public interest concerns when critical infrastructures are at the mercy of a cyber-incident. Part II then considers the utility governing authorities and different approaches taken across critical infrastructures in enhancing security and resilience through cyber-hygiene. Part III argues that the water utility compliance-based approach to cyber-safety remains deficient. Part IV describes how moving toward a risk-based approach and enacting H.R. 7922 would be an avenue that more effectively addresses cyber vulnerabilities.

I. WATER UTILITY TYPES AND CYBER-THREATS

By recognizing which water utilities fall under SWDA compliance-based certification and identifying sector-specific cyber-threats, H.R. 7922 foresees

16. 42 U.S.C. § 300i-2(b).

17. *Id.*

18. *Id.*

19. *Cybersecurity Assessments*, EPA (Nov. 12, 2024), <https://www.epa.gov/waterresilience/cybersecurity-assessments> [<https://perma.cc/MUV4-WWQ6>].

20. U.S. EPA, REPORT NO. 25-N-0004, MANAGEMENT IMPLICATION REPORT: CYBERSECURITY CONCERNS RELATED TO DRINKING WATER SYSTEMS 5 (2024) [hereinafter REPORT NO. 25-N-0004], https://www.epaoig.gov/sites/default/files/reports/2024-11/full_report_-_25-n-0004t_1.pdf [<https://perma.cc/HCT5-TUS8>].

and prevents significant cyber vulnerabilities that threaten reliable public drinking water. Therefore, as the current state of cybersecurity requirements for water utilities does not adequately address these sector-specific foreseeable and significant cyber vulnerabilities, Congress should enact H.R. 7922.

A. Various Types of Water Utilities

The SDWA was established by Congress to protect the quality of drinking water in the United States.²¹ The SDWA does so by requiring the EPA to promulgate national regulations for contaminants that may pose health risks and are likely to be present in public water supplies and then allowing states to exercise enforcement authority.²² The SDWA defines the term “public water system” as:

a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. Such term includes (i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system, and (ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.²³

There are three types of public water systems. First, a community water system is “a public water system that—(A) serves at least [fifteen] service connections used by year-round residents of the area served by the system; or (B) regularly serves at least [twenty-five] year-round residents.”²⁴ Community water systems serve most Americans and include roughly 52,000 systems.²⁵ Examples include municipal water supplies, neighborhoods providing their own water, and mobile home parks.²⁶

Second, a non-transient non-community water system is “a system that is not a Community Water System and regularly serves the same twenty-five (25) or more persons at least six (6) months per year.”²⁷ There are approximately 85,000 non-transient non-community water systems in operation in the United

21. See 42 U.S.C. § 300f *et seq.*

22. ELENA HUMPHREYS, CONG. RSCH. SERV., RL31243, SAFE DRINKING WATER ACT (SDWA): A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 6 (2021).

23. 42 U.S.C. § 300f.

24. *Id.*

25. *Background on Drinking Water Standards in the Safe Drinking Water Act (SDWA)*, EPA (Apr. 5, 2024), <https://www.epa.gov/sdwa/background-drinking-water-standards-safe-drinking-water-act-sdwa> [https://perma.cc/E424-GJ3Y].

26. *Are You A Public Water System?*, IND. DEP’T OF ENV’T MGMT. (June 20, 2011), https://www.in.gov/idem/files/factsheet_owq_pws_are_you_pws.pdf [https://perma.cc/2YFB-USVK].

27. *Id.*

States.²⁸ Examples include schools, factories, and churches, which provide water to the same population as a community water system but does not do so continuously over a calendar year.²⁹

The third type of public water system is a transient non-community water system. A transient non-community water system is “a system that is not a Community Water System and does not regularly serve at least twenty-five (25) of the same persons over six (6) months per year.”³⁰ There are roughly 18,000 transient non-community water systems in the United States.³¹ Examples include gas stations, grocery stores, and campgrounds where water is accessible to the public but not necessarily the same people.³²

Showing how water utilities may range in size and organization within a single state, Indiana has three main types of community water systems. First, a conservancy district utility is created when landowners, through a circuit court process, organize a not-for-profit special taxing district to provide water services within that district.³³ Valparaiso Lakes Area Conservancy District, for example, provides water, well, and sewer services to residents in the 2,623-acre watershed area north of Valparaiso.³⁴

Second, a community water system in Indiana may be an investor-owned utility, which “can be a private company where only a selection of people can invest, a publicly traded company where anyone can be a shareholder, or a subsidiary of a larger private or public company.”³⁵ For example, Indiana American Water is a publicly traded water utility company serving over one million people throughout seven Indiana counties.³⁶

Third, a community water system may be a municipal utility, which is where a city or town acquires, owns, or operates its own water utility overseen by a town council or similar legislative body.³⁷ For example, Rising Sun Municipal Utilities provides water to the City of Rising Sun’s 1,600 residential and commercial consumers.³⁸ Through these examples, it is clear there is a large range in size and organization of water utilities within Indiana. With water utilities having diverse goals, few compliance-based expectations, and no

28. EPA, *supra* note 25.

29. *Id.*

30. IND. DEP’T OF ENV’T MGMT., *supra* note 26.

31. EPA, *supra* note 25.

32. *Id.*

33. IND. CODE § 14-33 *et seq.* See also *Indiana Utility Guide*, IND. UTIL. REGUL. COMM’N 59 (2023), <https://www.in.gov/iurc/files/IURC-2023-Utility-Guide.pdf> [<https://perma.cc/G2DZ-NDPF>].

34. See VALPARAISO LAKES AREA CONSERVANCY DISTRICT, <https://vlacd.org> [<https://perma.cc/6H2M-J6X6>] (last visited Oct. 27, 2025).

35. IND. UTIL. REGUL. COMM’N, *supra* note 33, at 59.

36. *Indiana American Water*, IND. BUILDERS ASS’N, <https://buildindiana.org/member-directory/indiana-american-water/> [<https://perma.cc/Q9PF-9LZY>] (last visited Nov. 18, 2024).

37. IND. UTIL. REGUL. COMM’N, *supra* note 33, at 59.

38. *Municipal Utilities*, CITY OF RISING SUN, <https://cityofrisingsun.com/departments/municipal-utilities/> [<https://perma.cc/N9JC-VFQE>] (last visited Nov. 18, 2024).

required risk-based cyber-hygiene baselines, drinking water is increasingly vulnerable to cyber-threats.

B. Cyber-threats: Social Engineering, Outdated Technology, and Ransomware

Because of rapidly increasing cyber-threats, such as social engineering (e.g., phishing scams) and outdated technology creating opportunities for malware installation, protecting water utilities from cyber-threats demands a multi-faceted strategy merging advanced technology, employee training, and strong cybersecurity policies.³⁹ Based on the accumulation of incidents, the EPA stated that “a cyberattack on a vulnerable water system may allow an adversary to manipulate operational technology, which could cause significant adverse consequences for both the utility and drinking water consumers.”⁴⁰ The potential adverse consequences include “disrupting the treatment, distribution, and storage of water for the community, damaging pumps and valves, and altering the levels of chemicals to hazardous amounts.”⁴¹

On October 8, 2024, the Office of Inspector General for the EPA identified ninety-seven drinking water systems, serving approximately twenty-seven million people, as having critical cybersecurity vulnerabilities.⁴² That investigation accentuates the imperative to understand the types of cyber-threats that face water utilities, address potential adverse consequences, and implement strategies to encourage cyber-hygiene. As a deficiency of cyber-hygiene results in significant public safety risks, water utility cyber-hygiene initiatives must be implemented and enforced.

A cyber-threat that can be prevented by advanced technology, employee training, and strong cybersecurity policies is a social engineering campaign. Social engineering exploits vulnerabilities by tricking people into responding to phishing emails or sharing personal and professional information that helps threat-actors impersonate them.⁴³ Phishing campaigns are becoming increasingly convincing. Indeed, the “all-threats security information source” for water sectors, the Water Information Sharing and Analysis Center, has been made aware of two cyberattack attempts within six months that targeted Maine water operators with emails asking employees to click a link to “verify” information or risk having their water license revoked.⁴⁴ Addressing social engineering

39. Ankita Patel, *How to Protect Water and Wastewater Treatment Facilities from Cyber Threats?*, ON THE SPOT NEWS (Nov. 22, 2024), <https://www.otsnews.co.uk/how-to-protect-water-and-wastewater-treatment-facilities-from-cyber-threats/> [https://perma.cc/9C5Y-PFX4].

40. EPA, *supra* note 4.

41. *Id.*

42. REPORT NO. 25-N-0004, *supra* note 20, at 5.

43. Practical Law Data Privacy & Cybersecurity, Practice Note, *Cybersecurity Tech Basics: Malware and End User Attacks: Overview*, W-003-4711 (2024).

44. (TLP:CLEAR) Threat Advisory—Another Phishing Campaign Impersonates State CDC Drinking Water Program, WATERISAC (July 3, 2024, at 13:35 ET), <https://www.waterisac.org/portal/tlpclear-threat-advisory—another-phishing-campaign-impersonates-state-cdc-drinking-water> [https://perma.cc/SZX3-RMT8].

vulnerabilities through increased employee education can help prevent adverse consequences.

Additionally, operating on outdated technology leaves water utilities vulnerable to attack. Water utilities have outdated technology because facilities tend to “allocate resources to physical infrastructure in need of replacement or repair (e.g., pipes) rather than IT/OT infrastructure.”⁴⁵ As outdated technology often lacks both the processing power and memory to run the latest necessary security features to protect against modern-day malware, threat-actors can leverage such vulnerabilities and compromise critical devices or systems.⁴⁶ The common use of outdated control systems exposes industrial control systems, such as human-machine interfaces, to public wireless networks where foreign actors can use a variety of techniques to gain remote access and make changes to the underlying OT.⁴⁷ For example, threat-actors can exploit a Remote Desktop Protocol that is insecurely connected to the Internet to infect a network with ransomware, which “may lead to loss of system control, denial of service, or loss of sensitive data.”⁴⁸

Ransomware in particular is an increasing type of cyber-threat to water utilities.⁴⁹ Threat-actors leveraging social engineering or outdated technology can gain unauthorized access to a computer system, software, or electronic data and install malware designed to disable or block access until a ransom is paid.⁵⁰ For example, in 2021, a string of ransomware attacks targeted Supervisory Control and Data Acquisition servers, which required the water utilities to run their treatment systems manually until the invasions could be investigated and cleared.⁵¹ A Supervisory Control and Data Acquisition system monitors water levels, turns pumps on or off to move water through pipes, adds chemicals, and adjusts water pressure.⁵² Thus, protecting the Supervisory Control and Data Acquisition systems from threat-actors should be a prioritized cyber-hygiene practice, as altering those systems can have significant and detrimental impacts on consumers, such as stopping water distribution or adding dangerous

45. Cybersecurity Advisory, *Ongoing Cyber Threats to U.S. Water and Wastewater Systems*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Oct. 25, 2021), <https://www.cisa.gov/news-events/cybersecurity-advisories/aa21-287a> [<https://perma.cc/6NWU-M4R6>].

46. *Id.*; see also Practical Law Data Privacy & Cybersecurity, *supra* note 43.

47. *Defending OT Operations Against Ongoing Pro-Russia Hactivist Activity*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (May 1, 2024), <https://media.defense.gov/2024/May/01/2003454817/-1/-1/0/DEFENDING-OT-OPERATIONS-AGAINST-ONGOING-PRO-RUSSIA-HACKTIVIST-ACTIVITY.PDF> [<https://perma.cc/P95R-D65Q>].

48. Cybersecurity Advisory, *supra* note 45.

49. See, e.g., *Rising Ransomware Threat To Operational Technology Assets*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY 1 (June 2021), https://www.cisa.gov/sites/default/files/publications/CISA_Fact_Sheet-Rising_Ransomware_Threat_to_OT_Assets_508C.pdf [<https://perma.cc/V373-JXSJ>].

50. Practical Law Data Privacy & Cybersecurity, *supra* note 43.

51. Cybersecurity Advisory, *supra* note 45.

52. U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106744, *CRITICAL INFRASTRUCTURE PROTECTION: EPA URGENTLY NEEDS A STRATEGY TO ADDRESS CYBERSECURITY RISKS TO WATER AND WASTEWATER SYSTEMS* 7 (2024).

chemicals to drinking water.⁵³ By keeping technology up to date, training employees on cyber risks, and developing strong cybersecurity policies, water utilities can help prevent adverse consequences caused by ransomware. Because cyberattacks on water utilities threaten public safety and health, strong cyber-hygiene initiatives must be implemented and enforced across the water sector.

C. Public Interest Concerns

In the wake of cyber-threats, people throughout the United States face significant public health and safety concerns. Water utilities and governmental units running them also face economic strife because of the potential aggregate adverse effects of cyberattacks disrupting the reliability of water utilities. Section 1433 of the SDWA defines resilience against cyber-attacks as “the ability of a community water system or an asset of a community water system to adapt to or withstand the effects of a malevolent act . . . without interruption to the asset’s or system’s function, or if the function is interrupted, to rapidly return to a normal operating condition.”⁵⁴ When a water utility’s asset or system is interrupted, the water utility must continue to meet consumer demands through the implementation of an effective, resilient, and sector-specific Emergency Response Plan to reliably ensure safe consumer drinking water.

Reliability and resiliency are interconnected to support not only the individual customer but also the entire nation. Many water utilities strategically allocate capital infrastructure investments toward emerging technological interventions to improve the efficiency and reliability of key processes like water purification, bulk transfer, and storage processes.⁵⁵ However, the benefits of increased digitization, connectivity, and greater flexibility also introduce significant cybersecurity risks.⁵⁶

The main technological integration that increases risk is the swift convergence of IT and OT systems through the adoption of the Industrial Internet of Things (IIoT).⁵⁷ The IIoT is “a network of intelligent devices connected to form systems that monitor, collect, exchange and analyze data . . . to enhance manufacturing and industrial processes.”⁵⁸ Although IIoT predictive maintenance and asset tracking results in increased efficiency, it also increases security risks.⁵⁹ The biggest risks associated with IIoT are the commonality of

53. *See id.*

54. 42 U.S.C. § 300i-2(h).

55. George Stathos, *Water utilities: Six focus areas to help build cyber resilience*, ERNST & YOUNG (Oct. 4, 2021), https://www.ey.com/en_cn/insights/power-utilities/water-utilities-six-focus-areas-to-help-build-cyber-resilience [<https://perma.cc/WW2S-LUYX>].

56. *Id.*

57. *Id.*

58. Alexander Gillis, Brien Posey & Linda Rosencrance, *What is the industrial internet of things?*, TECHTARGET, <https://www.techtargget.com/iotagenda/definition/Industrial-Internet-of-Things-IIoT> [<https://perma.cc/HCA5-Q3EP>] (last visited Feb. 7, 2025).

59. *Id.*

IIoT devices continuing the use of default passwords; transmitting data as clear text, making it easy for a threat-actor to intercept the data; and, having other resources and devices within the connected network readily accessible, which enables threat-actors who have obtained access to launch systemic attacks through the insecure IIoT device.⁶⁰ Many water utilities have placed their devices on an IIoT, connecting OT devices, such as water pumps, to IT resources to automate and regulate their operations cost-effectively.⁶¹ When this connection is made without cybersecurity protections, threat-actors will attempt to and may succeed in logging into the water utility firewall. The city of Hale Center, Texas, encountered this risk in January 2024, when a threat-actor was able to log into the firewall, and water overflowed into the city.⁶² Because cyberattacks impact how drinking water utilities function, the EPA says that water system managers need to “know when their treatment systems, pumps, valves, tanks, etc. are being compromised, how to stop an attack, and how to recover so that safe and full service can be returned to the community.”⁶³ By recognizing the nexus between reliability and resilience, water utilities can identify the developing risks and implement protocols to ensure public health and safety concerns, and economic strife, do not result from cyberattacks.

Because safe drinking water is imperative for public health and safety, proper cyber-hygiene should be implemented to increase water utility resiliency. Water utilities of all sizes are vulnerable targets for threat-actors because if reliability falters, there is a potential to “disrupt civilian infrastructure and cause widespread panic.”⁶⁴ Over ninety-two percent of the nation supplied by community water systems consistently receive drinking water that meets all health-based standards, but threat-actors have the potential to alter the levels of chemicals to hazardous amounts.⁶⁵ For example, on February 5, 2021, threat-actors obtained unauthorized access to the Supervisory Control and Data Acquisition system of a water treatment facility in the city of Oldsmar and increased the levels of sodium hydroxide in the water.⁶⁶ If the water treatment

60. *Id.*

61. Jessica Balen, *Public Utilities Benefit from the Industrial Internet of Things But Must Secure It*, STATE TECH (Oct. 9, 2024), <https://statetechmagazine.com/article/2024/10/public-utilities-benefit-from-iiot-security-perfcon> [https://perma.cc/V333-GMHL].

62. *Id.*

63. *Drinking Water Infrastructure Resilience and Sustainability Research*, EPA (Nov. 8, 2024), <https://www.epa.gov/water-research/drinking-water-infrastructure-resilience-and-sustainability-research> [https://perma.cc/VG2K-3GDV].

64. Jonathan Reed, *Cyberattack on American Water: A warning to critical infrastructure*, SECURITY INTELLIGENCE (Nov. 4, 2024), <https://securityintelligence.com/news/cyberattack-on-american-water-warning-critical-infrastructure/#:~:text=Attackers%2C%20particularly%20nation%2Dstate%20actors,systems%20are%20easier%20to%20breach> [https://perma.cc/NN3Q-KB67].

65. *Safe Drinking Water Act (SDWA)*, EPA (Oct. 6, 2025), <https://www.epa.gov/sdwa> [https://perma.cc/Q8U6-5NVF].

66. Cybersecurity Advisory, *Compromise of U.S. Water Treatment Facility*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Feb. 12, 2021), <https://www.cisa.gov/news-events/>

personnel had not been able to identify and mitigate this cyberattack when they did, the 15,000 people drinking the Oldsmar City water would have been severely sickened.⁶⁷

In addition to the health concerns, there are nationwide public interest concerns with the potential for economic strife that can result from cyberattacks on such a critical infrastructure. The Value of Water Campaign's economic impact analysis found that on a national level, "a one-day disruption in water service represents an aggregate daily loss of \$43.5 billion in sales and \$22.5 billion in GDP. For context, an eight-day national disruption in water service would amount to a one percent loss in annual GDP—putting roughly 1.9 million jobs at risk."⁶⁸ To prevent a disruption in water services, water utilities must do all that they can to mitigate cyber vulnerabilities through cyber-hygiene. The costs for larger water utilities can be millions to recover data and fix infected systems. For smaller water utilities, because they do not have the same number of resources or personnel to help with recovery, the costs of a cyberattack can cripple their operations. But ultimately, the costs of a cyberattack will be borne by the consumer in their water rate prices. Therefore, the potential adverse aggregate effects of an unreliable water utility, as a result of cyber-threats, are felt in both public health and safety concerns and economic strife. To ensure reliability and mitigate cyber vulnerabilities, water utilities should not only understand what the standard of cyber-hygiene is but also how those standards are governed and enforced.

II. HOW WATER UTILITIES ARE APPROACHING CYBERSECURITY

By understanding the broad federal agency guidance for cyber-hygiene and comparing the EPA compliance-based approach to cybersecurity for water utilities with the risk-based approach of the NERC CIP Reliability Standards for the electrical grid, it becomes clear that EPA's "checking a box" approach is not ideal for addressing foreseeable cyber-vulnerabilities within such a critical infrastructure. Therefore, because the current compliance-based cybersecurity requirements for water utilities do not adequately address these significant vulnerabilities, Congress should enact H.R. 7922, which would create sector-specific risk-based approaches to water utility cybersecurity.

cybersecurity-advisories/aa21-042a [https://perma.cc/H8ZV-JKXL]; Frances Robles & Nicole Perlroth, *'Dangerous Stuff': Hackers Tried to Poison Water Supply of Florida Town*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2021/02/08/us/oldsmar-florida-water-supply-hack.html> [https://perma.cc/J4AX-AMKU].

67. Robles & Perlroth, *supra* note 66.

68. *New Analysis Finds Closing the Investment Gap in Water Infrastructure Would Create 1.3 Million Jobs, \$220 Billion in Economic Activity*, U.S. WATER ALL. (Mar. 22, 2017), <https://uswateralliance.org/new-analysis-finds-closing-the-investment-gap-in-water-infrastructure-would-create-1-3-million-jobs-220-billion-in-economic-activity/> [https://perma.cc/UC2T-78QH].

A. A Patchwork of Federal Agency Guidance

The Presidential Policy Directive on Critical Infrastructure and Resilience intentionally provided a broad approach to cybersecurity to be applicable across all sectors through its identification of sixteen critical infrastructure sectors.⁶⁹ The Directive created room for sector-specific engagement and support but failed to delegate an adequate standard for agencies to create specific guidance or implementation standards.⁷⁰ As a result, there is a patchwork of federal guidance aimed at improving cyber-hygiene across critical infrastructures, which falls short of sector-specific needs when implemented without a specific sector in mind. The most notable support agencies are NIST, as it pioneered cybersecurity guidance in critical infrastructures; CISA, as it developed additional performance goals and serves as a resource for reporting cyberattacks; and the Federal Bureau of Investigation (FBI), as it leads the investigation process for cyberattacks against critical infrastructures.⁷¹

Although NIST provides cybersecurity standards, guidelines, and best practices to prioritize and address cybersecurity risks, it does not specify actions for meeting those outcomes.⁷² The NIST Framework, created from the direction of Executive Order 13636, maintains its “level of detail and specificity . . . [so that it remains] scala[ble] and flexib[le]” for a wide range of organizations.⁷³ As this flexibility allows for the NIST Framework to be adopted in all sixteen critical infrastructure sectors, the “one-size-fits-all” approach cannot sufficiently address cybersecurity concerns in sector-specific circumstances. Therefore, the NIST Framework leaves significant gaps in cyber safety for critical infrastructures that do not adopt additional cyber-hygiene methods. For example, NIST’s Quick Start Guide for analyzing gaps and creating an action plan asks entities to “establish, test, deploy, and maintain hardened baselines that enforce the organization’s cybersecurity policies and provide only essential capabilities.”⁷⁴ By presenting procedural instructions without a scaffolding of concrete criteria, the guidance creates loose compliance standards that cause resource-constrained critical infrastructures, such as municipal water utilities, to be disadvantaged.

With the NIST Framework as a jumping-off point, CISA collaborates with state and local partners as well as other agencies to defend against cyber-threats

69. PPD 21, *supra* note 5, at 114–15.

70. *See id.*

71. *See id.*

72. *Frequently Asked Questions*, NAT’L INST. OF STANDARDS & TECH. (Sep. 24, 2024), <https://www.nist.gov/cyberframework/faqs> [<https://perma.cc/CE96-3A9M>].

73. NAT’L INST. OF STANDARDS & TECH., INITIAL SUMMARY ANALYSIS OF RESPONSES TO THE REQUEST FOR INFORMATION (RFI): EVALUATING AND IMPROVING CYBERSECURITY RESOURCES: THE CYBERSECURITY FRAMEWORK AND CYBERSECURITY SUPPLY CHAIN RISK MANAGEMENT 5 (2022).

74. NAT’L INST. OF STANDARDS & TECH., NIST CYBERSECURITY FRAMEWORK 2.0: QUICK-START GUIDE FOR CREATING AND USING ORGANIZATIONAL PROFILES (2024), <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1301.pdf> [<https://perma.cc/K65B-HRK8>].

with the goal of creating a secure and resilient infrastructure.⁷⁵ CISA created the voluntary Cross-Sector Cybersecurity Performance Goals that align with the NIST Framework and set recommended actions such as having “[a]t least annual trainings for all organizational employees and contractors that cover basic security concepts, such as phishing, business email compromise, basic operational security, password security.”⁷⁶ However, the Cross-Sector Cybersecurity Performance Goals are not comprehensive and do not identify all the cybersecurity practices needed to protect national and economic security and public health and safety.⁷⁷ Beyond this guidance, critical infrastructure owners and operators are required to report covered cybersecurity incidences and ransomware payments to CISA under the Cyber Incident Reporting for Critical Infrastructure Act of 2022.⁷⁸ CISA then coordinates response and investigation efforts with the state and local government as well as relevant agencies such as the FBI.

The FBI collects and shares intelligence with critical infrastructures that have suffered a cyber incident and serves as the lead federal agency for investigating cyberattacks.⁷⁹ Investigating cyber-incidences is paramount for building a resilient future because it identifies the scope of the invasion, deters threat-actors from launching additional attacks, and helps industries learn which cybersecurity strategies are inadequate. Of the ransomware attacks reported to the FBI in 2023, almost half of them targeted critical infrastructure sectors.⁸⁰ As water utilities are targeted due to their vitality to public health and national economic security, understanding sector-specific authorities and approaches is important for the identification of cybersecurity gaps.

B. Water Utility Authorities and Approaches for Cybersecurity

As the Presidential Policy Directive on Critical Infrastructure and Resilience designates the EPA as the lead agency for water sector security, the

75. *About CISA*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/about#:~:text=Security%20and%20Resilience.-,CISA's%20Work,inrastructure%20security%2C%20and%20emergency%20communications> [https://perma.cc/55M6-MGRP] (last visited Nov. 26, 2024).

76. *Cybersecurity Performance Goals (CPGs)*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/cybersecurity-performance-goals-cpgs> [https://perma.cc/2MMG-UF2L] (last visited Nov. 26, 2024).

77. *Id.*

78. 6 U.S.C. § 681(b); Practical Law Data Privacy & Cybersecurity, Practice Note, *Critical Infrastructure Cybersecurity and Cyber Incident Reporting: Overview (US)*, W-043-8602 (2024).

79. *The Cyber Threat*, FBI, <https://www.fbi.gov/investigate/cyber#:~:text=The%20FBI%20is%20the%20lead,cyber%20activities%2C%20wherever%20they%20are> [https://perma.cc/D4C6-LBXE] (last visited Nov. 26, 2024).

80. Matt Kapko, *Ransomware attacks are hitting critical infrastructure more often, FBI says*, CYBERSECURITYDIVE (Mar. 11, 2024), <https://www.cybersecuritydive.com/news/ransomware-hitting-critical-infrastructure-fbi/709814/#:~:text=More%20than%202%20in%205,1%2C193%20hit%20critical%20infrastructure%20organizations> [https://perma.cc/5W2B-EVPJ].

EPA provides technical, outreach, and education assistance to state, local, and private water systems to develop their own cyber-hygiene standards.⁸¹ When a community water system serves fewer than 3,300 people, the EPA encourages it to refer to a linked guidance and assessment tool to gauge the utility's cybersecurity practices, focusing on identifying, protecting, detecting, responding, and recovering.⁸² When a community water system serves more than 3,300 people, the EPA requires it to certify to a Risk and Resiliency Assessment and an Emergency Response Plan every five years; however, the EPA does not require specific standards, methods, or tools to fulfill any certain requirements.⁸³ Therefore, comparing the identified goals to the reality of compliance-based cybersecurity implementation and enforcement generates visibility into sector-specific cyber vulnerabilities for water utilities.

To certify to the EPA, a utility must only acknowledge six components in its Risk and Resiliency Assessment:

1. the risk to the system from malevolent acts and natural hazards;
2. the resilience of the pipes and constructed conveyances, physical barriers, source water, water collection and intake, pretreatment, treatment, storage and distribution facilities, electronic, computer, or other automated systems (including the security of such systems) which are utilized by the system;
3. the monitoring practices of the system;
4. the financial infrastructure of the system;
5. the use, storage, or handling of various chemicals by the system; and
6. the operation and maintenance of the system.⁸⁴

The EPA provides a Vulnerability Self-Assessment Tool (VSAT) that can be downloaded in an app and filled out using multiple-choice and short-answer responses to assist a utility in assessing those six components.⁸⁵ In that tool, the utilities answer questions about the demographics of their utility service area, any mutual aid or assistance agreements between other utilities in circumstances when a rapid response is needed, and any minimum daily treatments performed during periods of non-functionality in order for the EPA to gather pertinent data

81. *Water and Wastewater Systems Sector Cybersecurity*, EPA (June 23, 2024), <https://www.epa.gov/climate-change-water-sector/water-and-wastewater-systems-sector-cybersecurity> [<https://perma.cc/9FJY-XZ8W>].

82. *Cybersecurity Assessments*, *supra* note 19.

83. *AWIA Section 2013/SDWA Section 1433: Risk and Resilience Assessments and Emergency Response Plans*, EPA (Aug. 14, 2024), <https://www.epa.gov/waterresilience/awia-section-2013#RRA> [<https://perma.cc/E32A-BL6X>].

84. *Id.*

85. *See VSAT Web Data Entry Guide*, EPA, <https://vsat.epa.gov/vsat/> [<https://perma.cc/FH8V-XVNG>] (last visited Nov. 24, 2025).

and to identify risks.⁸⁶ After a water utility submits its Risk and Resiliency Assessment, it must prepare an Emergency Response Plan that incorporates the Risk and Resiliency findings.⁸⁷ In the Emergency Response Plan, each utility must include individual strategies and procedures that focus on resilience and detection.⁸⁸ Although each utility has flexibility in developing its plan, the EPA provides a Community Water System Emergency Response Plan Template that outlines factors that need to be included in any response plan, such as an emergency internal and external communication strategy, and links to mitigation action guides such as the CISA Cyber Hygiene Scanning and Testing Services.⁸⁹

During the latest five-year certification period, approximately ninety-eight percent of community water systems serving more than 3,300 people certified to the EPA that they had completed a Risk and Resiliency Assessment and an Emergency Response Plan, as required by the SDWA Section 1433.⁹⁰ However, since September of 2023, over seventy percent of the systems inspected by the EPA were “in violation of basic SDWA Section 1433 requirements including missing specific sections of the RRA and ERP.”⁹¹ Examples of alarming cybersecurity vulnerabilities that EPA inspectors identified included failing to change default passwords, using single logins for all staff, neglecting to rescind access to former employees, and not including an assessment of resilience.⁹²

The EPA exercises its enforcement discretion on a case-by-case basis for community water systems that do not comply with SDWA Section 1433 requirements.⁹³ The enforcement discretion includes the authority to seek a civil penalty of up to \$69,733 each day in which such violation occurs or commence a civil action to require a water utility to comply.⁹⁴ However, the EPA has only taken a little over one hundred SDWA enforcement actions since 2020 for community water systems that do not comply with SDWA Section 1433 requirements despite over seventy percent of reporting community water

86. *Id.*

87. EPA, *supra* note 83.

88. *Id.*

89. EPA Off. of Water, *Community Water System Emergency Response Plan Template*, EPA (Sep. 2024), <https://www.epa.gov/system/files/documents/2024-10/community-water-system-emergency-response-plan-template-and-instructions.pdf> [https://perma.cc/HQ5D-SVS3].

90. *Get Ready for Round 2 of AWIA Section 2013 RRA and ERP Requirements*, AM. WATER WORKS ASS'N VIRGINIA SECTION, <https://vaawwa.org/stories/get-ready-for-round-2-of-awia-section-2013-rra-and-erp-requirements> [https://perma.cc/4QC4-XLRL] (last visited Nov. 27, 2024).

91. EPA, *supra* note 4.

92. *Id.*

93. EPA, AMERICA'S WATER INFRASTRUCTURE ACT SECTION 2013/ SAFE DRINKING WATER ACT SECTION 1433 FAQs 7 (2024), https://www.epa.gov/system/files/documents/2023-10/awia_s2013_faqs.pdf [https://perma.cc/D569-2MSG].

94. *Id.*

systems being in violation.⁹⁵ Therefore, the reality of cyber-hygiene for water utilities, under the current EPA strategy of collecting certifications of Risk and Resiliency Assessments and Emergency Response Plans, appears to be an inadequate way of addressing and correcting real cybersecurity risks for the critical infrastructure of drinking water as cyberattacks on the sector are increasing in frequency.

C. Electric Utility Authorities and Approaches for Cybersecurity

The Federal Powers Act requires an Electric Reliability Organization to develop mandatory reliability standards, which become enforceable after FERC review and approval.⁹⁶ FERC appointed NERC as the Electric Reliability Organization.⁹⁷ FERC then approved NERC's first eight CIP Reliability Standards, which requires users, owners, and operators of the Bulk-Power System to comply with specific requirements aimed at safeguarding critical cyber assets.⁹⁸ The NERC CIP Reliability Standards provide a comprehensive risk-based methodological set of requirements and clear penalties with the goal of promoting industry behavior that supports reliability.⁹⁹ That framework demonstrates how sector-specific regulatory oversight can effectively drive cybersecurity improvements across critical infrastructure. Water utilities face similar OT and IT security challenges and could benefit from an analogous regulatory structure that accounts for the unique characteristics of community water systems. A water sector-specific framework, similar to the NERC CIP Reliability Standards, could establish clear cybersecurity expectations, enforcement mechanisms, and penalties while considering the cyber risk realities in different types of water utility facilities.

The NERC CIP Reliability Standards, with the weight of law, require that electric utilities follow specific standards to “identify critical assets, create control mechanisms, enforce the logical and physical security of their systems, and recover any affected assets following a cybersecurity incident.”¹⁰⁰ One strategy the NERC CIP Reliability Standards uses is to compare the immediate difference between the actual power being exchanged and the power scheduled

95. EPA, *supra* note 4; Cf. EPA, REPORT NO. 23-P-0003, THE EPA MET 2018 WATER SECURITY REQUIREMENTS BUT NEEDS TO IMPROVE OVERSIGHT TO SUPPORT WATER SYSTEM COMPLIANCE 11 (2022), https://www.epa.gov/system/files/documents/2023-02/_epa_oig_20221208-23-P-0003_REPORT.pdf [<https://perma.cc/LMQ5-4SH8>] (“Approximately [nineteen] percent of water systems did not certify that they had completed their risk and resilience assessments . . . These noncompliant water systems may not be aware of their vulnerability to malevolent acts that could result in loss of service or unsafe drinking water. Furthermore, [ninety-five] percent of the noncompliant water systems were small water systems.”).

96. 16 U.S.C. § 824o; Mandatory Reliability Standards for Critical Infrastructure Protection, 73 Fed. Reg. 7368, 7369 (Feb. 7, 2008) (codified at 18 C.F.R. pt. 40).

97. Mandatory Reliability Standards for Critical Infrastructure Protection, 73 Fed. Reg. 7368.

98. *Id.*

99. *Id.*

100. Awati, *supra* note 13.

to be exchanged, with adjustments for factors like frequency bias, meter errors, and automatic time error correction to measure how reliably a power system can supply the demand placed on it.¹⁰¹ The NERC CIP Reliability Standards then specify the accuracy and availability requirements in a Violation Severity Level chart measuring from low to severe.¹⁰² A Violation Severity Level “defines the degree to which compliance with a requirement was [or was not] achieved.”¹⁰³ A Violation Risk Factor considers requirements that “if violated, could directly affect the electrical state or the capability of the Bulk Electric System, or the ability to effectively monitor and control the Bulk Electric System.”¹⁰⁴ By comparing the Violation Severity Levels to Violation Risk Factors, an electric utility can gauge what is expected of them for different NERC CIP Reliability Standards and what fines can be expected for different degrees of violations.¹⁰⁵

FERC exercises its enforcement discretion by having Regional Entities (Midwest Reliability Organization, Northeast Power Coordinating Council, ReliabilityFirst Corporation, SERC Reliability Corporation, Texas Reliability Entity, and Western Electricity Coordinating Council) monitor NERC CIP Reliability Standards compliance using tools like audits, spot checks, and investigations of the electric utilities within their regional boundaries.¹⁰⁶ Those Regional Entities then administer penalties pursuant to the Violation Severity Levels and Violation Risk Factors.¹⁰⁷ The administrated penalties assure mitigation of future violations and ensure that the sanctions bear a reasonable relation to the seriousness of the violation and factors such as the utility’s ability to pay, concealment, and multiple violations.¹⁰⁸

These NERC CIP Reliability Standards violation penalties range from one thousand dollars to one million dollars per violation per day.¹⁰⁹ NERC does not take this responsibility lightly, as there were 970 reported noncompliance

101. See N. AM. ELEC. RELIABILITY CORP., RELIABILITY STANDARDS FOR THE BULK ELECTRIC SYSTEMS OF NORTH AMERICA (2024), <https://www.nerc.com/pa/Stand/Reliability%20Standards%20Complete%20Set/RSCCompleteSet.pdf> [<https://perma.cc/W94S-LNSR>].

102. See *id.*

103. See N. AM. ELEC. RELIABILITY CORP., VIOLATION RISK FACTOR AND VIOLATION SEVERITY LEVEL JUSTIFICATIONS (2016), https://www.nerc.com/pa/stand/project%20201602%20modifications%20to%20cip%20standards%20dl/2016-02_cip_vrf_and_vsl_justification_clean_10212016.pdf [<https://perma.cc/SW76-QVMC>].

104. *Id.*

105. See *id.*

106. See *Compliance & Enforcement*, N. AM. ELEC. RELIABILITY CORP., <https://www.nerc.com/pa/comp/Pages/Default.aspx> [<https://perma.cc/82D4-G5ZM>] (last visited Nov. 25, 2025).

107. *Id.*

108. N. AM. ELEC. RELIABILITY CORP., SANCTION GUIDELINES OF THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION 1 (2014), https://www.nerc.com/pa/Stand/Resources/Documents/Appendix_4B_of_the_Rules_of_Procedure_Sanction_Guidelines.pdf [<https://perma.cc/C6LV-X6C7>].

109. *Id.* at 14.

incidences investigated in 2023.¹¹⁰ Of those reported, only 120 were determined to be moderate to severe risk violations.¹¹¹ As the investigation process and penalties for noncompliance are robust, ninety percent of utilities correct the immediate issue that led to the noncompliance and implement steps to minimize future recurrence within one year of a noncompliance reporting date.¹¹² Therefore, the reality of cyber-hygiene for electric utilities, under the current risk-based NERC CIP Resiliency Standards, is an effective way of addressing and correcting real cybersecurity risks for the critical infrastructure of electricity.

III. A DEFINED RISK-BASED CYBERSECURITY BASELINE FOR WATER UTILITIES IS NEEDED

As the current compliance-based approach to water utility cyber-security has neither shown to prevent threat-actors from taking advantage of system vulnerabilities nor been enforceable against all vulnerable water utilities, the current approach is inadequate. In comparison, the risk-based approach to electric utility cyber-security provides baselines and enforceable standards to allow electric utilities to develop cyber-hygiene in a flexible and industry-specific manner. Therefore, because current cybersecurity requirements for water utilities cannot adequately address foreseeable and significant cyber vulnerabilities in a compliance-based approach, Congress should enact H.R. 7922, which would create a means for a sector-specific risk-based approach to cybersecurity.

A. Water Utility Cybersecurity Remains a Deficiency

Because of underreaching baselines and a lack of resources, the current compliance-based approach to cyber-hygiene does not adequately address foreseeable and significant cyber vulnerabilities for water utilities as emphasized in the number of cyberattacks.¹¹³ Due to the number of systems and the range of community water system sizes, cybersecurity challenges faced by drinking water utilities may differ from other critical infrastructure sectors that have fewer providers.¹¹⁴ Therefore, having only compliance-based cyber-hygiene initiatives, such as certification to a self-performed and self-developed Risk and Resiliency Assessment and an Emergency Response Plan every five

110. N. AM. ELEC. RELIABILITY CORP., ORGANIZATION REGISTRATION AND CERTIFICATION PROGRAM AND COMPLIANCE MONITORING AND ENFORCEMENT PROGRAM ANNUAL REPORT 17 (2024), <https://www.nerc.com/pa/comp/CE/ReportsDL/2023%20CMEP%20and%20ORCP%20Annual%20Report.pdf> [<https://perma.cc/33XD-R7FV>].

111. *Id.* at 18.

112. *Id.* at 22.

113. *See* EPA, *supra* note 4.

114. ELENA HUMPHREYS, CONG. RSCH. SERV., IN12311, SAFE DRINKING WATER ACT (SDWA) CYBERSECURITY PROVISIONS 1 (Jan. 29, 2024).

years with standards analogous to the broad NIST Framework and CISA guidance, is inadequate. The compliance-based protocols currently in place for water utilities create a perilous regulatory landscape that inadvertently provides threat-actors with opportunities to exploit cyber vulnerabilities and adversely impact the nation by making drinking water unreliable.

A key issue with the current EPA cyber standards is underreaching baselines. The SDWA requires the EPA to “provide baseline information on malevolent acts of relevance to community water systems.”¹¹⁵ Black’s Law Dictionary defines a baseline as “the starting point for comparison.”¹¹⁶ However, the EPA only notes a general risk of cyberattacks and references flexible resources such as CISA’s Top Cyber Actions for Securing Water Systems and NIST’s Guide to OT Security.¹¹⁷ Conservancy district water utilities, investor-owned water utilities, and municipal water utilities range in sophistication and scale of their OT systems and are all vulnerable to cyberattacks; therefore, understanding the risks of cyberattacks coupled with general guidance is a starting point but not a solution.¹¹⁸

In the Top Cyber Actions for Securing Water Systems resource, CISA provides an outline of mitigating actions with links to free services and resources.¹¹⁹ The overview consists of reducing exposure to the public-facing Internet, conducting regular cybersecurity assessments, changing default passwords immediately, and reducing exposure to vulnerabilities.¹²⁰ In the Guide to OT Security resource, NIST provides an overview of OT, general threats, and specific recommendations for each type of threat.¹²¹ For example, the Guide to OT Security mentions when remote maintenance capabilities exist, an organization is advised to consider whether multi-factor authentication is productive for protecting OT environments due to it being an accepted best practice for remote access to OT applications.¹²² Therefore, although the voluntary flexible resources provide information about malevolent acts of relevance to community water systems, the starting point for cyber vulnerability risk and mitigation comparison is not clear because there are no well-defined sector-specific performance measurements of risk-based standards. This is demonstrated by CISA’s shallow Top Cyber Actions for Securing Water

115. 42 U.S.C. § 300i-2(a).

116. *Baseline*, BLACK’S LAW DICTIONARY (2d ed. 2024).

117. *See Baseline Information on Malevolent Acts for Community Water Systems Version 3.0*, EPA 24 (May 2024), https://www.epa.gov/system/files/documents/2024-05/baseline_information_malevolent_acts_508_050724.pdf [<https://perma.cc/2THQ-34SM>].

118. *See* IND. UTIL. REGUL. COMM’N, *supra* note 33, at 59.

119. *Top Cyber Actions for Securing Water Systems*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Feb. 23, 2024), <https://www.cisa.gov/sites/default/files/2024-03/fact-sheet-top-cyber-actions-for-securing-water-systems.pdf> [<https://perma.cc/2HUE-W5U2>].

120. *Id.*

121. *See* KEITH STOUFFER ET AL., NAT’L INST. OF STANDARDS & TECH., GUIDE TO OPERATIONAL TECHNOLOGY (OT) SECURITY (2023), <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-82r3.pdf> [<https://perma.cc/VBN6-4QBA>].

122. *Id.* at 41.

Systems and NIST's cross-sector Guide to OT Security.¹²³ The issue of underreaching baselines is conveyed in the frequency of cyberattacks.¹²⁴

In addition to the national-level reporting requirements exempting almost eighty percent of water systems from reporting, state, local, and municipal governments are not included as covered entities.¹²⁵ Many community water systems are municipal utilities; Indiana alone has 392 municipal water utilities.¹²⁶ Exempting vulnerable systems from reporting cyber incidents creates an incomplete picture where the actual number of cyberattacks likely exceeds what is publicly known and reported. The EPA Water Infrastructure and Cyber Resilience Division provided the “[c]onservative estimate of threat likelihood” to be, on average, at least one attempted cyberattack annually on every water system.¹²⁷ The likelihood of future cyberattack attempts is exacerbated by a lack of resources.¹²⁸

Because drinking water utilities range in operation size, they also range in the amount of staff and budgeting resources available.¹²⁹ It is often the case for smaller water utilities not to have dedicated threat intelligence or cyber hunting teams, as they have a finite amount of personnel already “wearing multiple hats.”¹³⁰ For example, the City of Elkhart provides over three billion gallons of drinking water to consumers but has only fifteen full-time operators.¹³¹ Even larger operations such as Aqua Indiana, having three public water systems serving 100,000 people, have a Security Operations Team, yet it only has forty-five employees working within Indiana.¹³² Therefore, simply providing voluntary guidance that requires the water utility to develop its own technical assessments and emergency plans adds potentially unachievable goals to the already stressed workforce. In connection to the lack of resources, many small utilities falling out of the SDWA Risk and Resiliency and Emergency Response Plan certification requirements assume they will not be targets of a

123. See EPA, *supra* note 4.

124. *Id.*

125. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 52, at 23.

126. *Municipal Utilities—A Brief Regulatory Overview*, IND. OFF. OF UTIL. CONSUMER COUNS. (July 2020), <https://www.in.gov/oucc/watersewer/tips-and-publications/municipal-utilities-a-brief-regulatory-overview/#:~:text=487%20water%2C%20electric%20and%20natural,and%20town%20governments%20in%20Indiana> [<https://perma.cc/X6P8-PDQ9>].

127. EPA, *supra* note 117, at 24.

128. Aikman, *supra* note 12.

129. See IND. UTIL. REGUL. COMM'N, *supra* note 33, at 58–59.

130. Aikman, *supra* note 12.

131. *2024 Water and Wastewater Utility Annual Presentation to the City Council*, CITY OF ELKHART (2024), <https://elkhartindiana.org/wp-content/uploads/2024-Presentation-for-FY23.pdf> [<https://perma.cc/6YNJ-L67X>].

132. *Aqua Indiana*, AQUA AM. (2025), <https://www.aquawater.com/about-aqua/states-serve/aqua-indiana> [<https://perma.cc/3TTF-4XG7>].

cyberattack.¹³³ However, ninety-five percent of public water systems in the nation are considered small under the SDWA, serving 10,000 or fewer people, and an aggregate attack against them could be especially devastating.¹³⁴

Those smaller utilities represent a significant vulnerability to our national water infrastructure because they lack adequate cybersecurity protections despite being attractive targets for threat-actors. On April 19, 2024, the Tipton West Wastewater Treatment Plant in Indiana was the target of a cyberattack.¹³⁵ Tipton Municipal Utilities provides water and wastewater treatment for a town of 5,000 people residing about forty miles north of Indiana's capital.¹³⁶ Although those affected were shocked to learn that a foreign actor was targeting their little town, their cybersecurity scare was not an anomaly, as "recent cyberattacks by groups affiliated with Russia and Iran have targeted smaller communities."¹³⁷ Therefore, having only compliance-based cyber-hygiene initiatives creates a voluntary regulatory landscape that inadvertently provides threat-actors with opportunities to exploit underreaching baselines and a lack of resources. The cyber vulnerabilities throughout drinking water utilities adversely impact the nation by making drinking water less reliable.

*B. NERC CIP Reliability Standards are a Successful
Example of Cyber-Hygiene*

Because NERC CIP Reliability Standards adequately address sector-specific cyber vulnerabilities with clear risk-based baselines and enforceable standards, the current bulk electric system risk-based approach to cyber-hygiene adequately addresses foreseeable and significant cyber vulnerabilities for electric utilities. The NERC CIP Reliability Standards serve the important goal of electric reliability while remaining reasonable, nondiscriminatory, non-preferential, and in the public interest.¹³⁸ Therefore, by having risk-based cyber-hygiene standards with accompanying mitigation guidance and penalties, NERC CIP Reliability Standards build upon the NIST Framework and CISA

133. See Rich Nye, *Russian hackers take responsibility for cybersecurity attack on Tipton wastewater treatment plant*, 13 WTHR (Apr. 25, 2024, at 9:23 EDT), <https://www.wthr.com/article/news/local/russian-hackers-claim-responsibility-for-cybersecurity-attack-on-tipton-indiana-wastewater-treatment-plant/> [<https://perma.cc/V49X-CB6T>].

134. *21st Annual EPA Drinking Water Workshop: Small System Challenges and Solutions*, EPA (Nov. 8, 2024), <https://www.epa.gov/water-research/21st-annual-epa-drinking-water-workshop-small-system-challenges-and-solutions> [<https://perma.cc/5XPR-DZV9>].

135. Nye, *supra* note 133.

136. Anna Ribeiro, *Hackers target Tipton Municipal Utilities wastewater treatment plant, prompting federal investigation*, INDUS. CYBER (Apr. 23, 2024), <https://industrialcyber.co/utilities-energy-power-water-waste/hackers-target-tipton-municipal-utilities-wastewater-treatment-plant-prompting-federal-investigation/> [<https://perma.cc/6PSQ-N9E2>].

137. *Cyberattacks on water systems are increasing, EPA warns, urging utilities to take immediate action*, CBS NEWS (May 20, 2024, at 18:46 EDT), <https://www.cbsnews.com/news/cyberattacks-on-water-systems-epa-utilities-take-action/> [<https://perma.cc/8KGE-NAN7>].

138. Mandatory Reliability Standards for Critical Infrastructure Protection, 73 Fed. Reg. 7368.

guidance to create a regulatory landscape that intentionally considers threat-actors with opportunities to exploit cyber vulnerabilities in electric utilities.¹³⁹

NERC CIP Reliability Standards provide clear risk-based baselines without imposing only one way to accomplish compliance.¹⁴⁰ FERC approved of NERC CIP Reliability Standards having measurable baselines and examples of ways to be compliant with the risk-based standards as well as delegating the creation of guidance to the Electric Reliability Organization to allow utilities “to implement measures adapted to their specific situations more consistently and effectively.”¹⁴¹ Advantages of risk-based compliance include enhanced resilience, the ability to adapt to evolving threats, and customized security measures.¹⁴² Accordingly, the baselines recognize that not all utilities connected to the bulk electric system have identical risks, but having risk-based cyber-hygiene standards with accompanying mitigation guidance and penalties allows FERC to adequately address foreseeable and significant cyber vulnerabilities for electric utilities.

One of the keyways that electric utility risk-based compliance is reasonable is that the Electric Reliability Organization updates known industry risks as they develop.¹⁴³ FERC and NERC gauge whether the industry, or segments of the industry, are having difficulty implementing standards and what cyber-hygiene standards effectively prevent attempted cyberattacks from being successful cyberattacks through “more frequent, semi-annual, self-certifications.”¹⁴⁴ NERC CIP Reliability Standards requires each utility to provide an impact rating signed by an executive in the company updated every fifteen months.¹⁴⁵ Additionally, the Regional Entities perform an annual audit to provide information and statistics to FERC about each NERC CIP Reliability Standard and how the electric utilities in each Regional Entity identify risk and compliance.¹⁴⁶ Most entities connected to the bulk electric system truly view the NERC CIP Reliability Standards as a baseline and implement additional more robust practices.¹⁴⁷ Therefore, the risk-based baselines and enforceable standards allow electric utilities to develop cyber-hygiene in a flexible and industry-specific manner.

139. Interview with Danielle T. Bennett, *supra* note 14.

140. Mandatory Reliability Standards for Critical Infrastructure Protection, 73 Fed. Reg. 7368.

141. *Id.*

142. *Enhancing Grid Security: The Role of Risk-Based Compliance in NERC CIP*, NETWORK PERCEPTION (Oct. 25, 2023), <https://www.network-perception.com/blog/enhancing-grid-security-the-role-of-risk-based-compliance-in-nerc-cip#:~:text=This%20approach%20involves%20assessing%20and,consequences%20of%20a%20security%20breach> [https://perma.cc/97T9-KKEB].

143. *See* Mandatory Reliability Standards for Critical Infrastructure Protection, 73 Fed. Reg. 7368, 7369.

144. *Id.*

145. Interview with Danielle T. Bennett, *supra* note 14.

146. N. AM. ELEC. RELIABILITY CORP., *supra* note 109.

147. Aikman, *supra* note 12.

A. Enactment of H.R. 7922

Because the current compliance-based cybersecurity requirements for water utilities do not adequately address foreseeable and significant cyber vulnerabilities, the EPA should move to a risk-based approach, like the NERC-CIP Reliability Standards, which would better enhance the reliability and resilience of drinking water. Although most industries, water sector inclusive, do not want the government to come in and set up rules and regulations, there is no evidence that the water sector is acting in a meaningful way of its own volition here, and the movement from compliance-based voluntary guidelines to risk-based required standards requires legislation to give the EPA enforcement authority.¹⁴⁸ On April 10, 2024, “Congressmen Rick Crawford (AR-01) and John Duarte (CA-13) introduced H.R. 7922, the Water Risk and Resilience Organization (WRRO) Establishment Act . . . [to establish] a new governing body, the WRRO, with cyber and water-system expertise to develop and enforce cybersecurity requirements for drinking water systems.”¹⁴⁹

H.R. 7922 proposes that the WRRO develop water-sector-specific standards and then monitor the implementation and compliance.¹⁵⁰ The WRRO will utilize “advanced technical knowledge and expertise in the operations of covered water systems” to develop and implement cybersecurity risk and resilience measurement requirements, in line with prevailing best practices, that “provide for an adequate level of cybersecurity risk and resilience” for community water systems.¹⁵¹ As for monitoring, the WRRO will annually submit an aggregated data findings report on the implementation and effectiveness of cybersecurity risk and resilience requirements to the EPA.¹⁵² They will then have the authority to impose penalties of up to \$25,000 per day if the utility is in violation.¹⁵³

H.R. 7922 is inspired by the success of NERC in developing, implementing, and enforcing the NERC CIP Reliability Standards.¹⁵⁴ NERC has successfully established sector-specific cybersecurity baselines that enhance bulk electric system resilience through flexible, risk-based approaches, allowing the critical infrastructure to adapt security measures to their operational environments while maintaining accountability through executive-signed impact ratings.¹⁵⁵ The

148. Interview with Jim Watson, Investigations, Cybersecurity & Data Priv. Couns., Ice Miller LLP (Oct. 28, 2024).

149. Sara Robertson, *Reps. Crawford and Duarte Introduce Legislation to Protect Water Systems from Cyber Threats*, U.S. CONGRESSMAN RICK CRAWFORD (Apr. 11, 2024), <https://crawford.house.gov/posts/rep-crawford-and-duarte-introduce-legislation-to-protect-water-systems-from-cyber-threats> [<https://perma.cc/BE24-2B7B>].

150. H.R. 7922, 118th Cong. (2024).

151. *Id.* § 1(c)(2)(A)–(C).

152. *Id.* § 1(e)(2).

153. *Id.* § 1(f)(4).

154. Gov’t Affs. Off., *Establishing the Water Risk and Resilience Organization*, AM. WATER WORKS ASS’N 1 (Apr. 11, 2024), <https://www.awwa.org/wp-content/uploads/WRRO-Summary-240410-164552-1.pdf> [<https://perma.cc/KXY7-ZLKB>].

155. Interview with Danielle T. Bennett, *supra* note 14.

NERC CIP Reliability Standards have merged regulatory compliance with practical security by building upon the NIST Framework and CISA guidance to create a preemptive cyber-hygiene landscape that addresses evolving threats and encourages utilities to implement practices beyond the minimum requirements.¹⁵⁶ Such a landscape aligns with the public interest for resilient and reliable utilities.

Allowing external review of cybersecurity risk and resilience to be a voluntary action is inadequate to ensure a critical infrastructure system is prepared to address cyber vulnerabilities. Therefore, the current EPA approach, of compliance equating to certification, alone needs to be addressed in legislation like H.R. 7922.¹⁵⁷ By transitioning to a sector-specific risk-based set of standards, water utilities will be able to incorporate cyber-hygiene using updated guidance based on the developments of known industry risks in a way that fits the resource capacity and risk of the individual water utility.

CONCLUSION

The Presidential Policy Directive on Critical Infrastructure and Resilience identified both energy and water as critical infrastructure sectors requiring cybersecurity measures against potential threat-actors.¹⁵⁸ In response to these identified vulnerabilities, federal regulatory bodies adopted divergent approaches: the EPA developed high-level compliance-based guidelines for drinking water utilities, whereas FERC implemented measurable risk-based standards for electric utilities connected to the bulk electric system. A comparison of the two regulatory approaches in addressing cyber vulnerabilities in critical infrastructures reveals substantial deficiencies in the cyber-hygiene protocols currently governing water utilities.

This Note argued that the current cybersecurity requirements for water utilities fail to adequately address foreseeable and significant cyber vulnerabilities, necessitating congressional action through H.R. 7922. This conclusion is supported by public interest concerns in the wake of emerging cyber-threats, the increasing amount of cyberattack attempts on water utilities, and the lack of enforcement authority for cyber standards. Furthermore, this Note argued that a comparison between the water utility compliance-based approach to cyber-safety and the electric utility risk-based approach to cyber-safety reveals a pronounced security deficiency within the water sector. FERC's risk-based methodology, with its emphasis on measurable outcomes and enforcement mechanisms, provides a more robust framework for addressing cyber vulnerabilities in critical infrastructure. To remedy these regulatory shortcomings, the EPA should transition from its current compliance-based

¹⁵⁶ *Id.*

¹⁵⁷ See Mandatory Reliability Standards for Critical Infrastructure Protection, 73 Fed. Reg. 7368.

¹⁵⁸ PPD 21, *supra* note 5, at 114–15.

approach to a risk-based method for cybersecurity standards with a defined measurement of compliance and meaningful enforceable authority. Implementation of this regulatory reform would be substantially facilitated by congressional enactment of H.R. 7922, which would provide the necessary statutory foundation for a more rigorous cybersecurity framework in the water sector.